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William Christensen et al v. Emeron Christensen et al : Brief of Defendants-Appellants

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

FILED

WILLIAM CHRISTENSEN, also known

as BILL CHRISTENSEN and CELESTE

CHRISTENSEN, husband and wife,

Plaintiffs and Respondents,

vs.

EMERON CHRISTENSEN and KATHLEEN

CHRISTENSEN, husband and wife,

Defendants and Appellants

DEC 1 1958

Clerk, Supreme Court, Utah

Civil

No. 8966

BRIEF OF DEFENDANTS-APPELLANTS

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

Honorable John L. Sevy Jr., Judge.

J. VERNON ERICKSON, Richfield, Utah

Attorney for Defendants-Appellants.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

vs.

EMERON CHRISTENSEN and KATHLEEN
CHRISTENSEN, husband and wife,
Defendants and Appellants

Civil
No. 8966

BRIEF FOR APPELLANTS

This action was brought by the plaintiffs William Christensen and his wife, Celeste Christensen against Emeron Christensen and his wife, Kathleen Christensen, defendants-appellants herein, to require the specific performance of two alleged oral contracts as hereinafter stated. The defendants-appellants answered denying the existence of such contracts and set up the statute of frauds and statute of limitations as defenses thereto.

The matter was tried before the Court at Richfield, Sevier County, Utah, on October 21 and 22, 1957, and the Court after taking the matter under advisement, entered its Decision on May 29, 1958, for the plaintiffs and against the defendants and subsequently denied defendants' Motion for New Trial.

It is from this decision that the defendants now appeal.

STATEMENT OF FACTS

Complaint was first brought by the plaintiff, William Christensen on Sept. 7, 1956 against the defendant Emeron Christensen, alleging that during the year 1942 the defendant, Emeron Christensen sold two tracts of real property in Sevier County, Utah, one tract containing 8 acres and one tract containing 2 acres, to the plaintiff for the sum of \$1000.00 to be paid upon an installment basis (no definite time being set up in the complaint for such payments) and without interest, such payments to be made in the form of credits against the purchase price for services to be rendered by the plaintiff to the defendant and for certain livestock to be furnished defendant by plaintiff, and that to the date of the filing of the complaint services and livestock had been furnished to the extent of \$684.00, and that plaintiff owed a balance of \$316.00 which he was ready and willing to pay. The complaint further alleged that the plaintiff went into possession of this property in 1942 and that he and his lessees were in possession of same up to and including the crop year of 1955 and that beginning with the crop year of 1956 he was dispossessed by the defendant. And further alleged that during his occupancy he improved the ground by fertilizing, leveling, and repairing fences. (R A-1)

The defendant answered the complaint and denied the existence of the contract and set up that although the alleged contract was for the sale of lands, no note or memorandum thereof was ever made in writing expressing the consideration and terms, subscribed by the defendant or any authorized agent of the defendant, and that the alleged contract was not performed within one year from the date of the alleged making and is void by reason of the Statute of Frauds. (R A-23)

Thereafter the matter was set for trial to begin on March 22, 1957 at 10 A.M. (R A-26) but was thereafter postponed and on April 2, 1957, counsel for plaintiff filed a motion to amend the complaint and for joinder of additional party defendant and party plaintiff which was granted by the court (R A-28) and an Amended Complaint was thereupon filed joining Celeste Christensen, the wife of plaintiff, as a party plaintiff, and Kathleen Christensen, the wife of defendant, as a party defendant. The Amended Complaint set up a Second Cause of Action in which it was alleged that during the year 1942 the plaintiffs and defendants entered into another oral agreement whereby it was agreed that the plaintiffs would convey to defendants 35 acres of real property they owned in Sevier County, Utah, with 17½ shares of Elsinore Irrigation Canal Company water, in consideration for the conveyance by Defendants to Plaintiff Celeste Christensen of 15 acres of real property in Sevier County, Utah, owned by defendant Kathleen Christensen, plus 22½ shares of Sevier Valley Irrigation Company water stock, and as a further consideration to the deal the defendants agreed to assume and discharge a certain financial obligation then owed by the plaintiffs to the Federal Land Bank of Berkeley. The plaintiffs then allege that all of the contract had been performed save and except the defendants had failed and refused to transfer and deliver to plaintiffs the 22½ shares of Sevier Valley Irrigation Company water stock. (R A-37)

