

1960

Wayne C. Close v. Harold G. Blumenthal and Virginia A. Blumenthal : Respondent's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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**In the Supreme Court of the
State of Utah**

FILED

SEP 14 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**

**Respondent's Petition for Rehearing,
and Brief in Support Thereof**

Dallas H. Young, Jr., for
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Attorneys for Plaintiff and
Respondent

2025 OCTOBER 1960

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In the Supreme Court of the State of Utah

WAYNE C. CLOSE,
Plaintiff and Respondent,

vs.

HAROLD G. BLUMENTHAL and
VIRGINIA A. BLUMENTHAL,
Defendants and Appellants.

**CASE
NO. 9196**

Respondent's Petition for Rehearing, and Brief in Support Thereof

Respondent's Petition for Rehearing

Respondent, Wayne C. Close, petitions the Court for a rehearing in this case upon the grounds hereinafter set forth.

In support of said Petition, respondent relies upon the following points:

POINT I

THE COURT ERRED IN LAW IN RULING THAT THE SELLER ON A CONTRACT FOR THE SALE OF LAND HAD TO RETURN THE PAYMENT MADE OR BE PRECLUDED FROM BRINGING AN ACTION FOR SPECIFIC PERFORMANCE.

POINT II

THIS COURT ERRED IN THAT IT DISREGARDED THE ESTABLISHED LAW OF THIS JURISDICTION IN REACHING THE RESULT THAT IT DID.

POINT III

THIS COURT ERRED IN ASSUMING THAT THE BUYER WAS INDUCED TO SIGN THE CONTRACT SUE UPON UPON THE REPRESENTATION THAT THE AMOUNT DEPOSITED WOULD BE THE EXTENT OF HIS LIABILITY.

WHEREFORE, respondent prays that his petition for rehearing be granted and that upon such rehearing, and after consideration of the record, and the law, the decision of the court be recalled, and the District Court's decision affirmed.

Dallas H. Young, Jr., for
YOUNG, YOUNG & SORENSEN
Attorneys for Respondent

STATEMENT OF POINTS**POINT I**

THE COURT ERRED IN LAW IN RULING THAT THE SELLER ON A CONTRACT FOR THE SALE OF LAND HAD TO RETURN THE PAYMENT MADE OR BE PRECLUDED FROM BRINGING AN ACTION FOR SPECIFIC PERFORMANCE.

POINT II

THIS COURT ERRED IN THAT IT DISREGARDED THE ESTABLISHED LAW OF THIS JURISDICTION IN REACHING THE RESULT THAT IT DID.

POINT III

THIS COURT ERRED IN ASSUMING THAT THE BUYER WAS INDUCED TO SIGN THE CONTRACT SUE UPON UPON THE REPRESENTATION THAT THE AMOUNT DEPOSITED WOULD BE THE EXTENT OF HIS LIABILITY.

ARGUMENT**POINT I**

THE COURT ERRED IN LAW IN RULING THAT THE SELLER ON A CONTRACT FOR THE SALE OF LAND HAD TO RETURN THE PAYMENT MADE OR BE PRECLUDED FROM BRINGING AN ACTION FOR SPECIFIC PERFORMANCE.

The court's decision is against the established law of the State of Utah and against the "almost unanimous" rule of the jurisdictions of this country. The Supreme Court

of the United States has ruled to the contrary. *Stewart Vs. Griffith*, 217 U. S. 323, 54 L. ed. 782, 30 Sup. Ct. Rep. 528, 19 Ann. Cas. 639. So have almost all of the courts of this country. *Rogers Vs. Dorrance*, 140 Md. 419, 117 Atl. 564, 32 ALR 573.

The following states have adopted a rule which is exactly opposite to the rule announced by this court in this case: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, and Washington.

There are sound reasons why these jurisdictions have adopted the rule. They are correct. This court is wrong in its announced rule. Plaintiff cannot find one case outside this jurisdiction to support the court's ruling.

The cases which support the reasoning of the courts of the above jurisdictions are set out in annotations found in 32 ALR 584, and 98 ALR 887.

In nearly all those cases decided by the courts of the above states, the contracts were less favorable to the seller than in this case. In almost every one of those contracts, the contract expressly provided that in the event of breach, the money paid would be forfeited. No option was given the sellers. The contract provisions provided expressly that the payments would be forfeited as damages. Yet the courts uniformly hold that such contract provisions do not preclude an action for specific performance.

