

1987

# W. Roy Tolson v. Gene Yardley, Anita Yardley, Clair Yardley, Tom Yardley, and Trydale Dairy : Brief of Respondent

Utah Court of Appeals

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Russell R. Clark; Jory L. Trease; Dan Adamson & Associates; Attorney for Appellant.

Robert L. Jeffs; Jeffs & Jeffs; Ken Chamberlain; Richard K. Chamberlain; Olsen, McIlff & Chamberlain; Attorney for Respondents.

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**BRIEF**

UTAH  
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IN THE COURT OF APPEALS OF THE STATE OF UTAH

DOCKET NO. 87 0389-CA \* \* \* \* \*

W. ROY TOLSON, )  
Plaintiff-Appellant, )  
-vs- ) CASE NO. 870389-CA  
GENE YARDLEY, ANITA YARDLEY, )  
CLAIR YARDLEY, TOM YARDLEY, )  
and TRYDALE DAIRY, ) Category 14 b  
Defendants-Respondents. )

\* \* \* \* \*

BRIEF OF RESPONDENTS GENE YARDLEY,  
ANITA YARDLEY, TOM YARDLEY & TRYDALE DAIRY

\* \* \* \* \*

Appeal from an Order and Judgment of the  
Sixth Judicial District Court of Sanpete County  
Honorable David L. Mower, Associate District Judge

Ken Chamberlain  
Richard K. Chamberlain  
Olsen, McIff & Chamberlain  
Attorneys for Respondents  
Gene Yardley, Anita Yardley,  
Tom Yardley & Trydale Dairy  
76 South Main - P.O. Box 100  
Richfield, Utah 84701  
Telephone: (801) 896-4461

Russell R. Clark  
Jory L. Trease  
Dan Adamson & Associates  
Attorneys for Appellant  
5250 South 300 West, Suite 255  
Salt Lake City, Utah 84107  
Telephone: (801) 262-5885

Robert L. Jeffs  
Jeffs and Jeffs  
Attorneys for Respondent Clair Yardley  
90 North 100 East, P.O. Box 888  
Provo, Utah 84603  
Telephone: (801) 373-8848

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COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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-vs-	)	CASE NO. 870389-CA
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Ken Chamberlain  
Richard K. Chamberlain  
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Attorneys for Respondents  
Gene Yardley, Anita Yardley,  
Tom Yardley & Trydale Dairy  
76 South Main - P.O. Box 100  
Richfield, Utah 84701  
Telephone: (801) 896-4461

Russell R. Clark  
Jory L. Trease  
Dan Adamson & Associates  
Attorneys for Appellant  
5250 South 300 West, Suite 255  
Salt Lake City, Utah 84107  
Telephone: (801) 262-5885

Robert L. Jeffs  
Jeffs and Jeffs  
Attorneys for Respondent Clair Yardley  
90 North 100 East, P.O. Box 888  
Provo, Utah 84603  
Telephone: (801) 373-8848

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CLAIR YARDLEY, TOM YARDLEY,	:	
and TRYDALE DAIRY,	)	Category 14 b
	:	
Defendants-Respondents.	)	

\* \* \* \* \*

STATEMENT OF JURISDICTION

Respondents acknowledge that Appellant has taken this appeal pursuant to Sections 78-2-2(4) and 78-2a(3)(2)(h), Utah Code Annotated, 1953 as amended, and Rule 4A(a) of the rules of the Utah Supreme Court and Rule 4A(a) of the Utah Court of Appeals.

STATEMENT OF THE CASE

This is an action in which the Plaintiff, W. Roy Tolson ("Tolson"), sued the various Defendants for essentially Breach of Contract and Money Had and Received. The Defendants ("Yardleys") counterclaimed for a judgment authorizing Yardleys to effect a strict foreclosure of dairy cattle or otherwise realize upon collateral to satisfy an indebtedness due from Plaintiff in the amount of \$1,878,421.90.

### DISPOSITION IN THE LOWER COURT

At the end of Plaintiff's case the Court granted a Motion of all the Defendants to dismiss the Complaint; heard evidence on the Counterclaim of Gene Yardley for enforcement of his lien; and granted strict foreclosure against the collateral without the entry of a deficiency judgment. The Counterclaim Judgment was based largely on stipulation of Plaintiff's counsel.

### CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES & REGULATIONS

#### Statutes

70A-2-708, U.C.A. 1953, establishes sellers' damages for failure to pay the purchase price.

#### Utah Rules of Civil Procedure

Rule 40, Utah Rules of Civil Procedure, respecting continuances [esp. Rule 40(b) conditions precedent to continuances].

Rule 42, U.R.C.P., respecting justification for separating issues (bifurcation).

### RELIEF SOUGHT ON APPEAL

The Defendants ask that the Order and Judgment of the District Court be affirmed.

### STATEMENT OF FACTS

[Record References]

The Plaintiff will be referred to as "Tolson"; the Defendants Gene Yardley, Gene's wife Anita Yardley, Gene's father



Tom Yardley and Trydale Dairy, a corporation owned substantially by Gene Yardley will be referred to as "Yardleys"; and Clair Yardley, the other Defendant, will sometimes be referred to as "Clair".

The Record on Appeal is separated into (i) the pleadings file and (ii) the Transcript of the Evidence. Each is numbered chronologically and each begins with the number "1". Because of the duplicative numbering system references to the original file or the pleadings will be referred to as "R." and references to the transcript of the evidence of the trial as "Tr".

#### [Facts]

Tolson was engaged in the formation and operation of certain "tax shelters" to accumulate large federal tax deductions for members of partnerships Tolson formed (Tr.22, 23, 25, 26 and esp. 190; Tolson: "\*\*\*there was hundreds of thousands of dollars of investment tax credits at stake.").

Tolson's brief acknowledges the real reason for his interest in the Yardley dairy herd:

The impetus for entering such a relationship was the incentives and advantage that Plaintiff and his investors would receive through income tax deductions accorded Dairy Farmers. The tax ramifications were clearly enumerated as the major incentive and attraction for the Plaintiff to enter into such an expensive arrangement. (Brief of Appellant p.6, ¶1)

Tolson began tax shelter pursuits in the acquisition and sale of shares in orchards (Tr.50; Exh. 35). Apparently

experiencing success in tax avoidance with orchards, he moved into the activity of dairy herds (Exh.35).

Tolson approached Clair about acquiring the Yardleys' cows (Tr.47, 48).

