

1929

# Vitagraph, Inc. v. American Theater Co. and Theatres Operating Co. : Abstract of Record

Utah Supreme Court

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Allen T. Sanford; attorney for defendant and appellant.

James M. Carlson; attorney for plaintiff and respondent.

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

MAY TERM, 1929

VITAGRAPH, INCORPORATED,  
a corporation

Plaintiff and Respondent

vs.

AMERICAN THEATRE COM-  
PANY, a corporation, and  
THEATRES OPERATING COM-  
PANY, a corporation

Defendants

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**ABSTRACT**

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ALLEN T. SANFORD

Attorney for American  
Theatre Company,  
Defendant and  
Appellant.

JAMES M. CARLSON

Attorney for Plaintiff and  
Respondant

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CENTURY PRINTING CO.

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# In the Supreme Court of the State of Utah

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## ABSTRACT

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Trans.  
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### COMPLAINT

Comes now the above named plaintiff and complaining of defendants for cause of action alleges:

1. That Plaintiff is a corporation duly organized and existing under and by virtue of the constitution and laws of the State of New York with its principal place of business in New York City, New York State.

2. That the defendants, American Theatre Co. and Theatres Operating Co. are corporations duly organized and existing under and by virtue

of the laws of the State of Utah with principal place of business in Salt Lake City, Salt County, Utah.

3. That on or about the 21st day of July, 1927, the defendant American Theatre Co. made and entered into agreement with the plaintiff by which it was agreed that the plaintiff should furnish, let and lease to said defendant a certain picture film known as "When a Man Loves," for the purpose of being exhibited by said defendant in the American Theatre in Salt Lake City, Salt Lake County, Utah; and that said defendant promised and agreed to pay for the use of said film or moving picture and as rental therefore the sum \$4,000 and in addition thereto 50 per cent of the total receipts collected over and in excess of the sum of \$10,000 by the said Theatre during the exhibition of said picture. Said defendant promised and agreed to pay to plaintiff said rental during the month of September, 1927. Said contract was known as contract No. 2112.

4. That on or about the 9th day of Sept., 1927, the defendant American Theatre Co. entered into an agreement in writing with the plaintiff modifying and amending said contract, dated the 21st day of July, 1927, and known as contract No. 2112. That a copy of the contract dated on or

about the 9th day of September, 1927, is marked exhibit A and attached hereto and made a part of this complaint.

5. That the defendants, Theatres Operating Co. took over, or pretended to take over, the operation and management of the 'American Theatre from the defendant American Theatre Co., on or about the 9th day of Sept., 1927, and in order that said Theatres Operating Co. might obtain the said film or moving picture known as "When a Man Loves" and in order to comply with the provisions of the said contracts heretofore described between the American Theatre and plaintiff which provisions contain a requirement that the consent of the plaintiff be obtained to a transfer or assignment of the contract, the defendants, American Theatre Co. and the Theatres Operating Co. made and entered into a contract in writing known and described as an assignment contract, on or about the 20th day of September, 1927. A copy of said assignment contract is marked exhibit B, attached hereto and made a part hereof.

That the plaintiff furnished said film or moving picture to the defendants and fully performed all its part of said contracts specified to be performed and the defendants used and exhibited said film or moving picture in the said American Theatre in Salt Lake City, Utah, from the 26th

day of Oct., 1927 to the 3rd day of November, 1927 both dates inclusive, that is to say that defendants exhibited said picture under the terms of said contract for a period of nine days.

6. That the total receipts collected for tickets while said picture or film was shown at said American Theatre for the first 7 days amounted to \$3045.25 and the total for the 8th and 9th days of said showing of said picture in said Theatre amounted to the sum of \$532.01. That 50 per cent of the total receipts for the first 7 days of the exhibition of said picture and 25 per cent of the 8th and 9th days amounted to a total of \$1655.64.

7. That the said sum of \$1655.64 which is 50 per cent of the total receipts from the showing of said picture film for the first 7 days and 25 per cent of the receipts for the 8th and 9th days provided to be paid to this plaintiff is less than \$4,000 and has not been paid to this plaintiff nor has any part thereof, nor has any sum been paid to this plaintiff by the defendants or either of them.

That said contracts provide that in the event the defendants shall fail to perform any part or any provision of the said agreements herein described, the defendants shall pay to plaintiff the

sum of \$4,000 as a film rental for said attraction. That defendants failed to use an orchestra during both matinee and nights during the running of said picture and failed to spend a minimum of \$1,000 in advertising of said picture film, both of which defendants promised and agreed to do under the terms of the said contracts.

