

1959

J. Royal Andreassen and Alta N. Andreassen v.
George H. Hansen and Florence Hansen : Petition
for a Rehearing and Brief in Support Thereof

Utah Supreme Court

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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 FLOR-
ENCE HANSEN,

Defendants and Appellants

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15 1959

Supreme Court, Utah

Case
No. 8769

PETITION FOR A REHEARING AND
BRIEF IN SUPPORT THEREOF

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TABLE OF CONTENTS

	<i>Page</i>
PETITION FOR REHEARING.....	1
STATEMENT OF POINTS.....	1
ARGUMENT	3
POINT I. THE COURT ERRED IN ITS STATEMENT OF THE FACTS AND ITS APPRAISAL OF THE EVIDENCE GENERALLY AND IN MANY MATERI-	
AL PARTICULARS.	1
POINT II. THE COURT ERRED IN HOLDING THAT PLAINTIFFS AND RESPONDENTS HAD ELECTED TO RETAIN THE EARNEST MONEY PAID AS LI-	
QUIDATED AND AGREED DAMAGES.....	18
POINT III. THE COURT ERRED IN REVERSING THE JUDGMENT SINCE IN SO DOING IT RE- VERSED THE TRIAL COURT'S JUDGMENT QUIET-	
ING TITLE IN PLAINTIFFS AND RESPONDENTS	
AS AGAINST DEFENDANTS AND APPELLANTS.	28
POINT IV. IF LOSS OF AN ADVANTAGEOUS BAR- GAIN IS NO LONGER A PROPER MEASURE OF DAMAGES FOR BREACH OF A CONTRACT TO PUR- CHASE REAL ESTATE, THE CASE SHOULD BE RE-	
MANDED FOR A NEW TRIAL TO CORRECTLY AS-	
SESS DAMAGES UNDER A CORRECT MEASURE	
AS SET OUT BY THIS COURT.	27
CONCLUSION.	32

CASES CITED

Bartholomew v Pickett, 51 Utah 312, 170 Pac. 65.....	3
Buehner Block Co. v. Glezos, 6 Utah 2d 226, 310 P.2d 517.....	3
Cole v. Parker, 5 Utah 2d 263, 300 P.2d 623.....	30, 31
Gattucio v. Kallam, 314 P.2d 178 (Cal. 1957).....	25, 30
Hoyt v. Wasatch Homes, 1 Utah 2d 9, 261 P. 2d 927.....	3
Larsen v. Madsen, 87 Utah 48, 48 P.2d 429.....	3
Nokes v. Continental Mining and Milling Company, 6 Utah 2d 177, 308 P.2d 954.....	3
Parrish v. Tahtaras, 7 Utah 2d 87, 318 P.2d 642.....	3
Perkins v. Spencer, 121 Utah 468, 243 P.2d 446.....	30, 31
Royer v. Carter, 233 P.2d 539 (Cal. 1951).....	23, 25, 30
Sheffield v. Paul P. Stone, Inc., 98 F. 2d 250 (C.A., D.C. 1938)	25

STATUTES CITED

Sec. 61-2-20, Utah Code Annotated, 1953.....	12
--	----

OTHER AUTHORITIES CITED

Black's Law Dictionary, 3rd Ed., P. 635.....	22
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of the
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Case
No. 8769

PETITION FOR A REHEARING AND BRIEF IN
SUPPORT THEREOF

Come now the plaintiffs and respondents in the
above entitled action and respectfully petition the court
to grant a rehearing for the reasons and upon the ground
that in its opinion heretofore written the court erred in
the following particulars:

POINT I

THE COURT ERRED IN ITS STATEMENT OF THE FACTS

AND ITS APPRAISAL OF THE EVIDENCE GENERALLY
AND IN MANY MATERIAL PARTICULARS.

POINT II

THE COURT ERRED IN HOLDING THAT PLAINTIFFS
AND RESPONDENTS HAD ELECTED TO RETAIN THE
EARNEST MONEY PAID AS LIQUIDATED AND AGREED
DAMAGES.

POINT III

THE COURT ERRED IN REVERSING THE JUDGMENT
SINCE IN SO DOING IT REVERSED THE TRIAL COURT'S
JUDGMENT QUIETING TITLE IN PLAINTIFFS AND RE-
SPONDENTS AS AGAINST DEFENDANTS AND APPELL-
ANTS.

POINT IV

IF LOSS OF AN ADVANTAGEOUS BARGAIN IS NO
LONGER A PROPER MEASURE OF DAMAGES FOR
BREACH OF A CONTRACT TO PURCHASE REAL ESTATE,
THE CASE SHOULD BE REMANDED FOR A NEW TRIAL
TO CORRECTLY ASSESS DAMAGES UNDER A CORRECT
MEASURE AS SET OUT BY THIS COURT.

I, the undersigned attorney for the plaintiffs and
respondents herein, certify that in my opinion there is
merit to the foregoing claim and that the court committed
errors in the particulars above specified.

