

1979

Utah Mortgage Loan Corporation v. Betty J. Black, Individually And As Personal Representative of The Estate of Don J. Black, And Don J. Black Realty, Inc : Brief of Amicus Curiae

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

UTAH MORTGAGE LOAN CORPORATION, :

Plaintiff-Appellant :

vs. :

CASE NO. 16610

BETTY J. BLACK, individually :
and as personal representative :
of the estate of DON J. BLACK, :
and DON J. BLACK REALTY, INC., :

Defendants-Respondents :

APPEAL FROM A SUMMARY JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, UTAH
HONORABLE CHRISTINE M. DURHAM, JUDGE

BRIEF OF AMICUS CURIAE

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FILED

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BRIEF OF AMICUS CURIAE

ARGUMENT

POINT I

A HOLDING THAT THE ONE-ACTION RULE PRECLUDES AN ACTION FOR
A DEFICIENCY WHEN MORTGAGED PROPERTY IS RELEASED WITH
CONSENT OF THE MORTGAGOR IS NEITHER DESIRABLE NOR REQUIRED

This Court has granted the Utah Bankers Association
leave to file an amicus curiae brief with respect to this
appeal. The Utah Bankers Association is a nonprofit trade
association composed of all commercial banks located within the
State of Utah. The object of this brief is to assist the Court
in the application of the one-action rule, consistently with
legislative intent and prior judicial construction, so as to
avoid frustrating reasonable expectations of lenders and
borrowers.

Financing arrangements such as the one presented in this case are common.

A construction loan is the usual source of funds with which the builder will finance the improvements he will build on the land. In essence, the construction loan is a short-term loan, usually secured by a first mortgage or deed of trust on the property, which will be paid off in full as to each lot when the lot is ultimately sold to a home buyer. Most construction loans are made by institutional lenders; savings and loan associations, commercial banks, and real estate investment trusts are the most active participants.

G. Nelson and D. Whitman, Cases and Materials on Real Estate Finance and Development, 553 (1976).

A. THE ONE-ACTION RULE PERMITS SALE OF THE COLLATERAL IN ANY MANNER AGREED UPON BY THE MORTGAGOR

This Court has articulated two purposes for the one-action rule:

a. The statute was created for the very purpose of doing away with the rule allowing an action on a note, and also a suit to foreclose the note securing it, and to avoid a multiplicity of actions on the same debt.

Mickelson v Anderson, 81 Utah 444, 19 P.2d 1033, 1036 (1933)

b. It is therefore held that under that statute the property mortgaged or pledged, or the proceeds derived upon a sale in an action in equity to foreclose the mortgage, constitutes the fund to pay the debt, and it must be exhausted before a personal judgment can be entered against the makers of the note.

Smith v Jarman, 61 Utah 125, 131, 211 P 962 (1922). See Note: Mortgage Foreclosure: The One-Action Rule In Utah, 6 Utah L. Rev. 278 (1959). In the case before this Court, there is no objective of the one-action rule to be served. The collateral has been exhausted by agreement of the parties and there cannot be a multiplicity of actions. Because the collateral has been

sold and the proceeds applied to the debt by agreement of the parties prior to this suit on the note, this is not a suit on a debt secured by a mortgage. Therefore the one-action rule which applies only to debts "secured solely by a mortgage upon real estate" does not apply. Utah Code Ann. § 78-37-1 (1953).

Focusing upon the purposes of the one-action rule, the avoidance of a multiplicity of suits on the same debt and prior exhaustion of the collateral, assists in the proper application of the rule. Certainly, the beneficiary of a trust deed can cause exhaustion of the collateral pursuant to statute without fear that the one-action rule will bar a deficiency.

Under the provisions of Sec. 57-1-23, U.C.A. 1953, as amended, it is made optional with the beneficiary of the trust deed whether to foreclose the trust property after a breach of an obligation in a manner provided for foreclosure of mortgages or to have the trustee proceed under the power of sale provided therein.

Security Title Co., v. Payless Builders Supply, 17 Utah 2d 179, 407 P.2d 141, 142 (1965).

As with the trust deed sale, all sales of mortgaged property, with the consent of the mortgagor, whether by agreement at the time the mortgage is granted or thereafter, are compatible with the purposes of the one-action rule. Indeed, this Court has specifically approved such sales.

The mortgagor and the mortgagee could agree upon the manner of sale, and, if the property was sold pursuant to the agreement at a fair price, no one, not even one who claimed a subsequent lien upon the property, could legally object.

Utah Ass'n of Credit Men v Jones, 164 P. 1029, 1031 (1917).

B. AN EXPANSION OF THE ONE-ACTION RULE TO PRECLUDE DEFICIENCIES AFTER A CONSENSUAL SALE OF MORTGAGED PROPERTY WOULD SHARPLY CURTAIL AN IMPORTANT FORM OF FINANCING IN UTAH

Respondent has urged the lower Court to hold that because Appellant released the realty pursuant to agreement between parties, and could not, therefore, foreclose upon the realty, it is barred by the one-action rule from collecting the balance due on the note. Such a windfall to the mortgagor is repugnant to all sense of fairness. Having released collateral with the mortgagor's agreement, the lender should not be punished by being denied an opportunity to recover the balance of its loan. Moreover, an application of the one-action rule to these facts changes the entire character of the relationship between mortgagors and mortgagees.

If this Court adopts the position urged by respondent below, it appears inevitable that all real property securing the debt must be available for foreclosure. Thus, when the first lot is released, in fact, when an agreement such as the one before the Court is entered into, the lender has committed itself to look only to the collateral for recovery of its loan. Under such circumstances, lenders and borrowers would be unable to ever agree to the release of collateral^{1/} and no funding would be available in situations when such an agreement is essential.

^{1/} If all the lots but one had been released, could the lender refuse to release the last one - despite the prior agreement - merely to comply with the letter of § 78-37-1 and establish a basis for a deficiency judgment?

If this be the law, a lender can give little weight to the financial strength of the borrower. The financial risks of a project are shifted from the borrower, who usually is in control of the project, to the lender whose maximum recovery is the amount of the loan and interest. The incentive of the borrower to make the project a success, and thereby avoid personal loss, is gone. Because of the lack of predictability of the cost and marketability of many real estate developments, the lender is rarely certain of sufficient collateral. Except in cases of exceptionally high collateral to loan ratios, no prudent lender could be expected to accept such risks. One important form of financing would be eliminated in Utah.

POINT II

THE ONE-ACTION RULE DOES NOT BAR AN ACTION AGAINST SURETIES

In Point II of its brief, Appellant argues that Mr. and Mrs. Black are sureties. If they are sureties, this Court's previous decisions make it clear that they are not entitled to the benefit of the one-action rule. This Court has stated that the statute is for the protection of the mortgagor and possibly for "those who have or claim some specific lien upon the mortgaged property, but the statute was certainly not to give those whom neither have or claim to have any specific rights in or to the property the right to object." Utah Ass'n of Credit Men v Jones, 49 Utah 519, 164 P. 1029, 1030-31, (1917). "The provisions of that act apply only to actions

between mortgagors and mortgagees." Pillsbury Mills v. Nephew
Processing Plant, 7 Utah 2d 286, 323 P.2d 266, 268, (1958).
is important to remember that the concept of one action with
respect to a mortgage is purely statutory. In stressing this
point the Utah Supreme Court has quoted from 41 Am.Jur., Pledge
and Collateral Security, § 99:

The taking of collateral security for the payment
of a debt does not, in the absence of a statute or
stipulation to the contrary, afford any implication that
the creditor is to look to it only or primarily for the
payment of the debt. The obligation of the debtor to
respond in his person and property is the same as if no
security had been given, and upon default in payment, the
pledgee may elect to sue the pledgor for his debt, without
a sale of the security, and may recover a judgment in such
suit against the pledgor for the amount of the debt,
without destroying or in the least affecting his lien on
the property pledged. And he is not required to return the
security before bringing suit on the claim secured, in the
absence of a special contract to that effect, although when
that claim is satisfied he may be compelled to release or
reassign the collaterals

Campbell v. Peter, 108 Utah 565, 162 P.2d 754 (1945).

