

1961

Veigh Cummings and JoEllen Cummings v. J. Elmo England, DeLoyd England and Boyd England : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

VEIGH CUMMINGS and JoELLEN
CUMMINGS, his wife,
Plaintiffs and Appellants,

vs.

J. ELMO ENGLAND, DeLOYD
ENGLAND, AND BOYD ENG-
LAND, a partnership, doing busi-
ness under the name and style of
ENGLAND BROTHERS,
Defendants and Respondents.

FILED

JAN 16 1961

Clerk, Supreme Court, Utah

BRIEF OF APPELLANTS

KING AND HUGHES
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Plaintiffs and Appellants

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No. 9344

BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

Throughout this Brief, plaintiffs will be referred to either as plaintiffs or by their individual name. Defendants will be referred to as defendants or by their individual names, as the case may be. All italics are ours.

STATEMENT OF FACTS

This is an appeal from a Judgment entered in this case on the 25th day of August, 1960, which granted to the defendants judgment against the plaintiffs in the amount of \$2,925.38.

Plaintiffs commenced this action on the 18th of August, 1959, and sought to obtain an accounting of funds which were received from the sale of property in which plaintiffs had an interest. The property was located in Summit County.

Two separate and distinct accounting features are involved. An accounting between plaintiffs and the defendants covering a period while the plaintiff operated the Summit County property under an Agreement dated the 7th of May, 1958. The agreement provided for the sharing of expense of operation by the parties.

The Court found that plaintiff paid \$1754.11 which was chargeable to defendant. This finding is satisfactory to plaintiffs.

The Court determined that plaintiffs were not entitled to share the profits of \$15,000.00 made on the sale of the property by the parties to the Church of Jesus Christ of Latter-day Saints. From this finding plaintiffs appeal.

The basic agreement between the parties is Exhibit 7-P. This document entitled "Agreement" is dated the 7th of May, 1958. It provides for the plaintiffs to buy one-half interest in the real property and covered the operation of the property during the period that plaintiffs were paying the purchase price of their one-half interest.

Plaintiffs were in possession of the property on May 7, 1958 and continued in possession until the sale.

During the summer and fall of 1958, until the time that the grazing operation ceased plaintiffs paid on behalf of the joint operation, \$3,498.25. One-half of said payment by the plaintiffs was chargeable to the defendants. In addition to the \$1754.11, the Court determined that the plaintiffs were entitled to \$1597.79 by reason of the original down payment made by plaintiffs in the amount of \$3,000.00, having arrived at the figure of \$1597.79 by deducting interest at 4½% on the unpaid balance of defendants' contract with one MILLS in the amount of \$35,692.52 as provided in the Contract between the parties.

The Court thus determined by its findings that there was due and owing to plaintiffs by reason of the agreement between plaintiffs and defendants and the operation conducted by plaintiffs on the joint property, \$3351.90.

In February of 1959, while the parties were still jointly operating the property, defendant, Elmo England,

gave an Option to the Church of Jesus Christ of Latter-day Saints to purchase the land covered by the agreement for a price of \$75,000.00 (R. 80). He did not disclose the giving of this Option to the plaintiffs (R. 96).

In April of 1959, plaintiffs tendered the semi-annual payment due in the amount of \$1500.00. Defendants refused to accept it. Exhibit 4-P, a letter dated May 14, 1959, shows the rejection by defendants of plaintiffs' payment and defendants' attempt to exercise the Option to Purchase plaintiffs' interest in the property. Even at this late date defendants do not mention the Option given the Church on the property.

On the 11th day of September, 1959, the defendants attempted to pay plaintiffs for their share of the property as provided for in the "Agreement" and purchase the interest of the plaintiffs in the joint property by granting a credit of \$1595.79. This amount, defendants claimed was the net amount paid on the purchase contract by plaintiffs. At that time this action had been filed. Plaintiffs had joined with defendants in the sale to the Church of Jesus Christ of Latter-day Saints and had received \$6,000.00 out of the sale price.