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POINT I

THE COURT ERRED IN ITS STATEMENT OF THE FACTS AND ITS APPRAISAL OF THE EVIDENCE GENERALLY AND IN MANY MATERIAL PARTICULARS.

In reviewing the findings and judgment of the trial court the Supreme Court is obligated to view the evidence and every inference and intendment fairly arising therefrom in a light most favorable to the party prevailing in the court below, *Buehner Block Co. v. Glezos*, 6 Utah 2d 226, 310 P2d 517, *Parrish v. Tahtaras*, 7 Utah 2d 87, 318 P2d 642, *Hoyt v. Wasatch Homes*, 1 Utah 2d 9, 261 P2d 927, and it is presumed that the facts support the findings of the trial court, and that the findings support the judgment. *Larsen v. Madsen*, 87 Utah 48, 48 P2d 429. See also *Bartholomew v. Pickett* 51 Utah 312, 170 P 65. The reasons for giving such weight to the findings and judgment of the trial court are effectively set out by this court in *Nokes v. Continental Mining and Milling Company* 6 Utah 2d 177, 308 P2d 954, 955:

The rule just stated is based upon the sound reasoning that some credit should be indulged in favor of the findings of the trial court because of the advantages peculiar to his position in immediate contact with the trial. It is indeed often true that "the matter has more eloquence than naked words portend." There are intangibles of expression and attitude which give color and meaning not apparent from words alone. The judge feels the impact of the personalities of the parties and the witnesses: He is able to observe their appearances and behavior; their forthright-

ness or hesitancy in answering; their frankness and candor, or lack of it. Similarly revealing to him are indications of surprise, anger, resentment or vindictiveness, pleasure or other emotions which may be discerned from expressions of their countenance or voice. He also has some advantage in appraising their abilities to understand and their capacities to remember. Furthermore, he is in a position to question the witness himself to clarify doubtful points or verify his impressions on the matters just mentioned. All of this combines to afford him better insight as to the truthfulness of the testimony offered than does a perusal of the cold record. *It is a sound and well-recognized policy of the law to repose some confidence in the verity of the actions of the trial court, and not to interfere with them unless it clearly appears that he is in error.* (Emphasis Added)

The trial court in the instant case made the following findings of fact:

1. On or about January 30, 1956 the defendants George H. Hansen and Florence Hansen entered into a written contract whereby the defendants, George H. Hansen and Florence Hansen, unconditionally agreed to purchase of the plaintiffs a certain piece of real property known as 1233-1235 Alameda Avenue, Salt Lake City, Utah, and the defendants entered into said contract with full knowledge of the terms of said contract.

2. *Without any justification or excuse the defendants breached said contract and did refuse and fail to perform the terms of said contract.*

3. *At all times the plaintiffs were ready, willing, and able to perform said contract. Plaintiffs did not breach said contract in any particular.*

4. In making said contract the defendants deposited the sum of \$50.00 as earnest money with Holt Realty Company. *Plaintiff did not at any time agree or elect to accept or retain said earnest money in lieu of damages.* Plaintiffs' actual damages caused by the breach of the defendants are grossly disproportionate to the amount of said earnest money deposit, and said earnest money deposit is grossly inadequate to compensate plaintiffs for losses proximately resulting from breach of contract by the defendants.

5. After breach of said contract by the defendants, *the plaintiffs made diligent and reasonable efforts to resell said property and did find another buyer for said property, but only upon terms less advantageous to the plaintiffs than the terms of the contract with the defendants, and by reason of the defendants' breach of contract the plaintiffs realized from the sale of said property \$2,100.00 less than plaintiffs would have realized under the terms of the contract with the defendants.* Plaintiffs' damages in the sum of \$2,100.00 consist of the following items:

- (a) difference in the total sale price, \$1,000.00,
- (b) value of refrigerator included with second sale, \$150.00,
- (c) expense of real estate commission in obtaining the second sale, \$700.00, and
- (d) the plaintiffs' time in obtaining the new sale, \$250.00.

The second contract provides for interest at the rate of $5\frac{1}{2}$ per cent per annum of the unpaid balance in contrast to the provision for 6 per cent interest per annum on the unpaid balance in the contract with the defendants, but the court declines to award the plaintiffs any damage for loss of interest.

6. The defendants agreed in said contract with the plaintiffs to pay all expenses of enforcing said contract or the rights arising out of breach thereof, including a reasonable attorney's fee. Plaintiffs hired counsel to represent them in the prosecution of this action and a reasonable sum to be awarded to the plaintiffs for attorney's fees is the sum of \$250.00. (Emphasis added)

Since the Supreme Court's main opinion adopted the evidence as alleged by the defendants, and went beyond this evidence by discussing matters of which the defendants did not complain and of which they made no point either in the court below or before this Court on appeal, the plaintiffs feel that in their prior appearance before the Supreme Court they did not adequately bring to the attention of the Court the fact that the trial court's findings in favor of the plaintiffs were amply and thoroughly supported by the evidence, and feel it is therefore necessary to review briefly some of the evidence supporting the findings in favor of the plaintiffs. This evidence should be viewed in a light most favorable to the plaintiffs as the prevailing party below.

