1967

John Elwood Dennett v. A. P. Neilson : Appellant's Brief

IN THE SUPREME COURT
OF THE
STATE OF UTAH

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JOHN ELWOOD DENNETT
Intervening Plaintiff
and appellant

vs.

A. P. NEILSON
Defendant in
Intervention and
Plaintiff and Respon-
dant

Case No.
11032

vs.

HERTA K. DENNETT
Defendant

- -

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This case is an attempt on the part of the plaintiff, A. P. Neilson, to foreclose a claimed lien on property, or to terminate a claimed "license" agreement on the property on which he claims a lien. The appeal involves the illegal appointment of a receiver of the property and an illegal turn-over order of monies over which neither the purported receiver nor the court had any jurisdiction.

DISPOSITION IN LOWER COURT

On or about September 13, 1967, the lower court, without hearing any evidence of any kind, either on the question of the standing of the applicant to seek a receiver, or on the question of cause or necessity, entered an order, which purported to appoint one Alvin I. Smith as receiver of the property involved in this dispute.

Although the purported receiver has never undertaken, even yet, to qualify himself as a receiver in accordance with his purported appointment, the lower court, as part of the same order, ordered the appellant summarily, and without evidence, a trial, or due process, to turn over $1,800.00 which appellant had collected at least two weeks before Mr. Smith's purported appointment. Despite Mr. Smith's continuing failure to perfect his prima-facia appointment, or to qualify himself as a receiver of any kind, the lower court has persisted in demanding of appellant, that he turn over the $1,800.00, and to coerce compliance with its illegal order, has ordered the appellant to pay a $200.00 fine, or alternatively to spend five days in jail, or alternatively to comply with the turn-over order.

RELIEF SOUGHT ON APPEAL

Appellant seeks relief from the illegal turn-over order and contempt finding of Judge Wilkins. Implicit in that relief is relief from the illegal order of Judge Wilkins appointing Mr. Smith or for that matter, anyone, as receiver of the subject property. Implicit in that relief is also relief from the continuing trespasses and harassments of Mr. Smith, who above and beyond the illegality of his appointment, has yet failed to qualify himself to serve or

act in any capacity with respect to the property.

STATEMENT OF FACTS

The business relationship between appellant and A. P. Neilson was the aftermath of a business relationship and law suit between A. P. Neilson and E. R. VomBaur. Appellant was co-owner with Mr. VomBaur of certain business and commercial property at 4985 So. State Street in Murray City, Utah, commonly known as TEENE TOWNE, the property in which this dispute has its actual origins.

Prior to 1960, the TEENE TOWNE property was an old run-down, abandoned, dance hall. Mr. VomBaur, who had done various assignments and sales promotions for Mr. Neilson, undertook to purchase that property from him. The sale was transacted on a Uniform Sales Contract. The relationship between Mr. VomBaur was a close relationship, being to a large degree social, besides being business, but even moreso, Mr. Neilson expressed a fondness for Mr. VomBaur, which Mr. Neilson often characterized as a feeling he would have towards his own son.

Mr. VomBaur and Mr. Neilson complemented each other to an unusual degree. Mr. Neilson had extensive financial resources, including properties he wished to promote and sell. Mr. VomBaur had unusual talents as a salesman and promoter.

After owning the TEENE TOWNE property for about a year, Mr. VomBaur undertook very extensive improvements to modernize the property and greatly enhance its value. Within a period of about six months, he had increased the appraised value from about $125,000.00 to about $375,000.00.

Mr. Neilson was pleased with what Mr. VomBaur was doing. He made frequent trips to the property, conversed with the workmen, expressed his satisfaction with what they were doing, and encouraged them to stay on the job.

