

1968

Jerome B. Guinand v. Paul T. Walton and Thomas F. Kearns dba, Aalton-Kearns : Respondent and Cross-Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JEROME B. GUINAND,

*Plaintiff-Respondent,
and Cross-Appellant,*

vs.

PAUL T. WALTON and THOMAS
F. KEARNS, dba ALTON-
KEARNS,

Defendants-Appellants.

Case No.
11153

Respondent And Cross - Appellant's Brief

**Appeal from the Judgment of the Third District Court
in and for Salt Lake County, Utah
The Honorable Stewart M. Hanson, Judge**

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*Plaintiff-Respondent,
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vs.

PAUL T. WALTON and THOMAS
F. KEARNS, dba ALTON-
KEARNS,

Defendants-Appellants.

Case No.
11153

Respondent And Cross - Appellant's Brief

STATEMENT OF THE KIND OF CASE

Respondent commenced this action seeking to recover an undivided ten per cent interest in the leasehold interests, overrides, reversionary interests, working interests, mineral interests and all other assest, including cash, of the partnership known as Walter-Kearns as of the date he terminated his employment with said partnership on May 31, 1965, together with an accounting for commissoins due as of said date.

DISPOSITION IN THE LOWER COURT

The case was tried below to the Court sitting without a jury. The Court awarded to plaintiff an accounting for commissions earned and not paid, based upon three per cent of the gross sales price of any mineral interest or lease sold by plaintiff on behalf of the partnership, Walton-Kearns, together with interest on said sum from May 31, 1965, as provided by law (R. 57-58). The Court also awarded to plaintiff an undivided ten per cent interest in all leases and mineral interests held by the partnership, Walton-Kearns, as of May 31, 1965, and ordered an accounting to determine the sum defendants are indebted to plaintiff on the sale of leases or mineral interests held by the partnership as of May 31, 1965, upon which the defendants have not paid the plaintiff the sum of ten per cent of the gross sales price of the said lease or mineral interest (R. 57-58). The Court also held that the writing of January 2, 1962, was not supported by consideration and is so vague as to be unenforceable and is not sufficiently definite as to be construed from its four corners (R. 54).

Appellants, hereinafter referred to as defendants, appealed from the judgment of the lower court after denial of their motion for a new trial. Respondent, hereinafter referred to as plaintiff, cross-appealed from the judgment of the Court below in relation to the various holdings of the Court in regard to the validity and enforceability of the writing of January 2, 1962 (R. 72-A and 72-B).

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of that part of the Court's judgment which holds that the writing of January 2, 1962, is so vague as to be unenforceable and is not sufficiently definite to be construed from its four corners, and that the said writing is not supported by consideration.

STATEMENT OF FACTS

The plaintiff agrees, in general, with the Statement of Facts set forth in the brief of defendants. However, that are several points thta plaintiff feels should be clarified. Therefore, a brief Statement of Facts is herein set forth.

Prior to the formation of the partnership consisting of Paul T. Walton and Thomas F. Kearns on November 1, 1955, the plaintiff was employed by Paul T. Walton and engaged generally in activities of a nature similar to those which were carried on by the partnership after its formation (Walton deposition, page 5, lines 10-12, and page 7, lines 1-7). At some date thereafter, it was clearly understood between the plaintiff and the defendants that he had an interest, at least in the leases held by the partnership, which interest was characterized as a two or three per cent carried working interest (Walton deposition, page 9, lines 9 through 12). At a later date it was further clearly understood between the parties that plaintiff had a five per cent interest, although it is not clear whether or not that

interest was a carried working interest or some other type of interest. (Walton deposition, page 11, lines 14-22). It further appears, rather clearly, that it was the intention of the parties that plaintiff was to receive at least a ten per cent interest in the leases if he terminated, and it would appear that this interest was absolute and not a carried working interest against which there would be any offset (Walton deposition, page 29, lines 9 through 17, and page 29, line 30, and page 30, lines 1 and 2) (R. 167-68). Although the agreement dated January 2, 1962, was not, in fact, signed on that date, it is admitted by all parties that at a prior date a discussion had been had between the plaintiff and the defendant Walton to the effect that plaintiff should have an increased interest in the partnership (R. 175 and R. 154). In March of 1962, when plaintiff was about to depart to Europe and North Africa on a business trip for the Walton-Kearns partnership, he requested that a writing be given him reflecting his interest in the assets of Walton-Kearns (R. 178). He told Mr. Walton that he had recently been married and that his wife did not know what his interest was in the partnership assets, and that he felt that he should have something in writing before leaving on an extended trip (R. 179). Pursuant to that request, the defendant Walton arranged for the drafting of an agreement by counsel for defendants in this case (R. 179). A meeting was had the afternoon of March 13, 1962, at which the defendant, Walton, defendants' counsel, and his secretary and the plaintiff were present (R. 179-180).

