

1950

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

Utah Supreme Court

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



Part of the [Law Commons](#)

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

L. C. Montgomery and Edward L. Montgomery; Attorneys for Defendants and Respondents;

Recommended Citation

Brief of Respondent, *Mawhinney v. Jensen*, No. 7537 (Utah Supreme Court, 1950).
https://digitalcommons.law.byu.edu/uofu_sc1/1304

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

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

FILED
OCT 21 1950

Clerk, Supreme Court, Utah

Respondents' Brief

L. C. MONTGOMERY and
EDWARD L. MONTGOMERY

*Attorneys for Defendants
and Respondents.*

I N D E X

	Page
STATEMENT OF FACTS.....	1
POINTS RELIED UPON FOR AFFIRMANCE.....	2
ARGUMENT	4
1. The District Court properly sustained respondents' Demurrer to the first count of the first cause of action, and for the following reasons:	
a. A cause of action for reforming a written instrument has not been alleged, as a matter of law, when it appears from the Complaint that the parties thereto had not previously arrived at a final expression of their intention.....	4
b. c A cause of action for reforming a written instrument has not been alleged, as a matter of law, if it appears that the instrument, when reduced to writing, was such as the parties themselves designed it to be.....	11
e. As a matter of law, the jurisdiction of Equity will not be invoked to reform a written instrument when it appears from the allegations in the Complaint that the complaining party has slept on his rights and has been solely responsible for the damage, if any, resulting to himself.....	18
d. A cause of action for reforming a written instrument has not been alleged, as a matter of law, when the alleged right to reformation is based upon oral representations and the instrument itself precludes such a showing.....	22
2. The District Court properly sustained respondents' Demurrer to the second count of the first cause of action in the Amended Complaint for the reason that this count failed to state a cause of action.....	23
3. The District Court properly sustained respondents' Demurrer to the third count of the first cause of action in the Amended Complaint for the reason that this count failed to state a cause of action	30
4. The District Court properly sustained respondents' Demurrer to the second cause of action in the Amended Complaint for the reason that no cause of action has been alleged.....	37
CONCLUSION	38

I N D E X—(Continued)

TABLE OF CASES

	Page
Adamson vs. Brockbank, 112 Utah 52, 185 Pac. 2d 264.....	5, 18
American Mfg. Co. vs. U. S. Shipping Board Emergency Corp., 7 F. 2d 565.....	34
American Rug Co. vs. V. S. Hoffman Machine Co., 320 Ill. App. 556, 51 N.E. 2d 809.....	34
Baker vs. Patton, 144 Ga. 542, 87 S.E. 659.....	15
Beaver Drug Company vs. Hatch, 61 Utah 597, 217 Pac. 2d 695	18, 28, 29, 30
Bennett vs. Bowen, 65 Utah 444, 238 Pac. 240.....	5, 18
Cameron vs. Cameron, 88 Cal. App. 2d 585, 199 P. 2d 443.....	27
Carpenter vs. Hamilton, 18 Cal. App. 2d 69, 62 P. 2d 1397.....	27
Daly vs. Old, 35 Utah 79, 99 Pac. 460.....	18
Del Rio vs. Ulen Contracting Corp., 94 F. 2d (C.C.A. Texas) 701, 703	26
Dyck vs. Snygg, 138 Neb. 121, 292 N.W. 119.....	25, 27
Ewald vs. Kierulff, 175 Cal. 363, 165 Pac. 942.....	12
Feak vs. Marion Steam Shovel Co., 84 F. 2d (C.C.A. Ore.) 670, 673	27
Foell Packing Co. vs. Harris, 127 Pa. Supra, 494, 195 Atl. 152.....	32
Garner vs. Thomas, 94 Utah 295, 78 Pac. 2d 529.....	15
Garrity vs. Miller, 204 Cal. 454, 268 Pac. 622.....	12
George vs. Fritsch Loan & Trust Company, 69 Utah 460, 256 Pac. 400	11, 12, 13, 16
Goodlotte vs. Acme Sales Corp., 229 Ill. App. 610.....	32
Harburger vs. Stern, 189 N.Y.S. 74.....	34
Holland vs. Good Brothers, 318 Mass. 300, 61 N.E. 2d 544.....	33
Kinnear vs. Prows, 81 Utah 135, 16 P. 2d 1094.....	24
Kirsch vs. Coon, 111 Conn. 564, 150 Atl. 523.....	33
Kleinclaus vs. Dutard, 147 Cal. 245, 81 Pac. 516.....	12
Knobel vs. I. Bartel Co., 176 Wis. 393, 187 N.W. 188.....	32
Landes & Co. vs. Fallows, 81 Utah 432, 198 P. 2d 389.....	8, 36
Lehi City vs. Meiling, 87 Utah 237, 48 P. 2d 530.....	9, 36
Marmet Coal Co. vs. People's Coal Co., 226 Fed., 646.....	34
Marsh Wood Products Co. vs. Babcock Co., 207 Wis. 209, 240 N.W. 392	33
Matchless Electric Co. vs. Morley, 252 Mich. 144, 233 N.W. 202.....	32
Milz vs. Bloomfield, 146 Misc. 649, 262 N.Y.S. 580.....	32
Reams vs. McMinnville, 153 Tenn. 408, 284 S.W. 382.....	15
Rothenberg vs. Shapiro, 140 N.Y.S. 148.....	33

I N D E X—(Continued)

	Page
Rushton vs. Hallett, 8 Utah 277, 30 Pac. 1014.....	14, 17
Silberman vs. Engel, 125 Misc. 816, 211 N.Y.S. 584.....	34
Simoz vs. Brockman, 249 Wis. 50, 23 N.W. 2d 464.....	34
Skola vs. Merrill, 91 Utah 253, 64 P. 2d 185.....	13, 26
Stewart vs. Hansen, 62 Utah 281, 218 Pac. 959.....	35
Stewart vs. Menzel, 181 Minn. 347, 232 N.W. 522.....	34
Strike vs. White, 91 Utah 170, 63 Pac. 2d 600.....	30
Stuck vs. Delta Land & Water Co., 63 Utah 495, 227 Pac. 791....	5, 18, 24
Taylor vs. Moore, 87 Utah 493, 51 P. 2d 222.....	13
Tegan vs. Chapin, 176 Wis. 410, 187 N.W. 185.....	32, 34
United States vs. Conklin, 54 Fed. Supp. (D. C. Mont.) 500, 502.....	26
United States vs. Krueger, 228 Fed. (C.C.A. Colo.) 97, 103.....	27
W. S. Maxwell Co. vs. Southern Oregon Gas Co., 158 Or. 168, 74 P. 2d 594.....	33
Wells vs. Lloyd, 125 P. 2d 128 (Cal. 1942).....	27

