

1967

## Marcell Pitcher v. C. W. Lauritzen : Appellant's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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MARCELL PITCHER,  
*Plaintiff and Respondent,*

vs.

C. W. LAURITZEN,  
*Defendant and Appellant.*

Civil No.  
10563

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## APPELLANT'S BRIEF

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Appeal from the Judgment of the  
First District Court for Cache County  
Lewis Jones, Judge

UNIVERSITY OF UTAH

JAN 13 1967

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FILED

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Clerk, Supreme Court, Utah

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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*Plaintiff and Respondent,*

vs.

C. W. LAURITZEN,

*Defendant and Appellant.*

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10563

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## APPELLANT'S BRIEF

---

### STATEMENT OF THE KIND OF CASE

This is an action to recover the reasonable value of hay and straw unlawfully taken from the plaintiff, and a counterclaim to specifically enforce an earnest money contract for the sale of the farm from which the hay and straw were taken, and failing that, for damages for breach of contract.

### DISPOSITION IN LOWER COURT

The issues as to the value of the hay and straw, and whether the earnest money contract had been re-

pudiated were tried to a jury, and the remaining issues were tried to the court. From a judgment for the plaintiff, the defendant appeals.

## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment, and a decree in his favor for specific performance of the earnest money contract, or failing that, for a new trial under the direction of this court.

## STATEMENT OF FACTS

The plaintiff as "Seller" and the defendant as "Purchaser" executed a document entitled, "Earnest Money Receipt and Offer to Purchase", dated April 16, 1962, which provides for the sale of the "220-acre Pitcher farm, 60-acre Bambrough farm and 160-acre Weston farm together with all water rights, owner's interest in well, pump and sprinkler pipe" for \$100,000.00. The sum of \$100.00 was deposited and the contract provides, "Balance of purchase price to be paid as follows 30 acres in North Logan as indicated by map valued at \$50,000.00, \$25,000.00 cash from loan on Seller's farm, and Seller to carry balance on contract or second mortgage at 5% interest."

The plaintiff remained in possession of the land referred to in the contract and in 1962 produced crops of hay, grain and sugar beets. (Tr. 153, 154). Meanwhile, the defendant caused his 30 acres of land in

North Logan to be surveyed and a legal description of the land to be prepared. (Tr. 74, 158, 159). The plaintiff delivered his abstract to the Hickman Abstract Company to be brought to date for use in an effort to obtain the necessary \$25,000.00 loan. (Tr. 73).

The defendant talked to Ravsten, the plaintiff's real estate broker, every two weeks in an effort to get the deal completed. (Tr. 70). He also inquired about the operation of the farm in 1962. (Tr. 82). Ravsten called the plaintiff on several occasions to get him to keep an appointment with the defendant, and each time he was told he was too busy. (Tr. 88, 89).

Ravsten undertook to obtain the necessary \$25,000.00 loan for his principal. He got a commitment for a \$25,000.00 loan on the North Logan land from First Federal. (Tr. 127). This was reported to the plaintiff and he said "he was not interested in taking the loan." (Tr. 150, 151).

In August of 1962, the defendant, who was engaged in the dairy business, needed hay. (Tr. 66, 67, 86). His son Arden Lauritzen, called plaintiff's agent, Ravsten, and then went up to plaintiff's home to get hay and straw. He met plaintiff at the farm and asked him if it was all right to take the hay.

"... 'Certainly,' he said, 'take any of the hay you want,' he said. 'However, I'd recommend that you get this one particular stack which lay on the east side of the highway running to Weston.' He said, 'It's down in a hollow and there's

a poor road at the time to it, and when the weather is bad, it's impassable. I recommend you get that before snow.'

Q. And did you have any further conversations with him? Did he make any other statements?" (Tr. 95).

"THE COURT: Out by the haystack now.

