

1941

# Gust Papadopoulos v. Marion Defabrizio : Brief of Appellant

Utah Supreme Court

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C. E. Norton; Attorney for Defendant and Appellant;

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No. 6377

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In  
The Supreme Court  
of the  
State of Utah

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GUST PAPADOPULOS,  
Plaintiff and Respondent,  
vs.

MARION DEFABRIZIO,  
Defendant and Appellant.

---

Appeal From the Third District Court of Utah,  
for Salt Lake County  
Honorable P. C. Evans, Judge

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BRIEF OF APPELLANT

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C. E. NORTON,  
Attorney for Defendant  
and Appellant.

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FILED

JUN 20 1941

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THE THEORY OF THE CASE

This case was put to trial upon an indefinite theory. That theory the complaint does not outline. The evidence does not sustain it, and the law does not support it.

The complaint contains allegations which may be construed into three or four different theories. The evidence sustains the theory that respondent coveted the appellant's crop of growing wheat as alleged in paragraph "9-c" of the complaint. That is the gist of this case. Appellant contends that the respondent plead himself out of court entirely upon

all four theories. The respondent is precluded and estopped, and in good conscience and equity, he should be precluded and estopped from maintaining this action by his conduct shown in the record.

In paragraphs 1 to 4 of his complaint respondent alleges that he was a tenant of L. H. Gray, and that appellant, "claiming to be a tenant of Salt Lake County" prevented him from using the premises. That is one theory.

In the next paragraph respondent alleged that he (the plaintiff) "leased from Salt Lake County." So that would make a contest or *dispute between two tenants of the same alleged new landlord* which claimed an auditor's deed to the said L. H. Gray's real property. That is another theory

Finally, in paragraph 6 respondent alleged adverse title against his former landlord, L. H. Gray, and seeks to evict Gray's tenant, the appellant, who holds under a crop lease, so as to convert the wheat crop into mutton, as alleged in paragraph "9-c" of the complaint. That is the real theory.

Notwithstanding the said pleadings, in his opening statement on the trial, counsel for respondent said:

"Now, if the court please, this case is not a complicated case, while the facts may seem to be complicated. It involves primarily the issue, first, as to whether or not a lessee may, upon discovery that his lessor no longer has title to the leased premises, when the leased premises have been sold under tax sale to the County, then go to the County and secure a lease from the County for the same or similar purposes, and then claim possession of the property as against his former lessor, who has lost his title by tax sale. (Tr. 60). And the

issues narrow themselves to just really the one point of law that Mr. Norton suggested, that is, whether or not a lessee can come in and deny the title of his former lessor when his former lessor lost the title (by auditor's deed), and then can make a lease with the new owner under a tax sale; and what are the measures of damage in this case."

Upon that primary indefinite theory the case was tried. The court found the issue in favor of the plaintiff and against the defendant, and made findings, word for word, according to the indefinite complaint, and assessed damages for 50 lambs at \$5.00 each as one measure of damages, which was not plead, and enjoined the defendant. From such final judgment the defendant appeals on questions of both law and fact, and brings the record in a bill of exceptions. (Tr. 51, 172).

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## STATEMENT OF THE FACTS

This is a rather complicated case. The first step is to acquire a knowledge of the facts. In dealing with complicated facts, it is best to arrange the narrative of events in the order of date — a simple rule not always acted upon, but which enables us to unravel the most complicated story, and to see the relation of one set of facts to another set of facts. This method enables us to disregard irrelevant topics and to settle our minds on the turning points in the case. So we shall state this case in the order of dates. *W. I.*

March 15, 1935, plaintiff leased the Barney Canyon Ranch, containing seven sections of land in

S. L. County, from the Western Land Association and L. H. Gray, for a term of five years, ending December 31, 1939, and paid agreed rentals for the years 1935, 1936 and 1937, and used said premises for grazing, shearing and lambing of sheep during the months of April, May and June of each year up to and including the year 1940 — every year notwithstanding his lease expired on December 31, 1939. And plaintiff alleges that relation of landlord and tenant in his complaint, and annexed a copy of his lease as Exhibit A. *Dr. 2.*

April 6, 1938, defendant leased Section 31, a portion of said Barney Canyon Ranch, from the same landlords, the Western Land Association and L. H. Gray, for a term of six years, ending April 6, 1944, for dry land wheat farming, at an agreed rental of one-fourth of the crops raised thereon during said term, and in said lease provision is made to protect the other lessee, the plaintiff, until December 31, 1939. A copy of the lease is annexed to the answer and counter-claim. *Dr. 21*

May 4, 1938, both the plaintiff and the defendant were on said lands, under said leases, one lambing the sheep and the other clearing and plowing on Section 31, when Mr. Rushton, a neighbor, told them that their landlords had not paid the taxes on said lands. They voluntarily went to the courthouse. There was no eviction by any one at any time, *Dr. 91*

May 4, 1938, plaintiff and defendant went to the County Commissioners and exhibited their said leases and fully explained that they were so in possession of said lands (one lambing and the other clearing and plowing) and by mutual consent and agreement, and without the knowledge or consent of their said landlords, they agreed that plaintiff

would take six Sections, (1, 6, 12, 34, 35 and 36) and that defendant would take said Section 31, under agreements dated May 4, 1938, and for a consideration of \$1.00 as recited in such agreements, Exhibits No. 1 and H. 27. 172

It will be observed that both agreements are almost word for word the same, except in the plaintiff's agreement it is provided:

"The Second Party is hereby granted an option to purchase said property (six sections) on terms acceptable to First Party."

