

1950

Wilbur Mawhinney and Ruth E. Mawhinney v. John A. Jensen and Anna Jensen : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILBUR MAWHINNEY and RUTH
E. MAWHINNEY,

Plaintiffs and Appellants,

— vs. —

JOHN A. JENSEN and ANNA
JENSEN,

Defendants and Respondents.

Case No.
7537

Appellants' Brief

FILED

GLEN M. HATCH and
B. Z. KASTLER, JR.

AUG 5 1930

*Attorneys for Plaintiffs
and Appellants.*

Clerk, Supreme Court, Utah

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Appellants' Brief

This is an appeal from the Order of the District Court dismissing plaintiffs' case, which Order was based upon the sustaining of a General Demurrer to the plaintiffs' amended complaint, wherein leave to further amend plaintiffs' amended complaint was denied at the time the demurrer was sustained.

The pertinent parts of plaintiffs' amended complaint are as follows:

1. (Allegations as to venue.)

2. That on the 14th day of September, 1946, and for many years prior thereto the defendants were the owners and operators of the property known as the Jensen Hotel, consisting of a restaurant, coffee shop, fourteen cabins and a two-story hotel-apartment building situated in Heber City, County of Wasatch, State of Utah; that the defendants thereby had had long familiarty with such businesses; that at that time they had complete and exclusive knowledge of all of the stock therein and the costs thereof; that the plaintiffs were newcomers to such businesses and were at said time unfamiliar with the conduct of such business, the volume and rapidity of stock turnover, the nature and quantity of the stock therein and the cost thereof.

3. That on or about the 14th day of September, 1946, the defendants above named made and entered into a written earnest money contract for the purchase of that certain restaurant and hotel business with these plaintiffs, as follows:

Salt Lake City, Utah, Sept. 14th, 1946

EARNEST MONEY RECEIPT AND AGREEMENT

RECEIVED FROM W. H. Mawhinney the sum of One Thousand Dollars to secure and apply on the purchase of the following described property known as the Jensen Hotel, Restaurant, Coffee Shop, 14 cabins, and the 2 story apartment house, situated in Heber City, Utah.

For the purchase price of Thirty Five Thousand Dollars.

The balance of the purchase price shall be paid as follows: Nine Thousand Cash. Balance \$200.00 per month plus interest on the unpaid balance.

Interest at 4% per annum on the unpaid portions of the purchase price to be included in the prescribed payments and possession given Nov. 1st, 1946.

Property taxes for the current year shall be adjusted on pro-rata calendar basis, seller to pay for period from January 1st to date of closing, purchaser from date of closing to December 31st. Rents, insurance, interest, water and other expenses of said property shall be pro-rated as of date of closing. No exceptions.

*Contract of sale or instrument of conveyance to be made on the approved form of the Salt Lake Real Estate Board in the name of W. H. Mawhinney and Ruth E. Mawhinney.**

The following items are included in the purchase price and are to remain with the property. All stock and fixtures now on property.

This payment is made subject to the approval of the Seller and unless so approved within 2 days from date hereof, the return of the money herein receipted shall cancel this sale without damage to the undersigned.

*In the event the 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.**

It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the Buyer and Seller and that no verbal statements made by a representative of the Agent relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein.

It is further agreed that the execution of final transfer papers abrogate this Earnest Money Receipt.

The Seller agrees in consideration of the efforts of the agent in procuring a purchaser to pay said agent the rate of commission as established by the Salt Lake Real Estate Board.

Brockbank Realty Co.

(s) L. B. Pearson, Agent

We do hereby agree to carry out and fulfill the terms and conditions on the above receipt specified, the seller agreeing to furnish a good marketable title with abstract to date, or policy of title insurance at the option of the seller and to make final conveyance by sufficient deed. If either party fails so to do, he agrees to pay the expenses of enforcing this agreement, including a reasonable attorney's fee.

/s/ J. A. Jensen

/s/ W. H. Mawhinney

/s/ Anna Jensen

/s/ Ruth E. Mawhinney

Together with all stock and fixtures now on the above described premises.

*Italics ours.

4. That at the time of making said agreement, and as an inducement to the plaintiffs to enter into said agreement for the purchase price stated therein, the plaintiffs examined the stock, merchandise, fixtures, premises and other items and accessories on said premises in the company of the defendant, John A. Jensen and the defendants' agent L. B. Pearson and was informed by the defendant John A. Jensen, that all the said items were included in the aforesaid contract and were to be conveyed by said contract.

5. That at the time of making said agreement it was agreed that on the 1st day of November, 1946, the defendants would relinquish possession of the said premises and items of personal property to the plaintiffs and at or before that time a uniform real estate contract would be executed by the parties in furtherance of the agreement reached by the parties at the time of the execution of the aforesaid earnest money agreement. That the parties agreed that the defendants might use from the stock on said premises during the period between September 14th, 1946 and the time of the relinquishment of possession to the plaintiffs, but that the defendants would replace all the stock or any other items on the said premises which they might use.