Defendants answered the First Cause of Action of the Amended Complaint denying they had ever entered into such oral contract and again setting up the statute of frauds, and entered a motion to dismiss plaintiffs' Second Cause of Action, which motion was overruled by the court. (R A-49) (R A-53) The defendants then answered the Second Cause

of Action denying they had ever agreed to such transaction so far as the transfer of 22½ shares of Sevier Valley Irrigation Water stock was concerned, and further setting up that this cause of action was barred by reason of the statute of limitations. (R A-54)

The testimony as to the contracts claimed by the plaintiffs and the denial thereof by the defendants is as follows:

The plaintiff, William Christensen, testified in substance as follows:

In the spring of the year 1942 he had a conversation with the defendant Emeron Christensen which took place in the plaintiff's stack yard and he and the defendant were the only persons present and at that time the defendant offered to trade land. The plaintiff then said if the defendant would give him clear title on his home, 15 acres of farming ground, and 22½ shares of Sevier Valley Water, he would give the defendant 35 acres of land and 17½ shares of Elsinore water. (R 15-18) And at that time the defendant said he would sell his 10 acre tract (the 8 and 2 acre tract as described in the First Cause of Action) to the plaintiff for \$1000.00 (\$100.00 per acre) but this transaction was not a part of the other transaction involving the trading of lands and water. (R 15 to 18) The defendant told him he could pay as they went along and haul his beet pulp to the sugar factory and deliver livestock. That two or three days after the date this conversation took place the plaintiff took defendant a bay mare and in the fall of 1942 he delivered other animals to the defendant and that his wife kept track of these transactions in a note book. That he hauled 255 tons of beet pulp for defendant at \$1.50 per ton in the fall of 1943 and spring of 1944. (R 19 to 28)

Then in June of 1942 the defendant and his wife called at the home of plaintiff in Richfield, Utah, when they brought the plaintiffs the deed to their home released by the Federal Land Bank of Berkeley, the deed to the 15 acre tract and abstracts on the 10 acre tract, and the defendants then received from

plaintiffs the deed to the 34 acre tract and 17½ shares of water in the Elsinore Canal Company and that plaintiff asked the defendant Emeron Christensen when he was going to get the deeds on the 8 and 2 acre tracts and defendant answered 'You have got it just about paid for. I'll fix it all up with you, your water stock and your deeds and you can finish paying me for it.' (R 29 to 31)

That in the spring of 1943 he had another conversation with the defendant, Emeron Christensen at his farm and that the defendant Emeron Christensen said he had been too busy to get things fixed but would do so right away. (R 32)

That he had another conversation with defendant before 1950 at his home in Richfield when the defendants called to get plaintiff to transfer a cattle permit he was holding for defendant and when asked when he was going to fix up plaintiffs' property, defendant said 'Any time.' " (R 34)

The defendant, Emeron Christensen testified in substance as follows:

"That he never had any oral agreement with plaintiff for the sale of the 8 and 2 acre tracts and never agreed to sell him that property for \$100.00 per acre. That he heard plaintiff testify he was to buy that property and work it out, sell livestock and apply it and have all the time he wanted without interest. Defendant denied that this was the truth. (R 119) Defendant said the arrangement he did have with the plaintiff was this: Plaintiffs had their home, 11½ shares of water stock in Sevier Valley Canal Co. and their farm mortgaged to Federal Land Bank of Berkeley. Defendant agreed to pay off the balance on the mortgage in the sum of some \$2300.00 which would release plaintiffs' home, their water stock and farm, and deed plaintiff a 15 acre tract of farming ground which could be watered under the Sevier Valley canal and on which plaintiff could use his 11½ shares of Sevier Valley water, in consideration for the plaintiffs deeding to defendants a 34 acre tract with 17½ shares Elsinore Canal Water. That this completed the transaction and there was

never any agreement on defendants' part to further transfer to plaintiffs 22½ shares of Sevier Valley water. (R 127 - 128)

