

1991

Mark Plaskon v. Darwin S. Hayes, Beth Hayes, Duane H. Jenkins, Carma Jenkins, dba Double D Storage Garages : Brief in Opposition to Certiorari

Utah Supreme Court

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John T. Caine; Richards, Caine & Allen; Attorneys for Respondent.

James B. Hanks; Kipp & Christian; Attorneys for Petitioners.

Recommended Citation

Legal Brief, *Plaskon v. Hayes*, No. 910563.00 (Utah Supreme Court, 1991).

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UTAH SUPREME COURT
BRIEF.

IN THE UTAH SUPREME COURT

MARK PLASKON, :
Plaintiff/Respondent. : *910563*
vs. :
DARWIN S. HAYES, BETH HAYES, : Case No. 900587CA
DUANE H. JENKINS, CARMA JENKINS, :
dba DOUBLE D STORAGE GARAGES, :
Defendants/Petitioners. :

OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

APPEAL FROM A DECISION RENDERED BY THE HONORABLE
DOUGLAS L CORNABY, JUDGE OF THE SECOND JUDICIAL
DISTRICT COURT FOR DAVIS COUNTY, STATE OF UTAH,
SITTING WITHOUT A JURY, DISMISSING PLAINTIFF'S CASE
FOLLOWING A PARTIAL TRIAL HELD ON OCTOBER 4, 1990

JOHN T. CAINE and
RICHARDS, CAINE & ALLEN
Attorney for Respondent
2568 Washington Boulevard
Ogden, Utah 84401

JAMES B. HANKS, ESQ.
KIPP & CHRISTIAN, P.C.
Attorney for Petitioners
175 East 400 South, #330
Salt Lake City, Utah 84111-2314

JAN 17 1992

CLERK SUPREME COURT

IN THE UTAH SUPREME COURT

MARK PLASKON, :

Plaintiff/Respondent. :

vs. :

DARWIN S. HAYES, BETH HAYES, :

DUANE H. JENKINS, CARMA JENKINS, :

dba DOUBLE D STORAGE GARAGES, :

Defendants/Petitioners. :

Case No. 900587CA

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QUESTION PRESENTED

Whether there are special and important reasons for granting review by a Writ of Certiorari.

IN THE UTAH SUPREME COURT

MARK PLASKON,	:	
Plaintiff/Respondent.	:	
vs.	:	
DARWIN S. HAYES, BETH HAYES,	:	Case No. 900587CA
DUANE H. JENKINS, CARMA JENKINS,	:	
dba DOUBLE D STORAGE GARAGES,	:	
Defendants/Petitioners.	:	

OPINIONS BELOW

On November 22, 1991 the Utah Court of Appeals, in a unanimous decision reversed the Order and Judgment of the Trial Court. The Decision is attached as Appendix "A" and the Findings of Fact and Conclusions of Law of the Trial Court is attached as Appendix "B".

JURISDICTION

Plaintiff does not dispute the jurisdiction of this Court to consider a Petition for Writ of Certiorari to review an Order of the Utah Court of Appeals.

CONTROLLING STATUTES AND RULES

Utah Code Annotated Section 38-3-1 as amended (1953)

The text of this statute is set out verbatim in Appendix "C".

STATEMENT OF THE CASE

Disposition Below

This case arises out of the Plaintiff's claims against the Defendants as owners of a storage unit in Bountiful, Utah, wherein the allegation was that they improperly sold personal property stored in the storage unit without giving notice and without conducting a Sheriff's Sale pursuant to the provisions of Utah Code Annotated Section 38-3-1 as amended (1953).

The Trial was held in the Second Judicial District Court for Davis County, State of Utah before the Honorable Douglas L Cornaby, sitting without a jury.

That the Court entered its ruling October 31, 1990 and Plaintiff appealed to the Court of Appeals on November 20, 1990. The Court of Appeals reversed the Trial Court on November 22, 1991.

Statement of the Facts

The Plaintiff, in June of 1987, resided in Bountiful, Utah with an individual by the name of Paulette McFarland. (p. 9) At that time, the Plaintiff owned a large number of duck and game bird decoys which he utilized in a guide service guiding

individuals on private hunting trips in the Northern part of the State of Utah. (Tp. 10-11)

That difficulties arose between Plaintiff and McFarland, causing McFarland to move all of the Plaintiff's belongings, including the decoys, from their residence to a storage unit.

