

1979

# Ned O. Gregerson v. James L. Jensen and Nedra Jensen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NED O. GREGERSON, )

Plaintiff/Appellant, )

vs. )

Case No. 16339

JAMES L. JENSEN and )

NEDRA JENSEN, his wife, )

Defendants/Respondents. )

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APPELLANT'S BRIEF

Appeal from Judgment of Sixth Judicial District  
Court for Sanpete County, State of Utah, The  
Honorable Don V. Tibbs, District Judge, Presiding.

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FILED

JUN 18 1979

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Clerk, Supreme Court Utah

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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NED O. GREGERSON, )

Plaintiff/Appellant, )

vs. )

JAMES L. JENSEN and EDRA )

JENSEN, his wife, )

Defendants/Respondents. )

---

Case No. 16339

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BRIEF OF APPELLANT

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NATURE OF THE CASE

This is an action by Appellant for specific performance of a contract to convey real property, or, in the alternative, for damages as to the reasonable value of said property.

Respondents answered claiming there was no enforceable agreement between the parties and that the same was barred by the Statutes of Frauds.

DISPOSITION IN THE LOWER COURT

The case was tried to the court sitting without a jury. At the completion of Plaintiff's case, the Court granted judgment in favor of Defendants on Plaintiff's Complaint for Specific Performance, no cause of action. The Court however, granted judgment to Plaintiff and against Defendant in the sum of \$350.00 plus interest at the rate of eight percent per annum from September 30th, 1971, together with Court costs

incurred.

### RELIEF SOUGHT ON APPEAL

Appellant seeks an Order of this Court reversing the judgment of the trial court and ordering that the agreement reached between Plaintiff and Defendants is specifically enforceable; or that this Court reverse the trial court and order that Plaintiff had established prima facie case that a contract existed between Plaintiff and Defendants, and therefore that the trial court's judgment against Plaintiff, no cause of action, was in error; or, for an Order of the Supreme Court remanding the case to the trial court for a new trial.

### STATEMENT OF FACTS

Immediately prior to September 30th, 1971, Plaintiff/Appellant GREGERSON, hereinafter referred to as GREGERSON, entered into negotiations with Defendants/Respondents JENSEN, hereinafter referred to as JENSEN, for the purchase of a portion of the only real property owned by JENSEN in Sanpete County, Utah. (Transcript of court proceedings hereinafter T) 11A:19-30; 12:1-17; 45:25-30; 46:6-13; 47:1-10; 48:5-19.

After an initial conversation at JENSEN's business, GREGERSON and JENSEN went to the property in question which is unimproved real property located directly in back of JENSEN's home in Gunnison, Utah. T 26:10-14. The property which the parties stood upon was enclosed by fences on all four sides. T 37:24-30. Thus a fence separated the subject property from

JENSEN's home. The property at that time was being used for pasture for JENSEN. T 38:8-9.

In the presence of JENSEN and GREGERSON, the property was measured by one Don Anderson and GREGERSON's father who used a tape measure to evaluate where a building could set on the property. T 38:24-36; T 64:26-29. At least one iron stake was placed on one corner of the property. T 64:30; T 65:11-23. The corners determined by the survey coincided with the existing fences on the property. T 38:27-30. In measuring the property, Don Anderson used a tax notice describing the property and tried to evaluate what property was there according to the tax notice. T 38:17-22.

While JENSEN and GREGERSON were on the property, JENSEN kicked the dirt where a stake could be set up to determine the point of beginning and so as not to interfere with his cesspool and drain fields. T 46:10-11; T 47:4-6.

