

1948

Leon Stucki v. James Ellis, W. H. Stewart, June S. Spackman, Clare Spackman, Thomas A. Tarbet and Magnus Olsen : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Leon Fonnesbeck; Attorney for Respondent;

Recommended Citation

Brief of Respondent, *Stucki v. Ellis*, No. 7200 (Utah Supreme Court, 1948).
https://digitalcommons.law.byu.edu/uofu_sc1/916

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court of the State of Utah

LEON STUCKI,
Plaintiff and Respondent,
vs.

JAMES ELLIS, W. H. STE-
WART, JUNE S. SPACKMAN,
CLARE SPACKMAN, THOM-
AS A. TARBET, and MAG-
NUS OLSEN,
Defendants, and Appellant
THOMAS A. TARBET.

Respondent's Brief

Appeal from the District Court of the First Judicial
District of the State of Utah, in and for the
County of Cache.

Hon. Marriner M. Morrison, Judge

LEON FONNESBECK

Attorney for Respondent.

JUL 23 1948

FILED
JUL 23 1948
CLERK SUPREME COURT, UTAH

In the Supreme Court of the State of Utah

LEON STUCKI,

Plaintiff and Respondent,

vs.

JAMES ELLIS, W. H. STEWART, JUNE S. SPACKMAN,

CLARE SPACKMAN, THOMAS A. TARBET, and MAGNUS OLSEN,

Defendants, and Appellant

THOMAS A. TARBET.

Respondent's Brief

STATEMENT OF FACTS

The statement of facts in appellant's brief is incomplete and misleading as to a correct picture of all of the facts, hence we make the following statement of the facts in this case, as alleged and/or admitted in the pleadings, or by the parties in their testimony, or as found by the Court.

June S. Spackman, daughter of defendant W. H. Stewart, was the record owner of the premises in question from October 9, 1945 to March 1, 1946. On October 16, 1945, she entered into a written agreement to sell said premises to one James Ellis for \$1,000, of

which \$400 was paid by Ellis as a down payment; the balance, \$600, was payable at the rate of \$10 per month. That contract is an exhibit in evidence. W. H. Stewart admitted that he acted as agent for his daughter, June, both in buying and selling said premises. (Tr. 42, 48, 59, 61) James Ellis with his wife and children immediately moved into possession of said premises. Shortly thereafter the dwelling was partially destroyed by fire. The title to the premises was never in Ellis's name, but remained in June S. Spackman until she deeded the premises to appellant Tarbet March 1, 1946.

Concerning the allegations in the complaint that plaintiff was induced to do the repair work by the representations of defendant Stewart that the premises were insured and that he would see that plaintiff got his money as soon as the repair work was done, the Court found in its finding No. 3, as follows:

The Court finds that after said premises had thus been partially destroyed by fire, the plaintiff was induced to repair the same by said James Ellis and W. H. Stewart, under promise and agreement by them to pay the repair bill in full as soon as the work was completed. That said W. H. Stewart represented to plaintiff and his agent that said premises was covered by fire insurance, and that he would see that plaintiff's money was ready as soon as the repair work was completed. (This part of the finding is supported by the testimony of Roy Earl. Tr. 24, 27, 29, 31) But in this connection, the Court further finds that the motion for dismissal and non-suit against said W. H. Stewart was granted by the Court at the close of the plaintiff's case for the reason that under

the Statute of Frauds, the defendant Stewart would not be liable on an oral agreement to answer for the debt or default of the defendant James Ellis.

Plaintiff's testimony is not disputed that plaintiff repaired said premises during the period from January 2nd to January 23, 1946 nor that the cost of repair was \$323.87. When the repair bill was presented to Stewart and payment refused, plaintiff, on March 15, 1946, filed his notice of mechanic's lien against said premises, as provided by statute. This is a suit to foreclose said mechanic's lien.

In paragraph No. 6 of the Findings the Court found.

The Court further finds that defendant Thomas A. Tarbet purchased the said premises about the first day of March, 1946, at which time a deed was made by June S. Spackman and husband, Clare Spackman, to defendant Tarbet. That defendant James Ellis did not have title or ownership in said premises in his name but merely had a contract for the purchase thereof at the time he sold his interest in the premises, about February 25, 1946.

