1951

Dan T. Orr v. Clegg Livestock Company, Inc. : Brief of Appellant

Utah Supreme Court

M. Earl Marshall; Attorney for the Defendant and Appellant;

Case No. 7658

IN THE SUPREME COURT
of the
STATE OF UTAH

DAN T. ORR,
Plaintiff and Respondent,

vs.

CLEGG LIVESTOCK COMPANY, INC., a corporation,
Defendant and Appellant,

APPELLANT'S BRIEF

M. EARL MARSHALL,
Attorney for the Defendant and Appellant.

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STATEMENT OF FACTS

The plaintiff brought this action to recover from the defendant the sum of $1,495.00 together with interest thereon, for thirteen head of cattle which the plaintiff alleged were purchased by the defendant from plaintiff on the 5th day of January, 1949, and delivered by the plaintiff to the defendant on the same date, under the terms of a certain agreement between the parties herein, entered into on the 5th day of January,

1949, and a copy of which agreement was attached to plaintiff's complaint and marked Exhibit "A" and by reference made a part thereof.

The defendant filed an answer and cross complaint in which defendant admitted the execution of the agreement, Exhibit "A" and made a general denial of the other material allegations of plaintiff's complaint. As a further defense the defendant alleged that in accordance with the terms of said agreement, Exhibit "A" the parties gathered 86 head of cattle on May 14, 1949, 7 head of cattle on May 17, 1949, and 16 head of cattle on June 9, 1949, making a total of 109 head of cattle gathered from the open range. Defendant further alleged that on the 9th day of June, 1949, the plaintiff delivered to the defendant 25 head of said 109 head of cattle, as leased cattle and as provided for by the terms of the agreement between the parties, Exhibit "A", and delivered the other 84 head of said 109 head of cattle to the defendant and was then and there paid the sum of $6,660.00, which together with the $3,000.00 cash paid at the time of the execution of said agreement constituted payment in full for such 84 head of cattle at the agreed price of $115.00 per head; that on the 6th day of July, 1949, there were delivered to the defendant by the plaintiff 13 head of cattle and the plaintiff was then and there paid the sum of $1,495.00 by the defendant; that on the 17th day of August, 1949, the parties gathered one cow and she was delivered to the defendant and the

plaintiff was paid the sum of $115.00; that at the times when all three such deliveries were so made the brand of the plaintiff was vented on all cattle so delivered. Defendant further alleged that on the 1st day of March, 1950, it tendered to the plaintiff an interest payment in the sum of $150.48 which payment was rejected by the plaintiff.

Defendant alleges, by way of cross complaint, that between the dates of January 1, 1949 and April 30, 1949, the defendant sold and delivered to the plaintiff 85 tons of hay of the reasonable value of $44.00 per ton and for a total price of $3,740.00, and 12 ton of cotton seed cake at $100.00 per ton for a total of $1,200.00 and furnished services and labor of men and machinery to the plaintiff for the reasonable value of $1,025.00 and prayed judgment against the plaintiff for dismissal of his complaint and for judgment in the sum of $5,965.00. Plaintiff filed an answer to this cross complaint and admitted the execution of the agreement, Exhibit "A" and denied the other material allegations of the cross complaint.

Trial was had, without a jury, and the plaintiff was given judgment against the defendant in the sum of $1,495.00, representing the value of 13 head of catle at $115.00 per head, together with interest thereon from January 5, 1949, together with costs in the amount of $45.40.

Thereinafter the defendant filed a Motion for a New Trial on the following grounds; insufficiency of the evidence to justify the judgment; that the evidence herein is insufficient to support the findings herein by the court; that the judgment entered is against the law. The motion for a new trial was argued by counsel for the parties and denied by the court and the defendant appeals.

All italics are mine.

STATEMENT OF POINTS

1. That the agreement between the parties, Exhibit "A" is an *executory agreement to sell* and not an *executed agreement of sale* and that title to said cattle remained in the plaintiff until delivery was made in June, July and August, 1949.

2. That the evidence is insufficient to support the findings of the court as to Findings of fact, Sections two, three, four and five.

