

1967

Marcell Pitcher v. C. W. Lauritzen : Respondent's Brief

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**IN THE SUPREME COURT OF
THE STATE OF UTAH**

MARCELL PITCHER,

Plaintiff and Respondent

VS.

W. LAURITZEN,

Defendant

Edwin J. Skene,

Attorney for Plaintiff

Wm. Lake,

Attorney for Defendant

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARCELL PITCHER,
Plaintiff and Respondent,

vs.

C. W. LAURITZEN,
Defendant and Appellant

Civil No. 10563

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

Plaintiff brought action against Defendant to recover the reasonable value of hay and straw taken from his farm in the Summer and Fall of 1962, and for conversion of the hay. Defendant counterclaimed, alleging a valid earnest money receipt for the sale of the farm, claiming the hay and straw taken, and requested specific performance of the contract, and or damages for breach of the contract.

DISPOSITION IN LOWER COURT

The Trial Court submitted the question of reasonable value of the hay and straw to the jury and adopted the jury's findings as to value. The additional question of repudiation was submitted to the jury, and remaining is-

sues tried to the the Court. The Court found in favor of the Plaintiff and against the Defendant and awarded judgment for reasonable value of the hay and denied specific performance of the earnest money receipt as requested in Defendant's counterclaim.

STATEMENT OF FACTS

Respondent does not agree with the Statement of Facts as outlined by Appellant, and restates the facts to give a more complete picture of the case now before the Court.

On October 14, 1961 Ravsten Realty obtained a 6 months farm listing from Plaintiff (Def. Exh. 7). The listing called for a cash sale of his farm at the price of \$126,000.00. Towards Spring of 1962, Ben Ravsten, real estate man, contacted Plaintiff and stated Defendant was interested in the farm and had reduced the price of 30 acres of land in North Logan and that he, the real estate agent, had a prospective purchaser for the property, and that if Plaintiff would sign the Earnest Money receipt he could move the property by May 1, 1962 (See Dep. 27 and Tr. 140-141).

Plaintiff signed and delivered the Earnest Money receipt on the express condition that he was not interested in the North Logan property, which he had never seen, and that the final contract would not be agreed upon, prepared or closed until the sale of the North Logan property, at which time this sale could go through. (Tr. 140-141, 151 and Dep. 27).

The Plaintiff and Defendant had never met together prior to or at the time of signing the Earnest Money

Receipt. Signatures of each of the parties was obtained separately by the real estate agent Ravsten. (Tr. 49-50, 122). The contract expressly provided:

“The total purchase price of \$100,000.00 shall be payable as follows: \$100.00 which represents the aforesaid deposit, receipt of which is hereby acknowledged by you. \$..... on delivery of deed OR FINAL CONTRACT OF SALE WHICH SHALL BE ON OR BEFORE MAY 1, 1962. Balance of the 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 SELLERS FARM; Seller to carry the balance on contract or second mortgage at 5% interest.” (Def. Exh. 1).

The real estate man did not make a sale of the North Logan property by May 1, 1962, or at any other time. No final contracts were ever discussed, drafted, presented or signed. (Tr. 87). Loan application was made by the real estate agent but no loan for more than \$12,600.00 could be obtained on Seller's farm (Tr. 124, 126).

The real estate agent called on the parties at different times and got them together about twice at his office in an attempt to reach a meeting of the minds on a possible deal for the above and other and different property (Tr. 28).

Sometime in the Summer of 1962, the real estate agent called Mrs. Pitcher and stated the Defendant was in need of hay and would it be agreeable for him to get Plaintiff's hay. Mrs. Pitcher told him that they (the Plaintiffs) had no animals to feed and that she would consult her husband about Defendant's request. Later

she told the real estate agent the hay was for sale and that the Defendant could remove it from the Plaintiff's farm (Tr. 149). The real estate agent relayed this information to the Defendant but the said real estate agent could not remember any details about the hay (Tr. 178-179). This matter was never discussed between the parties themselves (Tr. 29). There is no issue raised on this appeal as to the Defendant taking the hay and straw or its value of \$3,487.00, the amount fixed by the jury and in the judgment (R. 2).

Each of the parties remained in possession of their respective lands and subsequent negotiations between the Plaintiff and Defendant were directed towards an enlarged deal (Tr. 89, 133, 191).

