

1958

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

Utah Supreme Court

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Ray, Quinney & Nebeker; C. Preston Allen; W. Douglas Allen;

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In the  
Supreme Court of the State of Utah

FILED

APR 18 1958

HEBER W. GLENN,

*Plaintiff and Appellant,* Clerk, Supreme Court, Utah

vs.

Case No. 8780

RENA S. PLAYER, sometimes  
known as SERENA PLAYER,

*Defendant and Respondent.*

BRIEF OF RESPONDENT

RAY, QUINNEY & NEBEKER,  
C. PRESTON ALLEN and  
W. DOUGLAS ALLEN

*Attorneys for Respondent.*

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### *Cases Cited:*

- Banks vs. Judah, 8 Conn. 145, 161. -----  
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Free vs. Little, 31 U 449, 88 Pac. 407, P. 463 and 466.  
Glotzer vs. Keyes, 125 Conn. 227, 5 A 2d 1. -----  
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Federal 2d 250. -----  
Smith vs. Smith, 77 U 60, 291, Pac. 298. -----  
Thompson vs. Rosehill Burial Park, et al, 60 Pac.  
2d 756. -----

### *Statutes Cited:*

- Section 75-11-26, Utah Code Annotated, 1953. -----  
Section 75-11-27, Utah Code Annotated, 1953. -----  
Section 75-11-29, Utah Code Annotated, 1953. -----  
Section 78-12-23, Utah Code Annotated, 1953. -----

### *Texts Cited:*

- Equity Jurisprudence, Vol. 4, Sec. 1140. -----  
19 R.S.C., Sec. 142, Page 395. -----  
55 Am. Jur. P. 579. -----  
18 Am. and Eng. Enc. L. 362. -----

# In the Supreme Court of the State of Utah

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HEBER W. GLENN,  
*Plaintiff and Appellant,*

vs.

RENA S. PLAYER, sometimes  
known as SERENA PLAYER,  
*Defendant and Respondent.*

Case No. 8780

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

The plaintiff commenced this action directing his remedy to the equitable side of the court and requested that a contract, which had been entered into over fourteen years prior to the date of the filing of the complaint, be ordered specifically performed. The lower court justly refused to grant the request of the plaintiff and entered its judgment in favor of the defendant after a full trial on the merits.

We do not wish to burden the Court with a lengthy recital of the facts, but opposing counsel has only recited

the record on controverted facts in the light most favorable to his case and has thereby ignored the oft-repeated rule that the judgment of the lower court will not be disturbed if supported by any substantial evidence.

On the 11th day of February, 1942, C. F. Player was the owner in fee of a parcel of real property located in Salt Lake County. (Ex. 8) C. F. Player, on the date aforesaid, was the husband of the defendant, Rena S. Player.

On February 11, 1942, the defendant and her husband entered into a sales contract with the plaintiff to sell to the plaintiff the real property which is the subject matter of this proceeding. (Ex. 3) This contract was written by the plaintiff's agent. (T 66) At that time the plaintiff paid to the defendant and her husband the agreed down payment of one-thousand dollars and, as recited in the contract, he agreed to pay six hundred dollars on May 11, 1942, and the balance on August 11, 1942. (Ex. 3) At no time did the defendant or her now deceased husband receive the subsequent payments agreed to be paid by the plaintiff under the provisions of the contract. (T 47) And at no time prior to March 26, 1956, did the plaintiff, Mr. Glenn, contact the defendant to pay her for the property. (T 47)

The contract recites that taxes would be pro-rated to the date of possession, but the defendant's deceased husband during his life, or the defendant, have discharged the property tax obligation since the contract was entered into. (T 34) The plaintiff has at no time paid the property taxes (T 42) and he has never offered to reimburse the defendant for these taxes. (T 49)

Shortly after the contract was signed, the plaintiff

removed approximately one hundred yards of gravel from the property. (T 37) The court has found from the record that the plaintiff relinquished possession on August 11, 1942, and has not been in possession of the property, nor has he removed gravel, in any of the intervening fourteen years. (T 73) It is well to note here also that for the fifteen year period between August 11, 1942, and the date of the trial, Mrs. Player's son has farmed the property and Mrs. Player or her deceased husband were at all times in possession by reason thereof. (T 57)

As heretofore stated, the defendant's now deceased husband owned the subject property in fee during his lifetime. (Ex. 8) The only interest to the date of death of the husband, held by the defendant, was her inchoate statutory interest. (Ex. 8) She has taken title to the said property after electing to relinquish her statutory interest, through the testamentary provisions of her deceased husband's will which was probated in Salt Lake County. (Ex. 8) The probate record was before the trial court in this matter, and that file disclosed, and the court here found, that Heber Glenn, the plaintiff, did not file a claim for a refund or for a debt due in the probate proceeding nor did he request the court or the executrix to specifically perform the contract which is the subject of this case. (T 48-73).

