

1950

# Horace F. Taylor dba Taylor Motor Service v. Kenneth R. Murray v. Charles P. Stuart : Brief of Appellant

Utah Supreme Court

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Marriner M. Morrison; H. A. Sjostrom; Attorneys for Appellant;

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# In the Supreme Court of the State of Utah

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HORACE F. TAYLOR, doing  
Business as  
TAYLOR MOTOR SERVICE,  
*Plaintiff and Respondent*

-VS-

KENNETH B. MURRAY,  
*Defendant and Appellant.*

-VS-

CHARLES P. STUART,  
*Third Party Defendant  
and Respondent.*

Civil Case No.

7570

**FILED**

DEC 4 1950

Clerk, Supreme Court, Utah

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## APPELLANT'S BRIEF

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**Appeal from the District Court of the First Judicial  
District of the State of Utah, in and  
for the County of Cache**

**Hon. Lewis Jones, Judge**

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Marriner M. Morrison  
153 North Main St.,  
Logan, Utah

*and*

H. A. Sjostrom  
Armo Block  
Logan, Utah

*Attorneys for Appellant.*

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# In the Supreme Court of the State of Utah

HORACE F. TAYLOR, doing

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## APPELLANT'S BRIEF

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### STATEMENT OF FACTS

On the 27th day of October, 1949 and prior thereto, Charles P. Stuart was the owner of, and in possession of a 1941 Hudson automobile and certificate of title thereto. On said date the defendant, Kenneth B. Murray, was the owner of a 1949 Packard automobile, subject to a conditional sales contract with the Lockhart Finance Company, having a balance due thereon of \$2100.00, upon which contract the plaintiff Taylor was a co-signer. Murray was using this Packard as a "demonstrator" in his work as a salesman for plaintiff.

Prior to October 27, 1949, Murray had on several occasions approached Stuart for the purpose of selling the Murray Packard to Stuart but had never been able to reach a satisfactory agreement as to the terms of the sale including the trade-in credit to be allowed Stuart on the 1941 Hudson Stuart was to turn in on the purchase price of the Packard (tr. 82-83). On October 27, 1949 Murray called on Stuart at his farm in Wellsville, Utah, at which time Stuart offered to purchase Murray's Packard as follows:

“If you want my car on a trade on your car for \$550.00, go get in it and drive out”. (tr. 83)  
which offer was accepted by Murray as follows:

“Okay, Charlies, I'm just going to make you a trade today”, (tr. 83)

whereupon a written contract was signed for the purchase by Stuart of the Murray Packard for \$2975.00, not including the sales tax, and a credit was allowed on the Hudson automobile to Stuart of \$550.00 (tr. 83, Pltf's. Ex. 1). After this contract was signed and at the direction of Murray, Stuart deposited the certificate of registration and the Certificate of Title to the Hudson in the front seat of the Hudson and later that day Murray returned to the Stuart residence and drove the Hudson away, taking it to his headquarters at the Taylor garage for repairs and to be placed in condition for resale, where he ordered parts and directed their installation in order to put the Hudson in a condition for resale (tr. 84).

The Certificate of Registration and Certificate of Title and the contract were taken to the Taylor garage, where Murray maintained his headquarters, and exhibited to Taylor who observed that the Certificate of Title had not been signed by Stuart (tr. 97). A few days later and between the dates of October 27, 1949, and **November 9, 1949**, Murray took the Certificate of Title to Wellsville and obtained the signature of Stuart thereon and then returned it to the Taylor garage and placed it with the other papers (tr. 97-99) where it remained until these papers were returned to Murray at the direction of Taylor on the evening of November 9, 1949 (tr. 92). In the meantime Murray had taken his Packard to Charles Miller for repair of a minor blemish on the body, for which he personally paid the sum of \$11.50 and returned it to the Taylor garage, for the usual servicing preparatory to delivery to Stuart. This was done about October 29, 1949, and then told Taylor his Packard was ready for delivery to Stuart when he came after it; that the papers were all clamped together and Murray asked Taylor to complete the transaction with Stuart (tr. 91) when he came after the Packard.

On November 9, 1949 Murray was out of the garage and Mr. Stuart and wife came after the Murray Packard (tr. 91 161). At this time Taylor sold Stuart a different Packard off the show-room floor after a discussion of the contract with Murray and Stuart drove the new



Packard away that evening.