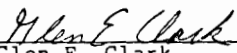
CONCLUSION

Irrespective of the outcome of this appeal, the amicus
curiae respectfully urges this Court to avoid any holding or
dicta which would hamper the ability of lenders and borrowers
to enter into agreements for realty financing which would
permit orderly release of collateral, pursuant to agreement,
without risk of loss of the right to recover a deficiency.
It is suggested that the Court will achieve a correct result if it
applies the one-action rule only insofar as is necessary to
achieve its objectives, prevention of a multiplicity of suits
on the same debt and exhaustion of collateral before deficiency
judgment.

DATED this 26th day of November, 1979.

FABIAN & CLENDENIN

By 
Peter W. Billings

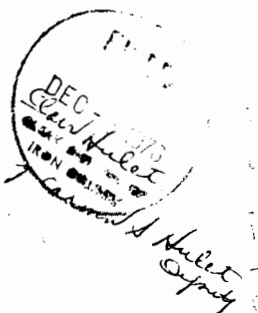
By 
Glen E. Clark
Attorneys for
Utah Bankers Association,
Amicus Curiae

CERTIFICATE OF MAILING

This is to certify that on this 26 day of November, 1979, I caused to be mailed a true and correct copy of the foregoing Brief of Amicus Curiae, postage prepaid, to Richard B. Ferrari and L.S. McCullough, Jr., Attorneys for Respondents, 1200 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, and to Steven H. Gunn, Ray, Quinney & Nebeker, Attorneys for Appellant, Suite 400, Deseret Building, 79 South Main Street, Salt Lake City, Utah 84111.

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IN THE DISTRICT COURT FOR IRON COUNTY
STATE OF UTAH

MORLEY WILSON and	:	
MARY ELLEN WILSON,	:	
	:	PLAINTIFFS' MEMORANDUM OF
Plaintiffs,	:	POINTS AND AUTHORITIES IN
	:	SUPPORT OF THEIR MOTION TO
v.	:	DENY DEFENDANT'S MOTION TO
	:	DISMISS
HUBERT C. LAMBERT,	:	
	:	Civil No. 5178
Defendant.	:	

STATEMENT OF FACTS

110612
Clark Superior Court

On or about October 16, 1978, the defendant filed for the first time his MOTION TO DISMISS the above-entitled matter. This MOTION was filed more than ten (10) years after the instant action was commenced; more than seventeen (17) months after the defendant executed its STIPULATION agreeing that Morley Wilson and Mary Ellen Wilson could be substituted as parties plaintiffs in the above-entitled lawsuit thereby implying that the plaintiffs could move ahead on the said lawsuit; more than seven (7) months after the court's own ORDER TO SHOW CAUSE hearing on March 6, 1978, in which the court directed both parties in this case to appear and show cause why the action should not be dismissed for failure to prosecute at which time the plaintiffs and their counsel appeared; however neither the defendant nor his counsel appeared and at which time the court dismissed its ORDER TO SHOW CAUSE and set the matter down for trial; more than eight (8) months after the plaintiffs filed their REQUEST FOR TRIAL SETTING stating that they were ready to proceed with trial in this matter;

but only approximately ten (10) days after the plaintiffs filed their FIRST INTERROGATORIES TO THE DEFENDANT requiring the defendant to answer a substantial series of questions dealing with the issues in this case. It appears obvious the defendant wants to peacefully ignore this case and hope it will die an uneventful death but the he will refuse to do any work on the case to get it ready for trial.

Within approximately one (1) week after receiving the defendant's MOTION TO DISMISS, the plaintiffs filed their MOTION TO DENY DEFENDANT'S MOTION TO DISMISS and also filed their NOTICE OF MOTIONS setting this matter for an immediate hearing before the Honorable J. Harlan Burns on Wednesday, the 8th day of November, 1978, commencing at 3:00 p.m. Counsel for the defendant was not able to appear on that day and requested a continuance which was granted setting the matter for the present time on Tuesday, December 5, 1978, commencing at 3:00 p.m.

After the plaintiffs filed their MOTION TO DENY DEFENDANT'S MOTION TO DISMISS and their NOTICE OF MOTIONS and within four (4) days thereafter, the defendant filed its MOTION FOR EXTENSION OF TIME TO ANSWER INTERROGATORIES requesting the court to extend the normal thirty (30) day period for the defendant to answer the INTERROGATORIES until thirty (30) days "from and after the entry of the final ORDER denying such dismissal," referring to the ORDER which the court might enter denying the defendant's MOTION TO DISMISS.

The PLAINTIFFS' MOTION TO DENY DEFENDANT'S MOTION TO DISMISS set out ten (10) grounds upon which the plaintiffs would rely in arguing this matter to the above-entitled court. On November 29, 1978, the defendant responded to the ten (10) points in that certain document entitled DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO DENY DEFENDANT'S MOTION TO DISMISS.

The instant MEMORANDUM will set forth the plaintiffs' points and authorities upon which it is relying in support of its MOTION TO DENY DEFENDANT'S MOTION TO DISMISS.

The COMPLAINT in the above-entitled matter was filed on March 11, 1968, in the above-entitled court by J. Lambert Gibson, Attorney for the plaintiff Jeff Baldwin. The State Engineer filed his ANSWER on April 22, 1978, and mailed a copy of same to the plaintiff's attorney, J. Lambert Gibson at Gibson's Salt Lake City office address.

Nothing further was done on the matter until on April 26, 1973, when the above-entitled court through District Judge J. Harlan Burns entered an ORDER SETTING TRIALS setting the above-entitled case for trial on Monday, September 17, 1973. Again, notice of the said ORDER SETTING TRIALS was mailed to J. Lambert Gibson at his Salt Lake City office address, 174 East 800 South. For some reason unknown to either the present plaintiffs in this action or their counsel the said trial was not had at the time set.

EXHIBIT 1 attached to this MEMORANDUM is a copy of an AFFIDAVIT executed by Dean W. Sheffield, Executive Director of the Utah State Bar, on October 30, 1978. In this AFFIDAVIT, Mr. Sheffield states in part as follows:

2. J. Lambert Gibson was a member of the Utah State Bar having been admitted to the Bar January 5, 1937. He was suspended from the Bar June 13, 1967, for non-payment of license fees and was re-instated April 26, 1968. Mr. Gibson was again suspended May 14, 1971, for non-payment of license fees and was not thereafter re-instated.

It thus appears that when the COMPLAINT was filed in the above-entitled matter on March 11, 1968, Mr. Gibson was not an active member of the Utah State Bar and was not authorized to practice law. He never made this fact known to the court apparently, and was reinstated about six (6) weeks later on April 26, 1968. However, his license to practice law was again suspended on May 14, 1971, and from that time through the present date, he was not authorized to practice law. Apparently, none of this information was communicated either to his client, Jeff Baldwin, or to the above-entitled court since nothing appears in the official records on file in the Office of the Iron County Clerk.

Furthermore, since the Clerk's Office has continued to send all mailings to J. Lambert Gibson as attorney for the plaintiff at his Salt Lake City law offices, it appears he never did notify the court of either the fact that he was suspended from the practice of law or that the plaintiff, Jeff Baldwin, should retain new counsel. It is obvious from a casual inspection of the court records that no NOTICE OF WITHDRAWAL OF COUNSEL was ever filed by Mr. Gibson. Under these circumstances, the plaintiff, Jeff Baldwin, was placed under a serious handicap and the status of Mr. Gibson's license to practice law is no doubt one of the main reasons why this case was not moved forward for so many years.

The original plaintiff, Jeff Baldwin, died on November 8, 1975, in Beaver County, State of Utah. [See paragraph 1 of the MOTION TO SUBSTITUTE PARTY PLAINTIFF filed in this court on or about May, 1977.] Thereafter, one, John Davis, was appointed the Administrator of the Estate of Jeff Baldwin, Deceased. [See EXHIBIT 1 attached to the said MOTION TO SUBSTITUTE PARTY PLAINTIFF in the official records herein.] Subsequent to the said appointment and on or about August 6, 1976, certain real property formerly owned by the said Jeff Baldwin was sold by the Administrator to Morley Wilson and Mary Ellen Wilson, his wife, the present plaintiffs in this matter; that the said property included among other things the four (4) Water Applications Nos. 24624, 24625, 24626, and 24627, which were filed in the Office of the Utah State Engineer and which are the subject matter of this instant lawsuit. A copy of the CONTRACT OF SALE which was executed between the Wilsons and John Davis as Administrator of the Estate of Jeff Baldwin is attached to this MEMORANDUM as EXHIBIT 2 and is by reference incorporated herein and made a part hereof at this time.

