

1941

# John Christy and Kathryn E. Christy v. Edward L. Guild and Mabel C. Guild : Abstract of Record

Utah Supreme Court

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J. D. Skeen; E. J. Skeen; Attorneys for Defendants and Appellants;

H. G. Metos; Chris Mathison; Attorneys for Plaintiffs and Respondents;

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No. 6320

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In  
The Supreme Court  
of the  
State of Utah

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JOHN CHRISTY and KATHRYN  
E. CHRISTY, Husband and Wife,  
Plaintiffs and Respondents,  
vs.

EDWARD L. GUILD and MABEL  
C. GUILD, Husband and Wife,  
Defendants and Appellants

---

Appeal From Third District Court, Salt Lake County  
Hon. Oscar W. McConkie, Judge

---

**ABSTRACT OF RECORD**

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J. D. SKEEN,  
E. J. SKEEN,  
Attorneys for Defendants  
and Appellants.

H. G. METOS,  
CHRIS MATHISON,  
Attorneys for Plaintiffs  
and Respondents.

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**FILED**

JAN 16 1941

## INDEX

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Assignments of Error .....	36-38
Answer of Defendants .....	8-11
Amendment to Complaint .....	8
Bill of Exceptions .....	11-35
Complaint .....	1-8
Exhibit A .....	4-6
Exhibit B .....	7
Judgment on Verdict .....	34-35
Motion for Time Denied, Etc. ....	33
Motion to Strike, Etc. ....	26
Offers to Pay Contract .....	23
Order .....	32-33
Verdict .....	34

## TESTIMONY

Barclay, L. J. ....	22
Bradshaw, Clyde .....	12
Christy, Kathryn .....	12
Cross Examination .....	12-15, 16, 26
Re-Direct Examination .....	15, 26
Rebuttal .....	25-26
Guild, Edward L. ....	16-18
Cross Examination .....	18-19, 25
Re-Direct Examination .....	20, 25
Re-Cross Examination .....	20
Recalled .....	22-24
Guild, Mabel .....	21
Cross Examination .....	21
Re-Direct Examination .....	21-22
Powell, Parley .....	22

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**ABSTRACT OF RECORD**  
**COMPLAINT**

(TITLE OF COURT AND CAUSE).

30 Come now the above named plaintiffs and for  
cause of action against the above named de-  
fendants, complain and allege:

1.

That the defendants are residents of Salt Lake  
City, Salt Lake County, State of Utah.

2.

That on or about the 24th day of January, 1935,  
the plaintiffs entered into a written agreement

with the defendants, wherein and whereby the plaintiffs, as sellers, agreed to sell, and the defendants, as purchasers, agreed to buy from the plaintiffs, the real estate hereinafter described in Exhibits A and B for the sum of \$3200.00, upon payment of certain monthly installments, as stated and set forth in said contract, and, pursuant to said contract, the defendants entered into possession of said premises and still continue to hold and occupy the same. That it is provided in said contract, among other things, that said defendants would place and build certain permanent improvements to the building located thereon, to-wit: To build, at defendants' cost between February 1, 1935, and January 31, 1936, a porch to the front of said building on said premises, with concrete foundation and fire brick, covering the full width of the building, and also remodel and plaster with California stucco the porch in the rear of said building, and it was further agreed between said parties, and set forth in said contract, that said defendants would pay the monthly installments therein stipulated; all taxes and assessments against said property, and keep the said premises insured against fire in the sum of \$3000.00 for the benefit of the plaintiffs and to pay the premiums for said fire insurance; and it was further provided in said contract that if the defendants failed to perform the matters and things above mentioned or fail to make the payments therein stated and failed to pay the taxes and assessments against said premises and the fire insurance premiums, that plaintiffs, at

their option and election, could terminate said contract and that the plaintiffs would be released from further liability or obligations thereunder and that the defendants would forfeit all their interest and rights to said premises to the plaintiffs and would deliver the possession of same to the plaintiffs.

## 3.

That on or about the 30th day of April, 1940, the plaintiffs served upon the defendants, and each of them, a notice in writing, terminating said contract for failure on the part of said defendants to perform said agreements in the particulars set forth in Exhibit A, hereto attached and made a part hereof.

## 4.

That the defendants have failed to perform the matters or pay the items mentioned in said Exhibit A, and plaintiffs, on or about the 6th day of May, 1940, served upon the said defendants, and each of them, a notice in writing demanding the delivery of said premises to the plaintiffs, which notice is hereby referred to as Exhibit B, and attached hereto and made a part hereof.

## 5.

That the plaintiffs are entitled to the immediate possession of said premises.

## 6.

That the defendants have failed, refused and neglected to surrender said premises and still continue in possession thereof and still refuse to surrender the same to the plaintiffs. That

the monthly value of the rents and profits of said premises is the reasonable sum of \$75.00.

WHEREFORE, plaintiffs pray judgment against the defendants, and each of them, as follows:

1.

For the restitution of said premises and damages for the rents and profits of said premises in the reasonable sum of \$75.00 per month.

2.

That said damages be trebled for the occupation and unlawful detention and holding over of the same by the said defendants, amounting to the sum of \$225.00 per month, beginning with the 23rd day of May, 1940.

3.

For costs of this action.

H. G. METOS,  
Attorney for Plaintiffs.

Filed May 23, 1940.

