

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 The of Wayne Sandberg: Brief of Appellants

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Utah Supreme Court  
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IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

WANDA SANDBERG; WANDA SANDBERG, Admini- )  
stratrix 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 Plaintiff's )  
Complaint adverse to Plaintiffs' Ownership )  
or any cloud upon Plaintiffs' title )  
thereto, )

Case No. 15146

Defendants and Respondents )

& )

In the Matter of the ESTATE )  
of )  
WAYNE SANDBERG, )  
Deceased. )

---

BRIEF OF APPELLANTS

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An Appeal from Summary Judgment of the  
District Court of the Fifth Judicial  
District, the Honorable Don V. Tibbs,  
District Judge, Presiding.

---

James P. Cowley  
WATKISS & CAMPBELL  
310 South Main, 12th Floor  
Salt Lake City, Utah 84101  
  
Attorney for Defendants and  
Respondents

Michael D. Hughes  
ALLEN, THOMPSON, HUGHES & BEHLE  
148 East Tabernacle  
St. George, Utah 84770

Royal K. Hunt  
Theodore I. Wittmayer  
2265 East 48th South  
Salt Lake City, Utah 84117

Attorneys for Plaintiffs and  
Appellants

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In the Matter of the ESTATE )

of )

WAYNE SANDBERG, )

Deceased. )

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BRIEF OF APPELLANTS

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NATURE OF THE CASE

Plaintiffs-appellants filed this action to quiet title to approximately 400 acres of real property situate in Washington County, Utah. Defendants-respondents filed a counterclaim seeking specific performance of an Option Agreement allegedly

pertaining to some of the property. For purposes of judicial convenience, the lower court subsequently consolidated the quiet title action with a probate proceeding involving the same parties and issues.

#### DISPOSITION IN THE LOWER COURT

The case was heard by the lower court on Motions for Summary Judgment either to declare the Option Agreement of no effect, or to find the same specifically enforceable. On March 25, 1977, the court entered the ORDER from which this appeal is taken granting judgment in favor of Defendants on their Counterclaim and decreeing specific performance of a real estate purchase contract allegedly in conformity to the Option Agreement presented by Defendants.

#### RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the summary judgment entered against them on the grounds that the Option Agreement is not a document susceptible of specific enforcement and that the Option Agreement was not properly exercised.

#### STATEMENT OF FACTS

In early 1962, the respondent, Mr. Robert Klein, a man previously licensed in real estate, with a contractor's license and over ten years' experience in the building and subdividing business, came to the Sandberg home in Washington County, Utah, with Orval Hafen, an attorney.<sup>1</sup> (Deposition of Robert D. Klein, pp. 2-3, 17-18 [hereinafter DRK],

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<sup>1</sup>Notations to the record herein are to the civil case and not the probate files consolidated therewith unless otherwise specified.

R. 397) (Deposition of Wanda S. Kurt, p. 6:12-15 [hereinafter DWS]; R. 398) As a result of initial negotiations, on April 4, 1962, Wayne Sandberg, now deceased, and his wife, Wanda Sandberg, now Wanda Sandberg Kurt, entered into an Earnest Money Receipt, which was essentially a preliminary offer to Robert D. Klein to allow him to purchase certain real property located in Washington County, Utah, (DWS, pp. 6, 7:20-24, 55:23, R. 398; DRK 4:5, R. 397), described therein as follows:

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 fenceline, it being understood that the exact line will have to be determined if and when the option hereinafter mentioned is executed. (R. 196)

The Earnest Money Receipt provided that the buyer had thirty days "to enter into an option" on the terms as set forth therein "and on such other terms as the parties hereto may agree."

(R. 197) Moreover, the Earnest Money Receipt was specifically referred to as a "preliminary contract" that of necessity "[did] not contain all the terms and conditions either of the option or the agreement to purchase, and that both of said documents [would] contain the usual and customary provisions." (R. 198)

The April 4, 1962, Earnest Money Receipt that was supposed to remain open for thirty days was extended to June 14, 1962, pursuant to a written addition to the document dated April 30, 1962. On June 14, 1962, Robert Klein paid \$500.00 on the Earnest Money Receipt to further extend the original thirty-day period. Additional sums totalling \$3,500.00 were subsequently paid to prevent the option granted by the Earnest Money Receipt from terminating until December 14, 1964. (Answers to Request for Admissions of Robert D. Klein [hereinafter AnRK] No. 1, R. 66; Answers to Requests for Admissions of Wanda Sandberg [hereinafter AnWS] Nos. 2 & 3, R. 132)

On September 21, 1964, however, Robert Klein and Wanda Sandberg, individually and as the legal representative and heir-at-law of Wayne Sandberg, signed an Option Agreement which agreement was drawn and prepared by Robert Klein. (AnRK No. 14, R. 69) At that time, as before, Mrs. Sandberg was not represented by counsel.

By its terms, the Option Agreement formally ratified the terms and conditions of the earlier Earnest Money Receipt "together with the modifications to which the parties have agreed." (R. 59) The Option Agreement covered . . .

[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. (R. 59-60)

The "Schedule A" spoken of never came into existence and thus was not incorporated into the Option Agreement as recited therein; similarly, the description of the "excluded property" is also nonexistent and not attached thereto.

Paragraph 3 of the Option Agreement recited those payments necessary to keep the Option Agreement in effect (R. 60-61), while paragraph 4 contained provisions allowing for the possible extension of the Option Agreement until 1982, some eighteen years after the document was signed with no adjustment in the price for the land. (R. 61) It is not disputed, however, that the last payment tendered to maintain and keep the option in good standing was made on or before December 14, 1970. That payment was for a six-month extension of the option until June 14, 1971, and, as of that date, the option expired. Thus, by the terms of the Option Agreement the option would have had to have been exercised on or before June 14, 1971, to create a binding contract. (AnRK Nos. 1, 4, 7, 9 & 13 R. 66-69; DWS 55:13-17, R. 398) As of the last payment on December 14, 1970, respondent Klein had paid \$17,000.00 to maintain the option in good standing.

Paragraph 5 of the Option Agreement provided the only method by which the option was to be exercised:

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 shall provide as follows: (R. 61 (emphasis added))

. . .

Thereafter, several subparagraphs of paragraph 5 set forth some of the terms and conditions to be provided in the contract. For example, subparagraph 5b required a down payment under the contract of "Two Thousand Dollars (\$2,000.00) (or such other amount as the parties may agree) on said contract", and paragraph 5e provided for partial releases of contiguous land selected by the buyer or otherwise as mutually agreed by both parties. (R.62)

On March 12, 1971, while state appraisers were appraising the Sandberg property at \$100.00 per acre for probate purposes, Mrs. Sandberg, at Robert Klein's request, authorized James R. Brown, a Utah attorney, to represent her in a condemnation proceeding filed against her by Dixie Rural Electric Association. (DWS 27:9-18, R. 398, R. 105) In that same authorization she assigned whatever proceeds were received from those proceedings to Robert Klein, subject, of course, to his proper exercise of the option. (R. 105; AnWS No. 10, R. 135)

On March 30, 1971, respondent Klein apparently delivered to Wanda Sandberg a letter indicating "his intention of exercising the option of September 24, 1964."

Petition for Order Requiring Administratrix To Execute Deeds, and for Specific Performance of Contract, ¶14, Probate Record 57;R.71) Respondent Klein has stated and the lower court has ruled that the letter of March 30, 1971, together with some verbal communication was the understanding of the parties regarding the contract for purchase (AnRK No. 11, R. 68; Order of District Court [hereinafter Order] ¶7, R. 358), and that Mrs. Sandberg knew that respondent "was purchasing all of the property in my [his] letter." (DRK 13:13-16; R. 397) That letter, unsigned in the record before the Court, in pertinent part, states as follows:

[T]here are one or two matters that should be considered preparatory to my exercising the option and the delivery of title to a portion of the land designated by the option.

. . .

My interpretation of the number of acres involved essentially corresponds with yours, namely that the land Wayne intended to sell lies west of the fence line that you and I have both seen together. I would like you to know that I can appreciate your concern that this line be agreed to by both of us.

. . .

If you think about it, descriptions along section or quarter section lines generally are more easily handled. It is for this reason, after careful review that I have discribed [sic] the annexation description as indicated by the plat which I am including with this letter. This description, within a few feet, corresponds with the fence line that you and I have observed together when we last saw each other. [sic] This I trust will correspond with your own interpretation of what land you in fact believe you are selling. Should you still have some apprehension that I am not aware of, I am sure that on a face

to face basis and with the help of a surveyor we can resolve fairly to each of our satisfaction whatever differences [sic] of opinion we may encounter.

I trust that the linen of the kind which I am showing you at the time of delivery of this letter will be all that will be required. You will note that I am only proposing that land be annexed which I am in fact buying from you. (R. 71-73)

The proposed annexation linen spoken of in the letter was executed by Robert Klein and Wanda Sandberg on April 5, 1971. (Affidavit of Robert D. Klein [hereinafter ARK] ¶14, R.39) That same linen bearing the subsequent approval of the St. George City Council appears in the record on page 109 and in the probate record at page 83. (Note there are two set of 80's in the probate record) According to respondent Klein, this plat dealt with the real property which was the subject matter of this lawsuit. (ARK ¶14; R. 339) Specifically, respondent Klein has stated, apparently to confirm the letter of March 30th's language, that "he was buying approximately 450 acres described in the Holidaire Lands annexation plat and the option agreement dated September 21, 1964," which lands respondent Klein caused to be annexed to the City of St. George on May 17, 1971. (Answers to Request for Admissions, First Set and Interrogatories, Fourth Set of Robert D. Klein [hereinafter AnlI4RK] 2c, R. 151; ARK ¶14, R. 339-40; Memorandum of Points and Authorities of Robert D. Klein [hereinafter MRK], R. 289)

On June 3, 1971, respondent Klein drafted a check bearing the notation "down payment to commence June 15 agree-

ment 1971." (R. 64) This check was tendered to Mrs. Sandberg on June 7, 1971, as the down payment on the contract contemplated by paragraph 5 of the September 21, 1964, Option Agreement and not as payment under paragraph 3d of the Option Agreement to keep it in good standing. (AnRK Nos. 2-5, R. 67; R. 61) Respondent Klein successfully asserted before the lower court that this act, coupled with the delivery of the prior letter of March 30, 1971, exercised the option. (MRK ¶8, R. 271; Order ¶7, R. 358)

Though respondent Klein had requested a release of 55 acres in his letter of March 30, 1971, (R. 71-73), Mrs. Sandberg conveyed only 40 acres to respondent Klein, executing a Warranty Deed prepared by him. (AnRK No. 7, R. 68; R. 111) The conveyance, in particularity, dealt with the

SE 1/4 NE 1/4 of Section 21, Township 42 South,  
Range 15 West, Salt Lake Base and Meridian  
(R. 111)

All Mrs. Sandberg recalls was that respondent Klein wanted this property because he already had it sold. (DWS 26:13-20, R. 398) Respondent Klein did sell that property, apparently all 40 acres, to one Harman Johnson for \$700.00 per acre. (DRK 11:20-28, R. 397)

Although the check dated June 3, 1971, bore the inscription "down payment on June 15, agreement 1971", at no time prior to June 15, 1971, did the respondent execute a contract to purchase "all or such part or parts of the property as the parties may agree" as required by paragraph 5 of the Option Agreement. (R. 64; AnRK No. 10, R. 68; R. 61)

In fact, there is no agreement of June 15, 1971, in the record because no such agreement exists. It is important to note that respondent Klein stipulated that "at no time during her contacts with Defendant [respondent] in this case did she [Wanda Sandberg] request the Defendant [respondent] to abstain from submitting contracts required pursuant to the 1964 option agreement' entered into by the parties. (R. 355; Transcript [hereinafter T] 7:12-14, R. 399)

As no payments were made to extend the option after December 14, 1970, the period for exercising the option terminated on June 14, 1971. (Option Agreement ¶3, R. 60-61; R. 339; AnRK No. 1, R. 66-67)

In April of 1972, some ten months later, respondent Klein met with Mrs. Sandberg purportedly to finalize arrangements with her to complete a survey to determine the exact acreage of the Holidaire Lands Addition to St. George so that the real estate contract contemplated by paragraph 5 of the Option Agreement could be drafted and the annual installment required under that proposed document computed. (MRK pt. 10, R. 272) Mrs. Sandberg, however, concluded that after her conveyance of forty acres, and, in the absence of the June 14, 1971, and December 14, 1971, payments under paragraph 3d of the Option Agreement, that the Option Agreement had terminated. (DWS 28-29, 33:26-30, R. 398) Respondent Klein, nonetheless, apparently requested and paid Howard G. Stevens, a registered land surveyor, for a survey in the entire NE 1/4 of Section 22, T42S, R15W, of a fenceline

which respondent Klein had shown to Mr. Stevens which Klein apparently believed to be the fenceline referred to in the Option Agreement and Earnest Money Receipt. (Affidavit of Howard G. Stevens, [hereinafter AHS] ¶7, R. 264) Meanwhile on May 2, 1972, respondent Klein's attorney, Leo A. Jardine, Esq., wrote Royal K. Hunt, Esq., who had been retained by Mrs. Sandberg adjunct to the probate proceedings, a letter. The pertinent part of that letter pertaining to land descriptions reads as follows:

The parties have also tentatively agreed as to the property description which, in our opinion, is the only matter yet to be fully resolved but can be resolved and determined by application of the provisions of the contract and the written notations made by the parties on that plat or from a physical survey of the property. (R. 115)

The "contract" spoken above was the Option Agreement, because on May 2, 1972, there was still no contract as contemplated by paragraph 5 of the Option Agreement in existence.

Howard Stevens completed the survey requested by respondent Klein on May 12, 1972. (AHS ¶8, R. 264) On May 16, 1972, respondent Klein executed as grantee and submitted to Wanda Sandberg for her signature as grantor a Real Estate Purchase Contract which was alleged to be "in every way consistent with the terms and conditions of the Option Agreement." (MRK pt. 10, R. 272) The lower court also took this position, that is, that "[t]he real estate Agreement, submitted by Robert D. Klein to Wanda Sandberg, was in conformity both as to description and consideration with the option agreement." (Order ¶4, R. 358)



The real estate purchase contract submitted to Mrs. Sandberg by respondent Klein appears in the record on pages 117-121. Although the Option Agreement only reserved to the sellers [Sandberg] some land contained in the "Northeast one quarter of the Northeast one quarter of section 22" (R. 60), the real estate purchase contract reserved for the sellers land not only in the NE 1/4 of the NE 1/4 of Section 22, but in the SE 1/4 of the NE 1/4 as well. This additional reservation to Mrs. Sandberg was the result of Mr. Stevens' survey of a fence line shown to him by respondent Klein. Thus, respondent Klein's "conforming contract", in seeking to convey only part of Section 22, in the following language, left Mrs. Sandberg with more land than had been reserved for her by the Option Agreement, and was an attempted exercise for only part of the property subject to the option.

