

1954

John C. Cutler Association v. DeJay Stores, Inc. : Brief of Plaintiff and Appellant

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN C. CUTLER ASSOCIATION,
a corporation,

Plaintiff and Appellant,

— vs. —

DEJAY STORES, INC., a foreign
corporation,

Defendant and Respondent.

FILED
MAY 13 1954

Supreme Court, Utah
Case No.

8163

Appeal From District Court of
Salt Lake County
Hon. A. H. Ellett, Judge

BRIEF OF PLAINTIFF AND APPELLANT

CLARENCE M. BECK,
ELIAS HANSEN,
Attorneys for Appellant.

*Received Service of the above Brief
day of May, 1954.*

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IN THE SUPREME COURT
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STATE OF UTAH

JOHN C. CUTLER ASSOCIATION,
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Defendant and Respondent.

Case No.
8163

STATEMENT OF CASE

The plaintiff brought this action to recover from the defendant rental of and damages to leased premises which plaintiff claims is owing by the defendant on account of a lease of property located at 36 South Main Street, Salt Lake City, Utah.

The lease is dated June 30, 1951 and contains, among others the following provisions:

“That in consideration of the covenants herein contained on the part of the Lessee to be observed, payed and performed, the lessor doth hereby demise and lease unto the said lessee the ground floor and basement of that certain building commonly known as 36 South Main Street, Salt Lake

City, Utah, erected on the following described property, to-wit:

Commencing 32.84 feet North of the Southeast corner of Lot 8, Block 76, Plat "A", S.L.C. Survey; thence North 25.27 feet; thence West 100 feet; thence South 25.27 feet; thence East 100 feet to place of beginning, together with two rooms located upstairs in the rear of said premises, approximately 20 x 40 feet, occupied by former tenant as alteration room and office, excepting however, Bradley-Badger shall have ordinary and usual right of egress and ingress to elevator through North room, all in Salt Lake City and County, State of Utah, said premises to be used and occupied by the lessee continuously as a wearing apparel store during the term hereof.

"Yielding and paying rent, therefore, at the rate of Five (5%) percent of lessee's annual gross sales, provided however, it is expressly agreed that in no event shall a minimum rent of less than FOUR HUNDRED (\$400.00) DOLLARS per month to be paid to lessor. The said Five (5%) percent for the year 1951 to be paid lessor within Thirty (30) days immediately subsequent to December 1951. The said Five (5%) percent for each succeeding year of the term of this lease shall be paid in cash within Thirty (30) days after December 31, of each successive year of the term hereof, but in no event shall the amount of rent to be paid to lessor per month be less than a minimum of FOUR HUNDRED (\$400.00) DOLLARS, and it is agreed that the said lessee will pay such monthly minimum rental of FOUR HUNDRED (\$400.00) DOLLARS in advance during the term hereof, beginning on the 1st day of

August, 1951, and FOUR HUNDRED (\$400.00) DOLLARS on the first day of each successive month thereafter during the term hereof; except lessee will pay upon the execution hereof the sum of FOUR HUNDRED (\$400.00) DOLLARS which is a payment on and toward the rent for the last or final month of the term hereof; all rents to be payable at the office of the said lessor in Salt Lake City, Utah.

“Said rents, whether due or to become due, shall be a perpetual lien on any and all goods, wares and merchandise, and fixtures which may at any time during the continuance of this lease be contained in the premises, except such goods and merchandise as are sold in the usual course of retail trade . . .

“that all improvements, betterments, changes, additions, changes or alterations shall at the expiration of this lease be and remain with the said premises and belong to the said lessor . . .

“That the said lessee will not assign, underlet or part with possession with the whole or any part of the demised premises without first obtaining the written consent of the lessor.

“That the said lessor, at all reasonable times, may enter to view the said premises and to make repairs which the lessor may see fit to make or to show the premises to persons who may wish to buy and that during three months next preceeding the expiration of the term it will permit the lessor, if lessor so desires, to place and keep upon the front of the building a notice that the premises are for rent or sale.

“That at the expiration of the said term, the lessee will peaceably yield up to lessor or those

having its estate therein the premises and all additions made upon the same in good repair in all respects, reasonable use and wear and damages by fires or other unavoidable casualties excepted, as the same now are or may be put during the term hereof.

“That no assent, express or implied by the lessor to any breach of any of the lessee’s covenants shall be deemed to be a waiver of any succeeding breach of the same covenant.

“It is further agreed that lessee shall pay any costs, charges and reasonable attorney’s fees that may be incurred because of the default, non-performance or violation of any provisions of this lease agreement on the part of the lessee.

“If the said lessee shall give notice of its desire to lease the said premises for an additional period on or before the 1st day of August, 1955, then and in that event, the said lessee shall have the right of leasing the premises for an additional period of Five (5) years upon the terms and conditions that are mutually agreed to by the parties on or before the 1st day of August, 1956.”

To the lease is attached two riders, one reading:

“The lessee shall have the right to sublet these premises to any wholly owned corporation, providing it will remain responsible for the performance of all the terms and conditions of this lease.”

and

“Heat is to be supplied by the landlords.”

These riders were consented to by the president of the plaintiff corporation, but so far as appears, not by the directors thereof (R. 5 to 11 and Exhibit P-1).

