1977

Ara Otteson and Nellie A. Otteson, Husband and Wife v. Richard D. Malone and Hila Sue Malone, Husband and Wife : Respondent's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ARA OTTESON and NELLIE A. OTTESON, husband and wife,	)	
Plaintiffs-Respondents,	)	
vs.	)	
RICHARD D. MALONE and HILA SUE MALONE, husband and wife,	)	
Appellents-Defendants.	)	Case No. 15478

RESPONDENT'S BRIEF

Appeal from Judgment of the
Seventh District Court for Carbon County
Honorable Edward Sheya, Judge

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RESPONDENTS BRIEF

STATEMENT OF THE NATURE OF THE CASE

This case is an appeal from that portion of the judgment entered by the trial court denying Appellants' demand for specific performance of the option portion of a "Lease and Option" and that portion of the trial court's judgment declaring void the option portion of the "Lease and Option." Appellants also appeal from the order denying their Motion for New Trial and Alternative Motion to Amend the Findings of Fact, Conclusions of Law and Judgment.

DISPOSITION IN LOWER COURT

This matter came for trial before the Honorable Edward Sheya, Judge of the Seventh Judicial District Court of Emery County on the 7th and 8th of December, 1976. The Respondents had filed suit against the Appellants for, among other things, relief from the option portion of the "Lease and Option" executed

by the Appellants and Respondents and the Appellants had counterclaimed for specific performance of the option portion of the "Lease and Option." The court denied Appellants' motion for specific performance and granted Respondents' plea by declaring void the option portion of the "Lease and Option". Appellants moved the trial court for a new trial and in the alternative for amendment of the Findgings, Conclusions and Judgment. These motions were denied.

RELIEF SOUGHT ON APPEAL

Appellants seek judgment declaring their option to purchase valid and granting their request for specific performance of said option. Respondents seek affirmation of the Findings of Fact, Conclusions of Law, Judgment and rulings of the lower court.

STATEMENT OF FACTS

On June 27th, 1974 a document entitled "Lease and Option" was executed by the Appellants and the Respondents. (Complaint Exhibit B). The document purports to grant to the Appellants a five year lease of 28 acres belonging to Respondents. In addition the document contains an option to purchase same said 28 acres.

A dispute arose between the parties as to the meaning, effe and validity of the contract, a suit was filed by the Respondent

alleging breach of the agreement and asking relief from the option, and an answer and counterclaim asking for specific performance of the option was filed by the Appellants. The Respondents requested a jury trial on April 22, 1976 which the Appellants vigorously opposed by motion and memorandum. The trial court, as a result of Appellants opposition, denied Respondents demand for jury trial. The case came for trial before the Honorable Edward Sheya, District Judge, sitting without a jury, on the 7th and 8th of December, 1976. The court made the following findings based upon the testimony of Ara Otteson, Richard D. Malone, Hila Sue Malone, Boyd Bunnell and the deposition of Nellie A. Otteson, which was admitted in lieu of her attendance at trial due to disability and doctors prohibition:

1. The Court found in its Findings of Fact and Conclusions of Law beginning with the second paragraph on page 3 as follows:

> a. That the plaintiff, Ara Otteson is aged, but appears to be in good health and of sound and disposing memory, he having testified before the court during the course of the trial. From the evidence it appears that Nellie A. Otteson, the wife of the plaintiff Ara Otteson, is infirm and at the time of trial was totally unable to attend the trial do to sickness, disability, age and doctors prohibition.
>
> b. That the defendant Richard D. Malone and Hila Sue Malone appear to be youthful in comparison to plaintiffs and of normal intelligence.

c. That the home of the plaintiffs lie upon the land which is subject to the plaintiffs third cause of action, the plaintiff Ara Otteson, having farmed it with his father as a boy and having been a farmer on the said land his entire lifetime, that plaintiff Ara Otteson has supported and sustained himself and his family over the years by raising crops and animals upon said land.

