

1964

## Paul Rubey and Carol Rubey v. Morris T. Wood and Ruby J. Wood : Brief of Respondents

Utah Supreme Court

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Perris S. Jensen; R. William Bradford, Jr.; Attorneys for Respondents;

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JUN 30 1964

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

LAW LIBRARY

PAUL RUBEY and  
CAROL RUBEY, his wife,  
*Plaintiffs and Respondents,*

vs.

MORRIS T. WOOD and  
RUBY J. WOOD, his wife,  
*Defendants and appellants.*

FILED  
APR 13 1964

Supreme Court, Utah

Case No.  
9833

Case No.  
10001

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RESPONDENTS' BRIEF

Appeal from Judgment of Third District Court in  
and for Salt Lake County, Utah

---

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

---

PAUL RUBEY and  
CAROL RUBEY, his wife,  
*Plaintiffs and Respondents,*

vs.

MORRIS T. WOOD and  
RUBY J. WOOD, his wife,  
*Defendants and appellants.*

Case No.  
9833

Case No.  
10001

---

RESPONDENTS' BRIEF  
Appeal from Judgment of Third District Court in  
and for Salt Lake County, Utah.

---

STATEMENT OF THE CASE

This is an action in equity for specific performance of a written contract for the sale of land.

STATEMENT OF FACTS

On April 18, 1959, appellants and respondents, at appellants' home near Herriman, Salt Lake Coun-

ty, Utah, jointly prepared and executed a typewritten contract (Exhibit P-1) for the sale to respondents of 728 acres, more or less, of farm land for a price of \$107,000.00 with an option to purchase an additional 55 acres for \$8,350.00. More than three weeks thereafter, on May 11, 1959, after several telephone conversations between the parties, the Rubey and the Woods met again at the Wood home where they jointly prepared and executed a handwritten supplement to the typewritten document (Exhibit P-2). The terms of this supplement reduced the amount of the initial payment, increased the amount of the annual installment payments, repeated various provisions of the typewritten contract and added certain provisions requested by appellants.

Subsequently, but before the initial payment was due, Rubey tendered \$5,000.00 to Wood. Wood rejected the tender and repudiated the contract. This action was then commenced for specific performance. Appellants interposed a counterclaim seeking to quiet title to the property, and for judgment declaring the contracts to be void.

The action was tried on November 30 and December 1, 1960, before the Honorable Aldon J. Anderson, sitting as a Court in Equity with an advisory jury. After plaintiffs put the two contracts into evidence, defendants went forth first with their proof. At the conclusion of defendants' case, plaintiffs moved for and were granted a judgment for specific performance in the form of a Judgment on Directed



Verdict (R-9833, p. 10). The Court stated that plaintiffs' contentions regarding the contracts were accepted and defendants' counterclaims were dismissed. From the judgment on directed verdict appellants appealed to the above entitled Court (Case No. 9447) in which appeal the above Court unanimously affirmed the lower court (R-9833, p. 14).

Respondents then tendered to appellants \$15,000.00 which tender was rejected in a letter signed by appellants stated as follows:

"September 26, 1962

"Dear Mr. and Mrs. Rubey:

"We received a letter dated September 20, 1962, from Jensen, Jensen & Bradford.

"We particularly deny that there was ever a valid contract between us and further deny that any valid tender was ever made or a performance made in any manner or form provided by law, or as promised as an inducement for said contracts, or as provided in said contract or at all.

"In particular, we deny that you ever made any payment or tender of payment called for on or before May 11, 1962, as you assert, and your present purported tender at this time is not timely and is refused. You are further advised that your failure to pay payments has voided any claim or contract and you are further advised that any rights that you might claim under the purported contracts have been terminated and are of no effect.

"Very truly yours

/s/ Morris T. Wood

"/s/ Ruby Wood"

Subsequent to the entry of the Decree of the lower court, from which the original Appeal in the above entitled cause was taken (Case No. 9447), and notwithstanding the fact that said Decree found the Agreement between the parties to be valid and binding, defendants placed on record in the office of the County Recorder of Salt Lake County, State of Utah, mortgages totaling \$92,550.00.

On the 4th day of October, 1962, respondents moved for an Order to Show Cause (R-9833, p. 26). Appellants appeared and were found in contempt of court (R-10001, p. 106), but sentencing was stayed pending final outcome on appeal (R-10001, p. 114-5).

Upon stipulation of all of the parties (R-10001, p. 114) a referee was appointed to interpret the contracts. By order of the court, (R-10001, p. 155), the report of the referee (R-10001, p. 121-6) was accepted by the court, the findings of the referee were adopted by the court, and the court made and entered Findings based upon the referee's report, together with additional Findings of the court based upon its own study of the two contracts. An Amended Decree to this effect was entered July 29, 1963. No mention is made of this Amendment to Decree in either of appellants' Notices of Appeal (R-9833, p. 55; R-10001, p. 167).

On the 4th day of October, 1962, respondents commenced Civil Action No. 139046 in the Third Judicial District Court in and for Salt Lake County, State of Utah, seeking damages for unlawful refusal

on the part of appellants to obey the Decree of the court and to deliver possession of portions of the property to respondents as said portions were paid in full by respondents, and seeking to remove the mortgages placed on said property by appellants after the entry of the original Decree December 1, 1960.

On or about the 15th of October, 1962, appellants commenced Civil Action No. 139263 in the lower court seeking a declaratory judgment that the contracts between the parties were void by reason of alleged breach on the part of respondents. On October 23, 1962, appellants' Motion to consolidate No. 139263 with No. 124832 was granted, whereupon respondents' Motion to Dismiss No. 139263 was also granted (R-9833, p. 43-44). No appeal was taken from said Decree.

## STATEMENT OF POINTS

### POINT I

THE COURT PROPERLY INTERPRETED THE TWO WRITTEN CONTRACTS ACCORDING TO THEIR TERMS.

### POINT II

APPELLANTS' SECOND POINT IS WITHOUT MERIT FOR THE REASON THAT NO MOTION TO DISMISS WAS MADE BY APPELLANTS BELOW, AND FOR THE FURTHER REASON THAT RESPONDENTS MADE TIME-

LY ANNUAL INSTALLMENT PAYMENTS UNDER THE CONTRACTS.

### POINT III

THE INTERPRETATION OF THE CONTRACTS WAS A MATTER OF LAW TO BE DETERMINED BY THE COURT FROM THE FACE OF THE INSTRUMENTS AND NO FURTHER TESTIMONY WAS REQUIRED BY THE COURT.

### POINT IV

THE LOWER COURT PROPERLY INTERPRETED THE WORDS "OR MORE" CONTAINED IN THE CONTRACTS.

### POINT V

APPELLANTS HAD NO RIGHT TO A JURY TRIAL BELOW FOR THE REASON THAT THE INSTANT CASE IS ONE IN EQUITY AND THE MATTERS DETERMINED BY THE LOWER COURT FROM WHICH THESE APPEALS WERE TAKEN WERE MATTERS OF LAW.

### POINT VI

THE LOWER COURT PROPERLY DETERMINED THAT APPELLANTS WERE NOT ENTITLED TO INTEREST UNDER THE CONTRACTS.