That on or about July 11, 1987, McFarland went to the Double D Storage Unit owned by the Defendants in this action and moved Plaintiff's property into a particular unit. (Tp. 68-69)

That at that time, a document entitled "Double D Storage Garage Rental Agreement" was signed. The agreement, although filled out by McFarland, indicated that "I, Mark J. Plaskon, agree to rent storage unit 108 for a period of one (1) month for a total of \$40, plus \$2 key deposit". The document was actually filled out by Paulette McFarland (Tp. 35) in Plaintiff's name and countersigned by Carma Jenkins, one of the owners of Double D Storage Garage. (Tp. 69)

In addition, McFarland told Jenkins that while she would pay the first months' rent, Plaintiff would be responsible for any thereafter and this was acceptable with Jenkins and she knew that Plaintiff was to be the responsible party. (Tp. 69-70)

That following this initial conversation and the initiation of the storage unit, the Defendants had no further contact with Paulette McFarland and on various occasions, sent notices of delinquency to Plaintiff. (Tp. 71)

That after a number of unsuccessful attempts to contact the Plaintiff about delinquent rent through the period of 1987 and

1988, the decision was made to sell the contents of the unit. All four (4) of the Defendants made the unanimous decision. (Tp. 76)

That no notice was ever sent to the Plaintiff concerning the sale of the property pursuant to Section 38-3-1 UCA (1990), nor was there a Sheriff's Sale or any public notice of a sale. (Tp. 78) Simply a private sale to an individual named James Kenneth Oswald, which took place in June of 1988 for \$500. (Tp. 54-56)

That the matter came on for Trial on October 4, 1990. That the parties were directed by Judge Cornaby to consider the issue of standing of the Plaintiff initially with witnesses and that the decision would be made as to whether or not he had such standing before the damage issue would be determined. (Tp. 3) In furtherance of that request, the Plaintiff called Plaintiff, Paulette McFarland, Carma Jenkins, Darwin Hayes and Duane Jenkins, all of whom acknowledged that while Paulette McFarland had actually filled out the rental agreement, it was filled out in Plaintiff's name and that all parties to the transaction knew that Plaintiff was the responsible party for the payment of rent on the storage unit. In fact, counsel for the Defendants admits in the opening portions of his closing statement,

"Your honor, I am going to agree with Mr. Caine on a lot of what he said, particularly involving whether or not the parties looked to Mr. Plaskon as a liable party under this contract. I think that has been clearly established." (Tp. 111)

The Court however, determined that there was no contract between Plaintiff and Defendants, but that the contract was between McFarland and Double D. That Plaintiff could only look to

McFarland and that the Defendants had violated Section 38-3-1 UCA in not giving the Plaintiff proper notice of the sale and therefore, based on the finding of no standing, the case was dismissed.

It is from that decision that the Plaintiff filed an appeal which was heard by the Court of Appeals. On November 22, 1991 the Court unanimously reversed Judge Cornaby.

ARGUMENT

THE UTAH COURT OF APPEALS APPROPRIATELY REVERSED THE TRIAL COURT'S DECISION AND ACCORDINGLY THIS COURT SHOULD DENY DEFENDANTS' PETITION FOR A WRIT OF CERTIORARI AS THERE IS NO SPECIAL AND IMPORTANT REASON FOR GRANTING REVIEW BY A WRIT OF CERTIORARI

Review by a Writ of Certiorari is a matter of judicial discretion, not a right, and is granted only for "special and important reasons". Utah Supreme Court Rule 43. Rule 43 states the type of reasons that should be considered for granting Certiorari. This Court may review a Court of Appeals case when the Court decision conflicts with another Court of Appeals decision or a decision of this Court, or when the Court of Appeals makes an extreme departure from the usual course of judicial proceedings or when the decision involves an important question of law which has not been, but should be, settled by this Court. This case does not fall within any of these categories.

This is a simple case of the Plaintiff contracting with the Defendants (which was admitted by all parties) for the use of a storage unit. Plaintiff defaulted in the payment and the

Defendants simply did not follow the appropriate procedures set forth in the statutory provisions of the law to sell his personal property.

The Trial Court found that indeed the Defendants had not complied with the terms of the Utah statute, but determined that there was no "privity of contract" between the Plaintiff and Defendants and therefore, he could not proceed. This finding was in direct contradiction of the testimony of all the parties and the admission on behalf of the Defendants' counsel in the arguments at the conclusion of the case.