In the said EXHIBIT 2, the Wilsons agreed to pay a substantial amount of money, to-wit: fifty-six thousand five hundred dollars (\$56,500.00) for the real property and water rights which

are described in the said EXHIBIT. This is a substantial change in the plaintiffs-Wilsons' position and was made based on their interpretation of Jeff Baldwin's rights in the instant lawsuit. Since the water rights add substantially to the value of the nine hundred and sixty (960) acres of real property purchased, and since the purchase price would be far less than fifty-six thousand five hundred dollars (\$56,500.00) if the water rights did not exist, it is clear the Wilsons were only willing to pay the fifty-six thousand five hundred dollar (\$56,500.00) purchase price if the water rights could be included. It was based on this assumption and the further assignment of the water rights by the Administrator, that the land CONTRACT (EXHIBIT 2 attached hereto) was executed by the Wilsons. Had the Wilsons had any intimation that the instant lawsuit involving the water rights was defective in any way or subject to a statutory MOTION TO DISMISS, they would never have executed the CONTRACT.

Although the CONTRACT OF SALE attached hereto as EXHIBIT 2 is dated August 6, 1976, the authority to execute the said CONTRACT was not given by the probate court for Beaver County until May 16, 1977, and a former CONTRACT OF SALE executed by Helen Lorraine Baldwin was superceded by the new one executed by John Davis, Administator. [See paragraph 4 of the MOTION TO SUBSTITUTE PARTY PLAINTIFF on file herein.] Immediately after the said CONTRACT OF SALE was approved by the probate court for Beaver County on May 16, 1977, and the next day on May 17, 1977, the plaintiffs, Morley Wilson and Mary Ellen Wilson, his wife, served their MOTION TO SUBSTITUTE PARTY PLAINTIFFS in the above-entitled matter. On May 17, 1977, the defendant through his attorney, Dallin W. Jensen, executed a STIPULATION authorizing the substitution of party plaintiffs and an ORDER was executed on May 19, 1977, by Judge J. Harlan Burns permitting the substitution.

These documents dealing with substitution of parties plaintiffs were prepared by James A. McIntosh, new counsel of record for the Wilsons. Mr. McIntosh was first contacted by Mr. Wilson

on March 17, 1977, and the following two (2) months were spent getting matters in the probate estate straightened. From May, 1977, for the remainder of the year, Mr. McIntosh spent a substantial amount of time in conferences with his client, conferences with representatives from the State Engineer's Office, and in meetings with representatives from the United States Geological Survey Office. Other work was done in an effort to prepare this case for trial, and on or about February 13, 1978, the said McIntosh filed on behalf of his clients a REQUEST FOR TRIAL SETTING asking the court to refer this matter for an immediate trial.

An ORDER TO SHOW CAUSE hearing was held on March 6, 1978, pursuant to the court's own ORDER directly the parties to appear in the above-entitled court to show cause, if any, why the case should not be dismissed for failure to prosecute the action further. The plaintiffs and their counsel, James A. McIntosh, were present at the time of the hearing; however neither the defendant nor his counsel appeared. Mr. McIntosh explained to Judge J. Harlan Burns the sequence of activities that had occurred since he had been retained to represent the Wilson; and, after hearing these matters, the court dismissed its ORDER TO SHOW CAUSE and referred the matter to the trial calendar.

Nothing further was done of this matter, and it was not set for the trial calendar for the following seven (7) months. Therefore, on or about October 3, 1978, the plaintiffs filed their FIRST INTERROGATORIES TO THE DEFENDANT dealing with substantial inquiries as to the issues raised in the pleadings on file herein. Faced with these INTERROGATORIES and the necessity of answering the same, the defendant in less than one (1) week after receiving the INTERROGATORIES filed for the first time his MOTION TO DISMISS.

The defendant's MOTION TO DISMISS is based on §73-3-15, Utah Code Annotated, and is further based upon the Utah Supreme Court

case of Dansie v. Lambert, 542 P.2d 742 (Utah 1975), which the defendant says is authority for his MOTION TO DISMISS.

Immediately upon receipt of the said MOTION TO DISMISS, the plaintiffs filed their MOTION TO DENY DEFENDANT'S MOTION TO DISMISS and set forth ten (10) grounds as a basis for the said denial. This instant MEMORANDUM will discuss those ten (10) points.

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I.

SECTION 73-3-15, UTAH CODE ANNOTATED, 1953, IS UNCONSTITUTIONAL BECAUSE IT VIOLATES ARTICLE V, SECTION 1 OF THE UTAH CONSTITUTION DEALING WITH THE SEPARATION OF POWERS PRINCIPLE IN THAT IT IS A LEGISLATIVE ATTEMPT TO INTERFERE WITH A JUDICIAL FUNCTION.

Section 73-3-15, Utah Code Annotated, 1953, reads in part as follows:

An action to review a decision of the State Engineer may be dismissed upon the application of any of the parties upon the grounds provided in Rule 41 of the Utah Rules of Civil Procedure for the dismissal of actions generally and for failure to prosecute such action with diligence. For the purpose of this section, failure to prosecute a suit to final judgment within two (2) years after it is filed, or, if an appeal is taken to the Supreme Court within three (3) years after the filing of the suit, shall constitute lack of diligence.

The defendant argues this section is mandatory and allows the court no discretion whatsoever even though Rule 41 of the Utah Rules of Civil Procedure is clearly discretionary with the trial judge. Section 73-3-15 is an attempt by the legislature to tell the court that cases must be brought to final judgment within two (2) years after a complaint is filed or to a final appeal within three (3) years after the filing of the complaint. This section was fatally defective even when passed in 1937; but is even more so forty-one (41) years later when the courts calendars have become so congested and where it may be impossible for the matter to reach fruition at the trial level or for a final appeal decision to be made even though the plaintiffs are moving it ahead with dispatch. Section 73-3-15 does not require the trial judge to give water law appeals any priority on the calendar; and therefore there would be nothing in the documents filed in the County Clerk's Office that would alert the clerk to give water law appeals any priority. The section further makes no allowance for the contingencies of a sole trial judge in the area dying, the attorneys dying, the attorneys getting disbarred or suspended from the practice of law and not notifying their

clients or the courts as exists in the present case. The section does not require the defendant to make a motion to dismiss at any particular time and therefore the defendant could theoretically wait until ten (10) days before the trial after the plaintiffs have incurred substantial attorney's fees and other court costs in preparing for the case and then make the motion to dismiss. Finally, the congested court calendars and other inevitable delays in bringing a case to trial, especially in large counties like Salt Lake County, would effectively close the courtroom doors to any relief for the plaintiffs; even though they had done everything they could to try to satisfy the provisions of the statute.

The courts have uniformly held that such statutes are unconstitutional and void as being an attempt by the legislative branch of the government to usurp the powers conferred upon the judicial branch of the government by the Constitution and to limit or abolish the judicial discretion belonging to the courts and necessary for the proper administration of justice.

In Atchison, T. & S.F. Ry. Co. v. Long, et al., 251 P. 486 (Okla. 1926), the court was asked to construe a section of an initiative measure adopted by a vote of the people under the initiative and referendum laws of the State of Oklahoma providing that the district courts shall try certain classes of cases within ten (10) days after the defendant has answered, and that appeals must be taken within ten (10) days from the rendition of judgment except for good cause shown the trial court may extend this time for a period of not to exceed twenty (20) days, and the Supreme Court shall determine the appeal at the earliest possible moment. The court held that not only the particular section being construed but the entire statute itself was invalid, unconstitutional, and void. The court recognized the sole question presented by the appeal was whether the act, and particularly §3 thereof, was in conflict with the provisions of the Oklahoma Constitution dealing with separation of powers. These provisions

were found in Article IV, Section 1 of the Constitution of Oklahoma and are similar to the provisions found in Article IV, Section 1, of the Utah Constitution. The court noted the law was well settled that the powers and functions of the three (3) several co-ordinant branches of the state government must be and forever remain separate and distinct, each one designed for a separate purpose and each functioning in its own sphere, and that the separation of powers doctrine was the basic principle of the constitutional system.

