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Peter M. Lowe v. Max Rosenlop and Max Rosenlop Construction Co. : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

JAN 19 1961

PETER M. LOWE,
Special Administrator of
Estate of T. O. Nelson,
Plaintiff and Appellant,

— vs. —

MAX ROSENLOF and
MAX ROSENLOF
CONSTRUCTION CO.,
a partnership,
Defendants and Respondents.

Clk. Supreme Court, Utah

Case
No. 9348

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This suit was brought by the appellant to recover damages for an alleged breach of a written subcontract and for the conversion of some prefabricated forms used in pouring concrete. The respondents had the prime contract to build a high school building in Lehi, Utah. They subcontracted the basic concrete work to appellant. The appellant alleges that the respondents “without legal ex-

cuse excluded'' appellant from the work and converted the tools, materials and concrete forms which appellant had on the job. (R. 4) Respondents counterclaimed, contending that the appellant had breached the contract by abandoning the work. (R. 6) The trial court found that the appellant had abandoned the work and awarded damages to the respondents. It also found that respondents had converted part of the concrete forms. Plaintiff has appealed.

We do not agree with the statement of facts made by the appellant. It ignores the decision of the trial court which resolved the conflicts in the evidence in favor of respondents. Since, however, two of the three points raised go to the sufficiency of the evidence, we believe that we can best detail the evidence as a part of our Argument.

STATEMENT OF POINTS

POINT I

THE COURT CORRECTLY FOUND THAT THE APPELLANT BREACHED THE CONTRACT BY ABANDONING THE WORK AND REQUIRING RESPONDENTS TO COMPLETE IT.

POINT II

SINCE APPELLANT BREACHED THE CONTRACT BY ABANDONING THE WORK, HE IS NOT ENTITLED TO CONTINUE TO ENFORCE THE BENEFITS OF THE CONTRACT.

POINT III

THE FINDING BY THE TRIAL COURT THAT THE FORMS CONVERTED HAD A MARKET VALUE OF \$4,000.00 IS SUPPORTED BY THE EVIDENCE.

ARGUMENT

(Tr. refers to the transcript of the evidence, and (R) to the record of the pleadings and motions.)

The trial court has found that the appellant abandoned the work and required the respondents to complete it. The primary issue to be determined is whether or not the trial court's finding in this regard is supported by substantial evidence. If this finding is sustained by the evidence, then, although the plaintiff might be permitted to recover for the value of the work performed by him on a theory of quantum meruit, he can not recover on the contract. His own material breach of the contract is a bar to an action to enforce it. Because of the importance of this issue, we first address ourselves to it, although it is Point III in the appellant's brief.

POINT I

THE COURT CORRECTLY FOUND THAT THE APPELLANT BREACHED THE CONTRACT BY ABANDONING THE WORK AND REQUIRING RESPONDENTS TO COMPLETE IT.

The court expressly found in Finding No. 5 that the plaintiff was in serious financial distress on August 1,

1958; that his labor and materialmen were unpaid, and that “on or about September 9, 1958, the plaintiff abandoned the work and the contract and defendant was required at said time to take over and complete plaintiff’s work.” (R. 106)

This court has stated on numerous occasions that a finding of fact made by the trial court will not be disturbed if it is based on substantial evidence. See *Child v. Child*, 8 Ut. 2d 361, 332 P. 2d 981.

There is ample evidence here to support the court’s finding. At the outset we direct this court’s attention to the testimony of Max Rosenlof. He testified that he made a long distance telephone call to the appellant’s home on September 9, 1958. (Tr. 136) The appellant admits that the call was made. (Tr. 83) Both admit that the initial inquiry made by Mr. Rosenlof concerned appellant’s absence from the job, and that appellant advised that he was trying to sell his home. (Tr. 83, 136) At this point the parties disagree as to what was said. Mr. Rosenlof testified (as the trial court found) that appellant said he could not go on, and that respondents would have to take over.

