

1948

R. Byron Ferguson v. J. Oscar Garrett and Stella F. Garrett : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT of the State of Utah

R. BYRON FERGUSON,

Plaintiff and Appellant,

VS.

**J. OSCAR GARRETT and STELLA P.
GARRETT, his wife,**

Defendants and Respondents.

BRIEF OF APPELLANT

APPEAL FROM THE
FOURTH JUDICIAL DISTRICT COURT,
IN AND FOR UTAH COUNTY, STATE OF UTAH
JUDGE WILL L. HOYT

**J. RULON MORGAN
ELIAS HANSEN**

*Attorneys for Plaintiff
and Appellants.*

GEORGE BALLIF

*Attorney for Defendant
and Respondents*

FILED
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U. SUPREME COURT, UTAH

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

R. BYRON FERGUSON,
Plaintiff and Appellant,

vs.

J. OSCAR GARRETT and STELLA P.
GARRETT, his wife,
Defendants and Respondents.

Case No.
7257

BRIEF OF APPELLANT

STATEMENT OF CASE

The plaintiff brought this action to recover damages, both general and special, for the breach of a written contract for the sale of real property and for damages sustained by the plaintiff because of the breach of the covenants of a warranty deed executed and delivered by the defendants to the plaintiff in pursuance of the contract of sale.

The first document executed by the parties in their negotiations provides:

“Received from R. Byron Ferguson the sum of Two Hundred and Fifty Dollars, to secure and apply on the purchase of the following described property: Home at 726 North University Ave. and Store building, including shelving and heater, and apartment house, consisting of three 3 room apartments, including 3 heaters and ice box for the purchase price of Twenty-Four Thousand Dollars. The balance of purchase price shall be paid as follows: Fifteen Thousand Dollars on or before 90 days from date (above) and the balance \$9,000.00 on or before 2 years at 3% interest per annum until paid. Interest shall be charged on all unpaid portions of the purchase price at 3% per annum, and possession given in 90 days (Seller to occupy North apartment for 2 years, rent free).

Taxes for the current fiscal year ending December 31st, following this date and the insurance, rents and other expenses of said property shall be pro-rated as of date of delivery of deed or final contract of sale. All other taxes and assessments shall be paid by owner except the following: No exceptions. Insurance as written goes with property.

Contract of sale to be mde on the approved form of the PROVO REAL ESTATE BOARD in the name of.....

In the event said purchaser shall fail to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller, be retained as liquidated and agreed damages.

The payment is received and sale is made subject to owner's approval, and unless so approved on or before.....days from date the return of

the money herein receipted shall cancel this sale without damage, to the undersigned.

We do hereby agree to carry out and fulfill the terms and conditions in the above receipt specified, the owner agreeing to furnish a good marketable title with abstract to date, or policy of title insurance and to make final conveyance by sufficient deed.

	Buyer /s/ R. BYRON FERGUSON
NO AGENT	/s/ STELLA P. GARRETT
	Seller /s/ J. OSCAR GARRETT

R. 8 and Exhibit "A".

Thereafter the following instrument was executed by the parties :

"We, J. Oscar Garrett and Stella P. Garrett, husband and wife, the undersigned, acknowledge receipt of Six Thousand Nine Hundred Seventy-Seven and 59/100 Dollars, from R. Byron Ferguson and further acknowledge that the method of payment in the certain Earnest Money Receipt dated July 29, 1946 by and between said parties is changed and amended to read:

Seven Thousand Two Hundred and No/100 (\$7200.00) within 90 days from date (July 29, 1946) and the balance as represented by certain notes and mortgages executed this 26 day of October, A. D. 1946 by R. Byron Ferguson and Faun C. Ferguson, his wife, which is part read as follows:

1 note dated October 26, 1946 for \$9,000.00, payable on or before two (2) years from date, with interest, payable quarterly at the rate of 3 per cent per annum.

1 note dated October 26, 1946 for \$3,000.00, payable on or before one (1) year from date, with interest, payable quarterly at the rate of 5 per cent per annum.

1 note dated October 26, 1946 for \$4,800.00, payable 75 days from date with no interest.

All of the rest of the provisions of said Earnest Money Receipt (Contract remains unchanged).

/s/ J. OSCAR GARRETT

/s/ STELLA P. GARRETT

Receipt of \$27.59 included in the above is for pro-rated portion of the 1946 general taxes, paid by R. Byron Ferguson." R. 9 and Exhibit "B".

On October 18th, 1946 the defendants made and executed a statutory form of warranty deed which provides:

WARRANTY DEED

"J. OSCAR GARRETT and STELLA P. GARRETT, his wife, Grantors, of Provo, Utah, hereby CONVEY AND WARRANT to R. BYRON FERGUSON and FAUN C. FERGUSON, husband and wife as Joint Tennants, with full right of survivorship, Grantees of Provo, Utah, for the sum of \$12,000.00, Twelve Thousand Dollars and other valuable consideration the following described tract of land in Utah County, State of Utah, to-wit:

Commencing 6 rods North of the Southwest corner of Block 8, Plat "D", Provo City Survey; which is also 11 rods North of the Northwest corner of Block 29, Plat "C" Provo City Survey of

Building Lots; thence East 9 rods; thence North 6 rods; thence West 9 rods; thence South 6 rods to the place of beginning.

