

1949

Ray D. Williams, A. U. Miner, Mima Thomas, Ila Thomas Lambert, P. P. Thomas, Max Thomas, Joseph Hanson, Roland J. Hanson and Roy Hanson, Elberta Land and Water Company v. Oren E. Barney and Thelma Barney, The Bank of Spanish Fork, and Utah County : Brief of Respondent

Utah Supreme Court

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Geo. W. Worthen; Attorney for Respondents;

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# In the Supreme Court

of the

## State of Utah

RAY D. WILLIAMS, A. U. MINER,  
MIMA THOMAS, ILA THOMAS  
LAMBERT, P. P. THOMAS, MAX  
THOMAS, JOSEPH HANSON, RO-  
LAND J. HANSON and ROY HAN-  
SON, partners under the name of EL-  
BERTA LAND AND WATER COM-  
PANY,

Plaintiffs and Appellants,

vs.

OREN E. BARNEY and THELMA  
BARNEY, his wife, THE BANK OF  
SPANISH FORK, a corporation; and  
UTAH COUNTY, a body politic and  
corporate of the State of Utah,

Defendants and Respondents.

Case No. 7336

# FILED

## RESPONDENTS' BRIEF

OCT 28 1949

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GEO. W. WORTHEN,  
Attorney for Respondents.

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SPANISH FORK, a corporation; and  
UTAH COUNTY, a body politic and  
corporate of the State of Utah,

Defendants and Respondents.

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## STATEMENT OF FACTS

Counsel for appellants have made a "Statement of Facts" which we deem incomplete. Counsel delineates the title of plaintiffs to and including the quit claim deed from P. P. Thomas and others to plaintiffs. Counsel have also set out the defense set up by defendants' answer.

We shall set out additional facts which we believe will help the court to understand the issues and the court's conclusions and decree.

Elberta is a small community located in the south-westerly part of Utah County (Townships 9-10-11 South Range 1 West S.L.M.) The community had received its water from what is known as the Mona Reservoir in Juab County. (Tr. 13). The water had originally been distributed to the residents of Elberta by the Uah Lake, Land Water & Power Company. (Exhibit "D".) (Exhibit "4".) Prior to 1937 the project had become defunct and the residents of Elberta distributed the water themselves. (Tr. 15). It is indicated that sheep men were trying to obtain the lands, and the home and land owners of Elberta were vitally concerned. (Exhibit "7".)

The record owners of the property—the Colorado Development Company, which held title to the land, and the Utah Valley Land & Water Co., successors to Utah Lake, Land Water & Power Co., considered the project of little value (Exhibit "7" & "8".), which exhibits disclose that O. A. Penrod purchased the entire project, including land, reservoir, flumes, ditches and water rights for \$2500.00.

In 1937, under the necssity of saving their own property and protecting their homes, the residents of Elberta began holding mass meetings with the idea of acquiring the land and water rights (Exhibit "6", "7" & "8") (Tr. 18, 21, 22, 26, 27, 28). O. A. Penrod was one of the persons attending the mass meetings and was a leader in the move to acquire the property.

Previous to September 21, 1937 O. A. Penrod had

been appointed chairman of a committee to investigate acquiring and taking over the land and water from the record owners in the interest of all the people of Elberta and vicinity (Exhibit "6".) Because of some misunderstanding between the people and the committee and of the powers of the committee, O. A. Penrod on November 27, 1937, purchased from the Colorado Development Co. the holdings of the company (Exhibit "C".) and on the same day purchased from the Utah Valley Land and Water Co. the reservoir, flumes, water rights, etc. (Exhibit "4".)

O. A. Penrod likewise contacted the commissioners of Utah County about purchasing the county's tax title (Exhibit "7".)

A mass meeting was held at Elberta on Dec. 8th, 1937. It was attended by citizens of Elberta, two members of the county commission, Mr. Ballif of Provo and P. P. Thomas, one of plaintiffs. (Exhibit "7").

Mr. Ballif stated that the meeting was called by Mr. Penrod; that Penrod and a committee came to see him asking him to help in legal matters in regard to the proposition; that Penrod had contacted Mr. Allen in regard to buying the company holdings; that Mr. Penrod had taken an option on the property for \$2500.00 and later took up the option.

Mr. O. A. Penrod spoke, and made the following statement:

"All the company holdings are now in **my name** but I am more than willing to deal with the the people here and let them have what I bought for the same price of twenty-five hundred dollars plus what little expense was attached."

Mr. Thomas, one of the plaintiffs, and president of the Commercial Bank of Spanish Fork, then talked verifying Mr. Penrod's statements. He said that for many years Mr. Penrod had tried to interest the bank in this proposition but they were not at all interested. He said they had fallen heir to a piece of property here which he tried to trade to Mr. Penrod for a Thanksgiving turkey but he refused. He said Mr. Penrod borrowed the money from this bank to buy the option and since paid most of it back. He said, "I am not at all interested **in the land here** but if the people here would get together and organize so that there would be some head to things, form an irrigation committee, perhaps the bank might become interested." (Ehhibit "7".)

At this meeting Mr. Penrod was accused by someone of working against the committee; Penrod protested that he was working with the interest of the people at heart.

An examination of the minutes (Exhibit "7") discloses, in the last paragraph on page 4, the following:

"Mr. Mangum made a motion that Mr. Ballif prepare preliminary papers for reorganizing or cooperating and present them to the people to read and sign. These papers to be here by Saturday night. Motion seconded by Mr. Patten and carried unanimously."

On December 11th, 1937 another mass meeting was held. This meeting was attended by P. P. Thomas and Max Thomas and Hr. Hanson.

The minutes of the meeting (Exhibit "8") disclose that Mr. Thomas spoke as a representative of the bank from which Penrod borrowed the money. Also as a property holder.

He stated that those buying from the company bought water as well as land but that the company was out of eixstence. He said further,

"The water we bought is in the reservoir . . . . No one to speak for us. No way to go ahead and get the water down here, and therefore there is only one thing for us to do and that is to form some kind of an irrigation company so that we can get to work and get something done."

The minutes of December 11th, 1937 (Exhibit "8") disclose that Mr. Thomas said,

"Penrod holds all the company holdings so **the dealings would be with him.** All are familiar with this proposition so better figure out which kind of a district is best and form it."

Motion was made and carried unanimously that a committee be appointed to organize and get things in shape.

Mr. Barney nominated Mr. Penrod, and Mr. Thomas advised that since the committee was to deal with Mr. Penrod he not be on the committee.

Plaintiffs introduced Exhibits "J", "K" and "L".

Exhibit "J" was executed after the series of meetings held at Elberta (Tr. 21-30).

Exhibits "K" and "L" were drawn up by Mr. Ballif but were never executed. (Tr. 88 & 89.)

