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Craig Caldwell and Robert E. Convington dba Caldwell and Covington v. Anschutz Drilling Company, Inc. : Brief of Respondent

Utah Supreme Court

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No. 9587

IN THE SUPREME COURT
of the
STATE OF UTAH

CRAIG CALDWELL and ROBERT E. COVINGTON, dba CALDWELL AND COVINGTON,

Plaintiffs and Appellants,

vs.

ANSCHULTZ DRILLING COMPANY, INC., a corporation,

Defendant and Respondent.

Respondent's Brief

On appeal from a Judgment for Defendant entered by the District Court of Uintah County, Utah, the Honorable Joseph E. Nelson, Judge.

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IN THE SUPREME COURT
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No. 9587

CRAIG CALDWELL and ROBERT E. COVINGTON, dba CALDWELL AND COVINGTON,

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Defendant and Respondent.

RESPONDENT'S BRIEF

On appeal from a Judgment for Defendant entered by the District Court of Uintah County, Utah, the Honorable Joseph E. Nelson, Judge.

STATEMENT OF THE KIND OF CASE

Respondent agrees that this is an action wherein plaintiffs seek a decree of specific performance requiring defendant to convey to plaintiffs certain oil and gas leases, with an alternative prayer for damages for breach of alleged contract, in the event specific performance is impossible.

DISPOSITION IN LOWER COURT

Over defendant's objection a jury was impaneled to try the case. At the conclusion of plaintiff's evidence, the trial court took the case from the jury and granted defendant's motion to dismiss with prejudice.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the judgment of dismissal and a direction for a new trial. Defendant seeks affirmance of the judgment as entered.

STATEMENT OF FACTS

With small but important exceptions hereinafter noted, plaintiffs statement of facts is correct so far as it goes; however, it omits some facts necessary to a full consideration and proper disposition of the case, so that defendant is under the necessity of correcting and supplementing the same.

As indicated, the plaintiffs brought this action for specific performance. Damages are asked for only in the event "specific performance of said contract is not granted." See plaintiffs' complaint herein.

Defendant by its answer denied the existence of the alleged contract on which plaintiffs based their action, and as a further affirmative defense alleged that plaintiffs had rejected the defendant's offer to enter into a proposed contract, and that thereafter the defendant entered into a binding agreement with a third party to sell the subject leases to such a third party, which affirmative defense was placed in issue under the rules. Insamuch as the action was terminated at the conclusion of plaintiffs' case, there is no evidence

in the record with respect to this alleged contract of sale to a third party, and nothing appears in the record before this court to show that it would be either impossible or inequitable to decree specific performance if an enforceable contract were found to exist in fact and in law.

On the pleadings mentioned, plaintiffs filed a demand for a jury trial. Defendant moved to strike the demand for jury trial upon the ground that the action was essentially and primarily one for specific performance in which plaintiffs were not entitled to jury trial, but in which, on the contrary, defendant was entitled to have the court determine the facts, and particularly the facts relating to the existence or non-existence of the alleged contract. Defendant's motion was denied and a jury impaneled to try the case, but, as indicated, at the conclusion of plaintiffs' case, on defendant's motion the court took the case from the jury and entered a judgment of dismissal with prejudice upon the ground that plaintiffs had failed to prove a claim upon which any relief could be granted. The specific basis for this motion and ruling was that plaintiffs had failed to prove an existing, enforceable contract.

It must be carefully noted that there is no proof, and indeed plaintiffs do not claim, that any consideration was given to defendant for the offer to sell embodied in the proposed draft contract, plaintiffs Exhibit 3. It does not appear that plaintiffs contend, and indeed they cannot contend, that this was a legally binding option by which defendant was required to keep its offer open for any specified time.

The certified check which paragraph 4 of this written offer requires to be delivered contemporaneously with the execution of the contract by the buyer is stated to be "hereinafter referred to as 'earnest money'." As stated in paragraph 9 of the offer (quoted on page 3 of plaintiffs' brief) the defendant seller specifically stipulated the conditions for the acceptance of the offer which must be met before the offer would ripen into a binding contract: (1) This contract must be executed by buyer; (2) The "earnest money" must be *received* by seller on or before February 23, 1961; and (3) An executed copy of the contract must be *received* by seller on or before that date.