\$26.95 Revenue Stamps.

WITNESS THE HANDS of said Grantors this 18th day of October, A. D. 1946.

Signed in the presence of

/s/ J. OSCAR GARRETT
/s/ WESTON GARRETT
/s/ STELLA P. GARRETT

— — — — —
STATE OF UTAH)
) SS.
County of Utah

On the 18th day of October, A. D. 1946, personally appeared before me, a Notary Public in and for the State of Utah, J. OSCAR GARRETT and STELLA P. GARRETT, his wife, the signers of the above instrument, who duly acknowledged to me that they executed the same.

/s/ A. K. BREINHOLT
Notary Public
(SEAL) Residing at Provo, Utah
My Commission Expires 8-17-49"

R. 10 and Exhibit "C".

It is in substance alleged in the complaint that at the time plaintiff entered into negotiations for the purchase from the defendants of a store building, a home and a three unit apartment house located at 726 North University Avenue in Provo, Utah, he, the plaintiff, was engaged in the business of coal trucking, operating a

farm west of Provo and feeding some cattle for beef. That he had been injured and desired to purchase defendants' property for the purpose of living in one of the apartments, renting the other apartments and conducting a grocery store and meat market in the store building which were on the premises which he sought to purchase. That prior to and during the negotiations for the purchase of the premises and the improvements on the property plaintiff informed the defendants of the purposes for which he, the plaintiff, desired to purchase the property. That at the time the negotiations for the purchase of the property were being conducted and at the time the property was conveyed to the plaintiff by the defendants there was a tenant in possession of the store building. According to the allegations of the complaint the defendants informed the plaintiff that the tenant so in possession of the store building was renting the same from month to month. R-1 to 6.

Plaintiff also alleges that prior to bringing his action he had demanded possession of the store building, but was unable to secure possession thereof to his damage in the sum of \$500.00 per month from November 1st, 1946 until he secured possession thereof, \$1050 loss on the sale of cattle and \$300.00 feed bill on the cattle which he held for the purpose of selling at retail in the store building and \$200.00 for the depreciation of the equipment which he bought for use in the store building and for costs. That the reasonable rental value of the store building was and is \$150.00 per month.

In their answer the defendants admit the execution of the written instruments above mentioned. They also admit that demand was made for the possession of the store building. They deny that they informed the plaintiff that the tenant, who was in possession of the store building was leasing such building from month to month and they allege the fact to be that they, the defendants, during the negotiations for the sale of the property, informed the plaintiff that the store building was leased and that possession of the property would be given subject to the lease on the store building. R. 19 to 24. The lease on the store building was admitted in evidence as defendants' Exhibit 1.

At the trial the parties offered evidence in support of their respective allegations. At the conclusion of the evidence and argument of counsel the trial court found the issues in favor of the defendants and against the plaintiff and entered judgment accordingly. Plaintiff prosecutes this appeal from the judgment so entered.

There are two fundamental questions presented for determination on this appeal. They are:

1. Is parol evidence competent to vary the terms of a written contract for the sale of real estate and of a statutory Warranty Deed given to consummate such contract?

2. In case of a breach of a contract for the sale of real estate and of the covenants contained in a Warranty Deed may the injured party recover special damages for the breach, or is such injured party limited to re-

cover merely the reasonable rental value of the property during the time he is deprived of the possession thereof?

ASSIGNMENTS OF ERROR

The plaintiff and appellant assigns the following errors upon which he relies for a reversal of the judgment appealed from:

1. The trial court erred in denying the motion to strike the following allegations from paragraph 6 on page 2 of defendants' answer, "and in that connection alleges that prior to its execution by defendants they advised plaintiff that they would deliver possession of said premises subject to the existing leases and tenancies existing thereon and prior to July 29, 1946, including the leases on the store building." R. 28 and Tr. 1.

2. The trial court erred in denying the motion to strike the following allegations from paragraph 10 on page 3 of defendants' answer, "subject to all leases and tenancies existing thereon" and in that connection allege that prior to July 29, 1946 defendants specifically informed plaintiff that they could not and would not deliver possession of the said store building as the tenant therein occupied same under a lease which had not expired, and being so informed the plaintiff agreed and undertook in the agreement of sale of said premises to accept possession of said store building and premises, subject to said leases hereinafter set forth in defendants' affirmative answer." R. 28 and Tr. 1.

3. The trial court erred in refusing to strike from paragraph 11 on page 3 of defendants' answer the following: "and in that connection the defendants allege that possession of same was delivered strictly in accordance with the agreement between plaintiff and defendants and subject to leases and tenancies existing on said premises including the store building lease as hereinafter alleged." R. 28.

4. The trial court erred in refusing to strike from paragraph 11 on page 3 of defendants' answer the following allegation: "and subject to leases and tenancies existing on said premises including store building lease as hereinafter alleged."

5. The trial court erred in refusing to strike from defendants' answer the following allegation: "that during those negotiations and on or about July 15, 1946, defendants advised plaintiff that one Haddock had possession of the store building situated on said premises under a lease." R. 28 and Tr. 1.

6. The trial court erred in refusing to strike from paragraph 2 on page 4 of defendants' answer the following allegation: "and that defendants would be unable to remove said tenant." R. 28 and Tr. 1.

