

1959

Lewis F. Hansen dba Hansen Realty Co. v. Ivy B. Snell : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH FILED

LEWIS F. HANSEN,
d.b.a. HANSEN REALTY CO.,
Plaintiff and Respondent.

vs.

IVY B. SNELL,
Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No.
9169

BRIEF OF APPELLANT

ELIAS HANSEN
Attorney for Appellant
721-26 Continental Bank
Building
Salt Lake City 1, Utah

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IN THE SUPREME COURT of the STATE OF UTAH

LEWIS F. HANSEN, d.b.a. HANSEN REALTY CO., <i>Plaintiff and Respondent.</i>	}	Case No. 9169
vs. IVY B. SNELL, <i>Defendant and Appellant.</i>		

BRIEF OF APPELLANT

STATEMENT OF FACTS

Ivy B. Snell, defendant and appellant, prosecutes this appeal from a judgment rendered against her in favor of plaintiff and respondent for a commission claimed to have been contracted for and earned by plaintiff and respondent growing out of an alleged agreement to pay a commission because of an effort by plaintiff to sell some property belonging to defendant and appellant.

In the main, there is no conflict in the evidence. In our view the case should have been disposed of as a matter of law upon the pleadings. However, in order that the Court may have before it the evidence which may be deemed material, we shall give a brief summary thereof.

On August 19, 1958, defendant and appellant executed and delivered to plaintiff and respondent what is designated as an Apartment Listing on one side and as a Sales Agency Contract on the other. Exhibit 1-P. On the side designated as Apartment Listing is some printed matter and some handwriting. Following the printed word "Price" are the figures in writing "\$43,000" followed in printing "cash," which in turn are followed in writing by the words "Terms to suit Seller." The writing on Exhibit 1-P is that of plaintiff and respondent, except the signature of Mrs. Snell, defendant and appellant. It was so testified to by plaintiff and respondent (R. 23).

On the side of Exhibit 1-P, designated as Sales Agency Contract, appears this language. Some words are scratched out at the top of the page and the words "Hansen Realty" written in. The document then reads:

"In consideration of your agreement to list the property described on the reverse side of this contract with the Multiple Listing Bureau of Salt Lake Real Estate Board (these words have a line drawn through them as indicated) during the life hereof, and to use your efforts to find a purchaser therefor, I hereby grant you for the period of six months from date hereof, the exclusive right to sell or exchange said property or any part thereof, at the price and terms stated hereon, or at

such other price, terms or exchange to which I may agree.

During the life of this contract, if you find a buyer who is ready, able and willing to buy said property or any part thereof at said price and terms, or any other price or terms to which I may agree in writing, or if I agree to an exchange of said property or any part thereof, or if said property or any part thereof is sold or exchanged during said term by myself or any other person, firm or corporation, I agree to pay you the Salt Lake Real Estate Board commission on such sale or exchange, or if it is sold or exchanged within three months after such expiration to any person to whom you or any member of the Multiple Listing Bureau of the Salt Lake Real Estate Board have previously offered it, I agree to pay you the commission above stated; and in case of the employment of an attorney to enforce any of the terms of this agreement, I agree to pay a reasonable attorney's fee and all costs of collection."

On cross examination Mr. Hansen further testified, over objection of his Counsel, that he had listed the property last year for \$37,500.00, but was unable to sell it at that price; that if she could get \$43,000.00 cash that would take care of the income tax (R. 24). That Mrs. Snell never refused to sell the property on terms to suit her. That witness could not get terms to suit her (R. 25). That witness showed Mrs. Snell and her husband another place to help them make up their minds; that he told Mrs. Snell she could remain in the house where she was living a reasonable time (R. 26). That witness does not recall receiving a copy of Exhibit A, which is attached to the Answer, but he knew about it, and that Mrs. Snell had made the offer contained therein (R. 27). That Bennetts

would not accept the offer; they said they would accept it at six per cent, or any per cent, but would not accept it at ten per cent; that Bennetts said they would pay cash; that witness does not recall that any offer was made except for cash (R. 29). That witness did not get the consent of Mrs. Snell to deposit the \$1000.00 to her account (R. 30). That Mr. Nelson brought the \$1000.00 to witness and asked him to place the credit of Mrs. Snell, and gave Mrs. Snell the deposit slip; that he did know that Mrs. Snell refused to accept the money, and that the same was returned to Bennett Motor Company (R. 31).

