

1949

Vern Frailey v. John C. McGarry : Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

VERN FRAILEY,

Plaintiff and Appellant,

vs.

JOHN C. McGARRY,

Defendant and Respondent.

BRIEF OF APPELLANT

APPEALED FROM THE
FIFTH JUDICIAL DISTRICT COURT,
IN AND FOR IRON COUNTY, UTAH
WILL L. HOYT, JUDGE

FILED

ELIAS HANSEN,
*Attorney for Plaintiff and
Appellant*

APR 1 1940
CLINE, WILSON & CLINE,

~~Attorneys for Defendant and~~
CLARK, SORENSON & CLARK,
Respondent

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IN THE SUPREME COURT
of the
STATE OF UTAH

VERN FRAILEY,

Plaintiff and Appellant,

vs.

JOHN C. McGARRY,

Defendant and Respondent.

Case No.
2506

BRIEF OF APPELLANT

STATEMENT OF CASE

The plaintiff brought this action against the defendant for the purpose of rescinding a contract entered into by plaintiff and defendant on December 7, 1945 and to recover from the defendant the sum of \$2,600.00, which the plaintiff paid to the defendant in cash and labor performed by the plaintiff for the defendant.

The contract which plaintiff sought to have rescinded contains, among others, the following provisions:

“That the seller (defendant) for the consideration herein mentioned agrees to sell and convey to the buyer and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the County of Iron, State of Utah, to-wit:

‘All of Lots 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 23, 25, also Northeast quarter of Southwest quarter and Northwest quarter of Southeast quarter, all being in Section 6, Township 36 South, Range 16 West S.L.M. and containing 960 acres more or less, according to the official survey thereof.’

“It is agreed that in the event the buyer or any assignee shall make application to appropriate water or shall procure a certificate of appropriation to appropriate water or shall procure a certificate to appropriate water from wells located upon the said premises and said buyer or assignee or assignees shall thereafter default in this contract, the seller shall immediately become the assignee of any such application or appropriation and the state engineer of the state of Utah is hereby authorized to recognize said seller as the assignee of any such application and in the event a certificate of appropriation has issued to the said buyer the water right thereunder shall be considered as appurtenant to the said premises and in the event of default the title thereto shall immediately pass to the seller. The seller reserves one-half of all mineral rights and oil rights

which might be appurtenant to or belonging thereto.”

“Said buyer hereby agrees to enter into possession and pay for said described premises the sum of Twenty Eight Thousand and Eight Hundred and No/100 Dollars, payable at office of John C. McGarry, Cedar City, Utah, strictly within the following times to wit: Two Thousand and Six Hundred and No/100 Dollars cash the receipt of which is hereby acknowledged. The remaining balance of \$26,200.00 payable as follows, to-wit: On any and all lands where water wells permits are granted and allowing water for any given acreage, said acreage is to be tilled and cropped. On or before January 1st being termed the end of each harvest season said buyer is to pay to said seller, the sum of Ten Dollars per acre cash and in addition thereto five per cent (5%) interest on all deferred payments on each and every acre tilled and cropped until the full purchase price, together with interest has been paid. The above given \$2,600.00 cash payment receipted herein is to be credited on the next payment which becomes due and payable on or before January 1, 1947.

“Said monthly payments to be applied first to the payment of interest and second to the reduction of the principal. Interest shall be charged from this date on all unpaid portions of the purchase price at the rate of five per cent per annum, payable monthly.”

“In the event the Buyer shall default in the payment of any special or general taxes, assessments or insurance premiums as herein provided, the seller may, at his option, pay said taxes, assessments and insurance premiums or either

of them, and if he elects so to do, then the Buyer agrees to repay the seller upon demand all such sums so advanced and paid by him, together with interest thereon from date of payment of said sums at the rate of $\frac{3}{4}$ of one per cent per month until paid."

"The seller on receiving the payments herein reserved to be paid at the times and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances, except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer and to furnish at his expense an abstract or a policy of title insurance at the option of the seller brought to date at time of sale or at times of delivery of deed at the option of Buyer."

"The Buyer and Seller each agree that should they default in any of the covenants and agreements contained herein to pay all costs and expenses that may arise from enforcing this agreement either by suit or otherwise including a reasonable attorney's fee."

The contract is signed by defendant John C. McGarry, as seller, and plaintiff Vern Frailey, as buyer. J. E. Thompson signed as a witness.

There are numerous other provisions in the contract which are not quoted but we do not deem such other provisions material to this controversy and therefore have omitted quoting such other provisions.

A copy of the contract is attached to the amended complaint (R. 24) and the original contract was received in evidence as Plaintiff's Exhibit "A".

The grounds upon which the plaintiff seeks to have the court rescind the contract as appears from the amended complaint are:

On the First Cause of Action it is in substance alleged that the plaintiff was induced to enter into the contract by the fraudulent representations of the defendant in that the defendant represented that: (a) there was ample water available to properly irrigate the real property described in the contract; (b) that the defendant falsely represented that he had a good title to the property; (c) that the contract is against public policy as expressed in the provisions of U.C.A. 1943, 100-3-8 which provides that a filing of a water right application must be made in good faith and not for purposes of speculation or monopoly; (d) in that at the time the contract was entered into the defendant was a married man whose wife was a resident of the State of Utah but that he did not inform the plaintiff of said fact or have his wife join in the contract so that she could be held to the performance thereof.

The Second Cause of Action is founded upon the failure and refusal of the defendant to furnish the plaintiff with an abstract of title to the property described in the contract; notwithstanding a demand was made for such abstract.