EXHIBIT A

To Edward L. Guild, and Mabel C. Guild, his wife, 128 South 10th East Street, Salt Lake City, Utah:

Dear Sir and Madam:

- 34 You Are Notified that John Christy and Kathryn E. Christy, the Sellers named in that certain contract made and executed by you as Buyers, bearing date January 24, 1935, hereby terminate said contract by reason of your failure to make the monthly payments, totalling the sum of \$130.00, which monthly payments, under the terms of said contract, you agreed

to make; and also for your failure to pay the taxes and insurance on the property purchased by you; and also for your failure to place upon the building located on said premises herein-after described the following permanent improvements, towit:

A porch to the front of said building on said premises with concrete foundation and fire brick, covering the full width of the building; and also because of your failure to remodel and plaster with California stucco the porch on the rear of said building on said premises.

You are now in default in the monthly payments, which, under the terms and conditions of said contract, were due on the 1st days of January, February, March, and April, 1940, in the sum of \$30.00 per month, and a balance of \$10.00 for the month of December, 1939, aggregating a total sum of \$130.00.

And you are further in default in the payment of taxes for the year 1935 in the sum of \$84.37, and for the taxes for the year 1936 in the sum of \$99.32, totalling the amount of \$183.69, which taxes have been paid by the Sellers; and you are further in default for your failure to pay the taxes for the year 1938, which, up to November 21, 1939, amount to the sum of \$100.01.

You have further failed to pay the insurance on said premises amounting to the sum of \$13.50, which insurance has been paid by the Sellers, and that said advances and monthly payments in default, pursuant to the terms of said contract carry interest at the rate of 10 percent per annum.

You Are Hereby Further Notified that unless you pay the entire amount of \$130.00 now due,



as aforesaid, on said contract, and the sum of \$183,69 paid by the Sellers for taxes, and \$13.50 for insurance, together with interest at the rate of 10 percent per annum, and also pay the sum of \$100.01 taxes for the year 1938, which are still unpaid, and make the permanent improvements, as aforesaid, on or before the 12th day of May, 1940, you will, in accordance with the provisions of said contract, and by the election of said Sellers, forfeit as liquidated damages all payments heretofore made by you on said contract and will become a tenant at will of the said John Christy and Kathryn E. Christy of the real property hereinafter described, situate in Salt Lake County, State of Utah, towit:

Commencing 79 feet West from the Northeast corner of Lot 6, Block 29, Plat F, Salt Lake City Survey, and running thence West 43 feet; thence South 125 feet; thence East 43 feet; thence North 125 feet to the place of beginning.

Together with a right of way: Beginning 2 rods West and 125 feet South of the Northeast corner of said Lot 6, and running West 132 feet; thence South 10 feet; thence East 132 feet; thence North 10 feet to the place of beginning.

I am authorized and directed by said John Christy and Kathryn E. Christy to give you this notice.

Dated this 30th day of April, 1940.

(Signed) H. G. METOS,

Attorney for John Christy  
and Kathryn E. Christy,  
404 Boston Building, Salt Lake City, Utah.

## EXHIBIT B.

## NOTICE TO QUIT

To Edward L. Guild and Mabel C. Guild, his wife, 128 South Tenth East Street, Salt Lake City, Utah.

Within five (5) days after service of this notice upon you, you, and each of you, are hereby notified and required to deliver up and surrender to the undersigned owners, the premises hereinafter described and, if you fail so to do, legal proceedings will be instituted against you to recover possession of the premises and for three times the damages sustained. Said premises are situated in Salt Lake County, Utah, and are commonly known and described as follows, to-wit:

Commencing 79 feet West from the Northeast corner of Lot 6, Block 29, Plat F, Salt Lake City Survey, and running thence West 43 feet; thence South 125 feet; thence East 43 feet; thence North 125 feet to the place of beginning.

Together with a right of way: Beginning 2 rods West and 125 feet South of the Northeast corner of said Lot 6, and running West 132 feet; thence South 10 feet; thence East 132 feet; thence North 10 feet to the place of beginning.

Dated this 15th day of May, 1940.

JOHN CHRISTY,  
KATHRYN E. CHRISTY.

Owners.

By H. G. METOS,  
Attorney for said Owners.  
404 Boston Building,  
Salt Lake City, Utah.

## AMENDMENT TO COMPLAINT

(TITLE OF COURT AND CAUSE).

- 18 Come now the above named plaintiffs and, after leave of court first had and obtained, file by interlineation to paragraph 2 of plaintiffs' complaint Exhibit 1, hereto attached and made a part of said complaint on file herein.

H. G. METOS,  
Attorney for Plaintiffs.

(Attached exhibit is a copy of the Lease and Sales Agreement, Exhibit A in evidence).

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ANSWER

(TITLE OF COURT AND CAUSE).

- 12 Come now the defendants above named and make answer to the complaint herein which said answer is filed at the same time as the demurrer filed herein and without waiving the said demurrer:

1.

Admit the allegations of paragraph number one.

2.

Admit that plaintiffs and defendants entered into a contract for the sale of premises located in Salt Lake County, State of Utah on or about the 24th day of January, 1935 and that these

defendants entered into possession of said property.

### 3.

Admit that by the terms of the said contract, these defendants agreed to make improvements of the said property and in this connection these defendants allege that they made improvements to the said property to the approximate cost and value of \$2,000.00 and allege further that some of the improvements specified in the contract to be made by these defendants were, after further consideration by all of the parties to the said contract, considered undesirable and the said plaintiffs waived all provisions of the said contract with respect to the undesirable improvements.

