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IN THE SUPREME COURT OF THE STATE OF UTAH

CLIFTON J. HACKFORD, SHARON HACKFORD, RANDOLPH G. HACKFORD, and SANDRA H. ASAY, Plaintiffs/Appellants, -v- ALBERT LEO SNOW and CORWIN BARTON SNOW, Defendants/Respondents.	:	Case No. 17067
ALBERT LEO SNOW, Plaintiff/Cross-Appellant, -v- CLIFTON J. HACKFORD, et al., Defendants/Cross-Respondents.	:	

BRIEF OF PLAINTIFFS/APPELLANTS AND DEFENDANTS/CROSS-RESPONDENTS

CROSS APPEAL FROM A JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UINTAH COUNTY, STATE OF UTAH, THE HONORABLE KENNETH G. ANDERTON, PRESIDING BY DESIGNATION.

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FILED

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Clerk, Supreme Court, Utah

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BRIEF OF PLAINTIFFS/APPELLANTS AND DEFENDANTS/CROSS-RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This case involves two actions consolidated for trial: An action by plaintiffs/appellants (hereinafter "appellants") against defendants/respondents (hereinafter "respondents") for unlawful detainer, and an action by respondents against appellants for specific

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performance of a lease agreement and option to purchase certain properties which are the subject of both actions.

DISPOSTION IN THE LOWER COURT

On the 12th day of February, 1980, Kenneth E. Anderton, sitting by designation as a Judge of the Fourth Judicial District Court of Utah County, State of Utah, entered a judgment dismissing appellant's Complaint for unlawful detainer against respondents and granting judgment for respondents on their Complaint for specific performance of a lease and option agreement of the parties, and awarded damages and costs to appellants and respondents on the various claims and counterclaims at issue in each action.

On the 7th day of April, 1980, the lower court entered a further order amending the judgment in several particulars.

RELIEF SOUGHT ON APPEAL

Appellants seek to have this Court reverse the findings and judgment of the lower court, and specifically, to find and declare that appellants are entitled to judgment against respondents for their unlawful detainer upon appellants' lands, and that

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respondents are not entitled to a judgment for specific performance of the lease and option agreement of the parties, and to assess damages and costs against respondents according to the evidence adduced at trial.

STATEMENT OF THE FACTS

In April, 1975, appellant Clifton J. Hackford and respondent Corwin Barton Snow negotiated an Agreement whereby respondents were to lease and have an option to purchase certain lands owned by all appellants and described in the Agreement as: "Neola, (420 acre Hackford farm), Uintah County, State of Utah." (Plaintiff's Exhibits 1 and 4). None of the other appellants or respondent Leo Snow participated in any of the negotiations regarding the Agreement and each signed the Agreement at different times prior to its execution by appellant Clifton J. Hackford and respondent Corwin Barton Snow. (Tr. Vol. I, pp. 10-13, 20-21, 106, 122-123).

The Agreement was drawn on a standard Earnest Money Receipt and Offer To Lease form by Sherman Culp, a real estate agent and friend of respondent Corwin Barton Snow, at his instance and request (Tr. Vol.

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I, p. 39).

Appellant Clifton J. Hackford was a married man at the time of the Agreement and the name of his wife, Sharon Hackford, appears on one of the two original drafts of the Agreement (Plaintiffs' Exhibits 1 and 4). However, Sharon Hackford testified that she never signed the Agreement and respondent Corwin Barton Snow testified that he was aware that she had not signed the Agreement (Tr. Vol. I, pp. 21-22, 128-130; 49).

Although the Agreement provides on its face (lines 36-38) that appellants and respondents agreed to execute "a written lease which will supercede and abrogate this agreement" "within 10 days after tender of a firm lease prepared by the landlord in a form consistent with the above provisions and containing other customary and reasonable general provisions" (Plaintiff's Exhibits 1 and 4), the parties never executed a formal written lease.

The 420 acres subject to the Agreement was part of a larger tract of approximately 640 acres comprising the Hackford farm (Tr. Vol. I, p. 52; De-

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fendants' Exhibit 6). At the time the Agreement was made, approximately 555 acres of the farm were involved in an action styled Pumper's Inc. v. Clifton K. Hackford, et al., Civil No. 7180, pending in the Fourth Judicial District Court of Uintah County, State of Utah. This was an action to partition the lands in question between Pumper's, which had purchased an interest in the land, and Clifton Kermit Hackford, Randolph G. Hackford and Sandra Hackford Asay, appellants herein (Tr. Vol. I, p. 32 ; Defendants Exhibit 6). An additional 85 acres not at issue in the Pumper's case but referred to in the Decree therein was owned by appellant Clifton J. Hackford in his own right (Tr. Vol. I, 22-23, 26; Defendants' Exhibits 6 and 7).