STATUTES

Utah Code Annotated, 1943, Sec. 81-3-8.....	32
Utah Code Annotated, 1943, Sec. 81-3-9.....	33
Utah Code Annotated, 1943, Sec. 81-6-1.....	31

OTHER AUTHORITIES

45 American Jurisprudence, 586.....	4
45 American Law Reports, 701.....	15
65 American State Reports, 485.....	19
53 Corpus Jurisprudence, 907.....	4
53 Corpus Jurisprudence, 908.....	20
28 C.J.S. 1049.....	9, 36
19 C.J.S. 1255	9, 36
13 Encyclopedia of Law and Procedure, 680.....	15
28 Lawyers Reports Annotated (N.S.) 799.....	15
23 Ruling Case Law, 311.....	21
1A Uniform Laws Ann. (Sales) 107.....	35
Uniform Sales Act, Sec. 74.....	35
5 Williston on Contracts, 4343 (Rev. Ed., 1937).....	19, 20, 21

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

Respondents' Brief

STATEMENT OF FACTS

The appeal in this action is based upon an order of the District Court sustaining respondents' Demurrer to appellants' Amended Complaint on the grounds that no cause of action had been alleged. Appellants were denied leave to amend. The matter was orally argued before the District Court and written briefs were ordered and submitted. The Court had previously sustained re-

spondents' Demurrer to the original Complaint also upon the grounds that no cause of action had been stated.

The facts as alleged in the Amended Complaint are reproduced in appellants' brief, pages one to eighteen, and are correct, except insofar as an inventory attached to the principal contract involved is not set forth. However, the inventory is incorporated into the Amended Complaint and is part of the transcript on appeal, it being attached to the original Complaint.

Both the order of the District Court in sustaining respondents' Demurrer to the original Complaint and the order sustaining the Demurrer to the Amended Complaint were made pursuant to the Utah statutory rules of procedure as they existed prior to January 1, 1950.

In those portions of this brief wherein reference is made to appellants' Amended Complaint or where it is summarized, every effort has been made to set forth its provisions or substance fairly and objectively.

POINTS RELIED UPON FOR AFFIRMANCE

1. THE DISTRICT COURT PROPERLY SUSTAINED RESPONDENTS' DEMURRER TO THE *FIRST COUNT OF THE FIRST CAUSE OF ACTION* IN APPELLANTS' AMENDED COMPLAINT ON THE GROUNDS THAT A CAUSE OF ACTION HAD NOT BEEN ALLEGED, AND FOR THE FOLLOWING REASONS:

a. A CAUSE OF ACTION FOR REFORMING A WRITTEN INSTRUMENT HAS NOT BEEN ALLEGED, AS A MATTER OF LAW, WHEN IT AP-

PEARS FROM THE COMPLAINT THAT THE PARTIES THERETO DID NOT PREVIOUSLY ARRIVE AT A FINAL EXPRESSION OF THEIR INTENTION, AND WHERE THE EFFECT OF REFORMATION IS TO CREATE A CONTRACT UNINTENDED BY THE PARTIES.

b. AS A MATTER OF LAW, THE JURISDICTION OF EQUITY WILL NOT BE INVOKED TO REFORM A WRITTEN INSTRUMENT WHEN IT APPEARS FROM THE ALLEGATIONS IN THE COMPLAINT THAT THE COMPLAINANT HAS BOTH SLEPT ON HIS RIGHTS AND HAS BEEN SOLELY RESPONSIBLE FOR THE DAMAGE, IF ANY, RESULTING TO HIMSELF.

c. A CAUSE OF ACTION FOR REFORMING A WRITTEN INSTRUMENT HAS NOT BEEN ALLEGED, AS A MATTER OF LAW, IF IT APPEARS FROM THE COMPLAINT THAT THE INSTRUMENT, WHEN REDUCED TO WRITING, WAS SUCH AS THE PARTIES THEMSELVES DESIGNED IT TO BE.

d. A CAUSE OF ACTION FOR REFORMING A WRITTEN INSTRUMENT HAS NOT BEEN STATED, AS A MATTER OF LAW, WHEN THE ALLEGED RIGHT TO REFORMATION IS BASED UPON ORAL REPRESENTATIONS AND THE INSTRUMENT ITSELF DEMONSTRATES THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE.

2. THE DISTRICT COURT PROPERLY SUSTAINED RESPONDENTS' DEMURRER TO THE *SECOND COUNT OF THE FIRST CAUSE OF ACTION* IN THE AMENDED COMPLAINT FOR THE REASON THAT THIS COUNT FAILED TO STATE A CAUSE OF ACTION.

3. THE DISTRICT COURT PROPERLY SUSTAINED RESPONDENTS' DEMURRER TO THE

THIRD COUNT OF THE FIRST CAUSE OF ACTION IN THE AMENDED COMPLAINT FOR THE REASON THAT THIS COUNT FAILED TO STATE A CAUSE OF ACTION.

4. THE DISTRICT COURT PROPERLY SUSTAINED RESPONDENTS' DEMURRER TO THE *SECOND CAUSE OF ACTION* IN THE AMENDED COMPLAINT FOR THE REASON THAT NO CAUSE OF ACTION HAD BEEN ALLEGED.

ARGUMENT

POINT 1-a

THE DISTRICT COURT PROPERLY SUSTAINED RESPONDENTS' DEMURRER TO THE *FIRST COUNT OF THE FIRST CAUSE OF ACTION* FOR THE REASON THAT A CAUSE OF ACTION FOR REFORMING A WRITTEN INSTRUMENT HAD NOT BEEN ALLEGED, AS A MATTER OF LAW, WHEN IT APPEARS FROM THE COMPLAINT THAT THE PARTIES THERETO HAD NOT PREVIOUSLY ARRIVED AT A FINAL EXPRESSION OF THEIR INTENTION, AND WHERE THE EFFECT OF REFORMATION IS TO CREATE A CONTRACT UNINENDED BY THE PARTIES.

The jurisdiction of Equity is extended to reform the terms of a written instrument only when that instrument fails, because of either fraud or mutual mistake, to reflect an earlier but final agreement reached between the parties. 53 C. J. 907 et seq. Reformation requires a previous final agreement to which the instrument may be made to conform as altered. A written document, therefore, cannot be reformed if it appears that the earlier agreement was not designed by the parties to

represent the final expression of their intention (45 Am. Jur. 586), and a Complaint which demonstrates this to be the case has failed to allege a cause of action. It is not sufficient to merely allege fraud.

This proposition is not disputed by appellants, and on page 20 of their brief, the following appears:

“Instruments are rescinded rather than reformed where there has been no prior intention to be implemented by the writing in question, though the other elements of a reformation are present.”