Articles of Incorporation No. 1417, No. 1431 and No. 1439, filed in the office of the County Clerk of Utah County, were offered by plaintiffs' counsel and received in evidence. Counsel for plaintiffs advised the court that if necessary they would be willing to furnish copies of them (Tr. 91.)

Mr. Thomas testified that he assisted in the organization of Monebo Reservoir Corporation, (Articles of Incorporation No. 1431.), Articles of Incorporation of Current Creek Irrigation Company No. 1439 were filed on May 16, 1939 and disclose that Mr. Thomas was named Secretary-Treasurer of that corporation.

Excerpts from minutes of the Current Creek Irrigation Co. were read in evidence.

The minutes of the first meeting held May 29, 1939 recite that Joseph Hanson presided and P. P. Thomas,

Secretary-Treasurer, was present (Tr. 60). The minutes show that among bills presented and approved for payment was the following: O. A. Penrod Project cost \$3500.

Minutes of meeting held Feb. 4, 1942 show payment for cost of project to O. A. Penrod—Principal \$3500., interest \$426.22 (Tr. 61).

Minutes of meeting held September 18, 1939 show notice of assessment of \$1.00 per share on each share of stock payable to P. P. Thomas, Secretary-Treasurer. (Tr. 61 & 62).

On December 16th, 1939 O. A. Penrod and wife conveyed to Current Creek Irrigation Co. all of the irrigation system formerly owned by Utah Lake, Land, Water & Power Co. for \$3500.00, and certain stock issued to O. A. Penrod and to Commercial Bank of Spanish Fork. (Exhibit "5").

On June 3rd, 1940 a committee of Elberta residents consisting of Mrs. Bauer, **James Mikkelson**, Alva Patten and Mr. & Mrs. Earl Barney met with the county commission of Utah County. (Tr. 47).

Mr. O. A. Penrod was present at the meeting and advised the committee and the county commission that he and his partners or workers had all the land that they desired; that all those with water rights had been taken care of and if the people so desired they could have all that remained. (Tr. 39).

O. A. Penrod stated:

"Well we have got all the land we want—  
Go ahead and buy all there is left if you want to."  
(Tr. 52).

O. A. Penrod, when asked about land above the canal, said:

"Oh, we aint interested in that and never was." (Tr. 52).

Penrod further stated, "We never was interested in anything above the canal." (Tr. 54).

At this time O. A. Penrod was the owner of record of the land in question (Exhibit "H"). The deed from O. A. Penrod and wife to Commercial Bank of Spanish Fork (Exhibit "H") was executed on January 11, 1938 but was not placed on record until Dec. 29, 1944.

## ARGUMENT

### I.

The appeal should be dismissed because of failure on the part of appellants to comply with Rule 8 of the Rules of Practice of this court, in that the assignment of errors are insufficient to point out specifically to this court wherein the lower court erred.

(a) Assignment of error No. 1, charging error in the denial of plaintiffs' motion for a dismissal of defendants' counter claim and for judgment, is not sufficient to call the court's attention to the specific error relied on or any reason why the court's rulings constituted error.

In 3 Am. Jur. Page 293, Sec. 703, the author says:

"An assignment of error must be specific; a general assignment, without specification of the particular point relied on, gives no information to the appellate court or to the adverse party and will not, as a general rule, be considered . . . ."

The author cites under Note 15, cases holding that an assignment of error that the court erred in denying a motion for a new trial is too general to be available.

(b) Assignment of error No. 2 assigns error against all of the findings of fact. It singles out no specific finding and is ineffectual.

In 3 Am. Jur. Pages 287-288, Sec. 695, the author says:

"It is well recognized that the appellant must assign errors relied on for reversal for the purpose of informing the appellate court and the adverse party of the matters relied on as error, inasmuch as it is not the duty of the appellate court to search the record for errors . . . ."

In 3 Am. Jur. Page 300, Sec. 712 the rule is stated thus:

"Where there are several findings of fact, a general assignment of error that the decision is not supported by the evidence is insufficient to call in question the correctness of any particular finding of fact."

(c) Appellants' assignment of error No. 3 fails to point out any particular wherein the findings of fact do

not support the conclusions of law and we believe are subject to the objections heretofore noted.

(b) Appellants' assignment of error No. 4 fails to point out wherein the findings of fact and conclusions of law are insufficient to support the decree and are governed by the same rules as we have pointed out with respect to the last two assignments.

(e) Assignment of error No. 5, charging the admission of heresay testimony and **other inadmissible evidence**, is equally objectionable. Nothing is contained in said assignment to call the court's attention to the errors relied on.

In 3 Am. Jur. Page 296, Sec 708, the author says:

"The general rule that assignments of error must be specific applies to assignments based on the rulings of the trial court in regard to matters of evidence. Thus, an assignment of error in the admission or exclusion of evidence, to be sufficient, must be specific and must clearly indicate the particular rulings complained of . . . ."

## II.

THE STATUTE OF FRAUDS (SEC. 33-5-1 & SEC. 33-5-3 UTAH CODE ANNOTATED, 1943) IS NO BAR TO ESTABLISHING RIGHTS IN REALTY THROUGH EQUITABLE ESTOPPEL

In 19 Am. Jur. Title Estoppel, Page 743-& 4, Sec. 87, the author says:

"The rule is well settled in modern law that the title to land or real property may pass by an equitable estoppel, which is effectual to take the title to land from one person and vest it in another where justice requires that such action be done . . . The majority rule is to the effect that to permit the transfer of title by operation of equitable estoppel does not contravene the statute and that the legal title may be so transferred. In other states in which it is held that a legal title cannot be affected by equitable proceedings, such as an equitable defense of estoppel, it is nevertheless held that the holder of the legal title may be precluded by equity from setting up the defense of the statute of frauds and that the title may pass by operation of an equitable estoppel in spite of the statute. In only a few jurisdictions has it ever been held that the statute of frauds prevents the passage of title by means of the doctrine of equitable estoppel . . ."

In the case of *Albachten v. Bradley* (Minnesota) 3 N.W. 2d. 783, the action was on a promissory note to which a defense was set up that the action was barred by the statute of limitations. Plaintiff sought to avoid the bar of the statute by evidence of an agreement of the parties extending the time of payment and by an estoppel on the part of defendant to set up the statute of limitations as a defense.

In answering the contention of defendant that the estoppel set up was violative of the statute of frauds, the

Minnesota court at page 786 of the report said:

"The objection that an estoppel may not operate to create rights which under the statute can be created only by an instrument in writing signed by the party chargeable is of no avail. Our decisions have settled the rule contrary to the objection. Estoppel may preclude a party from asserting the lack of a writing required by statute. In *Dimond v. Manhein*, 61 Minn. 178, 63 N.W. 495, 497, *supra*, Mr. Justice Mitchell said: 'While at one time the courts hesitated to apply the doctrine so as to give or divest an estate or interest in land, as being opposed to the letter of the statute of frauds, yet it is now well settled that a person may by his conduct estop himself from asserting his title to real property, as well as to personality. The overwhelming weight of authority supports this view'."