Plaintiffs' duplex was listed for sale with Holt Realty Company. Tr. 20-29, 21-1, 57-14, 57-25, 57-28, 58-1.

Defendants saw an advertisement concerning the property and called a salesman, Mrs. Abbey, and arranged for a showing early in the afternoon of January 29, 1956. Tr. 21-4, 53-18, 56-26, 71-24. Defendants liked the property, were interested in buying it and spent an hour thoroughly inspecting it. Tr. 21-19, 22-3, 72-4, 72-26 through 76-30, 40-17, 54-3, 112-17, 112-24, 113-2. They observed the age and condition of the house and had explained to them the personal property which went with the house. Tr. 73-20, 74-4, 76-18, 151-28, 152-23. They declined an offer of the salesman to show them further around the neighborhood, saying that they were acquainted with the area. Tr. 54-7, 22-3, 128-2. Defendants were not "persuaded" to submit an offer of \$15,000.00 and to make a deposit of \$50.00 as indicated in this Court's opinion. On the contrary, as Mrs. Abbey drove them home, the Hansens expressed their desire to make an offer to purchase the property. They were advised by Mrs. Abbey as follows:

And Mr. Hansen said he would like to make an offer on the house, and I suggested that they think about it by taking them home and that I would call them later in the afternoon that I thought it was too quick to make up their minds. Tr. 22-12.

Later that day the Hansens asked Mrs. Abbey to come to their home since they wanted to make an offer on the property and could pay from \$15,000.00 to \$15,900.00. Tr. 22-24, 45-1, 129-27. The Hansens suggested that the offer be \$15,500.00 and Mrs. Abbey recommended that

they make the offer only \$15,000.00. Tr. 22-27, 24-3, 24-15.

The earnest money agreement was therefore filled out under the instructions and directions of the Hansens and in their presence. The defendants thoroughly considered the terms of the offer item by item, read the document, and signed it. In accepting the defendants' claim that they did not understand the terms of the contract, the Supreme Court has overlooked ample evidence to the contrary which the trial court heard and believed. The Supreme Court's opinion considered the defendants' testimony credible (unlike the trial court which heard the testimony) and recited that there was no indication that the defendants understood the terms of the contract and that every inference was to the contrary. This statement is clearly contrary to the finding of fact of the trial court which is as follows:

. . . The defendants entered into the contract with full knowledge of the terms of said contract. (Paragraph I Findings of Fact.)

This finding of the trial court is fully supported by the evidence and is entitled to a presumption of correctness since the trial court had the opportunity of observing the demeanor of the defendants as witnesses and making its decision as to the truthfulness of their testimony.

When preparing the offer, the terms of the contract were discussed in detail between Mrs. Abbey and Mr. and Mrs. Hansen and their daughter. Tr. 23-3, 25-3, 26-22, 26-11, 161-5. Mrs. Abbey testified as follows:

I got the real estate contract out, and we went over it, item by item, hot (sic) it was to be filled in, each item you have to ask the customer everything, from how they wanted it, in joint tenancy, the time they wanted to take to pay, how much did they want to put down, how they wanted to pay the rest of the balance of the money, their interest rate, everything has to be discussed, item for item. Tr. 24-17.

To further emphasize the unreasonableness of the defendants' allegation that they misunderstood the meaning of the contract and that they thought it was simply an offer and receipt for \$50.00 and if they did not want the property the \$50.00 would be forfeited, and to emphasize the reasonableness of the trial court's findings that defendants fully understood the contract, the record shows that a short time prior to the signing of this earnest money receipt and offer to purchase the Hansens had sold their own home in a similar transaction using an earnest money receipt and offer to purchase, the terms of which were also explained to them at that time.

Mr. Hansen testified in part:

Q. Were they to handle the transaction and draw the papers on it?

A. They did.

Q. Did they present those papers to you?

A. They did.

Q. Did you sign them?

A. I did.

Q. Did you read them before you signed them with your realtor?

A. No, they were explained to me.

Q. You did not read them at all?

A. No. It was explained to me that you —

Q. Just a minute. Just answer the question. *Did you sign an earnest money receipt in connection with your transaction?*

A. Yes. (Tr. 170-26 to 171-9) (Emphasis added.)

Defendants were not “high pressured” into this purchase, as indicated by the Court’s opinion, but admitted that they entered into the contract willingly and that nothing was misrepresented to them. Mrs. Abbey testified as follows:

Mr. Webber asked them if there was anything wrong with the house, and they said, “No,” and he also asked or said, “Has Mrs. Abbey twisted your arm, or in any manner misrepresented the house,” and they said, “No.”