9. That plaintiff is informed, and therefore upon information and belief, alleges that the defendant Theatres Operating Co., under the provisions of its lease and the provisions of the said contract of assignment, a copy of which is attached hereto, surrendered to the defendant, American Theatre Co., the lease on said American Theatre at a date subsequent to the showing of said pictures and after the indebtedness and obligations to plaintiff under the terms of said contracts for the rental of said picture film had accrued.

WHEREFORE, plaintiff prays judgment against the defendants and each of them in the sum of \$4,000, together with the costs herein.

JAMES M. CARLSON,  
Attorney for Plaintiff.

(Verified.)

Exhibit "A" is a very long contract, the parts necessary are the rider attached to it, as follows:



The exhibitor agrees to pay to the distributor a sum equal to fifty per cent (50%) of the gross box-office receipts without any deductions whatsoever.

The exhibitor agrees to run said attraction for a minimum of seven consecutive days.

The exhibitor also agrees to use an orchestra during both matinees and nights and to spend a minimum of One Thousand Dollars (\$1,000.00) in advertising and exhibition of said attraction.

In the event the exhibitor fails to comply with any or all of the terms of this contract, the exhibitor then guarantees to pay to the distributor a film rental for said attraction in the amount of Four Thousand Dollars (\$4,000.00).

If the gross receipts total Seven Thousand Dollars (\$7,000.00) for the first five days, the exhibitor agrees to increase the run to nine days, and will pay to the distributor a sum equal to twenty-five per cent (25%) of the gross box-office receipts of the two additional days.

It is mutually understood and agreed that the provisions of this contract and rider automatically supercede, and supplant, and take the place of any conflicting provisions in that certain contract No. 2112, dated July 21st, 1927, heretofore entered into by and between the parties hereto.

Also the following provisions of the contract:

“Fifth. If this contract calls for payment or any part thereof computed upon the Exhibitor’s gross receipts the Exhibitor shall furnish to the Distributor daily a correct itemized statement of the gross receipts of said theatre for admission thereto upon the exhibition date or dates of each photoplay for which payment is so required to be made. Should the Distributor so require, such itemized statement shall be made upon forms furnished by the Distributor.

The Distributor shall have access during the period of exhibition of each such photoplay and for a period of sixty (60) days after the receipt by the Distributor of the final box-office statement, for the purpose of inspection, to the box-office and to all books and records relating to the Exhibitor’s box-office receipts during the period of exhibition of each such photoplay.

Payment or any part thereof computed upon the Exhibitor’s box-office receipts shall be made daily during the exhibition of the print of each photoplay for which payment is so required to be made.”

#### EXHIBIT “B”

For value received, \_\_\_\_\_ (hereinafter described as the Exhibitor) hereby assigns

to Theatres Operating Company, a corporation (hereinafter described as the Purchaser) all the right, title and interest of the said Exhibitor in and to the contracts now in force between said Exhibitor and Vitagraph, Inc., for the exhibition of pictures described below at the theatre specified above, and all the right, title and interest of said Exhibitor in and to any deposit heretofore paid on account of the rental of said pictures, and said Exhibitor hereby releases Vitagraph Inc. from all further obligation to perform its said contracts with said Exhibitor.

The Purchaser hereby assumes and agrees from the date hereof with Vitagraph Inc. to perform each and all of the terms and provisions of said agreements above described, therein agreed to be performed by said Exhibitor.

Vitagraph Inc. consents to the foregoing assignment, and so long as the said Purchaser performs each and all of the terms and provisions of said agreement therein agreed to be performed by said Exhibitor in accord with the terms thereof, Vitagraph Inc. agrees to perform the terms and conditions of said agreements therein agreed to be performed by it.

It is mutually agreed that if the Purchaser shall fail or neglect to perform or shall breach any of

the terms and provisions of any of said contracts hereby agreed to be performed by said Purchaser, the said Exhibitor as well as the said Purchaser shall be liable jointly and severally to Vitagraph Inc. or its assigns for any loss occasioned thereby.

### LIST OF CONTRACTS

“When a Man Loves.” As per amended contract dated September 8, 1927, whereby the Exhibitor pays to the Distributor fifty per cent (50%) of the gross box-office receipts.