6. That on or about the 17th day of September, 1946, and again on or about the 23rd day of September, 1946, the plaintiff Wilbur Mawhinney went to the premises in question by appointment with defendant John A. Jensen for the purpose of inventorying the said premises; that on each of these occasions he requested the defendant John A. Jensen to permit him, the plaintiff Wilbur Mawhinney, to make a written inventory of all the items of personal property and fixtures which were the subject of the above-mentioned contract between these parties; that on each of the said occasions, the defendant John A. Jensen informed the plaintiff Wilbur Mawhinney that he was too busy and did not have the time to conduct an inventory with him on that date; that he would not allow Wilbur Mawhinney to take it except with him; that in consequence hereof, the plaintiffs were never able to obtain a full, accurate

inventory of the personal property and fixtures which were to have passed by virtue of the said agreement.

7. That on or about the 23rd day of September, 1946, while plaintiff Wilbur Mawhinney was waiting on the premises in question to conduct the inventory with the defendants, he was able to list portions of the personal property on said premises, but was not able to list those items of stock and other personal property which are described in Paragraph 10 below, because he was denied access by the defendant John A. Jensen to the places where these items were stored.

8. That on the 28th day of October, 1946, the plaintiffs and the defendants assembled for the execution of their uniform real estate contract in the lobby of the hotel premises, the subject of the said contract; and at this time the plaintiff Wilbur Mawhinney demanded of defendant John A. Jensen that the said defendant then and there permit him to inspect the premises and inventory the balance of the stock in order that he might know, before executing the real estate contract, that all of the stock which was on hand at the time of the execution of the earnest money agreement was still there or had been replaced.

9. That at this time, the defendant John A. Jensen refused to permit the plaintiffs to enter upon his premises for the purpose of making such inventory; that he refused to go with them to make such inventory; that he indicated that he was greatly offended and insulted that the plaintiffs should question his word or feel

that an inventory was necessary at this time; and that he informed the plaintiffs that all of the stock which was on the premises at the time of the execution of the earnest money agreement was still there or had been replaced, so that the quantities were the same at this time as they had been at time of the execution of the earnest money agreement; that at said time the plaintiffs were bound by said earnest money agreement to execute the uniform real estate contract and would have been in default thereunder if they had refused to execute same; that at said time and at said previous times referred to in Paragraphs 6, 7, and 8 herein, plaintiffs were prevented by the tricks and artifices of the defendant John A. Jensen from obtaining a true inventory of stock on said premises; that the plaintiffs thereupon signed the uniform real estate contract, the pertinent parts of which are as follows:

UNIFORM REAL ESTATE CONTRACT

THIS AGREEMENT, made in duplicate this 28th day of October, A. D. 1946, by and between John A. Jensen, also known as J. A. Jensen and Anna Jensen, his wife, hereinafter designated as the Seller, and W. H. Mawhinney and Ruth E. Mawhinney, his wife, as joint tenants, not as tenants in common with full rights of survivorship hereinafter designated as the Buyer, of Heber City, Utah.

WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, to-wit:

See attached sheet for legal description (A legal description of the premises sold was contained on an attached sheet).

Together with all improvements, fixtures, equipment, signs, merchandise and stock now on the premises; see attached Itemized List. (This inventory listed certain fixtures and hotel and tourist cabin equipment, but included *no items of stock; i.e., food, used in a restaurant business.*)

Together with all rights and interest in and to the lease dated December 28, 1937, by and between Melvin D. Close and Hope Close, his wife, the parties of the first part and Jack A. Jensen and Anna Jensen, his wife, parties of the second part, including the 2 story, 3 apartments Green Building located on property involved in this lease with all furnishings and improvements included.

Said buyer hereby agrees to enter into possession and pay for said described premises the sum of Thirty Five Thousand (\$35,000.00) dollars, payable at office of Sellers or assigns in Heber City, Utah, strictly within the following times, to-wit: Ten Thousand (\$10,000.00) dollars cash, the receipt of which is hereby acknowledged. Balance to be paid \$200.00 December 1, 1946 and \$200.00 or more on the first day of each month thereafter until this contract, with interest, is paid in full.

Said monthly payments to be applied first to the payment of interest and second to the reduction of the principal. Interest shall be charged from November 1, 1946 on all unpaid portions of the purchase price at the rate of 4 per cent per annum, payable monthly. Buyer agrees to maintain a merchandise inventory of Three Thousand

Five Hundred Dollars (\$3,500.00) at all times during the life of this contract.

* * * * *

In the event of a failure to comply with the terms hereof by the buyer, or upon failure to make any payments when the same shall become due, or within 30 days thereafter, the Seller shall, at his option, be released from all obligations in law and equity to convey said property and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may, at his option, re-enter and take possession of said premises without legal process as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land and become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller. It is agreed that time is the essence of this agreement.

* * * * *

The Seller on receiving the payments herein reserved to be paid at the times and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer, and to furnish at his expense, an abstract or a policy of title insurance, at the option of the Seller, brought to date at time of sale or at time of delivery of deed at the option of Buyer.

It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto.

Abstracts to date.

* * * * *

(Signatures of all parties.)

10. That the aforesaid representation of the defendant John A. Jensen was entirely false in this: That he, the said John A. Jensen, had removed therefrom large quantities of stock, merchandise, fixtures and equipment. That the following is a list of the equipment which the said defendant had removed from said premises and which equipment had been on the premises at the time of the execution of the earnest money agreement; that opposite each item listed below is stated the value of said personalty at the time the parties entered into the earnest money agreement: (The complaint then contained three pages of items of stock, merchandise, equipment and fixtures used in the operation of a restaurant and hotel business, including large quantities of food and condiments.)

