

1963

Samuel Adams and Hilda M. Adams v. Don A. Taylor and Mildred B. Taylor : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Bean and Bean; Attorneys for Appellants;

Lothaire R. Rich; Attorney for Respondents;

Recommended Citation

Brief of Appellant, *Adams v. Taylor*, No. 9986 (Utah Supreme Court, 1963).

https://digitalcommons.law.byu.edu/uofu_sc1/4386

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

SAMUEL ADAMS and
HILDA M. ADAMS, his wife,
Plaintiffs and Respondents,

vs.

DON A. TAYLOR and
MILDRED B. TAYLOR, his wife,
Defendants and Appellants.

FILED
1936
Supreme Court, Utah

Case No.
9986

BRIEF OF APPELLANTS

BEAN AND BEAN
50 North Main Street
Layton, Utah
Attorneys for Appellants

LOTHAIRE R. RICH,
14 East Stratford Avenue
South Salt Lake, Utah
Attorney for Respondents

PRINTERS INC. - SUGAR HOUSE

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	6
POINT I. THE TRIAL COURT CORRECTLY GRANTED SPECIFIC PERFORMANCE OF THAT PART OF THE PARTIES' VERBAL AGREEMENT WHICH PERTAINED TO A LEASE	6
POINT II. THE TRIAL COURT IMPROPERLY DENIED SPECIFIC PERFORMANCE OF THAT PART OF THE PARTIES' VERBAL AGREEMENT WHICH PERTAINED TO AN OPTION TO PURCHASE	11
Conclusion	16

AUTHORITIES CITED

Cases

<i>Dann v. Spurrier</i> , 3 Bos & P 399, 127 Eng Reprint 218, 2 Eng Rul Cas 756, Eng Rul Cas 458.....	14
<i>Goodright d. Hall v. Richardson</i> , 3 T.R. 462 1789).....	14
<i>Hogan v. Swayze</i> , 65 U. 380, 237 P. 1097 (1925).....	10
<i>Latses v. Nick Floor, Inc.</i> , 99 U. 214, 104 P.2d 619.....	8
<i>In re Madsen's Estate</i> , 123 U. 327, 259 P.2d 595 (1953)....	11
<i>Randall v Tracy Collins Trust Company</i> , 6 U. 2d 18, 305 P.2d 480 (1956).....	11

Texts

32 Am.Jur., Landlord and Tenant, Section 62.....	13
49 Am.Jur., <i>Statute of Frauds</i> , Section 422.....	7
49 Am.Jur., <i>Statute of Frauds</i> , Section 449.....	9
1 American Law of Property, Sections 3.21, 11.7, 11.9....	10
Corbin on Contracts, Section 30.....	14
Corbin on Contracts, Section 266.....	12
Corbin on Contracts, Section 434.....	11
Utah Code Annotated, 1953, Section 25-5-3.....	6
2 Walsh, Commentaries, Law of Real Property (1947)....	14

IN THE SUPREME COURT OF THE STATE OF UTAH

SAMUEL ADAMS and
HILDA M. ADAMS, his wife,
Plaintiffs and Respondents,

vs.

DON A. TAYLOR and
MILDRED B. TAYLOR, his wife,
Defendants and Appellants.

Case No.
9986

Appeal from a Judgment of the Second District Court
for Davis County

HONORABLE THORNLEY K. SWAN, Judge

STATEMENT OF THE NATURE OF THE CASE

This is an unlawful detainer action by which respondents seek restitution of premises and treble damages against appellants and in which appellants counter-claim for specific performance of a verbal lease and option to purchase.

DISPOSITION IN LOWER COURT

The lower court denied respondents any relief, and granted appellants' prayer for specific performance of the verbal lease, but denied appellants' prayer for specific performance of the verbal option to purchase.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the lower court's denial of specific performance of the option to purchase.

STATEMENT OF FACTS

In December, 1958, the appellants, Mr. and Mrs. Taylor, approached respondents, Mr. and Mrs. Adams, about leasing or buying from the Adamses a parcel of ground fronting on U. S. Highway 91 north of the City of Layton for an A & W drive-in restaurant (T. 4, 23, 61). There was an existing building on the parcel in question, but it was run-down and unsuited for use as a drive-in, having been condemned by the Davis County Health Department (T. 104, 105). The Taylors took a picture of the premises and submitted it to the A & W national organization (T. 4, 6, 23, 62), and the national organization approved it, subject to the making of certain specified changes (T. 6, 7, 62). The Taylors requested the Adamses to make the necessary improvements to the premises at the Adamses' expense and recover their money through a higher rent, but the Adamses declined and said the Taylors would have to make their own improvements (T. 19, 26, 62, 63).

