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Leo Van Zyverden and Sytske Van Zyverden v. Ralph W. Farrar and Helen R. Farrar et al : Brief of Respondents and Cross-Appellants

Utah Supreme Court

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16 1964

IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

14 - 1963

LEO VAN ZYVERDEN and SYTSKE VAN
ZYVERDEN, his wife,

Plaintiffs, Respondents,
and Cross-Appellants,

vs.

No. 9945

RALPH W. FARRAR and HELEN R. FARRAR,
his wife, Defendants, and SEAGULL IN-
VESTMENT COMPANY,

Defendant and Appellant.

SEAGULL INVESTMENT COMPANY,

Plaintiff and Appellant,

vs.

No. 9946

LEO VAN ZYVERDEN and SYTSKE VAN
ZYVERDEN, his wife,

Defendants and Respondents.

Brief of Respondents and Cross-Appellants

Cross-Appeal from the Judgment of the Fourth Judicial
District Court in No. 9945 (2449 below),
Honorable R. L. Tuckett, Judge

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No. 9946

Brief of Respondents and Cross-Appellants

CROSS-APPEAL, CASE NO. 9945

Come now the plaintiffs and respondents in case No. 9945, No. 2449 in the trial court, and hereby cross-appeal to the Utah Supreme Court from the Judgment and Decree entered by the trial court on plaintiff's complaint in said case No. 2449, said judgment having

been entered on the 14th day of June, 1963, the plaintiffs' motion for new trial having been denied on the 5th day of July, 1963. Appellant's brief herein was served and filed on September 6, 1963.

STATEMENT OF CASE ON APPEAL

The buyers under a Uniform Real Estate Contract invoked the jurisdiction of the trial court for the purpose of adjudicating their rights to damages, and, alternatively, for specific performance as a consequence of defendants having failed to perform certain promises according to the intentions of the parties at the time the contract was executed. This case was assigned No. 2449 in the court below. The assignee of the sellers filed a cross-complaint in the same action, and, alternatively in a second case (No. 2456 below) urged the court to grant a judgment against the buyers for alleged unlawful detainer and possession of the property.

DISPOSITION IN LOWER COURT

The cases being consolidated for trial, the lower court found against the buyers in No. 2449 (No. 9945 on appeal) and against the sellers in both No. 2449 and 2456 (No. 9945 and 9946 on appeal). The court entered no cause of action against all parties.

RELIEF SOUGHT ON APPEAL

The buyers urge this court on appeal to affirm the judgment of the trial court whereby the sellers were

denied relief for alleged unlawful detainer and for restitution of the premises. The buyers urge that the trial court's judgment against them on their original complaint be reversed and that a new trial be awarded whereby they would be afforded an opportunity to prove the amount of damages which they have sustained as a result of the sellers' breach, and that such damages be off-set against any liability to the sellers in the nature of payments due under the contract. Buyers urge this court to instruct the trial court to determine the rights of the parties, and order that the sellers be required to convey the land involved to buyers upon such performance as is found to be due.

STATEMENT OF FACTS

The central and controlling issues in this litigation involve an interpretation of the intention of the parties in connection with the execution of a certain real estate contract for the purchase and sale of a ranch at the mouth of Daniels Canyon in Wasatch County. The property involved is referred to in the record as the "Daniels Creek Ranch." That name will be applied to it for convenience in this brief. Because of the importance of the circumstances of the execution of the agreement and the knowledge of the parties of the prior history of the operation of previous owners and tenants, it is necessary to describe in some detail the relationship of the parties and the factual circumstances under which the agreement was negotiated.

On or about January 12, 1957, Ralph W. Farrar and Helen R. Farrar, his wife, defendants in No. 2449, acquired an interest in the Daniels Creek Ranch by entering into an agreement to purchase the same from LaVerda Lynn (Exhibit 7). The Farrars first leased the ranch to a Mr. Van Camp, who had prior experience in the dairy business. Mr. Van Camp attempted to operate the ranch as a dairy but he failed in that enterprise and cancelled the lease (R. 570-571). The next occupant of the premises was a Mr. Mecham, who was in possession for approximately one and one-half years (R. 572). Then a man called Collier had the premises for one and one-half years. Mr. Collier agreed to pay \$66,000 for the property. Mr. LaMont Bowers then occupied the ranch for approximately one and one-half years. Subsequent to Mr. Bowers, Aluminum Roofing Company occupied the ranch, apparently under some arrangement with Bowers. Each one of these tenants in sequence attempted to operate the premises as a dairy farm (R. 573-577). Each one of these tenants was unable to meet his commitments, either as buyers or lessees of the premises.

Some time prior to September 25, 1960, Mr. Farrar called upon Leo Van Zyverden in response to a newspaper advertisement of Van Zyverden on some other property. Mr. Farrar explained that he had the Daniels Creek Ranch for sale and arrangements were made for Mr. Van Zyverden to see it (R. 498, 499). Mr. Farrar explained that he was foreclosing on the people who had been in possession of the place and told Van Zyverden

that the prior occupants had attempted to operate a dairy (R. 500). The condition of the barns and buildings was inspected. Mr. Van Zyverden explained to Farrar that the place would continue to be unsuccessful as a dairy and that "it should be converted into a beef operation" (R. 500-501). Mr. Van Zyverden testified that he showed Farrar that by converting the main ranch into a grazing operation and leaving approximately 37 to 40 acres at the airport in hay, that the enterprise could be operated much more economically than as a small dairy. He specifically explained that he would expect to run 100 head of cattle (R. 519-520).

Mr. Farrar admitted that he told Mr. Van Zyverden of the prior history of the ranch and that he knew that Mr. Van Zyverden intended to convert it from a dairy to a beef operation. He realized that the only manner that he could expect to be paid for the property was to enable the purchaser to convert from dairy to beef. He realized that the milk base and the milking equipment on the premises had no value to a beef raiser and that he took that fact into account when he signed the purchase agreement with the Van Zyverden (R. 578-579).

