

1963

# Leo Van Zyverden and Sytske Van Zyverden v. Ralph W. Farrar and Helen R. Farrar et al : Brief of Appellant

Utah Supreme Court

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Ronald C. Barker; Attorney for Appellant;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

SEP 8 - 1963

LEO VAN ZYVERDEN and SYTSKE

VAN ZYVERDEN, his wife,  
*Plaintiffs and Respondents,*

*vs.*

Clerk. Supreme Court, Utah

No. 9945

RALPH W. FARRAR and HELEN R.

FARRAR, his wife, and  
SEAGULL INVESTMENT COMPANY,  
*Defendants and Appellants.*

SEAGULL INVESTMENT COMPANY,

*Plaintiff and Appellant,*

*vs.*

LEO VAN ZYVERDEN and SYTSKE

VAN ZYVERDEN, his wife,  
*Defendants and Respondents.*

No. 9946

BRIEF OF APPELLANT, SEAGULL INVESTMENT  
COMPANY

Appeal from the Judgment of the Judgment of  
the Fourth Judicial District Court for Wasatch County,  
Honorable R. L. Tuckett, Judge

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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LEO VAN ZYVERDEN and SYTSKE  
VAN ZYVERDEN, his wife,

*Plaintiffs and Respondents,*

*vs.*

RALPH W. FARRAR and HELEN R.  
FARRAR, his wife, and  
SEAGULL INVESTMENT COMPANY,  
*Defendants and Appellants.*

No. 9945

---

SEAGULL INVESTMENT COMPANY,  
*Plaintiff and Appellant,*

*vs.*

LEO VAN ZYVERDEN and SYTSKE  
VAN ZYVERDEN, his wife,  
*Defendants and Respondents.*

No. 9946

---

BRIEF OF APPELLANT, SEAGULL INVESTMENT  
COMPANY

---

## STATEMENT OF THE KIND OF CASE

Van Zyverdens as buyers of a farm, on a Uniform Real Estate Contract, commenced an action (No. 9945) against Farrars as sellers and Seagull as assignees of Farrars' interest thereunder, alleging breach of contract by both Farrars and Seagull and thereby attempting to excuse

their non-performance of the contract and seeking to recover damages.

Seagull, as assignee of the sellers' interest in said contract, commenced an action (Case No. 9946) against Van Zyverdens and filed a counterclaim (Case No. 9945) for damages for breach of contract, attorney fees, restitution of the farm and for unlawful detainer.

### DISPOSITION IN LOWER COURT

The two cases (Nos. 9945 and 9946) were joined for trial in the District Court pursuant to stipulation of counsel. The cases were tried before the Court, setting without a jury, and judgment of no cause of action was entered against all parties on all claims for relief.

### RELIEF SOUGHT ON APPEAL

Appellant, Seagull Investment Company, seeks an order vacating the judgment of no cause of action against it on the claims for relief contained in its complaint and counterclaim and judgment against Van Zyverdens for restitution of possession of the farm, damages for breach of contract, attorney fees, interest, triple damages for unlawful detainer and costs, or, in the alternative, for an order remanding the case to the District Court for a new trial on the issues contained in its complaint and counterclaim.

### STATEMENT OF FACTS

These lawsuits are concerned with a dairy farm near Heber City, Utah, which was purchased in September, 1960, by Van Zyverdens from Farrars (R. 226) for \$60,000.00, with a down payment of \$5,000.00 recited in the contract (R. 226) but which was not paid (R. 20).

Farrars assigned their interest as sellers under the uniform real estate contract (R. 226) to Seagull Investment Company (R. 242). Van Zyverdens defaulted in the performance of their obligations under said contract (R. 226) in many particulars, including, but not limited to, their failure to pay the property taxes assessed against the farm (R. 543, L. 30, R. 544, L. 1-11), failure to pay the water assessments for irrigation water for the farm (R. 544, L. 7-21), failure to keep the premises insured (R. 544, L. 5-9) and failure to pay the annual payments due on the purchase price on or before the 1st day of November, 1961, and 1962 (R. 544, L. 19-24). Van Zyverdens have paid nothing toward the purchase price of the farm (R. 543, L. 20-30, R. 544, L. 1-24) although they have had possession of the farm since September, 1960 (R. 226).

The grace period for the payment by Van Zyverdens of the first annual payment on the purchase price of the farm expired November 30, 1961 (R. 226), and on December 1, 1961, Van Zyverdens commenced legal action (Case No. 9945), claiming damages for alleged breach of contract by Farrars and Seagull and asked for \$18,000.00 credit against the purchase price for the alleged damages or in the alternative for judgment for that amount.