In this regard, it is well to note, that the plaintiff waited until five years after the death of C. F. Player, the real owner of the property, to bring his action. By reason thereof, the defendant was placed at serious disadvantage to cope with the claims of the plaintiff.

Exhibits 6 and 7 show that on March 19, 1953, defendant entered into binding options to sell the said real



property to the State Road Commission. In addition, on March 9, 1956, the plaintiff, by warranty deed, conveyed a portion of the premises to Gibbons and Reed Company. (Ex. 8)

The first notice of the plaintiff's claim during the fifteen year period which the defendant, Mrs. Player, received was subsequent to the above conveyances and was in the form of a letter mailed March 28, 1956, written by opposing counsel to her directing her to make conveyance of the property. (Ex. 5 and T 47) This was fourteen years after the contract was signed—thirteen and a half years after the plaintiff was supposed to have made the final payment on the contract—five years after the death of C. F. Player—two and a half years after the estate of C. F. Player was closed—three years after the defendant was placed in an inextricable position through the options to the State Road Commission—and subsequent to the time the defendant had warranted a portion of said premises to a third party.

It is also well to note that Mr. Glenn fully realized the substantial increase in value real property enjoyed during all of the fourteen years he was silent. (T 44)

Some weight has been attached by counsel to the provision set forth in the contract of February 11, 1942, wherein Mr. Glenn was given an *option* to take title to a portion of the property after certain amounts were paid in. Significantly, this record is completely absent of any testimony or exhibit wherein Mr. Glenn attempted to exercise any such option. His only contact to the defendant was by letter of March 28, 1956, in which his counsel requested a conveyance of the entire parcel.

The plaintiff has set forth certain facts in a manner



which would lead one to believe are uncontroverted in the record. May we direct the Court's attention to Page 2 of plaintiff's Brief wherein the second full paragraph recites that the plaintiff offered the sellers the balance of the purchase price on May 10, 1942. Transcript Page 47 shows that when the defendant, Mrs. Player, was asked if the plaintiff ever offered her the payments on the contract she replied "No, Sir."

Again, the second full Paragraph on Page 3 recites that the plaintiff made other visits to settle the matter with the defendant. Her testimony, however, is to the effect that she never saw the plaintiff after the contract was executed until the day of trial. (T 46-47)

Based upon the foregoing facts, the Court properly refused the equitable remedy requested and entered judgment in favor of the defendant. From this judgment, the plaintiff has appealed.

## STATEMENT OF POINTS RELIED UPON

### POINT NO. I.

THE PLAINTIFF IS ESTOPPED FROM MAINTAINING SPECIFIC PERFORMANCE BY REASON OF HIS LACHES IN REQUESTING EQUITABLE RELIEF.

- a. A Fourteen Year Delay In Bringing An Action In Equity Will Bar The Plaintiff From Receiving Equitable Relief.
- b. The Plaintiff Is Barred From Receiving Equitable Relief By Reason Of The Statute Of Limitations.

### POINT NO. II.

THE PLAINTIFF HAS ABANDONED, FORFEITED

AND RELINQUISHED HIS RIGHTS IN THE CONTRACT AND THE PROPERTY.

### POINT NO. III.

THE PLAINTIFF WAIVED HIS RIGHTS UNDER THE CONTRACT BY NOT FILING A CLAIM OR DEMAND FOR PERFORMANCE IN THE PROBATE PROCEEDINGS OF C. F. PLAYER.

### POINT NO. IV.

THE PLAINTIFF IS NOT ENTITLED TO A PORTION OF THE PROPERTY BECAUSE HE FAILED TO EXERCISE THE OPTION IN THE CONTRACT.

