

1983

Boyd Corbett, Keith Gurr and Utah Ranch Lands,
A Partnership v. Lee A. Fitzgerald, Helen Fitzgerald,
His Wife, Perry G. Fitzgerald And Carolyn Fitz
Gerald, His Wife : Brief of Defendants-
Respondents Lee A. And Helen Fitzgerald

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IN THE SUPREME COURT OF THE

STATE OF UTAH

WILLIAM CORRELL, KEITH GIBB and
UTAH RANCH LANDS, a partnership,

Plaintiffs and
Appellants

vs.

No. 19225

LEE A. FITZGERALD, HELEN FITZGERALD,
his wife, PERRY G. FITZGERALD and
CAROLYN FITZGERALD, his wife,

Defendants and
Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS
LEE A. AND HELEN FITZGERALD

Appeal from Judgment of the Fourth
Judicial District Court of Utah
County, State of Utah, Honorable
J. Robert Bullock, Judge

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FILED

SEP 30 1983

Clark, Supreme Court, Utah

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UTAH RANCH LANDS, a partnership,

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NATURE OF THE CASE

This is an action by plaintiffs-appellants as buyers under a series of contractual agreements with the defendants-respondents, Lee A. and Helen Fitzgerald, wherein plaintiffs-appellants sought to have the trial court order specific performance of the contracts and agreements, or in the alternative, to award damages. Defendants-respondents herein, Lee A. Fitzgerald and Helen Fitzgerald, brought a Counterclaim asking for a determination that the plaintiffs-appellants had breached their contractual obligations under the various contracts and terminating any interest of plaintiffs-appellants

in and to said properties described in the deed of said appellants.

DISPOSITION TO THE LOWER COURT

The trial court ruled that the plaintiffs-appellants had failed to perform under the May 1977 contract and the September 1977 option and failed to pay a note for the balance of the August 1977 purchase. The trial court terminated all further interest of the plaintiffs-appellants in the properties described in the May 1977 contract and September 1977 option, but it awarded the plaintiffs-appellants a money judgment for the amount by which plaintiffs-appellants had made payment in excess of the value of the properties deeded to plaintiffs-appellants prior to the commencement of action.

After defendants respondents', Lee A. Fitzgerald and Helen Fitzgerald, counsel submitted proposed Findings of Fact, Conclusions of Law and Judgment to the trial court, plaintiffs-appellants filed an OBJECTION TO, OR IN THE ALTERNATIVE, A MOTION TO ALTER OR AMEND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT OF LEE A. FITZGERALD (R. 759-761), and a MOTION FOR NEW TRIAL (R. 762-764). Plaintiffs Appellants also filed a Notice of Appeal (R. 767-768).

The trial court signed the Findings of Fact, Conclusions of Law and Judgment (R. 775-802) on June 25, 1982. On July 13, 1982, plaintiffs-appellants filed a WITHDRAWAL OF MOTION FOR NEW TRIAL (R. 808-809) and a WITHDRAWAL OF PLAIN

OBJECTION AND MOTION TO ALTER OR AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT OF LELAND A. FITZGERALD (R. 810-811). On July 13, 1982, plaintiffs-appellants filed a second Notice of Appeal to the Utah Supreme Court (R. 812-813) on the issues raised in the trial.

This Court dismissed the appeals with prejudice by its ruling on the 1st day of November, 1982 in Case Nos. 18529 and 18594. A copy of said ruling is attached herein as Exhibit 1.

Defendants-Respondents, Perry and Carolyn Fitzgerald, brought an Order to Show Cause against the plaintiffs-appellants pertaining to the judgment rendered against plaintiffs-appellants and in favor of Perry and Carolyn Fitzgerald (R. 821-823). The trial court held hearings upon said Order to Show Cause on the 26th day of November, 1982 (R. 840), the 6th day of January, 1983 (R. 864-865), the 20th day of January, 1983, and the 1st day of February, 1983 (R. 919-920).

Defendants respondents, Lee A. Fitzgerald and Helen Fitzgerald, were not served with any pleadings pertaining to any of said hearings subsequent to the dismissal by the Supreme Court of the plaintiffs-appellants' appeal, but appeared with counsel on hearings noticed up by the trial court for the 20th day of January, 1983 (R. 865) and February 1, 1983.

The trial court entered an Order and Judgment (R. 929-933) denying any relief to the plaintiffs-appellants as

against defendants Lee A. Fitzgerald and Helen Fitzgerald. The trial court affirmed the judgment entered against the plaintiffs and ruled in favor of Perry Fitzgerald and Carolyn Fitzgerald on their Counterclaim, amending the said judgment from an order of restoration of assets to a money judgment.

Plaintiffs-Appellants filed a third Notice of Appeal (R. 940-941) on May 18, 1983 as Case No. 19825.

RELIEF SOUGHT ON APPEAL

Defendants Respondents, Lee A. Fitzgerald and Helen Fitzgerald, ask to have the appeal filed in this matter on the 18th day of May, 1983 (R. 940-941), declared to be null and void and dismissed for the reason that the matters were previously determined adverse to the plaintiffs-appellants in the first appeal of this matter, and to hold that the matter is governed by the principles of res judicata and the law of the case.

In the alternative, Defendants respondents, Lee A. Fitzgerald and Helen Fitzgerald, seek to have this Court rule that the decision rendered by the trial court on the 25th day of June, 1982 should be affirmed as being fully supported by the evidence and the law.

STATEMENT OF FACTS

Plaintiffs Appellants' Statement of Facts in the

Let it be stated that this matter is a mixture of the facts interpreted in a light most favorable to the position that plaintiffs-appellants wish this Court to follow and not in a light favorable to the sustaining of the trial court's rulings. The Statement of Facts is in large part unreferenced and does not meet the requirements of prior rulings of this Court on appeal that factual determinations must be viewed to determine if there is adequate evidentiary support to sustain the trial court's determination.

These defendants respondents do not accept the Statement of Facts presented by the plaintiffs-appellants, and in accordance with Rule 75(p)(2), these defendants-respondents submit the following Statement of Facts.