This court in the case of *Bracken v. Chadburn* 55 Utah, 430; 185 Pac. 1021, said at page 437 of the Utah Report:

"The statute of frauds cannot be invoked to defeat plaintiffs' rights under a state of facts as shown by this record. Whatever may have been the various and devious interpretations given by the courts to Statute 29, Charles II, it has never been construed to be an instrument of fraud; and such would be the effect if the defendant Chadburn were premitted to successfully invoke it in this action . . . ."

## III.

COMPETENT EVIDENCE OFFERED AND RECEIVED BY THE COURT WAS SUFFICIENT TO RAISE AN ESTOPPEL IN DEFENDANTS' FAVOR PREVENTING PLAINTIFFS FROM ASSERTING CLAIM TO THE PROPERTY INVOLVED AND JUSTIFYING THE COURT IN QUIETING TITLE IN DEFENDANTS.

We believe the merits of the case can be presented under point III, if the court declines to dismiss the appeal under our point I.

We concede that the tax procedure followed in connection with the sale of the property involved was ineffectual to convey full legal title to defendants under the quit claim deeds from Utah County. (Exhibits "1" & "2".) But we submit that said deeds were sufficient to create a color of title which a court of equity, under the facts established, will protect and against which appellants will be prevented from asserting their otherwise valid title. (*Bozievish v. Slechta*, 109 Utah 373—166 Pac. 2nd, 239.)

In our statement of facts we have set out in detail the history of the Elberta project. The land involved in this action was purchased by O. A. Penrod from the Colorado Development Co. (Exhibit "G") November 27, 1937. On the same day Penrod purchased from the Utah Valley Land & Water Co. the reservoir, flumes, laterals, water rights, etc. (Exhibit "5") at a total consideration of \$2500.00.

As pointed out in our statement of facts, P. P. Thomas, one of plaintiffs, attended the mass meetings at Elberta held December 8th and December 11th, 1937. It is disclosed by the meeting of December 11th, which was attended by members of the Utah County Commission, that the land under the Elberta project had gone to tax sale. Penrod stated that the committee appointed met with the county commission asking about the delinquent tax lands and were advised that there were about 2200 acres for sale. (Exhibit "7"). In addition to the land that had been formerly irrigated and was below the canal, there was considerable land purchased by Penrod that lay above the canal and could not be irrigated. (Tr. 50 to 54. Particularly Page 52). The land involved in this action was land that could not be irrigated. It was described by P. P. Thomas as being dry, desert land. (Tr. 93).

P. P. Thomas, Max Thomas and Joseph Hanson, plaintiffs, attended the meeting of December 11, 1937. Max Thomas and Joseph Hanson, two of the plaintiffs, were present on December 11th when P. P. Thomas, one of the plaintiffs, spoke as a representative of the bank from which O. A. Penrod borrowed the money. They presumably heard him say that at first they were not interested in redeeming this land but since the meeting the other night (presumably the meeting of December 8th, 1937) they were much interested in order that they can sell their 60 acres.

It must be presumed that Max Thomas and Joseph Hanson, two of plaintiffs, heard P. P. Thomas say on December 11th, 1937 (Exhibit "8"),

"Penrod holds all the company holdings so the dealings would be with him. All are familiar with his proposition so better figure out what kind of a district is best and form it."

The minutes of the meeting held November 21, 1937 (Exhibit "6") disclose that Mr. Penrod reported that he had contacted the county commissioners and that Mr. Johnson said to tell the people they would not sell to an individual such as a person wanting it for sheep range and they could give clear title to all the land the county owned. He further stated that the bank (presumably First Security Bank of Provo as disclosed by (Exhibit "D", "J", "E", & "F".) would let go of their holdings for \$2500.00 which meant the reservoir and canal and what land they now held:

One or two points are very important to bear in mind in connection with this matter.

**First**—one month after P. P. Thomas had called the attention of the residents of Elberta to the fact that Penrod held all of the company holdings and they should do business with him, a secret deed was executed by O. A. Penrod (Exhibit "H") by which Penrod and wife conveyed to the Commercial Bank of Spanish Fork, of which P. P. Thomas and Joseph Hanson were officers, all the property Penrod had purchased under the deed from Colorado

Development Co. (Exhibit "G").

It is significant that this deed dated January 11, 1938 was never put of record until December 29, 1944.

There is nothing in the record anywhere to indicate that P. P. Thomas, Joseph Hanson, Max Thomas or O. A. Penrod ever advised any of the residents of Elberta that O. A. Penrod had conveyed the property, which stood on the record in his name, to the Commercial Bank of Spanish Fork. Such was the state of the record at the time defendants purchased the property involved in this action from Utah County.

**Secondly**, it is important to observe that defendants purchased part of their irrigated land from James H. Mikkelson and wife (Exhibit "10"). The deed recites that the Mikkelsons are residents of Fountain Green. The acknowledgment was taken in Sanpete County. The minutes of the meeting held September 21, 1937 (Exhibit "6") disclose that J. H. Mikkelson took an active part in said meeting. (We admit that the initials appear to be J. W. Mikkelson).

Earl Barney testified that **James Mikkelson from Fountain Green** was a member of the committee that waited upon the county commission June 3, 1940 (Tr. 49) and that this committee was appointed by citizens of Elberta (Tr. 48).

Oren Barney testified that he owned stock in the Current Creek Irrigation Company. That he acquired

the stock from his predecessor in interest and that the stock was surrendered by him and new certificates issued. (Tr. 62-63).

**Thirdly**, it is significant that the Articles of Incorporation introduced by plaintiffs No. 1417, No. 1431 and No. 1439, together with plaintiffs' Exhibits "J", "K", and "L", follow definitely the pattern set out and outlined by Mr. Thomas on December 11, 1937 (Exhibit "8").

O. A. Penrod and wife, on December 16, 1939, conveyed to Current Creek Irrigation Company (Exhibit "5") all of the irrigation system formerly owned by Utah Lake, Land, Water & Power Co. including the reservoir, dams, canals, flumes, ditches, etc. for the sum of \$3500.00 and certain shares of stock. This deed was acknowledged before Charles H. Dixon, one of the partners of Elberta Land & Water Co. at the time the first affidavit of doing business under an assumed name was filed. (Exhibit "O"). This deed was never recorded.

Defendants' Exhibit 7 discloses that a motion was made that Mr. Ballif prepare preliminary paper for organizing and cooperating and present them to the people to be read and signed. Mr. P. P. Thomas testified that after meetings of December 8th and December 11th, 1937 (Exhibits "7" & "8") that certain agreements were drawn up.

