

1948

# General Talking Pictures Corporation v. Naida L. Hyatt and James Cochran Littlejohn : Brief of Appellant

Utah Supreme Court

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Hammond & Hammond; Attorneys for Plaintiff and Appellant;

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## Recommended Citation

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# In the Supreme Court of The State of Utah

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GENERAL TALKING PICTURES CORPO-  
RATION, a corporation,

Plaintiff and Appellant,

—vs.—

NAIDA L. HYATT, as Executrix of the  
Estate of E. H. Littlejohn, who is the same  
person as Elsie Haas Littlejohn, who is the  
same person as Elsie H. Littlejohn, and  
JAMES COCHRAN LITTLEJOHN, as ad-  
ministrator with will annexed of the Estate  
of William Littlejohn, deceased,

Defendants.

CIVIL

No. 7170

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## Appellant's Brief

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HAMMOND & HAMMOND,

Attorneys for Plaintiff and  
Appellant.

Price, Utah

**FILED**

**MAY 21 1948**

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# In the Supreme Court of The State of Utah

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GENERAL TALKING PICTURES CORPO-  
RATION, a corporation,

Plaintiff and Appellant,

—vs.—

NAIDA L. HYATT, as Executrix of the  
Estate of E. H. Littlejohn, who is the same  
person as Elsie Haas Littlejohn, who is the  
same person as Elsie H. Littlejohn, and  
JAMES COCHRAN LITTLEJOHN, as ad-  
ministrator with will annexed of the Estate  
of William Littlejohn, deceased,

Defendants.

CIVIL

No. 7170

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## Appellant's Brief

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This is an appeal by the plaintiff upon the Judgment Roll from a judgment entered by the District Court of Carbon County in favor of the defendants and against the plaintiff, no cause of action.

### STATEMENT OF FACTS

The plaintiff is a corporation organized and existing under the laws of the State of Delaware with its office and principal place of business in New York City. (J.R. p 43). The defendant Naida L. Hyatt is the executrix of the estate of E. H. Littlejohn who died on or about May 8, 1942; and the defendant James Cochran Littlejohn is the administra-

tor with will annexed of the estate of William Littlejohn who died on or about June 14, 1944. (J.R. p 44).

The action is upon a claim which is alleged by plaintiff to have been "duly presented" to the defendants in their representative capacities (J.R. p 2) which claim is based upon a written contract dated November 19, 1931, a copy of which contract is attached to the complaint, whereby the plaintiff leased to the decedents for a term of ten years from the date of the contract, certain patented talking-picture apparatus designated in the contract as the "Equipment", for use only in the Lyric Theatre in Price, Utah, for the sum of \$2,000.00 payable in installments of \$500.00 each, the last of which was due 60 days after the installation of the equipment in the theatre. In addition, the decedents were to pay, during the term of the contract, annual license fees of \$50 commencing with the year 1932. (J.R. p 4).

The equipment was installed (J.R. p 44) and the \$2,000.00 was paid, (J.R. p 25) but none of the \$50 annual fees was paid. (J.R. p 45). The court found that the plaintiff had performed all the obligations and conditions imposed upon it by the agreement. (J.R. p 45).

The contract was found to have been executed by defendants' testators (J.R. p 44), and it provides that "upon the expiration or sooner termination of this license for any reason whatsoever OR (emphasis added) the abandonment by the Exhibitor (decedents; J.R. pp 4, 45) of the Theatre (Lyric Theatre, Price, Utah; J.R. p 4) or his eviction therefrom, the Exhibitor, at its own cost and expense, shall surrender and deliver up possession of the Equipment to the



Company (Plaintiffs; J.R. p 4) at its factory . . .” (J.R. pp 6, 45-46). The decedents, and after their deaths, the defendants, failed and neglected to return the equipment at the expiration of the “license”, or at all (J.R. p 45), and the defendants are unable to return said equipment for the reason that they have no knowledge of its whereabouts (J.R. p 45). Also, the decedents, and after their death, the defendants, have failed to pay any of the said \$50 annual fees. (J.R. p 45).

