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James Latses and James Sdrales v. Nick Floor, Inc. : Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

JAMES LATSES and
JAMES SDRALES,

Appellants,

vs.

NICK FLOOR, INC.,

Respondent.

APPELLANTS' BRIEF

ALLEN T. SANFORD,

E. A. ROGERS,

Attorneys for Appellants.

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In the Supreme Court of the State of Utah

JAMES LATSES and
JAMES SDRALES,

vs.

NICK FLOOR, INC.,

Appellants,

Respondent.

Case No. 6237

APPELLANTS' BRIEF

STATEMENT OF CASE

On and prior to September 25, 1933, down, to May 31, 1939, the property involved in this suit, 79 West 2nd South Street, Salt Lake City, Utah, was owned: W. P. Noble Company one half, Ford E. Hovey and Willard H. Dressler, Trustees, one-fourth and William Frederick Bragg, Robert Russell Bragg, Frederick Ingham Bragg, Laura Lillian Harkins and Laura I. Bragg, one-fourth and, on May 31, 1939, they conveyed it by general warranty deed, with a special warranty of immediate possession to the plaintiffs, who on June 2, 1939, served a notice on the defendant to deliver up to plaintiffs the possession of said premises on or before July 1, 1939. The defendant having refused to deliver possession of said premises to the plaintiffs, they brought this suit in unlawful detainer. (Ab. 1) The defendant answered, alleging that

on September 25, 1933, it entered into a written agreement with the Stockyards National Bank of South Omaha, a corporation, the W. P. Noble Company, a corporation, and the Fred Bragg Estate, as lessors, executed by A. H. Ball, Agent, whereby said lessors leased the premises, 79 West 2nd South Street, to the defendant for three years at a monthly rental of \$75.00 a month; that said lease agreement provided that if the defendant should, prior to May 25, 1935, expend \$1,000.00 in permanent improvements he could lease said premises for an additional five years at a monthly rental of \$90.00 a month, and that defendant had made such expenditure and election. Defendant further alleged in its answer that said lease provides, "either party agrees to pay all costs and attorney's fees and expenses incurred by the other that shall arise from enforcing the covenants of this lease, "and alleged that \$500.00 was a reasonable attorneys' fee.

The alleged lease is attached as an exhibit (Ab. 11).

The plaintiffs, in their reply, admitted that Ball had signed the alleged lease, and denied he had any authority from the owners, or any of them, and alleged the lease is void under the provisions of Sections 33-5-1 and 33-5-3, Revised Statutes of Utah, 1933, and denied that the defendant had expended \$1,000.00 on permanent improvements on said premises or that it had exercised its option to extend said alleged lease.

The defendant then filed a pleading, alleging the plaintiffs were estopped from denying Ball's authority because the rent had been paid as provided in the lease

and that the owners all knew defendant had expended \$1,000.00 on improvements and that plaintiffs and their predecessors knew of the lease and improvements and had ratified the actions of A. H. Ball. (Ab. 18).

To this the plaintiffs, in their second reply, admitted the receipt of the rent and denied all other allegations. (Ab. 20).

ASSIGNMENT OF ERRORS

The appellants assign forty-two errors on which they seek a reversal. They may be summarized as follows:

The court erred in receiving in evidence the alleged lease, exhibit 28 (Ab. 76); Assignment No. 17 (Ab. 116); Exhibits 25, 26, 27, 29, 30, (Ab. 26, 30); Assignment No. 17 (Ab. 116), and Exhibits 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 (Ab. 90-96); Assignments No. 21 (Ab. 117) and Exhibits 5, 4, 4-A, 2, 6, 7, 7-A, 8, 9, 10, 1, 3, 10-A, 11, 12, 13, 14 (Ab. 54-56). Assignment No. 10 (Ab. 115); Exhibits 15, 16, 17, 18, 19, 20, 21, 22 and 23 (Ab. 59); Assignment No. 10 (Ab. 115).

The court erred in overruling plaintiffs' objection to testimony (Ab. 45, 101), Assignments Nos. 1 to 28 (Ab. 114-117), and especially the wide scope of cross examination of witness, R. Gould-Smith (Ab. 46-61), Assignments Nos. 1-21 (Ab. 114-116); the direct examination questions to A. H. Ball over plaintiffs' objection (Ab. 68-80), Assignments 12-17; and overruling of objection to testimony of Nick Floor (Ab. 88-101), Assignments No. 17 to 28 (Ab. 116-118); overruling the objec-

tion to evidence of H. Arnold Rich (Ab. 98.), Assignment No. 26 (Ab. 117).

The court erred:

In making each and every one of its findings of fact, 1 to 9 inclusive (Ab. 22-36); Assignments Nos. 29 to 36, inclusive, (Ab. 118-120).

In making each and every one of its conclusions of law, 1 to 5, inclusive, (Ab. 37-39); Assignments No. 37-41 inclusive, (Ab. 120).

In rendering judgment in favor of the defendant and against the plaintiffs (Ab. 39); Assignments No. 42 (Ab. 121) and rendering judgment for attorney's fees.

QUESTIONS INVOLVED

The questions involved are:

1. Was the alleged three year lease valid (Ab. 11) which purported to be executed by the Stockyards National Bank of South Omaha, W. P. Noble Company and the Fred Bragg Estate, by A. H. Ball, Agent, when it was stipulated (Ab. 44) the owners, at the time the lease was executed, were W. P. Noble Company, a corporation, one-half interest, Ford E. Hovey and Willard H. Dressler, Trustees, one-fourth interest, William Frederick Bragg, Robert Russell Bragg, Frederick Ingham Bragg, Laura Lillian Harkins and Laura I. Bragg one-fourth interest, and when it was pleaded that the lease was void under the statute of frauds, sections 33-5-1, and 33-5-3, Revised Statutes of Utah, 1933 and it was objected to because one co-tenant could not give a valid lease to the whole property?

2. Did the defendant place permanent improvements of the value of \$1,000.00 on the leased premises prior to May 25, 1935, and elect to continue said lease five additional years, as was provided in said alleged lease?

3. If the lease is held to be valid, was the defendant entitled to recover attorneys' fees against the grantees of only one of the parties (the W. P. Noble Company), designated as lessors in said alleged lease, and the plaintiffs' herein?

I.

THE ALLEGED LEASE WAS VOID BECAUSE A. H. BALL WAS NOT AUTHORIZED IN WRITING TO EXECUTE A LEASE.

A. H. Ball testified that his father, who died in June, 1930, had collected the rentals on the Eagle Block for many years and that Walker T. Gunter acted with his father in handling the affairs of the building and he signed all leases as witness (Ab. 69). That for several months during his father's illness, under Mr. Gunter's orders, he had collected the rentals and made the reports of rentals collected. (Ab. 70, 71). And he saw Mr. Gunter as a rule, every day in connection with the estate. (Ab. 71). That at the time of his father's death Mr. Gould-Smith of the Noble Company came to the funeral. While he was here, "We met with Mr. Gunter at his office and Mr. Gould-Smith said, 'Just take and handle the property as my father had' (Ab. 80) I wrote Mr. Gould-Smith of things to be done in connection with

building. I consulted with Mr. Gunter all the time, (Ab. 81), and in a conversation with Mr. Gould-Smith at Miss Noble's home, he said 'Go ahead and collect the rents and they would decide later what they were going to do.''' When Mr. Gould-Smith left for home he said, "You go right on and do things as your father had." (Ab. 86)

"Walker T. Gunter wrote a letter to each, The Stockyards National Bank of South Omaha, Mr. Brome an attorney in Wyoming to whom rent due the Braggs was transmitted, and Mr. Gould-Smith, advising that I be continued. I saw the letters he received in reply or he read them to me. I saw a letter from Mr. Smith. The letters advised Mr. Gunter that "I knowing all about the property, and he advised it would be logical to have me go and handle the work, the same as my father had." (Ab. 72). "I think the letter from Mr. Brome was written in long hand. I think it was signed C. L. Brome. I can't say whether the Bragg Estate was mentioned in the letter. I would say that Dressler's letter was typewritten. I couldn't say that the Stockyards National Bank of South Omaha was mentioned. Mr. Hovey's name was not mentioned in this letter." (Ab. 86).