Mr. Van Zyverden testified directly that he told Farrar he was not interested in the ranch as a dairy operation and that Farrar said he would permit a conversion into a beef ranch (R. 503). Mr. Van Zyverden explained that in order to convert into a beef operation the milk equipment and base would have to be sold or exchanged into beef (R. 503). Van Zyverden ex-

plained to Farrar that he had no money himself to go into the beef business but that he had some machinery and livestock and horses in Roosevelt and other places and he would use this property as a down payment by placing the assets on the ranch and permitting the seller to retain a security interest in such property as well as the Farrar assets subject to the sale (R. 503). Farrar and Van Zyverden decided that since it was then the fall of the year and winter was approaching, there was no feed on the premises, the milk base would be sold and the money would be retained by Farrar until such time as the weather would open up in the spring and could be used to purchase livestock (R. 505). The purchase agreement which was executed by the parties is in the record as Exhibit 1. For the most part it is a standard Uniform Real Estate Contract. The "rider" provides, among other things, that "It is agreed that the Hi-Land milk base . . . and all milking equipment as above mentioned, can be exchanged for livestock or horses of equal value, remaining security for the period of two years as agreed above." At the time this agreement was executed Mr. Farrar knew that there was a provision in his original contract with LaVerda Lynn whereby he was prevented from conveying the base, unless, of course, the seller would consent. The language of the Lynn agreement relevant to the problem is as follows:

"It is understood and agreed that the Hi-Land milk base and 100 shares of capital stock in the Hi-Land milk company is included in the sale, and that base is non-transferable during the life of the agreement." (See Exhibit 1.)

Mr. Farrar admitted that he did not tell Van Zyverden anything about the limitation of the transferability of the milk base as contained in Exhibit 3 at the time of the execution of the agreement (R. 576). He testified that he had "mental reservations" about the milk base at the time he signed the agreement with Van Zyverden but he did not discuss them with Van Zyverden (R. 576, 577).

The evidence is thus clear and uncontradicted that at the time the parties executed the agreement, Ralph W. Farrar knew Mr. Van Zyverden intended that the milk base and equipment was to be used to assist in financing the Van Zyverden beef operation. It is only reasonable to conclude that Mr. Farrar did not expect Mr. Mickelson, the assignee of the seller's interest under Exhibit 3, to raise any substantial objection to the transfer of the base; therefore he was perfectly willing to undertake the obligation to enable Van Zyverden to transfer the milk base and milking equipment in order to raise capital for a beef operation. Farrar was sufficiently shrewd and logical to realize that only by undertaking that obligation could a sale be made to the Van Zyverdens on the property.

After the agreement was signed, Mr. Farrar had possession of it for some period of time for the purpose of getting his wife's signature. He struck out of the description of the property to be sold the language relating to 100 shares of stock of Hi-Land dairy and approximately two or three weeks later urged Mr. Van

Zyverden to consent to such procedure. Mr. Van Zyverden agreed to the amendment (R. 506-507). It is clear, however, that Farrar had plenty of time to study the provisions of the agreement with respect to the Hi-Land milk base between these two dates.

Between September and approximately the middle of November, Van Zyverden and Farrar had additional discussions with respect to converting the milk base to beef cattle (R. 509-510). Van Zyverden obtained from Hi-Land the name of a prospective purchaser of the base named Pert. He requested that Farrar write a letter to Hi-Land asking permission to transfer the base to his prospect (R. 510-511). Mr. Farrar was very pleased that he had a sale and indicated to Van Zyverden that the sooner it was sold, the better. Pert would pay \$10 a pound for whatever part of the base Hi-Land would transfer, and this arrangement was acceptable to Farrar (R. 512). Farrar assured Van Zyverden that he would immediately contact Hi-Land and ask them to transfer the base to Mr. Pert.

Mr. Farrar wrote to Mr. Van Zyverden on November 2 (Exhibit 2), stating that he had "stopped at Hi-Land dairy and found that there are 479 pounds of base. This would be reduced to 378 pounds . . . in the event of a sale. I see no reason why this cannot be sold to an individual at a price of not less than \$3,000 and if it were worked on a trade for livestock would bring possibly more. Inasmuch as you do not plan to put stock on the farm this fall as was originally agreed, it will be neces-

sary to have the money derived from the sale of the base placed in an account in my name until such time as stock will be purchased. . . . I suggest that the base and tanks be sold as conveniently as possible."

On December 27, Mr. Farrar wrote to Hi-Land dairy approving Pert as a buyer and requesting that the base be transferred to him. Farrar admitted that this letter was sent at Mr. Van Zyverden's request and that its purpose was to enable the sale or exchange of the milk base pursuant to their agreement (R. 581-582).

Mr. Farrar did not advise Mr. Mickelson of the proposed tranfer to Pert. He did not ask Mr. Mickelson to consent to the assignment.

The compelling evidentiary force of Farrar's conduct at this time, however, is that he admitted that he was acting to perform his obligations to Van Zyverden. He agreed to the Pert sale, tried to complete it quickly, and instructed Mr. Van Zyverden that the money was to be banked in his name until spring when cattle could be purchased.

In failing to obtain Mr. Mickelsen's approval in advance, Farrar miscalculated. When Mr. Mickelsen learned of the Farrar request he advised Hi-Land that he had a security interest in the base and that they should not allow any transfer without his consent.

Thereafter, Farrar did not attempt to resolve the matter with Mickelsen so that he could perform the

obligation contained in the Van Zyverden contract. Hi-Land declined to allow the transfer without Mickelsen's consent.

Prior to the time of the trial, Farrar had never advised Mr. Van Zyverden that he could perform by making a sale or exchange to Mr. Pert or to any other person (R. 587). As of November 1, 1962, Mr. and Mrs. Farrar assigned their interest under the contract to the defendant Seagull Investment Company (Exhibit 10). Seagull agreed that it would keep, observe and perform "all of the terms, conditions and provisions of said agreement that are to be kept, observed and performed by the assignors."

The Van Zyverdens made a tender of proof at the trial with respect to damages. In addition to the machinery and livestock which the buyers delivered to the sellers as down payment on the premises, Van Zyverden made improvements in the nature of new pump, fence additions, well repairs and other comparable capital expenditures involving cash or equivalent payments of \$8,812.00 (R. 222). At the trial, plaintiff offered to prove that there were specific discussions with Mr. Farrar concerning the profit which the buyer could have made if he had been able to exchange the milk base for young livestock (R. 523, 524). The offered testimony would have been to the effect that the money received from the sale of the Hi-Land milk base or the cattle received on any exchange would provide the capital necessary for a cattle operation. The amounts received

from the sale would be sufficient to purchase approximately 100 head of young calves. At two pounds of gain per day during the grazing season, the increase on these cattle would provide sufficient funds to make the payments under the contract in the fall and some additional small profit to the operator. Mr. Farrar was told in substance and effect that this was the precise manner in which the purchaser intended to make payment. Mr. Farrar recognized that these projections of Van Zyverden were substantially accurate and it was agreeable with him that the operations should be so conducted. The witness offered to testify that 100 young dairy cattle having an average weight of 300 lbs. in the spring would gain on the average two pounds per day, taking into account reasonably anticipated losses. The evidence was offered in support of two propositions: First, that the parties intended and agreed at the time of the execution of the contract that the sellers enabling the milk base to be exchanged for beef cattle was a conditional performance to the performance of the buyer, and secondly, that under the theory of *Hadley v. Baxendale* and Sections 330-331 of the Restatement of Contracts the buyer was entitled to recover loss of profits because they were anticipated by the parties (R. 523-526).

