

1963

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

Utah Supreme Court

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Recommended Citation

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

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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

RESPONDENTS' BRIEF

**Appeal from a Judgment of the Second District Court for
Davis County
HONORABLE THORNLEY K. SWAN, Judge**

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Case No.
9986

RESPONDENTS' BRIEF

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 appellant counter-claim for specific performance of a verbal lease and option to purchase.

DISPOSITION IN LOWER COURT

The lower court gave judgment “no cause of action” on Plaintiffs’ complaint for restitution and damages, and on appellants’ counter-claim declared that the appellants were properly in possession of the property under a lease, but denied appellants judgment on option to purchase.

RELIEF SOUGHT

Respondents seek reversal of the lower court’s award of possession to the appellants and on their cross-appeal ask for restitution of the premises to the respondents and award of treble damages for failure to vacate.

STATEMENT OF FACTS

The statement of facts as presented in appellants brief are substantially true except as to the changes which are set forth herein pointing out and emphasizing appellants’ statements inconsistent with the facts. Respondents point out some facts for emphasis and assert other facts as controlling factors in the case.

The appellants contended that they originally agreed on a ten-year lease. Respondents claim lease was to have been from three to five years (T. 24, L. 4).

The Taylors never at any time gave an option to buy, but rather stated that Taylors would have the first

chance to buy if the time ever came that they decided to sell ('T. 25, 26).

There was a dispute among the parties present as to how much of the land should have been surveyed. Mr. Taylor stated it was to go back to the post ('T. 11). Mr. Fifield, the surveyor, stated that he didn't go to the post, and that it could have been within 10, 20, or 50 feet; but he never went to the post ('T. 110). Mrs. Adams testified that the surveyor went farther than she told him to go ('T. 30), that a copy of the plat was not given to Mrs. Adams until some months later ('T. 42).

The lease was given back to appellants' attorney a day or two after received, and respondents were never presented with another lease ('T. 29), and the respondents never had another lease prepared with the four-or-five-year provision in it, although Mr. Taylor stated they were going to do so after they signed Exhibit A ('T. 19).

It is stipulated between the counsel that the officer serving the notice would have testified that he served Mrs. Taylor personally, by giving her a copy of the notice to Quit and Vacate at the place of business, and that Chief Mottishaw would have testified that he prepared the notice for mailing and personally placed the notice in an envelope and delivered it to his secretary for mailing by certified mail, and that she, the secretary, would have testified that she addressed it and had taken the letter, addressed to Mr. Taylor at his residence in Clearfield, Utah, and mailed it, certified

mail, in the Layton, Utah, post office on the twelfth day of January, 1962.

That there were a number of improvements on the premises, and that plaintiffs' Exhibit "C" reflects the condition of the drive-in after remodeling, and plaintiffs' Exhibits "E" and "F" show the condition prior to their remodeling.

That in the findings of the trial court, the improvements were in excess of \$6,000.00, and the testimony of Mr. Ford was that the whole building could have been built for about \$4,500.00 (T. 122).

It should be pointed out that the property in question was owned solely by Samuel J. Adams, and such fact was known to the appellants as Mr. Taylor stated that Mrs. Adams told them Mr. Adams was the owner (T. 86).

That Samuel Adams never signed any note or memorandum giving the Taylors an option to buy or lease; and while Hilda Adams, wife of Samuel Adams, did most of the negotiating, there was never any contention at any time that she had any authority in writing to sign for Mr. Adams, either on a lease or an option.

That all evidence clearly points to the fact that the negotiations were preliminary to drawing the final lease, and no final lease was ever drawn.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS AN ENFORCEABLE LEASE.

A lease to be enforceable for a period longer than one year under the Utah Code must be in writing. Title 25, Chapter 5, Section 3, of the 1953 Utah Code provides:

“Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.”

