

1948

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

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.

CASE
NO. 7257

BRIEF OF RESPONDENTS

Appeal from the Fourth Judicial District Court, In
and For Utah County, State of Utah
Judge, Will L. Hoyt

GEORGE S. BALLIF,
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and Respondents

FILED

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DEC 18 1918

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and Appellants.

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CASE
NO. 7257

BRIEF OF RESPONDENTS

STATEMENT OF CASE

For the most part we accept the statement of case as made by counsel in plaintiff's brief. We desire, however, to add thereto the following particulars. This is a suit for damages brought by plaintiff against defendants for breach of the provision in Exhibit "A", which reads "possession given in 90 days." This Earnest Money Agreement shows on its face that there are three housing units located on the premises described therein, which were (1) the home,

(2) the store building, and (3) the three unit apartment house.

In order to found his claim the plaintiff alleged in his complaint the negotiations prior to and contemporaneous with Exhibit "A": that plaintiff informed defendants that he was engaged in the coal trucking business, operating a farm, and feeding some beef cattle; that he had been injured and was no longer able to perform heavy work and therefore desired to buy defendants' property in order that he could engage in the operation of a grocery and meat business in a store located thereon, and that it was necessary for plaintiff to sell his home, trucking business and farm in order to raise money for the purchase of defendants' property and the establishment of the grocery business thereon. The plaintiff further alleges that there was a tenant occupying the store building on defendants' premises at the time of these negotiations, and that defendants represented to the plaintiff that this tenant occupied the store building on a month to month tenancy which could and would be terminated within 90 days; that pursuant to this understanding, the plaintiff and defendants entered into the written agreement dated July 29, 1946, Exhibit "A"; that after the signing of this agreement and in reliance thereon, plaintiff sold his home, trucking business and farm, and on November 1, 1946, moved into the home located on defendants' premises and also moved equipment for the grocery store onto the premises, but that the possession of the store building has not been delivered to plaintiff. The plaintiff then alleges the provisions of Exhibits "A", "B" and "C", and special damages for the claimed failure of defendants to deliver possession of the store.

The defendants, in their answer, while admitting the

execution of Exhibits "A", "B", and "C", deny the negotiations leading up thereto as alleged by the plaintiff, and particularly that they informed the plaintiff that the tenant in possession of the store was leasing the building from month to month, or that he could or would be removed from the store within 90 days; defendants then go on in their affirmative defense and allege their version of the negotiations leading up to the making of the contract, Exhibit "A", and particularly with respect to the matter of the delivery of possession of the store building; defendants further allege that the negotiations between the parties continued over a period of seven weeks, and that on July 15, 1948, they advised plaintiff that Haddock had possession of the store; that defendants would be unable to remove Haddock, and that if sale was made plaintiff would have to take possession of the store subject to Haddock's rights under the lease; that plaintiff, so advised, agreed that if defendants would sell their property to him he would assume the obligation of getting Haddock out of the store ;that pursuant to this agreement by plaintiff, defendants signed Exhibits "A" and "B", and on August 3, 1946, notified Haddock plaintiff was the new owner, and that he would pay rent to him after November 1, 1946; that on November 1, 1946, defendants delivered the entire premises, including the store, to plaintiff, subject to Haddock's lease rights in the store; that plaintiff went to Haddock after the agreement was signed and demanded possession of the store building, which the tenant refused to grant; that after plaintiff advised defendants of this, they offered to call the whole deal off until Haddock's lease expired; that again plaintiff advised defendants that he was not worried and could get Haddock out of the store building in 30 days, and that

plaintiff wanted to go through with the deal; that subsequently plaintiff demanded that defendants get possession of the store building from Haddock, claiming that his lawyer had informed him that defendants were obliged so to do under the agreement; that when plaintiff was reminded by defendant of his agreement to accept possession of store building subject to Haddock's lease, he told them that he had changed his mind; and that defendants have fully performed their agreement and delivered possession of the premises, including the store building, to plaintiff in accordance with the agreement, and that if plaintiff suffered any damage, it was not due to any failure of defendants, but the result of plaintiff's breach of his agreement to accept possession subject to Haddock's lease rights in the store. Plaintiff, having alleged in his complaint his version of the conversations and negotiations leading up to the signing of the agreement, filed a lengthy motion to strike, (R-27 to 30) whereby he seeks to strike all of the allegations contained in the answer of defendants, which set forth their version of the negotiations leading up to the making of the agreement. The motion to strike, as well as the demurrer of the plaintiff, was denied (R-46).

