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IN THE SUPREME COURT OF THE STATE OF UTAH

WILFORD M. BURTON, Trustee,
Plaintiff and Respondent,

vs.

UNITED STATES OF AMERICA,
Involuntary plaintiff, respondent, and defendant,

vs.

WILLARD ROGERS, ARLENE ROGERS, his wife, WILLARD D. ROGERS, Jr.,
Defendants and Appellants.

Case No. 12,917

APPELLANTS' PETITION [illegible] AND BRIEF IN SUPPORT [illegible]

Appeal from the [illegible]
3rd Judicial District Court for [illegible]
Honorable Gordon R. [illegible]

RO[illegible]
RIC[illegible]
[illegible]
Salt La[illegible]
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IN THE SUPREME COURT OF THE STATE OF UTAH

WILFORD M. BURTON, Trustee, *Plaintiff and Respondent,* vs. UNITED STATES OF AMERICA, *Involuntary plaintiff, respondent, and defendant,* vs. WILLARD ROGERS, ARLENE ROGERS, his wife, WILLARD D. ROGERS, Jr., *Defendants and Appellants.*	Case No. 12,917

APPELLANTS' PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF UTAH:

Come now the petitioners, Willard Rogers, Arlene Rogers, his wife, and Willard D. Rogers, Jr., Defendants and Appellants, and hereby respectfully request a rehearing in the above entitled cause and that the decision and opinion of this Honorable Court filed herein on March 6, 1973 be modified, reversed as hereinafter suggested for the reasons, and upon the grounds following, to-wit:

POINT I — THE COURT ERRED IN ITS DECISION IN INTERPRETING THE MEANING OF CONTRACT (EXHIBIT 29-D):

(a) THE SUPREME COURT ERRED IN ITS INTERPRETATION OF THE PHRASE "AS EXCLUDED HEREINABOVE," AS EXCEPTING THE PROPERTY CLAIMED BY APPELLANTS HEREIN.

(b) THE SUPREME COURT'S INTERPRETATION OF THE CONTRACT WORDING RESULTS IN A "HARSH" DETERMINATION OF THE APPELLANTS' RIGHTS.

(c) WHERE ALTERNATIVE INTERPRETATIONS OF THE MEANING OF CONTRACTUAL RELATIONSHIPS ARE PRESENT, THE SIMPLER, LESS INVOLVED, AND MOST STRAIGHTFORWARD INTERPRETATION SHOULD PREVAIL; RATHER THAN A STRAINED INTERPRETATION.

(d) THE COURT SHOULD GIVE MEANINGFUL WEIGHT TO EACH PARAGRAPH OF THE AGREEMENT, RATHER THAN MAKING THE INTERPRETATION TURN ON A SINGLE PARAGRAPH OF THE CONTRACT.

(e) THE COURT RESOLVES THE CONTRACTUAL RELATIONSHIP BETWEEN THE PARTIES AS THOUGH IT WERE THE SITUATION BETWEEN TWO CONTRACTING PARTIES, WHEREAS RESPONDENTS HERE ARE STRANGERS TO THE CONTRACT.

(f) THE SUPREME COURT FAILED TO GIVE WEIGHT TO THE MEANING OF THE CONTRACT AS PLACED THEREON BY THE PARTIES THERETO THEMSELVES.

(g) THE DISTINCTION BETWEEN "EXEMPTED" AND "RESERVED" IS NOT WELL TAKEN HERE, SINCE

THE WORDS (ALTHOUGH TECHNICALLY DIFFERENT) NEVERTHELESS THROUGH USAGE HAVE BECOME PRACTICALLY INTERCHANGEABLE.

POINT II — THE SUPREME COURT ERRED IN FAILING TO DETERMINE WHETHER RESPONDENT BURTON HAD (A) ANY TITLE TO SUSTAIN HIS CLAIM AS A TITLEHOLDER OR OBLIGOR HEREIN OR (B) WHETHER THE UNITED STATES TAKING THROUGH BURTON AND THE DEFICIENT DEEDS TO HIM HAD ANY STATUS AS TITLEHOLDERS TO BRING THIS ACTION.

POINT III — SITUATION RESULTING FROM THE COURT'S DECISION MAY BE PRODUCTIVE OF FURTHER LITIGATION, RATHER THAN FIXING TITLE IN THE PARTIES AS A FINALITY.

WHEREFORE, petitioners respectfully submit that a rehearing should be had and that the aforesaid decision and opinion of this Honorable Court be vacated and revised in accordance with the principles hereinabove set forth, believing that a re-examination of the record, made by this Honorable Court after a rehearing, wherein counsel will be able to assist the Court to examine the totality of issue and in the record certified, which will result in a revision and reversal of the decision herein and see that a miscarriage of justice will not result.