"The letter from Mr. Smith was received by me in August or September and I gave it to Mr. Gunter. My wife saw it." (Ab. 82.) Mrs. Ball said she read the letter which stated, "he was very sorry on the death of Art's father and asked if Art would continue to carry on the work that his father had previously done. That was all there was in it. I don't think it mentioned the Eagle Block." (Ab. 84) Mr. Ball testified that the letters had

been burned or destroyed by Mr. Gunter's folks after his death.

Then Mr. Ball produced exhibits 25, 26 and 27, which purported to be leases on parts of the Eagle Block, leasing store rooms for three years, which had been signed by H. T. Ball and witnessed by Walker T. Gunter, and, over plaintiffs' objection, the court received in evidence these leases, (Ab. 74; Assignment No. 17, Ab. 116).

Mr. Dressler said, "I don't think I wrote a letter to A. H. Ball, after his father's death, that I desired or requested said A. H. Ball to collect the rents and look after the property as his father had done". (Ab. 62).

Mr. Gould-Smith testified he was secretary and treasurer of the W. P. Noble Company, and resides in San Francisco. That Mr. H. T. Ball had collected the rentals of the Eagle Block since 1909. "Shortly after his death, in June, 1930, Mr. Gunter and I verbally employed his son, A. H. Ball as agent. Mr. Gunter died September 23, 1933. Until his death, he and I were consulted on all matters of importance, and after his death Mr. Ball consulted with me by mail frequently. Mr. Ball was allowed \$60.00 a month. He reported his collections monthly and reported the collections by the street number, not by the name of the tenant. He never mentioned he gave a lease." (Ab. 51).

While the direct examination of Mr. Gould-Smith had been limited, the court, over plaintiffs' objection, threw wide open the cross examination. (Ab. 45-62; Assignments Nos. 1 to 13, Ab. 114, 115), and permitted

the questions to go far afield from the subject of the direct examination.

There is not a scintilla of evidence that the Senior Ball ever had written authority to make leases. The testimony was that he and Mr. Gunter made a few leases for a period exceeding a year. Under the authorities, this was not any proof of written authorization to A. H. Ball to execute this lease. The case of *Darke v. Smith*, 14 Utah 35, 45 P. 1006 is decisive. We quote from p. 1009:

“The defendant testified that in April, 1884, he received a letter from his father, who was then in Arizona, and afterwards lost it in moving. Jane L. Smith testified that she read the letter; that it was Lot Smith’s writing; that her son let her read it; that intestate stated in it that he wanted the defendant to take possession of the land, and make him a home, and he would give him a deed to it; that the letter mentioned the land. It referred to the land he owned in Weber. He owned other land there. Two other witnesses corroborate the defendant and Jane L. Smith in some material respects. While the letter, as remembered by the witnesses, does not contain a description of the land in dispute, or refer to it with reasonable certainty, the testimony of the witnesses, taken in connection with the letter, indicates that the land in dispute was intended. We think this letter was not sufficiently definite and certain as a writing to take the transaction out of the statute of frauds.”

In *Abba v. Smyth*, a Utah case, 59 P. 756, 21 Utah 109, the first paragraph of the syllabus is as follows:

“Under section 2647, Rev. St., unless the es-

sential terms of the contract can be determined from the contract itself, it is within the statute of frauds; and, if thus defective, the defect cannot be supplied by parol proof, for by admitting parol testimony to supply the essential parts of the contract, would be to restore the mischief which the enactment of the statute of frauds was framed to prevent.”

In *Adams v. Manning*, 46 Utah 82, 148 P. 465, the fourth paragraph of the syllabus is as follows:

“Where a contract for the sale of 30 acres of land did not designate the property, and the grantor owned considerable land, mere possession of a particular parcel by letting stock graze thereon will not take the case out of the statute of frauds by identifying the land.”

“A written memorandum stating that it is agreed by the parties that each of them can sell certain lots, ‘and each party has the privilege to sell each lot at \$250.00, which shall pay Mr. Ringer in full for said lots, and if sale is not made within 16 days Mr. H. is to pay to Mr. Ringer the original price agreed upon’ between them is insufficient, within the statute of frauds, when the agreement as to the original price is oral.” Syllabus

Ringer v. Holtzclaw, 20 S. W. 800

“Where, in an assignment of a lease, there is no agreement by the assignor to put the assignee in possession of the leased property, oral evidence is not permissible to show that prior to the execution of the assignment the assignor made such agreement. Parol evidence is not permissible to supply defects in a written contract, which, by the statute of frauds, is required to be in writing.”

Syllabus, *Boyd v. Paul*, 28 S. W. 171.

“The written authorization from the owner, in order that it may be sufficient to permit the owner to enter into a binding contract of lease, must express within its terms the intention of the owner to confer upon the agent complete authority to do so. The mere employment by the owner of an agent to lease his real property will usually be held insufficient as a grant of power to execute a binding lease.”

27 C. J. 298, last par. sec. 376

An agent received from an owner of a lot a letter asking the agent “to see what he could do about selling the lot”, etc., but it did not authorize the agent to sell the lot. Agent made written contract to sell the lot to Lennox and recorded the contract. A day or two later the owner of the lot sold it to Johnson who entered upon the property and made valuable improvements. Lennox sued Johnson, et al to compel specific performance. He lost his case.

Court held the letter gave the agent no power or authority to sell the lot and further held that one dealing with an agent *was bound at his peril* to learn the extent of the agent’s authority.

Johnson v. Lennox, 133 P. 744 (Colo.)

In the case of *Salter v. Ives, et al*, (Cal.) 155 P. 84, the owner of the property wrote to an agent authorizing him to negotiate a lease and setting forth the terms of the lease, and it was held that the mere employment by the owner of an agent to sell or lease the property is usually insufficient as a grant of power to execute a binding conveyance or lease, and it was further held that a binding lease must be executed by the owners.

An agent, with oral authority to sell land, wrote to his principal that he had sold a part of it and the principal made a deed for the land sold and wrote the agent, "I am glad you have sold 80 acres; now sell the 40." It was held that this "is wholly insufficient to constitute such a written memorandum of the contract of sale as would have bound Feger" * * * * "It was wholly insufficient to identify the 40 acres intended to be sold. And although both the principal and the agent may have understood that it was the 40 acres of the principal's farm that lay south of the road, that fact lies wholly outside of the written authority, and cannot be added to it by parol."

Johnson v. Fecht, 83 S. W. 1077 (p. 1079)

"A letter to an agent, saying, 'As you stated you could get \$30,000 for the place you occupy * * * * and if you can, we will sell at that price * * * * and allow you two and one-half per cent on said price—merely authorizes the agent to find a purchaser, but not to sell; and a contract by the agent to sell confers no rights on the purchaser.'"

