

1953

Perry E. Burnham et al v. Albert E. Reid et al : Brief for Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

PERRY E. BURNHAM and BERTHA
H. BURNHAM, his wife, and L.
EARL BURNHAM and GLADYS
H. BURNHAM, his wife,

Plaintiffs and Appellants,

vs.

ALBERT E. REID and LEAH REID,
his wife, CLIFTON B. LAYTON
and JACK B. LAYTON,

Defendants and Respondents.

No. 7993

BRIEF FOR APPELLANTS

FILED

JUN 16 1953

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vs.

No. 7993

ALBERT E. REID and LEAH REID,
his wife, CLIFTON B. LAYTON
and JACK B. LAYTON,

Defendants and Respondents.

BRIEF FOR APPELLANTS

STATEMENT OF FACTS

On the 22nd day of November, 1946, the Cove Ranch Land & Livestock Company and others made a contract to sell to Clifton B. Layton a ranch in Blaine County, Idaho, known as the Cove Ranch, for the total consideration of \$70,000.00. Layton paid \$3,000.00 and agreed to pay \$17,000.00

additional on or before the 1st day of January, 1947, and the balance of \$50,000.00, together with interest, on or before the 21st day of January, 1948. On the same day, he and his wife, Lois, executed and delivered to A. Edsen Christensen and Ray Rosebraugh, a note for \$10,000.00 and a mortgage covering the land which he had contracted to buy, to secure payment of the note.

Perry E. Burnham, one of the appellants herein, advanced to Layton \$17,000.00 with which to complete the first installment payment. The contract has endorsed on it the receipt of \$10,000.00 on December 7, 1946.

The balance of the purchase price of this property became due on the 21st day of January, 1948, and at that time, Perry E. Burnham and L. Earl Burnham paid to the Cove Ranch the sum of \$46,104.35 and took title to the ranch. \$8,000.00 of the purchase price was paid through the trading of some of the land covered by the original contract for other land, and \$8,000.00 in money, all of which went to the Cove Ranch. This payment covered interest and reduced the indebtedness to the \$46,104.35. Upon payment of the \$20,000.00, Layton went into possession of the property. Upon the taking of the deed by Burnhams in January, 1948, they took possession and retained possession in person or by tenants at all times until the making of a contract between the Burnhams and the defendants (Tr. 8). The mortgage to Christensen and Rosebraugh was not paid, and they brought suit upon the note for the foreclosure of the mortgage. Later they endorsed and transferred the note and mortgage to Walter Stewart, who filed an Amended and Supplemental Complaint, and made the

Burnhams parties defendant. The plaintiff, in the Supplemental Complaint, pleaded that (Tr. 25):

“ . . . their (the mortgagors’) interest in the property was that of a purchaser, under said written agreement between the said Cove Ranch Land and Livestock Co., and said defendants . . . ”

While the suit was pending and on the 15th day of April, 1948, Perry E. Burnham and L. Earl Burnham gave notice to Clifton B. Layton and to Jack Layton and his wife, the assignees of the contract of purchase, of the cancellation of the agreement (Tr. 30).

Clifton B. Layton alleged in his Answer to the Stewart Complaint that (Tr. 36):

“This defendant, being unable to make payment of the purchase price of said property so advanced by the said Perry E. Burnham and L. Earl Burnham, was compelled to suffer the cancellation of the said agreement.”

and Jack Layton admitted that: (Tr. 39)

“ . . . Perry E. Burnham and L. Earl Burnham have acquired by purchase the real estate in the Mortgage, Exhibit B, and that they are now the owners in fee of said property.”

At the time of the trial of the case, there was no controversy between the plaintiffs and the Laytons. The court found: (Tr. 47)

“That the said Burnhams did not give this plaintiff (Stewart) or the said Christensen and Rosébraugh or any of them an opportunity to pay the balance unpaid on said contract of November 22, 1946, and did not

give any of such persons advance notice of their intention to forfeit said contract and did not at any time tender to Christensen and Rosebraugh or the plaintiff or any of them a deed to the property described in said agreement of November 22, 1946, or any part or portion thereof."

