

1965

John J. Sweeney v. Happy Valley, Inc., A Utah Corporation : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN J. SWEENEY,

Plaintiff and Appellant,

vs.

HAPPY VALLEY, INC., a Utah cor-
poration,

Defendant and Respondent.

Case No.
10259

UNIVERSITY

BRIEF OF APPELLANT

Appeal From a Judgment of the District
Court of Salt Lake County

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DEC 1 - 1935

Clk. Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN J. SWEENEY,

Plaintiff and Appellant,

vs.

HAPPY VALLEY, INC., a Utah corporation,

Defendant and Respondent.

} Case No.
10259

BRIEF OF APPELLANT

STATEMENT OF THE CASE

Insofar as pertinent to this appeal, the matter involves an action by Plaintiff and Appellant for money claimed to be due him from the Defendant and Respondent Happy Valley, Inc. under the terms of a written contract, in which action Appellant alleges breach of the contract, seeks a determination of his rights under such contract, an accounting by Respondent for the money due Appellant and for injunctive relief.

DISPOSITION IN THE LOWER COURT

Although the Pretrial Order explicitly framed the issues and set the matter down for "jury trial," the

Judge before whom the case was tried determined at the beginning of the trial that the matter was one strictly for an equitable accounting and refused Appellant a jury trial. The Trial Court further limited the issues to be tried to an equitable accounting, resolved those issues against Appellant, fixed a formula upon which it decreed Respondent had to account, and directed that Respondent forthwith account on such basis without making any determination as to the amount owing.

RELIEF SOUGHT ON APPEAL

Appellant seeks by this appeal to have the Supreme Court determine that the lower Court erred in its analysis and determination of the issues and in its analysis and interpretation of the contract; that on the basis of the agreement between the parties and the facts adduced at the trial Appellant was and is entitled to be paid by Respondent in respect to the transfer of title of various lots and parcels of property on the basis of a price or amount greater than that accounted by Respondent; and that Appellant was entitled to a jury trial in the determination of the issues.

STATEMENT OF FACTS

On or about August 8, 1957, Appellant John J. Sweeney (and other parties not involved in this action) entered into a written Agreement with Respondent Happy Valley, Inc. providing for the subdivision, development and improvement of certain land located near the mouth

of Big Cottonwood Canyon in Salt Lake County, State of Utah. (R. 49-56)

The Agreement recites that First Party (Respondent herein) is the owner of, or entitled to sell, certain land situated in Salt Lake County, State of Utah, consisting of approximately 366 acres; that it desires to develop the said land and to subdivide a portion thereof for residential building lots and reserve a suitable portion thereof for use as a golf course and country club. The Agreement further recites that Second Party (of whom Appellant is the only party presently interested therein) is to effect the organization of a non-profit corporation under the laws of the State of Utah, to be known as the Willow Creek Country Club, for the purpose of buying and developing a portion of said Entire Premises sufficient in area and terrain for an 18-hole golf course. (R. 49, 50)

Paragraph 6 of said Agreement (with which paragraph we are primarily concerned) provides that First Party intends "to develop, subdivide, and sell as residential lots, and a shopping center in conjunction therewith, all of said Entire Premises, except the Club Premises. Said Entire Premises shall not be sold or developed in any other manner except on the written consent of Second Party." (R. 51)

Said paragraph further provides that the "gross proceeds of sales of all such property sold for residential lots shall be divided" so that 75% would be paid to Respondent (First Party) and the other 25%, after initial deduction of a certain amount to pay a proportionate

part of the initial cost of acquisition of the property, should be paid to Second Party (Appellant and others).

In the event any part of the Entire Premises is traded or exchanged for other land "that portion of the Entire Premises so traded shall be valued on the basis of its fair market value for the purpose of determining gross proceeds of sale and applying the 75%-25% ratio hereinabove referred to."

Finally, Paragraph 6 provides that First Party shall render an accounting to Second Party "not less frequently than quarterly, showing all sales made from the Entire Premises and showing the gross proceeds of sale, together with a showing of the distribution thereof as provided in this paragraph. Sums due Second Party under the provisions of this paragraph shall be paid monthly." (R. 51, 52)

Paragraph 8 sets forth the respective interests of the persons who comprise Second Party, including Appellant Sweeney who was and is the owner of 31.8% of the 25% interest of Second Party. (R. 53) This interest entitles Appellant to receive 7.75% of the total gross proceeds referred to in the contract. Since then, the other persons comprising Second Party have transferred their respective interests to Respondent (First Party) thereby leaving Appellant as the only person entitled to share with Respondent in the gross proceeds from the sale of the "Entire Premises." Likewise, at the time the contract was executed C. Taylor Burton, Owen W. Bunker and G. Kirk Graff owned all the stock of First Party

(Respondent herein) in equal shares and were the officers and directors of the company. (R. 321) Prior to the commencement of this action Graff sold his interest in Respondent corporation to Burton and Bunker.

Subsequent to the execution of the foregoing contract Respondent provided with plans for a subdivision and entered into a contract with American Insurance Corporation about April 10, 1958, for the promotion of sales of the residential lots. (R. 510) A preliminary subdivision plan was prepared indentifying individual lots (Exhibit 31-P), listing "sales agency" contracts were executed with American Housing on September 21, 1958, for sale of individual lots ranging in price from \$3,999.00 to \$7,499.00 (Exhibit 21-P). (R. 512)

Within less than a month after these listing agreements were signed three lots in the proposed subdivision had been sold and earnest money receipts obtained (Exhibit 30-P). One lot was sold to a Mr. Bain for \$3,999.00, one to Howard J. Ford for \$4,999.00; and the other to O. V. Hansen for \$4,500.00 (Exhibit 30-P). However, since the subdivision had not been approved it was necessary to hold up sales so that no more were made prior to the approval of the subdivision plat. (R. 380) In fact, the earnest money agreements referred to above were called and "options" were given to the parties. (Exhibits 32-D, 33-D) Thereafter certain changes were made in the subdivision plat and a portion only of the Entire Premises was subdivided into four subdivisions with the lots being renumbered. The plat for subdivision 1 was filed and approved on November 4, 1959, after the subdivision improvements were put in. (R. 366)

During the interim the three principals of Respondent corporation (Burton, Bunker and Graff) were assessing themselves monthly for cash contributions to the corporation "to keep up the uniform real estate contracts underlying the subdivision, as well as to make payments on improvements being installed." (R. 366)

Shortly after subdivision 1, containing 40 lots, was approved Respondent corporation conveyed to the three principals who were its sole stockholders, officers and directors, 24 lots in that subdivision. (R. 323, 388, 507)

The plats for subdivisions 2 and 3 containing 110 lots, were recorded on April 5, 1961; and on May 10, 1961, Respondent corporation conveyed to Owen W. Bunker 1 lot in subdivision 1, 12 lots in subdivision 2 and 11 lots in subdivision 3. At the same time 5 lots in subdivision 2 and 19 lots in subdivision 3 were conveyed to G. Kirk Graff; and 3 lots in subdivision 2 and 21 lots in subdivision 3 were conveyed to C. Taylor Burton. (R. 324, 388, 507, Exhibit 14-D)

In a letter sent to Appellant under date of May 26, 1961, Respondent corporation outlined certain difficulties which it stated had been encountered in getting the subdivision plats approved and lots sold so that the individual officers "have had to make cash contributions." Respondent then stated that these contributions "had been secured to the sponsors by the corporation deeding to them sufficient lots to equal the cash necessary to keep the company's land payments current." The basis used as value was stated to be \$3,000.00 per lot which the letter said had been established by outside appraisers (Exhibit

42-P). The appraisals referred to were received in evidence in Exhibits 8-D through 13-D, inclusive. They are dated in October and November, 1960, and August, 1961, although they relate back to December, 1960. They involve only lots in subdivision 1 and were used in connection with an investigation by the Federal Government "on tax questions concerning the valuation." (R. 371)

Two of the appraisals (Exhibits 8-D and 9-D) are very general and give a value of an average of \$3,000.00 per lot. Two other appraisals (Exhibits 9-D and 13-D) were made in a more detailed manner and appraised the lots at an average value of \$3,500.00 and \$3,450.00 per lot respectively.

The corporate minutes of Respondent show that on November 4, 1959, the corporation was indebted to each of the three stockholders in the sum of \$17,000.00 represented by unsecured notes, and that Mr. Bunker was unwilling to make further contributions without "some kind of security for a return of some of funds already advanced. As a method of reducing the company's obligation to the principals he suggested each taking title to some lots to offset some of the company's borrowings. The lots would be taken at cost, after determining same, or \$3,000.00 which was offered by Mr. Shaw, or whichever was greater." (R. 35)

On some of the lots taken by the principals there were outstanding mortgages of \$2,000.00 (R. 577) so that the corporation received from the principals a reduction of \$1,000.00 only on its indebtedness to them since

they individually assumed such mortgage indebtedness. (R. 579, Exhibit 42-P) Likewise a portion of the indebtedness owing by Respondent company to its stockholders (at least insofar as G. Kirk Graff was concerned) arose from salary rather than from cash contributions. (R. 507)

In addition to the lots conveyed to the principals Respondent made other transfers or sales.

