

1976

Joseph L. Gasser, Jr. and Freda N. Gasser v. David M> Horne and Jeanne M. Horne : Brief of Defendants-Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH S. GASSER, JR., et ux,)	
Plaintiffs-Appellants,)	
v.)	
DAVID M. HORNE, et ux,)	No. 14513
Defendants-Respondents,)	
v.)	
AMERICAN SAVINGS & LOAN ASSOCIATION,)	
et al,)	
Third-Party Defendant and)	
Respondent.)	

BRIEF OF DEFENDANTS-RESPONDENTS

NATURE OF THE CASE

Plaintiffs-Appellants (hereinafter referred to as "Appellants" or "Gassers") brought an action in the Third Judicial District Court to enjoin the delivery and recordation of a deed placed in escrow and to declare unenforceable an agreement they had entered into with Defendants-Respondents (hereinafter referred to as "Respondents" or "Hornes"). Respondents counterclaimed and filed a third-party complaint against American Savings & Loan Association and others, claiming an interest in certain real property resulting from the agreement between Appellants and Respondents.

DISPOSITION OF THE CASE

The Honorable Ernest F. Baldwin of the Third Judicial

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Court of Salt Lake County rendered judgment for Respondents and against Appellants refusing to set aside the agreement between the parties and adjudging Respondents to be the owners of an undivided 50% fee interest in certain real estate, subject, however, to a trust deed given to American Savings & Loan to secure a certain promissory note, on which note and obligation the court further determined Respondents were personally liable.

Appellants filed their notice of appeal on January 5, 1976, which appeal was dismissed by this Court on February 2, 1976. Although no further notice of appeal was thereafter filed, on motion of Appellants the lower court on March 1, 1976, granted Appellants an extension of time to file their notice of appeal. How Appellants are able to revive an appeal which has once been dismissed by this Court is a matter which this Court will have to reconcile. But since Respondents do not believe the appeal itself has substance, they have chosen to address their brief to the merits.

RELIEF SOUGHT ON APPEAL

In the event this Court chooses to review the case on the merits, Respondents seek affirmance of the decision and judgment of the trial court.

STATEMENT OF FACTS

Respondents take issue with Appellants' Statement of Facts as being incomplete. Appellants state only those facts favorable to their contentions to the exclusion of evidence

supporting the findings of the trial court. They further fail to support many of their statements with any specific reference to the record. Respondents, therefore, feel obliged to submit the Statement of Facts as follows:

During 1971 and 1972 Appellant Joseph S. Gasser, Jr. became involved in several business transactions with a group of businessmen and doctors, headed by Messrs. Skankey, Doty, Strausser and Sorbonne. Appellants Gasser acquired a 42.5% interest in the Hill Gate Terrace Mobile Home Community, Layton, Utah. Dr. Skankey also acquired a 42.5% interest in the same trailer park. (Tr. 35-38, 97-101) As a result of this acquisition by Appellants and other transactions between these parties, Gassers became indebted to Skankey individually in the sum of approximately \$139,000.00, evidenced by a promissory note. (Tr. 100-105) This note was secured by a second mortgage on Gassers' interest in the Hill Gate Trailer Park. (Tr. 105) Messrs. Skankey, Doty, Strausser and Sorbonne (referred to by the trial court as "the group") also held a note from Gasser for \$225,000.00. This note was secured by a mortgage of Gassers' interest in the trailer park and also by a mortgage on certain Montana properties. (Tr. 101-104; Exh. 12-D) In August of 1972, Gasser proposed refinancing the trailer park in order to pay these notes and offered to purchase Dr. Skankey's 42.5% interest for \$200,000.00. (Tr. 107, 110, 114; Exhs. 13-D and 15-D) Dr. Skankey agreed to sell his interest for \$275,000.00. (Tr.

42; Exh. 18-D)

When Gassers' obligations became delinquent in November, 1972, Mr. Joseph L. Henriod was retained by Skankey and "the group" to collect the same; and Gasser was given notice to pay. (Tr. 38-40, 350) Continuing pressure was thereafter exerted on Gasser by Mr. Henriod to pay the amounts owing. (Tr. 113, 330) Gasser came to Mr. Henriod on several occasions and discussed with him different methods or alternatives by which Gasser might meet his obligations to Dr. Skankey and "the group." (Tr. 40-42, 113-114, 288, 299; Exh. 15-D) At this time Appellants were represented by Attorney James Barker who continued to act as legal counsel for them through July, 1973. (Tr. 103, 118, 144-145, 288, 293-295)

In the early part of January, 1973, Gasser approached Horne and asked Horne to help him obtain the necessary financing to pay off the obligations and purchase the remaining 57.5% interest in the trailer park. (Tr. 56, 114) After viewing the property, Horne agreed to lend assistance but stated that if he were required to sign for a loan he would need to receive compensation therefor. (Tr. 57-61, 357) Horne and Gasser then submitted a joint loan application to American Savings & Loan Association for over \$1,050,000.00, which money was to be used to pay off the obligations owing by Gasser individually and to acquire the other 57.5% interest in the trailer park which was owned by Skankey and two others. (Tr. 111-112; Exh. 3-P)

Late in March, 1973, Gasser called Mr. Henriod and reported that he (Gasser) was going to receive the necessary outside financial assistance from Horne and that they were going to get a loan from American Savings. (Tr. 290) Prior to that time Mr. Henriod was not involved in and had no knowledge of Gasser's contacts with Horne. (Tr. 113, 290-291) Although Mr. Henriod had represented Horne on other matters, he did not undertake to represent Horne at any time in this transaction. (Tr. 115, 290, 319, 326, 344, 350) As the representative for Dr. Skankey and "the group," Mr. Henriod discussed with Gasser and Horne their financing agreements; but only at Gasser's requests. (Tr. 113, 115, 309, 326, 335, 344) He was never asked to represent Horne (Tr. 290, 368) and was never paid by Horne. (Tr. 312, 368)

Gasser brought Horne into Mr. Henriod's office on March 29, 1973, to discuss the refinancing with American Savings in particular. (Tr. 290-293) After coming to an agreement with Horne in private conversation and out of the presence of Henriod, Gasser then dictated to Mr. Henriod what he and Horne had tentatively agreed verbally to do; that is, if Horne would sign on the loan from American Savings, he (Gasser) would give Horne a 50% interest in the trailer park, subject to the new loan of over a million dollars; provided that if Gasser were able to refinance the loan within 60 days without Horne's signature, Horne would not receive any compensation. (Tr. 115, 117, 292, 314) This agreement, Exhibit 4-P, was

typed and sent unsigned to Mr. Barker for his approval as attorney for the Gassers. (Tr. 118, 292) Horne did not discuss the matter further with either Gasser or Mr. Henriod until late June, 1973. (Tr. 116, 139, 296-297, 322)

