

1960

Ray Keith Sudbury and Ruth Jean Sudbury v. Olaf Theodore Stevensen, Jr., and Barbara Ann Stevensen : Brief of Appellants

Utah Supreme Court

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Bridwell, Reynolds & Cuthbert; Attorneys for Appellants;

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IN THE SUPREME COURT
of the

STATE OF UTAH
FILED

JUN 27 1960

Clerk, Supreme Court, Utah

RAY KEITH SUDBURY, and RUTH
JEAN SUDBURY,

Plaintiffs and Appellants,

—vs.—

OLAF THEODORE STEVENSEN, JR.,
and BARBARA ANN STEVENSEN,

Defendants and Respondents.

BRIEF OF APPELLANTS

BRIDWELL, REYNOLDS &
CUTHBERT

Attorneys for Appellants

506 Judge Building
Salt Lake City, Utah

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IN THE SUPREME COURT of the STATE OF UTAH

RAY KEITH SUDBURY, and RUTH
JEAN SUDBURY,

Plaintiffs and Appellants,

—vs.—

OLAF THEODORE STEVENSEN, JR.,
and BARBARA ANN STEVENSEN,

Defendants and Respondents.

Case No.
9220

BRIEF OF APPELLANTS

STATEMENT OF FACTS

Prior to June, 1958, Plaintiffs and Defendants were partners, conducting a business known as "Ollie's Terrace Room" in Salt Lake City, Utah. Plaintiffs acquired their one-half ($\frac{1}{2}$) interest in that partnership from Defendants by paying to Defendants the sum of \$42,500.00 (Deposition Keith Sudbury, page 3, line 8).

In June, 1958, the parties agreed in writing for the sale of Plaintiffs' partnership interest back to Defendants for the lesser sum of \$31,608.41. A copy of that

agreement, the subject of this suit, is attached to Plaintiffs' complaint as Exhibit "A." An unpaid contract balance of \$25,408.41 was to be liquidated by Defendants in weekly installments of \$100.00 each, commencing September 1, 1958, three months after the contract was signed.

In addition to this first three month period without payment, Defendants were accorded a cumulative fifteen week grace period, from and after September 1, 1958 (Paragraph III C, Exhibit "A").

The provisions of the contract pertaining to security and default are of prime importance to the case and provide as follows:

"SECURITY FOR PERFORMANCE:

V.

That it is agreed that as security for performance of the payment of money herein specified to be made to SELLERS that BUYERS shall execute a blanket chattel mortgage upon all equipment and tenants' improvements in and upon those premises that have been used for the conduct of the Limited Partnership herein referred to, which mortgage it is understood and agreed shall be considered a second mortgage as to the mortgage that BUYERS presently contemplate entering into to obtain financing of said business; that it is understood and agreed that the equipment and fixtures to be mortgaged to SELLERS under the terms of this agreement may be traded or replaced by BUYERS without first obtaining consent of SELLERS, provided that none of such

equipment is disposed of by BUYERS for the sole purpose of raising capital or satisfying creditors.

DEFAULT:

VI.

That it is agreed that in the event of BUYERS' failure to pay to SELLERS the sums due them under the terms of this agreement that SELLERS may, at their option, elect to proceed in either one or the other of the following designated manners:

A. *MORTGAGE FORECLOSURE*: SELLERS may, at their option, declare the whole of the unpaid balance under the terms of this agreement at once due and payable and proceed to collect same and foreclose their security herein given, it being understood and agreed in such event, however, that SELLERS shall have no rights against BUYERS beyond BUYERS' assets that may be represented by the furniture, fixtures, tenants' improvements, and leases upon the premises herein referred to, and it is agreed that in the event of election to foreclose as in this paragraph stated, SELLERS may sell any of said property at public or private sale and retain the full proceeds thereof as their own in discharge of any remaining obligation of BUYERS to SELLERS.

B. *FORFEITURE*: SELLERS, alternative to foreclosure as above specified, may take all of BUYERS' right, title and interest in and to said business contemplated by the terms of this agreement to the full exclusion of all right, title and interest of BUYERS in and to any of said property and the business represented thereby in full discharge of any remaining obligations, and in

such event SELLERS may hold same as their own and operate said business in the manner that they may deem desirable, being responsible, nevertheless, to the creditors of BUYERS as said creditors' rights may appear as provided by law.