On or about April 6, 1959, a tract of land approximately the size of one lot was conveyed to the Salt Lake Water Conservancy District on which a well was located. (R. 31) This property is referred to throughout the Record as the "wellsite."

On or about April 4, 1961, a small portion of lot 2, subdivision 2, was conveyed to a David L. Jessup to clarify the boundary line. (R. 32)

On or about January 29, 1962, Respondent conveyed a tract of approximately 30 acres (surveyed by George B. Gudgell to be 31.07 acres) (R. 275) to Twenty-Five Associates, Inc. and R. E. McConaughy in exchange for their interest (as some of Second Party) in the contract dated August 8, 1957. (R. 31, 32) Twenty-Five Associates, Inc. owned 41.4% of Second Party's interest in said contract and Mr. McConaughy owned 9.5%. (R. 53)

On or about April 30, 1962, Respondent conveyed to Estates, Inc. a tract of land in excess of two acres, comprising a portion of several lots in subdivision 4 in exchange for the offsite improvement on Respondent's lots in subdivision 4. (R. 32, 394-397)

None of these transactions had ever been reported to Appellant or accounted for by Respondent prior to the trial (Exhibits 14-D, 15-D and 16-D). At the trial Respondent acknowledged that an accounting had to be made for the 30 acre tract conveyed to Twenty-Five Associates, Inc. and McConaughy. (R. 268)

A few other lots were sold and conveyed to third parties as reflected on the accountings rendered by Appellant. (Exhibits 14-D, 15-D and 16-D)

The balance of the lots remaining in subdivisions 1, 2, and 3 (33 in number) were sold under a contract to Gordon and Bush, Inc. on July 15, 1963, for \$181,500.00 or approximately \$5,500.00 per lot. This contract involved a down payment of \$500.00 only and allowed the buyers four years to complete the purchase provided not less than seven lots per year were paid for. (Exhibit 27-P)

Insofar as the other property comprising the "Entire Premises" is concerned a portion was subdivided as subdivision 4; and the balance is yet to be developed. After the present action was filed and on or about September, 1962, an additional four lots in subdivision 4 were transferred each to C. Taylor Burton and to Owen W. Bunker who by then were the sole stockholders of the company. (R. 32) The consideration for the sale was still \$3,000.00 per lot. (R. 324, 389)

Some of the lots conveyed to the principals were sold by them to other individuals. For instance, on April 4, 1962, Burton transferred Lot 559 in subdivision 1 to

Gibbons and Reed Company for a credit of \$6,250.00 on the balance owing to Gibbons and Reed Company by Respondent company for offsite improvements. At the same time Mr. Bunker transferred Lot 589 in subdivision 1 to Gibbons and Reed Company for a credit of \$6,200.00 on such obligation owing by Respondent company. (R. 331, 91, 94) Other conveyances of lots by the principals are set forth in the Answers to Interrogatories filed by them. (R. 91-94) However, the Trial Court refused to receive testimony with respect to many other such conveyances made. (R. 582-591)

The first formal accounting made by Respondent to Appellant (or others of Second Party) on account of any sales of lots by Respondent corporation was made July 17, 1962. (R. 253, 1019, Exhibit 14-D). This accounting showed the number of lots conveyed by Respondent to Mr. Burton, Mr. Bunker and Mr. Graff up to that time. (Exhibit 14-D)

Following receipt of the July 17, 1962, accounting, Appellant herein filed legal action against the Respondent company and its officers and directors Owen W. Bunker, C. Taylor Burton and G. Kirk Graff, said action being filed on August 17, 1962 (R. 1-3) The Complaint was thereafter amended twice. (R. 69, 121) Motions filed on behalf of the individual Defendants were ultimately granted by the Court (R. 175); and all causes of action other than the Second Cause of Action were dismissed prior to or in connection with the pretrial conference held. (R. 175, 261)

A pretrial was held on September 11, 1963. The Pretrial Order entered by the Court recites that the "Second Cause of Action is an action for an accounting for declaratory relief as to the rights of the Plaintiff and for injunctive relief, all of which arises out of the photostatic copy of the contract which is a part of the file herein," entered into on August 8, 1957. (R. 195)

The issues framed by the Court as to the Second Cause of Action are as follows:

"1. Whether the Plaintiff is entitled to have the lots which were conveyed from the corporation to the individual officers and directors of the corporation accounted for at any other value than that which was fixed by those officers and directors at the time of such conveyances;

"2 Whether the Plaintiff is entitled to have the subdivided lots which were conveyed to other persons than those mentioned above evaluated at any other figure than that heretofore asserted by the corporation; and

"3. Whether the Plaintiff is entitled to have the undivided tracts of land which have heretofore been conveyed out of the corporation evaluated as residential lots, and if so, at what value." (R. 195)

In addition to the foregoing issues the Judge who conducted the pretrial further stated in the Pretrial Order that the Plaintiff contends "That it is entitled to a declaratory judgment determining his rights under the August 8, 1957, contract as to accountings, time of

payment, and the rate and manner of development of the properties subject of the Agreement.” (R. 196)

The Pretrial Order further states:

“At the time of the pretrial it was stipulated and agreed by and between the Plaintiff and the Defendant that Plaintiff is entitled to an accounting as to the improved lots conveyed by the Defendant. Defendant contends that the accountings should be predicated on the actual gross proceeds received by the corporation for the lots conveyed. Plaintiff contends that he is entitled to an accounting based on the fair market value of the property as residential lots at the times of conveyance.”

“As to the unimproved property, which has been conveyed by the Defendant, Defendant contends first that Plaintiff is not entitled to an accounting on this unimproved property. However, in the event the Court determines that Plaintiff is so entitled to such an accounting, then it is Defendant’s contention that such accounting should be predicated only on the fair market value of the property conveyed as unimproved property at the time of the conveyance. The Plaintiff contends that they are entitled to the fair market value of that property as subdivided residential lots at that time.” (R. 197)

The Pretrial Order then directs that the case “be set for jury trial” (such trial having been demanded by Appellant herein) for December 9, 1963. (R. 194)

The matter came on for trial before the Honorable Merrill C. Faux, who dismissed the jury at the beginning

of the trial, because he determined the case involved only an equitable accounting between the parties. Counsel for Appellant at the time of trial excepted to the Court's ruling, stating that Plaintiff had filed a Demand for Jury Trial and paid a fee, that Plaintiff was entitled to a jury (R. 249). Respondent was permitted to go forward with the proof by offering in evidence the accountings theretofore made to Appellant on July 17, 1962 (Exhibit 14-D), December 26, 1962 (Exhibit 15-D), and September 9, 1963 (Exhibit 16-D), following which the Court stated that "it appears to the Court that the charge is somewhat in the nature of an action in fraud — certain things have done here which you now seek relief upon, saying that they have done, but done by bad faith so that it isn't simply a charge of breach of contract where you would ask for certain damages and proceed upon proof to the extent of preponderance but that you may be required to make your proof clear and convincing." (R. 259) Appellant replied that he did not claim bad faith, but rather that Respondent "entered into this transaction with themselves."

"They conveyed from the corporation they controlled, to themselves, this property." "What we are claiming here, is that they have simply breached the contract; doesn't matter whether they did it in good faith or not."

"If they breached it, they breached it. We claim the contract required them to make sales which would require market value, and that they made sales to themselves which did not establish market value because who is the judge in a sale to yourself — not yourself, of course. That is our point. It isn't the question of bad faith, at all." (R. 260)

The Court then stated its view:

“Now, if you contend that they proceeded under the contract and that the difference between you is interpretation of the contract, then that is probably for the Court to determine — what is meant by the parties as sign their names to it.

* * *

“Second, this will be then — after I have interpreted it — did the parties proceed in accordance with that interpretation? That may be a mixed question of law and fact.” (R. 261)

After further discussion, the Court finally concluded:

“I am going to proceed as though this were an action in equity for an accounting between the parties . You have, by Stipulation, presented to me now what the parties have offered to do in a way of accounting.

