

1956

Q. T. Shepherd v. Max D. Holbrook and Blanche C. Holbrook : Brief of Appellant

Utah Supreme Court

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**In the Supreme Court
of the State of Utah,**

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Q. T. SHEPHERD,
Plaintiff and Appellant,

vs.

MAX B. HOLBROOK and
BLANCHE C. HOLBROOK, his
wife,
Defendants and Respondents.

clerk, Supreme Court, Utah

No. 8549

BRIEF OF APPELLANT

ON APPEAL FROM THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE STATE OF
UTAH, IN AND FOR MILLARD COUNTY

HON. WILL L. HOYT, *Judge*

CLINE, WILSON & CLINE,

AND

RICHARD C. HOWE,

Attorneys for Appellant.

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In the Supreme Court of the State of Utah

Q. T. SHEPHERD,
Plaintiff and Appellant,

vs.

MAX B. HOLBROOK and
BLANCHE C. HOLBROOK, his
wife,
Defendants and Respondents.

No. 8549

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This case is before this Court on appeal from a judgment of the District Court of the Fifth Judicial District of the State of Utah, in and for Millard County, in favor of the defendants and against the plaintiff, in an action tried before the court sitting without a jury. The judgment of the trial court was "that plaintiff take nothing by his complaint and that defendants have and recover from plaintiff all costs of this action."

Plaintiff commenced this action in claim and delivery to obtain possession of certain chickens, alleging a special interest by reason of being the chattel mortgagee under a chattel mortgage executed by one Kenneth E. Barker and his wife on January 15, 1952. Defendants claim title to the chickens under a sales contract dated January 18, 1950, which they claim to be conditional not only as to the real property, as to which there is no dispute, but also as to the chickens involved in this controversy, which plaintiff vigorously disputes.

STATEMENT OF FACTS

On January 18, 1950, defendants and respondents entered into a written agreement (Ex. 1) with Kenneth E. Barker and his wife whereby the Holbrooks agreed to sell and the Barkers agreed to buy certain real estate in Millard County, Utah, together with 8181 chickens and other personal property. Only chickens are involved in this controversy. The Barkers turned over other property worth approximately three-fourths of the purchase price as a down payment. (Tr. 63, R. 79).

So far as pertinent to the issues of this case, the Agreement between Holbrooks and Barkers can be summarized as follows:

1. That excepting for a stipulated minimum, the balance of the purchase price should be paid out of "net income." (See Paragraph 3 of the Agreement).

2. "Net Income" is defined in Par. 4 of the Agreement.
3. The Barkers were to maintain at all times approximately 8000 chickens on the farm.

And, respecting any title retaining provisions, the following paragraphs are quoted:

"17. The Sellers on receiving the payments herein reserved to be paid at the times and in the manner mentioned agree to execute and deliver to the Buyers a good and sufficient Warranty Deed conveying title to the real estate described in paragraph 1 hereof free and clear from any encumbrance . . . and to deliver an Abstract of Title showing a good and marketable title in the Sellers except as provided in this paragraph."

"16. In the event of a failure to comply with the terms hereof by the Buyers, or upon failure to make any payments when the same shall become due, or within 60 days thereafter, the Sellers shall, at their option, be released from all obligations in law and equity to convey said property and all payments which have been made theretofore on this contract by the Buyers shall be forfeited to the Sellers as liquidated damages for the non-performance of the contract, and the Buyers agree that the Sellers may, at their option, re-enter and take possession of said premises without legal process as in its first and former estate, together with all improvements and additions made by the Buyers thereon, and the said additions and improvements shall remain with the land and become the property of the Sellers, the Buyers becoming at once a tenant at will of the Sellers. It is agreed that time is

the essence of this Agreement.”

The Agreement has no title retaining provisions other than as quoted, and makes no provision whatever respecting increase or replacements of chickens.

The Barkers went into possession of the real and personal property and commenced the egg and chicken business. They experienced financial difficulties to the end that Barkers became indebted to plaintiff for poultry feed and sundry supplies to the extent of \$4750.00 (Tr. 54-57, R. 70-73). Shortly prior to January 15, 1952, the plaintiff told the Barkers that he wanted a note secured by a chattel mortgage (Tr. 55, R. 71) and after negotiations the Barkers did on January 15, 1952, give plaintiff a promissory note in that sum, secured by a chattel mortgage (Tr. 57, R. 73) on 7300 chickens (Ex. 2) and--

“Together with all increases and replacements of any of said chickens.”

