

2001

# Lowell L. Brady v. John E. Fausett, George L. Smith : Brief of Appellant

Utah Supreme Court

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### STATEMENT OF NATURE OF CASE

This action was brought requesting declaration of invalidity and unenforceability of a document entitled "Agreement to Sell Cattle and Lease Land With Option to Purchase" and for damages.

### DISPOSITION IN THE LOWER COURT

The trial court found the document to be a valid and enforceable agreement and held that Appellant had no cause of action. The court also supplied a description of lands which it found to be covered by the document in dispute and held that Respondents are entitled to specific performance of the agreement it found to exist.

### RELIEF SOUGHT ON APPEAL

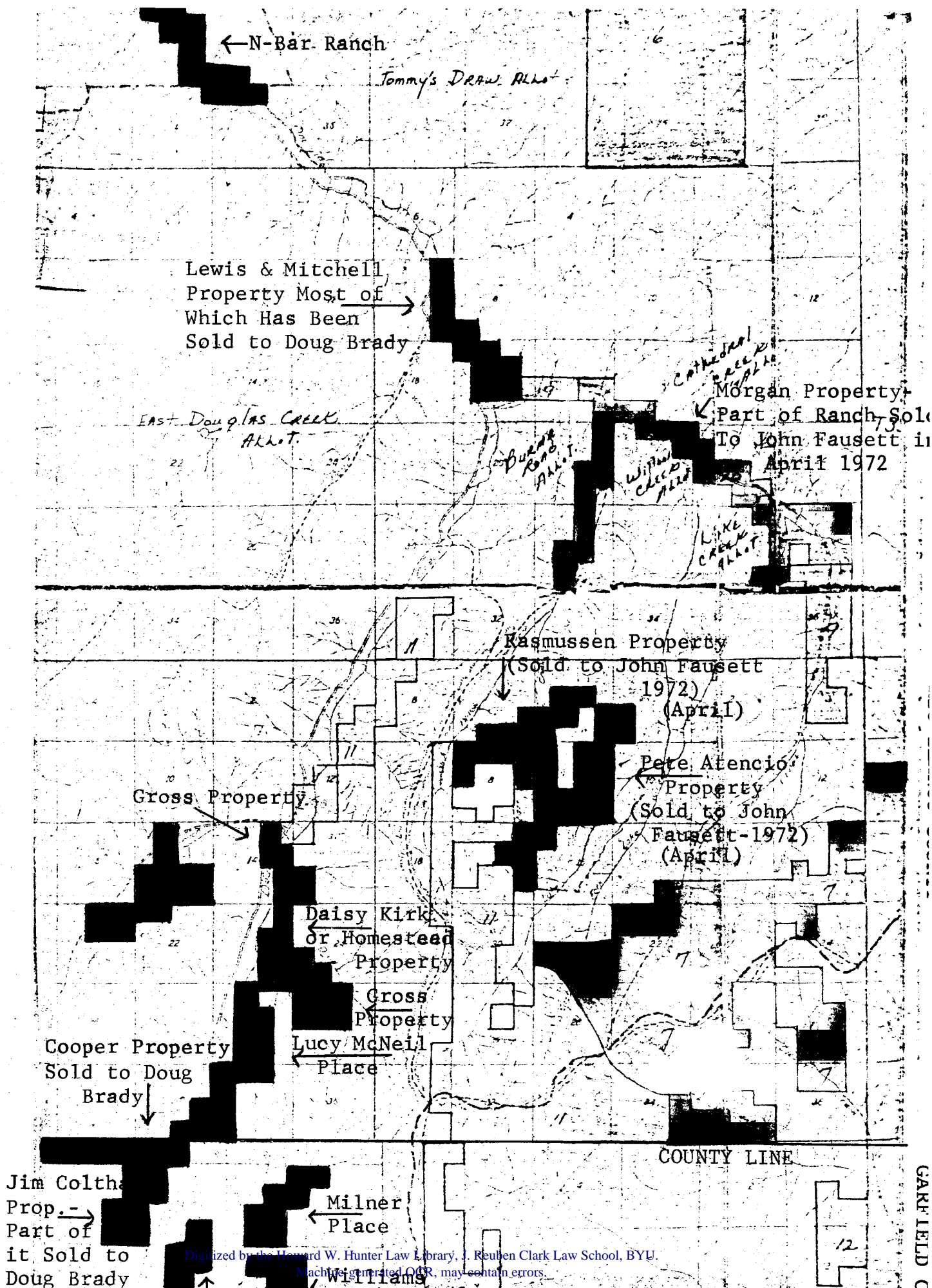
Appellant seeks to have this court reverse the Judgment and Decree of the trial court and hold that the document entitled "Agreement to Sell Cattle and Lease Land With Option to Purchase" is invalid and unenforceable.

### STATEMENT OF FACTS

Appellant, Lowell L. Brady, is a 75-year old man who

has owned and operated various properties with livestock operations near Rangely, Colorado, since the 1920's. (TR. 33)

These properties are designated in purple on the map at Page 3 of this brief and are referred to in this brief, as they were by both Mr. Brady and Mr. Fausett in their testimony at trial, by the names of the separate ranches. (TR. 32, 33) Two of the ranches had passed out of Mr. Brady's control at the time of the July 25, 1972 document which is of concern in this case. One of these two ranches is referred to by Mr. Fausett (TR. 8) as a big ranch and good cattle ranch which Mr. Fausett purchased from Mr. Brady in April of 1972 consisting of 1,720 acres and B.L.M. grazing permits. (TR. 8, 32, 33 & 91) Another had been sold to Mr. Brady's son, Douglas Brady. (TR. 134) In addition to these two ranches, Mr. Brady had acquired from time to time properties operated as separate ranches by previous owners, and he as well as Respondents and others continued to call these ranches by the names of previous owners; i.e., N-Bar (TR. 293 & 321), Williams, (TR.