Syllabus, Grant v. Ede, 24 P. 890

On certain property a company was given "the full management and control thereof, with power to collect the rents and income therefrom, to pay the taxes, insurance premiums and other fixed charges incident thereto and to make all necessary repairs and to do all other things which second party (the Guardian Savings & Trust Co.) deems necessary or advisable in the proper

management of said property.” The court held this was insufficient, saying:

“It is significant, too, that nowhere in the enumeration of the powers delegated to the agent is any express power conferred to execute any lease whatever” * * * *

Lithograph Bldg. Co. v. Watt, 117
N. E., p. 28

The owner of land wrote his attorney, saying he would take \$200.00 for certain timber land, if removed in a year, and “if this is satisfactory to the buyers you may close the deal.” Held, this is not sufficient authority for the agent to make a contract of sale. The court said:

“We are of the opinion that the authority of a real estate agent or broker to bind the principal by a contract of sale should clearly and unequivocally appear before the latter can be held.”

LaPlant v. Loveland, 170 N. W. 920

“The contract must be complete in itself and leave nothing to rest in parol. And it must be certain and definite as to the parties, property, consideration, premises and time of performance.”

Cooper v. Pierson, 180 N. W. 351

Other authorities holding that the mere employment of an agent to rent real property does not authorize the agent to enter into a long-term lease, are:

Miller v. Shaw, 195 P. 743

Campbell v. Galloway, 47 N. E. 620

Perky v. Harding, 123 N. W. 69

Farley v. Fair, 256 P. 1031

It is apparent that Ball’s authority, being in parol,

he could not grant a lease for more than one year without the written approval of his principals. Gunter's approval had always been secured by Ball's father, and by Ball, prior to this lease.

To summarize briefly, the evidence as to the contents of the alleged letters shows conclusively that they were insufficient as a writing because, (a) they did not identify the property. Ball testified they said "for him to carry on as his father did." He did not testify that they named the property. Mrs. Ball testified that she could not recall whether "Eagle Block" was mentioned in the alleged Smith letter. Therefore, the description of the property would have to be supplied by oral testimony, which under the authorities cited, is not admissible; (b) To "carry on as his father did," there is no evidence that the father had any written authority and it is a novel proposition to say that while the agent acting did not have written authority he may act because he is authorized to act as his predecessor did, even though the predecessor had no written authority. Under the defendant's contention, Ball could have made a lease for 99 years as well as for 8 years. There is no limitation to this authority which it is alleged jumps from father to son and gains force with each jump. So we have here the whole question of authority to be supplied by oral evidence and nothing intimating that the father had written authority. Therefore, it follows conclusively that if Ball "may act as his father did," there is no evidence that the father had written authority; therefore, there is not sufficient writing to comply with the statute, and

even if no written authorization were required they have failed, because the father acted with Walker T. Gunter, and Gunter was not consulted here.

(c) The evidence does not show that the alleged letters were signed by the owners of the property, or any of them. Ball testified that Gunter received a letter from Dressler, but did not say Dressler signed it. He did testify that neither Hovey nor the Stockyards National Bank of South Omaha was mentioned. Both Mr. and Mrs. Ball testified a letter was received from Mr. Smith. They did not say it was signed W. P. Noble Company, by Mr. Smith or by Mr. Smith personally. The signatures of the parties are essential. None of the Braggs signed anything, and it was not shown that Brome, the lawyer to whom collections were remitted, had any authority to lease the property, nor were the signatures of any other person shown to have been subscribed to the mythical letters.

Clearly the Court erred in overruling the plaintiffs' objections to the introduction of the lease (Exhibit 28) because there was no written authority and the parties named as lessors in the lease were not the owners (Ab. 76; Assignment No. 17, Ab. 116). Clearly the court erred in overruling plaintiffs' objections to the oral evidence endeavoring to show authority in A. H. Ball (Ab. 67-80, Assignment Nos. 14 to 19, Ab. 116), and the testimony as to the contents of the letters (Ab. 67-80, Assignment Nos. 14 to 19, Ab. 116).

II.

THE ALLEGED LEASE WAS VOID, BECAUSE IT
WAS NOT EXECUTED BY OR ON BEHALF
OF ALL THE OWNERS.

It was stipulated (Ab. 44) that the owners of the property, at and prior to the time of the alleged lease, were the W. P. Noble Company, a corporation, owning a one-half interest; Willard H. Dressler and Ford E. Hovey, Trustees, owning a one-fourth interest; William Frederick Bragg, Robert Russell Bragg, Frederick Ingham Bragg, Laura Lillian Harkins and Laura I. Bragg, owning an undivided one-fourth interest. The lessors of the alleged lease were the Stockyards National Bank of South Omaha, the W. P. Noble Company, both corporations, and the Fred Bragg estate, and these names were signed to the lease as lessors by A. H. Ball, Agent (Ab. 11).

No one co-tenant has the power to make a lease to the entire property without the other co-tenants. Such a lease would be an attempted eviction by one co-tenant of his co-tenants. This principle was well illustrated in the case of *Howard v. Manning*, 192 P. 358, and we quote paragraphs 10 and 12, beginning on page 361, as follows:

“Neither of the tenants in common is entitled to the exclusive possession of all the land to the exclusion of his co-tenants, nor entitled to possession to any particular part of it. As he cannot exclude his co-tenants by his own occupation of the land, he cannot, without their consent or ratifica-

tion, lease all or any particular part of the land in such a way that his lessee will have the right to the exclusive possession of all the land or any part thereof. It is well settled that a lessee of one tenant in common by a lease in which the other tenants have not joined is, as to them, a trespasser so far as he occupies any portion of the land. The lessee of one tenant in common is a trespasser as to the other tenants in common, but the lease is not void as against the tenant in common executing it. Underhill on Landlord and Tenant, vol. 1, secs 62 and 64; Miles v. Fink, 119 Miss. 147, 80 South. 532; South Penn Oil Co. v. Haught, 71 W. Va. 720, 78 S. E. 759; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144; Ziegler v. Brennerman, 237 Ill. 15, 86 N. E. 597; Archer on Oil and Gas, p. 660; Stewart v. Tennant, 52 W. Va. 559, 44 S. E. 223. Neither tenant in common has, by virtue of his relationship to his co-tenant in common, any authority to act as agent for his companion in either giving a lease or enforcing a forfeiture thereof. Freeman on Co-tenancy, and Partition, sec. 180; 38 Cyc. p. 105; Rotzlen v. Merchants Loan & Trust Co. (S. D.) 170 N. W. 128; Adams v. Yukon Gold Co., 251 Fed. 226, 163 C. C. A. 382.

The rule is stated possibly a little differently in the case of Satterlee v. Umenthum, 198, N. W. 823, and we quote from paragraph 1 of the opinion on page 823, as follows:

“We are of the opinion that respondent, by virtue of the lease did, for the period of its duration, become a tenant in common with appellant’s wards. In Tiffany on Real Property (2nd Ed.), p. 683, we find the rule thus stated:

‘A co-tenant cannot make a lease valid as against other co-tenants, so as to give to the lessee the right of exclusive possession of any part of the land, unless he was authorized to act as their agent in making the lease, or unless, having made it as their agent, his act is ratified by them. The effect of a lease by one cotenant, acting for himself alone, is at most merely to confer on the lessee a right to share in the possession for the term of the lease, that is, to make the lessee a co-tenant for the term.’ ”

Our own Supreme Court in the case of *Shell Oil Company v. Stiffler*, 87 Utah 176, 48 P. (2d), 503, recognizes this rule. In this case a husband and wife, as co-tenants, executed a lease. Later the lessee and the husband made a modification of the lease without authorization from the wife, and the court held that the modification was void.