After negotiations, Tolson and Yardleys (including Clair) entered into an agreement dated December 30, 1980 for the purchase by Tolson of some registered and some unregistered dairy cows for a total of \$1,500,000.00 (Exh.17, Schedule A). Page 1 of the contract refers to 320 registered cows as the "herd" but in actuality 500 were sold which included 180 cows called "Representative" all cows being classified on Schedule "A" of Exhibit 17. This agreement contained an integration clause (Exh.17, ¶10).<sup>1</sup> Tolson made a down payment and executed two promissory notes aggregating \$1,462,500.00 collateralized by a Security Agreement covering the dairy animals (Exh.28).

Tolson sold "interests" in the herd or animals (which were still encumbered by the lien to Yardleys [Exh.17]) for between \$2,500,000.00 and \$2,750,000.00 and received as much as \$700,000.00 in cash and held the balance under contract obligations due to Tolson (Tr.120). This was for only 240 of the adult animals and 200 as their produce (Id. at lines 1 and 2). In all of Tolson's testimony he did not at any time state he either bothered or had any obligation to deliver any cattle to his purchasers or clients.

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<sup>1</sup>This is significant because Tolson, although he proposed the form of the agreement, later claimed it lacked provisions Tolson wanted.

When negotiations for a contract began Tolson brought to Yardleys a stereotype purchase agreement which Tolson had used in acquisition of orchards (Tr.132, 133; Exh.35). This was an instrument by which he would acquire interests in orchards for the purpose of creating partnerships for tax purposes (Exh.35, pp. 1, 4 and Schedule E). Tolson proposed to adapt the Orchard Agreement to a contract for acquisition of a dairy herd (Exh.35, pp.1, 2, 4).

Tolson did encounter difficulty for himself and his clients with the Internal Revenue Service because of overstated deductions (Tr.26; Exh.34). It becomes material in this way:

Tolson alleges in his Complaint that different kinds of fraud were practiced upon him by Yardleys (R.6). At the trial this narrowed down to the question whether or not Yardleys were guilty of misrepresentation of the value of the dairy herd (R.347 - p.3 ¶F of Pre-trial Order). In the testimony it developed that Tolson had been in a recent proceeding before the United States Tax Court (Exhibit 34 is a transcript of the hearing). Mr. Tolson had, by the time the Tax Court proceedings were held, already commenced this "fraud" action against Yardleys. In the Tax Court trial Tolson, for obvious reasons, wanted to maintain the contract price (rather than the reduced figure he claims here) as the value of the herd as "basis" for tax credits, depreciation, and other preferences. Counsel for Internal Revenue Service introduced, in the Tax Court case, a copy of Tolson's (the Plaintiff's) Complaint in this action (Exh.34, p.93). Mr. Tolson was asked if he had not alleged in the State

Court (this) case that the dairy herd bought from Yardleys was worth only approximately one-half the amount he contracted to pay for the herd (Exh.34, p.97). In contradiction of his fraud complaint here Tolson nevertheless denied he had made such an allegation (Id. p.98) but before the Tax Court reconsidered and testified that the value of the dairy herd at the time of his purchase contract was "within a price range of \$1,500,000.00 to \$2,000,000.00" (Exh.34, p.121).

Tolson agreed not only to purchase the dairy herd but also entered into an operating agreement (Tolson Brief p.6) but in presenting his case Tolson never offered the written agreement upon which he relied and to which reference was made in counsel's opening statement (Tr.20).

Tolson complained in this action that Yardleys had never delivered him a Bill of Sale (even though he always owed more than \$1.5 million on the cattle). Tolson had a devious purpose in seeking a Bill of Sale for the livestock.

At page 83 of the transcript Tolson's counsel elicits this testimony from his own client:

Q Mr. Tolson, in your earlier testimony, you stated that you did not receive a bill of sale; is that correct?

A That's correct.

Q Why was that so important to you?

A Having a desire to resell the animals that I had purchased from Yardleys it was critical that I had a bill of sale entitlement to go out and put together the partnerships or the individual purchasers that I was looking for, and at the same time I likewise was giving each of those investors a bill of sale to establish their ownership.

Tolson offered no proof whatsoever that he had been damaged or if he had, by what amount, by reason of Yardleys' not delivering him a Bill of Sale.

The entire herd was encumbered by a lien for the payment of promissory notes in the original principal amount of \$1,462,500.00 (Exh.17, attached Promissory Notes "Note due April 1, 1981" and "Note due December 30, 1980"). The Purchase Agreement (Exh.17) contained the proviso: "The herd as described in Schedule 'A' hereto \*\*\*shall at all times be subject to a perfected security interest in favor of Sellers". Section 3.2 provided that the Buyer [Tolson] shall deliver to Seller [Yardleys] a financing statement giving Sellers a perfected security interest in the herd (Exh.17 p.2).

For Tolson to have exhibited a Bill of Sale to the animals would have been a false representation to Tolson's "investors" that Tolson had unencumbered title to animals which were collateral for the continuing lien of Yardleys.

At the time the case came to trial the smaller note had a principal balance of \$29,701.09 plus accrued interest of \$19,298.61 and principal on the larger note of \$1,235,000.00 had not been reduced at all (Tr.314). Because of an unintentional compounding effect those figures were adjusted by the Certified Public Accountant called by Yardleys as an expert witness but those modifications became immaterial since counsel for Tolson agreed that the Judgment could be based on simple interest calculations (Tr.328) and additionally stipulated that Yardleys would be entitled to a strict foreclosure (i.e.: would accept the

collateral in satisfaction of the debt) and there would be no deficiency imposed on Tolson whatever the amount Tolson owed Yardleys (Tr.328, 329, 330).

Tolson admitted that nothing on the note for \$1,235,000.00 had ever been paid (Tr.131). At the time of trial interest on this note had accumulated to the extent of \$594,422.22 (Tr.314). Although Tolson claimed the \$227,500.00 note was ultimately paid in full (which Yardleys deny) Tolson admitted it was not paid on its due date of April 1, 1981 (Tr.152). The fact is it was never fully paid (Exh.40).

At the end of Tolson's case he still had proved no fraud, misrepresentation, grounds for rescission or any of the other demands in the Complaint. At the end of his case Tolson's counsel also acknowledged that he had not established the amount of any claim for damages and asked that the case be bifurcated submitting the testimony to that point to the jury on the question of liability or as he called it "breach of contract" and then by conducting a trial on the damage issue at a later date (Tr.282).