At the time of the negotiation of the Agreement, appellant Clifton J. Hackford was not certain that appellants would retain more than 445 acres of the Hackford farm as a result of the Pumper's litigation (Tr. Vol. I, pp. 30, 52). Appellants therefore determined to lease 420 acres of the 445 to respondents and to retain a five acre parcel surrounding appellant Clifton J. Hackford's home and 20 acres of hay ground

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(Tr. Vol. I, pp. 69, 108, 113). Appellant Clifton J. Hackford testified that during the negotiation of the Agreement he indicated to respondent Corwin Barton Snow that appellants might retain their 20 acres of hay ground near the five acre parcel surrounding his home, but that he could not make a final decision as to where appellants would retain their 20 acres of hay ground without consulting with the other appellants, each of whom lived some distance from him (Tr. Vol. I, pp. 69, 98-99, 105, 108, 117). The Agreement contains no reference or description of the 25 acres of land retained by appellants which were not subject to the Agreement of April, 1975 (Tr. Vol. I, pp. 41,46).

Appellants Clifton Kermit Hackford, Randolph G. Hackford and Sandra Hackford Asay, each testified that they did not discuss or determine where they would retain the 20 acres of hay ground until some time after the Agreement was signed. At that time, they determined to reserve the 20 acres of hay ground in the southeast of the southwest section where the oil well is now located (Tr. Vol. I, pp. 17, 120-121, 124; Defendants' Exhibit 5-20 acre section labeled "NOT IN CONTRACT").

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Appellant Clifton J. Hackford testified that during 1975 and 1976, he and respondent Corwin Barton Snow entered into a verbal agreement whereby respondent Corwin Barton Snow was permitted to take hay from the 20 acres of appellants' hay ground not subject to the Agreement of April, 1975, in exchange for providing a certain amount of hay to appellants for their livestock, and based on respondent Snow's agreement to pay the taxes and assessments on appellant's hay ground (Tr. Vol. I, pp. 99-100, 154). Respondent Corwin Barton Snow acknowledged the existence of these verbal agreements with appellant Clifton J. Hackford, but stated that he believed that the verbal agreements related to 20 acres of land near appellant Clifton J. Hackford's home. On cross-examination, however, respondent Corwin Barton Snow admitted that there was not 20 acres of hay adjacent to appellant Hackford's home and that he stacked the hay he removed from the property purusant to the verbal agreement down by the oil well where appellants claim they retained their 20 acres of hay ground (Tr. Vol. I, pp. 48-49). In the fall of 1975, appellant Clifton J. Hackford constructed fences around appellants' 20 acres of

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hay ground not subject to the Agreement of April, 1975 (Tr. Vol. I, p. 74).

Appellant Clifton J. Hackford testified that he did not see respondent Corwin Barton Snow on the Hackford farm after the Fall of 1976, and that the parties had no verbal agreement with respect to respondent's use of hay from appellant's hay ground after 1976 (Tr. Vol., p. 84, 95, 99-100).

On January 25, 1977, appellants and their respective spouses entered into an Oil and Gas Lease with Flying Diamond Oil Corporation (Plaintiffs' Exhibit 12) and an oil well was erected on appellants' 20 acres of hay ground not subject to the Agreement of April, 1975 (Tr. Vol. I, pp. 70, 100). At no time during or subsequent to the construction of the oil well did either of the respondents assert any claim that the well was constructed on land subject to the Agreement in April, 1975, or take any legal action to contest the construction of the well (Tr. Vol. I, pp. 70-71). Mr. Leslie Brown, who was employed to take readings on the well's activity during June and July, 1977, and was at the well during every other sixteen hour period throughout those two months, testified that

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on no occasion did either of respondents ever claim that the well was constructed on property subject to the Agreement of April, 1975, or undertake legal action to eject him or the oil company from the property (Tr. Vol. I, pp. 191-193).

Marvin Huber, a hired hand, testified that he cut hay on appellants' hay ground during both the "first" and "second" cuttings of 1977 and was paid for his work by appellant Clifton J. Hackford. Mr. Huber testified that he cut hay on other parts of the Hackford farm during 1977 and was paid for this work by respondent Leo Snow (Tr. Vol. I, pp. 87, 150-151, 153). Johnnie Reber, another hired hand, testified that he bailed hay on appellants' hay ground during the "third" cutting in August, 1977, and was paid for his work by appellant Clifton J. Hackford. Appellant Clifton Kermit Hackford cut the hay on appellants' hay ground in August, 1977 (Tr. Vol. I, pp. 156-157, 161). At no time on any of these occasions did either of respondents claim that the hay removed from appellants' hay ground was subject to the Agreement of April, 1975 (Tr. Vol. I, pp. 265-266).

Pursuant to the Agreement of April, 1975,

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respondents, as tenants, agreed to pay "Real Property Tax" and any "Increase above 1974 Real Property Tax" and to "maintain the fences and property water system" on the property subject of the Agreement (Plaintiffs' Exhibits 1 and 4).

Appellant Clifton J. Hackford testified that water assessments were due on April 1 of each year and that he so advised respondent Corwin Barton Snow at the time the Agreement was negotiated (Tr. Vol. I, p. 73). In 1975, the water assessment was paid a month late and then was only paid after appellants made several telephone calls to respondent Corwin Barton Snow to obtain payment of the assessment (Tr. Vol. I, pp. 73-74; Defendants' Exhibits 13 and 14).