On June 16, 1963, the Defendant and his son came to the home of the Plaintiff to go over the farm. The Plaintiff had gone to church and the Defendant and his son looked over some property not mentioned in the Earnest Money Receipt. They then came back to the house and Mrs. Pitcher testified as follows:

"A. I was going to get Marcell (Plaintiff) for them and they said 'No, they would go to the farm and look it over and they would be back.' I told them when they came back, I would go get him. Mr. Lauritzen came back. It was a quarter to twelve when he came. I told him I'd get Marcell and he said, 'no, just tell him the deal is off.' He left." (Tr. 63-64).

Thereafter, the parties met only a couple of times (Tr. 28). During these meetings the Plaintiff attempted

to collect his money for the hay and straw. (Tr. 32). It wasn't until Plaintiff brought this action in an attempt to collect the bill for the hay and straw, that he learned of the claim of the Defendant, that the Earnest Money receipt was still valid. It wasn't until the trial that the Defendant tendered a deed and offered to pay \$25,000.00, the amount of the loan (Tr. 159-160). During this time (approximately 2 years) the Plaintiff had made valuable improvements on his farm in excess of \$20,000.00 (Tr. 189).

While the evidence is somewhat conflicting in many respects the Court made the following Findings: (R. 37).

3. That neither the Plaintiff or Defendant had met the other at the time the Earnest Money Contract was signed, but signatures were obtained by one B. J. Ravsten, real estate broker, who represented to the Plaintiff that the price of the North Logan property had been reduced and that had a prospective purchaser for the same. The said B. J. Ravsten stated that he expected to close the sale of the North Logan property within ten days. The Plaintiff relied upon these statements and signed the Earnest Money Contract, believing no final contract would be entered into to close the transaction until the North Logan property had been sold.

4. That at the time Plaintiff signed the Earnest Money Agreement no map was exhibited to him and he had never seen the premises. The Plaintiff stated to the real estate man that he was not interested in the North Logan property unless the same could be sold for cash, which he needed to get into the sprinkler pipe business. That the 30 acres mentioned in the Earnest Money Agreement to be traded by De-

fendant to Plaintiff for \$50,000.00 was a part of the 189 acre tract owned by Defendant and a description of this 30 acres was not obtained until a survey was made in October, 1962 and the same was never accepted by the Plaintiff.

5. That no final contract was ever prepared, made or presented to the Plaintiff within the time specified therein or within a reasonable time thereafter, by the real estate agent or either of the parties. That no conveyance of any property was ever prepared or ever presented to either party for signature until at the trial in 1965, when the Defendant prepared and tendered a deed to the North Logan property (30 acres). That an attempt was made to obtain a loan of \$25,000.00 but no loan for such sum could be obtained or any sum in excess of \$12,600.00. That by reason thereof it was impossible to perform this condition of said contract and Plaintiff is excused of any performance under the terms of the Earnest Money agreement.

6. That the said Earnest Money contract made no mention as to the time for possession for the Pitcher form or the North Logan property. That each of the respective parties remained in possession of their respective properties. That at no time prior to the removal of the hay and straw by Defendant did either party request of the other the right to possession of the property agreed to be sold or exchanged. That both prior to and after the removal of the hay and straw, there were some negotiations in the office of the real estate broker to assemble a contract agreeable to the parties, but at no time were the terms of such contract agreed upon. That the taking of the hay was not taking possession of the property under the Earnest Money contract and Defendant was not entitled to ownership of the hay or other crops before

obtaining possession of the real property or until the purchase price therefor was paid.

7. That during the latter part of July or the first part of August, 1962, the real estate agent called Plaintiff's wife on the phone and stated that the Defendant was in need of hay and asked if Plaintiff had hay to sell. Thereafter, the real estate agent reported to the Defendant that Plaintiff had hay available and he could get the same. That between August 15, 1962 and November 15, 1962, the Defendant or his agents removed at least 165 ton of hay and 44 ton of straw from Plaintiff's farm. That no conversation was had between the parties concerning the removal of hay until August, 1963, when Plaintiff attempted to collect the amount due from the Defendant from the hay and straw, at which time the Defendant conditionally offered to pay \$2,000.00 for the same. That at the time the hay and straw were removed by the Defendant from Plaintiff's farm, it was baled and stacked, except the Third Crop hay and straw, which were baled but still in the field. That Plaintiff believed he was selling the hay to Defendant and Defendant believed he was entitled to the hay under the Earnest Money Contract.