That as an express and integral part of the consideration of the terms of this agreement, and in consideration of SELLERS' consenting that BUYERS' assets shall not be amenable to process by SELLERS in the event of default by BUYERS, that BUYERS hereby covenant and agree that in the event of default and an election by SELLERS to proceed under the terms of the foregoing forfeiture provision that BUYERS will never raise nor assert as a defense to any such action defense of forfeiture, and they hereby expressly waive and covenant not to claim as their own any rights in any of said property nor rights to refunds of any moneys that may be paid under the terms of this agreement, and BUYERS covenant that they will not sue upon theory of forfeiture nor assert said theory either by way of counterclaim, affirmative defense or offset in any action that may be brought by any of the parties to this agreement; that each party to this agreement understands that Courts do not favor forfeitures, but that each party consents that an indispensable part of the consideration for the terms of this agreement is that BUYERS covenant not to sue or defend upon the theory of forfeiture and they do hereby expressly waive and consent not to assert such right."

At the time the agreement between the parties was negotiated, the provisions quoted above were specifically and fully discussed by Keith Sudbury, one of the Plain-

tiffs, and Theodore Olaf Stevenson, one of the Defendants (Deposition Keith Sudbury, page 38, line 30 through page 41, line 15). No chattel mortgage was ever executed.

No payment was made on the contract by Defendants until payment of \$300.00 on December 8, 1958, which was at the end of the fifteen weeks grace period. The \$300.00 was for the payments that were due September 1, 8 and 15, 1958.

On January 2, 1959, Defendants paid \$1,000.00 for payments due for September 22, 1958 through November 24, 1958 inclusive. No other payments were made until March 16, 1959; thereafter all payments were made fifteen weeks after their due dates and on the last day of the fifteen weeks grace period (Ex. P-3).

On August 10, 1959, Defendants gave Plaintiffs two checks in the amounts of \$100.00 and \$200.00 respectively. The \$200.00 check was for payments due April 20, and 27, 1959. The \$100.00 check, postdated to August 17, 1959, was for the installment due May 4, 1959.

Both of those checks were dishonored by Defendants' bank. Because of the refusal to honor the checks, Defendants were then delinquent a total of eighteen payments totalling \$1,800.00.

Plaintiffs gave Defendants written notice on August 17, 1959 that they would accept no further installment payments and were accelerating the payments. Defendants were told that there was a balance due Plaintiffs of \$23,506.51 which Plaintiffs would expect a short time

after Defendants returned from Europe so that it would not be necessary for Plaintiffs to foreclose Defendants equipment or take over the business (Exhibit P-4).

Thereafter on September 1, 1959, Defendants attempted to pay \$500.00, purportedly to bring the contract payments current. That sum was refused by Plaintiffs and this lawsuit resulted (Exhibit P-5).

Defendants filed no answer in the case. The case was heard by the trial court on motions for summary judgment. Defendants were granted summary judgment against Plaintiffs, and this appeal results.

STATEMENT OF POINTS

POINT ONE

THE FINDINGS AND JUDGMENT OF THE TRIAL COURT THAT DEFENDANTS WERE NOT IN DEFAULT UNDER THE CONTRACT, AND THAT THE CONTRACT WAS VALID AND SUBSISTING IS CONTRARY TO THE EVIDENCE WHICH IS UNCONTRADICTED THAT DEFENDANTS WERE DELINQUENT A TOTAL OF EIGHTEEN PAYMENTS.

POINT TWO

THE JUDGMENT, FINDINGS AND CONCLUSIONS OF THE TRIAL COURT ENTIRELY IGNORES THE COVENANT OF DEFENDANTS NOT TO SUE NOR DEFEND ON THE GROUND OF FORFEITURE.

POINT THREE

THE JUDGMENT OF THE TRIAL COURT THAT THE FORFEITURE PROVISION OF THE CONTRACT IS UNENFORCEABLE AS A MATTER OF LAW IS ERRONEOUS.

POINT FOUR

THE FINDINGS AND JUDGMENT OF THE TRIAL COURT THAT PLAINTIFFS DID NOT ACCELERATE THE CONTRACT BALANCE AND THAT DEFENDANTS MADE A VALID TENDER ARE IMMATERIAL AND CONTRARY TO THE EVIDENCE.

