

1959

# William Christensen et al v. Emeron Christensen et al : Brief of Plaintiffs and Respondents

Utah Supreme Court

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Gustin, Richards & Mattsson; Attorneys for Plaintiffs and Respondents;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

JAN 21 1959

WILLIAM CHRISTENSEN, also known  
as BILL CHRISTENSEN and CELESTE  
CHRISTENSEN, husband and wife,  
*Plaintiffs and Respondents,*

—vs.—

EMERON CHRISTENSEN and KATH-  
LEEN CHRISTENSEN, husband and  
wife,  
*Defendants and Appellants.*

Clerk, Supreme Court, Utah

Civil No.  
8966

BRIEF OF PLAINTIFFS AND RESPONDENTS

Appeal from the District Court of the Sixth Judicial  
District in and for the County of Sevier, State of Utah.

HONORABLE JOHN L. SEVY, JR., *District Judge*

GUSTIN, RICHARDS & MATTSSON

By CARVEL MATTSSON  
JOHN T. VERNIEU  
*Attorneys for Plaintiffs and  
Respondents*

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The Plaintiffs and Respondents will be referred to as  
“Respondents” and the Defendants and Appellants will be  
referred to as “Appellants.”

STATEMENT OF FACTS

The Appellants’ Statement of Facts is substantially  
accurate to the extent it has gone. However, Appellants

have omitted any reference to facts unfavorable to their position. In the first place, the Respondent William Christensen and the Appellant Emeron Christensen are brothers (R. 11). Both are farmers but William Christensen also does trucking work (R. 20). Prior to and during the spring of 1942 the Respondent William Christensen was the owner of a thirty-five-acre (actually 34.20 acres) tract of land and seventeen and one-half shares of the Capital Stock of Elsinore Irrigation Company, used on the land, and Respondents also owned eleven and one-half shares of Sevier Valley Irrigation Company, said land and water stock being mortgaged to The Federal Land Bank of Berkeley (R. 12). Also, the home of the Respondents at Richfield, Utah, was mortgaged to The Federal Land Bank and Respondents had executed and delivered to said Bank a Deed to be held until the mortgage indebtedness was paid in full. The Appellant Emeron Christensen was farming, along with other property, a fifteen-acre tract across the road kitty-corner from the William Christensen property, owned of record by the Appellant Kathleen Christensen (R. 4). Twenty-two and one-half shares of the Capital Stock of Sevier Valley Irrigation Company, owned of record by the Appellant Emeron Christensen, were then and had been used on said property since 1928 (R. 4 and 13). Appellant Emeron Christensen had also been farming two additional tracts of land, one a two-acre piece and the other an eight-acre tract, title to which was acquired by himself and his wife as joint tenants (R. A-38 and R. 15). These

two tracts will hereafter be referred to as the ten-acre tract.

In the spring of 1942, William and Emeron Christensen made a verbal agreement to trade land and water, the details of which are as follows :

Appellants were to pay off the indebtedness due The Federal Land Bank of Berkeley against Respondents' home and Appellants were to convey to the Respondents the fifteen-acre tract of land, together with twenty-two and one-half shares of Sevier Valley Irrigation Company water. In return Respondents were to convey to Appellants the thirty-five acre tract of land and seventeen and one-half shares of water of the Elsinore Irrigation Canal Company (R. 17 and 18). *At the same time and as a part of the same transaction* Appellants agreed to sell to the Respondents the ten-acre tract of land for One Thousand Dollars (R. 18), and Respondents were to use on said land the eleven and one-half shares of Sevier Valley Irrigation Company water which they already owned (R. 62). The sales price was payable in livestock and credits for hauling Emeron Christensen's beet pulp. Also, Respondent William Christensen hauled commodities for third persons and they paid the Appellants who were to credit the account of the Respondents (R. 92 and 93). Respondents were to pay the taxes and title to the ten acres was to pass to Respondents "right away" (R. 19). The transaction was not to bear any interest (R. 62).

