

1949

# Jerry Sine and Dora Sine v. Mildred Iona Harper : Brief of Appellant

Utah Supreme Court

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Grant Macfarlane; Robert S. Richards; Attorneys for Appellant;

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## Recommended Citation

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# In the Supreme Court of the State of Utah

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JERRY SINE AND DORA SINE,  
*Plaintiffs,*

VS.

MILDRED IONA HARPER, Admin-  
istratrix of the Estate of Cathrine  
Jensen, deceased,

*Defendant.*

} Case No. 7386

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## APPELLANT'S BRIEF

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## INDEX

	Page
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	2
COMPLAINT AS ANSWERED .....	3
FINDINGS OF FACT .....	10
CONCLUSIONS OF LAW .....	13
STATEMENT OF ERRORS .....	15
APPELLANT'S ARGUMENTS .....	17
I. The court erred in permitting heresay evidence of the statements of plaintiffs to their agent concerning instructions to purchase the 25½ foot tract, and in finding that such were the instructions and that plaintiffs intended to purchase the said 25½ foot tract .....	18
II. The court erred in admitting any testimony the effect of which was to vary the terms of the written real estate contract.....	20
III. The court erred in finding and decreeing that there was a contract for the sale and purchase of the 25½ foot tract of land not described in the written uniform real estate contract as such contract is within the statute of frauds.....	22
IV. The court erred in permitting the witness, Dowell, to testify to conversations and negotiations with Cathrine Jensen in violation of Section 104-49-2 (3) Utah Code Annotated 1943.....	25-26
V. The court erred in its findings of fact, conclusions of law and decree of reformation, because there is no clear and convincing evidence of a mutual mistake in the execution of the uniform real estate contract.....	39
CONCLUSION .....	61

## STATUTES, AUTHORITIES, AND CASES CITED

Banking House of Wilcoxson and Co. vs. Rood (1896) 132 Mo. 256, 33 S. W. 816.....	28
Biskupski vs. Jaroszewski (1947) 398 Ill. 387, 76 N. E. 2d 55....	52
Bruner vs. Battell's Executors, 83 Ill. 317.....	36
B. T. Moran, Inc., vs. First Security Corp., 82 Utah 316, 24 Pac. 2d 384 .....	21
Capone vs. Roberts, (1947) 73 N. Y. Supp. 2d 712.....	58, 60
Chambers vs. Emery, 13 Utah 374.....	39
Cram vs. Reynolds, (1919) 55 Utah 384, 186 Pac. 100.....	39
Deseret National Bank vs. Dinwoodey et al, 17 Utah 43, 53 Pac. 215 .....	39
Ewing vs. Keith, 16 Utah 312, 53 Pac. 4.....	39

# INDEX (Continued)

	Page
Forrester vs. Cook, 77 Utah 137, 292 Pac. 206.....	52
Fox Film Corp. vs. Ogden Theatre Co. Inc., 82 Utah 279, 17 Pac. 2d 294, 90 A. L. R. 1299.....	21
Fuller vs. Wheelock, 10 Pick. 135.....	34, 36, 37
Good vs. Lindstrom (1947) 80 Cal. App. 2d 476, 181 Pac. 2d 933 .....	58
Hood vs. Owens (1927) 293 S. W. 774.....	54
Last Chance Ranch Co. vs. Erickson, 82 Utah 475, 25 Pac. 2d 952 .....	21
Shapiro vs. Amalgamated Trust and Savings Bank 283 Ill. App. 243 .....	38
Taylor vs. George (1914) 176 Mo. App. 214, 161 S. W. 1187.....	29
Teutsch vs. Hvistendahl (1947) ____ S. D. ____, 29 N. W. 2d 389 .....	53
Weight vs. Bailey, 45 Utah 584, 147 Pac. 899.....	39
Wherritt vs. Dennis, 48 Utah 309, 159 Pac. 534.....	39
Whitt vs. Proctor (1947) 305 Ky. 454, 204 S. W. 2d 582.....	58
70 Corpus Juris 266 .....	35
1 Greenleaf on Evidence, 14th Ed., 503, Sec. 417.....	33
5 Jones, Commentaries on Evidence, 2nd Ed., 4280.....	32
Restatement of Agency, Section 379.....	37
13 Rocky Mountain Law Review 282, August, 1941.....	27
Utah Bar Bulletin, July-August, 1941.....	27
Williston on Contracts, Revised Ed., Section 1555.....	24
Utah Code Annotated 1943, Section 33-5-3.....	23
Utah Code Annotated 1943, Section 104-48-15.....	20
Utah Code Annotated 1943, Section 104-49-2 (3). ....	15, 18, 26

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## APPELLANT'S BRIEF

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### STATEMENT OF THE CASE

This is an appeal from the Decree of Reformation entered April 25, 1949, in the Third Judicial District Court in and for Salt Lake County, purporting to reform a Uniform Real Estate Contract for the sale of real estate from Cathrine Jensen, defendant's testator, to the plaintiffs Jerry and Dora Sine.

## STATEMENT OF FACTS

The plaintiffs, Jerry Sine and Dora Sine, his wife, on or about the 27th day of July, 1947, employed a Real Estate Agent by the name of Dowell to see if he could negotiate a deal for the purchase in their behalf of some real estate consisting of a lot and duplex to use in connection with their auto court. Dowell determined the owner to be Cathrine Jensen and after two or three visits with her obtained her signature on an Earnest Money Receipt and Agreement agreeing to sell the property located at 656-658 West North Temple Street, in Salt Lake City, Utah, for \$8,500.00 with \$1,500.00 down and payments of \$75.00 per month for the first two years and after two years payments to be reduced to \$60.00. Subsequently Dowell obtained from Cathrine Jensen an abstract and took it to his office where under his instructions a Uniform Real Estate Contract was prepared, dated the 31st day of July, 1949, including the above terms, and describing the real estate as a tract 115 feet in depth with a 49½ foot frontage on West North Temple Street. This contract was subsequently signed by all parties. Between this tract and that already owned by the plaintiffs as part of their auto court is a tract of vacant property 115 feet deep with a 25½ foot frontage also owned by the said Cathrine Jensen, which is the subject of this controversy.

Plaintiffs claim that it was the intention of all parties that the contract was for the purchase of the 25½ foot tract as well as for the 49½ foot tract, and

that the description of only the 49½ foot tract got into the contract by mistake. Plaintiffs notified Cathrine Jensen of the alleged mistake and asked her for a new contract covering both tracts, which she refused to give, and plaintiffs brought this action against her for reformation of the contract. Cathrine Jensen answered plaintiffs' complaint denying that she had ever intended to sell anything other than the 49½ tract, that there was no mistake on her part, and that the action was barred by the statute of frauds, Section 33-5-3, Utah Code Annotated 1943. Before the case could be brought to trial, Cathrine Jensen died, and Mildred Iona Harper who was appointed Executrix of her estate, was substituted as defendant in the action by Jerry and Dora Sine.

To clarify the issues for the court, we set out plaintiffs' complaint, together with defendant's answers to the allegations therein and plaintiffs' reply:

## COMPLAINT AS ANSWERED

For their cause of action against the defendant plaintiffs allege:

1. Plaintiffs and defendant are, and at all times herein mentioned were, residents of Salt Lake County, State of Utah. (Admitted by defendant.)

2. Plaintiffs are, and at all times herein mentioned were, the owners of the following described tract of land in Salt Lake County, Utah, to wit:

Commencing 75 feet East of the Southwest corner of Lot 3, Block 61, Plat "C", Salt Lake City Survey, and running thence East 151 feet; thence North 127 feet; thence East 104 feet; thence North 58 feet; thence West 11 feet; thence North 104 feet; thence East 11 feet; thence North 41 feet; thence West 206 feet; thence South 12 feet; thence West 112 feet; thence South 191 feet; thence East 112 feet; thence South 12 feet; thence West 49 feet; thence South 115 feet; to the place of beginning; together with a right of way over the following: Commencing 124 feet East and 115 feet North of the Southwest corner of said Lot 3 and running thence 124 feet; thence North 215 feet; thence East 124 feet; thence South 12 feet; thence West 112 feet; thence South 191 feet; thence East 112 feet; thence South 12 feet to the place of beginning.

(Admitted by defendant.)

3. Defendant is, and at all times herein mentioned was, the owner of legal title to property adjoining the property described in Paragraph 2 hereof, which property is more particularly descibed as follows, to wit:

Commencing at the Southwest corner of Lot 3, Block 61, Plat "C", Salt Lake City Survey, and running thence East 75 feet; thence North 115 feet to an alley; thence West along the South side of said alley 75 feet; thence South 115 feet to place of beginning; together with a right of way over said alley, the same being 12 feet wide and extending from Western Avenue to the West end of said tract.

(Admitted by defendant.)



4. On or about July 27, 1947, an agent of plaintiffs acting in their behalf entered into an oral agreement with defendant for the purchase of defendant's property described in Paragraph 3 at a price of \$8,500.00; that on July 29, 1947, the said oral agreement was reduced to writing in the form of an Earnest Money Receipt and Agreement, copy of which is attached hereto as Exhibit "A" and by this reference made a part hereof. (Defendant admitted the execution of the Earnest Money Receipt and Agreement, but denied all other allegations.)

5. That it was and is the understanding of the parties that Exhibit "A" covered the property of defendant described in Paragraph 3 hereof and was the property adjoining the property of plaintiffs and on the West thereof. (Denied by defendant.)