Since title to increase and replacements is involved in this case it may be well to state at this point that Barkers under the Agreement received 8181 chickens; that at the time plaintiff took his mortgage only 1000 of the original chickens remained on the premises (Finding of Fact No. 21); that at the time demand was made on Holbrooks for possession of the chickens involved in this action, none of the original chickens remained (Tr. 83, R. 99) and that at such time all of the 4000 chickens on the premises were

replacements (Tr. 83-84, R. 99-100).

Thereafter the plaintiff on the faith of the note and chattel mortgage extended further credit to the Barkers to the extent of approximately \$3200.00. Being himself in need of money, he prevailed on Barkers to borrow that sum of a bank and indorsed the Barker note which Barker did not pay.

Barkers paid only \$568.00 in reduction of his note to the plaintiff (Tr. 12; R. 28) and on or about the 29th day of September, 1955, commenced this action to recover immediate possession of the chickens and to foreclose his chattel mortgage. At that time Barkers were indebted to plaintiff in a sum in excess of \$8,000.00 including the bank note which plaintiff indorsed and which Barker did not pay.

Prior to the commencement of this action the Holbrooks commenced an action to repossess the property covered by the Agreement with Barker, since Barker had defaulted. In the course of that litigation the Holbrooks and Barkers settled their difficulties by some payment from Holbrooks to Barkers (Tr. 106, R. 122) and possession of the real property and 4000 chickens (Tr. 108, R. 124), which were replacements and not any of the original chickens, was given to the Holbrooks. Although plaintiff knew of the action between Holbrooks and Barkers he was not a party to it.

STATEMENT OF ERRORS RELIED ON

The errors relied on by the plaintiff for a reversal of the judgment of the trial court can be stated as follows:

I. The Sellers, respondents herein, did not retain title to chickens purchased by the Buyers to replace those chickens comprising the 8181 chickens which had been culled out or had died.

II. Title to the original 8181 chickens passed from the Sellers to the Buyers upon execution of the Agreement dated January 18, 1950.

III. The Court erred in admitting into evidence testimony by Mr. Barker as to his understandings of various words and provisions of the Agreement of January 18, 1950, because the testimony was inadmissible under the standard of interpretation to be applied in determining the meaning of the contract.

IV. The admission of certain testimony of Barker and Mr. and Mrs. Holbrook violated the Parol Evidence Rule.

V. The Agreement gave the Buyers the right to sell the chickens and the Sellers cannot therefore object to the appellant's mortgage which was given for value.

ARGUMENT

I.

The Sellers, respondents herein, did not retain title to

chickens purchased by the Buyers to replace those chickens comprising the 8181 original chickens which had been culled out or had died.

The chickens which the appellant sought to recover in this action by virtue of his chattel mortgage were replacements of the 8181 originals. The mortgage was given two years after the Agreement had been executed and at that time not more than 1000 of the original 8181 birds remained (Finding of Fact No. 21). And at the time appellant commenced this action, none of the original hens remained. All had been replaced by younger birds. This fact is extremely significant in this case and cannot be over-emphasized. It is appellant's contention that even though this Court should hold that title to the original 8181 chickens was retained by the sellers as security for the balance of the unpaid purchase price, by no means can the agreement be interpreted to also admit of the seller's retaining title to the replacements. Thus, appellant urges, title to the replacement chickens was clearly in the buyers and they were free to execute to the appellant a good chattel mortgage on them. Appellant's chattel mortgage was expressly made to extend to increase and replacements and there can be no question but what it covered the chickens possessed by the Sellers (respondents herein) at the time this action was commenced.

Counsel has not been able to find any cases respect-

ing replacements in conditional sales contracts. However, the same rule should apply as in cases of chattel mortgages since both are security devises used in the sale of personal property. The rule governing replacements in chattel mortgages is well stated at *10 Am. Jur., Sec. 133, Page 802*:

“Whether a mortgage of a stock of goods covers additions and substitutions thereafter made in the ordinary course of business depends on the intention of the parties as gathered from the language of all parts of the agreement, considered in relation to each other and interpreted with reference to the situations of the parties, and their objects, unless some established principle of law or sound public policy would thereby be violated. *The intention to cover additions and substitutions must be clearly expressed in the instrument in order to charge persons dealing with the stock with notice of that fact, and it has been held that, as a rule, the mortgage must expressly provide that it is to cover additions or substitutions where the rights of third persons are involved.*” (Italics added).