The Court concluded that the plaintiff was entitled to have his mortgage foreclosed and the property sold at sheriff's sale (Tr. 49). The court corrected the Findings by reciting that Grover Giles appeared only for the defendants, Clifton B. Layton and Lois Layton (Tr. 50) and by a letter (Tr. 51), recited as a finding, the following:

"Mr. Giles also, on behalf of his clients Clifton Layton and wife, appears to be under the impression that the Court should at this time make some provision in the decree of foreclosure requiring the defendants Burnhams, in the event of redemption by Clifton B. Layton, to account to his clients for rents and profits while the Burnhams have been in possession of the mortgaged premises. No issue in this respect appears to have been made by the pleadings, and it is not my understanding that defendant Clifton B. Layton, at the time of the trial, claimed any right to possession in or to the mortgage premises as against either the defendants Jack B. Layton and wife or the Burnhams."

A Decree of Foreclosure was entered (Tr. 53), which Decree directed the sale of all of the property notwithstanding the mortgage purported to cover only the interest of the Laytons, which, as to plaintiff Stewart having not been terminated, was subject to foreclosure. This Decree was followed by an Order of Sale (Tr. 57), and the sale by the sheriff of all of the property (Tr. 59), as if the mortgage covered the

real estate, and not as found by the court, only the right of the successors-in-interest of Layton to purchase it.

Thereafter, the court made an Order on the petition of Clifton B. Layton and Jack Layton fixing the amount payable for the redemption of the property from the sale made to the Burnhams. The court disclaimed any intention of passing upon the question as to who had redemption rights.

In this state of the record of the contracts and foreclosure proceedings, the plaintiffs and appellants entered into a contract of sale of their interest to the respondents herein, Albert E. Reid and Leah Reid, his wife (Exhibit A to the Complaint-Tr. 8). This contract is the immediate occasion for this litigation.

Two tracts of land described in the Contract (Tr. 9) were not included in the description of the property in the original contract of sale and were not included in the mortgage foreclosed or in the Sheriff's sale—one tract, because it is the property received in exchange for some land covered by the original contract, and the other tract was land omitted from the described property in the original contract. We call this to the attention of the court at this time because upon the second cause of action involving wheat grown upon this land, the court, notwithstanding stipulations, held it had no jurisdiction to enter judgment. At the time of the making of the Contract (Exhibit A-Tr. 8), between the parties hereto on the 6th day of September, 1950, all of the land covered by the contract, the certificate of redemption, and the quit-claim deeds, was in the possession of a tenant under a crop share contract with

the Burnhams. The hay was in the stack and a part of the grain was harvested, and a part was being harvested.

It was thought in the beginning, that all of the facts could be stipulated as was contemplated by the Contract of September 6th. Accordingly, the court will find attached to the original Complaint, exhibits showing the status of the property and the relations between the plaintiffs and the predecessors in interest of the defendants from the original transactions out of which the controversy has arisen. No evidence was offered or received. The judgment is predicated upon the record made as indicated. The difficulty arises out of the interpretation of the record. We must, however, at this point, invite the court's attention to a stipulation found in the record (Tr. 68) providing for the filing of an amendment and supplement to the Complaint which was attached to the stipulation and filed on order of the court (October 17, 1951—Tr. 67), and the Answer to the amendment filed by the defendants (Tr. 71). This stipulation, amendment and answer pertain to wheat grown upon the land described in the amendment which admittedly did not belong to the defendants and which pertains solely to a personal claim against the defendants, and was purely a transitory action. The court refused to consider it upon the ground that the court had no jurisdiction over the subject matter.

Upon the record made, which also included disclaimers by Clifton B. Layton and Jack B. Layton of any interest in the crops grown upon the land described in the amended pleading, the court made findings (Tr. 146) to which we now invite attention:

1. That the District Court for Blaine County issued an order for the sale of the Cove Ranch and that the plaintiffs herein purchased the property.

2. That plaintiffs and defendants entered into a contract, Exhibit "A" attached to the Complaint, from which a quotation is made.

3. That the defendants paid to plaintiffs \$81,085.74 and plaintiffs issued a certificate of redemption covering the land and water rights.