6. That on or about August 9, 1947, plaintiffs caused their attorneys to examine the abstract submitted to plaintiffs by defendant and supposed by plaintiffs to cover the property described in Paragraph 3 and on or about said date plaintiffs caused their aforementioned agent to prepare a Uniform Real Estate Contract covering said property, which contract was dated July 31, 1947, and executed on or about August 10, 1947, copy of which is attached hereto as Exhibit "B" and by this reference made a part hereof; and that in executing said agreement the plaintiffs relied on their attorneys and their agent as aforesaid to safeguard plaintiffs in the purchase of the said property and execute Exhibit

“B” in the belief that the said contract covered the property described in Paragraph 3 and adjoined plaintiffs’ property. (Defendant admitted the execution of the Uniform Real Estate Contract, but denied the other allegations for lack of knowledge.)

7. That plaintiffs have information which they believe and therefore allege as a fact that defendant in signing Exhibits “A” and “B” did so in the belief and with the understanding that she was selling to plaintiffs the property described in Paragraph 3 hereof and that she later discovered the mistake that had been made, which discovery was made on or about July 15, 1948. (Denied by defendant.)

8. That plaintiffs discovered the abovementioned mistake on or about July 17, 1948, and forthwith requested defendant to correct said mistake by reforming Exhibit “B” to conform to the intentions of the parties with reference thereto and that defendant thereupon refused and has since refused to rewrite said agreement although demand therefor has been made upon her so to do. (Denied by defendant.)

WHEREFORE, plaintiffs pray judgment against the defendant that the contract between the parties dated July 27, 1947, be corrected and reformed to cover that tract of land 75 feet by 115 feet together with right of way over alley to the North which adjoins the property of plaintiffs in Block 61, Plat “C”, Salt Lake City Survey, according to the intentions of the parties at the time said agreement was executed and that plaintiffs

have their costs incurred herein and such other further and different relief as the court shall find to be equitable.

As a further answer to plaintiffs' complaint, and as an affirmative defense thereto, defendant alleged as follows:

1. Defendant acquired the property described in paragraph 3 of plaintiffs' complaint by two separate conveyances at different times and from different grantors, to-wit:

*Parcel 1*

Commencing at the Southwest corner of Lot 3, Block 61, Plat "C", Salt Lake City Survey, and running thence East  $49\frac{1}{2}$  feet; thence North 115 feet; to an alley; thence West along the South side of said Alley  $49\frac{1}{2}$  feet; thence South 115 feet to the place of beginning.

acquired from Catherine H. Hardy by warranty deed dated September 24, 1930.

*Parcel 2*

Beginning at a point  $49\frac{1}{2}$  feet East from the Southwest corner of Lot 3, Block 61, Plat "C", Salt Lake City Survey, and running thence East  $25\frac{1}{2}$  feet; thence North 115 feet; thence West  $25\frac{1}{2}$  feet; thence South 115 feet, to the place of beginning.

acquired from Pehr J. W. von Ehrenheim by warranty deed dated May 2, 1939.

2. That on or about July 29, 1947, defendant signed a written agreement prepared by her agent, in the form of the Earnest Money Receipt attached to

plaintiffs' complaint as Exhibit "A", for the sale to plaintiffs of the said Parcel 1 as described above.

3. That on or about July 29, 1947, defendant delivered to plaintiffs an abstract, well knowing and understanding that said abstract covered only said Parcel 1.

4. That never at any time did defendant sell, contract to sell, either orally or by writing, or intend to sell Parcel 2 to plaintiffs.

5. That plaintiffs' action is barred by the provisions of Section 33-5-3, Utah Code Annotated 1943.

WHEREFORE, defendant prays that plaintiffs take nothing by their complaint, and that defendants go hence with their costs, and for such other relief as to the court shall seem fit and proper.

In their Reply to Defendant's Answer plaintiffs denied the allegations of paragraphs 3, 4, and 5 of the affirmative defense, and alleged with reference to said affirmative defense that if the defendant acted in the manner alleged in paragraphs 3 and 4 of the affirmative defense she defrauded the plaintiffs knowing full well that the plaintiffs bargained for, agreed to buy, intended to buy, and thought they were acquiring the property adjoining that already owned by plaintiffs and lying immediately west of said property of plaintiffs.

Trial was had upon the issues raised by the above pleadings at which Jerry and Dora Sine were permitted to testify over the objection of the defendant's attorney

that it was their intention to purchase the 25½ foot piece as well as the 49½ foot piece, and that they thought that the Uniform Real Estate Contract finally entered into contained a description that covered both tracts, although they admitted that they didn't read the contract. Mr. Dowell was also permitted to testify as to his instructions from Mr. Sine to the effect that he was to purchase the property adjoining the Sine property, which was objected to by defendant's counsel. The court further permitted Dowell to testify concerning negotiations and conversations with Cathrine Jensen, over objections of defendant's counsel that he was an incompetent witness under the "dead man's statute", Section 104-49-2 (3), Utah Code Annotated 1943. Defendant's motion to strike all of the above testimony, and her motion for nonsuit at the end of plaintiffs' case were denied by the trial court. Defendant's witnesses, including herself, two other daughters of Cathrine Jensen, Mr. J. C. Jensen, surviving husband of Cathrine Jensen, and C. W. Biddinger, former husband of Cathrine Jensen all testified to statements of Mrs. Jensen before her death, both before and soon after the transaction in issue, to the effect that it was her intention not to sell the 25½ foot piece, but rather to erect a small building on it either for residential or business purposes.

## FINDINGS OF FACT

The trial court made the following Findings of Fact and Conclusions of Law in favor of the plaintiffs:

1. Cathrine Jensen, the original defendant, passed away on or about November 26, 1948, and the defendant Mildred Iona Harper was duly appointed executrix of the estate of Cathrine Jensen, deceased, on January 5, 1949, and was substituted as defendant in the above-entitled action by order of the court dated February 9, 1949.

2. In February 1946 the plaintiffs became the owners of a tract of land in Block 61, Plat "C", Salt Lake City Survey, on the north side of West North Temple between 5th West and 6th West, Salt Lake City, Utah, being more particularly described as follows, to-wit:

Commencing 75 feet East of the Southwest corner of Lot 3, Block 61, Plat "C", Salt Lake City Survey, and running thence East 151 feet; thence North 127 feet; thence East 104 feet; thence North 58 feet; thence West 11 feet; thence North 104 feet; thence East 11 feet; thence North 41 feet; thence West 206 feet; thence South 12 feet; thence West 112 feet; thence South 191 feet; thence East 112 feet; thence South 12 feet; thence West 49 feet; thence South 115 feet to the place of beginning; together with a right of way over the following: Commencing 124 feet East and 115 feet North of the Southwest corner of said Lot 3 and running thence West 124 feet; thence North 215 feet; thence East 124 feet; thence South 12 feet; thence West 112 feet; thence South 191 feet; thence East 112 feet; thence South 12 feet to the place of beginning.



3. In the fall of 1946 the plaintiffs purchased an additional tract of land in said tract, being 33 x 125 feet in dimension in a northerly and easterly direction from a point 127 feet North and 12 feet East of the Southwest corner of Lot 3 in said block, thus completing purchase by the plaintiffs of all of the property shown in pink on Exhibit B in this cause.

4. At all times herein mentioned Cathrine Jensen and the defendant as executrix of the estate of Cathrine Jensen, deceased, have held legal title to property adjoining the property described in finding 2 hereof, which property is more particularly described as follows, to-wit:

Commencing at the Southwest corner of Lot 3, Block 61, Plat "C", Salt Lake Survey, and running thence East 75 feet; thence North 115 feet to an alley; thence West along the South side of said alley 75 feet; thence South 115 feet to place of beginning; together with a right of way over said alley, the same being 12 feet wide and extending from Western Avenue to the West end of said tract.

5. On or about July 27, 1947, plaintiffs instructed their agent to purchase in their behalf the property described in the next preceding paragraph from the owner of said property and on or about said date the said agent, acting in behalf of the plaintiffs, entered into an oral agreement with Cathrine Jensen for the purchase of said property at a price of \$8,500.00 and on July 29, 1947, the said oral agreement was reduced to writing in the form of an Earnest Money Receipt

and Agreement, which is Exhibit A in this cause, and was signed by the respective parties thereto.

6. It was and is the understanding of the plaintiffs that Exhibit C covered the property of defendant described in finding 4 hereof and was the property adjoining the front portion of the property of plaintiffs and lying immediately to the west thereof.

7. On or about July 31, 1947, and within a few days thereafter, the plaintiffs and Cathrine Jensen, deceased, entered into a real estate contract, copy of which is Exhibit D in this cause.

8. In executing Exhibit D, the plaintiffs relied on their attorneys and their agent as aforesaid to safeguard plaintiffs in the purchase of said property and executed the original of Exhibit D in the belief and with the understanding that said Exhibit D covered the property described in finding 4 and adjoined plaintiffs' property as herein described.

9. Cathrine Jensen executed Exhibit C and the original of Exhibit D in the belief and with the understanding that she was selling to plaintiffs the property described in finding 4 hereof and that she discovered a mistake in the description contained in the original of Exhibit D either in September or November 1947.

10. Plaintiffs discovered the above mentioned mistake on or about July 24, 1948, and forthwith requested Cathrine Jensen to correct said mistake by reforming the original of Exhibit D to conform to the intentions of the parties with reference thereto and so as to de-



scribe the property described in finding 4 hereof, which Cathrine Jensen and later the executrix of her estate refused to do.