The Third Cause of Action is based upon the claim that the contract is against the public policy of this state and particularly U.C.A. 1943, 100-3-8 in that the defendant by the contract is seeking to speculate in the public waters of the state by attempting to sell land which was of the market value of \$1.50 per acre without water for \$30.00 per acre if and when plaintiff provides water for the land, and thereby defendant attempted to secure a profit of \$28.50 per acre or 2000 per cent if and when water is received by the plaintiff for irrigation of said land. That if the contract is held valid it will result in an unconscionable profit to the defendant as a result of his speculating in the public waters of the State of Utah without the defendant expending any labor or money in developing or putting to a beneficial use the public waters of the State of Utah.

In the Fourth Cause of Action it is alleged that the contract which it is sought to rescind is so uncertain as to render the same invalid in that it cannot be determined therefrom when, if ever, plaintiff is entitled to a conveyance of the property described in the contract, nor can it be determined from said contract when, if at all, the interest or the amount provided for in such contract begins, or the amount of the purchase price; that is to say whether interest is payable from the date of such contract or only on the amount that becomes due because some of the acreage of such land is irrigated, tilled and cropped. That no consideration whatsoever was given or agreed to be given by the de-

fendant for \$26,200.00 of the amount provided for in said contract and therefore such provision is invalid.

In each cause of action the plaintiff sought to recover \$500.00 as attorney's fees for the prosecution of the action. (R. 12 to 24)

To the amended complaint the defendant filed a demurrer to each cause of action (R. 25) and a motion to strike. (R. 27)

Defendants motion to strike was granted and his demurrer to the Second, Third and Fourth causes was sustained but overruled as to the First Cause of Action. (R. 29)

Thereafter the defendant filed an answer and cross-complaint (counterclaim).

In the answer the defendant denied that any fraud was perpetrated upon the plaintiff in the execution of the contract. (R. 30 to 34) As a further affirmative defense and as a cross complaint defendant seeks to have declared forfeited any rights the plaintiff may have in the contract because of his having failed to pay the taxes on the property described in the contract and because he has failed to plant any crops or till any of the land described in the contract notwithstanding he has filed with the state engineer applications to appropriate water to irrigate such lands and at least one of such applications has been granted by the state engineer, and because plaintiff has abandoned the contract. (R. 34 and 36)

To the answer and cross complaint the plaintiff filed a reply and answer in which he admitted that he had not paid the taxes on the premises described in the contract. He alleged that he went to the attorney for the defendant and through him made filings for appropriation of a water right to irrigate the lands described in the contract and denied generally the other allegations of the answer and cross complaint. (R. 38 to 41)

Upon the issues thus raised by the amended complaint, the answer and cross complaint of the defendant and the reply and answer of the plaintiff a trial was had. After the conclusion of the trial and the filing of briefs of counsel the court made and filed its memorandum of decision. (R. 62 to 68) In such memorandum of decision the court found, among other things, that the defendant had perpetrated fraud on the plaintiff as to the availability of water to irrigate the lands described in the contract; that the plaintiff had not established the lack of good title in the defendant; that the land described in the contract was of a value not to exceed \$1.50 per acre without water but with water was of a value of \$30.00 per acre. The court concluded that if the plaintiff would transfer his own, and secure a transfer of the filings to appropriate water held by Thompson, then and in such case the defendant should repay to the plaintiff the \$2600.00 paid on the contract together with the money paid by plaintiff and Thompson for filing fees, and together with legal interest thereon, otherwise the defendant should retain the money paid

to him by the plaintiff on the contract and defendant should also have decreed to him all of the filings made by plaintiff and Thompson and retain the land described in the contract free from any and all claims of the plaintiff. The plaintiff was given "fifteen days to give notice to the court and to counsel for defendant as to whether plaintiff and Thompson will transfer to defendant the water application herein referred to and in case plaintiff does not so elect then counsel for plaintiff (defendant) may prepare and submit findings, conclusions and decree disposing of the case in accordance herewith." The plaintiff gave no notice within the fifteen days allowed, or at all, that he would make the transfer of his water fillings or that he could secure the water filings of Thompson whereupon the trial court made its Findings of Fact, Conclusions of Law and Decree. (R. 70 to 79)

By its Judgement and Decree the court held that the contract of sale and purchase Plaintiff's Exhibit "A" was not subject to rescission by the plaintiff and that plaintiff take nothing by reason of his amended complaint; that plaintiff has defaulted in and has breached the said contract and the same is hereby declared to be forfeited and terminated and all rights of the plaintiff in and to all of the property therein described are hereby declared to be lost, cancelled, forfeited and terminated.

It is from the judgement so made and entered that plaintiff prosecutes this appeal.

ASSIGNMENTS OF ERROR

The plaintiff and appellant assigns the following errors committed by the trial court upon which he relies for a reversal of the judgement and decree appealed from and for an order of this court directing the trial court to enter a judgement and decree as prayed for in plaintiff's amended complaint.

1. The trial court erred in granting defendant's motion to strike and in sustaining defendant's demurrer to the second cause of action set up in plaintiff's amended complaint. (R. 29)

2. The trial court erred in granting defendant's motion to strike and in sustaining defendant's demurrer to the Third Cause of Action set out in plaintiff's amended complaint. (R. 29)

3. The trial court erred in granting defendant's motion to strike and in sustaining defendant's demurrer to plaintiff's Fourth Cause of Action (R. 29) set out in plaintiff's amended complaint.

4. The trial court erred in striking paragraph 11 of plaintiff's first cause of action set out in plaintiff's amended complaint. (R. 16)

5. The trial court erred in striking paragraph 12 of plaintiff's first cause of action set out in plaintiff's amended complaint.