4. That the tenant, Nek Stelma, was in possession of the property as a tenant, and that wheat grown upon the land was sold and pursuant to the contract, \$3,129.08 was paid to defendants and two-thirds of the landlord's share of the proceeds of the sale, amounting to \$6,258.05 was placed in escrow with Zion's Savings Bank to be paid out upon judgment of the court in a suit for a declaratory judgment. The court concluded that the plaintiffs were entitled to \$2,340.51, and the defendants \$3,917.54, and further:

"That the court cannot terminate the controversy of the matter referred to in the supplemental to the Complaint . . ."

and the court entered judgment accordingly.

POINTS UPON WHICH THE APPELLANTS EXPECT TO RELY

I. The court erroneously assumed the relationship of mortgagor and mortgagee existed between Clifton B. Layton and/or

Jack B. Layton and the plaintiffs herein as to the Cove Ranch and that the mortgage foreclosure in the District Court for Blaine County, Idaho, was a foreclosure of the mortgage.

II. The court wholly disregarded the fact as stipulated that the foreclosure was the foreclosure of a right on the part of Clifton B. Layton to complete the purchase of the Cove Ranch under contract (Exhibit C-Tr. 15) and that such right had been cut off as to Clifton B. Layton and Jack B. Layton by notice, pleadings, findings and judgment in Stewart vs. Layton et al and existed only as to the right of Stewart, the successor-in-interest of the mortgagees, in the mortgage from Layton to Christensen et al, to complete the purchase of the ranch under said contract.

III. The court erroneously assumed and found that the District Court for Blaine County, Idaho, in the Stewart case, had held that the notice of cancellation of the contract between the Cove Ranch and Layton was ineffective for all purposes; notwithstanding the cancellation was pleaded by Clifton B. Layton and Jack B. Layton.

IV. The court disregarded the admitted fact that the sole title and ownership of the Cove Ranch was in the plaintiffs at all times before and after the execution sale and that they alone had the exclusive right to lease the property and to collect and hold as against the whole world all of the rents and profits at all times up to the making of the contract between the plaintiffs and the defendants.

V. The court arbitrarily, without application or justification, revived the cancelled contract between the Cove Ranch

and Layton and gave the Laytons a right of redemption which was not given by the District Court for Idaho and the court has, in disregard of the contract between plaintiffs and defendants, added a right which did not exist.

VI. The court misinterpreted Exhibit A to the complaint, (Contract between plaintiffs and defendants) by making it include as property sold by plaintiffs to the defendants, personal property, to-wit: the crops which were harvested and ready for harvest at the time of the contract and which were not included in the sale, except as to that portion specifically covered by the contract.

VII. The court erroneously refused to adjudicate the ownership of the wheat grown upon the land described in the amendment to the Complaint on the ground of lack of jurisdiction notwithstanding the wheat had no relationship to the land, having been severed, and the parties to the controversy were all, by stipulation and order of the court, made parties to this proceeding. The court erred in holding something more than personal jurisdiction was required.

ARGUMENT

POINTS I, II, III and IV

POINT I

THE COURT ERRONEOUSLY ASSUMED THE RELATIONSHIP OF MORTGAGOR AND MORTGAGEE EXISTED BETWEEN CLIFTON B. LAYTON AND/OR JACK B. LAYTON AND THE PLAINTIFFS HEREIN AS

TO THE COVE RANCH AND THAT THE MORTGAGE FORECLOSURE IN THE DISTRICT COURT FOR BLAINE COUNTY, IDAHO, WAS A FORECLOSURE OF THE MORTGAGE.

POINT II

THE COURT WHOLLY DISREGARDED THE FACTS AS STIPULATED THAT THE FORECLOSURE WAS THE FORECLOSURE OF A RIGHT ON THE PART OF CLIFTON B. LAYTON TO COMPLETE THE PURCHASE OF THE COVE RANCH UNDER CONTRACT (EXHIBIT C-TR. 15) AND THAT SUCH RIGHT HAD BEEN CUT OFF AS TO CLIFTON B. LAYTON AND JACK B. LAYTON BY NOTICE, PLEADINGS, FINDINGS AND JUDGMENT IN STEWART VS. LAYTON ET AL AND EXISTED ONLY AS TO THE RIGHT OF STEWART, THE SUCCESSOR-IN-INTEREST OF THE MORTGAGEES, IN THE MORTGAGE FROM LAYTON TO CHRISTENSEN ET AL TO COMPLETE THE PURCHASE OF THE RANCH UNDER SAID CONTRACT.

