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IN THE SUPREME COURT OF THE STATE OF UTAH

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CLYDE HUTCHESON, Plaintiff and Appellant, -vs- LARRY GLEAVE, PATRICIA GLEAVE DELOY SHAW and HELEN SHAW, Defendants and Respondents.	) :) :) :) :) :) :	NO. 16944

* * * * * * * * * * * * * * * * * *

BRIEF OF APPELLANT

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Appeal from the Judgment of the
Sixth Judicial District Court for Piute County
Honorable Don V. Tibbs, Judge

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FILED

JUL 9 1980

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * * * * * * * * *

CLYDE HUTCHESON, Plaintiff and Appellant, -vs- LARRY GLEAVE, PATRICIA GLEAVE DELOY SHAW and HELEN SHAW, Defendants and Respondents.	) :) :) :) :) :) :	BRIEF OF APPELLANT NO. 16944

* * * * * * * * * * * * * * * * * *

STATEMENT OF KIND OF CASE

The Plaintiff entered into an Earnest Money Receipt and Offer to Purchase Agreement with the Defendants for the purchase of property known as the "Elbow Ranch" in Piute County, Utah. The Plaintiff made payment to the Defendants of $40,000.00. The Defendants continued in possession of the property and the parties continued to negotiate the details of the sale.

The Defendants sold a major portion of the property to a third party. Without knowledge of this fact, the Plaintiff commenced an action for specific performance. Later, upon learning of the binding sale of a highly material portion of the property to a third party, the Plaintiff's Complaint was amended to seek return of the $40,000.00 deposit made by him.

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DISPOSITION IN THE LOWER COURT

The Lower Court entered a judgment in favor of Defendants and dismissing Plaintiff's Complaint thereby permitting the Defendants to retain the Plaintiff's $40,000.00 deposit as damages.

RELIEF SOUGHT ON APPEAL

The Plaintiff seeks to have the judgment of the Lower Court reversed and a judgment entered in favor of the Plaintiff for the sum of the $40,000.00.

STATEMENT OF FACTS

On July 30, 1977, the Defendants listed their ranch property known as the "Elbow Ranch" for sale with Bushnell Real Estate Company, which listing was taken by one of its agents, Cathy Bagley (Exhibit #7).

A legal description of the property sold and a specific description of the water rights and equipment was not given to the realtor nor to Plaintiff. However, a statement of offering information was prepared by the real estate agent (Exhibit #9) and made available to the Plaintiff.

The Exhibit provided the Elbow Ranch consisted of 3800 deeded acres and approximately 4000 acres of leased school sections.

The water right with the ranch consisted of a storage right in Manning Reservoir as well as all rights of Don Springs, Tibideau Canyon, Swift Springs, and 10/17ths of the first three and one-half feet of Dry Creek Canyon.

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It was further represented that there was operated on the property three central irrigating pivots in irrigating approximately 580 acres and mineral rights were available on 3200 acres.

The property was offered for sale to the Plaintiff. Negotiations were commenced in 1977 which resulted in a series of signed Earnest Money Agreements, the last of which was executed on the 28th day of February, 1978, (Exhibit #12) a copy of which is annexed to this Brief as Appendix i.

The agreement also refers to and incorporates an earlier agreement, which agreement is Exhibit #11, and attached as a part of this Brief, as Appendix ii.

The Plaintiff was relying upon the sale of Arizona property as a source for payments required during the year of 1978 (Tr.130, 131 & 132). The parties knew the full payment was conditioned upon the Arizona sale and included a handwritten provision to take care of the problem in Exhibit #12 and which read:

> The balance of 1978 payments is to be secured by a mortgage on a 42-unit motel known as the "Time Motel" of Flagstaff, Arizona, or property of similar value. Interest at the rate of 8-1/2% per annum on the unpaid portion of the down payment will be due and payable when the balance of the 1978 payment is made (No later than October 15, 1978).

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Payments totaling $40,000.00 were made to Sellers prior to April 10, 1978 (Tr. 131, L 14 & 15; Tr. 238, L 9-12).

The Sellers were required, as conditions precedent to the contract, to have the irrigating system in good working order, furnish an abstract or title insurance showing the Sellers had good and marketable title to the property being sold. (See Exhibit 10)

The pivots were not in reasonable operation on April 10, 1978 (Tr. 27, 32, 37, 49) and, as a matter of fact, the Defendants have filed a lawsuit against the manufacturer and installers of the irrigation equipment for defective erection (Tr. 121, 245 & 246).

