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Sher Khan v. Perry Zolezzi, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SHER KHAN,

Respondent,

vs.

CASE NO. 7346

PERRY ZOLEZZI, INC.,

Appellant.

Brief of Respondent

FILED

FEB 16 1966

Clerk, Supreme Court, Utah

WHITE, WRIGHT & ARNOVITZ
Attorneys for Respondent.

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PERRY ZOLEZZI, INC.,

Appellant.

CASE NO. 7346

Brief of Respondent

This action was commenced by the filing of a complaint on April 18, 1947, setting up a cause of action against the defendant, W. R. Perry, upon a note executed by him to the plaintiff, and also against the corporate defendant for the payment of this indebtedness of the defendant, W. R. Perry, upon the ground that the corporate defendant had assumed and agreed to pay this debt, and upon the further ground that the corporate defendant received property in the amount of this note from the defendant Perry, upon an undertaking to apply the property

pursuant to such promise and pay the property or money over to the plaintiff. Plaintiff also alleged that pursuant to such promise, the corporate defendant, on Sept. 21, 1946, did pay \$3,588.83 on this debt of \$18,588.83, leaving a balance due of \$15-000.00. A writ of attachment was issued and real estate and personal property of the defendant corporation was attached.

The defendant corporation entered a general denial and alleged that the sum of \$3,588.83 was paid by the defendant, W. R. Perry without authority of the defendant corporation (R. 27). A plea alleging that the cause of action was barred by the provisions of 33-5-4, U.C.A. 1943 was also filed (R. 28).

On Nov. 19, 1947, plaintiff filed an amendment to the complaint, adding a second cause of action. This second cause of action alleges a sale by the defendant, Perry, of all of his assets, otherwise than in the course of trade, and a failure of the purchaser to comply with the Bulk Sales Act—Sec. 33-2-2-U.S.C. 1943. (R 40). The delict of the purchaser was in failing to distribute the purchase price of the assets ratably to the creditors, in that all of the creditors of the individual defendant were paid in full, whereas this creditor, the plaintiff, was paid only \$3,588.83, upon a total obligation of \$18,588.83. This creditor was paid approximately 19% of the amount of its claim, whereas all other creditors were paid 100%. Plaintiff alleged that assets of an agreed and reason-

able value of \$192,809.90 were transferred by the defendant, Perry, to the corporate defendant, and at that time the liabilities of the defendant, Perry, including \$18,588.83, owing to the plaintiff, were \$142,809.90. The sale price then was more than enough to pay all creditors 100% of the amount of their claims.

The corporate defendant moved:

“to dismiss the second cause of action, or in the alternative, to require plaintiff to elect between said alleged causes of action as to which of the same he will stand upon as a basis for his remedy, upon the ground and for the reason that said alleged causes of action and the remedies sought are inconsistent in this, to-wit: That the alleged first cause of action, by its terms, seeks to enforce and secure the benefits for plaintiff of a purported contract, whereas under the alleged second cause of action said plaintiff seeks to repudiate, disallow and declare null and void as to plaintiff the said transaction referred to in the first cause of action.” (R. 57)

The fact that the corporate defendant stated in its motion that the plaintiff was seeking to have the sale declared null and void ‘as to the plaintiff,’ should itself have brought to the attention of the corporate defendant the fact that there was no inconsistency between the first and second causes of action, in that both causes of action acknowledge that the contract is valid as between buyer and seller, the second

cause of action only adding the entirely consistent allegation that as between the buyer and the seller's *creditors*, the contract, by force of statute, was null and void, and by force of statute could be disregarded. We shall discuss this feature later.

The action of the court in denying this motion to dismiss and in refusing to require the plaintiff to make the election of remedies is the basis of the corporate defendant's First Assignment of Error (App. Br. p. 26).

The corporate defendant then filed its answer to the second cause of action (R. 60). It pleaded as the second affirmative defense (R. 65):

"That the plaintiff has by filing its first cause of action herein and by attaching the funds of this defendant corporation, elected to treat said conveyance and transfer of property from defendant, W. R. Perry, to this defendant corporation as a valid conveyance and sale, and has elected his remedy herein."

We mention the second affirmative defense before the first affirmative defense because the court having sustained a demurrer to the second affirmative defense, the corporate defendant assigns that action of the court as error in its second specification of error (R. 26). The defendant here asserts that even though the court did not order an election of remedies, that the plaintiff by levying a writ of attachment elected to treat the conveyance and trans-

fer of property from the defendant, Perry, to the defendant corporation as a valid conveyance, and that plaintiff could not thereafter maintain the second cause of action. We shall discuss these two assignments of error together, since they are essentially the same, both dealing with that phase of the law known as "Election of Remedies."