## ARGUMENT AND AUTHORITIES

### POINT I.

THE PLAINTIFF IS ESTOPPED FROM MAINTAINING SPECIFIC PERFORMANCE BY REASON OF HIS LACHES IN REQUESTING EQUITABLE RELIEF.

- a. A Fourteen Year Delay In Bringing An Action In Equity Will Bar The Plaintiff From Receiving Equitable Relief.

The facts in this case, as found by the Court and as shown by the evidence, are to the effect that the plaintiff entered into the possession of the real property we are here concerned with on February 11, 1942, and he remained in possession until August 11, 1942, upon which date he relinquished possession and was not seen by the defendant again until the morning of the trial of this action. The plaintiff demanded a deed be delivered to him in May, 1942, but such a deed was not delivered at that time nor has one been delivered since. Substantial testimony was

elicited from Mrs. Player and LeRoy Player all to the effect that after the defendant relinquished possession of the premises, he was not seen again until the morning of the trial.

The first word after 1942 that was received by the defendant which indicated plaintiff was asserting an interest in the property was the letter sent by plaintiff's counsel to the defendant in the latter part of March, 1956. This was fourteen years subsequent to the execution of the contract and  $13\frac{1}{2}$  years after the defendant should have paid for the property and  $13\frac{1}{2}$  years after the plaintiff requested a deed. In other words, if plaintiff has ever had a cause of action, it arose  $13\frac{1}{2}$  years prior to his letter of March, 1956, and over fourteen years prior to the date upon which he filed his complaint applying for equitable assistance.

What has happened during this period of time? First, after the property was distributed to the defendant at the close of the probate of her husband's estate, she entered into two options with the State Road Commission, the first of which pertaining to eight acres of the property is probably enforceable either in an equitable proceeding or through an action for damages. Second, Mrs. Player has conveyed a portion of the premises by warranty deed to Gibbons and Reed Company. It is true that Gibbons and Reed have had notice of the claims of the plaintiff, but, nevertheless, damages would certainly be assessed against Mrs. Player if Gibbons and Reed were evicted by the plaintiff.

Consequently, the climate here is such that the fourteen year delay in enforcing any alleged right has worked to the serious prejudice of Mrs. Player, the defendant.

Such prejudice has arisen solely by Mr. Glenn's delay and must bear the label of "laches" as against the plaintiff.

In *Dewitt vs. Old Town Bank*, 85 Md. 315, 37 A. 266, 60 Am. St. Rep. 322, laches was defined by Chief Judge McSherry, as follows:

"Strictly speaking, and using the term as it is understood in the law, laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity."

Professor Pomeroy in *Equity Jurisprudence*, Vol. 4, Sec. 1140, states:

"Laches, in legal significance, is not more delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; *but when, knowing his rights, he takes no step to enforce them until the condition of the party, has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as estoppel against the assertion of the right.*"

The defendant's position here has been further prejudiced and impaired by other events which have occurred since the execution of the contract and which have been considered as significant to denying the relief of specific performance in other courts and by the text writers on the subject. For instance, C. F. Player, the primary seller and the person the plaintiff claims to have talked with, died five years prior to the time this action was commenced and nine years after the plaintiff requested a deed. The

prejudice which is worked by reason of the decease of C. F. Player is certainly subject to speculation but it is not difficult to imagine that Mr. Player, if alive, could shed much light on the facts in the case. By reason thereof, absence of his testimony would certainly make the imposition of an equitable order subject to great doubt. Further, the defendant, Mrs. Player, elected to take under the provisions of her husband's will rather than under her statutory widow's interest. How much her election was influenced by the long delay in asserting any rights by Mr. Glenn is again subject to some speculation, but it would appear reasonable to believe that the relinquishment and abandonment of the property and contract by Mr. Glenn entered into her decision to take under the terms of her husband's will. In regard to the foregoing, this Court, in *Jones Mining Company vs. Cardiff Mining and Mill Company*, 56 U 449, 191 Pacific 426, adopted the general doctrine stated in 19 R. S. C. 142, Page 395, which is as follows:

"It is a familiar doctrine that, apart from any question of statutory limitation, courts of equity *will discourage laches and delay in the enforcement of rights*. The general principle is that nothing can call forth the court of chancery into activity but conscience, good faith, and *reasonable diligence*. Where those are wanting, the court is passive and does nothing. The doctrine is founded principally on the equity maxims, 'he who seeks equity must do equity,' 'he who comes into equity must come with clean hands,' and 'the laws serve the vigilant, and not those who sleep over their rights,' and is based on considerations of public policy. Its object is in general to exact of the complainant fair dealing with his adversary, and the rule was adopted largely because *after great length of time, from*



*death of parties, loss of papers, death of witnesses, change of titles, intervention of equities, or other causes there is danger of doing injustice, and there can be no longer a safe determination of the controversy."* (Emphasis supplied.)