## POINT VII

THE COURT PROPERLY CONSOLIDATED CIVIL ACTION NO. 139263 WITH NO. 124832 AND PROPERLY DISMISSED NO. 139263.

## POINT VIII

THE LOWER COURT PROPERLY DIRECTED THE CLERK OF THE COURT TO MAKE AND DELIVER A WARRANTY DEED TO THE RESPONDENTS SUBSEQUENT TO APPELLANTS' REFUSAL TO OBEY THE ORDER OF THE COURT TO EXECUTE SUCH DEED.

## POINT IX

IT WAS PROPER FOR THE LOWER COURT TO ORDER THE CLERK OF THE COURT TO SATISFY A JUDGMENT IN FAVOR OF PLAINTIFFS-RESPONDENTS FOR ATTORNEY'S FEES AND COSTS OF SUIT OUT OF THE DEPOSIT THAT HAD BEEN MADE TO THE CLERK OF THE COURT BY RESPONDENTS.

## POINT X

THE LOWER COURT PROPERLY AWARDED JUDGMENT FOR ATTORNEY'S FEES IN FAVOR OF RESPONDENTS BASED UPON THE TESTIMONY OF COUNSEL FOR RESPONDENTS.

## POINT XI

THE APPELLATE COURT SHOULD NOT GIVE CONSIDERATION TO APPELLANTS' BRIEF FOR THE REASON THAT IT STATES ONLY POINTS OF LAW AND MAKES NO REFERENCE TO ANY FACTS IN THE RECORD TO WHICH SUCH POINTS OF LAW MAY BE RELEVANT.

## POINT XII

APPEAL NO. 10001 SHOULD BE DISMISSED BECAUSE THE ORDER ENTERED SEPTEMBER 26, 1963 FROM WHICH THE APPEAL IS TAKEN IS NOT A FINAL JUDGMENT.

## ARGUMENT

## POINT I

THE COURT PROPERLY INTERPRETED THE TWO WRITTEN CONTRACTS ACCORDING TO THEIR TERMS.

Appellants have referred this Court to the briefs submitted in the first appeal in the above entitled matter, and consequently respondents are forced to make reference to said briefs, as background, although such reference to the closed chapters of the long and painful history of this case is merely offered by appellants to assist them in their newest of many repeated attempts to obtain a review and re-adjudication of matters long since

settled. This Court, however, should not consider appellants' repetitious challenges to the decisions of this Court and the court below in the case at bar, which decisions do not coincide with appellants' views, as being either reason or argument. "While it may be a relief to their feelings, it does not carry conviction to the judicial mind." *Hilton v. Thatcher*, 31 U. 360, at p. 377, 88 P. 20 (1907).

The issues before this Court on the first appeal of the case had generally to do with whether the two contracts involved were valid and binding or whether, as contended by appellants, they should have been rescinded for fraud. Those issues were resolved in favor of respondents when this Honorable Court unanimously affirmed the lower court (R-9833, p. 14).

The general issue before the lower court since the conclusion of the first appeal, and the issue now before this Court is: How are the contracts to be performed?

Appellants' Point 1 rests on the assumption that the two documents involved herein were prepared solely by respondents. This assumption is false. The typewritten document prepared April 18, 1959, was fully discussed point by point in the presence of all parties thereto, and was then dictated aloud in the presence of all parties by Paul Rubey to his wife, who operated the typewriter. The handwritten document dated May 11, 1959, was dictated by appellant Morris Wood to respondent Paul Rubey in the presence of all parties to said document. These facts are

born out by the following references to the transcript of trial: P. 46, lines 3-6; P. 42, lines 9-12; P. 79, lines 7-14; P. 80, line 30; P. 81, lines 9-11; P. 81, lines 17-25; P. 88, lines 17-22; P. 100, lines 7-10; P. 115, lines 15-22.

Appellants refer on page 7 of their brief to 12 *Am. Jur.* 795, Sec. 252, concerning the manner in which doubtful language in contracts should be interpreted most strongly against the party who uses it. However, no language is cited in appellants' brief from either contract which appellants claim to be doubtful. This portion of appellants' brief should therefore not be considered by the Court. See respondents' Point XI below. The rule quoted by appellants is further explained in Sec. 252 of 12 *Am. Jur.* Contracts, pp. 795-796 as follows:

“The rule that expressions will be interpreted against the person using them applies only where, after the ordinary rules of interpretation have been applied, the agreement is still ambiguous.”

In 17A CJS, p. 28 is stated:

“So a contract is ambiguous when, and only when, it is, or the provisions in controversy are, reasonably or fairly susceptible of different constructions or interpretations. . . .” (p. 34)

Neither the trial court below, nor the referee appointed pursuant to stipulation, found the language in either contract to be susceptible to differ-



ent constructions or meanings. Consequently, rules of construction do not apply.

Furthermore, when a contract is prepared by both parties, using the language of both, one being merely a scrivener, there is no reason to construe the contract against anyone. Although Mrs. Rubey typed the first contract and Mr. Rubey wrote the second, both documents were, in fact, the product of the minds of all of the parties thereto. Appellants complain that the lower court ruled in favor of respondents in every instance. This fact is not disputed, but it is respectfully asserted that the contracts were thus interpreted because respondents' contentions were the only logical interpretation possible.

*Stout vs. Washington Fire and Marine Insurance Co.*, 14 U. 2d 414, 385 P. 2d 608 (1963), quoted in appellants' brief, is not in point for the reason that it involved an insurance policy which in fact contained doubts and uncertainties as to its meaning and effect and was therefore properly construed most strongly against the insurance company which prepared it. To the contrary, in the case at bar, the typewritten contract between Rubey and Wood was prepared by both of them, and the handwritten contract was written by Rubey upon the dictation of Wood. The facts in the instant case are therefore distinguishable from the facts in the *Stout* case.

This Court, in its original opinion rendered in the above entitled cause stated:

“The parties were strangers to each other. There had been no previous contacts and no reason to establish a trusting relationship.” (R-9833, p. 14.)

The parties to the two documents now in question stood on equal footing, were free to do what they chose, and because there is no Utah statute to the contrary, the only duty of the lower court was to discover the meaning of the specific documents and to enforce them without leaning in either direction. 12 *Am. Jur.* Contracts, Sec. 226 et seq p. 745.

At page 8 of their brief, appellants again allege that Rubey had extraordinary background and experience and infer that the Woods were naive and inexperienced. On this point, reference is again made to the Court’s previous opinion in the above entitled matter (R-9833, p. 14) where the Court quoted Justice Crockett in *Lewis v. White* 2 U. 2d 101, 269 P. 2d 865 (1954) as follows:

“No matter how naive or inexperienced the defendants were, they could not close their eyes and accept unquestioningly any representations made to them. It was their duty to make such investigation and inquiry as reasonable care under the circumstances would dictate.”

Any naivete or inexperience under which appellants may have labored at the conception of the two documents before the court is no defense to an action for specific performance, nor should it now be pertinent upon the question of interpretation of the contracts.

There being no reason to construe either of the contracts against any party thereto, the court below properly interpreted the contracts according to their terms.