Upon the return of Murray later that evening he was advised by one of Taylor's employees of the sale to Stuart of a different Packard, an altercation followed and Murray terminated his services with Taylor . Murray demanded a return to him of the Certificates of Registration, Title and the contract of sale. They were delivered to him upon Taylor's direction (tr. 92).

Shortly after this incident Murray returned to the Taylor garage and drove his Hudson away and took it to his residence at Wellsville, Utah. Several demands were made upon him to return the Hudson, but Murray refused, claiming to be the owner thereof and the Certificate of Title (r. 52, 53, 94, 95). Taylor then sent a couple of his men to Wellsville after the Hudson and removed it from the Murray premises without Murray's consent, knowledge, or approval, against his will and after Murray had forbidden him to take it. This was done by making electrical connection to start the motor since Murray had refused to deliver or surrender the key to Taylor (tr. 53). Taylor thereafter sold the Hudson to one John Bybee (tr. 47) and later *wrecked* (tr. 209).

Through the interference by Taylor with Murray's contract with Stuart and the consequence breach of the contract by Stuart, Murray was forced to default on his payments to the Lockhart Finance Company and

they required him to put his Packard in storage at the Taylor garage and then, without notice to Murray, Taylor paid off the balance of the conditional sales contract, took title in his own name and sold the Murray Packard, retaining the entire proceeds of the sale for himself.

Upon Murrays refusal to surrender the Certificate of title to the Hudson, Taylor commenced this action against defendant Murray, in Claim and Delivery to recover the Certificate of Title (tr. 1). Defendant answered and counter-claimed in Claim and Delivery seeking possession of Hudson automobile, also in conversion for actual damages and attorney fees and a third counter-claim seeking to recover his equity in the Packard automobile in the possession of Taylor through his manipulations (tr.4-5). The plaintiff Taylor, answered the counter claims of the defendant. Plaintiff admits that Stuart entered into a contract with Murray for the sale of the Murray Packard and the trade-in of the Hudson but alleged that he rescinded or repudiated said contract and so informed Murray, because of fraud; admits that he took the Hudson automobile from the premises of Murray and alleges that he had no knowledge of Murrays claim to ownership or possession thereof (tr. 6-10). When Taylor set up fraud between Murray and Stuart the defendant filed a Third-Party complaint against Stuart seeking damages, general and special for breach of the contract by Stuart (tr. 12-16), to which Stuart

answered generally, incorporating the plaintiff's answer to defendant's counter-claims and adopting them as his own, including the alleged fraud (tr. 17, 18).

Both plaintiff and Third Party defendant (respondents) having admitted the contract and having set up fraud in the inducement of the contract between Murray and Stuart, it was agreed and stipulated between counsel that the case should be submitted on the question of fraud only and the verdict of the jury would control the liability of the parties except as to the question of law as to whether the \$150.00 attorney fee could be allowed for defending the Claim and Delivery action (tr. 46-48).

At the conclusion of the evidence the Court submitted the case to the jury on the question of fraud but notwithstanding the verdict of the jury which found no fraud (tr. 31) and in direct disregard thereof, the Court made Findings of Fact, Conclusions of Law and entered Judgment against the defendant and appellant and in favor of the plaintiff and Third Party defendant (respondents) (tr. 33-40), from which this appeal is taken.

## STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY FOR REVERSAL OF JUDGMENT

A. The Court erred in making and entering its Findings of Fact numbers First, Second Third, Fifth,

except Five-A, Sixth, Seven, Eight, Nine and its Conclusions of Law numbers One, Two and Three.

B. The Court erred in making and entering its Judgment and the whole thereof.

C. The Court erred in refusing to enter judgment in favor of the defendant and Third-Party plaintiff, the appellant, on his first counter-claim, for the value of the Hudson or on his second-claim in conversion and on his third counter-claim for his interest in the Packard automobile for \$875.00.

D. The Court erred in refusing to give judgment of Third-Party plaintiff, and against the Third-Party defendant for the sum of \$150.00 attorney fees, costs and \$875.00 for breach of contract.

