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Glen F. Nielsen and Alta R. Nielsen v. W. R. Rucker and Addie W. Rucker : Brief of Respondents

Utah Supreme Court

Walter G. Mann; Attorney for Respondents;

In The Supreme Court
of the State of Utah

GLEN F. NIELSEN and ALTA R. NIELSEN, his wife,
Plaintiffs and Respondents

vs.

No. 8817

W. R. RUCKER and ADDIE W. RUCKER, his wife,
Defendants and Appellants

RESPONDENTS' BRIEF

Appeal from the District Court of Box Elder County,
State of Utah
Honorable Lewis Jones, District Judge
Walter G. Mann, Attorney for Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

GLEN F. NIELSEN and ALTA R. NIELSEN, his wife,
Plaintiffs and Respondents

vs.

W. R. RUCKER and ADDIE W. RUCKER, his wife,
Defendants and Appellants

Case No. 8817

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Although the respondents do not seriously disagree with the statement of facts set out in the appellants' brief they believe it to be inadequate to illustrate the background of the issues in this case. Appellants reluctance to refer to a record that does not support their contentions is understandable. Respondents, therefore, will relate the facts in more complete detail.

Prior to the 14th of March, 1957, the respondents owned a dairy farm located approximately three miles north of Brigham City, Utah. This farm, together with 77 head of dairy stock and equipment thereon, had been listed with the Real Estate Exchange of Ogden, Utah. At the same time Mr. Rucker and his wife were the owners of a 24-unit motel, a home and an apartment house in Tremonton, Utah, and at that time had listed this property with the

Chapman Realty Company, which company was a member of the multiple listing agreement group. (Tr.25-26) Negotiations for a trade of this property for the dairy farm owned by respondents commenced in the month of March, 1957, and Mr. Rucker looked over the respondents' property (Tr. 27).

On the 14th day of March, 1957, appellants and respondents acting through the said Real Estate Exchange represented by a Mr. Petersen and Mr. Cheney, agents who acted for both parties, made, signed and delivered, each to the other, the original contract (Plaintiffs' Ex. A) upon which the respondents are now seeking a decree of specific performance from the court, (Tr. 29, 32 & 35). This is designated as an earnest money receipt and offer to purchase.

Under the terms of this contract it was agreed, that the appellants would exchange their 24-unit motel, one home, one apartment house located in Tremonton, Utah, together with all fixtures and equipment, all linens, bedspreads, blankets and all pertaining to the motel, apartment house and home, for the dairy farm together with all stock and equipment owned by the respondents as more particularly set out and listed on a listing card (Ex. X) all located three miles north of Brigham City, Utah. Each of the above properties was valued at $95,000,00. The respondents' property was encumbered by a $29,000.00 obligation and the appellants' property had a $19,000.00 mortgage on it. The difference of $10,000.00 was erased by an agreement between the parties, that plaintiffs would sign an agreement to pay the defendants an additional $10,000.00 as stated in the original contract (Ex. A).

This original contract for the exchange of the property owned by the parties provides that the date of possession of the property by the respective parties be on or before April 5th, 1957.

All of the parties concerned with this transaction testi-

fied consistently as to several inspections and viewings of the premises and as to their complete knowledge of the properties prior to the signing of the instrument. Mr. Rucker testified that prior to the signing of the first agreement he had visited the Nielsen property and "I went over the cattle" (Tr.28); and he admitted that he knew that there was a chattel mortgage on the cattle (Tr. 38). He further testified that he counted the cows and was satisfied (Tr. 198). Robert W. Rucker, son of the appellants, testified that prior to the time the original agreement was signed they went over to the Nielsen place and Mr. Nielsen showed them the lines of the place—the way it laid (Tr.291). Also, Max W. Rucker, another son of the appellants testified regarding the negotiations and explained the examination of the Nielsen property by his parents (Tr. 312-319). He also stated that his parents started packing things preparatory to moving after March 30th and that his father said that if everything went right he was figuring on moving (Tr. 320).

The respondent, Mr. Nielsen, testifed (Tr. 154) that he and Mr. Rucker had counted the cattle together, and when the latter was shown about the property he stated that he was acquainted with the land. Mr. Cheney, the agent, testified that he had counted the farm machinery and the cattle with Mr. Rucker and his sons (Tr. 102).

Tacit acknowledgment of the existence of the agreement was further given by appellants when, some two weeks after it was signed, they sought to implement the original contract by entering into an agreement "to supplement part" of it. Had no original contract been in effect there would be nothing to supplement. The evidence at the trial reveals that subsequent to the signing of the original agreement the respondents were experiencing difficulty in raising the necessary financing to carry out their part of the agreement and Mr. Rucker, the appellent, sought to assist them in this situation by proposing that the original agree-

ment be supplemented in order to expedite the performance of the agreement according to its terms. Mr. Rucker testified that he approached the agent, Mr. Petersen, himself and proposed the supplemental agreement as a method for carrying out the trade (Tr. 39-40), and that by doing so he agreed to do some of the financing himself and take a second mortgage on part of the property that Mr. Nielsen was going to receive in the trade.

The record is clear, convincing and undisputed that the supplemental agreement was initiated by Mr. Rucker and that he was aware of the financial obligations imposed by it. Mr. Cheney testified (Tr. 110) that the first agreement was supplemented at the request of Mr. Rucker, who went to the real estate office and offered to assume the chattel mortgage in order to facilitate performance of the contract. Mr. Petersen testified that this second agreement was made out in his office and the respondents were not present at the time (Tr. 58) only Mr. Rucker was present and he was fully informed as to the financial aspects of the deal (Tr. 60-61) and he made no objection (Tr. 62, 140, 144).

Mr. Nielsen testified that he had nothing to do with the preparation of the supplemental agreement (Tr. 157) and the appellant testified regarding it as follows (Tr. 206-207):

"Q. Now I wanted to asked this to satisfy my mind. You went to Ogden on the 30th of March. It was you that hunted up Mr. Peterson in his office?
A. I went to his office.
Q. Why did you go down there that day?
A. Well, I thought I was helping out the deal.
Q. That's my understanding.
A. I intended to trade if everything had been like they said it was.
Q. And at that time he did — or that is, you decided on a method of financing it as you had Mr. Petersen make the supplemental agreement.
A. Yes.
Q. That's correct, isn't it?
A. Yes.
Q. And Mr. Peterson then wrote out what you would

do?
A. Yes."

