

1953

# Kenneth Rasmussen and Faun Rasmussen v. Neal G. Davis and Dora S. Davis : Brief of Defendants and Respondents

Utah Supreme Court

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Don V. Tibbs; Dilworth Woolley; Attorneys for Respondents;

Don Mack Dalton; Elias Hansen; Attorneys for Plaintiffs and Appellants;

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**IN THE SUPREME COURT**

**of the**

**STATE OF UTAH**

**FILED**

MAY 14 1953

**KENNETH RASMUSSEN AND FAUN RASMUSSEN,** Clerk, Supreme Court, Utah

*Plaintiffs and Appellants,*

# 7987

No. 4218

— vs. —

**NEAL G. DAVIS AND DORA S. DAVIS,**  
*Defendants and Respondents.*

**BRIEF OF DEFENDANTS AND RESPONDENTS**

**Appealed From The District Court of Sanpete County, Utah**  
**Hon. L. Leland Larson, Judge**

**Don Mack Dalton**

**Elias Hansen**

*Attorneys for Appellants*

**DON V. TIBBS**

**DILWORTH WOOLLEY**

*Attorneys for Defendants  
and Respondents*

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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KENNETH RASMUSSEN AND FAUN  
RASMUSSEN,

*Plaintiffs and Appellants,*

— vs. —

NEAL G. DAVIS AND DORA S. DAVIS,

*Defendants and Respondents.*

No. 4218

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**BRIEF OF DEFENDANTS AND RESPONDENTS**

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**DISCUSSION OF THE CASE**

To understand this case one must bear in mind what the contract is about, the terms of the contract and how the case developed on the pleadings. A general knowledge, based upon observation, of the operation of a Grade A Dairy Enterprise is also most helpful.

The Davises owned and operated a farm upon which

they carried on a Grade A Dairy. This farm was fully equipped with a modern home, barns, milk sheds, farm machinery and livestock, registered Holstein milch cows, a flock of chickens, and a small herd of sheep. All these properties were used together as a going concern. On the 15th day of March, 1951, after Kenneth Rasmussen, the plaintiff and appellant, had gone over the place with Mr. Davis, the defendant, and had made his own observations of the land, and all the implements, equipment, and after Mrs. Rasmussen had inspected the house twice, the parties entered in the contract whereby the Davises agreed to sell and the Rasmussens agreed to buy all this property, for the agreed price of \$32,000.00. Rasmussen and Davis together consulted an attorney and had him write their contract. The contract stipulated that the purchase price was to be paid as follows:

\$8,000.00 down, which was paid, and is now the issue of this law suit.

\$5,000.00 on or before January 1st, 1952, and the balance in annual installments of \$3,000.00 each until the last payment, that being \$4,000.00, with interest on the deferred balance at 4% per annum.

The second installment of \$5,000.00, which was to be paid January 1st, 1952, was represented by a promissory Note executed by the buyers and was secured by a chattel mortgage on some cattle then owned by the Rasmussens (not the cattle sold under the contract).

The contract also provided that since the buyers were let into possession, they should pay the taxes on the property, etc.

Kenneth Rasmussen seemed to have the idea that he could leave the operation of this farm and the Grade A Dairy project to the mercies of his wife and daughters, while he held down a wage - earning job elsewhere, for he spent his working time at Lark, Utah, and the women carried on at the Dairy.

As anyone, except an extreme optimist, would expect, Mr. Rasmussen was disappointed with the crops and with the income from the farm and dairy. He made some complaints to Mr. Davis throughout the summer and fall, but these related primarily to the terms for payment of the balance of the purchase price, and some efforts were made by him, in which Mr. Davis cooperated with him, looking toward the Rasmussens refinancing the debt. It being understood that they intended Mr. Rasmussen was to borrow money elsewhere and pay up the obligation to Davis. All such efforts, however, were unsuccessful.

Then, on December 31, 1952, the last day before the \$5,000.00 installment which was represented by the note and chattel mortgage became due, the plaintiffs filed their complaint in this action.

Now, please notice his complaint.

First: He alleges that the provisions of the contract relating to the rights reserved by Davis and his right to retake possession of the property in case of default by the buyer are void, being against public policy.

Second: He alleges that Davis made certain false representations regarding the character of the land to the damage of plaintiffs in the sum of \$25,000.00.



So, he prays the Court:

1. To strike from the contract the provisions relating to liquidated damages and the right to possession.

2. And, standing on the contract as they wanted it, amended by the Court, they demand judgment against defendant for \$25,000.00 damages for fraud; and

3. They want the Court to off-set their damages against what they still owe for the property, including the \$5,000.00 of the principal, and ten months interest on \$24,000.00, due January 1, 1952.

Note the result if they had been permitted to get away with that:

They get a judgment for \$25,000.00 damages for the fraud, which wipes out all they still owe on the property and they get title to property which is estimated by all concerned to be worth at least \$30,000.00 for \$8,000.00, their initial down payment.

To the plaintiffs complaint the defendants answered, prayed the plaintiffs take nothing by their complaint and set up the following counterclaims:

First counterclaim the defendants asked for a judgment and decree declaring that the contract be rescinded, that defendants have right to immediate possession, and that defendants have the right to retain as liquidated damages all payments which had been made by plaintiffs on the purchase price, for attorneys fees, for costs, or in the alternative, that the Court adjudge and decree that the contract be terminated on account of the breach, that defendants be restored the immediate possession of the property, that the defendants

have judgment against the plaintiff for damages in the sum of \$10,000.00, and in case the court refused to restore possession of property to defendants, for the court to appoint a receiver to take possession, for attorneys fees and for costs.

Second Counterclaim, that if the court shall refuse to award the relief prayed for on the first counterclaim, then that the defendants have judgment against the plaintiffs for the sum of \$5,000.00 for installments of principal, \$1,000.00 interest, taxes, insurance, and attorneys fees; and that the chattel mortgage be foreclosed and the personal property therein be sold as provided by law.

Third Counterclaim for the sum of \$1,805.00, together with interest for items of personal property which was left on the premises on plaintiffs promise to buy.

The plaintiffs answered the defendants counterclaim, they allege the forfeiture provision is null and void, admit they have not paid the \$5,000.00 due, but allege they are entitled to off-set it against damages for the fraud perpetrated. They deny they have refused to pay taxes or insurance. They deny they committed waste on the premises and admit they sold some equipment. They accept defendants offer to rescind, and consent that defendants retain sufficient of the \$8,000.00 to pay for property not returned and the reasonable rental value. They deny other allegations in first counterclaim.

They answered the second counterclaim by admitting they have not paid the \$5,000.00, that they are entitled to off-set it against the damages for fraud.

In the plaintiffs answer to the third counterclaim they

admit some liability and deny the remainder. That they also desire to off-set this against the fraud damages in their original complaint.

Shortly after defendants answer was signed and filed, the parties got together and compromised their differences; the buyers gave up possession to the sellers, made restitution for certain items of personal property, which they could not return, and the sellers agreed to give up the \$5,000.00 note and chattel mortgage.

Then on June 26th, 1952, or 131 days after the buyers had surrendered the property to the sellers, the plaintiffs filed an amended supplemental complaint, in which they, in effect, abandoned their case as set out in the original complaint, and sued upon the theory that the contract had been rescinded by agreement of the parties, except as to the disposition of the \$8,000.00 which they alleged the parties had agreed should be divided by the attorneys or by the Court. They only asked for \$6,000.00 judgment in this amended complaint.

In their answer the defendants agree the parties got together and settled and compromised their case, but deny that the settlement of the \$8,000.00 was left to the attorneys or the Court to divide. The defendants allege that the \$8,000.00 remained with the sellers in the parties compromise agreement.

The plaintiffs in their reply denied that the agreement was that the defendants were to keep the \$8,000.00.

The case was then tried on these issues, as shown by the amended complaint, answer and reply.

## APPELLANTS POINTS RELIED UPON FOR REVERSAL

### POINT ONE

THE TRIAL COURT ERRED IN REJECTING THE EVIDENCE OFFERED BY THE WITNESS, FAUN RASMUSSEN, ONE OF THE PLAINTIFFS HEREIN, TO THE EFFECT THAT HER HUSBAND, THE OTHER PLAINTIFF, TOLD HER JUST BEFORE THEY VACATED THE PREMISES THAT THE ATTORNEYS WERE TO DETERMINE WHO SHOULD GET THE \$8000.00 AND IF THEY COULD NOT AGREE IT WOULD BE DETERMINED BY THE COURT. (Tr. 185)

### POINT TWO

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. ONE WHERE IT FOUND THAT THERE IS NO QUESTION OF FRAUD OR MISREPRESENTATION IN THIS CASE WHICH SHOULD BE SUBMITTED TO THE JURY AND THAT THE CONTRACT MADE BETWEEN THE PLAINTIFFS AND DEFENDANTS IN THIS CASE IS A VALID ENFORCEABLE CONTRACT. (R. 72)

### POINT THREE

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. THREE TO THE EFFECT THAT THE ONLY QUESTION INVOLVED IN WHETHER THE DOWN PAYMENT OF \$8000.00 MAY PROPERLY BE CONSIDERED AS LIQUIDATED DAMAGES OR WHETHER THE SAME SHOULD BE SET ASIDE BY THIS COURT AND LEFT TO THE JURY TO DECIDE. (R. 73)

#### POINT FOUR

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. FOUR TO THE EFFECT THAT THE FORFEITURE CLAUSE INVOLVING THE \$8000.00 DOWN PAYMENT IS FAIR AND JUST UNDER THE CONTRACT; THAT PLAINTIFFS TERMINATED SAID CONTRACT OF THEIR OWN FREE WILL AND THAT THE \$8000.00 DOWN PAYMENT PROVIDED FOR IN THE CONTRACT SHOULD BE AND HEREBY IS FORFEITED BY PLAINTIFFS TO DEFENDANTS AS LIQUIDATED DAMAGES, WHICH, IN THE OPINION OF THE COURT, ELIMINATES ANY QUESTION OF DAMAGES TO BE DETERMINED BY THE JURY. (R. 73)

#### POINT FIVE

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS FAILED TO PAY THEIR PART OF THE TAXES ON THE PROPERTY DESCRIBED IN THE CONTRACT AND FAILED TO PAY THE FIRE INSURANCE PREMIUM UPON THE PROPERTY.

#### POINT SIX

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. SIX WHEREIN IT FOUND THAT THE PARTIES HAVE DISCHARGED AND TERMINATED ALL THEIR RIGHTS INVOLVED IN THIS ACTION.

#### POINT SEVEN

THE TRIAL COURT ERRED IN MAKING ITS CONCLUSIONS OF LAW TO THE EFFECT THAT THE ACTION SHOULD BE DISMISSED AND THE DEFENDANTS SHOULD BE AWARDED THEIR COSTS.

## POINT EIGHT

THE TRIAL COURT ERRED IN ENTERING JUDGMENT THAT THE ACTION BE DISMISSED AND THAT DEFENDANTS SHOULD BE AWARDED COSTS AGAINST THE PLAINTIFFS.

## ARGUMENT

### APPELLANTS POINT ONE

THE TRIAL COURT ERRED IN REJECTING THE EVIDENCE OFFERED BY THE WITNESS, FAUN RASMUSSEN, ONE OF THE PLAINTIFFS HEREIN, TO THE EFFECT THAT HER HUSBAND, THE OTHER PLAINTIFF, TOLD HER JUST BEFORE THEY VACATED THE PREMISES THAT THE ATTORNEYS WERE TO DETERMINE WHO SHOULD GET THE \$8000.00 AND IF THEY COULD NOT AGREE IT WOULD BE DETERMINED BY THE COURT. (Tr. 185)

There was no error in sustaining the objection to the proffered testimony.

If the evidence was offered to prove what agreement had been made by the parties for the compromise of the lawsuit, it was clearly incompetent because it was hearsay and self serving.

But we now learn from appellants brief that it was not offered for any such purpose. Counsel say it was offered to rebut a claim which mght be made to the effect that Mrs. Rasmussen was bound by what her husband and Davis had agreed to do about the \$8,000.00 unless she made timely objection.

But even for such limited purpose, the proffered evidence was immaterial and incompetent. The evidence, if it had been admitted, could not have changed the result. It would not have proved nor tended to prove that she was not bound by the agreement. The fact that the statement was made by the husband to his wife was not relevant to any fact in issue, and hence the authority cited in the brief is not applicable.

Furthermore, even if there were error in the Court's ruling, the same was a harmless error and should not result in a reversal of the judgment.

#### APPELLANTS POINT TWO

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. ONE WHERE IT FOUND THAT THERE IS NO QUESTION OF FRAUD OR MISREPRESENTATION IN THIS CASE WHICH SHOULD BE SUBMITTED TO THE JURY AND THAT THE CONTRACT MADE BETWEEN THE PLAINTIFFS AND DEFENDANTS IN THIS CASE IS A VALID ENFORCEABLE CONTRACT. (R. 72)

We offer no argument on appellants Point Two because they make none.

#### APPELLANTS POINT THREE

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. THREE TO THE EFFECT THAT THE ONLY QUESTION INVOLVED IN WHETHER THE DOWN PAYMENT OF \$8000.00 MAY PROPERLY BE CONSIDERED AS LIQUIDATED DAMAGES OR WHETHER THE SAME

SHOULD BE SET ASIDE BY THIS COURT AND LEFT TO THE JURY TO DECIDE. (R. 73)

There is no evidence in the case proving or tending to prove that the disposition of the \$8,000.00 was to be left to the attorneys or to the court. The evidence on this subject shows that the whole case was settled by the agreement of the parties.

Be it remembered that appellants in their amended and supplemental complaint (R. 27, paragraphs 11 and 12) allege that Kenneth Rasmussen and Neal G. Davis met and entered into an oral agreement and that the contract was rescinded between *plaintiffs* and *defendants* except as to the \$8,000.00 which the plaintiffs paid to the defendants at the time that contract was entered into, and that as to the \$8,000.00, Kenneth Rasmussen and Neal Davis agreed that Davis should retain sufficient of the \$8,000.00 to reimburse him for the rental of the property during the time defendants were in possession and any damage that might have been done to the premises and personal property during such possession, and that Kenneth Rasmussen would get in contact with his attorneys in an attempt to get an agreement with the defendants as to the amount of the \$8,000.00 that should be retained by Davis as rental and damages.

In their answer to the Amended and Supplemental Complaint (R. 39) the defendants admit that the contract was rescinded by agreement of the parties, they deny the allegations concerning the \$8,000.00, and in connection therewith defendants allege that the agreement was that Davis should keep the \$8,000.00 and be returned to possession and have



the hay and sheep which Rasmussen returned and that Davis agreed to give up the \$5,000.00 note and mortgage on Rasmussens' cattle, along with interest, taxes, insurance and attorneys fees.

And in their Reply (R 43, paragraph 2) plaintiffs admit that the contract between them and the defendants was rescinded but they deny that the \$8,000.00 should be kept by the defendants.

The record being so on the pleadings, the sole issue was whether or not the agreement for compromise embodied the stipulation alleged by the plaintiffs concerning the \$8,000.00.

On this issue the burden was on the plaintiffs to prove their allegations. They failed to carry their burden. There is no evidence in the record to show that the agreement was as alleged by the plaintiffs or anything like it. There was a complete failure of evidence to support their claims. Indeed, according to the testimony of both Rasmussens, the evidence points almost conclusively the other way and sustains defendants' allegations.

Kenneth Rasmussen testified (Tr. 18); A conversation on the property in July, 1951:

"I told him (Davis) that I would like to have him take the place back and give me the cows — give me my cows back, the mortgage on it."

Davis said: (R 19) "I am going to wait until the first of the year and then I will either have the \$5,000.00 payment or I will take the cows."

Again (Tr. 25) They talked on February 13, 1952, at the Davis home in Ephram:

"I said, (Rasmussen) I want that \$8,000.00 back. He (Davis) said you are not going to get \$8,000.00 back, and he said, 'If you don't — if you stop the sale of this — if you stop this sale, I will sue you for a lot more than this \$8,000.00'."

Again on February 14, 1952, which is the day they moved off the farm, (Tr. 42) in answer to questions by the Court.

"The Court:

Q: You insist now that you did not make any agreement with respect to the \$8,000.00?

A: That is right.

Q: Did you say anything about it?

A: He said, 'I won't give you a penny of it.'

Q: What did you say?

A: I said, 'I want part of it back.'

Q: Is that about all of that conversation . . . about all there was to that conversation?

A: That was about all, yes."

Then they moved off.

Again, on cross examination, referring to the conversation . . . June or latter part of July, he testified: (R 99)

"I said, 'I am sick of it . . . I am so sick of it, that I would damn near give it back to you, if you would give me the mortgage on my cows'."

Again (Tr. 109), referring to the talk . . . the Davis home, in February, 1952, he testified the \$8,000.00 was not mentioned. Again, (Tr. 113):

"I said how about giving me back the \$8,000.00.

He said, 'I won't give it back to you.' He said, 'if you don't get off there, it is going . . . if you stop this sale on this property that I have, it will cost you a lot more'."

Again (Tr. 117, line 21 to 30 and Tr. 118, lines 1 to 22):

A: "Neal and I made this deal, my wife was not there. Then it came down to the releasing of the mortgage. He said that he would release this mortgage on the cows and give me that back and then we talked a little while and then he asked about the \$8,000.00. He said, 'I want that \$8,000.00 and all this cancelled off.' I said, 'No, sir, I want that \$8,000.00, you misrepresented this to me, and the whole deal all the way through has been misrepresented and I want the \$8,000.00'."

Q: This is out in front on the 13th of February?

A: Yes, sir.

Q: Go on, what else was said?

A: He wanted me to come to his Attorney and fix the matter. I said, 'I could not do a thing until I had talked to my Attorney'.

Q: How do you know you could not do a thing about it?

A: If you put it into law, they have a right to it. Isn't that right?

Q: Don't ask me.

A: Well, that is the way I understood the matter.

Q: All right, what else did Neal say?

A: That is about the size of it, that he wanted the \$8,000.00

Q: And tell us again who was present?

A: Neal and I.

Q: Did he refuse to give you the \$8,000.00?

A: Yes, sir.

Q: And you turned over possession and everything, at that time?

A: Yes.

Q: Did he promise to give you back any part of that \$8,000.00?

A: No, sir."

Again (Tr. 131) referring to his testimony by deposition, we fired these questions and answers:

Q: (by Mr. Tibbs) The third sentence on page 14, from the top.

"Did you understand that this settlement that you and Mr. Davis entered into in this case? A. No, sir. Q. Now, just a minute, did you understand that is was settled? A. No, sir, not until I talked to my attorney, I could not settle it. Q. You don't know what happened or what you agreed to then? A. I could not do anything until I had talked with my attorney. Q. So far as you were concerned, it had ended the case?

MR. HANSEN. I think we will object. It calls for a conclusion of the witness and it is not a proper question. So far as you were concerned, just answer the question? A. Yes, sir."

MR. HANSEN. We insist upon our objection, at this time, as calling for a conclusion of the witness.

THE COURT. Well, it has been read.

MR. HANSEN. I will withdraw the objection.

THE COURT. You may proceed

"Q. It had ended the case? A. No. Q. What more did you think was involved? A. I wanted to have a word with my attorney. Q. Was there anything else to be settled? A. No."

Q: (by Mr. Tibbs) Were those questions made and did you answer as I have read?

A: Yes, sir.

Q: Now, the fifth line from the bottom, on page 14 of your deposition.

"Q. Just the Attorney fee was all, is that right, yes or no? MR. HANSEN. Object as calling for a conclusion of the witness He can testify as to what was said but not his conclusions to the legal effect of it."

MR. TIBBS. Now on page 15.

"Q. Please answer it? A. It was not the Attorney fee. I had to see the Attorney, he had the case. He had my case. I can't come to you and settle with you or anyone, isn't that law? I am not much up on law questions. Q. That is as you understood, that it was finished? A. Yes, sir."

MR. TIBBS. "and after you got with the Attorney possession. *you amended that and said, "Yes sir, so far as taking*

Q. (by Mr. Tibbs) Did you answer those answers to my questions, as I have read?

A. Yes, sir."

Again (Tr. 141), on redirect . . . (line 28) the question was put by his own attorney:

Q: You intended him to keep the \$8,000.00?

A: I could not do anything about it."

We submit there can be no error in any of the findings or in the judgment in this case, in the light of the foregoing testimony of the plaintiff Kenneth Rasmussen and of the pleadings in this case.

#### APPELLANTS POINT FOUR

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. FOUR TO THE EFFECT THAT THE FORFEITURE CLAUSE INVOLVING THE \$8000.00 DOWN PAYMENT IS FAIR AND JUST UNDER THE CONTRACT; THAT PLAINTIFFS TERMINATED SAID CONTRACT OF THEIR OWN FREE WILL AND THAT THE \$8000.00 DOWN PAYMENT PROVIDED FOR IN THE CONTRACT SHOULD BE AND HEREBY IS FORFEITED BY PLAINTIFFS TO DEFENDANTS AS LIQUIDATED DAMAGES, WHICH, IN THE OPINION OF THE COURT, ELIMINATES ANY QUESTION OF DAMAGES TO BE DETERMINED BY THE JURY. (R. 73)

We agree with Counsel for Appellants wherein they state that even if the provisions of the contract dealing with the matter of that forfeiture were held to be valid contrary to appellants' contention, that would not solve the controversy between the parties to this action.

We also assert that a finding or holding by the court in

favor of defendants position with respect to the so-called forfeiture provisions of the contract would not have solved the controversy between these parties as the case stood on the supplemental pleadings.

Both propositons are true because those issues were no longer in the case.

In light of this, Perkins et al V. Spencer, et al, 243 Pac 446, does not apply to this case.

We feel constrained, however, to make the following observations concerning the law of Perkins et al V. Spencer et al. That case does not *hold* nor do any of the authorities, so far as we know, that forfeiture clauses, or liquidated damage clauses, are void as a matter of law. The law is that such provisions will not be enforced by a court of equity, if to enforce them will result in inequity and injustice to the delinquent party to a sales contract of the kind we have here. In this case the court held that the forfeiture clause, under the facts and circumstances shown by plaintiffs was not an injustice to the plaintiffs.

So we submit there is not error in appellants point Four.

#### APPELLANTS POINT FIVE

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS FAILED TO PAY THEIR PART OF THE TAXES ON THE PROPERTY DESCRIBED IN THE CONTRACT AND FAILED TO PAY THE FIRE INSURANCE PREMIUM UPON THE PROPERTY.

It is true the evidence does not show how much in taxes plaintiffs had failed to pay.

But Mr. Rasmussen (Tr. 225) testified that in December they had not paid their share of the taxes.

APPELLANTS POINTS SIX, SEVEN and EIGHT

THE TRIAL COURT ERRED IN MAKING ITS FINDING NO. SIX WHEREIN IT FOUND THAT THE PARTIES HAVE DISCHARGED AND TERMINATED ALL THEIR RIGHTS INVOLVED IN THIS ACTION.

THE TRIAL COURT ERRED IN MAKING ITS CONCLUSIONS OF LAW TO THE EFFECT THAT THE ACTION SHOULD BE DISMISSED AND THE DEFENDANTS SHOULD BE AWARDED THEIR COSTS.

THE TRIAL COURT ERRED IN ENTERING JUDGMENT THAT THE ACTION BE DISMISSED AND THAT DEFENDANTS SHOULD BE AWARDED COSTS AGAINST THE PLAINTIFFS.

What has already been written reputes, in our estimation, the propositions contained in appellants' Points six, seven and eight.

The evidence shows that the parties got together and compromised their lawsuit; the plaintiffs failed to prove the issues which they had to prove, as the pleadings stood at the time of the trial; they failed to make a case, so there was nothing for the court to do but to dismiss the action and



award defendants judgment for their costs.

We therefore respectfully submit that the judgment should be affirmed and respondents awarded their costs.

*Respectfully*

DON V. TIBBS

DILWORTH WOOLLEY

*Attorneys for Defendants  
and Respondents*