The principal issues raised by these pleadings are: (1) Was plaintiff induced to enter into the agreement by the representation that defendants could and would deliver possession of the store building within 90 days after the date thereof? (2) Did plaintiff inform the defendants that he was counting on possession of the store building within 90 days in order to start his grocery business therein? (3) What was the agreement with respect to the possession of the store building?

At the trial plaintiff was allowed to go into the con-

versations with the defendants constituting the negotiations prior to the execution of the contract, and fully gave evidence of his version thereof. When defendants offered evidence of their version of the conversations constituting the negotiations leading up to the making of the agreement, the plaintiff assailed their right to do so, and invoked the parol evidence rule to sustain his position. The Court overruled the objection and permitted defendants to give their version of the negotiations.

At the conclusion of the trial, and after the matter was fully argued, the Court made findings of fact on the material issues raised by the pleadings and entered judgment thereon in favor of the defendants and against the plaintiff, "no cause of action" (R-50 to 55). Plaintiff takes this appeal assigning error to the trial court for (1) refusing to strike defendants' answer allegations of the oral negotiations leading up to the execution of the written contract, (2) admitting oral evidence of these negotiations when offered by defendants, (3) making findings and judgment which are not supported by competent evidence or the law, and (4) failure to admit evidence offered by plaintiff as to special damages.

THE ARGUMENT

It should first be observed that the plaintiff predicates his claimed error almost entirely on the position that the "parol evidence rule" has been violated in that an attempt has been made to vary the terms of the written agreement, Exhibit "A." The assignments may be generally grouped as (1) An attack on defendants' answer alleging their version of the oral negotiations leading to the execution of the

contract, (2) The evidence admitted at the trial supporting those oral negotiations, and (3) That the findings and judgment made by the Court are not supported by competent evidence. Counsel, in their brief (Br. 7) state the fundamental issue on this appeal as: "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?" We do not believe this to be the principal issue as drawn by the pleadings in this case. Rather it is our position that the basic issue here is: Does the parol evidence rule preclude the parties from showing by oral evidence the agreement respecting possession of the store made prior to or contemporaneous with the written contract? Plaintiff sues defendants for failing to give him possession of the store within 90 days under the written contract. Apparently plaintiff could not determine from the contract itself what the possession provision thereof meant, for he alleged in paragraph 3A of his complaint that "The defendants represented and stated to plaintiff that said tenant occupied said store building on a month to month tenancy which tenancy could and would be terminated by defendants and the possession of said store building could and would be delivered to the plaintiff by the defendants within 90 days after the signing of the agreement" (R-2). Defendants denied this, and in their answer alleged in paragraph 2, page 4, "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, and that defendants would be unable to remove said tenant, and if the sale was made plaintiff would have to take possession of said store subject to tenant's rights under said lease. That the plaintiff, be-

ing 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-22).

Clearly then, under the pleadings the issue became: What was the prior oral agreement respecting delivery of possession of the store? The agreement in this regard, which plaintiff attempts to show is a collateral one to the written agreement in question. Indeed, plaintiff's whole case rests upon the oral agreement made between these parties prior to or contemporaneous with the written contract in question, as does defendants' defense thereto. Both parties claim that this prior oral agreement was the inducement held out to each of them to enter into the written agreement. Both parties were allowed to give evidence on this matter, the plaintiff: That the defendants represented to him that the tenant could and would be removed from the store within 90 days and plaintiff given possession,—the defendants: That plaintiff represented that if they would sell to him he would accept possession of the store subject to the tenant's rights. The Court heard all the evidence and found generally in accordance with the defendant's version of the prior oral agreement. We contend that the Court's action in do doing did not offend against the parol evidence rule.

We have no quarrel with the parol evidence rule as set out in counsel's brief and the Utah cases they cite sustaining it. We shall call attention, however, to certain exceptions or areas where the rule has no application. Our position is that there is no error in the trial court's ruling either on the motion to strike, the admission of evidence,

or the making of findings and judgment, because the parole evidence rule has no application to the issues in this case as drawn by the pleadings. We base our position upon the three legal propositions to follow:

I. THE PLAINTIFF, HAVING ALLEGED AND GIVEN EVIDENCE OF THE ORAL AGREEMENT AS TO POSSESSION OF THE STORE PRIOR TO THE EXECUTION OF THE WRITTEN CONTRACT, THE DEFENDANTS ARE NOT PRECLUDED BY THE PAROLE EVIDENCE RULE FROM ALLEGING AND GIVING EVIDENCE OF THEIR VERSION OF THIS ORAL AGREEMENT.

