

1963

Leo Van Zyverden and Sytske Van Zyverden v.
Ralph W. Farrar and Helen R. Farrar et al : Reply
Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LEO VAN ZYVERDEN and SYTSKE

VAN ZYVERDEN, his wife,

*Plaintiff, Respondents
and Cross-Appellants,*

vs.

RALPH W. FARRAR and HELEN R.

FARRAR, his wife, and

SEAGULL INVESTMENT COMPANY,

Defendant and Appellant.

Supreme Court, Utah

No. 9945

SEAGULL INVESTMENT COMPANY,

Plaintiff and Appellant,

vs.

LEO VAN ZYVERDEN and SYTSKE

VAN ZYVERDEN, his wife,

Defendants and Respondents.

No. 9946

REPLY BRIEF OF APPELLANT,
SEAGULL INVESTMENT COMPANY

Appeal from the Judgment of the
Fourth Judicial District Court for Wasatch County,
Honorable R. L. Tuckett, Judge

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TABLE OF CONTENTS

	<i>Page No.</i>
Statement of the Kind of Case	1
Disposition in Lower Court	2
Relief Sought on Appeal	2
Statement of Facts:	2
1. Is intent material to issues.....	3
2. Had dairy been a failing operation.....	4
3. Miscellaneous incorrect statements alleged as facts in Van Zyverdens' brief.....	5
4. Was previous operation successful.....	5
5. Did parties contemplate a horse, sheep or beef operation.....	5
6. Did parties compute anticipated profits.....	6
7. Did parties agree that milk base would finance Van Zyverdens' beef operation.....	6
8. Does contract permit a "sale" of milk base.....	7
9. Was exchange of milk base a condition precedent to Van Zyverdens' obligations.....	7
10. Did delay in exchanging milk base prevent beef operation.....	8
11. Van Zyverdens elected to operate a dairy.....	8
12. Inadequacy of offer of proof.....	9
Argument	11

POINT I

VAN ZYVERDENS' CROSS-APPEAL SHOULD BE DISMISSED FOR FAILURE TO FILE BOND FOR COSTS	11
---	----

POINT II

VAN ZYVERDENS' CROSS-APPEAL IS VOID BECAUSE RULE 74(b), URCP IS INVALID	12
--	----

TABLE OF CONTENTS (Cont'd.)

Page No.

POINT III

VAN ZYVERDENS' CROSS-APPEAL SHOULD BE DISMISSED BY REASON OF FAILURE TO FILE CROSS-APPEAL WITHIN TIME ALLOWED BY LAW	14
---	----

POINT IV

COURT'S DECISION THAT VAN ZYVERDENS' CLAIMS FOR RELIEF ARE NOT SUPPORTED BY THE EVIDENCE SHOULD BE AFFIRMED.....	17
1. <i>Is the contract ambiguous</i>	18
(a) Meaning of "Can".....	19
(b) Meaning of "Exchange".....	20
(c) Construing ambiguous contracts.....	21
(d) Van Zyverden is an experienced realtor.....	22
(e) Certainty of error is required for reformation.....	22
2. <i>Is the question of ambiguity properly before the court</i>	22
(a) Van Zyverdens' complaint.....	23
(b) Pre-trial order.....	24
(c) Parol evidence rule.....	26
(d) Merger clause	26
(e) Notice of restriction on milk base from chain of title.....	27

POINT V

VAN ZYVERDENS IN FACT SUFFERED NO DAMAGES FROM THE ALLEGED BREACH OF CONTRACT	29
---	----

POINT VI

SEAGULL IS ENTITLED TO THE RELIEF RE- QUESTED IN ITS APPEAL BRIEF ON FILE HEREIN	33
SUMMARY AND CONCLUSION.....	37

AUTHORITIES CITED

	<i>Page No.</i>
Allen v. Garner, 45 U. 39, 143 P. 228.....	13
Anderson v. Anderson, 3 U. (2d) 277, 282 P.2d 845..	14, 16
Anderson v. Halthusen Mercantile Co., 30 U. 31, 83 P. 560.....	14
Bailey Realty & Loan Co. v. Bunting, 19 So. 2d 607, 608, 31 Ala. App. 450.....	19
Ballantyne v. Rusk, 36 A. 361, 362, 84 Md. 649.....	19
Blythe & Fargo Co. v. Swenson, 15 U. 345, 49 P. 1027....	13
Bryant v. Deseret News Publishing Co., 120 U. 241, 233 P.2d 355, 26 ALR 2d 1131.....	22
Burger-Phillips Co. v. Conn. of Int. Rev., CCA Ala. 126 F.2d 934, 936.....	21
Burt v. Stringfellow, 45 U. 207, 143 P. 234.....	19, 22
Buttrey v. Guaranteed Securities Co., 78 U. 39, 45, 300 P. 1040.....	12
Christiansen v. Los Angeles and S. L. R. Co., 77 U. 85, 106, 291 P. 926.....	13
Coal Co. v. Doren, 142 U.S. 417.....	28
Cook v. Oregon Short Line & U.N. Ry. Co., 7 U. 416, 27 P. 5.....	12
Croft v. Jensen, 86 U. 13, 40 P.2d 198 at page 202.....	30
Cram v. Reynolds, 55 U. 384, 186 P. 100.....	22
Crampton v. McLaughlin Realty Co., 99 P. 586 (Wash. 1909).....	33
Dairymen's League Co-op Ass'n. v. Metropolitan Casualty Ins. Co. of NY, 8 NYS 2d 403, 412.....	21
Erisman v. Overman, 11 U.2d 258, 358 P.2d 85.....	32
Farmers' & Merchants' State Bank of Verdon v. USF&G Co., 133 NW 247, 248, 28 SD 315, 36 LRA NS 1152.....	19
First National Bank of Ogden v. Nielsen, 60 U. 227, 208 P. 522.....	14
Forrester v. Cook, 77 U. 137, 292 P. 206, 209.....	22, 27

AUTHORITIES CITED (Cont'd.)

	<i>Page No.</i>
Fox Film Corp. v. Ogden Theatre Co., 82 U. 279, 17 P.2d 294, 90 ALR 1299.....	23, 26
Handley v. Mutual L. Ins. Co., 106 U. 184, 147 P.2d 319, 152 ALR 1278.....	22
Hannon v. Myrick, 111 A.2d 729, 731, 118 Vt. 431.....	19
Henderson v. Barnes, 27 U. 348, 75 P. 759.....	13
Johnston v. Geary, 84 U. 47, 33 P.2d 757.....	12, 14
Last Chance Ranch Co. v. Erickson, 82 U. 475, 25 P.2d 952.....	23, 26
McCormic v. Levy, 37 U. 134, 106 P. 660.....	27
McGarry v. Thompson, 114 U. 422, 201 P.2d 288.....	28
Moser v. Lundahl, 97 U. 222, 92 P.2d 340.....	12
Northern Pac. R.R. Co., 21 Was. 320, 55 P. 210.....	28
Panatorium v. McLaughlin, Neb. 215 NW 798, 799.....	19
Petersen v. Ohio Copper Co., 71 U. 444, 266 P. 1050.....	35
Provo Reservoir Co. v. Tanner, 68 U. 21, 249 P. 118.....	12
Sikes v. State, 67 Ala. 77, 81.....	19
Sorenson v. Korsgaard, 83 U. 177, 27 P.2d 439.....	13
Texas Co. v. Aycock, 190 Tenn. 16, 227 SW 2d 41, 17 ALR 2d 322.....	28
Town of Barton v. Town of Albany, 189 A. 853, 856, 108 Vt. 531.....	19
Udy v. Jensen, 63 U. 94, 222 P. 597.....	19
Universal CIT Corp. v. Courtesy Motors, Inc., 8 U.2d 275, 333 P.2d 628.....	28
U.S. v. Paine, D.C. Mass., 31 F. Supp. 898, 900.....	21
Weight v. Bailey, 45 U. 584, 147 P. 899.....	22