The appellent further stated (Tr. 209-210):

"Q. Now I have another notation here. You said to Mr. Mason, "I considered the original agreement terminated. They said they couldn't get finance." When did you consider the original agreement, Ex A, terminated?
A. Well, I don't know whether it was Mr. Peterson or Cheney, that told me they couldn't get the finance, they'd have to quit.
Q. When did you consider then that you'd have to quit?
A. When they told me.
Q. When was that?
A. I don't remember.
Q. Was that before your supplemental agreement was made up?
A. Before the second one was made up.
Q. Yes. So rather than have it terminated, you went down to Ogden to try and work out something else to keep it revived?
A. That's right.
Q. And that's when you worked out there terms under Ex. B?"

Mrs. Rucker was also aware of the purpose of the supplemental agreement. She testified (Tr. 246):

"Q. And you knew that from the time you had signed Ex. A that Mr. Nielsen was around trying to raise some money to pay off this chattel mortgage as agreed in Exhibit "A"?
A. Yes.
Q. And so on the 30th of March, as a new way of financing, you knew your husband had proposed this agreement here shown as Exhibit "B", as a supplemental agreement?
A. Yes, I knew the conditions.
Q. Under that exhibit, why, you and your husband agreed to pay this chattel mortage?
A. Yes, we did under the terms.
Q. And after you two had agreed and signed, you knew that that was taken over to the Nielsens for their signature?
A. I guess so."

Thus the testimony clearly and indisputably shows that the supplemental agreement was entirely Mr. Rucker's own idea and that he did not consult with the Nielsens at all prior

to its preparation and execution. By this agreement the appellants, being fully cognizant of its terms, undertook to assume the responsibility for the chattel mortgage on the Nielsen cattle. At the time this agreement was executed the chattel mortage was on record at the County Recorder's office in the Box Elder County Court House. Hannah Hillam, an employee of the County Recorder's Office testified that the chattel mortgage signed by the respondents in favor of the Bank of Utah was filed with the County Recorder of Box Elder County on December 26, 1956, (Tr .176) and had been on record there ever since (Tr. 177).

Mr. Rucker testified that he knew of the chattel mortgage on the cattle (Tr. 181). In addition there is some testimony that he consulted with the County Recorder's records prior to the time the supplemental instrument was executed (Tr. 200-201) and fully understood the terms of the chattel mortgage, but, after a short recess during which he consulted with his counsel and Mrs. Rucker, he changed this testimony (Tr. 219). However, throughout his testimony, Mr. Rucker indirectly admitted that there were no misrepresentations by showing knowledge or constructive knowledge prior to March 30th of all details of the financial aspects of the agreement (Tr. 196-201).

Throughout the entire record there is consistent, uncontroverted and convincing testimony by all the parties that they considered the agreement to be binding and that it was the intent of all of them to trade their properties according to its terms. Mr. Rucker specifically testified "I intended to trade the motel, the home and apartment house" (Tr. 35); and gave his opinion as to the fairness of the trade as follows (Tr. 52):

> "Q. Now, Mr. Rucker, if I understand you right then, to sum this up, that this agreement together with the supplemental agreement that was signed on the 30th of March, 1957, if that agreement were carried out on both sides as written, you would make this trade?
> A. If they was correct, yes, but they wasn't correct.

Q. Well, we're here to see whether it's correct or not through this court. You wouldn't turn down a transfer or trade if it's exactly like the agreement?
A. I intended to trade if everything had been as said. Recommended. And it would have been a good, fair trade."

As will be subsequently shown herein, the offers of performance made by the respondents are as represented in the agreement, but the appellants seek to avoid performance under its terms because of frivolous excuses and objections made after the institution of this action and which have no sound basis in fact or in law.

That the appellants fully intend to make the trade in accordance with the agreement is further evidenced by the testimony of one of their tenants who stated that he had been informed by the Ruckers that they were moving out. This was toward the end of March, and the Ruckers said that they were moving the next Saturday and that a man from Harper Ward was going to come in (Tr. 89-92). Moreover, the evidence and testimony as to their actions during this time corroborates the oral testimony of this intent by revealing the preparations made and contemplated by the appellants and the respondents in order that the contract might be performed as anticipated. Appellants permitted an inventory to be made of the items which they intended to trade. Mr. Rucker testified that his wife gave the agent permission to count the items of personal property which would be traded with the motel. (Tr. 37). Mr. Rucker discussed with Mr. Nielsen the supplies on hand at the dairy farm and he testified that he told Mr. Nielsen he didn't want to fool with beet pulp, and told Nielsen he could sell it (Tr. 206). In addition, both parties made negotiations preparatory to carrying out the agreement. Mr. Rucker, the appellant, took some of his things over to the Nielsen property (Tr. 45). Mr. Cheney testified that he saw the fence posts and other things which Mr. Rucker had taken to the dairy farm (Tr. 104). On the

other hand, the respondents also commenced preparations for the exchange. They hired a truck and two men to help them move and contacted the former owner of the motel to employ him to assist them in taking care of it, (Tr. 152).

Any implication that the parties did not intend to make the trade in accordance with the contract is clearly contradicted by the record, either by direct testimony or by other facts and circumstances which are clearly shown. This contradiction of Mr. Rucker's testimony (Tr. 188-189) to the effect that he considered the original agreement terminated because of the inability of Mr. Nielsen to finance his portion of the agreement is completely and convincingly demonstrated by his and others' testimony as to his actions and efforts to supply such financing by proposing and executing the supplemental agreement.

