

2001

Malcolm N. McKinnon v. The Corporation of the President of the Church of Jesus Christ of Latter Day Saints, a corporation : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT 1975
OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

MALCOLM N. McKINNON,

*Plaintiff-Appellant,
Cross-Respondent,*

vs.

THE CORPORATION OF THE
PRESIDENT OF THE CHURCH
OF JESUS CHRIST OF
LATTER-DAY SAINTS,

a corporation,

*Defendant-Respondent,
Cross-Appellant.*

Case No.
13553

Brief of Cross-Appellant and Respondent

An Appeal from the Judgment of the
Third Judicial District Court of
Salt Lake County, State of Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

MALCOLM N. McKINNON,

*Plaintiff-Appellant,
Cross-Respondent,*

vs.

THE CORPORATION OF THE
PRESIDENT OF THE CHURCH
OF JESUS CHRIST OF
LATTER-DAY SAINTS,

a corporation, *Defendant-Respondent,
Cross-Appellant.*

Case No.
13553

Brief of Cross-Appellant and Respondent

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-appellant, and cross-respondent seeks money damages against defendant-respondent, and cross-appellant arising out of respondent's alleged breach of contract to provide Appellant with a haulage right-of-way to reach coal properties formerly operated by Appellant.

DISPOSITION IN THE LOWER COURT

Respondent moved the Third Judicial District Court of Salt Lake County, Judge Ernest F. Baldwin, Jr., presiding, for Summary Judgment. Said Motion was based upon several separate points. At the hearing, Appellant requested leave to file an Amended Complaint for the purpose of adding or substituting new or additional parties defendant, and in addition, to include a new cause of action. The Court granted Respondent's Motion for Summary Judgment on three separate grounds, and further denied Appellant's Motions to amend his complaint.

RELIEF SOUGHT ON CROSS-APPEAL

Defendant-Respondent, and Cross-Appellant contends that its Motion for Summary Judgment should have been granted on the additional points presented to the lower court. Defendant-Respondent, and Cross-Appellant prays that this Court order that the lower court should have granted Summary Judgment on the following grounds:

1. That the preliminary negotiations between the parties did not constitute a binding contract.
2. That the alleged contract is void for failure to comply with the Utah Statute of Frauds.

STATEMENT OF FACTS

For many years Appellant was the owner of certain coal properties located in Emery County, State of Utah. Respondent is a Utah corporation sole.

During the late 1950's Appellant approached Mr. Leonard F. Adams, Chairman of the Coal Committee of the General Church Welfare Committee concerning the possible purchase of the entire coal properties owned by Appellant. (McArthur Deposition, pg. 8) The purchase of the entire property was never consummated, however, in February, 1959, a 480 parcel of the property being offered was purchased for the sum of \$264,000.00. (McKinnon Deposition, Exhibit D-1).

Since only a portion of Appellant's property was purchased, Appellant proposed in a letter dated March 17, 1959, (McKinnon Deposition, Exhibit D-2), that he withdraw his application for a Bureau of Land Management lease for 640 acres of federal coal land, located immediately west of the original 480 acre plot which had been purchased. This was to enable the purchaser of the 480 acre parcel to apply for a lease to the adjoining property.

At about this time, Appellant expressed a concern about the existence of a fault lying within his property and running toward the federal land. He, therefore, suggested that if the fault were found to extend as far as the federal land, and if it became too expensive to cross through said fault, that he be granted a right-of-way through a portion of the federal lease so as to permit

him access to go around the fault and to continue his mining operations on the opposite side of the fault. (McKinnon Deposition, pg. 10).

Preliminary negotiations, conversations, and correspondence relating to the granting of the alleged right-of-way did take place. (McKinnon Deposition, Exhibits D-2, D-3, D-4, D-9 and D-10, Exhibit A, pg. 7 and 8). No oral agreement was ever consummated between the parties, and no written document was ever prepared or signed by Respondent corporation, or by an agent thereof, setting forth the terms of the alleged obligation to provide a right-of-way. Appellant himself has admitted that the negotiations were never consummated. (Exhibit A, pgs. 11 and 12; McKinnon Deposition, pg. 39).

On June 18, 1959, Cooperative Security Corporation, a Utah corporation, by and through its President, Henry D. Moyle, made application with the United States Department of Interior, Bureau of Land Management for a lease to the 640 acres of federal coal land. (Exhibit A, pg. 13). On March 1, 1962, said lease was granted by the Bureau of Land Management to Cooperative Security Corporation. (Exhibit A, pg. 18).