6. The trial court erred in striking paragraph 17 of plaintiff's first cause of action as alleged in his amended complaint. (R. 29)

7. The trial court erred in making its conclusion of law numbered 2 wherein it is concluded: "That said contract is not now subject to rescission because the plaintiff has not offered to rescind said contract in its entirety." That such conclusion is without support in either the evidence or the Findings of Fact and especially is it at variance with the allegations of plaintiff's amended complaint. (R. 77)

8. The trial court erred in making its conclusion of law numbered 3 and the whole thereof in that such conclusion of law is without support in either the evidence or the findings of fact and is contrary to law. (R. 77)

9. The trial court erred in making its fourth conclusion of law in concluding that plaintiff's failure to till and crop any part of said premises, to drill any wells on said premises for the irrigation thereof and to make any further payments thereunder constituted a breach of said contract. That such conclusion of law is without support in either the evidence or the findings of fact. (R. 77)

10. The trial court erred in making that part of its fourth conclusion of law wherein it concluded that "because of such default on the part of plaintiff the defendant under his cross complaint is now entitled to declare the same forfeited and terminated and all rights of the plaintiff thereunder forfeited." That such conclusion of law is without support in either the evidence or the findings of fact and is contrary to Law. (R. 77)

11. The trial court erred in its Judgement and Decree wherein and whereby it adjudged and decreed "That the contract entered into by defendant and plaintiff is not subject to a rescission by the plaintiff." and that plaintiff take nothing by reason of his amended complaint. That said judgement is without support in either the findings of fact or the evidence and is contrary to law. (R. 79)

12. The trial court erred in making its judgement and decree wherein it adjudged and decreed that all rights of the plaintiff in and to all of the property described in the complaint are declared to be lost, cancelled, forfeited and terminated, that such decree and judgement is without support in either the evidence or the findings of fact. (R. 79)

13. The trial court erred in that it failed to decide all of the issues raised at the trial of this cause and particularly in that the decree and judgement does not determine who is entitled to the water right applications which were filed by the plaintiff and Thompson in the office of the State Engineer. (R. 79)

14. The trial court erred in failing to find that he, the plaintiff, had farming equipment in the State of California which he would ship to Utah for use in clearing and preparing for crops on any land that he might purchase, as alleged in paragraph 4 of plaintiff's amended complaint. (R. 13-14) and as established without conflict by the evidence. (Tr. 10)

15. The trial court erred in undertaking to adjudicate and in adjudicating the rights of Jerold E. Thompson in and to the water right applications made by him in the office of the State Engineer notwithstanding he was not a party to this action and the court was therefore without jurisdiction to adjudicate such right.

16. The trial court erred in failing to grant plaintiff the relief prayed for in his amended complaint.

ARGUMENT

It will be noted that in his motion to strike the defendant sought to have stricken the allegation relating to the contract between plaintiff and defendant being against the public policy of this state and particularly those provisions thereof contained in U.C.A. 1943, 100-3-8 which in effect provide that the state engineer shall not approve an application to appropriate water when the same is filed for the purpose of speculation or monopoly. (R. 15) The motion is at page 27 of the judgement roll, paragraph 1 thereof. The trial court granted the motion at the time it was argued but at the beginning of the trial the court reversed its ruling and reinstated the allegations theretofore stricken. (Tr. 2) That being so we have not assigned such ruling as error.

It will also be observed that the trial court found that the defendant made the false representation alleged in the amended complaint and that plaintiff in reliance

thereon entered into the contract between him and the defendant. That being so we shall not at this time review the evidence touching that phase of the case.

While the plaintiff takes the position that it having been determined that the defendant was guilty of the fraud alleged in the amended complaint it follows, as a matter of law, that plaintiff is entitled to the relief prayed still we shall in this, plaintiff's original brief, argue the other assignments of error because even though, if for any reason plaintiff is not entitled to the relief prayed because of the fraud perpetrated upon him, still he is entitled to prevail on the assigned errors other than those touching the question of fraud.

THE CONTRACT BETWEEN PLAINTIFF AND DEFENDANT IS AGAINST PUBLIC POLICY AND THEREFORE THE COURT ERRED IN STRIKING THE THIRD CAUSE OF ACTION SET OUT IN THE AMENDED COMPLAINT

We have a law now in effect and in effect when the contract here involved was entered into which in part provides:

“It shall be the duty of the state engineer, upon the payment of the approval fee to approve an application if * * * * 4 The applicant has the financial ability to complete the proposed works and the application was filed in good faith and not for the purpose of speculation or monopoly.”

That the defendant seeks to secure to himself an unconscionable profit out of the public waters of this state is obvious. The evidence shows and the trial court found that the land without water was at the time complained of worth \$1.50 per acre and when water is available for the irrigation of the land it is worth \$30.00 per acre. (Tr. 122, R. 23)

The evidence further shows that the plaintiff signed a contract to purchase from defendant 160 acres of land in the latter part of November or the first of December, 1945 and at that time plaintiff signed an application to appropriate water for the 160 acres of land covered by the contract and that he paid the filing fee. (Tr. 8-9) That application was assigned to defendant at the time plaintiff and defendant entered into the contract here involved. (Tr. 10) It will further be noted that the defendant acquired the land described in the contract on November 7, 1945. (R. 60) The price paid by defendant is not made to appear, except the deed to him recites the sum of \$10.00. Mr. Edward H. Parry, who purchased approximately 1880 acres of land, including the land described in the contract, paid \$1.50 per acre. The sale was confirmed on October 9, 1945. (R. 56) The documents above referred to are found in the Judgment Roll and not among the exhibits.

Thus under the contract, if the same is construed as the defendant contends it should be construed, he is to receive a profit of \$27,360.00 if and when the plaintiff, solely at his own expense, makes application to appropriate water or procures a certificate to appropriate water from wells located upon the property described in the contract. If such a contract does not

constitute a speculation on behalf of the defendant in the public waters of this state it is impossible to conceive of transactions which may be said to constitute speculation.

