1973

Walter Corbet, DBA Walter Corbet Trailer Sales v. v. Loraine Cox And Anna C. Cox : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

WALTER CORBET, dba WALTER CORBETT TRAILER SALES,
Plaintiff and Appellant,

vs.

V. LORAINE COX and ANNA C. COX,
Defendants and Respondents.

Case No. 13112

BRIEF OF RESPONDENT

Appeal from Judgment on the Verdict of the Fifth Judicial District Court, Washington County, State of Utah, Honorable J. Harlan Burns, Judge

J. RALPH ATKIN
Suite 1, P.O. Box 757
Four Seasons Professional Plaza
St. George, Utah 84770
Attorney for Defendants and Respondents

JAMES P. McCune
110 South 100 East
Provo, Utah 84601
Attorney for Plaintiff and Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

CASES CITED

TABLE OF CONTENTS—continued

PAGE

STATUTES AND OTHER AUTHORITIES CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

WALTER CORBET, dba WALTER CORBETT TRAILER SALES,
Plaintiff and Appellant,

vs.

V. LORAINE COX and ANNA C. COX,
Defendants and Respondents.

Case No. 13112

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action to determine the legality of a lease with option to purchase and whether the terms are ambiguous, and also to determine if there was agency between the defendants.

DISPOSITION IN LOWER COURT

The trial court granted a jury trial at the request of the defendants over the objections of plaintiff. The jury

found in favor of defendants on all issues submitted by the Court, after the Court had received interrogatories from both parties. Prior to the jury being excused for deliberation, the defendants made a motion for a directed verdict which motion was taken under advisement. After the jury had returned, finding all issues in favor of the defendants, the trial court then granted the defendants' motion for directed verdict and entered Judgment on the Verdict, holding that no agreement either written or oral ever existed between the parties regarding the property, that V. Loraine Cox never acted as agent for Anna C. Cox in a transaction and Anna C. Cox never acquiesced to the terms of the alleged agreement and that the defendants are entitled to the exclusive and sole possession and use of the property.

RELIEF SOUGHT ON APPEAL

Plaintiff requests a reversal of the Judgment on the Verdict and that the action be remanded to the trial court for a new trial without a jury.

STATEMENT OF FACTS

Plaintiff and his wife Arta Corbet had engaged in the business of selling house trailers and mobile homes in the area of Orem, Utah and in 1963 decided to investigate the possibilities of opening such a business in St. George. In

February 1964, they contacted defendant Loraine Cox at his place of business regarding the lease or purchase of a parcel of vacant property located between 4th and 5th West and 1st North in St. George fronting on U.S. Highway 91. After several conversations with Loraine Cox over a period of two or three days and after Loraine Cox and Arta Corbet had walked over the property known as Lot 1, Loraine Cox told Arta Corbet that the fenced property, Lots 2 and 3, was also his but that he was not selling them. Loraine Cox then agreed to lease a portion of the property to the Corbets for five years, at an annual rental of $150, with a five year option to purchase a portion of that property for $5,000. The Corbets were aware at that time that Loraine Cox had received an offer for $12,000 for all three of his lots in 1956, and had refused that offer (TR 88, 177—179, 183, 184). This was eight years prior to plaintiff's offer. Mr. Cox had purchesed the property in the 1930's for $3,500.

During the course of negotiation for the lease with option to purchase, there were only three persons directly involved, Arta Corbet, Loraine Cox and Walter Corbet. Walter Corbet was ill during this period of time and Arta Corbet did the majority of the negotiation with Loraine Cox. The trial transcript clearly indicates that Arta

Corbet and Loraine Cox both understood the agreement to be that only Lot 1 was included in the option. Only the Plaintiff Walter Corbet who had little to do with the negotiation testified that the option was for more than Lot 1, even though he knew of the Anderson offer of $12,000 for all the property (TR 183,86—89). Mark Nelson, who was a witness to the negotiation between the Corbets and the Coxes testified that the Corbet's only wanted the "one piece" (TR 202).

The plaintiff was very anxious to get Mr. Cox to commit himself on the lease with option to purchase and so the plaintiff wrote up a handwritten agreement on a 3X5 card and presented it to Mr. Cox at this place of business on the 28th day of February 1964, while Mr. Cox was very busy pumping gasoline and taking care of his business. There were two cards, not duplicates, but with identical wording which Loraine Cox signed, even though he did not read them (TR 180) believing the cards contained the agreement that he and the Corbets had previously entered into, i.e. Lot 1.

