1970

Wayne E. Carroll and Mary W. Carroll v. Phil M. Birdsall and M. Laverne Birdsall : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

AYNE E. CARROLL and MARY W. ARROLL, husband and wife,
Plaintiffs-Respondents

vs.

HIL M. BIRDSALL and M. LaVERNE IRDSALL, husband and wife,
Defendants-Appellants.

Case No. 11854

RESPONDENTS' BRIEF

NNETH RIGTRUP
East 5th South, Suite 100
Lake City, Utah 84111
Attorney for Appellants

LIONEL M. FARR
914 Kearns Building
Salt Lake City, Utah 84101
Attorney for Respondents

TABLE OF CONTENTS

CASES CITED

REFERENCES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

WAYNE E. CARROLL and MARY W. CARROLL, husband and wife,
Plaintiffs-Respondents

vs.

PHIL M. BIRDSALL and M. LaVERNE BIRDSALL, husband and wife,
Defendants-Appellants.

Case No. 11854

RESPONDENTS' BRIEF

STATEMENT OF KIND OF CASE

This is an action of Unlawful Detainer arising out of a breach by the Defendants-Appellants of a Uniform Real Estate Contract by and between themselves and the Plaintiffs-Respondents.

DISPOSITION IN LOWER COURT

Judgment was granted in favor of the Plaintiffs-Respondents ousting the Defendants-Appellants from

the subject property, and quiting title in the said Plaintiffs, plus awarding treble damages. The reasonable rental value of the subject property was determined to be $85.00 per month.

STATEMENT OF FACTS

The Statement of Facts as related by the Defendants are somewhat complete, except that Plaintiffs add thereunto certain variations to conform with the record.

The 2D Notice which the Plaintiffs had served upon the Defendants was the Notice to Quit as required by Section 78-36-6(1), Utah Code Annotated, 1953, as amended. (Exhibit P12, R,7&8).

The Notice to Quit was served upon both of the Defendants, personally. (R.8) No evidence was introduced to the contrary. When personal service is obtained the requirement of the Statute is completed and no service by mail is required. Defendants did not at any time in the Lower Court object to or contradict this fact.

The Lower Court made a finding that the Notice to Quit was properly served. (No. 6,R,104) Defendants did not object to this finding. (R,70-80)

The subject contract (R,3) provided for monthly payments of $100.00, per month. Subsequently the monthly payment was increased to that of $150.00.

per month, by agreement of the parties. Defendants were consistently in default. (Exhibit P4-10) On many occasions they failed to make the complete payment.

As of March 12, 1968, the date the Defendants were served the 1st Notice, they should have paid a total of $20,800.00, exclusive of the taxes and insurance. The Carroll records with adjustments show that they paid the sum of $17,092.08, including taxes and insurance. The Court permitted Counsel for Plaintiffs to prepare an accounting showing interest on a monthly basis with interest figured to the 5th of the month, and to include the adjustments as supported by the evidence and as Plaintiffs' claimed them to be. In accordance with this accounting, the Court made a finding that the balance due on the contract was $4,106.05. (R,105)

The Defendants claimed that the contract balance was less than the mortgage balance owed by Carroll to Doxey-Layton. The Court found that this was not so. The records showed that the Defendants were consistently in default with their payments, and therefore could not come before the Lower Court with 'clean hands' according to the Principle of Equity; yet they claimed that it was unconscionable for the Lower Court to grant judgment to the Plaintiffs.

The Lower Court determined that the reasonable rental value for the property was $85.00. For

wrongfully withholding the property from the Plaintiffs after proper Notice to Quit was served upon them, the Lower Court granted restitution of the premises and awarded treble damages to the Plaintiffs. The Plaintiffs in accordance with the Judgment gave Defendants Notice that they had a credit due them of $812.41, subject to their giving up possession and daily damages of $8.50.

The letter of April 8, 1968, was answered with a request from the Plaintiffs that the Defendants show good faith by depositing with the Court sufficient cash to cover any delinquency. A hearing before the Court was held, and the Court denied the Plaintiffs request and ordered a submission of their records to the Defendants.