Part way through the improvements, Mr. Neilson approached Mr. VomBaur with a plan. The plan was simply to get all of the projected improvements finished at once, instead of trying to finance them on a shoe-string. Guy Alder, who made the $375,000.00 appraisal was an officer of Zion's First National Bank, and made the appraisal for loan purposes. Mr. Neilson, who maintains an excellent credit rating, a very substantial financial statement, and has good banking connections, had apparently made approaches to Zion's First National Bank and had received tenative approval for a loan as soon as all of the improvements were finished. Mr. Neilson saw in this the means of getting cash out of the TEENE TOWNE property instead of long-term monthly installments. The cash from the Zion's loan would pay off his contract all at once. Mr. VomBaur was agreeable to the plan of ram-rodding the improvements through to early completion. Mr. Neilson agreed in writing that he would get a bank loan for Mr. VomBaur to pay off the contract and the improvements as soon as the work was done. To expedite the completion of the improvements, he told Mr. VomBaur to forget the contract installments and to get the work done. Mr. VomBaur could work faster if he used the monthly installments on the contract as working capital.

The workmen, encouraged by Mr. Neilson's written promise and his frequent visits upon the premises, and by his obvious pleasure at their

progress, were willing to work on credit for a while.

Suddenly, Mr. Neilson did an about-face. When workmen talked to him, he told them that he wasn't going to pay them, but that they would have to get their money from Mr. VomBaur. They were obviously alarmed, and upon failure of the workmen's attorney to get any real assurance from Mr. Neilson that he would continue to stand behind the project, filed mechanics' and materialmen's liens and commenced actions to forclose them.

Upon receiving the summonses, Mr. Neilson consulted his attorney, Scott Woodland. Mr. Neilson was apparently upset over the action, and while maintaining the usual social relationship with Mr. VomBaur, decided that he would have to go through the motions of "forfeiting the contract interest of Mr. VomBaur, just to make his position clear with the workmen." He said that as soon as the liens were cleared, he would re-sell the property to Mr. VomBaur on a new contract. Mr. VomBaur took this at face value, and closed the operation down for a few days. By this time, TEENE TOWNE, a teen-ager's club was a flourishing business with thousands of members and patrons and with nightly activities.

Everything seemed to be going on schedule, until one day, it was discovered, that Mr. Neilson had, without aid of legal process, broke and entered the TEENE TOWNE property, by sheer physical force, and without effectively terminating the contract interest of Mr. VomBaur, had placed into possession, one Ray Thomas, who on his own, had undertaken to re-do the entire operation, and who, by the time he was discovered, had made rather extensive alterations in the premises.

Mr. Neilson suddenly became unavailable to Mr. VomBaur. He refused to even discuss the illegal dispossession with him. Mr. VomBaur consulted with appellant, who was also unable to obtain satisfactory answers. Lending to the strange turn of events the only interpretation that could be given them, namely that Mr. Neilson had reneged and gone back on everything he had promised, had led Mr. VomBaur into a trap, had left him with the full responsibility of paying the workmen, and withdrawn his financial backing, left him in apparent default on his Uniform Real Estate Contract, and had placed a stranger, one Ray Thomas in illegal possession, the last of which acts brought about the demise and cessation of the theretofore flourishing business of TEENE TOWNE, counsel (appellant) commenced an action and enjoined the trespass and illegal entry of Mr. Neilson until the matter could be concluded.

Mr. Neilson thereupon filed an action to quiet his title as against Mr. VomBaur. The three cases, (1) The lien-claimants case against Mr. Neilson and Mr. VomBaur, (2) Mr. VomBaur's case against Mr. Thomas and Mr. Neilson, and (3) Mr. Neilson's case against Mr. VomBaur were all consolidated for trial.

Although Mr. Neilson had been in virtual partnership with Mr. VomBaur, the trial court held that his interest in the property was not subject to the mechanic's liens. Mr. VomBaur virtually confessed a liability to the mechanics and materielmen, which is as it should have been. Mr. Neilson, however, was so utterly unable to make even a prima-facia case against Mr. VomBaur, that the trial court granted a motion to dismiss his case against Mr. VomBaur as soon

as Mr. Neilson rested. His forfeiture case was so completely devoid of merit that the trial court didn't even want to hear the defense.