A conversation also took place while JENSEN and GREGERSON were on the property wherein JENSEN told GREGERSON that he would sell his property north of where he kicked the dirt. T 48:11-15. The parties at that time agreed to a total purchase price of \$700.00 for the subject property. T 12:2-9; T 48:18-19. On September 30th, 1971, GREGERSON delivered to JENSEN a check in the sum of \$350.00 representing one-half of the purchase price. T 17:23-30; Plaintiff's Exhibit No. 1. On the face of the check, in the handwriting of GREGERSON, is the following language in the lower lefthand corner:

"1/2 payment on land as agreed - other 1/2  
payment when deed delivered"



A copy of this check is attached as an exhibit.

The check for \$350.00 was deposited to the joint bank account of J. L. JENSEN and EDRA JENSEN. T 60:16-22.

JENSEN also told GREGERSON that the property had a mortgage on it and that he would get a partial release of mortgage from the bank as he had on a past occasion. T 12:12-17; T 49:21-22.

Shortly thereafter and apparently in October of 1971, a deed was prepared describing in detail the real property which is the subject of this action. T 50:23-29. A copy of said deed is attached as an exhibit to Plaintiff GREGERSON's Motion For a New Trial and supporting Affidavits. (Designation of Record on Appeal No. 18). A copy of said deed is also attached as an exhibit to this Brief. The knowledge of that deed was not communicated by JENSEN to GREGERSON or his attorney until the trial of this matter on the merits, even though Plaintiff GREGERSON had requested by interrogatory that information from Defendants JENSEN:

"INTERROGATORY NO. 14: Please state whether or not any other written documents exist concerning the property described in Interrogatory No. 2 between Plaintiff and Defendants which were written or prepared on or about September 30th, 1971. If the answer to this is in the affirmative, please attach a copy of said instrument."

Defendant JENSEN answered Interrogatory No. 14 as follows:

"INTERROGATORY NO. 14:           ANSWER: In answer to Interrogatory No. 14, there are not any documents that exist regarding the sale of said property." (Designation of Record on Appeal No. 8).

The failure on the part of JENSEN to properly answer this

interrogatory was the substance of GREGERSON's Motion For A New Trial and based upon the finding of the trial court that a sufficient description did not exist which would allow the court to compel specific performance. That motion was denied by the court on the following basis:

"That the existance of an unsigned document not prepared by the Defendant would still not make a prima facie case for Plaintiff." (Court Order dated January 1st, 1979; Designation of Record on Appeal No. 24).

When GREGERSON failed to receive a deed to the property, he made inquiry of JENSEN as to the status of the matter. T 21:4-7. JENSEN responded that he would get the deed to GREGERSON and get the matter completed. T 21:7-9; T 22:6-11.

When JENSEN ultimately failed to deliver the deed, GREGERSON filed the instant action.

The case was tried September 27th, 1978, before the Honorable Don V. Tibbs, District Judge of the Sixth Judicial District. The court made the following Findings of Fact which are important for review on appeal:

#### FINDINGS OF FACT

1. That the Plaintiff and Defendants entered into negotiations concerning the sale of the property described in Plaintiff's Complaint during the latter part of September, 1971.
2. (Omitted for purposes of brevity).
3. (Omitted for purposes of brevity).
4. That the property examined by said parties was completely enclosed by a fence at the time it was measured.
5. That the only parcel of property owned by Defendants in 1971 was the parcel of land located in Gunnison, Utah, upon which the Defendants' home is

located and the property immediately north of Defendants' home which is the subject of this action.

6. That on September 30th, 1971, the property which is the subject of this action was recorded in the official records of Sanpete County in the name of J. L. Jensen and his name only, and is presently recorded only in said Defendant's name.

7. That no other written document evidencing a contract between Plaintiff and Defendant was produced at trial by Plaintiff in support of his position.

8. That Defendants have been in possession of the real property which is the subject of this action since September 30th, 1971, and have paid the taxes on the same since that date, but have not made any improvements on said property, save and except the installation of a chain link fence which replaced an existing fence on the property, said fence being installed by Gunnison Valley Hospital.

9. (Omitted for purposes of brevity).

10. (Omitted for purposes of brevity).

