1952

Angelo Ravarino v. Harry Price, Jr. et al : Brief of Plaintiff and Respondent

Utah Supreme Court

McKay, Burton, McMillan and Richards; Attorneys for Plaintiff and Respondent;

7882

In the Supreme Court
of the State of Utah

ANGELO RAVARINO,
Plaintiff and Respondent,

vs.

HARRY PRICE, JR., and MRS. HARRY PRICE JR., his wife, and MRS. MARCUS PARR, also known as ARLINDA PRICE PARR,
Defendants and Appellants.

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INTRODUCTORY STATEMENT

The basic problem in this case is a question of law, viz: Under the facts and circumstances of this case is the defendant Harry Price estopped in equity to assert the defense of the statute of frauds?

The defendants Mrs. Harry Price and Mrs. Marcus Parr both signed an earnest money receipt for the sale of certain

property in Salt Lake City to plaintiff. Defendant Harry Price having signed a listing contract, then orally agreed to complete the said written contract so signed by his wife and sister, Defendant Harry Price was told by plaintiff that he wanted to buy trackage for access to said property, but would buy only if Price definitely was going to sell to plaintiff, and on Price's assurance that he would sell, that there was a deal, and for plaintiff to buy the trackage, plaintiff, in reliance thereon bought a strip of land 19 x 60 feet adjoining the land in question for the sum of $1796.00. The real problem is whether the doctrine of equitable estoppel is applicable as against the statute of frauds in the defense of Harry Price.

The defendants and appellants have not directly contested any single finding of fact or conclusion of law of the Trial Court, nor have they asserted that any finding of fact is not amply supported by the record in the case. Instead, appellants have recited in considerable detail portions of the testimony and evidence in the action. They recite the facts as they would have liked the Trial Court to find them rather than as they were found by the Trial Judge. They request that the Court consider all of the evidence de novo.

We agree that this Court will re-examine the evidence in cases of equity. However, where there is a conflict in the testimony and the findings of fact are amply supported by the evidence, it is well settled in this jurisdiction that this Court will not upset those findings. In the case at bar the Findings of Fact are not only supported by the evidence, but the Trial Court reasonably could not have made any other findings. For this reason the statement of facts of defendants and appellants

cannot be accepted. Reference will be made in the Statement of Facts to the issues of fact before the Court below and the findings made upon them by that Court.

STATEMENT OF FACTS

On or about May 10, 1952, defendant Harry Price signed an exclusive sales agency contract authorizing one Lewis Hansen, a real estate broker in Salt Lake City, to list for sale the property located at "225-235 West 5th South," the size of the property being indicated as "165 x 165" (Exhibit D; R. 76). Approximately two weeks after the signing of this agreement, Mr. Hansen told Mr. Price that he had a signed offer for $18,000.00 for the property (R. 77). Mr. Price told Mr. Hansen that he would come in after work and sign the earnest money receipt on which the offer appeared, but he failed to come. The next day he told Mr. Hansen that his wife "wouldn't sign" and Hansen would "have to get hold of her, she really runs that end of it" (R. 77). Price told Hansen that "as long as she signed he would be willing to go along" (R. 82).

It appears that during July and August the Prices were shown several pieces of income property in Salt Lake City by Mr. Hansen. Their attention centered on a piece of property owned by Mr. A. C. Mollerup in Salt Lake City. Arrangements were made for their inspection of the Mollerup property and a series of negotiations ensued between Mr. Rich, a real estate broker who was acting for the Mollerups, and Mr. Hansen, acting for the defendants, relating to the possibility of an arrangement whereby defendants would purchase the

Mollerup property with the money obtained from the sale of their property. The Prices had an appraisal made of the Mollerup property by a Mr. Schluter. In response to a telephone call from Mrs. Price, Hansen went to her office and discussed the transaction (R. 80).

Exhibits E and J were discussed and signed at the same time by Mrs. Price at a coffee shop below Mrs. Price's office. "Exhibit E," the agreement sued upon in this cause, is an earnest money receipt dated September 21, 1950, signed by Mrs. Harry Price and Mrs. Marcus Parr, as sellers, and Angelo Ravarino, as purchaser. It describes property "165 x 165 at 235 West 5th South." "Exhibit J" is an earnest money receipt agreement signed by Mrs. Harry Price and Mrs. Marcus Parr, as purchasers, and A. C. Mollerup, as seller. It describes certain property as "243-245-247-249 West 4th South (93½ feet by 206 feet and right of way, inc. acreage on Pleasant Court.)"

Mrs. Parr signed these exhibits the next day at noon in Mr. Hansen's office (R. 84). At the time "Exhibit J" was signed, the blank with respect to the interest on the unpaid balance of the purchase price was left blank because they did not know what interest rate was applicable. There was no issue as to the question, but the interest rate was to be obtained from Mr. Rich and it was to be in the same amount "the mortgage had on it" (R. 135).

Hansen called Mr. Price on the telephone September 21st, after Mrs. Price had signed Exhibits E and J, and before Mrs. Parr had signed them. Hansen told Mr. Price in that conversation that his wife had signed and that his sister would

be in to sign the next day. The terms contained in the exhibits were explained in detail to Mr. Price in this conversation. Mr. Price replied that "he was willing to go along;" in fact, "he was perfectly fine about it, he seemed anxious (R. 82-83). Hansen told Price either in that conversation or in one the next day that the deal "was all signed up," and he asked Price "where we could get the abstracts." He was told that Ted Cannon had them. Hansen said that he would get them and have them brought up to date and examined and Price agreed (R. 84).

The two abstracts on the Price property were submitted to Edward M. Morrissey, an attorney representing plaintiff Angelo Ravarino, and the abstract on the Mollerup property was submitted to Mr. Ed Jensen, representing defendants (R. 84, 85). Exhibits L and P are title opinions which resulted from these examinations.

Within three or four days after the signing of the agreement by the two women, Hansen called Price and told him that Mr. Ravarino wanted to obtain some trackage owned by Mr. Roy Terry adjacent to defendants' property. Hansen told Price that he did not want Ravarino to buy a "goat farm" and that the 19-foot strip would certainly be of no interest to Ravarino unless he was to get defendant's property. Hansen's version of the conversation was, "Now, it looks like everything is O.K. and I just want to be sure there won't be any backing out, because I don't want to close the deal on the Terry property. * * * I told him we were ready to close that now and I wanted to be sure there wouldn't be any trouble. * * * I said, 'If there is no objection I will go ahead and close

it.' He said: 'That's fine, go ahead.' I said: I want to be sure because if Ravarino has that it will be like a goat farm because he won't have any right of way to it.' So he assured me it was all right and we closed it right close to that date, I think October 5th was when we made the deal" (R. 87, 88).

Angelo Ravarino obtained the Terry trackage and gave Hansen a check for $19,000 for defendants' property on the same day, October 5th (R. 88; Exhibit N).

After the conversation between Price and Hansen regarding the Terry property there is no question but that everyone concerned believed that they had a deal; in fact, according to Mr. Rich, defendants took possession of the Mollerup property on October 1 and Harry Price was to sign up for the utilities on that date (R. 145). Between October 1st and October 11th Mr. Hansen notified Mr. Rich that Mr. Price had a question about the income tax feature of the property (R. 144). Mr. Rich then called a Mr. Wise of the Bureau of Internal Revenue, and asked whether if there was a trade property there would be an income tax to defendants. The transaction was explained as a "hypothetical question" (R. 144). Up until that conversation there was no different transaction than contained in Exhibits E and J (R. 144, 145).

Mr. Rich then prepared Exhibits O, H and F and these documents were submitted by Mr. Ed Jensen (R. 146). These documents were prepared in their present form for the convenience of defendants in this action and so that there might be a possible saving to them for income tax purposes (R. 101). Mr. Rich called Harry Price during this period of time and told him that Mollerup had ordered some merchandise on

the strength of getting the money, and that he would lose his cash discount if the money was not paid. He said he would need $5000.00. Harry Price told Rich to get the money from Hansen. Harry told Rich in this conversation that "the papers will be signed as soon as the wife gets back from Denver" (R. 148, 149).

On October 5th the closing documents were presented to Mr. Price for his signature. He stated that everything was all right but he wanted to go down to the county clerk's office and determine the value of the property as it was given at the time it was appraised in his father's estate and check some income tax questions, and that he would sign on the following Monday (R. 149, 150). There was no question raised in these conversations as to interest or payments or down payment, because "that was all understood" (R. 150). Subsequently, Mr. Hansen called Mr. Price dozens of times and Mr. Price at all times indicated that he intended to complete the deal but that he would be out of town for a day or two and that he could not come in at that particular time (R. 94, 95, 96).

Finally, Ed Jensen told Hansen that his client was "dragging his feet" (R. 126). In November Price came in to see Hansen and told him that his property was "hot" and that he was not going through with the deal (R. 95).

On November 14, 1950, the same day that this lawsuit was filed, Mr. A. C. Mollerup addressed a letter entitled "Notice and Demand" to Mrs. Price and Mrs. Parr (Ex. 1). The notice stated in substance that unless the transaction was completed before November 20th, Mr. Mollerup would consider himself released and would pursue whatever remedies were available.