Tolson complains about commission, and the concealment of, a breach of contract by the act of selling Clair's interest to Gene Yardley. (Brief Points V-VII pp.22-26) A sale occurred December 9, 1982 (Exh.19). Tolson admitted Gene Yardley previously asked Tolson if a "change in management" would be offensive to Tolson (Tr.80). This occurred in a phone call of November 24, 1982 (Id. lines 11, 12). On December 10, 1982 Tolson wrote Gene Yardley saying, among other things:

[Exhibit 37]

To expedite matters, I have suggested and summarized from our conversation and Mr. Chamberlain's letter the following:

A new lease will be prepared to reflect a fixed annual lease rental payment of \$90,000.00.

New management and joint venture agreements will be prepared and the existing agreements with Clair will be voided. [Emphasis added]

The accounting for 1981 and 1982 will be completed by Squire & Co.

A modification of the purchase agreement to allow the annual payment now due in January to be due in March.

A schedule of payments to be made as follows:

\$50,000 upon acceptance of these proposals  
\$50,000 on or before December 31, 1982  
\$241,616.43 on or before March 01, 1983

It will be necessary for new documents for the lease, management and joint venture to be prepared and accepted by both of us. An addendum to the purchase agreement [underscoring supplied] allowing the date of annual payments to be made March 01 of each year will need to be prepared.

[Addendum p.i]

On that day (December 10, 1982) Tolson was in default \$191,616.43 together with interest at 12% on \$1,235,000.00 from January 7, 1982 (please see Exh.17 and Addendum p. v) on the larger note and \$180,138.50 principal and interest from April 1, 1981 at 9% on the smaller note (please see Addendum p. iii); with another payment of \$241,616.43 due within thirty days, no amount of the principal on which (but only partial payments of interest) was ever paid (please see Addendum v and vi).

The Court ruled on Plaintiff Tolson's claims for rescission justifying restitution and breach of contract that there were no damages (Tr.284). On the claim that the Defendants had been unjustly enriched the Court ruled that the unjust enrichment claim would have to be predicated upon absence of a contract. The Court found that there was a contract under which some payments from Tolson to Yardleys had been paid (Tr.285).

When Defendants moved to dismiss because Tolson had not proved any damages Tolson's counsel moved to submit the question of liability to the jury and let him prepare for and try the question of damages at a later time (Tr.281).

The Trial Court denied the Motion for bifurcating the trial because it was not requested in a timely way (Tr.285). The Court also ruled that there was no evidence to support Tolson's claim for punitive damages (Tr.285).

Tolson agreed that the note for \$1,235,000.00 had never been paid (Tr.131) and offered no evidence that any interest had been paid on that note.

The counterclaiming Yardleys, Gene and Anita, commenced to establish proof as to the balance due. During the course of examination of Yardleys' certified public accountant to establish the balance of principal and interest due on the notes Mr. Bush, Tolson's counsel, made the following statement to the Court:

\*\*\*[Yardleys' counsel]: \*\*\*the representation that the only recourse on the note was to execute on the [collateral]... based on the representation there does not appear there is an issue for judgment against Tolson. I am not willing to put everyone here through a lot of time to prove something that's really not going to have any ramifications against-- (Tr.291-292)



After colloquy between counsel for all parties and the Court it was agreed as stated by Tolson's counsel:

"Ok. Why don't we go ahead and do that. I do not expect to be contesting the figures"  
(Tr.294)

Exhibits 40 and 41 were received in evidence. These were certified public accountant calculations of amounts due on the two notes.

Appellant's Brief seems to suggest that Tolson did not receive full credit for recognition or all payments made to the Respondents.

Plaintiff's Exhibit No. 18 was introduced by Tolson as a summary of all payments made to Respondents for which credit should be applied on his behalf.

Defendant Clair Yardley, when called by Tolson's counsel to testify, identified the allocation or distribution of each of the payments identified in Plaintiff's Exhibit No. 18; and Tolson offered no evidence to rebut this testimony of Defendant Clair Yardley (Tr.295-306).

Sidney Gilbert, a certified public accountant, was thereafter called to testify as an expert witness as to the proper allocation to principal and accrued interest of the payments identified in Plaintiff's Exhibit No. 18 (Tr.311-314).

Defendants' Exhibit Nos. 40 and 41 were introduced as payment schedules prepared by the expert witness to reflect the allocation to principal and accrued interest of each payment made by Tolson and the then outstanding balance of the two promissory notes involved. Upon discovering that Exhibits 40 and 41

included interest calculated on a monthly compounded basis, Defendants were directed to provide substituted schedules with interest calculations based on simple interest rules. Exhibits 40 and 41 are a part of the Addendum as pages iii and v. Defendants substitute Exhibits reconstructing these accountings are attached hereto as a part of the Addendum (pp. iii & iv) and reflect the calculations and the account balances utilized in calculating the judgment entered against Tolson.

Revised Exhibit No. 40 (Addendum p. iv) reflects payments applied to the smaller, \$227,500.00, Note. The Exhibit consists of two pages due to the fact that the beginning interest rate was 9% per annum with an increase to 12% per annum beginning April 1, 1981 when it became past due. Page 2 of revised Exhibit No. 40 reflects an outstanding balance of \$179,928.51 as of April 1, 1981, the date on which the interest rate increased to 12% per annum. This Exhibit reflects the fact that as of February 10, 1987, the \$227,500.00 Promissory Note had an unpaid principal balance of \$28,938.13 with accrued and unpaid interest of \$17,791.00.

Revised Exhibit No. 41 (Addendum p. vi) reflects interest only payments made on the larger Promissory Note in the amount of \$1,235,000.00. This Exhibit (41) reflects the fact that the payments made on this Promissory Note were never sufficiently large enough to satisfy outstanding accrued interest and that the principal balance accordingly was never reduced. This exhibit further reflects that as of February 10, 1987, there

was an unpaid principal balance of \$1,235,000.00 with accrued and unpaid interest of \$542,855.74.

Appellant's brief appears to argue that the amounts paid by Tolson are of such an amount that it would be unconscionable for Respondents to retain the same under the forfeiture provisions of the contracts between the parties. When viewed separately, the amounts paid by Tolson would seem significant. However, when these total payments are viewed in light of all the contract obligations, payments which went for feed and overhead, (Tr.109, 226, 233, 234) and the amounts which should have been paid, it is clear that Tolson paid but a small fraction of the total amounts called for under the contracts.