It is perhaps significant that although appellants outline at some length the details of Adamson vs. Brockbank, 112 Utah 52, 185 P. 2d 264; Stuck vs. Delta Land & Water Company, 63 Utah 495, 227 Pac. 791; and Bennett vs. Bowen, 65 Utah 444, 238 Pac. 240 and cite them as authority in support of their right to reformation, all three cases either speak of or deal with rescission for a failure to arrive at a final bargain or for mistake and in none was the issue of reformation presented or even discussed.

It is alleged in the first count of the first cause of action in the Amended Complaint that appellants-buyers and respondents-sellers formulated an original agreement on September 14, 1946. (Para. 3) This contract was denominated an Earnest Money Receipt and Agreement and is incorporated into the Amended Complaint by Paragraph 3. The parties thereto agreed in this first

contract to execute a second and final contract at a later date, and it is alleged that on October 28, 1946 the second contract, denominated a Uniform Real Estate Contract, was adopted. (Para. 8) This contract is incorporated into the Amended Complaint by Paragraph 8, and provides that the buyers were to receive a hotel, a restaurant, and the personal property on the premises at that date, as enumerated in an attached inventory. Respondents are alleged to have removed portions of the personalty from the hotel and restaurant between the dates of the initial agreement and final contract (Para. 10), and appellants now seek to reform the second contract to provide that they are to receive that personal property on the premises at the date of the original agreement.

It is their position, and it is so alleged in Paragraph 19, that the first contract (Earnest Money Receipt and Agreement) represented the final expression of intention between the parties. Therefore, if it appears from the Amended Complaint and its incorporated documents that such was not the case, no right to reformation has been alleged because of the rule acquiesced in by appellants that Equity will not reform a written instrument unless the complaining party can point to an agreement previously adopted which was intended by the executing parties to be the final and conclusive expression of their intention.

It is the position of respondents that the initial agreement was not a final one, that it was not so intended by the parties, and expressly so provides.

The first agreement denominates itself a “receipt” and purports to be nothing else. Appearing upon this document is the signature of a real estate agent, together with a statement that the real estate company is to be paid a commission. These features initially suggest that the agreement was clearly not intended by the parties to contain all the terms of the final bargain. More important, however, are the following factors which are significant in connection with the language of the first agreement:

1. Taxes were to be adjusted pro rata to the date of the second contract.

2. Interest on the unpaid balance was to run from the date of the second contract.

3. The agreement speaks of the “date of closing” as the date of the second contract.

4. “Rents, insurance, interest, water, and other expenses of said property shall be pro rated as of the ~~date of closing~~ ^{date of closing} days after execution.

5. Sellers were given the right to change their minds and cancel the agreement any time within two days after execution.

6. “Contract of Sale or Instrument of Conveyance to be made on the approved form of the Salt Lake Real Estate Board . . .”

7. "It is understood and agreed that the terms written in this *receipt* constitute the *entire preliminary contract* between the Buyer and Seller . . ."

The foregoing language makes it perfectly clear that the initial agreement was meant by the parties to be superceded and cancelled by provisions of a final contract which they agreed to execute at a specified later date. It is uniformly held that a prior agreement and all intervening oral negotiations become merged into the final instrument. *Landes & Co. vs. Fallows*, 81 Utah 432, 19 P. 2d 389. This position seems to be conclusively indicated by the following clause in the original agreement:

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

The Amended Complaint contains no allegation indicating that appellants are entitled to avoid these numerous provisions of the initial agreement. Instead, appellants have adopted the anomolous position of urging the first agreement between the parties to be their final contract when that instrument expressly provides in unequivocal terms that such was not the case.

It is submitted, then, that no right to reformation has been alleged. Appellants agree that as a matter of law reformation requires a prior and final understanding in accordance with which the contract may be made to conform. They point to and allege the first agreement to be the concluding effort of the parties, yet they have,

despite repeated invitations, avoided answering, and in their brief make no attempt to answer, what respondents consider to be a particularly crucial question: How can the first agreement be said to be final when that instrument expressly provides in clear, precise, and unconditional language that it was not so intended; that it was to be “abrogated” by execution of final transfer papers.

In addition, it is perhaps important to examine briefly the effect of granting the reformation urged by appellants. The clause in the second contract sought to be reformed (“Together with all improvements, fixtures, equipment, signs, merchandise, and stock now on the premises; see attached Itemized List”) is perfectly clear and unambiguous. Further, this clause is the first of only four wholly typewritten terms in the entire instrument; the balance of the contract is printed. It is the first descriptive clause in the document.

The “attached Itemized List” referred to by the clause is an inventory which lists a total of 185 different types of personal property to be received by the buyers. This inventory serves to explain the term, “Improvements, fixtures, equipment, signs, merchandise, and stock.” That is, the specific enumeration in the inventory defines and limits the general words of the contract clause. *Lehi City vs. Meiling*, 87 Utah 237, 48 P. 2d 530, 541 (citing 19 C. J. 1255); 28 C. J. S. 1049 and cases cited. A copy of the inventory is attached to the original Complaint and is part of the transcript on appeal. Appellants do not allege that they did not receive any of the items

contained in the attached list, but complain that they did not receive a total of 79 different types of personal property not enumerated in the inventory.

By asking for reformation, then, appellants seek not only to reform the first descriptive clause of the final contract, but also to avoid the language of the first agreement which expressly provides that the second contract was designed and intended by the parties to be a final one, and in addition to add 79 different items to a detailed and itemized inventory. Finally, they ignore that term in the final instrument which in effect provides that the agreement as reduced to writing represents the entire bargain between the parties. In other words, appellants seek to pick and choose among the terms of the two agreements and to supplement their choice by parol evidence with the net result that a completely different contract is created and the purchase price as to them is reduced by one-third.

Therefore, it seems that appellants are asking the court to ignore the entire course of dealing between the parties as reduced to writing in *two separate instruments*, and to construct for them a new and different contract which the Amended Complaint and its incorporated documents show was unintended by the parties and one which would be entirely foreign to the objectives of the bargain.

POINT 1-b

THE DISTRICT COURT PROPERLY SUSTAINED RESPONDENTS' DEMURRER TO THE *FIRST COUNT OF THE FIRST CAUSE OF ACTION* FOR THE REASON THAT AS A MATTER OF LAW, THE JURISDICTION OF EQUITY WILL NOT BE INVOKED TO REFORM A WRITTEN INSTRUMENT WHEN IT APPEARS FROM THE ALLEGATIONS IN THE COMPLAINT THAT THE COMPLAINING PARTY HAS SLEPT ON HIS RIGHTS AND HAS BEEN SOLELY RESPONSIBLE FOR THE DAMAGE, IF ANY, RESULTING TO HIMSELF.

