

1969

A. Norman Grover; Arthur N. Grover; Estella v. Grover; Floyd E. Grover; Fay G. Wight; Amy G. Jensen; Max L. Grover; Jesse G. Parry; Joyce Anna G. Smith And June G. Huffman v. Oleen Garn And Maxine B. Garn, His Wife; Darvel Garn And Bonnie L. Garn, His Wife; Clive Garn And Aloha Garn, His Wife And Arthur N. Grover Farms Inc. A Corporation And Arthur N. Grover Farms Inc. A Corporation v. Oleen Garn And Maxine B. Garn, His Wife; Darvel Garn And Bonnie L Garn, His Wife; And Clive Garn And Aloha Garn, His Wife : Respondent's Brief

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. Walter G. Mann & Reed W. Hadfield; Attorneys for Respondents

Recommended Citation

Brief of Respondent, *Grover v. Garn*, No. 11472 (1969).
https://digitalcommons.law.byu.edu/uofu_sc2/4465

IN THE SUPREME COURT OF THE STATE OF UTAH

A. NORMAN GROVER; ARTHUR N. GROVER;
ESTELLA V. GROVER; FLOYD E. GROVER;
FAY G. WIGHT; AMY G. JENSEN; MAX L.
GROVER; JESSE G. PARRY; JOYCE ANNA
G. SMITH and JUNE G. HUFFMAN,

Plaintiffs and Appellants,

vs.

OLEEN GARN and MAXINE B. GARN, his
wife; DARVEL GARN and BONNIE L. GARN,
his wife; CLIVE GARN and ALOHA GARN, his
wife and ARTHUR N. GROVER FARMS INC.
a corporation,

Defendants and Respondents.

Case No.
11472

ARTHUR N. GROVER FARMS INC.

a corporation,

Plaintiff and Appellant,

vs.

OLEEN GARN and MAXINE B. GARN, his
wife; DARVEL GARN and BONNIE L. GARN,
his wife; and CLIVE GARN and ALOHA GARN,
his wife,

Defendants and Respondents.

RESPONDENTS' BRIEF

Appeal from the Judgment of the First Judicial District Court
of Box Elder County, Utah
Honorable Lewis Jones, Judge

MANN & HADFIELD

Walter G. Mann & Reed W. Hadfield

Attorneys for defendants and respondents

35 First Security Bank Building

Brigham City, Utah 84302

VAN COTT, BAGLEY, CORNWALL
& MCCARTHY

Clifford L. Ashton

Attorney for plaintiffs and appellants

141 East First South

Salt Lake City, Utah 84111

FILED

NOV 3 - 1905

Clara Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
POINTS RELIED UPON	17
POINT I. THE CONTRACT OF SALE IS VALID BECAUSE IT WAS AUTHORIZED BY ALL OF THE STOCKHOLDERS WHO WERE THE ACTUAL BOARD OF DIREC- TORS.	17
POINT II. THE CORPORATION SHOULD BE ESTOPPED FROM DENYING THE VALIDITY OF THE CONTRACT.	18
POINT III. THE GROVERS USED THE CORPORATION FOR THEIR INDIV- IDUAL PURPOSES, ARE PARTIES TO THE CONTRACT OF SALE, DID EXE- CUTE IT NOT ONLY AS INDIVIDUALS BUT ALSO AS OFFICERS AND DIREC- TORS AND ARE PERSONALLY LIABLE UNDER IT.	18
POINT IV. THE COURT DID NOT ERR IN FINDING THAT THE CONTRACT OF	

	Page
SALE WAS PREPARED BY THE GRO- VERS AND THEIR ATTORNEY.	18
POINT V. THE FINDINGS OF THE TRIAL COURT ARE CLEARLY SUP- PORTED BY THE WEIGHT OF THE EVIDENCE AND SHOULD NOT BE DIS- TURBED.	18
ARGUMENT	19
SUMMARY	46

CASES CITED

Bear River State Bank v. Merrill, 120 P2d 325, 101 Ut. 176	45
Beesley v. Beesley, 296 P2d 274, 5 Ut.2d 20	45
Bradford v. Sunset Land & Water Co., 157 P20, 30.Cal App. 87	38
Brunzell Construction Company Inc v. Harrahs Club, 37 Cal.Reptr 659	26
Fontaine v. Brown Co., Motors Co., 251 Wis 433, 29 NW 2d 744 174 ALR 694	43
Gottschalk v. Avalon Realty Co., 249 Wis 78, 23 NW2d 609	42
Halbert v. Berlinger, 273 P2d 274	32
Heiselt v. Heiselt, 349 P2d 175, 10 Ut.2d 126	45
Henry Building Co. v. Cowman, 363 P2d 208	21
Herring v. Fisher, 242 P2d 963	33
Ipstein v. Gonneen, 235 App.Div. 33, 256 NYS 49..	43

	Page
Jeppi v. Brockman Holding Co., 34 Cal 2d 11, 9 ALR 2d 1297, 206 P2d 847	34-35
Jewell v. Horner, 366 P2d 594, 12 Ut.2d 328	45
Keck Enterprises Inc. v. Braunschweiger, 108 F. Supp. 925	41
Lange v. Reservation Mining & Smelting Co., 48 Wash. 167, P.208	40
Minifie v. Rowley, 187 Cal.481, 202 P673	28
Painter v. Brainard-Cedar Realty Co., 28 Ohio. App 123, 163 N.E. 57	41
Russell v. Golden Rule Mining Company, 159 P2d 776	20
Seeburg v. El Royale Corp., 54 Cal.App 2d, 1, 128 P2d 362	38
Smith v. Flathead River Coal Co., 66 Wash 408, 119 P 858	41
Talbot v. Fresno Pacific Corp., 5 Cal.Rptr 361	28
Taylor v. Newton, 257 P2d 68	27
Tuttle v. Junior Building Corp., 227 NC 146, 41 SE 2d 363	42
Wenban Estate Inc. v. Hewlett, 227 P. 723	24

STATUTES CITED

Section 16-10-6, Utah Code Annotated, 1953, as amended	29
Section 16-10-74, Utah Code Annotated, 1953, as amended	29

TEXTS CITED

9 ALR.2d 1306, 1312	36, 37
58 ALR.2d 784, 786, 788	29
13 Am.Jur. Art 7, page 160	23
Fletchers Encyclopedia on Corporations Vol. 1, pp. 134, 136 and 165	28
1 Later Case Service, ALR2d 950	37

IN THE SUPREME COURT OF THE STATE OF UTAH

A. NORMAN GROVER; ARTHUR N. GROVER;
ESTELLA V. GROVER; FLOYD E. GROVER;
FAY G. WIGHT; AMY G. JENSEN; MAX L.
GROVER; JESSE G. PARRY; JOYCE ANNA
G. SMITH and JUNE G. HUFFMAN,

Plaintiffs and Appellants,

vs.

OLEEN GARN and MAXINE B. GARN, his
wife; DARVEL GARN and BONNIE L. GARN,
his wife; CLIVE GARN and ALOHA GARN, his
wife and ARTHUR N. GROVER FARMS INC.
a corporation,

Defendants and Respondents.

Case No.
11472

ARTHUR N. GROVER FARMS INC.
a corporation,

Plaintiff and Appellant,

vs.

OLEEN GARN and MAXINE B. GARN, his
wife; DARVEL GARN and BONNIE L. GARN,
his wife; and CLIVE GARN and ALOHA GARN,
his wife,

Defendants and Respondents.

RESPONDENTS' BRIEF

STATEMENT OF THE KIND OF CASES

The plaintiffs in the above case seek to cancel a contract of sale whereby Arthur N. Grover Farms Inc. a

Utah corporation sold on contract for the sum of \$186,535.00, certain farm lands, water-rights and grazing rights located in the State of Idaho, to the defendants.

