

1940

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

D. N. Straup; Willard Hanson; Stewart M. Hanson; Attorneys for Defendant and Respondent;

Recommended Citation

Brief of Respondent, *Latses and Sdrales v. Nick Floor, Inc.*, No. 6237 (Utah Supreme Court, 1940).
https://digitalcommons.law.byu.edu/uofu_sc1/646

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

No. 6237

In
The Supreme Court
of the
State of Utah

JAMES LATSES AND
JAMES SDRALES,

Plaintiffs and Appellants,

vs.

NICK FLOOR, INC.,

Defendant and Respondent.

Appeal From the Third District Court of Utah,
for Salt Lake County
Honorable P. C. Evans, Judge

BRIEF OF RESPONDENT

D. N. STRAUP,
WILLARD HANSON,
STEWART M. HANSON,
Attorneys for Defendant
and Respondent.

FILED
MAY 10 1940

INDEX

Attorney's Fees	57-66
Estoppel	35-45
Plaintiffs Failed to Prove Their Alleged Cause	2-12
Plaintiffs' Points	12-35
Statute of Frauds	45-57

TABLE OF CITATIONS

Alexander v. Culbertson Ir. & Water Power Co., 61 Nebr. 333; 85 N. W. 283.....	55
33 A.L.R. page 1489,	50
1 Bancroft Code Pl., Sec. 738, p. 1038.	7

(Table Continued)

TABLE OF CITATIONS

(A Continuation)

1 Bancroft Code Pl., Sec. 737, p. 1035.	7
1 Bancroft Code Pl., 984,	8
Black Hdwe. Co. v. Commissioner of Internal Rev., 39 Fed. (2d) 460.	56
Cache Valley Banking Co. v. Logan B. P. O. E., (Utah); 56 Pac. (2d) 1046.	55
Carnahan v. M. J. & B. M. Buck Co., (Mich.); 229 N. W. 513, ...	54
21 C. J., page 1206, under the title, "Estoppel," Sec. 207, ...	48
26 C. J. 657, Sec. 4, Subdivs. III-IV; 658, 666, Annotation 39; A.L.R. 1044.	42
27 C. J., page 343, Sec. 427, ...	47
35 C. J., Sec. 544, page 1214. .	61

TABLE OF CITATIONS

Fine Arts Corp. v. Kuchins Furniture Mfg. Co., (Mich.); 257 N. W. 823,	54
Friberg v. Bjelland, 95 Ore. 320; 182 Pac. 1113,	51
Fritsch v. Hess, 49 Utah 75; 162 P. 70.....	40
Fudicker v. Glenn, 237 Fed. 808.	54
Greenberg v. German-American Ins. Co., 83 Ore. 660; 160 Pac. 536.	8
Gutheil v. Gilmer, 27 Utah 496.	49
Hagar v. Home Stores, Inc., (Cal.); 259 Pac. 1007.....	55
Halligan v. Frey, reported in 49 L.R.A. (N. S.) 113,	52
Hargreaves v. Burton, 59 Utah 575; 206 Pac. 262,	49
Hogan v. Swayze, 65 Utah 380; 237 Pac. 1097,	50

(Table Continued)

TABLE OF CITATIONS

(A Continuation)

Jacksonville M. P. Ry. & Navigation Co. v. Hooper, 160 U.S. 512; 40 L. Ed. 515,	53
Jones v. Harsha, 225 Mich. 416; 196 N. W. 624.	56
Keogh v. Peck, 316 Ill. 318; 147 N.E. 266; 38 A.L.R. 1151,.	65
King v. West Coast Grocery Co., 72 Wash. 132; 129 Pac. 1081.	55
3 L.R.A. (N. S.) 790.	52
31 L.R.A. (N. S.), page 738,	53
Lynch v. Coviglio. 17 Utah 106; 53 Pac. 983,	50
Manchester Marble Co. v. Rutland R. R. Co., (Vt.); 136 Atl. 394.	55
Mantle v. White, 47 Mont. 234; 132 Pac. 22.	8

TABLE OF CITATIONS

1 Mechem on Agency (2d Ed.) at page 316, . Sec. 435,	49
Modern Music Shop v. Concordia Fire Ins. Co., 226 N.Y.S. 630.....	56
Notes, 41 A.L.R. 1370,	65
O'Neill v. Lyric Amusement Co., 119 Ark. 454; 178 S. W. 406.....	56
Parker v. Wulstein, (N. J. Eq.); 21 Atl. 623.	56
Peterborough R. Co. v. Nashua & L. R. Co., 59 N.H. 835.....	54
5 Pomeroy Equity Juris. (2d Ed.) page 5011, Sec. 2243,	48
Portland Cattle Ln. Co. v. Hansen L.S. Co., (Ida.); 251 Pac. 1051.	55
R. S. 1933, Sec. 104-14-2.....	8
104-9-5, R. S. 1933,... ..	45

(Table Continued)

TABLE OF CITATIONS

(A Continuation)

Robbins v. Duggins, 61 Utah 542; 216 Pac. 232.	7
7 R.C.L., page 1106, Sec. 22,	65
25 R.C.L., page 261, Sec. 62	47
Simpson v. Nelson, (Colo.); 208 Pac. 455,	53
Stuart v. Mattern, (Mich.); 105 N. W. 35.	54
Tobias v. Towle, (Wash.) 35 Pac. (2d) 1114,	53
West v. Washington & C. River R. Co., 49 Ore. 436; 90 Pac. 666.	55
Worley v. Peterson, (Utah); 12 Pac. (2d) 579, on rehearing p. 587.	8
Zenos v. Britten Cook Land & L. S. Co., (Cal.); 242 Pac. 914.	55

In
The Supreme Court
of the
State of Utah

JAMES LATSES AND
JAMES SDRALES,

Plaintiffs and Appellants,

vs.

NICK FLOOR, INC.,

Defendant and Respondent.

Appeal From the Third District Court of Utah,
for Salt Lake County
Honorable P. C. Evans, Judge

BRIEF OF RESPONDENT

This appeal involves a controversy between the plaintiffs, the appellants, and Nick Floor, Inc., the defendant and respondent, as to the possession of a certain storeroom — the first-floor and basement at 79 West Second South street, being the northwest corner of what is known as the Eagle building or block situate at the southeast corner of Second South and West Temple streets, Salt Lake City. With respect thereto, the plaintiffs claim

title and possession of the premises through warranty deeds from the then owners of the Eagle Block executed May 31, 1939, including the premises in question. The defendant claims possession of the storeroom and basement by virtue of a certain lease executed and delivered to it by the then owners of the Eagle Block on September 25, 1933, for a period of three years, with an option on conditions stated in the lease for an additional period of five years, or to and including September 25, 1941, the said lease being executed and delivered by an admitted agent of the then owners of the block.

PLAINTIFFS FAILED TO PROVE THEIR ALLEGED CAUSE.

By the complaint of the plaintiffs it was alleged, (Ab. 1), that on or about September 25, 1933, the then owners of the Eagle block leased and demised the premises in question to the defendant "from month to month at a monthly rental of \$70.00 payable monthly in advance, and that on or about the 1st day of May, 1935, by mutual agreement, the rental was fixed at \$90.00 per month; and that by virtue of such lease the defendant went into possession of the said premises and still continues to hold and occupy the same;" that on May 31, 1939, the premises by warranty deed were conveyed to the plaintiffs by the owners of the Eagle Block, who then became and ever since have been the owners thereof, and that on June 2, 1939, the plaintiffs in writing demanded possession of the premises on or before July 1, 1939, which the defendant refused to surrender; hence this action for restitution and damages.

The defendant demurred generally and specially to the complaint, which was overruled, and then answered, denying the lease and the terms and

conditions thereof as alleged in the complaint, or that any lease was made from month to month, or that defendant went into possession of or occupied the premises in virtue or in pursuance of any such lease, as alleged in the complaint; and averred that a written lease was entered into September 25, 1933, by the terms of which the premises in question were demised and leased to the defendant for a period of three years at an agreed rental of \$75.00 per month, and with the further stipulation stated in the lease that for and in consideration of the defendant making permanent improvements in and upon the premises to the amount of \$1,000.00 on or before May 1, 1935, the defendant was given possession of the premises for an additional period of five years from September 25, 1936, at a rental of \$90.00 per month for and during such additional five years; that the defendant, prior to May 1, 1935, made such permanent improvements to the value in excess of \$1,000.00, and since September 25, 1936, paid to the owners of the building the rental of \$90.00 a month and as in the lease stipulated; and that under and in pursuance of such lease and not otherwise, the defendant entered into and continued in possession of the premises; a copy of the lease, (Ab. 11), was attached to the answer and made a part thereof.

To that the plaintiffs replied, (Ab. 15) that the lease attached to the defendant's answer was void under Section 33-5-1 and 33-5-2, R. S. 1933, because not executed by the owners, the predecessors of the plaintiffs, or by anyone in writing authorized so to do; and further alleged that the defendant had not expended the sum of \$1,000.00, or any sum, in permanent improvements and had not at any time exercised the pretended option referred to in the lease. The defendant then further answered. (Ab. 16), pleading an estoppel, consisting of about four pages of the printed abstract, to which

reference is hereby made, to which pleaded estoppel the plaintiffs filed a general denial.

Upon these issues the case came on for trial before the court without a jury. The court made specific and complete findings on all of the issues in favor of the defendant and against the plaintiffs, (Ab. 22-37). We refer to the findings in the main as a complete answer to the appellant's brief wherein the findings are given but scant consideration. True, assignments are made with respect to most of them. But see (Appellants' brief, 44) how feeble consideration is given them as to insufficiency of evidence to support them, or as pointing out particulars wherein it is claimed the evidence is insufficient.

The appellants, however, say the court erred in finding No. 1, "that on September 25, 1933, the Stockyards National Bank of South Omaha, W. P. Noble Company and the Bragg Estate by and through their agent, A. H. Ball," leased and demised the premises in question to the defendant. The lease attached to the defendant's answer was so executed. It so states. Let the Court look at it. (Ab. 11-14). There is no dispute as to that. It was the only lease put in evidence. It was the only lease under which the evidence showed the defendant took and continued in possession and was in possession when notice was served on it to vacate the leased premises. As to that, the plaintiffs replied, not that the lease was not executed by an agent, as in the findings stated, but that the lease was void — that it was nothing, — because A. H. Ball, the admitted agent of the grantors of the plaintiffs, had no authority *in writing* to execute it. The defendant denied that, and by its additional answer for reasons therein stated, pleaded an es-

toppel as to both the grantors of the plaintiffs and as to the plaintiffs themselves, which estoppel by their further reply was denied by the plaintiffs.

In this connection some stagger of complaint is also made as to findings Nos. 2 and 3. Let them be read in the abstract. No complaint is made that the court by such findings did not properly reflect the essentials of the plaintiffs' complaint, or of any of the pleadings as hereinbefore noted, or that the lease as alleged in the complaint was not personally entered into by and between the predecessors of the plaintiffs and the defendant, or that the court incorrectly stated, that by the complaint of the plaintiffs it was averred that the defendant "by virtue of such lease (as alleged in the complaint) went into possession of the said premises and still continues to hold and occupy the same." As is seen, the court specifically found that no evidence was adduced to show the existence or the making of any such lease, as so alleged in the plaintiffs' complaint; that the allegations of such a lease were wholly unsupported by any evidence. But the appellants complain of such finding. Nowhere do they point out any evidence adduced by them in support of such a lease. As to the kind of lease alleged in the plaintiffs' complaint the record is barren of any evidence. Whether the plaintiffs may wholly abandon the kind of lease so alleged by them and rely for recovery upon the lease alleged by the defendant, will presently be noted. The point now being considered is that the complaints made by the appellants that finding No. 2 with respect to the pleadings and finding No. 3 with respect to the want of evidence to support the lease alleged in the plaintiffs' complaint, are wholly groundless; and no evidence—not anything—is pointed to by the appellants to support their contention that such findings are not supported. What conclusion is to be deduced from

such findings is another matter and will presently be considered.