While the lease does not expressly state the date of its expiration, no reasonable conclusion is permissible other than it was to continue for a period of five years. It will be noted that it is expressly provided in the lease that if an additional period is desired, notice thereof must be given before August 1, 1955 and that any new lease must be executed on or before August 1, 1956, which is five years after the beginning of the time that rent is made payable on the lease here involved.

Moreover, in light of the fact that the lessee went to considerable expense to prepare the leased property for occupancy and moved its fixtures and stock of goods into the building and set up business therein, the only reasonable construction that can be given to the lease agreement is that a reasonable time was intended which would make the period of the lease extend beyond the time for which the plaintiff is seeking to recover rental. Such view is further borne out by the evidence to which we shall presently refer.

When the case was called for trial, the plaintiff was granted leave to file a supplement and amendment to its Complaint. By such supplement and amendment it is alleged:

“that the defendant is and at all times herein alleged has been a corporation duly organized and existing under the laws of the State of Delaware. That the defendant corporation is not authorized and never has been authorized to do business in the State of Utah.” (R. 13)

At the trial it was admitted by the defendant that such allegation is true (Tr. 56 & 57). (The pages are those of the Court reporter which will be used throughout this brief.)

It is further alleged in the supplement and amendment to the Complaint that the plaintiff was compelled to pay and did pay a commission of \$1725.00 for securing a new tenant for the premises (R. 13 and 14). The evidence shows without conflict that such is the fact, and that the fee so paid is the usual and customary charge (Tr. 18).

The evidence shows, without conflict, these additional facts: That after the defendant began conducting its business on the leased premises, the amount of its business was not satisfactory and was not sufficient to require the payment of rental in excess of the minimum of \$400.00 per month required to be paid by the terms of the lease. Because of such fact, the defendant determined to vacate the premises upon which it held a lease from the plaintiff.

That on about February 15, 1952 a conference was held by and between Mr. Harold Cutler, the president of the plaintiff corporation, and Mr. Cantor, the local manager of the defendant corporation, and Mr. C. Frances Solomon, Jr., a real estate broker, who at that time was representing the defendant corporation, in an attempt to secure someone satisfactory to the plaintiff corporation to take over the lease on the premises involved in this litigation (Tr. 81-83). In that meeting, Mr. Cutler

was informed that the defendant had purchased some fixtures from the Salt Lake Knit which defendant wished to remove to the new location, but that the defendant in no way intended to discontinue recognizing its liability to make the payments as provided for in its lease and that Mr. Cutler offered to cooperate in an attempt to get a new lessee (Tr. 83-84).

That the witness Mr. Solomon attempted to get tenants to lease the property of the plaintiff at 36 South Main Street; that he received a written offer from Wally's Flower Shop, the same being Exhibit 1, which was received in evidence (Tr. 85).

The offer of Wally's Flower Shop is dated March 5, 1952 and by which, among other matters, one Wallace Toma stated he would pay a rental of \$400.00 per month, commencing April 1, 1952 and extending to July 31, 1956 for the entire property to consist of the front retail store together with the entire basement and a portion of a building on Richards Street, which is connected to the Main Street property by a bridge which now has two sets of washrooms. The offer of Mr. Toma is attached to the deposition of Mr. Solomon.

Mr. Solomon received an offer from the Martha Washington Candies of Utah whereby it offered to lease for a period of four years at a monthly rental of \$250.00 to begin when alterations have been completed and the store room ready for occupancy. The offer further provided "that the present front windows and present front door is to be remodeled providing for a depth of approxi-

mately five feet back from the front property line, a lock is to be provided on the front door of the room to be occupied by us and is to be partitioned ready for decorating and a drop ceiling is to be installed. In addition to the store room, it is our understanding a small storage room will be provided in rear, together with one wash room, including toilet and wash basin . . ." (See Def. Exhibit 4, attached to the deposition of Mr. Solomon.)

By an instrument dated July 15, 1952, Bradley-Badger Company, By Briant G. Badger, wrote to Mr. Solomon as follows:

"We are desirous of securing space in the Old Salt Lake Knit Location and are prepared to offer \$100.00 per month for a portion of the ground floor to be agreed upon, plus the basement and the space at the rear including the over-pass. We must ask, however, that you act upon this offer within one week from this date, and advise us." (See Def. Ex. No. 2, attached to deposition of Mr. Solomon.)

On July 16, 1952, Mr. Solomon received an offer from one, T. L. Wakefield for and on behalf of the Acousticon of Southern Illinois in which an offer was made to lease one-half of the front store space, approximately fifty feet, for a rental of \$250.00 per month and to begin when the alterations had been completed, and he could occupy the premises. The offer further recites that he understood the DeJay Stores Co. should take care of and pay for the alterations and that the lease should contain permission to sublet the premises. (See

Ex. 3 attached to the deposition of Mr. C. Francis Solomon.)

The plaintiff corporation did not accept the offer, but indicated that they might approve a lease at \$650.00 per month, but nothing was done about the counter offer, except that Bradley-Badger Company stated that they would increase their offer by \$25.00 per month. The plaintiff rejected the offer (Tr. 87 to 90). That Mr. Solomon made no further offer on behalf of the defendant to secure a lease of the premises here involved.