It is most difficult to determine the exact wording of the memorandum as it was written in longhand by the plaintiff and particularly the word 'lots' is difficult to distinguish whether it is 'lot' or 'lots'. The defendants'

position is that the memorandum read as follows: ''Lot facing main highway in west part of St. George, Utah owned by me.'' The legal description of the property owned by the defendants in the area is all that part of Lots 1, 2, and 3 of Block 34, Plat ''A'' of the St. George City Survey which lie from the northerly side of the U. S. Highway 91 (Exp.—4).

During the negotiation and the signing of the memorandum by Loraine Cox, no attempt was made by the plaintiff or Arta Corbet to obtain the consent of Anna C. Cox, wife of Loraine Cox, nor was any mention made by the Plaintiff to have Anna C. Cox sign the memorandum in question.

At the time of signing of this card, Loraine Cox stated that he would have his attorney draw up a legal contract (TR 14). Arta Corbet contacted Anna C. Cox several times during the ensuing year to sign a card and to have an agreement prepared. However, Anna C. Cox refused to sign the card and never did sign the card or acquiesce in the sale. Immediately after the signing of the memorandum the plaintiff and his wife took possession of Lot 1. Later they took possession of Lots 2 and 3 after they had obtained permission from Mr. Cox (TR 183). They then had Lot 1 cleared with a bulldozer ,installed the

water and sewer connections, grass and shrubs and foundation for an office and patio for the trailer business (TR 23—27). During the summer, both plaintiff and his wife requested Loraine Cox to have the legal papers prepared by his attorney but because of the demands of his business, Loraine Cox was not able to get the legal papers drawn up. The Plaintiff advised Loraine Cox that they would have their attorney draw up the legal papers and he told them to go ahead. (TR 31—32, 119—120). In February 1963, the plaintiff contacted his attorney, Ellis J. Pickett of St. George, and he prepared a lease and option on all of the property in accordance with plaintiff's understanding of the card (TR 31—35, and 119—120). Attorney Pickett contacted Loraine Cox by telephone and requested he and his wife to come to the office and execute the lease and option. Loraine Cox came to the office and after reading the option which indicated that all lots were to be sold, refused to sign it because he said the lease and option covered only Lot 1 and did not include Lots 2 and 3. (TR 180—181).

During the following three years, plaintiff remained in possession and used all of the property and paid the annual rent of $150 on the due dates. The annual rent of $150 equalled only the property taxes that were paid by

Mr. Cox (TR 179). Plaintiff filed a complaint against Loraine Cox on Februray 21, 1968, alleging that on April 19, 1965 and on January 25, 1967, plaintiff tendered payment to exercise the option to purchase the property, and that he was able and willing to pay the purchase price on delivery of the deed as provided in said memorandum card, and praying for an order of specific performance relieving them from the payment of further rents (R— 1). Loraine Cox filed an answer admitting the execution of the memorandum card by him, but that said memorandum referred to only the portion of property in Lot 1, and further that he has been willing to deed his interest in Lot 1 for the sum of $5,000 (R—3). An amended complaint was filed on February 13, 1969, joining Anna C. Cox as a defendant and alleging that Loraine Cox acted individually and as an agent for Anna C. Cox and praying for specific performance in relieving plaintiff from the payment of furtheer rent (R—6). Both defendants filed an answer admitting that Loraine Cox was the owner in fee of all the property, that Anna Cox was the owner of an inchoate interest, as his wife, but denied that Loraine Cox acted as an agent for Anna C. Cox in the execution of the memorandum card and denied the vailidity of the option an also denied that the lease was

in full force and effect (R—9). In December of 1970, the defendants filed an amended answer to the amended compaint and therein alleged the affirmative defense for the defendant Anna C. Cox alleging the statute of frauds pursuant to Rule 8 (See Utah Rules of Civil Procedure as to any and all allegations and claims against her by the plaintiffs.

On March 17, 1971, the court entered a pre—trial order providing that Loraine Cox admitted to the execution of both memorandum cards. That he was the owner of all the property when said cards were signed. That defendants deny that Anna C. Cox, by agency established in Loraine Cox or by her conduct is bound to relinquish her statutory rights in the property. That the plaintiff had performed the necessary acts in law to constitute a valid tender and had exercised whatever option rights he had under the memorandum cards, and finding that the issues reserved for trial were (1) the legal effect of the lease option, whether it is ambiguous, and if so, matters pertaining to the clarification of the ambiguities; and, (2) the authority of Loraine Cox to act for Anna C. Cox relinquishing her statutory rights in the property by virtue of the agency established prior to the signing of the memorandum cards, or by virtue of conduct after the signing and affirming and ratifying the memorandum

cards (R—14).