In *George vs. Fritsch Loan & Trust Company*, 69 Utah 460, 256 Pac. 400, defendant in his counter-claim prayed judgment for the reformation of a written contract which the plaintiff was seeking to specifically enforce against him. A period of 26 months had elapsed from the execution of the contract until the time when the defendant sought relief through reformation. This court indicated at page 467 that:

“... the law is well settled in this and other jurisdictions that a written contract will be reformed to express the agreement of the parties where the proof of the mistake is clear, definite, and convincing, *and where the party seeking reformation is not guilty of negligence in the execution of the contract nor of laches in making timely application for its reformation.*”

The reason for this position is outlined at page 471:

“The general rule is that relief by way of reformation of a written instrument should not be granted where the party seeking it has acquiesced in the written agreement after being aware of the mistake.”

At page 472 the court, in speaking of defendant's right to reformation, said: "And there were laches in not seeking timely relief . . ."

It is alleged in Paragraph 5 of the Amended Complaint that appellants were to take possession of the premises on November 1, 1946. Paragraph 8 indicates that the final contract was executed on October 28, 1946, and Paragraph 17 states that upon entering into possession, appellants discovered an alleged deficiency in personal property. The transcript on appeal reveals that this action was initiated on June 23, 1949, a period of 32 months after appellants are alleged to have discovered the mistake. This term of 32 months' delay might well be contrasted with the period of 26 months involved in *George vs. Fritsch Loan & Trust Company*, supra, wherein it was held that the delay was unreasonably long.

Because laches is apparent from the face of the Amended Complaint and the transcript, it is proper to raise the issue by way of Demurrer on general grounds. *Garrity vs. Miller*, 204 Cal. 454, 268 Pac. 622; *Kleinclaus vs. Dutard*, 147 Cal. 245, 81 Pac. 516; *Ewald vs. Kierulff*, 175 Cal. 363, 165 Pac. 942.

The Amended Complaint is fatally defective because it demonstrates that appellants have slept on their rights, if any they had, and there is no allegation whatsoever explaining or seeking to excuse them from their laches. The jurisdiction of Equity should not now be available because of the delay, and respondents should not be forced to prove the validity of a contract under which the

parties have been operating without dispute for a period of years.

The purpose of the rule announced in *George vs. Fritsch Loan & Trust Company*, supra, is the burden it places upon a contracting party who is obliged to search for and come forward with proof of the validity of a written instrument after having placed his continued reliance upon the contract and having had no reason to believe that its terms would be questioned in the future. The rule is not designed to punish but to prevent intolerable hardship, since after the lapse of a long period of time, it is easy to attack a written document, but difficult to defend one. Any other rule would place a contracting party in the enviable position of being able to determine before commencing an action whether or not the lapse of time has not made the other party unable to defend himself. It is to be normally expected that one experiencing an alleged loss of over \$10,000.00 will come forward before a period of almost three years has elapsed. Appellants are here asking the help of Equity in relieving them from their own written contract and yet have demonstrated by their Amended Complaint that they are not entitled to assistance because of their delay.

This court has consistently held that delay will bar Equity in suit for rescission based upon fraud. *Skola vs. Merril*, 91 Utah 253, 64 P. 2d 185, 192; *Taylor vs. Moore*, 87 Utah 493, 51 P. 2d 222, 226 (“To justify rescission, the party seeking to avail himself of that remedy must move promptly and with all reasonable diligence

. . . upon discovery of the fraud.” Citing Utah cases.) This principle has equal application to suits for reformation. A contracting party cannot accept the benefits of the bargain indefinitely and then choose to completely revise the essential elements of the contract.

Moreover, the Amended Complaint shows that the damage of which appellants complain was occasioned, if at all, as the result of their own neglect. Virtually the entire brief of appellants’ is directed toward this matter. However, little more than a brief review of the Utah cases will be herein set forth.

In *Rushton vs. Hallett*, 8 Utah 277, 30 Pac. 1014, plaintiff agreed to sell and defendant to buy real property consisting of two tracts and a deed was prepared. Subsequently, defendant prepared a second deed wherein he was to be conveyed three tracts of land, and “Falsely and fraudulently represented to plaintiff that the second deed was the same as the first mentioned deed.” (At 281) Plaintiff, “relying upon said false and fraudulent representations,” (at 281) signed the deed and later brought a suit to reform the second deed to conform with the first. Defendant demurred on the ground that no cause of action had been alleged, and the District Court so held. On appeal to this court, plaintiff argued that, “Equity will reform a deed to make it conform to the intention of the parties.” (At 278) The Supreme Court affirmed the order sustaining the demurrer holding that in an action to reform a written instrument the neglect of the complaining party may disqualify him, and the case is

cited to that effect in 45 A.L.R. 701, 28 L.R.A. (NS) 799, and 13 Cyc. 680. This court said at page 283:

“... if the plaintiffs were imposed upon, it was their own neglect. The complaint does not charge a mutual mistake, it charges fraud. If the plaintiffs were defrauded, it was their own fault entirely. Therefore, I think that there is no equity stated in the complaint that calls for the interference of a court of chancery and, therefore, the demurrer was properly sustained.”

The concurring opinion of Justice Wolfe in *Garner vs. Thomas*, 94 Utah 295, 78 P. 2d 529 indicates that the pleader must show himself free from neglect. That opinion refers to *Baker vs. Patton*, 144 Ga. 542, 87 S. E. 659 in which case reformation was sought for fraud and it was held that a Demurrer should have been sustained because of the neglect of the complaining party. The Georgia court stated at page 660:

“It is unnecessary to point out that petitioner does not rely upon a mutual mistake of fact to have the reformation of the writing . . . He relies upon fraud of the other party . . . In fact, the petitioner shows the grossest negligence on his part. . . . Under these circumstances, we do not think that petitioner is entitled to . . . (reformation). And it was therefore error for the court to overrule the demurrer thereto.”

The opinion of Justice Wolfe further provides:

“*Reams vs. McMinnville*, 153 Tenn. 408, 284 S. W. 382, 384 lays down the sensible rule that, ‘The pleader must explain how the mistake was made, and show that he was without fault in the matter’.”

Appellants themselves make reference in their brief to *George vs. Fritsch Loan & Trust Company*, 69 Utah 460, 256 Pac. 400 which case denied reformation based on mutual mistake because of neglect. The principles adopted in the above cases seem to be correct, since one seeking reformation of a written instrument is asking for an extraordinary remedy. His pleadings must show that he is entitled to the intervening of Equity.

It is submitted that the Amended Complaint is fatally defective because, (1) it contains no allegation indicating that appellants were free from neglect or explaining how the mistake was made, and (2) it conclusively shows that the injury of which they complain was produced as a result of their own carelessness.