In 1976, appellant Clifton J. Hackford mended the fences on the property and telephoned respondent Corwin Barton Snow and reminded him of respondents' obligation to maintain the fences on the property (Tr. Vol. I, p. 75).

Although appellants Clifton J. Hackford and Clifton Kermit Hackford made numerous requests and demands of respondents, respondents failed and refused to pay the 1976 water assessments which remained due

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and delinquent as of February of 1977 (Tr. Vol. I, p. 75; Defendants' Exhibit 13; Plaintiffs' Exhibit 14). At that time, appellant Clifton J. Hackford received a notice from the Uintah and Ouray Indian Agency, United States Department of the Interior, that he would receive no further water during 1977 until the assessment for 1976 was paid (Defendants' Exhibit No. 8; Tr. Vol. I, pp. 75-76). Thereafter, respondent Leo Snow finally paid the 1976 water assessment but appellant Clifton J. Hackford was billed penalty charges and interest on the 1976 water assessment which he was forced to pay in order to obtain water for his property during the 1977 irrigation session (Defendants' Exhibit 9; Tr. Vol. I, p. 143).

Appellant Clifton J. Hackford also testified that respondents failed to pay the property taxes on the 420 acres subject of the lease agreement when the taxes fell due on November, 1976. Finally, the taxes were advertised as delinquent in a local newspaper (Tr. Vol. I, p. 78).

Appellant Clifton J. Hackford testified that on or about April 17, 1977, respondent Leo Snow came to the Hackford farm to make the annual lease payment.

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Clifton J. Hackford and his son, appellant Clifton Kermit Hackford, informed respondent Leo Snow that the water assessment for 1977 had not been paid, and that they were going to terminate the Agreement of April, 1975, for respondents repeated breach thereof in failing to make timely payments of the property taxes and water assessments on the property subject to the Agreement (Tr. Vol. I, pp. 80-81). Respondent Leo Snow then promised appellants that if they would accept the annual lease payment, that he would keep up his obligations under the Agreement and pay the outstanding water assessments for 1977 together with the interest thereon within three (3) days. Appellants agreed to accept the annual lease payment from respondent Snow only on the condition that he follow through on his representations that he would perform his obligations under the Agreement (Id.).

Appellant Clifton J. Hackford testified that at the time he accepted the 1977 lease payment from respondent Leo Snow in April, 1977, that respondent Snow asked him to take a water turn on the leased property in May, 1977 (Tr. Vol. I, p. 82). When appellant Hackford went to the head ditch to release the

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water in May, 1977, he was unable to take the water turn because respondents had permitted the ditches to become filled with so much dirt and debris during the Fall of 1976, that the spring run off in 1977 simply washed over the ditch and created large gullies and washouts over a large area of appellants' property (Tr. Vol. I, p. 83). Appellant Hackford telephoned Sheriff Kenneth P. Pickup, who took several photographs of the washouts and gullies (Defendants' Exhibit 15; Tr. Vol. I, pp. 83, 159).

After discovering the extensive erosion and damage to appellants' land, appellant Clifton J. Hackford telephoned respondent Leo Snow and informed him that respondents' failure to maintain the ditches on the property had resulted in extreme damage to appellants' land and that appellants were going to terminate the Agreement of April, 1975 (Tr. Vol. I, pp. 211-212). Respondent Leo Snow promised that he would have the ditches cleaned but did nothing in this regard. Finally, appellant Clifton J. Hackford cleaned the ditches himself (Tr. Vol. I, pp. 83-34).

Following appellants' acceptance of the annual lease payment from respondent Leo Snow in April, 1977,

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upon his promise to pay the outstanding water assessments and interest thereon within three days, respondent Leo Snow did not pay the 1977 water assessment within three days, or thereafter, although he continued to promise appellants that he would do so (Tr. Vol. I, pp. 108-109).

In June, 1977, appellant Clifton J. Hackford was contacted by one Sonny Grand of the Uintah and Ouray Irrigation Office and advised that unless 1977 water assessments were paid, that appellants would not receive any water on their property after July 1, 1977 (Tr. Vol. I, pp. 81-82). Since appellant Hackford had been watering the hay on appellants' 20 acres not subject to the Agreement of April, 1975, and growing a garden on the five acre parcel surrounding his house, he could not afford to lose the water rights based upon respondents' continued non-payment (Tr. Vol. I, pp. 80-82; Defendants' Exhibit 10). Therefore, appellant Clifton J. Hackford contacted all of the other appellants and collected the money to pay the 1977 water assessment which he paid on June 30, 1977 (Id.). Respondent Leo Snow admitted that he never paid the 1977 water assessment despite his repeated

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promises to do so (Tr. Vol. I, pp. 212-213).

On July 7, 1977, appellants directed Albert Colton, an attorney in Vernal, Utah, to formally notify respondents of the termination of the Agreement of April, 1975, for their continued and notorious breaches thereof and attorney Colton sent a letter to respondents so advising them on the same date (Tr. Vol. I, pp. 84-85; Defendants' Exhibit 11).