On page 3 of plaintiffs' brief it is asserted that Mr. Lynch, defendant's president, told plaintiffs that "paragraph No. 9 need not be complied with as long as it was understood that a deal had been made." *This is not true.* The only evidence in the record is the stipulated testimony of plaintiff Caldwell that on February 22 Mr. Lynch "informed me that the deal was made and that *I need not be concerned about the time element* specified in paragraph 9 of the contract."

The plaintiffs sent the unsigned contract back to their attorney, Alloway, in Denver, with specific limited authority and instructions contained in two separate letters, plaintiffs' Exhibits 4 and 5, which were enclosed with the unsigned contract. Plaintiffs called Alloway as their witness. Alloway, an attorney of Denver, Colorado, understood and testified, and also told defendant's president, Mr. Lynch, that his agency and authority were limited in accordance with

his letter of instructions. When he went to see Lynch about consummating the offered contract, he "told him my agency authority was limited to the agency agreement which I had taken from Caldwell and Covington." (Tr. 56, line 6) Alloway also testified (Tr. 73, line 30 to 74, line 2) "The agency called for executing in accordance with the letter of instructions. I was exceeding my agency if I went proper."

The letter of plaintiffs, Exhibit 4, granted Alloway authority "to execute the contract of sale . . . with whatever modifications consistent with our letter to you of this date which you can effect." The accompanying letter of the same date contains the following:

> "The following changes will be desired by us, which are stated herein, and *will be revised according to our instructions to you,* together with any and all changes for our benefit which you may see feasible to change."

Exhibit 5 then specifies certain particular changes relating to warranties of title, permission for assignment and payment of delay rentals.

No check, certified or other, was sent to Alloway for use by him in meeting the requirements of paragraphs 4 and 9 of the written offer. (Tr. 65, lines 10 to 17.)

Mr. Alloway was therefore confronted with the necessity of writing his own check. This he hesitated to do, as he hesitated to assure Mr. Lynch that "he had the deal." (Tr. 72, line 21 to 73, line 9.) This was understandable in the light of Alloway's limited author-

ity((Exhibit 5), and the fact that the money he had available in his account was money received from a Mr. Stableford which which had been delivered to him for the specific purpose of paying another draft in another deal. (Tr. 78). After Alloway received the unsigned contract from plaintiffs at 2:50 p. m. on February 24th, he hurried to defendant's office, which is on the fourteenth floor of an office building. In so doing he passed within fifty yards of his bank. He had read the offered contract and knew the requirements of a certified check. He did not pause to get his check certified for the reason that he did not know that the bank stopped certifying checks at three o'clock. (Tr. 77, line 20 to 72, line 8) He had read paragraph 9 of the offer on the way over. (Tr. 68, line 11 and 77, lines 3 to 13).

After defendant's president had refused to make any modifications in the offered contract as requested by Alloway in accordance with his instructions in Exhibit 5, and had refused Alloway's personal check because it was uncertified, Alloway asked Lynch to go down to the bank with him, apparently to cash the check, and Mr. Lynch refused to accompany him to the bank. (Tr. 6, lines 23 to 27, and 59, lines 11 to 16.) Alloway testified that Lynch said cash was not acceptable, *but there is no evidence or claim that cash was ever actually tendered to him.*

After Alloway's unsuccessful attempt to get his check certified and the refusal by defendant's officers of his second offer of his uncertified check, Alloway concluded the negotiations by stating, "*If you are not bound, I am not bound.*" He then returned to the office,

taking with him the unsigned copy of the offered contract, together with his uncertified check. The offered contract was never signed by or in behalf of plaintiffs. Neither was it ever delivered to or received by defendant. By his statement, he intended to mean that if one party was not bound by the contract, neither was the other, and if the uncertified check was not acceptable, there was no point in signing the contract and he could do nothing more about the situation. (Tr. 59, line 29, to60, line 2; 78, lines 20 to 27; 60, line 12; and 76, line 29, to 77, line 2.)

When on the following Saturday morning Alloway called and said he had a check from Mr. Stableford for the full amount of the purchase price (uncertified) and that he was willing to bring it over if acceptable, defendant's President, Mr. Lynch, told Alloway, "No, I am sorry, we have got another commitment until Monday noon, the 27th." (Tr. 61, lines 21 to 25.)