The Defendants having consistently defaulted on their contract, the Court found that they were not entitled to anything more than a credit of $85.00 per month, for rental of the property. This was in accordance with the law of the State of Utah. (Perkins v. Spencer and Jacobson v. Swan)

The Court's Memorandum Decision was an opinion only and not intended as the Judgment. In fact the Court requested the Plaintiffs file Finding of Fact, Conclusions of Law, and Judgment before it would listen to any objections. This was done *prior* to any 'pressure' on the part of either of the lawyers. (R. 62,63,64)

The 'pressure' was exerted after the Defendants filed their Objections to the Judgment of August 25, 1969, and up to the time the Court signed the Judgment of September 25, 1969.

Proposed Findings of Fact, Conclusions of Law and Judgment were mailed to the Defendants on September 23, 1969, two days prior to the day the Court signed and entered them. (R, 102,106)

On September 25, 1969, after Counsel for Plaintiffs had advised the Court that it would accept the rental value of $85.00, per month, and so advised Counsel for Defendants, the Court signed and entered its Judgment granting restitution, quieting title and awarding treble damages.

The offer of September 23, 1969, did not include the payment of the attorney's fees. In fact the Defendants' Counsel intended to pay the amount into court but did not do so, and in fact admitted to Counsel for Plaintiffs that the checks they held had not been paid. They were in for collection.

Defendants had the time allowed them by the rules to file Objections to the Judgment of September 25, 1969; however, they did not take advantage of their opportunity. They in fact did not file any Objections to the Judgment of September 25, 1969 The Court did not deny them this right, neither did the Plaintiffs.

Plaintiffs served upon the Defendants Notice of Entry of Judgment by mailing same on the 26th day of September, 1969. (R,107) On the 29th day of September, 1969, Defendants obtained an Order Staying the Judgment and filed an insufficient bond. It was only after the Plaintiffs filed Objections and had a hearing before the Lower Court that the Defendants finally posted security ordered by the Lower Court. (R,127,128)

ARGUMENTS

POINT I

THE REQUIREMENT OF THE APPELLATE COURT IN REVIEWING THE INSTANT CASE ON APPEAL.

In regard to the question of review of a case from the lower or trial court by this appellate court, in cases of equity, this court has the duty and obligation to sustain the lower court, unless the decree or judgment is found to be against the clear weight of the evidence, or is contrary to law or established principles of equity, and in doubtful cases, the findings of the trial court should not be disturbed.

In support of this doctrine, the Plaintiffs-Respondents quote from the two cases cited by the Defendants-Appellants as follows:

> ". . . This being a suit in equity, we are required to pass upon the weight of the evidence.

In doubtful cases, the findings of the trial court should not be disturbed, because it hears the evidence which we but read, and it has the opportunity of observing the witnesses, their apparent frankness and candor or the lack thereof, and hence is in a better position than are we as a reviewing court to pass upon the weight that should be given the evidence. . ." - - - - *Croft v. Jensen*, 40 P2D 198. (Utah)

"In actions of equitable cognizance, this court will examine the record and weigh the evidence, but the decree or judgment will be sustained on appeal unless it is found to be against the clear weight of the evidence or is contrary to law or established principles of equity." *Cline v. Hullum*, 43 P2D 152. (Oklahoma)

Plaintiffs-Respondents respectfully submit that in the instant case now before this Court that the Decree or Judgment of September 25, 1969 is supported by the evidence, is not contrary to law or established principles of equity and therefore it should not be disturbed, and they argue herein in support of this proposition.

POINT II

THE WEIGHT OF THE EVIDENCE SUPPORTS THE FINDING AND CONCLUSION OF THE LOWER COURT THAT THE DEFENDANTS WERE IN DEFAULT IN THEIR PERFORMING ACCORDING TO THE TERMS OF THE UNIFORM REAL ESTATE CONTRACT, AND THAT THE EVIDENCE DOES NOT SUPPORT A FINDING OF DEFAULT ON THE PART OF THE PLAINTIFFS.

Section A

The question of the default of the Defendants in regard to the payments due and owing on the contract is uncontradicted. In this respect the weight of the evidence is clearly in favor of the Plaintiffs and supports the Judgment of the District Court.

