

1958

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

Utah Supreme Court

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Cannon & Duffin; Counsel for Respondents;

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## Recommended Citation

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

UNIVERSITY UTAH

MAY 3 1958

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LORIN PECK and  
MARY C. PECK, his wife,

*Plaintiffs and Respondents,*

vs.

WILLIAM REED JUDD, JR., and  
THEDA W. JUDD, his wife,

*Defendants and Appellants.*

FILED  
- 1958

Clerk, Supreme Court, Utah

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RESPONDENTS' BRIEF

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# IN THE SUPREME COURT of the STATE OF UTAH

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THEDA W. JUDD, his wife,

*Defendants and Appellants.*

Case  
No. 8721

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## RESPONDENTS' BRIEF

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### INTRODUCTION

(Numbers in parenthesis refer to pages of the record.  
Page 103 of the record should follow Page 100.)

This action was instituted by plaintiffs to regain possession of the property subject to the suit, for a writ of repossession, to adjudge defendants guilty of unlawful detainer, for treble damages, and for costs and disbursements and a reasonable attorney's fee.

The court adjudged plaintiffs entitled to immediate possession, defendants guilty of unlawful detainer, plaintiffs entitled to writ of restitution, defendants were not

entitled to any relief on their counterclaims and have no equity in property and contract null and void and wholly ineffective for any purpose whatsoever and should be cancelled and terminated.

An appeal is taken by defendants.

## STATEMENT OF POINTS

### POINT I.

THE EVIDENCE SUSTAINS FINDING DEFENDANTS WERE IN DEFAULT, FORFEITURE WAS AGREEMENT OF PARTIES IN EVENT OF DEFAULT, LIQUIDATED DAMAGES IN AMOUNT AWARDED WAS PURSUANT TO CONTRACT, LIQUIDATED DAMAGES WERE NOT UNCONSCOUNABLE AND WERE IN FACT LESS THAN DEFENDANTS TOOK FROM PROPERTIES, AND FORFEITURE BASED ON ACTS OF DEFENDANTS AND JUSTIFIED UNDER LAW OF STATE OF UTAH.

### POINT II.

TRIAL COURT DID NOT EXCLUDE DEFENDANTS' EVIDENCE RELATIVE TO IMPROVEMENTS AND DID NOT ERR IN EXCLUDING DEFENDANTS' EVIDENCE AS TO MAINTENANCE.

### POINT III.

EVIDENCE SUSTAINS FINDING THAT PROPERTIES INVOLVED HAD A REASONABLE MARKET VALUE OF \$40,000.00, AT THE TIME PLAINTIFFS TOOK OVER ACTIVE MANAGEMENT OF PROPERTIES FROM DEFENDANTS.

### POINT IV.

COURT DID NOT ERR IN NOT REQUIRING PLAINTIFFS TO REFUND TO DEFENDANTS ALL MONIES PAID TO PLAINTIFFS BY DEFENDANTS ON CONTRACT TERMINATED BY DEFENDANTS BY REASON OF DEFAULT OF DEFENDANTS.

## STATEMENT OF FACTS

## EVIDENCE RELATIVE TO CONTRACTS

On September 30, 1950, Lorin Peck and Mary C. Peck hereinafter referred to as plaintiffs, respondents herein, under an Apartment Listing on a Sales Agency Contract of the Salt Lake Real Estate Board Multiple Listing Bureau, listed the properties known as 121 to 130 East 7th South and 658 to 664 Edison Street, to sell for the price of \$75,000.00, requiring \$35,000.00 cash and the balance of \$40,000.00, at \$300.00 per month with interest at 4% per annum, indicating that the units contained 23 apartments, three of which were furnished, together with four garages. Said listing cited a mortgage contract of \$40,000, payable at \$300.00 per month to Floyd Burge and bearing 4% interest on unpaid balance. Said listing was with R. J. Chapman of Utah Realty and Construction Co. Exhibit 15.

On October 24, 1950, William R. Judd, Jr. and Theda W. Judd, hereinafter referred to as the defendants, appellants herein, together with Lorin Peck, one of plaintiffs, signed an Earnest Money Receipt and Agreement whereby defendants were to pay to plaintiffs the sum of \$75,000.00 for said properties, \$4,600.00 in equity in a real estate contract and the balance at the rate of \$600.00 per month, plus 1/12 of the yearly taxes, payable monthly, and interest of 4% on the amount due by plaintiffs on their contract of purchase with Burge and 5% on the balance of the amount over and above the amount due Burge and due and owing to plaintiffs. Exhibit 16.

On October 25, 1950, plaintiffs and defendants signed and executed a Uniform Real Estate Contract providing for the sale of said properties from plaintiffs to defendants for the sum of \$75,000.00 payable \$10,700.00 down as cash, and \$600.00 or more, on December 1, 1950, and \$600.00 or more, on or before the first day of each and every month thereafter until the entire principal, together with interest, shall have been paid in full, and it was also provided that defendants are to deposit monthly with plaintiffs a sum equal to  $1/12$  of the annual tax for the preceding calendar year, and prior to the 30th day of November, of each year the sums thus deposited shall be applied in payment of general taxes for the current year, and defendants agreed that at any time there was a deficiency between the amount deposited and the amount due, to make up the same. Interest was to be at the rate of 4% on the amount due by plaintiffs to Burge and 5% on the difference between the amount due to Burge and the balance due on said Uniform Real Estate Contract. Exhibit 1.

A pertinent provision of said contract reads as follows: "In the event of a failure to comply with the terms hereof the Buyer, or upon failure to make any payments when the same shall become due, or within *thirty* days thereafter, the Seller, shall, at his option, be released from all obligations in law and equity to convey said property and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees

that the Seller may, at his option, re-enter and take possession of said premises without legal process as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land and become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller. It is agreed that time is the essence of this agreement." Exhibit 1.

Taxes on said premises, for the year designated, were as follows:

Year	Amount	Due
1950	\$659.28 1/6 for two months	\$ 109.88
1951	734.08	734.08
1952	652.63	652.63
1953	671.01	671.01
1954	719.42	719.42
1955	786.61	786.61
		<hr/> \$3673.63

See Exhibit 11.

