

1969

Therald N. Jensen, Executor Of The Estate Of  
Clarence Ander-Son, Deceased v. Henry O.  
Anderson And Dorothy Anderson Vs Robert  
Radakovich : Appellant's Brief

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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THERALD N. JENSEN, Executor of  
the Estate of CLARENCE ANDER-  
SON, Deceased,

*Plaintiff-Appellant,*

vs.

HENRY O. ANDERSON and DORO-  
THY ANDERSON, husband and  
wife,

*Defendants-Appellants,*

vs.

ROBERT RADAKOVICH,

*Intervenor-Respondent.*

Case No.  
11367

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APPELLANT'S BRIEF

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Appeal from the Judgment of the  
7th District Court for Carbon County  
Hon. Ferdinand Erickson, Judge.

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FILED

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Clerk, Supreme Court, Utah

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*Intervenor-Respondent.*

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APPELLANT'S BRIEF

---

STATEMENT OF THE KIND OF CASE

This is an action for specific performance of an  
alleged option to purchase.

DISPOSITION IN LOWER COURT

The case was tried to the court and an advisory  
jury. From a judgment for the Intervenor, the Plain-  
tiff and Defendants appeal.

RELIEF SOUGHT ON APPEAL

Plaintiff and Defendants seek reversal of the  
judgment and judgment in their favor as a matter of  
law.

## STATEMENT OF FACTS

One Clarence Anderson died on July 13, 1966, and Letters Testamentary on his estate were issued on August 9, 1966 to the Plaintiff and Appellant, (hereinafter referred to as the "Plaintiff"). On October 11, 1966, the Intervenor and Respondent, (hereinafter referred to as the "Intervenor"), served upon the Plaintiff notice that he exercised an alleged Option to Purchase, purportedly signed by the decedent Clarence Anderson, and made a tender of \$26,975.00, which was refused by the Plaintiff as Executor of said decedent's estate. Henry O. Anderson, Defendant and Appellant, (hereinafter referred to as the "Defendant"), filed a notice with Plaintiff as Executor that he was the owner of an undivided one-half interest in the real property and water stock listed as an asset of the aforesaid decedent's estate. The Plaintiff thereafter instituted a suit to quiet title as against the Defendant Henry O. Anderson and his wife Dorothy, and Robert Radakovich intervened and set up his alleged option to purchase. The Plaintiff denied the validity of the option; affirmatively alleged that there was no consideration for the option; denied that the decedent signed the option; affirmatively alleged that the decedent was illiterate, and if it was established that he did sign the option that he did not understand the same; and that the alleged option being incomplete, indefinite and uncertain, it was unenforceable and void. The Defendant denied the validity of the option upon the ground that the decedent, in winding up the

dissolved partnership that at one time existed between himself and the decedent, was without authority to contract for the sale of partnership assets without his express consent, and that title to a portion of the property described in the alleged option was in the name of the Defendant. Thus the issues were joined, and the trial held thereon. The lower court submitted but one interrogatory to the jury: "Did Clarence Anderson sign the paper styled 'Option to Purchase' \* \* \* ?" A majority of the jurors answered in the affirmative, and the lower court adopted the jury's finding, and on all the remaining issues, both of fact and of law, found in favor of the Intervenor and against the Plaintiff and Defendant; fixed the monetary value of the remaining interest of Henry Anderson; and provided terms of payment by the Intervenor. From this decree the Plaintiff and Defendant prosecute this appeal.

## ARGUMENT

### POINT I

THAT THE ALLEGED OPTION IS INDEFINITE AND UNCERTAIN, AND RESERVED TO THE OPTIONEE AN UNLIMITED OPTION TO DETERMINE THE EXTENT OF HIS ACCEPTANCE OF ITS TERMS.

The alleged option reserve to the optionee an unlimited right to determine whether he will purchase from the optionee *any or all of the property* owned by the optioner, thereby giving him an unlimited election as to whether he would purchase *any or all* of the range ground, and *any or all* of the sheep.