The rough draft of the agreement, which has been introduced as Exhibit D-4, was furnished to the plaintiff, as well as to all other persons present (R. 180). The plaintiff testified that he made certain changes on Exhibit D-4 as they were dictated by defendants' counsel, because some of the provisions as set forth in the original draft did not set forth the full facts and understanding that plaintiff had had with the defendants (R. 180). There is dispute in the testimony as to how the final agreement of January 2, 1962, admitted in evidence as Exhibit P-3, came into its final form. However, there is no dispute about the fact that it was signed by both of the partners, Paul T. Walton and Thomas F. Kearns.

After receiving said document, plaintiff remained in the employment of the partnership for a period of three years and five months, until he left that employment and went into business for himself. It is undisputed that he had no obligation under the terms of the writing of January 2, 1962, to continue in the employment of the defendant, Walton-Kearns. The defendants rely heavily upon the original draft of the agreement of January 2, 1962, as it was interlined by the plaintiff. However, it is plaintiff's position that the agreement that is involved, to wit, the final document of January 2, 1962, which was admittedly signed by the partners in Walton-Kearns, is the document which governs in this situation, and that it is clearly construable from its four corners and is clearly supported by consideration.

ARGUMENT

POINT I. THE AGREEMENT CAN AND SHOULD BE CONSTRUED FROM ITS FOUR CORNERS.

The document upon which the action below was brought and which is in evidence reads as follows:

WALTON KEARNS
Oil and Gas Properties
1205 Walker Bank Building
Salt Lake City, Utah
Empire 4-4333
January 2, 1962

Mr. Jerome B. Guinand
5623 Indian Rock Road
Salt Lake City, Utah

Dear Mr. Guinand:

This letter is to confirm your ownership of an undivided ten per cent (10%) interest in WALTON-KEARNS, a co-partnership composed of Paul T. Walton and Thomas F. Kearns. This interest includes and is not in addition to the various interests from time to time heretofore acquired by you.

Upon termination of your employment with the partnership for any cause whatsoever, your interest in the partnership will be determined and discharged as of said time without resulting in a dissolution of the partnership; and such interest as may have theretofore been vested in you in specific properties shall become your separate

property, subject to adjustments incident to your proportionate share of the then partnership indebtedness.

/s/ Paul T. Walton

/s/ Thomas F. Kearns

Although the document bears the date of January 2, 1962, by admission of all of the parties it was, in fact, executed and delivered at a later date and was back-dated to January 2, 1962 (Walton deposition, page 13, lines 4 through 18, and page 25, lines 12 through 14). (R. 154 and R. 178-180). There is no dispute that plaintiff had been an employee of Walton-Kearns, a co-partnership composed of Paul T. Walton and Thmoas F. Kearns, since 1955 (Walton deposition, page 5, lines 13 and 14). It is further not disputed that he acquired various interests in the partnership between 1955 and January 2, 1962 (Walton deposition, page 9, lines 9 through 12, and page 12, lines 6 through 21) (R. 158, 159). The agreement of January 2, 1962, also refers to the interest that the plaintiff had previously acquired in the partnership. It is also undisputed that the plaintiff remained in the employment of the partnership from the year 1955 until May 31, 1965, or for a period of approximately three years and five months after the date of the agreement which is the basis of this actoin, without any obligation in law or in fact to do so, and that immediately prior to January 2, 1962, or at such other date as the agreement was, in fact, entered into, he was employed by the co-partnership under an oral agreement without any termination

date, and also without any obligation to continue said employment.

The agreement of January 2, 1962, seems to be composed of rather simple language, which is not complicated and should be construed on its face.

The only possible conflict that can be found in the agreement is between the following two portions:

“This letter is to confirm your ownership of an undivided ten per cent (10%) interest in WALTON-KEARNS . . . ”
(found in paragraph 1) and

“Upon termination of your employment with the partnership for any cause whatsoever your interest in the partnership will be determined and discharged as of that date . . . ”

In interpreting the meaning of this letter, there are certain standards and rules of interpretation that require, among other things, that if at all possible a construction of the agreement be reached which effects a valid contract. This principle is enunciated in *Driggs v. Utah State Teachers Retirement Board*, 105 Utah 417, 142 P. 2d 657 (1943) at 663, in which the Court, quoting from *Schofield v. Zion's C.M.I.*, 85 Utah 281, 39 P. 2d 342, 96 ALR 1038 (1934), states as follows:

“It is elemental, in construing a contract, that its purpose, its nature, and subject matter should be considered. A construction giving an instrument a legal effect to accomplish its purpose will be adopted when it can reasonably be done, and

between two possible constructions that will be adopted which establishes a valid contract.”

The Utah Courts have also adopted the commonly accepted rule that the ordinary and usual meanings of the words contained in a contract must be applied there-to in construing it. *Plain City Irrigation Company vs. Hooper Irrigation Company*, 11 Utah 2d 188, 356 P. 2d 625 (1960), recognizes this principle and the Court says as follows at page 627 of the *Pacific Reporter*:

“The beginning point of interpretation of a contract is an examination of the language used in accordance with the ordinary and usual meaning of the words used, and in case of uncertainty, the background circumstances may be looked to.”

It is also said in that case at page 628 as follows:

“Generally, where there is doubt about the interpretation of a contract, a fair and equitable result will be preferred over a harsh or unreasonable one. And an interpretation that will produce an inequitable result will be adopted only where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given it.”

