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IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID M. STAUFFER and CONNIE A. STAUFFER, Plaintiffs, Appellants and Cross-Respondents, vs RUSSELL CALL and VELMA CALL and SUNSET CANYON CORPORATION, Defendants, Respondents and Cross-Appellants,	APPELLANTS' BRIEF IN OPPOSITION TO RESPONDENT BRIEF FOR PETITION ON REHEARING Case No. 15468

* *

APPELLANTS' BRIEF IN OPPOSITION
TO BRIEF FOR PETITION ON REHEARING

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

* *

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IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID M. STAUFFER and CONNIE A. STAUFFER, Plaintiffs, Appellants and Cross-Respondents, vs RUSSELL CALL and VELMA CALL and SUNSET CANYON CORPORATION, Defendants, Respondents and Cross-Appellants,	BRIEF IN OPPOSITION TO BRIEF FOR PETITION ON REHEARING Case No. 15468

APPELLANTS' BRIEF

NATURE OF THE CASE

This is an action by Plaintiffs, Appellants and Cross-Respondents STAUFFER, (hereafter "STAUFFERS"), seeking specific performance of a Utah Uniform Real Estate Contract, and for partition. Defendants, Respondents, Cross-Appellants and Petitioners CALL and SUNSET CANYON CORPORATION, (hereafter "Defendants") seek to quiet title to the real property concerned, and request an order of restitution.

DISPOSITION IN THE LOWER COURT

This case was tried to the lower court on the sole issue of whether a certain Uniform Real Estate Contract dated 2 January 1969 constituted a valid and enforceable contract. Judgment was granted to Defendants, the lower court ruling that the contract was void and of no effect as a contract for the sale of real property, by reason of insufficiency of the descriptions in the document. Judgment was also rendered in favor of DAVID and CONNIE STAUFFER in

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the amount of $9,228.00 as of 1 September 1977, represent monies paid by STAUFFERS on the contract.

DISPOSITION ON APPEAL

On appeal, the Supreme Court reversed the ruling of t lower court, and ordered the case remanded to the lower court, with directions to determine the descriptions of th property purchased by STAUFFERS, to order Defendants to execute appropriate conveyances, and to conduct further proceedings consistent with the reversal and remand.

RELIEF SOUGHT

Defendants apparently seek a rehearing, even though n Petition for Rehearing has been filed, hoping to get the Supreme Court to reverse itself. STAUFFERS oppose the granting of a rehearing, and seek immediate remittitur of the case to the lower court, for further proceedings in accordance with the Supreme Court opinion filed 9 January 1979.

STATEMENT OF FACTS

On 2 January 1969, schoolteacher DAVID M. STAUFFER and his wife, seeking a Utah refuge for themselves and their sixteen children, purchased lands from Defendants by way of a Uniform Real Estate Contract (R259;P-17; T211:8-17). The wording of the descriptions involved was supplied by Defendant RUSSELL CALL. (T101:23-30; T25:1-7). The total purchase price was $12,000.00, payable in two payments of $1,000.00 each, the balance being payable at the rate of $100.00 per month. STAUFFERS could accelerate payment of the amount due

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STAUFFERS, together with their flock, went into possession of the property in April, 1969. (T17:19-25; R259). They lived there as a family except for two school years, and always lived there during the summertime. (T220:22-30;T221:1-13). It was most likely the winters of 1971 and 1974 that the family left the farm. However, during the time STAUFFERS were not physically in residence, they rented the property to persons of their choice. (T218:18-23; T219:22-30). The two homes on the property were unfit for human habitation, and STAUFFERS and their children renovated the homes for living purposes. Other substantial and significant improvements were also made upon and to the property over a period of years. In general, STAUFFERS and their family did everything that intelligent, progressive owners do to protect and improve their property. (T47 thru 50; R259-260). Defendants knew of the substantial improvements being made by STAUFFERS. (R260). So attached were STAUFFERS to their home that a son was interred on the property, binding them even closer to their chosen soil. (T115: 1-2). STAUFFERS faithfully made the monthly payments required of them. (R260).