In this case, because of the fact that Mr. Adams was hard of hearing due to advanced age (78 years, T. 46), Mrs. Adams did most of the talking; but Mr. Taylor knew that Mr. Adams was the sole owner of the property, and that he was the person who would have to sign the lease, as Taylor testified that Mrs. Adams had so told them (T. 86).

There is no question concerning the fact that no lease was ever signed by Samuel J. Adams, and no note or memorandum was ever subscribed by him. In fact, the uncontroverted testimony of Mr. Adams was that Taylor should do nothing on it until he got a contract (T. 47), and “that he, Taylor, signed the contract

before he done any business there, or it was up to him.” (T. 49, L. 6-16). It is also clear that Mr. Adams had not given Mrs. Adams authority to sign for him, as he said she had the authority to negotiate, but not to sign (T. 49).

There can be no question of the fact that there wasn't compliance with the statute. In fact, it is very clear that there was no intention on the part of anyone to be bound without a written lease. The Taylors assumed the responsibility of getting and supplying it. When the Taylors proceeded to go ahead, they were taking a calculated risk, as they were going ahead contrary to the agreement; and they should not now be able to complain, as all the Taylors would have had to do at any point of the negotiations would have been to refuse to proceed farther until the lease was agreed upon and signed.

It is a fundamental rule in law that any person going into possession of property with the permission of the owner, without having purchased the property, is there as a tenant. In this case, the Taylors went in contrary to the agreement, but did go in with permission, as shown by the fact that the rent was accepted. Williston states that in such cases there is a creation of the relationship of landlord and tenant.

It is also rather fundamental that where the lease fails to create another form of tenancy, if the payments are on a monthly basis, the tenant becomes a month-to-month tenant.

American Jurisprudence Volume 32, Landlord and Tenant, Section 71, Page 86, states:

“Accordingly, a tenancy from year to year or from month to month arises where no definite time is agreed upon, and the rent is fixed at so much per year or month.”

In this case it is the contention of the respondents that the tenancy became a month-to-month tenancy when there was no agreeable lease executed.

The appellants argue that the negotiations and the tenancy was under a verbal lease, and set forth that the Statute will enforce a verbal lease under the theory of part performance. However, to have a verbal lease, all of the elements and details of a lease must be present.

At Am. Jur. 32, Landlord and Tenant, Section 62, Page 77, among other things, provides:

“It is a cardinal principle in the creation of term for years that the term must be certain, that is, there must be certainty as to the commencement and duration of the term. * * * albeit there appear no certainty of years in the lease, yet if, by reference to a certainty, it may be made certain, it sufficeth. But the reference should be to a thing that has express certainty at the time the lease is made, and not to a possible or casual certainty.”

In the case of *Birdzell vs. Utah Oil Refining Company*, 242 P. 2nd, Page 578, decided April 1, 1952, where there was an alleged oral agreement between the parties for a lease and a letter setting forth some of the

conditions, the court sets forth the three essentials in a contract to make it valid under the STATUTE OF FRAUDS both as to lease and sell. These are:

FIRST, definite agreement as to the extent and boundary of the property to be leased.

SECOND, a definite and agreed term.

THIRD, a definite and agreed rental, and the time and manner of its payment.”

In the present case the appellants, as support and for the terms of the lease, have cited a memorandum which is marked Plaintiffs’ Exhibit A and is set forth in their statement of facts. They do not claim that this memorandum is sufficient to constitute a lease, and have to go outside of the memorandum for some of the other terms; but they do claim that this, with the other things, makes up a verbal lease.

In the *Birdzell* case the Plaintiffs attempted to claim a lease setting forth the conditions of the proposed lease as shown in a letter a memorandum sufficient to take it out of the Statute of Frauds and in that case the court held:

“The above letter will not suffice as an adequate memorandum because it lacks an acknowledgment that a contract has been entered into by the parties.”