11. That because of the representation of the defendant John A. Jensen as aforesaid, and because the plaintiffs were prevented by the tricks and artifices of the said defendants from obtaining a true and correct inventory of the premises, and because the plaintiffs were bound by the earnest money agreement previously re-

ferred to to execute said uniform real estate contract at that time, plaintiffs were induced to believe, and did believe, that all of the said personal property which had been on the premises at the time of execution of the earnest money agreement was still there and that they were thereby induced to enter into said uniform real estate contract as it was then worded.

12. That the defendants, and both of them, well knew that the statement of the defendant John A. Jensen to the effect that the quantity of the stock was then the same as it had been at the time of the execution of the earnest money agreement was entirely false and fraudulent; that the defendants and both of them, well knew that the said plaintiffs were wholly dependent upon what the defendant John A. Jensen said in reference to the quantity of stock and merchandise on the premises, because the defendants, and not the plaintiffs, were familiar with the conduct and stock and merchandise of said business and because the defendants tricks and artifices previously referred to in Paragraphs 6, 7 and 8 had prevented the plaintiffs from obtaining a true and correct inventory of said premises.

13. That the aforesaid false and fraudulent statement was made with the intent and purpose of the defendants to deceive the plaintiffs and to induce the plaintiffs to buy said business aforementioned by misleading them into executing the said uniform real estate contract as it was then worded, the defendants well knowing that the plaintiffs were wholly relying upon said representation.

14. That the plaintiffs, and both of them, were entirely ignorant of the falsity of the statement of the defendant John A. Jensen.

15. That because the plaintiffs were prevented by the tricks and artifices previously referred to from making an inventory, and because the plaintiffs were bound by said earnest money agreement as aforesaid, they were induced by the misrepresentations of the defendant John A. Jensen, to believe that the stock was the same and to execute the said real estate contract as it was then worded; that the plaintiffs wholly relied upon said representation and believed the same to be true; that they would not have entered into the said uniform real estate contract as it was then worded had they known that the vast quantities of stock mentioned above in Paragraph 10 had been removed therefrom.

16. That the plaintiffs had no reason to know that the defendant John A. Jensen did lie to them; that they were strangers to the community, having lived out of the county prior to the time of the execution of the earnest money contract; that they were assured by the defendants' attorney, L. C. Montgomery, an attorney licensed to practice law in the State of Utah and practicing in Heber City, County of Wasatch, State of Utah, that, "John is an honest man", that, "John would keep the stock up", and that "I've known him for years"; that because of these facts and the facts set forth in Paragraphs 11, 12, 13 and 15 the plaintiffs were induced to rely upon the false representation of the defendants that the stock was the same.

17. That upon entering into possession of the premises after the execution of the uniform real estate contract, the plaintiffs found that the vast quantities of personal property outlined in Paragraph 10 above had been removed therefrom to the damage of the plaintiffs in the amount of \$10,766.00.

18. That in the purchase money contract, it was stated that the plaintiffs were to receive all stock and fixtures *now on the above described premises*, and that the said John A. Jensen stated that this included all of the items of personal property of every sort and nature then on the premises; and that this was the basis of agreement of the parties when they entered into the earnest money agreement; that because of the fraud of the defendants, the uniform real estate contract states that the plaintiffs were to receive "all improvements, fixtures, equipment, signs, merchandise and stock *now on the premises*. See attached itemized list."

19. That whereas this purported to be the same contract as the original earnest money agreement, and it was intended by the plaintiffs that this contract should be to the same effect as the earnest money agreement, it was in effect entirely different from the earnest money agreement because of the removal of the vast quantities of personal property as set out hereinabove.

20. That the itemized list attached to the real estate contract was not intended by the parties to include all of the items transferred by said contract, because plaintiffs had been prevented from completing said inventory

by defendants, and they, the defendants, well knew the said list was not complete, and it was attached only because of the representation of the defendant John A. Jensen that the status of the stock was the same then as it had been at the time of the earnest money agreement.

21. That in order that the uniform real estate contract might have the same connotation as the earnest money agreement in furtherance of which it was executed, it should have stated as follows: "Together with all improvements, fixtures, equipment, signs, merchandise and stock on the premises *on the 14th day of September, 1946.*"

22. That the defendants have breached said contract, reformed as asked in that they have failed, neglected and refused to transfer, replace or convey to the plaintiffs the property set forth in Paragraph 10.

* * * * *

For a second alternative count to plaintiffs' first cause of action against the defendants, the plaintiffs allege as follows:

1. Refer to and repeat Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of plaintiffs' first count.

2. That at this time the defendant John A. Jensen refused to permit the plaintiffs to enter upon the premises for the purpose of making such inventory; that he refused to go with them to make such inventory, and that he then and there falsely, fraudulently and deceitfully

represented and asserted to the plaintiffs that all of the stock which was on the premises at the time of the execution of the earnest money agreement was still there, or had been replaced so that the quantities were the same at this time as they had been at the time of the execution of the earnest money agreement; that at said time the plaintiffs were bound by said earnest money agreement, previously referred to, to sign the real estate contract; and that at said time and said times previously referred to in Paragraph 6, 7 and 8 of plaintiffs' first count, plaintiffs were prevented by the tricks and artifices of the defendant John A. Jensen from obtaining a true inventory of the stock on said premises; that the plaintiffs thereupon signed the uniform real estate contract.