## POINT II

APPELLANTS' SECOND POINT IS WITHOUT MERIT FOR THE REASON THAT NO MOTION TO DISMISS WAS MADE BY APPELLANTS BELOW, AND FOR THE FURTHER REASON THAT RESPONDENTS MADE TIMELY ANNUAL INSTALLMENT PAYMENTS UNDER THE CONTRACTS.

Appellants' Notice of Appeal in Case No. 9833 (R-9833, p. 55) makes no reference to a Motion to Dismiss, nor does their Notice of Appeal in Case No. 10001 (R-10001, p. 167). There is in fact no such motion in the record. There is therefore nothing for the Court to consider under Point 2 of appellants' Brief.

Appellants have repeatedly sought to obtain a redetermination of the merits of this case with their successive motions, objections etc. in the lower court, their action commenced for Declaratory Judgment, their motion in the above court to rehear the original appeal and their Motion to Recall Remittitur and Reconsider their Motion for Rehearing in the above Court on the initial appeal. Again, in Point 2 of their brief, appellants attempt to avoid the consequences of the original judgment for specific performance, as unanimously affirmed by this Court, by making reference to a nonexistent motion to dis-

miss based on an alleged failure to tender contract payments as required by the contracts within the time specified, or within the 90-day grace period therein set forth.

In any event, respondents have repeatedly made timely tender of the annual contract installment payments called for in the agreement.

The record reflects that early in 1960, before the first payment was due on the contract, respondents tendered to appellants \$5,000.00 representing the initial payment on the contract (Tr. p. 49). This payment was refused, the contract was repudiated and this action resulted. Thereafter, on the 7th day of December, 1960, respondents tendered to appellants \$10,730.00 representing the initial payment together with the annual installment payment for the year 1961 (R-10001, p. 59), which installment was then not yet due. This tender was likewise refused. Thereafter, on the 20th day of September, 1962, before the third annual installment payment was due, respondents tendered to appellants \$15,000.00 (R-10001, p. 97) representing the payments for 1960, 1961 and 1962. Again this tender was rejected. (See appellants' letter set forth in the statement of facts above.)

In the Conclusions of Law entered by the lower Court on the 27th day of November 1962, (R-9833 p. 38) the court stated that the tender of \$15,000.00 by letter and the payment into court in Civil Action No. 139046 was a valid and timely tender of the \$15,000.00. The sum of \$15,000.00 was thereafter

paid into Court by respondents in Civil Action No. 139046 and said sum minus certain costs paid therefrom pursuant to Court Order (R-9833, p. 43-5), remains on deposit with the court.

The transcript of trial discloses the following:  
P. 25, lines 2-5

“Q. You were aware, were you not, that this last spring, in 1960, Mr. Rubey through his attorney, Mr. Jensen, offered to pay it to me as your attorney, a \$5,000.00 payment?

“A. Yes.”  
P. 50, lines 20-25

“Q. I would like to clear up the time when this \$5,000.00 was offered. I was just about to look to see when this action was filed. Depositions were taken on April 16, 1960 and the action was filed before that. Wasn't it true that the \$5,000.00 offer was made before this suit was commenced?

“A. Yes.”

It thus appears clearly from the facts that each year respondents have made timely tender of full, cumulative payment to appellants. Appellants' statement in Point 2 on page 8 of their brief, is therefore not true. Even if such tender had not been made, respondents would have been excused therefrom under the general rule that tender to a party who has breached a contract or repudiated it is a futile act and is not required.

In 17A CJS, p. 680, is stated:

“Non tender of performance is excused where it is apparent that a tender would be a vain and idle ceremony, or where the other party has prevented performance.”

From the inception of the above cause, appellants have steadfastly repudiated the contracts, which repudiation must certainly deprive appellants of any right to claim a breach on the part of respondents, even had the same occurred.

The rule stated above excused respondents from tendering the annual installment payments, but respondents have nevertheless gone the extra mile and made repeated tenders notwithstanding appellants' repudiation of the contracts.

Appellants in their brief cite *Sherman vs. Western Construction Company, Inc.*, 14 Wash. 2d 252, 127 P.2d, 673 (1942), 17 CJS 932, but the language quoted by appellants appears in the dissent, not in the main opinion. Thus, that case does not stand for the proposition claimed by appellants, and is not in point.

Appellants further quote from the last phrase of 55 *Am. Jur.* p. 1014 under Vendor and Purchase, Section 621, where it states:

“... and if payment is to be made in installments, default in the payment of any installment is a distinct breach and gives the vendor the right to declare the forfeiture therefor.”

However, appellants omitted the first part of this paragraph which states:

“The equitable estate or interest of the purchaser under an executory contract for the sale of land may be subject to be defeated under provisions therefor in the contract *if he fails to comply with the stipulations in the contract.*” 55 *Am. Jur.*, p. 1014, Sec. 621 (*Italics ours*).

Obviously, the passage quoted by appellants is a misleading extraction from the context of the paragraph and is improper in appellants' brief. Forfeiture for nonpayment is only a remedy if such remedy is explicitly spelled out in the contract. The Rubey-Wood contract contains no such remedy of forfeiture for non-payment. True, the handwritten document (Exhibit P-2) provides for liquidated damages in the event of default, but the typewritten document (Exhibit P-1) expressly binds the buyers to buy the entire 728 acres, and there is no express remedy for forfeiture in case of non-payment. Furthermore, there is no fact of non-payment in the instant case as set forth above.

Appellants have continuously, throughout the long history of the above case, appeared to assume that the breach of contract, assuming the same were to occur, would, in and of itself, automatically void the contract. Contracts, however, do not terminate automatically. A default under a contract may be waived. Cancellation requires affirmative action by the party desiring to terminate a contract and there

is no such action on the part of the Woods in the above cause except an abortive attempt to obtain a Declaratory Judgment, which action was properly dismissed (R-9833, p. 43-4).

Even if a Motion to Dismiss had been filed by appellants based on an alleged non-tender under the contract, such motion would have been properly denied.

### POINT III

THE INTERPRETATION OF THE CONTRACTS WAS A MATTER OF LAW TO BE DETERMINED BY THE COURT FROM THE FACE OF THE INSTRUMENTS AND NO FURTHER TESTIMONY WAS REQUIRED BY THE COURT.

A. The intention of parties to a contract must be determined by the Court from an examination of the contract only. 12 *Am. Jur.* Contracts, Sec. 229.

Throughout the long history of the proceedings in the above entitled cause, defendant-appellants have continually urged the court to take evidence to determine the intention of the parties at the times the two documents were executed in an effort to get the court to interpret the contracts in accordance with appellants' contentions. The general rule concerning interpretation of contracts is set forth in 12 *Am. Jur.* Contracts, 227, p. 746 as follows:

“Whatever may be the inaccuracy of expression or of the ineptness of the words used in an instrument in a legal view, if the intention of the parties can be clearly discovered,



the Court will give effect to it and construe the words accordingly. It must not be supposed, however, that an attempt is made to ascertain the actual mental processes of the parties to a particular contract. The law presumes that the parties understood the import of their contract and that they have the intention which its terms manifest. It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument. . . . Taking into consideration this limitation, it may be said that the object of all rules of interpretation is to arrive at the intention of the parties as it is expressed in the contract. In other words, the object to be attained in interpreting a contract is to ascertain the meaning and intent of the parties as expressed in the language used."