32 & 259), Milner (TR. 32), Gomez (TR. 32), McNeil (TR. 32, 214), Gross (TR. 32), Morgan Place (TR. 32, 241), Ralph Rasmussen (TR. 32), Pete Atencio (TR. 32), John W. Rasmussen (TR. 32), Daisey Kirk Place or Homestead (TR. 131, 224, 293, 295, & 305). One of the separate ranches is referred to in Paragraph 3 of the "Agreement to Sell Cattle and Lease Land With Option to Purchase". The cattle were to be delivered to "Seller's Homestead Ranch (the Daisy Kirk Place)". (Exhibit 4)

As indicated on the map, which is a copy of the map used and referred to at the trial (TR. 31 & 32), the lands involved are non-contiguous parcels separated from each other in some cases by many miles, and they are interspersed among lands owned by others. Three of the separate properties are located in Garfield County, Colorado, and the remainder in Rio Blanco County, Colorado. Some of the lands were mortgaged to the Connecticut General Life Insurance Company and others were not. (TR. 128) Some of the lands were used as base lands to maintain U. S. Bureau of Land Management Grazing privileges. Others had no grazing privileges attached to them and were operated

separate from any connection to B.L.M. lands. (TR. 109)  
In addition, Mr. Brady operated a ranch in the same general area in the 1920's before he acquired most of the lands which he now owns and acquired after 1942 (TR. 33).

Mr. Brady is the father of four sons and two daughters. (TR. 31) In March or April of 1972, Mr. Brady became acquainted with Respondent, John E. Fausett, and an unusually close relationship developed between the two men. (TR. 7, 9, 36) Mr. Brady's wife of fifty years was being cared for in a convalescent home at Roosevelt, Utah, near Mr. Fausett's home. Mrs. Brady had suffered from serious illness, including a stroke, since 1965. (TR. 9, 36, 37, 38, 39 & 40) Mrs. Brady had been in Roosevelt for over a year, having been moved there after being kept at the Utah State Hospital in Provo, Utah, as well as in Las Vegas, Nevada, and in Manti, Utah. (TR. 37, 38, 39 & 40) During the time Mrs. Brady was in Roosevelt, Mr. Brady commuted back and forth between his cattle operation in Colorado and the Roosevelt convalescent home almost daily, attempting to be with his wife as much as possible yet

still hold onto the ranching operation into which he had put his entire life. (TR. 9 & 41)

Mr. Brady, during this same period of time, experienced a falling out with two of his sons who had previously worked with him in his livestock operation, and they now refused to lend a hand. (TR. 11, 41 & 42) Financially, Mr. Brady was in trouble and faced the prospect of losing his entire operation. (TR. 152) Under the pressure of these events, Mr. Brady himself became physically ill, and mentally and physically exhausted, and he realized he could no longer carry on. (TR. 26, 42, 43, 48, 53, 79, 80, 205, 208, 209 & 214)

Mr. Brady stayed nights and was taken care of at the Fausett home over a period of many weeks during the last of Mrs. Brady's illness before she died in June of 1972. (TR. 9, 46) Mr. Brady came to confide in Mr. Fausett and trust him with his problems (TR. 47 & 48) and his financial circumstances. (TR. 260) Mr. Fausett realized that Mr. Brady had placed his trust in him (TR. 267) and told other people about it. (TR. 10, 264, 267, 268) As Mr.

Fausett learned that Mr. Brady was incapable of managing his business and saw Mr. Brady so sick he couldn't work (TR. 53), he took a hand in Mr. Brady's affairs. Mr. Fausett worked with Mr. Brady's cattle, bought Mr. Brady a new pickup truck, (TR. 12, 23, 24, 50, 51 & 52) and generally concerned himself with Mr. Brady's interests.

As Mr. Brady's financial circumstances grew more serious, he asked Mr. Fausett to help him by managing or leasing his lands until he could get back on his feet mentally and health-wise. Mr. Fausett testified at the trial:

"I told him at that time I was not interested in the property because I did not feel that it was fair to him, or me or anyone else to take the place at this time."  
(Emphasis supplied)

(TR. 26) Mr. Fausett understood the pressures under which Mr. Brady was laboring and admitted in the quoted sentence that Mr. Brady was in no condition to deal on a major transaction. Mr. Fausett reported to Lois Adams, Mr. Brady's daughter, at a later time that he:

"didn't see how . . . (Mr. Brady) . . . had been able to keep from having a mental breakdown, that he had spent fifty to sixty nights in his home the previous ten months, and that Mrs. Fausett had cared for

him as he was very ill, and . . . that when he was trying to get together the cattle that Spring, he was trying to gather them by himself. And John told me that he saw my father going along with a string of cans shaking them behind the cattle trying to get at these cattle alone, and then he would stop and break down and cry, and then he would pick up a stick and go along, and try to gather cattle without any other help." (TR. 214)

Mr. Brady asked Mr. Fausett to help him arrange a loan to meet his financial obligations until he could get back on his feet and fend for himself. (TR. 50 & 266) Mr. Fausett contacted Respondent, George L. Smith, and Smith and Fausett looked over the Brady operation and various properties. When Respondents realized that Mr. Brady was in no condition physically or mentally to continue to operate his properties, they decided rather than offer financial help by way of a loan, they would attempt to acquire the properties. (TR. 55 & 58)