POINT III

THE COURT ERRONEOUSLY ASSUMED AND FOUND THAT THE DISTRICT COURT FOR BLAINE COUNTY, IDAHO, IN THE STEWART CASE, HAD HELD THAT THE NOTICE OF CANCELLATION OF THE CONTRACT BETWEEN THE COVE RANCH AND LAYTON

WAS INEFFECTIVE FOR ALL PURPOSES; NOTWITHSTANDING THE CANCELLATION WAS PLEADED BY CLIFTON B. LAYTON AND JACK B. LAYTON.

POINT IV

THE COURT DISREGARDED THE ADMITTED FACT THAT THE SOLE TITLE AND OWNERSHIP OF THE COVE RANCH WAS IN THE PLAINTIFFS AT ALL TIMES BEFORE AND AFTER THE EXECUTION SALE AND THAT THEY ALONE HAD THE EXCLUSIVE RIGHT TO LEASE THE PROPERTY AND TO COLLECT AND HOLD AS AGAINST THE WHOLE WORLD ALL OF THE RENTS AND PROFITS AT ALL TIMES UP TO THE MAKING OF THE CONTRACT BETWEEN THE PLAINTIFFS AND THE DEFENDANTS.

The court will readily observe that Clifton B. Layton had a contract for the purchase of the Cove Ranch for the total consideration of \$70,000.00, \$3,000.00 of which he paid. \$17,000.00 on the first installment of \$20,000.00 was paid by Perry E. Burnham, \$50,000.00 was payable in January of 1948. Layton had no money with which to make the payment. The contract read (Tr. 19):

“That in the event the Fourth Party (Layton) is able to complete the said \$50,000.00 payment due on or before the 21st day of January, 1948, the said First, Second and Third Parties will make the transfers of title as herein provided above for the entire ranch properties specified, to Clifton B. Layton or his appointee.”

Layton was not able to make the payments, and the plaintiffs paid to the Cove Ranch, sellers, the balance of \$46,104.35—the difference between the \$50,000 payment, and interest, and the amount paid, covered by the sale of some of the land. The Burnhams took legal title to the property and took possession. After that date, Layton was never in possession of the property, and he never acquired title thereto. Notwithstanding this, Layton gave to Christensen and Rosebraugh a mortgage purporting to cover the ranch, to secure payment of a \$10,000.00 note. Christensen brought suit to foreclose the mortgage given to secure the \$10,000.00 note, and for nothing else. It was later assigned to Stewart. This suit was for the foreclosure of the mortgage, and all of the property constituting the Cove Ranch was described in the mortgage attached to the Complaint and in the Decree of the court. It was in that suit, and no other, that the foreclosure proceedings went forward. In the Complaint, Stewart alleged (Tr. 25):

“That at the time of the execution of said second mortgage, said defendants’ interest in said property was that of a purchaser thereof, evidenced by a written agreement, executed on the 22nd day of November, 1946, between the Cove Ranch Land and Livestock Co., and others, and the said defendants (Laytons)
... ”

After acquiring the property, Burnhams, on April 15, 1948, served notice of the cancellation of the Layton purchase contract (Tr. 30). The sufficiency of the notice was never questioned by the Laytons. On the contrary, Clifton B. Layton pleaded (Tr. 36):

“This defendant, being unable to make payment of

the purchase price of said property so advanced by the said Perry E. Burnham and L. Earl Burnham, was compelled to suffer the cancellation of the said agreement."

The case was tried on that pleading, Grover Giles appearing as attorney for Layton. No amendment was asked for or made. Jack B. Layton pleaded as follows (Tr. 39):

"Admit that Perry E. Burnham and L. Earl Burnham have acquired by purchase the real estate described in the Mortgage, Exhibit B, and that they are now the owners in fee of said property."