RULES CITED

	<i>Page No.</i>
Rule 6(b)	16
Rule 9(b)	23, 27
Rule 15	34
Rule 16	24
Rule 60(b)(1)	16
Rule 73(a)	15, 16
Rule 73(b)	14
Rule 73(c)	11
Rule 74	15
Rule 74(b)	12, 13, 14
Rule 75(p)(1)	14
Rule 82	13, 14, 16

STATUTES CITED

78-2-4, UCA, 1953.....	12, 14, 16, 17
78-25-16, UCA, 1953.....	26

TEXTS CITED

61 ALR 126, S. 100 ALR 1201.....	31
90 ALR 1299.....	23
100 ALR 1201.....	31
152 ALR 1278.....	22
17 ALR 2d 322.....	28
26 ALR 2d 1131.....	22
12 Am. Jur. Contracts 252.....	22
55 Am. Jur. Vendor and Purchaser 102, 106.....	33
56 Am. Jur. Waiver 12-16.....	35
Restatement of Contracts, Vol. 1, Sec. 236.....	22
Words and Phrases, Vol. 15A, P. 131.....	21

IN THE SUPREME COURT OF THE STATE OF UTAH

LEO VAN ZYVERDEN and SYTSKE
VAN ZYVERDEN, his wife,
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RALPH W. FARRAR and HELEN R.
FARRAR, his wife, and
SEAGULL INVESTMENT COMPANY,
Defendant and Appellant.

No. 9945

SEAGULL INVESTMENT COMPANY,
Plaintiff and Appellant,
vs.

LEO VAN ZYVERDEN and SYTSKE
VAN ZYVERDEN, his wife,
Defendants and Respondents.

No. 9946

REPLY BRIEF OF APPELLANT,
SEAGULL INVESTMENT COMPANY

STATEMENT OF THE KIND OF CASE

Action by Van Zyverdens to collect \$18,000.00 loss of anticipated profits from proposed cattle ranch operation allegedly prevented because of seller's alleged failure to

furnish Van Zyverdens with the use of \$3,190.00 and action by Seagull against Van Zyverdens for restitution of premises, damages for breach of contract, attorney fees and triple damages for unlawful detainer. No part of the \$55,000.00 purchase price, taxes, water assessments, etc. of ranch have been paid, either to sellers or into court, although Van Zyverdens have had possession of farm since September, 1960. Van Zyverdens contend that performance of their obligations was excused and postponed until litigation is concluded. Van Zyverdens also ask for specific performance requiring Seagull to convey the ranch to them.

DISPOSITION IN LOWER COURT

The District Court entered judgment of no cause of action against all parties.

RELIEF SOUGHT ON APPEAL

Seagull seeks reversal of judgment of no cause of action on Seagull's claims, restitution of farm, damages for breach of contract, attorney fees, interest, and/or triple damages for unlawful detainer and judgment affirming the decision of no cause of action against Van Zyverdens.

STATEMENT OF FACTS

The statement of facts contained in Seagull's appeal brief on file herein is incorporated by reference.

The voluminous statement of alleged facts contained in Van Zyverdens' brief are largely unsupported by the evidence and record and are for the most part vigorously disputed by Seagull, however, Seagull feels it necessary to present the true facts and issues in some detail. The

correct facts with respect to some of the more important disputed statements contained in Van Zyverdens' statement of facts are as follows:

1. *Is intent material to issues:*

The alleged "intent" of the parties, claimed by Van Zyverdens, to the effect that the parties intended that the permission granted in exhibit 1 (R. 227) for Van Zyverdens to "exchange" the milk base and milking equipment sold with the farm for "...livestock or horses of equal value, remaining security for the period of 2 years..." is a warranty and guarantee by the seller that they would assume obligation to enable the "sale or exchange" to be made, is untrue, is immaterial to the issues in the case (see pre-trial order R. 181-182) and constitutes an attempt: (a) to re-write the pre-trial order, (b) to add to and vary the terms of the contract by parol evidence and (c) an attempt to reform the contract without pleading fraud or mistake or asking for reformation by (d) calling their attempted reformation an interpretation of the "intent" of the parties.

Farrar testified that he was not aware that Van Zyverden had added language about exchange of milk base when he executed the real estate contract (R. 580-581). Van Zyverden himself testified that there was nothing said about the transfer of the milk base at the time the contract was signed (R. 51); that he never discussed with the sellers his present claim to the effect that he would be unable to pay for the ranch if the milk base could not be exchanged (R. 52); that before he signed the contract he did not consider that he would be unable to perform his obligations under the contract if the milk base could

not be exchanged (R. 538) and that he wanted permission to exchange the milk base in the event that he could not make the grade with a dairy operation (R. 538).

It is obvious after examining Van Zyverden's own testimony that all of the talk in Van Zyverdens' brief about "intent of the parties," "conditions precedent" and specific discussions and agreements as to exact profits to be realized from the beef operation as the only operation contemplated by the parties when the contract was signed, is incorrect and not supported by the record. The lack of evidence to support their wild assertions concerning intent, conditions precedent, damages, etc. is very apparent from the absence of citations to the place in the record where such evidence is found.

2. Had dairy been a failing operation:

Representations by Van Zyverdens that undisputed evidence shows business failures by five previous occupants is untrue. The only evidence of failure to make a profit by Van Camp, Meham, Collier or Bowers, the persons who received possession of the ranch from Farrars, is failure of Van Camp to make a profit, however, Farrar testified that the reason that Van Camp failed to make a profit was because he was only on the ranch for five days (R. 572). Aluminum Roofing Company acquired possession from Bowers, defaulted, and Farrar repossessed the ranch immediately before Van Zyverdens acquired possession. There is no evidence to show the reason why Aluminum Roofing Company defaulted and accordingly the statement that the ranch had a history of business failure is simply not supported by the record. See additional discussion under point IV.

3. *Miscellaneous incorrect statements alleged as facts in Van Zyverdens' brief:*

The following allegations in Van Zyverdens' statement of facts are untrue and unsupported by the record:

(a) The allegation that the parties agreed that the ranch would "continue" to be unsuccessful as a dairy, (b) that the ranch could only be operated profitably as a beef operation, (c) that no other type of operation was contemplated by the parties, (d) that the conversion to a beef operation was impossible except by sale or exchange of milk base and equipment to provide Van Zyverdens with working capital, (e) that the seller understood and agreed that payment of the purchase price could only be made with profits from beef operations since, (f) and that the parties were aware that Van Zyverden, himself, had no funds to go into the beef business. These alleged facts are discussed below:

4. *Was previous dairy operation successful:*

It is apparent from the record that the dairy operations had been at least moderately successful, that even Van Zyverdens operated the property as a dairy farm (R. 540) and that the milk base and milking equipment acquired in connection with the dairy operation were valuable assets (R. 547, 637).