On redirect examination Mr. Hansen testified that Mrs. Snell never told him that she would not sell the property for cash; that he told her that \$43,000.00 was above market and that she could pay her income taxes (R. 32).

At the conclusion of the testimony of Mr. Hansen his attorney stated that he would not contend that Mr. Hansen had made a filing with the County Clerk showing that he was doing business. Counsel for plaintiff in the court below, respondent here, further stated that "the file contains the pleadings and evidence of the appearance we have made, and we wish to submit the matter of attorney's fees on that evidence" (R. 33).

Mrs. Snell, defendant and appellant, testified in part as follows:

That when Mr. Hansen brought the listing to her she asked him as to how the listing obligated her, to which Mr. Hansen replied that "It's nothing. It's just to have a record

for our files. You have nothing to worry about. I'll protect you." That nothing was said at that time with respect to the payment of income taxes (R. 34). That she had never refused to sell the property on the terms alleged in her answer. She testified that she received the letter marked Exhibit 7 (R. 35).

It will be noted in that letter signed by Jos. S. Nelson it is in substance there stated that Bennett Motor Company rejects the offer of Mrs. Snell to sell the property under the terms contained in her letter of January 28, 1959. In that letter a tender was made of the remainder of \$43,000.00.

On cross examination Mrs. Snell testified that she had known Mr. Hansen for about twelve years; that Mr. Hansen has made possibly two sales of property for her (R. 36). That the property here involved was listed with Mr. Hansen in 1957 and 1958; that in 1957 Mr. Hansen told witness that he was offered \$35,000.00 cash for the property; that she would not sell the property for cash; that her only income was from rental of the property and she would not sell for cash (R. 37). Some of this answer was stricken, but the record does not show just what was stricken. That witness did not discuss the matter of whether she would accept \$35,000.00 for the property (R. 38). That she informed Mr. Hansen in August, 1958, that she wished to sell her property (R. 39). That she told Hansen that Bennetts were anxious to buy the property, and that Mr. Hansen was her friend, and he should probably have the sale. That Mr. Bird had contacted witness about the sale of the property to Bennett Motor (R. 40). That Mr. Bird had contacted witness before she signed the listing to Mr. Hansen (R. 41). That she informed Mr. Hansen that Bennett

Motor was interested in the purchase of the rear part of the property, but that Mr. McDermott was not mentioned (R. 42). That witness remembers seeing Exhibit 10, which is signed by Bennett Motor Company; that Mr. Hansen brought a contract that Bennetts and McDermott would buy the property; that witness was interested in selling the whole property, and did not know how it was to be divided by McDermott and Bennett Motor (R. 44). That when he brought the contract he asked witness what terms she would accept, and she told Mr. Hansen to give her time; that she does not recall of ever asking Mr. Hansen to relieve her from the listing of the property (R. 45). That witness told Mr. Hansen that she wanted a home to live in before she sold her property (R. 47). That witness considered the purchase of a duplex; that Mr. Hansen brought a number of contracts to her to sign, but she did not sign any of them (R. 48). Witness knew that Bennetts wanted to buy the property for cash; that she told Mr. Hansen she would not sell the property for cash (R. 49). That witness must have a down payment and a monthly payment until the property is paid for; that the original offer was for a down payment of \$5000.00 (R. 50). That the only offer witness made was the one prepared by Judge Hansen; that the offer was for 8%, if the buyer will assume the payment of the commission, and the monthly payment reduced to \$350.00; that witness's attorney mailed the offer; that witness did not state her terms until she employed Judge Hansen (R. 52).

On redirect examination Mrs. Snell testified that Mr. Hansen never told her that he had deposited a thousand dollars to her credit; that she never told him to do that (R. 54). That the thousand dollars did not remain to her credit; that she

refused to accept the credit; that witness never refused to sell the property to Bennett Motor Company (R. 55).