Respondents immediately went into possession of the ten acres of land with Appellants' knowledge and approval. Respondents turned over to the Appellants two

cows, one bay mare, one black steer, three calves and two heifers at agreed valuations per animal and the Appellants later sold the animals to third persons (R. 21 to 23). Beginning in the fall of 1942 and continuing through the spring of 1944 Respondent William Christensen hauled at an agreed valuation of \$1.50 per ton, 170 tons of beet pulp from the Gunnison Sugar Company (Exhibit 1 and R. 97). From time to time Respondent also hauled commodities for third persons who paid the Appellants for the hauling work. The value of the livestock and the hauling services was \$684.00, leaving a balance of \$316.00 payable.

In June of 1942 Appellants delivered to Respondents the Deed to their Richfield, Utah, home and the Abstracts of Title on the ten-acre tract (Exhibits 2 and 3), together with a Deed to the fifteen-acre tract. Appellants assured Respondents that they would complete the transaction for the sale of the ten-acre tract and that they would secure and deliver to the Respondents a Certificate for twenty-two and one-half shares of Sevier Valley Irrigation Company Water (R. 29 to 31). Respondents delivered to Appellants at this time their Deed to the thirty-five acre tract of property and a certificate for seventeen and one-half shares of water of Elsinore Irrigation Canal Company.

During the course of more than two years thereafter Appellant Emeron Christensen assured the Respondents on numerous occasions that, with respect to the preparation and delivery of a Deed to the ten acres of property and the Certificate for twenty-two and one-half shares of



Sevier Valley Irrigation Company Water Stock, "I will have it all fixed up for you right away," using as an excuse for his failure to execute and deliver the said Deed and Water Certificate, that he was then too busy with other matters (R. 32 to 35). Emeron Christensen did not, however, keep his word.

In November of 1955, Respondents offered to pay Appellants in cash the balance of the purchase price but Appellants again declined to accept the balance payable or to deliver the Deed and Water Stock Certificate (R. 38). It was at this time, however, that Appellant Emeron Christensen asked Respondent William Christensen to lease the land to him but Respondent William Christensen could not oblige him as the property was then leased to third person (R. 38 and 39).

In the early spring of 1956 Appellants dispossessed the Respondents from the ten acres, claiming that the property was theirs and that the agreement for sale and purchase was cancelled (R. 42).

When the Respondent William Christensen took possession of the ten acres it had not been fertilized for several years and the fences were down and the soil was rough and hilly with numerous high and low spots. An old road passed the property but it was impassible (R. 44). Respondent manured the property (R. 49) and planted sugar beets. Again in 1944 and 1945 the ground was manured and planted to beets and grain (R. 48). In the winter of 1945 and the spring of 1946 Respondent had the land leveled (Exhibit 4) and the irrigation system

was changed for better water coverage. Respondents' cost was \$385.00 (R. 52 and 53). The fences on the North and West side of the property were repaired and posts and wires replaced. Fencing was maintained by the Respondent until he leased the property in 1946 (R. 54). In 1944 Respondent William Christensen spent three weeks of his time helping with repairs to the road to the property in order to make it usable (R. 55). Beginning with the crop year 1946 Respondents leased the property to third persons who planted crops, fertilized the land and maintained and improved the fencing (R. 55). Regarding the fifteen-acre tract sold to Respondents by Appellants and upon which they received a Deed, but no Certificate for twenty-two and one-half shares of Sevier Valley Water, Respondent William Christensen and his Lessees farmed the ground each year from 1942 to 1955 and used thereon the twenty-two and one-half shares of Sevier Valley Irrigation Company water that Appellant had previously used on the ground. In the spring of 1956 the Appellant Emeron Christensen ordered the Irrigation Company not to turn the water on to the land (R. 57 to 59).