7. The trial court erred in refusing to strike from paragraph 2 on page 4 of defendants' answer the following allegation: "and if the sale was made plaintiff would have to take possession of said store subject to the tenants rights under said lease." R. 28 and Tr. 1.

8. The trial court erred in refusing to strike from paragraph 2 on page 4 of defendants' answer the following allegation: "that the plaintiff being so advised and fully informed concerning said Haddock lease on the store building then and there undertook and agreed that if defendants would sell said premises to him that he would assume the obligation of getting the Haddocks out of the store." R. 29 and Tr. 1.

9. The trial court erred in refusing to strike from paragraph 2 on page 4 of the defendants' answer the following allegation: "and plaintiff further stated to defendants that while he was waiting for the Haddocks to vacate said store he had other things he could be doing, to-wit: operate his coal business, operate his farm and orchard in Orem, Utah, operate his real estate and his insurance business." R. 29.

10. The trial court erred in refusing to strike from paragraph 3 on page 4 of the defendants' answer the following allegation: "that pursuant to the said agreement of plaintiff to purchase the said premises subject to the rights of the tenants in possession and particularly tenant Haddock's rights under his lease for said store building, the defendants signed said earnest money memorando Exhibits "A" and "B", aforesaid, on July 29 and October 26, 1946, respectively." R. 29 and Tr. 1.

11. The trial court erred in refusing to strike from paragraph 3, page 4 of the defendants' answer the following allegation: "that further in pursuance of said Agreement and on or about August 3, 1946, defendants

notified their tenant Haddock that the plaintiff was the new owner of said premises, including the store building occupied by him, and to pay rent to him thereafter.”

R. 29 and Tr. 1.

12. The trial court erred in refusing to strike from paragraph 3 on page 4, of the defendants’ answer the following allegation: “and that pursuant to said plaintiff’s agreement, and not otherwise, defendants on November 1, 1946, delivered possession of the entire premises, including said store building to plaintiff.” R. 29 and Tr. 1.

13. The trial court erred in refusing to strike from paragraph 3 on page 4 of the defendants’ answer the following allegation: “subject to the existing rights of tenants occupying said premises, and particularly the lease rights of said tenant Haddock in said store building.” R. 29 and Tr. 1.

14. The trial court erred in refusing to strike from paragraph 3 on page 5 of defendants’ answer the following allegation: “and that plaintiff received possession of said premises as aforesaid on said last mentioned date and now has same, and has had and enjoyed same at all times since.” R. 29 and Tr. 1.

15. The trial court erred in refusing to strike from paragraph 4 on page 5 of defendants’ answer the following allegation: “That within a day or two after said agreement was made, on or about August 1, 1946, so defendants are informed and believe, the plaintiff went

to the said tenant Haddock and demanded immediate possession of said store building, and said tenant refused to surrender possession thereof to the plaintiff stating to him that his (Haddock's) lease had not expired." R. 29 and Tr. 1.

16. The trial court erred in refusing to strike from paragraph 4, page 5, of defendants' answer the following allegation: "that subsequently and on or about October 16, 1946, plaintiff advised defendants that said Haddock refused to surrender possession of said store building, at which time defendants offered to call the whole deal off and postpone it until said Haddock's lease had expired." R. 29 and Tr. 1.

17. The trial court erred in refusing to strike from paragraph 4, page 5 of defendants' answer the following allegation: "but that plaintiff then and there advised defendants that he was not worried, and that he could get the Haddocks out of the store building in 30 days and that he wanted to go through with the deal." R. 29 and Tr. 1.

18. The trial court erred in refusing to strike from paragraph 4 on page 5 of defendants' answer the following allegation: "that thereupon defendants reminded plaintiff of his agreement to accept possession of said store building subject to Haddock's lease rights and that plaintiff was going to do other things until said lease expired, whereupon the plaintiff told defendants he had changed his mind." R. 29 and Tr. 1.

19. The trial court erred in refusing to strike from paragraph 5 on page 5 of defendants' answer the following allegation: "that defendants have fully performed their agreement with plaintiff for the sale of said premises, and have delivered possession of the same, and particularly the said store building, to the plaintiff in accordance with the said agreement subject to the lease rights of the said tenant Haddock." R. 30 and Tr. 1.

20. The trial court erred in refusing to strike from paragraph 6 on page 5 of the defendants' answer the following allegation: "that if the plaintiff has suffered any damage by reason of said transaction, it is not due to any failure of defendants to perform their said agreement, but is a result of the plaintiff's own breach of his agreement to accept possession of said premises subject to the right of said tenant Haddock to possession of said store building." R. 30 and Tr. 1.

21. The trial court erred in overruling the objections to the testimony of Mrs. Haddock touching the tender of checks to Mr. Ferguson and the admission in evidence of such checks. Tr. 46-50.

22. The trial court erred in sustaining objection to the following question asked plaintiff: "How much did it cost you to feed the cattle from November 1st, 1946 until the time you sold them?" Tr. 65-66.

23. The trial court erred in striking the following answer of the plaintiff: "I had made arrangements with the Provo Packing Company by the steel plant to slaughter these cattle as I needed them and hold them in their

ice box, cure them. They were to be sold over the counter, meat counter." Tr. 66.