It is of course an elementary principle of law that one may not do indirectly that which he may not do directly. In this case the plaintiff and his brother-in-law J. C. Thompson sought to secure from the State Engineer the right to develop some of the public waters for a beneficial purpose, namely: for the irrigation of land. Under the contract, as defendant contends it should be construed, the plaintiff is required to pay to the defendant \$27,360.00 for the privilege of exercising a right which the plaintiff and Thompson seek to acquire from the State Engineer. If the defendant had himself gone to the State Engineer and represented that he desired to file on sufficient water to irrigate the 960 acres of land which he intended to sell or had sold to the plaintiff under a contract whereby he, defendant, was to receive a profit of \$28.50 per acre on account of the water filing can there be any doubt that under such circumstances it would have been the clear duty of the state engineer to refuse such a request? The scheme adopted by the defendant in the questioned contract is at least as objectionable, if not more objectionable, than the supposed case.

Thus it will be seen that by the terms of the contract here in controversy the plaintiff does not obligate himself to apply for any water to irrigate the lands described in the contract. If however plaintiff shall apply for or develop water then and in such event he is required to pay homage to the defendant to the tune

of \$27,360.00, together with interest on any deferred payment at 5% per annum. Moreover by the contract here brought in question the defendant seeks to change the laws of this state so that any application to appropriate water made by the plaintiff shall be appurtenant to the land described in the contract, notwithstanding this court has held the law to be otherwise. *Duchesne County vs. Humpherys*, 106 *Ut.* 332, 148 *Pac.* (2) 338.

It would seem obvious that one of the purposes, if not the sole purpose, of the legislature in condemning speculation in the public waters of this state is to remove impediments that may stand in the way of the development of the natural resources of the state. If the public waters of this state are to be the subject of speculation and profits and enormous sums of money are to be paid to persons who take no part in the development of such waters the inevitable result is to retard development. The present controversy is an outstanding illustration of the results that follow in the wake of such a practice.

The evidence in this case shows that the plaintiff entered into the contract with the defendant and came to Utah from California with the intention to engage in farming upon a somewhat large scale. When he learned that it was at least very doubtful if he could acquire sufficient water to irrigate the lands which he had agreed to purchase and probably when he learned of the further fact that he was being defrauded by the defendant out of \$27,360.00 for the right to use a water right which the defendant did not own it is no wonder that plaintiff first hesitated and then concluded that he should not and probably could not go through with

his plan to develop the 960 acres of land which he undertook to purchase and develop. If the State of Utah should approve a procedure calculated to enrich the speculator and retard the development of its natural resources it is headed towards stagnation rather than progression.

If the contract here involved is considered from a different point of view its provisions are likewise against public policy. There is a well recognized rule of law that a contract in restraint of trade is against public policy. 17 *C.J.S.* 22, *et seq.* The reason for such doctrine is that people should be encouraged to be productive and not inactive. The contract between plaintiff and defendant is calculated to discourage the plaintiff from developing water to irrigate the land covered by the contract, that is to say if he developed water he must pay to the defendant the additional sum of \$26,200.00 for the privilege of doing so. If he chooses not to apply for a water right to irrigate and develop the property described in the contract he is free to do so without incurring any additional obligation.

So far as we have been able to find this court has not passed upon a contract involving the construction of the provisions of U.C.A. 1943, 100-3-8, which have heretofore been quoted. There is a somewhat early case in this jurisdiction which was decided before the enactment of the foregoing statute which seems to hold that independent of statute it is against the public policy of this state for one to speculate in its public waters. See

Sawards, et al vs. Meagher, et al, 37 *Utah* 212, at page 222; 108 *Pac.* 1112 at page 1116.

The law, however, is well and uniformly established that a contract which is against public policy will not receive the sanction of the courts. 17 *C.J.S.* 763, et seq. and cases cited in the footnotes.

THE PLAINTIFF HAD A RIGHT TO RESCIND THE CONTRACT BECAUSE THE SAME IS AGAINST PUBLIC POLICY

It is alleged in the amended complainit that at and prior to the time he entered into the contract, Exhibit "A", the plaintiff was not familiar with the practices and customs prevailing in the state of Utah with respect to the manner and procedure for acquiring a right to use underground water. (Paragraph 5, page 3 of the Judgment Roll). He so testified at the trial. Such allegation is by reference made a part of plaintiff's Third Cause of Action. (R. 20)

While the cases generally hold that where a contract is illegal the courts refuse to grant either of the parties relief. Such rule has no application where the parties are not in *pari delecto*. 17 *C.J.S. Sec.* 201, page 555-6 and *Sec.* 211, page 563.

For a discussion of the law touching the relief afforded to a party to a contract not equally at fault with the other party where public policy will be advanced. See 17 *C.J.S.*, page 660, *Sec.* 274. That is especially so

where the illegal purpose is not consummated. 17 *C.J.S.*, page 662, *Sec.* 275. There are numerous cases cited in the footnotes which sustain the text. The law announced in the text is so well and uniformly established that we shall not burden the court with a review of the cases. Moreover such contracts may not be ratified. Nor does the doctrine of waiver or estoppel apply to such contracts, especially where they contravene public policy. See 17 *C.J.S.*, *Sec.* 279, page 668 and cases cited in the footnotes.

The law will also be found discussed at some length in *Black on Rescission*, Vol. 2, page 844, *Sec.* 313, *et seq.* and at page 868, *Sec.* 322.

It will be noted that the plaintiff in this case was in no sense guilty of speculating in the public waters of this state. Under the decision rendered by the trial court that is the sole prerogative of the defendant.