Worthy of consideration is an additional fact supporting laches which developed during the long interval between the date of the contract and the date of the commencement of this action—that is the substantial increase in market value of this property. It seems evident to us that a person should not be permitted to sit back comfortably on his alleged rights during a fourteen year period of advancing values without making any effort to occupy the property, pay taxes as they accrue or evidence any interest in the property, and then, when a profit is assured, solicit the assistance of an equitable tribunal to insure his gains. It was interesting for us to note that this Court, in a fact situation involving a price decline over a mere three year period, affirmed a finding of laches as a bar to equitable relief. See *Olson vs. Gaddis Investment Co., et al.*, 85 U 430. 39 Pac. 2d 744.

It therefore appears that specific performance was here properly denied. The plaintiff did nothing to enforce his rights after relinquishing his possession of the property for fourteen years. In the interim, C. F. Player died and the property passed through his estate to Mrs. Player, the defendant, who, thereafter, made options and conveyances which would, if upset now, expose her to lawsuits and damages completely out of proportion to any supposed benefits running to the plaintiff.

Under these circumstances the laches of the plaintiff falls squarely within the above announced rules and the

plaintiff must be adjudged to be estopped from receiving the equitable remedy prayed for.

b. The Plaintiff Is Barred From Receiving Equitable Relief By Reason Of The Statute Of Limitations.

The plaintiff requested a deed to the real property and relinquished possession of the premises during the year 1942. It was therefore during the year 1942 that the plaintiff's cause of action accrued if he has ever possessed a cause of action. He waited until October, 1956, to file his complaint. The record is completely silent on any facts which would toll the running of the statute of limitations.

*Sections 78-12-23, Utah Code Annotated, 1953, states that:*

“Within six years: (after accrual of a cause of action)

\* \* \* \* \*

(2) An Action upon any contract, obligation or liability founded upon an instrument in writing  
-----” (must be commenced.)

It seems superfluous to state that the plaintiff brought his action on a written contract; that his cause of action accrued in 1942; and that he has not brought his action within six years as the statute requires.

It also seems superfluous to state that the statute is not limited in its application to matters arising at law but the general language also encompasses actions in equity. Although there appears to be no direct case on this subject in Utah, this Court's language in *Smith vs. Smith*, 77 U 60, 291 Pac. 298, indicates this Court's acceptance of the application of the statute to equitable matters. In an earlier



case, wherein the plaintiff was attempting, through equity, to impress a transaction with a trust, this Court stated:

“There is therefore no question of an express trust in this case, and the statute of limitations is applicable here precisely as in any other fiduciary relations out of which constructive or implied trusts arise. In all such cases the statute begins to run from the time that the complaining party discovered the wrongs complained of or when he was apprised of such facts and circumstances with respect thereto as would put a person of ordinary intelligence and prudence upon inquiry. The law is stated to that effect by this court in the case of *Gibson vs. Jensen*, 48 Utah, 248, 158 Pac. 426, and in *Salt Lake City vs. Investment Co.*, 43 Utah, 181, 134 Pac. 603. If therefore the facts and circumstances which came to the knowledge of the plaintiff corporation were such as would have caused a person of ordinary prudence and intelligence to act, then it should have acted, and the statute of limitations was set in motion as to it. This is so quite apart from the doctrine of laches which is always an important element in actions like the one at bar and which is relied on by defendants.”

The Oklahoma Supreme Court in *Thompson vs. Rosehill Burial Park, et al*, 60 Pac. 2d 756, in discussing the application of the statute of limitations to an action for specific performance stated:

“The action is of equitable cognizance, and the defendants have pleaded the statute of limitations. The trial court held that the statute of limitations interposed by the defendants was applicable and rendered judgment for the defendant. Actions for specific performance of a contract to convey an interest in real estate, unless there is

fraud or unusual circumstances, would justify the suspense of the application of the statute of limitations -----, must be brought within five years. See *Wilson vs. Bombeck*, 38 Oklahoma 498, 134 Pac. 382; *Hurst et al, vs. Hannah et al*, 207 Oklahoma 3, 229 Pac. 163.”