11. (Omitted for purposes of brevity).

From the adverse ruling of the trial court, Plaintiff now Appeals.

## ARGUMENT

### POINT I

THE TRIAL COURT COMMITTED REVERSABLE ERROR WHEN IT RULED THAT AN ENDORSED AND NEGOTIATED CHECK DID NOT CONSTITUTE A WRITTEN CONTRACT FOR THE PURCHASE OF REAL PROPERTY BY PLAINTIFF.

A. THE CHECK ITSELF CONSTITUTES A MEMORANDUM WHICH SATISFIES THE STATUTES OF FRAUDS.

Utah Code Annotated 25-5-1 provides as follows:

"Estate Or Interest In Real Property. - No estate or interest in real property, other than leases for a term not exceeding one year, nor

any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agents thereunto authorized by writing."

Although the Utah Court has never directly determined whether a check constitutes a contract or a sufficient memorandum to take an oral agreement out of the Statutes of Frauds, other jurisdictions have addressed this issue. In Cousbelis vs. Alexander, 315 Mass. 729, 54 N.E. 2d 47 (1944), the Plaintiffs' sought specific performance on a factual situation similar to the instant case. In Cousbelis, the Defendant was the owner of three lots, comprising of 14,300 square feet on Galvin Road, Watertown. This was the only land owned by the Defendant in Watertown. The Defendant orally agreed to sell and the Plaintiff to buy, this land at thirty-two cents per square foot. On September 1st, 1941, the Plaintiff handed the Defendant a check for \$200.00, payable to the Defendant, wholly in the Plaintiff's handwriting, on the face of which was written, "deposit for land in Galvin Road, Watertown price 32¢ a ft.". The court ruled that this check was a memorandum sufficient to satisfy the Statutes of Frauds:

It "need not be a formal document intended to serve as a memorandum of the contract; but it must contain the terms of the contract agreed upon - the parties, the Locus (if an interest in real estate is dealt with), in some circumstances the price, .... and it must be signed by the party to be charged or by someone authorized to sign on his behalf." .... In the nature of things there is no reason why the memorandum

cannot be written on a check. "The form of the memorandum is immaterial, if its contents adequately set forth the agreement." (Citing with approval, Hurley vs. Brown, 98 Mass. 545, 546, 96 Am Dec. 671.

The wording in the instant case "1/2 payment on land as agreed - other 1/2 paid when deed delivered" would indicate in and of itself that the purchase price was to be the total sum of \$700.00 and that GREGERSON and JENSEN had "agreed" on the land to be purchased. T 48:13-15. The balance of the purchase price was to be paid when the deed was delivered which could not be done instantly because of an existing mortgage and the need for an accurate description. That description is supplied by the Warranty Deed dated "October \_\_\_\_\_, 1971". The preparation, knowledge and non-delivery of this deed should have been taken into consideration by the lower court pursuant to the parol evidence rule. Mathis vs. Madsen, 1 Utah 2d 46, 261 P2d 952 (1953).

In Guinand vs. Walton, 22 Utah 2d 196, 450 P2d 467 (1969), the issue before this court was whether or not a letter in which partners unilaterally promised the Plaintiff an undivided ten percent interest in the partnership violated the Statute of Frauds since the partnership consisted of leaseholds and interest in land. This court stated the following concerning the interpretation of Utah Code Annotated 25-5-1, (1953, as amended):

From careful attention to the wording of that section it will be seen that there is no requirement either that the instrument in writing demonstrate a valid consideration, or that it be

a complete contract in any other particular. All that is required is that the interest be granted or declared by a writing subscribed by the party to be charged. For the purpose of establishing that there was such a grant by the partnership is not essential that its assets be described with particularity. The purpose of the statute is that certain matters of great importance such as the conveyance of real estate should be protected against frauds and perjuries. As between the contesting parties here, that requirement is satisfied by the letter in question, and the granting of the ten percent (10%) of the interest in the partnership includes the grant of its assets. (Emphasis Added).