POINTS URGED FOR AFFIRMANCE

1. *The evidence is insufficient as a matter of law to prove an enforceable contract for the sale and purchase of the leases.*

2. *The controlling issue of the existence of a contract was triable to the court, and the court acted properly in deciding the issue, instead of submitting it to the jury.*

ARGUMENT

POINT 1. THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO PROVE AN ENFORCE-

ABLE CONTRACT FOR THE SALE AND PURCHASE OF THE LEASES.

That there was no contract consummated between the parties seems almost too clear for argument. There never was and never has been any meeting of the minds.

The essence of the situation is this: At plaintiffs' suggestion, defendant on February 17th sent to plaintiffs a written offer to enter into a contract, specifying, as defendant had a right to do, with particularity and clarity the three concurrent acts necessary to an acceptance of the offer and fixing a time limit for such acceptance. There is evidence that the time limit was waived, but *there is no evidence that the three specified conditions constituting the manner of acceptance were ever waived.* There was no contract or enforceable agreement to keep the offer open for any specified time or any reasonable time. Plaintiffs rejected the defendant's offer by making a counter-offer through their agent, Alloway, and shortly thereafter the offer was withdrawn by defendant, who advised plaintiffs' agent that the leases had been committed to a third party, and there could be no further dealings under the offer. *Plaintiffs have never to this date* (1) *signed the contract,* (2) *delivered or tendered an executed copy thereof to defendant, or* (3) *delivered or tendered to defendant the certified check required as earnest money.* These were the three concurrent conditions for the acceptance of the offer, all clearly specified in the offer and never waived.

The contention of the plaintiffs that all of the conditions of acceptance specified in paragraph 9 of

the offer were verbally waived is, as we have seen, entirely unsupported in the record. The *only* evidence in the record is plaintiff Caldwell's stipulated testimony that defendant's president Lynch, on February 22, in a telephone conversation, informed him "that the deal was made and that *I need not be concerned about the time element*" specified in paragraph 9 of said contract. Clearly the only waiver was of the "time element." The evidence clearly and unequivocally shows, without any question, that both parties understood and knew that there was no waiver of the other requirements of paragraph 9 specifying the manner and conditions of acceptance of the offer. In the first place it is clear and undisputed that plaintiffs *did not consider themselves bound by the terms of the offer as written, even disregarding all of paragraph* 9, for they immediately afterwards telephoned and mailed their agent Alloway instructions to procure modifications in the other terms of the offer, relating to warranty, rental payments, etc., before executing the contract in their behalf, and their attorney-agent Alloway failed to procure a *certified* check only because he did not know that he could not procure certification later in the day. Further, Alloway testified that he never signed or offered to sign, or delivered or offered to deliver an executed copy of the contract, and that he took the offer with him after his counter-offer was rejected, and that he "neglected" to sign and tender delivery of the contract because defendant refused to accept his uncertified check and he couldn't get it certified so "What could he do-"

It is to be noted that Alloway never testified or claimed in the conversation with defendant's represen-

tatives that defendant had waived the requirement of a certified check, or had waived the requirements of the signing and actual delivery of the written contract. It seems certain that if plaintiffs had understood that defendant had waived these requirements, they would so have informed their agent, and he would have reminded defendant's officers during the two-hour-long negotiations for modifications in the offer and the arguments over Mr. Alloway's check as being as good as a certified check.

The testimony clearly shows that Alloway did not feel that he had authority to execute a contract under his oral and written instructions unless the proposed contract was first modified in matters respecting warranty of title and warranty of payment of rentals. He testified positively that he considered he was exceeding his authority in indicating that he would close on the terms of the written offer, provided his personal check were accepted in lieu of the certified check specified. That he was exceeding his authority is clear from his testimony as well as from his testimony that he consulted with the California company with whom his principals were dealing about the requirements of warranty and tried unsuccessfully to get a commitment from those people.

Plaintiff Caldwell's stipulated testimony that Mr. Lynch told him that the deal was made must, of course, be considered in the light of the reason for conversation, namely that he could not deliver a certified check on February 23rd, because Washington's Birthday, February 22nd, prevented him from getting such a check

in time to place it in Mr. Lynch's hands on the 23rd. The statement, if made, certainly would refer *only* to the "deal" as outlined in the written offer of a contract *and included the requirements of consummation of the deal by signing the contract, placing it in defendant's hands, and delivering therewith a certified check for the earnest money.* As indicated, this is made abundantly clear by the fact that immediately after the conversation, Caldwell and Covington employed Alloway to execute and deliver the contract, first attempting to get other modifications.