Applying this test to the present case, it is clear that there was no acknowledgment on the memorandum that a contract or a lease had been entered into; and the memorandum was admittedly not signed by Mr. Adams,

the owner, as he told them he would not sign it (T. 48, L. 6).

The only fact which Mr. Adams, as the owner of the property, would be chargeable with was the fact that he permitted the Taylors to go in on the basis of \$50.00 per month and accepted payment.

It is admitted that the lease, as prepared by the Taylors, was unsatisfactory; and as the proposed lease was not produced in court, we can assume that all of the terms were unsatisfactory, as it was not signed and there was no showing as to just which of the terms were acceptable, except that a ten-year lease was not acceptable, and it was admitted that there were other changes to be made.

Inasmuch as the testimony is to the effect that Mr. Bean, the appellants' attorney, was given the lease by Mrs. Adams about two days after it was received (T. 27, L. 25), and Mr. Bean admitted that he probably had a copy of the lease in his office (T. 9, L. 29), the lease and negotiations up to that time should be considered as having been totally unsatisfactory, and therefore, only consider the matters surrounding the renegotiation agreement as shown by the memorandum. Inasmuch as the memorandum is ambiguous and uncertain in and of itself, and there is no showing that any specific terms with respect to the lease were agreed upon at that time, it would seem that the lease should wholly fail.

In the case of *Utah Loan & Trust Company vs. Garbutt*, 6 Utah 342, 23 P. 758, the court states as follows:

“Under this section, where one executor without authority from his coexecutors, who were not under a disability and not absent from the state, made a lease in writing for more than one year, the lease was invalid.”

Under previous heading we also discussed the requirements that are set forth in the cases showing the necessity of completeness within and of an oral agreement and the memorandum showing that it has to be complete in and of itself and also show the requirements for a written lease. Namely, the certainty as to all of the elements.

Under *Adams vs. Manning*, 46 Utah 82, 148 P. 465, the court denied specific performance as follows:

“A receipt or memorandum is wholly insufficient to take an alleged parol contract for sale of land out of statute of frauds, where it merely recites receipt of \$30.00 a part payment for the land, but contains no sufficient or any description of land alleged to have been sold.”

In the case at bar there is also no description and no way of ascertaining what the description would be and as stated from the testimony and facts surrounding the case, it still is uncertain as to just exactly what they wanted to have under the terms of the lease. It is admitted that a survey was made but this was subject to dispute as set forth in the statement of facts and

even then the plat was not delivered to Mrs. Adams until much later, after the Exhibit "A" was signed and there is no reference in the memorandum to the plat or the description of the land and no reference was made at the time of negotiation. Neither Mrs. Taylor or Mr. Adams discussed the size of the property and Mr. Adams had property on two sides of the piece so it could have been of varying sizes.

Appellants' counsel recognizes the fact that there is one uncertainty, namely, as to whether the lease should be four or five years and bases his whole argument upon the contention that this uncertainty is to be resolved in favor of the lessee having the alternative right to determine whether the lease should be four or five years. To support his contention he has cited two old English cases running back to the 18th and 19th centuries to support his position.

Even these cases can be distinguished from the present case, as in the main case there was a specific memorandum setting forth all of the terms of the lease showing the location, the amount, when it was to commence, what it was to contain, who was to pay taxes and a number of other items and in addition, it was signed by both parties, the lessee saying he agreed to the terms set forth therein. The only question in that case, which was undetermined with exactness by the lease, was whether the term was to be seven, fourteen, or twenty-one years.

In the present case we have no such agreement.

We have a written memorandum and oral statement, both of which it was agreed by the parties would not constitute the lease until such time as it was drawn up in detail and executed and signed by the parties.

The appellants claim the doctrine of part performance takes the contract and lease out of the *Statute of Frauds* and for the part performance, sets forth the improvements made on the premises, but even with partial performance there has to be an enforceable contract.