Respondents' Lessee, Talmage Christensen, testified that he leased and farmed the ten acres and the fifteen acres after 1951 and that he used thereon a total of thirty-three and one-half shares of water (twenty-two and one-half shares of Sevier Valley Irrigation Company from the fifteen acre tract and eleven shares of Sevier Valley Irrigation Company water from the ten acre tract). Appellant knew Anderson was renting the land and the

water but never objected until 1956 when he dispossessed Anderson (R. 77 to 79).

Respondent Celeste Christensen testified that she personally paid the taxes on the ten acres each year from 1942 to 1955 (Exhibit 5 and R. 98 and 99). Mrs. Christensen also testified about the meetings of June, 1942, when the Abstracts of Title on the ten acres were delivered to Respondents, and the meeting of November, 1955, at Appellants' home at Elsinore, Utah, on both of which occasions Appellants assured the Respondents that Appellants would see that the Deed to the ten acres of land and the Certificate for the twenty-two and one-half shares of Sevier Valley Irrigation Company water were prepared and delivered "one of these days as soon as we have time" (R. 101 to 103). Mrs. Christensen kept an accurate record of the animals turned over to Appellants together with their valuations, together with the hauling of commodities for third person (Exhibit 6 and R. 106 to 110).

Appellant Emeron Christensen, in his testimony, flatly and absolutely denied having any conversations with Respondents about the foregoing matters or making any agreement whatever for the sale of the ten acres of land or the twenty-two and one-half shares of Sevier Valley Irrigation Company water (R. 119 and 120) but contended that he merely permitted the Respondents to use the ten acres of land and the twenty-two and one-half shares of water between 1942 and 1954 (R. 120 and 121). Appellant Emeron Christensen further denied that he had delivered the Abstracts of Title on the ten acres of land to the Respondents (R. 121) or that the Respondents

had delivered to him any animals (R. 122). Appellant acknowledged that the Respondent had hauled a quantity of coal and beet pulp for him but he contended that the Respondents had been paid in full (R. 123).

## STATEMENT OF POINTS RELIED ON

### POINT I.

THE DECISION IS SUPPORTED BY THE EVIDENCE AND IS NOT CONTRARY TO LAW.

(a) The Evidence Was Entirely Sufficient To Prove The Existence Of A Contract As To Both Causes of Action And To Justify A Decree Of Specific Performance.

(b) The Contract Relied Upon As To Both Causes Of Action Was Not Barred By The Statute Of Frauds.

(c) The Second Cause of Action Was Not Barred By The Statute Of Limitations.

### POINT II.

THE TRIAL COURT DID NOT COMMIT ERROR IN RECEIVING FROM COUNSEL FOR APPELLANTS AND RESPONDENTS LETTERS AND STATEMENTS AFTER THE TRIAL OF THE CASE.

### POINT III.

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL.  
ARGUMENT ON POINTS

### POINT I.

THE DECISION IS SUPPORTED BY THE EVIDENCE AND IS NOT CONTRARY TO LAW.

(a) The Evidence Was Entirely Sufficient To Prove The Existence Of A Contract As To Both Causes

of Action And To Justify A Decree Of Specific Performance.

Respondents agree with the principal of law established in *Montgomery v. Berrett*, 40 Utah 385, 121 P. 569, cited by Appellants, that the Plaintiffs seeking the specific performance of a parol contract must show a clear, mutual understanding and a positive assent to the terms of the Contract. See also *Price v. Lloyd*, 31 Utah 86, 86 P. 768.

It has been said that a Contract is a transaction in which each party comes under an obligation to the other and each reciprocally acquires a right to what is promised by the other. *Dartmouth College v. Woodward*, 4 Wheat (U.S.) 518, 4 L. ed. 629. Expressed in its simplest terms, the reciprocal duties of Appellants and Respondents were the following:

#### APPELLANTS' DUTIES

1. To pay off the existing debt of the Respondents to The Federal Land Bank of Berkeley and to deliver to Respondents the Deed held by the Bank.
2. To convey to Respondents the 15-acre tract of property and 22½ shares of stock in Sevier Valley Irrigation Company.
3. To convey to Respondent the 10.00-acre tract of property upon payment of the purchase price of \$1000.00.

