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IN THE SUPREME COURT
of the
STATE OF UTAH

WAYNE E. CARROLL and MARY W. CARROLL, husband and wife, *Plaintiffs-Respondents,* vs. PHIL M. BIRDSALL and M. LaVERNE BIRDSALL, husband and wife, *Defendants-Appellants.*	Case No. 11854

APPELLANTS' BRIEF

Appeal from Judgment of the
Third Judicial District Court for Salt Lake County
Hon. Stewart M. Hanson, Judge

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TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	4
ARGUMENTS	9
POINT I. THE APPELLATE COURT IS REQUIRED TO PASS UPON THE WEIGHT OF THE EVIDENCE	9
POINT II. THE WEIGHT OF THE EVIDENCE DOES NOT SUPPORT THE LOWER COURT'S CONCLUSION THAT DEFENDANTS WERE IN DEFAULT ON THE UNIFORM REAL ESTATE CONTRACT	10
POINT III. EVEN THOUGH THE WEIGHT OF THE EVIDENCE SUPPORTS THE LOWER COURT'S CONCLUSION THAT THE DEFENDANTS WERE IN DEFAULT ON THE UNIFORM REAL ESTATE CONTRACT, IT WAS IMPROPER FOR THE LOWER COURT TO PERMIT A FORFEITURE OF THE UNIFORM REAL ESTATE CONTRACT BY THE DEFENDANTS	19
POINT IV. ONCE THE TRIAL COURT HAD MADE ITS DECISION IT WAS IMPROPER FOR SAID TRIAL COURT TO RECONSIDER THAT DECISION	23
POINT V. THE AWARD OF TREBLE DAMAGES BY THE LOWER COURT WAS IMPROPER	24
CONCLUSION	26

CASES CITED

Cline v. Hullum, 435 P.2d 152, 154 (Okla., 1967)	9
Croft v. Jensen, 86 Utah 13, 40 P.2d 198, 203 (Utah, 1935)	9, 22
Drury v. Lunceford, 18 U.2d 74, 415 P.2d 662 (Utah, 1966)	23, 24
Perkins v. Spencer, 121 Utah 468, 243 P.2d 446, 452 (Utah, 1952)	19, 21, 22, 25
Van Zyverden v. Farrar, 15 U.2d 367, 393 P.2d 468, 470 (Utah, 1964)	25

STATUTES CITED

Section 78-36-3, U.C.A.	25
Section 78-36-6, U.C.A.	24
Title 68, ch. 36, U.C.A.	1

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APPELLANTS' BRIEF

STATEMENT OF KIND OF CASE

This is an action by Plaintiffs-Respondents, as sellers on a Uniform Real Estate Contract, to repossess real estate from the Defendants - Appellants, buyers on said Uniform Real Estate Contract. It is also an action seeking attorney's fees pursuant to the terms of said contract, and is an action for treble damages under the provisions of Chapter 36, Title 78, Utah Code Annotated, for any unlawful withholding of said real estate.

DISPOSITION IN LOWER COURT

After a non-jury trial on the merits, the lower court granted judgment to the Plaintiffs. The lower court found Defendants in default on the Contract and gave

judgment awarding the Plaintiffs immediate restitution of the real estate in question, and quieted title in the Plaintiffs. Also, Plaintiffs were awarded judgment for $85.00 per month rent from March 13, 1968, the day following the service of the Notice to Pay or Quit, which initiated these proceedings, to and including the 1st day of July, 1969, the day preceding the conclusion of the trial proceedings herein. In addition, the lower court awarded $8.50 per day rent from the 2nd day of July, 1969, to and including the day that the Defendants quit the property.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the judgment, and seek review by the appellate court of the evidence of record. Defendants further seek a determination by the appellate court that the Uniform Real Estate Contract in question was not in default at the time the Plaintiffs commenced their repossession action; a determination of what the contract balance was at the time the repossession and unlawful detainer action was commenced; an award of attorney's fees and costs in this case to the Defendants; a determination that the attorney's fees and costs awardable to Defendants are an allowable off-set against any payments Defendants should have made on the mortgage subsequent to the commencement of the action in question; a determination that the costs allowed the Plaintiffs by the lower court are improper and, therefore, disallowed; a determination that Defendants are entitled to possession of the premises in question, and

that the Writ of Restitution be immediately vacated; a determination that title to said premises be quieted in the Defendants, and that Plaintiffs be compelled to deed said property to the Defendants; and a determination that the case be remanded to the trial court to determine what the outstanding mortgage indebtedness is against said property, and after considering attorney's fees and costs, direct the lower court to determine whether or not there is a deficiency in favor of Plaintiffs, or whether or not there might be monies owing the Defendants. Should the evidence be such that there would be a deficiency owing in favor of Plaintiffs, then Defendants seek an order of the appellate court directing the lower court to satisfy said deficiency out of funds now on deposit with the Salt Lake County Clerk. Should there be monies owing the Defendants, then they seek an order of the appellate court directing the lower court to impress a lien against escrow funds in the account of the Plaintiffs with Doxey-Layton Company, and to enter judgment against the Plaintiffs for any additional funds owing the Defendants.

In the event the appellate court finds the weight of the evidence and the issues against the Defendants-Appellants, then said Defendants seek release of the funds on deposit with the Salt Lake County Clerk, and an order directing said Clerk to pay said funds over to the Defendants. In addition, the Defendants-Appellants would also request that a judgment be entered against the Plaintiff-Respondents, in the amount the

payments on the contract by the Defendants exceeds the reasonable rental value of the property.

STATEMENT OF FACTS

Plaintiffs sold Defendants their home on a Uniform Real Estate Contract, dated July 1, 1954. The sale price was $11,950.00. Said Contract reserved monthly payments of $100.00 (R. 3).