Vindicated in his claim that Mr. Neilson's illegal entry into Teene Towne had been nothing but a breaking and entering, Mr. VomBaur and appellant, (who had become co-owner of the property through the victory against Mr. Neilson) commenced an action against Mr. Neilson for the damages he had caused to the TEENE TOWNE enterprise by his illegal trespass. Damages were assessed in the complaint at $1,800,000.00.

Mr. Neilson discharged his attorneys and retained J. Reed Tuft to represent him. Mr. Tuft took a soft-sell on appellant and Mr. VomBaur. By feigning remorse at his mistakes, shifting the blame for the unwise course of action he had taken to Scott Woodland, who, Mr. Tuft and Mr. Neilson claimed had grossly misled his client, and shifting the blame to Mr. Neilson's alleged excessive consumption of alcoholic beverages, about which appellant knew nothing at the time, and by lamenting that Mr. Neilson was all but shut down on his credit resources due to the pendency of that damage suit, Mr. Tuft finally convinced appellant and Mr. VomBaur that Mr. Neilson should be forgiven for his mistakes, that he would do almost anything in return for a dismissal of the damage action, and that he would sell the TEENE TOWNE property back at a big discount, on contract, if the appellant and Mr. VomBaur would allow him to quiet his title to the property without contest.

As an added inducement, Mr. Neilson, having learned through his attorney, Reed Tuft, who had learned through another client Asael Sorenson, that appellant had made application for a mortgage loan on the Surety Building, offered to lend his credit,

financial statement, and to use his banking connections to get a loan for appellant locally.

While this offer lent some temptation to the matter, appellant was reluctant to deal with Mr. Neilson on any basis. The memory of what had just happened at TEENE TOWNE made appellant wonder whether it was worth the risk, to get involved with Mr. Neilson, merely to get a loan at a lower interest rate and with fewer points discount. Appellant had obtained two other loan commitments in Houston, Texas and was proceeding th close with one of them while these negotiations were taking place.

At Mr. Tuft's insistence that he absolutely controlled Mr. Neilson, and that he would personally warrant that Mr. Neilson would never, ever, under any circumstances interfere with appellant or his building, did appellant relent. Appellant agreed that Mr. Neilson could shop the loan at the local banks, and furnished him with appraisals, title reports, and plans and specifications with which to work. Mr. Neilson tried at several banks, and finally obtained from Walker Bank and Trust Company a committment for $85,000.00 at 6 1/4% interest for 15 years, with a 1% service charge. While the amount was disappointing, (Houston had offered $100,000.00), the interest rate was good (Houston wanted 7%), the service charge was good (Houston wanted 6% discount), and the term was good (Houston had only offered a 10-year loan). Appellant and the second mortgagee were able to negotiate an agreement to re-write $5,000.00 of the second mortgage, which brought total financing to $90,000.00.

During luncheon engagements and on other social occasions, Mr. Neilson and Mr. Tuft were making repeated assurances of continuing help in

appellant's temporary money squeeze. The temptation was simply too much, and appellant succumbed to the temptation to be helped, and agreed that Mr. Neilson could go ahead with the loan, as appellant's agent, on the terms stated. In the meantime, a satisfactory arrangement had been reached regarding the TEENE TOWNE property, and the whole matter was concluded.

It took a month or two after that to clear the title to the subject property, hereinafter referred to as the SURETY BUILDING. Until that time, no-one had even concerned themselves with the fact that record title was vested in the name of Herta K. Dennett, appellant's wife. A long development of the historical background relating to this matter seems unnecessary. Suffice it to say that the record title has always been in the name of Herta K. Dennett, but that appellant has always had possession and always managed the property. For estate planning and other purposes, appellant have from time to time, variously considered the property to be that of Mrs. Dennett, that of appellant, and that of both. Since appellant and Mrs. Dennett have always issued combined and consolidated profit and loss statements and balance sheets, it has really never been an issue, until this law suit was commenced, as to who owned the property.

