Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1982

Robert S. Fredericksen v. Knight Land Corp. : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

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.

Recommended Citation

Brief of Respondent, *Fredericksen v. Knight Land Corp.*, No. 18131 (Utah Supreme Court, 1982).
https://digitalcommons.law.byu.edu/uofu_sc2/2769

This Brief of Respondent 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 (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT

OF THE STATE OF UTAH

ROBERT S. FREDERICKSEN, aka ROBERT S. FREDERICKSON, Appellant, vs. KNIGHT LAND CORPORATION, a corporation, Respondent.	)	Case No. 18131

RESPONDENT'S BRIEF

On Appeal From the Third Judicial District Court
of Summit County, State of Utah
The Honorable Peter F. Leary, Presiding

Edward W. Clyde
Ted Boyer
CLYDE, PRATT, GIBBS & CAHOON
200 American Savings Plaza
77 West 200 South
Salt Lake City, Utah 84101
Telephone: (801) 322-2516

Attorneys for Respondent

Robert F. Orton
T. Richard Davis
MARSDEN, ORTON & LILJENQUIST
68 South Main Street
Fifth Floor
Salt Lake City, Utah 84101
Telephone: (801) 521-3800

Attorneys for Appellant

FILED

APR 14 1982

Clerk, Supreme Court, Utah

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT

OF THE STATE OF UTAH

ROBERT S. FREDERICKSEN, aka ROBERT S. FREDERICKSON, Appellant, vs. KNIGHT LAND CORPORATION, a corporation, Respondent.	)))))))))))	Case No. 18131

RESPONDENT'S BRIEF

On Appeal From the Third Judicial District Court
of Summit County, State of Utah
The Honorable Peter F. Leary, Presiding

Edward W. Clyde
Ted Boyer
CLYDE, PRATT, GIBBS & CAHOON
200 American Savings Plaza
77 West 200 South
Salt Lake City, Utah 84101
Telephone: (801) 322-2516

Attorneys for Respondent

Robert F. Orton
T. Richard Davis
MARSDEN, ORTON & LILJENQUIST
68 South Main Street
Fifth Floor
Salt Lake City, Utah 84101
Telephone: (801) 521-3800

Attorneys for Appellant

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

Page

NATURE OF CASE. 1

DISPOSITION OF THE CASE IN THE LOWER COURT. 1

THE FACTS 1

ARGUMENT. 7

I. THE GENERAL LAW 7

II. THE OBLIGATION TO MAKE THE MONEY PAYMENTS WAS BARRED. 8

III. ANY RIGHT APPELLANT MIGHT HAVE HAD TO RECEIVE PROPERTY FROM RESPONDENT IS BARRED, BOTH BY THE STATUTE OF LIMITATIONS AND BY THE NINE AND ONE-HALF YEARS DELAY IN ELECTING TO CLAIM LAND 13

IV. APPELLANT IS IN ERROR IN REFERRING TO HIMSELF AS A CO-OBLIGEE AND SETTLEMENT OF THE LAWSUIT WITH BUEHLER, ET AL, DID NOT TOLL THE STATUTE FOR APPELLANT. 19

V. APPELLANT WAS ENTITLED TO HIS SHARE OF AT LEAST 50% OF THE GROSS PROFITS FROM EACH AND EVERY SALE 21

VI. APPELLANT WOULD NOT BE ENTITLED TO INTEREST EVEN IF HIS CLAIMS WERE NOT BARRED BY THE STATUTE OF LIMITATIONS. 24

CONCLUSION. 25

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

CASES CITED

Page

Bjork v. April Industries, 547 P.2d 219 (Utah 1976), appeal after remand 560 P.2d 315, cert. den. 97 S.Ct. 2634, 431 U.S. 930, 53 L.Ed.2d 245. 8

Dixon v. Bartlett, 176 Cal. 572, 169 P. 236 (1917) 20

Elmore v. Fanning, 85 Kan. 501, 177 P. 1019, 38 L.R.A. (N.S.) 685 21

Hiscock v. Hiscock, 240 N.W. 50 (Mich. 1932). 20

Holloway, et ux v. Wetzel, 86 Utah 387, 45 P.2d 465 (1935). 21

Kimball v. McCornick, 80 Utah 189, 259 P. 313 7

Krause v. Spurgeon, 256 S.W. 1072 (Mo. App. 1923). 20

McKennon v. McKennon, 231 P. 91 (Okla. 1924). 20

Shadron v. Cole, 101 Ariz. 122, 416 P.2d 555, supp. 101 Ariz. 341, 419 P.2d 520. 8

State Automobile & Casualty Underwriters v. Salisbury, 27 Utah 2d 229, 494 P.2d 529. 7

State Tax Comm. v. Spanish Fork, 99 Utah 177, 100 P.2d 575 7

M.H. Walker Realty Co. v. American Surety Co., 60 Utah 435, 211 P. 998. 7

AUTHORITIES CITED

40 A.L.R. 29. 20

II Williston on Contracts (3rd Jaeger Ed 1957) §1293. 7

STATUTE CITED

Utah Code Ann. §78-12-23 (1953) 7

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

NATURE OF CASE

Appellant Robert S. Fredericksen filed suit on a written contract against the Respondent and one James L. Knight, seeking to recover 129 acres of land, or if the land could not be conveyed, judgment for its current market value. As an alternative, the Appellant sought judgment for $11,000. Respondent defended on the grounds that the action, both as to land and money, was barred by the six-year statute of limitations.