8. That there was no meeting of the minds of the parties with regard to the sale of the hay, and the Court further finds that at that time the Earnest Money Contract had not been performed according to his terms. The Defendant used the straw and fed the hay to his cattle. That Defendant has not paid any sum to the Plaintiff for the hay or straw and the Court accepts the jury findings on special verdict of the hay as being in the sum of \$3135.00 and the value of the straw being in the sum of \$352.00, making a total of \$3487.00 for both. The Court finds said amounts are a fair and reasonable value for the hay

and straw removed by the Defendant from Plaintiff's farm. That by reason thereof, the Defendant is indebted to the Plaintiff for the sum of \$3487.00, plus interest thereon at 6% per annum from November 15, 1962 to date hereof in the sum of \$656.25.

9. The Court further finds that the Plaintiff retained possession of his farm property for the years 1962, 1963, 1964 and 1965. That he paid for and harvested all crops thereon during these years, and made valuable improvements on the said farm during this time in the sum of \$20,000.00. That it would be inequitable and unjust to attempt to grant specific performance of the original Earnest Money Agreement, which would unjustly enrich the Defendant after this long and unreasonable length of time, even though the Court finds such agreement was a valid contract in its inception, but further finds that the said agreement was subsequently abandoned by the parties, and that negotiation thereafter were directed to an effort of making a new contract, which was never agreed upon.

POINTS OF APPEAL

1. Where the Defendant obtained hay from Plaintiff without any meeting of the minds as to the terms of the purchase of the hay and without consideration, the Plaintiff is entitled to a judgment for the fair market value of the hay.

2. The Earnest Money receipt in this case is not specifically enforceable because it is indefinite and uncertain as to many necessary details essential to the contract.

3. That the conduct of each of the parties and failure to finalize a contract within the time specified in the

Earnest Money Receipt or a reasonable time thereafter, was sufficient evidence of abandonment of the Earnest Money Contract, if the same was a valid contract.

4. It was impossible to finalize the Earnest Money receipt according to its terms.

5. That because of changed conditions within more than three years between the signing of the Earnest Money receipt and the trial of the case, it would be grossly unjust to grant specific performance of the contract at this time.

ARGUMENT

1. PLAINTIFF IS ENTITLED TO THE REASONABLE VALUE OF THE HAY AND STRAW TAKEN BY DEFENDANT FROM HIS FARM IN THE SUMMER AND FALL OF 1962 WITHOUT CONSIDERATION.

The Defendant apparently does not contend that the value of the hay and straw is unreasonable. The law seems well settled in this point that plaintiff is entitled to reasonable value of the hay or quantum Meruit.

To begin with, it should be stated that the rule in law cases in this State has been well established over a long period of time as follows:

“The Trial Court’s finding in a law action must be sustained on appeal if supported by any substantial competent evidence.” *Vadner v. Rozzelle* 88 Utah 162, 45 P. 2nd, 561.

“In law cases, the Supreme Court is bound by Findings of Fact of the Trial Court if supported by

any competent evidence.” *Harper v. Tri-State Motors, Ins.* 90 Utah 212, 58 P. 2nd 18.

“In law cases, trial court’s findings are not disturbed unless so clearly against weight of evidence as to indicate misconception or lack of due consideration thereof. *Greco v. Gentile* 88 Utah 255, 53 P. 2nd 1155.

“In law cases, the findings of the trial court are approved, if there is sufficient competent evidence to support them, and are disturbed, unless it is manifest that they are so clearly against the weight of evidence as to indicate a misconception, or not a due consideration of it.” *Jensen v Howell* 75 Utah 64 282 Pac. 1034.

While no Utah case on the question of growing crops has been found, a recent well considered Idaho case, *Nuquist v. Bauscher* 227 P. 2nd 83, 85, does seem to be in point: The Idaho Court says:

“The general rule is, subject to exceptions not herein necessary to discuss, that if there is no agreement, expressed or implied, in a contract for the sale of real estate, the purchaser is not entitled to possession until the full payment of the purchase price has been made, and if the purchaser complies and receives the deed to the premises, he is then, and not until then, entitled to possession of the property sold.”

“The rule is stated in 55 Am. Jur. 808, Par. 385, as follows:”****that if there is no agreement, express or implied, in a contract for the sale of real estate, that the vendor shall deliver possession of the premises before the full payment of the purchase price, the purchaser is not entitled to the possession: and

that a mere contract for the sale of real estate which provides that if the purchaser complies with his part of the contract and pays the purchase price as agreed, the vendor will then deed the property, raises no legal inference that possession of the property is to be given before the deed is to be executed."

"The rule covering growing crops on premises is stated in 15 Am. Jr. 202, Par. 11 as follows: "If,**** the purchaser is given no right to the possession until the time for conveyance arrives, he acquires no interest in the growing crops which mature and are harvested before the time for the conveyance and his right to possession arrives."