Both agreements recite: 27. 172

"The First Party agrees and hereby appoints the Second Party as agent for the First Party for the sole and only purpose of guarding, protecting and preserving the above described property from the 4th day of May, A. D. 1938, for a period of (13 months to plaintiff and 12 months to defendant) from date, unless terminated before that date; said termination to be in accordance with the provisions of the following paragraph:

"The First Party reserves the right to sell said land upon thirty days written notice to Second Party; said sale of land, however, to be made subject to this agreement."

May 27, 1938, L. H. Gray wrote to plaintiff:

"Pursuant to your call of May 24th I have taken opportunity to look into the Barney Ranch situation.

I was expecting to use your half year payment on the lease, of \$250.00, to redeem

the land on which the Lohman and Dorton Springs are situated, and find that the County does not give credit to me for anything you may pay to the County, and it leaves me without income with which to redeem any part of the leased land.

There was due from you under your lease \$250.00 and its diversion by you keeps me from meeting my tax obligations.

Your lease of March 15, 1935, provides for a payment of \$500.00 each year payable one-half at shearing time and the other half at sale of lambs in the fall.

The payment at shearing time of 1938 is due, owing and unpaid. I shall wait until June 1st, 1938.

(Signed) L. H. GRAY."

Ex. K, p. 172.

On December 30, 1938, said L. H. Gray and the Western Land Association (which is the same) paid such delinquent taxes and received a quit-claim deed from Salt Lake County, which deed was duly recorded on December 31, 1938, for the Southeast quarter of the Southwest quarter of Section 31, upon which land said Lohman Spring is located and recorded.

See Exhibit 1, p. 172 of Bill of Exceptions. That is the controlling undisputed fact in this case. And upon that fact, and upon that undisputed record, the whole case turns. After December 30, 1938, Salt Lake County had no right, title or interest in said land and water. After June 4, 1939, neither the plaintiff nor the defendant had any right of possession to said land and water under their

alleged leases of May 4, 1938, under and from Salt Lake County. From that time and at all times thereafter, both the plaintiff and the defendant had the right to use said land and water up to December 31, 1939, under their leases from L. H. Gray and the Western Land Association. Then the plaintiff's lease expired by its terms and the plaintiff became a trespasser. The defendant had, and still has until April 6, 1944, the sole right of possession and use of said land and water under his said lease of April 6, 1938, from and under said L. H. Gray and Western Land Association. And at all times since the said defendant has been, and now is, in the possession of said land and water under said lease, Exhibit No. 3, *Dr 172*

On June 14, 1939 — ten days after his alleged lease from Salt Lake County of May 4, 1938, aforesaid, had expired, yet while plaintiff held his said lease of March 15, 1935 from said L. H. Gray and Western Land Association, aforesaid, and five and one-half months after such redemption and recording of said deed, and with actual as well as constructive notice thereof, the plaintiff pretended to secure another so-called lease from Salt Lake County on all of the said lands in Barnev Canyon (described in his aforesaid lease from L. H. Gray and W. L. A. aforesaid) and wrongfully included all of said lands in Section 31 then in the possession of the defendant under his lease of April 6, 1938, aforesaid. That is the alleged lease annexed to the complaint as Ex. B., *Dr 172*

It must be remembered that during all of said times the defendant was in possession. He plowed and planted in 1938 to be harvested in 1939 according to said Gray lease, and that plaintiff had the

use of part of Section 31 and said water for grazing, lambing and shearing of sheep up to June 10, 1940, when he moved away all of his sheep. (Tr. 172).

On June 21, 1940, the plaintiff secured a pretended extension of said pretended lease of June 14, 1940, to June 15, 1941. That is the subject-matter of this action. (Tr. 1)

On December 6, 1940, said L. H. Gray and Western Land Association paid about \$2200.00 delinquent taxes on said lands and thereby redeemed all of said lands and secured a quitclaim deed from Salt Lake County. Said Deed was duly recorded on December 14, 1940. See Exhibit D, Tr. 172.

On January 8, 1941, plaintiff commenced this action against Defa — not against L. H. Gray — and alleged all of the said leases and agreements in his complaint. *And thereby plaintiff plead himself out of court.* (Tr. 1)

The defendant demurred to said complaint for uncertainty and for want of facts. The demurrer was overruled, and the defendant was required to answer and counter-claim. The defendant and appellant here assigns said adverse ruling as prejudicial and reversible error.

104-2-14, Rev. Stat. Utah, 1933, and  
98 Utah, 217.

The plaintiff did not reply to said answer and counter-claim, so the facts therein are deemed admitted. (Tr 51)

104-11-2 and 104-13-11, Rev. Stat. Utah,  
1933.

This brings the facts before the Court on the said pleadings. (Tr. 1 to 50 inclusive).

## COMPLAINT

The plaintiff complains of the defendant and alleges as follows: *Dram 1.*

## 1.

The plaintiff and defendant are and during all times mentioned in this complaint were residents of Salt Lake County, State of Utah.

## 2.

On March 15, 1935, one L. H. Gray leased to plaintiff the following described property, situate in Salt Lake County, State of Utah:

The Barney Canyon Ranch in Salt Lake County, State of Utah, containing approximately seven sections of land;

which lease was for a period of five years beginning on January 1, 1935, a copy of which lease is marked Exhibit A, is attached hereto, and is by this reference made a part of this complaint. Pursuant to said lease, the plaintiff took possession of the said property and all thereof on January 1, 1935, and paid rent pursuant to said lease for the years 1935, 1936, and 1937.