Between December, 1958, and July 1, 1959, there were a number of meetings between the parties concerning the terms of a lease and option to buy (T. 7, 64). The parties agreed to a ten-year lease term with an option to buy and agreed to a rent figure and other details of the lease and option (T. 8, 26, 64, 65, 69, 86, 99). Mrs. Adams set the rent figure and accepted a check for one-half of the first month's rent (T. 19, 23, 26, 62, 64, 75). The Taylors were not required to pay any further rent until they moved in (T. 31). It was agreed that Taylors would have their attorney draw up a lease embodying those terms (T. 8, 64). Mrs. Adams told the Taylors that if they put a lot of money into the place they would have an option to buy. The Taylors had the premises appraised and made an offer for immediate purchase before any lease, which offer was rejected (T. 65).

In the month of May, 1959, Mrs. Adams, Mr. Taylor and a surveyor staked out the boundaries of the subject premises on the ground, and the surveyor made up a plat and legal description (T. 15, 16, 30, 106-111, defendants' Exhibit 3). Also in May, the draft of a lease was presented to the Adamses, but they wanted some changes made and would not sign a lease with a ten-year term (T. 27, 45, 67). Attempts to meet at the attorney's office and reconcile their differences failed because Mr. Adams was sick (T. 13, 14, 18, 73). As the improvements to the property neared completion and the date for opening the drive-in grew nearer, the Taylors went to see the Adamses for the purpose of getting something in writing (T. 9, 11, 12, 66, 83). The date of this visit was July 1, 1959 (T. 67). The Taylors

told the Adamses they had to have something in writing before their equipment was put in (T. 66). The parties then agreed to a four or five-year lease with an option to purchase for \$13,000.00 (T. 34, 38, 65, 66). Mrs. Adams wrote on the back of one of the Taylors' checks (plaintiff's Exhibit A) the following words:

“Selling price \$13,000.00
Four to five years to buy or lease
Samuel J. Adams
Hilda M Adams”

Mr. Adams was present when Mrs. Adams signed his name to that check (T. 38).

Under that agreement the Taylors occupied the improved premises and paid rent to the Adamses each month for two years (T. 33). Rent checks were often made payable to both Mr. and Mrs. Adams, and Mrs. Adams accepted the checks and endorsed both names to them (T. 32, 33). After two years, the Adamses' attorney drew a lease with substantially different terms than what the parties had agreed to, including trebled rent, and the Taylors were requested to sign it (T. 17, 45). They refused, and the Adamses attempted to serve them with a document purporting to be a notice to quit (T. 20, 21). The Taylors remained in the premises, and this lawsuit ensued.

At the time the Taylors entered into the rent and option agreement with the Adamses, the subject premises were in a seriously run-down condition. The building had been vacant for a year or two (T. 104), although Mrs. Ad-

ams kept some ceramics in it (T. 40). The toilet bowl and wash basin were broken (T. 104). The sewage disposal was very inadequate; drainage from the building was running out on the surface of the ground (T. 77, 104). The sanitarian of the Davis County Health Department had notified Layton City not to issue a building or occupancy permit for the structure without a clearance from his department (T. 104, 105). He had also notified Mr. Adams of the building's shortcomings (T. 104). The building was a health hazard no matter what use it was put to (T. 105).

Prior to commencing business operations on the premises, the Taylors made the following improvements:

They took out the old broken toilets and basins and installed new ones (T.77).

They tore out the floor in the existing building and the plumbing located in it and installed entirely new plumbing in the floor, and installed a new floor (T. 78).

They installed new wiring with all new material (T. 78, plaintiffs' Exhibit D [letter of May 22, 1959 from Mr. Fred Bradshaw]).

They installed a new water system (T. 78).

They installed a new septic tank and drain field (T. 78).

They ran a natural gas line from nearby Angel Street, which is not the street on which the premises are located, to the premises (T. 78).