The inequitable conduct complained of consists of a refusal on two occasions to permit appellants an opportunity to examine the premises (Para. 6); statements by respondents as to the quantity of personal property and an accompanying refusal to permit an inventory on the day the final contract was executed. (Paras. 8 and 9) Superimposed upon this is the alleged state of fact that appellants were unfamiliar with the restaurant and hotel business (Para. 2); that they were strangers in the community (Para. 16); *that they executed the final contract on the premises immediately after being denied a right to examine the property* (Paras. 8 and 9) for the purchase of which they obligated themselves to pay the sum of \$35,000.00; and that they were imposed upon in general.

Thus, appellants are alleged to have voluntarily executed a contract under grossly suspicious circumstances and without having examined the premises they were buying; a contract which was perfectly clear and unambiguous in every particular, and one executed after appellants had thoroughly informed themselves of its precise terms. In the written briefs submitted to the District Court, the following significant passage appears in appellants' brief at page 12:

“In the case at bar, the plaintiff not only read the document he signed, but before he signed it, he deliberately and carefully attempted to ascertain whether that contract (the Real Estate Contract) stated his bargain and conformed to the intentions of both parties.”

The fact that appellants are alleged to have been newcomers to the community and unfamiliar with the hotel business would not seem to place them in a better position. If anything, it obligates them to display ordinary business prudence.

It is not surprising that appellants admit in their brief to this Court on page 24:

“It should be noted that in this case we have on one side a mistake which might easily have been said to be due to the parties' negligence . . .”

To merely allege fraud will not entitle one to the assistance of Equity in reforming a written instrument. *Rushton vs. Hallett, supra.*

It would appear, therefore, that the District Court properly sustained respondents' demurrer since the jurisdiction of Equity is not now available to assist the appellants for the reason that they failed to institute a timely action and because the damage of which they complain was occasioned, if at all, by their own neglect.

In their brief, appellants have outlined in detail *Stuck vs. Delta Land & Water Company*, 63 Utah 495, 227 Pac. 791; *Bennett vs. Bowen*, 65 Utah 444, 238 Pac. 240; *Beaver Drug Company vs. Hatch*, 61 Utah 597, 217 Pac. 695; *Adamson vs. Brockbank*, 112 Utah 52, 185 Pac. 2nd 264; and *Daly vs. Old*, 35 Utah 79, 99 Pac. 460 in regard to the matter of the neglect of the complaining party. However, in all of these cases the action was either based upon the theory of rescission or damages and in none was the issue of reformation of a written instrument presented. It does not, therefore, seem worthwhile to examine them in search of precedent.

POINT 1-c

THE DISTRICT COURT PROPERLY SUSTAINED RESPONDENTS' DEMURRER TO THE *FIRST COUNT OF THE FIRST CAUSE OF ACTION* FOR THE REASON THAT A CAUSE OF ACTION FOR REFORMING A WRITTEN INSTRUMENT HAS NOT BEEN ALLEGED, AS A MATTER OF LAW, IF IT APPEARS THAT THE INSTRUMENT, WHEN REDUCED TO WRITING, WAS SUCH AS THE PARTIES THEMSELVES DESIGNED IT TO BE.

Paragraphs 11, 13, and 15 of the Amended Complaint reveal that appellants were aware of the terms

of the final contract; that they intended it to read as it was then worded; and that it represented the voluntary expression of their bargain. *Appellants knew that the second contract was not the same as the first*, (Paragraphs 8, 11, and 15) and the disputed clause, the personal property “now on the premises,” was deliberately and understandingly included in the instrument. We have, therefore, a case in which appellants are seeking to avoid the very language in which they voluntarily chose to express themselves.

This count fails to state a cause of action for the reason that Equity will not reform a written instrument when the terms contained therein are such as the parties designed them to be. The rule is stated in 5 Williston on Contracts 4343 (Rev. Ed., 1937):

“The province of reformation is to make a writing express the bargain which the parties desired to put in writing. Agreements of which they did not desire written expression will not be put into writing by decree of the court.”

This position is outlined to like effect in 65 Am. St. Rep. 485:

“While a court of chancery will, upon proof of fraud, accident, or surprise raise an equity by which an agreement will be rectified according to the intention of the parties, *it will not interfere, where the instrument is such as the parties themselves designed it to be. If they voluntarily chose to express themselves in the language of a written contract, they must be bound by it*, for there is no general rule better settled or more just in itself,

than that parties who enter into contract, and especially contracts in writing, must be governed by them as made . . .”

In 53 C. J. 908 the principle is stated in the following terms:

“However, the instrument can only be reformed to conform to the parties’ agreement, that is, it may only be reformed to express some material thing which the parties agreed upon and meant to put in, but left out, or by striking out or changing something they did not mean to express. *A contract which the parties intended to make, but did not make, cannot be set up in place of one which they did make, but did not intend to make . . .*”

The Amended Complaint in no way suggests that the expression, the stock “now on the premises,” did not accurately describe the bargain. That is, the pleading shows that appellants knew that all they were to receive was the stock then on the premises. They complain, however, that respondents made oral representations concerning the quantity of personal property, (Paras. 9, 10 and 11) and that appellants “wholly relied upon said representations . . . and would not have entered into the . . . contract as it was then worded” had they been aware of an alleged deficiency. (Para. 15) The available authorities seem to agree that a written instrument may not be reformed on the basis of these allegations.

5 Williston on Contracts 4343 (Rev. Ed., 1937) indicates:

“Similarly, if the parties to a written instrument understand that part of their previous agreement has been omitted from the writing and rely on oral agreement with one another to vary or add in certain respects to the written agreement, whether they rely on moral obligation or believe that such a variation or addition is legally valid, equity cannot reform the writing by the insertion of the oral agreement.”

23 R. C. L. 311 provides:

“The court in recognizing the equity (of reformation) cannot make such a contract as it thinks the parties ought to have made or would have made if better informed. . . . Neither will the court insert a provision which was omitted with the consent of the party asking for reformation, although such consent was given in reliance on oral promise of the other party that the omission should not make any difference.”

5 Williston on Contracts, 4341 (Rev. Ed., 1937) points out:

“It is not enough to justify reformation that the court is satisfied that the parties would have come to a certain agreement had they been aware of the actual facts.”

The Amended Complaint does not proceed upon the theory that the instrument as written was designed or intended by the parties to read otherwise than as it did, or that it did not accurately represent the bargain. Instead, it is complained that appellants were mistaken as to how much stock was then present. It would seem, therefore, that the pleading if anything would go to the

existence of the contract because of mistake as to the subject matter rather than to the reformation of it.