On July 15, 1977, respondent Leo Snow and his attorney, John Beaslin, appeared at the home of appellant Clifton J. Hackford and attempted to persuade appellant to accept a check for the 1977 water assessments that appellants had been forced to pay. On the same occasion, attorney Beaslin informed appellant Clifton J. Hackford that respondents were prepared to pay appellants the full purchase price, but neither respondent Snow nor Mr. Beaslin attempted to tender payment at that time (Tr. Vol. I, pp. 85-86, 158). On this occasion, appellant Clifton J. Hackford led respondent Leo Snow and attorney Beaslin down through the fields and indicated the extensive washouts and gullies that had been created as a result of respondent's failure to maintain the ditches, and further indicated

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that respondents' failure to pay the water assessments and taxes had created considerable hardship to the appellants, and that, considering that respondents had continued to breach the parties' Agreement, that appellants had terminated the lease and would accept no further payments from respondents (Id.).

Subsequent to the formal termination of the Agreement by the letter of July 7, 1977, respondent Leo Snow entered and trespassed upon appellants' lands and removed hay therefrom (Tr. Vol. I, pp. 87-88). Following this incident, appellants served respondent Leo Snow with a further Notice of Termination of Lease Agreement and Notice of Eviction and Requirement to Vacate Premises Within Three Days (R. 7-8; Tr. Vol. I, pp. 223-225; Defendants' Exhibit 17).

On October 17, 1977, respondent Leo Snow filed a Complaint in the Fourth Judicial District Court seeking specific performance of the lease and option provisions of the Agreement of April, 1975 (R. 50-54).

On February 6, 1978, appellants filed an action for Unlawful Detainer and other damages against respondents R. 1-9).

On April 11, 1978, a pretrial conference was

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held in reference to both actions. On that occasion, respondents filed a tender offer for the full purchase price of the property with the Court (R. 78-79). At the conference, respondents represented to the Court that there should be a temporary order with respect to temporary possession of the land and stated that respondent Leo Snow had farmed the property for three years. Appellants argued that Leo Snow had never farmed the property and that his lease thereof had been cancelled for breach thereof and that respondents had been evicted. Following this exchange, the Court, per Judge J. Robert Bullock stated "I'm not about to upset the status quo with an order unless I hear testimony and evidence and so on." (See Transcript of Pretrial Hearing, pp. 14-16, contained in an envelope at R. 227).

Subsequent to the pretrial conference, the Court entered an order consolidating the parties' actions but entered <u>no</u> Order with respect to which of the parties should have possession of the property subject of the Agreement pending the trial, or respecting the right of either party to use irrigation waters on the lands (<u>Id.</u>).

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On April 17, 1978, respondents' counsel, without filing any Motion for a Temporary Restraining Order or Preliminary Injunction in the district court, and without notice to appellants' counsel as required pursuant to Rule 65 of the Utah Rules of Civil Procedure, arranged a telephone call with Judge J. Robert Bullock, during the course of which His Honor entered an Order in the nature of a Preliminary Injunction granting respondents possession of the property subject to the Agreement of April, 1975, pending trial (R. 91-92). During this conversation there was absolutely no discussion of the right of either party to pay legal assessments for the use of water on the premises during the pendency of the parties' actions (R. 17-28).

On May 9, without filing any proper Motion for a Temporary Restraining Order or Preliminary Injuction, and without notice to appellants' counsel or the opportunity for hearing required pursuant to Rule 65 of the Utah Rules of Civil Procedure, respondents' counsel, John C. Beaslin, obtained an ex parte order from the Fourth Judicial District Court, per Judge David Sam, ordering that appellant Clifton J. Hackford "be temporarily restrained from interfering with the

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use by plaintiff of irrigation water belonging to and used upon the lands which are the subject of this action. It is the intent of the Court that plaintiff be allowed the use of the water as well as the land as heretofore ordered by this Court until further order of this Court" (R. 87-88). This order also required appellant Clifton J. Hackford to appear and show cause "why he should not be held in contempt of court for willfully interfering with plaintiff's possession of the lands contrary to the terms of the Order issued at the hearing on April 17" (R. 87-88).

On or after May 9, 1978, without any notice to appellants or their counsel, respondent Leo Snow delivered a copy of the Order of May 9, 1978, to officials of the Uintah and Ouray Indian Agency, and demanded under authority thereof, the right to pay the 1978 water assessments, which appellant Clifton J. Hackford had previously refused to accept from respondent Snow (Tr. Vol. I, pp. 95-96, 225-229, 268). The May 9 Order on its face shows that it gave respondent Leo Snow no authority or right to make the water assessment payments regarding the water rights of appellant Clifton J. Hackford (R. 87-88).

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On the occasion that appellant Clifton J. Hackford appeared before Judge David Sam on the Order To Show Cause contained in the Order of May 9, 1978, the contempt charge against appellant Clifton J. Hackford was dismissed and Judge Sam vacated his order of May 9, 1978, and reserved the costs and attorney's fees to be assessed against respondents until the time of trial (R. 101).