Defendants Respondents, Lee A. Fitzgerald and Helen Fitzgerald, are the owners of interest in land in Cedar Valley, Utah County, comprising over 15,000 acres. (R. 995:15-19; 1001:8-13; Ex. 2). Those acquisitions by defendants respondents, Lee A. Fitzgerald and Helen Fitzgerald, were obtained from purchases from a variety of sources: one purchase of 12,940 acres was obtained from a purchase from Richard L. McKinney, Helen McKinney Stassi, and Johnell McKinney Yurka (Ex. Nos. 1 and 2); another parcel was obtained from Fern Loveless (Ex. No. 63); and another quantity was obtained from Robert Clyde (R. 995:15-19). On February 1, 1977, these defendants respondents entered into an Earnest

Money Receipt and the original Earnest Money Agreement and Keith Gurr dba Utah Son Valley. As will be evidenced in later parts of this Brief, the original Money Agreement was apparently destroyed and only a photocopy, largely illegible, entered as Ex. 4 was presented to the trial court. An earnest money deposit of \$10,000.00 was given as earnest money at the time of the execution of that agreement. (Testimony of Keith Gurr, R. 122:14-18; Testimony of Boyd Corbett, R. 1194:4 15, 1195:11 22, 1196:18 20). That Earnest Money required a payment of \$100,000.00 on April 1, 1977 and \$100,000.00 payable on June 1, 1977. It contained a provision that if the seller has to borrow \$100,000.00 on April 1st against the property, he would extend the time for payment date to May 1st and July 1st of the respective \$100,000.00 payments. On April 1, 1977, the uncontroverted evidence is that no \$100,000.00 payment was made, nor were there funds available (Testimony of Lee Fitzgerald; R. 1250:23 30; 1251:1-18; Ex. 4, ledger sheet of Valley Title). The testimony of Boyd Corbett was that after the \$10,000.00 down payment on the earnest money, all payments were channeled with Valley Title in Provo, Utah (Testimony of Boyd Corbett, R. 1199:23 26). At the conclusion of the grace period, May 1, 1977, the amount of \$100,000.00 due under the earnest money was not paid. (R. Testimony of Boyd Corbett, R. 1193:18-20). On or about May 1, 1977, Lee A. Fitzgerald met with Keith Gurr at the Draper State Bank for the payment

\$100,000.00 on the representation of Keith Gurr that the \$100,000.00 funds were being transmitted that day to the bank for such payment. (R. 1251:19-30; 1252:1-25; 1253:1-19). After waiting most of one business day and a part of the next business day, Keith Gurr informed Lee A. Fitzgerald that since they had not been able to make the \$100,000.00 payment, Lee A. Fitzgerald should keep the \$10,000.00 earnest money deposit and the Earnest Money Receipt and Offer to Purchase of February 1, 1977 (Ex. 4) expired by its own terms. (Testimony of Lee A Fitzgerald, R. 1252:1-25; 1253:1-19)

On or about May 13, 1977, these defendants-responses, Lee A. Fitzgerald and Helen Fitzgerald, entered into a Uniform Real Estate Contract with G. Boyd Corbett and Keith L. Gurr (Ex. 3) for the sale to Corbett and Gurr of 3140 acres, being a part of the land described in Exhibit 4. (Testimony of Lee A. Fitzgerald, R. 1255:11-17). That Uniform Real Estate Contract required a payment of \$136,000.00 cash and annual payments thereafter and provided for the transfer of title to 380 acres at the time of closing described as the West half of Section 33, T7S, R2W, and the Northeast quarter of the Northeast quarter and the North half of the Southeast quarter of the Northeast quarter of Section 10, T8S, R2W as shown in the Addendum to the contract (Ex. 3, page 4). The closing for the Uniform Real Estate Contract (Exhibit 3) dated May 13, 1977 is hereinafter referred to as the May 1977 con-

tract. The closing statement for the transaction (Ex. 34) was dated June 7, 1977. At the time of closing, the buyers were to have made payment to the defendants respondents, Lee A. Fitzgerald and Helen Fitzgerald of \$136,000.00 and buyers were to obtain title to the 389 acres. However, on the date of closing, the buyers informed Mr. Fitzgerald that they did not have the \$136,000.00 and represented that they would need a 30 day note on \$62,556.00 of said down payment (Ex. 6; Closing Sellers Statement, Ex. 34). The balance of the \$136,000.00 was to have been paid at the time of closing but was not paid at that time. On August 24, 1977 buyers made the first payment to the Fitzgeralds under the contract. (A check from Valley Title Ex. 25 as shown on the Valley Title ledger sheets, Ex. 54). Another payment of \$34,483.00 was paid on September 2, 1977. The promissory note (Ex. 5) dated June 7, 1977 for \$62,556.00 in accordance with the closing statement (Ex. 34) was not paid on July 15, 1977, its due date.

In August 1977, Lee A. Fitzgerald and Helen Fitzgerald sold Corbett and Gurr a parcel of 320 acres. At the time of closing as shown by the closing statement (Ex. 36), Corbett and Gurr did not have sufficient funds to make payment of the entire purchase price and payment was made to Lee A. Fitzgerald of \$31,861.50 (Ex. 40) and buyers executed a promissory note for \$3,840.00. (Testimony of Joyce Clark, K. 1091:9-30, 1092:1-6). On September 7, 1977, Lee A. Fitzgerald

Lee A. Fitzgerald entered into a Uniform Real Estate Contract with plaintiffs appellants, Corbett and Gurr, for an additional 2629 acres (Ex. 69).

At the same time as the execution of the September 7, 1977 Uniform Real Estate Contract, Lee A. Fitzgerald and Helen Fitzgerald granted to the plaintiffs-appellants, Corbett and Gurr, an option to purchase an additional 6368 acres (Ex. 6). The option was exercisable January 15, 1978.

At the time of the execution of the September 1977 contract and the September 7, 1977 option, the promissory note, still unpaid as a part of the down payment on the May 1977 contract, was renewed (Ex. 56) including accrued interest. The new note being in the principal amount of \$63,936.51. The note still unpaid for \$3,840.00 remaining on the August sale of 320 acres was renewed in the amount of \$1,956.00, including accrued interest. Both of the promissory notes were made payable on or before January 2, 1978.