Mr. Brady told them he was in no condition to talk that kind of business (TR. 56) and let them know that in any event he would never sell the Milner Place. The Milner Place was special in that it had been purchased by

Mr. Brady from the original patentee, and it was there that a cabin had been built where the Brady family had lived when the children were growing up. These lands had great sentimental value to Mr. Brady, especially at that time near his wife's death. He had communicated this feeling to Respondents and told them he had two daughters to whom he had promised these lands. (TR. 34, 35, 57 & 58) On the occasion when Respondents Smith and Fausett were shown this place in early July of 1972, Mr. Brady broke down when he told them about his feelings concerning it. Mr. Smith said: "Mr. Brady, don't never sell that place." (TR. 57 & 58) and Mr. Brady answered: "I don't intent to." There was never any question that Mr. Brady did not intend to part with the Milner Place under any circumstances.

When Mr. Fausett learned that Mr. Smith would join him and back him financially if he could get Mr. Brady to turn the operation over, he began anxiously to pursue the matter. He proposed that Mr. Brady sell to himself and Mr. Smith an interest in his operation (TR. 184) which

was rejected. Later he proposed a joint project which would guarantee Mr. Brady \$47,000.00 a year profit. (TR. 58 & 255) Mr. Brady also rejected that proposal, but suggested a sale of his cattle and a ten-year lease on the land at a rental of \$25,000.00 per year. With the sale of the cattle and the earlier sale of lands to Mr. Fausett, Mr. Brady felt he would have his financial obligations taken care of, an income of \$25,000.00 a year, and freedom from the responsibility of operating the ranch. This arrangement was agreed upon. (TR. 58, 59, 137, 138, 255 & 256)

During the latter part of July, Brady, Fausett and Smith met at the office of Hugh W. Colton, an attorney in Vernal, Utah. The purpose of the meeting at Mr. Colton's office was to prepare an agreement regarding the sale of Mr. Brady's cattle and a ten-year lease of his lands. (TR. 69) The annual rental of \$25,000.00 was agreed upon prior to the meeting. (TR. 68, 69)

When Mr. Brady arrived at Mr. Colton's office, Mr. Fausett and Mr. Smith were already there. A discussion,

and later an argument and disagreement ensued wherein Mr. Colton, Mr. Fausett and Mr. Smith attempted to persuade Mr. Brady to sell, not just lease his lands. (TR. 69 & 70) Mr. Brady insisted he did not want to sell. (TR. 69 & 70) In addition, he argued that even if he were to sell, some of the lands had to be reserved for his two daughters. Both Mr. Colton and Mr. Brady referred to the disagreement when they testified at trial. (TR. 70, 242) Although Mr. Colton was in theory Mr. Brady's attorney, he urged Mr. Brady to sell and took an active part in attempting to set a price on the lands, contrary to Mr. Brady's wishes. (TR. 69, 88 & 89) Because the argument caused Mr. Brady great distress from a severe prostate problem, he was forced to leave the office for some time to visit the rest room. (TR. 70)

When Mr. Brady returned, he was told that Mr. Colton, Mr. Fausett and Mr. Smith had gone to a nearby restaurant and that he was to go there to meet them. (TR. 70) The parties talked further and when they returned to Mr. Colton's office, Mr. Brady was presented with an



already typed document entitled "Agreement to Sell Cattle and Lease Lands With Option to Purchase." (Exhibit 4)

This document set forth the agreement of the parties regarding the sale to Fausett and Smith of Mr. Brady's cattle. It also contained provision for a lease of lands with an annual rental of \$25,000.00; the term of the lease, however, was for five (5) years rather than the previously agreed upon term of ten (10) years. In addition, the document provided for an option to purchase lands which Mr. Brady insisted should not be included.

Mr. Brady knew that without a sale of his cattle he would probably lose his holdings to his creditors. Respondents, however, had given him a choice of accepting the entire transaction on their terms in effect, or losing the property to the bank. This, of course, including the option to purchase, after Mr. Brady had taken Mr. Fausett into his confidence and revealed his personal affairs to him, and after Mr. Fausett had led Mr. Brady to rely on receiving payment for his cattle to extract himself from his financial difficulties. Now he had to either accept

the deal on Respondents' terms or he would get no money.

The document entitled "Agreement to Sell Cattle and Lease Land With Option to Purchase" was prepared with such haste that when it was submitted to Mr. Brady it was incomplete in that it had no description of the properties to be included. The document recites as follows:

"Seller agrees to and hereby leases to Buyers the following described real property situated in Rio Blanco and Garfield Counties, Colorado, for a period of five (5) years, at an annual rental of \$25,000.00 per year. The year's rental to be paid on or before January 2, 1973, and on January 2 of every year thereafter during the five-year term of this lease. The said land leased herein is described as follows:" (Exhibit 4, Paragraph 7)

The document then states: "(Description will be placed here)" (Exhibit 4) in the center of the page. No property description was placed in the document at that time as there had been no agreement reached as to which lands were to be included or excluded. The transcript shows without contradiction that Mr. Brady insisted on withholding lands and would not agree otherwise (TR. 88 & 89), and that Mr. Smith would not agree to that. (TR. 242) No agreement was ever reached on that point and thus no

description was placed in the contract. If it had been otherwise, a reference to all property could easily have been made. Mr. Brady had maintained that he did not want to sell at all, and at the very least that he had to hold certain lands for his daughters. Mr. Brady's objection to the sale of all lands was stated unequivocally and without contradiction at the time the document was discussed at Mr. Colton's office. At the trial, Mr. Brady said:

"A: Right while I was in Mr. Colton's office I said, 'Hugh, I'm terribly bugged about this thing'."