DISPOSITION IN LOWER COURT

Respondents adopt the statement made by appellants in their brief as to the disposition in lower court.

RELIEF SOUGHT ON APPEAL

Respondents seek to have the appellate court sustain the lower court in its decision.

STATEMENT OF FACTS

We do not agree with plaintiffs' Statement of Facts. Our Statement of Facts is as follows:

Arthur N. Grover and his wife Estella V. Grover were the owners of certain dry-farm lands in Idaho in what is known as Pocatello Valley, just across the Utah line. They formed a corporation known as Arthur N. Grover Farms Inc. and transferred to their corporation the title to their lands. They did so under the guidance of their attorney E. J. Skeen in the year 1963. In order to comply with the legal requirements of three incorporators, they used the name of Fay G. Wight, one of their daughters, who resided in the State of California as the third incorporator. This corporation was formed as

shown by the Articles (Exhibit #10) on the 1st day of March, 1963. The Articles provided (Article 4) for authority to issue 100 shares of stock. The stockbook (Exhibit #9) shows that there were three certificates of stock issued September 20, 1963. The first certificate was to Fay G. Wight for one share, the second certificate to Estella V. Grover for 45 shares and the third certificate for 45 shares to Arthur N. Grover.

The record further shows Fay G. Wight did not receive the certificate of stock for the one share issued by the corporation (see answer to Interrogatories in Civil File #10081 being answer to Interrogatory #1) until about August, 1965. Also, according to Fay G. Wight and Attorney E. J. Skeen, when the corporation was first organized Fay G. Wight, as president of the corporation, signed in blank for her father (R. 120, 781, 782) all the certificates of stock in the stockbook. This would then make it possible for her parents to issue stock to whomever they wanted, without contacting her. By this act she literally placed the full control of the corporation in the hands of her father and mother because they had a stockbook signed completely in blank by their daughter Fay G. Wight, as president. The one share to the daughter was not delivered to her. Her certificate could be canceled at any time and a new certificate issued by the use of the blank certificates that she had signed and left with her parents.

Thereafter the father filed with the Secretary of State, pursuant to Section 16-10-121 of the Utah Busi-

ness Corporation Act, the first annual report on the 2nd day of March, 1964. This was signed by him before a notary, being Nancy Lee Bishop the secretary of E. J. Skeen the attorney who had prepared the Articles of Incorporation (Defendants' Exhibit #10). This affidavit stated that 91 shares of stock had been issued as of that date. He again, on August 2nd, 1965, filed a second annual report under oath setting out that 92 shares had been issued in said corporation as of that date. The stockbook does not agree with these affidavits. The first three certificates equal 91 shares. These three certificates would equal the number of shares claimed issued on the first annual report as of March 2nd, 1964, filed with the Secretary of State. However, the stockbook certificate #4 shows one share of stock issued to Leonard Grover dated September 24, 1963. Certificate #5 shows one share of stock issued to Dr. Floyd E. Grover dated September 24, 1963. Certificate #6 shows one share of stock issued to Amy G. Jensen dated September 24, 1963. Certificate #7 shows one share of stock issued to A. Norman Grover dated September 24, 1963. Certificate #8 shows one share of stock issued to Max L. Grover dated September 24, 1963. Certificate #10 shows one share of stock issued to Joyce Anna Smith dated September 24, 1963. These certificates so issued make a total of 98 shares issued, all in the month of September, 1963, when the affidavits filed under oath show 91 shares as of March, 1964, and 92 shares as of August, 1965.

The court found (R. 880, 881) that no stock was

owned by other than the father and mother on the date of sale to the defendants Garn, to-wit: October 1st, 1964, which supported the contention of the defendant that the certificates shown issued in the stockbook were made up at a later date and back-dated for the purpose of assisting the plaintiffs in their cause of action.

A close examination of the stockbook (Exhibit #9) shows there are only stubs for twenty-three certificates, a peculiar number for a bound stockbook. Also, in the binding in the back there appears to show a small part of a stub still remaining after the major portion of it has been torn out. Also, certificate number 19 is dated May 16, 1964, while certificates numbers 11 to 18 inclusive, are dated July 16, 1964, which further indicates someone was mixed-up when this stockbook manipulation was attempted.

Mr. Grover had farmed this property alone or with the aid of tenants for many years prior to the year 1964. However he had decided to sell, and had listed his property for sale on the 22nd day of October, 1963 (Exhibit #31). He had also told other people about his desire to sell this property, one of whom was Charles Wood (R. 6, 226, 227) and as a result of this information Oleen Garn, one of the defendants, went to see the property in Idaho and met Arthur N. Grover upon the property. This occurred in September of 1964 (R. 7).

Mr. Grover showed Oleen Garn over the property and quoted him certain prices (R. 8). They arranged a second meeting and Mr. Garn and his two sons, the

other two named defendants in this law suit, returned and were shown the Grover property by Mr. Grover. Again, they discussed a purchase price of \$140.00 per acre for the tillable dry-farm ground which had been previously placed in crop. Mr. Grover asked no down payment but did request an annual payment. A \$15,000.00 figure was discussed which would include the range ground, water and Taylor Grazing rights. The Garns could have borrowed the money and paid him in full in one payment, but he stated his attorney had advised him to sell it in the manner he outlined. Mr. Grover said he wanted a low rate of interest, 3%, and a high price per acre for tax purposes. He also said he wanted his payments based upon one half ($\frac{1}{2}$) of the crop. He asked for a down payment of only \$10.00 to show good faith. Mr. Grover was to go back to Salt Lake and have his attorney draw up a contract of sale and the Garns were to meet him in the office of the First Security Bank in Brigham City, Utah (R. 9, 11, 12, 533, 537, 625, 626, 627, 628, 629, 630, Exhibit 40).

A working copy of some agreement was later taken by Mr. Grover to the First Security Bank where Mr. J. Leo Nelson, one of the officers, met with Mr. Grover and the Garns and the terms of the first contract prepared by the Attorney for Mr. Grover, E. J. Skeen, were discussed. There was also discussion about the property being owned by a corporation, and, the fact that the corporation had 91 shares of stock issued, 45 shares to Mr. Grover, 45 shares to Mrs. Grover and one share to a daughter named Fay G. Wight. Mr. Grover,

at that time, appeared very alert, and fully able to understand what he was doing and saying.

This first contract had no minimum payment provided in the contract, and on the advice of the banker there were some changes made. Mr. Grover said he wanted to convey 120 acres of the land to a daughter, and as this was agreeable to all parties the contract was taken back to Mr. Grover's attorney E. J. Skeen, to make the final corrections. It was then to be returned for signatures.

On the 26th day of September, 1964, Mr. Grover either drove or had someone drive him to the Garns' home in Fielding, where he presented to the three Garns a contract which he had apparently had prepared and requested the Garns to sign it, which they did. He said that Mr. Skeen was out of his office and the final draft was not finished but he wanted this signed while awaiting the final draft (Exhibit 33, R. 12, 13, 14, 15, 540, 542, 543, 544, 546, 547, 631, 632, 633, 634, 635 and 636).

On or about the 1st day of October, 1964, the Garns were advised by Mr. Grover to come to the First Security Bank at Brigham City, for the purpose of signing the contract of sale. When the Garns arrived, Norman Grover, a son of Arthur N. Grover, was in the back room of the bank with his father. When the father came out of the back room with Norman Grover, Norman Grover left without talking to the Ganrs. (R. 18, 19, 351, 548, 549, 637.) The contract which had been made up in Attorney Skeen's office (Exhibit #3) and two warranty

deeds of conveyance also prepared in the same office and notarized by Nancy Lee Bishop, the secretary of Attorney Skeen, were also there (Exhibits 2 and 5) as well as an escrow agreement prepared on a different typewriter (Exhibit #1). Present were Arthur N. Grover, the three Garns and their wives and J. Leo Nelson the banker. Estella V. Grover was not present but the instruments which required her signature had been previously signed by her (R. 20, 21, 22, 23, 553, 638, 639).