#### RESPONDENTS' DUTIES

1. To convey to Appellants the 35.00-acre

tract of real estate and  $17\frac{1}{2}$  shares of Elsinore Irrigation Canal Company water stock.

2. To pay the Appellants \$1000.00 for the 10.00-acre tract of property either in cash or in services or other commodities.

Appellants attempt to separate and to detach from the other mutual duties Appellants' No. 3 and Respondents' No. 2 duties listed above. It is significant to note, however, that all of the Respondents' evidence goes to the proposition that there was but one agreement and one contract embracing all of the duties and rights of the parties. Appellants chose to flatly and unequivocally deny the existence of any agreement, duty or responsibility, but the irrefutable facts are that the Appellants *did* pay The Federal Land Bank of Berkeley \$1,832.50 to release its lien on Respondents' property; Appellants *did* secure and deliver to Respondents the Deed to their Richfield, Utah, home; and Appellants *did* convey to the Respondent Celeste Christensen the fifteen-acre tract of land above referred to. It is obvious, therefore, that the Appellants from the very beginning had a clear understanding of their duties, as far as they chose to perform them. They proceeded with haste to perform all of Duty No. 1 and half of Duty No. 2. Also they permitted Respondents to perform their Duty No. 1 and substantially to perform their Duty No. 2. At no time did Appellants doubt the existence of Contract rights against the Respondents and it ill behooves them now, after realizing substantially all of the benefits from the Contract, to urge equity to declare that no Contract existed.

We submit that every necessary element of a Contract is clearly established by the Respondents' case. There is neither uncertainty nor indefiniteness as to any of its terms. The crux of Appellants' argument appears to be that in no event can a Contract be established because the Appellant Emeron Christensen denied in his testimony that none existed. *His actions would strongly indicate otherwise.* Brotherly affection would not move even Emeron Christensen to pay The Federal Land Bank of Berkeley \$1,832.50 without a good reason. Nor would Appellants have delivered to the Respondents the Abstracts of Title on the ten-acre tract if Respondents were only "using the land" until Appellants wanted it. Further, it is difficult to imagine Appellants permitting Respondents to use twenty-two and one-half shares of Appellants' water for 13 years unless Appellants well knew that the land and the water had been sold to the Respondents. We suggest to the Court that the reason why the Appellants suddenly contended that there was no Contract relating to the ten acres of land and the Twenty-two and one-half shares of Sevier Valley Irrigation Company water relates to the general drought in South Central Utah beginning in 1955 and the fact the Appellants' son had recently purchased from Appellants' attorney a tract of realty abutting on the ten acres in this law suit and the Appellant Emeron Christensen and his son "are farming together" (R. 137).

The fact that Respondents' agreement with the Appellants enabled them to pay for the ten acres over an unspecified period of time does not, as Appellants con-

tend, reduce the agreement to something less than a contract. The authorities are to the effect that where a Contract to render services is silent as to the time of payment for the services, payment is due when the services have been rendered. See 12 Am. Jur., Contracts, Section 304 and the cases cited in 2 A.L.R. 519.

Also: The Synopses of the following cases from Vol. 3, A.L.R. Digest, page 743 are significant:

The term "any time" used in a contract, although a relative term subject to variation in meaning according to the facts and circumstances of the case, is nevertheless to be given its ordinary meaning, in the absence of special circumstances indicating that it was not intended to have such meaning.

*Haworth v. Hubbard*, 220 Indiana 611, 44 N.E. 2d 967.

In the absence of agreement as to payment for work under a building contract no payment can be demanded until the work is substantially performed.

*Stewart v. Newbury*, 220 NY 379, 115 NE 984.

