

1954

Harold Calder and Sydney Calder v. The Third Judicial District Court of Utah et al : Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

George Fadel; Elias Hansen; Attorneys for Calders;

Recommended Citation

Legal Brief, *Calder v. Third Judicial District Court of Utah*, No. 8155 (Utah Supreme Court, 1954).
https://digitalcommons.law.byu.edu/uofu_sc1/2174

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

DEC 3 1954

LAW LIBRARY
U. of U.

IN THE SUPREME COURT
of the
STATE OF UTAH

HAROLD CALDER and SYDNEY
CALDER,

Plaintiffs,

— vs. —

THE THIRD JUDICIAL DISTRICT
COURT OF UTAH IN AND FOR
SALT LAKE COUNTY, and HON.
A. H. ELLETT and HON. RAY VAN
COTT, JR., two of the Judges thereof
and CHARLES S. MERRILL,

Defendants.

No. 8155

and

BRIEF

CHARLES S. MERRILL,

Plaintiff,

— vs. —

HAROLD CALDER and SYDNEY
CALDER,

Defendants.

No. 8159

~~FILED~~

APR 30 1955

GEORGE FADEL
ELIAS HANSEN

Attorneys for Calders

INDEX

	Page
STATEMENT OF CASES.....	1
POINTS AND ERRORS RELIED UPON.....	5
ARGUMENT	6
POINT ONE	7
THAT A WRIT IN THE NATURE OF A WRIT OF MANDAMUS IS A PROPER REMEDY TO RAISE THE MATTERS WHICH THE CALDERS SEEK TO HAVE DETERMINED, OR IF NOT SUCH MATTERS MAY PROPERLY BE INQUIRED INTO BY APPEAL.	
POINT TWO	8
THAT IT WAS THE DUTY OF THE COURT BELOW TO GRANT THE MOTION FOR A CHANGE OF VEN- UE FROM SALT LAKE COUNTY TO DAVIS COUNTY AND IT WAS ERROR OF THE COURT TO REFUSE TO ORDER SAID CHANGE.	
POINT THREE	14
THAT IT WAS THE DUTY OF THE COURT BELOW TO HEAR AND DETERMINE THE COUNTER- CLAIMS TOUCHING THE VALIDITY OF THE CON- TRACT BETWEEN THE PLAINTIFF MERRILL AND THE DEFENDANTS CALDERS AND THE COUNTERCLAIM FOR DAMAGES SUSTAINED BY THE CALDERS BY REASON OF PLAINTIFF MERRILL HAVING REPUDIATED SUCH CON- TRACT, AND THAT THE COURT BELOW EXCEED- ED ITS JURISDICTION AND ABUSED ITS DIS- CRETION IN DISMISSING SUCH COUNTER- CLAIMS, OR IN ANY EVENT IT WAS ERROR TO DISMISS THE COUNTERCLAIMS.	
POINT FOUR	28
THAT IT WAS THE DUTY OF THE COURT BELOW TO DECIDE THAT THE PLAINTIFF IS NOT EN- TITLED TO RECOVER THE MONEY WHICH HE HAS PAID ON THE CONTRACT HERE INVOLVED ON ACCOUNT OF ANY INFIRMITY IN THE DE- SCRIPTION OF THE PROPERTY MENTIONED IN THE CONTRACT AND THE COURT BELOW FAILED TO PERFORM A DUTY IMPOSED UPON IT WHEN IT FAILED TO SO DECIDE AND ON THE CONTRARY IN ANY EVENT THE COURT ERRED IN DISMISSING SUCH COUNTERCLAIMS.	

INDEX—(Continued)

Page

CASES CITED

Atlas Acceptance Corp. v. District Judge, 85 Ut. 352, 39 Pac. (2d) 710	13
Barber v. Anderson, 73 Ut. 357, 274 Pac. 136.....	11
Boley v. Dist. Court of 2nd Jud. Dist. in and for Morgan County, 90 Ut. 347; 61 Pac. (2d) 624.....	10
Brown v. Bailey, 1 Metc. (Mass.) 254.....	27
Buckle v. Ogden Furniture & Carpet Co., 61 Ut. 559, 216 Pac. 684	10-12
Conant v. Deep Creek & C. Valley Irrig. Co., 23 Ut. 627; 66 Pac. 188, 90 Am. St. Rep. 721.....	10
DeRemer v. Anderson, 169 Pac. 737; 41 Nev. 287; 25 A.L.R. 775, p. 740 of Pac. Rpr.....	24
Deseret Irrig. Co. v. McIntyre, 16 Ut. 398; 52 Pac. 628.....	13
Dohaney v. Womack, Texas 1893, 20 S.W. 950.....	26
Field v. Daisy Gold Mining Co., 26 Ut. 373; 73 Pac. 521	10-11
First Nat'l Bank of Coalville v. Boley, 90 Ut. 341; 346; 61 Pac. (2d) 621.....	10
Fleishman v. Wood, 135 Cal. 256, 67 Pac. 276.....	24-25
Floor v. Mitchell, 86 Utah 203; 41 Pac. (2d) 281.....	13
Gabarino v. Union Savings & Loan Assn. 107 Colo. 140; 109 Pac. (2d) 638, 132 A.L.R. 1489.....	34
Hale v. Barker, 70 Ut. 284; 259 Pac. 928.....	7
Hanson v. Iverson, 61 Ut. 172; 211 Pac. 682.....	7
Harris v. Barker, 80 Ut. 21, 26; 12 Pac. (2d) 277.....	7
Ketchum Coal Co. v. Dist. Ct. of Carbon Co., 48 Ut. 342, 359; 159 Pac. 737; 4 A.L.R. 519.....	7
Lawrence v. Ballou, 37 Cal. 518.....	27
Pace v. Wolfe, 76 Ut. 368; 289 Pac. 1102.....	7
Palfreyman v. Trueman, 105 Ut. 463; 142 Pac. 677, 678.....	12
Peckham v. Lane, 81 Kan. 489; 106 Pac. 464.....	25
Rains v. Apking, 247 S.W. (2d) 263.....	27
Reed v. Lowe, 8 Ut. 39; 29 Pac. 740.....	15
Schenk v. Evoy, 24 Cal. 410.....	27
Schmalzer v. Jamnik et al (Ill.) 95 N.E. (2d) 347.....	27
Schramm Johnson Drug Co. v. Cox, 79 Ut. 276, 284; 9 Pac. (2d) 399	7-13
Sherman v. Droubay, 27 Ut. 47; 74 Pac. 348.....	10
Simmons v. Hoyt, 109 Ut. 186; 167 Pac. (2d) 27.....	13