After Farrar had been unable or unwilling to obtain Mickelsen's consent to the transfer of the base, and during the time he knew that Van Zyverden was looking to him to obtain the result, he assigned his interest in the contract to Seagull Investment Company. The assignment provides explicitly that the assignee assumes all

the assignors' obligations under the contract (Ex. 7, R. 242, Para. 3).

When Seagull refused to negotiate any solution with the Van Zyverdens (R. 288), they filed their complaint in No. 2449 (R. 3, 4). The summons and complaint in No. 2449 were served upon Seagull on December 14, 1961 (R. 16). Seagull served a "Notice of Termination of Contract and Five Day Notice to Vacate Premises" upon the Van Zyverdens on January 2, 1962 (R. 266-273), but did not answer the complaint in the action filed until after the prescribed 20 days had expired (R. 19). Instead, they filed a new complaint, No. 2456, for alleged unlawful detainer, on January 16, 1962 (R. 258-273). Plaintiffs in No. 2449 moved for dismissal of No. 2456 on the ground that such pleading was a compulsory counterclaim in the first action, and that the default constituted a judgment which was res adjudicata (R. 274-276).

After the default certificate against Seagull in No. 2449 had been entered, and before it had been set aside, Seagull filed some requests for admissions in that action. Plaintiffs moved that they be stricken on the ground that Seagull's default had been entered and it had no standing in the case (R. 25). Without waiting for rulings on the pending motions, Seagull had the clerk of the court enter a "default certificate" against plaintiffs in No. 2449 for failing to answer the requests for admissions (R. 294). Seagull's motion for reinstatement was granted and its motion for summary judgment denied

(R. 295, 298). All of the information referred to in the requests for admissions was subsequently obtained through written and oral interrogatories.

Seagull subsequently served a second notice, Exhibit 5 (R. 233) stating that "this notice shall in no way affect the existing legal proceeding now pending concerning said property . . ."

At no time during the trial, or subsequently, did Seagull offer to file a supplemental complaint. As late as July, 1963, more than six months after the trial, Seagull was demanding payments allegedly due in November, 1962 (R. 723-725). The 1962 payments were due, if at all, at least ten months after the service of Exhibit 5, clearly indicating that any termination of the right of the Van Zyverdens as buyers at that time had been waived.

ARGUMENT

POINT I.

THE COURT ERRED IN FAILING TO FIND THAT THE PARTIES INTENDED THAT THE SELLER ASSUME THE OBLIGATION OF ENABLING THE BUYER TO CONVERT THE MILK BASE AND EQUIPMENT TO LIVESTOCK.

The contract provided that: "It is agreed that the Hi-Land milk base . . . and all milking equipment as

above mentioned, can be exchanged for livestock or horses of equal value, remaining security for the period of two years as agreed above." The Van Zyverdens asked the court to construe the agreement to the effect that the Farrars warranted that the Van Zyverdens would be enabled to exchange the milk base and equipment for livestock. The trial court failed to make such a finding. The conduct of the parties and the admissions of Farrar under oath at the trial demonstrate conclusively that this ruling of the trial court was erroneous.

A. *The intentions of the parties are controlling.* This court has uniformly held that the trial court should determine the actual intention of the parties to the contracts in the light of such extrinsic evidence as is available to determine such intentions. In *Burt v. Stringfellow et al.*, (1914) 45 Ut. 207, 143 P. 234, the court said:

"In case, however, a construction is called for, the to rule to be applied is well stated in 2 Elliott on Contracts (1913) Section 1508, in the following words:

'When a contract is ambiguous and open to construction, the true end to be reached is to ascertain what the parties intended, and when that intention is found it prevails over verbal inaccuracies, inapt expressions, and the dry words of the stipulations. The court should, as far as possible, place itself in the position of the parties when their minds met upon the terms of the agreement, and then from a consideration of the writing itself, its purpose, and the circumstances surrounding the transaction,

endeavor to ascertain what they intended and what they agreed to do; i.e. upon what sense or meaning of the terms use, their minds actually met. The purpose of all rules for the construction of contracts is to aid in ascertaining the intention of the parties from a construction of the whole agreement.'

"In other words, the rules of construction should be considered as servants, and not as masters, and thus one rule should not be given undue prominence while another is given but slight or no effect." (Emphasis supplied.)

Applying the rule in the same case the court stated:

"The question that we must determine, therefore, is: What was the intention of the parties to the contract . . . at the time it was entered into. . . . In case parties have entered into a contract and differ with regard to its meaning, and the terms of the contract are doubtful or ambiguous, the first duty of the court is to ascertain the actual intention of the parties at the time the contract was entered into. This intention must be determined from the language used by the parties when applied to the subject-matter of the contract and the circumstances and conditions surrounding the parties."

The *Burt* case was cited and its teachings applied in *U'dy v. Jensen* (1924), 63 Ut. 95, 222 P. 597, where the court said:

"The form of expression is inapt and awkward, but, in the light of the circumstances and conditions surrounding the parties, the meaning is clear. The actual intention of the parties must prevail over dry words, inapt expressions, and

careless recitation in the contract, unless that intention is contrary to the plain sense and binding words of the agreement. *Caine v. Hagenbarth*, 37 Utah, 69, 106 Pac. 945.

“ ‘The best construction is that which is made by viewing the subject of the contract, as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention.’ *Schuylkill, etc. Co. v. Moore*, 2 What. (Pa.) 490.”

B. *The contemporaneous conduct of the parties evidences an intention whereby the seller was obligated to obtain the exchange of the milk base.* Seagull Investment Company argued at the trial that the transfer of the base to Van Zyverden in the spring of 1961 constituted compliance with the contract. This, however, appears to be spurious. The agreement is explicit that the seller was obligated to transfer to the buyer the milk base as well as all other property subject to the sale. The buyer was to receive the right and power to exchange the milk base for livestock or horses of equal value. Unless the buyer was to have the right to make such an exchange to someone else, the specific language in question would be meaningless and superfluous. Thus it is clear from the agreement itself that the Van Zyverdens expected to exchange the milk base for livestock, and the agreement could not have been satisfied by the transfer of the base to the Van Zyverdens.