Mr. Henriod continued to press Gasser to pay Skankey and "the group" the overdue obligations. (Tr. 120, 330) Because Gasser still procrastinated, proceedings were begun in Montana to foreclose the Montana mortgage to "the group." (Tr. 289) On June 11, written notice was given by Henriod to Gasser that unless the debts were satisfied by June 25, 1973, proceedings would be instituted to foreclose the Hill Gate mortgage. (Tr. 121, 297; Exh. 16-D)

For more than 60 days following the meeting in Henriod's office and particularly during April, May and early June, Gasser made further efforts to obtain financing without Horne's signature. (Tr. 116, 118, 248) He finally informed Mr. Henriod that he (Gasser) would be ready to close on June 25 and was obtaining the necessary financing without Horne. (Tr. 134-136, 296-298, 300) On June 22, the final closing agreement (Exh. 18-D) between Gasser and Skankey and "the group" was prepared; and in accordance with Gasser's instructions to Mr. Henriod, Henriod deleted Horne's name from the transaction. (Tr. 134-136, 298-299; Exh. 18-D, ¶4) Then, on June 25, without prior warning or notice, Gasser called Mr. Henriod inquiring whether Horne was ready to sign their agreement, Exhibit 4-P. (Tr. 136, 300) Since Mr. Henriod had not

discussed the agreement with Horne subsequent to the March 29 meeting, he replied that he didn't know but would inquire.

(Tr. 301) When reached in San Francisco, Horne simply stated that he didn't know but would discuss it upon his return.

(Tr. 301, 359)

On June 27, 1973, Horne and Gasser again met in Mr. Henriod's office. Horne declined to sign the agreement, claiming that the time provided in Exhibit 4-P had already expired. (Tr. 301, 360) At that point Gasser became upset and left. (Tr. 84, 300) The next morning, June 28, Gasser called Mr. Henriod and told him that he and Horne had talked and resolved their differences. (Tr. 140-141, 302, 329, 364) He asked Mr. Henriod to prepare a new agreement (Exhs. 5-P and 22-D) and dictated the following terms: that upon the extension of his credit, Horne would receive a 50% interest in the trailer park if Gasser could not sell the loan to Equitable Savings of Portland within 30 days. (Tr. 140-141, 302, 364-365; Exhs. 5-P and 22-D) Gasser assured Horne there would be no trouble in selling the loan to Equitable Savings within 30 days. (Tr. 364)

Agreement 5-P was immediately prepared and taken to Horne's office by Mr. Henriod where he again met with both the Gassers and Hornes. (Tr. 302-303, 354-355) After interlineating a change, this agreement was signed by the Hornes and by Mr. Gasser. (Tr. 303-305) The Hornes also executed a note and trust deed to American Savings for

\$1,050,000.00. (Tr. 354) However, Appellant Freda Gasser refused to sign the agreement, stating that she wanted to first consult with their attorney, Mr. Barker. (Tr. 183, 305) The Gassers took both copies of the agreement (Exhs. 5-P and 22-D) and that afternoon consulted with Mr. Barker. (Tr. 144, 183-184, 305)

Mr. Barker called Mr. Henriod the next morning, June 29, and indicated that he wanted a change in paragraph 4 of the agreement. (Tr. 145, 184, 307) He instructed Mr. Henriod to prepare the agreement with that change but stated he had advised Gassers not to execute the agreement. (Tr. 225-226, 307, 344) The final agreement, Exhibit 6-P, was then prepared and the Hornes' signatures were then obtained by messenger. (Tr. 308, 330, 338-339)

That afternoon, June 29, Mr. Henriod delivered to the escrow agent's office the final agreement (Exh. 6-P), the note and the trust deed, all of which had been executed by the Hornes. (Tr. 308) Agreement 6-P was then executed by both Mr. and Mrs. Gasser in the presence of Mr. Henriod and the escrow agent, Mr. Ralph J. Marsh. (Tr. 211-212, 308) Because of the lateness of the hour, a disbursal of funds was delayed until Monday, July 2. On Monday, disbursement of the proceeds of the loan was made by the escrow agent Marsh pursuant to instructions from the parties, including American Savings & Loan. (Tr. 204-205, 213-215, 249; Exh. 7-P) Mr. Henriod received the appropriate funds on behalf of his client.

Dr. Skankey. (Tr. 156, 309, 310) After other necessary disbursements, \$94,000.00 was disbursed to Gasser for his personal use. (Tr. 149, 151; Exh. 19-D) The obligation owed "the group" was not paid at that time but was discharged at a later date with proceeds from the sale of the Montana properties. (Tr. 154-156, 208; Exh. 18-D)

On July 3, 1973, Equitable Savings gave notice to American Savings and Appellants that it elected not to participate in the loan transaction. (Exh. 10-P) During the remainder of July, Appellants did nothing to arrange any other participation or sale of the loan nor did they attempt to contact either Respondents or Mr. Henriod to so inform them or to ask for any extension of time. (Tr. 148, 151, 311, 367) At the end of the 30-day period Appellants brought this suit to prevent recordation of the trust deed and note which Respondents had cosigned with Gassers and also to prevent the recordation or delivery of the deed from Gassers to Hornes of a 50% interest in the property. (R. 1-2) As a result, the note and trust deed executed by Respondents and the deed to Respondents from Appellants were retained by the escrow agent, subject to final adjudication of the litigation. (Tr. 214, 355-356) In January, 1974, while the litigation has been pending, American Savings & Loan has assigned a 75% interest in the note and trust deed executed by Appellants to Far West Federal Savings, Portland, Oregon, but has continued to service the loan. (Tr. 6, 250-252; Exh. 1-P)

POINT I

THE JUDGMENT AND FINDINGS OF THE TRIAL COURT SHOULD BE AFFIRMED.

It is apparent that the object of Appellants' brief is to reargue the weight of the evidence in an effort to get this Court to grant a retrial of the issues. Appellants ask this Court to review the evidence, resolve the issues in their favor where there is a conflict in the evidence and draw inferences from the facts different from those drawn by the trial court. In so doing, Appellants completely ignore the basic rule of law that findings of fact of the court below will not be disturbed on appeal because an appellant views the facts differently. Pagano v. Walker, 539 P.2d 452 (Utah, 1975); Del Porto v. Nicolo, 27 U.2d 286, 495 P.2d 811 (1972); Nelson v. Nelson, 30 U.2d 80, 513 P.2d 1011 (1973); Corbet v. Corbet, 24 U.2d 378, 472 P.2d 430 (1970). On appeal this Court reviews the evidence in the light most favorable to the findings of the trial court. Cook v. Gardner, 14 U.2d 193, 381 P.2d 78 (1963).