After citing §3 of the Act, the court stated in part as follows:

Then, the question here is, can the courts be stripped of their discretionary powers guaranteed to them under the Constitution, by the legislative branch of the Government, which, in this instance, is a vote of the people instead of an enactment of the legislature. No one will deny that the legislative arm of the Government has the power to alter and regulate the procedure in both law and equity matters, but for it to compel the courts to give a hearing to a particular litigant at a particular time, to the absolute exclusion of others who may have an equal claim upon its attention, strikes a blow at the very foundation of constitutional government. The right to control its order of business and to so conduct the same that the rights of all litigants may properly be safeguarded has always been recognized as inherent in courts. And to strip them of that authority would necessarily render them so impotent and useless as to leave little excuse for their existence and place in the hands of the legislative branch of the State power and control never contemplated by the Constitution.

It takes no great exercise of the imagination to contemplate a condition arising wherein it would be impossible for the district court to try a particular case within ten (10) days after defendant had filed his answer, and that one or the other of the litigants would be entitled to a continuance, but under the provisions of this act, however meritorious an application for continuance might be, it must be denied, and it is violative of the principles of constitutional government and repugnant to every sense of justice to say that the court shall require one litigant to go to trial within a specified time under the provisions of this act where under the exact circumstances it would be a reversible error to require another litigant to go to trial, and yet this is the practical effect of the provision of the act before us. [emphasis added]

The Oklahoma Supreme Court noted decisions from other jurisdictions recognizing the absurd result created if the statute was upheld; and it accordingly held the act was unconstitutional,

invalid, and void, it being an attempt by the legislative branch of the government to usurp the power conferred upon the judicial branch of the government by the Constitution and to limit or abolish the judicial discretion belonging to the courts necessary for the proper administration of justice.

Rule 41(b) of the Utah Rules of Civil Procedure gives a trial judge discretionary power to dismiss an action for failure to prosecute. Section 73-3-15, Utah Code Annotated, 1953, is an attempt by the legislature to interfere with the judicial discretion granted by Rule 51(b). Under these circumstances it is obvious the statutory provision must fail because it is an attempt by the legislature to interfere with a judicial function, to-wit: that of the court docket and the quantity of business submitted to the court, the nature, the importance, and the difficulties attending the just and legal solution of matters involved.

In resolving an identical conflict between a statute similar to §73-3-15 and a rule of civil procedure similar to §41(b), the Nevada Supreme Court has held that the statute is void, invalid, and unconstitutional because it violates the separation of powers doctrine. Lindauer v. Allen, 456 P.2d 851 (Nev. 1969). In discussing the priority between the judicial rules of civil procedure and statutes attempting to interfere with those rules, the Nevada Supreme Court stated:

The legislature may, by statute, sanction the exercise of inherent powers by the courts, and the courts may acquiesce in such pronouncements by the legislature, but when a statute attempts to limit or destroy an inherent power of the courts, that statute must fail.

Article 3, Section 1, of the Nevada Constitution which provides for the division of the powers of government prohibits persons charged with the exercise of powers properly belonging to one of the three (3) separate departments from exercising any functions appertaining to either of the others. Any legislation undertaking to require judicial action within fixed periods of time is an unconstitutional interference by the legislature with a judicial function. Whether or not justice is administered without 'denial or delay' is a matter for which the judges are answerable to the people, and not to the General Assembly of Ohio. Manifestly, when a case can be heard and determined by a court must necessarily depend very largely upon the

court docket, and the quantity of business submitted to the court, the nature, the importance, and the difficulties attending the just and legal solution of matters involved. [emphasis added]

The court then held the rules of civil procedure did apply and the statute conflicting with those rules was unconstitutional and void. Similarly, in the instant case, §73-3-15 is clearly an attempt to interfere with the court's docket and the quantity of business submitted to the court, the nature, the importance, and the difficulties attending the just and legal solution of matters involved.

II.

SECTION 73-3-15, UTAH CODE ANNOTATED, 1953, IS UNCONSTITUTIONAL AND VOID BECAUSE IT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND OF ARTICLE I, SECTION 7 OF THE UTAH CONSTITUTION IN THAT IT CREATES AN ARBITRARY CLASSIFICATION OF PERSONS MAKING APPEALS BEFORE AND AFTER THE EFFECTIVE DATE OF THE ACT AND THE CLASSIFICATION HAS NO REASONABLE RELATIONSHIP TO THE PURPOSES OF THE ACT.

Section 73-3-15, Utah Code Annotated, 1953, provides in part as follows:

An action to review a decision of the State Engineer may be dismissed upon the application of any of the parties upon the grounds provided in Rule 41 of the Utah Rules of Civil Procedure for the dismissal of actions generally and for failure to prosecute such action with diligence. For the purpose of this section, failure to prosecute a suit to final judgment within two (2) years after it is filed or, if an appeal is taken to the Supreme Court within three (3) years after the filing of the suit, shall constitute lack of diligence. All suits heretofore or hereafter commenced must be dismissed after ten (10) days' notice by regular mail to the plaintiff, unless such suits are or were prosecuted to final judgment within the time specified above; provided, as to suits filed before the enactment hereof the court may upon a proper showing extend the time for a prosecution to final judgment for a period of not to exceed two (2) years from the date of hearing of any motion to dismiss filed pursuant to this section. [emphasis added]

The underlined part of the quoted portion of §73-3-15 is fatal to the section because it creates an arbitrary classification which substantially benefits those who file their lawsuits before the enactment of the act but does not allow this same benefit to those who file their lawsuits after the enactment of the act such as the plaintiffs in the instant case. Hence, it appears the classification is based entirely upon a time element, to-wit: whether the party has filed the complaint before the enactment of the act or after the that time.

The obvious and unconsciousable result of the underlined provision is to allow a person who filed his appeal lawsuit in the district court one (1) day before the act was passed to be able to sit on it for fifty (50) years before the motion to dismiss is made by the State Engineer; and then to receive a bene-

fit of a further two (2) year extension; whereas a person who files one (1) day after the act is passed and who has not been able to bring the case to trial through no fault of his own is penalized by having the action dismissed upon the filing of the "motion to dismiss" without any further two (2) year extension being awarded. Similar arbitrary classifications based on time elements have been struck down in the overwhelming majority of the cases deciding this issue.

The Utah Supreme Court has determined that a denial of the equal protection of the laws occurs where there is a discrimination between those who are included and those who are excluded from the operation of a statute on the basis of an arbitrary classification. State v. Mason, 94 Utah 501, 78 P.2d 920 (1938). In Mason, the court held that a classification is reasonable where the differentiation bears a reasonable relation to the purposes to be accomplished by the act. The purpose to be accomplished by §73-3-15, Utah Code Annotated, 1953, as amended, as stated in the case of Dansie v. Lambert, supra, is "designed to put a time barrier against litigation, in determining the precious water rights in this arid state." If this is the purpose and basis of the statutory provision, then it would apply equally to those who file before the statute was enacted in 1937 as well as to those who file their lawsuits after the statement was enacted. Why shouldn't the plaintiffs be entitled to have the court extend the time for an additional two (2) years or less after the MOTION TO DISMISS is heard--the same right preserved to those filing before the effective date of the act?

The legislature attempts to leave it up to the arbitrary whims of the Attorney General in filing his motion to dismiss and then goes on to extend the time an additional two (2) years after the motion to dismiss is filed for those persons who commenced their lawsuit prior to the effective date of the act. If the Attorney General waited twenty (20) years to bring the motion to dismiss, the claimant would receive an additional benefit of two

(2) years if he had commenced his lawsuit prior to the effective date of the act; and this result clearly would not further the purposes of the act to put a "time barrier against litigation in determining the precious water rights in this arid state." Under these circumstances, the persons who file their lawsuits after the effective date of the act are discriminated against and those who have filed lawsuits prior to the effective date of the act are favored. Clearly, such a classification based solely on time element has no relationship whatsoever to the purposes sought to be accomplished by the water act, and it is therefore a denial of the plaintiffs' equal protection of the law.