There is also another serious defect as regards the lease, in this: Dressler and Hovey were trustees of a one-fourth interest. It should be proven, and we believe it was not, that Dressler wrote a letter to Gunter stating that A. H. Ball “could carry on as his father had done,” and if it should be asumed that this letter contained sufficient writing to comply with the statute of frauds, then the lease in question would be defective because, where there are trustees, all of the trustees must be parties to any agreement or authorization to an agent.

The United States Supreme Court case of *Winslow v. Baltimore & Ohio Railroad Company*, 188 U. S. 646, 47 L. Ed. 635 was a case in which the trustees had given a lease, and thereafter one of the trustees executed an

agreement for an extension of the lease, and Mr. Justice Packham, speaking for the Court, said:

“In fact, however, the lease was not legally renewed in 1892, because the paper of that year was signed by one trustee only. In our opinion his signature did not make a valid lease. It required the signatures of all the trustees.”

“It is contended that the act of one of the trustees in signing the lease was subsequently ratified by the other by a recognition of its existence by long continued silence, if not by an express ratification. But an *express* ratification would consist of the signature of the other trustee to the paper, and of that there is no pretense. A ratification of an invalid instrument of this nature by recognition, we do not understand. The instrument was void under the statute of frauds, because of the lack of those signatures which could alone render it valid as a lease for five years. Recognition could not take the place of the absent signature. Whether the conduct of the trustees, or of Mrs. Patterson, amounted to such a part performance of an invalid contract as would take the place of the otherwise necessary signatures is another question. It is difficult to see how there could be any technical ratification of this instrument without a signing thereof by the other trustee.

But, assuming that something in the nature of a ratification might be based upon the subsequent recognition, yet such recognition or ratification must be shown to have been founded upon a full knowledge of all the facts. There is no evidence of that kind in the case; none that the other trustee even knew of the existence either of the written paper of 1892 or that it contained a cove-

nant to renew at all for any time. The possession by the company and the payment of rent were provided for by the covenant to renew contained in the lease of 1888, and hence there was a justification for that possession and for the payment of the money, which was entirely compatible with the non-existence of any written lease from 1892, or of any covenant to again renew for five years from August 1, 1897. This possession and payment cannot, therefore, be used as a basis for the presumption of knowledge on the part of the trustee of the existence of the so-called lease of 1892 or of the covenant contained therein.”

Our own Supreme Court, in the case of *Utah Loan and Trust Company v. Garbutt*, 6 Utah 142; 23 P. 758, makes the same holding with reference to the necessity of all the trustees joining in giving the written authorization to an agent.

James on “Option Contracts,” sec. 811, lays down the following rule:

“The mere fact that the optioners are the owners of the optioned property as tenants in common, or as joint tenants, does not, as we have seen, clothe any of the tenants with power or authority to give an option upon the common property that will be binding upon any interest except his own. The relation of principal and agent does not exist between tenants so far at least as the right to dispose of the common property is concerned. Nor are they partners. With reference to the subject matter under consideration, the relation between them is not different from that existing between owners of separate and distinct parcels of land, with the consequence

that the power of one to sell or dispose of the interest of the other as well as to accept or receive notice of election, must rest upon authority either impliedly or expressly granted."

In the case of *Landt v. Schneider*, 77 P. 307, (Mont.) there were three lessors and the lessee claimed there had been a modification of the lease by one of the lessors acting for all, and to substantiate the defense they offered a letter written to one of the lessors by another lessor in behalf of himself and the other lessors, "We (Ritter and Buxman) have concluded that Mr. Ritter goes to your place and all what he agrees about the brewery in Maiden is all right with me."

We quote further from the same case:

"This letter is signed by Geo. Buxman. Plaintiffs sought to show by this letter that Ritter had authority to enter into the agreement of September 20th extending the lease as the agent of Buxman. The court refused to admit the letter. This letter is a statement by plaintiff Landt, and does not purport to grant written authority to Ritter to contract for and on behalf of Buxman. Subdivision 5, sec. 2185, Civ. Code, provides that an agreement for leasing for a longer period than one year, or for the sale of real property, or for an interest therein, must be in writing, and such agreement, if made by an agent, is invalid, unless the authority of the agent be in writing, subscribed by the principal sought to be charged. Section 1504, Civ. Code, provides that, when an attorney in fact executes an instrument transferring an interest in real property, he must subscribe the name of his principal to it, and his own name as

attorney in fact. Ritter had no written authority, as appears from this record, to contract for Buxman; nor is Buxman's name signed to the agreement extending the time of this lease. This lease and agreement of extension also embody an agreement for the sale and conveyance of this land to defendant. Under the facts here presented, this alleged agreement of Buxman's amounts to nothing more than a parol agreement to extend the terms of the written lease and agreement to convey for more than one year beyond the date when the contract of extension was entered into."

THE DEFENDANT DID NOT ACT IN GOOD FAITH, AS HE HAD NOT ONLY CONSTRUCTIVE BUT ACTUAL NOTICE THAT BALL WAS NOT AUTHORIZED TO EXECUTE SUCH A LEASE.

Nick Floor testified that at the time he secured the lease he consulted with and submitted it to an attorney, Mr. Knowlton. (Ab. 106, 107). He did not say what the attorney advised him, nor did he produce the attorney as a witness to testify that he had advised him that the lease was in due form and would be a binding obligation. We must believe that he was told of the infirmities in the lease. A. H. Ball purported to sign as the agent of a bank in another state, the agent of a Utah corporation, and the agent of an estate. This was an 8-year lease. Any lawyer would have asked, "Has Ball written authorization from the bank; have the duly authorized officials of the Utah Corporation executed a power of attorney appointing Ball agent, with power to lease the

property?" And then we have the "Fred Bragg estate." Is there an order of court authorizing Mr. Ball to lease the property of the Estate? Eight years is a long time to tie up the property of an estate. No lawyer could have failed to warn Mr. Floor of these facts and advised him of the necessity of securing proof of Mr. Ball's authority.

The law cast on Mr. Floor the duty to ascertain these facts. Any lawyer would know Mr. Ball's authority must be in writing. The lawyer must have advised Mr. Floor accordingly. The duty was cast on Floor to ascertain the authority of Ball and he cannot evade that duty by saying he did not know. The authorities all hold that the duty is cast upon the lessee to determine the authorization of the person who purports to act for the principals.

2 C. J., p. 565, sec. 207, lays down the rule thusly:

"Where a third person dealing with an agent has knowledge that his authority must necessarily be in writing in order to bind the principal, it is his duty to ascertain whether the agent has such authority and whether it is in proper form; and where there is written authority, whether it is required or not, and such person has, or is charged with, knowledge thereof, it is his duty to ascertain the nature and extent of the authority conferred, and whether the agent is acting within its scope, unless he is excused from inspecting the written authority by a statement from the principal himself defining the authority. When the authority is by law required to be in writing he is charged with knowledge of the fact, and of the limitations upon the agent's power contained in such writing."

This rule is confirmed in 2 C. J. S., p. 1191, (Note 74) as follows:

“So it is in any situation where the agent’s power is by law required to be contained or expressed in writing; in such a situation, a third person is affected by notice of the existence and the contents of the power, alike whether he does or does not know of such matters.”

