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

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

LOWELL L. BRADY, Plaintiff-Appellant, vs. JOHN E. FAUSETT and GEORGE L. SMITH, Defendants-Respondents.	)	Case No. 14131

BRIEF OF RESPONDENTS

An Appeal from the Judgment of the District Court
of the Fourth Judicial District, The Honorable
J. Robert Bullock, Judge

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

LOWELL L. BRADY, Plaintiff and Appellant, vs. JOHN E. FAUSETT and GEORGE L. SMITH, Defendants and Respondents.	Case No. 14131

RESPONDENTS BRIEF ON APPEAL

***

STATEMENT OF KIND OF CASE

This is an action wherein plaintiff seeks the court to determine the option portion of an "Agreement To Sell Cattle And Lease Land With Option To Purchase" to be unenforceable. Defendants seek to uphold the validity of the entire agreement.

DISPOSITION IN LOWER COURT

After a trial before the Honorable J. Robert Bullock, sitting without a jury, the court found the agreement between the parties to be valid and enforceable in every respect, and decreed that defendants were entitled to specific performance of the option should they elect to exercise the same.

RELIEF SOUGHT ON APPEAL

Respondents seek to have the judgment of the District Court affirmed.

STATEMENT OF FACTS

Appellant's Statement of Facts is misleading and inaccurate. It assumes numerous factual matters which were in dispute and which were contrary to the weight of the evidence. It omits to include a number of very material and uncontroverted facts. It quotes numerous bits of testimony out of context. And it is filled with statements and conclusions not supported by the evidence. For this reason the respondents desire to make their own statement of facts covering the facts that are relevant and material to the issues in this appeal.

The defendant John E. Fausett (hereinafter referred to as Fausett) is a rancher residing in North Duchesne, Utah (T-6). He became acquainted with the plaintiff Lowell L. Brady (hereinafter referred to as Brady) in approximately February of 1972 (T-7). Shortly thereafter Brady approached Fausett about purchasing a ranch in Colorado and their discussions led to a transaction in April of 1972 wherein Fausett purchased a ranch from Brady (T-9). After this initial ranch purchase Fausett and Brady became friends. At that time Brady's wife

was confined in a rest home near Roosevelt, Utah (T-9). Brady, who resided in Colorado, was making numerous trips to Roosevelt to visit his wife and as a courtesy to him, Fausett offered to let him stay at his ranch in North Duchesne (T-9). From the period of April 1972 until July 1972 Brady stayed overnight on the Fausett ranch thirty-five to forty nights (T-9). During this time their friendship grew and Fausett made several trips to Brady's ranch in Colorado to help him out with his ranching operations (T-11,23). Brady's own son who lived on an adjoining ranch wouldn't help him or otherwise have anything to do with him because of a deal between them that Brady had reneged on (T-11,42).

During the time that Brady was visiting Fausett's ranch they talked steadily about Fausett purchasing Brady's cattle and also purchasing Brady's ranch in Colorado (T-13). Brady's wife died on June 6, 1972 (T-20), after which Brady became more serious and more persuasive about wanting to sell the ranch. On one occasion he flagged Fausett down on the highway when the parties were traveling in opposite directions and said "Johnny, can't you come over there and buy that place, lease it, take it over, do anything?" (T-26). Fausett told him that he couldn't afford the ranch and that he did not think Brady should be selling it so soon after his

wife had passed away (T-26). Following that incident there were many discussions about the purchase of the ranch (T-28) the last and most significant of which was a discussion which took place on the evening of July 24, 1972. On that evening Brady was urging Fausett to lease his ranch in Colorado for $25,000.00 per year (T-29,257). Fausett told Brady that under no circumstances was he interested in a lease. He explained that he had had a bad experience with the Ute Indian Tribe on a previous lease where he had spent a great deal of money and had done a lot of improvement work and then had his lease cancelled (T-29,257). He further explained that the Brady ranch was in a run-down condition; that it needed fencing, corrals, and other improvements, and that he simply was not interested in putting in his time and effort into a place that had been neglected for years and years on a lease basis (T-29,257). Brady then asked if Fausett would lease the property if he were guaranteed an option to buy (T-29,257). Fausett said he would be interested if he could get financial backing and that evening telephoned George L. Smith in Salt Lake City. Smith told Fausett over the telephone that he thought they could get the financing (T-29,257).

Brady then arranged for the parties to meet with his attorney, Hugh Colton, the next day in Vernal, Utah (T-29). Mr. Colton had been Brady's attorney for many years and had

represented him in many matters since 1928 (T-134,239). The meeting was attended by Fausett, Smith, Brady and Attorney Colton (T-68). The defendants Fausett and Smith were unrepresented by counsel (T-35,248). Prior to the meeting Brady had also discussed the transaction with his accountant, Mr. Siddoway, (T-258). At the meeting the terms of the proposed transaction were discussed and Brady instructed his attorney to draw up a five year lease with option to purchase (T-253). There was some discussion on the option price. Fausett thought the price should be $260,000.00 and Brady was asking $300,000.00 (T-259). After some discussion Brady proposed that they split the difference and the option price of $280,000.00 was agreed upon (T-14,259).