Beginning in an existing fenceline at its intersection with the north line of Section 22, T42S, R15W, SLB&M which point is 12.2 feet west from a stone mound marking the NE corner NE 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 443.0 feet along said fence, thence S 10° 09' 30" W 405.0 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. (R. 121)

Simply stated, there is land in the SE 1/4 of the NE 1/4 not requested from Mrs. Sandberg by respondent Klein, and, therefore, specifically reserved for her by respondent Klein's



Real Estate Purchase Contract. This fact is not affected by Mrs. Sandberg's conveyance of 40 acres in June of 1971, as that land was entirely in Section 21. (AnRK No. 7, R. 68; R. 111; R. 119)

Of course, respondent Klein can state that just such an exercise was authorized by paragraph 5 of the Option Agreement which in setting forth the manner of the Option Agreement's exercise called for a contract "to purchase all or such part or parts of the property as the parties may agree." (R. 60) Nonetheless, while the parties theoretically might have agreed to any description of land, Klein himself has not been consistent. For example, it is difficult to reconcile the fact that the real estate purchase contract covers approximately 70 acres less than the Holidaire Lands Addition to the City of St. George, all of which respondent Klein indicated he intended to buy in his letter of March 30, 1971. (R. 73; ARK ¶14, R. 339; AnII4RK 2c, R. 151; MRK, R. 289) Stranger still is the lower court's holding that this letter, unsigned in the record before the Court, along with the June 7, 1971 payment of \$2,000.00 exercised the Option Agreement giving rise to the real estate purchase contract, which covers less than all of that annexation. (Order ¶¶ 4 and 5, R. 358)

A check dated June 1, 1972, for the sum of \$8,627.84 with the notation "1972 annual principal and interest, and contract payment" was ultimately tendered to Mrs. Sandberg

presumably pursuant to the aforementioned unilaterally drafted real estate purchase contract. (R. 122)

Receiving no response, respondent Klein on June 13, 1972, caused F. Clayton Nelson, Esq., to hand deliver to Mrs. Sandberg a cashier's check in the amount of \$68,359.04. (R. between 122 and 123, unnumbered; DRK 6-8, R. 397) Along with that check was another unsigned letter which stated, inter alia:

Please find enclosed herewith a cashier's check in the amount of \$68,359.04 which constitutes payment in full for the 431.84 acres (40 acres of which you have delivered) which I have purchased from you and Wayne under our original Earnest Money Agreement dated April 4, 1962 . . . (R. 124 (emphasis added))

Respondent Klein probably failed to notify Attorney Nelson that Mrs. Sandberg was already represented by an attorney. (DRK 8, R. 397)

On July 6, 1972, respondent Klein, as president of Capital Enterprises, Inc., sent a letter demanding that Mrs. Sandberg deliver deeds to some property described as "Exhibit A" in said letter, but not part of the record.<sup>2</sup> (R. 125) Five days later, on July 11, 1972, Mrs. Sandberg's attorney, Royal K. Hunt, Esq., returned the tender of \$68,359.04 along with a letter indicating that the option had terminated prior to the tender of the June 1972 real estate purchase contract. (R. 126)

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<sup>2</sup>Presumably the "Exhibit A" spoken of would be the same "Exhibit A" as is attached to the real estate purchase contract signed by respondent Klein on May 16, 1972. (R. 121)

On April 3, 1974, Mrs. Sandberg filed an action to quiet title to the real property ultimately claimed by respondent Klein as set forth in "Exhibit A" to his real estate purchase contract. (R. 1-3, 121) Thereafter, acting on the advice of her attorney and for tax purposes, Mrs. Sandberg quit-claimed whatever interest she had in all of the lands mentioned in the original Earnest Money Receipt to a limited partnership in which her children are the limited partners. (DWS 48-49, R. 398) Subsequently, all parties named as defendants to the quiet title action have admitted that whatever right or title they have to those lands described in "Exhibit A" to respondent Klein's real estate purchase contract is claimed by and through respondent Klein.

On the 17th day of January, 1977, the Honorable J. Harlan Burns, District Judge, set the case for trial. Some two weeks later, on February 7, 1977, respondent Klein filed a counterclaim dated February 4th stating that "the property described as "Exhibit A" in the real estate purchase contract was that certain real property referred to in both the Earnest Money Receipt and Option Agreement. (R. 121, 170; Counterclaim of Robert D. Klein [hereinafter CRK] ¶¶ 1, 3, 4 and 6, R. 166-168)

Concurrently with the filing of respondent's counterclaim, Mrs. Sandberg filed a Motion for Summary Judgment. Subsequently, a similar motion was filed by respondent

Klein. Upon counsel's stipulation as to the facts,<sup>3</sup> the motions were heard on March 15, 1977, by Honorable Don V. Tibbs, District Judge, sitting in Washington County due to the illness of Judge Burns.

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<sup>3</sup>A stipulation as to the facts of this case was entered at the hearing on the motions for summary judgment. From the record, however, it is unclear what the parties stipulated. Appellants believe the stipulation was as to the existence of certain documents, the contents, dates, and signatures thereto if existent and as to the date and fact of receipt and delivery of the various documents.

The stipulation was made at the insistence of the court.

...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?  
(T 6:12-15.)

As stated in the above excerpt, the court apparently felt that the salient facts were set out in the memoranda in support of the various motions.

If you are willing to stipulate that it is a question of law based upon the fact as set forth in your respective motions. (T 6:26-29.)

The rejective counsel, however, felt that the motion was submitted on the basis of all the materials in the file.

MR COWLEY: Your Honor, I don't believe there is any dispute as to the facts, and I've traveled down here to argue the motion, and we are willing to submit it on the basis of the materials in the file. (T 6:20-24.)

MR COWLEY: Your Honor, I think maybe we ought to clear up by the record one more bit on this, and that is that it is submitted on the evidence before the Court in the file at this time and that this hearing is going to be an argument on the law and not the introduction of any further testimony or evidence.

THE COURT: That is my impression.

MR. THOMPSON: That is my impression.

(T 6:28-8.5)

## ARGUMENT

### PART ONE - PROCEDURAL AND EVIDENTIARY STANDARDS

#### POINT I

##### (Procedural)

#### THE SCOPE OF JUDICIAL REVIEW ENCOMPASSES BOTH LEGAL AND FACTUAL ISSUES

In equitable actions appellate review traditionally encompasses both the law and the facts. This broad scope of review is warranted because the original trial involved no finder of fact other than a judge, so the appellate court may easily place itself in the position of the trier of fact, which is not possible in review of jury trials. Some jurisdictions have even adopted a trial de novo review of equity cases in their supreme courts. See, e.g., Smith v. Vehrs, 242 P.2d 586(Ore. 1952).

Utah, while not providing for a trial de novo procedure in equitable proceedings, does provide for appellate review of the record on both legal and factual issues. This scope of review of equity cases is founded in the Utah Constitution.

The appeal shall be upon the record made in the court below...In equity cases the appeal may be on questions of both law and fact...  
(Utah Const. art. 8, §9).

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The subject matter of the stipulation is therefore difficult to ascertain, but appellants will proceed on the basis that the operative physical facts evidenced by the file were the subject of the stipulation and that the inferences therefrom, with questions of intent, understanding, and belief were not conceded by either party.

Essentially the same language is found in Rule 72(a) of the Utah Rules of Civil Procedure.

In equity cases the appeal may be on questions of both law and fact.

Thus, where the decision below was bottomed in equity and where the appellant questions the findings of fact, it is the duty of the appellate court to review the accuracy of both the findings of fact and conclusions of law. This is not a judicial burden that can be passed over lightly in an effort to get at the "real arguments". In the instant case, appellants believe that judicial cognizance of this rule may be requisite to their obtaining a full and fair hearing on the facts and issues of the case.

Under Article VIII, Section IX, Constitution of Utah, it is both the duty and prerogative of this court in an equitable action to review the law and the facts and make its own findings and substitute its judgment for that of the trial court. (Mitchell v. Mitchell, 527 P.2d 1359, 1360 (Utah 1974)).

See also Tripp v. Bagley, 74 Utah 57, 276 P. 912, 69 A.L.R. 1416 (1928).

That this Court has such broad review power is evident by the customary appellate disposition of equity cases where the evidence is not found lacking. Generally, this Court has not remanded equity cases after appellate review, but rather has entered or directed judgment.

In view, therefore, that this is purely an equitable proceeding which comes to this court upon questions of both law and fact, we have the power, and it is our duty, to either make findings and render judgment in accordance with the facts and the law applicable thereto, or direct that such findings

and judgment be made and entered by the court below. (Johnson v. Seagull Inv. Co., 65 Utah 424, 237 P.945, 948 (1925)).

See also St. George and Washington Canal Co. v. Hurricane Canal Co., 93 Utah 262, 72 P.2d 642 (1937). As was stated in a recent Oklahoma case, Matter of Reyna, 546 P.2d 622, (Okla. 1976):

In a case of equitable cognizance, the Supreme Court may weigh the evidence and enter such judgment as the trial court should have rendered.  
(546 P.2d at 625).

Entry of judgment by the appellate court is made following the review of equity cases because the appellate court has full power to find the facts, make conclusions of law, and enter judgment. Of course, where the court feels there is more necessary evidence available, not in the record, it may remand for further taking of evidence, either retaining the case for proceedings after the further evidence is gathered or remanding it entirely for both findings and conclusions in the lower court.

In this case, the parties stipulated at the hearing on the motions for summary judgment that they would submit the case on the evidence in the file at that date. (T 7:28-8:5) Appellants contend that the findings entered on the order appealed from do not reflect the facts as stipulated. For this reason, review of the factual, as well as legal issues is sought by the appellants. It is the duty of this Court to make independent findings and substitute its judgment for that of the trial court.

POINT II  
(Procedural)

APPLICABLE STANDARDS FOR REVIEW  
FAVOR THE APPELLANT IN THIS CASE

Because of the different nature of the proceedings which respectively result in summary judgment and judgment after trial, the standards for review of each type of judgment are different. A presumption of validity attaches to a judgment after trial, whereas summary judgments must be strictly scrutinized to ensure their propriety.

a. The Presumption Favoring Validity of Judgment After Trial Is Not Applicable in This Case.

Because of the advantageous position of the judge as a trier of fact, viewing and evaluating the credibility of witnesses, the trial court's judgment after trial is generally presumed valid. On review, the evidence must clearly preponderate against the findings of fact in order for an appellate court to reverse the trial court's order. In Stanley v. Stanley, 97 Utah 520, 94 P.2d 465 (1939), Justice Wolfe, concurring specially on this issue, noting the existence of many statements of this presumption in Utah case precedent, concluded that whatever presumption of validity was to be given the trial judge's findings was due to his presence at the trial.

In Zuniga v. Evans, 87 Utah 198, 48 P.2d 513, 520, 101 A.L.R. 532, a well considered case, it was stated: 'After a careful reading of the entire testimony of this witness, and weighing the same along with the admitted facts in the case, we do not feel satisfied that the finding ought to be disturbed. The trial judge did not accept the testimony of this witness in full.



The trial judge had a better opportunity from seeing and hearing the witness than we have from merely reading the transcript to appraise his credibility and to determine what weight would be given to his testimony. The opinion of the trial judge is therefore entitled to some weight with us.'

Other cases containing similar expressions are as follows: Williams v. Peterson, 86 Utah 526, 46 P.2d 674; Silver King Consol. Mining Co. v. Sutton, 85 Utah 297, 39 P.2d 682; Corey v. Roberts, 82 Utah 445, 25 P.2d 940; Consolidated Wagon & Machine Co. v. Kay, 81 Utah 595, 21 P.2d 836; Holman v. Christensen, 73 Utah 389, 274 P. 457; Warner v. Tyng Warehouse Co., 71 Utah 303, 265 P. 748; Ephraim Willow Creek Irr. Co. v. Olson, 70 Utah 95, 258 P. 216; Shulder v. Dickson, 66 Utah 418, 243 P. 377; Jenkins v. Nicolas, 63 Utah 329, 226 P. 177; McKellar Real Estate & Investment Co. v. Paxton, 62 Utah 97, 218 P. 128; Lawley v. Hickenlooper, 61 Utah 298, 212 P. 526; Bracken v. Chadburn, 55 Utah 430, 185 P. 1021; Kinsman v. Utah Gas & Coke Co., 53 Utah 10, 177 P. 418; Campbell v. Gowans, 35 Utah 268, 100 P. 397, 23 L.R.A., N.S., 414, 19 Ann.Cas. 660 (followed in Utah Com. & Savings Bank v. Fox, 44 Utah 323, 140 P. 660; and Little v. Stringfellow, 46 Utah 576, 151 P. 347); Fares v. Urban, 46 Utah 609, 151 P. 57; Froyd v. Barnhurst, 83 Utah 271, 28 P.2d 135; Paxton v. Paxton, 80 Utah 540, 15 P.2d 1051; Thomas v. Butler, 77 Utah 402, 296 P. 597; Clark v. Clark, 74 Utah 290, 279 P. 502; Olivero v. Eleganti, 61 Utah 475, 214 P. 313 (and cases cited); Singleton v. Kelly, 61 Utah 277, 212 P. 63 (and cases cited); Rieske v. Hoover, 53 Utah 87, 177 P. 228.

. . .

The reason then that we have the expressions that in order to reverse there must be shown a 'clear preponderance' or 'fair preponderance' of the evidence the other way or that we must 'bear in mind legal presumptions in favor of the judgment' etc., is because of this recognition that the lower court had the witnesses before it and was better able to judge of their credibility. (94 P.2d at 468).

See also Timpanogas Highlands v. Harper, 544 P.2d 481 (Utah 1976).

The presumption favoring the trial court's findings because of his ability to judge the credibility of witnesses is obviously not applicable in the instant case where no witnesses were presented and the judgment was made on the "cold record." In this case, an appellate court is as well suited as the trial court to evaluate the credibility of witnesses and the weight of evidence because the method of presentation of evidence is identical.

b. In Appeals From Summary Judgments Inferences Are to be Drawn Favorably to the Appellant.

At the hearing resulting in the order from which this appeal is taken, two motions for summary judgment were under consideration. Appellants moved for summary judgment on their complaint and against respondent on his counterclaim. Respondent moved for summary judgment on his counterclaim.

The court was required to consider, in each motion for summary judgment, the evidence and inferences therefrom in the light most favorable to the party opposing that particular motion. The court found against the appellants on their motion for summary judgment and found for the respondent on his motion. Apparently, the court found that viewing the evidence and inferences therefrom most favorably to the appellants, the respondent was entitled to judgment as a matter of law. It is incredible that the lower court could find, before one witness had taken the stand, that the evidence in the file considered favorably to the appellants met the high evidentiary standard required to support a

decree for specific performance in favor of the respondent, viz, free from doubt, vagueness and ambiguity. Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491 (1967).

In this review, this Court also must consider the evidence in the light most favorable to plaintiffs-appellants, drawing all inferences in their favor.

The pertinent inquiry is whether under any view of the facts the plaintiff could recover. It is acknowledged that in the face of a motion for dismissal on summary judgment, the plaintiff is entitled to have the trial court, and this court on review, consider all of the evidence which plaintiff is able to present and every inference and intendment fairly arising therefrom in the light most favorable to him. (Abdulkadir v. Western Pacific Railroad Company, 7 Utah 2d 53, 57, 318 P.2d 339 (1957) (footnote omitted)).

c. Standards for Review Favor the Appellant in This Case.

This Court, in review of the summary judgment below decreeing specific performance, must consider both the facts and the law in this case. The general presumption in favor of a trial court's findings does not apply as there was no observation of witnesses to afford the trial court that presumption. Further, the nature of an appeal from summary judgment requires that the Court consider the evidence and inferences in a light most favorable to appellants. Thus, this Court has a duty to consider the issues of both law and fact, to consider those issues without favor toward the findings below, and to draw inferences in favor of the appellant.

POINT III  
(Evidentiary)  
A HIGH EVIDENTIARY STANDARD MUST BE MET  
TO SUPPORT A DECREE FOR SPECIFIC PERFORMANCE

The nature of the remedy of specific performance requires that the respondent meet a high evidentiary standard to justify a decree in his favor. This is necessary because courts cannot create rights between parties; they may only confirm and enforce existing rights. The courts therefore require clear and certain proof as to all material terms of a contract before enforcement will be decreed. A recent Utah case, Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491, 493 (1967), has succinctly stated these requirements:

In speaking of certain terms required for specific performance, the author in 49 Am.Jur., Specific Performance, Section 22, at page 35 uses this language:

The contract must be free from doubt, vagueness, and ambiguity, so as to leave nothing to conjecture or to be supplied by the court. It must be sufficiently certain and definite in its terms to leave no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is called upon to have performed, and it must be sufficiently certain as to its terms so that the court may enforce it as actually made by the parties. A greater degree of certainty is required for specific performance in equity than is necessary to establish a contract as the basis of an action at law for damages.

As noted in Pitcher, a very high degree of proof is required.

71 Am.Jur. 2d Specific Performance §208 (1973)  
states the standard as follows:

Where an action is brought for specific performance, the established rule is that more than a mere preponderance of testimony is

required to establish the existence of the contract when its existence is denied. In order that specific performance of a contract may be decreed, the evidence of the making of the contract must be clear and convincing, or as stated in some cases, clear, cogent, and convincing, or strong and conclusive.