That the intent to include replacements or after-acquired property must be clearly expressed in the instrument (see *Jones on Chattel Mortgages & Cond. Sales*, 6th Ed., Sec. 173a, and the following cases: *Ryan v. Rogers*, 14 Idaho 309, 94 Pac. 427, 1916 D Ann. Cs. 1217; *Cunningham v. Alryan Woolen Mills*, 69 N. J. Eq. 710, 61 A. 372; *P. J. Black Lumber Co. v. Turk*, 50 Wyo. 361, 62 P. 2d 519; and *In re Thompson*, 164 Iowa 20, 145 N. W. 76, 1916 D.

Ann. (‘s. 1210. In the last cited case the court stated that in Iowa

“a party may by express terms mortgage, and his mortgage may be made to cover, not only stock in existence, but additions and substitutions thereafter made in the ordinary course of business . . . But the intent to do so must be *clearly expressed* in the mortgage, so as to charge persons dealing with the stock with notice of that fact.” (Italics added).

The court cited with approval an excerpt from *Jones on Chattel Mortgages*, 4th Ed., Sec. 154, wherein it is stated in substance that new goods which are acquired by way of renewal of old goods, or in substitution for them, or which are paid for out of the proceeds of old goods, are not brought under the mortgage unless the intent to do so be clearly shown.

The contract of January 18, 1950, can be searched in vain for any clear express provision or any provision that the sellers were to hold title to the chickens brought upon the farm as replacements of the 8181 originals. Under the rule of the above cited cases, the sellers did not have title to the replacements. Title to all replacements remained in Barkers as the purchasers of the replacements from third persons. When the parties drafted and executed the Agreement of January 18, 1950, they had it well in mind that the original 8181 chickens would be replaced from time to time by younger birds because

they provided that the buyers should operate the farm in an "efficient, economical and husbandlike manner" and the record is replete with testimony of all parties and witnesses that it was necessary to replace chickens for such an operation. Yet it is significant that they studiously avoided putting into their agreement any provision that title to the replacement birds should be held by the sellers as security. They went so far as to provide that approximately 8000 chickens should be kept on the farm at all times knowing that in a short time all would be replacements, but made no provision that title to such replacements should be held by the sellers. Plaintiff is confident that this Court knows that customarily chattel mortgages specifically cover increase and replacements where that is the intention of the lender and borrower, and equally it is true that contracts make such specific provision where the parties actually intend that title to increase and replacements should be in the seller.

There is a logical reason or explanation why the Agreement did not so provide. Barkers had paid three-fourths of the purchase price or had traded land to that value (Tr. 44-45, R. 60-61). The Holbrooks were, or thought they were, well secured by the title retaining features of the Agreement in connection with real property. The provision respecting the maintaining of 8000 chickens at all times was necessary in order that Barkers' net

income would be sufficient to pay out the balance, but certainly does not have title-retaining features. A provision similar to the above-mentioned provision of the Agreement was construed by the court in *Phillips v. Booth*, 58 Iowa 499, 12 N. W. 481. The court, after noting that the mortgage did not expressly provide that future acquisitions to stock should be held as included in the mortgage, stated:

“It is true, it (the mortgage) refers to a stock of boots and shoes and clothing but it also schedules and describes the mortgaged goods. There were no goods mortgaged excepting such as are scheduled because the language is that it is the property described in the following schedule. It may be that the parties intended to include future acquisitions of goods. The provision that the mortgagor should keep up the stock would seem to indicate something in that direction. But this is not a proceeding to reform the mortgage and we must take it as it reads. We cannot extend its provision, nor find by inference what was intended. The rule allowing property to be mortgaged which is not yet in being, or not owned by the mortgagor has in our opinion been extended quite far enough without allowing it to be done by mere inference.”

Jones in his treatise on *Chattel Mortgages & Cond. Sales*, 6th Ed., Sec. 173a, states the law to the same effect.

There being no clear expression of intent in the Agreement that the sellers should hold title to the replacement chickens, as required by the above authorities,

it follows that the sellers, respondents herein, cannot claim title to the replacement chickens.

II.

Title to the original 8181 chickens passed from the Sellers to the Buyers upon execution of the Agreement dated January 18, 1950.