The construction placed upon the agreement by

the parties themselves contemplates that Farrar undertook the obligation to enable the exchange. In *Caine v. Hagenbarth* (1910), 37 Ut. 69, 106 P. 945, the court approves the rule that the construction placed upon an agreement by the parties is controlling. At page 81 of the Utah Reporter the court said:

“So the general paramount intent controls the special intent, and in this way it sometimes becomes necessary either to enlarge or to restrict the ordinary meaning of words in order to preserve the paramount intent of the parties to the agreement. (2 Paige on Contracts, Sec. 1113.) One of the cardinal rules requires that ‘as between two constructions, each probable, one of which makes the contract fair and reasonable and the other of which makes it unfair and unreasonable, the former should always be preferred.’ (2 Paige on Contracts, Sec. 1121.) Another author, whose work on contracts has, for many years, been recognized as a standard authority, namely, Parsons on Contracts, in Volume 2 (9th Ed.), star page 494, says: ‘The first point is usually to ascertain what the parties themselves meant and understood.’ ”

Applying the rule in that case, the court said at page 96:

“The more that we have reflected upon the questions involved and the more we have considered the language contained in the contract when viewed in the light afforded by the subject-matter and the surrounding circumstances herein detailed, the more have we become convinced that appellant’s contention ought to prevail, and that the trial court, in construing the language con-

tained in the contract, overlooked the doctrine which is well expressed in the scriptural text, that it is 'not of the letter, but the spirit; for the letter killeth, but the spirit giveth life.' ”

At least four salient uncontradicted facts support the construction that the parties intended that Farrar warranted that the base could be exchanged for livestock or horses of equal value:

First: The parties to the agreement knew that prior efforts to operate a dairy farm on the property had been unsuccessful. Farrar testified in substance that each of the four prior operators of the ranch since the time he had an interest in it had attempted a dairy operation and had failed (R. 570-577). At the time of the negotiations with Van Zyverden, in fact, LaMont Bowers, the immediate past occupant, was in default under a contract and it was necessary to give him a Notice to Quit the Premises in order to complete the deal with Van Zyverdens. Farrar admitted that he told Van Zyverden of the prior history of the operation and that he knew that Van Zyverden intended to convert the place to a livestock operation. He admitted that he realized in negotiating the contract that the milk base and the milking equipment on the premises had no value to a beef raiser and that he took such facts into account when he signed the purchase agreement (R. 578-579). It is unreasonable to suppose that when both parties knew that the property had failed to support a dairy operation that Van Zyverden would have agreed to pay nearly \$60,000 only to engage in a failing enterprise. The

parties clearly contemplated that the ranch would be used for the raising of livestock.

Second: It is undisputed that Van Zyverden told Farrar that he had no cash or other capital to enable him to purchase beef or any other livestock. Van Zyverden testified directly that he told Farrar he would have to operate the premises from the assets that were being sold. Farrar knew that unless livestock were placed on the premises, Van Zyverden could not reasonably expect to make the payments. Farrar knew that Van Zyverden's economic circumstances were such that the payments required under the contract could not be made unless he had the capital to operate on a paying basis; Farrar knew that Van Zyverden had to make enough money from the ranch itself if the sellers were to realize the price.

Third: Farrar knew that under his agreement with LaVerda Lynn, which had since been assigned by her to Maurice Mickelsen, there was a restriction upon the transferability of the base and that the base could not be transferred without Mickelsen's consent. But Farrar failed to disclose this fact to Van Zyverden. Farrar admitted that he did not tell Van Zyverden anything about the limitation of the transferability of the milk base at or prior to the time of the execution of the agreement (R. 576). He admitted that he did not ever show the Lynn contract to Van Zyverden. He testified that he had "mental reservations" about the milk base at the time he signed the Van Zyverden agreement but he did

not discuss them with Van Zyverden (R. 576-577). It is unreasonable to suppose that Farrar would have failed to advise Van Zyverden as to the reservations in the Lynn contract unless Farrar had intended to undertake the risk incident to making the exchange possible. In other words, when Farrar looked at the language of the contract to the effect that the milk base "can be exchanged," he had to realize that if the base could not be exchanged he could not make a deal with Van Zyverden because Van Zyverden expected to exchange the base, in effect, for the working capital necessary to operate the ranch. Farrar had to make the base exchangeable to make a deal with Van Zyverden. It is only reasonable and logical to assume, therefore, that in his own mind he undertook the risk incident to enabling the exchange. It is submitted that the compelling force of the argument cannot be answered by the appellants in this case.

Fourth: After the agreement was signed, and when the time came to exchange the base, Farrar undertook to complete the exchange. Farrar admitted that his letter of December 24 to Hi-Land dairy approving Pert as a buyer and requesting that the base be transferred was sent at Mr. Van Zyverden's request and that the purpose of the letter was to enable the sale or exchange of the milk base pursuant to his agreement with Van Zyverden (R. 581, 582). Van Zyverden testified that after the parties were advised by Hi-Land that Mickelsen had refused to consent to the transfer, Farrar continued to represent to him that he would work the matter out with

Mickelsen (R. 514, 515). At no time did Farrar directly or indirectly deny this testimony. Farrar did not ever indicate to Van Zyverden, either directly or by implication prior to the assignment to Seagull Investment Company, that he did not expect to resolve the impasse with Mickelsen. It is submitted that Farrar's attempt to perform demonstrates unequivocally that he recognized that he had an obligation to perform. He knew that Van Zyverden looked to him to make the exchange possible in order that cattle or other livestock could be acquired to make the ranch pay out. It is significant that Van Zyverden made substantial improvements upon the premises during the spring of 1961 after the parties had been notified that Mickelsen declined to consent to the exchange. It is unreasonable to suppose that Van Zyverden would have continued to make such improvements unless Farrar had continued to assure him, as he testified, that he would work the matter out with Mickelsen so that the place could be successfully operated.

The trial court obviously ignored the intentions of the parties as reflected by their own testimony and their conduct at the time and subsequent to the agreement. It is significant that the trial court did not make a finding as to the intentions of the parties. It simply determined "that the wording of the contract and the evidence offered by the plaintiffs fails to support plaintiffs' claim" (R. 189). The findings incorporate the contract between the parties by reference (Finding No. 2, R. 204) and the court found that the purpose of the December 27 letter from Farrar to Hi-Land

dairy was “to bring about the sale or exchange of the milk base pursuant to the Farrar-Van Zyverden agreement” (Finding No. 6, R. 205), but the findings simply say that “the Van Zyverdens were not damaged by any default of the defendants in this action” without any interpretation of the intention of the parties, either with respect to the language of the written agreement itself or their contemporaneous conduct. Particularly, since the interpretation of their intention is the central issue in the case, the failure of the court to make a finding as to their intention in the light of all the circumstances requires reversal.