24 The trial court erred in sustaining objection to the following question asked plaintiff: "What were your earnings in the last few months that you were in the coal trucking business?" Tr. 67.

24. The trial court erred in sustaining the objection to the following question: "Now from the amount you did earn when you went in the real estate business, do you have a judgment what you could have earned by way of commission with Rowan & Grow?" Tr. 74.

25. The trial court erred in sustaining the objection to the following question asked of the plaintiff: "Well how much did you make on an average in the real estate business after you did get in the real estate business, for the ensuing few months?" Tr. 75.

In order that the court may better understand the assigned errors touching the admission of parol evidence touching the terms of the written contract and warranty deed we quote the following from the objections of one of counsel for the plaintiff:

"If the court please, at this time, in order to save time and not keep butting in, we object to any conversation had if it is intended by the conversation to vary the terms of this written instrument that has been offered in evidence, any conversation if it is calculated in any way to vary the terms of the written instrument, the contract, the written contract, and warranty deed. We

would like to have it understood any such testimony is objected to without interposing that objection too frequently. Of course, we can object to them as they come up, if that is preferable. We thought we would save time.” Tr. 138.

“The court: The record may show your objection against the same, for the purpose indicated.” Tr. 138.

26. The trial court erred in admitting and in refusing to strike that part of the testimony of Mrs. Garrett where she testified: “That Mr. Garrett said ‘I have people with a contract on the store and I can’t let you have the store.’ He said: ‘Well that don’t make any difference to me’.” Tr. 140.

27. The trial court erred in admitting in evidence and refusing to strike the following testimony of Mrs. Garrett: “as Mr. Ferguson, as he had said he would take the property with the lease.” Tr. 144.

28. The trial court erred in admitting in evidence and in refusing to strike the following testimony of Mrs. Garrett: “I know that was the time that Mr. Garrett said that when the Haddocks lease had expired, at the expiration of two years lease, he thought the contract or lease was on a month to month basis, and that the Haddocks thought the clause in the lease gave them the privilege of staying another two years. Then Mr. Ferguson asked about the clause in the lease, and he said he was not worried about the lease, or the clause in the lease, that he could easily get the Haddocks out in thirty days. Mr. Garrett says: ‘Now, Mr. Ferguson, you know I must

have Haddocks taken care of.' He says: 'Sure, sure'." Tr. 148.

29. The trial court erred in permitting Mrs. Garrett to testify and in refusing to strike the following part of her testimony: "Q. Is that a week after July 29th? A. The 29th. I would say around Thursday or Friday, Mr. Ferguson came to my door and said: 'Mrs. Garrett, will you tell me exactly how your lease reads with the Haddocks?' I said: 'Our lease calls for an option of staying two years and there is a clause in the lease giving them the privilege of staying two more years.' Mr. Ferguson said: 'Did they ever serve any papers on you, any writing about it.' I said: 'No.' He said: 'Then it is not worth the paper it is written on'." Tr. 150.

30. The trial court erred in permitting Mrs. Garrett to testify and in refusing to strike the following testimony: "Mr. Ferguson said, 'Mrs. Garrett, will you tell Mr. Garrett to get the Haddocks out of the store?' I said: 'Mr. Ferguson we understood you didn't want the store.' He said: I have changed my mind; my lawyer says I can get the Haddocks out of the store'. I said: 'Mr. Ferguson, why don't you get them out?' He said: 'Because my lawyer said it is Mr. Garrett's place to get them out'." Tr. 153.

31. The trial court erred in permitting Mrs. Garrett to testify and in refusing to strike the following: "He said he would take that responsibility himself." (getting the Haddocks out). On that occasion he said he had changed his mind." Tr. 153.

32. The trial court erred in admitting in evidence over the objection of the plaintiff a purported copy of the letter shown at page 159 of the transcript.

It should be noted that at the commencement of the testimony of defendant J. Oscar Garrett one of counsel for the plaintiff made the following objection: "May we have the same objection to all of the testimony that this witness may give with respect to these particular conversation, that it tends to vary the terms of the written instruments, insofar as they tend to vary the terms of the written instruments, that they are incompetent, for that reason." The court: "The record may so show." Tr. 178.

33. The trial court erred in permitting Mr. Garrett to testify and refusing to strike the following part of his testimony: "I have had Haddocks in the store and they have a contract, so I can't put them out. These other people that asked to buy my property wanted to take immediate possession, so I didn't sell to them. Mr. Ferguson said: "That is all right, I have several other things to do." Tr. 178-179.

34. The trial court erred in admitting in evidence and in refusing to strike the testimony of Mr. Garrett wherein he testified: "I told him (Ferguson) I thought it (lease) was running on a month to month basis, but the Haddocks insisted that they was entitled to remain in the store. Mr. Ferguson said the law reads I only have to give them thirty days notice and then they will have to get out. I turned to Mr. Ferguson and I said, in sub-

stance, 'Mr. Ferguson, I want the Haddocks taken care of.' He said: 'Sure, sure'." Tr. 183-184.

35. The trial court erred in overruling plaintiff's objection to the following question: "Now from your conversations with plaintiff before July 29, 1946 what was your understanding when you wrote the words "possession to be given in ninety days" into the Ernest Money Agreement that has been introduced?" Tr. 194.