James Ellis sold his interest in said premises to defendant Thomas A. Tarbet through W. H. Stewart. The full purchase price to Tarbet was \$1500. The facts regarding the said sale, the division of the money, were testified to by Stewart, and are stated in paragraph No. 3 of the Amended Answer of W. H. Stewart as follows:

That in pursuance to said listing aforesaid, the property was sold to the defendant Thomas A.

Tarbet for a consideration of \$1500.00. That at the time of said sale the said James Ellis was indebted to the defendants June S. Spackman and Clare Spackman, in the sum of \$610.00, principal and interest. That the balance of the proceeds of said sale to the defendant Thomas A. Tarbet, amounting to \$890.00, was disposed of as follows; to the defendant James Ellis the sum of \$800.00, and to Stewart & Harrison, the sum of \$90.00, to pay commission of \$75.00 for making said sale; and \$15.00 to pay general taxes on the property for the year 1945, in the sum of \$11.80, and \$3.20 for extension of the abstract of title.

Regarding the question whether Thomas A. Tarbet was the "head of a family" the Court found in paragraph No. 7 as follows:

The Court further finds that defendant Thomas A. Tarbet was single and lived with his mother as a member of her family and in her home about March 23, 1946, when he got married. That shortly thereafter, said Thomas A. Tarbet and wife moved into said premises. That while said defendant was in the Armed Services he got an allotment of about \$50.00 per month for his mother. That defendant's mother was on relief prior to receiving said allotment that she was taken off relief while said allotment continued and was again restored back on relief after said allotment discontinued.

The facts supporting this finding were largely admitted by Tarbet and were testified to by his mother, Mary A. Tarbet, (Tr. 85-90).

ARGUMENT

Respondent submits that the trial court made no error in its finding of fact number seven, nor in its

second conclusion of law, that Tarbet is not entitled to assert any homestead exemption adverse to plaintiff's foreclosure of his mechanic's lien herein.

Tarbet and his mother both admitted that Tarbet lived with his mother in **her home** and as a member of **her family**. She did not live with her son as a member of **his family**. (Tr. 85-87) Hence Tarbet cannot qualify as the "head of his mother's family" as specified and defined by statute,—Sec. 38-0-5.

The fact that he had an allotment of \$50.00 per month sent home to his mother while he was in the Armed Services, (of which it will not be denied the Government supplied \$28 per month) would not, standing alone, make him the head of his mother's family. His mother testified that she drew relief from the Welfare for a long time prior to receiving the allotment checks; that when the allotment checks started they (the Welfare) stopped her relief checks, and that after the allotment checks stopped, "they started me on relief again." (Tr. 88) This was admitted by appellant. (Tr. 90) Hence Tarbet cannot qualify as the head of a family and the sole provider for his mother—Bunker v. Coons, 21 Utah 164,—and the Court made no error in its finding and conclusion in that respect.

Tarbet admits that he did not get married until March 23, 1946, (Tr. 94) and that he and his wife even lived with his mother for a while after that, before he moved into possession of the property in question. (Tr. 95) All of these facts clearly show. (1) That Tarbet was not the head of his mother's

family and (2) that he could make no homestead claim in his own right until after March 23, 1946. Before that date plaintiff's lien had long since attached to the property.

After the work had been completed, (January 22, 1946) appellant could not defeat plaintiff's lien by entering marriage relationship. *Evans v. Jensen*, 51 Utah 1, 168 P. 762.

In case at bar, Tarbet did not own or have any interest in the property when the repair work was done and when the lien attached. By statute, Sec. 52-1-5, plaintiff's lien related back to January 2, 1946, when the work was begun.

A homestead right may be asserted only by those entitled to the right, and only those may claim the homestead exemption who are mentioned in the homestead laws. No one may assert a homestead claim under the doctrine of subrogation. 40 C.J.S. 691.