As indicated above, revised Exhibits 40 and 41 (Addendum pp. iv and vi) establish the amounts due as \$48,999.70 on the \$227,500.00 note and \$1,829,422.22 on the \$1,235,000.00 note (Tr.325). There was some question as to whether compound interest had been employed but it was agreed that the Defendants' certified public accountant would make any appropriate adjustments within five days to which the Court stated:

THE COURT: Mr. Bush [Tolson's counsel] when we talked before we talked about your client in strict foreclosure since there is no [deficiency].

To which Mr. Bush replied:

"I think that would be in his best interest (Tr.326).

Mr. Bush asked for a discussion outside the Courtroom following which counsel for Yardleys and counsel for Tolson adopted the following Stipulation [Tr.328]:

And the Counterclaimants, Gene Yardley and Anita Yardley, would be entitled to judgment in the amount of \$1,829,422.22, including principal and interest to February 10th, 1987, to be adjusted after Mr. Sidney Gilbert had recalculated the amounts of interest from compounded, by either a monthly or any other compounding basis, to simple interest. That would be incorporated into the same judgment, the form would be submitted to Mr. Bush five days before given to Your Honor. Mr. Bush would have five days within which to object or take exception to the amount of the judgment or the form of the judgment, and if none were taken, then the Court would enter judgment in favor of those Counterclaimants in those two amounts.

Mr. Tolson would yield back, surrender, and disclaim any right, title, or interest in or to any and all of the animals or the livestock which have been the subject of this litigation and would claim no contractual, legal, or equitable right in those animals and they would be the property of the Yardley Defendants and Counterclaimants and the matter would be settled in that way in one judgment.

After observation by Mr. Bush that Tolson would surrender back all interest he had in the herd the Stipulation was restated (Tr.328) and the Court asked Mr. Bush if that was "the Stipulation as you understand it?" (Tr.329, lines 10 and 11). Mr. Bush stated "It's real close" (line 12). The Trial Court would not accept this ambivalence and appropriately asked: "What's different?" Mr. Bush did not state that there was anything different from the agreement but only added a suggestion that the calculation of the balances due on the two notes be separated so there could "be no recourse against Tolson in the event of a judgment" (Tr.329, lines 14-22).

Judgment was then entered by the Court in accordance with the Stipulation. The Bench Ruling is found at Tr. 331 and

332. A written judgment dismissing Plaintiff Tolson's entire Complaint and granting Yardleys Judgment and an Order for strict foreclosure with no deficiency on the Counterclaim was adopted in written form and signed by the Court (R.373-378).

#### SUMMARY OF THE RESPONDENTS' ARGUMENT

1. Tolson argues (Appellant's Brief Points I and II) that he has paid "over \$650,000.00" to Yardleys and is entitled to a return of it. To the contrary, Tolson purchased cows in 1980 from Yardleys for \$1,500,000.00. He made some payments but was always seriously delinquent and at the time of trial Tolson insisted the cows were worth only half that amount (R.6 - Complaint "Fourth Cause of Action"). A substantial part of the money Tolson paid went for operations (feed, labor, general overhead) [Tr.109, 226, 233, 234]. Interest had accrued on the notes for six years. Tolson sold, for his own benefit, interests in a part of the herd for between "2.2 to 2.4" million dollars (Tr.120). This was for only approximately 240 adult out of the 320 registered (Exh.17) animals and offspring produced by the adults (Tr.120, line 2). Tolson is still indebted to Yardleys under the notes in the amount of \$1,878,421.90 secured by these same cows. Tolson is not offering to pay that amount and take clear title. He seems to be arguing for rescission.

Yardleys are entitled, among other things, to the benefit of the bargain. *Johnson vs. Carman*, 572 P.2d 371 (Utah 1977); *Warner vs. Rasmussen*, 704 P.2d 559 (Utah 1985). If Yardleys were to be paid 1.878 million dollars by Tolson, even

though delinquent, they would transfer title to the cows.

2. Tolson argues (Point III) that he was entitled to have the jury determine whether or not Tolson had paid the amounts shown on Exhibit 18 to Yardleys. Although Defendants disputed the method of applying those amounts (i.e.: whether to operating expenses or to interest and principal on the notes) irrespective of how that were determined, Tolson still owed Yardleys in excess of \$1,800,000.00 (Exhs.40, 41). Tolson never pleaded tender of payment or demonstrated willingness to pay. There was nothing of materiality for the jury to decide. This argument is specious because balances were agreed upon by Tolson's counsel. (See pp. 13, 14 supra)

3. Tolson argues (Point IV) that the Court should have allowed the jury to decide whether or not Yardleys were liable to Tolson and if so, then re-convene the case (at a later date and presumably with another jury) the amount by which Tolson had been damaged. At Tr. 281 Tolson's counsel after he had rested (Tr.235) made the incredible request: "We run into a problem there and that is under statute we are required within a certain prescribed time to file our complaint, but what I see is even though we are required to file our complaint within that time the issue of consequential, it appears, won't be resolved for probably another year. So I have some concerns about that and it would only seem fair, since I was required to file a complaint to meet the Statute of Limitations, that if the Jury does find that there was a breach and that there was damage, that the issue of the amount of damages be reserved to a time when it can be

ascertained." The Record establishes and the Court ruled that there was no liability; however, Defendants were present with their witnesses and it would have been unprecedented to sever the case into two lawsuits and require Yardleys to come back another time. The Trial Court ruled this Motion was untimely (Tr.285).

4. Tolson argues (Points V and VI) that the jury should have considered punitive damages (Point V) and fraud and misrepresentation (Point VI). His only fact argument on punitive damages is the sale by Clair to Gene Yardley of December, 1982 which we have treated in the Statement of Facts at pages 8 and 9, supra. Tolson knew about and wanted the "change in management [ownership]" (Exh.37; Addendum p.i). In his Point VI Tolson claims Yardleys acted deceitfully, recklessly and fraudulently. Yet he not only approved the transfer of ownership (Addendum p.i) but he also emerged from a "long period of silence" by writing Gene Yardley two years later saying that on "advise of counsel" he has "remained [refrained?] from contacting the investors and yourself" then went on to talk about rehabilitating the notes and accounts and discussing the herd and its growth (Exh.36; Addendum p.ii).

5. In Appellant's Point VII Tolson objects to the Court applying "agency-alter ego theories". The Court did mention that the Sellers-Defendants constituted a family and that Gene Yardley was prominent in Trydale Dairy and therefor acts of one could be regarded as acts of the others. Tolson's arguments are inconsequential because of Tolson's prior approval (Addendum p.i) and subsequent ratification (Addendum p.ii) of an

arrangement where Gene Yardley would represent all of the Defendants.