“When I got him on the telephone I said, ‘Ted, there’s got to be something done on that job. I haven’t seen you on that job for approximately two weeks. The men are running wild and getting in trouble because they have not been getting their pay checks’ * * *

“I asked him about getting down on the job because the job was running wild and he said,

‘Max, you are just going to have to take the job over; I am broke; I have got a lot of people pressuring me for money and I can no longer finance the job and I am about going crazy. I am going to lose my house; I am going to lose my trucks, the forms and the equipment.’ He says, ‘I have been home trying to sell my house so that I can get some operating capital to keep on operating with.’ (Tr. 136-7)

The appellant denies this. (Tr. 84) But the trial court did not believe him and an examination of the testimony demonstrates why. It is admitted that the phone call was made about September 9th. (Tr. 83) and that on the morning of the 10th, Rosenlof did take over the job. (Tr. 33) If, as the appellant testified (Tr. 83, 33), Rosenlof was satisfied with the answer that appellant would be back down on the job in a day or two, and the conversation had ended with that understanding, it is not likely that he would take over the work the following morning. There is not any dispute in the evidence at all concerning the fact that Rosenlof did take over the following morning. (Tr. 33, 102) This is exactly what would have been expected if the substance of the phone conversation was as Rosenlof testified; but it is completely inconsistent with what would have been expected if the phone call had ended as appellant testified.

Appellant’s own conduct after he learned that Rosenlof had taken over the job likewise is completely inconsistent with his testimony at the trial. If the telephone conversation had ended with appellant’s assurance that he would return to the work in a day or two, and with

Rosenlof apparently satisfied, Nelson would have been very much surprised by the respondent's action in taking over the work the following morning. It is completely illogical and contrary to ordinarily expected conduct under these circumstances that appellant would not have contacted Rosenlof to find out why. Appellant did not seek to find out why; his only reaction was to have his wife go to Rosenlof to try to get some money to cover appellant's payroll checks which were "bouncing." (Tr. 106-7) This conduct on the part of appellant demonstrates that he must have known when the parties concluded their telephone conversation on September 9th that the work was going to be taken over. Thus, when he was told by his foreman (Tr. 87) that Rosenlof had taken over, he did not need to call Rosenlof — he already had discussed this on September 9th, and knew why.

The direct testimony of Rosenlof to the effect that Nelson told him he (Nelson) would have to quit and that Rosenlof would have to complete the work is further corroborated by various other convincing bits of evidence.

First, Rosenlof testified that appellant had stated as his reason for quitting that he was in severe financial distress. This is entirely consistent with what the actual facts were, for appellant was in financial distress. A bill for work performed by Rex Industries way back in March was still unpaid. (Tr. 67-8) The suppliers who had furnished the lumber for the doing of the work had not been fully paid. (Tr. 70-71) Arnold Machinery, from whom he had rented a vibrator in April, had only been

paid one \$90.00 payment. (Tr. 71) Conesco, from whom he was renting part of the forms, had written a demand letter on August 28th, telling of a bill for \$2429.32, which was overdue. (Ex. 16, 2, 68) Some of the payroll checks issued to cover the work period from August 1st to August 15th had not cleared when presented, and some of the men had not been paid since the 1st of August. (Tr. 94) Thus, what was happening on the job is exactly what Rosenlof said he told Nelson and what Nelson told him. Rosenlof said the men were "running wild" because they hadn't been paid, and that Nelson had to do something about the job. (Tr. 136-7) Nelson responded that he was broke, and that Rosenlof would have to take over. (Tr. 136-7) Thus, while we have only Rosenlof's testimony as to what was said, it is not likely that Rosenlof called long distance merely to pass the time of day. It is more likely that the trouble which was occurring on the job was the subject matter of that telephone conversation (as Rosenlof testified); that he *did* tell Nelson of the trouble; that Nelson, because he *was* in financial distress, did say that respondents would have to take over, and that respondents therefore did so.

Second, an independent witness, to-wit, Kelsey Chatfield, inspector for the architect, testified that on four or five occasions within a month to six weeks before Nelson left the job, appellant told Chatfield that appellant was in financial difficulty; that he couldn't finance the work, and he used the expression, "he would have to quit." (Tr. 119) This bit of evidence is important in two respects. First, if Chatfield was telling the

truth, Nelson was not, because Nelson testified under oath that he had no such conversation with Chatfield. (Tr. 88) If Nelson would not tell the court the truth, about this, how could he be believed on other matters? Secondly, if Chatfield was the one telling the truth, then for a month to six weeks before September 9th Nelson was advising the inspector that he was going to have to quit the job because he couldn't finance it.

