

1960

Wayne C. Close v. Harold G. Blumenthal and Virginia A. Blumenthal : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

MAR 4 - 1960

WAYNE C. CLOSE,

Plaintiff and Respondent,

—vs.—

HAROLD G. BLUMENTHAL and
VIRGINIA A. BLUMENTHAL,

Defendants and Appellants.

Clerk, Supreme Court, Utah

Case No.
9196

APPELLANT'S BRIEF

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STATEMENT OF FACTS

This is an appeal from a judgment for specific performance of a written instrument entered by the District Court for Utah County, State of Utah, on December 14th, 1959.

The statement of facts are simple and the matters presented on this appeal involve principally questions of law. On the 28th day of April, 1959, at Provo, Utah

County, Utah, Harold G. Blumenthal and Virginia A. Blumenthal signed an instrument in writing denominated "Earnest Money Receipt and Offer to Purchase," as buyers, and by Wayne C. Close as seller, a married man, and whose wife has never signed the said instrument. The original earnest money receipt and offer to purchase is attached to the Findings of the Court, (R. 36).

At the time the Blumenthals signed the earnest money receipt they deposited with the real estate agent for the seller the sum of \$500.00. Said receipt provided:

"In the event the purchaser fails to pay the balance of 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."

It was stipulated by and between the parties that Harold G. Blumenthal notified the attorney for the plaintiff on or about the 15th day of June, 1959, that the buyers did not intend to go through with the contract. It was further stipulated between the parties that the \$500.00 deposit was never returned to the defendants, or any part thereof prior to the commencement of the action for specific performance. No offer has been made to return it to the defendants since. (Tr. 3 and 4). R. 23.

A complaint was filed by the plaintiff on June 24th, 1959, and prayed for a judgment against the defendants to perform said agreement, and to pay the plaintiff the sum of \$25,500.00, the remainder of the purchase price, with interest from April 28th, 1959, at the rate of 6% per annum; attorney fees in the amount of \$2500.00 and

costs. The defendants filed an answer denying the allegations of the complaint, and amended this answer alleging certain affirmative defenses on July 30th, 1959, and prayed that plaintiff take nothing by his complaint. On August 21st, 1959, the defendants filed a motion for summary judgment, (R. 22), which was denied by the trial court, (R. 24). A petition thereafter was filed with the Supreme Court requesting an interlocutory appeal from the motion denying said judgment, which petition was denied. The only pertinent facts in dispute are those set forth in paragraph 3, 5 and 7 of the findings of the court, (R. 34), to which findings the defendant objected, and filed a motion along with their objections to amend the findings of the court in these respects. The defendants contending in their objections that there is nothing in the evidence or the testimony to warrant the court's findings as set forth in paragraphs 3, 5 and 7. In other words the court found "3. That on the 1st day of June, 1959, the plaintiff was ready, able and willing to perform the contract as set forth in the plaintiff's Exhibit No. 1." This finding was objected to by the defendants and is disputed, (R. 43). The defendants disputed and objected to the findings of the court in paragraph 5 as follows: "5. The court finds that the foregoing facts were not disputed by the defendants at the pretrial hearing or at the time of the trial," which the defendants did dispute and now dispute and have always disputed. The findings in paragraph 5 would be an admission that the defendants accepted without dispute the findings set forth in paragraph 3. The court found as set forth in paragraph 7 of its findings, "7. The court finds that Wayne C. Close,

the plaintiff, was a married man on April, the 28th, 1959 and on June 1st' 1959. The court further finds that on June 1st, 1959, the plaintiff was ready, willing and able to convey the property described in Exhibit 1 by warranty deed executed by the plaintiff and the plaintiff's wife." The defendants objected to this finding for the reason that there was never any tender of performance made by the plaintiff and plaintiff's wife, or by the plaintiff himself and there is nothing in the evidence to warrant such findings by the court. The complaint was not filed until June 20th, 1959. The earliest date of a deed, discussed later, is July 30th, 1959. The objections of the defendants to the findings of the court was partially remedied by admission by the plaintiff's attorney at the hearing on the motion to amend the findings of the court. (See proceedings on objections to the court's findings of fact, January 11th, 1960, at page 3, line 3.)