Defendant's conduct in this regard has, of course, been entirely consistent throughout: It has insisted upon strict compliance with the offer from beginning to end.

It is, of course, elementary in the law of contracts that a simple offer, even if written, may be recalled and revoked at any time before legal acceptance causes the offer to ripen into a contract. Accordingly in

> 1 Willaston on Contracts,
> 3rd Edition (1957), Section 55,
> page 176,

the learned author says:

> "It is a consequence of the rule that unsealed promises without consideration are not binding, that offers unless under seal or given for a consideration may be revoked at any time prior to the creation of a contract by acceptance. 8 Therefore, even though a definite time in which acceptance may be made is named in such an offer, the offeror may, nevertheless, re-

voke his offer within that period. 9 Nor is it material that the offer expressly states that it shall not be withdrawn; revocation is still possible. 10 What communication amounts to a revocation is a question of interpretation. Any statement which clearly implies unwillingness to contract according to the terms of the offer is sufficient, though the word 'revoke' is not used. 11

"Thus, after an offer to sell property to one person, a statement by the offeror to the offeree indicating that he has sold the property to another person is a revocation. 12"

See also

Restatement of the Law:
Contracts, Sections 35(e),
41, and 42,

where the rules are set out that an offer may be terminated by revocation by the offeror, that revocation is accomplished by a communication from the offeror received by the offeree stating or implying that the offeror no longer intends to enter into the proposed contract, if received before acceptance, and that an offer for sale of property is revoked when the offeree acquires reliable information that the offeror has sold or contracted to sell to another person.

Of course if a promise to keep an offer open is made binding by a consideration, it cannot be revoked by unilaterial action during its effective period. See

1 Willaston on Contracts, Third Edition,
Section 61, page 196.

Of course there is no proof, and indeed no contention, that defendant here received any consideration or made any promise to keep the offer open for any particular time. See

1 Willaston on Contracts,
3rd Edition, Section 61(a).

No option is here involved. Accordingly it is clear that when Mr. Lynch told plaintiffs' agent Alloway on Saturday morning that the lease had been committed to another party, defendant's offer was revoked, unless it had been previously accepted and had become binding. This, of course, was not the case.

Again, it is elementary, as we have seen, that defendant may in its offer specify with particularity the manner of acceptance thereof. This, of course, it had an absolute right to do, and its discretion in this regard is not in any way limited. No one is bound to enter into a contract, and if he desires to do so, he may even prescribe seemingly unreasonable, or even silly conditions which must be complied with before he is bound. Accordingly,

> "If an offer prescribes the place, time, or manner of acceptance, its terms in this respect must be complied with in order to create a contract."
>
> Restatement of the Law:
> Contracts, Section 61.

See also

1 Willaston on Contracts,
3rd Edition, Section 76,
page 238.

where the learned author says:

> "Not only may the offeror dictate the consideration which he demands in return for his offer, but he may also dictate the way in which acceptance shall be indicated. 3 The offeror may limit the time within which an offer may be accepted. 4 He may also, as was held in a leading case, dictate the place at which acceptance must be made, likewise the manner of acceptance may be a condition of the offer. 5 Thus, if an offer requires an answer by telegram or otherwise specified channel of communication, an answer by a different channel will generally not create a contract. 6
>
> ". . . . Even though the offer prescribes as a condition and not merely a suggestion a particular mode adopted by the acceptor will be effectual if the offeror thereafter manifests his assent to the other party 10 but it seems not otherwise. To allow a unilateral waiver of the method originally prescribed is open to objection for the irregular acceptance is a counter-offer and as such must itself be accepted."

In this case paragraphs 4 and 9 of the offer of defendant did specify a particular manner of acceptance and performance, consisting of three specified requirements, none of which have ever been satisfied. Neither plaintiffs nor anyone for them have ever (1) delivered or tendered a certified check for the earnest money, (2) signed the proffered contract, or (3) placed an executed copy of the contract in defendant's hands.

