

1989

# Interstate Land Corporation v. R. D. Patterson : Reply Brief

Utah Court of Appeals

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**BRIEF**

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DOCKET NO. 89-280 CA

IN THE SUPREME COURT OF THE STATE OF UTAH

INTERSTATE LAND CORPORATION, )

Plaintiff, Respondent )

vs. )

R. D. PATTERSON, )

Defendant, Appellant. )

(Supreme Court Appeal  
No. 870020)

-----  
MELVIN E. INGERSOLL, MARIAN )  
BEVERLY INGERSOLL, LELAND R. )  
INGERSOLL and EVELYN E. )  
INGERSOLL, )

Lower Court No C-85-0790

Plaintiffs in Intervention, )  
and Appellants, )

vs. )

INTERSTATE LAND CORPORATION, )  
and R. D. PATTERSON, )

Defendants in Intervention, )  
and Respondents. )

89-280-CA

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BRIEF OF RESPONDENT**

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**FILED**

JAN 27 1988

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff, Respondent )

vs. )

R. D. PATTERSON, )

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I. COUNSEL MAY APPROPRIATELY REPRESENT ALL APPELLANTS.

Interstate objects to attorneys Ronald C. Barker and Larry L. Whyte as counsel for the five appellants. It should be noted that Larry L. Whyte is no longer associated with this law office as he has recently accepted an offer from another firm. Mr. Whyte has been replaced by David C. Cundick.

Interstate's sole argument against counsel representing all appellants is that the Ingersolls are named on the caption of this case as proposed plaintiffs in intervention and appellants while Patterson is named as a proposed defendant in intervention and appellant. Interstate maintains that this is a violation of the Rule 1.7(a) of the Rules of Professional Conduct. Interstate argues that because of the caption of this case, Patterson and the Ingersolls are opposing parties. This is not correct, Patterson and the Ingersolls' positions are not inconsistent. Additionally, this is the identical argument that Interstate made in its' Motion for Summary Disposition which was filed before this Court on or about February 3, 1987. The Court denied that motion on or about March 4, 1987. It is apparent, therefore, that this Court has already heard and decided against Interstate on this repeated argument.

There are no conflicts of interest between Patterson and the Ingersolls. To the contrary, Patterson wishes that Ingersolls' appeal be granted so that Ingersolls can intervene as co-defendant with Patterson. Additionally, it is important to note that

Patterson and the Ingersolls' interest in the property subject to this dispute is an undivided interest. It is obvious that there is no ethical problem of counsels' representation in this matter.

## II. THIS COURT HAS PROPER JURISDICTION.

1. **The Court has already heard Interstate's argument concerning jurisdiction.** Respondent Interstate argues that Patterson and the Ingersolls failed to file a notice of appeal as required within thirty (30) days after entry of a final order by the lower court. This is the same argument that Interstate made in its' Motion for Summary Disposition which was filed before this Court on or about February 3, 1987. The Court denied that motion on or about March 4, 1987, which should make this repeated argument moot. Patterson and the Ingersolls will address the merits of this argument on the chance that the Court may for some unknown reason wish to reconsider the issue.

2. **Appellants' Motion to Correct Order was not defective.** Interstate's main contention stems from the Honorable Judge Michael R. Murphy's Memorandum Opinion and Order denying Patterson and Ingersolls' Motion to Correct Order. (see Memorandum Opinion and Order attached hereto as exhibit "a", page 3, ¶2.) The contention is that when Patterson and the Ingersolls brought a timely Motion to Correct Order under URCP 59 after the lower court entered judgment against them, the motion was defective as a procedural matter, that because the motion was allegedly defective, it allegedly failed to toll the thirty (30)



day limitation period for bringing an appeal after judgment has been entered. Patterson and Ingersoll believe that the Motion was proper for the following reasons:

3. **A summary judgment is a trial.** Interstate complains that a motion to correct under URCP 59 is defective since there has not been a trial. Such is not the case. Black's Law Dictionary, fifth ed. p. 1348, defines trial as; "a judicial examination and determination of issues between parties to action, whether they be issues of law or of fact." (citations omitted.) Clearly the lower court made a judicial determination of issues of law when it entered judgment granting Interstate's Motion for Summary Judgment. If it failed to make such a determination, the court by definition would have acted in an arbitrary and capricious manner in rendering its' decision. Interstate, in its' brief, offers no authority to the contrary. In any event, summary judgment is a trial and a motion to correct is proper under URCP 59.

4. **Federal courts allow a FRCP 59 motion where there has not been a formal trial.** The Tenth Circuit Court of Appeals, in Vreeken v. Davis, 718 F.2d 343 (10th Cir., 1983), allowed an appeal under FRCP 59 where the district court ruled against the appellant on a motion for summary judgment. As noted in Appellants' Brief (see Appellants' brief, page 17, ¶ 2), the Tenth Circuit Court of Appeals is not alone in holding that FRCP 59 is proper procedure for a party seeking to vacate summary judgment

even though there has not been a formal trial with witnesses.

5. The holding in Vreeken is sound law. Interstate questions the soundness of the Vreeken decision. In Vreeken, the court succinctly described the procedural facts as follows:

In the instant case, the district court stated in open court that it would grant the defendants' motion for summary judgment; it then entered the summary judgment order on March 30, 1982. In the interim, on March 23, the plaintiffs filed a pleading styled "Motion for Leave to File a Second Amended Complaint," which the court denied on May 28, 1982. On June 25, 1982, the plaintiffs filed a notice of appeal. Thus, unless the plaintiffs' motion of March 23 tolled the running of the time for filing a notice of appeal on the summary judgment order, the plaintiffs' notice of appeal was untimely except as to the denial of the motion to file an amended complaint. Id. at page 345.

The Tenth Circuit then stated that even though plaintiff's Motion for leave to File a Second Amended Complaint was made pursuant to FRCP 60(b), the court would treat it as a FRCP 59(e) motion, Id. at page 345.

Interstate argues that, "In Vreeken, the court ignored the plain meaning of a motion and held that a motion to file an amended complaint was somehow intended to be a motion to alter or amend the judgment." (See Interstate's brief, page 3 ¶2). What Interstate fails to point out is that the court went on to note that even though the motion was styled as a motion for leave to file an amended complaint, the motion specifically requested in the motion itself that the district court treat the motion as one made pursuant to FRCP 59, Id. at page 345. The Tenth Circuit, therefore, did not act as irrational as Interstate would lead this Court to believe. To the contrary, the Tenth Circuit simply

gave a liberal view to the Federal Rules of Civil Procedure and allowed the plaintiffs' motion in the district court to toll the running of the time for filing a notice of appeal on the summary judgment order.

While the merits of the Vreeken decision are based upon the facts in that case, it is clear that the Tenth Circuit Court of Appeals has adopted the rule that a FRCP 59 motion tolls the time for taking an appeal, whether the motion follows a trial with live witnesses or a summary judgment.

There is no sound legal reason why the trial court should be permitted to re-examine and to possibly correct its' decision on a URCP 59 motion following a trial with live witnesses, but should not be permitted to do so following a summary judgment trial. To permit the court to re-examine and, if appropriate, to correct its summary judgment decision may avoid many unnecessary and costly appeals.

**6. The holding in Durkin should not apply to the facts of this case.** Interstate argues that Durkin v. Taylor, 444 F. Supp. 879 (E.D. Va. 1977), which did not authorize a party who had lost a motion for summary judgment to file a motion to alter judgment under FRCP 59(e), is applicable to the facts of this case. In Durkin, however, the appellant was not barred from bringing his appeal by the court's harsh application of rule 59. In the present case, Patterson and the Ingersolls brought their Motion to Correct Order in good faith and with persuasive legal support

that the Motion complied with proper procedure. To allow a narrow and harsh application of rule 59 such as is argued by Interstate would be inequitable, especially when one considers Patterson and Ingersolls' previous argument that URCP 59 is more broadly drafted than FRCP 59 (see appellant's brief, page 16, ¶1).

7. Interstate's argument concerning rule 2.9(b) is irrelevant to cases in the Third Judicial District Court. Interstate argues that neither Patterson nor the Ingersolls filed any objection to Interstate's proposed order even though Interstate complied with the requirements of Rule 2.9(b) of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah (see Interstate's brief, page 6, ¶ 1). Interstate reasons that because Patterson and the Ingersolls failed to object to its' proposed order as required by Rule 2.9, they cannot attack the substance of the proposed order on appeal. Interstate fails to recognize Rule 5 of the Local Rules of the Third Judicial District Court. Rule 5 specifically states that:

Rule 2.9 of the Rules of Practice in the District Courts and of the State of Utah shall not apply in the Third Judicial District Court.

Rule 5 further states:

(b) Copies of the proposed order . . . shall be served on opposing counsel before being presented to the court for signature **unless approved as to form by opposing counsel**, or the court otherwise orders. (emphasis added.)

Rule 5 suggests that any objection Patterson or the Ingersolls made to Interstate's proposed order is appropriate only to the form of such proposed order. Patterson and the

Ingersolls' objection to the proposed order in the lower court was to the content of the proposed order and as such an objection under Rule 5 would not have been correct as a procedural matter.

### III. RES JUDICATA AND COLLATERAL ESTOPPEL

#### SHOULD NOT BE APPLIED TO THIS CASE.

1. There is no conclusive evidence showing that the lower court granted summary judgment for reasons of collateral estoppel and res judicata. Interstate contends as an undisputed fact that the lower court granted summary judgment based on the doctrine of res judicata and/or collateral estoppel (see, respondent's brief, page 11, ¶ 1). There is, however, no evidence to support such an allegation, nor can Interstate show such evidence. The clear facts of the case show that no reason was ever stated as to why the motion for summary judgment was granted.

2. Interstate's collateral estoppel argument is not appropriate to the facts of this case. This Court, In Re Town of West Jordan, 7 Utah 2d 391,393, 326 P.2d 105,107 (1958), explained the applicability of collateral estoppel, stating:

That doctrine only applies where a question of fact essential to and determinative of the judgment is actually litigated and determined by a valid or final judgment which is conclusive as between the parties to a subsequent action on a different cause of action.

To apply the doctrine of collateral estoppel Interstate must show that an issue present in the case at bar was already litigated between the parties in a previous action. Interstate feebly argues that the issues of the present case were already

litigated in Salt Lake City Corporation v. Mountain Fuel Supply Company, Third District Court for Salt Lake County, Civil No. C78-7764. A copy of Ingersolls' Amended Complaint, which sets forth the issues of the case, is attached hereto as "exhibit b". In that case the issues involved for litigation included:

1. Whether the Ingersolls were entitled to a declaratory judgment with respect to the validity and effect of certain Salt Lake City Ordinances;
2. Whether the Ingersolls could receive an injunction against Mountain Fuel Supply Co. enjoining it from interfering with the same property of this present case as a use by the public as a public thoroughfare; and,
3. Whether the Ingersolls were entitled to damages in connection with Mountain Fuel Supply Co. prohibiting the public from using the property as a thoroughfare.

The issues in the Salt Lake City case all involved the validity of certain Salt Lake Ordinances and whether such ordinances were effective to maintain the property as a public road. Such issues are significantly different from the issues of the present case which involve the rights of parties to ownership of the same property now that it has been determined that Salt Lake City no longer has use of the property as a public road.

**3. Interstate's res judicata argument is not appropriate to the facts of this case.** The doctrine of res judicata is adequately explained in 46 Am.Jur. Judgments, §394. It provides:

. . . the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

In order to find that res judicata is applicable to the facts of this case, Interstate must show that this cause of action has previously been litigated in the Salt Lake City case. This is not possible since the cause of action in the previous case was to decide the validity of Salt Lake City Ordinances 172, 173 and 200. The Ingersolls were unsuccessful in arguing that the ordinances were valid. Ownership of the property was not decided in that case and therefore there is no res judicata argument available for Interstate in this present action.

