

1959

## Robert L. McMullin v. Lynwood F. Shimmin and Jacquie A. Shimmin : Brief of Appellant

Utah Supreme Court

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Robert B. Hansen; Attorney for Appellant and Plaintiff;

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IN THE SUPREME COURT JG6 1959

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STATE OF UTAH

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ROBERT L. McMULLIN,

*Appellant and Plaintiff,*

vs.

LYNWOOD F. SHIMMIN and JACQUIE

A. SHIMMIN,

*Respondents and Defendants.*

Clerk, Supreme Court, Utah

Case No.

8998

BRIEF OF APPELLANT

ROBERT B. HANSEN

*Attorney for Appellant  
and Plaintiff*

65 East 4th South

Salt Lake City, Utah

## TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS .....	1
ARGUMENT: .....	3
POINT I. THE PRE-TRIAL JUDGE ERRED IN DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE AT THE PRE-TRIAL HELD ON NOVEMBER 7, 1958 .....	3
POINT II. THE PRE-TRIAL JUDGE ERRED IN NOT GRANTING PLAINTIFF'S MOTION TO ALTER JUDGMENT .....	5
CONCLUSION .....	10

## AUTHORITIES CITED

### STATUTES

Rule 8(a) U.R.C.P. ....	5
Rule 8(e)(2) U.R.C.P. ....	5

### CASES

Andreason v. Hansen, ..... Utah ....., 335 P (2d) 404.....	3, 9
Connihan v. Thompson, 111 Mass. 270 .....	6
McMahan v. McMahan, 122 S.C. 336, 115 S.E. 293, 26 A.L.R. 1295 .....	8
Pierson v. Dorff, 223 N.W. 579, 198 Wisc. 43 .....	5
Salt Lake City v. Industrial Commission, 17 P (2d) 239.....	6

### TEXTS

18 Am. Jur. 155 .....	7
28 C.J.S. 1090 .....	6
9 R.C.L. 960 .....	6

IN THE SUPREME COURT  
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ROBERT L. McMULLIN,

*Appellant and Plaintiff,*

vs.

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A. SHIMMIN,

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8998

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BRIEF OF APPELLANT

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STATEMENT OF FACTS

On January 20, 1958, defendants executed an Earnest Money Receipt and Offer to Purchase on the standard form approved by the Utah State Securities Commission and the Salt Lake Real Estate Board for the purchase of real property. Plaintiff accepted this offer by signing it that same day.

Plaintiff alleges that defendants breached the terms of this agreement in April, 1958, by not going forward with said purchase. Defendants deny any liability under the agreement for various reasons set forth in their answer. Defendants paid plaintiff the sum of \$100.00 at the time the document referred to above was executed, and plaintiff has never returned or offered to return this money to defendants. On May 21, 1958, plaintiff brought an action for specific performance of the afore-said agreement and prayed in the alternative for damages for breach of contract in the event specific performance was not granted and for attorney's fees for enforcement of the contract in either case. On August 15, 1958, plaintiff sold the property in question to Elmer and Elma Klitgaard. At a pre-trial hearing held on November 7, 1958, Judge A. H. Ellett dismissed plaintiff's complaint with prejudice for the reason that plaintiff did not return nor offer to return to defendant the earnest money deposit referred to above prior to the commencement of this proceeding. On November 14, 1958, plaintiff filed a motion to alter judgment. Plaintiff's motion was denied by the Honorable A. H. Ellett on December 1, 1958, on the grounds that plaintiff could not maintain an action for damages after selling the subject property to a third person after commencing an action for specific performance or for damages in the alternative.

## STATEMENT OF POINTS

## POINT I

THE PRE-TRIAL JUDGE ERRED IN DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE AT THE PRE-TRIAL HELD ON NOVEMBER 7, 1958.

## POINT II

THE PRE-TRIAL JUDGE ERRED IN NOT GRANTING PLAINTIFF'S MOTION TO ALTER JUDGMENT.

## ARGUMENT

## POINT I

THE PRE-TRIAL JUDGE ERRED IN DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE AT THE PRE-TRIAL HELD ON NOVEMBER 7, 1958.

The issue here is whether a seller must restore consideration paid as a deposit on a contract to purchase real property in order to elect to enforce the contract upon buyer's breach by an action for specific performance or in the alternative for damages. In the case of *Andreason vs. Hansen*, ..... Utah ....., 335 P (2d) 404, it was held that the failure to return the deposit

on an earnest money agreement precluded a subsequent action for damages since the amount had thereby become liquidated at the election of the seller. No such election, however, could be claimed where the action commenced is one for specific performance. In the Andreason case, the successful buyers-appellants' brief stated as follows: "The cases clearly hold that where there is a provision for liquidated damages in a contract for the sale of real property, the fact that such a provision exists does not eliminate the right of seller to require specific performance of the contract rather than accept his other available remedy, that is liquidated damages." (P 4, 5). The pre-trial judge recognized this by stating at the conclusion of the proceedings of December 1, 1958, as follows: "I wasn't aware that the matter was for specific performance, nor was I aware that the land had been sold on November 7th. I had assumed it was an action for damages, and, of course, the Andreason case in my opinion would apply only to damages and not to specific performance actions" (R 23). Therefore, there was not and could not be an election in this case at the time this suit was commenced to retain the deposit as liquidated and agreed damages rather than to enforce the agreement.

## POINT II

THE PRE-TRIAL JUDGE ERRED IN NOT GRANTING  
PLAINTIFF'S MOTION TO ALTER JUDGMENT.