On November 18, 1950, Mr. Ed Jensen, representing Mrs. Price and Mrs. Parr, wrote to Mr. Mollerup and in effect demanded performance of the Mollerup contract in behalf of these persons, without interest on the $17,000 balance (Ex. I). There is no indication in Exhibit I that either Mrs. Price or Mrs. Parr are not bound by the transaction, or that they were bound only conditionally upon the acceptance of the deal by Harry Price; in fact, the tender in the letter and the demand was unconditional. Harry Price was still looking into the Mollerup property after the present lawsuit was filed in December.

The principal factual issues before the Trial Court were as follows:

(1) *Were the signatures of Mrs. Parr and Mrs. Price upon Exhibit E conditional?* The defendants claimed at the trial that Hansen told them Exhibit E would not be binding until Harry Price signed it. Hansen denied this, and the Court found specifically that it was not signed conditionally. (Finding of Fact No. 6; R. 251, 252).

2. *Was Exhibit E filled in, i.e. were the blanks filled in when it was signed by Mrs. Price and Mrs. Parr?* The Court specifically found on this question that it was filled in, as contended by plaintiff and as testified to by Hansen. (Finding of Fact No. 6; R. 252).

3. *Did Ravarino purchase the Terry strip in reliance on an oral promise of Harry Price that he would conclude the transaction?* The Trial Court specifically found in Findings

of Fact Nos. 6 and 10 that Price did in fact make such a representation and that Ravarino did in fact rely upon it.

4. *Did the parties intend that all of defendants' property on Fifth South was to be included in the sale to plaintiff?* The Trial Court specifically found that all of the property was included in the transaction (R. 250-251); in fact, it appears that at the time of defendants' first answer they themselves had no question that the entire lot 165 x 165 was to be conveyed. The breaking down of the property into two separate parcels appears to have been an afterthought, suggested by counsel after it appeared that there were separate abstracts. (See Par. 5 of defendants' first answer, R. 6).

The primary question of law, therefore, became simply whether defendant Price was estopped in equity from asserting the statute of frauds as a defense in view of plaintiff's purchase of the Terry strip in reliance on Price's acts and assurances, combined with all other facts including the signatures of the two women and circumstances indicating that the parties all thought they had completed the transaction. The Trial Court decided this question of law in plaintiff's favor.

The record shows that the complaint in this action was filed on November 14, 1950. The answer was filed February 9, 1951. A few days before the trial, to-wit: May 22, 1951, the defendants answered that they still denied that they were liable to plaintiff in any way, but "if plaintiff has been aggrieved or injured by purchase of said (Terry) strip, the defendants herein are ready, willing and able to and hereby offer to pay plaintiff the purchase price which he paid to the former owners of said strip therefor upon plaintiff conveying to de-

fendant Harry Price, Jr., and defendant Mrs. Marcus Parr a good and marketable title thereto." Defendants now allege that they have made a sufficient tender so that they do not have to perform their bargain. We think that the facts with respect to this tender speak for themselves. It will, of course, be argued further in this brief.

STATEMENT OF POINTS RELIED UPON

POINT NO. I

THE FINDINGS OF THE TRIAL COURT ON THE FACTUAL ISSUES ARE SUPPORTED BY THE EVIDENCE.

(a) *The signatures of Mrs. Parr and Mrs. Price upon "Exhibit E," and their assent to the proposition therein contained, were not conditional upon the signatures or assent of Harry Price.*

(b) *The purchase money receipt identified as "Exhibit E" was filled in and in its present form except for the signature of Ravarino at the time it was signed by Mrs. Price and Mrs. Parr.*

(c) *Ravarino purchased the Terry strip in reliance upon Harry Price's promise to complete the transaction.*

(d) *Both of the lots of defendants on Fifth South were included in the transaction.*

(e) *The rule that the findings of the Trial Court on conflicting evidence will not be disturbed on appeal is applicable in this case.*

POINT NO. II

EXHIBIT E WAS THE AGREEMENT BETWEEN THE PARTIES.

POINT NO. III

DEFENDANT HARRY PRICE IS ESTOPPED IN EQUITY TO DENY HIS PROMISE AND AGREEMENT TO BE BOUND PURSUANT TO THE TERMS OF EXHIBIT E.

ARGUMENT

POINT NO. I

THE FINDINGS OF THE TRIAL COURT ON THE FACTUAL ISSUES ARE SUPPORTED BY THE EVIDENCE.

There were a number of important and basic factual questions presented or the determination of the Trial Court. As heretofore stated in this brief, appellants have not contended and apparently do not now contend that the findings of the Trial Court are not without support in the evidence. Appellants do not directly challenge a single Finding of Fact or Conclusion of Law. Nevertheless, they purport to reargue all of the evidence as though this Court was to disregard all of the findings of the Trial judge. Appellants argue isolated bits of evidence which, considered individually, tend to confuse the issues before the Trial Court, and certainly tend to

unfairly present the issues before the Court on this appeal. Appellants could not, we submit, contend *directly* in view of all the evidence in this case that the Findings of Fact are not supported.

Respondent most vigorously asserts *that even in equity, if the Findings of Fact of the trial judge are supported by the evidence as they are in this case, those Findings will not be upset on appeal.* We desire in this portion of the argument to point out to the Court the basic questions of fact involved in this case, and to invite the Court's attention to the evidence which supported each and all of those Findings.

(a) *The signatures of Mrs. Parr and Mrs. Price upon "Exhibit E," and their assent to the proposition therein contained, were not conditional upon the signatures or assent of Harry Price.*

From the beginning of the negotiations the defendant Price made it clear to Mr. Hansen that when the approval of Mrs. Price was obtained to the transaction, the others would be agreeable. After the earnest money receipt was signed by Mr. Ravarino offering $18,000 in cash for defendants' property, Mr. Price came into Hansen's office and said, "My wife won't sign it." Hansen said, "Well, you told me there would be a sale, you didn't mention your wife, you mentioned your sister having to sign it and it would be allright." Whereupon Price said, "You will have to get hold of her, she really runs that end of it." So Hansen testified that he called Mrs. Price "that very day." Hansen told us that "she wouldn't, under any circumstances, sell that property for $18,000 and turn the $18,000 over to Harry. She said: "We will sell it but we want

it to go in income property. If Harry has that money we don't know what will happen to it" (R. 77).

It is submitted that these are not the statements of a woman who did not intend to be bound until her husband approved the deal. It is clear that Mrs. Price was the controlling influence in all of the business transactions relating to the property. The property, of course, belonged to Mr. Price and Mrs. Parr, but Mrs. Price managed the property, handled the income, drew the checks and she drew the check from the account concerning this property to give to Hansen as a deposit when Exhibit J was signed (R. 53, 163).

After the first offer of Ravarino was declined, the primary dealings were with Mrs. Price. She was shown the Mollerup property by Mr. Rich, and the testimony is that Hansen showed various properties in Salt Lake City to her and Mrs. Parr. Mrs. Price arranged for Mr. Schluter to appraise defendants' property and the Mollerup property (R. 51, 165, 166).

It was only natural and logical that the conversation on September 21, 1950, which resulted in the signatures on Exhibits E and J, should be held with Mrs. Price. The evidence is that these exhibits were prepared in a coffee shop below Mrs. Price's place of employment. At that time Mrs. Price related that Mr. Schluter thought the Price property was maybe a little low, and as a result Mr. Hansen filled out Exhibit E to raise the amount on the Price property of $1000 and the Mollerup property was reduced from $36,000 to $35,000, "and so we made them both out right there and she signed them both and she gave me a check for $500.00, which was to

apply on the Mollerup property, and said her sister would be in the next day at noon and sign it" (R. 80).

Mr. Hansen denied that he ever told Mrs. Price that these documents would not be legal until Harry Price had signed them (R. 114). When Mrs. Parr came in the next day at noon, she signed Exhibits E and J without any question, and Mr. Hansen denied making any representations whatsoever to her (R. 82). Mrs. Price was not concerned about her husband's consent. She stated on cross-examination that she signed the exhibits without consulting him. There was no question about securing his approval of the transaction. The fact is, of course, that he approved of it, and that the whole thing was explained to him by telephone the same day that Mrs. Price signed the exhibits (R. 83, 84).

When Mr. A. C. Mollerup served the Notice and Demand (Ex. 1) upon Mrs. Harry Price, Mrs. Marcus Parr and Hansen Realty Company, demanding performance of the earnest money receipt and agreement that was introduced into this case as "Exhibit J," the women did not at that time consider that they were not bound because the signature of Harry Price was not obtained. This notice was served on or about November 14, 1950, on the same day that the complaint was filed in this action. Mrs. Price and Mrs. Parr then went to see Ed Jensen, an attorney, and Mr. Price did not even attend the conference with them (R. 216, 217). There was no demand made for Mr. Price. Mr. Price was not in the conference and at that time the two women were in fact attempting to assert some rights in Exhibit J without any signature of Mr. Price being affixed to it (R. 217).

On November 18, 1950, Mr. Ed Jensen directed a letter to Mr. A. C. Mollerup, which letter was introduced in this action as "Exhibit I" as a result of the conferences with Mrs. Price and Mrs. Parr with respect to the notice introduced here as Exhibit 1. The last paragraph of Exhibit I commences with the language, "Mrs. Price and Mrs. Parr demand that you sell the property above specified to them upon the terms and conditions set forth in the earnest money receipt. * * *" There apparently was no thought at this time that the signatures of these documents were conditional in any way. In fact, Mrs. Price and Mrs. Parr are attempting to assert liability against Mollerup on the basis that Exhibit I is complete in itself.

Even after this action was filed it does not appear that any of the defendants thought of the consent of Mrs. Price and Mrs. Parr and their signatures as being conditional. In Paragraph 5 of the first answer defendants filed on or about February 9, 1951, defendants Mrs. Harry Price and Mrs. Marcus Parr admitted that they executed the agreement. They did not at that time assert any defense to the fact that they signed only conditionally upon the approval of Harry Price.

It appears, in fact, that the first time this notion occurred to defendants was in the course of the preparation for trial. The record here is clear and convincing and the evidence is overwhelming that when Exhibits E and J were signed by the two women, they intended to be bound and they intended to perform the transaction according to the terms of Exhibit E. The suggestion that they might have had different intentions at the time appears clearly to have been an afterthought. There

is no rule of law to the effect that the signatures of one tenant in common is presumed to be conditional upon obtaining signatures of others, especially here, where there is no reliance placed upon the judgment of Harry Price throughout the entire deal. Instead, reliance was placed totally on the judgment of Mrs. Price. She was the real guiding power behind the title to the property. It is not, of course, contended that she had authority to bind Harry Price as such, but it is certainly ridiculous, considering all the facts and circumstances, to assert here that she did not intend to be bound until her husband affixed his signature to the two exhibits. It can hardly be said that the Findings of the Trial Court on this question are not supported by the evidence.

Appellants argue in Point IV of their brief that the enforcement of Exhibit E is inequitable as to the women because of an alleged misunderstanding of the contents and effect of that document. They argue that it was not filled in when it was signed and they argue that Mr. Hansen represented that they were bound unless the defendant Harry Price signed the exhibit. (Appellants' brief, 81-96).

As elsewhere in their brief, defendants entirely skirted the obvious objection to their position in this regard, viz: that the Court found the facts against them. The Trial Court specifically, as herein stated and as stated in Point III of this brief, that Exhibit E constituted the agreement of the parties, and that they knew the contents of the exhibit when it was executed. The Court found squarely against them in their contention that Hansen told them that their signatures would be conditional.

It is again pointed out to the Court that whether or not Hansen told them that their signaures were conditional would be purely a question of oral testimony, and the Court's conclusion was upon admittedly conflicting statements of the witnesses. The Trial Court heard and observed the witnesses. The finding of the Court is explicit. The entire argument of appellants was based upon a finding they hoped to obtain but in which they failed. The argument is entirely fallacious and irrelevant.

The Court's finding on this point is also a complete answer to the point made by defendants in Sub-section 3 of their Point No. III. Exhibit E has not been charged or separated to make an agreement contrary to the intent of the parties. Exhibit E *is* the agreement of the parties, and when it was signed by the women, when Harry Price told Hansen to proceed to close the Terry transaction and the deal was all right with him, he and they were fully advised of the contents of that exhibit.

Certainly the primary arguments of the defendants fail when they are reconsidered in the light of the findings of the Trial Court on the facts.

(b) *The purchase money receipt identified as "Exhibit E" was filled in and in its present form except for the signature of Ravarino at the time it was signed by Mrs. Price and Mrs. Parr.*

One of the factual questions discussed in appellants' brief is whether Exhibits E and J were completed at the time they were signed by Mrs. Price and Mrs. Parr. Defendants and

appellants urge the Court to adopt their view of the matter, which was that they were signed in blank. The Trial Court found "that said contract (Earnest Money Receipt and Agreement) was complete and the blanks all filled in as above set forth at the time Mrs. Parr and Mrs. Price signed said agreement, and all defendants were aware of the terms of the agreement and the signatures of sellers prior to the signature of plaintiff * * * ."

The testimony of Mr. Hansen upon this question is as unequivocal and direct as testimony could possibly be. He testified as follows:

> "Q. Was both Exhibit E and J then filled in other than the signature of Mollerup and Ravarino?
>
> A. Exactly as they are—Mrs. Price was sitting here, and I was here, and they were made out just exactly that way.
>
> Q. They were filled out in her presence?
>
> A. Right, no question in the world about that." (R. 237).

It is true that there is a conflict of evidence on this point. However, the Trial Court found directly and squarely that the blanks were filled in at the time the signatures of Mrs. Price and Mrs. Parr were obtained. The record amply supports the finding of the Court, and there is no reason in this case why this finding should not be sustained on appeal.

The findings of the Trial Court are a complete answer again to the arguments of appellants to the effect that Exhibit E is uncertain and the arguments made under Point IV that

some mistake was made by someone as to the transaction agreed upon. Certainly it is apparent from the record that women of the determination and experience, and with the personalities of Mrs. Price and Mrs. Parr, did not sign Exhibit E without knowing what they were doing. They had been discussing this transaction with Hansen for several weeks; particularly Mrs. Price was fully aware of every detail, including a description of the property and the fact that defendants were receiving $19,000.00 in cash. The argument that defendants were unaware of the significance of their act is most incongruous. Throughout their depositions all three of the defendants referred to their act as involving "their property on Fifth South." It is submitted that they knew perfectly well all of the implications of the writing on Exhibit E at the time it was signed and at all times subsequent thereto.

(c) *Ravarino purchased the Terry strip in reliance upon Harry Price's promise to complete the transaction.*

It is respondent's intention in this portion of the argument to invite the Court's attention to the various portions of the record which support the Trial Court's determination of the *facts* with respect to Harry Price's promise and Ravarino's purchase of the Terry strip in reliance thereon. The legal effect of the facts will be argued in a separate point as a proposition of law.

The Court found "that following the signing of said Earnest Money Receipt and Agreement, and the oral assurance of the defendant Harry Price, Jr., that he accepted, ratified and acknowledged said contract and would sell the property in accordance therewith, and after the said Harry Price,

Jr., had been advised by Hansen that the plaintiff intended to buy the said strip of property 19' x 66' adjoining the said property described in Paragraph 2 on the South, and after the said Hansen, having advised Harry Price, Jr., that the plaintiff would and could have no use for said property and would not buy it unless he was sure the said Harry Price, Jr., would complete the sale of said property described in Paragraph 2 in accordance with the contract of sale, and after the assurance of said Harry Price, Jr., that he would sell the property in accordance with the Earnest Money Receipt signed by his wife and sister, and relying upon the assurance of Harry Price, Jr., that he would convey as aforesaid, the said plaintiff then purchased the said adjoining strip of land 19' x 66' for the purchase price of $1,796.00; that Harry Price, Jr., with full knowledge aforesaid that plaintiff was going to buy said strip of property on the assurance of Harry Price, Jr., that he would sell and convey his property aforesaid in accordance with the Earnest Money Receipt for the purpose of providing access to plaintiff to said property to be purchased from Harry Price, Jr., told the plaintiff to proceed with the purchase of said property and that he would convey in accordance with the Earnest Money Agreement."

Appellants have argued in considerable length and with some considerable repetition that the purchase by Ravarino of the Terry strip was not in reliance upon the promise of Price to complete the transaction. Emphasis is placed on some testimony of Ravarino, Sr., from which it is apparent that Mr. Ravarino refers to a later conversation, in November, after Price had decided that his property was "too hot" to complete the transaction.

It appears that Hansen had discussed the Terry strip with both plaintiff and defendants for some time prior to September 21st. Hansen stated: "I had an offer for a long time on the Terry property that could not go through until the Ravarinos were purchasing the Price property. * * * So the offer was held up until we were positive that the Prices were selling to Ravarinos" (R. 130).

On September 21, 1950, the signatures of the two women were obtained on Exhibits E and J. The contents of Exhibit E were explicitly reported to Mr. Price on the same day that Exhibit E was signed by Mrs. Price and Mr. Price was informed at the same time that Mr. Honsen had available to him the $19,000.00 to complete the transaction (R. 97). Hansen explained to Price that the agreement was represented by Exhibit E (R. 98).

Harry Price also knew of the particular importance of the Terry strip because Hansen had told him about it many times and had expressed the opinion to him that it was important that the Terry strip go with defendants' property (R. 130, 131).

A few days after September 21st, Hansen called Harry Price on the telephone and stated to him that "it looks like everything is okeh and I just want to be sure there won't be any backing out." Hansen told Price that Ravarino wanted to complete the transaction to obtain the Terry strip so that trackage would be available "to get freight cars in there from First South." Hansen said: "I told him we were ready to close that now and I wanted to be sure there wouldn't be any trouble." He said further: "I want to be sure because if Rava-

rino has that it will be like a goat farm, because he won't have any right-of-way to it." Price assured Hansen, "It is all right" (R. 87, 88). The deed to the Terry property was obtained "close to that date, I think October 5th was when we made the deed" (R. 88).

Hansen testified that after his conversation with Price he then saw Mr. Ravarino, and on October 5th he obtained the Terry deed, which was introduced into evidence in this case as "Exhibit N." The check from Angelo Ravarino for $19,000.00 was obtained apparently on the same date as the deed. Ravarino himself stated that he gave Hansen a check for $19,000.00 after the women had signed Exhibit E and that he signed the check at the time he bought the Terry property (R. 244). Ravarino told Hansen that he did not want the Terry property unless he was sure he was getting the Price property (R. 244).

The Court's attention is invited to the fact that on September 29, 1950, the plaintiff had already submitted to Edward M. Morrissey, an attorney in Salt Lake City, the two abstracts of title introduced in this action as "Exhibit A" and "Exhibit B," and that Mr. Morrissey on that date wrote title opinions covering these abstracts. The opinions were introduced in this case as "Exhibit L." This date is important because Harry Price turned over the abstracts to his attorney, Ted Cannon, for delivery to Mr. Morrissey prior, of course, to the date of their examination. Mr. Price certainly had unmistakably given evidence of his intention to be bound by the terms of "Exhibit E" at that time. It appears from Exhibit P," which is a title opinion from Mr. E. C. Jensen to Mr. Ben C.

Rich, on the Mollerup property, that Mr. Price and the other defendants on that date considered that the deal was completed. Mr. Jensen in that title opinion, "Exhibit P," gives various instructions for the clarification of the title to the ollerup property in anticipation of the unexpected conveyance to defendants in this action.

"Exhibit K," a series of statements from McGhie Abstract & Tile Company to Hansen Realty, demonstrates that all of the abstracts in question were completed and the bill sent on or before September 28, 1950.

The real estate men considered that defendants went into possession of the Mollerup property on October 1st (see testimony of Rich, R. 145), and Harry Price saw no reason after his conversation with Hansen why Hansen could not turn over to Mollerup $5,000.00 of the $18,000.00 which was going from Ravarino to defendants (R. 148, 149).

Following the actual delivery of the Terry deed to Ravarino, there ensued a number of telephone conversations between Hansen and Price. Hansen testified that Price talked with him on the telephone dozens of times and on each occasion Hansen stated that he would be into sign the deeds and instruments of conveyance the next day, or that he was going out of town, or that he wanted to check one little angle or another, but always he was stating to Hansen that he intended to complete the transaction (R. 94, 95, 96).

Finally, some time in November, Mr. Ed Jensen, who had been employed by Mr. Price to examine the abstracts on the Mollerup property, informed Mr. Hansen that he

thought his client was "dragging his feet," (R. 126) and it appears that in the early part of November, Mr. Price came into the office of Hansen Realty Company and stated to Hansen that "that is hot property, I am not going to go through with it" (R. 95). It appears that Mr. Price was never asked to sign "Exhibit E" (R. 96), but that he was advised as to every detail of "Exhibit E" and that he knew that the Terry deed had been obtained and paid for in reliance on his promise to complete the transaction according to the Exhibit (R. 96). Harry Price considered that the deal was made.

The fact is that Hansen had a conversation with Price to the effect that Hansen should pay a mortgage in the amount o f$1500.00 to the Tracy Loan & Trust Company out of the money that Hansen had from Ravarino to pay to defendants (R. 97). Price saw no reason why Hansen should not turn $5,000.00 over to him for him to give Mollerup, so that Mollerup could get certain discounts on merchandise he had purchased (R. 148, 149).

There can be absolutely no doubt that the Trial Court was not only justified but virtually compelled to find, in view of this overwhelming and convincing evidence, that Price knew exactly the terms of the transaction intended by the parties, and that he knew that Ravarino did not intend to proceed further with the Terry deal until Price had given his consent. At the time Hansen talked with Price about the Terry strip, no one had any doubt as to what was expected of Mr. Price. Mr. Hansen said in substance and effect that Ravarino wanted to buy the Terry property, provided that Price was willing to complete the transaction pursuant to the provisions of Exhibit

E. Mr. Price replied unequivocally that he would proceed with the transaction and Mr. Ravarino proceeded to acquire the Terry strip in reliance upon this representation.

The Trial Court so determined the facts. Judge Baker in effect found the fact to be as contended by plaintiff in his complaint in this action. Certainly the evidence justifies this finding. There is no question but what the finding is clear and that it correctly reflects the record with respect to the subject matter it contains. The very fact that the appellants in this case do not endeavor to controvert the finding is indicative of the weightiness which it carries.

Appellants argue on Pages 30 and 31 of their brief that no reliance can be placed upon these brief remarks, because they do not "constitute any kind of a promise or offer at all." Certainly the Court must be aware of the manner in which assent is manifest in the business world. Businessmen rarely say, with technical nicety, "I offer to do thus and so" and answer "I accept the offer." The conversation which Harry Price had with Hansen cannot be considered outside of the context in which it occurred. Hansen said in substance, are you or are you not going to proceed with this deal? My client desires to know so that he can protect his interests accordingly.

Mr. Price realized the significance of his own words because he considered himself bound after the conversation, and, in fact, at all times up through the date in November in which he repudiated the transaction he dealt with the property involved as though he was bound, and there is nothing ambiguous or uncertain in his dealing toward any of it.

Ravarino purchased the Terry property immediately following the conversation. He gave Hansen $19,000.00 at the same time, clearly indicating that he believed, with Price, that the bargain was complete, that only the detail of obtaining the deed remained.

(d) *Both of the lots of defendants on Fifth South were included in the transaction.*

Appellants state on Page 5 of their brief that the "undisputed testimony" is that only the lot with the warehouse upon it on Fifth South was to be conveyed in the transaction involved in this lawsuit. Probably no portion of appellants' argument is more indicative of their efforts to create confusion after this dispute arose over facts that were perfectly well understood at the time the transaction was agreed upon than is this argument. The two women come into court and testify that only one lot is involved when they have signed an Earnest Money Receipt describing the property as 165 x 165 feet, and when it appears that all the negotiations with reference to the sale of the property included all of defendants' property on Fifth South. What appellants refer to as "undisputed testimony" in their brief appears to be somewhat of an ingenious afterthought. Certainly the Trial Court would not have been justified in finding anything else than that the entire tract on Fifth South, 165 x 165 feet, was to be sold to plaintiff.

It is particularly interesting that appellants contend that this Court should reverse the Trial Court on the fact that because the "documentary evidence tells the whole story," and yet they assert that these women believed, despite the

unambiguous dscription in Exhibit E, that only part of the land was involved. The fact is that every document introduced in evidence in this case demonstrates that defendants thought all of their property was being sold. Defendant Harry Price admits explicitly that there was no misunderstanding on his part. He knew that all the property was involved from the very beginning. There was no occasion for him to discuss any different arrangement with his wife (R. 236).

Attention is again invited to the finding of the Trial Court and the evidence supporting the finding that at the time Mrs. Price and Mrs. Parr signed Exhibit E it was filled in and in its present form, describing the lot 165 x 165 feet (R. 237).

Both abstracts covering in the aggregate the same property described in the Earnest Money Receipt were turned over to plaintiff's attorney for examination, and the opinions of Edward M. Morrissey describe both pieces of property. They are dated September 29, 1950, after the entire transaction was worked out and agreed upon. The documents of transfer (Exhibit G and Exhibit O) describe all of defendants' property on Fifth South. These documents were present at the conversations which occurred in Hansen's office after the purchase of the Terry strip (R. 91). No objection was raised to any of these descriptions at the time of these conversations (R. 91, 92). Apparently there was no doubt at this time that the Fifth South property was being conveyed, because the defendants and real estate men were present at these conversations. Moreover, these documents or copies were submitted to Ed Jensen (R. 146), and apparently he had them in his

possession at the time he prepared the Demand to Mr. Mollerup (R. 92, 207, 208). Even at the time the first answer was prepared and filed on or about February 9, 1951, there was no question about the description of the property in Exhibit E (R. 5 and particularly Par. 5). The evidence upon which defendants base their argument in this respect is certainly most unreliable; it consists of the statements of the women as to their state of mind and the appraisal of Mr. Schulter, made out of the presence of any other witnesses.

It appears from the record that like several other of the defenses, the suggestion that there was only intended to be one lot conveyed to Mr. Ravarino was an afterthought, inspired by the placing of the case upon the trial calendar. Certainly there is ample and convincing support in the evidence for the finding of the Trial Court that all of defendants' property was included in the transaction.

(e) *The rule that the findings of the Trial Court on conflicting evidence will not be disturbed on appeal is applicable in this case.*

While the Constitution of the State of Utah, Article VIII, Section 9, gives this Court the power to review factual as well as legal questions on appeal in equity cases, this Court has uniformly held that the finding of the Trial Court on conflicting evidence in an equity case will not be set aside, unless the Trial Court manifestly misapplied facts or made findings against the great weight of the evidence. *Olivero v. Eleganti,* 61 Ut. 475, 214 Pac. 313; *Jenkins v. Nicolas,* 63 Ut. 329, 226 Pac. 177; *Bennett v. Bowen,* 65 Ut. 444, 238 Pac. 240; *Hansen*

v. Mutual Finance Corporation, et al., 84 Ut. 579, 37 Pac. (2d) 782; *Hoyt v. Upper Marion Ditch Co.,* 94 Ut. 134, 134, 76 Pac. (2d) 234; *Stanley v. Stanley,* 97 Ut. 520, 94 Pac. (2d) 465; *Tanner v. Provo Reservoir Co.,* 99 Ut. 139, 98 Pac. (2d) 695; rehearing denied 99 Ut. 158, 103 Pac. (2d) 134; *Bear River State Bank v. Merrill,* 101 Ut. 176, 120 Pac. (2d) 325; *Prowitt v. Lunt,* 103 Ut. 574, 137 Pac. (2d) 361.

This rule has been uniformly applied in equity cases and has been held applicable in varying factual circumstances. The rule has been variously stated by this court and has been variously stated as well by courts of other jurisdictions, but the fundamental meaning and purpose of the rule is clear. Where the trial court has seen the witnesses, observed their demeanor on the witness stand, has heard the entire evidence, it is, of course, in a better position to judge the credibility of witnesses and to determine what inferences might properly be drawn from the various testimony.

It is submitted that in this case there is no justification for failure to apply this rule to the ultimate factual questions. Admittedly there was a considerable disparity in the testimony of the defendants and the other witnesses with respect to certain basic factual questions. The defendants and appellants, however, do not even argue directly that the findings of the Trial Court were not supported by the evidence. Conflicting inferences might be drawn and more weight might be given to certain testimony than to other testimony, evidence and circumstances proved to the Court, but the Trial Court observed and analyzed all of these circumstances and contradictions. The conflicts and the evidence were resolved and

the Trial Court made its findings with respect to the ultimate questions of fact in issue.

It is felt that a careful reading of the record will conclusively demonstrate that the overwhelming weight of the evidence and the inferences to be drawn therefrom preponderates in favor of the plaintiff's position throughout the proceedings. The findings are supported by the evidence and the findings are not disputed by any uncontroverted evidence in the case.

The appellants assert that "the documentary evidence tells the whole story," and "on these documents rests also any question of credibility here so that this Court is in as good a position on such matters as the trial court" (Appellants' brief, Page 4). No sooner have the appellants spoken these words, however, than they proceed to explain to the Court in their Statement of Facts and in their Argument the reliance placed upon *conversations* between and among the parties in the case.

It is perfectly apparent from reading the appellants' brief, and from the discussion of the factual issues in this brief, that the *documents do not tell the whole story.* The entire theory against the defendant Harry Price is equitable estoppel and is based upon some oral statements made by him to the real estate agent handling the transaction for the plaintiff in this case. If the documents tell the whole story, then why is it possible for the defendants Mrs. Price and Mrs. Parr to contradict, argue with, dispute and attempt to evade the plain and unambiguous language on Exhibit E, introduced in this action? It is too plain for argument that

the documents do not tell the whole story, and that it was necessary in this case to resort to the testimony of witnesses concerning conversations and occurrences outside of any written or undisputed evidence or testimony.

POINT NO. II

"EXHIBIT E" WAS THE AGREEMENT BETWEEN THE PARTIES.

The greater part of defendants' brief has been an attempt to avoid the fact that Exhibit E was the contract for the sale of defendants' property. In reply to that we wish to submit the following to the Court.

In Finding No. 6 Judge Baker sets forth in full "Exhibit E" and finds that it was signed by Mrs. Price and Mrs. Parr with knowledge that Harry Price, Jr., had approved the terms, and that the signatures of Mrs. Price and Mrs. Parr were not affixed conditionally in any manner whatsoever; that all defendants were aware of the terms of the Agreement, and that plaintiff signed the Agreement two or three days after the signing and approval of that Agreement by defendants; that all defendants agreed to sell to plaintiff the said land in accordance with the terms and conditions of the Earnest Money Receipt and Agreement, and that plaintiff agreed to purchase in accordance with that Agreement; that Harry Price, Jr., ratified, approved and acknowledged the contract as his own and is estopped to assert the defense of the statute of frauds for his failure to sign the Agreement.

Ravarino was only concerned with the purchase of the Price property. What the Prices did with this purchase money was of no concern to him. Whether Price bought other property, bought stocks or put it in a bank account was of no concern to Ravarino so long as he received his property.

Mr. Ben C. Rich, a real estate agent having the listing for sale of the Mollerup property, said in his testimony (R. 140):

> "A. Well, Mr. Hansen called me up and said he had a deal on to sell the Price property to the Ravarinos, that Mrs. Price wouldn't sell unless we found her a piece of good investment property to put the money in and wanted to know if the Mollerup property was still available."

Mr. Rich then indicated the events in which the property had been shown to the parties. Then at R. 140 he stated:

> "Q. When was the next incident that occurred?
>
> A. When Mr. Hansen informed me he had an offer on the property signed by the Prices.
>
> Q. And what was the next thing you did after that conversation?
>
> A. I went down and picked up the offer and took it down to Mr. Mollerup.
>
> "Mr. Mollerup looked it over . . . it was for some less than Mr. Mollerup was asking for the property, but it called for $18,000.00 cash and he had need for the money in his business at that time . . ."

At R. 142 Rich states:

"Q. What was the next thing you did in connection with this transaction?

A. I got the abstracts from Mr. Mollerup, sent them down to Ed Jensen to examine."

At R. 143:

"Q. Had anything been said up to the time the date of that letter, October 11th, about there being any trade in this matter? * * *

A. Yes."

At Page 144 of the record:

"Q. Can you tell me about the date of this conversation?

A. It was between this period of October 1st and Oct. 11th.

* * * *

Q. Did you ever have any discussions with Mr. Price relative to any income problems he might have arising out of the sale of his property?

A. The information came to me from Mr. Hansen, that Mr. Price was worried about the income features of the property, of the deal, so I told Mr. Hansen that I would check up with the Internal Revenue Bureau and get a ruling on it.

Q. And that conversation you have given was dated sometime between October 1st and October 11th?

A. So I called the Internal Revenue Bureau, setting the facts of this transaction as a hypothetical question, I didn't state the names of the parties, I just called Mr. Wise, giving him the facts of this hypothetical question. I asked if it would be taxable.

He said not for trade, income property would be tax free and I related that information to Mr. Hansen.

* * * *

Q. Up to the point of the conversation with Mr. Hansen as far as you know there was no transaction, no writing, no oral statement different than the provision of Exhibit J which you have there, the earnest money receipt?

A. Not as far as we are concerned there was not."

Again at R. 145 Mr. Rich states:

"Q. I will ask you this, what was this $18,000.00 to be?

A. It was to be money, cash."

Again at R. 156, on cross-examination, Mr. Mulliner asked Mr. Rich this question and received this answer:

"Q. And as far as you knew the deal as it was expected to go was a trade of the Price and the Mollerup property?

A. No, as originally signed up, it was a cash deal to Mr. Mollerup as it was originally signed up but it was adjusted later to this to help Mr. Price's tax situation."

In the examination of Mrs. Parr at R. 198 appears the following testimony:

" * * * Well, you see if we have this: You were selling to Ravarino, which determined the value that there would be for your Fifth South property?

ANSWER: Yes."

The following is the excerpt from the deposition of Mrs. Parr as it appears at R. 195:

> "ANSWER: No, when I talked to my sister-in-law what was to be done, we were to pay so much down and the balance in monthly payments at a set price * * *
>
> QUESTION: The amount that you paid down would be the amount you would get from the Ravarino sale?
>
> ANSWER: Uh huh."

From all the foregoing it is clear that as indicated by the evidence, there were two separate contracts, Exhibit E for the sale and purchase of the Price property and Exhibit J for the sale and purchase of the Mollerup property. As to the Mollerup property, the sum realized by the Prices and Mrs. Parr from the sale of their property was to be used as the down payment for the purchase of the Price property.

Exhibit E, as found by Judge Baker, was fully understood and known by both the Prices and Ravarino, was exhibited by them, and the evidence amply supports the Finding of Judge Baker that the parties intended to proceed in accordance with its terms and were bound by it. The details of arranging for the conveyance to Mollerup were of no consequence to Ravarino so long as he received title to the property. The fact that Price desired to have title come to Ravarino through Mollerup was not even known by Ravarino until after Exhibits E and J were signed (R. 109).

The original answer of defendants contained no reference to any "trade" rather than sale. The claim to an exchange agreement first appeared in the amended answer of May 22, 1951, filed just prior to the trial setting in the spring of 1951.

It is, of course, clear from the record that the conversation between Mr. Price and Mr. Hansen which resulted in the purchase of the Terry property was a few days after the execution of Exhibits E and J by the women. Prior to this conversation, Hansen had explained every detail of the transaction to Harry Price.

Argument is made in appellants' brief to the effect that the plaintiff did not rely upon Price's promises when he purchased the Terry strip. Appellants refer to some testimony of Ravarino when Price said, "I'm going on the road five or six days and when I come back I will let you know, yes or no."

This argument could be answered appropriately under Point III of this brief, but since it also concerns the agreement of the parties and the relationship that existed because of that agreement, it is mentioned here. The conversation referred to by Ravarino in which Price said, "I will let you know, yes or no," clearly occurred long after the rights of the parties had become fixed because of the execution of Exhibits E and J and the purchase of the Terry property. It is perfectly clear that Mr. Ravarino never met Mr. Price until sometime toward the last part of October or the first part of November, when Price went down to see them at their place of business. Price himself states that he only had one conversation in his life with Ravarino (R. 234), and that occurred in Ravarino's office at approximately the time the summons was served upon Price in this action (R. 235). It resulted from Hansen's call to Price in which Price was told that "Ravarino is really on my back." Ravarino was told in this conversation by Price that "I didn't think I was going through with that deal."

It is interesting to note that Price was told at this time that the Terry strip had been purchased and that the architect had been employed to draw the plans and the steel had been purchased, apparently for the construction of a building. Price's remark was "that's up to you, he hasn't my property, and that's up to you buying that strip." Price stated that he thought "they got a little wild about it, especially the elderly Mr. Ravarino" (R. ibid.) This was the only conversation which Price ever had with Ravarino, and it is somewhat ridiculous for appellants to try to breathe something into the testimony of Mr. Ravarino, particularly in view of the obvious language difficulties he was having during his examination and cross-examination. All Ravarino said about his conversation with Price was that even at that late time he was told that the two women were still willing to proceed on the transaction but that Harry Price was welching on the deal. This is consistent with the notice given by Ed Jensen to Mollerup that the women were ready to proceed.

Even at this late time Harry Price, in his conversation with Ravarino, was not making any alibis for not performing along the lines of the defenses made in this case. There is no indication that there was any question in his mind that the plaintiff was entitled to the property. There was no question that Exhibit E did not constitute the agreement. The only excuse for non-performance that Harry Price suggested to anybody until after this lawsuit was well underway was that his property was "hot" and that he "was not going through with that deal" (R. 235).

Appellants have attempted in this case, by the selection

of approximately a half dozen lines of the testimony of Angelo Ravarino, to support their position that the terms of the agreement were not definite and that there was no reliance by Ravarino upon Price's promise at the time Ravarino purchased the Terry strip. The quotation from Ravarino's testimony is: "I signed that and at the same time we buy Terry property, see?" Counsel for appellants have misquoted this statement of the record to have it read as follows: "I signed that (Exhibit E) at the same time we buy the Terry property, see." The leaving out of the word "and" is certainly most significant in the testimony of the elderly Italian who has the evident difficulty with the English language as did Angelo Ravarino. The foregoing appears at Page 244 of the record.

Again we quote: "I gave Mr. Hansen one week. You know he come so many times in my place, so I gave Mr. Hansen one week, if you fix it up, fix it up for 19,000, okey, I give you one week."

Here again counsel have omitted the significant part of the testimony which appears at page 242 of the record, wherein the following is to be added to the testimony of Ravarino, identifying the time and the date which he might have had in mind in referring to Exhibit E: "Two, three days later he came and bring me that book and say Mrs. Price and Price's sister they all fix up and sign and I give this thing, I give it to my lawyer—." The foregoing appears on Page 242 of the record.

Counsel also omit from Ravarino's testimony the following answers and questions as they appear at Page 244 of the record:

"Q. Did you ask Mr. Hansen before you bought the Terry property if the deal was closed because you didn't want the Terry property without the Price property?

A. Mr. Hansen said Mrs. Price and Price's sister they sign and everything will be okeh, and the time was okeh and everything will be okeh that time. He said, 'You better get the money ready so we can pay them.' That is when I got and cash $11,000.00 U. S. Bonds and I never get nothing, if I have it now I have 11,000, I lose already 1,600 besides that, let me tell you."

"MR. H. L. MULLINER: I object to it, Your Honor.

Q. (BY MR. BURTON): Now, in the conversation to Hansen, was anything said about your not wanting the Terry property unless you were sure you had the Price property?

A. Sure, I told him.

MR. H. L. MULLINER: Let me state, the Court please, Mr. Hansen told us what it was, what is the use of coming back with this now?

MR. BURTON: It is to show—

THE COURT: Well, he answered the question.

MR. BURTON: That is all."

From the foregoing it is clear that Mr. Mulliner, Sr., had conceded to the Court and counsel that Hansen had given the story of the conversation with Price in reliance on which Ravarino proceeded to buy the Terry property.

In the face of this explicit concession made by counsel during the trial, the appellants come back in their brief, following a brief cross-examination of the witness on the very

subject, through the use of approximately a half dozen lines of his testimony, and assert that he did not rely upon Price's promise in the purchose of the Terry property.

It is submitted that the whole record demonstrates the certainty of the agreement and the definiteness of the reliance thereupon by the plaintiff in the purchase of the Terry strip.

POINT NO. III

DEFENDANT HARRY PRICE IS ESTOPPED IN EQUITY TO DENY HIS PROMISE AND AGREEMENT TO BE BOUND PURSUANT TO THE TERMS OF EXHIBIT E.

The Trial Court found and the evidence is that the following developments occurred in sequence:

(1) Harry Price signed the listing agreement with Hansen for the sale of the Fifth South property owned by the defendants (R. 250).

(2) Hansen reported an offer to Price, who reported it to his wife. Hansen was told by Price that the offer did not agree with Mrs. Price, particularly because she wanted other income property, and everything he could work out with Mrs. Price would be agreeable and acceptable to Harry Price.

(3) Mr. and Mrs. Price were both shown the Mollerup property and after some discussion Mrs. Price and Mrs. Parr signed "Exhibit E" and "Exhibit J" in their present form.

(4) "Exhibit E" was explained in every detail to Mr. Price by Mr. Hansen. Every requirement and provision of Exhibit E was explained to and discussed by Mr. Price.

(5) Abstracts were brought to date and examined, and a few days after the explanation of Exhibit E to Mr. Price, Hansen told Price that the plaintiff Ravarino desired to purchase the Terry strip of trackage. Price was told that Ravarino did not want to buy the strip unless Price was going through with the transaction as explained to him. He further was told that the strip would be nothing more than a goat farm unless he agreed to sell to the plaintiff in conformity with the agreement of the two women. Hansen was told by Price in this conversation to go ahead with the deal and for Ravarino to buy the Terry strip.

(6) The plaintiff Ravarino did in fact purchase the Terry strip and the deed of conveyance was executed to him. At the same time plaintiff left with Hansen for delivery to defendants the purchase price for the Fifth South property.

(7) Closing documents were prepared and approved and possession taken of the Mollerup property.

(8) Various telephone conversations occurred between Price and Hansen on the one hand and Hansen and Ed Jensen, representing Price, and after a number of such conversations, Jensen told Hansen that Price was dragging his feet.

(9) About the first part of November, Price told Hansen that his property was 'too hot to sell," in substance, and that he was refusing to go along with the deal.

Of particular importance, of course, is the conversation between Mr. Price and Mr. Hansen, and that conversation has been reported in detail to the Court in this brief. There is no question, and can be no doubt, that the plaintiff purchased the land from the Terrys in direct reliance upon Price's statement to Hansen that he, Price, would convey the land. The real question in this case is whether under the circumstances, and in view of the factual determinations of the Trial Court with respect to the controverted issues of fact, the doctrine of equitable estoppel is applicable.

This presents the real legal issue in the case. We submit that the appellants have skirted the problem, dodged it and attempted to evade it. The Trial Court, however, faced it squarely and concluded that defendant Harry Price was estopped under all the facts and circumstances to deny liability pursuant to the understanding expressed in Exhibit E. We think this Court will affirm the determination of the Trial Court on this question upon a full consideration of the basic doctrine of equitable estoppel as applied to the facts.

The doctrine is, of course, a development of the chancellor to avoid the harshness and frequently the downright injustice of the Statute of Frauds. Pomeroy describes generally the doctrine in Section 803 of his work on equity jurisprudence, (Pomeroy's Equity Jurisprudence, 4th Ed., Volume 2, pages 1635, etc.) He defines the doctrine as follows:

> "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of prop-

erty, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy."

Pomeroy Equity Jurisprudence, 4th Ed, Sec. 804. The doctrine is stated in *Corpus Juris* as follows:

> "As a general rule, where a person with actual or constructive knowledge of the facts induces another by his words or conduct to believe that he *acquiesces* or ratifies a transaction, or that he will offer no opposition thereto, and that another, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice. (31 CJ 112).

