

1977

# Joseph S. Gasser, Jr. v. Lyman Dayton : Appellee's Brief

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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JOSEPH S. GASSER, JR.,	)	
	:	
Plaintiff-Appellant,	)	
	:	
vs.	)	Case No. 15394
	:	
LYMAN DAYTON,	)	
	:	
Defendant-Respondent.	)	

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APPELLEE'S BRIEF

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Appeal from a Judgment of the Third Judicial District Court  
for Salt Lake County, State of Utah.

Honorable Dean E. Conder, Judge

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## TABLE OF CONTENTS

NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	1
ARGUMENT	3
POINT I	3
<p>THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S FINDING THAT THE \$5,000.00 RECEIVED BY THE DEFENDANT WAS AN INVESTMENT.</p>	
POINT II	9
<p>WHERE THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S RULING, AND THE COURT'S FINDINGS ARE CLEARLY SUPPORTED BY THE EVIDENCE, THE JUDGMENT OF OF THE LOWER COURT MUST BE AFFIRMED.</p>	
CONCLUSION	9

## CASES CITED

Cannon v. Wright, 531 P.2d 1290, Utah 2d (1975).	4
Child v. Child, 332 P.2d 981, 8 Utah 2d 261.	5 and 9
Continental Bank & Trust Co. v. Stewart, 291 P.2d 890, 4 Utah 2d 153 (1955).	9
In Re Behm's Estate, 213 P.2d 657, 117 Utah 151 (1950).	9
Jensen v. Eddy, 514 P.2d 1142, 30 Utah 2d 154.	9
Lake vs. Pinder, 368 P.2d 593, 13 Utah 2d 76.	9
O'Gara v. Findlay, 306 P.2d 1073, 6 Utah 2d 102 (1957).	9

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Defendant-Respondent.	)	

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APPELLEE'S BRIEF

---

NATURE OF THE CASE

This action is based on an oral agreement whereby plaintiff transferred by check \$5,000.00 to defendant on August 26, 1969. Plaintiff alleges the transfer was a loan to be repaid within one year, whereas defendant alleges the transfer was an investment, repayment of which was contingent upon the profitability of a current film venture.

DISPOSITION IN LOWER COURT

The case was tried to the Court. From a Judgment for the defendant of no cause of action, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

The defendant seeks reversal of the Judgment and Judgment in his favor as a matter of law.

STATEMENT OF FACTS

The plaintiff was a resident of Salt Lake County, Utah, and the defendant

was a resident of the State of California and engaged in various aspects of motion picture production during all times material to this action. During midsummer of 1969, defendant first became acquainted with plaintiff, (Tr. p. 18) As a result of conversations between plaintiff and defendant, plaintiff transferred \$5,000.00 to defendant. (Tr. p. 3, 17-18)

Plaintiff alleges that he loaned \$5,000.00 to defendant " . . . for some of his business ventures and his family expenses." (Tr. p. 11) Plaintiff knew defendant was working on a film entitled "Sing a Sad Song for Sarah" and that the business venture for which the money would be used was for the film. (Tr. p. 11) Plaintiff further alleges that the money was to be repaid within one year and although there was never any discussion as to interest, plaintiff expected normal interest. (Tr. p. 4-5) Plaintiff sent the \$5,000.00 check with a letter dated August 26, 1969, which letter made no mention of the funds being a loan. (R. p. 21) Approximately two years later, plaintiff for the first time, contacted defendant by letter asking for repayment, calling the transfer of funds a loan. (Tr. p. 7-8) Defendant responded by letter dated August 16, 1971. (R. p. 22) Finally, on January 13, 1972, plaintiff wrote defendant a second letter requesting repayment of the funds because of plaintiff's "very shakey" economic situation. (R. p. 24)

Defendant claims that the \$5,000.00 was an investment. He states that sometime in midsummer of 1969, he explained to plaintiff that they were completing a film called "Sing a Sad Song for Sarah," and that in order to obtain "answer prints," they needed additional funding. (Tr. p. 18-19) Defendant further informed plaintiff that repayment of the funds was conditional upon the movie generating sufficient revenue to pay the funds back. (Tr. p. 20) After receiving plaintiff's letter of August 4, 1971, (R. p. 23), defendant responded by letter dated August 16, 1971, and enclosed therein a