## ARGUMENT

### Point A.

It is the position of Appellant that the stipulation of the parties through their counsel, at the very outset of this case (tr. 46-48) as to the issues of the case, the alleged fraud on the part of Appellant, and the special findings of the jury (Answers One, Two and Four, Tr. 31) and the understanding of the Court of that stipulation (tr. 199) as recorded as follows:

“If the jury finds there was no fraud and answers these questions against you, then as I understand the purport of the original stipulation, then in that event you’re (*they’re*, our correction) entitled to damages against you, which the Court will . . . . .”,

is determinative of this case, save and except the legal question as to whether attorney fees can be awarded as damages against a party to a contract, whose breach of his contract gives rise to litigation between the other party and a third party.

It is further the position of Appellant that the decisive questions raised by Appellant's Statement of Points can substantially be summarized under the following general propositions:

- a. With whom was Stuart doing Business?
- b. What was the subject-matter of the transactions?
- c. What did Stuart expect to get?
- d. What did Stuart expect to give?
- e. Was there a contract fully executed?
- f. Was there fraud in the inducement of the contract?

Under proposition a. there can be no doubt that Stuart was doing business with Kenneth B. Murray, and his is a recognized fact both in the testimony and the pleading (tr. 6 Parag. 3). Answer to Defendant's Counter-Claim wherein respondent Taylor pleaded as follows, in substance: That Stuart and Murray entered into negotiations for the purchase and sale of the Murray Packard, "\*\*\*\*That in order to induce the said Charles Stewart to ENTER INTO SAID CONTRACT" the defendant made certain false representations and that upon discovery of said misrepresentations, Charles

Stewart "REPUDIATED ANY AGREEMENT" which he intended to make with this defendant and so informed the defendant of such REPUDIATION". (tr. 7). The falsity of this allegation comes from the mouth of respondent Stuart, himself when he testified:

"Q. Did you ever tell Mr. Murray that he had misrepresented the car to you?

A. I don't know as I ever seen Mr. Murray after that time. I tried to get in touch with him, but he was always a step ahead of us.

Q. But you never did talk to Mr. Murray about this automobile did you?

A. I never had a chance to talk to him". (tr. 163). Also again (tr. 164. 165).

"Q. Well, I just asked you just a minute ago if you ever complained to him in any way, and now you say you did?

A. I never complained until I went to settle the deal in the garage. I never detected\*\*\*\*.

Q. But you never complained to Mr. Murray?

A. No."

These allegations and admissions were also adopted and realleged by Third-Party Defendant, Stuart in his Answer of Third-Party Defendant (tr. 18.) The evidence is also conclusive, and admits of no doubt that Stuart was doing business with Kenneth B. Murray and such was known and understood not only by the parties themselves but by the employes of Taylor also.

Taking the evidence in the sequence given at the

trial for the convenience of the Court and the writer, Mr. Taylor admits he knew of Murray trying to sell the Murray Packard to Stuart (tr. 57) and again (tr. 58):

“Q. So you knew then that Mr. Murray had been negotiating with Mr. Stuart for the sale of his automobile?

A. Yes, Sir. For HIS automobile?

Q. Yes.

A. Yes, I KNEW THAT”.

And again, a moment later:

“A. He had the WRITTEN CONTRACT in his Sales book”. (tr. 58).

Taylor knew in October that Murray was negotiating for the sale of his Packard (tr. 59). Taylor knew on November 9, 1949 when Stuart came to the Taylor garage that Stuart came after the MURRAY Packard (tr. 60, 69), further, when Stuart came to the Garage he looked the Murray Packard over, and then according to Taylor said: (tr. 61) “I’m supposed to buy . . . ”. then apparently remembering the necessary facts to support his claim, began to stammer and finally admitted: “\*\*\*and his wife says they wouldn’t have the automobile”, and then Taylor siezed upon the opportunity to cut Murray out of the sale of his Packard and sell a “Taylor” Packard. (tr. 195, 197).

When the 1941 Hudson of Mr. Stuart was brought in, Taylor admits he knew it was a trade-in (tr. 68)

and that he also knew Stuart had not purchased a new Packard. How then did he know? Simply because he had seen, and had in his possession the Murray-Stuart contract.

Kenneth B. Murray testified with respect to the transaction between himself and Stuart. To set out this testimony here would only add volume to these remarks when we feel the Court will readily see that the position of the Appellant is definitely established by Respondent's own testimony.