THERE WAS NON-EVIDENCE OF ESTOPPEL OR RATIFICATION

The defendant alleged that it had paid the rent according to the terms of the said lease and that the plaintiffs’ predecessors had received the rent, which plaintiffs admitted. The defendant further alleged that the original lessors had notice of the lease and of the fact that defendant, in reliance thereon, had spent \$1,000.00 in permanent improvements. This is denied. A. H. Ball carefully concealed from the owners the fact of the Floor lease. On October 20, 1933, Mr. Ball wrote Mr. Gould-Smith: “I have delayed sending the report for September on the Eagle Building, hoping I would have something definite to say with respect to 79 West 2nd South * * * * We have a good man in 79, and I feel that things will be all right on the corner now.” (Ab. 52). The monthly reports of collections merely reported the monthly payments of “79 West 2nd South.” When Gould-Smith and Dressler visited Salt Lake City, Mr. Ball told them nothing of the lease. The letters and monthly reports submitted by Mr. Ball never mentioned the giving of leases. (Exhibits 4 to 23; Ab. 54-60).

Mr. Dressler testified he visited Salt Lake City in November, 1937, and went to the Eagle Block with Mr. Ball, but did not go inside, and was told nothing as to tenants. (Ab. 63-65).

Mr. Gould-Smith testified he came to Salt Lake City two or three times a year. "Occasionally I would go down with Mr. Ball and look at the Eagle Block." Ball would say, "I have got a tenant for such and such a place." We discussed repairs. I noticed no change in 1934 and 1935, only that it looked older. (Ab. 45-48).

Mr. Ball testified that Mr. Gould-Smith was here several times. "We would walk over to the Eagle Building, and he would look at it from the outside, and he said 'Carry on as you are.' I pointed out to Mr. Gould-Smith that the tenant, at his own expense, had put in 'just a little strip of tile' on West Temple Street, under the window. I told Mr. Smith I thought we had a very good man in there and I was sure we would get the rent," to which Mr. Smith said, "Fine."

"None of the Bragg heirs came. Mr. Dressler came in the Fall of '36 or the Spring of '37. I showed him the property and he said it needed a lot of improvements, and I said, 'Yes.' Nothing was said about any leases or who was occupying it. I don't think anything was said to Mr. Smith about leases." (Ab. 78)

There is no basis for estoppel or ratification. There can be neither without a full knowledge of all of the facts. A. H. Ball showed in his testimony, respecting the visits of these principals, that his treachery to his principals in making the Floor lease and not reporting it, was

continuing. He led Mr. Gould-Smith to believe that the tenant, at his own expense, had put in "A little strip of tile." This shows clearly that Ball's failure to disclose to his principals the fact of the Floor lease was not mere oversight, but deliberate betrayal of the interest of his principals. It was the duty of Ball to tell them the facts. The principals, having full confidence, in Ball, made no inquiry and the principals were lulled into security that their agent was not unfaithful to his duties. Query: Was Ball acting to protect Floor by concealing the lease? So long as the principals did not know of the lease Floor was secure, but if he had disclosed the fact he knew his services would be terminated and Floor's lease terminated. He knew that Gould-Smith had told him, in April, 1933, he wanted to keep the building free and intact; that there might be a chance to sell it (Ab. 61, 62 and 110). He testified, "I knew in 1937 that some of the owners wanted to sell. I received the original of Exhibit F in May, 1936. I knew some of the owners wanted to sell. I didn't call the attention of anyone that I had given a lease which would not expire until 1941." (Ab. 87).

Willard H. Dressler testified the first he knew of the Floor lease was when he received a notice from the plaintiffs, dated June 9, 1939, that Floor claimed a lease (Ab. 64) and that he immediately wrote Ball. Ball testified that Dressler wrote a letter exhibiting surprise. "I got the impression from the letter that Mr. Dressler knew nothing about the lease, that he considered this thing a racket." "I didn't tell Mr. Dressler there was a lease. I don't know why I didn't tell him in my letter

of July 15, 1939, that I had previously told him about the lease in '36 or '37."

The disloyalty of Ball continued to the last. Knowing his principals were selling the property he gave no notice to them of the lease and permitted them to give a general warranty deed with a special warranty, warranting immediate possession. He did his utmost to protect Floor, to the detriment of his principals, to the last.

The case of *Jones v. Mutual Creamery Company*, 17 P. (2d), 256, 81 Utah, 223, is conclusive. The judgment was unanimous. We quote from the opinion written by Justice Straup, as follows:

"It is well recognized that, in order that a ratification of an unauthorized act or transaction of an agent or of another may be valid and binding, it is essential that the principal or the person making the ratification had full knowledge at the time of the ratification of all material facts and circumstances relative to the unauthorized act or transaction (2 C. J. 476), and also that an intention to ratify is essential and which must be shown either by an express or by an implied ratification (2 C. J. 484, 492.).

The foregoing decision is in harmony with the practically universal authority as shown by a portion of sections 205 and 206, 21, C. J., beginning on page 1202, as follows:

"Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title or right, he cannot afterwards assume a position inconsistent with such act, claim or conduct to the

prejudice of another who has acted in reliance on such conduct or representation.”

“To render the rule operative it is essential that in taking the former position the party against whom the estoppel is claimed should have acted with knowledge of his rights, and that he was aware of the facts in respect of the estoppel claimed; also that the party invoking the estoppel was misled by the acts or conduct of the party against whom the estoppel is claimed; that he changed his position in reliance thereon, and was justified in so doing, and that he was prejudiced thereby, or the party against whom the estoppel is claimed benefitted.”

V.

THERE WAS NO EXTENSION BECAUSE, (a) NOTICE TO BALL WAS NOT NOTICE TO THE PRINCIPALS; (b) DEFENDANT DID NOT EXPEND \$1,000.00 IN PERMANENT IMPROVEMENTS; (c) DEFENDANT DID NOT, IN WRITING, AGREE TO THE EXTENSION.

(a) We have this situation: Ball executed this lease without authority, it being a lease which the statute provides must be authorized in writing, and an agent not having written authority has no authority. Further, the duty is cast upon the defendant to ascertain whether or not the agent had written authority.

Restatement of Agency, 279;
2. C. J. S., p. 1081, sec. 42

Under these circumstances, the owners were not affected by the knowledge of the agent; in fact, it was, in

a way, a conspiracy between the agent and the defendant, both knowing that the agent had no written authority. The agent carefully concealed from his principals the fact that a written lease had been made. His letter or report to Mr. Smith after the execution of the Floor lease, was "We have a good man in 79." (Ab. 52.) This also was erroneous, because the tenant was a corporation.

The relationship of principal and agent is fiduciary in character. The agent owes the highest duty to his principal and concealing from his principal important facts is as disloyal as giving erroneous information. The principals had correspondence with Ball respecting the sale of the property and Ball was contacting real estate agents respecting the matter. Ball knew that the principals were selling the property, yet he never warned them that there was an outstanding lease, and the principals executed warranty deeds containing a rather unusual clause warranting immediate possession. Ball has been disloyal to his principals ever since September 25, 1933; he was acting with the lessee, both had full knowledge that Ball had no authority.

The presumption that an agent will notify his principal of matters pertaining to the business with which he is entrusted is not applicable to those acts which were executed by the agent in disloyalty to his principal. In other words, it cannot be presumed that the agent will notify his principal of his own breach of duty and disloyalty. The case of *Dixie Guano Co. v. Wessel*, 296 Fed. 433, was a case in which the plaintiff's agent had been disloyal and sold goods belonging to it for his own

account, and after more than a year had elapsed the plaintiff sued the party receiving the goods, who plead an estoppel and ratification, and the court held that there was no possible basis for estoppel and quoted the case of *American Surety Company v. Pauly*, 170 U. S. 133, 150, and 42 L. Ed. 977, as follows:

“Ordinarily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents; but in this case all these transactions, if there were any transactions of a fraudulent and dishonest character, on the part of the cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and under those circumstances the law does not infer that the agent or the officer will communicate the fact to his principal, the corporation, and under such circumstances the corporation is not bound by his knowledge. So this defense melts away and there is nothing of it whatever.”