UNDER THE DECISION OF THE TRIAL COURT THE DEFENDANT IS REWARDED BECAUSE OF THE FRAUD PERPETRATED UPON THE PLAINTIFF

It is of course the uniform purpose of law and of equity to prevent one guilty of fraud from reaping the profits of his fraudulent acts. Under the decision of the trial court the defendant is not only given all of the profits that he could hope to realize if the contract had been free from fraud or other objections but in addition thereto the court apparently awarded the defendant the

applications to appropriate water filed by Jerold E. Thompson, the brother-in-law of the plaintiff, notwithstanding there is nothing in the contract which provides that he is entitled thereto and notwithstanding Jerold E. Thompson was not a party to the contract. It will be noted that the contract provides that "in the event the buyer or any assignee shall make application to appropriate water or shall procure a certificate to appropriate water from wells located upon the said premises and said buyer, as assignee, or assignees, shall thereafter default in this contract the seller shall immediately become the assignee of any such application * * *."

Jerold E. Thompson is not and never has been the assignee of the plaintiff of the applications made by Thompson to appropriate water. Not only that but Thompson was never a party to this proceeding. Notwithstanding such being the state of the record it was apparently the intention of the trial court to award to the defendant the water filings made by Thompson. We say apparently because of the provisions of the last paragraph of the judgment and decree wherein it is provided that the plaintiff has defaulted in and has breached the said contract, and the same is hereby declared to be forfeited and terminated and all rights of the plaintiff in and to all of the property therein described are declared to be lost, cancelled, forfeited and terminated. By such provision the trial court may or may not have assumed that the water filings made by Thompson belongs to Frailey. If the court assumed that such filings belonged to Frailey such assumption is

wholly without support in the evidence. If the trial court did not so assume it was none the less error for the court to fail to find and decree that the same did not belong to plaintiff but belonged to Thompson. It is, of course, one of the cardinal principles of law that when a court of equity takes jurisdiction of a cause it is required to dispose of all questions presented to the end that every controversy is disposed of.

THE TRIAL COURT ERRED IN FAILING TO DE-
CIDE ALL OF THE ISSUES IN THIS CAUSE
AND IN UNDERTAKING TO ADJUDICATE
THE WATER RIGHT APPLICATION
OF JEROLD E. THOMPSON

By assignments numbered 13 and 15 plaintiff attacks the last paragraph of the judgment and decree (R. 79) wherein it is decreed that all rights of the plaintiff are forfeited in and to all of the property described in the contract. It is by no means clear just what is meant by the judgment. It will be noted that no water right applications are described in the contract. Certainly the water right applications of Thompson are not, therein described and as we have pointed out under the preceding heading such water right is not even referred to in the contract, because Thompson is not an assignee of plaintiff but on the contrary he is the original applicant for a water right. Moreover it may be open to serious doubt if the water flings are property, but even if they are they are not described in the contract. Thus it is plaintiff's position that the decree is so vague and

uncertain as to be at least voidable if not absolutely void, and as we have heretofore pointed out if the decree and judgment is not vulnerable to attack because of its uncertainty it is none the less without support in the evidence and is contrary to law.

THE TRIAL COURT ERRED IN GRANTING THE
MOTION TO STRIKE THE SECOND CAUSE
OF ACTION SET OUT IN PLAINTIFF'S
AMENDED COMPLAINT

The trial court granted defendant's motion to strike the Second Cause of Action set out in plaintiff's amended complaint. (R. 18, 27, 29) Plaintiff has assigned such ruling as error. The contract between plaintiff and defendant contains this provision:

"The Seller on receiving the payments herein reserved to be paid at the times and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances, except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer, *and to furnish at his expense an abstract or a policy of title insurance at the option of the seller brought to date at the time of sale or at time of delivery of deed at the option of the Buyer.*" (Italics supplied.)

At the time of the argument of the motion to strike the trial court took the view that the defendant was under

no obligation to furnish an abstract of title or a policy of title insurance until he was paid for the property in full. As we read the provisions of the contract above quoted they are not subject to such a construction. The seller agreed to do two things. To furnish an abstract of title or a policy of title insurance at the option of the seller brought to date at time of sale or at time of the delivery of the deed at the option of the buyer (the plaintiff) and to execute and deliver a deed conveying a good title to the buyer.

It will be noted that the form of contract used by the parties to the contract here involved was a uniform sales contract which is in general use in Utah. Notwithstanding that form of contract has been in general use in Utah for a number of years, this is the first time that the writer of this brief has learned of anyone placing the construction on the contract that was given it by the trial court. Moreover the language above quoted gives the buyer the option to require an abstract or policy of insurance brought to date *at time of sale* or at time of delivery of the deed. If the seller, defendant, is not obligated to furnish an abstract until he receives all of his money and delivers a deed there would be no sense in the buyer having an abstract or policy of title insurance as of the time of sale. Obviously an abstract of title or policy of title insurance as of the time of delivery of deed would be effective as of the time of sale. Moreover the purpose of the buyer being entitled to an abstract or policy of title insurance was to furnish the buyer protection against the contingency that the seller might receive

all or substantially all of his money and then be unable to convey title, with the result that the buyer may have parted with his money without being able to recover the same or the premises. A construction of the contract such as that given by the trial court is without support in the language of the contract as well as at variance with the common practice of those who engage in transactions for the sale and purchase of real estate where the payments are extended over a substantial period of time.

In connection with what we have said touching the striking of the Second Cause of Action the attention of the court is directed to the allegation contained in paragraph 12 of plaintiff's First Cause of Action, which was stricken by the trial court and which we have assigned as error in assignment 5.

If the defendant had furnished an abstract or policy of title insurance plaintiff could have ascertained if the wife of the defendant had conveyed to him her inchoate interest in the property or that she become obligated to join in the conveyance when the money was paid for the property. The outstanding inchoate interest of defendant's wife is of course a cloud upon his title.