A. I said, 'How can you go to all of the expense to produce this crop when the farm is going to be transferred to another owner, in view of the fact that it's going right through the crop season?' or words to that effect. And he answered that, well, it was very pressing on him. It was costing him a lot of money and—but he would have to have some help on the beets because he'd spent a tremendous amount of money on the hand labor part of it, but that the hay and the grain and the straw were ours." (Tr. 153, 154).

In September or October, 1962, Ravsten called Arden Lauritzen and told him the Pitchers' wanted the third crop of hay taken off so they could turn their cattle out. (Tr. 102). Ravsten told defendant that it was his hay, "come out and get it." (Tr. 193).

The plaintiff did not say anything about the price of the hay and straw, nor did he orally demand payment or send any bill. (Tr. 194). He never asked for weights. (Tr. 199). The first time defendant heard that plaintiff expected to be paid was when he got a letter from the bank in December, 1963, Defendant's Exhibit 5. He got a letter from plaintiff's attorneys shortly before the action was filed. (Tr. 196).



There is no evidence that the defendant refused to perform his contract nor that he abandoned it. The reason the contract was not performed is found in the testimony of the plaintiff. On cross-examination he testified as follows:

“Q. Now you testified, as I remember, on direct that you were anxious to make this deal with Mr. Lauritzen to get money. You needed money to go into the pipe business.

A. That's correct.

Q. And the reason the deal fell through was that you couldn't get the money on this property?

A. That's one of the reasons.

Q. Well, what are the other reasons?

A. Well, we were never able to sell the property, no other way of getting—there was no money forthcoming on this thing.

Q. Well, in other words you were unable to sell the North Logan property?

A. Correct.

Q. And you were trying to sell that as well as borrow money on your own property; is that right?

A. Yes, that's correct.

Q. And you were unable to sell the North Logan property?

A. That's right.

MRS. PITCHER: It was Bennie that was selling that North Logan property.

Q. Was it your idea, Mr. Pitcher, that this earnest money receipt and offer to purchase, exhibit D-1, could not be performed by you unless you were able to sell the North Logan property?

A. That was the understanding that I had. Mr. Ravsten said he could sell the property, and I said if he could sell the property, fine and dandy, we'd go through with the deal, and that was the reason we signed it.

Q. And when you signed the agreement, exhibit D-1, did you even read it?

A. I didn't think I had to read it. Mr. Ravsten told me what he'd do and that there was good enough for me.

Q. And you didn't even read D-1 before you signed it?

A. I didn't even read it. . . ." (Tr. 138-139).

" . . . Q. Well, that's the A-number one item, is it not?

A. Well, there are other items involved too. Been an awful lot of increase in the value of the property that we have out home. We've put sprinkler systems and wheel moves, improved the property in this length of time. . . ." (Tr. 140).

See also (Tr. 141-142).

The issue of the value of the hay and straw taken by the defendant was submitted to a jury and the special verdict was accepted by the court and is within the evidence. The jury was also asked to answer the

question, "Has any party repudiated the earnest money contract, exhibit 1." The answer was "No." (R. 24). After the special verdict was returned, additional testimony was taken on the remaining issues. (Tr. 118-204).

During the trial the defendant tendered a deed to the North Logan property, offered to pay \$25,000.00 and offered to give a second mortgage to secure another \$25,000.00. (Tr. 158-161). The tender was refused. (Tr. 161). In his pleadings the defendant offered to pay the reasonable value of the hay and straw in addition to the full purchase price of \$100,000.00. (R. 30).

It will be noted that the plaintiff pleaded that there had been no meeting of the minds and had never been a contract. (R. 25-29). He also pleaded that the contract was barred by the statute of frauds and that the contract was impossible to perform because he could not get a loan. (R. 25-29). He did not plead abandonment of the contract. The issue of abandonment was never before the court.