"financial program" in order to give plaintiff an "up-to-date progress report" on the movie. (R. p. 22) It was defendant's custom "to send to each of the investors a progress report and a projection as to those points of marketing strategies that we had tried to put into effect." (Tr. p. 24) In defendant's letter of August 16, 1971, he also stated, "I'm hoping that foreign sales will make it possible to give a remittance of the \$5,000.00 sooner." (R. p. 22) and that by making that statement, the defendant was "hoping that through foreign sales, we could generate income so we could return the investment to Mr. Gasser as well as other investors." (Tr. p. 25) Plaintiff received a two percent interest in the profits of the picture for his \$5,000.00 investment. (Tr. p. 20,32) Although plaintiff acknowledged that if the film were successful, he would receive a share of the profits, he claims he had no ownership in the movie. (Tr. p. 5) Defendant stated that in some cases investors received a written agreement to evidence their ownership, but is not sure who did and did not receive the written acknowledgment. (Tr. p. 23-33)

#### ARGUMENT

##### POINT I

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S FINDING THAT THE \$5,000.00 RECEIVED BY THE DEFENDANT WAS AN INVESTMENT.

In its findings of fact, the Trial Court found that the \$5,000.00 transferred from plaintiff to defendant was an investment for the movie, "Sing a Sad Song for Sarah," (Tr. p. 40) and that plaintiff was aware that the funds were an investment at the time of transfer. (R. p. 40) Further, the Trial Court found that the repayment of the investment was to be made out of the profits of the film, of which plaintiff had a two percent ownership interest. (R. p. 40) It is clear from the record and transcript of the case that there is substantial evidence to support these findings.

Utah law states that the governing principle for review of this case is

the "substantial evidence rule." Cannon v. Wright, 531, P.2d 1290, Utah 2d . This case is a classic example of the reason the substantial evidence rule should govern on appeal.

"As we have often reiterated, it is the prerogative of the Trial Court to determine what aspects of the evidence he will believe. This includes that he can be selective and choose those portions of the testimony of any witness he thinks has the greater probability of being true. Cannon v. Wright, 531, P.2d 1290, Utah 2d.

In the instant case there are four critical questions of fact on which the parties' testimony is diametrically opposed:

1. Was the \$5,000.00 a loan or an investment? Plaintiff claims the \$5,000.00 was a loan while the defendant claims it was an investment.
2. Was repayment conditional or unconditional? Plaintiff claims defendant was to repay the funds within a year while defendant claims repayment was conditional upon the film making a net profit.
3. How was the \$5,000.00 to be used? Plaintiff claims at first that he did not know that a portion of the funds would be used for production costs of a film, (Tr. p. 9) but after reviewing his Answers to Interrogatories, he acknowledges that the funds were to be used for the film. (Tr. p. 11) Defendant specifically recalls telling plaintiff funds were needed to complete the film, specifically for answer prints. (Tr. p. 19)
4. Did plaintiff have an ownership interest in the film? Plaintiff claims he had no ownership interest in the film, (Tr. p. 5) while defendant claims plaintiff had a two percent ownership interest in the profits. (Tr. p. 20)

The Trial Judge necessarily had to decide which witness was telling the truth in these critical areas of conflicting testimony.

"Passing upon the credibility of witnesses involves to some extent the judging of what goes on in the minds of others and is therefore fraught with uncertainty. Whether one believes a witness is telling the truth often depends as much or more upon the impression the witness is making as upon the words he says. His appearance and demeanor.

his manner of expression and tone of voice, his apparent frankness or candor, or the want of it; his forthrightness in answering, or his tendency to hesitate or evade, and in fact his whole personality go into the composit effect of the testimony. This is so even though the hearer may not be paying particular attention to nor separately evaluating such factors. Child v. Child, 332 P. 2d 981, 985, 8 Utah 2d 261.