"A discussion of cases on the subject would serve no useful purpose and would unnecessarily extend this opinion to an unreasonable length. For a review of the subject matter and cases thereon, see: *Barrell v. Britton*, 244 Mass. 273, 138 N.E. 579, 28 A.L.R. 1069." *Wilson v. Sanchez* 254 P. 2nd 594 in a California case supporting the same rule of right to possession.

In the interest of brevity we refer to the Note in 28 A.L.R. 1069, where many cases are listed, for the rule in the Idaho case.

Rules on Appeal in equity cases are as follows:

"Supreme Court has full power to review all questions of law and fact in equity case and to set aside trial Court's judgment if, in opinion of Supreme Court, such judgment is not supported by evidence, but, where case was regularly tried and trial court found on all material issues, its findings will not be disturbed by Supreme Court unless they are so manifestly erroneous as to demonstrate oversight or mistake which materially affect substantial rights of

appellant." McKay vs. Farr, 15 U. 261 49 P. 649; Klopenstine vs. Hays, 20 U. 45 57 P. 712; Elliot v. Whitmore, 23 U. 342, 65 P. 70.

See also:

Omega Inv. Co. v. Woolley, 72, U. 474, 271 P. 797
Escamilla v. Pingree, 44 U. 421, 141 P. 103. Sidney
Stevens Implement Co. vs. South Ogden Land,
Building & Improvement Co. 20 U. 267, 58 P. 843.
Silver King Consol. Mining Co. v. Sutton 85 U. 294,
39 P. 2d 682.
39 P. 2d 682. Clotworthy v. Clyde, 1 Utah 2nd 251;
265 Pac. 2nd 420.

There are no special circumstances in the case at bar that would indicate the Defendant was to take possession of the property before the final contract was agreed upon and executed. All the evidence in this case why the Plaintiff should not be entitled to a judgment for the value of the hay and straw as entered by the Court.

2. THE EARNEST MONEY RECEIPT IN THIS CASE IS NOT SPECIFICALLY ENFORCEABLE BECAUSE IT IS INDEFINITE AND UNCERTAIN AS TO MANY NECESSARY DETAILS ESSENTIAL TO A CONTRACT.

Counsel for appellant cites authorities holding that an Earnest Money contract can be specifically enforceable. These authorities have no fact situations similar to this case. There is no evidence that plaintiff changed his mind as contended by defendant. Plaintiff has always maintained that the contract was signed on the condition

of the sale of the North Logan property, and the conduct of the parties and the real estate agent indicates that the parties understood this.

In the case of Bowman et al vs. Reyburn et al, Colorado 170 P2d, 271 at page 275 the Court says:

“The contract must be enforced according to its terms or not at all. A COURT IS WITHOUT AUTHORITY TO COMPEL A PARTY TO DO SOMETHING HE DID NOT CONTRACT TO DO. In the case of Schmidt v. Barr, 165 NE 131, 135, 65 ALR 1. This Court said in Hunt vs. Rousmaniere’s Adm’rs 1 Pet 1, 14, 7 L. Ed. 27 Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise, is highly beneficial to society. The latter is without its authority, and the exercise of it would be not only a usurpation of power, but would be highly mischievous in its consequences.”

In the case of Adams v. Henders 168 US 573, 18 S. Ct. 179, 182, 42 L. Ed 584, the Court states:

“In an action for specific performance, the Contract must be free from ambiguity and it must be clearly established that the demanded performance is in accordance with the actual agreement of the parties. Offutt v. Offutt, Md, 67 A. 138. “A greater amount or degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for damages.”

Before a contract can be specifically enforced the contract must be complete, definite and certain.

In 65 ALR 102 it states:

“ On the other hand, a suit in equity is wholly an affirmative proceeding, its objective being to procure a performance by the Defendant specifically, and this requires a clear and precise understanding of the terms of the contract, for they must be CLEAR AND DEFINITE before the performance thereof can be decreed.”