The whole of the agreement must be considered and effect must be given to the entire agreement, if at all possible. See *Gates v. Daynes*, 3 Utah 2d 95, 279 P. 2d 458 (1955) at page 462 of the *Pacific Reporter*, where the Court states:

“The contract is not artfully drawn and ap-

pears to have been drawn without outside assistance. We are permitted only to construe the contract so as to give effect to the entire agreement without ignoring any part thereof."

In this same connection, it was said in *Cornwall vs. Willow Creek Country Club*, 13 Utah 2d 160, 369 P. 2d 928 (1962), in construing the meaning of a contract:

"In interpreting a contract, the primary rule is to determine what the parties intended by what they said. The court may not add, ignore or discard words in the process, but attempts to render certain the meaning of the provision in dispute by an objective and reasonable construction of the whole contract."

Although the word "said" is used, the contract in question was in writing.

A case of great interest herein is *Marx v. Noble*, 10 Utah 2d 440, 354 P. 2d 121 (1960), in which it is recognized that, if there is uncertainty or ambiguity, the contract should be strictly construed against the drawer, but that before that rule is reached the Court must look realistically at the contract in the light of the circumstances surrounding its coming into existence and give effect to the intent of the parties, if it can be reasonably ascertained. This proposition is set forth in the following language from that case:

"It may be a source of regret to the parties that the contract did not expressly state how the interest was to be handled. Not having done so, in adjusting the rights of the parties, it is neces-

sary to resort to established rules relating to the interpretation of contracts. We are in agreement with the well-recognized rule urged by the defendants that where there is uncertainty or ambiguity the contract should be construed against him who draws it. But it is to be kept in mind that this rule applies only where there is some genuine lack of certainty, and not so strained or merely fanciful or wishful interpretations that may be indulged in. The primary and a more fundamental rule is that the contract must be looked at realistically in the light of the circumstances under which it was entered into, and if the intent of the parties can be ascertained with reasonable certainty it must be given effect."

In the event there are two apparently conflicting provisions, which is not admitted by the plaintiff, but which is contended in this case by the defendants, the rule set forth in *Hardinge vs. Eimco*, 1 Utah 2d 320, 266 P. 2d 492 (1954), should be followed:

"It is fundamental that if effect can be given to both of two apparently conflicting provisions in a reasonable reconciliation that interpretation will control. Williston on Contracts, sec. 622."

A most recent case, *Seal vs. Tayco, Inc.*, 116 Utah 2d 323, 400 P. 2d 503 (1965), contains a discussion which is apropos here. The Court was addressing itself to the problem of interpretation of a contract in which there were conflicting clauses and admittedly one of them was later in the contract, but also in small print. However, the principle remains the same. The Court there said:

“In addressing this problem, certain principles should be kept in mind. The first is that in case of uncertainty as to the meaning of the contract it should be construed most strictly against its framer, Amsco. A particularized application of this well-recognized doctrine is that it seems manifestly unfair to permit one who formulates a contract to so fashion it as to mislead the other party by setting forth a clearly apparent promise or representation in order to induce acceptance, and then designedly ‘burying’ elsewhere in the document, in fine print, provisions which purport to limit or take away the promise, and/or preclude recovery for failure to fulfill it.”

In *Morgan vs. Child Cole and Company*, 41 Utah 562, 128 P. 521 (1912), this Court interpreted a contract which was no less certain than the contract in question. In that case the plaintiff and defendant had entered into a written agreement that provided that the plaintiff should furnish the defendant information “. . . concerning the property known as the Sioux Consolidated Mining Company . . .” and that the defendant should purchase “. . . about 40,000 shares of the capital stock of said company, or an investment of not to exceed \$15,000.00 . . .” and to equally divide the profits and share the loss. The defendant in that case urged the agreement was ambiguous and could not be enforced. The Court held the agreement did not contain an incurable ambiguity.

In *Pelton’s Spudnuts vs. Doane*, 120 Utah 366, 234 P. 2d 852 (1951), this Court was faced with the question of whether a franchise contract which pro-

vided that five per cent of the gross spudnuts sales of the defendant should be spent for advertising, with $2\frac{1}{2}$ per cent to be paid by the plaintiff and $2\frac{1}{2}$ per cent to be paid by the defendant, was too indefinite and uncertain to be enforced. The defendant did not pay any sum for the advertising, and on trial the lower court held that the provision was void on its face as "too indefinite and uncertain" and that it was unenforceable. On appeal, this Court held that the provision was neither indefinite or uncertain, and reversed for a new trial on other issues. Thus, this very Court has held that a percentage determination or formula for determining the amount to be paid in a given situation is not so indefinite or uncertain as to make an agreement unenforceable or ambiguous.