To enable the Trial Judge to make his finding of fact, not only did he have the advantage of observing the witnesses and passing upon their credibility, he also had additional supporting evidence to establish each of his findings on the four critical questions of fact.

1. Was the \$5,000.00 a loan or an investment?

In addition to the testimony that the funds were an investment, the check itself had the letters "Inv." written thereon. When asked if he wrote the abbreviation on the check, plaintiff could only respond "I don't recall." (Tr. p. 12) No evidence was presented to even suggest any other means by which the abbreviation was so placed. Thus, in addition to defendant's testimony, which the Trial Judge chose to believe, plaintiff's own exhibit helped to substantiate the Court's findings.

2. Was repayment conditional or unconditional?

In addition to defendant's testimony that repayment of the funds was conditional upon the firm making a profit, (Tr. p. 19-20) the Trial Judge received in evidence a letter written by defendant to plaintiff marked Exhibit 3-P. (R. p. 22) Enclosed with letter was a copy of a letter which described the financial statement referred to in defendant's letter, (Tr. p. 24) and when asked by the Court if the financial report was attached, defendant responded, "I think I did." (Tr. p. 24) Defendant's uncertainty on this point only further strengthens his credibility. A less than truthful person could easily positively claim a document was attached to a letter, especially if the alleged attached document cannot be found at a later date. Nevertheless,

Court with uncertainty as to whether he in fact attached the financial report. However, a subsequent letter written by plaintiff to defendant acknowledges receipt of defendant's letter "along with a report on your progress. The report stated a corporation would be formed by October, and I would hear. Approximately five months have expired since then and I haven't heard." (Ex P-4, R. p. 24) Plaintiff received the financial report and was well informed as to the financial status of the film.

To add further evidence to the finding that repayment was conditional, defendant states in Exhibit P-3, "I'm hoping that foreign sales will make it possible to give a remittance of the \$5,000.00 sooner." (R. p. 22) Defendant testified that he was hoping foreign sales would generate sufficient income to return the investment of plaintiff. (Tr. p. 25) Thus, in addition to defendant's testimony, plaintiff's Exhibits P-3 and P-4 helped to substantiate the Court's findings.

3. How was the \$5,000.00 to be used?

In addition to defendant's testimony that the funds were to be used to help finance the final stages of the film, (Tr. p. 19,21) plaintiff's Answers to Interrogatories acknowledged that the funds were to be used to "assist the defendant in his film ventures, and in paying his personal family expenses." (Tr. p. 10, R. p. 19) Thus, even though plaintiff initially denied knowing a portion of the funds would be used for the film, (Tr. p. 9) the record clearly shows he knew a portion of the funds were to be used for production costs of a film, specifically, "Sing a Sad Song for Sarah." (Tr. p. 9, R. p. 19) Therefore, in addition to the defendant's testimony as to how the funds were to be used, plaintiff's interrogatories helped to substantiate the Court's findings.

4. Did plaintiff have an ownership interest in the film?

In addition to defendant's testimony that plaintiff had a two percent ownership interest in net profits, defendant provided plaintiff with an up-to-date progress report, which was his custom to do for investors. (R. p. 22) Thus, in addition to defendant's testimony, Exhibit P-3 helped to substantiate the Court's findings.

Plaintiff's argument deals with three "elements" that he suggests should overturn the Court's findings:

1. That a demand for repayment of a loan was made by plaintiff on defendant by letter;
2. That defendant did not contradict the loan claim in his response, and;
3. That defendant's wife endorsed the check and deposited the funds into a personal account.

With regard to plaintiff's demand for repayment, it is significant that the transfer took place in August 1969, and according to plaintiff's testimony, was to be repaid within one year. (Tr. p. 4) However, it was not until two years later, August 1971, that plaintiff made a demand for repayment of the funds and there is no testimony to show plaintiff referred to the transfer as a loan at any time before the letter of August 1971. If plaintiff had actually considered the transfer to be a loan to be repaid within one year, surely he would have pressured for payment sooner than he did. Plaintiff's Exhibits P-2 (R. p. 23) and P-4 (R. p. 24) make it very clear that plaintiff was in serious financial trouble whereby he stood to lose all his property and this may well have clouded his recollection of the true nature of the transfer of the funds.