The proposed closing at Walker Bank and Trust became so annoying and complicated, that appellant told Mr. Neilson and Mr. Tuft to forget the whole matter-- it wasn't worth the trouble. Mr. Tuft and Mr. Neilson wouldn't let that happen, though. In advance of the closing, Walker Bank had prepared a closing statement which was so distorted and inaccurate, and so totally unacceptable, that

appellant and his wife, even on the day of closing, decided not to go through with the loan. Hal Waldo entered into the picture, trying to save the loan, inasmuch as Walker Bank had quite an investment in it by then, and agreed to insert in the closing statement certain reservations which would preserve certain rights with respect to certain of the items therein recited. When, however, Mr. Waldo made an addendum to the trust deed to the effect that if Mr. Neilson ever conveyed title back to the grantors, appellant and his wife, that Walker Bank could declare the trust deed at once due and payable, appellant and his wife walked out of the closing and refused to go forward. Mr. Neilson pursued appellant down the corridor, insisting that the matter be concluded, and assuring appellant that if Walker Bank ever invoked that clause, that he could get equal or better financing elsewhere at any time, and would do so, if called upon to do so.

It was decided, however, that it would be imprudent to sign the deed which appellant had prepared, which would have reconveyed title to the grantors, due to the new addendum made to the trust deed. Appellant's wife had left in the meantime, as had Mr. Neilson's wife, and the remaining details were hashed out between appellant, Mr. Neilson, and Hal Waldo. Walker Bank agreed to send Mr. Neilson the disbursing check in a few days, after the final title policy had been issued.

Mr. Neilson and appellant departed the bank together. As we left, Mr. Neilson said, "Okay kid, there's your deal. Good Luck. Drop by the office in a few days and get your money. Take good care of the building and make your payments. I don't want Walker Bank asking me for any money on this."

Out of the closing proceeds of $85,000.00, appellant authorized disbursement, conditionally, and with rights to reclaim refunds reserved, of $30,298.21 to Federated Security Insurance Co., of $23,028.00 to Waller & Lewis, second mortgagees, of $375.00 for a title policy, of $850.00 for the 1% service charge, of $116.95 for a special improvement district assessment, and for miscellaneous recording, photograph, credit report, and amortization schedule expenses in the approximate amount of about $25.00. Appellant further authorized the withholding of $1,000.00 to insure completion of the hard-surfacing of the parking lot and $3,100.00 to cover a latent defect in the title. In tabular form, the debits and credits look like this:

Loan Proceeds:	85,000.00	
Disbursed to Federated		30,298.21
Disbursed to Waller & Lewis		23,028.00
Title Policy		375.00
1% Service Charge		850.00
Special Improvement Dist		116.95
Misc. Expense		25.00
Parking Lot Escrow		1,000.00
Title Company Escrow		3,100.00
Balancing Totals	85,000.00	57,793.16
Undisbursed Residue		28,206.84
Totals to balance	85,000.00	85,000.00

There was a tenative agreement to apply $17,140.00 of the residue towards the indebtedness of E. R. VomBaur on the Teene Towne property on condition that the property be sold so that the joint ownership of the property in Murray City be reflected in E. R. VomBaur and the appellant. This condition never came to pass, but A. P. Neilson may have attempted to apply it for the purpose it was originally earmarked. If so, this can simply be the subject matter of another law suit.

Mr. Neilson did, however, upon appellant's request, disburse the sum of $7,565.17 to cover some pressing bills. For this he should receive credit. To carry the building through a period of remodelling, appellant left all of the balance and residue of the loan proceeds with A. P. Neilson in trust, and to increase the balances on hand, caused to be paid to Mr. Neilson the rent due from the Community Mental Health Center of about $2,000.00. Appellant further added about $400.00 of his own funds to the escrow in about February of 1967, bringing the total funds for which Mr. Neilson has not yet accounted to about $23,041.67 plus the $1,000.00 which was escrowed at Walker Bank and Trust.

Mr. Neilson has been asked repeatedly for an accounting, which he has, in nearly two years, failed to supply. Through counsel, appellant has been able to ascertain that Mr. Neilson has disbursed about $13,000.00 in payments and constructions costs until last summer, and perhaps another $3,000.00 or $4,000.00 since then, so that the funds on hand may nearly be accounted for by now.

