

1948

# Parlan McFarlane v. Glenn Winters : Brief of Respondent

Utah Supreme Court

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## IN THE SUPREME COURT OF THE STATE OF UTAH

----- )  
 PARLAN McFARLANE, also known )

as PARLANE McFARLAND, )

Plaintiff and  
 Respondent, )

CASE NO.

vs )

7201

GLENN WINTERS, )

Defendant and  
 Appellant. )

-----  
 RESPONDENT'S BRIEF

FILED

SEP 20 1948

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# TABLE OF INDEX

## Page

Argument . . . . . 33

Statement. . . . . 3

## Statutory Citations

Section 44-0-4 of 1943 Code. . . 33

## Text Book Citations

21 A. L. R. P. 433 at P. 437 . . 35

16 American Jurisprudence, Page  
16, Chapter 3, Paragraph 12 . 40  
Paragraph 13 . . . . . 40  
Paragraph 14 . . . . . 41

30 American Jurisprudence P. 50  
Paragraph 62. . . . . 34

33 C. J. Page 215, Note 61 . . . 34

25 C. J. S. P. 1053, Par. 5. . . 39

47 C. J. S. P. 35 Par. 21. . . . 34  
P. 34 Par. 21. . . . . 36  
P. 79 Par. 75. . . . . 34

## Cases cited

Hamilton vs. Wheeling Public Ser-  
vice Company 35  
21 A. L. R. P. 433 at P. 437;  
88 W. Va. 573; 107 S. Eastern

# TABLE OF INDEX Contd.

Page

## Cases Cited, Contd.

Fink vs. Prudential Insurance Co- mpany of America. . . . .	39
90 Pac. 2nd at P. 762	
Praetorians vs. Phillips. . . . .	38
88 Pac. 2nd P. 647 at P. 650 . .	

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GLENN WINTERS,

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Defendant and  
Appellant.  
)  
- - - - -

RESPONDENT'S BRIEF

STATEMENT

Respondent controverts the facts as  
stated in Appellant's brief for the follow-  
ing reasons:

FIRST: There is no issue in this  
case involving interest raised by the  
pleadings, or otherwise, or at all.

(q.v) Complaint, Judgment Roll page

1-3; Answer, Judgment Roll page 7-9; Reply, Judgment Roll page 10-12; Findings of Fact, Judgment Roll page 14-15; Judgment, Judgment Roll page 16.

See Bill of Exceptions, Reporter's Transcript.

Tr. 2 MR. LARSON: I think there is only, Judge Woolley tells me, Your Honor, that there is only one issue here and that is whether Parlan McFarlane, the plaintiff, is dead. Is that correct?

MR. WOOLLEY: Yes, but that takes various aspects and has various consequences.

MR. LARSON: Yes, it does.

MR. WOOLLEY: If there is no plaintiff, there is no case.

Tr. 4 THE COURT: What I believe, Judge Woolley, that the burden is with the

defendant to proceed on the affirmative allegation that the plaintiff is dead.

Tr. 5 MR. WOOLLEY: I do, if the Court please. I make a motion now that the counsel for the plaintiff be required to show by what authority he appears for the person named as Parlan McFarlane, the plaintiff in this action. I am willing to take counsel's statement. I don't ask that he be sworn. If he has any authority from Parlan McFarlane to maintain this suit, I will take his word for it.

MR. LARSON: I will say that he is maintaining this suit and I am the attorney for him, Your Honor, and I have been for twenty years or more, in this particular action.

THE COURT: Does that satisfy you?

MR. WOOLLEY: Not quite, Your Honor, I know that Mr. Larson was attorney for Parlan McFarlane when the action was commenced against Glenn Winters in 1913 or '14, and I know that he has renewed the judgment obtained in that year from time to time appearing as attorney for that plaintiff. I don't know by what authority he maintains the present action. In other words, my point is this, I question and doubt that he has received any communication from Parlan McFarlane in the last ten years which would authorize him to represent him in prosecuting this lawsuit.

Tr. 6 THE COURT: Well, Mr. Larson, what was the last arrangement you had with



your client?