These defendants admit that said contract contained provisions for the forfeiture of all payments for failure to comply with the terms of the said agreement and in this connection allege that strict performance of the said contract was expressly, and, by the acts of the parties, waived and these defendants made forty-nine payments upon the said contract from March 16, 1935 to March 31, 1940 in various amounts aggregating a total of \$1647.67, and on the 21st day of November, 1939 the parties to the said contract made a computation of all payments made upon the said contract, all payments which had then matured and all charges of every character by the plaintiffs against the defendants and determined that there was then due on back payments, interest and taxes including the 1938 taxes and lumber purchased and used in making improvements upon the said building the sum of \$485.82 and on said date, these defend-

ants executed and delivered to the plaintiff their negotiable promissory note for the said sum of \$485.82, payable in installments of \$35 per month which said negotiable promissory note the said plaintiffs hold or have negotiated and these defendants have made payments on account of said note.

These defendants further allege that they paid to plaintiffs the sum of \$80.00 on or about the 31st day of March, 1940 and that before the institution of this suit they tendered to the said plaintiffs the total amount due upon said contract, exclusive of the said note, to wit: the sum of \$130.00; that they have kept said tender good and now offer to make all payments due upon the said contract to the clerk of this court and to fully comply with the terms and conditions of the said contract.

4.

These defendants deny the allegations of paragraph number three, except they admit that the plaintiffs served upon them a notice demanding the payment of sums of money largely in excess of the amount due upon the said contract and the doing of other things which these defendants were not required by said contract and the modifications thereof to do or to perform and these defendants deny that the said notice terminated the said contract.

5.

These defendants deny the allegations of paragraph number four and allege the tender of all money due upon the said contract and the per-

formance of all the terms and conditions thereof.

6.

These defendants deny the allegations of paragraph number five.

7.

These defendants admit that they have refused to surrender the premises to the plaintiffs and allege that they have a legal right to retain possession of the same.

WHEREFORE, defendants pray that plaintiffs take nothing by their said complaint and that the defendants have their costs herein expended.

J. D. SKEEN,  
E. J. SKEEN,  
Attorneys for Defendants.

Duly verified.  
Filed June 7, 1940.

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## BILL OF EXCEPTIONS

(TITLE OF COURT AND CAUSE).

- 56 It is stipulated that Exhibit A, the Lease and  
Sales Agreement; Exhibit B, the Notice to  
Quit; Exhibit C, Notice; Exhibit D, a letter  
from H. G. Metos to J. D. Skeen and Exhibit 1,  
58 a sheet showing endorsement of payments,  
might be received in evidence.

It as stipulated further that the payment  
sheet, Exhibit 1, shows the time and amounts of

payments, but it was not stipulated that those were the only payments made.

- 62 The note, Exhibit 2, was offered and received in evidence. Thereupon

CLYDE BRADSHAW testified for the plaintiffs as follows:

- 64 A real estate broker. The premises located at 1026 East 1st South of the reasonable rental value of \$75.00 a month after deductions of insurance and taxes.

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KATHRYN CHRISTY testified for the plaintiffs as follows:

- Resides at Woods Cross, Utah and is one of the plaintiffs in the case. Wife of John Christy, the other plaintiff. The defendants are delinquent \$10.00 for the month of December, 1939
- 66 and no payments have been made in 1940. \$30.00 was due on the 1st day of January, 1940 and the first day of each month thereafter. The defendants bought the place in January, 1935 and paid only one year's taxes. The defendants are behind on the items appearing in paragraphs 2, 3, 4, and 5 of Exhibit B.

#### CROSS-EXAMINATION:

- 70 I handled the accounts involved in the contract. The handwriting appearing on the bottom of Exhibit 3 is that of Mr. Harry Metos who was our attorney authorized to receive money and issue receipts. He received \$70.00 on February 14, 1940. Exhibit 3 being a receipt, read to the court and jury. The words "applied on note"



appearing on Exhibit 3 had reference to the agreement "Exhibit 2." Witness referred to it as an agreement and said it had never been called a note.

I was a witness in the lower court and produced the paper, defendants' Exhibit 2. The instrument was kept at home and in the lawyer's office. It was made out by Mr. Metos and retained in his possession until the case was tried in the lower court. My handwriting appears on the second sheet at the top "\$255.82 note and interest up to date." \$130.00 for back taxes and insurance — lumber. \$100.00, 1938 tax.

78 I collected some money on the note. \$54.00 applied on principal and \$16.00 on taxes. (note read to jury).

The notation "\$8.00 to be taken from this payment each month for the 1940 tax" is in my handwriting. It was written in the presence of Mr. and Mrs. Guild before the note was signed. The other notations on the second page were written at the same time.

Q. This first item says: "Note and interest." Had you taken a note before this time?

84 A. No, I don't think so.

Q. Is it not a fact that you paid the 1935 and '36 taxes, and then took a note from the Guilds as evidence of your payment?

A. No; we put it on their contract. We borrowed the money and paid the taxes for them. They promised to pay us back on installments.

Q. Did you take a note also?

Objection by attorney for plaintiff.

The Guilds agreed to pay so much a month for the 1940 tax. They agreed to pay \$35.00 a



month on the back taxes. It was admitted by Mr. Metos that there were no other contractual relations between parties and that the obligation for lumber and taxes grew out of the real estate contract in question.

- 91 The two instruments, Exhibit A and the note, defendants' Exhibit 2 are the only two papers we hold against the Guilds. The endorsements on the back of Exhibit 2 refers to the back taxes on the property covered by the contract. I made the notation of them there so we could keep them straight.

