

1958

# Heber W. Glenn v. Rena S. Player : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Backman, Backman & Clark; Attorneys for Appellant;

---

## Recommended Citation

Brief of Appellant, *Glenn v. Player*, No. 8780 (Utah Supreme Court, 1958).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2995](https://digitalcommons.law.byu.edu/uofu_sc1/2995)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

MAY 3 1958

LAW LIBRARY

IN THE SUPREME COURT

OF THE

STATE OF UTAH

FILED

MAR 6 - 1958

HEBER W. GLENN,

*Plaintiff and Appellant,*

vs

RENA S. PLAYER, sometimes known as  
SERENA PLAYER,

*Defendant and Respondent:*

Clerk, Supreme Court, Utah

Case No.  
8780

APPELLANT'S BRIEF

BACKMAN, BACKMAN & CLARK,

*Attorneys for Appellant*

1111 Deseret Bldg.

Salt Lake City, Utah

## INDEX

	Page
STATEMENT OF FACTS .....	1
STATEMENT OF POINTS .....	4
ARGUMENT .....	4
Point One: The appellant is entitled to a decree of specific performance of the agreement if the application of established principles or rules of equity designed for the administering of justice are applied.....	4
Point Two: Delay in performance of contract is not enough to defeat specific performance.....	8
Point Three: Part performance entitled vendee to specific performance of contract.....	15
Point Four: Optional part of agreement should be enforced as a matter of right.....	18
Point Five: The purchaser not required to file a claim against estate of C. F. Player.....	18
CONCLUSION .....	19

## CASES

	page
Anderson vs Scott, 94 Mo. 637, 8 S. W. 235.....	15
Beheret vs Myers 240 Mo. 58, 114 S.W. 824.....	8
Bennett vs Moon, 110 Neb. 692, 194 N.W. 802.....	5
Brixen vs Jorgensen, 28 Utah 290, 78 Pac. 674.....	17
Chabot vs Inter Park Co. 34 Fla. 258, 15 So. 756.....	10
Craig vs Leiper, 2 Yerg (Tenn) 193, 24 Am. Dec. 479.....	10
Cummings vs Nielson, 42 Utah 157, 129 Pac. 619.....	8
Davis vs Gray, 16 Wall 203, 21 L ed 447.....	9
De Cordova vs Smith, 9 Tex 129, 55 Am. Dec. 136.....	9
De Huy vs Osborne, 96 Fla. 435, 118 So. 161.....	10
Dougherty vs Harsel, 91 Mo. 161, 3 S.W. 583.....	15
Easkin vs Wycoff, 118 Kans. 168, 234 P. 63.....	9
Garbis vs Weistock, 51 A 2nd 154, 187 Md. 549.....	11
Griffin vs Nash, 187 Iowa 345, 174 N.W. 233.....	7
Halloran Judge Trust Co. vs Heath, (Utah) 258 Pac. 342.....	7
Hallin vs Rogers 176 F 709, 34 Lra 120.....	9
Howard vs Moore 4 Sneed (Tenn) 317.....	11
Hudson vs King, 2 Heisk. (Tenn) 560.....	7
Indianapolis No. Traction Co. vs Essington, 54 Ind. App. 286, 99 N.E. 757, 100 N.E. 765.....	15
Jennison, vs Leonard, 21 Wall 302.....	19
Johnson vs Jackson 27 Miss. 498, 61 Am. Dec. 522,.....	17
Leaf vs Codd, 41 Idaho 547, 240 Pac. 593.....	9
L'Engle vs Overstreet 61 Fla. 653, 55 So. 381.....	6
Lewis vs Wellard 62 Wash. 590, 114 Pac. 455.....	11
McNeil vs McNeil, 61 Utah 141, 221 Pac. 988.....	7
Middleton vs Newport Hospital 16 R.I. 319, 15 A. 800.....	19
Offutt vs Offutt, 106 Md. 236, 67 A. 138.....	19
Oliver vs Poulos 312 Mass. 188, 44 N.E. 2nd 1.....	10
Roberts vs Braffett 33 Utah 51, 92 Pac. 789.....	7, 12, 13, 16
Robinson vs McDonald 11 Tex. 62 Am. Dec. 480.....	19