As indicated above, it was plaintiff who, in his pleadings and proof, opened up the prior oral agreement with respect to the possession of the store, and this regardless of the provision in the written contract "possession given in 90 days." However, when defendants attempt to allege their version of the same prior oral agreement as to possession of the store and give evidence in support thereof, the plaintiff invokes the parole evidence rule as a barrier to defendants doing so. It is true that counsel concede (Br. 24) that defendants would have right to deny plaintiff's allegations concerning the prior oral agreement, but it is contended that the denial would go no farther than the special damage matter. In effect, counsel contend that plaintiff can allege and prove a prior oral agreement concerning possession of the store, the breach of which he claims entitled him to damages, but that by means of the parole evidence rule he can preclude the defendants from either alleging or proving their version of the same oral agreement in defense. Plaintiff's position is untenable, and

the law is against him. The general rule of law governing such a case is stated in 2 Jones on Evidence, 4th Ed., section 434, at page 824:

"An apparent departure from the rule is presented by the practice whereby, if one party is permitted to introduce extrinsic evidence to vary a written contract, his adversary is permitted to resort to such evidence to uphold the contract, even though it tends to vary or contradict the words of the writing which he seeks to support."

The rule was applied in *Richeson, et al, v. Wood*, 158 Va. 269, 163 S. E. 339, 82 A. L. R. 1189. This was a suit on a written contract claimed by the defendant to be usurious. The defendant borrower gave oral evidence as to usury, and attempted to bar the plaintiff from giving oral evidence in the support of the legality of the contract by pleading the parol evidence rule. The court, in holding that parol evidence rule did not preclude such evidence, had the following to say:

"When, however, the borrower has alleged and introduced evidence tending to prove that a written contract, legal on its face, was in fact illegal in its inception, because executed by him for an usurious consideration, upon that issue, the lender, or other party seeking to support the legality of the contract, may, without violating the parol evidence rule, introduce any competent extrinsic evidence, which is relevant and material to show that the contract was in fact executed for a legal consideration. And this is true though such evidence may tend to vary or contradict the terms of or recitals in the written instrument, or tend to prove a consideration different from either that expressed in the contract, or alleged by the borrower." (A. L. R. p. 1195).

"The rule above announced is also consonant with the rule that where one party has been permitted to introduce extrinsic evidence of the facts and circumstances leading up to and connected with the execution of a written contract, the other party may introduce evidence as to the same matters, notwithstanding that the evidence offered by him tends to vary or contradict the writing. 22 C. J. (Evidence) p. 1295, and cases there cited in note 96." (A. L. R. p. 1197).

See also 20 Am. Jur. 964 and 1013, citing *Bogk v. Gassert*, 149 U. S. 17, 37 L. Ed. 631, 13 Sup. Ct. Rep. 738. In that case the plaintiffs sued defendant Bogk upon a lease of certain premises in Butte, Montana, praying for judgment of restitution and damages. At the trial defendant Bogk gave evidence of conversations had with the plaintiffs leading up to the execution of the lease and which showed that the transaction respecting the real property covered by the lease was to mortgage same to the plaintiffs rather than to sell it to them. The plaintiffs were allowed in rebuttal of this testimony of defendant Bogk to give their version of the conversations leading up to the making of the lease. It was objected that it was error to allow plaintiff to so testify in view of the Montana Statute, which embodies the common law, providing that parol evidence shall not be admitted to show the terms of agreements that have been reduced to writing except in cases of ambiguity, mistake, or fraud. The Supreme Court, in holding that there was no error and affirming the judgment of the lower court, had the following to say on this point:

"In rebuttal, Steel and Gassert were put upon the stand and asked as to the conversation which took place at the attorney's office at the time the deeds and

contract to reconvey were made. This conversation was admitted, and defendant excepted. Now, while this might have been improper as original testimony, it would have been manifestly unfair to permit Bogk to give his version of the transaction, gathered from conversation between the parties, and to deny the plaintiffs the privilege of giving their version of it. The defendant himself, having thrown the bars down, has evidently no right to object to the plaintiffs having taken advantage of the license thereby given to submit to the jury their understanding of the agreement. The Code is merely in affirmance of the common law rule, and was evidently not intended to apply to a case of this kind." (Sup. Ct. Rep., p. 740).