An examination of the Agreement of January 18, 1950, entered into between the Holbrooks, as sellers, and the Barkers, as buyers, discloses that it was the intention of the parties that title to the personal property described in the Inventory attached thereto (which includes 8181 chickens) should pass from the sellers to the buyers upon the execution of that agreement. The Agreement will not admit of a construction that title to the personal property should be retained by the sellers until the purchase price had been paid in full, as was their intention respecting the real estate. In Paragraph 17 of that Agreement it is provided that title to the real estate should be conveyed upon payment of the purchase price in full:

“17. The Sellers on receiving the payments herein reserved to be paid at the times and in the manner above mentioned agree to execute and deliver to the Buyers a good and sufficient Warranty Deed conveying title to the real estate described in paragraph 1 hereof free and clear from any encumbrance . . . and to deliver an Abstract of Title show-

ing a good and marketable title in the Sellers except as provided in this paragraph.”

There is no provision in the above paragraph or at any other place in the Agreement for the vesting of title in the personal property in the buyers upon their paying the purchase price in full. Had such been their intention, it is reasonable to assume that in Paragraph 17 provision would have been made to that effect. That the parties did not intend for the Sellers to retain title to the personal property is further borne out by the provisions of Paragraph 16 wherein it is provided:

“16. In the event of a failure to comply with the terms hereof by the Buyers, or upon failure to make any payments when the same shall become due, or within 60 days thereafter, the Sellers shall, at their option, be released from all obligations in law and equity to *convey* said property and all payments which have been made theretofore on this contract by the Buyers shall be forfeited to the Sellers as liquidated damages for the non-performance of the contract, and the Buyers agree that the Sellers may, at their option, *re-enter* and take possession of said *premises* without legal process as in its first and former estate, together with all improvements and additions made by the Buyers thereon, and the said additions and improvements shall remain with the *land* and become the property of the Sellers, the Buyers becoming at once a *tenant* at will of the Sellers. It is agreed that time is the essence of this Agreement.” (Italics added).

Note the choice of words in that paragraph which we have italicized: "Convey," "re-enter," "premises," "tenant." They could not more clearly be limited to real property in their application. They are not words which would be employed by a draftsman who intended to affect personal property as well as real property. There is conspicuously absent from the Agreement any provision for the recovering of the personal property upon the default of the buyers. Thus it can only be assumed that the parties intended the sale of the personal property to be absolute, that title pass from the sellers to the buyers upon the execution of the Agreement, and that the default of the buyers would have no affect on the title to the personalty. It should be remembered that the buyers had made a down payment of approximately $\frac{3}{4}$ of the value of the chicken ranch by conveying to the sellers their farm in North Ogden (R. 60, Tr. 44), and it is not unnatural in view of that large down payment that the sellers felt sufficiently secure in retaining only the title to the real estate and allowing the title to the personal property to pass at the time of the execution of the Agreement.

If there be any doubt as to the intent of the parties expressed in the Agreement as to when title to the personal property passed from the sellers to the buyers, recourse should then be made to *Secs. 60-2-2 and 60-2-3 Utah Code Ann. 1953*, wherein it is provided:

60-2-2. "(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intended it to be transferred.

"(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

60-2-3. "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

"Rule (1) Where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, is postponed."

The 8181 chickens designated in the inventory were specific goods in a deliverable state and under the above statutes title to them passed to the buyers at the time the agreement was signed, there being no different intention manifested in the Agreement. A recent case strikingly similar to the instant case in which the court relied upon the above sections of the Uniform Sales Act is *Ross v. Orr*, 3 N. J. 277, 69 A. 2d 730. There the plaintiff and defendant on March 18, 1946, entered into a written agreement for the sale and purchase of a garage building, the land on which it stood, and all the personal property then on the premises, except for a hydraulic jack. Right of possession to the premises was given immedi-

ately and payment and delivery of the deed was set for on or before May 1, 1946. About two days after the execution of the agreement, but before the buyer had taken actual possession of the premises, the personal property was stolen. In a suit by the seller to recover the purchase price of the personal property (which had been stated separately in the contract) the buyer contended that under the agreement title to the personal property would not pass until execution and delivery of the deed and payment of the purchase price for the real and personal property, which was to be on or before May 1, 1946. Hence, defendant argued, title to the personalty was in the seller on the date of the theft. The trial court directed a verdict for the plaintiff on defendant's opening statement, which ruling was upheld on appeal to the Supreme Court of New Jersey. The latter court in its opinion, after acknowledging that the contract provided for the payment of the purchase price (of both the realty and personalty) simultaneously with the delivery of the deed on May 1, 1946, said:

“Although time of payment for the personal property was postponed by the provisions of the agreement, there was no expression negating the statutory presumption of passage of title when the contract was signed.

“If, after weighing the language employed in the contract, doubt still exists as to the interpretation of it, then, under the statute, we turn to the

‘conduct of the parties’ and the ‘circumstances of the case’ as there provided, ‘for the purpose of ascertaining the intention of the parties’. (citing N. J. statute identical to 60-2-2, U.C.A. 1953) . . .