The court in Guinand reversed the lower court and held the letter to be binding upon the parties.

This court has also held that letters exchanged between the owners of interest in mining claims and mining operations were sufficient written memorandum to satisfy the provisions of the Statutes of Frauds pertaining to contracts for interest in lands and agreements that by their terms were not to be performed within one year of the making. Petersen vs. Hendricks, 524 P2d 321 (Utah 1974):

There was an exchange of letters between the parties which tended to show that the parties contemplated that each would have an equal interest in the claims and the proceeds of any ore extracted therefrom. While these letters do not precisely set forth the terms of an agreement nor do they describe the claims, nevertheless, it was the opinion of the trial court that they constituted a sufficient memorandum of the agreement to meet the requirements of the statutes of frauds, Section 25-5-3 and 25-5-4, Utah Code Annotated, 1953 as amended. (Emphasis Added).

The endorsement of a check has been held to constitute a memorandum which negates the defense of the Statutes of Frauds. In Favor vs. Joseff, 16 Ariz. App. 420, 494 P2d 370 (Ariz. 1972),

the landlord accepted a check which represented the first years rent on the renewal of a lease, thereafter endorsed the check in her own hand, deposited it and received the proceeds. The court held against the landlord and determined that the lease agreement was valid and binding:

The "memorandum" of the agreement "in writing and signed by the party to be charged" (A.R.S. Section 44-101) need not be a single document and that which has been "signed by the party to be charged" may be one of several documents. In our opinion this rule has been established by the Arizona Supreme Court by the following cases. Bartlett - Heard Land and Cattle Company vs. Harris, 28 Ariz. 497, 238 P2d 327 (1925); Carley vs. Lee, 58 Ariz. 268, 119 P2d 236 (1941); and LeBaron vs. Crismon, 100 Ariz. 206, 412 P2d 705 (1966).

We hold that when Mrs. Joseff endorsed the check in her own hand, deposited the same for collection and received the proceeds thereof, she effectively signed a memorandum negating the defense of the Statute of Frauds as to the 1964 - 1969 lease.

In King vs. Stanley, 197 P2d 321, (Cal. 1948), the parties exchanged letters concerning the purchase by plaintiff of defendant's property. The initial letter from J. W. King stated:

In looking through the records, I find that you are the owner of two lots on 4th Avenue in the 9100 block in Englewood, California. If you are interested in disposing of one I would be willing to pay \$1,500.00 cash. Please reply to 1st Lt. John W. King.

After some counter offers, escrows were prepared and thereafter defendant attempted to negate the transaction. The court ruled in favor of the plaintiff/purchaser, and therein stated as follows:

An Agreement for the purchase of sale of real property does not have to be evidenced by a



formal contract drawn with technical exactness in order to be binding. A memorandum of the agreement (Sec. 1624(4), Civil Code) is sufficient, and this may be found in one paper or in several documents, including an exchange of letters or telegrams or both ...., or in a letter from the vendor to the purchaser which is accepted and acted upon by the latter.

In King, supra, the court relied upon the description provided by separate document. The lower court in the instant case should have taken into consideration the unsigned deed from JENSEN to GREGERSON. King states:

The material factor to be ascertained from the written contract are the Seller, the Buyer, the price to be paid, the time and manner of payment, and the property to be transferred, describing it so it may be identified....there is no questions that these essential items were clearly determinable here. The Defendants were the Seller. The Plaintiff was the person with whom she had negotiated as Buyer and the fact that he sought to take title in the name of himself and his wife as joint tenants as a matter of convenience would not materially affect the agreement. As the transaction was to be cash it was immaterial to the Seller whether the Buyer took title in his own name, or with his wife, or with his father. The price to be paid was clearly \$4,000.00 net; terms, cash on delivery of merchantable title. The property itself was sufficiently described in the parties' writings.