At the July 25 meeting there was also discussion about the property to be included. Fausett denies that there was ever any discussion about Brady wanting to take care of his daughters (T-15). However, Brady did make a statement about wanting to keep a little area around the Milner cabin (T-15). According to the testimony of Fausett, Smith would not agree to this and told Brady he could use the property during his lifetime but that he didn't want to fight with his children after he was dead, whereupon Brady advised his attorney to make a clean deal (T-25), meaning to include all of the property. Mr. Colton substantiated this testimony stating that he recalls that Smith would not agree to any

property being withheld from the deal (T-242). It was clearly Colton's understanding that the transaction was to include all property owned by Brady in Colorado (T-250,252). Later when it became necessary to obtain legal descriptions for B.L.M. purposes he advised Fausett the descriptions could be obtained by taking all of Brady's property descriptions and simply deducting the land previously sold under contract to Fausett and to Brady's son (T-250).

Following the meeting on July 25 Mr. Colton prepared the "Agreement To Sell Cattle And Lease Land With Option To Purchase" (inasmuch as this agreement is the subject of the lawsuit a full and complete copy of the same is set forth in Appendix "A" of this brief). Fausett and Brady met in Colton's office on July 29th and the agreement was signed (T-81,245). Prior to the signing Brady had consulted with his Attorney Mr. Colton privately about the agreement (T-135). Smith was not in Vernal on the 29th and copies were mailed to him in Salt Lake City (T-246).

Between the meeting in Mr. Colton's office of July 25 and the time the agreement was signed on July 29 another conversation was held between Brady and Fausett wherein Brady told Fausett he didn't want to go through with the deal. Fausett immediately offered to forget the deal and Brady said "Let's not get hasty" and that "I don't think that I better back out" (T-262).

The written agreement between the parties provided that the seller Brady was the owner of "a cattle ranch, and range lands and Bureau of Land Management permits in Rio Blanco and Garfield Counties, Colorado, which he is desirous of selling" (R-106, Exhibit 18; See also Appendix "A" to this Brief). It then provided at Page 3 that the said land leased herein is described as follows: "Description will be placed here". The reasons the property descriptions were omitted from the written agreement was because Brady's abstracts were not available and were being held by Connecticut General Insurance Company in Denver (T-128,243). Brady was supposed to assist Mr. Colton in obtaining the abstracts so that the legal descriptions could be supplied (T-128). There is nothing whatsoever in the record to even remotely suggest that the descriptions were withheld because the parties could not agree upon the land to be included. Nor does this provide any basis upon which to conclude that the agreements were prepared in haste as has been argued in appellant's brief.

After the signing of the written agreement on July 29th the defendants Fausett and Smith took possession of the entirety of the Brady property and have exercised dominion and control over it ever since that date (T-121,292). They have constructed improvements to the property consisting of sewer lines, water systems, wells, corrals, reservoirs, roads, land-fill, and flood drainage work (T-293,295). The value of these

improvements will be approximately $76,000.00 (T-294). In addition they have purchased a sprinkling system at a cost of $10,000.00 (T-293); ran power to the property at a cost of $6,731.70 (T-294); and expended approximately $36,000.00 worth of caterpillar work (T-295).

Brady acknowledged in his testimony that the defendants Fausett and Smith have lived up to all of the terms of the agreement (T-143). He acknowledges receipt of $50,000.00 on July 29, 1972 which was the initial down payment under the contract (T-120). Thereafter he received an additional draft of $2,230.00 on August 30, 1972 (T-122); $2,230.00 on September 25, 1972 (T-123); and $2,330.00 on October 29, 1972 (T-123); all being pursuant to the agreement (T-123). After the final roundup of cattle in the fall of 1972 the defendants Fausett and Smith paid Brady an additional $166,400.00 representing the final payment for cattle under the agreement (T-124). Thereafter on January 8, 1973 the defendants paid Brady $25,000.00 representing the lease payment for the ranch for the year 1973 (T-125). On approximately December 28, 1973 Brady was paid an additional $25,000.00 representing the lease payment for the ranch for the year 1974 (T-126). And in December of 1974 Brady was paid $25,000.00 representing the lease payment for the ranch for the year 1975 (T-127). Thus, under the very agreement that Brady seeks the court to declare unenforceable he has been

paid a total of $298,190.00, none of which has ever been tendered back to the defendants, and substantial portions of which were received even after the filing of this lawsuit.

At the time of the roundup of cattle in the fall of 1972 a short addendum contract was entered into between the parties relating primarily to the final settlement on the purchase of cattle (R-163). The date of the addendum contract was October 29, 1972, which was some three months after Fausett and Smith had taken full possession of all of Brady's Colorado property. The addendum was signed by Lois B. Adams, Brady's daughter, who was acting as his attorney-in-fact. Brady acknowledged that his daughter had been given full authority to sign the agreement (T-129). The addendum contract contained the following language:

> "The parties hereby adopt all of the provisions of the initial contract and again reaffirm the same except as they are specifically amended and changed by this addendum."

