

1960

Jesse J. Leavitt and Phoebe Leavitt v. Eleanor Blohm and Verda Lynn : Brief of Appellants

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Leavitt v. Blohm*, No. 9153 (Utah Supreme Court, 1960).
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**IN THE SUPREME COURT OF
THE STATE OF UTAH**

FILED

FEB 15 1960

JESSE J. LEAVITT and PHOEBE

LEAVITT, his wife

Plaintiff-Appellants,

vs.

ELEANOR BLOHM,

Defendant-Respondent,

vs.

VERDA LYNN,

Third Party Defendant.

Clerk, Supreme Court, Utah

Case No.

9153

BRIEF OF APPELLANTS

9153 Appeal from the 4th Judicial District Court
of the State of Utah

Honorable R. L. Tuckett

FORREST W. FULLER

Attorney for Plaintiff-Appellants.

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VERDA LYNN,

Third Party Defendant.

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9153

BRIEF OF APPELLANTS

STATEMENT OF FACTS

On December 22, 1955, Forrest and Renae Hancock, fee simple title holders of the property in dispute, sold the same to Deloy E. Smith et ux by Uniform Real Estate Contract. The sales price was \$75,000.00. The down payment was \$17,080.00, the balance was to be paid at the rate of \$300.00 per month including interest at 5% per annum and these payments were due on the 15th day of each month. The contract provided for a 45 day grace period. (Exhibit 1).

In August of 1956 the vendee's interest in this contract was assigned to I. J. Kartchner, (ignoring the assign-

ment to A. M. J. Inc., Kartchner's alter ego). (Exhibits 2, 3, and 4.)

On August 1, 1956, I. J. Kartchner, vendor, and Verda Lynn, vendee, (ignoring the sale to Lynn Realty, Inc., Lynn's alter ego) entered into a Uniform Real Estate Contract for the sale of the subject property: sales price \$86,000.00; payments of \$555.00 during 6 months of the year and of \$375.00 during the other 6 months; \$4,000.00 down; interest at 5%. This contract provided for a 30 day grace period. (Exhibits 6 and 8). On or about the last day of November, 1956, Lynn paid the September and October payments due Hancock (\$600.00) to Miller and Viele, Hancocks duly appointed collection agent. All payments prior to September were timely made. Lynn made all payments due Kartchner under the August 10, Uniform Real Estate Contract strictly when due, to and including the payment due January 10, 1957.

On November 10, 1957, Verda Lynn, vendor, and Eleanor Blohm, vendee, entered into a Uniform Real Estate Contract for the sale of the property in dispute: sales price \$95,705.00; alleged down payment of \$5,000.00 by the transfer of other property; monthly payments of \$450.00 each November through May, and \$630.00 each June through October; 1st payment due November 1, 1957; interest at the rate of 5% per annum; and 30 days grace period. (Exhibit No. 6.) On January 10, 1957, Blohm paid Kartchner \$380.00. (Defendants Answer and Counterclaim). On January 10, 1957, Lynn assigned all of her right, title and interest in and to the Kartchner-Lynn contract and the Lynn-Blohm contract to the plaintiffs. (Exhibits 6, 7, and 8). On

November 7, 1956, the Hancocks had demanded payment of past due installments from Kartchner and Lynn. (Exhibit 11).

On March 25, 1957, Leavitt paid \$1,500.00 to Kartchner, and two or three days thereafter the tender was refused by Hancocks, Kartchner having forwarded the \$1,500.00 bank money order of Leavitts' thereto. (Exhibits 11, 13, and 25.)

On March 26, 1957, Kartchner, vendor, and Leavitts, vendees, entered into a Uniform Real Estate Contract dated August 10, 1956, designed to replace the August 10, 1956, Kartchner-Lynn contract at this time owned by the Leavitts. Kartchner also gave Leavitt an option to purchase the Kartchner equity in the property for 50% of its face value. (Exhibit No. 5.)