Counsel for plaintiffs introduced plaintiffs' Exhibit "J" in cross examination of Earl Barney. An examination of Exhibit "J" will disclose that it provided for the forma-

tion of an irrigation company or for doing business through the company already formed. That O. A. Penrod was to convey to the corporation all right, title and interest that he had in the project and that the sum of \$3500.00 should be paid to O. A. Penrod for the project which he had heretofore purchased and that said money should be repaid by levying an assessment upon all the water stock issued.

Exhibit "J" purports to have been signed by J. H. Mikkelson, predecessor in interest of defendants, as well as by Robert E. Clements. Defendants purchased irrigated land in Elberta from J. H. Mikkelson and Robert E. Clements (Exhibits "9" & "10". Tr. 58 & 59).

Mr. Thomas testified that Exhibits "K" and "L" were drawn up by Mr. Ballif.

Exhibit "K" verifies the testimony of Mrs. Bauer and alleges that the Utah Valley Land & Water Co. "which has heretofore owned the water system and served the water users in connection with the Elberta project in Utah County, State of Utah, is now defunct and its corporate charter has been revoked by the Tax Commission of the State of Utah, leaving the said Elberta Project in an unorganized condition . . . ." It recites that the First Party (O. A. Penrod) has bought the right, title and interest of the Utah Valley Land & Water Co. in and to said water system and now owns the same. That Second Parties are those who either owned land and water rights or desire to acquire the same. It is then alleged:

"Whereas, much of the land located in said Elberta project **has gone to tax deed and is now owned by Utah County** and the County Commissioners of said County are desirous of selling said lands back to any of the parties to this agreement and others desiring to make their homes on said Elberta Project . . . . "

It is then recited that the parties are desirous of preserving their mutual interests ,and then alleges that:

"Whereas, the First Party is desirous of conveying to said water company, as soon as its organization is completed, all right, title and interest recently purchased by him in the said Elberta Project Water system . . . . "

Then the proposed agreement and mutual promises follow (on page 2) and provide, among other things, that "a mutual water stock company be incorporated; that as soon as the water company comes into legal existence, First Party shall convey all his right, title and interest in and to the project, . . . . . and that all the parties hereto shall pay into said water company, as soon as the same comes into legal existence, their respective per share assessment in the amount and at the place hereinafter provided, and that First Party shall be paid out of the proceeds of said assessment the sum of \$3,000.00 . . . . "

Provision is further made for the payment to the Commercial Bank of Spanish Fork of the sum of \$1.00 per share of stock in said water company and it is made the duty of the Commercial Bank of Spanish Fork to pay

to the First Party (O. A. Penrod) from the proceeds received by it from the said stock assessment, the sum of \$3000.00 to reimburse said First Party for his cash outlay above mentioned.

Plaintiffs' Exhibit "L" is designated Articles of Incorporation. This also is an unsigned agreement offered in evidence by plaintiffs. After setting out the formal matters and the purposes, it is provided in Article 7 that the officers shall be a board of five trustees, a president, a vice president, a secretary and a treasurer.

Article 9 provides that the following named persons, parties to this agreement, shall be officers of the corporation until the first annual meeting of stockholders:

"O. A. Penrod shall be a trustee and president.

D. Penrod shall be a trustee and vice president.

Lloyd Penrod shall be a trustee.

P. P. Thomas shall be a trustee and secretary.

Joseph Hanson shall be a trustee and treasurer."

Article 15 sets out the property owned by the corporation and conveyed to it by O. A. Penrod.

It is clear that these documents were all prepared subsequent to the meetings held at Elberta.

May we call attention to the fact that the minutes of December 8th and December 11th (Exhibits "7" & "8") proposed a program entirely consistent with Exhibits "J", "K" and "L".

As heretofore observed in our Statement of Facts,

Mr. Thomas and Mr. Hanson both participated in Articles of Incorporation No. 1431 and 1439. Articles of Incorporation No. 1431 were filed with the Utah County Clerk on January 3rd, 1939. The principal place of business was listed as Elberta, Utah. It provided that O. A. Penrod, D. Penrod, P. P. Thomas and Joseph Hanson should sell and convey to the corporation the waterworks system which had been purchased by Penrod from Utah Valley Land & Water Co. for the sum of \$3500.00. Defendants' predecessor in interest, J. H. Mikkelson, was one of the incorporators of this corporation, and his residence was listed at Fountain Green.

Articles of Incorporation No. 1439 was filed May 16, 1939 and was an agreement for consolidation of the Current Creek Irrigation Co. and the Monebo Reservoir Co. The articles provided that when incorporated the consolidated corporation agrees to pay the sum of \$3500.00 for the Current Creek Reservoir together with all dams, gates, ditches, etc., and that O. A. Penrod, D. Penrod, P. P. Thomas, Joseph Hanson and the Commercial Bank of Spanish Fork and Monebo Reservoir Co. agree to sell and convey to the consolidated corporation, when organized, for the sum of \$3500.00 together with interest at the rate of 8% per annum, all the property acquired by Penrod from Utah Valley Land & Water Co. Defendants' predecessor in interest, J. H. Mikkelson, is shown as one of the incorporators of the consolidated corporation.

Article 13 provides for certain officers until the first

Wednesday in February, 1941. Among the officers named are:

Joseph Hanson	President and Director
O. A. Penrod	Director
P. P. Thomas	Secretary & Treasurer

It will be observed from the Articles of Incorporation that the offer of Penrod to convey the project to the corporation for \$3500.00 (\$2500.00 and incidental expense which would include interest, legal fees, etc.) was still in force and effect. The same offer was mentioned in Exhibits "J", "K" and "L", and Articles of Incorporation No. 1439 made provision for the transfer to the consolidated corporation.

Minutes of the Current Creek Irrigation Co. show that at the first meeting held May 29, 1939, just thirteen days after the Articles of Incorporation were filed, a bill was approved for payment to Penrod of Project cost in the amount of \$3500.00 and interest. (Tr. 60). During all of this time, Penrod was still the owner of the reservoir, dams, laterals, ditches and water rights purchased from Utah Valley Land & Water Co.

Minutes of the Current Creek Irrigation Co. of September 18, 1939 show a notice of assessment in which \$1.00 per share was levied upon the stockholders payable to P. P. Thomas, Secretary. The notice required that the payment of the assessment be made before the 25th of October, 1939, and provided for sale of any stock upon which the assessment had not been made on the 25th of

November, 1939. (Tr. 61 & 62.)

It is significant that the deed from Penrod to Current Creek Irrigation Co. was not made until after the delinquency date for payment of said assessment, to-wit: December 16, 1939. (Exhibit "5").