Tr. 6-7 MR. LARSON: My arrangement, if you want to know, Your Honor, was this. I was retained in this case by Parlan McFarlane on a contingent basis and I have an interest in this judgment and our relations have been the same since we sued Glen Winters and his father, and I think Sam King was the attorney then and we got a judgment in the lower court, but the Supreme Court reversed the case and it is an outstanding case on the issue for the reason that Glen Winters in the action took the attitude that he was not the agent of his father W. P. Winters and in this particular state they don't hold the owner of a car liable when it is driven by some other person unless that person

is the agent of the owner and is on the business of the owner. Now a great majority of states don't hold to that rule but that is the ruling in Utah and it was established in the case of Parlan McFarlane vs. W. P. Winters and Glen Winters and I have been his attorney from that time on and I am interested in the case just as much as he is, 50 per cent contingent fee, and he has left this matter with me on a contingent basis because he knew I was interested as well as he. The judgment to begin with against Glen Winters was only about \$488 and a few cents maybe, but it has been drawing interest. We have issued executions and we have had him served and renewed the judg-

ment from time to time through the course of the years and we are now again seeking to renew it, and these people having put up the affirmative defense that Glen Winters, no, that Parlan McFarlane is dead, it is up to them to prove that he is dead and we will show him what the presumptions are relative to life and relative to death. The law is clear on it.

Tr. 8        MRS. ANNA C. McFARLANE, called as a witness by and on behalf of the defendant, was sworn and testified as follows:

DIRECT EXAMINATION by Mr. Woolley

Tr. 11    Q you have handed me, Mrs. McFarlane a check dated July 9, 1921 \*\*\* signed by Anna C. McFarlane.

A yes. That's right.

Q Apparently indorsed on the back "Parlane McFarlane," and then the other indorsement.

A Yes.

Q You have handed me another check dated August 14, 1921 \*\*\* pay to the order of Parlan (Tr. 12) McFarlane, \$15.00 and signed by Anna C. McFarlane and indorsed on the back by Parlan McFarlane.

A Yes.

Tr. 13 Q Did he tell you where he was going when he left, at that time? (Meaning her husband.)

A No, he didn't tell me. I think he ran away from his creditors, mainly.

Tr. 14 Q Do you know whether he (meaning the plaintiff) was contented or discontented in his family life or not?

A I don't know whether he was clear contented. I think we was kind of a burden to him.

Tr. 15 Q How old would he be now?

A 63.

Q 63 years ago last October, is that right?

A That's right.

Q And he was younger than you.

A yes.

Q How much?

Tr. 16 CROSS EXAMINATION By Mr. Larson:

Tr. 17 Q You know whether the mother, your husband's mother is dead?

A Yes, she is dead.

Q When did she die?

Tr. 18 A She died in '41.

Q In '41. Do you know whether she was ever in communication with her son?

A Why, I know that she got a card from him.

Q When was that?

A As near as I remember, it was a short time before she died.

Q Did you see that card?

A I saw the envelope it was in.

Q Did you see the handwriting on it?

A I did.

Q Did you know the handwriting?

A I certainly did.

Q And would you say that was the handwriting of your husband, Parlan McFarlane?

A Yes, sir.

Q A short time before she died.

When did she die?

A July 26, 1941.

Q July 26, 1941. You happen to re-

member ~~where~~ that card came from.

That envelope that had his handwriting on it?

A Yes. It had a California postmark, but I don't remember the town.

Tr. 19 McFarlane's mother said, "Do you recognize the handwriting," and I said I certainly did.

Tr. 27 WM. McFARLANE, called as a witness by and on behalf of the plaintiff, was sworn and testified as follows: (I Think the word plaintiff here should be defendant.)

Tr. 27 DIRECT EXAMINATION by Mr. Woolley:

Tr. 27 Q When did you last see him? (Meaning the plaintiff.)

A I saw him the year after he left here. He was in Salt Lake City. I saw him in Salt Lake a year after he left Manti.

Tr. 29 Q Has anybody else brought word to you from him or purported to do so?

A Yes.

Q Who?

A Bruce Axelson.

Q Did your mother die in July of 1941?

A 26th of July 1941.

Tr. 30 Q Did you ever know of an address that he had in San Francisco, California?

A Nothing more than in California.