On December 6, 1966, Cooperative Security Corporation, the owner of the 480 acres, and also the lessee of the federal leased land, granted an option to Peabody Coal Company. (R. 102). Upon learning of such transaction, Appellant, for the first time in approximately six years, wrote a letter dated February 16, 1967 addressed to the Frist Presidency of the Church, calling attention

to the prior discussions and to the fact that such negotiations had not been concluded. (Exhibit A, pg. 11). Subsequent negotiations were then carried on in an attempt to resolve the matter, however, it was never resolved to the satisfaction of the Appellant.

On June 1, 1968, Appellant granted an option of his property to the same Peabody Coal Company, which option was subsequently exercised by said company resulting in a long term lease between Appellant and Peabody Coal Company, whereby Appellant is to receive a minimum of \$3,000 per month until such time as he has received the total sum of \$540,000.00, thereafter, the minimum would be the sum of \$10,000.00 per year. (R. 103). On April 12, 1972, the date the lawsuit was commenced, Appellant neither possessed nor operated the property upon which the fault existed, and therefore had no need for the right-of-way.

ARGUMENT ON CROSS-APPEAL

POINT I

THE LOWER COURT ERRED IN FAILING TO GRANT RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT ALL PRELIMINARY NEGOTIATIONS CONCERNING THE GRANTING OF THE RIGHT-OF-WAY FAILED TO CREATE A BINDING CONTRACT BETWEEN THE PARTIES.

It is a fundamental in the law of contracts that before an agreement may become valid, be it written or oral, that there must be a mutual assent to all of the terms of the contract, or a "meeting of the minds." The essential terms of the contract must be "... spelled out either expressly or impliedly with sufficient definiteness to be enforced." *Valcarce v. Bitters*, 12 Utah 2d 61, 362 P 2d 427 (1961). In an earlier case entitled *Price v. Lloyd*, 31 Utah 86, 86 Pac. 767 (1906), being an action to compel specific performance of a parol agreement, the Utah Supreme Court held:

This contract must be complete and certain in its terms; and 'this element of completeness' must exist in every contract which can be specifically enforced, whatever be its external form whether written or verbal, whether embodied in the memorandum required by the Statute of Frauds, or rendered obligatory by part performance, or by any other act which may obviate the provisions of that statute.

In addition, the burden of proving such assent and definiteness of terms lies upon the party who claims the existence of a contract. *B. & R. Supply Company v. Bringham*, 28 Utah 2d 442, 503 P 2d 1216, (1972).

In the case at bar, Appellant has attempted to establish the existence of a valid contract, claiming that several documents read collectively constitute a binding contract or obligation to grant a right-of-way. A summary of the documents relied upon by the Appellant are as follows:

1. A letter dated March 12, 1959 from Mr. Leonard Adams of the General Church Welfare Committee to the Appellant. (Exhibit A, pg. 1).

There is no mention in this letter concerning the granting of a right-of-way.

2. A letter dated March 17, 1959 from Appellant to Mr. Leonard Adams of the General Church Welfare Committee. (McKinnon Deposition, Exhibit D-2).

The letter states as follows:

I would like to present a proposition, wherein the Church applies for the acreage I asked for in my lease modification, along with other acreage suitable to Church use, and after the lease is granted, assigns to me a portion of the land I applied for in my lease modification. I need a portion of this land in order to develop a practical haulageway to the west that will go around the fault that is running in a south-westerly direction and could cut me off if I do not have some additional land to the south. (Emphasis added.)

3. A letter dated April 15, 1959 from Leonard E. Adams to Henry D. Moyle. The letter reads in part as follows:

Should be pleased to discuss this matter (right-of-way) with you with view to determining whether or not the Church could consistently grant the American Fuel Company access to any of the Government Land which the Church expects to lease from the Government provided it was necessary for the Amer-

ican Fuel Company to have access to such acreage. (McKinnon Deposition, Exhibit D-5).

4. A letter from Frank Armstrong, Appellant's attorney dated January 6, 1960 to Henry D. Moyle, states as follows:

I talked to you some time ago just prior to the death of Leonard E. Adams regarding an appointment to meet with Brother Adams and Malcolm N. McKinnon *to arrange the granting of a right-of-way* to Mr. McKinnon over a portion of the land the Church was obtaining by lease from the Federal government and to arrange for a contribution to the church out of the money to be paid Mr. McKinnon for a portion of his mine. (Emphasis added.) (McKinnon Deposition, Exhibit D-9).

5. A letter dated February 8, 1961 from Appellant to Henry D. Moyle which states as follows:

While there is *no immediate rush to conclude this matter*, I have been holding a sizeable donation for the Church. I want to turn this over to you at the time you give me a letter stating that: In the event I should require additional land to make it possible to go around the end of the faults that might otherwise prevent me from being able to extract the coal from land lying west of the faults, the Church would agree to make it available. This is in accord with the understanding you had with Mr. Armstrong. (Emphasis added.) (Exhibit A, pg. 8).