On March 12, 1968, the Plaintiffs caused to be served on the Defendant M. LaVerne Birdsall a notice which put the Defendants on notice that they were delinquent in their monthly payments $2,175.00, and the Defendants were further notified that the balance on the contract as of December 5, 1967, was in the amount of $4,740.44. The Defendants were required by said notice to bring current the delinquent payments on or before March 22, 1968, and pay "a *reasonable* attorney's fee of $475.50." (Emphasis added.) As an alternative thereto, the Defendants were given the option to give up possession of the subject property and forfeit all payments made thereon as liquidated damages to the Plaintiffs (R. 4). A copy of said notice was personally served on the Defendant M. LaVerne Birdsall (R. 5), and a copy thereof was left for Defendant Phil M. Birdsall by leaving same with Defendant M. LaVerne Birdsall. A copy thereof was not mailed addressed to Defendant Phil M. Birdsall at his place of residence, or his place of business (R. 6). A second notice was served on Defendants on March 25, 1968, notifying the Defendants to vacate the premises

(R. 7). Although the record discloses that both Defendants were personally served the second notice (R. 8), the service on the second notice was effected in the same manner as was the service of the first notice, with no personal service being made on Defendant Phil M. Birdsal, and with no mailing being made to said Defendant.

As of March 12, 1968, the Defendants should have paid monthly payments under the terms of the Contract (R. 3) in the total amount of $17,000.00, exclusive of taxes and insurance. A careful review of all of the accountings on file in this case will show that the Defendants had paid in excess of $17,000.00 on the Contract at the date they were given Notice to Pay or Quit (app. I). On that date, according to Lionel M. Farr, attorney for Plaintiffs, Defendants were indebted to Plaintiffs in the amount of $4,102.06 (Ex. 42-P & app. II). According to Lorin Blauer, the clerk who did the accounting for the Defendants, the Defendants were indebted to the Plaintiffs in the amount of $2,792.71 (Ex. 32-D & app. II). Defendants respectfuly submit that the appropriate adjusted contract balance as of that same date would more closely approximate $3,350.44 (app. III). There was an outstanding mortgage against the premises on which at that date the Plaintiffs owed Doxey-Layton Company the amount of $3,647.39 (Ex. 31-D). Had the Defendants paid the Plaintiffs rents on the property in question, they would have paid $14,025.00 from the date of the Contract to the date of the first notice, assuming a monthly rental rate of $85.00 per

month and a total of $11,550.00, assuming a monthly rental rate of $70.00 per month (app. I).

By letter dated April 8, 1968, this author, attorney for the Defendants, advised Mr. Lionel M. Farr, attorney for the Plaintiffs, that the amount sought to be recovered by the Plaintiffs was greatly in dispute and that an accounting was desired before any conclusions could be made (R. 10). Notwithstanding Defendants' efforts to affect a reconciliation of the problem through a proper accounting, Plaintiffs commenced action in this case on April 15, 1968, seeking repossession of the property, treble damages, and attorney's fees (R. 2). On April 23, 1968, the Defendants filed a responsive pleading in which, among other things, they asserted the legal insufficiency of the Notices to Quit, denied the entitlement of the Plaintiffs to treble damages, denied the Plaintiffs' right to an attorney's fee, and plead facts to support the conclusion that the Plaintiffs were not entitled to repossession of the premises in question (R. 9-11). In addition, by way of counterclaim filed the same date, Defendants generally asserted their right to have an accounting in this case and, that at the conclusion of such an accounting, that the Court grant appropriate relief to the parties to afford reasonable protection of the rights of the respective parties, without permitting an unconscionable forfeiture to take place (R. 12-15).

Judge Stewart M. Hanson announced at the commencement of the trial of this case on the 11th day of June, 1969, that the Court could not allow or permit a

forfeiture by the Defendants of their interest in the real estate, as such would be an unconscionable forfeiture. Judge Hanson reiterated this point throughout the trial, and finally memorialized that conclusion in writing by the execution and filing of a Memorandum Decision on July 2, 1969. The Court in its written Memorandum Decision concluded that the Defendants were indebted to the Plaintiffs in the amount of $4,133.24 on the Contract, and that the Defendants were in default on said Contract; however, the Court found that it would be an unconscionable forfeiture to deprive the Defendants of their equity in the property and denied restitution of the premises to the Plaintiffs. The Court concluded that the Plaintiffs were not entited to treble damages, that the Plaintiffs were entitled to $500.00 attorney's fees, plus costs, and that the Plaintiffs were entitled to enter judgment against the Defendants for $1,128.23. The Defendants were admonished to refinance the property to pay the Plaintiffs on said judgment and, upon payment thereof, the Plaintiffs were directed to deed the property to the Defendants (R. 59-61).

After Judge Hanson had made his initial decision, and after he had caused said decision to be reduced to writing, signed same, and caused it to be filed with the clerk's office, then the tenacious litigants and lawyers engaged in numerous motions, arguments, and the application of much pressure. Preliminary entreaties were made of the Court and the Court then seemed to yield to the pressure, finally allowing counsel for the Plain-

tiffs to submit Findings of Fact and Conclusions of Law and a Judgment, but consistent with the views of counsel for the Plaintiffs, rather than with the Memorandum Decision. Said Findings of Fact, Conclusions of Law and Judgment were in fact prepared and submitted to the Court and signed by the Court and filed in the clerk's office on August 25, 1969 (R. 65-69). After extensive objections and arguments were made, the Court directed Mr. Farr to prepare final Findings, Conclusions, and Judgment. On September 23, 1969, this author called Mr. Farr and advised him that he had received checks from the Defendants, amounting to $2,000.00 and that consistent with the Memorandum Decision, the Defendants would pay $1,233.90 as the original amount of the judgment, plus costs of $22.40, and attorney's fees of $500.00 for a dismissal of the case without any further proceedings, and for a deed to the property in question. This offer of settlement was flatly rejected by the Plaintiffs and their attorney.