It is clear that the instrument as written was such as the parties voluntarily intended it to be and it cannot, for that reason, be altered. This is a necessary principle in contract law, since to hold otherwise would oblige one to enter a contract at the peril of the other party's later reforming the instrument on the basis that he did not mean what he said, but meant something entirely different all along.

It is not sufficient in seeking to allege a right to relief by way of reformation simply by outlining the elements of fraud. A written instrument incorporating those provisions which the contracting parties desire is not made less valid merely by complaining that it was the product of unfair conduct. It is, therefore, submitted that no right to reformation has been alleged.

POINT 1-d

THE DISTRICT COURT PROPERLY SUSTAINED RESPONDENTS' DEMURRER TO THE *FIRST COUNT OF THE FIRST CAUSE OF ACTION* FOR THE REASON THAT A CAUSE OF ACTION FOR REFORMING A WRITTEN INSTRUMENT HAS NOT BEEN STATED, AS A MATTER OF LAW, WHEN THE ALLEGED RIGHT TO REFORMATION IS BASED UPON ORAL REPRESENTATIONS AND THE INSTRUMENT ITSELF DEMONSTRATES THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE.

Paragraphs 9 to 16 of the Amended Complaint in substance allege that respondents made certain oral representations to appellants concerning the quantity of personal property on the premises at the time of the execution of the final contract. It is then alleged that appellants were induced to believe the truth of the statements; (Para. 11) that they signed the contract on the faith of oral representations, (Para. 15); and that they are, therefore, entitled to reformation of the contract because, other than for the alleged representations, they would not have executed the instrument. (Paras. 11 and 15.) The following clause is contained in the final contract relating to this issue:

“It is hereby expressly understood and agreed by the parties hereto 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.”

The Amended Complaint contains no allegation to the effect that appellants are entitled to avoid this language and are not bound by it. It is, therefore, submitted that the instrument may not be reformed on the basis of oral representations or on the basis of a prior agreement when the instrument itself expressly provides that no such representations nor agreements have been made.

POINT 2

THE DISTRICT COURT PROPERLY SUSTAINED RESPONDENTS' DEMURRER TO THE SECOND COUNT OF THE FIRST CAUSE OF ACTION IN THE AMENDED COMPLAINT FOR THE REASON THAT THIS COUNT FAILED TO STATE A CAUSE OF ACTION.

The second count of the first cause of action is one in tort wherein it is alleged that respondents made certain oral representations to appellants concerning the quantity of personal property on the premises (Paras. 2 and 7), and that relying on those representations, appellants “executed said Uniform Real Estate Contract and were damaged . . .” (Para. 11) This count fails to state a cause of action for three reasons:

First, it is not alleged that appellants had a right to rely upon respondents’ representations. A cause of action in Utah based upon actionable fraud must include that element. *Kinnear vs. Prows*, 81 Utah 135, 16 Pac. 2d 1094, 1095; *Stuck vs. Delta Land & Water Co.*, 63 Utah 490, 505, 227 Pac. 791. This principle is admitted by appellants in their brief at pages 21 and 35.

In count two of the Amended Complaint it is alleged that the representations were false, material, intentional, relied upon, and that damage resulted. However, it is not alleged in any portion of this count, either directly or by inference, that appellants were entitled to rely upon the alleged representations. This count, therefore, fails to state a cause of action.

Secondly, the stated facts show that appellants cannot now claim to have been deceived or that they were entitled to rely upon the alleged representations. Paragraph 1 of the second count (incorporating Paras. 4 and 5 of the first count) alleges that respondents stated to appellants that all the personalty on the premises at the date of the original agreement would be conveyed and

that none would be removed during respondents' interim possession. It is then alleged (incorporating Para. 6) that appellants went to the premises for the purpose of conducting an inventory, but were refused admission by respondents, and that they returned and were again denied access. Further, on one occasion (Para. 7 as incorporated) appellants commenced an inventory of their own; that is, they chose not to rely upon respondents' alleged representations. Paragraphs 2 of the second count then indicates that respondents repeated the representations concerning the quantity of personal property, but that appellants again demanded a right of inspection. This demand was refused and the parties then executed the contract while on the premises. It is submitted that these facts demonstrate that appellants cannot now urge that they were deceived or that they relied or had a right to rely upon the alleged representations.

“To maintain an action for fraudulent representations, it is not only necessary to establish the telling of the untruth, knowing it to be such, or that it was told without knowledge of the facts, but also to prove that the plaintiff had a right to rely upon it, and did so rely . . .” (Citing cases) *Dyck vs. Snygg*, 138 Neb. 121, 292 N.W. 119, 123.

The Amended Complaint clearly shows that the alleged representations were accompanied with circumstances so outrageously suspicious as to cast serious doubt upon the truth of the statements. Of course, one is not obliged to assume that he will be abused by fraud. However, he cannot, after his suspicion is aroused, complain that he is entitled to rely upon the representations

made to him. "It is difficult to believe that the plaintiff is as credulous as he claims." *Skola vs. Merrill*, 91 Utah 253, 64 P. 2d 185, 192. "One cannot close his eyes to the obvious and then claim to be deceived." *Del Rio vs. Ulen Contracting Corp.*, 94 F. 2d (CCA Tex.) 701, 703. This is particularly true in the light of the fact that appellants admittedly questioned, if they did not thoroughly disbelieve, the statements imputed to respondents, this being evidenced by repeated demands for an examination of the property for the avowed purpose of confirming the representations made concerning it. The relevant cases seem to support the conclusions above stated.

"Does the evidence show that the defendant . . . had sufficient knowledge to require an investigation or inquiry on her part before becoming a purchaser. . . . Where circumstances of a questionable nature, creating a suspicion of fraud, come to the attention of one whose duty it is to investigate, and where, if inquiry were made, the facts constituting the fraud would be disclosed, and such person fails to make such inquiry, the law charges him with full knowledge of whatever facts pertaining to the fraud would have been disclosed." *United States vs. Conklin*, 54 Fed. Supp. (D. C. Mont.) 500, 502.

"Restatements of the fraudulent representation do not themselves constitute concealment, and where a party is once put upon notice of fraud he cannot avoid the consequences of his constructive knowledge of the fraud nor fulfill his duty to investigate by going to the party he suspects of the fraud. He cannot desist from further investigation because he is reassured of the truth of the

original representations.” (Citing cases) *Feak vs. Marion Steam Shov. Co.*, 84 F. 2d (C.C.A. Ore.) 670, 673.

“The rule is universally recognized in fraud cases that where the buyer is aware of suspicious circumstances or has learned of the falsity of one or more of the representations, he . . . may not rely upon the statements of the seller.” *Carpenter vs. Hamilton*, 18 Cal. App. 2d 69, 62 P. 2d 1397, 1401.