Therefore the defendants deny, (1) that Wayne C. Close was ready, able and willing to perform the contract on the 1st day of June, 1959, as found by the court in paragraph 3 of its findings. Such finding is clearly outside the evidence or record. The same is true with the finding of the court in paragraph 5 and no deed was ever introduced into evidence until after both the plaintiff and the defendants had rested their cases and then allowed to be introduced two months and one day as a side issue during the hearing on the motion to amend the court's findings of fact.

STATEMENT OF POINTS

POINT I

THE PLAINTIFF EXERCISED THE OPTION PROVIDED IN THE RECEIPT BY RETENTION OF THE DOWN PAYMENT, AND THEREBY TERMINATED THE AGREEMENT.

POINT II

THE AGREEMENT SUED UPON IS NOT ENFORCEABLE IN EQUITY.

POINT III

THE AGREEMENT IS NOT ENFORCEABLE AGAINST THE DEFENDANTS FOR WANT OF MUTUALITY.

POINT IV

THE PLAINTIFF NEVER MADE A TIMELY OFFER TO PERFORM THE AGREEMENT.

ARGUMENT

POINT I

THE PLAINTIFF EXERCISED THE OPTION PROVIDED IN THE RECEIPT BY RETENTION OF THE DOWN PAYMENT, AND THEREBY TERMINATED THE AGREEMENT.

The defendants contend that the case at bar is *controlled* by the decision of this court on February 10th, 1959, in the case of Andreason vs. Hansen, 335 Pacific 2d, 404, wherein the plaintiff brought an action for general damages upon *the very same kind of a receipt*

involved in this case, without ever having returned the earnest money paid. This court held: upon breach of the terms of the receipt by the buyers the sellers exercised their option to accept as liquidated damages the earnest money deposit by retention thereof, and precluded them from further remedy. In the Andreason Case the Salt Lake Real Estate Board filed a petition for rehearing, and brief as amicus curiae, again presented the question to this court, under Point No. 2 of their brief, as follows: "THE HOLDING OF THE COURT THAT THE RETENTION OF THE DOWN PAYMENT CONSTITUTED AN ELECTION TO ACCEPT THE DOWN PAYMENT AS LIQUIDATED DAMAGES IS CONTRARY TO LAW AND HARMFUL TO BOTH BUYERS AND SELLERS." The Petition for rehearing was denied by this Court.

In the case at bar the plaintiff never returned the earnest money, or any part thereof, or made any offer to return the same to the defendants at any time. R. 23; Tr. 3 and 4. On page 408 of the Report of the Andreason Case Judge Crockett stated:

"A further and fatal failty in the judgment by the trial court that the sellers did not exercise their option to forfeit the defendant's \$50.00 deposit. Notwithstanding the plaintiff's assertion that they would not keep the money as liquidated damages, their conduct must be regarded as speaking louder than their words. The fact is that the defendant's \$50.00 was kept, and that there was no return, nor tender of return of the money. We are not unmindful of the testimony to the effect that the \$50.00 was in the custody

of the Holt Realty Company. But that company was the appointed agent and acting for the plaintiff, and the money was thus constructively in their possession. The plaintiff, as an attorney, assumed to advise the defendants as to the technical effect of the earnest money receipt. In doing so he was aware, or should have been, that the provisions he now relies upon gave him, at best, a choice of two alternatives; either to keep the amount paid in as liquidated damages, or to rely upon the offer to purchase. The fact that the money was kept is incontrovertible evidence that the plaintiff exercised the option to keep it. That being so they must be deemed to have kept it for the purpose indicated in the contract, *that is as liquidated damages.*"

In the same case, on page 409 of the report, Henroid, Justice, concurring in the result stated as follows:

"I agree with the result for but one reason which I consider determinative, and which I believe obviates the necessity of treating any other phase of this case. It was agreed that the sellers, at their option, could retain the amount advanced as liquidated damages if the buyers broke their promise. The buyers broke their promise and the sellers retained the amount advanced. In my opinion such retention constitutes an exercise of the option, and precluded the sellers from pursuing any other remedy."