Utah recognized this doctrine in Miller vs. Hancock,  
246 P 949 (Utah 1926):

Respondent cites cases to the effect that separate writings may be construed together as containing all the terms of the contract, though only one be signed by the party to be charged..." The doctrine of these cases is well-nigh elementary. It is at least supported by the great weight of judicial opinion.

The trial court should have therefore construed the check as a memorandum defeating JENSEN's claim as to the application



of the Statutes of Frauds. The trial court could have therefore looked to the Warranty Deed prepared within the same time frame to obtain the necessary description.

In Leonard vs. Woodruff, 23 Utah 494, 65 P 199 (1901), letters were exchanged between the parties and deeds were prepared and executed but never finally delivered. The Supreme Court enforced the contract and ruled that the exchange of letters, which did not describe the property, constituted a sufficient compliance with the Statutes of Frauds:

Do the letters which pass between the parties in connection with the Deed to Bothwell constitute such a memorandum of an agreement between the parties for an exchange of said real properties as meets the requirements of the Statutes of Frauds? We are of the opinion that they do. The only requirement about which there can be any question is that relating to the description of the properties to be exchanged. Each was properly described in the respective deeds executed by each of the parties with a view to the consummation of the exchange. The fact that these deeds were never finally delivered, and did not affect as conveyances, and that one of them was not executed until after the terms of the exchange offered by the respondent had been accepted (the dates of which offer, acceptance, and the acquiescence of the respondent are shown by Exhibits D, F, and G), did not destroy their effect as written memorandums signed by the parties to be charged, or as evidence of the agreement to make the exchange. Jenkins vs. Harrison, 66 Ala. 346, 355 and cases cited; Thayer vs. Luce, 22 Ohio St. 62, 74-76; Bowles vs. Woodson, 6 Grat. 78; Parrill vs. McKinley, 9 Grat. 1, 58 Am Dec. 212. Again, the answer, which admits that the negotiations therein mentioned related to the properties which are accurately described in the complaint, and which, as we have stated, resulted in the agreement to make the exchange, is a sufficient designation of the properties to meet that requirement of the Statutes of Frauds. (Emphasis Added).

B. TO RENDER THE CONTRACT UNENFORCEABLE WOULD BE  
TO PERPETRATE A FRAUD ON APPELLANT.

The purpose of the Statutes of Fraud has long been recognized that its purpose is to prevent the perpetration of a fraud.

Plaintiff's principal attack on the judgment of the trial court involves the application of the Statutes of Frauds. His contention is that the statutes prohibits the original contract from being declared valid and binding on the original signers. We approach this question by directing attention to the principal that the statute should be used for the purpose of preventing fraud and not as a shield by which fraud can be perpetrated. Jacobson vs. Cox, 202 P2d 714 (Utah 1949).

Had GREGERSON tendered to JENSEN cash instead of the check, the Statutes of Frauds would likely have direct application. In Hunter vs. Wetzel, 84 N.Y. 549 (1881) the court states:

The purpose and object of the statute should not be forgotten. Its aim is to substitute some act for mere words, to compel the verbal contract to be accompanied by some fact not likely to be mistaken, and so avoid the dangers of treacherous memory or down right perjury. The delivery of the check was such an act.

The giving of a check is an overt act much easily proved, and less susceptible to misconstruction or perjury than the payment of a sum in currency. It is objected that a draft or check of a debtor is only conditional payment, and not satisfaction of the debt for which it is given, in absence of some agreement to the contrary. That, it is submitted, has nothing to do with the application of the Statutes of Frauds. The statute is not concerned with the legal affect of the payment; it says nothing about the payment being unsatisfaction, wholly or in part, of the vendor's claim. The purpose of the Statutes of Frauds is fully satisfied by the physical delivery of the instrument, the overt act indicating that there was a bargain between the parties.

