

1977

Wanda Sandberg; Wanda Sandberg, Administratrix of The Estate of Wayne Sandberg, Deceased; Jeffrey Scott Sandberg; Susan Sandberg, By Wanda Sandberg, Her Guardian v. Robert D. Klein, Avalon Klein, Jane Doe And All Other Persons Unknown Claiming Any Right, Title Or Interest In The Real Property Described In Plaintiff's Complaint Adverse To Plaintiffs' Ownership) Or Any Cloud Upon Plaintiffs' Title Thereto And In The Matter of

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Utah Supreme Court

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WITH SECOND FINDINGS AND CONCLUSIONS

TABLE II COMPARISON OF LAND DESCRIPTIONS

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KEY TO ABBREVIATIONS

| | |
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| AB | Appellants' Brief |
| AnII4RK | Answers to Request for Admissions, First Set, and Interrogatories, Fourth Set (of Robert D. Klein) |
| AnWS | Answers to Requests for Admissions (of Wanda Sandberg) |
| DWS | Deposition of Wanda Sandberg Kurt |
| P.R. | Probate Record |
| R. | Record (in Civil Case) |
| RB | Respondents' Brief |
| T. | (Transcript of) Court Proceedings (March 15, 1977) |
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IN THE SUPREME COURT OF THE STATE OF UTAH

WANDA SANDBERG; WANDA SANDBERG,)
Administratrix of the ESTATE OF)
WAYNE SANDBERG, Deceased; JEFFREY)
SCOTT SANDBERG; SUSAN SANDBERG,)
by WANDA SANDBERG, her Guardian,)

Plaintiffs and)
Appellants,)

vs.)

ROBERT D. KLEIN, AVALON KLEIN,)
JANE DOE and all other persons)
unknown claiming any right, title)
or interest in the real property)
described in Plaintiffs' Complaint)
adverse to Plaintiffs' Ownership)
or any cloud upon Plaintiffs')
title thereto,)

Case No. 15146

Defendants and)
Respondents,)

Case No. 15274

AND)

In the Matter of the ESTATE)

OF)

WAYNE SANDBERG,)

Deceased.)

REPLY BRIEF

DISPOSITION IN THE LOWER COURT AND ON APPEAL TO DATE

In light of Respondents' statement that a procedural irregularity exists in this appeal, Appellants will bring the Court current on and clarify the relevant procedural history of this case, both in the lower court and on appeal. (Respondents' Brief, hereinafter RB, at 4)

Appellants filed this action in the Fifth Judicial District seeking to quiet title to lands which Respondent Klein claimed he had purchased pursuant to an alleged exercise of an Option Agreement. (R. 1) Klein counterclaimed for specific performance. (R. 166)

Both parties filed summary judgment motions under Rule 56 U.R.C.P. The motions were heard on March 15, 1977, Judge Don V. Tibbs temporarily presiding.

On March 24, 1977, Judge Tibbs signed an Order, docketed on March 25, which contained Findings of Fact, Conclusions of Law and ultimately decreed specific performance in favor of the Respondents in conformance with a Real Estate Purchase Contract submitted by Respondents. (R. 358, 324) The Order further instructed Respondents, the prevailing party to prepare Findings of Fact and Conclusions of Law in conformity with Respondents' Affidavit which the lower court specifically found constituted "a true and correct statement of the facts". (R. 359)

On Thursday, April 7, 1977, Respondents mailed a set of Findings of Fact and Conclusions of Law grossly inconsonant to those "facts" found by the court in March. Sua sponte, Respondents submitted a second Order and Judgment and Decree of Specific Performance. Appellants' counsel and the lower court received these documents on Monday, April 11, 1977. That same day Appellants' counsel learned that the additional Findings and Conclusions and second Judgment had

been immediately signed by the court. (Transcript May 25, 1977, 6:14-16; 8:19-21; R. 368; R. 369-391)

On April 15, 1977, Appellants appealed the original Order of Specific Performance docketed on March 25, 1977.^{1/} (R. 363) Simultaneously and consistent with Rule 52(b) U.R.C.P., Appellants filed an objection to the Findings of Facts and Conclusions of Law proposed by Respondent. (R. 361; see also attachment to Clerk's Certificate filed June 16, 1977 in Case No. 15146)

Though the Notice of Appeal filed April 15, 1977 indicated the appeal was solely from the Order of Specific Performance signed on March 24, Respondents convinced the lower court that the filing of the notice had divested it of jurisdiction to hear Appellants' objections to the second set of Findings of Fact and Conclusions of Law and second Order and Decree. (R. 363; Transcript May 25, 1977 3:17-22; Minute Entry attached to Clerk's Certificate filed June 16, 1977 in No. 15146)^{2/} Despite the lower court's holding that it had no jurisdiction after April 15, 1977, Respondents' set of Findings of Fact and Conclusions of Law and the second Order and Judgment and Decree of Specific Performance were docketed on April 19, 1977. (R. 369, 386)

The irregular presence of the two conclusive Orders and two separate sets of Findings of Fact and Conclusions of Law, resulted in Appellants' perfection of two independent appeals.

In late July, Appellants obtained special permission, pursuant to Rule 75(p)(2) U.R.C.P., and filed an enlarged brief in the appeal from the original Order. Respondents have described that brief as a conglomeration of legal "technicalities, niceties, arguments and sophistry". (RB 50)

In August Respondents moved to dismiss both appeals. On September 6, 1977, this Court denied those motions, instead consolidating, sua sponte, Case Numbers 15146 and 15274 for appeal.

As the consolidation occurred more than one month after Appellants filed their brief, a section in this Reply Brief will briefly correlate the arguments of that earlier brief with the second set of Findings of Fact and Conclusions of Law and Order and Judgment and Decree of Specific Performance.^{3/} See Table I, Appendix.

RELIEF SOUGHT AND GROUNDS THEREOF

Appellants contend that at the very least that Court must vacate the summary judgment and remand this case for trial, inasmuch as there are unresolved fact issues material to the legal issues on which the lower court based its judgment. Among these are:

1. Did Mrs. Sandberg "excuse" the timely, proper exercise of the option?
2. Were Mr. Klein's acts sufficient to find part performance to take the contract out of the Statute of Frauds?
3. Did Mr. Klein tender proper consideration?
4. Does Mr. Klein have clean hands requisite to seeking equitable relief?

5. Can an unaided surveyor locate one definite parcel of land using the land descriptions in the various documents before the Court?

6. Where are the physical reference points referred to in the various documents?

7. Did Mr. Klein exercise as to all or part of the property?

Clearly, these issues, decided in favor of Respondents by the lower court were both factually contested and material. As such, they should be resolved by a trier of fact. Hellstrom v. D. A. Osguthorpe, 22 Utah 2d 440, 455 P.2d 28 (1969). In Transamerica Title Insurance Company v. United Resources, Inc. 24 Utah 2d 346, 471 P.2d 165 (1970), this Court said:

It is thus clear from the rule that when upon the basis of the pleadings, depositions, answers * * *, admissions and affidavits, which we herein refer to as 'submissions,' a party is entitled to judgment as a matter of law, the motion for summary judgment shall be granted. But if it appears from such submissions that there is a dispute as to any issue of fact which would be determinative of the rights of the parties, it should be denied and trial should be had to resolve the disputed issues. 24 Utah 2d at 348 (emphasis added)

This Court in Bullock v. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P.2d 559 (1960), amplified the Transamerica language as follows:

A summary judgment must be supported by evidence, admissions and inferences which when viewed in the light most favorable to the loser, shows that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor. (11 Utah 2d at 4-5) (emphasis added)

Thus, to sustain the lower court's judgment, this Court must not only make findings consistent with those made in the lower court but further find that as to these facts there was no issue, completely prejudging Appellants' version of the facts as having no credibility or weight, without the benefit of a trial. Carr v. Bradshaw Chevrolet Co., 23 Utah 2d 415, 464 P.2d 580 (1970); Singleton v. Alexander, 19 Utah 2d 292, 431 P.2d 126 (1967).

Beyond the existence of material fact issues, Appellants contend that several legal issues are decisive and allow this Court to avoid remand and simply reverse and enter judgments in Appellants' favor. Among these are:

1. That Respondents have failed to exercise the option, which required timely submission of a real estate contract.

2. That the option required future agreement of the parties and was not complete and thus incapable of specific performance.

3. That the consideration tendered and to be paid under the contract is not in conformity with the option.

4. That the documentary evidence pled in Respondents' counterclaim is insufficient to support a contract under the Statute of Frauds.

Appellants firmly believe that these legal issues, as to which there are no disputed facts, compel a reversal and entry of judgment on behalf of Appellants. If that is not done, this Court, viewing the submissions in a light most favorable to the Appellants, must find that there are unresolved issues of material fact which should be determined by a trial.

POINT I

THE SCOPE OF REVIEW ENCOMPASSES BOTH LAW AND FACT

Respondents apparently agree (1) that the Supreme Court in an equitable proceeding is charged with reviewing both factual and legal issues; (2) that Summary Judgments do not enjoy the normal presumptions attributable to findings and judgments made after trial; and (3) that all inferences are to be drawn in favor of the losing party below. (RB 13) Nonetheless, Respondents suggest that this Court should now make an exception and "concern itself only with the legal issues, notwithstanding its power to review the facts in equity cases," due primarily to Appellants' failure to treat the second findings in their original brief. (RB 15) Respondents further interpret the language in an exchange between Judge Tibbs and Appellants' counsel, Mr. Thompson, as a stipulation and waiver of trial. (Id.) Appellants deny that this was their intent, and further contend that Respondents' assertions are without both factual foundation and judicial precedent.

Respondents' suggestion that this Court not review the facts is bottomed in the lower court's express finding that the prevailing parties' self-serving affidavit, not the losers' assertions, constituted "a true and correct statement of the facts." (R. 359) To suggest, therefore, that this Court not exercise its "power" to review the facts is to ask that this Court to shirk a self-imposed duty.

Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974). That

suggestion, contrary to long-accepted standards of appellate review,^{4/} should serve as a forewarning that the "facts" cannot be sustained by a careful scrutiny of the pleadings, submissions, and contentions of the parties.

POINT II

THE SECOND SET OF FINDINGS OF FACT AND
CONCLUSIONS OF LAW IS INVALID, IMPROPER,
AND UNSUPPORTED BY THE EVIDENCE

A. The Second Findings and Conclusions are Entitled
to Little, if Any, Weight.

Respondents' brief notes that Appellants have not specifically attacked any of the Findings of Fact or Conclusions of Law entered April 19, 1977, claiming that, as a result, they are unchallenged. For several reasons, Appellants did not treat the April 19 findings and conclusions in their original brief.