The only difference between the Andreason Case and the Case at Bar is that the Andreason Case was an action for general damages, whereas the case at bar is an action for specific performance for the price, which in actuality is nothing more than an action for damages, except that the measure of damages is determined by

the amount agreed upon whereas in an action at law the damages are determined by legal rules.

Again in the Andreason Case Henroid, Justice, concurring in the results stated:

“It is inconsistent for the sellers holding the buyers to the terms of the contract, and at the same time retain the money that they agreed would be the measure of damages upon breach, if they retained it. Such inconsistency must be resolved against the sellers who not only furnished the printed contract, (as in the case at bar) but who had the power of election.” (words in parentheses are ours).

It may be contended by the plaintiff that it is futile to require him to return the earnest money, prior to a suit for specific performance, and then require the defendant to turn around and hand it back as a part of the purchase price if a judgment is rendered against him. The question however, has been resolved in the Andreason Case, that such retention is an exercise of option, and that before any other remedy might be pursued it is necessary for the plaintiff to return the earnest money to the defendants. The question here presented cannot be interpreted as a provision for (a) security of performance of a contract; or (b) as one providing for a penalty, but gives the seller an option to retain as agreed and liquidated damages, the earnest money deposit or resort to other remedies. It gives him a right to do one or the other; not a right to do both. So that if he retains the money paid down without returning the same or offering to return it before filing a suit for

specific performance he already has made the choice open to him; has exercised his option to take liquidated damages in lieu of other relief.

We are not dealing with a provision in a contract where the sum forfeited might be accounted as liquidated damages, but with one that gives the seller a choice to accept the money as liquidated damages upon breach of the buyer, or not to accept it and otherwise stand on the promise. If by his actions he does the first, the choice has been made and the option spent. He does not have another or second choice; he has but one, and by choosing the first it follows that he is precluded from pursuing the second. The same rule applies whether the action is one for damages at law, for breach of the defendant's promise or by a suit in equity for specific performance of the promise.

The measure of relief agreed upon is set forth in the printed form furnished by the plaintiff. He could not keep the money paid down on the one hand as liquidated damages and at the same time claim other and additional relief on the other, since the first is a substitute for the latter.

If the option provision to retain as liquidated damages the earnest money, did not provide for adequate and satisfactory relief in case of breach by the buyer, why did the seller make it a part of the contract at all? Other remedies open to him already existed as a matter of equity and law. Was it inserted as a penalty? No. As security for performance? No. As this court has

held on that very question involving the identical option in the same kind of a receipt:

“The fact that the money was kept is incontrovertible evidence that the plaintiff exercised the option to keep it. That being so, they must be deemed to have kept it for a purpose indicated in the contract, *that is, as liquidated damages.*”
Andreason vs. Hanson, 335 Pac. 2d. Page 408.

In Rose vs. Garn, 56 Utah 533, 191 Pacific 645, this Court held

“Under an agreement whereby abstract and deed were placed in escrow and were to be delivered to grantee upon payment of certain amounts and providing for forfeiture of sums paid as liquidated damages, on buyer’s breach, held, that failure of the grantee to make one of such payments terminated the transaction, and the vendor was *entitled only to retention of the installments paid and repossession of the property and could not specifically enforce the agreement as a contract of sale of the property.*”

In the case at bar the defendants have never been in possession of the premises set forth in the plaintiff’s Complaint.

In *Dropp vs. Richards*, 43 Utah 341, 135 Pac. 99, this court held:

“Unless a contract is oppressive, unconscionable, or against public policy, the courts will allow the parties to stipulate for themselves whether a provision for a forfeiture shall be a penalty or liquidated damages.”