One of the principal reasons for reaching this result is that the courts conclude that contracts should be per-

formed not breached. Unless the contrary appears, the courts unanimously assume that the deposit is made to insure performance, not to entitle the buyer to violate the contract. 32 ALR 585 at 588.

“The question is whether the sum provided to be forfeited as ‘liquidated damages’ was intended as security for the performance of the contract, or whether the clause is to be construed as an option by which, at the election of the purchaser, he could pay the purchase money and take the land, or refuse to take the land and lose the money which had been paid. The fact that the sum is stated to be ‘liquidated damages’ is immaterial, unless the contract is to be construed as an option, and the forfeiture of the sum named substituted for the payment of the purchase money, at the purchaser’s election.” Donahoe Vs. Franks (1912) 199 Fed. 262, Supra.

“When the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out.” Dooley Vs. Watson, (1854) 1 Gray (Mass.) 414.

“It was competent for the parties to make an alternative agreement by which the purchasers are given the right to complete the purchase or to pay a stipulated amount of money by way of damages in place of performance, and, where that is the agreement, specific performance of the contract will not be decreed. The question in every case of this kind is whether the provision for the forfeiture of a prescribed amount is made to secure performance or as a substitute for performance. If the stipulation shows that it was a mere penalty to secure compliance with the conditions of the contract, a court will enforce it, but, if it shows that it was alternative in character, giving the party the option to per-

form or pay a stipulated amount in lieu thereof, specific performance will be denied." *Knisely vs. Robinson* (1922) 111 Kan. 300, 206 Pac. 877.

This court gave the provision in question an interpretation exactly opposite to the one given by all of the courts of other jurisdictions.

The insertion of the option on the part of the seller should strengthen not reduce the seller's rights. Yet this court penalizes the seller because he has the expressed option to require performance or retain the money paid as damages.

Few of the contract provisions contained in the cases cited in the 32 ALR 584 and 98 ALR 887 annotations provided alternative courses of action for the seller. Nearly all of the cases provided that the payments made would be forfeited as liquidated damages. The courts hold almost unanimously that even though the contracts say that the amount paid will be retained as liquidated damages, still the seller has an option. The option is to accept the amount paid or enforce the contract. Some of the contract provisions cited in 32 ALR 584 are as follows:

"... if the purchaser fails to perform, the earnest money 'shall, at the option of the vendor and his agents, be forfeited as liquidated damages,' and this contract shall become null and void. *Egle Vs. Morrison*, (1904) 27 Ohio C. C. 497;

"... if either party fails to perform, he shall forfeit to the other party \$500 as 'liquidated damages.' *Kettering Vs. Eastlack* (1906) 130 Iowa 498, 107 N. W. 177, 8 Ann. Cas. 357;

"... if the vendee fails to comply with the contract, the \$100 paid by him shall be 'forfeited by him and

retained by said vendor as liquidated damages for its breach.' *Ochs Vs. Kramer* (1908) 32 Ky. L. Rep. 762, 107 S. W. 260. (The court said that it did not think the contract an alternative one; that the clause in respect to the forfeiture of the \$100 was evidently inserted by way of penalty, and with the object of securing full performance of the contract, and not with the view that the payment should constitute a performance of the contract and thereby operate as a discharge thereof);

" . . . in case of forfeiture by purchaser for failure to make stipulated payments, the vendor may retain improvements and one-half of the purchase money and all interest from the taxes and expenses of insurance paid thereon, 'as liquidated damages' for the breach of the contract and for rent of the premises, there being an express provision that the vendor might waive the forfeiture. *Steel Vs. Long* (1897) 104 Iowa 38, 73 N. W. 470 (*arguendo*);

" . . . in case of default by the purchaser, the initial payment or deposit of \$1,000 shall be forfeited as 'liquidated damages.' *Rittenhouse Vs. Swiecicki* (1922) _____ N. J. Eq. _____, 118 Atl. 261;

" . . . if the purchaser fails to make the payment when due, he shall forfeit all rights under the contract, and all payments theretofore made shall be retained by the vendor as 'liquidated damages.' *First Trust & Sav. Bank Vs. Pruitt* (1922) 121 S. C. 484, 113 S. W. 469; *First Trust & Sav. Bank Vs. Spratt* (1922) _____ S. C. _____, 113 S. E. 473;

" . . . five hundred dollars paid in cash to bind the bargain to be forfeited if vendee makes default. *Waddill Vs. Sabree* (1892) 88 Va. 1012, 29 Am. St. Rep. 766, 14 S. E. 849;

“ . . . in case either party fails to perform the stipulations of the contract, or any part of the same, he shall pay the other the sum of \$1,000 as ‘damages for non-fulfilment of the contract.’ O’Brien Vs. Paulsen (1922) 192 Iowa 1351, 186 N. W. 440 (arguendo).”