First, the Order initially appealed from contained its own findings and conclusions, and completely resolved the issues. Judicially drafted, Appellants felt that its three pages were entitled to more weight than the seventeen page self-serving document proffered by Respondents. Further, whereas the judge simply found the Option Agreement clear, unambiguous, and properly exercised, Respondents' findings also find waiver of defective exercise, estoppel against the assertion of those defects, if any, and part performance, all of which are both unnecessary and contradictory to the prior findings. Obviously, Respondent has made his own findings and drawn his own conclusions, rather than merely drafting them in accordance with the judicially pronounced

viewpoint.^{5/} The practice has been condemned, and in the instant case ubiquitously granted the Respondents the plenary powers to protect their record. As noted in Kentucky Milk Mktg. v. Borden, 456 S.W.2d 831 (Ky. 1969):

We do not condemn this practice in instances where the court is utilizing the services of the attorney only in order to complete the physical task of drafting the record. However, to the extent that the court delegates its power to make findings of fact and draw conclusions this is not good practice. . . . Especially after the court has indicated by its orders a final disposition of the case.

To permit counsel to clutter up the record by filing detailed, lengthy, contradictory findings of fact and conclusions of law, which, as in this case, are designed for no purpose other than to attempt to cover up mistakes that might have been made in the trial can serve no useful purpose but to unduly enlarge, confuse, compound, and expand appellate records. Id. at 834.

Appellants felt that this Court would rely on the court's findings rather than those drafted by Respondents.

Second, the findings are obviously improper under the procedural standards for Summary Judgment. On Rule 56 motions the facts are to be viewed in the light most favorable to the opposing party, and inferences drawn in his favor. Below, the affidavit of Respondent Klein in support of his own motion was adopted as findings to support a summary judgment in his favor, even though the only affidavit stipulated to as fact for both motions was one filed by the Appellants.^{6/} The findings are thus suspect at the outset. Singleton v. Alexander, supra.

Third, Appellants were aware that "[f]indings of fact and conclusions of law are unnecessary on decisions of

motions under Rule 12 or 56 . . . " Rule 52 U.R.C.P. The reason that no findings are needed is simple:

Since . . . a summary judgment may not be entered where there is a genuine issue as to any material fact, there is no fact-finding function in connection with the entry of such a judgment. It follows that no findings of fact are needed to support a summary judgment, and Rule 52(a), Federal Rules of Civil Procedure, expressly so provides. Dredge Corp. v. Penney, 338 F.2d 456, 463 (9th Cir. 1964).

In fact, in General Teamsters, Chauffers & Helpers U. v. Blue Cab Co., 353 F.2d 687, (7th Cir. 1965), the court felt that the making of findings of fact was ill-advised and implied the existence of factual questions. In light of Blue Cab it is interesting to note that the Respondents' 37 findings comprise 12 full pages, although there was supposedly no issue of fact.

Fourth, Appellants considered the second set of findings of no effect because they were filed after the notice of appeal from the original order. Even the lower court stated, on Respondents' urgings, that after the notice of appeal was filed it was divested of jurisdiction.

Fifth, Appellants felt the second findings, so discordant with the court's earlier findings, and the irregularity thereof, would best be dealt with in the separately perfected appeal, Case No. 15274.

Sixth, the second set of findings were signed under extremely prejudicial and suspect circumstances. Respondents mailed the proposed findings to Appellants and to the court on Thursday, April 7, 1977. (R. 385, 391)

Appellants received the findings on Monday, April 11, and immediately telephoned the court, only to discover they had already been signed.^{7/} The lower court refused to hear Appellants' objections to the findings, concluding, on Respondents' urgings, that the filing of a notice of appeal from the earlier order had divested it of jurisdiction to review the second order. (Transcript May 25, 1977 at 3:17-22; Minute Entry attached to Clerk's Certificate filed June 16, 1977)

For the foregoing reasons, Appellants did not feel that these findings and conclusions were entitled to consideration in this appeal. As Respondents have raised them in their brief, and as this Court has, sua sponte, consolidated the appeals, Appellants will speak to those findings and conclusions in this brief.

B. The Summary Judgment as Rendered Below Was Improper.

The summary judgment in favor of Respondents was improperly rendered below in that the lower court not only found facts, but based its decision on an express finding that the prevailing parties' version of the facts was true.

This case below was heard on cross-motions for summary judgment. In such circumstances, each party claims his entitlement to judgment, based on his opponent's version of the facts; neither, however, concedes his opponent's facts for purposes of his opponent's motion.

Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the

making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination of whether genuine issues of material fact exist. If any such issue exists it must be disposed of by a plenary trial and not on summary judgment. Rains v. Cascade Industries, Inc., 402 F.2d 241, 245 (9th Cir. 1968)

It is clear that motions for summary judgment do not resolve or admit disputed issues of fact for judgment, nor necessarily eliminate the necessity of trial, despite the number of parties seeking summary judgment, and despite allegations for purposes of each motion that there are no disputed issues of fact.

Cross-motion confusion often arises in cases similar to the instant one where an interpretation of documentary language is critical. While both parties may concede what the document says, there may remain a dispute pertaining to what it means. If the disputed inferences are material, evidence of intent and understanding must be taken precedent to making findings of fact and resolving the case.

This Court has recognized that regardless of the number of parties seeking summary judgment, disputes as to material inferences may still exist. For example, in West v. West, 15 Utah 2d 87, 387 P.2d 686 (1963), a man brought suit against his wife and son for dissolution of a partnership and for an accounting. The parties placed several documents before the court, each contending for an interpretation thereof inapposite to the other. The plaintiff-husband unsuccessfully moved for summary judgment, the lower

court specifically finding that he intended and understood that certain monies advanced to the partnership were contributions to capital. On appeal this Court perceived that though the physical facts were not disputed, the inferences drawn by the lower court were clearly contested:

[I]f the matter were to be determined solely upon the basis of the documents, we would be inclined to the view contended for by the plaintiff as to monies advanced after the initial investment. But it should be abundantly plain that the documents are ambiguous and uncertain. It is therefore necessary to take evidence and make findings of fact as to what the intent of the parties was in executing them. In that connection it is proper to consider the background and circumstances, including the relationship of the parties, the purposes for which the various documents were made and principles of equity and justice relating thereto. West v. West, 15 Utah 2d 87, 91, 387 P.2d 686 (1963).

Defendants then contended that plaintiff was precluded from appealing those findings because he had conceded for purposes of his motion that there was no dispute as to material facts. This Court flatly rejected that proposition, stating:

When a party thinks that his case is so clear that he should have a summary judgment without trial and so moves, the denial of that motion settles that issue and nothing else. That is, that he is not entitled to the summary judgment. Depending on what else he asserts and what is plead in opposition thereto, there may well be issues of fact in dispute which it is necessary to resolve in order to settle the controversy. In such event a trial of such disputed facts is necessary, regardless of who or how many parties have moved for a ruling in their favor as a matter of law. Id. (emphasis added)

The West case makes it clear that even inferential fact issues may not be resolved by summary judgment. In the instant case, for example, neither party contests what paragraph 5 of the Option Agreement says, only what it means,

the Appellants stating it called for a future agreement in any instance, the Respondents claiming otherwise. The lower court, however, found it did not constitute an agreement to agree.

In summary, each party moving for summary judgment merely claims his entitlement to judgment as a matter of law, neither party, however, conceding his opponent's facts and inferences for purposes of his opponent's motion. Further, "findings" are clearly improper at summary judgment because they are made without proper judicial consideration of the weight of testimony and credibility and demeanor of witnesses. See Singleton v. Alexander, 19 Utah 2d 292, 431 P.2d 126 (1967). That Appellants failed to prevail on their motion should settle "that issue and nothing else". Nonetheless, Respondents now infer that denial of Appellants' motion automatically entitles them to a summary judgment; i.e., that Appellants have stipulated to have inferences drawn against them by the lower court:

. . . counsel for all parties stipulated that the matter would be disposed of by motion for summary judgment . . . (RB 13)

The lower court also seemed to feel that as both parties moved for summary judgment, a ruling in favor of one party or the other, disposing of the case, was mandated.

Are you prepared to submit it on the motions or are there any issues of fact that should be determined, that is what I'd like to know, just without a lot of horsing around on your Motions for Summary Judgment? (T. at 6:3-6, R. 399).

Okay, I don't want you to dodge around because I am going to tie you down right now. What I am saying is that are you prepared -- do you want to argue this on a Motion for Summary Judgment or are you prepared to stipulate that this case may be submitted to the Court as a question of law based upon your statement of facts as set forth in your Motion for Summary Judgment? Id. at 6:9-15.

The Court then called for a stipulation "that it is a question of law based upon the facts as set forth in your respective motions". Id. at 6:26-28.

The confusion is apparent. Simply stated, the lower court's difficulty in conceptualizing the procedure for simultaneous cross-motions for summary judgment in a case where there were still contested issues of fact resulted in his taking each party's view of the facts as true for that party's own motion. Having so disposed of all fact issues, he then vacated the trial date and approved the facts as set forth in Respondents' affidavit as being true and correct for purposes of Respondents' motion. (Order, R. 359; Affidavit of Robert Klein, R. 337; Findings of Fact and Conclusions of Law, R. 369.) Appellants are confident that this method of disposing of the trial calendar and eliminating contested factual stances is not authorized by the rules of this Court.

It should be noted that the affidavit submitted and filed by Wanda Sandberg on March 15, 1977, the morning of the hearing, was stipulated to as "uncontroverted" fact for purposes of both motions. (T. at 7:12-15, R. 399;

Affidavit at R. 355) Ultimately, it appears that the lower court misconstrued the parties' stipulation on Mrs. Sandberg's affidavit and instead attached the "uncontroverted" label to Klein's affidavit filed one month earlier. (R. 337-348; Order, R. 359) This is the only plausible explanation the Appellants can offer for the court's "findings".

C. Specific Objections to Findings of Fact.

Appellants attempted to make objections to Respondents' self-serving findings in the lower court but the court felt an interposed notice of appeal divested it of jurisdiction. This Court, nevertheless, may consider "the question of the sufficiency of the evidence . . . whether or not the party raising the question has made in the district court an objection to such findings . . ." Rule 52(b) U.R.C.P.

Immaterial Findings

Several of the findings are immaterial to the issues of the case. The parties' acts before the exercise of the option have no bearing on whether the option was exercised according to its terms. Specifically, the activities with the Dixie Rural Electric Association condemnation (Findings No. 6 & 8) and the annexation of the land to the City of St. George (Finding No. 12) have no bearing on the sufficiency of the exercise of the option.

