

1958

# Lamar H. Carlson and Betty M. Carlson v. W. L. Hamilton and Estella Hamilton : Brief of Respondents

Utah Supreme Court

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Richard C. Dibblee; Counsel for Respondents;

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## Recommended Citation

Brief of Respondent, *Carlson v. Hamilton*, No. 8634 (Utah Supreme Court, 1958).  
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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

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LAMAR H. CARLSON and BETTY  
M. CARLSON, his wife,

*Plaintiff and Respondents,*

—VS.—

W. L. HAMILTON and ESTELLA  
HAMILTON, his wife,

*Defendants and Appellants.*

**FILED**

AUG 19 1958

Clerk, Supreme Court, Utah

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**BRIEF OF RESPONDENTS**

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# IN THE SUPREME COURT of the STATE OF UTAH

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LAMAR H. CARLSON and BETTY  
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—vs.—

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HAMILTON, his wife,

*Defendants and Appellants.*

Case No. 8634

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## BRIEF OF RESPONDENTS

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(Numbers in parenthesis refer to pages of the Record. The parties will be referred to as they were in the Trial Court.)

### STATEMENT OF THE CASE

This is an appeal by defendants from a judgment entered against them in the sum of \$2,119.94. The sum awarded by the trial court was the difference between the total amount paid under the terms of a written sales agreement, and the actual damages suffered by defendants as a result of plaintiffs inability to perform said sales agreement.

The sales agreement which is the subject of this action is dated October 1, 1952, and pertains to approximately 160 acres of farm land of defendants located near

the City of Fairview, County of Sanpete, State of Utah. The property is divided into approximately 80 acres of cultivated land with water rights (R 59) of which from 8 to 10 acres is designated as meadow land, (R 61) and 80 acres of dry pasture or hill ground (R 61). Included in the sale was a six room two story home and certain farm machinery (R16).

The sale price for the farm was the sum of \$22,000.00. This amount was to be paid \$5,000 down and an annual payment of \$1,680.00 principal and interest. The plaintiffs paid to defendants the down payment of \$5,000.00, and the first annual payment of \$1,000.00 principal and \$680.00 interest on January 1, 1954. Plaintiffs were unable to meet the installment due January 1, 1955 (R. 9), and defendants took possession of the property sometime between the date of the default by plaintiffs and March 1, 1955 (R. 11).

This action was instituted to recover any sums of money in excess of the damages suffered by defendants as a result of the breach of the agreement. The trial court found that plaintiffs had paid the sum of \$6,680.00 and defendants had only been damaged in the sum of \$4,566.06 and awarded judgment to plaintiffs for the difference.

## STATEMENT OF POINTS

### POINT I

THE COURT DID NOT ERR IN FINDING AND CONSTRUING THE FORFEITURE CLAUSE AS BEING A PENALTY INSTEAD OF LIQUIDATED DAMAGES.

### 3

#### POINT II

THE COURT PROPERLY DENIED DEFENDANTS' MOTION FOR NEW TRIAL.

#### ARGUMENT

##### POINT I

THE COURT DID NOT ERR IN FINDING AND CONSTRUING THE FORFEITURE CLAUSE AS BEING A PENALTY INSTEAD OF LIQUIDATED DAMAGES.

The main issue presented by defendants' brief is whether defendants should be entitled to retain the sum of \$2,119.94 as liquidated damages for plaintiffs' breach of the sales agreement. The defendants base their right to retain said sum upon the provisions of the sales agreement pertaining to liquidated damages. The provisions of the agreement is contained in paragraph 7 and provides as follows:

“\* \* \* but immediately upon the happening of any breach or default by the buyers, \* \* \* the Sellers shall have the right to cancel and rescind this contract, \* \* \* and to hold and retain all payments made and all improvement upon said premises as agreed and liquidated damages for the breach of this contract, \* \* \*”

Defendants assert this clause of the agreement is not a penalty because it is an attempt by the parties to reasonably forecast the just compensation that may be due defendants for the harm that will be caused by plaintiffs' breach. The trial court, in support of plaintiff's position, held that the words “*all payments made*” did not constitute a reasonable forecast of just compensation. This holding is supported by the evidence

and is logically sound. To demonstrate the illogic of defendants' novel forecast argument, assume that the buyer had paid \$21,000.00 of the \$22,000.00 total purchase price. Would the rescission of the contract and the keeping of the \$21,000.00 as well as the land by the defendants be just compensation for the breach or would it be an unreasonable forfeiture? The posing of the question indicates only one possible answer.