	Page
Tate vs Pensacola Gulf Land and Dev. Co. 37 Fla. 439, 20 So. 542 .....	9
Tidewater R. Co. vs Hurt 109, Va. 204, 63 S.E. 421.....	15
Warren vs Goodloe Ky. 20 S.W. 2nd 278.....	8
West vs Bundy 78 Mo. 407.....	15
Wilson vs Holub 202 Iowa 549, 210 N.W. 593.....	9
Yates vs American Republic Corp. 163 F2nd 178.....	11
Zempel vs Hughes 235 Ill. 424, 85 N.E. 641.....	11

## OTHER AUTHORITIES

65 A.L.R., Specific Performance, page 8.....	6
page 14 .....	7
Page 39 .....	7
page 55 .....	10
page 63 .....	15
49 Am. Juris, Specific Performance, Sec. 9.....	4
Sec. 73 .....	8
Sec. 74 .....	9
Sec. 75 .....	9
Sec. 76 .....	16
Sec. 147 .....	19
81 Corpus Juris Secundum, Specific Performance page 639.....	11
Pomeroy on Specific Performance of Contract, 2nd Ed.	
Sec. 361-362 .....	14
Sec. 395 .....	13
Sec. 396 .....	14

# IN THE SUPREME COURT

OF THE

## STATE OF UTAH

HEBER W. GLENN,

*Plaintiff and Appellant,*

vs

Case No.  
8780

RENA S. PLAYER, sometimes known as  
SERENA PLAYER,

*Defendant and Respondent:*

---

### APPELLANT'S BRIEF

### STATEMENT OF FACTS

This action was brought by the plaintiff and appellant against the defendant and respondent for specific performance of an agreement for the sale of real property dated February 11, 1932 (Tr. 21), Exhibit 3-P.) Said agreement is designated as a Sales Contract and is executed by C. F. Player and Serena Player, his wife, as sellers and Heber W. Glenn as buyer. It describes certain real property situated in Salt Lake County, State of Utah, consisting of approximately 13 acres of land about a mile and a half

west of Redwood Road and about a mile south of 48th South St. (Tr. 17). The purchase price is at the rate of \$200.00 per acre and payable \$1000.00 paid by the buyer at the time of the execution of the agreement, receipt of which is acknowledged and \$600.00 on or before May 11, 1942 and the balance of the purchase price on or before Aug. 11, 1942. The agreement also contains the following agreement: "It is understood and agreed by both the sellers and the buyer that the buyer at his option, when he has paid \$100.00 more than is sufficient to cover the full payment, at the rate of \$200 per acre on either of the above tracts of land as described, may enter onto said tract of land, *fully paid for*, and take possession and receive clear title thereto *and such action shall not alter in any way the balance of the contract.*" (Exhibit 3-P.)

That subsequent to the 11th day of February, 1942, the plaintiff entered into possession of the said real property and removed gravel therefrom. (Tr. 19, 35 and 36)

That on May 10, 1942 the plaintiff offered to the sellers the balance of the purchase price and requested a deed and abstract of the property (Tr. 23, 29) and sellers failed to comply with said request.

Subsequently on the 7th day of May, 1951 the said C. F. Player died and the defendant was appointed executrix of the estate of C. F. Player (Tr. 48) and the real property described in said agreement was distributed to the defendant herein under the estate of C. F. Player deceased.