d. That in the year of 1972 or 1973, the defendants, in a real estate purchase agreement, purchased from plaintiffs, ten acres of land without water, and on June 27th, 1974, the defendants prevailed upon plaintiffs to lease the balance of the acreage which was irrigated land with water rights to the defendants, and that after considerable discussion of the subject by the parties, the plaintiffs did agree orally, to enter into a lease of the land and water rights which had not been sold by plaintiffs to defendants; which said land and water rights, located in Emery County, State of Utah, is more particularly described as follows:
(description of 28 acres omitted)

e. That the plaintiff Ara Otteson, and the defendant Hila Sue Malone, prior to having the lease reduced to writing drove in the said defendants automobile from Huntington to Price City for purpose of reviewing the contents of the proposed lease. The plaintiff, Nellie A. Otteson, was unable due to physical disability to go to the meeting at the office of Mr. Bunnell, attorney of Price City, nor did the defendant, Richard D. Malone, go to the meeting with the attorney Mr. Bunnell. On the way to the meeting with the attorney, Mr. Otteson discovered that the batteries in his hearing aids were dead, and when his hearing aid batteries are dead, he is almost totally unable to hear sound or conversation. During the meeting with the attorney, Mr Otteson was unable to hear any of the discussion or to participate in any of the conversation between the defendant Hila Sue Malone and Mr. Bunnell. The attorney Bunnell testified at the trial that he thought that there was something wrong with Ara Otteson, and he, the attorney, thought perhaps Mr. Otteson had a stroke because he "acted strange at the meeting" which had been arranged by the plaintiff Ara Otteson's wife Nellie A. Otteson, by telephone.

f. That Ara Otteson heard none of the discussion at the meeting relative to the preparation of the lease between attorney Bunnell and the defendant Hila Sue Malone, and at no time during said conference, or before

the conference with attorney Bunnell, did either Ara Otteson or Nellie A. Otteson, his wife, talk or discuss any terms, or even the subject of an option to purchase the real estate, either at attorneys Bunnell's office, or on any other occasion.

g. Sometime after the meeting in attorney Bunnell's office above-described, the attorney sent a copy of a lease he had drafted on the subject property to the plaintiffs. The plaintiff Ottesons reviewed the lease and it appeared to be substantially correct, except there was reference to an option to buy which the plaintiffs concluded meant, since they had never discussed any privilege or right in the defendants to buy the said acreage, that in the event they decided to sell said real estate, that the Malones, defendants, would have first right of refusal to buy the property. Since the plaintiffs did not intend to sell the said acreage, they did not consider the "option to buy", which they interpreted to be a first right of refusal in the event they, in their sole judgment, determined to sell the said property, of any consequence.

h. Subsequently, they had one or more discussions regarding the lease with the Malones, and at no time did the defendants Malones, ever mention either the option to buy or the meaning of the option to buy, which had been inserted in the lease without either the permission or advanced knowledge of the plaintiffs.

i. That it was not until subsequent to a notice served upon plaintiffs by defendants indicating that the defendant intended to exercise the said option to buy the said real estate, that plaintiffs Ottesons realized their mistake and failure to appreciate the meaning, significance and effect of the words "option to buy" which were inserted in the lease by attorney Bunnell at the direction of defendant Hila Sue Malone.

j. That the evidence indicates that the plaintiff Ara Otteson thought and believed that the option meant that he nevertheless had the right to determine at some later time whether or not the property should be sold, and that only in such event, that he thereafter decided to sell the property, would the defendants have the right of first refusal to buy the said property.

k. Further, plaintiffs, in fact, told the defendants

prior to signing the lease, that they would not, under any circumstances, sell the subject land, and at no time did they discuss with the defendants or attorney Bunnell an option to buy the said property.

1. That defendants have not kept the terms of the lease in that they have failed to pay lease payments as due, water assessment charges due, and property taxes defendants were requested to pay by terms of the lease.

2. The court in its memorandum decision beginning at the top of page twelve stated as follows:

> The court is not clearly satisfied from a preponderance of the evidence that said option embodies the real understanding of the parties, and especially of the plaintiff Ara Otteson. The other plaintiff, Nellie A. Otteson, was by reason of illness and infirmity, unable to attend the trial, and therefore, the court does not have the benefit of her testimony.
>
> By reason of the circumstances under which the option was executed, the court is doubtful that the significance or effect thereof was understood by plaintiffs, and especially the plaintiff Ara Otteson. The evidence indicates that plaintiff Ara Otteson thought that the option meant that he still had the right to determine later whether or not the property should be sold, and only in the event that he thereafter decided to sell the property, would the defendants have the right of first refusal. Plaintiff Ara Otteson stated he and his wife told the Malones they wouldn't sell the land and did not discuss the option in the form it appears in the lea

Appellant challenged the courts finding of fact by motion to amend and a motion for new trial which was schedule for hearing in Emery County on the 20th of September, 1977. On Tuesday, the 20th day of September, at the time of hearing, counsel for the Appellant was not present at the hearing. The court after considering the matter, denied Appellants motion in all its aspects.