Third, in another material respect the court would be justified in refusing to believe the appellant as to the substance of the conversation on September 9th. Appellant stated on direct examination (Tr. 34) and on cross-examination (Tr. 84, 87 and 99) that "absolutely," they did not discuss taking over the work on September 9th. Yet on his deposition, he stated exactly the opposite. On his deposition, he was asked for the substance of the telephone conversation, and he answered, "and he (Rosenlof) said he was taken over." (Tr. 85) He was pressed on the deposition for more details about this conversation, and he answered, "I just don't remember what the discussion was, only that he was taking the job over."

"Q. Did he tell you why? A. No, he just said he was taking the job over that was all." (Tr. 86)

Thus, we have the appellant at the trial testifying under oath that the subject of Rosenlof taking the job over was not discussed (Tr. 87, 99) and yet on his deposition he testified that it was. (Tr. 86) He certainly was either not telling the truth at the time of the trial or else was not telling the truth at the time of the deposition.

This (like his testimony about his talks with Chatfield) indicated that he was not being wholly truthful with the court.

Thus to sustain the trial court's finding that appellant abandoned the work and required respondents to complete it, we first have Rosenlof's direct testimony that he told Nelson the unpaid men were running wild, and Nelson would have to do something, and Nelson said he was having financial trouble and was going to quit and that respondents would have to take over. Respondents, consistent with this, did take over the next morning.

Nelson did nothing — didn't even contact respondents about it. He *was* in financial distress, his men *were* unpaid, his materialmen *were* unpaid, and he for a month had been telling Chatfield he was going to quit. The only conflicting testimony we have is the testimony of Nelson to the effect that a taking over of the work was not discussed and Rosenlof was satisfied when Nelson said he would return to the job in a couple of days. But Nelson had not told the same story on his deposition; he had denied talking with Chatfield about quitting, yet evidenced no surprise when Rosenlof did take over. The court believed Rosenlof and the finding is fully supported by the evidence.

Finally, the appellant argues under Point III that the financial difficulties plaguing the appellant were caused by the failure of the respondent to make payments in accordance with the terms of the contract. This just

simply is not supported by the evidence and is contrary to the trial court's findings. The respondents went far beyond their contract obligations in an effort to help the appellant get the job done. Specifically, we note the following:

(a) Respondents cosigned with appellant for a loan from Geneva Rock Products Co. for \$1,000.00 to raise the money to help appellant get started on the job. They certainly had no contract obligation to do so, but everyone admits that they did. (Tr. 149, 52)

(b) Appellant admitted that he understood that he was to be paid only once each month for the work he had done, (Tr. 60) and the subcontract itself clearly so provides. (R. 10) However, through August 9th, respondents paid appellant twice a month. (Tr. 61-62) In this regard, it is without dispute that by August 9th respondents had paid appellant \$34,540.00, and also had made a \$500.00 payment to Geneva Rock Products on the loan. (Tr. 21) The times when these payments were made are set out in full at R. 53 in the findings.

(c) Since appellant brought this suit for breach of contract he had the burden of proving that he had not been paid in accordance with estimates submitted. A demand was made at the trial for him to produce the estimates, (Tr. 65) and he produced four. (Ex. 8 and 12) (Tr. 154). These totaled only \$29,500.00, and cover bills for work done from April to August 1st. (Tr. 156) Appellant did not know amount billed for March, if any (Tr. 63). The court expressly found "that no estimate was

submitted by the plaintiff to the defendant for work done during the month of August.''' (Finding 5, Tr. 106) Although Nelson said he had one, he could not produce it. (Tr. 156) Nor did he give the amount.

There thus is no evidence whatever to sustain any contention that the amounts paid did not exceed the estimates submitted. The total estimates shown by the evidence are the four contained in Exhibits 8 and 12. These total \$29,500.00 for work done through August 1st, (for April, May, June and July) and the stipulated payments show that respondents had paid the appellant \$34,540.00 for the same period of time (Tr. 21) and in addition had paid \$500.00 on the loan from Geneva Rock Products Company.