Defendant Deloy Shaw testified, commencing Tr. 245, Line 30 and continuing Tr. 246:

Q (Mr. Olsen) Now, we've talked quite a bit about the circular sprinkler system and the other day you told us you were in the Federal District Court in a lawsuit with the manufacturer of this sprinkler equipment.

A (Mr. Shaw) Yes.

Q Who is representing you in that lawsuit?

A Mr. McIff.

Q Now, did the manufacturer sue you or did you sue them?

A We sued them.

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Q In your pleadings or in any statement you have made, have you claimed that the equipment wasn't put together properly at the time of the initial installation on the land?

A Yes.

Q You're making that claim?

A Yes.

Q Are you making a claim that because of the faulty installation, it just didn't work properly?

A Yes.

Material portions of the land had been conveyed to Keith Barben and separately to Verl Henrie, which were part of the original Elbow Ranch (Tr. 23 & 24; Tr. 182, 183). The conveyances included a conveyance of a part of the water right known as "Don Spring". (Exhibits #5 & #6)

The property was to have mineral rights in 3200 acres which were a major consideration to the Plaintiff (Tr. 124, 125, 126).

At the time the parties met to review the transaction on April 10, 1978, a title report was presented to the Plaintiff and his attorney (Exhibit #14). The title report showed some 18 title objections, including a reservation by Western Gateway and Storage Company, formerly, American Packing and Provision Company, a Utah corporation, in 2165.75 acres and an outstanding mineral lease to Phillips Petroleum Company.

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Various matters were discussed on April 10th, including the Plaintiff's ability to pay as well as the problem with the mineral rights and for the first time the Plaintiff was presented with a Uniform Real Estate Contract for his review (Exhibit #16).

There was objection to the form of the Agreement and the Defendants' attorney was to re-draft the agreement and send a copy to Plaintiff and his attorney (Tr. 100 & Tr. 142, Line 29). No agreement was ever drafted or presented to the Plaintiff for his review.

The Defendants continued in possession of the property and operated it "as usual" during the entire year of 1978 (Tr. 238 & 239). The parties had a series of contacts with the Plaintiff personally but at no time did anyone mention an intention to forfeit out the $40,000.00 deposit of the Plaintiff.

On August 17, 1978, the Defendants sold a major part of the property to a buyer for $700,000.00 (Exhibit #20). No notice of this contract was given to the Plaintiff. On June 6, 1978, a telephone call had been initiated by the Defendants' attorney to Plaintiff's attorney, John Robinson, during the negotiations on ranch property. Without the knowledge of Mr. Robinson, the conversation was taped by Mr. McIff. The conversation concerned when additional cash could be put into the Utah venture. The discussion was amicable and Defendants reaffirmed that they were willing to cooperate and finalize the transaction (Tr. 287 through 293).

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A date of June 12th was arrived at as a "cut-off" date so the Defendants could advise Zions First National Bank of a date they anticipated payment would be made. However, the parties agreed the "cut-off" date was not critical since the Defendant Sellers had a substantial redemption period. Mr. Gleave speculated about the reaction of Zions First National if the payment was not made by June 12, 1978 as follows:

"I am sure they will, you know, if they do file a notice, why we have still got the 90 days anyway" (Tr. 292, Line 2).

A more detailed analysis of the telephone conversation is included under Plaintiff's Argument in this Brief.

The Plaintiff received no notice from any party that the Defendants intended to terminate the contract and forfeit the $40,000.00 deposit he had made.

The Plaintiff brought an action for specific performance of the contract. (R. 1-8) Upon learning that a major part of the property had been sold, the Complaint was amended to recover the $40,000.00 deposited with the Defendants since the Defendants could no longer perform their proposed contract.

At the trial the Defendants did not show any damage resulted to them. They did show they made an advantageous re-sale since they sold a part of the property to Virginia Jenkins for $700,000.00 (Exhibit #7) and the balance of the property had a value of $433,800. The Defendants were benefited by the

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sum of $171,300.00 over the Plaintiff's contract (Exhibit #12).