Plaintiff below, respondent here, was recalled and in substance testified: That he had a listing of the property here involved in about 1957 (R. 57). That he had a dozen conversations with Mrs. Snell about an offer to purchase the property in 1957 (R. 58). Mr. Hansen was permitted to answer over objection of Counsel for Mrs. Snell about a conversation had with Mrs. Snell in 1957. Such testimony so admitted was to the effect that Mrs. Snell would not state what amounts she would take for the property less than the listed price (R. 60).

Counsel for plaintiff, over objection of Counsel for defendant, was permitted to examine witness Hansen about Exhibits 9 and 10 (R. 63). Mr. Hansen was again permitted to testify about showing houses and property to Mrs. Snell (R. 64). Mr. Hansen further testified that Mrs. Snell told him that she wanted to sell because negroes were moving near by (R. 66). That at the time of the listing nothing of importance was said (R. 67).

Mrs. Ruth C. Hansen, wife of plaintiff, was called as a witness, but she was not permitted to testify to anything which will be of aid in this controversy. Her testimony will be found in the record of pages 69 to 71.

Ben C. Rich testified that he is in the real estate business; that he is acquainted with Lewis F. Hansen, and has met Mrs. Ivy B. Snell on one occasion (R. 71). That he met Mrs. Snell when he delivered the offer to buy her property for cash. That Mr. Hansen, Mr. McDermott, Mrs. Hansen or Mrs. Snell

and her husband and witness was present at her home at the time (R. 73). Over objection by defendant's Counsel, Mr. Rich was permitted to testify that Mrs. Snell stated she decided she didn't want to sell the property, and that witness stated to Mrs. Snell that she had already sold her property. "We've accepted your offer. Now you can name the terms, and we'll conform to it, within reason." Mrs. Snell replied that "I don't believe anybody can make me sell my property, if I don't want to." That witness was aware of the listing of the property in the year 1957 (R. 74). That Mrs. Snell refused to sign any of the documents that Mr. Bird had (R. 76). That when witness said we had accepted her offer, witness meant himself and Mr. Hansen; that Mrs. Snell was told that she could have either all cash or terms that were satisfactory to her (R. 77). That witness did not know about the final offer she had made; that witness did not know what terms he thought might be satisfactory to her; that she said she had changed her mind and didn't want to sell her property (R. 78).

Mr. Hansen was again recalled and identified Exhibits 12 and 13, the former was admitted, the latter rejected (R. 80-81).

Mrs. Snell was recalled on rebuttal and denied that she had ever stated that she refused to sell the property here involved (R. 83).

It is further made to appear that Exhibits 1, 2 and 3 were received in evidence at the time of the Pre-trial; Exhibit 5 was also received in evidence (R. 84). It will be noted that in Exhibit 2-P it shows that under date of November 14th Bruce J. McDermott and Bennett Motor Company state that they

accepted the offer of Mrs. Snell to sell the property here involved for "Price \$43,000.00 cash. Terms to Suit Seller."

At the time of preparing appellant's Brief there cannot be found the Exhibits that were received in evidence at the Pre-trial.

In our opinion much of the evidence which we have summarized should have been rejected, but we shall not discuss that phase of the case because in our view the pleadings viewed in the light of the evidence received present only questions of law.

Following are the Points upon which appellant relies for a reversal.

POINT ONE

THE TRIAL COURT ERRED BY CONCLUDING THAT PLAINTIFF MAY MAINTAIN THIS ACTION FOR ACOMMISSION NOTWITHSTANDING HE HAS FAILED TO COMPLY WITH THE PROVISIONS OF UTAH CODE ANNOTATED, 1953, 42-2-1 (R. 89).

POINT TWO

THE TRIAL COURT ERRED IN MAKING THAT PART OF FINDING NO. 2 WHEREIN IT WAS FOUND THAT BY THE LISTING HERE INVOLVED DEFENDANT COVENANTED "TO PAY TO PLAINTIFF 5% OF THE SALE PRICE AS A BROKER'S COMMISSION IF PLAINTIFF SHOULD FIND A PURCHASER READY, WILLING AND ABLE TO BUY SAID PROPERTY AT SAID PRICE" (R. 87).

POINT THREE

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. 5 WHEREIN IT FOUND THAT THE BUYER CONTINUED TO BE READY, WILLING AND ABLE TO BUY SAID PROPERTY ON REASONABLE "TERMS TO SUIT SELLER" (R. 88).