Under this general rule, it would have been improper for the lower court in this matter to have inquired into the subjective intent of the parties to the contracts as it may have existed prior to and at the time of the execution of the two contracts in this case. The court was limited to a consideration of the intention of the parties as it appeared from the language used by the parties in the two documents themselves.

There is a myriad of cases standing for the proposition that the intention of an instrument may

be determined only from an examination of the terms of the instrument itself. See *Cook vs. Smith*, 107 Tex. 119, 174 S.W. 1094, 3 A.L.R. 940 (1915); *Coal River Collieries vs. Eureka Coal and Wood Co.*, 144 Va. 263, 132 S.E. 337, 46 A.L.R. 485 (1926); *Kleuter vs. Joseph Schlitz Brewing Co.*, 143 Wis. 347, 128 N.W. 43 (1910); *Conery vs. New Orleans Water Works Co.*, 142, U.S. 79, 35 L. Ed. 943, 12 S. ct. 142 (1891); *Griffin vs. Fairmont Coal Co.*, 59 W. Va. 480, 53 S.E. 24 (1905); *Schneider vs. Turner*, 130 Ill., 28, 22 N.E. 497 (1889); *Delaware Ins. Co. vs. Greer*, 120 F. 916 (1903).

These rules may be summarized as follows:

It is commonly said that where a contract is plain and unambiguous, its meaning should be determined without reference to extraneous facts; similarly it is said that where there is no ambiguity in the language used in the contract, the intention of the parties must be gathered from that and from that alone. 12 *Am. Jur. Contracts*, Sec. 229, p. 752; *Green vs. Biddle*, 8 Wheat. (U.S.) 1, 5 L. Ed. 547; *Kihlberg vs. U.S.* 97 U.S. 398, 24 L. Ed 1106 (1878).

The lower Court referred the two contracts to a referee pursuant to a stipulation of all of the parties (R-10001, p. 114). The referee found the document to be understandable and enforceable according to its own terms and made specific findings with respect to the following:

1. The two contracts are one final agreement.
2. The contracts are performable.

3. The real estate described therein is sufficiently identified.

4. The purchase price is clear.

5. The initial payment of \$5,000.00 was to be made one year from May 11, 1959 with a 90-day grace period.

6. The time for payment of the subsequent annual installments was within the calendar year plus the 90-day grace period.

7. The contract provides for no interest but provides that sellers retain crops in lieu of interest. No interest could be charged beyond that.

8. The release clause is clear.

9. Sellers have the duty of furnishing surveys.

10. Sellers are obligated to deliver a separate warranty deed on each parcel as conveyed.

11. The written notice requirement is clear.

12. Taxes are to be paid by sellers on unreleased parcels.

13. There is an option to purchase 55 additional acres.

The referee suggested that the Court make additional findings as to the following matters:

1. Title insurance.

2. Surveys.

3. The phrase "the release clause would not release the buyers from the said amount of 728 acres."

4. Reduction of the purchase price in the event certain parcels were not in fact owned by the sellers.

Even though the contracts involved in this case leave something to be desired as far as the artfulness of the language in them is concerned, still the language was clear and unambiguous as found by the referee and the court. There was, therefore, no reason for the court to admit extrinsic evidence to assist the court or the referee in interpreting the terms of the contracts.

There is still another reason why the lower court could not admit extrinsic evidence d'hors the contracts as urged by appellants. In 12 *Am. Jur. Contracts*, 232 at p. 755 is stated:

“Where the parties intend a writing to be the sole memorial or integration of the contract, the writing embodies the contract and, accordingly, the interpretation of the contract consists of interpretation of the writing. A solemn instrument embodying the final intentions and agreements of the parties must be interpreted according to the legal import of its terms. In the absence of mistake or fraud, a written contract merges all prior and contemporaneous negotiations in reference to the same subject, and the whole engagement of the parties and the extent and manner of their undertaking are embraced in the writing. The written agreement and not the correspondence which preceded it is the correct exponent of the contract. All verbal agreements made at or before the time of the execution of a contract, are to be considered as merged in the written instrument.”

If, in each case of dispute over a contract, the Court were to inquire into the relations of the

parties, their knowledge, their discussions and verbal negotiations, there would be no point in preparing a written contract. The writing is the final word.

The contracts in the instant case must therefore be considered to be the final integration and the sole memorial of the agreement between the Rubeyes and the Woods. Absence of mistake or fraud was specifically found by the court on the trial below as affirmed by the Supreme Court on the first appeal. Consequently, the written documents merged in all prior and contemporaneous negotiations with respect to the sale of the real estate involved in the contracts, and therefore these written contracts, and not the correspondence or discussions which preceded them are the correct exponents of the contracts between the Rubeyes and the Woods. The court therefore could not properly have looked outside the two documents to extrinsic evidence for the purpose of determining the intention of the parties as urged by appellants.

That a court may refer matters to a referee is clearly set forth in Rule 53(a) and (b) Utah Rules of Civil Procedure. By stipulation of the parties hereto (R-10001, p. 114), the lower court in the instant case referred the contracts by consent to a referee, and based upon the report of the referee, the court applied its judicial function in interpreting the contracts and applying the law thereto.

As far as the findings of the referee are concerned on appeal *Hannaman vs Karrick*, 9 U. 236,

33 P. 1039 (1893) ; *Hannaman vs. Karrick*, 168 U.S. 328, 42 L. Ed. 484, 18 S.Ct. 135 (1897) states that the findings of the referee which have been adopted by the Court will not be disturbed unless it is clearly manifest that there was error or oversight. Appellants have shown no oversight or error in the referee's findings, and this Court, therefore, should not disturb them.

On page 10 of their brief, appellants refer to 55 *Am. Jur.* Vendor and Purchaser, Sections 97 and 98, p. 573 as though the lower court had a duty to interpret the contracts. However, the first footnote under Section 97 refers to 12 *Am. Jur.* Contracts, Sec. 227, p. 746 referred to above (p. 18). Thus the applicability of the rules of construction referred to under the title Vendor and Purchaser in 55 *Am. Jur.* Sec. 97-98 depends initially on whether the contract in question need interpreting or whether the contract is sufficiently clear as to speak for itself. As pointed out above, these rules of construction do not apply here.

In *Newcomb vs. Wood*, 97 U.S. 581, 24 L. Ed. 1085 (1878) is stated that parties who have stipulated that a controversy be submitted to a referee clearly imply that they intend the award or report to be final and conclusive. Thus, when the parties in the instant case stipulated that the contracts be submitted to a referee, they impliedly expressed their intent that the referee's report would be binding and conclusive, and appellants should not be permitted to complain of said findings.

B. Following the remittitur from the Supreme Court on the first appeal, no questions of fact were before the court, the sole issue being the interpretation of the written documents already held to be valid, binding and subsisting contracts in the original trial and on the first appeal.

