

1948

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

Utah Supreme Court

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In the Supreme Court of The State of Utah

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

Respondent's Brief

STATEMENT OF FACTS

Respondents agree that the statement of facts contained in the appellant's brief is substantially correct.

The company is the plaintiff in this action. The "Exhibitor" refers to E. H. Littlejohn and William Littlejohn, both deceased, who died on the 8th day of May, 1942, and the 14th day of June, 1944, respectively.

For convenience appellant will hereinafter be referred to as plaintiff, and respondents as defendants, and E. H. Littlejohn and William Littlejohn as decedents.

FIRST ASSIGNMENT OF ERROR

Plaintiff contends 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 Agreement upon which the claim was founded, or that such copy was not presented with said claim. (Finding No. 14; J.R. p. 47 & 48) that plaintiff should be sustained in its contention because it alleged that the claim was "duly presented" (J. R. p. 2; par. 12), and that nowhere is that allegation denied, but that on the contrary, the defendants admit in their Amended Answer to par. 12 of plaintiff's Complaint "that the plaintiff presented to each a purported claim in said estates." (J. R. p. 24).

We cannot agree with the plaintiff's argument to the effect that when plaintiff alleged that a claim was "duly presented" in each of said estates, it in effect alleged that a copy of the Agreement upon which the claim was based was attached to the claim as presented. Plaintiff agrees that a claim based upon a written instrument to be regularly presented, must be accompanied by a copy of such instrument, but counsel for plaintiff take the position that the word "duly" implies "the existence of every fact essential to perfect regularity of procedure." (19 C. J. p. 833).

Defendants denied generally and specifically that said claim was "duly" presented. In par. 10 of their Amended Answer (J. R. p. 24), the defendants admit only that the plaintiff presented to each of them a purported claim in said estates. Defendants did not admit that plaintiff "duly" presented said claim. Defendants, in their Amended Answer, denied specifically and generally each and every allegation in said par. 12 contained, not therein specifically

admitted or denied. (J. R. p. 24). Since defendants admit only the presentation of a "purported claim," and not that it was "duly" presented, and since the other allegations in said paragraph were denied, the defendants denied that said claim was "duly" presented.

After evidence duly presented, the court found that the plaintiff presented its claims "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 founded or based." (J. R. p. 48).

Section 102-9-4, Utah Code Annotated, 1943, provides, among other things, that:

"all claims arising upon contract whether the same are due, not due, or contingent, must be presented within the time limited in the notice, and any claim not presented is barred forever;—"

Section 102-9-5, Utah Code Annotated, 1943, on the

subject of the contents of a claim, provides, among other things, as follows:

"If the claim is founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim,—"

The plaintiff did not make a prima facie case against the defendants because of the deficiency in its claim in said particular, and the court has specifically found against the plaintiff on the fact involved. The matter of a claim was litigated in the lower court. The plaintiff cannot challenge the sufficiency of the evidence because it has failed to bring up the bill of exceptions in the case, and is therefore bound by the finding of the court as made.

However, even if the defendants had admitted that said claims were "duly" presented, this would not aid the plaintiff for the reason that in pleading, the word "duly" imports but a conclusion relating only to the formalities observed and non-observed and tenders no issue. (See 28 C. J. S. p. 586). (Emphasis ours.)

In *Miles v McDermott*, 31 Cal. 274, the court says:

"Such words as 'duly,' 'wrongfully,' and 'unlawfully' so frequently used in pleadings, might better be omitted. They tender no issue."

To the same effect see *Going v. Dinwiddie*, 86 Cal. 633, 25 P. 129. In *Stott v. City of Chicago*, 68 N. E. 736, a petition for mandamus to compel petitioner's restoration to the office of police patrolman, alleged that petitioner was duly appointed to the office without alleging the passage of any ordinance fixing the number of patrolmen or providing for their appointment or election. The court held the allegation that the petitioner was **duly appointed** to the office was insufficient as an allegation as to the manner of petitioner's appointment, the allegation being a legal conclusion. (Emphasis is ours.)

Counsel for the plaintiff in his brief cites 19 C. J. p. 833 in support of his contention in this matter. He neglected however to quote the following language from the very citation above quoted and cited by plaintiff, to-wit:

"In pleading, the term imports but a conclusion relating only to the formalities observed or non-observed, and tenders no issue. While it does not vitiate a pleading, it is surplusage, and had better be omitted."