11. In entering into the original of Exhibit D, the plaintiffs bargained for all of the property described in finding 4 and would not have entered into the said contract had they known that Exhibit D did not correctly describe the said property.

Upon the foregoing findings of fact the court makes the following

### CONCLUSIONS OF LAW

1. At the time the original of Exhibit D was entered into the plaintiffs and Cathrine Jensen had bargained for and believed that the transaction and sale covered the property adjoining property owned by the plaintiffs and being a piece with 75 feet frontage and 115 feet in depth.

2. The original of Exhibit D erroneously described the intention and understanding of the parties with reference to the description of the land, and plaintiffs would not have entered into the said contract or have made the said purchase for the land actually described in the original of Exhibit D.

3. Plaintiffs are entitled to a judgment reforming the contract between the parties to cover the land intended by the parties to be sold by Cathrine Jensen to the plaintiffs on or about July 31, 1947.

4. Plaintiffs are entitled to their costs in this action against the estate of Cathrine Jensen or Catherine Jensen, deceased.

In its decree of reformation the trial court ordered the defendant to execute and deliver to the plaintiffs a new contract describing the 25½ foot piece as well as the 49½ foot tract.

Defendant obtained an order from the Probate Court which has jurisdiction over the estate of Cathrine Jensen, for authorization to appeal to the Supreme Court from the decree of reformation and for authority to file an undertaking for costs and to execute the contract as ordered by the trial court and deliver it to the clerk of said court as required by Section 104-41-10, Utah Code Annotated 1943. Defendant now appeals to this court for a reversal of said lower court's judgment.

Further facts and details of testimony as might be helpful to the court will appear hereafter in appellant's argument.

## STATEMENT OF ERRORS RELIED UPON FOR REVERSAL OF THE JUDGMENT

The court erred:

1. In overruling defendant's demurrer to plaintiffs' complaint for the reason that it did not state facts sufficient to constitute a cause of action, and that said cause of action was barred by the provisions of Section 33-5-3 Utah Code Annotated 1943.

2. In admitting hearsay evidence of plaintiffs' instructions and statements to their agent, Dowell.

3. In admitting parol evidence to vary the terms of a written instrument.

4. In admitting evidence to set up an oral contract in violation of the statute of frauds.

5. In admitting testimony of a witness rendered incompetent by the "dead man's statute", Section 104-49-2 (3), Utah Code Annotated 1943.

6. In refusing to grant defendant's motion for non-suit on the ground that the plaintiffs had not sustained their burden to make out a prima facie case of mutual mistake.

7. In finding that plaintiffs instructed their agent to purchase the 25½ foot tract as well as the 49½ foot tract.

8. In finding that the plaintiffs' agent entered into an oral agreement with Cathrine Jensen for the purchase of the 25½ foot tract as well as the 49½ foot tract.

9. In finding that the plaintiffs believed and understood Exhibits C and D covered the  $25\frac{1}{2}$  foot tract as well as the  $49\frac{1}{2}$  foot tract.

10. In finding that Cathrine Jensen executed Exhibit C and the original of Exhibit D in the belief and understanding that they covered the  $25\frac{1}{2}$  foot tract as well as the  $49\frac{1}{2}$  foot tract.

11. In finding that Cathrine Jensen discovered her alleged mistake in September or November, 1947.

12. In finding that plaintiffs bargained for the  $25\frac{1}{2}$  foot tract as well as the  $49\frac{1}{2}$  foot tract and that they would not have executed Exhibit D had they known that it did not cover the  $25\frac{1}{2}$  foot tract.

13. In concluding as a matter of law that the plaintiffs and Cathrine Jensen believed the transaction and sale included the  $25\frac{1}{2}$  feet and that Exhibit D erroneously described the property intended by the parties to be sold.

14. In concluding that plaintiffs are entitled to a judgment reforming the contract to include the  $25\frac{1}{2}$  foot tract and that plaintiffs are entitled to costs.

## APPELLANT'S ARGUMENTS

Each assignment of error will not be taken up separately in this brief. Assignments 2, 3, 7 and 9 are discussed under Argument I; Assignment 3 will be taken up under Argument II; Assignments 1, 4, 12 and 13 are discussed in Argument III; Assignment 5 under Argument IV; and Assignments 6, 7, 8, 9, 10, 11, 12, 13 and 14 will be taken up in Argument V.

Appellant's arguments are as follows and will be considered in the following order:

I. THE COURT ERRED IN PERMITTING HERESAY EVIDENCE OF THE STATEMENTS OF PLAINTIFFS TO THEIR AGENT CONCERNING INSTRUCTIONS TO PURCHASE THE 25½ FOOT TRACT, AND IN FINDING THAT SUCH WERE THE INSTRUCTIONS AND THAT PLAINTIFFS INTENDED TO PURCHASE THE SAID 25½ FOOT TRACT.

II. THE COURT ERRED IN ADMITTING ANY TESTIMONY THE EFFECT OF WHICH WAS TO VARY THE TERMS OF THE WRITTEN UNIFORM REAL ESTATE CONTRACT.

III. THE COURT ERRED IN FINDING AND DECREETING THAT THERE WAS A CONTRACT FOR THE SALE AND PURCHASE OF THE 25½ FOOT TRACT OF LAND NOT DESCRIBED IN THE WRITTEN UNIFORM REAL ESTATE CONTRACT AS SUCH CONTRACT IS WITHIN THE STATUTE OF FRAUDS.

IV. THE COURT ERRED IN PERMITTING THE WITNESS, DOWELL, TO TESTIFY TO CONVERSATIONS AND NEGOTIATIONS WITH CATH-

RINE JENSEN IN VIOLATION OF SECTION 104-49-2 (3), UTAH CODE ANNOTATED 1943.

V. THE COURT ERRED IN ITS FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE OF REFORMATION, BECAUSE THERE IS NO CLEAR AND CONVINCING EVIDENCE OF A MUTUAL MISTAKE IN THE EXECUTION OF THE UNIFORM REAL ESTATE CONTRACT.

I.

THE COURT ERRED IN PERMITTING HERE-SAY EVIDENCE OF THE STATEMENTS OF PLAINTIFFS TO THEIR AGENT CONCERNING INSTRUCTIONS TO PURCHASE THE 25½ FOOT TRACT, AND IN FINDING THAT SUCH WERE THE INSTRUCTIONS AND THAT PLAINTIFFS INTENDED TO PURCHASE THE SAID 25½ FOOT TRACT.

In spite of the fact that there exists as the subject matter of this lawsuit a written Uniform Real Estate Contract the terms of which are clear and unambiguous, and the parties to which of their own free will and choice signed, the trial court found that the parties to the contract intended to agree to something other than what was expressed in it. As evidence of what the plaintiffs intended when negotiating and entering into this contract the court permitted both the plaintiffs and their agent, Dowell, to testify to conversations had regarding the instructions given by plaintiffs to Dowell for the purchase of real estate outside the presence of the defendant or her testator, Cathrine Jensen.

At T. 62 in answer to counsel's question, "What directions did he give you?", Dowell, over the objection of defendant's attorney, was permitted to answer as follows:

A. He said, "I am interested in acquiring a property next to my auto court." He said, "It belongs to a woman named Jensen, or some people named Jensen" . . . As I recall the conversation the property consisted of a vacant lot and of a duplex and I said, "How much do you want to pay for it?" He says, "I understand it can be bought for \$8,500.00 but," he says, "I don't think it is worth that much."

It is clear that this statement being made out of court and not subject to cross examination was hearsay and inadmissible.

At T. 19 in answer to counsel's question, "What were your original instructions to Mr. Dowell with reference to this property?", plaintiff, Jerry Sine, was permitted over objection of defendant's counsel, to answer as follows:

A. I told Mr. Dowell that I would like to purchase the property west of my property, the corner property, so that I could square my property that was in the rear. May I also tell him what else I told him?

This also was hearsay testimony. Statements made by a witness to other persons are no exception to the hearsay rule. Evidence of what a witness has said out of court should not be received to fortify his testimony. Other instances of admission of this sort of hearsay evidence are found at T. 26, T. 27 and T. 28.



It follows that since the above testimony was hearsay and incompetent it should not have been admitted nor considered by the trial court in determining whether or not the plaintiffs intended something other than that expressed by the clear and unambiguous language of the written instrument.

## II.

THE COURT ERRED IN ADMITTING ANY TESTIMONY THE EFFECT OF WHICH WAS TO VARY THE TERMS OF THE WRITTEN UNIFORM REAL ESTATE CONTRACT.