5. *Did parties contemplate a horse, sheep or beef operation:*

The contract itself (R. 227) indicates that Van Zyverdens contemplated some type of "livestock" or "horse" venture on the ranch at the time that the contract was

executed. Van Zyverden testified that “My planning instead of to run dairy cattle there to have beef cattle there, or *sheep or horses especially.*” (Emphasis added) (R. 539).

6. *Did parties compute anticipated profits:*

The foregoing testimony is clearly contrary to the basic premises of the Van Zyverden case, to-wit: (a) that the parties contemplated no venture except a beef operation on the ranch and (b) to theory of the tender of proof as to alleged anticipated profits from the beef operation and (c) contrary to the allegation that the figures mentioned in the offer of proof were exactly the figures allegedly discussed by the parties and specifically agreed upon as the profits to be made by Van Zyverdens from the beef operation. Obviously the parties did not specifically agree upon the figures suggested by Van Zyverdens for a beef operation since the beef operation was only one of several suggested operations for the ranch. Even if the parties tried to anticipate the gains or losses from such a speculative venture, their estimates would be vague and uncertain and would not form a proper basis for measuring damages.

7. *Did parties agree that milk base would finance Van Zyverdens’ beef operation:*

The contention that the sellers knew that Van Zyverdens had no funds to finance the alleged beef operation on the ranch and that they knew that payments could not be made except from profits is contrary to reason and common sense. Van Zyverdens would have the Court believe that Farrars were so anxious to sell the ranch to Van

Zyverdens with no down payment, with nothing to be paid for over a year and then only from profits, if any, realized from operation of the farm, that they were willing to finance Van Zyverdens' operation by not only permitting Van Zyverdens to sell the milk base and equipment included in the sale, but undertook to "warrant and guarantee" that the sale of the base and equipment could be accomplished.

8. *Does contract permit a "sale" of milk base:*

The contract (R. 226-227) permits an "exchange" and not a "sale" of the milk base. No offer of exchange of the milk base or equipment was ever presented by Van Zyverden (R. 553-554). The milk equipment could be exchanged at any time without restriction (R. 226-227, 230-231).

9. *Was exchange of milk base a condition precedent to Van Zyverdens' obligations:*

Van Zyverden testified that he did not say anything to anyone about not being able to perform his obligations under the purchase contract if he had any difficulty or delay in transferring the milk base (R. 539, L. 11-18) and that, at the time that he prepared the purchase contract (R. 226-227), he did not think that transferability of the milk base was sufficiently important to put a time limit on its transfer (R. 539, L. 19-22).

The only statement in the record which even discusses the liberal terms of the purchase of the farm is a vague statement, by Van Zyverden, that he had no money himself and that he was concerned about the liberal terms being offered him by Farrar (R. 503-504), which testi-

mony obviously referred to Van Zyverdens obtaining possession of the farm with no down payment, not to the wild and wholly unsupported contentions of Van Zyverdens to the effect that they would not have to make any payments on the purchase price except from profits and, in effect, that if the milk base could not be exchanged at all that Van Zyverdens would be excused from paying for the ranch at all. (See Van Zyverden brief, Page 36.)

10. *Did delay in exchanging milk base prevent beef operation:*

Had Van Zyverden completed the proposed sale of the milk base to Peart he would have had \$3,190.00 (R. 547, L. 27-30) available to him in the spring of 1961 (R. 21, L. 16-20). Van Zyverdens' contention that they were prevented from going into beef business by the transfer of the milk base being delayed until June 15, 1962, is obviously incorrect since Van Zyverdens had sufficient funds or credit to purchase 25 milk cows in March of 1961, which obviously cost more than the \$3,190.00, and probably cost about \$450.00 each or a total of about \$11,250.00 (R. 611, L. 16-20, R. 612, L. 17-19). Beef cattle were generally available on the market and no one stopped Van Zyverdens from purchasing beef cattle for the ranch (R. 557, L. 18-22).

11. *Van Zyverdens elected to operate a dairy:*

Obviously the alleged delay in exchanging the milk base for cattle was not the reason that Van Zyverdens elected to go into the dairy business instead of the beef business in the spring of 1961. It is important to note that in his letter of March 3, 1961 (R. 232) concerning ship-

ping milk to Hiland Dairy, no mention was made of selling or exchanging the milk base. Obviously Van Zyverdens at that time had elected to use the base to permit them to sell milk from their 25 cows instead of attempting a sale of the milk base itself.

12. *Inadequacy of offer of proof:*

There is no suggestion in the record, offer of proof, or Van Zyverdens' brief, that operating expenses, labor, feed costs, possible loss from disease or other causes, etc. were discussed. There is nothing in the record or offer of proof from which the Court could determine the net profit that Van Zyverden expected to make from this new, highly speculative, proposed beef venture. Even if the milk base at \$3,190.00 (R. 547) and equipment at \$1,850.00 (R. 524, 637) provided sufficient funds (approximately \$5,000.00) to purchase 100 head of beef animals weighing 300 pounds each (R. 525) in the spring, it would be impossible for them to operate through the summer and pay expenses of operation if in fact they had no other funds available. Certainly they would have been doomed to failure before they began. If we examine the proposed venture a little closer we can see how ridiculous their offer of proof actually is. 100 head of animals at 300 pounds each would weigh a total of 30,000 pounds. If they were purchased for \$5,000.00 this would mean that the purchase price would be $16\frac{2}{3}$ cents per pound rather than the 25 cents per pound which Van Zyverdens allege (without support in the record) that they could realize for weight gain. If, on the other hand, the correct price of beef is 25 cents per pound, it would have cost \$7,500.00 to purchase the 100 head of cattle, and Van Zyverdens would have been

\$2,500.00 short of having enough money to purchase the 100 head. If Van Zyverdens were able to borrow the \$2,500.00 (they deny that funds were available to them) and to repay it in the fall, from the sale of animals, to enable them to buy the entire 100 head and in fact the animals gained the full 2 pounds per day for the full 180 days suggested by Van Zyverdens, and they had no losses of animals, they would have only \$9,000.00 available from the operation to pay the annual contract payment due of \$6,334.17 (R. 33, 288), the property taxes of \$397.82, the water assessments of \$333.98, or a net of \$1,934.03 would have been left to absorb and pay all other costs and expenses including labor, feed, repairs, power, gasoline, supplies, telephone, travel expense, seed, harvesting hay and grain, loss from accident or disease, and the multitude of other expenses incidental to such an operation.

To make enough profit from the operation to make the payment of \$6,334.17 on the ranch (R. 33, 288) alone, would require a 127% profit on the \$5,000.00 investment and in excess of a 70% profit on gross income from the operation ($\$6,334.17 \div \$9,000.00 = 70.38\%$ return required to make payment). The \$5,000.00 invested in cattle could not be used to make the annual payment because the contract expressly states that the cattle are to remain as security for a period of two years (R. 226-227). Van Zyverdens allege that, in addition to paying expenses and making the payment on the purchase price, they expected to earn a small profit for themselves from the venture (R. 525). I am certain that, if we could make a 127% return on our investment by raising beef cattle, we would all be out raising beef cattle.

Van Zyverden allegedly paid \$5,779.75 in operating expenses (R. 221) and \$4,412.49 for repairs, maintenance, etc. (R. 220) during this period, so funds must have been available to Van Zyverdens, contrary to the assertions in their brief. This also gives some indication of part of the operating costs which could have been reasonably expected to be incurred in a beef operation and clearly demonstrates that little or no profit would have been realized from the proposed beef operation, therefore payment of the taxes, water assessments and the annual contract payment could not have been from profits, as alleged by Van Zyverdens in their brief.