6. In Point VIII Tolson states that Defendants have been unjustly enriched as a result of sums paid by Tolson to Yardleys. Unjust enrichment cannot be predicated upon a breach of contract by the claimant. *Verdi vs. Helper State Bank*, 57 U 502, 196 P 225 (1921).

#### STATEMENT OF POINTS

[Although our impression of Appellant's Brief is that its Statement of Points is rather irregularly organized, we will attempt to respond in the order Appellant has adopted. We will, however, consolidate our response to Appellant's Points I, II and III into Point I and Points V and VI into Point III]

#### POINT I

THE TRIAL COURT PROPERLY DISMISSED THE PLAINTIFF'S COMPLAINT.

#### POINT II

THE TRIAL COURT CORRECTLY DENIED TOLSON'S MOTION, MADE AFTER HE HAD RESTED HIS ENTIRE CASE, TO BIFURCATE THE LIABILITY FROM AND TRY THE ISSUE OF DAMAGES LATER.

#### POINT III

THERE WAS NO EVIDENCE OF ANY WRONGDOING UPON WHICH THE ISSUE OF PUNITIVE DAMAGES COULD HAVE BEEN SUBMITTED TO THE JURY.

#### POINT IV

TOLSON NOT ONLY RATIFIED BUT ENCOURAGED THE SUBSTITUTION OF GENE YARDLEY FOR CLAIR YARDLEY.



POINT V

RESTITUTION FOR UNJUST ENRICHMENT CANNOT BE  
BASED UPON A WRITTEN CONTRACT.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DISMISSED THE  
PLAINTIFF'S COMPLAINT.

It is undisputed that Tolson signed two notes, one for \$227,500.00 and one for \$1,235,000.00 (Exh.17). Some payments were made on the smaller note (Exh.40) but nothing was paid on principal on the larger note (Exh.41 and Tr.131). While Tolson established that he had made some payments on both notes (Exh.18) there remained a balance due of \$29,701.09 as unpaid principal and \$12,298.61 as interest on the first note (Exh.40) and \$1,235,000.00 principal and \$594,422.22 as unpaid interest on the second note (Exh.41). [Summaries of accounting of note payments are in the Addendum at pp. iii through vi]

All of this became academic when the parties stipulated Gene Yardley and Anita Yardley would be entitled to judgment in the amount of \$1,829,422.22 including principal and interest to February 10, 1987 subject to a minor interest adjustment (Tr.328). This was agreed to by Tolson's counsel (Tr.329) [the Court asked Tolson's counsel if the Stipulation at Tr. 328 was correct to which counsel said "it's real close" (Tr.329, line 12)]. When asked by the Trial Judge what was different counsel only asked that the balances of the two notes be separated (Tr.329, lines 14-22). Counsel for Tolson finally agreed to that stipulation as slightly modified (Tr.330, line 23). The amount

of the notes became superfluous because Yardleys agreed not to pursue a deficiency judgment against Tolson (Tr.329, lines 14-22).

As we will demonstrate under out Points III through VI, there were no issues to present to the jury.

## POINT II

THE TRIAL COURT CORRECTLY DENIED TOLSON'S MOTION, MADE AFTER HE HAD RESTED HIS ENTIRE CASE, TO BIFURCATE THE LIABILITY FROM AND TRY THE ISSUE OF DAMAGES LATER.

After Plaintiff had rested and he discovered grave deficiencies in his case-in-chief he made the following statement, not in the form of a motion but merely as a "request":

"since I was required to file a complaint to meet the Statute of Limitations that if the jury does find that there was a breach and that there was damage, that the issue of the amount of damages be reserved to a time when it can be ascertained." (Tr.281)

This seems to be both a request for severance of the damage amount from the liability question and a motion for a continuance. Utah does have a rule authorizing bifurcation but only "in furtherance of convenience or to avoid prejudice". Rule 42(b), Utah Rules of Civil Procedure, provides that

The Court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim\*\*\* or of any separate issue\*\*\*.

Whether or not to grant or deny a separate trial is within the discretion of the Court. *Raggenbuck vs. Suhrmann*, 7 U.2d 327, 325 P.2d 258 (1958).

The bifurcation of issues for trial should be confined to special circumstances found to be present and the trial court does not abuse discretion in refusing severance for any non-meritorious reason. *Jensen vs. Beaird*, 696 P.2d 612 (Wash 1985).

Text law agrees. At 75 Am.Jur.2d at page 123, Trial §7 it is stated:

Parties to an action must present all their evidence upon all issues pending, and cannot as of right have a trial divided.

The same text at page 123 states that:

\*\*\*to warrant a prior trial on the issue of liability it must appear that it is separate and distinct from the issue as to damages, that such prior trial will not operate to the prejudice of a party to the action, and that it will expedite litigation or lessen the cost thereof.

Tolson very likely could not have had a bifurcated trial had he made a motion well in advance of the trial let alone after he had rested his case. It is obvious that Tolson was merely asking for additional time or in other words a continuance. Rule 40, U.R.C.P. does allow continuances but under Rule 40(b) it must be (i) upon motion; (ii) in the court's discretion; (iii) upon such terms as may be just including the payment of costs. The Rule goes on to say that:

If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The Court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain\*\*\*.

The purely speculative need for additional witnesses or additional evidence does not entitle the defendant to a continuance. *State vs. Humpherys*, 707 P.2d 109 (Utah 1985). The Utah Supreme Court sustained the Trial Court in denying a motion for a continuance where the motion was filed nine days before trial in the case of *First Security Bank vs. Johnson*, 540 P.2d 521 (1975).

Tolson's claim that somehow the Statute of Limitations forced him to file the action prematurely is self-contradictory. If his cause of action had not accrued the time prescribed in the Statute of Limitations obviously would never have begun.

We submit that the claim that the Trial Court abused its discretion both in refusing to separate the issues and grant a continuance is untenable.

To be entitled to relief on the ground of want of time for preparation of his case a party must show some precise legal or strong equitable reason, as well as the exercise of reasonable diligence in every respect in which he claims to be unprepared. Where a party might have been prepared for trial, denial of a continuance grounded on lack of preparation is properly within the court's discretion. 17 Am.Jur.2d pp. 123, 124, Continuance §6.

### POINT III

THERE WAS NO EVIDENCE OF ANY WRONGDOING UPON WHICH THE ISSUE OF PUNITIVE DAMAGES COULD HAVE BEEN SUBMITTED TO THE JURY.