That in the fall of 1952, the friends of Mr. Glade, who was a candidate for Mayor, occupied the premises for 13 days and paid for the use thereof \$130.00. That the plaintiff was deprived of rent for ten months, less the \$130.00, before it was able to secure a satisfactory tenant (Tr. 11). Mr. Harold Cutler, president of plaintiff, testified that the defendant, without permission, took out everything that could be removed, including a good part of \$1500.00 worth of alterations which was put in by the Millard Construction Company. That the alterations that were removed was mostly shelving that was nailed to the walls and the plaster was chipped out. That there was about 6 or 8 mirrors removed from around the posts (Tr. 12). That stain glass was removed of the value of \$250.00. The glass was in the balcony at the back of the building (Tr. 14).

The witness was asked as to how much it cost to have the work of repairing the interior of the building done, to which an objection was made and sustained (Tr.

14). That the witness sent to New York, Los Angeles, and Missouri and put ads in the paper in an attempt to get a ladies apparel store in the building. That he finally secured the services of Mr. Solomon, a real estate broker, to get someone to lease the premises and paid him \$1,-725.00 for his service, which is the usual and customary commission." (Tr. 16-17).

That prior to the lease to the defendant, the premises had been leased to Salt Lake Knitting Stores for about ten years (Tr. 19). That the defendant purchased the fixtures in the store from the Salt Lake Knit (Tr. 19-20). Such fixtures are listed in Exhibit D-5, which was received in evidence.

Mr. Harold Cutler, the president of the plaintiff company, further testified that he did not tell Mr. Cantor that the defendant might remove the fixtures and merchandise from the premises, but he said he would cooperate with the defendant (Tr. 21). That it was up to the defendant to get another tenant if they were to move out. That the defendant moved out between April 20 and May 1, 1952 (Tr. 22). That the witness had a number of conferences with a Mr. Coulam about leasing the premises to the Western Pacific Railroad Company, but the parties were unable to agree on the terms of the lease (Tr. 25-27). Mr. Cutler further testified that the plaintiff did not say that it would give a lease to Bradley-Badger, the Acousticon Company of Illinois and Martha Washington for \$650.00 per month. That at the time it was attempted to get a new tenant for the premises it was estimated it

would cost about \$4000.00 to remodel the premises so that they could be occupied by the three tenants, and the De-Jay people said they would pay for such expense if a lease were made, but the plaintiff rejected the offer (Tr. 29).

On or about July 25, 1952, a notice, Exhibit D-2, was served upon Mr. Cutler by the Constable, who also gave Mr. Cutler the keys to the building (Tr. 29-30). That the witness placed "for rent" signs on the store after defendant moved out and permitted a political organization to occupy the premises for a period of 13 days at \$10.00 per day (Tr. 30). That it was so occupied in the latter part of October and the first part of November. That these acts were done without the consent of the defendant. That Exhibit D-3 is a fair picture of the premises after the same were vacated including the notices "for rent" in the windows (Tr. 31). The exhibit was received in evidence (Tr. 31).

In about February 1953, the witness received an offer of \$500.00 per month from the Utah Photo for rental of the property, but the offer was rejected (Tr. 32-33). The defendant did the renovating and painting when it moved it; the shelving was used to hold the merchandise; that the light fixtures were suspended by a metal bar (Tr. 33). That the bars were not put in by the defendant (Tr. 34). That the stained glass was in the premises when the defendant moved in and were apparently put in by the Salt Lake Knit Company; that Bradley-Badger stored some merchandise in the store, but no rent was paid by

them (Tr. 35). That the plaintiff was finally able to negotiate a lease with the Bradley-Badger Company (Tr. 35). Their rent started on May 1, 1953, but they were given possession of the premises on about March 1 to 15, 1953 in order to put the premises in a condition for occupancy. They are paying \$575.00 per month (Tr. 36). That Bradley-Badger stored only a small amount of obsolete stuff on the premises towards the back of the building during the last few months before they took a lease; that the storage was temporary. It was in and out again, and no charges were made (Tr. 37). That the offers made to rent the premises were changed so often that he does not recall of presenting all of them to the Board of Directors. That the three offers of Martha Washington, et al, were rejected because they were engaged in a different line of business; that there would be two stores, and Bradley-Badger taking the back part which would have required another partition. There were several drawbacks to that (Tr. 38). That toilets would have to be put in the basement, that they would have to dig doorways down and put in steps and they were hollering at the expense they would have had there; that the defendant was engaged in the business of selling ladies and men's clothes, Martha Washington was in the candy business, Bradley-Badger was in the appliance business and the other concern was engaged in selling hearing aids. That while the witness had several conversations with Mr. Coulam, who represented the railroad company, they were unable to agree on a lease (Tr. 39-40). That the plaintiff was not willing to lease to the Japanese florist

known as Wally's Flower Shop, because they were looking for the best deal they could make and the florist would not make any thing definite (Tr. 40). The Utah Photo also wanted three tenants in the building. That the credit of the Photo people was not satisfactory (Tr. 41). That at first the key to the building was sent to the witness by registered mail, but he refused to accept it because he knew what it was, and later the key with the notice was delivered to the witness by the constable (Tr. 42-43). That the only notice the witness had that the defendant would not be responsible for the payment of the rent is that contained in the notice marked Exhibit D-2 (Tr. 43-47). That during the time the defendant was occupying the premises at 36 South Main Street, Bradley-Badger was a tenant of plaintiff's premises immediately to the north (Tr. 45). That the renovations made by Bradley-Badger were necessary in order to lease the premises (Tr. 40-41).