Let it first be noted what the facts are, and as found by the court in such particular. Counsel's argument on conclusions based on groundless challenges of such findings does not get them anywhere. Counsel do not consider the case upon findings 2 or 3 as made by the court. They, in effect, now say that no reliance is placed upon the lease as alleged in the complaint of plaintiffs, and no claim now made that the defendant, as alleged by the plaintiffs, went into possession or occupied the premises, "in virtue of such lease," as in the complaint alleged. They now in effect proceed on the theory as an abandonment of the lease pleaded by them, and now claim that the defendant went into possession and occupied the premises for a period of nearly six years in virtue of the lease pleaded by the defendant but which the plaintiffs averred was absolutely void, notwithstanding the pleaded and found part performance and estoppel.

In this connection, let us now look at the conclusions of law with respect to findings 2 and 3. By conclusion of law No. 1 (Ab. 37), the court stated that the plaintiffs, to recover, were required to do so upon the case made by their complaint, and not upon one which may have been developed by proof, and as no such case as alleged by the plaintiffs was established by evidence, and as no judgment could be rendered in favor of the plaintiffs except on proof establishing the cause of action as alleged by the plaintiffs in their complaint, it followed, that the complaint against the defendant had to be dismissed for want of evidence to sustain the cause of action as alleged in the complaint.

By conclusion No. 2, (Ab. 37), the court further stated that the plaintiffs were not entitled to support their cause of action by recourse to the alleged

lease in the defendant's answer and the evidence adduced by the defendant in support thereof, for that the plaintiffs by their verified replies to the defendant's answer denied the existence, validity and binding effect of the lease as so alleged in the defendant's answer, declared that such lease under the statute of frauds was absolutely void, and that in such case the court stated a plaintiff could not aid his cause by recourse to material allegations of his adversary, which, as here, by replies, were specifically denied and by evidence of the plaintiffs controverted.

It is thus seen that no evidence whatever was given to sustain the lease as alleged in the complaint of plaintiffs, and the plaintiffs, having denied the alleged lease pleaded in the answer of the defendant and by evidence controverted its existence, cannot now as an aid to their cause of action avail themselves of the allegations in such respect contained in the answer, nor the evidence given with respect thereto, and particularly may not now accept a part and reject a part thereof, or seek to avail themselves of what in such particular they deem suitable and repudiate and reject or hold for naught what may be deemed unfavorable to them.

It, of course, is familiar doctrine that a mere imperfect or defective complaint or pleading often is and may be aided by a pleading of the adversary.

1 Bancroft Code Pl., Sec. 737, p. 1035.

Robbins v. Duggins, 61 Utah 542; 216 Pac.
232.

But just as well is it established that a plaintiff may not rely upon a pleading of his adversary where he has denied in his reply the allegations which he later relies on for assistance.

1 Bancroft Code Pl., Sec. 738, p. 1038.

Worley v. Peterson, (Utah); 12 Pac. (2d) 579, on rehearing p. 587.

Mantle v. White, 47 Mont. 234; 132 Pac. 22.

Greenberg v. German-American Ins. Co., 83 Ore. 660; 160 Pac. 536.

Just as well is it established and it is just as fundamental that a plaintiff must recover, if at all, upon the case made by his complaint, and not upon a case which may be developed by proof; and that a judgment cannot be sustained, unless the proof establishes the cause of action alleged in the complaint, even though a different cause of action may be fully proved.

1 Bancroft Code Pl., 984,

and numerous cases there cited in support thereof. Such holding is in line with the well established and familiar rule or maxim, *allegatta et probata*; allegations and proof must correspond. This Court in numerous cases has frequently so applied the rule.

Nor can the plaintiffs help themselves by claiming a mere variance, *for that the claim or cause of action alleged in the complaint is unsupported by any evidence*, not in some mere particular or particulars, but unsupported in its general scope and meaning, and hence, the case may not be deemed a variance, *but a failure of proof*.

R. S. 1933, Sec. 104-14-2.

This is particularly true, for that the lease alleged in the defendant's answer is adverse to any kind of a lease alleged in the plaintiffs' complaint. As heretofore stated, the only evidence as to the making of any lease is that contained in the defendant's answer. But the plaintiffs say such lease is absolutely void and is for naught. There being no evidence to sustain any other lease in fact, or one as in the complaint alleged, it follows that the plaintiffs' alleged cause of action stands unsupported by

evidence, and hence, is wholly insufficient to support any kind of judgment *on the cause of action as in the complaint alleged.*

We know counsel in their brief in effect abandon their complaint and the lease as therein alleged, point to no evidence which supports that kind of a lease, no longer claim that the defendant went into possession of the leased premises as alleged by them in virtue of the lease as stated in the complaint, but now assert that the defendant went and for six years continued in possession under the lease pleaded by it in its answer, which lease the plaintiffs now assert was absolutely void, because by its terms being a lease for more than one year and it not being shown that A. H. Ball, the admitted agent of the predecessors and grantors of the plaintiffs, who had exclusive charge and management of the premises and who as such agent made the lease in the name of and for the use and benefit of such predecessors, had authority *in writing* to make such a lease, and therefore it was absolutely void, and thus the plaintiffs as they assume could not change their position and assert that the defendant, instead of entering into the possession of the premises in virtue of the lease set forth in the complaint, did so in virtue of the lease set forth in the defendant's answer, which now as they assert gives the plaintiffs as the grantee of such predecessors, the right in law to treat and regard the possession of the defendant as a mere tenant from month to month, which tenancy by giving notice, could be terminated at any time and the defendant dispossessed of the premises, regardless of part performance by the defendant or of benefits received by the predecessors of the plaintiffs or even by the plaintiffs themselves.

Whatever merit there may be to such a contention, which presently will be considered, still, no

such cause of action or one on any such a theory is pleaded in the complaint of the plaintiffs. As has been seen, what is alleged by the plaintiffs in their complaint is that their predecessors and grantors made and entered into a lease with the defendant, leasing and demising the premises to it from month to month at \$70.00 a month and nearly two years thereafter "by mutual agreement" between the parties, the rental was increased to \$90.00, and "by virtue of such a lease, (not by virtue of any other lease), the defendant went into possession of the premises and still continues to hold and occupy the same," until the filing of the plaintiffs' complaint in this action, on or about August 22, 1939, a period of nearly six years. It is difficult to conceive two theories more inconsistent with each other than the one alleged in the complaint and the one in the defendant's answer and denied by the plaintiffs by their reply, and who now in effect seek assistance by what was solemnly denied by them. No such liberality in pleadings — to permit one to recover on what is denied by him — may be indulged by the most optimistic reformer without casting to the wind the very basic and fundamental principles of pleadings and to ignore the use and purpose of them.

And further, it indisputably was shown that the plaintiffs, prior to their purchase of the Eagle Block, including the premises in question, had not only constructive notice, but had actual knowledge, of the defendant's lease and knew that the defendant was in possession in pursuance thereof, had different conversations with the defendant concerning it, had examined a copy of the lease with their counsel, knew and were told that the term period of the lease had not expired until September, 1941 (Ab. 97, 108; Tr. 313, 379, 381), and of course, having examined the lease, the plaintiffs knew of

the provision of the lease, (Ab. 14), that for and in consideration of the expenditure by the defendant, on or before May 1, 1935, in making permanent improvements to the extent of \$1,000.00 in and upon the store and basement leased to the defendant a term period of the lease was granted for an additional five years from September 25, 1936, or to September 25, 1941, and upon the payment of monthly rentals by the defendant of \$90.00 for such additional five-year period.

Confessedly, and as hereinbefore stated, no evidence was given to support the averment in the complaint of plaintiffs that on or about May 1, 1935 "by mutual agreement" or by any agreement then made, "the rental was fixed at \$90.00 a month." Whatever arrangement there was between the parties as to an increase of rental to \$90.00 a month was as stated in the written lease attached to the defendant's answer, that in consideration of the defendant making the permanent improvements to the extent of \$1,000.00 and paying the increased rental of \$90.00 a month, a period of the lease was granted for an additional five years. All that was part and parcel of the lease itself entered into and granted September 25, 1933. Further than that, there was no evidence of any such increased monthly rental. For various and quite apparent reasons, the plaintiffs in drawing their complaint, did not desire to reflect the true status of such increased rental or the consideration or condition upon which such monthly rental was to be increased, and as stated in the defendant's lease. So the matter was smoke-screened by an averment in the complaint of plaintiffs that on May 1, 1935, there was an independent "mutual agreement" entered into by and between the parties fixing the monthly rental at \$90.00, when in truth and in fact, there was no such separate and independent agreement, and no evidence whatever

to support such an averment as alleged by the plaintiffs.

If, therefore, paragraphs 2 and 3 of the court's findings are supported by the record, (and not anything pointed out wherein they are not so supported), and if paragraphs 1 and 2 of the court's conclusions of law are under the law as heretofore stated, correctly drawn and stated, then the judgment of the court below must be affirmed, regardless of any and all other questions presented by the appellants.

PLAINTIFF'S POINTS

There are some 42 assignments. Fourteen of them relate to the findings and conclusions. Under assignments 10 to 21, inclusive, are grouped about 42 exhibits of the defendant admitted in evidence. Assignment 10 is a fair sample. It is rather a large load in one shotgun. Looks like shrapnel. Twenty-three of the assignments relate to examination and cross examination of witnesses. Not anything is exhibited in the abstract or even in the plaintiffs' briefs to show irrelevancy or immateriality or any abuse of discretion with respect to such alleged complaints. Nor is there anything exhibited in the abstract or in the brief of counsel showing even the substance or contents of the various exhibits put in evidence with the exception of one or two. What references are made with respect to them are merely by numbers. To ascertain any idea of their contents requires resort to the transcript to which the exhibits are attached, quite a bunch to find what is desired. They relate to the making of written leases, the manner in which the agents of the owners of the premises and predecessors of the plaintiffs conducted the business, the reports made by

their agents from time to time concerning the collection of rents, leasing of premises, payment of taxes, borrowing money, making repairs and other matters pertaining to the business carried on and handled by the agents of such predecessors.

A reading of the transcript shows that counsel for the plaintiffs objected to about everything attempted to be shown by the defendant. They objected to the cross examination of their witnesses and to the direct examination of the defendant's witnesses; objected to putting in evidence the written lease made for and on behalf of the plaintiffs' predecessors and attached to the defendant's answer, the manner in which the business was carried on by the admitted agents of the plaintiffs' predecessors, the leasing of the premises, the collection of rentals and making monthly reports thereof, making repairs, and paying taxes, etc. They even objected to putting in evidence the lease, Exhibit 28, attached to the defendant's answer. As heretofore shown, no evidence was given on behalf of the plaintiffs as to their alleged lease or as to any lease, oral or written, between the parties. Still they objected to proving or admitting in evidence the lease attached to the defendant's answer. Had they been successful in keeping it out, there would have been no evidence whatever as to any kind of a tenancy existing between the parties and not anything to show the circumstances or conditions under which the defendant was or had been in possession of the premises for nearly six years, in which case the plaintiffs would have been left wandering in the woods and lost as to how they got in or how to get out. In other words, the plaintiffs sought to have the court declare the lease attached to the defendant's answer for naught and void, regardless of giving the defendant an opportunity to show the circumstances and conditions under which the lease was made, part performance by the de-

fendant, benefits received by the predecessors of the plaintiffs, actual knowledge of the plaintiffs of the defendant's lease before they purchased the premises and of the circumstances of the defendant's possession and the making of permanent improvements by it in pursuance of and reliance upon the lease.