See *Words and Phrases*, First Series, Vol. 3, p. 2259:

“The word ‘duly,’ as used in an averment that plaintiff is duly incorporated, imports but a conclusion . . .”

In a tax refund suit, an allegation that the refund claim was “duly filed” was held merely a legal conclusion, and for the purpose of demurrer, said words must be treated as not showing when refund claim was filed. (James A. Hearn & Son v. U. S., 8 Fed. Supp. 698, certiorari denied, 55 S. Ct. 550, 294 U. S. 722, 79 L. Ed. 1254.

It will be noted from all the authorities above cited that the words “duly presented,” or “duly filed” and phrases of like import, are nothing but mere conclusions and tender no issue. Certainly, it would be a strained construction, to say the least, to hold that the words “duly presented” in this case mean that the claim presented to each estate herein was accompanied by a copy of the written Agreement between the plaintiff and the decedents. However, we have denied generally and specifically in our Amended Answer that said claims were “duly” presented, even if such phrase would permit such unwarranted meaning.

Plaintiff, on p. 6 of its brief, makes the claim that the defendants “admitted that plaintiff duly presented a ‘purported’ claim.” This is not true. There is no such language in our Amended Answer, and our Amended Answer is not subject to such construction. In fact our Answer does not use the word “duly” at all in regard to said claim, but denies specifically and generally the portion of the plaintiff’s Complaint in which it alleges that the claim was “duly” presented. (J. R. p. 24, par. 10.)

We are also unable to concur in plaintiff’s assertion that a purported claim is a sufficient and statutory claim, nor can we agree with counsel that the cases cited on p. 6

of his Brief sustain the proposition that a purported claim is a sufficient and statutory claim. We have examined said authorities cited on p. 6, and find that none of them sustain plaintiff's contention. Most of said cases simply construe statutes in which the word "purport" is used, and the courts seem to adopt the definition of said word contained in Webster's New International Dictionary to the effect that said word means "To have the appearance or convey the impression of being, meaning, or signifying some particular thing; to mean or seem to mean or intend."

It will be noted that some of the cases cited are criminal cases in which this word is construed, but we do not find in said cases any statement to the effect that a purported claim is a sufficient and statutory claim, and none of said cases are authority for the proposition which counsel contends for in this case.

SECOND ASSIGNMENT OF ERROR

Under this Assignment, plaintiff claims that the trial court erred in making the following finding, to-wit: "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). Plaintiff complains that said purported finding is not a finding of fact, but a conclusion of law. The writer of plaintiff's Brief states that he has not been able to find any case which has adjudicated this question with respect to the word "termination" or "terminated." We wish to cite two California cases wherein similar findings containing the word "terminated" were held to be findings of ultimate fact and not conclusions of law. See Central Heights Im-

provement Co. v. Memorial Parks, Calif., 105 P. 2d 596. In that case an action was brought to recover the unpaid purchase price alleged to be due under a contract for the sale of realty for cemetery purposes. The defendant corporation alleged that its only contract with plaintiff changed the terms of a previous agreement between the plaintiff and the promoter. The trial court made a finding that plaintiff's contract with the corporation "terminated and cancelled" the prior contract. Held: This finding constituted a finding of an ultimate fact and was within the issues presented by the pleadings.

See also Capital National Bank of Sacramento v. Smith, 144 P. 2d 665, 672 (Cal.) In this case the appellant Barbara de Bles challenged Finding No. 12 as a conclusion of law. The court said:

"The challenged finding specifically determines that the defendant Barbara de Bles defaulted in performance of the terms, covenants, and conditions of the Smith-de Bles Agreement, and that Smith terminated that contract on January 24, 1940, on that account; that all of the rights of said defendant under the contract were thereby terminated, and that she thereafter held no assignable or other interest in said property. Finding No. 12 is a sufficient determination of the ultimate facts to the effect that the contract of Barbara de Bles, dated September 27, 1936, was terminated for breach of covenants to pay installments at specified times . . ."

We cite also: Nuttal v. Holman, (Utah) 173 P. 2d, 1015, wherein the trial court made findings to the effect that the plaintiff "abandoned" his contract. This court held the findings were within the issues of the answer alleging that plaintiff promised to pay the full purchase price on a

specified day, and failed to do so. We submit that there is little difference between a finding that plaintiff “abandoned” his contract and a finding that a plaintiff “elected to terminate and did terminate” its agreement. We believe that under the circumstances both findings are of ultimate facts and are not conclusions of law.