It is our further position that whether all or a portion of the purchase price paid by the purchasers should be retained by the sellers as liquidated damages or returned to the purchasers as unreasonable forfeiture is a factual question to be resolved by the court.

In the case at bar the trial court heard all of the evidence and made findings pertaining to specific items of damages which the evidence supported. This ruling by the trial court properly compensated the defendants for all of their damage, and for the court to have permitted the defendants to retain "*all payments made*" would have resulted in the enforcement of a forfeiture and a penalty in the sum of \$2,119.94.

## POINT II

### THE COURT PROPERLY DENIED DEFENDANTS' MOTION FOR NEW TRIAL.

Defendants' Motion for a New Trial was on the grounds of newly discovered evidence and insufficiency of the evidence to justify the verdict.

With respect to the first ground, that of newly discovered evidence, the trial court correctly exercised its discretion in denying the motion for a new trial.



The granting of a motion for a new trial is generally within the discretion of the trial court. We submit, however, that before the trial court is permitted to exercise this discretion in granting a motion for a new trial on the ground of newly discovered evidence, the defeated party must meet certain requirements. These requirements are well stated in the case of *Trimble et ux v. Union Pacific Stages, et al.*, 142 P. 2d 674, 677, where the court stated the Utah rule to be as follows:

“Nor do we believe that the lower court erred in refusing to grant a new trial. The evidence of witnesses Hess and Halahan was cumulative, and it is well settled in this state that such evidence is not ground for a new trial. *Klopenstine v. Hays*, 20 Utah 45, 57 P. 712, 714, wherein it is said: ‘It is well settled 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 sufficient if it simply be 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 at 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 part.’ See also State



v. Moore, 41 Utah 247, 126 P. 322. Ann. Cas. 1915C, 976; Wimmer v. Simon, 9 Utah 378, 35 P. 507; State v. Brown, 48 Utah 279, 159 P. 545."

In the case at bar the newly discovered evidence is contained in an affidavit of the witness Peterson and pertains to the market value of the property involved in the action. The testimony contained in the affidavit does not meet the requirements outlined in the Trimble case for two very important reasons. The first reason is there is no affidavit or other pleading wherein it appears that counsel used reasonable diligence to discover and produce at the former trial the newly-discovered evidence or that the failure to produce the said evidence was not his own negligence. Counsel was unable to make this showing because in his brief he states the testimony was not produced because he did not believe that the market value of the property involved in the action would become material. This is an admission on his part that he did not use reasonable diligence to secure the evidence and an admission, also, that he was negligent in failing to anticipate what plaintiffs contend was an obvious issue.

In *Perkins vs. Spencer*, 121 Utah 468, 243 P. 2d 446, at page 452, this court outlined as an item of damage to allow the seller as compensation in the event the forfeiture clause of a sales agreement is not enforced as follows:

"\* \* \* (3) any decline in value due to change in market value of the property not allowed for in items numbers 1 and 2 \* \* \*"

We respectfully submit that counsel is presumed

to have known about the ruling in the Perkins case and if he did not, his ignorance in failing to anticipate this fact is not a basis for granting a new trial.

The second reason is that counsel failed to show to the trial court that the proposed evidence would have altered and changed the judgment.

At the trial of the case both parties to the action introduced evidence pertaining to the reasonable market value of the property. The plaintiffs called as a witness a real estate broker who was qualified as an expert in appraising farm land similar to the property in question and the defendant qualified as an expert the defendant and owner of the property W H. Hamilton. These witness did not differ in their respective appraisals and the trial court properly concluded that there had been no change in the market value of the property.

From this testimony it was incumbent upon the defendant to show to the court that the proposed evidence would alter the judgment. The court was apprised of the contents of the affidavitt and the qualifications of the witness Peterson, and we respectfully submit that his denial of the motion is a ruling he was not satisfied the evidence would have altered the judgment.

It is the contention of plaintiffs that the proposed evidence also fails to meet the other three requirements outlined in the Trimble case, but it is our opinion these two points are sufficient to show the trial court properly denied the motion.

The trial court properly denied the motion for new trial on the ground of the insufficiency of the evi-

dence. Defendants have failed to set forth in what particular the findings of the court or the judgment is not supported by the evidence, and we therefore submit, the decision of the trial court should be sustained.

### CONCLUSION

We respectfully submit that awarding plaintiffs a judgment in the sum of \$2,119.94 is supported by the evidence and the law. That the denial of the motion for a new trial was proper.

Respectfully submitted,

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