That at no time, either during the life of C. F. Player or since his death, was the plaintiff served with any kind of notice of cancellation of the contract. (Tr. 28, 55)

That during the lifetime of the said C. F. Player the plaintiff made other visits to the Player home to settle the agreement and to obtain a deed to the premises. (Tr. 30)

That subsequently on Feb. 3rd, 1949 the plaintiff had the said agreement recorded in the office of the County Recorder of Salt Lake County, State of Utah in Book 660, page 123. (Tr. 31)

That on March 29th, 1956 tender was made by the plaintiff through his attorneys to the defendant by registered mail of the balance of the purchase price and a request for a conveyance of said real property. (Tr. 32)

That at no time has the defendant offered to refund the money paid on the agreement (Tr. 52) or give a deed on said real property (Tr. 53).

That the plaintiff did not file a claim in the estate of C. F. Player and proceeded with his action for specific performance of the agreement, after the distribution had been made to the defendant herein, against the defendant.

The plaintiff now appeals from the decree of the trial court dismissing the plaintiff's complaint and declaring that the plaintiff has no right, title or interest in the real property described in the agreement nor in the Sales agreement dated Feb. 11, 1942.

## STATEMENT OF POINTS

The Appellant and Plaintiff respectfully submits five points:

### POINT ONE

Contract is entitled to be specifically enforced by the application of established principles or rules of equity designed for the administering of justice.

### POINT TWO

Delay in performance of contract is not enough to defeat specific performance.

### POINT THREE

Part performance entitled vendee to specific performance of contract.

### POINT FOUR

Optional part of agreement should be enforced as a matter of right.

### POINT FIVE

Purchaser not required to file a claim against estate of C. F. Player.

## ARGUMENT

### POINT ONE

The appellant is entitled to a decree of specific performance of the agreement if the application of established principles or rules of equity designed for the administering of justice are applied.

## 49 Am. Jur. Specific Performance Sec. 9 (page 17)

“As a general rule it may be said that when the party seeking specific performance of a contract establishes the existence of a valid binding contract which is definite and certain in its terms and contain the requisities of mutuality of obligation and is one which is free from unfairness, fraud or overreaching and enforceable without injustice upon the party against whom enforcement is sought, the court will, when the remedy at law for the breach of such contract is inadequate and the enforcement of specific performance will not be inequitable, oppressive or unconscionable, or result in undue hardship, grant a decree of specific performance as a matter of course or right.

Rights of the plaintiff to such relief where he makes a case coming within these equitable rules is not dependent upon any exercise or discretionary power on the part of the court in the literal sense of the term.”

Bennett vs. Moon, 110 Neb. 692, 194 N.W. 802,

Let us look at the agreement in controversy described as “Sales Contract.” It is entered into by and between C. F. Player and Serena Player, his wife as Sellers and Heber W. Glenn as Buyer; the said Serena Player being the defendant and respondent in this action and the said Heber W. Glenn being the plaintiff and appellant. The real property to be sold is adequately described. The acreage of approximately 13 acres is stated. The purchase price is at the rate of \$200 per acre and payable \$1000.00 in hand paid by the buyers, the receipt of which is acknowledged, \$600.00

on or before May 11, 1942 and the balance of the purchase price on or before Aug. 11, 1942. In fact in excess of 33 1/3% of the purchase price was paid at the time of the execution of the sales contract.

The "Sales Contract" is a valid binding contract which is definite and certain in its terms and contains the requisites of mutuality of obligation and there has been no evidence introduced which would infer that it was unfair or fraudulent, and certainly the buyer indicated his good faith in the purchase in paying a substantial part of the purchase price upon the execution of the contract.

65 A.L.R. page 8, *Specific Performance as Matter of Right*

"When a party to a contract appeals to a court of equity for a decree for specific performance, he addresses himself to what is termed the 'judicial discretion' of the court.

"The question whether a contract will be specifically enforced will be determined by the application of established principles or rules of equity designed for the administering of justice and which are appropriate to the circumstances of the particular case. Primarily the contract sought to be enforced should be definite and legally binding upon the parties, and its enforcement should be practical and equitable."

L'Engle vs. Overstreet 61 Fla. 653, 55 So. 381.