3. Refers to and repeats Paragraph 10 of plaintiffs' first count.

4. That the plaintiffs would not have entered into said real estate contract as it was worded had they known that the vast quantities of stock listed in Paragraph 10 had been removed therefrom.

5. Refers to and repeats Paragraph 11 of plaintiffs' first count.

6. Refers to and repeats Paragraph 12 of plaintiffs' first count.

7. That the aforesaid false and fraudulent statement was made with the intent and purpose of the defendants to deceive the plaintiffs and to induce the plain-

tiffs to buy said premises by misleading them into executing the said uniform real estate contract as it was then worded, the defendants well knowing that the plaintiffs were wholly relying upon said representation, and the defendants contemplating and intending that the plaintiffs would sign the said uniform real estate contract as it was then worded in reliance upon said representation.

8. Refers to and repeats Paragraphs 14 and 15 of plaintiffs' first count.

9. That the plaintiffs had no reason to know that the defendant John A. Jensen did lie to them; that they were strangers to the community, having lived out of the community prior to the time of the execution of the purchase money contract; that they were assured by the defendants' attorney, L. C. Montgomery, an attorney licensed to practice law in the State of Utah and practicing law in Heber City, County of Wasatch, State of Utah, that, "John is an honest man", that "John would keep the stock up", and that "I've known him for years"; that because of these facts and the facts set forth in Paragraph 2 of plaintiffs' first count and Paragraphs 5, 6, 7 and 9 of this count the plaintiffs were entitled to rely, and had a right to rely upon the false representation set forth in Paragraph 2 of this count above.

10. Refers to and repeats Paragraphs 17, 18, 19 and 20 of plaintiffs' first count.

11. That as a natural and probable consequence of the misrepresentations of the defendants as set forth

herein in Paragraph 2 above, the plaintiffs executed said uniform real estate contract and were damaged in the amount of \$10,766.00.

* * * * *

As a third alternative count, plaintiffs allege as follows:

1. Refer to and repeat Paragraphs 1, 2, 3, 4 and 5 of the plaintiffs' first count.

2. That on the 28th day of October, 1946, the plaintiffs and defendants assembled for the execution of the uniform real estate contract in the lobby of the hotel premises, subject of said contract; that at said time the defendant John A. Jensen represented and warranted to the plaintiffs that all of the stock that was on the premises at the time of the execution of the earnest money agreement was still there or had been replaced so that the quantities were the same at that time as they had been at the time of the execution of the earnest money agreement and thereby induced the plaintiffs to purchase the said premises by signing the said uniform real estate contract.

3. That the defendants breached the aforesaid representations and warranty in this: That upon entering into possession of the premises after the execution of the uniform real estate contract, the plaintiffs found that a vast quantity of personal property outlined in Paragraph 10 of plaintiffs' first count had been removed therefrom, whereby plaintiffs were damaged in the sum of \$10,766.00.

WHEREFORE, plaintiffs pray as follows:

1. That said uniform real estate contract be reformed so as to state: "Together with all improvements, fixtures, equipment, signs, merchandise and stock on the premises on the 14th day of September, 1946" so as to conform to the expressed intent of the parties as aforesaid.

2. For the sum of \$10,766.00, with interest thereon at the rate of 6% per annum from the 1st day of November, 1946.

3. For their costs herein, a reasonable attorney fee and for such other and further relief as the court may deem just and equitable.

POINTS RELIED UPON FOR REVERSAL

1. The first count in appellants' complaint states a cause of action for reformation of the "Uniform Real Estate Contract" and for damages for breach thereof as reformed.

2. Appellants' second count states a cause of action in deceit against respondents.

3. Appellants' third count states a cause of action for breach of warranty against respondents.

ARGUMENT

1.

This first count in appellants' complaint states a cause of action for reformation of the "Uniform Real Estate Contract" and for damages for breach thereof as reformed.

The basis for the equitable relief of reformation is set out in 45 Am. Jur. "Reformation of Instruments", Section 7, Page 586. I quote:

"Inasmuch as the relief sought in reforming a written instrument is to make it conform to the real agreement or intention of the parties, a definite intention or agreement on which the minds of the parties *had met** must have pre-existed the instrument in question . . . The prior agreement or intention must, of course, differ from the instrument in question or there would be no ground for relief . . . and it must be further shown that the difference was due to fraud or mistake. If no prior agreement or intention existed, then the only remedy is rescission."

*Italics ours.

Numerous Utah cases have dealt with situations warranting reformation or rescission, and these opinions clearly indicate that reformation of a writing which was executed to record a prior oral agreement or to complete the details of a prior written agreement will be allowed if the requisite facts for relief from fraud or mistake are present. Reformation was granted in Nordfors vs. Knight et ux., 60 P. 2d 115, Cram et al vs.

Reynolds et al., 55 Utah 384, 186 Pac. 100, and in Garner vs. Thomas et al., 75 P. 2d 168.

Instruments are rescinded rather than reformed where there has been no prior intention to be implemented by writing in question, though the other elements of a reformation case are present. This was done in Adamson et ux. vs. Brockbank et al., 185 P. 2d 264, Stuck et al vs. Delta Land and Water Company, 63 Utah 490, 277 P. 791, and in Bennett et al. vs. Bowen et al., 65 Utah 444, 238 P. 240.