In the Oregon case of Smith vs. Vehrs 242 P2d 586, page 589, it states as follows:

“In Berry v. Wortham supra, 96 Va. at page 89, 30 S.E. at page 444, the Court said: “It is an elementary doctrine of Courts of equity that they will not specifically enforce any contract unless it be complete and certain....*It must be complete in all its parts; that is, all the terms which the parties have adopted as portions of their contract, must be finally and definitely settled, and none must be left to be determined by future negotiations; and this is true without any regard to the comparative importance or unimportance of these several terms.*”

The above case also holds that the Court cannot make clear that which is left in doubt and uncertain. For this reason it would have been error for the Trial Court, in our opinion, to attempt to make a contract for these parties with regard to the Earnest Money Receipt now before the Court. The Defendant failed to prove what property was intended to be conveyed by the parties as listed upon the said Earnest Money Receipt. The attention of the of the Court is called to the testimony of Marcell Pitcher

THEREAFTER, WAS SUFFICIENT EVIDENCE OF ABANDONMENT OF THE EARNEST MONEY CONTRACT EVEN IF THE SAME WAS A VALID CONTRACT IN ITS INCEPTION.

The facts show that following the execution of the contract on or between April 16 and 20, 1962, that no final contract was ever prepared or offered to Plaintiff for signature.

The record indicates that various attempts were made over a period of many months to put a deal together, but the terms were never agreed upon or completed.

The conduct of the parties clearly indicates that they never considered the Earnest Money Receipt a binding contract or anything other than a preliminary attempt to see if a deal could be put together.

Defendant never called upon Plaintiff to request possession of the farm. He retained possession and control of his North Logan property and Plaintiff kept possession of his farm in Cornish and Weston.

After the Earnest Money Receipt was signed Defendant did not undertake to farm the property of the Plaintiff, or show any interest in crops such as grain, beets and hay which were planted and harvested. The Defendant did not attend to the plowing, planting of crops, protecting the property, or do anything of any kind to produce or harvest any crops. He did not irrigate the hay, cut, rake, bale or stack the hay. Certainly this conduct is inconsistent to that of a person who claims to have purchased property or was bound by a contract to purchase it.

The foregoing is ample to negotiate the argument of counsel that Lauritzen did everything he could to get the contract completed. The fact is he did absolutely nothing at all until after the hay was stacked or the third crop baled in the field. Plaintiff had the hay for sale. Ravsten, the real estate agent, arranged for Lauritzen to go get it. (Tr. 149). The parties were still negotiating and Ravsten was still trying to find a buyer for the North Logan property. Pitcher made no objection to Lauritzen taking the hay, assuming he would pay for it.

The admitted actions or conduct of the Defendant all indicate an abandonment. On June 16, 1963, the Defendant expressly manifested this intent when he told Mrs. Pitcher the following:

“Just tell him the deal is off.” (Tr. 64).

This manifestation of his intent, together with his prior conduct supports a finding of abandonment by the Court. The Plaintiff's conduct in keeping possession of the property, farming it and cropping it as he did for the years 1962, 1963, 1964 and 1965 clearly establishes his intention that he never considered the contract as valid or binding. The fact that he made improvements upon the farm during this time, in excess of \$20,000.00 is entirely inconsistent with Defendant's argument that he did not have the necessary intent to abandon.

Since the Court found the contract was valid in its inception, the only reasonable conclusion the Court could reach from the conduct of the parties was the time for performance fixed in the agreement had long passed, that

they subsequently abandoned the deal. This finding would not have been necessary if the Court had correctly found this Earnest Money contract was not valid and binding as contended by the Plaintiff in his Cross Appeal.

4. IT WAS IMPOSSIBLE TO OBTAIN THE LOAN AND FINALIZE THE EARNEST MONEY CONTRACT ACCORDING TO ITS TERMS:

In this case, the efforts to obtain a loan were made by the Plaintiff through Mr. Ravsten, the real estate agent. Mr. Ravsten, however, was not able to get a loan for more than \$12,600.00 on Sellers (Plaintiffs) property. (Tr. 124, 126).

The record shows there was some mention of a \$25,000 loan committment being made by Cy Clark upon the North Logan property (Tr. 124-125). When Mr. Ravsten attempted to get this loan the money was no longer available (Tr. 128, 129). Remember that North Logan property was not Sellers property as specified in the Earnest Money receipt; upon which a loan was to be obtained.

As to the impossibility argument, Counsel for appellant, seems to indicate that it was plaintiff's responsibility to obtain the loan. The fact that there were pre existing mortgages on his farm is immaterial. There is no evidence in the record indicating that these mortgages were the reason that the loans could not be obtained. Counsel is merely speculating and attempting to blame plaintiff (because a loan could not be obtained). One might ask what did defendant do towards obtaining the loan. All the efforts of Mr. Ravsten were directed to-

wards getting the parties together and finalizing some of the points which were left open at the time of the original negotiations of the contract. (Dep. 7 and 8).