It is interesting that Interstate argues in its' brief that, "since the ownership of the vacated property was the central issue in the Salt Lake City Case, this Court should apply the doctrine of res judicata to bar the Ingersolls' proposed complaint in intervention in this case (see, Interstates' brief, pages 46 and 47). If ownership of the vacated property was indeed the central issue in the Salt Lake City Case, it would appear that Interstate would be barred in the present action against Patterson for those same principles of res judicata. It is obvious that ownership was not the central issue of the Salt Lake City Case and that the principles of res judicata are not applicable to the facts of the present case.

#### IV. THE INGERSOLLS' DID NOT MAKE BARE ALLEGATIONS IN ARGUING AGAINST INTERSTATE'S MOTION FOR SUMMARY JUDGMENT

Interstate erroneously argues that Patterson and the Ingersolls should not be allowed to claim on appeal that there is

a disputed issue of fact because Patterson and the Ingersolls submitted no affidavits or memorandum in opposition to Interstate' Motion for Summary Judgment (see, Interstate's brief, page 30, ¶ 2). Interstate, however, fails to understand the language of URCP 56 (c). Speaking directly to procedure involving summary judgment, the rule provides:

. . . The judgment sought shall be rendered forthwith if the **pleadings . . . on file**, together with the affidavits, if any, show that there is no genuine issue as to any material fact **and that the moving party is entitled to judgment as a matter of law. . . .** (emphasis added).

The Ingersolls attached exhibits to their Proposed Complaint in Intervention (a copy of which is attached hereto as exhibit "c"), meaning that the Ingersolls did not rest upon the mere allegations or denials of their pleadings but that the exhibits attached to their Proposed Complaint in Intervention, which was on file with the court, supported their allegations and/or denials. Therefore, Patterson and the Ingersolls are free to argue the existence of a material fact on appeal.

#### V. INTERSTATE MISAPPLIES UCA 57-1-20

1. **UCA 57-1-20 conveys title only as security.** UCA 57-1-20 states:

Transfers in trust of real property may be made to secure the performance of an obligation of the trustor . . . to a beneficiary. All right, title, interest and claim in and to the trust property acquired by the trustor, or his successors in interest, subsequent to the execution of the trust deed shall inure to the trustee **as security** for the obligation or obligations for which the trust property is conveyed in like manner as if acquired before execution of the trust deed. (emphasis added.)



Interstate, in its' brief, goes to great extents to show that title passes to the trustee when a trust deed is created (see, Interstate's brief, pages 34-41). Patterson and the Ingersolls strongly assert that in accordance with UCA 57-1-20, title inured to the trustee only for purposes of security and nothing else.

2. **Ownership of the property remained with the Ingersolls and Lemel after the trust deed was executed.** As established in Appellants' brief (see, Appellants' brief pages 10-11) and agreed to in Respondent Interstate's brief (see, Interstate's brief, page 41, ¶ 1), Utah is a lien state with respect to mortgages, meaning that ownership remains with the mortgagor. Patterson and the Ingersolls contend that Utah Law applies this same theory of mortgages to trust deeds. In Bybee v. Stuart, 112 Utah 462, 189 P.2d 118 (1948), the Utah Supreme Court held that Utah was a lien state in a case involving a mortgage. The court agreed with this lien theory even in the face of Sec. 78-1-13, U.C.A. 1943 which the court quoted:

. . . such mortgage when executed as required by law **shall have the effect of a conveyance** of the land therein described, together with all the rights, privileges, and appurtenances thereunto belonging, to the mortgagee, his heirs, assigns and legal representatives, **as security for the payment of the indentedness.** . . . (emphasis in original.)

It is interesting to compare the language of the above-quoted statute with that of UCA 57-1-20 (quoted supra., p 10). The language is quite similar in that both the conveyance of the

interest is given as security.

It is readily apparent that the court reasoned that a lien theory is preferable to a title theory because the former theory does not enable the owner of the mortgage to recover possession of the real property without a foreclosure sale.

Applying this theory to the present case, it would appear that if a title theory were applied to a trust deed a situation would arise that the court in the Bybee case, supra, was trying to avoid. That situation being that if ownership was passed to the trustee when the trust deed was created, the trustee could take the position of an owner and obtain possession of the land without following the proper procedure for foreclosure on the deed of trust.

Futher, to assert that ownership of the property passed to the trustee upon execution of the deed of trust would mean that when Salt Lake City vacated the street to the owners of the adjoining property, the trustee received such ownership of the vacated property. And, if the trustors paid off the obligation owed on the deed of trust, the trustee would still own the vacated property and as such, would receive a windfall through acting as trustee. Such a scenario is absurd and could not be contemplated by any rational reasoning.

Because the trustee received only a security interest in the property of the trust deed, Patterson and the Ingersolls had ownership of the vacated street property. The facts of the case

plainly show that neither Patterson nor the Ingersolls ever deeded this property to anyone else and therefore, they are still the owners of the property.

## VI. CONCLUSION

1. Patterson and the Ingersolls have shown that they are entitled to prevail on their appeal. URCP 56 mandates that in order for summary judgment to have been properly entered against Patterson and the Ingersolls, there must have been no genuine issue of fact and Interstate was entitled to judgment as a matter of law. Appellants Patterson and the Ingersolls have established a genuine issue of fact and further, that they are entitled to judgment as a matter of law.

2. On review, this Court should consider all the facts in the light most favorable to Patterson and the Ingersolls. The Utah Supreme Court has held that on review, a party against whom summary judgment has been granted is entitled to the benefit of having the court consider all of the facts presented, and every inference fairly arising therefrom, in the light most favorable to him. See, Morris v. Farnsworth Hotel, 123 Utah 289, 259 P.2d 297 (1953). When this Court uses the above stated standard in considering the present appeal, it is apparent that the holding of the trial court must be overruled.

Dated this 27th day of January, 1988.

RESPECTFULLY SUBMITTED.

David C. Cundick

Ronald C. Barker,  
David C. Cundick,  
Attorneys for Appellants

MAILING CERTIFICATE

I hereby certify that I caused 4 copies of the foregoing to be hand-delivered this 27th day of January, 1987, pursuant to Rule 26(b) Utah Rules of Appellate Procedure to: Patrick J. O'Hara, Esq., VanCott, Bagley, Cornwall & McCarthy, 50 South Main Street #1600, Salt Lake City, Utah 84144.

David C. Cundick

David C. Cundick

**ADDENDUM**

**A. EXHIBITS**

Memorandum Opinions and Order

Exhibit "a"

SEP 16 1986

FILED  
 By *Marlene Skumell*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

INTERSTATE LAND CORPORATION, a Utah corporation,	:	o
Plaintiff,	:	MEMORANDUM OPINION AND
vs.	:	ORDER
R. D. PATTERSON	:	CIVIL NO. C 85-790
Defendant.	:	

-----  
 This matter came before the court on the motions of defendant R. D. Patterson and proposed Intervenor to correct previous orders. The motions are expressly premised on Rules 59(a)(6) and (7), 59(d), 59(e), 60(b), U.R.C.P., "or other applicable rules" and are directed at the following orders:

1. Order Denying Motion to Intervene Filed by Melvin E. Ingersoll, Marian Beverly Ingersoll, Leland R. Ingersoll, and Evelyn E. Ingersoll, dated September 4, 1986 (hereinafter referred to as the "order denying intervention").
2. Order Granting Plaintiff's Motion for Summary Judgment against Defendant, dated September 4, 1986 (hereinafter referred to as "summary judgment order").

The motions in question are contained in a single pleading dated September 13, 1986 and filed on September 15, 1986. It

was plaintiff, however, that caused the motions to be heard by the court on October 20, 1986, by its filing of a Notice of Hearing.

The court heard the arguments of counsel on October 20, 1986, at 2:00 o'clock p.m., and took the matter under advisement. Thereafter, the court reviewed the entire file, including specifically the plaintiff's original Motion for Summary Judgment and supporting papers, the original Motion to Intervene and Proposed Complaint in Intervention and the transcript of the hearing of May 5, 1986 on the plaintiff's Motion for Summary Judgment and proposed Intervenors' Motion to Intervene (hereinafter sometimes referred to as "the original motions"). The following procedural facts are significant:

1. The original motions were fully presented to the court and argued on May 5, 1986. No legal memoranda, brief or evidence were submitted by the defendant or the proposed Intervenors. At that hearing, counsel for the proposed Intervenors proposed to submit a post hearing memorandum (Tr. p. 13) but none was forthcoming.
2. The court, per Judge Fishler, took the matter under advisement and thereafter issued his ruling by means of a minute entry dated July 28, 1986.
3. Proposed written orders incorporating the court's ruling were mailed by plaintiff to opposing counsel on August 1, 1986. Defendant and proposed Intervenors did not object to

the form or substance of these proposed orders. Thereafter, on September 4, 1986, the order denying intervention and the summary judgment order were entered by the court per Judge Daniels, Judge Fishler having previously resigned his position on the court.

4. The tenth day following entry of the summary judgment order fell on a weekend and defendant filed the motions challenging the summary judgment order on September 15, 1986, the next succeeding day which was not a weekend or legal holiday. Consequently, if such motions were proper under Rule 59, U.R.C.P., they were timely filed under Rule 59(b).

The primary issue presented is whether the motions in question are truly Rule 59 motions. The resolution of this issue impacts not only the consideration of the motions by this court but, more significantly, the finality of the judgment in question and thus the timeliness of any appeal to the Supreme Court of Utah. For the reasons set forth below, this court deems the motions as not properly filed under Rule 59.

The motions in question are premised in part on Rule 59(a)(6) and (7) and 59(d). Each of these subdivisions expressly reference a "new trial" as the contemplated relief. Consequently, they are applicable only when a trial has preceded the motion. In summary judgment proceedings no trial takes place and, in accordance with Rule 52(a), findings and conclusions are



unnecessary. Thus, a challenge to the entry of the summary judgment order cannot be premised on subdivisions (a) or (d) of Rule 59. Additionally, Rule 52(b) is inapplicable to the summary judgment proceedings.

The remaining question under Rule 59 is whether subdivision (e) is a proper vehicle to challenge the rendering of a summary judgment. Depending on the resolution of this remaining question, a further issue may be whether Rule 59(e) is appropriate to challenge a summary judgment when no new evidence, fact or even legal argument is presented in support of the Rule 59(e) motion.

Rule 59(e), which is identical to Rule 59(e) of the Federal Rules of Civil Procedure, has been a part of the Utah Rules of Civil Procedure from their inception. Rule 59(e) was, however, an addition to the federal rules in the 1946 amendments. The Advisory Committee Notes to the federal rules indicate that subdivision (e) was "... added to care for a situation such as that arising in Boaz v. Mutual Life Ins. Co. of New York, ... 146 F.2d 321 [(8th Cir. 1944)] and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry." In Boaz the court held that the district court had inherent power to amend a judgment of dismissal without prejudice to a judgment of dismissal with prejudice. While such power of amendment inheres in the court rendering the judgment, the use of Rule 59(e) for amendment of

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judgment is applicable in very limited situations such as those presented in Boaz. The Advisory Committee Notes themselves thus suggest that Rule 59(e) was not intended for the wholesale challenge of judgments when the other provisions of Rule 59 do not apply.

In the instant case, the Rule 59(e) motion does pose a wholesale attack on the summary judgment order. While cast as a Rule 59 motion, it is in fact a motion to reconsider. There are various specific rules which allow a party to seek reconsideration following a trial. Rules 50(b), 52(b) and Rule 59, U.R.C.P. The logical place for a similar rule upon which to premise a reconsideration of a summary judgment would be in a subdivision of Rule 56. No such rule, however, exists.