The answer to the second cause of action also sets up a first affirmative defense, to-wit (R. 63):

"That this defendant therefore verily and in good faith, believed that there were no obligations of said defendant, W. R. Perry, outstanding and unpaid when it received from said defendant, W. R. Perry, a conveyance of said assets, and that there was no requirement on its part to comply with the provisions of Section 33-2-2 U.C.A. 1943."

It also pleaded (R. 64):

"That it believed that said defendant, W. R. Perry, had fully paid and discharged, by payment, compromise or otherwise, all of the debts and obligations of the defendant, W. R. Perry; that by reason of said belief this defendant corporation transacted business and incurred obligations in its own name from the date of its incorporation to the date of the commencement of this action, in the belief that it, this defendant, was obligated for obligations created only by itself. That by reason thereof, plaintiff is guilty of laches in attempting at this time to question the validity of said sale and assignment by defendant, W. R. Per-

ry, to this defendant, and plaintiff is estopped to question the validity thereof at this time.”

Defendant also pleaded as part of this affirmative defense (R. 64) as follows:

“Defendant is informed, verily believes and therefore alleges the fact to be, that the said plaintiff agreed with the said defendant, W. R. Perry, that plaintiff would look to said defendant, W. R. Perry, for payment of said obligation from his personal funds and would regard said obligation as a personal indebtedness of said defendant, W. R. Perry.”

It is notable that it is not pleaded that this agreement was with the corporate defendant, or that there was an agreement releasing the corporate defendant from this obligation, or that any agreement was made with the corporate defendant that the plaintiff would waive the provisions of the Bulk Sales Act, enacted for the protection of creditors.

The foregoing sets out the facts required as a preliminary to the argument to the corporate defendant's Assignments of Error Nos. 1, 2, 3 and 6. None of these Assignments would have arisen but for the addition of the Second Cause of Action; therefore, instead of arguing these Assignments now, we would prefer to discuss them when we get to the Second Cause of Action.

**REPLY TO APPELLANT'S ARGUMENT ON FOURTH ASSIGNMENT
OF ERROR (P. 43 Appellant's Brief)**

The Fourth Assignment of Error deals wholly with the First Cause of action. Defendant complains of the finding made that the defendant corporation assumed and agreed to pay this debt of the individual defendant and that it received property from the individual defendant upon an undertaking to apply it, pursuant to such promise, to the payment of the debt owing by the individual defendant. Defendant also complains of the finding of the subsidiary facts tending to prove these ultimate facts, these subsidiary facts being that the corporation made entries on the books showing that it had assumed this debt, and, secondly, that the corporation made a part payment of \$3,588.83. We shall first discuss the finding that the corporation assumed and agreed to pay this debt of the individual defendant, pointing out that this was done by the terms of Exhibit B, which was the pre-incorporation agreement executed by the two incorporators who owned 100% of the stock of the corporation. The writing, Exhibit B, meets the requirements of the Statute of Frauds. We shall also undertake to show that Exhibits C, D, E and H meet the requirements of the Statute of Frauds. If this court concludes that these writings meet the requirements of the Statute of Frauds, then it would seem to be unnecessary to proceed further in this brief to establish the fact that the promise made by the de-

fendant corporation to pay the debt of Sher Khan was made by the defendant corporation which "has received property of another upon an undertaking to apply it pursuant to such promise."

The bulk of this brief will be taken up by an exposition of the facts to demonstrate that the defendant corporation received property from the individual defendant upon an undertaking to apply that property to the payment of the debt of the individual defendant. Less discussion will be required to establish the subsidiary fact that a part payment of \$3,588.83 was made by the defendant corporation through its duly authorized officers and agents.

EXHIBIT B WAS THE PRE-INCORPORATION AGREEMENT WHICH BECAME BINDING UPON THE CORPORATION AND BY THE TERMS OF THAT AGREEMENT THE CORPORATION ASSUMED AND AGREED TO PAY THE DEBT OF PLAINTIFF

Exhibit B states that W. R. Perry and one Stephen Zolezzi were to form a corporation, the stock in which, after the conclusion of the transactions mentioned, were to be owned, in equal shares, by W. R. Perry and Stephen Zolezzi. The plan was that W. R. Perry was to acquire assets of the partnership of Neilsen and Perry (W. R. Perry was one partner) and that Perry would pay off the debts of the partnership and then contribute the assets acquired from the partnership, together with his own assets, to the corporation. We here set forth those preliminary provisions in Exhibit B which are necessary to an

understanding of that paragraph, subdivision (b) of Paragraph VIII, in which is found the promise to pay the debt of the defendant, Perry, to this plaintiff. These paragraphs are as follows:

“V.