## EVIDENCE RELATIVE TO PAYMENTS

Defendants paid to plaintiffs pursuant to said Uniform Real Estate Contract the following sums on the date indicated, (Exhibit 11, which was stipulated to as the payments made by all parties hereto at the initial hearing):

Oct. 25, 1950	\$10,700.00
Dec. 5, 1950	655.00
Jan. 1, 1951	655.00
Feb. 8, 1951	655.00

Mar. 8, 1951	655.00
Apr. 12, 1951	655.00
May 10, 1951	655.00
June 13, 1951	655.00
July 12, 1951	600.00
Aug. 13, 1951	600.00
Sept. 14, 1951	600.00
Oct. 11, 1951	625.00
Nov. 1, 1951	49.00
Nov. 19, 1951	600.00
Dec. 18, 1951	600.00

Jan. 23, 1952	600.00
Mar. 1, 1952	600.00
Apr. 1, 1952	600.00
May 10, 1952	600.00
June 20, 1952	600.00
Aug. 1, 1952	627.00
Sept. 5, 1952	455.00
Oct. 4, 1952	455.00
Nov. 12, 1952	455.00
Nov. 29, 1952	254.64

Jan. 12, 1953	455.00
Feb. 7, 1953	455.00
Mar. 6, 1953	455.00
Apr. 7, 1953	455.00
May 7, 1953	455.00
June 12, 1953	455.00
July 7, 1953	455.00
Aug. 14, 1953	455.00
Sept. 17, 1953	455.30
Nov. 1, 1953	455.00
Nov. 28, 1953	521.00

Jan. 6, 1954	455.00
Feb. 23, 1954	455.00

Apr. 6, 1954	455.00
May 24, 1954	455.00
June 28, 1954	300.00
July 31, 1954	455.00
Sept. 4, 1954	500.00
Nov. 28, 1954	500.00
Oct. 9, 1954	455.00
Jan. 10, 1955	460.00
Mar. 8, 1955	444.24
Apr. 8, 1955	259.50
May 10, 1955	350.00
June 4, 1955	360.00
July 7, 1955	360.00
Aug. 15, 1955	258.44
Oct. 6, 1955	360.00
Oct. 31, 1955	260.00

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Paid to plaintiffs.....\$36,787.56

At the time of the purchase of said properties, Mr. Judd paid to the County Treasurer, Salt Lake County, the sum of \$109.88 on the taxes on said properties for the year 1950, which was defendants' proportionate share and defendants are entitled to a credit in said amount upon said contract (page 24). Defendants had made a total payment to plaintiffs pursuant to said contract on said November 30, 1955, the sum of \$36,787.56, including the down payment. No payments were made after said date. As of said November 30, 1955, defendants were under obligation to have paid to plaintiffs pursuant to said contract the sum of \$3,673.63 in taxes, plus 60 monthly payments in the sum of \$600.00 each, per month, or \$36,000.00, plus the down payment of

\$10,700.00, constituting a total obligation as of said November 30, 1955, of \$54,699.85 (Exhibit 22). The sum of \$36,787.56 had been paid as of said date and nothing was ever paid or tendered thereafter. This constituted an arrearage on November 30, 1955, on the part of the defendants, in the sum of \$13,586.07.

During this period of time when defendants were defaulting on their payments on said contract, plaintiffs were under obligation to maintain their purchase contract from Burge and make monthly payments in the sum of \$300.00 per month.

### EVIDENCE RELATIVE TO NOTICES

On March 14, 1955, plaintiffs caused to be served upon each of defendants a NOTICE TO REINSTATE THE TERMS OF THE CONTRACT TO PURCHASE BY PAYMENT OF ALL DELINQUENT AMOUNTS DUE AND OWING OR FORFEIT ALL RIGHTS UNDER SAID CONTRACT AS PROVIDED THEREIN FOR FORFEITURE. Said notice set forth that defendants were in arrears in the sum of \$10,734.64 and stated in part, as follows:

“Notice is hereby given that if you claim any rights under said contract, notwithstanding your agreement in writing to surrender said property to seller if the delinquent installments are not paid within a reasonable time, namely 30 days, you are hereby notified that said contract of sale is to be and is terminated and cancelled by reason of your defaults and refusal to pay and by reason of your rejection of the offer to reinstate said contract.” (Exhibit 2).

On May 20, 1955, sixty-six days after said Notice to Reinstate had been served on defendants and after no payment or tender of any nature had been made on said arrearage, plaintiffs caused to be served upon each of said defendants a NOTICE OF FORFEITURE, NOTICE OF TENANCY AT WILL, AND NOTICE TO VACATE PREMISES WITHIN FIVE DAYS AFTER THE SERVICE OF NOTICE. Said notice set forth therein that defendants were notified and required to pay the delinquent installments within "thirty days" or a "reasonable time"; that defendants did not pay said delinquent installments and in fact did not pay the monthly installments due during said period to reinstate said contract pursuant to said notice dated March 11, 1955, and defendants utterly failed to perform the terms of said instrument. Said notice further stated that if defendants held over that an unlawful detainer action would be instituted against defendants. Exhibit 3.

Defendants failing to comply with either of said notices in any manner, plaintiffs instituted an action in the District Court of Salt Lake County, State of Utah, on the first day of June 1955, against defendant and prayed that:

a. Plaintiffs be adjudged to be the owners of the real property described in said contract and be entitled to immediate possession thereof;

b. That defendant be adjudged guilty of unlawful detainer of said premises from and since May 26, 1955, and that plaintiffs have issued by this court a writ of

restitution whereby defendants shall be evicted from said premises, together with their goods and chattels, and that said premises be restored to the possession of plaintiffs; and

c. That plaintiffs recover from defendants damages for unlawful detainer in the amount of \$600.00 per month trebled (or at the rate of \$20.00 per day trebled) during the time defendants shall withhold possession from plaintiffs; and

d. That plaintiffs recover their costs and disbursements herein incurred, and such other relief as may be appropriate in the premises, including a reasonable attorney's fee. (Pages 4 and 5.)

#### EVIDENCE RELATIVE TO REPOSSESSION

Issue was joined by the filling of an answer and counterclaim of defendants on June 20, 1955, and a demand for trial certificate and order were filed.

In September, 1955, before the Honorable David T. Lewis, one of the judges of said District Court, a pretrial was held and at said time and place, namely six months after service of said Notice to Reinstate the Terms of the Contract, plaintiffs advised said court that plaintiff is "interested purely in the satisfaction of the contract and preferably by the contract being satisfied by the payment rather than forfeiture, and there is no desire on behalf of the plaintiff to cause the property to be forfeited if payment can be made in any manner. (page 41.)

On November 30, 1955, two months after said pre-trial, said Honorable David T. Lewis called up said case

for trial and again said statement of the position of plaintiffs relative to forfeiture was made. During the course of said trial, said Judge Lewis called counsel to his chambers and advised that the court felt the matter should be settled and that an agreement might be worked out. It was thought a settlement had been reached and stipulations made and the hearing was discontinued. Said stipulation was never reduced to writing but parts of the same were carried out including the plaintiffs taking possession of said properties and operating the same as of December 1, 1955. Defendants remained in the apartment defendants were occupying on said premises without payment of anything until March, 1956.