36. The trial court erred in admitting in evidence over the objection of plaintiff the testimony of Mignon Garrett wherein she testified that her mother said: "Mr. Ferguson why are you so interested in having Haddocks get out of the store when you told us they could stay in there as long as their contract was good? He said: "I have changed my mind." Tr. 232.

37. The trial court erred in permitting, over plaintiff's objection, the witness Jay Garrett to testify: "He said: (apparently meaning the defendant Mr. Garrett) I have a contract with the Haddocks in the store and I must give them a chance to." I think he said "I must take care of the Haddocks." Mr. Ferguson said: "Well, that is all right; while I am waiting I have some other businesses that I can go into." Tr. 236.

38. The trial court erred in admitting the following testimony of the witness Jay Garrett. "Father said: 'Well, Mr. Ferguson, I understood that you were going to take care of the Haddocks'. And I turned to Mr. Ferguson, I said: 'Mr. Ferguson, right down deep in your heart, you knew that you were to take care of the

Haddocks.' He said: 'Jay, you know that is a lie'." Tr. 239.

39. The trial court erred in making that part of its finding number 3 wherein it found: "That during those negotiations and on or about July 15, 1946 defendants advised the plaintiff that if the sale was made the plaintiff would have to take the property subject to the right of the said Haddock who would have to be taken care of. R. 51-52. That such finding is without support by any competent evidence and it at variance with the written contract of sale and with the covenants contained in the warranty deed executed and delivered to the plaintiff. R. 51-52.

40. The trial court erred in making that part of its finding numbered 3 wherein it found: "that the plaintiff—represented to the defendants that if they would sell said premises to him the plaintiff would assume the obligation of getting Haddock out of the store." That such finding is without support by any competent evidence and is at variance with the written instruments which constitute the agreement of the parties to this litigation. R. 52.

41. The trial court erred in making that part of its finding numbered 4 wherein it found: "That pursuant to and acting in reliance upon said representations of the plaintiff to purchase said premises subject to the rights of the tenants in possession, particularly by Haddocks' rights under his lease for said store building the defendants signed the said agreements A and B." That such

finding is wholly unsupported by any competent evidence. R. 52.

42. The trial court erred in making that part of its finding numbered 4 wherein it found that defendants "acting in reliance upon said representations (of plaintiff's) the defendants made, executed and delivered their warranty deed to the plaintiff." That such finding is wholly without support by any competent evidence. R. 52.

43. The trial court erred in that part of its finding numbered 4 wherein it found: "that pursuant to their agreement with the plaintiff the defendants served a written notice on Don D. Haddock." That such finding is wholly without support in the evidence in that there is no evidence that the defendants undertook or agreed to serve any written notice on Haddock. R. 62.

44. The trial court erred in finding: "that pursuant to said agreement defendants on Nov. 1st, 1946 delivered possession of the entire premises including the store building to the plaintiff—and plaintiff received possession of said premises — on November 1, 1946." That said finding in so far as it applies to the store building is wholly without support in the evidence. Tr. 52.

45. The trial court erred in making its finding numbered 5 and the whole thereof. That such finding is wholly without support by any competent evidence. R. 52.

46. The trial court erred in making its so-called finding numbered 6 and particularly in that such so-

called finding is not a finding of any fact but is a mere conclusion of law and if it should be a finding of fact it is without support in the evidence. R. 53.

47. The trial court erred in failing to find on all of the issues of facts raised by the pleadings.

48. The trial court erred in making its conclusion of law No. 1 in that the same is without support in the evidence. It is not supported by the findings of fact and is contrary to law. R. 53.

49. The trial court erred in entering judgment in favor of the defendants and against the plaintiff in that such judgment is without support in the evidence but is contrary thereto and is likewise without support in the findings of fact and the same is contrary to law. R. 53.

A R G U M E N T

The questions presented by this appeal are:

1. May defendants in an action to recover damages for the breach of a written contract and for the breach of the covenants of a statutory warranty deed, where no fraud or mistake is claimed, after having admitted the execution of such written contract and statutory warranty deed properly plead as a defense to such action oral statements alleged to have been made by the plaintiff prior to the execution of such written contract and statutory warranty deed?

2. Is parol evidence properly admitted to show that the words "possession given in 90 days (Seller to

occupy N. apt for 2 years rent free) "contained in a written contract for the sale and purchase of real property are ambiguous or uncertain and for that reason subject to be explained by such parol evidence?

3. Are the covenants of a statutory warranty deed broken when the property conveyed thereby is subject to a lease?

4. May a plaintiff, who has pleaded special damages recover such damages on account of profits which he would have realized from selling cattle owned by him in a store building which he has purchased but which he is unable to secure possession of, where the defendants prior to the purchase of such store building were informed of the purposes for which such store building was being purchased?

5. Does a finding that the allegations of a complaint are untrue constitute such a finding of fact as is required by law?

6. Are the findings of fact in this case supported by any competent evidence?

7. Are the conclusions of law in this case supported by the evidence or by the findings of fact?

8. Is the judgment in this case supported by the evidence or the findings of fact?

THE TRIAL COURT ERRED IN DENYING THE MOTION TO STRIKE THE VARIOUS ALLEGATIONS SOUGHT BY PLAINTIFF'S MOTION TO HAVE STRICKEN.