The trial court is in an advantaged position in factual matters. Pagano v. Walker, supra; Peterson v. Holloway, 8 U.2d 328, 334 P.2d 559 (1959); Child v. Child, 8 U.2d 261, 332 P.2d 981 (1958); Cannon v. Neuberger, 1 U.2d 396, 268 P.2d 425 (1954). It is that court's responsibility and advantage to hear the testimony of the witnesses, observe their demeanor and conduct in testifying and give to such

testimony the weight to which the trier of the fact deems it is entitled.

Likewise, in equity cases this Court, when reviewing the evidence to determine if it supports the findings, takes into account the advantaged position of the trial judge. Stone v. Stone, 19 U.2d 378, 431 P.2d 802 (1967). So long as there is evidence to support a factual determination, this Court will not reverse that determination even though this Court may disagree as to the determination. Brigham v. Moon Lake Electric Assn., 24 U.2d 292, 470 P.2d 393 (1970).

The principles of equity state that findings "will not be disturbed unless the evidence clearly preponderates against them and a manifest injustice or inequity is wrought."

McCullough v. Wasserback, 30 U.2d 398, 518 P.2d 691 (1974).

Factual issues which Appellants ask this Court to resolve anew were already resolved against Appellants by the trial court.

A party failing to prevail in the lower court may not recite

evidence favorable to its contentions to the exclusion of evidence supporting the lower court's findings. Thomson v.

Condas, 27 U.2d 129, 493 P.2d 639 (1972). The question on

appeal is not what the trial court could have found but,

rather, were the findings supported by the evidence.

Appellants' statement of the law in the Conclusion of their brief that this Court may substitute its own findings where the evidence would support different findings is erroneous.

Rule 7(a) and Rule 76, Utah Rules of Civil Procedure, cited

by Appellants are not authority for such assertion. The evidence is clearly sufficient to support the trial court's findings. Indeed, Respondents urge that the evidence should satisfy this Court as it did the trial court. Therefore, the judgment should be affirmed.

POINT II

THE AGREEMENT OF THE PARTIES IS SUPPORTED BY SUFFICIENT AND VALID CONSIDERATION.

Three different agreements were drafted at the request of Gassers. Exhibits 4-P, 5-P (22-D) and 6-P. Only Exhibit 6-P was finally executed on June 29, 1973, by both Appellants and Respondents. This final agreement provided that in consideration for extending their credit by cosigning the note and trust deed to American Savings, Respondents would receive from Appellants a 50% interest in the trailer park; except that in the event the note was resold within 30 days to Equitable Savings, Respondents would receive nothing. The note and trust deed (Exh. 7-P) were executed by the Hornes on June 28 and irrevocably placed in the hands of the escrow holder on June 29. The note and trust deed were not sold within the 30-day period. The only reason that the note and trust deed bearing signatures of the Hornes were not recorded on July 30 is because this suit was brought by Appellants and an injunction was issued preventing such recordation.

Appellants do not cite any cases holding that Respondents' extension of credit and assumption of liability do not

constitute sufficient consideration to support the agreement. Those cases cited by Appellants merely state the general rule--that consideration requires either a detriment to the promisee or a benefit to the promisor at his request. In Manwill v. Oyler, 11 U.2d 433, 361 P.2d 177 (1961), this Court expounded this general rule that ". . . the principal must be bound to give some legal consideration to the other by conferring a benefit upon him or suffering a legal detriment at his request. . . ." There is little question but that both exist in this case: On June 29, Respondents agreed to become and actually became personally liable for \$1,050,000.00--a detriment to the promisees; Appellants received a loan which they could not have done without Hornes signing with them on one set of the loan documents. They (Gassers) increased their ownership in the trailer park from 42.5% to 50% and received \$94,000.00 in cash for their own personal use--benefits to the promisors as per their request.

Several courts have found sufficient consideration to enforce a contract in similar situations. Western Savings & Loan Assoc. of Denver v. National Homes Corp., 167 Colo. 93, 445 P.2d 892 (1968); Teague v. Edwards, 159 Tx. 94, 315 S.W.2d 950 (1958); Danby v. Osteopathic Hospital Association of Delaware, 34 DCh 172, 101 A.2d 308 (1953); Bryant v. Starkey, 8 Div. 439, 39 So.2d 291 (1949); Casserleigh v. Wood, 119 Fed. 308 (8th Cir., 1902).

In Casserleigh v. Wood, supra, the appellant contracted

to give an estate in real property in return for factual evidence to establish a legal claim. This evidence was later determined to be immaterial to appellant's claim. In an effort to avoid the contract the appellant claimed that the same was unsupported by consideration. In rejecting this claim the court stated the general rule that "if the evidence was supposed material and necessary to establish the claim at the time of the promise, then the contract was founded on valuable consideration." (Emphasis added) If the promise was given for that which the promisor supposed he needed, the contract does not become voidable because of subsequent discovery that it is immaterial. Consideration is determined by conditions as they exist when the agreement is made and not by subsequent developments. Western Federal Savings & Loan Assoc. of Denver v. National Homes Corp., *supra*; Raine v. Spreckels, 77 Cal.App.2d 117, 174 P.2d 857 (1941); Teague v. Edwards, *supra*.

This is also the law in Utah. In Allen v. Rose Park Pharmacy, 120 Utah 608, 237 P.2d 823 (1951), this Court stated that "mutual promises that will be or apparently may be detrimental to the promisor or beneficial to the promisee and neither of which are void" constitute sufficient consideration (Emphasis added)

A defense of unjust enrichment was rejected by the Colorado court when a construction lender sought to enforce certain lien waivers executed by the defendant construction supplier

in Western Federal Savings & Loan Assoc. of Denver v. National Homes Corp., *supra*. The court reversed the trial court's decision that the lien waivers were unsupported by consideration which resulted in unjust enrichment to the bank, stating:

" . . . These items of consideration were not equal to the performance of National and it may be that National will receive nothing for its 12 packages. Nevertheless, legally there was consideration. A benefit to the promisor or a detriment to the promisee can constitute consideration, however slight . . . [and] is not to be measured in light of the eventual success or failure under a contract but rather consideration is measured as of the time of making the contract. . . ."

"Since there is consideration, the doctrine of unjust enrichment cannot be used as a basis to nullify the [lien] waivers."

There, the consideration to support the lien waivers was a promise by the lender to extend credit to the contractor.

It is also interesting to note that in the cases cited by Appellants, the courts found sufficient consideration supporting Respondents' position. See Malcoff v. Coyier, 14 Ariz. App. 524, 484 P.2d 1053 (1971); Temmen v. Kent-Brown Chevrolet Company, 217 Kan. 223, 535 P.2d 873 (1975); Kadish v. Kallof, 3 Ariz. App. 344, 414 P.2d 193 (1966); and Blonder v. Gentile, 149 Cal.App.2d 24, 309 P.2d 147 (1957). In Temmen, the Kansas court found sufficient consideration where the plaintiff suffered only the detriment of giving up the right to receive elsewhere a better bargain for auto repair work.