With regard to the 8 and 2 acre tracts, defendant let the plaintiff farm this during the years 1942 to 1955 with the use of such water of defendants as plaintiff helped himself to. Water was never turned to defendant but he used such water of defendant's stream as he needed. He did this to help plaintiff out and let him have the land for the payment of the taxes thereon. That a reasonable rental value for the land would be about \$40.00 per acre. That the value of the land in 1942 would have been in excess of \$100.00 per acre, and that defendant had bought a like amount of land ½ mile south of this tract at that time for \$3000.00. He said the plaintiff had never asked him to convey the 8 and 2 acre tracts as it was understood he was just farming it. He denied receiving the livestock as testified to by plaintiffs, and denied the plaintiffs having any credit by reason of hauling pulp, potatoes or coal, for which he had not been paid. (R 120 to 136)

That during all of this time plaintiffs never paid any of the water assessments on the 22½ shares of Sevier Valley water stock they now claim, but all of such assessments were paid by the defendant." (R 121 - 122)

As to the improvements placed on the property during the years plaintiff farmed it, the plaintiff testified:

That in 1943 and 44 he manured the ground (R 49) That in the fall of 1945 and spring of 1946 he had the land leveled at a cost of \$300.00 which he paid the Otter Creek Reservoir Co. under a cooperative plan which included his 15 acre tract also. (R 51-52) He also paid the County \$85.00 on a touch up job that year (R 53). He repaired the fences to the extent of replacing ½ dozen posts and new wiring the cost of which he didn't say. (R 54) He worked three weeks on improving a County Road to the property in 1943 or 44. (R 54 - 55)

As to the improvements on the land in question the defendant testified:

That the ground at present time has to be leveled—that it is almost impossible to irrigate. That the fences are like they always have been, posts sticking up here and there and loose wire. (R 126) That the County Road plaintiff testified he worked on runs for about a mile and serves plaintiff's other piece of ground as well as the ground in dispute, and land belonging to others and it is a County Road and not on the property in dispute. (R 129 - 130)

After the trial of the action was concluded in October of 1957, the Court took the matter under advisement and in April of 1958 called counsel for plaintiffs and for the defendants to his office and stated he wished to obtain some additional facts before rendering a decision. It was the understanding of counsel for defendants that any such additional facts to be submitted would be submitted by a stipulation by counsel for all of the parties. On May 14, 1958, a letter was written to the Court by counsel for the plaintiffs (R 173 - 4) in which a detailed statement of principal and interest on the Federal Land Bank loan of plaintiffs was set forth purporting to be information received from the Federal Land Bank of Berkeley, and further submitting valuations on land and water rights involved in this action.

Counsel for defendants took exception to such letter and procedure and wrote the Court on May 20, 1958 (R 175) to the effect that any evidential information to be submitted should be submitted by stipulation between counsel and made a part of the record.

Notwithstanding this objection another letter was written to the Court on May 23, 1958 (R 176) by counsel for plaintiffs with further estimates and valuations.

And the Court thereafter on May 29, 1958, entered his decision in this matter. (R 155 - 6)

STATEMENT OF POINTS

- I. THE DECISION IS CONTRARY TO LAW AND THE EVIDENCE.
 - (a) Evidence was Insufficient to Prove the Existence of a Contract on Either Cause of Action.
 - (b) If Contract on First Cause of Action Existed Terms were too Uncertain to Entitle Specific Performance.
 - (c) If Contract on First Cause of Action Existed It was Within the Statute of Frauds.
 - (d) Second Cause of Action was Barred by Statute of Limitations and Statute of Frauds.
- II. THE TRIAL COURT COMMITTED ERROR IN REQUESTING AND RECEIVING FROM PLAINTIFFS' COUNSEL, LETTERS AND STATEMENTS OF EVIDENCE AFTER THE TRIAL OF THIS ACTION, AND OBJECTED TO BY COUNSEL FOR DEFENDANTS.
- III. THE TRIAL COURT COMMITTED ERROR IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL.

ARGUMENT

POINT I. THAT THE DECISION IS CONTRARY TO LAW AND THE EVIDENCE.

(a) Evidence was Insufficient to Prove the Existence of a Contract on Either Cause of Action.