Appellant's counsel asks: "Even though Ellis and the Spackmans did not take any affirmative action to impress the character of a homestead on the property, may Tarbet now do so?" Our answer is, "No". The statute, Sec. 52-1-3 grants an absolute mechanic's lien, without any exceptions, for labor done and materials furnished. The homestead statute, Sec. 38-0-1, provides that the homestead shall be exempt from judgment liens and execution or forced sales, but the statute does not say the homestead shall be exempt

from a mechanics lien. But this Court has held that the homestead claim is exempt from mechanic's lien if the homestead claim is properly set up and asserted, *Voker Lumber Co. v. Vance*, 88 P. 896.

Hence it is submitted that if James Ellis had any homestead right in that property (which we do not concede he had at time of suit) he would have to assert and set up such homestead right,—take affirmative action to impress the character of a homestead on that property—in order to defeat plaintiff's foreclosure proceedings. If Ellis had not sold out his interest and was still in possession of the property, the plaintiff could still foreclose his mechanic's lien if Ellis did not set up and assert his homestead exemption. Ellis could waive that right. In other words the statute does not set up the homestead exemption against a mechanic's lien like it does the homestead exemption against judgment liens. Hence the mechanic's lien when properly filed is a lien on the homestead property and can only be defeated by affirmatively setting up the homestead claim; whereas the judgment lien is no lien at all upon the homestead. The statute which appellant relies on merely says that the homestead premises may be sold by the homestead claimant, the owner, free and clear of any judgment lien.

But counsel says: "The matter is set at rest by our statute, Sec. 38-0-2,—'When a homestead is conveyed by the owner thereof,' etc." Our answer is, that even if Ellis had been the "owner" of the premises

at the time he sold out his interest, February 25, 1946, which he was not, the conclusion reached by counsel doesn't follow. Query, whether Ellis could qualify as **owner**? We think it is appellant's failure to observe the distinction between mechanic's lien and judgment lien, as affecting the homestead, that has gotten him into his present difficulty.

The statute which he quotes, Sec. 38-0-2, says: "When a homestead is conveyed by the **owner** thereof such conveyance shall not subject the premises to any lien or encumbrance to which it would not be subject in the hands of the owner." This is in harmony with Sec. 38-0-1, which says that the homestead is "not subject to a judgment lien or forced sale," hence a sale of the homestead property does not subject it to any such lien or forced sale. The homestead premises are, however, subject to the mechanic's lien, in the hands of the owner, for Sec. 52-1-3 grants a mechanic's lien without exception. Hence Sec. 38-0-2 does not affect such continuing mechanic's lien,—does not free the property from such lien.

The homestead is often spoken of as a shield for the protection of the family from creditors of the homestead claimant. Now counsel seems to claim the right to stretch and expand this shield, not for the protection of the homestead claimant's family, but as a shield over the property itself in the hands of the new grantee and for the protection of the new purchaser. This, counsel asserts, is the effect of Sec. 38-

0-2, even though the new purchaser is not entitled to claim a homestead in the premises in his own right; even though he is not the head of a family.

There are two or three additional reasons why Tarbet cannot claim or set up any homestead exemption to defeat plaintiff's present foreclosure proceeding: He fails to specify whether he claims the homestead exemption of Ellis, or of the Spackmans. We think appellant should specify as to whose homestead he relies on as his defense. In addition to the fact that as a matter of law Tarbet has no right to claim, set up, or assert, the homestead right or exemption of either Ellis or the Spackmans, we submit that appellant should at least specify on which one he relies when he asserts such right. If his answer is that he relies on both, then he is in the position of asserting that both parties had homestead rights and exemptions in the same property and at the same time,—that June Spackman had a homestead right in that property after she executed a contract of sale of said premises to James Ellis, and let Ellis and his family into possession of the premises. After that contract of sale was signed (October 16, 1945) the Spackmans we submit, had no longer any right of possession in said premises and would have no right to claim any homestead therein. The record is silent as to where the Spackmans resided or that they signed their names to the contract of sale to Ellis (October 16, 1945) and the deed to conveyance to Tarbet (March 1, 1946), both of which deals and papers their father, W. H.

