

1976

Lloyd E. Lish, Jr v. Dean Compton : Defendant and Appellant's Brief in Support of Denial of Rehearing

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

| | | |
|---------------------|---|----------------|
| LLOYD E. LISH, JR., |) | |
| Plaintiff and |) | Case No. 14111 |
| Respondent, |) | |
| vs. |) | |
| DEAN COMPTON, |) | |
| Defendant and |) | |
| Appellant. |) | |

DEFENDANT AND APPELLANTS BRIEF IN
SUPPORT OF DENIAL OF REHEARING

Appeal from Judgment of the First
Judicial District Court for Box
Elder County, Honorable VeNoy
Christoffersen, Judge

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| LLOYD E. LISH, JR., |) | |
| | Plaintiff and) | Case no. 14111 |
| | Respondent, | |
| |) | |
| vs. |) | |
| |) | |
| DEAN COMPTON, |) | |
| | Defendant and) | |
| | Appellant. | |

BRIEF OF APPELLANT
IN SUPPORT OF DENIAL OF REHEARING

STATEMENT OF THE CASE

Action by a grain dealer against a producer,
farmer, for damages for breach of alleged verbal
contract.

DISPOSITION OF CASE

The lower court submitted special interrogatories
to the jury and granted judgment to the plaintiff for
\$13,150.00 damages against the defendant. On appeal
this court reversed the lower court holding under the
circumstances of the case that the defendant farmer was

not a "merchant" under the Utah Uniform Commercial Code and further that the confirmation of a purported verbal contract was not received within a reasonable time under the code and the facts of the case.

NATURE OF RELIEF SOUGHT

Defendant seeks the denial of the petition for rehearing.

STATEMENT OF FACTS

Defendant for 25 years, either alone or with his Father, has been a hay and grain farmer. He has never sold these commodities for anyone other than himself nor has he sold any such commodities that were not produced on his farm. He does not offer the goods for sale to the public. Plaintiff is regularly engaged in the buying and selling of grain, either as a broker or for his own account.

On August 2, 1973, the plaintiff telephoned the defendant and talked about the purchase of the latter's wheat crop soon to be harvested at Sublet, Idaho. The price discussed was \$3.30 per bushel and the anticipated harvest was about 15,000 bushels. According to the defendant, plaintiff would see if he could get that price. No further contact or communication between the parties occurred until August 15th.

According to the plaintiff, on August 3, 1973, the plaintiff entered in his notebook written notation of the purchase 'red wheat, rye mix... 15,000 bushels, \$3.30 per bushel, as is.' Such notation or confirmation was mailed by the plaintiff to the defendant on or about the 14th day of August 1973 and was received by the defendant in the mails in the afternoon of August 15, 1973. The notation of this transaction dated August 3, was out of sequence with other transactions in plaintiff's notebook and had it been in its proper sequence would have been dated August 13th or 14th.

ARGUMENT

POINT I.

THE COURT CORRECTLY RULED THAT THE DEFENDANT WAS NOT A "MERCHANT" IN THIS CASE NOR WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE.

There is no evidence in the record whatever that defendant was anything other than a farmer. Defendant never sold or bought wheat for anyone other than himself and other than the sale of his own wheat he never dealt in grain nor by his occupation or otherwise held himself out as having knowledge or skill peculiar to the grain trade nor has he employed an agent or broker or intermediary who by his occupation holds himself out as having such knowledge or skill. Plaintiff argues

in his brief that regardless of the interpretation given by the general public to the term "merchant" or by its interpretation by the judiciary the word "merchant" should have a different 'specific' meaning when used in the Uniform Commercial Code. It is to be noted however, Section 70A-2-104 uses language of common understanding in defining "merchant", to-wit, - 'a person who deals in goods of the kind' or 'otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction', or - 'by his employment of an agent or broker who - by his occupation holds himself out as having such knowledge or skill.' It does not seem logical that a person who, once a year or perhaps once in two years in the case of dry farmers, sells the crops he has raised thereby becomes a "person who deals in goods of the kind" or that he thereby "holds himself out as having knowledge or skill peculiar to the practices or goods involved". As pointed out by this court, adoption of plaintiff's argument would make a "merchant" of practically anyone who sold anything. Further, if plaintiff's argument applied to sellers, it would seem that it should also apply to buyers and the "lawyer or banker" who made annual purchases of fishing tackle or golf balls would likewise become a

"merchant" regardless of the circumstances in each case.

Both the Plaintiff's and Amicus Curiae Briefs miss the point of this court's ruling that in the instant case 'the trial court should have ruled as a matter of law under the circumstances shown here the defendant was not a "merchant" within the meaning of the Statute.'

Despite the Amicus Curiae protest of concern for Grain Dealers being imposed upon by farmers, they are protesting in a case where as a matter of fact the Grain Dealer had, for 12 days while the market rose wildly sat on his notice of confirmation and then, after the great rise in price mailed it to the farmer, disregarded the acknowledged verbal rejection thereof and after the 10 day lapse of time filed his suit claiming damages in excess of \$23,000.00. The condonation of such treatment of farmers can hardly be in the best interest of Amicus Curiae, Grain Dealers, or the Public. For the same conclusion see Cook Grains Inc. v. Paul Fallis 395 SW₂, 555, 239 Ark. 962.

POINT II.

THE COURT CORRECTLY RULED THAT AN UNEXPLAINED LAPSE OF 12 or 13 DAYS IN RECEIVING A WRITTEN CONFIRMATION OF A PURPORTED CONTRACT WAS NOT A REASONABLE TIME IN THIS CASE NOR WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE

The plaintiff's failure to mail the claimed confirmation of contract for 12 full days after preparing the same as he claimed, or the preparation of the alleged confirmation

on the 14th day of August, as it would appear from the location of the confirmation in plaintiff's records, during which time with plaintiff's full knowledge the grain market was fluctuating rapidly upward, would seem to admit to reasonable minds, no other conclusion than that plaintiff was awaiting a certain favorable position to himself before forwarding anything that would bind him to a contract. To argue that after the sharp rise in price over a 12 or 13 day period, during which time plaintiff had made out no less than 6 other notations or confirmations in the same book at increased prices was within a reasonable time, strains credulity and would be much like the 'gate keeper' arguing he timely closed the gate after watching all the horses run free. Reference is hereby made to the Lund vs. St. Paul M&M Railraod Company 71 P. 1032, 31 Wash. 286, Alsam Holding Co. v. Consolidated Tax Payers Mutual Ins. Co. N.Y.S. 2d 498, State vs. Commissioners of Cascade County 296 P 1, 89 Montana 37, Citizens Bank Bldg. v. Ellen E. Werthheimer 180 SW 361, 126 Arkansan 38, Hill v. Hobart 16 Main 164, Colefax County vs. Butler County 120 NW 444 83 Nebraska 803, relating to "reasonable time" and holding the same to be a question of law.

CONCLUSION

The court properly ruled under the circumstances of this case that the defendant and appellant was not by reason of merely having grown and marketed his own

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wheat for a period of 25 years a "merchant", as a matter of law. Further the willful or negligent delay for 12 days on a rapidly fluctuating market, to mail notice of confirmation of an alleged verbal contract, under these and the other circumstances of this case was not done 'within a reasonable time'. The petition for rehearing should be denied.

Respectfully Submitted,

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