The plaintiff in the case at bar, having opened up the matter of the prior oral agreement which led up to the execution of the written contract in question, cannot thereafter preclude the defendants from pleading and proving their version of the oral agreement by relying on the parol evidence rule. Neither can counsel at this late date say that "nowhere in the complaint does the plaintiff question the fact that the written instruments constitute the complete agreement." How about the above mentioned quotation from plaintiff's complaint? It makes no difference what purpose plaintiff had in mind in going into the oral agreement prior to the execution of the written contract. The law is that if he does so, he cannot thereafter preclude the defendants from pleading their version of the same.

II. THE PLAINTIFF, HAVING MADE A COLLATERAL ORAL AGREEMENT AS TO POSSESSION OF THE STORE PRIOR TO AND AS AN INDUCEMENT FOR DEFENDANTS TO ENTER INTO THE WRITTEN

CONTRACT, THE PAROL EVIDENCE RULE DOES NOT PREVENT ADMITTING ORAL EVIDENCE SHOWING WHAT THE COLLATERAL AGREEMENT WAS.

As indicated above, plaintiff, in his complaint and by oral evidence supporting it, claims that prior to the execution of the written agreement, the defendants represented to him that they could and would get the tenant out of the store and deliver possession of same to plaintiff within 90 days. The defendants, denying this, claim by pleadings and proof that plaintiff represented to them that he would be willing to take possession of the store within 90 days and agreed to do it subject to the rights of the tenant. Both parties respectively claim that the representation made to each by the other was the inducement for the entering into and execution of the written contract in question. Under these circumstances, can plaintiff, by pleading the parol evidence rule, cut off the right of the defendants to assert in pleadings and proof their right to show what the prior oral inducement agreement was? The law is clear on this point and generally is to the effect that the plaintiff cannot orally represent that he would accept the premises subject to the Haddock lease in order to induce the defendants to enter into a written contract, and then come into court and hide behind the parol evidence rule to preclude the defendants from showing what the oral representations were prior to the making of the written contract. The general rule of law is stated in 32 C. J. S., p. 970.

“The parol evidence rule does not preclude the admission of extrinsic evidence of a valid or prior contemporaneous parol agreement which is collateral both

in form and substance in that, although related in a general sense to the written instrument in question, it is independent thereof and does not vary or contradict the express or implied provisions thereof nor invade the particular field which the instrument undertakes expressly or impliedly to cover, but instead has for its subject a matter which the parties might naturally deal with separately."

"Generally speaking, a collateral agreement which constituted part of the consideration for a written agreement, or operated as an inducement for entering into it, may be shown by parol evidence; but there is some divergence of authority as to the limitations of the rule."

See also 22 C. J., page 1253, and cases cited in note 40; 20 Am. Jur. section 1141, page 994, citing cases in note 13, one of which is *Frederick v. Ludwig*, 112 Okla. 217, 240 Pac. 1049. In that case the suit was on some promissory notes. These notes had been executed by defendants in settlement of an account which had run between plaintiffs and defendants over a long period of time. At the trial, defendants offered to show an oral agreement whereby the plaintiff agreed that if the amount of the notes was not correct because of errors made in computing the account, that "he would correct any errors and credit them on the note." This evidence was objected to on the grounds that the parol evidence rule prevented its being received. The Court excluded the evidence, but on appeal this was held to be reversible error. The Court cites with approval 10 R. C. L. 1059, which is as follows:

"The evidence of a contemporaneous parol agreement between the parties under the influence of which note * * * or contract has been signed, which is

violated as soon as it has accomplished its purpose in securing the execution of the paper, may always be shown when the enforcement of the paper is attempted."