ARGUMENT

POINT I

VAN ZYVERDENS' CROSS-APPEAL SHOULD BE DISMISSED FOR FAILURE TO FILE BOND FOR COSTS.

Rule 73(c), URCP, reads in part as follows:

“(c) BOND ON APPEAL. At the time of filing the notice of appeal, the appellant shall file with such notice a bond for costs on appeal, unless such bond is waived in writing by the adverse party, or unless an affidavit as hereinafter described is filed . . .” (Emphasis added)

Seagull has not waived the requirement that Van Zyverdens file a bond for costs, no impecunious affidavit has been filed, and accordingly Van Zyverdens are not excused from filing an appeal cost bond. Van Zyverdens have not filed a bond as required by Rule 73(c) and

accordingly their cross-appeal has not been perfected and should be dismissed. This question has been before the Court on numerous occasions, and the rule is well established that where respondent or appellant filed no undertaking, or a pauper affidavit, or unless same is waived by adverse party, the appeal will be dismissed. *Buttrey v. Guaranteed Securities Co.*, 78 U. 39, 45, 300 P. 1040; *Cook v. Oregon Short Line & U. N. Ry. Co.*, 7 U. 416, 27 P. 5; *Provo Reservoir Co. v. Tanner*, 68 U. 21, 249 P. 118; *Moser v. Lundahl*, 97 U. 222, 92 P.2d 340; *Johnston v. Geary*, 84 U. 47, 33 P.2d 757.

Appeal cost bonds are required for cross-appeals in the same manner as for other appeals, and the failure of a cross-appellant to file a cost bond invalidates the cross-appeal. *Buttrey v. Guaranteed Securities Co.*, supra.

POINT II

VAN ZYVERDENS' CROSS-APPEAL IS VOID BECAUSE RULE 74(b), URCP IS INVALID.

Rule 74(b) purports to permit a party to cross-appeal without filing a notice of appeal after the time for appealing has expired. Prior to the adoption of the Utah Rules of Civil Procedure, no statutory procedure existed which permitted a cross-appeal, except by filing a notice of appeal in the same manner as was required for other appeals.

The Utah Rules of Civil Procedure were promulgated by the Supreme Court pursuant to authority delegated to it by 78-2-4, UCA, 1953, which reads in part as follows:

RULES—MAKING POWER.—The Supreme Court of the state of Utah has power to prescribe, alter and

revise, by rules, for all courts of the state of Utah . . . the practice and procedure in all civil and criminal actions and proceedings, including rules of evidence therein. . . . *Such rules may not abridge, enlarge or modify the substantive rights of any litigant . . .*” (Emphasis added)

Rule 82. URCP, further limits the scope of the rules, which rule reads as follows:

“These rules shall not be construed to extend or limit the jurisdiction of the courts of this state or the venue of actions therein.” (Emphasis added)

Rule 74(b) purports to permit the filing of a cross-appeal after the time for filing of an appeal has otherwise expired. Under the law in existence prior to the adoption of the Utah Rules of Civil Procedure the Supreme Court had no jurisdiction to entertain an appeal or cross-appeal filed after the statutory time for filing of a notice of appeal had expired. *Christiansen v. Los Angeles and S. L. R. Co.*, 77 U. 85, 106, 291 P. 926; *Allen v. Garner*, 45 U. 39, 143 P. 228; *Sorenson v. Korsgaard*, 83 U. 177, 27 P.2d 439; *Blyth & Fargo Co. v. Swenson*, 15 U. 345, 49 P. 1027; *Henderson v. Barnes*, 27 U. 348, 75 P. 759. Rule 74(b) purports to create the right to file a cross-appeal after the usual time for filing an appeal has expired, although no such right existed, and the Court lacked jurisdiction to entertain such an appeal under former law. Clearly rule 74(b) attempts to “extend” the jurisdiction of the Supreme Court, “abridges” the substantive rights of Seagull concerning the right of Van Zyverdens to appeal and “enlarges” the substantive rights of Van Zyverdens with respect to said appeal, and accordingly is invalid because

it was promulgated in violation of and in excess of the express limitation on rule-making power of the Supreme Court specified in 78-2-4, UCA, 1953 (*supra*), and in violation of the express prohibition contained in Rule 82, URCP (*supra*) and would tend to construe the Utah Rules of Civil Procedure in such manner as to extend the jurisdiction of the Court. The Supreme Court has no jurisdiction to entertain Van Zyverdens' cross-appeal except in accordance with the provisions of Rule 74(b), and accordingly, since that rule is invalid and its promulgation was in excess of the power of the Court the cross-appeal of Van Zyverdens should be dismissed.

POINT III

VAN ZYVERDENS' CROSS-APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION BY REASON OF THE FAILURE TO FILE CROSS-APPEAL WITHIN TIME SPECIFIED BY LAW.

Filing of notice of appeal within time required by law is essential to clothe Supreme Court with jurisdiction to adjudicate questions raised by the appeal. *Anderson v. Halthusen Mercantile Co.*, 30 U. 31, 83 P. 560; *Johnson v. Geary (supra)* ; *First Nat'l. Bank of Ogden v. Nielsen*, 60 U. 227, 208 P. 522; *Anderson v. Anderson*, 3 U. (2d) 277, 282 P.2d 845. No notice of appeal was filed by Van Zyverdens as required by the provisions of Rule 73(b), URCP. Van Zyverdens' attempt to cross-appeal pursuant to Rule 74(b), URCP, in their brief submitted October 4, 1963. Seagull's brief was filed September 6, 1963 and Van Zyverdens' brief was accordingly due September 26, 1963. (Rule 75(p) (1), URCP.) If in fact Van Zyverdens were

permitted under law to file a cross-appeal in their brief (which we deny — see discussion under point II), the time for Van Zyverdens to file their appeal would thereby be extended until the due date of Van Zyverdens' brief. Van Zyverdens failed to file their brief, containing said purported cross-appeal, within the time provided by law. The Supreme Court is without jurisdiction to adjudicate the questions raised by the cross-appeal because Van Zyverdens' cross-appeal was not filed even within the extended time mentioned in Rule 74, URCP.

After the time for filing of Van Zyverdens' cross-appeal had passed they discovered this fact, and on the 2nd day of October, 1963 obtained an order from the Chief Justice of the Supreme Court which purported to extend the time for filing their brief and cross-appeal. Once the time for appeal had expired the Supreme Court lost all jurisdiction and has no power to consider the matters raised in the cross-appeal. Rule 73(a), URCP, provides the only circumstances under which the Court may extend the time for appealing, which Rule 73(a) reads in part as follows:

“... The time within which an appeal may be taken shall be one month from the entry of the judgment appealed from unless a shorter time is provided by law, except that upon a showing of *excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding one month from the expiration of the original time herein prescribed...*” (Emphasis added)

The said order purporting to extend the time for Van Zyverdens to file their cross-appeal was granted on

grounds of mistake of law as to the period allowed for filing a cross-appeal and was, and is, in excess of the power of the Court, therefore it is void and of no effect whatsoever. Mistake of law is not "excusable neglect." Everyone is presumed to know the law.