The trial court found that the earnest money receipt and offer to purchase was "a valid contract in its inception", but further found that the "agreement was subsequently abandoned by the parties." See finding of fact No. 9. (R. 40). It was also found that the plaintiff could not obtain a loan for \$25,000.00 on his farm and that by reason thereof it was impossible for him to perform and that therefore he was "excused of any performance under the terms of the Earnest

Money Agreement.” See finding of fact No. 5. (R. 38). The court also found that the plaintiff retained possession of his farm during the years 1962, 1963, 1964 and 1965, paid for and harvested crops during those years and made valuable improvements in the sum of \$20,000.00 and that it would be inequitable and unjust to grant specific performance. (R. 39, 40). The trial court also found the value of the hay and straw to be as determined by the jury. (R. 39).

Judgment was entered in favor of the plaintiff for the value of the hay and straw. No disposition is made in the judgment of the other issues in the case.

## STATEMENT OF POINTS

1. The Earnest Money contract is specifically enforceable.

2. The finding of impossibility of performance is not supported by the evidence and is contrary to law.

3. Improvement of the farm after contracting for its sale is not ground for denying specific performance.

4. There is no evidence that the defendant abandoned the contract.

5. The court permitted the plaintiff to take advantage of his own default and erred in denying equitable relief.

## ARGUMENT

### 1. THE EARNEST MONEY CONTRACT IS SPECIFICALLY ENFORCEABLE.

The law is well settled that "in order to do justice or prevent injustice" a valid contract for the sale of real estate may be specifically enforced.

81 C.J.S. 476, 486

Nielsen vs. Rucker, 8 Utah 2d 302, 333 P.2d 1067

Johnson vs. Jones, 109 Utah 92, 164 P.2d 893

Genola Town vs. Santaquin City, 96 Utah 88, 80 P.2d 930

In the cases of Johnson vs. Jones, *supra*, and Nielsen vs. Rucker, *supra*, this court affirmed decrees specifically enforcing earnest money agreement closely resembling that involved in this suit.

Equity will not permit a party to evade a contractual obligation merely because such party has changed his mind.

Johnson vs. Jones, *supra*; Volk vs. Atlantic Acceptance & Realty Co., 139 N.J. Eq. 171, 50 A.2d 488.

In the Volk case the court said:

"It is one thing to decline to compel a person to perform an agreement into which he has never decidedly entered and quite another to permit him to escape a peremptory contractual obligation merely because he has changed his mind.

The eye of equity must always strive to pierce every curtain of artifice.”

The trial court in the instant case made a finding (No. 9) the contract between the plaintiff and defendant was a valid contract in its inception, (R. 40) but refused to order specific performance for three reasons, (1) that the plaintiff had failed in an attempt to borrow \$25,000.00 on his farm making performance impossible, (2) that since the execution of the contract the plaintiff had made valuable improvements which would unjustly enrich the defendants (R. 39, 40) and (3) that the parties had abandoned the contract. These three reasons for denying equitable relief will be discussed under separate headings.

## **2. THE FINDINGS OF IMPOSSIBILITY OF PERFORMANCE IS NOT SUPPORTED BY THE EVIDENCE AND IS CONTRARY TO LAW.**

The only evidence in the record relating to the question of impossibility is that Ravsten on behalf of the plaintiff unsuccessfully applied for loans on the farm. A loan was approved by Prudential Insurance Company in the amount of \$12,600.00. See Exhibit D-9 (Tr. 123, 124). Ravsten approached the Federal Land Bank and Utah Mortgage Loan, but no loan commitment was made. (Tr. 126).

The general rule is that impossibility arising subsequent to the making of a contract does not excuse performance.

Impossibility of performance originating in financial incapacity is not a defense.

6 Williston on Contracts, Rev. Ed. Sec. 1932, p. 5412

Martin vs. Star Pub. Co., (Del.) 11 Terry 181, 126 A.2d 238

Lewis vs. Harcliff Coal Co., 237 F. Supp. 6

The obvious reason the \$25,000.00 loan on the farm was not obtained was that the plaintiff already had it mortgaged to the Farmers' Home Administration for \$23,000.00 and there was an "escrow" indebtedness of \$8,000.00 on the Bambrough land (near Cornish). (Tr. 130, 137). However, before the trial the plaintiff borrowed \$14,000.00 on the Bambrough property. (Tr. 130).