DISPOSITION OF THE CASE IN THE LOWER COURT

The action against James L. Knight personally was dismissed by stipulation (Stip. ¶ 26, R. 243). As against Respondent, the court held that the action, both for land and money, was barred.

THE FACTS

The action on which this suit is based arose out of the following: Respondent Knight Land Corporation had in 1961 entered into an option contract to purchase the 16,500 acre Jeremy Ranch in Summit, Salt Lake and Morgan Counties, State of Utah. Respondent sold 5,000 acres of that land to a limited partnership, Huntington Park Investment Company (Huntington Park), in which the Appellant and others were limited partners. The partners collectively contributed $120,000 to Huntington Park for their partnership interests and it used the money as a down payment on the purchase of 5,000 acres. Respondent then used the $120,000 to make a payment under its contract. Huntington Park

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

only made the one payment and then defaulted.

Appellant had contributed $10,000 to Huntington Park and under the 1963 agreement Respondent agreed to return that $10,000 plus 10%, without interest, but only from the "gross proceeds" from the resale of lands released with payments made on the underlying contract. If from this source Appellant had not been paid in full by July 1, 1968, the contract gave him the option to select land from land "theretofore released" at $85 per acre to satisfy the unpaid portion. No sums were ever paid on Appellant's behalf and no land was ever conveyed.

The Appellant made no effort to select land prior to February 27, 1978. On that date Appellant, by letter, demanded an accounting and stated that Appellant had elected to take land under the terms of the 1963 agreement. Thereafter on March 22, 1978, Appellant filed this suit.

The parties submitted this matter to the trial court on a written stipulation of facts, to which a number of exhibits were attached and admitted in evidence. This stipulation in narrative form tells the story. It is lengthy and we will not repeat it here. However, the contract on which this action is based can best be understood if the reader first understands the reason why the contract was made, and how it interrelates with an earlier contract, under the terms of which Respondent held an option to purchase some 16,500 acres of land known as the Jeremy Ranch. We desire here only to make a background statement and will refer to the particular facts on which we rely as a part of our argument.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Under an option contract dated November 1, 1961 (admitted in evidence as Ex. A to the stipulation) (Stip. ¶1, R. 244), Respondent obtained an option to acquire the Jeremy Ranch. Under this underlying 1961 contract, Knight Land could continue the option to buy in force only by making an annual payment. With each annual payment (which was due on November 1st of each year and was in the amount of $160,000, without interest) Respondent was entitled to have released from the contract and conveyed to it a specified amount of land. The earlier payments released a relatively small amount of land, but thereafter Respondent was entitled to receive 1,600 acres of land with each $160,000 annual payment (Ex. A, ¶7).

It is recited in par. 6(i) of the underlying contract (R. 248) that Respondent had already paid $60,000 for an option to purchase the Jeremy Ranch from East Salt Lake Investment Company a partnership located in Phoenix, Arizona (East Salt Lake). The contract then provided that upon the signing of the contract on November 1, 1961, Respondent was to pay an additional $120,000.

It is stipulated that this $120,000 came from Huntington Park Investment Company, a limited partnership. The Articles of Partnership are attached to the stipulation as Ex. B (R. 265). As can be seen therefrom, Appellant was one of many limited partners in Huntington Park. Huntington Park had agreed to purchase 5,000 acres from the 16,500 acre tract originally constituting the Jeremy Ranch (Stip. ¶3(b), R. 232). The sum of

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

$120,000 was paid by Huntington Park to Respondent as a down payment on that purchase agreement. Huntington Park did not make the next payment and the contract was terminated. Some of the limited partners made no effort to get their money back (Stip. ¶5, R. 233). Others, including the Appellant, did. Appellant and nine others signed the agreement which is the basis of this suit. That agreement is attached to the stipulation as Ex. C. (R. 276).