The present liabilities which are owing by Neilson & Perry, a partnership, are represented by Mr. W. R. Perry to closely approximate the following:

Due Pacific National Life Assurance Company	\$36,500.00
secured by first mortgage on plant and equipment	
Principal	\$35,000.00
Accrued Interest	\$1,500.00
Federal withholding and payroll taxes and property taxes	6,000.00
Sundry creditors for merchandise, construction, services, etc.	60,500.00
Unpaid drafts and contingent commitments	61,000.00
	<hr/>
TOTAL	\$164,000.00”

“VI.

It is agreed that funds to meet the foregoing liabilities, set forth in item (5) hereof, will be provided as follows:

Proceeds of loan from First National Bank of Salt Lake City, to be secured by first mortgage on land, buildings and equipment	\$80,000.00
Cash to be provided by subscription of Mr. Zolezzi to stock of new corporation	50,000.00

Cash to be contributed by Mr. Perry directly to the First National Bank of Salt Lake City	10,000.00
Turkey drafts presently owned by Mr. W. R. Perry which will be converted into cash currently and contributed to First National Bank by Mr. Perry	18,000.00
Accounts Receivable and turkey inventory presently carried as partnership assets which are expected to be converted into cash to be delivered by Mr. Perry to First National Bank of Salt Lake City	10,000.00
TOTAL	\$168,000.00"

"VIII

Mr. Perry agrees that he will contribute to the new corporation, in exchange for cancellation of \$40,000.00 of the \$50,000.00 note given by him to the corporation and the issuance of 49,000 shares of the new corporation's \$1.00 per share par value stock, the following properties:

- (a) His equity in the real property and improvements, which equity will consist of said properties valued at \$135,000.00, subject to a first mortgage or deed of trust to secure the payment of \$80,000.00, liability for the payment of which obligation will be assumed by the new corporation. Value of real property equity \$55,000.00
- (b) Any cash remaining in the hands of the First National Bank of Salt Lake

City, which remains out of the sum of \$168,000.00 deposited under item (6) above, after the payment of other settlement of all of the liabilities of the partnership amounting to \$164,000.00, per item (5). Minimum net cash expected to be contributed 4,000.00

It is understood that the liability due Sher Khan, in the amount of \$23,588.83, may be settled temporarily by the payment of, say \$5,000.00 in cash and the execution by Mr. Perry of a note for the balance of \$18,588.83. In such event, the cash remaining in the hands of the First National Bank of Salt Lake City, to be transferred by Mr. Perry to the new corporation will be increased by \$18,588.83 and will be subject to the obligation incurred by Mr. Perry in the same amount of \$18,588.83.

- (c) Supplies and other prepayments presently recorded on the partnership books, having a book value in the approximate amount of \$15,000.00, together with certain Accounts Receivable, supplies and other assets presently owned by Mr. Perry in his own right closely approximating in value the amount of \$15,000.00. Value of assets to be contributed \$30,000.00

(d) TOTAL OF ITEMS (a), (b) and
(c) to be contributed by Mr. Perry

\$89,000.00

In consideration of the transfer to the new corporation of the properties represented by (a), (b) and (c) herein in this item (8) set forth, the new corporation will cancel \$40,000.00 of Mr. Perry's \$50,000.00 note and issue Mr. Perry 49,000 shares of its \$1.00 per share par value stock, as above indicated."

The assumption of this debt is found in the second paragraph of subdivision (b). It is true that the defendant corporation assumed payment of the debt only if it received property in the amount of \$18,588.83. As stated in the introduction of this discussion, it will be necessary to establish the fact that the defendant corporation received this sum of \$18,588.83 and after that fact is established we shall set forth our position as to the applicable law that makes this pre-incorporation agreement the agreement and writing of the corporation.