On March 5, 1957, the Honorable Ray Van Cott, Jr., one of the judges of said District Court, called said case up for trial and again said court was advised that:

“Plaintiff is interested purely in the satisfaction of the contract and preferably by the contract being satisfied by the payment rather than forfeiture. That there is no desire on behalf of the plaintiff to cause the property to be forfeited if payment can be made in any manner.” (Page 41).

Said plaintiff, Mr. Peck, further testified at the trial as follows:

“Q. And is it your desire that this property and these premises be turned over to you pursuant to a writ of restitution?”

“A. Yes sir.

“Q. And if you could get your money out

of this contract you would be glad to let them remain there, is that right?

“A. Yes sir.

“Q. And you are asking that the Court order that the contract, this uniform real estate contract, the subject of this action be terminated and be declared null and void?

“A. Yes sir.

“Q. And you are asking that you be awarded treble damages for the unlawful detainer of these premises?

“A. Yes sir.” (Page 64)

## EVIDENCE RELATIVE TO CONDITION OF PROPERTY WHEN SOLD AND RETURNED

Said premises were in “very good condition.” (Page 81). There were no roofs leaking, no plaster falling off the ceilings, the paper and painting “were all in good condition” and it was “all in good condition.” (Pages 80 and 81). These facts are uncontroverted in the evidence. In December, 1955, as the properties were returned and were again under the management of Mr. Peck, his manager, Mrs. James Egan, testified that the conditions of the properties were “terribly run down,” that the plaster was off some of the ceilings, the place was badly in need of paint, and that the premises were not in as good condition when she returned in December, 1955, as they were when she left in 1950. Mrs. Egan further testified that the premises were being improved from the time she reentered; that improvements were made at 121 and 123, a new roof was put on the four units on

Edison Street, that Mr. Peck has put congoleum on and has furnished paint for people to decorate and fix up their apartments and that some of the apartments are in better condition than they were when Mr. Peck took over the management again and that in the over-all the apartments were in better condition than they were when plaintiffs first took them back; there having been new pipes in the heating system and that the furnace had been repaired (Pages 82 and 83).

Three or four thousand dollars in repairs had been put on said premises between the time Mr. Peck took the properties back and Mr. Ashton appraised them (Page 77).

### EVIDENCE RELATIVE TO FAIR MARKET VALUE OF PROPERTY AT TIME OF RETURN OF PROPERTIES

Edward M. Ashton, the only witness called by any of the parties to testify as to the fair market value of the property, who had been appraising properties for a period of thirty years for life insurance companies and for private individuals, running into thousands of cases and a member of the Association of Real Estate Brokers and also of the Real Estate Appraisal Organization of America, a former president of the Chamber of Commerce of Salt Lake City and twice president of the Real Estate Board of the city and once of the State of Utah, made an appraisal from "two angles," "First, by adding up the value of the ground separate from the improvements and putting the improvements separately,

and then I have taken it on the basis of the economic value of the property, based on its operation, gross income and expenses, and the net, and I have arrived at it in the following manner." (Page 42 and 43).

Mr. Ashton testified that:

"... I got \$50,000.00 and I figured that that would be obtainable from the property if it was kept in pretty good shape. But in going through the property I found very serious conditions there. Some places where the roof was leaking badly and wasn't plastered down. Then I took occasion last Saturday to employ a man who is an expert painter that had been in the business for 25 or 30 years and he checked it all over and he found it would cost \$11,000.00 to repaint the interior of the houses and the exterior so that made a serious situation. So my judgment is that as of today the building in its present condition probably wouldn't be worth any more than about \$40,000.00." (Page 44).

He further stated that from the economic standpoint the property is worth today about \$40,000.00. "But it has a potential greater than that," and explained that "The potential would be this. That if it was properly improved they would have a greater income than ever has been obtained for it, because over a period of years they haven't obtained as much from rental as I indicated with my figures. But if it were properly operated and the grounds fixed up, which have been allowed to go to helter skelter it makes a different situation there," and explained "Well as of today in its present condition it wouldn't be more than about \$40,000.00" was stated in

reply to the question as to the value of the ground and the value of the improvements on the property itself. (Pages 44 and 45)

In explaining how he arrived at these figures, he stated “. . . in checking the property over very carefully I made an analysis of it, showing the location of each building on the ground and compared that with what they call the Sanborn Map. That shows, it is a map of all of the properties in Salt Lake City; where they are located, what they are, and I find that shown in the back of the apartments, especially 121 and 123. There were framed porches down there which were gone and the building has the appearance of no protection from fire. I find probably it needs a new furnace and there is probably \$1,000.00 expense there and then a lot of things I have discovered. The building in the back of 125 that has since been removed and the bricks still on the premises not removed.”

In the other approach, Mr. Ashton testified that from the front foot basis “That gave me \$25,815.00 total valuation of the land, . . then I figured the total of all of these buildings \$29,050, or a total of \$54,863.00 from the standpoint of summing the property up but from the economic approach I figured a lesser figure.” Counsel for the defendants then asked Mr. Ashton, “Well you would actually come close to the figure of \$50,000.00 in one case and \$54,800.00 in the other?” And in reply, Mr. Ashton stated, “Yes. And the thing that made me come down to 40 is the—” and counsel for the defendants then interrupted Mr. Ashton and did not permit him

to finish when he started to explain why the value was \$40,000.00. Mr. Ashton did state that "I would say, Your Honor, when you get down to putting it down to market value it would sell pretty close to 40 to \$50,000.00. None of us are smart enough to pin it down to a certain sum of money." (Page 52).

Mr. Peck, on cross examination, testified that Mr. Chapman told him (pure hearsay) that he appraised it at \$61,700.00 (Page 75). Mr. Peck said that Martin Turner's appraisal "was \$65,000." (Page 76). In reply to the question of whether or not the other gentlemen (Mr. Chapman and Mr. Turner) were certified appraisers he indicated "I think Not" but that he did not know as to their qualifications. Mr. Peck stated that he was advised to get a certified appraisal of said properties and that was the reason that he engaged the services of Mr. Ashton (Page 76).

