

1953

# Thirteenth and Washington Streets Corporation v. Clarence C. Neslen, Elliott W. Evans, H. D. Lowry, and Marvin J. Bertoch : Brief on Petition for Rehearing

Utah Supreme Court

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# IN THE SUPREME COURT

## of the

# STATE OF UTAH

THIRTEENTH AND WASHINGTON  
STREETS CORPORATION, a California  
corporation,

*Plaintiff and Appellant,*

— vs. —

CLARENCE C. NESLEN, ELLIOTT W.  
EVANS, H. D. LOWRY, and MARVIN J.  
BERTOCH.

*Defendants and Respondents.*

Case No. 7875

BRIEF ON PETITION FOR REHEARING

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## INDEX

	Page
PETITION FOR REHEARING.....	1
STATEMENT OF FACTS.....	3
STATEMENT OF POINTS.....	3
ARGUMENT .....	4
CONCLUSION .....	14

## INDEX OF AUTHORITIES

### Cases

Barker v. Utah Oil Refining Company, 111 Utah 308, 178 Pac. 2d 386.....	2, 3
Dickason v. Dickason, 18 N.E. 2d 479 at 483.....	12
Fooch v. Bates, 18 Ida. 374, 110 Pac. 265.....	10
Jessen v. Peterson, Nelson & Co., 18 Cal. Ap. 345, 123 Pac. 219.....	10

### Treatises

Bancroft's Code Pleading, Practice and Remedies, Vol. 3 (10 Year Supplement) Page 2214.....	5
(10 Year Supplement) Page 2214, Sec. 1686.....	9
Corpus Juris, Vol. 64 Page 1276; Trial, Sec. 1154.....	5

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Case No. 7875

#### PETITION FOR REHEARING

COMES NOW, Plaintiff and Appellant Thirteenth and Washington Streets Corporation, a California Corporation, and respectfully petitions this Court for a rehearing in accordance with Rule 76, Utah Rules of Civil Procedure, alleging that this court has erred in the following respects:

1. The Findings of Fact of the trial court do not constitute either expressly or by implication ultimate facts to justify the legal conclusion of constructive eviction and this court erred in holding that such a legal conclusion was here justified.

2. The trial court did make express findings of ultimate fact as to heat, light, janitor and elevator service, which do not meet the standards set by this court in its opinion in this case to justify its legal conclusion of constructive eviction and this court erred in so holding.

3. Even if one assumes the absence of an express finding of ultimate fact by the trial court in this case, such ultimate fact cannot be presumed when it does not "necessarily follow," and such ultimate fact does not necessarily follow in the facts in this case and this court erred in so holding.

4. The remaining defects other than heat, light, janitor and elevator service found by the trial court do not expressly meet the standard of substantial deprivation required by this court in its opinion in this case and this ultimate fact cannot be presumed and this court erred in so doing.

5. *Barker vs. Utah Oil Refining Company*, 111 Utah 308, 178 Pac. 2d 386 is not authority for the absence of a volitional element in the definition of constructive eviction in that the statement therein was mere dicta unsupported by the very authorities cited in the quotation used, and is against the weight of authority in the United States.

Respectfully submitted,

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## BRIEF ON PETITION FOR REHEARING

### STATEMENT OF FACTS

This case involves an action for rent to which Defendants answered with the defense of constructive eviction. Plaintiff appealed from a judgment in favor of Defendants, and this court affirmed the trial court.

Appellant's original brief presents detailed arguments on numerous questions which it is respectfully submitted are not discussed by this court in its opinion. This is especially true with regard to the question of the necessary volitional element to constitute a constructive eviction. Appellant, in its original brief, conceded that one must be held to intend the natural consequences of his actions, but argued this was not applicable to this case. The undisputed fact that the court's quotation in the Utah Oil Case (*Barker v. Utah Oil Refining Company*, 111 Utah 308, 178 Pac. 2d 386) was mere dicta, constituting a quotation from Black's Law Dictionary which was unsupported by the various authorities therein, was not discussed.

However, this Petition is not filed to rehash already argued questions. It is confined to this court's discussion of the lower court's findings of fact. If error exists here it is, of course, unnecessary to proceed further.

### STATEMENT OF POINTS

I. THE FINDINGS OF FACT OF THE TRIAL COURT DO NOT CONSTITUTE, EITHER EXPRESSLY OR BY IMPLICATION, ULTIMATE FACTS TO JUSTIFY THE LEGAL CONCLUSION OF CONSTRUCTIVE EVICTION.