## 3.

The land generally described in Paragraph 2 and more particularly described hereinafter is useful to plaintiff for the grazing, shearing, and lambing of sheep and is valuable for such uses, particularly during the months of April, May, and June of each year, plaintiff being the owner of approximately 2,000 head of sheep.

## 4.

On or about April 24, 1938, plaintiff sought to make use of said land pursuant to the said lease by tak-

ing possession of the property for purposes of shearing, lambing and grazing his sheep, but was prevented from so doing by defendant claiming to be a tenant of Salt Lake County. Salt Lake County at said time and thereafter claimed all of the property generally described in Paragraph 2 and more particularly described hereafter by virtue of a tax deed issued by the auditor of Salt Lake County and duly recorded in the office of the County Recorder of Salt Lake County.

### 5.

Plaintiff for a valuable consideration leased from Salt Lake County on or about May 4, 1938, for a period to and including June 4, 1939, the following described property in Salt Lake County, to-wit: (Description by metes and bounds).

Which constitutes a portion of the property described generally in Paragraph 2 hereof. Under this lease agreement plaintiff had the right to possession, use and peaceful enjoyment of all of the said property for the entire term of said lease from May 4, 1938, to and including June 4, 1939, for the purposes of lambing, shearing and grazing his sheep.

### 6.

On June 14, 1939, plaintiff entered into a lease agreement with Salt Lake County for a period of 13 months from May 4, 1939, covering all of the property described in Paragraph 5 which lease is attached hereto, marked Exhibit B, and by this reference made a part hereof. This lease marked Exhibit B was renewed and extended by act of the Salt Lake County Commission on June 21, 1940, which extended the period of the lease from June 14, 1940, to June 15, 1941, for a valuable consideration paid by plaintiff to Salt Lake County. Pur-

suant to these lease agreements, plaintiff has and had a right to exclusive use, possession and enjoyment for the purposes stated in said Exhibit B for the period from May 4, 1939, to and including June 15, 1941, of all of the property described in said Exhibit B. The act of the Salt Lake County Commission of June 21, 1940, also approved the lease of a portion of the above described property, to-wit: 100 acres then under cultivation, for the additional period to and including July 30, 1941.

## 7.

Plaintiff entered into possession, use and enjoyment of the above described property pursuant to the above described leases from Salt Lake County on or about May 4, 1938, and has ever since remained in possession, use and enjoyment of said property except as hereinafter alleged although using the said property more particularly in the months of April, May and June of each year, beginning with the year 1938.

## 8.

On or about April 25, 1940, plaintiff drove his 2,000 head of sheep on said property for the purpose of grazing, shearing and lambing said sheep, and plaintiff kept the said sheep on said property until on or about June 7, 1940, when plaintiff left with one-half of said sheep and their lambs, the remainder of the sheep being kept on said property until on or about June 15, 1940, when plaintiff took them away.

## 9.

During the period from on or about May 20, 1940, to on or about June 15, 1940, plaintiff was prevented by acts of the defendant and his agents from enjoying the use and possession of a portion of said

property, which acts of defendant and his agent are more particularly alleged as follows, to-wit:

(a) From on or about May 20, 1940, to and including June 1, 1940, defendant plowed a portion of the above described property, being more particularly a portion in that part of Section 31 which was covered by the lease agreement, marked Exhibit B, by reason of said plowing destroying the use of the property for grazing, or for shearing of plaintiff's sheep thereby causing damage to plaintiff and doing irreparable damage to plaintiff by virtue of preventing the use by plaintiff of property rightfully leased to him.

(b) On and after June 15, 1940, defendant or his agents plowed additional portions of the land lying in said Section 31, plowing in all approximately 160 acres of land in said Section 31, rendering said property by virtue of the destruction of feed and ouster of possession of little value for the purposes of grazing, shearing and lambing plaintiff's sheep and rendering all of the property described in Paragraph 5 of little value, the 160 acres which was plowed being the most valuable grazing land of all of the said tracts, without the use of which the property under lease could not and cannot support plaintiff's sheep during lambing and shearing time.

(c) Between June 15, 1940, and August 20, 1940, defendant planted all the plowed ground in the said 160 or more acres which was planted into a crop believed to be

grain which crop is now growing upon the said property which crop renders the land useful for purposes of grazing.

## 10.

Defendant threatens to interfere with plaintiff's use for shearing, grazing and lambing of sheep of the property described in Paragraph 9 for the months of April, May and June, 1941, by preventing plaintiff from entering upon this portion of the property leased to plaintiff and will prevent plaintiff's use of said leased property unless enjoined by this Honorable Court from so doing and unless the defendant is so enjoined plaintiff will suffer irreparable injuries by being prevented from using property to the use, enjoyment and possession of which he is entitled by virtue of the above mentioned leases and by damage to the plaintiff's sheep and lambs.

WHEREFORE, plaintiff prays judgment against the defendant:

## 1.

For damages suffered by plaintiff through plowing of land in May and June, 1940, as alleged in Paragraph 9 in the amount of \$100.00 for loss of grazing and \$250.00 for damage to sheep and loss of lambs.

## 2.

For an injunction preventing defendant from interfering with plaintiff's use of his leased property and the whole thereof during April, May and June of 1941, by grazing the whole thereof and

using any or all portions thereof for lambing and shearing ground.

3.

For such other and further relief as plaintiff may be entitled to.

4.

For plaintiff's costs in this proceeding and for attorney's fees.