Finally, the complete about-face was completed by the Court in the entry of final Findings of Fact, Conclusions of Law, and Judgment, on September 25, 1969 (R. 101-06), though the second set of Findings, Conclusions and Judgment was at variance from the first set which is on file herein. Mr. Farr then proceeded immediately to obtain a Writ of Restitution on the 26th day of September, 1969 (R. 19-20), and before any notice had been given to this author that the Court had entered judgment in this case (R. 107), and that the Defendants

were in a perilous situation. Defendants were afforded no opportunity to make any objections to the final Findings, Conclusions, and Judment, and were afforded no opportunity to have a bond fixed by the lower court to stay execution on the Judgment. The appeal then followed.

ARGUMENTS

POINT I

THE APPELLATE COURT IS REQUIRED TO PASS UPON THE WEIGHT OF THE EVIDENCE.

Since the Plaintiffs in this case sought enforcement of the contractual provisions which permit a forfeiture by the Defendants of amounts paid on the contract, and which permit the Plaintiffs the right to re-enter and to re-take possession of the premises, rather than seeking monetary damages, this case is one ordinarily cognizable in equity, rather than in law. In such cases, the appellate court is required to consider the entire record and pass upon the weight of the evidence. *Croft v. Jensen,* 86 Utah 13, 40 P.2d 198, 203 (Utah, 1935); *Cline v. Hullum,* 435 P.2d 152, 154 (Okla., 1967). It is respectfully submitted that the weight of the admissable competent evidence in this case is inconsistent with the conclusions reached by the lower court in several respects, and these inconsistencies will be reviewed with particularity in the arguments hereinafter to follow.

POINT II

THE WEIGHT OF THE EVIDENCE DOES NOT SUPPORT THE LOWER COURT'S CONCLUSION THAT DEFENDANTS WERE IN DEFAULT ON THE UNIFORM REAL ESTATE CONTRACT.

The Uniform Real Estate Contract in this case provides that where the seller maintains a loan secured by a mortgage against the property that "when the principal [amount outstanding and due on the contract] has been reduced to the amount of the loan and mortgage, the seller agrees to convey and the buyer agrees to accept title to the above-described property subject to said loan and mortgage." (R. 3) The Plaintiffs served the Defendants a Notice to Pay or Quit on March 12, 1968 (R. 5). On March 18, 1968, the outstanding balance owing on the mortgage against the premises by Plaintiffs to Doxey-Layton Company was in the amount of $3,647.39 (R. 223, Ex. 31-D). The balance owing by Defendants to Plaintiffs on the Contract as of March 5, 1968, according to the final accounting done by Lionel M. Farr, attorney for Plaintiffs, as adjusted for conceded error of January 5, 1968, was $4,102.46 (Ex. 42-P). Defendants respectfully submit that the weight of the evidence supports the conclusion that the corrected contract balance as of March 5, 1968, should have been $3,350.44 (app. III). Although the Blauer Accounting, as adjusted for an error made on the transaction of January 5, 1955, indicates that the Contract balance as of March 12, 1968, was $2,792.91 (Ex. 32-D), an adjustment thereof, consistent with the analysis made in Appendix III, would make the contract balance $3,421.45. Accordingly, it is

apparent that the net difference between the accountings of Lionel M. Farr and Lorin R. Blauer is de minimus.

In support of the foregoing observation that Defendants are entitled to additional credits, over and above those given in the Farr and Carroll Accountings, a brief review of the record, and the reasons in support of Defendants' contentions, will hereinafter be set forth, as follows:

1. The Defendants produced an original receipt dated February 25, 1955, which indicated Phil Birdsall made a $25.00 payment on the 1315 Gillespie property (the subject property), and said receipt was signed by W. E. Carroll (Ex. 15-D). The receipt was admittedly in Carroll's handwriting (R. 169). The receipt by its very appearance is old, and certainly is entitled to the equal dignity of the original accounting record of Mr. Carroll (Ex. 4-P). Mr. Carroll, in explaining Exhibit 22-P, indicated that he made an entry as of March 7, 1955, and then remembered that the payment had been made February 23, 1955. Accordingly, he scratched March 7, 1955, and wrote in February 23, 1955, which he would have the Court believe was the same payment as that represented by the receipt of February 25, 1955 (R. 178-79). It seems incredible to this author that Mr. Carroll would have such an amazing memory at date of trial, but would register such uncertainty back in 1955, which conclusion is fairly deducible from the question mark next to the March 7 entry on Exhibit 22-P. Surely Mr. Carroll would have had a copy of the February 25,

1955, receipt in his receipt book which would have permitted him to adjust the original record, had such an adjustment been warranted at the time. Accordingly, it is respectfully submitted that the duly authenticated receipt is evidence of a quality sufficient to allow additional credit to the Defendants over and above that given in Plaintiffs' original accounting (Ex. 4-P). Such receipt, standing relatively unimpeached, should be accepted by the Court as the weightier evidence.