And she said they just didn’t want the house, they guessed they had bought it too quickly, — Mrs. Hansen said that.

She said, “I guess we just bought it too quickly.” Tr. 35-16.

Mr. Andreasen testified as follows, quoting his conversation with Mrs. Hansen when she asked to cancel the contract:

I said, "Is there anything the matter with the house; did the agent misrepresent anything to you?"

No, it was not that, we just can't take it."
"Well, why can't you?"

She said, "Well, we are having some family trouble about it. We just decided we can't take it and we would like to withdraw. *Will you let us out of it?*" Tr. 80-18. (Emphasis added)

Plaintiffs accepted the offer as made by the defendants, and relying upon defendants' unconditional agreement to purchase, informed other prospective purchasers that the property had been sold, and informed other salesman of this fact and advised them not to bring any more people around to see the property. The listing agent, Holt Realty, reported the property sold, and the listing was withdrawn from the Multiple Listing Bureau.

After the offer was accepted the Hansens called the plaintiffs and acknowledged that they had purchased the property. Mrs. Alta Andreasen testified as follows:

A. Yes, After Mrs. Abbey and Mr. Webber had left, some time, I don't remember how long after, but later in the evening, the telephone rang and I answered it. Mrs. Hansen identified herself and she said, "*I understand we have bought your house?*" Emphasis added)

I said, "Yes."

She said, "I would like to bring my daughter up to see it, when could we come." Tr. 113-13.

This Court in its opinion inferred that plaintiffs chose the form of contract on which this offer was to be made and accepted, and held that because the defendants misunderstood the contract that plaintiffs' agent had put before them and because of the fine print of the option clause, defendants were not bound thereby. This is not only contrary to the findings of fact of the trial court, but this Court has failed to consider the fact that the contract was made on a printed earnest money receipt and offer to purchase, which was prepared by the Securities Commission of the State of Utah, and approved by the Attorney General of the State of Utah. Exhibit 1. This is the only form which the law allows a real estate agent to use and on which this transaction could have been handled. Section 61-2-20 Utah Code Annotated, 1953, provides as follows:

"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 forms 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.*" (Emphasis added)

Use of any other form by the real estate salesman would be considered the practice of law. Neither the plaintiffs, the real estate agent, nor the defendants had anything to do with the preparation of the printed wording of the contract. The defendants made the offer on this form, the blanks having been filled in according to Hansens' instructions, tr. 27-14, and the trial court found that they fully understood the terms of the same. The defendants made no point of the fine print of the contract either in the court below or before this court, nor did they object to the form of the printed contract in any manner. In fact the defendants must have found it satisfactory and been familiar with it since they had recently sold their own home using the same printed contract. Tr. 170 and 171. This earnest money receipt and offer to purchase, when accepted by the sellers, is a valid, unconditionally enforceable, and binding contract, conclusive and not contingent or executory in nature. Directly above the signatures of the defendants on the contract appears the following:

We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract to date or at sellers' option a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed or; in the event of sale of other than real properties the seller will provide evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enforcing this

agreement or of any rights arising out of the breach thereof including a reasonable attorney's fee.

The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission equal to the minimum recommended by the Salt Lake Real Estate Board. In the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect. (Emphasis added)

The above italicized wording clearly contemplates that a suit might properly be brought to (1) enforce the agreement (specific performance), or (2) "enforce any rights arising out of the breach thereof" (Legal damages).

Defendants did realize the binding nature of this contract, as indicated by the trial court's findings and they admitted that they were bound by the contract. Sterling G. Webber of Holt Realty testified as follows:

A. I was introduced to the Hansens by Mrs. Abbey, and we sat in the sales office there in private, and I asked them what the problem seemed to be, and she said they just decided that they did not want to purchase the home, and I asked them very point blank if Mrs. Abbey misrepresented anything, or did she twist their arm in any way, in getting the offer. We like to have everyone happy in every transaction we handled, and they said, "No, she did not," that *there never was any pressure of any kind involved*, and I asked them what they wanted to do — what they wanted me to do, as a broker, in the thing.

They said they would like to get out of it if they could. I said, "Well, I would have no authority to let them out, but I would be happy to discuss the matter with Mr. Andreassen, and go over the matter with him.

Q. Did Mr. Hansen say anything — any conversation with him?

A. Yes, he said that he had purchased the home and he knew he was bound on the thing, but because his wife being so upset, that they would like to get out from under purchasing it if they could. Tr. 60-6. (Emphasis added)

The Supreme Court's opinion further infers that the defendants were justified in breaching the contract. On the contrary, the trial court specifically found as follows:

"Without any jurisdiction or excuse the defendants breached said contract and did refuse and fail to perform the terms of said contract. Paragraph 2, Findings of Fact.