The facts of the instant case clearly show that Respondents suffered a detriment, not slight but major; in fact, a personal liability for \$1,050,000.00. Likewise,

Appellants gained several benefits. Even American Savings incurred a benefit as a result of Respondents' promise; and, of course, consideration may move to or from a third party. 17 Am. Jur. 2d, Contracts, §94.

Notwithstanding the fact that Hornes executed a note for \$1,050,000.00, Appellants claim lack of consideration in that (1) the parties never intended that Hornes become liable; (2) agreement 6-P is fatally ambiguous; and (3) Hornes never actually became liable to American Savings. These contentions are clearly contrary to the evidence and the findings of the trial court. (R. 228; Findings 4-5)

A. The parties expected and intended that Respondents would be personally liable on the note and mortgage.

It is certainly a novel approach to say that experienced, sophisticated businessmen would arrange for and execute a one million dollar promissory note, never intending or expecting to be liable for the same. The testimony is clear that all the parties both intended and expected Hornes to be personally liable. (Tr. 60, 63, 117, 248-250, 356-357, 371) Indeed, it is ridiculous to even suppose that in making such an unusually large loan American Savings would require Hornes to cosign the note but never expect them to be liable. It was clearly understood that without the additional strength of Hornes' credit, American Savings would not make the loan. (Exh. 11-2) The undisputed fact is that American Savings & Loan would not have approved the loan nor authorized the disbursement of the

funds thereafter if Hornes had not signed the note and trust deed. (Tr. 119, 228-230, 248-250; Exhs. 7-P and 11-P)

The initial loan commitment from American Savings was addressed to both Horne and Gasser. (Tr. 57; Exh. 3-P) Gasser testified that he knew American Savings considered Horne liable and, in fact, as early as March, 1973, discussed Horne's liability with American Savings. (Tr. 62-64) In discussing with Horne his participation in the loan, he further testified that Horne stated ". . . that if he [Horne] was going to enter into liabilities that he should receive compensation to compensate for this liability." (Tr. 60) At the time document 4-P was drafted, Gasser understood that in return for a one-half interest Horne would be committed to the entire amount of the loan. (Tr. 116-117)

Gasser spent April, May and June attempting to remove Hornes' liability but was unsuccessful. The American Savings commitment letter of June 6 stated that either the loan would have to be presold before closing or that Hornes would have to sign. (Tr. 118-119, 248-249; Exh. 11-P) Certainly Appellants read and understood the various escrow documents and their deed to Horne and must be presumed to have intended the natural result and consequence by signing them. (Exhs. 7, 8, 9)

Horne testified that his purpose in signing the note and deed (Exh. 7-P) was to guarantee the loan with American Savings:

"Q. (By Mr. Nielsen) Now, what was the purpose of your signing the trust deed and note which appears a part of Exhibit 7-P?

"A. To guarantee a loan with American Savings. (Tr. 354)

"Q. Are you prepared at this time to remain liable on those documents in reference to this transaction?

"A. Yes." (Tr. 356)

In an effort to support their claim regarding lack of consideration, Appellants point to the change of the word "removing" to "eliminating" on the face of Exhibit 4-P, paragraph 3. Such a specious attempt to distinguish the meaning of these terms is itself meaningless. It is merely an attempt to misconstrue the clear meaning of a document which is itself the best evidence of the intent of the parties and which this Court is able to read and evaluate as the trial court did. Both Websters International Dictionary and the Oxford English Dictionary define "eliminate" as "to remove" and "remove" as "to eliminate." Such attempted implications as alleged are at best tenuous. There is even a dispute as to when and how the change ever occurred. (Tr. 118)

As further indication of the weakness of Appellants' position, there is no testimony that Appellants' attorney requested the change in Exhibit 5-P, paragraph 3. (Tr. 145, 224, 307; Exhs. 5-P and 6-P) Appellants have miscited the record in an attempt to bolster their claims. Even so, Appellants' naked assertion that the changes made in paragraphs 3 and 4 indicate that the parties did not intend liability

is entirely unsupported. If anything, these paragraphs make it crystal clear that the parties intended Hornes should receive an interest if the 30-day condition was not met.

This Court has held that where the parties to a transaction dispute the intent surrounding some act involved in the transaction, the question of the intent is a factual issue and the determination of that factual issue will not be disturbed on appeal if there is any evidence to support it. Taylor v. Turner, 27 U.2d 39, 492 P.2d 1343 (1972); Youngren v. John W. Lloyd Construction Company, 22 U.2d 207, 450 P.2d 985 (1969).

B. Agreement 6-P states a valuable and sufficient consideration.

Appellants claim that by the language of agreement 6-P Respondents did not agree to do anything. This assertion is not correct. When Exhibit 6-P was signed, Respondents had already performed. The note and trust deed were signed by Respondents on Thursday, June 28. (Tr. 304) These were delivered to the escrow holder on June 29 and became irrevocable when Appellants executed the escrow documents. (Tr. 308) Agreement 6-P was executed by Gassers on Friday, the 29th, with the other escrow documents, Exhibits 7, 8 and 9.

Agreement 6-P states the valuable consideration of both parties. The trial court properly found sufficient consideration both in the instrument and implied in the surrounding

circumstances. California Wine Assoc. v. Wisconsin Liquor Co., 20 Wisc.2d 110, 121 N.W.2d 308 (1963); Vars v. Fisher, 405 S.W.2d 866 (Tex. App., 1966)

17 Am. Jur. 2d, Contracts, §90, states:

"It is the general rule that a consideration for a contract need not be recited or expressed in the writing since, if not expressed, consideration may be implied by or inferred from the terms and obvious import of the contract, or it may be proved by parole evidence." (Emphasis added)

In In Re Las Colinas Inc., 294 F. Supp. 582 (D.P.R., 1968), an action by a debtor to rescind several notes and recover security given, the federal court stated the law to be:

"Even though consideration is not expressed in a contract it is presumed that it exists and that it is licit unless the debtor proves the contrary." (294 F.S. at p.597)

The Tenth Circuit has also held that:

". . . A contract includes all implied promises as are indispensable to effectuate the intent of the parties." New York Casualty Co. v. Sinclair Refining Co., 108 F.2d 65 (10th Cir., 1939).

Williston states that a promise which originally might have been too indefinite may become definite by performance. If a promise itself is insufficient but performance gives benefit or detriment, the promise becomes binding. Jaeger, Williston on Contracts, 3d ed., §106.