Dated this 26th day of March, 1973.

RICHARD S. JOHNSON
ROBERT C. CUMMINGS

Attorneys for Petitioners,
Willard Rogers, Arlene Rogers,
his wife and Willard B. Rogers,
Defendants and Appellants

IN SUPPORT OF APPELLANTS' BRIEF FOR REHEARING

POINT I (a)

THE SUPREME COURT ERRED IN ITS INTERPRETATION OF THE PHRASE, "AS EXCLUDED HEREIN-ABOVE," AS EXCEPTING THE PROPERTY CLAIMED BY THE APPELLANTS HEREIN.

It is well settled that the interpretation of the meaning of a provision in a contract must be correlated to he entire contract, and not considered as an isolated item. See:

(i) *Vitagraph Inc. v. American Theatre Co.,* 77 Utah 71 (page 79), 291 Pac. 303, where the court says:

"Every word in the agreemnt must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument."

(ii) *Vulcan Steel Corporation vs. Markosian,* 23 Utah 2d 287, 462 Pac 2d 166, where the Court used the folowing wording:

"In interpreting a contract, the primary rule is to determine what the parties intended by what they said. The Court may not add, ignore or discard words in the process, but attempts to render certain the meaning of the provision in dispute by an objective and reasonable construction of the whole contract."

(iii) *Cornwall vs. Willow Creek Country Club,* a corporation, 13 Utah 2nd 160, 369 Pac 2nd 928, which is in accord with and in the same language as in the quote above.

(iv) *Continental Bank & Trust Co. vs. Bybee,* 6 Utah 2nd 98, 306 Pac 2nd 773, where the rule is set out as:

"/1-4/ The sole question . . . is whether the parties intended . . . that respondent should assume the obligation on the note. . . . This intent should be ascertained first from the four corners of the instrument itself, . . ."

The net result of the court's determination may be summed up in saying that the items listed in the contract as being subject to conveyance by "quit-claim" deed are non-existant, and hence, of no effect. This does violence to the language of the contract by striking, in effect, the commitment to convey certain portions of he described property by quit-claim deed.

Furthermore, to read into the commitment to convey certain properties by quit-claim deed, the exceptions made to the warranty deed is fallacious, since (a) The items to be conveyed by quit-claim include properties not covered by the warranty deed (and hence its exceptions), and (b) would be superfluous by requiring both warranty and quit-claim deeds to the same properties.

Furthermore, the Court has erroneously interpreted the word "as" as a synonym for "subject to," a meaning which is both novel and unwarranted. It is clear that the meaning intended for "As" in this contract is that of "because," "since," "it being the case," or "which" — Black's Law Dictionary at page 145 of the 9th Edition states:

". . . It may also have the meaning of 'because,' 'since,' 'or it being the case' . . ."

In the case of *State vs. Rudman,* 136 Atl. 817 (Maine, 1927), the word "as" was given the meaning of "because" in the phrase "unless the same was done as necessary for the preservation of the mother's life. . . ." In the same case at page 819, it is stated:

> "/8/ In the plain meaning of the words of the statute our conclusion is verified. An accepted meaning of the conjunctive 'as' is 'because,' 'it being the case that.' Webster's New Int. Dictionary. If substitution be made and the statute read 'unless the same was done 'because' or 'since it was' (or) 'it being the case that it was necessary' no ambiguity remains; — the legislative intent is clear."

In the case of *Kelley vs. Peterson,* 2 N.W. 346 (Nebraska) 1879, the court held that the word "as" in the phrase "the defendant refused and neglected to cut plaintiff's wheat as defendant had agreed and contracted" means "who" or "which."

The phrase "as excepted hereinabove" thus means "which (were) excepted hereinabove" relating to the mining claims to be "deeded by quit-claim, 'because' they were excepted from the conveyance by warranty deed," or "since" they were so excepted above, or, "it being the case that 'they were excepted above.' " This interpretation gives meaning to the whole phraseology and is consistent with the purpose and intent of the whole contract, which is the necessary determination to be made to correlate all the terms of that document without expunging extensive parts of the "quitclaimed" areas from the operation of the sale agreement.

POINT I (b)

THE SUPREME COURT'S INTERPRETATION OF THE CONTRACT WORDING RESULTS IN A "HARSH" DETERMINATION OF THE APPELLANTS' RIGHTS.

It has been variously stated that a "harsh" result is to be avoided.