On April 25, 1957, the Hancocks filed their Amended Complaint in Civil No. 2148 seeking termination of the Hancock-Smith contract, possession of the property, forfeiture of all sums paid, damages in the sum of \$900.00 per month, and attorney's fees of \$1,500.00. Summons had been served on Eleanor Blohm March 25, 1957, upon the Leavitts and the Kartchners April 1, and upon Verda Lynn April 9. No complaints were filed with the clerk of the Court. Lynn, the Kartchners and the Leavitts filed general denials. In addition to an answer the Leavitts cross complained against the Kartchners for \$8,375.00 and the return of their \$1,500.00 money order. No notice to quit was ever served upon Eleanor Blohm in this or any other action. (Transcript page 35.)

On or about May 27, 1957, the Hancocks, vendors, and the Kartchners and one Nephi Cutler, vendees, knowing full well of the contract rights of the plaintiffs and of the defendant and knowing full well the unsettled status of Civil No. 2148, all parties to such contract also being parties to said lawsuit with the exception of Nephi Cutler, entered into a Uniform Real Estate Contract for the sale of the property in dispute. (Exhibit No. 9.) This contract also assigned all of the rights of the Hancocks in and to their causes of action set forth in said Civil No. 2148 to the vendees. This was an obvious attempt to vitiate the Leavitts equity. The sales price was \$60,762.88 (the exact balance due under the Hancock-Smith contract); the down payment was \$2,000.00 (slightly less than the delinquent payments); the monthly payments were \$350.00 for 3 years and \$300.00 per month thereafter. The grace period was only 25 days.

On April 10, 1957, the Leavitts accepted a contract paying \$50.00 per month from Blohm instead of her delinquent payments. The total credit allowed on the contract was \$2,341.67.

On August 9, 1957, the plaintiffs by and through their alter ego, Vineyard Investment Corporation purchased the equity of Kartchner and Cutler in and to the May 27 contract. (Exhibit 10.) The June payment on this contract was timely made and the July payment was accepted by the Hancocks in the later part of September. At all times herein mentioned the Leavitts were officers and directors in Vineyard Investment Corporation and Mrs. Leavitt owned 98% of its stock.

On December 10, 1957, the Hancocks filed their complaint in Civil No. 2207, seeking forfeiture, repossession and attorney's fees under the May 27, 1957, contract from the plaintiffs and the defendant in this action. This suit was based upon an October 24, 1957, demand for payment which demanded a June payment which the Hancocks were estopped from asserting, and demanded 1957 taxes before the same were due. Vineyard answered denying the default and counterclaimed for the sum of \$22,500.00. On or about January 21, 1958, the defendant Eleanor Blohm abandoned the possession of the property to the Hancocks without notice to the Leavitts. On or about January 31, 1957, these two friendly litigants stipulated that a default judgment might be entered. This was done by the Court, without notice to the other parties to the action, the Leavitts, on February 17, 1958.

Eleanor Blohm was in undisturbed and peaceable possession of the premises from November 10, 1956, to January 21, 1958. (Transcript page 110.) Mrs. Blohm did not make the entire May, 1957, payment nor did she make any payments thereafter although demand was made for the same. (Transcript page 126).

On April 22, 1958, the Hancocks, vendors, and the Leavitts, vendee's, entered into a new Uniform Real Estate Contract for the sale of the property in dispute. (Exhibit No. 21.) The purchase price was \$60,696.22, the balance due under the old Hancock-Smith contract, and the down payment was \$23,242.00 (the amounts received by the Hancocks under the old Smith contract excluding interest). On July 8, 1958, the Hancocks brought an action seeking to terminate

this agreement. The Leavitts were never served. It is the contention of the Leavitts that this lawsuit Civil No. 2236 should be dismissed, the May payment under this contract haing been timely tendered.

At this time it may be well to review the status of the myriad contracts month by month:

November 30, 1956. Blohm was delinquent the November 10, payment due Verda Lynn in the amount of \$450.00. The Hancocks were paid through October 15th and that contract was well within the 45 day grace period.