The escrow agreement (Exhibit #1) provided on its reverse side that after the payment of certain charges the balance of any payments on said contract would be credited to the account of Arthur N. Grover and Estella V. Grover. Obviously the money to be paid to the Grovers was requested to be made available to them individually, just as though there were no corporation in existence. The legal instruments were all signed at that time at the First Security Bank by the Garns and Arthur N. Grover and were left in escrow with the bank (R. 18) on or about October 1st, 1964.

Arthur N. Grover was so pleased with this sale that he sent a check in the sum of \$500.00 marked "in appreciation" to Charles Wood (R. 228) because Mr. Wood had referred the Garns to him to make the sale.

Various members of the Grover family came to the farm in August of 1965, one year after the date of the sale (R. 41, 42) and Mr. Grover was with them. All were happy regarding the sale to the Garns.

The first defector was Norman Grover. He met Darvel Garn after contracts had been executed and the Garns had gone into possession and were planting wheat in October of 1964. (R. 639, 640, 641). He wanted them to move off. The following spring Norman Grover and his brother Max, went to the farm (R. 37, 38, 39, 353, 354, 355) and demanded the Garns walk off. He followed this up with a meeting at the Cross Roads Service Station east of Tremonton, Utah, where he met the father, Oleen Garn, in September of 1965 (R. 55, 356, 357). He admitted he didn't have any stock in the corporation but said he was representing his father, Arthur N. Grover, and they were going to take the farm back and kick the Garns off. He followed this up with a meeting a month later at the same place. This was called at his request. This time there was present Oleen Garn, his son, Clive Garn and Norman Grover (R. 56, 57, 359, 360, 566, 567). At this meeting Norman Grover was confronted with the fact that at the prior meeting he said he owned no stock and that he was just representing his father, Arthur N. Grover and to that Norman Grover replied:

"That's the way it was then, but it's not the case now and if you don't get off we're going to take legal action and throw you off."

Evidently the new stock issue shown in the stockbook took place between these two meetings in October and November of 1965.

Between these two meetings mentioned above another meeting took place during October, 1965, at the

request of the father, Arthur N. Grover, at his home in Salt Lake City (R. 58, 59, 562, 563, 564, 641, 642, 643). There he had a paper to read to the Garns claiming in substance that the income tax on the sale would cost him from \$130,000.00 to \$140,000.00 according to his son, Norman Grover, and that he would have to take the farm back. At this meeting Estella V. Grover served some ice cream and showed the lady folks some pictures. A new meeting was set up at the First Security Bank in Brigham City, the following Monday (R. 60, 563, 644). Norman Grover was there with his father and claimed his father would have to pay \$140,000.00 in taxes on the sale. The Grovers refused to have an attorney come in and determine the amount of tax. The meeting broke up.

On December 31, 1965, Norman Grover filed Civil Action #10038 on the Garns. He had contacted Attorney Skeen (R. 361) and Attorney Skeen prepared the complaint for Norman Grover (R. 395, 396, 397) but for some reason did not sign it as the attorney. While he had personally prepared the original contract for the sale of Arthur N. Grover Farms Inc. and had advised Mr. Arthur N. Grover during the negotiations, he at this time alleged in the complaint that the price was so inadequate and the interest rate so low that the sale was unconscionable and unfair to the seller (R. 396). However that same complaint prepared by E. J. Skeen (R. 845) for Norman Grover did not allege any incompetency on the part of either Arthur N. Grover or Estella V. Grover (R. 845, 846, 847).

At the time of the trial, Attorney Clifford L. Ash-

ton made a great attempt to have Arthur N. Grover, one of his clients who was also the secretary-treasurer of the corporation at the time of sale, brought in as an adverse witness, (R. 70, 71, 73) alleging incompetency. There was considerable argument on this point so the court called him as its witness. Then Attorney Ashton immediately guided this witness into a claimed incident (R. 76) which was supposed to have taken place on September 26, 1964. It was claimed that Mr. Arthur N. Grover had tried to crank a tractor and had blacked out when either the tractor backfired and the crank hit him or he had suffered a heart attack. He claimed he laid there six or seven hours before his son-in-law, who was deceased at the time of trial, found him (R. 77). He also claimed that he was paralyzed from his waist down, that the son-in-law found his tonic that he kept on hand and gave it to him and that he bathed his legs in cold water, then in alcohol for three hours and then in the evening took him to Salt Lake City. He also claimed that on the following day Oleen Garn telephoned Arthur N. Grover (R. 78) and said he had heard that Mr. Garn wanted to sell his property.

Relying on this claimed injury which could not be supported by any other evidence except the statement of Arthur N. Grover who claimed that this injury took place on September 26, 1964, two doctors were presented by plaintiffs. The first was Dr. Thomas E. Robinson of Salt Lake City and he was asked (R. 283) :

“Q. And in October of 1964 did he come to you relating an incident of unconsciousness?

A. I think it was October. It was in that region or that area of time, at least, when he did."

Then Attorney Ashton as the record from there on will show, attempted to use this doctor based on this incident, to show possible incompetency. When the doctor was cross-examined he was asked to produce his office book to establish the date of any office calls or treatments (R. 297) and he said he left it at home. He admitted he expected to be cross-examined on this date.

The other doctor was Dr. J. Gordon Felt. He never had Arthur N. Grover as a patient until May 15th, 1967 (R. 315) but claims he was at a social party at Norman Grovers place at one time and Mr. Grover related the incident of him blacking out (R. 314). The very date that this incident was supposed to have taken place, to-wit: September 26, 1964 (R. 77) Arthur N. Grover delivered to the three Garns in Fielding, Utah (Exhibit #33) being a brief typed contract dated that date which he wanted signed to bind up the agreement until Mr. Skeen, his attorney, could complete the final document. All four people signed it that day (R. 544, 545, 546, 547, 634, 635, 636).

Since the signing of this contract Mr. Grover has filed a law suit entitled "Arthur N. Grover Farms Inc. vs. F. P. Nielson & Sons," Civil #9945 filed August 9, 1965, with E. J. Skeen, attorney for plaintiff. Answers to certain interrogatories are signed by Arthur N. Grover before a notary E. J. Skeen as of September 10, 1965, and are of record in said action.

Neighbors and business associates who had known Mr. Grover for many years testified to his competency to-wit: Junior Lish, who had known him since 1956 (R. 409) and had hauled his grain which was in storage in Blue Creek, to market in 1965 (R. 411). Mr. Grover went with him with each load until approximately 15,000 bushels were hauled. Mr. Grover told him (R. 412, 413, 414) of how happy he was to have made a sale to the Garns. He also said he could not get any of his children to help him, including Norman Grover (R. 416, 417) so that is why he decided to sell the farm.

J. Leo Nelson who was Arthur N. Grover's banker had known him for over 20 years (R. 441). In the fall of 1964 Mr. Grover said he was going to sell his farm and Mr. Nelson asked him why he didn't sell it to his son Norman and he said "I can't deal with Norm" (R. 441). Mr. Nelson testified that Mr. Grover appeared to fully understand each and every part of what was taking place when the contract was signed (R. 452, 453, 454, 455) and he even loaned him money since the execution of the agreement.

Ernest Brenkman an employee of F. P. Nielson & Sons had known Arthur N. Grover for 28 years (R. 615), while running a wheat elevator and during those times had dealt with Mr. Grover on numerous occasions. He purchased grain from him in May, 1965. Mr. Brenkman said (R. 617):

"A. To the best of my knowledge, with my associations prior to this, he seemed about the

same spirits, same type of gentleman we'd always done business with before."