It is respondents' contention that Exhibits "A" and "B" form the entire contract between the parties as to the exchange of the properties and only the detail of making up and executing the legal documents to carry out the agreement and the physical exchange of the properties on the agreed date remained to be done, and the appellants admit that at the time they fully intended to trade (R. 52). It was further agreed verbally between the parties that an exchange would take place on Saturday and Sunday the 6th and 7th of April, 1957 (R. 153) and each of the parties actively commenced to carry the exchange into being by the appellants delivering certain personal property to respondents' place (R. 45) and the respondents arranging for hired help and trucks with which to move the equipment (R. 152). The details of preparing the final instruments of title were left up to the joint agent of both parties. Everything was agreeable up to the 5th day of April, 1957, when the respondents went to the Rucker home and received instructions on how to keep the books, and the listing of renters (R. 155) and on the 6th of April Mr. Rucker was going to see how the cows were handled (R. 156). But about

the same time Mr. Rucker came back and picked up some posts he had left (R. 156) and the famous telegram of April 6th was sent to Mr. Petersen in Ogden. It reads as follows:

"BRIGHAM CITY, UTAH, APRIL 6th 11:30 P. M.,
HAROLD S. PETERSEN
REALTORS OFFICE, 421 KEISEL AVENUE
OGDEN,UTAH
RE: RUCKER NIELSEN DEAL, TIME HAS RUN OUT, NO FURTHER CONSIDERATION NECESSARY. WE GIVE NO FAVORS AND ASK NO FAVORS.

GEORGE M. MASON." (Plaintiff's Ex. Y)

It must be noted that this telegram makes no charge of failure of consideration or of performance or proffered performance on the part of the respondents. (See Tr. 48-49). A reading of it reveals no valid ground for rescission. Mr. Petersen, the agent who received it, testified, "I didn't know what the telegram meant. I couldn't understand it." (Tr. 84).

Throughout the entire period the respondents have been willing and able to do anything necessary to perform their obligations under the agreement. Mr. Nielsen testified that they were ready and willing to move and exchange their farm for the property of the appellants on the basis set out in the agreement, but were barred from doing so by the actions of the appellants, and it was necessary to bring an action to seek the court to enforce the contract according to its terms. (Tr. 157). Furthermore, papers were prepared by the agents for the respondents' signatures to carry out their share of the agreement, and if these papers are not full and complete the plaintiffs are willing to sign any paper that the court might direct in order to perform under the contract according to its terms. (Tr.172).

Evidence and testimony of the appellants' actions and attitudes on the other hand, reveals a complete refusal to recognize and perform their obligations under the agreement. Transfer papers were prepared by the agents and

presented for their signature, but they refused to sign (Tr. 50-51, 53, and 64). Although the agent stated that Mr. Rucker should have his attorney look the papers over, and if there was anything further which needed to be done by the agent, the latter would comply with the attorney's directions (Tr. 83-84), no such directions were issued to the agent, and there is no indication that the attorney attempted to determine the sufficiency of the papers submitted and direct that further instruments be prepared, or that those received be corrected in any way. Numerous and various excuses have been offered for the appellants' failure to perform and most of them were not advanced until trial. Most of the objections now raised to excuse the non-performance could have been cured without trial had the appellants and their attorney raised them at the time the performance was offered. The only evidence of the basis for their failure to perform, other than the telegram hereinbefore discussed, is the testimony of Mr. Cheney regarding a conversation he had with Mr. Rucker on the 7th or 8th of April, (Tr. 105):

> "He said the deal was all off and he said, 'We can't go through with it because you've asked us to sign for the personal property in the apartment house.' We didn't ask him to sign the personal property. We asked him to sign the fixtures. The fixtures are not the furniture."

As a consequence of the appellants' refusal to carry out the terms of their contract, this action in specific performance was filed by the respondents and tried successfully in the lower court.

STATEMENT OF POINTS

POINT I. THE ORIGINAL AGREEMENT (PLAINTIFFS' EXHIBIT A), AS SUPPLEMENTED BY THE INSTRUMENT DATED MARCH 30, 1957 (PLAINTIFFS' EXHIBIT B) AND SIGNED BY ALL PARTIES HERETO, WAS NOT A TENTATIVE AGREEMENT, BUT CONSTITUTES A VALID, DEFINITE, COMPLETE AND CERTAIN CONTRACT, EXECUTORY IN NATURE, WHICH IS BINDING ON ALL THE PARTIES.

POINT II THE CHATTEL MORTGAGE WAS A MAT-

TER OF PUBLIC RECORD AND THE APPELLANT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF ITS CONTENTS, AND ITS ASSUMPTION BY HIM WAS A CREATURE OF HIS OWN MAKING.

POINT III. THE COURT, SITTING AS A COURT OF EQUITY, MAY COMPEL SPECIFIC PERFORMANCE OF THE AGREEMENT (PLAINTIFFS' EXHIBITS A & B), AND THERE IS NO ADEQUATE REMEDY AT LAW.

POINT IV. RESPONDENTS HEREIN HAVE MADE EVERY REASONABLE EFFORT TO COMPLY STRICTLY WITH THE TERMS OF THE CONTRACT AND TO CARRY ITS PERFORMANCE.

POINT V. THE PURPORTED FAILURE ON THE PART OF THE AGENT OF BOTH PARTIES TO PREPARE CERTAIN INSTRUMENTS IN KEEPING WITH THE ORIGINAL CONTRACT DOES NOT AFFECT THE OBLIGATION OF THE PARTIES THEREUNDER, NOR DID IT INDUCE THE EXECUTION OF THE CONTRACT, AND ERRORS COULD HAVE BEEN CORRECTED AT ANY TIME TO COMPLY WITH THE ORIGINAL CONTRACT, IF APPELLANTS HAD ACTED IN GOOD FAITH.

ARGUMENT

POINT I. THE ORIGINAL AGREEMENT (PLAINTIFF'S EXHIBIT A) AS SUPPLEMENTED BY THE INSTRUMENT DATED MARCH 30, 1957, (PLAINTIFF'S EXHIBIT B), and SIGNED BY ALL PARTIES HERETO, WAS NOT A TENTATIVE AGREEMENT, BUT CONSTITUTES A VALID, DEFINITE, COMPLETE AND CERTAIN CONTRACT EXECUTORY IN NATURE, WHICH IS BINDING ON ALL THE PARTIES.