Cases cited by Appellants do not support their position. In Malcoff v. Coyier, supra, the defendant orally agreed to pay plaintiff a commission for the sale of defendant's land.

defendant later attempted to avoid the agreement by claiming lack of consideration. The court stated that:

"We agree that it is essential that . . . there be a consideration or a mutuality of obligation; that its terms be sufficiently clear so that one can state with certainty the obligation involved. If the terms are ambiguous or uncertain, there is no contract unless by the performance of the parties it is shown and indicated that there was . . . a mutual understanding of agreement." (484 P.2d at p.1055)

The court then outlined the performing acts of the plaintiff and enforced the contract.

In the instant case the terms of the written contract are sufficiently clear and can be stated with certainty; that the parties had negotiated a loan with American Savings; that Respondents would provide the necessary financial backing for that loan and that Appellants would give a 50% interest in the property if Respondents were not removed from liability within 30 days. Furthermore, a "mutual understanding of agreement" was obviously reached when, in performance, Respondents executed the note and trust deed and Appellants executed the escrow documents.

Also, in accord are the following cases cited by Appellants: Temmen v. Kent-Brown Chevrolet Company, supra; and Blonder v. Gentile, supra.

C. Respondents became and continue to be actually and personally liable to American Savings for \$1,050,000.00.

At the closing of the loan and for 30 days thereafter, the note and trust deed executed by Hornes were held in escrow.

As previously noted, if at the end of 30 days (July 30, 1973) the loan remained unpurchased by Equitable Savings, then these documents would be immediately recorded and delivered to American Savings. (Tr. 249-250, 214-216; Exh. 7-P) By the terms of said note and trust deed, Respondents were personally liable. On July 3, 1973, Equitable Savings gave notice that it would not purchase the loan. (Tr. 250) During July, Gasser made no attempts to ask for an extension from Horne or to obtain further help from American Savings. On July 30, 1973, the note and trust deed, not having been resold, were to be delivered to American Savings. Mr. Marsh, the escrow agent, testified that he was prepared to so proceed but was prevented from doing so by the filing of this lawsuit. (Tr. 214-216) But for the acts of Appellants, Respondents' note would have been delivered to American Savings. However, the trial gave effect to the transaction as if the note had been delivered.

Appellants claim that American Savings never considered Hornes liable; and, therefore, to enforce the agreement will result in a "windfall" to Hornes. Gasser's testimony and the testimony of Mr. Bradshaw undeniably indicate that American Savings would not have made the loan without Respondents being liable. (Tr. 116-117, 248-249) At trial, American Savings requested that Respondents be held liable with Appellants. (Tr. 372) By judgment of the trial court, Respondents are and continue to be liable to American Savings:

"2. Defendants Horne are jointly and severally liable

with Plaintiffs on that certain Promissory Note dated June 25, 1973, in the principal sum of \$1,050,000.00 payable to American Savings and Loan Association."
(R. 236)

Respondents have never repudiated or sought to avoid personal liability for the one million dollars plus.

Appellants also argue that since Respondents have not made any personal payments, they have, in fact, not suffered any detriment. This is irrelevant since the note payments are being made from income produced by the trailer park in which Respondents own a 50% undivided interest. It might just as well be said that Appellants have not made any payments on the note either. It is relevant, however, to emphasize that under the terms of the loan transaction, Respondents are legally obligated personally to make payments on the indebtedness if for any reason payments are not otherwise made.

Temmen v. Kent-Brown Chevrolet Company, supra, cites Williston on Contracts, saying that detriment means "legal detriment as distinguished from detriment in fact." Williston defines "legal detriment" as:

" . . . A detriment to the promisee, in a legal sense, if he, at the request of the promisor and upon the strength of that promise, had performed any act which occasioned him the slightest trouble or inconvenience and which he was not obliged to perform." Jaeger, Williston on Contracts, 3d. ed., §102A.

And in response to Appellants' charge of "unjust enrichment," Am. Jur. 2d provides:

"Where on the part of the promisee, who was under no duty to do so, there has been an act . . . at the request of the promisor and upon the strength of that promise,

which act . . . occasioned the promisee disadvantage . . . though slight and not actually harmful, there is valid consideration. . . ."

"If the promisee does something that he is not legally bound to do, the fact that he himself derives a benefit therefrom is not material." (Emphasis added) 17 Am. Jur. 2d Contracts, §97.

Agreement 6-P is binding and enforceable by the parties, being supported by valid and sufficient consideration. The consideration by Hornes was given and performance completed. Respondents are willing and able to remain liable on the promissory note and trust deed.

POINT III

THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND ECONOMIC DURESS OR COERCION.

Appellants claim agreement 6-P is void, having been executed by them as a result of the duress and coercion of Hornes and Mr. Henriod. The findings of the lower court are that:

"12. The attorney representing the creditors of Plaintiffs . . . also represented Defendant Horne on other matters but did not represent him in connection with the negotiations with Plaintiffs.

"13. Plaintiffs were at all times during their negotiations with Defendants Horne represented by legal counsel and Plaintiffs counseled with their attorney. . . .

"14. Plaintiffs executed said agreement . . . voluntarily and were not induced, coerced, intimidated or otherwise compelled to enter into such agreement by any improper conduct on the part of Defendants Horne.

"15. Defendants at no time were guilty of any wrongful or improper conduct. . . ." (R. 229-230, Findings of Fact 12-15)

Appellants' brief is replete with insinuations and

accusations of impropriety. We believe that to take up each item and refute it would be a waste of the Court's time. Respondents prefer merely to discuss the relevant issues. As before stated, Appellants ask this Court to substitute their "proposed" findings for the trial court's findings. The issue is not how this Court might find the facts based upon Appellants' choice of testimony, but whether the findings of the lower court are supported by the evidence. Pagano v. Walker, supra; Del Porto v. Nicolo, supra; Thomson v. Condas, supra. The evidence, as well as Respondents' authorities cited herein, amply support the above findings that Gassers were not wrongfully threatened or coerced into their agreement with Hornes.