“Plaintiff may proceed carrying the burden of proof — carrying the burden of going forward — and the burden of proof charging that, under the contract, a proper accounting has not been made or tendered.” (R. 267)

The case thereupon proceeded to trial. Following a rather protracted hearing lasting several days, during which the examination of Appellant’s witnesses was frequently and repeatedly interrupted for so-called “voir dire” examination, the Court rendered a memorandum decision in which it:

1. Rejected the position of Appellant and that Respondent was required to go forward with proof to sustain the adequacy and propriety of the accounting by clear and convincing evidence;

2. Rejected Appellant's claim that he should be granted relief against Respondent "as for a breach of contract";

3. Rejected Appellant's request for a jury trial;

4. Determined that the matter had to be tried as an equitable accounting;

5. Determined that Appellant had the burden of proving the conduct of the Respondent corporation toward Appellant was dishonest and fraudulent;

6. Accepted evidence of fair market value as one of the factors which would enable it to decide whether Respondent's actions were "so far from reasonable conduct that equity would require different standards than those already used or proposed in the accounting;"

7. Commented that Appellant's witnesses on "fair market value" gave the impression of having had "more than necessary instruction" from Appellant "in hope that they would reproduce his views;" while the testimony of Respondent's witnesses was more helpful to the Court; and

8. Concluded that Respondent must include in its accounting interest on receipts from deferred payment contracts and "must now promptly account and pay" in accordance with the Court's decision and hereafter "account and pay promptly when there is something to account and pay, at the time prescribed in the contract."

The Court otherwise resolved the issues in favor of Respondent, denied any relief to Appellant, and di-

rected counsel for the Respondent corporation to prepare appropriate Findings of Fact and Conclusions of Law. (R. 206-209)

Thereafter, the Court issued a supplemental decision in which it specifically referred to the transfer of 31.07 acres to the Twenty-Five Associates and McConaughy. Since the tract involved was zoned for A1 use, the Court concluded that the sale and purchase of the property as a tract "was necessarily as and for residential lots." In addition the Court found that Respondent corporation sold its equity in that tract for a consideration which, as reported in the accounting made in open Court during the course of the trial, was fair and reasonable. (R. 210)

The Court signed the Findings of Fact and Conclusions of Law submitted to it by Respondent (R. 211-218), and rendered judgment in favor of the Respondent and against the Appellant. (R. 219-221)

Thereafter, Appellant filed a Motion to Alter and Amend the Findings, Conclusions and Decree or in the alternative for a new trial. (R. 230-234) The Court denied the Motions in toto, but did make an amendment to the Findings to the effect that Appellant "by his act and conduct, and the negotiations with Happy Valley held from time to time during the periods in question, waived his contractual right to receive quarterly accountings and monthly payments under the terms of said Agreement, as well as all interest on such payments to the dates that the tenders of payments were made by Happy Valley as more specifically set forth in Finding

No. 14 on file herein.” (R. 236) Appellant thereupon filed his Notice of Appeal. (R. 243)

ARGUMENT

I.

THE COURT ERRED IN ITS ANALYSIS AND DETERMINATION OF THE ISSUES.

In order to assist this Court in reviewing the various claims of Appellant in respect to this matter, we have sub-divided the discussion of this point into several specific sub-topics with respect to which Appellant classes the Trial Court erred in its determination of the issues, as follows :

A. The Trial Court erred in treating the case solely as an action in the nature of an equitable accounting and in refusing Appellant a jury trial.

B. The Trial Court erred in determining that in order to be entitled to relief Appellant had to prove that the conduct of the principals of Respondent corporation in dealing with themselves in conveyances of real property from Respondent corporation was dishonest and fraudulent as to Appellant.

C. The Trial Court failed to consider and make findings in respect to the rights of Appellant under the terms of the contract for the development of the property, the subject of the Agreement.

D. The Court erred in refusing to hear and receive certain testimony.

A.

THE TRIAL COURT ERRED IN TREATING THE CASE SOLELY AS AN ACTION IN THE NATURE OF AN EQUITABLE ACCOUNTING AND IN REFUSING APPELLANT A JURY TRIAL.

Although the Court may have understandably been somewhat confused because of the background of this case involving amended pleadings, additional parties and previous Orders of the Court dismissing certain of the Causes of Action and also dismissing the action as to all individual parties, the Pretrial Order specifically sets forth the issues which the Trial Court was called upon to hear and determine. As to the Second Cause of Action remaining the Order recites that it is "for an accounting for declaratory relief as to the rights of the Plaintiff and for injunctive relief" arising out of the contract dated August 8, 1957. (R. 195)

The specific issues set out by the Order have little or no relationship to any so-called action for an equitable accounting. The issues as framed are: (1) Whether Plaintiff is entitled to have the lots conveyed by the corporation to the individual officers and directors accounted for at any other values than those fixed by the same officers and directors; (2) Whether the Plaintiff is entitled to have the property conveyed to other persons than the officers and directors evaluated at any figure other than that asserted by the corporation; and (3) Whether the Plaintiff is entitled to have the undivided tracts of land which have been conveyed out of the corporation evaluated as residential lots and if so, at what value. (R. 195)

These questions, the Court stated in the Pretrial Order, arise out of the construction of the contract dated August 8, 1957 "which the Trial Court will have to completely read and attempt to understand before this matter is tried." (R. 196)

That Appellant is entitled to have Respondent "account" to him for the monies received from the sale of the lots has never been disputed. Not only does the contract specifically so provide, but it has always been conceded by Respondent corporation and was so conceded by it at the beginning of the trial. There is, therefore, little or no basis for limiting the matter solely to considering an equitable accounting. In any event, however, there was no reason for construing the matter as one for an equitable accounting rather than a common law action for an accounting.

As stated in I Am. Jur. 2d, ACCOUNTS AND ACCOUNTING, Section 45:

"The action of account is designed to provide a remedy to compel a person who, by virtue of some confidential or trust relation, has received or been entrusted with money or property belonging to another or which is to be applied or disposed of in a particular manner, to render an account thereof, and to recover the balance found to be due."

On the other hand, Section 51 states the following with respect to the equitable action for an accounting:

"Equitable jurisdiction for an accounting is usually put upon the following grounds: (1) the

existence of a fiduciary relationship with a duty resting upon the Defendant to render an account; (2) the existence of mutual account, or if the account is all on one side, the fact that the account is complicated; and (3) the need for a discovery. A court may also assume jurisdiction where other grounds for invoking equity, such as fraud, multiplicity or suits, etc., are present. *However, equity will not take jurisdiction in uncomplicated matters of account, absent some other ground for equitable jurisdiction, since to do so might involve the equity courts in the trial of matters properly triable in an ordinary assumpsit action.*" (Emphasis added.)

Section 51 thereafter concludes:

"But where the principal purpose of a suit is not a subject of equity jurisdiction, and the discovery and accounting sought therein are merely incidental and dependent on the main issues, equity will not generally take jurisdiction on grounds of accounting."

These general principles of law have been adhered to in this jurisdiction. In the case of *Halloran-Judge Trust Company vs. Heath*, 70 Utah 124, 258 P. 342, the Supreme Court held that although the specific relief requested in the Complaint was an accounting and injunction, what the Plaintiff actually was entitled to, if anything, was the recovery of money claimed to be owing under a contract which was obtainable only in an action at law.

In the case of *Williams vs. Herring*, 183 Ia. 127, 165 NW 342, the Iowa Supreme Court was concerned with the problem of whether the action should be referred to

the equity side of the Court. Plaintiff's Complaint alleged a violation by Defendant of certain terms of a written contract entered into between the parties. Defendant contended that inasmuch as there would be numerous accounts involved in determining whether or not any amount was due Plaintiff under the contract, the matter should be transferred to the equity side of the Court.

In analyzing the matter the Court stated:

“Apparently, the principal reason for seeking a transfer of this cause to equity is that same can there be much more conveniently, and probably efficiently, tried than at law. Conceding that this is true, yet the pleadings do not disclose a controversy arising out of a matter cognizable in a court of equity, and the relief sought upon the first count is for a sum alleged to be due as compensation and upon the second count for damages based upon an alleged violation of one of the provisions of said contract. The question of mutual accounts is not, under the pleadings, involved. The fact that the controversy involves a large number of items of debit and credit arising out of many business transactions, and that same could be more conveniently tried to the Court, is not a ground of equitable jurisdiction. The test is not whether the cause can be more conveniently or satisfactorily tried and determined by the Court than a jury but the accounts must be mutual requiring an accounting, or there must be some other ground or equitable cognizance not shown to exist in this case.”

Since under our constitution (Article VIII, Section 19) any distinction between actions at law and equity has been abolished and there is but one form of civil action, what difference does it make whether the Court

treated the matter as an equitable accounting or as an action at law? Not only did this ruling result in unduly restricting and limiting the scope of inquiry in the case (as will be discussed more particularly hereinafter), it persuaded the Court to refuse Appellant a jury trial. Although the Pretrial Order set the matter down for a jury trial (R. 194), the Trial Court after determining the action was for an equitable accounting dismissed the jury and tried the case to the Court.