(d) Under Point III of appellant's brief, he sets forth a computation of the percentages of the total contract price which had been received by respondents at the end of each month. He argues that by September 10th appellant was, under these figures, entitled to at least \$43,670.00. It is difficult for us to understand the logic of this argument. In the first place, the percentages appellant is using are through the *end* of September, and appellant abandoned the job September 9th. He was paid on August 9th on the last estimate he had submitted. Even if *arguendo* we admit appellant's figures as shown on page 11 of his brief, he would by the end of July only have been entitled to \$34,170.00, less the 10 per cent retention as permitted by the subcontract. (R. 10) He had received \$34,540.00 directly and \$500.00 had been paid to

Geneva Rock. This was nearly \$1000 more than the amount contended for *without* any retention.

Of course, if the work had been going along properly and plaintiff had not abandoned the job, he would have been entitled to submit an estimate on September 1st for his work done in August and to have been paid 90 per cent thereof by September 10th. Under the figures contended for by appellant through August, appellant would have been entitled to receive \$39,270.00 (less the 10 per cent retention) if he had submitted his August estimate. Appellant had been paid within \$300 of this amount for work done to the end of July, to-wit:

Paid Direct	\$34,540.00
Paid to Geneva Rock Prod.....	500.00
10 per cent retention on \$39,270	3,927.00
<hr/>	
Total	\$38,967.00

Therefore, even if appellant had submitted an estimate for work done in August, and had done so on the basis of the theory urged by appellant on page 11 of his brief, appellant had been overpaid to such an extent by August 9th that he would have had only \$300 coming when the estimate became due on September 10th.

(e) On page 65 of the Transcript and in Interrogatory No. 8 (R. 77) appellant admits that the total out-of-pocket cost of his work through September 9th, was about \$36,000.00. This included the unpaid bills (Tr. 65) Since by the 9th of August he had received \$34,540.00 and \$500.00 had been paid on account to Geneva Rock

Products, the payments by August 9th came within \$1,000.00 of his total out-of-pocket costs, including his unpaid bills, plus all costs incurred in August and through September 9th. This fact alone conclusively demonstrates that it was not the amount paid by respondent which caused him to leave his bills unpaid, for debts incurred in March and April were still unpaid. (Tr. 67 and 71)

(f) The contract price of \$51,000.00 for placing 5,400 cubic yards of concrete computes out at \$9.45 per cubic yard. It is admitted by appellant, however, that he *based his estimates* and billings on a \$10.00 per cubic yard price, and was paid on that basis. (See for example Ex. 8 and Tr. 983.) This further liberalized the payments to him.

(g) Finally, as will be argued in answer to Point I, during the same period of time defendant had furnished a crane to place the concrete and had done plaintiff's work in two areas at a total cost, as found by the court, of nearly \$7,500.00. This was not deducted from the payments made because Nelson said he needed the money (Tr. 146)

It is, therefore, respectfully submitted that his financial distress was not caused by any default or failure to cooperate on the part of the respondent.

POINT II

SINCE APPELLANT BREACHED THE CONTRACT BY ABANDONING THE WORK, HE

IS NOT ENTITLED TO CONTINUE TO ENFORCE THE BENEFITS OF THE CONTRACT.

The title used by appellant in his Point I indicates that appellant erroneously believes that he is still entitled to enforce the contract and have the benefit of all of its terms, even though he breached it and abandoned the work. When plaintiff abandoned the contract, less than 75 per cent of the work had been completed. (R. 165) His failure to complete the work was, of course, a material breach of contract. Having breached the contract, it is fundamental law that he can not continue to enforce it, or to have its benefits. His right to recover for work completed prior to September 9th can not be based on the contract, but can be allowed, if at all, only on a quantum meruit basis to prevent an unjust enrichment.

If plaintiff could continue to recover the full contract price less only the naked cost of completing the work, it would permit him to turn his own wrong (the breach of contract) into a triumph. If this were the law, it probably would be advantageous to a contractor to abandon the work. Usually a prime contractor can complete the work as efficiently and for about the same cost as the subcontractor could have done it. If the subcontractor could abandon the work and still recover on the contract he would be permitted to have the benefits of the contract without having had any of its burdens. Because this result is unreasonable, the cases never permit such a recovery. The general law clearly is that full, or at least substantial, performance of the work is a condition precedent to payment. Since the denial of any recovery often

would unjustly enrich the owner (in this case the prime contractor), the courts permit the contractor to recover on a quantum meruit basis, but only for the reasonable value of the work he has performed less the owner's damage. We will not labor the point. The cases dealing with this are noted by the West Digest System under Key No. 319 (1) and Key No. 297, where numerous cases are noted.