As a result of a divorce action between the plaintiff, Walter Corbet and Arta Corbet, Walter Corbet received any partnership interest of Arta Corbet in the property in question. On March 10, 1972 the court entered an order in this case substituting Walter Corbet dba Walter Corbet Trailer Sales as plaintiff in lieu of the original plaintiffs Walter Corbet and Arta Corbet, dba Corbet Trailer Sales (R—21—28).

On December 15, 1971 defendants filed a demand for jury trial and on January 21, 1972 the court overruled the objection of plaintiff and granted a jury trial (R—17—20).

ARGUMENT

POINT 1.

THE COURT ERRED IN OVERRULING THE DEMAND FOR JURY TRIAL BY DEFENDANT.

The Statutory authority in the State of Utah is found in Section 78—21—1, UCA (1953) which states as follows:

> "In actions for the recovery of specific real or personal property with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a

> jury, unless a jury trial is waived or a reference is ordered."

In the action at bar, the facts indicate that it is an action concerning real property located in St. George, Utah and particularly regarding the terms of a handwritten document alleged to be a lease with option to purchase. The pre—trial order specifically stated that the issues to be determined at trial were (1) the legal effect of the memorandum, (2) whether or not the terms of that memorandum were ambiguous and (3) whether or not there was agency existing between the defendants. Without question the determination of the ambiguities of the document and the agency of the defendants are both clearly issues of fact that may be tried by a jury. In the case cited by the appellant, Sweeney vs. Happy Valley, Inc. 18 Ut. 2d 113 at 117 the court stated:

> "In circumstances where doubt exists as to whether the cause should be regarded as one in equity, or one in law wherein the party can insist on a jury as a matter of right, the trial court should have some latitude of discretion. In making that determination it is not bound by the ostensible form of the action, nor by the particular wording of the pleadings. It may examine into the nature of the rights asserted and the remedies sought in the light of the

> facts of the case to ascertain which predominates; and from that determination make the appropriate order as to a jury or

The facts as outlined in this case are ones in which a handwritten document with terms which were not explicit were used and there was an admitted ambiguity in the terms. Futher, the agency between Anna C. Cox and Loraine Cox is in no way clarified by the written option and could only be determined by facts presented to the court. The trial court heard the motion of the defendants and the argument of the plaintiff and exercised its discretion in allowing a jury trial to determine those issues of fact, i.e. (1) the ambiguous terms in the lease option and (2) the agency between Loraine and Annd C. Cox. Not to ignore the fact that the entire trial was dealing with the real property located in St. George, Utah.

It should also be pointed out that the trial court gave a directed verdict in this case, as well as the jury returning a verdict all in favor of the defendant. Therefore, if the court did err in allowing a jury trial it was a harmless error in view of the fact that the trial court entered a directed verdict.

POINT II.

THE COURT ERRED IN RULING THAT THE MEMORANDUM AGREEMENT IS AMBIGUOUS AND PERMITTING THE JURY TO CONSIDER EVIDENCE AS TO ALL OF THE FACTS AND CIRCUMSTANCES SURROUNDING THE EXECUTION OF THE MEMORANDUM AND OVERRULING THE OBJECTION OF THE PLAINTIFF TO ANY EVIDENCE ALTERING THE TERMS AND CONDITIONS OF THE WRITTEN MEMORANDUM.

Counsel for the defendants must address himself to the representations made on page 10 and 11 of appellant's brief regarding a conference in chambers with the trial court. As to any ruling being made and delivered by the trial court as represented on page 11 of the appellant's brief, counsel for the defendants has no recollection that such a general ruling was ever made. A search of the court reporter's notes on the 28th day of August, 1972 and a letter from the trial judge, Judge J. Harlan Burns, both failed to support the position of the plaintiff's claim as to this ruling. To the best of my knowledge, no such ruling was ever made by the trial court. As Judge Burns stated to Mr. McCune in his letter

dated September 28, 1973 regarding this case:

> "As my memory serves me at this time without the benefit of exhibits or the file, it seems to me as though the purported contract was in fact brief, handwritten and ambiguous."