“Impossibility of performance of contract is defense to action for specific performance thereof, though impossibility is Defendant’s fault, as equity will not order defendant to do something beyond his power.” *Rachou v. McQuitty et al*, Mont. 1951, 229 P2d 965, 968, citing Rest: of law of contracts Sec. 368, p. 669. Also 5 Williston, Contracts, Rev. Ed. Sec. 1422. p. 3973.

In the case of *Crittenden v. Hansen et al*, Cal. 1943, 138 P2d 37 pages 38 and 39 the Court stated as follows:

“But since the contract has become unenforceable, appellant is confronted with the settled rule that specific performance will not be required when its enforcement would be impossible or inequitable.”

The facts of this case clearly fall within this announced rule of law.

5. IT WOULD BE INEQUITABLE AND UNJUST FOR THE COURT TO GRANT SPECIFIC PERFORMANCE OF THIS CONTRACT THREE YEARS OR MORE AFTER IT WAS EXECUTED.

In this case, the Trial Court, sitting as a Court of equity, had the duty to look carefully at all the evidence and determine whether equity and justice could be obtained by granting specific performance.

More than three years and five months elapsed between the time of the execution of the Earnest Money

receipt and the trial where the Defendant requested the Court to grant specific performance. This was only after the Plaintiff brought a lawsuit for the purpose of recovering money for the value of hay and straw removed by the Defendant from his farm in the Summer and Fall of 1962. During the intervening time, Plaintiff made considerable improvements in the farm. (Tr. 140, 89). To force the Plaintiff to now sell under the original terms would cause irreparable damage to the Plaintiff.

As to Counsel for Appellant's third point, that the plaintiff could not recover the improvements made on the farm in 3½ years, he cites the case of *Erisman v. Overman* 11 Utah 2d 268, 358 P. 2d 85. This case is not similar to our case in any facts whatsoever. In that case the defendant had entered into possession, failed to make monthly payments as required in the escrow contract for a period of 10 month, apparently claiming the right to offset the payments for a sewer hookup. During the time they made improvements on the home, and then after action was brought against them for delinquencies under the contract they tried to recind the contract and collect for improvements. In our case, possession was never surrendered. Each party farmed their own lands. Plaintiff never considered his farm as sold, and defendant never made claim to it until after action was brought by plaintiff for the price of the hay in the summer of 1963.

In 61 ALR page 58 it states:

"In the exercise of its discretionary powers to determine when the equitable relief of specific performance may be invoked, on the general rules formulated and followed is that this equitable relief will not be granted if, under the circumstances, either

because of the inequitable enforcement of the contract would be harsh, inequitable, oppressive or unconscionable. . ”

The Defendant, after this long delay should be estopped from asking for specific performance, after knowing that the deal never did go through and the final contract was never made by May 1, 1962 as contemplated by the parties, and from asking this Court for Specific Performance, when this action was brought for the purpose of recovering money for the purchase price of hay and straw, which the Defendant admits he received and never paid for.

Near the end of the trial the Court was exploring the question of whether the offer was fair and just and might result in an agreeable compromise settlement of the case. The following record is recited.

“The Court: I have got to ask you again, Mr. Pitcher. Now here is a deed to the North Logan property. Mr. Lauritzen is ready to give you \$25,000.00 in cash and then sign a note and a mortgage on your property up there for \$25,000.00. Now what’s wrong with that?”

A. “This here price of this property in North Logan for \$50,000 is so unrealistic, your honor, that it isn’t worth a tenth of that.”

A. “The reason we signed this thing was, Mr. Ravsten made the statement that he could sell the property, and it was on that premise that we signed it. (Tr. 162).

Finally, the Court of equity here considering all the facts and circumstances of the case can only do justice

between these parties by leaving them as the owners of their respective properties. The Defendant is out nothing whatever. He got the Plaintiff's hay and fed it to his cattle and should pay for it.

If specific performance were granted here on the vague and insufficient terms of the Earnest Money receipt or the offer above referred to, thus forcing the Plaintiff to take the two tracts, 20 acres of which is still sage brush land comprising approximately 30 acres with no rental value shown and for which no sale can be found, it would result in the Plaintiff suffering a loss of approximately one half of the list price of his property, when the loss of the improvements placed on the property by Plaintiff is considered.

There was no meeting of the minds of the parties on any such a deal and the Court should not make it for them.

CROSS APPEAL

RESPONDENT CROSS APPEALS FROM THE TRIAL COURT'S FINDING THAT THE EARNEST MONEY RECEIPT WAS A VALID CONTRACT IN ITS INCEPTION.