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN GRANTING A FORFEITURE OF $40,000.00

A. THE CONTRACT OF THE PARTIES WAS NOT CLEAR AND HAD NO SELF-EXECUTING FORFEITURE PROVISION

B. NO NOTICE OF INTENTION TO TERMINATE CONTRACT AND FORFEIT THE PLAINTIFF'S PAYMENT WAS EVER GIVEN

C. THE DEFENDANTS CANNOT DISGUISE THE FORFEITURE BY THEIR WEAK ATTEMPT TO SHOW DAMAGES

This Court has had many occasions to consider unearned forfeitures. In Parker vs. California State Life Ins. Co., (Utah 1935) 40 P2d 175, this Court stated: "[f]orfeitures have not been and are not now favored by the law. * * *Any acts or statements suggesting an intention to keep a contract alive are liberally construed as a waiver of the right of forfeiture."

Likewise, in the case of Green vs. Palfreyman, (Utah 1946) 166 P2d 215, the Court stated: "[f]orfeitures are not favored, and in interpreting an agreement, every reasonable presumption should be indulged against an intention to allow a forfeiture."

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In Peterson vs. Hodges, (Utah 1951) 239 P2d 180, this Court again stated: "[F]orfeitures are not favored. Even contracts which expressly provide for a forfeiture will not be extended beyond the strict and literal meaning of the language used."

* * *The parties insisting on the forfeiture must comply strictly with all contract requirements and with conditions authorizing the forfeiture. So, when the forfeiture is dependent on the making of a demand and failure to comply with the demand, the failure to make a proper, specific and reasonable demand is a failure to the enforcement of the forfeiture by a Court of law or equity." S. T. McKnight Co. vs. Central Hanover Bank & Trust Co., 120 F2d 310 (C.A.A. Minn.) as cited in 17A CJS, Contracts, §407, p. 497.

In the light of the clear rule of this Court, the specific contract and conduct of the parties should be reviewed.

A. THE CONTRACT OF THE PARTIES WAS NOT CLEAR AND HAD NO SELF-EXECUTING FORFEITURE PROVISION

The parties had a series of negotiations and signed a series of Earnest Money Agreements, the last of which was executed February 28, 1978 and incorporated as part of the previous agreement of December 12, 1977 (See Appendix i and Appendix ii attached to this Brief).

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In the period of negotiations, several things were discussed. The discussions included the property, water rights, pivot sprinklers, permit rights which were to be sold. The agreement attaches no real property description or itemization of what was to be sold. The Defendants did not own all of the property originally used as the "Elbow Ranch". Also, portions of the ranch property were conveyed by Defendants to others (Tr. 18, L 17; Tr. 22, 23, 24, 36 & 37). Therefore, the Earnest Money Agreement itself contemplated a final contract would be prepared to meet these specifics. No acceptable final agreement was completed although Defendants' attorney was to prepare and furnish the Agreement to Plaintiff (Tr. 100 & Tr. 142, L 29).

The Plaintiff paid to the Defendants $40,000.00 prior to April 10, 1978. The balance of the payments to be made in 1978 was to be made from the sale of 150 acres of farm land to be sold by the Plaintiff in the State of Arizona (Tr. 132, L 25-28). Therefore, the parties inserted into their contract the following: "Balance of 1978 payments is to be secured by a mortgage on a 42-unit motel known as the "Time Motel" in Flagstaff, Arizona, or property of similar value. Interest at the rate of 8-1/2% per cent per annum on the unpaid portion of the down payment will be due and payable when the balance of the 1978 payment is made (*no later than October 15, 1978*)." [emphasis ours]

On August 17, 1978, the Defendants sold a major portion of the ranch property being purchased by Plaintiff to a Virginia Jenkins for $700,000.00. (See Exhibit #20)

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Nevertheless showing his good faith, Plaintiff, after securing the extension of time for further payments in 1978, authorized the release of his $40,000.00 deposit to the Defendants for their use (Tr. 194 L 26-30; Tr. 195; Tr. 199).

The Plaintiff did not take possession of the property in the year of 1978. The property was operated "as usual" by the Defendants. The Defendants grazed their cattle upon the property and made use of the permit; harvested the alfalfa which was raised and fed it to their cattle and grazed the alfalfa fields as they had the previous year (Tr. 159, L 26-30; Tr. 160, L 1-4).

In the continuing contact between Plaintiff and the Defendants, there was never any notice or statement made to the Plaintiff that his interests in the property would be forfeited unless he paid an additional $160,000.00 by a certain or specific date.

No notice of the contract negotiations with Virginia Jenkins was ever given to the Plaintiff and he had no knowledge of the transaction until he called one of the Defendants and advised him that he had an additional $160,000.00 in the month of August, 1978. Plaintiff was advised to call the real estate agent. The real estate agent then told the Plaintiff of the property sale to Virginia Jenkins (Tr. 113, L 4-27).