December 31, 1956. Blohm was delinquent two payments of \$450.00, and her grace period had lapsed. The grace period in the Hancock-Smith contract was still in effect. Kartchner was paid to date.

January 31, 1957: Blohm was behind \$970.00 and her grace period had lapsed. The grace period under the Hancock-Smith contract had lapsed and it would have taken \$600.00 to reinstate this contract. Kartchner had been paid to date. Leavitt had no knowledge of any delinquencies.

February 28, 1957. Blohm was behind \$1,420.00 and her contract had lapsed. It required \$900.00 to bring the Hancock contract within the grace period.

March 31, 1957: Leavitt paid Kartchner \$1,500.00 on March 26, which paid his contract with Kartchner up through June 10, 1957. Hancock was tendered \$1,500.00 which was sufficient to bring the Smith contract current through the March payment and extend the grace period to May 1st, 1958.

April 30, 1957: Blohm had paid a total of \$2,721.67

on her contract which paid the payments through April 10, 1957, with \$21.67 of the May 10 payment having been made.

May 31, 1957: Blohm had made a partial payment of \$21.67 for May and was delinquent \$428.33. The Hancock-Kartchner contract was in full force and effect.

June 30, 1957: Blohm was delinquent \$1,058.33 and her grace period had expired. The June payment on the Hancock-Kartchner contract was made.

July 31, 1957: Blohm was delinquent \$1,688.33. The Hancock-Kartchner contract was in full force and effect.

August 31, 1957: Blohm was delinquent \$2,318.33. The Hancock-Kartchner contract was in full force and effect.

September 30, 1957: Blohm was delinquent \$2,948.33. The Hancock-Kartchner contract (now assigned to Leavitt) was in full force and effect.

October 31, 1957: Blohm was delinquent \$3,578.33. The Kartchner-Hancock contract as assigned to Leavitt was delinquent \$350.00.

November 30, 1957: Blohm was delinquent \$4,028.33 and Leavitt was delinquent \$1,050.00.

December 31, 1957: Blohm was delinquent \$4,478.33 and Leavitt was delinquent \$1,400.00.

January 31, 1958: Blohm was delinquent \$4,928.33. Leavitt was delinquent \$1,750.00.

February 28, 1958: Blohm was delinquent \$5,378.33 and Leavitt \$2,100.00.

March 31, 1958: Blohm \$5,828.33, Leavitt \$2,450.00

April 30, 1958: Blohm \$6,278.33, the Leavitt-Hancock contract of April 22, 1958, is in full force and effect.

May 31, 1958: Blohm is delinquent \$6,628.33.

November 30, 1958: The Leavitt-Hancock contract is in full force and effect having never been lawfully terminated, and all payments due having been tendered prior to lawsuit. Blohm is delinquent \$9,878.33. Interest on past due installments to November 10, 1958 is \$458.35.

It may be well to summarize the benefits received by each party involved in the property:

The Hancocks received	\$ 23,242.00
Verda Lynn received	\$ 8,705.00
Jay Kartchner received	\$ 13,000.00

Eleanor Blohm received 14 months possession and took \$4,500.00 out of the property.

The Leavitts received \$2,341.67 and paid out about \$36,000.00.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND/OR JUDGMENT ON THE PLEADINGS.

POINT II

THE TRIAL COURT ERRED WHEN IT FAILED TO ALLOW THE PLAINTIFF TO AMEND ITS COMPLAINT AND/OR INTRODUCE EVIDENCE SHOW-

ING THAT THE DEFENDANT HAD REMOVED VALUABLE PERSONAL PROPERTY FROM THE PREMISES FOR WHICH THE PLAINTIFFS SHOULD RECOVER.

POINT III

THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE DEFENDANT AND SHOULD HAVE ENTERED JUDGMENT IN FAVOR OF THE PLAINTIFFS UPON THE SECOND CAUSE OF ACTION.

ARGUMENT POINT I

POINT I. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND/OR JUDGMENT ON THE PLEADINGS.