The general rule is discussed in 12 Am. Jur. 903 as follows:

“ . . . partial performance of an entire and indivisible contract by one of the parties does not entitle him to performance of the contract by the other and *does not warrant a recovery by the former against the latter upon the contract.* Full or substantial performance of the promise of one party is a condition precedent to the right to maintain an action on the promise of the other. . . .”
(Emphasis supplied)

The rule is also recognized in 17 C. J. S. Section 511 as follows:

“Ordinarily, there can be no recovery on an entire contract for part performance although there may be a recovery pro tanto or on the quantum meruit for accepted benefits or in case full performance was prevented by the other party. Different rules apply to severable contracts.”

The Utah Supreme Court recognized and applied this rule in *Ryan v. Curlew Irrigation & Reservoir Co.*, 36 Utah 382, 104 P. 218. This case involved the construction of a dam. The plaintiff brought suit on the contract to recover a sum which he claimed was still due to him. He

alleged that he had complied with the provisions of the contract for the building of the dam but the defendant contended that he had not completed his work. This issue was submitted to a jury and the jury found in favor of the defendant. The Supreme Court said:

“In an action upon the contract, appellant cannot recover unless and until he shows that he has, substantially at least, complied with its provisions. Appellant alleged that he had so complied and respondent denied these allegations and much evidence was directed to the issue thus presented. . . .”

The jury had found the issues in favor of the defendant and thus had found that the contractor had not completed the dam as required by the contract. The court then noted:

“The jury allowed him (the contractor) the contract price for all material furnished and all work done by him. In view that the jury have found that the dam was not completed in accordance with the terms of the contract, and the finding being supported by the evidence, we think the appellant was allowed all that he was entitled to.”

See also *Miller v. Young* (Okla.) 172 P. 2d 994; *Kennard v. Keller*, (Cal.) 269 P. 114; *Miller v. Yockey*, (Colo.) 112 P. 772; *Hanley v. Walker*, (Mich.), 45 N.W. 573.

In *Miller v. Young*, *supra*, the plaintiff took over work which had already been commenced, and agreed to complete it. He later quit without legal excuse. The owner wouldn't pay him anything, and he brought suit. The

lower court granted judgment, but the appellate court reversed, stating:

“It is an elementary principle of law of contracts that in order to recover upon a contract, the contractor . . . must first establish his own performance or a valid excuse for his failure to perform (citing authorities including Am. Juris). Since plaintiff failed under the uncontradicted proof to complete the work he contracted to do, without valid excuse for such failure, he was entitled to no judgment against defendant.”

There are authorities recognizing that he should be paid on a quantum meruit basis.

See for example, *Eckes v. Luce*, (Okla) 173 P. 219. The holding is reflected by the following headnote:

“A building contractor who entered into a contract with the owner to furnish material and labor and to remove the old and build a new front in a storeroom according to plans and specifications and was to receive therefor the sum of \$725, and after certain materials had been furnished and part of the labor performed on the contract the contractor abandoned the work, the owner accepted the work done and materials furnished, completed the work at his own expense. Held, the contractor is entitled to recover for the work done and materials furnished according to the contract price, in proportion that the same bears to the completed work, less the damages sustained by the owner by reason of the contractor's failure to complete the work.”

See also *Ball v. Dolan*, 21 S. D. 619, 114 N.W. 98.

Under these authorities the very most the plain-

tiff was entitled to was credit for the reasonable value of the work he did, less respondents' damages. *He was not entitled to be paid anything for the work he did not do.* The trial court went far beyond this here and its decision is much more favorable to the appellant than he was entitled to under the foregoing authorities.