The trial court further found:

"At all times the plaintiffs were ready, willing, and able to perform said contract. Plaintiffs did not breach said contract in any particular." Paragraph 3, Findings of Fact.

The record further shows that plaintiffs' agent Holt Realty offered to assist the defendants in any way they could and offered to help at no cost in disposing of the property. Tr. 61-4, Mrs. Abbey testified as follows:

"Mr. Webber said he would talk to Mr. Andreassen again. He also said if Mr. Andreason held them to the contract, that he would list the house,

or take it and sell it and try to get out, without any commission so far as they were concerned, or try and see they lost no money by it, or we would rent it for them if they didn't wish to move into it themselves, while we are trying to work out the problem for them." Tr. 35-23.

Plaintiffs did not sue "with vengeance" as indicated by this Court's opinion, but in fact made every effort possible to try and encourage defendants to perform and to try and get a better price on the second sale in order to mitigate damages. Mr. Andreasen himself phoned other people who had been around to see the property in an effort to get a better price on the second sale.

The main opinion of the Supreme Court presented the "facts" as unsuccessfully argued to the trial court by the defendants. Such "facts" are contrary to the actual facts as shown by the record and found by the trial court. The trial court fully heard the defendants contentions and disbelieved them.

It appears therefore that the Supreme Court's treatment of the evidence is clearly contrary to the rules previously stated by this court requiring the Supreme Court to review the evidence with every inference and intendment fairly arising therefrom in favor of the party prevailing in the trial court.

A thorough reading of the transcript will reveal ample evidence in support of plaintiffs' contentions and ample evidence in support of the Findings and judg-

ment of the trial court. Plaintiffs were not required to prove their facts conclusively, but were only required to prove them by a preponderance of evidence, and such a preponderance is contained in the record.

Contrary to the inference contained in the Supreme Court's opinion the transcript reveals that it was the sellers who throughout the entire transaction dealt in strict good faith, as found by the trial court, and it is they who are entitled to sympathy and not the defaulting vendees whose unjustified actions injuriously affected the sellers' rights.

The Supreme Court considered the trial court to have acted under a misapprehension of the law regarding damages. Even if this were so, it does not justify the Supreme Court in overruling the findings of the trial court on other issues where there was no misapprehension of the law, some of such issues being:

- a. Defendants' full understanding of the nature of the contract.
- b. Plaintiffs' good faith in executing the contract, tendering performance and mitigating damages.
- c. Defendants' lack of justification for breaching the contract.
- d. Credibility of witnesses.
- e. The fact that plaintiff elected to sue for actual damages rather than forfeiture of the earnest money.

POINT II

THE COURT ERRED IN HOLDING THAT PLAINTIFFS AND RESPONDENTS HAD ELECTED TO RETAIN THE EARNEST MONEY PAID AS LIQUIDATED AND AGREED DAMAGES.

The trial court specifically found as follows:

“In making said contract the defendants deposited the sum of \$50.00 as earnest money with Holt Realty Company. *Plaintiffs did not at any time agree or elect to accept or retain said earnest money in lieu of damages.*” Paragraph 4, Findings of Fact. (Emphasis added)

This finding is fully supported by the evidence and there is no evidence to the contrary. The transcript contains supporting facts as follows:

The defendants entered into an unconditional contract to purchase real estate. Before the defendants voiced any desire to withdraw from the contract the sellers, relying on this unconditional contract, had changed their position to their detriment by discouraging other interested parties from viewing the property, by informing salesman not to bring others to look at the property, Tr. 91-11, 91-23, 92-13, and since the sale had been reported to the real estate board the listing was withdrawn from the Multiple Listing Bureau, Tr. 61-11, 61-16, 64-27, 64-29, 65-6. Defendants thereafter announced their desire to withdraw from the contract and suggested that plaintiffs retain the earnest money and relieve the

defendants of their contractual obligation. The plaintiffs clearly, specifically and repeatedly stated to the defendants that they would not release the defendants from the obligation, that the earnest money was insufficient to cover either the obligations already incurred by plaintiffs or the contemplated and possible future damages, that the plaintiffs elected to hold the defendants to such actual damages as might arise, and that they would not accept or elect to allow the defendants to forfeit the earnest money in lieu of damages. Mr. Andreassen testified as follows concerning a conversation with Mr. Hansen:

A. This was by telephone. I telephoned Mr. Hansen from my office, and told him that the time was drawing near. I think it was Tuesday when the deal was to be closed and the money paid, and that I wanted to discuss it with him, since they had raised this question as to whether they were going to perform, and I asked him again what the difficulty was, why he did not want to take it.

Well, his wife decided she did not want it. He said that was the only reason. *He said, "We are having trouble here in the family about it, and we would rather not take it."* And he said, *"Why don't you just take the \$50.00."*

I told him, no, that would not begin to pay for my damages, that the new commission alone would be many times that much. I did not know what the new deal would be, with what terms it would be, and I might be able to get a better deal, or might have to take a worse one.