The agreement acknowledges that Respondent had no general obligation thereunder to pay Appellant (see Ex. C. ¶12, R. 282); the obligation to pay was limited to 50% of the gross profits realized from the resale of land released to Respondent when and if Respondent made payments on its underlying contract. It was also expressly acknowledged that Respondent had no obligation to continue to make those payments which were required to keep the 1961 option contract in good standing; but if in Respondent's own self-interest, it elected to do so, then the parties acknowledged that with each such payment, Respondent would get a release of (title to) a tract of land (Ex. C. ¶7, R. 280) The 1963 contract with Appellant then gave Respondent two options. First, Respondent could sell any released land. If it did so, it could retain the first $85 per acre to cover the cost of the land. Everything in excess of $85 per acre was considered to be "gross profits" and Respondent was to divide the gross profits on a 50-50 basis. The $85 per acre ties back into the underlying 1961 contract in this fashion--the total price under that contract was $1,400,000

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

and the land sold was approximately 16,500 acres, which divides out at just less than $85 per acre. It was recognized in Appellant's contract that Respondent would have some attorney fees, title insurance and other costs of sale and Respondent was to pay these from its 50% share of the gross profits. The other 50% of the gross profits was to be paid to Security Title Company for the use and benefit of the Appellant and the others who signed the contract (Ex. C. ¶2(d), R. 277).

As a second option, Respondent could elect to keep the land that had been released. If it did this, it was required by par. 11 of the contract (Ex. C.) to give a mortgage to secure Respondent's obligations to the Appellant and the others. Then, if Respondent had not sold enough of the released land by July 1, 1968, so that 50% of the profits would be sufficient to pay off the ten people who signed the 1963 contract, they were then each individually given by Par. 3 the option to select land from land "theretofore released" at $85 per acre for the unpaid balance. If he preferred, Appellant could decline to select land and wait until the land was sold and be paid in money (Ex. C. ¶4, R. 278).

The contract was signed in December of 1963. The next annual payment was made under the underlying contract on November 1, 1964. The land released with that payment was immediately sold by Respondent for a price which the parties stipulated was greater than $85 per acre (Stip. ¶14, R. 239). There was thus a "gross profit" and 50% thereof should have been paid to Security Title Company in November of 1964, but it was not. This first

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

breach thus occurred nearly 14 years before this suit was filed. Like payments were made under the underlying 1961 contract and land was released in 1965, 1966 and 1967 and in each instance Respondent immediately sold the released land for a price greater than $85 per acre, but paid nothing to the escrow (Stip. ¶14, R. 239).

Respondent was unable to make the 1968 payment on its 1961 option contract, but was able to induce one Elliott Wolfe to acquire the position of the seller (East Salt Lake) for the balance due under that contract. Mr. Wolfe did this and then gave Respondent an extension. At that time there were still 12,500 acres of land which had not been released. That land was all sold in May of 1970. There was a $500,000 down payment, none of which was paid to the escrow for the benefit of the Appellant. All of the remaining 12,500 acres were conveyed at that time to the buyer and Respondent took back a trust deed and note for the unpaid balance (Stip. ¶8, R. 236).

The 1963 contract did not fix a definite period of time within which the option to select land (which matured July 1, 1968) had to be exercised, but the trial court found that the contract should be construed as requiring the election to be made within a reasonable time and that the effort by the Appellant to select land ten years later, in the Spring of 1978, was not timely (R. 394). By February, 1978, Jeremy Ranch had been acquired by a resort developer and a golf course and other improvements had been constructed on part of it. The demand letter for

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

land was served on February 7, 1978, and the complaint was filed March 21, 1978 (R. 1).

The trial court held that the suit was barred by the statute of limitations. We will undertake in the following argument to demonstrate that this holding was correct.

ARGUMENT

Before turning to a detailed analysis of the contract and discussion of the stipulated facts, we think it will be helpful if we note the general law.

I. THE GENERAL LAW.

Sec. 78-12-23, U.C.A., 1953, provides that any action "founded upon an instrument in writing" must be brought within six years. The statute of limitations begins to run as soon as the contract is breached. See State Automobile & Casualty Underwriters v. Salisbury, 27 Ut.2d 229, 494 P.2d 529; Kimball v. McCornick, 80 Ut. 189, 259 P. 313. In fact, nonperformance of contractual duties gives rise to a cause of action as soon as there is a day's delay in the performance beyond the period stipulated in the contract, II Williston on Contracts (3rd Jaeger Ed. 1957), § 1293, p. 28; and demand for performance is not necessary when both parties have equal knowledge of the contract provisions regarding the various options available for non-performance. See also M.H. Walker Realty Co. v. American Surety Co., 60 Ut. 435, 211 P. 998, which holds that the statute begins to run for breach of contract when the breach occurs, and State

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Tax Comm. v. Spanish Fork, 99 Ut. 177, 100 P.2d. 575, which holds that the statute begins to run when the debt is due and payable.

The fact that the promise is in the alternative (to give land or to pay money) does not change the general rule. See Shadron v. Cole, 101 Ariz. 122, 416 P.2d 555, supp. 101 Ariz. 341, 419 P.2d 520; Bjork v. April Industries, 547 P.2d 219 (Ut. 1976), appeal after remand 560 P.2d 315, cert. den. 97 S.Ct. 2634, 431 U.S. 930, 53 L.Ed.2d 245.