Voylet Grover, sister-in-law had known Arthur N. Grover for more than 52 years (R. 685). She attended a family reunion in 1965 where Arthur N. Grover was present in July of that year (R. 686). He mentioned about the sale of his farm to the Garns and how happy he was about it. She considered him competent, (R. 687, 688, 689, 690). Each and all of the Garns considered him competent.

From these facts, the court found:

Arthur N. Grover Farms Inc. was incorporated March 1st, 1963, with 100 shares of stock authorized. That Arthur N. Grover owned 45 shares of issued stock and Estella V. Grover owned 45 shares of issued stock. One share of stock was issued to Fay G. Wight but not delivered until August of 1965. That Fay G. Wight as president and signed the stockbook in blank and delivered it to Arthur N. Grover (R. 878). That Arthur N. Grover and Estella V. Grover are the father and mother of all the Grover plaintiffs. That no stock had been issued to any of them except Fay G. Wight, prior to August of 1965 and none was delivered to any of them prior to said date (R. 879). That besides the real estate that had been conveyed to the corporation Arthur N. Grover owned personally 50 shares of Lone Spring Water Co., stock being one half interest in said company, 50 shares or rights to graze 50 head under the Taylor Grazing permits and certain machinery and equipment (R. 880).

That Arthur N. Grover and Estella V. Grover for themselves as secretary-treasurer and vice-president and for in behalf of Arthur N. Grover Farms Inc. entered into a contract of sale of certain real property with the Garns on certain terms and conditions set out in said contract (R. 880). That said sale was authorized by all stockholders of said corporation who had stock issued and in their possession.

That Arthur N. Grover and Estella V. Grover were using the corporation to carry out their private purposes. That said corporation was formed for the purpose of buying, selling and dealing in real property (R. 880). That in August, 1965, the children met with their parents and induced them to issue stock to them and back-date the same to show them as stockholders prior to the contract date of sale, to-wit: October 1st, 1964. That stockholders meeting were then held wherein a claimed resolution was passed but not reduced to writing, claiming the stockholders were not notified of the sale prior to its execution (R. 881). That the only shares issued and in the possession of any parties prior to August 2, 1965, were 45 shares each to Arthur N. Grover and Estella V. Grover (R. 882). That the children of Arthur N. Grover and Estella V. Grover had no stock in their possession prior to August 2, 1965, and had no standing to file a class action as stockholders to attack the contract of sale of October 1st, 1964 (R. 882). That the contracts of sale and deeds were signed by the owners of said corporation and placed in escrow (R. 882). That the Arthur N. Grover Corporation by its officers,

agreed to deposit water stock certificates and grazing rights with escrow holder (R. 883) which have not been deposited. That the escrow agreement provided that the funds, when paid, were to be transferred to the private individual accounts of Arthur N. Grover and Estella V. Grover (R. 883). That the sale was made in keeping with the purposes of the corporation (R. 883). That the defendants have altered their position because of said sale by buying equipment and have paid all sums that through time have become due prior to the due date (R. 884). That the contract provided that if either party had to employ counsel to enforce the provisions of the contract the defaulting party should pay reasonable attorneys fees and \$5,000.00 was fixed as attorneys fees. That no notice was ever given to the defendants prior to the contract date that either Arthur N. Grover or Estella V. Grover had no authority to enter into said contract (R. 884). That on date of sale both Arthur N. Grover and Estella V. Grover possessed sufficient mental capacity to so enter into said agreement, fully understood and exercised their own free will and were physically and mentally capable of understanding and appreciating the nature and effect of the agreement. That the price per acre was higher than other sales but the interest rate was lower for a tax benefit. That any changes in the contract were made by E. J. Skeen, attorney for plaintiffs (R. 885). That the contract was not inadequate as to price. That said sale was not done in the manner as outlined by Section 16-10-74 Utah Code Annotated 1953, as amended, but said contract

was not void nor of no force or effect because all of the stockholders of said corporation entered into and signed said contract and said corporation is now estopped to now assert that the acts of its stockholders are not binding on said corporation. That Arthur N. Grover and Estella V. Grover had the advice of counsel at all times. That there was no imposition of any other persons will upon the Grovers. That no fraud, deceit or undue influence was practiced upon them (R. 887).

The court concluded that the Arthur N. Grover Farms Inc. was but the instrumentality through which Arthur N. Grover and Estella V. Grover, for convenience, transacted their business. It pierced the corporate veil and concluded that any statutes relating to corporations and particularly to meetings of stockholders were either complied with or waived when the owners of the stock of said corporation entered into said contract. That the corporation and Arthur N. Grover and Estella V. Grover, individually, are bound by the contract entered into October 1st, 1964 (R. 888) and an appropriate decree was entered.

POINTS RELIED UPON

POINT I

THE CONTRACT OF SALE IS VALID BECAUSE IT WAS AUTHORIZED BY ALL OF THE STOCKHOLDERS WHO WERE THE ACTUAL BOARD OF DIRECTORS.

POINT II

THE CORPORATION SHOULD BE ESTOPPED FROM DENYING THE VALIDITY OF THE CONTRACT.

POINT III

THE GROVERS USED THE CORPORATION FOR THEIR INDIVIDUAL PURPOSES, ARE PARTIES TO THE CONTRACT OF SALE, DID EXECUTE IT NOT ONLY AS INDIVIDUALS BUT ALSO AS OFFICERS AND DIRECTORS AND ARE PERSONALLY LIABLE UNDER IT.

POINT IV

THE COURT DID NOT ERR IN FINDING THAT THE CONTRACT OF SALE WAS PREPARED BY THE GROVERS AND THEIR ATTORNEY.

POINT V

THE FINDINGS OF THE TRIAL COURT ARE CLEARLY SUPPORTED BY THE WEIGHT OF THE EVIDENCE AND SHOULD NOT BE DISTURBED.

ARGUMENT

POINT I

THE CONTRACT OF SALE IS VALID BECAUSE IT WAS AUTHORIZED BY ALL OF THE STOCKHOLDERS WHO WERE THE ACTUAL BOARD OF DIRECTORS.

POINT II

THE CORPORATION SHOULD BE ESTOPPED FROM DENYING THE VALIDITY OF THE CONTRACT.

POINT III

THE GROVERS USED THE CORPORATION FOR THEIR INDIVIDUAL PURPOSES, ARE PARTIES TO THE CONTRACT OF SALE, DID EXECUTE IT NOT ONLY AS INDIVIDUALS BUT ALSO AS OFFICERS AND DIRECTORS AND ARE PERSONALLY LIABLE UNDER IT.

Points I, II and III are so interrelated that we shall discuss them together in order to avoid repetition.

The essence of Points I, II and III is the fact that we are dealing with a "family corporation." Specifically, a corporation whose entire assets were transferred to it by Arthur N. Grover and Estella V. Grover, his wife,

in exchange for ninety (90) shares of stock (Findings of Fact No. 1). This represented all of the stockholders of the corporation who had stock issued and in their possession at the time (October 1, 1964) the contract of sale in question was entered into (Findings of Fact No. 6). There was only one other share of stock that had been issued by the corporation and that had been issued to Fay G. Wight, a daughter, for no consideration and the possession of said certificate of stock was not delivered to Fay G. Wight until August, 1965, (Findings of Fact No. 1 and No. 6). It can thus be seen that the contract of sale was authorized and entered into by the holders of all of the stock of the corporation (Findings of Fact 19(a) and 19(b)).