The payment to plaintiffs was made after an Agreement between the parties dated June 26, 1959. Exhibit No. 25-D. Under that Agreement, defendants received \$30,000.00, and the balance of the Mills Contract was paid in full in the amount of \$35,000.00, plus.

The money remaining from the sale price of \$75,000.00, approximately \$4,000.00, was held in escrow pending determination by the appropriate Court action for its distribution.

Plaintiffs were entitled to \$3,351.90 the Court determined as result of payments made during the joint operation. Plaintiffs claim they are entitled to one-half of the net profit which was made from the sale to the Church of Jesus Christ of Latter-day Saints in addition to the amount found by the Court to be due. Said profit is the difference between \$75,000.00 and the purchase price of the property recited in the Agreement of May 7th, 1958, namely, \$60,000.00.

The Court found that defendants by their Notice on May 14, 1959, and tender on the 11th of September of \$1595.59, deprived the plaintiffs of their interest in the property and their share in the profit made from the sale of the real property to the Church of Jesus Christ of Latter-day Saints.

The Court found that there did not exist during the joint operation of the ranch properties any fiduciary relationship between plaintiffs and defendants. That defendants did not act improperly nor in violation of any duty to the plaintiffs when they gave to the Church of Jesus Christ of Latter-day Saints the Option to purchase the property for \$75,000.00, and neglected to inform

the plaintiffs of the Option until the June, 1959 negotiations.

It is plaintiffs' position that after the Option was granted to the Church of Jesus Christ of Latter-day Saints by the defendants in February, 1959, neither party could then take advantage of that portion of the Agreement which provided that after twelve months either party might buy out the other party by tendering the other party the net amount paid on the purchase price of the property, by that party.

The Option so changed conditions that it would be unconscionable, unfair, and unreasonable to permit either party to purchase the other party's interest for a small part of its value as determined by the Option figure.

Plaintiff also objects to the Finding of the Court that the defendants could purchase plaintiffs' interest by tendering to plaintiffs \$1595.79 at a time when there was actually due and owing to plaintiffs the sum of \$3351.90 as has been determined by the Finding of the Court.

Most of the trial was consumed in a discussion and litigation of the various items of expense which the plaintiffs paid during the summer and fall of 1958 while they were operating the joint property of all parties,

and the Court has found generally in plaintiffs' favor on these items and determined that there was \$1754.11 which was due to plaintiffs from defendants for the advancement by the plaintiffs of the total cost of operations during the summer of 1958. This \$1754.11 was \$254.11 in excess of the amount necessary for plaintiffs to pay defendants to make the payment called for under the Contract due on the 1st of October, 1958.

ARGUMENT

POINT I

NO VALID OR SUFFICIENT TENDER TO PLAINTIFFS OF THEIR INVESTED INTERESTS IN THE JOINTLY OPERATED PROPERTY WAS EVER MADE BY DEFENDANTS.

POINT II

AT THE TIME OF THE GRANTING OF THE OPTION TO PURCHASE, AND ITS EXERCISE, PLAINTIFFS AND DEFENDANTS WERE JOINT OWNERS OF THE PROPERTY, AND PLAINTIFFS ARE ENTITLED TO ONE-HALF OF THE NET PROFIT REALIZED ON THE SALE.

ARGUMENT

POINT I

NO VALID OR SUFFICIENT TENDER TO PLAINTIFFS OF THEIR INVESTED INTERESTS IN THE JOINTLY OPERATED PROPERTY WAS EVER MADE BY DEFENDANTS.

On May 14th, 1959, defendants, through their Attorney, attempted to buy the interest that the plaintiffs had in the property by virtue of the Agreement on May 7th, 1958. The Notice was given prior to notice to plaintiffs of the Option to the Church.

Under the Agreement, in order to purchase defendants had to elect to do so, and within 120 days from the date of the election pay cash to plaintiffs whose interest was being purchased. On the 11th of September, 1959, defendants notified plaintiffs that they would grant an offset against moneys coming from the sale of the property in the amount of \$1597.79 (See Exhibit 20-D).

The amount of \$1597.79 is the net payment to the Mills on the principal amount owing out of the down payment of \$3,000.00. This sum does not take into consideration the amounts which the plaintiffs had paid on defendants' account during the joint operation which the Court determined was an additional \$1754.11.