Whether a stipulation for forfeiture of breach of an executory contract shall be construed as a penalty,

or as liquidated damages, must be determined from the terms of the contract.

“Where an executory contract for the sale of land provided for the forfeiture, as liquidated damages, of the amount of the payments made by the purchaser in the event of his failure to complete the purchase, and it appeared that the advance payments required to be made by the purchaser were practically equal to the rental value of the land for the time he was in possession under the contract, and that such payments added to the value of the land at the time the vendor took it, exceeded the total amount due under the contract, including interest, the stipulation will be treated as one for liquidated damages, and not as a penalty regardless of whether the purchaser had made the advanced payments called for by the contract.” *Cooley vs. Call*, 61 Utah 203, 211 Pac. 977.

Defendants have never claimed to own the property either equitably or legally, but have been bound to do nothing more than to forfeit the \$500.00, or pay the balance of the purchase price and require the conveyance of the property, at the option of the seller. The fact is, that the plaintiff is in as good position now as when he made the contract, as he has the property and he has shown no damage at all, and in view of this fact the forfeiture of \$500.00 is adequate compensation.

In *Cooley vs. Call*, 211 Pacific 977, at the top of page 980 this court said:

“There is little or no difference in principle between that case (the Dopp Case) and this. In that case the plaintiff resumed possession of the

land and brought an action for damages. In this case the plaintiff sued for specific performance of the contract. *The rules in each case are the same for determining the question whether or not the damages stipulated in the contract are to be regarded as liquidated, and therefore exclusive of other remedies, or whether they are a penalty for non performance.* In that case, (the Dopp Case) this court, after a careful review of the facts and the law applicable thereto, 43 Utah, Page 341, 135 Pacific, Page 102, uses the following language: 'Take any view we please of the contract in question, its terms were all fair and entirely proportioned to the damages that might be sustained, upon the one hand, or the benefits that might accrue the other. Under such circumstances the court is not justified in departing from the terms of the contract with regard to the damage stipulated therein *but is required to enforce that stipulation the same as all other stipulations in the contract.*' "

"We are of the opinion therefore that the amount stipulated as constituting liquidated damages in the contract in question cannot be construed as a penalty, but must be held to be liquidated damages, and must be enforced as such." (words in parentheses are ours).

POINT II

THE AGREEMENT SUED UPON IS NOT ENFORCE- ABLE IN EQUITY.

"Where the parties to any agreement, whatever may be the subject matter, or the terms, have added a provision for the payment, in case of a breach, of a certain sum which is truly liquidated damages, and not a penalty — in other

words where the contract stipulates for one of two things in the alternative, the performance of certain acts, or the payment of a certain amount of money in lieu thereof, equity will not interfere to decree a specific performance of the first alternative, but will leave the injured party to his legal remedy of recovering the money specified in the second. The reason for this rule is, that the parties have formally agreed upon the compensation — have assessed the damages — and have thereby declared that an appeal to equity is unnecessary, since they have made the legal relief adequate." Pomeroy, Specific Performance of Contracts, 3rd Edition, Section 50, Page 134.

If the parties to the receipt have provided therein for liquidated damages in breach of the conditions thereof by the buyer, they have provided for an adequate remedy at law as has been held in the *Andreason vs. Hansen*, and therefore, equity would not take jurisdiction to grant specific performance.

"A complete and adequate legal remedy authorizes denial of specific performance." *Halloran Judge Trust Co. vs. Heath*, 258 Pac. 242, 70 Utah 124.

We can find no cases where an option provision in the contract, such as the one at bar, has been made for the benefit of the seller, and he has exercised that option by retention of the down payment, that he has thereafter been given the right of specific performance.

In line 44 of the original receipt, R. 36, attached to the Findings of the court the following is provided:

"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."