None of the courts of the states listed above required the return of the money paid as a condition to enforce the contract.

Such a requirement is not realistic. The amount paid by the buyer may or may not be in the possession of the seller. Sometimes sellers have obligations to meet. Sometimes disputes arise between sellers and their agents. See 31 ALR 2d 8 where cases involving litigation between sellers and brokers respecting earnest money payments are reported. The time for performance varies. In this case the time for performance was 32 days after the payment. Oft times the time for performance extends over a period of years.

POINT II

THIS COURT ERRED IN THAT IT DISREGARDED THE ESTABLISHED LAW OF THIS JURISDICTION IN REACHING THE RESULT THAT IT DID.

This court has given a very similar contract provision a construction exactly opposite to the one given in this case. In the case of Soter Vs. Snyder, 277 P2d 966, the appellant made substantially the same argument as the appellant made here.

In that case, the seller had sold personal property on a conditional sales contract. Part of that case reads as follows:

“Appellants contend that such judgment was contrary to the law and the agreement of the parties because by providing that the seller may at his option declare the entire sum due and owing upon the purchasers’ defaulting in any of the payments when due or within 30 days thereafter, and upon such failure of the purchasers, the sellers could retake possession of said property and could retain any payments as liquidated damages, respondent thereby expressly agreed that his only remedy for breach of this contract should be repossession. We cannot agree with this argument. Under their agreement, the purchasers specifically agreed to pay a certain sum for the property involved, the balance of which was to be paid in installments until the total purchase price was paid. It was further agreed that the ‘title of the property herein conditionally sold should remain in the seller until all of the agreements of the purchasers shall have been performed and until all payments aforesaid to the seller have been fully paid, and upon full payment by the purchasers aforesaid to the seller, title shall thereupon pass and be vested in purchasers.’ It would be unreasonable to construe such a contract as meaning that the parties thereto intended that the seller could not, if he so desired, insist upon being paid the purchase price, merely because he had an option to repossess the property. To so argue is to ignore the meaning of the word ‘option.’” Soter Vs. Snyder, *supra*.

There are other similarities between the Soter case and this case. According to the contract in this case, possession of the property was to be delivered on April 28, 1959, 33 days before the balance of the purchase price was due. Likewise possession of the goods sold had been delivered in the Soter case. The presumption is that the contract was performed. 13 Corpus Juris 762, Contracts Sec-

tion 953; 20 American Jurisprudence 222, Evidence Section 227. So, presumably, the buyer was in possession. The contract provided that interest would be charged from April 28, 1959. Under the contract as executed, the risk of destruction of the property fell upon the buyer after April 28, 1959. The remaining balance due was the balance of the purchase price and yet in spite of all these things—delivery of possession, the agreement on the part of the buyer to pay interest on the amount due under the agreement, the assumption of risk for damage to the property—still this court under the present opinion precludes the seller from maintaining an action for specific performance. Either this case is wrong, or the Soter case is wrong. Obviously, the court is in error in this case.

POINT III

THIS COURT ERRED IN ASSUMING THAT THE BUYER WAS INDUCED TO SIGN THE CONTRACT SUE UPON UPON THE REPRESENTATION THAT THE AMOUNT DEPOSITED WOULD BE THE EXTENT OF HIS LIABILITY.

No such facts were ever claimed by the defendants. The contract itself provided for interest on the balance of the purchase price. The contract provided that the risk of destruction of the property was upon the defendants after April 28, 1959 (R. 36). In making the assumption that it did, the court not only assumed facts not in the record, it ignored the facts which are in the record to the contrary.

CONCLUSION

Respondent respectfully submits that the court erred in reaching the conclusion that it did reach. Under the court's ruling, Utah will represent a minority view of this rule of law and it will be the single state representing that minority view. This case changes the law of the State of Utah from a sound to an unsound condition. This case should be re-argued and the judgment of the District Court affirmed.

Respectfully submitted,
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