The law is well settled that before specific performance can be decreed the existence of the contract must be established by clear and satisfactory evidence and that a greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for damages.¹

¹ See Pomroy's Specific Performance of Contracts, 2nd Ed. No. 159 and also as quoted in Ward v. Ward, 94 Colo. 275, 30 P. 2nd, 853, and also in Mestas v. Martini, 113 Colo. 108, 155 P. 2nd 161.

Our Utah Court has held that there can be no contract unless the minds of the parties have met and have mutually agreed. This was true in the case of *Montgomery v. Berrett*, 40 Utah 385, 121 P. 569 wherein it was held:

“Plaintiff seeking the specific performance of a parole contract must establish the terms thereof with a greater degree of certainty than is required in an action at law, and he must show a clear, mutual understanding and a positive assent of both parties to the terms of the contract.”

and Justice Frick states at page 570 of the Pacific report:

“(1) It is now well settled that, where a party seeks specific performance of a parol contract in equity, he must establish the terms thereof with a greater degree of certainty than would be required to establish the same contract in an action at law. *Pomeroy on Confs.* (2d Ed) No. 159. Referring to this question, the Supreme Court of California, in a recent case, entitled *German Svgs. & Loan Soc. v. Mc Lellan*, 1954 Cal. at page 716, 99 P. at page 196, states the rule in the following language: ‘There can be no contract, unless the minds of the parties have met and have mutually agreed. Equity requires as a condition of specific performance a clear, mutual understanding and a positive assent of both sides as to the terms of the contract.’ ”

“In 36 Cyc. 543, in speaking of the essentials of a contract which is enforceable in an action for specific performance, it is said: ‘In general, the contract must have the essentials of a contract valid and binding at law, in order to be enforceable in equity. It must be a completed contract; there must have been a clear, mutual understanding and a positive assent on both sides as to the terms of the contract. It must be sufficient, definite and certain. * * * ’ ”

Practically the same rule is laid down by Mr. Justice Straup in *Price v. Lloyd*, 31 Utah, 86, 86 Pac. 768, for at page 772 of the Pacific Report he says:

“* * * In order to ingraft this exception onto the statute of frauds, which requires that a conveyance

of lands must be evidenced by a memorandum in writing there should, in addition to the fact of possession and making of improvements, **be clear and conclusive proof of the contract, its scope and terms.** (bold face ours) The object of the statute of frauds is to prevent the transfer of titles to lands 'on loose and indeterminate proofs of what ought to be established by solemn written contracts.' *Taylor v. Ashley*, 15 Tex. 50. In order to sustain a verbal contract for the sale of land, of course, it is absolutely necessary to prove the verbal contract either by direct or circumstantial evidence; and this must be accompanied by proof of possession and strong equities independent of the contract."

And a California case, *Weisbrod v. Weisbrod*, 81 P. 2d 633, 27 Cal. App. 2d 712, held: "Without mutuality, no specific performance of an assented agreement can be decreed."

And in another Utah case, *Ward v. Ward*, 85 P. 2d, 635, 96 Utah 263, it was held:

"To entitle a party to specific performance of a contract, the contract must in all respects be fair, just and reasonable, and the compensations must be mutual."

and

"To entitle a party to specific performance, the contract must be attended with all the attributes of fairness and honesty as will appeal to the conscience of the chancellor, and the terms of the contract may not be pieced out of oral testimony uncertain and contradictory in nature."

The situation that we have in the case at bar, before the Court can consider whether the alleged contract is within the statute of frauds or is taken out by part performance, is then whether or not a contract actually existed. Did the defendant agree to sell to the plaintiffs, and if so what were the terms of the contracts?

Inasmuch as the first and second causes of action are separate transactions (R 18-19) testimony as to the alleged

sale of the lands involved in the first cause of action should be considered as was given by the plaintiff, William Christensen who testified that in the spring of 1942 the defendant Emeron Christensen met him at his (the plaintiff's stack yard and agreed to sell him the two tracts of land comprising 10 acres for \$100.00 per acre, and that plaintiff could pay defendant in livestock and services any way he wanted to, without interest. There was no time set for any of the payments. The plaintiff could pay just what he wanted any time he wanted and for as long a time as he wanted. According to plaintiff's testimony the contract could have gone on forever, and the defendant would have had no action against the plaintiff for non payment etc.