Appellant being disatisfied with the trial courts decision

thereafter pursued this appeal.

ARGUMENT

POINT I.

THE COURT BELOW DID NOT ABUSE ITS DESCRETION IN DENYING SPECIFIC PERFORMANCE TO THE APPELLANTS ON THEIR COUNTERCLAIM.

The Appellants, in this Appeal, take exception with two rulings of the lower court; the voiding of the option portion of the "Lease and Option", and the denial of Appellant's request for specific performance of the option portion of the agreement. The Appellants in the body of their argument have failed to clearly address the different issues presented by these two separate rulings, but rather have lumped the reformation/ rescission theories and cases with specific performance theories and cases. Respondents will hereinafter focus on the court's denial of specific performance believing that the Appellant has not properly treated the law with respect to that ruling.

The granting or denying of a bill of specific performance involves a necessarily fact intensive decision making process on the part of a trial court. As such, the trial court is given a reasonable amount of latitude by courts of appeals which may be couched in terms of "Judicial Discretion", "Sound Discretion", and the like.

Professor Corbin in his work on contracts at Specific Performance, section 1136 discusses the problem of the trial court in weighing the numerous factual and legal considerations that may be involved in passing judgment on a petition for Specific Performance and stated at Volume 5 A Page 95 as follows:

> The solving of these problems may require the weighing of conflicting evidence, and in the end may depend upon matters of opinion that are not capable of obvious demonstration. It is in these respects that the court has more "discretion" in a suit for specific performance than in an action for damages.

The matters to be considered and the amount of discretion allowed a trial court in its considerationnof a petition for Specific Performance are different from the considerations and discretion involved in an action for rescission or cancelation. Again Professor Corbin, at Specific Performance Section 1136 page 96 states:

> While it is going to far to say that granting or refusing of a decree is wholly in the discretion of the trial court, it is true that, in determining the question, a greater variety of facts is to be taken into consideration than is the case in an action for damages for breach of contract.... Among these facts are the public interest, oppression and sharp practice in the formation of a contract, inadequacy of consideration, mistake even though unilateral in character, hardship that will be caused by enforcement, the plaintiffs own breach or inequitable conduct. These and other facts, either singly or in combination may be sufficient to justify a refusal of specific enforcement even though they would not be sufficient to constitute

a defense to an action for damages or even justify an affirmative decree for rescission or cancelation.

This principle of judicial discretion is also well recognized by the Utah Court. In Free vs. Little, 31 Utah 449, 88 P. 407, (1907) and again in McNeil vs. McNeil, 61 Utah 141, 211 P. 988 (1922) the Utah Supreme Court Stated as follows:

> The right to specific performance depends not upon hard fast rules according to which all cases are to be decided, but each case is dependent upon its own peculiar facts and circumstances. While the right is to be governed by general rules and principles of equity, each case, nevertheless, must be determined upon its own inheritant equities.

After a court of equity has exercised its discretion the high court, in reviewing such a decision, should view it with considerable deference. In Barber vs. Calder, 522 P.2d, 700 (1974), the Utah Supreme Court sets forth the standard of review in discretionary matters:

> In situations where the exercise of discretion is appropriate, considerable weight should be given to the determination of the trial court, whichever way it goes. This is true, because due to his close involvement with the parties, the witnesses and the total circumstances of the case, he is in the best position to judge what the interests of justice require in safeguarding the rights and interests of all parties concerned.

The following are elements of this case upon which the trial court's denial of specific enforcement can properly be based:

1. The significance and effect of the option as executed

was not understood by the Ottesons.