On January 2, 1978 neither promissory note was paid although demands for payment were made on the escrow agent, Joyce Clark at Valley Title Company.

On January 15, 1978 the exercise date of the option granted September 7, 1977 (Ex. 6), no tender of the \$100,000.00 payment was made either by Corbett and Gurr or by the escrow agent, Joyce Clark at Valley Title (R. 1044:28-30, 1045:1-3, 1280:16-30; testimony of Joyce Clark). Shortly

after January 15, 1978, Lee A. Fitzgerald communicated with Joyce Clark to see if the \$100,000.00 was there for the exercise of the option and was informed that it was not. He then asked if there were sufficient funds in the escrow to make payment of the \$63,000.00 note (Ex. 56) and was informed by Joyce Clark there was not (R. 1280 1281). He then asked if there were sufficient funds to pay the \$3,856.00 note (Ex. 55) and was informed by Joyce that she could not make payment without authorization from Corbett and Gurr.

On March 6, 1978, plaintiffs-appellants, doing business as Utah Ranchlands, entered into a Uniform Real Estate Contract with Perry G. and Carolyn Fitzgerald (Ex. 8). That Uniform Real Estate Contract included 2240 acres of the property purchased by Corbett and Gurr under the May 1977 contract (Ex. 3).

When the annual payment due under the May 1977 contract was not paid on June 1, 1978, Lee Fitzgerald sent a demand letter to the plaintiffs for the payment on June 29, 1978 (Ex. 51).

Although it was past the grace period provided under the May 1977 contract, on July 10, 1978, an extended meeting was held at the offices of Valley Title with Corbett and Gurr and Lee A. Fitzgerald. During that meeting Lee A. Fitzgerald made demands for the payment of the annual payment before he would release any additional ground. Corbett and

Gurr did not tender funds for the annual payment of principal with accrued interest at said meeting. (R. 1111:1-20). The records of Valley Title show that there were not sufficient funds in Valley Title on July 10, 1978 to make the payment (Ex. 54, page 4). On July 21, 1978 plaintiffs made a demand upon defendants-respondents, Lee A. Fitzgerald and Helen Fitzgerald, for a credit of \$10,000.00 that had been the earnest money on the February 1, 1977 earnest money contract, and also made a demand for conveyance of 390 acres as a condition of their payment of the annual payment under the May 1977 contract (Ex. 17, Letter from Valley Title with attached letter from Corbett and Gurr).

On July 31, 1978, Lee A. Fitzgerald sent a letter to Corbett and Gurr offering to rewrite the original May 1977 contract on the original terms provided they could make payment within five days. (Ex. 52).

On January 15, 1979 Lee A. Fitzgerald again offered to rewrite the May 1977 contract for 3140 acres on the original terms provided they would make payment within five days. (Ex. 53). On January 16, 1979, Lee A. Fitzgerald and Helen Fitzgerald recorded a Notice of Termination of the May 1977 contract and sent notice to Corbett and Gurr of termination (Ex. 64).

No further payments were paid by Corbett and Gurr on the May 1977 contract and no payments were ever paid on the

September 1977 option. The option was not exercised. The option form Real Estate Contract entered into on September 27, 1977 (Ex. 69) was in full force and effect and current and not a part of the litigation.

ARGUMENT

POINT I

THE APPEAL FILED HEREIN VIOLATES THE PRINCIPLES OF RES JUDICATA AND THE LAW OF THE CASE AND SHOULD BE DISMISSED.

On February 9, 1982 and 16, 1982, trial was held in this action. On May 4, 1982 Judge J. Robert Bullock filed his Memorandum Decision. (R. 734). Plaintiffs appellants prematurely filed an OBJECTION TO, OR IN THE ALTERNATIVE, A MOTION TO ALTER OR AMEND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT (R. 764) and a MOTION FOR NEW TRIAL (R. 762) on June 4, 1982 prior to the Findings or Conclusions being executed and filed. Then on June 16, 1982 before the trial court had ruled on the pending motions or entered its Findings and Conclusions, plaintiffs appellants filed their Notice of Appeal. (R. 767).

On June 29, 1982 the trial court filed its Findings of Fact and Conclusions of Law and Judgment. (R. 778, 795). Plaintiffs-appellants withdrew their MOTION FOR NEW TRIAL and OBJECTION TO, OR IN THE ALTERNATIVE, A MOTION TO ALTER OR

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT and filed a second Notice of Appeal on July 13, 1982. (R. 808, 810, 817).

On November 1, 1982 the Court dismissed that appeal with prejudice. (R. 837). At that point, the judgment rendered by the trial court became final.

The matter was brought before the trial court on Terry G. and Carolyn S. Fitzgerald's Order to Show Cause for enforcement of the judgment rendered in their behalf against plaintiffs appellants. At that proceeding, plaintiffs-appellants took issue with the judgment previously entered by the trial court. The trial court continued the matter to allow plaintiffs appellants to file appropriate pleadings to bring the matter before the trial court. (R. 840). No pleadings were filed. The trial court in its Minute Entry dated January 4, 1983 stated it would hear arguments on January 20, 1983 (later changed to February 1, 1983) on whether the trial court should amend the Judgment on its own initiative. (R. 865). At the hearing held on February 1, 1983, plaintiffs-appellants presented to defendants respondents a document entitled "Memorandum in Support of Correcting and/or Amended Judgment Leland Fitzgerald".

The proceeding before the trial court on February 1, 1983 was improper and not brought in accordance with the Utah Rules of Civil Procedure. These defendants respondents ob-

jected to the trial court's ruling. The trial court was without authority to grant the motion. The trial court's ruling was not a ruling on the merits, and the trial court's ruling was similarly improper.

Even if the trial court had granted plaintiffs appellants' motion properly, the trial court still could not have granted the relief plaintiffs appellants requested. Rule 60(a) of the Utah Rules of Civil Procedure provides for the means of correcting a judgment. But that rule only allows a correction of a judgment to properly reflect its decision. As stated in *Richards v. Billway*, 84 Utah 314, 471 P.2d 113 (1970) (interpreting Rule 60(a)):

The only amendment then permissible is one which is intended to make the judgment speak the truth by showing what the judicial action really was, and not one which corrects judicial error, and making it express something which the court did not pronounce, and did not intend to pronounce in the first instance.