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The Earnest Money Receipt (Exhibit #12) makes no provision for a method of forfeiting any amount of funds and the conduct of the parties would give no indication of any such intention.

In the case of Leone vs. Zuniga, 34 P2d 699 (Utah 1934) this Court has discussed the difference between contracts containing self-executing forfeiture provisions and those containing provisions requiring notice of forfeiture. The decision approved a statement from Pomeroy, Specific Performance of Contracts (3rd Ed.) §393, p. 836, and held that where the clause was not absolute, causing the contract to be automatically void upon default in payment at the time specified, but rather containing language which gave the vendor an election to treat the contract as avoided, required that the vendor, if he intends to avail himself of the provision, must give the purchaser timely and reasonable notice of his intention to avoid the contract, or must do some unequivocal act which unmistakably shows that intention, for the vendor cannot treat the default alone as terminating the agreement.

The Utah Supreme Court further concurred with the well-reasoned Michigan case of Miner vs. Dickey, 140 Mich. 518, 103 NW 855, and approved the following language:

> * * *The relations between the parties were contract relations. It is apparent that these relations might continue to exist after the breach of contract by the vendee; the vendor having the right to waive the breach, or to forgo her remedy therefor* * *We do not mean to hold that parties to such a contract may not stipulate that a specified breach or breaches of the contract shall at once

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> determine the contract relations, and work a forfeiture of the vendee's rights thereunder. The contract in this case does not so stipulate. The provision is that after breach the vendor shall have a right to declare the contract void. The rule that the vendor must terminate the contract relations by a notice of forfeiture or otherwise, or that the defendant must do some act or thing which of itself determines the contract relationship, before proceedings to recover possession of premises can be begun, is well settled.

In the case of Crestview-Holiday Home Owners Association, Inc., vs. Engh Floral Company, (Utah 1976) 545 P2d 1150, this Court, after holding that the provisions in the contract were not self-executing and thus requiring some affirmative act on the part of the seller, stated:

> Therefore, the contractual relations between the seller and the buyer are in existence until such time as the seller chooses to notify the defaulting buyer of its election to proceed under one, or all, of its options. In so doing, seller must give the defaulting buyer a reasonable time within which to cure the default. Without this notice, the defaulting buyer would not know what to do. He would not have certain knowledge his tenancy was at an end. He could assume that the seller may have waived default, or would elect to enforce the contract rather than forfeit it; or he could assume he would be permitted to perform.

The Earnest Money Agreement (Exhibit #12) does not have any self-executing forfeiture clause. Therefore, the sellers were required to give reasonable notice of their intention to declare a forfeiture of the deposit and to terminate the contract.

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In the case of Lamont vs. Evken, (Utah 1973) 508 P2d 532, this Court analyzed a similar situation under a Uniform Real Estate Contract:

> Before a seller of land under a Uniform Real Estate Contract can exercise any of the options given him because of a failure on the part of the purchaser to pay an installment as promised, he must give the purchaser notice of the default and a reasonable time in which to bring the contract current.
>
> The Court then went on to state:
>
> The rule is especially applicable in cases like the instant one where the default was overlooked by the parties for some 15 months.

B. NO NOTICE OF INTENTION TO TERMINATE CONTRACT AND FORFEIT THE PLAINTIFF'S PAYMENT WAS EVER GIVEN

The discussion under Sub-section A of this Brief was of the contract of the parites as well as the requirement to give some reasonable notice of an election to forfeit a contract right. There must be a notice which would advise of the interpretation placed on the contract and permit some opportunity to rehabilitate the contract. The notice requirement was particuarly important in this case since the terms of the contract needed to be finalized.

In this case, no notice was given to Plaintiff of any intention to terminate the contract and sell the property to a third party.

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The Supreme Court of Arizona in the case of Kammert Brothers Enterprises vs. Tanque Verde Plaza Company, (Ariz. 1966) 428 P2d 678, stated that a forfeiture notice must be "clear and unequivocal to be effective." Stating further that a notice which "merely declared the contract to be in default fails as a matter of law to constitute a notice of forfeiture."

The Defendants make no claim that they have given the Plaintiff notice of any type concerning an intention to terminate the contract and forfeit out the $40,000.00 deposited by Plaintiff. Defendants rely upon a telephone conversation between one of the Defendants, Mr. Gleave, and the Defendants' attorney, Mr. McIff, and Attorney John Robinson in Arizona who was representing the Plaintiff. An examination of the conversation, recorded without the knowledge of Plaintiff's attorney, shows an amicable situation existed between the parties. The conversation affirmed the parties' intention to continue their existing relationship and not to terminate it.