The minutes of Current Creek Irrigation Company of February 4, 1942 show the payment to Penrod of \$3500.00, cost of the project. (Tr. 61). No land was conveyed by Penrod to the Current Creek Irrigation Co. That had all been conveyed to the Commercial Bank of Spanish Fork by deed which had conveniently been kept from record and which was never recorded until December 29, 1944. (Exhibit "H").

We submit that the entire record warrants the conclusion that the deed to the Commercial Bank of Spanish Fork (Exhibit "H") was given without any consideration. That Penrod was paid in full for all that he had purchased as the agent and representative of the citizens of Elberta by the payment of the \$3500.00 given in consideration of the conveyance of the reservoir, ditches, canals and water rights.

J. H. Mikkelson, defendants' predecessor in interest, who was present at the meetings held in Elberta, who executed Plaintiffs' Exhibit "J" and who was an incorporator under Articles of Incorporation 1431 and 1439, was entitled, as were all other residents of Elberta and vicinity, to assume that Penrod was holding the land purchased from Colorado Development Co. and that upon

the payment by the Current Creek Irrigation Co., that the residents of Elberta and persons interested were entitled to all the rights that Penrod held, subject only to the county's tax title.

The trial court, in its memorandum decision, used this language at page 8 thereof:

"In view of this record, the court cannot accept the contentions of the plaintiffs that all transactions between Penrod, the Thomases and Hansons and the land owners and water users prior to 1939 are immaterial because none of the preliminary work was effecuated by agreement. While the water only was conveyed to the Current Creek Irrigation Company, that was the only subject for the public concern as such, and lands, such as Penrod and his associates wanted, had been purchased from the county under the same void tax procedure which characterized the defendants' purchase. Thus up to then, the court concludes that all parties concerned in the land considered that the county's tax title was good and was completely effective as against plaintiff's chain of title . . . ."

On June 3, 1940, the committee of Elberta residents consisting of James Mikkelson, from Fountain Green (Tr. 49), defendants' predecessor in interest, met with the county commission (Tr. 47).

We pointed out in the statement of facts, on page 5, that Penrod disclaimed any further interest in land purchased.

Plaintiffs offered no evidence whatsoever to dispute the fact that O. A. Penrod was not paid in full for the land and water purchased by him for the people of Elberta when he received his \$3500.00.

We submit that neither O. A. Penrod, P. P. Thomas, Joseph Hanson or the Commercial Bank of Spanish Fork had any claim or right whatsoever to the land purchased by Penrod after payment of the \$3500.00.

Hanson and Thomas at all times knew that Penrod had been repaid. They knew that the Commercial Bank of Spanish Fork had no claim whatsoever on any property covered by (Exhibit "H").

Under the facts disclosed it is our position that equitable estoppel arises to bar plaintiffs from asserting their title to the land involved in this action. First, because of the continued offer of O. A. Penrod to convey lands and water rights for the consideration of \$2500.00 and incidental expense, which was to be raised by organization assessments which condition was met by the land owners and water users of Elberta, two of whom were defendants' predecessors in interest, one of whom actively participated in the organization of the corporation to which the water was conveyed.

Secondly, we contend that plaintiffs are estopped from asserting their title to the land in question because of Penrod's statements (made while he was the owner of record of the land in question) to the effect that he and his partners or workers (that were working with him) had

all the land that they desired. That all those with water rights had been taken care of and if the people so desired they could have all that remained. (Tr. 39).

Counsel, in their brief at page 9, argue that the testimony given by Mrs. Bauer and Earl Barney as well as the excerpts from the minutes of the county commission were incompetent and heresay.

It is true that the defendants were not present at the meeting in the county commission office.

We submit that the facts in this case as disclosed by the record warrant the court in setting up equitable estoppel against plaintiffs, even though defendants were not present. As we have pointed out, defendants' predecessor in interest was present and the parents of defendants, Oren Barney, were both present.

In 2 Pomeroy Equity Jurisprudence Sec. 811, P. 1666, the author discussing the proposition that the person sought to be estopped must intend the party asserting the estoppel to act upon his acts, words, conduct or silence, says:

"While such intention must sometimes exist and while the proposition is therefore true in certain cases it would be very misleading as a general rule. In many familiar species of estoppel no intention can possibly exist . . . . It is not necessary in equity that the intention should be to deceive any particular individual or individuals. If the representations are such, and made in such circumstances that all persons interested in the

subject have the right to rely on them as true, their truth cannot be denied by the party that has made them, against anyone who has trusted to them and acted on them."

The defendant, Oren Barney, testified that he had been a resident of Elberta at all times since 1926 with the exception of eight years from 1932 to 1940. (Tr. 64). That he had been writing to folks at home and had received letters back two or three times a month. (Tr. 73). That he had left livestock with his father at Elberta and had an interest in the livestock operated by his father from 1932 until his return.

He testified that he had sent money to his father to purchase certain land but was advised that the piece he especially had in mind Penrod wouldn't turn loose, and his father had held the money for him. (Tr. 66). That that land was in Section 30 and was below the canal. (Tr. 69).

He further testified that Penrod's statement made on June 3, 1940 had been called to his attention. (Tr. 63.)

On cross examination, counsel for plaintiffs asked the following question and the defendant, Oren Barney, gave the following answer:

"Q I understood, Mr. Barney, when you first started to testify, with reference to what you had heard, that your father went with you to the county commissioners; is that right?

A That's right." (Tr. 73.)

On cross examination counsel asked and defendant,

Oren Barney, answered the following question:

"Q Yes, sure. And you talked with your father about that before you went, didn't you?

A We had been talking about the whole project.

Q Sure, and the water rights and the new corporation; isn't that right ?

A Possibly." (Tr. 75).

Defendant, Oren Barney, testified that when he negotiated with the board of county commissioners to purchase the land in question he was accompanied by his father, Earl Barney. (Tr. 64).

He was asked the following questions and gave the following answers:

"Q Did you have any conversation with your father with respect to this land?

A I did.

Q Prior to your making the purchase?

A Right.

Q Did he make any statement to you with respect to any statement that had previously been made by Mr. Penrod to himself or any group?

Objection made by counsel and overruled by the court and the defendant answered:

A He did." (Tr. 65).

Oren Barney further testified that he had been interested in the land at Elberta ever since they lived there. (Tr. 68).

Counsel state, on Page 11 of their brief, that under

any theory the promises made by Penrod in the presence of P. P. Thomas and acquiesced in by Thomas were nothing more than verbal promises to transfer an interest in real property.

We submit that defendants' Exhibits "7" and "8" show that no one assumed that it was necessary for Penrod to deed the land he had bought. All present knew that the land had gone to tax sale. The county commission were present at the meeting of December 8th which was called by Penrod. Commissioner Johnson said they were not trying to work against the people but with them in trying to get these delinquent lands redeemed.