The Utah Rules of Civil Procedure (which follow quite closely the Federal Rules) provide that "the right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties." (Rule 38(a)) Our statute, Section 78-21-1, U.C.A., 1953, provides:

"In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered." (Emphasis added.)

Certainly the instant action is one "for money claimed as due upon contract" as above defined. Unfortunately, however, the lower Court apparently was unduly influenced by the use of the phrase "action for an accounting" without considering the over-all object of the suit. In fact, the Court stated: "If there has been a breach, then the parties are not entitled to an accounting. If the contract remains in force — binding upon the parties — you are entitled to an accounting thereunder."

(R. 265) And in its memorandum decision the Court stated :

“Could not reconcile the conflicts of a demand for an accounting under a contract intact and for damages under a contract breached.” (R. 207)

The Court never quite realized that it was the failure to make an accounting according to the terms of the contract which constituted the breach giving rise to the action by Appellant here; and the request for an accounting was only ancillary to the request that the rights of the Appellant under the contract be determined. It certainly was not necessary, as the Court stated, for the Plaintiff to rescind or disavow the contract in order to secure relief for the breach thereof. (17 Am. Jur. 2d, CONTRACTS, Section 445)

A noted case on the right to a jury trial in the State of Utah is the case of *Norback vs. Board of Directors of Church Extension Society*, 84 Utah 506, 37 P. 2d 339, where the Court held that it was error to refuse the Plaintiff a jury trial, in rendering its decision the Court quoted from the earlier case of *State ex rel Hansen vs. Hart*, 26 Utah 220, 72 P. 938, as follows :

If the principles to which appeal must be had are principles of law in the main or primary action, either party thereto upon demand is entitled to a trial by jury. This is true although application is made to the Court to exercise its equity powers in granting injunctive relief. Where the issues are legal issues, the fact that equitable relief may be prayed for, to carry into effect the judgment based upon the legal issues is not sufficient to deprive either party of his rights to have the legal issues submitted to a jury.”

In the later case of *Valley Mortuary v. Fairbanks*, 119 U. 204, 225 P. 2d 739, (1950), our Supreme Court extended the rule laid down in the Norback Case further in favor of guaranteeing to the parties the right to a trial by jury. The Fairbanks Case involved an action by Plaintiff to enjoin Defendant from operating a funeral business in alleged violation of an agreement between the parties and for damages for past infractions of the agreement. The trial court, on the basis of the rule laid down in the Norback Case refused a jury trial because the Court "conceives in the light of the prayer for relief the paramount object of the proceeding is injunctive . . . that the question is primarily equitable, that the damage action . . . is incidental to the primary relief; . . . that the parties are not entitled as a right to a jury to try the cause."

The Supreme Court after citing our statute on the right to a jury trial held that the Defendant was entitled to a jury trial as to said damages regardless of the primary or paramount object of the proceeding. The Court quoted with approval from the case of *Farrell v. City of Ontario*, 39 Cal. App. 351, 178 P. 740, as follows:

"There is no occasion in this state for the application of the rule that equity, once taking jurisdiction, will retain it for the purpose of disposing of the entire case, because here the court may dispose of the entire case without the necessity of trying it as a case wholly of equitable cognizance. Here the court, having jurisdiction, may hear and determine the equitable issue according to the rules of equity, and the legal issues in accordance with the rules of laws, both in the same action."

Our Court then stated:

“There is no persuasive reason why either party should not be entitled upon timely demand to a jury to determine the issues of fact raised by the legal causes of action.”

The Supreme Court of the United States had occasion to consider the right to a trial by jury in a matter involving an accounting under the Federal Rules of Civil Procedure (which have been adopted in this State in respect to the matters referred to in the Court's opinion). In *Dairy Queen v. Wood*, 369 U.S. 469, 8 L. ed 2d 44, 82 S. Ct. 894, a complaint had been filed alleging a breach of a written trademark licensing agreement by failure to pay the agreed amount for the exclusive right to use the trademark within a certain territory. A temporary and permanent injunction were requested along with an accounting to determine the exact amount of money owing by the defendant and for judgment for that amount. The trial court refused the defendant a jury trial whereupon defendant petitioned for a writ of mandamus which brought the matter before the Supreme Court for review. The Court discussed the history behind the right to a trial by jury in Federal Court and as presently in effect under the Federal Rules of Civil Procedure, as follows:

“At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury — that based upon the view that the right to trial by jury may be lost as to legal issues where those issues are characterized as ‘incidental’ to equitable issues — for our previous decisions make it plain that no such rule may be applied in the federal courts.

In *Scott v. Neely*, decided in 1891, this Court held that a court of equity could not even take jurisdiction of a suit 'in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief.' That holding, which was based upon both the historical separation between law and equity and the duty of the court to insure 'that the right to a trial by a jury in the legal action may be preserved intact,' created considerable inconvenience in that it necessitated two separate trials in the same case whenever that case contained both legal and equitable claims. Consequently, when the procedure in the federal courts was modernized by the adoption of the Federal Rules of Civil Procedure in 1938, it was deemed advisable to abandon that part of the holding of *Scott v. Neely* which rested upon the separation of law and equity and to permit the joinder of legal and equitable claims in a single action. Thus Rule 18(a) provides that a plaintiff 'may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing part.' And Rule 18(b) provides: 'Wherever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.'

The Federal Rules did not, however, purport to change the basic holding of *Scott v. Neely* that the right to trial by jury of legal claims must be preserved. Quite the contrary, Rule 38(a) expressly reaffirms that constitutional principle,

declaring: 'The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.' Nonetheless, after the adoption of the Federal Rules, attempts were made indirectly to undercut that right by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally came before us in *Beacon Theatres, Inc. v. Westover*, a case which, like this one, arose from the denial of a petition for mandamus to compel a district judge to vacate his order striking a demand for trial by jury.

Our decision reversing that case not only emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury but also limits the issues open for determination here by defining the protection to which that right is entitled in cases involving both legal and equitable claims. The holding in *Beacon Theatres* was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot

even be a contention that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury.”

The Court then stated:

“Petitioner’s contention, as set forth in its petition for mandamus to the Court of Appeals and reiterated in its briefs before this Court, is that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal. We agree with that contention. . . .

As an action on a debt allegedly due under a contract, it would be difficult to conceive of an action of a more traditionally legal character.”

The Court further stated:

“The respondents’ contention that this money claim is ‘purely equitable’ is based primarily upon the fact that their complaint is cast in terms of an ‘accounting,’ rather than in terms of an action for ‘debt’ or ‘damages.’ *But the constitutional right to a trial by jury cannot be made to depend upon the choice of words used in the pleadings.* The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in *Beacon Theatres*, the absence of an adequate remedy at law. Consequently, in order to maintain such a suit on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the ‘accounts between the parties’ are of such a ‘complicated nature’ that only a court of equity can satisfactorily unravel them. In view of the powers given to District Courts by Federal Rule of Civil Procedure 53(b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately

to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met. But be that as it may, this is certainly not such a case. A jury, under proper instructions from the court, could readily determine the recovery, if any, to be had here, whether the theory finally settled upon is that of breach of contract, that of trademark infringement, or any combination of the two. The legal remedy cannot be characterized as inadequate merely because the measure of damages may necessitate a look into petitioner's business records." (Emphasis added.)

Finally we wish to point out to the Court that Section 78-33-9, Utah Code Annotated 1953 provides that where a Declaratory Judgment action "involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending."

B.

THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT HAD TO PROVE THAT THE CONDUCT OF THE PRINCIPALS OR RESPONDENT CORPORATION IN DEALING WITH THEMSELVES IN CONVEYANCES OF REAL PROPERTY FROM RESPONDENT CORPORATION WAS DISHONEST AND FRAUDULENT AS TO APPELLANT.