The paragraph referred to includes lines 39 to 44 inclusive. Therefore, until there is evidence that another listing has not been made by the seller, making the receipt presently effective, specific performance should not be entertained. It is inequitable and unjust to permit the plaintiff to specifically enforce a contract before it has been proven that no previous listing has been made with other brokers. It cannot be determined that there is a complete and binding contract until such fact is established or that a complete and enforceable contract exists. An elementary rule in equity is:

"A greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is to be the basis of an action at law for damages." Pomeroy Specific Performance of Contracts, 3rd Edition, Section 159, Page 404.

POINT III

THE AGREEMENT IS NOT ENFORCEABLE AGAINST THE DEFENDANTS FOR WANT OF MUTUALITY.

In the case at bar the wife of the plaintiff never signed the receipt upon which the action is brought, nor was she ever made a party plaintiff to the action.

In *Candland vs. Oldroyd, et al*, 67 Utah 605, 248 Pacific, 1101, this court held on page 1103 of the report as follows:

"A contract to be binding upon one must likewise be binding upon the other. If one party has a right to insist upon specific performance, the other party to the contract must likewise have the same right. Tested by the elementary considerations that enter into every contract, we are unable to conclude that any contract existed, growing out of this correspondence."

In *Woolsey vs. Draper, et ux*, 103 Ore. 103, 201 Pac. 730, the Supreme Court of Oregon held:

"The rule is settled in this State that in suits for specific performance of contracts for the sale of land, where the wife having a right of dower in the land, is sued jointly with her husband upon a contract not binding on her, and the object of the suit is to divest her of her inchoate right of dower, the suit cannot be maintained against her nor against her husband unless prior to the decree in the lower court the plaintiff elects to accept the deed of the husband alone because as to her the contract lacks mutuality. The court will not coerce the wife to perform a contract made by her husband alone, which she is not legally bound to perform. This rule, however, must be limited to cases where the wife has a present existing right of dower in the lands involved." See *Weatherford vs. Weatherford et al*, 260 P 2d 1097.

If the parties in this action had been reversed the plaintiff could not have coerced the wife to perform the contract or give up her inchoate dower interest for the reason that she was not a party to the contract, and therefore, if the contract lacks mutuality as to her, it

also lacks mutuality as to the defendants in the present case when they are sued by the plaintiff alone, the wife of the plaintiff being neither a party to the action nor a signatory to the receipt.

It may be stated, as was affirmed in the case of *Candland vs. Oldroyd* above, that if one party has a right to insist upon specific performance the other party to the contract must likewise have the same right, and the reverse of it is, that, if one party doesn't have the right neither does the other.

In *Hart vs. Turner*, 226 Pacific 282, 39 Idaho, 50, the court held:

"Where from the inception of the contract, to and including the time of the trial, the vendor in a contract for the sale of land is unable to perform the contract according to its terms, specific performance will not be decreed against the vendee." *Tucker vs. Finch*, 188 Pacific 235.

"Specific performance of a contract will not be compelled where its validity depends upon the approval of a third person, and where the consent or approval of such third person has not been obtained, and tendered at the time specific performance is sought."

Hardy vs. Deskins, 215 Pacific, 738, 95 Oklahoma, 108.

"The test of mutuality in specific performance action is mutuality of remedy whether the agreement is such that equity would decree

specific performance for either party." *Wheat vs. Thomas*, 209 Cal. 306, 287 Pac. 102.¹

"To be specifically enforceable, an agreement must be definite in its terms, and party seeking specific performance must establish by clear and satisfactory proof, the existence of the contract alleged." *Store Properties vs. Neal*, 164 Pacific 2d 38, 72 California Appeals 2d, 112.

