

1950

# Joseph M. Perkins, Esther J. Perkins v. Richard L. Spencer, Grace N. Spencer : Brief of Plaintiffs

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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JOSEPH M. PERKINS,  
ESTHER J. PERKINS,

Plaintiffs,

vs.

RICHARD L. SPENCER,  
GRACE N. SPENCER,

Defendants.

**CASE  
NO. 7565**

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## BRIEF OF PLAINTIFFS

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Appeal from Fourth Judicial District Court of the State  
of Utah, Hon. W. Stanley Dunford, Judge.

**FILED**

NOV 20 1960

PETER M. LOWE,  
RICHARD M. TAYLOR,  
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Clerk, Supreme Court, Utah  
**HUGH VERN WENTZ,**  
Attorney for Defendants

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# In the Supreme Court of the State of Utah

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JOSEPH M. PERKINS,  
ESTHER J. PERKINS,

Plaintiffs,

vs.

RICHARD L. SPENCER,  
GRACE N. SPENCER,

Defendants.

**CASE  
NO. 7565**

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## BRIEF OF PLAINTIFFS

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### STATEMENT OF FACTS

The plaintiffs-appellants and defendants-respondents entered into a Uniform Real Estate Contract, (attached Exhibit "A") on or about the 26th day of May, 1949, by which contract the defendants-respondents agreed to sell and the plaintiffs-appellants agreed to buy certain real estate located in Provo, Utah, for the sum of \$10,500.00, payable \$2,500.00 cash and \$75.00 or more per month beginning June 26, 1949, with interest on deferred payments at 5% per annum, payable monthly, with provisions that

"monthly payments be applied first to the payment of interest, and second to reduction of principal."

The Contract (attached Exhibit "A") carries the following provision:

"In the event of a failure to comply with the terms hereof by the Buyer, or upon failure to make any payments when the same shall become due, or within 30 days thereafter, the Seller shall, at his option, be released from all obligations in law and equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may, at his option, re-enter and take possession of said premises without legal process as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land and become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller. It is agreed that time is the essence of this agreement."

During negotiations between the parties there was no reference or discussion by either Buyer or Seller of the forfeiture clause set forth above, nor what the damage would be in the event of breach of the Contract set forth above. The real estate agent for the Seller selected the printed contract form, and instructed his secretary to fill in the blanks. The Buyer paid the down payment of \$2,500.00 and three of the \$75.00 per month installments, making a total paid by them of \$2,725.00. The last payment was made August 25, 1949. The Buyers failed to pay further installments, and on November 3, 1949, the Sellers served notice that unless the Buyers paid the delinquency within five days, the Buyers were tenants at will of the Sellers, and would for-

feit, as liquidated damages, all moneys paid in performance of the Contract. No payment was made within the five days allowed by the foregoing notice, and on November 9, 1949, the Sellers caused another notice to be prepared in which they informed the Buyers that they were then tenants at will of the Sellers, and served Notice requiring them to vacate the premises within five days after service of said notice. This notice was not served personally upon Joseph M. Perkins, and no copy was transmitted to him through the mail. Memorandum Decision, pgs. 3, 4.

On or about the 7th day of November, 1949, the Buyers commenced an action in the District Court of Utah County against the Sellers, seeking rescission of the aforesaid contract upon the grounds of fraud, or in the alternative, reformation of the contract upon the basis of mistake. The Sellers, on or about the 18th day of November, 1949, commenced an action in Unlawful Detainer against the Buyers in the City Court of Provo City. The Buyers answered the action in the City Court of Provo City, and pleaded another action pending in the District Court of Utah County. The Sellers then answered the Buyers' complaint in the action pending in the District Court of Utah County and counter-claimed for unlawful detainer, and in the alternative, for specific performance of the contract. The Buyers in their reply in the action in the District Court of Utah County, defended upon the grounds that the Sellers had elected to recover the property in question and could not obtain specific performance. The Buyers pleaded a counterclaim in their reply, alleging said election of remedies by the Sellers, and praying for restitution of all amounts paid by them to Sellers, and alleging that the forfeiture provisions

of said contract were void because they provided for a penalty and not liquidated damages.