As to terms of payment provided for in the al-

leged option, they lack certainty in several respects. There is no specification as to how the payments are to be made: annually, semi-annually, or lump sum at the end of the term? How the interest was to be paid: annually, semi-annually, or monthly? Was there to be a conveyance of the real estate and a mortgage back to secure payment, or was a contract of sale contemplated? If the optionee elected to purchase the sheep, and paid down one-fourth of their value, with the balance to be paid in 17 years, would he be required to keep the herd at the same level or could he with impunity dispose of any or all of the sheep? Obviously, numerous questions and situations are suggested by a mere reading of the unlimited provisions of the alleged option which determine its uncertainty and indefiniteness in all particulars. In 12 Am. Jur. Contracts, 558, Sec. 66, it is said:

A reservation to either party to a contract of an unlimited right to determine the nature and extent of his performance, renders his obligation too indefinite for legal enforcement.

In *Pitcher v. Lauritzen*, 18 Utah 2d 368, 423 P.2d 491, this Court had under consideration an earnest money receipt and offer to purchase, of which specific performance was demanded. The offer to purchase, under consideration in that case provided that a balance of \$25,000.00 was to be carried by the seller on *contract or second mortgage*. This Court posed the question:

Which would the court require? \* \* \* How



are the payments to be made: annually, semi-annually, or lump sum at the end of the term? How was interest to be paid: annually, semiannually, or monthly? \* \* \*.

And, this Court held that the earnest money receipt and offer to purchase lacked such certainty as to prevent the court from granting specific performance.

In the instant case, the Plaintiff poses the question: Are not the identical uncertainties present in the alleged option to purchase now before this Court?

In *Candland v. Oldroyd*, 67 Utah 605, 248 Pac. 1101, this Court quoted with approval Page on Contracts as follows:

In order to be the basis of a decree of specific performance in equity, the contract must be so certain that the chancellor's decree can specify exactly what must be done in order to comply therewith. A lack of certainty as to the length of time that the contract is to remain in force, or as to the method of securing obligations for deferred payments, prevents specific performance.

However, the district court in the instant case did undertake to make certain that which was uncertain, and to specify that the balance of the principal should be paid *within* 17 years; that interest should be paid *at least annually*; and that legal title should remain in the beneficiaries under the will of Clarence Anderson, deceased, until paid.

The option to purchase with which we are con-

cerned in this cause was personally prepared and drafted by the Intervenor himself. (See: Published deposition of Robert Radakovich at page 7, lines 21 and 22). Options for the purchase of real estate are usually strictly construed as against the person whose right it is to exercise the option. *Krall v. Light*, 210 S.W.2d 739 and *Johnson v. Smith*, 269 P.2d 384. And this Court held quite specifically in *Maw v. Noble*, 10 Utah 2d 440, 354 P.2d 121 that it is in agreement with the well-recognized rule that where there is uncertainty or ambiguity the contract should be strictly construed against him who draws it.

## POINT II

THERE WAS NO CONSIDERATION FOR THE ALLEGED OPTION.

The position of the lower court was that an option itself doesn't require a consideration. (See: Transcript of Proceedings page 7, lines 11 and 12; Transcript of May 20, 1968, page 76, lines 14 and 15, and page 79, lines 23 and 24).

The authorities are in harmony that an option to be valid and effective must be supported by a consideration. 91 C.J.S. Vendor & Purchaser, p. 848, Sec. 7, and 55 Am. Jur. Vendor & Purchaser, p. 502, Sec. 32.

It is conceded that the authorities disagree as to whether a nominal consideration is sufficient; however, in the instant case it is the position of the Plaintiff that the alleged option was without consideration.