POINT FIVE

THE TRIAL COURT ERRED IN NOT MAKING AND ENTERING FINDINGS OF FACT TO SUPPORT ITS CONCLUSIONS OF LAW AND JUDGMENT.

ARGUMENT

POINT ONE

THE FINDINGS AND JUDGMENT OF THE TRIAL COURT THAT DEFENDANTS WERE NOT IN DEFAULT UNDER THE CONTRACT, AND THAT THE CONTRACT WAS VALID AND SUBSISTING IS CONTRARY TO THE EVIDENCE WHICH IS UNCONTRADICTED THAT DEFENDANTS WERE DELINQUENT A TOTAL OF EIGHTEEN PAYMENTS.

Although the record in this matter gives little solace to one attempting to ascertain how the trial court reached the conclusions it did, certain elements stand out as guideposts.

A complaint was filed praying for a declaration of a forfeiture of Defendants rights in the agreement and the assets described therein. No answer was filed by Defendants, but Defendants' motion for summary judgment casts some light upon their position. They prayed for summary judgment on the basis that the contract was valid and subsisting and that Defendants were not in default thereunder (R. 19).

An affidavit of one of Defendants sets forth some of the material one would expect to find in an answer. These are (1) a denial that Defendants had exhausted the fifteen weeks grace period, and (2) denial that Defendants failed to make the payments that became due on August 10th and 17th, 1959. Apart from these two points, Defendants requested a trial to put in evidence on other points of the case (R. 21).

The findings and conclusions of the trial court go far afield from the points raised by Defendants' motion, but in part find that there was no default and that the contract was valid and subsisting. This was erroneous based upon the uncontradicted evidence before the trial court, and warrants a reversal of the order of the trial court granting Defendants' motion for summary judgment.

The contract is clear that the \$100.00 weekly payments were to commence the 1st day of September, 1958. Defendants were accorded a cumulative fifteen weeks grace period. It is apparent that the Defendants elected to take immediate advantage of the fifteen weeks grace period, because no payments were made from the time of execution of the contract in June, 1958, until the 8th day of December, 1958. Then the sum of \$300.00 was paid for the payments due September 1, 8 and 15, 1958.

A glance at the calendar and use of simple arithmetic will establish that all payments thereafter were fifteen weeks delinquent, to the end of the accorded grace period (Ex. P-3). The last payment was made on July 27, 1959,

and was for the installment due April 13, 1959.

The evidence is uncontradicted that the checks given on August 10, 1959, for payments due April 20 and 27, 1959, and May 4, 1959, were refused and dishonored by Defendants' bank (Ex. P-1; Ex. P-2; Deposition of Keith Sudbury, Pages 10-17).

The record is barren of contradiction that Defendants were then in arrears eighteen payments totalling \$1,800.00, and were therefore in default.

Before any further payments were tendered by Defendants, Plaintiffs delivered written notice of default (Ex. P-4).

The ruling of the trial court that the contract was valid and subsisting and that Defendants were not in default is contrary to all of the evidence and is erroneous.

POINT TWO

THE JUDGMENT, FINDINGS AND CONCLUSIONS OF THE TRIAL COURT ENTIRELY IGNORES THE COVENANT OF DEFENDANTS NOT TO SUE NOR DEFEND ON THE GROUND OF FORFEITURE.

The trial court in its summary judgment determined that the forfeiture provision was unenforceable. In order to do this, it ignored what the parties declared to be an "indispensable" part of the consideration for the agreement: an express covenant not to sue nor raise the defense of forfeiture.

The contract provides:

“* * * in consideration of sellers’ consenting that buyers’ assets shall not be amenable to process by sellers in the event of default by buyers that buyers hereby covenant and agree that in the event of default and an election by sellers to proceed under the terms of the foregoing forfeiture provision that buyers will never raise nor assert as a defense to any such action the defense of forfeiture, and they hereby expressly waive and covenant not to claim as their own any rights in any of said property * * *; that each party to this agreement understands that Courts do not favor forfeitures, but that each party consents that an *indispensable* part of the consideration for the terms of this agreement is that buyers covenant not to sue or defend upon the theory of forfeiture and they do hereby expressly waive and consent not to assert such right.”

A covenant not to sue is universally recognized and uniformly enforced. 45 Am. Jur., Release, Section 3.