INDEX—(Continued)

	Page
Skeen v. Pratt, 87 Ut. 121; 148 Pac. (2d) 457.....	8
State v. Hart, 19 Ut. 438; 57 Pac. 415.....	8
State v. Hart, 26 Ut. 229; 72 Pac. 938.....	8
State v. 2nd Dist. Ct., 36 Ut. 396; 104 Pac. 282.....	7
Toffery v. Kaufman, 134 Cal. 391; 66 Pac. 471; 86 Am. St. Rep.	33
Wallace v. Miller, 52 Calif. 655	27
White v. Dist. Ct., 232 Pac. (2d) 785.....	8

STATUTES CITED

Utah Rules of Civil Procedure, Rule 65 B (2) and (3).....	7
Utah Rules of Civil Procedure, Rule 82.....	8
U.C.A. 1953, 78-13-1	8, 12, 13
U.C.A. 1953, 78-13-4	9, 12, 13
U.C.A. 1953, 78-13-5	9
U.C.A. 1953, 78-13-6	9
U.C.A. 1953, 78-13-7	9

AUTHORITIES CITED

117 A.L.R. page 1086.....	27
41 Am. Jur. Sec. 2, 3, 4 & 5, page 806-808.....	22
49 Am. Jur. Sec. 22.....	18
49 Am. Jur. Sec. 192, page 170.....	29
49 Am. Jur. Sec. 350, page 660.....	23
49 Am. Jur. Sec. 564, page 870.....	30
56 Am. Jur. Sec. 11, page 13.....	11
56 Am. Jur. Sec. 11, page 14.....	11
72 C.J.S., Sec. 8-10, page 406-408.....	22
81 C.J.S., Sec. 6, page 417.....	15
L.R.A. 1916D, page 472.....	32
L.R.A. 1916D, page 478.....	32

OTHERS

Brown Legal Maxims, page 156, et seq.....	17
Page on Contracts, Vol. 6, page 5785.....	26
Pomeroy's Equity, 3rd Ed., Sec. 860, page 1516.....	15
Pomeroy's Specific Performance of Contracts, Sec. 22 and 24, pages 59 et seq. and 75 et seq.....	15
Pomeroy's Specific Performance of Contracts, Sec. 71, page 183	20
Pomeroy's Specific Performance of Contracts, Sec. 85, page 206	21

IN THE SUPREME COURT
of the
STATE OF UTAH

HAROLD CALDER and SYDNEY
CALDER,

Plaintiffs,

— vs. —

THE THIRD JUDICIAL DISTRICT
COURT OF UTAH IN AND FOR
SALT LAKE COUNTY, and HON.
A. H. ELLETT and HON. RAY VAN
COTT, JR., two of the Judges thereof
and CHARLES S. MERRILL,

Defendants.

No. 8155

and

BRIEF

CHARLES S. MERRILL,

Plaintiff,

— vs. —

HAROLD CALDER and SYDNEY
CALDER,

Defendants.

No. 8159

STATEMENT OF CASES

Most of the issues involved in the foregoing cases are the same. Counsel for the Calders entertained some doubt as to whether or not the questions which they wish to have determined could properly be raised in one pro-

ceeding. Thus, the Calders complain because the Court below dismissed the Counterclaim which they filed in the case brought against them by Merrill. It was feared by counsel for the Calders that this Court might deem the proper remedy is by appeal to secure a ruling on the question of the dismissal of the Counterclaims filed by the Calders. If such a view should be entertained and the dismissal of the Counterclaims should be held to be a final judgment as to such Counterclaims from which an appeal could be had, the time for appeal would doubtless have elapsed before a ruling could be had on the matters raised on the Petition for a Writ.

In view of this situation, counsel for the parties stipulated that the two proceedings might, with the approval of this Court, be consolidated. In conformity with such stipulation, this Court ordered that the two cases be consolidated. We shall, therefore, on behalf of the Calders, argue both proceedings in this Brief.

The petition for a Writ contains copies of all of the documents filed in the Court below, but to avoid confusion, we shall, in this Brief, indicate the places in the Record on Appeal where the various documents referred to may be found.

Charles S. Merrill, plaintiff in case No. 8159 and one of the defendants in Case No. 8155, brought an action in the District Court of Salt Lake County, Utah whereby he sought to recover from Harold Calder and Sydney Calder, defendants in Case No. 8159 and plaintiffs in Case

No. 8155, the sum of \$33,000.00 which Merrill had paid on a written contract for the purchase of 200 acres of land situated in Davis County, Utah.

One of the grounds upon which Merrill sought to recover back the money paid by him to the Calders was that the contract of purchase was void because the same was uncertain in that it did not contain a particular description of the land to be sold and therefore not in compliance with that provision of the Statute of Frauds, U.C.A. 1953, 25-5-3 which provides :

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

The particular description which it is claimed by Merrill is fatal to the validity of the contract reads thus :

“Also additional acreage of the Seller located in Section 5, Township 1 North, Range 1 East, so that the acreage selected in said Section 5, added to the acreage in Section 32 above, will total 200 acres. However the Buyer must select such land in Section 5 in one tract, and the selection to be made within sixty days from date.”

The land covered by the contract is situated in Davis County, Utah where the Calders reside. (R. 1 to 14)

To the Complaint filed by Merrill the Calders answered and filed Counterclaims and a Motion for a

Change of Venue, together with an Affidavit in support of the Motion for a Change of Venue. In such Affidavit it is averred that the land described in the contract and in plaintiff's Complaint is situated in Davis County and that the defendants are and for more than ten years last past have been residents of Davis County, Utah. (R. 5)

At the time of hearing the Motion for a Change of Venue, counsel for Merrill was granted leave to amend the Complaint by writing thereon that the statement as to the land to be sold being below an irrigation ditch was made in Salt Lake County, Utah. No evidence was offered in support of the claim that any representations were made by the Calders in Salt Lake County unless the mere unverified amendment made to the Complaint may be said to be evidence, which we submit it is not. The Affidavit of the defendants in support of their Motion for a Change of Venue is not contradicted. Hon. A. H. Ellett, one of the judges of the District Court of Salt Lake County, denied the Motion for a Change of Venue from Salt Lake County to Davis County. (R. 7)

Defendants filed an Amended Answer and Counterclaim in the cause. (R. 15) There are three Counterclaims set out in Calders' pleadings. By the first counterclaim, they seek to have the court determine that the contract between Merrill and the Calders is valid, in the second counterclaim they seek to have the court decide that Merrill is not entitled to recover the money he has paid on the contract upon the ground that such contract is void because of the alleged infirmity in the description of

the land, and the third counterclaim is for damages for breach of the contract in that Merrill has repudiated the same.