The facts in this case as set out in plaintiffs' Statement of Facts were all before the Court below when it ruled upon plaintiffs' motion for summary judgment in the form of the Exhibits and Depositions of Eleanor Blohm, Verda Lynn and Jesse J. Leavitt. Upon these facts and the Exhibits the Court should have ruled in favor of the plaintiffs in the amount of the installments due under Exhibit 6 (Uniform Real Estate Contract between Verda Lynn as Seller and Eleanor Blohm as Buyer as assigned to Jesse J. Leavitt and Phoebe Leavitt).

The pleadings of the defendant in this case at the time of plaintiffs' Motion for Judgment upon the pleadings ad-

mitted the execution of the contract between the defendant and third party defendant as assigned to the plaintiffs and in fact set forth the language of this contract in its entirety. (Defendant's Third Party Complaint). This third party complaint against the third party defendant Lynn setting forth the claim of defendant for damages by virtue of the misrepresentations claimed to have been made negative any issue of damages from the plaintiffs for if the defendant was damaged by the misrepresentations of Lynn she could not have been damaged by any action of the plaintiffs in this case.

If the defendant has any damage for failure of title, and we do certainly not admit this to be the case, she would of necessity have to recover these damages from Lynn for if, as the Court below seems to feel, the contract was in default on November 10, 1956, (plaintiff of course contends that the Hancock-Smith contract, Exhibit 1, was not so in default) then defendants claim for damages in this wise must of necessity be recoverable, if at all, from the third party defendant since the plaintiffs had not even entered the picture at this time. Indeed their assignment (Exhibit 6) was not executed until January 10, 1957, and then they did not assume any existing obligation of the third party defendant, Lynn, to the defendant, Blohm, but rather were *assigned* only whatever right, title and interest Lynn may have had in the property and in the contracts concerning the same.

Applying the law to the pleadings, and certainly to the Motion for Summary Judgment it is difficult to understand how the Court could fail to grant one motion or the other,

for a defaulting vendee who knows that her vendor does not have title but only has a conditional right to secure the same and must rely upon the contract payments of such defaulting vendee to perfect such rights cannot recover from the vendor but the vendor can recover full damages from the vendee. 55 *American Jurisprudence*, Section 555. *Roper v. Milbourne*, 142 NW 792, 52 A.L.R. 1530. *Seeking v. King*, 17 A2d 869, 134 A.L.R. 1060. These cases are broad enough of course to sustain the claim of the plaintiffs for specific performance of the contract to the extent of the payments past due under the contract. The defendant in her answer admits that no payments were made beyond June, 1957.

In order to recover damages when title fails the vendee must tender possession and at least be able to tender the payments. 55 *AMERICAN JURISPRUDENCE*, Sections 556, 605, 601, 602; *McKeller v. Paxton*, 218 P 128; *Nelson v. Fernando*, 55 P2d 859, 134 A.L.R. 1088; *Hardin v. Union*, 271 NW 176; *Fitcher v. Walling*, 279 NW 417; *Fleisheher v. Lockwood*, 16 NYS 205; *Miller v. Smith*, 267 NW 176; *Stryker v. Marschner*, 264 NW 344; *Continental v. Jones*, 142 SW 401; and *Thayer v. McGill*, 55 P2d 1272. In the instant case the defendant tendered neither possession nor the back payments, and the pleadings so admit.

The following language appears in *McBride v. Stewart*, 68 Utah 12, 249 P 114, 48 ALR 267, in turn citing *Foxley v. Rich*, 35 Utah 162, 99 P. 666:

“The Court in that case held that the purchaser of land who was in default and had abandoned the premises, and who had refused to make the payments

stipulated after repeated requests, could not recover the money paid. Clearly under the facts recited in that case, no other conclusion ought to have been reached than that the plaintiff (vendee) there was not entitled to recover the money paid as part of the purchase price. He had refused to make the payments, had abandoned the property, and had still refused to pay when requested . . . ”

The facts in the instant case are squarely in point with the *Foxley* case.