Thus, the appellants by their brief note: (1) that A. H. Ball, the admitted agent of the predecessors of the plaintiffs, was not authorized in writing to execute the lease for and on behalf of the owners of the premises; (2) that the lease was void because not executed on behalf of all the owners; (3) that the defendant had not acted in good faith; (4) that there was no evidence to show an estoppel, etc.; (5) that no notice was given to the owners themselves of any extension of the lease from three to five additional years, or that the owners in writing had consented thereto, and no evidence to show that the defendant had expended \$1,000.00 in permanent improvements; (6) that the plaintiffs were not liable for attorney's fees; and (7) that most of the findings and conclusions of law were erroneous without sufficiently specifying the particulars thereof. No direct reference in counsel's brief is made or any discussion had in respect of the numerous assignments made relating to the examination of witnesses or to the various exhibits admitted in evidence. As to that, they say, they desire their discussion on other matters to be considered. When the issues presented by the pleadings and the specific and complete findings made as to all material issues are first considered, as they should be, and when then appellants' brief is considered, this Court cannot fail to see how scantily the findings are regarded, and in many particulars disregarded by their brief. What reference they make to evidence, they point chiefly to testimony by some of their witnesses. But this is a law case,

and where findings are made as to particular issues, the evidence and the reasonable inferences deducible therefrom and from the proven facts and circumstances in support thereof, will be accepted rather than testimony on behalf of the appellants in conflict therewith.

As abstract propositions, we do not dispute that a tenant without authority in writing may not, without the knowledge or consent of his principal bind him as to the granting or conveyance of real estate or any interest therein of his principal, or to the granting of a leasehold interest therein for a period longer than one year, particularly where the agreement or contract is still executory.

Nor do we dispute the proposition that a co-tenant cannot make a valid lease of premises as against other co-tenants so as to give the lessee a right *to the exclusive possession* of any part of the land demised, unless he was authorized to act as their agent in making the lease and unless ratified by them.

As well, however, is it settled that where a lease for more than one year is made by an agent in charge of premises and having complete management thereof for his principal or principals, though the agent is not authorized in writing to make such a lease, yet, where the parties had knowledge of the making of it by his or their agent, accepted and received the benefits thereof and part performance on the part of the lessee by making permanent improvements on the demised premises, or otherwise carried out the terms and conditions of the lease on his part to be performed and the payment of rentals as by the lease stipulated, or where otherwise to permit the principal, or principals, to invoke the statute of frauds would have in effect worked a fraud upon the lessee, the principal, or principals, will be held estopped

to deny that his or their agent was not authorized in writing to make the lease, or to declare the lease void or for naught. That is this case. That is what the court found and determined. That, we say, is not only supported by sufficient evidence, but by the great weight of the evidence.

Let us first get a proper background for all this. Prior to September, 1933, when the lease was made to the defendant, the owners of the Eagle Block consisted of W. P. Noble Company, a corporation organized under the laws of Utah, owning a one-half interest in the Eagle Block, the Fred Bragg Estate owning a one-fourth, and the Stockyards National Bank of South Omaha, a one-fourth. Robert Gould-Smith, the secretary and treasurer of the Noble Company, resided in San Francisco. Miss Noble was president of the company, residing in Salt Lake City, but Smith as such secretary and treasurer transacted substantially all the business of the company with respect to the block, first through H. T. Ball, the admitted agent of such owners, and thereafter A. H. Ball, their agent, with respect to leasing the premises, collecting rents, making repairs, and generally looking after the interest of the owners in respect of the Eagle building. Smith, the active representative of the Noble Company, then and prior thereto resided in San Francisco, California. All the heirs and those interested in the Fred Bragg Estate resided in Wyoming and their business with respect to the Eagle building was handled for them by their attorney C.L. Brome at Basin, Wyoming; and those interested in the Stockyards Bank at South Omaha, resided in Omaha, all non-residents of Utah. It is not clear on the record just when the bank acquired its interest. Some reference is made that they at one time held a mortgage lien on the building which was foreclosed; but just when that was, is not def-

initely shown. However, it is clear that the bank at its foreclosure proceedings or otherwise acquired its interest some time prior to 1932. See defendant's Exhibit No. 1.

The defendant's lease is dated September 25, 1933, but in fact was not signed until October, 1933 (Tr. 253) or November, 1933, after A. H. Ball returned from Chicago (Ab. 82-83), and then was by him signed as agent for the Stockyards National Bank of South Omaha, the W. P. Noble Company and the Fred Bragg Estate. Some time prior to May 15, 1935, the exact time again is not stated, the Stockyards National Bank conveyed its one-fourth interest to William H. Dressler and Fred E. Hovey, *as trustees for liquidation*. (Ab. 65). But, as the record shows, such interest thereafter, as before, was treated and referred to by the parties as still the interest of the Stockyards National Bank. On May 27, 1939, the Noble Company conveyed its one-half interest by warranty deed to the plaintiffs; the heirs of the Bragg Estate on May 13, 1939 conveyed their one-fourth interest to the plaintiffs, and on May 12, 1939 William H. Dressler and Fred E. Hovey, *as trustees*, conveyed their interest as such, to the plaintiffs. Until then all reports of business affairs and transactions concerning the Eagle Block and remittances of collections of rent were made, one-half to the Noble Company, one-fourth to the Fred Bragg Estate and one-fourth to the Stockyards National Bank or to the bank in care of William H. Dressler; and in such manner without objections such reports and remittances were so received and acknowledged.

For many years and until his death, which occurred a few days prior to September 25, 1933, W. T. Gunter, an attorney at Salt Lake City, and as their counsel, represented all of the owners of the Eagle building and advised them as to their several interests in the building and handled their

legal matters with respect thereto (Ab. 80). For 17 years and until his death in June, 1930, H. T. Ball, residing in Salt Lake City, was employed by all of the owners as their agent in managing, handling and caring for the block or building, to procure tenants therefor, to demise, lease and let various parts thereof to different tenants, collect the rentals of premises so leased by him, pay the taxes on the building, make and keep it in repair, keep the premises insured, and remit the rentals each month to the respective owners, and in the performance of such duties he entered into written leases, some of them for three years, prepared by Attorney Gunter for and on behalf of the owners and predecessors of the plaintiffs and were signed by H. T. Ball, as agent for and on their behalf. See Exhibits 27, 26 and 25 in the transcript.

H. T. Ball died in June, 1930. For a year and a half prior to his death and while he was sick, his son, A. H. Ball, assisted him in collecting the rents and helped in looking after the property, and consulted Gunter with respect thereto. The son thus became familiar with the work theretofore performed by his father (Ab. 68). That his father had signed written leases prepared by Gunter for and on behalf of the predecessors of the plaintiffs for a period of more than one year, was clearly shown by the evidence. At his father's death, his son, A. H. Ball, became the agent of the owners and predecessors of the plaintiffs, at which time there were at least seven leases in writing executed by his father and given to various tenants in possession, (Ab. 69; Tr. 178), all of which were prepared by Gunter for H. T. Ball to sign and which he did sign for and on behalf of the owners and predecessors of the plaintiffs. When H. T. Ball died, Gunter told A. H. Ball to look after the business as his father had, and to collect the rents and put them in a bank and make

out statements of rentals which were OK'd by Gunter and sent to the respective owners, W. P. Noble Company, to Charles R. Brome for the Bragg Estate, and to the Stockyards National Bank of South Omaha. That was in June, 1930. Smith attended the funeral of H. T. Ball. He told the son to look after the business as his father had done. A few days thereafter he wrote a letter from San Francisco to Gunter to that effect. The letter advised Gunter that as A. H. Ball knew all about the property, he advised it would be logical to have him handle the work the same as his father had done. Gunter at that time also wrote letters to the Stockyards National Bank and to the attorney representing the Bragg Estate, both of whom in reply also stated to let the son handle the business the same as his father had. (Ab. 72, 73; Tr. 184, 185, 186). They were written and replies received shortly after the death of H. T. Ball. They, with many other letters, writings and documents from the predecessors of the plaintiffs concerning transactions had between them and Gunter, came into his hands and were kept by him. When Gunter died September 23, 1933, his folks shortly thereafter left Utah and much of such and similar matters were destroyed by them, thinking they no longer were of any consequence (Ab. 77). However, the letters written by Gunter and the replies thereto concerning the employment of A. H. Ball were by Gunter shown to Ball who testified from memory as to their contents. As to some of them, he was corroborated by testimony of his wife.

Thus A. H. Ball, as the agent for all the owners, took charge of the Eagle building and managed and handled the business just as his father had done. There is no substantial dispute as to that. Some of those who came to Ball to rent premises in the building, desired written leases. He gave such

leases just as his father had. Gunter, until his death, prepared the leases to be signed by A. H. Ball, as the agent of the owners of the building, just as he had done when H. T. Ball was the agent (Ab. 73-75). In May, 1932 such a lease (See defendant's Ex. 1), was prepared by Gunter to be and which was signed by A. H. Ball, as the agent of the Stockyards National Bank of South Omaha, the W. P. Noble Company and the Bragg Estate, demising and leasing the identical property, 79 West Second South street, to others *for a period of three years*, which premises were later leased to the defendant. From June, 1930, after his father's death and until the premises were sold to the plaintiffs in May, 1939, A. H. Ball managed and handled the property just as his father had, gave written leases, first prepared by Gunter and later by Cluff, collected the rentals, looked after the repairs of the building, paid the taxes, kept the premises in repair and when necessary borrowed money at the bank to pay taxes and make repairs, sent one-half of the rentals to Smith at San Francisco for the Noble Company, one-fourth to C. L. Brome in Wyoming for the Bragg Estate, and one-fourth to the Stockyards National Bank at Omaha or to the bank in care of W. L. Dressler, sent monthly statements and reports to each concerning the business handled by him and had numerous correspondence with them concerning the same, some of which were put in evidence. But here again, let it be noted that letters, writings and documents received by him from the respective owners concerning the business handled by him were kept at his residence, which in 1934 or 1935 was partly destroyed by fire and with it many personal effects, including letters, writings and documents and correspondence between him and the several owners.

We now come to the employment of Mr. Cluff, an attorney at Salt Lake City. Counsel in their

brief say (page 30) that A. H. Ball, after Gunter's death, "hired Cluff as attorney for his principals." They then say "Ball at every stage rendered such help as he could to the defendant (Nick Floor, Inc.), and the attorney he claims to have hired for his principals is in the employ of the defendant in this action." The fact is, Attorney Cluff was not hired by Ball, but by the owners of the premises, and predecessors of the plaintiffs. At page 195 of the transcript, A. H. Ball in giving his testimony, was asked:

"Q. Had you received directions from anybody about who to consult after Mr. Gunter's death?

A. I wrote letters and explained that I had had business with Mr. Cluff and he was a very good lawyer, and I suggested him to take and represent me, *the same as Gunter had*, (who without any substantial dispute was in the employ of and represented the predecessors of the plaintiffs), and they said it was all right.

Q. Who said it was all right?

A. Mr. Brome of the Bragg Estate, the Stockyards National Bank and Mr. Smith."

On pages 224-225 on cross examination, after testifying that he had advised with Smith concerning things in connection with the building whenever occasion arose, then was asked:

"Q. And you also consulted with Mr. Gunter about it during his lifetime?

A. All the time.

Q. Yes. Now you say that you wrote to Mr. Gould-Smith concerning the employ-

ment of Cluff as your attorney in your capacity of agent, as agent of the building?

A. I did,"

and when asked how soon he did that after Gunter's death, he said it may be a week or two, but that it was prior to the making of the lease with the defendant, and then was asked:

"Q. So that you didn't write Mr. Gould-Smith about the employment of Mr. Cluff prior to the execution of this lease (the lease to the defendant)?

A. I wrote him as soon as Mr. Gunter had passed away, and he was handling all the things, and I went up and I talked to Cluff.

(As heretofore shown, the lease was not signed or entered into until in October or November, 1933, and was dated back to September 25, 1933). He then further was asked and answered that some of the writings and documents were destroyed by fire and some were not.