In the case of *Campbell et al v. Nelson et al.*, 125 P. 2nd, Page 413, decided May 1, 1942, there was an oral contract for the purchase of land and the contract was prepared but never signed by the Defendant, who went into possession of the property and made considerable improvements and when the owner tried to dispossess him, he claimed the improvements as partial performance. The court held that:

“The terms of the contract in the present case were indefinite. An oral contract for the purchase of real property must be sufficiently definite and certain so that it can be enforced by the court. Until the parties have agreed as to the terms there is not an enforceable contract in fact, and partial performance cannot make up for the deficiency in the understanding between the parties.”

Appellants also cite Volume 49, Am. Jur. *Statute of Frauds*, Section 422, Page 727, which among other things states:

“That the Defendant may be estopped in view of the part performance to assert the STATE as a defense.”

Quoting from 19 Am. Jur., Section 42, Page 642:

“The essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) Intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) Knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) Reliance upon the conduct of the party estopped; and (3) Action based thereon of such a character as to change his position prejudicially.”

It should be noted that there is required to be error on one side and fault or fraud on the other. In this case, there is no question of fraud or fault on the part of the Plaintiffs herein and Defendants do not even contend such to be the case. It is clear that none of the elements were present which would cause the *Doctrine of Estoppel* to arise and this should be disregarded as it cannot affect or apply in the particular case at hand. This is further explained in Sections 45, 46, 47, 48, and 49.

Counsel cites *Latses v. Nick Floor, Inc.*, 99 Utah

214, 104 P. 2nd 619, to support his theory of part performance. However, the *Nick Floor* case can be distinguished from the present case. In that case an agent for the landlord executed a lease complete and regular on its face, and the tenant went into possession of the property and made improvements under the lease. It was determined that the agent did not have the written authority and under the *Statute*, the lease was void. However, as improvements were made on the premises by the tenant in good faith in error, thinking he had a valid lease, the court ruled that the part performance took the case out of the *Statute*.

In contrast to the *Floor* case, the appellants knew that there was no authority on the part of Mrs. Adams, and also knew when they went ahead with the improvements that there had to be a written lease. Also, there was no fraud upon the part of the Adams.

In the case of *Hoggan v. Swayze*, 65 Utah 380, 237 P. 1097, this can also be distinguished, as in that case a person by written agreement bought an undivided half interest in certain land and subsequently by verbal agreement it was agreed that the property would be divided and each party would take half. The plaintiff made valuable improvements on the one-half based on the oral agreement. In that case there was strict reliance on the oral agreement to modify the written contract, and there was no ambiguity or question as to the terms of the contract and the court granted specific performance.

In this case the Taylors were specifically told that they had to have a written contract and, therefore, could not rely on any oral statements.

Also, in the case of *In Re Madsen's Estate*, 123 Utah 327 and 259 P. 2nd 595, the court allowed specific performance as against the wife of the deceased owner where there was a contract of sale executed by the owner of the land in writing, and signed by his wife previous to which time the owner of the land, who was also the President of the *Madsonia Realty Company*, had sold the particular property to the *Madsonia Realty Company* and had taken from the company the money for himself as payment for the property. At the time he entered into the contract with his wife and the Third Party, he had even shown on the books of the Realty Company the profit between what he had sold it to the realty company for and the price that it had been resold to the Third Party, as a profit for the realty company. However, he had failed to execute a deed to the company, and this was the specific performance granted by the court. This, of course, would be a perfect case for estoppel, as it would have been fraud upon the realty company to do otherwise.

In the case of *Randall v. Tracy Collins Trust Company*, 6 Utah 2nd 18, 305 P. 2nd 480, specific performance was granted against a woman's estate. In that case the aunt of the Plaintiff was owner of a home in Provo and owner of controlling stock in a savings and loan company, and she promised the Plaintiff that

if he would come and take care of her and manage the savings and loan company, that she would leave him the stock to the savings and loan company and give him her home. She gave him the stock to the savings and loan company, but by will left her home to a one-half cousin. The Plaintiff had fully performed all of his duties; and as far as he was concerned, it was a completed contract. The court granted specific performance against the estate. It is obvious that it would have been much more inequitable for the half cousin to take the home when he had done nothing particularly for the woman, while the Plaintiff had earned the delivery.