Appellants in their brief apparently take the position that there must both be part performance and fraud for the application of the doctrine of equitable estappel (Appellants' Brief Point 2, particularly pages 41, etc.) Appellants' argument in this respect, however, which seems to infer that both part performance and equitable estoppel must be proved to make a case, is totally lacking in substance and is certainly an improper analysis of the basic doctrine involved. The editor of 75 ALR, 651, discusses the historical and analytical relations between the doctrines of estoppel and part performance as a basis for the enforcement of contracts. He states:

> "One cause of the misconception of the basis of the doctrine of part performance probably lies in the requisite of this doctrine that the acts relied upon must have been done in pursuance of the contract, and must be referable thereto. This requirement is pri-

marily intended not to assure the probative integrity of the acts in question, but to show that the plaintiff relied upon the agreement and upon the defendant's inducement or acquiescence, such reliance being a prerequisite element of estoppel. The relative trustworthiness of the acts as evidence was probably considered by the courts in formulating and limiting the doctrine of part performance; but, if so, this consideration was merely an argument in favor of the feasibility and safeness of applying principles of estoppel in such cases, and was not the real basis of the doctrine. In other words, this consideration may have been a justification of the doctrine, but it was not the basis thereof."

The editor concludes, after quoting Story on *Equity Jurisprudence,* 14th Ed. Sec. 1005, 1047, and Pomery *Equity Jurisprudence,* 4th Ed. Sec. 1409, that:

> "The weight of authority recognizes the rule to be based upon estoppel or fraud."

The editor states significantly at the conclusion of the annotation:

> "Estoppel, to assert the statute of frauds, is no more a subversion of the law than is estoppel to take advantage of any other firmly established legal principle, whether embodied in a statute or not. *The principle of estoppel is of equal dignity with the statute of frauds, and is perhaps even more indispensable as a protection against fraud."* (Emphasis supplied).

Attention is invited to the further fact that the fraud concerned is not actual fraud in the sense of "a willful deception, but simply it is unconscientious; much less do they assert that there was actual fraud—willful deception—in the act of entering into the verbal contract." (See Pomery *Equity*

Juprisprudence, supra, Sec. 803, where the author points out that the fraud which constitutes the estoppel may consist of of acts, words, or silence, with or without an intention to deceive.)

Attention is also invited to the annotations at 101 A.L.R. 923, 945, et seq. with respect to the doctrine of part performance in suits in equity for specific performance of parol contracts to convey real estate and the Comment Note at 117 A.L.R. 939 concerning the relationship between the doctrines of equitable estoppel and part performance.

It now appears as to be well established that the doctrine that part performance will take an oral contract out of the statute of frauds rests essentially upon the ground of estoppel. See *Wolfe, Administratrix, et al. vs. Wallingford Bank & Trust Co.,* 124 Conn. 507, 1 Atl. (2d) 143, 117 A.L.R. 932. The following language of the Court in that case is of interest in the case at bar:

> "The estoppel in such a case as the one before us makes enforcible an agreement in all respects complete and valid except that compliance with the statute of frauds is lacking, by preveting the defendant from setting up that statute to defeat his agreement. Insofar as *DeLucia vs. Witz,* 92 Conn. 416, 103 Atl. 117, is contrary to the conclusion here reached, it must be overruled.
>
> "Two other claims of the defendant require but brief mention. One is that an actual design or intent to deceive or defraud must exist in the maker at the time of his representation or promise to afford the basis of an estoppel. The law is not so. 'In this connection the meaning given to fraud or fraudulent is

virtually synonymous with unconscientious or inequitable. The fraud may and generally does consist of the subsequent attempt to controvert the representation and to get rid of its effects, and thus to injure the one who has relied on it, or, as it has been stated, equitable estoppel arises when the conduct of the party estopped is fraudulent in its purpose or unjust in its results.' 10 R.C.L. 691, Sec. 20; Seymour vs. Oelrichs, 156 Cal. 782, 796, 106 Pac. 88, 94, 134 Am. St. Rep. 154."

It is, of course, clear that equitable estoppel is available with respect to a defense of the statute of frauds. The editor of Ruling Case Law states:

"It has frequently been asserted as a broad general rule that a court of equity will not permit a party to shelter himself under the defense of the statute and thereby commit a fraud on the other party to the contract. This principle is not limited to any particular class of contracts and has been applied to a contract of employment not to be performed within a year. An equitable estoppel may also be invoked to preclude a party to a contract from setting up the defense of the statute, and it is now generally recognized that permitting the doctrine of equitable estoppel to operate in effect to transfer title to real estate does not contravene the statute."

The principle of equitable estoppel has been explicitly adopted by this Court. See *Hilton v. Sloan,* 37 Utah, 359; 108 Pac. 689; *Kerr v. Hillyard,* 51 Utah 364, 170 Pac. 981; *Tanner v. Provo Reservoir Co. et al.,* 76 Utah, 335, 289 Pac. 151; *Bamberger Co. et al. vs. Certified Productions, Inc. et al.,* 88 Utah 194, 48 Pac. (2d) 489; *Latses vs. Nick Floor, Inc.,* 99 Utah 214, 104 Pac. (2d) 619. As stated by the Court in *Bam-*

berger Co. vs. Certified Productions, Inc. et al., supra, in the opiinon of Judge Wolfe:

> "As stated by Mr. Justice Cardozo, then justice of the Court of Appeals of New York, in Imperator Realty Co. v. Tull, 228 N. Y. 447, 127 N. E. 263, 266: 'Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver * * *. We need not go into the question of the accuracy of the description. * * * The truth is that we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. * * * The statute of frauds was not intended to offer an asylum of escape from that fundamental principle of justice.'
>
> "We accept this principle. If a party has changed his position by performing an oral modification so that it would be inequitable to permit the other party to found a claim upon the original agreement as unmodified or defeat the former's claim by setting up a defense that performance was not according to the written contract, after he has induced or consented to the former going forward, the modified agreement should be held valid."

and this even though the modification was within the statute of frauds.

While it may be true that there never has been a case exactly like the one at bar, the principle of equitable estoppel should certainly be applied to the facts in this case, that principle being, "that he who by his language or conduct leads another to do what he would not otherwise have done, shall

not subject such person to loss or injury by disappointing the expectations upon which he acted." 75 A.L.R. 642, 646.

Can there be any doubt that these principles are applicable to the case at bar?

Attention is again invited to the testimony of Hansen to the effect that Price unequivocally and definitely stated that he would go along with the deal and to go ahead and purchase the Terry property.

It is to be observed in the case at bar that the plaintiff purchased an interest in real property adjoining the property owned by the defendants in reliance upon the promise of Price. Of course, the piece of property that he purchased was in the nature of an improvement to the defendants' property. How can one imagine a more valuable improvement to property of this kind than an adjoining piece of trackage? The trackage has no value in itself and, in fact, is absolutely worthless. It constitutes truly a 'goat farm" in the language of the real estate agent Hansen if it is not used with other property, but it is in the nature of a valuable real property interest when used in connection with the real property owned by defendants.

There are two decided cases in which the purchase of interests in real property in reliance on an oral promise has been held to constitute acts of reliance within the meaning of *Vogel v. Shaw,* 42 Wyo. 333, 294 Pac. 687, and the celebrated and frequently cited case of *Dickerson v. Colgrove,* 100 U. S. 578, 25 L. Ed. 618.

The *Vogel* case stands for the proposition that where a promisor represents to a promisee that if the promisee will

purchase realty of which the promisor is the leasee, the promisor will assign to the promisee his lease and a sublease and the promisee buys the property relying upon such representation, the promisor is estopped in equity to assert the statute of frauds as a defense where an action is brought involving the right to the rent paid by the sub-lessee.

The Wyoming Court held explicitly in this case that a plaintiff was enttiled to rely upon the oral agreement to convey the lease after he had acted on a promise in good faith, notwithstanding the fact that the lease was clearly within the statute of frauds in the state of Wyoming. This Wyoming case is extremely carefully considered; it contains analyses of cases from Massachusetts, California, the United States Supreme Court, North Carolina, Iowa, Texas, New York and other states, and in addition cites a number of well-considered texts and authorities. The Wyoming Court concluded "over and over again the courts have said that they will not allow the defense of the statute of frauds when in so doing it becomes an instrument for perpetrating fraud. Vogel having used the promise of an intended abandonment of his rights under the Files lease to induce Shaw to do what he otherwise would not have done, should not—in the language of the court of last resort in this nation—'subject such person to loss or injury by disappointing the expectations upon which he acted.' In our judgment the offered proof should have been received and error was committed by the trial court in not doing so."

The *Dickerson v. Colgrove* case, supra, is summarized by the Wyoming Court as follows:

"There one C owned certain land and died, leaving

as his only heirs a son and a daughter. On May 3, 1953, the daughter and her husband conveyed all the land to M by warranty deed. M took possession of the property. Prior to April 1, 1856, M learned of the existence of C's son and that he lived in California. M caused a letter to be written to the son, inquiring whether he made any claim to the premises. The son wrote to his sister in Michigan wherein he said, 'You can tell Mr. Moreton for me, he needs not fear anything from me * * * I intended to give you and yours all my property there and more if you need it.' The contents of this letter came to the knowledge of M, who took no measures to perfect his title nor to procure redress from the daughter and her husband, who had conveyed and paid for the whole of the property, nothwithstanding they owned but half. Thereafter M conveyed to the defendants, who were numerous and who also went into possession of the premises so transferred. Subsequently the son in California, by quitclaim deed, passed an undivided one-half of the property to the plaintiffs, who brought a suit in ejectment against M and his grantees for the land covered by the quitclaim deed. The trial court held that the son's grantees were bound by an estoppel in pais and gave judgment against them. Affirming this judgment and citing with approval the language of Judge Kendall in the case of Paxton v. Paxton, the Supreme Court of the United States significantly said: 'The estoppel here relied upon is known as equitable estoppel or an estoppel in pais. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.' "

The Court further said in the *Dickerson-Colgrove* case that a change of position by a promisor under the circumstances

there "is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice."