In New Mexico, the legislature attempted to pass a certain statute (Laws 1921, Chapter 185) which provided that all private corporations organized under the laws of the Territory of New Mexico which failed to file an annual report would be automatically dissolved. The New Mexico Supreme Court was called upon to construe this statute and determine if there was an arbitrary classification which denied certain corporations their equal protection of the law in that the act made the time of incorporation rather than the failure to file the reports the decisive factor in determining delinquency. State v. Sunset Ditch Co., 145 P.2d 219 (N.M. 1944). The court held the statute was unconstitutional and void because it created a legislative classification based entirely upon a time element when the time selected had no reasonable relation to the object of the legislation. The court noted the act

Did not apply to all existing corporation which were delinquent in respect to making reports, etc.; it applied only to 'private corporations organized under the laws of the Territory of New Mexico.' Thus it will be seen that the act makes the time of incorporation rather than the mere failure to file reports, the decisive factor in determining delinquency as it effects a dissolution of the corporation and forfeiture of its charter. We see no reasonable basis for the distinction. . . . Many corporations, whether organized before or after January 6, 1912, the date of statehood, are the same type of corporation, are formed under the same laws, possessed like powers and present identical problems of supervision and control. [emphasis added]

Similarly, in the instant case, the time element is also present in §73-3-15. The underlined portion quoted at the beginning of this argument creates an arbitrary classification penalizing those seeking review of the Engineer's rulings in that those plaintiffs that filed their lawsuit before the enactment of the statute may, by continual extension and delay and an additional two (2) year benefit prolong litigation indefinitely, while those who filed after the enactment of the statute have no such privilege. Yet plaintiffs in both cases bring the same type of suit, under the same statute, presenting "identical problems of supervision and control." Clearly, the section is unconstitutional and creates an arbitrary classification which bears no reasonable relation to the purposes to be accomplished by the act and therefore is an unconstitutional denial of equal protection of the laws guaranteed both by the Fourteenth Amendment to the Constitution of the United States and by Article I, Section 7 of the Utah Constitution.

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III.

SECTION 73-3-15 IS UNCONSTITUTIONAL AND VOID BECAUSE IT VIOLATES ARTICLE I, SECTION 11 OF THE UTAH CONSTITUTION IN THAT ITS APPLICATION TO THE INSTANT CASE CLOSES THE COURTROOM DOORS TO THE PLAINTIFFS.

Article I, Section 11 of the Utah Constitution provides as follows:

All courts shall be open, and every person, for an injury done to him and his person, property, or reputation, shall have remedy by due course of law which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

This section of the Constitution clearly provides that courtroom doors shall be open to a litigant who has received injury to himself, property, or reputation and that he shall be able to pursue his property remedy in the courts of law without denial. Section 73-3-15, Utah Code Annotated, 1953, does in fact deny the plaintiffs the opportunity to prosecute their action in court and thus is an unconstitutional interference with Article I, Section 11 of the Utah Constitution. As pointed out above, the plaintiffs may with all dispatch attempt to move their case along; however because of circumstances over which they have no control whatsoever, it might be impossible for them to comply with the provisions of the statute which require them to bring their case to trial judgment in two (2) years or a final appeal decision within three (3) years.

This harsh result arises even though §73-3-15 does not require the courts to give priority to water rights appeals, and does not require the State Engineer to bring the motion to dismiss within a reasonable time after the two (2) year period. Furthermore, the circumstances with respect to the congestion of court calendars and the matter of business had before the courts, the matters of litigants, attorneys, or judges dying, the matter of the time it takes a court reporter to get the transcript

prepared and filed especially under busy deadlines in the larger counties where numerous appeal are had; the problems of attorneys being disbarred or suspended from the practice of law and not letting their clients or the courts know it as in the present case, etc., etc., all argue against allowing validity to the Limitation Provisions §73-3-15.

In Oklahoma City v. Castleberry, 413 P.2d 556 (Okla. 1966), the Supreme Court of Oklahoma was called upon to construe the policy of Article II, Section 6 of the Constitution of Oklahoma which is similar to Article I, Section 11 of the Utah Constitution. In vacating a default judgment against a landowner who had failed to appear at a condemnation proceeding where the action of an officer of the court misled him as to the time his cause would be tried, the Oklahoma Supreme Court stated as follows:

It is the policy of the law to afford every party to an action a fair opportunity to present his side of the case, and while it is true the courts must require diligence on the part of litigants in being present when cases in which they are interested are being proceeded with, nevertheless if the court or an officer of the court by their conduct mislead parties as to the time cases will be acted upon, the absense of such parties will be excused.

Similarly, in the present case, the conduct of the court in denying its own MOTION and ORDER TO SHOW CAUSE dated January 10, 1978, and referring this matter to the trial calendar and the defendant's approval of this action has induced the plaintiff to believe his action was being rightfully continued. Having relied thereon and proceeded with the litigation of the action by filing a REQUEST FOR TRIAL SETTING and by filing INTERROGATORIES, the plaintiff should not be "barred from prosecuting . . . the civil cause to which he [has become] a party."

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IV.

THE DEFENDANT HAS WAIVED HIS RIGHT TO ASSERT §73-3-15, UTAH CODE ANNOTATED, 1953, BECAUSE OF HIS CONDUCT INDUCING THE PLAINTIFFS TO BELIEVE HE WOULD RAISE IT; BECAUSE OF THE SUSPENSION OF JEFF BALDWIN'S ATTORNEY FROM THE PRACTICE OF LAW; AND BECAUSE OF THE FAILURE OF THE DEFENDANT TO APPEAR AT THE ORDER TO SHOW CAUSE HEARING IN MARCH, 1978.

The Utah Supreme Court has held §73-3-15 is "in substance and effect . . . nothing more nor less than a Limitations Statute, . . ." Dansie v. Lambert, 542 P.2d 742 (Utah 1975). Rule 8(c) of the Utah Rules of Civil Procedure recognizes a Statute of Limitations as an affirmative defense. The Utah Supreme Court has ruled that a Statute of Limitations as an affirmative defense must be pleaded pursuant to this provision of the Rules. In Re: Jones' Estate (Jones v. State Tax Commission), 99 Utah 373, 104 P.2d 210 (1940).

In Utah Delaware Minn. Co. v. Industrial Commission, 76 Utah 187, 289 P. 94 (1930), the Utah Supreme Court again held that a Statute of Limitations defense is waived by the failure to plead it at the first opportunity. In this case, the mining company had been given notice of a claim made by one of its employees and also had been given notice of the hearing before the Industrial Commission. However, the mining company failed to appear. A rehearing was granted, and the mining company appeared; and for the first time interposed the Statute of Limitations defense. Refusing to allow the defense, the court stated:

The general rule is that a party can rely on the Statute of Limitations only where he pleads it and ordinarily is required to interpose the plea at his first opportunity.

In the instant case the defendant knew the Utah Supreme Court had held §73-3-15 to be a Limitations Statute. In fact, counsel for the defendant in the instant case, Dallin W. Jensen, was the same counsel who represented the defendant, State Engineer, in the Dansie case, supra. Yet, Mr. Jensen not only failed to raise the Limitations defense when the Dansie case was

decided on November 10, 1975, but rather went ahead in May of 1977 and executed a STIPULATION allowing the instant lawsuit to move ahead by the substitution of parties plaintiffs.

The defendant could have raised the Statute of Limitations at any time subsequent to two (2) years after the COMPLAINT was filed in this matter on March 11, 1978. His failure to do so for such a long period of time has substantially prejudiced the present plaintiffs who had executed contracts calling for them to pay more than fifty-six thousand five hundred dollars (\$56,500.00) for certain real property being purchased in connection with the water rights which are the subject matter of this lawsuit. Under these circumstances, the defendant has not only waived his right to raise the Statute of Limitations, but should be estopped to do so for the reasons more fully set forth hereafter.