The court below granted the motion to dismiss the counterclaim and entered an Order to that effect. (R. 21) While the Order dismissing the counterclaim is in the singular, we have assumed that the Court below dismissed all three of the Counterclaims because all three were argued and submitted to the court for its decision.

At the time the Order dismissing the Counterclaim was made, there was pending in the Court below and not disposed of a Motion to require Merrill to select the land which he agreed to select in Section 5. (R. 18)

It is the contention of the Calders that the Court below was in error in denying the Motion for a Change of Venue, in dismissing the Counterclaims set out in Calders Amended Answer and Counterclaims and that these errors may properly be considered and disposed of in the Petition filed herein, which is in the nature of a Petition for a Writ of Mandamus and is expressly provided for in Rule 65 (b) (2) and (3) of the Utah Rules of Civil Procedure, or if it should be determined that such matters may not properly be determined by reason of the petition for such a writ that then the same may be determined on the appeal from the order dismissing the counterclaims.

The Calders rely upon the following points and errors for the relief which they seek:

POINT ONE

THAT A WRIT IN THE NATURE OF A WRIT OF MAN-DAMUS IS A PROPER REMEDY TO RAISE THE MATTERS WHICH THE CALDERS SEEK TO HAVE DETERMINED.

POINT TWO

THAT IT WAS THE DUTY OF THE COURT BELOW TO GRANT THE MOTION FOR A CHANGE OF VENUE FROM SALT LAKE COUNTY TO DAVIS COUNTY AND IT WAS ERROR OF THE COURT TO REFUSE TO ORDER SAID CHANGE.

POINT THREE

THAT IT WAS THE DUTY OF THE COURT BELOW TO HEAR AND DETERMINE THE COUNTERCLAIMS TOUCHING THE VALIDITY OF THE CONTRACT BETWEEN THE PLAINTIFF MERRILL AND THE DEFENDANTS CALDERS AND THE COUNTERCLAIM FOR DAMAGES SUSTAINED BY THE CALDERS BY REASON OF PLAINTIFF MERRILL HAVING REPUDIATED SUCH CONTRACT, AND THAT THE COURT BELOW EXCEEDED ITS JURISDICTION AND ABUSED ITS DISCRETION IN DISMISSING SUCH COUNTERCLAIMS, OR IN ANY EVENT IT WAS ERROR TO DISMISS THE COUNTERCLAIMS.

POINT FOUR

THAT IT WAS THE DUTY OF THE COURT BELOW TO DECIDE THAT MERRILL IS NOT ENTITLED TO RECOVER THE MONEY WHICH HE HAS PAID ON THE CONTRACT HERE INVOLVED ON ACCOUNT OF ANY INFIRMITY IN THE DESCRIPTION OF THE PROPERTY MENTIONED IN THE CONTRACT AND THE COURT BELOW FAILED TO PERFORM A DUTY IMPOSED UPON IT WHEN IT FAILED TO SO DECIDE AND ON THE CONTRARY IN ANY EVENT THE COURT ERRED IN DISMISSING SUCH COUNTERCLAIMS.

ARGUMENT

POINT ONE

A WRIT IN THE NATURE OF A WRIT OF MANDAMUS IS A PROPER REMEDY TO RAISE THE MATTERS WHICH THE CALDERS SEEK TO HAVE DETERMINED, OR IF NOT SUCH MATTERS MAY PROPERLY BE INQUIRED INTO BY APPEAL.

The Caldery seek the writ prayed for pursuant to 65 B (2) and (3) of the Utah Rules of Civil Procedure. Such rule, in effect, provides for the same remedy that was provided for by the Writs of Mandamus and Certiorari as known at common law and by our Code of Civil Procedure prior to the adoption of the Rules of Civil Procedure by this court. It will be noted that the Note to the rule so indicates. This court has held that :

“When a District Court erroneously refuses to grant a change of venue, mandamus is the proper remedy to compel the granting of such change.”

Hale v. Barker, 70 Utah 284; 259 Pac. 928; *Pace v. Wolfe*, 76 Utah 368; 289 Pac. 1102; *Schramm Johnson Drug Co. v. Cox*, 79 Utah 276, 284; 9 Pac. (2d) 399. So also is this court committed to the doctrine that where a court erroneously dismisses an action or counterclaim, mandamus may be resorted to for the purpose of securing the reinstatement of the dismissed action or counterclaim. *State v. Second District Court*, 36 Utah 396; 104 Pac. 282; *Ketchum Coal Co. v. District Court of Carbon County*, 48 Utah 342, 359; 159 Pac. 737; 4 A.L.R. 519; *Hanson v. Iverson*, 61 Utah 172; 211 Pac. 682; *Harris v. Barker*, 80

Utah 21, 26; 12 Pac. (2d) 577; *Skeen v. Pratt*, 87 U. 121; 48 Pac. (2d) 457; *State v. Hart*, 19 Utah 438; 57 Pac. 415; *State v. Hart*, 26 Utah 229; 72 Pac. 938; *White v. District Court*, 232 Pac. (2d) 785, not in Utah reports.

POINT TWO

IT WAS THE DUTY OF THE COURT BELOW TO GRANT THE MOTION FOR A CHANGE OF VENUE FROM SALT LAKE COUNTY TO DAVIS COUNTY AND IT WAS ERROR OF THE COURT TO REFUSE TO ORDER SAID CHANGE.

It is provided by Rule 82 of the Rules of Civil Procedure that:

“These rules shall not be construed to extend or limit the jurisdiction of the Courts of this state or the venue of the actions therein.”

It thus follows that the Utah Code of Civil Procedure is still in effect and is controlling.

U.C.A. 1953, 78-13-1 provides:

“Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof is situated, subject to the power of the court to change the place of trial as provided in this code (1) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property. (2) For the partition of real property. (3) For the foreclosure of all liens and mortgages on real property.

Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties and the county so selected is the proper county for the trial of such action."

U.C.A. 1953, 78-13-4:

"Where the defendant has contracted in writing to perform an obligation in a particular county of the state and resides in another county, an action on such contract obligation may be commenced and tried in the county where such obligation is to be performed or in which the defendant resides."

U.C.A. 1953, 78-13-5 and 78-13-6 deals with transitory causes of action arising without the state and as the cause of action here involved did not arise without the state, the foregoing sections dealing with transitory actions have no application here. U.C.A. 1953, 78-13-7 provides that:

"In all other cases the action must be tried in the county in which the cause of action arises, or in the county in which any defendant resides at the commencement of the action, etc."

The cause of action here involved falls within the provisions of U.C.A. 1953, 78-13-1. It is an action respecting real property. It is for the determination of what right or interest the parties have in real estate in Davis County by reason of the written contract entered into by them on February 28, 1953. Mr. Merrill seeks to have the Court hold that he does not have and never has had

any interest or right in the real estate described in the contract. The Calders contend that Merrill does have such an interest and that he is, by the contract, obligated to pay the balance of the purchase price. While we have been unable to find a case in this jurisdiction where the exact question here presented has been decided, we do find cases where this Court has announced principles of law that are applicable to the facts here involved.

In the case of *Buckle v. Ogden Furniture and Carpet Co.*, 61 Utah 559; 216 Pac. 684, it is held that it was the intention of the legislature in enacting the law as to venue of actions to establish the right of a defendant in an action to have an action against him tried in the county where he or a co-defendant resides and that actions which may be tried elsewhere are limited and restricted to those which the act itself exempts from the general rule. Under this section an action to foreclose mining claims is properly brought in the county where the claim is situated. *Field v. Daisy Gold Mining Co.*, 26 Utah 373; 73 Pac. 521. Where a note secured by a mortgage is payable in one county and the property is in another, the foreclosure is properly had in the county where the mortgaged property, or some part thereof, is situated. *Sherman v. Droubay*, 27 Utah 47; 74 Pac. 348. To the same effect are: *Conant v. Deep Creek and C. Valley Irr. Co.*, 23 Utah 627; 66 Pac. 188; 90 Am. St. Rep. 721; *First Nat'l. Bank of Coalville v. Boley*, 90 Utah 341; 346; 61 Pac. (2d) 621; *Boley v. District Court of 2nd Judicial District in and for Morgan County*, 90 Utah 347;

61 Pac. (2d) 624. In the case of *Barber v. Anderson*, 73 Utah 357; 274 Pac. 136, it is held that the proper county to bring an action to set aside a Deed is the County where the property is situated.

Our statutory law dealing with the venue of actions touching actions affecting real estate is in accord with the common law dealing with the same question. It is so stated in the case of *Field v. Daisy Gold Min. Co.*, supra. Common law actions affecting interest in real estate were local in their nature and therefore should be brought in the county where the land is located, while transitory actions could be brought where the cause of action arose or where one or more of the defendants reside. It is said in 56 Am. Jur., page 13, Sec. 11 that:

“Venue statutes providing that suits for the possession or recovery of real estate, or for the determination of title, rights and interest in real estate are to be brought in the county where the real estate or some part thereof is situated are more or less declaratory of common-law rules and the common-law tests of local action are usually applied.”

Quoting further from page 14 of the above Vol. of Am. Jur., it is said:

“A statute which makes local actions for the determination of interest in lands has been held applicable to an action for the reformation of a contract for the sale of land, a proceeding to set aside a transfer of real estate as in fraud of creditors, a suit to have a deed absolute on its face declared a mortgage and to redeem there-

from, an action to quiet title to real estate as against the apparent lien of a void judgment, and a suit against an executor and devisees to subject real estate to the payment of debts of the ancestor and to vacate deeds made by the devisees to third persons."

Cases are cited in the foot notes which support the law announced in that text. As heretofore stated there would seem to be no escape from the conclusion that the determination of whether or not the contract between Merrill and the Calders is valid or invalid is local in character in that it involves "the determination" of a "right or interest" . . . to real property within the meaning of U.C.A. 1953, 78-13-1.

Moreover U.C.A. 1953, 78-13-4 provides that an action on written contracts must be had either in the county where the defendant resides or where the obligation by its terms is to be performed. In this case the defendants reside in Davis County and the contract by its terms is to be performed in Davis County.

This Court on a number of occasions has construed such Section as meaning that an action on a written contract must be brought in the County where the defendant or some of them reside or if the contract is to be performed in a county other than that where the defendant or some of them reside, then and only in such case may the action be commenced in the county where the contract is by its terms to be performed. *Buckle v. Ogden Furniture and Carpet Co.*, 61 U. 559; 216 Pac. 684; *Palfreyman*

v. Trueman, 105 Utah 463; 142 Pac. 677, 678; *Atlas Acceptance Corp. v. District Judge*, 85 Utah 352, 39 Pac. 2d 710; *Floor v. Mitchell*, 86 Utah 203; 41 Pac. (2d) 281; *Simmons v. Hoyt*, 109 Utah 186; 167 Pac. (2d) 27.

Apparently the trial court took the view that the venue of this action is controlled by U.C.A. 1953, 78-13-7. It will be seen that the provisions of that Section apply only to actions not covered by the other provisions. There are such cases as *Schramm Johnson Drug Co. v. Cox*, 79 Utah 276, 283; 9 Pac. (2d) 399, and the *Deseret Irrigation Company v. McIntyre*, 16 Utah 398; 52 Pac. 628, which are authority for the doctrine that if a cause of action arises in two or more counties, the same may be brought in either county. However, it must be a transitory action and not an action respecting real property or a written contract, because the venue of such actions is fixed by U.C.A. 1953, 78-13-1 and 78-13-4.

There is still another reason why the Court below erred in failing to order a change of venue from Salt Lake to Davis County, namely, the affidavit by the Calders shows that they are residents of Davis County and that the land in question is located in such county. Indeed the court will take judicial notice of the fact that the land is located in Davis County, Utah. There is no competent evidence which shows or tends to show that the Calders ever made any false or other representations in Salt Lake County. It does appear that at the hearing of the Motion for a Change of Venue counsel for Merrill

asked and was granted leave to amend the allegations with respect to false representation as having been made in Salt Lake County, Utah. Obviously such unverified allegations in a complaint merely signed by counsel for Merrill are not evidence of the fact that false representations were made in Salt Lake County, or for that matter anywhere else, especially when the same are denied by the Calders.