"The jurisdiction of a court of equity in decreeing a specific performance of an agreement, is a peculiar jurisdiction in the exercise of which that

forum becomes of its own inherent strength, a court of conscience.”

Hudson vs. King. 2 Heisk. (Tenn.) 560.

“It is said to be a discretionary jurisdiction, not indeed, or arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself, as far as it may, by general rules and principles but at the same time which withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties.”

McNeil vs. McNeil, 61 Utah 141, 221 Pac. 988, which states:

“The right to specific performance depends not upon hard and fast rules according to which all cases are to be decided, but each is dependent upon its own peculiar facts and circumstances.”

Halloran Judge Trust Co. vs. Heath, (Utah) 258 Pac. 342.

65 A.L.R. page 14. Meaning of term “discretion”

“Specific performance of a contract to convey real estate will not be arbitrarily denied by the court, but only the exercise of a sound judicial discretion, in harmony with established principles and rules of equity.”

Griffin vs. Nash, 187 Iowa 345, 174 N.W. 233.

Roberts vs. Braffett 33 Utah 51, 92 Pac. 789.

65 A.L.R. page 39.

“The inadequacy of the legal remedy to enforce a contract for the sale of land is assumed in every case where no objection is made thereto, and specific

performance of the contract follows as a matter of course.”

Cummings vs. Nielson, 42 Utah 157, 129 Pac. 619.

“Warren vs. Goodloe, Ky. 20 S.W. 2nd 278 holds that where a contract for the sale of land is fairly made, it is the duty of the court to enforce it. Where the contract sought to be enforced specifically concerns land the jurisdiction to enforce specific performance is undisputed and does not depend upon the inadequacy of the legal remedy in the particular case.”

“Specific performance of a contract for the sale of land is a matter of right where it appears that the land sold for its actual value, that the sale was bona fide, that timely legal tender was made of the entire purchase price and performance was demanded.”

Beheret vs. Myers 240 Mo. 58, 144 S.W. 824.

May we again call the court's attention to the fact that on May 10, 1942 the plaintiff offered to the sellers the balance of the purchase price and requested a deed and abstract of the property. (Tr. 23, 29)

That during the lifetime of the said C. F. Player the plaintiff made other visits to the Player home to settle the agreement and to obtain a deed to the premises. (Tr. 30)

That on Mar. 28, 1956 tender was again made and a request for conveyance. (Tr. 32)

## POINT TWO

Delay in performance of contract is not enough to defeat specific performance.

49 Am. Jur. Sec. 73, page 89. Specific Performance.

“Although it is universally recognized that inexcusable laches or default on the part of the party seeking such relief will be a sufficient ground for the denial of the relief, the vendor, to make the plaintiff’s delay available as a defense, must have performed or been ready and willing to perform all the terms of the contract stipulated for on his own part.”

Tate vs. Pensacola Gulf Land and Dev. Co. 37 Fla. 439, 20, 542.

Leaf vs. Codd, 41 Idaho 547, 240 Pac. 593.

49 Am. Jur. Sec. 74, page 90.

Delay alone is not enough.

Wilson vs. Holub, 202 Iowa 549, 210 N.W. 593

Delay caused by the acts of the defendant will not constitute laches.

Davis vs. Gray 16 Wall 203, 21 L ed 447,

Hallin vs. Rogers 176 F 709, 34 Lra 120

A plaintiff is not chargeable with laches until he has knowledge, that his rights under a contract are being disputed by the other party.

De Cordova vs. Smith 9 Tex. 129, 55 Am. Dec. 136.

49 Am. Jur. Sec. 75, page 92. Period Constituting Laches:

“What length of time will constitute such laches as to bar recovery in a suit for specific performance depends upon many circumstances and rests largely in the sound discretion of the court. The lapse of time must be so great, and the relations of the defendant to the right such, that it would be inequitable to permit the plaintiff to assert such right.”