When Ravsten had difficulty borrowing money on the plaintiff's farm he applied to the First Federal for a loan on the plaintiff's farm and the North Logan property. It was approved for \$25,000.00. (Tr. 127). There was no action on it. Some months later the plaintiff "indicated an interest in picking up the loan as a source of getting money", but he could not get the loan then. (Tr. 128, 129).

Under the circumstances of this case the following legal principle is applicable:

" . . . Where a contract is performable on the occurrence of a future event, there is an implied

agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and, where he prevents, hinders, or renders impossible, the fulfillment of a condition precedent or its performance by the adverse party, or is himself the cause of failure to perform the condition, he cannot rely on such condition to defeat his liability. A party who prevents the fulfillment of a condition of his own obligation commits a breach of contract; and a party whose misconduct has rendered it futile as a practical matter, for the other party to fulfill a condition cannot complain of his failure to do so. . . ." 17A C.J.S. p. 645.

See also 6 Corbin on Contracts, sec. 1329 p. 346.

It is evident from the testimony of the plaintiff that the defense of impossibility is a subterfuge for the reasons stated above and for the additional reason that the plaintiff did not intend to perform unless the North Logan property was sold. (Tr. 138, 139).

"Q. Was it your idea, Mr. Pitcher, that this earnest money receipt and offer to purchase, exhibit D-1, could not be performed by you unless you were able to sell the North Logan property?

A. That was the understanding that I had. Mr. Ravsten said he could sell the property, and I said if he could sell the property, fine and dandy, we'd go through with the deal, and that was the reason we signed it.

Q. And when you signed the agreement, exhibit D-1, did you even read it?

A. I didn't think I had to read it. Mr. Ravsten



told me what he'd do and that there was good enough for me.

Q. And you didn't even read D-1 before you signed it?

A. I didn't even read it." (Tr. 139).

### 3. IMPROVEMENT OF THE FARM AFTER CONTRACTING FOR ITS SALE IS NO GROUND FOR DENYING SPECIFIC PERFORMANCE.

The trial court made a finding that during the years 1962-1965 the plaintiff made valuable improvements on the farm in the sum of \$20,000.00, and that it would be "inequitable and unjust to attempt to grant specific performance. . . ." If this reasoning is sound, a party seeking to avoid his obligation to perform a real estate contract could simply improve the real estate. The law does not support such a contention.

In the case of *Erisman vs. Overman*, 11 Utah 2d 268, 358 P.2d 85, the party in possession under a real estate contract made a claim for the value of improvements voluntarily made on the premises. This court held:

" . . . As to any claim for improvements made voluntarily by the defendant, there is nothing in this case that would justify any claim therefor in law or in equity since they were made under circumstances that would not bind plaintiffs by any equitable doctrine of estoppel or the like, or under any legal or statutory interdiction. . . . "

#### 4. THERE IS NO EVIDENCE THAT THE DEFENDANT ABANDONED THE CONTRACT.

The trial court made a finding that the agreement was abandoned *by the parties*. (R. 40, Finding No. 9). Proof of mutual abandonment involves not only the acts but the intentions of both parties. The following evidence shows a consistent effort on the part of the defendant to obtain performance by the plaintiff.

The defendant: (1) Talked with the plaintiff's agent Ravsten at least once every two weeks to find out why the transfer papers were not completed and to check up on the crops. (Tr. 70). See also Ravsten's testimony to this effect. (Tr. 82). (2) Had the North Logan property surveyed and legal descriptions prepared. (Tr. 74, 158, 159). (3) Had a map prepared by an engineer when the property was surveyed and furnished it to Ravsten in the fall of 1962. (Tr. 159). (4) Removed hay and straw from the farm when the plaintiff said it belonged to defendant. (Tr. 153, 154). (5) Offered to pay Pitcher \$2,000.00 for the hay in August, 1962, if he would perform his agreement. (Tr. 195). (6) Offered to pay \$25,000.00 cash instead of requiring Pitcher to borrow that sum on his farm. (Tr. 161). (7) Had his attorney write letters to the plaintiff in August and September, 1963, demanding that he perform. (See Exhibits 2 and 3.) (8) Never failed or refused to perform. (Tr. 73). (8) Had his abstract brought to date and all transfer papers prepared. (Tr.