"Q: What did you mean, 'bugged'?"

"A: Well, I was all shook up. I told him I says 'This isn't the way we started out with this deal, because it had been changed to a five-year lease and there had . . . there was an option here.' And he said, 'Forget it'. He said, 'You'll never be able to . . . You've got all the money that you need.' And I said, 'Hugh, there's a sentimental reason here that you're over-looking'."

At the time Mr. Brady placed his signature on the agreement without any property description to get the cattle sold, he said:

"A: 'I told Mr. Colton, I said, 'There are

lands here that I'm turning to my daughters'. I have daughters that I told them that I would keep the Milner Place (the) the Williams Place for my family. And he said 'Mr. Brady', he said, 'I've seen so much of that over in Dry Fork, right over here, (indicating) I've handled many cases, and' he said, 'let it all go.' And I said, 'No, Mr. Colton. I can't do it because I promised my family that I would keep part of these lands.'" (TR. 88 & 89)

Mr. Fausett also testified concerning a discussion in Mr. Colton's office at which Mr. Brady said, "I would like to keep the little area that I have fenced around the Milner Cabin". (TR. 15)

The transaction was so hurried and entered into under such pressure, Mr. Brady being in a state of opposition, confusion and exhaustion, that no attempt was even made to specifically describe what was to be included. (TR. 71)

Mr. Brady took a copy of the document with him and left. He had confided in Mr. Fausett as a father would in a son, and had counted on the sale of cattle to clear up his financial obligations. Now, because Respondents had been taken into Mr. Brady's confidence, he was put

into a position of either entering into a transaction which he knew he wasn't ready to handle and did not want anything to do with or lose the sale of cattle he had counted on to extract himself from his financial difficulties. Mr. Brady went to Colorado (TR. 74) where Mr. Fausett continued to pressure him to go through with the deal. When Mr. Brady told Mr. Fausett he was sick and wanted to be left alone, Mr. Fausett expressed concern that Mr. Brady would die before the papers were signed and offered to take him to a doctor in Salt Lake City (TR. 79 & 82) after the papers were signed.

Mr. Brady discussed the matter with the Colorado P. C.A. officials (TR. 75) and one of his sons and told the son that he had no intentions of signing the contract (TR. 176)

The P.C.A. officials told him the document was poorly prepared and that he didn't have to sign it if he didn't want to (TR. 76). He promised one of his daughters he wouldn't sign any papers until he had talked to her. (TR. 209, 210)

Mr. Brady, as soon as he was able, returned to Utah to tell Mr. Fausett. (TR. 80) Mr. Brady and Mr. Fausett met and argued late into the night. (TR. 80 & 81) Mr. Fausett took the approach of threatening to pull out of the deal entirely and in fact turning back to Mr. Brady the ranch which he had previously purchased from Mr. Brady. (TR. 261 & 262) Because of his close relationship with Mr. Brady and the confidence from which he benefited, Mr. Fausett knew well that Mr. Brady, at that time, was in no condition to handle his cattle by himself and desperately needed to get the money from their sale and the earlier ranch sale to Mr. Fausett. (TR. 262)

The next morning, Mr. Brady being very ill and exhausted, was driven by Mr. Fausett to Vernal where Mr. Brady placed his signature on the document without discussing it with any member of his family despite his prior practice and promise of doing so. (TR. 187, 188, 197, 209, 210) Mr. Brady again expressed his refusal to include the Milner and Williams' Places. Mr. Colton told him that he would have to come back and finish up the contract by inserting the property descriptions of the lands

to be included since he was the only one who knew what lands were to go into the agreement, but that the incomplete agreement would do for now. Mr. Brady is still confused and does not know for sure what happened that he put his signature on an agreement without any property description. (TR. 71, 128) He said at the trial:

"I don't hesitate in making a statement that I was so rum-dum after the condition which I had gone through that I didn't . . . I've never figured out yet hardly what happened from then on. I never figured out how come that I would sign an agreement of that kind."  
(TR. 71)

Mr. Fausett then drove Mr. Brady, still very ill, to the Vernal Airport from where he flew to Las Vegas, Nevada. Mr. Brady was confined in bed at the home of his daughter for approximately forty days. (TR. 84, 85, 210) His son-in-law described his condition at the time as being completely shell-shocked and mentally incapable of making any decisions. (TR. 220) During this time, Mr. Fausett took possession of the Brady properties and cattle as he was to care for and manage the cattle until time to count and ship them.

In October of 1972, while Mr. Brady was still sick

Respondent Fausett secured from Hugh Colton a copy of the document entitled "Agreement to Sell Cattle and Lease Lands With Option to Purchase" and took it without Mr. Brady's consent or knowledge (TR. 295, 318, 319) to the Meeker, Colorado Office of the Bureau of Land Management and requested that all of Mr. Brady's B.L.M. grazing privileges be transferred to Mr. Fausett and Mr. Smith. (TR. 16, 17, 106 & 165) When the B.L.M. observed that the document was incomplete and that it did not contain any property description, they required Mr. Fausett to furnish a document with the property description before any grazing privilege could be transferred. A description of some lands was secured, taped to a copy of the document entitled "Agreement to Sell Cattle and Lease Lands With Option to Purchase", and filed with the B.L.M. (Exhibit 12) The description of the properties inserted in the document described some lands which were not even owned by Mr. Brady, yet failed to describe other lands which were. On the basis of this document, the Bureau of Land Management transferred to Fausett and Smith all of Lowell



Brady's grazing privileges with the B.L.M., consisting of some 60,000 acres of land. This action effectively deprived Mr. Brady of any opportunity to require Fausett and Smith to sit down and finalize the agreement.