Id. at 317.

Plaintiffs appellants did not ask the trial court to correct the judgment to reflect its decision. Rather, they asked the trial court to amend the judgment to require these defendants respondents to make certain payments. The trial court's ruling was not a ruling on the merits, and the trial court's ruling was similarly improper. The trial court's ruling was in the nature of a ruling to amend the judgment under Rule 60(a) Utah Rule of Civil Procedure.

... under Rule 50(b), must be made within ten days of when the judgment was entered. The judgment was entered on June 29, 1982, and plaintiffs-appellants did not raise the issue asking for an amendment of the judgment until the Order to Show Cause hearing on November 26, 1982.

Even though the trial court was without jurisdiction to entertain such a motion at the request of plaintiffs-appellants on the February 1, 1983 proceeding, it entered, of its own initiative, an Order and Judgment clarifying its prior judgment and in paragraph 1 therein declined to alter or amend the previous judgment as to these defendants-respondents. (R. 429)

Plaintiffs-appellants filed the present appeal on or about May 18, 1983, ostensibly from the trial court's Order and Judgment refusing to alter or amend the previous judgment.

A. The Judgment Entered June 29, 1982 Is The Law Of The Case And Is Res Judicata As To This Appeal.

Utah Courts have recognized the doctrine of the law of the case as early as 1896. In the leading Utah decision on the principle of "law of the case" the Court held at page 364:

... where an appellate court disposes of the entire case by directing just what judgment shall be entered, then the case is finally disposed of, and no new issues can be raised, and the only thing that can be determined on another appeal is whether the trial court has followed those directions.

Helper State Bank v. Crus, 81 P.2d 359, 95 Utah 320 (1938).

When the Court of Appeals affirmed the appeal with prejudice and remitted the case to the trial court it effectively directed that court "just where judgment shall be entered" being the June 29, 1982 Judgment. The only appealable issue left is whether the trial court followed this Court's direction.

But the Docketing Statement filed on this appeal provides in paragraph 5 that the issues presented on appeal is "whether or not the Court erred in the application of the law to the facts presented to it at trial". This appeal cannot now determine this issue of whether the trial court erred in its prior decision.

Furthermore, the issue presented for consideration in this appeal is identical to the issue raised in the prior appeal. In paragraph 8 of plaintiffs appellants' Docketing Statement in the previous appeal (18529 and 18594), they stated the issue presented on that appeal was "whether or not the court erred in the application of the law relating to the facts presented to it at trial".

In Helper State Bank the Court held:

It is a well established rule in this jurisdiction as well as in a majority of other jurisdictions, that where the questions of law and fact are the same the decision of the first appeal, whether right or wrong, becomes the law of the case on the second appeal and is binding as well on the parties to the action, the trial court, and the appellate court. (Emphasis added)

Id. at 361.

... was held in this case and the issue on appeal is Therefore, the decision in the first appeal is ... on this Court. It is respectfully submitted that this Court should dismiss plaintiffs-appellants' appeal and affirm the Judgment of June 29, 1982. As held in Prudential Federal Savings & Loan Ass'n. v. St. Paul Ins. Cos., 22 Utah 2d 70, 448 P.2d 724 (1968):

... the present so-called appeal is abortive and is more in the nature of a belated petition for rehearing, after a previous appeal. . . . in both of which events the problems involved here were canvassed and resolved.

Id. at 71.

See also Gammon v. Federated Milk Products Ass'n, Inc., 14 Utah 2d 383, P.2d 402 (1963) and Davis v. Payne and Day, Inc., 12 Utah 2d 107, 363 P.2d 498 (1961).

The Court should conclude that plaintiffs-appellants' attempt to resurrect this appeal is improper. To hold otherwise would open the door to an endless stream of litigation in a single action by a dissatisfied party. The party could simply move the trial court at any time to re-examine its judgment ostensibly under Rule 60(a) Utah Rules of Civil

... then appeal the issues raised at trial of the The Court expressed this concern in Krantz v. Rio Grande Railway Co., 13 Utah 1 (1896). In that case the appellant attempted to appeal the judgment entered as a result of

the Court's decision in Ward is not binding on the trial court. The Court said:

...that even if a judgment entered by an inferior court is affirmed by a mandate of the appellate court, it need not be sustained; and the rule is not only in accordance with authority, but is founded on reason and justice. For if successive appeals were allowed on the same state of the record, there would be no end to litigation and appeals, the courts themselves could be turned into instruments of injustice by an obstinate litigant. (Emphasis added)

Id. at 4.

B. Any Appeal From The Order And Judgment Of April 20, 1983 Is Void.

If the Court determined that the trial court had jurisdiction to consider plaintiffs appellants' request to correct its judgment in the hearing on February 1, 1983, then arguably plaintiffs appellants could appeal the decision not to correct the judgment. But plaintiffs appellants's Brief and Docketing Statement do not raise an issue with that ruling, rather they take issue with the trial court's decision of June 29, 1982.

In Moulton v. State, 80 Utah 47, 27 P.2d 455 (1933) the Court held an order denying motion to correct or amend the judgment was an order to confirm its finality and to obtain review of the case appeal must be made from the original judgment. Plaintiffs appellants did appeal that judgment and that appeal was dismissed with prejudice. No appeal lies

April 29, 1983 opinion and judgment confirming the validity of the previous judgment. Defendants respondents, Lee A. Fitzgerald and Helen Fitzgerald, request that the issue raised by this appeal as between these defendants-respondents and plaintiffs-appellants should be dismissed.

POINT II

THE PLAINTIFFS APPELLANTS HAVING RECEIVED PAYMENT OF THE JUDGMENT ENTERED IN THEIR FAVOR AND AGAINST THE DEFENDANTS RESPONDENTS, LEE A. FITZGERALD AND HELEN A. FITZGERALD, DEFEATS PLAINTIFFS APPELLANTS' CLAIMED RIGHT OF APPEAL.

Paragraph 1 of the judgment rendered by the trial court (R. 795-800) awards to the plaintiffs-appellants a judgment against the defendants-respondents, Lee A. Fitzgerald and Helen Fitzgerald, in the amount of \$4709.96. The release of that judgment was executed on the 28th day of September, 1982 by Utah Ranch Lands, Boyd Corbett and Keith Gurr and acknowledged and filed with the Clerk of the Court on October 4, 1982 (R. 820).