The alleged option in question recites: "Con-

sideration: Robert Radakovich has helped me a lot on the place building sheds, with my selling and buying plus numerous other tasks *all at no cost to me*, which would be great if paid for." This is the alleged consideration for the option as stated by the Intervenor himself, he having personally drafted the alleged document; and the lips of the decedent, Clarence Anderson, are sealed by death. This is the alleged option that Calvin Rampton, as attorney, suggested to the Intervenor should be replaced by a legal one. (See: Published deposition of Robert Radakovich at page 14, lines 21 and 22, and page 15, lines 1, 2 and 3). Specifically and unequivocally, the reference in the alleged option is to a past consideration which would support no promise whatever. In 17 C.J.S. Contracts, pages 837-38, Sec. 116, appears a concise statement on this subject:

\* \* \* by the great weight of authority a past consideration, if it imposed no legal obligation at the time it was furnished, will support no promise whatever. \* \* \*

A past consideration, it is said, is some act or forbearance in times past by which a man has benefited without thereby incurring any legal liability; if afterward, whether from a good feeling or from interested motives, he makes a promise to the person by whose act or forbearance has benefited, and that promise is made on no other consideration than the past benefit, it is gratuitous and cannot be enforced; it is based on motive and not consideration. Thus services rendered or money expended in the past, but not at the express or implied request of the

person benefited by them, or at his request but without an understanding that they were to be paid for, will not support a promise by him to pay for them.

And, it is further stated in the same authority at page 778, Sec. 90:

Where services are rendered and benefits conferred without any request and under circumstances rendering lack of expectation to be compensated therefor highly improbable, no obligation to make such compensation arises and a promise founded on motives of honor or gratitude is not a sufficient consideration.

The purported consideration recited in the alleged option is not supported by the evidence—there is testimony, both oral and documentary, that the help rendered Clarence Anderson by the Intervenor, was not at no cost.

Assuming for purpose of argument that the Intervenor had helped the decedent at no cost to him, and that this created a moral obligation on the part of the decedent to compensate the Intervenor, such moral obligation would not constitute a valid consideration. In *Manwill v. Oyler*, 11 Utah 2d 433, 361 P.2d 177, this court said:

The rule quite generally recognized is that a moral obligation by itself will not do so (constitute a valid consideration). Although some authorities appear to be otherwise, it will usually be found that there are special circumstances bolstering what is termed the moral obligation. The difficulty we see with the doctrine is that

if a mere moral, as distinguished from a legal obligation were recognized as valid consideration for a contract, that would practically erode to the vanishing point the necessity for finding consideration. This is so, first because in nearly all circumstances where a promise is made there is some moral aspect of the situation which provides the motivation for making the promise even if it is to make an outright gift. And second, if we are dealing with moral concepts, the making of a promise itself creates a moral obligation to perform it. It seems obvious that if a contract to be legally enforceable need be anything other than a naked promise, something more than a mere moral consideration is necessary. The principle that in order for a contract to be valid and binding, each party must be bound to give some legal consideration to the other by conferring a benefit upon him or suffering a legal detriment at his request is firmly implanted in the roots of our law.

In the instant cause, we have a situation where, under any justifiable theory, there was no consideration whatever for the execution of the alleged option. The evidence fails to support the Intervenor that he helped the deceased a lot on the place building sheds, selling and buying, and other tasks, all at no cost to the deceased. The alleged option itself is reputed to be upon a past consideration which will not support it. Viewed in the light that there was a moral obligation upon the part of the deceased, such moral obligation did not constitute a valid consideration.

### POINT III

#### PREJUDICIAL COMMENTS OF THE LOWER COURT IN THE PRESENCE OF THE JURY.

The district court by inuendo indicated to the jurors that it had an unfavorable opinion as related to the testimony of expert witnesses. (See: Transcript of Proceedings pg. 202, lines 3 and 4) ; and reference to the Transcript of Proceedings discloses the lower court's impatience with the testimony of Plaintiff's highly qualified handwriting expert. (See: Transcript of Proceedings pg. 161 lines 19 and 20) ; and the argumentative statements of the court in the presence of the jury were most prejudicial. (See: Transcript of Proceedings, p. 161, lines 1 to 3 and 13 to 16; page 167, lines 9 and 10; pg. 197, lines 6, 7, 11, 12 and 13; page 200, lines 4 and 5; comments of the court on pages 202 and 203; page 205 lines 8 to 16; and page 299 lines 3 to 8.)