RESPONDENT'S POINTS ON CROSS APPEAL

Respondent cross appeals from the Trial Court's ruling that the Earnest Money Receipt was a valid contract and relies on the following points:

1. That the Earnest Money receipt (Def. Ex. 1) did

not contain a sufficient description of the land to be sold or received to contribute an enforceable contract.”

2. That there was no map prepared of the North Logan property until the late Fall of 1962. The map finally offered in evidence as a survey was prepared by Defendant without consulting the Plaintiff or giving him an opportunity to accept or agree to it. It was totally unacceptable to the Plaintiff.

3. That the contract is indefinite and silent as to who was to make the \$25,000 loan or its terms and conditions or who was to pay the same or necessary terms to constitute a contract for sale or exchange of real estate.

4. Contract fails to set forth whose obligation it was to pay the existing FHA mortgage on Plaintiff's property in the sum of \$23,000.00.

5. The said Earnest Money Agreement was expressly signed upon the representation and belief that the real estate agent had or would have a sale for the 30 acres before the terms of a final contract would be agreed upon before May 1, 1962. That this was a mere preliminary step towards a later final agreement.

6. That there was never a meeting of the minds of the parties as to any of items 1 to 6, but they did, by words and conduct, establish that the said Earnest Money contract was merely a temporary receipt to be finally determined if the transaction could be finalized by agreement.

ARGUMENT

In the interest of brevity the previous arguments in support of the above points are not repeated here but should apply also on the Cross Appeal.

The description of the property to be conveyed by Plaintiff is as follows:

220 acre Pitcher farm, 60 acres Bambrough farm and 160 acre Weston Farm.

Together with all water rights and owners interest in well, pump and sprinkler pipe at Cornish, Cache County, Utah.

To be received by Plaintiff, "30 acres in North Logan as indicated by map."

These descriptions come squarely within the rule in the case of Adams vs. Manning 46 Utah 82 148 Pac. 465 where this Court, in a well considered opinion, said such a description could not be construed to meet the statute of frauds. In that case, as here, there were other lands owned by the vendor and it was not possible to identify from the document which land was intended to be transferred. The Court says if that is sufficient, what becomes of the statute of frauds. There was claimed possession in that case and yet the Court reversed the Trial Court, saying that the possession shown was not sufficient part performance. There is nothing that even squints of part performance here.

No surveyor or anyone else could take these descriptions and locate any land. The Court found there was no

map shown to the Plaintiff and the record amply establishes this finding (Tr. 131, 146). Defendant Exhibit 3 from which it appears the description in the deed tendered at the trial was prepared in the Fall of 1962 and platted in December 1962. It was prepared by the Defendant without consulting Plaintiff or giving him an opportunity to accept it. The record is not clear when, if at all, this was shown to Plaintiff but it is clear that the Plaintiff never accepted it or agreed to it.

The Survey allots Parcel "A" 21.6 acres in the Southeast corner of the 189 acre tract and Parcel "B" near the Northwest corner of the larger tract. The two tracts, according to the scale of the map are about 3600 feet (almost .7 mile) apart. The survey did not purport to survey the fence lines that could mark the boundaries or property in mind. If the Defendant could pick out two tracts of sage or uncultivated land for the 30 acres, what is to prevent him from picking out a dozen other pieces. Certainly, there was no evidence that the Plaintiff knew there were to be two pieces (he had not seen the land when he signed the agreement (Tr. 131) and he was never willing to agree to these descriptions.

In the depositions of Mr. Ravsten, the real estate agent, he stated that at the time of the execution of the contract by the parties, *he did not have any maps which which he referred to that would have described the property used in the Earnest Money receipt.* (See Dep. page 21 lines 21 to 28).

We believe Counsel for Defendant must admit that part of the Plaintiff's home farm was not intended to be

included in the sale as evidenced by Mr. Ravsten's testimony, (Dep. page 3, line 27), wherein he states that the home place was not to be included in the deal. It should be noted further that the Plaintiff has additional land in and around the said area, and no indication is given where the dividing lines would be between the lands purportedly intended to be sold herein and the lands that he intended to keep.

This leaves the record devoid of any evidence of the meeting of the minds of the parties as to the descriptions of the property.