On Page 19 of Appellant's brief reference is made to erroneous descriptions of property which appear in Bureau of Land Management files (R-103, Exhibit 12). Respondents place no significance at all to these descriptions. Fausett testified that he followed up in transferring Brady's B.L.M. grazing rights to himself and Smith, but that he did not at any time furnish any legal descriptions to the B.L.M. (T-19).

Statements in Appellant's brief about Brady being ill at the time of the initial agreement and mentally incapable of making rational decisions result solely from self-serving statements of Brady and members of his family. The only diagnosed illness of Brady was a prostate problem (T-43,120). He had been going to doctors for medication (T-120), but counsel did not see fit to call any doctors to testify at the trial. Brady's Attorney, Mr. Colton, was called as a witness by the defendants. Counsel for Brady had full opportunity to cross examine him and the question of Brady's competence during the course of the negotiations wasn't even brought up. Fausett also affirmatively testified that during the week of negotiations prior to the 25th and 29th of July, 1972 there was nothing wrong with Brady (T-265). He had been staying at Fausett's ranch and eating "like a horse" (T-266). At the time the contract was actually signed he appeared to be in good spirits and there was some kidding and teasing going on as to Brady's planned trip to Las Vegas and the Go-Go girls there (T-264). No evidence was offered by Brady, and so far as respondents were aware no claim has been made, that the option price was unfair or not in accordance with the market value of the land.

After hearing all of the evidence in the case the trial court from his advantage position found that Brady was fully competent at the time he entered into the agreement of

July 25, 1972; that he advised by competent counsel and freely, voluntarily, and understandingly dealt with Fausett and Smith in an arms length transaction; and that there was no fraud, undue influence or any unconscionable advantage taken or committed by Fausett or Smith in any manner whatsoever (R-77). The court further found that there was a meeting of the minds and no misunderstanding whatever between the parties as to the property to be included in the lease and option, of which the defendants had taken possession, and that said property consisted of all of the property owned by Brady in Rio Blanco and Garfield Counties, less the property previously sold under contract (R-77). Based upon these findings the court found the agreement of July 25, 1972 to be in full force and effect and decreed that defendants Fausett and Smith are entitled to specific performance of the option should they subsequently elect to exercise it (R-75).

ARGUMENT

POINT I

IN EQUITY CASES THE FINDINGS OF THE TRIAL COURT ARE PRESUMED TO BE CORRECT.

Appellant Brady has alleged in his brief that under Article VIII, Section 9, of the Utah Constitution the court in equity cases may review questions of both law and fact. Defendants do not dispute that principle, but merely point out that the scope of review in equity cases has been clearly

defined in prior adjudications of the court. The findings of the trial court will only be upset if the evidence clearly preponderates against them. Such findings are presumed to be correct; the burden is upon the appellant to show they were in error; and where the evidence is in conflict they will not be disturbed merely because the Supreme Court may have reviewed the matter differently, Del Porto vs. Nicolo, 27 Utah 2d 286, 495 P.2d 811. The reasons for this rule are summarized in the following language of the court taken from Nokes vs. Continental Mining and Milling Company, 6 Utah 2d 177, 308 P.2d 954:

> " Where there is a conflict in the evidence, the finding of the trial court will not be disturbed if the evidence preponderates in favor of the finding; nor, if the evidence thereon is evenly balanced or it is doubtful where the preponderance lies; nor, even if its weight is slightly against the finding of the trial court, but it will be overturned and another finding made only if the evidence clearly preponderates against his finding.
>
> The rule just stated is based upon the sound reasoning that some credit should be indulged in favor of the findings of the trial court because of the advantages peculiar to his position in immediate contract with the trial. It is indeed often true that, "the manner hath more eloquence than naked words portend." There are intangibles of expression and attitude which give color and meaning not apparent from words alone. The trial judge feels the impact of the personalities of the parties and the witnesses: He is able to observe their appearance and behavior; their forthrightness or hesitancy in answering; their frankness and candor, or lack of it. Similarly revealing to him are indications

> of surprise, anger, resentment or vindictiveness, pleasure or other emotions which may be discerned from expressions of the countenance or voice. He also has some advantage in appraising their abilities to understand and their capacities to remember. Furthermore, he is in a position to question the witness himself to clarify doubtful points or verify his impressions on the matters just mentioned. All of this combines to afford him better insight as to the truthfulness of the testimony offered than does a perusal of the cold record. It is a sound and well recognized policy of the law to repose some confidence in the verity of the actions of the trial court, and not to interfere with them unless it clearly appears that he is in error."

See also Stone vs. Stone, 19 Utah 2d 378, 431 P. 2d 802; Metropolitan Investment Company v. Sine, 14 Utah 2d 36, 376 P. 2d 940. There is nothing in the record of the instant case to show that the trial court misapplied any proven facts or made any findings against the weight of the evidence.

POINT II

THE DESCRIPTION IN THE CONTRACT IS LEGALLY SUFFICIENT.