Clearly this rule applies to the case at hand. The first agreement—the so-called “Earnest Money Agreement” (Paragraph 3 of Amended Complaint, Supra P. 2) stated all of the principal terms of the contract and further indicated that a subsequent contract would be made “on the approved form of the Salt Lake Real Estate Board”. It was obviously intended that the second contract would be entirely consistent with the “Earnest Money Agreement”.

The allegations show that the second contract (Paragraph 9 of the amended complaint, Supra P. 16) was in terms entirely consistent with the first contract except for the inconsistency induced by the fraud. They further show that the parties *never manifested any intention* of altering the terms of the first agreement in the second agreement.

Of course, the flaw sought to be eliminated by reformation must have been caused by *actionable fraud*

or mutual mistake. We are concerned here with fraud. The requirements for actionable fraud in Utah for cases seeking reformation, rescission, or in tort based on deceit, are set forth in *Stuck et al. vs. Delta Land and Water Company*, 63 Utah 490; 227 Pac. 791 as follows: (at Page 505.)

“It may be stated generally that the elements of actual fraud consist of: (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer’s ignorance of its falsity; (7) his reliance upon its truth; (8) his right to rely thereon; (9) his consequent and proximate injury.”

The main contention of respondents in their argument to the trial judge was that appellants had no right to rely on the representations of the respondents, that they were negligent to do so and were, therefore, not entitled to relief. We submit that little question can be raised as to the sufficiency of the allegations to meet the other eight requirements outlined above.

Respondents cited the case of *Rushton vs. Hallett*, 8 Utah 277, as sustaining their point. In this case plaintiffs agreed to sell to defendants two certain tracts of land between which was a third tract of land which had at one time been purportedly conveyed to the City, but, as claimed by plaintiffs, such conveyance had never been completed. The defendants prepared first a deed describing the two outside pieces of land. A short while

later, they prepared a second deed which they presented to the plaintiffs and represented to be the same as the first. However, its description covered the three tracts, including the center lot. It also included this exception: "But there is nevertheless excepted from the foregoing the street heretofore deeded to said city, and embraced in said last mentioned lot 1, section 11, township 1 aforesaid." Plaintiffs allege that defendants fraudulently misrepresented to them that the second deed was the same as the first.

The court denied reformation, stating two bases: I quote from Page 283:

"... If the ground can be identified, the title does not pass to the defendants, and, if no street existed at all, the title to the disputed ground still remains in the plaintiffs, and they have no cause for complaint against the defendants. The question as to who owns the land is between them and the city . . . The plaintiffs were in possession; still are in possession, knew all about how it lay, and its boundaries. The parties were at arm's length. No relation of confidence or trust existed between them; and, if the plaintiffs were imposed upon, it was their own neglect."

Since the circumstances in the Rushton case and this case as to knowledge, access to information, etc., are dissimilar, it could not be said to be controlling. The numerous other Utah cases more clearly spell out the limitations of the "right to rely" doctrine. We contend that they reveal these considerations: (1) That negligence will not bar relief in *fraud* cases nearly so readily as in *mutual mistake* cases, and (2) that in fraud cases only

the most extreme negligence will bar the defrauded party from relief.

In *Garner v. Thomas et al.*, 75 P. 2d 168 and in *Nordfors vs. Knight et ux.*, 60 P. 2d 1115, relief was granted based on mutual mistake. In the *Garner* case the injured party had failed to read a deed she signed. In the *Nordfors* case, the plaintiff had failed to have a survey made. These cases indicate how little consideration has been given the "negligence" doctrine in the absence of circumstances of estoppel, rights of third parties or laches.

The only cases denying reformation on ground of negligence which counsel for appellant has been able to find are *George vs. Fritsch Loan and Trust Company*, 69 Utah 460, 256 Pac. 400, and *Federal Land Bank of Berkely vs. Salt Lake Valley Sand and Gravel Company et al.*, 89 P. 2d 791. In the *George* case the injured party drew the document and acquiesced in it while the other party spent a large sum in reliance upon it. In the *Federal Land Bank* case the evidence failed on the question of mistake.

Even Judge Wolfe's dictum in the case of *Garner vs. Thomas et al.* (on petition for rehearing) 78 P. 2d 529, merely states that the pleading must contain "an allegation that the (injured party). . . .had not been guilty of negligence in signing the mortgage," which requirement we submit we have met, and furthermore he was discussing a mutual *mistake* situation.

Numerous Utah cases dealing with fraud situations have granted relief. In *Cram et al vs. Reynolds et al.*,

55 Utah 384, 186 P. 100, the parties had agreed to execute a contract and deed transferring certain land, including 11 shares of water. (These were shares in an incorporated water company). When they got together and had the papers drawn up, the defendant noticed that the water shares were not mentioned in the contract or the deed. He then asked his attorney if they went with the land and was informed that they did not, but that he should transfer them. He stated then that he would let them sweat a little while. When later on in the evening the water shares were demanded by the plaintiffs, he stated that he had signed enough papers and would sign no more that day. Thereafter, the action was prosecuted for the reformation of the contract and deed to include the water shares.