Q You had heard through someone else, had you, that he was in California?

Tr. 31 A Yes.

Q Wilford Frischknecht told you that he had seen him down there in 1925, didn 't he, or did he?



A Yes. He told me he had seen him (meaning the plaintiff) while he was on his mission.

Q And Bruce Axelson told you that he had seen him sometime after that.

A Yes.

Q That is all you know about him, isn't it, or is it?

A No. \*\*\* He said they had seen Parlan McFarlane conducting a paint shop; this was 1929. They were asked to find out what they could about the family but not to give address, which they didn't do.

Tr. 32 Q Tell us now, Will, whether you have been putting up the money to maintain this law suit.

A I have. Mr. Larson and myself have.

Q You have been putting up the money.

A Yes.

Q You put up the money. Was that because of your interest in his wife?

A Yes.

Q You wanted to keep the judgment alive so she could eventually get it. Is that right?

A Yes.

Tr. 34 CROSS EXAMINATION by Mr. Larson:

Tr. 35 Q Do you know your brother's handwriting?

A Yes.

Q And have you known it for many years?

A Yes.

Q And have you ever seen any correspondence with his handwriting on it in recent years?

A Yes, sir.

Q Where?

A I saw it -- I saw the card that he sent to mother for Mother's Day.

Q And you saw the handwriting on the envelope.

A Yes.

Tr. 35 Q And did you know it was the handwriting of your brother? Do you know that?

A Yes, sir.

Q And when was that?

Tr. 36 A It was just before mother died. It was Mother's day.

Q 1941.

A Yes, sir.

Tr. 36 REDIRECT EXAMINATION by Mr.

Woolley:

Tr. 38 Q That address on there, you think

was in your brother's handwriting,  
is that right?

A Yes, sir; I know it was.

Tr. 40 GLEN WINTERS, called as a witness in his own behalf, was sworn and testified as follows:

Tr. 40 DIRECT EXAMINATION by Mr. Woolley:

Tr. 42 Q I suppose you were here at the trial of the case.

A Yes, sir.

Q And I suppose you saw him here at that time. (Meaning the plaintiff.)

A Yes, sir.

Q At the time he got the judgment.

A Yes, sir.

Q Have you ever seen him since that time?

Tr. 42 A Not that I know of.

Q Have you made any effort since

this action was commenced to find him?

A Well, I --.

Tr. 42 Q All right. What have you done in that respect? Tell the court what inquiries you made.

A I went to Salt Lake City, and I got in communication with some of the policemen up there I knew.

Q First, let me ask you this. Did you begin that inquiry before you talked to me about the case?

Tr. 43 A No.

Q What was the first thing you did after you talked with me? Didn't I send you down to see Mrs. McFarlane?

A I think the first thing I did after I told you about the case, you asked me to go and see Bill McFarlane and Mrs. McFarlane.

Q Those are the two people who just testified.

A Yes.

Tr. 45 Q I show this paper which has been marked Plaintiff's Exhibit A and ask you if that is a letter that you referred to in your testimony.

A Yes. This is the one that she wrote, and wrote in my name, and <sup>I</sup> signed it, but there were a lot of them and I signed them and sent them out.

Tr. 50 Q When did you begin to make this search that you talk about?

A Well, I don't know that that would be necessary.

Q Just a minute, I didn't ask what you knew, I asked when you began making your search.

A When?

Q Yes.

A When I decided to come into court.

Tr. 51 Q That is then after this action was commenced when he told you to go to work and a make a search.

A Yes.

Q And up to that time you had not made any search, had you?

A I didn't even know the man was missing.

Q I just want to know this, whether you had made any search before you communicated with Mr. Woolley.

A No.

Tr. 52 Q All right. It was before the action was commenced against you this last time or shortly thereafter. Can you answer that?

A I came down after I had been ser-

ved in Castle Gate to see Mr. Woolley, and when I talked to Mr. Woolley, he didn't concur with an attorney that I had talked to on the day I was served in Castle Gate. That attorney was Henry Ruggeri.

MR. LARSON: No objection on this to the admission of B.

Tr. 56      CROSS EXAMINATION by Mr. Larson:

Q Now, you have told us about what you have done to try to find him, haven't you. (Meaning the plaintiff.)