We set out the telephone conversation commencing Tr. 289 so that it can be reviewed in detail:

> MR. McIFF: What we think we would like to do, John, not that we want to be difficult at all, but we would just like to set a cutoff date so that you could tell that to the people you're dealing with and we can tell it to the Bank and we can say to the Bank, "Okeh, this is the day. If we don't resolve it by then, then we

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will do something else." What--can you give us a date that we can rely on and then we will all go with that? Could we rely on the 12th?

MR. ROBINSON: If you would, let me say the 15th and then that would give us a couple extra days down here. Just in case something screws up again.

* * *

MR. McIFF: What about the 15th, Larry? Can you live with that?

MR. GLEAVE: I think we can live with the 15th, but it couldn't be any later than that.

* * *

MR. McIFF: Tell your people that Clyde's put some money in it that he runs the risk of losing and that they had better be aware of that.

MR. ROBINSON: I have made them all totally aware of that.

* * *

MR. McIFF: What we propose to do then is call Zions Bank and tell them that's our cutoff date.

MR. ROBINSON: Yes.

MR. McIFF: And that we--if we cannot close the deal on or before that date then we will go--

MR. ROBINSON: Go another route--

MR. McIFF: Yes, we will go another route and try to solve our problem.

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MR. ROBINSON: If it would do any good, I will still be glad to talk with the people at Zions and let them know what's happening and why.

MR. McIFF: Well, of course, Larry has had most of the contact with them and I know he's talked to them, what, Larry, fifteen times?

MR. GLEAVE: Yes.

MR. McIFF: And Mr. Bushnell from Bushnell Realty has talked with them.

MR. GLEAVE: I'll tell them of this development.

MR. ROBINSON: Okeh.

MR. McIFF: Okeh.

MR. GLEAVE: I am sure they will, you know, if they do file a notice, why we've still got the ninety days anyway.

MR. ROBINSON: You still have the redemption period.

MR. GLEAVE: But we'll try to keep them from filing notice.

MR. ROBINSON: Okeh.

MR. McIFF: John, will you please keep me posted?

MR. ROBINSON: As soon as I receive any different information, I'll give you a call.

MR. McIFF: Okeh, alright. We'll--

MR. ROBINSON: Right now, I'm waiting for other people to give me information and when they do, I'll let you know.

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MR. McIFF: Yes, call me as soon as you know anything so that I can get everything ready from our end, you know, the paper work and that, I'll get that--

It is apparent from the conversation the parties were cooperating with one another that there was no extreme urgency. Mr. Gleave clearly indicated time was not of the essence and even if they had a problem with their financing institution, "Why we've still got the ninety days anyway."

The Plaintiff was never advised by his attorney or by any of the Defendants there was a cut-off date which would affect his contract rights (Tr. 301, L 18-28).

The conversation could not be construed to be a "Notice of Forfeiture" which was clear and unequivocal. On the contrary, it can only be interpreted that the parties would work out some other accommodation.

C. THE DEFENDANTS CANNOT DISGUISE THE FORFEITURE BY THEIR WEAK ATTEMPT TO SHOW DAMAGES

In the case of Johnson vs. Carman, (Utah 1977) 572 P2d 371, this Court has summarized the law on the damages required to be shown to support a forfeiture provision. This Court restated its holding in Kay vs. Wood, (Utah 1976) 549 P2d 709 as follows:

> This Court has long been committed to the rule that parties to a contract may agree as to amount of liquidating damages that shall be paid in the case of a breach, that the agreement is enforceable if the amount

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stiuplated to is not disproportionate to the damages actually sustained. The provision in a contract for the sale of real property that all payments which have been made will be forfeited as liquidated damages will not be enforced if the forfeiture would be grossly excessive and disproportionate to any possible loss so as to shock the conscience. See also Perkins vs. Spencer, 121 Utah 468, 243 P2d 446 (1952); Jacobsen vs. Swan, 3 U2d 59, 278 P2d 294 (1954); Peck vs. Judd, 7 U2d 420, 326 P2d 712 (1958).

This Court in Perkins vs. Spencer, supra. specified evidence to be used to calculate damages at the time of a breach. These factors are:

(1) Loss of an advantageous bargain;

(2) Any damage to or depreciation of the property;

(3) Any decline in value due to change in market value of the property not allowed in items 1 and 2;

(4) For the fair rental value during the period of occupancy.

The evidence before the Lower Court must be reviewed concerning the question of damages. No evidence was offered by the Defendants concerning the loss of an advantageous bargain. As a matter of fact, the evidence before the Court was that the Defendants had entered into a contract to sell the property to the Plaintiff for $962,500.00 (Exhibit #12); that a major part of the property (a water right) was sold to Virginia Jenkins for $700,000.00 (Exhibit #20) and that there remained all of the property except water from Manning Creek. The remaining property had a value of $433,800.00, (See Exhibit #7) making a total of $1,133,800.00 or a profit of $171,300.00 over the Earnest Money offer of Plaintiff.

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The only attempt made by the Defendants to show damage was that they had anticipated or expected the Plaintiff would seed part of the crops on the ranch property. Possession of the ranch property was never delivered to the Plaintiff and the Defendants operated the property as usual. However, for some reason they claimed the Plaintiff should have planted additional crops and given Defendants the benefit of those crops. This view overlooks the fact that Defendants had possession, use and occupancy during the full year 1978 as well as the use of Plaintiff's $40,000.00.

It also overlooks the vital fact that if the Plaintiff were entitled to possession he was also entitled to all of the crops produced upon the land. If Defendants' theory is adopted, the Defendants should have been accounting to Plaintiff for their use of the property during the year of 1978.

CONCLUSION

The Earnest Money Offer Contract existing between the parties contemplated the execution, by the parties, of a final contract which would describe specifically the property sold by legal description. This was required since the property known as the "Elbow Ranch" was parceled out to several parties before the contract was entered into by the Plaintiff. The general description "Elbow Ranch" was not certain enough to be a completed contract between the parties.

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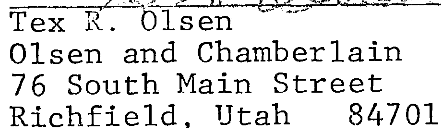
The Defendants continued to deal with and encourage the Plaintiff in entering into a final sales contract during the full year of 1978; during that year Defendants, without notifying Plaintiff who had a written contract allowing him until October 15, 1978 to pay the pending installments, sold a major portion of the property to a third party on August 15, 1978.

The Defendants also failed to give any notice that they intended to terminate the negotiations and to declare forfeit the deposit paid by the Plaintiff and failed to give Plaintiff any notice that would afford him an opportunity to repair any claimed default or review a proposed final contract.

Further, no damages were proved by Defendants to support a forfeiture of $40,000.00.

The Appellant respectfully submits to this Court that the Judgment of the District Court should be reversed and a judgment entered in his favor for the $40,000.00 deposit forfeited by order of the Lower Court.

Respectfully submitted,



Tex R. Olsen
Olsen and Chamberlain
76 South Main Street
Richfield, Utah 84701

Attorney for Plaintiff-Appellant

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 1980, I personally delivered two (2) copies of the within and foregoing Brief of Appellant, to Mr. K. L. McIff, Attorney at Law, at his office at 151 North Main Street, Richfield, Utah.

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[illegible] RECEIPT AND OFFER TO PURCHASE

AGREEMENT DATED DEC 6, 1977

TO: Bushnell Real Estate Inc __________ Richfield Utah, Feb 23 19 78
Name of Broker Company

[CO]NSIDERATION OF your agreement to use your efforts to present this offer to the Seller, I/we Clyde Hutcheson
[deposit] with you as earnest money the sum of ($ 10,000) Ten thousand Only ------------- DOLLARS
[to] apply on the purchase of the property situated at: see original - - property known as Elbow Ranch

City __________ County, State of __________

[Any] of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including stoker and oil tanks, water heaters and burners, [fix]tures excluding bulbs, bathroom fixtures, roller shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and any other -0-

[The following] personal property shall also be included as part of the property purchased: -0-

[The tot]al purchase price of ($ 962,500.00) Nine hundred, sixty two thousand, five hundred ...... DOLLARS
[payab]le as follows: $ 10,000.00 which represents the aforedescribed deposit, receipt of which is hereby acknowledged by you:
---------------- when seller approves sale; $------- __________ on delivery of deed or final contract of
[sale which sha]ll be on or before April 10 19 78, and $ __________ each month commencing __________

[Pay]ment schedule prior to closing: $20,000 - March 6, 1978; $10,000 - March 20, 1978;
[$?],000 - April 10, 1978; Payment schedule after closing; May 1, 1978 - $25,000;
[Jun]e 1, 1978 - $25,000; October 15, 1978 - $50,000; Balance of $762,500 shall be paid
[as] follows: On Mar 15, 1979 and Mar 15, 1980, payments shall be $52,000 and shall be paid
[by] escrow holder directly to Zions First National Bank; Commencing Mar 15, 1981, annual
[ins]tallments of $70,951.06 (includes interest at the rate of 8½% per annum) shall be due
[and] payable until balance is paid in full.