In assignments numbered 1 to 20 plaintiff attacks the refusal of the trial court to strike from defendant's answer various allegations contained in their answer. The allegations so sought to be stricken are so similar that in our view the law applicable to each of them applies to all and therefore all of such assignments will be discussed together.

It will be noted that in their answer the defendants admit that they executed Exhibits "A", "B" and "C" which are attached to and made a part of plaintiff's complaint and which have heretofore been quoted in this brief. That being so all prior negotiations were merged in such written documents. All of the oral negotiations which were had leading up to the execution of the written instruments thus ceased to have any legal effect as to the terms of the transaction. The law is well settled that in the absence of fraud "a written contract merges all prior and contemporaneous negotiations on the subject, together with all prior oral contracts, and together with and including antecedent correspondence and prior written memorandums." 17 C. J. S. pages 872-874, Sec. 381. Numerous cases are collected in foot notes to the text, among them being Last Chance Ranch Co. vs. Erickson, 25 Pac. (2d) 952; 82 Utah 475; State Bank of Sevier vs. American Cement and Plaster Co., 10 Pac. (2) 1065; 80 Utah 255; Field vs. Missouri State Life Ins. Co., 290 Pac. 979; 77 Utah 45; Halloran Judge Trust Co. vs. Heath 258 Pac. 342; 70 Utah 124; 64 A. L. R. 368. We have examined a number of the cases cited and particularly those from this jurisdiction. Needless to say that the law

announced in the text and the cited cases is so well established as to require no argument in support thereof.

It was suggested at the trial of this cause that because the plaintiff in his complaint alleged that certain oral statements were made in the course of the negotiations leading up to the execution of the written instruments which constituted the final consummation of the transaction that therefore the plaintiff waived any rights that he might otherwise have had to insist on a compliance with the contract as finally agreed upon and as evidenced by the written instruments.

No where in the complaint does the plaintiff question the fact that the written instruments constitute the complete agreement.

The sole purpose of pleading the conversations had prior to the execution of the written instruments was to make out a case for special damages.

It is of course elementary law that before special damages may be granted the facts relied upon as a basis for special damages must be alleged and proven. See 25 C.J.S., page 755, Subsection 2 and cases there cited in foot notes.

We do not contend that defendants in their answer were precluded from denying the allegations of the complaint touching the question of special damages but we do most earnestly contend that the defendants having admitted the execution of the written instruments was precluded from claiming that the conversation had prior or

at the time such instruments were executed, modified said written instruments.

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE CONVERSATIONS CLAIMED BY THE DEFENDANTS TO HAVE BEEN HAD PRIOR TO, AT THE TIME AND SUBSEQUENT TO THE EXECUTION OF THE WRITTEN CONTRACTS AND THE STATUTORY WARRANTY DEED, EXHIBITS "A," "B" AND "C," IN SO FAR AS THE SAME MAY MODIFY SUCH INSTRUMENTS.

We have heretofore in this brief under the preceding heading directed the court's attention to the uniformly established law which precludes the admission of oral evidence which is calculated to add to, detract from or otherwise vary the terms of a written instrument. The law in such particular is so well established that we shall assume opposing counsel will not contend the law to be otherwise.

In our assignments numbered 21 to 38, both inclusive, we have attacked the ruling of the court in admitting in evidence oral testimony which offends against such law in so far as such evidence was received for the purpose of adding to, detracting from or otherwise varying the terms of the written instruments, Exhibits "A," "B" and "C," which are heretofore quoted at length in this brief.

If there was any basis for the admission of such oral testimony it must be that the written instruments were deemed ambiguous or uncertain.

It will be noted that Exhibit "A," the earnest money agreement, provides that possession is to be "given in 90 days (seller to occupy north apartment for two years rent free). That instrument was drawn by the defendant J. Oscar Garrett and therefore the same should be construed, if it is subject to construction, against him.

It will be observed that the defendant J. Oscar Garrett put in the contract a provision that the plaintiff was not to have possession, for two years, of the part of the premises that were to be occupied by the defendants. If it was necessary for defendants to reserve said right it would seem that it was equally necessary for the defendants to make provision that the Haddocks should remain in possession, if such was in fact the agreement. Certainly so far as the plaintiff was concerned he was not in possession of the store building any more than he was given possession of the part of the premises retained by the defendants.

What constitutes possession of lands has been before the courts on numerous occasions. In *National Cypress Pole Piling Co. vs. Hemphill Lumber Co.*, 31 SW (2d) 1059; 1063; 325 Mo. 807, a number of cases are cited and discussed. The following citation from 49 C. J. page 1094 is approved:

"Possession of land has been defined as the actual control by physical occupation, and the holding and exercise of dominion over it; the immediate and exclusive dominion over it; that position or relation which gives to one its use and

control and excludes all others from like use or control.”

In the case of *Brewer vs. Curtis*, 197 A 780, 783, 130 Pa. Supra 270 and again in *Moore v. Boyd*, 30 P. (2d) 502, 503, 59 App. D. C. 252 it is held that possession of land means the exclusive exercise of dominion over land in the sense of occupancy.