“... Giving the defendants the benefit of every doubt and assuming no inference as to their intent can be spelled out either by contract or by their conduct, then the statutes apply unless the contract expresses ‘a different intention’. (citing N. J. statute identical to 60-2-3, U.C.A. 1953) . . . Under the statute set forth above, the property in the goods passed to the buyers when the contract was made unless a different intention appears and it is immaterial whether time of payment or the time of delivery or both be postponed.

“Was there anything in the contract to indicate a different intention? It is asserted such a contrary design appears in the provision for the later conveyance of title to the real estate, but the contract deals with realty and personalty as separate and distinct transactions and there is no specific provision that the general rule for the immediate transfer of personal property should not apply. It is presumed the parties contracted in light of the statute and, if they had a purpose contrary to the legislative enactment, they would have expressed it in clear and unmistakable language. Finding no such declaration, we conclude that the statutes control and title passed on the date the contract was executed.”

As in the above case, there is nothing in the Agreement between the Holbrooks and the Barkers to suggest that Rule 1 of Sec. 60-2-3, U.C.A. 1953, should not apply.

There is nothing to negative the statutory enactment that title to personal property should pass immediately. We have already noted that there is nothing providing for title to the personal property to pass simultaneously with the title to the real property, and there is no provision for allowing the sellers to retake the personally in case of the default of the buyers. Title to the personal property, including the 8181 chickens, therefore, passed on January 18, 1950, when the Agreement was executed. It follows that the buyers could give to the appellant a valid chattel mortgage on what remained of the original 8181 chickens.

III.

The court erred in admitting into evidence testimony by Mr. Barker as to his understanding of various words and provisions of the Agreement of January 18, 1950, because the testimony was inadmissible under the standard of interpretation to be applied in determining the meaning of the contract.

Over the objection of counsel for the appellant, the trial court allowed counsel for the respondents to elicit from Mr. Barker, one of the buyers, what his understandings were as to whether under the Agreement (1) the Sellers retained any security for the balance of the purchase price (R. 61-63, Tr. 45-47); (2) whether the word "premises" in Paragraph 16 included both land and chickens (R. 63, Tr. 47); (3) the meaning of the word

“property” appearing in Paragraph 16 of the Agreement wherein it is provided that in case of default of the buyers, sellers shall have the option of being relieved of all obligation to convey the “property” (R. 64-64, Tr. 48-49), and the meaning of the word “premises” in said paragraph; (4) his understandings of Paragraph 10 (R. 65-67, Tr. 49-51); (5) whether under the Agreement he had the right to sell the chickens and replace them with younger hens (R. 66, Tr. 50); (6) how many chickens he had the right to sell (R. 67-69, Tr. 50-52).

In brief, the trial court permitted Barker and the Holbrooks, while on the witness stand, not only to vary the terms of a written contract by parol evidence, not only to testify to their claimed understanding of it, not only to interpret the meaning of words of legal import and place their own construction on the contract, but permitted them to actually re-write the entire contract according to their own desires, and attempt to bind this plaintiff who was not even a party to it.

Parenthetically, it is observed that not only are Points III and IV well taken even though this were a suit between the parties to the Agreement, but in this case the parties to the Agreement are attempting to bind a third person, this plaintiff.

Appellant contends that the admission of the above testimony and the consideration of it by the trial court in interpreting the Agreement constitutes reversible

error because the Agreement is an integrated contract and cannot be interpreted according to the understandings of the parties as to what its various provisions mean. *The Restatement of Contracts*, Sec. 228, defines as integration as follows:

“An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted.”

Respondents have never contended otherwise than that the Agreement of January 18, 1950, contained the whole agreement between the Barkers and them. There being an integration, it was patently erroneous for the trial court to allow Barker, one of the parties to that integration, to testify as to what he understood various words and provisions to mean. *The Restatement of Contracts*, Sec. 230, sets forth the standard to be used in interpreting an integrated contract:

“The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, *other than oral statements by the parties of what they intended it to mean.*” (Italics added).

In comment (a) to the above section, it is stated:

“ . . . But oral statements by the parties of what they intended the written language to mean are excluded, though these statements might show the parties gave their words a meaning that would not otherwise be apparent. Such a common understanding may justify reformation, but cannot be the basis of interpreting an integration. So the meaning given the words of a writing by a reasonably intelligent third person will be given them, even though that meaning is not one that would be anticipated by one party or the other.”