MOYLE, RICHARDS & McKAY,  
AND RICHARD L. BIRD, JR.,  
Attorneys for Plaintiff.

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## DEMURRER

Now comes the defendant and demurs to the complaint upon the following grounds: *2v. 14*

1.

That paragraph 2 of the complaint is indefinite and uncertain, and it cannot be ascertained from said complaint what is the meaning of such paragraph 2 because the Exhibit A therein mentioned is not annexed to and made a part of the said complaint as therein stated. That is, no copy of the alleged lease is annexed, and the terms thereof are not pleaded.

2.

That said complaint is indefinite and uncertain, and especially paragraph 6, because the alleged Exhibit B is not annexed or filed with the complaint, and the substance thereof is not pleaded.

3.

That said complaint does not state facts sufficient

to constitute a cause of action against this defendant.

WHEREFORE defendant prays that said complaint be dismissed and for costs.

MARION DEFA,  
Defendant.

C. E. NORTON,  
Attorney for Defendant.

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### ORDER OVERRULING DEMURRER

The court orders the general demurrer overruled and the special demurrer sustained. The plaintiff is granted permission to amend the complaint by inserting Exhibits A and B. Defendant is granted 10 days within which to answer. (Tr. 15).

---

### ASSIGNED ERROR NUMBER I.

The trial court erred in overruling the Demurrer to the Complaint. Bill of Exceptions, page 51. A careful reading of the foregoing complaint shows the demurrer is well taken. There is reversible error without further argument. The complaint must be dismissed, and the judgment of the trial court should be reversed.

The plaintiff is precluded and estopped by  
104-2-14, Rev. Stat. of Utah, 1933,  
and by the case of

Woodbury v. Steele & Bunker, 98 Utah 217,  
upon the theory of this case stated and admitted  
on the first page of this brief.

## ARGUMENT

And right here is the most important fact, shown by said pleading and by all of the evidence: the plaintiff did not surrender possession of the premises to his landlord, and he was not evicted by paramount title or otherwise, or at all. When plaintiff and defendant discovered that their landlord was behind in payment of the taxes on said land, they volunteered and paid one dollar and protected their landlord's title. Neither of them then claimed adversely to their landlord, L. H. Gray. And their said landlords did not evict them, or either of them. No damage is claimed by plaintiff for any period before May 20, 1940, when defendant commenced to plow and plant the crop of wheat to be harvested in the summer of 1941.

It is true that the plaintiff did not pay the rent for the years 1938 and 1939 amounting to \$1,000.00, and that L. H. Gray was depending upon said rentals to pay said delinquent taxes as shown by Exhibit G. Notwithstanding, on December 30, 1938, said L. H. Gray did redeem and secure a quitclaim deed from Salt Lake County to the SE $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 31, where the Lohman Water Spring is situated, so as to fully protect all parties concerned, and that at all times the plaintiff used said land and water as provided in said lease, until December 31, 1939.

Nevertheless, on June 14, 1939, (while still in possession of all of said land and water under said L. H. Gray, and after said L. H. Gray had redeemed said land and water, and the County had no title whatever thereto) the plaintiff attempted to secure a pretended lease from Salt Lake County which is the subject-matter of this action, and as alleged in the complaint. This is the alleged adverse title

under which plaintiff seeks to evict the defendant. Salt Lake County had no title to said SE $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 31 — it had quitclaimed to Western Land Association on December 30, 1938. See Exhibit No. 1.

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## ANSWER

Now comes the defendant and answers the complaint, and admits, denies and alleges, as follows:

*Fr. 20*

### 1.

Admits that both plaintiff and defendant are now residents of Salt Lake County, State of Utah; and admits that this defendant has a lease upon the premises described in the complaint, and that he planted, and has planted, part of said lands, in grains, and that a crop of grain is now growing on 85 acres of said lands as hereinafter alleged.

### 2.

Denies each and every other allegation in said complaint alleged, and the whole thereof.

### 3.

Alleges that on the 6th day of April, 1938, at Salt Lake County, State of Utah, the owners of said lands, L. H. Gray-Western Land Association, a corporation, leased and let unto this defendant, approximately 300 acres of land situated in Sections 31 and 32, (the Bingham & Garfield Railroad forming the East Boundary of said tract) in Township 2 South, Range 2 West, in Salt Lake County, State of Utah, for a term of six years; with an agreement to clear, plow and plant as much acreage as he can, planting in the fall of 1938, and to clear and plow more land in the spring of 1939 and plant in the fall, and to clear and plow more land in the

spring of 1940 and plant in the fall to wheat, and to pay a rental of one-fourth of such crops.

## 4.

Defendant further alleges that under the terms of said lease this defendant went into possession of said premises described in said lease, a copy of which lease is hereunto annexed and made a part hereof, on said April 6th, 1938, and ever since said day this defendant has been, and now is, in the sole and exclusive possession of said premises; and that during all of said times this defendant has performed and kept all of the covenants and conditions of said lease agreement; and that under the terms of said lease this defendant has expended more than ten dollars per acre in clearing and plowing said lands described in said lease and in so improving said lands, and otherwise kept and improved said lands under said lease. That said lease agreement is in words and figures as follows:

**“DRY FARM OR WHEAT RAISING  
LEASE**

The agreement of lease is entered into at Salt Lake City, Utah, this 6th day of April, 1938 by and between L. H. Gray (agent for Western Land Association) the first party, Lessor, and Marion Defa, the second party, Lessee, WITNESSETH:

**FIRST** party leases to **SECOND** party for dry farm wheat raising the following land in consideration of the clearing, plowing and planting thereof and a share of the crop;

Approximately 300 acres of land situated in Sections 31 and 32, the Bingham & Garfield R. R. forming the East

Boundary of the tract, all in Township  
2 South, Range 2 West.