On June 21, 1978, appellant Clifton J. Hackford hired Marvin Huber to cut the hay on appellants' 20 acres of hay ground not subject to the Agreement of April, 1975. When Mr. Huber attempted to cut the hay, respondent Leo Snow informed Mr. Huber that he would have him arrested if he attempted to cut the hay (Tr. Vol. I, pp. 89-90, 151-152, 185-192).

On July 22, 1978, respondent Leo Snow's employee, Guy Whiting, attempted to remove hay from appellants' hay ground and was given a ticket for trespassing on appellants' lands by Sheriff Murray (Tr. Vol. I, pp. 91-92).

On July 31, 1978, respondent Leo Snow permitted 57 head of his cattle to trespass upon the 5 acre parcel of land surrounding appellant Clifton J. Hackford's home and to destroy appellant Hackford's vegetable

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garden (Vol. I, pp. 19-93). Sheriff Kenneth P. Pickup investigated the incident. Although another man whose cattle had also trampled the garden, offered to pay appellant Clifton J. Hackford for the damage, respondent Leo Snow did not (Tr. Vol. I, pp. 169-175, 203-205). Leo snow represented to Sheriff Pickup on that occasion that he owned the 5 acre parcel surrounding appellant Clifton J. Hackford's home (Tr. Vol. I, pp. 218-219) although respondents' counsel, at trial, represented that respondents claimed no interest therein (Tr. Vol. I, p. 26).

On August 2, 1978, respondent Leo Snow shot the lock off the gate to the five acre parcel of land surrounding the home of appellant Clifton J. Hackford and cut and removed 722 bales of hay from the property (Tr. Vol. I, pp. 93, 176-182).

Throughout the trial of this action, over the continuing objection of counsel for appellants, the Court admitted parol evidence, in the form of testimony from respondents, to establish which of the lands comprising the Hackford farm were included and excluded from the 420 acres subject to the Agreement (Tr. Vol. I, pp. 36, 37, 46, 56, 58, 146).

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ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO FIND THAT RESPONDENTS UNLAWFULLY DETAINED ON THE PROPERTY SUBJECT TO THE AGREEMENT AFTER RECIEVING NOTICE OF APPELLANTS' TERMINATION OF THE AGREEMENT FOR RESPONDENTS' BREACH THEREOF.

A. THE TRIAL COURT ABUSED ITS DISCRETION IN HOLDING THAT RESPONDENTS' BREACHES OF THE AGREEMENT OF APRIL, 1975, DID NOT CONSTITUTE GROUNDS FOR APPELLANTS' TERMINATION OF THE AGREEMENT.

"Except where there are special circumstances which would render a forfeiture unconscionable, or where the breach is trivial and not willful, the lessor may terminate the lease, pursuant to a provision for forfeiture therein, where the lessee does not fulfill his covenant to pay taxes or other assessments on the leased property." 51 C.J.S. 108. This Court expressed the identical view in Bacon v. Park, 57 P. 28 (Utah 1899), holding that:

> Where due payment of taxes is one of the covenants of a lease, and the taxes are allowed to become delinquent . . . (no demand is necessary) before declaring a forfeiture . . . Equity will not relieve against the forfeiture of a lease for breach of a covenant when the breach has been culpable, long persisted in and detrimental.

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See also, Anno. 93 A.L.R. 1243. The same result obtained in Shoemaker v. Pioneer Investments, 381 P.2d 735, 736 (Utah 1963), in which this Court held that the failure of a tenant to pay taxes and insurance premiums she covanted to pay under a lease agreement constituted a material breach of the lease for which the lessor could terminate the lease.

This Court has also recognized that the forfeiture of a lease is justified for the improper use, prohibited transfer or neglect of the leasehold, Gerard v. Young, 432 P.2d 343 (1967), and neighboring courts have also so held. Bolon v. Pennington, 432 P.2d 274 (Arizona 1974); Freeman v. Rose, 188 N.W.2d 683 (Neb. 1971); Eliason v. Eliason, 443 P.2d 884 (Mont. 1968); Bentler v. Poulson, 141 N.W.2d 551 (Iowa 1966).

In Russell v. Park City Utah Corp., 548 P.2d 889, 891 (Utah 1976), cert. den. 1976, this Court held:

> Parties are free to contract according to their desires in whatever terms they can agree upon and forfeiture is to be allowed where the terms of the agreement are clear.

Also, in Jacobsen v. Swan, 278 P.2d 294, 298 (Utah 1954), this Court noted that:

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> It is only when the forfeiture would be so grossly excessive as to be entirely dispoportionate to any possible loss that might have been contemplated, so that to enforce it would shock the conscience, that a court of equity will refuse to enforce the provision.

In the instant case, the evidence is uncontroverted that respondents covenanted under the Agreement of April, 1975, to pay all property taxes and assessments and to maintain the fences and water system on the property subject of the Agreement (Plaintiffs' Exhibits 1 and 4, lines 25-27). The Agreement contains an unequivocal forfeiture provision for the breach of these covenants, providing that:

> In the event the tenant fails to execute said lease as herein provided, the amounts paid hereon shall, at the option of the landlord, be retained as liquidated and agreed damges, or landlord may elect to retain said sum and to require specific performance.