Inasmuch as this case involves a contract made in Utah between Utah residents for the lease and purchase of real property in the State of Colorado, the question may arise as to whether Utah or Colorado law applies. The general rule is to the effect that in actions involving real property, the lex loci rei sitae, or the law of the state where the land is situated is controlling. 16 Am. Jur. 2d, Conflict of Laws, Section 14, et seq. This may not be very significant, as the authorities from both Utah and Colorado, as well as the law

generally, support the position of the respondents.

A. The General Law. The law recognizes that much less certainty and strictness in the description of property is demanded in a contract for sale of land than in a deed. United Truckmen vs. Larentz (Cal.), 249 P. 2d 352; Ralston vs. Lebrain (Cal.), 248 P. 2d 810; 55 Am. Jur., Vendor and Purchaser, Section 8. All that is required in a contract of sale is that the land be described with reasonable certainty or furnish the means by which the land can be identified with reasonable certainty. See exhaustive annotation, 23 A.L.R. 2d 6, Sufficiency of Description of Designation of Land in Contract or Memorandum of Sale under Statute of Frauds; also 55 Am. Jur., Vendor and Purchaser, Section 8. Under said rule, the following types of descriptions have been held sufficient to meet the Statute of Frauds and compel specific performance of a contract:

"Fleming Farm on French Creek." Ross vs. Baker, 72 Pa. 186.

"Lands Campbell sold to said Preece situated in Shanty Ranch." Campbell vs. Preece, 133 Ky. 572, 118 S.W. 373.

"The lot sold to him in Zoar, Massachusetts." Miller vs. Burt, 196 Mass. 395, 82 N.E. 39.

"Have sold a tract of land on Laurel Fork, Morgan County, to party of the second part, Roe Wheeler for $900.00." Wheeler vs. Keeton, 242 S.W. 2d 1013.

"A horse and lot of land situated on Amity Street, Lynn, Massachusetts." Hurley vs. Brown, 98 Mass. 545, 96 Am. Dec. 671.

"Land at Sites consisting of 3,281 1/2 acres." 76 F. 525.

"80 acres of land 1 3/4 miles N. of Merwin, Bates County, Mo." Tracy vs. Berridge, 180 Mo. App. 220, 167 S.W. 1176.

"Enfield property." Where defendant held title to no other property. Packer vs. Putnam, 57 N.H. 43.

"83 acre farm in Brunfield." Schafer vs. Faylor, (Ohio) 60 N.E. 2d 339.

"Homestead farm situated on both sides of Quidnick Pond Road, so called." Capwell vs. Spencer, 48 R.I. 401, 137 A. 699.

"Watts Street house." Harper vs. Battle, 180 N.C. 375, 104 S.E. 658.

"Property situated on Sackman Street between Lavonia and Riverdale Avenue." Miller vs. Tuck, 88 N.Y. Supp. 495.

"The farm on which I now live." Bateman vs. Hopkins, 157 N. Car. 470, 73 S.E. 133.

"The home place, 80 acres." Davis vs. Davis, 171 Ark. 168, 283 S.W. 360.

"My home place and storehouse." Henderson vs. Perkins, 94 Ky. 207, 21 S.W. 1035.

"The farm of Mrs. Lula Foor, wife of J. M. Foor, located about 2 1/2 miles from Ensor, where Mrs. Foor now lives." Foor vs. Mechanics Bank & Trust Company, 144 Ky. 682, 139 S.W. 840.

"E. H. Sherwood's barn and lot, Seventeenth and Davenport." Ballou vs. Sherwood, 32 Neb. 666, 49 N.W. 790.

"Store No. 32 Market Square which I own." Coates vs. Lunt, 210 Mass. 314, 96 N.E. 685.

"Their plantation located on Carson Lake, in the Osceola District of Mississippi County, Arkansas." Miller vs. Dargan, 136 Ark. 237, 206 S.W. 319.

"Our Roscoe Farm." Bennett vs. Palmer, 128 Ill. App. 626.

"My farm, known as the Jno Baskett Home Farm." Posey vs. Kimsey, 146 Ky. 205, 142 S.W. 703.

"Whatever lots or lands which may be owned by the said parties of the first part in the plat of Montville aforesaid." St. Paul Land Company vs. Dayton. 42 Minn. 73, 43 N.W. 782.

Reference is made to the A.L.R. annotation cited above for numerous other examples.

B. The Utah Authorities. In step with the law generally are the decisions from Utah involving the sufficiency of a legal description. Typical cases are as follows:

In Eastman vs. Thatcher, 7 Utah 99, 25 P. 728, a description of property as a "one-half interest of Hyrum Thatcher, of Logan, Utah, in horses and ranch, etc." is a sufficient legal description for specific performance where it appears from parol evidence that Hyrum Thatcher owned a one-half interest in but one ranch.