The testimony of plaintiff in court as to the time and place of the making of the alleged contract was contradictory to the sworn answers of the plaintiff to the written interrogatories of the plaintiff on file in the action. In his sworn Answer to Interrogatory No. 1 the plaintiff said:

"The defendant Emeron Christensen offered to sell the said 8.00 acre tract of real property described in Plaintiff's Complaint to the plaintiff * * * on numerous occasions during the spring, summer and fall of the year 1942. * * * The said representations were made on the said real property involved in this case and at the home of the defendant Emeron Christensen at Elsinore, Utah. The plaintiff and the defendant and the wife of the plaintiff, Celesta Christensen, were present at the time said representations were made." (bold face ours) (R A-15)

Plaintiff's answer to Interrogatory No. 4 was:

"The negotiations for the sale and purchase of the 10.0 acre tract of property described in plaintiff's complaint transpired over a period of several months during the spring, summer and fall of the year 1942. The plaintiff and the defendant were present at the time said negotiations were completed and the oral

agreement was reached for the sale and purchase of said 10.0 acre tract of real property.” (bold face ours) (R A-16)

The plaintiff's testimony in Court was somewhat different. He testified that the defendant offered to sell only the one time, at his (the plaintiff's stack yard) in the spring of 1942, and that only he and the defendant were present. (R 60 and 66)

The plaintiff introduced a number of pulp receipts tending to substantiate his claim that he hauled beet pulp for the defendant during the fall of 1943 and spring of 1944. Some were in the defendant Emeron Christensen's name and some were in other names. The plaintiff claims he was not paid for this labor by the defendant and that the same was to apply on the purchase price of the property at the rate of \$1.50 per ton, but the receipts in themselves do not show a credit by Emeron Christensen to the plaintiff, and there is no memorandum in writing or other substantive evidence to show that defendant ever agreed to pay defendant \$1.50 per ton for hauling beet pulp, or that he had any credit from defendant for such purported services whatsoever.

The plaintiffs also introduced in evidence a certain account book in which the plaintiff, Celeste Christensen, had noted certain livestock purportedly sold to defendant during the years 1943 to 1944, for which plaintiffs claimed credits on the purchase price of the land in question. These notations were made by plaintiff Celeste Christensen and there was no notations by the defendants that same were to be credited on any contract of sale. The defendant flatly denied such were credits or that he received any livestock from plaintiffs.

So here we have a situation of an oral contract claimed

to have been made with all of the terms and conditions thereof being alleged by the plaintiffs, all the credits on purchase price being also alleged by plaintiffs, 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 or payment thereon of services or livestock by the defendants.

Defendant testified that during the years in question he let the plaintiff, his brother, farm this ground because it was situate where he didn't have other farming ground and let him use the ground if he would keep it up and pay the taxes each year and he terminated such arrangement when he bought adjoining property in 1955.

And as to plaintiffs' Second Cause of Action, under an Amended Complaint filed some seven months after the first Complaint was made, wherein they allege they were to have 221½ shares of Sevier Valley Water stock under an exchange agreement (also oral) entered into between the parties on the same day (the spring of 1942), the defendants denied plaintiffs were to have this water under any agreement ever made but admitted there was an agreement for exchange of lands and water which had been fully consummated. No evidence to substantiate the alleged agreement of defendants to give plaintiffs 221½ shares of water in the Sevier Valley Canal Company, was introduced, other than the plaintiffs' testimony.

**(b) If Contract on First Cause of Action Existed
Terms were too Uncertain to Entitle Specific Performance.**

Assuming that the plaintiffs' oral contract did exist, did it meet the test of sufficiency to entitle it to be specifically performed? We think not. Specific performance will

not be decreed where the contract is incomplete, uncertain or indefinite.²

If the plaintiffs are to be believed, the defendant Emerson Christensen agreed to sell the premises, but there was no fixed amounts of payments or time for payment. The plaintiff, William Christensen said he could pay in labor and services at any time he wanted. (R 61) There was no specific place, terms or time of payment.

