

2001

# Wayne H. Braithwaite v. E. Mayo Sorensen : Brief of Appellant

Utah Supreme Court

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Louis G. Tervort; Attorney for Respondents, Sorensens.

Keith E. Murray; Attorney for Appellants.

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## Recommended Citation

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

-----  
WAYNE H. BRAITHWAITE and  
ELIZABETH F. BRAITHWAITE,

)  
)  
)  
)  
Plaintiffs/Appellants,

Case No. 14691

-----  
E. MAYO SORENSEN, VERA A.  
SORENSEN, and FIRST STATE BANK  
OF MANTI CITY, MANTI, UTAH,

)  
)  
)  
)  
Defendants/Respondents.  
)

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BRIEF OF APPELLANTS  
-----

Appeal from Judgment against Appellants in the Sixth  
Judicial District Court in and for the County of  
Sanpete, State of Utah, the Honorable Don V. Tibbs  
presiding.  
-----

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FILED

AUG 16 1976

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## AUTHORITIES

### CASE CITED:

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IN THE SUPREME COURT OF THE STATE OF UTAH

-----  
WAYNE H. BRAITHWAITE and )  
ELIZABETH F. BRAITHWAITE, )  
Plaintiffs/Appellants, )

--vs--

Case No. 14691

)  
E. MAYO SORENSEN, VERA A. )  
SORENSEN, and FIRST STATE )  
BANK OF MANTI CITY, MANTI, )  
UTAH, )

Defendants/Respondents. )  
-----

BRIEF OF APPELLANTS

-----  
STATEMENT OF THE NATURE OF THE CASE

The appellants filed this action in the District Court of Sanpete County, State of Utah, to compel the respondents to convey title to real estate being purchased under an Agreement entered into on May 9, 1973. A copy of this Agreement is attached.

The Agreement provided, among other things, that the appellants would purchase the real estate described for the sum of \$900.00, \$200.00 down and \$700.00 payable when the contract was signed on May 9, 1973. The Agreement, further, provided that the respondents', Sorensens, deed would be placed in

escrow with First State Bank of Manti City, Manti, Utah; and that when a tax lien release was received from the U. S. Internal Revenue Service, the transaction would be completed with the deed being delivered to the appellants; and the balance of the purchase price, \$700.00, would be paid to the sellers. Termination date of the contract was May 9, 1976, with provision that the escrow funds and deeds would be returned to the parties if the tax lien had not been paid by then.

On December 31, 1975, appellants received a letter from the Internal Revenue Service, a copy of which is attached, indicating that they would accept the sum of \$900.00 to discharge said tax lien. The appellants then made an offer of settlement and agreed to pay \$200.00 more to satisfy said tax lien and waive all further claims against the respondents, if the transaction would be completed and Sorensens' deed delivered to appellants. This offer of settlement was dated and mailed to the respondents on May 5, 1976, a copy of which is attached.

Because of the refusal of Sorensens and First State Bank of Manti City, Manti, Utah, to deliver the deed to appellants, this action was commenced. Respondents, Sorensens, then filed a Motion For A Summary Judgment.

### DISPOSITION IN LOWER COURT

The respondents', Sorensens, Motion For A Summary Judgment was granted by the lower court on June 25, 1976, a copy of which is attached hereto.

### RELIEF SOUGHT ON APPEAL

The appellants are requesting that the lower court's decision be reversed, and that the respondent, First State Bank of Manti City, be ordered to deliver Sorensens' deed to the appellants. The Internal Revenue Service tax lien would be satisfied from the escrow funds and the balance to be paid by the respondents, Sorensens, to the extent of \$900.00, or by appellants, as previously offered.

### STATEMENT OF THE FACTS

There are no facts which are in dispute. The contracts, pleadings, briefs, exhibits, etc., were the basis for the lower court judgment. The only issue is the legal issue as to what the parties intended from the wording of the contract dated May 9, 1973.

### ARGUMENT

It would appear from the wording of the contract that the parties were intending that the appellants were purchasing the real estate indicated for the sum of \$900.00. The appellants paid the \$200.00 to the respondents, Sorensens, and \$700.00 to

the First State Bank of Manti City, Manti, Utah, as required. The only obstacle to the completion of the sale in May, 1973, was the existence of the Internal Revenue Tax Lien.