The Supreme Court of the State of Utah, so far as this writer has been able to determine, has spoken only once on the acceptance of the benefits of a judgment as it relates to an appeal. In Ottenghiemer, et al. v. Mountain States Supply, 58 Utah 190, 188 P. 1117 (1920) the Utah Court at page 194 said that where a party recovering a judgment accepts the benefits thereof voluntarily and knowing the facts, he is estopped to afterwards reverse the judgment or decree on

error.

The case is closed by the fact that a party, by an action accepting the benefits of a judgment, thereby waives his right to have the judgment reviewed on appeal. The Court is now cited to the annotation found in 39 A.L.R.2d 153 to the effect that a party recovering a judgment at the trial court level by accepting the benefits of the judgment waives his right to appeal from said judgment.

The appeal herein has become moot.

POINT III

THE JUDGMENT OF THE TRIAL COURT RENDERED JUNE 25, 1982 WAS PREDICATED UPON ADEQUATE AND COMPETENT TESTIMONY.

- A. Earnest Money Receipt And Offer To Purchase Dated February 1, 1977. The Findings, Conclusions And Judgment Of The Trial Court Were Correct.

The first transaction between plaintiffs and the defendants, Lee A. Fitzgerald and Helen Fitzgerald, occurred on February 1, 1977. (Testimony of Boyd Corbett, R. 1138:4-21, Ex. 4). The Earnest Money deposit paid on that agreement was \$10,000.00, paid February 1, 1977. (Testimony of Boyd Corbett, R. 1194:4-9). Pursuant to the terms of the Earnest Money Agreement \$100,000.00 was to be paid on April 1, 1977, with a provision in the Earnest Money Agreement that if Mr. Fitzgerald needed to borrow on the property that the April 1st payment would be paid on May 1, 1977 and the June 1st

to be paid on July 1, 1977. (Ex. 4, line 23). All money after the Earnest Money deposit were paid through Valley Title. (Testimony of Boyd Corbett, R. 1194:16-23).

On April 1, 1977 Corbett and Gurr had approximately \$16,000.00 held in escrow at Valley Title Co. (R. 1195:1-15). By May 1st, there was no \$100,000.00 either at Valley Title (Ex. 54, it shows there were only \$4,122.97 in the escrow on that date), nor had it been paid to Mr. Fitzgerald (testimony of Boyd Corbett, R. 1196:8-12). No additional funds were paid to defendants respondents, Lee A. Fitzgerald and Helen Fitzgerald. The only money paid upon the Earnest Money was the \$10,000.00 Earnest Money deposit. (Testimony of Boyd Corbett, 1196:18-20; Testimony of Lee A. Fitzgerald, R. 1251:12-18). Shortly after May 1, 1977, Mr. Fitzgerald met with Mr. Gurr at the Draper State Bank. (Testimony of Lee A. Fitzgerald, R. 1251:19-24). The purpose of this meeting was to receive the \$100,000.00 required by Exhibit 4 to be paid on or before May 1st. (Testimony of Lee A. Fitzgerald, R. 1252:1-12). The purpose for being at the meeting was because Mr. Gurr had advised Mr. Fitzgerald that there was money supposed to be delivered to the bank to be used for the payment of the \$100,000.00 (R. 1253:13-30). The following day, Mr. Fitzgerald again went and met with Mr. Gurr at the Draper State Bank (R. 1254:1-4). After waiting until about two or three o'clock in the afternoon, a conversation

ensued in which Lee A. Fitzgerald testified that Mr. Fitzgerald had completed his part of the contract and they, Corbett and Gurr, had failed to tender to produce the \$100,000.00. He said Mr. Fitzgerald could keep the \$10,000.00 earnest money deposit and terminate the contract (R. 1254:5-19).

The trial court made Findings numbers 2, 3 and the first sentence of Finding 4, Conclusions of Law number 23 and Judgment paragraph 3. Such Findings, Conclusions and Judgment were predicated upon the exhibits and testimony primarily from the mouths of the plaintiffs appellants and fully support the judgment rendered.

The testimony of the plaintiffs appellants themselves verifies that after the earnest money deposit there was no subsequent payment nor tender of payment on the February 1, 1977 contract. The Findings, Conclusions and Judgment of the trial court were fully supported by the evidence.

B. The Uniform Real Estate Contract Dated May 13, 1977. The Findings, Conclusions, And Judgment Of The Trial Court Were Correct.

After the meeting at the Bremer State Bank later in May, 1977, the plaintiffs appellants approached Mr. Fitzgerald while he was working on his farm in Deer Valley and requested the opportunity to buy approximately 3,000 acres from him. (Testimony of Lee A. Fitzgerald, R. 1253:10-27). They negotiated for the sale of 3,140 acres at a purchase price of \$150.00 per acre. (Testimony of Lee A. Fitzgerald, R.

As a result of those negotiations, the parties entered into a Uniform Real Estate Contract on May 13, 1977 (Ex. 3, R. 1255:11-17). In that negotiation, Mr. Fitzgerald required \$136,000.00 as down payment on the purchase but did agree to reduce the price from \$461,000.00 to \$461,000.00 to give Corbett and Gurr credit for the \$10,000.00 earnest money paid on the February 1, 1977 Earnest Money Receipt and Offer to Purchase. (Testimony of Lee A. Fitzgerald, R. 1255:20-30, 1256:2-6, 1257:17-30). The May 13, 1977 Uniform Real Estate Contract (Ex. 3) was handled on a closing through Valley Title. (Ex. 34). The contract required a down payment of \$136,000.00. With regard to the payments on that contract, they were handled through Valley Title. (Testimony of Joyce Clark; R. 1032:4-7). The closing statement was prepared by Valley Title. (Ex. 34, testimony of Joyce Clark, R. 1080:8-20). The first payment on the \$136,000.00 down payment required under the contract was paid through Valley Title on August 24, 1977 in the amount of \$60,000.00. (Ex. 25; Testimony of Joyce Clark, R. 1080:20). At the time of the closing, the plaintiffs-appellants were unable to pay \$136,000.00 required by the contract. Mr. Fitzgerald accepted a promissory note (Ex. 5, R. 1007:11) in the amount of \$62,556.00 payable July 15, 1977. (Testimony of Lee A. Fitzgerald, R. 1006:30, 1007:1-8). The closing statement (Ex. 34) showed that a balance to close, in