The terms of the Uniform Real Estate Contract, entered into between the plaintiffs and Cathrine Jensen were clear and unambiguous, and comprised a complete bilateral executory contract. The execution of such contract superseded all the preceding oral negotiations and stipulations between Mr. Dowell and Cathrine Jensen concerning its terms and the subject property; and the testimony of Mr. Dowell as to conversations and negotiations prior to or contemporaneous with the execution of the written contract is inadmissible to contradict, change or add to the terms plainly incorporated into and made a part of the written contract. The Utah statute in reference to this rule of evidence is Section 104-48-15, Utah Code Annotated 1943, which reads as follows:

“There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

(Exceptions not applicable here)



The annotations to this section include the Utah cases of Fox Film Corp. vs. Ogden Theatre Co., Inc., 82 Utah 279, 17 Pac. 2d 294, 90 A.L.R. 1299; B. T. Moran, Inc. vs. First Security Corp., 82 Utah 316, 24 Pac. 2d 384; and Last Chance Ranch Co. vs. Erickson, 82 Utah 475, 25 Pac. 2d 952. In the Last Chance Ranch Co. case the plaintiff sued for specific performance of an oral contract to transfer 66 shares of stock in a loan company which were alleged to have been purchased together with the real property for which a deed had been executed and delivered by the defendant to the plaintiff. Plaintiff offered oral testimony of statements made at the time of delivery of the deed with respect to such agreement, and it was held that the lower court properly excluded it as varying the terms of the deed. In the B. T. Moran Inc. case there was a written contract for the purchase of wallets providing that the seller would furnish bank-purchaser operators to manage a savings account campaign. Admission of parol evidence that the seller's agent represented that such operators would be experienced in the savings account business and especially trained in sales psychology was held to be reversible error. In the Fox Film Corp. case the defendant had entered into a written contract with the plaintiff corporation for the use of news reels over a period of a year. Because they were found to be old films, when they arrived, the defendant refused them, and, in that case, defended against an action for the balance due on the contract. It was held that the offered testimony to the effect that plaintiff's agent rep-

resented to defendant that these would be the latest reels was inadmissible as adding stipulations to the written contract. The court said that where there is an obvious ambiguity in the writing extraneous evidence of custom and circumstances might be admitted to help clarify the ambiguous terms, but "direct oral evidence as to representation in the nature of warranties or as to statements that are in effect stipulations may not be received . . . The exceptions to the parol evidence rule pertain usually to informal writings, incomplete memoranda, unilateral documents and other writings that do not purport to set forth the entire contract. In cases involving complete contracts signed by the parties thereto and purporting to contain all their promises, representations and undertakings, the rule is more strictly applied."

### III.

THE COURT ERRED IN FINDING AND DECREETING THAT THERE WAS A CONTRACT FOR THE SALE AND PURCHASE OF THE 25½ FOOT TRACT OF LAND NOT DESCRIBED IN THE WRITTEN UNIFORM REAL ESTATE CONTRACT AS SUCH CONTRACT IS WITHIN THE STATUTE OF FRAUDS.

One of the terms of the Uniform Real Estate Contract involved in this action is that

"there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto."

The terms of the Earnest Money Receipt and Agreement include the following:

“Contract of sale or instrument of conveyance to be made on the approved form of the Salt Lake Real Estate Board”

and

“It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the Buyer and Seller and that no verbal statements made by a representative of the Agent relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. It is further agreed that the execution of final transfer papers abrogate this Earnest Money Receipt.”

The execution of this latter instrument constituted the agreement of the parties to a written contract for the sale and purchase of the property described therein, and under its own terms there is no other agreement with reference to said property. Now, when the plaintiffs allege that the parties entered into a different contract, it is barred by the statute of frauds because there is no written memorandum of it signed by the parties. The Earnest Money Receipt and Agreement, although written, by its own terms was abrogated by the execution of the Uniform Real Estate Contract. If Cathrine Jensen, the deceased, ever agreed to sell the 25½ foot tract to the plaintiffs, there is no written memorandum of such agreement and under Section 33-5-3, Utah Code Annotated 1943, neither she nor her

personal representative could be bound by said agreement. The section reads as follows:

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

To seek reformation of an executory contract for additional property is no different from seeking to bind a person to an alleged oral contract of which there is no written memorandum. Professor Williston in his work on Contracts, Revised Edition, says at Page 4356, Section 1555:

Even where an executory contract relates to land and is within the Statute of Frauds, many American authorities allow its reformation whether a deed has subsequently been executed in conformity with the written contract or not. This result deserves support where the instrument contains all the terms required to comply with the Statute, but one or more of those essential terms are by mistake incorrectly stated. Some courts, however, have gone further and reformed an incomplete instrument so as to conform it to the intention of the parties although the omitted terms were necessary to comply with the Statute of Frauds. In other decisions, however, American courts have declined to reform such an executory contract, especially if it is sought to enlarge the terms of the writing, unless there has been such part performance or other circumstances as will make

a failure to reform work a fraud upon the complainant. The theory of the latter cases seems sound, and the Restatement of Contracts adopts it. Where the only effect of a refusal to reform a contract is the loss of an executory bargain which the parties intended to make, it seems impossible to give relief on any principle that would not justify the entire destruction of the Statute.

It is submitted that under the rule as adopted by the Restatement of Contracts, the reformation granted in this case is error because it enlarges the terms of the contract by extending the description of the property involved to include an entirely separate tract 25½ feet in width.

What good is the Statute of Frauds if it doesn't prevent the possibility of fraud in the offering of testimony concerning an oral contract for the sale of land? Here is a contract complete and clear on its face. The purpose of the statute is to prevent a party or a witness from coming into court and making misrepresentations in trying to set up an oral contract which the party to be charged denies? What protection is there for innocent parties from such fraud if the Statute of Frauds does not cover this kind of case? And as Williston says we might as well get rid of the statute as to whittle down its effect to a point where it offers no protection at all.

#### IV.

THE COURT ERRED IN PERMITTING THE WITNESS, DOWELL, TO TESTIFY TO CONVER-

SATIONS AND NEGOTIATIONS WITH CATHRINE  
JENSEN IN VIOLATION OF SECTION 104-49-2 (3),  
UTAH CODE ANNOTATED 1943.

At common law parties to an action or persons interested in the event thereof were disqualified to testify on the ground that their interest in the matter tempted them to perjure themselves. This rule in most jurisdictions both in England and in America has been eliminated by statute and parties in interest are now competent witnesses. Practically every jurisdiction, however, made an exception, and retained the rule in the case of a witness who is called to testify against the heirs, devisees or legal representatives of persons deceased as to conversations, negotiations, or transactions with the deceased. Utah's statute is as follows:

Section 104-49-2, Utah Code Annotated 1943.  
The following persons cannot be witnesses:

\* \* \* \* \*

(3) A party to any civil action, suit or proceeding, and any person directly interested in the event thereof, and any person from, through or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit or proceeding claims or opposes, sues or defends, as guardian of an insane or incompetent person, or as the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian, assignee or grantee, directly or remotely, of such heir, legatee or devisee, as to any statement by, or transaction with, such deceased, insane or incompetent person, or matter of fact whatever, which must have been equally within

the knowledge of both the witness and such insane, incompetent or deceased person, unless such witness is called to testify thereto by such adverse party so claiming or opposing, suing or defending, in such action, suit or proceeding.

There is a split of authority on the question as to whether or not the statute applies to the testimony of an agent for the party who sues the deceased's representative. The Utah court has never ruled on the matter. Mr. Justice Wolfe discussed the question in an article printed in the Utah Bar Bulletin, July-August, 1941, and 13 Rocky Mountain Law Review 282, June, 1941. In pointing out the type of proceeding in which the disqualification exists, he gives a rule that it seems ought to apply in cases where agents are called to testify. It is as follows:

“A rule of thumb which may not be of universal application but which is at least helpful is as follows: On one side is a person who is seeking to protect the integrity of the estate or to recover assets claimed to belong to it; on the other side is a person who seeks to subtract from the estate or resist recovery of claimed assets. The statute is for the benefit of the first side and operates against the opposing party. Therefore when one stands on the state, affirms and acknowledges it for the support of his interest or claim whether that interest be derived directly or through heirs or others who took or claimed through the estate he can take advantage of the statute. But he whose claim depends upon subtracting from an estate or on establishing the fact that the property did not belong to or was not derived from the estate is made incompetent



by the statute. Where parties all stand on the estate for their rights but the controversy is over their respective shares, as in will contests, the statute does not apply.”

We certainly have a case here where the personal representative is defending to preserve the estate from depletion by strangers to the estate. A general rule of agency is that when an agent acts he acts for his principal. The plaintiffs who are attempting to deplete the estate were represented by their agent, Dowell, in any conversations, negotiations and transactions with the deceased. Applying the rule of agency his transactions with the deceased were the plaintiffs’ transactions with the deceased, and his testimony concerning those transactions by the same token was as though it was the testimony of the plaintiffs. The case of *Banking House of Wilcoxson and Co. vs. Rood* (1896), 132 Mo. 256, 33 S. W. 816, supports this theory. The plaintiff bank sued the administratrix of the estate of the maker of a note payable to the bank. The cashier and president of the bank, both of whom were stockholders of the bank, were allowed to testify to the genuineness of the signature as well as to the fact that they saw the deceased sign the note. It was held that testimony concerning the signing of the note was concerning a negotiation or transaction, and was improperly admitted. The court said:

“Signing the note by deceased was part of the transaction which resulted in the contract in issue, and the agent of the corporation who conducted the negotiations, whether a stockholder or



not, could no more testify to that fact than any other fact connected with the negotiations. . . . The court has ever undertaken to conform its decisions to the spirit, rather than to the strict letter of this statute. . . . The primary object and purpose of the law, evidently, was to remove the disabilities by which parties to the record and parties interested were at common law rendered incompetent to testify. The exception was intended to prevent the injustice that would arise in permitting one party to the contract or cause of action to testify when the lips of the other are sealed in death.”

The exception to the Missouri statute in this case was as follows:

*provided*, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead . . . . the other party to such contract or cause of action shall not be admitted to testify.

and the court said:

A party to the contract has been construed to mean the person who negotiated the contract rather than the person in whose name and interest it was made.