The first issue here is whether a seller who commences an action for specific performance and in the alternative for damages is precluded from obtaining the latter remedy when he sells the property between the time the action is commenced and the case tried.

Rule 8(a) provides that relief in the alternative or of several different types may be demanded. Rule 8(e)(2) provides that a party may set forth as many separate claims as he has regardless of consistency and whether based on legal or on equitable grounds or both. In the case of *Pierson vs. Dorff*, 223 NW 579, 198 Wisc. 43 (1929), the vendee brought an action to recover \$500.00 earnest money paid vendor pursuant to alleged breach of real estate contract. Vendor counter-claimed for specific performance and thereafter moved to amend his complaint by pleading a counter-claim for damages based on vendee's breach. The court there said: "It is equally clear that the remedy of specific performance and that prosecuted to recover damages are not inconsistent remedies, because both are based upon the contract. . . . the mere commencement or pendency of one will not bar



the other or defeat the action.” That case cited this language from *Connihan vs. Thompson*, 111 Mass. 270: “The remedy in equity by compelling specific performance and that at law in damages for breach are both in affirmance of the contract. They are alternative remedies but not inconsistent, and remedy in both forms might be sought in one and the same action.”

The Wisconsin case cited above concluded: “From the foregoing it conclusively appears that the equitable remedy for specific performance and the legal remedy to recover damages are not inconsistent, especially where the action to recover damages is prosecuted after the abandonment of a plea for specific performance.”

Even if the remedies of specific performance and damages are considered inconsistent, many courts have held that the commencement of a suit is not a conclusive election and none occurs until plaintiff receives some benefit or defendant is caused some detriment thereby. 28 C.J.S. 1090

This court in the case of *Salt Lake City vs. Industrial Commission*, 17 P (2d) 239, cited the following language of 9 R.C.L. 960 with approval: “An election of a remedy which has the effect of an estoppel in pais or an estoppel by record in that class of cases in which the remedies

are really inconsistent is generally considered made when an action has been commenced on one of such remedies. Some courts go so far as to say that in such cases the choice of remedy once made can not be withdrawn or reconsidered though no advantage has been gained nor injury done by setting the choice aside. But the more reasonable rule is that the mere bringing of an action which has been dismissed before judgment, and in which no element of estoppel in pais has arisen, that is, where no advantage has been gained or no detriment has been occasioned, is not an election."

18 Am. Jur. 155 states the rule as applied to the type of case in question as follows: "Parties to a contract have a right to stand on the agreement as entered into by them and may, in a proper case, invoke the aid of the court for its specific enforcement, or at their option they may, upon breach of the contract, seek damages at law. When they resort to one of these remedies, such action may constitute an abandonment of the right to invoke the other. On this ground, an action for damages for breach of a contract has been held to bar a later suit for specific performance of the same contract, even though the first action was dismissed before judgment. On the other hand, the beginning of a suit for specific performance has been considered not such an election

of remedies as would bar a later action for damages for breach of the contract, where the first proceeding was discontinued before any advantage accrued to the plaintiff or detriment resulted to the defendant." The case of *McMahan v. McMahan*, 122 S.C. 336, 115 S.E. 293, 26 A.L.R. 1295, an action for breach of realty sale contract is cited as authority for that last statement of law.

The crucial question is: If seller elects to enforce a contract by commencing an action for specific performance, must he return any payments made by buyer prior to or immediately after he resells the subject property in order to pursue a remedy for damages for breach of contract when the damages exceed the amount of such payments?

As a practical matter it certainly would seem to be desirable to encourage sellers to resell their property after commencing an action for specific performance rather than compel an unwilling purchaser to buy a house he does not want. Once the property has been resold and it is ascertained that the seller's loss caused by the buyer's breach of contract is greater than the amount received by him on account of the purchase price, it would hardly seem reasonable to expect him to pay

such lesser amount to the buyer in order that he might sue him for a larger amount. To do so would be so inconsistent with the normal pattern of conduct that it is not to be expected.

If the principle of the Andreason case is extended to such a case as this where there was no overreaching, no vengeance, no deceptive nets, there is a grave danger that contracting parties will be deprived of the protection of their written agreements by overlooking a seemingly innocent provision there which appeared to be for their benefit by neglecting to return to the party at fault an insignificant amount and thereby falling into an unintended election of remedies, the result of which would be as grossly unfair as the judgment reversed in the Andreason case. It would appear to be a much more desirable rule to consider the question of election as one of fact rather than of law. Retention of the deposit is substantial evidence of election but it should not be incontrovertible so as to make it a rule of law.

Was not the holding in the Andreason case a result of the court's conscience being shocked that an attorney would and could obtain a judgment totalling \$2,350.00 when less than 24 hours elapsed between the time the contract there was executed and the breach occurred in

the absence of any evidence showing any material change in the market within that brief period of time? Should not the rule in that case be limited to very similar facts rather than given universal application in a case such as this where more than four months elapsed between the time defendants signed the agreement and the time they indicated they would not go through with this sale? Otherwise a just result in that case will probably result in unjustifiable protection to contract breakers in the future.

### CONCLUSION

The judgment of dismissal of the District Court of Salt Lake County should be vacated and the cause remanded to the District Court to ascertain whether a valid agreement was entered into between plaintiff and defendants, and if so, whether the latter are liable for breach of the agreement, and if so, to enter judgment accordingly, including reasonable attorney's fees.

Very respectfully submitted,

ROBERT B. HANSEN

*Attorney for Appellant  
and Plaintiff*

65 East 4th South

Salt Lake City, Utah