On page 21 of the appellants' brief, they say that, "Nick Floor (the manager of the defendant, Nick Floor, Inc., and who transacted all the business for and on its behalf), testified that at the time he secured the lease (the lease here in question, defendant's Ex. 28), he consulted with and submitted it to an attorney, Mr. Knowlton," and referred to Abstract 106-107. There, the abstract shows that Nick Floor not only consulted Attorney Knowlton, but as testified to by him, he "had an attorney when we fixed the lease. I showed the lease (Ex. 28) to my attorney. My attorney was Horace Knowlton." (See also transcript page 371). There it also shows that when the lease was fixed up in October or November, 1933, and dated back, Cluff prepared the lease and that the terms thereof were talked over by Knowlton as the defendant's

attorney, and with Cluff and Ball, representing the lessors. And here let it again be noted that H. T. Ball, until his death, and A. H. Ball thereafter consulted with and was advised by Gunter until his death concerning the management and handling of the property and the making of leases, as well as to all other legal matters and business affairs relating to the property. Upon the great weight of the evidence, no claim may be made, that Gunter was not in the employ of and did not represent the owners of the property and the predecessors of the plaintiffs as their attorney. At least there was ample sufficient evidence, if not by a clear and manifest weight of the evidence, to show that Gunter was so employed, and that after the death of Gunter, A. H. Ball wrote to Smith, representing the Noble Company, to Brome representing the Bragg Estate, and to Stockyards National Bank, suggesting the appointment of Cluff to represent him, "*the same as Gunter had,*" to which they replied that "it was all right," the fair meaning of all of which is, that Cluff was appointed and hired as the representative of the owners and the predecessors of the plaintiffs, the same as Gunter had represented them, and not that Cluff was hired simply as the personal attorney of Ball. If all that Ball desired was merely the employment of an attorney for himself, there was no occasion to write to the owners or to anyone about it. We thus say that the finding of the court (Ab. 28) that after the death of Gunter, L. E. Cluff, an attorney at law, was employed by the predecessors of the plaintiffs to take the place of Attorney Gunter and that Cluff drew up the lease, Ex. 28, demising the premises to Nick Floor, Inc., as lessee, to be and which was signed by A. H. Ball for and on behalf of the predecessors of the plaintiffs, is well supported by the evidence. Until the

time of the trial of this cause, there is no evidence to show that Cluff at any time before was in the employ of or represented the defendant or in any capacity had acted for it. None of the pleadings in the cause were signed by him and at the beginning he did not and had not appeared for the defendant. It was not until after the replies of the plaintiffs and on the first day of the trial of the cause that Cluff appeared as additional counsel for the defendant to defend the lease which the plaintiffs (not their predecessors) asserted was void. Nor is there any evidence to support the statement of appellants that Ball "at every stage rendered such help as he could to the defendant." To the contrary the evidence and reports submitted by him to the owners show that he handled and managed the premises to their best interest and that the tenant occupying 79 West 2nd South was a good tenant and promptly paid the rent which he did, as some of the prior tenants had not done. The evidence further shows (Tr. 196-198) that Floor, in obtaining the lease, indicated the kind of business he desired to carry on in the leased premises and desired a lease longer than merely from month to month.

We recognize that there is some conflict in the evidence with respect to some of the statements heretofore made. The plaintiffs called but two witnesses. The first was Gould-Smith (Ab. 44). The direct examination was very brief. After showing he was the secretary and treasurer of the Noble Company, about all testified to by him was that no written authority was given by him to Arthur Ball (A. H. Ball) *to give any lease*. But see his cross examination (Ab. 45-61), in which he testified concerning the employment of H. T. Ball, and that after his death A. H. Ball was employed *by the witness and by Gunter* as the agent for the building

to look after it, collect the rents and make repairs for all of the owners. The cross examination is lengthy. From letters and reports and other things produced by Smith and put in evidence as part of the cross examination, it clearly showed, and the witness testified, that A. H. Ball was the agent for the owners; that Ball was keeping him advised as to who the tenants were; sent him statements showing that after September, 1933 he was receiving \$75.00 a month rental for the premises in question, 79 West Second South Street, but testified that he did not notice that "the defendant's rental during the period of nearly four years" was increased from \$75.00 to \$90.00 a month, when, at the same time, the monthly reports of rentals received by him showed that for nearly four years the defendant's rental was so increased. He further testified that Ball sent the portion of the monthly statements of rentals of the Noble Company to him, and presumed he sent the Stockyards Bank their portion, as well as to others interested in the premises.

The letters and reports furnished by Smith and put in evidence showed also repairs made by Ball, the payment of taxes, the leasing of the premises, and even the borrowing of money on behalf of the owners to pay taxes and repairs; all of which were reported to Smith and were approved by him. On page 60 of the Abstract, the witness attempts to explain why he did not discover the increased rentals from \$75.00 to \$90.00, notwithstanding the reports of rentals each month showed such increase, for the reason, as he testified, that he did not follow the reports very carefully.

He further testified that Ball had not told him that he had given leases, but "had not asked him if he had given any;" that they discussed the building and the rentals and the possibility of sales, and that "on my instructions the bank would let him

(Ball) have the money, and my instructions were to pay the note from the rentals received;" which instructions were carried out by Ball. A fair interpretation of the testimony of this witness, as disclosed by the transcript, shows that he knew that the defendant was in possession of the premises from September, 1933 to and including the time the premises were sold in May, 1939, a period of nearly six years; that for the first three years defendant paid a rental of \$75.00 a month, and for the next three years \$90.00 a month; knew the manner in which A. H. Ball was handling the property, and leasing and collecting the rents, and that the tenant in possession of the leased premises No. 79 West Second South, was so in possession under and in pursuance of a lease other than merely from month to month.

The next witness produced by the plaintiffs, page 62 of the abstract, was William H. Dressler, who had a permanent residence at Omaha, and a temporary residence at Long Beach, California. In portions of his testimony, he testified that he was the grantee, together with Ford E. Hovey, of a conveyance made to them by the Stockyards National Bank of South Omaha; that "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 and carry on with the Eagle Block as his father had done;" that he had not informed A. H. Ball, either orally or in writing that he could enter into a lease or leases other than from month to month (which was denied by the testimony of Ball), and that he did not know that A. H. Ball had given a lease for a longer period until in June, 1939, when he learned such fact from the new owners; which also was denied by Ball. But again, see his cross examination (Abstract pages 63 to 66, in-

clusive). There, he testified that he had acquired a one-fourth interest from the Stockyards National Bank in October, 1929; that *A. H. Ball of Salt Lake City was in charge of the building and that he had not made any change in the persons or agents who were looking after the rental of the building and collecting the rents; that he had not done anything to find out who the tenants were, or what rents were being paid; that he received "a monthly financial statement showing the amount of rents collected and its disposition. I am attaching the statement of January, 1939. The others are in the same form;"* that he was not acquainted with the father of A. H. Ball, but, so far as he knew, the father collected the rents, paid the taxes, and disbursed the remainder to parties of interest; and that after his death, the son looked after the renting of the building, the collection of rents and the disbursement of them; that Gunter "was not my attorney in looking after the building and employing agents;" that he had had no letters from Gunter, and had not given A. H. Ball *any instructions whatever regarding the renting of the building; and "did not instruct A. H. Ball to enter into a lease from month to month,"* in fact said he had not given Ball any instructions. He further testified he had "no attorney in Salt Lake," and had no information of the giving of any lease by Ball until June, 1939, after the sale of the premises—which was denied by Ball. However, he further testified that—

"A. H. Ball was looking after my interest in renting the building. I did not make any inquiries concerning the tenants or the amount of rent they were paying. I dealt with A. H. Ball. I made no inquiries as to what leases the tenants had or what rentals were being paid;" that A. H. Ball collected the rent from the tenants and remitted the same to the various owners as their interest appeared; that

he made no inquiry of A. H. Ball as to the nature of the tenancy of any tenant; that he first came to Salt Lake City in November, 1937, met A. H. Ball at that time, went to the Eagle Block with him, that Ball showed him the building from the exterior and the ground that went with it; that he did not see a single tenant; that he did not know if the defendant was a tenant in the building; that he did not recall seeing the sign, "Golden Gate Beer Garden, Nick Floor, Inc."; that "I made no inquiries as to the nature of the tenancy of the defendant. I did not see the improvements that the defendant had placed upon said premises. I did not know his rental was increased from \$75.00 to \$90.00 per month;" that "I acquired an interest in the property in question prior to May 15, 1935. At no time did I make any inquiry as to who the tenants were, what rent was being paid, and the nature of the tenancy. The Stockyards National Bank conveyed a one-fourth interest to me and others as trustees for liquidation." (Ab. 66).

The testimony of this witness was given by deposition at Long Beach, California. He attached to his deposition a report for January, 1939, received by him showing the amount of rental of the premises in question to be \$90.00 a month, and that such report of collections of rents, was the same as other reports of rentals received by him. From the testimony of this witness, it is not clear just when he acquired an interest in the premises. On his cross examination (Ab. 63) he testified that in October, 1929, "a one-fourth interest was conveyed *to me* from the Stockyards National Bank of South Omaha." That is not true, for he himself further testified (Ab. 66) that the "Stockyards National Bank conveyed a one-fourth interest to me and others, *as trustees for liquidation.*"

He never had any interest other than that of trustee, and as such he and Hovey, *as trustees*, conveyed an undivided one-fourth interest in and to the Eagle building or block to the plaintiffs. However, as already stated, after such conveyance, whatever the time the Stockyards Bank conveyed to Dressler and Hovey, *as trustees*, in liquidation, whether in 1929 or at some other time prior to 1935, such interest of the Stockyards National Bank as between the parties, was still carried on in the name of the bank until the conveyance to the plaintiffs. (See letter of May 11, 1936, part of Ex. 23, wherein W. H. Dressler, *as cashier of the Stockyards National Bank*, addressed a letter to A. H. Ball at Salt Lake City for and on behalf of the bank; and too let it be noticed, defendant's Ex. 1 where in May, 1932, a lease was prepared by W. T. Gunter to be and which was signed by A. H. Ball, *as agent for the Stockyards National Bank of South Omaha*, W. P. Noble Company and the Fred Bragg Estate).

As thus disclosed by his cross examination this witness, from the time he as trustee acquired an interest in the premises and until the conveyance to the plaintiffs, had made no inquiry and knew nothing as to the tenants, their leases, possession or occupancy of the premises, knew nothing, did nothing; like the traditional monk, saw not, heard not, spoke not, except for a period of six years without complaint or objection received from those in charge of the premises monthly reports of rentals and other statements in the name of the Stockyards National Bank. What a trustee! What diligence exercised for and on behalf of his *cestui que trust*!

It is not necessary in detail to refer to the evidence adduced on behalf of the defendant, the tes-

timony of A. H. Ball, and exhibits (direct examination Ab. 88 to 99; Recalled 182; cross examination 85-87); and the testimony of Nick Floor, (direct examination 88 to 101, and Exhibits, his cross examination 102-108). The contentions of appellants are chiefly based on the testimony of their witnesses and upon objections to the cross examination thereof, and objections to the testimony and exhibits adduced on behalf of the defendant. They particularly claim that the lease (Ex. 28) given the defendant and executed by A. H. Ball as agent for and on behalf of the Noble Company, the Fred Bragg Estate and the Stockyards National Bank was not executed for and on behalf of the true or all of the owners as lessors, because, as they say, the bank before that had conveyed its one-fourth interest to Dressler and Hovey, as trustees in liquidation, and that the lease was not signed by any of the heirs of the Bragg Estate; and further, because no evidence was adduced as they say, to show authority of A. H. Ball to execute the lease for and on behalf of the owners or lessors. As to this, we refer particularly to the findings of the court (Ab. 28, 29, 30), which we submit are supported by ample and sufficient evidence, though in particulars it may be claimed there is some conflict therein.