THE CORPORATION RECEIVED FROM THE INDIVIDUAL DEFENDANT, PERRY, MORE THAN WAS REQUIRED BY THE FIRST PARAGRAPH OF SUBDIVISION B. IT ACTUALLY RECEIVED \$18,599.83 MORE AS WAS CONTEMPLATED BY THE PROVISIONS OF THE SECOND PARAGRAPH OF SUBDIVISION (b) of PARAGRAPH VIII

In paragraph V the liabilities of the partnership were estimated as being \$164,000.00 and paragraph VI stated that \$168,000.00 was to be provided

from the sources stated in Paragraph VI to pay these debts of \$164,000.00. This \$4,000.00 overage was to be used by Perry, together with \$85,000.00 more of Perry's assets to repay the \$40,000.00 loan to the corporation and to pay for 49,000 shares of the capital stock of the corporation. This agreement was drawn upon the assumption that that amount of \$4,000.00 would be available if the figures used in paragraphs V and VI were correct. However, the agreement itself recognized that these figures would be subject to change. In the second paragraph of subdivision (b) of Paragraph VIII, which we have quoted above, it was understood that the liability due Sher Khan, in the amount of \$23,588.83 might be settled *temporarily*, by the payment of, say \$5,000.00 in cash and the execution by Mr. Perry of a note for the balance of \$18,588.83. As a matter of fact on the date of the execution of this agreement, namely, July 17, 1946, \$5,000.00 had already been paid to Sher Khan and the balance of the account was \$18,588.83 and a note had been given for that balance, and it was known that this note was not due until Dec. 1, 1946 and that this note would not be paid until the date it fell due. Though the estimated amount of the debts of \$164,000.00 as stated in paragraph V included the account of Sher Khan in the amount of \$23,588.83. (Exhibit F, First page of Accounts Payable), and funds were going to be provided for the payment of the entire account due to Sher Kahn, upon the date of the execution of this agreement, it was know that since this

debt to Sher Khan was not going to be paid immediately, there would be more than \$4,000.00 available to the new corporation. The second paragraph of VIII (b) took note of this eventuality, stating:

“In such event, the cash remaining in the hands of the First National Bank of Salt Lake City to be transferred by Mr. Perry to the new corporation will be increased by \$18,588.83, and will be subject to the obligation incurred by Mr. Perry in the same amount of 18,588.83.”

It was then apparent that if assets of \$168,000.00 were provided to pay the debts of \$164,000.00, less the \$18,588.83 due to Sher Khan, there would be left an excess of \$22,588.83, rather than an excess of only \$4,000.00. The corporate defendant then agreed to this statement in paragraph VIII (b), that in consideration of receiving that extra amount of \$18,588.83, in cash or its equivalent, the cash remaining in its hands would be subject to the obligation incurred by Mr. Perry in the same amount of \$18,588.83.

The corporate defendant admits this in its brief, but the defendant argues (P. 48 of App. Brief) that the Promotion Agreement—Exhibit B,

“did not provide that the defendant corporation should assume the liability. Contends that the agreement provided only that if Perry gave the corporation money equal to the Sher Khan debt that the corporation should

take the funds 'subject to' the obligation of Sher Khan. The most that can be said of such a provision would be that Perry might use corporate funds to pay the debt. This is vastly different from saying that the note becomes a company liability."

Counsel for respondent must say that he is unable to see what is different about using the corporate defendant's funds to pay the debt from setting up this obligation as a company liability. Indeed, the corporation itself, upon its own books, with the acquiescence and consent of the company's bookkeeper, stockholders, auditors and officers set this amount up on the company's books as a liability. See Exhibit D, being a true copy of the journal entry on the books of Perry Zolezzi, Inc., taken from the General Journal, page 3, lines 1 to 9. This entry records the personal property and assets taken over from W. R. Perry in August of 1946 at a value of \$40,152.94, and shows the following contra-entries:

That it records a liability to Sher Khan of \$18,588.83 and gives Perry credit on his loan account of the difference of \$21,564.11. It follows these entries with the following explanation:

"To record receipt of assets and assumption of liabilities of W. R. Perry."

This is the company's own explanation of what is meant by taking over these assets and stating that it would take these assets over, subject to the obliga-

tion of the Sher Khan account. The company's own explanation is that it meant to, and did, assume the obligation to pay Sher Khan. Exhibit C also states that the account of Sher Khan was assumed by Perry Zollezzi, Inc., the corporate defendant. Exhibit H states:

“We will not be able to pay Mr. Sher Khan on December 1st but we will be in a position to do so by January 10th.”

This Exhibit is signed by the company, albeit by W. R. Perry, as President of the company.

Reference to these facts should dispel the statements of counsel for appellant that no additional funds or property was received. Counsel for appellant blandly states (App. Br. 49):

“Mr. Duke, Perry's former employer and later Secretary of the company, testified that no such additional money was received by the company. It was a paper transaction.”

If counsel means by the words ‘paper transaction’ that the money or property was recorded on paper in the books of the company, he is correct. If he is using the term as being synonymous with a transaction without substance, he errs grossly. Mr. Duke testified to the contrary (R. 77):

“Q. (by Mr. Arnovitz) Mr. Duke, I show you Exhibit G, which is the Account Receivable Account of W. R. Perry. I will ask you to refer to this record and tell us what bal-

ance there was in favor of Mr. Perry as an amount owing to Mr. Perry as of August 6—no, well, as of this particular period here?