The Court had no reason to submit the issue of punitive damages to the jury.

The brief of Appellant argues for punitive damages first (Point V) and then for finding of fraud and misrepresentation (Point VI). The only predicate for punitive damages would have to lie in the claim of fraud and misrepresentation. Appellant's brief suggests only one act which Tolson claims constituted fraud or misrepresentation and that is the transaction between Clair Yardley and Gene Yardley in December, 1982. We have treated this claim hereinabove but at the expense of repetition respectfully call the Court's attention to Addendum pages (i) and (ii) and reiterate that Tolson not only knew in advance of this transaction but approved it in writing and was pleased with it.

It may be that Tolson is saying on appeal that punitive damages are predicated upon misrepresentation of values. This claim is considered in pages 5 and 6 of the Statement of Facts, supra, and in Point V infra.

#### POINT IV

TOLSON NOT ONLY RATIFIED BUT ENCOURAGED THE  
SUBSTITUTION OF GENE YARDLEY FOR CLAIR  
YARDLEY.

This Point has been argued above (Point III and in ¶4 of the Summary of Argument). To avoid time and space we respectfully call the Court's attention to the Addendum pp. i and ii.

## POINT V

### RESTITUTION FOR UNJUST ENRICHMENT CANNOT BE BASED UPON A WRITTEN CONTRACT.

In Tolson's last appeal for reversal (Point VIII) Tolson sums up his entire argument by the claim that "Defendants have been unjustly enriched through sums paid by Plaintiff."

The only factual claim is that Tolson had made some payments on the two notes (Brief p.28). Tolson's only reference to law is a citation of the case which sets out the elements for recovery in an unjust enrichment case.

It is fundamental that where an express contract exists an implied contract for restitution cannot. *Verdi vs. Helper State Bank*, 57 U 502, 196 P 225 (1921). The remedy of unjust enrichment is predicated upon a contract by implication that money has been paid to a defendant under circumstances where it would be inequitable to retain it. No agreement can be implied where there is an express contract existing and an express contract precludes the existence of a contract implied by law. 66 Am.Jur.2d pp. 948, 949, Restitution and Implied Contracts, §6. To prevail a claimant must show that the money was received under such circumstances that it would give offense to equity and good conscience to permit the possessor to retain it. *Thermoid Western Co. vs. Union Pacific Railroad Co.*, 365 P.2d 65, 12 U.2d 256 (1961).

Tolson's argument for unjust enrichment is demolished by his own contracts and his own testimony. He contracted to purchase the cattle for \$1,500,000.00 (Exh.17). He alleges in his own complaint that they were only worth \$752,000.00 (R.6

¶38). In his Tax Court trial (Exh.34) he was confronted with this allegation in his complaint (Exh.34 p.95). In the same proceedings Tolson was asked (p.93):

Q. Mr. Tolson is it your allegation that the purchase price paid of \$1.5 million for the 320 animals and 180 representative was their fair market value in 1980?

A. Yes it was.

At the time of trial Tolson owed Yardleys \$1,878,421.90.

Although prices may have decreased between 1980 and the time of trial Yardleys are still entitled to recover the total purchase price and those payments made by Tolson which he now claims represent unjust enrichment are less than Yardleys' damages. If the cattle in Yardleys' hands are only worth half the amount Tolson purchased them for in 1980 Yardleys are not to blame.

In the watershed case of *Perkins vs. Spencer*, 121 U 468, 243 P.2d 446 (1952) which prohibited forfeitures where purchasers failed to perform, the rights of the seller are still rigidly preserved in the following particulars:

The vendors are entitled to any loss occasioned them by any of these factors:

- (1) Loss of an advantageous bargain;
- (2) Any damage to or depreciation of the property;
- (3) Any decline in value due to change in market value of the property not allowed in items nos. 1 and 2.

(243 P.2d at 451 and 452)

[and, of course, seller should be entitled to interest at the contract rate].

In the Sales Act of the Uniform Commercial Code the same remedies are available to sellers. Under §70A-2-708, U.C.A. 1953, the sellers are provided a "measure of damages" for non-acceptance or repudiation by the buyers:

(1) \*\*\*[as] the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages\*\*\*.

[also]

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a condition as performance would have done then the measure of damages is the profit which the seller would have made from full performance by the buyer, together with any incidental damages\*\*\*.

These provisions are consistent with the axiom that no claim for unjust enrichment can be made where there is a contract.

#### CONCLUSION

The Appellant Tolson has failed to establish any grounds for reversal of the Trial Court's ruling or the entry of the final Judgment and the Decree authorizing strict foreclosure.

To view the case in what we respectfully see as its proper perspective the Plaintiff, to have prevailed, would have had to prove, in somewhat near this order, (1) fraud or misrepresentation; (2) grounds for rescission; or (3) lack of a contract; and (4) damages by reason of the foregoing or for some breach of the contract.

The record is totally devoid of any showing of damages.



Tolson has received from his clients and kept over \$700,000.00 in cash and has contracts running to him for somewhere near \$2,000,000.00. He has a liability to the Yardleys in excess of \$1,800,000.00 and accumulating interest to the present time.

The parties entered into an arms-length transaction reduced to writing based upon an investigation by Tolson of the value of the herd and Tolson has represented in another proceeding (before the United States Tax Court) that the livestock were worth, at the time he bought them, at least as much as the contract price.

Tolson also testified in the Tax Court action that the value of the dairy cows had been reduced by one-half. The Yardleys are entitled to the benefit of their bargain and if what Tolson states is true then what he must accept is that he purchased livestock for \$1,500,000.00 and in the course of his delinquent payments and delinquent performance under the contract market values declined making the livestock worth only \$750,000.00. The Yardleys are entitled to the benefit of the bargain made in the 1980 agreement and where a written contract is present no action for unjust enrichment on the ground of an implied contract may be maintained.

We respectfully submit that the Judgment entered in the Trial Court must be affirmed.

