

1957

# Lorin Peck et ux. V. William Reed Judd et ux. : Brief of Appellants

Utah Supreme Court

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Dean W. Sheffield; Attorney for Appellants;

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

LORIN PECK, et ux.

*Plaintiffs and Respondents*

vs.

WILLIAM REED JUDD, et ux.

*Defendants and Appellants*

FILED

DEC 5 - 1957

Clerk, Supreme Court, Utah

Case No.

8476

8721

**Appellants' Brief**

DEAN W. SHEFFIELD

*Attorney for Appellants*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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LORIN PECK, et ux.

*Plaintiffs and Respondents*

vs.

Case No.  
8476

WILIAM REED JUDD, et ux.

*Defendants and Appellants*

## **Appellants' Brief**

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### **PRELIMINARY STATEMENT**

Plaintiffs commenced this action to declare a forfeiture under a Uniform Real Estate Contract with the defendants, and for damages for unlawful detainer of the premises involved. The defendants alleged fraud in the original sale transaction under which the property was purchased.

The case came on for trial before the court while the defendants were in possession of the real property, and during the trial of the case a settlement was attempted which resulted in the trial being suspended and a stipulation settling the matter was attempted to be worked out.

The stipulation failed to materialize completely, however, possession of the entire premises, consisting of several rental units, was turned over to the plaintiff pursuant to the anticipated stipulation, and the defendants thereafter occupied only one of the rental units, while the plaintiffs took possession of and operated the balance of the rental units.

Thereafter, after the stipulation failed to settle the entire matter, the question of forfeiture and retention of the entire sums paid in by the defendants to the plaintiffs as liquidated damages pursuant to the contract was brought on for trial. It is from the judgment of the court enforcing the forfeiture and allowing retention by the plaintiffs of the entire monies paid in by the defendants together with the improvements on the property, that the defendants appeal. It is the defendants position that to declare a forfeiture under the facts is improper and unconscionable.

### **STATEMENT OF FACTS**

Defendants purchased certain real property, described in the complaint, from the plaintiffs under a

written Uniform Real Estate Contract dated October 25, 1950, agreeing to pay therefor the sum of \$75,000. Defendants made a down payment of \$10,700 and agreed to pay the sum of \$600.00 per month thereafter part at 4 per cent interest and part at 5 per cent interest, together with the taxes after 1950.

Although there was some question as to the actual crediting of certain payments made under the contract the undisputed fact is that defendants were unable to make their payments and were in arrears in their payments at the time suit was commenced.

It appears that the total amount paid by the defendants to plaintiffs, including the down payment, was \$36,933.82, which included the amount due from the defendants for taxes for the period they were in possession of the property.

The property involved consists of five separate buildings, all of which are divided into rental units. The buildings are old, and a good deal of repairs, improvements and maintenance were necessary, and the defendants performed a great deal of work and placed many improvements on the property.

The plaintiffs introduced evidence at the trial to establish the actual value of the premises at the present time as \$40,000.00 (Tr. 6) on cross examination plaintiff admitted that he had two other appraisals of the property both of which were sub-

stantially higher than the expert witness testified. Those appraisals were as follows \$61,700.00, and \$65,000.00 (Tr. 36, 37). The trial court found that the property was worth only \$40,000, and that consequently, when plaintiffs took the property back they suffered a loss of bargain of some \$35,000 (R. 102).

To arrive at the rental value of the property, in retrospect, and to establish that the plaintiffs had netted a fair return from their investment and more, the defendants sought to introduce evidence as to the improvements made by the defendants on the property, and their costs, and the costs of maintenance of the property and operation thereof. The court refused to allow this evidence to be introduced and sustaining objections thereto. The figures sought to be introduced are before the court in the form of an offer of proof. (Tr. Ex. 24, 25).

Those figures reveal that defendants spent \$15,845.33 on permanent type improvements during their occupancy of the premises, and \$20,529.59 on maintenance, with, however, a great deal of the labor charged having been performed by defendants.

During the period of occupancy by the defendants they took in a total rental of \$51,151.49, which includes the apartment occupied by them. (Tr. 78, 86, 87).