The sole purpose of the provision in the contract requiring the seller to furnish the buyer an abstract or policy of title insurance at the time of sale was to enable the buyer to protect himself against the possibility that he might pay for the property and then when the time for conveyance arrives be unable to secure title to the purchased property.

The following cases support the proposition that if a seller who has agreed to furnish an abstract or policy of title insurance fails and refuses to do so the buyer may rescind the contract of purchase and recover any money that he may have paid on the contract:

Austin vs. Shipman, 160 Mo. App. 206; 141 S.W. 425

McChesney vs. Appek, 156 Min. 260; 194 N.W. 882

Kneeland vs. Hetzel, 103 Okla. 3; 229 Pac. 218.

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO STRIKE THE
FOURTH CAUSE OF ACTION SET
OUT IN PLAINTIFF'S
AMENDED COMPLAINT.

Heretofore in this brief we have discussed the contract, Plaintiff's Exhibit "A", on the assumption that such contract is sufficiently definite and certain to enable the court to ascertain what was the intention of the parties when such contract was entered into. It was apparently on the assumption that the terms of the contract were sufficiently certain to enable the court to ascertain what the parties intended that the trial court sustained the demurrer and granted the motion to strike the Fourth Cause of Action set out in plaintiff's amended complaint. (R. 29)

By our argument touching the various other reasons why the judgment of the court below should be reversed we do not wish to be understood as conceding that the contract is sufficiently certain to enable a court

to ascertain what was the intention of the parties thereto and to give effect to such intention.

We have already pointed out that there is nothing in the contract whereby the plaintiff obligates himself to apply for any water to irrigate the lands described in the contract. In the event the plaintiff should not apply for a water right there is nothing in the contract which indicates what shall be the rights of the parties or when, if at all, plaintiff is entitled to a conveyance of the premises. If plaintiff should fail to apply for a water right is the \$2600.00 paid on the contract to be in full payment for the land? If not is the plaintiff required to pay more or less than \$2600.00, if so, how much more or less? There is no language in the contract from which the court can find any answer to these questions. The contract provides that "on any and all lands where water well permits are granted and allowing water for any given acreage said acreage is to be tilled and cropped." Suppose permits are granted and water is allowed but no water is actually developed must such lands nevertheless be tilled and cropped? To give effect to such language according to its meaning would require the plaintiff to till and crop land even though no water is or can be developed. Can it be that such was the intention of the parties to the contract? We don't know and it is impossible for anyone to ascertain from the language used when viewed in the light of the purposes of the contract. Just what function the language "on or before January 1st" being termed the end of each har-

vest season serves in the contract we are at a loss to ascertain.

The contract then provides that "said buyer is to pay said seller the sum of Ten Dollars per acre cash and in addition thereto five percent (5%) interest on all deferred payments in cash and every acre tilled and cropped. Until the full purchase price, together with interest has been paid." Supposing that no land is tilled or cropped what then? No one can tell. Is the five percent interest provided for in the contract to be paid only on each and every acre tilled and cropped or is the 5% interest payable on the whole \$28,800.00? No one can tell from the language of the contract. The language just quoted indicates that the 5% interest is payable only on the land that is tilled and cropped and upon which there is a deferred payment. How frequently is the \$10.00 per acre to be paid on the land tilled and cropped? No one can tell from the language used in the contract. Contrary to the provision of the contract above quoted it is provided that monthly payments shall be made and interest from this date at 5% per annum. What was the agreement of the parties with respect to payments that were provided for in the typewritten portion of the contract just quoted and the provision in the printed portion of the contract immediately following? Again no one can tell.

If the language of a purported contract is so vague and uncertain that the courts cannot ascertain therefrom

what is intended the court will declare the same void. 12 *Am. Jur.*, page 554, *Sec. 64* and cases there cited.

THE CONTRACT HERE INVOLVED WAS VOID
FROM ITS INCEPTION IN SO FAR AS IT
DEALS WITH WATER RIGHTS BE-
CAUSE OF THE IMPOSSIBILITY
OF PERFORMANCE.

The authorities teach that when a contract is impossible of performance at the time of its execution it is invalid. *Page on Contracts*, Vol. 5, page 4698, *Sec. 2670*, and cases there cited.

It is alleged in the First Cause of Action and the trial court found that there was not sufficient water available to irrigate the lands described in the agreement between plaintiff and defendant. (See paragraphs 7 and 8 of the amended complaint. R. 14 and paragraph 9 of the Findings of Fact. R. 72) It is also alleged and found that the plaintiff believed that there was sufficient water to irrigate the lands described in the contract and that he would not have entered into the contract if he had known that there was not sufficient water to irrigate such premises. (Paragraph 9 of the amended complaint. R. 15 and paragraph 13 of the Findings of Fact. R. 73) Thus the plaintiff did not assume the risk of there being an insufficient supply of water when he entered into the contract and therefor the same is invalid because of the impossibility of performance or mistake of fact. That being so the plaintiff is, upon such ground, en-

titled to rescind the contract, or more accurately there was no contract. 17 *C.J.S. Sec. 962, page 952* and cases there cited.

THERE WAS A PARTIAL IF NOT A COMPLETE
FAILURE OF CONSIDERATION FOR THE
MONEY WHICH PLAINTIFF AGREED TO
PAY IF AND WHEN A WATER RIGHT
WAS ACQUIRED.

The general rule is that a failure or even a partial failure of consideration will justify the rescission or cancellation of an obligation in equity. 1 *Black on Rescission*, 2 *Ed.*, *Sect. 159*; *Sterling vs. Gregory*, 149 Cal. 117; 85 Pac. 305; *Simeon vs. Klinze*, 66 Mont. 314; 213 Pac. 440; *Williams vs. Butter*, 58 Ind. App. 47; 105 N.E. 387; 107 N.E. 300.