The trial court, by its affirmative findings of fact and statement of the law in its memorandum decision makes it clear that it considered the Ottesons' misapprehension of the meaning and effect of the option as being of primary significance in its denial of specific performance. The court, in its memorandum decision beginning at the top of page two stated as follows:

> The court is not clearly satisfied from a preponderance of the evidence that said option embodies the real understanding of the parties, and especially of plaintiff Ara Otteson. The other plaintiff Nellie A. Otteson was by reason of illness and infirmity unable to attend the trial, and therefore, the Court does not have benefit of her testimony.
>
> By reason of the circumstances by which the option was executed, the Court is doubtful that the significance or effect thereof was understood by the plaintiffs, and especially the plaintiff Ara Otteson. The evidence indicates that plaintiff Ara Otteson thought that the option meant he still had the right to determine later whether or not the property should be sold, and only in the event that he thereafter decided to sell the property would the defendants have the right of first refusal. Plaintiff Ara Otteson stated he and his wife told Malones they wouldn't sell the land and did not discuss the option in the form it appeared in the lease.
>
> In 71 Am Jur 2d Pages 79, 80, 81, Sections 53 and 54, the author states, as far as the court deems it applicable to the facts of this case as follows:

"Inasmuch as specific performance will not be granted unless it is in accordance with equity and good conscience, it is well settled that equity may properly and generally refuse to issue a decree of specific performance to compel a defendant to perform a contract which he entered into under mistake in which he would not have entered into had he understood its true effect . . . Specific performance not being a matter of absolute right, equity will refuse to enforce its performance when not clearly satisfied that it embodies the real understanding of the parties. Where the circumstances under which the contract was executed render it doubtful whether the act was understood by the defendant, the Court is justified in refusing specific performance. Thus in an apppropriate case, a unilateral mistake may justify a court of equity in refusing specific performance. . . . . .

. . . . . Neither is actual fraud or intention to defraud necessary to defeat the plaintiff's claim for specific performance. It is sufficient that the mistake is one to which the plaintiff by his acts has unintentionally contributed. In fact, the plaintiff's connection with the mistake is not an essential factor.

While it is well established doctrine that equity will not enforce a contract when the plaintiff contributed to or induced the defendant's mistake or misapprehension, the discretion of a court of equity to refuse specific performance of a contract entered into under mistake, it is not limited to cases in which the mistake is induced or made probable or possible by conduct, acts, or ommissions of the plaintiff.

Even though the mistake is that of defendant

> or his agent and the plaintiff is neither directly or indirectly responsible therefore, the Court may, and ordinarily will, refuse a decree of specific performance where the mistake is a material one and the enforcement of the contract under the circumstances would be inequitable or a hardship to the defendant, particularly where the plaintiff does not claim to have changed his position before he was notified of the mistake, or to have suffered any loss by reason of having entered into the contract. In such cases, the court is governed by the principle of hardship and unfairness equally with that of mistake."
>
> "By reason of the above, the Court denies the defendant specific performance of the option to purchase the plaintiff's real property described in the lease agreement dated June 27, 1974. Therefore, it is unnecessary for the court to make a specific finding as to whether a separate consideration was necessary for the option. (Emphasis added)

The court has cited its own authority for its finding but there are additional authorities to be found which also support the court's action. 81 C.J.S. at page 830, Specific Performance Section 50, Subsection (a) reads:

> Specific Performance will ordinarily be denied if it is doubtful whether there has ever been a meeting of the minds or a full and complete understanding of all the essential terms of the contract sought to be enforced. Specific Performance will also be denied if a misunderstanding as to an important matter is evident or the intention, as expressed, has not been understandingly formed because of mistake, misapprehensio... or misrepresentation as to a material matter, in the absence of which the contract would not have

been entered into. Since in determining specific enforceability of a contract, a court of equity acts on different principles than where cancelation or reformation of a contract is sought, specific performance may be denied even though there is no such misunderstanding, fraud, or mistake as would permit the contract to be canceled or reformed. (Emphasis added)

The clearest statement of this principle in case law is found in Chambers vs. Livermore, 15 Mich. 381, (1867), in which the Michigan Court stated as follows:

> Specific Performance, even of a binding contract, is not a matter of right; and a court of equity will refuse it, and turn the complainant over to his remedy at law, if not clearly statisfied that it embodies the real understanding of the parties. At page 138.