Corpus Juris Secundum, Vol. 81, page 493, sets forth the following on Time and Place of Payment or Performance:

"(1) In General. In order to warrant a decree of specific performance thereof, a contract must be reasonably definite and certain with respect to the time, place and manner of payment or performance. Specific enforcement of a contract may be precluded by indefiniteness and uncertainty as to **duration** or as to **the time for performance or the time or terms of payment**. Likewise, **the place of performance or payment** must be stated with sufficient certainty or definiteness or be capable of ascertainment from the contract." (bold face ours)

(2) Failure to State Time. Where it is the intention of the parties to defer payment, but no provision is made as to the time of payment, the uncertainty is fatal; but mere failure to fix a time for payment will not prevent specific performance where deferred payment was not contemplated. **Where payment by the terms of the contract is to be deferred, but the time of payment is not specified, the uncertainty is fatal.** Likewise, it is held in some, but not other jurisdictions that where a mortgage is to be given, a failure to state when it shall mature or be payable

² See Dodge Bros. v. Williams Estate Co. 52 Nev. 364, 287 P. 282, 283, wherein it was held: "There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain or indefinite."

renders the contract so indefinite and uncertain as to defeat specific performance. * * * (bold face ours)

If a purported agreement is too indefinite to ascertain the intention of the parties, it cannot be enforced; not for want of an equitable remedy but because of the absence of clear, unmistakable proof of all the essential Terms of a contract. See *Buckmaster v. Bertram*, 186 Cal. 673, 676, 200 P. 610. In this case a written contract was involved wherein the plaintiff agreed to sell and convey to defendant, and defendant agreed to buy, five parcels of land in a certain tract in a county for \$1,000, payable "at the times and in the manner hereinafter mentioned, * * * to wit, in the form of a mortgage payable to S. and due April 3, 1919", and the court held this contract too uncertain as to payment of the price to be enforceable.

And the case of *Mariposa Commercial & Mining Co. v. Peters, et al*, reported in 8 P. 2d, 849, decided by the Supreme Court of the State of California, held "Agreement giving option held incapable of specific performance where silent on rate of interest and date of maturity of indebtedness."

And a Utah case, *Olsen v. Gordon et al*, reported in 125 P. 2d, 413, held "An oral contract for the purchase of real property must be sufficiently definite and certain so that it can be enforced by the court and a partial performance cannot make up for the deficiency in the understanding between the parties."

It was held in the case of *Edward H. Snow Development Co. v. Oxsheer*, 62 N.M. 113, 305 P. 2d, 727, that where binder agreement for the purchase of land provided that balance of price was to be paid as lots were released at the convenience of the purchaser but no time was set for pay-

ment of the balance, there was no presumption that a reasonable time was intended by the parties and the binder was incapable of specific performance, and a court of equity will not decree specific performance of a contract which does not itself set a time for payment of a deferred balance.³

(c) If Contract on First Cause of Action Existed it was Within the Statute of Frauds.

The law relating to the Statute of Frauds is set out in 25-5-3 Utah Code Annotated 1953, which provides:

“Leases and contracts for interest in lands.— Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.”

The alleged contract in this action being one in parol, if it exists, is obviously under the statute of frauds and non-enforceable. The plaintiffs have sought to take the matter out of the statute of frauds relying upon part performance consisting of (1) alleged part payment and (2) the going into possession of the premises and (3) the making of permanent improvements thereon.

The credits plaintiffs claims on the purchase price were as heretofore noted in the sum of \$684.00 for services and livestock as set forth by them, with a denial thereof by defendants, and no receipts from the defendants for such items as credits on purchase price of the land involved. These

³ Quoting 81 C.J.S. No. 34, p. 493: “Where it is the intention of the parties to defer payment but no provision is made as to the time of payment, the uncertainty is fatal; but mere failure to fix a time for payment will not prevent specific performance where deferred payment was not contemplated.”

claims for credit on purchase price are nothing more than claims by the plaintiffs, denied by defendants, totally uncorroborated by any outside source, or by any written note or memorandum by the defendants.

The going into possession of the premises was explained by defendant Emeron Christensen. He let his brother go into possession and farm the ground for keeping it up and paying the taxes and he took the property back when such arrangement was no longer tenable.

The case at bar does not involve actual possession and permanent improvements in the usual sense. The leveling plaintiff said he did was in conjunction with a County project and benefitted plaintiff's 15 acre tract as well as the 10 acres in question. His fence repairs were trivial and his work on a County road not contiguous to the property which benefitted his 15 acre tract and property of others was certainly not sufficient. Even if the evidence had been clear and strong enough to impart life and validity to a contract invalid because verbal, the essential requirements for invoking equity are absent.