I said I would not consider the \$50.00 in settlement of the damages that it was entirely inadequate, and I explained to him to either perform the contract, or I would hold him responsible for whatever damages I suffered by his breach of the contract." Tr. 82-3. (Emphasis added)

Mr. Andreassen further testified concerning a conversation with Mrs. Hansen:

She said, "Well, we are having some family trouble about it. We just decided we can't take it and we would like to withdraw. Will you let us out of it?"

And I told her it was not as simple as that, that the agent had performed the services in finding a buyer and that when that was done, I had then become obligated to pay a real estate commission of \$750, and that I was not about to stand that loss and pay the extra costs of re-selling it.

I told her further that other agents who had been bringing people to see the house, I had told them it had been sold, and told them not to bother to bring any further customers; that I had told Mr. Webber to cancel the listing, told him I had made arrangements, that it would be extremely inconvenient and bothersome for me to start all over again for a sale.

I told her that I did not know when or what kind of a deal I could get for a resale. I might sell it for more or less. We did not know. There is the possibility we might have to take a lot less. I would assume that loss, that I would stand that loss, and I would hold her responsible for it. Tr. 80-22 through 81-10.

He in no way attempted to advise the defendants as an attorney, as inaccurately and unfairly suggested by this Court's opinion. In fact, defendants had an attorney but refused to disclose the name of this attorney to plaintiffs so that plaintiffs could discuss the matter with him. Up to the time of performance of the contract, February 7, the plaintiffs repeatedly urged the defendants to perform, and it was only after refusal on the part of the defendants to either perform or discuss the matter, that on February 8 the plaintiffs commenced action against the defendants to recover damages and to clear the title. The complaint of the plaintiffs states at Paragraph 3:

Defendants paid to Holt Realty and Investment Company the sum of \$50.00 to apply upon the purchase price of said property, and said \$50.00 is held in trust by Holt Realty and Investment Company *to be applied pursuant to order of this court.* (Emphasis added)

The finding of the trial court that the plaintiffs did not elect to retain the earnest money in lieu of damages is in accord both with the facts of the case and is in accord with the well-known principle that the law does not require one to do a useless act. It is also in accord with common sense business practices. It is contrary to such practices to require that a person say for example, "You have paid me \$100.00 earnest money and have now breached your contract damaging me in the sum of \$1,000.00. Here is your \$100.00 back. I will now sue you to try and get the \$100.00 back plus an additional

\$900.00.” It is reasonable to say, “You have paid me \$100.00 in earnest money and have breached your contract, damaging me in the sum of \$1,000.00. Your \$100.00 now constitutes a set off against your obligation of \$1,000.00. Now pay me \$900.00 for the balance of my damage.” The view of this transaction as taken by the Supreme Court is not only an unrealistic method of transacting business but it puts an impossible burden on the seller especially in a situation where he does not know the financial circumstances surrounding his buyer or his credit reputation, and will not know whether he will ever recover his damages or not. It leaves the seller in a position where he must, before selling his property, compute the amount which he will be damaged should the sale fail and require that amount of earnest money of every prospective purchaser.

Such is not the purpose of earnest money. Earnest money is not a measure of the amount of money the purchaser is going to risk on a transaction as urged by the defendants. Nor should earnest money be confused with the price paid for an option to purchase. Earnest money is defined as follows:

“The payment of a part of the price of goods sold or the delivery of part of such goods, *for the purpose of binding the contract*. A token or pledge passing between the parties by way of evidence, or ratification of the sale.” Black’s Law Dictionary, 3rd Ed., P. 635. (Emphasis added)

The holding of the Supreme Court that plaintiffs had elected to retain the earnest money received as liquidated damages for the breach of the contract, contrary to the findings of fact of the trial court, has converted this earnest money receipt and offer to purchase, which has been prepared by the Securities Commission and approved by the Utah Attorney General, as a binding contract, into a mere option to purchase, and has removed all binding effect from the contract.

Defendants in their brief on appeal have cited to this court many cases which have precluded a seller in a contract providing for liquidated damages, from suing for additional damages in addition to, or in lieu of retaining the liquidated damages. None of the cases cited by defendants involve contracts with provisions like the one in this case. The clause by which defendants here seek to avoid their legal obligations is as follows:

In the event the purchaser fails to pay the balance of the said purchase price or complete said purchase as herein provided the amounts paid hereon shall *at the option of the seller* be retained as liquidated and agreed damages. (Emphasis added)

In *Royer v. Carter* 233 P2d 539 (Cal. 1951) a contract with a very similar provision was considered. This contract provided:

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. (Emphasis added)

A comparison of these two provisions reveals very few differences. The defendants in *Royer v. Carter* made the same contention as made in the instant case: the plaintiff had an option to retain the down payment instead of suing for damages and that the option was exercised by retaining the deposit. The Supreme Court of California held at 233 P2d 539, 541:

The retention of the deposit was not, however, inconsistent with plaintiffs right to elect to hold the defendant responsible for damages. Independently of any right she may have had under the option clause itself . . . plaintiff had the alternative right to retain the down payment as a set off against her actual damages . . . Her retention of the money was consistent with the choice of either remedy. And 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."