Appellant retained possession of the building, in accordance with the understanding that Mr. Neilson was retaining record title only in trust. The first several months elapsed without incident. Mr. Neilson's bookkeeper simply made the installments due to the bank out of the funds she was holding in trust.

Disagreement started when Mrs. Riter, closing agent at Walker Bank began to annoy Mr. Neilson about the black-topping on the parking lot. The installation was held up due to an about-face by Salt Lake City Corporation, which

in conjuntion with the building permit issued to appellant, required that the water drainage be directed southward from Douglas Street to 2100 South, instead of northward, as the water had theretofore drained. Reversal of the drainage pattemrequired extensive engineering, design, and fill, which appellant undertook, during the months of June and July 1966 to do. Before this could be done, however, the entire rear wall of the building had to be removed, new foundations and footings installed, and a new wall built. This was done entirely by appeallant, nearly two months after the closing at Walker Bank. Just when the mulch was ready to be installed on the parking lot, on about July 20th, 1966, the City Engineer intervened, and indicated that the drainage had to be reversed to conform with the old pattern.

This needless and expensive about-face was frustrating and expensive to say the least, and was a source of renewed irritation to Walker Bank and Trust Company, who in turn harrassed Mr. Neilson because the parking lot wasn't installed. Annoyed by the incessant calls made to him by Walker Bank, Mr. Neilson, in turn made frequent calls to appellant, inquiring as to what was holding up the installation.

Upon being told about the city's position, Mr. Neilson volunteered his help to get the problem solved. He claimed to be a political creditor of George Catmull, and recommended that he engage Mr. Catmull's personal attention to the completion of the job, rather than to pursue an action against the City. He then requested appellant to leave the matter of the parking lot entirely to him, and not to interfere; that he could get it done best without any help.

This sounded like a reasonable solution, and so the total responsibility was given to him on or about August 15, 1966.

Upon Mr. Neilson's intervention, work and progress ceased suddenly and completely. Appellant was concerned about the mounting loss of income and the unexplained delays. Appellant tried, but was unable to make any contact at all with Mr. Neilson. He was frequently in Southern California. Other times he was "indisposed", or "busy". Through these various excuses and delays, the installation of the parking lot mulch was not completed until May 1967, a lapse of nearly nine months from the time he undertook the job. During this time, there was a complete cessation of rental income, and through Mr. Neilson's delay, the building got into financial difficulty.

During December 1966, appellant and Mr. Neilson looked over other needs of the building, for which Mr. Neilson had some help during the off-season in the construction business. Two offices had some old rain damage (although negligible), and the feasibility of installing a new roof was discussed. Appellant and Mr. Neilson agreed that a shell would be built over the front part of the building, where there were previously gables, and a new built-up roof installed over the flat part of the building. The cost was estimated at about $1,000.00 plus labor. There were other miscellaneous needs, too numerous to detail here. These amounted to about $2,000.00. The agreement between appellant and Mr. Neilson was very simple. Appellant would provide about $1,000.00 towards payment of the building's needs. Mr. Neilson would advance the rest. Mr. Neilson would furnish an accounting of the funds he had on hand still, and

if the expenditures exceeded the funds on hand, appellant would apply all of the gross rent proceeds towards payment of the over-draft until the account was in balance.

Things progressed quite well for about three months. Mr. Neilson's personal problem with intoxicants became a source of considerable annoyance, and at times he would send workmen to do work appeallant had already had done, and do other irrational things, but by staying in close contact with the project, appellant was able to keep things under control.

As it turned out, Mr. Neilson grew so irritable at times that appellant made the disbursements Mr. Neilson had agreed to make, rather than to aggravate him. Between November 1966 and May 1967, appellant disbursed, instead of the $1,000.00 he agreed to disburse, the sum of $2,150.83 to materialmen and laborers. The list is too detailed to burden this brief with a list of the parties and amounts.

On March 7, 1967, Mr. Neilson and appellant had a rather serious and major confrontation. Appellant had contracted with Mountain Fuel Supply to install a gas meter in the front of the building between the filigree blockwork and the front wall, and had carefully had the gas mains engineered so that the largest feeder pipe faced towards the place the mater was to go, and then reduced in size by steps, as branch lines were taken off, so that the pressure to each appliance could be equalized and no furnace or water heater would be starved.

