

1959

J. Royal Andreassen and Alta N. Andreassen v.
George H. Hansen and Florence Hansen : Brief of
Amicus Curiae

Utah Supreme Court

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Jensen & Jensen; Attorneys for Salt Lake Real Estate Board;

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IN THE SUPREME COURT
of the
STATE OF UTAH

J. ROYAL ANDREASEN and
ALTA N. ANDREASEN
Plaintiffs and Respondents

vs.

GEORGE H. HANSEN and
FLORENCE HANSEN
Defendants and Appellants

FILED

SEP 15 1959

Supreme Court, Utah

Case No. 8769

BRIEF OF AMICUS CURIAE

JENSEN & JENSEN,
Attorneys for Salt Lake Real Estate Board

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BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT

The Salt Lake Real Estate Board, which is not a party to the above entitled action but is vitally concerned about those aspects hereinafter discussed of the

decision heretofore rendered by the Supreme Court of the State of Utah in said action, herewith presents to the Supreme Court of the State of Utah its Amicus Curiae Brief in connection with a Motion for Rehearing of the Decision of the Supreme Court, duly made and entered in the above entitled action on the 10th day of February, 1959, and now reported in 335 P. 2d, page 404.

The Salt Lake Real Estate Board, to the full extent of its authority, attempts to discipline its members and do all in its power to see that members of the Board, constituting the majority of the real estate brokers and salesmen in the Salt Lake City area, abide by the law and in all respects conform with the provisions of law, both statutory and judicial. It is respectfully pointed out that the decision rendered in the above entitled matter raises points which require clarification, in order that the Real Estate Board may discharge its responsibility and correctly advise its members as to their duties and responsibilities.

STATEMENT OF POINTS

Point I

THE USE OF THE "EARNEST MONEY RECEIPT AND OFFER TO PURCHASE," THE FORM OF WHICH IS SEVERELY CRITICIZED BY THE COURT IN THE FEBRUARY 10, 1959, DECISION IN THE ABOVE ENTITLED CASE, IS MANDATORY

Point 2.

THE HOLDING OF THE COURT THAT THE RETENTION OF THE DOWN-PAYMENT CONSTITUTED AN ELECTION TO ACCEPT THE DOWN-PAYMENT AS LIQUIDATED DAMAGES, IS CONTRARY TO LAW AND HARMFUL TO BOTH BUYERS AND SELLERS.

ARGUMENT

Point 1

THE USE OF THE "EARNEST MONEY RECEIPT AND OFFER TO PURCHASE", THE FORM OF WHICH IS SEVERELY CRITICIZED BY THE COURT IN THE FEBRUARY 10, 1959 DECISION IN THE ABOVE ENTITLED CASE, IS MANDATORY.

The Court, in its opinion in the above entitled matter, severely criticizes the "Earnest Money Receipt and Offer to Purchase" which was used by the real estate broker in endeavoring to consummate a sale of the plaintiff's property to defendants. The Court criticizes the size of the print and appears to infer that the form was prepared to discourage a customer from reading or understanding its and that portions of it are "neatly buried in the center" so as to escape notice. It is respectfully pointed out that real estate salesmen are required by law to use this form. The 1951 Legislature expanded the responsibilities of the State Securities Commission by enacting Chapter 102 of

the Laws of Utah 1951, which amended Title 82 of the Utah Code Annotated 1943. Sec. 82-2-20, as enacted by the 1951 Legislature, provided:

"It is expressly provided that a real estate salesman shall have the right to fill out and complete an Earnest Money Receipt and Agreement *in form to be approved by the Commission* and forms provided by statute and that a real estate broker shall have the right to fill out and complete forms of legal documents necessary to any real estate transaction to which the said broker is a party as principal or agent, and which forms have been approved by the Commission and the Attorney General of the State of Utah. Such forms shall include a closing real estate contract, a short-form lease, and a bill of sale of personal property." (Emphasis added)

This same provision was carried over into the 1953 compilation of the code and now appears as Sec. 61-2-20 Utah Code Annotated, 1953. The 1953 Code made no change whatever except to remove the capital letters from the words "Earnest Money Receipt and Agreement," "Commission" and "Attorney General".