The Burnhams pleaded the same thing. The court, by supplemental findings in the form of a letter (Tr. 51) found:

"The pleadings and the evidence shows that Clifton B. Layton assigned all his interest in the contract of November 22nd, 1946, to Jack B. Layton, and the defendant Jack B. Layton, by his answer, expressly admitted 'that Perry E. Burnham and L. Earl Burnham have acquired by purchase the real estate described in the mortgage, exhibit B . . . ' "

The court further found (Finding No. 4—Tr. 45):

"That at the time of the execution of said mortgage, the interest of the said Clifton Layton and Lois Layton in said property was that of a purchaser thereof, evidenced by a written agreement executed and delivered on the 22nd day of November, 1946 . . . "

and further (Finding No. 8—Tr. 47):

"That sometime in April, 1948, the said Burnhams served a written notice of forfeiture upon the said A. Edsel Christensen and Ray Rosenbraugh and others, as shown by the exhibit introduced in evidence herein. That the said Burnhams did not give this plaintiff

(Stewart) or the said Christensen and Rosebraugh or any of them an opportunity to pay the balance unpaid on said contract of November 22, 1946, and did not give any of such persons advance notice of their intention to forfeit said contract and did not at any time tender to Christensen and Rosebraugh or the plaintiff or any of them a deed to the property described in said agreement of November 22, 1946, or any part or portion thereof."

We have quoted from all these documents for the purpose of meeting the contention of counsel and apparently the conclusion of the court that by these findings, the notice as to the Laytons was disregarded as insufficient. That is not the fact as shown by the pleadings, and it was not the intention of the court as disclosed by the clearest kind of language which limited the annulment of the notice to Christensen and Rosebraugh and the plaintiff Stewart in that case. The Laytons had a perfect right to accept, as the lesser of two evils, the cancellation of the contract of the sale of the property during the course of the foreclosure proceedings. The case was tried on that theory and while Layton will claim he was not properly represented, the court will find that he was represented by independent counsel as found by the court, and yet he elected to accept the cancellation of the contract and thereby end his connection with it.

At no time after the Burnhams paid the \$46,104.35 were the Laytons in possession of the property, and at no time were they entitled to the possession of it.

It is difficult to understand the theory of the District Court for Blaine County in ordering the sale of the property.

The Decree does not, in any respect, follow the Complaint, the evidence or the findings, for the court found Layton had only the right to purchase the land under the contract with the Cove Ranch, owners, when he gave the mortgage, and so the pleader in the foreclosure suit pleaded that right. The court found that right and nothing more. Furthermore, the pleadings disclosed without denial, that the Burnhams owned the ranch. Notwithstanding these admissions, the court made a Decree ordering the sale of the land itself, not of the right being foreclosed, to-wit: *the right to purchase the land.*

The Burnhams had a perfect right to stand upon their contract and if redemption had been made, not of the sale of the property itself, but of the right to purchase the property by Stewart, as the record stood, the Burnhams may have been compelled to specifically perform by conveying the land to Stewart and accepting the purchase price as determined by the court, if a controversy existed. Stewart did not elect to complete the purchase under the contract. These relations do not disclose any right of redemption or any other right except insofar as Stewart was concerned, the right to perform, and so far as Laytons were concerned, no rights at all.

An appeal was not taken from the judgment of the district court and when the Reids appeared on the scene with an offer to perform the contract by paying Burnhams the full amount of their money, with interest, costs and expenses, they accepted. In the meantime, however, and in obedience to the decree of the court, the Sheriff for Blaine County went through the formality of the sale of the ranch owned by Burnhams to the Burnhams; and in order to clear the record, Burnhams

agreed to accept the money from the Reids and to give them whatever documents were necessary insofar as the Burnhams were concerned, to clear title to the property. The trial court in this proceeding was therefore in clear error in assuming the relationship of mortgagor and mortgagee existed. The court evidently divided the money under the Idaho statute, applicable only in usual cases of execution or foreclosure sale. The statute has no application to this case.