They constructed a 13'6" x 20' addition on the back of the existing structure (T. 79, 97).

They installed a new roof on the old structure, removing some of the old studding and sheathing and installing new studding and sheathing (T. 79, 87).

They blacktopped the surrounding area (T. 83).

They installed light poles and lights for outside lighting (T. 83).

And they installed an A & W neon sign (T. 83).

The value of the improvements to the building and premises by the Taylors was approximately \$10,500.00 (T. 84, 95). All of the material and labor which that figure represents went into the building (T. 88, 94, 95).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY GRANTED SPECIFIC PERFORMANCE OF THAT PART OF THE PARTIES' VERBAL AGREEMENT WHICH PERTAINED TO A LEASE.

Although the agreement between the parties for a lease and option to purchase the premises in question was verbal only, and therefore subject to the provisions of the Statute of Frauds, Section 25-5-3, Utah Code Annotated

1953, it was nevertheless enforceable by reason of the companion section, 25-5-8, U.C.A. 1953, which states. "Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof." The latter section apparently only restates the well recognized equitable principal that courts will not allow the Statute of Frauds to be used as an instrument of fraud by allowing one party to escape performance of his obligations under an oral agreement after permitting the other to perform in reliance upon the agreement. As the author at 49 Am.Jur., *Statute of Frauds*, Section 422, at Page 727 has stated:

The doctrine of part performance operates not upon the theory that the part performance is a substitute for the written evidence required by the statute of frauds, but on the theory that the defendant may be estopped in view of the part performance to assert the statute as a defense. Part performance takes the case out of the statute not because it furnishes proof of the contract, or because it makes the contract any stronger, but because it would be intolerable in equity for the owner of a tract of land knowingly to suffer another to invest time, labor, and money in that land, upon the faith of a contract which did not exist.

The court's attention is directed to the unquestioned part performance which is present in this case. Beginning in July, 1959, the appellants (Taylors) had possession of the premises in dispute here, and every month for twenty-

four months they operated an A & W drive-in restaurant thereon. Every month for twenty-four months they paid rent to respondents (Adamses), and in each of these twenty-four months, respondents accepted the checks. The checks were endorsed by Mrs. Adams and were paid in the normal course of business. It is submitted that this is a very substantial part performance of the lease aspect of the parties' agreement.

But perhaps more important are the extensive improvements to the premises which appellants installed after the original agreement as to lease terms. The detailed items are set forth in the Statement of Facts herein at pages 2 through 5 and will not be repeated at this point. The only reliable testimony of their total cost was given by appellant Mr. Taylor at \$10,500.00. Respondents attempted, through the testimony of a retired contractor who had not been licensed for eight years, to rebut this testimony, but on cross-examination that witness, Mr. Ford, testified he did not take into consideration the majority of the improvements which appellants had made (T. 122, 125). The trial court found that the improvements made by appellants were substantial in nature and were of a value in excess of \$6,000.00 (R. 61, Finding No.9).

In 1940, this court decided a case, *Latses v. Nick Floor, Inc.*, 99 U. 214, 104 P.2d 619, which turned on the doctrine of valuable or substantial improvement. The language of that decision at 104 P.2d 622 is directly pertinent here:

This court has recognized the principle that improvements placed upon premises may take the

contract out of the statute of frauds even to the extent of requiring a conveyance of the property upon an oral agreement. *Price v. Lloyd*, 31 Utah 86, 86 P. 767, 8. L.R.A., N.S., 870; *Hargreaves v. Burton*, 59 Utah 575, 206 P. 262, 33 A.L.R. 1481. Certainly if a conveyance may be had upon an oral agreement so taken out of the statute, an extension of the term of a lease should be granted upon the same grounds. Leases have been extended before upon such grounds. 33 A.L.R. 1489, 1510; *Read Drug & Chemical Co. v. Nattans*, 129 Md. 67, 98 A. 158. The Utah cases cited above bring out the fact that the improvements must be such as are indicative of something more than repairs that a tenant from month to month might make simply for his own convenience. Under the lease in question, they were to be *permanent* improvements.