Finally, we call the court’s attention to the case of *Sandall v. Hoskins*, 104 U. 50, 56; 137 P. 2d, 819, 822, wherein it is stated that the Supreme Court should not be technical in requiring a trial court to make refined separations between findings of fact and conclusions of law, especially where the basis for the so-called findings clearly appears in the findings. See also *Wright v. Lee*, 104 U. 90; 138 P. 2d 246.

Plaintiff argues secondly that the said finding is erroneous for the reason that it is outside the issues raised by the pleadings, and that this is an affirmative matter for the defendants to plead. The plaintiff is in court only on the Judgment Roll. Evidence was introduced in the trial court on the question of termination, and said matter was specifically involved in the pleading of the statutes of limitations. The Reply of the plaintiff alleges that approximately 74 letters were written to the decedents, (J. R. p. 39) and gives the dates thereof. The court found in part as follows:

“That in each of said letters plaintiff demanded payment of the sum due it from the decedents under paragraph 5A of the Agreement, and in some of said letters the plaintiff demanded the return of it by the decedents of said phonofilm and equipment; that the dates of the letters in which the plaintiff demanded of the decedents that they return the said phonofilm and equipment to

New York City are as follows—(dates given).”
(J. R. p. 47.)

We also wish to call the court’s attention to the fact that after the filing of the plaintiff’s Reply alleging the sending of all of said letters to the decedents, which said Reply is dated May 10, 1946, (J. R. p. 40), the defendants filed a “Supplement to Amended Answer of Naida L. Hyatt, and Amended Answer of James Cochran Littlejohn” on May 14, 1946 (J. R. p. 37), in which the defendants plead the bar of the statutes of limitations. This supplement pleads that the plaintiff’s alleged cause or causes of action, are barred by the statutes of limitations (J. R. p. 37). All of these matters, together with the evidence introduced, resulted in the court making the finding “that more than six years prior to the commencement of this action, the plaintiff elected to terminate and did terminate said Agreement—” (Finding 12; J. R. p. 46).

The plaintiff’s demands for the return of said equipment and its right to the same are involved in and connected with the question of the termination of the Agreement. The plaintiff was not entitled to the return of the equipment without its termination of the Agreement. The court has made complete findings of fact on these matters. This court is bound by said findings, appeal being only on the Judgment Roll.

Defendants contend that even if it were determined that said finding is outside the issues raised by the pleadings, this objection is not available to the plaintiff for the reason that the finding is amply supported by the evidence. Since plaintiff brings this appeal upon the Judgment Roll only, and since the evidence is not before this court and

cannot be considered by it, this Assignment is not available to the plaintiff. See *Stephens v. Doxey*, 62 Utah 241, 218 P. 965. In that case, the appellant complained that a certain finding of the court was based on a matter outside the pleadings, and hence was not made an issue in the case. This court held that appellant's objection was without merit, where it was not asserted that the finding was without evidence to support it, or that such evidence was objected to. See also *Moyle v. McKean*, 49 Utah 93, 162, P. 63, 65, wherein this court held an assignment of error that a finding was not within the allegations of a complaint will be overruled, where, though there were no allegations in the complaint in the precise form of the finding, it was fairly within the purview of the allegations and responsive thereto.

The authorities also appear to hold that even in the absence of specific allegations of certain matters, if evidence is introduced on such matters, the court may make a finding thereon. See *Starkweather v. Eddy*, (Cal.) 261, P. 763, which was an action for the recovery of money. The complaint contained no specific allegations of fraud, but evidence of fraud was introduced. The California court held in that case that the trial court could find on the question of fraud, even though it was not alleged, since evidence was introduced thereon.

The case of *Taylor v. Taylor*, 218 P. 756 (Calif.) is to the effect that issues which arise from the evidence, and which are not directly made by allegations in the pleadings should be found upon.

It is our contention that the pleadings do raise the issue of termination of the contract, but that in any event,

evidence was introduced thereon, and the court was warranted in making the finding to which plaintiff objects. And further, that appellant's objection is without merit, because it has not and can not assert that the finding of the court on this matter was without evidence to support it or that the evidence introduced on the question was objected to by appellant. It has appealed only on the judgment roll.