Appellants cite no "disputed questions of fact" in their brief under their point 3(b) and that point should therefore be disregarded by the Court.

C. The referee in paragraph 7 of his report, (R-10001, p. 121) specifically found that each annual installment was to be paid within each calendar year plus a 90-day grace period. This finding was expressly incorporated into the findings of the court (R-10001, p. 155-60).

The determination of the time when each annual installment was to be paid was a matter of law, which was determined by the referee and the court, and, as such, is not the proper basis for appeal.

D. The referee made no specific findings concerning title insurance and surveys, but the court, upon an examination of the documents, made findings concerning these matters (R-10001, p. 155-60).

The fact that the court was able, from the documents themselves, to make specific findings concerning the matters left unresolved by the referee, is in and of itself sufficient proof that the documents were, on their face, clear, unambiguous and susceptible of proper interpretation by the court as a mat-

ter of law and without resorting to extrinsic evidence.

#### POINT IV

THE LOWER COURT PROPERLY INTERPRETED THE WORDS "OR MORE" CONTAINED IN THE CONTRACTS.

In the lower court, appellants contended that the words "or more" appearing in the contracts in question, meant that the contract sellers, i.e., appellants, were to have the right to make demand upon the buyers (respondents) to make payments in excess of the amounts called for in the contracts. The referee determined that the words "or more" under general usage in the real estate industry, and according to the law of contracts in general, gave the buyers, not the sellers, the option to accelerate contract payments. The usual interpretation of those words is clear, and the court cannot be said to have committed an error by failing to admit parole evidence to vary their obvious and universal meaning.

The general rule is stated in 12 *Am. Jur.*, Contracts, Sec. 236, p. 758 as follows:

"Words will be given their ordinary meaning when nothing appears to show that they are used in a different sense, and no unreasonable or absurd consequences will result from doing so. Words chosen by the contracting parties should not be unnaturally forced beyond their ordinary meaning or given a curious, hidden sense which nothing but



the exigency of a hard case and the ingenuity of a trained and acute mind can discover.”

The words “or more” have an ordinary meaning as found by the referee and the lower court. There is no reason appearing in the contracts or the record to force these words unnaturally beyond their ordinary meaning. Nothing appears in the contract as supplemented to suggest that any other meaning was intended than the usual and ordinary meaning of the words. It is ridiculous to construe “or more” to give the seller the right to demand more than is due. Such construction would make the instrument a demand instrument, whereas the contracts in question, in fact, provide for annual installment payments over a period up to 23 years.

For these reasons, and because no proffer of evidence to the contrary was made by appellants below, there was no reason for the lower court to admit such evidence and failure to do so cannot be said to have been error.

## POINT V

APPELLANTS HAD NO RIGHT TO A JURY TRIAL BELOW FOR THE REASON THAT THE INSTANT CASE IS ONE IN EQUITY AND THE MATTERS DETERMINED BY THE LOWER COURT FROM WHICH THESE APPEALS WERE TAKEN WERE MATTERS OF LAW.

The answer to Point 5 contained in appellants’ brief appears in appellants’ own discussion, where it is stated that:

“The Constitution of the United States, the Utah State Constitution and our Rules of Civil Procedure all direct that a jury trial shall be had upon demand of any party, *unless it is an equity proceeding* or some other situation where a jury trial is not appropriate.” (Italics our) (Appellants’ Brief p. 13.)

The above Court in its original opinion in the case at bar stated that this case is one in equity. The general rule is that equitable actions, as such, are not within the constitutional provisions that the right to trial by jury shall remain inviolate so that the right as “heretofore enjoyed” shall be preserved. *Ketchum Coal Co. vs. District Court of Carbon County*, 48 U. 342, 159, p. 737 (1916); *U. S. vs. Louisiana*, 339 U.S. 699 94 L. Ed 1216, 70 S.Ct. 914 (1950); *Pacific Railway Company vs. Wade*, 91 Cal. 449, 27 P 768 (1891); *Woolsey vs. Woolsey*, 121 Cal. App. 576, 9 P. 2d 605 (1932); *U. S. Fidelity & Guarantee Company vs. Springbrook Farm Dairy, Inc.*, 135 Conn. 294, 64 A 2d. 39, 13 A.L.R. 2d 769 (1949).

Thus, the constitutional guarantees to a jury trial as are claimed by appellants were not available to them in this equity case.

This action is one for specific performance of written documents, the meaning and operation of which have been in issue since the Supreme Court affirmed the lower court to the effect that the documents were one binding agreement.

The legal effect of written instruments is a question of law to be determined by the Court, even

where the facts affecting the terms of the written instrument are in dispute as where the instruments have been lost, in which case the jury may find what the terms of the contract were. *Verdi vs. Helper State Bank*, 57 U. 502, p. 510, 196 P. 225 (1921).

In Title 78-21-3 Utah Code Annotated, 1953, it is stated that the Court is to decide questions of law, including the construction of statutes and other writings. It was thus for the Court below, not a jury, to interpret the contracts in evidence.

Appellants cite *Holland vs. Wilson*, 8 U. 2d 11, 327 P. 2d 250 (1958) which case is not in point. That action was one to quiet title, an action at law, not one in equity for the construction or interpretation of written documents as is the instant case. True, appellants herein originally interposed a counterclaim to quiet title, but that did not convert the action to one at law. In *Butler Bros. Development Company vs. Butler*, 111 Vt. 329, 108 P. 2d 1041 (1941), it was held that imposing a legal defense to an equitable action does not as a general rule entitle a party to a jury trial. (Accord: *Holland vs. Wilson, supra*; *Newbern vs. Farris*, 149 Okl. 74, 299, P. 192 (1931).) Appellants, by their counterclaim to quiet title, did not become entitled to a jury trial. Furthermore, the lower court, prior to the first appeal, expressly dismissed all of the appellants' counterclaims (R-9833, p. 12) so that subsequently there was no issue to quiet title before the court.

Even if appellants below had been entitled to a jury trial they waived such right by failing to de-

mand a jury trial. The general rule is that a failure to demand a jury trial or properly to give notice that one is desired within the time provided by statute constitutes or gives rise to a presumption that that right has been waived. Rule 38 *U.R.C.P*; *Duignan vs. U. S.*, 274 U. S. 195, 71 L. Ed. 996, 47 S. Ct. 566 (1927); *Gulbenkian vs. Gulbenkian*, 147 F. 2d 173 (1945).

Several documents appear in the record in which appellants generally allude to their claim that the court should take additonal testimony and evidence to bring out the intentions of the parties, but nowhere does there appear a demand for a jury subsequent to the first appeal. See Morris Wood's affidavit (R-10001, p. 88); appellants' Motion to stay enforcement of judgment (R-10001, p. 86); affidavit of counsel for appellants (R-10001, p. 107); stipulation (R-10001, p. 107); stipulation (R-10001, p. 114); Objections to Amendment to Decree (R-10001, p. 153); Objections to Amendment of Decree (R-10001, p. 161); affidavit (R-9833, p. 34). Appellants' failure to demand a jury below, or give notice that one was desired was a waiver of any right they may have claimed to a jury trial and not having raised the question of a right to a trial by jury below, appellants may not raise such an issue for the first time on appeal.