Applying the above standards of construction to the agreement, and in particular to the language of the agreement most recently quoted above, the last part of which the defendants contend to be vague or unenforceable, it becomes apparent that the first sentence confirms to the plaintiff his ownership of ten per cent in Walton-Kearns. The second sentence merely designates the time the *value* of that interest will be computed. At the time the agreement was entered into, it obviously would not have been possible to determine the dollar value of the ten per cent interest because the business was to be continued from and after that date, and its assets and liabilities would, without doubt, change. The only reasonable interpretation that can be placed upon the agreement is that at the time of

the termination of plaintiff's employment the assets and liabilities of Walton-Kearns would be determined, the latter subtracted from the former, and ten per cent of that figure resulting is the *value* of the plaintiff's interest. The contention of defendants that the agreement is vague and unenforceable because there is no standard fixing or governing its meaning is absolutely negated by the language of the agreement itself. The standard as set forth therein is ten per cent of the assets, after deducting from the assets the partnership indebtedness as of the date of termination of employment of the plaintiff. Applying the rules of interpretation set forth herein to the plain language of the agreement, it becomes obvious that there is no need of an additional standard and that the agreement carries with it all of the necessary elements for computing the defendants' obligation to the plaintiff. Therefore, on the basis of the written instrument itself, judgment should be awarded in favor of plaintiff and against defendants, requiring an accounting based upon the determination of the assets of the partnership as of the date of the termination, less the partnership indebtedness, and ten per cent of said amount should be the value of plaintiff's interest.

POINT II. THE AGREEMENT IS SUPPORTED BY ADEQUATE CONSIDERATION.

In regard to the language of the agreement above set forth, it should be specifically noted that the first

sentence reads, in part, as follows:

“This letter is to *confirm* your *ownership* of an undivided ten per cent (10%) interest in Walton-Kearns . . . ” (emphasis added)

The document does not say that it specifically *conveys*, but speaks in terms of *confirming*, which by clear implication means that it is reducing to writing a prior agreement between the parties. Now, it matters not whether we speak of consideration for the written document or whether we speak of consideration for the prior agreement between the parties which was reduced to the writing dated January 2, 1962. At least a portion of the consideration in either instance is the same, to wit: Guinand's remaining in the employment of Walton-Kearns. The defendants contend and the Court below was in error in holding that, without a term or tenure written into the contract, the plaintiff was free to terminate at any time and thus gave no consideration for the ten per cent interest plaintiff received. The law is quite to the contrary, and the Court's attention is directed to 35 *Am. Jur. Section* 12.1, found at page 37 of the 1968 supplement, which says in part as follows:

“It is elementary that the parties to a contract of employment, if they act upon a sufficient consideration while the contract remains executory and before a breach of it occurs, may by a new and later agreement rescind it in whole or in part, alter or modify it in any respect, add to or supplement it, or replace it by a substitute. The latter agreement which may properly be called the secondary agreement, may be either one of

two different kinds: (1) it may merely alter, modify or qualify the original agreement, or (2) it may entirely supersede the original agreement . . . It has been variously held that the following consideration moving from the employee to the employer is sufficient to support a secondary agreement of employment; . . . *the continuance of the employee in the services of his employer where he was under no contractual obligation to remain* . . . Warren v. Mosher, 31 Ariz. 33, 250 P. 354, 49 ALR 1311; Spicer v. Earl, 41 Mich. 191, 1 NW 923, 32 Am. Rep. 152; Roberts v Mays Mills, 184 NC 406, 114 S.E. 530, 28 ALR 338; Scott v. J. F. Duthie & Co., 125 Wash. 470, 216 P. 853, 28 ALR 328; Long v. Forbes, 58 Wyo. 533, 136 P.2d 242, 158 ALR 224.” (emphasis added)

In this situation, assuming the defendants’ contentions to be correct, that is, that plaintiff had no obligation to continue in the employment after the agreement conveying the ten per cent to him was reached, the above authority clearly meets that situation and holds that the fact that he did continue in the employment is consideration to support the employment agreement. He obviously had no obligation to continue in defendants’ employ before the January 2, 1962 agreement. See Counter-Affidavit of defendant Walton dated February 24, 1966, as follows:

“That the plaitniff in the instant action had the right to terminate his employment with Walton-Kearns at will, and that the writing of January 2, 1962, in no way altered, changed or committed him to any tenure of employment with Walton-Kearns.” (R. 21-22)

The same rule is found in an annotation in 158 *ALR* at 242, *Section 4*, in which all of the cases to that date are collected. The case to which the above annotation is made is *Long v. Forbes*, 58 Wyo. 533, 136 P. 2d 242 (1943), and is almost identical to the instant case. In that case there had been a contract to pay an employee an additional \$50.00 per month, to be held for him until the termination of the contract, and the Court held against a contention that there was no consideration for defendant's promise to pay the additional \$50.00 per month as follows:

"An employment of this sort which is terminable at any time is subject to modification at any moment by either party as a condition of its continuing at all. (Citing numerous cases and the Restatement of Contracts, Section 76, comments (c)) . . . The doing of anything beyond what one is already bound to do, though of the same kind, and in the same transaction, may be a good consideration. Pollock on Contract, 10th Ed., 181; Willison on Contracts, Revised Ed., Section 102A."