Kentucky has announced the same rule. See *Knappp et al vs. Read*, 21 S.W. 2nd 705. See also *Church et al, vs. Winton et al*, 46 *Atlantic* 363 and *Pepper et al, vs. Truitt et. al.*, (CCA 10), 158 *Federal* 2d 250.

It seems to us, therefore, the plaintiff's cause of action is directly barred by the statute of limitations.

## POINT II.

THE PLAINTIFF HAS ABANDONED, FORFEITED AND RELINQUISHED HIS RIGHTS IN THE CONTRACT AND THE PROPERTY.

As found by the trial court, the plaintiff entered into possession of the property at the time the contract was executed in February of 1942. He immediately commenced the removal of gravel and remained in possession until the final payment was due on the contract. The trial court further found that in August, 1942, the plaintiff relinquished possession of the property and has not been in possession nor has he removed gravel since that date.

On the other hand, the defendant, through her son, managed the property and farmed it each of the intervening fourteen years. The possession of the property by the defendant during this entire period has been open and exclusive.

These facts can lead to only one reasonable conclu-

sion, that is, that the plaintiff in the year 1942 intended to abandon the property and in pursuance of this intent, relinquished possession of the property. In addition, he paid no payments for taxes or otherwise and remained indicatively silent for fourteen years.

These facts are very clear and persuasive that the plaintiff abandoned the property and his rights in the contract.

In *Glotzer vs. Keyes*, 125 Conn. 227, 5 A. 2d 1, the Connecticut Court made a scholarly summation of the rule of abandonment, and in so doing, stated:

"To constitute an abandonment there must be an intention to abandon or relinquish accompanied by some act or omission to act by which such intention is manifested. *Stevens vs. Norfolk*, 42 Conn. 377, 384; *Collins vs. Lewis*, 111 Conn. 299, 303, 149 A. 668; 1 C.J.S., Abandonment, p. 8, par. 3. While mere nonuse and lapse of time alone are not enough to constitute abandonment, they are competent evidence of an intent to abandon, and as such may be entitled to great weight when considered with any other circumstances, and abandonment may be inferred from circumstances, such as failure by acts or otherwise to assert any claim to the right alleged to have been abandoned, or may be presumed from long continued neglect. *New York, N.H. & H.R. Co. vs. Cella*, supra, page 522, 91 A. 972; *Town of Derby vs. Alling*, 40 Conn. 410, 436; 1 Am. Jur. p. 11; *Keane vs. Canovan*, 21 Cal. 291, 303, 82 Am. Dec. 738. Most frequently, where abandonment has been held established, *there has been found present some affirmative act indicative of an intention to abandon*, as in *Peck vs. Lee*, supra, page 377, 148 A. 133, where it was found that the mortgagee had de-

stroyed the mortgage and the note which it secured, but nonuser, as of an easement, or *other negative or passive conduct may be sufficient to signify the requisite intention and justify a conclusion of abandonment*. The weight and effect of such conduct depends not only upon its duration but also upon its character and the accompanying circumstances. *Raritan Water-Power Co. vs. Veghte*, 21 N.J. Eq. 463, 480. *McArthur vs. Morgan*, 49 Conn, 347, 350, sustained a finding as a fact that a right to use water power of a stream in connection with a mill site, *as to which there had been for eight years no manifestation of an intent to utilize it, had been abandoned*. See, also, *Banks vs. Judah*, 8 Conn. 145, 161." (Emphasis supplied)

Text writers have announced:

"In the absence of a default of one party which gives the other party a right to elect to rescind, unless a land contract is voidable when made, for fraud, mistake, duress, undue influence, infancy, mental incompetency, etc., the same principle which requires the assent of both parties to the making of the contract of sale ordinarily requires the assent of both parties to its change or extinguishment. It is, however, competent for the parties, as in case of other contracts, to change or extinguish a contract of sale of real property by subsequent mutual assent. A mutual agreement to rescind may be found if, after breach or abandonment by one party, the other by word or act declares the contract rescinded. *It has been said that no mode of terminating the equitable interest of the purchaser can be more perfect than a voluntary relinquishment by him of all rights under the contract, and a voluntary surrender of the possession to the vendor.*" See 55 Am. Jur. P. 579. (Emphasis supplied)