The Restatement of the Law of Contracts phrases the rule as follows:

“Section 405. CONTRACT NOT TO SUE.

“(1) A contract by which one party promises never to sue the other party, or a third person for the enforcement of a specific right, or not to do so for a limited time, bars an action for that purpose during any agreed time * * *”

The enforceability of a covenant not to sue is tested by the same standards as are determinative for any other type of contract. If the elements of an enforceable contract are found to be present in a covenant not to sue, the covenant not to sue is enforceable.

In this case we have two parties, competent to contract, who in clear and explicit terms, contracted with regard to a subject matter as to which they were free to contract. The mutual assent of both is clear from the language used. There was an independent consideration given by Plaintiffs for Defendants' promise not to raise the defense of forfeiture. There is no tinge of illegality or imposition involved in their agreement. The covenant not to sue thus meets all the requisites for the formation of a valid and enforceable contract. 12 Am. Jur. p. 509, Contracts, Section 16.

The rights of the parties which were exchanged in connection with the covenant not to sue certainly represent a fair exchange of values. Plaintiffs gave up the very valuable right to look to the personal assets of Defendants for the enforcement of Defendants' promise to pay the agreed purchase price for the business. Defendants, with full knowledge that courts disfavor forfeitures agreed not to invoke this attitude of the Courts if Plaintiffs had need to enforce the forfeiture provision.

By giving effect to the covenant not to sue, as the trial court should properly have done, it only remained for the court to consider whether or not there had been a default in the prescribed payments and an election by Plaintiffs to proceed under the forfeiture provision.

As discussed above in Point I, there can be no question that Defendants were in default in their payments. Further Plaintiffs notified Defendants on August 17, 1959 that they would accept no further installment

payments, and demanded payment of the full balance due under the contract (Exh. P-4). When Defendants did not pay the balance by September 11, 1959, Plaintiffs notified Defendants that they were electing to pursue the forfeiture provision unless full payment was made within 30 days thereafter (Exh. P-5). When the contract balance was not paid by November 10, 1959, this suit was commenced for declaration of the forfeiture. This clearly manifests an election by Plaintiffs of the remedy they were pursuing.

The trial court's complete disregard of the covenant not to sue clearly invades a very sacred right of human endeavor — the freedom and right to contract.

The right of private contract is no small part of liberty of citizens, and the function of the courts is to maintain and enforce contracts rather than enable parties to escape their obligations.

That principle is repeatedly announced by the courts. 12 Am. Jur., Contracts, Section 172; *McCallum v. Campbell-Simpson Motor Company*, Idaho 1960, 349 P. 2nd 986; *J. R. Simplot Company v. Chambers*, Idaho 1960, 350 P 2nd 211.

It is respectfully urged that the judgment of trial court in derogation of the express terms of the contract not to sue or defend was erroneous and should be reversed.

POINT THREE

THE JUDGMENT OF THE TRIAL COURT THAT THE FORFEITURE PROVISION OF THE CONTRACT IS UNENFORCEABLE AS A MATTER OF LAW IS ERRONEOUS.

Appellants believe the covenant not to sue or defend on the ground of forfeiture prevents Defendants from defending that the forfeiture provision of the agreement is not enforceable.

However, even without the covenant not to sue, the forfeiture provision itself, when viewed in the light of all the circumstances of the case, is the only effective remedy which Plaintiffs have under the contract, and the court therefore erred in summarily ruling as a matter of law that it was unenforceable.

19 Am. Jur., 102, Equity, Section 93, sets out the law respecting enforcement of forfeitures as follows:

“While the law does not favor forfeitures, and since all ambiguities in a contract are to be resolved against their existence, it is not to be supposed that a court of equity will lightly dispense with contracts made between competent parties and substitute therefor other agreements more in accordance with variable rules of right and conscience, thus preventing them from having that which was made by them the very essence of their agreement. Courts in general have not gone so far as to hold that equity can relieve from the consequences of the breach of a condition whenever it stands as security for the performance of some act. Forfeitures are not per se unlawful, and if a contract in unmistakable terms provides for a forfeiture, is otherwise free from legal in-

firmity, and the act secured against is of the essence of the contract, neither a court of equity nor a court of law will relieve against the forfeiture.”