The theory upon which a vendor of real property can sue in specific performance for the price is that of mutuality of remedy, otherwise damages at law would be an adequate remedy, and he would thereby be precluded from suing in equity for specific performance. But since a purchaser of land (land being regarded as unique) can maintain a suit for specific performance, equity on the basis of mutuality of remedy usually grants the vendor the right to specific performance when he is only to receive money. This being so, it is very important that mutuality of remedy exists in favor of the vendee, otherwise a great advantage is given to the vendor if he can compel specific execution of a land contract against a purchaser, when the vendor's wife has not signed, and he sues only for the price. If the purchaser cannot sue and obtain the whole estate of both the seller and his wife, then the seller ought not to be

¹Also the same effect, *Hupp vs. Lawler*, 288 Pacific, 801, 106 California Appeals, 121. *Moody vs. Crane*, 199 Pacific, 652, 34 Idaho, 103. *Poultry Producers of Southern California vs. Barlow*, 208 Pacific 93, 189 Cal. 278. See also *Parker vs. Grainger*, 149 Pacific 2d, 625, 158 Kansas, 706. *Schneidau vs. Manley*, 39 Atlantic 2d, 885, 131 Connecticut 285. *Ray Richardson, Inc. vs. Carlton*, 191 Southern 433, 140 Florida 229. *Baumann vs. Mchel*, 181 Southern 549, 190 Louisiana, 1. Also 176 Southern 907.

granted specific performance against the purchasers for the price. It is doubly important that mutuality of remedy exists in favor of the vendee as well as in favor of the vendor, for the latter can sue in damages for his money loss. But the loss of land, it is said, cannot be measured in money.¹

POINT IV

THE PLAINTIFF NEVER MADE A TIMELY OFFER TO PERFORM THE AGREEMENT.

The earnest money receipt (R. 36) provides in lines 12 to 15 inclusive as follows:

“The total purchase price of \$26,000.00 (Twenty Six Thousand and no/100 Dollars) shall be payable as follows: \$..... which represents the afore described deposit, receipt of which is hereby acknowledged by you; \$..... when the seller approves the sale: \$25,500.00 *on delivery of deed or final contract of sale which shall be on or before June 1st, 1959*
* * *

This agreement requires the seller to deliver a deed on or before the 1st day of June, 1959, before the defendants, as buyers, would be liable to pay the \$25,500.00, the balance of the purchase price. The seller never performed or offered to perform the contract on June 1st, 1959, and no such offer to perform was ever made, except the deed above referred to as being admitted in evidence on January 11th, 1960, at the time of the

¹See *State Extrel-Place vs. Bland*, 183 SW 2d, 878, 353 Mo., 639, *Rice vs. Griffith*, 144, SW 2d, 837, 56 NE 2d, 607, 316 Mass., 517, *Lutz vs. Dutmer*, 382 NW 431, 286 Mich. 467.

hearing on the defendant's motion to amend the findings of the court. There is absolutely no proof in the record of any tender of performance on the part of the plaintiff on June 1st, 1959, or at any other time during the trial. The deed admitted in evidence was allowed to be introduced two months and one day after the conclusion of the trial, and over the objections of the defendants, and without the court ever having reopened the case for the admission of new evidence. See Tr. of Proceedings, Jan. 11, 1960, at page 4, line 23 to line 3 on page 5, also lines 16 and 17 on page 5.

In paragraph 3 of plaintiff's complaint, (R. 3) plaintiff does allege that he was ready, willing and able to deliver to the defendant the deed to the premises pursuant to the agreement and offered to do so, etc. This allegation however, was denied by the answer of the defendants, filed on July the 8th, 1959. This denial of the defendants was never altered or withdrawn but they amended the answer to effectuate setting up affirmative defenses which they did by an amendment to the answer, filed on July 30th, 1959. (R. 12 and 13.)

It is true that the court in its findings, in paragraph 7, found that the plaintiff and his wife were able, ready and willing to convey the property described in Exhibit 1, by warranty deed executed by the plaintiff and the plaintiff's wife. This finding, of course, was objected to and the motion to amend it was made by the defendants. A hearing thereon was held January 11th, 1960. The paragraph was amended in some respects, to wit: "that the plaintiff Wayne C. Close, was at all times during the