## EVIDENCE RELATIVE TO "FAIR RENTAL VALUE" OF SAID PREMISES

Mr. Ashton in summarizing the operation and rentals obtained from the premises as reflected by the statements of the parties, testified as follows:

"That if it was properly improved they would have a greater income than even has been obtained for it, because over a period of years they haven't obtained as much from rental as I have indicated with my figures. But if it were properly operated and the grounds fixed up, which have been allowed to go to helter skelter it makes a different situation there." (Page 44)

Mr. Sheffield, counsel for defendants advised the court that "we . . . have in our hands produced income from the property of \$51,151.49. That is the income alone," and explained "That includes Mr. Judd's apartment at \$40.00 a month, since it was not a furnished apartment for 60 months." Mr. Judd testified that \$48,871.49 is the total receipts on people we give receipts to on all of these apartments and testified that \$40.00 per month, which I figure is the fair rental value of that apartment" (the one which he occupied) for the period of time until he surrendered the premises to Mr. Peck, constituted a total rental of said \$51,151.49, though Mr. Judd did not actually move from his apartment until the following March, 1956.

## PLEADINGS OF PLAINTIFFS

Plaintiffs prayed:

- a. Plaintiffs be adjudged owners of said real property and be entitled to immediate possession thereof;
- b. Defendants be adjudged guilty of unlawful detainer of premises from and since May 26, 1955, and that plaintiffs have issued by court a writ of restitution whereby defendants shall be evicted from premises, together with their goods and chattels, and premises be restored to plaintiffs;
- c. Plaintiffs recover from defendants damages for unlawful detainer in amount of \$600.00 per month trebled during time defendants withhold premises from plaintiffs; and

- d. Plaintiffs recover costs and disbursements, including reasonable attorney's fee and such other relief as appropriate.

## PLEADINGS OF DEFENDANTS

Defendants set forth five separate and distinct defenses and two counterclaims. The first defense was that the complaint failed to state a cause of action. This defense was abandoned and was never presented for argument. The second defense was that plaintiff consented to a change in the terms of said agreement with respect to the amount of payment per month and allowing defendants to make lesser payments. No evidence was presented on this defense and no argument was made and this defense was abandoned. The third defense was that plaintiffs did not own, nor were able to convey title. No evidence was presented as to the inability of plaintiffs to convey or that defendants were in the position to demand conveyance and this defense was abandoned. The fourth defense was that plaintiffs cannot give possession or quiet enjoyment of nor physical title to said premises. No evidence was presented to support said defense and it must have been abandoned. The fifth defense was that by the acceptance of the payments that plaintiffs had acquiesced in a change in the payments for a long period of time and that there was a reliance on said acquiescence. No evidence or argument was made on said defense and the same was abandoned.

The First Counterclaim was that there was an express and implied warranty that said premises were in a fit and proper and habitable condition for occu-

pancy as rental properties and apartments and that defendants were required to expend approximately \$30,000.00 to repair the same to the extent necessary to pass Board of Health requirements in order that said properties could be continued as rental properties. No evidence was presented as to Board of Health requirements and defendant testified "it was a suitable place as far as rentable building." (Page 55). Exhibit 23 of defendants shows the income rental on said apartments and on each the income appears constant. No argument was made as to any breach of warranty and said counter claim based upon breach was abandoned.

The Second Counterclaim was that Pecks were seeking to enforce a penalty and forfeiture against defendant which is totally and completely unjustified, and that defendants should have returned to them the value and amount paid into said plaintiffs and value of said improvements in said property, over and beyond the reasonable rental value of said property, which sum amounts to \$42,521.50; and that enforcement of the forfeiture provisions herein would allow an unconscionable and exorbitant recovery to plaintiffs, far in excess of any loss or damage suffered by them, and that said provisions should not be enforced.

Upon the Second Counterclaim and upon said basis only was the issue drawn.

## FINDINGS OF COURT

The court made and entered its findings of fact, findings, inter alia, which found: That a total payment

was made by defendants to plaintiffs pursuant to said contract, including the down payment was \$36,787.56, and that there was due and owing on said contract as of the 30th day of November, 1955, a total sum of \$54,699.85, and an arrearage of the sum of \$13,586.07. To these findings, no exception is taken by the defendants. The court further found that defendants collected as rentals on said premises during the period defendants were in possession, namely from November 1, 1950, to and including November 30, 1955, the sum of \$48,751.49, and had the use and occupancy of an apartment which was used and occupied by defendants as their own dwelling which had a reasonable rental value of \$50.00 per month during said five year period or a value of \$3,000.00, constituting a total rental received by defendants from said premises of \$51,751.49. These findings are based on the testimony of defendant (Pages 100-104).

## DECREE OF COURT

In the decree of the court, plaintiffs were adjudged the owners of said property and entitled to immediate possession thereof and that defendants were adjudged guilty of unlawful detainer thereof, plaintiffs were entitled to a writ of restitution and defendants were not entitled to any relief on their counterclaims and have no equity in said property or premises and that said contract is null and void and wholly ineffective for any purpose whatsoever and should be cancelled and is cancelled and terminated (Pages 106-107).

## APPEAL GROUNDS

The defendants appeal upon the following "Statement of Points"

1. The court erred in its ruling that the property has only a value of \$40,000.00.
2. The trial court erred in excluding defendants evidence as to improvements and maintenance costs.
3. 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.
4. 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 on the contract.
5. The fact situation here involved did not justify forfeiture under the law of the State of Utah.

## ARGUMENT

## POINT I.

THE EVIDENCE SUSTAINS FINDING DEFENDANTS WERE IN DEFAULT, FORFEITURE WAS AGREEMENT OF PARTIES IN EVENT OF DEFAULT, LIQUIDATED DAMAGES IN AMOUNT AWARDED WAS PURSUANT TO CONTRACT, LIQUIDATED DAMAGES WERE NOT UNCONSCOUNABLE AND WERE IN FACT LESS THAN DEFENDANTS TOOK FROM PROPERTIES, AND FORFEITURE BASED ON ACTS OF DEFENDANTS AND JUSTIFIED UNDER LAW OF STATE OF UTAH.

Statement of Points 3 and 5 of defendants and Point I of Plaintiffs will be discussed in the following manner:

a. Was the forfeiture of the rights in the property proper under the terms of the contract; and

b. Was the allowing the plaintiff to retain all of the monies paid in by the defendants as liquidated damages, without regard to the excluded evidence, proper.

The provision of the contract relative to forfeiture and liquidated damages reads as follows:

“In the event of a failure to comply with the terms hereof the Buyer, upon failure to make any payments when the same shall become due, or within *thirty* days thereafter, the Seller shall, at his option, be released from all obligations in law and equity to convey said property and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may, at his option, re-enter and take possession of said premises without legal process as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land and become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller. It is agreed that time is the essence of this agreement.” Exhibit 1.

a. It must be remembered that the plaintiffs took the properties over on December 1, 1955, with the full consent of the defendants except the apartment in which Judds were residing and continued to reside until March, 1956. There was no court order but a stipulation of settlement was in the offing and all that is in the record is that the plaintiffs took over the management of the

properties on December 1, 1955. The properties were turned back over to plaintiffs by defendants. The taking over and repossession was not over the protests of defendants but with their acquiescence.