Because of the foregoing reasons, the proper venue of the action brought by Merrill against the Calders above mentioned is in Davis County, and the Calders urge that the defendant, District Court and A. H. Ellett, one of the Judges thereof, be commanded to order such change of venue to be made.

POINT THREE

THAT IT WAS THE DUTY OF THE COURT BELOW TO HEAR AND DETERMINE THE COUNTERCLAIMS TOUCHING THE VALIDITY OF THE CONTRACT BETWEEN THE MERRILL AND THE CALDERS AND THE COUNTERCLAIM FOR DAMAGES SUSTAINED BY THE CALDERS BY REASON OF MERRILL HAVING REPUDIATED SUCH CONTRACT, AND THAT THE COURT BELOW EXCEEDED ITS JURISDICTION AND ABUSED ITS DISCRETION IN DISMISSING SUCH COUNTERCLAIMS, OR IN ANY EVENT IT WAS ERROR TO DISMISS THE COUNTERCLAIMS.

By their amended answer and counterclaims the Calders in the action brought against them by Merrill by counterclaims one and three seek to have the Court determine that the contract with Merrill is not invalid because

of the description of the land or that if such relief may not be had that the Calders be awarded damages on account of the repudiation of the contract by Merrill.

While the authorities generally require more convincing evidence to support a decree for specific preformance than is necessary to maintain a judgment for damages (See 81 C.J.S., Sec. 6, page 417 and Pomeroy's Equity 3rd Ed. Sec. 860, page 1516) the principles of law, in each of such proceedings in the main, are the same and therefore we shall discuss the first and third counterclaims set out in Calders' Answer and Counterclaim under one heading.

When the Court below dismissed the Counterclaims of the Calders, such dismissal constituted a final adjudication from which an appeal may be had. Because of such a situation, the Calders are seeking relief by a petition for a Writ and also by appeal so that if this court should deem a proceeding in the nature of mandamus improper, this court is vested with authority to pass upon the rulings complained of by the Calders by reason of their appeal from the judgment of dismissal. However, if the counterclaims were improperly dismissed, it is the contention of the Calders herein that such error may also properly be inquired into and determined by a Writ.

At the hearing of this case in the court below, counsel for Mr. Merrill placed considerable reliance on the case of *Reed v. Lowe*, 8 Utah 39; 29 Pac. 740, which was

decided in 1892. It is very doubtful if that case is of any value as applied to the facts in this case. The contract in that case is set out in full in the opinion. Nothing whatsoever is said in the contract as to who should make the selection of the land. That being so, it of necessity required oral testimony to determine who should make the selection. True the court said that the purchaser had the option to make the selection. Evidently such conclusion must have been reached because of some oral testimony received at the hearing before the referee because there is no language in the contract to support that conclusion. So, also, it cannot be determined from the opinion whether the action was brought by the successor to the original purchaser or seller. There is no language in that contract that either the vendor or the vendee obligated himself to make the selection. In this case it is expressly provided in the contract that the vendee, Merrill, must select such land in Section 5 in one tract and the selection to be made within sixty days.

It was argued in the Court below that Merrill having failed to make the selection within the period of sixty days, he is by reason of such fact relieved from his obligation to make the selection. In other words, Merrill may take advantage of his expressed obligation to select the land in Section 5 and by that means render invalid a contract which would have been valid if he had fulfilled his obligations. We have always understood the law to be that one may not take advantage of his own fault. That such is the law is so elementary and of such

uniform application that the citation of authorities would seem unnecessary. If authorities are desired, see Brown Legal Maxims, page 156, et seq.

Nor may it be said that there is any uncertainty about the contract obligating Merrill to select enough land in one piece in Section 5 to make up the 200 acres. It is so provided in the contract. The whole contract is in writing. Unlike the cases cited and relied upon by Merrill, there is no need to rely upon oral evidence to ascertain exactly what the parties obligate themselves to do. By the terms of the contract, Mr. Merrill is to select the land he needs to make up the 200 acres in Section 5 within sixty days from the date of the contract.

It should be noted that courts of equity in proper cases enforce the specific performance of contracts to perform acts other than the conveyance of land. The test applied by courts of equity is whether or not an action at law affords adequate relief.

It is true that contracts for personal service extending over a long period or which require the performance of a series of acts or which vest a discretion in the person obligated to perform a particular act will generally not be specifically enforced by a court of equity because to do so is usually burdensome and often impossible to enforce. However, courts of equity do not hesitate to grant specific performance of contracts to perform serv-

ices or acts which such person has agreed to perform when a decree of specific performance may readily and effectively be enforced.

The law in such particular is thus stated in 49 Am. Jur. 22:

“Jurisdiction to decree specific performance of a contract is exercised in two classes of cases: (1) Where the subject matter of the contract is of such special nature or of such peculiar value that damages, when ascertained according to legal rules, would not be a just and reasonable substitute for or representative of that subject matter in the hands of the party entitled to its benefits, in other words, when damages are inadequate. (2) Where from special and practical features or incidents of the contract inhering in the subject matter, in its terms, or in the relation of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any degree of certainty so that no real compensation can be obtained by means of an action at law, in other words, where damages are impracticable.”

To the same effect see Pomeroy's Specific Performance of Contracts, Sec. 22 and 24, pages 59 et seq. and 75 et seq. and cases cited in footnotes.

We quote the following from the section just cited:

“As a general proposition, contracts which provide for the personal affirmative acts, or personal service of the parties, are not specifically enforced in equity, not because the legal remedy of damages is always sufficiently certain and adequate, but because the courts do not possess

the means and ability of enforcing their decrees, which would necessarily be very special and of compelling the performance, which constitutes the equitable remedy. Wherever from the nature of the agreement the difficulty in the way of granting relief does not exist or can be obviated, the principles and rules of specific performance apply to contracts which stipulate for personal acts or omissions, as well as to those whose subject matter is real or personal property. A few examples of such application will suffice as illustrations. Agreements for a separation between husband and wife, if valid in form, made upon a sufficient consideration and executed by parties legally able to contract, will be specifically enforced by decreeing the execution and delivery of the proper deed, and by restraining the husband, if necessary, from personally interfering with and molesting his wife in violation of his covenant.