To the same effect is the text at 49 Am.Jur., *Statute of Frauds*, Section 449, Page 755:

The making of valuable permanent improvements on the land by the purchaser, in pursuance of the agreement and with the knowledge of the vendor, has been said to be the strongest and most unequivocal act of part performance by which a verbal contract to sell land is taken out of the statute of frauds, and is ordinarily an improvement element in such part performance. It appears that even in a comparatively early period of the statute of frauds there was coined the apt expression that "a man may be improved out of his estate." The rule has been laid down in numerous cases that the making by the purchaser of valuable and permanent improvements upon land purchased by parol agreement, in reliance upon the agreement, may constitute a sufficient part performance to take the contract out of the operation of the statute. The view is that where the purchaser upon the faith of the contract makes valuable improvements upon

the land, for which he has not been compensated from the produce and profits of the land, and for which he cannot be adequately compensated in damages, a palpable fraud would be perpetrated upon him if the vendor were permitted to repudiate the contract.

And further in the same section, at Page 756:

Possession by the purchaser under parol contract for the purchase of real property, together with his making valuable and permanent improvements on the property which are referable exclusively to the contract, in reliance on the contract, in the honest belief that he has a right to make them, and with the knowledge and consent or acquiescence of the the knowledge and consent or acquiescence of the vendor, is deemed a part performance of the contract.

The author of the foregoing text cites a Utah case, *Hogan v. Swayze*, 65 U. 380, 237 P. 1097 (1925).

Also supporting the above-stated rule is 1 American Law of Property, Section 3.21, at Page 219, with respect to the landlord-tenant relationship, and Sections 11.7 and 11.9 with respect to the vendor-purchaser relationship. At Section 11.9 of the last cited text, the author states:

Where a purchaser takes possession, under an oral agreement for the sale of land or of an interest therein, with the consent of the vendor, and, once in possession, makes valuable and lasting improvements on the premises in reliance on the contract, it has been generally held that there is sufficient part performance to take the case out of the Statute of Frauds. The improvements must be such that

they are referable solely to a contract, and that they have been made in reliance upon the promise to convey. Thus made, they are usually strong evidence of the existence of a contract and of irreparable injury if the contract is not enforced.

All of the authors cited thus far have required that the improvements relied upon must be referable to the contract, i.e., must have been made in reliance on or in performance of the oral contract. To the same effect is *Corbin on Contracts*, Volume 2, Section 434, at Page 495, where the author says:

As in the case of possession, the improvements made will have small weight unless they are of a kind that would not have been made had there been no oral contract. They must be "referable to the contract," it is often said. This does not mean that the improvements made must have been referred to in any way in the contract but only that they are such as it would have been improvident to make in the absence of some such contract, so that they are strong circumstantial evidence of its existence.

This court has so held in *Randall v Tracy Collins Trust Company*, 6 U.2d 18, 305, P.2d 480 (1956), and *In re Madsen's Estate*, 123 U. 327, 259 P.2d 595 (1953).

POINT II

THE TRIAL COURT IMPROPERLY DENIED SPECIFIC PERFORMANCE OF THAT PART OF THE PARTIES' VERBAL AGREEMENT WHICH PERTAINED TO AN OPTION TO PURCHASE.

The appellants and respondents did not enter into two contracts. A single consideration — namely, appellants' covenant to pay rent — supported both the respondents' covenant to give possession of the premises for five years under the lease and to sell at the end of the lease period for \$13,000.00. See Corbin, Volume 1A, Section 266, at Page 539. The appellants would not have entered into the one without the other (T. 86).

Counsel acknowledges that the authorities cited under Point I herein refer both to leases and contracts to sell. It is the identity of controlling principles in each case which illustrates the point here discussed. The option to purchase is a contract for the sale of realty. It is inseparably joined with the agreement to lease the premises. This seems clear from the fact that this was commercial property, that it was in a run-down condition when the appellants took it over, that it required substantial improvements of a permanent nature in order to make it usable, and that the appellants in fact made the necessary improvements at considerable expense to themselves. Such improvements are not reasonably referable solely to a five-year lease, since it would require the sizeable portion of that lease term in order to build up a business, and without an option to purchase or an option to renew, the business would be lost within a relatively short time. It is not reasonable to suppose that it would have been worth the trouble for appellants to install those permanent improvements or to suppose that they could recover their investment in that short a time.

