

1953

# J. Lloyd Mathis and Nellie M. Burtenshaw Mathis v. Alonzo F. Madsen et al : Brief of Respondents

Utah Supreme Court

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Dan T. Moyle, Moyle & Moyle; Attorneys for Respondents;

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# IN THE SUPREME COURT of the STATE OF UTAH

J. LLOYD MATHIS and NELLIE  
M. BURTENSHAW 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, JAY 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.  
KINGSTON, Deceased; DAVIS  
COUNTY COOPERATIVE SO-  
CIETY, INCORPORATED, a Corpo-  
ration, and WESTERN RESERVE  
CORPORATION, a Corporation,

*Defendants and Appellants.*

Case No. 7900

## BRIEF OF RESPONDENTS

**FILED**

DAN T. MOYLE,  
FEB 28 1933 Of the Firm of Moyle & Moyle,  
*Attorneys for Respondents*

Clerk, Supreme Court, Utah

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COUNTY COOPERATIVE SO-  
CIETY, INCORPORATED, a Corpo-  
ration, and WESTERN RESERVE  
CORPORATION, a Corporation,

*Defendants and Appellants.*

Case No. 7900

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## BRIEF OF RESPONDENTS

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### STATEMENT OF FACTS

Appellant's statement of the case is incomplete, ar-  
gumentative and contains numerous conclusions which  
are not supported or justified by the evidence. For these

reasons respondents deem it advisable to make a full and comprehensive statement in order that the Court may be fully advised with respect to all issues presented.

The events and transactions leading up to the controversy are as follows:

On January 24, 1942, respondents J. Lloyd Mathis and Nellie Burtenshaw Mathis, his wife, together with C. E. Kingston as Trustee-in-Trust for Davis County Cooperative Society, entered into a Uniform Real Estate Contract as joint purchasers with Western Reserve Underwriters Corporation, as seller to purchase approximately 560 acres of land located near Lehi in Utah County, known as the Austin Brothers Association Farm, together with certain water rights and personal property, all of which was particularly described, and by supplemental agreement, dated the same day and attached to the Contract, it was agreed that when the Seller deeds the property that such Deed should be executed conveying an undivided four-fifths of the property to respondents as joint tenants, and the remaining one-fifth to "C. E. Kingston as Trustee-in-Trust for Davis County Co-op, a corporation of Utah." (This Contract and Supplemental Agreement is in evidence as Exhibit A.)

After the execution of this Contract, farming operations were conducted on the property by C. H. Owens, F. L. Hansen and Allen M. Frandsen. These men were all members of the Davis County Cooperative Society, and C. H. Owens was in addition a member of the Governing Board. These parties each operated certain por-

tions of the property under the supervision of C. E. Kingston, who rendered monthly reports to the respondents with regard to the operations conducted upon the property. (These reports are in evidence as Plaintiffs' Exhibits H, I, and J.)

Memorandums of Agreement for the farming operations were made in March of 1942 (Plaintiffs' Exhibit R and E), which provided for the sharing of expenses and profits upon percentages as provided therein, and in order to obtain funds to carry on farming operations, certain agreements and loans were made, which are referred to on pages 4 and 5 of Appellants' Brief.

With regard to Defendants' Exhibit 2, the so called farm lease this was apparently executed for the particular purpose of obtaining the Utah Farm Production Credit Association loan, (Defendants' Exhibit 9) this being shown by the minutes of the meeting of May 1, 1944, of the members of the Davis County Cooperative Society (Plaintiffs' Exhibit V), from which we quote:

"C. E. Kingston: 'The purpose of this meeting today is to bring to your attention for your approval some of the things it is necessary for us to do regarding the property at Lehi. Concerning the loan we have down there, last year it was necessary to raise it to \$17,485.00. After that we found it was necessary to raise it still another \$1,000.00. That made it \$18,485.00. At the present time the way we stand we have paid all of that back with the exceptions of \$2,200.00. We have enough grain and AAA payments coming to more than take care of that balance. Our last year's ex-



penses there have been quite a bit less than our total incomings. There have been advantages that have come from that place. Brother Ben Clegg was able to get his hay there on a service slip. It is easier to raise our hay and grain on a place than to raise cash to buy it. Last year the P.C.A. objected to our articles of incorporation because they are written so we cannot be sued. For a long time time they insisted we change them and write them up so it would be easy to sue us if someone wanted to. For this set up this year they are asking us to write up a lease whereby the Davis County Cooperative and myself are lessors and Mr. Mathis and his wife and all the operators there are lessees. They claim by doing that they are not dealing with the Cooperative. So we are going to draw this lease up in that manner so the Davis County Cooperative leases to Mr. Mathis and all the operators there as lessees.' ”

We do not consider that any of these agreements with respect to the farming operations are material to any of the issues in the instant case, they being involved in controversies between the respondents and Davis County Cooperative Society and the above mentioned operators, which controversies are involved in an action pending at the time of the commencement of this action, in the District Court of the Third Judicial District, which action will later be referred to, and the District Court in the present action in its Memorandum Decision, Findings and Decree reserved the interpretation and effect of these instruments for determination by the Third Judicial Court.



Farming operations were conducted by the same operators up to and including the year 1946, and in the latter part of that year the Respondents and the Davis County Society and its Trustee-in-trust, C. E. Kingston, determined to sell the property and to liquidate all assets and to settle the affairs between them, and in September, 1946, the property, together with equipment and certain livestock, was listed for sale with C. Ed. Lewis Company of Salt Lake City, the original listing agreement having been signed by Respondents and C. E. Kingston, as owners, (Plaintiffs' Exhibit Aa); and in connection with the listing of the property it was agreed that a real estate commission of 5% be paid.

On January 13, 1947 a formal Agreement of Sale was made between J. Lloyd Mathis and Nellie M. Mathis, as sellers, and J. A. Ferrell and Almira Ferrell, his wife, and Jay Ferrell, their son, for the sale of all of the land and water rights for the sum of \$120,000.00, payable \$30,000.00 down, receipt of which was acknowledged as paid, and the balance payable in yearly installments of \$7,500.00. (Plaintiffs' Exhibit C). Prior to the execution of this Contract certain preliminary contracts of sale of the real estate to J. A. Ferrell had been entered into, one in the sum of \$140,000.00 signed by J. L. Mathis and C. E. Kingston as sellers, (Plaintiffs' Exhibit F); this being dated November 27, 1946, which was made subject to Mr. Ferrell's son's approval within 15 days from the date thereof; and another, (Plaintiffs' Exhibit W) dated December 10, 1946, signed by J. A. Ferrell and

Jay Ferrell alone, which provided for the purchase price of \$120,000.00, payable \$10,000.00 cash and an uncompleted five-room house with basement, together with one-half acre of land and fruit trees, and clear of encumbrance, valued at \$18,000.00 finished in a workmanship-like manner, and the balance in yearly installments of \$7,500.00; this referred to five-room house with basement and one-half acre of land and fruit trees was owned by Appellant Alonzo F. Madsen and located in Davis County, Utah. (See testimony of C. Ed. Lewis, R. 368).

Another such preliminary contract (Plaintiffs' Exhibit G) also dated December 10, 1946, was signed by all of the Ferrells, including the son, as buyers, and J. L. Mathis and Nellie M. Mathis and C. E. Kingston, as sellers, calling for the purchase price of \$120,000.00, acknowledging receipt of \$12,000.00, and the balance of the purchase price payable \$18,000.00 cash upon delivery and acceptance of Abstract and improved real estate contract showing good title, and the balance of \$90,000.00 to be paid in yearly installments of \$7,500.00, and it was this preliminary contract out of which arose the formal finally executed contract Exhibit C. See testimony of C. Ed. Lewis, (R. 369).

In connection with the listing and sale of the property Appellants in their statement at page 6 of their brief state that the sale of the property was made while C. E. Kingston was employed by C. Ed. Lewis Company, as a real estate salesman. This is not borne out by the testimony, the only testimony in this connection being that of C. Ed. Lewis (R. 364), which is to the effect that

C. E. Kingston came into the employ of C. Ed. Lewis Company about the year 1945 and worked for about a year or a year and one-half; there was no direct evidence that he was so employed at the time of the sale. However, we do not feel that this is in any sense material, as in any event all of the transactions concerning the sale were handled by Mr. Holbrook for the C. Ed. Lewis Company or Mr. Lewis himself, (R. 195, 376, and Exhibits F, G, W, and R), and C. E. Kingston had no connection with the sale for the C. Ed. Lewis Company, he only appearing as one of the owners and sellers of the property.

At the time the Ferrell negotiations were going on all of the parties knew that the Davis County Society held a one-fifth interest in the Western Reserve Underwriters Corporation Contract, and in connection with this interest, and also in connection with the liquidation of the affairs between respondents and the Davis County Society, the instrument in evidence as plaintiffs' Exhibit "D" was executed. This was dictated over the telephone by respondent Mathis in a telephone conversation with C. E. Kingston and it was written out at the office of C. Ed. Lewis Company (R. 196, 372).

This Exhibit D reads 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. Mathis, 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"

This instrument was acknowledged January 23, 1947 by C. E. Kingston and Ethel M. Kingston, his wife, before Ardous Kingston a Notary Public, and who also was Secretary of the Davis County Cooperative Society.

As stated in the Stipulation and Order stating issues upon pre-trial (R. 86), this agreement was also executed in connection with the settlement of the affairs between respondents and the Davis County Society.

The Ferrell Contract (Exhibit "C") was acknowledged and presumably delivered February 15, 1947, after the execution of the above mentioned Exhibit "D".

With regard to the letter of Moyle & Moyle referred to in appellants' Brief, it is erroneously stated that these attorneys at that time were representing Mathis (page 10). Mr. Mathis testified (R. 241, 243) that they had no attorney—that Oscar Moyle was representing himself and Mr. Ferrell "on the abstract and etcetera." The only connection these attorneys at that time had in respect to the matter was to check the condition of the title and it is very evident that the matter was not again referred to them for attention or for final closing. In any event, whatever connection they did have, is not material to any of the issues involved in this case.

After the execution of the Contract (Exhibit "C") to Ferrells, they went into possession of all of the property covered by the same, and remained in the exclusive possession at least until the 15th day of June, 1948, on which date the Davis County Society executed and delivered to Alonzo F. Madsen and Leona F. Madsen, a deed to an undivided one-fifth of the property, and according to the testimony of Ferrell, Madsen claimed an interest thereunder.

Madsen was a brother-in-law of Ferrell and was closely connected with him in all transactions concerning the property, both prior to the execution of this deed and subsequently, all of which will be taken up later in the argument; and after the execution of the deed,



neither the appellants Ferrells or Madsens informed respondents of the execution of the same or advised them of any interest claimed by Madsens in the property until the 26th day of November, 1948, when a letter was written to Mathis by Attorney Rose, who apparently represented the Ferrells (Plaintiffs' Exhibit "Q"). As can be noted, this letter did not advise respondents as to the existence of the deed, but only made some demand upon them for one-fifth of the profits derived from the farm, and stated that it was their information "That Mr. Madsen bought his one-fifth interest from a Mr. Kingston." After receipt of this letter, respondents caused the Abstract of Title to be brought to date, which Abstract disclosed the existence of the Madsen deed (R. 202).

From the time that Ferrells took possession of the property under Exhibit "C", neither the Davis County Society nor any of its members made any demand upon him for any share of the crops grown, or claimed any interest in the property, and the only claims that the Society or its members have ever made, after the execution of Exhibit "C", were claims made against Mathis for a share of the proceeds of the sale to Ferrells (R. 386). These demands were refused by respondents as they considered that the Society had been paid in full (Exhibit "P") and (R. 200), and it was admitted by the Society that there was some dispute concerning the same (R. 391).

In order to settle the various claims and rights of

the parties in and to the property, respondents commenced this action and filed their Complaint, which was in the usual form of an action to determine adverse claims to real estate and to quiet title, and separate Answers were filed by the defendants which were later, after the Stipulation (Exhibit "B") was entered into between all of the parties, amended and amplified to include both denials of plaintiffs' claims and asserting certain counterclaims, to which each of said amended Answers separate amended Replies were made thereto by plaintiffs.

The Stipulation (Exhibit "B") provided that all of the real estate and water rights described in the complaint might be sold by J. A. Ferrell, Elmira Ferrell and Jay Ferrell in one or more tracts as they might deem advisable or advantageous, and that out of the proceeds of the sale there be paid to respondents \$56,000.00 on account of the unpaid purchase price under the Ferrell contract, and that \$37,500.00, being the estimated balance due under the contract should be deposited in the Clearfield State Bank pending a settlement or the entry of a final Judgment in this matter, and then disposed of in accordance with such Judgment; and further, that if said \$37,500.00 did not represent the true amount of the balance due, that either a larger or a lesser sum be deposited. The Stipulation further provided that upon the payment of the sum of \$56,000.00, and the depositing of the escrow money, the respondents would execute and deliver to the Ferrells or to any person



or corporation whom they might direct, a Quit-Claim Deed conveying all of the property, and that further, they would authorize and direct the Western Reserve Underwriters Corporation to execute and deliver a good and sufficient Warranty Deed to the property to the Ferrells or whomsoever they directed.

The Stipulation further provided that upon payment of the money, that the pleadings be amended so as to present to the Court issues affecting the ownership of the money so deposited in escrow only, and the title to the property itself be cleared as to all claims and demands of the respondents.

Prior to the commencement of this action plaintiffs had filed suit in the District Court of Salt Lake City against the Davis County Cooperative Society, Charles W. Kingston as Administrator of the Estate of Charles E. Kingston, Deceased, Charles H. Owens, F. L. Hansen and Allen M. Frandsen for an accounting as to the farming and other operations conducted on the property, and claiming general and punitive damages, which suit is now, and at the time of the trial of the instant case was at issue, and pending in that court and the Stipulation provided that the same should be without prejudice to the rights of any of the parties in the Salt Lake County action. It was further provided that the Stipulation was made for the specific purpose of clearing title to the property, in order that the same might be sold and the controversies referred to be limited only to the proceeds of sale. This action, therefore, is no

longer one specifically to quiet title, but to determine the interest of the parties in the escrow funds upon the basis of the interests of the parties in the land prior to the execution of this Stipulation, and the pleadings were accordingly amended in this respect.

Prior to the trial, a portion of the property consisting of 198.21 acres was sold to the Sugar House Stake of the Church of Jesus Christ of Latter-day Saints, and the \$56,000.00 was paid to plaintiffs and \$10,000.00 placed in escrow. After submission of the case and before final Judgment, the remainder of the property had been sold and the total amount of \$39,300.00 placed in escrow in the Clearfield State Bank, and the same is now so held.

Respondents, of course, have not attempted to abstract all of the evidence in this cause and other facts will be referred to in the argument.

On pre-trial of this matter, certain facts were stipulated to (R. 84), and certain issues of fact and of law were reserved for determination (R. 88-90).

The appellants in their Brief have set forth at pages 13 and 14 the pre-trial issues of fact and of law reserved, which are in some respects incomplete. However, in general they do perhaps sufficiently cover the exact issues reserved by the Court for determination. The appellants' statement of findings at page 15 of their Brief, as will be noted, are incomplete; however, we will not attempt to set out the findings in detail, but will refer the Court to the complete findings made (R. 153).

## ARGUMENT POINT I.

EXHIBIT "D" WAS A VALID AND EFFECTIVE TRANSFER OF THE INTEREST OF C. E. KINGSTON AS TRUSTEE-IN-TRUST FOR THE DAVIS COUNTY SOCIETY AND OF THE SOCIETY IN AND TO THE WESTERN RESERVE CONTRACT AND THE PROPERTY COVERED THEREBY.

Respondents make several attacks upon the validity and effectiveness of Exhibit "D", none of which can be sustained.

As to the authority of C. E. Kingston to act for the Society with respect to this Exhibit, this will<sup>1</sup> be considered later. It is then contended by respondents that C. E. Kingston was the agent of C. Ed. Lewis Company, who was in turn the agent of plaintiffs, while at the same time he was the Trustee of the Davis County Society, and therefore adversely interested, and no applied authority could be imputed. In connection with this, the evidence does not sustain respondents' position in respect to Kingston's being the agent of C. Ed. Lewis Company at the time this agreement was executed. The only evidence in this respect is that of C. Ed. Lewis himself (R. 364), which was that he first met Mr. Kingston along about 1945. "That he came in the office and went to work for us as a farm salesman and that he worked about a year—maybe a year and a half." This certainly does not establish that Mr. Kingston was still in the employ of C. Ed. Lewis Company at the time of the execution of this exhibit in January, 1947. In any event, however, this does not appear to be material, for there is no evidence whatsoever that Kingston was personally interested in

the sale, or that he derived any personal benefit from the same. The evidence is not disputed that Mr. Keith Holbrook and Mr. Lewis himself handled the sale for the C. Ed. Lewis Company. Kingston's only interest in the sale was as a seller representing Davis County Society, and it was in this capacity that he signed the Listing Agreement with Mathis for the sale of the property and the Earnest Money Receipts—Exhibits "F" and "G".

The cases cited by appellant with regard to this are not in point, therefore, as Kingston was not personally interested in the sale nor did he derive any personal benefit from the same; his interest and activities were not adverse to the Davis County Society but were for and on its behalf.

Another contention made by appellants is that this instrument was at most but an offer, and if communicated to plaintiffs was not accepted. This also, is not supported by the evidence, as it was undisputed that Mr. Mathis himself dictated the same over the telephone to Mr. Kingston at the office of C. Ed. Lewis Company, where the same was transcribed, and as to its acceptance by respondents this is amply shown by testimony of Mr. Mathis and by Exhibits "K", "L", "O", "P", "S" and defendants' Exhibits "3" and "4", which exhibits represent checks showing payment by or on account of Mr. Mathis to C. E. Kingston for the Davis County Society, and for its benefit.

Appellants repeatedly in their Brief and particularly in their Statement of Fact at page 7, have stated to the

effect that all of the money derived from the sale to Ferrells went to Mathis and that no part of the same was received by the Society. This certainly is contrary to the undisputed evidence in this matter, both as stated in Mathis' testimony and in the above Exhibits.

Mr. Mathis (R. 199) testified that Exhibit "L", a check of C. Ed. Lewis Company in his favor in the sum of \$4,000.00 was endorsed by him payable to C. E. Kingston; also that Exhibit "O" was his own check in the sum of \$7,000.00 payable to C. E. Kingston for the Davis County Co-op. This exhibit contains the endorsement on the back: "Partial payment on sale of Saratoga Ranch, Lehi, Utah", and was endorsed by C. E. Kingston for Davis County Co-op. and C. E. Kingston individually.

Also, that Exhibit "P" was a check in the sum of \$1,000.00 given by him to C. E. Kingston. This exhibit contains the endorsement on the back: "Advanced on Saratoga Ranch Property, and if Necessary not Classified as Payment but a Loan", and is signed by C. E. Kingston. That the endorsement on this check, "Advanced on Saratoga Ranch Property, and if Necessary not Classified as Payment but a Loan", was written by himself for the reason that at the time he figured they had been paid in full (R. 200).

Mr. Mathis further testified (R. 198) that Exhibit "K" was a check in the sum of \$2,000.00 of C. Ed. Lewis Company made payable to him that was endorsed by him and used as a payment to the Western Underwriters Corporation.



Exhibit "S" is a check of J. L. Mathis in the sum of \$3,000.00 payable to Lehi State Bank, being payment on the Chattel Mortgage.

Defendants' Exhibit "3" is a check in the sum of \$9,000.00 of J. L. Mathis, Agent, payable to C. A. Arrington—Western Underwriters Corp., containing the endorsement on the back: "Payment in full for Warranty Deed as per Uniform Real Estate Contract", and Exhibit "4", check to this company of \$187.50 endorsed: "Interest in full of all demands."

From this testimony and these exhibits it therefore is clear that of the \$30,000.00 down payment and the first yearly payment on the Ferrell Contract, the Davis County received a very substantial portion of the sum, and of course, out of this down payment, a commission of \$6,000.00 was paid to Mr. Lewis (R. 198).

It is therefore clearly evident that Mr. Mathis not only accepted this Exhibit "D", but also acted in accordance with its terms and paid over to Mr. Kingston for the Davis County Society all of the money to which both he and Mr. Kingston evidently considered due it; this being indicated by the endorsement on the above mentioned \$1,000.00 check (Exhibit "P").

A further contention made by appellants is that this Exhibit "D" is unintelligible, incomplete, uncertain and ambiguous, and that the Court misinterpreted and misconstrued the same. This is well answered by the following statements taken from the Court's Memorandum Decision in this matter (R. 122). The Court states as follows:

"A mere cursory glance at Exhibit 'D' is sufficient to establish that it is very poorly drawn, is so ambiguous and uncertain as to constitute an outstanding example of the tragedy which sometimes occurs when untrained persons presume to discharge the highly technical functions of legal counsel. That fact alone, however, does not relieve the Court of its responsibility to ascertain its meaning if that can be done under the provisions of law respecting this type of instrument. In searching for the meaning the Court must first examine the language used in the instrument itself and accord to it the weight and effect which the instrument itself may show that the parties intended the words to have. If then its meaning is still ambiguous or uncertain, the Court may consider other contemporaneous writings concerning the same subject matter, and may, if it is still uncertain, consider parole evidence of the parties' intention. See *Burt vs. Stringfellow*, 45 U. 207; 143 P. 234. *Beagley vs. United States Gypsum Co.*, ..... U. ....; 235 P. (2) 783. In *Miller vs. Hancock, et al.*, 67 U. 202; 246 P. 949, the Court says:

'Respondent cites cases to the effect that separate writings may be construed together as containing all the terms of a contract, though only one be signed by the party to be charged: (Citing cases). *The doctrine of these cases is well-nigh elementary. It is at least supported by the great weight of judicial opinion.*' (Emphasis added.)

"The evidence establishes that only one relationship ever existed between the plaintiffs and



C. E. Kingston, and that Exhibit "A" was the inception of that relationship. By the attached supplemental agreement, the parties to the contract agreed that their respective interests therein were four-fifths in plaintiffs and one-fifth in C. E. Kingston, Trustee-in-Trust for Davis County Cooperative Society. In Exhibit "D", it is recited that the plaintiffs and C. E. Kingston 'for the Davis County Cooperative Society, Inc. own on an 80%-20% basis of Ranch at Lehi.' Furthermore they identify the property as the 'Saratoga or Austin Brothers Ranch' and the property is identified in the Exhibit "A" as 'the Austin Brothers Association Farm.' Clearly, then, Exhibit "D" is in respect to the rights of the parties in and to the contract of purchase (Exhibit "A") and the property being purchased thereunder.

"It is clear in the record that upon execution of Exhibit "A", the plaintiffs turned full management of the farm over to C. E. Kingston as Trustee in Trust for Davis County Co-op. The latter made periodic reports to the plaintiffs of the operation, and these reports are before the Court in Exhibits "H", "I" and "J". When these exhibits were offered in evidence, the Court reserved determination of objections of the defendants. It is ordered that they be received as to defendants Kingston and as to Davis County Co-op. In addition, Exhibits "D", "K", "L", "M", "N" and "O" are received as to Kingstons and Davis County Co-op. The plaintiff had received nothing for his investment for the five years that the property was possessed, aside from the value of his equity to the land and to personal property being purchased thereunder. Exhibit "D" clearly indicates that the property, and the parties' respective interests, were 'in process of liquidation,'

and that until the audit was completed, it would not be known whether Davis County Co-op had anything further coming from its equity than it had received prior to the completion of the audit. Both Mathis and Kingston considered that the Davis County Co-op had probably received payment for the latter's interest as is evidenced by the endorsement by Kingston on Plaintiffs' Exhibit "P", stating that the \$1,000.00 paid by that check was 'advanced on Saratoga Ranch Property & if necessary not classified as payment but a loan.'

"It is clear, too, that at the time of making Exhibit "D", the parties had before them the 'sale of Real estate, (Exhibit "C"), livestock, feed and machinery.' It is stated, then, that if, from these sales, there was not realized sufficient funds to pay the equity of C. E. Kingston (and Ethel M. Kingston) for Davis County Co-operative Society, Inc., the property described in Exhibit "A" was to be transferred from the sellers in Exhibit "A" to plaintiffs and the balance of the value of the Kingstons—or Davis County Co-op—was to be '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.' That is certain which is capable of being ascertained and definitely fixed. See 6 Words & Phrases, Perm. Edition, page 41, and cases cited. With this recital, the Kingstons signed and acknowledged the instrument 'hereby waiving all rights and interests in this property,' Austin Brothers Ranch, the metes and bounds description of which are stated in Exhibit "A" and agreeing that the property should be trans-

ferred from Western Underwriters to plaintiffs.”

The Court further states (R. 125) :

“The parties understood the instrument and gave it a practical interpretation consistent only with the foregoing analysis. Immediately upon execution of plaintiff’s Exhibit “C”, Ferrells went into possession of the property and operated it during the year 1947, taking all of the crops, to their use, yet neither C. E. Kingston nor Davis County Co-op, nor the Madsens, demanded a one-fifth share to this date. Considering that operation in the year 1947 may have been unprofitable, they have made no offer to bear one-fifth of any loss that may have occurred. There is, however, no indication, beside the allegation in the pleading, that operation of the farm during the 1947 season was not profitable and from the evidence of previous years operation, Exhibits “H”, “I” and “J”, it must be assumed that it was so.

“A copy of Exhibit “D” was part of the files of the Davis County Co-op. C. W. Kingston saw it there soon after it was made (Tr. 209).

“C. W. Kingston’s first demands upon Mathis in 1948 were for the balance of the money claimed to be due upon their equity from Mathis, which could only have arisen under Exhibit “D”.

“C. W. Kingston and M. H. Brown called upon Mathis under express authority unanimously given by the Board (Exhibit “T”). They demanded settlement for the ‘sale of the property,’ which demand is inconsistent with any other theory than that Davis County Co-op and C. E. Kingston were relying fully upon Exhibit “D” as a conveyance of their interest to plaintiffs subject to final accounting as to equities.

“Thus it must be concluded not only that the instrument Exhibit “D” is not so indefinite, unintelligible or uncertain as to be entitled to no consideration by the Court, but it must also be held that the parties interested in the property at the time fully understood it and gave it the force and effect which the Court has outlined above. The first contention in respect to it is therefore overruled.”

Another contention is that this Exhibit “D” is void under the Statute of Frauds, Utah Code 33-5-1, 33-5-3.

This exhibit is clear and definite in all of its terms, with the exception possibly of the amount of the mortgage or lien that the Davis County Society might have in the event that sufficient funds would not be derived from the final closing of sale of real estate, livestock, feed and machinery, and this, of course, would merely be a mathematical computation, so that there can be nothing indefinite in this respect. Also, this agreement recites: “That 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.”, and the same is signed and acknowledged by C. E. Kingston and Ethel M. Kingston, his wife. At the time of the signing of this agreement, C. E. Kingston was Trustee-in-Trust for the Co-op, and was acting in its behalf, and he had implied authority, if not in fact, actual authority to execute the same on behalf of the Society. This is abundantly shown by the testimony which shows that C. E. Kingston, together with other members of the Society

were in possession of all of the property from the date of Exhibit "A" and until the proceedings of sale for liquidation at the approximate time of Exhibit "D". The minutes of the Co-op (Exhibit "V"), clearly establish that during all of this time the entire Board of the Co-op and the members of the Society were advised of the principal conditions and proceedings upon the property, and frequently affirmed and reaffirmed the powers of C. E. Kingston, and C. W. Kingston testified (R. 392) that so far as he knew, all sales made by him were ratified and approved.

Miss Ardous Kingston, the Co-op's Secretary, testified that Exhibit "V" contains all records of the meetings of the Board of the Society and all its members which pertain to or are connected with the property.

Also it is very significant that after the meeting of December 1946, there was no further action taken either by the Board or its members as to the property, and the Board were fully aware of the fact that negotiations were being conducted for the sale of the property to Ferrells, and that the affairs between the parties for liquidation was in process; and also, that immediately after execution of the Ferrell contract, the members of the Co-op occupying the property removed therefrom and the Ferrells went into possession of all of the property without any interference whatsoever by the Co-op or any one acting for it, and no demand was ever made by the Co-op or any of its members for one-fifth of the profits.

This certainly establishes sufficient authority or a



ratification of the acts of Kingston in executing this exhibit, and therefore the same meets the requirements of the statute. Also, as was well stated by the Court in its Memorandum Decision (R. 129):

“Certainly even if it should be found that C. E. Kingston could not execute Exhibit “D” without express authority, and thus that the Exhibit fails to comply with the Statute pleaded, there was sufficient performance of the agreement to transfer the interest of Davis County Co-op to the plaintiffs, to take it out of the statute.”

The Court then cites (R. 127) from *Utah Mercur Gold Mining Co. vs. Herschel Gold Mining Co.*, 103 U. 249; 134 Pac. 1094, where the plaintiff was seeking to hold good an oral promise to extend a lease on mining properties for an additional five years after expiration of the specified term, the Court said:

“The contract to extend or renew the written lease for five years was oral. It was tantamount to an oral contract to make a lease and option for five years from April 1, 1949. We think such oral agreement to make a written lease is governed by the statute of frauds the same as if an oral lease was made. An oral agreement to make a contract which must be in writing is itself within the statute of frauds. *Paul vs. Layne & Bowler Corp.*, 9 Cal. 2d 561; 71 P. (2) 817.”

“The Court then holds that where a pleading shows that in accordance with such an oral promise, the promisee ‘Continued to explore and develop said claims and carried on an established

new worthwhile development by doing road work, exploration, tunnel work, and shipping of overburden and by making arrangements whereby said claims could be profitably operated by a shovel and otherwise, at large expense extra to plaintiff and all in reliance upon said oral agreement and understanding and said additional representations made by said trustees in January or February of 1940 aforesaid,' that there is pleaded such a part performance as to take it out of the Statute of Frauds."

In 7 R.C.L. 623, it is stated :

"It is now well settled that when in the usual course of business of a corporation an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business."

And in 27 A.L.R., page 586, in quoting from *American National Bank vs. Wheeler, Adams Co.*, 31 So. Dak. 524, it states :

"Elliott was clothed by the directors with the authority of a general manager, therefore his acts, within the scope of the business of the corporation, were acts of the corporation itself and not the acts of an agent within the ordinary meaning of the word 'agent'."

The question in that case was whether a corporation was bound by the acts of Elliott in executing an agreement or option to buy real property of the corporation.



There was no written authority from the board, and the issue was as to whether the transaction was within the statute of frauds.

## POINT II.

THE COURT PROPERLY CONSTRUED EXHIBIT "D" AS BEING A TRANSFER OF ALL INTEREST AND EQUITY OF THE DAVIS COUNTY SOCIETY AND OF C. E. KINGSTON AS TRUSTEE-IN-TRUST FOR THE SOCIETY, IN AND TO THE WESTERN RESERVE UNDERWRITERS CONTRACT AND THE PROPERTY COVERED THEREBY, SUBJECT TO THE LIEN OR MORTGAGE INTEREST OF THE SOCIETY, IF SUFFICIENT FUNDS WERE NOT DERIVED FROM THE FINAL CLOSING OF THE SALE OF REAL ESTATE, LIVESTOCK, FEED AND MACHINERY, AND COMPLETION OF AUDIT.

As heretofore stated, all of the parties involved including C. E. Kingston and the Davis County Society and its members, evidently considered that Exhibit "D" was a transfer of the interest of the Society in the contract and in the property to the respondents; this being shown, among other things, by the fact that upon the execution of the Ferrell contract, the members of the Society in possession moved off of the property and full possession and control of the same was turned over to the Ferrells, and no demand was ever made for any interest in the property or any of the profits, the only demand made being for a portion of the proceeds of the sale.

It was certainly acted upon by the respondents as shown by the payments made by them from the first

proceeds received of the sale to Ferrells, and no further payments were made by respondents as it was considered that the Co-op had been paid in full for its interest.

The record definitely shows that the parties concerned by this Exhibit "D" intended that the same operate as an assignment of the interest of the Davis County Society and of Kingston as Trustee-in-Trust, and it was so acted upon by them as shown by their subsequent conduct.

To operate as an assignment no particular words or phrases are necessary, the important thing being the intention shown. *Wood vs. Casserleigh*, 71 Pac. (Colo.) 360; 97 Am. St. Rep. 138:

"An intention to assign on the one side, and an assent to receive on the other, operate as an equitable assignment of the subject matter of transfer, if sustained by a sufficient consideration. The form of words used is not alone controlling, but all the circumstances of the transaction are to be considered in determining the intention of the parties to such an agreement."

This case was quoted in 5 C.J. 910, which says:

"Any words or transaction which shows an intention on the one side to assign and an intention on the other to receive, if there is a valuable consideration, will operate as an effective, equitable assignment, even though the instrument assigned is a specialty."

There was certainly sufficient consideration shown

for this Exhibit "D", as by it the Davis County Co-op or C. E. Kingston on its behalf, received a very substantial portion of the payments made by the Ferrells, and also, respondents in reliance upon it, entered into the Ferrell contract by which they agreed to and bound themselves to deliver by Warranty Deed, title to the entire interest in the property.

With regard to the sale of the property, the Davis County Society in a meeting, apparently of its members held November 24, 1946 (Exhibit "V") considered the sale of the property to Ferrell, and the retention by the Society of an interest in the proceeds only, rather than entering into a contract for the sale of their interest. This is indicated by the following quotation from the minutes of this meeting:

"C. E. Kingston: Mr. Mathis wants us to get all our money out of it. If we let things go down there and all we had was a Real Estate Contract he would be rubbing our nose in the dirt. He is arranging so we can get out and get something else. He wants to arrange it so we can get all our money and he plans on taking a contract for the balance of his. The man's name is Ferrell who wants to buy the farm."

The appellants in their Brief apparently attempt to stress that the record does not disclose any formal corporate action with regard to the sale to Ferrells, and the execution of Exhibit "D". It is, of course, clear that the minutes of the meetings contained in Exhibit "V" do not disclose such corporate action; however,

whether or not there was in fact formal action taken was wholly within the control of the Society and its Secretary, and in the examination of Ardous Kingston, Secretary (R. 295), she testified that the minutes of the meetings were all in loose typewritten form and not in a bound book, and that they were filed away in a drawer, and that she didn't bring all of the minutes of meetings held for the period demanded in the subpoenae ducus tecum served upon her as, "I didn't have the time to get them in order to bring them." So that it further appears that it could have been very likely that there might have been some formal action taken by the Davis County Society and the minutes perhaps mislaid or lost.

Miss Kingston also testified that the minutes contained in Exhibit "V", are the only minutes of meetings of the Society or its members that had anything to do with the Saratoga Farm.

In this connection it is interesting to consider the fact that the minutes do not show any formal action taken either with regard to the original contract of purchase, the Western Reserve Contract, or the Deed executed in June, 1948 purporting to convey a one-fifth interest of the Society to appellants Madsens. This Deed was executed for the Society by C. E. Kingston as Trustee-in-Trust, and certainly it can be validly contended that if there was no authority to execute Exhibit "D", there certainly was no authority to execute either this Deed or the Western Reserve Contract.

## POINT III.

MADSEN HAD KNOWLEDGE OF EXHIBIT "D" AND OF THE INTEREST OF RESPONDENTS THEREUNDER AT THE TIME HE TOOK HIS DEED FROM THE DAVIS COUNTY SOCIETY, OR KNOWLEDGE OF FACTS SUFFICIENT TO PUT HIM UPON INQUIRY CONCERNING THE SAME, AND THE SAME IS BINDING UPON HIM EVEN THOUGH NOT RECORDED.

*Toland vs. Corey*, 6 U. 392; 24 P. 190, in the very early case it was stated:

"The demands of the statute are answered if a party dealing with the land has information of a fact or facts that would put a prudent man upon inquiry, and which would, if pursued, lead to actual knowledge of the state of the title, and this is actual notice."

And it was held in this case that actual occupancy of the land is sufficient notice to parties dealing with it to put them upon inquiry as to the rights of the occupant.

There is abundant evidence in the record to show that the respondents Madsens had either actual notice of the existence of Exhibit "D" and of the interest of respondents thereunder, or to put him upon inquiry with regard thereto, which inquiry, if pursued, would have lead to actual notice.

The defendant Madsen in his testimony (R. 325) testified that from the beginning he was fully aware of the sale being made by respondents to the Ferrells, and that he knew that the respondents were selling the entire interest in the property to the Ferrells, and also



that he knew that the Davis County Society had a one-fifth interest in the property under the Western Reserve Contract, and that he wondered about the fact that Mathis was selling the entire interest, but even with this knowledge he made no inquiry of Mathis or any other person with regard to the fact that they were selling the entire property (R. 326, 329).

The record also shows that in the original negotiations for the sale to Ferrells, it was proposed (Exhibit "W"), that property owned by Madsen in Davis County be applied as part of the down payment, so that clearly from the very beginning Madsen was fully acquainted with all matters concerning the sale; and also in the testimony of C. Ed. Lewis (R. 371), he stated that he became acquainted with Madsen through Mr. Ferrell, and that he said he was considering going in with him, and that the sale of the property by Mathis to Ferrell was discussed, and that Mathis explained to Mr. Ferrell and Madsen that he had bought out the 20% interest of the Co-op, and the Stipulation shows that Mr. Madsen was a brother-in-law of Mr. Ferrell, and that he was very closely connected with Ferrell, and that he worked on the property for Mr. Ferrell after Mr. Ferrell took possession under his contract, and that he had attended an irrigation meeting with respect to the water rights on the property, presumably on behalf of Mr. Ferrell; and that apparently, Mr. Ferrell considered that they were operating the property together, this being indicated by the pole line easement (R. 299), whereby an easement was granted over the

property, and the same was signed by Ferrell and Madsen, a partnership, by J. A. Ferrell.

It thus clearly appears that Mr. Madsen was fully aware of all details with regard to the property, and that he certainly had sufficient notice with regard to Exhibit "D" as to charge him with actual notice under our recording statute.

#### POINT IV.

APPELLANTS' FERRELLS HAD NOTICE OF EXHIBIT "D", AND IN ANY EVENT THIS IS IMMATERIAL EXCEPT AS TO LATER TRANSACTIONS HAD BETWEEN THEMSELVES AND THE MADSENS, WHICH COULD NOT AFFECT ANY OF THE RESPONDENTS' RIGHTS IN THIS CASE.

With regard to this matter, the record clearly shows that the Ferrells had notice of Exhibit "D", or at least of its existence as they were fully aware that Mr. Mathis had bought out the Davis County Society's interest, and that he was selling the entire property to him. However, in any event, this question would be material only as to transactions between himself and Mr. Ferrell which occurred long after its execution, and after Madsen had demanded some interest in the property. It is very significant with respect to the good faith of the appellant Ferrell, that after Madsen procured his deed and made a demand upon him for an interest in the property or proceeds, that he did not inform the respondents as to such deed or the claims by Madsen until long after, when apparently, he had Mr. Rose write the letter (Exhibit "Q") to Mr. Mathis.

The record is sufficiently clear to show either very



gross lack of good faith on his part or even a conspiracy between himself and Madsen in a concerted effort in an attempt to cut out the respondent's interest procured from the Co-op, and to attempt to obtain an undue and unjustified benefit or enrichment at their expense.

### POINT V.

THE COURT WAS CORRECT IN ITS HOLDING THAT THE QUESTION OF THE OPERATION OF THE PROPERTY PRIOR TO THE FERRELL CONTRACT, AND THE INTERPRETATION OF EXHIBITS "R", "E" AND "2", IN CONNECTION WITH THE OPERATION, SHOULD BE DETERMINED IN THE ACTION PENDING IN THE SALT LAKE COUNTY COURT.

As above shown, at the time of the commencement of the present action, there was pending in the District Court of Salt Lake County, an action brought by the respondents against the Davis County Cooperative Society, Charles W. Kingston, as Administrator of the Estate of Charles E. Kingston, Deceased, Charles H. Owens, Francis M. Hansen and Allen Frandsen, alleging fraud and praying for an accounting for the farming operations conducted on the property.

The questions involved in that action are clearly collateral to the issues in the instant case, and whatever determination might be made with regard thereto would have no effect upon the rights of the appellants Ferrells or Madsens; such controversy was between appellants and the Davis County Society and the members operating the farm, and certainly should be tried in a separate action, and the Decree of the Court in the instant case

specifically provided that the monies held in escrow, amounting to the sum of \$39,300.00 be held and distributed in accordance with the Decree that might be made in the Salt Lake County case. There was certainly no determination made in the instant case that would in any way tie the hands of or be binding upon the Salt Lake County case or act as *res adjudicata* as contended by respondents.

#### POINT VI.

THE JUDGMENT AND DECREE OF THE COURT ARE CORRECT, AND SHOULD BE CONFIRMED IN ALL PARTICULARS.

After the close of the case the Court was furnished with a complete transcript of all of the evidence and all exhibits presented, and was fully advised as to all issues presented. The Court made a very complete and thorough Memorandum Decision in the matter (R. 114), fully disposing of all issues presented, and its Decision and the Findings and Judgment rendered pursuant thereto are correct, and in all respects should be confirmed.

Respectfully submitted,

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