Respectfully submitted,

OLSEN, McIFF & CHAMBERLAIN

By 

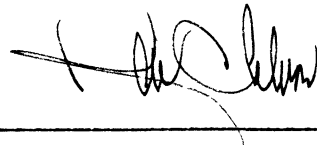
Ken Chamberlain  
Attorneys for Respondents  
Gene Yardley, Anita Yardley,  
Tom Yardley and Trydale Dairy

ACKNOWLEDGEMENT OF SERVICE

I hereby certify that four (4) copies of the foregoing Brief of Respondents were mailed to the following, by U.S. Regular Mail, Postage Prepaid, on this 29th day of January, 1988:

Russell R. Clark, Esq.  
Jory L Trease, Esq.  
Dan Adamson & Associates  
Attorneys for Appellant  
5250 South 300 West, Suite 255  
Salt Lake City, Utah 84107

Robert L. Jeffs, Esq.  
Jeffs and Jeffs  
Attorneys for Respondent Clair Yardley  
90 North 100 East, P.O. Box 888  
Provo, Utah 84603



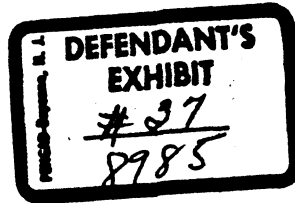
# FINANCIAL FUTURES

1875 S. State St. Suite 1300  
Orem, Utah 84057 • (801) 225-7533

Phoenix Office  
5151 N. 16th St. Suite E123  
Phoenix, Arizona 85016 • (602) 279-5705

"Creative Ideas in Money Management"

December 10, 1982



Gene Yardley  
Gunnison, UT

Dear Gene:

I hope you had a safe trip back to Gunnison Tuesday, the weather was not too co-operative. I appreciate your time and considerations in resolving the Quality Paradise matters.

I received Mr. Chamberlains correspondence Wednesday--after it's review, I can see that we needed it for your conversation Tuesday.

To expedite matters, I have suggested and summarized from our conversation and Mr. Chamberlains letter the following:

A new lease will be prepared to reflect a fixed annual lease rental payment of \$90,000.00.

New management and joint venture agreements will be prepared and the existing agreements with Clair will be voided.

The accounting for 1981 and 1982 will be completed by Squire & Co.

A modification of the purchase agreement to allow the annual payment now due in January to be due in March.

A schedule of payments to be made as follows:

\$50,000 upon acceptance of these proposals.

\$50,000 on or before December 31, 1982.

\$241,616.43 on or before March 01, 1983.

It will be necessary for new documents for the lease, management and joint venture to be prepared and accepted by both of us. An addendum to the purchase agreement allowing the date of annual payments to be made March 01 of each year will need to be prepared.

Best regards,

W. Roy Tolson

Accepted: \_\_\_\_\_  
Gene Yardley Date

cc: R.R. Brown  
File

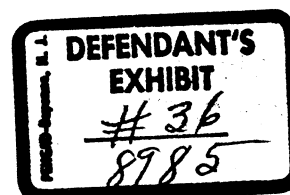


## financial futures inc.

"CREATIVE IDEAS IN MONEY MANAGEMENT"

November 13, 1984

Mr. Gene Yardley  
P.O. Box 371  
Gunnison, UT 84634



Dear Gene:

I wish to apologize for the long period of silence and non-activity with you regarding the dairy. The advice of counsel to remain from contacting the investors and yourself has caused me many sleepless nights and concerns. The status of the investigation is unknown to me at this time, but in order to insure some success with the program, it is now necessary to contact the involved parties.

The accounting and calculations which we had discussed during the summer regarding the active investors and the notes with yourself have been completed. The nature and confidentiality of the information make it impossible to mail you copies, but it is important that we discuss its contents in the near future.

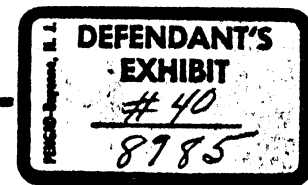
I would like to make an appointment to visit you in Gunnison on Friday, November 23, 1984. It would be appropriate to discuss and answer your questions, receive herd growth and summary information and the necessary information to complete operating statements for 1984.

Your confidence in me has been greatly appreciated. I want to thank you for it and to wish you an enjoyable Thanksgiving.

Thank you for your cooperation.

Yours very truly,

W. Roy Tolson



-----

Note from: TOLSON  
Payable to: YARDLEY  
Amount of original note: \$227,500.00  
Date of note: 30-Dec-80  
Nominal interest rate, compounded  
monthly 9.00%  
Annual interest rate (A.P.R.) 9.38069%  
Terms of payment: Variable payments; unpaid principal  
and interest due

-----

Total  
Paid

-----

Date of Payment	Amount Paid	Interest Accrued	Interest Paid	Interest Paid to	Principal Payment	Unpaid Principal	Unpaid Interest
30-Dec-80	Amount of original note					\$227,500.00	
28-Jan-81	\$13,000.00	1,695.59	\$1,695.59	28-Jan-81	\$11,304.41	216,195.59	\$0.00
01-Feb-81	2,000.00	222.25	222.25	01-Feb-81	1,777.75	214,417.84	0.00
20-Mar-81	12,500.00	2,590.01	2,590.01	20-Mar-81	9,909.99	204,507.85	0.00
01-Apr-81	25,000.00	630.71	630.71	01-Apr-81	24,369.29	180,138.56	0.00

```

*****
Note from:                                TOLSON
Payable to:                               YARDLEY
Amount of original note:                  $180,138.56
Date of note:                             01-Apr-81
Nominal interest rate, compounded
monthly                                   12.00%
Annual interest rate (A.P.R.)             12.68250%
Terms of payment:                         Variable payments; unpaid principal
                                           and interest due
-----

```

Total  
Paid

Date of Payment	Amount Paid	Interest Accrued	Interest Paid	Interest Paid to	Principal Payment	Unpaid Principal	Unpaid Interest
01-Apr-81	Amount of original note					\$180,138.56	
06-Apr-81	\$25,000.00	312.96	\$312.96	06-Apr-81	\$24,687.04	155,451.52	\$0.00
08-May-81	10,000.00	1,728.45	1,728.45	08-May-81	8,271.55	147,179.97	0.00
12-Jun-81	25,000.00	1,789.90	1,789.90	12-Jun-81	23,210.10	123,969.87	0.00
13-Jul-81	50,000.00	1,335.33	1,335.33	13-Jul-81	48,664.67	75,305.20	0.00
28-Dec-81	50,000.00	4,395.89	4,395.89	28-Dec-81	45,604.11	29,701.09	0.00
10-Feb-87		19,298.61	0.00	28-Dec-81	0.00	29,701.09	19,298.61

=====

Note from: TOLSON  
 Payable to: YARDLEY  
 Amount of original note: \$227,500.00  
 Date of note: 30-Dec-80  
 Nominal interest rate,

