

1966

Mary Colleen Roundy v. Norman R. Reber, Bonnie Reber, Melvin C. Roundy, and Others Including the Church of the First Born : Respondent's Brief

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

MARY COLLEEN ROUNDY,
Plaintiff and Respondent,

vs.

ORMAN R. REBER, BONNIE REBER,
MELVIN C. ROUNDY,
Defendants and Appellants.

SEP - 2 1966

#10533
Clk. Supreme Court Clk.

No.
157718

No.
168592

RESPONDENT'S BRIEF

Honorable A. H. Ellett, District Judge

MAR 1 1967

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARY COLLEEN ROUNDY,
Plaintiff and Respondent,

vs.

NORMAN R. REBER, BONNIE REBER,
' MELVIN C. ROUNDY,
Defendants and Appellants.

No.
157718

No.
168592

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action for Unlawful Detainer.

DISPOSITION IN LOWER COURT

These cases were heard by special setting before the
honorable A. H. Ellett on the 17th day of December, 1965.
Judge Ellett ruled that defendants were holding plaintiff's

premises in unlawful detainer and awarded plaintiff treble damages in the amount of \$852.04 plus \$4.00 per day trebled until defendants quit the premises; and possession.

RELIEF SOUGHT ON APPEAL

Defendants seek to reverse the judgment and for an order remanding the case back for dismissal.

STATEMENT OF FACTS

The defendants have not fairly treated the facts. There are two cases on this appeal, No. 157718 and No. 168592.

The first was commenced on June 3rd, 1965, for unlawful detainer and damages. Part of this case (the question of ownership) was heard before Judge Merrill C. Faux on the 17th day of August, 1965. Judge Faux held that a deed from plaintiff's estranged husband, delivered June 2, 1965, to defendant Reber was "fraudulent and otherwise void," (R-47 to 50). The remainder of plaintiff's causes of action for damages and unlawful detainer was continued.

On August 17, 1965, plaintiff then served defendants written notice to quit (R-39).

Plaintiff, on November 2, 1965, filed the second case on this appeal, No. 158592, (R-81). This action also was for damages and unlawful detainer.

At a hearing before Judge Marcellus K. Snow on November 26, 1965, both of the above cases were consolidated (R-92). Subsequently, Judge A. A. Ellett, by special setting, heard the question of possession on both cases on December 17th, 1965. Judgment was entered in favor of plaintiff and against the defendants Reber for treble damage. Plaintiff's other causes of action were dismissed without prejudice.

These cases involve the question of ownership and possession of a house at 3314 South 3300 East, Salt Lake County, State of Utah. Plaintiff and her husband lived in the home and became estranged, and plaintiff's husband after the divorce action commenced deeded the house to defendant Reber, which deed was held fraudulent and void, and defendants continued to live in the home without making payments and the bank threatened foreclosure, and is still threatening foreclosure.

ARGUMENT

POINT I

APPELLANTS' FAILURE TO RAISE OBJECTION IN LOWER COURT BARS REVIEW.

The entire record is deplete of any reference to Appel-

nts' principle argument on this appeal. Appellants did not raise the specific question of whether Respondent's notice to quit was served before the commencement of any of the actions and Appellants are now barred from raising the question on appeal.

In support of this the case of *Kenkel v. Utah Lumber Company*, 29 Utah 13, 81 P. 897, is cited:

"In absence of exceptions to a charge, it cannot be reviewed." 29 Utah 13, 81 P. 897.

Also, in support of this 3 Am. Jur. pp 106 and 107, is cited:

"The rule prevailing in most jurisdictions is that in order to preserve for review a question with respect to the conduct or argument of counsel, there must be an objection, a request for appropriate corrective action, and an exception to the court's ruling or action or to its failure or refusal to rule or act." 3 Am. Jur. p. 106-107.

"The general rule that an appellate court will consider only such questions as were raised in the trial court . . ." 3 Am. Jur. p. 108.