LESSEE proposes to clear, plow and plant as much acreage as he can, planting in the fall of 1938.

Also clear and plow more land in the spring of 1939, and plant in the fall.

Also clear and plow more land in the spring of 1940, and plant in the fall.

For a term of six years unless sooner terminated by failure to comply with the conditions required as set forth herein.

LESSEE is to dry farm to wheat as much of said land as is plowable and will pay LESSOR one-fourth of the crop of wheat to be delivered at the MILL with LESSEE own  $\frac{3}{4}$  share. Lessor to pay for his own transportation."

This lease is not to interfere with the grazing lease to Gust Pappas for the spring of 1938. After that suitable arrangement is to be made with said Pappas to herd his sheep off of the grain or wheat."

If LESSEE desires to purchase said land he may do so instead, cancelling the Pappas lease which is given subject to right of sale."

This lease is subject to termination on a sale of the land, but such sale is not to interfere with any crop then on the land prepared for crop, which lessee may crop and harvest it.

Clearing and plowing to begin in the spring of 1938, and planting thereafter each fall.

Failing to comply with any provision herein when due or to be done causes this lease

to be terminated at once without notice, and the premises shall revert to LESSOR who may re-enter and re-possess the said premises for the breach of this agreement."

(Signed) L. H. GRAY, Lessor,  
MARION DEFA, Lessee.

And under which said Lease the defendant has been, and now is, in possession of said premises, and the whole thereof; and the plaintiff has no right, title, or interest therein, nor in any of the said lands described in said lease, nor in any part thereof.

5.

Defendant denies each and every other allegation in said complaint contained, and the whole thereof. WHEREFORE defendant prays the plaintiff recover nothing from this defendant, and that the complaint be dismissed, and that this defendant have and recover his costs.

C. E. NORTON,  
Attorney for the Defendant.

STATE OF UTAH,                   )  
                                                  ) ss.

COUNTY OF SALT LAKE)

MARION DEFA first being sworn, says; that he is the defendant in this action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge.

MARION DEFA.

Subscribed and sworn to before me this December 11th, 1941.

CHAS. E. NORTON,  
Notary Public,

Residing at Salt Lake City, Utah.

My commission expires June 27, 1941.

## ASSIGNED ERROR NUMBER II.

No reply was filed to said answer and counterclaim which pleads the landlord's title and the defendant's rights of possession and possessory title. The same are admitted by the plaintiff. The landlords, L. H. Gray, and Western Land Association had the record title, and they ordered said land to be cleared, plowed and planted, and they reserved one-fourth of the crops as rentals, and this defendant is entitled to three-fourths of the crops, and sole possession of Section 31 until April 6, 1944.

104-11-2, 104-13-11, 104-60-14, Rev. Stat. of Utah, 1933.

The trial court, sitting without a jury, erred in refusing to make findings of fact upon the material issues of the complaint and answer. In the complaint the plaintiff alleged a lease dated March 15, 1935, for a term ending December 31, 1939, and in the answer the defendant alleged a lease dated April 6, 1938, for a term of six years, ending April 6, 1944: both leases being from the common landlord, L. H. Gray, and evidence was received in support of both of said pleadings. The court made findings Nos. 2 and 5 upon plaintiff's lease from L. H. Gray, *but never mentioned said lease from L. H. Gray to this defendant.* (Exhibit No. 3), (Tr. 50) in which agreement said L. H. Gray ordered the clearing, plowing and planting and reserved one-fourth of the agreed crops as rentals, and protected the plaintiff's lease by special agreement. On the contrary is finding No. 4.

The appellant contends that such omission and refusal is error prejudicial to the substantial rights of the defendant, and that by reason thereof, the conclusions of law, and the judgment are prejudicial and reversible errors. (B. E. 52).

### ASSIGNED ERROR NUMBER III.

After the trial plaintiff's counsel proposed findings of fact which followed almost word for word the allegations of said indefinite complaint. Defendant's counsel served and filed objection to such proposed findings, and moved the trial court to modify such proposed findings. Without hearing such motion and without any modification whatever, the trial court signed and filed plaintiff's proposed findings, and filed defendant's motion and objections, which are included in the transcript and bill of exceptions, (Tr. 43-44-45) and allowed and settled as part of such bill of exceptions, and are as follows:

### OBJECTIONS TO PROPOSED FINDINGS AND CONCLUSIONS

The defendant objects to the proposed findings, conclusions and judgment, and proposes amendments thereto, as follows:

#### 1.

Objects to proposed finding No. IV, and proposes an amendment thereto, and place thereof, as alleged in defendant's answer:

#### IV.

That on the 6th day of April, 1938, L. H. Gray leased and let unto this defendant approximately 300 acres of land situated in Sections 31 and 32, Township 2 South, Range 2 West, for a term of six years, with an agreement to clear, plow and plant said land into winter wheat, *and to give said lessor, L. H. Gray, one-fourth of the crop of wheat;* and that a copy of such written

lease is annexed to and made a part of defendant's answer herein, and that the original lease was offered and received in evidence in this case.

That under said lease the defendant went into possession of said 300 acres, and cleared, plowed and planted said lands to winter wheat, and that said crop is now growing on said lands and will be harvested during the summer of the year 1941.