Irrelevant Findings

Several other facts found have no probative value, such as the establishment of a survey corner (Finding No. 15),

and the failure of the Probate Order to mention Klein's interest. (Finding No. 7)

Findings Showing Failure To Exercise

Other facts found have no bearing on a proper exercise, and in fact tend to indicate Klein's desperate attempts to save himself from loss of a good deal. For example, his insistence on performance after the option's expiration and Mrs. Sandberg's refusal to perform (Finding No. 17), the submission of a real estate contract nearly a year after the option's expiration (Finding No. 21), the tender of some payments (Findings No. 22 and 23), sending a letter demanding conveyance (Finding No. 24), his alleged readiness to perform after the option expired (Finding No. 27) and Appellants' refusal to allow a tardy exercise or recognize the earlier act as an exercise (Findings No. 25 and 26), while designed to show Klein's intent to exercise and good faith, merely display his failure to exercise. These acts, done largely after Klein's retention of counsel, do nothing to revive the option. That these belated attempts to comply with the option were of no effect was pointed out in Appellants' Brief at 73-77 and 86-95.

Findings Resolving Disputed Issues Against Appellants

Of course, all of the findings are subject to the same fatal objection; that they are in conformity with Respondents' affidavit when Respondents prevailed on summary judgment below. Appellants had alleged and presented evidence which contradicts several of the findings made.

Patently, the facts were not viewed favorably to Appellants. Finding No. 13 cites that Mrs. Sandberg met with and made suggestions to Klein's surveyor, while Mrs. Sandberg has no recollection of any such suggestions. (DWS at 17; AnWS No. 12, R. 135-136) Finding No. 15 describes a meeting with the county commission, while Mrs. Sandberg denies it ever took place. (DWS at 12) Again, Finding No. 16 deals with other conversations with Klein or his surveyor which Mrs. Sandberg has denied. (AnWS No. 17, R. 137; DWS at 13)

Finding No. 33, that the conveyance of 40 acres was an acknowledgment of exercise as to all the property is contradictory to Mrs. Sandberg's statements that she believed that 40 acres was the full extent of the exercise. (DWS 23:24-29; 24:17-20) She then understood the option to have expired (Id. at 30:12-13), and denied any discussion pertaining to the remainder of the acreage. (Id. at 30:16-23, and 56:4)

Finding No. 36 that Mrs. Sandberg acknowledged Klein's purchase to third parties in 1972 is totally unfounded and again contradicts Mrs. Sandberg's testimony. (Id. at 51-53)

Findings Contradictory to the Evidence and Self-Contradictory

Several findings are not only contradictory to the evidence, but actually self-contradictory! Most blatant are the findings of conformity of land descriptions. For example, while the land descriptions reproduced in Findings 2 and 5

are clearly different, they are treated as identical. Further, the survey prepared by Klein's surveyor is found to conform to the other two descriptions in Finding No. 20. Finally, to allay any doubt, Findings No. 21 and 28 find all descriptions conforming. The record below, however, clearly depicts the descriptions as contradictory. (See also Appellants' Brief, hereinafter AB, 53-63, especially 60-61) Respondents now suggest a reformation of the descriptions, for the first time on appeal. Alternatively, they ask this Court not to concern itself with the facts. (RB at 15)

Findings No. 21, 22, 28 and 30 specifically state that the real estate contract and cashier's check conform as to consideration with the option terms. Yet the findings themselves recite that only \$19,000 was paid under the option (Finding No. 10), while the contract recites a \$20,000 payment to be credited to Klein. Appellants' Brief pointed out this error at page 94.

Finding No. 21 specifically declares the exercise of the option by the tender of a check, while the Option Agreement clearly called for execution of a contract. The court's findings found the option exercised by the March 30, 1971, letter, and the June 3, 1971 check.

Findings No. 30 and 32 state that the documents are clear, unambiguous, and in the case of the Option Agreement, not an agreement to agree. While certainly clear standing alone, the Earnest Money Agreement and Option Agreement describe different parcels, and the latter document is

unintegrated. Neither, however, conforms to the proffered Real Estate Purchase Contract, and to accept Klein's interpretation of the phrase, "as the parties may agree" is heinous. Lastly, it is all too convenient that the unambiguous and clear Option Agreement was found to fail to specify the party responsible for preparing the real estate contract requisite for its exercise. (Finding No. 34) Klein, under the law, bore the burden of exercise. (AB at 64) Also, Klein had provided that the expense of such preparation could be credited against the ultimate purchase price, pursuant to paragraph 5h of the option. Appellants cannot understand how the lower court found that they, as optionors, had a duty of exercising their own option, leaving Respondent Klein, the optionee, utterly confused as to his obligations. After all, Respondent Klein drafted the option to state that he could exercise only by execution of a real estate contract. His alleged confusion is both feigned and inexcusable.

Likewise, the finding that Mrs. Sandberg requested a delay in the survey which caused a delay in contract preparation is unfounded and illogical. The reason for delay is found in Findings No. 16, 29 and 34 and explained in Finding No. 28. But what precluded Respondents from submitting a real estate contract with the same price formula contained in the option? The initial down payment was set at \$2,000 regardless of the amount of land selected and agreed to. While Respondents claim through Finding No. 28 that calculation of price was essential prior to execution

of a contract, the first payment relating in any way to the amount of land selected was not due until one year after the purported exercise. Thus, Klein could have submitted a contract with the price formula, and in the first year completed a survey to ascertain the amount of the first annual payment. This he failed to do, with neither the selection of agreed land, nor the tender of a contract occurring in a timely manner.

The finding (actually a legal conclusion) of waiver of timely preparation (Finding No. 34) is dealt with infra in Point VI, B, at 42.

The finding that the Option Agreement was not an agreement to agree was dealt with at p. 41 in Appellants' Brief. See also Point IV, at 29 infra for the reply to Respondents' arguments.

The finding that Klein exercised as to all the land subject to the Option Agreement (Finding No. 33), is also contradictory to all the evidence. See Appellants' Brief at 61 and Table II in the Appendix. Klein drafted this finding to avoid the conclusion that he attempted exercise as to only part of the land, which exercise, even in his view, would have required the agreement of the parties. That such a finding was entered, however, does not alter the descriptions in the record. The lack of support for Respondents' self-serving findings is evident. It is little wonder that Klein desires that this Court overlook them. (RB at 15)

Illegitimate Findings

Appellants further contend that several findings extend far beyond the court's earlier Order and Respondents' theory of the case propounded below. While the court earlier found the option had been timely and properly exercised, Respondents' fervor to protect their record, estop Appellants from asserting defenses and shelter the flimsy framework of "proper exercise" has caused that framework to be obfuscated by Respondents' protective boilerplate of waiver, estoppel, and part performance.

To make findings after a summary judgment is suspect, to freely delegate the making of findings to counsel is patently improper, and to allow such findings as these to stand is a mockery.

D. Specific Assignments of Error to the Conclusions of Law.

Appellants' original brief pointed out the erroneous application of the law on the legal issues decided by the lower court in its order entered March 25, 1977. Specifically, Appellants argued that:

1. The court failed to apply the high evidentiary standard ("clear and convincing") appropriate to actions for specific performance. (AB 24)

2. The court erroneously considered evidence other than that signed by Mrs. Sandberg. (AB 27)

3. The court erroneously concluded the Option Agreement was not an agreement to agree. (AB 41)

4. The court ignored the fact that the Option Agreement was incomplete by lack of a contemplated exhibit. (AB 51)

5. The court erroneously concluded that the various land descriptions were sufficient, unambiguous, and conforming. (AB 53)

6. The court ignored proper law in finding an exercise of the option. (AB 64)

7. The court improperly decreed specific performance of a document which contained terms inconsistent with the option. (AB 86)

As Appellants' initial brief did not deal with the second order, Table I in the Appendix correlates Appellants initial legal arguments with the issues raised in the second set of findings and conclusions.

POINT III

THE STATUTE OF FRAUDS IS A DEFENSE

Respondent argues that the Statute of Frauds cannot be asserted to preclude enforcement of the "writings" in the record in that

[t]his is not a case in which Respondent is seeking to enforce an oral agreement to convey land. The agreements in this case have all been written. (RB at 17)

Respondent assumes, however, that all of his proffered writings^{8/} automatically satisfy the statute once they appear on paper. Nonetheless, as Appellants have contended:

The statute requires that the contract designate the parties, identify the land to be conveyed, recite the consideration therefor, and contain the signature of at least the party to be charged. (AB at 17)

See 72 Am.Jur. 2d Statute of Frauds §295 (1973). Thus, writings other than the Option Agreement and Earnest Money Receipt cannot be properly asserted against Mrs. Sandberg. Further, only these documents were pled by Respondents in their counterclaim. Due to their insufficient and discordant

descriptions, nonexistent exhibits, and requirements of future agreement, however, these documents are insufficient to bind Mrs. Sandberg.

Respondents also claim that Appellants have not formally raised the issue of the Statute of Frauds below.^{9/} Below, there was no apparent need. Because Respondents pled only the Option Agreement and Earnest Money Receipt against Appellants, and both of those documents bear the signature of Mrs. Sandberg, Appellants could not properly object to those documents on the basis of the statute. When it became apparent at the hearing, however, that Respondents desired to bind Mrs. Sandberg on the basis of unsigned letters and parol conversations, it became proper for Appellants to assert the statute as an evidentiary objection to all of the evidence, parol in nature, or signed only by Klein, contradictory to the writings. Thus, by the very course of proof offered by Respondents, at variance with their pleadings, Appellants' assertions of the statute to preclude judicial consideration of those parol matters must, under Rule 15 U.R.C.P. and for reasons of substantial justice, be treated as if raised in the pleadings.

Thus, Respondents' objection to Appellants raising the statute forgets that Respondents, not Appellants, first strayed from the pleadings, seeking specific performance of written documents on the basis of unsigned letters and dangling conversations. This tactical ploy not only surprised Appellants but is contrary to the well-settled principle

that parties seeking specific performance must conform their evidence to the pleadings. 81A C.J.S. Specific Performance §189 (1977). Similarly, Appellants being moved against for summary judgment were entitled to know their opponents' evidence. Burningham v. Ott, 525 P.2d 620 (Utah 1974). Lastly, Rule 56(c) U.R.C.P. generally permits a judicial excursion beyond the pleadings to avoid injustice or fundamental error. Continental Bank & Trust Co. v. Cunningham, 10 Utah 2d 329, 353 P.2d 168 (1960). Such injustice or error would certainly result here if this Court were to disregard such an essential rule of law. See, e.g., Greenblatt v. Munro, 61 C.A.2d 596, 326 P.2d 929 (1958).

Respondents' third argument that the Statute of Frauds does not apply is based upon a misapplication of the doctrine of part performance. Appellants do not agree that Randall v. Tracy Collins Trust Co., 6 Utah 2d 18, 305 P.2d 480 (1956) states the applicable law in the instant case. First, Randall does not deal with an intervivos parol agreement to convey (as this present case does, there being no sufficient memorandum), but with a decedent's earlier parol promise to devise. Part performance under each is vastly different. As stated in Note, "The Doctrine of Part Performance as Applied to Oral Land Contracts in Utah", 9 Utah L.Rev. 91, 101, 102 (1964):

[The promise to devise] differs from the one involved in a contract for the intervivos transfer of land in two respects: First, the plaintiff cannot perform the acts of going into possession and making valuable improvements because no possessory rights

accrue to the plaintiff until the defendant's death; and second, the promise to devise results in the formation of a unilateral contract. . . .

