

1953

Kenneth Rasmussen and Faun Rasmussen v. Neal G. Davis and Dora S. Davis : Brief of Plaintiffs and Appellants

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Rasmussen v. Davis*, No. 7987 (Utah Supreme Court, 1953).

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IN THE SUPREME COURT
of the
STATE OF UTAH

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**KENNETH RASMUSSEN AND FAUN
RASMUSSEN,**

Plaintiffs and Appellants,

— vs. —

NEAL G. DAVIS AND DORA S. DAVIS,

Defendants and Respondents.

No. 4218

BRIEF OF PLAINTIFFS AND APPELLANTS

APPEALED FROM THE DISTRICT COURT OF
SANPETE COUNTY, UTAH
HON. L. LELAND LARSON, *Judge*

DON V. TIBBS

DILWORTH WOOLLEY

Attorneys for Respondents

FILED **DON MACK DALTON**
DELIA HANSEN
Attorneys for Plaintiffs and
Appellants

APR 23 1953

Clerk, Supreme Court, Utah.

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IN THE SUPREME COURT

of the

STATE OF UTAH

KENNETH RASMUSSEN AND FAUN
RASMUSSEN,

Plaintiffs and Appellants,

— vs. —

NEAL G. DAVIS AND DORA S. DAVIS,

Defendants and Respondents.

No. 4218

BRIEF OF PLAINTIFFS AND APPELLANTS

STATEMENT OF CASE

Plaintiffs brought this action against the defendants to recover damages from the defendants on account of the alleged false and fraudulent representation made by the defendants to the plaintiffs in connection with a contract wherein and whereby the plaintiffs agreed to purchase and the defendants agreed to sell some tracts of land in Sanpete County, Utah, with the improvements thereon, together with some shares of water right, farming ma-

chinery, twelve head of cows, five calves and twenty sheep.

In such action the plaintiffs also sought to have the court declare null and void a provision of the contract which in effect provided that the defendants may, upon default in performance of any of the obligations of the contract by the plaintiffs, rescind the contract and retain whatever had been paid thereon as liquidated damages. The basis upon which plaintiffs alleged such provision of the contract is null and void is that the same constituted a penalty and as such is against public policy (R. 1-18).

To the complaint the defendants filed their answer and three counterclaims. In their answer they admitted the execution of the contract set out in plaintiffs' complaint, but denied generally the other allegations thereof.

In their counterclaims, defendants alleged that plaintiffs had failed to pay an installment of \$5000.00 that became due on January 1st, 1952, the interest on the amount remaining unpaid on the contract and taxes and insurance premium, the amount of which is not alleged.

Defendants also alleged that plaintiffs had committed waste on the property, had sold some of the personal property and that because of such breach of the contract defendants had been damaged in excess of \$8000.00. Defendants also alleged in their counterclaim that they rescinded and cancelled the contract set out in plaintiffs' complaint and retained the down payment of \$8000.00 as

liquidated damages and demanded possession of the property mentioned in the contract and for \$1000.00 attorney's fee.

By the second counterclaim defendants sought to foreclose a mortgage for the payment of \$5000.00 due on January 2, 1952 and for interest on the money not paid, for \$1000.00 attorney's fee and for insurance premiums and taxes in an amount not alleged.

In a third counterclaim, defendants sought a judgment against the plaintiffs for various sums of money for a gas stove, a couch, a water heater, chickens, feed for livestock and other items in the total amount of \$1805.00 together with interest thereon at 6% per annum from March 15, 1951 (Tr. 12 to 19).

Plaintiffs answered the counterclaims of the defendants in which answers plaintiffs attacked as void a number of the provisions of the contract between plaintiffs and defendants which were set out and relied upon by the defendants for the relief they sought. Plaintiffs admitted that they sold some of the farming equipment for which they had no use and that they also sold some calves and lambs in which defendants had no title or right. Plaintiffs in their answer to the counterclaim consented to a rescission of the contract between them and the defendants and consented that the defendants be permitted to retain sufficient of the down payment of \$8000.00 to pay for any property that may not be returned to the defendants and for the reasonable rental value of the prop-

erty mentioned in the contract between the parties herein during the time they had the possession thereof.

In their answer to the third counterclaim, the plaintiffs admitted that they agreed to pay defendants \$180.00 for a gas stove, a couch and a water heater, but denied generally the other allegations of the counterclaim (R. 21 to 26).

Before the case came on for trial upon the original pleadings, the plaintiffs were, by the court, granted leave to file, and they did file an amended and supplemental complaint. In such pleading, plaintiffs alleged generally the same matters that were alleged in their original pleadings. They further alleged that after the original pleadings were filed an oral agreement was entered into whereby the contract between plaintiffs and defendants was cancelled and rescinded; that the property which plaintiffs were to receive and were given possession of under the contract was returned to the defendants, except the pieces of farming machinery that had been sold by the plaintiffs and that in lieu of such machinery, the plaintiffs delivered to and there was accepted by the defendants some hay and sheep.

In the amended and supplemental complaint it is further alleged that by the oral agreement so entered into, it was agreed that the defendant, Neal G. Davis, should retain sufficient of the \$8000.00 to reimburse defendant, Neal G. Davis, for the rental of the premises during the time plaintiffs had possession thereof and any

damages that might have been done to said premises and personal property while plaintiffs were in possession of the same, and that plaintiff, Kenneth Rasmussen, would get in contact with his attorneys in an attempt to get an agreement with the defendants as to the amount of the \$8000.00 that was paid down on the contract that should be retained by the defendants as rental and damages.

It is further alleged in the amended and supplemental complaint that plaintiffs and defendants have been unable to reach an agreement as to the amount that should be retained by the defendants and that \$2000.00 is ample to reimburse the defendants for the rental of the real and personal property mentioned in the contract and for any damages that might have been done to such property during the time the same was in possession of the plaintiff.

To the amended and supplemental complaint the defendants answered. In their answer, they set up three defenses:

In the first defense they allege that the contract between them and the plaintiffs had been rescinded by the defendants because of the breach thereof by the plaintiffs and that the \$8000.00 was a reasonable compensation for such breach and that plaintiffs agreed that defendants should retain the same.

The second and third defenses are in substance the same as the first (R. 39 to 41).

Plaintiffs replied to the answer of the defendants in

which reply they deny that they agreed that defendants were to retain the \$8000.00.

It was upon the issues raised by the amended and supplemental complaint of the plaintiffs, the answer of the defendants thereto, and plaintiffs' reply to the answer that the cause came on for trial (R. 43 to 44).

When the case was called for trial, plaintiffs asked leave of the court to amend their amended and supplemental complaint in conformity with a copy of such motion theretofore served upon the defendants. By such proposed amendment plaintiffs sought to charge the defendants with having, prior to the execution of the contract between the parties herein, falsely represented that the heating of the home on the premises described in the contract between plaintiffs and defendants cost only a little more than to heat the same with coal while in fact such costs of heating said house with oil was substantially six times as much as the cost of heating the same with coal (R. 45).

Defendants' counsel objected to permitting the amendment to be made. The court took the motion under advisement (R. 3-4).

The evidence offered and received in this case, particularly the cross-examination of the plaintiffs is quite lengthy when viewed in light of the limited issues raised by the pleadings. In view of such fact we shall confine ourselves in this brief to directing the attention of the court to only those portions of the evidence which we

deem necessary to an understanding and a proper determination of the matters wherein appellants claim the trial court erred in rendering the judgment appealed from. There is no controversy concerning these facts.

On March 15, 1951 the defendants as sellers and the plaintiffs as buyers entered into a written contract whereby the defendants agreed to sell and the plaintiffs agreed to buy the land, water stock, farming equipment, cattle and sheep described in the contract, a copy of which is attached to the original complaint and another copy is attached to the supplemental complaint and in each case marked Exhibit A. The contract was received in evidence as plaintiffs' Exhibit A (R. 6 and 54).

The total price agreed upon for the property was \$32,000.00 of which \$8000.00 was paid in cash and the plaintiffs gave a Chattel Mortgage to defendant, Neal G. Davis, for the sum of \$5000.00 as security for the payment of the installment of \$5000.00 which, by the terms of the contract, became due on January 1, 1952. The court so found (R. 73).

The contract of sale and purchase contained among others the following provisions:

"The Buyers may take immediate possession of said property and they may continue in possession of said property while this contract remains in good standing and until a breach or default by the Buyers, but immediately upon the happening of any breach or default by the Buyers or at any time thereafter (without prejudice on

account of Sellers' failure to act or any action taken for a previous default) the Sellers shall have the right to rescind this contract and to terminate the same and forfeit all of the right of the Buyers herein in and to said property and to hold and retain all payments received from the Buyers and all improvements upon said property and all replacements of said personal property and livestock as liquidated damages, (which damages are hereby declared to be the damages the Sellers shall suffer in the event of such breach or default) etc." Exhibit A.

It also appears without controversy that plaintiffs went into possession of the property described in the contract immediately after its execution and remained in possession thereof until on or about February 15, 1952 when the contract was rescinded and the property described therein returned to the defendants (Tr. 22).

From time to time during their occupancy of the property described in the contract here involved, the plaintiffs complained to the defendants about the misrepresentations made by the defendants to the plaintiffs about the property covered by the contract and particularly about the property being free from weeds, (Tr. 8-18-94-98-99-152) free from alkali, (Tr. 15-18-83-93) its ability to furnish feed for all the milch cows and sheep (Tr. 13-15-19), the cost of heating the home with oil (Tr. 139-140-177).

There were a number of conversations and attempts to settle the controversy between plaintiffs and defend-

ants prior to the time the contract was rescinded (Tr. 103-106-113-114-121).

During the time plaintiffs were in possession of the premises which they agreed to purchase, they sold some of the farm equipment for which they had no use. To pay for the equipment, plaintiff, Kenneth Rasmussen, gave defendant, Neal G. Davis, some hay and sheep which were accepted by Davis in payment for the machinery sold (Tr. 31-43-108-116). It is in effect so alleged in defendants' answer to the amended and supplemental complaint (R. 40). It was so found by the trial court (R. 72).

As bearing on the reasonable value of the use and occupancy of the property described in the contract between plaintiffs and defendants during the eleven months that plaintiffs were in possession of the property, the evidence shows:

That plaintiff, Kenneth Rasmussen, levelled about 20 acres of the land described in the contract at a cost of \$750.00 of which amount plaintiffs paid \$350.00 and the Federal Government paid \$400.00 (Tr. 13). That in addition to the hay raised on the Davis property, plaintiff purchased grain to feed the dairy cows in the amount of \$1300.00 (Tr. 20). That he raised about 500 bushels of wheat (Tr. 11) that there was about 15 tons of hay raised on the Davis land (Tr. 8) which was only about one-fifth of the hay fed to the dairy cows that was raised on the Davis property (Tr. 21); that plaintiffs sold wool

from the sheep and received therefor about \$400.00 (Tr. 32). Plaintiff sold some wild hay for about \$60.00 (Tr. 38). Mrs. Faun Rasmussen, one of the plaintiffs, who handled the money derived from the dairy cows testified that she had gone over the amount of money that was received for the milk sold from the dairy cows and that during five and one-half months they received \$2200.00 which was an average of the money received from that source (Tr. 170). That about two-thirds of the milk produced and sold came from cows that were owned by the plaintiffs before they entered into the contract with the defendants. The plaintiff, Kenneth Rasmussen, testified that the usual rental paid for land in Sanpete County is that the tenant gets one-half of the crop for operating the land and the land-owner gets the other one-half and the tenant furnishes the equipment; that the witness did not know of any custom or practice as to the division of the profits in operating a dairy.

The plaintiff, Kenneth Rasmussen repeatedly testified that it was agreed that the contract should be rescinded, but that he and defendant, Neal G. Davis, could not and did not agree upon who should have the down payment of \$8000.00; that it was finally agreed that the matter should be left to the attorneys for the respective parties to adjust, if they were able to adjust the same. (Tr. 25, 42, 100, 112, 113, 114, 117). Mr. Rasmussen further testified that he did not think he could settle the case without the consent of his attorneys. (Tr. 118).

During the course of the examination of the plaintiff, Mrs. Rasmussen, the following occurred:

“Q. Where did you next learn of what, if anything, had been done toward a settlement of this dispute?

A. That evening.

Q. And who did you learn that from?

A. Kenneth.

Q. What did he tell you?

A. He told me that he had given Neal Davis the sheep, three ton of hay in replacement for the machinery we sold. That we had straightened that matter up and we were going to give them possession of the place, but at no time did I consent—

MR. WOOLLEY: Just a minute, don't go on.

THE COURT: Don't say anything else.

Q. Was anything said by your husband as to the matter of the \$8000.00?

A. Yes sir.

THE COURT: In his presence?

THE COURT: If there is no objection, I will let her testify, if there is, I won't.

MR. WOOLLEY: We object. She is talking to her husband. This is a conversation she had immediately after he returned from talking with Mr. Davis, on or about the 13th day of February, 1952, when apparently some arrangement had

been made between Mr. Davis and Mr. Rasmussen.

THE COURT: Well, she just testified that her husband told her he had traded the twenty-one head of sheep and the three tons of hay for the machinery that he had taken. Now he again has asked her what else the husband told her. If you gentlemen want to let it in, it is all right with me.

MR. WOOLLEY: If I had any idea what her answer would be, I don't know whether we would object or not. We think it is incompetent.

THE COURT: It is clearly hearsay." (Tr. 185).

In the absence of the jury, counsel for the plaintiff stated that plaintiff offered to show, if the plaintiff were permitted to testify, she would testify that her husband stated to her, at or just prior to the time they moved out of the Davis home that he had settled the matter with respect to the property and machinery and had turned the farm over to them, but the \$8000.00 should be settled by the attorneys or disposed of in further litigation. To which Mr. Woolley stated: "Let the record show that counsel for the defendants objects to that offer." Mrs. Rasmussen further testified that at or prior to the time that she moved off the Davis property, which is involved in this action, she did not know or have any information that the \$8000.00 was to be retained by Mr. Davis. (Tr. 185).

It will be seen from the pleading of the parties that there is no controversy about the contract between the

plaintiffs and defendants having been rescinded. The plaintiff alleges that the terms of the rescission were that the disposition to be made of the down payment was to be left to the attorneys to agree upon, or if they could not agree, then to be determined by the courts. (R. 31). On the other hand the defendants allege that by the terms of the rescission of the contract the defendants were to retain the down payment of \$8000.00. (R. 40).

Such being the principal issue, much of the evidence brought out by the cross-examination is wholly foreign to such issue, and we have purposely confined our reference to that portion of the evidence which bears upon that issue together with such evidence as may shed light on the reasonable rental value of the property described in the contract during the time the plaintiffs were in possession thereof. In light of the fact that the defendants moved for judgment at the conclusion of plaintiffs evidence and the further fact that such motion was granted, the value of the use and occupation of the property described in the contract between plaintiffs and defendants seems to have been ignored by the trial court. It is from the judgment entered by the trial court at the conclusion of plaintiffs evidence that the plaintiffs prosecute this appeal.

SPECIFICATION OF POINTS RELIED UPON FOR A REVERSAL OF THE JUDGMENT APPEAL- ED FROM:

The errors upon which the appellants rely for the reversal of the judgment appealed from are:

POINT ONE

THE TRIAL COURT ERRED IN REJECTING THE EVIDENCE OFFERED BY THE WITNESS FAUN RASMUSSEN, ONE OF THE PLAINTIFFS HEREIN, TO THE EFFECT THAT HER HUSBAND, THE OTHER PLAINTIFF, TOLD HER JUST BEFORE THEY VACATED THE PREMISES THAT THE ATTORNEYS WERE TO DETERMINE WHO SHOULD GET THE \$8000.00 AND IF THEY COULD NOT AGREE, IT WOULD BE DETERMINED BY THE COURT. (Tr. 185).

POINT TWO

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. ONE WHERE IT FOUND THAT THERE IS NO QUESTION OF FRAUD OR MISREPRESENTATION IN THIS CASE WHICH SHOULD BE SUBMITTED TO THE JURY AND THAT THE CONTRACT MADE BETWEEN THE PLAINTIFFS AND DEFENDANTS IN THIS CASE IS A VALID ENFORCEABLE CONTRACT. (R. 72).

POINT THREE

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. THREE TO THE EFFECT THAT THE ONLY QUESTION INVOLVED IS WHETHER THE DOWN PAYMENT OF \$8000.00 MAY PROPERLY BE CONSIDERED AS LIQUIDATED DAMAGES OR WHETHER THE SAME SHOULD BE SET ASIDE BY THIS COURT AND LEFT TO THE JURY TO DECIDE. (R. 73).

POINT FOUR

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. FOUR TO THE EFFECT THAT THE FORFEITURE CLAUSE INVOLVING THE \$8000.00 DOWN PAYMENT IS FAIR AND JUST UNDER THE CONTRACT; THAT PLAINTIFFS TERMINATED SAID CONTRACT OF THEIR OWN

FREE WILL AND THAT THE \$8000.00 DOWN PAYMENT PROVIDED FOR IN THE CONTRACT SHOULD BE AND HEREBY IS FORFEITED BY PLAINTIFFS TO DEFENDANTS AS LIQUIDATED DAMAGES, WHICH, IN THE OPINION OF THE COURT, ELIMINATES ANY QUESTION OF DAMAGES TO BE DETERMINED BY THE JURY. (R. 73).

POINT FIVE

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS FAILED TO PAY THEIR PART OF THE TAXES ON THE PROPERTY DESCRIBED IN THE CONTRACT AND FAILED TO PAY THE FIRE INSURANCE PREMIUM UPON THE PROPERTY.

POINT SIX

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. SIX WHEREIN IT FOUND THAT THE PARTIES HAVE DISCHARGED AND TERMINATED ALL THEIR RIGHTS INVOLVED IN THIS ACTION.

POINT SEVEN

THE TRIAL COURT ERRED IN MAKING ITS CONCLUSIONS OF LAW TO THE EFFECT THAT THE ACTION SHOULD BE DISMISSED AND DEFENDANTS SHOULD BE AWARDED THEIR COSTS.

POINT EIGHT

THE TRIAL COURT ERRED IN ENTERING JUDGMENT THAT THE ACTION BE DISMISSED AND THAT DEFENDANTS SHOULD BE AWARDED COSTS AGAINST THE PLAINTIFFS.

ARGUMENT

This is an action at law. When it was commenced the action was for fraud. Thereafter the parties entered

into an agreement whereby the contract was rescinded. In their amended and supplemental complaint, plaintiffs alleged that by the terms of the rescission, the attorneys for the parties were to agree upon the division of the \$8000.00 and if they were unable to agree, the same should be determined by the court. The defendants alleged that by the terms of the rescission the defendants were to retain the down payment of \$8000.00. It is, of course, elementary that, in the absence of an agreement to the contrary, a rescission carries with it the obligation of each of the parties to restore to the other that which has been received. 12 Am. Jur. page 1031, Sec. 451 where it is said:

“The very idea of rescinding a contract implies that what has been parted with shall be restored on both sides. Releasing one party from his part of the agreement and excusing him from making the other party whole does not seem agreeable to reason or justice. Hence the general rule is that a party who wishes to rescind an agreement must place the opposite party in status quo. An attempted restoration of the status quo is an essential part of rescission of a contract.”

Numerous cases from state and federal courts are collected in foot notes to the text. The law in such particular is so well settled that we refrain from a further discussion thereof. Under plaintiffs pleading and evidence the question to be determined is: What was the amount that plaintiffs were to pay for the use and

occupancy of the property described in the contract between the plaintiffs and defendants? That was a question for the jury.

POINT ONE

THE TRIAL COURT ERRED IN REJECTING THE EVIDENCE OFFERED BY THE WITNESS FAUN RASMUSSEN, ONE OF THE PLAINTIFFS HEREIN, TO THE EFFECT THAT HER HUSBAND, THE OTHER PLAINTIFF, TOLD HER JUST BEFORE THEY VACATED THE PREMISES THAT THE ATTORNEYS WERE TO DETERMINE WHO SHOULD GET THE \$8000.00 AND IF THEY COULD NOT AGREE, IT WOULD BE DETERMINED BY THE COURT. (Tr. 185).

Before the contract between the plaintiffs and defendants could be rescinded by agreement of the parties it was necessary that both of the plaintiffs agree to such rescission. Since married women were emancipated, they have the same right to enter into a contract as do their husbands and their rights are entitled to the same protection as their husband's. Indeed under the evidence in this case it was Mrs. Rasmussen who was required to carry the principal burden of carrying out the contract. During the winter season, Mr. Rasmussen was away from home and Mrs. Rasmussen had charge of operating the dairy that was conducted on the farm. (Tr. 22). So far as appears, Mrs. Rasmussen did not agree to release any interest the plaintiffs had in the down payment of \$8000.00. By their counterclaim the defendants sought a rescission of the contract, which if granted, would entitle the Rasmussens to such portion

of the \$8000.00 down payment as remained after the defendants were made whole. So far as appears Mrs. Rasmussen never authorized her husband to release her right in the down payment of \$8000.00. In this case much of the business connected with entering into the contract for the purchase of the property therein mentioned was conducted by Mr. Rasmussen. Such fact may, in a measure, tend to show that Mrs. Rasmussen is bound by what he did, unless she timely made objection to what he did. It was to rebut any such claim that we offered to show what Mr. Rasmussen told his wife about what was to be done with the \$8000.00 just before the Rasmussens vacated the property they were buying from the Davises.

There are a number of well recognized exceptions to the rule excluding hearsay evidence. Among such exceptions it is thus stated in 31 C.J.S., page 988, Sec. 239:

“Where the fact that a particular statement was made is of itself a relevant fact regardless of the truth or falsity of such statement, the statement is admissible in evidence as an independently relevant fact.”

The doctrine so announced is the holding of this court in the case of *Parry v. Harris*, 93 Utah 317; 72 Pac. (2d) 1044. Applying such doctrine to the case in hand, it is of the utmost importance to know the circumstances under which Mrs. Rasmussen consented to move from the Davis property. If she left the property because

she was told that part of the down payment of \$8000.00 was to be repaid to her and her husband, that is one thing. If she had reason to believe and did believe that she was giving up all claim to the down payment of \$8000.00, it is quite another.

POINT TWO

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. ONE WHERE IT FOUND THAT THERE IS NO QUESTION OF FRAUD OR MISREPRESENTATION IN THIS CASE WHICH SHOULD BE SUBMITTED TO THE JURY AND THAT THE CONTRACT MADE BETWEEN THE PLAINTIFFS AND DEFENDANTS IN THIS CASE IS A VALID ENFORCEABLE CONTRACT. (R. 72).

To call the foregoing language a finding may well be a misnomer. It can more properly be called a Conclusion of Law. If it is meant by the first part of the foregoing finding that it is not of controlling importance whether fraud was or was not perpetrated by the defendants upon the plaintiffs in the course of the negotiations which resulted in the execution of the contract, we have no quarrel with such a statement. In light of the fact that the contract was rescinded so far as the defendants and plaintiff, Kenneth Rasmussen, are concerned, the results would probably be the same, that is to say, a valid rescission could be had whether fraud or misrepresentation was or was not perpetrated. That was the reason that plaintiffs made no attempt to fully develop the elements that are necessary to constitute actionable fraud. If it is meant by such so-called finding that no fraud or misrepresentation was shown, then

we cannot agree with such finding. The evidence to which we have heretofore directed the attention of the court shows fraud and misrepresentation although no attempt was made to show the extent of the damage sustained by the plaintiffs because when a contract is rescinded the matter of damages is no longer a proper subject matter of inquiry as the rights of the parties are, when a rescission is had, to be placed in status quo. We shall defer our discussion of the legal effect of the contract until we take up the Fourth Point where the same question is raised.

POINT THREE

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. THREE TO THE EFFECT THAT THE ONLY QUESTION INVOLVED IS WHETHER THE DOWN PAYMENT OF \$8000.00 MAY PROPERLY BE CONSIDERED AS LIQUIDATED DAMAGES OR WHETHER THE SAME SHOULD BE SET ASIDE BY THIS COURT AND LEFT TO THE JURY TO DECIDE. (R. 73).

We have not and do not now contend that the question of the rescission of the contract should be left to the jury. As we understand the law the question of whether a contract should or should not be rescinded is an equitable matter. If, as the pleadings and the evidence which was received at the trial show, the contract was rescinded, then there is no occasion for either the court or the jury to pass upon the question of a rescission. However, in this case, the controversy, so far as we can ascertain from the pleadings, is not whether there was a rescission, but what were the terms thereof. When,

as here, the parties are agreed that a rescission was had, but they are apparently not agreed as to the terms of the oral agreement, it would seem clearly to be the province of the jury to determine what were the terms thereof the same as it is the province of the jury to find facts that are in dispute in other oral agreements.

POINT FOUR

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. FOUR TO THE EFFECT THAT THE FORFEITURE CLAUSE INVOLVING THE \$8000.00 DOWN PAYMENT IS FAIR AND JUST UNDER THE CONTRACT; THAT PLAINTIFFS TERMINATED SAID CONTRACT OF THEIR OWN FREE WILL AND THAT THE \$8000.00 DOWN PAYMENT PROVIDED FOR IN THE CONTRACT SHOULD BE AND HEREBY IS FORFEITED BY PLAINTIFFS TO DEFENDANTS AS LIQUIDATED DAMAGES, WHICH, IN THE OPINION OF THE COURT, ELIMINATES ANY QUESTION OF DAMAGES TO BE DETERMINED BY THE JURY. (R. 73).

It will be seen that the so-called finding which is attacked by Point Four is in part a finding of facts, in part a conclusion of law, in part a judgment and in part a mere expression of the opinion of the court.

Both the plaintiffs and defendants by their pleadings allege that the contract was rescinded. They differ only as to the terms of the rescission. If the plaintiffs' allegations about the terms of the rescission had been established by the evidence, that is one thing, and if the allegations of the defendants as to the terms of the rescission had been established by any evidence, which it was not, that is quite another.

Apparently the so-called finding numbered four above quoted was intended to put the stamp of approval on the contract here involved. Even if the provisions of that contract dealing with the matter of forfeiture were held to be valid contrary to our contention, that would not solve the controversy between the parties to this action.

In this case the evidence shows that Mrs. Rasmussen was never informed of the claim made by the defendants that the down payment of \$8000.00 was to be forfeited at or prior to the time the Rasmussens vacated the Davis property. If the purpose of finding No. 4 is intended to preclude her from recovering back a part of the \$8000.00 down payment because the defendants had a right to and did declare a forfeiture of the \$8000.00, then we take issue with such a claim. It will be noted that by the terms of the contract the defendants may declare a forfeiture not only of the \$8000.00 down payment, but also of the \$5000.00 note secured by a mortgage on cows belonging to the plaintiff if plaintiffs were guilty of any breach. The provisions of paragraph 6 of the contract is about as all embracing and harsh as can be drawn, except possibly under its provisions the plaintiffs could not be deprived of the custody of their children, if they breached the contract.

It will be seen that not only did the defendants receive the \$8000.00 down payment, but they also received a \$5000.00 note and mortgage. Thus they had a down payment equivalent to \$13,000.00 which, under the terms

of the contract, they could retain if the plaintiffs breached their contract in any particular such as a failure to pay the premium on a fire insurance policy or the taxes. Even the defendants seem to have had the semblance of a conscience when they concluded that it would be asking for too much to not only retain the down payment of \$8000.00, but also the \$5000.00 note and mortgage. If as we contend the provision of the contract dealing with forfeiture was invalid when executed, its invalidity could not be cured by the defendants foregoing an attempt to retain all that the contract provided might be retained. In light of the recent decision of this court in the case of *Perkins et al. v. Spencer et al.*, 243 Pac. 446 (not yet in Utah Reports) and the other cases from this jurisdiction there cited, we shall not cite other cases or authorities. As we read that case the provisions therein contained dealing with a forfeiture are indeed mild as compared with the provisions touching a forfeiture in this case.

POINT FIVE

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS FAILED TO PAY THEIR PART OF THE TAXES ON THE PROPERTY DESCRIBED IN THE CONTRACT AND FAILED TO PAY THE FIRE INSURANCE PREMIUM UPON THE PROPERTY.

All that need be said about this finding is that nowhere does it appear what part of the taxes the plaintiffs were to pay or the amount of taxes, or that plaintiffs refused to pay the same, and the record is

absolutely devoid of any evidence as to fire insurance premiums.

POINT SIX

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. SIX WHEREIN IT FOUND THAT THE PARTIES HAVE DISCHARGED AND TERMINATED ALL THEIR RIGHTS INVOLVED IN THIS ACTION.

Such finding No. 6 is not only without support in the evidence, but it is contrary to the uncontradicted testimony of plaintiff, Kenneth Rasmussen, to which we have heretofore referred in which he repeatedly testified that he did not agree that the defendants should retain the down payment of \$8000.00.

POINT SEVEN

THE TRIAL COURT ERRED IN MAKING ITS CONCLUSIONS OF LAW TO THE EFFECT THAT THE ACTION SHOULD BE DISMISSED AND DEFENDANTS SHOULD BE AWARDED THEIR COSTS.

The matters we have heretofore discussed apply to Point Seven, and we shall not enlarge upon what is there said.

POINT EIGHT

THE TRIAL COURT ERRED IN ENTERING JUDGMENT THAT THE ACTION BE DISMISSED AND THAT DEFENDANTS SHOULD BE AWARDED COSTS AGAINST THE PLAINTIFFS.

If the court erred in the particulars heretofore discussed, it follows that the plaintiffs are entitled to prevail on this assigned error. The trial court not only

invaded the province of the jury in taking this case from it, but likewise erred in the particulars heretofore discussed.

It is submitted that the judgment should be reversed and the cause remanded to the court below for trial with a jury, and that appellants should be awarded their costs.

Respectfully submitted,

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Appellants*