When the Internal Revenue Service agreed to accept \$900.00 in settlement of this tax lien, and with the offer of the appellants to pay this, the transaction should have been completed. With this offer, the appellants would have been paying \$200.00 more than was originally agreed upon. Respondents, Sorensens, should now be required to pay the difference between the balance in the escrow fund of \$700.00, plus accrued interest, and the \$900.00 owing to clear the tax lien, or appellants would pay the difference, as offered.

The appellants complied with all terms of the Agreement. It now appears that the respondents, Sorensens, do not want to perform, as the property has, probably, increased in value. The agreement of the Internal Revenue Service to accept payment was more than five months prior to the termination of the contract, and First State Bank of Manti City, Manti, Utah, should have delivered Sorensens' deed to the appellants at that time, in accordance with appellants' offer of settlement.

The contract, which was drawn by Sorensens' attorney, makes no mention of whose obligation it was to determine if the tax lien release from the Internal Revenue Service could

be obtained. The sellers made no effort to clear the tax lien; and when this became apparent to the buyers, they then contacted the Internal Revenue Service and received the settlement offer.

With all conditions of the contract having been fulfilled, the buyers should be entitled to a specific performance requiring conveyance of the real estate to them, as agreed.

Where there is a mutuality of remedy and obligation to perform by the buyers, then the sellers likewise are under the same obligation. This general rule is stated in 71 Am. Jur. 2d, page 37, as follows:

§22. Mutuality of remedy as dependent upon the right of each party to specific performance.

"The rule that equity will grant a decree of specific performance of a contract only if there is mutuality of remedy is often stated, particularly in the earlier cases, in such a way as to indicate that this mutuality of remedy requires that the remedy of specific performance be available to both parties in order to be available to either, and in cases in which the right of a party to specific performance is clearly recognized, as in the case of a vendee of land or of personalty of a peculiar nature not readily procurable on the open market, it requires that the other party also be entitled to the same remedy."

The buyers having paid the full purchase price for the property by paying \$700.00 into the escrow and \$200.00 direct



to the sellers had completed their obligation and were legally and practically bound, having paid the full purchase price for the property.

Ordinarily, the seller is required to take what steps are necessary to clear title to real estate, to complete the sale. There is nothing in this contract which indicates that the sellers did not have this responsibility. Any ambiguities or uncertainties in the contract should be construed against the respondents, the maker of the contract.

A Utah case which concerns specific performance of water agreements states the general rule in *Genola Town -vs- Santaquin City*, cited in 80 Pac. 2d, page 934, as follows:

"Specific performance is granted by equity when it is plain that the party should and can perform and refuses to do so, and injustice not remediable by a money judgment would otherwise result. The nature of the remedy is revealed by the fact that equity takes a hand because the legal remedy is inadequate. The development of the doctrine of mutuality as to remedy reveals that it was founded on the idea that one party should not have from equity what the other party could not have obtained had it applied. The doctrine that at the time of making of the contract there must be mutual fixed obligations is not tenable. If the contract itself provides for a preliminary period definite or indefinite in which it is to be determined whether a condition precedent which will make the contract binding will take place, and before withdrawal by the obligor of the

contract, it becomes bilateral by performance of the condition precedent, equity may under the rule above laid down decree specific performance in order to do justice or prevent injustice, as if the contract from the beginning had been bilateral."

It is submitted that if there was a condition to the completion of the contract, to-wit: satisfaction of the Internal Revenue Service Tax Lien, upon elimination of this defect and before termination of the contract, that respondents, Sorensens and the First State Bank of Manti City, Manti, Utah, should have been obligated to deliver said deed to appellants and pay the tax lien, which they refused to do.

Because of the uniqueness of land, it is the desire of the buyers to receive this particular piece of property. Specific performance is the only remedy that would be fair to the appellants.

With the contract providing, under Paragraph 3, that the buyers should pay all taxes, etc., which they paid, and given immediate right of possession, under Paragraph 4, it would indicate that the parties had intended a completed sale, subject to payment of the tax lien. Paragraph 9 of the contract, also, provided for attorney fees; and appellants asked for \$550.00 attorney fees and court costs in the lower court. The appellants should be awarded attorney fees and costs in this amount for sellers' breach of contract.