### POINT IV

#### THE LOWER COURT ERRED IN THE GIVING OF ITS INSTRUCTION NO. 12.

By instructing the jury that the Plaintiff was "trying to defeat the effect of the written instrument entitled 'Option to Purchase' ", the court impliedly instructed the jury that the Plaintiff was at fault in prosecuting the law suit, and that his efforts to defeat the option had failed.

The execution of the alleged "Option to Purchase" having been placed in issue, and the signing of same

by the deceased having been denied; the burden of going forward with the evidence shifted to the Plaintiff, but the burden of proof, or risk of non-persuasion, remained with the Intervenor throughout the trial to establish the due and valid execution of the alleged "Option to Purchase." However, the district court's instruction "that as a written instrument, said 'Option to Purchase' is endowed with a presumption of validity." And that, "This presumption of validity can only be overcome by clear and convincing evidence and the burden is on the defendant (Plaintiff) as Executor of the estate of Clarence Anderson, deceased, to produce such clear and convincing evidence." Such instruction placed the full burden of proof on the Plaintiff to sustain his position. 32 C.J.S. Evidence, p. 793, Sec. 625 reads:

The admission of the instrument on preliminary proof of its execution does not relieve the party of the burden of proving to the jury its due and valid execution, and questions as to its genuineness, the weight to be accorded it, and the like, are for the jury.

The Intervenor was the one upon whom first fell the duty of going forward with evidence. After meeting that duty, and making out a prima facie case, the burden shifted to the Plaintiff, but the risk of non-persuasion never shifted, and remained the burden of the Intervenor throughout the trial. *Kartchner v. Horne*, 1 Utah 2d 112, 262 P. 2d 749.

## POINT V

THE LOWER COURT ERRED IN ITS REFUSAL TO GIVE PLAINTIFF'S REQUESTED INTERROGATORY NO. 2.

"Did the deceased know or understand what he was signing or as a reasonable person should he have known or understood what he was signing?" The district court regarded the illiteracy of the deceased as a question of law. (See: Transcript, page 49, lines 6 to 10; and page 54, line 26; page 55 and page 56, lines 1 to 7).

## POINT VI

BY ITS DECREE THE LOWER COURT AWARDED THE INTERVENOR LANDS NOT EMBRACED WITHIN THE ALLEGED "OPTION TO PURCHASE."

The alleged option covers "From 3,800 to 4,200 acres of range ground located at Scofield, Carbon County, Utah \* \* \*." And, "The farm located in Miller Creek consisting of around 200 acres \* \* \*." The lower court's decree, in addition, covers 160 acres of land classified in the Findings and Decree as Mountain land which is in the joint names of Clarence Anderson and Henry O. Anderson, one of the defendants in the action. This land is described as the SE $\frac{1}{4}$  of Section 34, Township 12 South, Range 7 East, SLB & M. (Page 4 of the Findings, page 2 of the Decree). The lower court's Findings in addition also include 640 acres described as valley land and specifically described as all of Section 2, Township 15 South, Range 9 East SLB & M. (Page 5 of the Findings, and page 3 of the Decree).



The lands in Section 16 and 21, Township 15 South, Range 10 East, SLB & M. described at page 5 of the Findings and page 3 of the Decree total 240 acres which exceeds the 200 acres of farm land in Miller Creek referred to in the alleged option. The 640 acres of land in Section 2 is in a different township and range and is not in Miller Creek but is located approximately four miles Northwesterly from the farm on Miller Creek. This 640 acres was acquired by Clarence Anderson after the date of the alleged option and was purchased by him from the State of Utah. This 640 acres is not farming land and cannot be farmed as the same lies above the irrigation canals.

The Intervenor did not introduce any testimony at the trial to identify the particular tracts of land as being within the general description of "range land located at Scofield" and "farm land located in Miller Creek" as set forth in the alleged option. All that was introduced was the Inventory and Appraisement in the probate proceedings in the Clarence Anderson estate. This inventory at best could only be construed to describe the land that Clarence Anderson owned at the time of his death and would not be evidence of what he owned on the date of the alleged option.