Attention of witness called to Exhibit 4. The words: "Balance on contract — \$2160.29. Note \$237.82 — In. \$15.92 — \$253.74" means Guild made a payment on the back taxes. \$255.82 of the note, Exhibit 2 was for back taxes and insurance. It had reference to the contract, Exhibit A. Mr. Guild wanted to get lumber to finish one of his apartments and we stood good for his lumber bill and he promised to pay back so much a month on the lumber bill. That is the meaning of \$130.00 lumber." The next item, \$100.00 — 1938 tax covers 1938 taxes on the property described in the contract which Mr. Guild promised to pay. The 1938 tax is still unpaid. The note covered the \$100.00 item.

Q. So you took the note and then you wanted more interest too, didn't you, because of these items being in default so you changed them to ten percent interest on that?

- 99 A. When you are back on taxes they charge you ten percent interest on back taxes, and he agreed to pay ten percent, the same as he would

have to pay so we wrote the note for ten percent interest, covering the whole amount.

Mr. Guild went out to our place at Bountiful and made a payment some time in the spring of 1940. The payment was \$80.00. I don't recall whether it was March 31st. If another payment of some \$25.00 was made earlier in March in Salt Lake City, it would be on the contract. Doesn't recall whether she received a \$10.00 payment and a check for \$9.00 after March 1, 1940. All those payments were applied to his back lumber bill, the \$130.00 item mentioned on the note. Mr. Guild was supposed to pay \$25.00 a month on his lumber, \$5.00 to Morrison-Merrill and \$20.00 to Ketchums. It was all included in the note for \$485.82. I have a record of payments made on the note at home.

#### RE-DIRECT EXAMINATION:

- 103 I took possession of the premises involved in this suit on July 10, 1940, and have had possession since that time. After I gave Mr. Guild the note, Exhibit 2, he had it in his possession for about a week and said he would take it to his attorney to look over.

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MRS. KATHRYN CHRISTY recalled.

#### DIRECT EXAMINATION:

- 105 Mr. Guild told me he had lost his contract and the note, Exhibit 2, was made out in order that we could keep the back taxes and things straight.

## CROSS-EXAMINATION:

It was agreed that the items of taxes, lumber, and insurance should be put in a paper which Mr. Metos was to draw up. We added up the back taxes and so forth on the contract and they came to the total amount of \$485.82. We took the note to Mr. Guild at his home, and when we presented it he insisted that I write the items that he owed on the note and it was agreed that he should pay the delinquent items at the rate of \$35.00 per month. Mr. Guild was supposed to pay \$35.00 on the note and in addition \$30.00 on the contract of sale.

---

EDWARD L. GUILD testified on behalf of the defendants, as follows:

## DIRECT EXAMINATION:

- 110 I am one of the defendants and a party to the contract with John Christy and Kathryn Christy. The contract called for a porch on the front of the premises, a concrete foundation and fire brick. After the contract was made, I would say August or September, 1935, John Christy came to receive a payment, I said: "John, now we are going to make an apartment house out of it. It seems to be the style that they are doing away with porches in the front of apartment houses." He agreed with me and said, "That is right." Mrs. Christy was there and she said that they are not now putting porches on in front of apartment houses. We told them what we intended to do was to make a small porch at the entrance, but not the complete porch as we had agreed on in

the first place. We did not do anything with the porch. Later we talked to Mrs. Christy about the rear of the house, probably two years later, I would say in the last of 1937, at the house. John Christy came to collect and I told him that I was going to stucco and that I was going to get some flooring, which I did. There was about one thousand feet of flooring put on the rear instead of stucco. He sanctioned that. He did make the remark: "You ought to have it painted." Neither Christy or his wife ever made a complaint about making either of these improvements or about our failure to make the improvements called for in the contract. They complimented me on doing the work inside, they never asked me to do the work on the outside.

117 Q. About how much money did you spend in making the improvements on the inside?

MR. METOS: I object to that Your Honor, on the ground it is incompetent, irrelevant and immaterial, not within any issue in this case. What difference does it make how much he spent inside? It was not in the contract.

MR. SKEEN: It is a matter of equitable consideration.

MR. METOS: There are no equitable considerations in this case.

THE COURT: The objection is sustained.

We made a payment to Mrs. Christy of \$40.00 in March, 1940. I do not know how it was credited. I understood her to say she put it on the note. We made an \$80.00 payment on March 31st, that was paid on the contract. Before that, we made, I believe, it was a \$70.00 payment on the note. We made a \$19.00 pay-

ment at the house that was credited on the note. I believe it was in February. I was owing Mr. Christy one note on the '35 and '36 taxes. He had taken a note. He said he wanted it to draw 10 percent interest while the contract was only drawing 5 percent interest. Mr. Christy came  
 119 in the house and said, "I want to make out another note. We will figure out all you are owing on taxes, insurance and lumber bill." My wife and his wife sat down at one end of the table, and figured it all up, and I sat at the other end of the table. He demanded that I should make out the note. We argued a while and then the Christys said: "We will go and get our attorney and talk it over with him."

They brought back a note and I hesitated about signing it. He left it three or four days. When they came back, my wife and I signed it. The notations on Exhibit 2 were written by Mrs. Christy. I asked Mr. Christy if he would give me the money or pay the bill, he said: "I will pay it." Then I said, "You write on this bill what you are going to pay with that." That is why they wrote it on there, how much they are going to pay, so much on taxes, and so much on lumber bill.

120 I never requested or demanded that a paper be written incorporating these items. We did not lose the contract. Mr. Christy approached me about the note drawing ten percent. He said, "We will draw up these items and get the taxes paid and there will be nothing against the contract."