6. A letter dated November 30, 1961 from Appellant's attorney to Henry D. Moyle states as follows:

When Malcolm N. McKinnon sold a part of his mine to the Church, I talked to you about a right-of-way to get into some of his leased property if, because of faults, he couldn't get to it from his present workings.

7. An envelop containing two checks, totalling \$14,000.00 from Appellant payable to The Church of Jesus Christ of Latter-day Saints. Said checks were to be held until negotiations for right-of-way were completed. *These checks have never been cashed.* (McKinnon's Deposition Exhibits D-3 and D-4) Written upon envelop was the following:

"Hold: Two checks totalling \$14,000.00. Malcolm McKinnon tendered for right-of-way. This matter is pending." (R. 99).

8. A letter dated September 17, 1969 from Alfred W. Uhrhan to the Appellant. Part of the letter reads as follows:

The two checks were handed to me personally by the late President Moyle with the instructions to hold them until the details of the right-of-way were worked out with the mine management. . . . At that time, Brother Leonard E. Adams was still alive and in charge of the mine. However, he was ailing, *and it is obvious that the matter was not finalized at that time.* (Emphasis added.) (Exhibit A, pg. 7).

According to Appellant's own admission, the foregoing enumerated documents constitute all of the documents relied upon by the Appellant to show the existence of a contract requiring Respondent to convey a right-of-way. (R. 98 & 99). It is obvious from a review of these documents that there is no "meeting of the minds." The only assumption which may be gleaned therefrom is that preliminary negotiations on the possible granting of a right-of-way were held. This court held in *Valcarce, supra* at page 428 "... that where there was simply some nebulous notion in the air that a contract might be entered into in the future, the court cannot fabricate the kind of a contract the parties ought to have made and enforce it."

A collective reading of all of the documents relied upon by the Appellant fail to mention the *location, nature, extent or duration* of the proposed right-of-way. There are no documents which were prepared by either Appellant or Respondent, or their agents which indicate that Appellant in fact agreed to or consented to the terms of a purported right-of-way.

Appellant, in his deposition on the 28th day of June, 1972, himself admitted that the negotiations were never consummated. He states beginning on Page 39 as follows:

Well, let's say prior to the time that you leased to Peabody Coal Company *we were waiting for you to give us in writing something to establish the fact that we were to have the right to go around.* ... (Emphasis Added.)

It was to be a donation to be held and not cashed until such time as the leases could be issued and some written document given to me assuring me that if the faults extended into your property, I could go into your property far enough with my entries to go around the end of the fault. . . .

Q. I see. And if we did not give you the written document, we were not to cash the checks?

A. If I didn't get the written documents, you weren't to cash the checks. (Pages 40-41).

A. If they had given me a letter stating that I could go if I needed it, Yes.

Q. But if they failed or refused to give you that letter, they were not entitled to the \$14,000.00?

A. No. (Page 42).

The checks were never cashed.

It is clear that at the end of the negotiations, there was, at best, an agreement to make a contract at some future date, pending the satisfactory negotiation of additional terms of the contract. An agreement to agree at a future date does not constitute a contract, and to so hold would be in contravention of long standing precedents in this and other jurisdictions. *Hi-Way Motor Co. v. Service Motor Co.*, 68 Utah 65, 249 Pac. 133 (1926); *Slayter v. Palsey*, 199 Ore. 616, 264 P2d 444 (1953); *Western Airlines, Inc. v. Lathrop Company*, 499 P2d 1013, (Alaska 1972).

The applicable law in this case is, therefore, clear: That where there are mere negotiations moving toward the making of a contract, and where there is no evi-

dence of an actual "meeting of the minds" as to the essential and material terms of the contract, there is no contract between the parties.

Based upon these facts, the lower court should have held that there was no binding contract in existence, and properly should have granted Respondent's Motion for Summary Judgment on that basis.

POINT II

THE LOWER COURT ERRED IN FAILING TO GRANT RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT THE ALLEGED CONTRACT FAILED TO COMPLY WITH THE UTAH STATUTE OF FRAUDS.

A. AN ORAL AGREEMENT FOR THE GRANTING OF A RIGHT-OF-WAY TO LAND IS VOID.

The Utah Statute of Frauds renders all oral executory agreements for the sale of an interest in land void.

Section 25-5-3, Utah Code Annotated, 1953, provides as follows:

LEASES AND CONTRACTS FOR INTEREST IN LANDS: Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by

the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

In 1971, the Utah Supreme Court in *Wells v. Marcus*, 25 Utah 2d 242, 480 P 2d 129 (1971), defined "any interest in lands" for purpose of applying the Statute of Frauds to include the right to run a pipeline over the land of another. This affirms the rule of law adapted by other jurisdictions which previously defined "interest in land" to include easements and specifically rights-of-way. *Simonson v. McDonald*, 131 Mont. 494, 311 P 2d 682 (1960).

B. THE DOCUMENTS RELIED UPON TO TAKE THE CASE OUT OF THE STATUTE OF FRAUDS ARE INSUFFICIENT TO CONSTITUTE A "MEMORANDUM IN WRITING."

The Utah Statute of Frauds provides that a contract for an interest in land is void unless evidenced by a "... note or memorandum thereof . . . in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing." Utah Code Annotated, Section 25-5-3, 1953.

The Utah Supreme Court has further required that the note or memorandum relied upon to establish a written agreement be sufficiently definite so as to establish the terms of the agreement, and, in addition, must contain all the essential terms and provisions of

the contract. *Birdzell v. Utah Oil Refinery Co.*, 121 Utah 412, 242 P2d 578, (1952); *Collett v. Goodrich*, 119 Utah 662, 231 P 2d 730 (1951).

Not one of the documents relied upon by the Appellant in the matter before the court bear the signature of the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, nor any authorized agent thereof. In fact there are no documents which constitute an agreement, which have been signed by any agent of any Church entity. Accordingly, the provisions of the Utah Statute of Frauds have not been complied with, and the purported contract should be held to be void.

The lower court should have held that the purported contract between the parties was void for not having complied with the Utah Statute of Frauds.

RESPONDENT'S ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT APPELLANT WAS SUING THE WRONG DEFENDANT.

The Appellant contends that the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints is the proper defendant in this action. Re-

spondent claims and the lower court found that said corporation is not the proper defendant, rather the Cooperative Security Corporation should have been named as the proper defendant.

The Corporation of the President of the Church of Jesus Christ of Latter-Day Saints is a Utah corporation sole, organized and existing pursuant to the provisions of Section 16-7-1 through 11, inclusive, Utah Code Annotated, 1953, as amended. Such corporation, as a corporation sole, consists of one individual, namely, the President of the Church of Jesus Christ of Latter-Day Saints.

Appellant has stated in his Brief that all contacts during the formation of the purported agreement were with representatives, agents, or employees of the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints. Appellant further states that at no time did he have any contact with employees or representatives of Cooperative Security Corporation. This is not true. There were initial conversations with Leonard Adams and Alfred W. Uhrhan; however, the person with whom Appellant negotiated was Henry D. Moyle. There is no evidence to show that Henry D. Moyle was acting as a representative, agent, or employee of Respondent corporation. Although Henry D. Moyle was a member of the First Presidency of the Church during the entire period of time of negotiations, he was also the President of Cooperative Security Corporation. (Exhibit A, pg. 17).

At no time has the Respondent corporation owned or held a leasehold interest in the property over which the alleged right-of-way was to have been granted. On June 18, 1959, Henry D. Moyle, as President of Cooperative Security Corporation, a Utah corporation, pursuant to a Resolution by the Board of Directors, filed an Application with the Bureau of Land Management of the United States Government to acquire a lease of the 640 acres through which the alleged right-of-way would have been granted. (Exhibit A, pg. 13). Subsequent thereto, on March 1, 1962, a lease was issued by the Bureau of Land Management to Cooperative Security Corporation. (Exhibit A, pg. 18). Due to the fact that Respondent corporation has never held an interest in the property in question, nor contracted with Appellant, there cannot be any breach of an alleged contract by the Respondent to convey an interest in the property.

Appellant himself had adequate knowledge of the proper party to this action, and in no way was misled by Respondent. In a letter dated February 13, 1962 Appellant was advised as follows:

You are familiar with the fact that *the Cooperative Security Corporation recently obtained for the Deseret Coal Mine leases on two tracts of Government coal land. . . .* (Emphasis Added.) (Exhibit A, pg. 19).

On June 18, 1968 Appellant was advised in a letter that if a right-of-way were to be granted, it would be between himself and Cooperative Security Corporation.

The letter provides in part as follows: "This is in reply to your recent letter asking for definition of *right-of-way agreement that might be entered between yourself and Cooperative Security Corporation.*" (Emphasis added) (Exhibit A, pg. 20).

Appellant, in answer to Respondent's Interrogatory No. 28, although attempting to include the Respondent corporation, *admits that the granting of the alleged right-of-way would have to be in the name of Cooperative Security Corporation.* (R. 108). In Interrogatory No. 29, Appellant further admits that he was aware of the fact that *Cooperative Security Corporation had a leasehold interest in the subject property as early as December 12, 1961.* (R. 109).

It is fundamental that where a corporation is the real party in interest it should be sued in its corporate name. Article XII, Section 4 of the Utah Constitution provides in part as follows:

All corporations shall have the right to sue, and shall be subject to be sued in all courts, in like cases as natural persons.

Section 16-10-4, Utah Code Annotated, 1953, further provides that corporations can sue and be sued in their corporate name.

Cooperative Security Corporation was incorporated in the State of Utah on April 22, 1937, and since that date has been authorized to do business in the State of Utah (Exhibit A - Page 21). As owner of the lease-

hold interest in the subject property, and by virtue of the fact that all negotiations concerning the alleged right-of-way were conducted with the President of said corporation, Cooperative Security Corporation is the proper defendant in this action, not the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints.

To contend, as does Appellant, that the President of the Church can control various entities and, therefore, become subject to suit for all such business transactions, clearly ignores the laws of the State of Utah pertaining to corporations. To carry such assertion to the results desired by appellant would be to suggest that all suits involving the Deseret Book Company, Hotel Utah, Beneficial Life Insurance Company, Bonneville International, Cooperative Security Corporation, and many other church related corporations could be sued by suing the Corporation of the President.

The lower court was, therefore, correct in holding that the lawsuit commenced by the Appellant was in fact commenced against the wrong party, and the granting of Summary Judgment on this ground was correct.

POINT II

THE LOWER COURT CORRECTLY HELD THAT APPELLANT'S CAUSE OF ACTION IS BARRED BY THE UTAH STATUTE OF LIMITATIONS (SECTION 78-12-25, UTAH CODE ANNOTATED, 1953).

Section 78-12-25, Utah Code Annotated, 1953, entitled "Within four years", establishing a four year Statute of Limitations provides in part as follows:

An action upon a contract, obligation or liability not founded upon an instrument in writing. . . .

By virtue of the fact that there is no instrument in writing establishing the agreement between the parties, the above-mentioned Statute of Limitations is controlling.

In the case of *Last Chance Ranch Company vs. Erickson*, 82 Utah 475, 25 P2d 952, (1933) the Utah Supreme Court held that an action for specific performance of an oral contract or agreement to convey land which was commenced over five years after the execution of a deed was barred by the four year Statute of Limitations. The Supreme Court further held that the cause of action or right to sue arose the moment an action may be maintained to enforce it, and that the Statute of Limitations is then set in motion. See also *State Tax Commission vs. Spanish Fork*, 99 Utah 177, 100 P2d 575, (1940), and *O'Hair vs. Kounalis*, 23 Utah 2d 355, 463 P2d 799, (1970).

Appellant admits in his Answer to Respondent's Interrogatories No. 7 that the contract, or obligation to provide a right-of-way first came into existence on March 1, 1962, the date the lease was obtained from the Bureau of Land Management. On that date Cooperative Security Corporation was in a position for the first time to grant a right-of-way to Appellant, if

in fact an obligation so to do existed. According to the foregoing cases, a cause of action therefore arose on March 1, 1962, and a four year Statute of Limitations was then set in motion. This cause of action was initiated by the Appellant by the service of a summons upon the Respondent on April 12, 1972. This is in excess of 10 years following the commencement of the cause of action and the start of the running of the Statute of Limitations. Therefore under any theory or under any Statute of Limitations, Appellant's cause of action would be barred.

Appellant admits in answer to Respondent's Interrogatory No. 14 that Respondent's failure to perform the contract took place on December 9, 1966 when Respondent through Cooperative Security Corporation entered into a lease or option agreement with Peabody Coal Company and failed in said agreement to reserve the right-of-way for Appellant's use. Appellant also states in answer to Respondent's Interrogatory No. 13 that his first demand for performance was made by letter on February 16, 1967. (R. 102) In response to Respondent's Interrogatory No. 16, requesting the date the Appellant claims that a cause of action arose against the Respondent the Appellant stated as follows:

On March 17, 1967 by virtue of a letter from Wilford W. Kirton, Jr., counsel for Defendant addressed to plaintiff denying any obligation or arrangement on behalf of defendant to provide plaintiff the right-of-way.

The court can accept any of the dates relied upon by the Appellant as the date the cause of action arose, and the same is still barred by the four year Statute of Limitations, as provided for in Section 78-12-25, Utah Code Annotated, 1953.

Appellant, in his Brief, has attempted to claim that the Respondent is precluded from asserting a defense of the Statute of Limitations on the ground that there existed a fiduciary or confidential relationship between the parties. Appellant failed to assert the claim of a confidential relationship at the time of the taking of his deposition or at the time of answering the Interrogatories. It would appear as though the Appellant is now attempting to assert a new defense in order to combat the obvious running of the Statute of Limitations. A further treatment of the argument concerning the fiduciary relationship will be treated in Point III of our Brief.