(Plaintiffs' Exhibits 1 and 4, lines 39-40).

It is uncontested that from the inception of the Agreement of April, 1975, respondents failed to make timely water assessment and property tax payments and that this continued throughout 1975, 1976 and 1977 to the extent that the property taxes for 19 were advertised as delinquent in a local newspaper

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and appellants were given notice that they would lose their irrigation rights for the 1977 season unless the assessments were paid, at which point appellants were forced to pay the assessments (Supra, pp. 10-16). Likewise, the respondents did not contest that they failed to maintain the ditches and water system on the property subject to the Agreement in the fall of 1976, with the result that in the spring of 1977, the water ran over the filled ditches and created substantial damage in the form of washouts and gullies to appellants' property (Supra, pp. 12 - 16). The evidence adduced at trial also shows that appellants continually notified respondents of their breaches of the Agreement and respondents repeatedly pledged to cure their breaches but failed to do so (Supra, pp. 10 - 16) The evidence shows that respondents' breaches of the Agreement of April, 1975, were "culpable, long persisted in and detrimental." They were breaches of the nature which this Court has consistently held to constitute justification for the termination of a lease agreement. Therefore, appellants submit that the trial court abused its discretion in ruling that such breaches did not constitute grounds for appellants' termination of the lease Agreement of April, 1975.

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B. THE TRIAL COURT ABUSED ITS DISCRETION IN HOLDING THAT APPELLANTS COULD NOT TERMINATE THE AGREEMENT OF APRIL, 1975, EXCEPT BY INSTITUTING AN ACTION AGAINST RESPONDENTS FOR UNLAWFUL DETAINER.

In its Memorandum Decision, the trial court held that:

> . . . The letter of July 7, sent by defendants'(appellants herein) counsel to plaintiffs did not terminate the lease, and so holds. The Earnest Money Agreement contained no provisions for termination of the lease for violation of its terms and the proper procedure for termination was under the Forcible Entry and Detainer statutes of the State of Utah.

(R. 209-210).

Although at common law lease agreements were almost always terminated by the terms of the lease, today a lease may also be terminated by the operation of law. This means that although there is no specific provision in the lease allowing termination, the law will consider the lease at an end by looking at the intent and actions of the parties. Such termination often takes the form of terminations for reasons of frustration, surrender, or forfeiture. B.Y.U., Summary of Utah Property Law, Vol. 2, p. 572 (1978). The decisions of this Court are uniform in holding that the lessee's breach of covenants to pay taxes and

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assessments, or breach of any covenant which results in the misuse or damage of the leasehold, constitutes grounds for the termination of a lease by operation of law. Bacon v. Park, supra; Russell v. Park City Utah Corp., supra; Shoemaker v. Pioneer Investments, supra; Gerald v. Young, supra.

Assuming then, that respondents' breaches of the Agreement of April, 1975, did constitute sufficient grounds for appellants to declare the termination and forfeiture thereof pursuant to law (See, Argument, Point I (A), supra), appellants submit that they could enforce the termination of the Agreement simply by giving proper notice thereof, and that they would not, contrary to the trial court's decision, be forced to initiate an action for unlawful detainer to terminate the Agreement, although appellants might be required to initiate such action in order to regain possession.

In Shoemaker v. Pioneer Investments, supra, the lessor, after the lessee had failed to pay taxes and insurance premiums on the leased premises in accordance with her covenants in the lease agreement, declared a termination of the Agreement and declared the termination of the agreement in a letter to the lessee. The trial court held that the "letter of March 24,

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1960 terminated the lease" and this Court upheld that determination, noting that the lessor therein properly initiated an action for unlawful detainer to regain possession of the leased premises when the lessee refused to relinquish the premises.

In the case at bar, the evidence is uncontested that appellant Clifton J. Hackford telephoned respondent Leo Snow in May, 1977, and informed him of appellants' intention to terminate the Agreement of April, 1977, and that appellants later had Albert Colton, an attorney in Vernal, Utah, send a letter to respondents formally informing them of the termination of the lease and detailing respondents' breaches thereof. (See _supra_, pp. 13 - 15). Appellants submit that these actions provided respondents with all the notice of their default and breech of the Agreement of April, 1975, and appellants' action in terminating the Agreement required by law. See generally, _Day v. Smith_, 30 P.2d 786, 788 (Wyo. 1934); _Independence Flying Service Inc. v. Abitz_, 386 S.W. 2d 399, 404 (Mo. 1965); _Moore v. Richfield Oil Corp._, 377 P.2d 32, 35 (Ore. 1962). When respondents refused to vacate the premises subject of the Agreement of April, 1975, the evidence is clear

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that appellants did institute an action for unlawful detainer to <u>regain possession</u> of their land, but this action was not for the purpose of <u>terminating the lease</u> or required for termination of the Agreement of April, 1975 (See <u>supra</u>, pp. 15 - 16). The decisional law contained in the Annotations to the Utah Focible Entry and Detainer statutes, Utah Code Ann. §78-36-2 (1953 as amended), pp. 436, 439, is uniform in holding that an action for unlawful detainer is instituted for the purpose of "regaining possession" and is not necessary to the termination of the lease agreement.