The court had found, as discussed above in Point I, that the plaintiff had breached the contract by abandoning the work and had required the respondents to complete it. The court had no direct evidence as to the reasonable value of the work actually done by the appellant. Only 4,367 yards of concrete had been formed and placed at the time the appellant abandoned the work (R. 105) and of this the respondents had formed and poured the columns and beams in the gym and administration areas, and had furnished a crane to place substantial parts of the concrete. We will detail the evidence on this below. It also was admitted that on the entire job covered by the contract, a total of 5,982 yards of concrete was placed. (R. 106) Even though respondents had formed and poured the last 1,615 yards and had done the columns and beams, the court awarded the plaintiff credit for the full contract price of \$9.45 per cubic yard, on the entire 5,982 cubic yards of concrete, whereas it should have limited him to the value of the work done by him. The court then totaled the respondents' total cost for the concrete work covered by the entire contract. These costs consisted of the \$35,540.00 paid directly to the plaintiff and Geneva Rock Products, the \$5,903.81 which the respondents would yet have to pay to unpaid materialmen and laborers, the

costs respondents had incurred in completing the forming and placing 1,615 yards which were left to be poured when plaintiff abandoned the work (\$12,527.14); the crane rental for placing concrete while plaintiff was on the job and the cost to the respondents of forming and pouring the columns and beams in the gym deck and the administration area (\$7,569.00). It found that defendants' total costs thus exceeded the contract price respondents would have paid if plaintiff had performed his contract by the amount of \$5,010.65, and awarded defendants judgment therefor. See Findings 6-9 (R. 106-7) The court recognized expressly in Finding 10:

“That if the plaintiff is charged with said \$5,010.65 (respondents' excess costs), plaintiff will be given credit for all the concrete poured at the contract price of \$9.45 per yard, *and this results in a substantial credit to the plaintiff, which plaintiff would not have received if plaintiff had only been given credit for the 4,367 yards, * * ** completed before the work was abandoned, but the court finds that plaintiff is entitled to any benefit which accrued by reason of defendant being able to complete the remaining work for a lesser cost per yard than the contract price.”

The court went on to find that it was awarding this credit because the work remaining to be done would be less expensive per yard.

Thus, the Utah Supreme Court and the general authorities hold that when a contractor fails to complete his work, he is entitled to a credit against the owners' damage for the value of the work done by him, but no more. Here the trial court has given him credit, not only for

credit relates to the columns and beams in the pan area, after having first denied it. (Tr. 82-83) When he was asked about this on his deposition, he said he couldn't remember anything about why he gave this credit. (Tr. 51) At the trial he "remembered" that Rosenlof forced him to bill it this way. (Tr. 82) It is thus admitted that Rosenlof did do the work, and before the work was abandoned Nelson even gave credit for it in his invoice. (Ex. 8)

Both parties also admit that Rosenlof — not Nelson — did the beams in the Administrative area. (Tr. 81, 128)

The court let appellant have the contract price on the full 5,982 yards of concrete work done on the whole job, and charged him only with the defendants' excess cost above the agreed contract price. While we believe that this is more favorable than the law allows, we did not cross-appeal because it perhaps reaches substantially the same end result as would a proper quantum meruit approach.

POINT III

THE FINDING BY THE TRIAL COURT THAT THE FORMS CONVERTED HAD A MARKET VALUE OF \$4,000.00 IS SUPPORTED BY THE EVIDENCE.

This court has stated on many occasions that the measure of damages for conversion is the market value of the item converted at or near the time of the conversion. Such is the rule as stated by the Utah Supreme

Court in the case cited by appellant, to-wit *Lym v. Thompson*, 112 Utah 24, 184 P. 2d 667, where the court said:

“As a general rule the measure of the value of an item of converted property which has a market is value at the time and place of conversion.”

In that case the court did “*uphold*” a trial court finding which based the value on cost new upon a showing that most of the pipe was new or “the equivalent of new.” Here appellant seeks to “*reverse*” because the trial court would not accept “cost” as “value.” There the court commented that although some of the pipe was “equivalent of new,” it was not new pipe, but the price would be difficult to determine, because “plaintiff’s pipe is not possible of identification, an appraisal is impossible.”

The Utah Supreme Court has also held in *Knighton v. Manning*, 84 Utah 1, 33 P. 2d 401 (1933) that the failure to prove the value of property alleged to have been converted, completely precludes recovery on the theory of conversion.