On July 1, 1954, Plaintiffs and Defendants, as Seller and Buyer, entered into a Uniform Real Estate Contract whereby the Seller agreed to sell, and the Buyer agreed to purchase certain real estate situate in Salt Lake County, Utah, at an agreed purchase price payable at the rate of $100.00, per month. Subsequently this monthly payment was increased to $150.00, per month. (Exhibit P-8, P-28, R,3 & R,10)

Defendants failed to comply with the terms for monthly payments on many occasions, and the contract was consistently in default. (Exhibits P-14-10, R,184,185)

The final failure to make a timely payment happened on or about the 9th day of January, 1968.

when the Defendants gave Plaintiffs a check for $150.00, which bounced. Defendants however were finally given credit for the January 9th payment when they subsequently gave the Plaintiffs $150.00 cash sometime in February, 1968. This incident culminated when the Plaintiffs finally called a halt to the entire matter on March 11, 1968, when they issued and caused to be served the 1st Notice upon the Defendants. Said Notice gave the Defendants the alternative of either bringing the contract current or returning the property to the Plaintiffs. At the time of issuing the 1st Notice, the February and March payments had not been paid.

To show the consistent default status of the Carroll-Birdsall contract a schedule showing a comparison between the total annual payments required and the total annual amounts paid is as follows, to-wit:

SCHEDULE P

	DATE	A Total Due Per Contract & Admendment	B Payments Made As Per Carroll's Records With Adjustments
a.	1954	$ 900.00	$ 300.00
b.	1955	1,200.00	951.08
c.	1956	1,200.00	1,049.02
d.	1957	1,200.00	1,308.92
e.	1958	1,200.00	1,159.40
f.	1959	1,200.00	1,256.12
g.	1960	1,200.00	635.00
h.	1961	1,450.00	1,146.37
i.	1962	1,800.00	1,800.00
j.	1963	1,800.00	1,653.20

k.	1964	1,800.00	1,650.94
l.	1965	1,800.00	1,552.70
m.	1966	1,800.00	1,281.33
n.	1967	1,800.00	1,200.00
o.	1968	450.00	150.00
p.	Totals	20,800.00	17,092.08

An analysis of the above schedule shows that the Defendants were in default on the contract each year except the years: 1957, 1959, and 1962.

Plaintiffs submit that the weight of the evidence supports the findings and conclusions of the lower court that the Defendants were in default on their contract.

Section B

Defendants' contention that they were not in default for failing to make the required monthly payments because Plaintiffs failed to convey subject property to them in connection with the Doxey-Layton mortgage is not according to the terms of the contract, nor equitable.

Defendants appear to be somewhat immature in trying to excuse their failure to comply with the terms of the contract by trying to blame the Plaintiffs for their faults. Defendants should recognize their wrongs and be mature enough to suffer the consequences of their own acts.

Plaintiffs cite the terms of the contract to which reference should be made in regard to the default to which the Plaintiffs refer, and the default to which the Defendants refer, as follows:

The clause regarding conveyance to the Buyer is as follows:

> "The seller is hereby given the option to execute and maintain a loan secured by mortgage upon said property of not to exceed $ (*contract balance*) . . . bearing interest at the rate of not to exceed —6— per cent. When the principal has been reduced to the amount of the loan and mortgage, the Seller agrees to convey and the buyer agrees to accept title to the above described property subject to said loan and mortgage."

The clause of the contract regarding forfeiture and repossession is as follows:

> "In the event of a failure to comply with the terms hereof by the Buyer, or upon failure to make any payments when the same shall become due, or within 30 days thereafter, the Seller shall, at his option, be released from all obligations in law and equity to convey said property and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may, at his option, re-enter and take possession of said premises . . . "

Also the clause of the contract regarding conveyance of title is as follows:

> "The Seller on receiving the payments herein reserved to be paid at the times and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as . . ."

Accordingly, before the Defendants would be entitled to have title to the subject property conveyed to themselves, the contract on their part would have to be *current and* in *good standing;* otherwise, they would have no recourse. To think or do otherwise would appear to the Plaintiffs to be contrary to the terms of the subject Uniform Real Estate Contract, and against the principles of equity and public policy.

Section C

For sake of argument only and without conceeding that Defendants' have a point that they should have been given additional credit for payments or amounts alleged to be overlooked, wrongly included, erroneously entered, or for whatever reason as may be applicable, the Plaintiffs comment on the evidence in answer to Defendants' Brief which presents these items under POINT II, beginning at Page 10.