Another case holding that an agent is included within the rule and which follows the Banking House case is *Taylor vs. George*, (1914), 176 Mo. App. 215, 161 S. W. 1187, in which the plaintiff sued the executor of her mother's estate on a claim that prior to her mother's death she had rendered care and services under a contract whereby the mother was to pay for said care and services. The plaintiff's husband, contending to be an

agent of his wife, was held to be incompetent as a witness inasmuch as he acted as an agent in negotiating the contract with his wife's mother. The court in this case said the following:

. . . . The present ruling certainly conforms to the evident purpose of the statute, makes it uniform in its application, and aids in preventing inequality and false swearing in that, in all cases where one of the active parties in making a contract or conducting a business transaction, whether as principal or agent, is dead and such contract or transaction becomes the basis of a lawsuit, then the other active party is disqualified as a witness with relation thereto. Keeping this intent and purpose of the proviso to the statute in view, much of the difficulty in the construction of the statute vanishes by applying these principles: That the spirit of the statute includes in the term "party to the contract or cause of action" the agent who negotiated the contract or conducted the business; that the statute makes no distinction in this respect between corporations or partnerships and individuals when acting by agent, and there is no distinction in principle; that the proviso to the statute makes the death of the other party to a contract or cause of action the sole ground and test of such disability without any reference to the witness' interest in the controversy or his competency at common law. We therefore hold that the trial court did not err in holding that plaintiff's husband is not a competent witness as to making any contract as agent of his wife with the deceased and in excluding his evidence as to such matter.

It is submitted that the same reasons that prompted the Missouri court to hold the agent incompetent in these cases and the same reasons that prompted the legislature to disqualify a party in this state are present in this case and that Dowell as the agent of the plaintiffs in negotiating for the purchase of the real estate from Cathrine Jensen, ought to have been disqualified from testifying to those transactions after the lips of Cathrine Jensen had been sealed by death. The spirit as well as the letter of the law would then be served.

Not only should Dowell be disqualified as an agent of the plaintiffs, but he should also have been held incompetent as a person interested in the event of the suit. In referring to the transcript where defendant's counsel cross examined Mr. Dowell we find at T. 153 the following:

Q. Now you, as I understand, still have a note of Mr. Sine's which has not been paid, for the payment of your commission?

A. That's right.

Q. And your instructions were to, you say, to buy the entire tract?

A. That's right.

Q. So that if Mr. Sine is not successful in this lawsuit you may not be able to collect your commission?

(An objection was here made which was overruled.)

A. There was never any question in my mind about collecting that.

Q. But you are interested in seeing that Mr. Sine prevails in this action?

A. Definitely, I feel that I fell down on it, on my end.

Appellant contends that the interest Mr. Dowell admits in the action is such a direct interest in the event thereof as to disqualify him. The best way to determine if a person should be disqualified because of interest is to go to the common law and see if, before the statutes liberalizing the rules of competency, an agent would have been disqualified because of a similar interest in a suit. Jones, Commentaries on Evidence, 2nd Ed., Vol. 5, Page 4280, also advocates this guide as follows:

“Sec. 2235—Persons Interested in Suit—In General—In many jurisdictions the disqualifying proviso extends to persons generally who are ‘interested in the event’ of the particular action in which they seek to testify, whether or not they are parties to the action or to a particular contract in issue. In view of the number of statutes in which such language is employed, it becomes necessary to determine the nature of interest sufficient to bring a proposed witness within the term. We may say at the outset that in no event does disqualification for interest under such provisos go beyond the common law conception of that term as developed around the rule prior to comparatively modern statutes that a party or person ‘interested’ was incompetent as a witness in any suit or action. It is conceived that the intent of the provisos in such statutes could only have been to save the common law rule in the exceptions stated, and not to go beyond such rule.”

The common law rule that disqualified all parties and all persons interested in the event of the suit was rather harsh in the case of transactions in which parties usually dealt through agents, brokers and factors, for there was no way of proving the existence of, or details of, such transactions unless they were permitted to call their agents, brokers and factors to testify for them. So out of public necessity and convenience grew an exception to the interest rule and such individuals were allowed to testify. But this exception was limited to cases where the agent had acted within the ordinary course of the business of his principal, and where he had no direct interest in the suit. Greenleaf in his work on Evidence, 14th Ed. Vol. 1, page 503, discusses the question as follows:

“Sec. 417—Limitations of Exception in Favor of Agents, Etc. — This exception being thus founded upon considerations of public necessity and convenience, for the sake of trade and the common usage of business, it is manifest, that it *cannot be extended* to cases where the witness is called to testify to facts *out of the usual and ordinary course* of business, or to contradict or deny the effect of those acts which he has done as agent. He is safely admitted, in all cases, to prove that he acted according to the directions of his principal and within the scope of his duty; both on the ground of necessity, and because the principal can never maintain an action against him for any act done according to his own directions, whatever may be the result of the suit in which he is called as a witness. But if the cause depends on the question, whether the agent has been guilty of some tortious act,

or some negligence in the course of executing the orders of his principal, and in respect of which he would be liable over to the principal, if the latter should fail in the action pending against him, the agent, as we have seen, is not a competent witness for his principal, without a release.”

and here Mr. Greenleaf cites the case of Fuller vs. Wheelock, 10 Pick. 135, an old Massachusetts case decided in the days before the relaxation of the competency rules. The plaintiff brought an action on a promissory note, and the defendant pleaded payment to the plaintiff's agent. The plaintiff was allowed to put on his agent who testified that even though he made out a receipt to the defendant, he didn't receive the payment. The court held that admission of this testimony was error because of the incompetency of the witness. A part of the decision of the court is as follows:

“The question then is, was this witness incompetent by reason of interest, and the court are of opinion that he was. He was the acknowledged agent of the plaintiff to receive the money; his receipt was *prima facie* evidence that he had received it, and the plaintiff had given him no release. If the plaintiff failed in this suit, he would have an immediate action against the witness for money had and received, an action which a recovery in this suit would bar. If the plaintiff should prevail in this suit, the defendant would have no action over against the witness, to recover back the money, without being obliged to prove not only that he had paid the money according to the terms of the receipt, but

also that the witness had been guilty of some breach of trust, towards the party of whom the money was received, so as to bring the case within the principle of *Fowler v. Shearer*, 7 Mass. 23. Otherwise, the witness being duly authorized to receive the money, would be responsible to his principal only, and not to the defendant. We think, therefore, that his direct interest on one side, was not balanced by an equal interest on other side, and that he was not a competent witness.

“Nor does the witness come within the exception in regard to agents. This exception is founded upon considerations of necessity and great public convenience, for the sake of trade, and the common usage of business. These considerations cannot apply where a witness is called to testify to facts out of the usual and common course of business, and to contradict and deny the effect of those acts which he appears to have done as such agent.”

At 70 Corpus Juris 266 the rule, as supported by possibly the weight of authority, that allows an agent to testify is stated and then qualified to include Greenleaf's limitation as follows:

“Sec. 333—Agent of Party—One who acted as an agent for another in a transaction with a person since deceased is, as a general rule, competent to testify as to transactions or communications with decedent. An agent, being neither a party to, nor directly interested in, the result of an action by or against his principal or a representative of his deceased principal, is competent as a witness therein. However, where the agency is coupled with an interest in the event



of the action, the agent will be disqualified as a witness."

Corpus Juris cites in support of this last sentence the above quotation from Greenleaf, and the case of Bruner vs. Battell's Executors, 83 Ill. 317. The Illinois case involved the question of the last installment payment on a real estate contract, and was being prosecuted by the purchaser's personal representative. Following the Fuller vs. Wheelock, supra, case the court held that the seller's agent should not have been allowed to testify as to non-payment. The court said that prior to the Statute of 1867 which removed the disqualification of parties and those interested in the event of the suit, there would have been no question as to the incompetency of the agent's testimony and further that "the act of 1867 would have removed the disability of the agent by reason of his interest, had he testified while Bruner was living; but when he testified Bruner was dead, the suit was being prosecuted by his widow and heirs, and the matter of his evidence comes within none of the exceptions in that statute, which allows an interested party to testify, notwithstanding the suit is being prosecuted by the representatives of a deceased person, on the theory that the mouth of the deceased had been closed by death."

Dowell admitted as shown above that he felt that he had let Mr. Sine down in negligently transacting the business it is alleged he had been employed to perform. Why shouldn't Mr. Sine, if he instructed Dowell to purchase both tracts, seek retribution from Dowell for



his negligence? Of course, he can't sue Dowell for specific performance, but he could sue for damages for the loss of the bargain it is alleged he thought he was getting. Dowell knew there was the possibility of such a suit, and therefore it is possible he was tempted to testify as he did, in trying to set up this mutual mistake; for as the court in the Fuller vs. Wheelock case, *supra*, said "if the plaintiff failed in this suit, he would have an immediate action against the witness . . . an action which a recovery in this suit would bar." Of course, the appearance of the plaintiffs and the witness Dowell in court was that they were very friendly and that the plaintiffs had no ill feeling toward Dowell for his negligence in the closing of the transaction. Nevertheless it is submitted that if the plaintiffs should eventually lose this case on appeal they might well proceed against Mr. Dowell, and there is authority that they would have a good cause of action. The Restatement of Agency, Section 379 provides as follows:

Unless otherwise agreed a paid agent is subject to a duty to the principal to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has.