2. The Defendants produced a cancelled check dated January 10, 1958, made payable to Wayne Carroll by M. LaVerne Birdsall in the amount of $35.00 (Ex. 16-D), which was admittedly endorsed by Carroll (R. 165). The Carroll Accounting included $35.00 payments for January 6, and January 29, but failed to include a payment for January 10 (Ex. 6-P). Mr. Carroll proffered Exhibits 23-P and 24-P as evidence that the January 10, 1958, check had bounced. He testified that Exhibit 23-P was for the same check number and in the same amount, but said Exhibit does not identify check number 151 (R. 181). Moreover, said chargeback slip is dated January 10, 1958, and it seems very unlikely that the bank would make the chargeback the same day that the check was given by the Defendants to the Plaintiffs. Exhibit 24-P also fails to identify check number 151 of January 10, 1958, and Carroll frankly admitted in his testimony that he did not know what happened during that period of January (R. 181). An examination of Exhibit 16-D discloses that the check was honored by the bank. It is not

stamped "Return to Sender" or "Insufficient Funds," and there is no other indication that the check bounced. Since Carrolls adduced no evidence identifying this check as not having been properly honored, or any evidence to create any disbelief that Defendants had in fact made a payment of January 10, it is submitted that the check is the weightier evidence. Therefore, Defendants should be entitled to a credit for this payment.

3. The Carroll Accounting did not provide an addition for taxes on November 30, 1960, in the amount of $133.98 (Ex. 7-P). Mr. Farr submitted interrogatories to the Defendants, in which he set forth a schedule of real estate taxes on the subject property (R. 27). He requested that the Defendants admit the correctness of such schedule, and the Defendants did admit that the schedule of taxes was in fact correct (R. 31). However, the answer to the interrogatory in no way admitted that the Plaintiffs had paid the taxes, and were not reimbursed by the Defendants. Mrs. Barbara Place of Doxey-Layton Company testified that Doxey-Layton had paid the taxes every year the contract was in force (R. 224). Based upon the answers to the interrogatories, Mr. Farr took the liberty of adding said amount in his accountings, which were received into evidence, notwithstanding the lack of proper foundation, qualification, and considering that they were nothing more than hearsay evidence. The Defendant Phil M. Birdsall testified that he paid the taxes every year (R. 209), and the fact that Defendants reimbursed Plaintiffs for taxes is somewhat corrobor-

ated by a notation on Exhibit 6-P which indicates that the 1958 taxes were paid, although said accounting did not have a formal entry of the payment of such taxes. The Defendant Phil M. Birdsall further indicated that he paid the taxes in cash (R. 210). Mr. Carroll testified that the exclusion of the taxes from the accounting was an oversight, and should have been included (R. 271), without there being any specific testimony or evidence of how he could have possibly remembered such a thing for so many years back. Judge Hanson had earlier commented in the trial that he didn't think that it was proper for Mr. Farr to vary the original accounting records (R. 155). Where, as in this case, there is an original accounting record, which is of ancient origin and there is no similar documentary evidence of equal dignity, and no other specific testimony or evidence which identifies the particular transaction in question, it would seem to this author gross error to permit a variance from the original Carroll Accounting.

4. Exhibit 9-P of Plaintiffs' original accounting records contains a credit to the Defendants for a $150.00 payment on June 20, 1964. Mr. Farr introduced Exhibit 25-P, which is a bad check from Defendant Phil Birdsall to Wayne Carroll in the amount of $43.25, as justification for crediting the Defendants with a payment of only $106.75 on that particular date. Mr. Carroll never really tied the bounced check in with any evidence, and was certainly very indefinite as to whether or not the check should have been charged back (R. 183). The bounced

check might have been for taxes and insurance, and later could have been redeemed by the Defendants for cash, or any number of things could have possibly happened. Moreover, it would have been very simple for Mr. Carroll to have made a reversing entry on his accounting records. Accordingly, it is submitted that the original accounting record is the best evidence available to the Court, and without a much stronger showing by the Plaintiff, the lower court should have been compelled to give the appropriate weight to the original accounting record of the Plaintiffs.

5. On November 30, 1965, Mr. Farr again took the liberty of adding $189.61 for 1965 taxes, notwithstanding the fact that Mr. Carroll had not charged this amount to the Defendants in his original accounting (Ex. 10-P). Mr. Carroll testified that said taxes should have been entered on the record, but were not because of an oversight (R. 271). He again failed to give any reasons for the oversight, or any compelling testimony which should be of sufficient weight to vary from the original accounting record which he made at the time of the transaction. The reasons set forth above as to item 3 apply with equal force to Mr. Farr's deviation from the original record in this instance.

6. On December 16, 1966, the Defendants purchased a tape recorded for the Plaintiffs. The Defendants obtained said tape recorder from Semco, and no other items were purchased from Semco (R. 205-07 & 218-19). They paid $103.50 for said tape recorder (Ex. 26-D). Mr.

Carroll testified that he gave them credit for wholesale price (R. 166), and that amount supposedly was $81.33 (Ex. 10-P). However, there is no evidence in the record to indicate anything other than that the Defendants actually paid $103.50 for said tape recorder. Accordingly, the additional credit of $22.17 ought to be given the Defendants.