On or about 22 September 1972, STAUFFERS tendered full payment of the balance then due on their purchase contract, and requested their deeds. Delivery of deeds was refused by Defendants CALL. (R3, R45). After attempts to obtain title failed, this action was filed on 3 March 1973.

Defendants CALL thereafter, as had been their obvious

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intent since refusing to deliver deeds, sold the property a second time to Defendant SUNSET CANYON CORPORATION for the price of $60,000.00, exactly 500% of the price of the original sale to STAUFFERS. (T267:1-30; T268:1-11).

At trial, the lower court found the contract unenforceable due to insufficiency of description, quieted title in Defendants and ordered all monies paid on the contract to be returned to STAUFFERS, with interest from dates of payment. ($257-264; R265-268). At no time did Defendants ever tender return of the money paid by STAUFFERS.

After trial and during appeal, Defendant SUNSET CANYON CORPORATION has regularly caused the property to be advertised and offered for sale as commercial development property, at a price of about $4,000.00 per acre. Some specific representations made to the public about the value of the land are as follows:

1. The property is "440 + acres on key interchange leading to Zion Park. Prime highway commercial potential."

2. The property is the "investment opportunity of the season.....on all 4 sides of the interchange .....This land is a syndicator's dream package!"

3. "400 acres at this key interchange leading to Zion National Park.....ready for its transformation to Highway commercial. Over 8000 cars per day during August. 1,000,000 plus visitors see Zion Park each year and are potential customers.....Priced under $4,000.00 per acre." (See Appendix , Affidavit of CONNIE A. STAUFFER). Using Defendants' figures, the land is now worth about $1,600,000.

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if the "400-acre " figure is used, and about $1,760,000.00 if the "440-acres" figure is used.

When STAUFFERS purchased in 1969, their interest constituted one-half or more of the total ownership interest in the property, worth $12,000.00, the conservative value of the whole therefore being $24,000.00 or less.

On an acreage basis, the land in question was worth $60.00 per acre if the 400-acre figure is used, and $54.54 per acre if the 440-acres + is used. With Defendants willing to sell at about $4,000.00 per acre in the year 1978, the value of each acre of land has increased between 6,666.67% and 7,335.90%, depending on whether the high or low number of acres is used. Actually, the land value of the property may have risen as high as 12,574.66%. See Affidavit of Connie A. Stauffer.

Defendants have never filed a Petition for Rehearing. See record on file. A "Brief for Petition on Rehearing" has been filed by Defendants.

ARGUMENT

POINT I

ANY REQUEST OF DEFENDANTS FOR REHEARING SHOULD BE DENIED FOR FAILURE OF DEFENDANTS TO FILE AND SERVE A PETITION FOR REHEARING WITHIN THE TIME REQUIRED BY LAW.

URCP 76(e)(1) states:

> "Within 20 days after the filing of the decision of the Supreme Court, either party may petition the Court for a rehearing. The petition shall state briefly the points wherein it is alleged that the appellate court has erred. The petition shall be supported by a brief of the authorities relied upon to sustain the

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points listed in such petition. Both the petition and brief in support thereof must be prepared in accordance with the requirements of Rule 75(p), and shall be served upon the adverse party prior to filing. (Emphasis added)

The record in this case shows that the decision of the Supreme Court was filed on or about 9 January 1979. Defendants upon reading the decision which went against them, determined that they needed additional time to prepare and file a petition for rehearing, and requested and were granted until 13 February 1979, in which to file a petition for rehearing. See Ex Parte Motion to Extend Time for Filing Brief and Petition for Rehearing and Order, and Affidavit in Support of Ex Parte Motion to Extend Time for Filing Brief and Petition for Rehearing, and URCP 76(f).

On 9 February 1979, Defendants apparently filed their Brief for Petition on Rehearing, and on the same day, not earlier, served copies upon counsel for STAUFFERS. See Brief for Petitioners. At no time has a petition for rehearing been served or filed by Defendants, who find themselves in the position of having a brief in support of a non-existent pleading, the time for filing such pleading having long passed.