A Yes.

Q You don't pretend to know whether he is dead or whether he is alive, of your own knowledge, do you?

A He sure disappeared.

Tr. 64      WILFORD FRISCHKNECHT, called as  
a witness by and on behalf of the



plaintiff, was sworn and testified as follows:

DIRECT EXAMINATION by Mr. Larson:

Tr. 64 Q Now, did you ever see him any place after he left Manti? (Meaning the plaintiff.)

A Yes.

Q Where did you see him?

A I saw him in Salt Lake, and I will not say whether it was 1922 or 1923. I saw him at that time at Beck's Hot Springs.

Tr. 65 Q Did you ever see him (meaning the plaintiff) at a later date?

A Yes, I saw him in Oakland, California in 1925.

Q Under what circumstances and where did you see him at that time?

A I was there on a mission, and it

was in the Church on McArthur Street; at that time, I think it was Adams Street, and has been changed to McArthur street, and he was sitting in the center of the hall. I was a district president in the Bay area, and I came down the aisle to count the attendance, and he got up from the center of the hall and passed through the people to the aisle and came out to talk to me.

Q And you talked to him on that occasion.

A Yes.

Q That was in 1925.

A It was in, I think, May. Either May or June.

Tr. 65      BRUCE AXELSON, called as a witness by and on behalf of the plain-

tiff, was sworn and testified as follows:

Tr. 65 DIRECT EXAMINATION by Mr. Larson:

Tr. 66 Q About what time did you see him  
(meaning the plaintiff) in San Francisco?

A Well, the first time I saw him, I went to San Francisco in the last part of 1928, so I would say it was the first part of 1929 that I saw Parlane McFarlane on Third and Jessie streets.

Q Did you talk to him?

A Yes, sir. And my brother was also with me.

Q Did you see Parlane McFarlane after that?

Tr. 67 A Yes, sir.

Q Where did you see him then?

A On Howard Street between Third and Fourth, San Francisco. I didn't do much talking to him. My brother talked to him. But he said (meaning the plaintiff) he was going on a paint job out at Palo Alto.

Q Have you ever seen him since then?  
(Meaning the plaintiff.)

A Yes; I saw him one more time after that, and I distinctly remember the time because it was a year after my brother's death, (Tr. 68) in 1937.

Tr. 68 Q Where did you see him at that time?

A I saw him on the corner of Third and Howard Streets.

Q In San Francisco, California.

A Yes, San Francisco.

Q Did you talk with him at that time?

A Yes.

Tr. 69 Q Did you recognize him, (meaning the plaintiff) when you first saw him?

A Yes, we turned the corner of Market Street and Jessie Street in between Mission and Market, and as we went along down the street, my brother said "do you recognize this man," and I said it is Parlan McFarlane. He has lost a lot of weight.

Q When you saw him (meaning the plaintiff) in 1937. How did he look?

A He was still thin.

Q What was he doing?

Tr. 70 A He was drunk, if I have to tell you.

Tr. 71 Q He was leaning against a lamp post, drunk.

A Yes, sir.

Q Was he dressed well?

A Not too well; no, sir. He had a pair of painter's overalls on.

Q Did you talk to him?

A Yes, sir.

Q What did you talk to him about that time?

A I talked to him, I went up, and I said, hello, Parley, and he said his name wasn't Parley. I said, aren't you Parlan McFarlane, and he said, no. My name is Mac. I am from the Windy City.

Tr. 72 Q And the last time you talked to him, you knew he was Parlan McFarlane. You knew that.

A Yes, sir; I did. He finally admitted it the last time I talked to him. He asked me if his mother was

still living, and he asked me how Bill was; that was his brother, and I told him that Bill was running the theatre.

Q And the last time you talked to him, you knew he was Parlan McFarlane. You knew that.

A Yes, sir; I did.

Tr. 72 LOUISE COX, called as a witness by and on behalf of the plaintiff, was sworn and testified as follows:

Tr. 72 DIRECT EXAMINATION by Mr. Larson:

Tr. 73 Q And have you seen him recently? Parlan McFarlane.