Reformation was granted, the Court stating as follows: (At Page 386)

“Mutual mistakes can be corrected, and courts will reform a contract so as to express what the parties actually agreed upon and make it express the terms upon which the minds of both parties met. The law on the subject is well established in this jurisdiction.”

(It should be noted that in this case we have on one side a mistake which might have easily been said to be due to the parties' negligence, but on the other hand, the knowledge of that mistake by the other party which he fraudulently withheld from the persons who would suffer from it.)

In *Stuck et al. vs. Delta Land and Water Company*, 63 Utah 490, 227 P. 791, plaintiffs after seeing certain circulars distributed by defendant in California, came to Utah to view certain lands for which defendant was seeking settlers to whom defendant company proposed to sell certain rights. In its circular the company represented that the Pahvant Valley (the lands for which defendant was seeking settlers) was a thoroughly proven general farming district. Defendant's agents took the plaintiffs to certain of the cultivated lands which were farmed in Pahvant Valley and introduced them to many of the farmers, all of whom spoke in a laudatory manner concerning the property. Then the agents conducted the plaintiffs to a tract of unoccupied land in the northern part of the district where there were two pieces of land open for entry.

While plaintiffs examined the unoccupied lands, they discovered in some places thereon a white substance which they thought was alkali. When they asked defendant's agents about this, they were assured that it was not alkali but gypsum and was not injurious to the land, and that the soil had been duly tested. Relying thereon the plaintiffs entered upon the land, paid the appropriate fee to the State and purchased, for a considerable sum, the necessary water rights. Their crops, however, turned out to be an almost total failure because of excessive quantities of alkali on the land.

The trial court awarded damages on the basis of the allegations and proof, and the Supreme Court affirmed the judgment, stating as follows: (At Page 506)

“Appellant also quotes the following excerpt from Black on Rescission and Cancellation, Paragraph 113:

‘It is a rule of great antiquity, and supported by a great body of authorities that a person about to enter into a contract or assume an obligation should exercise reasonable care and prudence in the matter of accepting at their face value representations concerning the subject matter made to him by the opposite party; and, although the representation were false and fraudulent, and he was deceived by them and misled to his injury, yet he cannot rescind or repudiate his contract on that ground, if it appears that he might have discovered their falsity by *mere inspection of the subject, or by the exercise of reasonable diligence in referring to sources of information which were equally open to him as to the other party. There are exceptions to this rule . . . where the matter was exclusively within the knowledge of one of them, where an examination of the subject-matter would require unusual pains, expense, or trouble, and involve special training or technical knowledge, and so on.*’ ”*

And at Page 512:

. . . “As far as the question of alkali is concerned, plaintiffs testified they were unfamiliar with alkali, especially on desert land. Whether or not a given substance is alkali can only be determined by experience or technical knowledge. Plaintiffs testified that when they inquired of these selling agents as to whether a certain substance seen upon the land they afterwards entered was alkali, the agents informed them it was not alkali but gypsum and was not deleterious to the land. They also informed plaintiffs that

every 40 acres of the land had been tested and that there was no alkali. *These statements, together with the fact that it involved a question of technical knowledge, undoubtedly brought the question within the doctrine of the authorities cited, especially Black on Rescission, Paragraph 113,** supra. Nor does the fact that plaintiffs themselves made some investigation of the project and went on the land alter the rule.”

*Italics ours.

In Bennett et al. vs. Bowen et al., 65 Utah 444, 238 P. 240, the defendants had attended a certain Chautauqua lecture in Logan, Utah, and as they were leaving the hall, they were confronted by Plaintiff, W. G. Ruckebrod, who had in hand a piece of folded paper, the exposed side of which was blank. He asked each of them if they enjoyed the lectures and if they wanted them to return and requested the defendants to sign their names to the blank paper, and represented to them that it was for the purpose of ascertaining their interest in and good will for the Chautauqua organization and a desire that the association should return to Logan for the season of 1923, the following year. Actually the paper on the other side contained a written guaranty contract. The defendant signed the paper in reliance upon the statements and did not intend to enter into any such contract.

From a judgment for the plaintiff, the defendants appealed. The Supreme Court, speaking through Justice Thurman, reversed the trial court and held that the defendants were not liable on their contract. Plaintiff contended that the defendants were negligent in signing

the contract and quoted from Greenfield's Estate, 14 Penn., Page 489, the following:

“If a party who can read . . . will not read a deed put before him for execution, or if, being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or at law.”

In dealing with the doctrine advanced in this case, the Supreme Court stated as follows: (At Page 453)

“There may be some foundation for that doctrine, in the absence of fraud, misrepresentation or concealment; but where one or more of these occur it is not the law. Approximately 6,000 years ago, when Cain's hands were reeking with the blood of his brother Abel, he was asked the question, ‘Where is Abel, thy brother?’ Cain answered, ‘I know not; am I my brother's keeper?’ Human nature has not changed. The idea is still prevalent that our brother must look out for himself. It will not always do, however, in the administration of justice. We are our brother's keeper to the extent that, if, in a business transaction, we mislead him by false representations or concealment, to his injury, we are liable for the consequences of our wrongful conduct. In Page on Contracts (2d Ed.) Paragraph 233, it is said:

‘If the party defrauded could read, has a chance to read, and omits to read the instrument, relying on the adversary party's statement of its contents, the instrument should on principle be treated as void, as between the parties thereto, since it should be no defense for the party who is guilty of the fraud to say that the other party was negligent in believing him. The majority of the courts take this view

of such cases, and hold such contract void, in spite of the negligence of the defrauded party.' ”

In *The Beaver Drug Company vs. Hatch*, 61 Utah 597, 217 P. 695, the defendant sold to plaintiff corporation a certain drug store business, including stock, for an agreed sum. During the negotiations for the purchase of the property, the defendant, who for ten years prior to the purchase was the owner and sole manager of the business, represented to the plaintiff's incorporators that an inventory of the stock, merchandise and drugs would total at least \$4,000.00. In reliance upon these representations, which the defendant knew were untrue, the plaintiff corporation purchased the drug store. Thereafter, an inventory of the stock was performed which indicated that it was worth only \$2,834.59. In this action plaintiff sought to recover the difference between the inventory value and the represented value; i.e. \$1,166.41. The District Court awarded a judgment for this sum to the plaintiff and the Supreme Court sustained this award.

In *Adamson, et ux. vs. Brockbank et al.*, 185 P. 2d 264, a common grantor of a large tract of ground sold ten acres from the western and lower portion of the tract to the plaintiff for farming purposes. For many years there had been an irrigation ditch running the length of the eastern portion of the tract, and this ditch was essential to the irrigation of the ten acres purchased by the plaintiff. Later on the grantor sold to the defendants the eastern and higher portion of the land. Thereafter the defendants erected a consider-

able number of dwelling houses (which they called Columbia Village), and in the process of this, they destroyed the irrigation ditch.

After the defendants had purchased their portion of the land, but before they destroyed the ditch, the title insurance company discovered a discrepancy in the boundary line between the defendants' and the plaintiff's property. Upon discovering this, Defendant Allen Brockbank prepared a quitclaim deed and inportuned the plaintiffs to sign it. They at first refused to sign the deed, but subsequently, after a number of visits by Defendant Allen Brockbank and after he had repeatedly informed plaintiffs that the sole purpose of the deed was to clear up the discrepancy in the boundary, plaintiffs executed the deed. No discussion had been had with respect to their relinquishing their rights to the use of the ditch.

Thereafter plaintiff sued defendants for damages for the destruction of the ditch and also asked that the quitclaim deed insofar as it purported to erase plaintiff's right in the ditch running across defendants' land be rescinded. Defendants, of course, claimed that the quitclaim deed had not only corrected the boundary but had also erased plaintiff's easement.

The Supreme Court, speaking through Justice Latimer, upheld the trial court in rescinding the quitclaim deed. To indicate the standard of care required to entitle plaintiffs to rely upon defendants' representations as to the effect of the deed and Defendant Brock-

bank's intention in obtaining it, the Court (at page 276) quoted from Black, "Rescission of Contracts," Paragraph 68, Page 172, as follows:

"The circumstances must have been such as to justify the defrauded party in relying on the representation, as a basis of his own decision or action, without making an independent investigation of its truth or falsity, *or he must have been in some way dissuaded or prevented from making a sufficient investigation.*"*

In applying this doctrine to the case at hand, the Court stated: (also at Page 276)

"In considering the last of the principles above quoted, it is sufficient to state that appellant Brockbank, by virtue of his superior knowledge; by his action of taking respondents to the courthouse and pointing out the plats which revealed the existing discrepancy; by assuring respondents he would satisfy their mortgagee that the quitclaim deed was only for the purpose of clearing up the discrepancy; by obtaining clearances from the mortgagee of respondents' property; and by having a representative of the title insurance company further assure them of the necessity and purpose of the deed; all these were such circumstances as justified respondents in relying on Brockbank's representations without making an independent investigation."

*Italics ours.

These cases might warrant denial of relief where a party simply fails to read a deed. But consider the following circumstances alleged in the amended complaint which placed appellants in a most disadvanta-

geous position in relation to respondents as far as information, or opportunity to obtain it, were concerned:

a. Appellants were newcomers to the community and to this business and were unfamiliar with the volume of stock turnover or the quantity of stock (Paragraph 2).

b. Since they were not given a right to inspect the premises in the Earnest Money Agreement, if they had refused to execute the second agreement unless permitted to inventory, they would have forfeited their down payment and their rights under the contract (Paragraph 3).

c. When Appellant Wilbur Mawhinney went on to the premises to inventory the stock, etc., he was stalled by Respondent John A. Jensen, who said he was too busy (Paragraph 6).

d. At the time of the execution of the second contract, Respondent John A. Jensen acted greatly insulted that his word should be questioned (Paragraph 9). Furthermore, appellants were assured by respondents' attorney that "John in an honest man . . . (and) . . . would keep the stock up . . . I've known him for years." (Paragraph 16).

Considering these facts in comparison with the Beaver Drug case (Supra P. 29) this case appears much stronger. In that case the defrauded party lacked access for about the same reason as here. But the *active steps to conceal and dissuade* were lacking there.

In the Adamson case (Supra P. 29) active steps to conceal were taken (as in the Bennett case, Supra P.), but if Adamson had consulted an attorney, he would have been warned of the possibility of the loss of his easement.