WHEREAS, the Exhibitor herein has heretofore entered into a leasehold contract and supplemental agreement, in writing, with one P. O. Silvagni, said contract and supplemental agreement covering the American Theatre at Salt Lake City, Utah, and,

WHEREAS, the aforementioned leasehold contract and supplemental agreement, provides, among other things, that the said P. O. Silvagni, may, at his option, organize and create a Corporation for the purpose of taking over and assuming the said P. O. Silvagni's rights, duties, and obligation hereunder, and which leasehold contract and supplemental agreement further provides that the said Corporation (so organized) may, at the option of its Board of Directors, at any time

within six months from the date of commencement of said leasehold contract and supplemental agreement, turn back the American Theatre to the Exhibitor herein and surrender to the Exhibitor herein its lease and the within Film contracts; and,

WHEREAS, the said P. O. Silvagni has, in fact, organized and created under the laws of the State of Utah a Corporation entitled, Theatres Operating Company, and has, in fact, subrogated the said Corporation to all of his rights, duties, and obligations under the aforementioned leasehold contract and supplemental agreement; now, THEREFORE, it is mutually understood and agreed by and between the EXHIBITOR herein, Theatres Operating Company, and the DISTRIBUTOR herein, as follows, to-wit:

1. In the event Theatres Operating Company herein shall exercise its option to and in fact surrender its lease to and terminate said leasehold contract and supplemental agreement with the Exhibitor herein, then, and in such event, Theatres Operating Company herein shall be automatically relieved from any and all liability and obligations under the within contracts accruing from and after the date of such leasehold surrender, and it is further mutually understood and agreed by

each and all of the parties herein that, in such event, the primary liability of the Exhibitor herein, under the within contract, shall continue as heretofore.

2. It is further mutually understood and agreed by each and all of the Parties herein, that, *EITHER*, until such time as Theatres Operating Company exercises its option to and does in fact surrender its leasehold contract and supplemental agreement. *OR*, in the event Theatres Operating Company shall not exercise its option as hereinabove stated, the Exhibitor herein shall assume the status of guarantor to VITAGRAPH, INCORPORATED, *conditioned upon the proper, faithful, and complete fulfillment of each and all of the conditions of the within Film contract.*

Our guaranty is on condition that contract is faithfully performed; if not so performed, then no liability.

AMERICAN THEATRE CO.,  
FRED DAHNKEN  
D. E. SCHAYER

(Signed) F. C. DAHNKEN,  
(Exhibitor)

THEATRES OPERATING COMPANY,  
a corporation (Purchaser)

By: (Signed) P. O. SILVAGNI

Its: (Signed) President

VITAGRAPH, Inc.

By: HARRY LUSTIG (Signed)  
(West Coast Sales Mgr.)

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(Title of Court and Cause.)

DEMURRER OF AMERICAN THEATRE CO.

10 Comes now the American Theatre Company  
and demurs to complaint herein filed on the  
ground and for teh reason that the said complaint  
does not state facts sufficient to constitute a cause  
of action against this defendant.

WHEREFORE, this defendant prays that  
the complaint be dismissed and it recover its  
costs.

ALLEN T. SANFORD,

Attorney for American Theatre Co.

12 Minute order over-ruling demurrer of defend-  
ant American Theatre Company.

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(Title of Court and Cause.)

ANSWER OF AMERICAN THEATRE CO.

14 Comes now the American Theatre Company  
and for its answer to the complaint herein, al-  
leges as follows:

1. It admits the allegations of the first, sec-  
ond, fourth, sixth and ninth paragraphs of said  
complaint.

2. Respecting the allegations of the third

paragraph, this defendant alleges that under the agreement, exhibitor was to pay to the plaintiff fifty per cent (50%) of the gross box office receipts for the first week and twenty-five per cent (25%) of the gross box office receipts for the time the picture might be run over one week, and denies that the defendant agreed to pay Four Thousand Dollars (\$4,000.00) for said picture.

3. Respecting the allegations of the fifth paragraph, this defendant admits the allegations thereof, except that it denies that the plaintiff performed its part of said contract in that under the said contract it was required to collect from the exhibitor its portion of the receipts daily and it failed to collect or attempt to collect the said receipts daily in the manner provided in the contract. It denies that said picture was delivered to this defendant.