While it was true that the actual agreement was signed by the Plaintiff's then girlfriend, the agreement was in Plaintiff's name, he acknowledged that he was bound, all other correspondence concerning the Plaintiff's default was directed to him, it was Plaintiff's property that was stored in the unit and Defendants, themselves, acknowledged that they believed that Plaintiff had a contract with them and that he was responsible for payment to them. There was simply no basis for Judge Cornaby, under the overwhelming weight of the evidence, to simply conclude for his own reasons that there was no contract and the Court of Appeals, after reviewing the record, found that he had committed reversible error in so finding.

This is simply a case where the Trial Court erred on the facts and on the law on that portion of Plaintiff's claim wherein a contract was established between the parties. The Appellate Court easily recognized this and in an unanimous decision reversed

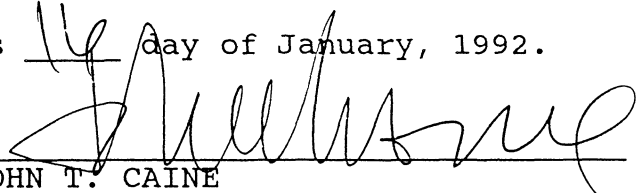
and on the basis that the Trial Court had already determined that the Defendants had not complied with the provisions of Utah Code Annotated, Section 38-3-1 as amended (1953) in selling the property and that the matter be remanded for evidentiary hearing on the issue of Plaintiff's damages.

There are no special or compelling reasons to grant a Writ. This is not new law, nor does it contradict existing law, but is simply a situation where a Judge made an error on the facts and the Appellate Court correctly reversed it.

CONCLUSION

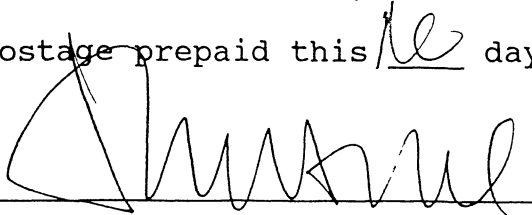
Because there are no "special and important reasons" for granting a Petition for Writ of Certiorari it should therefore, be denied.

RESPECTFULLY SUBMITTED this 14 day of January, 1992.


JOHN T. CAINE
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Opposition to counsel for the Defendants, James B. Hanks, Attorney at Law, 175 East 400 South, Suite #330, Salt Lake City, Utah 84111-2314, postage prepaid this 14 day of January, 1992.



APPENDIX

APPENDIX "A"

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Gary Thomas
Vice President
Clerk of Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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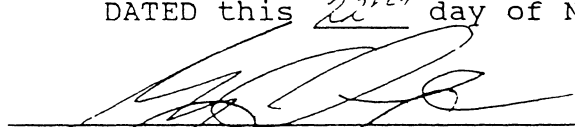
Mark Plaskon,)	ORDER OF REVERSAL
)	
Plaintiff and Appellant,)	
)	Case No. 910124-CA
v.)	
)	
Darwin S. Hayes, et al.,)	
)	
Defendant and Appellee.)	

Before Judges Orme, Garff, and Jackson (Rule 31).

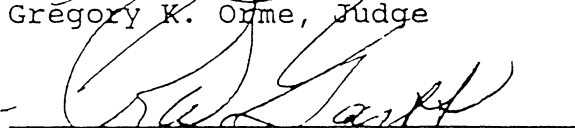
This matter is before the court pursuant to Utah R. App. P. 31.

We determine that the trial court erred in finding that no contract existed between plaintiff and defendants. Based on the court's further finding that the sale was not conducted pursuant to Utah Code Ann. § 38-3-1, et seq. (1988), we reverse the judgment for defendants and remand for a determination of the damages incurred by plaintiff.

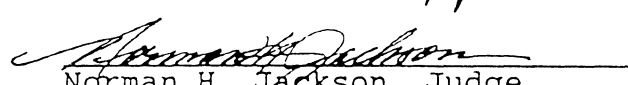
DATED this 22nd day of November, 1991.