C. IN THE EVENT THE COURT DETERMINES THE CONTRACT

BETWEEN THE PARTIES TO HAVE BEEN ORAL, THE DOCTRINE OF "PART PERFORMANCE" REMOVES THIS MATTER FROM THE STATUTES OF FRAUDS.

GREGERSON maintains that the check itself constitutes a written contract between himself and JENSEN. However, in the event the Court determines the agreement to have been oral, payment of one-half of the purchase price constitutes part performance to take the case out of the Statutes of Frauds.

It is anticipated that JENSEN will rely upon the recent Utah case of Holmgren Brothers, Inc. vs. Ballard, 534 P2d 611 (Utah 1975). The facts in Holmgren are distinguishable on their face. The check that was delivered was made payable to someone other than the landowner and negotiation of the same was conditional. Furthermore, no part of the money represented by that check was ever paid to defendant and the court construed the same to be a conditional offer.

It is submitted that the agreement reached between GREGERSON and JENSEN in the instant case, and the subsequent payment of one-half the purchase price, meets the standard set forth by the Supreme Court in Holmgren:

The oral contract and its terms must be clear, definite, mutually understood, and established by clear, unequivocal and definite testimony, or other evidence of the same quality. In addition, there must be acts of part performance which in equity are considered sufficient to take the case out of the Statutes of Frauds: (1) Any improvements made must be substantial, or valuable, or beneficial. (2) A valuable consideration is demanded by equity. (3) If there is possession, such possession must be actual, open, definite not concurrent with the vendor, but it must be with the consent of the

vendor. (4) Such acts as relied on must be exclusively referable to the contract. (Emphasis Added).

In Holmgren, the court addressed itself as to the necessity of payment:

Where, as here, payment is advanced as one of the acts of part performance, it must be delivered to, and accepted by the vendor, in discharge of part, or all of the purchase price.

It is undisputed that JENSEN received the sum of \$350.00 and has had the full use of said money since September 30th, 1971.

Partial performance by payment was also recognized by the Utah Supreme Court in LeGrand Johnson Corporation vs. Peterson, 26 Utah 2d 158, 486 P2d 1040 (1971), which held that plaintiff was not barred by the Statutes of Frauds where plaintiff had advanced \$44,000.00 for the development of quarries and defendant had orally agreed to convey an interest in said mining claims to the plaintiff.

## POINT II

THE LOWER COURT COMMITTED REVERSABLE ERROR WHEN IT RULED THAT A SUFFICIENT DESCRIPTION DID NOT EXIST WHICH WOULD ALLOW THE COURT TO SPECIFICALLY ENFORCE THE CONTRACT FOR THE REASON THAT THE COURT FAILED TO RECOGNIZE THE WARRANTY DEED PREPARED AFTER APPELLANT GREGERSON DELIVERED ONE-HALF OF THE PURCHASE PRICE TO RESPONDENTS JENSEN.

In this case, GREGERSON and JENSEN both acknowledged that they went to the real property in question, that it was behind JENSEN's house and that JENSEN "kicked the ground" as to where the point of beginning was to be. Furthermore, the property was enclosed on all four sides by a fence, with one section of the fence separating the subject property from JENSEN's home.

The unsigned and undated deed accurately describes the subject property (Affidavit of Louis B. Cardon, licensed abstractor, In Support Of Motion For A New Trial. Designation of Record on Appeal No. 21) and appears to have been done by someone with skill and competence in land surveying. Even without the deed, however, the lower court could have determined the amount of property which JENSEN agreed to sell to GREGERSON. In Jacobson vs. Cox, 202 P2d 714 (Utah, 1949) the court states:

"Plaintiff's next attack revolves around the claim that the original contract is unenforceable because the property is not described with certainty and definiteness. We overrule this contention. People who reside in far away rural communities cannot be charged with unreasonable accuracy in describing unsurveyed land. The only reasonable means by which a person can describe property located on a public domain, and which has never been surveyed, is by reference to natural monuments. The original parties to the contract could not have described the land by meets and bounds without going to the expense of running a survey. They apparently considered this unnecessary as all parties knew the exact location of the property involved; had been familiar with, and used it for many years; had described it in all documents by reference to fences, natural monuments, size and occupancy. In spite of the misdescriptions in the record, the original owners knew and the present litigants know the location of the piece of property in dispute." (Emphasis Added).