In *McKellar v. Paxton*, 62 Utah 97, 218 P. 128, wherein the vendors seek to recover the full unpaid purchase price of the property from the vendees, the Court said:

“In *Harvey v. Morris*, 63 Mo. 475, the Court Said: ‘Where a purchaser of land, by virtue of the contract of purchase, is put in possession of the land purchased, he cannot resist the payment of the purchase money without offering to restore the possession thus acquired by him to the venor. He cannot be permitted to occupy, possess and enjoy the profits of the land bought and at the same time be allowed to withhold the price agreed to be paid.’ ”

“That language is quoted by the Supreme Court of Kansas in *Dunn v. Mills*, 70 Kan. 656, 79 P 147; 3 Ann Cas. 363. See also, *McCourt v. Johns*, 33 Or 561, 53 P 601; *Taft v. Kessel*, 16 Wis 273; *Wickman v. Robinson*, 14 Wis 493, 80 Am Dec 789.

“It is further insisted and argued as a defense against plaintiffs’ claim that the testimony showed plaintiffs were unable to convey a merchantable title. The covenants on the part of plaintiffs and defendants, as found in the written contract, are independent and mutual. The plaintiffs bound themselves to ‘convey or cause to be conveyed in fee simple . . . by warranty deed, when payment by said purchaser

of the consideration . . . shall have been full performed.' The purchasers undertook to make the payments as stated in the agreement. By the plain provisions of the contract, the seller was not required nor obligated to convey the premises until the full purchase price had been paid. In the absence of some showing that plaintiffs did not have title to the premises, *or could not acquire title*, it may seriously be doubted whether the defect of title, if there was a defect, could be interposed as a defense to plaintiffs' action to recover the purchase price." (*Italics supplied by the writer*).

The facts in the instant case are squarely in point with this law on the subject.

Section 601 of 55 *AMERICAN JURISPRUDENCE* is hereinbelow repeated in its entirety:

"Performance or Offer by Purchaser to Perform: Effect of Default of Purchaser—In accordance with the general rule that a party to a contract who asks for rescission thereof must himself be without fault, there is considerable authority supporting the broad view that purchaser in default is not entitled to rescind and recover back money paid upon the purchase price. In this connection, it may be observed that, as hereinbefore mentioned, where the promise to convey the title required by the contract is conditioned upon payment, the vendor is not obligated to convey and there can be no breach unless payment is made or tendered; in such a case the purchaser must pay or tender payment in order to put the vendor in default. Accordingly, where the vendor's promise is conditioned upon performance by the purchaser of whatever is to be performed upon his part, which is, of course, chiefly the payment of the purchase price, nonperformance by the vendor does not con-

stitute a breach warranting rescission unless the purchaser performs or tenders performance. In other words, where the vendor's promise is so conditioned, the purchaser must perform or tender performance in order to put the vendor in default and entitle the purchaser to rescind the executory contract and recover back money paid upon the purchase price. Thus, a vendee's nonperformance of a covenant therein to make improvement has been held to accrue when the contract price is fully paid. A purchaser of land who does not offer to perform the contract on his part until several days after the time set for performance cannot enforce a forfeiture for nonperformance on the part of the vendor. However, even though the vendor's promise is conditioned upon payment by the purchaser of the purchase price, there may be an obligation to perform and a breach upon the part of the vendor without payment or tender of payment by the purchaser where payment or tender of payment would be useless, as where the vendor is *unable or refuses* to perform. Accordingly, where performance or tender of performance by the vendee would be useless, the vendee need not perform or tender performance in order to rescind for a breach of the vendor." (Italics supplied by writer.)

The Court's attention is directed to 40 A. L. R. 693, where it is said:

"See also *Poheim v. Meyers* (1908) 9 Cal. App. 31, 98 Pac. 65, in which it is held that where the vendee in a contract in which time is of the essence is in default, he cannot, without tendering the balance due, recover a payment theretofore made on the contract, on the ground that the title of the vendor is defective.