We are not dealing with a "public corporation" having numerous stockholders. It is this distinction between the small closed family corporation and the large public corporation having many stockholders that the appellants choose to ignore. We are here dealing with a corporation that is nothing more than the alter-ego of the individuals or a mere shell covering the real parties in interest. Consequently we wish to confine the argument to cases of this kind and support it with cases that are in point with the case now before the court.

In the case of *Russell vs. Golden Rule Mining Company* 159 P2d 776, it appears that certain parties entered into some agreements to purchase some mining claims with the right to install certain machinery. The machinery so installed would become the property of

sellers if default took place. After a period of time and after additional contracting had been done, a corporation was formed with assignments of the contracts to the corporation. When default occurred, the principal stockholder who held a majority of the stock directed certain legal action to proceed in behalf of said corporation. He did so without a meeting of the stockholders. The court said on page 785, left-hand column:

“ . . . A stockholder may maintain a suit on behalf of the corporation. Such suit may be instituted without a previous demand if it appears that such a demand on the corporation would be useless or unavailing . . . Furthermore, *while the old rule was otherwise, it is now held that ‘the trend of authority is to uphold as binding on the corporation acts or contracts on its behalf by a person or persons owning all or practically all of the stock, even though there is a lack of, or defect in, some corporate step, or action’.* 19 C.J.S. Corporations p. 472 Art. 1004.” (emphasis added)

We say that a calling of a meeting of the stockholders, Arthur N. Grover (45 shares) Estella V. Grover (45 shares and Fay G. Wight (one share) to pass a resolution authorizing the sale is a “useless” act. We also say that when two people owning 90 shares out of 91 shares, enter into a contract of sale for the corporation, it is binding on the corporation “even though there is a lack of, or defect in, some corporate step or action.”

The case of *Henry Building Company vs. Cowman*, 363 P2d 208 (Okl) is a case of a real estate broker

bringing action against two corporations for a broker's commission for procuring a purchaser for an apartment building owned by the corporations. The corporations defended on the ground that the contract had not been entered into by a formal act of the directors as provided by statute. On page 212 right-hand column, the court stated:

“ . . . In her (The plaintiff's) amendment to petition she alleged that C. H. Henry told her that the corporations were family corporations and that he and his wife, May Henry, owned the corporations and all of the stock of the corporations.

“Under 18 O.S., 1951 Art. 1.34 supra, and under the general rule in external dealings with third persons a corporation exercises its powers by and through its board of directors. 19 C.J.S. Corporations Arts. 999 and 1000, pages 463 and 464. However, there are exceptions to the rule. In 19 C.J.S. Corporations Art. 1004, page 471, it is said: . . . “but the trend of authority is to uphold as binding on the corporation acts or contracts on its behalf by a person or persons owning all or practically all of the stock . . . ’

“In *Wenban Estate Inc. vs. Hewlett et al*, 193 Cal 675, 227 P.723, 731, the Supreme Court of California said:

‘Accordingly it has been held that upon a sufficient showing that a corporation is but the instrumentality through which an individual, who is the sole owner of all of the corporate capital stock, for convenience transacts his business, equity, looking to the substance rather than the

form of the relation, and the law as well, will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation.' (emphasis added)

"In the body of the opinion in *Mid-Continent Life Insurance Co. v. Goforth*, 193 Okl. 314, 143 P2d 154, 157, this court said: 'It is the general rule that a corporation is an entity separate and apart from the persons composing it, but the rule has its limitations. Both law and equity, when necessary to circumvent fraud, protect the rights of third persons, and accomplish justice, disregard the distinct existence and treat them as identical.'

See also 13 Am. Jur. Corporations, Art. 7, page 160, to the same effect."

Consequently we say that in this case Arthur N. Grover owned 45 shares of stock, Estella V. Grover owned 45 shares of stock and Fay G. Wight owned one share but she had never received delivery of that one share prior to the sale (see her answers to interrogatories). She had endorsed the stock certificates in blank for the benefit of her father and he held the stockbook with her signing in blank all of the stock certificates, giving him and his wife absolute control of the corporation. The corporation had been created by Mr. and Mrs. Grover for the express purpose of handling their own property. The property in the corporation was only the property that they themselves had accumulated over a lifetime. The one share to the girl had not been delivered

to her. The parents had absolute control over the corporation.

New, let's refer again to *Wenban Estate Inc. vs. Hewlett* 227 P.723. I fall back to this case because there are a whole line of cases that follow the thinking of this decision and we are nearly exactly in line with the facts in it. In the *Wenban Estate v. Hewlett*, page 728 left-hand column in the next to the last paragraph, it reads:

“ . . . In June, 1908, upon the advice of Hewlett, the corporation was formed for the express purpose of taking over, managing, and developing the properties of Caroline S. Wenban.

“At the time the corporation was organized 9,995 shares of its 10,000 shares of corporate capital stock were issued direct to Caroline S. Wenban. The remaining 5 shares were issued in order to qualify directors, 1 share to Caroline S. Wenban, 1 share to her daughter, Eva Shaw, 1 share to her daughter, Flora Wenban Mills, 1 to her business agent, George W. Merrill, and 1 share to defendant Eugene Hewlett. These shares were shortly thereafter indorsed by the persons to whom they were originally issued over to and delivered to Caroline S. Wenban, who has ever since held them as sole owner. She controlled the corporation in all of its actions, and the officers of the corporation, who were members of her family, did whatever she wanted them to do with regard to the corporation.”

Again on page 731 right-hand column, it reads:

“ . . . That the corporation was looked upon as the alter ego of Caroline S. Wenban is evidenced

by the acquiescence of the other directors of the corporation in her conduct whereby she treated the bonds of the corporation as her own. In such a situation her responsibility as the sole shareholder of the corporation, when dealing with the assets of the corporation, was the corporation's responsibility, and conversely the obligation of the corporation in this particular situation is her obligation."

Now, I have shown this for the reason that in our case when the contract was filed with the escrow holder, the First Security Bank, the contract provided that all of the payments that were made on the sale of the property by the corporation, were to be transferred into the personal accounts of Mr. and Mrs. Grover. Again, we have proof that the corporation is just the alter-ego of Mr. and Mrs. Grover and was set up to serve their individual purposes. Let's take another quote from this same case, found on page 731 in the middle of the page, which reads:

"While it is the general rule that a corporation is an entity separate and distinct from its stockholders, with separate, distinct liabilities and obligations, nevertheless there is a well-recognized and firmly settled exception to this general rule, that, when necessary to redress fraud, protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations.

“Accordingly it has been held that upon a sufficient showing that a corporation is but the instrumentality through which an individual, who is the sole owner of all the corporate capital stock, for convenience transacts his business, equity, looking to the substance rather than the form of the relation, and the law as well, will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation. . . .”

The Wenban case has been cited as authority by the California courts and other state courts on many, many occasions. One of the most recent decisions citing this Wenban case is the 1964 California case of *Brunzell Construction Company Inc. vs. Harrahs Club* 37 Cal Rptr, 659. There Harrah's Club was sued for breach of contract and other causes of action and the court found that Harrah's Club was really only a one man corporation and the alter ego of the owner. The court held that the corporate shell must be disregarded in order to effectuate justice. On page 665 in the right-hand column, it reads:

“ . . . Under our law where one person owns all of the stock of a corporation and uses the corporation as a mere conduit for the transaction of his own business, the corporation is regarded as his 'alter ego'.”

Then it cites several California cases and further states:

“To adhere to the separate corporate entity theory in this case would be nothing short of placing a judicial stamp of approval upon an appar-

ent fraud — here the whole structure of the various enterprises is transparent. . . .”