Provision of an express and specific mechanism to reconsider a final judgment, such as those prescribed in Rules 50(b), 52(b) and 59, is necessary so that a motion for reconsideration can stay the running of the time for filing a notice of appeal. To allow Rule 59(e) to be used as a catchall means to seek reconsideration of any final judgment merely provides a means to challenge the integrity and finality of this court's judgments and allows the moving party further time within which to file an appeal.

There are numerous thresholds in summary judgment proceedings in which a party opposing the motion may be heard. Quite obviously, the party may submit opposing papers, memoranda

and briefs and be heard at oral argument. Following any hearing and while the court has the matter under advisement, the party opposing the motion may make further submissions. Even if the matter is not taken under advisement, a signed judgment is always necessary under Rule 58A. Rule 2.9 of the District Court Rules of Practice requires service of a proposed judgment on opposing counsel and allows five days for objection. Only then can the final judgment be entered. Thus, Rule 2.9 provides the opposing party with an opportunity by means of objection to convince the court that its previously ruling was erroneous. No further mechanism for reconsideration is necessary or desirable.

The instant case is illustrative. The plaintiff originally presented this matter to the court on May 5, 1986, in a hearing on its Motion for Summary Judgment. Defense counsel had the opportunity to file papers, memoranda, and affidavits in opposition. No such items were filed. Counsel for the proposed Intervenor filed a Motion to Intervene and a Proposed Complaint in Intervention. At the hearing on plaintiff's Motion for Summary Judgment, defense counsel and counsel for the proposed Intervenor were heard.

The court thereafter had the matter under advisement for over two months during which time defendants and the proposed Intervenor made no filings or submissions. While counsel for the proposed Intervenor did propose to file a post hearing memorandum (Tr. p. 13), none was forthcoming. It is particularly

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significant that at no time have defendant or the proposed Intervenor submitted affidavits or the like raising a genuine issue of material fact. Following the minute entry of July 28, 1986, which was mailed to all counsel, neither defendant nor the proposed Intervenor requested this court to reconsider its ruling. Moreover, no objections to the proposed judgment submitted by plaintiff's counsel were interposed under Rule 2.9 of the District Court Rules of Practice.

Defendant and the proposed Intervenor now, however, seek to have this court reconsider its final judgment by means of its Rule 59 motions. At the hearing of October 20, 1986, counsel for defendant and intervenors admitted on the record that there was nothing before the court, including new legal arguments, that had not previously been submitted and argued at the May 5 hearing on the original motions. The only thing different was that there was a new judge, Judge Fishler having resigned before the formal entry of the written judgment.

The courts which have addressed the issue are split, some holding that Rule 59(e) is not a proper vehicle to challenge a summary judgment and others holding to the contrary. E.g., compare Blair v. Delta Air Lines, Inc. 344 F Supp. 367 (S.D. Fla. 1972) and Durkin v. Taylor, 444 F. Supp. 879, 889-90 (E. D. Va. 1977) with Sidney-Vinstein v. A. H. Robins Co., 697 F. 2d 880, 885 (9th Cir. 1983) and Stephenson v. Calpine Conifers II, Ltd., 652 F. 2d 808 (9th Cir. 1981). See also Jetero Constr. Co.

v. South Memphis Lumber Co., 531 F. 2d 1348, 1351-52 (6th Cir. 1976).

Hume v. Small Claims Court of Murray City, 590 P. 2d 309, 310-311 (Utah 1979) addresses the issue from the standpoint of a denial of a petition for a writ of mandamus. To that extent it is instructive but not controlling in the context of a summary judgment. In the latter context many more opportunities are generally available for parties and advocates to present argument. Parties opposing summary judgment are also generally presented an opportunity by means of objections under Rule 2.9 to convince the court prior to entry of judgment that its ruling was erroneous.

Even if Rule 59(e) was generally deemed a proper mechanism to challenge a summary judgment, it should not be deemed a proper use of such mechanism when no new fact, piece of evidence or even legal argument is presented in support of a Rule 59(e) motion or when a party opposing summary judgment fails to object to a proposed judgment under Rule 2.9. Under such circumstances, the party opposing summary judgment should pursue their remedy by appeal rather than a motion for reconsideration under the guise of Rule 59(e).

For the reasons set forth above, defendant's Rule 59 motions are denied as being improperly premised on Rule 59. Proposed Intervenor's motion for reconsideration cannot even be deemed to be premised on Rule 59 since they were not parties to the

proceeding when summary judgment was granted. In the event this matter is appealed and this court's view of Rule 59 is correct, plaintiff might be able to avoid some of the additional delay by moving for summary disposition under Rule 10, U.R.A.P. on the grounds that the notice of appeal was filed more than thirty days following judgment.

Because the Utah Supreme Court could disagree with the views expressed herein and to avoid any possible remand solely for this court to reconsider its judgment pursuant to the defendant's Rule 59 motions, the court has considered the entire record and finds no manifest error underlying the orders entered on September 4, 1986. The court particularly notes that it has not yet been presented with any matter by defendant or otherwise which tends to raise a genuine issue of material fact. For these reasons, even if defendant's motions should be deemed properly presented under Rule 59, the motions are denied.

The court further denies defendant's motion under Rule 60(b) for the reason that it is a motion to reconsider and is not properly premised on the grounds specified in Rule 60(b). See Blair v. Delta Air Lines, Inc., 344 F. Supp. 367 (S.D. Fla, 1972). The only surprise that has been asserted was expressly asserted at the May 5, 1986 hearing, over four months preceding the filing of these motions, and no further memorandum was filed after the May 5 hearing as promised.

It is therefore ordered, adjudged and decreed that

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defendant's and proposed Intervenor's motions under Rule 59(a)(6) and (7), 59(d), 59(e), 60(b), U.R.C.P., "or other applicable rules" are hereby denied.

DATED THIS 2nd day of December, 1986.

ATTEST  
H. DION HINDLEY  
CLERK  
BY Michael R. Murphy  
Deputy Clerk

Michael R. Murphy  
MICHAEL R. MURPHY  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Opinion and Order, postage prepaid, to

Ronald C. Barker, Esq.  
2870 South State Street  
Salt Lake City, Utah 84115-3692

Patrick O'Hara, Esq.  
P.O. Box 45340  
Salt Lake City, Utah 84145

Ralph J. Hafen, Esq.  
402 Kearns Building  
Salt Lake City, Utah 84101

This 2nd day of December, 1986.

Frederic L. Hunt

Ingersoll's Amended Complaint

Exhibit "b"



**FILMED**

APR 30 4 50 PM '79

W. STELLING EVANS, CLERK  
BY *[Signature]*  
DEPUTY CLERK

David B. Boyce  
of BACKMAN, CLARK & MARSH  
Attorneys for Interveners  
500 American Savings Building  
61 South Main Street  
Salt Lake City, Utah 84111  
Telephone 531-8300

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

\*\*\*\*\*

SALT LAKE CITY,	:	AMENDED COMPLAINT
Plaintiff,	:	
vs.	:	Civil No. 78-7764
MOUNTAIN FUEL SUPPLY CO.,	:	
Defendant.	:	
***	:	
LEMEL CORPORATION, MELVIN E.	:	
INGERSOLL, MARIAN INGERSOLL,	:	
his wife, LELAND R. INGERSOLL,	:	
EVELYN E. INGERSOLL, his wife,	:	
Interveners,	:	
vs.	:	
MOUNTAIN FUEL SUPPLY CO. and	:	
SALT LAKE CITY,	:	
Defendant and	:	
Cross-Defendant.	:	

\*\*\*\*\*

Come now the Interveners and for cause of action  
against the Plaintiff and Defendant plead and allege as follows:

1. That Interveners are the owners of certain real  
property situated in Salt Lake City, State of Utah, known as the  
Brewery Mall, which is in the immediate vicinity of the real  
property which is the subject matter of this action. Said  
subject matter property would be the primary access to the  
Brewery Mall.

2. That the subject matter real property consists of  
First South Street and Glendale Street and those portions more

particularly described in Plaintiff's complaint.

3. That at some time prior to October 15, 1977, the Defendant petitioned the Plaintiff for passage of ordinances that would vacate certain portions of those streets as dedicated public thoroughfares.

4. That in August or September, 1977, the Defendant, by and through its authorized agent, contacted Melvin E. Ingersoll and inquired of him whether the Interveners objected to ordinances vacating First South Street west of 1100 West and that portion of Glendale Street north of 100 South Street and First South Street between 10th and 11th West.

5. That Melvin E. Ingersoll informed the Defendant's agent that Interveners had no reason to want the aforementioned vacation, and would strongly oppose any attempt to vacate First South Street between 10th and 11th West.

#### FIRST CAUSE OF ACTION

6. Interveners incorporate by reference the allegations contained in paragraphs 1 through 5 of Interveners' amended complaint.

7. That because of the Interveners' objection to the proposed vacation by the Defendant, Melvin E. Ingersoll and the Defendant's agent agreed that they would both determine the possibilities of having the Plaintiff or others construct certain overpasses over the railroad and an off ramp from the freeway to provide additional access to the Brewery Mall in exchange for an agreement by the Interveners that they would sign the petition for the vacation of First South Street west of 1100 West and that portion of Glendale Street north of 100 South Street. Melvin E. Ingersoll also agreed that if the overpasses and off ramp were acquired, that Interveners would not object to the petition to vacate First South Street between 10th and 11th West. That Defendant agreed not to petition for the vacation of First South

Street between 10th and 11th West until the possibilities for the off ramp and overpasses were determined and agreed to give the Interveners actual notice of any attempt to petition for the vacation of First South between 10th and 11th West.

8. That the Defendant breached said agreement by petitioning the Plaintiff for the vacation of First South between 10th and 11th West prior to attempting to obtain the overpasses and off ramp and without giving notice to the Interveners, or any of them.

9. That pursuant to the petition of the Defendant, the Plaintiff enacted an ordinance vacating First South between 10th and 11th West to the damage and detriment of the Interveners

10. That the Interveners do not have an adequate remedy at law.

11. That the agreement between the Defendant and Interveners should be specifically enforced to give the parties an opportunity to determine if the overpasses and off ramp can be acquired and to give the Interveners the right to timely object to the petition to vacate First South between 10th and 11th West and to rescind their consent to the other petition.

12. That the Plaintiff has already determined that there is not good cause for said vacation and that such vacation would be detrimental to the Plaintiff, the Interveners and the public in general.

#### SECOND CAUSE OF ACTION

13. Interveners incorporate by reference the allegations contained in paragraphs 1 through 12 of Interveners' amended complaint.

14. That in about early October, 1977, the Defendant's agent requested Melvin E. Ingersoll to execute the petition for the vacation of First South Street west of 1100 West and that

portion of Glendale Street north of 100 South Street.

15. That the Defendant's agent failed to disclose to Melvin E. Ingersoll that Defendant was pursuing and intended to pursue its petition to vacate that portion of First South Street between 10th and 11th West.

16. That Interveners executed the petition on the assumption that Defendant would not and was not petitioning or pursuing its petition for the vacation of First South Street between 10th and 11th West.

17. That the omission of the Defendant constituted a misrepresentation concerning a presently existing material fact which falsely deceived the Interveners into signing the petition and the defendant knew that it did so and that Interveners would not have signed the petition with knowledge of Defendant's intention and the omission was done for the purpose of inducing the Interveners to sign the petition and the Interveners acted reasonably and in ignorance of the Defendant's intent and relied upon the information given with the understanding that there was no intent to attempt to vacate First South Street between 10th and 11th West.

18. That as a result of the omission, the Interveners have been damaged.

19. That Interveners have no adequate remedy at law.

20. That Interveners should now be given an opportunity to present their objections to the petition that resulted in the ordinance vacating that portion of First South Street between 10th and 11th West and said objections should be considered to be timely and the ordinances should be set aside.

#### THIRD CAUSE OF ACTION

21. Interveners incorporate by reference the allegations contained in paragraphs 1 through 20 of Interveners' amended complaint.