POINT II.

THE COURT ERRED IN FINDING THAT THE VAN ZYVERDENS WERE NOT DAMAGED BY SELLERS’ DEFAULT.

The Van Zyverdens, in effect, conveyed personal property to the Farrars of the agreed value of \$5,000 as down payment on the premises. In the event the Van Zyverdens were required to forfeit their interest, this consideration would be totally lost. In addition, they made capital expenditures in the nature of permanent improvements on the premises of a value of \$8,212.49, including the reasonable value of their own labor (R. 220-222). A forfeiture would result in the loss of these improvements and would unjustly benefit the sellers and their assignee, Seagull Investment Company.

Even more important to the Van Zyverdens is the fact that they have been deprived of the use of the premises for the purposes anticipated by them and the Farrars at the time of the purchase agreement. They have been denied reasonably anticipated profits during the two years that the sellers were in default.

Since *Hadley v. Baxendale* (1854), 9 Ex. Ch. 341, the law has been clear that loss of profits are recoverable when they are provable with reasonable certainty, and where they are within the contemplation of both parties as a probable result of a breach. The case is discussed in *Victorial Laundry v. Newman Industries*, (1941) 1 All Eng. 997, where it was held that a person who promised to deliver a large boiler to a laundry where it was needed for immediate use in the business had reason to foresee loss of profits for business that the use of the boiler would make possible. Section 331 of the Restatement on Contracts states the rule as follows:

“Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.”

Illustrations 4, 5, and 10 are helpful in applying the general principle to the case at bar.

“4. A sells seed to B, warranted by A to be Bristol cabbage seed. The seed is worthless mixed seed; but while unaware of this, B sets out 105,000 plants raised from it. The crop produced is good only for cattle. B has a right to the value

of a crop of Bristol cabbage that would be produced under the existing conditions, less the value of the crop that is actually produced, if his evidence gives a sufficient basis for estimating these amounts.

“5. A contracts to permit his established coal mine to be operated by B and to pay B \$1.60 per ton for coal produced. The mine has been operated for a long period and its veins are well established. In an action for A’s breach, by preventing B from operating the mine, B proves satisfactorily that the mine has regularly produced 200 tons per day at a net cost of \$1.40 per ton. The profits that B would have made from operating the mine are not too uncertain for inclusion in the damages awarded.

* * *

“10. A employs B as master of a whaling ship on a five-year voyage, the compensation to be a share of the net proceeds of oil taken on the voyage. After two years B is wrongfully discharged and at once brings action. Although the earnings of the ship after B’s discharge are contingent and uncertain, B may be able to lay a sufficient basis for their estimation by giving evidence of the conditions and experience in the whaling industry.”

This court approved an instruction permitting a loss of anticipated profits in *Park v. Moorman Manufacturing Co.* (1952), 121 Ut. 339, 241 P.(2d) 914.

It is undisputed in the instant case that the parties discussed and agreed upon the concept that profits could be made from the Daniels Creek Ranch only if it was

operated as a livestock enterprise, and that the Van Zyverdens would have to convert some of the existing assets subject to the sale to livestock to enable them to operate on this basis. Plaintiffs offered to prove a specific series of conversations between Van Zyverden and Farrar in which Farrar was advised in substance and effect that the sale of the milk base and equipment would provide sufficient cash to purchase approximately 100 head of calves in the early part of the season and that the calves could expect to gain two pounds per day during the grazing season. Mr. Farrar acknowledged the accuracy of Van Zyverden's analysis of the proposed operation and his projection of profits. Van Zyverden offered further to testify that he was acquainted with the prices of cattle and livestock during the spring and summer of 1961 and that such profit as was available from increase of weight on cattle during that period of time would have been sufficient to enable him to make the payments on the contract. The evidence was offered in support of two propositions:

First, that the parties in fact contend that the obligation to pay was conditioned upon performance of the obligations of the sellers to obtain the transfer of the base, and secondly, under the rule of *Hadley v. Baxendale* and Section 330-331 of the Restatement on Contracts (R. 524-526).

The court rejected the offer of proof. It is important to observe that the basis of the court's ruling was that future profits were not recoverable and not that the offer of proof was insufficient (R. 523).

It is submitted that the ruling of the court denying the plaintiffs in No. 2449 the right to recover for loss of profits under the circumstances of this case is clearly erroneous and requires reversal. In the event of the court should be of the view that the record is insufficient at this time to prove or calculate actual damages, the trial court should be instructed to hold an additional hearing so that actual market quotations on beef for the spring and fall of 1961 can be included in the record. Actually, such damages can be computed by reference to readily available market data. There are approximately 180 days of grazing available in the Heber Valley. At two pounds per day, 100 head of cattle would gain 200 pounds per day or 36,000 pounds. At 25c per pound, the amount of gain per year would be \$9,000.00.

Upon analysis, there is no more reason for denying promisee loss of profits as an ultimate of damage than loss of any other benefit of his bargain. Corbin analyzes the problem as follows:

“A profit is the net pecuniary gain from a transaction. The profit to be made from a contract by one of the parties thereto is the full value of the performance promised him by the other party, diminished by the cost of his own performance that he contracts to render in exchange.”

Where the profit was in terms of a commodity having a definite and relatively uniform market price a loss of profits should no more be denied than if the contract was for the exchange of two commodities, cf. the discussion in Corbin *supra*, pp. 119-120. Even if loss of

profits is not recoverable, there is no reason for denying recovery of the \$13,812.49 invested in the property if forfeiture is required as the result of the seller's own conduct.

POINT III.

THE SELLERS' BREACH GAVE RISE TO A CAUSE OF ACTION BY THE BUYERS FOR DAMAGES, OR SPECIFIC PERFORMANCE, OR BOTH, AGAINST SEAGULL INVESTMENT COMPANY.

A. The assumption of the Sellers' duties and liabilities under the Van Zyverden-Farrar agreement was expressly assumed by Seagull.

The court found that "On or about November 1, 1961, the Farrars assigned their interest under the Van Zyverden contract to Seagull Investment Company. The Farrar-Seagull assignment is in writing and incorporated herein by reference, and provides in substance that the assignees will perform the provisions of the Van Zyverden agreement and will hold the assignors harmless from any claim or demand arising from any act or omission of the assignee."

The assignment is in evidence as Exhibit No. 10. Paragraph 3(a) expressly provides that the assignee will perform all of the obligations of the assignor.