> See: "Harsh and repugnant interpretations of written instrument are not looked upon with favor."—*Massachusetts Bonding & Insurance Co. v. Concrete Steel & Bridge Co.,* C.C.A. W.Va., 37 Fed 2nd 695.
>
> "Where strict construction would make contract unreasonable it will be construed liberally.—*Raw Silk Trading Co. v. Katz,* 194 N.Y.S. 638, 201 App. Div. 713.
>
> "Presumptions: (1) It is presumed that parties intended to make a reasonable and rational contract.—*Lowery v. May,* 104 So. 5, 213 Ala. 66.
>
> "(2) Only the terms they employ can invite or justify a conclusion to the contrary. *Burton v. Steverson,* 91 So. 74, 206 Ala. 508.
>
> "(3) Contracting parties usually engage on rational considerations and to reasonable effects and ends, and when the courts find it necessary to construe instruments of obligation, it is ever proper and often essential for them to assume, at least prima facie, that the unreasonable and irrationable was not the contractual intent. *Smith Sons Lumber Co. vs. Steiner, Crum & Well,* 85 So. 758, 20 4Ala. 306."

To interpret the contractual provisions involved here as intending to incorporate the exclusions to the warranty items, would not only as hereinabove set out be

causing both warranty and quit-claim conveyances to the same properties, an unthinkable redundancy, but, also result in, as construed in the opinion of the Court, a total elimination of property to be conveyed by quit-claim, and leave the appellants with no claim to title whatsoever on the property listed to be quit-claimed by the sellers, as relates to this lawsuit.

And the word "as" in the exclusion clause should be read "being the property excepted above," (referring to that to be conveyed by warranty), not all the exceptions to the warranty items themselves.

It is clear that the property to be conveyed by the warranty deed applies only to the mining claims excluding metes and bounds description claimed by Burton, but as to the excess to quit claim all other interest in the said mining claims.

POINT I (c)

WHERE ALTERNATIVE INTERPRETATIONS OF THE MEANING OF CONTRACTURAL RELATIONSHIPS ARE PRESENT, THE SIMPLER, LESS INVOLVED, AND MOST STRAIGHTFORWARD INTERPRETATION SHOULD PREVAIL, RATHER THAN A STRAINED INTERPRETATION.

> "The construction of a written contract or any other instrument should be broad enough to allow it to operate fairly and justly under all the conditions to which it may apply, and a court will not place an unjust construction upon a contract unless it is compelled to do so by the terms of the instrument. A construction which is just and fair to both parties will be preferred to one which is unjust or unfair, and a contract will not be construed so as to render it oppressive or inequitable as to either party, or so as to place one of the

parties at the mercy of the other, unless it is clear that such was their intention at the time the contract was made. The inconvenience, hardship, or absurdity of one construction of a contract or its contradiction of the general purpose of the contract is weighty evidence that such meaning was not intended where the language is open to a construction which is neither absurd nor frivolous and is in agreement with the general purpose of the parties.—Section 252, Contracts, 17 A.J. 2d, Page 644.

"As a general rule, contracts should be liberally construed so as to give them effect and carry out the intention of the parties. To this end, a liberal construction will be given to the words, either singly or in connection with the subject matter. A literal or technical construction of an isolated or special clause should not be indulged to defeat the true meaning of a contract, which is to be determined from all of its provisions. Where it is plain that a strict and literal construction of a contract does not convey the real meaning of the parties, such construction should not be entertained."—Section 253, Contracts, 17 A.J. 2d, p. 646.

An interpretation of the contract (Exhibit 29-D), which leaves property to be conveyed by quit-claim, rather than eliminating it is in accord with spirit and intent of the contract, and is the interpretation to be desired, rather than a strict, strained, and highly technical construction of an isolated phrase as the governing point in the desideratum. By eliminating the property for which appelants bargained for in their contract, and inserted in their agreement to be conveyed by quit-claim

deed, there is resort to a construction not intended or countenanced by law and equity.

It should not be assumed that the parties intended to delete all the property the Supreme Court's opinion says is excluded, by means of an obscure and difficult and controversial phraseology, when a reasonable reading of the clause as it exists would indicate otherwise. and the exclusion could have been accomplished by simpler and more direct phraseology.

The properties to be conveyed by quit-claim deed, include East half of the Alton, George Lode South of Silver Lake #3, and East half of Silver Lake #1. The only portion of the above claims which might conflict with the respondents' claimed interest is the area in the East half of the Alton claim. Since the other claims, as first listed, were to be conveyed by warranty deed there was no need to include them, but, it was the intent of the parties to convey by quit-claim the excluded ground in the warranty deed class. The only reason for including the same claims in the quit-claim category was to assure conveyance by quit-claim of the exceptions to the warranty deed.