Herman Nelson, an employee of respondent Taylor, knew of the sale of the Murray Packard to Stuart: (tr. 137)

“A. \*\*\*I remember Ken coming in one night and saying he had sold his car and left the order and the title and that he was going some place and would Mr. Taylor take care of the deal when these people came in”.

And that the title and order were left with Taylor Motor Service. Further, Nelson testified that the Stuarts came to the Taylor garage to get the MURRAY PACKARD.

Stuart, the respondent, testified that he begun dealing with Murray in September of 1949 and that Murray then had a Packard automobile (tr. 155). Then immediately following this testimony respondents' own counsel asked this question of Stuart:



“Q. WHEN WAS THIS DEAL FINALLY CONSUMATED?”

The answer was October 27, 1949. Stuart then testified that he had seen the Packard Murray was driving; that he and Murray finally came to an agreement to which Murray had already testified (tr. 157); that the price was right; the trade-in was right; that he knew the Packard had been used as a “demonstrator”. and again (tr. 158) that “The contract is alright” and then again charges misrepresentation and fraud.

Stuart also testified (tr. 161) “I made arrangements to buy KEN’S CAR if a ’50 model, yes”, and again at page 161 Stuart admits that he came to pick up KENS MURRAY’S automobile.

To further establish the existence of an intent to do business with Murray, Stuart testified (tr. 164)) “My understanding was that his figures were right here. I would have taken the car if it had been what it should have been”.

There can be no doubt but what Stuart came to the Taylor garage fully intending to perform the balance of his contract with Murray and would have done so had it not been for the intervention of Taylor who was anxious to sell a new automobile (tr. 161-163) and it is more than evident, we think, that the defects in the automobile alleged, the misrepresentations claimed and the deceit perpetrated are only synthetic to avoid the

consequences of a breach of the contract with Murray. At least our belief is supported by the verdict of the jury who also found to the same effect.

Taylor testified that when Stuart came to his garage he encouraged him to go see Murray and make things right with him before he purchased another Packard off the floor (tr. 60, 62). If neither Taylor or Murray thought there was an agreement on the MURRAY car then how can these conversations be explained? Considering the evidence, all from Respondents' own witnesses, the conclusions seems inescapable that Stuart was doing business with Kenneth B. Murray, knew it, understood it, and that conclusion cannot be avoided either by the Court or counsel, since the question of the execution of the contract was put squarely before the jury upon Stuart's claim that Murray tampered with the contract after he had signed it in "blank", yet Stuart still admits "The contract is alright". (tr. 158) and that the contract bears Kenneth B. Murray's name as the seller, Stuart's name as the buyer and is the same way it was drawn when Stuart signed it.

Proposition b. must be too obvious to admit of argument. The Kenneth B. Murray Packard was the subject-matter of the contract. From testimony already quoted, the price was right the trade-in was right, the car purchased and listed on the contract was the specific Packard described by motor and serial number and belonging to Murray, it was purchased as a "demonstra-

tor", Stuart came to get that specific automobile, and would have taken it, so he admits, IF IT HAD BEEN AS REPRESENTED.

To read the testimony would seem to make the answer to proposition c. evident. Stuart expected to get the Murray "demonstrator" agreed upon and described in his written contract with Murray. He came after it and would have taken it if SOMETHING had not changed his mind. Stuart and Taylor claim it was fraud and misrepresentation yet Stuart testified that it was Taylor who called his attention to the alleged misrepresentations when, Stuart came for the Murray Packard (tr. 161-163) and then Taylor sold Stuart another Packard off the floor.

What did Stuart expect to give? Proposition d. Here again the contract "that is alright" (tr.158) speaks for itself. Stuart agreed and the "price is okay (tr. 157) to pay \$2975.00 exclusive of taxes, for the automobile of Murray's and to receive a credit of \$550.00 on that price for his 1941 Hudson automobile as a trade-in. When the deal was "Consumated" he delivered the Hudson, its Certificate of Registration and Certificate of Title to Murray at the time the contract was signed (tr. 83). This part of his contract he performed and his performance can only be considered as performance pursuant to the contract. No other explanation can be, or was given.

A reading of the record itself fully answers proposition d. A written contract was fully executed and partially performed and so considered by the respondents in their pleadings and testimony (Deft's Ex. 1, tr. 6, 7, 17). In objecting to a question on cross-examination, Respondent's counsel made the following statement (tr. 64):

“Mr. Preston: I object to that as improper cross-examination, as no bearing on this case. This is a deal between Mr. Murray, in which Murray represented this is a 1949 Packard, and those people, if they've been defrauded, I imagine they'll sue Mr. Taylor”.