Seagull made written demand upon Van Zyverdens on November 15, 1961, for payment of the 1961 property taxes and the installment of \$6,334.17 due on the purchase price on November 1, 1961 (R. 33, 288), and on December 1, 1961 sent them (mailed them) a notice to remedy their default or to quit (R. 32, 287) which was refused by Van Zyverdens (see discussion under point I).

Seagull caused a notice of default (R. 266-272) to be



served upon Van Zyverdens about January 3, 1963, wherein Seagull elected, under paragraph 16A of the real estate contract (R. 226), to terminate the interest of Van Zyverdens in and to said farm and the real estate contract at the end of 5 days, in the event that they failed to remedy their defaults within that time, and notified Van Zyverdens that they would thereafter be guilty of unlawful detainer if they failed to vacate and surrender said premises. Van Zyverdens failed to remedy their default or to surrender the farm and Seagull commenced an action (Case No. 9946) against Van Zyverdens, seeking restitution of the premises, damages for breach of contract, attorney fees and triple damages for unlawful detainer.

Seagull caused another notice (R. 233-240) to be served upon Van Zyverdens (R. 60-61, Ex. 5) on or about the 10th day of February, 1962, wherein Van Zyverdens were informed that if for any reason the previous notices served were insufficient, that they would be guilty of unlawful detainer if they failed to vacate said premises within 5 days after service of that notice. Van Zyverdens still failed to remedy their default or to quit, and on or about the 13th day of February, 1962, Seagull filed a counterclaim (R. 40-43) against Van Zyverdens in the action already commenced by Van Zyverdens (No. 9945), wherein Seagull asked for damages for breach of contract, attorney fees and triple damages for unlawful detainer. At the trial Seagull offered the February 10, 1963 notice (R. 233-240) in evidence (R. 546) and, upon objection by Van Zyverdens as to its admissibility on the alleged grounds that it was served after these actions were commenced (which is untrue as to No. 9945), the Court took



the question of its admissability under advisement (R. 546, L. 9-12) but never ruled on this matter. Seagull moved for permission to amend its pleadings to refer to the notice of February 10, 1963, when Van Zyverdens objected to its admissability, but this motion was not granted (R. 61).

Seagull served certain requests for admissions upon Van Zyverdens on the 27th day of January, 1962 (R. 26-38, 281-293). The default of Van Zyverdens for failure to admit or deny said requests for admissions as required by law was entered on February 7, 1962 (R. 39, 294). These default certificates have never been stricken or set aside. No answers have ever been filed to the requests for admissions in Case No. 9946, and accordingly the statements contained therein are deemed to be admitted. A partial answer to the requests for admissions served in Case No. 9945 was filed by Van Zyverdens after the time for answer thereof had expired and accordingly the statements contained in those requests for admission are also deemed admitted (see discussion under point I).

The cases were tried on December 4, 1962, before the Court, and a decision was signed by the Honorable R. L. Tuckett, District Judge, on the 28th day of March, 1963 (R. 189-190), wherein the Court awarded judgment of no cause of action against Van Zyverdens and Farrars and also against Seagull on the grounds that the notice of January 3, 1963 (R. 266-273) was insufficient in that said notice allegedly failed to give Van Zyverdens an option to perform the conditions or to surrender or quit the premises (R. 190). No mention was made in that decision of the notice of February 10, 1962 (R. 233-240), or con-

cerning the other claims for relief asserted by Seagull (R. 40-43). Seagull moved the Court to amend its decision (R. 191-195) and pointed out to the Court that the notice expressly gave Van Zyverdens the option to remedy their default or to quit (R. 191-192), however, the Court denied Seagull's motion (R. 215).

## ARGUMENT

### POINT I

THE STATEMENTS CONTAINED IN REQUESTS FOR ADMISSION ARE DEEMED ADMITTED BY VAN ZYVERDENS AND ACCORDINGLY SEAGULL IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Requests for admission were served upon Van Zyverdens by Seagull on January 27, 1962, in both cases (R. 26-29, 281-285), and on February 7, 1962, the default of Van Zyverdens was entered in both cases (R. 39, 294) in accordance with Rule 55(a)(1), URCP, by reason of their failure to respond thereto. The requests for admission were not denied within the time allowed by law, the default certificates have never been set aside and the statements contained therein are deemed admitted in accordance with the provisions of Rule 36(a), URCP.