## POINT VII

THE ALLEGED OPTION IS NOT BINDING UPON THE PARTNERSHIP OR THE SURVIVING PARTNER.

The property which is the subject of the alleged option belonged to the partnership comprised of the

decedent, Clarence Anderson, and the defendant, Henry O. Anderson. Record title to part of the land was and still is in the name of Clarence and title to part was and still is in the name of Henry. By mutual agreement Henry withdrew from the partnership and Clarence continued to operate the partnership property. No final settlement was made prior to the death of Clarence. The alleged option was not signed by Henry and Henry had no knowledge of its execution by Clarence. (See Stipulation and Findings of Fact and Conclusions of Law in case file.)

That the partnership was not terminated by the withdrawal of Henry is made clear by Sec. 48-1-27, UCA, 1953, which provides as follows:

“On dissolution a partnership is not terminated, but continues until the winding up of partnership affairs is completed.”

Sec. 48-1-32, UCA, 1953, specifies the authority of a partner to bind the partnership after dissolution, providing in part:

“(1) After dissolution a partner can bind the partnership, . . .:

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution.”

It seems clear that the option given by Clarence does not come within the meaning of the provision “completing transactions unfinished at dissolution”. There were no negotiations for sale of the property to intervenor pending at the time of dissolution.

The precise question is whether or not the option to sell all of the partnership property given by one of the partners after dissolution falls within the meaning of "any act appropriate for winding up partnership affairs". Winding up of partnership affairs means the administration of the assets for the purpose of terminating the business and discharging the obligations of the partnership to its creditors and members. *Duncan v. Bartle* (Oregon, 1950), 216 P.2d 1005, 1013.

The general rule as to the power of a partner after dissolution is set forth in 40 Am. Jur, Partnership 318, Sec. 274, as follows:

"Upon the dissolution or termination of a partnership the general agency of one partner for his copartners ceases, although the mutual agency to a certain extent is prolonged until the affairs of the partnership are administered and wound up. As between themselves, neither partner after dissolution has any power whatever to act for or bind the other. And as regards third persons, the dissolution of the partnership works an absolute revocation of all implied authority in either of the partners to bind the other to new contracts or obligations, or to create any new cause of action binding copartners or the firm, except when made by express authority;..."

Of similar import is 68 CJS Partnership, 868, Sec. 362:

"The general rule is that the dissolution of a partnership terminates the implied authority of each partner to enter into new obligations

on behalf of the firm or of his copartners; but this rule does not prevent the contracting or incurring of obligations, in the due course of settling the affairs of the partnership, by reason of transactions prior to the dissolution."

As to the power of a liquidating partner in winding up the partnership, 40 Am Jur, Partnership 325, Sec. 283 states:

"By virtue of his appointment he does not possess any power he did not have before, and without express authorization he cannot bind the partnership in any manner or for any purpose not before within the ordinary powers of a partner. Thus, a liquidating partner cannot make new contracts, or create new liabilities as by giving promissory notes binding on the firm; nor can he extend the time for the payment of existing obligations of the firm, or make acknowledgements of the validity of claims against the firm. For the purpose of winding up the concern however, the liquidating partner has the same general power to bind the firm as he had before, and may bind the partnership by borrowing money to meet its accruing liabilities, and may sell its real estate to raise money to pay its debts."

At the time the alleged option was executed by the deceased there was no necessity to sell the property in order to pay partnership debts. The option constituted a new contract, of which the defendant had no knowledge. By the terms of the option, Intervenor was to have 6 years in which to exercise it and if exercised, a 17 year period in which to make payment. This constituted a new obligation upon the partnership which

was beyond the power of the deceased to make. When a partnership is dissolved the authority of one partner to create a new obligation for the partnership is revoked and his agency for his copartners ends. Credit Bureau of San Diego v. Beach (Calif. 1956), 301 P 2nd 87, 90.

## CONCLUSION

The decree and judgment of the lower court should be reversed.

Respectfully submitted,

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