Stewart, made and prepared for them. Hence we do not see how June Spackman could claim a homestead in that property. Nor did the Spackmans ever assert any homestead rights in that property until they filed their Answer, in case at bar, which was long after they had conveyed the premises to Tarbet by their warranty deed.

James Ellis had sold out his contractual interest in said premises, and no longer had any interest therein. We have noted that when Ellis sold his interest (February 25, 1946) he got \$800 in cash for his equity in his contract of purchase. Hence Ellis had abandoned his contract of purchase. He had lost all his right to purchase said premises, as well as any right of possession therein. By selling out his equitable interest in said premises he forfeited and abandoned his contract and any homestead rights he might have had under that contract of purchase. In the case of *Swanson v. Anderson*, 38 P. (2d) 1065, the Oregon court said:

The right of homestead however does not exist after the right of possession is lost, and the right of possession ceases when the contract is lawfully terminated.

40 C.J.S. pg 522, reads as follows:

Forfeiture or abandonment of contract. The homestead right is lost with the loss of the rights of the purchaser under his contract for the purchaser of land.

To the same effect is *Montgomery v. Wise*, 62 P. (2d) 647, (Okla.) Clearly after Ellis sold out, he could

not thereafter claim any homestead right in the premises; so how can appellant now claim the right to set up Ellis' homestead rights?

Counsel again asserts that the statute, Sec. 38-0-2, "is simple and can mean only one thing, i.e. if the homestead exemption could have been asserted by Ellis or the Spackmans then the conveyance to Tarbet would not subject the property to the lien of plaintiff." Again we repeat that counsel jumps to a long unwarranted conclusion and assumes much in making such a statement, which is, of course, not justified under the facts and the law: (1) He assumes that Ellis or the Spackmans could have asserted a homestead exemption in said premises, in this action, which we have shown is not true, and (2) counsel also assumes that if either Ellis or the Spackmans could assert a homestead claim in said premises (he does not bother to designate which) then Tarbet may now assert such claim, even though he cannot assert a homestead claim in his own right. This is a new and unwarranted conclusion under the statute or law which he cites. We have never heard of such a contention before. We doubt whether this Court has. Yet for support of the major premise of his contention, subrogation of homestead right, counsel cites no authority. Certainly the statute (Sec. 38-0-2) which he cites and relies on does not justify or support such a contention.

We have no quarrel with the law quoted by counsel from 40 C.J.S. pg 612, nor with any of the other

authorities cited on pages 5 and 6 of appellant's brief to the effect that, "the conveyance does not place the creditor in any better position than he was before the transfer." We agree to that. We do **not** claim that that plaintiff and respondent is in any better position now than he was before the transfer (conveyance) of the property to Tarbet. But neither is the plaintiff in any worse position. The statute Sec. 38-0-2 does not affect the plaintiff's rights one way or the other.

We are willing to concede, for the sake of argument, that if Ellis had not sold out his interest and equity in the premises and in his contract of purchase, and if Ellis and his family were still in possession of and living on the premises and were present in court defending against plaintiff's present foreclosure proceedings, that then Ellis would have the right, if he chose to do so, to set up and assert a homestead right in said premises which would have the effect of defeating plaintiff's present foreclosure proceedings. But that fact does not permit or justify Tarbet's present contention that he (Tarbet) is now subrogated to, and may set up the homestead right of Ellis, which Ellis might have set up if Ellis had not sold out, abandoned his right to purchase, and moved away from the premises.

Appellant, in making such a contention, assumes both of his premises, on which his conclusion is based. Neither of his premises is true, nor in fact exists. Thus he assumes, (1) That if Ellis were present in court he (Ellis) could set up a homestead claim in the

premises. That is obviously not true, for Ellis has long since (February 25, 1946) sold out his interest in the premises, abandoned his contract and moved away from the premises. Ellis' whereabouts is unknown. (2) Next appellant assumes that he is subrogated to and may set up and claim the homestead rights which Ellis might have set up and claimed. That premise is equally false and untenable.

We think appellant is in much the same state of wishful thinking as the ardent fisherman was who, when asked how many fish he had caught, replied: "When I catch this one nibbling at my hook, and one more, I'll have two."