This case contains quotations of a similar effect from many other cases and citations to many authorities.

In the case of *Lithograph Building Co. v. Watt*, 117 N. E. 25, which we have quoted above, respecting a written authorization which was insufficient on its face to authorize the lease, the court held:

“Here the purchaser was bound to know the extent of the agent’s authority. The contract made by the agent exceeded that authority, and the principal repudiated it as soon as he learned that it had been made. The case contains none of the elements which must be present before the

application of the doctrine of estoppel can be insisted upon.”

2. C. J. S., p. 1081, sec. 42, states,

“Where material facts are suppressed or unknown there is no valid ratification.”

and on page 1083, of the same section we quote:

“As a corollary to the rule that the principal must have knowledge of the material facts relating to the authorized act of his agent in order to ratify the same, it follows that, notwithstanding a principal’s approval of unauthorized acts which have been done on his behalf by another, if the material facts be either suppressed or unknown there is no valid ratification. In this respect it is immaterial whether the principal’s want of knowledge is due to designed or undesigned concealment or willful misrepresentation on the part of the agent or his mere inadvertence, or whether the question of ratification arises between the principal and the agent or arises with respect to third persons.”

If Floor had been innocent here, that is, if he hadn’t been under the duty of ascertaining that Ball had written authority, he could have sued Ball for damages.

2 C. J. S., page 114, sec. 208

2 C. J. S., page 117, sec. 211

But under the circumstances, he was negligent respecting a matter which it was his duty to ascertain the fact, that is, whether Ball had written authority to execute this lease. Another strange feature: Ball says he hired (after Gunter’s death) Mr. Cluff as attorney for his principals (Ab. 81). Now Ball, at every stage, rendered

such help as he could to the defendant, and the attorney he claims to have hired for his principals is in the employ of the defendant in this action. Under these circumstances, in so far as Floor was concerned, Ball did not represent the original owners, because he carefully concealed from them all the facts. Therefore, he had no right or authority to make any approval of the improvements that Floor placed in the property, nor did he have any right or authority to accept notice of the renewal of the lease.

2 C. J. S., p. 1078, section 39, states :

“It is essential to ratification that the right to repudiate exist.

In addition to the other essential elements of ratification hereafter considered in sections 40-44, it is held to be necessary that the third person who deals with the agent be ignorant of the fact that the agent lacks authority to act and that the principal be permitted to repudiate the act if he chooses so to do.”

And the following from the case of *Allen v. Greenland Oil Company*, 256 P., 1004:

“The doctrine of ratification of an agent’s unauthorized agreements implies the existence of at least two essential elements: (a) that the party contracting with the agent did not know the agent lacked authority to make the agreement, and (b) that the principal had the privilege of repudiating the unauthorized agreement, if he did not choose to ratify it.”

This shows conclusively that our contention that the disloyalty of Ball in concealing all the facts of this al-

leged lease removed him as the agent of the owners respecting his dealings with the defendant, all of which were based upon concealment. Otherwise, how can the basis of ratification, as shown in section (a) of the *Allen v. Greenland Oil Company* case depend upon the defendant knowing that the agent lacked the authority, because here he is presumed to have known and it is the same as if he knew and, therefore, it was a deal between Ball and the defendant so long as the facts were kept from the owners. True, they received the rent from Floor, and Floor received a big value for every dollar he paid for rent.

Other authorities holding that the rule imputing agent's knowledge to the principals does not apply when the third party knew that the agent in the original contract did not have authority to make the contract are:

Jenkins-Renfro 66 S. E. 212, 25 L.
R. A., N. S., 231
Meacham, Agency, sec. 721
3 C. J. S., p. 218, sec. 280
Mutual Life Ins. Co. v. Hilton, 241
U. S. 613, 60 L. Ed. 202
Millincamp v. Willenberg, 169 N. W.
100
McCourt v. Singers-Bigger, 145 Fed.
163
Scripture v. Scottish American, 49
S. W. 644

(b) The defendant has pleaded that he expended \$1,000.00 in permanent improvements and the lease provided that in order to be entitled to a renewal it was

necessary for him to have expended \$1,000.00 in permanent improvements on or before May 1, 1935.

Permanent improvements necessarily means those improvements which permanently affect the building, and not merely such improvements as are convenient for the use of a particular tenant or which will be used up or worn out during the period of the tenancy. The defendant has made proof of large expenditures but he has failed to segregate trade improvements, or improvements which will be worn out during his tenancy, from the permanent improvements. The court overruled plaintiffs' objections on these grounds. (Ab. 91, Assignment of Error 21, Ab. 117). The clear duty rests upon the defendant to make this segregation. The defendant introduced the following bills:

The Granite Mill and Fixture Co. (Exhibit 32, Ab. 91), for a large number of items for a total of \$820.00, including a new floor, which we admit was necessary, but when defendant decided to conduct a dance hall, it required a maple floor, 12 x 22 feet, which had to be smoothed and sanded twice. When the license for dancing was not renewed, defendant put linoleum over the maple floor. At first fir flooring was ordered and then changed to maple: it added the exchange cost \$15.00 (Ab. 102, 104).

The toilet was on the main floor. "I thought for my business I would rather have it downstairs."

Then there were two stairways, one in the southeast corner, which was enlarged, and leads to a ladies' rest room which defendant installed, and an opening in the

floor was cut in the west side and a stairway constructed to the men's toilet. The framework for these toilets could be removed. The opening and the stairway on the east side was not used.

We submit that moving the toilet downstairs and making a place for a new stairway instead of using the old one are alterations to suit the tenant's desire, and not permanent improvements. The linoleum on the floor and the carpet on the stairway, which was charged in the bill, were worn out and had been removed. (Ab. 102, 103). The trap placed under the bar to catch the water from the bar and the 50 to 60 feet of 2-inch pipe leading to the sewer was included. A paneling was placed around the room and the same paneling was placed in an old closet owned by Floor at the north end of the bar, and included in the cost. When defendant went in there was a partition dividing the front from the back. It was 7 or 8 feet high with a square opening. "I wanted to increase the size of the dance hall, so I moved the partition north about 3 feet and built it higher up to the ceiling, with swinging doors, making a complete separation of the rooms," at a cost of \$85.00. The swinging doors are stored in the basement. To suit its convenience, the defendant changed the transom. (Ab. 104).

Bernardi's Electric Company bill (Exhibit 34, Ab. 93, 105, 112). This bill was for \$181.85. It is a question whether any of it was for a permanent improvement, as it was really a trade convenience. New wiring in conduit was necessitated by defendant's installing an air compressor; electric lights were installed in ten booths with

wire in conduit leading to each booth. There were 7 chandeliers—4 in front and three in the back (Ab.105). Floor said he could remove lighting fixtures, worth \$52.50. We submit that the 10 branches and outlets for the booths would be a large part of the balance of the costs. The defendant failed to show what he had done with the old lights.

It was clearly the duty of the defendant to segregate the costs, which were not permanent improvements.

We submit that the other bills, except Elias Morris & Sons Company, are not, in any sense for permanent improvements.