The whole history of the parties' negotiations with reference to their agreement bears out the fact that it was one agreement intended to accomplish one purpose. More particularly, from an examination of plaintiffs' Exhibit A, the check signed on July 1, 1959, at the home of the respondents, there can be no doubt that the respondents agreed to a five-year lease with an option to purchase the premises at the end of the five-year lease for the sum of \$13,000.00. It is submitted that a finding by the trial court that the one existed is necessarily a finding that the other existed, and the finding that both agreements existed is the only one supportable by the evidence.

* * *

Inasmuch as respondents have cross-appealed, it is deemed appropriate at this point to make reference to three arguments which have been advanced in the trial court.

First, respondents have argued that because the document, plaintiffs' Exhibit A, signed by Mrs. Adams, makes reference to a four or five-year term, the lease is therefore indefinite and cannot be sustained even in the light of extensive part performance. The only authority counsel has been able to find is to the contrary. 32 Am.Jur., *Landlord and Tenant*, Section 62, at Page 78, states. "A lease may be in the alternative for two or more specified periods at the option of the lessee without being invalid for want of certainty as to the duration of the term; and where it is in the alternative for two or more specified periods, without stating by whom the period is to be determined,

it has been held that the option to determine for which period the lease shall continue was given to the lessee, and therefore the lease was not invalid for want of certainty as to the term, the reason for this being that the lease should be construed most favorably to the lessee." The text at that point cites *Dann v. Spurrier*, 3 Bos & P 399, 127 Eng Reprint 218, 2 Eng Rul Cas 756, 15 Eng Rul Cas 458, which case cites *Goodright d. Hall v. Richardson*, 3 T.R. 462 (1789). The Goodright case is cited in 2 Walsh, *Commentaries, Law of Real Property* (1947) Section 140 at Page 115 in support of the same rule above cited from American Jurisprudence.

Second, respondents have argued that the parties were not to be bound by any agreement until a writing had been executed by them. With reference to this point, *Corbin*, Volume 1, Section 30, Page 98 says with reference to contracting parties: "If their expressions convince the court that they intended to be bound without a formal document, their contract is consummated and the expected formal document will be nothing more than a memorial of that contract. In very many cases the court has been convinced that such was the intention and has held the parties bound by a contract, even though no document has been executed." In the same section at Page 105, the author states: "Usage and custom may be decisive of the issue. The greater the complexity and importance of the transaction, the more likely it is that the informal communications are intended to be preliminary only. The fact that the parties contemplate the execution of a document is some evidence not in itself conclusive that they intend not to

be bound until it is executed. . . The subsequent conduct and interpretation of the parties themselves may be decisive on the question as to whether a contract has been made, even though a document was contemplated and has never been executed. They may both have already begun performance and may have made statements that are strongly evidential. Of course, the subsequent conduct of the parties may constitute a tacit contract on the terms previously agreed upon, even though the understanding had at first been that the execution of a formal document was necessary." It is pointed out that the conduct of the parties as disclosed by the testimony in the record is that they did intend to be bound, even though the understanding had at first been that a formal lease and option agreement would be drawn.

Thirdly, respondents have contended that Mrs. Adams was without authority to enter into the negotiations with appellants on behalf of Mr. Adams or to sign anything in his behalf. In his testimony Mr. Adams said that Mrs. Adams did most of the negotiations, and that she did so with authority from him (T.49). The prior course of dealing by Mrs. Adams with others in relation to their property strongly suggests that she had authority in this transaction. It was Mrs. Adams who carried on the conversations with appellants, and it was she who took the draft agreement to the local banker for his opinion on it. It was she who showed Mr. Fifield where the boundary pegs should go. It was she who signed the back of the check, plaintiffs' Exhibit A, in the presence of Mr. Adams without his protest, and it was she who leased the property previously to Mr. Bench.

CONCLUSION

In summary, the evidence is clear and convincing that appellants and respondents entered into a verbal lease and option to purchase agreement which was certain in its terms, which was entered into by both parties and partly performed, and which should now be enforced by a court of equity. Accordingly, the holding of the trial court granting specific performance of the parties' agreement as to lease of the premises in question should be affirmed, and the holding denying specific performance of appellants' option to purchase said premises should be reversed.

Respectfully submitted,

BEAN AND BEAN

K. Roger Bean
50 North Main Street
Layton, Utah
*Attorneys for Defendants
and Appellants*