Appellant contends that under terms of the contract it was the duty of Respondent corporation to effect an orderly development of the property and sell the residential lots at their fair market value. Respondent,

however, conveyed more than half of the lots in subdivision 1 through 4 to its sole stockholders, officers and directors "for a fixed and determined consideration of \$3,000.00 per lot." The first conveyance of lots in subdivision No. 1 took place in November 1959 when 27 lots were conveyed for the recited consideration of \$3,000.00 per lot. The next conveyance took place 18 months later in May 1961 when 1 lot was conveyed from subdivision No. 1, 21 lots in subdivision No. 2 and 51 lots in subdivision No. 3. The third conveyance was in September 1962, nearly three years after the first conveyance when 8 lots were conveyed in subdivision No. 4. Further, the first conveyance in November 1959 occurred within a few days after the approval of the subdivision and the recording of the plat so that it would have been impossible to have had any experience in determining what these lots would have sold for on the open market. Nor does Respondent corporation claim that it ever offered the lots to the public at the same price which it conveyed the lots to its sole officers and directors. The purchase price of the lots offered to the public from the same subdivisions ranged in price from \$3,900.00 to \$7,500.00. It is also significant to point out that when the first conveyance was made by the Respondent corporation to its sole officers and directors a sale was intended. In a letter written to Appellant and Mr. Norvel E. Safford (one of the other persons comprising Second Party) dated May 26, 1961, and signed by both Owen W. Bunker and C. Taylor Burton (then the surviving directors and stockholders of Respondent Corporation) the purported circumstances giving rise to

the necessity for the conveyance are set forth. After stating that it had been necessary for the sponsors to make cash contributions to Respondent Corporation the letter states that such contributions "have been secured to the sponsors by the corporation deeding to them sufficient lots to equal the cash necessary to keep the company's land payments current." (Exhibit 42-P)

The minutes of the Board of Directors of Respondent Corporation record the transaction as follows:

"More money will be required before spring lot sales can be made to carry the contract payments, so it appears the principals will have to make further contributions. Mr. Bunker stated he was unwilling to do so without at least some kind of security for a return of some of the funds already advanced. As a method of reducing the Company's obligation to the principals he suggested each taking title to some lots to offset some of the Company's borrowings. The lots would be taken at cost, after determining same, for \$3,000.00 which was offered by Mr. Shaw, or whichever was greater. Mr. Graff and Mr. Burton each agreed to this procedure. A future financing for the Company is needed before sales are able to pick up necessary contract payments, cash advances may be handled in the same manner." (R. 34, 35)

Although the minutes also reflect certain offers had been made for lots in subdivision No. 1 for \$3,000.00 per lot as of November 1959, there was no attempt at any time thereafter to obtain appraisals of the lots when substantial numbers were conveyed in May of 1961 and again when the transfer of eight lots was made in September 1962.

The lower court, both during the trial and in its Memorandum Decision, interpreted the contract to require Appellant to prove that the transaction between Respondent Corporation and its sole stockholders, officers and directors was unconscionable, fraudulent and unfair in order to fix a price on the lots conveyed to such principals different from that which they themselves fixed. In fact, the Findings of the trial court on this matter are as follows:

“18. The evidence adduced by plaintiff did not show bad faith, unfair dealings, unreasonable, unconscionable or arbitrary conduct on the part of Happy Valley with regard to the transactions referred to in Findings 5, 6, 7, 8, 9, 10, 11 and 12, nor was Happy Valley's conduct with regard thereto shown to be fraudulent as to plaintiff. There has been no showing made that Happy Valley acted unreasonably under the circumstances.” (R. 215)

Without regard to whether the Court properly interpreted the provisions of the contract to limit Appellant to the actual “proceeds” regardless of the amount thereof, the determination that the burden was upon Appellant to prove the unfairness or fraudulent nature of the transaction whereby the corporation through its sole officers and directors conveyed 108 of its 150 subdivided lots to such officers and directors is clearly in error. In considering the question of the propriety of the action of a director or officer of a corporation in acquiring corporate property, *Fletcher on Corporations* (Permanent Edition) Revised Vol. No. 3, Section 949 states:

“If the sale is actually, or in effect, made by the officer to himself, as where he wholly or partially represents the corporation and also is the purchaser either as an individual or as a member of a firm or the like, *the sale is voidable at the option of the corporation merely because of the relationship of the parties and without regard to whether the sale is a fair or an unfair one, according to the general rule already stated. Thus, a director of a corporation cannot become the purchaser of property of the corporation which it is his duty to sell.* Likewise, the president of a corporation has no authority to sell its goods to himself, nor can he sell its future output to himself so as to cut off a prior vendor’s lien of which he as president was bound to take notice. So the president of a corporation cannot purchase notes belonging to the corporation from the corporation as represented by himself and indorse them to himself.” (Emphasis added.)

It must be remembered here that the officers to whom the property was conveyed were the persons who authorized the conveyance and who had the duty as the officers of the corporation to subdivide and sell the property pursuant to the terms of the contract. Thus the law is that the sale is voidable at the option of the corporation merely because of the relationship without regard to whether the sale is fair or unfair. Again, as stated in *Fletcher, ibid. Section 937*:

“It is self-evident that if a majority of the directors are adversely interested, then any transaction between themselves and the corporation as represented by its board of directors is simply a case of officers dealing with themselves. It has been held that the entire board of directors cannot contract with the corporation, since there is no

one to represent the corporation. This is undoubtedly true if it merely means that such a contract is voidable as distinguished from being void. Furthermore, such dealings undoubtedly are to be considered as dealings between interested officers acting for themselves as one party to the contract and acting for the corporation as the other party to the contract, so as to authorize the corporation to set aside the contract merely on the ground of the relationship of the parties without reference to its fairness or the good faith of the parties." (Emphasis added.)

Fletcher also discusses the responsibility on the part of the officer or director acquiring assets of property of the corporation to prove the fairness of the transaction (even where he is not dealing with himself because other directors approved the transaction):

"In this connection, however, the question to be considered is what are the presumptions and upon whom the burden of proof rests where the ground urged for setting aside the transaction is that it is unfair or entered into in bad faith. As to this matter, the courts agree that while there is no presumption of unfairness or bad faith in the first instance, unless the facts of the particular case are such as to naturally raise such a presumption, yet *the burden is on the director seeking to uphold the transaction not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein.*" (Ibid. Sec. 921)

A landmark case on this point is *Pepper v. Litton*, 308 U.S. 295, 84 L. ed 281, 60 S. Ct. 238 decided by the Supreme Court of the United States. The Court there stated the law to be:

"A director is a fiduciary. *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 588, 23 L. ed 329, 330. So is a dominant or controlling stockholder or group of stockholders. *Southern P. Co. v. Bogert*, 250 U.S. 483, 492, 63 L. ed 1099, 1107, 39 S. Ct. 533. Their powers are powers in trust. See *Jackson v. Ludeling*, 21 Wall, 616, 624, 22 L. ed 492, 495. Their dealings with the corporation are subjected to rigorous scrutiny and *where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein*. *Geddes v. Anaconda Copper Min. Co.* 254 U.S. 590, 599, 65 L. ed 425, 432, 41 S. Ct. 209. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside. While normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee. *For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation — creditors as well as stockholders.*" (Emphasis added.)

It is to be noted that the Court specifically states that the standard of fiduciary obligation is designed "for the protection of the entire community of interests in the corporation — creditors as well as stockholders." This, of course, includes Appellant in the present situation because he is a creditor of the corporation in connection with any sale by the corporation of its lots, to the extent of his interest in the proceeds of said sale.

The principles enunciated above with respect to directors of a corporation dealing with themselves as individuals were early recognized by our Supreme Court. In the case of *Bear River Valley Orchard Co. v. Hanley*, 15 Utah 506, 60 Pac. 611, the Court held:

“Agents cannot bind their principals by contracts with respect to subjects in which they may have opposing interests. In such a case their own interests may interfere with their duty to their principal. Self-interest may turn out to be a stronger motive than their obligation to their principals. Under such circumstances the law will not allow them to serve two masters, — to be led into such temptation. *Victor Gold & Silver Min. Co. v. National Bank of the Republic (Utah)* 49 Pac. 826; *Wardell v. Railroad Co.*, 103 U.S. 651; *Mechem, Ag. Secs.* 455, 456; 1 *Mor. Priv. Corp. Sec.* 517; *McGourkey v. Railway*, 146 U.S. 536, 13 Sup. Ct. 170.”

In the later case of *Glen Allen Mining Co. v. Park Galena Mining Co.*, 77 Utah 362, 296 Pac. 231, our Supreme Court reversed the trial court in respect to the transfer of certain corporate assets, holding:

“The authorities everywhere recognize the rule that, where a fiduciary relation is shown to exist, the burden is upon the fiduciary to show good faith and fair dealing in his relations with his cestui que trust. It is frequently said that the relation of a director to his corporation is not that of trustee and cestui que trust. But it does not follow from that statement that the director is not bound by the same rules of good faith, full disclosure, and fair dealing as surrounds the trustee in dealing with the cestui que trust. As agents intrusted with the management of the corporation

for the benefit of the stockholders and creditors, they occupy a fiduciary relation, and are held liable to the corporation as trustees. The liability of directors and other officers to the corporation is determined by substantially the same principles which determine the liability of any other agent to his principal for failure to perform the duties which he has undertaken.