The Court's decision and opinion herein, in effect, has the parties saying that in the warranty deed class, there are certain conflicts, which are excepted from the warranties, and, they are likewise to be included in the quit-claim class, subject to the same exceptions. Why convey by quit-claim with the same exceptions? No meaningful result would be obtained by the Court's theory, whereas, the clear and obvious intent of the parties was

to except only the parts of the claims above conveyed by the warranty.

To further illustrate, the West half of the Alton claim is covered by the call for a warranty deed in the first listing of properties to be conveyed, and so when the entire Alton is mentioned in the quit-claim deed (in fact to cover the East half of the Alton claim), but, if the property excluded in the warranty section is also by the Court's interpretation excluded from the quit-claim category, then it may be noted that the effect is to add the East half of the Alton claim, which, by the exclusion as read by the Court, becomes immediately again excepted, which results in a futile, superfluous and useless set of gestures, which type of construction is under the foregoing authorities to be avoided.

POINT I (d)

THE COURT SHOULD GIVE MEANINGFUL WEIGHT TO EACH PARAGRAPH OF THE AGREEMENT, RATHER THAN MAKING THE INTERPRETATION TURN ON A SINGLE PARAGRAPH OF THE CONTRACT.

This rule is universally stated in approximately the language of this point.

Besides the "description" paragraph, there are other items of the contract which are worthy of consideration, and apparently overlooked. Paragraph Six of the contract (Exhibit 29-D) should be noted in this context:

> "Seller shall furnish to Buyer marketable title to said premises by Warranty deed, except as to those portions to be conveyed by quit-claim deed as first hereinabove stated, said premises to be free and clear of encumbrances save and except

the following:" (Patent reservations), (Subject to easements), (Subject to mineral rights), (Subject to pipeline easement), (Exceptions in an Act of Congress).

Certainly these exclusions are "normal" exclusions, and they do not purport to exclude the "exceptions as above," and when read with the quit-claim provision on the 1st and 2nd pages of the sales agreement, are perfectly sound and sensible exceptions. Certainly, if the exceptions mentioned exclude the title to the ground, or portions of it, excepted from the warranty, there would as to the ground here in dispute be an interpretation that would be senseless as eliminating any meaning for the clause, and read in conjunction, with the exceptions normal to such transfers as set out in paragraph sixth, it would make sense, instead of senselessness by eliminating from operation of the quit-claim provision the items listed as includable therein, per the contract [Exhibit 29-D].

POINT I (e)

THE COURT RESOLVES THE CONTRACTURAL RELATIONSHIP BETWEEN THE PARTIES AS THOUGH IT WERE THE SITUATION BETWEEN TWO CONTRACTING PARTIES, WHEREAS RESPONDENTS HERE ARE STRANGERS TO THE CONTRACT.

Note that the interpretation adopted by the respondents relative to the meaning of the exclusion clause on page 2 of the Real Estate Sales Contract (Exhibit 29-D. page 2), is **NOT** one raised by a party to the contract, the parties evidently having adopted the construction claimed in appelant's brief (Point **VIII**, Pages 25, 26, 27, 28) being in agreement, and their understanding was

being caried out by the sellers and the escrow agent in making deeds to the escrow agent as trustee. [Exhibits 39-D, page 45; Exhibit 40-D, Page 39; Exhibit 41-D, Page 30; Proposed Exhibits 49-D, 50-D.]

Certainly, it is hardly justifiable to say that third parties may claim a relatively greater advantage under a contract than the contracting parties themselves placed upon the relevant language.

POINT I (f)

THE SUPREME COURT FAILED TO GIVE WEIGHT TO THE MEANING OF THE CONTRACT AS PLACED THEREON BY THE PARTIES THERETO THEMSELVES.

Continuing further, the total factors involved in construing the contract as a whole, attention of the Supreme Court is invited to paragraph Tenth of the Real Estate Contract, which provides for conveyance of the property to Security Title Company as Escrow Agent to hold as security during the time of the purchase money payments.

The deed given to Security Title wtih "warranties" is in accordance with the warranty agreement part of the title arrangement set out on the first page of the agreement. [See Exhibits 39-D, page 45; 40-D, page 39; 41-D, page 30] recorded December 29, 1961.

Likewise the "copy" of partially completed quit-claim deed, proferred in evidence but erroneously not admitted, [Exhibits 49-D, 50-D] contains a description just the same as the contract description of items to be conveyed by quit-claim, giving meaningful construction to the intent of the parties in connection with this contract, and,

not subject to the strained construction contended for by the respondents.