3. That the judgment is contrary to the findings of the court, section six of the findings.

4. The judgment is contrary to the law.

5. Appellant's motion for a New Trial should have been granted.

ARGUMENT

THAT THE AGREEMENT BETWEEN THE PARTIES IS AN EXECUTORY AGREEMENT TO SELL AND NOT AN EXECUTED AGREEMENT OF SALE AND THAT THE TITLE TO THE PROPERTY INVOLVED REMAINED IN THE PLAINTIFF UNTIL DELIVERY WAS MADE BY THE PLAINTIFF ON OR ABOUT THE 15th DAY OF MAY, 1949, AS PROVIDED FOR BY THE TERMS OF SAID AGREEMENT AND ANY LOSS UP TO THAT TIME SHOULD BE AT THE EXPENSE OF THE SELLER: THAT THE LANGUAGE OF THE PARTIES USED IN SAID AGREEMENT IS CLEAR AND UNAMBIGUOUS AND THE INTENTION OF THE PARTIES SHOULD BE DETERMINED BY THE LANGUAGE USED IN THE SAID AGREEMENT: THAT THE TITLE TO SAID CATTLE REMAINED IN THE PLAINTIFF UNTIL DELIVERY ON OR ABOUT MAY 15, 1949, AND PLAINTIFF WAS RESPONSIBLE FOR THE FEED FOR SUCH CATTLE UP TO THAT TIME AS FURNISHED TO THE PLAINTIFF BY THE DEFENDANT, AND THEREFORE THE COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT.

Contracts involving the sale of personal property are divided into two classifications by the statutes of this state. They are classified as *contracts to sell* and *contracts of sale.* Utah Code Annotated, 1943, Title 81, Chapter 1, Section 1 provides as follows:

> 81-1-1. Contract to Sell and Sales.
>
> 1. A contract to sell goods is a contract whereby the seller argees to transfer the property in goods to the buyer for a consideration called the price.

2. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

The text books on this same subject classify the contracts to sell as *Executory Contracts* and the contracts of sale as *Executed Contracts.* In 55 C. J. page 39, Section 6, we find these two types of contracts defined as follows:

> "An executed sale or executed contract to sell personal property exists where nothing remains to be done by either party to effect a complete transfer of title to the subject matter of the sale."
>
> "An executory sale or an executory contract to sell is one under which something remains to be done by either party before delivery and passing of title."

The Utah Court in *Middleton vs. Evans,* 86 Utah 396, 45 Pac. 2nd 570, decided in 1935, states as follows:

> "It is a well established rule of law that where the language of a contract is clear and unambiguous, it is the duty of the court to determine the intent of the parties from the language used by the parties in the agreement."

If we apply this rule to the present case we find that the agreement, exhibit "A", clearly uses language which indicates and clearly establishes the fact that the parties intended to and did enter into an executory contract to sell and not an executed

contract of sale. In line twenty-four of page two of such agreement the contract reads as follows: "all of said cattle *will be* gathered by on or about May 15, 1949, and that all of said cattle *will be sold* to the Lessee (defendant) herein." In line thirty of page two it again states, "all of the remaining cattle *will be sold* to the Lessee (defendant) herein." This language clearly indicates that there was something to be done, that is, that the cattle were to be gathered on or about May 15, 1949, and would then be sold to the defendant. The further defense of the defendant alleges that said cattle were so gathered and delivered to the defendant beginning with May 14, 1949, and the evidence sustains this allegation. Transcript pages 70 and 71.

In the case of *Middleton vs. Evans,* cited above, the court states further:

> "Under section 81-2-1 no property in the goods is transferred to the buyer unless and until the goods are ascertained" and
>
> "Section 81-2-2 provides that under a contract to sell, the property in the goods is transferred to the buyer at such time as the parties to the contract intend it to be transferred" and "for the purpose of ascertaining the intention of the parties regards shall be had to the terms of the contract, the conduct of the parties, usages of trade and circumstances of the case."

In applying this reasoning to the instant case it would seem certain that the cattle to be delivered and

sold to the defendant by the plaintiff would not be ascertained until they were gathered and delivered to the defendant on or about May 15, 1949, as expressly set forth by the terms of the agreement and that therefore no property would pass until that time and that any loss up to that time would be at the expense of the Seller, and in this case the plaintiff. The evidence clearly shows that no number was ascertained, as to any cattle sold and delivered to the defendant, until the months of May, June, July and August, and that the loss of the thirteen head, which is the basis of the suit of the palintiff, took place many months prior to the date of gathering and delivery in the month of May and thereafter.

If in our present case we look to Utah Code Annotated, 1943, Rule 2, under Title 81, Chapter 2, Section 3, we find the following:

> "Where there is a contract to sell specific goods, and the seller is bound to do something to the goods for the purpose of putting them in a deliverable state, the property does not pass until such thing is done."