The defendants contend these were only ordinary expenditures that were required if plaintiff farmed the land and are requirements that are most often assumed and met by a lessee when farm renting, and especially in view of the fact that plaintiffs received the crops, rents and profits from said land. The evidence is certainly not clear if they benefitted the ground in question to any great and substantial extent. The testimony of defendant was that the ground had not been permanently improved and that it still needs to be leveled and the fences repaired.

If the improvements were in fact made by plaintiff, it

should be brought to attention that such expenditures would be far less than plaintiffs' income from the property during the time he used same—from 1942 to 1955, during all of these years he received the benefit of the crops thereon, and expended only the taxes thereon with such upkeep as would be ordinarily necessary.

There are authorities to the effect that where the improvements do not exceed the rental value of the premises 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 of frauds.⁴

In the case at bar the defendant testified that a fair rental for the property in question would be \$40.00 an acre (R 125) At this rate the rental value of the land for 14 years would far exceed any purported improvements made upon the premises. As Justice Straup said in the case of *Price v. Lloyd* 31 Utah, 86, 86 P. 767, at page 771 of the *Pacific Reporter*:

“*** Here it is shown that the rental value of the land far exceeded the improvements made upon the premises. While such fact alone may not be the test in determining the character and permanency of the improvements, still it is a strong circumstance in determining whether the purchaser or donee, who made the improvements suffers a loss or injury, if the contract is not specifically performed. For, as the authorities say, it must appear that the improvements relied upon as part performance are of a character permanently beneficial to the land and involving a sacrifice to him who made them because and in reliance of the gift. If he had gained more by the

⁴ See *Wooldridge v. Hancock*, 70 Tex. 18 6 S.W. 818; *Schoonmaker v. Plumer* (Ill) 29 N.E. 1114; *Buhler v. Trombly* (Mich) 102 N.W. 647; *Burns v. Daggett* 141 Mass. 368, 6 N.E. 727; *Poullain v. Poullain*, 76 Ga. 420, 4 S.E. 92; *Pom. Spec. Per. Cont.* 2nd Ed. No. 128, 129.

possession and use of the land than he has lost by his improvements, or if he has been in fact fully compensated for the improvements, they will not be available to him as ground for specific performance. *Gallagher v. Gallagher* (W. Va.) 5 S.E. 297; *Browne*, St. Frauds No. 487-891."

In the case of *Ravarino v. Price* (Utah) 260 P. 2d 570 it was held:

"Even if general improvements without possession are sufficient to take oral contract to convey outside statute of frauds, where possession is lacking court must be convinced that no reasonable doubt exists as to whether improvements are explainable on some basis other than hypothesis of oral contract."

In 36 Cyc. 670 the rule is stated as follows:

"If improvements are relied upon, not merely as evidence that an actual possession was taken, but as an additional, independent ground for specific performance, they must be both valuable and permanent. Slight expenditures for repairs and the like, such as might naturally be made by any person as incident to an occupation of the premises, are insufficient."

And citing *Johnston v. Baldock*, 201 P. 654, 83 Okl. 285:

"Improvements relied on in connection with possession must be both valuable and permanent to take an oral land sale contract out of the statute of frauds."

And a Utah case:

"In action to quiet title to real property wherein defense was that defendant was in possession pursuant to parol gift, evidence that defendant made expenditures upon real estate was not sufficient to take case out of statute of frauds even had defendant definitely proven promise to give her the property, where **value of defendant's free use of the property exceeded amount allegedly spent for improvements.**" (bold face ours) *Moffat v. Hoffman*, 61 U. 482, 214 P. 308.

(d) Second Cause of Action was Barred by Statute of Limitations and Statute of Frauds.