POINT FOUR

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. 8 WHEREIN IT FOUND THAT THE INTEREST RATE NOT BEING SPECIFIED, THE INTEREST RATE SHOULD BE 6% PER ANNUM (R. 88).

POINT FIVE

THE TRIAL COURT ERRED IN ITS FINDING NO. 9 WHEREIN IT FOUND THAT IN EITHER EVENT THE INTEREST RATE SHOULD BE 6% PER ANNUM ON THE UNPAID BALANCE (R. 88).

POINT SIX

THE TRIAL COURT ERRED IN ITS FINDING NO. 10 WHEREIN IT FOUND THAT PLAINTIFF'S BUYER IS READY AND WILLING TO BUY SAID PROPERTY ON THE TERMS STATED BY DEFENDANT WITH 6% INTEREST (R. 88).

POINT SEVEN

THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT ASSENTED TO THE TRIAL COURT FIXING THE AMOUNT OF ATTORNEY'S FEES TO BE ALLOWED PLAINTIFF'S ATTORNEY (R. 89).

POINT EIGHT

THE TRIAL COURT ERRED IN MAKING ITS CONCLUSION OF LAW NUMBERED 1 WHEREIN IT CONCLUDED THAT PLAINTIFF IS NOT BARRED BY THE PROVISIONS OF SECTION 42-2-1, U.C.A., 1953, FROM MAINTAINING THIS ACTION.

POINT NINE

THE TRIAL COURT ERRED IN MAKING IS CONCLUSION OF LAW NO. 2 WHEREIN IT CONCLUDED THAT PLAINTIFF HAS FOUND A BUYER WILLING TO PAY INTEREST AT 6% PER ANNUM ON THE UNPAID BALANCE (R. 89).

POINT TEN

THE TRIAL COURT ERRED IN MAKING ITS CONCLUSION OF LAW NO. 4 WHEREIN IT FOUND THAT PLAINTIFF IS ENTITLED TO A COMMISSION OF 5% ON \$43,000.00, OR \$2,150.00 (R. 89).

POINT ELEVEN

THE TRIAL COURT ERRED IN FAILING TO FIND THAT DEFENDANT WAS ENTITLED TO A JUDGMENT UPON THE GROUND THAT THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED, IN THAT, PLAINTIFF ALLEGES AND DEFENDANT ADMITS THAT DEFENDANT DID NOT AND HAS NOT REFUSED TO PERFORM, AND IS STILL NEGOTIATING WITH SAID PURCHASER TO PURCHASE SAID PROPERTY, (R. 1 AND R. 7), AND THAT, THEREFORE, THE BRINGING OF THE ACTION WAS PREMATURE.

POINT TWELVE

THE TRIAL COURT ERRED IN FAILING TO FIND IN CONFORMITY WITH THE ALLEGATIONS CONTAINED IN PARAGRAPHS 4, 5, 6, 7 AND THAT PART OF PARAGRAPH 11, OF DEFENDANT'S AMENDED ANSWER WHEREIN IT IS ALLEGED THAT "PLAINTIFF HAS IN THE MANNER ABOVE ALLEGED BEEN REPRESENTING THE PROPOSED PURCHASER."

ARGUMENT

POINT ONE

THE TRIAL COURT ERRED BY CONCLUDING THAT PLAINTIFF MAY MAINTAIN THIS ACTION FOR A COMMISSION NOTWITHSTANDING HE HAS FAILED TO COMPLY WITH THE PROVISIONS OF UTAH CODE ANNOTATED, 1953, 42-2-1 (R. 89).

It is provided by *U.C.A.* 1953, 42-2-1, that:

"No person or persons shall carry on or conduct or transact business in this state under an assumed name or under any designation, name or style, corporate, partnership or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business unless such person or persons shall file in the office of the County Clerk of the county in which the principal place of business is or is to be located, an affidavit setting forth the name under which such business is or is to be conducted or transacted, and the full name or names of the person or persons owing, conducting or transacting the same, the location of the principal place of business with the post office address or addresses of such person or persons. Such affidavit shall be executed by the person or persons so conducting or intending to conduct such business."

Section 42-2-2, provides for an index to be kept by the County Clerk, who shall collect a fee of \$1.00 for his service.