The Court in the District Court action in Utah County granted the Sellers a nonsuit on the Buyers' cause of action for rescission and reformation. Memorandum Decision, pg. 5. The Court also found that the Sellers had elected to rescind the contract, and were not entitled to specific performance. Memorandum Decision, pg. 11. The Court held the Buyer, Mrs. Esther J. Perkins, guilty of unlawful detainer. Memorandum Decision, pg. 14. The Court further found that the forfeiture provided by the contract was not a penalty, but was liquidated damages. Memorandum Decision, pg. 13.

### **PLAINTIFFS' POINTS**

- 1—The Court erred in assessing \$532.50 damages by reason of the unlawful detainer of the said Esther J. Perkins, and in holding the plaintiff Esther J. Perkins guilty of unlawful detainer.
- 2—The Court erred in holding the forfeiture provision of the contract was not a penalty.

### **POINT ONE**

The Court held that the Plaintiff, Joseph M. Perkins, was not guilty of unlawful detainer. Perkins was at least a tenant at will as is provided for by the Contract. see Forfeiture Clause). In our state, such a tenancy may not be terminated except by the procedure set forth in the Code, Sec. 104-60-3 (5), Utah Code Annotated, 1943, and prior to the terminating of the tenancy, the tenant has the possession and control of the premises. 35 C. J. 953. Since



by definition, a tenant at will has the possession and control during the life of the tenancy, it would seem to follow that the owner of the fee does not have sufficient interest to bring unlawful detainer against anyone but the tenant. Therefore, it would seem that Mrs. Perkins could not be guilty of unlawful detainer so long as her husband's tenancy at will was not terminated.

If the above argument be valid, then it follows, of course, that the judgment for damages for unlawful detainer can not be sustained. The Court in *Forrester v. Cook*, 77 U. 137, 292 P. 206, held that "damages must be the natural and proximate consequences of the unlawful detainer and nothing more." If there be no unlawful detainer, it follows there can be no damages.

#### THE FAILURE OF ESTHER J. PERKINS TO MOVE OUT OF THE HOUSE DID NOT CAUSE SPENCERS ANY DAMAGE.

Even if there were unlawful detainer, it is difficult to see how the Sellers were damaged. They had no right to possession since the tenancy at will of Joseph M. Perkins was undetermined. Any damages, therefore, would seem to be by reason of the Sellers' failure to terminate both joint tenancies, and not be reason of the occupancy by Mrs. Perkins. Even if Mrs. Perkins had moved, the Sellers would have been in the same position so far as their damages are concerned. They still would not have had the right to possession until they terminated her husband's tenancy, and would not be damaged by Mrs. Perkins unless she remained thereafter. 36 C. J. S., p. 1159.

*Forrester v. Cook*, 77 U. 137, 292 P. 206.  
*Buchanan v. Crites*, 160 U. 428, 150 P2d 100.

Here we are not concerned with damages for breach of Contract, but are considering the damages which were the direct and natural result of Esther J. Perkins' failure to move out of the property in question after having received defendants' Notice to Vacate. It is respectfully submitted that there have been no damages resulting from Esther J. Perkins' failure to move. The defendants have lost nothing !

## POINT TWO

The law in this state as to what constitutes a penalty has undergone a distinct evolution since the first case which considered the question. *Dopp vs. Richards*, 43 U. 332, 135 P. 98. The law early recognized that even though a contract by its terms called for liquidated damages, in fact, may provide for a penalty. Just when this is the case may be difficult to determine, and the Courts have used several tests.

WHERE THE DAMAGES PROVIDED FOR IN THE AGREEMENT ARE DISPROPORTIONATE TO THE SEVERAL COVENANTS THEREIN PROVIDED, THEY WILL BE CONSTRUED AS A PENALTY RATHER THAN LIQUIDATED DAMAGES.

The first case to announce this test was *Dopp v. Richards*, 43 U. 332, 135 P. 98, where the Court was considering a forfeiture provision similar to that in the Uniform Real Estate Contract marked Exhibit "A". The next Utah case to utilize this test was *Western Macaroni Mfg. v. Fiore*, 47 U. 108, 151 P. 984 (1915), where the Court said, "where an agreement imposes several distinct duties or obligations of different degrees of importance, and the same sum is named as damages for the breach of either indifferently,

the sum is to be regarded as a penalty." This case was cited and approved in *Calambra Corp. v. Abels*, (Okla.) 95 P2d 601 (1939), where the Court held a reversion clause in a contract to be a penalty.