ITEM 1. (The $25.00 amount)

1. Carroll testified that he gave Birdsall credit for this amount, and explained that it was

the item shown on Exhibit 22-P, as the entry where he had first made it as the date of March 7th and then scratched it out and entered it as February 23. Mr. Birdsall did not controvert this testimony or introduce any other evidence than the receipt to show otherwise. (R, 179, 189)

ITEM 2. (The $35.00 amount)

1. Carroll testified that at the time of this payment there was a question of bouncing checks, and that during the period of this check, he showed two payments of $35.00, each, and that this certain $35.00, was included in the payments recorded for January, 1958. (R, 180-182)

ITEMS 3 & 5. (Taxes of $133.98 for 1960 and of $189.61 for 1965)

1. The agent from Doxey-Layton testified that the taxes were paid by Doxey-Layton, that Mr. Carroll made the payments on the contract, and that the payments on the contract were current. Carroll testified that the taxes were paid through Doxey-Layton. Mr. Birdsall testified that he could not remember about paying the taxes for 1959. He could not remember that far back. Also, Mr. Birdsall did not keep a record of payments made on the contract to Mr. Carroll. Carroll testified that the taxes for these years should have been included in his records. (R,224; R,174, R,210; R,271)

ITEM 4. (Bounced check for $43.25)

1. This amount of $43.25, is represented by a check which the Bank returned unpaid.

Birdsall never contradicted this fact, and Carroll testified that it probably should have been charged back into the account. He further testified that because of bouncing checks he had a constant problem of charging back such items. (Exhibits 25-P, R, 183)

ITEM 6. (Tape Recorder — $22.17 difference)

1. Carroll testified that Birdsall obtained a tape recorder for him at the wholesale price, and that he gave him credit accordingly. Birdsall did not controvert this testimony by denying this conversation alleged to by Carroll. In fact there is not testimony in the record which contradicts Carroll's testimony that Birdsall was to receive any thing other than the wholesale price for the tape recorder. Carroll's records show what Carroll understood the wholesale price of the tape recorder to be. (Exhibit P, 10; R, 165, 166)

ITEM 7. (The payment of $125.00)

1. Carroll testified that he received only one payment on March 13, 1967, from Birdsall and that this was paid by the Bishop which Carroll thought was sent through the mail. The original receipt and the duplicate made by Mr. Carroll were not given to the Birdsalls. They remained in the possession of the Carrolls until Mr. Carroll gave them to Farr. Blauer took them from Farr's office over to Rigtrup's office and supposedly returned them to Farr's office. (R, 177, 178, 272, 273, 275, 238, 239, 172)

2. Birdsall went to the hospital on February 22, 1967, with a heart attack. He testified of the incident as follows: (R, 277)

> "February 22, 1967, I was admitted to the hospital with a heart attack, and we hadn't paid the payment before, and my wife took the payment up and the check that Bishop Metcalf gave her, because he paid the payments on the house while I was in the hospital. And Mr. Carroll told me that we would have to make up the extra, $150.00 that was due on the three months, on account that he wouldn't accept the $125.00, and that is exactly what we did. . . ."

Exhibit P10 contradicts Birdsall's testimony. It shows that on February 23, 1967, the day before Birdsall entered the Hospital a payment of $75.00 had been recorded by Carroll. For the month of January, 1967, a payment of $150.00, had been made. Previously to that for December, 1966, the entry of $81.33, for the tape recorder was made.

Mrs. Birdsall testified that she couldn't remember about the payment of March 13, 1967. (R, 219)

In addition to the above items, Defendants at one time contended that they should be allowed credit for $170.00, as a payment on July 9, 1954, and included in the Blauer accounting. (Exhibit 32D) The court did not allow them to have credit for this item, and

rightly so since the weight of the evidence supported this conclusion. (R, 267 to 270)

Plaintiffs should be allowed to include an item for $16.43, of pro-rated insurance which the court allowed and was included in the Farr accounting but excluded from the Blauer accounting. (Exhibit 40P, R, 134, 135)

Carroll also reflected in his account and Blauer excluded from his without any evidence or good reason, the fees and costs retained by Bayles, of $16.60 and a 2D attorney's fee of $50.00. (Exhibit P2, P6, P8, 32D)

Blauer also excluded from his accounting a bounced check which Carroll shows reflected in his records just prior to his entry dated the 22nd day of February, 1965. Defendants did not introduce any evidence to contradict that fact that this was a correct entry. The court allowed it to remain, and the weight of the evidence supports the fact that it should remain as indicated in the Carroll records. (R, 9 & Exhibit 32D)

Blauer's accounting contains an error of $115.72 under date of January 5, 1955, which should be corrected. Also the bounced check of January 9, 1968 was improperly deducted under date of January 9, 1967, in the Blauer accounting. (Exhibit 32D)