A. As of the last day of August there was a credit balance due Mr. Perry of \$4,310.40.

Q. That was after setting up a credit for the account of Sher Khan, wasn't it?

A. That same day, yes.

Q. In other words, after showing payment of Sher Khan's account, Mr. Perry had contributed more assets by \$4,310.40 than the whole total of his debts were. Isn't that right, what that account shows?

A. The account shows a credit balance.

Q. As of what date?

A. As of the last day of August."

Appellant makes reckless statements that the action setting up this liability on Perry Zollezzi's books was some sort of fraud by the defendant, Perry. (App. Br. 50 to 54, inc.)

(R. 159) Mr. Duke was asked by attorneys for the appellant:

"Q. Was any direction on the part of directors of the corporation in regard to its books taken into consideration at the time you set them up.

A. No—in that we did transfer the exact balances of W. R. Perry, rather than—we did have a copy of the minutes of the

first Board of Directors' meeting, which coincided—which figures coincided very closely with the figures on the books, but we transferred the actual book values.”

Exhibit I contains the minutes of the special meeting of the Board of Directors, and Mr. Duke acknowledges that the figures stated in the minutes “coincided very closely with the figures on the books.” (R. 161)

Mr. Duke was asked:

“Q. In regard to your opening entries in the journal whose language is used in those, in that journal, and who selected the language used in that journal?

A. Mr. Evington of--

Q. Mr. Evington?”

THE COURT. Though you may be clear, just what was Mr. Evington's position in this set-up?

MR. RICH. He has testified, your Honor, he was a member of the firm of Wells, Baxter & Miller.

THE COURT. A representative of that firm and that is the only capacity he appeared in here in connection with this original transaction of setting up the books as a hired accountant?

MR. ELTON. That is right.

THE COURT. Hired by the new corporation?

MR. ARNOVITZ. That is right.

THE COURT. Is that correct?

MR. RICH. That is correct.

MR. ELTON. That's right."

As further evidence of the fact that the matter of setting up books was not done at the direction of Mr. Perry, is found in the fact that when the accounts receivable belonging to Mr. Perry were taken over by the corporate defendant they did not give Mr. Perry credit for all of his accounts receivable, but set up a reserve of \$821.97 (R. 162 and 168). Surely if Mr. Perry had given the orders, the accounts receivable would have been taken over at their full face amount, rather than by setting up a reserve of \$821.97.

More than all this, the auditors sent to Salt Lake City by Mr. Zolezzi approved the values and had checked over the entries made on the books of the corporation (R. 155, 157). Mr. Pinska was an accountant and auditor who came to Salt Lake City with Mr. Zolezzi to examine the books of the corporation after they had been set up. After discussing that examination of the books by Mr. Pinska, the following evidence was given by Mr. Duke: (R. 157)

"Q. But at any rate, after that examination, no change was made in the values of these assets as set up on the books of the company?

A. No.

Q. And there never has been a change made, has there, in the books of the company?

A. No.”

This discussion of the First Cause of Action demonstrated that the corporate defendant received \$18,588.83, just as was contemplated by the eventuality mentioned in the second paragraph of subdivision (d) of paragraph VIII. We shall substantiate this by a series of schedules prepared from the exhibits introduced into evidence.

SUBSTANTIATION OF FACT THAT ASSETS OF \$18,588.83 MORE THAN WAS NEEDED TO GIVE THE CORPORATION A NET WORTH OF \$100,000.00 WAS RECEIVED BY THE CORPORATION AND THAT IN CONSIDERATION OF THE RECEIPT OF THAT SUM IT ASSUMED THIS OBLIGATION. THE ASSETS RECEIVED IN THIS AMOUNT OF \$18,588.83 COMPENSATED FOR THE LIABILITY ASSUMED IN THE SAME AMOUNT, THE CORPORATION STILL HAVING A NET WORTH OF \$100,000.00.