22. That the promises made by the Defendant as set forth in paragraph 7 of Interveners' amended complaint were made in such a way that the Defendant should reasonably have expected them to induce the signatures of the Interveners on the petition that required their signatures and forbearance by the Interveners in opposing the other petition.

23. That the above described promises did, in fact, induce such action and forbearance.

24. That the promises operated as an abandonment of an existing right on the part of the defendant.

25. That injustice can only be avoided by enforcing the promises of the Defendant, setting aside the ordinances that vacated the subject matter property and giving the Interveners an opportunity to timely present their objections to the vacations.

26. That the Defendant should be estopped from claiming any right, title or interest in the subject matter real property.

#### FOURTH CAUSE OF ACTION

27. Interveners incorporate by reference the allegations contained in paragraphs 1 through 5 of Interveners' amended complaint.

28. That the Plaintiff enacted two (2) ordinances vacating First South Street between 10th and 11th West and First South Street west of 1100 West and that portion of Glendale Street north of 100 South Street.

29. That said vacation was not in the best interest of the general public and, in fact, there is no public benefit from said vacation and said vacation is detrimental to the general interest of the public.

30. That the decision of the Plaintiff to enact said ordinances was done arbitrarily and was an abuse of discretion and results in an invasion of the property rights of the

Intervenors. That said vacations were done at the insistence of the Defendant and the Defendant knew that the Plaintiff was acting under the assumption of information that was, in fact, erroneous, namely, that the Plaintiff was not the owner of the underlying fee title to the subject matter property.

31. That said vacations were done without giving the Intervenors notice and an opportunity to be heard and said vacations have damaged the Intervenors.

32. That the Intervenors have been specifically damaged by said vacations.

33. That the Intervenors do not have an adequate remedy at law.

34. That said vacations should be set aside.

WHEREFORE, Intervenors pray judgment against the Defendant as follows:

1. For a judgment setting aside the ordinances that were enacted by the Plaintiff that vacated First South Street west of 1100 West and that portion of Glendale Street north of 100 South Street and 1st South Street between 10th and 11th West.

2. For an injunction enjoining the Defendant permanently from interfering with the subject matter property and the use thereof by the public as a public thoroughfare.

3. For a judgment specifically enforcing the agreement between the Defendant and the Intervenors and giving the Intervenors the right to timely present their objections to said vacations to the Plaintiff and giving the Plaintiff an opportunity to timely re-examine whether the subject matter property should be vacated.

4. For judgment against the Defendant enforcing the promises of the Defendant and estopping Defendant from claiming any right, title or interest in the subject matter real property.

5. Alternatively, for judgment for damages in an amount

to be determined as a result of the acts, conduct and omissions of the Defendant as set forth herein.

6. For costs of Court and any other relief the Court deems just in the premises.

Against the Plaintiff, Salt Lake City, as follows:

1. For judgment setting aside the vacation ordinances.

2. Alternatively, for judgment for damages in an amount to be determined as a result of the acts, conduct and omissions of the Plaintiff as set forth herein.

3. For costs of Court and any other relief the Court deems just in the premises.

Dated this 30 day of April, 1979.

BACKMAN, CLARK & MARSH

David B. Boyce

David B. Boyce  
Attorneys for Interveners  
500 American Savings Building  
61 South Main Street  
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I hereby certify that on the 30 day of April, 1979, a copy of the foregoing Amended Complaint was mailed, postage prepaid, as follows:

James S. Lowrie  
Thomas E. K. Cerruti  
JONES, WALDO, HOLBROOK & McDONALD  
Attorneys at Law  
800 Walker Bank Building  
Salt Lake City, Utah 84111

Judy F. Lever  
Assistant City Attorney  
101 City & County Building  
Salt Lake City, Utah 84111

Yolanda M. Dick

Ingersolls' Proposed Complaint in Intervention

Exhibit "c"



Ronald C. Barker #0208  
Attorney for intervenors  
2870 South State Street  
Salt Lake City, Utah 84115-3692  
Telephone (801) 486-9636

THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH

---ooOoo---

INTERSTATE LAND CORPORATION,	)	
Plaintiff,	)	
vs,	)	
R. D. PATTERSON,	)	C85-0790
Defendant.	)	Judge Phillip R. Fishler
-----		

MELVIN E. INGERSOLL, MARIAN	)	
BEVERLY INGERSOLL, LELAND R.	)	
INGERSOLL and EVELYN E.	)	
INTERSOLL,	)	
Plaintiffs in Intervention,	)	
vs.	)	COMPLAINT IN INTERVENTION
INTERSTATE LAND CORPORATION,	)	
and R. D. PATTERSON,	)	
Defendants in Intervention,	)	

---ooOoo---

Plaintiffs in intervention, herein referred to collectively as ("INGERSOLLS"), answer the allegations in the main complaint herein so far as they relate to the disputed property described below, and complain and allege as follows:

INTERVENORS' ANSWER TO INTERSTATE'S COMPLAINT

Intervenors answer the complaint of Interstate Land Corporation ("INTERSTATE") on file herein by admitting, denying and alleging as follows:

### FIRST DEFENSE

#### (Failure to State Claim)

Plaintiff's complaint fails to state a claim for relief upon which relief may be granted. Among other things, plaintiff has failed to allege that plaintiff's "predecessor or grantor" was "seized or possessed of the property in question within seven years" as required by 78-12-5, 78-12-6, et seq., UCA, 1953.

### SECOND DEFENSE

#### (Patterson & Ingersolls' Title by Adverse Possession)

Each of the four Ingersolls are the owner of an undivided 1/5 interest and defendant R. D. Patterson ("PATTERSON") is the owner of an undivided 1/5 interest in and to said property. At all time from and after October, 1977, Ingersolls and Patterson have been in actual physical possession of and have visibly, openly, notoriously, continuously possessed and used the disputed property under a claim of title and ownership thereto, which claim has at all times been hostile and adverse to the claims of all persons and organization, including the claims of Interstate and of the persons and organizations through whom Interstate claims to have derived its title. The disputed property has been disposed of by Salt Lake City within the meaning of 78-12-13, UCA, 1953. Ingersolls and Patterson have been in "the exclusive, continuous and adverse possession of such real estate" for "more than seven years subsequent to such conveyance" and are "purchasers" within the meaning of said statute. Accordingly, Ingersolls

and Patterson have acquired "adverse title" to the disputed property as provided therein. In the alternative, Ingersolls and Patterson have acquired title to the disputed parcel by adverse possession as provided in 78-12-7, 78-12-7.1, 78-12-8, 78-12-9, 78-12-10, 78-12-11, 78-12-12, 78-12-21.1, 78-12-16, 78-12-17 and other applicable statutes pertaining to acquisition of title to real property by adverse possession.

### **THIRD DEFENSE**

(Statutory Time Bar to Plaintiff's Claims)

Plaintiff's claim is barred by the provisions of 78-12-5, 78-12-5.1, 78-12-5.2, 78-12-5.3, 78-12-6, 78-12-7, 78-12-8, 78-12-9, 78-12-10, 78-12-11, UCA, 1953, and other applicable statutes of limitations. Among other things plaintiff's claim is barred under those statutes since neither plaintiff nor the persons or organizations through whom it claims to have acquired title have been in possession of the disputed property within seven years prior to commencement of this action (or at all).

### **FOURTH DEFENSE**

(Waiver and Estoppel)

Plaintiff has by its acts and/or omissions (and those of its predecessors in alleged title) waived any claim that they may have had to the disputed property and/or are now estopped to assert said claims. Among other things plaintiff's predecessor in alleged title did not ask for or received a trust deed or other security with respect to the disputed property, and as-

serted no claim to the disputed property when it caused the notice of default under the trust deed to be recorded. See allegations in ¶ 9 and 11 below.

#### FIFTH DEFENSE

(Response to Complaint)

Answering the numbered paragraphs of plaintiff's complaint, intervenors admit, deny and allege as follows:

1. Admit allegations in ¶ 1 and 2.

2. Admit allegations in ¶ 3, except deny that said property (herein referred to as the "Disputed Property") is "plaintiff's real property"; allege affirmatively that plaintiff has no right, title or interest thereon; and that Ingersolls and Patterson are the owners of said property as appears more fully in the complaint in intervention (below).

3. Deny allegations in ¶ 4. Allege affirmatively that plaintiff has no right, title or interest in and to said property as appears more fully in the complaint in intervention (below).

4. Admit allegations in ¶ 5. Allege affirmatively that both defendant Patterson and defendants Ingersolls are in possession of said property and claim ownership thereof.

5. Deny allegations in ¶ 6 and all other allegations in plaintiff's complaint not specifically admitted herein.

**COMPLAINT IN INTERVENTION**

**FIRST CLAIM FOR RELIEF**

(Quiet Title)

6. The main action herein is a quiet-title lawsuit seeking to determine ownership of a disputed parcel of real property ("DISPUTED PROPERTY") located in Salt Lake County, Utah, which premises are described:

(a) in exhibit "A" to the complaint of plaintiff Interstate Land Corporation ("INTERSTATE"),

(b) in the quit-claim deed of July 27, 1979 from Lemel Corporation ("LEMEL") to defendant R. D. Patterson ("PATTERSON"), a copy of which is attached hereto as exhibit "I",

(c) as parcels #8 and 9 in the Trustees Deed of June 3, 1982 from NACM International ("NACM") to General Brewing Company ("GENERAL BREWING"), a copy of which is attached hereto as exhibit "II", and are

(d) also shown in the plot map attached as exhibit "C" to the affidavit of Raymond L. Griffith filed herein, a copy of which is attached hereto as exhibit "III".

7. The disputed property was the West half of Glendale and the South half of First South Streets, West of 1100 West in Salt Lake City, Utah, as vacated by the City of Salt Lake by an ordinance passed by the Board of Commissioners of Salt Lake City, Utah on October 5, 1977, a copy of which is attached hereto as exhibit "IV" (see also plot map, exhibit "III" hereto).

8. At the time that said streets were vacated each of the

four Ingersolls (plaintiffs in intervention) were the owners of an undivided 1/5 and and Lemel was the owner of an undivided 1/5 of the real property abutting ("ABUTTING PROPERTY") the disputed property. By operation of law when said streets were vacated fee title to an undivided 1/5 of the disputed property reverted to and vested in each of the four Ingersolls and Lemel. Lemel thereafter conveyed its undivided 1/5 ownership interest in and to the disputed property to Patterson by a quit-claim deed, exhibit "I" hereto.

9. The abutting property was pledged by Ingersolls and Lemel as security for an obligation owed by them to General Brewing by a trust deed executed in July, 1977, a copy of which is attached hereto as exhibit "V". The disputed property was not pledged as security for said debt by said trust deed.

10. After acquisition of title to the disputed property (May, 1980) Ingersolls conveyed their interest in the abutting property to Lemel by quit-claim deed, a copy of which is attached hereto as exhibit "VI", and Lemel thereupon became owner of 100% of the abutting property. Ingersolls did not convey the disputed property to Lemel.

11. Lemel failed to pay the obligation secured by the trust deed (exhibit "V") and General Brewing caused a notice of default of said trust deed to be filed about September, 1979, a copy of which is attached as exhibit "VII". In said notice of default General Brewing asserted no claim to the disputed property.

12. Thereafter Lemel filed a petition in bankruptcy in the

United States District Court for the District of Utah, Central Division, case No. 80-00755. The disputed property was not listed as an asset of Lemel in the bankruptcy.

13. In that bankruptcy NACM was appointed as trustee of Lemel. By a "Trustees Deed" (exhibit "II" hereto) NACM sold and conveyed the abutting property (parcels #1 thru 7) and purported to sell the disputed property (parcels #8 and 9) to General Brewing.

14. General Brewing purported to convey the disputed property to Interstate by a special warranty deed, a copy of which is attached as exhibit "VIII".