The weight of the evidence supports the Courts Finding of Fact No. 11, that the contract balance as of March 5, 1968, was $4,106.05. Also the Blauer accounting supports this finding after adjusting his balance of March 5, 1968, of $2,538.23, as shown on Page 7 of his accounting. (Exhibit 32D)

The following schedule reflects these above changes and shows that the Blauer balance would exceed the above contract balance referred to in Finding of Fact No. 11. (R, 105)

SCHEDULE B

Date	Explanation	Adjustment	Interest	Totals	Adj. Bal.
a. 3/12/68	Blauer Balance ..				$2,538.23
b. 7/9/54	Earnest Money ..	170.00	208.11	378.11	2,916.34
c. 11/30/54	Ins. pro-ration	16.43	17.90	34.33	2,950.67
d. 1/5/55	Blauer error	115.72	133.70	249.42	3,200.09
e. 2/25/55	Duplicate pmt. ..	25.00	28.44	53.44	3,253.53
f. 1/10/58	Duplicate pmt. ..	35.00	28.40	63.40	3,316.93
g. 5/12/58	Fees & costs	16.60	12.72	29.32	3,346.25
h. 11/30/60	Taxes - 1960	133.98	71.16	205.14	3,551.39
i. 9/1/61	Fees	50.00	23.25	73.25	3,624.64
j. 6/20/64	Bounced check ..	43.25	10.61	53.86	3,678.50

k.	2/7/65				
	Bounced check	133.38	26.71	160.09	3,838.59
l.	11/30/65				
	Taxes - 1965	189.61	26.98	216.59	4,055.18
m.	12/16/66				
	Tape recorder	22.17	1.65	23.82	4,079.00
n.	1/9/67				
	Bounced check ..	150.00	10.87	160.87	4,239.87

POINT III

THE CONCLUSION BY THE LOWER COURT THAT DEFENDANTS WERE IN DEFAULT, ENTITLED THE PLAINTIFFS, AS A MATTER OF LAW, TO THE JUDGMENT ENTERED IN THE LOWER COURT.

This Court has stated in the *Perkins* v. *Spencer* case, 121 Utah 468, 243 P2D 446, 452, what doctrine it follows in cases such as the instant case, to-wit:

> ". . . This Court is committed to the doctrine that where the parties to a contract stipulate the amount of liquidated damages that shall be paid in case of a breach, such stipulation is, as a general rule, enforceable, if the amount stipulated is not disproportionate to the damages actually sustained. . . ."

Furthermore, in the Perkins v. Spencer case, this Court outlined a formula to guide the lower Court in determining damages in such cases, and at Page 451, 243 P2D, it is as follows, to-wit:

> "The vendors are entitled to any loss occasioned them by any of these factors:
>
> (1) . . .
> (2) . . .
> (3) . . .

(4) For the fair rental value of the property during the period of occupancy.

"The total of such sums should be deducted from the total amount paid in, plus any improvements for which it would be fair to allow recovery, and any remaining differences awarded to the plaintiffs."

In the instant case, the Lower Court and Plaintiffs followed the above doctrine and formula. The Lower Court determined that the Defendants were in default, and that the reasonable rental value of the property was Eighty Five & No/100 ($85.00) Dollars per month (R, 101-106). The Plaintiffs followed the formula, figured out the differences and then informed the Defendants by written notice sent to their attorney on the 29th day of September, 1969, (R, 111) that they, the Plaintiffs were ready to deliver to the Defendants what ever amounts were due and owing as a difference between the amounts paid by the Defendants, and the rental set by the court plus treble damages according to the Judgment entered on September 25, 1969, as follows:

Total amounts paid by the Defendants		$16,936.91
Less:		
Rental - 7/1/1954 to 7/1/1969	$15,385.00	
Damages - 7/2/1969 to 9/25/1969	739.50	16,124.50
Amount due and tendered to Defendants		$ 812.41

The Defendants were also advised that the said amount of $812.41, diminished at the rate of $8.50 per day, until they gave up possession and quit the subject property.

Furthermore, Plaintiffs-Respondents refer this Court to the Law of the *Jacobson* v. *Swan* case, 3 Utah 2D 59, 278 P2D 294, and assert that in accordance with same they were and are entitled to restitution of the subject property, and treble damages all as set forth in the Findings of Fact, Conclusions of Law and Judgment of September 25, 1969 (Court File 101-106).