Based upon the foregoing, appellants respectfully submit that the trial court erred in holding that appellants could not effectively terminate the Agreement of April, 1975, except by resorting to an action against respondents for unlawful detainer.

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POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING RESPONDENTS' SPECIFIC PERFORMANCE OF THE OPTION TO PURCHASE CONTAINED IN THE AGREEMENT OF APRIL, 1975.

A. APPELLANTS' TERMINATION OF THE AGREEMENT OF APRIL, 1975, ALSO TERMINATED RESPONDENTS' OPTION TO PURCHASE CONTAINED IN THE AGREEMENT.

Under Utah law, the termination of a lease agreement containing an option to purchase also terminates the option, if the lease and option covenants are entirely interdependent and indivisable. In Russell v. Park City Corp., supra, this court held that a right of purchase granted the lessee under the lease agreement fell with the lease upon its termination. In that case, the lessee disputed the termination and also argued that the right to purchase the leased property contained in the lease agreement survived the termination of the lease. This Court, in denying the lessee's contention, applied the following rule:

> If by the express terms of the option, it can be seen as independent of the other covenants of the lease, and is supported by valid consideration, it can continue in existence notwithstanding the lease's termination.
> (Emphasis Supplied)

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This Court affirmed the finding of the lower court that no separate consideration supported the option, and that the option therefore ceased to exist at the time the lease agreement was terminated.

In Shoemaker v. Pioneer Investments, supra, at 736, this Court held that the trial court acted properly in declining to grant specific performance of an option contained in a lease agreement where the lessee did not attempt to exercise the option prior to the lessor's termination of the lease agreement.

In the case at bar, the Agreement of April, 1975, shows that respondents gave no separate consideration for the option to purchase contained in the Agreement, and that appellants formally notified respondents of the termination of the Agreement and Option by the letter dated July 7, 1977 (Plaintiffs' Exhibits 1 and 4; supra, p. 16). Thereafter, respondents notified appellants of their desire to exercise the option and to reimburse appellants for the water assessment payments which appellants were forced to pay in order to protect their irrigation rights after respondents' default in making the payments (Supra, pp. 15 - 17). Appellants did not accept these or

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or any other proposed payments from respondents subsequent to their termination of the Agreement and option (*Id.*).

Since the Agreement of April, 1975, and the option to purchase contained therein were completely dependent and interrelated and not supported by separate consideration, appellants submit that the trial court abused its discretion in failing to find that appellants' termination of the Agreement also terminated the option contained therein.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THAT RESPONDENTS WERE ENTITLED TO SPECIFIC PERFORMANCE OF THE OPTION TO PURCHASE CONTAINED IN THE AGREEMENT OF APRIL, 1975, WHEN RESPONDENTS WERE IN BREACH OF THE AGREEMENT AT THE TIME THEY ATTEMPTED TO EXERCISE THE OPTION.

Several courts have held that where lease and option provisions are not independent, but constitute parts of one entire contract, that the breach of the lease amounts to a failure of consideration for the accompanying option to purchase, such that the option is lost, the consideration for the option being the fulfillment of the covenants of the lease agreement. Annotation, 115 A.L.R. 376.

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Thus, in Russell v. Park City Utah Corp., supra, this Court observed that an option contained in a lease agreement is only enforceable after the termination of the lease agreement if the option agreement is either separate from the lease or severable from the lease. In Shoemaker v. Pioner Investments, supra, this Court declined to order specific performance of an option to purchase property subject to a lease agreement where the lease agreement had been terminated by the lessor for the lessee's nonpayment of taxes and insurance premiums.

In the instant case, the evidence demonstrates beyond peradventure that respondents were in breach of the lease Agreement of April, 1975, at the time appellants terminated the Agreement for respondents' nonpayment of property taxes and water assessments, and respondents' failure to maintain water systems on the property which resulted in severe damage to the land, and that appellants' termination of Agreement was due to this conduct on the part of respondents (Supra, 10-16). The letter formally notifying respondents of the termination of the Agreement sets forth the nature of respondents' breaches thereof

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in detail (Defendants' Exh. 17) and respondents did not actually tender performance of the option until March, 1978 (R. 76-79).

Since the option and Agreement of April, 1975, were not separate or independent and respondents were in breach of the Agreement at the time they attempted to exercise the option to purchase the property subject to the Agreement, the trial court erred in ruling that respondents were entitled to specific performance of the option to purchase.

C. THE TRIAL COURT ABUSED ITS DISCRETION IN HOLDING THAT THE LAND SUBJECT TO THE AGREEMENT OF APRIL, 1975, WAS DESCRIBED WITH SUFFICIENT CERTAINTY TO JUSTIFY THE COURT IN AWARDING RESPONDENTS SPECIFIC PERFORMANCE OF THE OPTION TO PURCHASE THE PROPERTY CONTAINED THEREIN.