See also comment (b) to Section 230. *Williston on Contracts*, Rev. Ed., Sec. 607, is in accord with the above rule of the Restatement. This court in *Erickson v. Bastian*, 98 Utah 587, 102 P. 2d 310, applied the Rule of Sec. 230 to the integrated contract in that case.

In *Miller v. O. B. McClintock*, 210 Minn. 152, 297 N. W. 724, the court stated:

“The exclusion of the statements and conversations as to what the parties meant by the language of the contract was correct. Evidence of all circumstances prior to and contemporaneous with the execution of the contract was admissible, but oral statements of the parties of what they intended the language to mean were not.” (citing Restatement of Contracts, Sec. 230).

The Miller case was cited with approval and the above language quoted by the court in *Ohio Citizens*

Trust v. Air-Way Electric App. Corp., 56 F. Supp. 1010. Again in *Colvocoresses v. Wasserman Co.*, 38 Del. 253, 190 A. 607, the court relying upon Section 230 of the Restatement stated:

“Where, as in this case, the language of the contract is not in any sense ambiguous, its meaning is ordinarily a question of law for the court to ascertain from the instrument itself, and allegations as to the intent of the parties with respect to the meaning of the words used, and whether such intent is shown by subsequent acts, or by the declarations of the parties, made at or about the time of the execution of the contract, or otherwise, are usually of no import,” citing cases including *Valentine v. Shepherd*, 19 Ariz. 241, 168 Pac. 648.

The testimony of Barker as to his understanding of various words and provisions was clearly inadmissible because of its immateriality in the interpretation of the Agreement and the trial court erred in admitting such testimony into evidence over the objection of counsel for the appellant. As will be seen under Point IV, that testimony was also inadmissible under the Parol Evidence Rule.

IV.

The admission of certain testimony of Barker and Mr. and Mrs. Holbrook violated the Parol Evidence Rule.

It has been shown under Point III that the lower court erroneously allowed into evidence, over the objection of counsel for appellant, testimony by Mr. Barker, the buyer, as to what he understood certain terms and provisions of the Agreement to mean. The error of the court did not stop there, however. The court also allowed (over objection of counsel for appellant) Mr. Holbrook, one of the respondents, to testify: (1) that the attorney who drew the Agreement had assured him before drawing it that it would be provided that in case of default of the buyers, sellers could retake the land and the chickens (R. 138, Tr. 122); (2) that Holbrook told the attorney that the agreement would have to provide that the buyers should maintain 8000 hens but that they could sell culls and replace them (R. 138, Tr. 122). Mrs. Holbrook, the other respondent, was allowed to testify what was said at a time prior to the execution of the Agreement respecting (1) the right of the sellers to repossess the property in case of default by buyers (R. 158, Tr. 143); (2) right of buyers to sell and replace chickens and that the land and the chickens would remain the property of the sellers (R. 159, Tr. 144); (3) and that there was no discussion respecting separating the chickens from the land (R. 160, Tr. 145).

The admission of the testimony of Barker set out under Point III and the testimony of the respondents, Mr. and Mrs. Holbrook, set out above, violated the Parol Evidence Rule because the testimony changed and nullified

the terms of the integrated contract between the parties. This was error. *Erickson v. Bastian*, 98 Utah 587, 102 P. 2d 310. There are no terms in the contract which are ambiguous and which need extrinsic evidence to explain them. Paragraphs 16 and 17 of the Agreement which Mr. Barker was allowed to explain are identical with provisions appearing in the Uniform Real Estate Contract which has been widely used in this State for years by real estate brokers and lawyers. Can it now be said that the meaning of the terms in those paragraphs such as "convey," "premises," and "property" are now ambiguous and extrinsic testimony is needed to interpret them? For example, Mr. Barker was allowed to testify that the word "premises" appearing in Paragraph 16 meant both land and chickens (and presumably the other personal property sold under the Agreement). Can the word "premises" which for years has been accepted by lawyers to refer to real property now become ambiguous and therefore justify the court in allowing testimony in evidence that "premises" means chickens, and presumably also a jeep, trailer, mill, egg grader, egg cleaner, feed mixer and motor and electric pumps? Certainly not! Respondents are seeking to find an ambiguity where there is none. This court in *Ruthrauff v. Silver King West. Min. and Mill. Co.*, 95 Utah 279, 80 P. 2d 338, stated:

"In support of the first theory mentioned,

plaintiffs have recourse to many matters beyond the face of the deed itself. This is not permissible unless the intent and meaning of the deed is *upon its face* uncertain or obscure. In determining intent, we are restrained to the language employed—to the chosen vehicle of the thought and purpose of its author. If the meaning is clear, we may not resort to extraneous aids to interpret, modify, add to, or subtract from its meaning. To do so would be to assume the function of making contracts for the parties under the guise of interpretation, a power not delegated to the courts.” (Italics added).