A jury trial may be demanded only when issues of fact arise from the pleadings, 59 *C.J.S.* p. 739, fts. 99, 2 and 3. No such issues of fact have been before the lower court since the conclusion of the

first appeal herein, and consequently, appellants have had no right to a jury.

## POINT VI

THE LOWER COURT PROPERLY DETERMINED THAT APPELLANTS WERE NOT ENTITLED TO INTEREST UNDER THE CONTRACTS.

The contracts before the Court provide that the sellers, appellants herein, were to retain all crops on property not fully paid for and released to the buyers, respondents. The referee specifically found that such provision was in lieu of interest that no interest could be charged beyond that (R-10001, p. 123, para. 8). This finding of the referee was specifically incorporated in the findings of the court. (R-10001, p. 157, para. g).

This interpretation is substantiated in the original opinion of the above-entitled Court (R-9833, p. 14) where it is stated:

“Defendants testified that they did not read the contract but understood from the oral representation of plaintiff that: . . . (2) they were to have full use of all the land until fully paid for in lieu of the payment of interest . . .”

Interest is payable on a contract only when a contract so provides. It is untenable to suppose that respondents should be required to allow appellants to retain possession of the land and the crops, and in addition, be required to pay interest on the unpaid contract balance.

The authority cited under Point 6 of appellants' brief, *Wasatch Mining Company vs. Crescent Mining Co.*, 7 U. 8, 24 P. 586 (1890) sets forth the general rule in Utah that interest may be allowed on debts overdue, even in the absence of a statute or a contract providing therefor. Respondents do not quarrel with this citation of the Utah Law, but point out to the Court that the *Wasatch* case is inapplicable to the case at bar for the reason that there is no overdue debt involved upon which the court could have allowed interest to accrue. Obviously, the unpaid contract balance is not due except as and when the annual \$5,000.00 installment payments fall due on December 31 of each calendar year (R-10001, p. 156, para. f). As stated in Point II above, however, respondents have repeatedly made timely tender to appellants so that at no time has there been any amount of the purchase price provided in said contract which could be said to be past due, and as to which interest could accrue.

The following extracts from the transcript of trial further demonstrate the agreement between the parties that appellants were to retain crops in lieu of interest:

Page 63, lines 19-22:

"A. Mr. Wood did say, 'I didn't have you any interest.' Mr. Rubey says, 'Inasmuch as you are farming the ground, well, I didn't figure I should pay any interest.' And Mr. Wood said that was all right."

Page 15, lines 17-24:

“Q. Did you have a discussion with regard to interest?”

“A. He didn’t want to pay interest. I thought inasmuch as I was cropping the land it would be all right.”

“Q. Because you would have the use and he wouldn’t be required to pay interest on the unpaid balance?”

“A. Yes.”

“Q. Is that what was said between you?”

“A. Yes.”

Page 19, lines 2-4:

“Q. Did you discuss the interest angle?”

“A. I left the interest out inasmuch as I was keeping the farm to crop. I thought that would be all right.”

The lower court, in considering the contracts before it, properly observed that prior to full payment for any portion of the land, crops were to be retained by appellants, and as to said land, the portion of the purchase price pertaining thereto, could bear no interest. Subsequent to payment in cash in full for a portion of the land to be conveyed, and upon proper notice and subsequent conveyance thereof to respondents, appellants would have received full payment, in cash, and consequently no interest could accrue on an amount already paid in full.

## POINT VII

THE COURT BELOW PROPERLY CONSOLIDATED CIVIL ACTION NO. 139263 WITH NO.

124832 AND PROPERLY DISMISSED NO. 139263.

In Civil Action No. 139263, filed with the lower court appellants sought a Declaratory Judgment asking the court to determine that the contracts which are the subject of this action, were void by reason of alleged breach. Appellants also asked for an injunction against the Rubeyes to restrain them from proceeding with their Order to Show Cause in Civil Action No. 124832 from which these appeals were taken. This was but another attempt on the part of appellants to obtain a review of matters theretofore already conclusively adjudicated.

If appellants objected to the Order to Show Cause proceedings in the case at bar, they should have filed their objections thereto in the instant case. The legal issues attempted to be raised in the declaratory judgment action No. 139263, if any such issues existed, were barred by res judicata as a result of the first Supreme Court ruling in this matter (R-9833, p. 14). In the Decree of the lower Court (R-9833, p. 43) paragraph one states:

“Civil Action 139263 be and the same is hereby consolidated with Civil Action No. 124832, the above entitled action, and after such consolidation, the Motion of the plaintiffs herein, defendants in said action, for dismissal thereof, is granted in said action, Civil No. 139263 and the whole thereof is hereby dismissed.”

Appellants took no appeal from said Decree which is therefore not before this Court. Appellants



may not properly incorporate into this proceeding an appeal from action of the court in Civil No. 139263, from which no proper appeal was taken, and the time for which appeal has elapsed.

Appellants in their brief refer to a "statutory right to amend." Counsel for respondents are aware of no statutory right to amend a pleading. Perhaps appellants have in mind Rule 15(a) *Utah Rules of Civil Procedure*, which states: "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served. . . ."

It is conceded in Civil No. 139263 that appellants would have had a right, as a matter of course, to amend their Complaint at any time before a responsive pleading was served by respondents. However, respondents did enter a responsive pleading in the form of a Motion to Dismiss, which Motion was granted by the court. This foreclosed any right appellants may have had to amend their pleadings under Rule 15(a).

The matter of granting relief under 15(a) rests largely within the sound discretion of the Court, to which the application is made, and its rulings with respect thereto will not ordinarily be disturbed unless it has been made apparent that the Court has abused such discretion. *Johnson vs. Continental Casualty Co.*, 78 U. 18, 22; 300 P. 1032 (1931). The purported issues in Civil No. 139263 were the same as issues either already adjudicated or then pending in the instant case. The two cases pre-

sent a situation squarely within the scope of Rule 42(a) *Utah Rules of Civil Procedure* providing for the consolidation of actions. The lower court, therefore, acted soundly with its discretion in consolidating Civil No. 139269 with No. 124832 and thereafter dismissing 139269, and no showing is made in appellants' brief that the court abused its discretion in that regard. Consequently the action of the lower court must stand.

Furthermore, appellants in that action, to-wit: No. 139269 for Declaratory Judgment, made no motion for leave to amend so they cannot now be heard to complain that such a motion was not granted.

Appellants further stated in their brief, "It was also error for the trial court to assume jurisdiction of a Motion to Dismiss a new case, as this matter should have gone before the regular Law and Motion Court for disposition." This statement is curious in that a motion signed by counsel for appellants appears in the record (R-9833, p. 366-37) as follows:

" . . . 3. That this Court direct a consolidation of the action brought by the above named defendants and against the plaintiffs, and being Civil No. 139263 in the above entitled Court, and also the action brought by the plaintiffs against the defendants and others, case number unknown, but which case was filed on October 4, 1962."

How can appellants who themselves moved to consolidate 139263 and 124832 now complain that the court granted the motion? Once the motion was

granted, the Motion to Dismiss filed in 139263 became a part of 124832 and was properly considered by the court as a part of the instant case. In any event, no appeal was taken from the order of dismissal.