Thus it appears that as a matter of law Respondents could not have required Appellants to deliver the Deed to the ten-acre tract until the \$1000.00 purchase price had been paid. But the more important consideration is that even so, *such an agreement is perfectly valid and enforceable*, if not within the Statute of Frauds.

In answer to Appellants' complaint that all of the terms and conditions of the Contract of the parties are



garnered from Respondents' case "with not so much as one receipt or the scratch of a pen to show the existence of the Contract by the Defendants or the credit of payment thereon of services or livestock by the Defendants" to quote Appellants' Brief at page 13 thereof, we can only say that it served Emeron Christensen's purpose not to keep a receipt or a record of any kind. In the beginning Emeron and William Christensen dealt with one another at something less than arm's length and appeared to enjoy one another's respect and confidence (R. 66). It was imprudent though not unnatural nor uncommon that they did not reduce their agreement to writing and keep adequate records. But the lower court concluded that Appellants' unblinking denial of the entire affair as it related to the sale of the ten acres of land and the twenty-two and one-half shares of Sevier Valley Irrigation Company water stock simply did not square with convincing and entirely believable testimony and evidence of Respondents' case. We submit that the Respondents told the strict truth at the trial as it related to their transaction or they did not. The lower court, being in a position to judge the demeanor of the witnesses as well as other factors, found that a contract did exist, that the rights, duties and responsibilities thereof were not severable and that the contract was in every respect capable of specific performance. Other than Appellant Emeron Christensen's complete and general denial, there is absolutely no evidence to the contrary. Further, we have noted with interest that the Appellant, Emeron Christensen, did not call upon his wife, Kathleen Christensen, to testi-

fy in the case as a corroborative witness to the fact that there was no agreement relating to the 10 acres of property and to the 22½ shares of Sevier Valley water and that the abstracts of title were not delivered to Respondents.

She was present at all of the meetings with Respondents except for the initial meeting in the spring of 1942 and was also present in the courtroom during the trial of this case. On this state of the record this Court ought not to set aside the lower Court's decision.

“This Court is authorized by the State Constitution to review the Findings of the Trial Court in equity cases, but the findings of the trial Courts on conflicting evidence will not be set aside unless it manifestly appears that the Court has misapplied proven facts or made findings clearly against the weight of the evidence.”

*Olivero v. Eleganti*, 61 Utah 475, 214 P. 313.

(b) The Contract Relied Upon As To Both Causes Of Action Was Not Barred By The Statute Of Frauds.

While it is at once apparent that the Contract between Appellants and Respondents was entirely oral, nevertheless Respondents rely on the saving grace of Section 25-5-8, Utah Code Annotated, 1953, which reads:

25-5-8. RIGHT TO SPECIFIC PERFORMANCE NOT AFFECTED. — Nothing in this Chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

Thus it is well settled in Utah that a sufficient part performance by the purchaser under a parol contract for the sale and purchase of real estate removes the contract from the operation of the statute of frauds and authorizes the Court to decree the specific performance of the agreement by the vendor.

In Utah, the leading cases on this proposition are *Price v. Lloyd*, supra; and *Hargreaves v. Burton*, 59 Utah 575, 206 P. 262. See also *Lynch v. Coviglio*, 17 Utah 106, 53 P. 983.

The true basis of the doctrine of part performance, according to the overwhelming weight of authority, lies in principles of equitable estoppel and fraud. It would be a fraud upon the Respondents if the Appellants were permitted to escape performance of their part of the oral agreement after they have permitted the Respondents to substantially perform in reliance upon the agreement. In the *Hargreaves v. Burton* case, supra, the Utah Supreme Court quoted with approval the following language from the *Price v. Lloyd* decision, which language originally came from *Pomeroy on Specific Performance of Contracts*, 2nd Edition, paragraph 145, to-wit:

“When a verbal contract has been made, and one party has knowingly aided or permitted the other to go on and do acts in part performance of the Agreement, acts done in full reliance upon such Agreement as a valid and binding Contract, and which would not have been done without the agreement, and which are of such a nature as to change the relation of the parties, and to prevent a re-

storation to their former condition and an adequate compensation for the loss of a legal judgment for damages, then it would be a virtual fraud in the first party to interpose the statute of frauds as a bar to the completion of the contract, and thus to secure for himself all of the benefit of the acts already done in part performance, while the other party would not only lose all the advantage from the bargain, but would be left without adequate remedy for his failure or compensation for what he had done in pursuance of it. To prevent the success of such a palpable fraud, equity interposes under these circumstances, and compels an entire completion of the contract by decreeing its specific execution."

Nowhere have we been able to locate a more exhaustive and authoritative collation of authorities on the doctrine of part performance than that found in the annotation in volume 101 of American Law Reports beginning at page 923 entitled "Doctrine of Part Performance in Suits for Specific Performance of Parol Contracts To Convey Real Property." Particular acts of part performance generally recognized as sufficient to take an oral contract out of the clutches of the Statutes of Frauds are there catalogued under the general headings of possession, possession coupled with other acts, improvements, payment of the purchase price, payment of taxes, etc. Not all of these acts are required in every case, and what constitutes performance must depend upon the particular facts of each case. See *Veum v. Sheeran*, 95 Minn. 315, 104 N.W. 135.

— The Utah cases above cited adopt the rule that possession of the property must be coupled with some other

act or acts of part performance, depending on the specific and particular circumstances of the case. In the instant case there can be no doubt of the fact that Respondents went into possession of the property and that they and their tenants and agents held possession for fourteen years, openly and notoriously, pursuant to the contract and exclusive of the rights of Appellants. Their possession was continuous and there was neither abandonment, surrender nor interruption of possession. All this was accomplished with the knowledge and consent of the Appellants. And in addition, Respondents also made valuable and permanent improvements upon the property consisting of fertilizing and cultivating the land, leveling of the ground, improvements to existing ditches, the construction of a new irrigation system, construction of new fencing and maintenance of old fencing and road improvements. All of these improvements were referable exclusively to the contract and were such as would not have been performed except for the contract. See *Price v. Lloyd* and *Hargreaves v. Burton*, supra.

In the case of *Drake v. Smith*, 14 Utah 35, 45 P. 1006 and *Karren v. Rainey*, 30 Utah 7, 83 P. 333, this court held that the erection and maintenance of fences in addition to other improvements on the property was sufficient to constitute part performance of an oral contract for the sale and purchase of land.

In *Bracken v. Chadburn*, 55 Utah 430, 185 P. 1021, this Court also held that the construction and maintenance of irrigation ditches and canals was sufficient part performance of an oral contract to convey property.

In *Hazen v. Swayze*, 65 Utah 380, 237 P. 1097, this court held that payment of the purchase price when coupled with possession and the making of valuable improvements in reliance upon the oral contract constituted a sufficient part performance to entitle the vendor to specific performance. See also collected cases from other jurisdiction on this point at Note 88, 101 A.L.R. 1056.

We also call to the court's attention the recent case of *In re Madsen's Estate*, 123 Utah 327, 259 P. 2d 595, wherein this Court held that where there was no memorandum reduced to writing, but the deceased had accepted the consideration and surrendered possession there was sufficient part performance to avoid the statute of frauds and the deceased's heirs and successors in title and interest should not be allowed to repudiate the oral contract.

It is acknowledged in the instant case that the Respondent had not paid all of the purchase price at the time they were dispossessed by the Appellants, but the difference between payment of all and a major portion of the purchase price would appear to be immaterial in view of this court's decision in the recent case of *In re Roth's Estate*, 2 Utah 2d 40, 269 P.2d 278, wherein this court held that the evidence supported a finding of part performance where the Defendant took possession of the property, made improvements thereto and paid half of the purchase price and had tendered the remaining purchase price to the Vendor.