In a California case, *Sabatini v. Hensley*, 161 Cal. 2d 172, 326 Pac. 2d 622, (1958), a situation very similar to the case at bar arose. In the *Sabatini* case, a former employee sued his former employer, seeking a bonus above his salary that had been promised by the employer. As in the instant case, there was no obligation for the employee to continue the employment. The Court held as follows:

"When an employer promises a prospective

employee a fixed salary and an indeterminate bonus, each promise is made to induce undertaking of the employment. Acceptance of the employment is consideration for the promise of a bonus, and this promise is enforceable. . . . We see no distinction where, as here, the promise is made after employment but is made to an employee who has not contracted to serve for a fixed term, and for the purpose of inducing him to remain an employee. Here no period of employment was specified.

“Continuing an employment to which one is not bound by contract is as clearly consideration as is entering into the employment in the first place.”

In *Sabatini*, there was no specific amount specified according to the evidence, and the California Supreme Court held that failure to specify the amount or a formula for determining the amount to be paid does not render the contract too indefinite for enforcement, because under California law the standard is reasonable worth pursuant to a California statute. In the instant case, we need not go to the extent of attempting to prove the value that was promised because there is a formula established, to wit: Ten per cent of all of the assets of the partnership, less ten per cent of the then partnership indebtedness, as of the date of termination of employment.

We submit the cases above cited support the proposition that the action of the plaintiff herein in continuing in the employment of the defendant for a period of three years and five months after the date of the agree-

ment is consideration for the promise made by the defendants.

The above discussion should lay at rest any contention that the arrangement evidence by the writing of January 2, 1962, by which plaintiff received the ten per cent interest in the partnership and continued in its employment is not supported by consideration. The case cited above, *Long v. Forbes*, supra, specifically noted and relied upon the Restatement of Agency for the proposition that employment without a term or tenure is employment terminable at any time. To this same effect also see 161 *ALR* at 709, where it is quoted with approval from the *Restatement of Agency*, Vol. 2, Section 422, as follows:

“Unless otherwise agreed contractual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party.”

This *ALR* annotation goes on to say:

“Since the rule is completely undisputed and supported by literally hundreds of cases, it has not been necessary to state any of the cases in detail.”

This rule, of course, by implication holds that the contract between the employer and employee is a valid contract, but that the services of the employee may be terminated by either employee or employer at any time, but, of course, that does not alter the consideration that the employee is to receive for the employment.

Additional consideration here involved revolves

around the fact that the plaintiff had a prior interest in the partnership, or even assuming the position of the defendants, a five per cent interest in the leases that Walton-Kearns held prior to the agreement reflected by the writing of January 2, 1962. See Walton's deposition of February 4, 1966, page 12, line 13. By that writing of January 2, 1962, the plaintiff gave up that interest in exchange for the interest set forth in that writing. The Court's attention is drawn to the writing of January 2, 1962, where it is said in the second sentence of the first paragraph:

"This interest includes and is not in addition to the various interests from time to time heretofore acquired by you."

This is plainly consideration and is set forth on the face of the instrument.

POINT III. THE WRITTEN AGREEMENT SHOULD BE INTERPRETED IN THE LIGHT OF THE CIRCUMSTANCES UNDER WHICH IT WAS ENTERED INTO, AND EFFECT GIVEN TO THE INTENT OF THE PARTIES.

The heading sets forth the rule found in *Marv v. Noble* (supra). Although there is conflict in the evidence as to how the final draft of the writing of January 2, 1962, came into effect, there is more than sufficient evidence to believe that it was drafted by the attorney for the defendants. In the deposition of the defendant, Walton, taken January 4, 1966, at page 13, lines 19

and 20, is found the following:

“Q. Now, do you recall who prepared that agreement? (The agreement of January 2, 1962).

“A. Yes, Mr. Gustin prepared it.”

It should be remembered that the above quotation from the mouth of the defendant, Walton, was taken at the time that the first deposition was taken in this matter, to wit: in February of 1966. Subsequently, at the time of trial, Mr. Walton stated that he had asked his attorney, Mr. Gustin,

“ . . . as to how to go about giving Mr. Guinand as close to a partnership interest as we possibly could, that is being a partner, Mr. Gustin evolved this typewritten letter of January 2.” (R. 156)

And subsequently the defendant, Walton, testified that Mr. Guinand made some changes in the original draft of the document as prepared by the defendants' attorney and presented it to Mr. Walton, who informed the plaintiff that if it was all right with Mr. Gustin, it was all right with the defendant. The defendant Walton states that thereafter the plaintiff went to Mr. Gustin's office and returned to the office of the defendants, where he had the document of January 2, 1962 typed by one of the secretaries and handed it to Mr. Walton, who signed it and who also procured the signature of Mr. Kearns. (R. 162-63)

In conflict with this testimony is the testimony of the plaintiff, who stated that in March of 1962 the Exhibit D-4, which is the interlined original draft of the final agreement of January 2, 1962, was presented

to him at a meeting at which the plaintiff, Walton, his attorney, Mr. Gustin, and a secretary in Mr. Gustin's office were present, and that upon receiving the original draft, some discussions were had regarding the fact the original draft did not set forth the understanding that the plaintiff had had with Mr. Walton (R. 124-125). The plaintiff then testified that after discussing the matter for a while in Mr. Gustin's office, Mr. Gustin, defendants' attorney, dictated the changes and that the plaintiff wrote them in on his copy. He also stated that a copy of the document was available to all of those who were meeting at that time (R. 125). Contrary to the assertions of counsel for the defendant, the only testimony in the record under oath regarding the drafting of the agreement as to the fact that the plaintiff was told that it was simply an agreement to agree in the future is that of the plaintiff, where he denies on cross-examination that he was told that the agreement would require another agreement when he terminated his employment (R. 126).