No question has been or is being raised relative to the right of defendants to retain possession of the properties. The return of the property to the defendants is not being sought nor argued. The uncontroverted testimony of the plaintiff is that there was no desire on the part of the plaintiff to cause a forfeiture in the event plaintiff could but obtain his rights under the contract. Notice to reinstate the contract was given in March, 1955; two months later another notice of the termination of the contract and the declaration of the creation of a tenancy at will was served in May, 1955; and, in September, 1955, six months after the first notice at the time of the pretrial, the defendants were again advised that there was no desire to require a forfeiture and opportunity was given defendants to make plaintiffs whole and they would thereby become whole, then on November 30, 1955, two months after the pretrial and eight months after the initial notice, a hearing was commenced and the hearing was terminated to afford defendants every opportunity to salvage anything salvageable defendants might have in said contract and properties.

At the time the first notice was served on defendants to reinstate their contract, the defendants were some \$10,734.64 in arrears. Defendants knew that during the time defendants were defaulting, plaintiffs were required to keep in full force and effect plaintiffs contract to pur-

chase these same premises. Plaintiffs were really being damaged in having to maintain payments on their contract of purchase when defendants were defaulting on their contract.

In the early case of *Rose v. Garn*, 56 Utah 533, 191 Pac. 645, the Supreme Court, State of Utah, stated:

“No court has ever held that the parties may not agree between themselves as to the measure of damages that shall be sustained upon the breaching of a contract by either party.”

It would seem that there could be no question of the right of the plaintiffs to re-enter and take possession of said premises when defendants were \$10,734.64 in arrears at the time of the giving of the notice to reinstate the contract and plaintiffs did not take possession until eight months later during which time defendants had the opportunity to salvage their interest in said properties; after defendants had collected some \$51,751.49 in rentals from said premises and had only paid to plaintiffs a total sum of \$36,787.56, including down payment, taxes, interest and principal; when the properties were “terribly run down” when the properties were taken over by plaintiffs in December, 1955, and when said properties “were in very good condition” when the same were sold to defendants according to the uncontroverted testimony of Mrs. Egan, the manager of said properties at the time of the sale and immediately following the return of the properties to Mr. Peck. There was simply no other way out as Mr. Ashton stated that the grounds “have been allowed to go helter skelter” and therefore “over a period of years

they haven't obtained as much from rental as I indicated with my figures. But if it were properly operated and the grounds fixed up" there would have been greater income. Plaintiffs could wait no longer and permit the premises to continue to degenerate and were compelled to retake the premises and this was done with the acquiescence of defendants.

b. This court has previously had the problem of considering whether the application of a liquidated damages clause in a contract is actually liquidated damages or a penalty. In the case of *Cooley v. Call*, 61 Utah 203, 211 P. 977, speaking through Justice Thurman, the court stated:

"It does seem to the writer that here was a candid deliberate attempt on the part of the contracting parties to fix and determine a measure of damages which should operate as an exclusive remedy in the event that the vendee should default in subsequent payments. If the damages stipulated in the contract were either inadequate or radically excessive, as compared with the probable damages that could be foreseen by the parties when the contract was executed, there might be some reason for contending that the damages stipulated were not intended as an exclusive remedy, but such was not the case, as appeared from the record. Upon the execution of the contract, November 25, 1919, defendants paid plaintiffs \$1,850. During the next year they paid one-half of the interest on a \$6,000 mortgage at 6 percent per annum amounting to \$180, and paid taxes on the property for the year 1920, which must have amounted to at least \$100. As to the exact amount the findings were indefinite. In any event the defendants paid taxes and interest in at least the sum of \$280, which added

to the initial payment of \$1,850, gives a result of \$2,130. The final payment was to be made December 1, 1921, or within two years and five days from the execution of the contract. So that it could be readily foreseen by the parties to the contract at the time it was executed just what plaintiffs' damages would probably be when the last payment became due, even if defendants should default in every subsequent payment provided for by the contract. A simple mathematical calculation demonstrates that the \$1,850 paid by defendants amounted to at least 10 per cent per annum on the purchase price of the property, of which amount plaintiffs were absolutely assured because it was paid in advance. Can it be said in the light of these facts that the damages stipulated in the contract were so excessive, on the one hand, or so inadequate, on the other, that it could not have been intended as the amount of damages to which plaintiffs would be entitled in case defendants defaulted in subsequent payments? We think not."

Statement of Points No. 5 is that the fact situation here involved did not justify forfeiture under the law of the State of Utah.

What are the facts in the instant case? There was a down payment required of \$35,000.00 on the original listing which was reduced to the sum of \$10,700.00 under the contract actually made. There was a requirement of \$600.00 per month payment on the contract, plus taxes, or a total of \$7,200.00 per year plus the taxes which averaged about \$700.00 per year or less than \$8,000.00 per year on the contract. How much was collected by defendants as rentals during the five year period, which Mr. Ashton said could be increased with good operation and

management? The sum of \$51,151.49 was actually collected in rentals during the five year period, or a sum \$10,230.29 annually, and the sum of \$852.52 was actually collected monthly as rentals on the average and the monthly payment due plaintiffs was the sum of \$600.00 plus the taxes. The difference between what defendants collected as rentals (\$51,151.49) and the amount paid plaintiffs (\$36,787.56 including taxes) is \$14,363.93. At the time defendants purchased said premises the contract price was \$75,000.00, which was the fair market value as of that date because there was no force or pressure claimed. Mr. Ashton's testimony at the time of the trial was:

“\*\*\*So my judgment is that as of today the building in its present condition probably wouldn't be worth any more than about \$40,000.00.” (Page 44)

and Mrs. Egan testified that: since she returned between the time that Mr. Peck retook the premises and when Mr. Ashton made his appraisal that:

“\*\*\* The property has been improving, other than the roof has been put on and Mr. Peck has put congoleum on. He has furnished paint for people for several places for them to do their decorating and fixing up their apartments.” (Page 82)

And Mr. Peck testified that he had expended some \$4,000.00 since taking said premises back. (Page 77)