Mr. John C. Jenkins was called by the plaintiff and testified that he is and at the time involved in this controversy was a director of the plaintiff corporation (Tr. 46-47). That the defendant vacated the premises at 36 South Main Street about April 19 or 20, 1952. That when the defendant vacated the premises the plaster was torn from the walls, there were holes in the linoleum; that the walls would require plastering and redecorating, the fixtures were torn entirely from the ceiling, leaving holes therein (Tr. 49). That the plaintiff company was at all times desirous of getting a ladies apparel shop as a lessee of the premises owned by the plaintiff; it had been so

used for the past 15 years and as a clothing store for the past 45 years before it was leased to Bradley-Badger (Tr. 51). That the reasons why the Board of Directors of plaintiff corporation were not willing to accept the offers made to lease the premises were that they wished the same to be let for a ladies apparel shop, some of the offers were made by people who did not have sufficient credit, and the Board of Directors did not want to divide the building into several stores (Tr. 52). That as an accommodation to Bradley-Badger some furniture was stored in the back of the building for a short time (Tr. 53). That at no time did the plaintiff company agree to rent the premises to Martha Washington Candy, et al for a rental of \$650.00 per month.

Harold Cutler was recalled and asked whether or not he had a bid to repair the building after it was vacated, to which question objection was made that it was incompetent, irrelevant, immaterial and hearsay (Tr. 58-59). The objection to the proffered evidence was sustained on the ground that it is hearsay. The plaintiff offered to show that it would cost \$850.00 to make the necessary repairs (Tr. 58-61). The foregoing summary is taken from the testimony of Mr. Solomon, one of the defendant's witnesses and Harold Cutler, the president and general manager of the plaintiff corporation who testified as plaintiff's witnesses. Some of the testimony of John C. Jenkins is also abstracted. All of the material facts are established by the evidence abstracted. There is no substantial conflict in the evidence except that defendant offered evidence which tended to show that Mr.

Cutler consented to the defendant's vacating the premises (Tr. 84) which Mr. Cutler denied (Tr. 11, 21 and 119).

The plaintiff and appellant relies upon the following points and errors for the relief which it seeks :

POINT ONE

THE TRIAL COURT ERRED IN SUSTAINING OBJECTIONS TO THE FOLLOWING QUESTIONS ASKED OF HAROLD CUTLER, THE PRESIDENT OF THE PLAINTIFF CORPORATION: DO YOU KNOW HOW MUCH IT COST TO HAVE THAT WORK DONE? WHAT WAS THE EXTENT OF THAT BID? (THE BID TO REPAIR THE BUILDING AFTER IT WAS VACATED BY DEFENDANT.) (TR. 58-59)

POINT TWO

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF ACCEPTED AND TOOK POSSESSION OF SAID DEMISED PREMISES IN SEPTEMBER, 1952.

POINT THREE

THE TRIAL COURT ERRED IN FAILING TO FIND THAT DEFENDANT AGREED TO REMAIN OBLIGATED TO PAY THE RENT ON THE DEMISED PREMISES UNTIL A NEW LEASE COULD BE SECURED.

POINT FOUR

THE TRIAL COURT ERRED IN REFUSING AND FAILING TO AWARD PLAINTIFF DAMAGES IN THE SUM OF \$1725.00 AND INTEREST THEREON AT 6% PER ANNUM FROM AND AFTER FEBRUARY 4, 1954, THAT BEING THE AMOUNT THAT PLAINTIFF WAS COMPELLED TO PAY AND DID PAY AS A REAL ESTATE BROKER'S COMMISSION TO GET A NEW TENANT FOR THE PROPERTY INVOLVED IN THIS LITIGATION (TR. 15-16).

POINT FIVE

THE TRIAL COURT ERRED IN FAILING AND REFUSING TO AWARD PLAINTIFF JUDGMENT AGAINST THE DEFENDANT FOR RENTAL IN THE FOLLOWING AMOUNTS: \$3870.00, TOGETHER WITH INTEREST AT 6% PER ANNUM ON \$400.00 FROM AND AFTER JULY 1, 1952; ON \$400.00 FROM AND AFTER AUGUST 1, 1952; ON \$400.00 FROM AND AFTER SEPTEMBER 1, 1952; ON \$400.00 FROM AND AFTER OCTOBER 1, 1952; ON \$270.00 FROM AND AFTER NOVEMBER 1, 1952; ON \$400.00 FROM AND AFTER DECEMBER 1, 1952; ON \$400.00 FROM AND AFTER JANUARY 1, 1953; ON \$400.00 FROM AND AFTER FEBRUARY 1, 1953; ON \$400.00 FROM AND AFTER MARCH 1, 1953; ON \$400.00 FROM AND AFTER APRIL 1, 1953.

