

1953

J. Lloyd Mathis and Nellie M. Burtenshaw Mathis v. Alonzo F. Madsen et al : Brief for Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

J. LLOYD MATHIS and NELLIE
M. BURTENSCHAW MATHIS, his
wife,
Plaintiffs and Respondents,

vs.

ALONZO F. MADSEN and LEONA
F. MADSEN, his wife, J. A. FER-
RELL and ALMIRA FERRELL, his
wife, J. A. FERRELL, an unmarried
man, CHARLES W. KINGSTON,
as administrator of the Estate of
CHARLES E. KINGSTON, also
known as C. E. KINGSTON, De-
ceased, and ETHEL M. KINGSTON,
wife of the said CHARLES E. KING-
STON, Deceased; DAVIS COUNTY
COOPERATIVE SOCIETY, INCOR-
PORATED, a Corporation, and
WESTERN RESERVE CORPORA-
TION, a Corporation,

Defendants and Appellants.

Case No. 7900

BRIEF FOR APPELLANTS

FILED J. D. SKEEN,
Attorney for Appellants
JAN 10 1953

Clerk, Supreme Court, Utah

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COOPERATIVE SOCIETY, INCOR-
PORATED, a Corporation, and
WESTERN RESERVE CORPORA-
TION, a Corporation,

Defendants and Appellants.

Case No. 7900

BRIEF FOR APPELLANTS

STATEMENT OF CASE

This litigation has all arisen from a contract for the sale and purchase of real estate, dated January 24, 1942, between the Western Reserve Underwriters Corporation, as seller, and plaintiffs, J. Lloyd Mathis and Nellie M. Burtenshaw Mathis and C. E. Kingston, as trustee in trust for Davis County Cooperative Society. By the terms of the supplement to the Contract, (Exhibit A) the seller agreed to convey the property—four-fifths to Mathis and wife and one-fifth to C. E. Kingston as trustee. The purchase price of the property was paid and no controversy arose directly in connection with the purchase. When the full sum of the purchase price was paid, the seller was advised of a controversy and held up the deed.

Immediately upon the execution of the contract, the purchasers went into possession of the property. A memorandum of agreement for the operations on the farm was made as early as March of 1942. (See Plaintiffs' Exhibit R). No serious controversy appears to have arisen as operations were conducted under this memorandum. It is apparent that the parties to the purchase of the property were not in controversy on the 1st day of March, 1944, for on that day, an instrument entitled Farm Lease (Defendants' Exhibit 2) was entered into. J. Lloyd Mathis, Nellie M. Mathis and C. E. Kingston, as trustee in trust for Davis County Co-op are designated as lessors. J. Lloyd Mathis, Nellie M. Mathis, C. H. Owens, Delsa E. Owens, F. L. Hansen, Julia C. Hansen, C. E. Kingston and Allen M. Frandsen, and LaMonda H. Frandsen, his wife, are designated as lessees. The land is described, and the lease is for a period of five years beginning March 1, 1944.

The consideration is "\$1.00 and other lawful consideration, plus 50 per cent of profits of each year's earnings after all expenses, loans, etc., are paid." It is definite and certain that the lessees named took possession of the property at that time, for on the 24th day of May, 1944, they executed and delivered to the Utah Farm Production Credit Association, a crop and chattel mortgage, upon crops grown upon the lands and including a large amount of farm machinery, equipment and a large number of livestock to secure payment of the sum of \$19,054.95. (See Defendants' Exhibit 9).

On the 19th day of February, 1946, C. H. Owens and wife, F. L. Hansen and wife, and J. Lloyd Mathis and wife, executed and delivered to the State Bank of Lehi a crop and chattel mortgage covering crops grown upon the same land and also farm machinery, equipment, and livestock and including 2500 bushels of wheat and 1500 bushels of barley stored in bins on the farm, to secure payment of a loan of \$8500.00.

We call special attention to the farm lease and the two chattel mortgages because it will appear hereafter that the controversies as between the plaintiffs and the Davis County Cooperaitve Society spring directly from the occupation and use of the premises during the period following the farm lease, (Exhibit 2) and indirectly involve the contract between the plaintiffs and the defendants Ferrells (Exhibit C).

We leave for the time being the statement of the facts leading up to the controversy as between the plaintiffs and the Davis County Cooperative Society to take up the statement chronologically of the facts out of which the controversy be-

tween the plaintiffs and the defendants Madsens and the Ferrells arose. To complete the setting, this preliminary observation is important.

About 1945, C. E. Kingston, who was then an officer of the Davis County Co-op, entered the employment of C. Ed. Lewis, as a real estate salesman and while he was so employed, the land described in the original contract of purchase by the plaintiffs and Kingston was listed for sale by the plaintiffs, J. Lloyd Mathis and Nellie M. Mathis and C. E. Kingston, and in connection with the listing of the property, Mathis agreed to pay a real estate commission of five per cent. After the listing, C. Ed. Lewis Company made a preliminary Contract of Sale of the real estate to J. A. Ferrell for the sum of \$140,000.00 signed by J. L. Mathis and C. E. Kingston as sellers (Plaintiffs Exhibit F).

On December 10, 1946, Ferrells paid \$2,000.00 on account of the purchase of the property, (Plaintiffs' Exhibit W) and on the same day, Ferrell paid the sum of \$12,000.00. The terms of sale were apparently modified and this preliminary contract was signed by J. A. Ferrell, Jay Ferrell, Almira Ferrell, J. Lloyd Mathis, Nelie M. Mathis and C. E. Kingston (Exhibit G).

On the 13th day of January, 1947, a formal agreement was made between J. Lloyd Mathis and Nellie M. Mathis, as sellers, and J. A. Ferrell and Almira Ferrel, his wife, and Jay Ferrell, the son, for the sale of the land for \$120,000.00, \$30,000.00 of which was acknowledged as paid in the contract and installments of \$7,500.00 (Plaintiffs' Exhibit C). It is made to appear from the record that all of the parties to the

contract knew of the interest of the Davis County Cooperative Society in the property, for there was written into the contract the following provision:

"In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encumbrances other than herein provided for shall hereafter accrue against the same by acts or neglect of the Sellers, then the Buyers may at their option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payments herein provided to be made may, at the option of the Buyers, be suspended until such a time as such suspended payments shall equal any sums advanced as aforesaid."

Ferrell paid the first installment of \$7,500.00, making total payments of \$37,500.00 and all of the money went to Mathis. There is no claim that the Davis County Cooperative Society received any part of this fund except possibly an advancement that had been made prior to that time in addition to the part payable by the Davis County Co-op. That was returned. The Davis County Cooperative demanded a division of the money. Mathis refused to make it, and a sharp controversy arose by reason of which Ferrell made no further payments except under the terms of the stipulation hereinafter referred to.