Easkin vs. Wycoff, 118 Kan. 168, 234 P. 63

“What is a reasonable time within which to file a bill for specific performance cannot be fixed with precision by any general rule, but such delay as raises a presumption that the party has abandoned the contract is considered the equivalent to consent to its rescission.”

De Huy vs. Osborne 96 Fla. 435, 118 So. 161

Chabot vs. Winter Park Co. 34 Fla. 258, 15 So. 756

“Thus it follows that delay of a few months may constitute laches, and the decisions refusing specific performance include periods of from a few to many years and it has been granted following delays as long as 35 years.”

In Craig vs. Leiper 2 Yerg. (Tenn) 193, 24 Am. Dec. 479, Where it appears that delay has been by the consent of both parties and occasioned by the vendor's failing to obtain the legal title, specific performance has been decreed notwithstanding a lapse of thirty years from the making of the contract.

49 Am. Jur. Sec. 76, page 93. “In order for delay in seeking specific performance to constitute laches it must have been prejudicial to the defendant.”

Oliver vs. Poulos 312 Mass. 188, 44 N.E. 2nd 1,

65 A.L.R. 55. “But mere delay in performance of a contract will not ordinarily preclude a decree for its specific performance, where acquiesced in by the other party.”

Many cases cited.

Laches due to the act of the defendant will not preclude specific performance in behalf of the plaintiff.

Zempel vs. Hughes 235 Ill. 424, 85 N.E. 641.

“If the delay upon the part of the vendee is attributable to the conduct of the vendor, it will not stand in the way of a decree for specific performance of the contract in behalf of the vendee.”

Howard vs. Moore 4 Sneed (Tenn) 317.

“Delay by the vendee in paying the purchase price, where the vendor takes no steps to forfeit the vendee’s rights under an executory contract for the purchase of land, will not preclude relief in behalf of the vendee who has paid a large share of the purchase price.”

Lewis vs. Wellard, 62 Wash 590, 114 Pac. 455.

## 81 C.J. Sec. page 639, Specific Performance

“Where time for performance is not essential the mere lapse of time does not necessarily bar plaintiff from relief. No rule with respect to the length of the delay which will be fatal to relief can be laid down, but each case must depend on its peculiar circumstances. A delay will not deprive plaintiff of relief if he has never abandoned the contract and the defendant has suffered nothing from the delay for which he cannot be compensated in the decree.”

Yates vs. American Republics Corp. 163 F2nd 178

Garbis vs. Weistock 51 A 2nd 154, 187 Md. 549.

4. Now, let us apply the foregoing to the facts in the present case.

The plaintiff offered to the sellers the balance of the purchase price on May 10, 1942 (Tr. 23, 29) and made other attempts to obtain the deed (Tr. 30) and the defendant as one of the sellers was not ready or willing to perform her part of the contract.

The plaintiff is not chargeable with laches until he has knowledge that his rights are being disputed by the other party. At no time, during the life of C. F. Player or since his death, was the plaintiff served with any kind of notice of cancellation of the contract. Tr. 28, 55)

At no time could it be presumed that plaintiff had abandoned the contract, in view of his substantial down payment, (See exhibit 3 P ), the fact that he recorded the contract on Feb. 3, 1949 (Tr. 31) and also made tender of payment to the defendant (Tr. 32)

Certainly the delay has been by the consent of both parties and would have been paid on May 10, 1942 if the vendors had delivered title.

The Roberts vs. Braffett case, 33 Utah 51.

A contract for the sale of real estate entered into in March 1902 called for performance the following October by the payment of the price and the execution of the deed. The purchaser paid a part of the price, but failed to pay the balance due in October. The vendor frequently thereafter

demanded payment and notified the purchaser to pay or the contract would be rescinded. The plaintiff claimed that notwithstanding his delay and neglect, he is entitled to have the contract specifically enforced because the defendant made no tender of a deed and therefore did not put the plaintiff in legal default.