### CROSS-EXAMINATION:

The county charges 2 percent penalty on delinquent taxes and 8 percent interest. The

Christys never asked me to build the front porch or stucco the back. I didn't know they wanted it done until I read it in the complaint and summons. I also read about it in the notice. They never did say anything about the improvements only when I mentioned it first. A man came up to the house about stuccoing, but he didn't mention the porch. I don't know who sent him. About the same time this suit was started I received \$1236.00 from the Industrial Commission. Mr. Barclay represented me.

I am acquainted with Curtis E. Guild and Fern Guild Hogan and on March 27, 1940 we made an assignment of this contract to them and recorded the assignment. I assigned all of my right, title and interest in the contract to them and they are still the owners of it. Curtis E. Guild is my son and the other party is my daughter. This contract is now in their names. I am still interested in the present contract because they agreed they would not take it over until it was all settled. I made a straight out assignment of the contract to them.

The Christys stood good for \$130.00 worth of lumber through the note. I paid the 1937 taxes and the 1938 taxes are still owing. I paid money to Mrs. Christy for the 1938 tax, I don't know whether she paid them or not. Before I signed the agreement, Exhibit 2, I consulted with an attorney. I knew there is a statement in the note to the effect that it does not alter or modify any of the conditions of the contract, but is for money loaned. Mr. Christy wanted the note because it would draw 10 percent interest.

On April 31st, leaving the note business aside, I was \$130 behind under the contract. I sent



through my attorney, \$130.00 on May 20th. According to the notice there was \$130.00 due.

#### RE-DIRECT EXAMINATION:

- 132 Referring to the part of the note in which it is said that the consideration for the note consisted of money loaned, the witness was asked whether Christy advanced any cash. He answered "No."

I asked Mr. Christy to let me have the cash and I would go and pay the taxes and lumber bill, and he said "No, I will pay them, but I will take your note with ten percent interest." The note, Exhibit 2, has never been offered back to me, at the time the notice was served or at any other time. I first saw it after it was signed on November 21, 1939 in the court room.

The item, \$255.82 note and interest up to date, refers back to the 1935 and 1936 taxes. I did previously give Mr. Christy a note covering those items and have never received it back.

#### RE-CROSS EXAMINATION:

- 134 I did not pay anything on the first note. I don't remember ever seeing the note, Exhibit 2, until in the court room. I remember going to your office with Mr. Haas to tender you some money. I paid you some money then and made two payments since.

#### RE-DIRECT EXAMINATION:

One of the payments I had reference to was the \$70.00 payment. I would say that I have paid approximately \$95.00 on the note.

MABEL GUILD called as witness for the defendants:

136 I am a party defendant to the contract of purchase and one of the defendants in the suit. Within a year after the contract was made I participated in and heard a conversation with respect to the building of a porch in front. The parties present were my husband, myself and Mr. and Mrs. Christy. We discussed putting the porch on and asked them what they thought about it. They said they would rather have us concentrate on the inside so that we would be bringing in more money, and forget about the porch at the time. We asked them if they thought porches were going out of style and they said they believed they were. Mr. Christy said, "Forget about the porch now. It is not necessary. We would like to get the inside fixed up so you can make more money out of it, and bring more in."

138 I also heard a conversation with respect to the stucco work at the rear of the house after my husband had put lumber on the back instead of stucco. We took Mr. and Mrs. Christy around to look at it and they said that it was all right and that it was satisfactory.

#### CROSS-EXAMINATION:

We had a conversation about the stucco on the rear a short time after the lumber was put on the back, between two and three years ago. The back is completed with exception of painting.

#### RE-DIRECT EXAMINATION:

Until the notices were served, Mr. and Mrs. Christy never demanded that we do anything



with respect to the front or the back of the house.

---

L. J. BARCLAY, called as a witness for plaintiffs:

- 141 After stating his name and that he was once an attorney for the defendants and was asked about a transaction between him and the defendants, objections were interposed on the ground of a privileged communication. Objection was sustained and witness excused.
- 

PARLEY POWELL testified on behalf of the plaintiffs as follows:

- 142 I live at Bountiful and I am a plasterer and I am acquainted with Mr. Christy and have seen the defendant, Mr. Guild. I have been to the premises at 1026 East 1st South two or three times, at Mr. Christy's request. I have seen Mr. Guild only once, about one year ago. I looked over the stucco job and gave Mr. Guild an estimate and he said I will see you about it later.
- 

EDWARD L. GUILD recalled.

- 145 I was in the City Court when this case was tried.

The following question was then asked: "I will ask you to state whether or not an offer to make accruing installment payments on the

contract was made, and if so, what the offer was?"

MR. METOS: We object to that, immaterial, irrelevant and incompetent.

149 THE COURT: Objection sustained.

### OFFERS TO PAY CONTRACT

The following offer of proof was made by the defendants:

150 "Come now the defendants, and with the defendant Edward L. Guild on the witness stand, duly sworn to testify in the case, and offer to show by this witness that after the execution of the contract on January 24, 1935, with the knowledge, consent and approval of the plaintiff he caused the building upon the premises to be divided into four apartments, that he constructed two additional bathrooms, he installed bathroom fixtures, and made other necessary interior changes to make it suitable for the occupation of four tenants, at an expense to him of two thousand dollars."

154 Mr. Guild testified that he put \$140.00 in the bathroom on the main floor, including fixtures and all improvements. Objection to the tender sustained.