## **STATEMENT OF POINTS**

- I. The court erred in its ruling that the property has only a value of \$40,000.00.**
- II. The trial court erred in excluding defendants evidence as to improvements and maintenance costs.**
- III. The trial court erred in declaring a forfeiture and allowing the plaintiff to retain all of the monies paid in by the defendants as liquidated damages, without regard to the excluded evidence.**
- IV. If the contract is null and void as decreed by the court, then the trial court erred in not requiring a refund to the defendants of the monies paid in by the defendants on the contract.**
- V. The fact situation here involved did not justify forfeiture under the law of the State of Utah.**

## POINT I

**The court erred in its ruling that the property has only a value of \$40,000.**

The trial court found the value of the property to be only the sum of \$40,000. The evidence on this subject came from an expert called by the plaintiffs, and from the plaintiff, Lorin Peck. Mr. Ashton testified that by the use of one method of appraisal he arrived at \$40,000 (Tr. 44, 45) but that if in good shape it would be worth \$50,000 (Tr. 44), and also, that by figuring the property on the basis of the total valuation of the land and the buildings, that he arrived at a total value of \$54,863.00 (Tr. 50)

The expert acknowledged that he did not see or know the condition of the property a year earlier when the defendants were in possession of the property (Tr. 51) and that to a large measure his reduced figure was predicated upon the maintenance condition of the property at the time he saw it, after it had been back in the possession of the plaintiffs several months (Tr. 51)

Mr. Ashton further stated at page 52 of the transcript: "When you get down to putting it down to market value it would sell pretty close to \$40,000 to \$50,000," and that the fair and reasonable market value would be somewhere between those figures.

Mr. Peck the plaintiff, on cross examination admitted that he had Mr. Chapman, a realtor and the man who handled the Judd sale, appraise the property for him in December of 1956, which was the time the plaintiffs resumed operation of and possession of the property, and that Mr. Chapman appraised the property at \$61,700, at that time. (Tr. 75) Mr. Peck also admitted that Mr. Turner of Turner Realty Co. had appraised the property for him in November or December, 1956, and that his appraisal was \$65,000. (Tr. 76)

Either of the appraisals, that of Mr. Chapman, or that of Mr. Turner, were far above the figures given by Mr. Ashton, and both appraisals were made at the time the plaintiffs took the possession of the property back from the defendants, and not at a subsequent time when the plaintiffs had been in possession for some 15 months.

It is respectfully submitted, that the weight of evidence is definitely against the finding made by the trial court, and that the evidence establishes a value between \$61,700 and \$65,000 at the time when the value bears an important relation to the issues here involved, that is, December, 1955, when the plaintiffs took possession of the property back from the defendants.

The evidence of Mr. Ashton is remote in time he admitted an unfamiliarity with the property at

the time the possession passed from defendants to plaintiffs, and its condition at that time. This being the case, his evidence cannot be given the weight attributed to it in the face of the other appraisals.

Yet another reason exists, however, why the finding of a value of \$40,000 should not be allowed to stand. Mr. Ashton frankly admitted the market value was somewhere between \$40,000 and \$50,000, and by one method he arrived at a value in excess of \$54,000. It is completely erroneous to utilize the absolute minimum figure Mr. Ashton placed on the property as being the market value in view of his repudiation of it as a fixed figure, and it is equally erroneous to seize upon the lowest possible figure cited by him in view of the wide latitude he gave in his figure. That is, somewhere between \$40,000 and \$50,000. Such an estimate is not sufficiently close to justify the finding as made.

## **POINT II**

**The trial court erred in excluding defendants evidence  
as to improvements and maintenance costs.**

Defendants sought to introduce evidence as to the improvements placed upon the property herein involved, and to introduce evidence of the maintenance and operational costs both during the operation by the defendants and during the operation of the property by the plaintiffs.