Unlike the intervivos sale situation where payment of consideration by the plaintiff is not regarded as an act of part performance, in personal service situations the only act performed by the plaintiff is the very consideration called for by the agreement.

Further, Randall was decided when the doctrine of part performance was in flux in Utah and often mixed with elements of estoppel. Appellants submit that the doctrine of part performance is more accurately stated in the more recent case of Holmgren Brothers, Inc., v. Ballard, 534 P.2d 611 (Utah 1975).

According to Holmgren, the threshold question is whether there is a contract and what its terms are.

The oral contract and its terms must be clear, definite, mutually understood, and established by clear, unequivocal and definite testimony, or other evidence of the same quality. Id. at 614 citing Christensen v. Christensen, 9 Utah 2d 102, 339 P.2d 101 (1959).

The reason for this strict requirement of an unequivocal showing that there was an actual agreement complete in all its terms was explained in an early case.

To call anything a part performance, before the existence of the thing (the contract) whereof it is said to be part performance is established, is an anticipation of proof by assumption, and gets rid of the statute by jumping over it, for the statute requires proof, and prescribes the medium of proof. Adams v. Manning, 46 Utah 82, 148 P. 465, 466, (1915), citing Roberts on Frauds, 135.

See also 73 Am.Jur.2d Statute of Frauds §401 (1974).

In the instant case, the Real Estate Purchase Contract, upon which Klein seeks specific performance, was

drafted one year after the option expired, and contains a land description which did not exist on paper when the option was purportedly exercised. The contract differs materially from the option in consideration, time requirements, and necessity of mutual future agreement as to land sold. Unsigned by the party against whom enforcement is sought, it does not provide the threshold proof of existence and terms of a contract requisite under Holmgren to invoke the part performance doctrine.

Assuming, arguendo, however, that the threshold proof of a contract has been made, Holmgren further delineates those acts sufficient to constitute a part performance. These are transfer of consideration in conjunction with either the making of valuable improvements on the land, or entry into possession with the consent of the vendor. Additionally, these acts must be performed subsequent to the existence of the contract, and be exclusively referable to it.

In addition [to clear, unequivocal and definite proof of the contract and its mutually understood terms] there must be acts of part performance which in equity are considered sufficient to take the case out of the statute of frauds: (1) Any improvements must be substantial, valuable, or beneficial. (2) A valuable consideration is demanded by equity. (3) If there is possession, such possession must be actual, open, definite, not concurrent with the vendor, but it must be with the consent of the vendor. (4) Such acts as are relied on must be exclusively referable to the contract [footnotes omitted]. Holmgren Brothers, Inc., v. Ballard, 534 P.2d 611, 614. (Utah 1975).

While Respondent claims the facts in this case "clearly establish part performance by Mrs. Sandberg and

Respondent", and that "[p]artial performance by both parties bars a statute of frauds defense . . ." (RB at 19), the acts to be considered in evaluating a claim of part performance are acts performed by the grantee. As stated by an early Massachusetts Supreme Court decision responding to allegations that a grantor's conveyance of part^{10/} of the land invoked the doctrine of part performance as to the remainder:

Indeed, the rule seems to be that no part performance, by the party sought to be charged, will take an agreement out of the statute of frauds, except in those cases where the statute itself provides for such effect. It is part performance by the party seeking to enforce, and not by the other party, to which courts of equity look, in giving relief from the statute. Glass v. Hurlbert, 102 Mass. 24, 31 (1869) (citations omitted).

Klein does claim some of his actions unequivocally evince his part performance:

On June 7, 1971, Respondent tendered a down payment to Mrs. Sandberg which was accepted and cashed . . . Respondent made substantial payments over the years which were accepted; Respondent expended time, energy, and money in having a survey monument established and in having the property annexed to the City of St. George; Respondent had the property surveyed; and Respondent had the Real Estate Sales Contract prepared. (RB at 19)

Acts of payment alone are never sufficient to constitute part performance. In addition, the payments were admittedly made simply to extend the option. The act of annexation was done after the letter Respondent claims exercised the option, but, by the letter's own terms, prior to exercise, i.e., prior to any contract. The surveying was done after the expiration of the option, but surveying,

similar to annexation, is not a substantial improvement on the land. Furthermore, were surveying or annexation a sufficient act of part performance exclusively referable to a parol contract, it would allow a unilateral act to define the scope of that contract. Similarly, if Klein's preparation of a contract of purchase can constitute sufficient part performance of a parol agreement, Klein as the draftsman could easily and unilaterally select its parameters.

The Statute of Frauds is a viable defense in this case and should bar all evidence of an agreement, other than that in writing and signed by Mrs. Sandberg. Respondents' unsigned letters, tender of monies and unilaterally drafted purchase contract, while perhaps material and admissible to show the attempted exercise of the option, cannot be legitimately used to clarify or establish the terms of the option or the agreement of the parties, and avoid the Statute of Frauds through the part performance doctrine.

POINT IV

THE OPTION AGREEMENT IS AN UNENFORCEABLE AGREEMENT TO AGREE

Appellants and Respondents disagree as to whether the Option Agreement is unenforceable as an agreement to agree. The dispute arises under two different types of clauses, one apparently requiring future agreement as to selection of land in any event, the other providing for future agreement on material terms as alternatives to fixed terms. (AB 41-51)

Appellants maintain that the Option Agreement required a future agreement of the parties as to the land subject to eventual purchase. This contention is based on Appellants' interpretation of Paragraph 5 of the Option Agreement drafted by Respondent Klein.

5. The Buyer may exercise his right to purchase this property for the sum of Two Hundred Dollars (\$200.00) per acre at any time during the option period, (including any extension period) by executing a contract to purchase all or such part or parts of the property as the parties may agree; such contract to purchase shall provide as follows . . . (R. 61) (emphasis added)

Appellants interpret the paragraph as requiring the agreement of the parties as to land purchased in all events. (See Point V, AB at 41-45) Conversely, Respondents assert that this provision requires an agreement of the parties only if there is an attempted exercise as to part of the land subject to the option. (RB 22) Appellants feel that careful analysis of the paragraph belies Respondents' claims, but even if Respondents' interpretation is accepted, the facts show an attempted exercise as to only part of the property described in the Option Agreement. (AB at 61) Thus, even under Respondents' strained interpretation, the requirement of future agreement is factually invoked.

Wanda Sandberg disputes Respondents' claims that the \$19,000 in payments made to extend the option make her construction of paragraph 5 unreasonable. Under amicable circumstances, parties often provide for future agreement, as is evinced by the plethora of decisions focusing on this

point. Many such contracts doubtless avoid judicial consideration because the contemplated agreement is reached. Ignorant of the legal consequences of such a clause, the parties here made and received payments; Mrs. Sandberg holding the land from the open market and anticipating the making of such future agreement as a condition precedent to Klein's exercise. This is reasonable. And, as Klein admittedly drafted the option, perhaps "Appellants' construction" is not the issue. In such cases this Court should be concerned with Appellants' "understanding" of the paragraph. Jensen v. Anderson, 24 Utah 2d 191, 468 P.2d 366 (1970).

Clearly, this was her understanding. (DWS at pp. 13, 30; R. 398) The fact that Klein paid \$19,000 changes neither the substance of the option or the equities. Thinking Respondents had exercised the option by selecting a 40-acre parcel, Appellants deeded them the same, concededly worth \$28,000, in 1971. (DRK 11:20-24, DWS at 26)

The parties clearly recognized the necessity of such an agreement as the expiration of the option approached. (See AB 47-49) Also, Respondents conceded as late as eleven months after the option expired, not only the necessity of such future agreement, but that such agreement had not yet been reached. In May, 1972, Respondents' attorney wrote:

The parties have also tentatively agreed as to the property description which, in our opinion, is the only matter yet to be fully resolved. (R. 115)

Appellants also maintain that the presence of other clauses in the Option Agreement which allow alterna-

tive performances of material terms render the option void under the authority of Kline v. Rogerson, 181 P.2d 385 (Cal. Dist. Ct. App. 1947). Respondents summarize Appellants' argument and Respondents' objection quite well.

. . . Appellants cite Kline . . . for the proposition that providing for a future agreement only as an alternative renders a contract void. The holding of that case does not even approximate such a proposition. (RB at 21)

Respondents' following analysis of the case, however, sacrifices accuracy for brevity.

The court in Kline v. Rogerson stated the following as the sole issue for determination: 'Was plaintiff the owner or holder of the check executed by defendant?' Contrary to Appellants' representation that the general phrase "or terms to mutual satisfaction" following very specific terms rendered the contract void, the specific terms of the contract were unenforceable simply because defendant had not signed the contract which meant he had not agreed to the specific terms. (RB at 21)

Respondents apparently refer to the fact that in Kline the parties had previously executed a deposit receipt (reproduced in the margin of the case) but failed to execute a contract of sale. However, as is apparent from a close reading, the deposit receipt was essentially an agreement of sale. On the basis of that receipt, Kline claimed the deposit as a forfeiture. The court found that the deposit receipt was not effective as an agreement for sale solely by reason of the alternative phrase "or terms to mutual satisfaction":

The deposit receipt signed by defendant did not constitute an agreement of purchase and sale by the parties since it expressly provided that the balance of the purchase price was to be paid "at \$5,000 or more per year, plus interest at 5% or terms to mutual satisfaction". Since the parties never agreed upon

terms which were mutually satisfactory, there was never an agreement of purchase and sale. Hence the plaintiff was not entitled to any portion of the purchase price. 181 P.2d at 387 (emphasis added).

That this was the decision of the case, that is, that future agreement as an alternative to specified terms renders a contract unenforceable as an agreement to agree, is brought out in the following cases, all of which cite Kline as Appellants have done. Roberts v. Adams, 330 P.2d 900, 903 (Cal. Dist. Ct. App. 1958), Burgess v. Rodom, 121 Cal. App. 2d 71, 262 P.2d 335, 336 (1953), Alaimo v. Tsunoda, 215 Cal. App. 2d 94, 29 Cal. Rptr 806, 808 (1953). See also Annot., 68 ALR 2d 1221, 1229 (1959).

Appellants maintain that under the authority of Kline, clauses providing for future agreement even as an alternative render a contract uncertain and unenforceable. Paragraphs 5b and e of the Option Agreement fall expressly within this category.

POINT V

THE LAND DESCRIPTIONS ARE FATALY DEFICIENT

Respondents allege that the Court should overlook the fact that the land descriptions in the various documents are contradictory. Furthermore, although the exhibits allegedly appended to the letter of exercise neither are in the record nor were they presented by Respondents below and are thus concededly a matter of conjecture, Respondents ask this Court to accept their description proffered one year after the option expired. (RB 37; R. 117; R. 166, 170) Appellants

submit that it would be unjust to enforce this unilateral declaration of self interest; rather, only clearly proven contracts and agreements should be specifically enforced. Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491 (1967).