The defendants made the following offer:

"We now offer to pay, that is, the defendants now offer to pay to the plaintiffs the full balance of the contract price of this property, described in the complaint, in lawful money of the United States, upon preparation and delivery of an abstract of title showing marketable title to the property, and upon cancellation and delivery to the defendants of the note which has

been offered and received in evidence as Exhibit 2, and upon satisfaction and discharge of all obligations accruing out of the contract of purchase, in accordance with the terms of the contract.”

THE COURT: You will pay out on the contract as the contract originally provided?

MR. SKEEN: Yes, except we accelerate the payments, any due payments on the contract,  
157 we offer to pay in money the full balance due on the contract.

THE COURT: Now, Mr. Metos, if the offer were sufficient to save you harmless and reimburse you for your costs and attorney’s fees, so your client would be free from any additional expense, would you then consider a settlement?

158 MR. METOS: I would consider it as a settlement — not that he was entitled to it in this case, but would be willing, as a matter of settlement, if he will pay the attorney’s fees, court costs, and pay off the contract.

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EDWARD L. GUILD recalled.

#### DIRECT EXAMINATION:

The first five lines of proposed Exhibit 5 are in the handwriting of Mrs. Christy. It has reference to the 1935 and ’36 taxes. The handwriting on proposed Exhibit 4 is Mrs. Christy’s. The notation “Note \$237.82 & In. \$15.92” refers to the note given for the 1935 and ’36 taxes. The notation on Exhibit 2, “\$255.82 Note & interest up to date. For back tax and insurance” refers to the note mentioned on Exhibit 5. I have never received the first note back.

**CROSS-EXAMINATION:**

- 161 My wife and I never lived on the premises involved in suit. We rented them for about \$125.00 a month when the apartments were full. We figured we would clear about \$75.00 a month. I have worked in Bingham, but my work has not been steady. In 1939 Mr. and Mrs. Christy said they were willing to discount the contract \$150.00 if we paid them up.

**RE-DIRECT EXAMINATION:**

By Mr. Skeen.

Q. Mr. Guild, counsel has asked you if Mr. Christy offered to take the money, and by getting it all at once to reduce it one hundred and fifty dollars. I will ask you whether or not now you are ready and willing and able to pay the full balance due upon the contract, in accordance with its terms?

A. Yes sir.

Q. You are now ready, able and willing to pay the full balance due on the contract?

A. Yes sir.

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**KATHRYN CHRISTY** testified on rebuttal as follows:

**DIRECT EXAMINATION:**

- 167 We never had any such conversation regarding improvements to the front porch and back porch as testified to by Mr. and Mrs. Guild. They were supposed to take care of the front porch and rear porch for their down payment. It was supposed to be improved with the first

year's time. We talked to them about making the improvements many times and they said they would take care of it later. We had a conversation about the lumber bill. Mr. Guild wanted to finish up another apartment and he told us that he had no credit, so my husband and I and Mr. Guild went down to Ketchums to get the lumber. They said they knew Mr. Guild, but they wanted no business dealings with him and we could get the lumber if we signed for it, and saw that it was paid for; so we got the lumber for Mr. Guild in our name. We instructed our attorney to write letters to Mr. Guild about making the improvements. Mr. Guild has been down to our attorney's office many times concerning these matters.

#### CROSS-EXAMINATION:

During the time from 1935 to 1940 we knew that the porch had not been put on the front and the stucco had not been put on the rear porch and that is why we were after them all the time to take care of it. We received \$80.00 from the Guilds as late as March 31, 1940.

#### RE-DIRECT EXAMINATION:

I was present at a conference with Mr. Guild after we had served notice on him in January to vacate. We asked him if the matter could not be settled out of court and he said that court was a good thing and that he wanted to go to court to settle it.

Both parties rested and the attorney for the plaintiff made the following motion:

#### MOTION TO STRIKE, ETC.

- 174 Come now the plaintiffs and move the court to strike all of the testimony of the defendants

relating to a modification of the contract, wherein the defendants claimed that there was an agreement between the plaintiffs and the defendants that the porch on the front of the premises and the porch in the back of the premises need not be repaired or constructed as set forth in the contract.

Secondly, the plaintiffs move the court to direct the jury to find in favor of the plaintiffs and against the defendants, as prayed for in their complaint, upon the following grounds:

The affirmative evidence in this case is that the defendants have failed to meet the requirements of their agreement, first, in making the improvements set forth in the contract —

THE COURT: What improvements?

MR. METOS: The porches, the front and rear porches; and second, they have failed to make the payments set forth in the contract.

The affirmative evidence is that they are delinquent since December, 1939, and they are also delinquent in the payment of taxes for the year 1935 and for the year 1936, totaling \$183.69, and also for failure to pay the taxes for the year 1938, amounting to over a hundred dollars.

THE COURT: Taxes for when?

MR. METOS: For the year 1938, and also to pay the insurance on the premises, amounting to \$13.50.

Furthermore, for the purpose of the record, the motions I have made are, of course, two motions, one for a directed verdict, and the other



a motion to strike the testimony, and they should be considered separately.

187 THE COURT: There is a motion by plaintiff to strike all testimony relating to modification of the contract. My present view is that testimony ought to be stricken. I think it would be very hazardous indeed to allow that testimony to stand. A contract for the sale of real estate must as a matter of law be written and to just allow someone to come in and say I had a talk with so and so and he agreed that I should not build the porch, even though that may be a fact, it should not be permitted. I am inclined to think that testimony should be stricken. I am inclined to think that if you admit everything that Mr. Skeen has said, it is still admitted by the exhibits which are in evidence and the stipulations and the testimony that is not in conflict, that there was a default in the payments at the time the complaint was filed. Admitting for the moment for the sake of the argument that what Mr. Skeen says about defaults and the 1938 payments may be the law, there still is a default, and that default existed, by the undisputed evidence. There is nothing to go to the jury on that because the evidence is not disputed that in 1940 when the complaint was filed there was a default, and under the contract the plaintiff had the right to make a forfeiture.