The plaintiff in its brief states that it believes that the case of *Neuberger vs. Robbins*, 37 Utah 197, 106 P. 933, is absolutely "determinative" of this question. We have read this case carefully and while the quoted portion from the opinion in counsel's brief is correct, the case is not an authority for the proposition claimed for by the plaintiff. The second syllabus in the Pacific report of said case is very accurate in stating the holding of the case. Said syllabus is, as follows:

"Where a seller sued for the balance due on a contract, on the theory that he had performed the contract binding him to sell and deliver the amount of wheat he then had on hand, and the undisputed evidence showed that he had on hand 2,163 bushels, and that he delivered only 1,142½ bushels, a finding that the seller had fully performed his part of the contract was unauthorized."

The plaintiff's brief, at Page 10, after discussing the *Neuberger Case*, proceeds with a discussion of the letters and states, among other things, as follows: "Unless these letters are calculated to have effected the termination of 'said Agreement' the trial Court has made no conclusion respecting them." If the Bill of Exceptions had been brought to this Court by the plaintiff, it could be easily determined that the Court concluded from all of the evidence, includ-

ing the letters, that the plaintiff had elected to terminate and did terminate said Agreement more than six years prior to the commencement of this action.

Plaintiff's brief also states on page 11 thereof, as follows: "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." Plaintiff did elect to terminate and did terminate said contract prior to 1941 and more than six years prior to the commencement of this action as found by the Court. If the plaintiff had brought up the Bill of Exceptions, this matter could have been determined by this court. In the absence of the Bill of Exceptions, the finding must be against the plaintiff.

A copy of the Agreement sued upon is attached to the plaintiff's Complaint, (J. R. pp. 4-7). Said Agreement provides in part, as follows:

"14.—This license shall be for a period of ten (10) years from the date hereof but may be sooner terminated by the Company upon the happening of any of the following events:

... "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 hereunder by the Exhibitor, and in this respect time shall be of the essence." (J. R. p. 5).

The Findings of Fact state in part, as follows:

"(a) That said Agreement provides that Elsie Haas Littlejohn and William Littlejohn pay to the plaintiff the sum of 'Fifty Dollars (\$50.00) annually during the term of this license, the first payment commencing one (1) year from the date hereof'; that the date of said Agreement is the 19th day of November, 1931; that the said Elsie Haas Lit-

tlejohn and William Littlejohn and the defendants herein have failed and neglected to pay to the plaintiff said annual installments of Fifty Dollars (\$50.00) each and have failed and neglected to pay to the plaintiff any of said annual installments." (J. R. p. 45).

The first annual Fifty Dollar payment due from the decedents to the plaintiff became due on the 19th day of November, 1931. Said payment was not made. An additional Fifty Dollar installment became due from the decedents to the plaintiff yearly thereafter. None of said installments were made. (J. R. p. 45). The plaintiff, three days after the decedents failed to make the first payment, had the right to terminate said Agreement. The Court in its Findings of Fact found that the plaintiff on July 9th, 1935; August 27, 1935; December 28, 1936; February 1, 1937; April 30, 1937; August 7, 1937; November 16, 1937; April 6, 1938; May 26, 1938; July 14, 1938; October 12, 1938; June 9, 1939; September 25, 1939; November 13, 1939; January 10, 1940; February 17, 1940; July 31, 1940; December 2, 1940; January 30, 1941; July 16, 1942 and March 1, 1943 demanded of the decedents that they return said phonofilm and equipment to the plaintiff in New York City (J. R. p. 47). Under the terms and provisions of said Agreement, the plaintiff had no right to the return to it of said phonofilm and equipment without it having elected to terminate said Agreement. From the contents of said letters and the other evidence introduced before the lower Court, the Court made the finding "that more than six years prior to the commencement of this action, the plaintiff elected to terminate and did terminate said Agreement - - -", Finding 12, (J. R. p. 46). This finding is one of an ultimate fact and

can not be disturbed by the appellate Court on an appeal which is merely on the Judgment Roll. The Court agreed with the plaintiff that the plaintiff is the only one that had the right to terminate said Agreement, but found that the plaintiff had elected to terminate and did terminate said Agreement more than six years prior to the commencement of this action. The plaintiff's example of a Promissory Note payable to the plaintiff in annual installments over a period of ten years is not analogous to the situation involved in the case at bar.