In the instant case, the monthly payments arranged and provided for by the contract from experience, even with poor management and permitting the property to become in a state of disrepair, were less than the amount

to be paid on the contract and therefore were in no sense unconscionable and exorbitant. There was an average of more than \$250.00 per month cushion for expenses in operation. Certainly Peck could not be expected to assume the responsibility for the management and operation during the period Judds had said properties. There was no penalty in this case, as in the *Western Macaroni Mfg. Co. v. Fiore*, 47 Utah 108, 151 P. 984, but actually a surrender of less than defendants had collected on the premises as rentals was being forfeited. See the cases of *Dopp v. Richards*, 43 Utah 332, 135 P. 98, and *Cooley v. Call*, supra, wherein this court went into detail to determine if the liquidated damages were compensatory for the injury sustained or were penal in nature. In the instant case, the amount being collected monthly exceeded the amount he was required to pay on the contract. As stated in *Bramwell Inv. Co. v. Ugglä*, 81 Utah 85, 16 P. 2d 913, Justice Elias Hansen speaking for the unanimous court stated:

“This court is committed to the doctrine that, where the parties to a contract stipulate the amount of liquidated damages that shall be paid in case of a breach, such stipulation is, as a general rule, enforceable, if the amount stipulated is not disproportionate to the damages actually sustained. A different rule applies where the amount stipulated is oppressive, unconscionable, or is in the nature of a penalty rather than damages actually sustained.”

In the case of *Croft v. Jensen*, 86 Utah 13, 40 P. 2d 198, the Seller was tendered all the money due and owing

on the contract prior to the commencement of the suit, the amount being \$200.00 on a contract upon which \$6,500 had been paid. Of course, no forfeiture was granted. In the instant case, plaintiff at every step of the proceeding stated that plaintiffs did not desire a forfeiture but only what the contract called for and only asked for forfeiture because of the inability of defendants to perform. There was still some \$54,699.85 due and owing on the contract and had the property a marketable value as contended by defendants, defendants could have sold said properties during the many months after the notice to reinstate the contract and before judgment, as plaintiffs on the day of trial offered to withdraw the action if plaintiffs could be but made whole, paid off the balance on the contract and had an equity.

In the case at bar, the purchase price was \$75,000.00 and the balance due on the contract was \$54,699.85, (Exhibit 22) at the time of the trial, which means that approximately one-third of the purchase price had been paid on the principal. Justice Crockett, in alluding to the case of *Christy v. Guild*, 101 Utah 313, 121 P. 2d 401, written for the court by Justice McDonough, in *Perkins v. Spencer*, 121 Utah 468, 243 P. 2d 446, stated as follows:

“While they (Guilds) had paid in approximately one-third of the purchase price, they had paid only \$20 to \$30 each month over the period, plus making improvements on the premises totally \$2,000. But the property had a monthly income to them of \$75.00, which exceeded the total of the payments they had made plus their improvements. After reviewing those facts, it was held that the

forfeiture provision was not a penalty under the rule above stated."

Those facts are practically the same as in the instant case. One-third of the purchase price had been paid, approximately, and the amount collected from the premises as rentals was \$51,151.49, and there had only been paid on the contract \$36,787.56.

The Reinstatement of Contracts, 339, dealing with the question of forfeiture is cited in the brief of appellants and in said *Perkins v. Spencer*, supra, as stating 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."

Consider in the instant case that Judds were required to pay to Pecks under the contract the sum of \$600.00 per month, plus the taxes each year, and that Judds collected as rentals an average of \$852.52 per month. Is that not evidence that the liquidated damages were not intended as a penalty? Plaintiffs have no quarrel with the application of the restatement provisions to the instant case.

After reviewing the opinions of this court relative to the basis of damages ordinarily recoverable for a breach of contract or excluding "liquidated damages"

which are in fact “penalties” for a breach, Justice Crockett set forth a rule which guided the trial court in the instant case and guided counsel in the litigation of the trial of the case. See *Perkins v. Spencer*, supra. This rule is as follows:

“The vendors are entitled to any loss occasioned them by any of these factors:

- (1) Loss of any 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 for in items no. 2 and 3; and
- (4) For the fair rental value of the property during the period of occupancy.

“The total of such sums should be deducted from the total amount paid in, plus any improvements for which it would be fair to allow recovery, and any remaining difference awarded to the plaintiffs.”

Applying the rule set forth by this court to the instant case, the following considerations must be given:

1. Loss of an advantageous bargain. The price of sale or bargain was \$75,000.00. The Finding of the Court at the time it was returned was \$40,000.00.

2. Any damage to or depreciation of the property. Mr. Ashton, a certified appraiser testified:

“\*\*\* If I capitalized that at 7% I got \$50,000.00 and I figured that that would be obtainable from the property if it were kept in pretty good

shape. But in going through the property I found very serious conditions there. Some places where the roof was leaking badly and wasn't plastered down. Then I took occasion last Saturday to employ a man who is an expert painter that had been in business for 25 or 30 years and he checked it all over and he found it would cost \$11,000.00 to repaint the interior of the houses and the exterior so that made a serious situation. So my judgment is that as of today the building in its present condition probably wouldn't be worth more than about \$40,000.00." (Page 44)

"There were framed porches down there which were gone and the building has the appearance of no protection from fire. I find it probably needs a new furnace and there is probably \$1,000.00 expense there and then a lot of things I have discovered. The building in the back of 125 that has since been removed and the bricks still on the premises not removed." (Page 46)

On cross examination as to the value of the property from the two approaches used by Mr. Ashton and in reply to the question of counsel for defendants.

"Q. Well you would actually come close to the figure of \$50,000.00 in one case and \$54,800.00 in the other?"

"A. Yes, and the thing that made me come down to 40 is the \*\*\*"

and there he was interrupted by counsel but he was clear that "the thing that made me come down to 40" was existent and the value was not \$50,000 or \$54,800. (Page 50)

In reply to the question of the court:

"Mr. Ashton, there is a question I want to ask.

Having in mind when a person not under compulsion to buy and one not under compulsion to sell, what would you say the reasonable fair market value of the property is at this time?

"I would say, Your Honor, when you get down to putting it down to market value it would sell pretty close to 40 to \$50,000.00. None of us are smart enough to pin it down to a certain sum of money." (Page 52)

Mrs. Berg testified that the properties were in better condition when Mr. Ashton made his appraisal than when Mr. Peck took the properties back and Mr. Peck testified that he had expended \$4,000.00 on the properties since taking them back. This testimony is uncontradicted, even by Mr. Judd, who was subsequently upon the stand. (Pages 41-42)

3. There was no testimony that there had been any decline in value due to change in market value of the property not allowed for in items Nos. 1 and 2.