In the case of Pope Manufacturing Company vs. Gormully, 144 U.S. 224, 36 L.ed 414 (1891) United States Supreme Court based its affirmation of a denial of specific performance on its determination that the defendant did not understand the legal purport of the instrument which he signed. The court stated as follows:

> ...Specific Performance is not an absolute right, but one which rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity and not arbitrarily or capriciously, and always with reference to the facts of the particular case. (citing cases)
>
> ...Indeed, the operation of these covenants upon his ligitimate business was such that it is hardly possible he could have understood their legal purport.... We have not found it necessary to go into the details of this testimony. While we are not satisfied that his assent to the contract was obtained by any fraud or misrepresentation or that the defendant should not be bound by it to the extent to which it is valid at law, we are clearly of the opinion that it is of such a character that the plaintiff has no right to call upon a court of equity to give it the relief it has sought to obtain in this suit.

2. Appellants had failed to satisfactorily perform their portion of the contract.

Professor Corbin, at Volume 5(a) page 301, Specific Performance Section 1175 states:

> In the case of a bilateral contract in which the promised performances constitute an agreed exchange of equivalence, one who has himself broken his promise in some material respect cannot get a decree of specific performance.

A court of equity, if it is to require a defendant to perf his contract with exactness and specificity, may ligitimately require that the plaintiff to have performed his obligations wi the same kind of exactness and specificity. Recently the cour which Appellant and Respondent are now before held in Fischer vs. Johnson, 525 P.2d, 45 (1974) as follows:

> But it is also true that Specific Performance is a remedy of equity; and one who envokes it must have clean hands in having done equity himself. That is, he must take care to discharge his own duties under the contract; and he cannot rely on any mere inconvenience as an excuse for his failure to do so. Even if inconvenience or difficulty is encountered, he must make an effort to perform or tender performance, which manifests reasonab diligence and a bonified desire to keep his own promises.

The lower court in the case now before this court made the foll finding of fact in paragraph 12 on page 6 of Findings of Fact a Conclusions of Law:

> That defendants have not kept the terms of the lease in that they have failed to pay lease payments as due, water assessment charges due, and property taxes defendants were required to pay by the terms of the lease.

The Malones having failed to perform with exactness and good faith, the terms of the lease and option agreement. The trial court did not abuse its discretion in failing to require the Ottesons to specifically perform their covenants and promises under the Lease and Option Agreement.

The appellants in their brief, point I, argue that the parole evidence rule prevents the court from considering anything but the "four corners of the written instrument" in its determination of a defense to specific performance. This is a complete misstatement of the law of specific performance. In Free vs. Little (supra) and McNeil vs. McNeil (supra) the Utah Supreme Court stated that

> The right to specific performance depends not upon hard fast rules according to which all cases are to be decided, but each case is dependent upon its own peculiar facts and circumstances. (Emphasis added)

In Chamber vs. Livermore (supra) the same question was presented to the court, resulting in the following comment by that court:

> Complainant however, insists that all the parole proof introduced to show that the reservation was agreed upon as alleged in the answer, was incompetent. This objection is untenable. Without now approaching the mooted question, whether a complainant can be allowed to show by parole a mistake in a contract, with a view to having it reformed and then enforced,

it is sufficient for us to say there is no dispute in the authorities that the mistake may be shown by parole, as a defense to specific performance of the written instrument. See 1 Lead. Cas. in eq. 519 (Margi) Note, and cases cited.

The Trial court in its equity jurisdiction over the specific performance of the option did properly consider the circumstances surrounding the contract and its execution and properly exercised its discretion in denying specific performance.

POINT II

THE COURTS RULINGS WERE PROPERLY BASED ON EVIDENCE BEFORE THE COURT AT TRIAL.

The tryer of fact may consider all of the facts and circumst which may have a bearing on the truthfulness or accuracy of any witnesses' statement and is not bound to give equal credibility all witnesses. Gittens vs. Lundberg, 3 Utah 2d., 392, 284 P.2d 1115 (1955). The record on appeal including the trial transcript shows the following which support the major findings of fact made by the court:

a. As to the age and health of the parties, the court was present to see each party for itself and in addition, the follow testimony appears. Mr. Cassity asked (at trial transcript page

43,) why Nellie Otteson had not accompanied Ara to the office of Boyd Bunnell.