[Bala]nce of $ 762,500.00 together with interest is paid; provided, however, that buyer at his option, at any time, may pay amounts in excess of the monthly [payments upo]n the unpaid balance, subject to the limitations of any mortgage or contract by the buyer herein assumed. Interest at 8½ % per annum on the unpaid portions of the [purchase price] to be included in the prescribed payments and shall begin as of date of possession which shall be on or before April 10 19 78. All risk of loss and destruction [of property, an]d expenses of insurance shall be borne by the seller until date of possession at which time property taxes, rents, insurance, interest and other expenses of the property shall [be prorated as] of date of possession. All other taxes and all assessments, mortgages, chattel liens and other liens, encumbrances or charges against the property of any nature shall be paid [by seller e]xcept: -0-

[The foll]owing special improvements are included in this sale; Sewer ☐—Connected ☐, Septic Tank and/or Cesspool ☐, Sidewalk ☐, Curb and Gutter ☐, Special Street [Sp]ecial Street Lighting ☐, Culinary Water (City ☐—Connected ☐, Other Community System ☐—Connected ☐, Private ☐—Connected ☐.) Legend: Yes [x] No [o] except
-0-

Sale or Instrument of conveyance to be made in the name of Clyde Hutcheson

[If pa]yment is received and offer is made subject to the written acceptance of the seller endorsed hereon within n/a days from date hereof, and unless so [accepted the r]eturn of the money herein receipted shall cancel this offer without damage to the undersigned agent.

[In the e]vent the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller, [be retained as] liquidated and agreed damages.

[It is un]derstood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement made [rela]tive to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. It is further agreed that execution of the final contract shall [abrogate this E]arnest Money Receipt and Offer to Purchase.

[Bus]hnell Real Estate Inc __________ Agent By Cathy Bagley
Broker Company

[I/We] hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract to date or at Seller's [option a policy] of title insurance in the name of the purchaser and to make final conveyance by warranty deed or __________; [in case o]f sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enforcing [this agreement], or of any right arising out of the breach thereof, including a reasonable attorney's fee.

[Se]e original agreement for items on lines 47-55.
[Zi]ons First National Bank is designated as escrow holder. Buyer and Seller to each
[pa]y half of escrow fees.
[Bu]yer authorizes all monies paid prior to closing to be paid to seller as the monies
[ar]e paid to Bushnell Real Estate.
[Se]ller gives permission to the buyer to be on the premises and do whatever is necessary
[to] farm the property. - as of March 15, 1978
[Th]is agreement is subject to the approval of Zions First Nat'l Bank.

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Appendix i

(cont. on reverse side)

6. 2/28/78 Date — Larry J. Shurne / Patricia [illegible] Seller — Clyde Hutchesan Purchaser

7. Date — Leroy Shaw / Helen Shaw Seller — Purchaser

Balance of 1978 payments are to be secured by a mortgage on a 42-unit motel known as the Time Motel in Flagstaff, Arizona (or property of similar). Interest at the rate of 8½% per annum on the unpaid portion of down payment will be due and payable when balance of 1978 payment is made (no later than Oct 15 1978).

Cashier's check for $20,000 received on Mar 6, 1978.

8. (State law requires brokers to furnish copies of this contract bearing all signatures to buyer and seller. Dependent upon the method used, one of the following forms must be

RECEIPT

9. I acknowledge receipt of a final copy of the foregoing agreement bearing all signatures:

10. Larry J. Shurne Seller — 3/6/78 Date — Clyde Hutchesan Purchaser

11. I personally caused a final copy of the foregoing agreement bearing all signatures to be mailed to the ☐ Seller, ☐ Purchaser, on

12. ______________ 19______, by registered mail and return receipt is attached hereto.