The plaintiff contends that in any event in this action it is entitled to recover the last two Fifty Dollar annual installments. We submit that after the plaintiff elected to terminate said Agreement it could not collect any additional annual installments.

32 Am. Jur., Landlord and Tenant, Sec. 875, states, as follows:

“On the other hand, a forfeiture which the lessor elects to assert terminates the lease and with it all obligations, covenants, and stipulations in the lease dependent upon the continuance of the term. Thus, as a general rule the lessee is relieved from liability for subsequently accruing rents, in the absence of a stipulation in the lease for his continued liability, and although the lessee refuses to surrender possession after a forfeiture, the lessor cannot recover rent subsequently falling due while the lessee continues possession; his remedy in such a case is an action for damages for the lessee's wrongfully withholding possession.”

The Agreement between the parties also provides in part, as follows:

“18—Upon the expiration or sooner termination of

this license for any reason whatsoever or the abandonment by the Exhibitor of the Theatre - - - - -, the Exhibitor, at its own cost and expense, shall surrender and deliver up possession of the Equipment to the Company at its factory in good order and condition, reasonable wear and tear excepted, - - - - -" (J. R. p. 6).

Plaintiff states at page 13 of its brief discussing this matter, as follows: "Apparently the defendants and the trial court take the view that such abandonment did terminate the agreement". Plaintiff argues that the decedents could not terminate their obligation under said Agreement by abandoning the Lyric Theatre and that it would take some affirmative act on the part of the plaintiff to terminate said Agreement after the abandonment. The plaintiff misunderstands the Agreement. The Agreement provides that the decedents could not use said equipment any place except in the Lyric Theatre in Price, Utah, and that if they abandoned the Lyric Theatre they, at their own expense, "shall surrender and deliver up possession of the equipment to the Company at its factory in good order and condition, - - - - -". The decedents, upon abandoning the Lyric Theatre in the year 1937, became immediately obliged to ship said equipment to the plaintiff at its factory in New York City. The Agreement does not provide that the decedents could not abandon the Lyric Theatre, but provides only that if they did they shall return said equipment to the plaintiff. The decedents did not breach the Agreement by abandoning the Lyric Theatre, but did breach the Agreement in 1937 when they did not immediately after abandoning said Theatre return said equipment to the plaintiff.

Plaintiff argues that it has not been shown that the plaintiff knew that the decedents abandoned the Lyric Theatre and therefore the Statute of Limitations did not start to run until the plaintiff learned of said fact. The Utah case of *Dee vs. Hyland et al.*, 3 Utah 308, 3 Pac. 388, 136 A. L. R. 659, holds that the statutes of limitations begin to run from the time of the commission of the wrongful act, or when the right of action accrues, and not from the time of the knowledge of the act by the plaintiff. The *Dee Case* is a leading case on the subject and has been cited with approval by the Supreme Court of Oklahoma in *Grisson et al vs. Beidleman et al.*, 129 P. 853; by the Supreme Court of Oregon in *Hume v. Burns et al.*, 83 P. 391, and has also been cited with approval by other courts.

The California Case of *Rose vs. Dunk-Harbison Company, et al.*, 46 P. 2nd 242, reading from page 243 states:

“As a rule, statutes of limitation commence to run when a cause of action is complete. There are well-recognized exceptions to the rule. But the fact that the injured party is without knowledge of the wrong committed, while bringing a case within the exceptions generally recognized in cases of fraud and fraudulent concealment of facts, does not generally toll the statute. A cause of action is not suspended merely because a party is ignorant of the fact that he has a cause of action or of the identity of the one who committed a certain act.” *Lightner Mining Co. vs. Lane*, 161 Cal. 689, 120 P. 771, Ann. Cas. 1913C, 1093; *Lambert vs. McKenzie*, 135 Cal. 100, 67 P. 6; *Medley vs. Hill*, 104 Cal. App. 309, 285 P. 891.”

The general rule is also stated in an annotation in 136 A. L. R. 658.

In the light of the above authorities, we believe the

law to be as follows:

1. That when "the plaintiff elected to terminate and did terminate said Agreement", more than six years prior to the commencement of this action, that its cause of action accrued and the statutes of limitation immediately started to run.

2. The statutes of limitation began to run on each of the Fifty Dollar installment payments when each of the same became due. None became due during the period more than six years immediately prior to the commencement of the action because the plaintiff had terminated the Agreement and could not thereafter recover the rental installments, as stated in the citation from 32 Am. Jur., Landlord and Tenant, Sec. 875, above quoted.