Motions to strike the requests for admission which were filed by Van Zyverdens on January 31, 1962 (R. 25, 280), do not comply with the express requirements of Rule 36(a) in several particulars including the requirement that objections be served with a notice of hearing at the earliest practicable time and accordingly the motions to strike are insufficient to prevent the admissions from being deemed to be admitted.

The proported answers to a part of the requests for admissions, in Case No. 9945, were untimely and accordingly were without legal force or effect to avoid the admission of the statements contained therein.

The objections to the requests for admissions which were raised by Van Zyverdens in their motions to strike the requests for admissions were disposed of on February 5, 1962, by the Court striking the default certificate which had been entered against Seagull in Case No. 9945. Even if the motions to strike had been well taken and properly served (which we deny), their objections were disposed of by the striking of said default on February 5, 1962, and accordingly the requests for admission were deemed admitted 10 days after that date since no answer or objections were filed within that time.

The requests for admissions served in Case No. 9946 have never been answered by either Van Zyverden, and the requests for admission served in Case No. 9945 have never been answered by Sytske Van Zyverden (R. 48-50), although a separate answer was required from both Leo and Sytske Van Zyverden (R. 26), and accordingly the statements contained therein are deemed to be admitted as to Sytske Van Zyverden in both cases and as to both Van Zyverdens in Case No. 9946.

In both cases Seagull asks for restitution of the premises, damages for breach of contract, attorney fees and for triple damages under the unlawful detainer statute. The relief sought by Seagull and to which Seagull is entitled is more fully discussed under other points in this brief and will not be reviewed here, however, the admission of the facts stated in the requests for admissions entitled

Seagull to relief under all of its claims for relief, including but not limited to relief under the unlawful detainer statute, since the admission of the statement contained in request for admission No. 20 (R. 27, 283) is an admission that Van Zyverdens are guilty of unlawful detainer.

## POINT II

SEAGULL IS ENTITLED TO RESTITUTION OF THE FARM AND TO DAMAGES UNDER THE TERMS OF EXHIBIT 1 AND ALSO TO RESTITUTION AND DAMAGES UNDER THE UNLAWFUL DETAINER STATUTES.

Seagull elected to exercise its rights under paragraph 16A of Exhibit 1 (R. 226) on December 1, 1961, when Van Zyverdens defaulted in making their first annual payment of \$6,334.17, due on the purchase price of the farm, and the payment of irrigation water assessments due on the farm of \$333.98, by mailing a notice of default to Van Zyverdens wherein Van Zyverdens were given an option to remedy their default or to quit (R. 32, 287). Van Zyverdens admitted the mailing of that letter by Seagull and their refusal of delivery thereof by reason of their failure to respond to requests for admissions No. 3, 4 and 5 (R. 26, 281) (see also discussion under point I above). Under the terms of paragraph 16A of exhibit 1 (R. 226), and the election contained in that notice, Van Zyverdens became tenants at will of the farm on December 7, 1961, and accordingly were tenants at will when the January 3, 1962 notice (R. 266-273) was served, and Van Zyverdens became guilty of unlawful detainer 5 days thereafter when they failed to remedy their default.

On January 3, 1962, Seagull served upon Van Zyver-



dens an instrument entitled “NOTICE OF TERMINATION OF CONTRACT and FIVE DAY NOTICE TO VACATE PREMISES” (R. 266-273). A copy of the contract (R. 266, Ex. 1) and the assignment of the sellers’ interest in that contract (R. 247, Ex. 10) were annexed to that notice and incorporated therein by reference. The Court based its decision of no cause of action against Seagull upon the grounds that said notice (R. 266-273) allegedly did not require the performance of the conditions or the surrender of the premises and accordingly was insufficient in the view of the Court to sustain Seagull’s claims for relief. In its decision the Court recited the alleged deficiency in said notice as follows:

“... The notice recited the defaults under the contract, but *nowhere were the Van Zyverdens required to perform the conditions or to surrender or quit the premises*. Under the statute and the cases construing the same, it appears to the Court that service of a proper notice is an essential part of the plaintiff’s and counterclaimant’s cause of action. . . .” (R. 190) (emphasis added).