## 2.

The defendant objects to proposed finding No. VIII, and proposes an amendment regarding the possession and the "taking" possession of said lands in Section 31, as follows:

That the defendant went into possession of said 300 acres in Secs. 31 and 32, on May 4, 1938, and he has been in possession ever since May 4, 1938; and

That the plaintiff went out of said possession on May 4, 1938, and never has been in possession of said 300 acres in Sections 31 and 32 since said May 4, 1938.

## 3.

The defendant objects to the proposed conclusions of law and judgment, and suggests an amendment thereto based upon the principles of equity applied to the evidence, as follows:

The plaintiff cannot claim title adverse to this former landlord, Gray, who has a one-fourth interest in the growing crop of wheat on said land under the lease to Defa. In April, 1938, Defa went into possession under Gray, and the plaintiff stood by and made no objection to Defa clearing, plow-

ing and planting of said land. The crop was winter wheat to be harvested during the summer and fall of the year 1939. And Defa was in possession and had said growing crop of wheat thereon in May, 1939, when Pappas secured his lease from Salt Lake County; and Defa was also in possession with a growing crop of said land in June, 1940, when Pappas secured an extension of his lease to June 15, 1941, and during all of that time Defa was performing his part of the lease under said L. H. Gray.

That the plaintiff is precluded and estopped, and in good conscience and equity the plaintiff should be precluded and estopped from destroying defendant's said crop of wheat.

#### 4.

The defendant objects to the findings and conclusions as to damages, and suggests that the "Measure of Damages" is not computed according to the law of damages in such cases made and provided, and that such damages, or alleged damages, are excessive.

Furthermore, no actual or consequential damages are alleged in the complaint, either generally or specially, to sustain a finding of "the loss of approximately fifty lambs." And there is no legal evidence to support the finding that the plaintiff "has been damaged by the plowing of the land in 1940 by defendant in the sum of \$425.00."

Finally, it is shown by the evidence that all of the "plowing" was done in the years 1938 and 1939, and the very same land was planted in 1940 to be harvested in 1941 — and there was no vegetation on said "plowed" land in 1940.

The "*Measure of Damages*," if any, is the loss of the crop of wheat in the present year 1941. And equity should protect the crop of wheat, whether it be 84 to 90 acres, or 300 acres. The sower should reap the crop which may be worth, if weather conditions prevail, about 25 bushels per acre, or about \$3,000.00. And equity should not allow Pappas to ruin this crop of wheat before June 15, 1941, when his alleged County lease expires.

The findings, conclusions and judgment should be recast so as to protect the legal and equitable rights of both parties.

Respectfully submitted,

C. E. NORTON,

Attorney for Defendant.

Copy received this April 17th, 1941.

MOYLE, RICHARDS & BIRD,

Attorneys for Plaintiff.

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#### ASSIGNED ERROR NUMBER IV.

The trial court erred in denying said motion for modification of said proposed findings, and by refusal to make a finding as to possession of said land in Section 31, and made finding No. 8, which is contrary to the undisputed evidence and admissions in said answer and counter-claim, and as shown by transcript of the Court Reporter which is annexed to and made part of the bill of exceptions.

## ARGUMENT

Under the prevailing rule of practice in the Third District, proposed findings and conclusions are served on opposing counsel who is given 24 hours after service in which to propose amendments and to make objections to such proposals. The objections were made and overruled by the court and the court refused to make any modifications whatever, and filed such objections and motion. (Tr. 43-44-45).

The law,

Secs. 104-26-2, 104-26-3. Rev. Stat. of Utah,  
1933,

and the Utah cases there cited — too many to here quote — as well as the local rules, requires the trial judge to make findings upon all material issues before judgment can be rendered. And modifications can be made upon motion at any time before a notice of appeal is served and filed. The appeal was perfected on April 22, 1941, and thereafter, on May 21, 1941, the court changed the judgment and finding No. XI, in favor of the plaintiff but would make no change in favor of the defendant — would not even mention the defendant's lease of April 6, 1938, Exhibit 3, which is copied in defendant's answer and counter-claim, and stood on finding No. 4, (Tr. 30). That is reversible error.

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## ASSIGNED ERROR NUMBER V.

The trial judge erred in making finding No. 4, and in changing the whole theory of the case shown by the pleadings and tried the titles of the landlords in this suit between the tenants. Said finding No.

4 is not supported by any evidence whatever. It is contrary to the undisputed and record evidence.

## ARGUMENT

In paragraph 4 of the complaint (Tr. 1) it is alleged, and in finding No. 4, (Tr. 30) the court found, word for word:

“On or about April 24, 1938, plaintiff sought to make use of said land pursuant to the said lease by taking possession of the property for purposes of shearing, lambing and grazing his sheep, but was prevented from so doing by defendant claiming to be a tenant of Salt Lake County. Salt Lake County at said time and thereafter was the owner of said property generally described in paragraph 2, and more particularly described in paragraph 6 by virtue of a tax deed issued by the auditor of Salt Lake County and duly recorded in the office of the County Recorder of Salt Lake County.”

During the trial it was stipulated by counsel, and then ruled by the trial judge, that said two tenants could not try the titles of their landlords. The court said: “Mr. Gray and the County might litigate that” — not the tenants. (B. E. 103; Tr. 161). That was the right ruling. But in making the findings, counsel for plaintiff followed the allegations of said indefinite complaint, and not the evidence in the case. This is error.

The undisputed evidence shows both plaintiff and defendant were on said land on May 4, 1938, one lambing his sheep and the other plowing on Section 31 — and not “prevented from so doing by

the defendant'' at any time whatsoever. The Gray lease to defendant provided that plaintiff could use Section 31 until December 31, 1939. See Lease of April 6, 1938. (Ex. No. 3).