The same doctrine was applied in *McGregor v. Farmers'-Merchants Bank & Trust Co., et al* (1935) 180 Wash. 440, 40 P2d. 144. McGregor brought the action to establish a preferred claim against the general funds of the defendant bank in liquidation. McGregor had a check payable to himself for \$1,000.00 drawn on Coffman-Dobson Bank. He endorsed and presented the check to the defendant bank requesting payment in \$50.00 bills. The cashier advised McGregor that he only had \$500.00 in \$50.00 bills on hand and requested McGregor to take those bills and deposit the remainder with the bank, which plaintiff refused to do. It was then agreed between McGrgor and the cashier that plaintiff should take \$500.00 in \$50.00 bills and that the bank should hold the remaining sum of \$500.00 and exchange it for \$50.00 bills as soon as convenient and promptly notify respondent when the exchange had been made. McGregor then requested a receipt for the \$500.00 represented by the uncollected portion of the \$1,000.00 check. In response to the request, the cashier drew a cashier's check for \$500.00 payable to Charles McGregor, absolute and in negotiable form. The check was handed to McGregor by the cashier with the statement that it "was the same as a receipt," or that it "would answer the same purpose as a receipt." McGregor did not question the statement, but took the cashier's word for it. The bank collected the \$1,000.00 check but did not notify McGregor that it had obtained the \$50.00 bills, and before plaintiff could call at

the bank, it was taken over by the State Banking Department as an insolvent concern. McGregor presented a preferred claim to the supervisor in charge of the bank, but the latter denied it as such and allowed it only as a general claim. Whereupon this action was instituted. At the trial McGregor was allowed to prove the oral agreement with the cashier of the bank that the cashier's check was merely a receipt. This proof was allowed over the objection of the defendant that the parol evidence rule prevented the receipt of such evidence on the grounds that it varied the terms of the cashier's check, which was absolute in form. On appeal the judgment of the trial court was affirmed and the plaintiff was permitted to recover the \$500.00 as a preferred claim. The opinion is concerned with the parol evidence rule question raised on the appeal. In this regard the Court had the following to say:

"Certain exceptions to the rule are as firmly established as the rule itself. In fact, they may be said to be a part of the rule. We mention only one or two of the exceptions, which we conceive to be applicable here. One is that, where a parol contemporaneous agreement is the inducing and moving cause of a written contract, or where a parol agreement forms part of the consideration for a written contract, and it appears that the written contract was executed on the faith of the parol contract or representations, then such evidence is admissible. 3 Jones on Evidence (2d Ed.) par. 1492"

"But it clearly appears from the evidence that the acceptance of the check was induced by a contemporaneous parol agreement which went to the very heart of the consideration. Though the check was absolute in form and was manually delivered, it was given and

accepted upon the express condition that it was to represent a fund that was at all times to belong to respondent. As to \$500 of the proceeds to be derived from the collection of the \$1,000 check, the bank was not to mingle that amount with its general funds, but was to convert it into \$50 bills to be held for respondent. The situation was exactly the same as though respondent had left with the bank \$500 in silver or in small denominations of currency to be converted into ten bills of \$50 each and held for him in its converted form. Certainly, in the latter instance, it would be considered as a trust fund."

" The terms of the check were not, under the peculiar circumstances, inconsistent with the contemporaneous agreement between the parties. The parol agreement was separate and distinct from the agreement implied by the check. Although an agreement between parties is reduced to writing, the law does not merge into the writing prior or contemporaneous agreements which are distinct, valid, and not in conflict with the writing. 3 Jones on Evidence (2d ed.) sec. 1440, p. 2712. The contemporaneous agreement did not, in this instance, become merged in the agreement implied by the check."

In such case it is not necessary to allege that the oral agreement was omitted because of fraud, accident, or mistake, as is shown by *Champlin v. Transport Motor Company* (1934) 177 Wash. 659, 33 P2d 82. In that case, the plaintiff, who was a salesman of the defendant, entered into a contemporaneous oral agreement with defendant that defendant would hold plaintiff harmless in financing a new car. Relying upon this oral arrangement, plaintiff bought a new car, turned his old one in on same, and signed a conditional sales agreement to complete the transaction. It

was never intended that plaintiff should pay anything for the new car because defendant was to resell same at the end of six months and pay up the balance on the contract. Just before the six months period expired, the finance company repossessed plaintiff's car and turned it over to the defendant. The plaintiff sued for the damages he had sustained and defendant strenuously objected to any evidence concerning the oral agreement on the grounds that it violated the parol evidence rule. The evidence was allowed and plaintiff recovered judgment for \$500 against defendant. The judgment was affirmed on appeal, the Supreme Court having the following comments to make, page 8v:

"The chief contention of appellant is that the trial court erred in allowing the parol evidence, in that it alters the written contract heretofore mentioned and violates the parol evidence rule. In furtherance of this contention appellant also contends that the trial court refused to make a finding of fraud, mistake, or intimidation, so that this case cannot rest upon the ground of fraud inducing the contract.