When Mr. Brady determined what had occurred, he formally protested the transfer of Grazing Privileges by the B.L.M., which protest is now pending in the Department of the Interior.

All during the Winter of 1972 and Spring of 1973, Mr. Brady attempted to get an accounting from Mr. Fausett as to the number of cattle Mr. Fausett claimed to have received (TR. 86 & 87) and to follow up on what Mr. Brady considered the unfinished business of completing the transaction by reaching an agreement on which lands were to be included. (TR. 106, 107, 108, 109 & 115, and Exhibits 16 and 17)

As Mr. Brady recuperated from his illness in the Spring of 1973 and his attempts to talk with Mr. Fausett to clear up what he considered to be the unfinished business of finalizing the incompleted transaction brought no results, in

the early Summer of 1973, Mr. Smith and Mr. Fausett were given written notice that Mr. Brady did not consider himself bound by the agreement, and eventually a notice to quit was served on Fausett and Smith and the instant action was filed to have the incomplete document declared invalid. (TR. 115 and Exhibits 16 & 17)

### ARGUMENT

#### I.

IN EQUITY CASES THE APPEAL MAY BE ON QUESTIONS OF BOTH LAW AND FACT.

Article VIII, Section 9, of the Constitution of the State of Utah, relates to appeals from District Courts and provides in pertinent part as follows:

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

The case before the Court being a case in equity (TR. 1 & 2) involving questions of right to specific performance under an asserted contract, the Supreme Court has the responsibility to review the evidence. Nokes v. Continental Min. & Mill Co., 6 Utah 2d. 177, 308 P.2d 954 (1957).

In fact it is the duty of the Supreme Court under Section

9 of Article VIII of the Constitution of Utah to review the facts, make an independent analysis of them, and determine what findings and conclusions can be properly drawn from the evidence. Crockett v. Nish, 106 Utah 241, 147 P.2d 853 (1944).

## II.

THE DOCUMENT ENTITLED "AGREEMENT TO SELL CATTLE AND LEASE LAND WITH OPTION TO PURCHASE" WHICH DOES NOT DESCRIBE THE LANDS TO BE INVOLVED BUT STATES THAT A DESCRIPTION WILL BE INSERTED LATER IS UNENFORCEABLE.

The Agreement before the Court is unenforceable because it does not meet the requirements of the Statute of Frauds. Furthermore, to supply a property description which the parties themselves did not agree upon would violate the parol evidence rule. Davison v. Robbins, 30 Utah 2d., 388, 517 P.2d 1026 (1973). There appears to be no conflict in the rule that blank deeds or blank papers executed as was the "Agreement to Sell Cattle and Lease Land With Option to Purchase" are void and do not convey any interest in or title to land. Utah State Building & Loan Ass'n. v. Perkins, Et. Al., 53 Utah 474, 173 P. 950

(1918). A long line of cases establishes that in order to comply with the Statute of Frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony. Barth v. Barth, 143 P.2d 542 (Wash. 1943); Martinsen v. Cruikshank, 3 Wash. 2d. 565, 101 P.2d 604 (1940). Papers executed in blank as to the description of the property intended to be conveyed are a nullity. Utah State Building and Loan Ass'n. v. Perkins, Et. Al., 53 Utah 474, 173 P. 950 (1918); Mesich v. Board of County Commissioners of McKinley County, 129 P.2d 974 (N.M. 1942); Dahlberg v. Johnson's Estate, 211 P.2d 764 (Ida. 1949).

This Court recently stated in the case of Davison v. Robbins the rule which is applicable in the instant case.

"Parol evidence will not be admitted to complete a defective description, or to show the intention with which it was made. Parol evidence may be used for the purpose of identifying the description contained in the writing with it's location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated, and supplying a description thereof which they have omitted from the writing.

There is a clear distinction between the admission of oral and extrinsic evidence for the purpose of identifying the land described and applying the description to the property and that of supplying and adding to a description insufficient and void on its fact."

Davison v. Robbins, 30 Utah 2d. 338, 517 P.2d 1026, (1973) at 342.

The context in which the instant case came before the Court is a request for a declaration as to whether or not specific performance of the contract would be ordered. It is elementary that the law will not enforce specific performance of a contract unless the contract is definite, certain and complete. Equity cannot make a contract for the parties when they themselves have not agreed upon its terms. Allen v. Kitchen, 16 Ida. 133, 100 P. 1052 (1909); Brooks v. Allard, 244 C.A. 2d 283, 53 Cal.Rptr. 82 (1966); Corona Unified School District of Riverside County v. Vejar, 165 C.A. 2d. 561, 332 P.2d 294 (1959); Herrmann v. Hodin, 58 Wash. 2d. 441 364 P.2d 21 (1961); Meadowlark Investment Corp. v. Croeni, 237 Ore. 535, 392 P.2d 327 (1964). In the instant case, any evidence introduced by Defendants would not be that of

identification of a description good on its face; rather it would be for the purpose of supplying a description omitted originally from an incomplete and indefinite contract and is therefore inadmissible for the purpose of supplying that to the contract.