Respondents also allege that the land description is a non-issue due to Wanda Sandberg's use of Respondents' metes and bounds description in her complaint to quiet title. Appellants used that description in the complaint because that description is what Respondents used in their contract which was the cloud on title sought to be removed.

Respondents also prepared "findings" that Mrs. Sandberg waived her objection to the land description defects. The fallacy in this argument is that a waiver of defects does nothing to cure the deficiency, and render a description certain. Respondents apparently contend, however, that a "waiver" enables them to select whatever land they desire and claim it for the description. Nonetheless, no two descriptions before this Court conform, though several on their own are unambiguous.^{11/} See AB at 59-61, and Table II, Comparison of Land Descriptions, in the Appendix.

Respondents now advance plausible explanations for the contradictions between the documents, but in doing so commit several fatal errors.

First, they locate a reservoir on the maps when there is absolutely no evidence in the record depicting the same, other than the Earnest Money Receipt which says it is somewhere in the NE 1/4 NE 1/4 of Section 22. Second, they

assume that the fence Klein pointed out to his surveyor and allegedly plotted in the Real Estate Purchase Contract is the fence indicated in the other agreements. There is no evidence that an unaided surveyor, using the Option Agreement or Earnest Money Receipt descriptions would find the fence to be the one referred to in these documents. Thus, Klein's assertion is a self-indulgent one; there are several fences on the property. Third, Respondents rely on a conversation in 1971 that the fence plotted by Klein's surveyor in 1972 was earlier agreed upon. Mrs. Sandberg recalls walking a fenceline, and that the land selected would be "located within the property physically identified by the parties"; nothing else. See AnWS No. 9, R. 134. Thus, such parol testimony now unilaterally supplies the description, otherwise indeterminate. This is impermissible under the Statute of Frauds.

The land must be described in the agreement or by reference to a plan or other matter so that it can be identified and located, and the description must be sufficiently definite within itself and not require the aid of parol testimony or be left to the future action of the same or other parties. Safe Deposit & Trust Co. v. Diamond Coal and Coke Co., 234 Pa. 100, 83 A. 54, 57, LRA 1917A 596. (1912).

Apart from Wanda Sandberg's denial of such an agreement, considerations of Klein's credibility, and the actuality of his pointing out the same fence to a surveyor, the fact remains that this testimony is parol.

While Respondents cite Johnson v. Jones, 109 Utah 92, 164 P.2d 893 (1946) for the proposition that extrinsic

and documentary evidence of description may be properly considered, they fail to specify the logical limitations of such a rule. Clearly, such evidence must be used only to aid and clarify a land description, not to explain differences between two different descriptions or to supply a new description.

Parol evidence is admissible to apply, not to supply, a description of lands in a contract. Parol evidence will not be admitted to complete a defective description, or to show the intention with which it was made. Parol evidence may be used for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated, and supplying a description thereof which they have omitted from the writing. There is a clear distinction between the admission of oral and extrinsic evidence for the purpose of identifying the land described and applying the description to the property and that of supplying and adding to a description insufficient and void on its face. Davison v. Robbins, 30 Utah 2d 338, 342, 517 P.2d 1026, (1973).

Appellants submit that what Klein actually seeks is a parol reformation of the Option Agreement. He admits the descriptions vary in the Earnest Money Receipt and the Option Agreement. (RB at 33) He further admits that the option's description does not conform with his proffered Real Estate Purchase Contract. Klein's suggestion, therefore, that this Court ignore this variance as a scrivener's error seeks, through parol, not to clarify, but to change the description in his Option Agreement, and somehow make it conform to the Earnest Money Receipt and proffered contract. Klein presents his view of the reservoir and fence locations, and his recollection of an alleged oral agreement to support this reformation of the plain and clear language of the Option Agreement. His desperate resort to parol attempts to

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avoid the obvious conclusion that his exercise was only as to part of the land described in the Option Agreement.

Ultimately, Klein's attempted reformation, not clarification, of the Option Agreement by resort to unilaterally proffered and self-serving parol makes the whole contract parol and unenforceable under the Statute of Frauds.

[W]here a written agreement is varied by oral testimony, the whole contract in legal contemplation becomes parol. If there is anything settled in our law that principle is firmly established. When, therefore, a party to an executory agreement in writing for the sale of lands succeeds in reforming it by oral testimony, he reduces the whole agreement to a parol contract, and derives himself of the right to have it specifically performed. He pulls down the house on his own head. When he coverts the writing into an oral agreement, the statute declares it to 'be void'. He has rectified the written contract, and in its place has established an agreement which in contemplation of law is parol, and therefore, by statutory mandate, absolutely invalid and without force. Safe Deposit & Trust Co. v. Diamond Coal & Coke Co., 234 Pa. 100, 83 A. 54, 58, L.R.A. 1917A 596 (1912).

This result is generally reached by the courts. To do otherwise would be to bootstrap an avoidance of the Statute of Frauds by first reforming a contract with parol, and then enforcing it as reformed. This is exactly what Klein desires to do here; have this Court modify an otherwise sufficient description, and then enforce it as modified.

POINT VI

THE OPTION WAS NEVER PROPERLY EXERCISED

The law with respect to the exercise or acceptance of an option is succinctly stated in 91 C.J.S. Vendor and Purchaser §10 (1955) as follows:

The acceptance of an option, to be effectual, must be unqualified, absolute, unconditional, unequivocal,

unambiguous, positive, without reservation, and according to the terms or conditions of the option. Substantial compliance with the terms of the option is held not sufficient to constitute an acceptance; to be effectual, the acceptance must be identical with the offer, or, at least, there must be no substantial variation between them. An acceptance of an option must such a compliance with the conditions as to bind both parties, and if it fails to do so it binds neither. Id. (emphasis added)

This rule of unqualified and absolute acceptance has been long adhered to by the Utah courts. See, e.g., Nance v. Schoonover, 521 P.2d 896 (Utah 1974); and Lincoln Land and Development Co. v. Thompson, 26 Utah 2d 324, 489 P.2d 426 (1971).

The lower court, however, applied the standard of substantial compliance applicable to real estate contracts, upon Respondents' explicit recommendation. See, Respondents' Memorandum of Points and Authorities at R. 279, citing 81 C.J.S. Specific Performance §102 (1953) and Fischer v. Johnson, 525 P.2d 45 (Utah 1974). That real estate contracts are used as mortgage substitutes and have no critical event such as exercise makes the real estate contract standard inapplicable. For a comparison of the option and contract standards, see 81A C.J.S. Specific Performance, §§56 and 114 (1977), appearing as §§47 and 102 in the 1953 edition.

Further, Respondents' reference below to Fischer for the principle that substantial compliance is sufficient to exercise an option is, at best, a curious one. In that case, Johnson cited Lincoln Land and Development Co. v. Thompson, supra, an option case, as a standard for specific

performance. (Appellant's Brief, Fischer v. Johnson, No. 13530 at 13-14.) Fischer's counsel, Mr. Cowley, responded:

Johnsons' reliance on the case of Lincoln Land and Development Co. v. Thompson, 26 Utah 2d 324, 489 P.2d 426 (1971), is grounded in this mischaracterization of our Earnest Money Agreement for Lincoln involved a question of timely and adequate exercise (sic) of an option.

The distinction between an option contract and a contract of sale is fundamental. An 'option' is a unilateral agreement, a continuing offer to sell, binding only upon the optionor-owner to sell within the time stated and upon the conditions set forth. The option does not become a contract inter pares, in the sense of an agreement to convey and purchase, until exercised by the optionee. A 'contract of sale' is a mutually binding bilateral agreement which creates an obligation to convey by one party and an obligation to purchase on the other. (Respondent's Brief, Fischer v. Johnson, No. 13530 at 35)

Respondents' counsel obviously comprehends the distinction between executory contracts to purchase real estate and option agreements. Nonetheless, he successfully asserted the Fischer standard of substantial compliance before the lower court. Similarly, cases such as Lamont v. Evjen, 29 Utah 2d 266, 508 P.2d 532 (1973), and Leone v. Zuniga, 84 Utah 417, 34 P.2d 699 (1934), are inapposite to option law.

A. The Consideration Tendered was Insufficient.

As previously set forth, option agreements call for strict compliance in their exercise. Respondents have conceded that their tender was \$1,000 less than that called for by the Option Agreement.^{12/} (RB 47) As it is both the duty and prerogative of the Supreme Court in this equitable action to review both the facts and the law, substituting

its judgment for that of the lower court, Appellants request a reversal of the judgment entered below. Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974) Alternatively, Appellants request that this Court remand this case to the lower court for a specific finding on the consideration issue as well as other matters.

Respondents' contention that their insufficient tender was but a "de minimis" "mathematical error" obviously does not comport with the strict compliance standard. (RB 47) Their excuse that insufficient tender was only "discovered late during the course of litigation" is immaterial, as Appellants cannot be penalized for "late discovery", only non-discovery. (Id.) Respondents' new allegations, however, that the assignments of error pertaining to consideration are not properly before this Court are without foundation and have seemingly been raised to somehow both shift Respondents' burden of proof and preclude this Court's careful scrutiny of the records and submissions before it.

Though Respondents clearly bore the burden of going forward, Appellants' discovery methodically set forth the insufficiency of consideration,^{13/} thus confirming one of Appellants' Complaint's initial assertions, that is,

[t]hat the option agreement between the parties be declared to have expired for failure of the Defendant [Respondent] to perform and failure of consideration.
(R. 3) (emphasis added)

Furthermore, a cursory examination of Respondents' affidavit in support of summary judgment reveals the following assertions:

(1) that only \$19,000 was tendered on the option as prior payments (¶12, R. 399); and (2) that the monies tendered in the Real Estate Purchase Contract attached as Exhibit "O" thereto reduced by a mysterious \$20,000 in prior payments conformed to the Option Agreement. (Id.)

Finally, Appellants' memorandum for summary judgment asserted the following:

There is no proof either in Mr. Klein's deposition or in his responses to Interrogatories and Requests for Admissions upon which the Court could find Mr. Klein's subsequent tender of monies and deeds to be an unequivocal and unconditional exercise of the option upon its terms and conditions as drafted by Mr. Klein's attorney. (R. 222-223)

Respondents' counsel had certainly discovered his client's insufficient tender.^{14/} To avoid the obvious implications of this shortcoming, however, Respondents successfully recommended the "substantial performance" standard and further argued that Appellants were seeking a forfeiture, a doctrine totally inapplicable to option law. (R. 284-288; see also Point VIII, infra, at 48)

The lower court's findings specifically set forth the conformity of tender requisite for specific performance. (Order ¶4, R. 358) For Respondents now to suggest that this Court, sitting in an equitable appeal, is precluded from reviewing those findings is oblivious to the record and the nature of these proceedings.