CROSS ASSIGNMENT OF ERROR

The Court erred in granting defendant W. H. Stewart's motion for nonsuit and in its dismissal of the action as to him.

The Court granted Stewart's motion for nonsuit and dismissal under Sec. 33-5-4 (2) which provides that "every promise to answer for the debt, default or miscarriage of another" shall be void "unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith."

We think the facts herein bring defendant Stewart within the exceptions provided for in Sec. 33-5-6 (2) which provides. "A promise to answer for the obligation of another in any of the following cases is

deemed an original obligation of the promisor and need not be in writing:

“(2) Where the creditor parts with value or enters into an obligation in consideration of the obligation in respect to which the promise is made in terms or under circumstances such as to render the party making the promise the principal debtor and the person in whose behalf it is made his surety.”

If Stewart wasn't the real owner in selling the property to Ellis, he certainly had the same interest and anxiety to have the property repaired. He admitted he was looking after it and acting for his daughter June.

Ellis told the plaintiff that he was buying the property from Stewart and that Stewart said it was covered by insurance. But plaintiff was not willing to rely on Ellis's statement. Before undertaking to do any of the said repair work, plaintiff sent his foreman, Roy Earl, with Ellis over to see W. H. Stewart, so as to get that point clear as to who was going to be responsible,—where the money was coming from,—to pay for the repair work.

In substance Roy Earl testified as follows: “Ellis pleaded to have the work done; said the place was insured and that he was buying it from Mr. Stewart. Ellis introduced me to Mr. Stewart, and said. ‘Mr. Stewart, I haven't any money to pay for it. I understand this place has insurance on it.’ (Tr. 23) Stew-

art said, 'The place is covered by insurance, just as soon as the work is completed, if you will present me with a bil I'll see that it is paid.' I told Stewart I understood Mr. Butler had started to repair the premises. Stewart said, 'Mr. Butler has failed to keep his agreement, and there is no string attached to it, so when you complete the work, present the bill and I'll see that it is paid.' (Tr. 24)

"When I told Stewart that he had told us the house was covered by insurance, he said, 'the house was covered by insurance, but Mr. Garff had cancelled it out.' (Tr. 27)"

Cross Examination by Mr. Preston:

"Q. So when you did the work you relied on Mr. Stewart's statement of insurance?"

"A. Absolute y. (Tr. 29) Mr. Stewart said there would be no responsibility on Mr. Ellis' part, that we were to present the bill to him and he would see that it was paid. Mr. Stewart was to take care of the collection of the insurance. He assured us that the insurance would pay for the repair work. He asked me what the cost of the repair work would be. I told him between \$300 and \$400. Stewart said that's a hundred dollars cheaper than Mr. Butler agreed to do it for." (Tr. 31)

The fact that Stewart had previously had an "agreement" with Butler to do that repair work (who had failed to keep his agreement) is significant, we

submit, as showing: (1) That Stewart was the real party interested in having said premises repaired, and (2) Stewart was the man providing the money for the repair work. Stewart did not deny that part of Earl's testimony. Stewart was also interested in knowing the estimated amount of the repair bill, which further shows that Stewart expected to provide the money.

In its finding No. 3, the Court found:

The Court finds that after said premises had thus been partially destroyed by fire, the plaintiff was induced to repair the same by said James Ellis and W. H. Stewart, under promise and agreement by them to pay the repair bill in full as soon as the work was completed. That said W. H. Stewart represented to the plaintiff and his agent that said premises was covered by fire insurance, and that he would see that plaintiff's money was ready as soon as the repair work was completed.

We think the trial court erred in its ruling dismissing as to Stewart, for under the circumstances and facts in case at bar Stewart's representation that the place was insured, and that he would see that the money was paid as soon as the repair work was done and the bill presented, was solely relied on by plaintiff, and made Stewart the principal obligor. Plaintiff did not rely on Ellis to pay the repair bill. As we have seen, Ellis stated right in front of Stewart, when he introduced plaintiff's foreman, that he (Ellis) had no money. Plaintiff parted with value (labor and materials) in respect to the payment of which Stewart's representation and promise was "made in terms or under circumstances such as to render the party

making it (Stewart) the principal debtor and the person in whose behalf it is made (Ellis) his surety."