Plaintiff sued to recover the value of the equipment which the court found to be \$3,000.00 at the commencement of the action (J.R. p 45), and to recover the total of the annual license fees. The action was commenced on May 24, 1945 and the case was tried to the court without a jury on May 14, 1946 (J.R. p 50), and on October 27, 1947 the court made and filed his Findings of Fact and Conclusions of Law (J.R. p 49) and entered judgment in favor of defendants and against the plaintiff (J.R. p 51). Motion for new trial was duly filed (J.R. p 54) and, on December 8, 1947, the motion was denied and overruled (J.R. 55). This appeal is upon the Judgment Roll.

The court found, inter alia, that plaintiff presented its claim to the defendants in their respective capacities, “but did not accompany or present with said claims, or either of them, a copy of the written Agreement upon which the same was and is found or based”, and “that William Littlejohn and E. H. Littlejohn abandoned and ceased to operate the Lyric Theatre in the year 1937 (J.R. p 46). Also, “that more than six years prior to the commencement of this action, the plaintiff elected to terminate and



did terminate said Agreement and more than six years prior to the commencement of this action, repeatedly demanded a return of said Phonofilm and equipment by the decedents; that notwithstanding said termination and said repeated demands, as aforesaid, said Phonofilm and equipment were never returned to the plaintiff." (J.R. p 46), and concluded that plaintiff's cause of action was barred by Sections 104-2-24(2) and 104-2-22(2) Utah Code Annotated, and that plaintiff's "alleged claims" are legally insufficient (J.R. p 48), adjudged that plaintiff recover nothing by its complaint from the defendants, or either of them, and rendered judgment in favor of the defendants and against the plaintiff, no cause of action.

### ASSIGNMENTS OF ERROR

The plaintiff contends that the court erred in:

(1) Finding that plaintiff's claims were presented to the defendants without accompanying or presenting therewith copies of the written Agreement upon which the same was and is founded or based.

(2) Finding that more than six years prior to the commencement of the action plaintiff elected to terminate and did terminate said Agreement.

(3) Concluding that plaintiff's cause or causes of action are barred by the Statutes of Limitations.

(4) Concluding that the claims presented by plaintiff were legally insufficient.

(5) Concluding that judgment should be for defendants no cause of action and that plaintiff should take nothing by its complaint.

(6) Concluding that defendants should be awarded their costs.

(7) Granting judgment in favor of defendants and against the plaintiff no cause of action, and the plaintiff recover nothing from defendants, or either of them.

(8) Granting judgment in favor of defendants for their costs.

## ARGUMENT

### First Assignment of Error

It is the contention of the plaintiff that the trial court erred in finding that plaintiff's claim as presented to the defendants was not accompanied by a copy of the written contract upon which the claim was founded, or that such copy was not presented with said claim. (Finding No. 14; J. R. p 47). The plaintiff should be sustained in its contention because it alleged that the claim was duly presented (J.R. p 2; Par. 12) and nowhere is that allegation denied. On the contrary, the defendants admit in their amended answer to Paragraph 12 of plaintiff's complaint "that the plaintiff presented to each a purported claim in said estates." (J.R. p 24).

When plaintiff alleged that a claim was "duly presented" in each of said estates it, in effect, alleged that a copy of the contract upon which the claim was based was attached to the claim as presented. This is so because the word "duly" implies "the existence of every fact essential to perfect regularity of procedure." 19 Corpus Juris, page 833. Since a claim, based upon a written instrument, to be regularly presented must be accompanied by a copy of such instrument, it follows that a claim regularly presented

is one with which is also presented a copy of the written instrument upon which it is founded.

As pointed out above the defendants not only did not deny the proper, regular and "due" presentation of the claim, they admitted that plaintiff duly presented a "purported" claim. A "purported" claim is a sufficient and statutory claim. *State vs Burling* (Iowa) 72 N W 205; *Hollister v McCord et al* (Wis) 87 N W 475; *State vs W. S. Buck Merc Co* (Wyo) 264 P. 1023 @ 1030; *Gilchrist's Case* (Eng) 2 Leach 657 quoted in *Words & Phrases* Vol 35, Per Ed. p. 542; *Merrifield v Robbins et al* (Mass) 8 Grey 150; *Brownlow v Wunsch* (Colo) 83 P2nd 775, 781; *Lacy v State* (Okl) 242 P. 296; *McCraney v Glos* (Ill) 78 N E 921, 923; *Deskin v U S Reserve Ins. Corp* (Mo) 298 S W 103, 106; *Regina v Keith*, Eng. Law & Equity 558, 560, quoted in Vol 35 *Words & Phrases* Perm. Ed. p. 541. It is therefore contended that no issue was raised by the defendants' amended answer to this allegation. The allegation being admitted, a finding in conflict therewith is erroneous and must be disregarded. 64 *Corpus Juris*, page 1259; *Chase v. Van Camp Sea Food Co.*, 292 Pac. 179; *Gabriel v. Tonner*, 70 Pac. 1021; *Murphy v. Coppeiters*, 68 Pac. 970; *Dressler v. Johnston*, 21 Pac. (2d) 969; *De Michele v. London and Lancaster Fire Ins. Co.*, 40 U. 312, 120 Pac. 846; *Peterson v. Bean*, 22 U. 43, 61 Pac. 213.