7. It is the contention of the Defendants that two payments in the amount of $125.00 were made on March 13, 1967, but that the Plaintiffs only gave credit for one payment (Ex. 10-P). Exhibit 19-D contains copies of two receipts evidencing two payments: Receipt No. 02413 to Phil Birdsall for payment of $125.00 was signed by Mary W. Carroll, and Receipt No. 02476 to Phil Birdsall for $125.00 was initialed by Wayne E. Carroll (R. 172-73). Mr. Carroll testified that only one payment was made on that date, and explained that his wife usually made the deposits, and receipts were made up at the same time. When he went to make up a deposit on this occasion, he started to write a receipt and didn't discover the duplicate until after the receipt was partially made out (R. 177). He also testified that the Defendants' Bishop made the March, April and May payments for 1967, and that he had entered credit on his accounting card for said payments (R. 178, & Ex. 41-P). In addition, he testified that neither of the original receipts were given to the Birdsalls (R. 273). However, this author would question why Mr. Carroll had not voided

the improper receipt, if in fact it was duplication. Mr. Birdsall testified on February 22, 1967, he was admitted to the hospital, and that he had been somewhat delinquent during this period of time. As a result, Mr. Carroll would not accept a single payment on this particular occasion (R. 277). This is corroborated by Mrs. Birdsall's testimony to the effect that there had been several occasions on which double payments had been required (R. 219). Mr. Birdsall testified that Carroll had done this many times, and that the Defendants would have to bring back more money on the same day in order to satisfy Mr. Carroll (R. 207-08). It is respectfully submitted that the weight of the evidence would justify the Court's allowing an additional credit of $125.00 to the Defendants.

Assuming that this Court reaches the same conclusion as this author, or makes a similar determination which concludes that the mortgage balance of March 12, 1968, exceeded the balance due Plaintiffs by the Defendants on the Uniform Real Estate Contract in question, then it would be the Plaintiffs who were in default on the Contract, rather than Defendants. In such an event, the Plaintiffs were obliged by the contractual terms to convey the property to the Defendants, subject to the mortgage. Even though the Plaintiffs have continued to make mortgage payments after the initiation of the repossession proceedings such that the mortgage balance now has been reduced below the contract balance on March 12, 1968, it seems evident that they cannot now be heard to complain, since they refused to receive

any more monthly payments from the Defendants, once they had initiated said proceedings. It is, therefore, respectfuly submitted that the lower court granted inappropriate relief by allowing restitution of the premises to Plaintiffs, by quieting title in them and by allowing the Plaintiffs rents and treble damages, and costs of the proceeding. Defendants suggest that the Court should compel the Plaintiffs to deed the property to the Defendants, allow the Defendants a reasonable attorney's fee for the handling of this case, including the appeal, consistent with the evidence in the record (R. 263), and costs of these proceedings. As to any amount by which the mortgage balance might now be reduced below the contract balance as of March 12, 1968, the Court should first allow the Defendants to off-set the awarded attorney's fee against any deficiency created by continued payments on the mortgage by the Plaintiffs. Unless the Plaintiffs have paid the mortgage in full, there is still an outstanding balance thereon which approximates $2,700.00, thus creating a deficiency below the March 12, 1968 contract balance of only approximately $950.00, which amount the attorney's fee should more than adequately off-set. Should the Court reach a different conclusion, there is on file with the Salt Lake County Clerk's office a cash bond in the amount of $1,500.00 which could be used by the Court to adjust any remaining problems (R. 131-32). However, the Defendants respectfully submit that those funds ought to be returned to the Defendants at the conclusion of this case.

POINT III

EVEN THOUGH THE WEIGHT OF THE EVIDENCE SUPPORTS THE LOWER COURT'S CONCLUSION THAT THE DEFENDANTS WERE IN DEFAULT ON THE UNIFORM REAL ESTATE CONTRACT, IT WAS IMPROPER FOR THE LOWER COURT TO PERMIT A FORFEITURE OF THE UNIFORM REAL ESTATE CONTRACT BY THE DEFENDANTS.

It is "the duty of the Court to determine whether its offices are being used to exact an *unconscionable requirement or amount.*" (Emphasis added.) *Perkins v. Spencer*, 121 Utah 468, 243 P.2d 446, 452 (Utah, 1952).

It is "the duty of the court to determine whether possession of the home and started paying for it in July of 1954. They made payments thereon, although sometimes sporadically, all during the period of time from 1954 until the Plaintiffs initiated repossession proceedings in this case. Even by the most liberal interpretation of the evidence in favor of the Plaintiffs, the Defendants had paid approximately two-thirds of the original purchase price of $11,950.00. Commencing in September of 1961, the Defendants started paying payments of $150.00 (Ex. 8-P), in an effort to bring delinquent payments current on the Contract in question. Had the Defendants been permitted to continue monthly payments of $150.00 per month, as was demanded in the first notice of the Plaintiffs, any delinquencies soon would have been corrected, and the contract balance would have been liquidated in a relatively short time. Moreover, when one considers that the Plaintiffs owed Doxey-Layton Company $3,647.39 on a mortgage against the property, and

that the contract balance, at best, was no more than $4,102.46, when Plaintiffs first gave Defendants notice, according to the final accounting of Mr. Farr, the Plaintiffs' equity in the property could have been no more than $455.07. By comparing the equity figure with the original purchase price, it is clearly seen that the Plaintiffs had less than 4% of their contract price which they had not yet received, either by way of payments from the Defendants, or by way of monies received from a mortgage which they had placed against the property.

Also, when one reviews all of the additional credits which were given by the Plaintiffs to Defendants, after the various accountings were made in this case (app. I), there seems to be reasonable merit in the position taken by Defendants at the outset of this case; *i.e.*, their request for a complete accounting in an effort to reconcile differences between the parties before legal action was commenced, and their putting Plaintiffs on notice of the definite disagreement with the results of the Carroll Accounting. In addition, there are the other items or transactions for the Court's consideration which are catalogued in Appendix II and Appendix III and which are argued at length in Point II hereinabove. With all of the variances, discrepancies, and errors which have been brought to light as a result of these proceedings, certainly the Court must conclude that the Defendants were well within their right to demand and expect a thorough accounting before any additional funds were paid the Plaintiffs, or before they could make any deter-

mination as to what their course of action should be as a result of the Notice to Pay or Quit and the Notice to Quit in this case.