URCP 76(e) clearly requires the timely filing and service of both a petition for rehearing and a supporting brief. In this case, no petition for rehearing has been filed or served by Defendants, and the Court should not grant any rehearing, the prerequisites to such not having been met.

In Enrique v. Grant, 5 Utah 400, 16 P. 595 (1888), this

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Court early determined that a petition for rehearing was a pleading, not an argument. The Court stated:

> "We call attention to the practice pursued in this case on motion for rehearing. The petition is an extended and elaborate argument in favor of a rehearing. This is not in conformity to the rule. The petition for rehearing is a pleading, and should not be an argument. If points and authorities are submitted, it should be in a separate instrument, and not as part of the petition."

The rehearing requested in Enrique was denied.

In our neighboring states, it was early decided that a late filing of a petition for rehearing would result in denial of the same. In Durgin v. McNally, 82 Cal. 595, 23 P. 375 (1890), the petition for rehearing arrived and was filed one (1) day late. It was denied as being untimely. Wyoming early ruled that the rule requiring the filing of a petition for rehearing within a certain time, had the force of statutory law, and held that petitions filed after were unavailing. Dean v. Omaha-Wyoming Oil Co., 21 Wyo. 133, 129 P. 1023, reh. den. 21 Wyo. 133, 128 P. 881 (1913). Even where the petition is mailed within the time limit, but arrives late for filing, a rehearing will be denied. Whettlin v. Jones, 32 Wyo. 446, 236 P. 247, reh. den. 32 Wyo. 446, 234 P. 515 (1925). Oregon has even held that where a rule of the Supreme Court fixes a time within which a petition for rehearing must be filed, the court has no discretion to grant a rehearing. Coyote Gold and Silver Mining Co., v. Ruble, 9 Or. 121 (1881). Recent cases in sister states have held that a one (1) day filing delay

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after extension of time, is too late, Cauley v Industrial Commission, 107 Ariz. 285, 486 P.2d 183 (Ariz., 1971); and that the time for filing a petition for rehearing is not extended by the 3-day period ordinarily allowed for service by mail by another rule, Garrett v Garrett, 30 Colo. App. 167, 505 P.2d 39 (Colo., 1971); all going to show the jurisdictional nature of timeliness where petitions for rehearing are concerned.

Since no proper petition for rehearing has been filed, no rehearing should be granted to Defendants.

POINT II

IF DEFENDANTS' "BRIEF FOR PETITION ON REHEARING" IS CONSTRUED TO BE A "PETITION FOR REHEARING", IT SHOULD BE DENIED FOR THE REASON THAT IT IS NOT IN PROPER FORM, CONTAINS ARGUMENT AND REARGUMENT, AND NO SUPPORTING BRIEF HAS BEEN TIMELY FILED.

URCP 76(e), of course, requires filing of both a petition for rehearing and a supporting brief on a timely basis. Enrique, supra, the only Utah case on point, requires the same. If Defendants urge that the Supreme Court consider their "Brief for Petition on Rehearing" as constituting a petition for rehearing, the Supreme Court should not adopt such contention, but if it is adopted, such petition should be denied for not being accompanied by a proper, supporting brief.

A petition for rehearing will not be considered in the absence of an accompanying brief. State v Sorenson, 34 Wyo. 90, 241 P. 607, reh. den. 34 Wyo. 90, 241 P. 705, and 34 Wyo. 84, 241 P. 707 (1926). In Tuttle v. Rohrer, 23 Wyo. 305, 153 P. 27, reh. den. 23 Wyo. 305, 149 P. 857 (1915), a

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brief was timely filed, entitled "Petition for Rehearing". The Wyoming Supreme Court deemed it not in compliance with applicable rules governing rehearings, and denied the rehearing. In the instant case, we find either a brief unaccompanied by a petition, or a petition unaccompanied by a brief. We do not find Defendants in compliance with the applicable rules.