It is difficult to understand how the Court could fail to observe the options given Van Zyverdens in that notice, to remedy their default, unless only the heading of that notice were read. Seagull fully complied with the provisions of paragraph 16A of the contract (R. 226), concerning termination of Van Zyverdens’ rights under the terms of the contract, and, with the requirements of the Unlawful Detainer Statute, and Seagull is entitled to restitution of the premises and to the other relief requested, *under the terms of the contract* (R. 226) and/or under the provisions of the Unlawful Detainer Statutes,

78-36-3 (5), 78-36-10, UCA, 1953, and related statutes. Van Zyverdens were fully advised in said notice (R. 226) that they could, within 5 days after service of that notice, remedy their defaults under the contract and thereby avoid forfeiture of their interest under the contract. Van Zyverdens failed to do so and 5 days thereafter, if they were not already tenants at will because of the December 1, 1961 notice, became tenants at will of the farm, and thereupon Seagull became entitled to possession of the farm as provided in said paragraph 16A (R. 226). The following is a summary of some of the various ways which Seagull informed Van Zyverdens in that notice of their option to remedy their default or to quit:

1. The notice (R. 268) informed Van Zyverdens that Seagull had elected the remedy mentioned in paragraph 16A of the contract (R. 226), and a copy of that contract was attached to the notice. Said paragraph 16A reads in part as follows:

“... upon failure of the buyer to remedy the default within five (5) days after written notice . . . the buyer agrees that the seller may, at his option, re-enter and take possession of said premises without legal process as in its first and former estate, together with all improvements and additions made by the buyer thereon, and the said additions and improvements shall remain with the land and become the property of the seller, *the buyer becoming at once a tenant at will of the seller. . . .*” (R. 226) (emphasis added)

That paragraph of Exhibit 1 (R. 226) clearly specifies that Van Zyverdens could remedy their default within 5 days after written notice, and accordingly said notice was sufficient to comply with both the forfeiture requirements

of that paragraph of the contract, since all of the terms thereof were recited by reference, and to constitute Van Zyverdens tenants at will. Reference to that paragraph in the notice was also sufficient to satisfy the requirements of the statute which specifies when persons who hold property under the terms of an agreement are guilty of unlawful detainer, which statute reads in part as follows:

78-36-3 (5). “. . . when he continues in possession, in person or by sub-tenant, after a neglect or *failure to perform any condition or covenant of the lease or agreement* under which the property is held, other than those hereinbefore mentioned, and *after notice in writing requiring in the alternative the performance of such conditions or the surrender of the premises*, served upon him, . . .” (Emphasis added)

Van Zyverdens were in default under the terms of the agreement under which they held the property, they failed to vacate the premises or to perform the conditions within 5 days after service of the notice (R. 266-273) and accordingly thereupon became guilty of unlawful detainer under the provisions of the above mentioned statute.

2. The notice (R. 268-269) refers to the specific unlawful detainer statute quoted in paragraph 1 above. That statute expressly gives Van Zyverdens an option to remedy their default within 5 days after service of the notice, and accordingly reference to that statute, without more, is sufficient to appraise Van Zyverdens of their rights to reinstate and is sufficient to comply with the requirements of that statute concerning notice.

3. The notice (R. 268) informed Van Zyverdens of the election of Seagull, under paragraph 16A (R. 226), to



terminate Van Zyverdens' interest in and to the contract and farm, in the event that they failed to remedy their default within 5 days, which notice was clearly sufficient under the terms of exhibit 1 (R. 226) to entitle Seagull to restitution of the premises by reason of breach of contract by Van Zyverdens, and/or also under the unlawful detainer statutes. The portion of the notice pertaining thereto reads in part as follows:

“NOW THEREFORE, you are hereby notified that Seagull Investment Company does elect to exercise its rights as provided by sub-paragraph ‘A’ of paragraph 16 of the contract annexed hereto as exhibit ‘A’ to be released from all obligation in law and equity to convey said property and to *terminate your interest in and to said premises at the end of five days after service of this notice upon you in the event that you fail to remedy the aforesaid defaults and to fully perform all of your obligations under said contract within said time; that in the event that you fully perform all of your obligations under said contract within that time you may reinstate said contract.*” (R. 268) (Emphasis added)

4. The notice (R. 268-269) again informed Van Zyverdens of their option to remedy their default within the 5-day period mentioned in the notice and that, if they failed to do so, legal action would be commenced against them for restitution of the premises, triple damages for unlawful detainer, etc., which by itself is sufficient to entitle Seagull to restitution of the premises and the other relief sought by Seagull under the provisions of paragraph 16A of the contract (R. 226) and/or the unlawful detainer statute. The portion of the notice pertaining thereto reads in part as follows:

*“You are further notified that in the event that you fail to remedy your defaults in performance of the covenants and conditions which you are obligation (sic) to perform under the terms of said contract, within five days after service of this notice upon you, that you will be guilty of Unlawful Detainer of said premises in accordance with the provisions of 78-36-3 (5), Utah Code Annotated, 1953, and that thereafter you will be liable for three times the amount of damages assessed for said unlawful detainer as provided by 78-36-10, Utah Code Annotated, 1953 and related statutes, and that legal action will be commenced against you for restitution of said premises, treble damages, attorney fees, court costs, etc. . . .”*  
(R. 268-269) (Emphasis added)

Clearly Seagull complied with the requirements of paragraph 16A of Exhibit 1 (R. 226) and, in accordance with the provisions of that paragraph, Van Zyverdens became tenants at will of said premises at the end of 5 days after written notice and their failure to remedy their default, if for any reason they were not tenants at will on December 7, 1961 as indicated above. The first written notice was mailed on December 1, 1961, and delivery thereof was refused by Van Zyverdens (and as demonstrated above, said facts were established, as a result of failure to answer requests for admissions). Clearly notice cannot be defeated by the mere refusal to accept delivery of the notice, particularly where the parties had been corresponding about this matter through the mails (R. 33, 288). The notice served on January 3, 1962, complied with the requirements of paragraph 16A of Exhibit 1 and in any event, Van Zyverdens became tenants at will of said premises five days after service of that notice by reason of their failure to remedy their default as provided

therein as indicated in paragraph 16A of Exhibit 1 (R. 226) quoted above.

Seagull is clearly entitled to restitution of the premises, damages, attorney fees and other relief requested in accordance with the provisions of paragraph 16A of exhibit 1, independent of the unlawful detainer statute, and as requested in its complaint (R. 261, Par. 1) and its counterclaim (R. 42). The Court failed to rule upon this relief requested by Seagull and limited its decision to the question of Seagull's right to recover under the unlawful detainer statute. It has been demonstrated above that the ruling of the Court, to the effect that Seagull failed to give Van Zyverdens an option to remedy their default or to quit in the notice, was in error, and accordingly Seagull is also entitled to restitution of the premises and to triple damages under the unlawful detainer statute as also independently requested by Seagull in the complaint (R. 262, Par. 4) and the counterclaim (R. 42-43, Par. 5). It is common practice, under a contract for the sale of realty containing the usual forfeiture clause, to bring an unlawful detainer against a defaulting vendee. *Christy v. Guild*, 101 U. 313, 121 P.2d 401; *Forrester v. Cook*, 77 U. 137, 153, 292 P. 206; *Pacific Development Co. v. Stewart*, 113 U. 403, 195 P.2d 748.

### POINT III

THE COURT ERRED IN NOT ADMITTING EXHIBIT 5, A SUBSEQUENT NOTICE TO QUIT, INTO EVIDENCE, AND IN FAILING TO DETERMINE THE ULTIMATE RIGHTS OF THE PARTIES CONCERNING THE FARM.

After Seagull's complaint had been filed in Case No.

9946 (Jan. 16, 1962 — back of R. 273) and before the counterclaim was filed by Seagull in Case No. 9945 (Feb. 13, 1962 — back of R. 44) Seagull caused Exhibit 5 (R. 233-240) to be served on Van Zyverdens on the 10th day of February, 1962 (R. 240). A copy of the notice to remedy default or to quit, served upon Van Zyverdens on January 3, 1962 (R. 266-273), was attached to Exhibit 5 and incorporated therein by reference (R. 234-239).

Exhibit 5 informed Van Zyverdens that, if for any reason, the demand to terminate their occupancy of the premises, mentioned in the earlier notice, was ineffective, that they would be guilty of unlawful detainer if they failed to vacate said premises within 5 days after service of that notice upon them (R. 233). Said notice further informed Van Zyverdens that the triple damages claimed in the pending legal proceedings were the same damages as those mentioned in Exhibit 5, and that the service of Exhibit 5 would not constitute a waiver of or affect the pending actions.

Van Zyverdens failed to comply with the demands contained in Exhibit 5 and continued to occupy the farm. Van Zyverdens objected to the introduction of Exhibit 5 into evidence (R. 545-546), apparently on the alleged ground that it was served after these actions were commenced, however, as indicated above, Exhibit 5 was served three days before the counterclaim was filed in Case No. 9946, and the Court reserved ruling thereon (R. 546, L. 9-12). The Court made no mention of Exhibit 5 in its decision (R. 189-190). Seagull moved the Court to amend its pleadings to refer to Exhibit 5 (R. 545) when Van Zyverdens objected to its admission into evidence,



however, the Court did not rule on that motion.