On January 23, 1947, while the Ferrell negotiations were going on, and before the Ferrell contract was acknowledged and presumably delivered, February 15, 1947, a letter was addressed to C. Ed. Lewis, acknowledged but not recorded

(Plaintiffs' Exhibit D). The letter is so ambiguous and we think meaningless, that its contents cannot be adequately restated, and certainly we cannot state the legal effect. We, therefore, incorporate it in this statement of the case as follows:

"C. E. Lewis Company
117 East Broadway
Salt Lake City, Utah

TO WHOM IT MAY CONCERN:

J. L. Mathis and Nellie M. Mathis, his wife; and C. E. Kingston and Ethel M. Kingston, his wife, for the Davis County Cooperative Society, Inc., own on an 80%-20% basis of Ranch at Lehi, Utah, formerly known as Saratoga or Austin Brothers Ranch; are in process of liquidation.

When audit is complete final closing of sale of real estate, livestock, feed, and machinery is sold and allotment of funds from these; it is hereby agreed that in event there is not sufficient funds to pay C. E. Kingston and Ethel M. Kingston for Davis County Cooperative Society, Inc., their equity, this property shall be transferred from Western Underwriters Corporation to J. L. Mathis and Nellie M. Mathsi, secured by a mortgage at 3% per annum payable to C. E. Kingston and Ethel M. Kingston for Davis County Cooperative Society, Inc., out of all future funds derived as per sale except of interest due J. L. Mathis and Nellie M. Mathis until such an amount due C. E. Kingston and Ethel M. Kingston for Davis County Cooperative Society, Inc., has been paid in full, hereby waiving all rights and interests in this property.

/s/ C. E. Kingston
/s/ Ethel M. Kingston

On this twenty-third day of January, A. D. 1947 before me personally appeared C. E. Kingston and Ethel M. Kingston, his wife who executed and signed the foregoing document.

(Seal) /s/ Ardous Kingston
My Commission Expires: Notary Public."
August 12, 1949.

There is no evidence in the case that C. E. Kingston and/or Ethel M. Kingston, his wife, had any express authority whatsoever to sign this meaningless letter. It was claimed, however, that they had implied authority to do so, and the court so found. We call attention again to the fact that at that time C. E. Kingston was employed by Lewis. His interests were adverse to the interests of the Davis County Cooperative Society. There is no evidence to the effect that either of the Ferrells or the defendant Madsen knew of this letter until after all transactions involving them were closed.

On the 15th day of June, 1948, the Davis County Co-op executed and delivered to Alonzo F. Madsen and Leona F. Madsen, for a valuable consideration, a deed to an undivided one-fifth of the property jointly owned by the plaintiffs and the Davis County Co-op. The deed was regularly recorded and Madsen took possession of one-fifth of the property, which under agreement, constituted 100 acres, and farmed it, taking the crops for 1948, 1949, 1950 and 1951. The court has found that the letter (Exhibit D) operated as a transfer of the undivided one-fifth of the property to Mathis and that the deed from the Davis County Co-op to Madsen was void.

We now come to the stipulation referred to constantly in the record. The court will probably conclude at this stage of

the transactions that the title of the property was involved. Ferrell had no means of making certain that he could ever acquire the full ownership of the property or even that he could reap where he had sown. Something had to be done. Accordingly, all of the parties interested in the property joined in a stipulation, (Plaintiffs' Exhibit B) under the terms of which Ferrell was authorized to sell the property, and out of the proceeds of the sale, to pay to Mathis the sum of \$56,000.00 and to deposit in escrow the balance of what was determined to be the full purchase price payable by Ferrell amounting to \$37,500.00, which with interest, was subsequently determined to be \$39,300.00, in the Clearfield State Bank, Clearfield, Utah, in the joint names of Dan T. Moyle and J. D. Skeen, as attorneys of record in this case. The money is now there on deposit.

In order to clear the title to the property so that it might be sold, it became and was necessary for Ferrell to procure a deed from Madsen and wife to the undivided one-fifth as well as quit claim deeds from other parties to the litigation. He accordingly agreed to pay Madsen one-fifth of the selling price of the property (See Plaintiffs' Exhibit 12). At this point, we desire to add that the matter of the Davis County Cooperative Society's interest was discussed in correspondence between Ferrell and Moyle and Moyle, attorneys for Mathis. Ferrells insisted upon the title being cleared because they knew it was not all in the plaintiff, who had signed the contract before they made payment of the \$30,000.00. In order to satisfy them, on the 25th day of January, 1947, Moyle and Moyle wrote Ferrell with respect to the title and said:

"I will personally see that a proper conveyance is obtained before or at the time the payment is made."

The Western Reserve Underwriters Corporation refused even after the stipulation was made to convey the property to Mathis because it had agreed to convey to him four-fifths and to the Davis County Co-op, one-fifth. Accordingly, it executed and delivered deeds—four-fifths to Mathis and one-fifth to the Davis County Co-op, which, with the Warranty Deed from the Davis County Co-op to Madsen, perfected his title to the one-fifth.

Other facts must necessarily be referred to in our argument.

PENDING LITIGATION, PLEADINGS AND STATUS

On June 30, 1949, Moyle and Moyle, appearing as attorneys for plaintiffs, filed suit in the District Court for Salt Lake County against the Davis County Cooperative Society, Charles W. Kingston, as administrator of the Estate of Charles S. Kingston, deceased, Charles H. Owens, Francis M. Hansen and Allen Frandsen, as defendants, alleging fraud and praying for an accounting, \$50,000.00 general damages and \$10,000.00 punitive or exemplary damages. That suit is at issue, pre-trial has been had, and specifications of particulars wherein it is claimed fraud was perpetrated by the Davis County Cooperative Society has been filed. It is referred to at length in the transcript of the testimony, pages 63 to 72, to which reference will hereinafter be made in detail. While the Salt Lake suit was thus pending and undisposed of, and while the Ferrell

contract was in full force and effect, upon which the plaintiffs had received for their own use and benefit to the exclusion of the Davis County Co-op \$37,500.00, plaintiffs filed this case in the District Court for Utah County, Dan T. Moyle of the firm of Moyle and Moyle appearing as attorney for the plaintiffs, praying for judgment quieting title to the real estate in the plaintiffs.

The defendants all filed Answers, Counter-Claims and Cross-Complaints. The issues thus framed were therefore limited to the question of the ownership of the land. It was in that situation that the Stipulation, appearing on page 75 of the record, was entered into, a pre-trial was had, and the court made an order stating the issues appearing in the record on page 84. The contract of purchase of the ranch was offered and received in evidence as Exhibit A with the supplemental agreement providing for the conveyance to Davis County Co-op of an undivided one-fifth and to the plaintiffs, an undivided four-fifths. It was agreed that the seller, Western Reserve Underwriters Corporation, had been paid in full. The stipulation was received in evidence, the depositing of money in escrow was admitted. The Western Reserve Underwriters Corporation conveyed the property — four-fifths to plaintiffs and one-fifth to Davis County Cooperative Society and the deeds were recorded. It was stipulated that after the contract of purchase of the property was made, it was operated under some arrangement between the plaintiffs, C. E. Kingston and Ethel M. Kingston. The letter addressed to E. Ed. Lewis (Exhibit D) was received in evidence subject to proof of authority to execute it and subject to its interpretation. The

deeds to Madsen and wife were admitted, and it was admitted that Madsen and Ferrell were brothers-in-law and that Madsen attended an irrigation meeting, and further, that the total sum of \$39,300.00 was deposited in escrow. The following issues were reserved for submission to the court:

PRE-TRIAL ISSUES OF FACT

(1) The arrangement under which the plaintiffs and C. E. Kingston and Ethel M. Kingston operated the farm prior to January 23, 1947.