After paying the fee, and arriving on the job a few days later, appellant learned that Mountain Fuel Supply had undertaken to have the

meter installed in the rear of the building. The placement was not only dangerous inasmuch as it was on a parking lot, but unsightly, and engineered completely backwards, so that the gas flow went into small pipes and then progressively larger pipes. Furthermore, the meter was in the way of the next construction step, where building was to take place shortly, a most annoying and expensive development.

When called to account for the incorrect installation, Mountain Fuel Supply replied that Mr. Neilson had ordered the change. They were very apologetic and agreed to take out the yard line and install it as contracted. Within a few minutes Mr. Neilson arrived. He was hardly rational. He was so completely under the apparent influence of intoxicants that he could hardly talk, and flew into a rage. He said that if appellant did not let him do the construction work, and stay away from the job until he got it done, he would take the building away from appeallant. He accompanied his threat by a harmless assault, which due to his condition consisted of no more than flailing the air.

Within a few days, Mr. J. Reed Tuft contacted appellant and demanded some type of surrender of possession until the building could be finished, rented and occupied, or some type of receiver. Mr. Tuft demanded a Carte Blanche as far as additional expenditures were concerned, a rather unlikely proposition in light of the conduct and behavior of Mr. Neilson recently exhibited.

A proposal that the items Mr. Neilson thought should still be done should be inventoried and carefully bid was rejected by Mr. Tuft. Upon refusal to agree, Mr. Tuft instigated an action in the District Court.

Be it remembered, that appellant or his wife has always treated the building as theirs, and A. P. Neilson has never treated the building as his. His accountant informs appellant that Mr. Neilson has never claimed any operating profit or loss, or interest or taxes paid on his income tax return. Likewise, Mr. Neilson has never had possession of the building, except when he broke and entered, by force, about the time the dispute over the gas meter arose.

Mr. Marshall, upon filing the complaint approached Judge Stewart M. Hanson in the hall of the City and County Building. What happened there can only be pieced together, but discloses a rather unique happening. Judge Hansen signed a paper which Mr. Marshall put in front of him. He apparently didn't know what he was signing, because when approached the next day by the appellant, he not only denied that he had signed any papers relating to appellant or his wife, but further denied signing any injunctions or appointments of receivers on the previous day. When pressed by appellant for explanations, the judge became quite annoyed and adamant, and only when confronted with his own signature on an order appointing a receiver and enjoining certain activities on the building, did he finally realize what he had done. What he said in commentary on the matter at the realization of what had happened, is not proper subject matter to repeat in a brief. He did the only thing available to him, namely to exempt from operation of the injunction and receivership the appellant's estate and activities. One thing was brought out at this point, however, and that was the fact that no witnesses had been sworn and testified in support of the matters which would have justified the temporary relief sought and obtained, this notwithstanding the requirements of Canon 16

of Judicial Ethics. He thereupon disqualified himself sua sponte from entering any further orders relating to the affairs of appellant or his wife., so that he would not be requested to do anything further in the case.

Mr. Marshall, thereupon, without producing further witnesses, tried to get appellants order vacated, and being unable to induce Judge Hansen to act again, went to Judge Wilkins, representing to him that there had been a full-blown hearing on the merits, and inducing him, by this misrepresentation to vacate Judge Hansen's order. At this time, no further witnesses were called.

In the meantime, tenants for the entire building had been secured, (in advance of April 1st), the work completed, except for the mulch on the parking lot, and the building was producing income.

At the hearing held on April 20th, 1967, the entire day was occupied in adducing testimony on the ownership of the beneficial interest of the building, which was to be probative of the question as to whether Mr. Neilson had failed to join an indispensible party, namely the appellant, in his action against Herta K. Dennett.