POINTS V AND VI

POINT V

THE COURT ARBITRARILY, WITHOUT APPLICATION OR JUSTIFICATION, REVIVED THE CANCELLED CONTRACT BETWEEN THE COVE RANCH AND LAYTON AND GAVE THE LAYTONS A RIGHT OF REDEMPTION WHICH WAS NOT GIVEN BY THE DISTRICT COURT FOR IDAHO AND THE COURT HAS, IN DISREGARD OF THE CONTRACT BETWEEN PLAINTIFFS AND DEFENDANTS, ADDED A RIGHT WHICH DID NOT EXIST.

POINT VI

THE COURT MISINTERPRETED EXHIBIT A TO THE COMPLAINT, (CONTRACT BETWEEN PLAINTIFFS AND DEFENDANTS) BY MAKING IT INCLUDE AS PROPERTY SOLD BY PLAINTIFFS TO THE DEFENDANTS, PERSONAL PROPERTY, TO-WIT: THE CROPS

WHICH WERE HARVESTED AND READY FOR HARVEST AT THE TIME OF THE CONTRACT AND WHICH WERE NOT INCLUDED IN THE SALE, EXCEPT AS TO THAT PORTION SPECIFICALLY COVERED BY THE CONTRACT.

The claim of the defendants to any part of the proceeds of the sale of the landlord's share of the hay and grain must necessarily be based upon a right of redemption supposed to have been acquired by the quit-claim deeds from the Laytons, or upon the contract between the plaintiffs and the defendants. As we have shown, the contract gave them the land, the title to which they would get through deeds from the Burnhams and through the certificate of redemption, *given merely to clear the title*. By the express terms of the contract, in addition to the land, they were to have a portion of the landlord's share of the crop, which was designated in the contract and paid to them. There is no difficulty therefore in coming to the inevitable conclusion that the defendants acquired no part of the crops through the contract.

We pass now to the supposed right of redemption of the Laytons. We have quoted from the pleadings, the findings, the Decree and the Order of the court fixing the amount payable if a redemption is made, and in which the court expressly states that he does not pass upon any question of the right of any party to the litigation to redeem. There is, therefore, no adjudication of the right of the Laytons to redeem. The trial court has not made it clear as to the basis of the judgment, but he seems to proceed upon the theory that it is a statutory mortgage foreclosure and therefore the right of redemption

follows. Bearing in mind that *the right to complete the purchase of the property under the contract between Cove Ranch and Layton was the subject matter of the Stewart suit*, it is clear under the Idaho statutes, which we will assume are the same as Utah statutes, that through the proceedings, Stewart acquired the right by the sale to perform by paying Burnhams their money. Inasmuch as that is the right which was sold, had Stewart become the purchaser or had he redeemed from the Burnhams, Layton would have had the right to redeem in turn from Stewart. That would be the law under Title 104-37-30, Utah Code Annotated 1943, because Layton was the judgment debtor of Stewart—not of Burnhams.

Stewart did not elect to perform the contract between Layton and the Cove Ranch and his judgment was never paid, and Layton never reacquired the right to perform the contract by redeeming from the sale in Stewart vs. Layton et al. Inasmuch as he did not come within the terms of the statute referred to or Rule 69(f), Utah Rules of Civil Procedure, which supersedes the statute and which we assume is the same as the Idaho statutes, whatever rights Stewart had with respect to the Cove Ranch contract were wiped out by the sales to Burnham.

The right of redemption, having been developed in the courts of equity and given effect by statutes, was nevertheless based upon equitable principals. These principals are adverted to in Ferguson vs. Sullivan, Idaho, 74 P. 2nd 183, wherein the court said, in referring to the Idaho statute:

“Under this statute the purchaser was only entitled to receive ‘The value of the use and occupation’ of the

premises from the date of sale, May 25, and not from the beginning of the year. *For the same reason the original owner was entitled to the value for the use and occupation of the premises up to the time she lost the title.*"