A promise to pay for labor or materials is not within the statute where the contract is performed solely on the credit of the promisor, who has a beneficial interest in the performance of the contract. 37 C.J.S. 540.

Stewart does not claim that his promise was a collateral obligation, or that of a surety for Ellis—that Stewart would pay if Ellis didn't. Stewart denies that Roy Earl ever came and talked to him. The foreman, Roy Earl, is not contradicted that Ellis stated right in front of Stewart and Earl that he (Ellis) had no money. Stewart's statement to plaintiff's foreman, was definite, clear and unequivocal, that the premises were covered by insurance, and that as soon as the work was done and the bill presented, he (Stewart) would see it was paid. What statement could be more assuring, or would better allay any fears or better induce plaintiff and his foreman to proceed and do the repair work?

The plaintiff relied upon Stewart's promise. He did not look to or expect Ellis to pay for the repair bill. Plaintiff did not send the bill to Ellis, but he mailed the bill directly to Stewart. This also shows that there was no doubt in plaintiff's mind as to who should pay; that plaintiff relied solely upon Stewart and that he expected Stewart to send him a check or see that the bill was paid.

It was an **original** obligation, of Stewart, which was not within the Statute. It was not a promise to pay Ellis' debt. Ellis had no money. Plaintiff was not anxious to do that repair work, and did so only on Stewart's assurance that the money would be ready when the work was completed.

It is important to note that Stewart apparently thought that he had the insurance policy, for he testified: "At the time of the fire, I didn't have the insurance. When El is came in after the fire, we got busy to find out why he (Curtis) hadn't brought the insurance in as he agreed to. We found Orson Garff had cancelled it. Then immediately I wrote fire insurance on the property, but that was after the fire." (Tr. 57)

While in the case of *McMillan v. Dickover*, 248 P. 154, the Oregon court held defendant's promise was a collateral promise, and thus within the statute, the Oregon court quotes and states the rules of law applicable in concise and clear terms. The Oregon court uses this language.

. . . If the promise is collateral, it is within the statute of frauds and plaintiff cannot prevail; but if there is evidence tending to show an original obligation on the part of defendant, the finding of the jury in reference thereto is conclusive.

In determining whether a given state of facts constitutes an original or a collateral promise, the intention of the parties controls, and this must be ascertained from the words used in making

the promise, the situation of the parties, and all of the circumstances surrounding the transaction. *Masters et al. v. Bidler et al.*, 101 Or. 322, 198 P. 912, 199 P. 920; *Mackey v. Smith et al.*, 21 Or. 598, 28 P. 974; 25 R.C.L. 489. Where the language used by the parties is ambiguous and the intention is not clear, it is a question of fact for the jury as to whether a promise is original or collateral. *Masters et al. v. Bidler et al.*, *supra*; *Mackey v. Smith et al.*, *supra*. As stated in 25 R.C.L. 490:

"Where the language used, together with the surrounding facts and circumstances, makes it doubtful whether the parties intended by the promise to create an original or a collateral obligation, the intention should be determined by the jury."

However, when the facts are undisputed and but one reasonable inference can be drawn therefrom, it becomes a question of law for the court to determine. 27 R.C.L. 390; *Breidenback et al. v. Upper Valley Orchards Co.*, 57 Mont. 247, 187 P. 1008; *Masters et al. v. Bidler et al.*, *supra*.

Justice Brewer, in *Davis v. Patrick*, 141 U.S. 479, 12 S. Ct. 58, 35 L. Ed. 826, says:

"* * * The real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise."

Courts are concerned with substance rather than form.