A. *The Trial Court did make express findings of*

*ultimate fact as to heat, light, janitor and elevator service which do not meet the standard set by this court to justify its legal conclusion of constructive eviction.*

B. *Assuming the absence of an express finding of ultimate fact, this cannot be presumed when it does not "necessarily follow," and this court erred in so doing.*

C. *The remaining defects found do not expressly meet the standard of substantial deprivation required by this court, and this ultimate fact cannot be presumed.*

D. *Conclusion.*

## ARGUMENT

I. THE FINDINGS OF FACT OF THE TRIAL COURT DO NOT CONSTITUTE, EITHER EXPRESSLY OR BY IMPLICATION, ULTIMATE FACTS TO JUSTIFY THE LEGAL CONCLUSION OF CONSTRUCTIVE EVICTION.

A. *The Trial Court did make express findings of ultimate fact as to heat, light, janitor and elevator service which do not meet the standard set by this court to justify its legal conclusion of constructive eviction.*

The essential question in this law suit is whether the acts of the landlord resulted in that quantum of deprivation of beneficial enjoyment to the tenants so as to lead, as a legal conclusion, to a finding that they had been constructively evicted.

This court has held that in the light of the specific lease provisions here (viz., that Plaintiff shall be "sole judge" of the amount of heat, light, janitor and elevator service to be furnished) that these defects must be flagrant and unreasonable in order to find as a conclusion of law that Defendants were constructively evicted. Failure of heat, light, janitor and elevator service are

clearly the preponderant objections raised by Defendants.

“Flagrant and unreasonable” defects are thus the ultimate facts from which the trial court could legally conclude that Defendants were entitled to relief. We have now set our standard in this case, which the above-named defects must meet, for Defendants to prevail. Do they meet this?

It is undisputed that the trial court made no such ultimate findings. However, this court felt that the finding of such ultimate fact would not be necessary where such ultimate fact “must necessarily follow” from the probative facts found by the trial court.

Appellants have no quarrel with this rule in the abstract, but they earnestly contend that this court erred in applying it to this case.

Evidentiary of probative facts and ultimate facts have been distinguished as follows:

“. . . generally speaking, the distinction is that the findings of evidentiary facts relate to evidence of the existence of some other fact, and those of ultimate fact to the final resulting effect reached by logical reasoning from the evidentiary facts.”

64 Corpus Juris, 1276; Trial, Sec. 1154.

It is only necessary, and indeed is preferred, that the trial court restrict its findings of fact to ultimate facts.

3 Bancroft’s Code Pleading, Practice and Remedies, 10 Year Supplement, page 2214.



It is the exceptional case where a court, in its findings of fact, adopted as drafted by Defendants, would make express findings as to the probative facts but leave the highly critical ultimate fact to be presumed from these, when the correlation between the probative facts and the ultimate fact of flagrant and unreasonable defect is the very issue before the court.

Appellant contends that the trial court did in fact make findings of ultimate fact in this case. These ultimate facts, however, were not of the quantum of defect set by this court and urged by Appellant as necessary to lead to a legal conclusion of constructive eviction; therefore, the trial court erred and should, from these findings of ultimate fact, have entered judgment for Plaintiff.

A review of the findings as to express defects makes Appellant's contention clearer.

Finding VII states that heating problems occurred frequently and during the cold months, resulting in the wearing of heavy winter overclothing (probative facts). The finding recites that the heat was thus "inadequate" (ultimate fact).

Finding VIII recites that the janitor service of the premises was "inadequate" (ultimate fact).

Finding IX recites that restrooms were not clean, properly ventilated or adequately supplied with soap, towels or toilet paper (probative facts), and thus were "inadequate" (ultimate fact).

Finding X recites that janitor service of the hall, stairways and lobby was "inadequate" (ultimate fact).

Finding XI recites that a barber shop and shoe shine

stand were permitted to be established (probative facts), that these were offensive in sight (ultimate fact), detrimental to Defendants' practice (ultimate fact) and disagreeable (ultimate fact).

Finding XII recites that Plaintiff failed to furnish elevator service after 8:00 P.M. (probative fact), which greatly inconvenienced Defendants (ultimate fact), and that their clients were frequently obliged to come to Defendants' offices up unlighted latrine-like stairs (probative fact) to the detriment of Defendants' professional relationships (ultimate fact).

Finding XIII recites that Plaintiff closed the building on Sundays and holidays and after 8:00 P.M. (probative fact), to the inconvenience of Defendants (ultimate fact), and to the detriment of their professional relationship (ultimate fact).

Findings as to "inadequacy", "detrimental relationships", and "inconvenience" are only found as a result of certain more basic probative or evidentiary facts, the body of which leads to this factual conclusion. Such facts cannot be probative or evidentiary. They must thus either be ultimate or, as this court seemed to construe them, they must be of some intermediate, previously unclassified nature between the two, from which this court held, one must "necessarily" presume the ultimate fact of flagrant and unreasonable defects.