At page 155 Stuart testified that the deal had been “consumated” on October 27, 1949. He further testified: “The contract is alright” (tr. 157) but alleges and testified that when the contract was signed it was blank. If the contract had been blank, which contention the jury found to be untrue (tr. 31) would not this be sufficient to constitute a ratification or adoption? Stuart acknowledges the contract was as agreed upon and that he would have taken the Murray Packard but for the alleged misrepresentations which the jury found were not made (tr. 31, 35).

Taylor also acknowledges the contract as follows (tr. 197):

“I could have kept that title after they brought it in. I could have did that. I could have kept that title and all it would have been is a contract. I wanted to do the right thing”.

The Court itself, recognized the contract and that defendant should recover judgment in the absence of fraud (tr. 199.). The jury found there was no fraud.

Next proposition: Was there fraud? The case was tried on the theory there was a contract which had been repudiated because of fraud (tr. 46, 47) and the Court so understood (tr. 199). The jury found no fraud (tr. 31, 35) and the Court so found and adopted and approved the findings of the jury on this point (tr. 35).

We submit the only answers that can be logically made to the propositions listed above are:

- a. Murray
- b. Kenneth B. Murray's Packard.
- c. Kenneth B. Murray's Packard.
- d. The total sum of \$2975.00 plus taxes for which he was to receive a credit of \$550.00 for his Hudson trade-in.
- e. Yes.
- f. No.

Turning more specifically to Appellants Statement of Points, we submit the Court was in error in finding that plaintiff was the owner of and entitled to the immediate possession of the Certificate of Title to the 1941 Hudson automobile. (Finding First, tr. 35) and that plaintiff was entitled to the possession of the Hudson automobile and for failing to find instead of said finding that the defendant was the owner of and entitled to the immediate possession of both the Hudson and its Certificate of Title.

Finding Second (tr. 34) the Court is in error for the reason set out above.

Finding Third (tr.34). The Court is in error in that the finding is incomplete and should have stated fully and fairly that Murray and Stuart entered into a written contract for the purchase and sale of the Murray Packard, which contract was fully executed and partly performed.

Finding Fourth (tr. 34) is subject to the observations above and further that this finding is squarely contrary to respondents' pleading, theory and evidence and a further reason the Court is in gross error, we feel, the intent of Stuart at the time of the signing of the certificate of title is wholly immaterial, since by his own testimony, he signed the certificate of title, which by inadvertence he failed to sign when it was delivered to Murray, AFTER STUART HAD BREACHED THE CONTRACT WITH MURRAY AND AFTER HE HAD PURCHASED A NEW PACKARD FROM TAYLOR. (tr. 168).

Finding Fifth (tr. 34). The only finding that could be made was that through the default of Stuart, Murray was required to put his Packard in storage at the instance of the Lockhart Finance Company until the deal with Stuart was straightened out (tr. 124-127) and then without notice to Murray of any kind, Taylor obtained title thereto by paying off the conditional sales con-

tract and resold the Murray Packard and retained the proceeds. At least there would have been no trouble with the finance company but for the breach of the contract by Stuart.

That notwithstanding the verdict of the jury and in disregard thereof, and while paying lip-service to the verdict of the jury in its Finding Five-A. (tr. 35) the Court found fraudulent representations were made Finding Sixth (tr. 36) which in fact deceived Stuart and that Stuart's breach of the contract was justified.

Appellant further submits that the Court's Finding Seven (tr. 37) is beyond any issue joined, beyond the evidence and squarely contrary to the evidence and contrary to any theory upon which said case was tried; is far beyond the prepared decree of Counsel for respondents as appears from the papers in the record itself (tr. 36-38) and is an issue and findings injected into this case by the Court itself in an attempt to justify its other erroneous Findings. We further submit that this finding is immaterial and contrary to law and is not sufficient upon which to base any legal conclusion or judgment.