The granting by the lower court of immediate restitution of the property to the Plaintiffs was most certainly an "unconscionable requirement" within the meaning and spirit of the Perkins case, *supra,* and, specifically, would violate the self-imposed limits of power the Courts are willing to exercise as was very ably expressed by the late Chief Justice Wolfe in his concurring opinion in the Perkins case, *supra,* at page 453:

> Unconscionableness may be present at the making of the contract or it may arise at the time of default or time of enforcement. But courts inherently have the power to refuse to lend themselves to unconscionable acts. All that is required is that the courts, when asked to enforce an unconscionable provision in a contract, refuse to do so because at the time the enforcement is asked it would be unconscionable to do so.

Judge Hanson certainly recognized this principle as he indicated several times throughout the trial that restitution would be unconscionable, and he demonstrated his convictions by his written Memorandum Decision. However, with the exertion of much pressure, he was improperly persuaded to retreat from a decision that he had made, with a view to fundamental fairness and justice.

Although the Perkins case, *supra,* differs significantly in its fact situation from the case before the

Court, the case of *Croft v. Jensen,* 86 Utah 13, 40 P.2d 198 (Utah, 1935), is a reasonably analogous factual situation to the one before the Court. A real estate contract in the amount of $6,500.00 was involved, on which there was an unpaid balance of $200.00. The facts of the Croft case differ from this case in that a tender of the $200.00 contract balance was made to the seller. However, it is submitted that the uncertainty surrounding the contract balance in this case well justified the Defendants in not making a tender of the balance due under the contract. At page 202, the court indicated that

> the paintiff was not entitled to declare a forfeiture of the contract involved in this action. *The limit and measure of her right to recover because the installments were not paid when the same became due was the amount of the installments together with legal interest thereon.* (Emphasis added.)

To maintain consistency with the Croft case, this Court must deny restitution, and award Plaintiffs the difference between the contract balance as of March 12, 1968, and the mortgage balance as of this time.

Were this Court to conclude that the Plaintiffs are entitled to a return of the property in question, then the Defendants surely are entitled to a judgment based upon the unenforceable or unconscionable forfeiture concept discussed throughout the Perkins case, *supra.* Defendants contended, and adduced direct evidence in point thereon, that the reasonable rental value of the property over the period of time in question approximated $11,

550.00, as opposed to the approximate $17,000.00 they paid on the contract. (See app. I.) Although the Plaintiffs claimed the reasonable rental value to be $125.00 per month, no competent evidence was adduced in support of such a conclusion. Accordingly, Defendants should be entitled to a judgment against the Plaintiffs for approximately $6,000.00 for the payment of excess rents, should this Court grant restitution. Moreover, it is submitted that the Defendants should be entitled to a return of the $1,500.00 cash bond on file with the Salt Lake County Clerk's office, since a return of the property to the Plaintiffs in this case is a clear-cut windfall. Not only did they effectively have little equity in the property, but the present real estate market has undoubtedly created a situation in which the Plaintiffs would receive a property greatly appreciated in price and value.

POINT IV

ONCE THE TRIAL COURT HAD MADE ITS DECISION, IT WAS IMPROPER FOR SAID TRIAL COURT TO RECONSIDER THAT DECISION.

Although the case of *Drury v. Lunceford,* 18 U.2d 74, 415 P.2d 662 (Utah, 1966), considered the finality of an order given as a result of a motion, and was not concerned with the decision rendered by a court after trial, such case has application to the case now before the Court. At page 663 of the opinion, the now Chief Justice Crockett indicated that once the lower court had made its decision, that then completed both the duty and prerogative of said court. Although the opinion does not define what constitutes a "decision," Defendants con-

tend that the Memorandum Decision of Judge Hanson which was signed and filed with the Clerk on July 2, 1960, constitutes such a decision within the spirit and meaning of the holding of the Drury case, *supra*. The very dangers and problems thought to be put to rest by the Drury holding are conspicuously present in the case before the Court, since Judge Hanson thereafter signed and filed two separate sets of Findings, Conclusions and Judgments. Such final pleadings are at variance, and there is no clear indication in the record which set of final pleadings was intended by the lower court to be the final decision.

POINT V

THE AWARD OF TREBLE DAMAGES BY THE LOWER COURT WAS IMPROPER.

Section 78-36-6, Utah Code Annotated 1953, provides that the notice required in a forcible entry and detainer action must be served in a particular way or ways. Where, as in this case, the tenant is absent from his place of residence, or from his usual place of business, "a copy of such notice may be left with a person of of suitable age and discretion at either place, and a copy thereof must be mailed to the tenant at his place of residence or place of business." The Return of Service of the Notice to Pay or Quit, as to Defendant Phil M. Birdsall, indicates that a copy thereof was left with his wife, but it failed to certify that a copy of same was mailed to the Defendant Phil M. Birdsall (R. 6). In addition, said notice demanded the full payment of the delinquent

balance, which was substantially in error, and put Defendants on notice that the contract balance was $4,740.44, quite a bit more than was due to Plaintiffs on the Contract. Moreover, the notice made a demand for an attorney's fee of $475.50, which, by any standard, is an outrageous fee for the preparation of such a notice, and for the services which are attendant therewith. Certainly, such a notice cannot be permitted to stand where its demands are improper and unlawful. The Defendants asserted the invalidity of the preliminary notices in their answer (R. 9 and 11). The case of *Van Zyverden v. Farrar*, 15 U.2d 367, 393 P.2d 468, 470 (Utah, 1964), spells out the fact that a preliminary notice is required to place the buyer in the status of a tenant at will, and until that is done, the buyer would not be amenable to the notice provided in Section 78-36-3, Utah Code Annotated. Unless there has been strict compliance with these requirements, then the forcible entry and detainer action does not lie. Since the Plaintiffs in this case failed to strictly comply with the service requirements as to Defendant Phil M. Birdsall, their forcible entry and detainer action does not lie against him.

The Perkins case, *supra,* at page 449, has met the very problem before this Court. Mrs. Perkins had been personally served, and a copy of the notice had been left with Mrs. Perkins for Mr. Perkins. However, no copy was mailed to Mr. Perkins. This Court, through Justice Crockett, concluded that since Mr. Perkins was in possession, the continued possession by Mrs. Perkins

could result in no additional damage to Spencers. Even though the trial court awarded treble damages as against Mrs. Perkins, the Utah Supreme Court reversed, and declined to allow treble damages as to either person. Therefore, the Carrolls are not entitled to treble damages in this case, as to either of the Defendants.

CONCLUSION

Passing upon the weight of the evidence in the record, as this Court must, the conclusion that the Defendants were not in default on the Uniform Real Estate Contract is amply supported by the weight of the evidence. Accordingly, restitution of the property to the Plaintiffs is improper.

Even though this Court concludes that the weight of the evidence supported the conclusion of the lower court that the Defendants were in default on the Uniform Real Estate Contract, the evidence in this case is such that the allowance of restitution of the property to the Plaintiffs shocks the conscience, and such a remedy to the Plaintiffs is an unconscionable forfeiture, and should be disallowed.

It is respectfully submitted that this Court must reverse the lower court and the case should be remanded to the lower court for further proceedings consistent with the opinion of the appellate court.

Costs and an attorney's fee should be awarded Appellants-Defendants.

Respectfully submitted,

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Counsel for Appellants

APPENDIX I

Payments required of Defendants under the terms of the Uniform Real Estate Contract of July 1, 1954, between the parties, from inception of the contract to and including the 12th day of March, 1968, the date on which Plaintiffs instituted repossession action in this case (R. 3):

Year	Required yearly payments
1954	$ 1,000.00
1955	1,200.00
1956	1,200.00
1957	1,200.00
1958	1,200.00
1959	1,200.00
1960	1,200.00
1961	1,200.00
1962	1,200.00
1963	1,200.00
1964	1,200.00
1965	1,200.00
1966	1,200.00
1967	1,200.00
1968	300.00
Total required payments under Contract to date repossession proceedings instituted	$17,000.00

Payments made by Defendants to the Plaintiffs as per Farr Accounting No. 1 (Ex. 11-P):

Year	Amount
1954	$ 300.00
1955	906.08
1956	1,049.02
1957	1,308.92
1958	1,313,86
1959	1,256.12
1960	635.00
1961	1,146.37
1962	1,800.00
1963	1,652.40
1964	1,474.31
1965	1,552.70
1966	1,281.33
1967	1,200.00
1968	150.00
Total payments — Farr Accounting No. 1	$17,026.11

Payments made by Defendants to Plaintiffs as per Farr Accounting No. 2 (Ex. 42-P):

Year	Amount
1954	$ 300.00
1955	916.08
1956	986.51
1957	1,336.43
1958	1,298.86
1959	1,206.12
1960	735.00
1961	1,146.37
1962	1,650.00
1963	1,803.20
1964	1,457.69
1965	1,418.54
1966	1,275.78
1967	1,281.33
1968	225.00
Total payments — Farr Accounting No. 2	$17,036.91

Payments made by Defendants to the Plaintiffs as per original Carroll Accounting (Exs. 4-P through 10-P):

Year	Amount	
1954	$ 300.00	
1955	951.08	
1956	1,022.83	
1957	1,238.92	
1958	1,194.40	
1959	1,150.00	
1960	585.00	
1961	1,196.37	
1962	1,800.00	
1963	1,652.40	
1964	1,650.93	
1965	1,350.84	
1966	1,281.33	
1967	1,125.00	
1968	150.00	
Total payments — Carroll Accounting		$16,649.10

Plus: Additional payments Plaintiffs stipulated Defendants paid Plaintiffs, and which were not included in the Carroll Accounting (these are credited in Ex. 11-P, Farr Accounting No. 1, consistent with the oral stipulation entered between respective counsel):

Date	Payment	
12/31/56 (R. 149-50)	$ 26.19	
1/6/57 (R. 148 & 164)	35.00	
2/6/57 (R. 148 & 165)	35.00	
2/17/59 (R. 149 & 164)	106.12	
1/16/60 (R. 149 & 164)	50.00	
2/25/63 (R. 149 & 164)	.80	
1/27/65 & 2/7/65 (R. 149 & Ex. 17-D)	1.16	
5/6/65 (R. 149 & 165)	75.14	
6/23/65 (R. 149 & 165)	125.56	
8/10/67 (R. 149)	75.00	
Total credits not received by Defendants in Carroll Accounting		$ 527.97
Total payments — Adjusted Carroll Accounting		$17,179.07

Payments made by Defendants to Plaintiffs, as per the Blauer Accounting (Ex. 32-D):

Year	Amount
1954	$ 670.00
1955	976.08
1956	1,022.83
1957	1,308.99
1958	1,330.46
1959	1,256.12
1960	635.00
1961	1,196.37
1962	1,800.00
1963	1,652.40
1964	1,650.94
1965	1,552.70
1966	1,303.50
1967	1,350.00
1968	150.00
Total payments — Blauer Accounting	$17,855.39

Rents on property from July 1, 1954, possession date, to and including March 31, 1968, based upon an $85.00 per month rental payment (Findings of Fact, R. 105, Par. 12):