“Pomeroy in his work on Equity Jurisprudence, Sec. 1077, states the rules as follows:

“‘As long as the confidential relation lasts the trustee or other fiduciary owes an undivided duty to his beneficiary, and cannot place himself in any other position which would subject him to conflicting duties or expose him cestui que trust. The rule applies alike to agents, partners, guardians, executors, and administrators directing and managing officers of corporations as well as to technical trustees. The most important phase of this rule is that which forbids trustees and other fiduciaries from dealing in their own behalf with respect to matters involved in the trust, and this prohibition operates irrespectively of the good faith or bad faith of such dealing.’” (Emphasis added)

More recently in the case of *Hansen v. Granite Holding Company*, 117 Utah 530, 210 P. 2d 274, the Court set aside a purported sale and conveyance of real property by a corporation to a son of the principal stockholder and president and general manager of the corporation. Defendant had paid a total of \$84,500.00 for the property which was appraised during the course of trial from \$90,000.00 by Defendant’s appraisers to \$115,000.00 by Plaintiff’s appraisers. The Trial Court found the property to be reasonably worth the sum of \$100,000.00. On

appeal, the Supreme Court announced the rule with respect to corporate management dealing with the corporation as follows:

“But a fiduciary relation exists between the board of directors and the management of the corporation on one hand, and the stockholders on the other and where the management is interested in any deal with the corporation so that its interests are contrary to that of the corporation, then its actions must be open and above board and their dealings must be carried on with the utmost fairness and good faith. In such cases courts of equity will carefully scrutinize the dealings of the management and set aside such transactions on slight grounds. *Noble Mercantile Co. v. Mt. Pleasant Co-operative Inst.*, 12 Utah 213, 42 P. 869; *Victor Gold & Silver Mining Co. v. National Bank*, 15 Utah 391, 49 P. 826; *McIntyre v. Ajax Mining Co.*, 17 Utah 213, 53 P. 1124; *Erwin v. Oregon R. & Nav. Co.*, C. C., 27 F. 625.”

See, also, *Clark and Wilson Lumber Co. of Delaware v. McAllister*, (9 Cir.) 101 F. 2d 709; *Mardel Securities Inc. v. Alexandria Gazette Corp.*, (4 Cir.) 320 F. 2d 890.

In the light of the foregoing it is hard to understand how the Trial Court could have concluded that Appellant had to prove that the conduct of the sole stockholders, officers, and directors of Respondent Corporation (in conveying Respondent's real property to themselves) was unfair, unreasonable or unconscionable. In fact, however, Respondent's own evidence clearly demonstrates that except for the initial conveyance in November of 1959, the lots conveyed by the principals to themselves were worth considerably in excess of the amount which

was determined to be the purchase price. Mr. C. Francis Solomon called as a witness for the Respondent Corporation testified that he was a professional fee appraiser; that he had made appraisals of the lots in subdivisions 1, 2, 3, and 4 as of the dates on which the transfers had been made from Respondent Corporation to its principals. His appraisal was made on the basis of individual lots and is summarized in Exhibit 59-D. (R. 1199-1202) The Exhibit in question which contains his appraisal reveals that of the 28 lots appraised in subdivision No. 1, only 18 were appraised at \$3,000.00 or less and the average appraisal for the lots in such subdivision as of November 1959 was \$3,080.00 per lot. With respect to the 20 lots conveyed by the Respondent to its officers and directors from subdivision No. 2 in May 1961, none were appraised at \$3,000.00 or less and the average appraisal was \$3,660.00 per lot. In respect to the 52 lots conveyed in May of 1961 from subdivision No. 3, only 3 lots were appraised at \$3,000.00 or less and the average appraisal was \$3,500.00 per lot. Of the 8 lots appraised in subdivision No. 4 as of September 1962, none were appraised at \$3,000.00 or less and the average appraisal for said lots was \$3,500.00. The total difference between the "price" used by Respondent's principals in conveying the lots to themselves and the fair market value of these lots at the time of such conveyance as appraised by Respondent's own witness is \$45,050.00. Since Mr. Solomon's appraisal was the only independent appraisal submitted by Respondent Corporation during the trial of the case as to the lots in subdivisions 2, 3, and 4, the trial Court would have concluded under any cir-

cumstances that the transaction was fair and equitable to all persons interested therein.

This does not consider the appraisals of Don W. Stahle and Edward M. Ashton, both of whom submitted appraisals to Respondent as to the lots in subdivision No. 1 as of November 1959. Mr. Stahle appraised the lots of the average fair market value of \$3,500.00 per lot (Exh. 9-D); and Mr. Ashton appraised the same lots to be of the average fair market value of \$3,450.00 per lot. Using these figures as a basis for value of the lots in subdivision No. 1 instead of Mr. Solomon's figures for such subdivision would increase the difference between what the principals took the lots for and what the fair market value was from \$45,050 to \$57,810.00. Nor does this take into consideration the fair market value of the lots testified to by the several witnesses who were called by Appellant. These figures are substantially higher than the figures of Mr. Solomon. (Exh. 38-P)

C.

THE TRIAL COURT FAILED TO CONSIDER AND MAKE FINDINGS IN RESPECT TO THE RIGHTS OF APPELLANT UNDER THE TERMS OF THE CONTRACT FOR THE DEVELOPMENT OF THE PROPERTY, THE SUBJECT OF THE AGREEMENT.

Although the Pretrial Order specifically states that the action is one "for declaratory relief as to the rights of the Plaintiff" and sets forth that one of the claims of the Plaintiff is that he is entitled to a declaratory judgment determining his rights under the August 8, 1957 contract as to accountings, times of payment and

the rate and manner of development of the properties, the subject of the Agreement," the Court refused to consider any testimony regarding the terms of the contract with respect to the development of the properties and made no findings in reference to the rights of the Appellant in respect thereto. (R. 196)

The Agreement of August 8, 1957 between the parties recites that First Party (Respondent) is the owner or entitled to sell certain land situated in Salt Lake County denominated the "entire premises" and desires to develop those premises to subdivide a portion thereof for residential building lots and reserve a suitable portion for use as a golf course. The Agreement further recites that it is the intention and desire of Second Party (including Appellant herein) to effect the organization of the Willow Creek Country Club for the purpose of buying and developing a portion of the entire premises as a golf course. (R. 137) The contract then provides that First Party agrees to sell and Second Party agrees to acquire the portion of the entire premises for a golf course and First Party further agrees to furnish culinary and irrigation water to satisfy the needs of the Country Club.

First Party then agrees to use its best efforts to cause the balance of the entire premises to be zoned for Class "A" residential purposes and agrees to develop, subdivide, and sell as residential lots and a shopping center in conjunction therewith all of the entire premises except those sold for Club purposes. Paragraph 6 of the Contract specifically states that "said entire premises

shall not be sold or developed in any other manner except upon the written consent of Second Party."

The Court made no finding as to the responsibility, if any, of First Party to make an orderly development of the property or to subdivide and sell the property as residential lots as contended for by Appellant nor did it make any finding in reference to this matter. This Court has repeatedly held, both before and since the adoption of the Utah Rules of Civil Procedure, that findings must respond to and cover all the material issues raised by the pleadings whether evidence respecting them was or was not adduced and if there be no such express or implied findings the judgment has no support. See *Simper v. Brown*, 74 Utah 178, 278 P. 529. In the recent case of *Gaddis Investment Co. v. Morrison*, 3 U. 2d 43, 278 P. 284, The Court held:

"The defendant's answer raised the issue of abandonment of the contract but the trial court made no finding regarding it. Utah Rules of Civil Procedure, Rule 52 provides:

'In all actions tried upon the facts without a jury * * * the court shall, unless the same was waived, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *'

"It appears that the judgment was based principally upon the findings that the contract was entered into and the commission had not been paid, totally disregarding defendant's answer to the complaint. It has been frequently held that the failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial. *Hall v. Sabey*, 58 Utah

343, 198 P. 1110; Baker v. Hatch, 70 Utah 1, 257 P. 637; Prows v. Howley, 72 Utah 444, 271 P. 31; Simper v. Brown, 74 Utah 278, 278 P. 529; West v. Standard Fuel Co., 81 Utah 300, 17 P. 2d 292; Pike v. Clark, 95 Utah 235, 79 P. 2d 1010."

We submit that by the lower court concluding that the action was for an equitable accounting only it failed to consider and pass upon all the issues raised by the Pretrial Order and therefore that the judgment should be reversed for this matter to be considered and resolved.

D.

THE COURT ERRED IN REFUSING TO HEAR AND
RECEIVE CERTAIN TESTIMONY.