To find probative facts and "intermediate" facts and legal conclusions, but to omit the one essential factual finding and to leave this to be implied is a most unorthodox approach for any trial court. One cannot so

radically interpret a court's findings merely on the basis of the standard rule that they should interpret inferences most favorably to Respondents.

The only natural interpretation of these findings is that the trial court, and Defendants' counsel, followed orthodox procedure; that they drafted and found certain probative or evidentiary facts (a practice optional with trial courts) which led the court to their ultimate facts (viz., inadequacy, detrimental relationships and inconvenience). The sole question then before this court is — are these facts a finding of flagrant and unreasonable deficiency? This is question of semantics. It is clear that "inadequacy", "inconvenience" or "detrimental relationships" alone or together cannot equal flagrant unreasonableness.

Appellant does not so argue to escape judgment on a technicality. It so argues because it believes that this problem clearly illustrates the trial court's error. Appellant has admitted that this was not the best of office buildings. Appellant will even admit *arguendo* the court's findings that the defects were "inadequate", resulting in "inconvenience" and "detrimental cliental relationships". But the law says, and this court concurs, that this is not enough. The trial court erred in holding that it was.

B. *Assuming the absence of an express finding of ultimate fact, this cannot be presumed when it does not "necessarily follow," and this court erred in so doing.*

Even if one assumed that the trial court's findings as to "inadequacy", etc. were not ultimate facts but of some

intermediate nature, the fact then must be faced that one must, if one can, presume what the ultimate facts are. One must here discover a finding of flagrant unreasonableness by presumption.

This court attempts this in several ways which, it is respectfully urged, are subject to error.

First, this court stated

“From the fact that the court found the issue in favor of Defendants and accepted their evidence, it appears that the testimony with respect to the unsatisfactory restroom facilities, a lack of enough heat, and the unlighted stairway was such that the deficiencies in the services involved could only have been flagrant and unreasonable.”

In this way, the findings are allowed to lift themselves by their own boot straps. The question to be decided is whether the trial court erred in concluding from its ultimate fact that constructive eviction resulted. If the ultimate fact showed flagrant unreasonableness, there was no error. If it did not, there was error. One cannot, as this court did, thus say that as the trial court found that a constructive eviction occurred, that the ultimate fact must have supported it. This begging the very question in hand. As Bancroft has said,

“Conclusions of law cannot take the place of ultimate facts.”

3 Bancroft Code Pleading, Practice and Remedies, 10 Year Supplement, page 2214, Sec. 1686.

Secondly, this court relies on the well established rule that:

“Where findings as to probative facts are made from which must necessarily follow the existence of a required ultimate fact, the failure to expressly formulate a finding as to the ultimate fact is not prejudicial error.”

Yet the very question before us is whether the probative facts (and the “intermediate” facts) “must necessarily follow”. In some cases, this is an easy matter. Thus, in one of the cases cited by this court in support of this rule (*Jessen v. Peterson, Nelson & Co.*, 18 Cal Ap. 345, 123 Pac. 219), it was a mere mathematical calculation from probative facts. The trial court had found that Plaintiff had expended One Hundred Twenty-Two and 50/100 Dollars (\$122.50) in medical bills. The conclusion of law gave judgment for One Thousand Dollars (\$1,000.00). The ultimate fact as to the recovery for personal injury was determined, although not expressly found, by subtracting One Hundred Twenty-Two and 50/100 Dollars (\$122.50) from One Thousand Dollars (\$1,000.00).

The ultimate fact in this case cannot be found by subtraction or by any other inference. The record shows no substantial dispute as to the probative facts. They probably could have been reached by stipulation. But the crux of this law suit is the characterization of the ultimate fact—it is of crucial importance. And there is clearly nothing which “necessarily” (*Fooch v. Bates*, 18 Ida. 374, 110 Pac. 265) or “conclusively” (*Jessen v. Peterson, et al*, supra) makes the ultimate fact of flagrant unreasonableness result from either “intermediate” facts of “inadequacy”, etc. or of probative facts as to shoe



shine stands, elevator service, etc. This is the very question which determines this law suit.

If it did "necessarily follow" from these various facts that the ultimate fact would be presumed, then this court would in effect be stating that in the case of a misplaced shoe shine stand, or faulty elevator service or the like, that these as a matter of law constitute a constructive eviction. It is felt that this is not what this court intended—rather than such an inflexible rule, its intention was to leave the determination of such ultimate facts to the discretion of the trial court which had heard and weighed the evidence at first hand.

When the omitted ultimate fact is equivocal or not entirely certain from the facts found, the trial court has a duty to resolve such doubt by a direct finding of the essential ultimate fact. This court cannot fulfill that duty for it.