Year	Amount
1954	$ 510.00
1955	1,020.00
1956	1,020.00
1957	1,020.00
1958	1,020.00
1959	1,020.00
1960	1,020.00
1961	1,020.00
1962	1,020.00
1963	1,020.00
1964	1,020.00
1965	1,020.00
1966	1,020.00
1967	1,020.00
1968	255.00
Total rents property would have yielded to month of commencement of proceedings @ $85.00 per month	$14,025.00

Rents on property from July 1, 1954, possession date, to and including March 31, 1968, based upon a $70.00 per month rental payment (R. 204, & 217-18; and for evidence in support of Carroll conclusion that rental value was $125.00 per month, see R. 159):

Year	Amount
1954	$ 420.00
1955	840.00
1956	840.00
1957	840.00
1958	840.00
1959	840.00
1960	840.00
1961	840.00
1962	840.00
1963	840.00
1964	840.00
1965	840.00
1966	840.00
1967	840.00
1968	210.00
Total rents property would have yielded to month of commencement of proceedings @ $70.00 per month	$11,550.00

APPENDIX II

Contract and mortgage balances on March 12, 1968, the date of the service of the Notice to Pay or Quit (R. 4-6):

Carroll Accounting (Ex. 10-P)	$ 4,787.96
Farr Account No. 1 (Ex. 11-P)	4,201.42
Farr Account No. 2 (Ex. 42-P)	*4,102.46
Blauer Accounting (Ex. 32-D)	**2,792.91
Doxey-Layton Mortgage Balance (Ex. 31-D)	3,647.39

*The balance on the Farr Accounting No. 2 of $4,133.24 was reduced by the amount of $30.78 consistent with the acknowledged error made by Mr. Farr in his Answers to Defendants' Objections (R. 96), which acknowledged that said accounting included an item for taxes for January 5, 1958, in the amount of $16.75, plus applicable interest in the amount of $14.03 (R. 73).

**The balance of the Blauer Accounting of $2,538.23 was increased by the amount of $254.48 to correct the error made by Blauer on the entry of January 5, 1955, where $57.86 interest was deducted, rather than added (Ex. 32-D). The $254.48 adjustment was made by adding the $115.72 net error and the applicable interest or $138.76.

VARIANCES BETWEEN ACCOUNTINGS

Date	Amount	Carroll	Farr	Blauer
7/9/54	$170.00	Excluded	Excluded	Included
11/5/54	16.43	Excluded	Included	Excluded
2/25/55	25.00	Excluded	Excluded	Included
1/10/58	35.00	Excluded	Excluded	Included
5/16/58	16.60	Excluded	Excluded	Included
11/30/60	133.98	Excluded	Included	Excluded
6/20/64	43.25	Included	Excluded	Included
11/30/65	189.61	Excluded	Included	Excluded
12/16/66	22.17	Excluded	Excluded	Included
1/9/67	150.00	Excluded	Excluded	Included

Payments, insurance, taxes, or other items or transactions in dispute which may alter the final results of the various accountings:

Date	Explanation	Amount	*Interest	Evidence: Carroll	Evidence: Birdsall
7/9/54	payment	$170.00	$215.20	Exs. 27-P, 39-P & 40-P. R. 212, 267, & 269-70.	Exs. 14-D. R. 204 & 213.
11/5/54	insurance proration	16.43	36.49	Ex. 40-P. R. 270-71.	Ex. 4-P, 22-P, & 27-P. R. 277.
2/25/55	payment	25.00	29.70	Ex. 11-P, 22-P & 42-P. R. 178-77.	Ex. 15-P. R. 163 & 169.
1/10/58	payment	35.00	29.32	Exs. 23-P & 24-P. R. 181.	Exs. 16-D & 6-P. R. 164, 181, & 191.
5/16/58	payment	16.60	13.15	Ex. P-2.	Ex. P-3.
11/30/60	taxes	133.98	72.79	R. 27, 31, 224 & 271.	Ex. 7-P. R. 155 & 209-10.
6/20/64	payment	43.25	10.61	Ex. 25-P.	Exs. 9-P & 11-P. R. 183.
2/27/65	payment	151.62	29.82	Exs. 20-P, 21-P. R. 175-76.	Exs. 18-D & 20-P.
11/30/65	taxes	189.61	27.34	R. 271.	Ex. 10-P.
12/16/66	tape recorder	22.17	1.60	Ex. 10-P. R. 166.	Ex. 26-D. R. 205-07 & 218-19.
3/13/67	payment	125.00	7.05	Ex. 41-P. R. 177-78 & 273.	Ex. 19-D. R. 172-73, 207-08, 219 & 277.

*The above interest computations were compounded on a monthly basis by Arthur O. Dummer, 3993 Milky Way Drive, Salt Lake City, Utah, actuary and vice-president of Beneficial Life Insurance Company.

APPENDIX III

Defendants'-Appellants' submit that the weight of the evidence in the record supports the conclusion that they are entitled to additional credits against the contract balance consistent with the following analysis:

Balance Farr Accounting No. 2 — 3/12/68........$4,102.42

Additional credits to which Defendants-Appellants should be entitled:

Date	Amount	Interest
2/25/55	$ 25.00	$ 29.70
1/10/58	35.00	29.32
11/30/60	133.98	72.79
6/20/64	43.25	10.61
11/30/65	189.61	27.34
12/16/66	22.17	1.60
3/13/67	125.00	7.05
	$574.01	$178.41

Less: combined principal and interest.............. 752.02

Defendants'-Appellants' suggested contract balance on 3/12/1958 ....$ 3,350.44

Less: Doxey-Layton mortgage balance — 3/12/68 .... 3,647.3[illegible]

Defendants'-Appellants' proposed overpayment by Defendants at date action commenced.........$ 297.[illegible]