By the Court limiting the trial to a hearing of an equitable accounting at the outset of the trial, Appellant was very limited in the nature of the testimony which he could adduce. Even so, there were times during the trial when evidence was excluded that would have related directly to the good faith of the principals of Respondent Corporation in dealing with themselves. During the course of examination of Mr. Owen W. Bunker, Appellant offered to prove by the witness that several lots received by him from the Respondent were resold at substantially higher prices; that in September 1961 Lot 561 in subdivision No. 1 was sold to Leon J. Nicolaides for the price of \$7,500.00; that on October 9, 1961 Lot 37 in subdivision No. 2 was sold to Richard Prows, Inc. for \$7,500.00 in cash; that Lot 33 in subdivision No. 2 was sold to the Johnsons on October 4, 1963 for \$6,500.00 and Lot 32 in subdivision No. 2 was sold to the Rowleys on May 21,

1963 for \$7,200.00; that Lot 21 in subdivision sold to the McKays on July 12, 1962 for Lot 26 was sold to Award Homes on October \$6,000.00 cash. (R. 582, 583) Appellant failed to show by the testimony of Mr. C. Taylor on April 15, 1962 he sold Lot 9 in subdivision the Gordons for \$6,000.00; that on May 2, Lot 8 in subdivision No. 3 to Ferre for \$ Lot 27 in the same subdivision to the Ma 000.00; that he sold Lot 28 in the subdivision Gordon and Bush on July 1, 1963 for \$7,0 54 in the same subdivision to Donald Dyson 8, 1963 for \$6,000.00 and Lot 55 to a LeRoy same terms as the sale for Donald Dyson would testify that he sold Lot 10 in subdivision to Gordon and Bush in April 1963 for \$ additional terms being involved. (R. 585, 5

In denying the proffer of proof the Court

“The court takes note of the proffer and objections made, and it appears to me that this is a proffer of the — of some of the facts of a sale, and without proof of any evidence of any competent witness with regard to the comparability of the proffered sales with sales with respect to which plaintiff claims the accounting now made is unconscionable in the light of the objections. I am summarizing those and the views of the court. I think the law is that proof of a sale alone is no proof of comparable sales. Proof of the fair market value of the property which plaintiff claims the accounting is unconscionable or

Accordingly, the offer — the proffer of proof — is refused.” (R. 591)

Appellant submits, however, that the foregoing evidence was material and relevant and should have been received where the principals took conveyance of lots from the Corporation for the sum of \$3,000.00 per lot and in turn sold them for \$6,000.00 to \$7,500.00 per lot. Therefore, this testimony was admissible and should have been considered by the Court in determining whether or not the conduct and actions of the directors was in fact conscionable and fair as far as the Appellant is concerned.

In the course of examination of C. Taylor Burton by Respondent Corporation, the witness identified certain appraisals which had been obtained by the stockholders, officers and directors of Respondent Corporation. (Exhs. 8-D to 13-D) Most of these appraisals were dated approximately a year after the conveyance but referred to the date of sale as the value date. Upon being examined on voir dire by Appellant, Mr. Burton testified that these appraisals were used in the negotiations with the Federal Government on tax questions which concerned the value of the property taken by the stockholders and directors from the Corporation. (R. 371) Subsequently, in the course of cross examination of Mr. Burton, Appellant attempted to inquire further into the matter by asking him concerning the difficulty with the Federal Government which necessitated their revaluing for tax purposes the 24 lots received by them from the Corporation in subdivision No. 1.

An objection by Respondent was sustained by the Court thereby precluding Appellant from ascertaining

what value the parties had accepted with the Federal Government, in connection with which the very exhibits which had been received in evidence was used. This again was material and relevant in determining the fairness of the transaction between the principals and the Corporation.

We respectfully submit that the errors committed by the trial court in the analysis and determination of the issues in the case and in the limitation of the evidence received in the matter requires this Court to reverse the judgment and send it back for a new trial before a jury.

II.

THE COURT ERRED IN ITS ANALYSIS AND INTERPRETATION OF THE CONTRACT OF AUGUST 8, 1957.

Not only did the trial court misconstrue the issues in the case and fail to consider all of them, it likewise failed properly to interpret the contract between the parties and failed to give effect to all of its terms. It is a well recognized principle of law that it is not only for a breach of express promises in a contract that a person is liable, but also for a breach of implied promises as well. As stated by *Williston on Contracts, Revised Edition, Vol. 5, Sec. 1293*:

“Since the governing principle in the formation of contracts is the justifiable assumption by one party of a certain intention on the part of another, the undertaking of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding or included.”

In the case of *Watson Brothers Transportation Co., Inc. v. Jaffa* (B Cir.) 143 F. 2d 340, the Court made the following statement:

“Aside from the allegation of the petition that Jaffa did make such an agreement, it is to be noted that although the written agreement contains no express provision that Jaffa will cooperate with Watson Bros., Inc., to meet the formal requirements for approval of an application for permission to operate trucking routes under a lease, *it is well settled that a contract includes not only the terms set forth in express words, but in addition all implied provisions indispensable to effectuate the intention of the parties and carry out the contract*, and in the absence of which the contract could not be effectively performed. *Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 329, 47 S. Ct. 368, 71 L. ed 663; *New York Casualty Co. v. Sinclair Refining Co.*, 10 Cir., 108 F. 2d 65, 69; *Montrose Contracting Co. v. Westchester County*, 2 Cir., 94 F. 2d 580, 582; *American Central Insurance Co. v. McHose*, 3 Cir., 66 F. 2d 749, 751; *Baldwin Rubber Co. v. Paine & Williams Co.*, 6 Cir., 1107 F. 2d 350, 353; *Williston on Contracts*, Sec. 1293 et seq.; see *Cornell Law Quarterly* 615; 23 *Minn. Law Rev.* 189. In determining whether the principle is applicable, the nature of the contract, the circumstances under which it was made, the situation of the parties and the objects they had in view in making the contract should be considered.” (Emphasis added.)

In the instant case Appellant contends that where Respondent transferred lots to its sole stockholders, officers and directors, the Court should have required it to account on the basis of the fair market value at the

time of such conveyance or in the alternative treated the matter as not being a sale until the principals in turn sold such lots at which time the amount received by them would be treated as the gross proceeds. Certainly there was an "implied" agreement that the Respondent Corporation would not sell the lots to its sole stockholders, officers and directors for a price less than the fair market value thereof.

In the case of *Reback v. Story Production, Inc.*, 9 A.D. 880, 193 N.Y.S. 2d 520, the New York Court held that an agreement whereby a buyer of exclusive motion picture and television rights undertook to pay the seller a guaranteed minimum and percentage of proceeds in excess thereof also imposed the duty on the buyer to exploit the rights in respect to which the royalty was to be paid and at least to use its best efforts to sell and dispose of the film contracts so as to create a proceeds from which to pay the percentage. Again, in the case of *Daitch Crystal Dairies, Inc. v. Neisloss*, 8 N.Y. 2d 723, 201 N.Y.S. 2d 101, the Court of Appeals of New York held that where a lessor rented a store to a lessee with a "percentage" lease clause and covenanted not to rent other space in the same building for similar use and a plot plan attached to the lease showed an adjoining vacant lot, not owned by the lessor, the lessor could not thereafter acquire such adjoining property and lease the same for a similar use.

A good discussion on the question of what is meant by "proceeds" in connection with an oil and gas lease is found in *Phillips Petroleum Co. v. Johnson*, (5 Cir.)

155 F. 2d 185. There the Court was concerned with the interpretation of a clause in a lease providing for the payment to the lessor of 1/8 of the "net proceeds" derived from the sale of gas at the mouth of the well. There was a further provision in the contract relating to oil which used the expression "current market price." The Court held that where the lessee used some of the gas to manufacture a different compound, lessor would be entitled to receive his proportionate cost of the fair market value of the gas. We quote from the Court's discussion:

"The law often resorts to 'fair value' or 'fair market value,' when 'market price' is stipulated and there is no market, or when 'proceeds' are stipulated and there is no sale. This is because the contract evidently intends payment shall be made, and value is the nearest approach possible under the circumstances to the measure of payment contracted for."

It is interesting to note that in the Phillips Case the Court determined that the accounting between the parties to an oil and gas lease was properly tried as an action at law before a jury.

Certainly the Court should have construed the term "gross proceeds" to mean not less than fair market value if Respondent was going to convey the lots to its sole stockholders, officers and directors.