II. THE OBLIGATION TO MAKE THE MONEY PAYMENTS WAS BARRED.

The parties have stipulated that when Respondent made a payment under the 1961 option contract, it thereby secured the release of land (Stip. ¶6, R. 235). We have stipulated that the payments were made in 1964, 1965, 1966 and 1967 and with each payment land was released (Stip. ¶7, R. 236). We have stipulated that the land thus released with each of those payments was immediately sold for a price in excess of $85 per acre (Stip. ¶14, R. 239), thus, in every case generating a gross profit. The 1963 contract upon which this suit is based, required Respondent to divide the gross profits on a 50-50 basis, with 50% being paid into escrow for the benefit of Appellant and others. The parties have stipulated that this was not done (Stip. ¶14, R. 239). There was thus a clear breach of the promise to pay money which occurred in November of 1964, nearly 14 years before this action was filed.

The gross profits from that 1964 sale would not alone have been enough to pay in full the Appellant and the others who

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

signed the contract, but the right to receive his share of the gross profits from this November, 1964, sale was barred in November, 1970. Like gross profits were generated in November of 1965, 1966 and 1967 and Appellant's rights to those were barred in 1971, 1972 and 1973, respectively.

A sale of the 12,500 remaining acres was made (by Wolfe, who held title, and by Respondent who still held the 1961 contract) on May 1, 1970. That sale was closed by the purchaser paying $500,000 in cash and giving a note and trust deed for the $1,600,000 balance. All of the remaining lands, consisting of 12,500 acres were conveyed to the purchaser at that time (Stip. ¶10, R. 237). The stipulation included an Ex. H. (R. 311), which shows how the $500,000 was disbursed. Copies of the checks used in making the disbursement are also attached. From this down payment, Respondent paid the balance that was due to Wolfe. It used part of the money to negotiate the release of some judgments as necessary to clear the title and there was $123,855.02 left over. This was paid to the Respondent by two checks--one for $110,000, dated June 2, 1970 (Check No. 55) and a second check for $13,855.02, dated June 24, 1970 (Check No. 63). The total amount owed under the 1963 contract was $78,500, plus 10% (Ex. C, ¶12, R.276-7). Thus, Respondent had left over from the $500,000 payment in May, 1970, (after paying Wolfe and clearing the title) considerably more money than was necessary to pay all of them in full. It was, of course, all still due, because none of the gross profits from the 1964-1967 sales were paid to Appellant as

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

required. By at least June of 1970 there had been more than enough "gross profits", so that 50% thereof would have paid the contract in full, with a large amount to spare. The date for selecting land (July 1, 1968) had also long since gone by. Suit could have been filed then for all the relief Appellant now seeks. The statute barred the claim by June of 1976.

Appellant now, confronted with the statute of limitations, wants the court to hold that Respondent was legally entitled to keep the entire $500,000 to recoup the cost of 12,500 acres at $85 per acre, and to thus postpone the right of the Appellant to receive any money until the later installments, some of which would fall due within his six-year statute of limitations period. However, there is no justification in either normal accounting, or under the specific terms of the contract for such a unique accounting approach. We are, after all, controlled by the contract. It is the basis for the suit. Par. 13 thereof expressly deals with the rights of the parties on a sale of the Jeremy Ranch as an entirety, as distinguished from a sale of the individual tracts released with annual payments.

Appellant, on page 19 of his brief, quotes from par. 13(c), but in his discussion ignores the fact that the paragraph which provides for each installment to be shared "proportionately" only comes into play if the installment contract would be paid in full "before December 31, 1968". Par. (d) says that if the installments go beyond 1968, Appellant would, nevertheless, be paid in full from "the sums so received by December 31, 1968".

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

In full, this par. 13 provides that if the Respondent does sell the Jeremy Ranch as an entirety and receives payment in full therefor, the Appellant and others would be entitled to be paid in full forthwith. (See par. 13(b), R. 283). Par. 13(c) provides that if Respondent makes an installment sale, which under its terms would be paid off in full <u>before</u> <u>December</u> <u>31,</u> <u>1968</u>, then the Respondent was to pay for the benefit of the Appellant and the others only a proportionate share of each installment payment. If the installments extended beyond December 31, 1968, par. 13(c) required Respondent to pay the Appellant and the others in full from the funds received before December 31, 1968. We submit that it is impossible in the face of this express contract language to conclude that the parties intended for Respondent to keep all of the early installment payments from the May, 1970, sale and credit them to the recovery of the cost of the land and to require Appellant and the others all to wait until the end installments to get any of their payments. The installment contract did extend beyond December 31, 1968, and under the contract Appellant was entitled to his money from the early payments. As Appellant admits on page 24 of his brief, the parties contemplated that Appellant would be paid in full by land or money by December 31, 1968, and notes that the contract provided that Appellant would be paid without interest. Yet, because of his statute of limitations difficulties, he wants the court to ignore the clear language of the contract and to hold that Appellant legally had to wait until the 1974 final payment

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

to claim his money. That argument is simply contrary to the agreement on which he sues. We did have one unforeseen and thus uncontemplated development--Respondent could not make the November 1, 1968, payment and did not get the expected 1,600 acres released. However, the option contract was not forfeited, because Wolfe paid it off and then granted Respondent an extension. This, however, did not cancel par. 13 of the agreement dealing with a sale of the whole ranch.