B. The buyer is entitled to assert a remedy for specific performance with appropriate abatement constitut-

ing compensatory damages for the loss sustained by Sellers' breach.

Van Zyverdens proposed that the amount of money which they were entitled to receive as damages for the sellers' breach be applied against the obligations of the buyers under the contract, and that the sellers be required to convey in accordance with their contractual obligations after having made such credit. It was suggested that there was an applicable analogy to the situation where specific performance with abatement could be obtained in situations where the seller of land was unable to convey all that he had bargained for under an executory real estate contract.

Corbin states the abatement principle as follows:

“If a vendor is unable to transfer title to all of the land that he contracted to transfer, or if there are defects in his title that he cannot remove, the vendee may desire such performance as is within the vendor's ability. In such cases the vendee can get specific performance with respect to the part that the vendor can transfer, with compensation, an abatement in price proportionate to the deficiency or defect, or an indemnity against future injury. Thus, if one has contracted to transfer complete title, and his wife who has a dower interest refuses to join in the deed, the vendee can compel a transfer of such interest as the promisor has, with an abatement for the value of the wife's interest. It has been so held even though the vendee knew when the contract was made that the wife had an interest and was not bound to join in the conveyance.” Corbin on Contracts, Vol. 5, p. 687.

The same rule appears in the Restatement of the law of Contracts in Section 365. Illustration 3 to the section is as follows:

“3. A contracts to transfer land in fee simple to B. A is unable to perform in full because of the existence of a building restriction. B may be given a decree for the transfer by A of such interest as he has, with compensation or an abatement for the building restriction.”

In the instant case, the Farrars agreed to the sale of specific real and personal property, and as a part of the consideration to be paid by the buyers, agreed in addition that they would enable the exchange of part of these assets to be convertible to other property in order that the ranch might be successfully operated. It is suggested that Van Zyverden received less than the promised performance in a manner comparable to the buyer who receives less acreage than the seller has agreed to convey. Damages can properly be assessed in a dollar sum and applied against the purchase price, including interest, and other items agreed to be discharged by the buyer in the purchase contract. The analogy to the abatement principle is particularly useful in the instant case because it would prevent the sellers from benefiting from their own wrong.

It is obvious from the record in this case that the value of the property has substantially increased between the time the contract was executed and the time of trial. There is evidence before the court to the effect that the present value of the property would be approximately

\$85,000. If the sellers successfully forfeit the buyers' interest under the circumstances here, they will have deprived buyers of the real fruits of the agreement through their own conduct. This is an instance where damages and specific performance should both be provided to place the parties in their respective positions to the same extent as though the contract had originally been discharged by the parties in accordance with their initial intentions. While no case has been found explicitly adjudicating the kind of result requested by the Van Zyverdens, it is submitted that the court has sufficiently broad powers to achieve the indicated result and that such result would achieve substantial justice between the parties.

POINT IV.

SEAGULL CANNOT RECOVER FOR UNLAWFUL DETAINER.

A. The trial court correctly ruled that unlawful detainer was not established at the time of the trial.

Even assuming that the plaintiff was in default under Exhibit 1, the defendant Seagull must, in order to succeed in its unlawful detainer action, prove that the plaintiff was given the requisite statutory notice. *Carsten v. Hansen* (1944), 107 Ut. 234, 152 P.(2d) 954. This the defendant has failed to do.

Utah's unlawful detainer statute only applies to tenants of real property for a term less than life (78-36-

3 U.C.A.). As this court has noted in the case of *Pearce v. Schurtz* (1954), 2 Ut.(2d) 124, 270 P.(2d) 442, the relationship of vendor-vendee under a Uniform Real Estate Contract is not one of landlord-tenant to which the unlawful detainer statute applies. The court said: "In a situation where title is held until payment is complete, the general conclusion to be drawn is that a conditional sale or mortgagor-mortgagee relationship exists." *Ibid* at 127, Utah Reporter.

Under paragraph 16(a) of Exhibit 1, the seller has the election, upon the buyer's default, to serve the buyer with written notice to remedy such default, and "upon failure of the buyer to remedy the default within five (5) days after written notice . . . the buyer agrees that the seller may, at his option, re-enter and take possession of said premises without legal processes as in its former estate, together with all improvements and additions made by the buyer thereon, and the said additions and improvements shall remain with the land and become *the property of the seller, the buyer becoming at once a tenant at will of the seller . . .*" (Emphasis supplied.)

Thus it is only upon the buyer's failure to remedy a default within five days after written notice that a landlord-tenant relationship, to which the unlawful detainer statute applies, is created.

Again, this court noted in the *Pearce* case, provisions such as the one set forth above in paragraph 16(a) of Exhibit 1 were "undoubtedly adopted to obtain the benefits of the unlawful detainer statute." (*Ibid* at 127.)

If, however, Seagull Investment Company seeks to claim the benefits of the unlawful detainer statute, it must comply with the requirements of that statute, and under that statute a *tenant at will* is only “guilty of an unlawful detainer” if he remains in possession “after the expiration of a notice of not less than five days” (57-36-3 U.C.A.).

In this case the defendant Seagull did serve the plaintiff on or about the 3rd day of January, 1962, with a five-day Notice to Vacate Premises (see Notice attached to Exhibit 5) and pursuant to such notice on page 2 notified the plaintiff that it was electing to exercise its rights pursuant to paragraph 16(a) of Exhibit 1, and further gave the plaintiff five days to remedy the alleged defaults.

Even assuming that the defendant was in default and that he failed to cure such defaults within five days after the service of the above mentioned Notice, Seagull could not successfully maintain an unlawful detainer action against the plaintiff until it had served the plaintiff with the requisite five-day statutory notice. The first notice, pursuant to paragraph 16(a), did not suffice for the statutory notice because only upon the failure of the plaintiff after five days to remedy the alleged defaults would a landlord-tenant relationship exist to which the unlawful detainer statute can apply, and the landlord-tenant relationship could then only be terminated pursuant to the five-day notice required by the statute.

This statutory five-day notice was never served upon the plaintiff prior to the time that defendant's action for unlawful detainer was commenced, either by suit Civil No. 2456 or in its counterclaim to suit Civil No. 2449. (See return of service attached to Exhibit 5). Subsequent to the commencement of defendant Seagull's action for unlawful detainer, the defendants, in effect recognizing the validity of the plaintiff's position on the inadequacy of notice, caused a second notice (Exhibit 5) to be served on the plaintiff. This notice was wholly abortive, however, in the present cases. Seagull has now attempted to file an appropriate supplemental pleading. Moreover, Exhibit 5 expressly provides that it shall "in no way affect the existing legal proceedings." All the pleadings in the cases before the court are predicated upon the first notice, which, as shown, failed to satisfy the requirements of the statute.