As to the plaintiff's failure to contradict the use of the term "loan," defendant's letter response of August 16, 1971 (R. p. 22) when taken as a

whole clearly contradicts any allegation that the transfer was a loan.

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Finally, with regard to where the funds were deposited, defendant testified that he was in Mexico at the time the check arrived and the funds were needed in the bank. (Tr. p. 26) Thus, it is totally reasonable that defendant's wife would endorse the check and deposit the funds in the bank. Whether the funds went to the defendant's personal account or business account is not clear inasmuch as both accounts were in the same bank. (Tr. p. 29-30) Defendant further testified that he thought the funds went into his business account, but he didn't know for sure. (Tr. p. 29-30)

Plaintiff's counsel attempts to diminish the significance of the abbreviation "Inv." on the original check by claiming "It must have been added to the check sometime after it was drawn.", because it does not show up on Exhibit P-1, a xerox copy of the check. (Plaintiff-Appellant Brief p. 5) There is no testimony whatsoever to support this theory. The first time defendant's counsel ever saw the original check and the abbreviation thereon was at the trial. Defendant has no way of knowing when Exhibit A, the xerox copy of the check, was made or by whom. Nor does defendant know when the abbreviation was placed on the check.

Plaintiff's counsel places great emphasis on the Trial Court's comments at the end of the evidence. Defendant argues that this is not proper to be reviewed on appeal. The comments by the Trial Judge at the close of the testimony do not constitute evidence. Nevertheless, if considered, the comments give more credence to the Court's ultimate findings. After considering all testimony, Exhibits, and weighing the credibility of the witnesses, the Court found in favor of the defendant.

Thus it is clear that the Trial Court applied the proven facts and made findings supported by substantial evidence.

Plaintiff's counsel would have this Honorable Court believe the cases

of Continental Bank & Trust Co. vs. Stewart, 291 P.2d 890, 4 Utah 2d 153 (1955), and In Re Behm's Estate, 213 P.2d 657, 117 Utah 151 (1950) provide a basis upon which this Court can rely to reverse the Judgment. However, even a cursory review of the facts in both cases reveal that neither case is even remotely similar to the instant case and as such should have no bearing upon the decision to be rendered by this Honorable Court.

## POINT II

WHERE THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S RULING AND THE COURT'S FINDINGS ARE CLEARLY SUPPORTED BY THE EVIDENCE, THE JUDGMENT OF THE LOWER COURT MUST BE AFFIRMED.

The case of O'Gara vs. Findlay, 306 P.2d 1073, 6 Utah 2d 102 (1957), states the applicable law on appeal, namely that this Court will not overturn the Trial Court's findings unless the Trial Court misapplies proven facts or makes findings clearly against the weight of the evidence. In the instant case, the findings were supported by the exhibits presented at the trial as well as the testimony of the defendant which the Trial Court chose to believe. The evidence supporting the Judgment in the instant case is overwhelming and in complete accord with the Trial Court's findings.

## CONCLUSION

THE (DEFENDANT) HAVING PREVAILED BELOW IS ENTITLED TO HAVE US SURVEY THE EVIDENCE, AND EVERY REASONABLE INFERENCE AND INTENDMENT THAT CAN FAIRLY BE DRAWN THEREFROM, IN THE LIGHT MOST FAVORABLE TO HIM. Child vs. Child, 332 P.2d 981, 983 8 Utah 2d 261.

The law in Utah is very clear that if there is substantial evidence which furnishes a reasonable basis in support of the lower Court's findings, when evidence is viewed most favorable to the findings, Judgment based thereon must be affirmed. Lake vs. Pinder, 368 P.2d 593, 13 Utah 2d 76, Jensen vs. Eddy, 514 P.2d 1142, 30 Utah 2d 154. In the instant case the Trial Judge chose to believe the testimony of the defendant, which taken together with the supporting

documentary evidence, provides not only substantial, but overwhelming evidence to support the Court's findings. To find otherwise would require one to ignore the vantage point of the Trial Judge in assessing the credibility of witnesses and to misconstrue the documentary evidence.