In view of such findings, the appellants may not fold their arms and proclaim that the defendant must show some written instrument signed by the owners authorizing Ball to give a written lease for more than one year. The record shows that from at least 1922 until the conveyance of the premises to the plaintiffs in 1939, a period of 17 years, the parties treated and referred to the one-fourth interest of the Braggs as the "Fred Bragg Estate" and in that name were all reports of rentals and

other reports and statements designated. (See defendant's Ex. 25, 26, 27 and other numerous exhibits) sent to and transmitted to C. L. Brome, attorney for the Fred Bragg Estate and for the heirs thereof, and as such were received and acknowledged by him. A. H. Ball testified that from the time he took charge of the premises in June, 1930, and until the conveyance to the plaintiffs and while he had full charge, management and handling of the premises he, and prior thereto his father, so and in such name, remitted to Brome, as the attorney for the Fred Bragg Estate, reports of rentals and other reports and that the same were so received and acknowledged by him. There does not seem to be any dispute as to that.

From the time the Stockyards National Bank by foreclosure of its lien acquired its one-fourth interest in the premises, the exact time of which is not clearly shown, but which at least was prior to May 5, 1932, and until the conveyance to the plaintiffs, reports of rentals as to the interest of the bank, as well as other reports and statements, were transmitted to and in the name of the bank, or in the name of the bank in care of W. H. Dressler, and as such were so received and acknowledged. A. H. Ball so testified and there does not seem to be any dispute as to that. And, without dispute, it also was shown that whatever interest Dressler and Hovey acquired in and to the bank's interest was only as trustees, and as trustees, and not otherwise, they conveyed an undivided one-fourth interest to the plaintiffs; and, too, let it not be overlooked that the rentals and other benefits so transmitted to the bank and received by Dressler, were not only as to the interest he had, but for the whole of the undivided one-fourth interest acquired by both Dressler and Hovey as trustees, and without evi-

dence to the contrary, of which there is none, it will be presumed Dressler accounted to Hovey or to his cestui que trust for the whole of the rentals and benefits received for such undivided one-fourth interest. No evidence was given to show that Hovey had not consented to or acquiesced in all that his co-trustee had done, or that Hovey was without knowledge thereof.

The numerous cases thus cited by the appellants to the effect that one co-tenant cannot give exclusive possession of an interest in real estate without authority of other co-tenants, or to which they had not consented or acquiesced therein, had not received the benefits thereof and refused to be bound thereby, or cases where one of several trustees without the consent or acquiescence of other trustees conducted or transacted business for the cestui que trust and where the other trustees had no knowledge of such transactions and had not consented or acquiesced therein and had not received benefits therefrom and refused to be bound by such transaction, are not applicable to cases where as here such co-tenants or co-trustees had received benefits thereof, as here shown, that they had knowledge of the tenancy of the defendant for a period of nearly six years and had received, without complaint or objection, their just proportion of the rentals and other benefits of such tenancy.

Further as to this. Who here is complaining? Certainly not trustee Hovey, nor even the traditional monk Dressler, nor the Bragg Estate or any heir thereof, not even the Noble Company, nor the Stockyards Bank. Then why all this mess? Let the Court look at the deeds, plaintiffs' Ex. A, B and C, whereby the Noble Company, the heirs of the Bragg Estate and the trustees Dressler and Hovey conveyed the Eagle Block, including the

premises in question, wherein they "warranted immediate possession to the grantees," notwithstanding they knew of the possession and occupancy of the defendant as a tenant for a period of nearly six years, and was in possession when the deeds were made, and that the grantees themselves before they purchased the premises had full knowledge of the defendant's possession and occupancy and of the terms and conditions of its lease under which it was in possession and had made valuable improvements and well knew that under the terms of its lease the defendant was entitled to a continued possession of nearly two years more, and that it claimed the right for such period to continue in possession, and so the court found (Ab. 33-34), but notwithstanding all that, and with full knowledge of the claimed rights of the defendant, the plaintiffs, after such purchase, served notice on the defendant to vacate the premises, and on his refusal to do so brought this action.

It, therefore, is unnecessary to review the appellants' cited cases, for it is apparent that they have no application either to the record or to the findings. No doubt, the appellants may claim they can make the same defense and contentions against the defendant's lease and possession as the grantors themselves could have done. Let it be so. However some of the representatives of the grantors by their testimony, sought to disclaim knowledge of the defendant's lease and of its possession thereunder. But how stands the case as to the plaintiffs, who before they purchased the premises, indisputably had actual and full knowledge of the defendant's lease and of the defendant's possession thereunder and of the terms and conditions of the lease and of *the improvements and part performance made by the defendant* and of its claimed

right to continue in possession for nearly two years more? We shall see, when presently we consider the question of estoppel.

In view of all this, the appellants nevertheless further say (their brief 21) that the defendant had not acted in good faith. To support that they say that since he submitted the lease to his counsel, Mr. Knowlton, "we must believe that he (Floor) was told of the infirmities of the lease," because signed by an agent for and on behalf of the lessors. No claim is made of any evidence to show that any information of such or of any infirmity of the lease was given Floor or that the lease for the reason stated or otherwise was infirm. They say that he was bound to ascertain the agent's authority to execute a lease for more than one year. Here A. H. Ball, who admittedly as the agent for the lessors, all of whom were non-residents, had the management and handling of the premises and had full charge thereof for them with authority to lease the premises and collect the rentals, and that in such case what was so done by him in the course of his employment will, until the contrary is shown, be presumed to have been done with authority. Had further inquiry been made by the defendant, it would have been disclosed that A. H. Ball, since he had charge of the premises, gave written leases for a period longer than one year, and as his father prior thereto in charge of the premises for many years had done. The claim of the defendant's bad faith is as groundless and unsupported by the record as is the further statement of appellants in their brief (page 30) that A. H. Ball "at every stage rendered such help as he could to the defendant." There is not anything to justify that.

As heretofore shown, the defendant, because of the business stated by him to be conducted on the

leased premises, required something more than a mere month to month lease. When the lease was prepared by Cluff, the terms and conditions of the lease were discussed by Knowlton, counsel for defendant, with Cluff and Ball representing the lessors, the defendant requesting a lease for five years, Ball willing to give one only for three years. Finally, they came to an agreement for a lease for three years with an option for five additional years, provided the defendant on or before May 1, 1935, made permanent improvements on the leased premises to the extent of \$1,000.00, and for such additional period to pay a monthly rental of \$90.00 instead of \$75.00, and the lease so provided (Ab. 14). For such three years, the lessors without complaint or objection received \$75.00 a month, and for the next three years \$90.00 without any claim that such rentals were not entirely satisfactory. Talk about bad faith on the part of the defendant, when as the court found, and as presently will be shown supported by the evidence, that the defendant under the lease made valuable and permanent improvements of the premises not only to the extent of \$1,000.00, but in excess of \$1,700.00 (Ab. 31).

ESTOPPEL

Counsel for appellants (page 23 of their brief) further say that there was no evidence of an estoppel. We first refer to the findings of the court on the subject. Because the question of estoppel is one of the most important and controlling questions in the case, we take the liberty here to set forth the court's finding in such respect. The court found (Ab. 31):

“That the defendant, in virtue of the written lease attached to its answer and under

which it was put in possession of and occupied the premises, on or before May 1, 1935 and in accordance with the terms and provisions of the said lease, made permanent improvements in said storeroom and basement so let and occupied by it, to the reasonable value in excess of the sum of \$1,000.00, towit, more than \$1,700.00, by putting in a maple hardwood floor, building new stairways, putting in toilets and partitions, installing electric wiring, building and putting in new doors, putting in a valuable plate glass window in front of the building, doing plumbing work and making sewer connections, putting in tiling and panel work, constructing a cement stairway, putting up valuable and permanent awnings, doing inside and outside painting in preservation of the premises, laying and gluing to the floor valuable and durable linoleum, and making other valuable improvements and as in the additional answer of the defendant alleged, all of which improvements were attached to the building itself and were to be and to become part thereof, and were so intended to be made, none of which may be removed without injury to the premises to which they are attached or without injury to the fixtures or permanent improvements themselves; and that such improvements were made in consideration that the defendant, as stipulated and provided in the said lease executed and delivered to it, was to be and was given an additional extension of time for a period of five years from September 25, 1936, or to and including September 25, 1941, and of the payment of \$90.00 a month rental instead of \$75.00 for such

additional five-years' period from September 25, 1936, and that the defendant as rental on said premises paid to the predecessors in interest of the plaintiffs and until the commencement of this action the sum of \$90.00 a month instead of \$75.00, which payments were so received by the predecessors in interest without any objection and without any claim made by them, or any of them, that the possession or occupation of the defendant was without right or a mere tenancy from month to month."

Counsel by their brief do not refer to this finding. They say nothing about it. Nowhere is it stated in their brief wherein the finding is not supported by the evidence. They say it was alleged that the defendant in reliance upon its lease spent \$1,000.00 in permanent improvements, and that such allegation was denied. True. But what they now say is that Ball concealed from the owners the fact of the defendant's lease. There is no evidence to show that, and none pointed to. They say the reports of monthly collections of rent merely reported the monthly payments of 79 West Second South. Even that is not correctly stated. The monthly rental statements show rents received from numerous parts of the building *without showing the names of any of the tenants*. The fact that the name of the defendant was not mentioned is thus of no consequence. They then say Ball had not informed Smith of the lease given the defendant. But without dispute it was shown that Smith directed Ball to handle the property just as his father had. His father gave written leases. No dispute as to that. They further say Dressler testified that when he was at Salt Lake City in November, 1937, and with

Ball went to the Eagle Block, Ball did not tell him anything as to the tenants or about the lease given the defendant. But Ball testified he then told Dressler about the lease. However, we have already referred to the testimony of Dressler that he made no inquiry concerning the tenants, or what lease they had, not anything as to the management or handling of the property, made no inquiry, found nothing, knew nothing.

Smith, who visited the premises several times while A. H. Ball had charge of them, testified that Ball told him he now had a good man in the premises, where theretofore they had a poor tenant, yet did not tell him under what lease he was in possession. It is not made to appear that Smith asked him. The burden of the appellants' brief on this subject chiefly consists of characterizing Ball of "treachery to his principals in making the Floor lease and not reporting it," and that his failure to do so was "a deliberate betrayal of the interest of his principals." We think this uncalled for. For years Gunter for the owners and lessors prepared leases to be signed for and on their behalf by H. T. Ball and A. H. Ball. It is not made to appear that the leases or copies of them were sent or were required to be sent to the lessors. No complaint was made of that until after the Eagle building was conveyed to the plaintiffs, who now complain, notwithstanding before they purchased the premises, they had actual knowledge of the defendant's possession, of his lease and of the terms and conditions thereof, and that a copy of the lease was submitted to their attorneys before they purchased the premises. They thought they could "break it" (Ab. 108). Why chastise Ball and denounce him a traitor because he had not informed the lessors of the terms of the defendant's lease, when the plaintiffs

themselves, before they purchased the premises, full well knew of the terms and conditions of the lease, the possession of the defendant under it and the making of valuable and permanent improvements by him? And too, neither of them took the witness stand to deny a word of it (Ab. 35).

Space does not admit of detailed references to the numerous exhibits of monthly reports and statements transmitted by Ball to the lessors, nor to the correspondence had between them concerning the handling and managing of the property by Ball, all of which was approved by the lessors. However, as to what the predecessors of the plaintiffs knew as to the defendant's lease, the court made specific findings (Ab. 29, 30, 31). Space does not admit here setting up such findings in *haec verba*. The court found that while there was no positive or direct evidence that the predecessors of the plaintiffs saw the written leases executed by H. T. Ball or by A. H. Ball, nor the lease or a copy thereof of the defendant prepared by Cluff and signed by Ball for and on behalf of the lessors, yet the court found facts and circumstances from which the only reasonable inference deducible was that both H. T. Ball and A. H. Ball had right and authority to execute the leases for and on behalf of the predecessors of the plaintiffs and that they well knew that the possession of the defendant was something more than a mere lease from month to month, that rentals of the premises in question were collected by Ball from the same tenant and reported to the lessors for the first three years at \$75.00 a month, and thereafter for nearly three years and until the premises were conveyed to the plaintiffs, at the rate of \$90.00 a month. We submit the record well supports such findings. As to most of the facts so found, there does not seem much, if any, dispute.