Seagull is asking the court to apply a drastic and penal remedy. It simply has not brought itself within the statutory requirements to enable itself to maintain the alleged remedy in the present actions."

B. Seagull has waived any rights to recover for unlawful detainer under the notices introduced at the trial.

Both during the time the lawsuit was pending and after the trial date, Seagull was demanding that the Van Zyverdens make the annual payments and discharge the obligation for taxes and insurance for the year ending November 30, 1962. At the time of the notices

introduced at the trial, Seagull was claiming a default only for alleged deficient performances through the fall of 1961.

The record now shows that in July, 1963, Seagull served upon the Van Zyverdens a "Notice to Remedy Default or to Quit" in which it was claimed that Van Zyverdens were indebted for the payments for the years 1962 as well as 1961, and a demand was made "that you remedy all your defaults in the performance of your obligations" under the contract within five days (R. 723-725). Even since the judgment of the trial court, therefore, Seagull has taken a legal position inconsistent with its right to recover for unlawful detainer or obtain any other rights under the prior notices. Certainly Seagull cannot argue that the Van Zyverdens were tenants at will in February, 1962. and at the same time Seagull was entitled to receive a payment due from them, as buyer, in November, 1962.

It is generally held that the taking of a legal position inconsistent with the forfeiture of the buyer's interest under an executory land contract waives any right obtained by the seller under a notice of forfeiture. The editor of an annotation at 107 ALR 395 states:

"An option to forfeit because of default occurring as to a particular payment or payments is waived by the vendor's adoption of a legal remedy inconsistent with such forfeiture . . .

"Thus an action to recover the unpaid purchase money, or a part thereof, is a waiver of any

right of forfeiture because of the non-payment of such money." (Citing cases.)

In *Clark v. Neumann* (1898) 56 Neb. 364, 76 N.W. 892, a vendor waived a notice of declaration of forfeiture and then attempted to enforce the contract. It was held that he waived the benefit of the notice. The court said:

"Upon these facts, we think the defendants are not in an attitude to insist that there was an effective rescission of the contracts. They were treated by both parties as being in full force and effect. The company recognized their validity, and waived the right of forfeiture by attempting to enforce them . . . "

A fortiori where a seller's right is claimed to be for unlawful detainer, the assertion of a claim inconsistent with the notice declaring the buyer's interest forfeited and making the buyer a tenant at will is waived by a demand of a payment due on the contract after the notice was served.

It should be realized by the court that the Van Zyverdens do not take an inconsistent position when they urge the court to rule that the prior notices were insufficient under the unlawful detainer statute and that the subsequent conduct of Seagull constitutes a waiver of the notices. Unlawful detainer is a penal and harsh remedy. Not only does Seagull attempt to obtain a judgment for treble damages, it seeks at the same time to forfeit values of approximately \$18,000 which Van Zyverdens could have either paid to the sellers or put into the property in terms of permanent improvements.

The court should not be sympathetic to invoke its powers to aid Seagull under these circumstances.

It is, of course, well established law that the party to an executory contract guilty of a first breach cannot maintain an action on the agreement. See Restatement on Contracts, Section 278, comment (a). As Cross-Appellants establish under Points I and II of this brief, Seagull was in default prior to the time when the buyer's payments became due. The default consisted of a failure to cause the performance of the condition precedent. The damages sustained by the buyers should be off-set against the liabilities for these payments. (See argument in Point III of this brief). On this basis, the notices of defaults were wholly abortive and of no effect because the obligations of the buyers were postponed until the equities and rights of the parties were adjusted as a result of seller's default.

Even, however, if the court disagrees with the position taken by the buyers on Points I, II and III of this brief, Seagull cannot prevail upon any unlawful detainer theory for the reasons stated in this point of the brief.

It is submitted that under any theory, the trial court's judgment denying Seagull restitution of the premises should be affirmed.

POINT V.

SEAGULL SHOULD NOT BE PERMITTED TO BENEFIT FROM ITS OWN ERRORS AND INCONSISTENCIES.

The relief sought by Seagull in this litigation is basically punitive. It seeks damages for unlawful detainer; it is attempting to forfeit the interest acquired by the buyers in the Daniels Creek Ranch; it has resisted consistently efforts of the buyers to adjust the equities of the parties either through negotiations or pursuant to the original action filed by the buyers in Wasatch County.

Despite the fact that it seeks the imposition of the harsh remedies incident to unlawful detainer, it has pursued a course of blunders and inconsistencies. Yet it asks this court on appeal in effect to do its work for it, to excuse it from its inconsistencies, and to require the Van Zyverdens to bear the entire brunt of its own errors.

To begin with, Van Zyverdens filed case No. 2449 in Wasatch County to obtain an orderly and peaceable adjudication of their equities under the contract. The record is clear beyond question that as long as the sellers' position was assumed by Mr. and Mrs. Farrar under the original Van Zyverden-Farrar contract, the Farrars were attempting to work out a reasonable and orderly adjustment of the problems involved as a result of their not having been able to obtain the transfer of the milk base pursuant to the Van Zyverden agreement.

As soon as Seagull obtained the Farrar agreement, it arbitrarily started making demands (R. 32-33).

When Van Zqverdens filed the complaint in No. 2449 and served summons upon Seagull, it did not file an answer or otherwise respond in that action until after a default certificate was entered. While Seagull was still in default, it filed certain requests for admissions (R. 26-29). At this time it had no standing in the case. It was not entitled to have any response made to the requests because its default had been entered. Yet Seagull argues in its brfief that it is entitled to judgment as a matter of law because such requests were not denied by the Van Zyverdens.

Rather than filing its purported claims against the Van Zyverdens as compulsory counterclaims under Rules 12 and 13, Seagull filed a separate complaint but the complaint was insufficient as far as unlawful detainers is concerned because no notice had been required at that time as provided in the statute. See the authorities cited in Point IV. At the pretrial, Judge Tuckett indicated that if the Van Zyverdens were in default one of the remedies available to Seagull was foreclosure. He indicated that Seagull could not recover attorney's fees if it was proceeding in unlawful detainer on a tort theory rather than for restitution under the contract. Seagull expressly, voluntarily, elected to proceed in unlawful detainer for treble damages rather than on some other theory (R. 206, para. 12). This election was made voluntarily at the pretrial by Seagull. Certainly

if Seagull contends that the Van Zyverdens are tenants at will and the unlawful detainer statute is applicable, they cannot at the same time contend that the Van Zyverdens are buyers under the contract and should be subjected to unlawful attorney's fees for the enforcement of rights given the seller under such agreement. It is not suggested that the sellers did not have a cause of action for damages for buyers' default if they were in default prior to termination of the agreement, but if Van Zyverdens' interest under the contract are terminated, then the sellers' rights under the contract are terminated at the same time. It is certainly impossible to assert a remedy for restitution against Van Zyverdens as buyers if they are not buyers but tenants at will. The choice as to whether Van Zyverdens were to be treated as tenants at will or buyers was one voluntarily made by Seagull. Yet it asserts in its brief that it is entitled to have the court make that choice for it, to award it restitution and attorney's fees as though the choice had not been made.