A. She wasn't able to go.

Q. Why not?

A. Crippled up. Not feeling well.

Q. She has pretty much been an invalid for many years?

A. Yes sir.

At trial transcript page 222 the following dialogue appears in direct examination:

Q. How is it, that you are taking care of your wife today and yesterday?

A. Well it is very hard work.

Q. No, I am saying who takes care of her?

A. My sister, Mrs. Collard.

Q. And who took care of her yesterday?

A. Mrs. Fox.

Q. Relief Society President?

A. Yes sir.

b. Bearing on the finding of fact that Ara Otteson farmed the 28 acres with his father and had been a farmer on the land for his entire life time is the following dialogue appearing in the trial transcript at page 41:

Q. And is it true that on the 28.2 acres you had your home?

A. Yes sir.

Q. And that is where you and Mrs. Otteson reside?

A. Yes.

Q. And is it true that over the years through inheritance from your forebears that you obtained the title to the property?

A. Yes.

Q. Now did you farm this ground for many years?

A. Yes.

At page 56 of the trial transcript, appears the following:

Q. Do you have any personal judgment - how many years did you farm Mr. Otteson?

A. Several years. I farmed since about 30, 1930.

Q. From 1930 to when.

A. 1972.

c. As to the courts findings that plaintiffs did orally agree to enter into a lease of the land to the defendants, the following testimony appears beginning on the 11th line of page 41 of the trial transcript.

Q. How long was it before that date that you first talked about the lease on the 28 acres or was it about that time?

A. It was in March. About the 21st.

Q. And who started talking about the lease?

A. Malones.

THE COURT: Speak as loud as you can.

A. Yes, sir.

Q. And Mr. Otteson, will you tell us how that happened? Did they come to you or did you go to them? Tell us what happened?

A. First started out.

Q. Excuse me.

A. They came to us about the lease.

Q. In your home?

A. Yes, sir.

Q. Alright, did you ever offer to lease the property to them before they came to you?

A. No sir.

Q. Alright, and they came down to your little mobile home?

A. Yes, sir.

Q. And will you tell us what was said to the best of your ability?

A. They would like to lease the 28 acres.

Q. And did you agree to do so?

A. Yes, we talked it over.

Q. And did you come to a decision that you were willing to lease them the 28.2 acres?

A. Yes sir.

Q. How many conferences did you have between March and June

about your leasing them and them leasing from you the 28 acres?

A. Several, I don't -

Q. Do you know just how many?

A. No.

d. As to Mr. Otteson's hearing disability, the following testimony appears beginning at the bottom of page 43 of the trial transcript:

Q. And when you got to Mr. Bunnell's office, did you have occasion to have a conversation with Mrs. Malone, with Mr. Bunnell?

A. Yes sir.

Q. And could you hear?

A. Not. No.

Q. Why not?

A. Didn't have any batteries for my hearing aid.

Q. Why did you go see Mr. Bunnell if you couldn't hear?

A. Well I expected them every day but. I ordered new ones but didn't get them.

Q. I see. So when you got there, did, do you remember anything that was said between Mr. Bunnell and Mrs. Malone?

A. I was introduced to Mr. Bunnell. Said would like to

have a little service done. Making out some papers.

Q. Do you remember anything else during that meeting which was said?

A. Mrs. Malone done most of the talking, I didn't.

Q. Did you hear what was said?

A. Part of it, yes.

Q. Part of it you heard?

A. Very little.

Q. Very little?

A. Yes.

On page 45 beginning with the fourth line down is the following dialogue regarding the meeting at Mr. Bunnell's office:

Q. Did you at any time hear any mention of the word option?

A. No.

Q. Never heard the word mentioned?

A. Not at this meeting.

Q. Now before you went to that meeting, had the word option ever been mentioned by Mr. & Mrs. Malone or you and Mrs. Otteson during the time you met in March to June, 1974?

A. No sir.

Q. Never?

A. No sir.

Q Had Mr. & Mrs. Malone ever told you that in connection leasing the property that they wanted to buy it?