The lower court was correct in its ruling that the four year Statute of Limitations controlled and the action by the Appellant is therefore barred.

POINT III

ANY FIDUCIARY RELATIONSHIP, CONSTRUCTIVE TRUST, OR RELIANCE UPON INTERNAL CHURCH GRIEVANCE PROCEDURES CEASED TO EXIST MORE THAN FOUR YEARS PRIOR TO THE COMMENCEMENT OF THIS ACTION, AND THEREFORE,

RESPONDENT IS NOT ESTOPPED FROM ASSERTING A DEFENSE OF STATUTE OF LIMITATIONS.

A review of the correspondence will show that during the period immediately following the conveyance of the property by the Respondent to Peabody Coal Company that any alleged fiduciary relationship; right to rely upon a constructive trust; utilization of internal grievance procedures; or the right to rely upon conduct of the Respondent constituting an estoppel ceased and terminated.

A series of letters show that legal procedures, not church procedures, were resorted to.

On August 23, 1967 in a letter from Appellant to President Tanner of the First Presidency of the Church of Jesus Christ of Latter-Day Saints, attention is called to the fact that the letter was prepared at the request of legal counsel for the Church and sent to the Appellant's legal counsel. (Exhibit A - Page 23). On September 14, 1967, Appellant was advised that all future requests or negotiations would be handled by legal counsel for the church. (Exhibit A - Page 24). In his response, Appellant, on September 21, 1967 stated that all future negotiations would be presented to the Church's legal counsel. (Exhibit A - Page 25). This correspondence clearly shows that the parties were proceeding through normal, legal channels and utilizing legal counsel rather than relying upon the special fiduciary relationship existing between the parties.

In a letter dated October 10, 1967 to Mr. Kirton, legal counsel to the Church, Appellant, after complaining about the conduct of the Church as it applied to him, stated as follows:

I feel that the treatment I have recently received, after working closely in the past with the Church for many years in connection with coal-mining and coal-lands, is definitely wrong. *It is my opinion that I have not only been used for the Church's benefit, but I have been betrayed outright.* (Emphasis added.) (Exhibit A, pg. 28).

By November 9, 1967, the Appellant apparently recognizing that his personal requests had been refused, made a personal appeal to President Tanner for a meeting with him, stating that the lowest type of criminals are given a chance to be heard. He further stated:

It seems to me that you have closed all doors, but I am asking you one more time; can you not meet with me personally and try to arbitrate this matter harmoniously together? (Exhibit A, pg. 29).

President Tanner responded that he would be willing to meet with Appellant but further stated in his letter of November 14, 1967 as follows:

Having arranged for Brother Wilford W. Kirton, our legal counsel, to discuss the matter with you, I was of the opinion that you had been given a hearing *and his explanation of your requests was such as to make it impossible for us to meet them.* (Exhibit A, pg. 30).

The meeting was apparently held but not to the satisfaction of the Appellant. On February 6, 1968, the

Appellant wrote a letter to the Bureau of Land Management, in essence "turning Respondent in" for alleged misconduct in securing the leases. In the letter the Appellant stated:

I hereby file a formal protest against the L.D.S. Church assigning, selling, sub-letting, or altering the ownership or right to operate and produce coal . . . from designated leases. (Exhibit A, pg. 31).

On February 27, 1968 Appellant once again complained about the improper treatment received by him, and then, in no uncertain terms, makes it clear that he was no longer placing any trust in representatives of the Respondent. The letter in part states as follows:

. . . I am now of the opinion that the Church was intending to sell their coal-lands to Peabody, as far back as this, and were just using me to help the matter along. . . .

It seems strange that the death of so few could change the policy of the Church so much.

. . . but in each case received a rebuff and was treated as though I were trying to use the Church for my own benefit.

Instead of me using the Church, it seems the Church used and deceived me, *and then, in the end, secretly betrayed me altogether*. (Emphasis Added.) (Exhibit A, pg. 37).

On March 15, 1968, counsel for the Church replied to the Appellant's preceding letter by stating:

I think it is very unfortunate that you believe the Church used and deceived you and secretly betrayed you altogether. . . .

Beyond this, The First Presidency have concluded and *I am under instructions to inform you that it has no moral obligation to you and is unable to grant your request.* (Exhibit A, pg. 40).