During the trial, Seagull offered Exhibit 5 in evidence and objection was made on the ground that it was immaterial. Repeatedly since the day of the trial when the offer was made, counsel for Van Zyverdens has suggested that the appropriate and orderly method of procedure was that a supplemental complaint be filed to enable the court to adjudicate the issues raised by the service of Exhibit 5. Seagull has stubbornly refused and neglected to attempt to make any such amendment. Judge Tuckett had the case under advise-

ment for three months before he issued a ruling. There was plenty of opportunity to file a supplemental pleading during that time. Seagull was advised orally and by the briefs filed by the Van Zyverdens that the court could not rule on the questions raised on Exhibit 5 until supplemental pleadings were filed bringing into the service of the notice served after the filing of the complaint. This court knows well that the Van Zyverdens made the same suggestion in connection with the issuance of the extraordinary writ by this court in No. 9917, following the filing of a new case by Seagull in Salt Lake County.

Even after the issuance of the writ in No. 9917 Seagull persisted in its stubborn refusal to bring the pleadings to date in the Wasatch County cases by the filing of a motion for leave to file a supplemental pleading or otherwise. In fact, Seagull apparently realized at that point that it could not successfully proceed under the existing notices which were in issue in the Wasatch County cases. The record shows that after the issuance of the extraordinary writ by this court in No. 9917, Seagull served upon the Van Zyverdens two additional notices. The first of these notices was served on about July 8, 1963 (R. 723-726, 729). It demands payment for the annual payments allegedly due during November, 1962. This notice constitutes a clear recognition of the rights of the Van Zyverdens as buyers under the contract and a demand for the enforcement of their obligations *as buyers* after the service of Exhibit 5, and in fact at all times prior to the date

of the service of the notice, namely July 8, 1963. The second notice attempts to require the Van Zyverdens to quit the subject premises within five days. Apparently it was served at a time between July 8 and July 26, 1963, the exact date not appearing in the record.

This court can take notice of the fact that Seagull thereafter filed a second complaint in Salt Lake County, despite the prohibition of the writ in No. 9917. The second case was filed in August, 1963. It consists of four causes of action and the prayer demands judgment for the payments allegedly due from the Van Zyverdens as buyers under the real estate contract in question, including interest, taxes and water assessments for the years 1961 and 1962. It is thus clear that Seagull is now attempting to obtain judgment for payments made after the service of Exhibit 5 and after the time of the trial. In other words, Seagull is now asking this court to determine that it is entitled to restitution of the premises and a judgment for unlawful detainer by reason of notices served not later than February, 1962 and at the same time it is urging the District Court of Salt Lake County to determine that it is entitled to a judgment for payments which the Van Zyverdens purportedly owe as buyers in November, 1962.

Seagull urges this court to hold that Judge Tuckett should have made a final judgment determining the ultimate rights of the parties in accordance with Rule 54(c) (1). (Appellant's brief, 19-20). It is submitted that

Seagull has the responsibility of placing before the trial court the appropriate pleadings and theories upon which it claims relief. Assuming that the Van Zyverdens are in default, Seagull has the right to make some election of remedies. It cannot require the court to make the election if it chooses the wrong course. There is no way that Seagull can place upon this court the burden of relieving it from its inconsistencies.

The Van Zyverdens have attempted from the beginning in this action to obtain an orderly adjudication of their rights under the agreement. They believe that it would now be appropriate for this court to remand the cause to Wasatch County with instructions to determine the balances due back and forth between the parties and to enter an appropriate decree for damage against an offending party. If the Van Zyverdens are not entitled to recover any damages, or if additional evidence is required to make more certain any amount of damages which they should receive, these questions can be appropriately determined by the District Court of Wasatch County under the original pleadings in No. 2449. If supplemental pleadings are required at this time to bring to date any relevant facts or events which have occurred since the filing of the original pleadings in No. 2449, leave might even now be given to amend to permit appropriate adjudication of the issues. The Van Zyverdens insist, however, that the judgment of the District Court with respect to the disposition of Seagull's present complaint is entirely appropriate and should be sustained absent appropriate amendments by

Seagull. The arguments which Seagull now makes in Point IV of its brief, that it should be awarded some relief whether such relief is demanded or not, and in Points V and VI that it is entitled to some amount in damages and for attorney's fees under the present status of the record are spurious. The arguments made under Point I of Seagull's brief that certain statements in requests for admissions are admitted cannot be taken seriously in this litigation. Judge Tuckett at least twice denied Seagull's motions for summary judgment when it made the same argument. The basis of the court's ruling was substantially that the information otherwise contained in the file appropriately advised Seagull of the views of the Van Zyverdens and that Seagull had no standing at the time its requests were filed.

It is suggested that Seagull's arguments, to the effect that amendments and supplements to pleadings should be made by the court even in the absence of any tender of such pleadings by Seagull, are captious.

Under all of the circumstances in this case, it seems fair to suggest to the court that Seagull's real interest here is to proceed in such a manner that the Van Zyverdens have no actual or genuine opportunity to realize the present values of the property. If Seagull genuinely desires an orderly adjudication of the real issues, it has had plenty of opportunity to present them to the court for determination.

SUMMARY AND CONCLUSION

The judgment of the trial court denying relief to Seagull under the status of the existing pleadings was entirely appropriate and should be affirmed. The trial court erred in failing to determine that the parties intended that the seller assumed the obligation of enabling the buyer to convert the milk base and equipment to livestock and that such failure constituted a breach by the seller. It further erred in denying the Van Zyverdens the right to prove damages in the nature of loss of profits. This court should remand the case to the trial court with instructions to make appropriate findings, particularly with respect to the amount of damages sustained by Van Zyverdens.

In the event this court feels that Seagull has not had a reasonable opportunity to amend its pleadings, despite all of the facts and circumstances appearing in the record, it is submitted that this court has the power to permit appropriate amendments and supplemental pleadings upon remand.

Respectfully submitted this 4th day of October, 1963.

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