A similar statement was made by this court in *Starley v. Desert Foods Corp.*, 93 Utah 577, 74 P. 2d 1221:

“Courts have been quite ready to open the case to parol evidence to explain the intention of the maker where there is anything *on the face of the note giving rise to ambiguity*. This view is well indicated by the cases cited by appellant. But where there is no ambiguity, the rule will not be relaxed. The intention of the parties must be gathered from the instrument itself. Any other rule would tend to destroy the value of written instruments.” (citing cases). (Italics added).

The fact of the matter is that no provision was made in the contract for the sellers, respondents herein, to retain title to the chickens, and hence under Sec. 60-2-3, U.C.A. 1953, title passed to buyers upon execution of the Agreement. Respondents are endeavoring to give an integrated agreement a meaning completely alien to anything its words can possibly express in order to de-

feat the provisions of 60-2-3.

Even if appellant were to concede that the terms and provisions of the Agreement are ambiguous as to when title of the chickens was to pass, it would avail the respondents nothing for Rule 1 of Sec. 60-2-3 provides that unless a different intent appears, title passes when the contract is made. In *Heath v. U. S.*, 209 F.2d 318, the court stated: that "If the actual intent of the parties is ambiguous," resort should then be made to the rules of presumption found in *Uniform Sales Act* Sec. 19, which is our Sec. 60-2-3. *Williston on Sales*, Rev. Ed., Vol. 2, Sec. 261, Pg. 9, states in discussing the question of intention of the parties as to when title passes:

"By intention in this connection is meant in the law of sales as throughout the law governing the formation of contracts, expressed intent. This is indicated by the provisions of Sec. 18 (2) (of the Uniform Sales Act, Sec. 60-2-2 U.C.A. 1953). Parties should not be allowed to testify as to their mental intents, but merely as to what they said and did." (citing cases).

The same rule was well stated in *Foster v. Ropes*, 111 Mass. 10, where the court said:

"In all cases, however, the intent of the parties as to when the title is to pass can be ascertained *only from the terms of the agreement as expressed in the language and conduct of the parties, and as applied to known usage and the subject matter. It must be manifested at the time the bargain is made.*

The rights of the parties under the contract cannot be affected by their undisclosed purposes, or by their understanding of its legal effect." (Italics added).

See the later case of *Murray v. Indursky*, 266 Mass. 220, 165 N. E. 91, citing with approval the above rule from *Foster v. Ropes*.

Clearly, there was no ambiguity in the contract to be interpreted and extrinsic testimony of Barker, Mr. and Mrs. Holbrook, set out above, was erroneously admitted and considered by the court in construing the Agreement. The trial judge by his consideration of this improperly admitted testimony, completely disregarded the provisions of our Sales Act (Secs. 60-2-2 and 60-2-3) as to when title passes.

V.

The Agreement gave the Buyers the right to sell the chickens and the Sellers cannot therefore object to the Appellant's mortgage which was given for value.

Assuming for the purposes of our argument under this point that the contract provides for the retention of title to the chickens and replacements by the sellers, it was admitted by respondents below that the contract gave the buyer the right to re-sell the chickens. Certainly in view of this authorization by the sellers, they could

not object had Barker sold the chickens to a purchaser for value. The sellers could have no ground to object to that which they had authorized. We contend that appellant was a purchaser for value and that the respondents can no more object to his mortgage than they could had he purchased them from Barker for cash.

While in this State we have not adopted the Uniform Conditional Sales Act, an examination of that Act and decisions under it respecting the question here involved will be helpful. *Sec. 9* of the *U. C. S. A.* provides that where the conditional seller expressly or impliedly consents to the re-sale of the property, the reservation of title shall be void against a purchaser from the buyer. We set out that section in full:

“Where goods are delivered under a conditional sale contract and the seller expressly or impliedly consents that the buyer may resell prior to the performance of the condition, the reservation of property shall be void against purchasers from the buyer for value in the ordinary course of business, and as to them the buyer shall be deemed the owner of the goods, even though the contract or a copy thereof shall be filed according to the provisions of this act.”