Although we can find no specific Utah authorities directly in point relating to fertilizing the ground, cultivation of the land, ground leveling work and road im-

provements, we refer to the court to the collation of American authorities on these points in 33 A.L.R. beginning at page 1489 in the annotation entitled "Character and Extent of Improvements Necessary To Constitute Part Performance," wherein the authorities hold that the making of such improvements coupled with such other acts as the particular circumstances of the individual case require, constitute sufficient part performance to justify a court in decreeing specific performance of an oral contract for the sale and purchase of land. Also, while it is admittedly true that the payment of taxes alone is not sufficient part performance, we refer the court's attention to the cases cited in Notes 67, 68 and 69 on page 1109 of 101 A.L.R. holding that payment of taxes, when added to other acts of part performance, will suffice to take a contract for the sale and purchase of real property out of the statute of frauds.

Appellants in their Brief go to some length to belittle the Respondents' acts of part performance. They allege that Respondents' possession of the property was not under the Contract, but rather, it was out of the goodness of Emeron Christensen's heart. Also, at page 17 of Appellants' Brief it is asserted with apparent seriousness that this case does not involve actual possession and permanent improvements. We can only reply that the undisputed facts of the case show possession in every sense of the word and the weight of legal authority establishes that the improvements made were both permanent and substantial.

In a final effort to whittle down the stature of Re-

spondents' case, Appellants cite the dicta in the *Price vs. Lloyd* case supra and the case of *Moffat vs. Hoffman*, 61 Utah 482, 214 P. 308 that "where the improvements do not exceed the rental value of the property they will not be regarded as of such a substantial value and character as to constitute part performance so as to take the case out of the statute" (quotation from the *Price vs. Lloyd* case, supra). A careful reading of both of these cases will show that any excess of value of the use of the land over the value of the improvements is *not* the test in determining the character and permanency of the improvements, but is only one of the circumstances to be taken into consideration in determining whether the purchaser who made the improvements suffered a loss or injury. In the instant case the record will show that when the reasonable value of the Respondent William Christensen's time and effort is given proper consideration and is added to the value of the fertilizing of the land, the cultivation thereof, the leveling of the ground, the improvements made to existing ditches, the construction of new irrigation ditches, new fencing and the maintenance of old fencing and road improvements, they far exceed Appellants' estimate of rental value of \$40.00 per acre and perfectly illustrate the reason why the doctrine of part performance was invoked by the Courts of equity, to-wit, to prevent injury and damage from being inflicted upon one who relied in good faith upon an oral contract. No judgment for damages could adequately recompense the Respondents.



(c) The Second Cause of Action Was Not Barred By The Statute Of Limitations.

Appellants apparently concede that Respondents' First Cause of Action is not barred by the Statutes of Limitations since they did not raise the bar of the statute thereto. However, on the theory that Respondents' Second Cause of Action is entirely separate, distinct and a thing apart from Respondents' First Cause of Action, Appellants contend that the Second Cause of Action is barred by Section 78-12-25, Utah Code Annotated, 1953.

All of the evidence in the case establishes the fact that the contract for the sale to Respondents of the twenty-two and one-half shares of Sevier Valley Irrigation Company Water was part and parcel of the larger contract of the Respondents and Appellants of April, 1942.....that is, unless Appellants' general denial is to be believed. Under the terms of the Contract, Appellants were not obligated to completely perform until Respondents has performed. Respondents had tendered their complete performance as late as the fall of 1955 (R. 104) and were ready, willing and able to perform their part of the bargain in the spring of 1956 when they were dispossessed (R. 42). Thus Respondents' Cause of Action for specific performance as to the twenty-two and one-half shares of Sevier Valley Irrigation Company water did not mature until the Spring of 1956. It was not different in any degree or extent from the time Respondents' First Cause of Action matured, and as the First Cause of Action was not barred by section 78-12-25 of Utah Code Annotated, 1953, neither was the Second Cause of Action.