15. Since Lemel did not have title to the disputed property exhibit "II" conveyed nothing to General Brewing and the deed from General Brewing to Interstate (exhibit "VIII") conveyed nothing to Interstate. However, said deeds cloud the title to Ingersolls and Patterson to the disputed property. The Court should quiet title to a 1/5 interest in and to the disputed property in the names of each of the Ingersolls and Patterson, and declare that Interstate has no right, title or interest therein.

#### **SECOND CLAIM FOR RELIEF**

(Adverse Possession)

16. Intervenors incorporate herein by reference thereto all of the allegations contained in ¶ 6 thru 15 above.

17. At all time from and after October, 1977, Ingersolls and Patterson have been in actual physical possession of and have

visibly, openly, notoriously, continuously possessed and used the disputed property under a claim of title and ownership thereto, which claim has at all times been hostile and adverse to the claims of all persons and organization, including the claims of Interstate and of the persons and organizations through whom Interstate claims to have derived its title.

18. The disputed property has been disposed of by Salt Lake City within the meaning of 78-12-13, UCA, 1953. Ingersolls and Patterson have been in "the exclusive, continuous and adverse possession of such real estate" for "more than seven years subsequent to such conveyance" and are "purchasers" within the meaning of said statute. Accordingly, Ingersolls and Patterson have acquired "adverse title" to the disputed property as provided therein. In the alternative, Ingersolls and Patterson have acquired title to the disputed parcel by adverse possession as provided in 78-12-7, 78-12-7.1, 78-12-8, 78-12-9, 78-12-10, 78-12-11, 78-12-12, 78-12-21.1, 78-12-16, 78-12-17 and other applicable statutes pertaining to acquisition of title to real property by adverse possession.

WHEREFORE, Ingersolls as intervenors pray for judgment as follows:

19. Quieting title to a 1/5 undivided interest in and to the disputed property in the names of Melvin E. Ingersoll, Marian Beverly Ingersoll, Leland R. Ingersoll, Evelyn E. Ingersoll and R. D. Patterson against the claims of Interstate and of all



persons or organizations claiming by, under or through Interstate.

20. For such damages as the Court determines to have been sustained by intervenors as a proximate result of the improper claims and acts of Interstate.

21. For interest, costs, a reasonable attorney's fee and for such other and further relief as the Court deems proper.

Dated the 3rd day of May, 1986.

  
Ronald C. Barker  
Attorney for Ingersolls

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a copy of the foregoing to be mailed, postage prepaid, the 3rd day of May, 1986, to each of the following person at the addresses indicated:

Patrick J. O'Hara, Esq., P. O. Box 45340, Salt Lake City, Utah 84145, and to Ralph J. Hafen, Esq., 402 Kearns Building, Salt Lake City, Utah 84101.

  
Ronald C. Barker

SCHEDULE "A"

Beginning at the Southeast corner of Lot 1, Block 1, JONES' SUBDIVISION, Block 54, Plat "C" Salt Lake City Survey, said point also being the Northwest corner of 1100 West and First South Streets; and running thence South 0°2'53" East 132.17 feet; thence West 334.00 feet; thence North 0°00'55" West 214.63 feet to the Northeast corner of Lot 1, Block 2, said JONES' SUBDIVISION; thence North 33°42' East 59.48 feet; thence East 36.00 feet to the Northwest corner of Lot 2, Block 1, said JONES' SUBDIVISION; thence South 132.00 feet; thence East 264.00 feet to the point of beginning.

P- 15-2-128-004

Pt 15-2-129-000

SALT LAKE COUNTY RECORDER  
KATIE L. DIXON  
11 MARCH 1982

3655782 QUIT CLAIM DEED

\*\*\*5.00

TOTAL RECORD FEE PAID BY CASH

\*\*\*5.00

THANK YOU - YOUR DOCUMENT WILL BE  
RETURNED WHEN PROCESSING IS COMPLETE

15-2-121  
112

599 So 7th East  
Sandy, Utah 84070

Space Above for Recorder's Use

FILED  
RECORDED  
SALT LAKE COUNTY  
UTAH

1 31 PM '82

De Kesson

# QUIT-CLAIM DEED

3655782

[CORPORATE FORM]

LEMEL CORPORATION, a corporation  
organized and existing under the laws of the State of Utah, with its principal office at  
Salt Lake City, of County of Salt Lake, State of Utah,  
grantor, hereby QUIT CLAIMS to

R.D. PATTERSON

of Salt Lake County grantee  
Ten and no/100----- for the sum of  
and other good and valuable considerations DOLLARS,  
the following described tract of land in Salt Lake County,  
State of Utah:

The West half of Glendale and South half of  
First South Streets, west of 1100 West in  
Salt Lake City, Utah, as vacated by the  
City of Salt Lake by an ordinance passed  
by the Board of Commissioners of Salt Lake  
City, Utah on the 5th day of October, 1977  
and published on the 15th day of October,  
1977, the entirety of said Glendale and  
First South Streets west of 1100 West being  
more particularly described as follows:

(See Schedule "A" attached)

The officers who sign this deed hereby certify that this deed and the transfer represented  
thereby was duly authorized under a resolution duly adopted by the board of directors of the  
grantor at a lawful meeting duly held and attended by a quorum.

In witness whereof, the grantor has caused its corporate name and seal to be hereunto affixed  
by its duly authorized officers this 27th day of July, A. D. 1979

Attest:

LEMEL CORPORATION

Company

Secretary

By

[CORPORATE SEAL]

MELVIN E. INGERSOLL

President

STATE OF UTAH,

3682590

TRUSTEE'S DEED

Grantees Address:  
21 Tamal Vista Blvd  
Corte Madera California  
94025

THIS INDENTURE, Made this 3rd day of June, 1982,  
between NACM INTERMOUNTAIN, the duly appointed, qualified and  
acting Trustee of the estate of LeMel Corporation, and  
GENERAL BREWING COMPANY;

W I T N E S S E T H:

WHEREAS, by an Order duly made and entered on the 27th  
day of May, 1982 by the United States Bankruptcy Court for  
the District of Utah, Central Division, the Honorable Ralph R.  
Mabey, U. S. Bankruptcy Judge presiding, in proceedings then  
pending in said court entitled "In re: LeMel Corporation,  
Debtor" No. 80-00755, NACM Intermountain, in its capacity as  
Trustee of the estate in Bankruptcy of LeMel Corporation, was  
duly authorized and empowered to convey all of the right, title  
and interest of LeMel Corporation, the Debtor, and all right,  
title and interest of the estate of the Debtor in the real  
property hereinafter described to General Brewing Company;  
and said court having determined that the requirements of Notice  
and hearing under Section 11 U.S.C. §363(b) have been met;

NOW, THEREFORE, NACM Intermountain, in its capacity as  
Trustee of the estate of LeMel Corporation, by virtue of the  
power and authority in it vested as aforesaid, and in considera-  
tion of the sum of Ten and no/100 Dollars (\$10.00) and other  
valuable consideration to it in hand paid by General Brewing  
Company, the receipt of which is hereby acknowledged, does hereby  
quit-claim and convey unto the said General Brewing Company,  
all of the right, title and interest of LeMel Corporation and  
all of the right, title and interest of the estate in Bankruptcy  
of LeMel Corporation, in and to that certain real property  
situate, lying and being in the County of Salt Lake, State of  
Utah, subject to two leases, each for a term of years, certain

23.50  
RECORDED  
JUN 9 10 42 AM '82  
SALT LAKE COUNTY, UTAH  
KARLE L. GIBSON  
RECORDER  
66 540000  
EXHIBIT "II"

month-to-month tenancies, and certain interests, rights of way and easements hereinafter described, but otherwise free and clear of all liens and other interests, more particularly described as follows to wit:

PARCEL NO. 1:

All of Block 43, Plat "C", Salt Lake City Survey

PARCEL NO. 2:

Beginning at the Northeast corner of Lot 8, Block 43, Plat "C", Salt Lake City Survey and running thence East 4 feet; thence South 660 feet; thence West 4 feet to the Southeast corner of Lot 1 of said Block 43; thence North 660 feet to the point of beginning.

PARCEL NO. 3:

Beginning at the Southwest corner of said Block 43, and running thence West 99 feet; thence North 247.5 feet; thence West 163 feet, more or less, to the East bank of the Jordan River; thence Northerly along said East bank to a point due West from the Northwest corner of said Block 43; thence East to the Northwest corner of said Block 43; thence South 660 feet to the point of beginning.

PARCEL NO. 4:

All of the South half of vacated First South Street lying between the West line of Glendale Street produced and the East Bank of the Jordan River.

PARCEL NO. 5:

Commencing at the Southwest corner of Block 44, Plat "C", Salt Lake City Survey, and running thence North 10 rods; thence East 10 rods; thence South 10 rods; thence West 10 rods to the point of beginning.

PARCEL NO. 6:

all of Lot 3, Block 1, JONES SUBDIVISION of Block 54, Plat "C", Salt Lake City Survey.

Together with the east half of vacated Glendale Street adjoining on the West.

EX-5381 ME 823

PARCEL NO. 7:

All of Lots 1 and 23, Block 2, JONES SUBDIVISION of Block 54, Plat "C", Salt Lake City Survey.

Together with the following described portion of vacated Glendale Street adjoining on the East; Commencing 82.5 feet North from the Southeast corner of Lot 1, Block 2, said JONES SUBDIVISION, and running thence North 66 feet to the Northeast corner of said Lot 23; thence East 33 feet; thence South 33° 42' West 59.48 feet to the point of commencement.

Together with the North one-half of vacated First South Street adjoining on the South.

PARCEL NO. 8:

The following described portion of vacated First South Street being the South one-half of vacated First South Street lying between the West line of 1100 West Street and the West line of Glendale Street produced across First South Street: Beginning at a point 66.045 feet South of the Northwest Corner of 1100 West and 100 South, which corner is also the Southeast Corner of Lot 1, Block 54, Plat "C", Salt Lake City Survey, and running thence South 66.045 feet; thence West 330.0 feet; thence North 66.045 feet; thence East 330.0 feet to the point of beginning.

PARCEL NO. 9:

The following described portion of vacated Glendale Street: Beginning at the Southeast corner of Lot 1, Block 2, Jones Subdivision of Block 54, Plat "C", Salt Lake City Survey and running thence North 82.5 feet; thence North 33° 42' East 59.48 feet; thence South 132.0 feet thence West 33 feet to the point of beginning.

Together with the North one-half of vacated First South Street adjoining on the South.

SUBJECT TO THE FOLLOWING RIGHTS OF WAY AND EASEMENTS AND INTERESTS:

1. An Easement for construction and maintenance of an underground conduit along the following described line: Beginning 45.23 feet West of the City Engineer's monument on 10th West Street and 56 South of City Engineer's monument on First South Street, and running thence West 327.27 feet, as created in favor of Utah Power & Light Company, a Corporation, by instrument recorded November 18, 1916, as Entry No. 369203 in Book 3-0, page 218.

W5381 M 829



STATE OF UTAH,

**SS.**

**I.**

Mildred V. Higham

, City Recorder of Salt Lake City, Utah, do hereby

rtify that the attached document is a full, true and correct copy of Bill No. 173, an ordinance vacating Glendale and First South Streets west of 1100 West Street located in Salt Lake City, Utah.

passed by the Board of Commissioners of Salt Lake City, Utah,

October 5,

1977

as appears of record in my office.

City, this  
(SEAL)

21st

**day of**

December

1978

**City Recorder**

\*\*\*\*\*

EXHIBIT "IV"



**AN ORDINANCE**

**VACATING** Glendale and First South Streets west of 1100 West Street located in Salt Lake City, Utah.

Be it ordained by the Board of Commissioners of Salt Lake City, Utah:

**SECTION 1.** That Glendale and First South Streets west of 1100 West Street located in Salt Lake City, Utah, more particularly described as follows, be, and the same hereby is, vacated and declared no longer to be public property for use as a street, avenue, alley or pedestrian way.