In *Tchlenoff v. Jacobs*, 267 App. Div. 908, 46 N. Y. Supp. 2d 875, it was held that under *Sec. 9* of the *U. C. S. A.* a mortgagee was a “purchaser” and the seller had no standing to object to his mortgage.

This court in *Federal Land Bank of Berkeley v. Pace*, 87 Utah 156, 48 P. 2d 480, held that a mortgagee was a "purchaser" within the meaning of our recording statutes respecting real property.

An illuminating case on the question here involved is *Schoenfelds Standard Furn. Co. v. Stoe*, 175 Wash. 201, 27 P. 2d 564, where the conditional vendor of furniture impliedly consented to the resale of the furniture by the conditional vendee, and then attempted to defeat the rights of the subpurchasers. Said the court:

"Appellant (vendor) further contends that the respondents (subpurchasers) did not rely upon any act or omission on the part of the appellant, but that, having made an independent, yet complete, search of the records, and having failed to ascertain the true state of title, it was their negligence that occasioned the loss. It may be conceded that respondents did not go to the extent of examination and inquiry that prudent persons would ordinarily be called upon to exercise. But that, we think, is beside the point here. If, as the court held, the appellant conferred authority for the sale of the furniture to respondents, it would be immaterial what the records showed. The mere fact that the title or interest of the one in possession of personal property is evidenced by a conditional sales contract of record would not affect the right of such persons to sell the property if, as a matter of fact he has actual or implied authority to sell it; the authority to sell such property implies the expectation that it will be sold, and also implies the authority to pass title to it if it is sold."

We submit that the above statement by the Washington court is sound. A conditional vendor cannot on one hand give authority to his conditional vendee to sell, and then, on the other hand, raise an objection to the sale. Appellant should be entitled to the same protection of the rule since, as we have seen, he was a purchaser for value. He took his chattel mortgage when approximately \$3700 was owing to him by the Barkers, and upon the strength of the mortgage, allowed Barkers credit up to about \$8000.00. As pointed out by the Washington court, appellant is entitled to prevail regardless of what notice he may have had of the contract between Hollands and Barkers. Had appellant fully read the Agreement between Holbrooks and Barkers, he could have only learned the Barkers had the authority to re-sell which, as we have seen, includes the authority to mortgage.

The Supreme Court of California in *Hart-Wood Lumber Co. v. Bonaly*, 192 Cal. 180, 219 Pac. 432, stated:

“But payment is of little importance when from the face of the instrument it appears that the parties intended to pass title irrespective of payment. Thus where the owner gives to the buyer the right to resell, and nothing is said in the agreement as to the time when title should pass, the rule is that title passes with the execution of the instrument, or at least when the time arrives when the buyer is in a position to resell, because the right to resell presupposes the existence of a title which the buyer can pass to the new purchaser. (citing cases).”

Plaintiff believes that the question of notice is not material to the issues in this case. While the record discloses only that he had notice of the fact there was an agreement, but had not seen it, let us assume the plaintiff had read it and had notice of the contents. In that event, the plaintiff has notice of what? May we answer in that event he had notice that the contract had no title-retaining provisions respecting the chickens and did not reserve title to replacements of chickens originally sold, all of which points have been heretofore argued in this brief. Certainly the plaintiff did not have notice of oral understandings, secret or unexpressed constructions or interpretations.

Viewed in the light most favorable to the defendants, Barkers mortgaged to the plaintiff whatever interest he had in the chickens described in the mortgage and he had title to the replacements. Plaintiff having notice of the agreement, had notice that Barkers had a legal title to the chickens which they mortgaged to him.

CONCLUSION

Should the judgment of the trial court be sustained, it will have the result that the defendants sold real and personal property, including 8181 chickens, for a sum almost equal to \$50,000.00, receiving a down payment of approximately three-fourths of that amount, plus some

additional payments, and then recover all of the real property and certain trucks and 4000 chickens which are replacements and not the original chickens for an additional \$5500.00 (Tr. 106, R. 122) which they paid to a bank on a G. I. loan and mortgage. At the same time, this plaintiff stands a loss of approximately \$8000.00. As a matter of equity, it may also be observed that had the plaintiff not extended credit to Barkers and supplied feed, there would have been no chickens left because Barker had exhausted his credit and had reached the end of the rope (Tr. 29, 71-73; R. 85, 87-89). Of necessity, Barker would have had to dispose of the chickens.

Plaintiff respectfully submits that the judgment of the trial court should be reversed and plaintiff should have judgment for the chickens involved in this action or the value thereof.

Respectfully submitted,

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AND

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