This burden of clear and definite proof must be met as to each element of the contract.

Specific performance cannot be required unless all terms of the agreement are clear. The court cannot compel the performance of a contract which the parties did not mutually agree upon. (Pitcher, supra, at 493, citing Bowman v. Reyburn, 155 Colo. 82, 170 P.2d 271 (1946)).

In Pitcher, specific performance sought on an earnest money agreement was denied because a map designating the land to be conveyed was never attached thereto as recited. The contract as written was incomplete and therefore not a proper subject for specific enforcement.

The Bowman opinion, referred to in Pitcher, explained the rationale for such strict requirements of proof, citing Adams v. Henderson, 168 U.S. 573, 18 S.Ct. 179, 42 L.Ed. 584 (1897):

'Equity,' this court said in Hunt v. Rousmaniere's Adm'rs, 1 Pet. 1, 14, 7 L.Ed. 27, 'may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise is highly beneficial to society. The latter is without its authority, and the exercise of it would be highly mischievous in its consequences.'

. . . .

[I]t must be clearly established that the demanded performance is in accordance with the actual agreement of the parties. (170 P.2d at 276).

In this case, it is not clear that any contract has arisen. The terms of the "contract" are in many respects vague and uncertain. The Option Agreement, upon which respondent bases his claim against Mrs. Sandberg was never completed as contemplated by the parties. Not only has respondent failed to prove a clear mutual understanding on unambiguous terms, he has failed to prove the existence of a contract. And certainly his proof is not clear and convincing.

Beyond the deficiency of proof, a variance of proof from the pleadings is fatal. Respondent alleged in his counterclaim that the real estate purchase contract he drafted represents the agreement he has with Mrs. Sandberg and that the property described as "Exhibit A" in said contract was that certain property referred to in both the Earnest Money Receipt and Option Agreement. (R. 121, 170; CRK ¶¶1, 3, 4 and 6, R. 166-168) Thus, if this court finds that the real estate purchase contract is materially different from the Option Agreement, it must reverse, for that reason alone, and respondent would not be entitled to a decree.

In an action for specific performance the proof must conform to the pleading. Accordingly, plaintiff must prove the contract as laid in the bill and he cannot recover on some other contract . . . (81 C.J.S. Specific Performance §139c (1953)).

Appellants contend that the deficiency and variance of proof require reversal of the judgment below.

POINT IV  
(Evidentiary)

UNDER THE STATUTE OF FRAUDS  
ONLY THE EARNEST MONEY RECEIPT AND OPTION AGREEMENT  
MAY BE CONSIDERED AS COMPETENT EVIDENCE AGAINST MRS. SANDBERG

In the present case, the documents presented by respondent as the basis of his claim for specific performance include the Earnest Money Receipt of April 4, 1962 and the Option Agreement of September 21, 1964. (CRK ¶¶ 1 and 3, R. 166) The lower court relied on those documents and letter of March 30, 1971, was exercising the option and forming an enforceable contract. Apparently these documents, in the mind of the lower court, constituted a sufficient memorandum of sale under the Statute of Frauds to grant specific performance.

The Statute of Frauds, Utah Code Ann. 25-5-1 et seq., declares certain classes of agreements (designated by subject matter) invalid unless such agreements are in writing and signed by the party to be charged. The rationale of requiring a signed writing is basically for evidentiary, cautionary, and protective reasons.

Contracts for the conveyance of land are covered by the statute. 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. The effect of the statute is to exclude all evidence of a contract which is not in writing and signed by the party to be charged. The requirements of the statute are thus more stringent than



and independent from those of the parol evidence rule. The parol evidence rule only excludes evidence of prior and contemporaneous statements proffered to vary or contradict the terms of a written instrument, but it does allow evidence of agreements subsequent to the writing and allows extrinsic evidence to clarify a writing.

The statute of frauds, however, effectually prohibits parol evidence which would add to or contradict an existing writing or evidence a separate agreement, whether prior, contemporaneous, or subsequent, by forbidding judicial enforcement of such terms or agreements. Therefore, as to contracts designated within the statute of frauds, parol evidence is admissible only to clarify the writing, not to add to or subtract from it.

The requirement of a signature of the party to be charged is made to ensure the validity of the alleged contract. It is often said that only the signature of the party to be charged is required because the other party admits the contract by suing thereon and seeking the benefits therefrom. It is also generally accepted that parol evidence may show acceptance of a written option because a true acceptance adds no terms to the option; otherwise such "acceptance" would amount to a counteroffer. 37 C.J.S. Frauds, Statute of §281 (1943).

Where separate writings each signed by the party to be charged are available, they together may constitute a sufficient memorandum. Or, a writing signed by the party



to be charged referring to an unsigned writing may create a valid memorandum by incorporation. However, "[a] paper signed by the party to be charged cannot be incorporated in a paper not signed by him by a reference in the latter [unsigned document]." 37 C.J.S., Frauds, Statute of §178 (1943).

Therefore, the letter of March 30, 1971, cannot be considered as a memorandum to be held against Mrs. Sandberg. Only the Earnest Money Receipt and Option Agreement may be relied on in a claim against her for only those documents bear her signature. Respondents apparently realized this and pled only those documents in their counterclaim. The lower court failed to realize that the letter of March 30, 1971, was incompetent evidence as to any claim against Mrs. Sandberg and instead considered it as forming some of the material terms of the "contract" sought to be enforced against Mrs. Sandberg. Of course, that letter may be admissible for the alleged purpose of showing that Klein exercised the option in accordance with its terms, but it may neither add to, alter, or subtract from the contractual liability of Mrs. Sandberg.<sup>4</sup>

The case of Lewis v. Elliot Bay Lodging Co., 112 Wash. 83, 191 P. 803 (1920), is analagous to the present

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<sup>4</sup>While considering the effect of the Statute of Frauds it should be noted, particularly with respect to the argument on the lack of mutuality under the contract allegedly formed by the Option Agreement, and the letter of March 30, 1971, that there is no evidence that the March 30, 1971, letter was ever signed by Klein. No copies of that document in the record appear with his signature. See R. 71-73, 102-104, 207-209, 249-251, 305-307; Probate Record 76-78. No copies of that document could have been relied upon by Mrs. Sandberg in a claim against Klein.

situation. In Lewis, the Washington Supreme Court considered letters of the respective parties to determine if a sufficient memorandum existed to charge the seller. Of course, the seller's signature appeared only on his offering letter which the court found contained an insufficient description of the alleged contract's subject matter. Although the buyer's letter of acceptance contained the requisite additional descriptive terms, the Lewis Court correctly held that the obviously responsive acceptance could not cure the defect in the seller's offer.

Respondent cites a number of cases upon this question, all of which have been carefully read and considered, but none of them would sustain a holding that the appellant could be charged upon a memorandum which it did not sign, and which designated the quantity, where the writing signed by the appellant did not sufficiently designate the subject-matter in that respect. They are cases where the party sought to be charged signed a memorandum which contained all the essential terms of the contract, and which was simply accepted by the opposite party, or cases where the party sought to be charged had accepted the terms as they were written by the opposite party. They are therefore not applicable to the facts in the case now before us. (191 P. at 804).

Though the acceptance in Lewis was obviously related to the deficient offer and received without protest by the offeror, it was not competent evidence against him and could not supply the subject matter description, for it did not bear his signature. Even if the offeror had orally agreed, subsequent to the writings, that the subject matter description in the acceptance was correct, the evidence of that agreement would not have been competent against him. Though the parol

evidence rule would facially allow such evidence of such a subsequent parol agreement, the statute of frauds prohibits it because it would alter the signed writing. Thus, any enlargement or addition of terms by a source external to the writings bearing the signature of the party to be charged violates the Statute of Frauds.

While appellants do not feel that the lower court's consideration of a plethora of evidence clarified the terms of the written memoranda, the refusal to limit evidence in accordance with the Statute of Frauds was clearly improper and allowed a mass of paper unilaterally supplied by respondent to be considered as binding Mrs. Sandberg. When this Court considers the evidence, properly charging Mrs. Sandberg with only those writings bearing her signature, it will be apparent that she has no contractual liability to Klein. Nonetheless, while the parol evidence proffered by Klein in purporting to add to the writings is incompetent and inadmissible, it does not clarify the writings, but merely highlights their ambiguity.

PART TWO - THE OPTION AGREEMENT IS NOT  
A DOCUMENT SUSCEPTIBLE OF  
SPECIFIC ENFORCEMENT

POINT V

THE OPTION AGREEMENT OF SEPTEMBER 1, 1964  
IS AN AGREEMENT TO AGREE;  
AS SUCH IT MAY NOT BE JUDICIALLY ENFORCED

In 1970 the Utah Supreme Court in Jensen v. Anderson, 24 Utah 2d 191, 468 P.2d 366 (1970), stated the fundamental and uniform rule that option agreements are to be strictly construed against the party drawing such agreements where uncertainty and ambiguity appears. The option agreement upon which respondent Klein seeks specific performance was admittedly drawn and prepared by him. (AnRK No. 14, R. 69) Thus, where ambiguity or uncertainty exists in the Option Agreement, it must be construed in favor of Wanda Sandberg and against the respondent who relies on that document for specific performance.

a. Contracts Expressly Leaving Material Terms To Future Mutual Agreement Are Unenforceable.

A defect common to all types of contracts is the deletion of essential terms. Often, courts can supply the terms by implication when the deficiency is the result of inadvertence and the term is one of standard use. However, where it is apparent that the parties have failed to complete their contract by expressly leaving essential terms to their future mutual agreement, courts will not enforce the writing that represents their preliminary agreement to agree at a later date.

Option agreements are frequently objectionable on the ground that they constitute agreements to agree. Of course, by their nature, option agreements contemplate a future contract (upon the optionee's exercise of the option), but often the parties leave terms to their future agreement, instead of placing all the material terms in the option. An option must contain all the material terms to be susceptible of a binding acceptance. An acceptance adding terms is a counteroffer, so also, an option leaving terms to be spelled out by the acceptance or by future mutual agreement is not susceptible of unilateral acceptance.

Courts will not enforce agreements to agree because they cannot compel a nonconsenting party to agree to new and unilaterally proposed terms. In effect, such an indulgence would be to judicially impose a state of mind on the objecting party, compelling that party to agree. Courts uniformly admit that even equity does not possess these ubiquitous powers, nor will the courts intervene to make, alter or substantially add to contracts as actually written and entered into by the parties. For example, in Lucey v. Hero International Corporation, 281 N.E.2d 266 (Mass. 1962), the Massachusetts Supreme Court considered a contract to purchase land which granted plaintiff "an option to purchase additional land belonging to...[the defendant], which said land shall be northerly of the conveyed premises and along Lennox Road as mutually agreed upon by both parties." 281 N.E.2d at 268.

In reversing the lower court's decree of specific performance in favor of the plaintiff-optionee, the Massachusetts Court stated that the holding below that the optionee could unilaterally select the property he desired would "ignore the very words of the provision." 281 N.E.2d at 270. Had the option provided for a unilateral selection of land, there would have been no question of its validity. Courts may compel a party to act and make a selection, but cannot compel two parties to agree. Davison v. Robbins, 30 Utah 2d 338, 517 P. 2d 1026 (1973); Calder v. Third Judicial District Court, 2 Utah 2d 309, 273 P.2d 168 (1954). The words of the Massachusetts court in denying specific enforcement are precise and definitive:

We are also of the opinion that the option agreement is too indefinite to be specifically enforced. For that additional reason, the final decree is wrong. 'An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the contract.' (citations omitted) Since, therefore, an option is a contract, '[a]ll the essential terms...must be definite and certain so that the intention of the parties may be discovered, the nature and extent of their obligations ascertained and their rights determined.' (citations omitted) 'The court cannot make for the parties a contract which they did not make for themselves.' (citations omitted) (Id. at 269)

In Applebaugh v. Hohl, 535 P.2d 222 (Colo. Ct. App. 1975), the Colorado Court of Appeals considered an earnest money receipt to purchase three lots of a subdivision. Specifically set forth in the earnest money receipt was the total sales price of \$11,000.00, with

acknowledgment of a down payment of \$1,000.00 by the plaintiff-purchaser. In his complaint the plaintiff offered to pay the \$10,000.00 balance remaining on the purchase price. The Colorado Court, however, agreed with the defendant's contentions that the memorandum of sale was unilateral and not mutually binding or enforceable despite the fact that it contained "many of the terms that would be included in an option." 535 P.2d at 224. The problematic clause in the memorandum was the phrase "pending a mutually acceptable contract to be furnished by buyer." Id. at 223. In holding the memorandum of sale unenforceable the Court agreed that it constituted merely an invitation to negotiate further and that "[t]o have an enforceable contract or option, it must appear that further negotiations are not required to work out important and essential terms." Id. at 224.

Similar to Lucey and Applebaugh is the California case of Roberts v. Adams, 330 P.2d 900 (Cal. Ct. App. 1958). In Roberts, the California Court of Appeals considered a suit for specific performance on a term in a lease providing an option to purchase certain real property for a sum of \$85,000.00 "payable as mutually agreed by both parties." The California appellate court stated that it is "Hornbook law that an agreement to make an agreement is nugatory, and that this is true of material terms of any contract." 330 P.2d at 901. The policy for the Roberts holding was then further clarified:

Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise. (Id. at 902, citing 1 Williston on Contracts (Rev. Ed. 1936) §45 at 131)

Several Utah decisions expressly recognize these propositions. For example, it is accepted in Utah that in order to be binding and enforceable a contract must set forth with sufficient definiteness all of its terms so that each party knows what is required of him. Kier v. Condrack, 25 Utah 2d 139, 478 P.2d 327 (1970); Efco Distributing Inc. v. Perrin, 17 Utah 2d 375, 412 P.2d 615 (1966); Owyhee, Inc. v. Robbins Marco Polo, 17 Utah 2d 181, 407 P.2d 565 (1965); Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597 (1962); Valcarce v. Bitters, 12 Utah 2d 61, 362 P.2d 427 (1961); Hansen v. Snell, 11 Utah 2d 64, 354 P.2d 1070 (1960); and Pelton's Spudnuts v. Doan, 120 Utah 366, 234 P.2d 852 (1951). As a corollary to the above, it has been held that specific performance of an option agreement cannot be decreed unless all of its terms are clear, since the courts cannot compel performance of a contract upon which the parties did not mutually agree. Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491 (1967).

Thus, when material terms of a contract are left to the future agreement of the parties, such contracts are nugatory as agreements to agree. In cases where the material provision to be agreed upon is the selection of lands covered by the writing, it has been further held that such a designa-



tion in the contract not only violates the prohibition against enforcement of agreements to agree but also does not provide a description sufficient and tenable under the Statute of Frauds. Thus, where parties leave the selection of the tract to be conveyed under the written memorandum to future mutual agreement, the memorandum is deficient under the Statute of Frauds in that the description of land itself cannot be accurately platted from the memorandum, because the memorandum's very terms require another agreement. See Calder v. Third Judicial District, 2 Utah 2d 309, 273 P.2d 168 at 170 (1954), citing Scanlan v. Oliver, 42 Minn. 538, 34 N.W. 1031 (1890), which distinguished cases where the contract of sale gave one of the parties thereto a right of selection from those cases in which the particular piece of property to be conveyed was to be mutually agreed upon between the parties, finding the former valid, the latter unenforceable. See also Annot., Sufficiency, Under the Statute of Frauds, of Description or Designation of Land in Contract or Memorandum of Sale Which Gives Right to Select the Tract to be Conveyed, 46 A.L.R. 2d 894 (1956).

As a rule, therefore, a provision requiring future agreement of the parties on any material term of a contract renders that contract unenforceable. The requirements of the Statute of Frauds further prohibits such enforcement when the material term to be agreed upon is the particular piece of real property to be conveyed by the writing. Davison v. Robbins, 30 Utah 338, 517 P.2d 1026(1973).