The defendant in the *Royer* case also contended that she entered into the contract thinking she could forfeit her down payment and be relieved of further liability. As in the instant case the trial court specifically found that the defendant did not enter into the contract under that

impression, and its holding was upheld by the California Supreme Court. The court therefore upheld the trial court's award to the plaintiff of *the difference between the contract price and the price at which the property was resold, plus the expenses incurred in connection with the second sale, less the amount of the down payment. These damages included the sales commission on the second sale.* The *Royer* case, therefore, is strikingly similar to the instant case both in fact and in procedural aspects.

Gattuccio v. Kallam 314 P2d 178 (Cal. 1957) was also a similar situation. The buyer there had paid \$10,000.00 as a deposit, the agreement also providing that in the event the buyers failed to complete the purchase, the \$10,000.00 could be retained by the seller at the seller's option. The sellers proved that they were damaged in the sum of \$18,000.00 and the buyer contended that the seller had elected to receive the \$10,000.00 deposit as full damages. The court, citing *Royer v. Carter*, *supra*, made the following holding which is fully applicable to the instant case:

Independently of any rights he may have had under the option clause itself, plaintiff had the alternative right to retain the down payment as a set off against her actual damages.

Some of the issues in *Sheffield v. Paul P. Stone Inc.*, 98 F. 2d 250 (C.A. D.C. 1938), are identical with the case at hand and some of the issues are completely

different because the case arises out of an entirely different procedural situation and because of important differences in the facts. *Sheffield v. Stone* involves a suit by a defaulting purchaser to recover a \$500.00 earnest deposit on a real estate contract. The contract in that case provided that the earnest money deposit might be forfeited *at the option of the seller*, or that the seller might avail himself of any other legal or equitable rights under the contract. The case differs in an important respect from the present case in that the record there indicates that the house was sold to a third party after the buyers' breach, for a sum *in excess* of the contract price, but the record does not show whether it was the gross price or the net price which exceeded the contract price. Nine months after the plaintiffs' repudiation of the contract, six months after the sale of the house to a third party, and two months after the plaintiffs had demanded the return of the deposit, action was brought by the defaulting buyers to recover the earnest money.

The first issue involved was whether such retention of the earnest money by the seller constituted an exercise of the seller's option to forfeit the deposit. The court defined forfeiture of the deposit to mean "keep it as liquidated damages and call the contract off." The contentions of the parties were just opposite to the contentions in the present case. The seller contended that the retention of the earnest money constituted an exercise of the option to forfeit the earnest money and the defaulting buyers contended that the retention of the earn-

est money did not amount to an exercise of the option to forfeit the earnest money. The United States Court of Appeals for the District of Columbia held that *the retention of the earnest money was not an exercise of the option to forfeit the earnest money and did not preclude the sellers from claiming actual damages* (as determined by the difference between the contract price and the price at which the property was sold to third parties less the expenses of the second sale to third parties). The court stated at page 252:

When plaintiffs' breach occurred two alternative remedies, apart from a suit for specific performance, were open to defendants: (1) to "forfeit" the deposit, i.e. to retain it as liquidated damages and call the deal off; (2) to establish the actual damages by selling the house to third persons, and hold plaintiffs for the damages so established. Defendants chose the second course. Their letter of December 30 expressed that choice plainly. They had never expressed, and apparently had never formed, an intention to "forfeit" the deposit as liquidated damages. They not only expressed an intention to collect actual damages but proceeded to fix their amount, if any, by a resale of the house. We think they thereby availed themselves of "legal or equitable rights" under the contract so as to preclude them, by a fair interpretation of the option clause, from electing to forfeit the deposit, i.e. to claim it as liquidated damages. They cannot be permitted to make their choice between liquidated and actual damages after they have determined which are the greater; for the intent of the option clause is not to give them that advantage, but to make it unnecessary

for them to ascertain actual damages.

Since the sellers were not making claim or counterclaim to recover damages, and since it appears from the record that the actual damages did not equal or exceed the amount of the deposit, this case does not involve either by holding or by dictum the question presented by a situation where the actual damages do exceed the amount of the deposit. The court remanded the case for further hearing to determine the amount of the actual damages, and held that the seller could retain actual damages, and that the defaulting purchaser could not recover the earnest money payment unless and only to the extent that it exceeded actual damages.

Neither defendant nor the Court's opinion cite any authority inconsistent with the above, and plaintiffs' research has revealed no cases on the same or similar facts, inconsistent with those above.