"The decisions on the subject appear to warrant the following generalizations: Where the vendor has until the time for performance to obtain title

to the property which he has contracted to convey, or to remedy defects in such title, the purchaser cannot, prior to the time of performance claim the right to rescind because of such defects, and so must make a tender in order to put the vendor in default. *Papesh v. Wagnon* (1916) 29 Idaho 93, 157 Pac. 775; *Laub v. De Vault* (1908) 139 111. App. 398; *Claude v. Richardson* (1905) 127 Iowa, 623, 103 N. W. 991; *Greenby v. Cheevers* (1812) 9 Johns, (N. Y.) 126; *Pioneer Gold Min. Co. v. Price* (1915) 189 Mo. App. 30, 176 S. W. 474; *Goldman v. Willis* (1901) 64 App. Div. 508, 72 N. Y. Supp. 282; *Ward v. James* (1917) 84 Or. 375, 164 Pac. 370, 372 . . .

“Where under the terms of the contract the obligation to pay precedes or accompanies the obligation to make title, the purchaser must, in order to put the seller in default, pay or offer to pay the purchase money; and hence cannot rescind on the ground of a defect in the title without tendering performance on his part. *Dennis v. Straseburger* (1891) 89 Cal. 583, 26 Pac. 1070; *Leach v. Rowley* (1903) 138 Cal. 709, 72 Pac. 403; *Eames v. Germania Turn Verein* (1881) 8 Ill. App. 663; *Claude v. Richardson* (1905) 127 Iowa 623, 103 N. W. 991; *Hartley v. James* (1872) 50 N. Y. 38.”

Also op. eite page 696:

“Mere defect of title in the vendor, and a present inability to give such a title as he covenanted to give, do not in all cases dispense with the necessity of payment of the entire purchase money and the demand by the vendee of a conveyance, in order to entitle the latter to maintain an action to recover back the purchase money already paid; and where in such an action there is no proof of tender of payment of the purchase money and of demand for the conveyance, and it is shown that, notwithstanding an infirmity of title in the vendor, if the purchase

money had been paid the vendee could and would have obtained a title conforming to the covenant, the plaintiff cannot maintain the action. *Pate v. McConnell* (1894) 106 Ala. 449, 18 So. 98; *Drake v. Nunn* (1923) 210 Ala. 136, 97 So. 211.

"In *Dennis v. Strassburger* (1891) 89 Cal. 583, 26 Pac. 1070, an action to recover the amount of a deposit in part payment made under a contract reciting the sale of certain property for a stated sum and further providing: 'fifteen days allowed for examination of title and completion of purchase; i. e. \$7,200 is to be paid upon the tender of good and sufficient deed conveying a title; if title is defective thirty days are allowed to perfect the same, and, if after the expiration of said term, unless extended by mutual consent, the title shall not have been perfected, the deposit is to be returned on demand. If the sale is not consummated according to the foregoing conditions, the deposit is to be forfeited and become the property of the undersigned. Time is the essence of this contract'—it was held that, in order to recover, the plaintiff should have tendered the balance of the purchase price and demanded his deed, and, if such demand was refused, he should then have demanded the return of his money; that if he based his right of recovery upon defective title he should have notified defendant that the title was defective; and, if upon the expiration of thirty days from that time defendant had not perfected his title, then he should have demanded a return of the amount paid, and a refusal would have formed a basis for a good cause of action."

Also 40 A. L. R. 700:

"But in *Joyce v. Shafer* (1893) 97 Cal. 335, 32 Pac. 320, where it appeared that some time after the last payment fell due, the vendor, without tendering a deed to the purchaser or demanding payment from her, without her consent sold and conveyed the land to another, it was held that the pur-

chaser could not sue to recover the money paid, without having tendered the amount due on the contract, since, notwithstanding the conveyance to the third person, the vendor might be able, when the time of performance should arrive, to furnish a good title.

“Where the conveyance to a third person is shown to have been made subject to the contract, the purchaser cannot sue to recover his deposit without first tendering performance. *Nance v. Avenall* (1915) 20 Cal. App. 551, 147 Pac. 583.”