Even if this two-year extension nullified par. 13 (where the parties attempted to deal expressly with the sale of the ranch as an entirety) and thus the contract is held not to have dealt with the problem, what Appellant is urging is contrary to normal accounting procedures. When an installment contract is made, the normal accounting procedure is to allocate each payment so as to recoup a proportionate share of the costs and a proportionate share of the profits from each payment. The $500,000 payment was 24% of the agreed $2,100,000 purchase price. It normally would have been allocated to recoup 24% of the land costs for the acreage sold and the balance would be profits. That is the way this contract defines profits. The total sale covered 12,500 acres; 24% of this would be 3,000 acres; $85 per acre on 3,000 acres would be $255,000 land cost in the down pyament. The balance ($245,000) would be gross profits. Half of these gross profits would be $122,500. This was much more than the total sum owed ($78,500 plus 10%) to all ten of the signatory parties. Thus, by May 1, 1970, we had had the gross profits from the four

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

sales in 1964, 1965, 1966 and 1967; we then had the gross profits from the May 1, 1970, sale; and 50% of all of these gross profits far exceeded the total debt to the Appellant and the others under this contract.

We respectfully submit that the stipulated facts demonstrate, without a doubt, that the right of the Appellant to receive his share of the gross profits was first breached in 1964, nearly fourteen years before the complaint was filed and that by May 1, 1970, nearly eight years before the complaint was filed, the Respondent was required by the terms of the contract to have paid the Appellant in full. The claim for payment of the $10,000, plus 10%, had fully matured by June of 1970, and the right was already barred when this action was filed in March of 1978. The trial court so held.

III. ANY RIGHT APPELLANT MIGHT HAVE HAD TO RECEIVE PROPERTY FROM RESPONDENT IS BARRED, BOTH BY THE STATUTE OF LIMITATIONS AND BY THE NINE AND ONE-HALF YEARS DELAY IN ELECTING TO CLAIM LAND.

By the terms of the contract, the right to select land matured July 1, 1968 (R. 7, ¶3). It is stipulated that no election to select land was made until the demand letter of February 7, 1978, which is attached to the complaint (Stip. ¶20, R. 241). This is nearly ten years after the right to select land first matured on July 1, 1968. If there had been land available (theretofore released and unsold) on July 1, 1968, so that the right to select land would come into play, the selection, in law, had to be made within a reasonable time. Even the cases cited by Appell-

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

ant so hold. Nine and one-half years is not a reasonable time and the trial court so held (R. 394). By 1978 the Jeremy Ranch had been greatly improved with condos, a golf course, etc., and letting Appellant select these lands in 1978 at their 1961 cost of $85 per acre would be most unreasonable, and demonstrates the wisdom of a statute of limitations. Respondent sold <u>all</u> of the remaining land in May, 1970. Even if the right to select land were still in existence at that time, the promise to permit the selection of land became irrevocably impossible for Respondent to perform, because it was all sold and conveyed. The lower court so found (R. 394, ¶16). That conveyance occurred nearly eight years before this suit was filed and the claim to land is barred.

We emphasize that the right to select land was expressly restricted by Appellant's contract to particular land--that is, land which had been "theretofore" released to Respondent through the making of the payments on the underlying contracts (Ex. C, ¶3, R. 278). Because this is criticial to the Appellant's argument and the contract is dispositive, we quote the pertinent language on this right to select.

> If Knight has not reimbursed each of the Parties of the First Part in full for all sums advanced by him, as aforesaid, plus 10%, by July 1, 1968, each or any of the Parties of First Part may request Knight to reconvey to said requesting party sufficient of the acreage <u>theretofore</u> <u>released</u> to Knight from the Jeremy Ranch, at the rate of $85 per acre to fully satisfy. . .

any remaining unpaid balance. The Appellant's contract does not talk about after-acquired land or about land to be obtained by Respondent under some future contract, or for some different

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

consideration. By Par. 3 of Ex. C, the right to select land after July 1, 1968, was from land "theretofore released" under the 1961 Jeremy Ranch option contract. Even if Respondent had in fact reacquired and now owned land from what was once a part of the Jeremy Ranch, there is no contract language which would permit Appellant to select that land, either in 1968, when the right matured, or in 1978, when Appellant first elected to take land. If there is contract language showing that the parties so intended, Appellant ought to cite it to the court. The fact is--there is no such language.