In that case it was never intended that there should have been a written agreement and nothing more could have been done by the Plaintiff until his aunt died and he found out how the will had been made, and then it was too late to make a change.

In the specific case, it was always intended that this be a written agreement, and the appellants admit that they never had any written agreement drawn up pursuant to the terms of the memorandum, although they intended to.

In no case has appellants' counsel been able to cite or respondents' counsel able to find where this court has ever granted specific performance of a contract which was intended to be in writing, but was never reduced to writing, and where the person who was to reduce it to writing has failed so to do.

POINT II

THE TRIAL COURT PROPERLY DENIED SPECIFIC PERFORMANCE OF AN OPTION TO PURCHASE.

A. SPECIFIC PERFORMANCE COULD NOT HAVE BEEN GRANTED EVEN IF THERE HAD BEEN A VALID OPTION, AS THERE HAS BEEN NO EXERCISE OR TENDER OF PERFORMANCE BY APPELLANTS.

It is fundamental that before an option can be specifically enforced, it must ripen into a contract, and the option must be exercised by the optionee in accordance with the terms and provisions of said option. This is true, as an option is a unilateral contract.

Am. Jur., Vol. 49, Specific Performance, Sec. 117, P. 137, provides:

“The remedy of specific performance can be invoked only upon the theory that the optionee has accepted the offer and the agreement has ceased to be an option and has ripened into a mutually binding enforceable contract. It is well established that when an option which the owner of property gives to another for the purchase of such property is consummated by acceptance according to its terms within the time specified, it merges into a contract for the purchase of the property which equity will enforce by specific performance the same as any other contract wherein the requisite elements of equity jurisdiction are present.”

In the present case they are asking for specific performance of the option contract *without ever having offered the cash to buy to make this option into a binding agreement on which there are the mutual obligations required for specific performance.*

Williston on Contracts, Vol. 1, Section 62, Page 206, states:

“Action is required by optionee to exercise option. This is accomplished by his acceptance of the terms. When optionee decides to exercise his option, he must act unconditionally and precisely according to the terms of the option. When the acceptance is made the optionor becomes bound. Nothing less will suffice. The optionee is in position of either accepting or not.”

In some cases the law provides, where requested in the complaint or counter-claim that specific performance be enforced for the option on the theory that the party asserting the claim or counterclaim has exercised his option and made it ripen into a binding agreement. Here, there has never been any pretense that an offer has been made and, therefore, there could be no specific performance.

B. THE COURT CANNOT GRANT SPECIFIC PERFORMANCE OF AN INCOMPLETE VERBAL AGREEMENT.

Even if there had been a full tender of the money alleged to be the agreed purchase price, there could have been no specific performance as contract was not

in writing and was not sufficiently complete to be specifically enforceable.

It should be noted here that much more care should be taken in granting a decree for specific performance for the sale of property than would be the case in a lease, as the sale of property alienates the land forever from the owners, and any mistake cannot be rectified. While in a lease for a term of years, the mistake will rectify itself by the return of the property to the owner at the expiration of the lease period.

It is noted also that such things as exact boundaries and some other terms would not be so pertinent, as a person could occupy the premises for years without ever having to have the exact boundaries determined; but in a sale the exact boundaries would have to be determined before the property could be transferred.

However, assuming that the appellants had tendered the alleged prices, it would still be unenforceable, as the option must have all of the requirements of a written contract which is specifically enforceable.