Now I am inclined to think the court must reach those conclusions and that the court must take the case from the jury. The Supreme Court would direct it to take the case from the jury upon appeal. I see no escape in this case other than to direct the jury to find a verdict

for the plaintiff as prayed on facts which are undisputed.

Now if that is done, the defendants lose what they say is \$2,000; that is they testified they put in approximately \$2,000 in inside improvements. If that is true they would lose that, and I have no reason for saying or intimating that it is not true. That would be a very hard thing for them.

Now I am going to take a recess for 15 minutes and if at the conclusion of the recess the defendants are willing to pay the contract out, plus the costs, I will give them another chance and accept the offer that has been made.

188 Now I think that in all good conscience and in all justice the attorney's fees are a part of the costs. It is very clear to the court that the defendants are responsible for this law suit. The plaintiff has offered to give the premises to them if they will pay the contract out and pay the court costs which the plaintiff fixes at \$35.00 and the defendant fixes at \$25. That \$10 surely could not stand between anybody on a settlement, and if \$2,000 has bona fidedly been spent I cannot see how \$200 could stand between them. The plaintiff has made the statement in open court that the attorney's fees in the case are \$300. The court has listened to testimony by attorneys many times as to attorney's fees. Attorney's fees have been fixed over and over again at \$50 a day for court work. There are two attorneys in the case and this is the second day and that would be \$200.

MR. METOS: We have had another trial, Your Honor.



THE COURT: The attorneys say \$300 is the fee which they have agreed with their clients upon and this court is perfectly aware that \$100, independently of another trial, would not be too much for the work preparatory to the case in bringing it through the law and motion stages, the preparing of the pleadings, going through the law and motion stages up to this time, I would say \$100 would be a very reasonable fee.

- 189 Now if the defendants will accept the offer, I will withhold the judgment. I will give them 15 minutes to decide. If at the end of the 15 minutes they determine to stand on the record as it now is, I will enter judgment and leave the rest to the future.

The court will be in recess for 15 minutes.

THE COURT: The understanding will be that if you accept the matter you will have until the 20th of September in which to turn over the money and if it is not done on the 20th of September then I guess I would have to continue the case; I expect I would have to continue the case until the 20th, wouldn't I?

MR. SKEEN: Your Honor, the defendants have given due consideration to the proposition for settlement made and have accepted it.

THE COURT: Then the understanding is that the defendants will pay to the plaintiff the contract deficiency, whatever it is; they will pay the contract out on or before the 20th of September at 10 o'clock?

MR. SKEEN: Better make it 12 o'clock.

Court re-convened Friday, September 20, 1940 at 2 P. M. It was reported that no agreement had been reached.

193 MR. SKEEN: Now, all the way through this discussion it has been referred to as an agreement. As I remember, the order of the court was that unless within this week's time the defendants produced the amount due on the contract plus \$300 attorneys' fees, plus the actual cost of court not exceeding \$35, a directed verdict would be entered for the plaintiff.

THE COURT: Are you ready at this time?

MR. SKEEN: We are not ready at this time, to —

THE COURT: Irrespective of what this shows, you are still not ready to make good?

MR. SKEEN: Not within a few dollars; the reason I suggested we should have additional time, we have contacted numerous building and loan companies and banks about a loan, and we have reached within maybe a hundred or \$200 of the amount due; but we haven't been able yet to get the amount; and, in the first place, we didn't know to the dollar what it was. I am asking at this time that we have some additional time within which to raise the full balance due on the contract.

THE COURT: Well, you haven't asked any time. "Some additional time" doesn't mean —

MR. SKEEN: Well, I will ask for another week's time.

MR. METOS: Well, Your Honor, we can't go on with this forever because the place up there

needs a heating system and it is getting cold and the people are freezing to death up there.

THE COURT: As I understand it — let me see if there has been any change here. I think now that I ought to deny the offer, Mr. Skeen.

201 The court granted the plaintiffs' motion to strike all testimony respecting the agreement to the effect that the front porch need not be installed nor the back porch repaired by the application of stucco.

202 The court granted the plaintiffs' motion for a directed verdict.

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## ORDER

(TITLE OF COURT AND CAUSE).

40 The jury heretofore impaneled, the respective attorneys and all necessary parties hereto being present and ready, the further trial of the within case is resumed. Whereupon Edward L. Guild is recalled and further testifies in his own behalf. Documentary proof in behalf of the defendants is offered and received in evidence. Defendants rest. Kathryn E. Christy is recalled and testifies in her own behalf in rebuttal. Plaintiffs rest. Both sides rest.

Comes now H. G. Metos, one of the attorneys for the plaintiffs in the absence of the jury and moves the court to strike the testimony of the defendants relating to the modification of the contract. Comes now H. G. Metos, one of the attorneys for the plaintiffs in the absence of the jury and moves the court for a directed verdict in favor of the plaintiffs and against

the defendants as prayed. Said motions are argued to the court by respective counsel and submitted. Whereupon the court orders that the within case be settled providing that the defendants accept the offer of the plaintiffs as follows, towit: That defendants pay off the contract on file herein. That defendants pay the costs of court not to exceed \$35.00 as attorney's fees. It is further ordered that the defendants be given to September 20, 1940 in which to pay the within amounts. It now being the hour of adjournment, it is ordered that the within case be continued to Friday, September 20, at two o'clock P. M.