(2) The authority of C. E. Kingston for such operation and the execution of plaintiffs' Exhibit D.

(3) As to whether there was an estoppel which would operate as confirmation of the authority of Kingston.

(4) On what date, plaintiffs received actual notice of the execution and delivery of the deed (Exhibit 4).

(5) As to the actual knowledge of Madsen and wife of Exhibit D.

(6) As to whether there was a conspiracy between Madsens and Ferrells to defeat plaintiffs' rights.

(7) If Ferrells were entitled to specific performance of Exhibit C and plaintiffs are unable to convey one-fifth of the property, what damages would be sustained by Ferrells?

(8) Was the deed from Davis County Co-op to Madsens fraudulently executed?

(9) Did plaintiffs have knowledge of, or give their consent to the assertion by the Madsens of a claim of title by Madsens of one-fifth of the property?

(10) Did Ferrels purchase Madsens' interest of one-fifth of the property, and if so, upon what terms?

(11) Did Ferrells, after the assertion of claim by Madsen, permit defendants to use 100 acres of the land during 1948, 1949, 1950 and 1951, and if so, the value of the use.

Questions of law were reserved as to the effect of plaintiffs' Exhibit D.

(1) As to notice to Madsens of Exhibit D or knowledge of facts sufficient to put them on notice.

(2) If there was conspiracy between Madsens and Ferrells, the effect of it upon any claims for damages asserted by defendant Ferrell.

(3) If it were determined that the defendants Madsen acquired good title to the one-fifth interest did defendants Ferrell waive any right to strict performance by plaintiff of Exhibit C.

(4) Are defendants Ferrell entitled to the specific performance of Exhibit C, and are they entitled to damages for loss of use of one-fifth interest?

(5) Did plaintiffs have legal right to make contract of sale to Ferrell (Exhibit C)?

(6) What is the basis upon which the escrow money should be paid?

(7) If Ferrells purchased the one-fifth from Madsen, were they justified in so doing?

(8) If they are entitled to reimbursement for the cost of one-fifth, are they entitled to offset such amount against the sale to Mathis?

(9) Assuming that in order to relieve the claim of defendants Madsen to title and possession of one-fifth of the property, were Ferrells justified, as a matter of law, in permitting Madsen to use 100 acres of the land?

(10) The interest of the parties in the money placed in escrow in the Clearfield State Bank.

STATEMENT OF FINDINGS

1. The court found (Finding No. 5) that after the execution of the contract of purchase of the property, the plaintiff "turned full management of all of the property covered thereby over to C. E. Kingston, as trustee in trust, and that the said C. E. Kingston, together with other members of the Society, were in possession of the property until proceedings for the sale of the property and liquidation of the same, and the settlement of the accounts and advance between plaintiff and the Society were had in the latter part of 1946, or the forepart of 1947." Defendants except to that finding and assert that it is contrary to all of the evidence, written and documentary.

2. The court found (Finding No. 7) the signing and

delivery to C. Ed Lewis, a real estate agent, of the letter, Exhibit D.

3. The court found (Finding No. 8) that C. E. Kingston "did considerable work for Lewis and that Exhibit D was executed in the office of C. Ed. Lewis after the plaintiff, J. Lloyd Mathis, had dictated its terms by telephone to the said C. E. Kingston himself and that such instrument was signed and acknowledged upon its date.

4. The court finds (Finding No. 10) that the interest of the Davis County Co-op in and to the real property covered by the contract (Exhibit 8) was by Exhibit D "transferred and conveyed to the plaintiffs upon the conditions subsequent that any balance that might be found to be due to the Davis County Cooperative Society, upon completion of the audit of the transactions by the plaintiffs and the Society and the said C. E. Kingston be secured by mortgage payable to C. E. Kingston and Ethel M. Kingston, his wife, for said Davis County Cooperative Society, with interest at 3 per cent."

5. The court found (Finding No. 10) that "such condition subsequent has not as yet matured and the audit showing some disputable items is now before the Third District Court of Salt Lake County for determination." The court found that said Exhibit D and the execution thereof by the said C. E. Kingston was duly and legally, although not expressly by formal action, authorized by the Board of Directors of Davis County Cooperative Society, and by the members thereof.

6. The court found (Finding No. 13) (Tr. 159) that C. E. Kingston, together with other members of the Davis

County Cooperative Society, were in possession of the property from the date of the said Exhibit A and until the proceedings of sale and liquidation at the approximate time of Exhibit D, and that during all of this time, the entire Board of the Society were fully advised of the plans, conditions and proceedings upon and in connection with the property, and frequently affirmed and reaffirmed the powers of the said C. E. Kingston to act for the Society in connection with the property and that such powers were never terminated or modified and that after the execution of said Exhibit D, a copy of the same was a part of the files of the said Society and that all of the acts of C. E. Kingston in the purchase and management of the property were fully approved by the Board and by the membership of the Society and that said Exhibit D was considered by such Board and members to be a transfer of the interest of the Society to plaintiff, and it was so acted upon by them.”

7. The court found (Finding No. 14, Tr. 160) that Ferrells went into possession of the property and operated it during the year 1947, and no demand was made upon them until June of 1948. The court found (Finding No. 15) that the Davis County Cooperative Society ratified and affirmed and approved the acts of Kingston in connection with Exhibit D and is estopped from denying C. E. Kingston had proper authority to execute the same.

8. The court found (Finding No. 17) that Madsen had actual notice of Exhibit D or knowledge that would put a prudent man upon inquiry, that he was a brother-in-law of

J. A. Ferrell and that Madsen was not a purchaser for value without notice.

9. The court found (Finding No. 20) that Ferrells had actual notice of the existence of Exhibit D and that they were not justified in giving possession of 100 acres of land to Madsen.

10. The court found that there had been deposited in the Clearfield State Bank \$39,300.00 pursuant to stipulation.

11. Lastly, the court found (Finding No. 23) that with respect to the issue raised as to the sort of arrangement under which plaintiffs and C. E. Kingston and Ethel M. Kingston, his wife, operate the property prior to January 23, 1947, is more properly determined and should be determined in the said accounting action pending in the Third District Court.

STATEMENT OF CONCLUSIONS OF LAW

As Conclusions of Law, the court drew the following:

1. That Exhibit D transferred all of the interest of the Davis County Co-op in and to the ranch to the plaintiffs (Tr. 163).

2. That the plaintiffs were the owners of all of the equity and interest in the contract to purchase from the Western Reserve Underwriters and had the full right and authority to execute and deliver the contract, Exhibit C, to Ferrell.

3. That plaintiffs are entitled to all of the consideration for the sale of the property to the defendants, J. A. Ferrell,

Almira Ferrell and Jay Ferrell, under Exhibit A, (Tr. 164) including the amounts already received by them and the money on deposit in the Clearfield State Bank in the names of J. D. Skeen and Dan T. Moyle, to-wit: \$39,300.00, with all interest thereon, subject however to the right of the defendant, Davis County Cooperative Society to receive from such escrow funds such proportion thereof as may be necessary to compensate it for its interest in the property as of January 23, 1947. That may be determined by the District Court for Salt Lake County.