The nature of the present rights of Respondent in former Jeremy Ranch lands is covered in detail by par. 19 of the stipulation (R. 240). Par. 19(a) recites that Respondent obtained title to ten acres of land in 1974 "from Emigration Land Company". Note: This land was acquired from East Salt Lake Investment Company, the 1961 seller; it was not land available in 1968 when the right to select matured; it was not land from which a selection could ever have been made under the 1963 contract. Emigration Land Company had purchased all of the remaining Jeremy Ranch lands in May of 1970. Then we have stipulated, Respondent acquired ten acres under a 1974 contract with Emigration Land Company--not under the 1961 contract. That land has been sold (Stip. ¶19(a), R. 240). In Par. 19(b), (R. 240), the parties stipulate that in May of 1978, Emigration Land acquired out of a foreclosure proceeding a 2% partnership interest in a limited partnership called "The Jeremy". It is stipulated that Respond-

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

ent "subsequently" (that is, after May of 1978) acquired the 2% partnership interest in that limited partnership. Again, this interest did not come as a release of land under the 1961 contract. It was not land released with the payments made thereon. It was not land available for selection in July of 1968, in accordance with the 1963 contract. It is not even land. The Jeremy is a limited partnership which presently owns the remnants of the Jeremy Ranch. It has developed the golf course and made other improvements. Emigration Land, which purchased all the remaining land in May of 1970, lost all the land in a foreclosure sale. The partnership (The Jeremy) acquired the land at foreclosure sale in 1978, but Emigration Land was able to acquire a 2% partnership interest. After May of 1978, Respondent acquired that 2% interest. It was acquired nearly ten years after Appellant's right to select land matured.

In par. 19(c) (R. 240) the parties stipulated that on June 20, 1978, Emigration Land Company entered into an agreement with The Jeremy, a limited partnership, to purchase 180 acres. Respondent acquired Emigration Land's interest in that contract. If the contract is hereafter performed, Respondent will at some future date acquire by purchase that 180 acres. Again, this acquisition by Emigration Land and then under contract by Respondent, occurred ten years after the right to select land under the 1963 contract with Appellant had matured in 1968. It was not land released under the underlying 1961 contract. This contract interest did not even exist in 1968. How in the world can it be

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

argued, without tongue in cheek, that this 180 acres, or any other newly acquired interest, is land that was open to selection in 1968 under the 1963 contract? The trial court expressly found that this was not the extent of the contract (Find. #4, R. 392 and Find. #18, R. 394).

The terms of the contract control. The contract provides for only two sources of payment to Appellant. He could have been paid from 50% of the "gross profits from the sale of released land". If Appellant and others had not been paid in full from 50% of the "gross profits from the sale of released land by July 1, 1968", the Appellant and any other signatory party to the 1963 agreement could then each select average land at $85 per acre from land "theretofore released" for any unpaid portion (Ex. C. ¶2, R. 278).

In his brief (p. 24) Appellant argues and thus concedes that the parties intended that the agreement would be paid out by December 31, 1968 and since it was not, Appellant wants interest from that date. Appellant says:

> . . .This Agreement and its obligations were obviously intended to be satisfied and fulfilled by December 31, 1968. It was not anticipated by the contracting parties nor is it reasonable to assume that Respondent should have had use of Appellant's $10,000.00 for more than 17 years with only 10% added thereto. (p. 24)

The complaint and the letter reflect the same interpretation. This, of course, is what we contend. If Respondent had made its payments under the underlying 1961 contract and had gotten the agreed land releases, there should have been adequate money and/or adequate land released to take care of the obliga-

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

tion to Appellant by December 31, 1968. The required payments were all made and the agreed land was released through 1967. Then one unexpected development occurred. Respondent could not make the 1968 payment and did not get the 1,600 acres which would have been released thereby. However, as noted above, Respondent induced Elliott Wolfe to pay the balance due under the 1961 contract and take the position of the Seller. Mr. Wolfe then granted Respondent an extension. By the Spring of 1970 Respondent had succeeded in selling all of the remaining land. (Stip. ¶10, R. 237). The land was all conveyed. All the land was gone. If the right to select land was still in good standing in May of 1970, it ceased to exist thereafter, because Respondent sold and conveyed it. The statute ran six years thereafter and this action was not filed until March of 1978. The trial court correctly held (1) that the claim to land is barred (R. 394); (2) that Appellant let his right to select land expire by letting nearly ten years go by without trying to exercise the July 1, 1968, right to select land (R. 394); and (3) that the phrase "land theretofore released", as used in the 1963 contract, refers to land from the Jeremy Randh released to Respondent pursuant to the terms of the original contract of purchase (Find. #4, R. 392). Appellant, even if the claim were not barred, could not select land repurchased by Respondent in 1974 and 1978 at the $85 per acre cost of the land in 1961.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IV. APPELLANT IS IN ERROR IN REFERRING TO HIMSELF AS A CO-OBLIGEE AND SETTLEMENT OF THE LAWSUIT WITH BUEHLER, ET AL, DID NOT TOLL THE STATUTE FOR APPELLANT.