In Johnson vs. Jones, 109 Utah 92, 164 P. 2d 893, it was held that an agreement for the sale of an apartment house by street address, without indicating in what city, county or

state the property was situated, was not so uncertain as to preclude specific performance, where the defendant admitted he owned property at a certain stated address in Salt Lake City, Utah. The court also held that extrinsic evidence may be introduced to show the exact boundaries and location of property mentioned in the contract of sale and cited the following language from Cummings vs. Nielson, 42 Utah 157, 129 P. 619:

> "It is elementary that in equity that is certain which can be made certain. In case . . . certain lands are mentioned by name merely in a contract, without giving a definite description, the . . . lands intended by the contract may always be shown by extrinsic parol or documentary evidence. See also Pomeroy's Specific Performance of Contracts, 3d Edition, Section 152."

In Nielsen vs. Rucker, 8 Utah 2d 302, 333 P. 2d 1067, the court specifically enforced a contract wherein the property was described as "the dairy farm owned by Glen Nielsen and wife." The evidence established that the dairy farm in question was the only farm that the Nielsens owned in Brigham City, Utah, or elsewhere. In upholding the contract, the court again cited the same language from the Cummings vs. Nielsen case as set forth above.

The appellant in this case has relied heavily upon the recent case of Davison vs. Robins, 30 Utah 2d 338, 517 P. 2d 1026 wherein the court refused to specifically enforce a contract for lack of a sufficient legal description. The reason why the contract failed in the Davison case is because the sale

by its terms was not intended to include all of seller's land, and the portions to be excluded were subject to additional negotiation. In reaching its result, the court stated as follows:

> "In the instant action, the agreement in clear and unambiguous terms provided that the location and description of the land to be conveyed was subject to the future mutual agreement of the parties. This writing constituted a mere expression of a purpose to make a contract in the future, for the whole matter was contingent on further negotiations. The trial court erred in its conclusion that the writing constituted a valid enforceable contract."

Under no stretch of the imagination can the Davison case be construed to reverse all of the prior case law in the State of Utah, nor does it purport to do so. It is clearly distinguishable from the case at bar in that according to the findings of the court the contract between plaintiff and defendants in the instant case included all of plaintiff's land thereby leaving nothing open for future negotiation.

C. The Colorado Authorities. Colorado, likewise, follows the general law with respect to sufficiency of legal descriptions. An early Colorado case, Ross vs. Purse, 28 P. 473, wherein no county or state was mentioned in a legal description established the general rule. There it was stated as follows:

> "If the writing contains indicia by reference to which, coupled with the defective designation otherwise, the identity of the premises can reasonably be determined, specific performance may be decreed."

The Ross case has been cited in various other Colorado decisions, among which is Boyd vs. McElroy, 100 P. 2d 624. In the Boyd case, specific performance was decreed in a suit involving a lease with an option to purchase in which the property was described as "my homestead and additional land joining same of 440 acres." The court said: "Everyone connected with the deal knew what land was involved, and at the trial, the court permitted the description to be read into the record from the County Clerk's records."

Other Colorado cases holding to the same effect as the above are Shull vs. Sexton, 390 P. 2d 313 and Thurmon vs. Skipton, 403 P. 2d 211.

Based upon all of the above authorities from Colorado, Utah and elsewhere, it becomes obvious that the description in the case before the court, that is "a cattle ranch and range lands and Bureau of Land Management permits in Rio Blanco and Garfield Counties, Colorado," is legally sufficient to compel specific performance of the contract.

POINT III

IF THERE IS ANY INSUFFICIENCY IN THE DESCRIPTION IT HAS BEEN CURED BY DELIVERY OF POSSESSION AND OTHER PART PERFORMANCE OF THE AGREEMENT.

The evidence in this case conclusively showed that defendants have taken possession of the entirety of Brady's property and operated the cattle ranch since the very inception of the agreement. In addition, they have made substantial lease payments under the lease option agreement.

They have purchased and paid for the cattle. And they have made substantial improvements to the property.

It is generally recognized that a defective description may be cured by putting the purchaser in possession. 55 Am. Jur., Vendor and Purchaser, Section 8. In the case of Keepers vs. Yocum, 84 Kan. 554, 114 P. 1063, it was stated as follows:

> "For another reason, the appellants' contention must fail. A defective description of land in a contract of this kind may be cured by putting the purchaser in possession; that is, the parties may by their own conduct under the contract render certain what might otherwise be deemed uncertain. (Citation of authorities)
>
> The finding of the court, which appears to be sustained by the evidence, is that the appellee placed the appellants in possession of the land in Missouri within a few days after the contract was entered into, and they continued in the possession thereof until this action was brought. They disposed of a team of horses and other personal property included in the contract, received the owner's share of the crops raised on the land, and did all of these things after they knew that the legal title to the land stood in the name of Florence N. Briggs, and also after they knew that there were certain apparent defects in the title of the appellee which required attention."

And in Monday vs. Irwin, 20 N.M. 43, 145 P. 1080, it was held:

> "The argument of counsel is to the effect that the contract is so indefinite and uncertain as to the description of the property to be conveyed by plaintiff, and the complaint so fails to supply the deficiency, that the contract cannot be specifically enforced. The description in the contract and complaint is as follows:
>
> '40 acres of land adjoining the town of Hagerman and known as the Arnold Farms.'