The significant fact in connection with the law stated as applied to the facts in the instant case is that whatever damage the defendant Blohm suffered she suffered because of her own failure to make payments for if the payments had been made she would have ultimately received her title. For these reasons the Court below should have granted plaintiffs' motion for judgment on the pleadings and/or motion for summary judgment and awarded the plaintiffs damages in the amount of the delinquent payments under the contract.

ARGUMENT POINT II

THE TRIAL COURT ERRED WHEN IT FAILED TO ALLOW THE PLAINTIFF TO AMEND ITS COMPLAINT AND/OR INTRODUCE EVIDENCE SHOWING THAT THE DEFENDANT HAD REMOVED VALUABLE PERSONAL PROPERTY FROM THE PREMISES FOR WHICH THE PLAINTIFFS SHOULD RECOVER.

Wherever a claim is asserted by one the other always has the right to minimize the damages claimed by showing

either that the damages were not that great or by showing any off-sets he may have etc. In the instant case the pretrial order was certainly broad enough to allow the plaintiffs to introduce such evidence but the Court summarily denied this request.

Rule 15 (a) of the U. R. C. P., *UTAH CODE ANNOTATED*, 1953, provides " . . . Otherwise a party may amend his pleadings only by leave of court or by written consent of the adverse part; and *leave shall be freely given when justice so requires . . .* " (Italics supplied by the writer). Certainly the discretion of the Court below was abused in this instance for the defendant admitted that it could not claim surprise and the plaintiffs asserted that they had discovered these facts only since the pre-trial. (Transcript pages 3, and 4.) Certainly an injustice is done if the defendant is allowed to have the value of this personal property and also a judgment against the plaintiffs without offset.

ARGUMENT POINT III

THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE DEFENDANT AND SHOULD HAVE ENTERED JUDGMENT IN FAVOR OF THE PLAINTIFFS UPON THE SECOND CAUSE OF ACTION.

The Court at this point is requested to examine all of the law and all of the cases cited to it by the plaintiffs in their argument of Point I. It is our position that this law is concise and clear and that the facts in the instant case clearly square with the facts in the cases cited. For this

reason it is only urged in the alternative that if then the defendant is entitled to damages, the true measure thereof is the difference in the value of the property less the balance due under the contract. 55 *AMERICAN JURISPRUDENCE*, Section 510, 556; *Pembroke v. Caudill*, 37 S2d 538. So of course the trial Court erred in excluding Exhibit 28, showing the value of the Phoenix property to be at best \$25,000.00, and in ignoring the stipulated value of the Heber City property at \$47,500.00. Transcript page 100. Mr. Hatch also stipulated that the appraisers who authored Exhibit 28 were qualified experts and that if they were called they would testify to the effect set out in said Exhibit. Unfortunately because of the questionable censorship of the court reporter this is not included in the transcript and further because the Court would not give the plaintiffs extra time to secure this additional part of the proceedings from the court reporter who was "too busy" to start working on the same before the end of February. However, Mr. Hatch, I am sure, will not at this late date deny this stipulation.

When this value is compared with the contract balance due of about \$87,000.00 it is apparent that the defendant has no damages under this theory of the law but in fact the damages are minus \$40,000.00. "The Courts cannot supervise decisions made in the business world and grant relief when the bargain proves improvident." *Cole v. Parker*, 5 Utah 2d 275, 300 P2d 623.

Neither has the defendant any damages for her down payment since its value was only \$25,000.00 and she owed \$31,000.00 on this property. (Transcript page 109.) The

parties, set no value on this property, they merely traded equities. (Transscript page 99).

CONCLUSION

The judgment against the plaintiffs should be set aside and the cause remanded for further proceedings or in the alternative the Trial Court should be ordered to enter judgment on the pleadings or otherwise in the amount of the delinquent payments due from the defendant to the plaintiffs under the contract set forth in Exhibit 6.