In approximately January of 1970 (well within the six-year limit) J. Kent Buehler, Richard D. Madsen and Owen L. Sanders, three of the ten people who originally signed the 1963 agreement filed suit against Respondent (Stip. ¶5, R. 233).

The parties to that suit arrived at a stipulated settlement on approximately June 21, 1974 (R. 234, ¶5(c); R. 286, 290). The order of dismissal was signed June 28, 1974 (R. 286), and the satisfaction of judgment and the release of lis pendens was signed April 18, 1975 (R. 290, 291). Pursuant to that settlement Respondent paid certain moneys and transferred certain land to the adverse parties to that suit (R. 234, Stip. ¶5(a)). None of the parties to that lawsuit shared his recovery with Appellant or any of the other signatory parties to the 1963 agreement (Stip. ¶5(d)); nor did they purport to sue on behalf of the others. Appellant clearly bases this claim on the assumption that Buehler, et al, were "co-obligees". He says so in his "Title" to this point on page 17 of his brief. The agreement in par. 15 (Ex. C ¶15, R. 284) expressly says they are not.

Par. 15 provides that the ten First Parties (including Appellant) are not acting jointly, but each is acting separately and on his own behalf. Specifically, that paragraph says:

> It is mutually acknowledged that the First Parties are each acting on their own behalf, and that they are in no way associated one with the other. Payment will be made to each of the Parties of the First Part for his own account, and if any one or more of them selects to take land, it will be conveyed to each of the parties, or his nominee, in their individual names, and no one of the First Parties shall have

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> any interest in lands which are conveyed to any other one of the First Parties, it being mutually acknowledged that any association which may have existed between the First Parties has heretofore been cancelled and terminated.

In view of that express recital, there simply is no basis for arguing that the contract created joint obligees, nor that payment to Buehler, et al in 1975 would toll the running of the statute for the Appellant. In view of this par. 15, nothing else should be required to show that the parties were separate, not joint, but we note that the whole contract is consistent therewith. If they were not paid by July 1, 1968, they were separately (each and any) given an option to select land or separately could wait and be paid money. They did not need to act in concert--one could take money, the other nine could each select a different tract of land of his own choosing. This is, of course, consistent with par. 15 of the contract, which says that the interest is separate.

The cases cited by Appellant all are premised on that concept of a joint obligation: Krause v. Spurgeon, 256 S.W. 1072 (Mo. App. 1923), (payment to one of two joint holders of a note); Dixon v. Bartlett, 176 Cal. 572, 169 P. 236 (1917), (a letter to one partner acknowledging a partnership contract debt); Hiscock v. Hiscock, 240 N.W. 50 (Mich. 1932), (payment to one of several co-owners or holders of a mortgage). In McKennon v. McKennon, 231 P. 91 (Okla. 1924), the court declined to toll the statute for one holder of a note, because of payment to the other holder of the same note because the interest was not joint. The McKennon case is cited in an annotation in 40 ALR 29, which indi-

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

cates some conflict in the cases, but we do not need to reach that problem here, because even the cases where payment to one party is held to toll the statute on behalf of another, have done so under a theory that the payment was to a partnership or on a joint obligation.

This, we believe, is a complete and adequate answer, but there is still a further controlling factor and that is that the payment made to Buehler, Madsen and Saunders was not voluntary, and this was not an acknowledgment of the debt. Buehler, et al filed suit. There was a compromise settlement of that suit, which resulted in a judgment. The payment was made in satisfaction of that judgment, and the rationale for making payment start the limitation period over anew does not exist.

The Utah Supreme Court in Holloway, et ux v. Wetzel, 86 Ut. 387, 45 P.2d 465 (1935), cited with approval a Kansas case, Elmore v. Fanning, 85 Kan. 501, 177 P. 1019, 38 L.R.A. (N.S.) 685, which stated this rule as follows:

> A payment to toll the statute must be must under such circumstances as to amount to an acknowledgment of existing liability.

We submit that element is lacking where a suit is filed, goes to judgment and payment is made in the satisfaction of judgment.