On September 21, 1937 Mr. Mikkelson moved that a committee be appointed to deal with the bank and Utah County Commissioners. (Exhibit "6").

The land involved in this action had been sold for delinquent taxes assessed for the year 1931. (Exhibit "3").

Neither O. A. Penrod, P. P. Thomas, Joseph Hanson or the Commercial Bank of Spanish Fork had redeemed the land from taxes. P. P. Thomas and Joseph Hanson knew that the land involved here had been sold for delinquent taxes; knew that Thomas had told the people that **Penrod holds all the company holdings so the dealings would be with him.**

Thomas and Hanson knew that plaintiffs' Exhibits "J", "K" & "L" provided for purchase from Penrod of all his right, title and interest in the project.

Articles of Incorporation 1431 & 1439 show that Penrod was still considered the owner of the entire project and that Penrod, Thomas and Hanson participated in the Articles that called for re-payment to Penrod. They knew that the Current Creek Irrigation Company paid Penrod for the **project cost** some time between May 29th, 1939 and Feb. 4th, 1942.

Respecting the first equitable defense, we submit that the evidence establishes that the defendants, as successors in interest of Robert E. Clements and James H. Mikkelson, are in equity entitled to the property involved in this action as part of the property which Penrod purchased (Exhibit "G" and which Penrod, in December, 1937, agreed to let the people of Elberta have for what he had paid and incidental expense. (Exhibits "7" & "8").

It is our position that the offer of Penrod to the people of Elberta continued through all negotiations with respect to the project (Exhibits "J", "K" & "L" and Articles of Incorporation Nos. 1431 & 1439), and that the offer was accepted and the contract completed by the assessments raised upon the stock of the Current Creek Irrigation Co. (Tr. 61-62).

It is our position that after Penrod, Thomas, and the Commercial Bank of Spanish Fork were paid the \$3500.00 to cover cost of the project that the defendants, as successors in interest of James H. Mikkelson, were entitled to the land involved in this action because the condition upon which the right was granted had been performed.

We further believe that had James H. Mikkelson and the residents of Elberta brought an action for specific performance against Penrod, Thomas, Hanson and the Commercial Bank of Spanish Fork they would have been entitled to a decree quieting their title to the land which Penrod had purchased from Colorado Development Co. (Exhibit "G"), and the statute of frauds could not be asserted because of performance of the condition on which the offer was made.

There is no evidence that the offer of Penrod made in the presence of P. P. Thomas, Joseph Hanson and Max Thomas had ever been withdrawn. Rather, all transactions subsequent to December 8th and 11th were potent evidence that the offer still continued and was at all times available until the payment was made.

Certainly, the acceptance of the offer by the people of Elberta, including the predecessor in interest of defendants, and performance of the condition named therein, ripened into a valid contract in favor of defendants.

We submit that if O. A. Penrod were prosecuting this action alone he could not prevail. Likewise, we submit that if P. P. Thomas, Joseph Hanson or the Commercial Bank of Spanish Fork were prosecuting this action they could not prevail. We believe the estoppel is likewise effective against plaintiffs of whom P. P. Thomas, Joseph Hanson, Max Thomas and Charles H. Dixon were members at the time this conveyance was made.

Respecting our second equitable defense, we believe that the evidence justifies the trial court's decision in favor of defendants.

Penrod, because of his representations made June 3, 1940 to the father of Oren E. Barney and to the predecessors in interest of defendants and to the county commissioners who had been trying to secure the redemption of these lands by the people of Elberta and who had refused to sell to sheep men, is estopped to deny his statement wherein he declared his intention to abandon any interest in the lands in question.

Counsel, on page 22 of their brief, state that the doctrine of promissory estoppel is applied only in cases or promises or representations as to an intended abandonment of an existing right, and quote from the case of Elliott -vs- Whitmore, 23 Utah, 342. A reading of that case and an analysis of the facts will disclose that there was no abandonment by defendants of any right which had vested. The sentence preceding the quoted excerpt from page 354 (23 Utah Report) reflects a proper appraisal of the evidence as interpreted by the court. Defendants had no right whatsoever in any unappropriated water or in any water over and above that which they could beneficially use, and therefore had nothing to abandon.

The court there said:

" . . . It is clear from the conversations themselves that at that time plaintiff had in view

rather the imaginary possibilities of the waters of the creek than an interference with the then user of such waters by defendants . . . . "

In the American Law Institute's Restatement of the Law of Contracts, Section 90, appears the following:

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

In I Williston on Contracts, Revised Edition Page 502, Section 139, it is said:

"There would seem, however, compelling reasons of justice for enforcing promises, where injustice cannot be otherwise avoided, when they have led the promisee to incur any substantial detriment on the faith of them, not only when the promisor intended, but also when he should reasonably have expected, such detriment would be incurred, though he did not request it as an exchange for his promise."

In *Hammonds v. Flewellen* (Texas) 48 S.W. (2d) 813, the court said:

"If a person, either by words or conduct, has intimated that he will offer no opposition to an act to be done, or induce a reasonable belief that he consents to the act in view to be done, and another person is thereby induced to do that from which he otherwise might have abstained, such

person would be estopped from questioning the act done or the fair inference to be drawn from his conduct."

In the case of *Martin vs. Meles* (Mass.) 60 N.E. 397, Mr. Justice Holmes used this language:

"When an act has been done, to the knowledge of another party, which purports expressly to invite certain conduct on his part, and that conduct on his part follows, it is only under exceptional and peculiar circumstances that it will be inquired how far the act in truth was the motive for the conduct, whether in case of consideration . . . . or of fraud."

Counsel argue that Penrod had no existing right and assert that nowhere in the record is there anything to show or from which an inference might be drawn that the Commercial Bank of Spanish Fork or any plaintiffs, subsequent to such transfer, had any dealing with Penrod in connection with any **project** relating to the ownership of this property.

The entire record is honey-combed with transactions between Thomas, Hanson and Penrod and with the people of Elberta treating this property as Penrod's, and declaring in documents introduced by plaintiffs that Penrod was the owner of the property.

Penrod did not notify the county commission June 3, 1940 that he had no interest in the land purchased by him; he did not say to the committee from Elberta on that occasion, **you must see the Commercial Bank of Spanish**

**Fork. I have sold to the bank and it is now the owner.**

Neither Penrod, P. P. Thomas, Joseph Hanson, Max Thomas or Charles H. Dixon ever testified that they advised the defendants or any other person from Elberta that this unrecorded deed had been executed.

There is no intimation in the record that any information was ever permitted to leak out as to the deed (Exhibit "H") having been executed.

The record discloses that Penrod had been purchasing property from Utah County which had gone to tax sale.