In order to justify a decree for specific performance it is first necessary to establish the existence of a valid contract. American Jurisprudence, Volume 49, Section 15, Page 24, states the general rule in the following language:

> "While it is universally recognized that equitable relief by way of specific performance does not follow as a matter of course by establishing the existence and validity of the contract the performance of which is sought, the existence of a valid contract is essential, and many of the cases in which the jurisdiction of a court of equity, or of a court exercising equity powers, is invoked to obtain a specific enforcement of a contract do not turn so much upon rules governing the exercise of those equitable power as they do upon the underlying and fundamental questions as to the exist-

ence or nonexistence of a legal contract. In order for equity to decree specific performance, it is necessary that there be in existence and in effect a contract valid at law and binding upon the party against whom performance is sought for specific performance is never applicable where there is no obligation to perform . . . "

Corpus Juris Secondum sets out the necessary ingredients to the establishment of a valid contract as (1) parties competent to contract, (2) subject matter, (3) a legal consideration, (4) mutuality of agreement and (5) mutuality of consideration. (17C.J.S.310) By applying this test it becomes apparent that all of the necessary ingredients are present in the agreement in the instant case. All parties to the agreement were competent, the properties to be exchanged (subject matter) are described with reasonable certainty, the mutual promises to exchange them constitutes adequate consideration, and there is mutuality as to both agreement and consideration.

In this instance we are dealing with one agreement entered into between the parties for the exchange of their respective properties. This is the Earnest Money Receipt (Plaintiffs' Exhibit A). This agreement was subsequently supplemented by the instrument dated March 30, 1957 (Plaintiffs' Exhibit B), but essentially the two together constitute the one contract with which we are concerned. It must be remembered that all of the witnesses, including both of the defendants, testified specifically that at the time they executed this contract it was their intention to trade their properties. Furthermore a readng of the instrument itself reveals that one purpose and intent solely There is nothing in its language from which it can be implied that this was merely an agreement to make and execute another future agreement of exchange. The parties contemplated the immediate exchange of their realty and expressed this purpose in writing, and signed the instrument to the effect on March 14, 1957, setting on or before April 5, 1957, as the date of the physical exchange of their

properties. Although several separate documents were received in evidence there is only one contract consisting of plaintiffs' exhibit A, as supplemented by plaintiff's exhibit B which covers the entire transaction. All the other documents merely constitute a part of the plaintiffs' tendered performance, and were executed for the purpose of carrying out the intent of the parties as expressed in the original contract. Contrary to defendants' contention, this contract was not tentative, but upon its signing and delivery it constituted a definite, certain and complete agreement between the parties to exchange their properties. It was a complete contract, executory in nature, which necessarily contemplated certain further acts to be performed and instruments to be signed in order to effectuate completion of the performance of its terms.

It is clear that the parties did not contemplate the execution of any other instrument to set out their contract, although the performance of the agreement did call for the execution of other documents in order to effect a transfer of title to the properties. In this connection the California case of Mann vs. Mueller, 295 P. 2d 42, 140 C. A. 2d 481, is directly in point. The Court there held:

> "Where the parties, as in the instant action, have agreed in writing upon the essential terms of their contract (for the exchange of realty), even though several more formal instruments are to be prepared and signed later, the written agremeent which they have already signed is a binding contract. When one party refuses to execute the more formal instruments intended, the other party has a right to rely upon the contract already expressed in writing. Vavina v. Smith, 25 Cal. 2d 501, 504, 154 P. 2d 681."

Concededly, the contract anticipated subsequent actions on the part of the parties to carry out the terms of this contract, but these acts were to be the performance agreed to by the parties in the original contract. They contemplated that mortgages, bills of sale, deeds and other instruments would have to be signed and executed pursuant to

the original contract, but these documents were not to be considered the major agreement, they were minor and subsidiary accessories to the primary contract and none of them represents the complete whole of the agreement. This is represented only by the original primary agreement. It is the only instrument, either made or contemplated, which includes in definite terms the intent of the parties to exchange their properties and the terms upon which such an exchange was to be made. This instrument, by its nature, anticipated performance of future acts by both parties. It was therefore, not a tentative agreement as claimed by the appellants, but was a complete executory contract. "An executory contract is one in which a party binds himself to do or not to do a particular thing in the future. An executory contract conveys a chose in action; an executed contract, a chose in possession." (17 C.J.S. 326; Lewis v. Lambros, Montana, 194 Pac. 152).

Appellants quote 81 Corpus Juris Secondum Sec. 33, page 488, which states:

> "Except where uncertainty and ambiguity has been removed or cured by the parties a court of equity will not decree specific performance of a contract for the sale, exchange or conveyance of land, or an interest therein, unless the contract designates or describes the land with definiteness and certainty or furnishes or refers to means or data by which it can be identified and located with certainty by the aid of admissable extrinstic evidence, such as public records, maps or other documents. . . . . "

This is certainly a case where the parties themselves have cured any uncertainty about the property by viewing it, by looking at it, by inspecting, by counting the livestock, machinery and equipment. That there is nothing in the record that could be construed as evidence to the effect that neither of the parties knew what the other was to receive, in exchange for the others' property, after Exhibits A and B had been executed. But, more important than that, the quotation relied upon by the appellants is taken

from context and does not state the applicable rule in its entirety. The paragraph immediately preceding that quoted in appellants' brief and the first and primary rule stated in Section 33 of the quoted text is as follows:

> "Before a contract will be specifically enforced it must be reasonably definite and certain as to its subject matter; the subject matter must be, and it is sufficient if it is, described so that it may be aided and made definite by such extrinsic evidence as is admissable for such purpose."

One of the cases cited in the footnote to this section is directly in point. In the case of Thompson v. Walsh, 172 P.2d 745, (California) the court stated:

> " . . . . The escrow holder was the agent of the plaintiffs as well as of the defendants for the consummation of the sale and was authorized to receive from defendants an acceptance of plaintiffs' offer. It was not necessary that plaintiffs' instructions, D, also, should contain a description of the personal property, nor was it necessary that defendants' acceptance contain such description. Plaintiffs' offer was as much a part of the agreement as were the escrow instructions, and could be looked to for a description of the property which was to be the subject of the bill of sale and the inventory . . . ."

The Utah Supreme Court in Continental Bank & Trust Co. vs. Bybee, 306 P.2d 773, 6 Utah 2d 98, held that the intent of the parties to contract should be ascertained first from the four corners of the instrument itself, second from other contemporaneous writings concerning the same subject matter, and third from extrinsic parol evidence of the intentions. It has also been held that the mutual intention of the parties as exhibited by their language, acts and conduct governs in construing a contract. Crocker v. McFadden, (Calif.) 307 P2d. 429. In the instant case, all of the witnesses, including the two appellants, testified that at the time the agreement was signed it was their intention to trade their properties. In the light of these declarations, the only possible construction which can be placed upon the instrument is that it was a complete and

final agreement to carry out that intent. The evidence of the parties' activities during and immediately after the contract was signed also supports this construction.