As to Exhibit 35, bill of Spere Tent & Awning Company for two awnings (Ab. 94), Floor testified that they are good for three or four years yet. (Ab. 105).

Exhibit 36, linoleum and carpet, \$64.14. The linoleum was glued to the floor (Ab. 94). "The linoleum is pretty well worn now. I am going to put in another one soon." The 9½ yards of stair carpet and pads for 15 steps, amounting to \$17.90, is worn out. (Ab. 105, 106).

Exhibit 37, exterior painting done April 14, 1934, \$61.00 (Ab. 95, 106). The incidental items for approximately \$80.00 (Exhibit 40), described on pages 95 and 96 of the abstract, for painting, paper, paper-hanging, etc. are not allowable, because it was admitted that the painting and papering with these materials was done in 1934, and has been covered over with new paint and paper. (Ab. 106). Also screen doors, costing \$23.49, are included with \$6.01 for lumber, but clearly these are not permanent improvements (Ab. 106).

Exhibit 38, cement on floor of gent's lavatory, which was trade fixture (Ab. 95).

Objection was made that the foregoing testimony was irrelevant and immaterial, and the cost of the various items was not segregated and many of them were not permanent improvements. We have assigned the ruling of the trial court as error in Assignment No. 21, Ab. 117.

It is impossible to ascertain how much was paid for permanent improvements. The defendant has failed to furnish evidence on this, and Ball, having concealed from his principals all the facts in regard to defendant's lease, had no authority to pass upon and approve same.

As to the character of these improvements, and that they were not permanent improvements within the provisions of the void lease, we refer to the case of *Price v. Lloyd*, 31 Utah 86, 86 P. 767, and we quote from page 771 as follows:

“Generally speaking, the improvements, especially the papering of the rooms, the inside painting, much of the fencing, the chicken coops, and the like, are not such as have a substantial or permanent character, or as beneficial to the freehold; but they are such as are merely for the ordinary convenience and comfort in the use and occupation of the premises.”

(c) Let us assume that the positions were reversed—that the original owners, with full knowledge, had ratified the lease and the defendant refused to pay the rent and he was sued for the rent. Could he not plead that he was not liable; that there was no written agree-

ment by him to pay rent after the first three-year period; that any alleged extension was in parol and, therefore, he would not be liable?

The authorities are somewhat divided on this subject but the following authorities hold that such plea would be open to defendant:

JAMES, on Option Contracts, section 414:

“Where the option contract or offer falls within a particular or special statute, the character and sufficiency of the election, or acceptance, required must be determined by reference to the provisions of that statute.

Thus, the Alabama statute provides that a contract for the sale of land, etc. is void unless the purchase money, or a portion thereof, be paid and the purchaser be put into possession of the land by the seller. The owner of land gave a written lease with option to the lessee to purchase. An election to purchase under the option was made by the agent of the lessee whose authority to do so was not in writing as required by the statute, and it was held that since neither part of the purchase money was paid, nor possession taken under the option, the election, in law being oral, was insufficient.”

In speaking of an oral notice of extension, Judge Cooley in the case of *Veller v. Robinson*, 15 N. W., 448 (Mich.) said:

“But the difficulty with this agreement is, that it makes an extension for three years dependent for its creation and existence on a mere oral understanding.”

VI.

THE PLAINTIFFS ARE NOT LIABLE FOR
ATTORNEYS' FEES

The alleged lease provides, (Ab. 12), "and either party agrees to pay all costs and attorney fees and expenses incurred by the other that shall arise from enforcing the covenants of this lease."

The plaintiffs denied any liability for attorneys' fees. (Ab. 99, 117). The court, in its finding No. 9 (Ab. 36) and in its judgment (Ab. 40, 41), allowed the defendant \$500.00 as an attorney's fee. The plaintiffs have assigned as error such finding and judgment (Ab. 120, 121).

The plaintiffs submit that the court erred in such finding and judgment, because:

(a) There is no privity between the plaintiffs and the defendant and the provision for attorneys' fee was not a covenant running with the land.

The alleged lease purports to be between "The Stockyards National Bank of South Omaha, the W. P. Noble Company, both corporations, and the Fred Bragg Estate, all by A. H. Ball, as Agent, as Lessors, and the defendant, as lessee. (Ab. 12, 14). Of the lessors, only one, to wit, the W. P. Noble Company, had any interest in the property. The real owners conveyed the property to the plaintiffs on the 31st day of May, 1939 and warranted immediate possession (Ab. 66, 67), and there was no provision that the grantees (the plaintiffs) took the property subject to the lease. The plaintiffs immediately, on June 2, 1939, notified the defendant to vacate

the premises (Ab. 3, 4) and followed with this suit for unlawful detainer. There is no contract between plaintiffs and defendant; they are strangers. The defendant claims possession under an alleged contract which names only one of the owners of the property or of plaintiffs' grantors. The provision for attorneys' fee in the alleged contract is not a covenant running with the land, so as to make the purchaser of the land liable on a contract, though he is not a party to it. It in no wise touches or concerns the land or its use. It is purely a personal covenant.

We quote from the case of *Hollander v. Central Metal*, 23 L. R. A. (NS) 1135, 71 Atl. 442, the following:

“In *Glen v. Canby*, 24 Md. 127, the court stated as the established doctrine, ‘that a covenant to run with the land must extend to the land, so that the thing required to be done will affect the quality, value or mode of enjoying the estate conveyed, and thus constitute a condition annexed or appurtenant to it; there must also be a privity of estate between the contracting parties, and the covenant must be consistent with the estate to which it adheres, and of such a character that the estate will not be defeated or changed by a performance of it.’ This is the doctrine asserted by Mr. Poe in 1 Poe Pl. & Pr. 1st ed. 253, and reiterated by this court in *Whalen v. Baltimore & O. R. Co.*, 108 Md. 11, 17 L. R. A. (N. S.) 130, 69 Atl. 390. In *Taylor’s Landlord and Tenant*, 7th ed. sec. 261, it is said that, ‘in order that a covenant may run with the land, its performance or non-performance must affect the nature, quality, or value of the property

demised, independent of collateral circumstances, or must affect the mode of enjoyment. It must not only concern the land, but there must also be a privity of estate between the contracting parties.'

'In order that a covenant may run with the land—that is, that its benefit or obligation may pass with the ownership—it must respect the thing granted or demised, and the act covenanted to be done or omitted must concern the land or estate conveyed. Whether a covenant will or will not run with the land does not, however, so much depend on whether it is to be performed on the land itself, as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is owned or occupied; for, if this be the case, every successive assignee of the land will be entitled to enforce the covenant.' 11 Cyc. 1080.

'Such covenants, and such only, run with land as concern the land itself, in whosoever hands it may be, and become united with, and form a part of, the consideration for which the land, or some interest in it, is parted with, between the covenantor and covenantee.' Washb. Real Prop., sec. 1205."

We have cited many authorities laying down the general rule. We have made search through the digests and other sources and found no case where it has ever been claimed that a provision for attorneys' fee runs with the land.

We cite a few cases which come more nearly concerning the land than does attorneys' fee, and which the courts hold do not run with the land:

In the case of *Cohen v. Buns*, 170 N. Y. S., 560, one Sidman Weiss leased to B. Cohen for 10 years. Plaintiff Cohen deposited with Weiss \$400 as security for the performance of the lease. Seven years later Weiss sold to Buns, husband of defendant. He agreed to pay to plaintiff. He conveyed property to his wife as a gift. Plaintiff demanded the deposit from wife.