Accordingly there has never been any acceptance of the offer, never been any meeting of the minds, and has never been any contract, as a matter of law. True Alloway tendered his personal uncertified check, but this did not meet the terms of the offer and was rejected. This tender was certainly not even substantial compliance. This tender was made in defendant's office. It would have been possible for Alloway to leave the office, go directly to the bank and stop payment on his uncertified check. It would have been equally possible forAlloway to have been killed in an automobile accident over the weekend, which would have revoked the order for payment of money represented by the check. True, also, Alloway testified that he invited defendant's officers to go with him to the bank to cash the check, and that they declined. Even assuming that this is true, neither defendant nor its officers were under any duty to go fourteen floors and fifty yards, or fourteen inches, in order to collect cash in lieu of the certified check required. Certainly they were not required to accept the responsibility and danger inherent in caring for a large sum of money in cash over the weekend when they had specified that they were to be provided with a certified check, which would have been safe and sure against stop payment, cancellation by death, and theft. The legal conclusion that defendant's offer has never been accepted and no contract has ever come into existence is, it is submitted, irresistible. Although the principles here set out are so fundamental and so universally accepted that they have very rarely led to any litigation in recent years, this court has adopted and followed them. See

Candland vs. Oldroyd,
67 Utah 605, 248 Pac. 1101,

decided in 1926, and followed and cited with approval by this court in 1959 in the case of

J. Golden Barton Motor Company
vs. Jackson,
9 Utah 2nd 210, 341 Pac. 2nd 423.

Plaintiffs' argument seems to take the position that signing and delivery of the contract, and delivery of a certified check was excused because defendant would not accept Alloway's uncertified check and would not go to the bank with him to get cash in legal tender. This is not the law. Acceptance of an offer, whether a simple offer as here, or of a binding option, is never excused, because until the offer is accepted or the option exercised no contract can exist and the offeror or optioner is under no legal obligation. The acceptance of an offer in the manner specified therein never is and never can be a useless thing, because it is an essential ingredient to the formation of a contract, and if performed in the manner required would ripen into a contract notwithstanding any reluctance on the part of the offeror. See

Unatin 7-Up Company vs. Soloman,
157 A.L.R. 1304, 39 Atl. 2nd 835
(Pennsylvania).

Here Alloway admits that he "neglected" to sign and deliver the contract as required by the offer.

If it should be considered that a tender of cash would have been the equivalent of a tender of the

required certified check, the full and sufficient answer is that there never was any tender of cash.

> "In brief, to constitute a valid tender, the money must be *present, ready, produced,* and *offered* to the person who is entitled to receive it." (Emphasis added.)
>
> St. George's Society vs. Sawyer. (Iowa) 214 N.W. 877, 878.

This was never done. See also:

> Leask v. Dew, 102 App. Div. 529, 92 N.Y. Supp. 891 (1905), aff'd per curiam, 184 N.Y. 599, 77 N.E 1190 (1906);
>
> Bane v. Atlantic Coast Line R.R. 171 N.C. 328, 88 S.E. 477, (1916);
>
> Richey vs. Stanley, 38 S.W. 2d 1104 (Tex. Civ. App. 1931).

It should also be observed that under the established law the acceptance of an offer must be clear and unequivocal: The minds of the parties must meet upon every element of the proposed contract. See

> Candland vs. Oldroyd, supra,

and

> 1 Willaston on Contracts, 3rd Edition, Section 72, page 235.

Certainly in this case there was no unequivocal, positive and unambiguous acceptance of defendant's offer. Never was the certified check placed in defendant's hands, and never was a signed copy of the contract placed in de-

fendant's hands. Moreover plaintiffs' agent himself testified that his authority to accept the offer as written was doubtful. Clearly if the shoe had been on the other foot, and it had been defendant here who sought to specifically enforce this "contract" against the plaintiffs in this case, defendant would have been confronted with the argument that it had no signed contract and no contract was in force and that Alloway never had any authority to accept the offer except with the modifications stipulated in his letter of authority, that is to say, he never had any authority except to negotiate a new contract on terms not embraced within defendant's offer. As a matter of law it appears without question from the facts that there never was an acceptance of the offer and there is no contract which can support plaintiffs' action.

Finally it is submitted that it is clear that defendant's offer was rejected by plaintiffs before it was accepted and was thereby terminated so that any subsequent acceptance would be ineffectual. An offer may be terminated by rejection by the offeree, and where an offer is so terminated a contract cannot be created by subsequent acceptance.

Restatement of the Law:

Contracts, Section 35.

Furthermore

> "A counter-offer by the offeree, relating to the same matter as the original offer, is a rejection of the original offer . . ."

Restatement of the Law:

Contracts, Section 38.