See *Hardinge Co., Inc. vs. Eimco Corporation,* 266 Pac. 2d 494, 1 Utah 2nd 320, where the Court points out:

> ". . . Further in the interpretation of contracts, the interpretation given by the parties themselves as shown by their acts will be adopted by the Court. 3 Williston, Contracts, Sec. 623."

POINT I (g)

THE DISTINCTION BETWEEN "EXEMPTED" AND "RESERVED" IS NOT WELL TAKEN HERE, SINCE THE WORDS (ALTHOUGH TECHNICALLY DIFFERENT), NEVERTHELESS THROUGH USAGE HAVE BECOME PRACTICALLY INTERCHANGEABLE.

Though the words "exempted" and "reserved" originally had different technical meanings, the words are often now interchangeably used, and the Courts to effectuate the results intended by the parties, construe them to mean what was necessary to carry out the intention of the parties, rather than to make the technical differences vitiate the real desires of the parties to an instrument.

See such cases as *Martin vs. Cook,* 60 Northwestern, 679, 680, 102 Mich. 267, where the Court said:

> ". . . yet in order to effectuate the intention of the grantor, such a reservation has been treated as excepting from the grant the thing reserved."

Hence, by substituting the meaning "exempt" for "reserve" in paragraph seventh of the said contract, it becomes clear that the parties intended to convey all of the premises described in the contract.

The Court's interpretation rests upon an overly technical distrinction between an "exception" and a "reservation" and then says that the language in the contract concerning reservations refers only to that part of the contract not excluded. As has been observed, the terms "reservation" and "exception" are generally used interchangeably, and in this sense, the parties have in effect stated it is not the intent of the seller to exclude any part of the property (meaning that all of the property is to be conveyed by a combination of warranty deed or by quit-claim deed). Further there is no need for a provision in a contract constituting a covenant that nothing shall be reserved. It is axiomatic that an agreement to convey a certain tract constitutes a covenant to convey all of the interest which the sellers have. It adds nothing to say, "I agree to sell," and "I covenant not to reserve anything." The only reason for getting into the subject of reservations at all is to clarify that the sellers are going to convey all the interest which they have. The record of this action clearly shows that the sellers had an interest in the contested property by chain of title and by adverse possession. This is also borne out by the fact that sellers didn't bother to defend the first quiet title action, having thought they had disposed of their interest. By its construction, the court allows sellers to retain this interest (subject to buyers' equitable right for reformation, perhaps) although they agreed otherwise, and then presumably the Court's decision lets it be cut off by the first quiet title action or at least necessitates further litigation. This is not an equitable or economical result.

POINT II

THE SUPREME COURT ERRED IN FAILING TO DETERMINE WHETHER RESPONDENT BURTON HAD (A) ANY TITLE TO SUSTAIN HIS CLAIM AS A TITLE HOLDER OR OBLIGOR HEREIN, OR (B) WHETHER THE UNITED STATES TAKING THROUGH BURTON AND THE DEFICIENT DEEDS TO HIM, HAD ANY STATUS AS TITLEHOLDERS TO BRING THIS ACTION.

It is evident, without again setting forth the detail included in Point I (that respondents are not record title holders entitled to maintain an action to quiet title—Title in Predecessor Lakewood Farms due to defiicent deeds.) of Appellants' Brief herein, pages 5 and 6, and related matters.

If, in fact, the deeds from Lakewood Farm to Burton as trustee are not entitled to be recorded, and, if they are not for that reason to be binding upon appellants, or so a matter of record as to be notice to appellants of transfer of title, there would seem to be no proper vestige of title with respondents upon which to base their claim to status to maintain this action, and, irrespective of any claims by or for them, no proper party here to maintain any action. This is in effect a procedural ruling which should be made before a substantive ruling which the Court makes by its opinion filed herein.

POINT III

SITUATION RESULTING FROM SUPREME COURT'S DECISION MAY BE PRODUCTIVE OF FURTHER LITIGATION, RATHER THAN FIXING TITLE IN THE PARTIES AS A FINALITY.

The net result of the Court's decision is to say that the appellants have no title to the ground supposed to be conveyed by quit-claim as per the original sales agree-

ment (Exhibit 29-D). Now let us see where this leaves the parties: The appellants if the contract was under the erroneous interpretation futile to convey the lands in question would then in theory be able to obtain from the sellers under that contract further indicia of title, and, the parties are then back in almost the same position as they were initially, and the same issues would arise as were presented in appellants' brief and reply brief, leaving the problems still unsolved, as this litigation is not conclusive on the matter except as to the possible interpretation of the contract.

Respectfully submitted,

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