Held: The covenant in the lease to repay the deposit was a personal covenant upon the part of the then owner of the premises and did not run with the land. There was no privity of covenant or contract between plaintiff and defendant and no evidence of any promise on the part of the defendant to pay it, nor is there any evidence that she assumed the obligation when she accepted the deed of the premises. Under such circumstances the judgment cannot be sustained. *Knulsen v. Craque*, 99 N.Y.S. 911.

In the case of *Magoon v. Eastman*, 84 Atl. 869, a lease of a farm required the lessee to leave as much hay as there was on the farm when he took possession. He left the required amount but some of it was not cut in proper season and was therefor of less value than it otherwise would have been.

Held, that the lessee's obligation concerning the hay was not a covenant running with the land, but was a mere personal obligation and, hence, an action of covenant could not be maintained by the lessor's assignee for breach thereof.

“It is claimed that the plaintiff, as successor in interest to the lessor, was entitled to the required amount of hay properly and seasonably

harvested, according to the rule of good husbandry. This may be so, but the question here is whether he can recover the damage in an action of covenant brought in his own name. We think the defendant's obligation concerning the hay is not one that touches or concerns the land. The agreement to return was a personal obligation."

"If a covenant in a lease will be for the benefit either of the landlord or tenant by reason of its relation to the land, it concerns the land so as to run with it."

Bailey v. Walker & Co. 290 F. 282

"A covenant in a lease giving the lessee an option to lease other lands from the lessor is purely collateral and could not run with the land, even against heirs, when named in the instrument, since the necessary privity is absent."

Watts v. Bowen, 139 N. E. 658

"A provision in a lease limiting liability of lessor for damages sustained by tenant to one month's rent does not run with the land and the original lessor's grantor cannot enforce it."

Strong v. Woodard I. Co., 158 N.Y.S.
513

"A covenant of the lessor to buy, at the termination of the lease, the buildings remaining on the premises is personal to the lessor and does not run with the land, nor bind her heirs or legatees."

In re: Kenshaw, 75 N. Y. S. 1047
Etowah M. Co. v. Willis Valley, etc.
25 So. 720

(b) The attorneys' services rendered in this case is not within the terms of the contract.

The defendant, in order to justify his possession, claimed under the alleged lease. The plaintiffs denied there was any lease. This made the issue; that is, was there a lease? The services of the defendant's attorneys was rendered in attempting to establish that the defendant held a valid lease. The lower court found the defendant has a valid lease. Defendant did not attempt to sustain any covenant of the lease, but only, was there a lease. As to the provision for the extension, the defendant attempted to prove only that it had complied with a condition of the lease entitling it to the extension. The defendant did not agree to expend \$1,000.00 in improvements. The lease says, "For and in consideration of the expenditure by the lessee in permanent improvements in and on said store and basement to the extent of \$1,000.00, * * * * an option, under the same terms as herein set forth, for an additional 5 years is hereby granted * * * * said option to be exercised on or before 30 days prior to the expiration of 3 years * * * * In case said option is exercised, the rent shall be \$90.00 per month."

It is to be noted that the defendant in no wise agreed to make any improvements. So the provision for an extension was conditional, (1) on the improvements having been made; (2) in the election of the defendant. The defendant attempted to establish, and the lower court held it did, that it performed both conditions. This was in line with the whole issue—did the defendant hold a lease? If its lease was valid, then there was no question as to its covenants.

This case comes within the principle enunciated by this court in :

Forrester v. Cook, 77 Utah, 137, 292
P. 206 (10)

Leone, et al, v. Zuniga, 34 P. (2d)
699 (3) 84 Utah 417

Brandley v. Lewis, 92 P. (2d) 338

VII.

THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ARE ERRONEOUS

The plaintiffs have assigned error to each finding of fact, except finding No. 4. (Assignments Nos. 29 to 36, Ab. 118, 120).

As to Finding No. 1, Assignment of Error No. 29, (Ab. 118), states fully our objection.

Findings Nos. 2 and 3 seem to be based on insufficiency of allegations in the complaint. The defendant entered the premises under a void lease. We quote the syllabus from *Utah Loan & Trust Co. v. Garbutt*, 6 Utah 142, 23 P. 758:

“Under 2 Comp. Laws Utah 1888, sec. 3916, requiring a lease for more than one year to be in writing, and, if made by an agent, requiring the agent’s authority in writing, one of six executors having no written authority from any of the others, cannot make a lease for more than one year, a majority being required for any valid act by section 4030.

The acceptance of rent under a lease void under the statutes of frauds creates only a tenancy from month to month, the rent being payable monthly.”

The rule is universal that when a person occupies premises under a lease void under the statute of frauds, in collecting the rent for the occupation the terms of the lease will control. 35 C. J. 1028, 1124, sec. 344.

Finding No. 5. As to this the assignment of error No. 32, (Ab. 118), sets forth fully the objections except Cluff was employed by Ball as attorney and the employment was not ratified by the predecessors.

Finding No. 6, (Assignment of Error No. 33, Ab. 118), points out this finding is contrary to the evidence in finding that Mayme Noble visited the premises several times while the improvements were being made. Floor testified: "These changes had been made and the tile work done when Miss Noble came down." (Ab. 97,110).

We have discussed the other matters elsewhere in this brief, except the finding that the plaintiffs had knowledge of the lease. This is immaterial. The warranty deed they received warranting immediate possession was a repudiation of any claim by any person for any lease on, or for any part of, the Eagle Block extending beyond May 31, 1939, the day the premises were conveyed to them, and they being privy to the grantors have the right to plead the statute of frauds.

Collins v. Lacky, 123 P. 1118, 40 L.
R. A. (N.S.) 885 and annotation;
Givens v. Mason, 266 S. W. 7;
Hansen v. Buttison, 27 N. W. 423;
Bank v. Bank, 114 N. W. 409.

As to finding No. 7, and assignment of error No. 34, we amend the assignment by making it as follows:

“34. The court erred in making Finding No. 7, because the evidence shows that no notice of the exercise of the option was given to A. H. Ball, and A. H. Ball, having given the lease without authority, notice to him would not be notice to his principals, and there was no written notice of the acceptance of the extension signed by the defendant.”

We have argued these points elsewhere.

As to finding No. 8 and assignment of error No. 35, we amend the assignment of error to read as follows:

“35. The court erred in making Finding No. 8, because the matter of good faith upon the part of the defendant was not an issue in the case, and further, the defendant knew, or should have known, that his lease had no written authorization from the owners.”

Finding No. 9 grants the attorneys' fee, and assignment of error No. 36 (Ab. 120), we amend to read as follows:

“36. The court erred in making Finding No. 9, because the matter of attorneys' fee was not an issue, as the plaintiffs did not agree to pay any attorneys' fee, and this suit does not come within the terms of the contract entitling the defendant to attorneys' fee.”

We discuss this question elsewhere.

The lower court, having adopted the wrong theory of both the facts and the law, and the findings being erroneous, it necessarily follows that the conclusions of law and judgment are erroneous. The plaintiffs' assignments Nos. 37 to 42, (Ab. 120) are to the erroneous conclusions and judgment.

In conclusion, the alleged lease was void under the statute of frauds, and because it was not executed in the names of all of the owners; and the permanent improvements were not sufficient to meet the conditions of the alleged lease, and the defendant did not bind himself for the extension period, and the plaintiffs are not liable for any attorneys' fee.

Respectfully submitted,

ALLEN T. SANFORD,

E. A. ROGERS,

Attorneys for Appellants.