The reasonable inferences deducible therefrom were peculiarly within the province of the trial court. Under recognized established rules of evidence, findings of ultimate facts may well be based and determined upon indirect evidence and upon reasonable inferences deduced from other proven facts and circumstances. Many criminal offenders have properly been found guilty of the commission of offenses upon such character of evidence though there was no positive or direct evidence of guilt. No particular form or language is necessary to constitute authority in writing. It may be gathered from letters and telegrams, etc.

Fritsch v. Hess, 49 Utah 75; 162 P. 70,
and may be inferred or deduced from surrounding facts and circumstances.

The finding which the court made as to valuable and permanent improvements and the character thereof made on the premises by the defendant under and in pursuance of his lease has already been referred to. (Ab. 31). Floor testified with respect thereto in detail just what improvements were made, by whom, and what they cost, and numerous bills, statements and checks concerning them were put in evidence. His direct examination is found on page 88 to 101, and his cross examination 102 to 108 of the abstract. His testimony more fully appears in the transcript where references are made to exhibits put in evidence by him with respect to the improvements made, consisting of defendant's exhibits 31 to 40 inclusive. Some of these exhibits show not only permanent improvements made, but also the movable fixtures not claimed as permanent improvements. These the witness distinguished. As to the permanent improvements, (Tr. 272, et seq.) Floor testified that he expended for tiling

around the front of the building \$183.25; (Tr. 275 to 285), that he expended for a new maple floor, partitions, lavatories in the basement, sewer connections and plumbing, paneling, painting, stairways and cement steps \$775.00; additional paneling \$25.00; changing doors in rear room and new doors, \$20.00; (Tr. 291, et seq.), transome and screens, \$22.50; partition, swinging doors, large, new glass in front of the building, and doors in the basement, \$152.35; (Tr. 296), expended for necessary modern electrical wiring and making connections, \$181.85; putting up awnings, \$56.25; (Tr. 299), painting the outside three coats, \$61.00; for other floors, papering, hinges, linoleum glued to the floor and different other items concerning permanent improvements, \$97.25; (Tr. 304, et seq.), that he spent about \$55.60 for screen doors and lumber, paperhanging and for other minor permanent improvements, amounting in all to the sum of \$1,746.26. All these improvements, and as found by the trial court, were attached to the building itself and were to be and to become a part thereof and so intended to be when made, and none of which may be removed without injury to the premises to which they are attached or without injury to the permanent fixtures themselves.

In addition to such improvements, Floor testified he also expended about \$237.50 for booths in the front part of the building, about \$75.00 for cigarette cases and arches, about \$72.00 for tables, \$430.00 for booths in the back part of the buildings, installed a bar and mirror, and made numerous other improvements, in all, amounting to something like \$3,000.00 or \$4,000.00, none of which considered or claimed to be permanent improvements; and that the permanent improvements consisted of those found and enumerated by the court, Abstract 31, and

upon which were expended, as the court found, more than \$1,700.00, and as testified to by the witness consisted of about \$1,750.00.

It will be noticed by the cross examination of witness Floor that many questions were asked him concerning moneys expended for equipments in the building, put there by the defendant which in no sense were claimed by him as permanent improvements, but the witness otherwise in his testimony clearly indicated those which were regarded as permanent improvements and as found by the court, and those which were regared as mere movable trade fixtures.

But say appellants in their brief, the improvements made were not permanent, were not fixtures so attached to the building as to become a part thereof, and further say that the defendant had not expended \$1,000.00 in making them, or that they were not in value \$1,000.00. The record shows that neither the value nor the character of the improvements as testified to by Floor was disputed. No witness on the subject was called by the plaintiffs. As found by the court and as testified to by Floor, authorities need not be cited to justify the conclusion that such improvements so attached to the realty became a part thereof, at least by far the greater part thereof as enumerated by the findings, and that they were in value at least the sum of \$1,000.00. But see

26 C. J. 657, Sec. 4, Subdivs. III-IV; 658, 666, Annotation 39; A.L.R. 1044.

Appellants cite Price v. Lloyd, 31 Utah 86; 86 Pac. 765 as supporting their view that the claimed permanent fixtures were mere trade fixtures. All that is required to see that the case has no application is to note the difference between the nature

and character of the improvements there and here involved. So, too, as to the citation of other cases on the subject by the appellants. That the improvements were in fact made as found by the court and as testified to by Floor is not disputed. That they were made for and in consideration of an option of an additional five years' extension of the defendant's lease and the payment of \$90.00 instead of \$75.00 during such extended period also, is also not disputed. Who but a moron would enter into a lease to make permanent improvements of the value of \$1,000.00 on a mere month to month lease? Who but a moron on a mere month to month lease would even make and put into the building mere trade fixtures to the value of from \$4,000.00 or more, not knowing how soon he might be noticed to vacate the premises?

Counsel further say that no notice was given the lessors themselves as to the exercise of the option as provided by the lease. As to that, the record discloses without dispute that A. H. Ball, who had charge and management of the property and was authorized to make leases and to collect rentals, had notice and knowledge of the exercise of the option by the defendant and of the making of permanent improvements under and in pursuance of the lease by the defendant on or before May 1, 1935, and approved the same. The record also shows that Miss Noble, the president of the Noble Company, also visited the premises and was told and shown of the improvements being made by the defendant and expressed approval thereof. The record also shows without dispute that the lessors for the first three years of the tenancy of the defendant, received rentals at the rate of \$75.00 a month, and thereafter for nearly three years, received rentals at the rate of \$90.00 a month. We

submit that notice to an agent such as Ball, having the exclusive management and control of the premises and in handling the property for and on behalf of the lessors, was sufficient notice to the lessors of the exercise of the option. Nor does it lie in the mouth of the lessors after accepting and claiming, as they do, the benefits of the made permanent improvements, to now declare that they were not personally notified of the exercise of the option.

In view of the findings of the trial court and of the authority conferred upon Ball with the exclusive management and handling of the property, as hereinbefore indicated, the rule indicated by appellants in their brief and cases cited to the effect that knowledge of the agent may not be imputed to the principal when the third party, here the defendant, knew that the agent had no authority to make the contract, has here no application, for that there is no evidence that the defendant was possessed of any such knowledge, and further because of the findings of the trial court supported by ample evidence that Ball was clothed with authority to give leases, as his father had done, and that for many years written leases were given both by H. T. Ball and A. H. Ball, and from other proven facts and circumstances the only reasonable deducible inference is and as found by the court, that the lessors and predecessors of the plaintiffs had knowledge thereof. In view of all the facts and circumstances in evidence and of the general agency conferred upon both H. T. and A. H. Ball, it is almost incredible to believe otherwise, or that the predecessors of the plaintiffs for twenty years were ignorant thereof, or paid so little attention to the management and handling of the property as not to know thereof, and that it was well within the

province of the trial court to deduce the inference and deductions as found by the court.

Further as to the question of fixtures. If the possession of the defendant should now be terminated or terminated at the end of the additional five years, no one would be bold enough to assert that the defendant, without the consent of the plaintiffs, could remove any of the improvements found by the trial court and attached to the realty as permanent improvements, and that if in such case the defendant undertook to do so, swift indeed would the plaintiffs be seeking injunctive relief to prevent such removal.

STATUTE OF FRAUDS

We come now more particularly to the statute of frauds, 33-5-1, R. S. 1933, relied on by the appellants. In fact, their contention chiefly is based upon the statute that an estate or interest in real property of any one, other than leases for a term not exceeding one year, can be created only . . . "by his lawful agent thereunto authorized by writing." In considering the statute, let the Court also keep in mind 33-5-8 wherein it is provided that "nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof." Let it also be noted that at common law and under the practice of ancient courts in equity, law and equity could not be administered in the same forum and in the same action, and that both legal and equitable defenses could not be interposed in an action at law. But under the code,

104-9-5, R. S. 1933,

both legal and equitable defenses may be interposed to a complaint, whether at law or in equity. Here,

an equitable estoppel was interposed. No contention is or could be made against that. It is predicated upon part performance, receipt of benefits, upon acts and conduct constituting an estoppel, and on the doctrine that to permit the interposition of the statute of frauds by the plaintiffs, in effect, amounted to a fraud upon the defendant. Let it be assumed that A. H. Ball had no express authority in writing to execute and deliver the lease in question to the defendant. Yet, in view of the findings of the trial court and upon the record, the exclusive management and control of the premises by A. H. Ball, and prior thereto by his father, and where, as found by the court, written leases were made by both H. T. and A. H. Ball, under circumstances where it may reasonably be inferred that the predecessors of the plaintiffs had knowledge thereof, and without objections from time to time received rentals and benefits of leases made and executed by H. T. and A. H. Ball and received rentals and benefits for six years from the defendant, and the making of valuable and permanent improvements as heretofore indicated, clearly constituting part performance upon his part, how stands the case? This, therefore, is not a case merely where it is sought to hold the principal on an unauthorized conveyance of his lands or his interest therein, stripped from all acts and conduct, benefits received, part performance and elements of an estoppel, things not involved in many of the cases cited by counsel for the appellants.

As we understand, counsel for appellants do not dispute the rule or doctrine that benefits received and kept, or that part performance or acquiescence in an unauthorized contract or lease, or that acts and conduct amounting to an estoppel do take the case out of the operation of the statute of frauds. But whether counsel for the appellants

do or do not dispute the proposition, such, we understand, is the well established rule, whether the contract be regarded as void or only voidable, if the contract itself is not illegal or against morals or public policy, or ultra vires, or one which the predecessors of the appellants could not themselves have lawfully made. In

25 R.C.L. at page 261, and under Sec. 62, the author discusses the question that in England a delivery of possession pursuant to an agreement is in itself such part performance as to take the case out of the operation of the statute of frauds, citing cases, but that the American decisions are not in harmony on such question, that many of the American courts follow the English rule, some do not, some requiring something in addition to mere taking possession. Then on page 264, Sec. 65, the author further says that though, as has been seen, the courts are not in harmony as to the sufficiency of possession alone to constitute part performance, but that there seems to be practically no diversity of opinion where possession is taken under the contract in pursuance thereof and continued, and accompanied by lasting and valuable improvements of the premises, that the case is taken out of the operation of the statute of frauds, that the entry into possession and the making of the improvements are held to amount to such an alteration in the purchaser's position (here the lessee) as will warrant the courts entering a decree of specific performance, in support of which the author under Notes 14 and 15, and especially under 15, cites many cases from many different jurisdictions. In

27 C. J., page 343, Sec. 427, under the subject, "Statute of Frauds," the author says that where one party to an oral contract has in reliance thereon, so far performed his part of

the agreement that it would be perpetuating a fraud upon him to allow the other party to repudiate the contract and to set up the statute of frauds in justification thereof, equity will regard the case as being removed from the operation of the statute and will enforce the contract. In support of that very many cases are cited from many different jurisdictions. In

21 C. J., page 1206, under the title, "Estoppel," Sec. 207,

the author says that where one having the right to accept or reject a transaction, takes and retains benefits thereunder, he ratifies the transaction, is bound by it and cannot avoid its obligation or effect by taking a position inconsistent therewith, in support of which very many cases are cited from many different jurisdictions. And in Sec. 209, that a party to a transaction cannot ordinarily affirm it in part and in part disaffirm it, and that with regard to rights claimed under a contract, etc., a party will not be allowed to assume the inconsistent position of affirming the contract in part and disaffirming it in part, etc. And in Sec. 211, it is said that it has frequently been held that a person by the acceptance of benefits may be estopped from questioning the existence, validity and effect of a contract, and that such applies to a contention made that the contract was void and in violation of the statute of frauds, in support of which again very many cases are cited from many different jurisdictions. In

5 Pomeroy Equity Juris. (2d Ed.) page 5011, Sec. 2243,

the author also states that while the authority of the English and many American cases undoubtedly support the view that possession alone is sufficient to take a case out of the operation of the statute of

frauds, but that there is a diversity of opinions by the American cases as to that, but, says the author, that the rule is nearly universal holding that possession coupled with the making of valuable improvements is sufficient part performance to take the case without the operation of the statute of frauds, and at Note 26 cites very many cases from many different jurisdictions. In

1 Mechem on Agency (2d Ed.) at page 316,
Sec. 435,

the author says that one who voluntarily accepts the whole or any part of the proceeds of an act done by one assuming, though without authority, to be his agent, must ordinarily be deemed to ratify the act and take it as his own with all its burdens, as well as of its benefits, that he may not ordinarily take the benefits and reject the burdens, but must either accept them or reject them as a whole. Again the author cites very many cases from many jurisdictions, including

Gutheil v. Gilmer, 27 Utah 496.