A I think I seen him last summer in Provo on Main Street between Kress' and Firmage's stores. My daughter and I were together, and there was a man just ahead of us about three

feet, and something was said, and I burst out laughing and this man turned around and looked me right in the Tr. 74 face, and he, as soon as he seen me, took off just as fast as he could walk. My daughter said, "mother, that man recognized you." I said, "that is Jenny McFarlane's father." I was so positive that it was him because I had known him all my life and he knows me. He took the picture of my first three children up here in this little store.

Tr. 75 Q He apparently was trying to avoid you, would you say?

A I am positive that man knew me and that was what he was trying to do.

Q It is your opinion that it was Parlan McFarlane.



A that will always be my opinion until I am thoroughly convinced that it wasn't.

Tr. 75 CROSS EXAMINATION by Mr. Woolley:

Tr. 76 Q How was he dressed?

A He had a pair of bib overalls on, and I particularly noticed his walk.

Q Now wait a minute. Let's stay with the incident a little longer.

Tr. 77 A I want to explain the walk.

Q No, we will get along with that after a while. Was anybody walking in company with him?

A No one at all. He was all alone. It was about two o'clock in the afternoon.

Tr. 79 Q Well, Parlan was about your age.

A Yes.

Q Went through grade school together

and you had not seen him from 1916 until July or August of 1947, is that right?

A No, I hadn't seen him.

Tr. 80 Q And how far ahead of you was he when you laughed and he turned?

A Oh, he wasn't over about three feet.

Tr. 81 Q And then it was that you said your daughter said he recognized you.

A Not just the minute he turned and looked at me, my daughter said "Mama, that man knows you." Just as soon as he started walking fast, my daughter said, "Mama, that man recognizes you." I said immediately, "That is Jennie McFarlane's father right there." He wasn't four feet ahead of us.

Tr. 84 Q You think he didn't want to be rec-

ognized by you at that time.

A That is my opinion.

Tr. 84 MR. WOOLLEY: That is all.

MR. LARSON: I would like to introduce this judgment unless it is admitted or conceded that there is a judgment.

MR. WOOLLEY: That is admitted.

#### ARGUMENT

Appellant's first assignment of error alleges that the court erred in the computation of interest in the entry of said judgment and cites U.C.A. 44-0-4, Interest on Judgments.

"Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties which shall be specified in the judgment; other Judgments shall bear interest at the rate of 8% per annum."

In this particular case, the judgment

is for damages.

In 47 C. J. S. page 79 title Interest,  
Par. 75 it is said:

"To be sufficient a plea and answer must be responsive to a complaint or declaration seeking a recovery of interest, and it must raise an issue as to plaintiff's right to recover interest."

These are the black headlines of Paragraph 75.

Judgment for Damages. "Although there is authority to the contrary, note 9, in a general rule, statutes allowing interest on judgments include judgments for damages for torts," note 10.

47 C. J. S. Par. 21 at page 35, also  
33 C. J. page 215, note 61.

In 30 American Jurisprudence, page  
50, Par. 62, it is said:

"Compound interest may be recovered on a judgment whereby the aggregate amount of principal and interest is turned into a new principal."

This is cited in 21 A. L. R. page 433. The court says at page 437 of said case of Hamilton vs. Wheeling Public Service Company:

"And interest on judgments and decrees may properly be awarded even where such judgments and decrees themselves include the principal and interest theretofore accrued.

In addition to these, there are other recognized exceptions to the general rule, but it is unnecessary to enter upon an extended discussion of their nature and the circumstances under which it is proper to enforce them. Enough has been said to show that even where the ordinary obligations of indebtedness are involved, the rule that interest does not bear interest, though general, is not universal in its application."

Hamilton vs. Wheeling Public Service Company. 88 W. Va. 573; 107 South Eastern 401. Reported in 21 A. L. R.

The above quotation is taken from the said case in 21 A. L. R. at page 437.

Re: Compound Interest. See 47

C. J. S. Par. 21 at page 34. It is said:

"However, while there are some decisions to the contrary, note 9, it has generally been held that a judgment bears interest on the whole amount thereof, although such amount is made up partly of the interest on the original obligation, note 22, even though the interest is separately stated in the judgment, note 32. This rule is not affected by statutes which prohibit the allotment of compound interest, such statutes being intended merely as regulations of interest on contracts and not interest on judgments, note 94."