The defendant has further waived his right to assert §73-3-15 because he has approved a STIPULATION substituting parties plaintiffs and has failed to appear at the court's own ORDER TO SHOW CAUSE hearing dealing with a possible dismissal under Rule 41 of the Utah Rules of Civil Procedure. Under these circumstances the courts have uniformly held that statutory provisions similar to §73-3-15 making a dismissal of an action mandatory after a certain time can be waived by the conduct of the parties. Bayle-Lacoste and Co., Inc. v. Superior Court of Alameda County, 116 P.2d 458 (Cal.App. 1941); W. T. Rawleigh Co. v. Spencer, 118 P.2d 674 (Ariz. 1941); Burke v. Minnesota Elevator Co., 186 N.W. 948 (N.D. 1922).

In Bayle-Lacoste, supra, the court construed §583 of the California Code of Civil Procedure which made it mandatory that an action should be dismissed as to parties served, if not brought to trial within five (5) years after the filing thereof, except where the parties have stipulated in writing that the time may be extended. The court construed the statute to be

Not to rigid that under certain circumstances, notwithstanding defendant's failure to appear before the expiration of the five (5) year period, a party as

plaintiff, cross-complainant, or intervenor may not have the benefit of a "waiver" by his opponent. A party who, notwithstanding the absence of service of summons upon him, makes a general appearance, filing, after the five (5) year period, an answer in which he seeks affirmative relief in damages, as in the present case, thus voluntarily becoming a party to the litigation, thereby impliedly waives objection to the jurisdiction of the court and to the right of dismissal based upon the record date of the "commencement" of the action. . . . The purpose of the statute is plain: to prevent avoidable delay for too long of period. It is not designed arbitrarily to close the proceeding at all event in five (5) years, for it permits the parties to extend the period without limitation, by written stipulation; and, as we have already pointed out despite the mandatory language, implied exceptions are recognized. [emphasis added]

In Bayle-Lacoste, the defendant had filed its amended answer after the five (5) year period and thereafter sought to take advantage of the statute by moving for a dismissal under §583 of the California Code. The court held the defendant had acquiesced in the delay when it filed its amended answer; and therefore it had "waived" the mandatory provisions of the statute even though there was not a written stipulation.

Similarly, in the instant case, where the defendant has executed a written STIPULATION agreeing that the present plaintiffs could be substituted as parties plaintiffs, and where the defendant has failed to appear at the court's own to ORDER TO SHOW CAUSE hearing in March of 1978, and has made no objection to the court's dismissal of the said hearing and the setting of this matter for trial, the defendant has certainly "waived" the provisions of §73-3-15, Utah Code Annotated, 1953. The defendant had every opportunity to join in the court's MOTION TO DISMISS FOR FAILURE TO PROSECUTE, yet the defendant failed to do so.

In addition to the conduct of the defendant which clearly constitutes a "waiver" of his right to assert the provisions of §73-3-15, Utah Code Annotated, 1953, the action of the trial court in approving the continuation of this case and referring it to the trial calendar without objection by the defendant also argues against granting the defendant's MOTION TO DISMISS. In Cervi v. Town of Greenwood Village, 362 P.2d 150 (Colo. 1961),

the court postponed and vacated the trial over a period of eight (8) years at the multiple requests and failures of both parties. In denying the DEFENDANT'S MOTION TO DISMISS, the court held that although it had the inherent power to dismiss a cause for want of prosecution, such power is not unlimited, and should not be exercised where the record shows as here, that both parties nursed the case along with the court's approval. In the present case, the trial judge dismissed its own MOTION and referred the matter to a trial calendar thereby allowing the parties to continue the action. In reliance thereon, the plaintiff submitted INTERROGATORIES to the defendant.

Finally, a MOTION TO DISMISS FOR FAILURE TO PROSECUTE under §73-3-15 should not be granted where the attorney for the plaintiffs' predecessor was delinquent, was suspended from the practice of law, and never did notify either the court or his client of this fact; and where the present plaintiffs have engaged new counsel who have been diligent in moving the case ahead.

EXHIBIT 1 attached to this MEMORANDUM is an AFFIDAVIT from Dean W. Sheffield, Executive Director of the Utah State Bar. In this AFFIDAVIT, Mr. Sheffield states as follows:

J. Lambert Gibson was a member of the Utah State Bar having been admitted to the Bar January 5, 1937. He was suspended from the Bar June 13, 1967, for non-payment of license fees and was re-instated April 26, 1968. Mr. Gibson was again suspended May 14, 1971, for non-payment of license fees and was not thereafter reinstated.

It thus appears that when the COMPLAINT was filed in the above-entitled matter on March 11, 1968, Mr. Gibson was not an active member of the Utah State Bar and was not authorized to practice law. He never made this fact known to the court apparently, and was reinstated about six (6) weeks later on April 26, 1968. However, his license to practice law was again suspended on May 14, 1971, and from that time through the present date, he was not authorized to practice law. Apparently, none of this information was communicated either to his client, Jeff Baldwin, or to the above-entitled court since nothing appears in the

official records on file in the Office of the Iron County Clerk. Furthermore, since the Clerk's Office has continued to send all mailings to J. Lambert Gibson as attorney for the plaintiff at his Salt Lake City law offices, it appears he never did notify the court of either the fact that he was suspended from the practice of law or that the plaintiff, Jeff Baldwin, should retain new counsel. It is obvious from a casual inspection of the court records that no NOTICE OF WITHDRAWAL OF COUNSEL was ever filed by Mr. Gibson. Under these circumstances, the plaintiff, Jeff Baldwin, was placed under a serious handicap and the status of Mr. Gibson's license to practice law is no doubt one of the main reasons why this case was not moved forward for so many years.

In Mizer v. Jones, 403 P.2d 767 (Colo. 1965), the court denied the defendant's MOTION TO DISMISS because it found that there were mitigating circumstances for the delay consisting of the plaintiff's first attorney having dragged his feet for nearly two (2) years and of the plaintiff's monetary inability to acquire counsel for a year after that. The court held as follows:

Up to the time of the withdrawal of their first attorney, the plaintiffs themselves were diligent in their efforts to have this lawsuit tried. . . . By the time the motion to dismiss for lack of prosecution was heard the plaintiffs were ready and anxious to proceed and were not trying to delay the cause. . . . In the final analysis, courts have the responsibility to do justice between disputing parties and one's day in court should not be denied except upon a serious showing of willful default. Such is not the case here. [emphasis added]

Similarly, in the instant case, the plaintiffs are ready, willing, and able to try the case at the present time and have been since they engaged new counsel in 1977. Under these circumstances, the trial court should not deny the plaintiffs their day in court.

THE DEFENDANT IS ESTOPPED TO ASSERT THE PROVISIONS OF §73-3-15, UTAH CODE ANNOTATED, 1953, BECAUSE OF THE DEFENDANT'S CONDUCT WHICH INDUCED THE PLAINTIFFS TO REASONABLY ASSUME THE INSTANT LAWSUIT WOULD NOT BE DISMISSED FOR LACK OF PROSECUTION AND BECAUSE THE PLAINTIFFS HAVE SUBSTANTIALLY CHANGED THEIR POSITION BY INVESTING OVER FIFTY-SIX THOUSAND DOLLARS (\$56,000.00) IN CERTAIN REAL PROPERTY AND WATER RIGHTS, WHICH ARE THE SUBJECT OF THE INSTANT LAWSUIT.

By executing the STIPULATION agreeing that Morley Wilson and Mary Ellen Wilson, his wife, could be substituted as parties plaintiffs in the above-entitled lawsuit on May 17, 1977, some nine (9) years after the instant action was commenced, the defendant agreed that the present litigation could be continued and would not be subject to a MOTION TO DISMISS. Furthermore, when the defendant failed to join in the court's own ORDER TO SHOW CAUSE in January, 1978, requiring both parties to appear and show cause why the case should not be dismissed for failure to prosecute and when the defendant failed to appear at the said ORDER TO SHOW CAUSE hearing and allowed the court to refer the matter to the trial calendar, it is clear that the defendant was not going to assert the dismissal provisions of §73-3-15, Utah Code Annotated, 1953. Based on this conduct by the defendant, the plaintiffs have incurred an indebtedness of over fifty-six thousand dollars (\$56,000.00) for the purchase of certain real property and water rights which are connected thereto; which water rights include those in the instant case. The plaintiffs have also incurred substantial legal expenses and court costs and other expenses which they obviously would not have done had they felt the defendant would raise the provisions of §73-3-15.