Then at Sec. 436, the author further says that when the principal discovers that there has come into his hands the proceeds of an unauthorized act done by one who assumed therein to act as his agent, to voluntarily retain such proceeds is ordinarily to ratify the act, citing cases. In

Hargreaves v. Burton, 59 Utah 575; 206
Pac. 262,

by the syllabus it is stated with respect to the statute of frauds, that where a defendant in an action to quiet title relied on an oral contract for the purchase of the property, he must prove a certain, definite and unambiguous contract and also such acts in part performance thereof as in equity are considered sufficient to take the case out of the stat-

ute. Here, the lease pleaded and relied upon is in writing, though let it be assumed unauthorized, yet it is certain, definite and unambiguous. There is no doubt as to that, and so, too, do we contend that the nature and character of the improvements made in pursuance of the contract and in excess of \$1,000.00 were of such character and nature as to be valuable and permanent improvements. In

Hogan v. Swayze, 65 Utah 380; 237 Pac.
1097,

the doctrine as heretofore stated, is well recognized by the Supreme Court of this State and wherein, among other things, it is stated that specific performance will be decreed even in favor of a donee of parol gift of land where gift is followed by possession and substantial improvements in reliance thereon. The doctrine that possession and part performance in pursuance of an oral or unauthorized contract is also recognized in

Lynch v. Coviglio. 17 Utah 106; 53 Pac.
983,

as taking the case out of the operation of the statute of frauds.

Valuable annotations are appended in

33 A.L.R. page 1489,

to the case of Hargreaves v. Burton, supra, supporting the same doctrine. There the annotator says that though the courts in a few jurisdictions do not recognize the doctrine, it is the generally accepted view that part performance of a parol contract or the sale, gift or leasing of land, has under certain circumstances the effect of taking the contract out of the operation of the statute of frauds so that chancery may decree its specific performance if the remedy at law would be inadequate and

the contract is one which, if in writing, would be enforceable in equity; that the principle on which rests this exception to the statute of frauds which makes a written contract essential to a valid agreement to convey land is that a court of equity will not permit the use of the statute to perpetrate a practical fraud. The annotator then cites and reviews cases in jurisdictions where improvements were not essential to part performance, citing cases. Then the annotator refers to what contracts the doctrine was applicable and states that the rule was well settled both in England and in America that if the vendee under a verbal agreement for the purchase of real estate expends labor or money in improving the same, the contract is thereby partially performed and the statute of frauds has no application to it, citing many cases from nearly every State in the Union, including Utah. The author there also cites cases as to the character of the improvements, that the improvements must be permanent and valuable, and then refers to particular improvements, to which we particularly call attention; among others, to the case of

Friberg v. Bjelland, 95 Ore. 320; 182 Pac.
1113,

where the author says that in that case it appeared that the lessee had the interior of the house painted and tinted, had some closets made in the house and put in some additional electric lights and wiring, spending about \$150.00 on the house before he moved in and paid his monthly rental of \$20.00, and that the Court there said:

“An action at law would not afford the plaintiff adequate relief. It would be inequitable to permit the plaintiff to be ejected from the dwelling before the ex-

piration of the time orally agreed upon for the lease. There was a definite agreement between the parties, for a lease for the term of six years at a rental of \$20.00 per month. By the terms of the lease, the lessee was to make whatever repairs or alterations he might desire, in order to fit the dwelling for the use during that period. Relying upon the contract, and in compliance therewith, plaintiff took possession of the premises, and within a short time expended the sum of \$330.00 in repairs and alterations of the house and the construction of a garage on the lot. Such outlay strongly indicates that Friberg had an understanding or contract with Mr. Bjel-land for a lease of the premises for a period of more than one year, or he would not have expended a sum of money greatly in excess of one year's rental. The refusal by the defendant to perform the agreement operates as fraud upon the rights of plaintiff."

The annotator also refers to other cases from Wisconsin, Washington, Missouri and Illinois to the same effect.

Extended notes are also found appended to the case of

Halligan v. Frey, reported in 49 L.R.A.
(N. S.) 113,

and where the annotator says that the great weight of authority was to the effect that equity would intervene to protect the rights of one who has taken an oral lease out of the statute of frauds by part performance, citing many, many cases. See also notes in

3 L.R.A. (N. S.) 790.

In 31 L.R.A. (N. S.), page 738,
 the author under the subhead of "Ratification or Estoppel" says, that even though the selling and leasing of property belonging to a banking association be not considered as within the ordinary powers and duties of a bank cashier, such a sale or lease may be ratified by the acts and conduct of the board of directors, or the bank may become estopped from questioning the authority of its cashier, so as to render a contract entered into by him the contract of the bank.

To some extent the case of

Jacksonville M. P. Ry. & Navigation Co. v.
 Hooper, 160 U.S. 512; 40 L. Ed. 515,

is here applicable, wherein by the syllabus it is stated that a company is bound by a lease signed for it by its president, although there was no proof that he was authorized to do so by a resolution of the board, where the company took possession of the premises, rented a portion thereof and received and receipted for the rent.

In the case of

Tobias v. Towle, (Wash.) 35 Pac. (2d)
 1114,

the syllabus says that where agent leased premises for branch office in name of his principal, carried on business in his name and had apparent general authority, the principal held estopped to deny liability for delinquent rent on ground that agent had no actual authority to sign lease, and that a principal who intrusted agent with apparent general authority to sign lease could not accept benefits of agent's contract without incurring its obligations. In

Simpson v. Nelson, (Colo.); 208 Pac. 455,
 it was held that a landowner's acceptance of money paid as interest under a lease and option to buy

executed by her deceased husband without her written authority constituted ratification of the contract of sale sufficient to justify determinations for lessee in suits involving his right to enforce option. In

Carnahan v. M. J. & B. M. Buck Co.,
(Mich.); 229 N. W. 513,

it was held that where a lease is one that the corporation might make, the corporation could ratify the lease, and where the corporation ratified the lease by acquiescence, the corporation was estopped to say that it was not bound under the lease; that directors of corporation will be charged with knowledge of which it was their duty to know; that directors of corporation occupying premises and paying rent must be held to know of lease and its terms and of occupancy and paying rent.

In the case of

Fine Arts Corp. v. Kuchins Furniture Mfg.
Co., (Mich.); 257 N. W. 823,

it was held that though a lease was void under the statute of frauds because not authorized by an agent in writing, yet held the lease ratified by the lessor's letters acknowledging agent's authority and demanding payment of rent. On the question of ratification of a contract made by an agent unauthorized to make it, see also

Stuart v. Mattern, (Mich.); 105 N. W. 35.

If it is desired to further pursue the subject, we cite

Fudicker v. Glenn, 237 Fed. 808.

Peterborough R. Co. v. Nashua & L. R. Co.,
59 N.H. 835.

Alexander v. Culbertson Ir. & Water Power Co., 61 Nebr. 333; 85 N. W. 283.

West v. Washington & C. River R. Co., 49 Ore. 436; 90 Pac. 666.

King v. West Coast Grocery Co., 72 Wash. 132; 129 Pac. 1081.

Manchester Marble Co. v. Rutland R. R. Co., (Vt.); 136 Atl. 394.

Hagar v. Home Stores, Inc., (Cal.); 259 Pac. 1007.

Zenos v. Britten Cook Land & L. S. Co., (Cal.); 242 Pac. 914.

Portland Cattle Ln. Co. v. Hansen L.S. Co., (Ida.); 251 Pac. 1051.

Cache Valley Banking Co. v. Logan B. P. O. E., (Utah); 56 Pac. (2d) 1046.

As heretofore stated, the defendant's lease was not merely executory. For six years prior to the purchase by the plaintiffs it was executed and performed by the defendant in good faith, well believing that the lease gave the defendant the right to occupy and possess the premises under the terms and conditions specified in the lease. If anything is established by this law suit, that is; notwithstanding the asserted conclusions of counsel for the appellants to the contrary, or their assertions that the improvements made were only for the defendant's enjoyment of the premises as and for a month to month lease, or were mere removable trade fixtures. Should there be any doubt that the nature and character of the improvements as found by the court and enumerated by its findings and as testified to by Floor were permanent improvements and beneficial to the freehold, we, in addition to the text and cases heretofore cited, also cite

Parker v. Wulstein, (N. J. Eq.); 21 Atl. 623.

O'Neill v. Lyric Amusement Co., 119 Ark. 454; 178 S. W. 406.

Jones v. Harsha, 225 Mich. 416; 196 N. W. 624.

Modern Music Shop v. Concordia Fire Ins. Co., 226 N.Y.S. 630.

Black Hdwe. Co. v. Commissioner of Internal Rev., 39 Fed. (2d) 460.

We thus say that both the predecessors of the plaintiffs and the plaintiffs themselves are estopped from asserting that the defendant's lease is void under the statute of frauds, and that to permit the plaintiffs to interpose the statute is tantamount to permitting them to perpetrate a fraud upon the defendant. However, if for any reason it can be considered that the predecessors of the plaintiffs were not estopped because of want of knowledge of the defendant's lease until after the premises were conveyed to the plaintiffs, then we say that the plaintiffs nevertheless are themselves estopped, because it was indisputably shown by the record and as found by the court, that prior to the purchase of the premises, they had visited the premises, talked with Floor, the manager of the defendant, concerning the defendant's possession and of its lease and of its claimed right to continue in possession until 1941, and were informed of the terms and conditions of the lease and a copy thereof submitted to plaintiffs' attorney, all before they purchased the premises, and so the court found and stated its conclusions of law. (Ab. 38).

ATTORNEY'S FEES

As already indicated, the court, by its findings, conclusions and judgment, held the defendant's lease valid, and that the plaintiffs were estopped from asserting its invalidity. The lease, among other things, provided that "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 by reason thereof, the defendant alleged that if the plaintiffs' complaint be dismissed, the defendant be allowed \$500.00 attorney's fees, which the court found was stipulated by the parties in open court to be a reasonable attorney's fee for the purpose (Finding 9; Ab. 36), and evidence also was given to show that \$500.00 was a reasonable attorney's fee (Ab. 98). Thus the court, by its judgment, allowed the defendant \$500.00 as an attorney's fee by reason of such provision in the lease and stipulation of counsel.