Gregory K. Orme, Judge



Reginal W. Garff, Judge



Norman H. Jackson, Judge

NOV 27 1991

APPENDIX "B"

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DAVIS COUNTY, UTAH

OCT 31 11 31 AM '90

CLERK, E. COURT
BY _____
DE. _____

JAMES B. HANKS - #4331
KIPP AND CHRISTIAN, P.C.
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111-2314
Telephone: (801) 521-3773

Attorney for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

MARK PLASKON,	:	
	:	
Plaintiff,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
vs.	:	
	:	
DARWIN S. HAYES, BETH HAYES,	:	
DUANE H. JENKINS, CARMA	:	Case No. 890746591CV
JENKINS, dba DOUBLE D	:	
STORAGE GARAGES,	:	
	:	
Defendants.	:	

This matter came before the court for trial on Thursday, October 4, 1990. The defendants were represented by James B. Hanks of Kipp and Christian, P.C. The plaintiff was represented by John T. Caine. The court, having considered the evidence presented and being fully informed in the premises, now makes the following:

FILMED

FINDINGS OF FACT

1. The defendants are the owners of the Double D Storage Garages located in Davis County, State of Utah.

2. On July 11, 1987, Paulette McFarland signed a rental contract with the defendants for the rental of Unit 108 of the Double D Storage Garages. At the time the document was signed, she made the defendants aware that the property to be stored therein belonged to Mark Plaskon. She further stated that she would only be responsible for the first month's rent (\$40.00) and what happened thereafter would be between the defendants and Mr. Plaskon. All parties understood that.

3. Plaintiff's Exhibit "2" was signed by Paulette McFarland, not Mark Plaskon.

4. The defendants expected the plaintiff to show up after the first month and begin paying monthly rent or move his things out. The plaintiff did not do so. His property remained in Unit 108 until November, 1988 when he bought a home and moved in with Paulette McFarland. At this time, much of his furniture and clothing had been moved out of the storage shed, leaving only various duck decoys.

5. The plaintiff never contacted the defendants to establish a rental contract concerning Unit 108.

6. The plaintiff was sent notices of Past-Due rent on a regular basis but never made any response.

7. The defendants sent plaintiff a Notice of Sale of the contents of Unit 108 to 111 Wicker Lane, Bountiful, Utah. The notice should have been addressed to 14 Acorn Drive in North Salt Lake because an earlier notice was sent to this address (Notice of May 23, 1988) and it did reach him.

8. The defendants checked Unit 108 from time-to-time. When they checked with the plaintiff's former employer and learned that he was no longer employed, they checked the unit and found that the furniture had been moved out and nothing but decoys remained.

9. The documents set forth as plaintiff's Exhibit "1" were sent to the plaintiff with the notation "we do have a smaller unit if you still want one. We need to hear from you." This notice was sent on May 23, 1988. The plaintiff did not respond.

10. The court is aware of a conversation which the plaintiff claimed took place in which he made arrangements to pay the balance of rents due in the fall of 1988. The court does not believe that such an arrangement was made because of the way the defendants conducted their business. The court does not believe that the defendants

would let things go for approximately 14 months without any rent and just say " Well, sure. Contact us when you get around to it, to having some money." They testified that's not the way they do business.

11. The plaintiff never did sign a contract with the defendants or enter into an oral or written agreement with them. The plaintiff did not pay the defendants any amounts for rent.

CONCLUSIONS OF LAW

1. The plaintiff did not have a rental contract for the storage of his personal property with the defendants.

2. Section 38-3-1 of Utah Code Annotated sets forth the procedure for executing on a lien concerning property held in a self-service storage facility.

3. Because of a nonpayment of rent, the defendants had a lien on the contents of Unit 108 in the Double-D Storage Garage.

4. When the defendants disposed of the property contained in Unit 108 of the Double D Storage facility, they did not follow the procedures set forth in the above-named statute.


5. Paulette McFarland was not an agent of the

plaintiff nor were Ms. McFarland's rental agreements with the defendants ratified by the plaintiff. The defendants had a contract with Paulette McFarland, not the plaintiff. Any complaint that the plaintiff has is with Paulette McFarland.

6. There is no privity of contract between the plaintiff and the defendants.

DATED this 3/ day of October, 1990.

BY THE COURT:


HONORABLE DOUGLAS L. CORNABY

CERTIFICATE OF MAILING

MAILED, first-class, postage prepaid on the 19
day of October, 1990, a true and correct copy of the
foregoing Findings of Fact and Conclusions of Law, to the
following:

John T. Caine
RICHARDS, CAINE & ALLEN
2568 Washington Boulevard
Ogden, Utah 84401

Kirsten R. Blumley

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

OCT 31 11 36 AM '90

CLERK, 2ND DIST. COURT

BY DEPT. CLERK

JAMES B. HANKS - #4331
KIPP AND CHRISTIAN, P.C.
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111-2314
Telephone: (801) 521-3773

Attorney for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

MARK PLASKON,

Plaintiff,

vs.