4. That Madsen did not acquire any interest or title in or to the property involved as against the plaintiffs (Tr. 164).

5. That neither the defendants, Ferrells, nor Madsens nor any other defendants, with the exception of Davis County Cooperative Society, have any claim of any part of the fund, and lastly, that there should be expressly reserved from this case the interpretation of Exhibits R, E and 2.

Plaintiffs' Exhibit E is a memorandum of an agreement as to expenses and receipts from operation of the farm by C. H. Owens.

STATEMENT OF DECREE

The Decree adjudges the \$39,300.00 in escrow in the Clearfield State Bank in the joint names of J. D. Skeen and Dan T. Moyle to be the money of the plaintiffs, subject to the right of the defendant, Davis County Cooperative Society, of sufficient of such funds to compensate it for its interest in the property as of January 23, 1947, and adjudges further

that the Davis County Cooperative Society be denied any affirmative relief and expressly reserving the interpretation of Exhibits R. E and 2 as to their barring upon the relationship between the plaintiffs and the defendants, C. E. Kingston and Davis County Cooperative Society, in the farming and other operations of the property.

POINTS UPON WHICH THE APPELLANTS EXPECT TO RELY

I. Plaintiffs' Exhibit D, being a communication addressed to C. Ed. Lewis Company and signed by C. E. Kingston and Ethel M. Kingston is void because:

(a) It was signed, delivered and acknowledged without authority from the Davis County Cooperative Society.

(b) C. E. Kingston was the agent of C. Ed. Lewis Company, who in turn was the agent of the plaintiffs, while at the same time the said Kingston was the trustee for the Davis County Cooperative Society and was therefore adversely interested and no implied authority can be imputed to him.

(c) The Board of Governors of the Davis County Cooperative Society considered a proposal by C. E. Kingston respecting the sale of said property to Ferrell during the negotiations for the sale of said property but failed to authorize the said C. E. Kingston to sell said property, and implied authority of the said C. E. Kingston, if any, to act for said corporation cannot be found.

(d) Said instrument was at most but an offer and if communicated to plaintiffs, was not accepted.

(e) Exhibit D is void under the Statute of Frauds, because it purports to impose upon the plaintiffs an obligation to pay to the Davis County Cooperative Society 20 per cent of the proceeds of the sale of said property, and to give the said Davis County Cooperative Society a mortgage to secure payment of said sum and said instrument was not signed by the parties to be bound thereby, as required by Utah Code 33-5-1, 3.

(f) Exhibit D is unintelligible, incomplete, uncertain and ambiguous to the extent that it cannot be intelligently construed or enforced and it without equity.

II. The court wholly misinterpreted and misconstrued Exhibit D in this that the court takes "hereby waiving all rights and interest in this property" out of the context and construes it to mean an absolute, unconditional transfer of an undivided one-fifth of the said land contrary to and in express disregard of the context thereby making it mean that the property was transferred by the voluntary act of C. E. Kingston while acting in a dual capacity for adverse interests without consideration.

III. There is no proof of knowledge of the defendant Madsen of the existence of Exhibit D when he took title to one-fifth of the property.

IV. There is no evidence that the Ferrells had any knowledge of Exhibit D until after they had purchased the property in reliance upon paragraph No. 9 of their contract, Exhibit C, and the Moyle letter, Exhibit 8.

V. The court failed to construe or to give effect to contracts for the operation of the ranch, Exhibits R, E and 2.

VI. Exhibit D was not a transfer of the interests of the Davis County Cooperative Society in the lands covered by the Contract, Exhibit A.

VII. The plaintiffs refused to pay to the Davis County Cooperative Society one-fifth of the proceeds of the sale of said property to Ferrell and thereby rejected the binding effect, if any, of Exhibit D.

VIII. The trial of this case was abortive and incomplete and inconclusive in that while the court based its judgment upon the possession by the Davis County Co-op of the Saratoga Ranch, it refused to consider the instruments which show conclusively that the legal and actual possession of the property was in the plaintiff and other individuals, not including the Davis County Co-op.

IX. The decree made and given in the above-entitled cause is not supported by the findings or conclusions or the record, is unjust and contrary to law and equity, and the judgment must be reversed.

ARGUMENT

POINT I

PLAINTIFFS' EXHIBIT D, BEING A COMMUNICATION ADDRESSED TO C. ED. LEWIS AND SIGNED BY C. E. KINGSTON AND ETHEL M. KINGSTON IS VOID BECAUSE:

(A)

IT WAS SIGNED, DELIVERED AND ACKNOWLEDGED WITHOUT AUTHORITY FROM THE DAVIS COUNTY COOPERATIVE SOCIETY.

The court does not find, in the written opinion or in the findings, that direct authority was ever given by the Board of Managers of the defendant, Davis County Cooperative Society, to C. E. Kingston to sell the undivided one-fifth of the Saratoga Ranch at any time or for any price. The minutes of the Board, Exhibit V, negative any claim of such authority.

(B)

C. E. KINGSTON WAS THE AGENT OF C. ED. LEWIS COMPANY, WHO WAS IN TURN THE AGENT OF THE PLAINTIFFS, WHILE AT THE SAME TIME, THE SAID KINGSTON WAS THE TRUSTEE OF THE DAVIS COUNTY COOPERATIVE SOCIETY AND WAS THEREFORE ADVERSELY INTERESTED AND NO IMPLIED AUTHORITY COULD BE IMPUTED TO HIM.

Kingston was dead at the time of the trial of the case and hence his reason for signing Exhibit D could not be disclosed to the court however, his acts were readily understandable. He was employed by Lewis as a real estate salesman (Tr. 198) and the court so found. Lewis was a real estate broker and had this land listed with him for sale on a real estate dealer's commission (See Plaintiffs' Exhibits F, W and G). We assume the employment was on a commission basis;

however, in any event, it was Kingston's duty to Lewis to make the sale or to participate in the consummation of it. In either event, his relations to Lewis and to the Davis County Co-Op were adverse, and being so adverse, there could be no implied authority to act for the corporation.

Elggren et al vs. Woolley, 64 Utah 183.

In this case, quoting from Thompson on Corporations, the Court said:

"In all contracts they make they represent the stockholders and not themselves; and in all their official actions they are to consider, not their private interests, but that of the stockholders, whose property they manage and control. This rule is so strict and so rigidly enforced that the law will not permit these officials to subject themselves to any temptations to serve their own interest in preference to the interest of the stockholders."

In Kahn vs. Perry Zolezzi, Inc., 226 Pac. 2nd 118, Judge Dunford, speaking for this court said:

"It is against public policy for officers of a corporation to deal with others in relation to corporate business for their own separate advantage and the law affords no sanction whatever for such acts."

Citing Elggren vs. Woolley.

And see the recent case of

Knox et al v. First Security Bank of Utah, et al,
196 Fed. 2nd 112,

where the United States Court of Appeals, Tenth Circuit, Bratton, Circuit Judge, speaking for the court said:

"A. C. Milner was interested in having that obliga-

tion on his part discharged by the Milner Corporation adopting the contract of March 16, 1909. His interests were adverse to the Milner Corporation, and that being so, he could not bind the corporation under his general authority as president. See Fletcher Corporations, Permanent Ed., Vol. 3, Section 922 et seq.; Kahn v. Perry Zolezzi, Utah 226 P. 2d 118, 123; Elggren vs. Woolley, 64 Utah 183, 228 P. 906."

The adverse interest having been shown by the plaintiffs in this case, we conclude, under these authorities, that there could be no implied authority on the part of Kingston to sign Exhibit D.

(C)

THE BOARD OF GOVERNORS OF THE DAVIS COUNTY COOPERATIVE SOCIETY CONSIDERED A PROPOSAL BY C. E. KINGSTON RESPECTING THE SALE OF SAID PROPERTY TO FERRELL DURING THE NEGOTIATIONS FOR THE SALE OF SAID PROPERTY BUT FAILED TO AUTHORIZE THE SAID C. E. KINGSTON TO SELL SAID PROPERTY, AND IMPLIED AUTHORITY OF THE SAID C. E. KINGSTON, IF ANY, TO ACT FOR SAID CORPORATION CANNOT BE FOUND.

We call attention to the minutes of the Board of Governors held on November 24, 1946, wherein the matter of selling the farm was reported by C. E. Kingston and discussed by the individual members. C. E. Kingston was not only not authorized to make the sale but the expression of individual members were against a sale. The price at which Kingston said he had a chance to sell the property was \$140,000.00, not \$120,000.00,

for which the place was sold. Again, at the meeting of December 22, 1946, Owen reported that Ferrell had said he was going to buy the property. Again, no authority was given Kingston to make the sale.

Exhibit D is dated January 23, 1947, and no meeting was held at which any authority was given between that date and the date of signing the Exhibit on January 23, 1947.

It is significant that at these meetings, there appears to be no controversy whatsoever between Mathis and the Co-op and certainly there was no thought on the part of the Governing Board that Mathis claimed he had been defrauded or even that there was any indebtedness due from the Co-Op to him. On the contrary, it appears that the Co-Op had faithfully complied with its agreement and was able to pay the balance of the purchase price of the property without assistance from Mathis. These minutes, we contend, negative any intention on the part of the Co-Op to permit C. E. Kingston to sell the property without action on the part of the Co-Op itself.

(D)

EXHIBIT D CONSTITUTED AN UNACCEPTED OFFER, DID NOT BECOME A CONTRACT AND IS NOT SUBJECT TO SPECIFIC PERFORMANCE.

This exhibit is a letter addressed to . Ed. Lewis, not to the plaintiffs. It did not purport to be a contract of sale of the interest of the Davis County Co-Op in the ranch. It imposed obligations upon Mathis and necessitated his accept-

ance in writing which was not given. Notwithstanding the last clause, it did not operate as a sale of the interest of the Co-Op in the property. The conduct of Mathis shows conclusively that he did not intend to be bound by it, for it provides, if it can be construed at all, for the payment of all of the proceeds of the sale of the property to the Co-Op until its claims to an undivided one-fifth was eliminated. That, Mathis refused to comply with. Furthermore, it provides for the giving by Mathis of a mortgage to secure payment to the Co-Op of any balance due it and the mortgage presumably was to cover the very property that was being sold by Mathis. There is nothing in the contract of sale to Ferrells that authorized the giving of such a mortgage. Attention has been called to the fact that nowhere in the dealings between the Co-Op and Mathis was there any indication of an indebtedness from the Co-Op to Mathis. On the contrary, the evidence shows there was none. Had Mathis signed the instrument, the court could and should have impounded the money or directed the payment of it to the Co-Op, provided Exhibit D constituted such an instrument as could be specifically enforced, but Mathis did not elect to be bound by it and it did not become a contract.

(E)

EXHIBIT D IS VOID UNDER THE STATUTE OF FRAUDS, UTAH CODE 33-5-1, 33-5-3.

This statute reads:

"No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any

manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

33-5-3

"Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing."

Exhibit D imposes the distinct obligation upon Mathis to give a mortgage for an unknown amount upon property which must be read into the contract and which will attach to all future funds derived from the sale of the property until the unknown amount is paid to the Davis County Co-Op. There is no controversy respecting these propositions.

Construed in *Adams vs. Manning*, 46 Utah 82

The Supreme Court of the United States said, in the very old case of

Hughes c. Moore, 3 L. Ed. U.S.R., at page 312,

"The court can perceive of no distinction between the sale of land, to which a man has only an equitable title and a sale of land to which he has title. They are equally within the statute."

In 49 American Jurisprudence, Section 354, the law is stated as follows:

"It is not sufficient that the note or memorandum express the terms of a contract; it is essential that it completely evidence the contract which the parties made by giving all of the essential terms. The writing must be such that all of the contract can be collected therefrom; resort cannot be had to the terms of the oral contract to supply deficiencies in the memorandum. A memorandum which refers to an essential term of the contract *as one to be agreed on subsequently does not meet* the requirements of the statute. A contract in writing which leaves some essential term thereof to be shown by parol is only a parol contract, and is, therefore, not enforceable under the statute of frauds. Thus, a written contract for the sale of land or an interest therein must cover the entire contract in order to satisfy the statute."

It is amply supported by the cases cited.

In *Williams v. Morris*, 95 U. S. 444, 24 L. Ed., 360, the court said:

"Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and, if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent."

And in *Keystone Hardware Corp. vs. Tague*, 158 NE 27, 53 ALR 610, the Court of Appeals of New York said:

"A written contract for purchase and sale of real estate which provides for mortgage to expire on dates to be subsequently agreed upon cannot be specifically enforced if the dates are never agreed upon or are agreed upon by parol."

See also *Dineen v. Sullivan*, 231 Pac. 2nd 241, where the rule above stated is repeated with quotations from numerous cases.

The letter cannot therefore be treated as a contract for any purpose whatsoever because it does not purport to be a binding contract. It is vague and uncertain in the respects pointed out. It is not signed by the Western Underwriters Corporation, which by its terms was to convey the legal title to the whole of the property to Mathis contrary to its previous agreement, and it is not signed by Mathis and his wife, who are parties to be bound by it in that they agreed to give Kingston a mortgage to secure his equity. The exhibit must be wholly disregarded.

(F)

EXHIBIT D IS UNINTELLIGIBLE, INCOMPLETE, UNCERTAIN AND AMBIGUOUS TO THE EXTENT THAT IT CANNOT BE CONSTRUED OR SPECIFICALLY ENFORCED IN EQUITY.

The plaintiffs, by their conduct, rejected the letter as a contract or an offer to contract, by taking and holding all of the money paid by Ferrell, and even after the stipulation was made, insisted upon the payment in full of their part and the depositing in escrow of the part which properly belonged to the Co-Op or its successors in interest. No mortgage was tendered. There is no evidence that they participated in securing an audit if any audit was necessary, but on the contrary, asserted spurious claims in order to create the color of right to take and hold money on accounts which it had never claimed

to exist before Exhibit D was signed. It brought suit first against the Co-Op and various individuals and later, brought suit to quiet title to the property as hereinafter more fully set out, in disregard of its contractual obligations. It could scarcely have done more to make definite and certain its rejection of the offer if it can be construed as anything of a legal nature. For the many reasons stated, the letter does not come within the classes subject to specific performance.

We cite 5th Pomeroy, Section 2188

“But parol evidence can never be given to supply an omitted item or make definite and certain that which the parties left indefinite and uncertain; in a word, parol evidence cannot show the intent of the parties if it cannot be found in the contract.”

Section 2189

“The contract must be complete, definite and certain as to whatever conditions are annexed, terms of credit where given, place of performance, time of performance unless a reasonable time is inferred, and other terms that are made by the contract. Thus, a contract to furnish a city with light, allowing the substitution of electric light for gas, but leaving the number and price of the electric lights for later agreement is unenforceable for incompleteness in a material term.”

Exhibit D was not mutually enforceable when it was delivered to Lewis by Kingston, and there never became mutuality in the remedy because the plaintiffs did not sign it or otherwise accept it as an offer, did not, by their pleading, offer to do equity, and the plaintiff Mathis, on the witness stand, positively refused to do equity by paying to the Co-Op its proportion of the proceeds of the sale of the property. It does

not therefore come within the rule that even though a contract lacks mutuality when executed, it may be specifically enforced if there is mutuality in the remedy.

See monographic not to

Vanzandt vs. Heilman, New Mexico, 22 ALR 2nd 497, 508.

After a very extended citation of cases, the rule is stated as follows:

“Given a contract within the class which a court of equity will compel to be specifically executed, and given the fact that the plaintiff’s undertaking remains wholly or partly executory, the court will not entertain jurisdiction of the case unless its decree can be made to compel execution by both sides, and unless it is prepared to retain jurisdiction of the case and oversight of performance until full execution is accomplished. The plaintiff must allege that he is ready, able, and willing to perform his undertaking as may be decreed by the court, and if on motion or otherwise it appears that he may not be financially able to do so when the decree is entered, it is within the discretion of the court to require such security against that event as the case may warrant, by payment of money into court or otherwise.”

Exhibit D in no sense comes within this rule and furthermore the court did not even attempt to protect the Co-Op, but on the contrary went to an extreme limit in attempting to stay the hands of the District Court for Salt Lake County with a res judicata so that even it could not protect the defendant because of the finding of possession which we have heretofore criticized.

It cannot be claimed that the suit to quiet title to the land can be treated as a suit for specific performance and as an acceptance of an offer by Exhibit D, for the Co-Op withdrew the offer before acceptance upon the refusal of Mathis to pay in accordance with Exhibit D and to convey the property to Madsen.

POINT II

THE COURT MISINTERPRETED AND MISCONSTRUED EXHIBIT D.

The exhibit plainly provides that an audit is to be made, that the funds are to go to C. E. Kingston for the Davis County Co-Op from the sale of various things, that the property shall be transferred from Western Reserve Underwriters Corporation to J. L. Mathis and Nellie Mathis, and that the Co-Op shall have all of the money derived from the sales except interest and the balance due the Co-Op shall be secured by mortgage until the Co-Op is paid in full. At that time, there was in existence a contract with the Wesetrn Reserve Underwriters Corporation under which it agreed to convey one-fifth of the property to the Co-Op. It was of course not a party to Exhibit D and was in no way bound by it. When all these things were done, and the Co-Op had received its money, the last clause, "hereby waiving all rights and interest in the property," could take effect. The instrument is not subject to any other interpretation. By the Findings, Conclusions and Decree in this case, the court has, in effect, stricken out all parts of Exhibit D excepting only the last clause and has

attempted to tie the hands of the District Court for Salt Lake County with a res judicata while at the same time refusing to consider documents showing conclusively that the Co-Op was not and is not in any way indebted to the plaintiffs.

We invite the court's attention to the cross examination of Mathis with respect to Exhibit D, and the retention by him of all of the money received from the sale of the property, and to his detailed specification of claims filed in the District Court for Salt Lake County. Mr. Mathis was asked (Tr. 61)

"Q. In other words, Mr. Mathis, did you think by this letter, you got this property before the Co-op was paid up for its one-fifth interest?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. And you don't claim now that you have this property, do you?

A. No, sir.

Q. No. You didn't claim that you owned this property when you made a contract to sell it to Ferrell, did you?

A. Yes, sir, on the basis of that agreement."

The court found to the contrary and upon the basis apparently of the finding that the Co-Op had been in possession of the property at all times without regard to Exhibits 2, R and E, which the court refused to consider, and upon the specifications of claims against the Co-Op set out in 33 different assignments in all and specifically referred to in the record. Be-

cause of the importance of this claim, we are calling specific attention to these assignments (Tr. 62—specifically Tr. 68 to 97).

The 33 assignments are epitomized:

1. Reasonable value of meats, poultry, eggs and produce raised or grown on said property and consumed by the defendants during their occupancy of the same.

2. Charges made by the defendants for repairs and maintenance.

3. Charges and expenditures made by the defendants for gasoline and oil claimed to have been used by them for farming and other equipment.

4. Charges and expenditures made by defendants for repairs to equipment.

5. Charges by defendant Owen for mowing hay.

6. Charges made by Allen Frandsen for plowing in 1945.

7. Charges made by defendant Hansen for hauling cement.

8. In accordance with agreements between defendant's Owen, Hansen and Frandsen and C. E. Kingston, acting for or on behalf of defendant, Davis County Co-Op, no charges for labor performed on the property by these defendants or their families was to be made against the plaintiffs. In the items of labor charged by these defendants, an accounting should be made.

9. The same with respect to thinning beets, etc.

10. During the years 1945 and 1946, defendants Owen and Frandsen, on behalf of defendant, Davis County Cooperative Society, without authorization by or consultation with plaintiffs, entered into contracts with certain Japanese for the planting, caring for and harvesting of celery and the advancement of money to them. On this item, we call the court's attention to the chattel and crop mortgage given by the plaintiffs and others to the State Bank of Lehi (Exhibit 1). The mortgage was signed by the plaintiffs and covered the celery referred to in specification 10.

11. No. 11 is confined entirely to Owen, Hansen and Frandsen.

12. No. 12 is confined to Owen.

13. No. 13 is for a credit for reasonable value of materials and crops wasted and allowed to spoil.

14. No. 14 pertains to Owen.

15. No. 15 pertains to a hay bailer purchased by defendant Hansen.

16. No. 16 pertains to fertilizer for celery and pertains to Owen.

17. No. 17 pertains to Owen.

18. No. 18 is for telephone bill and pertains to Owen.

19. No. 19 pertains to Frandsen and is for checks taken

20. No. 20 pertains to flour used by Frandsen.

21. No. 21 pertains to Owen, Hansen and Frandsen.

22. No. 22 pertains to tools alleged to have been on the place at the time of the purchase.

No. 23 pertains to the cost of the cellar constructed for potatoes without plaintiffs' consent.