It is clear that the only document filed by Defendants applicable to a claimed rehearing, consists of argument, and of reargument of matters already heard by the Court. A petition containing argument and reargument should be stricken or properly denied. Washington Securities Co. v. Goodstein, 79 Colo. 343, 246 P. 278 (1926); Dredge Corp. v. Husite Co., 78 Nev. 69, 369 P.2d 676; cert. den. 83 S.Ct. 39, 371 U.S. 821 9 l.Ed.2d 61 (1962); Gershenhorn v. Walter R. Shetz Enterprises, 73 Nev. 293, 306 P.2d 121 (1957); In re Powell's Estate, 62 Nev. 121, 144 P.2d 996 (1944); and Clark v. Jones, 62 Nev. 72, 141 P.2d 385 (1943).

As set out succinctly in Enrique, above, "The petition for rehearing is a pleading, and should not be an argument."

Where a petition for rehearing does not comply with the rules set, it will not be heard. People ex rel. Dunbar South Platte Water Conservancy District, 139 Colo. 503, 343 P.2d 812 (1959).

If the "Brief for Petition on Rehearing" is considered

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a petition for rehearing timely filed, the "petition" con argument, reargument, and is not accompanied by a proper supporting brief, and should therefore be denied.

POINT III

NO CONSIDERATION OF REHEARING SHOULD BE GRANTED IN THE ABSENCE OF JUSTICE ELLETT.

Chief Justice ELLETT wrote the opinion of the Court this matter, with Justices CROCKETT, MAUGHAN, and HALL concurring. Since filing of the opinion, Chief Justice ELLETT has retired. The Court has previously taken the position that where an opinion is rendered by the Court, that opinion will not be set aside except by the vote of a majority who heard the matter. Shipper's Best Exp., Inc. v. Newsome, 579 P.2d 1316 (Utah, 1978).

The instant case was heard and decided by Justices ELLETT, CROCKETT, MAUGHAN, and HALL, with WILKINS dissenti Since the retirement of Chief Justice ELLETT, only four remain who heard the case.

If any consideration is to be given to Defendants' request for rehearing, such consideration should be given b the five who decided the matter, particularly where the writer of the opinion could be appointed as a Justice Pro Tem for purposes of the hearing. If not so appointed, consideration of a request for rehearing by Defendants should only be undertaken by the four remaining members of the deciding Court.

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The preferred course, though, would be to have the five who decided the case, decide any request for rehearing. This procedure is authorized by UCA 49-7-5.7 (1953, as amended), which states in part:

> "Any judge who has retired under the provisions of this act and is physically and mentally able to perform the duties of the office and who is not engaged in the practice of law shall be entitled after retirement to serve from case to case as a justice of the Supreme Court upon invitation of the Chief Justice. . . . "

If the Court is going to consider this matter at all, the Chief Justice should invite former Justice ELLETT to again sit as Justice of the Supreme Court for purposes of any such consideration, particularly where Justice ELLETT is the author of the Court's decision of 9 January 1979.

POINT IV

> NO REHEARING SHOULD BE GRANTED, FOR THE REASON THAT THE SUPREME COURT DID NOT TAKE OR NEED TO TAKE JUDICIAL NOTICE TO REACH ITS DECISION IN THE OPINION DATED 9 JANUARY 1979, AND THE CONCLUSION REACHED BY THE COURT THAT LAND VALUES INCREASED GREATLY IS AMPLY SUPPORTED BY THE RECORD.

Defendants assert that the Court took "judicial notice" of the great increase in land values in the area of the

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subject property since the contract of 2 January 1969 was made. Whether "judicial knowledge" is the same thing as "judicial notice" is questionable. In any event, the wording "This Court takes judicial knowledge of the fact that land values in the area increased greatly since the contract was made" found in the opinion is dictum not required for the Court to reach its decision. Further, the Court had actual, "judicial knowledge" of the increase in land values in the area, and had specific knowledge of the increase of the subject property, because such facts are clearly set forth in the record. The original, arm's-length transaction showed the land purchased by STAUFFERS to have a fair market value of $12,000.00. A while later, Defendants CALL sold their interest in the contract to Defendant SUNSET CANYON CORPORATION for $60,000.00! Clearly, the record gave the Court "judicial knowledge" of the great increase in the value of the land. (R259; P-17; T267:12-30; T268:1-30; T269:1-15). In view of the record, this Court had and is charged with judicial knowledge of the great increase in value of the land involved in this matter, and properly so found. Such being the case, Defendants' clamor about "judicial notice" is not pertinent.