It might have been otherwise had the defendants alleged in their amended answer wherein the claim was defective and not what it purported to be. It is submitted that this is an affirmative matter which defendants are required to plead. By simply admitting that plaintiff duly presented a purported claim defendants did not deny that

the claim was presented, or allege that it was not regular or proper in form or was not what it purported to be.

### Second Assignment of Error

It is also the contention of the plaintiff that the court erred in finding "that more than six years prior to the commencement of this action, the plaintiff elected to terminate and did terminate said Agreement \* \* \*". (Finding No. 12; J.R. p 46).

The court erred first because the purported finding is not a finding of fact but a conclusion of law. For example, assume that a litigant was seeking an adjudication that he was no longer liable on a contract for the reason that the adverse party had terminated it, and alleged simply that the adverse party had terminated the contract, without alleging the acts or conduct which, in the opinion of the pleader, effected such termination. This, certainly, would have been bad as pleading a mere conclusion of law, and would have raised no issue of fact.

The writer has not been able to find any case which has adjudicated this question with respect to the word "termination" or "terminated", but there are numerous cases and text books wherein words of the same character are condemned as mere conclusions of law, for example, "repudiated"; "abandoned"; "surrendered"; "waived"; "rescinded"; "released"; "forfeited." It is submitted that the word "terminated" is one of the same character as those quoted. Therefore the authorities would apply the same rule to the word in question. 49 Corpus Juris 55, 58, 59; Pleading, Sections 27 and 36; Dutch Flat Water Co. v. Mooney, 12 Cal. 534; Miller v. Modern Motor Co. of Glendale, 290 Pac.

122; *Adams v. Hine*, 268 Pac. 217; *Zorn v. Livesley*, 75 Pac. 1057; *Hanson v. Fidelity Mutual Benefit Corporation*, 13 Atl. (2d) 456; *King v. Sperry Gyroscope Co.*, 57 N. Y. S. (2d) 684. Therefore it follows that, even if defendants had pleaded that plaintiff "elected to terminate, and did terminate said Agreement", such a plea would have been bad as a mere conclusion of law. Because the court adopts a "finding" of termination it does not change its character from a conclusion to a fact.

Secondly, the "finding" is erroneous for the reason that it is outside the issues raised by the pleadings. Surely this is an affirmative matter for the defendants to plead. Plaintiff pleaded a contract for a term of ten years from the dates of its execution. If the defendants claimed the contract was terminated before the expiration of the ten-year period it was up to them to set forth the facts which they claimed effected such termination. But one will look in vain through the defendants' amended answer for even the allegation of the legal conclusion of termination. Being outside the issues raised by the pleadings the "finding" must be disregarded by this court on appeal. 64 *Corpus Juris* 1227, 1256-7; *Kimball v. Success Mining Co.*, 38 Utah 78, 110 Pac. 872; *Neuberger v. Robbins*, 37 Utah 197, 106 Pac. 933; *Cole v. Gill* (Cal.) 144 Pac.(2d) 25. Also, "where the pleading is silent regarding a material fact, the presumptions are against the pleader, and no intendment can be made in his favor. Thus a material fact, if not alleged, is presumed not to exist." 49 *Corpus Juris* 120.