In another recent California case, *Taylor vs. Newton*, 257 P2d 68 (1953) it was re-emphasized that the distinct entity of a corporation will be disregarded in order to achieve justice and to prevent fraud. It was said on page 72, left-hand column:

“ . . . ‘It is the law in California as elsewhere that, although a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will, when necessary to circumvent fraud, protect the rights of third persons and accomplish justice, disregard this distinct existence and treat them as identical.’ The issue is not so much whether, for all purposes, the corporation is the ‘alter-ego’ of its stockholders or officers, nor whether the very purpose of the organization of the corporation was to defraud the individual who is now in court complaining, as it is an issue of whether in the particular case presented and for the purposes of such case justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form.”

All of these authorities go to the very point that we wish to impress strongly here and that is, that if the Grovers were allowed to deny the fact that their corporation was merely their alter ego, this court would be allowing a stamp of approval upon a fraud because clearly the Grover Corporation was formed for the very purpose of protecting the property of the two shareholders of the corporation. To allow these shareholders

to hide behind the corporate entity and be given greater rights because of this corporate existence, would be to allow an injustice to occur, because enforcing the letter of the law would defeat the very spirit of the law. This is further emphasized in Fletcher's Encyclopedia on Corporations, Vol. 1 pp. 134, 136 and 165. The California courts have repeatedly held that this doctrine of disregarding the corporate mask in searching to see who is the real party in interest, does not depend upon the presence of actual fraud. The recent California case of *Talbot v. Fresno Pacific Corporation*, 5 Cal,Rptr, 361, stated that very point and added:

“It is designed to avoid or prevent what would be fraud or injustice, if accomplished.”

If there is any question as to when the courts should ignore the corporate veil and pierce it to see who are the real parties in interest, the California courts have also given us a good definition of that in the case of *Minifie v. Rowley*, 187 Calif. 481, 202 P.673. The first test is that the individual not only influences and governs the corporation but there is such a unity of interest and ownership that the individuality or separateness of the person or the corporation has ceased. Second that the facts are such that an adherence to the fiction of a separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice. There can be no question but what those two criteria have been met in our case. Here the individuals had such a unity with the corporation that the corpora-

tion and the stockholders were one. And, certainly the second criteria is present, that if the court did not disregard the fact that the plaintiffs and the corporation are one, it would promote an injustice.

Now, let us look at the sections of the statutes themselves. We believe that Section 16-10-74, UCA 1953, as amended which is the section which the plaintiffs want to hang their hat on, is really controlled by Section 16-10-6, UCA 1953 as amended, under the heading of Defense of Ultra Vires. This section provides that:

“No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, . . . ”

Mr. Ashton always has claimed that this section has no reference at all to Section 16-10-74. However, we note that as a footnote to this section the editor has referenced it to 58 ALR 2d 784:

“Who may assert invalidity of sale, mortgage, or other disposition of corporate property without approval of stockholders.”

This ALR reference states in a preliminary section at page 786:

“Statutes commonly require stockholder approval of alienations of the property of corporations. Sometimes they relate to transfers of all or substantially all of the corporate assets; . . . ”

In other words, the editors of the Utah Code Annotated have reference under 16-10-6 the very matters controlling the provisions of 16-10-74 and the interesting thing in this, is that on page 788 of the ALR Annotation they have included a section under the heading: "General Rule that Statute is for Benefit of Stockholders Only" — "Who May Assert Invalidity of Transfer." In Section 3, Stockholders, it reads:

"It is generally recognized that a charter or general statute requiring the consent of a percentage of the stockholders to validate a sale, mortgage, or other disposition of corporate property is intended primarily for the benefit of the stockholders, and it has been held or recognized in many decisions that only they can complain of the failure of the corporation to comply with this requirement."

Now, if this be the case that on the 1st day of October, 1964, there were 91 shares of stock issued with 45 belonging to the father and another 45 belonging to the mother and one share was issued to a daughter, but not delivered and the daughter had been willing to sign in blank the stock certificate book so the father and mother could handle their property as they saw fit, then the father and mother, Arthur N. Grover and Estella V. Grover, are the only persons who have any right to appear in court and assert any claim or objection under the statute. And, inasmuch as they own all of the stock, equity would not let them hide behind that statute and complain because they personally executed the documents themselves.

Also there is an important distinction between a large widely-held corporation with many stockholders and this type of family corporation where the stock is held by the heads of the family and the corporation is created and formed to carry out their purposes. They are not considered the same by the law as corporations which are commercial in character and have numerous stockholders and operate as big business.

I think if the court will look at the cases cited by the plaintiff it will find that each and all of the cases involve large corporations with many shares of stock outstanding. I think it will also find that the action involved in those cases was between the stockholders who were attempting to restrain or enjoin and was not one in rescission. I believe it will be found in each instance that the act had not been executed but was threatened and the position of the parties had not changed. Now, with this thought in mind we want to cite to the court a number of additional cases.

Dealing with the issue of the statutory requirement that a corporation cannot sell its assets until there has been a meeting of the shareholders to grant authority to the directors to sell said assets, it should first be stated that the common law rule was very similar. The common law rule stated that the directors had no authority to sell the assets of a corporation until the shareholders gave their approval. The Utah statute in question, Section 16-10-74 UCA 1953 as amended, merely codifies the common law rule but it is the rea-

soning behind the statute which is important, and the policy which is sought to be enforced. From an examination of this we can determine what was the intent of the statute. Certainly the same philosophy which caused common law judges to develop this rule is the same which prompted the creators of the Model Business Corporation Act to provide the similar provision which is an attempt to protect the shareholders from irresponsible acts of the directors or from acts which would benefit the directors at the expense of the shareholders.

But, as in all rules, some exceptions were developed. Both the common law and the other state statutes have allowed exceptions which stated that where the directors of a corporation own all or nearly all of the outstanding stock, then the acts of these individuals can be construed to be the acts of the shareholders and with the consent of the shareholders; any other interpretation of such a rule would be to place form over substance.

To allow a strict interpretation of the law would defeat the letter and purpose of the law. A long line of California cases have expressed such a theory. One case directly in point is that of *Halbert vs. Berlinger*, 273 P2d 274, 1954 case. In this case a husband and wife owned all of the corporation's stock. The wife took no part in the corporation's management and the husband was the president and executive officer of the corporation. The husband was more than a mere agent and his acts as president, in furthering the objectives

of the corporation, were binding upon the corporation itself. In that case the corporation president was piloting a plane which crashed and a passenger was killed. The plaintiff in this action sued the corporation for negligence. The jury found the corporation president was acting in pursuance of the corporation interests and therefore represented the corporation and was not a mere agent. On appeal the court held that the jury could reasonably infer that the corporation president had unrestricted and unlimited authority to act for the corporation in furthering its objectives. In our case it is clear that the executive secretary of the corporation, Mr. Grover, was acting in pursuance of the corporation's interests and he and his wife owned all of the stock so any acts he performs in his official capacity must be binding upon the corporation.

Another California case, *Herring v. Fisher*, 242 P2d 963 (1952) case held that a corporation officer whose specific duty was to guide the corporation and seek to further its interests could bind the corporation by his acts. There, the court held that the defendant, Fisher, was a spokesman for the corporation and possibly even its alter ego. In his correspondence with the respondent he never referred to the corporation. The president did not require written authority to make a sale or to employ an agent to do so. The court here also held the executive officer of such a corporation is more than an agent. He acts and speaks for the corporation in furthering its express objects and may sell all the properties of this corporation because that

is the very object of its organization. In this case it was a corporation which engaged in the sale of properties.