Plaintiffs-Respondents submit to this Court that the said Judgment is in accordance with *good conscious*, in accordance with the law of the Perkins and Jacobson cases, in accordance with the principle of equity applicable to this case, and the established doctrine and formula of this Court.

POINT IV

THE MEMORANDUM DECISION OF THE LOWER COURT WAS INTENDED ONLY AS AN OPINION OF THE COURT PRELIMINARY TO THE FILING OF THE FINDINGS OF FACTS CONCLUSIONS OF LAW, AND JUDGMENT.

A review of the Record of the Lower Court should indicate to this Court that the Lower Court never intended the Memorandum Decision to be a final judgment or decision as contended for by the Defendants.

After the Lower Court filed its Memorandum Decision, Plaintiffs filed Objections and Amended Objections to said Memorandum (R, 62-64) and sent Defendants a Notice (R, 63) advising of a hearing on July 29, 1969, before Judge Hanson, to consider Plaintiffs' Objections. On the 29th of July, when Plaintiffs counsel appeared for the hearing, Judge Hanson advised that before he could hear any objections that Plaintiffs' counsel would have to prepare Findings of Facts, Conclusions of Law, and Judgment.

Plaintiffs prepared the Findings of Fact, Conclusions of Law, and Judgment which were signed and entered by the Court on August 25, 1969 (C, 65-69). Then Defendants filed Objections (R, 70-80), and the Plaintiffs filed Answers (R, 94-100) to said Objections.

Defendants' Objections were subsequently heard and denied. Plaintiffs prepared amended Findings of Facts, Conclusions of Law, and Judgment (R, 101-106). Copies of same were mailed to the Defendants on September 23, 1969, two days before the court signed and entered said Judgment on September 25, 1969 (R, 106).

Plaintiffs thereafter on September 26, 1969, sent the Defendants a Notice of Judgment (R, the Defendants a Notice of Judgment (Court File, 107) advising of the Judgment, and among other things, that the Court had determined the reasonable rental value of the property was $85 per month.

Based upon the difference between the reasonable rental value of $85 per month from July 1, 1954, to July 1, 1969, and the total amounts paid in, the Plaintiffs notified the Defendants that they had due them a credit of $812.41 and tendered the same to the Defendants subject, however, to the condition that they would deliver up possession of the property to the Plaintiffs (R, 111).

Defendants did not file any Objections to the Findings of Facts, Conclusions of Law and Judgment of the 25th day of September, 1969. However, they did file a Motion to Stay the Execution of said Judgment, which the Court granted. It was from the Judgment of September 25, 1969, that the Defendants appealed (R, 113).

The Defendants did not appeal from the Memorandum Decision which was entered July 2, 1969 (R, 61).

The Defendants did not Object to the Memorandum Decision until or in conjunction with their Objections to the Findings of Facts, Conclusions of Law and Judgment of August 25, 1969, a period of 54 days.

The Court File and Transcript of Record appear to confirm the fact that the Defendants and the Plaintiffs considered the Memorandum Decision to be nothing more than an informal statement by the Court.

In WORDS AND PHRASES, Vol. 27, at Page 45 and 49, the word Memorandum is defined as follows:

> A 'memorandum' in common parlance is an informal record. Patterson v. Beard, 288 NW 414, 416; 227 IOWA 401; 125 ALR 393.
>
> A memorandum merely stating the conclusions of a judge on an issue before him, and giving direction as to an order, judgment, or decree which may be entered, is an opinion, whether labeled 'memorandum' or 'conclusion' or 'opinion'; and from an opinion no appeal lies. In Re Beam, 117 A. 613, 93 N. J. Eq. 593.

The case cited by Defendant, Drury v. Lunceford, 18 Utah 2D 74, 415 P2D 662, is not in point with the case before this Court. The Drury case dealt with the question of the basic rights bestowed upon a person by an Order granting a New Trial.

This Appellate Court has previous said in the Hartford Accident & Indemnity Co. v. Clegg, case, 135 P2D 919, 922, in regard to a final judgment that:

> It must appear that that 'which is offered as the record of a judgment is really such and not an order for a judgment or a mere *memorandum* (emphasis added) from which the judgment was to be drawn.

Also in the Clegg case this Court has in effect said that a Judgment to be final must be supported by Findings of Fact and Conclusions of Law.