Plaintiffs contend that if defendants did exercise their right to purchase the interest of plaintiffs in the property, a tender of less than one-half of the correct amount would be ineffectual and without any force or effect.

The rule of law concerning tenders seems to be relatively clear. It is held generally that in order to

constitute a valid tender, the tenderer must offer a specific amount which must include all that the tenderee is entitled to, and the tender of less than the amount due is insufficient, the insignificance of the deficiency generally being immaterial. See: *Cameron County Water Improvement District No. 8 vs. De La Vergne Engine Company*, 100 F. 2d. 523; *Equitable Life Assurance Society of U.S. vs. Boothe*, 160 Ore. 679, 86 P. 2d. 960; *Kelley vs. Clark*, 23 Ida. 1; 129 Pac. 921; *Advance-Rumely Thresher Co., vs. Hess*, 85 Mont. 293; 279 Pac. 236; *Wilbur vs. Taylor* 154 Wash. 282; 282 Pac. 65; *Francis vs. Brown*, 22 Wyo. 528, 145 Pac. 750; 86 C.J.S. P. 562, Sub. Sec. No. 7; 62 C.J., P. 660, Sub. Sec. No. 6.

Plaintiffs respectfully submit that at the time of trial neither of the parties had exercised properly, sufficiently, or effectively, the rights granted by the Agreement between them to purchase the interest of the other. At the time of trial both parties were the owners of the interests created by the Agreement of May 7th, 1958.

Out of the sale price of the property the balance owing Mills had been paid in full, which was more than the \$30,000.00 which the contract required to be paid by plaintiffs. It is the position of plaintiffs that at the time of the tender in September, 1959, proper distribution between the parties of the moneys realized from the sale of the joint property was all that could remain to be done.

The Court found that there was never any forfeiture of plaintiffs' interests. It is submitted that there was never any sufficient tender by defendants to purchase the interests of the plaintiffs. Plaintiffs owned the interest created by the sale agreement of May 7th, 1958 up to the date of trial.

POINT II

AT THE TIME OF THE GRANTING OF THE OPTION TO PURCHASE, AND ITS EXERCISE, PLAINTIFFS AND DEFENDANTS WERE JOINT OWNERS OF THE PROPERTY, AND PLAINTIFFS ARE ENTITLED TO ONE-HALF OF THE NET PROFIT REALIZED ON THE SALE.

Under the terms of the Agreement between the parties, plaintiffs agree to purchase a one-half interest in the property at Summit County which defendants were buying from parties named "Mills". For this one-half interest, plaintiffs agreed to pay \$30,000.00. The payments were to be made semi-annually on the 1st of October, and the 1st of April, in the amount of \$1500.00, each payment. Plaintiffs paid \$3,000.00 down at the time of the execution of the Agreement. This sum represented the payments due on October 1st, 1957 and April 1st, 1958.

Plaintiffs went into possession of the property and operated it on behalf of themselves and the defendants during the summer of 1958, and were still in possession when the property was sold and transferred to the

Church of Jesus Christ of Latter-day Saints in the summer of 1959. Defendants placed on the property livestock which were cared for and handled by plaintiffs. During the summer of 1958 and through the fall and early spring of 1959, plaintiffs paid the joint operational expense.

The Court found that expenses paid prior to May 7th, 1958 would not be allowed as against the joint account but that all expenses paid thereafter which were in the interest of the joint account would be credited to the joint account.

The amount of joint expenses paid by the plaintiffs and for which they were granted credit by the Court was \$3498.25. The Court found plaintiffs were entitled to a \$1754.11 credit for payments made on behalf of the defendants during the joint operation time.

The April, 1959 payment was tendered to defendants, but refused by them upon the ground and for the reason that they believed the plaintiffs had lost all interest in the property by not paying an additional \$1500.00 on the 1st of October. Plaintiffs tendered this payment late even though they had paid on defendants' behalf more than the amount of the payment.

The Court found the attempts to forfeit the interest of plaintiffs in the property were ineffectual and that

plaintiffs and defendants were jointly interested in the property up to the 14th of May, 1959.