“If (the party alleging fraud) becomes aware of facts that tend to arouse his suspicion, or if he has reason to believe that any representations made to him are false or only half true . . . he has no right to rely on statements of the other contracting party. *Cameron vs. Cameron*, 88 Cal. App. 2d 585, 199 P. 2d 443, 447.

Statements to the same effect are set forth in *United States vs. Krueger*, 228 Fed. (C.C.A. Colo.) 97, 103 and *Dyck vs. Snygg*, *supra*, at 123 (N.W.).

Appellants cannot improve their position merely by asserting that they had no access and were therefore forced to rely upon the alleged representations. The fact that they were repeatedly and without valid reason denied a right of inspection only aggravates the suspicious character of the events rather than placing appellants in a better light.

Moreover, the fact that appellants are alleged to have commenced an inventory (Para. 7 as incorporated) withdraws from their right to rely. *Wells vs. Lloyd*, 125 P. 2d 128, 134 (Cal. 1942) (“In view of the act that Bay

Cities commenced its investigation it cannot be said that it placed reliance upon any representations.'') The reason for this principle is that in a judicial contest, it would be thoroughly impossible to determine how much knowledge the investigation had revealed and it would be impossible to discover how much the buyer relied upon his own investigation and how much he relied upon the alleged statements.

It is submitted that appellants cannot now, years thereafter, be heard to say that they were deceived or that they were entitled to rely upon statements allegedly made to them for the following reasons clearly revealed upon the face of the pleading: (1) The representations made were accompanied with grossly suspicious circumstances squarely directed at the veracity of the statements; (2) Appellants admittedly questioned the truth of the statement upon which they now seek to rely; that is, appellants are alleged to have relied upon representations which they themselves doubted to be true; and (3) Appellants commenced an independent investigation and must be conclusively presumed to have relied upon the information obtained therefrom or, in the alternative, be charged with the knowledge it would have revealed if diligently pursued to completion.

Beaver Drug Co. vs. Hatch, 61 Utah 597, 217 Pac. 695, is the only case cited by appellants in support of the second count (page 35 of appellants' brief), and it is clearly distinguishable. In that case plaintiff was entitled to rely and did rely upon representations made

to him since he had no reason to question the truth of the statements. Appellants here cannot successfully assert that they did rely or were entitled to rely upon the very representations which appeared to be untrue, and which were, in fact, seriously questioned. Further, if appellants in the present action had completed the investigation once begun, it would have revealed to them the alleged inventory shortage of which they complain. In the Beaver Drug case, this was not true because the representations dealt with the *value* of a stock of drugs and in that action it would have required expert assistance to discover the falsity of the representations and, in fact, an expert was retained for the precise purpose of determining the worth of the drugs. In order to allege a cause of action in deceit, it must be made to appear that the damage complained of directly resulted from reliance placed upon representations and that this reliance was justified. One cannot show himself entitled to relief by complaining that his damage resulted from statements which he had every reason to doubt and when, in fact, he did entertain doubt. Yet this is precisely the substance of the second count.

Third, the contract itself demonstrates that no representations were made. Because the tort is alleged to arise from a contract and because that contract is made a part of the second count, it seems proper to examine the language of the instrument for relevant terms.

“It is hereby expressly understood and agreed by the parties hereto that . . . there are no representations . . . between the parties hereto with reference to said property.”

It is perhaps significant to note that this clause does not merely provide that the parties are precluded from demonstrating representations if any have been made; it provides that "there are no representations." The term is not, therefore, open to attack on the basis of its being unfair or invalid as precluding proof of the factors which induced a contract. Appellants now seek, in count two, to depart completely from this language without first alleging that they are entitled to avoid, reform, or strike it from the contract. This court said in *Strike vs. White*, 91 Utah 170, 175, 63 Pac. 2d 600, that a written instrument may be reformed under appropriate circumstances, "but until that is done, the parties are bound by its terms."

The clause, in addition, serves as another method by which *Beaver Drug Co. vs. Hatch*, *supra*, may be distinguished since, in that case, no contract term of this type appeared in the bargain between the parties.

For the above reasons it is submitted that the second count fails to state a cause of action.

POINT 3

THE DISTRICT COURT PROPERLY SUSTAINED RESPONDENTS' DEMURRER TO THE *THIRD COUNT OF THE FIRST CAUSE OF ACTION* IN THE AMENDED COMPLAINT FOR THE REASON THAT THIS COUNT FAILED TO STATE A CAUSE OF ACTION IN THE AMENDED COMPLAINT FOR THE REASON THAT THIS COUNT FAILS TO STATE A CAUSE OF ACTION.

The third count of the first cause of action in appellants' Amended Complaint takes the form of a contract

action for breach of warranty. Paragraph 2 alleges that respondents “represented and warranted” concerning the quantity of personal property on the premises, and in their brief, appellants define the nature of the alleged warranty as “. . . an affirmation of fact that is a representation, is a warranty . . .” (Page 36) This count fails to state a cause of action for three reasons:

First, because the alleged warranty is said to arise from respondents’ representations, it seems proper to again refer to the terms of the principal contract:

“It is hereby expressly understood and agreed that . . . There are no representations, covenants, or agreements between the parties hereto with reference to said property . . .”

This language expressly provides that there are no representations and the third count appears defective since it is not alleged that appellants are entitled to avoid, reform or strike this clause from the contract.

It has been the position of appellants that this term is ineffective and should be ignored. However, this overlooks the fact that a clause of this nature is given effect by the Utah Code Annotated, 1943, Sec. 81-6-1:

“Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negated or varied by express agreement.”

Secondly, the Amended Complaint demonstrates an acceptance by appellants of the delivered personal property, the effect of which is to relieve respondents from

liability or an alleged breach of warranty. Sec. 81-3-8 of the Utah Code Annotated, 1943 provides in part:

“The buyer is deemed to have accepted the goods when . . . (they) have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.”

Since the facts are undisputed for the purposes of this Demurrer, the question of an acceptance is properly one for the court. *Foell Packing Co. vs. Harris*, 127 Pa., Supra, 494, 193 Atl. 152. Paragraphs 2 and 3 of the third count allege that appellants took possession of the goods on October 28, 1946 and the transcript on appeal indicates that this action was commenced on June 23, 1949, a lapse of 32 months.

It is not alleged that the goods were rejected or protest made, and the act of appellants in retaining the personal property constitutes an acceptance. Pursuant to identical statutory provisions, it was held in *Knobel vs. I. Bartel Co.*, 176 Wis. 393, 187 N.W. 188, that a buyer's failure to reject delivered goods after having them in his possession for *25 days* constituted acceptance as a matter of law. The same result was reached as a matter of law, in *Milz vs. Bloomfield*, 146 Misc. 649, 262 N. Y. S. 580 (three weeks); *Matchless Electric Co. vs. Morley*, 252 Mich. 144, 233 N.W. 202 (two months); *Tegan vs. Chapin*, 176 Wis. 410, 187 N.W. 185 (57 days); *Goodlotte vs. Acme Sales Corp.*, 229 Ill. App.