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POINT V

IF THE SUPREME COURT DID TAKE JUDICIAL NOTICE OF THE GREAT INCREASE IN VALUE OF THE LAND, ANY REQUIREMENT OF A HEARING WOULD HAVE BEEN A FUTILE ACT, AND ANY ERROR MERELY HARMLESS ERROR, IN VIEW OF THE FACT THAT DEFENDANTS HAVE MADE NO CLAIM OF BEING ABLE TO SHOW THAT THE VALUE OF PROPERTY IN THE AREA HAS NOT INCREASED GREATLY IN VALUE SINCE THE CONTRACT WAS MADE, AND PARTICULARLY IN VIEW OF DEFENDANT SUNSET CANYON'S OWN VALUATIONS SHOWING INCREASES BETWEEN 6,666% and 7,340%, AND PERHAPS AS HIGH AS 12,574% SINCE THE CONTRACT WAS MADE.

Defendants claim that the Court committed error in taking "judicial notice" of the great increase in the value of the land involved in this case. While no "judicial notice" was taken, even if it had been, Defendants' arguments about error are without merit for the following reasons:

1. At no place in their "Brief for Petition on Rehearing" do Defendants make any claim that a hearing would result in any finding that the land did not greatly increase in value since the contract was made. Lacking any such claim, a hearing would have been a futile act, a waste of the time of the parties, their counsel, and this Court. Also, since the record shows the increase, the increase was noticed, and URE 12(4), does not require a hearing in such a case.

2. Further, if a hearing had been required, it would have resulted only in Defendants establishing that the land has increased in value somewhere between 6,666% and

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7,340%, with a possible increase of 12,574% , using their own values as stated by DEXTER SNOW, President of SUNSET CANYON CORPORATION, which values of about $4,000.00 per acre were published to the world in the Color Country Spectrum, a daily newspaper in Southern Utah, and the Washington County News, a weekly newspaper in the County in which the property is located. See Appendix, Affidavit of CONNIE A. STAUFFER. Admittedly, if a hearing were required, and if land values had not increased greatly since 1969, Defendants' rights might have been harmed. Where, however, no claim has been made by Defendants that the land has not increased greatly in value, and where SUNSET CANYON CORPORATION's President, DEXTER C. SNOW, values the land at about $4,000.00 per acre over the 1969 values of less than $60.00 per acre, no alleged error in failing to give notice pursuant to URE 12(4) could have harmed Defendants in any way.

URCP 61 states:

> "No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Here, where a hearing on the great increases in land values would have served only to further silhouette and magnify the great increases in the value of the land already shown upon the face of the record, Defendants are in a better po

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than the one they would occupy had such a hearing been held, and any error in failing to hold such a hearing is mere harmless and non-prejudicial error.

POINT VI

NO "DISHEVELMENT" OF THE RECORD OCCURRED, AND THE COURT APPLIED THE PROPER STANDARD OF REVIEW IN REACHING ITS DECISION.

Defendants apparently claim that the Court applied the wrong standard of review and that the opinion in this case was the result of the failure of then Chief Justice ELLETT, and impliedly of the failure of Justices CROCKETT, MAUGHAN and HALL, to read the trial transcript. No evidence shows the existence of any such failure or shows that the trail transcript was not reviewed. All files in the Clerk's office are available at all times to all justices, and it is not required that any part of a file be "checked out" when being reviewed by any Justice. It is the practice, however, for a Justice to "check out" items he takes from the building, as when he takes a part of a file home for evening study. In fact, the statement that Justice ELLETT checked out parts of the file, clearly shows his detailed attention to the case.