The memorandum agreement signed by Loraine Cox was in fact very brief, without a legal description of the property, and was written in longhand by the plaintiff.

The facts presented at the trial show that there were three people involved in the negotiations and one witness who overheard the conversations of the three parties as they were discussing the lease and option to purchase. Walter Corbet, Arta Corbet, and Loraine Cox were the only persons who were directly involved with the negotiation of a contract and both Arta Corbet and Loraine Cox agreed at trial that the terms of the written memorandum were for only Lot 1. The witness, Mark Nelson, who was a mechanic working at the service station at the time, recalled the conversations between the Corbets and Loraine Cox and testified that only one piece was discussed.

It is absolutely clear from the evidence presented at trial that three of four people who had knowledge of the terms of the lease and option all understood it to be for

one lot, and that only the plaintiff understood it to be for more than one lot. The facts as presented to the trial court show explicitly the necessity of having this short, handwritten document explained by outside evidence.

As the facts in this case show, the plaintiff prepared the memorandum and the general rule of law regarding memorandums of this nature is stated in Restatement of Contracts, Section 236 (d):

> "Where words or other manifestations of intentions bear more than one reasonable meaning, an interpretation is preferred which operates more strongly against the party from whom they proceed, unless they are used by him as prescribed by law."

Basically this rule of law states that a written memorandum should be construed against the writer, i.e., the plaintiff.

It is necessary in this particular case to have before you all testimony relevant and relating to the document and to the circumstances surrounding that document in order to fully understand the terms of that document. The document presented to the jury and to the court was a 3X5 card, handwritten in longhand by the plaintiff, which did not describe the property, and had a very inadequate description of the terms thereof. Further, the evidence shows that Loraine Cox was approached while

at work, during a busy time and that he did not read the document at the time that he signed it. The reason that he did not read it was because he trusted the plaintiff to the effect that the written document would contain the terms as negotiated by the parties.

The general rule of law applying to written contracts and the effect of the parol evidence rule is found in 30 Am Jur 2d, Evidence, Section 1069, Page 210,

> "Whenever, the terms of a written contract or other instrument are susceptible of more than one interpretation, or ambiguity arises, or the intent or object of the instrument cannot be ascertained from the language employed therein, parol or extrinsic evidence may be introduced to show what was in the minds of the parties at the time of making of the contract or executing the instrument, and to determine the object for or on which it was designed to operate."

See also Brown vs Markland 16 Utah 360 52 P. 597.

The instant case is one that falls on all fours with language above quoted. In this particular document, the terms 'lot' or 'lots' were used, the evidence showed that there were three lots and further the evidence showed that three of the four persons acquainted with the negotiations believed that the contract was only for one lot. The term 'lots' itself could mean either one lot, two lots, or three

lots, and the term 'lot' could mean any one of lots 1, 2 or 3.

The case at bar is a classic example of the soundness of the above rule of law. The above rule of law also states that you may also determine what was in the minds of the parties at the time of making of the contract or executing the instrument. The facts clearly show that when Loraine Cox signed the document he did not read the document because of his extremely busy schedule and because the plaintiff was pressing him and further because he felt that the written agreement would contain the terms as he understood them when in fact they did not. There can be no question that the written memorandum on its face is ambiguous.

POINT III.

THE COURT ERRED IN OVERRULING THE OBJECTION OF PLAINTIFF TO ADMISSION OF EXHIBIT "D—1".

Arta Corbet testified that she understood the terms of the agreement to be regarding the main lot or lot 1 of Mr. Cox's property and not all the property of Mr. Cox facing the main highway. Exhibit D—1 was a memorandum written February 28, 1964 by Arta Corbet and signed by Arta Corbet which simply reinforced her position as she understood it, i.e., that the

purchase was only of the main lot and not of all three lots. The document contained nothing more than her testimony regarding the negotiation between her and Mr. Cox and even if the trial court had granted plaintiff's motion and denied the admissibility of Exhibit D—1, the same information as contained on Exhibit D—1 was testified to by Arta Corbet from her independent recollection as she recalled the negotiations between the Corbets and Loraine Cox.