In 1951, in order to discharge the responsibility placed upon the Securities Commission by the new law, Mr. M. H. Love, as Director of the Securities Commission, requested the suggestions of the Salt Lake Real Estate Board and a Committee of members of the Board was appointed to work with Mr. Love in preparing the prescribed "Earnest Money Receipt and Agreement". This committee worked with the Securities Commission over an extended period

of time and finally developed a form of agreement which it was believed gave proper protection to both buyer and seller. This form was then presented to the Attorney General of the State of Utah for his approval as required by the law. The Attorney General retained the form in his office for study for a month, and then on January 8, 1952, wrote to the State Director of the Securities Commission as follows:

THE STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL
SALT LAKE CITY
January 8, 1952

M. H. Love, Director
Securities Commission
Department of Business Regulation 51-194
Building

Dear Mr. Love:

This will acknowledge receipt of your letter of December 7, 1951, requesting this office to examine a proposed "earnest money receipt and offer to purchase" form and to advise you

1. Whether rights of any person will be denied thru its adoption,
2. Whether the form is legal in every respect and in our opinion will protect the best interests of the contracting parties, and
3. Whether this office approves the form which, under the statute, has been approved by your Commission.

Section 82-2-20 as enacted by the 1951 Legislature, Chapter 102, Laws of Utah 1951, provides that your commission shall approve the form of the earnest money receipt and agreement. We are happy to give you our views concerning this form.

The last paragraph of the agreement which reads

The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission of ———% of the sale price. In the event seller has entered into a listing contract with any other agent and said contract is presently effective, this agreement will be of no force or effect.

would seem to invalidate the entire agreement if there is a valid subsisting listing contract. We suggest that the word "agreement" be changed to "paragraph", and that this paragraph be included in the second portion of the receipt rather than in its present position.

With the exception of these two changes, we have no suggestions to make at this time concerning the form. It appears to be legal and does not deny any substantive rights of persons signing the contract.

Yours very truly,

(Signed) CLINTON D. VERNON
Attorney General

GHT

The Attorney General recommended two changes; 1, the substitution of the word "paragraph" for the word "agreement"; and 2, the shifting of the paragraph into the

second portion of the receipt rather than in the first portion. These two changes were made and then the form was officially approved. In the minutes of a meeting of the Utah Securities Commission held at 310 State Capitol, January 17, 1952, at 11:30 a.m., appears the following:

“Director read the letter from the Attorney General Office #51-194 dated January 18, 1952, relative to proposed ‘earnest money receipt and offer to purchase.’ The approved form was discussed and Director was instructed to send each real estate broker a copy, and to request the Salt Lake Real Estate Board to have such forms printed for the use of real estate brokers throughout the state.”

The form thus prescribed by the Securities Commission, approved by the Attorney General on January 8, 1952, and approved by the Securities Commission on January 17, 1952, is the identical form now in use by the Salt Lake Real Estate Board and is the identical form which was used by the Holt Realty Company in attempting to consummate a transaction between plaintiffs and defendants.

The form of the agreement is not subject to change by the Salt Lake Real Estate Board nor by an individual salesman, and no opprobrium should be placed upon anyone for using the form.

A word may be appropriate with reference to the size of the print. This is a practical matter. It is necessary that the earnest money receipt be made out in quadruplicate. If the print were any larger, then it would be necessary to use two pages. This would not

increase the likelihood of any purchaser reading the document in full, but would rather discourage the reading, and the appearance of the document would be even more formidable. It is impossible to use larger print if the form is to be kept all on one page, because the blank lines now provided are scarcely adequate to contain the information which is customarily necessary in order to use the form. Down below the places for the signatures of the sellers and purchasers there is a blank space but this is quite essential in order to fill in special provisions, counter-offers and other matter that frequently must be filled in.

It is respectfully submitted that the criticism of the form by the Supreme Court may encourage either disgruntled sellers or disgruntled purchasers to attempt to avoid a valid contract which they may have entered into by claiming that the form or the size of the print prevented them from having a full disclosure of their legal rights and responsibilities under the instrument executed by them. It is respectfully requested, therefore, that the Court reconsider and delete the criticism of the earnest money receipt and offer to purchase form which those who are required to use it are powerless to change.