It would seem clear that from the language used by the parties in the agreement, exhibit "A" that the seller had the obligation to gather, count, vent the brands on the cattle to be delivered on or about the 15th day of May, 1949, before title to the cattle would pass to the buyer, and that any loss up to that time would be on the Seller.

The court below found, findings of fact sections two and three that the defendant *purchased* the cattle in question at the time he signed the agreement on the 5th day of January, 1949, and at such time went into *constructive* possession of said cattle and that the parties intended that the defendant have possession of said cattle and that defendant feed them.

The court further found, findings of fact section six, that the plaintiff refused to permit the defendant to spray said animals in the spring of 1949. This finding would infer that the Seller still intended that the ownership was in him and that he had the right to exercise control over the property being sold. This refusal on the part of the plaintiff to allow the defendant to spray said cattle in April, 1949, is sustained by both the testimony of the plaintiff and Howard J. Clegg, for the defendant. In further support of the contention of the defendant that title remained in the plaintiff until the actual delivery and payment made during June, July and August, 1949, is found in line ten, page three of the agreement, exhibit "A" between the parties which reads as follows; "title to said cattle shall remain in the Lessor herein until they are paid for by the Lessee." The Lessor is the plaintiff and the lessee is the defendant.

In Ruling Case Law, Vol. 24, page 20, section 282 we find the following statement of the law as to the

sale of personal property where it is contemplated by the parties that the property to be sold will be weighed, measured or *counted* at a later date.

> "The general doctrine seems to be that a sale of personal property is not contemplated while anything remains to be done to determine its quantity, as by weighing, measuring, *counting,* if the price depends on this, unless this is done by the buyer alone, and there is no other evidence to show the intention of the parties that the title shall pass before the quantity or price is so determined. The reason for this is because ordinarily in such transactions it is the intention of the parties that the title and the corresponding risk remains in the seller, until the price is definitely ascertained. Thus in the English case of Zagury v. Furnell (2 Campb. 242) where several bales of skins (stated in a contract to contain five dozen in each bale) were sold at a certain price per dozen, but it was the duty of the Seller to count over the skins, to see how many each bale contained, and before so doing they were consumed by fire, Lord Ellenbourough and Sir James Mansfield held the loss to be entirely on the seller." This same rule is approved and applied in the case of Williams vs. Allen (Tenn.), 51 Am. Dec. 709.

Other jurisdictions have many cases upholding the same rule of law as set forth immediately above. The Supreme court of Oklahoma in an old case, which seems to still be the law, decided in 1913, and reported in 132 Pac. 683 states the rule as follows:

> "The rule is that, if, under a contract for the sale of specific goods, the selled is bound to do

something to the goods for the purpose of putting them in a deliverable state, that is, into a condition in which the buyer is bound to accept them, unless a different intention appears, the property does not pass until such thing is done; as where trees are to be trimmed, cotton to be ginned and baled, fish to be dried, crops to be gathered or threshed, cattle to be fattened, hops to be baled, machinery to be set up, or lumber to be sawed or planed, the doing of the thing is presumably or presumptively a condition precedent to the transfer of the property. In the case of an executory agreement, as the proposed purchaser does not become the owner of the goods he cannot claim them specifically; he is not the sufferer if they are lost, cannot maintain trover for them, and has, at common law no other remedy for breach of contract than an action for damages."

Words & Phrases, Vol. 3, Page 32, states: Anything short of passing title is not a sale, but an agreement to sell.

An Illinois case wherein practically the same language was used as was used in this case now before the court, to wit, *agrees to sell* and in our case, *will be sold,* states as follows:

Windmiller vs. Flemming, 129 Ill. App. 476.

"A distinction exists between *sale* and *agreement to sell,* agreement to sell is merely executory and passes no title even in a distinct and specified chattel. The words *agrees to sell* are taken in ordinary acceptation of referring to the future."

The liability of the plaintiff as to the claim set forth in the cross complaint of the plaintiff will be determined when a final determination is made as to ownership of the cattle at the time the feed was consumed by the cattle. It is quite apparent that the responsibility for the feed as set forth in the cross complaint would rest upon the party owning the livestock to which it was fed. There seems to be no argument between the parties to the contrary.

I respectfully sumbit that the judgment of the District Court should be reversed.

Respectfully submitted,

M. EARL MARSHALL,

Attorney for the Defendant and Appellant.