In cross examination Mr. Earl Barney was asked the following questions and gave the following answers:

"Q. Isn't it a fact, Mr. Barney, that Mr. Penrod had purchased considerable areas of land which was below the canal under the water project?

A. Yes, he had bought considerable land.

Q. And before this meeting hadn't he?

A. Yes, I understood he had.

Q. And after having bought all this land under the water project he told you people at that meeting that he had bought all he wanted?

A. Yes, sir." (Tr. 51).

We submit that Penrod had an existing right. At that time he was the legal owner of record of the property involved in this action.

P. P. Thomas and Joseph Hanson as president and

vice president of the Commercial Bank of Spanish Fork, were in a position to advise the public that the bank had become owner of the property, if they had so desired, but they did not elect to put their deed of record until nearly 7 years after its execution.

Suppose Penrod, on June 3, 1940, had executed a deed to defendants covering the property in question. Would it be contended that the deed was void? Having kept the deed (Exhibit "H") from record and by their silence premitting Penrod to buy considerable areas of this land from the county (Tr. 51), and having held him out in all negotiations as the owner of the project, they certainly cannot now say that defendants were not entitled to rely on his representation that he had the present intention of abandoning his right to make further purchases from the county.

Even if the court fails to hold that plaintiffs have abandoned their appeal as heretofore urged by us, we submit that the evidence fully supports the court's findings of fact 17, 18 and 19.

It is not necessary that Max Thomas, P. P. Thomas and Joseph Hanson be advised of the representations made by O. A. Penrod on June 3rd, 1940. He was the legal owner of the property which stood in his name on the records and they stood by without notifying anyone that they claimed any interest or right therein. In fact, P. P. Thomas and Joseph Hanson participated in Articles of Incorporation 1431 and 1439 which recognized Penrod's

ownership of the project and provided for the people to buy the same from Penrod.

The testimony of Earl Barney and Mrs. Bauer as to Penrod's representations was never contradicted. Penrod was not called to deny the statements. Nor can there be any question as to whom O. A. Penrod referred when he stated that **he and his partners or workers—those that was working with him** had all the land they desired. (Tr. 39).

He certainly wasn't referring to the members of the committee from Elberta. The entire record shows who he was working with and that negotiations were conducted over a long period to reimburse him and the bank from whom he borrowed his money for the expenditures he had made.

The court, in its memorandum decision at page 14, used this language:

"Certainly, where the record is clear that the two Thomases and Joseph Hanson were active with Penrod in all transactions concerning the property and all three are of the partnership and party plaintiffs. The finding of notice through identity of the individuals is stronger in this case than the Bracken vs. Chadburn case, *supra*."

The court found in finding No. 19:

"That plaintiffs are not bona fide purchasers without notice and for value of the land in issue and are estopped to set up the claim that the quit claim deeds from Utah County, conveying the

land to defendants, are not valid against plaintiffs."

As heretofore observed (P. 23) it is our position that the record warrants the conclusion that the deed (Exhibit "H") was given without any consideration. It was given to the bank from which he had borrowed the money to buy the option. Mr. Thomas stated on Dec. 8th, 1937 that Penrod had paid most of it back.

In 31 C.J.S. Page 332, Sec. 105, it is said:

"The owner of real property or of an interest therein, by clothing another with an apparent title thereto or with an apparent authority over it may estop himself to deny such title or authority in the matter of dealing with the property."

In the case of *Tanner v. Provo Reservoir Co.* 76 Utah, 335, 289 Pac. 151 the trial court held plaintiff estopped to demand right to take his water through defendant's high line canal.

This court, although holding that the petition requesting the change did not constitute a contract for a change of place of diversion, said:

" . . . it does seem to be sufficient to sustain a finding that Jensen represented he wanted to take his water through the lower canal."

This court quoted from 21 C.J. P.1216 as follows:

"Where a person with actual or constructive knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, **or that he will offer**

no opposition thereto, such person is estopped from repudiating the transaction to the other's prejudice."

The defendants, in reliance on Penrod's representations of abandoning his right to make further purchases did purchase the land in question. Paid the county for the taxes which Penrod and the bank had not paid for the years 1931 to 1941 and paid all taxes since 1941.

The record shows that they passed up purchasing the land in Section 30 because Penrod refused to let loose, but this was purchased after he had let loose by his declared abandonment on June 3, 1940 made to Earl Barney who had previously informed his son, Oren E. Barney, that Penrod would not release the land in Section 30.

We submit that plaintiffs are not bona fide purchasers without notice for value of the land in issue.

Plaintiffs, P. P. Thomas, Joseph Hanson, Max Thomas and Chas. H. Dixon all knew that the deed from O. A. Penrod to the bank had been withheld from record from Jan. 11, 1938 till Dec. 29, 1944.

P. P. Thomas and Joseph Hanson joined with the Commercial Bank of Spanish Fork in making the conveyance to Elberta Land & Water Co. (Exhibit "I").

There is no evidence that plaintiffs own or claim any land in Elberta distinct other than that conveyed to O. A. Penrod by Colorado Development Co. (Exhibit "G") which exhibit shows the same land as that conveyed to

plaintiffs by the Commercial Bank of Spanish Fork, P. P. Thomas and wife and Joseph Hanson.

The plaintiffs were all advised of the equity claims pleaded by defendants in their answer. The reply does not plead bona fide purchase for value with out notice. None of plaintiffs except P. P. Thomas testified as a witness for plaintiffs. He never testified that the bank was not paid in full by the assessments collected. Nor did he testify that the payment made to Penrod which passed through his hands as secretary and treasurer of Current Creek Irrigation Co. did not pay the bank.

P. P. Thomas did not testify that he had no knowledge of Penrod's representations at the county commission meeting on June 3rd, 1940.

The trial court, in its memorandum decision on page 14, observed:

"Certainly where the record is clear that the two Thomases and Joseph Hanson were active with Penrod in all transactions concerning the property, and all three are of the partnership and party plaintiffs, the finding of notice through indentity of the individuals is stronger in this case than in the Bracken -vs- Chadburn case supra."

We call the court's attention to the case of **Bracken v. Chadburn** 55 Utah, 430; 185 Pac. 1021, and submit that the facts in that case are less convincing, that the corporation taking from the party against whom the

estoppel was raised had notice of the facts, than the records in this case.

It was there contended that the defendant, New Castle Reclamation Company was an innocent purchaser, without notice, for a valuable consideration. We submit that the facts in this case are as convincing that the plaintiffs here had notice through the Thomases and Joseph Hanson as they were in that case that defendant, Newcastle Reclamation Co. had notice through J. X. Gardner.

The court observed in that case at page 437 (55 Utah Report):

" . . . . The plaintiffs were in the open and continuous possession of the canal and the right to use and control the water running through it during the years 1908 to 1915, the date of the alleged purchase."