73). (10) Tendered a deed to the North Logan property, \$25,000.00 cash and a second mortgage for another \$25,000.00 in open court. (Tr. 161).

None of the facts above stated are controverted. There is no evidence in the record of any act of statement indicating that the defendant abandoned the contract. Absent proof of abandonment by both parties, the trial court erred in making finding of fact No. 9. Mutual abandonment involves an intention on the part of both parties to rescind or forsake the contract.

Green vs. Garn, 11 Utah 2d 375, 359 P.2d 1050  
See also 6 Williston on Contracts, Sec. 1826

## 5. THE COURT PERMITTED THE PLAINTIFF TO TAKE ADVANTAGE OF HIS OWN DEFAULT AND ERRED IN DENYING EQUITABLE RELIEF.

The plaintiff admitted on cross-examination that he had not even read the agreement before signing it and that he had never intended to "go through with the deal" until the North Logan property was sold. (Tr. 138, 139). The reasons for the evasions and delay are clarified by this cross-examination. The fault was all on the side of the plaintiff and yet the trial court permitted the plaintiff to use his own evasions and delay to defeat the defendant's clear right to equitable relief. This was manifestly error.

The writer of this brief has never seen a more callous disregard of an obligation nor a more obvious

effort to repudiate. Near the close of the testimony the court asked the plaintiff if he would perform if the defendant should give him \$25,000.00 in cash, a deed to the North Logan property and a note secured by a mortgage on the plaintiff's property for another \$25,000.00. His answer was, "No, I couldn't do it, not on that."

To carry out such a proposal the defendant offered in open court to pay \$25,000.00 and to sign a note and mortgage and he tendered a deed to the 30-acre tract in North Logan. This was refused. This offer would get for the seller the \$100,000.00 purchase price set out in the agreement. In addition, the purchaser offered in his amended pleading to pay for the hay and straw if specific performance was ordered. This would clearly meet his obligation "to do equity."

A practical solution was reached in a similar case. See *Haire vs. Patterson*, (Washington) 386 P.2d 953:

" . . . The earnest money agreement, considered in its entirety, contains all of the ingredients necessary for a cash sale. The buyers are granted the option to pay the full consideration at any time, and the seller is obligated to accept the same. The seller has agreed to convey a merchantable title by 'warranty deed, free of encumbrances except - - -' (No exceptions noted). The buyers may waive defects in title and elect to purchase subject to them. Encumbrances may be paid out of the purchase money at the time of closing sale. The preliminary title report showed the property subject to the lien of a mortgage

to Federal Land Bank with an unpaid balance of about \$888.29, a second mortgage to secure an indebtedness in the original amount of \$646.07, and a judgment for \$55.05, plus interest and costs. It further disclosed the existence of an easement for travel and utilities lines over a strip 16 feet in width, and an oil, gas, and mineral lease entered into in 1959 for a 10-year term with Humble Oil & Refining Company. We conclude that, if the respondents desire the property at this time for \$20,000 in cash and are willing to accept title subject to the foregoing easement and oil and gas lease, they are entitled to have it.