Section 42-2-4 provides that any person who "fails to comply with the provisions of this chapter is guilty of a misdemeanor.

There have been numerous adjudications by courts of last resort construing statutes similar to the Utah statute above quoted. The only Utah cases we are able to find dealing with the construction of the Utah statute are: *Putnam v. Industrial Comm.*, 80 Utah 187, 208, 14 Pac. (2d) 973, and *Christensen v. Johnson*, 90 Utah 273, 61 Pac. (2d) 597. In the former case it is held that the purpose of the statute is to give notice to the public as to the name or names of persons conducting the business. In the latter case it is held that when the defense

failed to set up non-compliance with the statute on appeal to the District Court, such defense is waived. The statute is clearly intended as a measure to regulate business and not a revenue measure. The only charge for filing the required affidavit is \$1.00. The law announced by this Court and the courts generally is to the effect that when the purpose of an act is to regulate business and not as a revenue measure and make the failure to comply with the act a crime, the courts refuse to permit the person failing to comply with such act the right to enforce contracts made without a compliance with the act. *Andersen v. Johnson*, 108 Utah 417, 160 Pac. (2d) 725.

It is said in 12 *Am. Jur.*, Sec. 163, page 658, that a distinction has been frequently recognized between statutes designed for the protection of the public and those designed for the raising of revenue. It appears that all the courts agree that where a statute was enacted to protect the public against fraud or imposition or to safeguard the public health or morals, an agreement in violation thereof is ordinary void." Numerous cases are cited in footnote 12 in support of the text. In 12 *Am. Jur.*, Sec. 161, page 656, the law is stated thus:

"In order that there may be an implied prohibition the imposition of a penalty is not essential. In other words, it is not necessary that a statute should impose a penalty for doing or omitting to do something in order to make void a contract which is opposed to its operation. The observe of this proposition is, however, the basis of awell-established rule, which originated at least as early as the time of Lord Holt. The rule, as stated in the early decisions, is that every agreement made by or about a matter or thing which is prohibited and made unlawful by any statute is void, though the statute itself doth not mention that it shall be so, but

only inflicts a penalty on the offender, because a penalty implies a prohibition though there are no prohibitory words in the statute . . . Lord Holt's remark is an authority for the proposition that an agreement made in direct violation of a statute providing a penalty for the violation thereof is illegal though the contract is not in express terms prohibitive or pronounced void."

It will be seen that numerous cases are cited under note 9 in support of the text. We have examined a number of the cases there cited, and the same support the law announced in the text.

To the same effect is the law announced in 65 *C.J.S.*, *Sec.* 9 (*b*), *page* 14, *et seq.* See also: 38 *Am. Jur.*, 603, and 45 *A.L.R.* 216, where cases are cited from Indiana, Michigan, New York, North Carolina, Pennsylvania and Texas, holding that a failure to comply with a statute similar to the Utah statute prevents the person so failing from bringing an action to enforce a contract made without complying with said law. It will be seen from a reading of the foregoing citations that there is an apparent conflict in the adjudicated cases. However, a number of cases which permit an action to be brought by one not complying with a statute somewhat similar to the Utah statute are readily distinguishable from the Utah statute. Thus some of the statutes provide that one who does business under an assumed name must file a verified statement containing his true name. Under such a statute it is held in some of the cases that if the surname is used, the one so using his surname need not file the required statement. It will be seen that our statute expressly provides that the statement which is required to be filed with the County Clerk must contain the full name or names of the person or persons owning, conduct-

ing or transacting the same and the principal place of business of the one conducting the business. The plaintiff in this case having failed to comply with *U.C.A.* 1953, 42-2-1 of the Utah statutes should not be permitted to maintain this action (R. 89).

POINT TWO

THE TRIAL COURT ERRED IN MAKING THAT PART OF FINDING NO. 2 WHEREIN IT WAS FOUND THAT BY THE LISTING HERE INVOLVED DEFENDANT COVENANTED "TO PAY TO PLAINTIFF 5% OF THE SALE PRICE AS A BROKER'S COMMISSION IF PLAINTIFF SHOULD FIND A PURCHASER READY, WILLING AND ABLE TO BUY SAID PROPERTY AT SAID PRICE" (R. 87).