At no place in the Agreement of May 7th, 1958 did the parties specifically provide as to what the situation would be if, during the life of the agreement and while all of the parties were jointly interested, the property was sold by the parties and a profit or loss realized over the agreed value of the premises which was \$60,000.00. This deficiency in the Agreement is the basic problem that was submitted to the Trial Court and is necessary of resolution in this Court.

Plaintiffs respectfully submit that after the contract of May 7th, 1958 had been signed and the performance of the contract commenced by plaintiffs each of the parties were the equitable owners of a one-half interest in the contract with Mills and the property at Park City.

The signing of the contract created in plaintiffs an interest in real property subject to their performance of the terms of the Agreement, and created a right in the defendants to receive the unpaid balance under the Agreement. This ownership, plaintiffs submit, continued up to and through the date when the property was sold to the Church of Jesus Christ of Latter-day Saints, and a profit realized on the sale over and above the agreed value by the parties of \$60,000.00.

The law has been long established that a party to a Contract of Sale of land under equitable principle owns what under the Contract he would receive upon performance of the contract.

. The earliest U. S. case is *Craig v. Leslie, et al.*, 3 Wheat. 562, 4 L. Ed. 460, wherein the United States Supreme Court held:

“Washington, Judge:

*** In the case of *Fletcher v. Ashburner* (1 Bro. Ch. Cas. 497) the master of the roll says the ‘nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given.’ He adds ‘the owner of the fund, or the contracting parties may make land money, or money land. The cases establish this rule universally.’ This declaration is well warranted by the cases to which the master of the rolls refers, as well as by many others. See *Dougherty v. Bull*, 2 P. Wms. 320; *Yeates v. Compton*, Id. 358; *Trelawney v. Booth*, 2 Atk. 307.

The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed

to be done, as having been actually performed where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity." (p. 463)."

A recent decision reciting the same principle is *Leedy vs. Ellis County Fair Ass'n*, 188 Okl. 348, 110 P. 2d. 1099, wherein the Court stated:

"The contract purports on its face to be an immediate sale of the premises in question. The equitable title in the land passed thereunder to Ralph R. Porter and is now owned by plaintiff. In such case the vendor and the purchaser occupy a fiduciary relationship toward each other. The vendor is trustee of the land for the purchaser, and the purchaser is trustee of the purchase money for the Vendor. *Dunn vs. Yakish*, 10 Okl. 388, 61 Pac. 926; *Hamra v. Mitchell*, 133 Okl. 264, 271 Pac. 1042. In the *Dunn* case the rule was stated as follows: 'Equity treats things agreed to be done as actually performed, and when real estate is sold under a valid contract, the deed executed at a future day, the equitable title passes at once to the vendee, and equity treats the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor.'"

See also: *Elliot vs. McCombs*, 17 C. 2d. 23, 109 P. 2d. 329; *Treadwell vs. Henderson*, 58 N.W. 230, 269 P. 2d. 1108; *Virginia Ship Building Corp. vs. U.S. Ship-*

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Pomeroy's Equity Jurisprudence 5th Edition, Volume 4, Page 479, Section 1161, states the rule as follows:

“Sec. 1161.—Under a Contract of Sale.—A contract of sale, if all the terms are agreed upon, also operates as a conversion of the property, the vendor becoming a trustee of the purchase-money for the vendor (see Secs. 368, 372). In order to work a conversion, the contract must be valid and binding, free from inequitable imperfections, and such as a Court of equity will specifically enforce against an unwilling purchaser. The fact that the contract of purchase is entirely at the option of the purchaser does not prevent its working a conversion, if he avails himself of the option. (See Secs. 1163).”

When the Option was granted by defendant, Elmo England, to the Church of Jesus Christ of Latter-day Saints, to purchase the property for \$75,000.00, he acted on behalf of the joint operation even though plaintiffs were kept in ignorance of the action by England. See: *Holland vs. Morton*, 10 Utah 2d. 390, 353 P. 2d. 989.