A considerable amount of argument in Appellants' brief is devoted to the idea that defendants below can avoid the doctrine of equitable conversion by their last minute tender to plaintiff of the amount of the purchase price of the Terry strip. The record shows that the answer was filed in this action on February 9, 1951. It was in effect a general denial. The defendants particularly denied that they had any information "pertaining to the acquisition by plaintiff of a strip of land purportedly purchased by him as in said paragraph alleged, and upon this ground deny the same." This despite the fact that Harry Price discussed the Terry sale with Mrs. Terry late in 1950 (R. 37). On the 22nd day of May, after the case was placed on the trial calendar, defendants came in and made an offer to pay plaintiff the amount of the purchase price for this strip of land.

The entire doctrine of equitable conversion is founded on the premise that land itself has a peculiar value, and that the payment of a sum of money would not make whole a promissee who has bargained for land. The very fact in this case that defendants are now willing to pay some money and that plaintiff is unwiling to accept, is indicative of the fact that defendants' property on Fifth South has a value far in excess of the money expended for the Terry strip.

Look at the first answer of defendants. Look at the position they have taken in this lawsuit. Consider the fact that the court below found time after time that the facts were con-

trary to their testimony. Consider the fact that they refused to do anything until they found themselves backed into a corner by this lawsuit. The recital demonstrates the fraud which would be perpetrated upon Ravarino if defendants were permitted to wiggle out of the position in which they have placed themselves.

The unfair position assumed in making the offer is further illustrated by an analysis of it. Do they offer to do equity when they omit the real estate commissions and taxes paid; loss of the opportunity for valuable land and trackage near Growers' Market; loss of the use of $19,000.00 for a period of several months pending this lawsuit; loss of money in bringing a lawsuit to enforce the contract?

Attention is invited to the similarity of the instant case and the case of *Boelter v. Blake,* 12 N. W. (2d) 327. Here a man and wife held title to a home. A written option for the purchase of the home by plaintiff was signed by the man but not the wife. The wife had knowledge of the option. In decreeing specific performance against the wife, the Court said:

> "The plaintiffs were tenants living in another dwelling owned by the defendants. After some preliminary negotiations, Mr. and Mrs. Boelter inspected the Cherrylawn Avenue property, and the terms of its sale were agreed upon with Mr. Blake. It was orally agreed that at the end of one year the plaintiffs would purchase the Cherrylawn Avenue place for $3,500, and during the year would pay $40 per month, $30 of which amount would be considered rent and $10 of which ($120 at the end of the year) would be applied on the down payment. Plaintiffs were also obliged by the

agreement to pay $300 as the balance of the down payment to the defendants at the end of the year if the option to purchase was exercised. The balance of the $3,500 was to be paid at the rate of $30 per month, which payments included taxes and insurance. On October 4, 1940, the plaintiffs paid to Mr. Blake $10 to close the deal and received a receipt therefor which Mr. Blake testified should read '$10.00 and $30.00 when house is ready. Option for rent at 19434 Cherrylawn'. It is denied that Mrs. Blake took part in this oral agreement although Mrs. Boelter testified that Mrs. Blake was present and took part in the conversation.

* * * *

"The plaintiffs have fully performed their part of the bargain. Mr. Blake signed the option. However, Mrs. Blake, as one of the owners of the entireties, did not sign the option and normally this failure on her part would be a fatal defect in the option, bringing it under the Statute of Frauds. Com. Laws 1929, Sec. 13413 (Stat. Ann. Sec. 26.908). It is a well-recognized rule that part performance of a contract may take it out of the statute. See Comp. Laws 1929, Sec. 13415 (Stat. Ann. Sec. 26.910). The sole question here is as to whether or not there has been such part performance as to permit a decree of specific performance against her. We approve the decision of the trial judge that there was such part performance.

* * * *

"Mrs. Blake had signed receipts for '$30.00 and $10.00' as previously indicated. Obviously she knew all the facts concerning the written option and by her silence acquiesced in its being given without her signature. She knew of and made no objection to the repairs and alterations made by the plaintiffs in their belief that they were going to purchase the property. Mrs.

Blake did not timely indicate to the plaintiffs her intention to consider the option void. She knew of and acquiesced in the plan of monthly payments made for the year, knowing that she and Mr. Blake owned the property by the entireties.

"Careful consideration of this record as a whole brings the conclusion that the equities are all in favor of plaintiffs, and that the contract was performed by the plaintiffs with the knowledge of the defendants to the extent equity requires plaintiffs be decreed specific performance. In this jurisdiction there are many decisions to the effect that although oral agreements to convey land are void under the statute of frauds above cited, Comp. Laws 1929, Sec. 13413 (Stat. Ann. Sec. 26.908), yet under the related section of the statute, Comp. Laws, 1929, Sec. 13415 (Stat. Ann. Sec. 26.910), a court of equity has the power to grant specific performance of agreements of which there has been part performance; and such relief should be granted when as between the parties an equitable result will thereby be accomplished."

It is fruitless to speculate in this action as to the amount of money required "to make plaintiff whole." The very fact that defendants are willing to pay a sum of money instead of being bound by the contract indicates that they are aware that the land has a value which is not compensable by the sum of money they have offered. Moreover, when the doctrine of equitable estoppel applies, the promisee acquires a property right. The equity passes in the same way as though the promisor had signed a written instrument.

In the language of Lord Chancellor Selborne in *Maddison v. Alderson,* L.R. 8 App. Cas. 467:

> "In a suit founded on such performance, the defendant is really 'charged' upon the equities resulted from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. * * * The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. * * *"

As stated by the Court in *Knauf & T. Co. v. Elkhart Lake Sand & Gravel Co.*, 153 Wis. 306, 48 L.R.A. (N.S.) 744, 141 N. W. 701:

> "The Statute of Frauds was not designed to enable the evil-disposed to possess an instrumentality with which to perpetrate fraud. It is the weapon of the written law to prevent fraud, while the doctrine of estoppel is that of the unwritten law to prevent like evil. Each is effective in its appropriate field. Both are essential to prevent and redress wrongs."

The obtaining of valuable trackage is, of course, a valuable improvement upon real property, but this case does not rest alone upon the doctrine of improvement within the meaning of the doctrine of part performance. As the annotator of 75 A.L.R. points out at Page 653:

> "Such cases, and many others, such as the Vogel case, are governed by the broader principles of estoppel, rather than by the specific application thereof known as the doctrine of part performance."

We submit that the principles applicable to this case are modeled upon the fundamental theories of equity jurispru-

dence. They are bottomed upon the approach to the law which has always been the particular pride of the chancellor. They are founded upon the efforts of equity courts to prevent imposition upon persons as a result of the stern and sometimes unyielding rules on the law side of the court.

It is submitted that the Trial Court in this case correctly conceived the legal problem and correctly applied the law. Harry Price is estopped to deny his affirmance and acceptance of the obligations and terms of Exhibit E. He is bound in equity to those terms to the same degree as though he affixed his name to the contract.

CONCLUSION

The fundamental problem here is whether the doctrine of equitable estoppel is applicable to the facts as they were determined by the Trial Court. The principle was expressly adopted by this Court in *Bamberger Company v. Certified Productions, Inc., et al.,* 88 Ut. 194, 48 Pac. (2d) 489, that in the language of Mr. Justice Cardozo:

> "We are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. * * * The statute of frauds was not intended to offer an asylum of escape from that fundamental principle of justice."

In short, the respondent asks this Court to reaffirm the principle "that he who by his language or conduct leads

another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Dickerson v. Colgrove,* 100 U. S. 578, 25 L. Ed. 618.

All of the argument in the brief submitted by appellants and defendants is based upon facts as these defendants and appellants *would like to have had them determined* by the Trial Court instead of the factual determination as they were made in the Findings of Fact. And yet not one single Finding of Fact is directly controverted or contested in this proceeding. There is absolutely no reason why the signatures of the two women are not binding upon them, and why plaintiff should not have specific performance of the contract as to their interest in the land. The complaint in this case prayed for such performance against all three defendants, resting the liability of the defendant Harry Price squarely on the doctrine of equitable estoppel.

It is submitted that the Trial Court correctly conceived the law and made correct and adequate Findings of Fact in this case. Its decree should be affirmed. Moreover, the contract provided for reasonable attorney's fees. It is submitted that the affidavit filed with this brief as to the amount of reasonable attorney's fee for handling of the case on appeal fairly apprises the Court of the value of respondent's attorneys. An attorney's fee to respondent in the sum of $1000.00 should be awarded.

Respectfully submitted,

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