The pre-incorporation agreement contemplated that so much of Perry's assets as would be needed to pay off the debts would be reduced to cash. Originally it was thought that \$164,000.00 in cash would be needed and that is why it was contemplated that cash would be available in the amount of \$168,000.00, or \$4,000.00 more than was necessary to pay the expected debts. However, the actual debts were only \$142,809.90, and by deferring the Sher Khan debt the cash required to pay the remaining debts was \$124,221.07. Thus the fund provided by the \$80,-

000.00 cash received on the mortgage and the \$50,000.00 for Zolezzi's contribution to the capital stock was more than enough to pay this amount of \$124,221.07. Hence it became unnecessary to reduce the other assets to cash, and, instead, the corporation took over Perry's assets at market value. Therefore the assets taken over would not result in their being \$4,000.00 of actual cash or any amount of actual cash, but instead, the new corporation would have tangible assets which were the equivalent of \$4,000.00 in cash. Whether the corporation would have had available in cash, or the equivalent thereof, only \$4,000.00 after the payment of all the debts of Perry, including the debt to Sher Khan, as stated in the first paragraph of subdivision (d), or whether it would have had available in cash, or the equivalent of cash, \$4,000.00, plus the \$18,588.83, of which it was temporarily deferring payment to Sher Khan, the end result sought to be obtained by the pre-incorporation agreement was accomplished. This end result sought to be obtained by the pre-incorporation agreement was that there was to be a net worth of \$100,000.00 in the new corporation upon its formation. (See par. IX of Exhibit B, which states:

“After giving effect to the foregoing transactions the new corporation will commence with a balance sheet substantially as follows:” (Then follows the balance sheet which we have inserted in the brief as “Schedule 1-A. See page 52)

The balance sheet in Schedule 1A shows what the balance sheet of the new corporation was required to look like if Perry had actually paid the debt, including the Sher Khan debt. Although it was anticipated that the Sher Kahn debt might not be paid, a second balance sheet was not inserted in the exhibit to show what such a balance sheet would look like. To prove that in each case the same end result namely, a net worth of \$100,000.00 is reached in both situations, we have prepared Schedule 1B (page 53).

We stated above that the seller, Perry, and the buyer, the defendant corporation, estimated Perry's debts as \$164,000.00, and that estimate included an account of Sher Khan in the amount of 23,588.83. This estimate of \$164,000.00 was too high for several reasons. There had been paid a few days before this agreement was signed the sum of \$5,000.00 to Sher Khan, and by going to his creditors Perry had secured a reduction in the amount of his debts so that the debts that he actually owed were \$142,809.90. Therefore it was not necessary to provide a fund of \$168,000.00 in order to pay the debts and to have a remainder of \$4,000.00. The amount necessary to accomplish this purpose was \$146,809.90. The mortgage loan from the First National Bank of \$80,000.00 and the \$50,000.00 stock subscription of Zolezzi, provided \$130,000.00, so only \$16,809.90 additional was required.

However, Perry had available assets of \$56,163.33 in his old business. In order to pay for his

capital stock of \$49,000.00 and to repay his loan as required in paragraph VIII, only \$30,000.00 of personal property was required. The remaining \$26,163.33 was also transferred to the corporation so that \$9,353.43 more was paid into the corporation in personal property assets than was required. The plant and equipment values were \$1,646.57 in excess of \$135,000.00 required. Together these two items equal \$11,000.00, and they were paid into the corporation in lieu of the \$10,000.00 promissory note which Perry was going to contribute and the \$1,000.00 in cash which Perry was going to pay in. Therefore, Perry contributed the exact amount of the property required of him by the agreement, and then when the payment of the Sher Khan account was deferred, the sum of \$18,588.83 was left on hand in the hands of the corporation.

The actual balance sheet of the corporation taken from the books of the company immediately after the corporation's books were opened shows that the corporation had a net worth of \$100,000.00, even after setting up the Sher Khan debt as a liability and after setting up an additional liability to Mr. Perry of \$4,310.40. If this sum of \$4,310.40 had not been owing to Mr. Perry, individually, this balance sheet, Schedule 1C would have shown the same balancing figure of \$198,588.83. We point this out so it will not be thought there is any conflict between the balance sheets, Schedules 1B and 1C. The balancing figure in Schedule 1C is \$202,899.23, including the

additional item of \$4,310.40, and eliminating that item, it would have been \$198,588.83, the same as in Schedule 1B. These three schedules are found in this brief at pages 52-54.

Further proof of the fact that the corporation received \$18,588.83 more than was contemplated is found in Exhibit L, prepared by Mr. Helwing, an auditor who appeared as witness for the plaintiff. This exhibit proves conclusively that not only \$18,588.83 more than was necessary to pay the other debts and for the capital stock was actually turned over, but in fact, that the excess amount turned over amounted to \$23,899.23, and after recording the assumption of this liability of \$18,588.83, and allowing for the \$1,000.00 that had been thought necessary to pay for the last \$1,000.00 worth of the capital stock there was still an excess amount of assets paid in by Mr. Perry of \$4,310.40.