Nothing was said about his standing to seek a receiver. Neither was anything said about the condition of the building on about April 1st, 1967. Only a few parties testified , and they said nothing about anything material or relevant to receivership questions. Mr. Neilson's witnesses were:

> Asael T. Sorenson, who testified regarding the value of the premises in January 1967 while the premises were under construction,

but knew nothing about their value or condition in April 1967, some four months later after all remodelling had been completed and the building was ready or nearly ready for occupancy.

Mr. Burton Stanley testified about a mechanic's lien that had expired or nearly expired, and which was not being foreclosed, a fact totally irrelevant to any questions regarding receiverships.

Lowell Garrett testified that he had inspected the premises in January 1967, and his observations regarding rain damage, but knew nothing about the building in April 1967.

Glenna Beddoes testified regarding disbursements made out of appellant's trust funds, but said nothing regarding the balances on hand, or the offsetting receipts.

These witnesses were taken out of turn, so that they could be excused. No one rested the case on the matter of receivership. No-one offered any evidence at all on the question of Mr. Neilson's status to seek a receiver. No-one offered any evidence on the question of the condition of the premises in April 1967. Had anyone offered any evidence on either question, or rested their proof on either question, appellant or his wife, would have had a multitude of evidence to defeat both questions.

The case never even reached this point. At the end of the day, Judge Wilkins denied Mrs. Dennett's motion to dismiss for failure of the plaintiff to join an indispensible party, and based upon the denial of that motion alone installed a receiver in the premises, without having heard one word of evidence about the question of either status or need.

Mr. Marshall therupon prepared an order, and carefully omitting to send a copy thereof to either appellant or Mrs. Dennett's attorney, M. Byron Fischer, made a series of 6 findings, not one of which was supported by one shred of evidence, and which are completely, individually, and categorically contrary to every fact. He made it appear in the findings that appellant and his wife were at fault in the cessation of income on the building. The truth of the matter is that the entire fault lay with Mr. Neilson, who took nine months to install the parking lot, which was not more than a three-day job.

Mr. Marhshall created a 5 point order, which absolutely went wild, and which conferred upon the purported receiver powers never dreamed of, including summary dispossession of the appellant, including the right to remodel and change the character of the premises at will.

The interest of appellant in the property, however was never reached. The order related only to the interests of the litigants.

Mr. Neilson disappeared to Europe during the ensuing three months, so that he could not be reached for depositions. First Security State Bank, seeing the trap they had been led into by Mr. Neilson, withdrew as receiver and refused to serve.

In August 1967, a motion was filed to substitue Alvin I. Smith as receiver. Without reciting the tedium in connection therewith, let it be observed that several hearings, all without evidence on the two basic questions, culminated in the order of appointment which was signed on September 13, 1967, which purported to appoint Alvin I. Smith as receiver of the premises.

Mr. Smith has, until this date, failed to qualify as a receiver, in that he has failed, inter-alia, to file the undertaking made mandatory by Rule 66(d) of the Utah Rules of Civil Procedure.

On about August 28, 1967, however, appellant found a prospective renter, Mar Don, Inc. who in the meantime has needed more and more space in which to operate its business, Patricia Stevens Career College. On August 28, 1967 there was no receiver at all, and particularly none of appellants interest. Mar Don, Inc., paid $1,800.00 in advance rents and agreed to finance the completion of the second story through advance payment of rents.

Mr. Smith intervened, stopped the remodelling, wrote a lease of his own, ignoring appellant's lease, put them in a different part of the building, and proceeded to gut the building, removing recklessly and without regard to its condition, expensive mahogany partitioning and panelling and expensive carpeting.

He has succeeded also, in the meantime, in driving away two wonderful tenants, who simply refuse to have anything to do with a person who behaves the way Mr. Smith has behaved. He has been guilty of many other items of untoward conduct including failure to keep the first trust deed current.

The $1,800.00 collected from Mar Don, Inc. went into the building. However, the court, without authority, order the funds turned over to Mr. Smith.

ARGUEMENT

POINT ONE: MR. NEILSON HAS NO STANDING TO SEEK A RECEIVER.

He has no standing except that of trustee, who took nominal record title for the sole purpose of obtaining a loan for appellant or his wife.