Also, there is no merit to the claim that a Motion to Consolidate should have gone on the Law and Motion calendar when the Judge who was most familiar with the whole matter was Judge Anderson, who took the action complained of.

### POINT VIII

THE LOWER COURT PROPERLY DIRECTED THE CLERK OF THE COURT TO MAKE AND DELIVER A WARRANTY DEED TO THE RESPONDENTS SUBSEQUENT TO APPELLANTS' REFUSAL TO OBEY THE ORDER OF THE COURT TO EXECUTE SUCH DEED.

The power of the Court is set forth in the provisions of Title 78-7-17, Utah Code Annotated 1953, which defines the powers of every judicial officer, including the following:

“(2) To compel obedience to his lawful orders as provided by law.”

The Court is hereby granted inherent power to enforce its own decrees, including the ordering of the clerk to perform ministerial acts which the defendant has refused to do when ordered to do so. See *Love vs. Watkins*, 40 Cal. 547, 6 A.R. 624 (1871),

cited in *Bancroft, Pleading and Practice*, Vol. 7, p. 7380, note 18. In a specific performance action, if a party refuses to execute a deed, a commissioner may be appointed to execute it for him. Title 78-7-24, Utah Code Annotated 1953. When jurisdiction is by statute conferred on a court or judicial officer, all means necessary to declare it unto effect are also given, and in the exercise of jurisdiction. If the course of the proceeding is not specifically pointed out, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the statute or rules of procedure.

The judgment on directed verdict entered by the lower court on the 1st day of December 1960, ordered the appellants specifically to perform the contracts according to their terms. After this judgment for specific performance was unanimously affirmed by the above Court appellants continued to repudiate the contracts and refused to perform them according to the Order of the Court. Following the Order to Show Cause proceedings, a Decree was entered by the court on the 27th day of November 1962, (R-9833, p. 43-5) wherein appellants were specifically ordered to execute a Warranty Deed to that portion of the total premises paid for by respondents with their \$15,000.00 payment. In the event of the failure of appellants to execute and deliver such deed, the court ordered that the clerk of the court should execute and deliver a deed to respondents. Thereafter, appellants in fact failed and refused to execute the deed, and upon application

by respondents to the court, the clerk of the court was ordered to execute and did in fact execute a Warranty Deed and deliver the same to respondents. (R-9823, p. 53.)

Rule 70, *Utah Rules of Civil Procedure* states:

“If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the Court may direct the act to be done at the cost of the disobedient party by some other person appointed by the Court and the act when so done has like effect as if done by the party. . . .”

It would certainly be futile for the State Legislature to grant authority to the Court to order specific performance of a contract without giving it the power to enforce its order.

Where a judgment directs a party to execute a conveyance of land and the party fails, the judge may appoint someone else to perform the act (See 7 *Moore's Fed. Practice*, 2504).

In ordering the clerk to perform the mechanical act of executing a deed which appellants had failed to execute, although specifically ordered to do so, the court below did no more than exercise its inherent power to enforce its own Decree.

Appellants in their brief at page 16 state the general rule to be that a judge is required to exercise his judicial authority in person without delegation

to another. In 16 C.J.S., Constitutional Law, Sec. 166, p. 844 is stated:

“Similarly there is no delegation of power in directing a master in chancery to make a conveyance in case of non-action of the party held by the Decree to convey, or to compute the amount due or determine other matters of fact.”

It was thus not a delegation of power by the lower court when it ordered the clerk to perform a ministerial act, i.e. execute a deed upon the failure and refusal of appellants to obey the court order to do so.

## POINT IX

IT WAS PROPER FOR THE LOWER COURT TO ORDER THE CLERK OF THE COURT TO SATISFY A JUDGMENT IN FAVOR OF PLAINTIFFS-RESPONDENTS FOR ATTORNEY'S FEES AND COSTS OF SUIT OUT OF THE DEPOSIT THAT HAD BEEN MADE TO THE CLERK OF THE COURT BY RESPONDENTS.

Appellants make no comment in their brief relating to their Point No. 9. No facts are referred to and no authorities are cited on that point. Point 9 therefore should be disregarded by the Court. See Point XI below.

By stipulation dated December 7, 1962, (R-9833, p. 46) appellants stipulated that “no objection will be made to the obtaining by plaintiffs by and through their attorneys of record of the sum

of \$1,764.00 from the clerk of the above entitled Court pursuant to the said Decree entered November 28, 1962," which was in full force and effect on the day that said funds were obtained from the clerk. Therefore, by reason of said Stipulation, appellants' Point No. 9 is not well taken and is improper.

Even if the Stipulation referred to above were not in the record, the court would nevertheless have had the power to order the clerk of the court to enforce the judgment of the court for attorneys' fees and costs in that such order is merely an exercise of the inherent power of the court to enforce its decrees and judgments (See Point VIII above).

The typewritten contract dated April 18, 1959 states as follows:

"... In the event either party violates any terms herein, the offended party shall have recourse to an attorney (sic), the costs of which shall be borne by the violating party."

Subsequent to the first appeal, on the 12th day of September 1962, the court entered an additional judgment in favor of respondents and against appellants for attorney's fees in the amount of \$500.00 in connection with the first appeal in this matter arising out of appellants' refusal to perform the contract as ordered by the court. No appeal was taken from the judgment for attorney's fees, and appellants thereby waived their objection that the court could not properly award attorney's fees during the

course of the proceedings and before a final determination of this appeal.

Based on said judgment, the clerk of the court issued a garnishment against Alvin Keddington, County Clerk, garnishee, to attach a \$15,000.00 fund held by the Court and deposited by respondents in Civil Action No. 139046. The garnishment was duly served and duly executed upon out of the funds held by the clerk. All of these procedures were clearly proper and within the powers of the court and clerk pursuant to law. The awarding of judgment for attorney's fees cannot be said to have deprived appellants of due process of law for they were awarded more than their day in court on the issue of the validity and enforceability of the contracts, including provision for attorney's fees. Such action by the court cannot be said to have prejudiced the rights of mortgagees who obtained mortgages from appellants subsequent to the original Decree of the court ordering specific performance. These mortgages had no claim to the funds held on deposit by the clerk of the court, and consequently any disposition of said funds by garnishment or court order could not in any way affect the rights of said mortgagees.

## POINT X

THE LOWER COURT PROPERLY AWARDED JUDGMENT FOR ATTORNEY'S FEES IN FAVOR OF RESPONDENTS BASED UPON THE TESTIMONY OF COUNSEL FOR RESPONDENTS.



The language contained in the typewritten contract quoted above with respect to attorney's fees, makes no reference to the reasonableness thereof and the lower court properly determined that the only evidence to support an award of attorney's fees which would be required by the court was evidence of the charge made by respondents' counsel. Testimony was taken under oath before the court from counsel for respondents as to the amount charged for attorney's fees, which testimony was uncontroverted.

To disallow attorney's fees because the word attorney is misspelled in the typewritten contract is too ridiculous to deserve comment.