610 (6 months); and Kirsch vs. Coon, 111 Conn. 564, 150 Atl. 523 (one year). The Amended Complaint, therefore, demonstrates that as a matter of law appellants made an acceptance of the delivered goods.

The effect of an acceptance is stated in Section 81-3-9 of the Utah Code Annotated, 1943:

“In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. *But if after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefore.*

This provision of the Sales Act defines the rights of the parties in instances such as this where a breach of warranty is alleged against a seller of personal property, (Rothenberg vs. Shapiro, 140 N.Y.S. 148) and notice promptly forthcoming from the buyer is a vital condition precedent to recovery. March Wood Products Co. vs. Babcock Co., 207 Wis. 209, 240 N.W. 392 (it is an “absolute condition.”); W. S. Maxwell Co. vs. Southern Oregon Gas Co., 158 Or. 168, 74 P. 2d 594. The failure to allege prompt notice is a matter which may properly be raised by Demurrer (Holland vs. Good Brothers, 318 Mass. 300, 61 N.E. 2d 544), and the question as to whether an unreasonable time has elapsed may be resolved by the court. Marmet Coal Co. vs. People’s Coal

Co., 226 Fed. (C.C.A. Ohio) 646; American Rag Co. vs. U.S. Hoffman Machine Co., 320 Ill. App. 556, 51 N.E. 2d 809.

Allegations of fraud do not dispense with the need for notice, and even the fact that a seller of goods may be alleged to have had knowledge of his own does not alter the operation of the statute. American Mfg. Co. vs. V. S. Shipping Board Emergency Corp., 7 F. 2d (C.C.A.N.Y.) 565; Simoz vs. Brockman, 249 Wis. 50, 23 N.E. 464.

This section of the code requires notice “of the breach of any promise or warranty within a reasonable time after the seller knows, or ought to know, of such breach.” The Amended Complaint does not allege that appellants gave notice of a warranty breach or protested or rejected the goods. Instead, paragraph 3 of the third count alleges that “upon entering into the possession of the premises . . .” in October, 1946 the alleged breach of warranty was discovered. On June 23, 1949 a difference in time of 32 months, the original Complaint was filed, it being the first notice communicated to respondents.

As a matter of law, an unreasonable period of time has elapsed and the cases constituting this section of the Sales Act uniformly so hold. Silberman vs. Engel, 125 Misc. 816, 211 N.Y.S. 584 (39 days). Harburger vs. Stern, 189 N.Y.S. 74 (7 months); Stewart vs. Menzel, 181 Minn. 347, 232 N.W. 522 (7 months); Tegan vs.

Chapin, 176 Wisc. 410, 187 N.W. 185 (57 days); see 1A *Uniform Laws Ann. (Sales)* 107 et. seq.

The Amended Complaint on its face, therefore, demonstrates (1) an acceptance of the personal property delivered, and (2) a failure to protest within a reasonable time. The pleading is fatally defective as a matter of law, pursuant to the Sales Act as adopted in Utah.

Although the cases cited above are from foreign jurisdiction, it seems appropriate to refer to them, since it was held in *Stewart vs. Hansen*, 62 Utah 281, 218 Pac. 959, 44 A.L.R. 340 that in an effort to give the Sales Act uniform application, it is proper to consider the interpretations placed upon identical provisions by courts in other states. In addition, Section 74 of the Uniform Sales Act provides:

“(The Sales Act) shall be so interpreted and construed as to effectuate its general purpose and make uniform the laws of those states which enact it.”

Third, even in the absence of these provisions of the Utah Code, and of the disclaimer term in the contract, the third count still fails to state a cause of action. Appellants argue in their brief at page 37 that, “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.” The clause to which appellants refer as uncertain provides:

“Together with all improvements, fixtures, equipment, signs, merchandise, and stock now on the premises; see attached Itemized List.”

It is respondents' position that this clause and the attached inventory are perfectly clear and unambiguous in every particular and that, as a result, it would be improper as a matter of law to add, by parol evidence, 79 other types of personal property to the inventory.

Appellants contend that the expression "stock and merchandise" is ambiguous because the attached inventory contains no items which, they argue, are normally associated with those terms, and that these items may properly be added. However, it seems correct to suggest that appellants may not impute a meaning to the terms of the contract entirely different than that which the contract gives them. That is, the inventory serves to explain the contract clause since the specific enumeration defines the general terms in the clause. *Lehi City vs. Meiling*, 87 Utah 237, 48 P. 2d 530, 541 (citing 19 C.J. 1255); 28 C.J.S. 1049 citing cases.

In *Landes & Co. vs. Fallows*, 81 Utah 432, 19 P. 2d 389, 392, the court said:

"If, on the other hand, the contract of sale specifically designates the subject-matter of the transaction, such designation must control and cannot be enlarged by construction."

Further, it is significant that most of the damages sought by appellants is for *equipment* such as a tool chest, electric griddle, radiators, stoves, rifle, automobile, etc., which items could clearly not be denominated

“merchandise and stock” under the meaning imputed to that expression by appellants.

For the above three reasons, it is believed that the District Court properly sustained respondents’ Demurrer to the third count.

POINT 4

THE DISTRICT COURT PROPERLY SUSTAINED RESPONDENTS’ DEMURRER TO THE *SECOND CAUSE OF ACTION* IN THE AMENDED COMPLAINT FOR THE REASON THAT NO CAUSE OF ACTION HAD BEEN ALLEGED.

Appellants’ second cause of action is alleged to arise from the failure of a heating system on the premises to conform to the standard of *quality* imputed to it by respondents. In their brief appellants have not argued against the order of the District Court in sustaining Demurrer to this cause of action and no argument will be made except to indicate that Paragraph 2 of that cause of action incorporates the final contract into the Amended Complaint and a term of that instrument provides:

“It is hereby expressly understood and agreed that the *buyer accepts the said property in its present condition . . .*”

The Amended Complaint does not allege that appellants are entitled to avoid this language, and it would therefore appear that no cause of action has been stated.

CONCLUSION

We respectfully submit that the District Court properly sustained respondents' Demurrer and correctly denied leave to amend for the reason that no portion of the Amended Complaint alleges a cause of action.

Respectfully submitted,

L. C. MONTGOMERY
Heber, Utah

EDWARD L. MONTGOMERY
Detroit, Michigan
*Attorneys for Defendants
and Respondents.*