"It is true that the trial court said that there was no fraud, or intimidation, and no such words were used in the amended complaint of respondent, which is unimportant.

"The amended complaint was founded upon the collateral oral agreement between the parties, based upon adequate consideration, which was the inducement for the written contract of sale of the Hupmobile car.

"The rule admitting parol evidence of a collateral agreement is especially applicable where such agreement constituted a part of the consideration of the written agreement, or operated as an inducement for

entering into it, * * * It has also been held that, where, at the time of executing a writing, a stipulation has been entered into, a condition annexed, or a promise made by word of mouth, on the faith of which the writing has been executed, parol evidence of such matters is admissible even though it may vary or materially change the terms of the contract; and in such case it is not necessary to allege that the agreement was left out of the contract through fraud, accident, or mistake.' 22 C. J. 1254."

The case at bar is one wherein the oral evidence was alleged, offered, and received, not for the purpose of varying the terms of the written contract but rather for the purpose of showing what the inducement was for the entering into such written contract as evidenced by the prior collateral oral agreement. It is submitted that such action does not offend against the parol evidence rule.

III. THE WRITTEN CONTRACT BEING AMBIGUOUS ON ITS FACE WITH RESPECT TO POSSESSION OF THE STORE, THE PAROL EVIDENCE RULE DOES NOT PRECLUDE ORAL EVIDENCE BEING RECEIVED TO ASCERTAIN THE MEANING OF THE PROVISION THEREIN, "POSSESSION GIVEN IN 90 DAYS."

Attention is called to the fact that the term "possession given in 90 days" contained in the written contract is ambiguous and uncertain and this appears on the face of the agreement itself. It appears from the agreement that the instrument calls for the sale of a home, a store building, and an apartment house consisting of three units. The provision concerning possession is modified definitely by the further provision "seller to occupy North apartment for

two years rent free." The fact that there are two of the apartment house units and the store occupied by tenants throws serious doubt as to the meaning of the provision concerning "possession given in 90 days." This ambiguity is not removed by the supplemental agreement, Exhibit "B", nor by the Warranty Deed subsequently given, Exhibit "C". The ambiguity was clearly recognized by plaintiff before he brought suit against the defendants for the breach of the possession provision. This is clearly evidenced by the allegations of the complaint and the proof offered by plaintiff at the trial. If it were not so, why did not the plaintiff declare upon the written contract and its provisions respecting possession, without going into the oral agreement between the parties prior to the execution of the written contract. No doubt it was because plaintiff was unable to tell from the face of the written instrument what possession under the written contract meant,—whether possession meant actual delivery to plaintiff of the store, the two apartments and the home unoccupied, or merely constructive possession of these various units located on the premises subject to the rights of tenants occupying them. The law recognizes that the term "possession" used in a written agreement may be so ambiguous and uncertain that oral evidence surrounding the making of the provision will be admitted to explain and clarify it. That principal of law is stated in 49 C. J. 1092, under section 1 of Possession, as follows:

"Both in common speech and legal terminology, there is no word more ambiguous in its meaning than 'possession', whether considered in its relation to real property or personal property, and this is especially true when it occurs in statutory provisions."

Citing *Leslie v. Rothes*, 2 Ch. 499 at 506, wherein the court used the following language:

“The ambiguous character of the term ‘possession’ is well known, and has been recognized by high authority. It has several meanings, and it may well have several meanings in the same instrument, some of them overlapping one another, and some being combinations of more than one.”

See *City Nat. Bank v. Folsom*, (Tex. Civ. A.) 247 SW 591, 594.

Where there is such ambiguity as is apparent in this case there is a well recognized exception to the parol evidence rule which permits the receiving of oral evidence to explain the ambiguity in writing. The rule is stated in 2 *Jones on Evidence*, 4th Ed., section 450, page 861, as follows:

“ In order to show what was in the minds of the parties at the time of executing the instrument, parol evidence is admissible where it appears that the language of the writing is ambiguous or susceptible of more than one interpretation, or where an indispensable term or factor cannot be ascertained therefrom ”

See *Fox Film Corp. v. Ogden Theater Company*, 82 Utah 279, 17 P2d 294, 90 A.L.R. 1299, wherein oral evidence was held proper to explain the understanding of the parties as to the time element for delivery of newsreels under the written contract in suit. The rule is well stated by the Utah Court in 90 A. L. R. at page 1302, as follows:

“One well-recognized exception to the above rule is that extrinsic evidence, parol or otherwise, is admissible to explain a latent ambiguity in a writing.