Under the rules all that need be pleaded are ultimate facts, it being unnecessary to set forth in detail the acts, conduct, language or artifices used to accomplish the result (Rule 8(a), URCP; *Wilson v. Oldroyd*, 1 U.2d 362, 267 P.2d 759, 763). A complaint is required only to give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved. (*Blackham v. Snelgrove*, 3 U. 2d 156, 280 P.2d 453, 455.) The pleadings, as filed (R. 40-43, 258-273), and the pre-trial order (R. 182) all fully informed Van Zyverdens as to the relief sought by Seagull and it was unnecessary to allege the service of any specific notices to state a cause of action for that relief since service of such notices are merely evidence to be presented at the trial. The fact that specific notices may have been mentioned in the pleadings does not limit the right of Seagull to introduce evidence of other notices which would establish evidence of facts necessary to support its claims for relief at the time of trial. Since it was unnecessary to allege any specific notice in the complaint in the first instance, the failure to mention exhibit 5 is immaterial and should not prevent exhibit 5 from being introduced into evidence. The Court erred in not admitting exhibit 5 into evidence. Seagull seeks restitution of the premises and damages. Exhibit 5 is merely evidence of facts which entitle Seagull to relief sought and Seagull is not asking for new or different relief. This notice was served 10 months before the trial and Van Zyverdens cannot claim surprise or prejudice for its being introduced into evidence.

Rule 15 (a) URCP provides in part as follows:

“... a party may amend his pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires. . . .*” (Emphasis added)

If for any reason Seagull was required to specifically allege the notice contained in Exhibit 5 in its complaint before it could be admitted into evidence in this action (which we deny), in view of the clear mandate of the foregoing rule, the Court abused its discretion in refusing to permit Seagull to amend when the motion for permission to amend was made at the time of trial (R. 545).

Rule 15(b) contemplates the exact situation which occurred in our case where evidence is objected to as not being within the issues of the pleadings, which rule reads in part as follows:

“... If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, *the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby* and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.” (Emphasis added)

The policy of the law is to avoid a multiplicity of actions and to resolve all issues that can be resolved in a single action. It was for this very reason that these two actions were consolidated for trial. The foregoing rule

indicates that the Court is to inquire into the merits and shall permit amendments during trial, if necessary, to get at the merits of the case and that if unfairness or surprise would result therefrom that the Court “*shall*” grant a continuance to avoid prejudice to the other party instead of excluding evidence which would assist in presenting the merits of the case. This is a clear mandate for the Court to look to the merits of the case rather than technicalities. In our situation the net effect of excluding Exhibit 5 would be to require Seagull to bring a separate action based upon the service of Exhibit 5, if the Court determined for any reason that the other notices served were insufficient to establish a cause of action against Van Zyverdens and in favor of Seagull for Unlawful Detainer. In any event, Seagull’s motion should have been granted in accordance with the provisions of Rule 15(d), URCP, concerning supplemental pleadings which reads in part as follows:

“Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, *permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. . . .*” (Emphasis added)

Van Zyverdens obviously agree that Seagull should be permitted to amend its pleadings to refer to exhibit 5 as shown by the following statement made by Van Zyverdens concerning this very same exhibit 5 at pages 4 and 5 of their memorandum filed in case number 9917 in the Supreme Court of Utah in support of their complaint for extraordinary writ. In that case a writ of prohibition was obtained by Van Zyverdens to prevent Seagull from



proceeding with a separate legal action filed in the District Court based upon service of the notice contained in exhibit 5.

“The point is that the Van Zyverdens are now being required to answer the Salt Lake County case and proceed to trial where that case involves the same precise claim for relief as is involved in the Wasatch County actions. Argument was made to Judge Hanson in the Salt Lake County case that Seagull Investment Company should be permitted to proceed there on the theory that it attached a notice which had not been served at the time of the filing of the case in Wasatch County. However, *Seagull Investment Company asked leave to amend their complaint in Wasatch County during the course of trial on December 4, 1962 to attach the notice in question. While they have not sought leave to file a supplemental complaint in the Wasatch County action, they clearly have that right under the rule, and in that event, the same record and defenses would be available to the Van Zyverdens obviating the necessity of a new trial upon the same issues with a different record.*” (Emphasis added)

The motion of Seagull to amend its pleadings to refer to exhibit 5 was not directed to any specific subdivision of Rule 15 and would apply with equal force to subdivision (d) regarding supplemental pleadings, if the court found that the notice was served after commencement of the other actions (we have demonstrated above that it was served 3 days before the counterclaim in Case No. 9946 was filed) and to the other subdivisions of Rule 15 discussed above, and the proposition presented to the Court by Van Zyverdens in the above quoted statement in Case No. 9917 fully supports Seagull’s position that the District

Court abused its discretion in not admitting exhibit 5 into evidence and/or permitting an amendment to Seagull's pleadings to refer to exhibit 5. Van Zyverdens should not be permitted to talk out of both sides of their mouth, and on the one hand to prevent Seagull from maintaining a separate action based upon exhibit 5 (Case No. 9917), and on the other hand to object to the admission of exhibit 5 into evidence in these cases.