The Davison case constitutes a definitive statement of Utah law on agreements to agree and the dual faceted objection to such agreements when they pertain to the selection of real property, i.e., that such agreements violate both the prescription against enforcement of agreements to agree and the Statute of Frauds. In Davison, plaintiffs, approached defendants with an offer to purchase a parcel of property for \$90.00 per acre. The parties executed a purchase contract which provided that defendant-sellers were to order a survey to determine the net acreage to be conveyed after sellers' deduction of a reserved area designated as the "bottom land". After sellers' reservation of "bottom land" the final sale was made contingent on plaintiff-buyers' approval of the net acreage description.

The plaintiff-buyers attempted to define the term "bottom land" through parol, testifying that defendant-sellers had pointed the certain fence lines, posts, and a highway to delineate the property to be retained. Though defendant-sellers vigorously denied this testimony the findings of the trial court reflected a belief in the plaintiff-buyers' parol version of the transaction. Immediately prior to trial, defendant-sellers indicated that they had elected to reserve from the sale all of their property (presumably as "bottom land") except for one acre. Nonetheless, the trial court found the contract valid and enforceable and that plaintiff-buyers were entitled to specific performance.

Defendants claimed on appeal that the trial court had:

1. Erred in admitting parol evidence indicating defendants' intention to reserve certain land within existing land marks, and

2. That the contract constituted merely an agreement to agree in the future leaving the matter of the reservation of acreage and that acreage conveyed open to future mutual agreement.

Relying on Calder v. Third Judicial District Court, supra, this Court distinguished a fact situation wherein one party was specifically granted the exclusive right to select the property and the contract in Davison wherein the piece of property to be conveyed was to be mutually agreed upon by the parties. After distinguishing the two fact situations, the Utah Supreme Court, ruling on both the agreement to agree objection and the parol evidence objection, held as follows:

In the instant action, the agreement in clear and unambiguous terms provided that the location and description of the land to be conveyed was subject to the future mutual agreement of the parties. This writing constituted a mere expression of a purpose to make a contract in the future for the whole matter was contingent on further negotiation. The trial court erred in its conclusion that the writing constituted a valid, enforceable contract.

Defendants further contend that the agreement does not describe the property to be reserved with sufficient certainty to support a decree of specific performance, and the trial court erred in admitting parol evidence to cure this defective description.

Parol evidence is admissible to apply, not to supply, a description of lands in the 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 the 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. (30 Utah 2d at 341 (footnote omitted))

Again Davison evinced a two-pronged attack on the enforceability of the contract that was before the Court:

1. The contract by its own terms contemplated further negotiations and was void and unenforceable.
2. As the contemplated future negotiation dealt with the selection of land, the land description was insufficient under the Statute of Frauds and could not be remedied by the admission of parol evidence.

There is authority which seems to suggest that even leaving future agreement as an alternative to specified terms may result in a contract being found unenforceable. For example, in Kline v. Rogerson, 181 P.2d 385 (Cal. Dist. Ct. App. 1947), the California district court of appeals held that a plaintiff seller could not enforce an agreement of purchase and sale against defendant since it 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." 181 P.2d 387. The defendant-buyer refused to pay \$5,000.00 per year and sought a renegotiation at \$2,000.00 per year. The Court denied a decree of specific performance stating that the parties never agreed upon terms which were mutually

satisfactory. Though it would seem that the defendant should have been held to his agreement to pay \$5,000.00 per year, the court apparently felt that the alternative provision for mutual agreement, in light of his refusal to perform according to the specific provision rendered the contract unenforceable. Kline is authority for the proposition that providing for a future agreement only as an alternative renders a contract void.

b. The Option Agreement was an Agreement to Agree.

In light of the foregoing analysis, appellants urge that the trial court's finding that the Option Agreement dated September 21, 1964, did not constitute an agreement to agree is not only untenable but utterly capricious. The entire history of the transaction is replete with such agreements. It is telling that page 2 of the original Earnest Money Receipt gave the buyer 30 days from date hereof to enter into an option "on the terms as above set out and on such other terms as the parties hereto may agree." When the Earnest Money Receipt was ultimately superseded by the Option Agreement which is the subject matter of this case, both the appellant Wanda Sanderg and the respondent stated the Option Agreement set forth "the terms and conditions of said option to purchase, as heretofore granted, together with the modification to which the parties have agreed." One of the conditions to which the parties agreed was the mode of exercising the Option Agreement and more specifically

the manner of the selection of land to be included in the respondent's ultimate purchase. That mode of selection is a singular statement clearly embodying both a necessity and an invitation for future negotiations. Quoting from paragraph 5 of the Option Agreement:

5. The Buyer may exercise his right to purchase his 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))

The above excerpted paragraph specifies the only means of exercising the Option Agreement upon which respondent seeks specific performance. Clearly, the structure of the paragraph in question allows no other interpretation than that the future agreement of the parties was required as to the amount of the land to be subject to the exercise of the option. In order to allow the greatest flexibility to themselves, the parties noted that the eventual agreement could cover the whole or one part or many parts of the land. The prepositional phrase "as the parties may agree" must be construed as modifying the immediately preceding word "property", which is in turn modified by the phrase "all or such part or parts" This is required by the doctrine of "last antecedent" which requires that a qualifier refer to the immediately preceding phrase or word. Dunn v. Bryan, 77 Utah 604, 299 P.253 (1931). It is telling that each of the words "all", "part", and "parts", is clarified

by the phrase "of the property" which phrase completes the thought for each alternative exercise contemplated by the parties.

That the entire phrase "all or such part or parts of the property" is modified by the qualifier requiring agreement can also be shown by an examination of the entire sentence. Schematically diagrammed the sentence appears as follows:

Buyer——may exercise——right——by executing  
contract to purchase  $\begin{matrix} \nearrow \text{all} \\ \text{such part} \\ \searrow \text{parts} \end{matrix}$  of the property as  
the parties may agree.

This disjunction "or" which joins the three words "all", "part", and "parts", indicates that each is an alternative within the contemplation of the parties.

It is clear that substantial modification of the contract would be required to allow interpretation of paragraph 5 of the Option Agreement as requiring future mutual agreement only if the optionee exercised as to a part or parts of the greater parcel. Again, the clause in question which is before this court appears as follows in the Option Agreement:

...by executing a contract to purchase all or such part or parts of the property as the parties may agree . . . (R. 61)

First, a clear disjunction must be made between "all" and "such part or parts". This could be done by insertion of a comma, e.g.,



contract to purchase all, or such part or parts of the property as the parties may agree.

Second, the preposition object "all" must be completed independently of "such part or parts" by the preposition "of the property", e.g.,

contract to purchase all of the property, or such part or parts of the property as the parties may agree.

Finally, the qualifying phrase "as the parties may agree" must be made clearly inapplicable to the purchase of "all of the property" by making the clauses before and after the disjunction independent of each other by supplying each other with a verb, e.g.,

contract to purchase all of the property, or to purchase such part or parts of the property as the parties may agree.

Such judicial rewriting of the Option Agreement, however, is clearly impermissible, as modification may not be made in the guise of interpretation. East Mill Creek Water Company v. Salt Lake City, 108 Utah 315, 159 P.2d 863 (1945). Further, words, punctuation, and phrases may not be supplied where lacking, and adding, ignoring or discarding words in the process of interpretation is improper. Cornwall v. Willow Creek Country Club, 13 Utah 2d 160, 369 P.2d 928 (1962). Alteration of meaning simply may not be made where the meaning is clear, and where it is apparent that the parties and the draftsmen could have expressed themselves differently had they so desired. Simply stated the parties must be held to their clear and understandable language as



committed to writing. Jensen's Used Cars v. Rice, 7 Utah 2d 276, 323 P.2d 359 (1958). That the parties chose to rely on their future mutual agreement as to the selection of land upon the exercise of the option does not justify a wholesale rewriting of the paragraph simply because the provision itself was an improvident one. Skousen v. Smith, 27 Utah 2d 169, 493 P.2d 1003 (1972); Ephraim Theater v. Hawk, 7 Utah 2d 163, 321 P.2d 221 (1958). Utah courts when confronted with such a contract have neither attempted to redraft its terms nor to cure it through parol evidence. In fact the Utah courts have uniformly declared such contracts unenforceable. Davison v. Robbins, 30 Utah 2d 338, 517 P.2d 1026 (1973).

That the language requiring future mutual agreement in all events in the selection of land was purposefully chosen is evident by examination of the rest of the contract. In two other paragraphs, future mutual agreement was specified as an alternative, and the alternative nature of the method is clear. For example, paragraph 5(e) provides for release of land upon selection by the Buyer of contiguous parcels, or upon agreement of the parties if non-contiguous parcels are sought.

Land to be released shall be selected by the Buyer provided such land is contiguously selected or otherwise mutually agreed by the parties.

The method of mutual future agreement is clearly alternative to the choice by Buyer of contiguous land.

Another provision for future mutual agreement as an alternative is found in paragraph 5(b):

The Buyer shall pay a down payment of Two Thousand Dollars (\$2,000.00) (or such other amount as the parties may agree) on said contract...(R.61)

Again, this drafting is clear in providing that the requirement of future mutual agreement was alternative.<sup>5</sup>

If the parties had intended under paragraph 5 of the Option Agreement to require future mutual agreement as to the selection of land in only those instances where the optionee desired a part or parts of the Sandberg land, then the respondent and his attorney clearly had the capacity and opportunity to draft the Option Agreement to so indicate. The condition of future mutual agreement was not stated as an alternative, however, but as a requirement in all instances. Many logical explanations exist for the making of such a requirement, the most probable being the uncertainty in the minds of the optionor and optionee in 1964 as to the amount of land each wished to commit to the terms of the option. The liberal use by the parties of the method of future mutual agreement has already been shown. Under apparently amicable circumstances the method did not seem at all uncertain, but it is well accepted that equity will not compel parties to agree.

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<sup>5</sup>It should be noted that each of these provisions under the rule in Kline v. Rogerson, 181 P.2d 385 (Cal. Dist. Ct. App. 1947) may render the contract unenforceable.

That the Option Agreement contemplated further negotiations pertaining to the land to be included in the contract contemplated in the option's exercise is further evinced by the letter of respondent Klein dated March 30, 1971 to Wanda Sandberg. Paragraph 4 of the letter of March 30, 1971, reads as follows:

My interpretation of the number of acres involved essentially corresponds with yours, namely that the land Wayne intended to sell lies west of the fence line that you and I have both seen together. I would like you to know that I can appreciate your concern that this line be agreed to by both of us. As I read the original and supplemental agreement, I have had some questions of interpretation in my own mind, but must conclude in good conscience, if you have in fact been conducting your feeding operation all these years where you presently are now doing so, that that property east of the fence clearly was to be excluded. I walked the fence line the other day and noted that it had some irregular jogs in it that you and I should probably discuss in order to assure absolute clarification. I see no problem in this connection as I am as a matter of personal principle disposed to agree with your wishes. (R. 71 (emphasis added))

As can readily be seen, respondent Klein both knew and understood that the boundary lines of any parcel to be selected were to be agreed to by both parties and that further clarification was necessary to define the lands to be included in the contract. Magnanimously, he indicated that as a matter of personal principle he would be inclined to agree with her wishes, however, he now seeks specific enforcement of a contract pertaining to real property that Mrs. Sandberg does not agree to sell.

Paragraph 5 of the letter then states as follows:

If you think about it, descriptions along section or quarter section lines generally are more easily handled. It is for this reason, after careful review that I have discribed [sic] the annexation description as indicated by the plat which I am including with this letter. This description, within a few feet, corresponds with the fence line that you and I have observed together when we last saw each other. This I trust will correspond with your own interpretation of what land you in fact believe you are selling. Should you still have some apprehension that I am not aware of, I am sure that on a face to face basis and with the help of a surveyor we can resolve fairly to each of our satisfaction whatever differences [sic] of opinion we may encounter. I am enclosing a drawing showing my proposed annexation request; not the indication of the fence line which I have included. (R. 71 (emphasis added))

Analyzing the fifth paragraph of the March 30, 1971, letter, the Court should be aware that neither the Earnest Money Receipt nor the Option Agreement ever described land in terms of quarter sections. Further, whereas paragraph 4 of the letter states that some property east of a fence was to be excluded from the contract, paragraph 5 indicates that the description provided with the letter only "within a few feet, corresponds with the fence line . . . ." Thereafter Klein expresses his belief that this description will correspond with what in fact Mrs. Sandberg believed she was selling, and that any differences of opinion be resolved by agreement with the help of a surveyor. It is impossible to conclude that the Option Agreement did not contemplate a future agreement regarding the description of land in the ultimate contract. It is impossible to conclude in light of

the "exercising" letter that the Option Agreement was not an agreement to agree, as the "exercising" letter itself indicates the necessity of future agreement and amicable cooperation. Indeed, on page 2 of his letter to Wanda Sandberg (R. 72), respondent Klein states that in April and May of 1971 they should "try to...[p]repare a land purchase agreement consistent with the terms of an option agreement and the accepted number of acres involved . . .". Preparation of a land purchase agreement prior to June of 1971 was crucial because in June of 1971 the Option Agreement expired by its own terms.

This lawsuit, as in Davison presents hard evidence that a final agreement was never made. Parol cannot be used to supply the terms of such an agreement, and Klein's contract of June of 1972 cannot be enforced against Mrs. Sandberg who has not signed the same. The Option Agreement clearly provided that in its exercise the selection of land was to be made by mutual agreement in the future.

Davison stands for the clear proposition that such a document cannot be judicially enforced simply because the law cannot compel someone to attain a state of mind, that is, to agree. Further, similar to Davison, it is improper to allow the introduction of incompetent parol evidence to add to an otherwise facially insufficient description or to attest to what the optionor at one time may have agreed.

Davison, supra; Reed v. Lowe, 8 Utah 39, 29 P. 740 (1892); Adams v. Manning, 46 Utah 82, 148 P. 465 (1915); Campbell v.

Nelson, 102 Utah 78, 125 P.2d 413 (1942); and Holmgren Brothers Inc. v. Ballard, 534 P.2d 611 (Utah 1975). Thus, the Option Agreement's manner of exercise as set forth in paragraph 5 clearly constitutes an agreement to agree, and, as such, must be held unenforceable. Further, whatever description was provided Mrs. Sandberg with the March 30th letter by its own terms and by respondent's own admissions varied from prior proposals. Nonetheless, not one of respondent Klein's proposals can be aided by parol evidence as the land description was to be mutually agreed on. Such parol testimony is clearly inadmissible. Davison, supra.

Respondent Klein may claim that the conveyance of 40 acres by Wanda Sandberg constituted some acquiescence or be akin to some form of part performance under the contract he proposed for her signature. This argument, however, would fail on three points: (1) the "exercising" letter of March 30, 1971, requested that 55 acres be released not 40; (2) the contract upon which the respondent seeks specific performance was not drafted until May of 1972 and not presented to appellant Sandberg until June of 1972, a year after the conveyance, and (3) the doctrine of part performance cannot be relied on to overcome the proscription of the Statute of Frauds because any acts relied on to overcome that proscription must be exclusively referable to the oral contract. Holmgren Brothers Inc., supra. Significantly, the letter of March 30 does not refer to Wanda Sandberg's conveyance of 40 acres of land, but rather to a release of 55 acres. Further,

it is impossible to construe that conveyance as being exclusively referable to a contract not drafted and indeed not in existence until a year later. The respondent simply cannot change this chronology nor can this Court legitimately ignore it. Thus, we urge the Court to reverse the trial court's holding not simply to remand on these points:

(1) Neither in equity nor at law do courts recognize the power to compel the appellant to agree. The Option Agreement by its express, concise, and clear terminology constitutes an agreement to agree. (2) Since the land selection clause contemplated future agreement, the land description in the Option Agreement violates the Statute of Frauds. (3) There is no evidence of a clear, definite and mutually understood parol contract established by clear, unequivocal and definite testimony, furthermore such parol is incompetent to aid the otherwise insufficient description.

Indeed, as the letter of March 30, 1971, indicates, if Wanda Sandberg had agreed to all of its terms she would simply have been saying "I will agree to get together with you and agree." To hold otherwise and sustain the trial court's finding that the Option Agreement was not an agreement to agree is to ignore its clear language and the obvious admissions in respondent's letter.

c. The Option Agreement was not Complete.