Applying this principal, neither Layton nor the defendants, at any time, had the title to the property. Hence, they could not have lost it and by the same token, Burnhams, at all times having the title and having paid the purchase price of the property, were entitled to all of the proceeds of the sale of the crops excepting only what they sold to Reids in the contract (Exhibit A to the Complaint-Tr. 8). These proceeds would not only include all of the \$6,258.05, held in escrow, but the additional sums of \$1280.00, representing one-half of the hay produced in 1950, and \$3589.67 received by defendants as proceeds from the other crops grown upon the ranch during that year. These amounts are set forth in detail in plaintiffs' Amended Complaint at page 6 thereof, (Tr. 121), and admitted in paragraph 9 of defendants' Answer (Tr. 128). The defendants got one-third of the landlord's share of the crops, and they are not, under the terms of the contract with plaintiffs, in any view of the matter, entitled to more. No attack has been made upon the contract and no reason has been assigned for the interpretation of it contrary to the express language used by the parties therein. The contract excludes from its operation the quarter section of land upon which the grain referred to in plaintiffs' second cause of action was produced (Tr. 122-123). The plaintiffs should also have all of the grain grown upon that land and this aspect of the case is considered in argument under the next point assigned as error.

POINT VII

THE COURT ERRONEOUSLY REFUSED TO ADJUDICATE THE OWNERSHIP OF THE WHEAT GROWN UPON THE GROUND DESCRIBED IN THE AMENDMENT TO THE COMPLAINT ON THE GROUND OF LACK OF JURISDICTION NOTWITHSTANDING THE WHEAT HAD NO RELATIONSHIP TO THE LAND, HAVING BEEN SEVERED, AND THE PARTIES TO THE CONTROVERSY WERE ALL, BY STIPULATION AND ORDER OF THE COURT, MADE PARTIES TO THIS PROCEEDING. THE COURT ERRED IN HOLDING SOMETHING MORE THAN PERSONAL JURISDICTION WAS REQUIRED.

The court will find by the contract (Exhibit A-Tr. 9) that the defendants expressly disclaimed any interest in or to the real estate. Notwithstanding this disclaimer, they allege that they leased the property to R. D. Hess, who took possession of it, cultivated and harvested the crops, after which and while this case was pending, they signed the stipulation (Tr. 68) to the effect

“ . . . that the Court may make and enter a Declaratory Judgment adjudging the ownership of the wheat therein referred to.”

and attached to the Stipulation was the amendment and supplement to the Complaint to the effect that by demands and threats they procured possession of the wheat and the court made an order to the effect that: (Tr. 67)

“ . . . plaintiffs may file an amended complaint and when such pleading is filed the Court may enter a

declaratory judgment adjudging the ownership of the wheat referred to therein."

That involved \$1,135.49 for 44,740 pounds of wheat grown on that land. As to this cause of action, it was purely and strictly personal, and the court had the absolute, unquestioned jurisdiction to make the adjudication and should do so. The subject matter was personal property and in no way involved an adjudication of the ownership of the land from which the wheat was produced. We recognize that jurisdiction of a court cannot be conferred by consent or agreement of the party litigants, where the court is without jurisdiction. *Hardy vs. Meadows*, 71 Utah 255, 264 Pac. 968. However, in determining jurisdiction of a district court, this court in the case of *Kramer vs. Pixton*, 72 Utah 1, 268 Pac. 1029, said:

"The test is not whether the court has jurisdiction of a particular case, but rather whether the court has jurisdiction of the class of cases to which the particular case belongs."

The parties were residents of Utah, personally before the court, and as before stated, the defendants herein expressly disclaimed any assertion of ownership of that particular land.

CONCLUSION

We do not wish to appear repetitious or belabor our argument, but in conclusion we must reiterate that the causes of action set forth by plaintiffs and appellants herein do not involve the title to or the possession of real estate. The transaction between the respective parties was in effect a sale of

the Cove Ranch by the plaintiffs to the defendants, less the 160 acres retained by plaintiffs, and the certificate of redemption was given only at the request of defendants for the clearing of title to said property. We respectfully urge that the district court should have entered judgment for the plaintiffs with respect to the entire sum of money held in escrow, for the sums of money received by defendants from the sale of the other crops harvested prior to the said sale of the land, and for the value of the wheat grown upon the 160 acres of land retained by the plaintiffs under the express terms of said contract of sale.

Respectfully submitted,

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