In Davidson v. Robbins, 517 P.2d 1026 (Utah 1973), this Court held that a real estate contract is not valid unless the land subject to the contract is clearly and unambigously described. This Court further held that parole evidence was only admissible to apply, not supply the description of land in a contract. In that regard, this Court observed:

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> Parole evidence will not be admitted to complete a defective description, or to show the intention with which it was made. Parole evidence may be used for the purpose of identifying the description contained in the writing with its locations upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated, and that of supplying and adding to a description insufficient and void on its face.

Appellants submit that the instant case is governed by Pitcher v. Lauritzen, 423 P.2d 491 (1967). In that case, this Court held that a real estate contract which did not provide with certaintly which 30 acres of the plaintiffs' 189 acre tract were to be conveyed to the defendants, could not support a decree of specific performance because the description of the land in the contract was deemed to be too indefinite.

As in Lauritzen, the evidence shows that appellants and respondents did not provide with any certainty which 420 acres of appellants' 445 acres were subject to the parties' Agreement of April, 1975 (Plaintiffs' Exhibits 1 and 4). The trial court, over appellants' objection, permitted respondents to offer parole evidence consisting of respondents' testimony as to where the 420 acres subject to the contract was located, and

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where the 25 acres not subject to the contract was located (Supra, p. 21). Appellants testified that the 25 acres not subject to the Agreement of April, 1975, were located in one area of the property and respondents testified that these same lands were located in a different place than appellants maintained. The evidence demonstrates that both appellants and respondents conducted activities on the sections of the Hackford farm claimed to be "included" and "excluded" from the Agreement according to the conflicting testimony of appellants and respondents, and that each party continued to claim different acreage was "included" or "excluded" from the Agreement, after the parties filed their separate actions in the district court and throughout the trial of the parties' consolidated actions (Supra, pp. 10-25). On similar facts, this Court refused to compel specific performance in Lauritzen.

Respondents have argued that Brady v. Fausett, 546 P.2d 246 (Utah 1976) is dispositive of this issue. Since counsel for respondents argued that case before this Court, they should be informed that Brady is readily distinguishable from the case at bar.

In Brady, this Court held that a contract for the lease of land containing an option for purchase

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was unenforceable on the theory of lack of specificity in the description of the land in the lease agreement where:

> the vendor prepared the contract and agreed to supply a description from documents at his disposal and in view of defendants' occupancy, operation and improvement of the properties.

In this case, none of the factors critical to the Brady decision are present.

First, in the instant case, the evidence indicates that appellants did not prepare the lease agreement. It is uncontroverted that the Agreement was prepared and drafted by one Sherman Culp, at the request of respondent Corwin Barton Snow (Supra, p. 3).

Second, the appellants did not agree in the Agreement of April, 1975, to supply any further description of the leased premises from documents in their possession, as did the lessors in Brady.

Third, unlike the lessors in Brady, appellants did not accept any payments from the respondents after appellants served notice upon respondents that the lease and option Agreement was terminated for respondents' breach thereof.

Fourth, even if a description of the property

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could be surmised from the parties' respective activities on the lands deemed to be "included" or "excluded" from coverage by the Agreement of the parties, the evidence demonstrates that appellants' activities on the 20 acres appellants claim to have retained as their hay ground was far greater than that of respondents.

In conclusion, appellants submit that this Court has not either implicitly or explicitly overruled its decision in Lauritzen by its pronouncements in Brady. As this Court noted in Lauritzen:

> A greater degree of certainty is required for specific performance in equity than is necessary to establish a contract as the basis of an action at law for damages. 18 Ut. 2d 368, 372.

Based upon the foregoing, it was error for the trial court to hold that the description of the properties covered by the Agreement of April, 1975, was sufficient to support an award of specific performance, and the Court also erred in admitting parole evidence for the purpose of supplying an adequate description in the lease where none existed.

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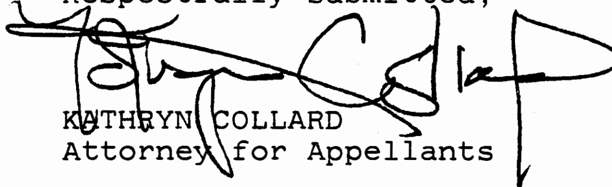
CONCLUSION

Based upon the foregoing, appellants respectfully request this Court to reverse the findings and judgment of the lower court, and specifically, to find and declare that appellants are entitled to judgment against respondents for their unlawful detainer upon appellants' lands, and respondents are not entitled to a judgment for specific performance of the lease and option agreement of the parties, and to assess damages and costs against respondents according to the evidence adduced at trial.

DATED this 21st day of November, 1980.

Respectfully submitted,



KATHRYN COLLARD
Attorney for Appellants

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Plaintiffs/ Appellants and Defendants/Cross-Respondents to Gayle F. McKeachnie, MCKEACHNIE & ALLRED, 53 South 200 East, Vernal, Utah 84078 and to John C. Beaslin, 185 N. Vernal Avenue, Suite 1, Vernal, Utah 84078, this 21st day of November, 1980.

Tami Stewart

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