A similar holding was stated in the case of *Jeppi v. Brockman Holding Company*, 34 Cal 2d 11, 206 P2d 847, 9 ALR 2d 1297. In that case the court recites the common law rule that the directors of an ordinary corporation could not dispose of all the assets without the consent of its stockholders. They cite the California statute which allows the corporation to dispose of its assets and wind up its business when authorized by a majority vote of the outstanding stock, rather than a unanimous vote. In this case the executive officer of the corporation, as in our case, agreed to make a sale with some buyer, entered into the transaction and later tried to withdraw from the agreement. The buyer instituted an action to force the sellers to continue with their agreement and the court upheld the agreement requiring the sellers to pass title to the property. There was no meeting of the shareholders. In our case there was a meeting of the shareholders as well as the directors, since they were all one group and the same people. But, the court in this California case expressly held that a corporation's sale of all its assets in the ordinary course of business for which it was organized, without the stockholders' consent, is not *ultra vires*. This is exactly what we have done—had a sale of the corporate assets in the ordinary course of the corporate purposes. When the Grovers found it was to their interest, which was also the corporation's interest, to sell some assets, then they, as this California court held, did not need to

have a stockholders meeting. That case, like ours, involves a statute. The court stated this, page 1302, right-hand column:

“The corporation relies upon Section 343 of the Civil Code, now Section 3901, Corporations Code, which reads: ‘No corporation shall sell . . . all or substantially all of its property and assets . . . unless under authority of a resolution of its board of directors and with the approval of the principal terms of the transaction and the nature and amount of the consideration by vote or written consent of (the) shareholders . . .’”

There is no question that the shareholders did not meet formerly. It was never contended they did, but the court did hold that where it was clear they were pursuing a corporate policy and interest, that any decision of the executive officers and the directors was binding upon the corporation and they would not be allowed to repudiate a contract on a technicality simply for the purpose of enforcing the strict letter of the law. Such a holding would defeat the very intent of the statute and would create an injustice. The court goes on to explain why it held as it did and states, page 1303, lefthand column:

“The provisions of the statute should not be applied solely upon the basis of the quantity of the property; the test which determines the question of the necessity for consent of the stockholder is, ‘whether the sale is in the regular course of the business of the corporation and in furtherance of the express objects of its existence, or something outside of the normal and regular course of the business. . . .’”

It is the contention of the defendants that the purposes of the Grover Corporation are buying, selling and exchanging property, which they were doing here.

One of the issues before the court at this time is the issue of whether or not a corporation can validly sell its stock or assets without first holding a shareholders meeting where there is a state statute that such a meeting be held. That exact issue has been considered in the American Law Reports at 9 ALR 2d 1306, and particularly in Section 3 on page 1312 ,Section 3 reads:

“Particular classes of corporations or corporations organized for particular purposes; buying and selling real estate. Statutes requiring approval by a specified percentage of the stockholders in a corporation in order to validate a sale of all or part of its business, franchise or property have been held inapplicable to sales of all or a part of their real estate by corporations engaged in a general real-estate business; therefore, such sales have been upheld notwithstanding the fact that there was no attempt to proceed in accordance with the terms of such a statute.”

Our Section 16-10-6 Utah Code Annotated 1953, as amended, supports this theory. Then several cases are cited which hold this very point, that is, that in a certain type of case there is no necessity to comply with the statutory requirement of first holding a stockholders meeting because the very purpose for which the corporation was organized is being furthered by the sale of the assets. There can be no question in our case but what one of the main purposes for which this corpo-

ration was organized by Grovers was for the sale of real estate. Exhibit #10 is the Articles of Incorporation of the Grover Corporation and Article 3 thereof reads:

“This corporation is organized for the purpose of engaging in farming and in *buying and selling, exchanging, leasing and renting real and personal property of every kind and description.*”
(emphasis added)

While the plaintiffs contend that this corporation is organized primarily for the purpose of farming, they cannot deny the fact that right in their own Articles of Incorporation they state that in addition to farming the corporation is organized for the purpose of buying and selling real estate and personal property of every kind and description. Certainly that statement is too broad to be limited to farming purposes only, for it clearly goes beyond that limited purpose. It also benefits the corporation shareholders by allowing and proposing the sale of property when it would so benefit the shareholders.

The ALR Annotation cites cases in California, New York, North Carolina, Ohio and Wisconsin and a more recent supplement edition to that annotation found in 1 Later Case Service, ALR 2d at page 950 cites additional cases in Washington and California.

All these cases reach the same important conclusion and that is that where the purposes of the corporation are being furthered by the sale, the statutory requirement that the shareholders meet together to

hold a meeting to discuss if the sale should be authorized or not is meaningless and need not be complied with. The Articles of Incorporation of the Grover Corporation clearly state what its purposes are and one of them is to sell property.

Looking now to some of these cases that are cited let us first look at the California case of *Bradford v. Sunset Land and Water Company*, 157 P. 20, 30, Cal. App. 87, which held, where there is a statute declaring that no sale, transfer, etc., of the "business franchise and property as a whole" of any corporation in the state should be valid without the consent of the stockholders of record who hold at least 2/3rds of the issued and capital stock of the corporation, the statute was not applicable to a contract by which a corporation engaged in a general real estate business gave an option for the purchase of real estate belonging to it.

A very similar holding was in the California case of *Seeburg v. El Royale Corporation*, 54 Cal.App.2d 1, 128 P2d 362. There the court held that an option to purchase an apartment house from a corporation was not void even though the consent of the corporation stockholders was not first obtained as required by a California statute which read:

"A corporation must first have a stockholders meeting before it could dispose of all or substantially all of its property."

That case held the very thing we are trying to point

out here, that where the purpose of the corporation is being furthered and effectuated by the sale there is no reason to require the stockholders to personally grant approval. At this point let us refer back to the earlier California case of *Jeppi v. Brockman Holding Company* cited earlier, where the California Supreme Court held there was no need to meet the requirement for a stockholders meeting, and that the option granted by the officers of the corporation to buy real estate was valid even though the statute expressly required a stockholders meeting before such sale could be made. In that said case there was one interesting difference from the other cases cited and that is that there it was not a realty company making the sale or a corporation expressly organized for the purpose of selling real estate, rather it was organized for the purpose of disposing of the assets of an estate. The court concluded that the sale was furthering the corporation's purpose. On page 1314 of this ALR Annotation there was another very interesting comment in the righthand column, halfway down, which states:

“It may be noted in this connection that the principles stated and illustrated above with respect to corporations engaging in the real-estate business generally has also been applied in a few cases where, *in addition to being organized for purposes other than the buying and selling of real estate generally*, the corporation was authorized in connection with its corporate activities to purchase and sell real estate.” (emphasis added)

Now, that goes right to the point of our case. The

plaintiffs contend that their corporation was organized only for farming purposes, not to buy and sell real estate. Now, even if that were true we do not agree that the same rule would apply according to this article. It cites several cases which have upheld the point that where even one of the several purposes for which a corporation was organized was to buy and sell real estate, even though its primary purpose was for some other goal, that then the same reasoning applies. They conclude that in such a case there is no reason to require a stockholders' meeting to authorize the sale even though a statute requires one. For example, the Washington case of *Lange vs. Reservation Mining and Smelting Co.*, 48 Wash. 167, 93 P. 208, held that a corporation which was organized among other things to buy, sell and deal in mines, had the power to enter into a contract for the sale of its mines together with the tools and machinery used in operating them, the same being all the property owned by the corporation. This was allowed, notwithstanding the objection of the minority stockholders. The court pointed out that the sale did not disrupt the corporation nor was it contrary to the purpose for which the corporation was formed. The court further stated that on the contrary, the corporation would be in as good a condition to proceed with the objects it was formed to promote after the sale as it was before the sale would fulfill one of its objects and purposes, and that the power of sale existed by virtue of both the Articles of Incorporation and the general law confirming the management and

control of the corporate business on the Board of Trustees. This case was expressly followed in the later case of *Smith v. Flathead River Coal Company*, 66 Wash. 408, 119 P. 858. No single point could be more important than the conclusions in these cases. Again, in the California case of *Keck Enterprises Inc. vs. Braunschweiger*, in the District Court of California, 108 F.Supp. 925, it was held that where there was a statute barring the corporate sale of all, or substantially all assets without the authority of the directors and the consent of the stockholders it did not apply in a case where the president of the corporation sold a major asset, games, because the sale was in the regular course of business of the corporation and the principal assets of the corporation was ownership of invention rights, not of games.