And see also

1 Willaston on Contracts,
3rd Edition, Section 77,
page 251:

"A conditional acceptance is in effect a statement that the offeree is willing to enter into a bargain differing in some respects from that proposed in the oiginal offer. 11 The conditional acceptance is, therefore, itself a counter-offer 12 and rejects the original offer so that thereafter even a purportedly unqualified acceptance of that offer will not form a contract. 13

". . . . A reply altering in any way the method of payment or performance 2 invalidates the acceptance."

And see also

1 Willaston on Contracts,
3rd Edition, Sections 57,

where the learned author has this to say respecting rejection by the offeree:

"When an offer has been rejected it ceases to exist, and a subsequent attempted acceptance is inoperative, even though the acceptance is made within the time which would have been sufficiently early had there been no rejection. 6

"Any words or acts of the offeree indicating that he declines the offer, or which justify the offeror in inferring that the offeree intends not to accept the offer, or give it further consideration amounts to a rejection. This principle is

most commonly illustrated where a counter-offer or a conditional acceptance which amounts to a counter-offer is made by the offeree. This operates as a rejection of the original offer. 8"

Plaintiffs agent Alloway rejected defendant's offer at least three separate times in the course of his conversation with defendant's officers: First, when in accordance with plaintiffs' instructions, he proposed and demanded that the contract be rewritten with respect to warranties and rental payments; second, when he tendered his personal, uncertified check in lieu of the certified check required by the offer; and third, when he left, taking the unsigned contract with him and declaring, "If you are not bound, I am not bound."

The significance of the fact that neither plaintiffs nor anyone for them authorized in their behalf ever signed the proposed written contract is of particular strength and significance. See

1 Willaston on Contracts,
3rd Edition, Section 28,

where the learned author says:

"It is also everywhere agreed that if the parties contemplate a reduction to writing of their agreement before it can be considered complete, there is no contract until the writing is signed. 17 . . . If it appears that the parties, although they have agreed on all of the terms of their contract, mean to have them reduced to writing and signed before the bargain shall be considered complete, neither party will be bound until that is done, so long as the contract re-

mains without any acts done under it on either side. 19 . . . Sometimes the parties expressly provide that no obligation shall arise until the formal writing is executed. 7"

It is abundantly clear from the undisputed record here that it was the intention of the arties that no contract should come into existence until the terms thereof should be reduced to writing and signed by both parties. This was plaintiffs' intention as well as defendant's, as is manifest from the fact that they sent the unsigned contract to Alloway with instructions to negotiate changes therein.

The learned trial judge in this case was correct in applying the principles above outlined and in ruling, as a matter of law, that the evidence submitted by plaintiffs did not prove the consummation of a contract which could be the basis of plaintiffs' action here.

Correctness of the trial court's ruling is supported by the fact that the law requires, before specific performance can be granted, that the plaintiffs prove their contract by clear and convincing evidence, which is substantially more than a mere preponderance of the evidence, so that the mere existence of some evidence would not justify submitting the case to the trier of the facts. See

49 Am. Jur., Specific Performance,
Section 169, page 191;
81 C.J.S., Specific Performance,
Section 143, page 724;
Clark vs. George,
120 Utah 350, 234 Pac. 2nd 844;

Bowman vs. Reyborn (Colorado 1946)
170 Pac. 2nd 271;
Mestas vs. Martini (Colorado 1944)
155 Pac. 2nd 161, 167;

and

Montgomery vs. Berrett,
40 Utah 365, 121 Pac. 569.

See also

Kerchgestner vs. D. & R. G.W. Railway
Company, 118 Utah 41, 233 Pac. 2nd 699;
Greener vs. Greener,
116 Utah 571, 212 Pac. 2nd 194, 205;

and

Sine vs. Harper,
118 Utah 415, 222 Pac. 2nd 571.

It is respectfully submitted that the quantum of proof as to the existence of a contract was totally insufficient to submit to the trier of the fact.

POINT 2. THE CONTROLLING ISSUE OF THE EXISTENCE OF A CONTRACT WAS TRIABLE TO THE COURT, AND THE COURT ACTED PROPERLY IN DECIDING THE ISSUE, INSTEAD OF SUBMITTING IT TO THE JURY.

From the beginning the plaintiffs here have frankly conceded that this is an action *in personam* for a decree of specific performance of an alleged contract relating to real property. Only as an alternative, and if specific performance cannot be had, do plaintiffs seek a judgment for damages for breach of contract. (See the prayer of plaintiffs' complaint and plaintiffs' brief, page 1.)