The transcript does not reveal that the court overruled the objection of counsel for the plaintiff, but rather the transcript reveals on page 103 and 104 that:

> Mr. McCune: "Just a minute, your Honor, I make a request at this time to voir dire the witness in the absence of the jury."
> The Court: "All right, and on what basis, counsel?"
> Mr. McCune: "As being familiar with the deposition of what her testimony is going to be I think that it is improper testimony and I would like to voir dire the witness and have the Judge rule on the matter."
> The Court: "Will counsel approach the bench?". (Discussion between the court and counsel at the bench not reported.)
> Question by Mr. Atkin' "Let's see, now, let's go back to the original document here that you, or you explained to the court, you wrote or drafted."

From the above it does not show that the court overruled the request by plaintiff's counsel and plaintiff's counsel did not continue his objection in the record. The position of the defendants is that the objection of the plaintiff's counsel was withdrawn at that time.

A foundation was laid as to D—1 in that Arta Corbet wrote the document, signed the document, received the phostatic copy from Ellis J. Pickett, an Attorney at Law, who at the time of the trial and prior thereto was deceased, and further from the deposition of Walter Corbet, he denied any knowledge of the original document. Therefore, it was the position of the defendant's counsel that if he denied knowledge of the original that he certainly would not produce the original. Furthermore, that Arta Corbet's best information and belief was that the original was in the hands of Walter Corbet. According to her testimony Ellis Pickett had informed her that Walter Corbet had taken many papers and that all she received was the photostatic copy. There was no evidence introduced contrary to that, D—1 being introduced only to reinforce the memory of Arta Corbet.

Had the trial court granted the objection of plaintiff's counsel, the testimony of Arta Corbet still would have been introduced and the jury received the same

information. Should this court determine that the trial court erred, if in fact it did overrule the objection of the plaintiff, then it would not be reversible error because it would not change, nor materially alter the facts as presented to the jury.

POINT IV.

THE COURT ERRED IN GIVING SPECIAL INTERROGATORIES No. 1 AND NO. 2 TO THE JURY AND IN FAILING TO SUBMIT INTERROGATORIES ON OTHER ISSUES OF FACT.

It appears from counsel for the plaintiff's argument that he is desiring the best of both worlds in that he has argued throughout his entire brief and through the trial that there was a contract for all three lots. He has never contended that there was a contract for Lot 1 only. The position of the defendants has been that the contract was for Lot 1 and not for all three lots. Therefore, Interrogatory No. 2 was submitted to the jury which stated:

> "That said agreement is ambiguous as to the property to be conveyed and that by reason thereof there was not mutual understanding and agreement between the plaintiff Walter Corbet and the defendant V. Loraine Cox, as to the amount of property referred to."

It is our position that this was a proper interrogatory to jury under the facts of the case, and under the posture of

both the plaintiff and the defendants. The plaintiff's position was that the contract was for all three lots and the defendants believed that it was for only one lot. The facts being presented to the jury indicate that there was no mutual understanding there was no "meeting of the minds," therefore, there was no contract. Corbin on Contracts, One Vol. Edition 1952, Section 104, Page 154.

Looking outside our own jurisdiction for assistance we find in the Supreme Court of Kentucky stating:

> "Where the evidence thereon is conflicting, the court should instruct the jury that if the parties' minds did not meet there was no contract." Meem Haskins Coal Corporation vs Pratt. 187 S. W. 2d 435, 299 KY. 767.

The trial court in the case at bar properly instructed the jury as to the law and the jury found there was no "meeting of the minds" and, therefore, no contract. The trial Judge, by his directed verdict also found no "meeting of the minds" and no contract.

The black letter law states:

> "Instructions clearly and correctly stating the law relating to the making of a contract are proper where there is an issue as to whether a contract was in fact made." 17A C.J.S. Contracts, Section 634, Page 1283.

The facts in this case deal with whether there was a "meeting of the minds" and as stated above

the jury found no "meeting of the minds" and no contract.

On page 20 of appellant's brief, counsel for the plaintiff alleges;

> "This is largely immaterial and there was no discussion of or identification of the property as 'lots' or 'lot' prior to theexecution of the memorandum (Transcript 12, 31—32, 44, and 93)."

At pages 92 and 93 of the Transcript we find the following question:

> Mr. Atkin: "I see. Did Mr. Cox explain to you the boundaries of the property, the perimeter of the property?" Mr. McCune: "Just a minute, I object, that's leading."
> The Court: "Well, it is leading, but he may answer yes or no and then you can go from there, did he or not?"
> The Witness: "Yes that way. Now, he didn't describe, you know, like lot, he said that the highway had come through there and there had been full lots over here indicating (and as I understood it he owned them at one time.) As I understood him to say he owned this property for about 20 years but he says that there was these two parts of lots. I was under the impression that Lot 1 was a full lot."