“A third class consists of contracts concerning a subject matter which would admit a sufficient remedy in damages, but which are so connected with circumstances and incidents, or are so incomplete in their terms, that a common law action upon them cannot perhaps be maintained, and which, nevertheless, equity considers as binding and enforcing by its own remedy of specific performance.

“The following are instances: An agreement for the purchase of timber was not the final contract in form between the parties but was to be made complete by subsequent writings. The remedy for the breach, by an action at law, being doubtful, on account of this incompleteness, the Court of chancery decreed its execution.”

It will be seen from the last citation of Pomeroy, page 75, that in some cases the court of equity will, in the event mandamus is impracticable, use its injunctive powers to accomplish the desired result.

In the Court below reliance was had by counsel for Merrill on the Statute of Frauds to support the motion to dismiss the counterclaim. The contract here brought in question meets both the letter and the spirit of the Statute of Frauds. The contract is in writing subscribed by the party by whom the sale is to be made and also by the person who is to purchase the property.

It is provided by the contract:

“That the seller, Calders, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described property situated in the County of Davis, State of Utah . . . also additional acreage of the Seller located in Section 5, Township 1 North, Range 1 East, so that the acreage selected in said Section 5 added to the acreage in Section 32 above will total 200 acres. However, the Buyer must select such lands in Section 5 in one tract and the selection to be made within sixty days from date.”

It is familiar doctrine that the purpose of the Statute of Frauds is to prevent fraud not to aid in its accomplishment. Its purpose is thus expressed in Pomeroy Specific Performance of Contracts, page 183, Sec. 71 as follows:

“The primary object to be obtained by the statute of frauds, as the term implies, is to prevent mistakes, frauds and perjuries, by substituting written for oral evidence in the most important classes of contracts, the courts of equity have established the principle which they apply under various circumstances, that it shall not be used as an instrument for the accomplishment of fraudulent purposes; designed to prevent fraud, it shall not be permitted to work frauds.”

Quoting further from the same book, Sec. 85, page 206, it is said:

“The memorandum, whether consisting of one writing or of several, must contain all the essential terms of the agreement so stated, that while parol evidence may, perhaps be resorted to for purposes of identification and to explain the situation of the parties and of the subject matter, it shall not be required to supply any substantive features which have been omitted. While the memorandum must thus embrace the substance of the contract, it need not describe the terms in a complete and detached manner; it is enough that what the parties have really assented to can be gathered from the writing and is not left to the recollection of witnesses. When this requirement is complied with, the demands of the statute are satisfied, however brief and informal the document may be.”

Applying the principles of law above quoted to the case in hand, the written contract clearly provides what the seller and buyers are required to do. There is no

opportunity to misunderstand its meaning, nor to make a contract other than the one agreed to by the parties who signed the same.

If and when Merrill selects the property which he agrees to select and which a court of equity may require him to select, then and in such case the description of the property which forms the subject matter of this contract is certain. If the contract were silent as to who should make the selection or when the same was to be made, then and in such case there might be merit to the claim that the whole of the contract is not in writing. But that is not this case. The Buyer by his contract agrees to make the selection within sixty days from the date of the contract. Such obligation on the part of Merrill, the buyer, is in effect a power of attorney, coupled with an interest. That being so, the Calders could not revoke such power, nor would the same have terminated upon the death of the Calders. So also does the language make it mandatory for Merrill to exercise the power. That being so a court of equity will require that the power should be exercised. See 72 C.J.S. p. 406-408, Sec. 8-10. To the same effect see 41 Am. Jur. p. 806-808, Sec. 2, 3, 4 and 5. Cases are collected in foot notes which support the text.

If we take a further look at the purpose of the Statute of Frauds, it will be seen that Mr. Merrill is without any standing in a court of equity to maintain a right to be relieved of his obligations to perform his obligations under the contract here brought in question.

As will be seen from the foregoing citation, the courts are uniform in holding that the Statutes of Frauds are enacted to prevent fraud or as is often said to serve as a shield, not as a sword.

If as the contract provides Merrill may select in one piece any tract of land in Section 5, he could not be injured because the particular tract is not more definitely described. Indeed it is apparent that such provision cannot possibly be used to defraud Merrill, but on the contrary is calculated to confer upon him a distinct benefit. Under the expressed terms of the contract, the Calders are bound by any selection of the lands in Section 5 that Merrill may make because they have so agreed in writing. There is, as the statute provides, not only a note or memorandum thereof in writing, but an executed contract in writing wherein the Calders agree to make the conveyance upon Merrill making the selection which he in turn agrees to make. Where the language is similar to that contained in the contract here involved, the adjudicated cases quite generally support the views heretofore contended for.

In 49 Am. Jur., 660, Sec. 350, it is said "that there is a definite conflict in the results of the cases determining the sufficiency under the Statute of Frauds of a description in a land contract which gives one of the parties the right to select the particular tract to be conveyed, but the diversity in result appears to be due in part at least to the circumstances present in some cases, but absent from others that the description located the property

from which the tract to be conveyed was to be selected," etc. We have examined the cases cited in the foot notes and from such examination, it is quite apparent that the results reached in the main depends on the language used. Thus in such cases as *Fleishman v. Wood*, 135 Cal. 256; 67 Pac. 276, the court holds that where, as here, the plaintiff is granted a right to make the selection, there is a compliance with the Statute of Frauds in that the entire contract is in writing.

The basis for such holding is thus expressed in the case of *DeRemer v. Anderson*, 169 Pac. 737; 41 Nev. 287; 25 A.L.R. 775, page 740 of the Pacific Reporter :

"This contract made the basis of the cross-complaint was entered into between the plaintiff, Fleishman and a third party and provided that upon the third party's performing certain conditions, he should at the end of three years become entitled to a conveyance of 4½ acres of the west half of said ten acres *to be selected by the plaintiff*. The Court in dealing with the specific question said :

There is no uncertainty as to the manner in which the selection is required to be made, nor do we see any lack of power in a court of equity to compel the selection to be made."

It will be noted that by the cross-complaint in that case, the defendant sought to compel the plaintiff to do that which by his contract he had agreed to do, namely to select the number of acres designated. In the matter at bar, the party to make the selection is unnamed and

unindicated. Were the terms and conditions of the contract between the parties here at all analogous to those in the *Fleishman Wood case*, we would have no hesitancy in concurring in the rule there asserted.