All of the foregoing correspondence took place more than four years prior to the commencement of this action. The foregoing establishes hostility on behalf of the Appellant and completely obliterates any claim that a fiduciary or confidential relationship existed subsequent to that date. These letters show that the Appellant was advised, and accepted the direction that all negotiations would be through legal counsel rather than Church grievance procedures. The Appellant was advised and understood that his claim was not being recognized. He therefore made further appeals for reconsideration. He finally concluded to take formal action by filing a protest with the Bureau of Land Management. Under such circumstances, and conduct, it is inconceivable how Appellant could claim conduct on behalf of the Respondent constituting an estoppel. Nor could he any longer contend that Respondent was recognizing his claim, thus constituting a constructive trust.

The Appellant in his letters acknowledges that he was on notice that his claim had been denied by Respondent at a time more than four years before commencement of this lawsuit. Thus, adopting a theory pertaining to the Statute of Limitations most liberal to the Appellant, the action is still barred.

The Affidavit of the Appellant to the effect that

he believed he was dealing with “a direct representative of God” and for Appellant to question such agents “would be heresy” can hardly be classified as an affidavit of facts as required by the Utah Rules of Civil Procedure. Rather, it appears to be statements of conclusions and afterthought statements of the Appellant’s mental attitude at the time. There is no reference in the affidavit to any facts sustaining the conclusions now asserted by the Appellant.

Likewise, the Appellant failed to assert the claim of a confidential relationship at the time of the taking of his deposition and in answer to interrogatories concerning any defense to the Statute of Frauds or Statute of Limitations.

The actual conduct of Appellant shows that he openly and critically challenged representatives of the church and further threatened to expose such “agents of diety,. This conduct is far more persuasive than belated self-serving statements in his affidavit.

In a letter dated July 30, 1968 to President Tanner the Appellant made it clear that he considered any further compromise negotiations at a close and stated that he intended to seek relief in the courts. Part of that letter is as follows:

The Church has severely damaged me, and those of you who are presently in control of the Church seem to lack the qualities advocated by the Church to settle this on a moral basis even though, in my opinion, it puts the Church in a position of being guilty of preaching one thing and yet practicing another.

I have tried for nearly 18 months to get this matter settled in a fair and amicable way, but all you have done from the beginning, in my opinion, is to try to find a way out without making a fair settlement, regardless of the damage you have done to me.

I have been in business for myself for approximately 38 years, and to the best of my recollection I have never been treated so shabbily.

In view of all that has transpired I consider that you have left me *no alternative but to seek relief in the courts*. So, unless you can come up with something that is more realistic and of some value to me, I herewith advise you that *my next move will be to file an action in court, to try and recover damages*. (Emphasis Added.) (Exhibit A, pg. 46).

A short time later the Appellant delivered a letter to the Editor of the Salt Lake Tribune, Mr. Will Fehr, asking the letter be published as a news item, exposing the Church and its officers. On August 19, 1968, the Appellant wrote to Mr. A. C. Deck, Executive Editor of the Tribune, calling attention that the letter had been delivered to Mr. Fehr and again requesting that the letter be published as a news item. If the paper were unwilling to publish it, the Appellant then stated that he was willing to pay for it to be published by any department or whatever section of the paper for which it would qualify. He concluded his letter as follows:

I will appreciate your giving this you attention as soon as conveniently possible, *because I intend to see to it that this matter is brought before the at-*

tention of the public by whatever means I find necessary. (Exhibit A, pg. 47).

On August 26, 1968 Appellant wrote to J. W. Gallivan, Publisher, Salt Lake Tribune, in which he stated as follows:

I also wonder if you fully realize what consequences could develop as a result of your refusal to publish this letter.

In my opinion, this letter covers points of utmost importance to most members of the L.D.S. Church, and it is also my opinion that the members of the Church should be made aware of how matters of this nature are presently being handled. (Exhibit A, pg. 48).

Such conduct by Appellant clearly demonstrates that his belated Affidavit is a sham. Obviously, there existed no fiduciary, or other confidential relationship between the parties which would estop the Respondent from asserting a defense of the Statute of Limitations.

POINT IV

THE LOWER COURT WAS CORRECT IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT THE ISSUE OF DAMAGES WAS EITHER MOOT OR NOT SUSCEPTIBLE TO LEGAL DETERMINATION.

It is clearly proper and within the discretion of the lower court to rule on an issue of mootness as a matter of law.

Appellant contends that it was improper for the lower court to rule on the issue of damages, claiming that it is “within the province of the jury” to decide matters of fact relating to the assessment of damages. However true this may be generally, in the case before the court, the issue is not the authority of the lower court to assess and rule on the actual amount of damages, but rather, the authority of the lower court to rule, as a matter of law, as to whether the Appellant has a justifiable cause of action for damages.