24. No. 24 pertains to charges made against Owen, Hansen and Frandsen.

25. No. 25 pertains to charges made against Owen.

26. No. 26 pertains to charges made against Hansen.

27. No. 27 pertains to charges against Frandsen for remodeling granary.

28. No. 28 pertains to Owen, to a loss of onion crop.

29. No. 29 is a charge against Frandsen and the Co-Op for apparently excessive water used in 1945.

30. No. 30 pertains to Frandsen and the Co-Op for the balance of \$90.00 for pasture rental.

31. No. 31 is against Owen and Frandsen and the Co-Op for hay raised in 1945.

32. No. 32 is against Owen, Hansen and Frandsen and the Co-Op for equipment taken by them from the property prior to auction sales.

33. No. 33 is against all of the defendants for \$480.00 for the cost of a temporary electric fence used on the property.

The court will readily see that the charges are substantially all based upon the Lease, Exhibit 2, and are against individuals and not the Co-Op. Notwithstanding which, the

court, we again say, disregarded Exhibit 2 and in the face of the fact that the claims are not made against the Co-Op treats them as a payment to the Co-Op of the moneys due it for its one-fifth interest. The court goes further and makes the finding, draws the conclusion and enters the judgment calculated to bar a full hearing of the pending suit in Salt Lake County.

POINT III

THERE IS NO PROOF IN THE RECORD OF KNOWLEDGE ON THE PART OF THE DEFENDANT MADSEN OR OF THE DEFENDANT FERRELL OF EXHIBIT D AT THE TIME MADSEN PURCHASED THE ONE-FIFTH INTEREST FROM THE DAVIS COUNTY CO-OP.

The court finds that Madsen had knowledge of Exhibit D at the time he purchased the property. The finding is based upon two facts as we understand the record:

1. That Madsen attended an irrigation meeting prior to the time he purchased the one-fifth interest from the Co-Op, and

2. That he is the brother-in-law of Ferrell and that Ferrell must have known of the existence of Exhibit D and must have told Madsen. Madsen testified without contradiction that he had never seen the instrument until it was shown to him in the office of the writer of this brief in the preparation of the trial of the case in Provo. That evidence is not contradicted.

While this finding is not supported by the evidence and is wholly unjustified, we pass it with the suggestion that it

is wholly immaterial for the reasons which we have heretofore fully set out. No layman or lawyer can read Exhibit D and conclude that it creates a lien upon anything or operates as a transfer of anything. It was not known to either Madsen or Ferrell or to their attorney until some considerable time after Madsen had bought and paid for this property. We will not repeat all the reasons why the Co-Op was perfectly justified in selling the property to Madsen. It had permitted one season to go, no doubt hoping to get a settlement with Madsen, and it was called upon to act or lose its property. The title to Madsen is perfectly regular in all respects, is for a valuable consideration. There is nothing in the record which discloses any adverse interest, and with the contract (Exhibit C) before him, Madsen was perfectly justified in buying the property as was the Mill Fork Coal Company in taking a mortgage.

POINT IV

THERE IS NO EVIDENCE THAT THE FERRELLS HAD ANY KNOWLEDGE OF EXHIBIT D UNTIL AFTER THEY HAD PURCHASED THE PROPERTY IN RELIANCE UPON PARAGRAPH NO. 9 OF THEIR CONTRACT, EXHIBIT C, AND THE MOYLE LETTER, EXHIBIT 8.

By the contract, Exhibit C, paragraph 9, the plaintiffs agreed that:

“In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encum-

branches other than herein provided for shall hereafter accrue against the same by acts or neglect of the Sellers, then the Buyers may at their option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payments herein provided to be made may, at the option of the Buyers, be suspended until such a time as such suspended payments shall equal any sums advanced as aforesaid."

And the Moyle letter is as follows: (Exhibit 8)

"You refer to the fact that Dr. Mathis does not appear of record to be the owner of the property. I have personally investigated this matter, and find that Dr. Mathis has a Contract for the purchase of the property and I suggest that the payment of the balance of the down payment be made only upon condition that at the time of payment Dr. Mathis receive a proper deed for the property. I will personally see that a proper conveyance is obtained before or at at the time the payment is made."

As above observed there is no evidence whatsoever that Ferrell, at that time, had knowledge of Exhibit D. He knew of the outstanding one-fifth interest in the Co-Op, and that is the interest which Moyles, by their letter, personally guaranteed to procure by legal conveyance before releasing the \$30,000.00 which he paid for the property. He was dealing with lawyers of good standing, he trusted them and trusted Mathis. He had a right to do so. Even had he known of the existence of Exhibit D, he still would have been justified in paying his money for it was paid upon the express condition that it should not be turned over to Mathis until a proper conveyance of the property was made. Such a conveyance was

not procured, and hence the trouble. Notice of existence of Exhibit D is wholly immaterial because Ferrells had protected themselves as against such contingency, both by the letter and by the contract. In the confusion resulting from the breach of good faith, as indicated, the title of the property was hopelessly involved and the stipulation furnished the only way out. It protects the rights of all parties. Before the Madsen interest could be eliminated, it was necessary for Ferrell to make an arrangement with him, which he did, as shown by the evidence, by agreeing to pay Madsen his proportionate part of the amount received from the sale of the property to the Sugar House Stake. The Western Reserve Underwriters Corporation, as previously stated, refused to convey except in strict accordance with their contract, and the title therefore went four-fifths to Mathis and one-fifth to the Co-Op, which by the Warranty Deed to Mathis, passed to him and from him to Ferrell.

From the sales of the property, \$39,300.00 was deposited in the Clearfield State Bank in the joint names of Dan T. Moyle and J. D. Skeen. The effect of the decision of the court, at this time, is to deprive Ferrell of his right to make application of the money, which he received from the property to the extinguishment of the debt and Madsen's claim to the one-fifth interest. By the conflicting findings of the court and the conclusion that the very instruments which must be construed to determine rights must be left for construction to another court. The court has deprived the Co-Op of its interest in the fund. It has deprived Ferrell of his interest and Madsen of his interest, regardless of the interpretation

of the Exhibits E, R and 2 and the outcome of the suit now pending in Salt Lake County. Either the court should have refused to try this case or it should have completed the trial instead of attempting, by one isolated, unsupported and erroneous finding, to tie the hands of another court.

POINT V

THE COURT FAILED TO CONSTRUE OR TO GIVE EFFECT TO CONTRACTS FOR THE OPERATION OF THE RANCH, EXHIBITS R, E AND 2.

Exhibits R and E are simply memoranda of some sort of a proposed working agreement for the operation of the farm. In both agreements, Mathis is an active participant in the whole of the farm business.

Exhibit 2 is a formal lease, complete in all respects and the court will find Mathis to be a lessor and a lessee. He actively participated in all ranch business after the date of the instrument. The Davis County Cooperative Society was not a lessee under the lease. After its execution, application was made to the Production Credit Corporation for a loan of approximately \$19,054.95. The money was received and expended by the lessees under Exhibit 2.