This Court has previously held that issues of fact preclude summary judgments where "uncontroverted" affidavits nonetheless stood in opposition to the averments of Plaintiff's

unverified complaint. Christensen v. Financial Service Co., 14 Utah 2d 101, 377 P.2d 1010, 2 A.L.R. 3d 1144 (1963). Similarly, this Court has held that the movant's affidavit itself may be self-contradictory or consist primarily of unsubstantiated opinions, precluding summary judgment. Walker v. Rocky Mountain Recreation Corporation, 29 Utah 2d 274, 508 P.2d 538 (1973). In the instant case, Respondent's affidavit (1) stands in opposition to Plaintiffs' complaint, and (2) is itself self-contradictory on the issue of consideration.

Appellants in the instant case have methodically set forth the insufficiency of Klein's tender among the various documents in the record.^{15/} Moreover, the pleadings and even the self-serving, conclusory yet contradictory nature of Klein's supportive affidavit focus specifically on Respondents' inadequate tender.

B. There Was No Waiver of Compliance.

The Option Agreement, in clear language, required for its exercise the execution of a real estate purchase contract by Buyer (Respondents).^{16/}

The Buyer may exercise his right to purchase this property . . . by executing a contract to purchase . . . (15, R. 61)

Respondents acknowledge that no contract was presented until 1972, almost a year after the option expired. Respondents' position is that

. . . Mrs. Sandberg requested that the survey, which was necessary for the preparation of the purchase contract in question, be delayed as an accomodation to

her. The delay requested by Mrs. Sandberg cannot now be used to Appellants' advantage. (RB 38)

The lower court's original order in this case, however, mentioned no such delay, waiver, or estoppel, but simply found that the option was timely exercised. (Order, ¶¶ 3, 7; R. 358) Recognizing the fallacy of the lower court's findings as to the manner of exercise, Respondents simply supplemented the court's findings with theories of waiver and estoppel. These "facts" and legal conclusions are summarized in the second Conclusion of Law.

Since Wanda Sandberg did not object to any of the conduct by Robert D. Klein prior to the exercise of the option on June 7, 1971, and since Wanda Sandberg requested the delay in completing the survey (which delayed the completion of the contract), and since Wanda Sandberg has never objected to the legal description prepared by Howard Stevens and used by Robert D. Klein in the Real Estate Purchase Contract, and since plaintiffs have never objected to any of the terms and conditions set forth in the Real Estate Purchase Contract prepared, executed and submitted by Robert D. Klein to Wanda Sandberg in May of 1972 the plaintiffs waived any objections or objections with reference to those matters and have, since the tender by Klein in June of 1972, been estopped from making any objection with reference to said matters.

Aside from the arguments that (1) the judge had no such conclusions in his findings and conclusions, (2) the facts do not show a waiver (especially when the facts are considered in favor of Appellants, considering Mrs. Sandberg's affidavit that she never made such a waiver), and (3) the equities are not sufficient to support a waiver or estoppel, the resort to waiver as a panacea remains fallacious.

First, a waiver by one vendor (or optionor) does not constitute a waiver by the other vendors (or optionors).

Mansfield v. Redding, 269 Pa. 357, 112 A. 437, 438 (1921).

Therefore, the acts of Mrs. Sandberg can have no effect on the rights of the other appellants, the children with interests in the property.

Second, as an extension of the time to exercise the option varies its terms, it must be in writing under the Statute of Frauds and the equal dignities rule, and further, be supported by consideration. See Gulf Oil Corp. v. Willcoxon, 211 Ga. 462, 86 S.E. 2d 507, 509 (1955).

Third, a waiver may only be made of a condition or promise that is not a material part of the bargain. This is expressed in the Restatement of Contracts §297 as follows:

A promisor whose duty is dependent upon performance by the other party of a condition or return promise that is not a material part of the agreed exchange can make that duty independent of such performance, in advance of the time fixed for it, by a manifestation of willingness that the duty shall be thus independent. (emphasis added)

Here the condition "waived" was the essence of the contract - the form of acceptance and timeliness!

C. There Was No Obstruction of Performance.

Klein also alleges he should be excused from strict compliance with the Option Agreement because Mrs. Sandberg prevented his performance. Appellants have no argument with Respondents' statement of the doctrine but deny that it applies here where allegedly Mrs. Sandberg merely declined to pay half of the costs of a survey of "the property" in 1971. Klein could have submitted a real estate contract with the same price formula as the Option Agreement.

As previously pointed out, the acreage and total price did not affect the initial payment, but only the first annual payment. Klein could also have completed the survey and credited the cost against the purchase price under paragraph 5h of the Option Agreement, or simply completed the survey at his own expense. He drafted the Option Agreement; it imposed no such duty of contribution on Appellants; the proposal that she pay half is an attempted parol modification. Further, there is no evidence that Mrs. Sandberg denied Klein's surveyor entry on the land at any time.

D. The "Exercising Documents" Were a Rejection, If Anything.

Besides assuming that the survey was essential to drafting of the contract, Respondents' waiver and obstruction arguments presuppose that Mrs. Sandberg had a duty to pay one-half the expense of a survey. This was not required by the Option Agreement. If the duty arose from Klein's acceptance the acceptance was not unconditional. As stated by authority cited by Respondents at 55 Am.Jur. Vendor and Purchaser §39, now appearing as 77 Am.Jur.2d Vendor and Purchaser, §91 (1975):

If the optionee attaches conditions not warranted by the terms of the option to his acceptance or notice of his election to buy, this itself amounts to a rejection; but it is otherwise when the acceptance is in the first instance unconditional . . . (RB 42).

Alternatively, if Mrs. Sandberg's participation in the survey was not called for by the option or the acceptance, how can her refusal to participate effectively waive

Klein's timely performance? Simply stated, the alleged acceptance in 1971 was either conditional, requiring additional performance on Appellants' part and thus a rejection, or, if unconditional, then Mrs. Sandberg's refusal to participate in such survey costs cannot be alleged as a material breach excusing or waiving Klein's timely performance.

POINT VII

THERE IS NO MUTUALITY

The lower court held that Klein's unsigned letter dated March 30, 1971, and a tender of \$2,000 in June of the same year exercised the option. This contradicts the option's clear requirement of submission of a formal contract for exercise. Appellants further complained that there was no mutuality within the option period.

If the letter and the check represent the acceptance of the Option Agreement, giving rise to a contract between the parties, then as of the date of Klein's 'acceptance' both Klein and Mrs. Sandberg must have had enforceable obligations. (AB 84)

Appellants pointed out the problems which Mrs. Sandberg would have had in bringing a suit against Klein alleging the unsigned letter and check as an acceptance, and cited Candland v. Oldroyd, 67 Utah 605, 248 P. 1101, 1103 (1926) for the proposition that "[a] contract to be binding upon one must be binding upon the other." (AB 83)

Respondents misconstrue Appellants' argument regarding lack of mutuality as implying a need for equivalence. This is not the case. Appellants have little doubt that an appropriate contract tendered by Respondents would by

necessity have contained those forfeiture provisions called for in the Option Agreement. Appellants merely point out that the letter and check are so nonconforming to the Option Agreement, so equivocal, precatory, and ambivalent as to belie the existence of a mutually binding contract. As stated in 81A C.J.S. Specific Performance §35 (1977):

Before a court may decree specific performance of an alleged contract, there must be a valid, binding agreement: Thus it is required that the agreement be a concluded or completed contract between the parties to the suit. Thus, the court cannot make a contract between the parties and then proceed to decree specific performance of the contract it has itself made. It cannot require the performance of any contract other than the one which the parties themselves made.

Respondents have repeatedly admitted that the letter merely expressed an intent to exercise the option and almost one year after the purported exercise, stated that the property description was "yet to be fully resolved". (P.R. 57; R. 114-116) Respondents now claim a binding contract was formed by the unsigned letter, which reportedly contained exhibits not presently a part of this record. As Respondents state, "[t]he proposed annexation plat is not a matter of record and what it showed or did not show is a matter of conjecture." (RB 37)

This casual admission that the descriptions referred to in that letter are unknown and undemonstrated in the record before this Court cannot be overlooked. Where Respondents' obligations are reduced to but a matter of conjecture, there can be no mutuality. Furthermore, the Statute of Frauds would have precluded the assertion of the

letter as against Klein. It cannot be said that Respondents irrevocably bound themselves.

This case is much like Crockett v. Lowther, 549 P.2d 303 (Wyo. 1976). In Crockett, prospective purchasers of real estate sued the executrix of a landowner's estate for specific performance. The Wyoming Supreme Court found the contract to be an option, cited Utah authority for the strict compliance standard of exercise, and found a letter of intent not absolute enough and not in the proper form to be an exercise. The court said specifically that "[o]ne cannot enforce a contract not binding upon himself." Id. at 310.

Likewise, where Klein's acts were not in strict compliance and are both insufficient to bind him and uncertain in the record, there can be no contract.

POINT VIII

RESPONDENTS MISCHARACTERIZE THE EFFECT OF THE \$19,000 PAYMENTS

Throughout their brief, Respondents have attempted to infer that their \$19,000 in payments made on the Option Agreement have some talismanic effect on its substance or somehow bring into consideration the doctrine of forfeiture. (See RB 19, 22, 24, 30) It is clear that payments made to maintain an option's existence do not change its terms. And, while Respondents infer that equity will not allow Appellants to accept such payments and avoid their obligation, this loses sight of the fact that the obligation paid for,

that of maintaining the option in good stead through 1971, was received. (RB 24) Simply stated, Appellants never denied the existence of the option.

Respondents' reliance on Woolsey v. Brown, 539 P.2d 1035 (Utah 1975) is misplaced. In Woolsey, prior acceptance of payments under an existing bilateral land contract was held sufficient to effectuate a waiver of timely payments, because strict application of that contract's forfeiture provisions would result in a loss of the vendor's equity and expectation of title under the contract. Because such contracts are increasingly used as mortgage substitutes, Utah courts have readily buffered their stringent provisions to allow purchasers thereunder rights similar to those of a mortgagor when a mortgagee seeks to accelerate and declare a default. Id., see also Lamont v. Evjen, 29 Utah 2d 266, 508 P.2d 532 (1973). The rule is a salutary one. Conversely, however:

An option contract does not come within the equitable rule against forfeitures. The question of declaring a forfeiture is not involved. An option contract gives the optionee a right under the named conditions. If those conditions are not met, the optionee does not acquire the right. Such a situation involves none of the elements of a forfeiture. In deprives no party of any right and abrogates no contract, but, on the other hand, is but the enforcement of the contract made by the parties. Lake Shore Country Club v. Brand, 339 Ill. 504, 171 N.E. 494, 501 (1930).