It is settled law that it is the duty of every judicial tribunal to decide actual controversies by a judgment which can be carried into effect. *Paul v. Milk Depots, Inc.*, 41 Cal Rptr 468, 396 P2d 924 (1964). This precludes the court having to rule on moot questions of law or fact which ultimately have no practical effect in settling the litigant’s rights. *Smith v. Smith*, 304 P2d 421 (Ore., 1956).

In the recent case of *Kelch v. Westland Minerals Corp.*, 26 Utah 2d 42, 484 P2d 726 (1971), the Utah Supreme Court held that where the Court was unable to effect the rights of the parties the issue was moot and therefore the appeal was dismissed.

In the instant case, as in *Kelch*, supra., both the Appellant and Respondent have disposed of the property in question to Peabody Coal Company. Initially, Cooperative Security Corporation conveyed an option to Peabody Coal Company. Thereafter the Appellant leased his adjacent property to Peabody Coal Company

on a 30 year lease, where Appellant is to receive at least the sum of \$540,000. The presence or absence of the alleged right-of-way became insignificant, inasmuch as Peabody Coal Company would then own not only the property containing the fault, but also the property over which the alleged right-of-way was to have run.

Had the Appellant received less money from Peabody Coal Company by virtue of the fact that he was unable to provide the alleged right-of-way over the property, he would then have had a clear issue of damages, which properly should have gone to the jury. By the Appellant's own admissions, the presence or absence of the right-of-way had no effect on the price he ultimately received upon the lease of the property. On Page 76 of Appellant's Deposition we read in part as follows:

Q. Was there any adjustment in the price in the ultimate deal made with Peabody by virtue of the fault problem that is the subject matter of this lawsuit?

A. No.

Q. There was none?

A. (indicating affirmatively).

By Appellant's own admission, and by virtue of his having leased his property for a substantial sum of money " . . . without any diminution in price to the owner of the property through which the alleged right-of-way was to be granted, makes the issue of damages

either moot or not susceptible to legal determination.” (Amended Order - Page 10). For this reason the lower court was correct in granting Respondent’s Motion for Summary Judgment.

Another reason why the issue of damages is moot is because the entire contract is conditional. If the fault were found to extend into the federal land, then, and only then was a right-of-way to be used. On pages 40 and 41 of Appellant’s Deposition, Appellant admitted that “. . . if the faults extended into your property, I could go into your property far enough with my entries to go around the end of the fault.” (Emphasis Added) In answer to Respondent’s Interrogatories No. 8 and 10, Appellant admits that the granting of the right-of-way was conditional. (R. 100 and 101). *As of the date the Appellant’s Deposition was taken, he had no knowledge as to whether or not the fault did in fact extend into the federal property.* (McKinnon Deposition, pg. 33 and 37).

Section 251 of the Restatement of Contracts provides in part as follows:

- (1) Performance of a duty subject to a condition cannot become due unless the condition occurs or is excused.
- (2) If the condition has not been excused, its nonoccurrence discharges the duty where the condition can no longer occur.

As of the time the Appellant entered into his agreement with Peabody Coal Company, it had not been

determined that the fault did, in fact, extend into such property. Since there has been no occurrence of the condition precedent, or any assurance that the condition will ever be fulfilled there is no way of assessing damages, if any, which Appellant would have suffered.

Accordingly, the lower court was correct in holding that the question of damages was moot, and not susceptible to legal determination.

CONCLUSION

Respondent has clearly presented to this Court a detailed analysis of the law concerning the points raised by Respondent in the lower court in support of its Motion for Summary Judgment. An examination of the various exhibits, and the record before this Court give ample justification for affirming the decision of the lower court in granting Respondent's Motion for Summary Judgment on the following grounds:

1. The action was commenced against an improper Defendant.

2. The cause of action is barred by the Utah Statute of Limitations (Section 78-12-25, Utah Code Annotated, 1953).

3. The fact that the Plaintiff having leased his property without any diminution in price to the owner of the property through which the alleged right-of-way was to be granted, makes the issue of damages either moot or not susceptible to legal determination.

Respondent further asserts that the lower court was correct in refusing to allow the Appellant to amend his complaint by substituting or including new parties defendant, and by adding a new cause of action. By virtue of the fact that the cause of action itself is barred by the Statute of Limitations and Statute of Frauds, permitting Appellant to sue a different party would be of no effect.

Respondent respectfully submits that this Court, based on the facts and authorities presented in Respondent's Cross-Appeal, should rule that Respondent was also entitled to a Summary Judgment on the grounds that the preliminary negotiations between the parties did not create a binding contract, and that the alleged contract is void for failure to comply with the Utah Statute of Frauds.

Respectfully submitted,

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