It is also undisputed and admitted as well as plead that on May 4, 1938, both plaintiff and defendant went to Salt Lake County Commissioners and there mutually agreed on partition of the said seven sections, and then and there they were appointed agents of the County, and secured two agreements, Ex. 1 to defendant for all of Section 31, and Ex. G to plaintiff for the remaining six sections.

It is also undisputed and admitted that on December 30, 1938, said landlords, Western Land Association and L. H. Gray, redeemed and secured a quitclaim deed from Salt Lake County for the SE $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 31 where the water spring is situated; and that thereafter, on December 6, 1940, said landlords redeemed and secured a quitclaim deed for the other said six sections above described or referred to in said finding No. 4. See Exhibits Nos. 1, 2, 3, and A, B, C and D in the Bill of Exceptions. Said exhibits are in evidence, and they show, by record evidence too, that said word, "thereafter" is untrue. That finding is prejudicial error. Said exhibits show the error, and any lawyer may see such error at first glance — it is a patent error which was purposely concealed in said finding No. 4. The defendant had legal possession of all of Section 31 under all of the leases, and he is entitled to the crops thereon. The County had no title or possession to give to plaintiff on June 21, 1940. That is self-evident. It is null and void.

## ASSIGNED ERROR NUMBER VI.

The trial court erred, over objections of defendant, in computing the alleged damages, and did not use the measure of damages required by law; and in allowing damages for the alleged loss of fifty suckling lambs which may have died in April, 1940, at the price of \$5.00 each, where such element of alleged damages is not alleged in the complaint, nor claimed in the letter of May 28, 1940. (Exhibit I; Tr. 172).

The trial court also erred in computing loss of pasture in the sum of \$175 paid in the years 1939 and 1940, without any such allegation in the complaint, and without any credit for the wheat and barley stubble, grasses, verdure and *water* on said Section 31 during all times after December 31, 1938, when said land and water was redeemed by the landlords, Western Land Association and L. H. Gray; and the evidence is insufficient to sustain such findings of fact, conclusions of law, and judgment entered thereon.

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## THE EVIDENCE

Defendant testified: *W 109*

Q. When did you go upon the property described in your lease?

A. In April, 1938.

Q. When did you first see Mr. Papadopoulos?

A. Mr. Papadopoulos came up there just about three days after I went up.

Q. Did you have a conversation with him?

A. He was going up to the sheep. The sheep were already up there. We had just started. He asked

what I was doing. I told him, "I come up to plow some of this land that Mr. Gray owns." He said, "What section?" I told him, "Section 31 and part of 32." He said, "I am glad you do that. I have seven sections of ground here, and there is too much ground for me, for the amount of sheep I am running here now. I got to lease the whole thing in order to get lambing ground. I don't need it. I got more ground than I need up here. Seven sections is too much," and he was mighty glad to see us go up there to take some of the ground which he called the Dorton place, they used to farm years ago. *Dr. 112*

Q. Then you went ahead and plowed the ground?

A. Yes, and planted it to dry farm grain. We plowed about 85 acres in 1938 to be harvested in 1939. In 1940 we plowed the same land over again and planted it to winter wheat to be harvested in 1941, and the prospect for harvesting a good crop is good. It is in good condition now, March 21, 1941. *Dr. 113*

Q. You wanted it so that Mr. Pappas could get to the water? *116*

A. Yes; without any trouble. That is the way we did in 1938 and 1939, and we did the same in 1940, so we left some of the ground without plowing.

Q. Don't you claim the right to plow all of Section 31?

A. Well, yes, we have the right to plow about 300 acres under the Gray and County leases. *117*

Q. I want to ask you about Exhibit No. 1 which appears to be a lease from Salt Lake County. How did you come to get this lease from the County? *120*

A. Well, when I was up there working, a neighbor of mine, Mr. Rushton, came to me and said: "Did

you lease this land from L. H. Gray?" I said, "Yes, I have my lease in my pocket." He said, "You had better go to Salt Lake County and find out. I was there yesterday and the County told me I could have a lease." Then I went to see the County. I showed the other lease and they said, "Well, we own the property today. It is for back taxes." I told them I wanted to lease it. So the County gave that lease to me. It is dated May 4, 1938, and market Exhibit No. 1, and is for Section 31. (Tr. 64). 122

Q. So you got a lease with the County? 123

A. I got the copy because I had half the work done. Mr. Oscar Gray said: "You won't have much of a crop because it is new ground, and if you plant all of the land, if you have a good crop you will pay for the lease; if you don't, just let it go until you get the next crop." I was to pay one-fourth rent. We never had any crop to speak about, so I came down to see Oscar Gray and told him I had spent over one thousand dollars there, and he said, "Since you spent about a thousand dollars working up there, and extra active, see if you can't make a better crop next time." At the same time I asked for a lease, but he said to me, "That lease you got is good for another year. There is a note on the bottom, as long as the County didn't notify you by writing you must get off the land, that lease is good." (Tr. 66). 124

Q. But you did appear before the County Commissioners later? 125

A. Yes. Then I took that lease this summer (1940) when Mr. Papadopoulos said to get off, and Mr. Boden and Mr. Rawlins looked at the lease and I told them I had the ground plowed and ready when the trouble came up, and they looked it over,

and I said, "Now, I understand you gave a lease to Papadopoulos for this ground too." Mr. Boden said, "I don't know anything about it. We never gave any lease to Papadopoulos for this particular place." When they got through over here they look up the lease and told me to keep the lease; it is good. "We will protect you if you get into trouble." That was in June, 1940. (Tr. 68).