addition to the payment of \$100,000.00, the down payment was supposed to include a payment of \$15,000.00, escrow fee of \$75,000, recording fee of \$1,000.00 and a payment to be made to the sellers to close of \$1,000.00. At closing, no such payment was made and no payments were received by Lee A. Fitzgerald until the August 24, 1977 payment of \$30,000.00. (Ex. 25, testimony of Joyce Clark, R. 1081:12-24). A payment of \$34,483.13 on September 1, 1977 (Ex. 26; Testimony of Joyce Clark, R. 1082:12-24). The \$1,007.50 is shown on Exhibit 29 as that portion applicable from Exhibit 29 to the May 1977 contract (R. 1083, testimony of Joyce Clark, R. 1083:10-24) and the escrow fee and recording fee shown on the closing statement. (Ex. 34, testimony of Joyce Clark, R. 1084:10-22).

On September 2, 1977 the last of any payments paid as a part of the down payment of the May 1977 contract (Ex. 3) was disbursed as Exhibit 28 an amount of \$193.37. (Testimony of Joyce Clark, R. 1084:27-30, 1085:1-19). A recapitulation of the down payment monies (Testimony of Lee A. Fitzgerald, Ex. 65, R. 1294:1-27) shows that the entire amount paid as down payment on the May 1977 contract was \$128,007.50, not \$136,000.00 as required by the contract. Nevertheless, the Fitzgeralds made no objection to this being the down payment on the contract. No other payments were ever paid on that contract. (Testimony of Lee A. Fitzgerald, R.

Clark, R. 1096:13-18).

On August 24, 1977, the promissory note given in the May 1977 contract had not been paid. (Testimony of Joyce Clark, R. 1097:15-25). In connection with the closing of another transaction on September 7, 1977 (Uniform Real Estate Contract; Ex. 69), the promissory note (Ex. 5) given as part of the down payment for the May 1977 contract was renewed including the interest in a new promissory note. (Exs. 38, 56; Testimony of Joyce Clark, R. 1097:26-30). The note was made due on January 2, 1978. (Testimony of Joyce Clark, R. 1098:1-2). The renewed amount was for \$63,936.51 (Ex. 56). The note was never paid. (Testimony of Joyce Clark, R. 1098:1-9).

At the time of the closing on the May 1977 contract, Leo A. Fitzgerald and Helen Fitzgerald delivered a Warranty Deed (Ex. 39) for 380 acres as required by the Uniform Real Estate Contract. (Ex. 3, par. 20 on page 4; testimony of Joyce Clark, R. 1099:18-30). Although, as shown above, the Fitzgeralds did not receive any of the down payment money until August 24, 1977, they did execute and deliver the deed on the day after the closing on June 7, 1977 which was recorded on the same day. (Ex. 39, testimony of Joyce Clark, R. 1099:31, 1100:20-27). At the time of the closing on the May 1977 contract, there was in the escrow account for Corbett and Corbett Valley Title \$115,800.00 (Ex. 54), but Corbett and

Gurr did not deny that Corbett and Gurr did not pay the taxes and gettals as required by the September 1977 contract. (Ex. 3, testimony of Joyce Clark, R. 1285:1-30, 1286:1-30, 1287:1-12).

At the time of the closing of the September 1977 Uniform Real Estate Contract (Ex. 3, 4, 5, part of this litigation), there was in the escrow account of Corbett and Gurr at Valley Title \$67,627.21 out of which Valley Title disbursed \$62,440.00 as the down payment on the September 1977 contract, leaving a balance in the escrow account of \$5,187.00. At that time, they renewed the promissory note given in connection with the May 1977 contract. (Testimony of Joyce Clark, R. 1102:17-30, 1103:1-47). Exhibit 9 is a consolidated statement of the escrow accounts of Corbett and Gurr with Valley Title arranged chronologically and is an exhibit substituted for Exhibit 10. (Testimony of Joyce Clark, R. 1285:25-30, 1286:1-30, 1287:1-12). The exhibit shows that on June 7, 1977 the account had \$115,825.00, but no disbursements were made on the closing to the February 1977 required by Exhibit 3, the May 1977 contract. It shows that on July 16, 1977, the due date of the original promissory note in the amount of \$62,556.00 (Ex. 3) that the escrow account had \$11,035.00, but Corbett and Gurr did not authorize the payment of that promissory note. It shows that on August 11, 1977 there was \$111,956.50 in the escrow account, but only \$60,000.00 (Ex. 25) was disbursed as a part of the down payment under the

Corbett, R. 12018:151).

A meeting was held at which the past period had ended on June 30, at which time Lee A. Fitzgerald met with Corbett and Gurr at the offices of Valley Title on July 10, 1978 pertaining to the past due June 1, 1978 installment. (Testimony of Lee A. Fitzgerald, R. 1283:21-30). That meeting was called for the purpose of Mr. Fitzgerald providing deeds for 142 acres of ground to be released and Corbett and Gurr to make payment of the annual installment of \$16,600.00 plus interest approximating \$39,000.00. (Testimony of Lee A. Fitzgerald, R. 1284:1-16).

At that meeting, when Mr. Fitzgerald represented that he had the deeds to make the exchange, Mr. Corbett kept changing the subject matter to argue over whether or not they had received credit on the May 1977 contract for the \$10,000.00 down payment previously paid on the February 1st earnest money (Ex. 4). (Testimony of Boyd Corbett, R. 1399:13-23; testimony of Boyd Corbett, R. 1405:27-30, 1406:6-10). During the July 10th meeting, they had a great deal of discussion and argument over the \$10,000.00 credit. However, by their own testimony, they had received the credit for the \$10,000.00 by reducing the contract price under the May 1977 contract by \$10,000.00. (Testimony of Keith Gurr, R. 1228:13-20). At the July 10th meeting, no funds were provided for the payment of the annual installment and no tender of payment was made for that in

Testimony of Joyce Clark, R. 1111:1-20). There were no sufficient funds to meet that payment according to the records of Valley Title (Ex. 54). The funds on hand between May 19, 1978 and August 22, 1978, by the records of Valley Title (Ex. 54), shows that there was \$27,278.36 in the escrow account, not sufficient to meet the annual installment of \$39,000.00, including interest.