On cross examination it was sought to be developed from the plaintiff, Mr. Peck, that his costs of operation had been compared to the income he received from the property. The purpose of this revenue of examination being to arrive at the net income from operation of the property to test this net income figure against the net income figure during defendants operation of the property to establish one of the important factors in a determination of whether the forfeiture here involved was unconscionable and exorbitant, that is, what was the property worth in producing revenue, since certainly the seller would be entitled to claim that amount as being a figure which bore a reasonable relation to the actual damages which could reasonably be anticipated at the time the contract was made. *Perkins vs. Spencer*, 121 Ut. 468, 243 P. 2d 446.

The trial court sustained an objection to this line of questioning (Tr. 29) and later when the same subject was attempted to be explored with the defendant Mr. Judd, similar objections were sustained (Tr. 51).

The basis of the court's ruling was apparently that the term "fair rental value" was an art phrase with a definite and clear meaning, and that the no evidence would be admissible which would reach the question of income produced by the property.

In this line of reasoning, the appellants earnestly assert that the trial court completely misconceived the holding of this court in the *Perkins vs. Spencer* case, supra, and has missed the entire spirit of that case, and, that further, he erred on the question of admissibility of evidence to prove "fair rental value."

First, a reading of the Utah cases upholding liquidated damages, as well as those wherein a penalty was found to exist, reveals, running throughout the cases the one basic proposition that, what is desired is that the injury sustained, if any, and the damages recovered therefor, bear a reasonable relation to each other. *Western Macaroni Mfg. Co. vs. Fiore*, 47 Utah 108, 151 P. 984; *Bramwell vs. Uggla*, 81 Utah 85, 16 P 2d 913, *Perkins vs. Spencer*, supra, and cases cited therein.

The evidence admissible in the individual case to establish the relationship of reasonableness or unreasonableness of the relationship of injury to the forfeiture amount, varied in those cases, and in the very nature of the problem will vary from case to case.

In the *Perkins vs. Spencer* case, which involved merely a single residence, it is obvious, that the rental value of the property provided a good, simple yard stick to determine what the loss occasioned to the plaintiff was in relation to the monthly payments which had been made.

In *Western Macaroni Mfg. Co. vs. Fiore*, 47 Utah 108, 151 P. 984, an entirely different basis was used, and in *Croft vs. Jensen* 86 Utah 13, 40 P. 2d 198, yet another type evidence was used; in *Malmberg vs. Baugh*, 62 Utah 331, 218 P. 975, the relatively short period of time of occupancy as compared to the amount paid by the defendant.

Without belaboring the point unduly, it appears that the trial court lost the spirit of the decisions and the rationale thereof in an attempt at technical application of a ruling to a fact situation which did not justify the ruling.

In the present case, the paramount determination as to what revenue the plaintiffs were entitled to anticipate from the property to serve as a yard stick of reasonableness, was not the rental value of individual apartments, but the net income which a rental property could and would reasonably be expected to produce, together with any other factors which would serve to aid the determination of other gains or losses to the plaintiffs upon retaking the property.

A detailed analysis of gross income and expenses is the only careful and practical way of arriving at the net income figure on the particular property, and this is what the defendants attempted to do, but were denied.

To carry the analysis one step further, it is quite apparent, that the evidence of cost of operations and net profits to be derived from the operation of the property by the defendants (see defendants offer of proof) would have produced a more favorable set of figures than did those of plaintiffs expert witness. See Point I herein. His figures concluded a 45 per cent net profit, whereas defendants figures as shown by exhibit 24, (offer of proof) would indicate something in excess of 50 per cent profit.

In this case the very nature of the property, its type, operation and upkeep problems made it imperative that the net income or revenue be used as the basic factor in determining whether the amount received by the plaintiffs from the defendants exceeded that which was reasonable. In refusing to allow this evidence to be introduced, it is earnestly submitted that the trial court erred seriously, and that the matter should be returned to the trial court for retrial, or for entry of judgment predicated upon defendants offers of proof.

Yet another reason illustrating the fact that the trial court erred in his ruling excluding evidence is apparent.

It is necessary to reconstruct in a case of this nature, since the parties were not contemplating a rental arrangement when they projected the agreement into being. Hence, in retrospect, the problem



is, "what is the best way to determine what a seller is entitled to expect from his property while in the hands of the buyer"? A synthetic situation has been created by reason of the lack of enforceability of the forfeiture provision, and therefore, it would seem that the interest of the court should be to consider that evidence which gives the most accurate forecast of these figures, rather than to try to fit a test to a particular case where it may not apply, as the court did in this instance.