The fact that the plaintiffs were negligent themselves in not carefully reading the contract, as prepared by Mr. Dowell, if such fact is true, would be no defense for Mr. Dowell in the event of suit against him by plaintiffs for his negligence in representing them. An

example of this is the case of Shapiro vs. Amalgamated Trust and Savings Bank, 283 Ill. App. 243. In this case the plaintiff had instructed her bank to obtain a fire insurance policy on some property of hers. The bank purchased a policy which carried a condition as follows: "Void if the interest of the insured be other than unconditional and sole ownership." The officers of the bank who handled the transaction for her knew that her ownership was not sole and unconditional. When plaintiff's premises were destroyed by fire and the insurance company refused to reimburse for the fire damage because of the condition, plaintiff brought an action for negligence against the bank and its defense was that the plaintiff was contributorily negligent for not reading the policy herself. The Court held for the plaintiff, and in its decision said the following:

"In the instant case the defendant was the agent of the plaintiffs in procuring the insurance policy and it cannot avoid liability because of an alleged failure on the part of the plaintiff to ascertain whether the agent has faithfully performed the duty for which it was employed."

In recapitulation of the points of this argument the court should note, first, that the agent, Dowell, was negligent in not purchasing for his clients the 25½ foot tract, if his instructions were in fact to so purchase it; second, that the plaintiffs' failure to read the contract carefully would be no bar to an action by said plaintiffs against Dowell for his negligence; third, that if plaintiffs succeed in this lawsuit they will, of course

be barred against suing Dowell, or conversely, if they do not succeed, they might well bring an action against Dowell; fourth, that such possibility of suit gives Dowell a direct interest in the outcome of the present action, and such interest, under our statute, is sufficient to disqualify him as a witness against the defendant.

## V.

THE COURT ERRED IN ITS FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE OF REFORMATION, BECAUSE THERE IS NO CLEAR AND CONVINCING EVIDENCE OF A MUTUAL MISTAKE IN THE EXECUTION OF THE UNIFORM REAL ESTATE CONTRACT.

To secure reformation of a written contract which is presumed to be the real contract and to contain all the terms agreed upon, the party seeking relief and demanding reformation of the contract must establish the mutual mistake by evidence that is clear, satisfactory and convincing. This rule was early established in Utah as indicated in the following cases: Cram vs. Reynolds, (1919) 55 Utah 384, 186 Pac. 100; Wherritt vs. Dennis, 48 Utah 309, 159 Pac. 534; Weight vs. Bailey, 45 Utah 584, 147 Pac. 899; Deseret National Bank vs. Dinwoodey et al., 17 Utah 43, 53 Pac. 215; Ewing vs. Keith, 16 Utah 312, 53 Pac. 4; Chambers vs. Emery, 13 Utah 374. Whether it is the alleged mistake made by the plaintiff who is attempting to show a different contract from that which is written, or whether it is the alleged mistake of the defendant who

is insisting that he made no mistake, the evidence to establish the mistake of either must be clear, satisfactory and convincing.

In order to determine whether or not there is any clear and convincing evidence that Cathrine Jensen ever intended to sell the 25½ foot tract together with the 49½ foot tract to the plaintiffs, or that she did in fact agree to sell the 25½ foot tract, as alleged by plaintiffs, we must make a careful examination of the evidence. In that connection there follows all of the evidence that has any bearing on the alleged fact that she had such intention or so agreed; and it must be noted that it is all Mr. Dowell's testimony, for both the plaintiffs, Jerry and Dora Sine, testified that they had no contact with Cathrine Jensen, personally, before, or at the time of, the execution of the contract. T. 46, and T. 58.

The following testimony of Mr. Dowell was admitted over the objection of defendant's counsel (T. 70):

Q. Did you talk to Mrs. Jensen concerning this property?

A. Yes.

Q. How many times?

MR. MACFARLANE: Now my objection goes to this whole line of testimony, if Your Honor please.

THE COURT: Yes, that is the understanding.

A. Well, I called on Mrs. Jensen twice at her home on Eighth South and at least three times at her home on Third South.

Q. How many of those conversations were prior to the execution of these contracts, prior to the execution of Exhibit D, the Uniform Real Estate contract?

A. Well, it would be two on Eighth South prior to the time I drew up this contract because we hadn't reached a meeting of the minds on the purchase price and terms.

Q. Now on your first approach to Mrs. Jensen, state where and when that took place.

A. Well, that was in her home on Eighth South. As a matter of fact, it was termed her husband's home. It belonged to Mr. Jensen, as I understand it. At any rate she was there when I rang the bell or knocked.

MR. MACFARLANE: Now I want the further objection, if Your Honor please and the record to show that the negotiations of the parties later resulted in a written agreement and that all of the conversations and negotiations were merged in a written agreement and this conversation is incompetent, irrelevant and immaterial.

THE COURT: The objection is overruled.

Q. Will you proceed?

A. Mrs. Jensen, I learned after, asked me to come in. The door, the screen door was locked. Her daughter from Colorado at that time was there and opened the door. I said to Mrs. Jensen, "My name is Dowell. I am a real estate agent. I understand you own some property on West North Temple adjoining the Bishop's Auto Court?" She said, "That is right." I said, "Is it for sale?" She said, "Yes, I'll sell it." I said, "What would you ask for

it? What would you take, including the commission?" She said, "I want \$8,500.00." I said, "I can't get \$8,500.00. I can get you \$8,000.00. I am authorized to buy it for \$8,000.00." She said, "who wants to buy it?" At first I was reluctant to say it. I was thinking in my own mind if I went down there—

(Objection—Sustained.)

A. She asked who wanted to buy it. I said, "The man who owns the auto court next to it, Mr. Sine." She said, "He should pay more for it." I said, "\$8,000.00 is all he wants to pay for it and in my opinion that is a lot of money for it." She talked about a lot of things. Her daughter came in and we talked about everything but real estate. We agreed—

(Objection—Overruled.)

A. The conversation involved the \$8,500.00. If I could get Mr. Sine to pay \$8,500.00 with \$1,500.00 down and \$75.00 a month she would accept it. I went back to Mr. Sine and asked, told him what I had found out.

\* \* \* \* \*

(T. 73)

Q. Then you went back to Mrs. Jensen?

A. I didn't go back to Mrs. Jensen that day. I went back the following day.

Q. Where did you see her then?

A. At the place I met her previously.

Q. Who was present at that time?

A. Mrs. Jensen, as I recall, was there. Her daughter was just driving away. In fact,



her daughter was preparing to go back to Colorado, as I recall.

Q. Will you state what the conversation was on that occasion?

A. I said, "Sine still wants to buy it for \$1,000.00 and he will pay \$75.00 a month for two years." She said, "I'm not going to pay a commission out of \$1,000.00. It doesn't give me any money." I said, "As a matter of fact, I am going to lend Sine the commission. You agreed to take \$8,000.00 net. Sine is paying the commission." And then that is when I had this agreement and she signed it.

Q. Now had Sine already signed this Exhibit?

A. Yes. When Sine first—

THE COURT: That is the earnest money receipt you are talking about now?

A. Uh huh.

Q. Exhibit C?

A. You see I didn't have an earnest money receipt when Sine first talked to me about it.

(Objection—Overruled.)

Q. Well, have you related all of those conversations?

A. You mean up to this time the earnest money receipt was signed?

Q. Yes.

A. Generally everything, as I recall, that has been said.

Q. Was anything said other than what you have testified to concerning the identity of the property or description of it?



A. There was nothing said other than talking about the property.

(Objection interposed here. Overruled.)

A. That was all that was said. I said, "The property that adjoins the Bishop's Auto Court."

Q. Was there any conversation regarding dimensions?

A. Yes.

MR. MACFARLANE: I object to that as leading and suggestive.

THE COURT: The objection is overruled.

A. There was talk about the dimensions when we were talking about this price. My opinion was it was a lot of money for a house forty years old. I said, "If you figure this out—the house isn't worth very much money—this man is paying \$8,000.00 for a—

Q. Give your conversation.

A. She said, "I get eighty or ninety dollars a month income from that and I could get a lot more if rent controls were taken off." I said, "The fact remains you are getting more than \$100.00 a foot for it. This buyer is going to tear the house down anyway." She said, "That has nothing to do with me. He is crazy if he is going to tear it down." I knew the piece down the street—

MR. MACFARLANE: I object to what he knew, Your Honor.

Q. State what you told her.

A. I told her a piece down the street sold for \$85 a foot.

Q. Do you know whether the matters you have just related were in the first or second conversation?

A. Well, they were both in the second conversation. I am inclined to think they were in the second conversation. The first time it was even more conversation and I didn't know what Sine would say so I couldn't sign up anything definitely, whether he wanted to pay \$8,500.00 or not, so I couldn't say anything definitely.

REDIRECT EXAMINATION OF DOWELL (T. 148)  
BY MR. BIRD:

Q. Now, Mr. Dowell, you stated last evening out of Court to me that there was some additional conversation that you had with Mrs. Jensen prior to the execution of the earnest money receipt in this case which you didn't mention and had not volunteered, is that correct?

A. That's right.

Q. Will you state what that was?

\* \* \* \* \*

MR. MACFARLANE: Now may I have the same objection that I have been interposing—that this is an incompetent witness and this is hearsay:

THE COURT: Yes you may, and the objection will be overruled.

A. In the conversation, trying to prevail upon Mrs. Jensen, trying to get her to accept \$8,000.00 for the property, I said, "Of course this property is worth more to my client than anyone else. That is the main reason he is paying \$8,000.00. The main reason is to straighten this out." I said, "However, he has in mind building a cafe there. People staying in this court have objected to having to go so far. They would stay one night and the next day they would move on account of having to go so far to get satisfactory food. Sine says I believe I

could put up a restaurant there and not only make it pay me—

THE COURT: This is what Mr. Sine said to you?