It is essential that a contract, to be specifically enforceable, contain all its terms and be complete. Failure to annex a document referred to in the body of the

contract may indicate a failure to reach a complete agreement. In Kerr Glass Mfg. Corp. v. Elizabeth Arden Sales Corp., 141 P.2d 938 (Cal. Ct. App. 1943), failure to attach building plans expressly called for by a lease rendered the lease for the land site and proposed building unenforceable. In this case, the parties stated in the Option Agreement that the property subject to the option was to be

...more particularly described in Schedule A attached hereto, to be signed by the parties and made a part hereof for all purposes. (R. 60).

An attachment with a legal description was to be made so that the area of land subject to the option would be certain. The signatures of both parties were required to evince the approval of the parties to the description. The description was to be an integral part of the agreement and at the time of the agreement was thought to be of such import as to require mutual approval, and subsequent subscription.

The law provides, where an essential element of the contract is specifically left for future negotiation, that the contract is unenforceable. Were the term one of standard usage and merely deleted, the court might imply it. But where the provision is specifically reserved for the future agreement of the parties, courts can neither imply the term nor, can it be gainsaid, compel the agreement.

The Option Agreement was never completed, as is evidenced by the nonexistence of a signed, mutually approved attachment.



To allow otherwise, that is, to allow the lower court to engraft a suitable Exhibit "A" invites several possibilities, among which are the description of land annexed to the City of St. George and referred to in the letter of respondent Klein in March of 1971 and the contract description presented in May of 1972 to Mrs. Sandberg for her signature as grantor. The folly of this type of judicial surgery is the omniscience it necessarily presumes, as Klein has indicated he is exercising the option as to the land described by both documents, yet neither description conforms with the other. (See POINT VI, infra.) As Mr. Klein has presented the court with two nonconforming descriptions and was clearly unable between March of 1971 and May of 1972 to make up his mind as to the lands he desired to submit for agreement, it is incongruous that the Court should do it for him, and then tell Mrs. Sandberg that the court's choice was the one that she and her deceased husband would have agreed to, annexed as Exhibit "A", and signed all along in 1964.

#### POINT VI

##### THE LAND DESCRIPTIONS ARE AMBIGUOUS AND CONTRADICTORY

Beyond the evidentiary burden of certain and definite proof to support a decree of specific performance, the Statute of Frauds requires the land to be conveyed to be identified with certainty.

This requirement of certain identification is in accordance with the evidentiary, cautionary, and protective

policies underlying the Statute. Thus, judicial cognizance of contracts with insufficient land descriptions would both contravene the legislative exaction of certainty and require the courts to divine the intent or mutual understanding of the parties.

The test for determining sufficiency for a description of land looks to the specificity and certainty of the description contained on the operative memorandum. See Annot., Sufficiency of Description of Land in Contract or Memorandum of Sale, Under Statute of Frauds, 23 A.L.R. 2d 6 (1952). A statement of the Utah requirements of specificity of description was made in Jacobsen v. Cox, 115 Utah 102, 202 P.2d 714, 721 (1949).

A description is sufficient if when read in the light of the circumstances of possession, ownership, situation of the parties, and their relation to each other and to the property, as they were when the writing was made, it identifies the property. A description is sufficient, although vague in respect of the boundaries, if it identifies a specific tract of land when applied to the facts on the surface of the earth, as where a surveyor with the contract in his hands and with the aid of no other means than those provided, could go to the place stated therein and accurately locate the land. 49 Am.Jur., "Statute of Frauds" §348.

An examination of the Earnest Money Receipt and Option Agreement will reveal that the land descriptions thereon are ambiguous. Neither of the descriptions are capable of location by a surveyor. The ambiguities in these descriptions, further, are not cured by parol evidence in the form of Klein's letter of March 30, 1971, and the real estate purchase contract of June, 1972.

Respondent Klein has alleged in his counterclaim that the descriptions on the Earnest Money Receipt and Option Agreement are identical to the description on the real estate purchase contract. (CRK ¶¶ 1 and 3, R. 166) The court below also found these descriptions to be in substantial conformity. (Order, ¶4, R. 358) Apparently, neither the lower court nor the respondent has read the land descriptions. Not only is conformity doubtful, but contradiction is obvious.

Each of the written descriptions describes the land as a large parcel, excepting a certain portion to be reserved by the sellers. The Earnest Money Receipt, subscribed to by Mrs. Sandberg, describes the land as follows:

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. (R. 196)

The Option Agreement, also signed by Mrs. Sandberg, described the land in a similar fashion--as a whole, but with one significant change in the excepted portion of the land designated by reference to a fence and reservoir:

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. (R. 59)

In the first description the reservoir is in the NE 1/4 NE 1/4 of Section 22, and the excepted area is somewhere in Section 22. In the latter description, it is not the reservoir which is in the NE 1/4 NE 1/4 of Section 22, but the excepted part is now confined to that area. In the Earnest Money Receipt's description the excepted part was in Section 22--a possible exception of 640 acres, while in the Option Agreement, the possibly excepted area is reduced to the NE 1/4 NE 1/4 of that section, which comprises approximately 40 acres.

The letter of March 30, 1971, which is admissible as parol evidence only to show an alleged exercise of the Option Agreement or to clarify ambiguities in that agreement, nonetheless, does not aid the prior descriptions, but confuses further.

The letter referred to the land only in general terms and did not contain in its text any specific description. Respondent Klein did state, however, that he was only annexing

"that land which I am in fact buying from you." (R. 73)

The annexation plat described the land without exception or reservation and in fact contained,

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 & 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 22.

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

(R. 109(emphasis added))

The description in the real estate contract submitted by Klein, held by the lower court to be in conformity with the description in the Option Agreement (Order 14, R. 358), would most certainly conform to the annexation plat as Klein in his purported letter of exercise stated that he was annexing "only that land which I [he] am [was] in fact buying from you [Sandberg]." (R. 73) Nonetheless, the description on the contract in attempting to describe a fence and reserve the area east of the fence to the prospective seller, reserves land to Mrs. Sandberg in both the NE 1/4 NE 1/4 of Section 22 AND in the SE 1/4 NE 1/4 of Section 22:

The following described property located in Washington County, State of Utah, Township 42 South, Range 15 West:

Section 22:

The Southeast Quarter of the Southwest Quarter;  
the Northeast Quarter of the Southwest Quarter;  
the Northwest Quarter of the Southwest Quarter;  
the Southeast Quarter of the Northwest Quarter;  
the Northeast Quarter of the Northwest Quarter.

Also,

Beginning in an existing fence line at its intersection with the north line of Section 22, T42S, R15W, SLB&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 443.0 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:

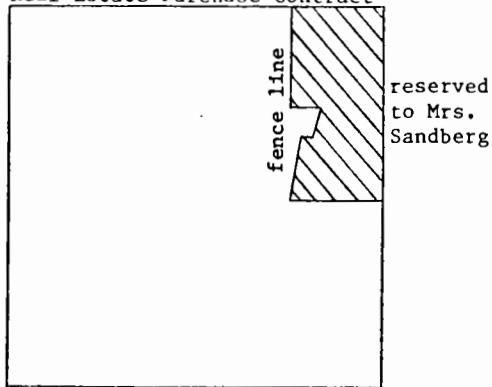
The Southeast Quarter of the Northeast Quarter;  
the Northeast Quarter of the Southeast Quarter.

Section 27:

All of sectional lot 1 consisting of approximately 19 acres; all of sectional lot 2 consisting of approximately 47 acres.

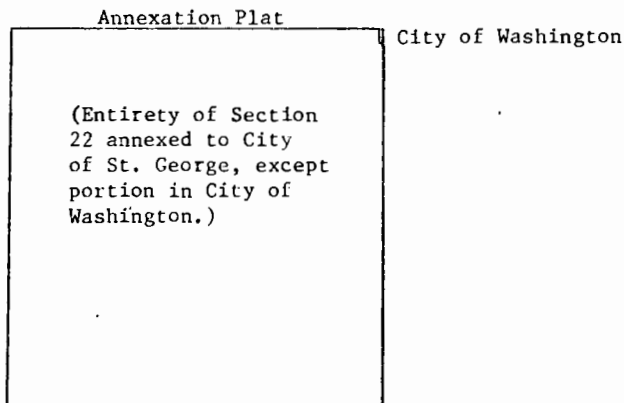
All of said property consisting of approximately 431.34 acres. (R. 328)

The description of Section 22 on the real estate purchase contract which purports to describe the fence as it stands appears graphically as follows. (See also R. 321)



Section 22

The description pertaining to Section 22 on the annexation plat enclosed with the letter of March 30, 1971, which Klein stated represented within "a few feet" the land which he was "buying" from Mrs. Sandberg appears graphically as follows:

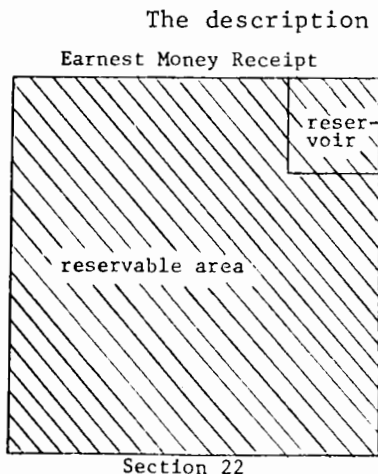
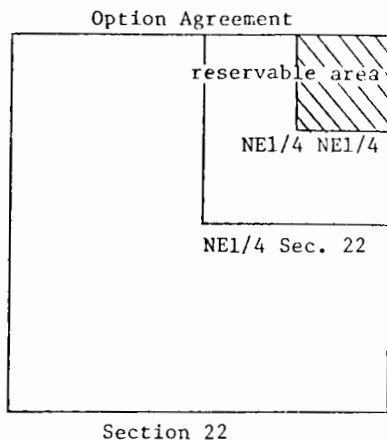


Section 22

Except for a "few feet", there was apparently no reservation of land for Mrs. Sandberg. The difference between the description on the annexation plat and the description on the contract, however, is more than the "few feet" indicated by the letter. The distance between the fence line on the real estate contract and the east section line of Section 22

is approximately 1/4 mile. As a result, the ultimate area covered by the proffered contract is at least 70 acres less than that land annexed to the City of St. George which Klein stated he intended to buy on March 30, 1971.

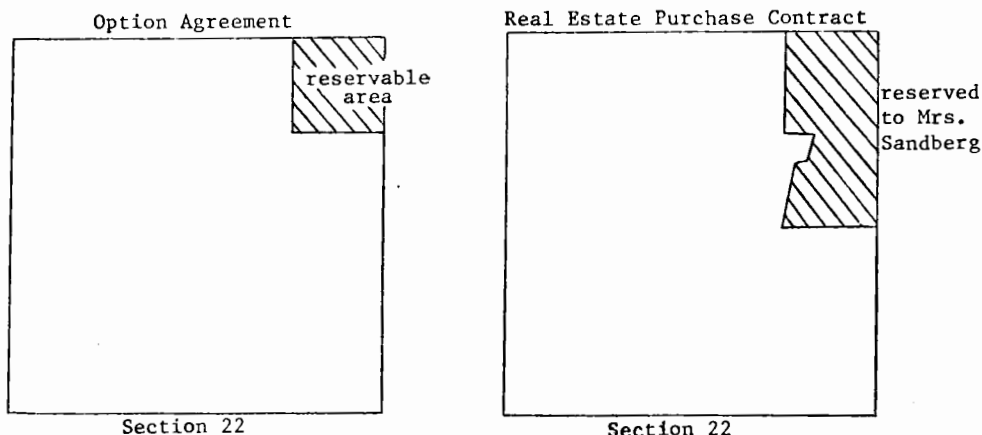
It is not possible to graphically represent the fence and area reserved as described by the original Option Agreement, but the area possibly excepted was specifically limited to the NE 1/4 NE 1/4 of Section 22 which is approximately 40 acres. The reservoir presumably would lie to the south and northeast of a fence located in that area.



Receipt likewise cannot be graphically represented. The reservoir therein is specifically located, however, in the NE 1/4 NE 1/4 of Section 22 and the area subject to possible reservation is described as the entirety of Section 22, totalling approximately 640 acres.



Beyond the aforementioned ambiguity and uncertainty in the Earnest Money Receipt, Option Agreement and letter with accompanying plat, there is a clear contradiction between the description on the Option Agreement and the description on the real estate purchase contract presented by Klein for Mrs. Sandberg's signature in 1972. The Option Agreement specifically excludes some lands from its purview, but limits those lands to an area within the NE 1/4 NE 1/4 of Section 22 unless the parties mutually agree to an exercise as to part of the land subject to the Option Agreement. The contract, however, reserves land in both the NE 1/4 NE 1/4 and in the SE 1/4 NE 1/4 of Section 22 to the appellants and clearly, requests an exercise as to only a portion of land subject to the Option Agreement.



Obviously, Klein has selected only a part of land covered by the Option Agreement, which, like any selection requires the mutual agreement of the parties. To grant

specific performance to the respondent on these facts and to blithely find the descriptions in conformity flies in the face of the facts, demeans the requirement of descriptive conformity of the documents, and allows Klein to unilaterally select lands for purchase oblivious to the contractual limitations of the Option Agreement.

Thus the several land descriptions on the Earnest Mondy Agreement, the Option Agreement, the Annexation Plat and the real estate purchase contract are at variance with each other and actually contradictory. To sustain the lower court's holding that they are in conformity would require this Court to close its eyes to the several descriptions in the record. Appellant invites this Court's scrutiny of those descriptions both as written and as platted in the record, and strenuously urges the Court to find that the contract presented for specific performance in excepting lands from the SE 1/4 NE 1/4 of Section 22 is not in conformity to the plain language of the Option Agreement unless the exercise was as to only a smaller tract, and clearly excludes lands annexed to St. George that on March 30, 1971, Klein indicated he was purchasing in his letter of "exercise".

Finally, it should be noted that there is no evidence that the fence line surveyed at Klein's instance is the fence mentioned in the Earnest Money Receipt and Option Agreement. Klein, in his letter of March 30, 1971, stated

that he had some questions of interpretation, as to what Wayne Sandberg, then deceased, wanted to do, and that he appreciated Mrs. Sandberg's concern that the fence be agreed to by both parties. It never was.

Ascertainment of Wayne Sandberg's intent will be impossible at this date. He is deceased and Klein, the other party to negotiations regarding the location of the fence line, is incompetent to testify as to those transactions. Utah Code Ann. 78-24-2(3).

Further, there is no evidence of an agreement between Klein and Mrs. Sandberg as to where the fence line is located. In fact, the surveyor testified that the fence line as surveyed was indicated to him by Klein alone. (AHS ¶7)

Not only is it evident that no clear and certain agreement was reached on the land area to be conveyed, it is also facially apparent that Klein himself has not been consistent in requesting one piece of land over another. Thus, there is not only no sufficient certainty in the several descriptions to allow a decree of specific performance, but the several descriptions themselves are both ambiguous and, in futile attempts at certainty, clearly contradictory.

PART THREE - THE OPTION WAS NOT PROPERLY EXERCISED

POINT VII

AS RESPONDENT DID NOT COMPLY WITH THE TERMS OF THE OPTION  
NO CONTRACT HAS ARISEN

- a. Respondent Klein Has the Burden of Showing Strict Compliance with the Terms of the Option as Construed Against Him.

Under Utah law an optionee seeking specific performance bears the burden of showing that he has strictly complied with all the terms of the option. Lincoln Land & Development Co., v. Thompson, 26 Utah 2d 324, 489 P.2d 426 (1971).

Strict compliance is required because an option creates a standing offer on specified terms which may not be withdrawn and is wholly for the benefit of the buyer. Thompson On Real Property, §4443, p.258. Hayward Lumber & Investment Co., v. Construction Products Corp., 255 P.2d 473 (Cal. Dist. Ct. App. 1953), states the rationale in these terms:

Since the optionor is bound while the optionee is free to accept or notas he chooses, courts are strict in holding an optionee to exact compliance with the terms of the option. (255 P.2d at 478)

The law does not place a duty upon the optionor to help the optionee tender a proper acceptance.