In Woley v. Turkus, the trial court had granted a MOTION TO DISMISS a plaintiff's COMPLAINT pursuant to the provisions of §583 of the California Code of Civil Procedure. The Supreme Court of California reversed the action of the trial judge and said the action should not have been dismissed because of the

defendant's conduct notwithstanding the mandatory provisions of §583. Section 583 of the California Code of Civil Procedure reads similar to §73-3-15, Utah Code Annotated, 1953. Section 583 states in part as follows:

Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to the plaintiff or by the court upon its own motion, unless such action is brought to trial within five (5) years after the plaintiff has filed his actions, except where the parties have filed a stipulation in writing that the time may be extended . . .

The California Supreme Court held that the purpose of §583 is to prevent avoidable delay in bringing an action to trial and recognizes that a delay of five (5) years as declared by the statute is unreasonable as a matter of law and is sufficient time to complete preliminary matters in bringing the cause to trial. However the court recognized that the statute is not designed

To arbitrarily close the proceedings at all events in five (5) years. It expressly permits the parties to extend the period without limitation by written stipulation. Exceptions have been recognized by the courts. One arises where a party is unable, from causes beyond his control, to bring to the case to trial either because of the total lack of jurisdiction in the strict sense on the part of the trial court or because proceeding to trial would be both impracticable and futile. Whether it is impossible, impracticable, or futile to proceed to trial must be determined in the light of the circumstances in each case. The circumstances include not only the terms of a written stipulation but the acts and conduct of the parties and the proceedings themselves. [emphasis added]

Similarly, in Tresway Aero Inc. v. Superior Court of Los Angeles Co., 96 Cal.Rptr. 571, 487 P.2d 1211 (1971), the California Supreme Court was asked to entertain a mandamus proceeding to compel the Los Angeles County Superior Court to quash service of summons and to dismiss the action for failure to serve summons within three (3) years after the filing of the COMPLAINT. The Supreme Court held that where a corporate defendant received a copy of a COMPLAINT and a defective summons and shortly thereafter requested and obtained a twenty (20) day extension of time in which to make appearance, and the defendant's maneuvering getting additional time to plead resulted in plaintiff's failure

to serve proper summons within the three (3) year period allowed from the filing of the COMPLAINT, the ends of substantial justice require that the defendant be estopped from moving to dismiss. The pertinent provisions of §581a of the California Code of Civil Procedure read as follows:

No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had thereon, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, . . . unless the summons shall be served and a return thereon made within three (3) years after the commencement of said action, except where the parties file a stipulation in writing that the time may be extended.

The California Supreme Court held that "notwithstanding the mandatory language of §581a, the trial court is vested with discretion in applying exceptions comparable to the discretion with which it is vested in apply exceptions to §583," of the Code of Civil Procedure requiring dismissal of actions not brought to trial within five (5) years after being filed. The court further held that as with the exercise of the court's other inherent and statutory powers to dismiss actions for want of diligence in either serving the summons or bringing the action to trial, the discretion permitted must be "exercised in accordance with the spirit of the law and with the view of subserving, rather than defeating, the ends of substantial justice." The court recognized that each case must be decided on its own particular facts, and no fixed rule can be prescribed to guide the court in its exercise of this discretionary power under all circumstances.

In Tresway Aero Inc., supra, the court discussed the implied exception of impracticability and the doctrine of estoppel as related to §§581a and 583 of the California Code of Civil Procedure. The court stated these doctrines affirm that "a person may not lull another into a false sense of security by conduct causing the latter to forbear to do some things which he otherwise would have done and then take advantage of the inaction caused by his own conduct." Similarly, in the instant case where

the defendant's own conduct lulled the plaintiffs into the false sense of security that the action would not be dismissed, and where the plaintiffs have substantially invested time and money into the purchase of the real property and water rights and have further incurred legal fees and other court costs, the defendant should be estopped to raise the dismissal provisions of §73-3-15. If the defendant's MOTION TO DISMISS is granted, the plaintiffs will have purchased nine hundred and sixty (960) acres of ground that will be virtually worthless because there will be no water rights in connection therewith.

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VI.

THE UTAH CASE OF DANSIE v. LAMBERT IS NOT CONTROLLING IN THE INSTANT CASE BECAUSE DANSIE DID NOT RAISE THE CONSTITUTIONAL OBJECTIONS TO §73-3-15 NOR THE WAIVER AND ESTOPPEL ISSUES AND BECAUSE DANSIE WAS DECIDED SOLELY ON THE BASIS OF INDISPENSIBLE PARTIES AND NECESSARY JOINDER OF PARTIES.

The only case cited by the defendant in support of its MOTION TO DISMISS is Dansie v. Lambert, 542 P.2d 742 (Utah 1975). The defendant basis its entire case upon the hope the trial judge will find Dansie is identical to the issues raised in the instant case. However, it is to be noted none of the arguments raised in this MEMORANDUM OF POINTS AND AUTHORITIES were raised in the Dansie case. The only issues decided in the Dansie case were issues dealing with indispensable parties and necessary joinder of parties. In Dansie, the plaintiff argued that since the State Engineer had not joined in the other defendants' MOTIONS TO DISMISS under §73-3-15, the State Engineer was not entitled to the benefit of the dismissal. In noting this limited scope of the issue to be decided on appeal, the Supreme Court stated in part as follows:

Plaintiff attacks the authority of the trial court to dismiss the complaint with prejudice against the defendant engineer, who did not join in the motion to dismiss, but plaintiff does not attack the authority as to the other co-defendants in which event, if plaintiff's request for relief were granted, there would remain a case lacking indispensable parties.

Thus, the court is quick to point out that the plaintiff was not attacking the authority of the other co-defendants to raise the motion to dismiss. Conversely, however, the plaintiffs in the instant case are attacking the right of the State Engineer to raise the MOTION TO DISMISS and are attacking the provisions of §73-3-15 as being unconstitutional and void. The plaintiffs also allege the defendant-State Engineer cannot raise the limitation provisions in this statute because he has waived them or is estopped to raise them. None of these points were considered by the Supreme Court in Dansie.

The court went on to emphasize a second time the narrow issue raised on appeal by saying:

Plaintiff does not claim the statute is or is not mandatory. His sole point on appeal is that the trial judge erred in granting the motion as to the Engineer. The fallacy of the contention lies in the fact that the statute has nothing to do with joinder of parties, dismissal as to parties and the like, but simply applies to the life or death of a cause of action.

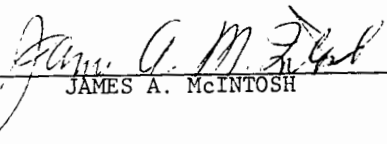
It therefore appears clear the Utah Supreme Court has never passed on the issues of "waiver," "estoppel," and the constitutional infirmities in the statute which are raised by the plaintiffs in the instant MEMORANDUM.

CONCLUSION

For the foregoing reasons, the plaintiffs respectfully request the court to deny the DEFENDANT'S MOTION TO DISMISS on the grounds that §73-3-15, Utah Code Annotated, 1953, as amended, is unconstitutional and void and/or on the further grounds that the defendant State Engineer has waived his right to raise the limitations provisions of the said statute and/or is estopped to raise the said provisions.