Q. This is in your conversation with Mrs. Jensen?

THE COURT: Oh, you told Mrs. Jensen that?

A. Yes.

THE COURT: All right.

A. "Sine had told me he aimed to put up a restaurant for the reason it would not only be profitable to him but it would add to the value of his auto court, the operation of it. It would be a more complete operation." And Mrs. Jensen said, "Well, I have had in mind doing something of that nature myself, if my health permitted or if I had somebody to entrust it to whom I could rely upon. I still might do that." She reluctantly—

MR. MACFARLANE: I move that "reluctantly" be stricken.

THE COURT: Well, that part, that word will go out. Just don't use the word "reluctantly."

Q. Describe what she said and did and if you can make plain her attitude. Otherwise you must not say what was in her mind. You say what she said and did.

A. She said, "I would hold on to the property. The children don't want me to sell it. But I am glad to be free of it for the reason that I just can't take care of it." She had a granddaughter living in the property—

MR. MACFARLANE: Now did she say that?

A. Yes. She told me her granddaughter

was there. I could have found her without going to all of the trouble to locate her. But of course at the time I didn't know that her granddaughter lived there.

Q. Have you completed the conversation?

A. Yes.

Except for some references to Mrs. Jensen in connection with obtaining the abstract from her and having her sign an affidavit and the Uniform Real Estate Contract itself, the above is the complete testimony of Mr. Dowell with respect to any conversations he had with Cathrine Jensen from which there is any indication of what was on her mind, when she entered into this contract, concerning the amount of ground she intended to sell. And among all these statements only three provide any inference at all that Catherine Jensen might have thought that the contract was for the 25½ foot tract as well as for the 49½ foot tract. Twice Dowell referred to the property Sine wanted to purchase as the property adjoining the Bishop's Auto Court, T. 72 and T. 75, and once at T. 149 and T. 150 the conversation concerned Sine's desire to put up a restaurant or cafe there. Regarding this restaurant or cafe, there is nothing to show that Cathrine Jensen might not have thought that Sine's desire was to put up the cafe or restaurant on the 49½ foot piece, on the corner, because Dowell had previously told her that if Sine purchased the property he would tear down the duplex on it (T. 76). Therefore, it is not unreasonable to believe that Cathrine Jensen didn't

realize that Dowell was bargaining for the 25½ foot piece as well.

As against this incompetent evidence concerning these conversations there is the testimony of all of the Defendant's witnesses, including herself, that Cathrine Jensen, at some time either just before or soon after she executed the Uniform Real Estate Contract, had told them she had plans for the use of the 25½ foot piece of ground. The defendant, Mrs. Harper, and a daughter of Mrs. Jensen, testified at T. 110 and 111 as follows:

Q. Now were there any other conversations at which you were present in which the twenty-five-and-a-half-foot strip was discussed?

A. Well, a long time before that.

Q. When would a long time before be?

A. That was in the fall of 1947.

Q. And who was present at this conversation?

A. Well, my father and Mrs. Freeman and she—

MR. BIRD: Could we have the date of that and the place?

A. Well, it was about September of 1947.

\* \* \* \* \*

Q. Now will you relate that conversation, please?

(Objection—Overruled.)

A. At that time she wanted my father to build him a little lunchstand, hamburger place, you know. Something along that order, thought it would give him a small income for his livelihood.

The following testimony at T. 126, 127 was given by Mrs. Freeman, another daughter of Cathrine Jensen:

Q. Now, Mrs. Freeman, did you in the year 1947 discuss with your mother, or was the matter discussed in your presence about this twenty-five-and-a-half-foot strip after the sale of the forty-nine-and-a-half-foot strip to Mr. Sine?

A. Yes sir.

Q. And when was that, please?

A. That was right, I talked with her right after she had sold the place.

\* \* \* \* \*

A. Mother said I could go ahead and use the twenty-five-and-a-half-foot piece and my father could build us a little hamburger place and little lunchstand and she thought he was a good cook and he could cook and I could help him. She said that would be adequate, it would be plenty large for a little five-cent place and since there was tourist cabins around there and she thought that would be a nice place and I mentioned that to Mrs. Sine."

And then at T. 128 she further testified to the same conversation in September, 1947, as Mrs. Harper testified to.

Mr. Biddinger, the father of Mrs. Harper and Mrs. Freeman, from whom Mrs. Jensen had been divorced in 1937, testified at T. 134 to the conversation in September, 1947 referred to above, and further at T. 135 that he had a conversation with Cathrine Jensen in June, 1948, at which time she told him she wanted him to take this 25½ foot piece of property and build a

little house on it, because he was then living in a basement apartment and was getting rheumatism.

Mr. J. C. Jensen, the deceased's surviving husband, testified at T. 140 to the same general line of conversations, although he did not place any one of them at any particular time.

Another daughter of Cathrine Jensen, named Verda Wheeler, testified at T. 165, 166 that the day her mother signed the Earnest Money Receipt and Agreement, the day of Dowell's second visit, she and her mother went to the premises at 656-658 West North Temple, and had the following conversation:

A. Well mother, she said, "They are not buying all of this." She said, "They are buying this that the house is on" and showed me what it was and I asked her why she wasn't selling the other twenty-five feet and she said, "I didn't buy that with the place and I am not selling it with the place." She said she wanted to put a hamburger stand some place on it and she said, "I am not selling the place."

Mrs. Wheeler further testified at T. 166 as follows:

Q. Now during the conversation that you heard on the first occasion did you ever hear Mr. Dowell mention seventy-five-foot frontage?

A. No sir, I don't remember hearing any footage mentioned at all. As I remember it, it was numbers 656 and 658.

Q. And did you during that conversation hear a statement in substance and effect made by Mr. Dowell that at \$8,000.00 she would be getting more than \$100.00 a foot?



A. No sir, I don't remember \$8,000.00 being mentioned.

Q. Did you on that occasion, the first occasion, ever hear the name of Mr. Dowell's client or the prospective purchaser mentioned?

A. No sir. Not until mother and I went up to the house. The day we went up to the house she told me who was buying it.

Q. Well, that was the second time?

A. The second time, yes sir.

The existence of the written Uniform Real Estate Contract requires that plaintiffs' evidence of mistake be clear and convincing. In the light of all of the above evidence, Dowell's testimony is certainly not clear and convincing. He stands alone as the only person who has given any evidence of Cathrine Jensen's alleged mistake. Even the court at T. 99, after hearing Dowell's testimony concerning his two visits to Cathrine Jensen, said there was no proof as to when she learned about the fact that the contract did not include the 25½ foot piece. It is admitted that she knew about it on the 24th day of November, 1947 when she paid the taxes on it. There being no proof according to the court as to when she learned of it prior to that time, there is no proof that she didn't know all the time just exactly what the description in the contract covered. Of course, as shown above, plaintiffs have attempted to prove by Dowell's testimony of conversations with Cathrine Jensen that she intended and agreed to sell the 25½ foot piece, but not one word of it refers to

any statement by her that she intended to sell the 25½ foot tract.

Following a long line of Utah cases the court in the case of *Forrester v. Cook*, 77 Utah 137, 292 Pac. 206, upheld the lower court's refusal to reform a contract for the sale of land, the default on which was the basis for an action in unlawful detainer. The defendants claimed that the contract failed to express the true intent of the parties in that it incorrectly provided that the mortgage was renewable for an additional term of three years, instead of for additional *terms* of three years, as intended by the parties and that the scrivener had made the mistake. Both defendants testified that in the conversations had prior to the making of the contract it was stated that the plaintiff would grant them the privilege of renewing this mortgage for additional terms. The plaintiff and her daughter testified just as positively that it was for one additional term. The attorney who drafted the paper testified that it was the understanding between the parties that it should be for additional terms and that the language in the instrument was probably the result of a typographical error of his stenographer. The court held that such was not clear and convincing evidence of the mistake and denied reformation.

Cases from a few other jurisdictions might serve to show what is intended by the requirement that the mutual mistake be proven by clear and convincing evidence. In the case of *Biskupski vs. Jaroszewski* (1947) 398 Ill. 287, 76 N. E. 2d 55, the appellate court re-

versed a decree of reformation of a contract for the purchase of property described as a corner store known as 8450 Commercial Avenue, which the plaintiff claimed was intended to include another store next to it known as 8448, both of which stores were in the same building. The holding of the court was in spite of the following evidence in favor of the plaintiff: Plaintiff testified that the preliminary negotiations concerned the whole "building". The plaintiff's son testified that the word "building" was used. The plaintiff's son-in-law testified to the same effect concerning the negotiations and further that when the defendant took them to look at the premises they went back and looked at the "building" from the rear. The real estate agent who drew the contract testified that he knew of both numbers, and when he asked whether to use both numbers in the contract, he was told by the defendants that 8450 covered the whole building. The court said that this evidence was too loose and there were too many discrepancies to overcome the strong presumption arising out of the written contract.

In the case of *Teutsch vs. Hvistendahl* (1947), \_\_\_ S. D. \_\_\_, 29 N. W. 2d 389, the seller owned lots 7 and 8. The house was mostly on lot 7, but overlapped 6.7 feet onto lot 8. The written contract for the sale of the house, prepared by the seller, provided for the sale of Lot 7 only. The purchaser upon discovery of his error sued for reformation of the contract to include lot 8. On the ground that there had never been any understanding between the parties prior to the

written contract which differed from the intention manifested in said contract, the court held that the trial court's refusal to reform the contract was correct.