The Utah Supreme Court has recently recognized the obligation on the part of the trial court to make a determination as to the property purchased where there is a dispute as to the actual boundary line. In Stauffer vs. Call, (Supreme Court of the State of Utah, filed January 9th, 1979, Case No. 15468), the reference in the description in the contract was to natural

boundaries which consisted of stone walls and wire fences. The lower court ruled the contract unenforceable, primarily because of the ambiguity in description. The Supreme Court reversed and stated:

"The court should take testimony as to what was said and done and then decide what was the legal description of the land included in the agreement to purchase. He should order a conveyance of that land to Stauffers upon the payment of the balance due pursuant to the written contract."

The court also in Stauffer acknowledged that the land values in the Southern Utah area have greatly increased since the contract was made. Likewise, land values in Gunnison, Sanpete County, Utah, have increased considerably in value. Furthermore, the property in question borders the local hospital which increases its value. T 37:29-30; T 31:1-4. JENSEN, by refusing to convey the real property is now in a position to sell the property at a greatly enhanced price to other parties.

### POINT III

THE TRIAL COURT COMMITTED REVERSABLE ERROR  
WHEN IT FAILED TO GRANT PLAINTIFF'S MOTION  
FOR A NEW TRIAL.

Only at the trial of this matter on the merits did GREGERSON and his attorney become aware that a Warranty Deed had been prepared and was in the possession of JENSEN and his banker. The failure of JENSEN to properly answer the interrogatory propounded to him was clearly prejudicial to GREGERSON's presentation of the case.

Rule 59(a) of the Utah Rules of Civil Procedure provides

that:

".... that on a motion for a new trial in an action tried without a jury, the Court may open the judgment if one has been entered, take additional testimony, amend Findings of Fact and Conclusions of Law or make new findings and conclusions, and direct the entry of a new judgment...."

In the early case of Kloppenstine vs. Hayes, 20 Utah 45, 57 P. 712 (Utah, 1899), the court set forth the well established rules concerning newly discovered evidence:

"It is well established that, to entitle a defeated party to a new trial on the ground of newly-discovered evidence, it must appear (1) that he used reasonable diligence to discover and produce at the former trial the newly-discovered evidence, and that his failure to do so was not the result of his own negligence; (2) that the newly-discovered evidence is not simply cumulative; (3) that such evidence is not insufficient if it is simply to impeach an adverse witness; (4) it must be material to the issues, and so important as to satisfy the court, by reasonable inference, that the verdict or judgment would have been different had the newly-discovered evidence been introduced on the former trial; (5) that the defeated party had no opportunity to make the defense, or was prevented from doing so by unavoidable accident, or the fraud or improper conduct of the other party, without fault on his own."

In this case, the standards set by the Supreme Court in Kloppenstine are applicable. It cannot be said that the discovery of a deed with an accurate description of the property in question is not a critical issue in this case and would likely affect the result of a new trial. Crellin vs. Thomas, 122 Utah 122, 247 P2d 644, (Utah 1952).

From the facts of this case, it is clear that the conduct of JENSEN in failing to properly answer the interrogatory could

be held to be misleading, unfair, unjust, or culpably negligent to justify the need for a new trial.

### CONCLUSION

The equities of this case are overwhelmingly in favor of GREGERSON.

1. This Court should reverse the judgment of the trial court and order the specific enforcement of the contract entered into between GREGERSON and JENSEN, using the description provided by the Warranty Deed discovered by GREGERSON only at the time of trial; or

2. This Court should reverse the trial court and require it to take testimony concerning the reasonable value of the land and award judgment in favor of GREGERSON and against JENSEN for that amount.