Further proof of this same fact is found in Exhibit G, which is the "Accounts Receivable Account" of W. R. Perry on the books of the corporation. Line 10 of that exhibit shows a credit balance in W. R. Perry's account of \$4,310.40, which means that Mr. Perry had actually paid that much more in assets than was required to pay all of Perry's debts, including the debt of Sher Khan. It cannot therefore be stated that the corporation did not receive assets from Mr. Perry as consideration for its promise to pay this debt nor that it did not agree to pay the obligation owing to the plaintiff.

THE PROVISIONS OF EXHIBIT B, THE PRE-INCORPORATION AGREEMENT BECAME BINDING ON THE CORPORATION AND THEREFORE IS A SUFFICIENT WRITING TO MEET THE STATUTE OF FRAUDS.

After discussing these facts and making analyses of these exhibits, we pass to the law to show that the written contract of W. R. Perry and Stephen Zolezzi became the writing of the corporation. The cases do not require that in order for a promotion agreement to be binding that the agreement be signed by the stockholders owning 100% of the capital stock.

The only question is whether the corporation accepted the benefits of the contract. See *Wall vs. Niagara Mining Company*, 20 Utah 474; 59 Pac. 399. We quote the following from that case:

“The most important question presented is whether ‘promoters’, or persons who contemplate organizing a corporation, can make contracts which will bind it after it becomes a legal entity. It is contended by counsel for the appellant that a contract made for a corporation before it has an actual existence is not enforceable by or against it. This contention is too broad. It indicates that a corporation cannot, even in the exercise of its powers to make contracts, accept and adopt a contract made for it by the promoters before its existence as an entity. The legitimate sequence of this would be that a corporation, upon full and complete organization under the statute, might accept and adopt such a contract, receive and retain the benefits thereof, and at the same time be absolved from its burdens.

We have no sympathy with a doctrine that would lead to such results; that might be employed as an instrument of fraud and injustice to the unwary. It may be assumed as true that promoters and incorporators have no standing in any relation of agency, since that which has no existence can have no agent, and, in the absence of any act authorizing them so to do, can enter into no contract, nor transact any business, which shall bind the proposed corporation after it becomes a distinct entity; but, notwithstanding this be true, still such promoters and incorporators may, acting in their individual capacities, make contracts in furtherance of the incorporation, and for its benefit, and, after the incorporation comes into being as an artificial person under the forms of law, it may, at least under the weight of American authority, accept and adopt such contracts, and thereupon they become its own contracts, and may be enforced by or against it. This the corporation may do, not because of an agency, on the part of the incorporators, before the existence of the entity, for there is none, but because of its own inherent powers as a body corporate to make contracts. Moreover, the adoption of such a contract need not be by express action of the corporation, entered on its minutes, but may be inferred from its own acts and acquiescence, or those of its agents, and there need be no express acceptance; or the corporation may be bound by the contracts of its promoters, if made so by its charter, which it has accepted and to which it was agreed. Unless, however, there be an acceptance and adoption thereof in some such way, the corporation will

not, in general, be bound by the contracts of its promoters and incorporators, made for it before its complete organization. Where a contract is made by and with promoters, which is intended to inure to the benefit of a corporation about to be organized, such contract will be regarded as in the nature of an open offer, which the corporation, upon complete organization, may accept and adopt or not, as it chooses; but, if it does accept and adopt and retain the benefits of it, it cannot reject any liability under it, but in such case will be bound to perform the contract, upon the principle that one who accepts and adopts a contract which another undertook to perform in his name and on his behalf must take the burden with the benefit. In *Mor. Priv. Corp.*, 548, it is said: 'A corporation may, however, make itself responsible for such acts and contracts by subsequently adopting them. The liability of the corporation, under these circumstances, does not rest upon a supposed agency of the promoters, and a ratification of their acts, but upon the immediate and voluntary act of the company. If an agreement is made with promoters or persons about to form a corporation, and the parties intend that the corporation, when formed, shall become a party to the agreement, such agreement would usually constitute or include an open offer, which may be accepted by the corporation after it is formed. And this is true, whether the promoters are primarily liable or not.' So, in *Tayl. Priv. Corp.* 87, the author says: 'It may be said, generally, that a corporation, when organized, in the absence of ratification on its part, is not responsible for the acts nor bound