4. Respecting the allegations of the seventh paragraph, this defendant admits the first paragraph thereof, and upon information and belief, it denies each and every allegation of the second paragraph thereof.

5. By way of further answer, this defendant alleges that after it entered into the said contract with the plaintiff, it leased the American Theatre,



in which it was intended to exhibit said picture, to the defendant, Theatres Operating Company, and under the contract of assignment of said contract, it was agreed that this defendant would be guarantor as to the payment of the amount required to be paid. That said picture was exhibited and under the contract, the plaintiff was required to collect its portion of the receipts daily; that it failed and neglected to do so and did not attempt to collect said receipts, daily or at the termination of the showing of the picture and did not attempt to collect receipts until long thereafter. That this defendant had nothing whatsoever to do with the exhibition of said picture or handling the receipts thereof and that the plaintiff made a new contract with the Theatres Operating Company and failed to collect the receipts to which it was entitled from the Theatres Operating Company, and thereby discharged this defendant from any obligation under said contract.

WHEREFORE, this defendant prays that the plaintiff take nothing by its complaint and that it be dismissed.

ALLEN T. SANFORD,  
Attorney for Defendant, American Theatre.  
(Duly verified.)

(Title of Court and Cause.)

REPLY

Comes now the above named plaintiff and replying to the Answer of American Theatre Co., denies and alleges as follows:

1. Denies that the contracts or either of them sued upon, provide that plaintiff should collect the receipts daily for the exhibiting of the picture known as "When a Man Loves", and denies that plaintiff did not attempt to collect said receipts at the time of the exhibiting of said picture.

2. And replying to paragraph 5 of said Answer, plaintiff denies "that it was required to collect its portion of the receipts daily". And denies that plaintiff did not attempt to collect said receipts at the termination of the showing of the picture. And denies that plaintiff did not attempt to collect the receipts until long thereafter, but alleges that plaintiff attempted to collect during the showing of the picture and immediately thereafter. And plaintiff forthwith denies that it made a new contract with the Theatres Operating Co., and denies that the defendant, American Theatre Co., was discharged by any acts or conduct on the part of the plaintiff.

WHEREFORE, this plaintiff prays that it

be awarded judgment as prayed for in its complaint.

JAMES M. CARLSON,  
Attorney for Plaintiff.

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The action was tried before the Hon. Chris Mathison, Judge, and on the 5th day of January, 1929, findings of fact, conclusions of law and judgment were entered. The findings of fact pertinent to the point involved on appeal are as follows:

4. That on or about the 9th day of September, 1927, the defendant American Theatre Co. entered into an agreement in writing with the plaintiff modifying and amending said contract, dated the 21st day of July, 1927, and known as contract No. 2112. That a copy of the contract dated on or about the 9th day of September, 1927, is marked Exhibit "A" and attached to plaintiff's Complaint.

5. That the defendant, Theatres Operating Company, took over the operation and management of the American Theatre from the defendant, American Theatre Company, on or about the 9th day of September, 1927, and in order that said Theatres Operating Company might obtain the said film or moving picture known as "When a

Man Loves'' and in order to comply with the provisions of the said contracts heretofore described between the American Theatre Co. and plaintiff which provisions contain a requirement that the consent of the plaintiff be obtained to a transfer or assignment of the contract, the defendants, American Theatre Co. and the Theatres Operating Company made and entered into a contract in writing known and described as an assignment contract, on or about the 20th day of September, 1927. A copy of said assignment contract is marked Exhibit "B," attached to plaintiff's complaint, and introduced in evidence as plaintiff's Exhibit "C."

That the plaintiff furnished said film or moving picture to the defendant, Theatres Operating Company, and fully performed all its part of said contracts specified to be performed and said defendant used and exhibited said film or moving picture in the said American Theatre in Salt Lake City, Utah, from the 26th day of October, 1927, both dates inclusive, that is to say that defendant exhibited said picture under the terms of said contract for a period of nine days.

6. That the total receipts collected for tickets while said picture or film was shown at said American Theatre for the first 7 days amounted

to \$3045.25 and the total for the 8th and 9th days of said showing of said picture in said Theatre amounted to the sum of \$532.01. That 50% of the total receipts for the first 7 days of the exhibition of said picture and 25% of the 8th and 9th days amounted to a total of \$1655.64.