That the policy of the law is to settle all matters between the parties in one action and to avoid a multiplicity of actions is further illustrated by Rule 54(c) (1) pertaining to demands for judgment, which reads in part as follows:

“... every final judgment ... may, when the justice of the case requires it, *determine the ultimate rights of the parties* on each side as between or among themselves.” (Emphasis added)

To leave the question of restitution of the premises unresolved and thereby require the filing of another lawsuit to determine that issue is to ignore the clear mandate of the foregoing rule. It is clear from the foregoing that Van Zyverdens are in default in the performance of their obligations concerning the purchase of the farm and that they are tenants at will of the farm. The “Ultimate Rights” of Seagull entitle them to possession of the farm. For the Court to close its eyes to these “ultimate rights” and to the service of Exhibit 5 (R. 233-240) is not only an abuse of discretion by the Court, but is contrary to the law and to the evidence, therefore the decision of the Court should accordingly be reversed.

## POINT IV

THE COURT SHOULD HAVE AWARDED SEAGULL THE RELIEF TO WHICH IT WAS ENTITLED WHETHER DEMANDED OR NOT.

The Court indicated in its decision that Seagull could have recovered possession of the farm if it had proceeded differently, but that Seagull had elected to proceed under the Unlawful Detainer Statute and had failed to comply with the provision thereof requiring service of a notice giving Van Zyverdens the option to perform the conditions or surrender the premises. The decision of the Court reads in part as follows (R. 190):

“... While the *said plaintiff and counterclaimant might well have pursued a different course to recover possession*, it having elected to proceed under the statute, it was necessary to comply with its provisions. . . .” (Emphasis added)

In essence the Court is indicating that Seagull proved its case for restitution of the premises under the terms of the contract (R. 226) but that, under the Court's view of the pleadings filed, relief was not requested under any theory other than the Unlawful Detainer Statute and accordingly the Court could not grant any other relief to Seagull, the Court having determined that the notice served (R. 266-273) was insufficient to comply with the requirements of the Unlawful Detainer Statute (R. 190).

Seagull attempted to plead claims for relief in the alternative under both the breach of contract theory and the unlawful detainer theory as more fully discussed under point II above. The complaint (R. 261-262) and the counterclaim (R. 42) clearly demonstrate that Seagull

sought damages for breach of contract, restitution of the premises and attorney fees, in addition to triple damages for unlawful detainer. The complaint and counterclaim also ask for such other general relief as the Court deems proper in the circumstances. The policy of the law is to do substantial justice to a party even if the pleadings are inexpertly framed by his attorney. Rule 54(c) (1), URCP provides in part as follows:

*“...every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. . . .”* (Emphasis added)

The Court erred in failing to apply this rule when it indicated in its decision that Seagull was entitled to possession of the farm, but that it had proceeded under the wrong theory to obtain possession. Seagull denies that it failed to ask for possession of the premises under the theory of breach of contract, but even if Seagull completely failed to request restitution under the proper theory, nevertheless, the Court, having determined that Seagull was entitled to possession, and the evidence of the breach by Van Zyverdens and their becoming tenants at will clearly appearing throughout the record, should have awarded restitution in accordance with the provisions of the above quoted rule. (*Wheelwright v. Roman*, 50 U. 10, 165 P. 513; *Buehner Block Co. v. Glezos*, 6 U. 2d 226, 310 P. 2d 517.)

In addition judgment should be awarded for the reasonable rental value of the farm for the period during which Van Zyverdens have had possession thereof of \$425.00 per month (see discussion R. 663) or for such other sum as the Court determines to be reasonable.

## POINT V

SEAGULL IS ENTITLED TO JUDGMENT AGAINST VAN ZYVERDENS FOR TAXES, WATER ASSESSMENTS AND DAMAGES REQUESTED BUT NOT RULED UPON BY THE COURT.

