FEB 14 1977
CLERK SUPREME COURT



IN THE COURT OF APPEALS OF IOWA

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| RONALD RUST, Appellee, | ) | Filed February 14, 1977 |
| vs. | ) | |
| D. TOM PETERSON, and DENNIS SODERSTRUM, d/b/a P AND S ENTERPRISES, Appellant. | ) | 33 2-58068 |

Appeal from Story District Court - Ed J. Kelley, Judge

Defendant-buyer appeals judgment awarding plaintiff-seller recovery on an alleged balance due from sale of cattle. - Affirmed.

John L. McKinney, of Ames, for appellee.

Charles Deppe, of Story City, for appellant.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

OXBERGER, J.

This appeal involves an action for a balance allegedly due on an oral contract for the sale of cattle. The plaintiff seller, Ronald Rust, was awarded a judgment from the trial court sitting as the finder of fact. The buyer, Tom Peterson, appeals this judgment. We affirm.

The questions presented on appeal are: 1) Did the trial court err in rendering judgment in Rust's favor after finding that the parties never had a meeting of the minds to form a contract? 2) Did the trial court err by awarding Rust recovery on a contract not pled by him? 3) Did the trial court err in allowing recovery on a contract invalid for lack of consideration?

Because this is a law action, the trial court's findings of fact have the force of a jury verdict. If supported by substantial evidence, they will not be disturbed. We view the evidence in the light most favorable to the judgment and construe the court's findings liberally. Farmer's Insurance Group v. Merryweather, 214 N.W.2d 184, 186 (Iowa 1974).

We must affirm the trial court if any sufficient basis appears in the record, even though the ruling was placed upon a different ground and even though plaintiffs do not seek to uphold it on the ground suggested. Binkholder v. Carpenter, 260 Iowa 1297, 1301, 152 N.W.2d 593, 596 (1967).

We are hampered by the trial court's limited findings of fact and his conclusions of law in which he said: "The law of contracts is so well settled in this State, that no citations need be quoted. The case turns entirely on a matter of fact."

The events giving rise to this action occurred in November, 1973. The trial court found Rust called Peterson several times in early November in regard to selling him some cattle. Finally, the "sale was made." The cattle were delivered in two separate trips and Peterson's agent gave a check of $37,365.70 for both

loads to the first trip driver as they had agreed. The next day, November 14th, the buyer examined the cattle and then on the following night, November 15th, he sold them at an auction. The cattle were sold at a loss. "The parties agreed over the phone to split the loss up to $1500." "The original check when presented to the bank at Story City, Iowa, payment had been stopped, either on the 16th or 19th of November, 1973." The defendant later paid plaintiff $34,105.65, the resale price, which was $3,262.05 less than the original amount. Rust filed suit against Peterson to collect this balance. The court concludes with the following statement: "It doesn't appear to the court that the minds of the parties ever met to form a contract. . . . The court finds that there was a loss as the result of this transaction. The court finds that the plaintiff should recover against the defendant in the sum of $1,800.35; this amount is arrived at by subtracting from the amount prayed, the $771.70 commission and $750 that the plaintiff agreed to stand as a loss."

In addition to the foregoing specific findings the court included the following statement in his findings:

> "The plaintiff claims he didn't know anything about the sale until the 17th - the cattle were already sold. . . . The parties have different views as to what happened and what was said. It is very unusual, that the cattle that were not satisfactory should be sold so soon and if you can believe one side they were sold before the other party knew of the difficulty. The court is left with very little to go on. . . . The defendant says he did not accept the cattle because they were not as represented, yet he went forward and had the cattle sold."

Construing these statements and the judgment most liberally in favor of affirming the trial court we find the trial court made the following findings of fact: after Peterson examined the cattle he found that they did not conform to the quality he had ordered. He immediately sold them at auction only to discover they brought less than his buying price. Peterson, not wishing

to bear the full loss, called Rust and informed him of the poor quality of the cattle delivered. Rust, feeling some obligation to assume part of any anticipated loss upon resale, agreed to split the loss up to $1500. Subsequently, Peterson had to pay $900 to Mr. Syperton for some of the cattle resold that died. Consequently, he refused to stand good for the compromise amount.

Peterson asserted at trial that the resale was at Rust's direction and that the only compromise he agreed to was to send $500 gratuitously to Rust. The trial court's findings of fact rejected Peterson's view and largely followed that asserted by Rust. There was substantial evidence to support these findings. It was undisputed from sale barn records that the sale occurred on November 15 and from bank records that the stop payment did not occur until November 16.

We conclude that from these findings of fact the court found an accord and satisfaction agreement was made between the parties over the telephone on November 17, 1973. In rendering judgment for Rust the trial court found the old contract was discharged when Rust and Peterson agreed to give and accept something in settlement of the claim and to perform this agreement. The "accord" is the agreement; the "satisfaction" its execution or performance. Holm v. Hansen, 248 N.W.2d 503, 506 (Iowa 1976); Kellogg v. Iowa State Trav. Men's Assn., 239 Iowa 196, 210-212, 29 N.W.2d 559, 567 (1948).

The defendant claims this agreement was not pled by Rust and therefore cannot serve as a basis for his recovery. However, Peterson did not object to the testimony offered by Rust on this issue. Indeed, he testified to a version of accord and satisfaction himself. In Holland v. Holland, 161 N.W.2d 744, 746 (Iowa 1968) the court said:

> "Further we have held several times that where evidence is introduced upon an issue not pleaded, if there were such here, and it is received without objection, this amounts to consent to try the issue and it is rightfully in the case (citations)."

The defendant objects that even if there was an agreement to share the losses it could not serve as a basis for Rust's recovery. He bases his argument on an asserted lack of consideration. We refer to the following authority:

> "A new promise by a debtor to his creditor, or a new agreement between them, either written or oral, may itself, as distinguished from its performance, be accepted by the creditor in satisfaction of a previous claim or demand, whether the latter is founded in contract or in tort, and where a promise or agreement is so accepted in satisfaction it extinguishes the claim or demand previously existing, and *constitutes a good accord and satisfaction, whether or not it is actually carried out or performed.* In case of nonperformance of the new promise or agreement the creditor's remedy is upon it, for its breach, and not upon the original claim or demand, which is not revived by the nonperformance of the new promise, and no right to recur to which arises or exists by reason of such breach.
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> . . . The new promise or agreement must, of course, in order to be efficacious, be supported by proper consideration, that is, some benefit to the creditor to which he was not before entitled or which he did not possess; *but this requirement is sufficiently met where the agreement constitutes an adjustment of a disputed claim or unliquidated demand."* 1 C.J.S. *Accord and Satisfaction* § 22 489-90, 491-92 (emphasis added).

See Sawyer v. Hawthorne, 167 Iowa 410, 418, 149 N.W. 512, 518 (1914). In this case when the new agreement was made on November 17th there was a dispute. The plaintiff claims the cattle were of the quality as ordered by the defendant. The defendant claims they were not. This dispute serves as a consideration for the promise to split the loss up to $1500. The plaintiff has not appealed the court's judgment that subtracts his commission so we do not consider this issue.

We find there is substantial evidence in the record to support the trial court's judgment. We affirm.