We find no rule of law to the effect that the optionee, by serving on optionor an inadequate notice of election to exercise the option, casts on the optionor any duty to instruct or inform the optionee of the particulars in which the election to exercise the option fails to meet the terms and conditions thereof; nor do we find that under such circumstances

the optionor is required to take any affirmative action on the theory that the optionee will amend or correct an inadequate acceptance. (Koplin v. Bennett, 155 So.2d 568, 573 (Fla. App. 1963))

Further, where uncertainty or ambiguity appears in an option contract, such uncertainty or ambiguity is to be construed against the party drawing the instrument. Jensen v. Anderson, 24 Utah 2d 191, 468 P.2d 366 (1970). Under oath, Klein has already admitted that the Option Agreement was drawn and prepared by him. (AnRK No. 14, R. 69) Therefore, Klein has the burden of showing strict compliance with the terms of the option, as construed against him.

b. The Purported Exercise of the Option Agreement Was Improper As To Form.

An option like any other offer, may only be accepted on the terms set forth therein. For example, in Nance v. Schoonover, 521 P.2d 896 (Utah 1974), the option under consideration required payment of \$17,000.00 in cash as part of the condition for its exercise. This Court held that the tender of a personal check in the amount of \$17,000.00 by the optionee did not comply with the terms of the option and therefore the attempted exercise was fatally defective. See also, Lincoln Land Development v. Thompson, 26 Utah 2d 324, 298 P.2d 426 (1971); Coombs v. Ouzunian, 24 Utah 2d 39, 77 P.2d 356 (1970); Chournos v. Evona Investment Co., 97 Utah 35, 94 P.2d 470 (1939); Tilton v. Sterling Coal & Coke Co., 28 Utah 173, 77 P. 758 (1904)

Paragraph 5 of the Option Agreement specifically required that the option be exercised by the preparation and submission of a real estate contract.

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)

Subparagraphs (a) through (h) which follow state the terms and conditions that are to be included or agreed to in the contract to purchase. The terms and conditions, inter alia, include:

1. Payments made during the option period would apply to the total purchase price (subparagraph (a)).
2. Provision for down payment of \$2,000.00 or such other sum as the parties might agree upon and the further provision that the total payments made during the first year in which the option was exercised was not to 29% of the total purchase price (subparagraph b)).
3. Contract period not to exceed ten years (subparagraph (c)).
4. Payment of the remaining balance in ten annual installments and provision for 3% interest on the balance (subparagraph (d)).
5. Contiguous partial releases or as otherwise mutually agreed (subparagraph (e)).
6. Default provisions applicable to both the option itself and the land purchase contract (subparagraph (f)).
7. Provision for drilling for water (subparagraph (g)).
8. Provisions for abstract of title (subparagraph (h)).

It should be noted that the down payment referred to in subparagraph b is technically a term and condition of the purchase contract, and that the contract, not the payment, would exercise the option. Further, the total purchase price is not stated due to the fact that it is to be determined by multiplying \$200.00 by the number of acres agreed upon by both parties ([contract for] "all or such part or parts of the property as the parties may agree").

To exercise the option, Klein was required to execute and submit a purchase contract prior to the expiration of the option. The terms of that contract are partially set forth in the Option Agreement and partially to be agreed upon. Klein's failure to execute a real estate contract on or before June 14, 1971, though tendering the down payment contemplated thereunder, was a fatally defective attempt to exercise the option. For example, in Cillessen v. Kona Company, 73 N.M. 297, 387 P.2d 867 (1964), plaintiffs had tendered monies required as part payment on the exercise of an option for real estate, which monies had been accepted by the optionor. Despite plaintiffs' claims that such part performance rendered the option enforceable, the New Mexico Supreme Court denied the plaintiffs' specific performance on the basis that they had failed to strictly comply with the terms of the option which specifically required them to notify the optionor of their exercise in writing.

Respondent Klein admits that no contract to purchase land included in the option agreement was executed or submitted by him prior to June 15, 1971. (AnRK Nos. 10 and 11, R. 68) Clearly in June of 1971, the Option Agreement had not been exercised. The lower court's holding that the letter of March 30, 1971, and tender of \$2,000.00 in June of that same year constitutes the exercise of the option both is oblivious to and ignores the clear requirements of the Option Agreement. The court may have relied on the language in many cases stating that "notice of exercise" is all that is required. However, those cases all involve options which do not specify submission of a contract as the means of exercise. Where the option merely requires notice to exercise, notice is sufficient, but where the option calls for submission of a contract to effect an exercise, that mode limits the means of exercising the power.

c. The "Exercising Documents" Were On Their Face Preliminary To The Exercise Of The Option.

It is a well established rule of law in Utah that an option is a continuing offer which must be unconditionally and unequivocally accepted. Cummings v. England, 12 Utah 2d 69, 362 P.2d 584 (1961); Williams v. Espey, 11 Utah 2d 317, 358 P.2d 903 (1961); Tilton v. Sterling Coal and Coke Co., 28 Utah 173, 77 P. 758 (1904). Breen v. Mayne, 118 N.W. 440 (Iowa) states that rule as follows:

It will not do to establish a rule in these cases which will allow an optionee to play fast and loose as interest may dictate. The acceptance of the option on the election when



made, must be unqualified and unequivocal, must be to the party giving the option in no uncertain manner, and be such that after it is exercised it becomes binding upon the party exercising. . . (118 N.W. at 441).

In United States Gypsum Co. v. Mackey Wallplaster Co., 252 F. 397 (9th Cir. 1918), an optionee was required to give written notice two months in advance to terminate an option to purchase, which would otherwise bind him. The optionee wrote the following letter within the requisite time period:

Dear Sir: On May 5th our option to purchase your mill property at Great Falls expires. I am writing you in advance of that date to inform you that conditions in Montana at this time are such that it will be necessary for us to cancel our arrangement with you at the time of its expiration, which is July 5th. We have had men looking for gypsum almost constantly since our last meeting, and so far our efforts have been fruitless. If you care to come down and talk the matter over, we will be glad to do so. Expect to give you formal notice on May 5th that we do not care to purchase your property. (252 F. at 400).

The Mackey Court determined that inspite of the letter's earlier statement "I am writing you in advance...to inform you...that it will be necessary for us to cancel our arrangement . . . at the time of expiration . . .", the inclusion of the last sentence in the letter, "[e]xpect to give you formal notice on May 5th that we do not care to purchase your property" qualified the entire letter, rendering it merely precatory and insufficient as notice required to terminate the option. In so holding, the Mackey Court concluded:

[E]vidently the writer of the letter well understood the necessity for formal notice as required by the terms of the agreement, and was careful not to give such a notice, which, of course, would have been of binding force. (Id. at 400)

Not unlike Mackey, the Wyoming Supreme Court, in Shellhart v. Axford, 485 P.2d 1031 (Wyo. 1971) confronted a situation where written notice was required to exercise an option. In Shellhart, a letter from the optionee's attorney stated in pertinent part:

This letter shall constitute that notice, however, the actual exercise of the option will not occur until sometime before December 1, 1969. (485 P.2d at 1033.)

The Shellhart Court held that this was an ineffectual attempt to exercise the option, the letter's precatory language not binding the optionee to perform. In the instant case, respondent Robert Klein successfully advanced the proposition that his letter of March 30, 1971, to Wanda Sandberg along with a tender of \$2,000.00 constituted the exercise of the option. An analysis of the letter, however, shows that it was only preliminary to the exercise of the option. In the very first paragraph of the subject letter, Klein states:

[T]here are one or two matters that should be considered preparatory to my exercising the option and the delivery of title to a portion of the land designated by the option. (R. 71)

Thus, the facially apparent purpose of the letter is to present and propose matters preparatory to the exercise of the option. This paragraph sets the tenor of the letter. The succeeding paragraphs further evince that the purpose of the letter is to resolve certain matters preparatory to the exercise of the option.

Respondent's purported exercise of the option is apparently based upon the statement contained in the first full paragraph on the second page of the subject letter (R. 72) which recites that on or before June 15, 1971, total option payments of \$18,000.00 will have been tendered, which, along with a tender of \$2,000.00 to exercise the option would allow for the release of 55 acres to the optionee pursuant to a formula contained in paragraph 5(e) of the Option Agreement. It should be noted that Klein has admitted under oath that the total payments made under the Option Agreement were only \$17,000.00. (See ARK ¶12, R. 339, AnRK No.1 R. 66-67) Respondent, therefore was apparently anticipating not only a \$2,000.00 down payment but also an additional payment of \$1,000.00 to extend the option and therefore included that amount in his calculation. The additional \$1,000.00 was never tendered. The letter also speaks of a release of 55 acres of land. Application of the Option Agreement's formula to determine the number of acres which could have been released to Klein had a proper exercise occurred reveals that on the basis of actual payments tendered as of the purported exercise in June of 1971, Klein could have demanded release of only 52.5 acres. That the letter speaks of necessary future events and assumes their occurrence as of the date of the exercise indicates that the letter was preliminary.

That the letter is both precatory and preparatory in nature is further evinced by its enumeration of matters

Klein expects to be accomplished prior to the exercise of the option. For example, the penultimate paragraph on page 2 of the letter states as follows:

During the months of April and May of 1971 I think we should try to accomplish the following:

1. Have survey made to determine the exact amount of acreage to be sold.
2. Arrive at the exact selling price so as to be able to determine the exact amount of principal that will be due and payable during a period of 10 annual installments.
3. Prepare a land purchase agreement consistant [sic] with the terms of an option agreement and the accepted number of acres involved consistant [sic] with the survey that will have previously been prepared. (R. 72(emphasis added))

That Klein knew that the letter could not be a valid exercise is conclusively shown by his statement that a land purchase agreement needed to be prepared consistent with the terms of the Option Agreement. Klein knew what was required to properly exercise the option if, in fact, he so elected. Construing the letter, however, as a whole, it is apparent that it is nothing more than a statement of intent and of matters to be accomplished before exercising the option and in no way binds defendant Robert Klein to purchase the property.

(Note, that letter is unsigned in the record before the Court.)

In Sieverts v. White, 2 Utah 2d 351, 273 P.2d 974 (1954), the Utah Supreme Court held that a statement that a party intends to do something is not the same thing as doing it. This is clearly a foundation of option law, which requires strict compliance from the party seeking specific performance.

Analytically, the letter cannot bear the burden of the option's exercise and simply does not establish the requisite

mutuality to bind the optionee. See POINT VIII, infra.

As this letter is clearly not the unequivocal, unconditional acceptance of an option required by Utah law, it in no way binds Klein to any type of performance. Further, not only has there been no evidence that Wanda Sandberg accepted the letter as the exercise of the option, it was stipulated as fact that at no time did she waive the proper tender of a contract as the exercise of the option. (AWS, R. 355; T. 6:29-7:3, R. 399)

d. The Tender of The Real Estate Contract in June of 1972 Was Not Timely.

An option, as previously stated, is a continuing offer which must be unconditionally accepted. Cummings v. England, 12 Utah 2d 69, 362 P.2d 584 (1961); Williams v. Espey, 11 Utah 2d 317, 358 P.2d 903 (1961); R.J. Dallm Const. Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952). Specifically, the exercise of an option must be made in the manner prescribed by law or specified in the option agreement. Timeliness of the exercise is material and has been said to be the essence of the option whether or not the option so states. For example, in Kelsey v. Crowther, 7 Utah 519, 27 P. 695 (1891), the Utah Supreme Court stated that an option period of 30 days did not mean 31 days and plaintiffs having failed to exercise the option in the 30 days lost their right to enforce the option. Likewise, in Gibbs v. Morgan, 101 Utah 66, 118 P.2d 128 (1941), the Utah Supreme Court stated that since an option had not been exercised within the 90-day period given thereunder, it could not be specifically

enforced. In a recent case, Wulfenstein v. Larson, 527 P.2d 650 (Utah 1974), the Utah Supreme Court dealt with an option agreement that required written notice of its exercise. The optionors did not actually come into possession of the notice until six days after the expiration date, though the notice had been mailed two days prior to the expiration date of the option. The postal service was not able to deliver it at that time and had timely left a "notice of attempted delivery" at the address. Six days later the defendants picked up the letter at the post office. The Court held, that, under these circumstances, the requirement of notice had been timely given.<sup>6</sup>

In the instant case execution and submission of a real estate purchase contract was specifically required to exercise the option. The maximum period of duration of the Option Agreement was approximately 18 years from the date of the signing of the option which was September 21, 1964. (R. 59, 60) The continuing validity of the option, however, was conditioned upon making certain payments.

Paragraph 3 of the Option Agreement provides as follows:

3. The following payments as made and as to be made shall be required to keep their option in good standing:

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<sup>6</sup>The decision may have been based on the 'mailbox rule' which states that the time of acceptance is when the letter delivered over to the post office, or the Court may have felt that the letter was constructively received by the optionors before expiration of the option. Whatever the grounds it is apparent that timeliness was crucial and that there were adequate grounds for finding the exercise timely.

a. Five Hundred Dollars (\$500.00) on June 14, 1962, receipt of which is hereby acknowledged as the original consideration for the option.

b. Five Hundred Dollars (\$500.00) on December 14, 1962, receipt of which is hereby acknowledged.

c. One Thousand Dollars (\$1,000.00) on June 14, 1963, receipt of which is hereby acknowledged, and

d. The sum of One Thousand Dollars (\$1,000.00) on June 14, 1963, and the sum of One Thousand Dollars (\$1,000.00) each six (6) months thereafter (i.e. each December 14 and June 14) until the option is exercised or until the expiration of the option period, unless the purchase price is sooner paid in full." (R. 60(emphasis added)).

Summarizing \$1,000.00 was to be paid each six (6) months on or before December 14, and on or before June 14 to maintain the option in good standing for the next succeeding six months. The use of the term "shall be" in paragraph 3 makes such payments mandatory to keep the option in effect. Respondent Klein has already admitted his failure to tender \$1,000.00 on June 14, 1971, which caused the Option Agreement to expire on that date, his last payment to extend the option being made on or before December 14, 1970. (AnRK Nos. 1,4,7,9, & 13, R.66-69).

It is hornbook law that consideration tendered to maintain the option in good standing is separate and distinct from consideration given under the contract formed when the option is exercised. Ide v. Leiser, 10 Mont. 5, 24 P. 695 (1890), see also, 77 Am.Jur. Vender and Purchaser §34 (1975). Thus respondent cannot assert that the payment of \$2,000.00 tendered on June 3, 1971, bearing



the notation "down payment to commence June 15 agreement 1971" was intended or accepted as payment to extend the option. In fact, respondent Klein has never so contended. (AnRK Nos. 1, 4, 7, 9 and 13, R. 66-69)

Appellants contend that under Utah law, Klein was required to present a contract of purchase executed by him as grantee while the option was still in good standing. Mrs. Sandberg never waived this requirement, such fact being stipulated to by both parties. (AWS, R. 355; T. 6:29-7:3, R. 399) As the last payment to maintain the option in good standing was made on December 14, 1970, an exercise must have occurred prior to June 14, 1971 to be timely. Thus, the presentation of an executed contract on May 16, 1972, more than eleven months after the expiration of the option is a defective exercise. Under Utah law timeliness is material. The respondent Klein contends that timeliness is excused because of the difficulty encountered in completing the terms of the purchase contract, specifically the description of lands to be included thereunder and the purchase price to be determined from the total acreage thereof. The Option Agreement, however, had been in effect in one form or another for over nine years when it expired, and it expressly provided that any expenses incurred by Klein could be applied against the purchase price. There was no excuse for Klein's delay. Any "agreement" to the contrary is parol and extraneous to the Option Agreement and would materially alter it, and again Klein has already stipulated that at no time did Mrs. Sandberg request him to refrain



from submitting contracts as required under the Option Agreement. (AWS 12, R. 355; T. 6:29-7:3, R. 399)

e. The "Exercising" Documents Were in Fact a Counteroffer.