Numerous other cases have upheld the same point, however, to cite only a few, see for example an Ohio case, *Painter v. Brainard-Cedar Realty Company*, 28 Ohio App. 123, 163 N.E. 57, which held that where there was an Ohio statute forbidding the sale of the entire property and assets of the corporation, except when authorized by three-fourths of the directors, and approval by the holders of three-fourths of the stock, did not apply to a sale by a corporation which was organized for the purpose of buying, selling and dealing in real estate. The court then stated that it was *meaningless to require the stockholders or directors to authorize the very thing that the corporation was organized to do.*

Another case is Tuttle vs. Junior Building Corporation, 227 N.C. 146, 41 SE.2d 365, where the object for which the corporation was formed was:

“To purchase a certain designated parcel of real estate, to own, operate, lease, transfer, assign, sell and convey this real property and/or to otherwise dispose of the same and to purchase and/or otherwise acquire real and personal property.”

(Almost the same exact wording of the Articles of Incorporation of the Grover Corporation.)

Just as in our case, here the corporation tried to deny its duty to fulfill a contract for the sale of property entered into on its behalf by its executives, because there had not been a meeting of the stockholders to give approval to such sale as was required by a statute, but the court held that the statute was not applicable, pointing out that under its charter it appeared that the corporation had general power to buy and sell real estate as its regular business. The specific mention of the building and lot in question did not exempt it from such power or segregate it from such property acquired generally for such purpose.

In a Wisconsin case, Gottschalk v. Avalon Realty Company, 249 Wis. 78, 23 NW.2d 606, it held that there was a legitimate exception to the general rule which should be made in the case of corporations created for the purpose of selling, buying, leasing and otherwise disposing of real estate because that was the

very purpose for which they were created. In a later case in Wisconsin, *Fontaine v. Brown County Motors Company*, 251 Wis. 433, 29 NW2d, 744, 174 ALR 694, the court stated:

“We do not agree with the contention that an ordinary business corporation may not transfer real property without a majority vote of its stockholders. At the common law, a business corporation other than a real estate corporation was not permitted to dispose of its entire property except by unanimous consent of the stockholders, if the corporation were a solvent going concern. The same was true of the conveyance of any part of the corporate property which was essential to a continuance of the corporate enterprise.

“The basis for the limitation of authority was that such a conveyance was a substantial abandonment of the business enterprise and contrary to the implied agreement of the stockholders that the corporate property would be devoted to the prosecution of corporate purposes.”

As a final case let us look at a New York decision, *Ipstein v. Gonnen*, 235 App.Div. 33, 256 NYS 49, which held that a New York statute which required that there would be a stockholders meeting which would require a two-thirds vote in favor of allowing the corporation to sell and convey its property rights, privileges and franchises or any interest therein, or any part thereof, does not apply to a contract for the sale of real estate by a corporation whose business was the sale of its own real estate.

POINT IV

THE COURT DID NOT ERR IN FINDING THAT THE CONTRACT OF SALE WAS PREPARED BY THE GROVERS AND THEIR ATTORNEY.

The contract that the court by its findings held was prepared by the Grovers and Attorney E. J. Skeen is Exhibit #3, dated October 1st, 1964 (R. 880 Findings of Fact #5) and not Exhibit #33 dated September 26, 1964, which is referred to in appellants' brief.

The Garns claimed this was brought to their home place in Fielding on the date it bears by Mr. Arthur, N. Grover, who claimed his attorney was away and he wanted something signed up until the final draft could be prepared by Attorney Skeen. (R. 544, 545, 546, 547, 634, 635 and 636). They did not know who made it up. Exhibit #3 was finally prepared and became the contract that is sought to be set aside. Mr. Nelson, the banker, denied that he made it up (Exhibit #33) and claimed he only became aware of it shortly before the trial (R. 472). Mr. Skeen (R. 771) claims he saw it for the first time when Mr. Grover brought it into his office. He claims he has searched his office and can't find the original (R. 772); the present Exhibit #33 being a copy. He admitted on cross-examination, however, that he does not have complete files, that Mr. Grover had other counsel for a year or two and took his files (R. 777).

It appears to the writer that Point IV involves a matter that has no bearing on this lawsuit. It talks of a contract that was superseded by another that became the official document involved in the action and that the comment made in regard to Exhibit #33 is just a smokescreen thrown in, in an attempt to cloud the issues. We will not pursue it further.

POINT V

THE FINDINGS OF THE TRIAL COURT ARE CLEARLY SUPPORTED BY THE WEIGHT OF THE EVIDENCE AND SHOULD NOT BE DISTURBED.

This court has repeatedly held that where the lower court heard the matter without the aid of a jury and had the opportunity to see and observe as well as hear the witnesses give their testimony, that the findings of the lower court will not be disturbed unless the evidence clearly preponderates against its findings, or there has been a plain abuse of discretion or the lower court has misapplied proven facts. *Bear River State Bank v. Merrill*, 120 P2d 325, 101 Ut. 176; *Beezley v. Beezley*, 296 P2d 274, 5 Ut.2d 20; *Heiselt v. Heiselt*, 349 P2d 175, 10 Ut. 2nd 126; *Jewell v. Horner*, 366 P2d 594, 12 Ut. 2d 328.

We have set out carefully in our statement of facts references to testimony given at the trial in support of each and every finding of the court. We believe

that a careful reading of the record will reveal the fact that the great weight of the testimony supports the court's findings.

SUMMARY

We believe the evidence shows that Mr. Grover, acting for himself and wife, through the corporation that they owned, obtained a price that was very good. He in all of the dealings in behalf of the sellers was sharp and shrewd. He took advantage of the tax he would have had to pay as the farm would be paid for, of having a high price per acre, which could be countered with the capital gain and a low rate of interest that he must show as regular income. Prior to this sale he had had the farm listed with real estate people for approximately a year. Mr. Grover, who has done all of the business for his wife and himself up to the time of sale, took care of his business after the sale in the same manner as he had done before. He dealt with different bankers; sold his produce; did his own banking; brought other lawsuits; continued to file annual reports for the corporation. He was sharp and alert and knew what he was doing. It was not until nearly a year after the sale that the family, through the determined efforts of Norman Grover, finally convinced the parents to try and set the sale aside. After the family joined forces, their efforts knew no bounds. The stock manipulation, that was attempted when the family united for this purpose, was crude and made in the face of other instru-

ments that had been made a matter of public record in the Secretary of State's Office. These instruments in the Secretary of State's Office had not been taken into consideration by them but plainly pointed out that a new issue of stock had taken place and been back-dated. In attempting to rescind the contract the Grovers were trying to take this farm away from individuals who, in good faith, had bought it and who have spent upwards of \$45,000.00 for new machinery and since the purchase have paid even a much greater sum than that on the purchase price. In addition, they have spent four good years of their lives in farming and developing, building and operating this farm.

From the facts and the equities in the entire matter the decision of the lower court should be affirmed. The corporation, Arthur N. Grover and Estella V. Grover, are just as well off as they ever were. They are receiving and will receive money in equal value to the land that they sold. By affirming the decision of the lower court the Garns would be protected from the unwarranted effort made by Norman Grover, a stranger to the entire transaction to have the sale set aside, and justice would prevail.

Respectfully submitted,

Walter G. Mann and
Reed W. Hadfield
of Mann and Hadfield

Attorneys for Defendants