The facts hereinabove set forth, while not in the record of the appeal, are official acts of the executive departments of the state, of which the court may take judicial notice as provided in Sec. 78-25-1 (3) UCA 1953.

Point 2.

THE HOLDING OF THE COURT THAT THE RETENTION OF THE DOWN PAYMENT CON-

STITUTED AN ELECTION TO ACCEPT THE DOWN PAYMENT AS LIQUIDATED DAMAGES IS CONTRARY TO LAW AND HARMFUL TO BOTH BUYERS and SELLERS.

The holding of the Court that the retention of the down payment constituted an election to accept the down payment as liquidated damages was not based upon any argument or authorities contained either in Appellants' Brief nor in Respondents' Brief. As a matter of fact, this exact point was not discussed in either Brief. Appellant's Brief cites a number of cases to the effect that the seller had two remedies; one, to accept the liquidated damages; and the other, to require specific performance. As a matter of fact, the seller has three remedies; the acceptance of the liquidated damages; the requirement of specific performance; or third, the rejection of the liquidated damages with the right to recover actual damages in excess thereof. None of the cases cited by defendant deal with the question as to whether or not the retention of the down payment constituted an election. The problem before the court is not a question of whether or not the court may award damages in excess of the "liquidated damages" but whether or not the plaintiff, while verbally refusing to exercise the option to accept the earnest money as liquidated damages, unwittingly exercised the option by the retention of the money by his agent.

The law on this subject is set forth in 92 CJS, p. 312, as follows:

“A vender who notifies the purchaser that he will hold the deposit and apply it to his damages, does not elect to enforce a forfeiture or lose his right to sue for damages.”

This statement by the editors of CJS cites as authority, a California case, *Royer v. Carter*, 224 P. 2d 767. This case is squarely in point and seems to have been well considered and appears to be a just and correct statement of the law.

In the California case, which the editors of CJS approve, the purchaser entered into an agreement to buy property at an agreed price of \$24,000.00. A deposit of \$1,000.00 was paid as earnest money. The contract provided, “that should the purchaser fail to pay the balance of the purchase price or fail to complete the purchase as herein provided, the amounts paid hereon may, at the option of the seller, be retained as a consideration for the execution of this agreement by the seller.” In that case too, the plaintiff retained the deposit, not in satisfaction of the claim for damages, but to apply in part satisfaction. The Court held “Plaintiff did not, as contended by defendant, exercise her option to forfeit the deposit. Upon defendant’s notification that she did not intend to comply with the contract, plaintiff notified her that she, plaintiff, elected to hold defendant in damages and that the \$1,000.00 deposit did not cover the damages already accrued. Since defendant had repudiated her contract, plaintiff was entitled to retain the deposit and to apply it on the damages suffered by her.” *Royer v. Carter*, *Supra*,

Defendant contended that she understood and believed when she signed the agreement that all she could lose was the amount of the deposit, and the real estate agent

testified that he expressed "his opinion" that such would be the limit of her loss. Notwithstanding her belief and the "opinion" of the agent the California Supreme Court held that "plaintiff was entitled to retain the deposit and to apply it on the damages." A motion for re-hearing was filed and the Court reconsidered this matter, and in a later opinion which appears at 233 P. 2d, 539, the doctrine which had been so briefly set forth, was further considered and the opinion pertaining to the point under discussion was strengthened. The retention of the earnest money deposit, defendant contended, constituted an election. The Supreme Court held that such was not the case and that the retention of the deposit was not inconsistent with the right to hold defendant responsible for damages. The Court said:

"The contract provided 'That should the purchaser fail to pay the balance of the purchase price, or fail to complete the purchase, as herein provided, the amountss paid hereon may, at the option of the seller, be retained as the consideration for the execution of this agreement by the seller.' Defendant contends that under this provision plaintiff had an option to retain the down payment instead of suing for damages and that she exercised this option by retaining the deposit. The retention of the deposit was not, however, inconsistent with plaintiff's right to elect to hold defendant responsible for damages. Independently of any right she may have had under the option clause itself, see Civil Code, Sec. 1670, 1671; *Freedman v. Rector Wardens*, etc., Cal. Sup., 230 P. 2d 629, plaintiff had the alternative right to retain the down payment as a set off against her actual damages. *Baffa v. Johnson*, 35 Cal. 2d 36, 40, 216 P. 2d 13. Her retention

of the money was consistent with the choice of either remedy. Since she informed defendant of her intention to hold defendant liable for actual damages, if the latter did not perform the contract, and since her conduct was not inconsistent with the election of that remedy, the trial court was justified in finding that the "deposit was retained by her to apply on damages sustained by reason of defendant's breach of contract."