V. APPELLANT WAS ENTITLED TO HIS SHARE OF AT LEAST 50% OF THE GROSS PROFITS FROM EACH AND EVERY SALE.

Appellant cites some cases and works out a theory which in effect asserts that the Appellant's contract right was only to receive his prorated share of each installment on the May 1, 1970,

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

sale of the Jeremy Ranch, and that since one large installment was paid in 1974, his prorated share of that installment is not barred by the six-year statute. The thing wrong with this theory is that it is not even approximately in accordance with the terms of the contract. The Appellant brought suit on a written contract and his rights are controlled thereby. In that contract, Respondent and Appellant agreed that while Respondent was not obligated to continue making payments on the Jeremy Ranch, Respondent, nevertheless, in its own self-interest could elect to do so (Ex. C ¶8, R. 280). With each payment Respondent would receive a tract of land (Ex. C ¶7, R. 280). If Respondent sold that tract for any sum greater than $85 per acre, the parties agreed that there would be a gross profit which should be divided at that time 50% to the Respondent and 50% to Appellant and the others who signed the contract (Ex. C. ¶2, R. 277). If the Respondent did not sell the land as it was released, he was obligated by par. 11, (R. 282) of the contract to give a mortgage to secure the ultimate payment to the Appellant and the others. If Appellant had not been paid in full from this arrangement by July 1, 1968, he could elect to select land, but only from land "theretofore released" for his unpaid balance (Ex. C. ¶2, R. 278). They also expressly agreed in the contract on how the payments would be made if Respondent sold the ranch as an entirety (Ex. C. ¶13, R. 283).

As Appellant concedes (brief p. 24), the parties contemplated that Appellant would be paid in full in money and/or in

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

land by the end of 1968; but there was, of course, the possibility that Respondent would not make all or any of the payments and that the underlying contract would simply be forfeited. In that event it was expressly agreed (Ex. C. ¶7, R. 280; also Ex. C. ¶12, R. 282) that Respondent would have no liability to Appellant and the others.

It is obvious why the parties believed that the matter would conclude by December 31, 1968, and contracted accordingly. The annual installments under the underlying contract were $160,000 each. If Respondent made the payments under the agreement as contemplated, there should have been adequate land and/or money to pay Appellant in full by the end of 1968. They so assumed and so agreed.

The contract also recognized in par. 13 that instead of securing annual releases and selling those lands tract by tract, the Respondent might at any time sell the Jeremy Ranch in its entirety under an installment sale contract. Par. 13 then specifies what will happen if that occurs, and it does not, we repeat, does not provide that Appellant will be required to take his proportionate share of installments paid after December 31, 1968, and wait to the end of an installment contract for his money. It provides to the contrary--that if the installment contract go out beyond 1968, Appellant was to get his money from the installments paid before that date. No one anticipated that this would stretch out beyond 1968, because the contract had very definitive forfeiture provisions. The contract was really only an option. If the

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

payment was missed, the option simply expired. Respondent was not obligated to make the payment. If it failed to do so, both Appellant and Respondent lost their rights. They were confronted by that very problem on November 1, 1968, but Wolfe paid the contract out, took over the position of seller and granted an extension. There is no reason why this extension of time would not be for the benefit of both Respondent and Appellant nor why par. 13, which governed the sale of the ranch in its entirety, should not continue to apply. The down payment made in May of 1970 contained more than enough "gross profits" to pay the Appellant in full and there is no reason why Appellant could not have done what Buehler, et al, did, that is, file suit in 1970 to get his money. Respondent had no legal right to change this and force Appellant to wait for his money. His claim matured and he waited nearly eight years to sue.

VI. APPELLANT WOULD NOT BE ENTITLED TO INTEREST EVEN IF HIS CLAIMS WERE NOT BARRED BY THE STATUTE OF LIMITATIONS.

Appellant asserts that he is entitled to recover interest. The contract says precisely to the contrary. Par. 2 of the contract (R. 6) obligates Respondent to pay the Appellant only from specified funds the $10,000 Appellant had advanced, plus 10% but "without interest". Appellant would have the court read this language to mean "without interest until the date of maturity and with interest at the legal rate after maturity". That is not what it says. It says "without interest". Then Appellant says interest should run from December 31, 1968, because by then the

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

debt had matured. If this is so, the statute necessarily runs from that date and the claim was barred on January 1, 1975.

The statute and cases cited by Appellant only apply where the parties have not specifically contracted for the payment without interest. However, here this is all mooted by the fact that the claim is barred; if the court holds otherwise, then the contract should control.

CONCLUSION

The trial court correctly held against the Appellant and the judgment should be affirmed.

Respectfully submitted this 13th day of April, 1982.

Edward W. Clyde
Ted Boyer
CLYDE, PRATT, GIBBS & CAHOON

By Edward W. Clyde
Attorneys for Respondent
Knight Land Corporation
200 American Savings Plaza
77 West 200 South
Salt Lake City, Utah 84101

I certify that I caused 2 copies of this brief to be hand delivered to Robert F. Orton and T. Richard Davis at 68 South Main Street, Salt Lake City, Utah this 14th day of April, 1982.

Ted Boyer

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.