It is a basic principle of contract law that an offer must be accepted on the terms on which it was made; any alteration of such offer is tantamount to rejection of the original offer and the making of a counteroffer. 91 C.J.S. Vendor and Purchaser §10 (1975) Similarly, this principle of contract law is applicable to options. For example, in Hayward Lumber & Investment Co. v. Construction Products Corp., 255 P.2d 473 (Cal. Dist. Ct. App. 1953) a lessor of real property and machinery granted his lessee an option to renew the lease for a period of two years. Immediately prior to the expiration of the option, the lessee wrote the lessor a letter, the material part of which reads as follows:

We are continuing our lease in accordance with our lease contract for the year 1951 for the factory and the machinery and tools.  
255 P.2d at 475.

Because the lessee attempted to renew the option for only a one-year period instead of two, the lessor notified the lessee that the lessee had failed to properly exercise the option to renew the lease provision of the agreement. The California Appellate Court, ruling on the lessor's objection, held as follows:

The determination that defendant's attempt-  
ed exercised of the option was not in accordance  
with the agreement is consistent with the settled  
principle, 'applicable to options as to other

contracts, that the offer must be accepted in the terms in which it is made, and the alteration of such terms...is tantamount to a rejection of the original offer and the making of a counter-offer.' (Id. at 466-467 (citations omitted)).

The Hayward Court further stated,

To avail himself of an option of renewal given by a lease, a tenant must apprise the lessor in unequivocal terms of his unqualified intention to exercise his option in the precise terms permitted by the lease. 32 Am.Jur, Sec. 979 p.822. . . In the matter at bar, however, a judgment against defendant was based upon its failure to exercise the option as required by its particular terms. An option is an offer by which a promisor binds himself in advance to make a contract if the optionee accepts upon the terms and within the time designated in the option. Since the optioner is bound while the optionee is free to accept or not as he chooses, courts are strict in holding an optionee to exact compliance with the terms of the option. Wightman v. Hall, 217 Pac. 580(1923). By varying the terms of the option in his purported renewal, defendant in effect rejected the option which became extinguished with the expiration of the terms of the lease. (Id. at 477-478(emphasis added))

This rule is also the law in Utah. For example, in Tilton v. Sterling Coal and Coke Co., et. al., 28 Utah 173, 77 P. 758 (1904), the Utah Supreme Court stated that an option granted in a lease was not accepted, because the optionee required, as a condition of his acceptance, that the optioner do more than called for by the lease, in effect attempting to expand the nature of the optionor's performance. Noting that conditional acceptance of an option amounts to a practical rejection of it, the Utah Supreme Court further quoted an early treatise which states the rule as follows: "The respondent is at liberty to accept wholly or to reject

wholly; but one of these things he must do, for if he answers, not rejecting, but proposing to accept under some modifications, this is a rejection of the offer." 28 Utah at 179. Similarly, in Chournos v. Evona Inv. Co., 97 Utah 335, 94 P.2d 470 (1939), an option provided two individuals as joint lessees a first right of refusal should the lessor receive an offer to purchase the leased property. The son of one of the joint lessees subsequently offered to purchase the property. Chournos, the other joint lessee, appeared at the lessor's office and tendered the required purchase price and requested a deed for himself. He was advised that this could not be done. He then tendered one-half of the purchase price and requested a deed to one-half of the property. He was again advised that this could not be done. The conversation proceeded and the time rolled past 12:00 o'clock, the deadline for exercising the option. The lessor then advised Chournos that all tenders were off as the deadline had passed. The Utah Supreme Court held that both the request that a deed be made to Chournos only and not to Chournos and the other joint lessee and the subsequent tender of one-half of the price and request for one-half of the property amounted to rejections of the offer and the making of a counteroffer.

The letter of March 30, 1971, from Defendant Klein to Mrs. Sandberg, was held by the lower court to constitute, (together with a check for \$2,000.00 delivered and paid on June 3, 1971,) the exercise of the option. (Order, ¶7, R. 358) The letter itself, however, not only is precatory

in nature but further proposes that an annexation description corresponding only "within a few feet" of the Option Agreement's description be purchased and that Mrs. Sandberg participate in the cost of a survey, even though paragraph 5h of the Option Agreement provides that such costs may be applied by respondent against the contract purchase price. (R. 71-73, see also POINT VI, supra; R. 63) As such, the letter is not only precatory in nature, but constitutes a counteroffer to the original Option Agreement.

By merely changing the legal description of the property in the purported exercise of the option, and proposing additional obligations for Mrs. Sandberg, respondent Klein rejected the original offer, and extended a counteroffer. Clearly, this is not an exercise of the option since it varied from its proffered terms. It is telling that although the lower court found many of the terms of the letter binding as against Mrs. Sandberg and further found the letter to properly express the understanding of the parties, it did not assess half of the costs of Mr. Stevens' survey, subsequently requested by Klein, against her. (Order, ¶7, R. 358)

## POINT VIII

### THE LACK OF MUTUALITY BELIES THE CREATION OF AN AGREEMENT BY THE LETTER OF MARCH 30, 1971, AND THE TENDERED CHECK OF JUNE 1971

Respondent Klein, and the lower court felt that the March 30, 1971, letter and the \$2,000.00 check constituted an exercise of the Option Agreement and that an enforceable contract was made between the parties. The lack of mutuality belies the creation of a contract between the parties. Their lack of mutuality is due to the vagueness of the exercising documents and particularly to the existence of ambiguities in the Option Agreement, and "exercising letter".

In contrast to the land selection provision of the Option Agreement which required a future agreement in all circumstances, two other clauses in the Option Agreement require a future agreement though only in the alternative. For example, paragraph 5 (e) provides for release of land upon selection by the Buyer of contiguous parcels or upon agreement of the parties if non-contiguous releases are sought. It states as follows:

Land to be released shall be selected by the Buyer provided such land is contiguously selected or otherwise mutually agreed to by both parties. (R.62)

Another provision for future mutual agreement as an alternative to specified terms is found in paragraph 5(b) regarding the down payment on the contract contemplated by the option. That paragraph states as follows:

The Buyer shall pay a down payment of Two Thousand Dollars (\$2,000.00) (or such other amount as the parties may agree) on said contract. . . . (R.61)

Again this drafting clearly provides for future mutual agreement as an alternative to a specified payment of \$2,000.00 and thus, it is not comparable to the land selection provision either in structure nor in intent.

While otherwise specific provisions requiring the necessity of future agreement only in the alternative would seemingly not require a contract to be declared unenforceable unless that alternative were invoked, some courts have indicated that the mere existence of such an alternative renders such a written instrument unenforceable as clearly lacking the requisite mutuality of obligation. Simply stated these courts find that where an alternative exists requiring future mutual agreement the written instrument is unenforceable.

For example, the Kline v. Rogerson decision, supra, found a contract fatally deficient when it provided for annual payments of \$5,000.00 per year or in an amount agreed to by the parties. When the buyer refused to pay \$5,000.00 per year, but was willing to pay \$2,000.00 per year, the court found that the seller could not compel the buyer to pay \$5,000.00 per year and found the contract unenforceable.

In Utah it has been held that an unconditional acceptance of an offer specifying payment in a lump sum, or alternatively, on installments does not create an enforceable agreement. For example, in Candland v. Oldroyd, 67 Utah 605, 248 P. 1101 (1926), the Utah Supreme Court considered whether an enforceable contract had arisen from an unconditional acceptance of an offer to sell land for \$1,300.00 in cash or for \$1,400.00 on terms specifically set forth. The buyer's acceptance failed to

indicate whether the acceptance applied to the cash offer or the offer stated in terms. On the basis of the written documents, the Utah Supreme Court stated as follows:

How could Oldroyd [Seller], or how could anyone, determine that Candland accepted to buy for cash or that he proposed to buy on payments to be made at stated times? How could Oldroyd determine, on receipt of Candland's communication . . . whether he had sold his farm for cash or on time? We do not see how it can be said with any degree of certainty from the writings--and the rights of these parties must be determined from these writings--that the minds of the parties ever met on a sale for \$1,300 in cash or on a sale \$1,400 on time. There is nothing in the letter of respondent Candland, save the statement that he accepts "your proposition" indicating which of the offers he had accepted. (248 P. at 1102)

In Candland, the Utah Supreme Court succinctly stated the doctrine of mutuality of obligation as it relates to the remedy of specific performance.

Let us assume that Candland had refused to go forward and purchase the property, and that Oldroyd had instituted an action for specific performance and had alleged that the offer had been made and accepted in the language found in the letters. Upon what theory could he have enforced specific performance? Would it have been upon the theory that Candland was to buy for cash or upon time? Whatever right Oldroyd had in an action of that nature must and would have been adjudged and determined from the writing found in the two letters. In what way could he have proven that respondent had elected to contract either for a cash payment or on time?

A contract to be binding upon one must likewise be binding upon the other. If one party has a right to insist upon specific performance, the other party to the contract must likewise have the same right. Tested by the elementary considerations that enter into every contract, we are unable to conclude that any contract existed growing out of this correspondence (248 P. 1103)



In the instant case, the lower court held that by the letter dated March 30, 1971, with the tender of \$2,000.00 respondent Klein had exercised the Option Agreement and was entitled to specific performance thereon. 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. If there was a contract, there would have been mutuality of obligation. The salient question is, what would a court have found had Mrs. Sandberg sued, alleging the Option Agreement and the letter and check as a contract against Klein? Obviously, the proof of a contract would be deficient as the letter is ambivalent, contradicts the Option Agreement, requests additional terms, proposes future agreement, is an unintegrated document, and is unsigned in the record before the Court. Likewise, in a suit by Klein, the proof is deficient.

Considering the issue of mutuality of obligation let us again examine the letter of March 30, 1971. It should first be noted that there is no evidence in the record that the March 30, 1971, letter was ever signed by Klein. Therefore, that document could not have been relied upon by Mrs. Sandberg in a claim against Klein. That letter, according to Mr. Klein, represents his acceptance of the Option Agreement. However, bearing no signature as it appears in the file, it could not have been relied on as an acceptance or exercise by Mrs. Sandberg in an action against the respondent. Further, the



letter refers to three enclosures, only one of which, the annexation plat (as ratified in May of 1971 by the St. George City Council), is in the file. Thus, it also is an unintegrated document. While Klein has subsequently executed other documents upon which he could be charged, none of those documents came into existence until after the expiration of the option and are untimely. There was, therefore, no mutuality of contract within the option period.

The terms of the letter are so equivocal as to prevent any enforcement by Mrs. Sandberg. Not only does the first paragraph fail to indicate a present exercise of the option, it specifically speaks in precatory terms regarding preparations necessary to the contemplated exercise of the Option Agreement in the future.

The second, third, fourth and fifth paragraphs of the letter discussed supra in Points Vb, VI, VIIc further indicate Klein's understanding that the property to be sold needed to be agreed to and that it had not on March 30, 1971, been described to the satisfaction of either party. In fact in paragraph 5 of that letter defendant Klein states as follows:

Should you still have some apprehension that I am not aware of, I am sure that on a face to face basis and with the help of a surveyor we can resolve fairly to each of our satisfaction whatever differences [sic] of opinion we may encounter. . .

It is telling that over a year later, respondent's attorney indicated that the property description still had not been fully resolved. (R.115)

The trial court's finding that the March 30, 1971 letter along with the \$2,000.00 check bearing the notation "down payment on June 15, agreement 1971 was an unequivocal and clear exercise of the Option Agreement flies in the face of the physical facts of this case and it cannot be said that Wanda Sandberg could have bound Klein to purchase anything on the basis of that letter and that tender of \$2,000.00, because on June 15, 1971, there was no memorandum sufficient on which to seek specific performance against Klein. Simply stated, the letter is vague, ambivalent, and contradictory. Unsigned in the record before the Court, it is also unintegrated, two of the referenced documents therein not in the record, or in the appellants' possession. Further, the letter proposes future agreement and seeks to impose additional terms on Mrs. Sandberg.

PART FOUR - SPECIFIC ENFORCEMENT OF THE REAL ESTATE  
CONTRACT WAS IMPROPER

POINT IX

RESPONDENT'S REAL ESTATE PURCHASE CONTRACT IS NOT  
IN CONFORMITY WITH THE OPTION AGREEMENT

The lower court decreed specific performance on a real estate purchase contract prepared by Klein nearly a year after the Option Agreement expired. (Order ¶4 & ¶1 of Conclusions R. 358). The court may have felt that enforcing a real estate contract would at least appear to conform with the terms of the option which specifically required the creation of just such an instrument. Also, a decree of specific performance on a real estate contract is much more expeditious than a decree on the Option Agreement as purportedly exercised, with explanatory parol documents. Those documents are so vague and uncertain

that enforcement of a document unsigned by the party to be charged, created almost one year after the expiration of the option it would purport to exercise, was that the real estate contract was "in conformity" with the Option Agreement in both description and consideration. Nothing could be less true. (Order ¶¶ 4 & 5, R.358).

a. Land Descriptions on The Real Estate Purchase Contract and Option Agreement are Not in Conformity.

It is undisputed by the parties that the original Earnest Money Receipt which preceded the Option Agreement and was superseded by it pertained to the following property:

All land owned by the Sellers in Section, 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 Northeast quarter Northeast quarter 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. (R. 196 (emphasis added)).

Two and one-half years after the Earnest Money Receipt was signed, the parties replaced it with an Option Agreement, drawn and prepared by respondent, that by its terms formally set forth the terms of the Earnest Money Agreement together with modifications to which the parties had agreed. (AnRK No. 14, R.69; R.59). The Option Agreement prescribed a certain mode of exercising the option therein, said mode being discussed

previously and entailing the execution of a contract of purchase for land to be mutually selected from the following description:

[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.

It is clear from the two descriptions set forth that the Earnest Money Receipt and the Option Agreement do not pertain to the same parcel. (See Point VI, supra). Furthermore, the description of the tract to be attached and subscribed to the Option Agreement as Exhibit A is nonexistent. The lower court can neither create that exhibit for the parties nor sign Mrs. Sandberg's name to it. Certainly, the 'Exhibit A' describing the land to be purchased by respondent in his contract of 1972 does not conform, as that contract excludes land in the SE 1/4 NE 1/4 of Section 22 as well as the NE 1/4 NE 1/4, and certainly does not bear Mrs. Sandberg's signature. (R.170). Succintly stated, the Option Agreement is not an integrated document.

The respondent drew and prepared the Option Agreement. (AnRK No. 14, R.69). Mrs. Sandberg, on the other hand, was not even aware in 1976 what possessing land in fee meant.

(DWS 4:30-5:4, R. 398). The nonintegration of the document, therefore, should be fatally construed against Klein, the drafter, real estate man and developer.

Although, the letter of March 30, 1971 is incompetent evidence to clarify the nature of the nonexistent 'Exhibit A', let us assume, arguendo, that that letter provides the means for accurately platting the phantom description. After all, the lower court considered the letter sufficient along with the respondent's payment in June of 1971 to timely exercise the option. (Order ¶7, R. 358). In referring to a fence line spoken of in the Earnest Money Agreement and the Option Agreement, the letter states as follows:

My interpretation of the number of acres essentially corresponds with yours, namely that the land Wayne intended to sell lies west of the fence line that you and I have both seen together. I would like you to know that I can appreciate your concern that this line be agreed to by both of us. . . . I walked the fence line the other day and noted that it has some irregular jogs in it that you and I should probably discuss in order to assure absolute clarification. I see no problem in this connection as I am as a matter of personal principle disposed to agree with your wishes.

If you think about it, descriptions along section or quarter section lines generally are more easily handled. It is for this reason, after careful review that I have described [sic] the annexation description as indicated by the plat which I am including with this letter. This description within a few feet, corresponds with the fence line that you and I have observed together when we last saw each other. This I trust will correspond with your own interpretation of what land you in fact believe you are selling. Should you still have some apprehension that I am not aware of, I am sure that on a face to face basis and with the help of a surveyor we can resolve fairly to each of our satisfaction whatever differences [sic] of opinion we may encounter. (R. 71-72(emphasis added)).

While the Earnest Money Agreement and the Option Agreement do not conform in what areas east of a fenceline are to be excluded, the former referring to all lands in Section 22 east of a fenceline, and the latter only to land in the NE 1/4 NE 1/4 of Section 22 east of a fenceline, the letter proposes an enclosed annexation description corresponding only "within a few feet" to "the fence line". Thus, at its very best, the enclosed annexation description only approximated the fenceline descriptions in both the Earnest Money Agreement and the Option Agreement as respondent understood them.