The only provision in the listing is "I agree to pay you the Salt Lake Real Estate Board commission on such sale or exchange." It is not clear as to whether the commission should be paid to plaintiff or to the Real Estate Board, or whether the word "you" refers to plaintiff or to the Salt Lake Real Estate Board. The difficulty, however, lies much deeper. There is not one word of evidence as to what commission is fixed or charged by the Salt Lake Real Estate Board. *U.C.A.* 1953, 78-25-1, contains provisions as to what the Court may judicially know. The commission that the Salt Lake Real Estate Board charges is not one of those matters. It will also be observed that defendant denies that she is owing plaintiff any commission (R. 87).

POINT THREE

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. 5 WHEREIN IT FOUND THAT THE BUYER CONTINUED TO BE READY, WILLING AND ABLE TO BUY SAID PROPERTY ON REASONABLE "TERMS TO SUIT SELLER" (R. 88).

The evidence in this case shows that the prospective purchaser at all times prior to the commencement of this action insisted on purchasing the property here involved for cash. At no time did they, or either of them, make any offer to purchase the property on an installment basis. However, in one of the communications the prospective purchaser did say that they would accept the offer to purchase the property "on terms to suit the seller." Bennett Motor Company gave to the plaintiff one thousand dollars to place to the credit of defendant in her bank. This was evidently done in order to trick defendant into a position where she agreed to accept cash. When plaintiff and a Mr. Rich, who represented one of the purchasers, called on defendant, they, according to the testimony of Mr. Rich, insisted that Mrs. Snell had sold her property (R. 74 and 77). It is true that Mrs. Snell delayed for some time before making up her mind as to the terms she was willing to accept. Her husband was seriously ill at the time, and later passed away (R. 45).

It will be seen from defendant's Amended Answer that on January 26, 1959, she made known the terms that she was willing to accept (R. 9, Exhibit A). There is no evidence which shows or tends to show that defendant was not willing to accept such terms up to and at the time of the trial. The

Court found that such offer was made (R. 88, paragraph 6). Plaintiff contended in the court below, and apparently the Trial Court found, that the terms therein were either unreasonable or not within the terms of the agreement. The terms that Mrs. Snell stated she would accept are: \$5000.00 in cash, and the unpaid balance to be paid in installments of \$400.00 per month, with interest at 10% per annum, if Mrs. Snell is to pay the commission, and if Mrs. Snell is not to pay a commission, by installments of \$350.00 per month, with interest at 8% per annum. The earned interest shall first be paid and the balance to be applied on the principal. The amount not paid to be secured either by a mortgage on the property sold or on other property of equal value. See Exhibit A attached to the Amended Answer (R. 9). In making the offer, Mrs. Snell stated that she did not admit that she was obligated to pay a commission.

It will be seen that throughout the negotiations for the sale of listed property plaintiff did all he could to aid the prospective purchaser by attempting to trick defendant into a position where she was bound to accept cash for the property. Having failed to accomplish that end, he brought this action with the apparent purpose of causing defendant to believe that she must pay a real estate commission even though she was unable to secure a deal on "terms to suit the seller."

It is alleged in the Complaint and admitted in the Amended Answer that "defendant has not refused to perform and is still negotiating with the said purchaser," etc. Under the listing Mrs. Snell did not agree to pay a commission for securing a prospective purchaser who merely engaged in negotiating for the purchase of the listed property.

The interest which Mrs. Snell exacted on the unpaid principal is within the amount which the Legislature has ordained are proper charges. The law of Utah expressly permits a charge of interest at the rate of ten per cent per annum. *U.C.A.* 1953, 15-1-2, for the loan or forbearance of any money, goods or things in action. The Legislature having so provided, it would seem idle to contend that such a charge of interest is unreasonable. When plaintiff secured the signature of Mrs. Snell to the listing he must have known that she retained the right to state that the terms which suited her would call for payment with interest on all deferred payments to carry interest at 10% per annum. If he did not wish to undertake to secure a buyer who was willing to accept such terms, it was up to him to make other provisions in the listing when he prepared the same. It is fair to assume that plaintiff was well aware of the fact that many sellers of property are unwilling to accept a payment so large that it will cast an immediate obligation upon the seller to pay the entire income tax on the profit made. So also is it fair to assume that one who sells property which is to be paid for at a substantial time in the future is taking a great risk that the value of money will further depreciate in value before the payment is made. The magazines, the press, the radio and television are full of such predictions. Moreover, there are many buyers who are willing and anxious to buy property on the installment plan with payments extended over a long period of time. Plaintiff in the court below, respondent here, may not be heard to say that he was not aware that defendant had a right to say that the "terms to suit the seller" were the terms submitted by her. Before plaintiff has any cause of action against defendant he

is required to produce such a purchaser. He has not done so, but on the contrary, has devoted his energies in an attempt to get defendant to accept terms to suit a prospective purchaser.