Mr. Henriod, representing Dr. Skankey and "the group," sought to require Gassers to pay their delinquent obligations. (Tr. 113, 330) Gasser personally contacted Mr. Henriod and asked for his assistance in acquiring Dr. Skankey's interest in the property. (Tr. 113-114, 318; Exh. 15-D) It was Gasser who called Mr. Henriod for an appointment on March 29, 1973, and told Henriod that he had arranged financing through Hornes. (Tr. 290) When Gasser brought Horne into Mr. Henriod's office, Mr. Henriod did not participate in the negotiations but left them to work out their own arrangement. (Tr. 115, 291) Horne never asked Mr. Henriod for his counsel or advice, and Mr. Henriod never offered it. (Tr. 113-115, 290, 301-302, 335, 368) At all times Mr. Henriod acted as attorney for the

mortgagees and aided Gasser, only at the latter's request, in order to facilitate the eventual satisfaction of the debts owing to Henriod's clients. It was Gasser who dictated to Mr. Henriod the terms of agreement 4-P (Tr. 291); Gasser, after personally resolving his differences with Horne on June 27 and 28, called Mr. Henriod, instructing him how to rewrite document 5-P (Tr. 302); Exhibit 6-P was also a result of Gasser's initiative. (Tr. 145, 306, 326) During the entire transaction from April to July of 1973, Horne never consulted nor requested advice from Mr. Henriod, never offered or agreed to pay for any legal services and never asked Henriod to prepare documents or otherwise represent him in any manner. (Tr. 365, 367-369) Mr. Henriod never suggested that Hornes should receive compensation from Gasser for their liability on the obligation or even that they should lend their credit. In fact, it appears that Horne had assisted Gasser on a financial matter or matters on a prior occasion. (Tr. 34-36)

In order to perceive the weakness of Appellants' argument of coercion from Hornes and Mr. Henriod, this Court need only examine the quality of that argument. As an example of their alleged "squeeze play," Appellants point to a letter from Mr. Henriod to Mr. Barker, which letter was marked for identification as 17-D. They single out an apparent typographical error as evidence that Mr. Henriod in fact represented Hornes. However, that document was not even offered or received in evidence because of the objection to its introduction by

Appellants' counsel. (Tr. 122, 153, R. 225; Exh. 17-D)

It is undisputed that Mr. Henriod exerted considerable pressure on Appellants to pay their obligations. In June, 1973, Gassers were over six months in default on their obligations of over \$350,000.00. Mr. Henriod was retained to collect that amount and to foreclose the mortgages if necessary. Appellants claim that Mr. Henriod "threatened" American Savings & Loan. However, in the testimony recited by Appellants, Mr. Howard Bradshaw, President of American Savings, specifically stated that he was never "threatened." He testified only that the situation became too "uncomfortable" and "messy." (Tr. 241-242) Mr. Henriod testified that he did not discuss any problems between Gassers and Hornes and that in conversations with American Savings only inquired when the loan proceeds would be available to Dr. Skankey and "the group." (Tr. 333-335)

It is a general rule that to threaten to do that which a party has a legal right to do does not constitute duress or coercion. Dunbar v. Dunbar, 102 Ariz. 352, 429 P.2d 949 (1967). Enforcement of a legal right by threats of foreclosure is not duress. Kopp v. Fink, 204 Okla. 570, 232 P.2d 161 (1951); Browning v. Blair, 169 Kan. 139, 218 P.2d 233 (1950); Stafford v. Field, 70 Ida. 331, 218 P.2d 338 (1950); 25 Am. Jur. 2d, Duress and Undue Influence, §7; Jaeger, Williston on Contracts (3d ed.), §§1606, 1608, 1618A. To ascribe to Mr. Henriod the attributes of a "card shark"

because he "held all the aces" is to suggest that every mortgagee with a right to foreclose a delinquent mortgage is a "river boat gambler." It was Mr. Henriod's right and duty to force satisfaction of the indebtedness to his clients by foreclosure if necessary. If any criticism is due, it is in his cooperation with the Gassers to give them additional time to arrange their refinancing.

In Ensign v. Home for the Jewish Aged, 274 S.W.2d 502 (Mo. App., 1955), the plaintiffs attempted to rescind an agreement to pay a certain sum for the care of their aged mother, alleging that the defendant knew and took advantage of her economic and physiological straits. Plaintiffs testified they signed the agreement unwillingly because there was nothing else to do. In rejecting their claims, the Missouri court stated:

" . . . Duress cannot be sustained where there is full knowledge of the facts of the situation and ample time and opportunity for full and free investigation, deliberation and reflection. [citations omitted]."

Gassers had every opportunity from April to June of 1973 to make other financing arrangements without Hornes. They were unsuccessful in dealing individually with American Savings but the record does not show what other, if any, efforts were actually taken by them. Yet, as late as June 25, 1973, Gasser told Mr. Henriod that the loan would be closed without Hornes' assistance. (Tr. 298-299) Mr. Henriod, representing Dr. Skankey and "the group," acted in reliance thereon. Gasser

corroborates this testimony. (Tr. 135-137; Exh. 18-D) Even during the crucial period of June 25 to June 29, Gassers had ample opportunity to consult and did consult with their counsel. They might have taken some alternative action. In fact, Mr. Henriod's testimony indicates he fully expected such might be the case:

"Q. And so at that time you knew that unless Mr. Horne put his agreement, signature to that agreement that he was insisting on at that time that the money would go back again to American Savings and Loan and Mr. Gasser would lose everything he had, you knew that at that time, did you not?

"A. You have asked me at least two questions. Responding to the first one, did I know that the money was there? The answer is yes, yes.

"Did I know where the money would go if it didn't finalize? I didn't know where it would go. He might have had another deal, he is always saying he had alternative routes, he may have gone another way.

"Third, I never made the statment that he would lose everything he had.

"Q. Well, you were threatening to foreclose.

"A. Yes, I was threatening to foreclose but that was only part of his assets." (Tr. 336-337)

When asked about the alleged "threat" by Mr. Henriod in Horne's office, Horne testified as follows:

"Q. Did you at any time on that date [June 28] hear Mr. Henroid [Henriod] state in substance and effect to Mr. and Mrs. Gasser unless they sign Exhibit 5-P that they would lose everything they had?

. . . [Objection of counsel overruled]

"The witness: No, I did not." (Tr. 355)

As authorities for their argument, Appellants cite

Dittbrenner v. Myerson, 114 Colo. 448, 167 P.2d 15 (1946); and Terrel v. Duke City Lumber Co., Inc., 86 N.M. 405, 524 P.2d 1021 (1974). These cases support the trial court's findings. In Dittbrenner, the court found the plaintiff was coerced when she was forced to sign a conveyance and agreement. Yet the court did so after testimony that the plaintiff was in fear of "injury to her person" and the destruction of her property. Also, the court found constructive fraud in the inducements made to the plaintiff. In the instant case, there is no evidence that Gassers were ever in fear of physical injury to themselves or destruction of their property. (Tr. 187) The Colorado court also characterized the plaintiff as a weak woman with a lack of business judgment. This case has since been cited as applicable to weak and incompetent persons. Certainly Appellants cannot be so characterized.

Terrel v. Duke City Lumber Co., Inc., *supra*, merely supports Respondents' argument that the trial court's findings are affirmed when supported by the evidence. In Terrel, the New Mexico court, affirming the findings of economic duress by the trial court, stated:

"The charge of economic compulsion, like fraud, is one easily made. . . . It must therefore be proven by clear and convincing evidence. . . .

. . .