DARWIN S. HAYES, BETH HAYES,
DUANE H. JENKINS, CARMA
JENKINS, dba DOUBLE D
STORAGE GARAGES,

Defendants.

:
:
:
:
:
:
:
:
:
:
:

ORDER OF DISMISSAL

Case No. 890746591CV

This matter came before the court for trial on the 4th day of October, 1990. The plaintiff was represented by John T. Caine. The defendants were represented by James B. Hanks of Kipp and Christian, P.C. The court, having heard the evidence produced at trial and being fully informed in the premises:

ORDERS, ADJUDGES AND DECREES:

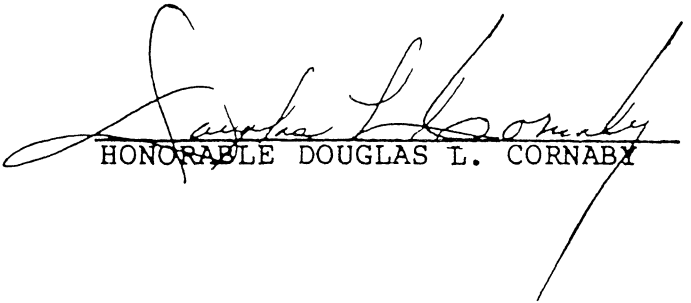
Plaintiff's complaint against the defendants is hereby dismissed because of a lack of contractual privity

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between the parties.

DATED this 31 day of October, 1990.

BY THE COURT:



HONORABLE DOUGLAS L. CORNABY

CERTIFICATE OF MAILING

MAILED, first-class, postage prepaid on the 19
day of October, 1990, a true and correct copy of the
foregoing Order, to the following:

John T. Caine
RICHARDS, CAINE & ALLEN
2568 Washington Boulevard
Ogden, Utah 84401

Kinden R. Blingdy

APPENDIX "C"

CHAPTER 3

LESSORS' LIENS

Section		Section	
38-3 1	Lien for rent due	38 3 6	Execution of writ of attachment
38-3 2	Priority of lessor's lien	38 3 7	Release of attachment — Bond
38-3 3	Attachment in aid of lien	38 3 8	When chapter not applicable
38-3 4	Attachment — Affidavit and bond		
38-3 5	When attachment will issue — De termination of priorities		

38-3-1. Lien for rent due.

Except as hereinafter provided, lessors shall have a lien for rent due upon all nonexempt property of the lessee brought or kept upon the leased premises so long as the lessee shall occupy said premises and for thirty days thereafter

History R S 1898 & C L 1907, § 1407, C.L. 1917, § 3776, L 1931, ch 7, § 2, R.S 1933 & C 1943, 52 3 1	Cross References — Attachment, Rules of Civil Procedure, Rule 64C Exemptions from execution, § 78 23
--	--

NOTES TO DECISIONS

ANALYSIS

Attachment and duration of lien
Cumulative or executive remedy
Duration of lien
Exemptions
Extent of lien
Priorities
Privity
Release of exempt property
Thirty-day period
Waiver or loss of jurisdiction

Attachment and duration of lien

Lessor's statutory lien for rent attaches from the beginning of tenancy and continues for thirty days after occupation by lessee ceases *Eason v Wheelock*, 101 Utah 162, 120 P 2d 319 (1941)

Cumulative or executive remedy

The remedy given by this section and §§ 38 3 2 to 38 3 8 is cumulative, and landlord may still proceed in equity to foreclose his lien, notwithstanding its provisions *Houston Real Estate Inv Co v Hechler*, 44 Utah 64, 138 P 1159 (1914)

Duration of lien

By the express terms of this section, the lessor's statutory lien terminates 31 days after the lessee has quit the premises to preserve their liens lessors must comply with the terms established by §§ 38 3 3 to 38 3 6 *Citizens Bank v Elks Bldg, N V*, 663 P 2d 50 (Utah 1983)

The landlord's possession of lessee's property left on the premises after the lessee has quit the premises did not extend the landlord's statutory lien beyond the 30 day period *Citizens Bank v Elks Bldg, N V*, 663 P 2d 56 (Utah 1983)

Exemptions

Alfalfa seed and hay held exempt under former §§ 104 37 13, 104 37 14, Code 1943 (now repealed) *Ray v Cox*, 83 Utah 499, 30 P 2d 1062 (1934)

Extent of lien

Landlord's lien is only for amount of rent due and may not include attorney's fee *Mar Jane Stevens Co v Foley* 67 Utah 578, 248 P 815 (1926)

Priorities

The lessor's statutory lien for rent is subordinate to a purchase money mortgage which mortgage, though unrecorded, is valid as be-

3-4. Attachment — Affidavit and bond.