Beginning at the Southeast corner of Lot 1, Block 1, Jones' Subdivision, Block 54, Plat "C", Salt Lake City Survey, said point also being the Northwest corner of 1100 West and First South Streets, and running thence South 0° 2' 53" East 132.17 feet, thence West 334.00 feet, thence North 0° 00' 55" West 214.63 feet to the Northeast corner of Lot 1, Block 2, said Jones' Subdivision; thence North 33° 42' East 59.48 feet, thence East 36.00 feet to the Northwest corner of Lot 2, Block 1, said Jones' Subdivision; thence South 132.00 feet, thence East 264.00 feet to point of beginning. Contains 51,833.32 square feet, or 1.190 acres.

Said vacation is made expressly subject to all existing rights of way and easements of all public utilities of any and every description now located on, in, under or over the confines of the above described property, and also subject to the rights of entry thereon for the purpose of maintaining, altering, repairing, replacing, removing or rerouting said utilities and all of them.

**SECTION 2.** This ordinance shall take effect 30 days after its first publication.

Passed by the Board of Commissioners of Salt Lake City, Utah, this 5th day of October, 1977.

**TED L. WILSON**  
Mayor

**MILDRED V. HIGHAM**  
City Recorder

(SEAL)  
BILL NO. 173 of 1977  
Published October 15, 1977  
(B-6)

2971310

TRUST DEED

\$ 1750  
REF. Patricia L. Brown Deputy  
Patricia L. Brown

THIS TRUST DEED is made this 6<sup>TH</sup> day of July, 1977, between

LEMELE CORPORATION, a Utah corporation, and MELVIN E. INGERSOLL and MARIAN BEVERLY INGERSOLL, his wife, and LELAND R. INGERSOLL and EVELYN E. INGERSOLL, his wife, as Trustors, all of Salt Lake City, Salt Lake County, State of Utah, BACKMAN ABSTRACT & TITLE COMPANY, as Trustee, and GENERAL BREWING COMPANY, a California corporation, as Beneficiary.

Trustor hereby CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the following described property situated in Salt Lake County, State of Utah:

PARCEL 1: All of Block 43, Plat "C", Salt Lake City Survey.

PARCEL 2: Beginning at the Northeast corner of Lot 8, Block 43, Plat "C", Salt Lake City Survey, and running thence East 4 feet; thence South 660 feet; thence West 4 feet to the Southeast corner of Lot 1 of said Block 43; thence North 660 feet to the point of beginning.

PARCEL 3: Beginning at the Southwest corner of said Block 43, and running thence West 99 feet; thence North 247.5 feet; thence West 163 feet, more or less, to the East Bank of the Jordan River; thence Northerly along said East Bank to a point due West from the Northwest corner of said Block 43; thence East to the Northwest corner of said Block 43; thence South 660 feet to the point of beginning.

PARCEL 4: All of the South half of vacated First South Street lying between the West line of Glendale Street produced and the East Bank of the Jordan River.

PARCEL 5: Commencing at the Southwest corner of Block 44, Plat "C", Salt Lake City Survey, and running thence North 10 rods; thence East 10 rods; thence South 10 rods; thence West 10 rods to the point of beginning.

PARCEL 6: All of Lot 3, Block 1, JONES SUBDIVISION of Block 54, Plat "C", Salt Lake City Survey.

Together with the East half of vacated Glendale Street adjoining on the West.

PARCEL 7: All of Lots 1 and 23, Block 2, JONES SUBDIVISION of Block 54, Plat "C", Salt Lake City Survey.

Together with the following described portion of vacated Glendale Street adjoining on the East: Commencing 82.5 feet North from the Southeast corner of Lot 1, Block 2, said JONES SUBDIVISION, and running thence North 66 feet to the Northeast corner of said Lot 23; thence East 33 feet; thence South 33°42' West 59.48 feet to the point of commencement.

Together with the North one-half of vacated First South Street adjoining on the South.

SUBJECT TO THE FOLLOWING:

1. An easement for construction and maintenance of an underground conduit along the following described line:

BOOK 4519 PAGE 1159

EXHIBIT "V"

BEGINNING 45.23 feet West of the City Engineer's Monument on 10th West Street and 56 feet South of City Engineer's Monument on First South Street, and running thence West 327.27 feet; as created in favor of Utah Power and Light Company, a corporation, by instrument recorded November 18, 1916 as Entry No. 369208, Book 3-C, Page 218.

2. Right of Way for a Railroad spur tract, said right of way being 8-1/2 feet on each side of, and measured at right angles to, the following described center line:

BEGINNING at a point West 411.5 feet from the Southwest corner of the Intersection of 10th West Street and First South Street, running thence Southerly on a 15°30' curve to the right a distance of 97.6 feet; thence Southerly on a tangent to said curve 142.8 feet; thence on a 14° curve to the left 172.2 feet to a point on the West line of 10th West Street which point is North 113.3 feet from the North line of Second South Street; as created in favor of the Western Pacific Railroad Company, a corporation, by instrument recorded June 27, 1921 as Entry No. 452855 in Book 11-I, page 81.

By Agreement recorded September 9, 1923, Entry No. 542833 in Book 3-V, page 373, said Western Pacific Railroad Company granted an easement and right-of-way over a portion of above described tract to Oregon Short Line Railroad Company.

3. An Agreement recorded September 9, 1925 as Entry No. 542834 in Book 3-W, page 338, by and between Oregon Short Line Railroad Co. and The Western Pacific Railroad Co. first parties, and Fisher Terminal Warehouse Co., a corporation, second party, which provides for relocation of present trackage and construction of additional trackage in accordance with a plat marked Schedule "A" attached thereto.
4. A perpetual easement for the sole and exclusive use of Oregon Short Line Railroad Company and the Western Pacific Railroad Company for a Right of Way for their present spur tracks over the following described land, to wit:

An irregular tract of land, being a part of Lot 6, Block 43, Plat "C", Salt Lake City Survey, and those certain portions of vacated First South Street (together with other property not covered by this deed) more particularly described in instrument recorded January 20, 1926 as Entry No. 551852 in Book 3-X of Liens and Leases, page 252.

5. A Right of Way for the purpose of laying, maintaining, operating and removal of a gas pipe line along the following described line:

BEGINNING at the West line of 10th West Street, and running West on First South Street, 15 feet South of the center line thereof, to the Jordan River; as created in favor of Utah Gas & Coke Company by instrument recorded July 27, 1949, as Entry No. 637186 in Book 44, Page 589 of Official Records.

6. A Pole Line Easement over the following described center line:

BEGINNING at a point South 89°58'22" West 470 feet from a Monument at the Intersection of First South and Glendale Streets, and running thence South 0°12'22" West 51 feet; thence North 89°58'22" East 436.8 feet; as created in favor of Utah Power and Light Company, a corporation, by instrument recorded August 23, 1945, as Entry No. 1009087 in Book 434, Page 609 of Official Records.

BOOK 4519 PAGE 1160

7. A Right of Way for a 3 inch water pipeline along the following described line:

BEGINNING at a point South 1230 feet and East 1136 feet from the Northwest corner of Section 2, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence South 83°10' East 155 feet; thence South 25°30' East 85 feet, as disclosed by Certificate of Appropriation of Water, recorded May 25, 1950, as Entry No. 1201402 in Book 768, Page 266 of Official Records

8. A perpetual easement for a drainage ditch along the North side of West First South Street, together with the right of the City to enlarge said ditch, as reserved by Salt Lake City in instrument recorded September 22, 1925, as Entry No. 543644 in Book 12-H, page 524 of Official Records.

9. A Pole Line Easement granted to Utah Power & Light Company as recorded January 16, 1961, in Book 1777, Page 242, Entry No. 1756733, Official Records, for the erection and continued maintenance, repair, alteration, and replacement of the electric transmission distribution and telephone circuits of the Grantee and two anchors and three poles along a line described as follows:

BEGINNING at a point within an existing transmission line which is 900 feet South and 1139 feet East, more or less, from the Northwest corner of Section 2, Township 1 South, Range 1 West, Salt Lake Meridian, thence South 6°49' West 540 feet on said land and being in Lots 3 and 6 of said Section 2.

10. A Pole Line Easement granted to Utah Power & Light Company as recorded January 16, 1961, in Book 1773, Page 243, Entry No. 1756734, Official Records, for the erection and continued maintenance, repair, alteration, and replacement of the electric transmission distribution and telephone circuits of the Grantee and one guy and 3 poles along a line described as follows:

BEGINNING at a fence on the North boundary line of the Grantors' land at a point 845 feet South and 1170 feet East, more or less, from the Northwest corner of Section 2, Township 1 South, Range 1 West, Salt Lake Meridian, thence South 0°02' East 740 feet, more or less, to a fence on the South boundary line of said land and being in Lots 3 and 6 of said Section 2.

11. Any other rights of way and easements for roads, ditches, canals, utilities, pipe lines, etc., which may exist over, under or across said land.

TOGETHER WITH all buildings, fixtures and improvements thereon and all water rights, rights-of-way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto now or hereafter used or enjoyed with said property, or any part thereof;

FOR THE PURPOSE OF SECURING payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$1,300,000.00, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and payment of any sums expended or advanced by Beneficiary to protect the security hereof.

BOOK 4513 PAGE 1161

Trustor agrees to pay all taxes and assessments on the above property, to pay all charges and assessments on water or water stock used on or with said property, not to commit waste, to maintain adequate fire insurance on improvements on said property, to pay all costs and expenses of collection (including Trustee's and attorney's fees in event of default in payment of the indebtedness secured hereby) and to pay reasonable Trustee's fees for any of the services performed by Trustee hereunder, including a reconveyance hereto.

The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

LECEL CORPORATION

By

President

By

Secretary

INDIVIDUALS:

MELVIN E. INGERSOLL

MARIAN BEVERLY INGERSOLL

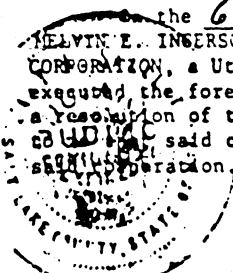
LELAND R. INGERSOLL

EVELYN E. INGERSOLL

STATE OF UTAH )

County of Salt Lake, ss

On the 6<sup>th</sup> day of JULY, 1977, personally appeared before me MELVIN E. INGERSOLL, as President and LELAND R. INGERSOLL, as Secretary of LECEL CORPORATION, a Utah corporation, and each duly acknowledged to me that they executed the foregoing instrument on behalf of said corporation by authority of a resolution of the board of directors of said corporation and that each acknowledged to me that said corporation executed the same and the seal affixed is the seal of said corporation.



Gary A. Sargent  
NOTARY PUBLIC

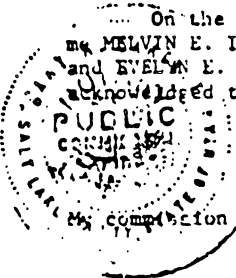
My commission expires JAN 4, 1979 Residing at FRUIT HEIGHT, UTAH

BOOK 4519 PAGE 1162

STATE OF UTAH )

County of Salt Lake ss

On the 6<sup>th</sup> day of JULY, 1977, personally appeared before me MELVIN E. INGERSOLL, MARIAN BEVERLY INGERSOLL, his wife, and LELAND R. INGERSOLL and EVELYN E. INGERSOLL, his wife, signers of the within instrument, who duly acknowledged to me that they executed the same.



Gary A. Sargent  
NOTARY PUBLIC

My commission expires JAN 4, 1979 Residing at EMMET HEIGHTS, UTAH

0004519 001163

Recorded at Request of Backman, Clark & Pionch  
at..... M. Fee Paid \$ 61.50 - Thru #500 51684111  
by..... Dep. Book..... Page..... Ref.:.....  
Mail tax notice to..... Address.....