The Supreme Court has held that neither Rule 6(b), granting the Court power to extend where a failure to act in time is due to "excusable neglect" generally, nor Rule 60(b)(1) authorizing the Court to relieve from a final judgment for inadvertence or excusable neglect, applies where the appeal has not been taken in time, and that Rule 73(a) quoted above prescribes the only circumstance under which the Court may extend the time for filing an appeal. *Anderson v. Anderson, supra*. The clear wording of Rule 73(a) (*supra*) not only restricts the right of the Court to extend time for filing an appeal to situations where the appellant failed to discover the entry of the judgment as a result of "excusable neglect," but also states that such order must be made by the "District Court," and does not authorize the Supreme Court to make an order extending the time for filing of an appeal.

To permit the order signed by the Chief Justice, purporting to extend the time for filing the cross-appeal, to confer jurisdiction upon the Court to hear the appeal after the time for filing said appeal had expired, would be to wholly disregard the clear meaning of Rule 82, URCP (*supra*), which states that the rules of civil procedure shall not be construed to extend or limit the jurisdiction of the courts, and to disregard the limitation imposed by 78-2-4, UCA, 1953 (*supra*) on the rule-making power of the Supreme Court, which statute expressly forbids the

Supreme Court to promulgate rules which "... abridge, enlarge or modify the substantive rights of any litigant ..." If the Supreme Court has not and cannot make a rule which permits it to extend the jurisdiction of the Court, clearly the jurisdiction of the Court cannot be extended by an order signed by a Justice thereof.

POINT IV

COURT'S DECISION THAT VAN ZYVERDENS' CLAIMS FOR RELIEF ARE NOT SUPPORTED BY THE EVIDENCE SHOULD BE AFFIRMED.

Van Zyverdens' entire case is founded upon their interpretation of the following wording contained in the ranch real estate contract (R. 227):

"It is agreed that the Highland milk base and all milking equipment as mentioned above *can be exchanged for livestock or horses* of equal value remaining security for a period of two years as agreed above."

It appears that a prior contract (R. 230-231) restricted the transfer of the milk base (R. 606) until June, 1962 (R. 602, 638) and that by reason of that restriction a proposed sale of the milk base to Pert was delayed. They contend that all of the parties intended and agreed that the proposed beef operation was to be financed solely with proceeds from sale of the milk base and milking equipment, that the parties intended the wording of the contract to constitute an undertaking, warranty and guarantee by sellers that the milk base could be conveyed to a third party, that said conveyance was a condition precedent to their obligations under purchase agreement, that their

performance was excused until such conveyance could be accomplished, and now claim \$18,000.00 damages for alleged breach of contract, alleging that amount of loss of anticipated profit, which they claim that they expected to make during 1961 from the proposed beef operation (R. 4), however, this claim now seems to be reduced to \$9,000.00 (Van Zyverden brief, P. 26).

The Court very properly held that Van Zyverdens' claim was not supported by the wording of the contract or the evidence and awarded judgment against them for no cause of action (R. 189).

The decision of the Court denying relief to Van Zyverdens is obviously correct and any one of the many legal propositions and/or facts mentioned below and the answers to the propositions urged by Van Zyverdens, contained herein, are sufficient to affirm the decision of the District Court.

1. *Is the contract ambiguous:*

Authorities cited by Van Zyverdens' brief concerning determination of intent of parties in interpreting contracts which are ambiguous and therefore open to construction (brief P. 14-15) refer to obviously ambiguous agreements. The permission granted to Van Zyverdens by the contract to "exchange" the milk base and equipment is clear and unambiguous. Van Zyverdens seek, by parol testimony, to show that the clear wording is in fact ambiguous and then seek to add to and vary the terms of the written agreement by further parol evidence. They in effect seek (a) a determination that the words "can be exchanged" used in the contract (R. 227) are ambiguous,

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(b) to reform the contract to express the true agreement between the parties and (c) to have the Court enforce the reformed agreement and to thereby impose the affirmative duty and guarantee upon sellers to accomplish an exchange of the milk base and (d) to excuse Van Zyverdens from all performance or payment of their obligations under the contract until this has been accomplished.

All words and expressions used by the parties in a contract must be given full force and effect, unless to do so leads to an absurdity or is contrary to the *manifest* purposes and intentions of the parties. *Udy v. Jensen*, 63 U. 94, 222 P. 597; *Burt v. Stringfellow*, 45 U. 207, 143 P. 234. The meanings of the words used by the parties are clear. (Emphasis added)

(a) *Meaning of "Can"* (R. 227):

The word "can" has the same meaning as "may," *Farmers' & Merchants' State Bank of Verdon v. USF&G Co.*, 133 NW. 247, 248, 28 SD 315, 36 LRA NS 1152; *Panatorium v. McLaughlin*, Neb., 215 NW 798, 799; *Sikes v. State*, 67 Ala. 77, 81, and the word "can" means to "give permission." The word "can" has also been defined as meaning 'possible,' *Ballantyne v. Rusk*, 36 A. 361, 362, 84 Md. 649; "to be able," *Hannon v. Myrick*, 111 A2d 729, 731, 118 Vt. 431, "to be enabled by law" and "to have a right to," *Bailey Realty & Loan Co. v. Bunting*, 19 So. 2d 607, 608, 31 Ala. App 450, *Town of Barton v. Town of Albany*, 189 A. 853, 856, 108 Vt. 531. No definitions of the word "can" have been located which expressly or by implication mean "guarantee" or "warranty" as urged by Van Zyverdens. The word "warranty" has essentially the

same meaning as “guarantee” and in effect makes the person giving the “warranty” an insurer. Obviously the obligations of an insurer are not undertaken lightly, and should not be imposed upon a person unless his intention to assume such a vast and sweeping obligation is clear from the plain wording of the contract.

In our situation the words “can be exchanged” in effect give Van Zyverdens permission to exchange one type of security for a different type of security in the event that they desired to make the “exchange” and go into the horse, sheep or livestock business (R. 539).

(b) *Meaning of word “exchange”:*

Van Zyverdens take the position that the word “exchange” includes the right to sell for cash. It is true that after the contract was executed the parties attempted to sell the milk base for cash with an escrow of the proceeds and to thereby modify the contract, however, that transaction was not completed and does not constitute a modification of the “exchange” provision of the contract and does not change the clear meaning of the contract or make it ambiguous. The alleged “contemporaneous” conduct referred to in the Van Zyverden brief (P. 16-22) is actually the acts done by Farrar *after* the agreement was signed to “go the second mile” and assist Van Zyverden in attempting to sell the milk base for cash, even though he had no obligation to do so under the terms of the contract. There is simply no evidence to support the theory of Van Zyverden that the attempted sale was pursuant to the terms of the written agreement. Farrar agreed to a sale of the milk base on terms different from the “exchange” requirement of the contract and sent the

letter (R. 246) to Hiland Dairy to carry out the terms of their new agreement concerning the proposed cash sale to Pert (R. 582).

The conduct of Farrar in “going the second mile” to assist Van Zyverden and the other conduct of the parties does not indicate that word “exchange” had any meaning to the parties other than its usual meaning. No “exchange” proposal, which would comply with the terms of the contract, was ever presented to the sellers, and accordingly Van Zyverdens cannot now complain that they were deprived of the right to make a non-existent “exchange.” Van Zyverdens were not damaged by the failure of the proposed cash sale to Pert since they were not entitled to insist on a sale for cash under the terms of the contract.