As heretofore stated, Paragraph 6 of the Agreement between the parties provides that "it is the intention of First Party to *develop, subdivide, and sell as residential*

lots, and as shopping center in conjunction therewith, all of said entire premises, except the Club premises," and further that "said entire premises shall not be sold or conveyed in any other manner except upon the written consent of Second Party." (R. 51) (Emphasis added.) Notwithstanding this provision Respondent Corporation made conveyances of property other than as residential lots. On or about January 29, 1962 Respondent conveyed a tract of approximately 30 acres (31.07 acres by actual survey) to Twenty-Five Associates, Inc. and R. E. McConaughy in exchange for their interest (as part of Second Party) in the very contract in question. (R. 31, 32) The TwentyFive Associates, Inc. and Mr. Conaughy owned a total of 50.9% of the interest in Second Party according to the contract. (R. 53) Appellant contended that this conveyance was in violation of the provisions of the contract and that he was entitled to recover his proportionate share of the fair market value of this acreage as it would have been divided into residential lots and sold as such as of the date of the conveyance. When Appellant attempted to have George B. Gudgell, a licensed land surveyor and consulting engineer, testify as to how the tract in question could have been divided into residential lots, an objection by the Respondent was sustained. (R. 288) Thereafter when Appellant attempted to adduce testimony as to the value of this property as individual lots, the Court sustained objection thereto, stating that he was construing the contract to require Respondent Corporation "to sell for residential lots" and that Respondent Corporation was not required to sell the property lot by lot as residential lots. (R. 495)

This same view was expressed in the Court's Supplemental Decision wherein stated that since the tract was zoned for residential use it was sold for residential lots even though sold as an entire tract. (R. 210)

We submit that the language of the contract is unequivocal and requires the property to be subdivided and sold as lots in order to assure that the highest price be obtained for such property. In any event, if there was any ambiguity in the contract such ambiguity should have been the subject of parole evidence for the purpose of explaining the provision and assisting the Court in determining what interpretation should have been placed upon the contract. The Court apparently took the position that since the third sentence of Paragraph 6 of the contract provides that the gross proceeds of sales of all such property "sold for residential lots" shall be divided, etc., and if the property were zoned for residential purposes and sold for the ultimate use as residential lots this satisfied the provision of the contract. However, it is Appellant's position that the use of the word "for" in the third sentence and the use of the word "as" in the first and second sentence connotes the same meaning and that the property is to be sold *as residential lots* and the proceeds of such sale divided between the parties.

Webster's New International Dictionary, 2nd Edition, defines the word "as" to be "in the idea, character, or capacity of." This definition was accepted by the Illinois Supreme Court in the case of *Tallman v. Eastern Illinois and Peoria Railroad Co.*, 379 Ill. 441, 41 N.E. 2d 537 involving the giving of a deed "as and for" a right

of way. Likewise Webster defines the word "for" to mean "as being"; also "equivalent to which, anything is regarded or treated." In the case of *Atkins v. Atkins*, 70 Vt. 565, 41 Atl. 503, a policy of insurance payable to Alfred Atkins, Trustee, "and the children of Hyrum Atkins" was construed to mean that the policy was payable to Alfred Atkins *as* Trustee for the children. The word "and" here meaning "for." Thus the Court construed "for" as meaning "as" in substitution for the word "and."

Not only did the Court sanction the sale of tracts of land other than "as" residential lots, it failed to award to Appellant his proportionate share of the proceeds. In the case of the transfer of the 31.07 acres to Twenty-Five Associates, Inc. and McConaughy, the Court did not give to Appellant either his proportionate share of the actual proceeds received for such transfer nor his percent of its fair market value. The transfer of the acreage to Twenty-Five Associates, Inc. and McConaughy was made in exchange for their 50.9% interest in the contract. Rather than give Appellant his percent of this consideration the Court converted the value of the 50.9% interest in the contract into a monetary figure and awarded to Appellant the proportionate amount of such monetary figure.

Appellant claims that he should be entitled to his proportionate amount of the *fair market value* of the property, at the time of the conveyance, as residential lots. The trial court accepted Respondent Corporation's determination of the value of interest received by it

from McConaughy and Twenty-Five Associates, Inc. This value, as testified to by Mr. Burton, was arrived at by taking the amount paid to N. E. Safford and American Insurance Agency for their interest in the contract and relating such figure to the percent of interest obtained from Twenty-Five Associates, Inc. and McConaughy. He testified that the American Insurance Agency interest of 8.2% was acquired for \$7,000.00 and that the Safford interest of 5% plus the Bradshaw interest of 4.1% (making a total of 9.1%) was acquired for the sum of \$7,588.80. On this arbitrary basis it was determined that the interest of the Twenty-Five Associates, Inc. and McConaughy (50.9%) was worth the sum of \$42,922.95. (R. 1152)

There was no attempt at any time by Respondent Corporation to determine the fair market value of the 31.07 acres conveyed to Twenty-Five Associates and McConaughy, either as an entire tract or as individual lots. On the other hand appraisers for Appellant testified that the fair market value of the property as an entire tract and not as individual lots was from \$124,000.00 (testified to by Werner Kiepe — R. 904) to \$133,750.00 (testified to by Melvin Teerlink — R. 795).

The finding of the Court in respect to this particular tract was to the effect that the “stated agreed and accepted gross proceeds received by Happy Valley for this conveyance was the respective interests of the grantees as part of Second Party in said agreement, being a total of 50.9% thereof and being of the reasonable cash value of \$42,908.00.” (R. 213) It is thus evident that the Court did not even attempt to determine the

fair market value of the property conveyed but only to assess the reasonable cash value of the proceeds by Happy Valley. Appellant contends that he was entitled to receive his proportionate share of the fair market value of the property as individual lots or in any event his percent of the actual proceeds received. See, *Phillips Petroleum Co. v. Johnson*, supra.

Again, the record shows that Respondent Corporation conveyed to Estates, Inc. approximately 2½ acres of real property on May 22, 1962. This was likewise a conveyance in bulk rather than as separate individual lots. Here again the consideration received for the conveyance of said property was something other than cash. Happy Valley received the benefit of certain offsite improvements, which the Court determined was of the value of \$13,742.85 (Finding No. 9, R. 213) We submit that Appellant was and is entitled to receive his proportionate share of the fair market value of this property appraised as individual lots and not as a whole tract. Likewise, Appellant should be entitled to receive consideration for the transfer by Respondent Corporation to Salt Lake Water Conservancy District of a tract of land approximately 100 feet wide by 130 feet (approximately the size of a lot) which property was transferred as a well-site and location for a pump house. The Court refused to receive evidence of the value of this tract of land and also as to the amount of revenue stamps placed upon the deed of transfer. (R. 1165, Exh. 58-P) Appellant again submits that he should be entitled to receive his proportionate share of the fair market value of this tract.

SUMMARY

In reviewing the evidence and presenting his position Appellant has refrained from relying on the testimony of Appellant's expert witnesses as to the value of the property. This should not be construed as abandoning such evidence. However, it was felt that even without reference to such testimony the error of the trial court was plainly manifested.

To have attempted to delineate all of the testimony in this case would have further demonstrated the extreme difficult circumstances under which Appellant had to present his evidence. In fact we believe that the remarks of this Court in the case of *Board of Education of Salt Lake City v. Bothwell and Swaner Company* (decided April 2, 1965) 400 P. 2d 568 are equally applicable here. The Court there remarked:

"The trial court may have had a labor pain or two induced by an unnecessary protraction of a very simple case that took over 600 pages of transcript to establish its simplicity. We are sure that the trial court really did not mean it when it said that 'having taken only 1962 prices, and without having considered anything in 1960, the court is of the view that Nielsen considers the 1962 prices more favorable to the landowner here who called him to testify.' The implication of dishonesty on the part of the witness is distasteful enough, under the evidence here; but it is more unforgivable for the trial court, in the middle of direct examination, punctuated by an erroneously permitted, but premature cross-examination, under the aura of the glittering magic words "voir dire," to evaluate the credibility of the witness, which, at that juncture, was none of its business, but that of the jury."

Mr. Werner Kiepe, an eminently qualified real estate appraiser, had hardly begun to testify with respect to comparable sales used by him in the course of his appraisal when in the course of being interrupted on a so-called void dire examination, the Court said: "If the witness doesn't use more care about what he considers comparables than statement just made by counsel would indicate, then I may not believe any of his testimony."

With this sort of a prejudgment of the testimony of the witness, it is no wonder that the Court concluded in its Memorandum Opinion that it did not believe the testimony of this witness.

Appellant respectfully submits that the trial court erred in its analysis of the issues in this case and in refusing to grant Appellant a jury trial, that the Court improperly construed and defined the terms of the contract and failed to award to Appellant any sum of money for certain sales and conveyances made by Respondent to third parties; that in any event the trial court failed to make a determination of the rights of Appellant under the contract and failed to require Respondent to show the good faith of the transactions in which it made conveyances to its sole stockholders, officers, and directors.

We respectfully submit that the judgment of the trial court should be reversed and a new trial granted.

Respectfully submitted,
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