While in this case the defendant did not agree that plaintiff should receive a water right, or for that matter make any agreement with respect to a water right other than to require the payment of an unconscionable sum of money by the plaintiff if he should choose to develop a water right. The defendant certainly acquired no greater right to have the contract enforced because of the complete or partial failure of consideration received by plaintiff because the consideration was to come from the public resources of the state rather than from some right possessed by the defendant. It will be noted that the plaintiff in his fourth cause of action, paragraph 3c, (R. 22) alleges that defendant gave no consideration for

the \$26,200 which was to be paid if and when a water right was acquired for the premises described in the contract. As heretofore pointed out that cause of action was ordered stricken and such order is assigned as error.

**BOTH THE CONCLUSIONS OF LAW AND THE
JUDGMENT AND DECREE ARE WITHOUT SUP-
PORT IN THE EVIDENCE AND LIKEWISE
WITHOUT SUPPORT IN THE FIND-
INGS OF FACT.**

In its Memorandum of Decision the court found that the defendant was guilty of the fraud charged in the amended complaint. Notwithstanding such findings the court concluded that the plaintiff was entitled to partially rescind the contract, that is to a return of the money which he had paid on the contract, if within fifteen days he and Thompson should assign to the defendant all of the water filings which they paid for and filed in the office of the State Engineer. (R. 68)

In order to fully appreciate the injustice to the plaintiff of the requirement that he and Thompson assign to the defendant their water filings before plaintiff could secure even a partial relief because of the fraud perpetrated upon him by the defendant it is necessary to keep in mind the facts and circumstances surrounding the execution of the contract between plaintiff and defendant.

At and prior to the time the contract was entered into the plaintiff was a resident of Tula Lake, California,

where he was engaged in farming and where he was the owner of farming equipment which enabled him to engage in farming on a large scale. Plaintiff made it known to the defendant that if he, plaintiff, purchased land from the defendant that he, plaintiff, would move his farming equipment to Utah for the purpose of operating irrigated farming lands on a somewhat large scale. (Tr. 9-10-16 and 103)

After plaintiff had learned from the state engineer that his water right applications would probably not be approved and after the defendant had refused to furnish plaintiff an abstract of title, the plaintiff, upon advice of the state engineer, purchased 640 acres of land from the state and sought to have the applications to appropriate water theretofore applied for use on the lands which he contracted to purchase from defendant to the lands purchased from the state. (Tr. 17) It should also be noted that J. E. Thompson was not a party to the contract although he signed as a witness thereto.

We have already pointed out that there is no provision in the contract which gives the defendant any claim to the filing made by Thompson. It is reasonable to assume that Thompson would not consent to assign his filings to defendant.

This court may take judicial notice of its own decision. It appears from the decision of this court in the case of *McGarry vs. Thompson*, 201 Pac. (2d) 288 that Thompson, who was a party to that case and who is the same person as the Thompson who made

the filings here involved, was and is in desperate need of a water filing to apply on lands which he has acquired from the state. That being so to grant plaintiff the right to a return of the money paid by him to defendant on condition that plaintiff surrender to defendant the water filings amounts to sheer mockery. The only chance that plaintiff has to succeed in his farming venture is to secure a water right. The water filings that plaintiff has made will probably not be what McGarry represented them to be but if plaintiff is permitted to retain them that is the best he can get out of a poor bargain. It should be kept in mind that the position in which plaintiff now finds himself is due solely to the fraud of the defendant.

If the case is viewed from the position of the defendant what principles of law or equity entitles him to retain all of the profits of his fraudulent acts? Why should he be entitled to retain not only the land covered by the contract and the \$2600.00 which he fraudulently secured but also have conveyed to him the water filings which were paid for by Frailey and Thompson? Of course if he is permitted to do that then and in such case fraud pays very handsomely. Not only that but the law prohibiting speculating in the public waters of this state becomes a myth and the defendant is at liberty to again perpetrate a fraud by selling the water right at an enormous price upon some unsuspecting person who might desire to develop the natural resources of the state. If he succeeds in doing that he may, as in this case, retain any down payment that he may receive and

then proceed to repeat his fraudulent practices without end, all to his own enrichment and the retardation of the development of the state.

The law is so well and uniformly settled to the effect that when a contract is rescinded the parties are to be placed in status quo that we shall cite only a few of the many authorities which so hold.

“The very idea of rescinding a contract implies that what has been parted with shall be restored on both sides. Releasing one party from his part of the agreement and excusing him from making the other party whole do not seem agreeable to reason or justice. Hence the general rule is that a party who wishes to rescind an agreement must place the opposite party in statu quo.”
12 *Am. Jur.*, page 1031, Sec. 451.

Numerous cases will be found in the foot notes to the text which support the same. To the same effect 17 *C.J.S.*, page 919, Sec. 438, et seq, and cases there cited in foot notes.

In this case the plaintiff by his amended complaint “offered to do equity in the premises and to cancel and return to the defendant his duplicate original of the contract above mentioned upon the receipt by the plaintiff of the consideration which he, the plaintiff, has paid to the defendant as hereinbefore alleged.” All that the plaintiff received from the defendant was the contract of purchase which as above indicated he offered to cancel.

THE PLAINTIFF AND NOT THE DEFENDANT IS
ENTITLED TO THE WATER FILINGS MADE
BY THE PLAINTIFF UPON A RE-
CISSION OF THE CONTRACT.