CONCLUSION

It is respectfully submitted that the decision granting respondents', Sorensens, Motion For Summary Judgment, should be reversed; and that a judgment should be granted in favor of the appellants for specific performance obligating the respondents to pay said funds, as escrowed herein, in release of the tax lien and deliver the respondents', Sorensens, deed to appellants, and appellants given their attorney fees and costs.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Keith E. Murray".

KEITH E. MURRAY

Attorney for Plaintiffs/Appellants

ENTRY NO. 223191 401  
RECORDED 5-9-73 AT 5:00 P. M. BOOK 169 PAGE 403  
REQUEST OF Wayne H. Braithwaite  
FEE PAID - JACKSON WANLASS, SANPETE COUNTY RECORDER  
4.00 BY Jackson Wanlass DEPUTY CLERK B

AGREEMENT FOR SALE OF REAL AND PERSONAL PROPERTY

This Agreement made this 9th day of May, 1973, by and between MAYO SORENSEN and VERA SORENSEN, his wife, of Manti City, Sanpete County, Utah, hereinafter called the SELLERS and WAYNE H. BRAITHWAITE and ELIZABETH F. BRAITHWAITE, his wife, of Manti City, Sanpete County, Utah, hereinafter called the BUYERS.

WITNESSETH:

1. The Sellers in consideration of the covenants and promises on the part of the Buyers hereby agree to sell to the Buyers and the Buyers hereby agree to purchase from the Sellers on the terms hereinafter set forth the real and personal property located in Manti City, Sanpete County, State of Utah, described as follows:

✓ Beginning at the Southeast corner of Lot 4, Block 69, Plat "A" Manti City Survey, thence North 128.00 feet, thence West 13.00 rods, thence South 128.00 feet, thence East 13.00 rods to the point of beginning.

Together with the improvements thereon and the appurtenances thereunto belonging or in any wise appertaining, including the Primary Water Right from Manti City Creek as heretofore used on the foregoing described tract of land for the irrigation thereof.

2. In consideration of the aforesaid sale by the Sellers the Buyers agree to pay a purchase price of NINE HUNDRED DOLLARS, payable to Sellers at the First State Bank, Manti, Utah, as follows: \$200.00 down, receipt of which is hereby acknowledged, and the balance of \$700.00 payable on the signing of this contract, May 9, 1973, and placed in escrow at the First State Bank, until a release of the Federal Tax Lien No. 87654-079-196-0471 is filed with the County Recorder of Sanpete County.

the Buyers.

Should such release of Federal Tax Lien not be filed with the County Recorder within three years from the date of this Agreement, the bank as escrow shall return the \$700.00 to the Buyers and the other papers to the Sellers, and both parties shall be released from all obligations in connection with their agreement herein.

3. The Buyers shall pay all taxes, special improvements and assessments as they become due and before they become delinquent, excepting the taxes and assessments for the year 1973 which shall be paid pro rata by the parties. The 1972 and all prior taxes, special improvements and assessments have been paid by Sellers in full.

4. The Buyers may take immediate possession of said property and may continue in possession while this contract remains in good standing, and until a breach or default. The Buyers agree to maintain the said premises in as good condition as they now are, reasonable wear and depreciation excepted.

5. It is mutually agreed that the Sellers, upon the execution of this Agreement shall execute a good and sufficient Warranty Deed in favor of the Buyers to the above described premises, and the said Deed, together with a copy of this Agreement, and the Abstract of Title, as soon as prepared, shall be placed in the First State Bank, Manti, Utah, in escrow. The said bank is hereby designated by these parties as Escrow Agent. The said Escrow is authorized and directed to deliver to the Buyers the Warranty Deed and the Abstract at such time as the Buyers shall have performed all of the covenants on their part to be performed.

6. The Sellers agree to deliver to the Buyers good and marketable title to the real and personal property herein described

executors, assigns and successors of the respective parties.

8. It is hereby expressly understood and agreed by the parties hereto that the Buyers accept the said property in its present condition and there are no representations, covenants or agreements between the parties hereto with reference to said property, except as are specifically set forth and attached hereto.

9. Buyers and Sellers agree that should they default in any of the covenants and agreements herein contained, to pay all costs and expenses that may arise in the enforcement of this Agreement, either by suit or otherwise, including a reasonable attorney's fee.

IN WITNESS WHEREOF, the parties to this Agreement have hereunto signed their names on the day and year first above written.