In the case of *Durham vs. Dodd*, 79 Ariz. 168, 285 P 2nd 747, 749, the Court, construing the interpretation of contract therein, cites the Re-statement of Law on Contract, Section 207, which prescribes a test to determine the adequacy of a memorandum to make enforceable contract under this statute of frauds. This section provides:

"A memorandum, in order to make enforceable a contract within the Statute, may be any document in writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto which states with reasonable certainty,...(b) the land, goods, or other subject matter to which the contract relates, and (c) the terms and conditions of *all the promises constituting the contract and by whom and to whom the promises are made.*"

This case further states that the boundaries must be ascertainable *from the memorandum* and that this cannot be supplied by parole. It cites 139 ALR, 965 an annotation.

A Washington case of 1960, *Bigalow vs. Mood*, 353 P. 2d 429, 430 states:

“We have held consistently that in order to comply with the statute of frauds, a contract for deed for the conveyance of land must contain a description of land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument, which does contain a sufficient description (citing numerous cases).”

The rule established by the above authorities clearly establish that there must be a meeting of the minds as to the identity of the property being sold or traded. The description could not be selected and prepared by the Seller without some agreement by the Buyer. If the Trial Courts ruling in this case is affirmed, let us have a ruling that the *Adams v. Manning* case, *Supra*, is overruled and that real estate agents are encouraged in their preparation of these form Earnest Money receipts to just insert a number of acres and then select any piece of property out of a larger piece that suits their convenience to hold the purchaser, so that they can collect their commission. Surely this Court is not going to go that far.

The real estate agent, Ravsten, testified in his deposition, which was published (Tr. 173), that there was no meeting of the minds as to many of the terms of the contract as indicated by the following testimony:

Q: “And did you discuss with Mr. and Mrs. Pitcher or either of them the matter of the balance of the \$25,000 on the transaction, whether it would be by contract or second mortgage?”

A: *"That it would be contract, and as I recall, although the details had not been worked out, I'm not certain whether it was a ten or a fifteen year period."*

Q: "It was one or the other, but you've forgotten."

A: "That's correct."

Q: "And were those details worked out at or about the time this draft of April 16, 1962, was made?"

A: *"They were discussed but were left open. When this was prepared pending some decisions on the part of Mr. Pitcher, as I recall the details."* (Dep. 7 & 8).

In addition to the failure to have a proper description that would satisfy the Statute of Frauds the Earnest Money receipt and offer to purchase is defective in that it provides that part of the purchase price was to be a \$25,000 cash loan on Seller's farm and that there is no statement in the contract indicating what type of loan this was, what interest rate would be paid, when it would be payable, what annual payments were to be made and who was to make the payments, what land was to be mortgaged, who would obtain the Loan and who would pay it.

It is obvious from the long effort and negotiations that took place over the Spring, Summer and Fall of 1962, and Spring and Summer of 1963, that no loan was ever obtained on the said property, thus complying with this provision of the Earnest Money contract. It would appear, that this fact alone, would be sufficient grounds to hold that the Earnest Money contract was fatally defective.

A further reason why the contract is defective is that it provides that the balance of the purchase price would be carried on a contract or second mortgage at 5% interest. Here again, there are no terms spelled out concerning the method of payment, who was to make the payment, whether or not it was to be made on an annual, monthly or other basis or whether it was to be on a contract or a second mortgage. Thus, we have in this particular Earnest Money receipt, areas which make the contract fatally defective as a sufficient memorandum to comply with the Statute of Frauds as required by statute.

CONCLUSION

The Plaintiff is entitled to an affirmance of the judgment for the reasonable value of the hay. Even if the Earnest Money receipt was a valid contract in its inception, it was an executory contract only, and never was executed to the point that would pass any title to the crops.

The Court erred in holding the Earnest Money receipt was a valid contract in its inception. If this point is now sustained, as we contend it should be, the other discussions about specific performance will need no further consideration.

The Earnest Money receipt was so indefinite, uncertain, and left so many items "Open" that it cannot be found to be so definite, clear and complete as to justify a judgment of specific performance.

The Court should not undertake to make some contract for these parties that they were not willing to make

for themselves. This is not a case where the Plaintiff changed his mind. His conduct and actions were all consistent with his testimony as to the conditions upon which he signed the paper.

To grant specific performance here would do unconscionable injustice to the Plaintiff. To deny specific performance injures no one unless consideration is given to the right of the real estate agent to collect his commission.

Any one of the four matters mentioned in in the last four paragraphs is sufficient to sustain the trial judgment of the Trial Court.

If there are technical errors in some of the rulings of the Court, growing out of some confusion in the record, all such errors were harmless and should be passed by in the interest of ending these three years of litigation.

Respectfully submitted,

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