It is respectfully submitted that the decision of the California Court is a well considered and correct statement of the law. To constitute an election of a legal remedy, three factors are necessary. The rule is set forth in 28 CJS 1077 as follows:

"To constitute an election of remedies at least three things are essential:

(1) There must be in fact two or more coexisting remedies between which the party has the right to elect. (2) The remedies thus open to him must be inconsistent. (3) He must, by actually bringing his action or by some other decisive act, with knowledge of the facts, indicate his choice between these inconsistent remedies.'" 28 CJS 1077. This statement is quoted with approval in *Cook v. Covey Ballard Motor Company*, 253 P. 196, 199; 69 Ut. 161.

In the case now before the Court there were, of course, two or more coexisting remedies between which the party had the right to elect, but it is respectfully submitted that the remedies, to-wit: the right to damages, and the right to retain the down payment as part

of and to apply on the damages, are not inconsistent. What constitutes consistency or inconsistency? In discussing the doctrine of what is consistent and what is not consistent, CJS sets forth the rule,

“To make them inconsistent one action must allege what the other denies, or the allegation in one must necessarily repudiate or be repugnant to the other. It is the inconsistency of the demands which make the election of one remedial right an estoppel against the assertion of the other and not the fact that the forms of action are different. Another test sometimes applied is: can the facts necessary to support one remedy coincide with the facts necessary to support the other?” 28 CJS 1068.

Applying these tests to the case now before the Court, it is apparent that no inconsistency exists. In this case facts exist which give to the plaintiff a right to damages against the defendant, and the same facts support either the right to the “liquidated damages” or the right to assert and prove additional damages if the one *having the right to elect* decides not to accept the liquidated damages. There is no inconsistency whatever. It would be inconsistent if the seller elected to sue for the payments accrued, thereby affirming that the contract is still in force, and at the same time, sue for damages upon the ground that the contract had been terminated. In such event there would be an inconsistency and assertion of the one would be an election and a rejection of the other, but where the only question at issue is the amount of the damages, there is no inconsistency. The seller has the right to “retain the deposit and apply it on the damages

suffered.” Royer v. Carter, *supra*. There is nothing inconsistent about such a course of procedure.

Had the plaintiff said nothing but merely retained the deposit, there might have been then an inference of acceptance and election; but where, as here, both the District Court and the Supreme Court found that he unequivocally stated that he was *not* exercising his option to forfeit the deposit, then the mere retention of the deposit does not constitute a contrary election. This matter was considered by the California Court in still a later case, Gattuccio v. Kallam, 314 P. 2d 178, 31 ALR 2d 8, in which the Court found,

“Under the trial court’s findings the actual damages were over \$18,000. and appellant cannot complain that respondents elected to take and the trial court awarded them only the \$10,000. deposits SINCE THEY MIGHT HAVE RETAINED THE DEPOSIT AS AN OFFSET AND RECOVERED THE BALANCE OF THE DAMAGES.” authorities cited (caps added).

Lest the Court should feel that the California Courts are relying upon a special statute contrary to the common law, we deem it proper at this point to quote the applicable provisions from the California Code and which we respectfully submit are in no way contrary to the common law bearing on this subject. The Royer v. Carter case *supra*, refers to Sections 1670 and 1671 of the California Civil Code. These sections read as follows:

Sec. 1670: “Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined

in anticipation thereof, is to that extent void, except as expressly provided in the next section."

Sec. 1671: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

It is respectfully submitted that this does not amend the common law and that therefore, the Code provisions in no way affect the strength of the statements of the California Supreme Court in their application to the case now before the court.