He might have had standing to file a mechanics or contractor's lien for improvements, but he has failed to do this.

Trustees categorically, and contractors who do not file liens have no standing and are not included in those classes described in Rule 66 (a) (1) and 66 (a) (2) of the Utah Rules of Civil Procedure.

POINT TWO: MR. NEILSON HAS THE BURDEN OF PROOF IN ESTABLISHING HIS STANDING, IF ANY HE HAS.

The Record will show that there has been not one shred of evidence offered in support of his claimed standing.

POINT THREE: MR. NEILSON HAS THE BURDEN OF SHOWING THE NEED OF A RECEIVER, EVEN IF, ARGUENDO, HE HAD SHOWN STANDING.

There was no need for a receiver. The causes are described in the same rules cited. The causes did not exist. He offered no evidence at all on the question, and the little bit of evidence that was taken was not rested, and related to a different period of time, after which there was very substantial claim. Furthermore, no opportunity was given to rebut the evidence which was offered.

POINT FOUR: THERE WAS NO RECEIVER AT ALL ON AUGUST 28, 1967.

The rents collected on August 28, 1967 were collected at a time when First Security Bank had withdrawn, and Alvin I. Smith had not yet been appointed.

POINT FIVE: EVEN IF THERE WAS A RECEIVER, THERE WAS NOT A RECEIVER OF APPELLANT'S INTEREST.

Appellant's interest in the property was not reddered subject to the jurisdiction of the court until he was allowed to intervene, which was on about September 13, 1967.

POINT SIX: ALVIN I. SMITH HAS NOT YET QUALIFIED AS A RECEIVER.

A receiver until he qualifies is not a receiver. He qualifies, if there is sufficient standing on the part of the applicant, which there was not, if there is sufficient cause for a receiver, which there was not, and if he files an oath and an undertaking. He may have filed an oath, but he has not filed an undertaking.

The undertaking is not discretionary, but mandatory. The word "must" not "may" is used in the rule. What would the administrator of an estate, or the executor of a will do which would be legal if he hadn't properly qualified. His acts would be void.

POINT SEVEN: THE COURT HAD NO JURISDICTION OVER APPELLANT'S PERSONAL AFFAIRS OR PROPERTY.

This argument needs amplification, but may perhaps be treated in a reply brief when it is learned what respondants have to say about it.

POINT EIGHT: NO COURT HAS THE RIGHT TO ORDER THE TURNOVER OF PROPERTY TO A NON EXISTANT RECEIVER.

If Mr. Smith had qualified, it might have shed a different light upon the matter. Since he hasn't, there isn't even a person constituted who could legally receive the money.

POINT NINE: APPELLANT CANNOT BE DEPRIVED OF HIS PERSONAL PROPERTY WITHOUT DUE PROCESS OF LAW.

If Mr. Smith had some right to the money, he should bring a civil action, so that the defenses to his claim can be tried in accordance with the facts and the law. Summary procedures are nearly always violative of consitutional guarantees, and most certainly in this case.

POINT TEN: CIVIL OR COERCIVE CONTEMPT CAN ONLY BE USED TO ENFORCE LEGAL ORDERS.

The Statutory Language of the Chapter on Contempt limits its operation to the enforcement of legal orders. This, by implication, exempts from its operation illegal orders. A person is within his rights to disobey an illegal order of the court. This order, which appellant elected to disobey was illegal. But above and beyond, the money, being appellants to do with as he saw fit, was spent on the building, and there was nothing much to turn over, if any, by the time Mr. Smith's

order of appointment was filed.

CONCLUSION: There is no receiver of the property at all. There has been neither a showing of status nor necessity. Furthermore the purported receiver has never qualified. If he had qualified, which he has not, he could not recover appellant's property summarily, but only upon consitutional principles of due process. The order of the court to turn over money was unconstitutional, ultra vires, and illegal, and appellant was within his rights to disobey a civil contempt order of that nature.

Deficiencies in arguement, if any, may be supplied, with leave of court, in a response brief when it is seen what respondants have to say to these arguments, if the court should permit a response.

Respectfully submitted,