> The argument by counsel proceeds to the effect that as 'there might have been a dozen 40-acre tracts near Hagerman known as the Arnold Farms, any one of which would have filled the description in the alleged contract and under the allegations in the said complaint relative to such description', the description is insufficient. He cites authority to the effect that if the complaint had alleged that there was but one 'Arnold Farm' adjoining Hagerman, or that the parties verbally agreed upon the property which would suit the description, the objection would be overcome. (Citation of authorities).
>
> But counsel overlooked the finding of the court that plaintiff had performed all of the conditions of his contract, which includes the putting of defendant into possession of the property, thus identifying the premises. Under such circumstances, the defect in the description is cured. (Citation of authorities).
>
> It, therefore, becomes unnecessary for us to lay down any general rule as to the sufficiency of description of real estate, to authorize the specific performance of contracts for the sale thereof."

The above may be characterized as nothing more than an application of the Doctrine of Part Performance to take a case out of the Statute of Frauds. The reason that the description is required to be in the contract in the first place is merely to satisfy the Statute of Frauds. (See for example, Calder vs. Third Judicial District Court, 2 Utah 2d 309, 273 P. 2d 168 where the court discusses the Statute of Frauds as being the reason for the description to be required in the written document.) Both Utah and Colorado have Statutes of Fraud requiring leases and contracts for interest

in land to be in writing. 25-5-3, Utah Code Annotated; 38-10-108, Colorado Statutes. Both jurisdictions, likewise, have statutory provisions relating to part performance. Those provisions are as follows:

> 25-5-8, Utah Code Annotated: Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.
>
> 38-10-110, Colorado Statutes: Nothing in this article shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements in case of part performance of such agreement.

The taking of possession under a contract, part payment of purchase price, making of improvements, etc., are all singly sufficient to take a case out of the Statute of Frauds, let alone the combination of these factors as exists in the instant case. See Siler vs. Investment Sec. Co., 125 Colo. 438, 244 P. 2d 877; Zamboni vs. Graham, 104 Colo. 23, 88 P. 2d 98; Barnes vs. Spangler, 98 Colo. 407, 56 P. 2d 31; Tolley vs. Fritsinger, 150 Colo. 440, 374 P. 2d 364; Babcock vs. Bouton, 85 Colo. 327, 275 P. 908; Rupp vs. Hill, 149 Colo. 48, 367 P 2d. 746; Ridgeway vs. Pope, 163 Colo. 160, 430 P. 2d 77; VanTrotha vs. Bamberger, 15 Colo. 1, 24 P. 883; Knoff vs. Grace, 68 Colo. 527, 190 P. 526; Brown vs. Johanson, 69 Colo. 400, 194 P. 943; Hunt vs. Hayt, 10 Colo. 278, 15 P. 410; In re Roth's Estate, 2 Utah 2d 40, 269 P. 2d 278; Randall vs. Tracy Collins Trust Company, 6 Utah 2d 18, 305 P. 2d 480; In re Madsen's Estate, 123 Utah 327, 259 P. 2d 595.

POINT IV

APPELLANT IS ESTOPPED FROM ASSERTING ANY INVALIDITY OF THE AGREEMENT BY REASON OF HIS INCONSISTENT POSITIONS AND HIS ACCEPTANCE OF BENEFITS.

It is undisputed in this case that Fausett and Smith have paid to Brady the total sum of $298,190.00 under the contract. It is also clear from the evidence that Fausett and Smith were unwilling to purchase Brady's cattle, lease his property, and make improvements to the land without obtaining an option to purchase. Brady now claims that he is entitled to enforce the lease and retain all of the benefits therefrom, and yet have no obligation on the option. His position in court is to pick and choose those portions of the contract that are the most advantageous to him and to unilaterally excuse himself from those portions that he doesn't want to perform. Unfortunately in doing this he runs squarely into the legal principle of estoppel.

As stated in 28 Am. Jur. 2d Estoppel and Waiver, Section 59, estoppel is frequently based upon the acceptance of benefits from a transaction which might have otherwise been avoided. Numerous authority is cited for this concept which is more fully explained as follows:

> "This doctrine is obviously a branch of the rule against assuming inconsistent positions, and it has been said that such cases are referable, when no fraud either actual or constructive is involved, to the principles of election or ratification, rather than to those of equitable estoppel. The result produced, however, is clearly the same, and the distinction is not usually made.

> Such estoppel operates to prevent the party thus benefited from questioning the validity and effectiveness of the matter or transaction insofar as it imposes a liability or restriction upon him, or in other words, it precludes one who accepts the benefits from repudiating the accompanying or resulting obligation."

Further explanation is made at Section 68, Am. Jur. 2d, Estoppel and Waiver, wherein it is stated as follows:

> "Generally speaking, a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action. This principle operates to preclude one who prevents a thing from being done from availing himself of the non-performance which he has himself occasioned. Similarly, it operates to prevent a person from taking advantage of his own wrong. It has also been held to prevent one who has been wronged in a transaction from subsequently impeaching it after having recognized it as valid."