For the Supreme Court to hold that the retention of a down payment, in the face of a statement that the seller was *not* exercising his option to forfeit the down payment, nevertheless constituted an election to forfeit the down payment, can give rise to many vexatious problems. In the Uniform Sales Act, for example, Section 60-4-2 (c) UCA 1953 one of the rights given to an unpaid seller is to resell the merchandise. Would the holding of the Court in the case now before us, as originally decided in 335 P. 2d 404, require the refund or tender back of the down payment before a seller would have the right to resell the merchandise? In the case of the repossession and re-sale of an automobile, would this ruling require a return of the down payment before the automobile could be sold and the buyer held for damages for deficiency? Suppose a real estate broker, because of his own interest in the earnest money deposit, for commission earned when a buy and sell agreement is executed, declines, upon request of the seller, to refund the earnest money, would

such a refusal constitute an election by the seller, contrary to his expressed decision not to exercise his option to accept the sum which the buyer tenders as liquidated damages. These are but a few of the vexatious questions that will be raised by the courts decision.

Certainly the provision in the earnest money receipt approved by the State Securities Commission, giving to the seller the *option* to retain the down payment as liquidated damages, is acumulative remedy, and for the seller to seek for damages and off-set against those damages the amount of the earnest money deposit, as expressly authorized by the cases above quoted is not an inconsistent action and does not, therefore, consitute an election. Where the remedies are not inconsistent, the person entitled to the remedies may pursue any or all of them until he has received full satisfaction of his claim.

“When remedies are not inconsistent and are merely cumulative, the party may pursue either or both without violating any rule of law or procedure.”
Robison v. Robison, 59 Ut. 215, 226.

What is the effect of the provision contained in the earnest money receipt?

In effect the buyer says If I do not go through with this transaction I am willing to forfeit to you, as liquidated damages on my part the sum paid as a down payment.

The seller does not agree that he will accept that sum. Because of intervening circumstances it might be wholly inadequate. He does not agree to waive his right to a determination of damages for breach. His is the option to accept the sum proffered by the buyer as liquidated

damages, or to reject it and seek any other remedy available to him at law. These other remedies include the right to specific performance and the right to assert and prove actual damages for breach.

Now if there were no option granted to seller, or if there were a provision by which the seller agreed that as to *him* the amount of down payment should constitute liquidated damages, then the rule would be different, and the cases quoted by defendant would apply, but this is not the case. This is a provision which is binding only upon the buyer until an election is made by the seller.

Now what will be the practical result if the decision of the court in this respect is permitted to stand? It will tend to stifle real estate sales. It may work great hardship on many prospective buyers. Often a buyer will have only a nominal down payment. To raise a substantial down payment when his offer may not be accepted might work a distinct hardship and may entail needless sacrifice and expense. But, if the court's ruling stands, then transactions based on a nominal down payment will cease to exist. No seller would consider accepting an offer without a down payment of sufficient size to adequately compensate for damages sustained if the buyer later fails to raise the balance of the money. Would not the ends of justice to both buyer and seller be better served to permit transactions to be made, based on a nominal consideration the seller relying for his security upon the rule of law set forth in CJS, *supra*, giving to the seller the right to damages, against which the down payment may be applied. By the rule as set forth in CJS the buyer has adequate protection. He is not compelled to sacrifice assets to raise a large down payment when his offer may not even be accepted. A nominal down payment will suffice. Then

if there is a breach and the seller claims damages and holds the down payment to apply on the claimed damages, if the court holds for buyer that there is no liability by buyer the court can then order the return of the down payment to buyer, rendering judgment therefor against the seller; while if judgment is for the seller the down payment will apply as part satisfaction thereof.

CONCLUSION

It is respectfully submitted that the previous opinion of the Supreme Court should be modified:

(a) To delete therefrom all criticism of the earnest money receipt, use of which by members of the real estate profession is compulsory, until the form is changed by the State Securities Commission; and

(b) To reverse the holding that the retention of the earnest money deposit constitutes, notwithstanding the assertions of the seller to the contrary, an election by the seller to accept such sum as liquidated damages, and in lieu thereof to hold that the statement in 92 CJS 312

“A vendor who satisfies the purchaser that he will hold the deposit and apply it to his damages does not elect to enforce a forfeiture or lose his right to damages.”

correctly states the law.

Respectfully submitted,

JENSEN & JENSEN

By Perris S. Jensen

*Attorneys for Salt Lake Real
Estate Board*