Defendants have made no direct charge that Justices CROCKETT, MAUGHAN and HALL failed to read the record, but imply such failure. No evidence exists to support such implied charges, other than that in Defendants' wishful thinking. No charge, express or implied, has been made by Defendants that any of the Justices on the majority failed to read the "Brief of Respondents and Cross Appellants" which

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was before the Court on appeal. A review of that documen clearly shows the fact of trial, and states facts in favo of Defendants much more favorably than the trial transcri itself, as could be expected. Therefore, even if the Justices in the majority had failed to read the trial transcript, such Justices were apprised of the facts and issues involved by Defendants' own brief on appeal.

Article VIII, Section 9, Constitution of Utah, requi that where equity is involved, this Court may review ques of fact as well as questions of law, and indeed, has the of examining questions of fact. The Supreme Court can re the evidence, make its own findings, and substitute its j for that of the trial court when the ends of justice so require. Harding v. Harding, 26 U.2d 277, 488 P.2d 308 (1971).

To the extent that the majority opinion appears to controvert the findings of the lower court, it is clear that the Supreme Court reviewed the evidence, found in favor of STAUFFERS on pertinent questions of fact, and the substituted its own judgment for that of the lower court, is the privilege and duty of the Supreme Court in a proper case, the instant case.

Point II in Appellants' Brief, before the Court on ap raises pertinent issues of fact for review by the Supreme Court, when it refers to the boundary agreement and markin boundaries by Defendant CALL.

There is no evidence on any record before the Court,

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that the Court applied the standard of review used for summary judgments, and Defendants' claim that such standard was used by this Court has no foundation.

POINT VII

THE DOCTRINE OF PART PERFORMANCE IN THIS CASE WAS NOT REQUIRED TO BE PLED BY STAUFFERS, WAS TRIED BY CONSENT, WAS IMPLIEDLY RAISED BY STAUFFERS ON APPEAL, AND, IF APPLIED BY THIS COURT, WAS PROPERLY APPLIED.

STAUFFERS pleadings clearly show their claim to specific performance. It was the duty of Defendants to raise any affirmative defenses to the same, and no further pleading of STAUFFERS was required. URCP 7(a) allows for a reply to an answer, where the court specifically orders a reply. In this case, the lower court never did order any reply to Defendants' answer.

The issue of part performance was raised and tried by consent, even by stipulation, at the time of trial. See T43:19-24, where RONALD W. THOMPSON, associate counsel for Defendants, stipulated STAUFFERS' possession, payments, and improvements, and also see T42:21-30, T43 through T51, and T47 through T126. The only objections raised were relevancy and materiality. Some of Mr. HUGHES' objections were granted; some were denied; but the salient factors of possession, payments, and substantial improvements by STAUFFERS were admitted by Defendants.

Point II, Appellants' Brief, previously before the Court, raises the issue of part performance where it claimed error on the part of the trial court in failing to show

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cure of alleged ambiguities in the contract. Defendants have sought to make the Court believe that the "part per... rule" is hard and fast, with no exceptions allowed. Such not the case. Defendants have relied extensively for sup... on Adams v. Manning, 46 U.82, 148 P.465 (1915). The situ... these involved a certain receipt alleged to be signed by Adams of $30.00 as part payment for thirty acres of land. Nothing was said about the location of the land on the larger parcel. D. C. Adams was dead, and at the trial level, no direct evidence of the terms and conditions of ... contract was shown, largely because of the "Dead Man Statu... The alleged possession of Manning was tenuous, at best, a... in some doubt. The Adams Court stated:

> "As we view it, no hard and fast rule should prevail in such cases, and the statute should be given due effect, and, if a case is presente... the inherent equities of which require specific enforcement, it should be enforced without hesitation, and if, upon the other hand, such is not the case, specific enforcement should be denied." (Emphasis added).

The Adams Court then went on to state:

> "(R)espondent's claims are entirely devoid of equity." (Emphasis supplied).