Among the cases supporting the view here contended for is *Peckham v. Lane*, 81 Kan. 489; 106 Pac. 464 decided in 1910. In that case it was contended that the contract there involved was unenforceable where a part of a larger tract of land should be selected by the defendant out of the larger tract of land owned by them because of the Statute of Frauds. Beginning at the bottom of page 465, of the Pacific Reporter, it is said:

“This view makes it necessary to determine whether, under the statute of frauds, an action will lie to compel the performance of a written contract for the sale of a tract of land to be selected out of a larger tract by the person sought to be charged; the selection not having been made in writing. *Alabama Mineral Land Co. v. Jackson*, 121 Ala. 172, 25 South. 709, 77 Am. St. Rep. 46, seems to answer this question in the negative. We think that case, however, proceeds upon a misconception. No reason is apparent why a person may not make a valid contract that he will sell to another one of several pieces of real estate of which he is the owner, to be selected by himself. When an agreement to that effect is written out and signed, it is a complete contract, all of the terms of which are expressed in writing. The owner agrees that he will first make the selection and then make the conveyance. If he refuses to do either, a court may compel him to do both. If he makes the selection and then refuses to con-

vey the court may coerce the completion of the contract. Probably an oral selection would not be enough to convert the contract into one for the conveyance of the specific tract selected. If the buyer should claim, over the denial of the owner, that the latter had made a selection, and upon that ground demand the conveyance of a particular tract, doubtless he could not support his contention except by written evidence, for to permit oral testimony to settle such dispute would be against the purpose of the statute. But he cannot avoid the obligation to which he has committed himself in writing, merely by refusing to act at all. This seems so obvious that the citation of the authorities is hardly necessary. The principle, however, is illustrated with more or less fullness in the following cases: *Ellis v. Burden*, 1 Ala. 458, 466; *Carpenter v. Lockhard*, 1 Ind. 434; *Washburn et al v. Fletcher*, 42 Wis. 152; *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276." *Waters v. Ben Extrix* (N.J.) 29 AT1 590.

The learned author of *Page on Contracts*, Vol. 6, page 5785, cites with approval the foregoing case and states the law to be as therein announced.

It will be noted in that case it was the vendor that was to make the selection and the Court held that he should be compelled to make the selection in an action for specific performance.

In the case of *Dohaney v. Womack*, Texas, 1893, 20 S.W. 950, it is held that where a person was sold 100 acres out of an 825 acre tract with the privilege of selecting which 100 acres he wants, the vendee became a tenant

in common with the vendor in 100/825 of the tract until he makes his selection, and the deed is not void for uncertainty. Other cases there cited to the same effect are: *Wallace v. Miller*, 52 Calif. 655; *Lawrence v. Ballou*, 37 Cal. 518; *Schenk v. Evoy*, 24 Cal. 410; *Brown v. Bailey*, 1 Metc. (Mass.) 254.

In the case of *Rains v. Apking*, 247 S.W. (2d) 263, it is held that a deed conveying a house and two acres around the house to be surveyed and laid off and designated by grantees, when the parties could not agree on the location of the two acres, the court appointed commissioners to lay off the land and such ruling was affirmed.

In 117 A.L.R. page 1086, the law is thus stated:

“Under the authorities generally it is clear that a deed is not void which purports to convey out a larger track of land presumably owned by the grantor, a stated number of unlocated acres to be selected at the will of the grantee.”

It will be noted that numerous cases are there cited in support of the law above quoted. See also *Schmalzer v. Jamnik et al*, (Ill.) 95 N.E. (2d) 347 (1950).

The cases we have heretofore discussed are typical of the cases generally which hold that under facts similar to the facts in this case specific performance will be ordered or damages will be awarded in case of a breach. Doubtless the court will not desire to read the numerous

cases dealing with the subject and therefore we have directed its attention to only a few cases which will enable the court to ascertain the trend of judicial authority.

POINT FOUR

THAT IT WAS THE DUTY OF THE COURT BELOW TO DECIDE THAT MERRILL IS NOT ENTITLED TO RECOVER THE MONEY WHICH HE HAS PAID ON THE CONTRACT HERE INVOLVED ON ACCOUNT OF ANY INFIRMITY IN THE DESCRIPTION OF THE PROPERTY MENTIONED IN THE CONTRACT, AND THE COURT BELOW FAILED TO PERFORM A DUTY IMPOSED UPON IT WHEN IT FAILED TO SO DECIDE AND ON THE CONTRARY ERRED IN DISMISSING THE COUNTERCLAIMS.

It will be noted that the Court below dismissed the counterclaim. It does not appear which counterclaim is meant. However, counsel for Merrill argued that the counterclaim with respect to Merrill not being entitled in any event to the return of the down payment should be stricken because that question might properly be raised on the general issue.

No such basis for dismissing the counterclaim is set out in the motion, and therefore, the record shows that the amended counterclaim was dismissed as recited in the motion "because the same does not state facts sufficient upon which to constitute a claim against the plaintiff.

Moreover, it is a well established rule of equitable jurisdiction that when equity takes jurisdiction of a controversy, it will decide every other contention connected

with the subject matter of the suit. The law in such particular is thus stated in 49 Am. Jur. page 192, Sec. 170:

“The general rule that equity, having taken jurisdiction of a cause, will retain jurisdiction of the litigation and grant full relief is applied to actions for specific performance. Where a court of equity properly acquires jurisdiction of a cause for specific performance, it may go on to complete adjudication of all matters properly presented and involved in the case, even to the extent of adjudicating legal rights and granting legal remedies, as well as granting all appropriate equitable relief. Once the jurisdiction of equity has attached, it will itself proceed to round out the whole circle of the controversy, and decide every other contention connected with the subject matter of the suit essential to do complete justice. Damages may be awarded in a proper case either independently or in addition to a decree of specific performance. Even though specific performance is denied, the court may in a proper case retain the bill and adjudicate and adjust any other equities which have arisen between the parties.”

In this case Merrill seeks a rescission of the contract which is an equitable proceeding and the Calders seek a construction of the contract to the effect that the same is legal and enforceable or if not enforceable that the Calders are entitled to retain the money paid on the contract. That being the nature of this proceeding on behalf of both Merrill and the Calders, the courts will dispose of all such issues, and not require the same to be again litigated.