POINT SIX

THE TRIAL COURT ERRED IN FAILING AND REFUSING TO AWARD PLAINTIFF JUDGMENT AGAINST THE DEFENDANT FOR \$600.00 AS AND FOR ATTORNEYS FEES IN THIS ACTION.

ARGUMENT

Some of the errors concerning which the plaintiff and appellant complains are in part due to the fact that the Court below failed to give effect to our statute relating to the results of a foreign corporation doing business in this state, without being authorized to do so.

If we approach the question which plaintiff and appellant claim requires a judgment for substantial additional amounts against the defendant with such statutes in mind, we believe considerable light will be shed upon the questions presented for review.

U.C.A. 1953 16-8-3 which was in effect at the time the transactions here involved were had provides:

“Any foreign corporation doing business within this state and failing to comply with the provisions of Section 16-8-1 and 16-8-2 shall not be entitled to the benefit of the law of this state relating to corporations, and shall not sue, prosecute or maintain any action, suit, counterclaim, cross complaint or proceeding in any of the courts of this state on any claim, interest, or demand arising or growing out of or founded on any tort occurring, or of any contract, agreement or transaction made or entered into, in this state by such corporation, or by its assignors or by any person from, through, or under whom it derives its interest or title or any part thereof, and shall not take, acquire, or hold title, possession or ownership of property, real, personal or mixed, within this state; and every contract, agreement and transaction whatsoever made or entered into by or on behalf of any such corporation within this state or to be executed or performed within this state shall be wholly void on behalf of such corporation and its assignees and every person deriving any interest or title therefrom, but shall be valid and enforceable against such corporation, assignee and person; and any person acting as agent of a foreign corporation which shall neglect or refuse to comply with the foregoing provisions is guilty of a misdemeanor and shall be personally liable on any and all contracts made in this state by him for or on behalf of such corporation during the time that it shall be so in default; provided, that this section shall not be held to apply to persons acting as agents for foreign corporations for a special or temporary purpose, or for a purpose

not within the ordinary business of such corporation, nor shall it apply to attorneys at law as such."

The foregoing provision has been before the courts of this state and has been construed by this court in the following cases: *Rio Grande Western Ry. Co. v. Tulleride Power Transmission Co.*, 23 Utah 22; 63 Pac. 995 where it is held (under a law not nearly as rigid as the present law) that a foreign corporation has no power to engage in business in this state or to acquire any water rights under the laws of this state, and is not in a position to question the rights of one who claims such right.

In the case of *Dunn v. Utah Serum Co.*, 65 Utah 527; 238 Pac. 245, it is held that a note and mortgage held by a foreign corporation executed by a domestic corporation to secure a loan made by a foreign corporation while the foreign corporation was doing business in the state without complying with 16-8-1 was void and such foreign corporation could not set off amount of loan against rent owing by it to domestic corporation.

In the case of *First Nat'l. Bank of Price v. Parker*, 57 U. 290; 194 Pac. 661, it is held that a bona fide holder for value without notice could not enforce a note payable to bearer and delivered to a non-complying foreign corporation, notwithstanding provisions of negotiable instrument law.

In the case of *Franklin Bldg. and Loan Co. v. Peppard*, 97 U. 483; 93 Pac. 2(d) 925, it is held that a non-complying foreign corporation could not impress any lien

to recover taxes on property upon which it held a mortgage.

We shall presently have occasion to revert to the principles of law announced in the foregoing cases in connection with our argument in connection with the above enumerated points, Two, Four, Five and Six.

POINT ONE

THE TRIAL COURT ERRED IN SUSTAINING OBJECTIONS TO THE FOLLOWING QUESTIONS ASKED OF HAROLD CUTLER, THE PRESIDENT OF THE PLAINTIFF CORPORATION: DO YOU KNOW HOW MUCH IT COST TO HAVE THAT WORK DONE? WHAT WAS THE EXTENT OF THAT BID? (THE BID TO REPAIR THE BUILDING AFTER IT WAS VACATED BY DEFENDANT.) (Tr. 58-59)

Harold G. Cutler was the President and General Manager of the plaintiff corporation and as such had the supervision of the premises which were rented to the defendant company (Tr. 8). After having testified to the condition in which the walls of the premises were in when the defendant vacated the premises, he was asked if he received a bid for the repairing of the building to which he responded that he received one bid for the painting. He was then asked "What was the extent, amount of that bid?" Objection was made to the questioning that it was incompetent, irrelevant, immaterial, eliciting hearsay testimony (Tr. 58). After some argument, the Court sustained the objection on the ground that it is hearsay. Counsel for the plaintiff offered to show that the bid was for \$850.00. The law relating to

the manner of establishing the value of service is thus stated in *Jones Commentories of Evidence*, 2 ed Vol. 2, page 1325.

“The proper method is to procure evidence of the price which a competent man would charge for that particular service or has charged for similar service.”

Numerous cases will be found collected in foot notes to the text which support or tend to support the same. Among such cases are: *Warden et al v. Hutchinson*, 69 Cal. app. 291; 231 Pac. 563. *Atlas Development Co. v. National Security Co.*, 190 Cal. 329; 212 Pac. 196.

POINT TWO

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF ACCEPTED AND TOOK POSSESSION OF SAID DEMISED PREMISES IN SEPTEMBER, 1952.