It may be claimed that appellants are resorting to parol evidence to support their position. As stated in Daly vs. Old et al., 99 P. 460 (At Page 463):

“If the intention of the parties cannot readily be ascertained from the language alone, then the court must have recourse to the situation, conditions, and circumstances which affected the parties, and from the language when considered in the light that those matters afford determine the real intention of the parties.”

To determine the “Stock and fixtures now on the property” as mentioned in the Earnest Money Agreement, obviously parol proof would be necessary.

The second contract refers to “all improvements, fixtures, equipment, signs, merchandise and stock now on the premises; see attached itemized list.” This list does not purport to include any restaurant “stock” and so is patently not complete. Again reference to parol evidence is necessary to determine the full facts and intention of the parties.

However, the main rule to consider in relation to this problem is that the parol evidence rule may not be invoked to uphold fraudulently induced provisions in a contract.

In 24 Am. Jur. (Fraud and Deceit), Section 267), Pages 103-104 and 105 are found the following statements (with cases cited):

“The fact that a contract is in writing does not preclude the introduction of evidence to show that a material stipulation therein was founded on the misrepresentations and fraud of one of the parties, or inserted by fraud, or that a material stipulation was omitted on account of fraud . . .

“ . . . The reduction of an agreement to writing is not at all conclusive against fraud in the contract, and the admission of extrinsic evidence which bears clearly upon the existence of fraud sought to be established for the purpose of avoiding the effect of the written agreement—as by rescission, reformation, or the establishment of a trust—or as the basis of a tort action, does not constitute an attempt to vary the terms of the agreement by parol. It was never intended that the parol evidence rule be used as a shield to prevent the proof of fraud, or that a person could arrange to have an agreement obtained by him through fraud exercised upon the other contracting party reduced to writing and formally executed, and thereby deprive the courts of the power to prevent him from reaping the benefits of his chicanery.

. . . The general rule that parol or extrinsic evidence is admissible to prove that a written contract was procured by fraud applies . . . whether the evidence offered relates to fraud in the omission of a material provision or to fraud in the insertion of, or a misrepresentation concerning, a certain term in the instrument, or whether the evidence offered directly contradicts the writing or merely covers a point not

referred to in the writing, and in spite of special provisions in the contract which purport to limit the application of parol evidence by stating that the writing contains all the terms involved and the representations made, or that the written contract shall be the sole evidence of the transaction, or that each contracting party relies and acts upon only his knowledge and not upon the representations of his adversary.'

So in *Strike vs. White et al.*, 63 P. 2d 600, where this court held that the parol evidence rule precluded the introduction of certain oral testimony in an action upon a contract, the court said: (At Page 602)

"If the contract does not express the intention of the parties, it may by proper proceedings be reformed."

II.

Appellants' second count states a cause of action in deceit against respondents.

The Utah cases do not seem to draw a distinction between the elements of actionable fraud necessary in deceit cases and those necessary in reformation and rescission cases. Therefore, the discussion under the first point covers this point.

The *Beaver Drug Company* case (*Supra* P. 29) seems entirely analagous to this case on the deceit question and seems ample authority on the point.

III.

Appellants' third count states a cause of action for breach of warranty against respondents.

Our Statute (81-1-12, U.C.A. 1943) defines an express warranty. We quote:

“Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller’s opinion only, shall be considered as a warranty.”

This has been amplified by the case of Nielson vs. Hermansen, 166 P. 2d, 536. We quote from page 537:

“... an affirmation of fact that is a representation, is a warranty and not merely evidence of a warranty, if its natural tendency is to induce the buyer to purchase the goods and the buyer thus induced does purchase them. Words of warranty such as “I guarantee or I warrant” are not necessary for an express warranty; a positive affirmation of the fact is enough to render the seller liable. The representation of fact which would naturally tend to and does induce a bargain is a warranty. The fact that the defendant did not intend to warrant is no defense if he did make a statement which brings him within the statute.”

In 46 Am. Jur. (Sales), Section 324, Page 505, Affirmations as to Quantity are dealt with as follows:

“Ordinarily, it would seem that a statement by the seller as to the weight or quantity of specific commodities sold is to be regarded as a

statement or expression of opinion rather than an assertion of fact, and is not to be deemed a warranty, and this is especially true when the statement is qualified by the word 'about' or the like. If, however, the circumstances show that it is the intention of the parties that a statement of this character is a statement of a fact on which the buyer should rely, it is treated as a warranty, and where goods shipped to the buyer are invoiced as containing a certain quantity, this is to be treated as a warranty."

Respondents argued before the District Judge that the parol evidence rule bars evidence to show the statement and shortage, relying upon the provisions in the second contract "See attached list". However, this list did not purport to include items of restaurant "stock" and "merchandise", and so resort may be had to parol evidence to explain what items constituted said "stock" and "merchandise". (See 46 Am. Jur. (Sales) Section 316, Page 499, and discussion Supra P. 33).

By the same token, the disclaimer provision of the second contract that "there are no representations, covenants or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto" does not bar recovery upon this warranty, because the written contract has left the quantity of stock uncertain and resort must be had to the oral statement as to quantity to complete the agreement.

CONCLUSION

We respectfully submit that the District Court erred in sustaining respondents' demurrer. We submit that a cause of action was stated alternately in either the count for reformation, the count on deceit or the count on breach of warranty.

Respectfully submitted,

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