This argument was admirably stated by an Indiana Court.

"... As applied to the instant case, the rule may be stated to be that if the finding of fact is of such a character as to involve necessarily the existence of the essential ultimate fact (not expressly found), then the failure to find the omitted ultimate fact may be immaterial. But when the existence of the omitted ultimate fact (not found) may reasonably be doubted from the facts found, or is equivocal and not entirely certain, then the trial court must resolve such doubt or equivocation or uncertainty by a direct finding of the essential ultimate fact. When this rule of law is considered with the rule that on appeal all facts not embraced in the special finding of

facts will be regarded as not true by the party having the burden of that issue and will be equivalent to finding against the party having such burden, then it becomes apparent that in the instant case the appellee must fail . . .”

*Dickason v. Dickason*, 18 NE 2d 479 at 483.

As a third approach to the problem this court held that the cumulative effect of the probative facts would sustain a presumption of a finding of the necessary ultimate fact although each of the probative facts in itself might not be enough. Thus, this court said,

“It is true as plaintiff alleges that the trial court made no specific finding that, in the terms just discussed, the failures were flagrant, wanton or wholly unreasonable; the fact remains that he found they were inadequate, and that, coupled with the other deficiencies complained of, they constituted a constructive eviction . . . It is not our problem to evaluate separately the conditions complained of. It may well be that various of them taken alone would not be of sufficient importance to create a substantial impairment of the use and enjoyment of the premises. However, it is a cumulative effect of them all which must be considered in determining the soundness of the judgment.”

This approach, it is submitted, is merely an adjunct to the “necessarily follow” rule discussed above. It states that although *one* such probative fact may not lead necessarily or even possibly to the required ultimate fact, several taken together might. With this, Appellant cannot quarrel; but this does not mean that such cumulative facts *must* lead to the required ultimate fact.

Whether they do or do not is, again, the very problem which it is up to the trial court to decide.

*C. The remaining defects found do not expressly meet the standard of substantial deprivation required by this court, and this ultimate fact cannot be presumed.*

Assuming that the “sole judge” provisions of the lease only raise the quantum required for the ultimate fact to flagrant unreasonableness in the case of heat, light, janitor and elevator service, then the other objections are held to an admittedly lower standard. By this Court’s opinion, this standard requires “substantial” deprivation.

Examining the other objections we see that the court found that they were “offensive”, “detrimental to defendants’ practice” and “disagreeable” (Findings XI and XIII), and not first class (Finding VI). Do these findings by themselves meet the legal quantum necessary? They must stand alone, because according to Appellant’s contention, the findings as to heat, light, janitor and elevator service do not meet the necessary standard to justify the court’s legal conclusion.

Again, it is clear semantically that “offensive”, “detrimental” and “disagreeable” are not automatically equated with substantial deprivation of enjoyment. To uphold the lower court, this court must once again classify the court’s findings as “intermediate” facts and presume the ultimate fact. This approach is only valid if such ultimate fact would “necessarily” follow. The debatability of this is clearly shown by the fact that the court chose to include other facts as to heat, light, jani-



tor and elevator service to cumulatively buttress its finding; and further, in the case of the locked door, by the lack of emphasis placed on this by Defendants themselves, the objection being absent from the objections listed in Defendants' notice of vacating and in their interrogatory answers. (In any event, this latter objection most likely was merely a question of contractual interpretation.)

#### D. *Conclusion.*

For the same reasons outlined earlier, it makes no difference whether all of the court's findings of fact must meet the higher quantum of deprivation or only "substantial" deprivation. The trial court has not expressly met either test, and this question being the crucial one in this case and not necessarily following from the facts so found, it is submitted that this court erred in upholding the trial court's conclusion of law based on such findings of fact.

This is the first time this court has had an opportunity to review the substantive problem of constructive eviction. It is clear that this doctrine was the result of a need for a more equitable technique for the adjustment of landlord and tenant relationships. At this date, our economic picture is such that it is a lessor's market, and he has been fairly successful in dictating his terms. New construction has created more space and the day may soon be near when it will be the tenant who will have superior economic bargaining power. This time has already arrived in many cities. In any event, Utah landlords and tenants must look to this case alone for guid-

ance. At this juncture they find that a lease as rigidly worded as one might imagine, made and entered into with tenants who were trained by their very profession in the mysteries of the law of contracts, may be broken merely upon the finding of the trial court that the landlord's services had been inadequate and resulted in inconvenience and detriment to their business. Sympathy might dictate such relief in this case, but it will only make hard law which Appellant is confident this court will have to distinguish upon another turn of the economic wheel.

Respectfully submitted,

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