In the instant case the contract specifically provides that the respondents were to trade "The dairy farm owned by Glen F. Nielsen and wife Alta R. Nielsen, together with all stock and equipment as listed on listing card, located at three miles north of Brigham City, Utah". Looking to the listing card, defendants' exhibit X, the acreage of the dairy farm is stated to be 110 acres and the buildings, cattle and other items are described. Thus, the contract itself specifically includes and refers to another document which, when read together with the contract, renders its meaning clear and certain as to the property contemplated by the parties and therefore the rule in the above quoted case is doubly applicable.

The minor errors made by the parties' mutual agent in tendering performance of the contract do not affect the basic agreement of the parties, about which there is no confusion. These errors will be discussed in a subsequent portion of this brief.

POINT II. THE CHATTEL MORTGAGE WAS A MATTER OF PUBLIC RECORD AND THE APPELLANT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF ITS CONTENTS, AND ITS ASSUMPTION BY HIM WAS A CREATURE OF HIS OWN MAKING.

The evidence at the trial reveals that subsequent to the signing of the original agreement the appellant, Mr. Rucker, approached the real estate agent and enlisted his aid in expediting the performance of the agreement according to its terms. Mr. Rucker made a trip to Ogden to the agent's office for this purpose. Pursuant to Mr. Rucker's desire and in his presence and at that time unbeknown to the respondents, the agent prepared the so-called supplemental agreement. The appellants, fully cognizant of its terms, signed this agreement and thereby undertook to assume the responsibility for the chattel mortgage on the Nielson cattle. At

the time the appellants executed this instrument the chattel mortgage was on record at the Box Elder County Court House and the officers of the bank which held this mortgage were readily available for consultation and information. In addition, there is some testimony in the record that Mr. Rucker consulted the records at the Court House prior to the time the March 30th instrument was executed, but this was later denied by him, after a short recess during the trial (Tr. 207, 216, 219). The testimony shows that this supplemental agreement was entirely Mr. Rucker's own idea and that he did not consult with the Nielson's at all prior to its preparation and execution. Also, it must be remembered that these parties are mature individuals, who had at least a basic knowledge concerning transactions in real estate having dealt in such matters previously and they should have understood the effect of their signatures when freely and voluntarily placed upon written instruments. In these circumstances, the conclusion is inescapable that Mr. Rucker knew or reasonably should have known the extent to which he would be bound by the agreement he signed.

However, conceding for purposes of argument only, that there was a misunderstanding between the parties as to the terms of the chattel mortgage which the appellants subsequently agreed to assume, respondents should not be held accountable for the appellants' misunderstanding. Certain admitted facts must be remembered in this connection. First: The respondents voluntarily and readily revealed that the title to the cattle was encumbered by a chattel mortgage. Second: The assumption of the chattel mortgage by the appellants was entirely voluntary and came about as a result of action initiated solely by Mr. Rucker. Third: The mortgage was on record at the Box Elder County Court House and had been a matter of record since December 26, 1956, over three months prior to the time the defendants agreed to assume it. Fourth: The appellants had conferred with the officers of the Bank of Utah, the

holder of the chattel mortgage, prior to the time they signed the subsidiary agreement in which they undertook to assume this obligation. Thus, no misrepresentations were, or could have been, made to them. The due date of the chattel mortgage and its terms were fully revealed. The opportunity to acquaint themselves with these terms was readily accessible to the appellants. Ordinary prudence and caution would dictate that they use reasonable diligence to discover the provisions of the mortgage, which were on record for all the world to see, prior to the time they agreed to assume it. Their failure, if any, to acquire actual knowledge of its terms should not be charged against the respondents who had openly, voluntarily and readily imparted the information that their title to the cattle was encumbered. It is unnecessary that actual knowledge of the mortgage terms on the part of the appellants be shown. Notice of the mortgage should be sufficient. At least, it is obvious that circumstances were known to the appellants which should have stimulated them to inquiry, when the means of such inquiry were so readily accessible. It is conceded that notice and knowledge are not, in law, always synonymous. However, proof of certain circumstances is generally sufficient to warrant a presumption that a person has knowledge, or the means of access to the needed information, and this is the equivalent of actual knowledge. The presence of such circumstances is apparent in this case and respondents contend that they are sufficient to justify a finding of knowledge on the part of the appellants. At least, in the face of all these facts and circumstances, appellants allegations of any misrepresentation on the part of the respondents, or misunderstanding on the part of themselves, can not be supported.

POINT III. THE COURT, SITTING AS A COURT OF EQUIY, MAY COMPEL SPECIFIC PERFORMANCE OF THE AGREEMENTS (PLAINTIFFS' EXHIBITS A & B) AND THERE IS NO ADEQUATE REMEDY AT LAW.

It is well recognized that, as a part of the appropriate

and acknowledged jurisdiction of a court of equity, specific performance of a contract to convey real property has been enforced from the earliest decisions, although the party may have, in most cases, another remedy by an action at law upon the agreement. Cummings vs. Nielsen, 42 Utah 157, 129 Pac. 619. When either party to a contract for the sale of land has failed in his obligation, the other is entitled to the alternative remedy of specific performance in equity, or damage at law. Thompson, Real Property Volume 8, Section 4630. Inasmuch as every suit for specific performance must necessarily be determined largely on its own special facts, the rules governing the case must be applied with more or less flexibility.

Respondents are aware that certainty and completeness of the contract are prerequisites of an action for a decree of specific performance. See Thompson, supra, Section 4637. In this case the instrument signed by the parties clearly expresses their intent and decision to trade their properties, and the descriptions of such properties are sufficiently clear. The terms upon which the exchange was to be made are expressed, and a definite date for possession was agreed upon, and the contract was certain as to its terms. By its execution the parties clearly and definitely expressed their intent to exchange their respective realty, and to later work out such details, perform such acts, and sign such further instruments as would be necessary to fully effectuate the exchange in accordance with their original expressed intent.