4. For the fair rental value of the property during the period of occupancy.

The defendants, Judd, testified that they had income from said properties in the sum of \$51,151.49 during the five years which they occupied the property. That was the total rentals. (Page 86)

Mr. Ashton testified that with better management and proper care these rentals could have been increased.

Defendants contend that "fair rental value" as used by the court does not mean the rentals received from the property or what the properties would rent for during

a certain period but what the net profit was from the rental of the properties. Mr. Judd had a clear conception of his understanding of what was meant by "fair rental value" as in response to his attorney's question as to his method of computing the rentals of his own apartment and adding those rentals to the total rentals collected from the other apartments, Mr. Judd responded:

"Well that is computed on an unfurnished apartment at \$40.00 per month, which I figure is the fair rental value of that apartment." (Page 87)

Nothing could be more clear as to the meaning of "fair rental value" in the mind of the defendant, Judd. The court very aptly stated: "I believe, Mr. Sheffield, the fair rental value means 'What does it rent for?' and it isn't a matter of, like I said to you this morning, it isn't a matter of determining how much profit is made, because one man might make a different profit than another man." (Page 68) The court continued:

"Well, Mr. Sheffield of course I can only assume that the Supreme Court meant by the use of the words 'fair market value' when they used the words 'fair rental value' in the Spencer case, I can only assume that they intended that those words mean their technical and legal meaning and from the authorities that Mr. Cannon has cited and from what I believe to be more authorities along that line I have to assume the Spencer case that that is what they meant and they didn't mean that fair rental value meant an amount that was determined after all of the expenses that might be incurred in accordance with caprice of what over the operator might be. In other words, I have

always thought that you came to me and you said, 'There is a house. Now what is its fair market value' I say '\$75.00 a month as a fair rental value and it's the same way with an apartment house, or, if you want to take an office building what is the fair rental value of the Walker Bank Building, the whole building if you were going up there to rent it, and then seek to sublease it to tenants, what would be its fair market value. Its fair market value might be \$25,000.00 a month, or something of that nature. And they wouldn't go into all the questions of how much it costs them to operate it or how much it is going to cost you. That is the matter of individual shrewdness and diligence, and so forth." (Page 72)

Corpus Juris Secundum, Volume 76, page 1168, states, under rental, sub head rental value :

"The words are said to be of some general and technical meaning and as applied to personally mean the hire of, the revenue from, or the value of the use of, as applied to real estate it is the value of the use of the land for any purpose for which it is adapted in the hands of a prudent and discreet occupant on a judicious system of husbandry. That amount which in the ordinary course of business the premises would bring or for which they could be rented are the value as ascertained by proof of what the premises would rent for and not the probable profit which might accrue, although it is said that it must depend and be measured by the extent of the property."

Words and Phrases, Permanent edition, volume 36, page 919, reads :

"Rental value or hire of a saw mill with a known capacity is the value of the use of the same."

32 American Jurisprudence, s 428, reads:

“The word ‘rent’ derives from the Latin word ‘reditus.’ In ordinary use, it means the return made by one who occupies real estate under an express or implied contract with the owner, for the occupation of the premises, and is defined broadly as the compensation in money, provisions, chattels, or services, paid or given in exchange for the use and occupation of real estate. Thus defined, it includes a ‘royalty’ based on the output of a mine.”

In the case of *More v. Deyoe*, 22 Hun. 208, the court stated:

“As an item of evidence on the question of the value of the use and occupation of the farm, it was competent to prove what sum was actually received from it as rent. This, of course, was not conclusive evidence of the value of the use of the farm, but it was competent evidence on the subject.”

The Supreme Court of Kentucky in *Allison v. Cocke*, 112 Ky. 212, 655 S.W. 342, 52 A.L.R. 1595, wrote:

“This is not the ordinary case of suit for damages, the vendees have come into equity for relief against a forfeiture. The relief is granted them on terms. They must make the vendors entirely whole before they are entitled to the return of the forfeit money. They cannot ask that the vendors return to them money which has been paid out for expenses. \*\*\* The penalty named in the contract fixes the limit of recovery.”

In *J. R. Frazier et al. v. D. W. Nicks*, 172 Ark. 1139, 292 S.W. 368, 51 A.L.R. 1287, the court considered a case

of the rental of farm land in which the actual price was not previously fixed. In the note in said 51 A.L.R., the editor wrote:

“The court observed that the correct standard by which to measure the rent was the amount the lessor could have rented the premises for during an ordinary year, and that he was not required to accept a less rental because of unforeseen crop conditions which rendered the year unproductive and unprofitable to the tenant.”

See the cases of *Colve v. Parker*, 5 Utah 2d 263, 300 P. 2d 623; and *Pearce v. Shurtz*, 2 Utah 2d 124, 270 P. 2d 442.

## POINT II.

TRIAL COURT DID NOT EXCLUDE DEFENDANTS' EVIDENCE RELATIVE TO IMPROVEMENTS AND DID NOT ERR IN EXCLUDING DEFENDANTS' EVIDENCE AS TO MAINTENANCE.

The trial court erred in excluding defendants evidence as to improvements and maintenance costs, contends defendant in his point 2.

May I quote from the record the statement of counsel for defendants and the rulings of the court: (See page 73)

“MR. SHEFFIELD: Well the reason I raised that at this time, Your Honor, is this: That if we're not in a position to deduct from the total income, which apparently would be the fair rental figure, the expenses of maintaining the property then the net income will make no difference and if that is the case then we couldn't reduce the rental value of the property below the figure which the property

actually produces. Now if that is the case then under the Spencer case I think that Your Honor has resolved the case regardless of the factual dispute between us. If this figure is the fair rental value it exceeds the amount, the total amount which we have paid and if that is the case—

“THE COURT: In other words you have received more than the fair rental than you have expended on the property over the period of time and you’re not entitled to a credit.

“MR. SHEFFIELD: Well it comes out, Your Honor, that we have paid in under our figures, we have paid in \$36,933.82. We have claimed permanent improvements of \$15,845.33, making the total of \$52,799.15. In the two figures then \$51,151.49 and \$52,779.15 leaves less than \$1,000 and, of course, Mr. Peck is entitled to the benefit of his bargain which is the aspect of the case.

“THE COURT: Which could run as high as 25 to \$35,000.00.

“MR. SHEFFIELD: Well under the very best evidence that we can put on it only has to be \$1,000.00 in order to wipe us out.

“THE COURT: Yes.