3431368

## QUIT CLAIM DEED

MELVIN E. INGERSOLL and MARIAN BEVERLY INGERSOLL, his wife, and  
LELAND R. INGERSOLL and EVELYN E. INGERSOLL, his wife,  
of Salt Lake City, County of Salt Lake, State of Utah, hereby  
QUIT CLAIM to LEMEL CORPORATION,

of  
TAX and No. 100- and for other good and valuable consideration, for the sum of  
the following described tract of land in DOLLARS  
State of Utah to wit: Salt Lake County,

SEE SCHEDULE "A" ATTACHED HERETO

\$16.00

RECEIVED  
SALT LAKE COUNTY  
MAY 6 2 46 PM '80  
David H. Bont  
Marian Beverly Ingersoll

WITNESS the hand of said grantor, this day of May, 1980.

Signed in the presence of

D. Kent Norton

Melvin E. Ingersoll  
MELVIN E. INGERSOLL

Marian Beverly Ingersoll  
MARIAN BEVERLY INGERSOLL

Leland R. Ingersoll  
LELAND R. INGERSOLL

Evelyn E. Ingersoll  
EVELYN E. INGERSOLL

STATE OF UTAH,

County of Salt Lake }

On the day of May

1980,  
personally appeared before me

MELVIN E. INGERSOLL and MARIAN BEVERLY INGERSOLL, his wife, and LELAND R. INGERSOLL and EVELYN E. INGERSOLL, his wife,  
the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

Ernestine Gunn

Notary Public, residing at

My commission expires

1-3-83

Salt Lake City, Utah

THIS DEED PRINTED ESPECIALLY FOR PHOTO-RECORDING. USE BLACK INK AND TYPE.

EXHIBIT "VI"

SCHEDULE "A"

Parcel 1:

✓ All of Block 43, Plat "C", Salt Lake City Survey.

C24-41-12

Parcel 2:

1 BEGINNING at the Northeast corner of Lot 8, Block 43, Plat "C", Salt Lake City Survey, and running thence East 4.0 feet; thence South 660.0 feet; thence West 4.0 feet to the Southeast corner of Lot 1 of said Block 43; thence North 660.0 feet to the point of beginning.

C24-41-12

Parcel 3:

11:00 AM 11:00 AM BEGINNING at the Southwest corner of said Block 43, and running thence West 99.0 feet; thence North 247.5 feet; thence West 163.0 feet, more or less, to the East Bank of the Jordan River; thence Northerly along said East Bank to a point due West from the Northwest corner of said Block 43; thence East to the Northwest corner of said Block 43; thence South 660.0 feet to the point of beginning.

D83-7-27

Parcel 4:

1 All of the South half of vacated First South Street lying between the West line of Glendale Street produced and the East Bank of the Jordan River.

S61-287-14

Parcel 5:

1 COMMENCING at the Southwest corner of Block 44, Plat "C", Salt Lake City Survey, and running thence North 10 rods; thence East 10 rods; thence South 10 rods; thence West 10 rods to the point of beginning.

D101-218-1

Parcel 6:

✓ All of Lot 3, Block 1, JONES SUBDIVISION of Block 54, Plat "C", Salt Lake City Survey.

S77-49

✓ TOGETHER WITH the East half of vacated Glendale Street adjoining on the West

Parcel 7:

✓ All of Lots 1 and 23, Block 2, JONES SUBDIVISION of Block 54, Plat "C", Salt Lake City Survey.

S61-287

✓ TOGETHER WITH the following described portion of vacated Glendale Street adjoining on the East:

DEC 5 1937 11:11:35



3334045

NOTICE OF DEFAULT

NOTICE IS HEREBY GIVEN: That RICHARD L. BLANCK is Trustee under a Deed of Trust dated July 6, 1977, executed by Lemel Corporation, a Utah corporation, Melvin E. Ingersoll and Beverly Ingersoll, his wife, Leland R. Ingersoll and Evelyn E. Ingersoll, his wife, in which General Brewing Company, a California corporation, is named as Beneficiary and Backman Abstract & Title Company is named as Trustee, recorded July 18, 1977, as Entry No. 2971310, in Book 4519, at Page 1159, of Official Records in the Office of the County Recorder of Salt Lake County, Utah, describing land therein as:

SEE ATTACHMENT

Said obligations include a note in the principal sum of \$1,800,000.00.

A breach of, and default in, the obligations for which such deed as security has occurred in that payments due on August 1, 1979 and September 1, 1979, in the total amount of \$55,316.66, have not been paid.

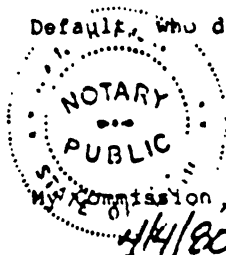
By reason of such default, Richard L. Blanck, as Trustee, and General Brewing Company, as Beneficiary, under said Deed of Trust, do hereby declare all sums secured thereby immediately due and payable and have elected and do hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.

DATED this 7th day of September.

Richard L. Blanck  
RICHARD L. BLANCK, Trustee

STATE OF UTAH                    )  
                                      ) ss.  
COUNTY OF SALT LAKE        )

On this 7th day of September, personally appeared before me Richard L. Blanck, as Trustee in the foregoing Notice of Default, who duly acknowledged to me that he executed the same.



Karen L. Lister  
NOTARY PUBLIC  
Residing in Salt Lake County, Utah

Ex-9939 mli:1

EXHIBIT "VII"

By Agreement recorded September 9, 1925, Entry No. 542833 in Book 3-V, page 573, said Western Pacific Railroad Company granted an easement and right-of-way over a portion of above described tract to Oregon Short Line Railroad Company.

3. An Agreement recorded September 9, 1925 as Entry No. 542834 in Book 3-W, page 338, by and between Oregon Short Line Railroad Co. and The Western Pacific Railroad Co. first parties, and Fisher Terminal Warehouse Co., a corporation, second party, which provides for re-location of present trackage and construction of additional trackage in accordance with a plat marked Schedule "A" attached thereto.
4. A perpetual easement for the sole and exclusive use of Oregon Short Line Railroad Company and the Western Pacific Railroad Company for a Right of Way for their present spur tracks over the following described land, to wit:

An irregular tract of land, being a part of Lot 6, Block 43, Plat "C", Salt Lake City Survey, and those certain portions of vacated First South Street (together with other property not covered by this deed) more particularly described in instrument recorded January 20, 1926 as Entry No. 551852 in Book 3-X of Liens and Leases, page 252.

5. A Right of Way for the purpose of laying, maintaining, operating and removal of a gas pipe line along the following described line:

BEGINNING at the West line of 10th West Street, and running West on First South Street, 15 feet South of the center line thereof, to the Jordan River; as created in favor of Utah Gas & Coke Company by instrument recorded July 27, 1949, as Entry No. 637186 in Book 44, Page 589 of Official Records.

6. A Pole Line Easement over the following described center line:

BEGINNING at a point South 89°58'22" West 470 feet from a Monument at the intersection of First South and Glendale Streets, and running thence South 0°12'22" West 51 feet; thence North 89°58'22" East 436.8 feet; as created in favor of Utah Power and Light Company, a corporation, by instrument recorded August 23, 1945, as Entry No. 1009087 in Book 434, Page 609 of Official Records.

7. A Right of Way for a 3 inch water pipeline along the following described line:

BEGINNING at a point South 1236 feet and East 1136 feet from the Northwest corner of Section 2, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence South 83°10' East 155 feet; thence South 25°30' East 85 feet, as disclosed by Certificate of Appropriation of Water, recorded May 25, 1950, as Entry No. 1201402 in Book 766, Page 266 of Official Records.

8. A perpetual easement for a drainage ditch along the North side of West First South Street, together with the right of the City to enlarge said ditch, as reserved by Salt Lake City in instrument recorded September 22, 1925, as Entry No. 543644 in Book 12-E, page 524 of Official Records.
9. A Pole Line Easement granted to Utah Power & Light Company as recorded January 16, 1961, in Book 1773, Page 242, Entry No. 1756733, Official Records, for the erection and continued maintenance, repair, alteration, and replacement of the electric transmission distribution and telephone circuits of the Grantee and two anchors and three poles along a line described as follows:

BEGINNING at a point within an existing transmission line which is 900 feet South and 1139 feet East, more or less, from the Northwest corner of Section 2, Township 1 South, Range 1 West, Salt Lake Meridian, thence South 6°49' West 540 feet on said land and being in Lots 3 and 6 of said Section 2.

EX-1143

10. A Pole Line Easement granted to Utah Power & Light Company as recorded January 16, 1961, in Book 1773, Page 243, Entry No. 1756734, Official Records, for the erection and continued maintenance, repair, alteration, and replacement of the electric transmission distribution and telephone circuits of the Grantee and one guy and 3 poles along a line described as follows:

BEGINNING at a fence on the North boundary line of the Grantors' land at a point 845 feet South and 1170 feet East, more or less, from the Northwest corner of Section 2, Township 1 South, Range 1 West, Salt Lake Meridian, thence South 0°02' East 740 feet, more or less, to a fence on the South boundary line of said land and being in Lots 3 and 6 of said Section 2.

11. Any other rights of way and easements for roads, ditches, canals, utilities, pipe lines, etc., which may exist over, under or across said land.

1300  
RECORDED  
SEP 7 3 55 PM '79  
KATHLEEN M.  
RECORDS  
SALT LAKE COUNTY  
UTAH

BOOK 1773 PAGE 243

**PARCEL NO. 1:**

All of Block 43, Plat "C", Salt Lake City Survey

**PARCEL NO. 2:**

Beginning at the Northeast corner of Lot 8, Block 43, Plat "C", Salt Lake City Survey and running thence East 4 feet; thence South 660 feet; thence West 4 feet to the Southeast corner of Lot 1 of said Block 43; thence North 660 feet to the point of beginning.

**PARCEL NO. 3:**

Beginning at the Southwest corner of said Block 43, and running thence West 99 feet; thence North 247.5 feet; thence West 163 feet, more or less, to the East bank of the Jordan River; thence Northerly along said East bank to a point due West from the Northwest corner of said Block 43; thence East to the Northwest corner of said Block 43; thence South 660 feet to the point of beginning.

**PARCEL NO. 4:**

All of the South half of vacated First South Street lying between the West line of Glendale Street produced and the East Bank of the Jordan River.

**PARCEL NO. 5:**

Commencing at the Southwest corner of Block 44, Plat "C", Salt Lake City Survey, and running thence North 10 rods; thence East 10 rods; thence South 10 rods; thence West 10 rods to the point of beginning.

**PARCEL NO. 6:**

all of Lot 3, Block 1, JONES SUBDIVISION of Block 54, Plat "C", Salt Lake City Survey.

Together with the east half of vacated Glendale Street adjoining on the West.

Interstate Land Corporation  
9710 South 5200 West  
West Jordan, Utah 84084

3901356

MAILE L. DIXON  
RECORDER  
SANTA FE COUNTY,  
N.M.  
FEB 14 8 48 AM '04  
19.50  
Small Thrust  
Lowell Burst

THE OFFICER who signs this deed hereby certifies that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the Board of Directors of the GRANTOR at a lawful meeting duly held and attended by a quorum.

IN WITNESS WHEREOF, the GRANTOR has caused its corporate name and seal to be hereunto affixed by its duly authorized officer this 17th day of February, 1984.

By Carl E. Mullin, Jr.  
CARL E. MULLIN, JR.  
PRESIDENT

STATE OF WASHINGTON )  
COUNTY OF CLATSOP ) ss.