In addition, this Court, in an action pertaining to the surrender of an option, has announced approval of the rule in *18 Am. and Eug. Enc. L.* 362, which reads:

“An actual and continued change of possession by the mutual consent of the parties will operate as a surrender by operation of law, though there was no express agreement of the parties that it should so operate.” See *K. P. Mining Co. vs. Jacobsen*, 32 U 115, 83 Pac. 728.

Based upon the facts here found by the trial court, it is manifest that an abandonment has been executed and that by reason thereof, plaintiff has relinquished all of his rights in the property and the contract.

### POINT III.

THE PLAINTIFF WAIVED HIS RIGHTS UNDER THE CONTRACT BY NOT FILING A CLAIM OR DEMAND FOR PERFORMANCE IN THE PROBATE PROCEEDING OF C. F. PLAYER.

The fee owner of the real property in February, 1942, was C. F. Player, the now deceased husband of the defendant. The defendant for the ensuing nine year period was not a joint tenant nor a tenant in common with C. F. Player and consequently had no direct affirmative interest in the property. Her only interest in the premises, as a matter of law, was her inchoate rights preserved to a widow under the provisions of the Utah Statutes.

Therefore, in February, 1942, Mrs. Player was not in the ordinary sense, a seller, for her inchoate interest by the nature of things, was not capable of conveyance but only release.

That was all that she contracted to sell under the agreement of February 11, 1942, for that was all she possessed. This seems self evident if we could reflect for a moment on the nature of a proceeding brought timely under these same facts. If C. F. Player was not made a party to an action brought during his life for specific performance, and only Mrs. Player were joined, what relief could be obtained? Could the Court, under such circumstances, order Mrs. Player to convey? Obviously not. This distinction and the nature of the estate held by Mrs. Player therefore comes into focus. She did not agree to convey the property—because she couldn't have—she didn't own it. Her husband was the person who owned the property and is the person who would have had to have made conveyance. Such was the status of the parties to the date of C. F. Player's death.

Nine years after the date of the contract, in the probate proceeding, Mrs. Player elected to relinquish her statutory right and to take the property pursuant to the provisions of her husband's will.

Pertinent sections of the *Utah Code Annotated*, 1953, provide as follows:

*Section 75-11-26:* "When a person, who is bound by contract in writing to convey any real estate or who is bound by contract in writing to assign, transfer or deliver any personal property, shares of capital stock, bonds or other choses in action, dies before making the conveyance, assignment, transfer or delivery; and in all cases when such decedent, if living, might be compelled to make such conveyance, assignment, transfer or delivery, the court may make a decree authorizing and directing his executor or administrator to convey

such real estate, or to assign, transfer, or deliver such personal property, shares of capital stock, bonds or other choses in action, to the person entitled thereto."

*Section 75-11-27:* "On the presentation of a verified petition by any person claiming to be entitled to such conveyance, assignment, transfer or delivery from an executor or administrator, setting forth the facts upon which the claim is predicated, the court or clerk must appoint a time and place for hearing the petition, which shall be upon notice."

*Section 75-11-29:* "If upon a hearing as hereinbefore provided the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the rights of the petitioner, *who may, at any time within six months thereafter, proceed by action to enforce specific performance thereof.*" (Emphasis supplied)

The foregoing statutory procedure provides the exclusive manner in which specific performance may be obtained in instances where a promisor has died. See *Free vs. Little*, 31 U 449, 88 Pac. 407, P. 463. In the *Free* case, this Court appropriately said:

"Appellants alleged in their answer, and it was admitted at the trial, that respondent presented no claim of any kind against the estate, nor did she in any way comply, or attempt to comply, with sections 3935 to 3940, Revised Statutes 1898, inclusive. These sections contained special provisions in respect to action for specific performance against deceased persons. The writing in this case sought to be enforced falls squarely within the provisions of the sections above referred to. Waiving, therefore, the question as to whether a claim should have



been presented under sections 3860 to 3874, Revised Statutes 1898, which we think, in view of the provisions of section 3935 et seq., above referred to. Those latter sections are intended to meet the very difficulties which have arisen in this case. . . .”