In the case before the Court, there are six covenants: (1) to pay \$75.00 per month; (2) to pay the balance due when the Bountiful house is sold; (3) upon request, secure a loan upon the property; (4) pay all taxes and special improvements; (5) pay general taxes after June 1, 1949; and (6) keep all buildings insured for \$8,000.00, and assign insurance policy to Seller. The Buyer could forfeit the same amount for failure to perform any of these Covenants. Covenant No. 1 would be broken by failure to make one installment of \$75.00, while Covenant No. 2 would be broken by failure to pay \$8,000.00 as the balance due. The remainder of the Covenants would all result in different damages if broken. It is obvious that these Covenants would all result in different damages if broken, and under the above test, the provision of the Contract is to be construed as a penalty. This Contract attempts to give the Sellers the right to forfeit the Contract and all money paid upon the breach of any one of the six foregoing Covenants.

ORDINARILY, IF DAMAGES ARE DIFFICULT TO ASCERTAIN, THE PROVISION WILL BE CONSTRUED AS FOR LIQUIDATED DAMAGES, AND IF THEY ARE NOT DIFICULT TO ASCERTAIN, AS ONE FOR A PENALTY . . . . 25 C. J. S., p. 666.

What would be the measure of damages in the event of breach of a Contract such as this one? In *Dopp v. Richards*, 43 U. 332, 135 P. 98, it is said:

"We think that the better reason and greater weight of authority sustain the rule that under such circumstances the measure of damage is the difference between the value of the land at the time of breach . . . and the Contract price to be paid, together with the interest on the purchase price unpaid."

The only evidence entered in this case is to the effect that the house recovered was of the value of \$10,281.00. (See Luke Clegg's testimony, TRS.) The purchase price was \$10,500.00. This indicates a damage of \$219.00. The interest on the unpaid balance equalled about \$33.00 per month, totaling \$165.00. Thus we see the total damage by this test is equal to \$384.00. Plaintiffs had paid \$2,725.00.

"But where there is an absolute agreement to do a particular act, followed by a stipulation as to damages in case of a breach, and the nature of the transaction is such that there can be no inherent difficulty in ascertaining actual damages, and the amount named is so excessive that it will not only make the other party whole, but form an exorbitant and unconscionable recovery, it will be held that the amount named should be regarded as a penalty."

Thomas v. Foulger, 264 P. 975, 71 U. 274.

Bramwell Inc. v. Uggla, 16 P2d 913, 81 U. 85.

Davis v. U. S., 17 Ct. Cl. 201, 215.

It is submitted that in this case there is no inherent difficulty in ascertaining or measuring the damages incident to the breach of the Contract by the Buyers. It is to be noticed that the forfeiture clause is entirely unilateral in its operation.

DAMAGES FOR THE BREACH OF CONTRACTS FOR THE PAYMENT OF MONEY ARE FIXED AND LIQUIDATED BY LAW, AND NEITHER REQUIRE NOR ARE SUSCEPTIBLE OF LIQUIDATION BY THE PARTIES . . . . 17 C. J. p. 954.

In *Truitt v. Patten*, \_\_\_\_\_ U \_\_\_\_\_, 287 P. 179 (1930) and again in *Croft v. Jensen*, 86 U. 13, 40 P2d 198 (1935) the Court said:

“The ordinary rules as to liquidated damages may be said to be inapplicable to Contracts for the payment of money only. In such cases the Courts construe the damages as a penalty, irrespective of the intent of the parties or the language by which it is expressed. The principle is that the damages for the breach of Contracts for the payment of money is fixed and liquidated by law, and neither require nor are susceptible of liquidation by the parties, **interest** being the legal measure of damages in all such cases.”

In the *Croft v. Jensen* the Court had before it a Contract which appears to be the same as is involved in this case. In the instant case the only covenant remaining unfulfilled by the Buyers was the Covenant to pay money and thus it comes squarely within the above rule.

ALTHOUGH IT IS NOT CONCLUSIVE, AS A BROAD GENERAL RULE THE INTENTION OF THE PARTIES DETERMINES WHETHER A PROVISION IN A CONTRACT IS FOR A PENALTY OR FOR LIQUIDATED DAMAGES WHICH INTENTION IS DETERMINED BY A CONSIDERATION OF THE CONTRACT AS A WHOLE TOGETHER WITH THE FACTS AND CIRCUMSTANCES THEREOF . . . . 25 C. J. S. p. 659.