The appellants now say there was no privity between the plaintiffs and the defendant, and that the provision for attorney's fees was not a covenant running with the land. Here the appellants again assert that the lease was not executed by Ball on behalf of the true owners and lessors, that is, that it was executed on behalf of the Stockyards National Bank, the Noble Company and the Fred Bragg Estate, when as they say, only the Noble Company constituted a real owner and lessor. We heretofore have gone over that, and have shown that the interest of the Stockyards National Bank, prior to September, 1933, and at all times subsequent thereto and until the conveyance of the property to the plaintiffs, was still carried on in the name of the Stockyards National Bank and that the parties so treated the bank as

still the owner of a one-fourth interest in the Eagle Block; that the one-fourth interest of the Fred Bragg Estate and of all of the heirs interested in that estate prior to 1933 and at all times subsequent thereto, was treated by the parties and carried on in the name of the Fred Bragg Estate including the heirs, and that all the dealings with respect thereto were had with attorney Brome, representing the estate and all the heirs thereof. We have also shown that Dressler and Hovey, to whom it was said the Stockyards National Bank conveyed its one-fourth interest, were mere trustees, and only as such conveyed the same to the plaintiffs, and that they at no time otherwise had any right, title or interest in or to the property. Since the parties thus through all their negotiations prior to 1933 and at all time prior to the conveyance to the plaintiffs, treated and regarded the Noble Company as owning one-half of the conveyed premises to the plaintiffs, the Stockyards National Bank as one-fourth and the Fred Bragg Estate one-fourth, the lease signed and executed by A. H. Ball as the agent for and on behalf of the lessors and predecessors of the plaintiffs, the court was justified in holding that the lease was made for and on behalf of the real owners and lessors of the premises. At no time during all of such period had the parties personally dealt with the heirs of the Bragg Estate, but for and on their behalf dealt with Brome, representing the Fred Bragg Estate, and including all persons interested in the estate. So, too, so far as concerns the Stockyards National Bank, the parties during all of such period, dealt with and had all the transactions in the name of the Stockyards National Bank and not in the name of the trustees.

We think the finding and conclusion of the court were well justified. That being so, much of

the complaint made as to attorney's fees is groundless. The finding and conclusion being justified, there was privity between the plaintiffs and the defendant. Strange it is, that while the plaintiffs claim the benefits of the lease, so far as receiving and accepting the increased rentals of \$90.00 a month for the additional period stipulated in the lease and until the conveyance of the premises to the plaintiffs, as well as claiming its benefits for the purpose of showing the relation of tenancy between the defendant and the predecessors of the plaintiffs, yet for all other purposes seek to reject the lease. They say that there was no provision in the grants that the plaintiffs took the property subject to the lease. As heretofore shown, (See defendant's Exhibit 41), the substance of the defendant's lease was put on record in the office of the County Recorder May 1, 1939, about a month prior to the purchase of the premises by the plaintiffs; and as further heretofore shown, the plaintiffs had actual knowledge of the defendant's lease and of the terms and conditions thereof and of its possession thereunder, and of course, took the premises, when they purchased them, subject to the lease. The appellants do not contend the contrary, but what they, all through this law suit, maintained was that the lease was void because not executed by an agent having written authority so to do. That, the court, by its findings, conclusions and judgment, found and adjudged against the plaintiffs.

Appellants further say there is no contract between the plaintiffs and the defendant. They allege in their complaint that on September 25, 1933, the Noble Company, Hovey and Dressler as trustees, and the heirs of the Bragg Estate "leased, demised and let to the defendant the premises" in question "from month to month at a monthly

rental of \$70.00, and that on or about the 1st day of May, 1935, by mutual agreement, the rental was fixed at \$90.00 per month," and that by such owners the premises were conveyed to the plaintiffs on the 31st day of May, 1939. The plaintiffs thus allege a contract between the parties. But as heretofore shown, there was no such contract; that the only contract between the predecessors of the plaintiffs and the defendant was the lease executed and delivered to the defendant for a term of years and as alleged in the defendant's answer, being defendant's Exhibit 28. And as heretofore shown, it is under that lease, and not otherwise, that any relation of tenancy is now claimed by the plaintiffs as having existed between the plaintiffs' predecessors and the defendant and under which they justified the right of plaintiffs' predecessors in receiving the rental of \$90.00 a month for the extension of the additional period of five years of the terms of the lease. So that when the plaintiffs purchased the premises, they took them subject to such lease.

Then the appellants say the provision in the lease providing for attorney's fees was not a covenant running with the land, that it was a mere personal covenant of the lessors and predecessors of the plaintiffs, and hence not binding on the plaintiffs.

The plaintiffs, before they purchased the premises, having had both actual knowledge and constructive notice of the terms and conditions of the lease under which the defendant was in possession, and knowledge of the permanent improvements made by the defendant under and in pursuance of the lease, did so subject to the lease and subject to all rights, privileges and equities possessed by the defendant. In such case, the plaintiffs as grantees stood in the shoes of the grantors

and assignors of the lease, and what the latter were required or obligated to do, so likewise were the plaintiffs. Such is the general rule and as shown in

35 C. J., Sec. 544, page 1214.

As there stated, where the lessee is in possession, the purchaser takes subject to the lease, and where the lessee is in possession under a defective or void lease, the purchaser will take subject to any equities of the lessee, that generally the rights and liabilities existing between the grantee and the lessee are the same as those existing between the grantor and the lessee. Many cases are cited in support of the text. On the following page it is also stated that if a lease is voidable, the grantee may, by his acts, preclude himself from thereafter attacking it, as by the acceptance of rent, and if the lease is voidable at its inception and the lessee has paid rents and made improvements, a subsequent purchaser of the land with knowledge of the facts cannot avoid the lease.

As shown by the record and on the facts as found by the court, the plaintiffs had no more right, than had their grantors if no conveyance of the premises had been made, to terminate the tenancy of the defendant by the service of notice demanding possession of the premises and upon a refusal to surrender possession, to bring an action therefor. There can be no greater invasion of rights with respect to leased premises than by a wrongful service of notice to vacate and the bringing of an action to eject the tenant from the premises. To defend his occupation and enjoyment, one in possession of necessity is required to employ counsel and is put to costs and expenses in defending and main-

taining his rights under specified and agreed covenants of his lease.

Here the covenant in the lease whereby either party was to pay costs, attorney's fees and expenses incurred *arising from enforcing the covenants of the lease*, was mutual and reciprocal and was for the benefit not only of the lessor, but also of the lessee. That is, it was not only a personal covenant, so far as the lessor was concerned, but it was, as well, a mutual and reciprocal covenant for the benefit of the lessee.

The plaintiffs here having served a notice that the defendant vacate the premises and upon its refusal to do so having brought this action, the defendant, by setting up its lease and the provisions therein contained, pleaded and invoked an enforcement of the terms of the lease, including the covenant relating to attorney's fees.

We note the cases cited by appellants upon this subject. They cite *Hollander v. Central Metal, etc. Co.*, (Md.); 71 Atl. 442; 23 L.R.A. (N. S.) 1135. It will be observed that the Court there was considering the question of whether a covenant by the lessor to *convey in fee* to the lessee, its heirs and assigns upon the performance of certain conditions runs with the land. The Court held it did. We have no disagreement as to what the Court there said as to covenants running with the land. And further, let it be noticed that the cited case went off on a demurrer to the complaint.

They also cite *Cohen v. Birns*, 170 N.Y.S. 560. A reading of the case will show that it has here no application. There, Cohen and his cotenants deposited with Weiss, the lessor, \$400.00 as security for the performance by the tenants of the covenants of the lease, one of which was the

payment of the rent when due, the repair of the premises and their surrender in as good condition as reasonable wear and tear permitted, and that the deposit of \$400.00 was to be returned to Cohen and his co-tenants at the expiration of the lease if the covenants were kept and performed. Space does not permit here a review of the case. A reading of it will show that it has no application, for, it is not even clear whether the deposit of \$400.00 was a part of the lease or not, or something entirely collateral to the lease. Here the covenant to pay attorney's fees was not collateral. It was a part of the lease itself.

The case of *Magoon v. Eastman*, 84 Atl. 869, also is cited. There the lease contained a provision that the lessee, when he vacated the premises, was required to leave as much hay on the farm as was there when he took possession and where the defendant left the required amount of hay, but it was not cut in proper season and by reason thereof, was of less value than it otherwise would have been, and by reason of which, it was "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 rules of good husbandry." With respect to that the Court said that might be so, but that the question there was whether he could recover damages in an action of covenant brought in his own name and where from further observations it was made to appear that the court merely denied the action because of its form, that is, that it was not "an action of covenant," but one for damages.

The appellants also cite *Brandley v. Lewis*, (Utah); 92 Pac. (2d) 338. We submit the case is inapplicable, for all that was there considered and

decided was that the appeal was not taken within time, and therefore it was dismissed.

Forrester v. Cook, (Utah), 292 Pac. 206, also is cited. The contract there provided for an attorney's fees, but the court said that "this is not an action to enforce the agreement," that the plaintiff proceeded upon the theory that the agreement fixed the status of the parties *with forfeiture*, that thereupon the defendants became tenants at will, and that "no attempt was made to enforce any of the provisions of the contract," and hence the law, and not the contract, fixed the measure of the damages and that the law itself did not allow attorney's fees in that sort of an action, and for that reason attorney's fees were not allowed. The question there was not one dealing with the question of whether the covenant was one running with the land or not.

Leone v. Zuniga, (Utah), 34 Pac. (2d) 699, also is cited. Neither does this case involve any question as to whether a covenant was one running with the land or not. We see no application of the citation of these Utah cases. Excerpts of other cases on the subject are also cited by the appellants. To see their application they must be considered in connection with the facts of such cases and the particular questions before the Court for decision. When so considered we think them not analogous to either the facts or the question here involved.

According to the authorities and cases, it is sometimes rather difficult in ascertaining whether the particular covenant is one running with the land or not. Texts and authorities teach that whether the covenant is one running with the land or not

is to be determined from the intention of the parties and as gathered from the whole instrument. In the case of

Keogh v. Peck, 316 Ill. 318; 147 N.E. 266;
38 A.L.R. 1151,

the Court said that the test as to whether the covenant runs with the land or is merely personal, is whether the covenant concerns the thing granted *and the occupation or enjoyment of it*, or is a mere collateral and personal covenant not immediately concerning the thing granted. In

7 R.C.L., page 1106, Sec. 22,
the author says that as a general rule covenants in a lease relating to the thing demised run with the land even though the covenant does not in certain instances have reference to something to be done upon the land itself; that in accordance with the general rule real covenants running with the land in leases include covenants to pay rent, taxes or assessments, to insure, to make improvements or to pay for improvements, to make repairs or to share in such expense, to deliver up the demised premises in good order and repair, to renew a lease, restrict the lessee's right of alienation, and other conditions there enumerated. See also the following sections or paragraphs; and also

Notes, 41 A.L.R. 1370,
where annotations are enumerated as to what covenants are considered as running with the land.

The clause or covenant here in question was not something wholly collateral and independent of the lease itself. It was something which expressly and directly related to the enjoyment and occupa-

tion of the leased premises and to the enforcement of the mutual and reciprocal rights and benefits of the lessors and the lessee. In other words, and as heretofore observed, the act of the plaintiffs, the grantees, without right serving a notice upon the defendant to surrender up the possession of the premises and upon its refusal so to do, the bringing of an action to dispossess the defendant and to eject it from the premises was *a direct invasion of the defendant's rights to the use and enjoyment of the property*, and that the clause or covenant in the lease had a direct bearing upon such invasion and as bearing on the enforcement of the covenants of the lease on behalf of the lessee. We thus say that such a covenant is one running with the land just as much as a covenant to pay rent. But if it may not be so considered, we further contend that under the facts as found and conclusions stated by the court, and particularly because of the actual knowledge of the plaintiffs before they purchased the property of the terms and conditions of the lease, including the clause or covenant in question, and of the valuable and permanent improvements made by the defendant, and of part performance upon its part, and of the facts as found by the court of the estoppel of the plaintiffs from questioning the validity or binding effect of the lease, and of the plaintiffs' acceptance of parts of the lease and attempting to reject other parts, the plaintiffs are bound by the clause or covenant in question to the same extent as though it was a covenant running with the land, and that the court may no more in the one case than in the other treat and regard the covenant in question as collateral to or independent of the lease, but is required to consider the cov-

enant as part and parcel thereof and as a binding obligation not only as to the lessors, but also upon their grantees who purchased the premises with full knowledge of all the rights, privileges and equities of the defendant in possession.

We thus respectfully submit that the judgment of the court be affirmed, with costs to the respondents.

WILLARD HANSON,
STEWART M. HANSON,
Attorneys for Defendant
and Respondent.

D. N. STRAUP, of Counsel.