On July 31st, Mr. Fitzgerald provided plaintiffs appellants an opportunity to rewrite the May 1977 contract on its original terms provided the payment for the June 1st installment was paid within five days. (Ex. 52, testimony of Boyd Corbett, R. 1200:17-24). Enough funds were deposited to the escrow account on August 22, 1978 to bring it sufficient to meet that \$39,000.00 payment. No further payments were paid on the May 1977 contract and on January 15, 1979 Mr. Fitzgerald mailed a Notice of Termination to Mr. Corbett and Mr. Gurr. (Ex. 53, testimony of Boyd Corbett, R. 1200:28-30, 1201:1-4). On January 16, 1979, Lee A. Fitzgerald and Helen Fitzgerald recorded in the office of the Utah County Recorder a Notice of Termination. (Ex. 64, testimony of Lee A. Fitzgerald, R. 1293:3-10).

The issue regarding performance under the May 1977 contract is primarily a factual dispute. Although the plaintiffs appellants allege that a tender was made of the payment due June 1, 1978 payment, their own testimony acknowledges

that no payment was made on the 10th day of July, the grace period provided under the contract.

The testimony of the escrow agent, Joyce Clark, shows that there were not sufficient funds in the escrow account to make the payment on the meeting called July 10, 1978, nor was she authorized to make any such tender. Her testimony is that she did not have sufficient funds to make such payment and that it never got to the point of the tender because the plaintiffs-appellants were arguing over a claim that they had not been credited with the \$10,000.00 earnest money deposited on Exhibit 4 when, in fact, they had been given the credit by a reduction of the purchase price for the 3140 acres at \$150.00 an acre reducing the purchase price from \$471,000.00 to \$461,000.00.

Plaintiffs-appellants own claims for tender show that they had deposited blank checks with Valley Title, but the checks were not tendered to the Fitzgeralds, nor even deposited by the escrow agent. The procedure followed by the escrow agent was to deposit the accounts to their bank, Commercial Security Bank, and wait for them to go through the clearing house, to the Draper State Bank, and then back to Valley Title before disbursement of the funds could be made. The testimony of Joyce Clark is that she never deposited those blank Utah Ranch Lands checks.

The case is strikingly similar to the factual situa

Valley Title & Associates v. Zumbrennen, 577 P.2d 129 (1978), wherein the buyer tendered to the same Valley Title a check which was claimed to be a tender of performance. This Court held that such was not a valid legal tender. In the facts now before the Court, all funds transferred through the escrow agent for payment to defendants-respondents, Lee A. Fitzgerald and Helen Fitzgerald, were deposited by Valley Title to their own account and thereafter, after the time for check clearance, paid by a Valley Title check to which the defendants respondents did not object.

In the case of the alleged tender of July 10, 1978, Joyce Clark testified that she did not deposit any of the blank checks and there were not sufficient funds in the account to make the June 1, 1978 payment. She further testified that she did not tender such payments to the Fitzgeralds because of the dispute which arose over the alleged \$10,000.00 deposit. See also Sieverts v. White, 2 Utah 351, 273 P.2d 974 (1954). In the case now before the Court, there is substantial competent admissible evidence in the record to support the trial court's judgment contrary to the protestations of plaintiffs appellants. Fisher v. Taylor, 572 P.2d 393 (1977).

The foregoing recitation from the record demonstrates that findings numbers 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15 and Conclusions numbers 20 through 38 and the Judgment paragraphs 2, 4 and 5 were fully supported by the evidence.

C. The September 14, 1977 option. The plaintiffs' Contingent Purchase Agreement and the deed were correct.

On the same date as the execution of the September 7, 1977 Uniform Real Estate Contract (Ex. 69), Mr. Fitzgerald also granted an option to the plaintiffs-appellants to purchase in excess of 6,000 acres of ground by an option. (Ex. 6, testimony of Lee A. Fitzgerald, R. 1021:12-18). The option was to be exercised on January 15, 1978.

Prior to the exercise date, the plaintiffs-appellants made a demand to receive title to 400 acres of ground at the time of the exercise, contrary to the provisions of the option. (Testimony of Lee A. Fitzgerald, R. 1021:24-30, 1022:1-5). The funds were never provided to Valley Title for the purpose of exercising the option. (Testimony of Joyce Clark, R. 1044:28-30, 1045:1-3). No instructions were given to Joyce Clark to apply any of the funds in the escrow account to the exercise of the option. (Testimony of Joyce Clark, R. 1047:26-30, 1048:1). There were funds deposited by buyers or potential buyers from Corbett and Gurr in other escrow accounts subject to closing according to the testimony of Joyce Clark. (R. 1048:16-30, 1049:1-10). On January 15th they had in such accounts some \$55,000.00 in other escrow funds and \$10,220.00 in the Corbett and Gurr escrow. (Testimony of Joyce Clark, R. 1050:1-23; 1105:12-15). Thus, on the exercise date of the option, there was available, subject to closings,

with Valley Title in the amount of \$55,000.00 plus interest at 6% per annum, according to Joyce Clark's testimony.

In addition, Joyce Clark had a check written by Keith Clark (Ex. 16) in the amount of \$35,000.00 payable to Valley Title with a notation to hold for Sterling Sill check and then return. (Testimony of Joyce Clark, R. 1052:14-21). At the time the option was to be exercised, Joyce Clark called the Truist State Bank to verify if the check could be negotiated and found that there were not sufficient funds. (Testimony of Joyce Clark, R. 1053:3-13). These escrows were on contracts entered into by Corbett and Gurr for sales of property covered by the option agreement which they had not yet exercised and in which they had no right or title in the property. (Testimony of Joyce Clark, R. 1106:2-8). On the date of the option, Joyce Clark did not, in behalf of the plaintiffs appellants, Corbett and Gurr, make any tender of payment of the \$100,000.00 required under the option. (Testimony of Joyce Clark, R. 1109:25-30, 1110:1-4). There was no exercise of the option by Joyce Clark in behalf of Corbett and Gurr. (R. 1128:14-29, 1129:6-9). Lee A. Fitzgerald's conversation with Joyce Clark right after January 15th showed that there were no funds to exercise the option and no authority to exercise the option. (R. 1280:16-30).