The word “exchange” has been uniformly defined by the courts as meaning a transfer of property for property or something of value *other than money*; *Burger-Phillips Co. v. Comm. of Int. Rev.*, CCA Ala., 126 F.2d 934, 936, and relates to the mutual giving and receiving of commodities *without the intervention of money*, *U. S. v. Paine*, D.C. Mass., 31 F. Supp. 898, 900. A “sale” is a transferring of goods for money, and an “exchange” is a transferring of goods by way of barter. *Dairymen’s League Co-op Ass’n. v. Metropolitan Casualty Ins. Co.* of N.Y., 8 NYS 2d 403, 412, *Words and Phrases*, Vol. 15A, P. 131 and cases there cited.

(c) *Construing — ambiguous contracts:*

If the contract is in fact ambiguous (which we deny), since Van Zyverden selected the wording which he now claims to be ambiguous (R. 505, 528, 551), any ambiguity

contained therein is being construed most strongly against Van Zyverdens. *Bryant v. Deseret News Publishing Co.*, 120 U. 241, 233 P.2d 355; 26 ALR 2d 1131; *Handley v. Mutual L. Ins. Co.*, 106 U. 184, 147 P.2d 319; 152 ALR 1278; *Restatement of Contracts*, Vol. 1, Sec. 236; 12 Am. Jur. Contracts 252.

(d) *Van Zyverden is an experienced realtor:*

This common sense rule of construction against the person who selected the language which that person now contends is ambiguous is particularly applicable in our case where Van Zyverden had 10 years experience in the real estate business (R. 496, 558), in the preparation of real estate contracts (R. 558) and the use of abstracts and title insurance in connection with the verification of title (R. 558-559).

(e) *Certainty of Error required for reformation:*

Where the contract is clear and unambiguous and all of its terms are explicit and certain, as in our case, the contract is not open to construction, *Burt v. Stringfellow*, *supra*. There is a presumption that the written contract correctly evidences the agreement of the parties and reformation will not be granted upon a probability and usually not upon a mere preponderance of the evidence, but only upon certainty of the error. *Forrester v. Cook*, 77 U. 137, 292 P. 206, 209; *Weight v. Bailey*, 45 U. 584, 147 P. 899; *Cram v. Reynolds*, 55 U. 384, 186 P. 100.

2. *Is the question of ambiguity properly before the Court:*

Van Zyverdens' authorities, cited in support of the proposition that the Court should inquire into the intent

of the parties, all deal with situations where the contracts being interpreted were obviously ambiguous and open to construction by the Court. In our case we must go outside of the four corners of the instrument if we are to show any ambiguity since the wording in question, "can be exchanged" is plain, simple and unambiguous.

The question of ambiguity appears to be an after-thought by Van Zyverdens' attorney after the trial since the complaint and pre-trial order make no mention of ambiguity, fraud or mistake. It appears from a review of the Van Zyverden brief that their basic contention is to the effect that the parties mistakenly used words in the contract which did not convey the true intention of the parties, and now seek to correct that alleged error by asking the Court to interpret the language in such a manner as to amount to a reformation, but seek to avoid the burden of proof required, their failure to plead the circumstances of fraud or mistake with particularity as required by Rule 9(b), URCP, and their failure to frame this as an issue in the pre-trial order by calling their requested relief an interpretation of alleged ambiguous wording in the contract rather than a reformation. The Utah Supreme Court has long held that in the absence of fraud or mistake, parol evidence is not admissible to contradict, vary, add to, or subtract from the terms of a valid written instrument. *Fox Film Corp. v. Ogden Theatre Co.*, 82 U. 279, 17 P.2d 294, 90 ALR 1299; *Last Chance Ranch Co. v. Erickson*, 82 U. 475, 25 P.2d 952. The matters before the Court can be summarized as follows:

(a) *Van Zyverdens' complaint:*

The only allegation in Van Zyverdens' complaint re-

garding the milk base reads as follows (R. 3, Par. 4):

“4. Defendants have *failed and refused to allow plaintiffs to exchange the Highland milk base and milking equipment* for livestock or horses of equal value, as provided in said contract, *and have thereby breached said contract.*” (Emphasis added)

The complaint obviously makes no reference to reformation of the contract, the alleged intent of the parties or claim that this exchange is a condition precedent to their obligations under the contract. The evidence shows that the complaint fails to state a cause of action since it is undisputed that the milking equipment was at all times freely transferable (R. 230-231, 628), but no offers of exchange of the equipment were ever presented (R. 553, L. 17-23), although it was worth \$1,850.00 (R. 524) and no offers to exchange milk base were ever presented (R. 541, L. 17-19); that Seagull and their assignor Farrars not only did not “refuse to allow an exchange” as alleged in Van Zyverdens’ complaint, but both did everything in their power to assist Van Zyverdens in arranging for a transfer of the milk base on terms even more liberal than specified in the contract (R. 541) and the milk base was actually transferred to Van Zyverden about March 25, 1961 (R. 543). The alleged refusal of Seagull and Farrar to permit an exchange as alleged in the complaint (R. 3, Par. 4) is not supported by the evidence and judgment of no cause of action is accordingly not only proper but required.

(b) *The pre-trial order:*

The issues before the Court as limited by the pre-trial order (Rule 16, URCP) pertaining to Van Zyverdens’ claims are as follows (R. 181-182):

- “1. Were the defendants (Farrars & Seagull) obligated *under the contract* of sale within a reasonable time after the date of the contract to *permit the exchange of the milk base* therein mentioned or to permit the Plaintiffs (Van Zyverdens) to exchange the milk base for livestock or horses of equal value.
2. Did the Defendants have a *duty to facilitate the exchange.*”
3. Have the Plaintiffs been *damaged* thereby?
4. If so, in what amount.” (Emphasis added)

The express wording of the pre-trial order limits the issues to the obligations imposed “*under the contract,*” and makes no mention of any “intent” of the parties which is not expressed in the actual wording of the contract. The obligations mentioned in the pre-trial order consist of a possible duty to “*permit the exchange*” or a possible “*duty to facilitate the exchange.*” As demonstrated under paragraph 2(a) above, Seagull and Farrars have not only been willing at all times to permit the exchange, but have also done everything in their power to facilitate the exchange (R. 541). The question of damages would necessarily not arise unless there were a breach of the duty mentioned in paragraphs 1 or 2 of the pre-trial order (R. 181-182). It is clear that the Van Zyverdens’ claims as shown by the pre-trial order are essentially the same as those contained in the complaint, and that the evidence shows conclusively that no cause of action exists under the Van Zyverden claims contained in either the complaint or pre-trial order, and accordingly the judgment of no cause of action against Van Zyverdens should be affirmed.

(c) *Parol evidence rule:*

Van Zyverdens' attempt to introduce oral testimony to (1) show that the contract is ambiguous and (2) to change the terms from mere permission for Van Zyverdens to make an exchange, to make sellers assume an affirmative duty to make possible and guarantee that the milk base could be exchanged or sold and to excuse Van Zyverdens' performance of their obligations under the purchase agreement until the sale could be accomplished. The proposed oral evidence clearly violates the express provisions of the parol evidence rule which has been codified as 78-25-16, UCA, 1953 and which reads as follows:

“there can be no evidence of the contents of a writing other than the writing itself, except...” (certain exceptions not pertinent herein follow).

The Utah Courts have long held that in the absence of fraud or mistake, parol evidence is not admissible to contradict, vary, add to, or subtract from the terms of a valid written instrument. *Fox Film Corp. v. Ogden Theatre, Co.*, *supra*; *Last Chance Ranch Co. v. Erickson*, *supra*. The vast changes suggested by Van Zyverdens certainly violate the express provisions of the above quoted statute, and attempt to “contradict, vary and add to” the terms of the contract (R. 226-227).