The case of Roberts vs. Braffett is an analysis of the law which particularly affects many aspects of the present case. May we call the Court's attention to the fact that in the Sales Contract there is no reference to time being the essence of the contract. (See Exhibit)

Justice Straup in his opinion makes this statement:

"It may be conceded that the stipulations and provisions contained in the contract were mutual, concurrent and dependent. It may also be conceded that time was not of the essence of the contract as originally made." He then refers to Pomeroy on Specific Performance of Contract, Section 395 (2d Ed.)

"As the doctrine that time is not essential in the performance of the contract may sometime work injustice, and be used as the excuse for unwarrantable laches, the following rule was introduced at a comparatively late period and is now firmly settled, which prevents the doctrine from being abused by the neglect or willfulness of either party. If either the vendor or the vendee has improperly and unreasonably delayed in complying with the terms of the agreement on his side, the other party may, *by notice*, fix upon and assign a reasonable time for complet-

ing the contract, and may call upon the defaulting party to do the acts to be done by him, or any particular act within this period. The time thus allotted then becomes essential and if the party in default fails to perform before it has elapsed, the court will not aid him in enforcing the contract, but will leave him to his legal remedy."

At Section 396 Pomeroy says: "That the notice cannot be arbitrary and a sudden termination of the contract; it must allow a reasonable length of time for the other party to perform and if it fails in any of these respects it may be disregarded and will produce no effect upon the equitable remedial rights of party to whom it is given; and that to be effectual in making the time allotted an essential element of the performance the notice must be express, clear, distinct, and unequivocal."

The defendant admits in her testimony that no notice of cancellation was ever given. (Tr. 28, 56)

At Sections 361 and 362 Pomeroy points out the distinction between granting specific performance of contracts when time is and when not, made essential. He says:

"Where the stipulations are mutual and dependant—that is, where the deed is to be delivered upon the payment of the price, either on a day named or without any day being specified, an actual tender and demand by one party is absolutely necessary to put the other in default and to cut off his right to treat the agreement as still subsisting. So long as neither party makes such tender—of the deed by the vendor

and of the price or securities by the vendee—neither party is in default; the contract remains in force and either party may make a proper tender or offer and sue.”

### POINT THREE

Part performance entitled vendee to specific performance of contract.

65 A.L.R. page 63. “An exception to the rule that a court will not enforce an inequitable contract is that where the defendant has received the consideration and retains it and alleges as a ground for not being required to perform that performance would be inequitable under the circumstances the court will decree performance without inquiry into the question.”

Indianapolis Northern Traction Co. vs. Essington 54 Ind. App. 286 99 N.E. 757, 100 N.E. 765.

“Where it is shown that there has been part performance of the contract under circumstances which affect the conscience of the defendant and his failure to carry out the contract would operate as a fraud upon the plaintiff’s right, a decree of specific performance will be granted as a matter of right.”

Tidewater R. Co. vs. Hurt 109 Va. 204, 63 S.E. 421

West vs. Bundy 78 Mo. 407

Dougherty vs. Harsel, 91 Mo. 161, 3 S. W. 583

Anderson vs. Scott 94 Mo. 637, 8 S. W. 235

49 Am. Jur. Sec. 76, page 94

“The purchaser in a contract for the sale of land has been held not to be precluded, however, from maintaining a suit for its specific performance because the land has increased in value, where such increase has taken place after he has paid a part of the purchase price and the delay in offering to pay the balance is neither unreasonable nor due to bad faith.”