9.00%  
 9.00000%

Terms of payment: Variable payments; unpaid principal  
 and interest due

-----  
 Total  
 Paid  
 -----

Date of Payment	Amount Paid	Interest Accrued	Interest Paid	Interest Paid to	Principal Payment	Unpaid Principal	Unpaid Interest
30-Dec-80	Amount of original note					\$227,500.00	
28-Jan-81	\$13,000.00	1,626.78	\$1,626.78	28-Jan-81	\$11,373.22	216,126.78	\$0.00
01-Feb-81	2,000.00	213.17	213.17	01-Feb-81	1,786.83	214,339.95	0.00
20-Mar-81	12,500.00	2,483.99	2,483.99	20-Mar-81	10,016.01	204,323.94	0.00
01-Apr-81	25,000.00	604.57	604.57	01-Apr-81	24,395.43	179,928.51	0.00

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=====
Note from:
Payable to:
Amount of original note:
Date of note:
Nominal interest rate,

                                TOLSON
                                YARDLEY
                                $179,928.51
                                01-Apr-81

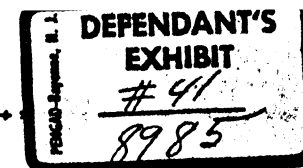
                                12.00%
                                12.00000%
                                Variable payments; unpaid principal
                                and interest due

-----
Total
Paid

-----
Date of      Amount      Interest      Interest      Interest      Principal      Unpaid      Unpaid
Payment      Paid      Accrued      Paid      Paid to      Payment      Principal      Interest
-----
01-Apr-81 Amount of original note $179,928.51
06-Apr-81 $25,000.00 295.77 $295.77 06-Apr-81 $24,704.23 155,224.28 $0.00
08-May-81 10,000.00 1,633.04 1,633.04 08-May-81 8,366.96 146,857.32 0.00
12-Jun-81 25,000.00 1,689.87 1,689.87 12-Jun-81 23,310.13 123,547.19 0.00
13-Jul-81 50,000.00 1,259.17 1,259.17 13-Jul-81 48,740.83 74,806.36 0.00
28-Dec-81 50,000.00 4,131.77 4,131.77 28-Dec-81 45,868.23 28,938.13 0.00
10-Feb-87 17,791.00 0.00 0.00 28-Dec-81 0.00 28,938.13 17,791.00

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Note from: TOLSON  
 Payable to: YARDLEY  
 Amount of original note: \$1,235,000.00  
 Date of note: 30-Dec-80  
 Nominal interest rate, compounded monthly 12.00%  
 Annual interest rate (A.P.R.) 12.68250%  
 Terms of payment: Variable payments; unpaid principal and interest due

-----  
 Total  
 Paid

Date of Payment	Amount Paid	Interest Accrued	Interest Paid	Interest Paid to	Principal Payment	Unpaid Principal	Unpaid Interest
30-Dec-80	Amount of original note					\$1,235,000.00	
07-Jan-82	\$50,000.00	160,061.87	\$50,000.00	25-Apr-81	\$0.00	1,235,000.00	\$110,061.87
23-Feb-82	21,303.42	20,168.65	21,303.42	14-Jun-81	0.00	1,235,000.00	108,927.10
25-Feb-82	17,500.00	858.24	17,500.00	24-Jul-81	0.00	1,235,000.00	92,285.34
03-May-82	15,000.00	28,751.06	15,000.00	28-Aug-81	0.00	1,235,000.00	106,036.40
02-Jul-82	10,000.00	25,747.22	10,000.00	21-Sep-81	0.00	1,235,000.00	121,783.62
28-Dec-82	50,000.00	76,812.54	50,000.00	15-Jan-82	0.00	1,235,000.00	148,596.16
30-Dec-82	50,000.00	858.24	50,000.00	12-May-82	0.00	1,235,000.00	99,454.40
10-Mar-83	50,000.00	30,038.42	50,000.00	05-Sep-82	0.00	1,235,000.00	79,492.82
20-Apr-83	50,000.00	17,593.93	50,000.00	31-Dec-82	0.00	1,235,000.00	47,086.75
06-Jan-84	30,000.00	112,000.40	30,000.00	11-Mar-83	0.00	1,235,000.00	129,087.15
31-Dec-84	20,000.00	154,483.31	20,000.00	26-Apr-83	0.00	1,235,000.00	263,570.46
10-Feb-87		330,851.76	0.00	26-Apr-83	0.00	1,235,000.00	594,422.22

```

=====
Note from:                                TOLSON
Payable to:                               YARDLEY
Amount of original note:                  $1,235,000.00
Date of note:                             30-Dec-80
Nominal interest rate,                    12.00%
                                           12.000000%

Terms of payment:                          Variable payments; unpaid principal
                                           and interest due
=====

```

Total  
Paid

Date of Payment	Amount Paid	Interest Accrued	Interest Paid	Interest Paid to	Principal Payment	Unpaid Principal	Unpaid Interest
30-Dec-80	Amount of original note					\$1,235,000.00	
07-Jan-82	\$50,000.00	151,448.22	\$50,000.00	02-May-81	\$0.00	1,235,000.00	\$101,448.22
23-Feb-82	21,303.42	19,083.29	21,303.42	23-Jun-81	0.00	1,235,000.00	99,228.09
25-Feb-82	17,500.00	812.05	17,500.00	05-Aug-81	0.00	1,235,000.00	82,540.14
03-May-82	15,000.00	27,203.84	15,000.00	11-Sep-81	0.00	1,235,000.00	94,743.98
02-Jul-82	10,000.00	24,361.64	10,000.00	06-Oct-81	0.00	1,235,000.00	109,105.62
28-Dec-82	50,000.00	72,678.90	50,000.00	06-Feb-82	0.00	1,235,000.00	131,784.52
30-Dec-82	50,000.00	812.05	50,000.00	09-Jun-82	0.00	1,235,000.00	82,596.57
10-Mar-83	50,000.00	28,421.92	50,000.00	10-Oct-82	0.00	1,235,000.00	61,018.49
20-Apr-83	50,000.00	16,647.12	50,000.00	10-Feb-83	0.00	1,235,000.00	27,665.61
06-Jan-84	30,000.00	105,973.15	30,000.00	25-Apr-83	0.00	1,235,000.00	103,638.76
31-Dec-84	20,000.00	146,169.86	20,000.00	14-Jun-83	0.00	1,235,000.00	229,808.62
10-Feb-87		313,047.12	0.00	14-Jun-83	0.00	1,235,000.00	542,855.74