13. Broker______________ By______________

PLAINTIFF'S EXHIBIT #12
CASE #1453
B.S.B

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Richfi[illegible] Utah, Dec 6

IN CONSIDI[illegible] ...agent this offer to the Seller, I/we Clyde Hutcheson

deposit with ... the sum of ($ ...) Two thousand and no/100------------

and apply on the purchase of the property situated at: property known as Elbow Ranch containin
approx 3700 acres
near Marysvale City Piute County, State of Utah

any of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including stoker and oil tanks, water heaters and light fixtures excluding bulbs, bathroom fixtures, roller shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and an -0-

except -0-

...ing personal property shall also be included as part of the property purchased:

total purchase price of ($ 962,500.00) Nine hundred ~~thousand~~ sixty two thousand, five hundred and no/100---------- Do

payable as follows: $ 2000.00 which represents the aforedescribed deposit, receipt of which is hereby acknowledged by you;
[...]0.00 on Dec 20 when seller approves sale; $ on delivery of deed or final cont

additional $10,000.00 shall be due on Jan 5, 1978; $30,000.00 on Feb 1, 1
[...]5,000 on Mar 15, 1978 which shall be the closing date. $25,000 payment
[...]l 15, 1978. Balance of $762500 shall be paid as follows; On Mar 15, 197
Mar 15, 1980, payments shall be $52,000 and shall be paid by escrow hol
[...]ectly to Zions First National Bank; Commencing Mar 15, 1981, annual
[...]allments of $70,951.06 (includes interest at the rate of 8½% per annum,
[...]all be due and payable until balance is paid in full.

balance of $ 762,500.00 together with interest is paid; provided, however, that buyer at his option, at any time, may pay amounts in excess of the m... upon the unpaid balance, subject to the limitations of any mortgage or contract by the buyer herein assumed. Interest at 8½ % per annum on the unpaid portions ... price to be included in the prescribed payments and shall begin as of date of possession which shall be on or before Mar 15 1978. All risk of loss and ... , and expenses of insurance shall be borne by the seller until date of possession at which time property taxes, rents, insurance, interest and other expenses of the prop... as of date of possession. All other taxes and all assessments, mortgages, chattel liens and other liens, encumbrances or charges against the property of any nature ...

for except: -0-

following special improvements are included in this sale: Sewer ☐ Connected ☐ Septic Tank and/or Cesspool ☐ Sidewalk ☐ Curb and Gutter ☐ S... Special Street Lighting ☐ Culinary Water (City ☐ Connected ☐ Other Community System ☐ Connected ☐ Private ☐ Connected ☐ .) Legend: Yes (x) No -0-

of Sale or Instrument of conveyance to be made in the name of To be designated at time
[...]viduals will personally guarantee. / closing.

payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within ______ days from date ... the return of the money herein receipted shall cancel this offer without damage to the undersigned agent.

event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the ... as liquidated and agreed damages.

understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no ... relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. It is further agreed that execution of ... is Earnest Money Receipt and Offer to Purchase.

[...]hnell Real Estate Inc Agent By [signature]

Broker Company

do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract ... policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed or ... of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enfor... ent, or of any right arising out of the breach thereof, including a reasonable attorney's fee.

[...]e includes cattle permits for 92 head and sheep permits for 400 A.U.M.'s
[...]e includes all state leases, all mineral, oil and gas rights presently
[...]n the ranch and all water rights and storage rights/belonging to Elbow
[...]ch. Seller agrees to have 3 Center Pivot sprinklers of comparable capac.
[...]those on the ranch now, in complete working order at date of closing.
[...]er to assume lease payments on sprinkler system after it is in working
[...]er. Sale also includes 1 wheel move sprinkler line approx 900 ft long.
escrow holder will be instructed to pay directly the amount due to
[...]ns bank when each annual payment is made by the buyer. The remainder
delivered to the seller.

[...]77 [signature] Seller [signature: Clyde Hutcheson] Purchaser

Seller

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(cont. on reverse side)

First State Bank of Salina is designated as escrow holder. Buyer and [illegible] to each pay half of escrow fees.
Seller is aware that one of the buyers is a real estate agent.

[illegible] law requires brokers to furnish copies of this contract bearing all signatures to buyer and seller. Dependent upon the method used, one of the following forms must [illegible]

RECEIPT

I acknowledge receipt of a final copy of the foregoing agreement bearing all signatures:

______________ Seller ______________ Date ______________ Purchaser

I personally caused a final copy of the foregoing agreement bearing all signatures to be mailed to the ☐ Seller, ☐ Purchaser, on ______________ 19______, by registered mail and return receipt is attached hereto.

[illegible]: ______________ By: ______________

PLAINTIFF'S EXHIBIT #11
CASE #1453
BBB

EXHIBIT "B"

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