## POINT XI

THE APPELLATE COURT SHOULD NOT GIVE CONSIDERATION TO APPELLANTS' BRIEF FOR THE REASON THAT IT STATES ONLY POINTS OF LAW AND MAKES NO REFERENCE TO ANY FACTS IN THE RECORD TO WHICH SUCH POINTS OF LAW MAY BE RELEVANT.

Throughout appellants' brief, random references to various authorities are made without reference to any facts in the record. By failing to relate the facts from the record to points of law quoted, appellants have waived any claim of error on the part of the lower court. In *Felkner vs. Smith*, 77 U. 410, 296 P. 776 (1931) at p. 48, an action founded upon a negotiable promissory note wherein the de-

fendant appealed from the judgment of the trial court in favor of plaintiff for the amount due upon the note, this Court stated that an assignment of error was not argued in appellants' brief and therefore it was deemed waived. Similarly, appellants herein have waived any claim of error they might have argued, had they done so sufficiently.

Further, in an action to recover from an insurance company when the roof of a house collapsed, the Court in *North British and Mercantile Ins. Co. vs. Sciandra*, 256 Ala. 409, 54 So. 2d 764 (1951) said that an appellate court may deny consideration to assignments of error which are not referred to in the brief, or, while mentioned in the brief, are not supported by citations of authority or argued sufficiently. Appellants have mentioned various alleged errors in their brief but have failed to argue their points sufficiently. Appellants' brief herein can be said to be no more than a statement of points with random citations of law. None of the matters referred to in appellants' brief are sufficiently argued or sufficiently related to any facts in the record so that the above Court can intelligently make an appraisal of any alleged error supposedly committed by the lower court. For these reasons, appellants' brief should be disregarded and the action of the lower court should be affirmed.

## POINT XII

APPEAL NO. 10001 SHOULD BE DIS-  
MISSED BECAUSE THE ORDER ENTERED

SEPTEMBER 26, 1963 FROM WHICH THE APPEAL IS TAKEN IS NOT A FINAL JUDGMENT.

Rule 72(a) *U.R.C.P.* states: "An appeal may be taken to the Supreme Court from all final judgments, in accordance with these rules . . ." (See Utah Constitution, Art. 8, Sec. 9.)

A judgment, to be final, must dispose of the case as to all of the parties and finally dispose of the subject matter of the litigation on the merits of the case. *Shurtz vs. Thorley*, 90 U. 381, 384, 61 P. 2d 1262 (1936).

The order entered below on September 26, 1963 (R-10001, p. 166), is erroneous. It states:

"Defendants' Motion to overrule objections to the amendment of the decree comes regularly before the Court for hearing. The plaintiffs appearing by R. Wm. Bradford as counsel. The defendants appearing and being represented by Wm. J. Cayais as counsel. Said motion is then argued to the Court by respective counsel and submitted. Whereupon the Court having considered and being advised hereby denies said motion."

In fact it was plaintiffs' motion which was before the court. (R-10001, p. 165), by which plaintiffs-respondents moved to overrule the Objections of defendants (R-10001, p. 161) to the Amendment to Decree (R-10001, p. 155). The order of September 26, 1963, should have stated:

"Plaintiffs' Motion to overrule objections to the amendment of the decree comes regular-

ly before the court for hearing, the plaintiff appearing by R. Wm. Bradford, Jr. as counsel, the defendants appearing and being represented by Wm. J. Cayias as counsel. Said motion is then argued to the court by respective counsel and submitted. Whereupon the court having considered and being advised hereby grants said motion."

That the above statement is correct with respect to the action taken by the court September 26, 1963, is supported by the fact that there appears nothing in the record correcting or otherwise disturbing the Amendment to Decree, which would have been corrected or otherwise changed had defendants-appellants' objections thereto been allowed, rather than overruled.

In any event, action by the court with respect to Objections to Amendment to Decree or a Motion to Overrule such objections, is not such a final disposition of the subject matter of the case on the merits as would constitute an appealable "final judgment." Similarly the denial of a Motion for a New Trial is not an appealable "final judgment." *Price vs. Western Loan and Savings Co.*, 35 U. 379, 100 P. 677 (1909); *Nunley v. Katz*, ..... U. 2d ....., 388 P. 2d 798 (1964); *Haslam v. Paulsen* ..... U. 2d ....., 389 P. 2d 736 (1964).

Appellants in their brief appear to assume that they have appealed from the entry of the only appealable final judgment which appears in the record subsequent to the first appeal, i.e. the July 29, 1963 Amendment to Decree. (R-10001, p. 155), but this they have not done, as will be shown hereinafter.

It is true that appellants' Notice of Appeal (R-10001, p. 167) refers to "all orders and decisions rendered by the above-entitled Court with respect to all proceedings that have been had since the above-entitled matter was reconsidered after return from the Supreme Court." Also, the Notice further states: "This appeal is on every decision and order rendered herein as well as the report of the referee which was adopted after objections by the above entitled Court."

Such sweeping language is certainly contrary to the intent of Rule 73(b) *U.R.C.P.*, which requires specific designation of the judgment appealed from. *Price vs. Western Loan and Savings Co.*; *Nunley vs. Katz*, *supra*. It is submitted that by failing to specify the July 29, 1963 Amendment to Decree in their Notice of Appeal appellants have failed to appeal therefrom.

A litigant is not entitled to review, on appeal, of that from which he has not appealed. In *Nunley vs. Katz*, *supra*, this Court dismissed an appeal on the grounds that appellants there were not entitled to review of a judgment entered December 3, 1962, where the Notice of Appeal specified a judgment entered January 3, 1963. The Court there stated: "Respondent is entitled to know specifically which judgment is being appealed." Appellants there contended that the reference in the Notice to the wrong judgment was a clerical error which should have been corrected by the Court under Rule 60(a)

*U.R.C.P.* The Court denied this contention and dismissed the appeal.

Appellants in the case at bar have not appealed from the July 29, 1963, Amendment to Decree, but only from the September 26, 1963, minute order which was not a final judgment which this court may consider on appeal.

In *Price vs. Western Loan and Savings Co.*, supra, appellant designated in the Notice of Appeal, not the final judgment entered September 26, 1960, but an order denying a Motion for New Trial entered December 8, 1960. The court held that appeal did not lie. Likewise Appeal No. 10001, does not lie, for similar reasons.

The fact that the time within which appellants may file a Notice of Appeal under Rule 73(b) *U.R.C.P.* begins to run from the denial of a Motion for a New Trial under Rule 59, or the overruling of Objections to findings under Rule 52, does not allow appellants to specify, in a Notice of Appeal filed within said time, an order from which no appeal can be taken, instead of the final judgment. Appellants in No. 10001 filed their Notice of Appeal (R-10001, p. 167) within ten days after the Minute Order of September 26, 1963, (R-10001, p. 166) but having failed to appeal specifically from the Decree of July 29, 1963, (R-10001, p. 155) their appeal should be denied for the reasons, and based upon the authority hereinabove set forth.

## CONCLUSION

It is respectfully submitted that upon the foregoing presentation of authorities and argument that the action of the lower Court from which these appeals were taken was proper and that the said action should be affirmed.

Respectfully submitted ,

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