In the instant case the property covered by the lease is exactly the same property as that covered by the option. The option and lease are both part of the very same agreement. The property is described in exactly the same manner as to both. Any Statute of Frauds defense would be equally applicable to the five year lease as well as the option. It is difficult to conceive of a situation more inconsistent than the position taken by the plaintiff in this case. Legal principles of estoppel and waiver are applicable to Statute of Frauds cases as well as other types of cases 73 Am. Jur. 2d Statute of Frauds

Sections 565 et seq, 570.

POINT V

THE OPTION TO PURCHASE LANDS WAS FULLY SUPPORTED BY CONSIDERATION.

Appellants argument that the option portion of the agreement is unsupported by consideration borders on the ridiculous. The option was part of an integrated contract, for which plaintiff has already received consideration in the amount of $298,190.00, not including the other covenants and promises which themselves would constitute sufficient consideration. Again, as has been already pointed out in other portions of this brief, the affirmative testimony of Fausett was to the effect that he and Smith were not interested in purchasing Brady's cattle or leasing the land without the option to purchase.

It is simple hornbook law that one consideration may be sufficient to support as many promises as are bargained for (See Restatement of Contracts, Section 83). Williston on Contracts, 3rd Ed. Section 137 A in explaining this legal concept cites the lease with option to purchase as a typical illustration of one consideration supporting several promises. If appellant's argument was adopted it would invalidate thousands of lease option agreements in this state, a result that would be absurd.

POINT VI

NO CREDIBLE EVIDENCE WAS PRESENTED IN THIS CASE TO SUPPORT ANY POSSIBLE FINDING OF INCAPACITY OR UNDUE INFLUENCE.

After hearing all of the evidence in this case the court made the following findings:

> "Plaintiff was fully competent at the time he entered into the agreement of July 25, 1972; he was advised by competent counsel; and he freely, voluntarily and understandingly dealt with the defendants in an arms-length transaction. There was no fraud, undue influence, or any unconscionable advantage taken or committed by the defendants in any manner whatsoever (R-77)."

A summary of the evidence in support of the above finding may be listed as follows:

1. Brady was represented by counsel throughout the entire transaction.

2. Brady's counsel was called as a witness in the case and there was no suggestion from him whatsoever that Brady was incapable of entering into a binding contract.

3. The defendants Fausett and Smith were not represented by counsel at any time during the transaction.

4. Brady consulted with his accountant prior to making the transaction.

5. Brady made self-serving statements about being sick and exhausted and being under the care of a doctor, yet not one shred of medical testimony was offered at the trial.

6. Fausett affirmatively testified that throughout the entire period of the negotiations there appeared to be nothing wrong with Brady.

7. No evidence was ever presented, nor was it ever suggested, that the purchase price under the option was unfair.

8. The evidence showed that Brady was a sophisticated businessman, having been in the sheep and cattle business many years, and having bought and sold ranches and cattle throughout his life.

9. There was no confidential or fiduciary relationship existing between the parties.

Based upon the above it would have been reversible error for the court to have made any other finding than it did. In order to find undue influence it must appear that the free agency of the person influenced was taken away and in its place the will of the defendant substituted 25 Am. Jur. 2d, Duress and Undue Influence Section 36. The evidence in this case shows that if any undue advantage was taken at all it was not by Fausett or Smith but by Brady himself who induced the defendants into paying an inflated price for the cattle and lease and then designably breached his agreement on the option.

Aside from all of the above, the law is clear that a contract made under undue influence is merely voidable and capable of being ratified 25 Am. Jur. 2d Duress and Undue Influence Section 41. The undisputed evidence shows that the agreement was ratified in the following respects:

1. By accepting lease and cattle payments under the contracts over a period of several years after the contract was made, and during periods in which no undue influence was

claimed or could possibly have been exerted.

2. By the execution of a subsequent written agreement wherein the parties "hereby adopt all of the provisions of the initial contract and again reaffirm the same."

The evidence conclusively establishes a ratification even if the trial court had made an adverse finding on the undue influence issue (which it did not).

CONCLUSION

Based upon all of the arguments and authorities as cited herein, respondents respectfully request the court to affirm the judgment of the trial court.

Respectfully submitted,

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APPENDIX "A"

AGREEMENT TO SELL CATTLE
AND LEASE LAND WITH OPTION TO PURCHASE

THIS AGREEMENT made this 25th day of July, 1972, by and between LOWELL L. BRADY, hereinafter called Seller; and GEORGE L. SMITH and JOHN E. FAUSETT, hereinafter called Buyers;

WITNESSETH:

WHEREAS, the Seller is now the owner of certain cattle, a cattle ranch, and range lands and Bureau of Land Management permits in Rio Blanco and Garfield Counties, Colorado, which he is desirous of selling, and;

WHEREAS, The Buyers are desirous of buying the cattle and leasing the said lands and permits with an option to buy the same,

NOW, THEREFORE, IT IS HEREBY AGREED by and between the Seller and Buyers as follows:

1. That the Seller hereby agrees to sell to the Buyers, and the Buyers hereby agree to buy from the Seller, the following described cattle at the prices shown:

Approximately 400 range cows, with 1972 calves by their side (pairs), (it being understood by the parties hereto that any calf born and following its mother prior to November 1, 1972, such cow and calf shall be designated a pair, and that if calved after November 1, such cow shall be considered a dry cow.)	$400.00 per pair
155 dry cows	$280.00 per head
26 bulls	$500.00 per bull

It being understood that the above numbers are approximate but that it is all the cattle the Seller has, and Buyers agree to take whatever number Seller delivers to them. Provided unmerchantable cattle (which are sick or crippled) shall not be covered by this agreement, and that should there be any steers or yearling heifers gathered they are not covered by this agreement.