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### MOTION FOR TIME DENIED, ETC.

(TITLE OF COURT AND CAUSE).

- 42 The within case having been continued to this time, the jury heretofore impaneled, the respective attorneys and all necessary parties hereto being present and ready, the further trial of the within case is resumed. Comes now E. J. Skeen, one of the attorneys for the defendants and moves the court for an additional week in which to pay to the plaintiffs the amounts listed in plaintiffs' offer heretofore made. Said motion is submitted to the court without argument and by the court denied. Plaintiffs' motion to strike the testimony of the defendants heretofore argued to the court by respective counsel and submitted, is by the court granted. Plaintiffs' motion for a directed verdict heretofore argued to the court and submitted is by the court granted. Whereupon the court directs the jury to select a foreman and sign the following verdict:

## VERDICT

(TITLE OF COURT AND CAUSE).

- 42 “We, the jurors impaneled in the above case, find the issues in favor of the plaintiffs and against the defendants and assess plaintiffs’ damages in the sum of \$137.50.

Dated September 20, 1940.

EDWIN C. BURT, Foreman.”

Whereupon the jury is excused from further consideration of the within case and are excused until called by the clerk.

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## JUDGMENT ON VERDICT

(TITLE OF COURT AND CAUSE).

- 45 This action came on regularly for trial before the court sitting with a jury of eight persons regularly impaneled and sworn to try said action; and evidence on the part of the plaintiffs and defendants having been presented, and the court having thereupon, on motion of the plaintiffs, directed a verdict for the plaintiffs finding the issues in favor of the plaintiffs and against the defendants and assessing the plaintiffs’ damages in the sum of One Hundred Thirty-seven and 50/100 Dollars (\$137.50); and the jury having returned its verdict accordingly;



Now therefore, It is Ordered and Adjudged:

1.

That the plaintiffs recover from said defendants the real property here in controversy, situate in Salt Lake County, State of Utah, particularly described as follows, to wit:

Commencing 79 feet West from the Northeast corner of Lot 6, Block 29, Plat F, Salt Lake City Survey, and running thence West 43 feet; thence South 125 feet; thence East 43 feet; thence North 125 feet to the place of beginning.

Together with a right of way, beginning 2 rods West and 125 feet South of the Northeast corner of said Lot 6, and running West 132 feet; thence South 10 feet; thence East 132 feet; thence North 10 feet to the place of beginning.

2.

That the plaintiffs recover from said defendants the sum of Four Hundred Twelve and 50/100 Dollars (\$412.50), the same being three times the amount of damages assessed by the jury as aforesaid for the unlawful detention of said premises; and

3.

That the plaintiffs have and recover of and from the defendants their costs and disbursements in said action amounting to the sum of \$.....

Dated this 21st day of September, 1940.

(Signed) OSCAR W. McCONKIE, Judge.

## ASSIGNMENTS OF ERROR

(TITLE OF COURT AND CAUSE).

Come now the appellants and make the following Assignments of Error:

### I.

The court erred in sustaining objections to the question:

“About how much money did you spend on making the improvements on the inside?” (Tr. 117; Ab. 17).

### II.

The court erred in sustaining objections to the following question:

“I will ask you to state whether or not an offer to make accruing installment payments on the contract was made, and if so, what the offer was?” (Tr. 145; Ab. 22-23).

### III.

The court erred in making and entering an order striking all evidence from the record relating to the modification of the contract by oral agreement and conduct. (Tr. 110, 136, 201; Ab. 16, 21, 32).

### IV.

The court erred in making and entering an order directing the jury to return a verdict in favor of the plaintiff and against the defendants for the reason that the record discloses a substantial conflict or contradiction in the evidence as to the amount the defendants were in default, if at all, in May, 1940, as to performance or waiver of the provisions of the contract

which relate to the making of improvements and as to the intent of the parties with respect to the taking of the note, Exhibit 2. (Tr. 66-110, 110-140, 142-145, 167-174, 202; Ab. 12, 16, 21, 22-23, 25-27, 32).

#### V.

The court erred in imposing a condition upon the defendants that they pay, in addition to the amount of the contract purchase price of said property, attorney's fees and court costs and in limiting the time within which the defendants were required to pay said attorney's fees. (Tr. 188; Ab. 29).

#### VI.

The court erred in making and entering an order directing the jury to return a verdict in favor of the plaintiffs and against the defendants. (Tr. 202; Ab. 32).

#### VII.

The court erred in making and entering a judgment on the verdict in favor of the plaintiffs and against the defendants. (Tr. 44; Ab. 34).

#### VIII.

The court erred in refusing to consider the equitable issues presented by the pleadings. (Tr. 12; Ab. 8-11).

#### IX.

The court erred in holding as a matter of law that the notice of forfeiture was reasonable and sufficient. (Tr. 202; Ab. 32).

#### X.

The court erred in making and entering a judgment that the plaintiffs recover from the



defendants the real estate described in the complaint herein. (Tr. 45; Ab. 34).

**XI.**

The court erred in making and entering a judgment for three times the amount of the damages as assessed by the jury as directed by the court. (Tr. 45; Ab. 34).

J. D. SKEEN,  
E. J. SKEEN,  
Attorneys for Defendants  
and Appellants.

Dated this 13th day of January, 1941.

Copy of the foregoing Assignments of Error received this 13th day of January, 1941.

H. G. METOS,  
Attorney for Plaintiffs  
and Respondents.