The last sentence in the letter adds a final touch of ambivalence to what clearly constitutes a counteroffer and proposal for agreement. That sentence states as follows:

You will note that I am only proposing that land be annexed which I am in fact buying from you.  
(R. 73 (emphasis added)).

The proposed annexation linen was executed by Robert Klein and Wanda Sandberg on April 5, 1971. (ARK ¶14, R 339) The same linen, bearing the notation "Holidaire Lands Inc. addition to St. George City" and signed by respondent as President of Holidaire Lands Inc. appears in the record on page 109 and in the probate record at page 83. (Note, there are two sets of 80's in the probate record). Its appearance is altered from that of March 30th, 1971, because, as he proposed respondent was successful in causing those lands to be annexed to the City of St. George and the Exhibits in the file bear the city's subsequent approval. (MRK, R. 289).



Apparently, to confirm the last sentence of the March 30th letter, Klein has, under oath, stated that that plat dealt with the real property that was the subject matter of the lawsuit (ARK ¶14, R. 339), and that "he was buying approximately 450 acres described in the Holidaire Lands annexation plat and the option agreement dated September 21, 1964." (An114RK 2c, R.151). Though the lower court apparently did not take the time to verify whether the Exhibit A to respondent's real estate purchase contract (R. 121) corresponded to the annexation description, this Court, with its power to review the facts in equity cases can, and, indeed, must review these Exhibits. And, in reviewing them, this Court will discover that respondent's real estate purchase contract of 1972 (R. 117-121) covers approximately seventy (70) acres less ground than the annexation. (See Point VI, supra).

Clearly, respondent sought to purchase in 1972 less ground than was annexed, less than he proposed to buy in 1971 when the option was still effective, and when the lower court ruled he had exercised the option. To allow the respondent to play this fast, and this loose, and then to allow the discrepancies in the descriptions to go unnoticed is to impose the respondent's ambivalence upon Mrs. Sandberg and say whatever his latest request is, well, that will be fine with us.<sup>7</sup>

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<sup>7</sup>As stated, the most serious discrepancy between the Option Agreement and the "exercising" letter, and the real estate purchase contract is the disparity of the land

- b. The Real Estate Purchase Contract and the Option Agreement are Not in Conformity as to the Necessity of Future Agreement.

The real estate purchase contract also ignores the Option Agreement's clear requirement for the mutual agreement of the parties on many terms, the most important of which is the amount of land to be subject to any contract of sale exercising the option. Though the Option Agreement states that it covers a certain amount of land, less a reserved area for the optionor, it is clear that the future agreement of the parties is required as to the amount of land to be subject to any contract of sale. The parties have never agreed to the amount of land Klein proposes in the contract. In this respect also the contract is not in conformity with the Option Agreement.

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descriptions. The argument at Point VI, supra, has noted that the area reserved for Mrs. Sandberg under the Option Agreement was approximately 40 acres in the NE 1/4 NE 1/4 of Section 22 while the area reserved for her under the contract is approximately 70 acres in the NE 1/4 NE 1/4 and in the SE 1/4 NE 1/4 of Section 22, both of which vary from the annexation plat. The two possible reasons for these differences are that Klein is proposing an exercise as to only a part of the property subject to the Option Agreement or that Klein simply was confused as to the location of fence which defined the boundary of the reserved parcel. There is no evidence that the fence surveyed by Klein is the fence spoken of in the Earnest Money Receipt and Option Agreement. There are some indications that it is not the proper fence line. For example, the descriptions of the fence in those two documents refer to the fence as being north and southwest of a reservoir. The fence Klein platted, however, runs straight north and south and could not be both north and southwest of any single point. Also, the fence referred to in the Option Agreement is only in the NE 1/4 NE 1/4 of Section 22 while the fence Klein has surveyed is in both the NE 1/4 and SE 1/4 of the NE 1/4 of Section 22.



c. The Real Estate Purchase Contract and the Option Agreement are not in conformity as to Time Requirements.

The real estate purchase contract proposes that the first annual payment thereunder be made on June 15, 1972. The Option Agreement required that the first annual payment under any contract of exercise be made one year after the date of the contract's execution. The date Klein submitted the real estate purchase contract was May 16, 1972. This indicates that the payment of the first annual installment is not properly scheduled. Assuming, however, that Klein meant by designating the first payment for June 15, 1972, that there was a contract between the parties one year prior to that date (i.e., on June 15, 1971), it is apparent that the supposed prior contract is at least a day late, for the option expired, at the latest, at midnight on June 14, 1971, when the six month extension paid for on December 14, 1970, expired. Even in his attempt to substantiate a fabricated parol contract, Klein is untimely, and the real estate purchase contract is again not in conformity with the Option Agreement.

d. The Real Estate Purchase Contract and the Option Agreement are Not in Conformity as to Manner of Exercise.

Another discrepancy in the real estate purchase contract is found in the self-serving statements respondent makes therein to a purported exercise of the Option Agreement in 1971. (R.117). For reasons already presented at POINT VII, supra, the letter and check of March and June, 1971, respectively were not a valid exercise of the Option Agreement. The Option Agreement clearly specifies that exercise is to be

made by execution of a real estate contract. (R.61) No other documents or action will constitute a valid exercise. The real estate purchase contract thus contradicts the clear requirement of the Option Agreement.

- e. The Real Estate Purchase Contract and the Option Agreement are Not in Conformity as to Consideration.

The real estate purchase contract submitted by Klein recites that in addition to the \$2,000.00 paid in June, 1971, an additional amount of \$18,000.00 was paid under the Option Agreement and is to be acknowledged by Mrs. Sandberg as prior payment toward the total purchase price of \$86,368.00. (R.118, ¶¶ 2, 2a & 2b) Paragraph 5a of the Option Agreement allowed that all payments made under it, "including payments made for and during the extension period, shall apply on the contract purchase price." (R.61) Therefore, in the real estate purchase contract Klein reduced the total purchase price by \$18,000.00 purportedly paid to maintain the Option Agreement in good standing and by the \$2,000.00 down payment made in June of 1971. These amounts correspond to the amounts Klein, in his letter of March, 1971, believed would be paid as of the date of his exercise of the option. Respondent, however, has later admitted under oath that he paid only \$17,000 under the Option Agreement, not including the \$2,000.00 in June! (ARK ¶12, R. 339; AnRK No. 1, R.66-67; & MRK ¶4, R.270) Thus, even assuming the description in Exhibit A to the real estate purchase contract were somehow correct, and even assuming the contract had been timely tendered (both of which

assumptions strain even a creative imagination), the consideration recited therein and due Mrs. Sandberg thereunder would be and is insufficient! Succintly, the \$86,368.00 total price recited in the real estate purchase contract minus \$19,000.00 is not equal to \$66,368.00 recited as the balance remaining due, but rather \$67,368.00.

Clearly, there is no basis for the lower court's finding that the real estate purchase contract was in conformity "both as to description and consideration with the Option Agreement." (Order ¶4, R.358).

The facts and simple mathematics belie the accuracy of the lower court's findings. The decree of specific performance on that contract (R.358, Conclusions ¶1) is onerous as to Mrs. Sandberg because its terms are so different from those of the Option Agreement which bears her signature. The lower court's decree of specific enforcement of a document which is insufficient in consideration, proposes unilaterally drafted terms, lacks Mrs. Sandberg's agreement as to land descriptions, and was conceived by respondent almost one year after the option expired, must be reversed.

#### CONCLUSION

Appellants seek reversal of the summary judgment declaring the Option Agreement a valid and enforceable contract and decreeing specific performance of that agreement in conformity to a real estate purchase contract submitted to the lower court by respondent.

Because respondent's claim for relief was bottomed in equity and due to the fact that the lower court ruled favorably on respondent's motion for summary judgment, this Court must consider both the facts and the law in this case, must do it without favor to the findings below, and must draw inferences in favor of the appellant. Only the application of these standards, as established by both statutory and case law, will afford the appellant her day in court.

The nature of a decree of specific performance requires clear and certain proof as to all of the material terms of a contract, and it is the respondent who bears this burden.

In the instant case, the documents presented by respondent as the basis for his claim include an Earnest Money Receipt executed by appellant in 1962 and an Option Agreement executed in 1964 that superseded the Earnest Money Receipt. Only these documents bear the appellant's signature and under the Statute of Frauds she can be charged only with these documents. Parol evidence, while admissible to clarify such writings, cannot be used to add to or subtract from their terms. Specifically, the letter dated March 30, 1971 apparently drafted by respondent but unsigned by him in the record before the Court may be admissible to show notice of acceptance of the option, if notice were all that was required, but not to add to, subtract from, or alter the contractual liability of the appellant.

The Option Agreement before this Court is not a document susceptible of specific performance. Drawn and

prepared by the respondent, a man experienced in real estate matters, it leaves material terms to the future agreement of the parties. Paragraph 5 of the Option Agreement, for example, which specifies the manner of the option's exercise, specifically requires the respondent to execute a contract for "all or such part of parts of the property as the parties may agree", leaving the selection of land to future agreement. In Davison v. Robbins, 30 Utah 2d 338, 517 P.2d 1026 (1973), this Court has already held such contracts unenforceable and, when the future agreement dealt with the selection of land, parol evidence may not aid the deficient description. Id. That the Option Agreement both necessitated and contemplated future negotiations is evinced by respondent's letter of March 30, 1971. That letter, both precatory in nature and wholly preparatory to the option's exercise, reveals that respondent knew and understood that any parcel to be selected had to be agreed upon.

The Option Agreement respondent relies on is not an integrated document. On page 2 of the Agreement, it recites that descriptions referenced therein, specifically the lands to be purchased and excluded from the purchase, will be attached thereto and independently subscribed by the parties as "Schedule A". No such schedule exists. Thus, these descriptions which were to be an integral part of the Option Agreement and which were of such importance to the parties as to require mutual approval, and subsequent and independent subscription, are lacking.

There are, however, various land descriptions before the Court. Two exist in the Earnest Money Receipt and Option Agreement, both of which referred to man made structures and require futher delineation. A third description exists on an annexation plat prepared at respondent's request, and ultimately, a fourth exists as an exhibit to respondent's real estate purchase contract presented to the lower court for the appellant's signature. Respondent successfully asserted in the lower court that the descriptions in the Earnest Money Receipt and Option Agreement were the same and, further, that they were identical to that description on the real estate purchase contract. An examination of the record will reveal that this is not true, as those descriptions, particularly with reference to Section 22 of Township 42 South, Range 15 West, Salt Lake base and meridian, play havoc with each other. Further, in his letter of March 30, 1971, respondent specifically indicated that he was only annexing "that land which I am [he was] buying from you [appellant]." The option expired on June 14, 1971. A year later, respondent submitted his real estate purchase contract which covers approximately seventy (70) acres less ground than the annexation. Yet, in one breath, the lower court held that the letter along with a tender of \$2,000.00 properly exercised the option and directed that appellant sign a real estate purchase contract submitted by respondent. It should be clear to this Court that a letter is not a proper

exercise when the option specifically requires that a contract be executed. Further, even assuming the letter were a proper exercise, the decree below does not conform to the terms proposed by the letter. The respondent attached a linen to the letter which, as subsequently ratified by the City of St. George, appears in the file as the Holidare Lands Addition to St. George City. According to the respondent's alleged letter of exercise, he was buying that land and under oath, respondent confirmed that "he was buying approximately 450 acres described in the Holidaire Lands annexation plat and option agreement dated September 21, 1964." The respondent's real estate purchase contract, however, which the lower court has directed the appellant to sign and which was attached to respondent's motion for summary judgment and memorandum of authorities, describes a different parcel of land!

The respondent, who seeks specific enforcement of the Option Agreement, bears the burden of showing that he has strictly complied with its terms. Paragraph 5 of the Option Agreement specifically required that the option be exercised by the preparation and submission of a real estate contract on lands to be agreed upon. The last extension payment made to keep the option open was tendered on or before December 14, 1970 and, by its own terms, the option expired on June 14, 1971. On this date, no contract had been submitted to the appellant for her approval. Respondent's failure to submit a purchase contract until almost a year after the option expired is



is untimely and fatally defective.

In the lower court, respondent successfully advanced the proposition that his letter of March 30, 1971, coupled with his tender of \$2,000.00 in June of 1971 exercised the option. Beyond blatantly ignoring the requirements of the Option Agreement, this proposition ignores the tenor of the letter which is to resolve certain matters preparatory to the exercise of the option.

[T]here are one or two matters that should be considered preparatory to my exercising the option and the delivery of title to a portion of the land designated by the option.

Analytically, the letter is precatory and cannot bear the burden of the option's exercise. Further, respondent does not now seek to purchase that land described in the linen which was attached to the letter, but a smaller parcel.

The only tender of a real estate purchase contract occurred in May of 1972, eleven months after the option had expired, and after respondent had been advised of its expiration. That tender (assuming, arguendo, that it was proper in every other regard) was untimely. Respondent contends on the basis of parol evidence that timeliness, which is material in Utah, is excused; this, even though the Option Agreement had been in effect more than nine years when it expired and despite respondent's stipulation that at no time did appellant request him to refrain from submitting a contract as required under the Option Agreement.

In proposing that appellant share in the cost of a survey and accept a proposed exercise to a parcel only approxi-



mating the land described in the Option Agreement, the letter which the lower court held exercised the option was precatory and amounted to little more than a counteroffer. The letter is also an unintegrated document as it specifically mentions three enclosures, only one of which is in the record. The appellant cannot even recall the other two enclosures, and, it begs the question, she certainly does not know of their location. Another defect in the letter as it appears in the record is its lack of a signature.

An option is a continuing offer which invites unilateral acceptance. Acceptance converts the option into a mutually binding contract, and the optionee, as well as the optionor, can be compelled to perform. The letter that the lower court found exercised the option is precatory, vague, ambivalent and contradictory. Unintegrated and unsigned in the record before the Court, it is impossible to conceive that appellant could maintain an action against the respondent on the basis of that letter. Indeed, more than a year after the letter had been drafted, respondent through one of his attorneys indicated that the land descriptions were still a minor problem and had to be resolved. This Court also cannot ignore the fact that the contract description presented to the lower court varies from the annexation linen referred to in the letter.

Ultimately, the lower court held that a real estate purchase contract presented to Appellant in May of 1972 and attached to respondent's motion for summary judgment and

memorandum of authorities was in conformity with the Option Agreement and should be signed by Appellant. Nothing could be less true. First, the land description in the real estate purchase contract excludes land in the SE 1/4 NE 1/4 of Section 22 and is not in conformity either to the Option Agreement, or the annexation linen which accompanied the March 30, 1971 letter of "exercise". Secondly, the real estate purchase contract ignores the Option Agreement's clear requirement for the mutual agreement of the parties on many terms, the most important of which was the amount of land subject to any contract of sale exercising the option. Thirdly, the real estate purchase contract was not only untimely submitted, but the payment schedule recited therein also fails to conform with the Option Agreement. Fourth, the real estate purchase contract recites in its preamble that the Option Agreement was exercised by the letter and check of March and June of 1971 respectively. This ignores the clear specification in the Option Agreement that the option be exercised by the execution of a contract to purchase lands to be mutually agreed upon. Lastly, even assuming the real estate purchase contract properly described a parcel agreed upon and even assuming timely tender, the consideration recited therein is, according to respondent's own sworn admissions, insufficient to make the purported purchase.

For the foregoing reasons, we strongly feel a reversal of the decision of the District Court is mandated.

Respectfully submitted,

ALLEN, THOMPSON, HUGHES & BEHLE

*Michael D. Hughes*

Michael D. Hughes

Royal K. Hunt

Theodore I. Wittmayer

Attorneys for Plaintiffs-Appellants

Served two copies of the foregoing Brief on James P. Crowley of Watkins and Campbell, 310 South Main Street, Salt Lake City, Utah, by delivering them to him on this 29<sup>th</sup> day of July, 1977.

*Royal K. Hunt*

Royal K. Hunt