Am. Jur., Specific Performance, P. 139 of Vol. 49, Sec. 117, provides:

“The contract consummated by the exercise of an option is, of course, subject to all the principles and rules with respect to specific performance that apply generally to contracts imposing mutual obligations. It must be certain as to price, manner of payment, and description of the property. If an option is so lacking in material parts that an acceptance of it does not

make a complete contract, specific performance may not be decreed.”

The *Statute of Frauds* as set forth in the Utah Code Title 25, Chapter 5, Section 1, states the manner in which an option or any other interest in land may be created as follows:

“No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.”

As can be seen, to comply with the *Statute of Frauds*, there must be a specific writing, having therein all the conditions of the contract. In this case the Defendants are contending that part performance of the contract is sufficient to take the contract out of the *Statute of Frauds* and would be enforceable. Part performance cannot cure the defects in a contract or supply terms that are not there.

It should be noted that in all the cases investigated and checked by counsel where there was any holding that part performance which would take it out of the *Statute of Frauds* there has been a contract where all the terms were agreed upon and the parties have gone ahead in the manner according to their oral agreement

or defective written agreement, thinking they were living up to their agreement; and they were performing under the contract, but the difficulty was in the form of the agreement; and so the courts have sometimes held that it would be unjust to permit a person to take advantage of the benefits of the contract as they set it up and not be liable under the terms therein.

In this particular instance, the parties did not go ahead in the manner that all testified was agreed upon, namely that the agreement was to be in writing and signed by all the parties; and so the Defendants, by going ahead and proceeding to make improvements or make payments knew that they were not doing so under the terms of any written lease or claimed option, and that the specific terms of the agreement have never been settled.

It should be noted that in all cases cited under Point I that said cases will apply with equal force to the argument set forth under Point II.

For the specific enforcement of a contract to be granted, it is held that the contract must be definite. See *Campbell et al. vs. Nelson et al*, previously cited, as well as *Birdzell vs. Utah Oil Refining Company*, previously cited, which states, in addition to matters previously set forth, that:

“It is fundamental that the memorandum which is relied upon to satisfy the *Statute of Frauds* must contain all the essential terms and provisions of the contract.”

And held:

“That the above lease will suffice as an adequate memorandum, because it makes an acknowledgment or recognition that a contract has been entered into by the parties.”

In the particular case at bar the appellants attempted to show that the description was agreed upon. It is fundamental that the agreement itself contain the boundaries or that it refer to a manner in which the boundaries can be determined by parole evidence or by some other manner.

Here there is no reference as to how much was to be specified in the contract and no reference as to how it could be determined. Mr. Adams owned property on two sides of the property in question (T. 22, L. 22). The surveyor testified that Mrs. Adams told him where the stakes should be. Mrs. Adams testified that he put the stakes beyond where she told him to (T. 30). She also testified that amount of land was not discussed (T. 29). She assumed that the amount of land would be the amount that was originally rented each time with the building, but Taylors wanted a piece about twice as large (T. 30).

The Defendant, Mr. Taylor, stated that the property leased was to extend to a certain pole on the property and the surveyor testified that he didn't stake it up to that pole. So it can be seen that the extent of the boundary is very much in doubt even from the parole evidence, none of which should have been admitted, as

it was not shown to have been a part of the original agreement.

In fact, from all the testimonies it cannot be determined when and if any agreement was ever reached. The memorandum signed by Mrs. Adams said merely "four to five years," which, of course, might be construed to be in the alternative if that was the only question. However, in the testimony it was stated that it was first agreed to twelve years, then ten years, and finally the four or five years, and the only agreement that was drawn up, as shown by the testimony, was the lease with option which was never signed and which term there was stated to be ten years. Clearly in view of the testimony, the term was ambiguous and impossible to determine from any agreement or statements from the parties. From all the testimonies it is further shown that there were a number of other details of the lease which were never ironed out, such as:

The time of commencement,

Where it was to be paid,

Whether cash or time on the option,

Who was to be responsible for the taxes,

Who was to furnish fire insurance, if any was to be furnished,

Whether or not there was to be any responsibility on the landlord's part of maintenance,

Whether the lease and option were personal and who was to be assigned,

Whether or not there was to be a grace period al-
lower, and

Whether abstract or title insurance was to be fur-
nished, and if so at whose expense.