Therefore, the defendant respectfully submits that the lower Court was fully justified in finding no cause of action and said Judgment is supported by substantial evidence which provides the basis for the Judgment to be affirmed.

Respectfully submitted,

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Jon M. Jeppson  
Attorney for Defendant-Appellee

I hereby certify that I delivered eleven (11) copies of the foregoing brief to the Utah Supreme Court, State of Utah, this \_\_\_\_ day of December, 1977. I also certify that I delivered two (2) copies of the foregoing brief to Richard B. Cuatto, 318 Kearns Building, Salt lake City, Utah 84101, the attorney for plaintiff-appellant, this \_\_\_\_ day of December, 1977, postage prepaid thereon.

## TABLE OF CONTENTS

I.	STATEMENT OF KIND OF CASE. . . . .	Page 1
II.	DISPOSITION OF LOWER COURT . . . . .	1
III	RELIEF SOUGHT ON APPEAL. . . . .	1
IV.	STATEMENT OF FACTS . . . . .	1
V.	ARGUMENT . . . . .	7
	<u>POINT I. APPELLANT'S APPEAL FOR LEGAL RELIEF</u> <u>LIMITS THIS COURTS SCOPE OF REVIEW.. . . .</u>	7
	<u>POINT II. THE AWARD OF DAMAGES FOR LOSS OF</u> <u>BUSINESS WAS IN CONFORMITY WITH THE TRIAL</u> <u>COURT'S FINDING THAT JEPSON BREACHED HIS</u> <u>FIDUCIARY DUTIES AS AN EMPLOYEE OF RPT.. . . .</u>	9
	<u>POINT III. THERE WAS MORE THAN SUFFICIENT EVI-</u> <u>DENCE BEFORE THE TRIAL COURT TO SUPPORT THE</u> <u>AWARD IN THE SUM OF \$10,000 FOR PLAINTIFF'S</u> <u>LOSS OF BUSINESS.. . . .</u>	14
VI.	SUMMARY. . . . .	21

### AUTHORITIES CITED

Lyman v. Town of Price, 63 Utah 90 222 P. 559. . . . .	8
Sine v. Salt Lake Transport Co., 106 Utah 289, 147 P. 2d 875. . . . .	8
Pixton v. Dunn, 120 Utah 658, 238 P. 2d 408. . . . .	8
Utah Constitution, Article VIII Section 9 . . . . .	3
27 Am Jur 2d Section 112 at page 637. . . . .	8
Ambler v. Choteau, 107 US 586, 27 L ed 322, S ct 556. . . . .	8

	Page
Koeon v. Corpeiro, 200 A2d 708 . . . . .	8
Mason v. Mason 160 P. 2d 730 [1945]. . . . .	9
Restatement of Agency 2d §396. . . . .	10
State Export Co. v. Mol Shipping & Trading, 155 N.Y. S 2d 188 . . . . .	10
28 ALR 3d § 24, P. 120. . . . .	11
Hoggan & Hall & Higgins, Inc., v. Hall 18 Utah 2d 3, 414 p. 2d 89 (1969). . . . .	11, 20
Duane Jones Company, Inc., v. Burke, 306 N.Y. 172, 117 N.E. 2d 237 (1954). . . . .	11, 12
Southern California Disinfecting Co. v. Lomkins, 183 Cal. App. 2d 431, 7 Cal Rpter. 43 (1960). . . . .	13
Stevens & Co. v. Stiles 29 RI 399, 71 A 802. . . . .	13
25 CJS, Damages, Section 90. . . . .	14
U.S. v. Griffith 210 F 2d 11 . . . . .	17
Gould v. Mt. States Telephone & Telegraph 309 p. 2d 802, 6 Utah 2nd 137 . . . . .	18, 19
Vickers v. Wichita State University 518 P 2d 512, 213 Kansas 614. . . . .	18, 19