The lessor shall before the issue of such writ of attachment file a complaint, an affidavit duly sworn to setting forth the amount of rent due over and above all offsets and counterclaims and a brief description of the leased premises, and shall further state, under oath that such writ of attachment is not brought out for the purpose of vexing or harassing the lessee; and the person applying for such writ of attachment shall execute and file a bond as in other cases of attachment.

Story: R.S. 1898 & C.L. 1907, § 1410;
1917, § 3779; R.S. 1933 & C. 1943,
4.

NOTES TO DECISIONS

ANALYSIS

affidavit requirements.
Self-help eviction is tort.

affidavit requirements.
Affidavit by landlord which states that writ
brought "to hinder, delay or defraud any
one or of said defendants" does not comply
with this section. Freeway Park Bldg., Inc. v.
Northern States Wholesale Supply, 22 Utah 2d 266,
522 P.2d 778 (1969).

Self-help eviction is tort.

Where a tenant has not abandoned the premises, a landlord commits a tort if he disregards judicial process and resorts to self-help by evicting a tenant and seizing the tenant's property. Pentecost v. Harward, 699 P.2d 696 (Utah 1985).

COLLATERAL REFERENCES

44 Am. Jur. 2d. — 49 Am. Jur. 2d Landlord and Tenant § 692.
Utah — 52 C.J.S. Landlord and Tenant

Key Numbers. — Landlord and Tenant
260.

3-5. When attachment will issue — Determination of priorities.

On the filing of such complaint, affidavit and bond it shall be the duty of the court wherein the same are filed to issue a writ of attachment to the sheriff or officer, commanding him to seize the property of the defendant subject to all such liens, or so much thereof as will satisfy the demand, and to make a determination of the priorities of the claims, liens, and security interests in the property.

Story: R.S. 1898 & C.L. 1907, § 1411;
1917, § 3780; R.S. 1933 & C. 1943,
L. 1977, ch. 272, § 51.

COLLATERAL REFERENCES

C.J.S. — 52 C.J.S. Landlord and Tenant § 572. Key Numbers. — Landlord and Tenant 260.

38-3-6. Execution of writ of attachment.

It shall be the duty of the officer to whom the writ of attachment is directed to seize the property of such lessee subject to such lien, or as much thereof as shall be necessary to satisfy such debt and costs, and to keep the same until the determination of the action, unless the property is sooner released by bond or the attachment is discharged.

History: R.S. 1898 & C.L. 1907, § 1412;
C.L. 1917, § 3781; R.S. 1933 & C. 1943,
52-3-6.

38-3-7. Release of attachment — Bond.

A bond for the release of the attached property may be given, and motion to discharge the attachment may be made, as provided in the Code of Civil Procedure in cases of attachment.

History: R.S. 1898 & C.L. 1907, § 1413; Cross-References. — Attachment, Rules of
C.L. 1917, § 3782; R.S. 1933 & C. 1943, Civil Procedure, Rule 64C.
52-3-7.

NOTES TO DECISIONS

Release of property.

Where exempt property is attached by lessor claiming statutory lien, court does not act in excess of jurisdiction in releasing such prop-

erty without bond as required by this section and former section 104-18-22, Code 1943 (now repealed). Ray v. Cox, 83 Utah 499, 30 P.2d 1062 (1934).

38-3-8. When chapter not applicable.

This chapter shall not be applicable to a written lease for a term of years in which, as part of the consideration thereof, the lessee or assigns shall erect a building or improvements upon the leased premises.

History: R.S. 1898 & C.L. 1907, § 1415;
C.L. 1917, § 3784; R.S. 1933 & C. 1943,
52-3-8.

COLLATERAL REFERENCES

Am. Jur. 2d. — 49 Am. Jur. 2d Landlord and Tenant § 336. Key Numbers. — Landlord and Tenant 241.
C.J.S. — 52 C.J.S. Landlord and Tenant § 620.