(d) *Merger clause:*

The real estate contract in question (R. 226-227) contains a merger clause (R. 226, Par. 20) which reads in part as follows:

“20. It is hereby expressly understood and agreed by the parties hereto . . . that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as

herein specifically set forth or attached hereto—
none.”

Van Zyverden testified that he was familiar with the contents of said merger clause and that he typed the word “none” in the blank at the end of the sentence (R. 559, L. 12-21), thus indicating that there were in fact no agreements between the parties other than those spelled out in the contract and that any other conversations or agreements were deemed to be merged into the written instrument or abandoned. Where the parties expressly agreed to a merger clause their agreement should not be lightly disturbed. *Forrester v. Cook, supra*.

The rule has long been established in Utah that where parties have deliberately put their contract in writing, and there is no uncertainty as to the extent of their respective rights and obligations under the contract, it cannot be overturned or varied by showing prior or contemporaneous oral agreements in conflict with or at variance with the written instrument. *McCormic v. Levy*, 37 U. 134, 106 P. 660.

(e) *Notice of restriction on milk base from chain of title:*

Van Zyverdens’ argument concerning alleged misconduct of Farrar in concealing restriction on milk base is in essence a charge of fraud (Brief, P. 18-22) used in inducing Van Zyverdens to purchase the ranch. They have not pleaded fraud as required by Rule 9(b), URCP, or set it up as an issue in the pre-trial order and the alleged fraud has not been proven by clear and convincing evidence as required by law. Even if fraud were present and proved (which we deny), Van Zyverdens would still not be

entitled to relief because they have constructive knowledge of the milk base restriction since it appears on the fact of documents in the chain of title. They are not permitted to shut their eyes or ears to the inlet of information and are charged with notice of all facts to which that inquiry will lead when prosecuted in good faith and with reasonable diligence. *Texas Co. v. Aycock*, 190 Tenn 16, 227 SW 2d 41, 17 ALR 2d 322 and cases there cited. Constructive notice is the same in effect as actual notice. *Coal Co. v. Doren*, 142 U.S. 417; *Northern Pac. R.R. Co.*, 21 Was 320, 55 P. 210; *Universal CIT Corp. v. Courtesy Motors, Inc.*, 8 U. 2d 275, 333 P.2d 628; *McGarry v. Thompson*, 114 U. 442, 201 P.2d 288.

Van Zyverden, a realtor with 10 years experience (R. 496), who was familiar with the preparation of real estate contracts (R. 558), the use of abstracts of title in connection with verification of title and with title insurance (R. 558) and obviously well versed in real estate transactions, testified that he made no investigation of the title to the ranch (R. 529), that he was aware of the Michelsen contract (which contained the restriction on the milk base) when the contract was executed (R. 529), although he had previously testified to the contrary (R. 504), that Farrar had the Michelsen contract in his hand but that he did not ask to see it (R. 532-533). The slightest effort to investigate title and the instruments in his actual presence would have disclosed the restriction on milk base, concerning which he now complains.

The facts that the wording of the Michelsen (R. 230-231) and Van Zyverden (R. 226-227) contracts, pertaining to the milk base, are identical except for the period of

the restriction; that the restrictions expired at the same date and that the word "extension" is misspelled in both contracts as "Extention" is strong evidence that Van Zyverden probably actually copied the wording for his contract from the Michelsen contract which contained the milk base restriction which is the basis of his claims in this lawsuit (R. 227 and 230).

The evidence and law discussed above show conclusively that Van Zyverdens have not pleaded or proven a cause of action and that the District Court judgment of no cause of action should be affirmed.

POINT V

VAN ZYVERDENS IN FACT SUFFERED NO DAMAGES FROM ALLEGED BREACH OF CONTRACT.

The trial court very properly ruled that if Van Zyverdens were entitled to recover anything by reason of the non-transferability of the milk base that it "... would be the value of the milk base itself..." (R. 520), and rejected Van Zyverdens' offer of proof as to the profits which they thought that they could have made from a beef operation (R. 528).

Related questions with respect to damages concerning: adequacy of the offer of proof was discussed at page 11 of this brief, inconsistencies and wild assertions concerning anticipated profits contained in the offer of proof are discussed at pages 6, 11, lack of intent to actually engage in a beef operation at the time of execution of the contract are discussed at pages 6, 10, and whether delay in exchanging milk base in fact prevented beef operation are

discussed at page 9 and accordingly will not be repeated here.

The profits (or losses) to be anticipated from conversion of a dairy into a new beef venture by persons who apparently had no experience in raising beef would be at best wildly speculative. Since the parties themselves could not expect to reasonably foresee the income and expenses to be expected from this new operation, certainly one party could not be heard to say that general discussions concerning what they hoped to make (if there were in fact any such discussions) would provide a sufficient basis for computing lost profits to ascertain damages with reasonable certainty. (See rules and examples where profits were easily determined, quoted at page 23 of Van Zyverden brief.)

If in fact there was a breach of contract by reason of the delay in transferring the milk base (which we deny), the damages, if any, resulting therefrom could easily be ascertained. If the sale to Pert had been completed as contemplated, the \$3,190.00 (R. 547) received therefrom would have been released from escrow and made available to Van Zyverdens about May 1, 1961 (R. 505). The restrictions on transferability of the milk base were removed on June 15, 1962 (R. 560, 602). Interest is the exclusive measure of damages for breach of contract to pay or for the detention of money. *Croft v. Jensen*, 86 U. 13, 40 P.2d 198 at Page 202. At the most Van Zyverdens were deprived of the use of \$3,190.00 from May 1, 1961 to June 15, 1962, and accordingly would at the most be entitled to recover interest of \$208.77 computed at legal rate of 6% per annum, however, because of a change in policy by

Hiland Dairy, the milk base was 360 pounds and at \$10.00 per pound (R. 547) was worth \$3,600.00 on June 15, 1962, and at the time of the trial (R. 549). Van Zyverdens accordingly made a profit of \$410.00 on the value of the base by waiting to dispose of it, and after deducting the interest of \$208.77 due for loss of use of the funds as aforesaid, Van Zyverdens actually had a profit of \$201.23. The Court must consider all circumstances which may have occurred to the date of the trial in measuring damages, whether such circumstances increase or reduce the amount of damages. (61 ALR 126, s. 100 ALR 1201.) The evidence clearly shows that Van Zyverdens actually sustained no legally recoverable damages from the restrictions upon transfer of the milk base, even if that issue had been properly before the Court, which it was not as discussed above.

The assertion by Van Zyverdens at page 27 that they are entitled to recover \$13,812.49 allegedly invested by them in the property is not an issue in Van Zyverdens' complaint, the pre-trial order or the trial of the case, and there is no evidence in the case to support the amounts claimed or Van Zyverdens' allegation that the property is now worth \$85,000.00. Obviously \$5,000.00 of the amount claimed to have been invested in the ranch constitutes credit allowed to Van Zyverdens for some equipment and livestock which they were supposed to bring on the property as additional security, but most of which has now disappeared if it in fact was ever brought to the property. Van Zyverdens still have exactly the same equipment and livestock as they had before the transaction, except to the extent that they have disposed of it. The additional

amounts claimed by Van Zyverdens undoubtedly represents operating and maintenance costs allegedly expended on the property which are detailed in their offer of proof made after the trial which was rejected by the Court. (R. 219-220.)

