

**BRITT  
vs.  
COLLUM et al.**

No. 5056

SUPREME COURT OF NEW MEXICO

1947-NMSC-070, 51 N.M. 433, 187 P.2d 947

December 23, 1947

Appeal from District Court, Union County; Livingston N. Taylor, Judge. Suit for injunction by W. E. Buck Britt against D. M. Collum and another to restrain defendants from violation of an alleged agreement to take plaintiff's cattle for pasture. From an adverse judgment, plaintiff appeals.

**COUNSEL**

O. P. Easterwood, of Clayton, for appellant.

E. Ray Phelps, of Clayton, for appellees.

**JUDGES**

McGhee, Justice. Lujan, Sadler and Compton, JJ., concur. Brice, C.J., not participating.

**AUTHOR: MCGHEE**

**OPINION**

{\*433} {1} The parties will be referred to as they appeared in the trial court.

{2} The plaintiff sought an injunction against the defendants to prevent their claimed violation of an agreement to take his cattle for pasture.

{3} A temporary restraining order was issued ex parte and the defendants were directed to show cause on May 26, 1947, why it should not be continued in force. The defendants filed an answer to the order to show cause in which they questioned the legal sufficiency of the complaint. This answer was treated as a motion to dismiss and sustained by the court, whereupon the plaintiff recited the filing of the motion and the action thereon, and then offered testimony to prove certain facts to cure the defects in the complaint. He did not ask for leave to amend or tender an amended pleading. After

hearing his tender the trial judge stated that under the complaint the plaintiff was not entitled to an injunction. The plaintiff then offered further testimony in support of his complaint.

{4} Our rules relating to pleadings are very liberal and we have gone a long ways in holding pleadings amended where testimony not admissible under the pleadings was admitted without objection, but we are hardly prepared to hold that when {\*434} tested by a motion to dismiss a plaintiff may aid his complaint by a tender of testimony.

{5} The assignments of error relate to the refusal of the court to admit the testimony offered, and it is not claimed that the complaint in fact stated a cause of action.

{6} The ruling of the trial court was correct. The judgment is affirmed.