In the case of *Bank of America Nat. Trust and Savings Assn. vs. Bank of Amador County*, 28 Pac. (2d) 86, 89; 135 Cal. App. 714, the court quotes with approval the text from 49 C. J. page 1094 heretofore referred to in the case of *National Cypress Pole Puling Co. vs. Hemphill*. In the California case last cited a number of other cases are cited and discussed.

The cases above cited are, we believe, sufficient to advise the court of the trend of judicial authority. But this case is not controlled alone by the language of the original contract, because that contract was merged in the warranty deed which, together with the mortgage given for the balance of the purchase price, constituted the consummated agreement.

We have a statute, U. C. A. 1943, 78-1-11, which prescribes the form of a warranty deed. That is the form of the deed given by the defendants to the plaintiffs. The affect of such a deed is thus provided for by the section above referred to.

“Such deed when executed as required by law shall have the effect of a conveyance in fee

simple to the grantee, his heirs and assigns, of the premises therein named, together with all the appurtenances, rights and privileges thereunto belonging that he is lawfully seized of the premises; that he has good right to convey the same, that he guarantees the grantee his heirs and assigns the quiet possession thereof; that the premises are free from all encumbrances and that the grantor, heir, heirs and personal representatives will forever warrant and defend the title thereto in the grantee, his heirs and assigns against all lawful claims whatsoever. Any exceptions to such covenants may be briefly inserted in such deed following the description of the land."

The uniform holding of the courts so far as we are able to ascertain is in accord with the statement of the law contained in Vol. 7, Sec. 3740, page 214 of Thompson on Real Property where it is said:

"A covenant of general warranty is the broadest and most effective covenant in a deed and warrants that the grantor has not conveyed the property described therein or any right, title or interest therein to any person other than the grantee, and that the property is free from encumbrances."

Such is the holding of our own Supreme Court in *Van Cott vs. Jacklin*, 62 Utah 412; 226 Pac. 460. We quote the following from that case. In the *Pacific Reporter*, page 461 it is said:

"As every lawyer well knows, the law is well settled that deeds, like all other written instruments, may not be contradicted, varied or added

to by parole. While that is not precisely what was attempted in this case in the form just stated, yet limiting plaintiff's rights to the boundary lines as they appear upon the land is in legal effect the same as though the defendant had been permitted to vary the terms of the written description of the lands conveyed by him and to withdraw the small area in disput from the effect of his covenants of warranty and for quiet enjoyment. The foregoing covenants are inserted in deeds of conveyance as against any defect of title and he has a right to rely on the deed as written as against verbal statements to the contrary. The law is well stated in Maupen, Marketable Title to Real Estate at page 335 thus:

“The covenants of warranty is intended as much for the protection of the purchaser against known defects of title as against those which are latent and unknown. It is therefore no defense to an action on the covenant that the purchaser knew at the time it was taken that there was an adverse claim to the land.”

A number of other cases are cited in the Utah case above referred to and an examination of such cases support what is claimed for them.

“The inability of the purchaser to enter into possession of the land without committing a trespass by reason of the paramount title being in another has the same effect as respects the right of action for a breach of covenants contained in the deed, as would an eviction if possession had been acquired. The purchase of a paramount title in the face of its assertion and to avoid suit thereon is equivalent to an eviction authorizing an

action for breach." 7 Thompson on Real Property, Sec. 3763, page 234.

The following cases are cited in a foot note which supports the text: Fritz vs. Pusey, 31 Minn. 368, 18 N.W. 94, Resser vs. Carney, 52 Minn. 397; 54 N. W. 89; Shattuck vs. Laub, 65 N. Y. 499; 22 Am. Rep. 656; Jayha vs. Smith 132 Ga. 779, 65 S. E. 68, Shaw vs. Guthrie, 14 Ga. App., 303; 80 S.E. 735; Dornell vs. Thompson, 10 Maine 170; 25 Am. Dec. 629; Brooks vs. Mohl, 104 Minn. 404; 116 N. W. 931; Drury vs. Shummary, 1 Am. Dec. 704; Morgan vs. Haley, 107 Va. 331; 58 S. E. 564.

So also is there a constructive eviction when the purchaser is unable to obtain possession by reason of a paramount title and possession in another. The purchaser is not required to commit a trespass in his endeavor to make an actual entry. The covenant is broken when at the time of the conveyance the land is encumbered by a lease under which the lessee holds possession with an agreement to convey the land to him on the payment of a certain sum. 7 Thompson on Real Property, Sec. 3764, page 235. Among the cases cited in support of the text are: Playter vs. Cunningham, 21 Cal. 229; Planter vs. Vincent 187 Cal. 443; 202 Pac. 655; Claffin vs. Case, 53 Kan. 560; 36 Pac. 1062; Green vs. Baker, 66 Mont. 568; 214 Pac. 88.

"The possession of one holding adversely to the grantee is prima facie evidence of title in the adverse holder and of eviction of the grantee. In an action to recover damages for a breach of covenants of warranty of title and for quiet en-

joyment, the plaintiff, to establish prima facie the breaches alleges, is required merely to prove that he has either been evicted or kept out of possession by one in actual possession claiming title paramount to his own." 7 Thompson Real Property, Sec. 3767, page 237 and cases cited in foot notes to the text.