In both cases Seagull prayed, under the terms of the contract (R. 226), for judgment for restitution of the premises, for attorney fees (which are discussed elsewhere in this brief), and for damages for breach of contract (R. 42-43, 261-262). In Case No. 9945 separate causes of action are stated for the \$5,000.00 down payment which was not paid, for property taxes in the sum of \$333.98, and irrigation water assessments of \$397.82, which were paid by Seagull (R. 40-43), but these causes of action were not ruled upon by the Court. The evidence clearly shows that Van Zyverdens contracted and agreed to pay said amounts (R. 226) and that they were not paid (R. 543-544) and accordingly Seagull is entitled, as a matter of law, to judgment for said amounts and for restitution of the premises, attorney fees and other damages established by the evidence.

## POINT VI

SEAGULL IS ENTITLED TO JUDGMENT AGAINST VAN ZYVERDENS FOR ATTORNEY FEES.

The Court failed to rule on Seagull's claim for attorney fees (R. 43, 262) for the prosecution of these actions. Seagull relies upon the provisions of paragraph 21 of Exhibit 1 (R. 226) to establish its right to recover attorney fees, which provision reads as follows:

"21. The Buyer and Seller each agree that should

they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, *which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah* whether such remedy is pursued by filing a suit or otherwise." (Emphasis added)

The election of Seagull to terminate Van Zyverdens' interest in and to the farm and Exhibit 1 (R. 226) by reason of their failure to remedy their default, does not in any manner affect the rights of Seagull under that contract, including the right to recover attorney fees. Paragraph 16A thereof indicates that only the Seller (Seagull) shall be released from obligation to convey the property to the Buyers (Van Zyverdens). At no place in the contract or notices have the rights of Seagull been terminated or affected. The Court should enforce the clear intention of the parties as expressed by the written contract. *Forrester v. Cook*, 77 U. 137, 292 P. 206; *Burt v. Stringfellow*, 45 U. 207, 143 P. 234; *Udy v. Jensen*, 63 U. 94, 222 P. 597.

The wording of paragraph 21 (R. 226) indicates that the parties contemplated this exact situation, where it was necessary to enforce the rights of the sellers in the event of default by the buyers, and the parties selected broad language which would apply to all litigation which might arise in connection with the contract including an action under the terms of the contract or an action under the Unlawful Detainer Statute. Attorney fees are accordingly recoverable by Seagull whether the action is maintained under the contract or under the Unlawful Detainer



Statute. Additional evidence should be permitted to establish the value of the legal services, including those in connection with this appeal.

## CONCLUSION

The issues before the Court are clear. Van Zyverdens acquired possession of the farm in question in September, 1960, with no down payment and since that time have paid nothing toward the purchase price, have failed to pay the property taxes, irrigation water assessments, or to keep the property insured, although they have had the use and benefit of the property during this entire period. The Court found that their claim for an offset was without foundation and awarded judgment of no cause of action. During this period Seagull has been required to make payments on the Michelsen contract (R. 230-231) and to pay the property taxes and water assessments to avoid total loss of the property. It is apparent that this prolonged litigation is an effort to put Seagull into such a financial squeeze that they will be forced to sell the farm to Van Zyverdens on the Van Zyverdens' terms to avoid a total loss of the farm.

Van Zyverdens, with advice of counsel, have intentionally pursued a course of action in complete disregard of the rights of Seagull. It would have been a simple matter for Van Zyverdens to have made the payments due to Seagull into the Court to preserve their rights under the contract. The unpaid balance due on the contract was in excess of \$55,000.00, payable over a period of years, and accordingly Van Zyverdens could have safely made their payments to Seagull as well as pursue their legal action for an offset, if they were bona fide about their claims,



since the unpaid balance was sufficiently large to have protected them to the extent of the entire \$18,000.00 claimed by Van Zyverdens in their action.

It is also apparent that Van Zyverdens have at all times been unable to meet their obligations under Exhibit 1, or to pay for the farm.

The defenses raised by Van Zyverdens to the relief sought by Seagull amount to nothing more than technical objections to procedure, do not go to the merits and are stalling actions. The various notices served upon Van Zyverdens clearly appraised them of their option to remedy their default or to quit the premises. Nothing more could be accomplished by the service of additional notices since Van Zyverdens failed to make any effort to remedy any of their defaults. Van Zyverdens are tenants at will of the premises. Clearly Seagull is entitled to restitution of the premises, attorney fees, and to damages. To affirm the judgment of the District Court could only result in an additional trial with the same parties, the same issues, and the same evidence with the ultimate result that Seagull would obtain the relief to which it is entitled. Clearly the judgment of the District Court is contrary to the evidence and to the law and should be reversed.

Respectfully submitted,

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