Under Plaintiffs' Second Cause of Action filed some seven months after the First Cause of Action, they seek to have 22½ shares of Sevier Valley Canal Company water stock transferred by defendants to them, under an alleged oral contract made during the year 1942. Defendants admitted a certain transaction took place between the parties whereby the plaintiffs conveyed to defendants 35 acres of real property in Sevier County, Utah, with 17½ shares of Elsinore Irrigation Canal Company water, in consideration for which defendants conveyed to plaintiff Celeste Christensen, 15 acres of real property in Sevier County, Utah, and further assumed and paid the Federal Land Bank of Berkeley some \$2300.00 which the plaintiffs owed under a mortgage, the payment of which released their home and farm and 11½ shares of water stock in the Sevier Valley Canal Company. But defendants specifically denied they had ever agreed to transfer 22½ shares of water in said Sevier Valley Canal Company as part of said exchange agreement.

Defendants contend the evidence was insufficient to support such contention of plaintiffs and to prove the existence of the contract, and in their answer alleged the same was barred by the statute of limitations. Section 78-12-25 (1) Utah Code Annotated, 1953, reads:

“(1) An action upon a contract, obligation or liability not founded upon an instrument in writing; *** (etc.) provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.”

Plaintiffs' right of action accrued in 1942 when the exchange agreement was made and consummated as to all of

the deeds and exchanges actually made between the parties. Now they cannot come back some 14 years later and ask for specific performance. The case of *Whitehill v. Lowe*, 10 U. 419, 427, 37 P. 589, applies 2 Comp. Laws 1888, which differs little from the present section 78-12-25. Under this section an action for specific performance of an alleged verbal contract to transfer certain shares of mining stock upon which right of action accrued in 1884, was barred for not having been commenced until 1892.

It is inconceivable that the defendant, Emeron Christensen would pay the water taxes upon this water (as his testimony shows during the 14 years in question) if the water belonged to plaintiffs and the plaintiffs had the right to the transfer of the same.

POINT II

THE TRIAL COURT COMMITTED ERROR IN REQUESTING AND RECEIVING FROM PLAINTIFFS' COUNSEL, LETTERS AND STATEMENTS OF EVIDENCE AFTER THE TRIAL OF THIS ACTION WAS CONCLUDED, AND OBJECTED TO BY COUNSEL FOR DEFENDANTS.

Defendants contend that it was highly irregular for the Court to request and receive from the plaintiffs' counsel, the letter of May 14, 1958 (R 173-4) in which valuations were submitted by plaintiffs as to the land and water rights involved as well as information pertaining to the Federal Land Bank loan of plaintiffs, and the letter of May 23, 1958 (R 176) in which counsel for plaintiffs again submits valuations in response to the Court's request and in order to get the matter determined and settled.

The Court has by a certificate stated that such letters were not taken into consideration in making a decision in the action, but it is a matter of record that his Decision was made on May 29, 1958, some six days after the letter of May 23, 1958, submitted by plaintiffs' counsel. And defendants contend that such procedure by the Court was irregular and prejudicial to the defendants in this action.

POINT III

THE TRIAL COURT COMMITTED ERROR IN DENYING DEFENDANTS' MOTION FOR NEW TRIAL.

Defendants assert that for all the reasons set forth herein and above, the lower Court committed error in denying their Motion for a New Trial, and submit that said Court, pursuant to Rule 59 (a) of the Utah Rules of Civil Procedure, should have made new Findings, Conclusions and Judgment in Defendants' favor.

CONCLUSION

Defendants can conceive of no possible way the court could have held for the plaintiffs in this action.

First, the existence of the agreements constituting the oral contracts were never sufficiently proved.

Second, specific performance could not be granted, even if proof of the contracts was sufficient, by reason of the uncertainty, indefiniteness and ambiguity of the terms as set forth by the plaintiffs.

Third, it does not appear that plaintiffs position is such that an action at law for damages would not have afforded them adequate relief.

Fourth, the alleged oral contracts are clearly within the statute of frauds and not enforceable if they exist at all. There was no memorandum in writing or no part performance sufficiently proved to take the contracts out of the statute, and plaintiffs have not suffered loss or damage having been fully compensated by the use of the property from 1942 to 1955 inclusive, having received the crops and income therefrom during said years, and any payments allegedly made by them for taxes and improvements during such years would be far less than the income received, and would in fact be less than a fair rental value for the use of the premises.

Accordingly defendants assert the decision rendered by the trial court should be reversed.

Respectfully submitted,

J. VERNON ERICKSON,
Attorney for Defendants-Appellants.