From the above and foregoing it is clear that the appellants are not entitled to specific performance be-
cause:

1. Defendants never exercised their option if there was an option and did not offer to.
2. There was no oral agreement.
 - a. Because all parties agreed that it should be written.
 - b. Because it didn't contain all of the terms of a binding agreement as clearly required.
3. Even if there was an oral agreement it is not sufficient as an option agreement must be in writing.
4. The only memorandum concerning the agree-
ment was not signed by the owner or any agent author-
ized in writing.
5. Even if we assume it was signed by an agent,
memorandum is not sufficient as it is incomplete and
doesn't contain all of the terms as required of the writ-
ing.
6. That any purported verbal agreement was in-
definite, ambiguous and unenforceable.

POINT III

THE COURT ERRED IN FAILING TO AWARD RESPONDENTS POSSESSION OF PREMISES AND FAILING TO AWARD TREBLE DAMAGES FOR THE APPELLANTS' FAILURE TO QUIT AND VACATE.

As has been clearly shown from the previous points in respondents' brief, the tenancy as entered into by the Taylors could have been nothing except a month-to-month tenancy, and based on a month-to-month tenancy the Adamses were entitled to give the Taylors notice to quit and vacate.

The 1953 Utah Code Annotated as amended provides in Title 78, Chapter 36, Paragraph 3, subparagraph 2:

“When, having leased real property for an indefinite time with monthly or other periodic rent reserved, he continues in possession thereof in person or by subtenant after the end of any such month or period, in cases where the landlord or the successor in estate of his landlord if any there is, fifteen days or more prior to the end of such month or period, shall have served notice requiring him to quit the premises at the expiration of such month or period.”

If due and proper notice was given and the Taylors failed to quit and vacate the premises, then the Adamses would be entitled to recover the property and damages for failure to vacate in the time specified.

Here there was no question about the fact that notice to quit and vacate was duly given to Mrs. Taylor on the business premises. The appellants claim that Mr. Taylor did not receive service.

The Code at the title and chapter above stated, but in Section 6, states:

“NOTICE TO QUIT—HOW SERVED.
The notices required by the preceding sections may be served, either:

(1) By delivering a copy to the tenant personally; or,

(2) If he is absent from his place of residence, or from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place and sending a copy thereof through the mail addressed to the tenant at his place of residence or place of business.”

The stipulation as to the testimony of the officers on the manner of service actually made is set forth in the statement of facts and clearly shows compliance with the code.

There was no finding as to whether or not such notice was duly and properly served, and the court should so find and upon finding should award damages to the respondents as the unbiased testimony under stipulation shows service to Mr. Taylor by giving a copy for him to Mrs. Taylor and mailing a copy to him at his home.

The reasonable rental value of the property was not specifically set forth in the testimony, but it is

abundantly clear that the reasonable rental value of the property would be \$50.00 per month, so that the respondents should be entitled to recover \$150.00 per month for each and every month that said Taylors were in the premises from July 1, until these premises are surrendered by them to the Adamses.

Said title and chapter under Section 10 of Utah Code provides for treble damages for failure to quit and vacate pursuant to proper notice.

CONCLUSION

By way of summary, the evidence is clear and convincing that there was never a written or verbal lease entered into and never a valid option to purchase which was certain in its terms; and, therefore, the holding of the trial court granting specific performance of the lease should be reversed. The holding of the trial court that there was no option agreement which could be specifically enforced should be affirmed. The trial court should be required to enter a finding that respondents are entitled to possession of the property and awarding judgment to them for treble damages at the rate of \$150.00 per month from July 1, 1961 until the premises are finally surrendered to respondents.

Respectfully submitted,

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