The Lake Shore court further pointed out that judicial manipulation of an option agreement under the pretext of preventing a forfeiture would necessarily violate the very essence of an option:

A court of equity cannot relieve the optionee from the effect of his failure to comply with the conditions on which he has been granted the privilege of buying. This would make a new contract for the parties and compel the owner to sell when he had not agreed to do so. The optionee must perform all conditions precedent to his right to purchase not waived by the optionor. In this respect the denial of an option to purchase property differs from the forfeiture of property rights already acquired under a bilateral contract. James on Option Contracts (1916) §862. Therefore, unless the appellee has met the conditions of the option contract or the conditions have been waived, it is not entitled to exercise the option. 171 N.E. at 501.

As stated in Sun Lumber Co. v. Thompson Land & Coal Co., 76 S.E.2d 105 at 110, (W.Va. 1953), an option is not an interest, but a mere personal right, and thus there is no forfeiture. Indeed, Appellants' conveyance of 40 acres in 1971, then concededly worth \$28,000, perceived by Mrs. Sandberg as the exercise of the option, makes the present claim of forfeiture a mischaracterization of the nature of the option and is purblind to the facts and equities of this case. 17/

CONCLUSION

Appellants firmly believe that several legal issues as to which there are no relevant factual issues are decisive in their favor, and that this Court must enter judgment in their favor. Alternatively, the presence of factual issues requires remand of this case for trial.

Respectfully submitted this 23th day of December, 1977.

ALLEN, THOMPSON & HUGHES

Michael D. Hughes
Attorney for Plaintiffs-Appellants

FINDING/CONCLUS

| No. | Substance | Page |
|---------------------|--|-------------------------------------|
| FINDINGS OF FACT: | | |
| 20 | Real property optioned to Klein is .ct. Estate Purchase Contract. m | AB 53-63 AB 87-91 |
| 21 | Real Estate Purchase Contract consider Money Receipt and Option Agreement material consideration, and all other terms. | AB 86-95 |
| 23 | \$68,359.04 was full payment for the | AB 94-95 |
| 28 | Fence survey & Real Estate Purchase are are consistent with Earnest Money R ment, and observation by the par dispute, or ambiguity in lan | AB 62 AB 53-63 p 27-32 |
| 30 | Earnest Money Receipt unambiguous. Kle | 7-63 -77 |
| 31 | On June 7, 1: down payment. | |
| 32 | Option Agreement to agree. | |
| 33 | Deed of 40 acres di indicated total exer | erein |
| 34 | Mrs. Sandberg waived ti requesting delay in surr | 44 herein |
| 37 | Klein expended time, energy one | 25 herein |
| 38 | Equity requires performance. | Footnote 16 herein |
| CONCLUSIONS OF LAW: | | |
| 1 | Earnest Money Receipt & Option Agreement unambiguous and enforceable. Klein e ertain. | AB 53-63 AB 86-95 AB 64-77 |
| 2 | Mrs. Sandberg did not object to condi June 7, 1973; requested delay in surr legal descriptions or terms of Real E Contract and has waived all objection | 20 herein 44 herein 43 herein |
| 3 | Klein has fully performed and is enti performance. | AB 64-77 AB 86-95 AB 41-51;61 |

TABLE I

CORRELATION OF APPELLANTS' ARGUMENTS WITH SECOND FINDINGS AND CONCLUSIONS *

FINDING/CONCLUSION

Substance

ARGUMENT

Substance

Page

FINDINGS OF FACT:

Real property optioned to Klein is as described in Real Estate Purchase Contract.

Land subject to option not clear; descriptions contradict. Real Estate Purchase Contract does not conform to Option Agreement as to land description.

AB 53-63
AB 87-91

Real Estate Purchase Contract consistent with Earnest Money Receipt and Option Agreement as to legal description consideration, and all other terms.

Real Estate Purchase Contract does not conform with other documents as to description, consideration, and other material terms.

AB 86-95

\$68,359.04 was full payment for the 431.84 acres.

The amount is \$1,000 short.

AB 94-95

Fence survey & Real Estate Purchase Contract descriptions are consistent with Earnest Money Receipt, Option Agreement, and observation by the parties. No discrepancy, dispute, or ambiguity in land description.

There is no evidence the fence surveyed is the one referred to in the documents. Descriptions contradict. Statute of Frauds bars parol evidence.

AB 62
AB 53-63
AB 27-32

Earnest Money Receipt & Option Agreement are clear and unambiguous. Klein timely performed all obligations.

Earnest Money Receipt & Option Agreement descriptions are different. Klein did not timely exercise.

AB 53-63
AB 73-77

On June 7, 1971, Klein exercised the option by making the down payment.

The "exercise" was improper, equivocal, untimely, and tentative.

AB 64-77

Option Agreement not vague or ambiguous; not an agreement to agree.

Option Agreement clearly required the agreement of the parties as to partial exercise, which agreement has not occurred.

AB 41-51;61

Deed of 40 acres did not indicate 40-acre exercise, but indicated total exercise.

Conveyance evidences exercise as to only 40 acres.

Footnote 10 herein

Mrs. Sandberg waived timely preparation of contract by requesting delay in survey which delayed contract.

Mrs. Sandberg could not waive on behalf of all plaintiffs; waiver of essential term not possible; delay of survey did not delay contract.

44 herein

Klein expended time, energy and money in reliance on exercise.

Acts are insufficient to show part performance.

25 herein

Equity requires performance.

Equity does not favor Respondents.

Footnote 16 herein

CONCLUSIONS OF LAW:

1 Earnest Money Receipt & Option Agreement are valid, unambiguous and enforceable. Klein exercised the option.

Land descriptions are unenforceably ambiguous & contradictory. No real estate contract was submitted until 1972. The "exercising letter" was precatory, ambivalent & uncertain.

AB 53-63
AB 86-95
AB 64-77

2 Mrs. Sandberg did not object to conduct of Klein prior to June 7, 1973; requested delay in survey, never objected to legal descriptions or terms of Real Estate Purchase Contract and has waived all objections and is estopped.

No such waiver occurred. Waiver of material terms impossible. Children, as parties, waived nothing.

20 herein
44 herein
43 herein

3 Klein has fully performed and is entitled to specific performance.

Klein has failed to perform in: properly exercising, tender of conforming contract, obtaining agreement as to exercise,

AB 64-77
AB 86-95
AB 41-51;61

References in regular type are to issues raised in the first set of findings and conclusions as well as the second set, and therefore treated in Appellants' Brief. *Italicized references* are to issues raised for the first time in the second findings and conclusions, treated herein.

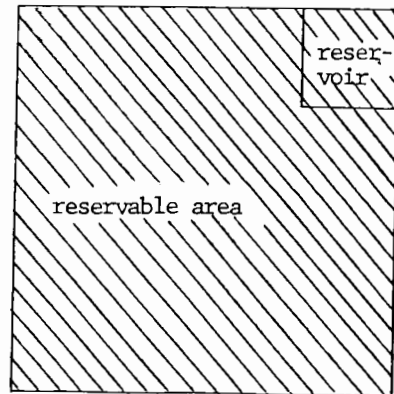
TABLE II

COMPARISON OF LAND DESCRIPTIONS

Earnest Money Receipt

All land owned by the sellers in Sections 21, 22 and 27, Township 42 South, Range 15 West, S.L.M., consisting, so far as the parties can determine at this time of approximately 500 acres not including any water or water rights, and less the following:

There is now a reservoir constructed by the City of St. George on what the parties believe to be the NE 1/4 NE 1/4 of Section 22, and there is an old fence running north and south west of this reservoir. The sellers intend to reserve from said sale all land in said Section 22 which lies east of said fence line, it being understood that the exact line will have to be determined if and when the option hereinafter mentioned is executed.

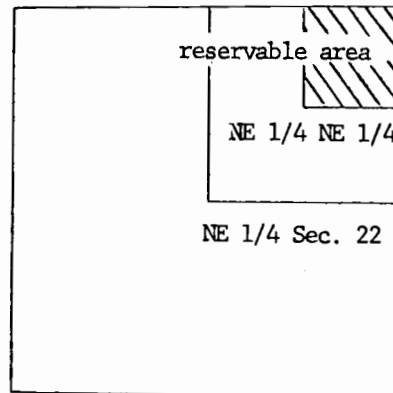


Section 22

1. Reservoir in NE 1/4 NE 1/4 Section 22.
2. Fence North and Southwest of reservoir.
3. Exclusion of all land in Section 22 east of fence.

Option Agreement

[A]ll land owned by the Sellers in Section 21, Section 22, and Section 27 of Township 42 South, Range 15 West, Salt Lake Base and Meridian consisting of approximately 500 acres, which property shall be more particularly described in Schedule A attached hereto, to be signed by the parties and made a part hereof for all purposes; not including any water or water rights, and excluding all land in the Northeast one quarter of the northeast one quarter of Section 22, which lies East of the old fence line, which runs North and Southwest of the City of St. George reservoir, said excluded property also to be more particularly described in Schedule A attached hereto and made a part hereof for all purposes.



Section 22

1. Reservoir not specifically located.
2. Fence north and southwest of reservoir.
3. Exclusion of land east of fence only in NE 1/4 NE 1/2 Section 22.
4. No Schedule A exists.

Annexation Plat

All of the NE 1/4 Section 22, Less that portion within Washington City.

All of the NW 1/4 Section 22 lying south of Interstate Highway 15.

All of the NW 1/4 SW 1/4 and E 1/2 SW 1/4 Section 22.

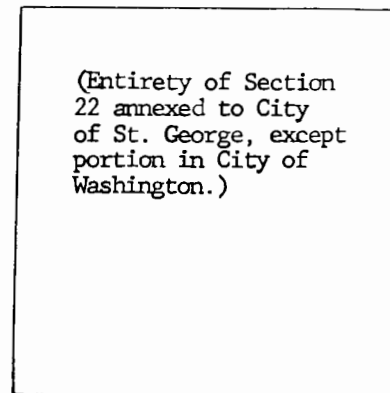
All of the E 1/2 NE 1/4 Section 21 lying south of Interstate Highway 15.

NE 1/4 SE 1/4 Section 21.

All of Sectional lots 1 & 2 Section 27.

All being located in T.42S., R.15W., Salt Lake Base and Meridian.

(R. 109 (emphasis added)).