And in further explanation, it was announced:

P. 466: “Suppose it developed that specific performance should not be decreed, as is often the case upon a full hearing, but that the claimant had some right to damages, how are those damages to be adjusted out of the estate if it has been fully closed and final distribution has been made? If the claim stood merely as a legal one, in view that it never was presented as provided by law, it would be fully barred and no relief could be granted. Does it stand in a different light in equity under the provisions of sections 3935 to 3940, inclusive where no petition has ever been filed or claim made in the probate court? We think not. These sections, when we view and consider them, have the same effect upon claims for specific performance in requiring such claims to be brought to the attention of the probate court pending the administration of the estate that the preceding sections have upon other or purely legal claims. As to legal claims, the right is barred absolutely unless they are presented within the time fixed by these several sections unless the cause pointed out by the statute prevented presentation. This would be so whether the claims were matured or not, contingent or fixed. *In claims for specific performance, we think, and so hold, that, unless a petition is filed or claim is made in a court for specific performance within the time limited to file other claims, the claim for specific performance must be held to be waived or abandoned*, unless, as in other cases, good cause is shown why it could not be filed within the

time allowed for claims to be filed.” (Emphasis supplied)

Here, it is not controverted that the plaintiff failed to file any claim against the estate of C. F. Player and that he also failed to file a petition for specific performance as required by the foregoing sections. There seems to be no question then that the relief requested would be denied as a matter of statute if this property had passed to third parties or if it were still held in the estate as an undistributed asset or if it had passed to the defendant without her name appearing on the contract.

An inspection of the decree entered on P. 24 of Ex. 8 will disclose that claims against C. F. Player’s estate were required to be filed on or before the 1st day of April, 1953, and that distribution of the assets of the estate thereafter took place on May 6, 1953. In addition, no petition for specific performance was ever interposed. Consequently, and we quote again the language of the Free Case:

“ . . . the claim for specific performance must be waived or abandoned. . . . ”

It should be recognized in this regard that during probate, and considering that the decedent owned the fee interest in the property, the executrix of the estate held the entire interest in the property subject to the probate proceeding. It is of cardinal importance to note also that the interest of Mrs. Player only arose after she had made here election and only was perfected by way of and upon distribution. She took nothing which she possessed and agreed to sell under the provisions of the contract of February, 1942.

Consequently, the trial court, if it had ordered specific performance of the contract would have ordered Mrs. Player to convey something which she did not own and could not have conveyed in February, 1942, or at any time prior to distribution. Further, as a matter of statute and law, the plaintiff's rights were waived and abandoned by his failure to comply with the aforequoted statutory sections.

It necessarily follows that the result is not changed because Mrs. Player signed the original contract.

#### POINT IV.

THE PLAINTIFF IS NOT ENTITLED TO A PORTION OF THE PROPERTY BECAUSE HE FAILED TO EXERCISE THE OPTION IN THE CONTRACT.

The plaintiff argues under Point IV. of his brief that he is entitled to a portion of the premises because the contract contained a covenant which provided that *at his option* he could acquire title to one of the two tracts involved after he had paid a certain sum. There is no question that enough money was paid to enable the plaintiff to exercise his option and acquire the smaller parcel, but the mere existance of such an option does not compel the conveyance. Certain acts must be done to perfect the right such as notice of the election and request for the deed and an entry as provided in the contract.

It seems patently clear from this record that *such an election was never made* and that any rights under the covenant have been waived and abandoned in addition to being barred by the statutes hereinabove set forth. Of further significance is the failure of the plaintiff to intro-

duce one fact which would support a finding that the plaintiff had exercised the option.

This point raised by the plaintiff lacks legal significance in this review.

## CONCLUSION

The cases cited by the respective parties in this proceeding do not appear to evidence any conflicting doctrines which could be urged to this Court. In fact, the general principles announced are quite uniform in the various jurisdictions. We believe the record in this case is substantial in support of the judgment of the lower Court.

Equity jurisprudence has historically been vested in the sound discretion of the chancellor and, with his opportunity to observe the demeanor of the witnesses and the parties, their frankness and candor, he is better able to justly grant or refuse equitable relief. Accordingly, the judgment of the lower Court should be affirmed.

Respectfully submitted,

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