A. No sir.

Q. Or they wanted the right if they chose to buy it?

A. No sir.

Q. Absolutely not?

A. That's right.

At page 114 the trial transcript on cross examination of Boyd Bunnell reflects the following:

Q. But in any case, Mr. Otteson did very little to participate in the discussion?

A. That is true.

e. As to the court's finding that the respondents at no time discussed sale or option to purchase with Mr. Bunnell or the Malones, the trial transcript reflects the following testimony of Mr. Bunnell at page 116, last paragraph:

MR. CASSITY:

Q. Just one further question in light of that, your honor. Mr. Bunnell, is it not true that you at no time explained what option to buy as used in that

agreement meant to Mr. and Mrs. Otteson?

A. That is true.

With regard to the finding of the court that the Ottesons understood the option as giving them a first right of refusal rather than a straight option, the transcript beginning on the bottom of page 46 contains the following testimony:

Q. Was anyone else present when you tried to decide what the option part of the lease said?

A. No sir.

Q. Or meant?

A. No sir.

Q. Just you and Mrs. Otteson?

A. just the two of us.

(Omitted discussion between Court and Counsel for all parties)

Q. Mr. Otteson, with regard to the option provision of the lease, what did you intend that that would give Mr. and Mrs. Malone?

A. The right to run the farm. under the lease. We didn't expect to have it, to sell it. Nothing was said, nothing about the option. Never talked option. at any time.

Q. At any time?

A. At any time.

Q. Well did you ever discuss what the provision meant

with Mr. and Mrs. Malone before you signed the lease?

A. No sir.

Q. Did it ever occur to you that that provision might mean that if the Malones wanted to buy the property, they could do so?

A. No sir. I never understood it that way.

Q. Well now, Mr. Otteson, did you and Nellie sign this lease?

A. Yes sir.

Q. And you thought it was a five year lease?

A. Yes sir.

(More discussion between counsel and court)

Q. What right did you believe the option gave Mr. and Mrs. Malone?

A. The right to sell the place.

THE COURT: The right to what?

A. Sell the place.

THE COURT: The right to sell the place did you say?

A. Under the option the way I have been instructed now.

Q. Who had the right to sell the place?

A. We had the right to sell it.

(Omitting more material involving discussions between the court and counsel)

Q. Alright. You said that you thought the option allowed you to sell the place while the lease was going on, is that right?

A. After we got acquainted with the lease but we never understood the option. That we had to sell it at any time or price.

At the beginning at the bottom of page 72 the trial transcript demonstrates the following testimony:

Q. Alright, then before you went over to Bunnell did you then reach an agreement between you on what the terms and conditions would be?

A. On all but the option.

Q. You claim the option wasn't discussed between you?

A. Yes sir.

Q. Is that correct?

A. That's correct. No time was it.

At page 85 the bottom paragraph, a portion of Mr. Ottesons deposition is read into the record as follows:

Q. Now this provision in here about the option and the things we have discussed that is what you and Malones agreed to is it not?

A. Yes, partly.

Q. Well what is the part you didn't agree to?

A. Not to sell. See we had no conversation about selling that farm when he lease it. None whatsoever. At no time no sale price was set. Or not any agreement to sell our farm.

Q. How do you mean that that you didn't agree on any sale price but that you did discuss this option provision that is in the lease, isn't that true?

A. That's what I say, we were friends and we trusted them which there was nothing said about them buying it until that option they put in the lease.

Then Mr. Cassity asked Mr. Otteson if this was his true tesimony and he answered "that's true."

Again the trial transcript at page 225 5th line from the bottom states as follows:

Q. Now when you talked about the lease with Mr. Malone and Mrs. Malone, did they ever mention to you at any time that they wanted to buy the land?

A. Yes.

Q. When?

A. Well when they wanted to lease it.

Q. What did you say?

A. I told them no. Both of them. My wife too.

Q. That you wouldn't sell the land?

A. Yes sir.

Q. And you told them at the very beginning?

A. Yes sir.

Q. Was there any further discussion about whether they

could buy it after that first meeting?