The Supreme Court refused specific performance in Adams because the purchaser showed no equities at all in ... favor! A close review of each and every subsequent case cited by Defendants will show a refusal of this Court to require specific performance only after the equities have been weighed, and found wanting on the part of the person seeking specific performance.

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In the instant case, the equities are overwhelmingly in favor of STAUFFERS and their family. They went into possession. They made substantial improvements. They occupied and resided upon the property. They buried their dead upon the property. They made all payments faithfully, as required by their contract. Defendants accepted STAUFFERS' money and never offered to return it. Land values rose precipitously. Only when struck by a bad case of "Sellers' Remorse" did Defendants have any doubts about the lands STAUFFERS purchased. Then Defendants CALL sold their interest in the contract to SUNSET CANYON CORPORATION, which knowingly purchased this lawsuit for $60,000.00, giving Defendants CALL a second purchase price 500% of the original price. Upon appeal of the instant case, the Supreme Court followed its prior positions, found the equities in favor of STAUFFERS, and therefore reversed and remanded.

In Jacobsen v. Cox, 115 Utah 102, 202 P.2d 714 (1949), this Court stated:

> "People who reside in faraway rural communities cannot be charged with unreasonable accuracy in describing unsurveyed land..... .....The original parties to the contract could not have described the land by metes and bounds without going to the expense of running a survey."

The Jacobsen Court then stated, at 722:

> "Conceding that the contract has some infirmities, we deal with more than an oral contract. We have a written instrument which is attacked because of uncertainties and ambiguities. We are of the opinion that Plaintiff, by his acts and conduct,

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is estopped from taking advantage of these deficiencies. To hold otherwise would permit the Statute of Frauds to be used as a shield to defeat what appears to be a just and equita cause against him." (Emphasis added).

In this action, the results flowing from the lower court's decision "shock the conscience", and this Court determined by its decision that it will not permit those results to stand and thus do inequity. It has, in effec estopped Defendants from taking advantage of any alleged deficiencies in the contract, and rightly so. Therefore, rehearing should be granted.

POINT VIII

EQUITY REQUIRES THAT NO REHEARING BE GRANTED.

At 27 Am. Jur. 2d 516, "Equity", Section 1, we find in part:

> "All great systems of jurisprudence have a mitigating principle or set of principles, by the application of which substantial justice may be attained in particular cases wherein the prescribed or customary forms of ordinary law seem to be inadequate. From the point of view of general jurisprudence, "equity" is the name which is given to this feature or aspect of law in general. However, the term "equity" has a variety of meanings. The word describes a system of jurisprudence, and it is employed to designate the principles or standards of that system. Such a use of the work is illustr by the maxim "equity regards as done that which ought to be done." In this connection, it may be observed that the court of chancery is sometimes referred to as a court of 'conscience (Emphasis supplied).

27 Am. Jur. 2d 518, "Equity", Section 2, states in part:

> "It has been said that one of the most salutar

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principles of chancery jurisdiction is that, strictly speaking, it has no immutable rules. It lights its own pathway, blazes its own trail, paves its own highway; it is, in short, an appeal to the conscience of the court." (Emphasis supplied).

This Supreme Court, in the exercise of its equitable jurisdiction, determined that it would be unfair to let the decision of the lower court stand as rendered, and effectively refused to recognize the mechanistic formulae propounded by Defendants, favoring instead, a balancing of equities resulting in STAUFFERS' favor.

Having determined the equities to be in STAUFFERS' favor, it would serve no good purpose now to grant a rehearing to review once more the contentions of Defendants. All parties have "had their day" before this Honorable Court, and the case should be remitted immediately to the trial court for further proceedings in conformity with the opinion of 9 January 1979.

POINT IX

EVEN IF THE FORMER LAW WERE AS STATED BY DEFENDANTS, NO REHEARING SHOULD BE GRANTED FOR THE REASON THAT THIS COURT, USING ITS COMMON LAW POWERS, MADE NEW LAW, BINDING IN THIS CASE AND IN THE FUTURE.