The assertion by Van Zyverdens that the transferability of the milk base was a condition precedent to their obligation to perform their obligations under the purchase contract and excused them from performing until that condition was met (page 25 of Van Zyverden brief) is so unreasonable that it is hardly worth considering. If this theory were carried to its logical conclusion, Van Zyverdens would have us believe that Farrar was so anxious to sell them the ranch with no down payment and nothing to be paid for over a year that they agreed to finance their operation by permitting the liquidation of part of the ranch assets, and agreed that if the assets could not be liquidated that Van Zyverdens would be entitled to retain the farm without paying for it or being required to pay the taxes, water assessments, insure the buildings, etc. Obviously no one would sell a \$55,000.00 farm on such terms.

The value of the milk base is approximately $\frac{1}{2}$ of 1% of the purchase price of the ranch. The Utah Supreme Court considered a similar situation involving a sewer connection that had not been made, the cost of which was about $\frac{1}{2}$ of 1% of the purchase price of the house, in *Erismann v. Overman*, 11 U. 2d 258, 358 P.2d 85, and denied equitable relief because there was an adequate legal remedy available, and stated that "If there is a legal remedy available to which resort may be had without sub-

stantial, irreparable damage, one may not seek equity.” The Court also stated that “Equity will not pick up pins.” The rule is well established that where payments are to be made in installments and the conveyance is not to be made until full payment (as in our case), the promise to pay is unconditional except as to the last payment. 55 Am. Jur. vendor and purchaser 102, 106; *Crampton v. McLaughlin Realty Co.*, 99 P. 586 (Wash. 1909). See also discussion at pages 682-686 of record.

Van Zyverdens obtained funds or credit necessary to purchase 25 cows in the spring of 1961, yet claim that they were prevented from going into the beef business because they were not permitted the use of \$3,190.00 for a little over a year. This argument is also obviously unsound. Van Zyverdens got what they bargained for but were unable to pay. They have retained possession of the use of and the income from the ranch since September, 1960, without paying anything toward the purchase price, taxes, water assessments or insurance, and now they claim that they have been damaged.

POINT VI

SEAGULL IS ENTITLED TO THE RELIEF REQUESTED IN ITS APPEAL BRIEF ON FILE HEREIN.

Most of the matters mentioned by Van Zyverdens in their points IV and V have been fully covered in the original brief filed by Seagull and will not be discussed herein, however, it is proper to reply to a few of the matters mentioned by Van Zyverdens.

Seagull generally agrees with the law as stated by Van Zyverdens in their reply brief, however, their application

of the facts to the law is disputed. Van Zyverdens have had much to say about Seagull filing a supplemental complaint, however, their argument is essentially that Seagull should have asked for permission to file a supplemental complaint (Van Zyverden brief, Pages 33, 39-43) rather than for permission to amend the pleadings to refer to the later notice (R. 233-240) as was done by Seagull when Van Zyverdens objected to admission of the second notice as being outside the scope of the pleadings (R. 545). Whether the amendment under Rule 15, URCP, is called an amendment or a supplemental pleadings seems unimportant. The fact is that Seagull asked to be permitted to refer in its pleadings to the second notice, if the Court was of the opinion that said second notice was outside the scope of the pleadings and issues in the case. Van Zyverdens agree that no good purpose could be accomplished by a new action based upon the same facts to recover possession of the ranch. (Van Zyverden brief, Pages 39-42.) This Court has the power to admit exhibit 5 (R. 233-240) into evidence without further hearings before the District Court. There can be no question that based upon notice contained in said exhibit 5 (R. 233-240) Seagull is entitled to the relief requested in its appeal brief on file herein, and judgment should be entered accordingly, and a new trial or hearing should be ordered to receive evidence as to the service of said exhibit 5, the amount to be allowed as attorney fees, etc.

The arguments raised by Van Zyverdens as to alleged waiver of the notice contained in exhibit 5 (R. 233-240) because of statements contained in and legal theories advanced in other litigation allegedly filed in the District

Court (Van Zyverden brief, P. 41) are not before the Court, and accordingly the position of Van Zyverdens is wholly unsupported by the evidence and the record and cannot be considered. The copies of notices allegedly served upon Van Zyverdens (R. 725-726, 729) are not properly a part of the record in this case for the reason that the motion to which they are attached was filed after the appeal was taken in this case, and after the District Court lost jurisdiction in this matter. *Petersen v. Ohio Copper Co.*, 71 U. 444, 266 P. 1050. In any event, said notices expressly state that Seagull does not thereby waive any rights which may have accrued by reason of or in connection with prior notices served, legal proceedings pending concerning the property described therein and cannot constitute a waiver since a waiver requires the voluntary relinquishment of a known legal right and requires consideration to support the waiver contract. 56 Am. Jur. Waiver, 12-16. The authorities cited by Van Zyverdens (Van Zyverden Brief, Page 35) are not in point since they contemplate a situation where both parties treated the contract as in full force and effect, whereas the notices in question expressly state that no waiver is intended. The legal position taken by Seagull in the two notices mentioned (R. 725-726, 729) is not inconsistent with the remedies sought in this action. If Van Zyverdens are in fact tenants at will by reason of the first notice (R. 266-272) served upon them as contended by Van Zyverdens (brief page 31), certainly so long as they remained tenants at will of the property any number of new notices could be served demanding that they vacate

or be guilty of unlawful detainer, and each new notice would give rise to a new cause of action. The mention of Van Zyverdens as "buyers" in said notices was merely descriptive of their connection with the real estate contract in the first instance, and was not a recognition of a status which then existed.

The claim of Van Zyverdens that Seagull had been defaulted at the time the requests for admissions were served in case number 2456 is obviously untrue since Seagull was the plaintiff in that action and the only default entered therein was the default certificate against Van Zyverdens for their failure to deny the requests for admissions. See discussion at pages 6-8 of Seagull appeal brief on file herein. Denial of motion for summary judgment by Judge Tuckett obviously does not bind this Court.

The assertion by Van Zyverdens that Seagull elected at the pre-trial conference to proceed in tort and to abandon its other claims is simply not true. Judge Tuckett suggested the possibility of proceeding as a mortgage foreclosure and his offer was declined, Seagull electing to proceed under the theories set out in its pleadings. The question of Seagull's right to recover attorney fees is a matter of law under the terms of the contract between the parties and any views expressed by Judge Tuckett with respect thereto would not bind this Court. Van Zyverdens' view that termination of the buyers' interest under the real estate contract (R. 226-227) also terminates the right of the seller to collect attorney fees in connection with the action and in accordance with the express agreement of the parties is contrary to reason and

would amount to the Court's remaking the contract for the parties.

SUMMARY AND CONCLUSION

It is obvious that Van Zyverdens have failed to state a claim for relief upon which relief can be granted either in their pleadings or the pre-trial order and that the propositions urged by Van Zyverdens are unrealistic and merely delaying tactics. On the other hand, Seagull should be awarded restitution of the ranch and damages by reason of Van Zyverdens' occupation thereof since September, 1960, without paying any of his obligations under the contract or any part of the purchase price.

Because of the severe damages being sustained by Seagull as a result of Van Zyverdens' appropriation of their property without compensation, it is strongly urged that restitution be ordered by this Court rather than delaying matters with further hearings concerning that issue in the District Court and the further delay of possible additional appeals to this Court.

Respectfully submitted,

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