POINT FOUR

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. 8 WHEREIN IT FOUND THAT THE INTEREST RATE NOT BEING SPECIFIED, THE INTEREST RATE SHOULD BE 6% PER ANNUM (R. 88).

It is a well-established law that a contract must be construed most strongly against the one who draws the contract. 12 *Am. Jur.*, Sec. 252, page 795, and cases there cited. The written part of the listing is in the handwriting of plaintiff and respondent, except the signature of Mrs. Snell (R. 23). It is also well settled that effect must be given when possible to every sentence, phrase and word contained in a written contract. 12 *Am. Jur.*, Sec. 241, page 772, *et seq.*, and cases there cited. Among such cases are: *Vitagraph v. American Theatre Co.*, 77 Utah 71, 291 Pac. 303; *Anderson v. Great Eastern Casualty Co.*, 51 Utah 78, 168 Pac. 966; *Smith v. Bowman*, 32 Utah 33, 88 Pac. 687.

If, as is provided in the listing, the terms of the sale should be satisfactory to the seller, to say that such language meant that only 6% may be charged on deferred payments, is to ignore the plain meaning of the language. The words "terms to suit the seller" apply to the payment of interest on deferred payments as well as to the amount and time of the installment payments. In the case of *Blackburn v. Bozo*, 82

Utah 556, 26 Pac. (2d) 543, the Court cited with approval the following meaning of the word "terms" as used in a contract of listing property for sale by a broker:

"The true meaning of the provision 'turns on a definition of the word terms which is said in 38 Cyc. 184' in its plural forms, in its restricted and legal sense and as used chiefly in reference to contracts to signify the conditions, limitations and propositions which comprise and govern the acts which the contracting parties agree expressly or impliedly to do or not to do; conditions, propositions stated or made which when assented to or accepted by another settles the contract and bind the parties."

The same thought is thus expressed in *Black's Law Dictionary*, 2nd Ed. 1146, in this language:

"In law of contracts and in court practice the word (terms) is generally used in the plural and terms are conditions, propositions stated or promises made when assented to or accepted by another, settle the contract and bind the parties."

We are unable to find a case and doubt that one can be found where the use of the word "terms" in a contract means that the interest rate on deferred payments shall be 6% per annum.

POINT FIVE

THE TRIAL COURT ERRED IN ITS FINDING NO. 9 WHEREIN IT FOUND THAT IN EITHER EVENT THE INTEREST RATE SHOULD BE 6% PER ANNUM ON THE UNPAID BALANCE (R. 88).

We adopt what is said under Point Four in support of this Point Five (R. 88).

POINT SIX

THE TRIAL COURT ERRED IN ITS FINDING NO. 10 WHEREIN IT FOUND THAT PLAINTIFF'S BUYER IS READY AND WILLING TO BUY SAID PROPERTY ON THE TERMS STATED BY DEFENDANT WITH 6% INTEREST (R. 88).

If plaintiff's buyer was ready or willing to buy the property on terms stated by defendant with 6% interest, they kept such willingness a profound secret. The Court will look in vain in the pleadings or the evidence in support of such finding. As will be seen from the evidence the prospective purchaser insisted on paying the full purchase price in cash. In this connection, the attention of the Court is directed to the law which holds that by plaintiff's insistency that defendant accept a cash payment of \$43,000.00, the prospective purchaser rejected all offers that defendant might make upon terms to suit her unless such offer was for cash. When an offer is made to sell property and such offer is not accepted, but a different counter offer is made, such counter offer is in law a rejection of the first offer. 17 C.J.S., Sec. 403, page 381, *et seq.*, and cases there cited in footnotes.