In connection with the Court's Finding Eight (tr. 37) Appellant submits said finding is grossly contrary to the evidence in the case and respectfully requests counsel for respondent to point out any issue on their part tendered, where any demand or request was ever made or where there is a single syllable of testimony

in the record, either believable or unbelievable where any lack of tender of title played any part in this transaction or any alleged justification for Stuart's failure to abide by his contract. Failure or prospective failure of consideration is an affirmative defense and unless pleaded is waived. Rules of Civil Procedure, Rule 8C. But the Court recognizing the understanding of the parties, and explaining their actions found in said findings (tr. 37) "\*\*\*\*the most that Murray ever did in this respect was to make it possible for Mr. Stuart to obtain possession only\*\*\*\*\*" This finding, like finding Seven, is an attempt on the part of the Court to create and inject an issue the parties themselves never considered worthy of injection into the case and is another effort to justify or support its erroneous Findings, Conclusions and Judgment entered in this cause. The Court finds that Stuart thought he was dealing with Taylor and even if this was true, it would be immaterial for the reason that this is a written contract fully executed and partially performed and admitted by the only person who could complain, to be "alright" and found by the jury to have been fully completed when signed and now the Court, on its own initiative and in total disregard for the writing itself, attempts to avoid the writing containing the names of the specific contracting parties, the specific property and the specific price by raising issues and making findings upon which there are no pleadings, issue or evidence and which



Stuart seeks to avoid because of "fraud" found NOT to exist by the jury, and then the Court (tr. 201) notifies the parties that it will not be bound by the findings of the jury on the issues submitted unless they conform to the pleasure of the Court.

Even Counsel for Respondents recognized the effect and result of the Findings of the jury in his Motion to Set Aside Verdict and for Judgment and in his misconcieved Alternative Motion For a New Trial (tr. 32) which he withdrew after determining the intentions and "personality" (tr. 204) of the Court (tr. 210).

If the Court is wrong, and we submit it is, in making its Finding of Fact, then it follows that it is wrong in each of its Conclusions of Law. And again Conclusion One is a finding of fact which is in error for lack of evidence and the purported conclusion is contrary to law and is in disregard of the evidence and the written contract. Conclusions Two and Three are also in error for the reasons heretofore argued. Taylor never did become the owner of or entitled to the possession of the Hudson automobile but attempted to rest his claim upon the alleged weakness of the right and title of defendant which weakness the jury found not to exist.

#### Points B. C. and D.

Any judgment entered upon such erroneous Finding of Fact and Conclusions of law to back it up, is as erroneous as the Findings and Conclusions upon which it is based.

Under the evidence Appellant is entitled to judgment against Taylor for \$550.00 and costs for the reason the Hudson was sold by Taylor to one John Bybee before the trial of the case and wrecked by Mr. Bybee. This judgment could be entered on either defendant's First or Second Counter-claims. Defendant (Appellant) should be awarded judgment against Taylor for \$875.00 and costs on Appellant's third -Counter-claim as the value of Appellants interest in the Packard automobile obtained through the manipulations of Taylor.

Appellant should be awarded judgments against Third-Party defendant and Respondent Stuart for \$2975.00 less the \$2100.00 owing on the Murray Packard and less any judgment defendant recovered against Taylor. Defendant and Appellant is entitled to the stipulated \$150.00 attorney fee against Stuart for breach of his contract which occasioned the necessity of defendant's defending against Taylor's Claim and Delivery action. But in this connection we respectfully request this court to remand the cause to the District Court for re-determining the value of the services of counsel in the light of these proceedings.

Counsel fees and costs are legitimate items of damage in a case such as this where the breach of contract by one party thereunto which occasions litigation between the other party to the contract and a third party.

- 15 A. J. 552, parag. 144  
17 C. J. 809, parag. 135.  
1 Rest. Contracts, 531 Parag. 334.  
Rules of Civil Practice, Rule 8.

### CONCLUSIONS

In conclusion we submit that a reading of the testimony, a review of the pleadings, the issues drawn therefrom, the theory upon which the case was tried and submitted and the understanding of those issues by the Court as expressed by it, and of Counsel will convince this Court that the District Court was in error in its Finding of Fact, Conclusions of Law and the Judgment it entered and the case should be reversed and remanded with directions to enter judgment in favor of Appellant and against the Respondents and to leave the question of special damages to the Appellant open for further testimony.

Respectfully submitted,

MARRINER M. MORRISON

H. A. Sjostrom

*Attorneys for Appellant.*