“Generally speaking the effect of rescission is to extinguish the contract. The contract is annihilated so effectually that in contemplation of law it has never had any existence even for the purpose of being broken. Accordingly it has been said that a lawful rescission of an agreement puts an end to it for all purposes, not only to preclude the recovery of the contract price but also to prevent the recovery of damages for breach of the contract. The effect of a rescission of an agreement is to put the parties back in the same position they were in prior to the making of the contract * * * The party rescinding may, however, have a right to restitution with respect to any performance on his part.” 12 *Am. Jur.* 1038, Sec. 455, and cases cited in the foot notes.

We have heretofore in this brief directed the attention of the court to the memorandum of opinion of the trial court wherein it found that plaintiff was entitled to rescind the contract because of fraud but then said that in order to exercise the right plaintiff must assign his water filings and secure an assignment of Thompson's water filings to defendant before he could exercise such right. To make the right of the plaintiff to rescind the contract conditioned upon the assignment of plaintiff's and Thompson's water filings to the defendant is directly at variance with the very essence of the doctrine of rescission. Independent of the contract

the defendant was wholly without even a color of right to the water applications. Such applications were made and paid for by the plaintiff and Thompson. In order to give the defendant any semblance of a claim to the water applications he must look to the contract. Moreover as we have heretofore pointed out if the contract be looked at it is made crystal clear that the defendant is, by the contract, illegally speculating on a large scale in the public waters of this state.

In its conclusions of law No. 2, page 77, the court concludes that said contract is not now subject to rescission because the plaintiff has not offered to rescind said contract in its entirety but demands a return of the down payment and cancellation of the contract, and asserts the right to retain all of the said water filings and applications. A similar thought is expressed in paragraph 3 of the conclusions of law. (R. 77 and in the first paragraph of the judgment and decree R. 79) We have assigned as error such conclusion of law and part of the judgment and decree in assignments numbered 7, 8, 11.

The trial court having concluded that plaintiff was entitled to rescind the contract the defendant may not be heard to say that plaintiff must assign his own water applications and secure the assignment of Thompson's water applications to the defendant. The defendant never had any right to the water applications at or prior to the time the contract was entered into nor is the plaintiff by the contract obligated to make any water filing or applications, much less did the defendant at the time

the contract was entered into or at all acquire any claim to the filings made by Thompson.

THE TRIAL COURT ERRED IN CONCLUDING
THAT BECAUSE PLAINTIFF BREACHED THE
CONTRACT DEFENDANT IS ENTITLED TO
RETAIN THE LAND, THE MONEY PAID
ON THE CONTRACT AND THE
WATER APPLICATIONS.

In paragraph 4 of the Conclusions of Law (R. 77) and in the second paragraph of the Decree and Judgment the trial court concluded and decreed that the plaintiff had forfeited all of his rights in the property mentioned in the contract because he had breached the contract. We have attacked such conclusion and part of the judgment by assignments numbered 9 and 10.

In light of the court's finding that water was not available to satisfy the water applications it would seem a useless thing for the plaintiff to drill wells and plant crops if there is no water available. While there does not seem to be any evidence in the record touching the cost of drilling a well it does appear in the case of *McGarry vs. Thompson*, 201 Pac. (2d) 288, 291, that the cost of drilling a well was \$1975.00. It would indeed be a reckless undertaking to drill wells at a cost of nearly \$2000.00 each when to do so would result in a failure to secure a permanent water supply and when

an attempt to drill a well may obligate the plaintiff to pay to defendant an additional \$26,200.00 without regard to whether the well proved to be a success or a failure.

Moreover, under the view taken by the trial court the plaintiff had a right to rescind the contract but because he sought the aid of the court in accomplishing his right he, the plaintiff, not only lost such right but was deprived of rights in his water filings and to the money he paid on the contract. Moreover, if the plaintiff had proceeded to perform the contract he would doubtless have been confronted with the claim that he had waived his right to a rescission because of the fraud perpetrated upon him.

If the plaintiff is entitled to rescind the contract it follows as a matter of law that he is entitled to be placed in statu quo, that is to a return of the money paid on the contract and to retain the water applications which he paid for. As we have heretofore pointed out if plaintiff is deprived of the water filing he will be unable to pursue his farming venture in the Byrl district, if indeed he will be able to do so if he is permitted to retain the water filing.

If the contract is rescinded and the defendant is given back his land he will be in the same position that he was in when the contract was executed. Defendant

did not at the time the contract was entered into have any interest in the water filings, nor did he under the terms of the contract acquire any right to require the plaintiff to make any such filings. His claimed right comes, if at all, because the plaintiff made the filings after the contract was executed. Under such a state of facts the doctrine of rescission is fully complied with by the plaintiff when the real estate described in the contract is returned to the defendant and the plaintiff is paid back the money, together with legal interest thereon and plaintiff is allowed to retain his water filings.

In the foregoing brief we have attacked the contract upon various grounds other than the fact that defendant perpetrated fraud upon the plaintiff in securing the same. We have so attacked the contract because if the same is void for the reasons discussed it is incapable of being ratified. Moreover if the contract is void neither of the parties acquired any right thereunder. Under such an instrument the defendant could not acquire any right to the water filings nor the money paid to him. If for example a contract is against public policy the same principles of public policy that condemns the contract likewise condemns an attempt to ratify the same and precludes the defendant from securing any rights thereunder.

It may be that the defendant will attack the trial court's finding touching the question of fraud and further claim that the plaintiff waived the fraud. Such were

defendant's contentions before the trial court. Until we are advised of defendant's position in such respects we shall not discuss such matter but reserve our discussion thereof for a reply brief.

It is submitted that plaintiff should be granted the relief prayed for in his amended complaint and that he be awarded his cost on this appeal.

Respectfully submitted,

ELIAS HANSEN

Attorney for Appellant