In *Haycraft v. Adams*, 82 Utah 347, 24 P. 2d 1110 (1933), the Supreme Court elaborated on the sufficiency of the proof of value. That case involved an auctioneer who had sold certain personal property at the request of a wife, without the permission of her husband. In an action by the husband for conversion of the property, the jury awarded the husband \$750.00 as the market value of the property at the time it was converted. The defendant appealed, relying principally on the ground that the evidence introduced as to value was in-

sufficient to support the verdict. In that regard the plaintiff's evidence (as did plaintiff's here) consisted only of the cost of the items when purchased, plus evidence as to what their cost new would have been if they had been purchased at the time of the trial. He had also called a witness who stated that the property "doesn't depreciate very much." The court noted (as here) that the property converted was still in the possession of the defendant and could have been examined, and that it was the duty of the plaintiff to produce evidence as to the market value. The court then said:

"Plaintiff apparently took the position that cost price was sufficient. The plaintiff made no attempt to supply any information as to the condition of the furniture or any other facts which might establish value, except the cost prices."

It then reversed the lower court, because under these facts it had erred in placing its verdict on cost.

Here Max Rosenlof testified that in his opinion the forms at the completion of the job should not be appraised at more than \$4,000.00 (Tr. 138) He was speaking about "*all*" of the forms, and the court accepted this uncontradicted testimony. We emphasize the word "*all*," because as is noted below, only a part of the forms were converted. As in the Haycraft case, *supra*, the trial court also had before it appellant's testimony concerning the original cost of the forms. He introduced the original invoices and a summary thereof, showing a total cost of \$17,707.49, but the invoices included some hardware and bolts, as can be seen by comparing the items in the sum-

mation with the invoices. The \$17,707.00 figure also includes one invoice dated March 21, 1958, for sixty 2 x 8 panels at a unit price of \$57.90 each. However, the invoice also shows that only 34 of these 60 were shipped, and the balance were back-ordered. There is no testimony to show that the 26 which were backordered were on the job. This \$17,707.00 figure also reflects the price of “all” the forms, whereas the evidence only shows that 60 per cent thereof were converted. (We will detail this evidence below.) It will also be noted that the major portion of the forms shown in Ex. 4 were purchased between May of 1955 and April of 1957.

Also, as in the Haycraft case, Mr. Nelson testified that the price of forms new had increased in recent years, and that it would now cost \$20,071.00 to purchase the forms new. (Tr. 24) He admitted that the forms depreciate with use; (Tr. 72) that the amount of depreciation will depend on how they are used and what care is taken to maintain them; that the use of the forms on the State Mental Hospital (the conversion) might not have hurt them very much if they were properly taken care of. (Tr. 73) He also indicated that these forms had been used “approximately” 300 to 400 times, and that with proper care they might have been used a total of 1,000 times, if “taken care of.” (Tr. 73) He did not, however, give one word of testimony as to the condition of the forms or how they had been maintained.

The trial court expressly found that the subcontract agreement (R. 10) permitted the respondents to use the

forms to complete the work, and that the use of the forms to complete the work was not a conversion. (Finding 11, R. 109)

It also found that respondents had acquired ownership of a chattel mortgage on the forms and had foreclosed the mortgage by private sale; that plaintiff had had notice of the sale, but had made no effort to bid for the forms or to protect his mortgagor's interest therein. (Finding 14 R. 109) This mortgage by its terms expressly also permitted the holder of the mortgage to hold possession of the forms if the mortgage were in default. (See Ex. 14, Finding 14) It was in default. (Tr. 28) Therefore, the use of the forms and their possession after September 9, 1958, was not a conversion.

The evidence, however, did show that Rosenlof used some of the forms twice in completing some work at the State Mental Hospital. He was not asked for any detail. His total testimony on this use is at page 144, and is as follows:

“Q. In respect to the forms that we are talking about, the use of the forms, I think in the answer to the interrogations you indicated you have used these forms on two other jobs, is that correct?

“A. One other job.

“Q. What other job was that?

“A. The State Mental Hospital.

“Q. When did you use those forms? When did you go to that job?

“A. In March of 1959 we started it.”

The interrogatory to which counsel was referring is Interrogatory No. 3 (R. 35) and the answer thereto (R. 38) in which Rosenlof stated that “about 60 per cent of the forms were used twice.” This is all the evidence there is to identify the forms which were converted.

Rosenlof was also asked by the same interrogatory to state where the forms were and he answered:

“Forms are now located at 1400 North State, Provo, Utah.”

So the forms were available and could have been appraised and their market value ascertained. But plaintiff made no effort to do this. Counsel also had Mr. Rosenlof on the stand and cross-examined him about his answer to the interrogatory on the use of the forms (Tr. 144) but he did not see fit to ask him which forms were used, whether they were the newest ones or the older ones, or which ones, and the trial court was totally without evidence from which it could have determined which of the forms were converted. The burden in this regard was, of course, on the plaintiff.