Defendants are seeking a rehearing before this Court based upon claimed errors of law, among other things. A voluminous brief has been filed, setting out the alleged violations of law by the Court. No rehearing should be granted for the reason that the opinion of 9 January 1979, if Defendants' contentions are true, changed existing law to do substantial

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justice in light of the circumstances of this case.

The proposition that this Court can modify, create, change existing common law to meet the requirements of ju is so well accepted as not to require citation. In fact, it may very well have been the Court's specific intent to change the law, in view of the fact that no precedents cited in its opinion, and in view of the fact that STAUFF in their Appellants' Brief, previously before the Court, expressly invited the Court to change Utah law if it were found by the Court to be in favor of Defendants' position, the interests of justice.

If the changes were made in existing law, then no err on the part of the Court exists, and Defendants have no ground for rehearing.

POINT X

THE DECISION OF 9 January 1979, IS PRESUMED TO BE CORRECT, AND THEREFORE, NO REHEARING SHOULD BE ALLOWED, WHERE SUPPORTING BASES FOR THE DECISION EXIST.

The opinion of 9 January 1979 cited no precedent, eit statutory or common law. However, the acts of this Court are presumed to be correct, and therefore must be viewed in the light most favorable to STAUFFERS. Doctrines which provide support for the action of the Court, among others, may be as follows:

1. The inherent equity powers of the Court.

2. Estoppel, either "in pais" or "technical" which would estop Defendants from denying the existence of

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agreement as to legal descriptions.

3. The common law powers of the Court to change existing law.

4. The power of the Court to review facts in matters of equity, to weigh the proof, and to overrule findings of lower courts, which is has done in many previous instances.

5. The power of the Court to adopt persuasive, foreign common law as Utah law.

6. The doctrine of "part performance".

Since any of the foregoing could have supported the opinion of 9 January 1979, no error exists in the decision rendered, and no rehearing should be allowed.

CONCLUSION

No rehearing should be granted for the reasons that (1) Defendants have never filed a proper petition seeking rehearing and therefore are not entitled to such relief; (2) if Defendants' "Brief for Petition on Rehearing" is viewed as a petition for rehearing, it contains improper argument and reargument, and is not accompanied by a proper brief; (3) Justice Ellett has retired; (4) no "judicial notice" was taken; (5) if "judicial notice" was taken, a hearing on the same would have been a futile act, and Defendants could not have shown that a great increase in the value of the land did not occur following the making of the contract, the failure to hold a hearing therefore being only harmless error, if any; (6) no "dishevelment" of the record occurred, and the Court applied proper standards of review; (7) the doctrine of

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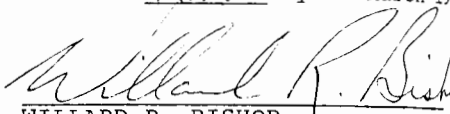
"part performance" was properly noted by the Court; (8) the Court properly exercised its equitable powers; (9) if existing law had been in favor of Defendants, the Court properly made new law; (10) the opinion of 9 January 1979 is supported amply by existing principles of law; and (11) the equities are overwhelmingly in favor of STAUFFERS. Therefore, the case should be immediately remanded to the court for execution of appropriate conveyances by Defendants to STAUFFERS, and for other necessary proceedings.

Respectfully submitted this 13th day of March 1979.



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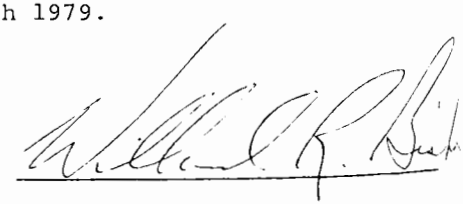
Cedar City, Utah 84720

CERTIFICATE OF MAILING

Two copies of the foregoing were mailed, postage prepaid, to MICHAEL D. HUGHES, of ALLEN, THOMPSON, and HUGHES, attorney for Defendants, Respondents and Cross-Appellants, to 148 E. Tabernacle, St. George, Utah 84770, first class, this 13th day of March 1979.



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