The law touching the question of the right of a party to recover back money paid on a contract such as that here involved is thus stated in 49 Am. Jur., page 870, Sec. 564:

“Where Vendor is Ready and Willing to Perform.—According to the great weight of authority, the vendee, under an agreement for the sale and purchase of land which does not satisfy the statute of frauds, cannot recover back payments upon the purchase price if the vendor has not repudiated the contract but is ready, willing, and able to perform in accordance therewith, even though the contract is not enforceable against the vendee either at law or in equity. Under this rule, one who has paid money in consideration of an oral contract cannot rescind such contract and recover the money paid unless the other party insists upon the statute and refuses to perform it on his part. It is necessary for the vendee to show tender of compliance on his part and a refusal of compliance on the part of the vendor. This is held true as to payments made to a third person for the benefit of the vendor, to be paid over to him upon his making the conveyance. It has been said that the purpose of the statute, so far as it relates to the sale of land, is to protect the vendor only, and the vendee, seeking to recover purchase money, cannot set up the statute against a vendor who is ready and willing to perform. The contract cannot be considered void so long as he for the protection of whose rights the statute is made is willing to treat and consider the contract good.

“In a few jurisdictions, the vendee is allowed to recover back payments made on the purchase

price under a contract which does not satisfy the statute of frauds, notwithstanding the vendor is ready, able, and willing to perform, unless there has been such part performance by possession or otherwise as would take the contract out of the statute and enable the vendee to enforce it in equity against the vendor. It is to be observed that in most of the jurisdictions which follow the latter view allowing recovery of payments made, notwithstanding the readiness, ability, or willingness of the vendor to perform, the statute, unlike the form of Sec. 4 of the original statute of frauds (29 CarII, c 3), declared the oral contract void, whereas in most of the jurisdictions following the general rule denying recovery, the statute merely declared that no action should be brought upon the oral contract. In some jurisdictions, however, notwithstanding the statute declares that oral contracts shall not be valid, the courts adhere to the rule that the vendee may recover the amount paid upon the purchase price under the terms of an oral contract which does not satisfy the statute if the vendor is ready, able and willing to perform. Even where this minority view prevails, if there has been such part performance as will entitle the vendee, irrespective of a sufficient memorandum, to enforce the contract against the vendor, he cannot recover back a part payment, if the vendor is ready and willing to perform.

“If a contract for the sale of land is signed by the vendor and delivered to and accepted by the vendee although not signed by the latter, the contract is binding on the vendor and is therefore a sufficient consideration for payments made by the vendee, and he cannot, on the ground that the

contract was not signed by him, recover the payments so made if the vendor is able and willing to perform."

The same doctrine is announced in L.R.A. 1916 D, page 472 where there are also collected numerous cases which support the text.

On page 478 of L.R.A. 1916 D will be found a collection and discussion of the cases which support the minority view, from which it will be seen that there is considerable confusion among the cases even in the same jurisdiction, especially is that true in the State of Alabama. The statement made in the above quoted text that the conflict in the authorities is in most of the jurisdictions which hold that a recovery may not be had is based upon statutes merely declaring that no action should be brought upon oral contracts is not borne out by the cases, especially is that true of the cases in the Western states where the statutes are identical, or substantially the same as the Statute of Utah. A number of the cases are based upon the fact that the statute is, as the language thereof shows, for the protection of the seller of the land and not for the purchaser. We shall not discuss the cases which lend some color to the view that money paid on an oral contract for the sale of land may be recovered back because we are not here concerned with an oral contract, but with a written contract, which if and when Mr. Merrill performs his obligations, is in all respects in conformity with the requirements of the Statute of Frauds.

Of the numerous cases there cited, we direct the attention of the court to a few from our neighbors as typical of the cases generally. It will be noted that where payments have been made on a contract the same may not be recovered back by the one making the payment even though specific performance or damages will not be awarded where the vendor is ready, able and willing to perform his part of the contract.

In the case of *Toffery v. Kaufman*, 134 Cal. 391, 66 Pac. 471, 86 Am. St. Rep. (decided in 1901 by the Supreme Court of California), it is held that where \$500.00 was paid down on an oral contract and the plaintiff sought to recover the same, he could not prevail where the defendant was ready, able and willing to convey the property upon payment of the amount remaining unpaid. In the course of the opinion (page 471 of Pacific Reporter) it is said:

“This action is not one to enforce the specific performance of a parol contract for the sale of land, nor is it one in which a defense is based upon the statute of frauds. The plaintiff having made the contract, which is not unlawful, nor against public policy and having paid the money thereunder, cannot of his own volition and without fault of defendants, come into court and receive the assistance thereof to recover the money voluntarily paid.”

On page 472 of the case, it is further said:

“The right of the vendee of land under a verbal contract to recover the money or other consideration paid is by all the authorities con-

fined to those cases where the vendor has refused or become unable to carry out the contract, the plaintiff himself having faithfully performed or offered to perform on his part."

A number of cases are cited in the foregoing case to the same effect.

In this case, Merrill contends that the time for making the selection has passed. Just how he may be heard to complaint because of such fact is difficult to understand where, as here, the Calders are ready, able and willing to perform their part of the contract, notwithstanding the delay.

Another well considered case decided by the Supreme Court of our neighboring state of Colorado is *Gabarino v. Union Savings and Loan Assn.*, 107 Colo. 140; 109 Pac. (2d) 638, 132 A.L.R. 1489. In that case the statute involved is almost identical with the statute relied upon by Merrill in this action. In that case the contract was oral. A check containing the words "Deposit on Detroit Apt., price \$27,500, free and clear" was given as the initial payment. In an action brought to recover on the check, the court held that such an action could be maintained and the fact that the same was given as a down payment for the purchase price of land was no defense. In that case the court cites a number of cases, including a few which the court indicated held to the contrary. However, as will be seen from the cases cited in the foot

note to 49 Am. Jur. 870, and L.R.A. 1916 D, page 472, the great weight of authority of the adjudicated cases and the text writers are in accord with the contention here being urged by the Calders, even if the contract is oral, which is not the fact in this case.

It is submitted that the Motion to Strike the Counterclaims should have been denied. The Calders pray that the errors complained of be corrected, that the case be remanded to the District Court with directions to that court to grant the change of venue prayed and that the counterclaims of the Calders be reinstated.

Respectfully submitted,

GEORGE FADEL,
ELIAS HANSEN,
Attorneys for Calders.

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

APR 30 1954

FILED