However, assuming, but not conceding that the trial court was correct in concluding that "rental value" must be used as a test in this case, the appellants earnestly assert that the trial court still erred in his ruling.

Ultimately, the point which the term "rental value" is seeking to reach is the determination of the value of the use of the land, or as stated in *Nelson vs. Minneapolis & St. P. L. Ry. Co.*, 41 Minn. 42 N.W. 788;

"The term 'rental value' as applied to realty, is but another form of saying the value of the use of the land for any purpose for which adapted in the hands of a prudent and discreet occupant upon a judicious system of husbandry."

Nor does it appear that the only test in determining "rental value" is testimony of what the prop-

erty would rent for. The case of *Reeves vs. Romanes*, 132 Ark. 559, 201 S.W. 882 after indicating that rental value is to be ascertained by proof of what a property will rent for adds:

“ \* \* \* or by evidence of other facts from which the fair rental value may be determined.”

to like effect, see *Brewington vs. Laughran*, 183 N.C. 558, 112 S.E. 257.

The problem involved here might well be likened to the situation where a loss of profit from the interrogation of use of real property under a share crop arrangement, where uniformly the courts hold that the party is entitled to recover the value of the crops less the cost of raising, etc. *Rice vs. Whitmore*, 74 Cal. 619, 16 P. 501; *Colorado Nat. Bank vs. Ashcroft*, 83 Colo. 136, 263 P. 23; and *Rogers vs. McGuffey*, 96 Tex. 565, 74 S.W. 753.

It is earnestly asserted by the appellants that they were entitled under the theory of “other evidence from which the reasonable rental value can be determined,” to introduce the excluded evidence.

A review of the evidence sought to be introduced by the defendants (Ex. 24, 25, offer of proof Tr. 50, 55) at once reveals the disproportionate and excessive penalty being extracted from the defendants.

### POINT III

**The trial court erred in declaring a forfeiture and allowing the plaintiff to retain all of the monies paid in by the defendants as liquidated damages, without regard to the excluded evidence.**

Appellants re-assert their argument from Point II, that the evidence sought to be introduced by the defendants was proper, and that a consideration of it would result in the declaration that a penalty was imposed by the contract, rather than liquidated damages, but adds at this point the further argument, that the evidence, absent the excluded testimony, still requires the finding that a penalty was imposed rather than liquidated damages.

The record shows that a total revenue of \$51,151.49 was realized on the premises during the occupancy and operation thereof by the defendants. Mr. Ashton testified that the operating costs of property of this type was 50 per cent of the gross income (Tr. 43) and that after deducting vacancy charges the net income would be 45 per cent.

Applying this formula to the gross income figure, there would be realized a net return of \$23,018.17 on the property during the time it was in defendants possession. During that same period, the defendants paid to the plaintiffs the sum of

\$26,233.82. It is apparent, therefore, that the defendant paid to the plaintiffs everything that the property could reasonably realize during the period that they had the property, and by plaintiffs own expert witness the net to be recovered from the property potentially in whomsoever's hands it would be operating would be less than the payments made to the plaintiffs by the defendants by some \$3,215.65. Add to this the \$10,700.00 down payment, and the disparity is at once apparent.

To go even further, however, plaintiffs expert witness placed the net income from the property at \$3,500.00 per year (Tr. 44), based upon his investigations of similar properties and his information as to this property. This would make a total net of approximately \$18,100.00 which would be anticipated from this property for the period the defendants had the possession and operation thereof resulting in an even wider disparity between the yield of this property and the income received from it by the plaintiffs amounting to some \$8,133.00.

It is quite apparent, therefore, that the plaintiffs have been very handsomely repaid for the use the defendants have had of the property during the period they occupied and operated it, quite aside from the \$10,700.00 down payment made by the defendants.