Mr. Brady has contended that the parties never agreed on what lands were to be placed in the incomplete document entitled "Agreement to Sell Cattle and Lease Land With Option to Purchase". That this is so is evidenced by the fact that Defendants themselves have claimed in four separate instances that the document should have included at least four different property descriptions. First, Respondents took the position at trial that all of the lands owned by Lowell Brady in the State of Colorado were a part of the transaction. Notwithstanding that assertion, the Respondents supplied the Bureau of Land Management a copy of the document entitled "Agreement to Sell Cattle and Lease Land With Option to Purchase" (TR. 165) containing a description of properties which not only included lands not owned by Mr. Brady, but also did not include lands

which actually were owned by him. Even at the time of trial, Respondent Fausett remained under the misconception that all lands owned by Lowell Brady were tied up with the B.L.M. as base land. This was not true, however, as the entire 440-acre N-Bar Ranch was not used as B.L.M. base land. The reason for this misconception on the part of Respondent stems from the fact that he and Mr. Brady never discussed selling all of the properties owned by Mr. Brady, and when Mr. Fausett found descriptions for approximately 2,120 acres, he figured he had all Mr. Brady owned.

Third, Fausett and Smith were obligated under the agreement to pay all of the real estate taxes on the lands involved in the contract. (Exhibit 4, Paragraph 8) The Respondents for two years after 1972 did not pay taxes on the Williams and Milner Places, the lands which Mr. Brady had insisted on keeping. Mr. Brady paid those taxes both years and has done so since that time, which was in accordance with his understanding that those lands were retained by him. Interestingly, Fausett claimed at trial that he paid taxes on all the property he bought from Mr. Brady,

(TR. 28) yet the exhibits show without dispute that Mr. Brady, not Fausett, paid those Garfield County taxes for 1972, 1973 & 1974, following the contract; also that Mr. Brady paid all taxes on all lands for 1973 & 1974. (TR. 103, 104, 159, 160, 290 and Exhibit 14)

Respondents' failure to pay taxes on those particular lands support Mr. Brady's position that those lands were never to have been included in the agreement.

Fourth, Respondents have asserted that they purchased 2,120 acres from Appellant. (TR. 27) Even under oath while answering interrogatories with the help of their attorneys, Respondents claimed to have purchased 2,120 acres. At trial, Respondents' counsel persisted in using the 2,120 acre figure. (TR. 139) The Appellant actually owned 2,560 acres in Colorado. If Defendants' statement is true, they therefore did not purchase 440 acres which Appellant would, of course, therefore retain. This is consistent with what Appellant has claimed from the beginning. He would voluntarily consider 2,120 acres as being the agreement, thus leaving him the approximately 400 acres which he desired to retain. Respondents, how-



ever, took the self-contradicting position that they were to have all of Mr. Brady's lands, but only 2,120 acres of them. There could be no clearer evidence to support the Plaintiff's position that no agreement was actually reached. The different positions taken by the Respondents are so inconsistent that it is clear that they themselves have not come to any agreement as to what was to be involved.

The trial court in its Memorandum Decision dated March 24, 1975, based its conclusion that a valid contract had been reached on two points, neither of which can be supported by the evidence. First, the Court found that Plaintiff's lawyer, presumably Mr. Hugh Colton, who appeared as a witness in the case against Mr. Brady (TR. 328) and was never paid anything for the contract by Mr. Brady, (TR. 117) was given full authority from Plaintiff to ascertain the correct legal descriptions of the properties to go into the agreement. Nothing in the evidence supports that conclusion. To the contrary, all the evidence, including the testimony of Mr. Fausett and Mr. Colton (TR. 243) was that Mr. Brady was to furnish the descriptions. (TR. 16) He alone knew what he was going to include. Mr. Colton

sent for some abstracts to only part of the property (TR. 128). He told Lowell Brady he was the only one who knew what was to go into the deal and encouraged him to come finish it up. (TR. 73, 119) Even if he were acting pursuant to an authorization by Mr. Brady to include some property descriptions, the fact remains undisputed that he never did do that and has not done so even now, three years later. Obviously, he did not consider himself authorized as the court found him to be. The finding is not supported by the record, and if it were, it would not cure the Statute of Frauds defects since no description was ever inserted.

The second point on which the Court relied in reaching its conclusion that specific performance was appropriate was that Respondents had partially performed, and that Appellant had accepted benefits therefrom, which estopped Appellant from asserting that the agreement was unenforceable.

Presumably the acts relied upon to cure the lack of legal description in this case involved the taking of possession by Respondents. Mere possession alone is insuff-

icient. Van Trotha v. Bamberger, 15 Col. 1, 24 P. 883 (1890). Moreover, the evidence clearly shows that Mr. Brady did not really deliver possession in any true sense, but that Respondents took possession from him during his time of sickness. When Respondents took possession, it was consistent with their purchase of the cattle. It might also be construed as consistent with a lease of some lands, but is not persuasive in an argument regarding which lands were to be under any lease or option.

It is factually significant that the Respondent established a new camp. Nothing in the evidence indicates their use of the cabin on the Milner Place which Mr. Brady had insisted on keeping. Neither did the Respondents make any of their improvements on the Milner Place, the Williams Place, or the Gomez Place, an indication of their uncertainty about which lands were to be retained by the Appellant. In addition, it should be noted that the part performance which Respondents claim by their establishing of a trailer camp and new corrals is in reality nothing more than work which needed to be done in any event for

the purpose of facilitating the rounding up of the cattle which they had previously agreed to purchase from Mr. Brady.