A. No sir.

Q. Never again?

A. Never again.

Q. And not in the attorneys office that you are aware of?

A. No sir,

On page 227 beginning at line 15 is the following dialogue:

Q. Let me rephrase that. Did you ever tell Mr. and Mrs. Malone that they could buy your property?

A. No sir.

Q. Or that they could have an option to buy it at their sole discretion?

A. No sir.

f. With respect to the trial courts determination that the defendants have not kept the terms of the lease, the following testimony is present in the transcript beginning 10 lines from the bottom of page 63:

Q. Did the lease require that Mr. Malone pay the water assessment each year?

A. Yes sir.

Q. Did he pay it in 1976?

A. No.

Q. Did you?

A. Yes sir.

Q. And in what amount?

A. $184.04.

Q. Did you tell him that you had paid that water assessment?

A. He came down and I told him I paid it, yes.

Q. Did you ask for the money back?

A. No I didn't.

Q. But under the terms of the lease, he owes it, is that correct?

A. That is right.

On page 131, Sue Malone, under direct examination stated that the 1975 lease payment was tendered to the Ottesons but when asked by her counsel "Have you made any other payments?" She responded "No sir.".

In light of the above, the evidence before the trial court was sufficient to support the trial courts findings.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFORMING THE LEASE AND OPTION BY ITS VOIDING OF THE OPTION PORTION OF THE AGREEMENT.

The Appellants characterization of the law in Utah as to the voiding, reformation or rescission of a contract clear

and unambiguous on its face, is substantially correct. In 76 C.J.S. Reformation of Instruments Page 374 it states as follows:

> ...But if the instrument does fail to express the real agreement or transaction due either to mutual mistake or to mistake, inadvertance, or accident on one side, and fraud or inequitable conduct on the other, and reformation is essential to give complete legal effect to the instrument, it will be allowed. (Emphasis added)

It is not clear to the Respondents according to Utah law what other inequitable conduct on the other side would be sufficient to allow reformation of a contract where inadvertance of one party had resulted in the execution of an unambiguous contract. Though by the authority cited by the Appellants, it is clear that the Utah Court will countenance reformation if fraud is present. The Appellants note that the trial court apparently dismissed allegations that there was fraud or duress on the part of the Malones. Respondent points out to the court that such language of the court was not at final disposition of the case, but appears in the transcript to be slightly over one-half of the way through the trial. The court could have considered evidence which was introduced in the second half of the trial weighed with the evidence presented at the first half and come to a different conclusion. Given the relative age and infirmity of the Respondents compared with the youthfulness of the

Appellants and given testimony produced at trial that an option to purchase or an outright sale of the land was never discussed between the parties and given all other circumstances surrounding the execution of the lease and option, the court may have concluded that there were sufficient inequities to justify rescission or reformation of the contract. Whether this evidence presented to the trial court was sufficient, in light of the wide discretion given the trial court, to justify rescission or reformation under Utah Law is for this court to decide.

As to the Appellants claim that Appellant was prejudiced by the courts advising the parties to brief the question of consideration supporting the option, the Respondents note the final words of the trial court as they appear in the trial transcript. The last paragraph of page 231 reads as follows:

> Okay, now I will take the case under advisement and permit you as I said this morning, to submit written memoranda on this question of the option. But not only on that, gentlemen. Feel free to discuss the matter of damages, what each one of you think about the question of damages. Whether the plaintiffs are entitled to damages or is not on the other side. I mean go into any issue that you think is relevant and important. And give the court the benefit of your view. (Emphasis added)

The court was clearly not limiting the issues which Appellant could argue and no prejudice could have resulted to the Appellant by the submission and argument of points of law which the trial court did not consider determinative.

CONCLUSION

The trial court had before it in live presence the parties involved in the case, along with testimony showing the unequal capacity of the parties, the execution of agreement whose meaning and effect was not apparent to the Respondents, the less than perfect performance of the obligations of the lease and option by the Appellants and no intent of the Respondents to sell or alienate their property. With these facts in evidence, the trial court cannot be said to have abused its discretion in denying specific performance to the Appellants. To require the Ottesons to sell their family farm under such conditions would deny the trial courts responsibility to do equity. The rulings of the lower court should be upheld accordingly.

DATED this 2nd day of February, 1978.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF MAILING

I certify that two copies of the foregoing Respondents Brief were mailed, postage prepaid thereon, on the 2nd day of February, 1977 to the attorneys for Appellants, Michael R. Jensen, Frandsen, Keller and Jensen, Professional Building, 90 West First North, Price, Utah, 84501.