At page 182 and 183 of the transcript, Loraine Cox testified that he showed the property to Arta Corbet and that he indicated to her that he owned other property from one end to the other. At page 183 it further indicates that the Corbets came to Loraine Cox

some time after they had taken possession of Lot 1 and requested permission of to take possession of Lots 2 and 3. It is the position of the defendants that it was clear prior to the signing of the agreement that there was more than one lot owned by the defendants.

Regarding counsel for the plaintiff's argument concerning Rule 51, Utah Rules of Civil Procedure, at page 226 of the transcript it clearly indicates that court requested the stipulation that the instructions be given to the jury and that any exceptions we may have to these instructions be argued after the jury has retired. Counsel for the plaintiff stipulated to that as well as counsel for the defendants. It is the position of the defendants that the interrogatories that were submitted to the jury were in no way incomplete. They in no way confused the jury and that they were proper and complete. It is also the position of the defendants that the cases of Cooper v. Evans 1 Utah 2d 68 262 P. 2d 278 (1953) and Baker v. Cook 6 Utah 2d 161, 308 P. 2d 264 (1957) do not refer to special interrogatories and should not be binding upon special interrogatories.

Rule 51 states:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an

instruction, the party must state distinctly the matter to which he objects and the grounds for his objection.''

The transcript does not show that counsel for the plaintiff in objecting to the instructions to the jury, objected for the courts failure to give an instruction of either finding a contract for all three lots or finding a contract for one lot (TR 230—232).

POINT V.

THE COURT ERRED IN OVERRULING THE OBJECTION OF PLAINTIFF TO THE PROPOSED JUDGMENT ON THE VERDICT AND ENTERING A JUDGMENT THAT THE DEFENDANTS ARE ENTITLED TO THE SOLE POSSESSION AND USE OF ALL THE PROPERTY AND THAT THE PLAINTIFF HAD NO TITLE OR INTEREST OF ANY OF SAID PROPERTY.

Evidence presented to the trial court was clear that Lots No. 1, 2 and 3 of Block 34, Plat A, of the St. George City Survey were owned by defendant Loraine Cox (See EX. P—4) (See lease drawn by Ellis Pickett). There was testimony by Loraine Cox that Lots 1,2 and 3 belonged to him, and at no time was there any evidence that the lots belonged to or were owned by Walter Corbet or Corbet Trailer Sales or any party that has been or was plaintiff in

this action. The Court's ruling that the defendants be given the sole possession and use of all the property and that the plaintiff have no right, title or interest to any part of the property was based on the evidence presented to the court and the defendants were the legal owner of the property and that the only ownership interest that the plaintiff could claim was whatever interest he had by virture of the 3X5 handwritten memorandum card. After the jury verdict and the directed verdict in favor of the defendants the court's order was to the effect that the plaintiff could have no right, title or interest to the described property and that there has been no evidence presented to the court which would indicate that he had any right, title or interest to the property.

The trial court acted correctly in entering its judgment that the defendants are entitled to the sole possession and use of all the property located in Lots 1, 2 and 3, Block 34, Plat A, St. George City Survey.

CONCLUSION

The Court at no time during the trial committed reversible error, but did at all times give the plaintiff every opportunity to make every objection that he so desired. The court viewed the action properly by construing an ambiguous contract and that there could be no specific

performance of the contract unless the terms of the contract could be construed. The court in construing the terms of the contract and the jury in contruing the terms of the contract found in favor of the defendants in every instance and properly construed the contract against the writer, i.e., the plaintiff and further that the over—whelming weight of the evidence was in favor of the defendants. There was only one witness of the six that were called to testify who testified in line with the plaintiff's position and that was the plaintiff himself.

Not to be overlooked is that the trial court also entered a directed verdict in the case and stated on page 235 of the transcript:

> "The Court grants the motion for a directed verdict on each of the four propositions. The Court believes that the evidence was consistent with the motion that the motion was well taken and that the jury verdict reaffirms that position and the motion was granted."

Defendants request the court to affirm the verdict and the directed verdict of the trial court consistent with the interest of justice.

Respectfully submitted,

J. RALPH ATKIN
P. O. Box 757
St. George, Utah 84770
Attorney for
Defendant and Respondent