RESPECTFULLY SUBMITTED,

McMURRAY, McINTOSH, BUTLER & NIELSEN

By 
JAMES A. McINTOSH

DELIVERY CERTIFICATE

I hereby certify that I personally delivered a true and correct copy of the foregoing PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DENY DEFENDANT'S MOTION TO DISMISS to Dallin W. Jensen, Assistant Attorney General, Attorney for State Engineer, 301 Empire Building,

231 East Fourth South, Salt Lake City, Utah 84111, this 5th day
of December, 1978.



JAMES A. McINTOSH

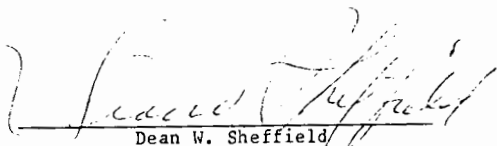
231 EAST FOURTH SOUTH
SALT LAKE CITY, UTAH 84111
(801) 532-0123

State of Utah)
 :ss
County of Salt Lake)

Dean W. Sheffield, being first duly sworn on oath deposes and says:

1. That he is the Executive Director of the Utah State Bar, and in that capacity has the records of the Utah State Bar under his direction and control, including the record of membership in the Utah State Bar.

2. J. Lambert Gibson was a member of the Utah State Bar having been admitted to the Bar January 5, 1937. He was suspended from the Bar June 13, 1967 for non-payment of license fees, and was re-instated April 26, 1968. Mr. Gibson was again suspended May 14, 1971 for non-payment of license fees and was not thereafter re-instated.



Dean W. Sheffield
Executive Director
Utah State Bar

Sworn and subscribed before me the 30 day of October, 1978.

My commission expires 29th day of September, 1981.



Nannette Millward
Notary Public

residing in Tooele County

EXHIBIT 1

CONTRACT OF SALE

THIS AGREEMENT, made and entered into this 6th day of August, 1964, by and between John Davis as administrator of the estate of Jeff Baldwin a/k/a Jeffery Mathewson Baldwin, deceased, hereinafter called the SELLER and Morley Wilson and Mary Ellen Wilson, husband and wife, as joint tenants with full rights of survivorship and not tenants in common, hereinafter called the BUYERS.

W I T N E S S E T H :

1. For and in consideration of the promises, covenants, and agreements hereinafter contained, the SELLER agrees to sell and the BUYERS agree to purchase the following described property situated in the County of Iron, State of Utah, and more particularly described as follows, to-wit:

a. E 1/2 of Section 7 and all of Section 9, Township 32 South, Range 13 West, Salt Lake Base and Meridian, containing approximately 960 acres.

b. Together with the following described personal property: two commercial gas engines to operate pumps, sprinkler heads and pipe, 89 lengths of 4" x 40' aluminum hand line galvanized pipe, water meter, and small culinary pump well.

c. Together with approximately 106 acres underground water rights and any and all other water rights which are appurtenant to the 960 acres described hereinabove to include, but not necessarily be limited to applications 24624, 24625, 24626, and 24627 which have been filed with the Utah State Engineer's office and which are the subject matter of that certain lawsuit in the District Court for Iron County, Civil No. 5178 entitled, Jeff Baldwin, Plaintiff, v. Hubert C. Lambert, State Engineer, Defendant.

d. Together with all rights, privileges and improvements thereunto belonging or in anywise appertaining, including an undivided one-half (1/2) interest in all oil, gas and any and all other underground rights and interests with the SELLER reserving to itself one-half (1/2) of said rights with the understanding that upon the death of the SELLER the entire oil, gas, and/or mineral rights or interests shall then pass to the BUYER herein.

2. PURCHASE PRICE: As purchase price for said land and property, the BUYERS agree to pay to the SELLER the sum of Fifty-Six Thousand Five Hundred Dollars (\$56,500.00) payable as follows: Three Thousand Five Hundred Dollars (\$3,500.00) down on the date hereof, the receipt of which is hereby acknowledged by the SELLER. The unpaid balance of the purchase price in the amount of Fifty-Three Thousand Dollars (\$53,000.00) shall be paid in ten (10) equal annual installments of

Five Thousand Three Hundred Dollars (\$5,300.00) each plus accrued interest at the rate of five percent (5%) per annum on the unpaid balance of the purchase price, with the first installment not to be paid before the 30th day of November, 1978, and thereafter payable on the 30th day of November, each year thereafter until the total purchase price, plus accrued interest, has been paid in full. That interest at the rate of five percent (5%) per annum will commence to run on the 30th day of November, 1977.

3. POSSESSION: The BUYERS shall have the right to possession and occupancy of said premises from and after the date hereof and so long as they are not in default under the terms of this agreement.

4. TAXES: The taxes levied or assessed against said property for the year 1976 shall be paid by the SELLER, and the BUYERS shall be responsible for the payment of all taxes levied or assessed against the property from and after the year 1976 and during the remaining life of this agreement.

5. WATER RIGHTS: It is understood and agreed there is a water right for forty (40) acres of underground right which has not been proved up on or certified by the State Engineer's office. The BUYER is to proceed with all diligence to prove up on said water right, but should it eventually happen through no fault of the BUYERS that the State Engineer during the first five (5) years of this agreement shall reject any part of the water right herein sold, the total purchase price shall be reduced by the amount of Four Hundred Twenty-Five Dollars (\$425.00) per acre for that property sold with water and that proper adjustment shall be made to subsequent payments.

6. ESCROW: It is agreed that this agreement and all related documents are to be escrowed at the American Bank of Commerce, 444 South Main Street, Cedar City, Utah, and the following documents shall be placed with said escrow:

- a. The original of this Contract of Sale.
- b. A warranty deed describing the real and personal property herein sold, together with the water rights and naming as Grantor both the SELLER herein and any other heirs, devisees, and/or legatees to whom the said property described in this CONTRACT OF SALE is to be distributed in the probate estate of Jeff Baldwin, deceased; and naming as Grantees the BUYERS herein.

- c. An abstract of title brought down to date to be furnished to Robert L. Gardner, Attorney at Law, for his examination of title and within a reasonable time thereafter, the abstract shall be placed in the escrow.

It is agreed that all costs and expenses of said escrow shall be shared equally between the parties hereto.

7. DEFAULT: In the event of a failure to comply with the terms hereof by the BUYERS or upon the failure to make any payment when the same shall become due and within thirty (30) days after written notice of said default, the SELLER shall be, at his option, released from all obligation in law and equity to convey the said property to the BUYERS, and all payments which have been made theretofore by said BUYERS shall be forfeited to the SELLER as liquidated damages for the nonperformance of this agreement, and the BUYERS agree that the SELLER may, at his option, re-enter and take possession of said property without legal process as in its first and former estate, together with all improvements and additions made by said BUYERS thereon, and the said additions and improvements shall remain with the land and become the property of the SELLER, and this agreement shall become null and void and of no further force and effect.

It is agreed that time is of the essence of this agreement and the remedies given in the preceding paragraph to said SELLER are in addition to any and all other remedies provided by law.

8. BINDING EFFECT: This agreement shall be binding on the heirs, distributees, successors, executors, administrators and personal representatives of each of the parties hereto.

9. NOTICE: Any notice contemplated herein to be served upon either party hereto shall be in writing and shall be sufficiently given if mailed in the United States Post Office, postage prepaid and certified to the parties at the following addresses:

SELLER:

John Davis
Milford State Bank
Milford, Utah 84751

Send notice to seller also to:

Patrick H. Fenton
Attorney at Law
13 West Hoover Avenue
Cedar City, Utah 84720

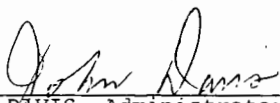
BUYERS:

Morley Wilson and Mary Ellen Wilson
Box 147
Enterprise, Utah 84725

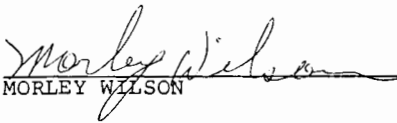
or such other addresses as the parties may from time to time in writing designate. Service of notice by mail shall be deemed effective and complete upon date of posting and mailing in accordance herewith.

10. ATTORNEY'S FEES: Should it become necessary by either party to this agreement to employ legal counsel to enforce any term or provision hereof, the prevailing party shall be entitled to recover from the other a reasonable attorney's fee plus costs.


IN WITNESS WHEREOF, the parties to this agreement have hereunto set their hands the day and year above first written.



JOHN DAVIS, Administrator of the
Estate of Jeff Baldwin a/k/a Jeffery
Mathewson Baldwin, deceased



MORLEY WILSON



MARY ELLEN WILSON