The primary inquiry is. To whom was credit extended at the time of the sale: Did plaintiff rely exclusively upon the credit of defendant, or did he merely look to him as a guarantor? Shaw, C.J., in Cahill v. Bigelow, 18 Pock. (Mass.) 369, quoted with approval in Mackey v. Smith et al., supra, thus states the test:

“ ‘Was the credit given to the person receiving the goods? If it was, then such promisor is a guarantor only, undertaking to pay another’s debt. If no credit were given to the person receiving the goods, then the promisor is himself debtor for goods sold to him and delivered to another by his order.’ ”

In Brown v. Weber, 38 N. Y. 187, it is stated:

“The test to be applied to every case is, whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a third person; in other words, whether he is the debtor, or whether his relation to the creditor is that of surety to him for the performance, by some other person, of the obligation of the latter to the creditor.”

We think the trial court acted with haste, and without due consideration, and was also confused as to the proper rule of law applicable under the statute of frauds when applied to the facts in the case at bar. At the close of the case the court said:

THE COURT. As far as the relative material facts of this case are concerned, I doubt that there is much dispute. I granted the nonsuit against Mr. Stewart because I felt that it was incumbent upon the plaintiff to prove ownership in Mr. Stewart of this property in order to avoid the

statute of frauds. The most that can be given to the testimony was that Mr. Stewart had represented that there was insurance on the property and out of that insurance the repair bill would be paid when it was presented, and I think that is a fact; but I don't believe that either shows ownership in Mr. Stewart or any rights that he had in the property which would take it out of the statute of frauds, which requires that any promise to pay for the debts or defaults or miscarriage of any person must be in writing and signed by the person sought to be charged. (Tr. 102)

Thus the Court definitely states that while he believes that Stewart represented that there was insurance on that property and that out of that insurance he would see that the repair bill would be paid when it was presented, yet the Court nevertheless held that in as much as plaintiff had failed to prove **ownership** in Mr. Stewart, or that Stewart had any rights in that property, that the case was not taken out of the statute of frauds, and Stewart would not be liable and was entitled to a nonsuit. That, lack of ownership in Stewart, clearly was an erroneous reason on which to grant the nonsuit, and we submit the court erred in its ruling that on account of such lack of ownership or interest in the property in Stewart, his promise came within the statute.

In as much as the Court definitely found that defendant W. H. Stewart represented that the property was covered by fire insurance and that he would see that plaintiff's money was ready as soon as the repair work was completed, respondent submits, as a

matter of law, that he is now entitled to judgment against W. H. Stewart as the party primarily liable for plaintiff's repair bill that that the ruling of the trial court granting a nonsuit as to Stewart should be reversed, and the trial court should be directed to enter judgment against W. H. Stewart personally for the amount of plaintiff's repair bill, costs, etc., as prayed for in the complaint.

Respondent submits that from the facts in the record and as found by the trial court, the statute of frauds is not a defense of which Stewart can avail himself; for by his representation and promise Stewart made himself primarily liable. The fact that plaintiff failed to prove that Stewart was the owner, or the fact that Stewart had no interest in the property, if that be a fact, is, we submit, after all, immaterial. The important question is: Did Stewart by his promise assume primary responsibility for that repair bill? Which the Court found he did.

Respectfully Submitted,

LEON FONNESBECK
Attorney for Respondent.

INDEX TO AUTHORITIES

	Page
Bunker v. Coons, 21 Utah, 164	5
37 C.J.S. pg 540	17
40 C.J.S. pg 691	6
40 C.J.S. pg 522	10
40 C.J.S. pg 612	11
Evans v. Jensen, 51 Utah 1, 168 P. 762.....	6
McMillan v. Dickover, 248 P. 154, (Oregon).....	18
Montgomery v. Wise, 62 P. (2d) 647, (Okla.).....	10
Swanson v. Anderson, 38 P. (2d) 1065, (Oregon).....	10
U.C.A. Section 33-5-4 (2)	13
U.C.A. Section 33-5-6 (2)	13
U.C.A. Section 38-0-1	6, 8
U.C.A. Section 38-0-2	8
U.C.A. Section 38-0-5	5
U.C.A. Section 52-1-3	6, 8
U.C.A. Section 52-1-5	6
Volker Lumber Co. v. Vance, 88 P. 896	7

INDEX TO BRIEF

Statement of Facts	1
Argument	4
Cross Assignment of Error	13