Walton admits in his testimony that plaintiff had advised him that he wished a writing to reflect his interests in the assets of the partnership, because he had recently been married and was about to undertake a trip overseas for the partnership, and desired something to protect his wife's interests in the event that anything might occur to the plaintiff (R. 160). The plaintiff, in testifying as to how the agreement of January 2, 1962, came into existence, stated that he had told Mr. Walton that, since he had recently been married and

his wife did not know what his interest was in Walton-Kearns, he felt he should have something in writing before he left on an extended trip for the partnership, and that Walton agreed (R. 179).

The plaintiff further testified that at the meeting held in March of 1962, out of which the agreement dated January 2, 1962 was developed, he wrote the changes as dictated by the defendants' attorney on the copy that had been furnished to him (R. 125 and R. 181-182). He read those changes and was asked by Mr. Gustin if it was satisfactory. He further stated that he said as follows, "I guess it is, as long as it gives me an undivided ten per cent interest in everything Walton-Kearns has," and that Mr. Gustin said to him, "Isn't that what it says?", to which the plaintiff replied, "I guess so," and that there was no further conversation at that time regarding the agreement (R. 182). The plaintiff also testified, which testimony is undisputed in the record by any statement under oath, that he at no time had any conversation with anybody in regard to the agreement of January 2, 1962, wherein it was described to him as an agreement to agree in the future (R. 186).

It would thus appear without doubt that the plaintiff had asked the defendants for a writing setting forth an understanding which had been arrived at between the parties at an earlier date, that is, earlier than January 2, 1962, but that the meeting at which the writing was finally developed did not occur until the middle

of March, 1962. It also appears without dispute that the plaintiff had advised the defendant Walton that the reason he wished such a writing was to protect his wife, who had no knowledge of his interest in the assets of Walton-Kearns, due to the fact that he, the plaintiff, was embarking upon an extended trip out of the country on behalf of the partnership.

It would seem to be an absolute exercise in futility for the plaintiff to insist upon a writing and then to accept it if he were advised that the agreement was simply an agreement to agree in the future, or, in the alternative, that it meant nothing, as alleged by Walton when he testified as follows on cross-examination:

“Q. Did you talk to Mr. Gustin or anybody else before you signed it, after it had been drafted in final form?

“A. Yes.

“Q. You called Mr. Gustin, did you?

“A. I don't know whether I called him or talked to him in his office.

“Q. But you did talk to him about that agreement?

“A. Yes.

“Q. And after receiving advice from Mr. Gustin or consulting with him in regard to it, you were willing to sign it?

“A. Yes. Mr. Gustin told me that the agreement did not mean a darn thing anyway, that we would have to have a final agree-

ment when and if Jerry ever quit, so it did not mean anything to sign it." (R. 163-164)

Following the rule set forth in *Marx v. Noble* (supra) earlier quoted to the effect that the agreement must be looked at realistically in the light of the circumstances under which it was entered into, and if the intent of the parties can be ascribed with reasonable certainty, it must be given effect, it does not comport with good judgment or with the normal behavior of human beings to go to the extent of coming to an agreement between the parties, spend the time and effort necessary to draft a document, have a meeting in regard to it in which it is re-drafted, have it signed and then deliver it, if the parties at the time did not intend that the agreement meant what it stated on its face. At the time the agreement was entered into, obviously, the plaintiff and defendants were at least in theory acting in good faith, a fact which Walton admits (Walton deposition page 30, line 24-25). If at that time they were, in fact, acting in good faith, then Walton or his counsel had an obligation to advise plaintiff that the agreement meant nothing, which, of course, as noted above, would be completely contrary to normal business practices and human experience where plaintiff was seeking an agreement which would protect his wife. Thus, it must be concluded that either the defendants were not acting in good faith and intended to mislead the plaintiff, or the agreement means what it states on its face.

Thus it is urged that when the agreement of January 2, 1962, is examined in the light of the circumstances surrounding its drafting, it becomes clear that the parties intended to grant plaintiff a ten per cent interest in the assets of Walton-Kearns, less ten per cent of the partnership indebtedness as of the date he left the employment of Walton-Kearns.

Any other interpretation of the undisputed facts surrounding the creation of the agreement would simply not comport with and, in fact, would be diametrically opposed to the expressed intentions of the parties in drafting said agreement.

POINT IV. THE DISPUTED PORTIONS OF THE AGREEMENT SHOULD BE MOST STRICTLY CONSTRUED AGAINST THE DEFENDANTS.