Re: Second Assignment of Error.

On page 8 of Appellant's brief, Appellant says:

"Assignment of error two goes to the important question in this case and that is as to whether or not the evidence supported the defendant's first defense that the plaintiff was dead and had been dead for more than twenty years prior to

the commencement of the action."

Then, counsel for Appellant proceeds to give a digest of the testimony in the case, and on page 13 of Appellant's brief, Appellant says:

"Concerning the legal proposition that absence creates a presumption of death, we refer to the following authorities."

He refers to a number of authorities, all of which seem to be based upon a seven year statute in one state or another whereby it was provided that "if a man were absent and not heard of for seven years in effect he was presumed to be dead."

We have no such statute in this state, and therefore, we should not be concerned unduly with said statute in other states.

Then counsel quotes extensively from different cases, all of which seem to the writer of this brief to be against him.

They appear to be insurance cases. Then on page 18 of defendant's brief, he cites the case of Praetorians vs. Phillips, 88 Pac. 2nd 647 at 650. He said: We have the following:

"It will thus be seen that the general rule is that where a person disappears and is not heard from for a period of seven years, upon a showing of due diligence, search and inquiry, it will be presumed that he is dead. This alone, however, will not give rise to a presumption that such person died prior to the last day of said 7 year period or at any particular time within said period."

There is no evidence in this case to the effect that McFarlane has not been heard of for a period of seven years. His wife and his brother both testified to seeing a letter from him addressed to his mother within seven years, to-wit: In the month of May 1941 prior to the death of his mother. Mrs. Cox testified to seeing



him in the year 1947 in Provo, and it would appear that the Judge who tried the case should have in mind, and it appears that Judge Keller believed the testimony of the witnesses for the plaintiff, and it is certainly within reason under all of the evidence for the court to believe that testimony, that persons had seen McFarlane since he left home in 1921.

The case of Fink vs. Prudential Insurance Company of America, 90 Pac. 2nd, at page 762, from which the Appellant quotes, seems likewise to be against the Appellant even in the state where a seven year statutory presumption existed.

This matter of evidence of death and of survivorship is treated in Vol. 25 C. J. S. Par. 5 at page 1053; in the black lines at the head of paragraph 5 it is

said:

"One who is shown to be alive at a given time is presumed to remain alive until the contrary is shown by proof or, in the absence of proof, until a different presumption arises."

In 16 American Jurisprudence, title Death, page 16, chapter 3, Presumptions and Proof of Death and Survivorship, Par. 12, it is said:

"Generally. This subdivision deals with presumptions and proof of death generally; proof of death for particular purposes is considered in specific articles. The general rule is that the burden of proof of the death of a person is incumbent on the party who asserts it. It is usually held that the death of a person may be presumed to have happened before a certain time, where it would be contrary to the ordinary course of nature that he should be living at such time."

Paragraph 13. "Presumption of of Continuance of life. The law presumes that a person shown to be

alive at a given time remains alive until the contrary is shown by some sufficient proof or, in the absence of such proof, until a different presumption arises. The civil law, following the principles of the Roman law, presumes a person to be living at the age of one hundred years, which was also the rule of the cannon law, and the common law does not stop much short of this. At least, in the absence of evidence to the contrary, the continuance of the life of an individual to the common age of man will ordinarily be assumed."

Paragraph 14, Proof of Death.

"The most satisfactory proof of death is by the direct testimony of a witness to the fact, but it may also be established by circumstantial or indirect evidence, such as the wearing of mourning by the family or testimony of relatives. The suggestion of the death of a plaintiff in the record and an order to make his devisees parties have been held to be prima facie evidence of his death for the purpose of the trial. While some textwriters and adjudicated cases hold that letters testamentary and of administration are admissible as evidence of the death of the party, in a suit between strangers, there is considerable authority opposed to this view."

Wherefore, espondent prays that Appellant take nothing by his appeal herein; that the judgment of the lower court be affirmed; that Respondent have his costs herein incurred.

LEWIS LARSON,  
Attorney for the  
Respondent and  
Plaintiff.