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The plaintiff testified: (Tr. 33).

Q. Were you there when Defa came out to plow in April, 1938?

A. Yes, I saw Mr. Defa with his boy plowing.

Q. What did you say to him?

A. I told Mr. Defa, why you come and start to plow here, because I had an agreement with L. H. Gray. So we talked the other way about the leases. He said, "L. H. Gray has got nothing to do with the land here. I got a lease from the County Commissioners, and your lease is not good you got from L. H. Gray." So I come down same day and went to Mr. Richards, my lawyer, and told him about it. And he called up the County Commissioner, if he had given a lease to Defa, and he said, "Yes, don't bother him." And I come down with Mr. Richards, and I told him, "May I have a lease for it?" He said, "Yes." So the County Commissioners have given lease to me for —

MR. RICHARDS: Just a moment. Mr. Norton we have a copy of that lease. Offered and received in evidence as Exhibit H.

### STIPULATION

that it did not conflict with Exhibit No. 1, the Defa lease, and that both leases are dated May 4, 1938.

(Tr. 35). Defa had Section 31 and Pappas had the other six sections referred to in said L. H. Gray leases. (Tr. 35).

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### ASSIGNED ERROR NUMBER VII.

In all cases of tenancy upon agricultural lands, where the tenant, Defa, held over and retained possession with a growing crop for more than sixty days after the expiration of his term under Salt Lake County without any demand for possession or notice to quit by the landlord or his successor in estate, he is entitled to hold under the terms of his lease for another full year; and such holding over shall be taken and construed as a consent on the part of both landlord and tenant to lease and to hold for another full year so as to harvest the crops.

Revised Statutes of Utah, 1933, Sec.  
104-60-4.

The plaintiff in this case is precluded and estopped from denying the possession of defendant on Section 31 by his conduct and consent and agreement with Salt Lake County on May 4, 1938, and his subsequent conduct shown by the entire record in this case.

See Exhibit No. 1 which leases Defa Section 31, and Exhibit H which leases Pappas the other six sections.

As stated in

Gill v. Malan, 29 Utah 431; 82 Pac. 471,

“The rule is elementary that a tenant cannot acquire title to property occupied by him as such tenant by adverse possession.

This doctrine is so well settled that we deem it unnecessary to cite authorities in support of it."

Woodbury v. Bunker & Steele, 98 Utah 217,

"It has been said with obvious truth that, if the rule was otherwise, no person would be safe in parting with the possession, and he might be driven to the necessity of making a complete chain of title before he could evict his tenant."

35 C. J. 1251.

"A purchaser at a tax sale is a stranger, and not in privity with the landlord's title."

O'Donnell v. McIntyre, 118 New York 156;  
23 N. E. 455.

Sperle v. Isaacs, 13 Daly (N. Y.) 275.

16 Ruling Case Law, Landlord and Tenant,  
149-156.

"A tenant cannot acquire a title from the purchaser at a tax sale which occurred before the creation of the tenancy so as to be able to assert such title against his landlord."

Balch v. Radford, 186 Michigan 292; 148  
N. W. 707.

Sharpe v. Kelley, 5 Dan. (N. Y.) 431.

35 C. J. 1247.

"The general rule is that a tenant without surrendering his possession to the original landlord, cannot attorn to a stranger, and that such attornment is void and in no way affects the possession of the possession of

the landlord, and a tenant by his *attempt* to so attorn becomes a trespasser and the attornment is void as to both landlords.

35 C. J. 1250.

“Although a tenant is not precluded from purchasing during his term for his own benefit, a paramount title adverse to his landlord, he cannot without the landlord’s consent, set up against his landlord’s title, whether acquired by him before, or during his tenancy, hostile in its character to the title he acknowledged in accepting the lease.”

35 C. J. 1245, and cases there cited.

In this case, Pappas, by paying One Dollar to Salt Lake County, could not avoid payment of the remaining \$499.00 on his lease to Gray for the year 1938 — and \$1.00 is all he paid in 1938.

See Exhibit H — lease from Salt Lake County from May 4, 1938 to June 4, 1939.

## ARGUMENT

There was no trouble between plaintiff and defendant until after the registered letter which was delivered June 8, 1940. (Ex. I). Prior to that time Defa had repaired Pappas’ auto tires, and allowed him to lamb and graze on Section 31, and had not plowed near the Water Springs, and gave him the stubble of the crop of 1939, and did not re-plow until after May 20, 1940; and in turn, Pappas testified that he hired two extra men to keep his sheep off the grain, and no claim was made until after May 28, 1940, and then only as recited in said registered letter. (Ex. I). No claim was ever made for

dead lambs until March 21, 1941. That was an afterthought — and then made in order to convert the growing crop of wheat for pasture. In paragraph 9-c of the complaint the plaintiff shows that he coveted the splendid crop of wheat growing on said land. He says: “*The crop now growing renders the land useful for purposes of grazing.*” He saw the crop planted in the fall of 1940, and he relied upon the so-called prejudices and favoritisms growing out of the European War. That is the crux of this case. The defendant is entitled to harvest the wheat crop under

104-60-4, Rev. Stat. 1933.

The judgment of the district court should be reversed and judgment should be entered in favor of the defendant.

**Respectfully submitted.**

**C. E. NORTON,**  
**Attorney for Defendant**  
**and Appellant.**