proceedings herein, a married man," but the finding that the plaintiff, Wayne C. Close, and his wife, were ready, able and willing to convey the property by warranty deed executed by them is that part of the finding which has no justification, and there is no evidence, and such fact was never proved, or offered to be proved by a deed then executed. The wife of the plaintiff was never in Court to testify and was never a party to the suit. The first time there was any tangible evidence of a deed was when it was filed four days after the judgment on December 18th, 1959. Both the plaintiff and the defendant had rested their cases on November 10, 1959. (Tr. 28, lines 13 and 15) It had never been introduced into evidence. The court's attention is called to the fact that this deed is dated the 16th day of December, 1959, two days after the judgment, together with its Findings of Fact and Conclusions of Law were signed and filed by the court. (R. 46). It will be noted that this deed is dated December 16th, 1959, signed by Wayne C. Close and Norma W. Close, and acknowledged before Dallas H. Young, Jr., who filled in the blank, and the date when his commission expires and his residence, and also the blank left for mailing the tax notice to Harold G. Blumenthal. There is another deed which appears on the scene, and this one is signed by Wayne C. Close and Norma W. Close but dated July 30th, 1959. It was this deed that was admitted into evidence two months and one day after the conclusion of the case, over the objection of counsel for the defendants, without reopening the case, or any order to that effect having been made, but toward the termination of the hearing on the defendant's objection to the

court's findings of fact and motion to amend them. It will be noted that this deed is dated prior to the first deed filed, but was never offered into evidence until January 11th, 1960, and filed that day. On this deed the expiry date of the Notary's commission is not filled in, or his residence, with the mail tax notice left blank and also the residence of the grantees. One wonders why this deed, if in existence, was not filed first. Pretrial hearing was on the same day as this deed is dated. It was on January 11, 1960, that the plaintiff's attorney reminded the court he had in his possession at time of the pretrial this deed. (See proceedings of January 11th, 1960 on the defendant's motion to amend the findings, at page 4, lines 4, 5 and 6.)

It is elementary that before the plaintiff can obtain specific performance of this contract he himself must allege and *prove* his offer to perform, or prove that he has fulfilled it or was willing to fulfill the contract, and no such evidence can be found during the trial of this case. The belated offer of the plaintiff to introduce a deed into evidence two months and one day after the conclusion of the trial is irregular and erroneous and it was error for the court to admit the same. Counsel for the plaintiff states that counsel for the defendants stipulated at the pretrial that there was no question of the plaintiff's offer to perform or any question about the title he was to convey. Counsel for the defendants emphatically deny this. There was no such stipulation and none can be found. The defendants have always contended, that without the plaintiff's wife's signature on the contract, he could not

be made to convey the whole estate in the property; and without first offering to perform on the date due, or at least by introducing such offer seasonably and properly into evidence, the defendants were never bound. Such is their position now and has been consistently, regardless of the findings of the court and the innuendos of counsel.

In *Altman vs. McDonald*, 12, Atlantic 2d, 230, 64 Rhode Island, 311 the court held:

“In suit for specific performance for contract for sale of real estate, complainant had burden of showing that he was ready, able and willing to perform his part of the contract on the date when the performance was due under the terms of the contract.”

Before the plaintiff can put the defendants in default so as to be able to sue for specific performance, he himself must have made a good tender, or performance on his part, by offering a deed on the date due, according to the terms of the earnest money receipt. Here the balance of the purchase price was to be paid upon the tender of the deed on June 1, 1959. However, a deed was never tendered.¹

It is therefore respectfully submitted that in accordance with the law and the facts of this case and the authorities herein cited, that the defendants are entitled to a judgment; that the plaintiff take nothing by his complaint, and that the case be remanded to the District

¹See also *Long v. Reiss*, 160 SW 2d, 668, 290 Ky. 198. Also, *Kunz vs. Peters*, 150 SW, 2d, 665, *Dodge vs. Blood*, 11 NW 2d, 846, 307 Mich. 169. See *Pomeroy, Specific Performance*, 3rd Edition, Section 62, Page 775.

Court for Utah County, with instructions to enter its judgment for the defendants and against the plaintiff.

Respectfully submitted,

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