POINT III

THE COURT ERRED IN REVERSING THE JUDGMENT SINCE IN SO DOING IT REVERSED THE TRIAL COURT'S JUDGMENT QUIETING TITLE IN PLAINTIFFS AND RESPONDENTS AS AGAINST DEFENDANTS AND APPELLANTS.

The defendants gained equitable title to plaintiffs' property by virtue of the agreement since it is an agreement which is subject to an action for specific performance. It was necessary, if for nothing else, to bring an action to quiet title since defendants failed and refused

to discuss the matter with plaintiffs after repeated demands. Defendants refused to meet with the plaintiffs to resolve the difficulties, and even refused to divulge the name of their attorney to plaintiffs for a negotiated settlement, and therefore clouded plaintiffs title by their equitable interest in the property.

As stated by this Court's opinion the award of attorney's fees is conditioned upon the necessity for incurring them and upon the plaintiffs being justified in their demands. The award of attorney's fees in the instant case is justified by the necessity of a quiet title action alone.

POINT IV

IF LOSS OF AN ADVANTAGEOUS BARGAIN IS NO LONGER A PROPER MEASURE OF DAMAGES FOR BREACH OF A CONTRACT TO PURCHASE REAL ESTATE, THE CASE SHOULD BE REMANDED FOR A NEW TRIAL TO CORRECTLY ASSESS DAMAGES UNDER A CORRECT MEASURE AS SET OUT BY THIS COURT.

This action is a legal action for damages for breach of contract, an ancient right firmly established in Anglo-American law. Breach of contract for sale of real estate occurs under many highly varied circumstances and various rules have been announced to fit the various circumstances of different cases. In cases such as the instant case many respectable authorities including the Supreme Court of the State of Utah have held the measure of damages to be "loss of an advantageous bargain." *Per-*

kins v. Spencer 121 Utah 468, 243 P2d 446, 451, held:

The vendors are entitled to *any* loss occasioned them by *any* of these factors: (1) *Loss of an advantageous bargain*; (2) *any* damage to or depreciation of the property; (3) *any* decline in value due to change in market value of the property not allowed in items numbers 1 and 2; and (4) *for the fair rental value of the property during the period of occupancy.* (Emphasis added)

The Supreme Court in *Cole v. Parker* 5 Utah 2d 263, 300 P2d 623, quoted the foregoing as the rule of damages and held that the plaintiff in that case could *recover the difference between the contract price and the price for which he could sell the property.* See also *Royer v. Carter* and *Gattuccio v. Kallam*, *supra*.

Undisputed testimony at the trial showed the plaintiffs made extensive and intensive efforts to find another buyer, and were not able to sell the property except upon terms less advantageous than the Hansen contract, to the plaintiffs' substantial loss.

Plaintiffs have sought and now seek only legal compensatory damages to restore this loss caused by defendants' breach of contract. Plaintiffs and the trial court proceeded upon the theory that loss of an advantageous bargain was the proper means of ascertaining just compensatory damages for the breach of this contract. The plaintiffs still believe that this is the true measure of damages appropriate to this case. However, the main

opinion of this Court appears to overrule the pronouncement of *Cole vs. Parker* and *Perkins vs. Spencer*, supra, as to the measure of damages. If in fact loss of an advantageous bargain is no longer a proper measure of damages for breach of a contract to purchase real estate and the plaintiffs and the trial court were in error in following this theory, the Supreme Court in this appeal should not reverse the trial court but should remand the case to be properly tried under a correct measure of damages as defined by this Court. Plaintiffs therefore urge the Court (1) to affirm the judgment of the trial court awarding damages for loss of an advantageous bargain or (2) if the cases of *Cole v. Parker* and *Perkins v. Spencer*, supra, are no longer the law, to give the plaintiffs opportunity to prove their loss under a correct measure of damages.

In the rehearing a clarification should also be made as to the degree of proof regarding damages in a civil action. The main opinion of the Supreme Court appears to upset well-established principles as to degree of proof, requiring a party in a civil suit for legal damages to prove his allegations by a preponderance of the evidence. For example, the opinion states that there was "no certainty" that it was necessary to include the refrigerator in the second sale. The evidence is clear and uncontradicted that it was necessary to include the refrigerator. Is a preponderance of evidence still sufficient, or must the plaintiff now establish each item of damages with "certainty"? Also, plaintiffs' evidence contained much

uncontradicted testimony and evidence as to the reasonable market value of the property. The Court stated that the plaintiffs' evidence was not "conclusive." Is it necessary that each item of damage in an action for legal damages be proved "conclusively" or is proof by preponderance sufficient?

CONCLUSION

For the reasons set forth the plaintiffs and respondents respectfully submit that the record fully supports the findings of the trial court and its judgment in favor of the plaintiffs and respondents, and respectfully requests the Court to grant a rehearing and affirm the findings and judgment of the trial court, or in the alternative, remand the case to the trial court for the purpose of correctly assessing damages consistent with proper instructions of this Court.

Respectfully submitted,

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