POINT II

HERE IS EVIDENCE IN THE RECORD TO SUPPORT THE JUDGMENT.

The court correctly held that the plaintiff's notice to

quit served on the 17th day of August, 1965, was valid (R-58, Par. 4).

In support of the fact that the action commenced on November 2, 1965 (R-81) the provisions of Rule 3(a) of Utah Rules of Civil Procedure, 1953, is cited:

"A civil action is commenced (1) by filing a complaint with the court, or (2) by the service of a summons . . ."

An action under the Utah Rules of Civil Procedure, 1953, may be commenced in two ways. *West Mountain Lime & Stone Co. vs. Danley*, 38 U. 218, 226, 111 P. 647.

The tenancy was terminated on August 17, 1965, (R-58, Par. 4), by proper notice to quit thereby establishing a cause for unlawful detainer. The notice to quit of August 17, 1965 (R-58, Par. 4), gave rise to the cause of action filed on November 2nd, 1965 (R-81). The plaintiff commenced suit by first terminating the tenancy by giving proper notice to quit.

The court determined properly on December 17, 1965, that a cause of action existed at the time the action was commenced on the consolidated cases of No. 168592 (R-81) and No. 157718 (R-2). The court determined that the notice to quit was served prior to the time the action had been commenced.

In support of this the case of *Perkins vs. Spencer*, 121 U. 468, 243 P. 2nd 446, is cited:

"The notice to quit is necessary to give rise to the cause of action. When a landlord commences suit without first terminating the tenancy by giving proper notice to quit, the tenant can certainly appear and show that his tenancy has not been terminated by proper notice." 121 U. 468, 243 P. 2nd 446. See also *Erisman v. Overman* 11 U. 2nd, 258, 358 P. 2nd 85.

POINT III

PLAINTIFF'S ACTION SHOULD BE UPHOLD

The case of *Perkins v. Spencer* referred to above and cited on page 4 and 5 of Appellants' brief is distinguishable on its facts from Respondent's situation herein. In the *Perkins v. Spencer* case a second action (R-81) was never commenced nor was the original action amended (R-12 and R-27). The court rightly held in the *Perkins v. Spencer* case referred to above that the tenancy was not terminated by proper notice to quit.

The requirements for establishing unlawful detainer were properly complied with by the Respondent herein.

POINT IV

IMPROPER NOTICE OF JUSTIFICATION OF SURETIES

Notice of Supersedeas Bond must be given to Respondent by Appellants after Notice of Appeal. Appellant filed

their notice of appeal on January 10, 1966. Respondent received a notice to justify sureties on January 3, 1966. Thereafter, no notice for justification of sureties was filed.

In support of this the case of Fisher v. Bylund et al, 97 U. 463, 93 P2d 737, is cited:

"It is our opinion that under our statutes a filing (of the undertaking) before serving of notice of appeal is a nullity."

POINT V

SURETIES ARE INSUFFICIENT

On Feb. 7th, 1966 the Honorable Bryant H. Croft heard the question of the sufficiency of Appellant's sureties, (R-95). He held that a supersedeas bond double the amount of the judgment, ie, \$852.04, plus, was sufficient. Respondent argued, (R-53), that the house was threatened with foreclosure, and thus the sureties were wholly insufficient.

Rule 73(d) of the Utah Rules of Civil Procedure, 1953, provides ". . . the amount of the supersedeas bond shall be fixed at such sum to cover) . . . *damages for delay.*"

CONCLUSION

The court did not err in considering as valid the plaintiff's notice to quit served on the 17th day of August,

1965, because the action commenced on November 2, 1965.
This case should be upheld.

Respectfully submitted,

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Served by mailing copy to Horace J. Knowlton, 214
Tenth Avenue, Salt Lake City, Utah, Attorney for the de-
fendants, this 28th day of April, 1966, postage prepaid.

DEL B. ROWE