May we observe that the defendants have been in possession of the property since September, 1940.

The plaintiffs, by their reply, charge the defendants with possession of the property from 1941 and seek payment for the grazing of defendants' stock thereon.

This use by defendants was as open as the use by plaintiffs in the Chadburn case.

Further, Section 69-1-9 U.C.A. 1943 provides that knowledge of a partnership acting in a particular matter acquired while a partner or then present to his mind when acting in a particular partnership matter, when he

could and should have communicated it to the acting partner, operates as notice to or knowledge of the partnership, except in case of a fraud on the partnership committed by or with the consent of that partner.

P. P. Thomas had knowledge of the facts constituting the estoppel. No member of partnership asserted fraud by P. P. Thomas to prevent operation of the statute. He and Joseph Hanson, Max Thomas and Chas. H. Dixon knew that defendants were in possession of the land involved, and all of plaintiffs are charged with the knowledge imparted by public records that defendants claimed the land as purchasers from Utah County.

No member of the plaintiff partnership **ever came forward to advise the court** that he was given no notice by Thomas.

P. P. Thomas testified that he recalled the circumstances of the preparation and the signing and the execution of plaintiffs' Exhibit "I" (Tr. 96).

He further testified that at the time when the deed, Exhibit "I" was executed, he had no recollection or knowledge of having made the statement which the minutes Exhibit "7" show he made, to-wit:

"I am not at all interested in the land here."  
(Tr. 96 & 97).

Mr. Thomas did not testify that he had no recollection of having said, on December 11th, 1937 at the meeting at Elberta, what he is reported to have said, to-wit:

"Mr. Thomas spoke as a representative of

the bank from which Penrod borrowed his money. Also was a property holder. Said that at first they were not interested in redeeming this land but since the meeting the other night they are much interested to be one of us and get things in running order so that they can sell their sixty acres." (Exhibit "8").

P. P. Thomas did not testify that he had no recollection of Article 7 of Articles 1439, which provide for the payment of \$3500.00 to O. A. Penrod, D. Penrod, P. P. Thomas, Joseph Hanson and the Commercial Bank of Spanish Fork, or either of them.

P. P. Thomas didn't testify that he had no recollection that he had control of the \$3500.00 payment to Penrod and the bank, and that he dispursed the same as secretary-treasurer.

Joseph Hanson, one of plaintiffs, didn't testify that he hadn't forgotten what he heard Thomas tell the people of Elberta on December 11th. (Exhibit "8").

The meeting of the Current Creek Irrigation Co. which authorized the payment to Penrod on May 29, 1939 (Tr. 60) was held in the Commercial Bank of Spanish Fork. The vice president of the bank, Joseph Hanson, was president of the irrigation company. The president of the bank, P. P. Thomas, was secretary-treasurer of the irrigation company.

Mr. Thomas didn't testify that he had forgotten Exhibits "J", "K" and "L". Mr. Thomas testified on cross

examination that he recalled attending the meeting of December 8th, 1937 (Tr. 98). He testified that he remembered speaking at that meeting. (Tr. 100).

The statement of Mr. Thomas that he had no recollection of the statement made by him on December 8th, 1937 when the partnership received Exhibit "I", is testimony to be weighed against circumstantial evidence in the case and is not conclusive that he had neither recollection or knowledge.

The trial court found the issue against Thomas. We submit that the court was amply justified in reaching the conclusion that Thomas had forgotten and was not without knowledge of the statement made and of all of the other facts showing, not only that he had knowledge but that he actively participated and directed proceedings which carried out the plans discussed on December 8th and 11th, 1937.

The record does not disclose when the partnership, Elberta Land & Water Co. was formed. Mr. Thomas testified that he didn't have the date in mind. (Tr. 98). The first affidavit of doing business under an assumed name, Exhibit "O", would indicate that the partnership was formed not later than March 3rd, 1945. Mr. Thomas never testified that between the date the partnership was formed and the date Exhibit "I" was executed he had no recollection of having made the statement that he was not interested in the land.

The Thomases and Hanson knew of the representa-

tions made by Penrod on December 8th and 11th, 1937, that the people of Elberta could buy what he got for \$2500.00 and incidental expense.

The Commercial Bank of Spanish Fork took the deed, (Exhibit "H") with knowledge on the part of P. P. Thomas and Joseph Hanson, president and vice president of the bank, that the offer had been made. That knowledge persisted with them certainly until the deed was recorded. The people of Elberta were entitled to rely on the promise. The deed, (Exhibit "H") while unrecorded, gave them no notice that Penrod had withdrawn the offer and the purchase by defendants from Utah County, while the deed was still unrecorded, gave them a good title against the bank, against Thomas and against Hanson.

Robert E. Clements who owned irrigated land at Elberta under the project and who signed plaintiffs' Exhibit "J", was entitled to purchase from the county the land in question. Defendant received a conveyance from Clements of his irrigated land and recorded that deed December 30, 1940, nearly one year before the quit claim deeds from Utah County to the defendants were executed. (Ex. "1" & "2".)

It is well settled that a person entitled to the benefit of an esoppel may transfer it by transferring the estate to which it relates. *Branson v. Worth*, 17 Wall (U.S.) 32, 21 L.Ed. 566.

When defendants obtained their deeds from Utah County, (Exhibit "1" & "2") on November 3, 1941, they

had all rights which Clements would have had to purchase from Utah County and to set up the same equitable estoppel which would have been available for their grantor, Robert E. Clements.

Counsel, on page 26 of their brief, quote from 19 Am. Jur. 645 in support of the contention that the statement of O. A. Penrod, made on June 3rd, 1940 was addressed to and designed solely for the information of persons other than the defendants. The author from whom counsel quoted in the same paragraph and on the same page, used the following language not quoted by counsel:

" . . . . An intention to influence the action of the particular person claiming the estoppel is not necessary in all cases. It is enough if there was a holding out to all **who might have occasion to act** of the existence of a certain state of facts which they might assume to be true and upon which they might act . . . . "

Under subdivision 3 of counsel's brief, at page 17, it is charged that the court failed to make findings on all the material issues involved in the case. Yet no assignment was made that the court erred on all material issues.

Our attention has just been called to the fact that the contents of Articles of Incorporation Nos. 1417, 1431 and 1439 have not been made available to the clerk of

the district court nor submitted by the clerk as a part of this record.

Plaintiffs offered the Articles of Incorporation and stated that if necessary they would be willing to furnish copies. (Tr. 91.)

We respectfully submit that the appeal in this case should be dismissed for failure to comply with rule 8, and for the reasons set out in Point I of this brief.

On the merits of the case we submit that the judgment should be affirmed.

Respectfully submitted,

GEO. W. WORTHEN,

Attorney for Respondents.