In drawing the conclusions of the trial court from

the evidence presented, the trial court concluded that the execution of the option was not required until provided that releases were to be delivered in writing in accordance with the provisions of Lee A. and Helen Fitzgerald's purchase contract with the McKinney/Stassi/Yurka contract. (Ex. 2). According to the reasoning of the trial court in the Memorandum Decision, the next payment to be paid by Lee Fitzgerald on that McKinney/Stassi/Yurka contract was on February 11, 1978. Although Mr. Fitzgerald made his payment prior to February 11, 1978 to Valley Title for his annual installment due McKinney/Stassi/Yurka, the Court said at the time of the execution of the option in September 1977, it could not be anticipated nor required that defendants respondents, Lee A. and Helen Fitzgerald should prepay on the McKinney/Stassi/Yurka contract before the exercise date of the option, January 15, 1978. (Ex. 6).

The trial court thus concluded that the demand by plaintiffs-appellants for a release of 400 acres of ground as a condition for the payment of the \$100,000.00 necessary to exercise the option was improper and not within the contemplation of the parties at the time of the execution of the option. The trial court properly concluded then that the exercise of the option required a written notification pursuant to the terms of the option which was never provided or given to defendants respondents, Lee A. and Helen Fitzgerald, and a

... was released on January 15, 1978, without a release from the land properly until the next release came from the agent of the Attorney General, York. The trial court concluded that, factually, there had been no payment, no tender of payment, no exercise of the option, and an improper demand by plaintiffs appellants for a release to acreage to which they were not entitled under the option. See also Sieverts v. White, supra; Nance v. Schoonover, 521 P.2d 896 (Utah, 1974); Equitable Realty, Inc. v. Nielsen, 519 P.2d 423, 30 Utah 2d 411 (1974).

The Trial court correctly made the Findings of Fact Nos. 16-19, Conclusions Nos. 39-47 and Judgment paragraphs 6 and 8. The Findings, Conclusions and Judgment of the trial court are fully supported by substantial competent admissible evidence and in accordance with the law.

D. The Promissory Note of September 7, 1977 for \$3,856.00. The Trial Court Correctly Ruled on Said Note.

In August, 1977, Lee A. Fitzgerald and Helen Fitzgerald made an intended cash sale of 320 acres of ground to plaintiffs appellants, Corbett and Gurr. (Testimony of Lee A. Fitzgerald, R. 1261:19-29, 1262:12-20). However, at the time of the closing, plaintiffs appellants said they were not able to pay the full purchase price and they were short \$3,840.00. (R. 1262:23-30). The closing statement of that transaction is Exhibit 36. (Testimony of Joyce Clark, R. 1091:25-30). That

promissory note was given as part of the down payment on the May 1977 contract. The note was executed on September 2, 1977, and is shown in the record as Exhibit 55. The due date of the renewed note was January 2, 1978, the same date as the promissory note given as a part of the down payment on the May 1977 contract. (Ex. 56). The note has never been paid. (Testimony of Joyce Clark, R. 1093:23-24).

At the time of the August 1977 transaction, Lee A. Fitzgerald and Helen Fitzgerald executed a Warranty Deed to 320 acres. (Exs. 61, 71). According to the closing statement (Ex. 36) and the testimony of all witnesses, that was a conveyance of the entire August transaction and a payment of all but the \$3,840.00. (Ex. 55). Defendants respondents were entitled to an offset to the amounts the trial court concluded defendants respondents had been unjustly enriched.

Based upon the undisputed testimony, the trial court correctly made Findings number 9, Conclusion numbers 44 and 51, and Judgment numbers 1 and 7. The trial court correctly ruled on its Findings of Fact, Conclusions of Law and Judgment pertaining to said transaction.

CONCLUSION

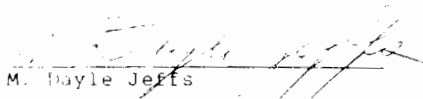
The appeal herein is a related attempt to resurrect the issues in the original appeal which was dismissed with

the trial court. This Court should not countenance the defendants respondents' appeal. This Court should dismiss the appeal on such grounds as it deems proper without further deliberation.

The plaintiffs appellants were successful in having the trial court rule that although they had never paid the monthly note for approximately half of the down payment on the May 1977 contract for which they received 380 acres, they had made payments sufficient to unjustly enrich the defendants respondents, Lee A. Fitzgerald and Helen Fitzgerald. The trial court entered judgment in favor of plaintiffs appellants and against the defendants respondents, Lee A. Fitzgerald and Helen Fitzgerald, in the amount of \$4,709.96. Plaintiffs appellants received payment of that amount and now wish to urge upon this Court a claimed basis for reversal. The Court should rule that the satisfaction and release of judgment executed by the plaintiffs appellants moots the appeal and having received the benefits of that judgment, they should now ask the Court to reconsider their appeal.

In the alternative, defendants respondents, Lee A. Fitzgerald and Helen Fitzgerald, believe that the voluminous record and transcripts in this matter, only a small part of which have been allowed to in the interest of brevity, amply demonstrate the substantial, competent, admissable evidence on which the trial court entered judgment on June 25, 1982, and that same should be affirmed.

Respectfully submitted 30th day of September,
1983.

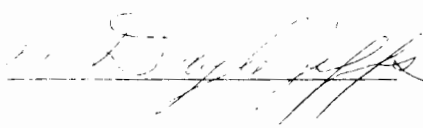

M. Doyle Jeffs

CERTIFICATE OF MAILING

I hereby certify that eleven copies of the foregoing were hand delivered on the 30th day of September, 1983 to the Clerk of the Court, Utah Supreme Court, and two copies of the same were mailed to the below named parties by placing same in the United States mails, postage prepaid, this 29th day of September, 1983, addressed as follows:

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