The *Whitehill vs. Lowe* case, 10 Utah 419, 37 P. 589, cited by Appellants in their Brief is clearly distinguishable from the instant case both as to the statute and the facts and is no authority for raising the bar of limitations in the instant case.

## POINT II.

THE TRIAL COURT DID NOT COMMIT ERROR IN RECEIVING FROM COUNSEL FOR APPELLANTS AND RESPONDENTS LETTERS AND STATEMENTS AFTER THE TRIAL OF THE CASE.

While it may have been somewhat irregular for the Court to receive from counsel for both parties information not formally presented to the Court in open session, nevertheless, no prejudice resulted to the Appellants. In the first place the attorney for the Appellants was at all times advised by the Court and Counsel for the Respondents of the Court's requests but Appellants' counsel at all times, failed, refused and neglected to cooperate in any way in assembling the requested information (R. 177). Also, Appellants' counsel received copies of all of the letters sent to the Trial Court (see endorsements at the bottom of the letters (R. 173 to 175), and Appellants' counsel could have objected to the matters set forth in the letter of Respondents' counsel dated May 23, 1958 (R.175) if he had wanted to do so. He did not so object.

The Trial Judge's Certificate (R. 187 and 188) states:

"That in arriving at a decision in this case the Court took the position as stated from the bench in open court at the hearing on the Motion

for a new trial that the issues in the case were substantially as set forth in the letter of counsel for the Defendants (Appellants here) dated May 20, 1958 (R. 170). . . . , and in reaching said decision the undersigned did not take into consideration any of the matters contained and set forth in the letters of counsel hereinabove referred but the Findings of Fact and Conclusions of Law and Judgment and Decree of the Court dated the 16th day of June, A.D. 1958, were based solely upon the files and records of the case and upon the evidence and testimony of the trial on October 21, 1957.

This Certificate is made for the purpose of implementing and completing the record of this cause since the above and foregoing statements were made by the undersigned from the bench in open court at the hearing on Defendants' Motion for New Trial on the 22nd day of July, A.D. 1958. The said statements hereinabove referred to were not, however, taken down stenographically by the Court Recorder at the time they were made and uttered from the bench as said Court Reporter was temporarily absent from the Courtroom during the argument of counsel upon said Motion for New Trial."

Any technical error committed by the Court in requesting and receiving letters and statements from counsel was harmless and resulted in no prejudice to the Appellants.

### POINT III.

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL.

Appellants' Motion for a New Trial (R. 170) was based on subsections (1) and (6) of Rule 59 A of the Utah

Rules of Civil Procedure relating to irregularity in the proceedings of the Court and insufficiency of the evidence to justify the Court's decision. Respondents respectfully refer the Court to the Argument set forth under Points I and II hereof where these matters are dealt with in detail.

For the reasons set forth under said arguments we assert that the Trial Court acted properly in denying Appellants' Motion for a New Trial.

### CONCLUSION

Respondents urge this Court to uphold the decision of the lower court because said decision is fully supported by the record and no error prejudicial to Appellants has occurred in the proceedings below.

It would be a virtual fraud upon the Respondents if the Appellants were now permitted to escape performance of their part of the oral contract after they had permitted the Respondents to substantially perform their part of the agreement in reliance thereon. There can be no doubt from the record that the agreement of April, 1942, existed, that its terms were in all respects exact, definite and fully capable of specific performance. Said agreement, by reason of its part performance is not within the statute of frauds nor has its enforcement been barred by the statute of limitations. Appellants would have the Court believe that all parts of the contract benefiting them were real and enforceable but that the parts

thereof relating to the sale of the ten-acres of land and the twenty-two and one-half shares of Sevier Valley Irrigation Company Water Stock to the Respondents were figments of Respondents' imagination. The facts are otherwise. The result of the Appellants' present position in this action is on its face so grossly inequitable as to be unconscionable. We submit that for all of the reasons heretofore stated the decision of the trial court should be upheld.

Respectfully submitted,

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