The general rule states that it is not essential that the contract be specific in all its terms, and in this instance the nature of the transaction between the parties necessarily required that subsequent documents such as assignments of contracts and escrow agreements, warranty deeds, bills of sale, mortgages and promissory notes be executed by the parties in order to carry out the agreed intent and terms as set out in the primary contract. The failure of the primary contract to recite all of the specific terms, details and

conditions of each of the contemplated minor documents does not affect its own validity.

While it is true that the language used in the contract is not as apt as it might have been, its meaning is reasonably clear and was well understood by the parties to the agreement. In this connection a leading Utah case on the subject of specific performance is pertinent. In Cummings vs. Nielsen, supra, decided by the Supreme Court in 1913 the lower court had heard plaintiffs' evidence in an action for specific performance of a contract and had granted a nonsuit and entered a judgment dismissing the action. On appeal the Supreme Court reversed, and in doing so laid down certain rules and principles governing such actions. The Court stated:

> "In determining the meaning that should be given to the language used in an agreement in order to ascertain the intention of the parties, all words or terms used must be given their ordinary and usual effect, when considered in the light of the subject matter and the nature of the agreement. . . . .
> " . . . . It is a cardinal rule of construction that that which is implied is always as much a part of any writing as that which is expressed.
> "It is elementary that in equity that is certain which can be made certain."

With the foregiing principles in mind a thorough examination of the contract in the present cast leads us to but one conclusion: That a valid, complete and certain contract to exchange their properties was entered into between the parties, and further, that the lower court's action in decreeing specific performance was proper.

Nor can there be any doubt that there is sufficient consideration to support the contract. Thompson, supra, Section 4639, states:

> "A contract to be specifically enforced must be supported by a valuable consideration, but the mutual promises of each party, as in a contract to exchange real estate, may be sufficient consideration to support an action for specific performance."

Here, the parties clearly intended to exchange their

properties. Each of them, without any undue influence, voluntarily signed the contract of which specific performance is now sought. Subsequent disagreements, or misunderstandings, if any, as to the minor details which had to be worked out in subsequent minor instruments in order to effect complete performance of the contract should not be allowed to affect retroactively the promises clearly pronounced in the primary understanding which existed between the parties, and which had previously been reduced to writing and signed and delivered by them. The contract is complete and valid and constitutes a clear statement of the desire and decision of the parties to exchange their respective properties, each valued at $95,000.00.

The modern trend in suits for specific performance evidences a tendency on the part of courts to accept established rules of equity as binding upon them, even though the language used in many of the cases expresses their decisions in such terms that would lead one to presume that it was a discretionary action. American Jurisprudence Volume 49, Secton 9, Page 17, expresses this modern view in the following language:

> "Terms indicating a discretion on the part of the court in decreeing specific performance were originally used apparently to distinguish equitable relief from the relief obtainable in an action at law for breach of contract, but the grounds upon which the courts were moved to grant relief by way of specific performance have gradually crystallized into rules binding upon the courts and controlling their discretion, until at the present time these rules and principles have become so well settled as to make the use of the term 'discretion' with regard to the granting of a decree of specific performance often somewhat misleading. This is true even when the terms 'sound' and 'judicial' discretion are used to indicate a discretion controlled by or subject to equitable rules granting or refusing relief in actions for specific performance of contracts. As has been said, the remedy of specific performance is governed by the same general rules which control the administration of other equitable remedies. As a general rule it may be said that when the party seeking

specific performance of a contract establishes the existence of a valid binding contract which is definite and certain in its terms and contains the requisite of mutuality of obligation and is one which is free from unfairness, fraud, or overreaching, and enforceable without injustice upon the party against whom enforcement is sought, the court will, when the remedy at law for the breach of such contract is inadequate, and the enforcement of specific performance will not be inequitable, oppressive, or unconscionable, or result in undue hardship, grant a decree of specific performance as a matter of course or right. Rights of the plaintiff to such relief where he makes a case coming within these equitable rules, or the right of the defendant to have the plaintiff remitted to his action at law if his case is not brought within these equitable rules, is not dependent upon any exercise of discretionary power on the part of the court in the literal sense of the term."

Accordingly, since the contract under consideration herein reasonably meets all the conditions of a valid contract, and clearly expresses the intent of the parties, was not obtained through fraud, and no hardship would be imposed since its performance would merely accomplish what was intended by both parties, the court, by applying the settled principles governing suits for specific performance should exercise its powers of equity and grant the relief sought by the respondents.

In this instance, little argument to the effect that there is no adequate remedy it law, is necessary. The contract involves the exchange of certain pieces of real property, and where that type of property is involved courts, almost universally, consider that money damages will not compensate for the breach. American Jurisprudence, Volume 49, page 107 states the rule in the followng language (Sec. 92):

"The subject matter most commonly involved in actions for specific performance is that of contracts for the sale of land or which otherwise involve interest in real estate. The reason for this lies not so much in any tendency of equity to distinguish between kinds of property as in the fact that the remedy at law is less likely to be adequate in the case of land than in the case of other property, for if the proper elements of jurisdiction are present, equity impartially grants specific per-

formance of any contract, regardless of whether it involves real or personal property. The most important aspect of land, in so far as equity jurisdiction for specific performance is concerned, is that no piece of land has its counterpart anywhere else, and is impossible of duplication by the expenditure of any amount of money.

"The courts assume, in almost every case in which action is brought to enforce specific performance of a contract for the sale of land or an interest therein, that money damages do not constitute an adequate remedy for the breach of such a contract, and take jurisdiction without the necessity of an actual showing that this is the case.. . . . "

Applying these principles to the instant case, it is the contention of the plaintiffs that the contract herein, being one involving real property, is a proper instrument upon which a court of equity should exercise its powers and grant specific performance, and that in such a case there is no necessity to show affirmatively that an action for damages at law would be inadequate.

POINT IV. RESPONDENTS HEREIN HAVE MADE EVERY REASONABLE EFFORT TO COMPLY STRICTLY WITH THE TERMS OF THE CONTRACT AND TO CARRY OUT ITS PERFORMANCE.