"It is a well settled rule that this court, on appeal, will . . . view the evidence in an aspect most favorable to the judgment and the party prevailing below. . . . [T]he weight of the evidence is not considered on appeal, rather only, if there is any substantial evidence to support the verdict. . . ."

. . . [citations omitted]

"The above cases conform with the ordinary rules of review of the record on appeal. That is, presumptions are in favor of verdicts and reviewing courts will view the facts in the light most favorable to the prevailing party, will indulge in all reasonable inferences in support of the verdict, and will disregard all inferences or evidence to the contrary. Further, it is for the jury and not the reviewing court to weigh the testimony, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of witnesses and say where the truth lies. . . . [citations omitted] We will review the evidence to determine if it is sufficient to establish, clearly and convincingly, the claim of economic compulsion."

Upon examination of the trial court's findings in Terrel, the appellate court detailed numerous incidents over several years which established a pattern of consistent conduct by the defendant to ruin the plaintiff financially so as to acquire his lumber business. The defendant creditor continually "meddled" in the plaintiff's business until the plaintiff was deprived of all economic decisions.

Appellants Gasser did not meet their burden of proof in the trial below. The evidence clearly preponderates against their claims. Even under the "Terrel test" which Appellants ask this Court to apply, Respondents did not act in a "commercially unreasonable manner" by asking for a 50% interest in exchange for a 100% liability. Neither was Mr. Henriod unreasonable in pressuring for the payment to his clients of \$350,000.00 in already delinquent notes.

This Court is well aware of its prior decisions regarding duress and coercion. Reliable Furniture Co. v. American Home

Assurance Co., 24 U.2d 93, 466 P.2d 368 (1970); Reliable Furniture Co. v. Fidelity & Guaranty Insurance Underwriters Inc., 16 U.2d 211, 398 P.2d 685 (1965); Fox v. Piercey, 119 Utah 367, 227 P.2d 763 (1951); and Ellison v. Pingree, 64 Utah 468, 231 Pac. 827 (1924).

In Fox, this Court applied the modern subjective standard which asks the question:

"Did the threats or coercive acts put one entering into the transaction in such fear as to preclude the exercise by him of free will and judgment? Age, sex, capacity, relation of the parties, attendant circumstances must all be considered. Persons of a weak or cowardly nature are the very ones that need protection. The courageous can usually take care of themselves." 227 P.2d at 766.

Appellants' argument confuses the old objective standard with the modern subjective standard articulated by this Court. Probing a person's actual state of mind is purely subjective and at best can only be analyzed by reference to objective and visible signs such as are noted above. Chief Justice Wolfe, concurring, alerted the Court to the inevitable dangers of a subjective approach:

"I see merit in the so-called modern rule that any threat which actually puts the victim in such fear as to compel him to act against his will constitutes duress but it reaches which ramify into the realm of psychology and, in its practical application, may encounter difficulties of discernment between the sly and the timid. The brash and robust mind may easily later on take a sensitive hue. 'The devil a monk would be' if it might aid recovery." 227 P.2d at 768.

This is precisely the approach now taken by Appellants. In order to resolve financial problems of their own making, Gassers arranged their agreement with Hornes so that Gassers

could purchase the entire mobile park and take home \$94,000.00 in cash. Gassers, now pointing to their new sensitive natures, claim rescission when the transaction did not work out as anticipated by them.

However, the Court in Fox, realizing this danger of the modern, subjective form of analysis which they adopted, provided a caveat:

"We approve this modern rule. It is obvious that applying this subjective test might theoretically degenerate to a point where a person desiring to avoid a contract might claim that practically any conduct of another put him in fear and overcame his will. It is necessary that there be some objective standard for determining when duress has been practiced. It must appear that the threat or act is of such a nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person, Ellison v. Pingree, supra. 17 Am. Jur. 885, note 15 and authorities there cited.

"Notwithstanding the fact that we approve this modern and liberal rule as a test of whether or not duress has been practiced, under all the authorities, ancient and modern, the act or threat constituting duress must be wrongful." [Emphasis added] 227 P.2d at 766.

In essence, this Court designed a three-prong test: the acts complained of must constitute reasonable and adequate cause to control the will of the complainant; the acts must actually put the complaining victim in such fear as to compel actions against his will; and the acts must be wrongful.

In Ellison v. Pingree, supra, this Court was asked to review facts similar to the instant case. Pingree's company, the Ogden Packing and Provisions Company, incurred heavy financial losses and was unable to pay Chicago creditors.

Security was demanded by these creditors and they threatened Pingree with civil and criminal actions for fraud and actions against the company for its indebtedness. In March, after a week of negotiations, Pingree agreed to deliver personally secured notes for the indebtedness. However, a few months later Pingree suggested modifications of the agreement which were opposed by the creditors. Threats of criminal prosecution were reiterated. In June, Pingree signed an agreement to secure obligations of \$250,000.00. At all times Pingree was represented by and consulted with his attorney. His counsel advised him not to sign the agreement; but when told by Pingree that he must, the attorney tried to get for him the best deal possible by suggesting modifications in the terms of the contracts. Later, Pingree sued to rescind the agreement, claiming that the same was without consideration and was obtained by duress.

The court analyzed the age, financial condition of the plaintiff, the relative positions of the parties and other surrounding circumstances of the transaction. Since the plaintiff was a wealthy businessman of varied experience and during all the negotiations had the benefit of legal counsel, the court indicated there was no duress involved. Furthermore, the court stated that Pingree, in a large measure, had dictated the terms of the agreements and was largely benefited by being released from a prior contract. Regarding duress, the court stated:

"'. . . duress will not ordinarily invalidate a contract entered into after opportunity for deliberate action. Duress by mere advice, direction, influence, and persuasion is not recognized in law. Nor can a charge of legal duress be based on mere vexation and annoyance, mere pecuniary distress, a threat to injure one's credit, or the refusal to surrender property on which one has a lien.'

. . .

"A person in his right mind and in full control of his faculties, who understands what he is doing and who has full power to enter into a legal transaction or to refuse to do so, does not act under duress if he enters into such transaction.'" 64 Utah at 476-477.

There is no duress when Appellants are free to come and go and to consult with counsel. Ellison v. Pingree, supra; Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885 (3d Cir., 1975); Palatucci v. Woodland, 166 Pa. Super. 315, 70 A.2d 674 (1950), and cases cited therein.

Again, in Ellison, the court commented on the allegation of lack of consideration in urging the claim of duress:

"It would be a needless task to undertake to point out why the contention is untenable. The mere fact that Mr. Pingree not only had a pecuniary interest, but a very large pecuniary interest in maintaining the credit and integrity of the company, was one sufficient consideration for the contracts." 64 Utah at 478.