The cause is remanded to the trial court with instructions to modify the judgment upon the going down of the remittitur by eliminating therefrom everything after the first paragraph ending with the words, 'NOW THEREFORE,' and by inserting in lieu thereof the following:

'It is hereby ordered, adjudged and decreed that, in the event that within 30 days from the date hereof plaintiffs shall pay into the registry of this court the sum of Twenty Thousand Dollars (\$20,000), which sum shall be subject to the further order of the court, and shall notify defendant in writing of such deposit and of their election to accept title subject to the easement for travel and utility lines, and the oil and gas lease to Humble Oil & Refining Company, then the defendant is hereby directed to carry out and perform all acts necessary to effect a sale of the property described in Plaintiff's Exhibit 1 in accordance with the terms thereof in the same manner as though the plaintiffs had elected

to pay the entire consideration in cash. The said Exhibit 1 shall be considered as having been executed on the date on which plaintiffs shall notify the defendant of their having made the aforesaid deposit into the registry of the court, and the time for the performance of the various acts required of the parties in said Exhibit 1 shall commence to run from said date. Upon the complete performance by the plaintiffs and the defendant of all acts necessary to consummate said sale, the court shall enter such further order relative to the deposit in the registry of the court as may appear equitable.

‘In the event that plaintiffs shall fail within said period of 30 days to make such deposit and notify defendant thereof, this action shall be dismissed with prejudice upon motion of defendant.

‘The court hereby retains jurisdiction of this cause for the purpose of making such orders from time to time as the court may deem necessary and proper to make effective and to complete the specific performance of any and all acts required by this decree.’

As so modified, the judgment is hereby affirmed. . . . ”

See also the case of *Darneille vs. Geraci*, (Maryland) 205 A.2d 55, in which the court ordered specific performance against a vendor who was evasive and sought to repudiate a contract for the sale of land. This case is so closely in point on the facts and the law that we quote from it at length:

“When as here it became clear that the sellers—by belately claiming that the contract of sale

was too indefinite, uncertain and ambiguous to specifically enforced—had no intention of going through with the sale in any event if that could be avoided, the purchaser was thereby required either to accept the title as it was and tender payment into court or take the risk of possibly losing his suit for specific performance. *Chapman vs. Thomas*, 211 Md. 102, 126 A.2d 579 (1956). In such case, the general rule is to the effect that where uncertainties exist in the terms of a contract of sale, specific performance should be granted when cash is tendered in full payment of the purchase price. And where credit is provided for, as was the case here, it is the privilege of the purchaser in the absence of some indication to the contrary, to waive all uncertainties relating to the extension of credit by tendering the whole (or balance) of the purchase price. Ordinarily, tender not only waives all defects or uncertainties in the terms of credit, but also waives all other uncertain terms, when as here they are primarily for the benefit of the purchaser. In addition to *Haire vs. Patterson*, *supra*, see *Blanton vs. Williams*, 209 Ga. 16, 70 S.E. 461 (1952); *Levine vs. Lafayette Bldg. Corp.*, 103 N.J. Eq. 121, 142 A. 441 (1928); *Binns vs. Smith*, 93 N.J. Eq. 33, 115 A. 69 (1921); *Morris vs. Ballard*, 56 App. D.C. 383, 16 F.2d 175, 49 A.L.R. 1461 (1926). See also 5 Williston on Contracts (rev. ed.) sec. 1424.

The defendants also contend that the offer to pay \$245,000 into court came too late. When, however, a purchaser is at all time able, ready and willing to perform, a tender before trial is not necessary where the seller has expressed his intention not to perform."

## CONCLUSION

The trial court found that there was a valid contract, and then refused to specifically enforce it for reasons set out in the findings of fact consisting of impossibility of performance, improvement of the premises by the plaintiff and mutual abandonment. We have pointed out above that the mere failure of the plaintiff to get a loan application approved for \$25,000.00 does not constitute "impossibility," especially in view of the fact that a loan was offered on other security for the full amount and the defendant actually offered to pay the \$25,000.00 in cash. The second reason for denying relief to the defendant, namely, that after selling the property the plaintiff placed valuable improvements thereon is equally without merit. The finding of mutual abandonment is not sustained by any competent evidence.

The defendant, who at all times was ready, able and willing to perform his contract, and who consistently sought, through the plaintiff's agent, Ravsten, to get the plaintiff to perform, is entitled to specific performance under such terms and conditions as will be just to both parties.

Respectfully submitted,

E. J. SKEEN

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