Assuming that the Court finds there is an ambiguity in the document as urged by the defendants, the ambiguity arises from language admittedly a part of the original draft, which is Exhibit D-4, which was prepared by defendants' counsel (Walton deposition, page 13, lines 19 and 20). The language which plaintiff urges grants him a ten per cent interest in the assets of Walton-Kearns reads as follows:

“This letter is to confirm your ownership of an undivided ten per cent interest in Walton-Kearns, a co-partnership composed of Paul T.

Walton and Thomas F. Kearns”
and

“Upon termination of your employment with the partnership for any cause whatsoever, your interest in the partnership business will be determined. . . ”

This language is contained in both the original draft and the final signed agreement of January 2, 1962, which is Exhibit P-3, and was the creation of defendants’ counsel. The balance of the language which was the changes shown on Exhibit D-4 and which, along with the quotations above, was incorporated into the final agreement, the plaintiff states was dictated to him by Mr. Gustin, the defendants’ attorney, at a conference where the original draft was being discussed (R. 124-125).

Even assuming that the plaintiff authored the interlineations, which plaintiff denies, nevertheless, the active or vital portions of the agreement are those which were originally the language of defendants’ counsel, and under the rule found in *Maw vs. Noble* (supra) should be most strictly construed against the defendants.

If the Court finds that the other portions of the agreement were, in fact, the creation of the plaintiff, he is willing to have them most strictly construed against him because they are the portions which protect Walton-Kearns, and plaintiff has no argument with being bound by them. By the same token, the granting

or vital portions of the agreement are those above quoted and should be most strictly construed against the defendants under the same rule.

POINT V. THE RECORD CLEARLY SUPPORTS THE AWARD TO THE PLAINTIFF OF A TEN PER CENT INTEREST IN ALL OF THE LEASES, LEASEHOLDS AND MINERAL INTERESTS HELD BY THE PARTNERSHIP, AS OF THE DATE OF TERMINATION OF EMPLOYMENT.

In spite of defendants' position raising numerous technicalities regarding the parol evidence rule, the pre-trial order and the Statute of Frauds, it is the contention of the plaintiff that the defendants have clearly admitted as a matter of fact, under oath, that the very least that they have always recognized that plaintiff had a claim to was ten per cent of all the mineral interests, leaseholds and leases of the partnership. See Walton deposition, page 29, lines 9 through 30, and page 30, lines 1 through 15, where, in response to questions regarding the defendant Walton's intention as to what the plaintiff would receive, if anything, at the time he terminated his employment with the partnership, Mr. Walton said:

“Yes, Mr. Guinand was to receive a ten per cent interest in the leases, most of which he already had his interest carved out by being

and, a record title owner.”

“If I understand the question correctly, Mr. Guinand’s interest would be ten per cent in the leases Walton-Kearns held at the time he left employment.”

See also the questions and answers as follows, found at page 30, lines 9 through 15:

“Q. Let me rephrase it. As I understand your answer to my last question, if Mr. Guinand quit before there were production profits after expenses, your intention was he would have a ten per cent interest in the leases then held, that is, on the date of termination, by Walton-Kearns?

“A. That is absolutely true. We went along on that from the very beginning.”

The same type of questioning was engaged in at the time of the trial of this case, and Walton admitted that, at the very least, even under his understanding of the agreement as he alleged it to be as of the time of trial, which apparently was changed from the time of the taking of his deposition, that the plaintiff was entitled to ten per cent of all the leasehold interests (R. 167-168). Referring to the agreement of January 2, 1962, Walton said as follows:

“A. After this date there was no question. We have never quibbled on this.

“Q. That is regardless of whose name it was in?

“A. Right.

“Q. If he was the holder of record, ninety per cent belonged to the partnership and ten cent belonged to him?

“A. In theory, yes.

“Q. And exactly the opposite was the situation, too, if it was all in your name, ten per cent belonged to him?

“A. That was the general situation.

“Q. Upon dissolution - not a dissolution, upon the termination of Mr. Guinand's employment with the company, is it not true that ten per cent would have been the figure that would have been used to determine whatever interest he had? I am not talking about whether it is net or gross, or whether you deduct anything from it or anything of the sort. I am just asking you, on whatever basis the division was to be made, his interest was fixed at ten per cent by this agreement in your mind?

“A. Yes.”

(R. 167-168)

At approximately the time that the oral agreement which resulted in the written agreement of January 2, 1962, was entered into, the plaintiff began taking leases on behalf of the partnership, with the consent of the defendants, showing in most instances that the plaintiff held a ten per cent interest in the leases (R. 175-178). Prior to the time that the agreement to increase the plaintiff's interest to ten per cent was reached, most of the leases were taken showing plaintiff to have a

five per cent interest (R. 175). This fact is admitted by the defendant Walton (R. 157-158).