“MR. SHEFFIELD: And that being the case maybe I’m anticipating by one witness I think that as soon as Mr. Peck is through why Mr. Cannon would rest and then I would put on Mr. Judd to establish these other facts and that is where I am stopped. So with that in mind I think we have finished the case and

about all I could do is to make an offer of proof at that point in respect to the improvements and then we will just have to test that question out." (Pages 73-74)

Continuing on page 89; after an objection to the admission of testimony relative to maintenance costs:

"MR. SHEFFIELD: Well, now, Your Honor, that brings me to the exact point that I was suggesting, that so far as we're concerned now that ends the lawsuit because we can't win it now.

"THE COURT: Yes.

"MR. SHEFFIELD: I have some additional evidence I want to put in, that of improvements, but I see no point in spending the time of the Court and counsel on an issue that won't make any difference to the outcome of this lawsuit as it now stands. And I was going to make an offer of proof as to what those things are, then if it has to be, if that issue later has to be tried it can be tried. (Pages 89-90)

Continuing on page 92:

"THE COURT: The point I make is this. I don't want the record to show that you are shut off from proving improvements and create an error in this record for that reason.

"MR. SHEFFIELD: No. No, Your Honor, I would not want the record to carry any such connotation whatsoever. The only point I was trying to make was if Your Honor's ruling with respect to maintenance is correct then if we prove all of the improvements that we claim

we would fall short of the Perkins-Spencer case.

“THE COURT: Yes, I want the record to show that. I don’t want it to show that you are being shut off here from proving improvements.

“MR. SHEFFIELD: No, Your Honor. I understand that.” (Pages 92-93)

From the record, it is clear that the court did not exclude any proffer of proof relative to improvements. The introduction of evidence as to operation costs and maintenance were excluded as not being an element of “fair rental value” as conceived in the Perkins-Spencer case, *supra*. If they were considered an element, the court would have to establish itself as manager of each business under forfeiture. Under such circumstances, the court would certainly apply the rule that where parties to an action have reduced a difficult unascertainable value to a liquidated figure and the parties have by written agreement arrived at said reasonable figure of liquidated damages then and in that case the court is not going to reform the contract to substitute its judgment for that of the parties previously ascertained.

### POINT III.

**EVIDENCE SUSTAINS FINDING THAT PROPERTIES INVOLVED HAD A REASONABLE MARKET VALUE OF \$40,000.00, AT THE TIME PLAINTIFFS TOOK OVER ACTIVE MANAGEMENT OF PROPERTIES FROM DEFENDANTS.**

Under the Statement of Fact and particularly under the subheading inserted in said Statement of Facts en-

titled **FACTS IN EVIDENCE AS TO FAIR MARKET VALUE OF THE PROPERTY AT THE TIME OF RETURN OF PROPERTIES** the facts of the case are set forth in considerable detail. Mr. Ashton came to a higher value for the properties in both of his methods of computation but when he applied the computations to the condition of the properties then he reduced the value by the \$11,000.00 it would cost to repaint the premises, and in addition he noted that the heating system would need a thousand dollars for repairs. This did not include the necessary improvements in fire protection, repairing the roofs of the leaks and replastering. It should be noted that the appraisal of Mr. Ashton was after plaintiffs had re-entered and put more than \$4,000.00 in maintenance upon the premises. There are two hearsay statements by Messrs. Chapman and Turner, neither of whom were called to testify, and the qualifications of the same were unknown to Mr. Peck, who testified that he obtained a certified appraiser in order to receive a competent appraisal. Naturally, the court did not give much credence to hearsay statements of unknown witnesses. (Pages 74-76). Mr. Chapman was subpoenaed as a witness for defendants but he was never called to testify.

#### POINT IV.

**COURT DID NOT ERR IN NOT REQUIRING PLAINTIFFS TO REFUND TO DEFENDANTS ALL MONIES PAID TO PLAINTIFFS BY DEFENDANTS ON CONTRACT TERMINATED BY DEFENDANTS BY REASON OF DEFAULT OF DEFENDANTS.**

Defendants proved that the rentals collected on said properties were \$51,151.49 during the time defendants occupied properties. (Page 86)

Plaintiffs proved that there was a contract and that there was due and owing on said contract the sum of \$54,699.85 (Exhibit 22) at the time the property was returned to plaintiffs; that defendants were in arrears \$13,586.07, as of said date; that the properties were in a deplorable state with leaking roofs, buildings needing \$11,000.00 in painting just to get them in shape; heating system in need of repair; knocked down building with bricks and debris left lying on the premises; back porches removed and no fire protection; plaster down; rentals during the period collected by defendants amounted to \$51,151.49, with only \$36,787.56 paid therefrom on a contract price of \$75,000.00, plus taxes and interest over a five year period, and with all those facts uncontested defendant asserts, plaintiff

“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 \*\*\*\*”

In the case cited by counsel there was no forfeiture clause in the contract as in the instant case. It is appreciated that this honorable court has paid little if any attention to the forfeiture clauses of contracts in any of the cases determined. Generally, the court has determined what the court finds to be an equitable solution to the problem and each case has stood on the facts of the case. In no

case has the court ever found that because the purchaser had no equity and the rights of the purchaser under the contract had been declared null and void that the seller was under obligation to return the purchaser all the monies paid on the contract, as proposed by point IV.

### CONCLUSIONS

Much has been stated in the cases to protect the purchaser. In the instant case as indicated in the Earnest Money Receipt, the plaintiff was under obligation to pay the realtor's commission of five percent of the purchase price, a sum of \$3,750.00, plaintiff prayed for treble damages for the hold over of defendants and proved the hold over and the reasonable rental value of the properties, plaintiff offered to not enforce the forfeiture provision at each step in the proceedings if plaintiff would be but made whole, plaintiff notes that practically \$15,000.00 over and above the rentals actually collected were not paid to plaintiff on said contract, and plaintiff asks no affirmative relief even though under the law plaintiff is entitled to the same.

It is earnestly submitted that every consideration possible was given defendants but nothing was done by defendants to relieve plaintiffs and there is nothing in this record of any attempt being made to relieve plaintiffs or even give plaintiffs what plaintiffs were entitled to under the contract. It is respectfully submitted that the defendants defaulted under the contract; that plaintiff is awarded nothing and receives nothing that is not provided for in the contract; that defendants took more in rentals from the properties than defendants paid plain-

tiffs on the contract by \$15,000.00; and that defendants had no equity in the run down delapidated premises that no one appraised as having anywhere near the value of the purchase price and even with the severest application of the conditions of the contract plaintiffs are not and could not be made whole. It is earnestly represented that the judgment should be affirmed with costs to respondents.

Respectfully submitted,

CANNON AND DUFFIN

By T. QUENTIN CANNON

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Respondents*