The case of *Neuberger v. Robbins*, *supra*, we believe, is determinative of the question. In that case the plaintiff

sued to recover the balance claimed by him to be due on the purchase price of 1,142½ bushels of wheat sold and delivered to defendant. Defendant answered that the plaintiff had contracted to sell 3,000 bushels of wheat to him at 64c per bushel; that to induce plaintiff to perform he had consented to an increase in the price to 68c per bushel. The delivery of the 1,142½ bushels was admitted, but defendant alleged he had been damaged by the plaintiff's failure to perform in the sum of \$278 and prayed judgment against the plaintiff for that sum. Plaintiff replied that at the time of modification of the contract it was agreed that he was to deliver only so much wheat as he had on hand at the date of delivery. There was testimony on plaintiff's behalf that the defendant, through his agent, stated that the quantity of wheat delivered made no difference, "just so we get what you have to spare. That is all we look for." The court made a finding to correspond to this testimony that "the plaintiff \* \* \* agreed to sell and deliver to the defendant so much of his said crop of wheat as he, the said plaintiff, could spare" and gave judgment for plaintiff. In reversing the judgment the court say:

"In his counterclaim defendant pleaded and relied upon the contract as first entered into between himself and plaintiff, which, he alleges, was modified so as to increase the price he was to pay for the plaintiff's grain, but not otherwise. On the other hand, plaintiff, in his reply to defendant's counterclaim, alleged that 'an entirely new agreement' was entered into 'in which plaintiff only agreed to sell the amount of wheat he actually had on hand at the time.' It will thus be seen that



the pleadings presented the question, namely, was the contract modified as alleged by defendant, or was a new contract entered into 'in which plaintiff agreed to sell the amount of wheat he actually had on hand at said time,' as pleaded by plaintiff? Now, the court, instead of making a finding responsive to and within this issue, found that a contract entirely different from either the contract pleaded by plaintiff or that pleaded by defendant had been entered into by the parties. **The finding being entirely outside of the issues is therefore erroneous and cannot be upheld.**" (Emphasis added). So, even though there is evidence to support a finding, if such finding is outside the issues, it is "erroneous and cannot be upheld."

Third, the court found that between the dates of November 23, 1932 and May 5, 1944, both dates inclusive, plaintiff wrote numerous letters, 74 in all, to decedents in each of which it demanded payment of the \$50 annual fees then due, and in some of said letters, between the dates of July 9, 1935 and March 1, 1943, both inclusive, plaintiff "demanded the return to it by the decedents of said Phonofilm and equipment." (Finding No. 13, J.R. pp 46-47). Unless these letters are calculated to have effected the termination of "said Agreement" the trial court has made no conclusion respecting them.

The contract provides, as the trial court found, (J.R. p 46), "that 'this license shall be for a period of ten (10) years' from its date but **may be sooner terminated by the plaintiff upon the happening of certain events, one of which**



is 'the failure or refusal for a period of three days to pay any sum or sums of money now or hereafter due, by acceleration or otherwise to be paid by' the decedents 'and in this respect time shall be of the essence.'" (Emphasis added). It must be noted that the plaintiff, alone, could terminate the contract prior to November 19, 1941, and then only upon the happening of certain events. The decedents were not granted any such right of election. The only one of these events that has any connection with the case or is material to its determination, is "the failure or refusal for a period of three days to pay any sum or sums of money now or hereafter due, by acceleration or otherwise." It must be borne in mind that such failure or refusal did not, *ipso facto*, terminate the agreement, but was a ground upon which the plaintiff might have done so if it saw fit. It must be borne in mind also that plaintiff was not bound to terminate the agreement upon the happening of any of the events.

The question which is then presented is, Did the demands for payment of the annual license fees and for the return of the equipment constitute an election to terminate, and a termination of, the Agreement? To ask the question is to answer it. Suppose decedents had executed their promissory note payable to plaintiff in annual installments over a period of ten years, and the note provided, as is frequently the case, that upon default in the payment of any installment the entire balance should become immediately due and payable at the election of the holder; and that decedents defaulted after the first year and made no further payments. Would it be contended that, if plaintiff had demanded payment of the installment

due the second year, and each year thereafter repeated the demand for the total of the accrued installments, it would be deemed to have elected to declare the entire balance due and thereby started the statute of limitations running against it? We think not. At no time before the expiration of the ten-year period did plaintiff demand payment of more than was due under the agreement at the time of demand. (J.R. p 47). Even if plaintiff had threatened to sue the decedents for their failure to make the payments when due this would not have constituted an election. 41 **Corpus Juris** 850, n 46(b). Nowhere in the agreement is there a provision that a demand for performance shall constitute an election to terminate, and that is all plaintiff did by its letters. The letters of demand show that plaintiff regarded the contract as still in force and effect. "The primary object of a demand is to enable defendant to perform his obligation or otherwise discharge his liability without being subjected to the inconvenience and expense of litigation." 1 **Corpus Juris** 979. How can it be said, then, that a demand is an election to cut off the defendant's right or opportunity to perform and subject him forthwith to litigation?