7. That the said sum of \$1655.64, which is 50% of the total receipts from the showing of said picture film for the first 7 days and 25% of the receipts for the 8th and 9th days provided to be paid to this plaintiff is less than \$4,000 and has not been paid to this plaintiff nor has any part thereof, nor has any sum been paid to this plaintiff by the defendants or either of them.

8. That said contracts provide that in the event the defendants shall fail to perform any part or any provision of the said agreements herein described, the defendants shall pay to plaintiff the sum of \$4,000 as a film rental for said attraction. That defendants failed to use an orchestra during matinees, during the running of said picture which defendants promised and agreed to do under the terms of said contracts.

9. That the defendant Theatres Operating Company, under the provisions of its lease and the provisions of the said contract of assignment, a copy of which is attached to plaintiff's com-

plaint, surrendered to the defendant, American Theatre Company, the lease on said American Theatre at a date subsequent to the showing of said picture and after the indebtedness and obligations to plaintiff under the terms of said contracts for the rental of said picture film had accrued.

10. That said picture described herein was exhibited under the contracts introduced in evidence therein. That the plaintiff was not required to collect its portion of the receipts daily, that plaintiff and its agents demanded payment from the Theatres Operating Co., and its officers and managers, on several occasions, during the exhibition of said picture in the said American Theatre Company, and demanded payment immediately after the termination of the showing of said picture, and shortly thereafter demanded payment from the defendant, American Theatre Company, and that the defendant, American Theatre Company, is not, was not, and at no time has been discharged from obligations to pay the \$1655.64 due and owing plaintiff as its percentage of the box office receipts during the showing of the said picture.

Tr. 26-29

As conclusions of law, it was found that the

plaintiff was entitled to judgment against the defendant for \$1655.64, with interest and costs.

On the same date judgment (Tr. 30) was entered in favor of the plaintiff against the defendant, Theatres Operating Company, a corporation, as principal debtor, and the American Theatre Company, a corporation, as surety, in the sum of \$1810.16 and costs.

Notice of motion for new trial; the defendant, American Theatre Company, filed its motion for new trial on the 10th day of January, 1929, upon the statutory grounds, the same being made upon the minutes of the Court (Tr. 34), March 12, 1929. the motion for new trial was over-ruled and notice served and filed of said over-ruling on the 13th day of March, 1929 (Tr. 36). (Tr. 42.)

Clerk's certificate, transmitting the record on appeal and certifying that an undertaking on appeal in due form had been filed in his office on the 13th day of July, 1929. (Tr. 43.)

(Title of Court and Cause.)

### NOTICE OF APPEAL.

To the above named Plaintiff, and its Attorney:

42        You and each of you are hereby notified that the American Theatre Company, one of the defendants intends to and does hereby appeal to

the Supreme Court of the State of Utah, from the judgment made and entered in the above entitled action, in favor of the plaintiff and against the American Theatre Company, on or about the 5th day of January, A. D. 1929.

ALLEN T. SANFORD,

Attorney for Defendant, American Theatre Co.

Received copy of the foregoing Notice of Appeal this 13th day of July, A. D. 1929.

J. M. CARLSON,

Attorney for Plaintiff.

Theatres Operating Co.

By D. E. SCHAYER,

Secretary.

(Title of Court and Cause.)

### ASSIGNMENTS OF ERROR

Comes now the American Theatre Company, one of the defendants, and appellant, and makes and assigns the following errors:

1. The court erred in over-ruling this defendant's demurrer. (Tr. 10-12; Abs. 14.)
2. The court erred in making the finding in Finding No. 10, as follows: "That the plaintiff was not required to collect its portion of the receipts daily."
3. That the court erred in making the finding in Finding No. 10, as follows: "And the



American Theatre Company is not, was not and at no time has been discharged from obligations to pay the \$1655.64 due and owing the plaintiff as its percentage of the box office receipts during the showing of the said picture.”

4. The court erred in making its conclusion of law that the plaintiff is entitled to judgment against this defendant in the sum of \$1655.64, or any sum.

5. That the court erred in making its conclusion of law that the plaintiff is entitled to recover from this defendant its costs incurred herein. (Tr. 28-29; Abs. 22.)

6. The court erred in entering judgment against this defendant for the sum of \$1810.16, with interest.

7. The court erred in entering judgment for costs against this defendant.

8. The court erred in over-ruling this defendant's motion for new trial. (Tr. 34-35; Abs. 22.)

ALLEN T. SANFORD,  
Attorney for American Theatre Co., Defendant  
and Appellant.