POINT SEVEN

THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT ASSENTED TO THE TRIAL COURT FIXING THE AMOUNT OF ATTORNEY'S FEES TO BE ALLOWED PLAINTIFF'S ATTORNEY (R. 89).

There is an absence of any evidence to support the above

attacked Finding, and likewise there is no evidence of any agreement as to the payment of attorney's fee, or as to the reasonable value thereof. What occurred with respect to attorney's fee appears on page 33 of the record where Counsel for plaintiff stated "that the file contains the pleadings, and evidence of appearance we have made, and we wish to submit the matter of attorney's fees on that evidence." However, as no attorney fee was allowed, this Finding is not prejudicial and we will not discuss this phase of the case in this Brief.

POINT EIGHT

THE TRIAL COURT ERRED IN MAKING ITS CONCLUSION OF LAW NUMBERED 1 WHEREIN IT CONCLUDED THAT PLAINTIFF IS NOT BARRED BY THE PROVISIONS OF SECTION 42-2-1, U.C.A., 1953, FROM MAINTAINING THIS ACTION.

We adopt what is said under Point One in support of this Point.

POINT NINE

THE TRIAL COURT ERRED IN MAKING IS CONCLUSION OF LAW NO. 2 WHEREIN IT CONCLUDED THAT PLAINTIFF HAS FOUND A BUYER WILLING TO PAY INTEREST AT 6% PER ANNUM ON THE UNPAID BALANCE (R. 89).

Appellant adopts what is said under Points Four and Six in support of this Point (R. 89).

POINT TEN

THE TRIAL COURT ERRED IN MAKING ITS CONCLUSION OF LAW NO. 4 WHEREIN IT FOUND THAT PLAINTIFF IS ENTITLED TO A COMMISSION OF 5% ON \$43,000.00, OR \$2,150.00 (R. 89).

Appellant adopts what is said under Point Two in support of this Point (R. 89).

POINT ELEVEN

THE TRIAL COURT ERRED IN FAILING TO FIND THAT DEFENDANT WAS ENTITLED TO A JUDGMENT UPON THE GROUND THAT THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED, IN THAT, PLAINTIFF ALLEGES AND DEFENDANT ADMITS THAT DEFENDANT DID NOT AND HAS NOT REFUSED TO PERFORM, AND IS STILL NEGOTIATING WITH SAID PURCHASER TO PURCHASE SAID PROPERTY, (R. 1 AND R. 7), AND THAT, THEREFORE, THE BRINGING OF THE ACTION WAS PREMATURE.

Little need be added to what has already been said in support of this Point. It is, of course, elementary that a cause of action must depend on the facts as they exist at the time the action is commenced. All that is alleged in the Complaint is that plaintiff had been successful in getting prospective purchasers to negotiate with defendant for the purchase and sale of the listed property. No one could then tell whether such negotiations would result in a sale. It may well be that

if plaintiff had not brought this untimely action, the parties would have been able to agree upon terms that suited the seller.

POINT TWELVE

THE TRIAL COURT ERRED IN FAILING TO FIND IN CONFORMITY WITH THE ALLEGATIONS CONTAINED IN PARAGRAPHS 4, 5, 6, 7 AND THAT PART OF PARAGRAPH 11, OF DEFENDANT'S AMENDED ANSWER WHEREIN IT IS ALLEGED THAT "PLAINTIFF HAS IN THE MANNER ABOVE ALLEGED BEEN REPRESENTING THE PROPOSED PURCHASER."

It has been repeatedly and uniformly held by this Court that in cases tried before the Court without a jury the Court must find on all material issues which find support in the evidence. Among such cases are *Thomas v. Farrell*, 82 U. 535, 26 Pac. (2d) 328; *Cleverly v. District Court*, 85 Utah 440, 39 Pac. (2d) 748. It is equally settled that it is the duty of an agent to faithfully serve his principals. That a real estate broker may not serve both seller and buyer without their consent.

For the reasons stated appellant prays that the judgment appealed from be reversed and that the Court below be directed to dismiss plaintiff's alleged cause of action, and that appellant be awarded her costs.

Respectfully submitted,

ELIAS HANSEN
Attorney for Appellant
721-26 Continental Bank
Building
Salt Lake City 1, Utah