In the case of *Cole v. Parker*, 5 Utah 2d 263, 300 P. 2d 623, this court said:

“In the absence of fraud or imposition, the parties are bound by the price or measure of value they have agreed on, and such price must be paid notwithstanding it may be excessive. The courts cannot supervise decisions made in the business world and grant relief when the bargain proves improvident.”

In the case of *Peck v. Judd*, 7 Utah 2d 420, 326 P. 2d 712, the court further acknowledged the right of persons to contract freely, stating at page 717:

“It is not our prerogative to step in and re-negotiate the contract of the parties. It may be conceded that with an advantaged background we may be able to improve on their work and considering the changed times and conditions say what now appears to us to be fair under such conditions. Possibly at least one of the parties would agree. There is no reason why we should consider the vendee privileged and entitled to our intervention unless the conditions sought to be imposed on the vendee are unconscionable. Equity should not indulge in refinements and exact valuations at a time subsequent to the breach or rescission, further than to determine if enforcement of the contract results in gross inequity, and unless and until the enforcement would be highly unconscionable, we should recognize and honor the right of persons to contract freely and to

make real and genuine mistakes when the dealings are at arms' length. It will be conceded, we think, that where a seller seeks not only his pound of flesh but likewise a goodly supply of blood he should not be indulged.

Nor should we fail to observe how many purchasers have made most advantageous bargains and when the contracts have run have secured property three times what the poor sellers received under their contracts. Should not equity, if we are going paternalistic, under the same tokens say to such a buyer, You can't do this to the poor seller—the property to which he still holds title is now worth two or three times what you are paying him and that is unconscionable; you will be required to pay more than the contract calls for in order that he be not required to give a deed to property worth three times what he is being paid.”

By application of the foregoing pronouncements to the case at bar, we, also, find a situation in which the forfeiture provision should be enforceable.

We have parties standing on equal footing and dealing at arms' length. There is no fiduciary relationship between them. Neither is under disability. There is no suggestion or claim of fraud in the inducement or execution of the agreement. The business experience of each had been a common one.

The parties parted. They agreed that Defendants should purchase Plaintiffs' interest. The sale was of an interest in a going business, but there were certain tangible assets to which Defendants needed unencumbered

title in order to borrow money to continue the business. The agreement, therefore, constituted a present conveyance of all tangible assets.

Because Defendants desired to borrow money on the business assets and were unwilling to make an unqualified promise to pay the purchase price, the contract, of necessity, assumed some unique characteristics as compared to an ordinary sales contract.

Thus, at Defendants' insistence, the following provisions came into the agreement:

(a). Title to all of the assets of the business passed immediately to Defendants;

(b). Plaintiffs were to have a chattel mortgage as security for the agreed purchase price; however, the chattel mortgage was expressly subordinated to additional financing arrangements, unlimited in amount, which Defendants might later desire to make (R. 7).

(c). Defendants had the absolute and untrammelled right to trade or substitute chattels without Plaintiffs' consent (R. 7);

(d). Defendants' promise to pay the purchase price was enforceable only against business assets, with personal liability against Defendants having been expressly waived by Plaintiffs (R. 8);

(e). Defendants were not required to make any payment whatever for three months after the

contract was signed. In addition, Defendants were given a fifteen week grace period for making payments (R. 6).

The agreement spelled out two alternative remedies for Plaintiffs in event of Defendants' default. The first was the right to declare the full amount of the purchase price due and proceed to foreclose on the mortgage. The second was the right to declare forfeiture of the business to Plaintiffs, subject to the obligation and duty of Plaintiffs to pay all creditors of Defendants, (R. 8-9), which, implicitly, would forestall the creditors of Defendants from enforcing their presumed right to deficiency judgments against Defendants. Either of these remedies were made available, at Plaintiffs' option.

Since Defendants were permitted to borrow undetermined and unlimited amounts from others, using the chattels as security, with Plaintiffs' rights being subordinated to any such financing, the security of a chattel mortgage on the physical assets of the business immediately became illusory and of no benefit whatever in protecting Plaintiffs' right to receive the promised price.

Resort to an example will graphically illustrate the fairness of the forfeiture provision. As stated, Defendants had total power to encumber the property, coupled with an entire absence of personal responsibility for any deficiency. Thus, if Defendants were to borrow the full resale value of the assets, as can be done, and Defendants then defaulted, Plaintiffs could recover nothing by way of mortgage foreclosure. They would get nothing since

there can be no personal judgment against Defendants under this contract. In such a situation the ability to take over a going business would give plaintiffs a chance to salvage their investment. This could only be accomplished by resort to the forfeiture provision.