In Reliable Furniture v. Fidelity and Guaranty Insurance Underwriters, Inc., supra, this Court, applying the law of Fox and Ellison, reversed the trial court's summary judgment and remanded the case for a decision on the evidence. This Court stated the general rule that the fact one is in financial need inducing him to accept a settlement will not, of itself, provide a basis for relief. 398 P.2d at 687. However, as

quoted by Appellants, since the plaintiff also claimed fraud by the insurance company, the court could not find, as a matter of law, that there was no duress. At trial, the lower court dismissed plaintiff's case after hearing the evidence. This Court affirmed, stating that there was insufficient evidence of fraud or duress. Reliable Furniture v. American Home Assurance Co., supra. The plaintiff could not claim fraud and duress after he had cashed the insurance checks and accepted the benefits of the agreement. There exists the same situation in the instant case. Not only did Gassers accept the benefit of the agreement, but they also ended up with a cash payment to them of \$94,000.00 from the proceeds of the loan.

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS A JURY TRIAL.

Appellants' argument that they were entitled to a jury trial is equally without merit. For purposes of seeking this Court's review of the trial court's findings, Appellants suggest this case is an action in equity. But when they come to discuss the alleged deprivation of their "rights" to a jury trial, Appellants would have us treat this case as an action at law.

The case was originally set for non-jury trial on October 11, 1974. How the case was set on the jury calendar Respondents and the lower court were unable to determine.

Contrary to the suggestion of Appellants, both parties did not "expect a jury trial." Certainly Respondents entertained no such expectation and when it was learned that Appellants had apparently requested a jury (without any notice to Respondents) moved to strike the case from the jury calendar. (R. 214-215) Respondents' motion to strike was granted. (R. 218, 220)

(1) Appellants' brief states the nature of the case to be an action to declare a contract and agreement null and void; that the suit was brought to rescind that agreement and to cancel a deed in escrow. (R. 1-2) An action to cancel an instrument or rescind a contract for fraud or duress is an equitable action and does not entitle a party to trial by jury. Johnson v. Johnson, 9 U.2d 40, 337 P.2d 420 (1959); Summers v. Martin, 77 Ida. 469, 295 P.2d 265 (1956); Goodson v. Smith, 69 Wyo. 439, 243 P.2d 163 (1952), reh. den. 244 P.2d 805; Liles v. Bigpond, 190 Okla. 112, 121 P.2d 596 (1942), and numerous authorities cited by these courts. In Goodson, a deed was already placed in escrow and the defendants counter-claimed for specific performance. In Bigpond, the Oklahoma court interpreted a statute very similar to §78-21-1, Utah Code Annotated (1953), and held it inapplicable to an action for rescission or cancellation of an agreement to convey.

This is not an action to recover the possession of real property within the purview of §78-21-1, U.C.A. (1953). The decisions of this Court are certainly dispositive of the issue. In Johnson, this Court held that a suit to declare certain

instruments void for reason of duress or undue influence was properly characterized by the trial court as an action in equity and, therefore, no jury trial. A review of Appellants' complaint shows that the issues raised are wholly and purely equitable in nature. And, only recently, this Court stated that when the principal thrust of a case is equitable, to-wit: specific performance (Respondents' requested relief), the lower court properly denied a trial by jury. Bradshaw v. Kershaw, 529 P.2d 803 (Utah, 1974).

At the time of trial Appellants did not make any demand to the court that the case be tried to a jury. Rather, Appellants' counsel sought to characterize the action as one for injunctive relief (R. 1-2); "to retain the status quo" (T. 97)--further indication that the issues presented are equitable. See, also, Sweeney v. Happy Valley, Inc., 18 U.2d 113, 417 P.2d 126 (1966).

(2) Appellants failed to make proper demand for a jury trial under the requirements of Rule 38(b), Utah Rules of Civil Procedure, and the then local rule, Rule 15, Rules of Practice in the Third Judicial District Court. Both rules require written demand and Rule 38(b) requires that the written demand be served on the opposing party. As admitted by Appellants, the record reveals that no written demand was filed nor ever served on Respondents. Yet the failing party begs excuse, crying that since Respondents later learned of a "jury demand," no harm was done. After all, Appellants

claim, following the requirements of the rules is not important. This Court has previously been acquainted with the failure of these Appellants to follow the requirements of the Utah Rules of Civil Procedure and then later beg this Court's indulgence. Rule 38(b) states that demand must be served on Respondents in writing. Substantial performance cannot be accomplished by merely paying the requisite jury fee and hoping the opposing party learns about it sometime in the future.

The trial court has discretion to permit or deny trial by jury, particularly when demand was improper. The denial of a jury trial when demand is improper is not an abuse of discretion. Sweeney v. Happy Valley, Inc., supra; James Manufacturing Co. v. Wilson, 15 U.2d 210, 390 P.2d 127 (1964), and cases cited therein. The trial court did not abuse its discretion when, after hearing arguments of counsel and considering the authoritative cases from this Court, it granted Respondents' motion to strike from the jury calendar. (R. 218)

In asking this Court to remand this case for a jury trial, Appellants are raising an issue not raised at trial or after trial. The Supreme Court cannot look dehors the record on appeal and consider facts which are stated in a brief but are absent from the record. Cooper v. Foersters Underwriters Inc., 123 Utah 215, 257 P.2d 540 (1953). It is the responsibility of Appellants to see that all matters essential to a decision

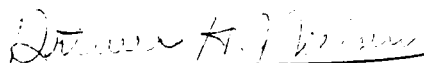
of a question be properly included in the record on appeal. All the record in this matter shows is the absence of a proper demand for jury trial and Respondents' motion and the court's order striking the matter from the jury calendar. Appellants were therefore not entitled to a jury trial and may not raise this issue on appeal.

CONCLUSION

The findings and judgment of the lower court are substantially supported by the evidence and should be affirmed. Respondents have been and continue to be liable to American Savings & Loan and are entitled to an undivided 50% interest in the Hill Gate Mobile Home Park. Appellants voluntarily entered into a valid agreement with Respondents, supported by sufficient and valuable consideration, and were not induced by duress, coercion or any other improper or wrongful conduct.

The trial court properly denied Appellants a jury trial since Appellants were not entitled thereto and totally failed to comply with the provisions of Rule 38(b) in attempting to secure one.

Respondents Horne respectfully submit that the judgment and decree of the trial court be affirmed.


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CERTIFICATE OF MAILING

SERVED the foregoing Brief of Respondent by delivering two copies thereof, personally, to Donald B. Allen, Attorney for Plaintiffs, Deseret Building, Salt Lake City, Utah 84111, two copies to Ralph J. Marsh, Attorney pro se, 61 South Main Street, Salt Lake City, Utah 84111, and two copies to Alma J. Boyce, Attorney for Third-Party Defendant American Savings & Loan, 61 South Main Street, Salt Lake City, Utah 84111, this _____ day of July, 1976.