The general rule seems to be that although a Fiduciary relationship does not, strictly speaking, exist between tenants in common by reason of the tenancy, there is

such a relationship of trust and confidence that each co-tenant has a duty to sustain, or at least not act in hostility of the common interest of the parties. 86 *C.J.S.* p. 376, *Section 17*.

One tenant in common will not be permitted to take advantage of the other, nor will one co-tenant, where all must act in unison, be permitted to obtain a secret profit to the disadvantage of the other co-tenant.

See *Wallace vs. Brooks*, 194 Okl. 137, 147 P. 2d. 784. This case involved the joint interest in mineral rights on property. "B" sold the property to "A", reserved a one-half interest in the mineral rights on the property. "A" placed a mortgage on the property, then permitted the mortgagee to foreclose the mortgage. "A" furnished the funds to his daughter to purchase at the foreclosure sale the title to the property. In this manner, it was planned that "B's" one-half interest in the mineral rights would be extinguished and the purchaser at the foreclosure sale obtain all the mineral rights. Subsequently, "B" sued to have his mineral rights preserved. The Oklahoma Supreme Court held that no tenant in common may act in hostility to the other's title and that the daughter of "A" acquired the title on behalf of the joint tenants and all would benefit and "B" was entitled to his one-half of the mineral rights under the new ownership.

Freeman, on Co-tenancy, and Partition, 2nd Ed. Section 154, discusses the mutual rights and obligations of co-tenants and states as follows:

“A co-tenant cannot take advantage of any defect in the common title by purchasing an outstanding title, or encumbrance, and asserting it against his companion in interest. The purchase is notwithstanding his design to the contrary, is for the common benefit of all the co-tenants.

“The legal title acquired by him is held in trust for the others if they choose within a reasonable time to claim the benefits of the purchase by contributing or offering to contribute their portion of the purchase money.”

See also, cases citing and upholding the rule stated: *Stevenson vs. Boyd*, 153 Cal. 630; 96 P. 284; 19 LRA NS 525. *Dwight vs. Waldron*, 96 Wash. 150; *Harrison vs. Cole*, 50 Colo. 470, 116 Pac. 1123; *Stianson vs. Stianson*, 40 So. Dak. 322; 167 N.W. 237, 6 ALR 280. *Turner vs. Simpson*, 313 Ky. 780, 233 SW 2d. 528.

A very interesting case upholding the rule as between joint tenants is *Berghous vs. Berghous*, 255 App. Div. 851, 7 N.Y.S. 2d. 435, aff. 280 N.Y. 799, 21 NE 2d. 623. In this case two brothers owned property as tenants in common, and agreed to sell to a corporation for \$15,000.00. Brother “A” unbeknown to brother “B” was the owner of the dummy purchaser. It was held that brother “B” could set aside the sale even though the only

relationship was that of tenants in common. The co-tenant was required by the relationship to disclose to his co-tenant the true name of the purchaser and the relationship that did exist between said purchaser and the co-tenant.

It is respectfully submitted by plaintiffs that when Elmo England granted the option to the Church of Jesus Christ of Latter-day Saints to purchase the jointly owned property he acted on behalf of the joint operation, and the benefits of said offer accrued to plaintiffs as co-tenants. Plaintiffs were entitled to share in the proportion to their ownership in the sale price. The only way in which they could be deprived of their one-half interest is if this Court should hold that the exercise on the 14th of May, 1959 by the defendants of their rights to purchase the interests of plaintiffs in the property was a valid, effective and lawful action.

It is respectfully submitted that under the doctrine of equitable conversion plaintiffs were the owners of an interest in real property during the period that they operated jointly with the defendants; that at no time did that interest cease or determine prior to the sale to the Church of Jesus Christ of Latter-day Saints and at the time of the sale, since they were a half interest owner in the property, they were entitled to one-half of the net profits derived from the sale. The Court, by its determination that they were not entitled to share in the profits of the sale made error of law.

CONCLUSION

The Court should reverse the judgment of the Trial Court and should order the entry of judgment awarding plaintiffs one-half the profits on the sale to the Church.

Respectfully submitted,

KING AND HUGHES

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By Dwight L. King