Obviously, without full efficacy being given to the forfeiture provision as written, Plaintiffs are without any security whatsoever.

Is it then unconscionable for Plaintiffs to declare a forfeiture of the business, take it back and operate it in an attempt to pay off any secured or other business creditors that Defendants may have, and if they succeed in this, thereafter attempt to recoup their money?

The trial court ruled that such a forfeiture is void as a matter of law. Significantly, it so ruled when there was no evidence whatever that total encumbrance in favor of other creditors was not the precise status of the business at the time forfeiture was declared.

If such were the fact, and there is no evidence otherwise, the court took from Plaintiffs the entire balance of the purchase price, less whatever sum the conscience of Defendants dictates they should pay to Plaintiffs.

In addition to the language of the contract that the forfeiture provision is indispensable, the above analysis of the operation of the contract demonstrates that the forfeiture provision is the *total essence* thereof. There is not another element of the entire contract upon which protection to Plaintiffs is more dependent.

The action of the trial court not only eliminated the freedom of these parties to contract, but it rewrites their entire agreement, giving all to a defaulting buyer, giving nothing to an unsecured seller.

The trial court's gratuitous "revision" is more unconscionable with respect to the rights of the seller than the most drastic forfeiture provisions could ever be.

If the trial court is to be permitted to rewrite the contract, deleting provisions inserted by the parties for valuable consideration, and of the utmost importance to each at the time of execution, it should also be required to give back the considerations relinquished in exchange for the deleted and ignored provisions.

It should be obliged to insert a provision granting Plaintiffs the right to deficiency judgment.

It should prohibit Defendants from encumbering or disposing of the physical assets of the business at will and compel Defendants to remove those encumbrances.

And to logically proceed, it should be compelled to prevent Plaintiffs sustaining a loss on the sale, by requiring Defendants to pay back to Plaintiffs their full original investment of \$42,500.00, not merely the \$36,200.00 agreed upon.

It is obvious that if the trial court had rewritten the contract to so assist sellers, this court would not pause for a moment in blue penciling such additions.

As has been aptly stated in the Utah case of *Peck vs. Judd*, supra, courts refuse to interfere with advan-

tageous bargains made by purchasers. The doctrine of mutuality of contract dictates and demands that the same prescription be applied against interference with the rights of sellers.

Note should be taken of the attitude of Defendants with respect to this agreement. Having been given three months before any payments were required of them, and an additional fifteen week grace period during the life of the contract, Defendants consciously and callously elected to exhaust the entire grace period during the first months of the contract, thereby courting peril and flirting with forfeiture. They should not now be heard to complain.

Defendants urge, the most literal interpretation of the contract, insofar as that could result in benefit to themselves; but they urge the court to completely ignore the contract in those respects where a benefit may inure to Plaintiffs.

Evidence of this fact is the tender of money Defendants made in court. Ostensibly, this was to bring the contract current. Actually, these tenders would bring the contract back to the point of not being in default; but continuing the fifteen week grace period exhausted.

It is submitted that it is not conscionable that Defendants be permitted to put Plaintiffs in a position where they are obliged to pay their obligation only out of the assets of the business, which assets can be wholly removed from Plaintiffs' reach by Defendants, and in

a cavalier manner, fail to make eighteen installment payments, give Plaintiffs two bad checks, leave the country for Europe, and then complain that the covenant given for ample and valuable consideration, not to sue nor raise the defense of forfeiture in event of default should not be enforced.

Finally, it should be noted that since the notice of default was given to Defendants, Plaintiffs have nevertheless been willing to accept the full contract balance due them in the sum of \$23,500.00 together with interest to date (Exh. P-4; P-5). That was and is a courtesy extended by Plaintiffs which was not required of them. It demonstrates that Plaintiffs have at all times acted in good faith with regard to the obligation. The election of Plaintiffs to forfeit this contract is not an attempt to take undue advantage of Defendants, but as demonstrated above, it represents the only effective remedy Plaintiffs could ever pursue to protect their rights under the contract.