The terms of the document of July 25th and the addendum clearly indicate that the monies paid Mr. Brady in July and October of 1972 were for the payment of cattle and had nothing whatsoever to do with any payment on lands.

(TR. 121, 124 & 125) Likewise, the money which was sent to Mr. Brady at the beginning of each year, and which each time Respondents refused to take back when Mr. Brady attempted to return the money to them (TR. 159), can only be construed as fair compensation to Mr. Brady for the use Respondents have had of his property. Each such check or draft has itself had noted thereon by Respondents themselves the words "rental" or "lease payment". (TR. 125, 126 & 127) Appellant indicated that he is holding any pre-payment of rent and stands ready to return it to Respondents upon their delivery to him of possession of his property. Respondents were aware that Mr. Brady did not consider the sale of land closed as evidenced by their

efforts to get him to take some money on the land as early as October of 1972. (TR. 226)

Specific performance will only be decreed when the party asking it will be defrauded if it is not granted. Randall v. Tracy Collins Trust Company, 6 Utah 2d. 18 305 P.2d 480 (1956). Respondents have not alleged nor have they proven any such kind of case. The evidence is uncontradicted that as soon as Mr. Brady was partially restored to health, he put Respondents on notice of his concerns regarding the transaction. He contacted his attorney, Mr. Chamberlain, in Richfield, Utah, in early 1973, who in turn wrote Mr. Fausett. Mr. Brady went to the Meeker, Colorado, B.L.M. office and made his position known to B.L.M. personnel and Mr. Fausett. He and his son took horses and attempted to inspect the Milner ranch he had insisted he would never part with, but they were ordered off the property. (TR. 107) In early 1973, after previous informal conversations with Mr. Fausett in which he expressed his position, a formal notice to quit was served. Mr. Brady took every reasonable step under the circumstances

to put Defendants on notice of his position as soon as he got out of his sick bed. No fraud on his part has been alleged nor proven.

Part performance as a doctrine may be used as a cure to a defective description only under circumstances not existing in this case. Partial performance is not a cure to the parol evidence rule problem with which the Supreme Court of Utah was concerned in the case of Davison v. Robbins, 30 Utah 2d. 338, 517 P.2d 1026 (1973). The case before the Court has both Statute of Frauds and parol evidence problems. It is clear that the July 25th "Agreement to Sell Cattle and Lease Land With Option to Purchase" does not contain a sufficient description of property to meet the requirements of the Statute of Frauds. The Respondents, therefore, persuaded the trial court to employ the doctrine of partial performance to cure the lack of description. The law without variation is that partial performance will not be employed to require specific performance unless the contract is clear, definite, and certain. Certainty and definiteness are not found in the in-

stant case. The parol evidence rule then comes into play. Parol evidence is admissible to apply, but not to supply, a description of lands in a contract. Davison v. Robbins, 30 Utah 2d. 338, 517 P.2d 1026 (1973). Partial performance, if it were shown, does not overcome the parol evidence problem found in this case. Even more than in the Davison case, there is a lack of certainty here. The parties left to a later time the determination and insertion of a description of the exact lands to be involved. The evidence of the case is uncontradicted that the withholding of some lands was discussed and no final agreement was made. Exhibit No. 5, Hugh Colton's letter to Fausett, in its final paragraph clearly sets forth his understanding that after the cattle sale was concluded, the parties would have to meet and work out the description of the lands to be involved.

The Statute of Frauds was enacted for the very purpose to which it should be applied here, that is to prevent parties from claiming that lands have been sold to them when there is no written agreement to evidence the same.

Also, specific performance is a doctrine of equity. Those who request it must come to court with clean hands. Specific performance will not be decreed unless damages would be inadequate. Randall v. Tracy Collins Trust Company, 6 Utah 2d. 18, 305 P.2d 480 (1956). Without conceding any damages to Respondents, it is respectfully submitted that damages for any monies Respondents might prove to have spent or which might benefit Mr. Brady upon his regaining possession of his lands will be adequate. The counterclaim of Respondents evidences Respondents concurrence in the idea that they can be compensated with money damages.

The Court should rule that the document before the Court is unenforceable for the reason that it is incomplete, lacks a description of properties, and that there was never an agreement between the parties as to which lands were to be involved. Certainly the Court cannot determine the intention of the parties from the four corners of the instrument as required by the law. Furthermore, the evidence is persuasive that no enforceable a-



greement was reached.

### III.

THE OPTION TO PURCHASE LANDS IN THE WRITING OF JULY 25, 1972 IS UNENFORCEABLE BECAUSE NO CONSIDERATION WAS GIVEN FOR IT.

Prior to the meeting at Hugh Colton's office, Brady and Fausett had agreed on a sale of cattle for which Mr. Brady was to be paid, plus a ten (10) year lease with payments to Mr. Brady of \$25,000.00 per year. (TR. 58 & 59) After the meeting, there was an agreement calling for the sale of cattle and a 5-year rather than a 10-year lease, with payments still at \$25,000.00 per year and an option to purchase. (Exhibit 4) No consideration was given for the option. In fact, Mr. Brady had less than before. The inescapable conclusion must be that there exists no valid option for want of consideration.