Fourth, as pointed out above, decedents had no right to terminate the agreement. That right was reserved to the plaintiff in the event decedents defaulted in certain particulars. (Agreement, Par. 14; J.R. p 5). The agreement also provides, as found by the court, that "upon the expiration or sooner termination of this license for any reason whatsoever **OR** the abandonment by the Exhibitor

of the Theatre or his eviction therefrom, the Exhibitor, at its own cost and expense, shall surrender and deliver up possession of the equipment to the Company at its factory . . .” (Emphasis added). The court also found that “William Littlejohn and E. H. Littlejohn (decedents) abandoned and ceased to operate the Lyric Theatre in the year 1937.” (Finding No. 11; J.R. p 45-46). It is clear from this provision of the agreement that **IF** plaintiff terminated the contract before its expiration date, or **IF** decedents abandoned the theatre, they (decedents) were to return the equipment at their own expense. But by abandoning the theatre the decedents could not thereby effect a termination of the agreement. Apparently the defendants and the trial court take the view that such abandonment did terminate the agreement. The defendants’ defense is the bar of the statute of limitations. The statute would not run against the plaintiff unless a cause of action accrued. No cause of action accrued if the plaintiff did not terminate the contract. The plaintiff did not terminate it as pointed out above, therefore, defendants’ defense hinges upon the abandonment of the theatre.

If any such construction of the contract is indulged the plaintiff could be deprived of its property by the decedents without due process of law. As an illustration, suppose that the equipment was very desirable to the decedents. Under defendants’ theory they could say to each other as soon as the equipment was installed, “Let’s cease operating the theatre and the equipment. According to the agreement we will then be required to return the equipment to the Company. But, if we refuse to do this, and just sit by and ignore all demands for its return, the

Company may not take any action before the agreement expires in 1941. The Company is three thousand miles away and won't know what is taking place. By 1941, however, action by the company will be too late. Its cause of action will have arisen immediately upon our abandonment of the theatre and more than six years will have expired. Its cause of action will be barred by the statute of limitations and the equipment will be ours." In this way, although plaintiff has a written contract to run for a term of ten years, it is defeated three of four years before the end of that term, and its property lost by a ruse that is locked up in the minds of the decedents.

Also, such a construction would permit the decedents to take advantage of their own wrong. The contract was for ten years. The parties contemplated the operation of the theatre and the equipment for that term. It was wrong for the decedents to abandon the theatre and to cease operating the equipment. It was wrong for them not to return the equipment when they did abandon it. And now their representatives set up those wrongs to defeat plaintiff's action brought within six years from the expiration date of the contract. **In Page on Contracts, Second Edition, Vol 5, page 4649** it is stated: "If a condition is inserted in a contract for the benefit of one of the parties, the adversary party can not take advantage of a breach thereof." To illustrate the principle the author cites the provision for acceleration of maturity common in contracts for the payment of money, and states: "In such case the debtor can not take advantage of breach of such condition; and the period of limitations does not begin to run until the creditor has elected to take advantage of such breach

and to treat the maturity of such instrument as accelerated in accordance with the provisions of the contract. (Ibid. p 4650). **Lavery et al. v. Mid-Continent Oil Development Co.**, 162 Pac. 737. The same principles, it is submitted, apply to the instant case.

### Third Assignment of Error

It is submitted that the trial court erred in concluding "that the plaintiff's cause of action is barred by the Statute of Limitations of the State of Utah and particularly Sections 104-2-24(2) and 104-2-22(2) of the Utah Code Annotated, 1943."

Section 104-2-24(2) is the section applicable to actions for the "taking, detaining or injuring" of personal property. This section does not apply for the reason that the action is upon a written instrument. The period of limitations for actions founded upon written instruments is six years. 104-2-22(2), Utah Code Annotated, 1943.