There can be no serious question about the efforts which respondents have made to perform their obligations under the contract. They executed all the documents presented to them by the agents, to carry out their portion of the contract and left these papers with the Real Estate Exchange in Ogden, Utah, for delivery to the appellants. They also delivered the abstract of title to the dairy farm to the agent in Ogden, where it was available for the appellants' examination. At all times they have stood in readiness to effect a physical exchange of the possession of the properties. Their institution of this suit for specific performance of the contract is but further evidence of their willingness and desire to conform to its terms. Any failure to complete the performance of the contract has been due solely to the actions of the appellants.

The respondents have at all times been ready and willing to perform the obligations assumed by them when they entered into the contract with the appellants. They still remain ready and willing to perform in accordance with the terms of the decree of the lower court, and so stated in open court (Tr. 158-159):

"Q. Are you willing to execute any instrument that might be necessary in the opinion of a court of equity to complete the transfer according to the terms of the agreement entered into?
A: Yes.
Q: And you would like the same paper entered in your behalf?
A: Yes."

POINT V. THE PURPORTED FAILURE ON THE PART OF THE AGENT OF BOTH PARTIES TO PREPARE CERTAIN INSTRUMENTS IN KEEPING WITH THE ORIGINAL CONTRACT DOES NOT AFFECT THE OBLIGATION OF THE PARTIES THEREUNDER, NOR DID IT INDUCE THE EXECUTION OF THE CONTRACT, AND ERRORS COULD HAVE BEEN CORRECTED AT ANY TIME TO COMPLY WITH THE ORIGINAL CONTRACT, IF APPELLANTS HAD ACTED IN GOOD FAITH.

Apellants point to a disparity between the total acreage of the dairy farm as anticipated in the contract and that in the performance tendered by the respondents through their mutual agent. Because of this they assert that their refusal to live up to their obligations under the contract is justified. This is a minor matter relating to one of the details of performance of the valid contract, and does not affect its original validity nor excuse non-performance on the part of the appellants. Respondents have continually maintained and testified that they are ready, willing and able to perform whatever acts are necessary to complete their performance of the contract. Any discrepancies or omissions in their tendered perfomance could and would have been corrected by the mutual agent had apellants dealt with them in good faith. In this connection it should also be remembered that the parties viewed the premises and properties thereon, and there was a complete understanding

and agreement as to the amount, extent and type of realty and personal property intended to be transferred. Any correction necessay to bring performance within the intent and meaning of the contract could have been easily remedied. It must be noted that the respondents were prohibited from carrying out their portion of the agreement in a proper manner by the appellants' attempted repudiation and failure to live up to their obligations. Had appellants notified their own agent of this minor inadvertant error, the papers could have been readily corrected.

Appellants also seek to avoid the obligations imposed upon them under the contract by claiming that their nonperformance is excused because the deed from the respondents to the appellants reserves one-half of all oil, gas and mineral rights (plaintiffs' exhibit F.) An immediate answer to this contention is that the appellants failed to include such an issue in their pleadings. Moreover, appellants' deed to the respondents (plaintiffs' exhibits M and N) included similar provisions. But, most important, and this consideration affects the reservation of these rights and other matter previously discussed, appellants made no objection to these matters at the time the performance was tendered or in a reasonable time thereafter, nor did they at any time seek to have the agent revise or correct any of the instruments or tell anyone concerned the nature of the deficiencies or discrepancies upon which they now base their objections. It is clear that the appellants did not base their attempted rescission of the contract upon any of the grounds now advanced since no one was informed of their objections. They should not be allowed to assert these matters after trial has commenced.

Pertinent to this issue is the case of McAdam v. Leak (Kansas) 208 Pac. 569, in which the court said:

> "It is contended that the minds of the parties did not meet upon all the essential matters of the contract because nothing had been said as to when and where the

purchase price was to be paid. In that situation the defendant could have insisted upon receiving it at her residence in exchange for the deed as soon as a reasonable time had elapsed for an examination of the abstract. She did not break off the deal, however, because of any question of time or place of payment or of delivery of the abstract or deed, but upon the ground that the price was too low."

And in Le Marinel v. Bach, 196 Pac. 22, the supreme court of Washington upheld a decree of specific performance of a contract for the exchange of property. The court said:

"The tender of performance made on the part of respondents included an assignment of the contract which they held from one Taylor and consent on Taylor's part to the assignment as well as tender of the $6000 which respondents were to pay the appellants. The appellants did not refuse to perform because the contract tendered was not such as they thought they were entitled to, but they based their claim in the first instance upon the alleged fact that the contract had been induced by fraud. If the court should be of the view that the contract to be tendered was different from that offered by the respondents, it would not follow that the action would absolutely fail for this reason, because, this being an equity action, the parties would undoubtedly be given the privilege of tendering such a contract as the court considered they were under obligation to do."

Respondents are of the opinion that the appellants are now confusng "completed contract" with "completed performance of the contract." These objections relate to performance, and not to any fatal defects in the contract itself. Appellants have failed to allege, or prove, what essential elements of a valid contract have been omitted from the agreement signed by the parties, but both appellants testified as to their intent. The parties here adapted a printed from to their use. This form is designated as an Earnest Money Receipt and similar instruments have prevously been considered by the Utah Supreme Court and their validity upheld. In Ney v. Harrison, 5 Utah 2d 217, 299 P2d 1114, the Supreme Court reversed the lower court

and upheld the validity of an earnest money receipt, thereby decreeing payment of a brokers commission according to the terms of the contract. See also Continental Bank & Trust Company v. Stewart, 291 P.2d 890, 4 Utah 2d 228, and Gaddis Investment Company v. Morrison, 3 Utah 2d 43, 278 Pd2 284.

As a final argument against the objections made to respondents' tender of performance as advanced by appellants, it should be noted that all necessary deeds and bills of sale could have been reformed to comply with the contract and the intent of the parties. See Nordfors v. Knight, 90 Utah 114, 60 P2d 1115; Naisbitt v. Hodges, 6 Utah 2d 116 307 P2d 620, and cases cited therein.

CROSS APPEAL

STATEMENT OF FACTS

The contract (exhibit A) provided for the payment of reasonable attorney's fees to enforce the same. The only evidence covering reasonable attorneys fees was $3000.00 to $3500.00.