Section 22

1. No reservoir is mentioned.
2. No fence is mentioned.
3. No exclusion.

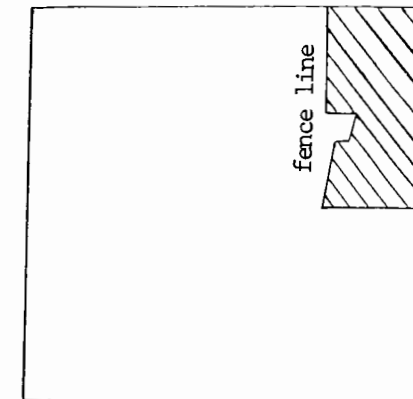
Real Estate Purchase Contract

The following described property located in Washington County, State of Utah, Township 42 South, Range 15 West: Section 22: SE 1/4 SW 1/4; NE 1/4 SW 1/4; NW 1/4 SW 1/4; SE 1/4 NW 1/4; NE 1/4 NW 1/4; also Beginning at an existing fence line at its intersection with the North line of Section 22, T42S, R15W, SL&M, which point is 12.2 feet west from a stone mound marking the NE corner NW 1/4 NE 1/4 said Section 22 and running thence S 0°14'W 1338.5 feet along said fence line, thence S 89°36'30" E 433.0 feet along said fence, thence S 10° 09'30" W 405.0 feet along said fence, thence S 83°49'30" W 107.0 feet along said fence, thence S 12°40'10" W 910.49 feet, more or less, along said fence to the South line NE 1/4 said Section 22, thence west 1380 feet to the SW corner said NE 1/4, thence north 2640 feet to the N 1/4 corner said Section 22, thence east 1307.8 feet to the point of beginning. Containing 86.84 acres, more or less.

Section 21: SE 1/4 NE 1/4; NE 1/4 SE 1/4.

Section 27: All of sectional lot 1 consisting of approximately 19 acres; all of sectional lot 2 consisting of approximately 42 acres.

All of said property consisting of approximately 431.34 acres. (R. 328).



Section 22

1. No mention of reservoir.
2. A fence is located.
3. Exclusion in both NE 1/4 and SE 1/4 of NE 1/4, Section 22.

FOOTNOTES

1/ This Order was on its face a final one and twenty-one days had passed since its entry when Appellants filed their notice under Rule 73 U.R.C.P.

2/ The lower court entered a formal Order to this effect on June 6, 1977.

3/ The procedural irregularity noted by Respondents on page 4 of their brief was caused primarily by their tender of a second Order to the lower court contrary to the dictates of the Order docketed March 25, 1977. Regardless of the cause of the irregularity, however, Respondents' proposition that Appellants' appeal from the Order entered on April 19, 1977 should be dismissed has been previously heard by this Court and denied.

4/ In appeals from equitable actions, it becomes both the duty and the prerogative of the Supreme Court to review both the law and the facts and to make its own findings and substitute its judgment for that of the trial court. Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974). Furthermore, every inference and every position arguable on behalf of the Appellant must be taken by this Court. Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975).

5/ Respondents' counsel dismissed this assertion as a "professional insult from some rather inexperienced counsel." (Transcript May 25, 1977 at 10:25-26)

6/ It should be noted that one affidavit was stipulated to as "uncontroverted" for purposes of both motions. That affidavit was the one submitted and filed by Wanda Sandberg on March 15, 1977, the morning of the hearing below. (T. at 7:12-15, R. 399; Affidavit at R. 355) Ultimately, it may be that the lower court misconstrued the parties' stipulation on Mrs. Sandberg's affidavit and instead attached the "uncontroverted" label to Klein's affidavit filed one month earlier. (R. 337-348; Order R. 359) This is the only plausible explanation the Appellants can offer for the court's "findings".

7/ Respondents' counsel represented to the lower court that he mailed the proposed findings "about ten days" before they were signed. (Transcript of Testimony, May 25, 1977 at 8:24-25)

8/ Appellants strenuously object to Respondents' reference to "acknowledged writings" in Respondents' Brief at 18. None of these writings are acknowledged.

9/ Respondents rely on five cases in support of their statement. Three of them (Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 702 (1970), In Re Ekker's Estate, 19 Utah 2d 414, 432 P.2d 45 (1967); Riter v. Cayias, 19 Utah 2d 358, 431 P.2d 788 (1967)) were cases in which the plaintiff attempted on appeal to present a new theory of recovery. These same three cases and another case (State By and Through Road Commission v. Larkin, 27 Utah 2d 295, 495 P.2d 817 (1972)) were appeals following a trial on the merits with full development of issues. In the other case cited, (Thompson Ditch Co. v. Jackson, 29 Utah 2d 259, 508 P.2d 528 (1973)), the Court noted that the issue sought to be raised for the first time on appeal was presented in another related case.

10/ In this case, the conveyance of 40 acres to Respondents in 1971 may be alleged to be part performance. Obviously, from the citation of Glass, acts of Mrs. Sandberg are not part performance. In fact, the Glass court specifically said that the conveyance of a portion of the land is neither a part performance, nor is it a recognition of the alleged oral contract so far as it relates to the remaining land not included in the deed. On the contrary, it is in distinct disregard and implied disavowal of such a contract. Glass, supra, at 29. Obviously, alleged partial conveyances always beg the question; part of what? The whole, by conveyance of part, can hardly be determined.

11/ Respondents object to Appellants' reliance on the annexation plat (included in the record as an Exhibit by Respondents) when the March 30, 1971, letter refers to the proposed annexation plat. (RB 37) Respondents apparently infer that the proposed annexation plat, referred to on March 30, 1971, is a materially different document than the annexation plat which bears a surveyor's certificate dated April 5, 1971, only 5 days later. Appellants feel that Respondents, who bore the burden of proof below, would have included such an exhibit were it probative. Appellants have never seen it.

12/ This concession is fatal even if Appellants were to concede the conformity of land descriptions.

13/ In his initial petition before the probate court, Respondent recited prior payments of \$19,000. (Probate record at 55) Subsequently, but as part of the same petition, Respondent incongruously recited prior payments totalling \$20,000 (Id. at 61) From this point forward Appellants sought discovery on the consideration matter, contending that all the matters presented in Respondent's probate petition were essentially in dispute. (Id. 103) Appellants filed a separate complaint seeking to quiet title to the land claimed by Respondent and specifically alleged

failure of consideration as a ground for voiding the Option Agreement. (R. 1) Thereafter in interrogatories to Avalon Klein, Appellants attempted to ascertain whether any payment was alleged to have been made by parties other than Respondent Robert Klein. (R. 17-19) Royal K. Hunt, Esq., acting as counsel for Appellants, requested any and all information by and through which the Defendant and Respondent Robert D. Klein based his conclusion regarding a tender of full performance of the conditions for exercise of the Option Agreement. (R. 25-27) Respondent's answers referred to the earlier petition in the probate case referred to supra, which was disputed. (R. 28-31) Unsatisfied with the response, Appellants then submitted a request for admissions to Respondent Klein detailing payment by payment the \$17,000 paid between June 14, 1962 and December 14, 1970, pursuant to the terms of the Option Agreement. (R. 55-56) In his answers to requests for admissions, Klein verified what Appellants thought true, that insufficient funds had been tendered. (R. 66-67) During discovery, Respondent Klein had marital difficulties and a second wife, Frances Klein, was requested to admit or deny whether she made any additional payments on the Option Agreement. Her responses indicate that she offered no additional consideration. (R. 128-131.) Ultimately Respondent Klein moved before the court for permission to file a counterclaim. (R. 164-165) The counterclaim alleges that payments were made as required under the option agreement and that Klein timely tendered "the full purchase price" for the real property allegedly contained in the Option Agreement. (R. 166-168, particularly ¶¶ 4 & 6)

14/ For example, his memorandum before the lower court clearly recites that only \$19,000 had previously been paid under the Option Agreement. (R. 286, 288)

15/ See footnote 12, supra; Appellants' Brief at 94-95.

16/ Respondents' contention that the option did not specify who was to prepare the contract is inane. The law places the burden of exercising - accepting the offer - on the optionee. Lincoln Land and Development Co. v. Thompson, 26 Utah 2d 324, 487 P.2d 426 (1971). Obviously the Respondents were to prepare the contract. Were Appellants expected to prepare the contract and have it waiting in case he desired to exercise? The Option Agreement specifically provided that Respondents could apply such costs to the purchase price. (Paragraph 5(h), R. 61)

17/ Respondents assert that the description on the Real Estate Purchase Contract they tendered was consistent with the Earnest Money Receipt and Option Agreement "according to the parties' understanding thereof". (RB 10) Respondents

fail to state that Mrs. Sandberg has previously indicated she never understood what Respondents intended, and it is clear that she never indicated to either the St. George City Council or the Washington County Commission that Respondent Klein had exercised the Option Agreement, as Klein has claimed. (AnWS No. 17, R. 137; An114RK Nos. 3a & b, R. 152)

Further, Respondent Klein has previously claimed under oath that "[h]e was buying approximately 450 acres as described in Holidaire Lands annexation plat." (No. 3c, Id.; R. 152-153; Plat R. 109) On appeal, however, he contends that that plat also depicts contiguous property that he is not purchasing. (RB 9; Plat. R. 109) It is little wonder that Respondents, in alleging all these descriptions to be identical, continually refer this Court to the findings of fact entered by the lower court instead of the actual documents in the record on appeal. The findings conform in large part to the conclusory affidavit filed by Respondent Klein on February 14, 1977. (R. 337-345; 369-380)

Respondents' contentions that Appellants orally agreed to the surveyor's description prepared in 1972 are both immaterial and without foundation. Davison v. Robbins, 30 Utah 2d 338, 517 P.2d 1026 (1973). Mrs. Sandberg's only understanding was that the land ultimately agreed to be somewhere within the boundary demarked by the fenceline and not coextensive with it. (AnWS No. 9, R. 134)

Respondents also state that Mrs. Sandberg represented to third parties after December of 1971 that Respondent Klein had purchased "the property". (RB 11-12) The basis for this "finding" is Mrs. Sandberg's deposition, R. 398, at pages 51-52. A reading of these pages reveals that both Mr. Klein's counsel and Mrs. Sandberg got confused at the deposition and had to begin this series of questions over. (Id. at 52:18-20) Ultimately, Mrs. Sandberg could only recall statements made before December 1971. (Id. at 52) Furthermore, Respondent Klein's own affidavit confirms that Mrs. Sandberg refused to discuss the option with him after December of 1971. (¶19, R. 341-342) Klein's omniscience apparently allows him to testify at will as to Mrs. Sandberg's "understanding". Mrs. Sandberg unfortunately is not equally gifted and has indicated her failure to comprehend Klein's intentions, affirmatively testifying that no agreement was ever made in June of 1971. (AnWS No. 17, R. 137; DWS, R. 298 at 30:12-19)

Lastly, Respondents quote Mrs. Sandberg as stating that she and the Respondent "walked out on the fence and that at that time she was insisting that the meandering fence was the boundary of the property she was selling, and that Respondent agreed thereto." (RB 24, citing DWS, R. 398 at 14-15) There is no such quote.

CERTIFICATE OF DELIVERY

I served two copies of the foregoing Reply Brief
on Mr. James P. Cowley of Watkiss & Campbell, 310 South Main
Street, Salt Lake City, Utah, by delivering them to him on
this 30th day of ^{December 1977} ~~January~~, 1978:



DAVID NUFFER