3. This Court should determine that Plaintiff/Appellant GREGERSON had established a prima facie case and that the trial court erred in granting judgment against Plaintiff/Appellant GREGERSON, no cause of action.

4. This Court should remand this case to the trial court and order a new trial.

DATED this 19th day of June, 1979.

Respectfully submitted,



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110 North Main Street  
Cedar City, Utah 84720  
Telephone: (801) 586-4404



"EXHIBIT 1"

|   |             |                 |
|---|-------------|-----------------|
| No.   |             | 30-65<br>1140   |
| DATE <u>30 Sept</u> 1971                                      |             |                 |
| PAY TO THE ORDER OF <u>Jay Jensen</u>                         | <u>PAID</u> | <u>\$350.00</u> |
| National Bank of Ft. San Antonio                              |             |                 |
| <u>Three hundred-fifty and 00/100</u>                         |             | DOLLARS         |
| OCT 7 1971  |             |                 |
| NATIONAL BANK OF<br>FORT SAN ANTONIO<br>AT SAN ANTONIO, TEXAS |             |                 |
| <u>Payment in hand as agreed</u>                              |             |                 |
| <u>other to paid when does not agreed</u>                     |             |                 |
| ⑆140⑆0085⑆ ⑈265⑈22⑈2⑈   |             | ⑈0000035000⑈    |

WHEN RECORDED, MAIL TO:

Space Above for Recorder's Use

## WARRANTY DEED

James L. Jensen and Nedra Jensen, his wife, grantors  
of Gunnison City, County of Sanpete, State of Utah,  
hereby CONVEYS and WARRANTS to Ned O. Gregerson and Dixie C. Gregerson,  
his wife, as joint tenants, with full rights of survivorship, and  
not as tenants in common, grantees  
of Gunnison City, County of Sanpete, State of Utah  
for the sum of Ten and 00/100 - - - - - DOLLARS.

the following described tract of land in Sanpete County, State of Utah, to-wit:

Beginning at a point North 89° West 2.52 chains and North 1° East 1.48 chains from the Southeast corner of Block 18, Plat "A" Gunnison City Survey; thence North 89° West 0.48 of a chain, thence North 1° East 1.82 chains, thence South 84° 30' East 1.13 chains, thence South 89° East 0.60 of a chain, thence South 1° West 1.47 chains, thence North 89° West 1.25 chains, thence South 1° West 0.26 of a chain to the point of beginning.

Together with all the improvements and appurtenances thereunto belonging or in anywise appertaining thereto.

WITNESS the hands of said grantors, this \_\_\_\_\_ day of October, 1971

Signed in the presence of \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

STATE OF UTAH,  
County of Sanpete

} ss.

On the \_\_\_\_\_ day of October, 19 71  
personally appeared before me James L. Jensen and Nedra Jensen, his wife

the signers of the above instrument, who duly acknowledged to me that they executed the same.

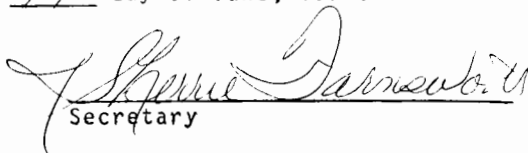
\_\_\_\_\_  
Notary Public.

My commission expires \_\_\_\_\_ Residing in \_\_\_\_\_

APPROVED FORM — UTAH SECURITIES COMMISSION

CERTIFICATE OF SERVICE BY MAILING

I served two copies of the foregoing Brief of Appellant on Mr. Dale M. Dorius, Attorney at Law, P. O. Box U, 29 South Main Street, Brigham City, Utah 84302, by mailing them to him, postage prepaid, this 14<sup>th</sup> day of June, 1979.

  
Secretary