Vera A. Sorensen  
Mayo Sorensen  
SELLERS  
Elizabeth F. Braithwaite  
Wayne H. Braithwaite  
BUYERS

WITNESS:

David B. Bernal  
STATE OF UTAH ( ss.  
County of Sanpete)

On the 9th day of May, 1973, personally appeared before me Mayo Sorensen and Vera Sorensen, his wife, and Wayne H. and Elizabeth F. Braithwaite, his wife, who duly acknowledged to me that they signed the above and foregoing instrument.

David B. Bernal  
NOTARY PUBLIC

Machine-generated OCR, may contain errors.  
Residence: Ephraim, Utah

# INVESTIGATION OF REQUEST FOR CERTIFICATE OF DISCHARGE OR SUBORDINATION

INSTRUCTIONS: Submit in triplicate.  
Use reverse of form if necessary.

NAME AND ADDRESS OF APPLICANT <b>Wayne H. Fraithwaite</b> <b>3757 Jefferson Ave</b> <b>Ogden, Utah 84403</b>	NAME AND ADDRESS OF TAXPAYER <b>E. M. Sorensen</b> <b>102 S. Main</b> <b>Panti, Utah 84642</b>	NAME AND ADDRESS OF APPLICANT'S REPRESENTATIVE  <b>Same</b>
---	---	---

APPLICATION SUBMITTED UNDER <input type="checkbox"/> Section 6325( ) ( ) ( ) <input checked="" type="checkbox"/>		AMOUNT OFFERED FOR DISCHARGE <b>\$ 700.00</b>
DESCRIPTION OF PROPERTY <input type="checkbox"/> Same as in application <input type="checkbox"/> Materially different (See correct description in attachment hereto)		AMT. DETERMINED AS GOV'T'S. INT. <b>\$ 900.00</b>
APPLICANT'S VALUATION <b>\$ 700.00</b>	APPRAISER'S VALUATION* <b>\$ none</b>	APPRAISER'S VALUATION* <b>\$ none</b>
		R.O. VALUATION (Explain basis below) <b>\$ 900.00</b>

BASIS FOR R.O.'S VALUATION  
**Discussion with realtor in area. Discussion with County assessor. Personal viewing of the lot in question, which is located in the less desirable area of town about one block from the rail road tracks.**  
*Not required for subordination unless requested by Chief, Special Procedures Section*

Were the two appraisals submitted by the applicant made by disinterested and qualified persons?  
☐ Yes ☒ No (Explain) **None Submitted**

## FEDERAL TAX LIENS AND ENCUMBRANCES PRIOR THERETO (List in chronological order)

ITEM NO. (Identify by corresponding no. in the application)	RECORDATION (If any)		DATE OF EXECUTION	TYPE OF ENCUMBRANCE	ORIGINAL AMOUNT OF ENCUMBRANCE	AMOUNT DUE AS OF DATE OF THE INVESTIGATION
	DATE	WHERE				
	7-16-71	Sanpete County				
	5-09-73	Sanpete County	5-9-73	Fed. Tax Lien Agreement for Sale of Real & Personal Prop. (copy attached to application)	1,473.93	\$

## INTEREST TO WHICH FEDERAL TAX LIEN IS TO BE SUBORDINATED

--	--	--	--	--	--

Is there evidence that the applicant or taxpayer is related to any of the holders of liens or encumbrances?

☒ No ☐ Yes (Explain)

Are cost and expenses stated in the application correct and reasonable?

☐ Yes ☐ No (Explain) **None stated.**

RECOMMENDATION:  
(State reasons)

☒ DISCHARGE PROPERTY FROM LIEN for the sum of \$900.00.

☐ DO NOT DISCHARGE

☐ SUBORDINATE LIEN

☐ DO NOT SUBORDINATE LIEN

The property is located in a run-down section of town. The value of the property has not increased since it was purchased.

REVENUE OFFICER <b>Eldon R. Zeller</b>	DATE <b>12-31-75</b>
APPROVED BY GROUP SUPERVISOR <b>Frank P. Smith</b>	DATE <b>01-19-76</b>
APPROVED BY SPECIAL PROCEDURES STAFF	DATE

KEITH E. MURRAY  
Attorney for Plaintiffs  
341 27 Street  
Ogden, UT 84401  
Telephone: 399-3388

IN THE DISTRICT COURT OF SANPETE COUNTY

STATE OF UTAH

WAYNE H. BRAITHWAITE and  
ELIZABETH F. BRAITHWAITE,

Plaintiffs,

--VS--

E. MAYO SORENSEN,  
VERA A. SORENSEN, and  
FIRST STATE BANK OF MANTI  
CITY, MANTI, UTAH,

Defendants.