We shall not burden the court with an analysis of the cases cited in the foot notes to the text just cited but observe that they are all to the effect that when a warranty deed (such as is provided by our law) is given the covenants thereof are all inclusive. We think no one would seriously contend that such a deed does not warrant against the existance of a lease upon the lands conveyed, or if such a contention should be made it is wholly without support in the authorities. The existance of a lease is an encumbrance. It prevents the owner of the premises from the peaceable enjoyment thereof. In our search we have not found a case which holds or lends support to the claim that the covenants of a warranty deed, such as that here involved, are not breached if and when there is a lease on the premises conveyed.

It may also be noted that even if, contrary to our contention, the parol evidence offered by the defendant should be properly received it is doubtful if the same can be given any legal effect. Such loose statements as the plaintiff should take care of the Haddocks could mean many things. There is no evidence that plaintiff was advised of the terms of the lease at or prior to the time he received the conveyance of the property. Obvi-

ously any conversation had with respect to the Haddock lease after the plaintiff received the deed could have no binding effect upon the rights of the parties.

There is some evidence touching the question of whether or not the Haddock lease was valid. No useful purpose could be served by discussing the lease because whatever conclusion may be reached with respect thereto the defendants undertook by their agreement in the contract and by the warranty deed to put the plaintiff in possession and having failed to do so they should respond in damages.

THE TRIAL COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF THE SPECIAL DAMAGES PLEADED BY THE PLAINTIFF.

Of course, this court may not fix the damages sustained by the plaintiff on account of the breach of the contract and the covenants contained in the warranty deed. However, if a new trial is ordered as plaintiff contends it should be the question of special damages is certain to come up again at the new trial.

The trial court evidently took the view that no recovery may be had for anticipated profits that may be derived from conducting a business. The current decision of the courts of last resort hold to the contrary. The law in such particular is thus stated in 15 Am. Jur., page 456, Sec. 53:

“In addition to general damages, one injured by the breach of a contract to which he is a party is entitled to recover special damages which

arise from circumstances peculiar to the particular case, where those circumstances were communicated to, or known by, the other party at the time the contract was made; that is, he may recover such damages as are the reasonable and natural consequences of the breach under the circumstances so disclosed and as may reasonably be supposed to have been in the contemplation of both parties."

Further quoting from 15 A. Jur., page 561, Sec. 151 it is said:

"As a general rule, profits which would have been realized if a contract had been performed may be recovered as damages for its breach, provided they are susceptible of being ascertained with reasonable certainty * * * ."

The evidence shows without conflict that the defendants prior to and at the time the contracts and deed were executed knew that plaintiff was purchasing the premises for the purpose of conducting therein a grocery store and meat market and that he owned some beef cattle which he intended to sell through the meat market. It is plaintiff's contention that the court erred in excluding evidence calculated to show the profits he would have realized from the operation of the store and meat market if he had been given possession of the property.

THE TRIAL COURT ERRED IN FAILING TO FIND ON ALL OF THE ISSUES.

It will be noted that in its finding numbered 6, R-53, the trial court merely found in effect that the allegations

in the complaint in so far as the same conflicted with the other findings made by the court were untrue. This court has repeatedly held that such a finding is not a compliance with the provisions of U. C. A. 1943, 104-26-3. That statute has upon numerous occasions been construed by this court. Among such cases are: *Giuque vs. Salt Lake City*, 42 Ut. 89; 127 Pac. 429. *Baker vs. Hatch*, 70 Ut. 1; 257 Pac. 673. *Prows vs. Hawley*, 72 Ut. 444; 271 Pac. 31.

The failure to make findings upon all material issues is reversible error. *Popes vs. Eakle*, 78 Utah 342; 2 Pac. (2d) 909. *West vs. Standard Fuel Co.* 81 Utah 178; 17 Pac. (2d) 292.

NEITHER THE FINDINGS OF FACT, THE CONCLUSIONS OF LAW NOR THE JUDGEMENT IS SUPPORTED BY COMPETENT EVIDENCE AND NEITHER THE CONCLUSIONS OF LAW NOR THE JUDGMENT IS SUPPORTED BY THE FINDINGS OF FACT.

We have heretofore directed the attention of the court to the fact that oral statements occurring before, during or after the written instruments were executed were inadmissible to vary the terms of the written instruments which were executed and which constitute the agreement made by the parties. There is no other evidence which supports or tends to support the findings which plaintiff has attacked in his assignments.

Moreover even if it should be held, contrary to plaintiff's contention, that such evidence was competent,

still as we have heretofore pointed out the same were merged in the contracts and the warranty deed. In other words the rights of the parties must be determined by the terms of the written contracts and the warranty deed. All the negotiations were merged in such documents. That being so the findings of the trial court touching such negotiations cannot be said to aid the defendants. Thus the findings as to the negotiations become immaterial.

The conclusions of law and judgment must stand or fall solely upon the terms of the contracts and the warranty deed. There is no language in such instruments which support or tend to support the conclusions of law or the judgment. It thus follows that the findings of fact do not support either the conclusions of law nor the judgment.

The judgment appealed from should be reversed with directions to grant a new trial with costs to appellant.

Respectfully submitted

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