In this case the Court below relies upon a Utah case which falls between *Dopp v. Richards* and *Croft v. Jensen*, cited *Supra*, and the test of the "Intent of the Parties" is applied (pp. 11, 12, 13 Memo Decision), in *Cooley v. Call*, \_\_\_\_\_U\_\_\_\_\_, 211 P. 977, the Court said:

"The final payment was to be made December 1, 1921, or within two years and five days from the execution of the Contract. **So it could readily be foreseen by the parties** to the Contract at the time it was executed just what plaintiff's damages would probably be when the last payment became due, even if defendants should default in every subsequent payment provided for by the Contract. **A simple mathematical calculation** demonstrates that the \$1,850.00 paid by the defendants amounted to at least 10 per cent per annum on the purchase price of the property . . . . "

"In conclusion, to avoid misunderstanding, **our decision of this case is based entirely upon what we conceive to be the obvious intention** of the parties at the time they executed the Contract . . . . "

- (1) In the instant case it is true that the down payment equals about 25% of the purchase price. This fact is merely coincidental. The Court in the above case makes no mention of this fact or measurement and attaches no significance to it.
- (2) In this case the Plaintiffs paid down \$2,500.00 and agreed to pay, and did pay for three months, \$75.00 per month. The lower Court found that \$75.00 per month is the "reasonable rental value" of the property. Every month the defendants were to get a reasonable return on their investment. Under these conditions it cannot be said that the parties intended the down payment to

provide the fund for the payment of interest or return on investment. It would seem to indicate exactly contrariwise.

- (3) What result do we get, if we use the mathematical test set out in *Cooley v. Call*?

There the Court computed the time from date of execution to the date of filing suit. In this case the same period is six months. Divide balance due into the down payment and we get 31.2%.

To get the per annum return on defendants' investment—multiply by two. We get 62.4% return on the investment.

- (4) In *Cooley v. Call*, the Court was concerned about what the parties **intended** by their Contract, and they used the foregoing test to show that since the down payment equalled only 10% per annum return on the investment, that **the parties must have intended** the down payment to be liquidated damage . . . . "damage fairly computed and estimated in advance."

But in this case the parties provided that during the interim between making of the down payment and paying the balance that the plaintiffs would pay, each month, a sum equal to the "reasonable rental value" of the property.

- (5) The lower Court in this case has mentioned the fact that defendants had to find another place to live and thus the uncertainty justified the forfeiture provision in the Contract.

(a) The first answer to that is that this element is not a proper element of damage. It was not made an element or an issue of the contract by the parties.

(b) The second answer is that the parties themselves did not consider it as an element of damage because they did not set a certain date for the balance to be paid. The balance was to be paid when the "house in Bountiful was sold." Apparently this might be ten years later without there being a breach of the Contract. For defendants to make the claim that they were relying on the payment of the balance appears to be in the nature of an afterthought.

(c) The third answer is that the Sellers reserved to themselves the right to mortgage the property at any time to the full extent of the unpaid balance due under the Contract. It also appears that the loan value on the property exceeded the down payment made by defendants on their new home. (See pp. 2 & 3, Memo Decision). Also the monthly payments on the new house were only about one-half of the payments to be made by the Plaintiffs.

- (6) In this instant case the evidence reveals that the parties did not consider nor discuss what the damage would be in the event of a breach of the Contract by the Buyers. (See stipulation of counsel on reopening of case in TRS). Thus we have no actual expressed intent of the parties.



WHERE IT IS DOUBTFUL WHETHER A PROVISION SHOULD BE DEEMED A PENALTY OR FOR LIQUIDATED DAMAGES, THE COURTS INCLINE TO REGARD IT AS A PENALTY . . . 25 C. J. S. p. 937.

The general principle announced above has been widely adhered to by the Courts of many states. The predominant reason given for the rule is that by "so doing, the recovery can be apportioned to the actual damages or loss sustained." Our Utah Courts have announced the principle and it was specifically referred to in *Western Macaroni Mfg. Co. v. Fiore*, 447 U. 108, 151 P. 984 (1915).

In the instant case the actual damages suffered by Defendants were very small and the sum named to be forfeited was very large and assumes the aspects of a penalty rather than compensation for damages suffered.

We respectfully submitted that under all of the tests announced and applied by our Court that the forfeiture provision in the Contract marked Exhibit "A" is a provision for a penalty and for that reason is void.

Respectfully submitted,

PETER M. LOWE,

Attorney for Plaintiffs.