If there ever existed a set of facts that justified a court of equity to reform a deed they were in the Missouri case of Hood vs. Owens (1927), 293 S. W. 774. In that case the parents of the plaintiffs had owned a four acre tract of land upon which stood their home, and two town platted lots adjoining the four acre tract across which lots was a road giving access to the highway which adjoined the town platted lots on the opposite side from the four acre tract. The parents had obtained all three parcels in the same deed. This case concerns a deed to the two plaintiffs from their parents, reserving a life estate, which deed described only the two town platted lots. The complaining daughter contended that the parents had intended to include all three parcels. At the time of executing the deed the parents had also executed a will disposing all of their other property to several other children. It carried this provision: "My daughters Nellie Gee and Lena Gericke (Plaintiffs herein) having already been provided for, I give nothing to them out of my personal property." The will disposed of no real property, but purported to dispose of all the property left. The evidence was to the effect that the deed and will were both made at the bank by Judge Hopper. The banker who was a witness to the will testified in part as follows:

"Judge Hopper had the book and did most of the explaining, and my recollection is that he

read it over, the will, and the question was asked there why the two girls got nothing, and it was explained there that the old folks had deeded this five acres to them, to these two girls."

A. They brought the will there. The reason that he gave them nothing, they had been paid out. They were provided for in the deed.

Q. To what?

A. To that five acres where they lived, that he had when they lived there, to the five acres.

\* \* \* \* \*

Q. Do you know what land was described in the deed?

A. No sir, only it was understood to be that five acres.

Q. Who understood that?

A. Judge Hopper and the two old folks."

A Mrs. Della Call testified:

"I knew where the Gericke home was in Miller. They owned four or five acres there. I talked to her about this home there at Miller. She said it was coming to Lena Hood and Nellie Gee at her death.

Lena Hood testified:

"Mama had told me, and Papa did too, why he hadn't given us anything in his will. Because we were to take care of mother as long as she lived and of him as long as he lived also, and it was to fall to us at her death, the property."

\* \* \* \* \*

Q. Did your mother tell you that this deed had been made?

THE COURT: What did she say about it?

A. She told me the next day after Mr. Hopper was out there how they had made the will, and she had made the deed out and how she had made it to us girls. We were to take care of her as long as she lived.

THE COURT: Had made a deed to what?

A. To that property to us girls.

Q. To what property?

A. To the four acres that we were living on. That was all she had.

Q. What did she say about what property it was that she had made the deed to?

A. It was the four acres, the place we were living on. They were to have the right to it as long as they lived. . . ."

An excerpt from the decision of the court is as follows:

"The evidence tends to show that the two platted town lots, conveyed to Lena Hood and Nellie Gee by the Warranty Deed which they seek to have reformed, have a width of only fifteen feet and the area of the two lots is so small that no substantial buildings or improvements can be erected thereon, and that the two platted lots are practically valueless, unless they be used as a part of the four-acre tract of land in controversy, immediately adjoining said lots on the south. The two platted lots lie between the four-acre tract and a public road or street on the north of said lots. Access to the public street from the four-acre tract can be had only over and across the two platted lots. The dwelling house and improvements are located entirely upon the four-acre tract in controversy.

“But whether the makers of the deed erred in their judgment as to the value of the two platted lots which were actually conveyed by the deed, or whether they intended to convey by the deed the four-acre tract in question, as well as the two platted lots which were actually conveyed by the deed, we find no clear and convincing proof in this record of the manifest intention of the makers of the deed to have included in the deed the four-acre tract of land, which respondents, long after the deaths of the scrivener and makers of the deed, now seek to have inserted therein.”

“While it may be true that an inference might be drawn from the evidence and surrounding circumstances herein, which, in the ordinary trial of facts, might justify a finding that the grantors intended to include in the deed the four-acre tract omitted therefrom, yet such inference cannot be indulged where reformation of an executed written instrument is sought in equity, inasmuch as clear, cogent, and convincing evidence of mutual mistake is always required in actions for reformation of such an instrument.

“It follows that the circuit court erred in decreeing reformation of the deed from Jennie M. and Henry J. Gericke to respondents, Lena Hood and Nellie Gee, and that the judgment of partition, based upon such reformation, is likewise erroneous.”

It might be helpful to the court to consider two or three cases in which a reformation of the written instrument has been granted in order to determine whether or not there is the necessary clear and convincing evidence in the case at bar. A recent case in



California, *Good vs. Lindstrom* (1947), 80 Cal. App. 2d 476, 181 Pac. 2d 933, granted reformation of a deed which, included 6½ acres instead of 1½ acres originally agreed upon as claimed by the Seller. Plaintiff put in evidence a document purporting to be an offer to purchase signed by the defendant, which described the property as 1½ acres. The court said the evidence was convincing. This case is easily distinguishable from the case at bar for there is no writing anywhere in the case at bar which describes the property as a 75 foot tract.

In *Whitt vs. Proctor* (1947), 305 Ky. 454, 204 S. W. 2d 582, there was involved a deed describing only three out of five contiguous lots. The grantees under the deed took possession of all five lots believing them all to have been conveyed. The grantors even watched the grantees tear down a barn and remove peach trees on the two lots that were not included in the deed. All five lots were later sold by the original grantees mentioned above to subsequent purchasers from them, who likewise took possession and used all five lots for 20 years. The latter discovered the mistake in the original purchaser's deed and sued in equity for its reformation to include the other two lots. The court held the evidence to be sufficiently clear and convincing to grant reformation, especially because the defendant had slept on his rights and led the purchasers to believe that he had intended to sell all five lots.

The plaintiff in *Capone vs. Roberts*, (1947) 73 N. Y. Supp. 2d 712, owned three parcels of land by virtue

of one deed. Two parcels had houses on them. The third did not. The deed in question described all three parcels also. Plaintiff, the seller, brings this action in equity for reformation of the deed so as to include only one parcel in the deed, claiming that the preliminary negotiations for sale which referred only to 1222 Dabney Avenue were intended to cover only the one parcel. There was evidence produced at the trial that the seller who couldn't read or speak English well took his old deed to his attorney to have the new deed drawn up, and the attorney knowing no better, copied the same description. Although the defendant testified that he thought he was to get all three parcels, his lawyer frankly admitted that he was surprised to learn that the description in the deed included more than one house. There was further evidence that the parcels were fenced separately, and assessed for taxes separately. A written notice of change of ownership was prepared at the time of closing and sent to the tenants of 1222 Dabney Avenue, but none was sent to the tenants of the other house, which the court said was significant, because if the buyer had thought he purchased both houses he would have sent notices to all tenants. The court granted reformation in this case on the ground of clear and convincing evidence of a mistake. This case is also distinguishable from the case at bar in that the reformation is to decrease the terms of the instrument rather than to increase them. If the facts of the case at bar were reversed so that the contract described a 75 foot tract, and the defendant was

suing for reformation to have it decreased to 491½ feet she would be in the position of the plaintiff in the Capone vs. Roberts case. There is a physical line of demarcation between the 251½ and 491½ foot tracts in that the hedge in front of the duplex does not extend over in front of the 251½ foot tract (T. 4), furthermore the properties are assessed separately for taxes, and as a matter of fact the taxes as shown above were paid by Cathrine Jensen on the 251½ foot tract for the year of 1947 (Defendants Exhibit 2).

There is uncontradicted evidence in the record (T. 117) and also among the exhibits, to the effect that Cathrine Jensen purchased the two tracts of land separately, the 491½ foot tract in 1930, and the 251½ foot tract in 1939. She obtained two separate abstracts, both of which are exhibits in this case (see defendant's exhibits 1 and 3). Surely she wouldn't forget that she possessed separate abstracts at the time Mr. Dowell came to her for the abstract on the property. If she had thought that the sale was to include both pieces of property, she would have given him both abstracts. This action on her part speaks for itself, that her intention was that she was selling only the 491½ foot tract, and consequently she handed to Mr. Dowell the abstract to that piece only. Plaintiffs alleged that if this were true, then Cathrine Jensen intended to defraud them, but, of course, the lower court found no evidence of fraud, and therefore such a consideration is unfounded and is beyond the issues of this appeal.

## CONCLUSION

Summarizing this argument, the written contract described the 49½ foot tract only, and in every particular the instrument was clear and complete on its face. Such an instrument creates a strong presumption that it represents the real intent and agreement of the parties, and such presumption can be overcome only by clear, cogent and convincing evidence. The only evidence of a mistake on the part of Cathrine Jensen is the testimony of Mr. Dowell, whose competency is very much in doubt because of his being an agent of one of the parties, and also because of his direct interest in the outcome of the case. Can such evidence be considered clear, cogent and convincing, especially in the face of the evidence, given by the witnesses for defendant, to the effect that the deceased had stated on several occasions that she had plans for the use of the 25½ foot tract, and in face of the fact that the properties had been acquired separately and were covered by separate abstracts, only one of which Cathrine Jensen gave to Mr. Dowell? Furthermore it was Cathrine Jensen who paid the taxes on the 25½ foot tract in November of 1947, not Mr. Sine.

Appellant contends that if the court sustains the lower court in the reformation of this contract a great deal of the sanctity of written instruments especially concerning the sale of land will have been lost, and persons dealing in land contracts will never have the security and protection intended under the statute of

frauds. Appellant earnestly requests that your honorable court review this record and reverse the lower court and direct that judgment be entered in favor of the defendant denying reformation, and for whatever other relief to the court seems proper.

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