2. The Buyers agree to buy the above described cattle at the prices above mentioned and to pay Seller therefor as follows:

$50,000.00 to be paid upon the execution of this agreement, and the balance to be determined and paid at the time said cattle are delivered to Buyers.

L.L.B
J.E.F

3. Seller agrees to deliver the said cattle at what is known as Seller's Homestead Ranch (the Daisy Kirk place) and to begin the delivery thereof as the cattle are gathered off the summer range, which shall be not later than November 1, 1972.

4. The Buyers agree to receive the said cattle as gathered which shall not be later than November 1, 1972, at the above designated place, or at such other place as they may agree to with Seller, and as the cattle are delivered, the brand of the Buyers will be placed on the cows and bulls, and the calves taken off the cows and trucked away from the ranch. The cows and calves will be counted as the cows are branded and as the calves are loaded in the trucks. It being understood that all calves not loaded in trucks shall be the property of the Seller until delivered as above provided. Provided, that all cattle later found not branded with Buyer's brand shall be the property of Seller, and as they are found, they will be gathered and Seller notified so that he may be present when they are branded, and when branded, he will be entitled to the payment therefor in accordance with the above selling prices. It being understood that Seller retains all right, title and interest in and to his brands.

5. The Buyers agree that they will cooperate with the Seller in rounding up the said cattle. It being understood by Buyers that the cattle are scattered over a wide area of range, and that the roundup may take considerable time. Both Seller and Buyers agree to supply the help necessary to make a complete ride of the range and delivery of the cattle.

6. As a further consideration, Buyers agree to take immediate possession of the said cattle and to, at their expense, herd, care for, and provide at least one rider for the said cattle and do all things necessary to care for the said cattle in a herdsmanlike manner, and to pay Seller for pasturage on the said cattle until November 1, 1972, $4.00 per month for each pair (cow with calf) and $3.50 per month for each dry cow and bull, and to pay this pasture bill monthly beginning on August 31, and to pay on September 30 and October 31. This pasture bill to be in lieu of interest on

the balance due for the price of the cattle until they are delivered to Buyers.

7. Seller further 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 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:

Description will be placed here.

Together with all improvements, appurtenances, rights of way, water rights and grazing rights thereunto belonging.

Reserving, however, to the Seller, an undivided three-fourths interest in whatever oil, gas and other mineral rights he may now have in, upon, or under the above described lands, together with the right of ingress and egress for the purpose of exploration and development of the said oil, gas, and other mineral rights.

8. The Buyers agree to pay, in addition to the above mentioned annual rental, all real estate taxes, as the same become due and to pay the same promptly when due so as to not create a lien against the said property, and to pay taxes on all personal property that they may have on the said described property, beginning with the taxes for 1973. Seller agrees to pay 10/12ths of the taxes for 1972, and the Buyers agree to pay 2/12ths of 1972 taxes.

9. As a further consideration of the said lease, Seller grants unto the Buyers an option to purchase the above described property at the end of the five-year lease period, including all improvements, appurtenances, rights of way, water rights, and all grazing rights, for the sum of $230,000.00. Buyers agree that upon the exercising of this option, the Buyers shall pay to the Seller 29 percent of the said $230,000.00, and to pay the balance due in five equal payments beginning on January 2, 1978.

Buyers shall also pay the Seller interest on the unpaid balances at the annual rate of 2 percent more than the Federal Intermediate Credit Bank's interest is for that year.

10. The Buyers agree that in the event they exercise this option to purchase the said property as described, they will, at that time, and upon the Buyer delivering to them a Warranty Deed to the said property, to execute a Promissory Note and secure the payment thereof by a Deed of Trust covering the above described property, water and range rights.

Time is of the essence of this agreement, and should the Buyers fail to make the payments as herein provided, then all payments made upon the execution of this agreement or at any time subsequent thereto shall be considered as rental and liquidated damages.

The provisions of this agreement shall extend to and bind, the legal representatives, assigns, and heirs of the respective parties hereto.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first above written.

Lowell L. Brady, Seller

George L. Smith,

John E. Fausett, Buyers

STATE OF UTAH)
) ss.
COUNTY OF UINTAH.)

On this day of July, 1972, personally appeared before me Lowell L. Brady, George L. Smith, John E. Fausett, the parties to the above entitled Agreement who personally acknowledged to me that they signed the same.

Notary Public

My commission expires:

Residing at: