

OPINION

This detainer action was filed in the General Sessions Court on January 5, 1995 to recover possession of real estate and for rent arrearages. Judgment of dismissal was rendered August 3, 1995, and the case was timely appealed to the Circuit Court where it was heard December 4, 1995 on the issue of damages. The appeal was dismissed, *in haec verba*, for the effective reason that the plaintiffs failed to prove accrued damages.

A Statement of the Evidence was filed by the plaintiffs. It was objected to by the defendants, acting *pro se*, with no ruling by the trial judge. See TENN. R. APP. P. 24(f). Ordinarily, a remand would be necessary, but the objections do not question the accuracy or completeness of the evidence and for this and other reasons we elect to treat the objections as having been denied.

In July 1992, these parties entered into a prolix contract styled "Agreement to Purchase" a residence in the Deepwood Estates in Wilson County. Paraphrasing the agreement, the plaintiffs agreed to convey their residence to the defendants in consideration of \$3,000.00 cash and the payment of \$900.22 monthly directly to the holder of the existing mortgage indebtedness for 60 months, when the plaintiffs would deliver their deed to the defendants, who agreed to "pay off" or assume the balance of the mortgage indebtedness.

The contract then provides that if the defendants fail to make the monthly payments, the contract shall, after 30 days notice, be forfeited, and all mortgage payments "shall be retained by [the plaintiffs] in full satisfaction and in liquidation of all damages sustained."

The defendants ceased making the monthly payments in September 1994. They continued to occupy the property until June 1995 when the holder of the mortgage indebtedness foreclosed and took possession. At that time, the defendants were ten (10) months in arrears with the mortgage payments.

The Statement of the Evidence is silent on the point, and we do not know whether the foreclosure resulted in a deficiency owing to the holder of the mortgage indebtedness.

The plaintiffs argue that the defendants are clearly liable to them for the payments they failed to make either pursuant to the contract or as reasonable rent since they continued to occupy the property. The contract affords no comfort, since it merely provides that in case of default, the monthly payments “shall be retained” by the plaintiffs, and no evidence was offered as to the reasonable rental value of the property. We cannot assume that the rental value is equatable to the mortgage payments; neither may we assume the plaintiffs suffered damages as a result of the foreclosure. The contractual provision that the monthly payments shall be “retained” as liquidated damages refers to payments actually made, and we are not inclined to append judicial gloss thereto or make unwarranted assumptions. We construe the contract as we find it. *Petty v. Sloan*, 277 S.W.2d 355, 359 (Tenn. 1955).

The argument of the plaintiffs that the defendants cannot be allowed 10 months free occupancy has, of course, much persuasive force. Under the contract, the defendants were not in privity with the holder of the mortgage indebtedness, and any resultant liability for a deficiency after foreclosure will fall upon the plaintiffs. The trial judge recognized this contingency by holding that damages could not presently be ascertained. We agree, but this fact in no way relieves the defendants of the obligation to pay a reasonable monthly rent for their habitation. See *Greenwood v. Maxey*, 231 S.W.2d 315 (Tenn. 1950). For this reason, the judgment is vacated and the case is remanded for the purpose of determining the fair rental value of the property during its occupancy by the defendants.

Costs are assessed to the appellees.

William H. Inman, Senior Judge

CONCUR:

W. Frank Crawford, Presiding Judge

Alan E. Highers, Judge