As indicated inthe statement of facts, there is noth-

ing in the record to indicate that if plaintiffs prove their alleged contract to the satisfaction of the court, a decree of specific performance, *in personam,* could not and would not be issued. Accordingly this is not a case in which plaintiffs seek *both* equitable relief and damages for breach of contract at the same time, as was the case in

Valley Mortuary vs. Fairbanks,
119 Utah 204, 225 Pac. 2d 739

The contingency upon which plaintiffs would ask to have the same considered as an action at law for damages has not and cannot happen, and the case must be regarded as one purely for equitable relief in the nature of specific performance.

Accordingly plaintiffs had no right to jury trial under the provisions of the statute,

Section 78-21-1, Utah Code Annotated 1953.

The remedy of specific performance which plaintiffs here seek presents some interesting and unique aspects. If specific performance is granted, then there is no breach of contract, for defendant has been compelled to perform. On the other hand, if the trial judge determines, in his consideration of the petition for specific performance, that there is no contract, and that the plaintiffs' claim for specific performance must fall for that reason, ,then, of course, the trial court's finding and judgment in that regard would be binding for our purposes, and would become *res judicata.* In such event, of course, there would remain nothing to submit to a jury, as it would already have been determined that

there is no contract, and a contract is essential as a basis to any action for damages for breach of contract.

Only in the case in which the facts prove a contract to the satisfaction of the judge, and the court finds an existing contract, but then denies the equitable remedy of specific performance because of impossibility of performance, or because of the intervening rights of third parties who are innocent purchasers, does any issue arise which is tryable to a jury under the statute. In this third case, the court's determination that a contract existed would again be *res judicata,* but the question of damages for breach of contract would then remain undetermined and could be and probably should be submitted to and tried to the jury under an instruction that the court had already determined that there was a contract which had been breached, and it only remained for the jury to assess the amount of plaintiffs' damages. This of course has no application here, because the judge in this case has determined, in his consideration of the question of specific performance, that there is no contract existing which could support either a decree of specific performance, or a verdict for damages for breach of contract.

Even though the learned trial court (perhaps out of an abundance of caution, or perhaps in order to save time in the event that the evidence as it developed should disclose the third factual situation discussed) impaneled a jury, at the most this jury's verdict, if received, would have been advisory to the trial court upon the equitable issues, and the trial court, having the duty to determine the facts, would have had the

right to disregard the same. In effect this is what the trial court did when it dismissed the case at the close of plaintiffs' evidence. As the evidence developed, it became plain that there was no cause of action for specific performance, which was the trial judge's duty to determine. The learned trial court properly discharged his duty under those circumstances in deciding the issue of fact which controlled the primary equitable issue, which was at that point the only one presented.

In view of the fact that this case is an equitable case for specific performance, plaintiffs were not entitled to a jury trial and could not become entitled to a jury trial unless and until the condition precedent specified for their alternative prayer for relief should occur. This has not happened. Accordingly they were entitled only to a finding by the learned trial court upon the issue of the contract which they asserted was the basis for specific performance. The verdict of the jury at most could have been advisory. Plaintiffs have received the finding and judgment of the trial court, which is all they had a right to receive, and the action of the learned trial court in declining to take a purely advisory opinion from the jury is not, and could not be prejudicial to plaintiffs. The plaintiffs have had a fair trial and received substantial justice in accordance with the established statutes and rules of procedure. The error, if any there were, in declining to receive an advisory verdict from the jury on the existence of the contract alleged, is harmless and must be disregarded under *Rule* 61, *Utah Rules of Civil Procedure.*

In this connection see also

Johnson vs. Johnson,

9 Utah 2nd 40, 337 Pac. 2nd 420.

It remains only to add that inasmuch as this was an issue properly decided by the trial court, the decision should not be reversed unless this court, after indulging all established legal presumptions in favor of the correctness of the trial court's ruling, is still satisfied that all of the facts necessary to the legal existence of the alleged contract, and which would require a reversal, have been proved by *clear and convincing* evidence on the record, as demonstrated in the last two paragraphs of *Point* 1 of this brief, supra.

Clearly there is no such clear and convincing evidence in this record to justify a reversal.

CONCLUSION

It is therefore respectfully submitted that plaintiffs' appeal is groundless, and that the judgment of the court below should be affirmed.

Respectfully submitted,

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