This does not mean that terms or conditions may be inserted into or taken out of the writing by direct oral assertions, but it does mean that the court may receive evidence of such surrounding facts as will enable it to look upon the transaction through the eyes of the parties thereto and thereby know what they understood or intended the ambiguous word or provisions to mean. 4 Jones Comm. on Ev. sec. 1544 et seq.

" A typical case illustrating the situation in which extrinsic evidence may be received to remove ambiguity is *Boley v. Butterfield*, 57 Utah, 262, 194 P. 128. In that case the plaintiff, Boley, leased to defendant, Butterfield, for a stated rental, 'grazing permit' for a herd of sheep. Butterfield refused to pay the rental because Boley had prior to making the lease to him leased the right to graze sheep on the range in question to another sheepman. The lease to defendant did not purport to be exclusive, nor did it purport to be nonexclusive. It was ambiguous as to the matter in question. In order to determine whether the parties thereto intended the lease to be exclusive or otherwise, the court admitted extrinsic evidence to show that defendant before and at the time this lease was executed knew that Boley had leased a grazing right to another sheepman. Boley was permitted to testify that he told Butterfield of the existing lease before the lease in question was executed. Observe that he spoke in the past tense of a fact that then existed.

"It may easily be seen from the above outline of the case that, in order to determine what the parties to the lease meant and intended as to whether it was to be exclusive or otherwise, it was necessary for the court to know as much as the parties at the time of signing knew about the subject-matter. The evidence admitted enabled the court, so far as necessary, to see the transaction through the eyes and understanding

of the parties. The testimony established a relevant fact but did not add a stipulation to the lease."

"From the record in this case we cannot infer that the parties to the contract in question were wholly inexperienced in the moving picture business. From what they knew of the business and its custom and practice, and of the art of making news reels, the places where made, and the customary manner of releasing and transporting the reels from the laboratories to the theaters, they undoubtedly had some common understanding of the time element implied in the very name of the article in question. The court was at liberty to hear evidence of such surrounding facts and circumstances and from the same to determine what that understanding was. *Ingram-Day Lumber Co. v. Schultz* (C. C. A.) 45 F. (2d) 359"

In the Boley case cited in the Fox Film Corp. opinion, the court had the following to say at uage 269 of the Utah Report:

"But defendant also insists that the court erred in admitting evidence on the part of plaintiffs in support of their reply. One of the contentions is that parol evidence is inadmissible to vary the terms of a written instrument. It is assumed by defendant that the instrument in question is unambiguous and self-explanatory. If that were true, defendant's contention would be indisputable, but we have already determined that there is a latent ambiguity in the instrument as to whether or not in conveyed an exclusive permit to defendant or a right in common with other parties. This ambiguity opened the door for the admission of evidence as to the understanding of the parties at the time the instrument was executed. The evidence objected to and admitted was calculated to shed light upon the question as to what the parties meant by the

terms used in the instrument. For that purpose the evidence was clearly admissible. It in no manner varied or altered the meaning of the terms used in the lease, but tended to explain the sense in which they must have been understood by the parties when the lease was executed and delivered.

"That extrinsic evidence may be resorted to to explain the meaning of a written instrument in such cases is elementary doctrine, and is recognized by this court in numerous decisions, some of which respondents have cited in their brief. *Cain v. Hagenbarth*, 37 Utah, 78-79, 106 Pac. 945; *Ernst v. Allen*, 55 Utah 272, 184 Pac. at page 831; *Brown v. Markland*, 16 Utah, 360, 52 Pac. 597, 67 Am. St. Rep. 629. See also *Egelund v. Fayter*, 51 Utah, at page 58, 172 Pac. 313, where numerous other cases are collated. There was no error in admitting the testimony to which objections were made."