The trial court's ruling that forfeiture is an unenforceable remedy effectively destroys any contract right which Plaintiffs had, and was error.

POINT FOUR

THE FINDINGS AND JUDGMENT OF THE TRIAL COURT THAT PLAINTIFFS DID NOT ACCELERATE THE CONTRACT BALANCE AND THAT DEFENDANTS MADE A VALID TENDER ARE IMMATERIAL AND CONTRARY TO THE EVIDENCE.

Plaintiffs do not now, and never have, contended that they accelerated the contract balance for the pur-

poses of foreclosure. In good faith, and as an unrequired courtesy, they merely extended to Defendants an opportunity to pay in full to avoid forfeiture (Exh. P-5).

If it is claimed that Plaintiffs were required to accelerate for purposes of forfeiture, they have done so (Exh. P-4 and P-5).

POINT FIVE

THE TRIAL COURT ERRED IN NOT MAKING AND ENTERING FINDINGS OF FACT TO SUPPORT ITS CONCLUSIONS OF LAW AND JUDGMENT.

Rule 52 (a), Utah Rules of Civil Procedure, makes it mandatory that in all actions tried without jury, the court must find specifically, as well as separately, the facts which constitute ground for decision (53 Am. Jur. Trials, Section 1133).

The findings contain statements to the effect that this agreement was a chattel mortgage, not a conditional sales contract, which findings are actually conclusions of law unsupported by any evidence or findings of fact.

The findings state that Defendants were not in default. The finding is wholly unsupported by the evidence, and in fact is a conclusion of law, barren of the requisite base of evidence.

There is nothing in the findings authorizing the conclusion that the forfeiture provision of the contract should not be enforced. There is no finding of fraud. None of imposition. None of gross inequity. None of unconscionable advantage nor injury to the public.

The judgment of the trial court that the forfeiture provision of the contract is unforceable is unsupported by any finding, and is consequently erroneous.

CONCLUSION

Intelligent parties dealt at arms' length. One said "I will buy your interest in your business *if, but only if*, you will agree that I may pay you from the proceeds of that business. If I do not pay you as I now agree to do, you may look to that business only for your money, not to me."

The other party, knowing of his great risk and hazard, consented, but stated: "I agree. But because of that concession to you, you must agree that if you don't pay me, you will give me back my interest and give me your own interest as well." The other party agreed.

These contractually competent people then discussed a method whereby they could make known their desires that they be permitted by the courts to contract and agree in the way that they both conceded was fair.

One of them gave away a valuable property right, to wit, the substantive entitlement to security and deficiency. In exchange, the other party promised that if he did not pay that he would then give the entire operation back, *subject, however to all the debts* he might in the future incur in his attempts to operate the business.

Both of these people desired the arrangement. They both knew that if a dispute should arise, the person who agreed to give back what he had acquired, plus his own interest, would then have available to him the possible defense that courts abhor and sometimes do not enforce forfeitures.

Knowing that, they then, within the limitations imposed by language as expressive of intent, framed words that say:

“We are now in agreement. We do not know which of us made a bad bargain or a good bargain. Retrospection, only, will tell us. But, if we ever get in the courts on this, our agreement, we both desire that the court that may then judge us will know that we desire to be judged on our state of minds existing on the day we drew our agreement.

“That is, both being fair, we know that forfeitures are not favored. We will spell that out for one purpose—so that the courts, if need be, will have the good sense, with clear conscience, to recognize our capacities and intentions and give credit to our integrity by enforcing our agreement in accord with our desires as we have expressed them and which we now agree are fair.”

The covenant not to assert as a defense the precept of forfeiture should be enforced.

Were the shoe on the other foot, would Plaintiffs be heard to complain that Defendants offended the public and this court by making Plaintiffs waive rights to

deficiency? Of course not. That position is ridiculous.

To deny Plaintiffs forfeiture would be to offend conscience, destroy mutuality and make a mockery of freedom of contract.

The judgment of the trial court on Defendants motion for summary judgment should be reversed, and the case remanded with directions to enter judgment for plaintiffs on their complaint.

Respectfully submitted,

BRIDWELL, REYNOLDS &
CUTHBERT

*Attorneys for Plaintiffs and
Appellants*

506 Judge Building
Salt Lake City, Utah

Received copies of Appellant's Brief this
.....day of June, 1960.

Attorney for Respondent