STATMENT OF POINTS:

POINT I: THAT THE COURT ERRED IN FAILING TO GRANT THE PLAINTIFFS ATTORNEYS FEES FOR THE USE AND BENEFIT OF THEIR ATTORNEYS IN THE SUM OF $3500.00 PURSUANT TO THE TESTIMONY PRODUCED AT SAID HEARING, AS BEING THE REASONABLE SUM FOR ATTORNEYS FEES FOR LITIGATING A TRANSACTION FOR SPECIFIC PERFORMANCE OF A CONTRACT DECLARED BY THE PARTIES TO INVOLVE PROPERTIES OF A VALUE OF $95,000.00 FOR EACH OF SAID PROPERTIES.

POINT II: THAT THE SUPREME COURT HAS THE RIGHT TO ASSESS SUCH SUM AS AND FOR ATTORNEYS FEES ON APPEAL, AS IS EQUITABLE THE CONTRACT RELIED UPON AND SIGNED BY THE PARTIES PROVIDED FOR A REASONABLE ATTORNEYS FEE FOR THE PURPOSE OF ENFORCING SAID CONTRACT.

ARGUMENT

POINT I: THAT THE COURT ERRED IN FAILING TO GRANT THE PLAINTIFFS' ATTORNEYS FEES FOR THE USE AND BENEFIT OF THEIR ATTORNEYS IN THE SUM OF $3500.00 PURSUANT TO THE TESTIMONY

PRODUCED AT SAID HEARING, AS BEING THE REASONABLE SUM FOR ATTORNEYS FEES FOR LITIGATING A TRANSACTION FOR SPECIFIC PERFORMANCE OF A CONTRACT DECLARED BY THE PARTIES TO INVOLVE PROPERTIES OF A VALUE OF $95,000.00 FOR EACH OF SAID PROPERTIES.

That the amount of attorneys fees awarded by the court below is clearly insufficient is established by the record. The only evidence regarding such fees is the testimony of Mr. O. Dee Lund who was qualified as an expert witness on this subject. After reviewing the nature of the case and the work involved in interviewing witnesses, examining documents, and researching legal authorities, he testified that a reasonable attorneys fee in a case such as this would be between $3000.00 and $3500.00 (Tr. 96-98).

In addition to this uncontroverted testimony as to attorneys fees, the inadequacy of the fees allowed by the court is further demonstrated when compared with the real estate broker's commission. This was a transaction involving the trade of two properties, each of a value of $95,000.00. On exchange of the properties each of the parties had agreed to pay the real estate agent five (5) per cent to perfect the exchange.

Even the attorney for the defense Mr. Mason agreed that the amount of $3500.00 was reasonable for the legal services performed. He stated (Tr. 435):

"Mr. Mason: Well we're still on these findings of fact. On the basis of the evidence, we take great issue with the provisions of paragraph nine and ten, and we take issue with paragraph eleven.
Mr. Mann: You mean you want to pay us more attorney's fees?
Mr. Mason: Mr. Mann, if you're entitled to any, I wish the court would have given you the whole $3500.00 Don't put that in the record.
The Court: It's in there.
Mr. Mann: Thanks George. That will help on appeal.
Mr. Mason: That's all right. That's all right.

The contract in this case provides:

"We do hereby agree to carry out and fulfill the terms and conditions specified above, and, . . . (etc.,) If either

party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right, arising out of the breach thereof, including a reasonable attorney's fee."

We, as members of the Bar, feel that our services are just as important as any real estate agent's services. If a real estate agent could act for both parties and draw five (5) per cent commission on $95,000.00 for each, we certainly feel that an attorney going to court to enforce that agreement would at least be entitled to $3500.00, as compared with $9500.00 for a real estate agent's services. We feel that the $600.00 allowed by the court was almost an insult to the ability of a lawyer. It might have had some effect to stop an appeal, but that consideration should not be involved in the assessment of a fair and reasonable fee. We believe that the Supreme Court should direct that the attorneys fees be in keeping with the only testimony presented to the Court: to-wit, $3500.00.

POINT II: THAT THE SUPREME COURT HAS THE RIGHT TO ASSESS SUCH SUM AS AND FOR ATTORNEYS FEES ON APPEAL, AS IS EQUITABLE, THE CONTRACT RELIED UPON AND SIGNED BY THE PARTIES PROVIDED FOR A REASONABLE ATTORNEYS FEE FOR THE PURPOSE OF ENFORCING SAID CONTRACT.

If the respondents are entitled to prevail on this appeal to the Supreme Court, then the Supreme Court should fix reasonable attorneys fees for defending this matter before this Court on appeal. The amount thereof should rest in the sound discretion of the Supreme Court, as no evidence at this stage can be offered.

We earnestly request that if the respondents prevail on their theory of the case that they also have fixed by this Court the reasonable value of their services on appeal, and that the District Court be directed to have it included as part of its judgment.

CONCLUSION

In conclusion the respondents contend:

1. That the original agreement (exhibit A) in connection with the supplemental agreement (exhibit B) is the complete contract between the parties; is executory in nature; was not a mere tentative agreement, but constituted a definite, certain, and complete expression of the intent of the parties to exchange their properties and clearly reflects the basic transaction contemplated by them.

2. That the parties involved are local parties, have passed each other's propery over periods of years; are mature individuals with a background of trading experience and knew what they were doing; took a great deal of time to investigate each and every angle of the transatction. It was not a matter of trading two properties of $95,000.00 each, without knowing every detail involved and upon the execution and delivery of the original contract and supplemental contract (Exhibits A & B) the parties were bound by its terms and since it deals with the exchange of specific parcels of real property it is a proper instrument upon which the court may exercise its equitable powers and grant specific performance, there being no adequate remedy at law.

3. That the respondents have done everything reasonably possible to perform their obligation under the contract.

4. That the instruments required to complete the transaction and place each of the parties into the possession of said properties, can be made up and executed by each under the direction of the court.

5. That the contract provides for the payment of attorneys fees for enforcing the same and respondents are entitled to a reasonable attorneys fee to-wit: The sum of $3500.00 for the hearing in the District Court, and for reasonable attorneys fees to be fixed by the Supreme Court upon defending this matter on appeal.

Respectfully submitted,

Walter G. Mann
Attorney for respondents