The trial court expressly found that only “*part*” of the forms were converted — no other finding could have been sustained by the evidence. (Finding 15) It also found from the only competent evidence it had on market value that “*all*” of the forms had a value of \$4,000.00. Still it awarded Nelson the full \$4,000.00, although only 60 per cent of the forms had been converted. (Finding 15) If the forms used on the State Mental Hospital and

thus converted were a fair average as to value, this \$4,000.00 award was tantamount to a \$6,666.00 award for the 60 per cent which were converted.

We are not here confronted with a situation where the trial court accepted “cost” as “value,” because the court under this evidence refused to do so. It did have before it the testimony of Rosenlof that at the completion of the job “all” the forms should not be appraised at more than \$4,000.00, and under the subcontract we had the right to use the forms, to the end of the job. (R. 10) The trial court elected to believe this evidence, and refused to accept Nelson’s testimony concerning cost as the measure of the value of forms. This is perfectly reasonable. Most of them were bought in 1955-1957. (Tr. 44) They do depreciate with age and use. (Tr. 72) The court had no evidence as to their condition. On an average, the forms had been used 300 or 400 times. If the forms had not been available for an appraisal, cost might have been given more weight — but the forms were in Provo where the case was tried. (R. 38) The court did have the testimony of Rosenlof to the effect that the forms should not be appraised at more than \$4,000.00, (Tr. 138) and it so found.

This brings us to the contention that plaintiff should have had a new trial. The granting or the denying of a motion for a new trial rests in the sound discretion of the trial court, and it should not be disturbed in the absence of a clear abuse of that discretion. This court has so held on many occasions. (See, for example, *Uptown Appliance*

v. *Flint*, 122 Utah 298, 249 P. 2d 826.) The trial court did not abuse its discretion here.

On October 5th the appellant served interrogatories for the first time to ascertain the location of the forms and whether or not they had been used on other jobs. (R. 35) These interrogatories were promptly answered, and by October 20th, appellant knew where the forms were and that 60 per cent of them had been used twice on the State Mental job, but plaintiff made no effort to have them appraised or to look at them himself.

The case was tried commencing November 5th, and both sides submitted detailed written memoranda. (R. 42, 70) The respondents argued to the court that the appellant's evidence using "cost" as "value" was not proper and all the arguments made here were made in the court below. The *Haycraft case* discussing the use of the cost as evidence of value was referred to. (R. 61-2) Notwithstanding this, the later memorandum filed by appellant only asserted that he was entitled to the "full value of the property converted," and he urged the court to award him \$20,071.00 on his testimony as to what the forms would cost now if they were new. (Tr. 24, R. 72) The trial court on December 8, 1959, rendered a memorandum decision. (R. 75) in which it accepted Rosenlof's testimony of \$4,000.00 as to the value of the forms. On December 22nd appellant filed a "Motion for Reconsideration," and stated as one of the grounds that the court "had failed to give weight or had overlooked the evidence of value in respect to the forms converted by the defendant. No affidavits were tendered, no request was

made for an opportunity to reopen to introduce further evidence. Plaintiff simply indicated that he desired to further argue the use of his cost figures as a measure of damages. The parties appeared before the court again and further argued the matter, and still no affidavits were filed and no effort was made to reopen to offer further testimony. Thereafter, the trial court rendered a further memorandum decision on February 10, 1960, (R. 89) and findings of fact and conclusions of law were signed on March 10, 1960. Only then did the plaintiff seek to reopen. Even then it was not alleged either in the affidavits or in the motion that there was any accident or surprise which ordinary prudence could not have guarded against, nor that he had newly discovered evidence which appellant could not have discovered with reasonable diligence and produced at the trial, as contemplated by Rule 59(a).

The appellant simply elected his theory and tried his case. Had he "sold" his theory, he could have "clipped" respondents for \$20,000.00, but he failed. He reargued his theories on a motion for reconsideration and again failed. Now he wants to retry the case and adopt a different theory and now produce evidence which was readily available to him at the trial, but which he had elected not to use.

It is respectfully submitted that the trial court did not abuse its discretion.

Respectfully submitted,

EDWARD W. CLYDE

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