It is possible that, if plaintiff had so elected, it had a cause of action against decedents in the year 1937 for "the taking, detaining or injury" to the equipment. But this would have been an action in tort. Plaintiff was not required to sue at that time, or to elect to terminate the contract. Certainly, plaintiff was not, and is not, required to sue in tort when it has a remedy *ex contractu*. In the case of **Bowes v. Cannon et al.**, 116 Pac. 336 @ 339, the court quote with approval the case of **Lightfoot v. Davis**, 91 NE 582, 584 as follows: "though a party may have lost one remedy by lapse of time, it is entirely possible that others may be open to him.'" Also, in 37 Corpus Juris 699, the rule is stated as follows: "Where a party has two reme-



dies for the enforcement of a right, the one he chooses is not barred by the statute of limitations, merely because the other, if he had resorted to it, would have been." Therefore, Section 104-2-24(2) of the Utah Code Annotate, 1943, has no application.

Plaintiff's cause of action under the contract did not accrue until November 19, 1941. The action was commenced May 24, 1945, well within the six-year period of limitation. Therefore, it was error for the trial court to conclude that plaintiff's cause of action was barred by Section 104-2-22(2) of the Code.

But the judgment should be reversed for yet another reason. The contract provides that "Notwithstanding any termination herein the Company shall be entitled to retain all sums received by it from the Exhibitor without prejudice to its right to repossession or to recover any additional sums then or thereafter due to it from the Exhibitor and to any other rights at law or in equity which the Company may have hereunder." (Contract, Par. 14; J.R. p 6). Apparently, the trial court overlooked this provision of the contract, for, assuming for the purpose of argument only, that the plaintiff did terminate the agreement more than six years prior to the commencement of the action, the decedents were still obligated to pay to the plaintiff the \$50 annual license fees "thereafter due it." Conceding that the six-year period of limitations had run against those annual license fees which were due **before** May 24, 1939 (six years prior to the commencement of the action), plaintiff is entitled to recover those annual fees which became due **after** May 24, 1939. A fee of \$50 was due November 19, 1939

and another was due November 19, 1940. Therefore, in any event, plaintiff is entitled to recover \$100 with interest and costs.

#### **Fourth Assignment of Error**

In its argument upon its First Assignment of Error plaintiff points out the error of the trial court in finding that plaintiff "did not accompany or present with said claims, or either of them, a copy of the written Agreement upon which the same was and is founded or based." (Finding No. 14; J.R. p 48). The conclusion drawn by the court "that the alleged claims presented by the plaintiff to the defendants are legally insufficient and an action will not lie thereon" (Conclusions of Law No. 2; J.R. p 48), is based upon the erroneous finding aforesaid. It therefore follows that, if the court erred in its finding, the conclusion based thereon is also erroneous.

If the plaintiff is correct in its position respecting its Assignments of Error Nos. One, Two, Three and Four, it follows that it must be sustained on its remaining assignments of error.

#### **CONCLUSION**

In conclusion, this court is confronted with a case where two parties entered into a written agreement which expired in November, 1941. The one party (plaintiff) fully performed all its obligations under the agreement; the other party failed to perform their obligations thereunder, and then plead that very failure as a defense to and actions brought within six years from the expiration date of the agreement.

The judgment for the defendants should be reversed



and judgment entered in favor of the plaintiff for the recovery of the value of the equipment, to wit, \$3,000.00 with interest thereon at the rate of six per cent per annum from May 24, 1945; and for the sum of \$100.00 with interest at the rate of six per cent per annum from November 19, 1941, together with plaintiff's costs and disbursements herein expended, both in the trial court and in this court on appeal.

Respectfully submitted,

**HAMMOND & HAMMOND,**  
Attorneys for Plaintiff.

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# In the Supreme Court of The State of Utah

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GENERAL TALKING PICTURES CORPORATION, a corporation,

Plaintiff and Appellant,

vs.

NAIDA L. HYATT, as Executrix of the Estate of E. H. Littlejohn, who is the same person as Elsie Haas Littlejohn, and JAMES COCHRAN LITTLEJOHN, as administrator with will annexed of the Estate of William Littlejohn, deceased,

Defendants.

CIVIL  
No. 7170

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## Respondent's Brief

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**FILED**  
**AUG 31 1948**

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