Hansen, Frandsen and Owen were lessees and apparently lived on the property and had to do with the business end of the operations. Subsequently, the same lessees borrowed \$8,500.00 from the Lehi State Bank. The money was put in the name of Owen and paid out on his checks. Mathis par-

ticipated in the management of the farm and in the conduct of its business. The court will find in a chattel and crop mortgage given by the lessees under the lease, Exhibit 2, that there was included all personal property on the ranch and also all crops. The celery crop complained of by Mathis was specifically described in the crop mortgage. A checking of the items specified in the particulars in the Salt Lake County suit in connection with the items included in the Lehi State Bank mortgage will disclose the participation of Mathis and also that the operations were conducted under the terms of the Lease, Exhibit 2. If losses were sustained, they were losses chargeable to the lessees only and not to the Co-Op. The cross examination of Mathis clearly disclosed that he was not acting in good faith in withholding the money from the Co-Op even though Exhibit D were valid, but on the contrary, filed the suit for the purpose of intimidating the Co-Op, and as a pretense for withholding from it its proportion of the money paid by Ferrell as the purchase price of the land.

POINT VI

EXHIBIT D WAS NOT A TRANSFER OF THE INTERESTS OF THE DAVIS COUNTY COOPERATIVE SOCIETY IN THE LANDS COVERED BY THE CONTRACT, EXHIBIT A.

The court has treated Exhibit D as a valid transfer of the undivided one-fifth of the Saratoga Ranch to the plaintiffs. But for the stipulation, which is made without prejudice to either of the parties, to have accomplished the purposes of

the court in cutting off the rights of the Co-Op, it would have been necessary for the court to have entered a Decree specifically performing the Contract, Exhibit D. We have set forth in detail the reasons why this could not have been done because Exhibit D was not a contract which would lend itself to specific performance. Accordingly, the court has taken the short cut predicated upon the stipulation which was to be without prejudice and has adjudged the money (the proceeds of the sale of the property) to belong to the plaintiffs. It has done, indirectly and through the stipulation, what it could not have done in a direct suit for the specific performance of the memorandum. The defendants are entitled to protection under the stipulation.

In order to bring about this result, a whole series of errors was committed:

1. The court disregarded the contract for the purchase of the land, Exhibit A.

2. Notwithstanding the utter insufficiency of Exhibit D it proceeded to specifically enforce it.

3. The court disregarded the Ferrell contract, Exhibit C.

4. It imputed notice to Madsen because he attended a meeting of a water company and was a brother-in-law of Ferrell.

5. It nullified the deed to Madsen.

6. It disregarded the non-acceptance of Exhibit D and its repudiation by the plaintiffs in withholding all of the money.

7. It has treated the instrument, which was not even intended as a conveyance or transfer of any interest whatsoever to be a valid deed of conveyance.

8. It disregarded the solemn agreement by the attorneys for the plaintiffs to procure a legal conveyance to Ferrell and

9. The court has disregarded the solemn stipulation of the parties that it was made without prejudice in order to clear the title to the land that it might be sold.

POINT VII

THE PLAINTIFFS REFUSED TO PAY TO THE DAVIS COUNTY COOPERATIVE SOCIETY ONE-FIFTH OF THE PROCEEDS OF THE SALE OF SAID PROPERTY TO FERRELL AND THEREBY REJECTED THE BINDING EFFECT, IF ANY, OF EXHIBIT D.

The absolute and persistent refusals on the part of Mathias to pay any part of the money received from the sale of the property to the Co-Op can be construed only as a rejection of Exhibit D. It makes no difference whether that was a condition precedent or a condition subsequent. The fact that the plaintiffs resorted to a subterfuge to cheat the Co-Op out of its proportion of the money can be treated only as a rejection and repudiation of Exhibit D. There is no evidence that the Co-Op, as such, actually participated in the operation of the farm after Exhibit 2 was signed and the money was borrowed first from the Production Credit Corporation and later from the Lehi State Bank. On the contrary, the lessees, borrowing

the money, complied with the rigid requirements of the Federal loan in the first instance, both in caring for and in marketing the crops and ultimately in repaying the borrowed money, and it is perfectly evident that they likewise complied with the terms of the Chattel and Crop Mortgage given to the Lehi State Bank, during the time the lessees were borrowers from it. Such a large loan from a small town bank would have had rigid attention until it was paid. The fact that the obligation was met impels the conclusion that the lessees under Exhibit 2 complied with their obligation. One of the principal complaints made by Mathias was that too much celery was planted. Even so, it was Mathias who signed the crop mortgage which covered the acreage of celery, which he said was excessive.

POINT VIII

THE TRIAL OF THIS CASE WAS ABORTIVE AND INCOMPLETE AND INCONCLUSIVE IN THAT WHILE THE COURT BASED ITS JUDGMENT UPON THE POSSESSION BY THE DAVIS COUNTY CO-OP OF THE SARATOGA RANCH, IT REFUSED TO CONSIDER THE INSTRUMENTS WHICH SHOW CONCLUSIVELY THAT THE LEGAL AND ACTUAL POSSESSION OF THE PROPERTY WAS IN THE PLAINTIFF AND OTHER INDIVIDUALS, NOT INCLUDING THE DAVIS COUNTY CO-OP.

The most serious criticism of the findings and conclusions is that the court went out of its way to cover up a *res judicata* which may have the effect of staying the hand of the District

Court for Salt Lake County in the pending case. We have said all that we should say with respect to the grievous errors of the court in finding that the Davis County Cooperative Society was in charge of the ranching operations in the face of the conclusive documentary evidence to the contrary. While the court left the construction of the Exhibits R, E and 2 to the Salt Lake Court, the construction, regardless of the views of the Salt Lake Court, may serve no purpose if the finding and conclusion that the Co-Op was in possession of the property stands. As to whether the finding and conclusion actually constitute a res judicata would be a legal question and another lawsuit which we hope to avoid. If this judgment stands, the Salt Lake Court may be left the one function of balancing the accounts involving the operation of the farm under Exhibit 2. But the court will have, by this Judgment, given effect to Exhibit D and will have cut off completely the meritorious claims of both Madsen and Ferrell and would have jeopardized the position of the Co-Op. In addition to what we have heretofore said, we call attention to the fact that the Co-Op is a corporation with stockholders and capital and the individuals named in Exhibit 2 were simply stockholders of the corporation. Without any contention having been made in the pleadings, the evidence, briefs, arguments or otherwise that the individuals were acting for the Co-Op and not for themselves, the court disregards the corporate entity and holds the corporation liable for obligations, if any, of three of its stockholders, who acted for themselves and not otherwise. It would serve no purpose to pursue this argument further upon this point.

POINT IX

THE DECREE MADE AND GIVEN IN THE ABOVE-ENTITLED CAUSE IS NOT SUPPORTED BY THE FINDINGS OR CONCLUSIONS OR THE RECORD, IS UNJUST AND CONTRARY TO LAW AND EQUITY, AND THE JUDGMENT MUST BE REVERSED.

Under no theory of law or equity can this judgment be sustained. If not set aside, extended expensive litigation is bound to follow because the Utah County Court has invaded the jurisdiction of the Salt Lake County Court, and without issues, evidence or reason may have barred the just and equitable disposition of the controversies among the parties hereto.

Respectfully submitted,

J. D. SKEEN,

Attorney for Appellants