If it is meant by the foregoing finding that the plaintiff accepted the property free from the obligation of the defendant to pay the rent up to the time a satisfactory new tenant could be obtained, then such a finding is wholly without support in the evidence. Defendant's evidence shows without conflict these facts: That when the conversation was had between Mr. Cutler, Mr. Cantor and Mr. Solomon, who at the time was representing the defendant company, “Mr. Cantor advised Mr. Cutler that they (the defendant) in no way intended to discontinue recognizing their responsibility on the lease and the payments would be made in accordance with the terms of the lease. Mr. Cutler offered to cooperate in trying

to help us (defendant) secure another tenant, and Mr. Cantor expressed the thought that our company would have an opportunity of finding a new tenant for 36 South Main Street." (Tr. 83)

"The conclusion of the visit that we had was that it was satisfactory with the Cutlers for DeJay Stores to move to the new location and Mr. Harold Cutler expressed a willingness to help us cooperate in seeing if we could find another tenant, a sub-tenant, a sublease of the property and I repeat that I had no impression that DeJay Stores in any way considered that they were getting out of their lease; they had every intention of taking the responsibility of making the payments and so advised Mr. Cutler." (Tr. 84-85)

Mr. Cutler testified that at no time did the defendant corporation or any of its officers, except by this notice (Exhibit D-2) ever tell (him) that they were surrendering up possession of this property (Tr. 43). He further testified that he did not tell Mr. Solomon and Mr. Cantor that the defendant could remove its merchandise and fixtures from the premises at 36 South Main Street, but did say he would cooperate with them (Tr. 21).

The evidence further shows that the defendant corporation first sent the key by registered mail to Mr. Cutler, the president of the plaintiff corporation, who refused to accept the same and later they had a constable serve the notice (Exhibit D-2) and the key upon Mr. Cutler (Tr. 29 and 42). Thus the evidence shows without

conflict that the defendant company abandoned the premises and the plaintiff was compelled to take possession thereof to preserve the same. If the premises were not to be and remain vacant, the plaintiff, of necessity, was required to lease the same. It may be inquired what else could the plaintiff do except take possession of the property and lease the same?

POINT THREE

THE TRIAL COURT ERRED IN FAILING TO FIND THAT DEFENDANT AGREED TO REMAIN OBLIGATED TO PAY THE RENT ON THE DEMISED PREMISES UNTIL A NEW LEASE COULD BE SECURED.

We have heretofore in this brief directed the attention of the court to the testimony of defendant's witness, Mr. Solomon, who was employed by the defendant to secure a new tenant for the premises which had been vacated by the defendant. His testimony upon that matter will be found in the Tr. 81 and 84-85. All of the evidence is of similar import.

POINT FOUR

THE TRIAL COURT ERRED IN REFUSING AND FAILING TO AWARD PLAINTIFF DAMAGES IN THE SUM OF \$1725.00 AND INTEREST THEREON AT 6% PER ANNUM FROM AND AFTER FEBRUARY 4, 1954, THAT BEING THE AMOUNT THAT PLAINTIFF WAS COMPELLED TO PAY AND DID PAY AS A REAL ESTATE BROKER'S COMMISSION TO GET A NEW TENANT FOR THE PROPERTY INVOLVED IN THIS LITIGATION (TR. 15-16).

The evidence as to the costs that the plaintiff was put to in securing a new tenant is likewise without controversy. The amount paid was \$1725.00, which was the usual and reasonable amount charged for such services (Tr. 16-17). The evidence further shows that Mr. Harold Cutler attempted to secure a lease from a tenant who would use the premises for the operation of a clothing store, but that he was not successful (Tr. 15). There can be no doubt but that the payment of the real estate commission was made necessary because the defendant abandoned the premises and that therefore the plaintiff is entitled to reimbursement for the money so expended unless it should be held that the plaintiff was obligated to accept one of the offers secured by the defendant agent to lease the property. We shall further discuss that phase of the case under the next heading. The case of *Huckman v. Bradford*, 178 Iowa 827; 162 N.W. 63, lends support to the claim that plaintiff is entitled to a reimbursement for this expense.

POINT FIVE

THE TRIAL COURT ERRED IN FAILING AND REFUSING TO AWARD PLAINTIFF JUDGMENT AGAINST THE DEFENDANT FOR RENTAL IN THE FOLLOWING AMOUNTS: \$3870.00, TOGETHER WITH INTEREST AT 6% PER ANNUM ON \$400.00 FROM AND AFTER JULY 1, 1952; ON \$400.00 FROM AND AFTER AUGUST 1, 1952; ON \$400.00 FROM AND AFTER SEPTEMBER 1, 1952; ON \$400.00 FROM AND AFTER OCTOBER 1, 1952; ON \$270.00 FROM AND AFTER NOVEMBER 1, 1952; ON \$400.00 FROM AND AFTER DECEMBER 1, 1952; ON \$400.00 FROM AND AFTER JANUARY 1, 1953; ON \$400.00 FROM AND AFTER FEBRUARY

1, 1953; ON \$400.00 FROM AND AFTER MARCH 1, 1953;
ON \$400.00 FROM AND AFTER APRIL 1, 1953.

It is apparent that the court below refused to give the plaintiff judgment for the rental which it lost between the 1st of October, 1952 and May 1, 1953, a period of seven months, less the ten days that the premises were used for political purposes for Mr. Glade, because of some transaction had between the plaintiff and the defendant. It will be seen from the language of U.C.A., 1953 16-8-3 heretofore quoted that "a non-complying corporation may not successfully maintain any claim, interest or demand arising or growing out of or founded on any tort occurring or of any contract, agreement or transaction made or entered into in this state . . . and every contract, agreement, or *transaction whatsoever* made or entered into by or on behalf of such corporation within this state, or to be executed or performed within this state shall be wholly void on behalf of such corporation and its assigns and every person deriving any interest or title therefrom but shall be valid and enforceable against such corporation, etc."

In the case of *Dunn v. Utah, etc.*, supra, it is said in 238 Pac. at page 251 that:

"Neither can this offending corporation prevail on the ground that the act of lending money was not doing business and hence that contract was not a valid transaction, nor upon the ground that the contract by which the money was lent was fully performed before appellant began doing business in this state, nor yet upon any implied

contract or equitable grounds. The statute strikes down every contract and transaction whatsoever made or had within the state by such corporation. The language of Section 947 (now with some amendments which do not aid the defendant, Sec. 16-8-3 above quoted) includes all transactions whatsoever, the first contract as well as the last, implied contracts as well as those which are expressed and excludes the idea that such a corporation may pick out any particular contract made within the state and claim any rights under or sue upon it."

To the same effect see 93 Pac. (2d) 925, *Franklin Building & Loan Co. v. Peppard, et al.*

The meaning of the word "transaction" as defined by the courts is discussed in *Words and Phrases*, Vol. 42, pages 356 to 383. Among the numerous definitions there collected from the adjudicated cases are:

"Transaction embraces every variety of affairs which conform to the subject of negotiations, interviews, or action between the parties and includes every method by which one person can derive impressions or information from conduct, condition or language from another."

International Shoe Co. v. Hawkinson, 10 N.W. (2d) 590, 593; 72 N.D. 622.

A transaction is something which has taken place whereby a cause of action has arisen. It must, therefore, consist of an act or agreement or several acts or agreements having some connection with each other in which more than one person is concerned and by which the legal relation of such persons between themselves are

altered. *Baker v. S. A. Healy Co.*, 24 N.E. (2d) 228, 234; 302 Ill. App. 634.

A transaction is the formation, performance or discharge of a contract, the assignment of a right under a contract, and also facts that would have amounted to any of these if it were not for mistake or some wrongful act of one of the parties. *Restatement Contracts*, Sec. 470c.

There would seem to be no escape from the conclusion that the action of Mr. Solomon in attempting to get a new tenant for the plaintiff and the delivery of the key to the property here involved, and the other acts relied upon by the defendant as the basis of its claim to be relieved from paying rent up to the time Bradley-Badger began paying rent were transactions. If they were not transactions, it may be inquired, what were they? If as the statute provides, such transactions were void, it necessarily follows that they could not serve to relieve the defendant from its obligation under the lease.

If, as the case from this jurisdiction above cited hold, a non-complying corporation may not enforce its contracts, for much stronger reasons may not such a corporation escape its obligations by such transactions as are relied upon by it in this litigation.

Before leaving this phase of the case, we digress to observe that the defendant has filed a cross appeal by which we apprehend that it will seek to reverse that part of the judgment whereby the plaintiff was awarded a judgment against the defendant for the sum of \$300.00

for damages to plaintiff's premises. In this connection we direct the attention of the court to those provisions of U.C.A. 1953 16-8-3 wherein it is provided that a non-complying corporation "shall not take, acquire or hold title, possession or ownership of property, real, personal or mixed, within this state."

The evidence here shows that the defendant, without the consent of the plaintiff, removed from the leased premises property valued many times \$300.00 (Tr. 11 and 13). If effect is given to the foregoing language of our statute, the plaintiff corporation was legally entitled to retain all of the property that was removed by defendant from the leased premises. Moreover, even if the non-complying defendant corporation had all the right of a complying foreign corporation or a domestic corporation, still the plaintiff would be entitled to the relief which it claims.

It will be noted that the lease provides that "said premises to be used and occupied by the lessee continuously as a wearing apparel store during the term hereof." We know of no reason why, nor have we been able to find any authority that the parties may not provide in a lease the purposes for which the leased property may be used. The authorities are all to the effect that the owner of property may lawfully make such provision in a lease. Thus it is said in 51 C.J.S., page 1022, Sec. 337 that:

"Express conditions or covenants are frequently embodied in leases to the effect that the

premises shall be used only for purposes specified therein, and it is within the power of the parties to make valid and binding restrictions."

A number of cases are cited in support of and which do support the text. The same doctrine is thus expressed in 115 A.L.R. page 207, in this language:

"Generally speaking a landlord who is under a duty to exercise due diligence to relet premises in order to mitigate the damages as to a tenant who has breached his lease is not required to alter the length of the lease term to the new tenant, renting for different uses than those provided in the original lease and the like. However such diligence is required as would be exercised by a reasonably prudent man under similar circumstances."

So also is the great weight of authority to the effect that a landlord is under no duty to seek a new tenant. The law is thus expressed in 40 A.L.R. 190:

"In all but two jurisdictions in which the question has been passed on, the Courts have adopted the view that a landlord is under no duty to seek a new tenant."

We have examined a number of cases there cited from various jurisdictions and the same support the text. No useful purpose will be served by reviewing such cases because here the landlord did seek to secure a tenant and upon finding one who was satisfactory, a new lease was executed and plaintiff is merely seeking rent from the defendant up to the time the new tenant began paying rent. The rule generally followed by the Courts is thus

expressed in the case of *Phillips-Hollman, Inc. v. Peerless Stage, Inc.*, 291 Pac. 178, where it is held that:

“The rule is well settled that where a lease has been repudiated by the tenant and the premises abandoned and there are no covenants in the lease to the contrary the landlord has a choice of but two remedies:

1. He may rest upon his contract and sue for each installment of rent as it falls due. If this alternative be selected obviously the action must be limited to accrued installments, and no recovery can be had for future installments because the lease being still in existence and no obligation to pay the rent until each installment falls due.
2. He may take possession of the premises, relet the same and recover from the tenant any damage suffered thereby.”

In this case, plaintiff has adopted the first option and as will be seen from the complaint, together with the amended and supplemental complaint, plaintiff is not seeking to recover for any rental or damages that it may sustain after the new tenant began paying rent.

Further as to that: In the Court below, the defendant made the contention that the plaintiff was obligated to accept the offers made by Martha Washington Candy, Bradley-Badger and Acousticon of Southern Illinois (See Defendant's Exhibits 4, 2 and 3, which are attached to the deposition of C. Francis Solomon, Jr.). Those are the only offers to lease that even approach the terms of the lease between the plaintiff and defendant. The record

fails to show any written offer whatsoever by the Western Pacific Railroad Company to enter into a lease agreement with the plaintiff and the talk that was had about a lease never materialized in an offer (Tr. 25). The offer made by Wallace Toma acting under the name of Wally's Flowers is attached to the deposition of Mr. Solomon and is marked Exhibit D-6. It will be observed that nothing is said in the offer about subletting the property. It also includes some property, the amount not specified, on Richards Street. It will be further noted that water is to be furnished by the owner, together with some structural repairs and plumbing. The plaintiff had doubts about the financial responsibility of Mr. Toma, and it will be noted that unlike the lease to the defendant there was no possibility of getting a larger rental from the premises than the \$400.00 per month. Obviously the plaintiff could not be required to accept such a lessee.

Under the offer of Martha Washington, et al, the defendant was to pay the cost of remodeling the premises which was estimated at \$4000.00 (Tr. 29). The defendant had employed Mr. Solomon, a real estate broker, to secure a lessee and the evidence shows that real estate brokers charge 5% of the amount of rent payable under the lease as a commission for services rendered in securing the lease. Thus, it is apparent that the defendant would have been compelled to pay substantially the same amount if plaintiff had accepted the offers of Martha Washington, et al as defendant will be required to pay if the claim of the plaintiff is satisfied, that is to say, plaintiff claims that there is owing to it by the defendant

\$3870.00 in rental. No claim is made for remodeling the premises. The defendant contends that the plaintiff should have accepted the three offers of Martha Washington Candy Co., et al in which event the defendant would have become obligated to pay an estimated \$4000.00 for the remodeling of the premises. If the plaintiff had agreed to accept the lease of the three offers the defendant would also have been obligated to pay Mr. Solomon, as it is the plaintiff has been compelled to pay Mr. Solomon and the defendant has been relieved from such obligation. While the trial court allowed an attorney's fee of \$300.00 and damages in the sum of \$300.00, the costs of remodeling may or may not have cost the additional \$600.00. In any event, the non-complying defendant foreign corporation certainly cannot be heard to complain because the plaintiff did not see fit to accept the three leases of Martha Washington Candy Co., et al, when it well sustained no substantial, if any, loss because of such failure of the plaintiff to accept the offers of Martha Washington Candy Co., et al. Plaintiff further directs the attention of the court to the provisions of U.C.A. 1953 16-8-3 whereby the defendant corporation is denied the benefits of the laws of this state relating to corporations which would seem to deny it the right of appeal.

POINT SIX

THE TRIAL COURT ERRED IN FAILING AND REFUSING TO AWARD PLAINTIFF JUDGMENT AGAINST THE DEFENDANT FOR \$600.00 AS AND FOR ATTORNEYS FEES IN THIS ACTION.

At the trial it was stipulated that the court below might fix the amount of attorney's fees to be awarded as and for the prosecution of this action. The court fixed the amount of \$300.00 (R. 164). Doubtless the trial court would have awarded an additional fee if it had awarded the amount of judgment to which the plaintiff is entitled. In any event we submit in light of the fact that plaintiff has been compelled to prosecute this appeal, the sum of \$300.00 is wholly inadequate, and we submit that this court should increase the same to \$1000.00, the amount prayed or remand the case to the court below with directions to award an attorney's fee commensurate with the services rendered in the trial court and on this appeal.

We submit that this court should direct the court below to award plaintiff the judgment prayed for and for costs of this appeal.

Respectfully submitted,

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