Plaintiffs respectfully submit that the Memorandum Decision of the Lower Court was intended to be only a memorandum in the sense that it was an informal record of the court's conclusions or opinions and did not bind the Court nor preclude it from entering its Judgment of September 25, 1969.

POINT V

THE AWARD OF TREBLE DAMAGES BY THE LOWER COURT WAS PROPER IN THAT IT WAS SUPPORTED BY THE LAW AND THE EVIDENCE AND NOT CONTRARY TO THE PRINCIPLES OF EQUITY.

Section 78-36-6(1), Utah Code Annotated 1953, as amended, provides that the Notice to Quit may be served:

> By delivering a copy to the tenant personally

Plaintiffs' Notice to Quit (Exhibit P-12, with Return of Notice attached) was personally served upon the Defendants on the 25th day of March, 1968. Deputy Sheriff, L. W. McAllister, certified that he personally served Phil M. Birdsall and M. LaVerne Birdsall on said date in Salt Lake County, Utah. The record shows this fact. The Defendants did not introduce any evidence to the contrary. The Lower Court made a Finding to the effect that such Notice to Quit was properly served (R, 104).

Plaintiffs Notice to Quit was admitted in evidence without any objection and with the consent of

Defendants' attorney, Kenneth Rigtrup. Neither did Defendants make any objection to said Notice to Quit either at the trial or at anytime thereafter in the Lower Court (R, 23 & R, 70-80). There is no evidence to contradict its sufficiency.

This Court should not be confused by the Defendants attempt to invalidate the Plaintiffs' 1st notice, the Notice advising of the default (Notice to Pay or Quit) which was served upon the Defendants prior to the service of the Notice to Quit.

Plaintiffs submit that the Perkins case as cited by Defendants is not authority to support their claim that Plaintiffs' 1st Notice is invalid.

Plaintiffs submit that the Perkins case is authority to support their claim that the Lower Court properly awarded treble damage.

The Perkins case sets forth the doctrine which this Court has followed in unlawful detainer actions. It outlines a formula to help determine damages which might be suffered by one entitled to repossession of property wrongfully detained. (See Plaintiffs' discussion of the Perkins case in POINT III)

In the instant case the 2D Notice: the Notice to Quit, was served upon the Defendants in accordance with Section 78-36-6(1). After receipt of the 2D Notice they remained in possession. They neither

brought the contract current nor gave up possession. The Court found that they were in default, and that the reasonable rental value was Eighty Five & No/100 ($85.00) Dollars per month. The weight of the evidence supports this finding (R, 159, 160, 161, 187, 200, 201, 203, 217, 218)

Under these circumstances the laws of Utah sustain an award for treble damages and restitution of the property. (See Perkins v. Spencer, 121 Utah 468, 243 P2D 446 and Jacobson v. Swan, 3 Utah 2D 59, 278 P2D 294)

Plaintiffs submit that in accordance with Section 78-36-10, Utah Code Annotated, 1953, sa amended, the cases herein cited and the weight of the evidence the lower court properly entered Judgment in their favor.

CONCLUSIONS

In conclusion Plaintiffs submit to this court that the lower court properly weighed the evidence, and in so doing arrived at a judgment in favor of the Plaintiffs and against the Defendants. In reaching its decision, the lower court had the benefit of listening to and observing the witnesses as they testified under oath on the stand, of watching their demenor, reacting to their reactions and personality, listening to their speach inflections, etc. A court setting which is

impossible to reflect in the record or transfer up to this court.

Furthermore, Plaintiffs submit to this court that:

1. The lower court did not allow a forfeiture.
2. That the Judgment of the lower court was rendered in good conscience. It would not shock the conscience of one who had breached the terms of his contract.
3. That the Defendant have received all that to which they are entitled in accordance with the terms of their Uniform Real Estate Contract, and with the established principles of equity, and law.
4. That after many many consistent defaults the Plaintiffs acting in good faith declared a default and requested repossession of the subject property.
5. That it would be against established principles of equity and public policy in addition to being contrary to the terms of the contract for this court to require the Plaintiffs to convey subject property in accordance with Defendants contention that the Plaintiffs should have done so in connection with the Doxey-Layton mortgage.
6. That the Judgment of September 25, 1969, should be sustained.

Respectfully submitted

LIONEL M. FARR
914 Kearns Building
Salt Lake City, Utah 84101
Attorney for Plaintiffs