On the 7th day of February, 1984, personally appeared before me CARL E. MULLEN, JR., being by me duly sworn, did say that he, the said CARL E. MULLEN, JR., is the President of the General Brewing Company and that the within and foregoing instrument was signed on behalf of said corporation by authority of a resolution of its Board of Directors and said CARL E. MULLEN, JR., duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation.

Nancy J. Turner  
NOTARY PUBLIC in and for the State of  
Washington, residing at Vancouver

82-5531 545

PARCEL NO. 1:

All of Block 43, Plat "C", Salt Lake City Survey

PARCEL NO. 2:

Beginning at the Northwest corner of Lot 8, Block 43, Plat "C", Salt Lake City Survey and running thence East 4 feet; thence South 660 feet; thence West 4 feet to the Southeast corner of Lot 1 of said Block 43; thence North 660 feet to the point of beginning.

PARCEL NO. 3:

Beginning at the Southwest corner of said Block 43, and running thence West 99 feet; thence North 247.5 feet; thence West 163 feet, more or less, to the East bank of the Jordan River; thence Northerly along said East bank to a point due West from the Northwest corner of said Block 43; thence East to the Northwest corner of said Block 43; thence South 660 feet to the point of beginning.

PARCEL NO. 4:

All of the South half of vacated First South Street lying between the West line of Glendale Street produced and the East Bank of the Jordan River.

PARCEL NO. 5:

Commencing at the Southwest corner of Block 44, Plat "C", Salt Lake City Survey, and running thence North 10 rods; thence East 10 rods; thence South 10 rods; thence West 10 rods to the point of beginning.

PARCEL NO. 6:

All of Lot 3, Block 1, JONES SUBDIVISION of Block 54, Plat "C", Salt Lake City Survey.

Together with the east half of vacated Glendale Street adjoining on the West.

EXHIBIT "A"

2005531 P. 546

PARCEL NO. 7:

all of Lots 1 and 23, Block 2, JONES SUBDIVISION of Block 54, Plat "C", Salt Lake City Survey.

together with the following described portion of vacated Glendale Street adjoining on the East; Commencing 82.5 feet North from the Southeast corner of Lot 1, Block 2, said JONES SUBDIVISION, and running thence North 66 feet to the Northeast corner of said Lot 23; thence East 33 feet; thence South 33°42' West 59.48 feet to the point of commencement.

Together with the North one-half of vacated First South Street adjoining on the South.

PARCEL NO. 8:

The following described portion of vacated First South Street being the South one-half of vacated First South Street lying between the West line of 1100 West Street and the West line of Glendale Street produced across First South Street. Beginning at a point 66.045 feet South of the Northwest Corner of 1100 West and 100 South, which corner is also the Southeast Corner of Lot 1, Block 54, Plat "C", Salt Lake City Survey, and running thence South 66.045 feet; thence West 330.0 feet; thence North 66.045 feet; thence East 330.0 feet to the point of beginning.

PARCEL NO. 9:

The following described portion of vacated Glendale Street: Beginning at the Southeast corner of Lot 1, Block 2, Jones Subdivision of Block 54, Plat "C", Salt Lake City Survey and running thence North 82.5 feet; thence North 33°42' East 59.48 feet; thence South 132.0 feet thence West 33 feet to the point of beginning.

Together with the North one-half of vacated First South Street adjoining on the South.

SUBJECT TO THE FOLLOWING EIGHT OF WAY AND EASEMENTS AND INTERESTS:

1. An Easement for construction and maintenance of an underground conduit along the following described line: Beginning 43.23 feet West of the City Engineer's monument on 10th West Street and 56 South of City Engineer's monument on First South Street, and running thence West 327.27 feet, as created in favor of Utah Power & Light Company, a Corporation, by instrument recorded November 18, 1916, as Entry No. 369208 in Book 3-0, page 218.

ENCLOSURE 547

## **ADDENDUM**

### **B. Statute and Rules Text**

Rule 5: Local Rules of the Third Judicial District Court

Rule 56(c): Utah Rules of Civil Procedure

Rule 59; Utah Rules of Civil Procedure

Rule 60 (b) Utah Rules of Civil Procedure



(d) All motions for summary judgment or other dispositive motions must be heard at least thirty (30) days before the date set for trial. No such motion shall be heard after that date without leave of court.

### **Rule 5. Written orders, judgments and decrees.**

Rule 2.9 of the Rules of Practice in the District Courts and of the State of Utah shall not apply in the Third Judicial District Court.

(a) **Filing of proposed orders, judgments or decrees.** In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen (15) days or such shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling.

(b) **Service of proposed orders, judgments or decrees; objections.** Copies of the proposed order, judgment or decree in civil and domestic cases shall be served on opposing counsel before being presented to the court for signature unless approved as to form by opposing counsel, or the court otherwise orders. Notice of objections thereto shall be filed with the court and served on opposing counsel no later than five (5) days after service of said proposed order, judgment or decree.

(c) **Stipulated settlements; dismissals.** Stipulated settlements and dismissals shall be reduced to writing and presented to the court for signature within fifteen (15) days of the settlement and dismissal.

(d) **Default judgments.** Default judgments which require a judge's signature shall be submitted to the judge assigned to the case. Default judgments which include an award of attorney's fees shall be supported by an attorney's fee affidavit which sets forth: (1) the legal basis for the award of the attorney's fees requested; (2) the amount requested; and (3) evidence that the amount requested constitutes a fair and reasonable fee for the services performed.

### **Rule 6. Pretrial calendar.**

This rule modifies Rule 5.1 of the Rules of Practice of the District Courts and Circuit Courts of the State of Utah.

Pretrial hearings in civil cases will be held when so ordered by the court. Pretrial hearings will be held before the judge who has been assigned the case. Motions for pretrial hearings may be filed at any time. Such motions shall set forth with particularity why a pretrial hearing is requested. The court may order in any case that such motions must be accompanied by a proposed pre-trial order in the format set out in the Rules of Practice of the District and Circuit Courts of the State of Utah; or that such a pretrial order be prepared before a final settlement conference or trial date is set.

### **Rule 7. Motions for supplemental proceedings.**

Motions for supplemental proceedings will be set on the regular weekly supplemental proceedings calendar before a clerk of the court. Counsel may alternatively schedule the matter to be heard before the judge assigned to the case on the assigned judge's regular law and motion calendar.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

**Key Numbers.** — Judgment ⇐ 92

## **Rule 56. Summary judgment.**

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(e) **Filing transcript of satisfaction in other counties.** When any satisfaction of a judgment shall have been entered on the judgment docket of the county where such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.

**Compiler's Notes.** — There is no federal rule covering this subject matter.

**Cross-References.** — Fee not charged for filing satisfaction, § 21-2-2.

#### NOTES TO DECISIONS

##### ANALYSIS

Court.

—Duty.

—Attachment.

Effect.

—Acceptance of full payment.

Owner or attorney.

—Vacation of satisfaction.

—Hearing.

Court.

—Duty.

—Attachment.

Court had duty to make order directing partial satisfaction of judgment to extent of money collected through attachment proceeding. *Blake v. Farrell*, 31 U. 110, 86 P. 805.

Effect.

—Acceptance of full payment.

When plaintiff voluntarily accepted full payment of a judgment in his favor, the satisfaction and discharge operated to satisfy and discharge everything merged in and adjudicated

by the judgment. *Sierra Nevada Mill Co. v. Keith O'Brien Co.*, 48 U. 12, 156 P. 943.

Owner or attorney.

—Vacation of satisfaction.

—Hearing.

The recorded satisfaction of judgment signed by judgment creditor cannot be vacated without action and hearing in equity, and the lien of an attorney against the proceeds of the judgment does not include his personal right to execute against the judgment debtor. *Utah C. V. Federal Credit Union v. Jenkins*, 528 P.2d 1187.

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d Judgments § 979 et seq.

**C.J.S.** — 49 C.J.S. Judgments §§ 574 to 584.

**A.L.R.** — Voluntary payment into court of

judgment against one joint tort-feasor as release of others, 40 A.L.R.3d 1181.

**Key Numbers.** — Judgment ⇌ 891 to 899.

### Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

**Compiler's Notes.** — This rule is similar to Rule 59, F.R.C.P.

**Cross-References.** — Fee for filing motion for new trial, § 21-2-2.

Harmless error not ground for new trial, Rule 61.

Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606.

## NOTES TO DECISIONS

### ANALYSIS

Abandonment of motion.

Accident or surprise.

Arbitration awards.

Caption on motion for new trial.

Correction of insufficient or informal verdict.

Correction of record.

Dev. Corp. v. Sather, 605 P.2d 1240 (Utah 1980).

**Cited in National Farmers Union Property & Cas. Co. v. Thompson**, 4 Utah 2d 7, 286 P.2d 249 (1955); **Holmes v. Nelson**, 7 Utah 2d 436, 326 P.2d 722 (1958); **Howard v. Howard**, 11 Utah 2d 149, 356 P.2d 275 (1960); **Nunley v. Stan Katz Real Estate, Inc.**, 15 Utah 2d 126, 388 P.2d 798 (1964); **Hanson v. General Bldrs. Supply Co.**, 15 Utah 2d 143, 389 P.2d 61 (1964); **James Mfg. Co. v. Wilson**, 15 Utah 2d 210, 390 P.2d 127 (1964); **Porcupine Reservoir Co. v. Lloyd W. Keller Corp.**, 15 Utah 2d 318, 392 P.2d 620 (1964); **Watson v. Anderson**, 29 Utah 2d 36, 504 P.2d 1003 (1973); **Nichols v.**

**State**, 554 P.2d 231 (Utah 1976); **Edgar v. Wagner**, 572 P.2d 405 (Utah 1977); **Time Con. Fin. Corp. v. Brimhall**, 575 P.2d 701 (Utah 1978); **Anderton v. Montgomery**, 607 P.2d 800 (Utah 1980); **Miller Pontiac, Inc. v. Osbourne**, 622 P.2d 808 (Utah 1981); **Muller v. Ingersoll-Rand Co.**, 628 P.2d 1301 (Utah 1981); **Kohler v. Garden City**, 639 P.2d 162 (Utah 1981); **Pozzolan Portland Cement Co. v. Gardner**, 668 P.2d 569 (Utah 1983); **Nelson v. Jacobsen**, 669 P.2d 1207 (Utah 1983); **Golden Key Realty, Inc. v. Mantas**, 699 P.2d 730 (Utah 1985); **Estate of Kay**, 705 P.2d 1165 (Utah 1985); **York v. Unqualified Washington County Elected Officials**, 714 P.2d 679 (Utah 1986).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d New Trial §§ 11 to 14, 29 et seq., 187 to 191.

**C.J.S.** — 66 C.J.S. New Trial §§ 13 et seq., 115, 116, 122 to 127.

**A.L.R.** — Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

Quotient verdicts, 8 A.L.R.3d 335.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial

of same case, or amount of verdict therein, 15 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

**Key Numbers.** — New Trial = 13 et seq., 110, 116.

### Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a

new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

**Compiler's Notes.** — This rule is patterned after, and similar to, Rule 60, F.R.C.P.

**Cross-References.** — Fee for filing motion to set aside judgment, § 21-2-2.

#### NOTES TO DECISIONS

##### ANALYSIS

Clerical mistakes.

—Computation of damages.

—Correction after appeal.

—Date of judgment.

—Void judgment.

—Estate record.

—Inherent power of courts.

—Intent of court and parties.

—Judicial error distinguished.

—Order prepared by counsel.

—Predating of new trial motion.

Other reasons.

—"Any other reason justifying relief."

—Default judgment.

—Impossibility of compliance with order.

—Incompetent counsel.

—Lack of due process.

—Merits of case.

—Mistake or inadvertence.

—Real party in interest.

—Requirements.

—Effect of set-aside judgment.

—Admissions.

—Fraud.

—Divorce action.

—Independent action.

—Constitutionality of taxes.

—Divorce decree.

—Fraud or duress.

—Motion distinguished.

—Invalid summons.