In the case at bar the court's action in denying plaintiff's motion to strike, and admitting the oral evidence of both plaintiff and defendants of the agreement made prior or contemporaneous with the execution of the written contract, was clearly right and proper under the foregoing exception to the parol evidence rule. This was not done for the purpose of varying the terms of the written contract, but rather for the purpose of explaining the ambiguity with respect to possession of the store which appeared on the face of the agreement itself. Neither the supplemental agreement, Exhibit "B", nor the Warranty Deed, Exhibit "C", cured the ambiguity, and the only way it could be explained was by oral evidence of the agreement of the parties with respect to the matter, or prior to the making of the written agreement. Counsel's argument concerning the

warranty of possession under the Utah Statute has no application. There is no question but what aa warranty deed carries a guarantee of quiet possession, but the Warranty Deed in the case at bar was clearly subject to the provision as to possession in the written contract, and the meaning of that provision could only be ascertained by the receipt of extrinsic evidence.

IV. DEFENDANTS' ANSWER TO PLAINTIFF'S CLAIMED ERROR OF TRIAL COURT FOR FAILURE TO ADMIT PROFFERED EVIDENCE OF SPECIAL DAMAGES AND FAILURE TO FIND ON ALL THE ISSUES.

1. As to the special damage point made by counsel (Br. 32) we agree that this claimed error can only be important if a new trial is granted. The trial court had no occasion to assess damages herein because after hearing all the evidence he found that plaintiff had failed to make his case. The court heard plaintiff's testimony that he had advised defendants before the contract was executed that he intended to operate a grocery business in the store and market his beef therein. The court also heard defendants deny that, and testify that plaintiff agreed to take the store subject to Haddock's rights (R-135 to 245). The court found against the plaintiff on this special damage issue. Upon this state of the record there was no need for the application of any rule of damages because the court found no breach of the contract and therefore no damages suffered by plaintiff. We have no quarrel with the rule of damages counsel set forth, but we contend that it has no application to the facts of this case. We also call attention

to the balance of the rule, which counsel omitted, appearing in 15 Am. Jur., page 457, which reads as follows:

"In order to recover special damages under this rule, however, it must appear that at the time of the making of the contract the defendant had reasonable notice or knowledge of the special conditions rendering such damages the natural and probable result of such breach. Otherwise, the damages recoverable will be limited to those resulting from the ordinary and obvious purpose of the contract and which, in the usual course of things, flow from its breach. The damages resulting by reason of the existence of the special circumstances are disallowed in such case, not because they are uncertain, consequential, or remote, but because they cannot be fairly considered to have been within the contemplation of the parties when the contract was made as consequences which might result from its breach.

"It must of course appear that the special damages claimed to have been thus in contemplation in fact resulted as the proximate consequence of the breach of the contract and would not have occurred had the defendant fulfilled it."

We believe the rule is more correctly and clearly stated in Restatement of the Law, I Contracts, sections 330 and 331, pp. 509-520.

Under these rules, we submit, the court applied the proper measure of damages.

2. We are unable to agree with counsel that the court failed to find on all the issues raised by the pleadings. Finding 6, which is complained of, does not stand alone. Findings on all the material issues were made (R-50 to 53) in-

cluding the making of the sales agreement with plaintiff (Exhibits "A", "B", and "C"), that negotiations were had prior to the execution of the contract and what plaintiff represented to defendants concerning getting Haddock out of the store, that defendants executed the agreement relying on plaintiff's representation and turned over the possession of the property to plaintiff November 1, 1946, subject to Haddock's rights in the store, and that the defendants fully performed their agreement. Then the court finds as untrue plaintiff's allegations in conflict with the findings made, as to the matter of the store occupancy representations prior to the execution of the contract. Such findings do not offend against any of the cases cited by counsel (Br. 34). We believe the case of *Patton v. Kirkman* (1946) 109 Utah 487, 167 P2d 282, sustains our position. This court in that case had the following to say:

"Although it is error for a court to fail to make findings on all material issues raised by the pleadings this does not mean that the court must negative every allegation contained in the pleadings. It is sufficient if from the findings it makes there can be no reasonable inference other than that it must have found against such allegations. See *Piper v. Hatch*, 86 Utah 292, 43 P. 2d 700."

We submit that from the court's findings in the case at bar there can be no conclusion other than that the court found against the allegations in the plaintiff's complaint and reply.

We conclude that the court's rulings at the trial on the pleadings, and on the admission of evidence are free from error; that the findings of fact, conclusions of law, and judg-

ment were made in accordance with competent evidence and the law; and that the judgment of the court should be affirmed.

Respectfully submitted,

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and Respondents.