It, therefore, becomes very clear from the testimony of the defendant Walton himself, as well as that of the plaintiff, that the award of the ten per cent interest in the minerals, mineral interests, leases and leasehold interests of the partnership to the plaintiff, as awarded by the Court below, is perfectly justified and supported by the evidence. If a reversal of that award were made, assuming the Court does not agree with plaintiff's proposition that the agreement itself provides that he is entitled to the ten per cent, upon a new trial below, it is difficult to see how the defendant could avoid the testimony above quoted and found in the record, which states the very position that the Court below found, to wit: that the plaintiff had always been regarded as the owner of, and was entitled to, a ten per cent interest in all of the minerals, mineral interests, leases and leaseholds held by the partnership as of the date of the plaintiff's termination with the partnership.

POINT VI. THE DEFENDANTS CANNOT RAISE ON APPEAL QUESTIONS NOT RAISED IN THE PLEADINGS OR AT THE TRIAL.

Assuming, but not agreeing, that the writing which is the basis of plaintiff's action is not a sufficient writing

to satisfy the provisions of the Statute of Frauds, which plaintiff urges is a sufficient writing, nevertheless, the defendants at this late date cannot raise the requirement of a writing under the Statute of Frauds. This matter was neither contained within the pleadings nor the pre-trial order, and was raised for the first time by the defendants' Motion for a New Trial or, in the Alternative, for Amendments of the Judgment and Other Relief, dated November 9, 1967 (R. 61-65). This Court has for so long held and has been so consistent in doing so that matters not raised in the pleadings nor put in issue at trial will not be considered on appeal, that to cite all of said cases would be mere redundancy. However, the Court recently in the case entitled *In Re Estate of Ekker*, 19 Utah 2d 44, 432 P. 2d 45 (1967), said of two points made on that appeal as follows:

“Neither of the first two points were raised in the pleadings nor put in issue at the trial. Therefore, they cannot be considered for the first time on this appeal.” Citing *Westerfield vs. Coop*, 6 Utah 2d 262, 311 P. 2d 787; *Delores Uranium Corp. v. Jones*, 14 Utah 2d 280, 263 P. 2d 883; *Nielson, et al. vs. Eisen*, 116 Utah 343, 209 P.2d 928.

Two other cases to the same effect not cited above are *Huber v. Deep Creek Irrigation Co.*, 6 Utah 2d 15, 305 P. 2d 478 (1956) and *Hamilton vs. Salt Lake County Sewage Improvement District No. 1*, 15 Utah 2d 216, 390 P. 2d 235 (1964), where the Court said, at 236:

“We need not canvass matters raised for the first time on appeal.”

and cited therefor *North Salt Lake vs. St. Joseph Water Company*, 118 Utah 600, 223 P. 2d 577 (1950); *In Re State in Interest of Woodward*, 14 Utah 2d 336, 384 P. 2d 110 (1963).

CONCLUSION

It is respectfully urged that this Court can and should on this appeal find that the agreement of January 2, 1962, is a complete agreement between the parties and can be construed from its face, and that it is supported by consideration. The consideration is implicit on the face of the agreement where it is stated:

“This interest includes and is not in addition to the various interests from time to time heretofore acquired by you.”

In addition, consideration is furnished by the admitted fact that the plaintiff remained in the employment of the defendants for a period of three years and five months after the date of the agreement, without any contractual obligation to do so. The agreement contains within it a formula for determining the interest to which the plaintiff is entitled, to wit: he is entitled to ten per cent of the assets of Walton-Kearns as of the date of his leaving the employment of Walton-Kearns, less ten per cent of the then partnership indebtedness. Upon making such a finding, this Court sets at rest all

of the contentions raised by the appellants.

If the Court cannot construe the agreement from its four corners, then the plaintiff respectfully urges that the record is replete with enough evidence to construe the agreement in the same manner and to the same effect as urged above.

The plaintiff further contends that the evidence within the record is sufficient to sustain the trial Court's finding that he was entitled to at least a ten per cent interest in all of the mineral interests, leases, leaseholds, reversionary interests, working interests and overrides of the partnership as of the date of his termination, and further urges that under the well-established rule of law as provided by this Court, the question of the Statute of Frauds cannot be raised at this late date for the first time.

Plaintiff also contends that there has been sufficient partial performance on his part, that is, the remaining in the employment of the defendants, to take any agreement that might have required a writing out of the Statute of Frauds.

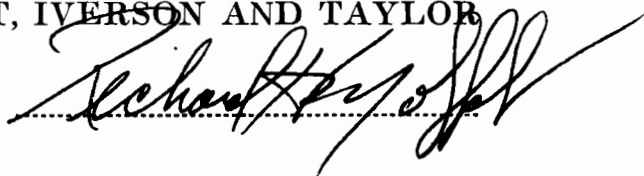
The judgment below should be affirmed in relation to the award to the plaintiff of his commissions which are not in dispute on appeal and the award to him of the ten per cent mineral interests, which award should be merged into an award reversing the decision below in regard to the enforceability of the agreement of January 2, 1962, which agreement should be construed

and enforced by this Court and the cause remanded solely for an accounting under the terms of the agreement of January 2, 1962, and an accounting for the commissions which are not in dispute on this appeal.

Respectfully submitted,

MOFFAT, IVERSON AND TAYLOR

By

A handwritten signature in black ink, appearing to read "Richard H. Moffat", written over a horizontal dotted line.

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