3. In addition to the above matters, upon the abandonment of the Lyric Theatre in 1937, the decedents became immediately obliged under the Agreement to return the equipment to the plaintiff. Decedents did not do so and a cause of action in favor of the plaintiff accrued at said time, both for the recovery of the possession of said equipment and for any damages suffered by the plaintiff for the decedents' breach. In any event, the statutes of limitation had commenced to run against the plaintiff's cause of action at the time the plaintiff "elected to terminate and did terminate said Agreement" more than six years prior to the commencement of this action. This action was not commenced by the plaintiff until May 24th, 1945.

4. As above stated, in any event the Court has found that the plaintiff elected to terminate and did terminate its Agreement more than six years prior to the filing of its

Complaint and the finding is unassailable because the appeal is on the Judgment Roll, and this court cannot review the evidence.

Plaintiff cannot recover in this case because its Complaint does not state a cause of action.

It is to be noted that the obligation of the decedents was to return the equipment to the plaintiff after the termination of the said Agreement. Plaintiff does not bring this action to recover the possession of said equipment. It brings the action for the sum of Three Thousand Dollars which it claims was the value of said equipment in the year 1941 at the end of the ten year period at which time the contract would have expired by its own terms had nothing else occurred in the meantime. We submit that the plaintiff's only action is for the recovery of the possession of the property. The only cause of action that the plaintiff had was for the recovery of the property, or in the event recovery of the property could not be had, then for its value. The Complaint does not set forth a cause of action for the recovery of the property, and in the event that recovery cannot be had, then for its value. Plaintiff claims that when decedents did not return said property to the plaintiff that the plaintiff had the right to bring an action for the value of the property. This is not the law. Counsel for plaintiff apparently believes that the decedents and the defendants were guilty of a conversion of said property merely by not returning the same to the plaintiff.

“Mere detention of another's chattels which rightfully came into one's possession is not an actionable conversion unless based upon a negation of the owner's rights or accompanied by an attempt

to convert the property to the holder's own use." - - - - - "Demand and refusal are necessary for the maintenance of an action for conversion, in all cases in which defendant was rightfully in possession." See *Fletcher vs. Pump Creek Gas and Oil Syndicate* 38 Wyo. 329; 266 P. 1062; 61 A. L. R. 615.

We wish to point out to the Court that there are no allegations in the plaintiff's Complaint covering these matters.

The general rule of law on the subject is given in an annotation in 61 A. L. R. 621. It is as follows:

"Generally speaking, where one is lawfully in possession of the goods or chattels of another, and a demand on him for the delivery of the goods or chattels is made by or on behalf of the true owner, his mere detention of the property or failure or neglect to make delivery, without the performance of any express or affirmative act of conversion, does not amount to a conversion."

The plaintiff does not state a cause of action in trover or conversion because it does not plead any acts of decedents or defendants amounting to a conversion. There is no allegation in plaintiff's Complaint of the performance by the decedents or defendants of any express or affirmative act of conversion.

A cause of action is not stated against the defendants in this case because of their inability to deliver said property to the plaintiff. See annotation in 61 A. L. R. 628 under the subject **Inability to deliver**. It states in part, as follows:

"It is likewise held in cases in which one has been lawfully in possession of chattels, but is no longer in possession, due to no act of conversion on his

part, that a mere failure to deliver after a demand by or on behalf of the true owner is not such a detention as will constitute a conversion."

See Supplemental Annotation in 129 A. L. R. 638 on the subject of "Mere detention of or failure to deliver chattels after demand as conversion."

See also:—

Watkins vs. Jensen, 58 Utah 13, 197 P. 222;

Nielsen vs. Hyland, 51 Utah 334, 170 P. 778.

In conclusion, we wish to state that the failure of the

plaintiff to file a proper claim with the representatives of decedents by its failing to attach a copy of the contract to the purported claims presented is determinative of this case, and precludes plaintiff from any recovery herein. In addition to this point, we believe that the law on the balance of the case is also conclusively against the plaintiff. For the reasons hereinabove stated, the judgment of the lower court should be affirmed.

Respectfully submitted,

DART & SHEYA

Attorneys for James Cochran Littlejohn

RUGGERI & GIBSON

Attorneys for Naida L. Hyatt

Respondents.