OFFER OF SETTLEMENT

Civil No. 7270

Come now the above plaintiffs and hereby offer to pay the difference between the amount now on deposit with the defendant, First State Bank of Manti City, Manti, Utah, including interest and the \$900, which the United States Internal Revenue Service has agreed to accept to release the Lien on the real estate referred to in contract entered into by and between the plaintiffs and the defendants, E. Mayo Sorensen and Vera A. Sorensen. That this Offer of Settlement will satisfy all claims of the parties to this action. The plaintiffs do further request



interest; and the plaintiffs will pay the difference to said bank, to then be paid to the United States Internal Revenue Service; and the said bank to then deliver defendants', E. Mayo Sorensen and Vera A. Sorensen, deed to the plaintiffs; and the escrow will be terminated; and all rights of the parties against the others

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will be settled in full.

DATED this 5th day of May, 1976.

/s/ Keith E. Murray  
KEITH E. MURRAY  
Attorney for Plaintiffs  
341 27 Street  
Ogden, UT 84401

I hereby certify that I mailed a copy of the foregoing Offer of Settlement to the defendants', E. Mayo Sorensen and Vera A. Sorensen, attorney, Louis G. Tervort, 50 North Main Street, Manti, Utah, 84642, and a copy to the defendant, First State Bank of Manti City, Manti, Utah, 84642, on this 5th day of May, 1976.

/s/ Carolyn Mackenzie  
Secretary

6-28-76

IN THE DISTRICT COURT, IN AND FOR SANPETE COUNTY,

STATE OF UTAH

WAYNE H. BRAITHWAITE,  
ELIZABETH F. BRAITHWAITE,

Plaintiffs,

-VS-

E MAYO SORENSEN, VERA A.  
SORENSEN, and FIRST STATE  
BANK OF MANTI CITY, MANTI,  
UTAH,

Defendants.

O R D E R

Civil No. 7270

\*\*\*\*\*

This matter came before the Court on the 25th day of June, 1976.

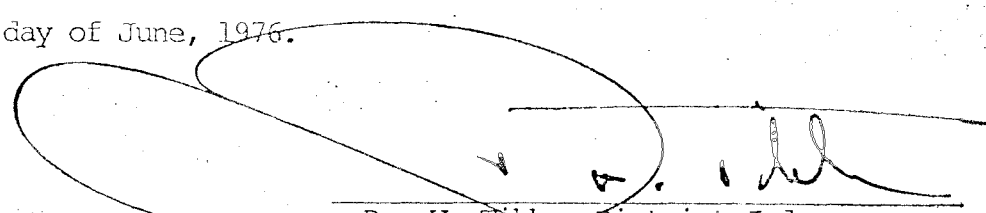
The Court finds: That the Plaintiffs have failed to conform with the second paragraph of paragraph 2 of the Agreement for Sale of Real and Personal Property, dated May 9, 1973.

NOW, THEREFORE, IT IS ORDERED AS FOLLOWS: The Defendants Motion to Dismiss Amended Complaint is granted. The Defendants Motion for Summary Judgment is granted. The Defendant, First State Bank, is directed to return escrowed papers to Defendants Sorensen.

Based on the Briefs filed by the Defendants Sorensen. The \$200.00 paid should be returned to Plaintiffs and they are awarded Judgment for said sum.

The Defendant, First State Bank of Manti, Utah, is awarded its costs but not Attorney fees.

Dated this 25th day of June, 1976.



Don V. Tibbs, District Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the above Order this 25th day of June, 1976, to the following Attorneys by mailing postage prepaid at Manti, Utah:

✓ Keith E. Murray, Attorney at Law 341 27th Street, Ogden, Utah, 84401

Louis G. Tervort, Attorney at Law, Manti, Utah, 84642

Ken Chamberlain, Attorney at Law, 76 South Main, Richfield, Utah, 84701

*Carole B. Mellor*  
Carole B. Mellor, Court Coordinator  
6th District Court, Manti, Utah