An option is defined in a simple and elementary way as a binding promise to keep an offer open for a stated period of time or until a specified date. O.A. Olin v. Lambach, 35 Ida. 767, 209 P.277, 44 A.L.R. 354; Davenport v. Doyle Petroleum Corporation, 190 Okla. 548, 126 P.2d 54; Strong v. Moore, 105 Ore. 12, 207 P. 179, 23 A.L.R. 1217.

It has long been established that the consideration for an option to purchase land is a thing apart from the consideration for the lease or of the actual sale of the land. There must be some consideration of which it can be said "This was given by the proposed purchaser to the proposed vendor as the price for the option for the privilege to purchase." Ide v. Leiser, 10 Mont. 5, 24 P. 695 (1890). The evidence clearly indicates that the rental of \$25,000.00 per year was arrived at through negotiations between Mr. Brady and Mr. Fausett and was agreed upon before any discussion with regard to an option was held. Also, the price of the cattle was specifically set forth. Not one cent has been paid to Appellant for an option to purchase lands. No consideration having been given for the option, it should be held invalid and unenforceable.

#### IV.

THE COURT SHOULD SET ASIDE THE CONTRACT OF JULY 25, 1972 BECAUSE PLAINTIFF WAS INCAPABLE OF CONDUCTING BUSINESS OF THE MAGNITUDE INVOLVED AT THE TIME HE SIGNED IT AND DEFENDANTS ABUSED A RELATIONSHIP OF TRUST WHICH HAD BEEN ESTABLISHED AND EXTRACTED A CONTRACT APPELLANT WOULD NOT OTHERWISE HAVE GIVEN.

The fact that Mr. Brady was in very poor physical health, was mentally exhausted, confused and unstable is virtually uncontested and in fact is confirmed by the testimony of Respondent, John Fausett. (TR. 26, 42, 43, 48, 53, 79, 80, 205, 208, 209 & 214) Also uncontested is the fact that a very close relationship was established between Mr. Brady and Mr. Fausett to the extent that Mr. Brady placed his trust and confidence in Mr. Fausett in his personal and business problems. (TR. 7, 9, 10, 36, 47, 48, 264, 267 & 268) Indeed, Mr. Fausett went so far as to say at trial that he had grown to love Mr. Brady. (TR. 264) Whenever two persons stand in such relation that confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of this position will not be permitted to retain the advantage, even if the transaction could not have been impeached if no confidential relationship had existed.

The courts of equity have carefully refrained from defining the particular instances of fiduciary relationships in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relationship exists as a fact, in which there is confidence reposed on one side and resulting superiority and influence on the other. The relationship and the duties involved in it need not be legal; they may be moral, social, domestic, or merely personal. Bentley v. Bentley, 141 Md. 428, 119 A. 293. When such a fiduciary relationship is established as in this case, the burden of proof should be shifted to defendants to prove that the transaction was fair, just and reasonable. Hinshaw v. Hinshaw, 148 Colo. 262, 365 P.2d 815 (1961). This contract should be set aside on the basis of the inequality between the parties, where there existed weakness on one side and advantage taken of that weakness on the other. Respondents, upon finding Mr. Brady's weakness, utilized it to extract from him a contract which he would not otherwise have made. In these

circumstances, the law presumes in favor of Mr. Brady and against the Respondents that:

- (1) The relationship placed the Respondents in a position to exercise influence and dominion over Mr. Brady;
- (2) That influence or dominion operated upon and procured the transaction, and
- (3) That the influence was improper and unfair or, to use the accepted phrase, was an undue influence.

This transaction should not stand unless the Respondents are able to repel the presumption by contrary evidence proving that it was fair, just, and reasonable. Dittbrenner v. Myerson, 414 Colo. 448, 167 P.2d 15 (1946).

Whenever a person is in pecuniary necessity and distress so that he would be likely to make an undue sacrifice, and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon inadequate consideration, or upon other highly inadequate terms, even though there may be no actual duress

or threats, equity may relieve defensively or affirmatively. Dittbrenner v. Myerson, 414 Colo. 448, 167 P.2d 15 (1946). The principle upon which a court of equity acts in relieving transactions on the ground of inequality of footing between the parties is not confined to cases where fiduciary relationship is shown to exist, but extends to all varieties of relationship in which dominion may be exercised by one over another, and this principle applies to every case where influence is acquired and abused or where confidence is reposed and betrayed. Dittbrenner, Supra.

As Justice Frankfurter stated in U.S. v. Bethlehem Steel Corp. 86 L.Ed. 855, 877:

"Does any principle in our law have more universal application than the doctrine that Courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other? Fraud and physical duress are not the only grounds upon which Courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the Courts generally refuse to lend themselves to the enforcement of a bargain in which one party has unjustly taken advantage of the economic necessities of the other. And there is great reason and justice in this

rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency will submit to any terms that the crafty may impose upon them."

No better opportunity has presented itself to a Court to apply the principles above set forth than in the instant case, where Defendants found Mr. Brady in a sick, exhausted and financially oppressed condition, and then took him in, helped him, obtained his confidence, and led him to believe they would buy his cattle and lease his land, and finally, when no alternative was left to Mr. Brady, extracted from him a contract he would not otherwise have signed.

#### CONCLUSION

Because of the lack of agreement about the lands which were to be involved, the lack of consideration for the option, and the inequitable manner in which Respondents abused Mr. Brady's trust and confidence in the dire circumstances in which they found him, the Court should reverse the lower court and set aside the July 25th document entitled "Agreement to Sell Cattle and Lease Land

With Option to Purchase", putting the parties back to the position they were in prior to the execution of it.

Respectfully Submitted,

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