Using the highest value estimated on the real

property at the time plaintiffs repossessed \$65,000.00 and the most favorable figures given by Mr. Ashton as to net profits from the property, (i.e.) \$3,500.00 per year (five years and two months) a total of \$18,100.00, together with the down payment, \$10,700.00, it is at once apparent that the plaintiffs have received much more than a reasonable return on the property, and much more than they would have realized had they operated the property themselves.

It is earnestly asserted by the appellants that the evidence clearly indicates that a penalty is here imposed under the facts in evidence and that it would constitute an extreme penalty to allow the plaintiffs to retain the \$36,933.82 paid to plaintiffs by the defendants, and also allow the plaintiffs to recover the property.

To allow such a result is to completely abrogate the principles laid down heretofore by this court several times, and more particularly in the case *Perkins vs. Spencer*, 121 Utah 468, 243 P. 2d 446, wherein the court said:

“ \* \* \* where enforcement of the forfeiture provision would allow an unconscionable and exorbitant recovery, bearing no reasonable relationship to the actual damages suffered, we have uniformly held it to be unenforceable.”

Certainly the recovery to the plaintiffs is so exorbitant and unconscionable bears no reasonable relationship to the damages suffered, and hence, the provision of the contract should be held to be unenforceable.

#### POINT IV

**If the contract is null and void as decreed by the court, then the trial court erred in not requiring a refund to the defendants of the monies paid in by the defendants on the contract.**

At this point appellants assert that if the contract of the parties is null and void as the court decreed, and wholly ineffective for any purpose as the court decreed, then the plaintiffs (respondents) cannot in the very nature of the relationship that the parties are placed retain monies paid in by the defendants under that contract, and can at best only recover damages for the use and occupancy of the premises or such other damages as they might be able to prove, and that since they proved no such damages, it was error for the court to find in favor of the plaintiffs and against the defendants allowing the plaintiffs to retain all of the monies paid in. *Malmberg vs. Baugh*, 62 Utah 331, 218 Pac. 975.

The determination that the contract was and

is null and void and of no force and effect is tantamount to a determination that no contract exists or existed under such circumstances it is not consistent nor possible for the court to allow the enforcement of provisions of that contract against the appellants, and the trial court therefore erred in ruling as it did in paragraph 6 of the judgment. Paragraphs 4 and 5 of the judgment are so wholly inconsistent that they cannot stand.

#### POINT V

**The fact situation here involved did not justify forfeiture under the law of the State of Utah.**

The case *Perkins vs. Spencer*, 121 Utah 468, 243 P. 2d 446, collates the Utah cases on this subject, and makes the following observation:

“It will be observed that in all cases where the stipulation for liquidated damages was enforced it bore some reasonable relation to the actual damages which could reasonably be anticipated at the time the contract was made and was not a forfeiture which would allow an unconscionable and exorbitant recovery.”

The court also quotes with approval the Restatement of Contracts, Section 339, as follows:

“(1) an agreement, made in advance of

breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless

(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, *and*

(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.”

The court also quotes approvingly from Williston on Contracts, Rev. Ed. Section 779, p. 2191 to the same effect.

It is apparent therefore, that the provision in the instant contract cannot stand as enforceable, since it meets neither the (a) or the (b) arm of the proposition as stated above.

The provision of the contract here involved (Ex. 5, first par. on reverse side) is as follows:

“ \* \* \* 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-performances of the contract, \* \* \* .”

The provision quoted obviously does not even consider the question of what is a reasonable forecast of just compensation, since by its terms it



would apply to a situation where 99 per cent had been paid as readily as to a situation where only one per cent had been paid.

Nor can it qualify as a situation where the harm caused by the breach is incapable or very difficult of accurate estimation, since in the very nature of the transaction involved, an accurate forecast is not only possible, but is easily made.

It is earnestly urged by the appellants, that the contract provision here involved cannot be sustained under the facts of the case, and in view of the nature of the transaction and the language of the contract provision.

### CONCLUSION

It is earnestly submitted by the appellants, and urged upon this court, that the trial court erred in allowing a forfeiture in this case under the facts and law, that in doing so he has allowed the very inequity to be fostered which the Utah cases cited herein have been decided to prevent. Further, that the errors of the trial court justify a reversal of the case for new trial.

Respectfully submitted,

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