Harris vs. Greenleaf, 117 Ky. 817, 79 S.W. 268, 4 Ann. case. 849

In the case before the Court, it will be remembered that the buyer had paid as a down payment in excess of one-third of the purchase price. The defendant admits that the payment was received and that she has retained it. (Tr. 52)

In Roberts vs. Braffett 33 Utah page 91 Chief Justice McCarty in his dissenting opinion makes the following statement and reference; which is significant to this portion of this case:

“It is a well established doctrine that before a party will be permitted to rescind his contract he must account or offer to account to the other party for the money, if any, paid in part performance of the contract. In the case of Frnik vs. Thompson this same principle of law was involved and in the course of the opinion the court says:

“There is yet another reason why plaintiff cannot have this contract rescinded. It appears from the complaint that soon after making the contract

defendant paid \$340 of the purchase price. Before plaintiff can abandon the contract and treat it as at an end, he must refund or offer to refund the money paid in performance of it, with legal accrued interest. It is a general rule that in order to disaffirm a contract and entitle a party to the right resulting therefrom, the rescinding party must put the other in statu quo. It would certainly be unjust to permit plaintiff, after having received a part of the purchase money, to put an end to the contract, upon the failure of defendant to pay the remainder, without offering to account to him for the money already paid. He who seeks the aid of a court of equity must himself do equity."

This statement of rule was quoted and approved by this court in the case of *Brixen vs. Jorgensen*, 28 Utah 290, 78 Pac. 674.

In *Johnson vs. Jackson*, 27 Miss. 498, 61 Am. Dec. 522, it is said:

"The vendors could not abandon the contract and treat it as at an end, without refunding to the vendee the money he had paid in part performance of it. For it is a general rule that, in order to disaffirm a contract and entitle the parties to the rights resulting therefrom, both parties must be placed in statu quo. It would certainly be unjust to permit the vendors after having received part of the purchase money from the vendee at the time of the contract, to put an end to the contract upon the failure to pay the residue of the purchase money and to make a resale to a third person, without refunding the money paid."

## POINT FOUR

The Sales Contract reads as follows:

“It is understood and agreed by both the sellers and the buyer that the buyer at his option, when he has paid One hundred (\$100.) dollars more than is sufficient to cover the full payment, at the rate of \$200. per acre on either of the above tracts of land as described, may enter onto said tract of land, fully paid for, and take possession and receive clear title thereto and such action shall not alter in any way the balance of this contract” (See Exhibit)

Another paragraph of Sales Contract reads as follows:

“In the event that the buyer shall fail to pay the balance of the purchase price as herein provided, the amount paid, over and above that necessary under the provision stated above, to clear title to any of the separate tracts described above, shall, at the option of the sellers, be retained as liquidated and agreed damages.” (See Exhibit)

The defendant in her own evidence admits that she received \$1100.00 from the plaintiff and that she has never returned said sum. (Tr. 52)

By the terms of the contract, therefore, the plaintiff has paid for 5 acres of the land, may enter onto said tract, fully paid for and is entitled to receive clear title thereto.

## POINT FIVE

The purchaser not required to file a claim against estate of C. F. Player.

The Sales Contract is entered into by and between C. F. Player and Serena Player, his wife, as Sellers and Heber W. Glenn as Buyer, and the said Serena Player who is the defendant and respondent herein signed the said contract. (See Exhibit (Tr. 45, 46)

The said defendant and respondent is therefore a primary party to the Sales Contract and there is no reason why a claim should have been filed against the estate of her deceased husband, C. F. Player.

49 Am. Jur. Sec. 147. Specific Performance:

Specific performance of a contract may be decreed not only between the parties, but between all those claiming under them in privity of estate or representation or title.

Contracts for the conveyance of land are capable of specific performance not only against the parties and their voluntary grantees and vendees with notice, but as against their heirs, devisees and widows.

Jennison vs. Leonard 21 Wall, 302,

Offutt vs. Offutt, 106 Md. 236, 67 A. 138

Middletown vs. Newport Hospital 16 RI 319, 15 A.  
800

Robinson vs. McDonald 11 Tex, 385, 62 Am. Dec. 480.

## CONCLUSION

For the reasons herein stated, the Decree of the District Court should be reversed and the appellant prevail.

Respectfully submitted,

Backman, Backman and Clark,

*Attorneys for Appellant*