by the contracts of its promoters, unless made so by its charter, which it has accepted and thereby agreed to. But this is not identical with the proposition that the corporation may ignore the engagements entered into by its promoters when it has had the benefit of them. It cannot be said that the promoters were the agents of the corporation, but, nevertheless, the corporation may adopt such acts of its promoters intended for its benefit, and may ratify such of their contracts made on its behalf, as would have been within the powers of the corporation after its organization, and this it may do notwithstanding that it was not organized when those contracts were made; and, if it ratifies their contracts, then, in the absence of express agreement with the other contracting party, the corporation must be held to have assumed the liabilities which would have attached to it had its promoters been its agents at the time when they contracted on its behalf.' In *Alger, Promoters Corp.*, 206, it was said: 'The acceptance or adoption may be implied from the acts of the corporation, — 'acts from which you can infer, and from which you ought to infer,' that there was an adoption of the contract by the corporation after its formation. This may be inferred from the acceptance by the corporation of property directly delivered to it by the other party to the contract, or received from him through the promoters, to whom it was delivered to be turned over to the corporation when formed; or it may be inferred from the retention by the corporation of the benefit of services rendered under the contract subsequent, or ordinarily prior, to the formation of the corporation., ' (Citing many cases.)

This case is followed by a more recent Utah case, *Murray vs. Monter*, 90 Utah 105; 60 Pac. (2) 960 at 962:

“The general rule of law is that promoters who undertake to organize a corporation cannot bind the corporation by their contracts and agreements made before the corporation is organized. *Tanner vs. Sinaloa Land & Fruit Co.*, 43 Utah 14, 134 Pac. 586, Ann. Cas. 1916C, 100; *Wall vs. Niagara Min. & S. Co.* 20 Utah, 474, 59 P. 399, 401; 1 *Thompson on Corps.* (3d Ed) 106; 4 *Cook on Corps.* (8th Ed) 707. But that the corporation after incorporation may accept and adopt such a contract which thereupon becomes its own contract, which may be enforced by or against it. *Wall vs. Niagara Mining & S. Co.* (supra). The rule is succinctly stated in 4 *Cook on Corps.* (8th Ed) 707, p. 2894: ‘A corporation accepting the benefits of the contract of its incorporators must accept the burden, and a promoter’s contract which has been ratified or adopted by the corporation, or the benefits of which have been accepted by the corporation with knowledge of such contract, may be enforced against it.’ ”

Counsel cited cases which state only the general rule, namely, that corporation is not bound by a promotion agreement. He does not refer to this exception to the rule which is discussed in the two cases which we have just quoted from.

We have an almost identical state of facts to our case in the case of *Balfour Guthrie & Co. vs. Breslaur*,

90 Wash. 441; 156 Pac. 398. In that case an agreement to which were subscribed the initials of the incorporators of this proposed corporation, mentioned that the debts of the former business were to be assumed by the new corporation. However, the minutes of the new corporation did not make an express assumption of the debts. The court held that was unnecessary and that the assumption of the debts could be implied from the fact that the corporation took over the assets, subject to the express promise to pay the debts of the former business. Since the provisions of Exhibit B became binding upon the corporation, there is a writing on behalf of the corporation sufficient to meet the Statute of Frauds.

**EVEN IF EXHIBIT B IS NOT BINDING ON THE CORPORATION
THERE ARE OTHER WRITINGS OF THE CORPORATION TO
SATISFY THE REQUIREMENTS OF THE STATUTE OF FRAUDS.**

Though counsel feels that we may well rest at this point on the proposition of showing that there was a writing sufficient to meet the statute of Frauds in the form of Exhibit B, nevertheless, without burdening the court too far, we should like to point out the additional exhibits which would be sufficient if there were not an Exhibit B.

Exhibit C is a writing by the corporation's own accountants and signed by them. It was admitted that Wells, Baxter & Miller, certified public accountants, were the agents of the corporation. The writing was subsequent to the organization of the corpora-

tion. The writing goes on to prove the complete performance of the agreement by the corporation. The writing states that personal property assets of \$56,-163.33 (the total of the six items listed beginning with the one labelled "Accounts Receivable") were received by the corporation, as well as real property having a value of \$136,646.57, or a total of \$192,-809.90. It also proves that the total amount of the liabilities paid out by Perry were \$124,221.07 and that capital stock of \$50,000.00 was given to Perry, or a total of \$174,221.07, and it then states categorically that the difference between the amount of assets contributed of \$192,809.90 and the amounts paid out for Perry's debts and his capital stock totaling \$174,221.07, or \$18,588.83, the amount of the debt owing to Sher Khan was expressly assumed. This statement is found on page 1 of Exhibit C, in these words: " * * * account payable of Nielson & Perry to Sher Khan assumed by Perry-Zolezzi, Inc." This writing should also be sufficient to meet the requirements of the Statute of Frauds, namely, that an agreement to assume the debt of another must be in writing. See *McConnell vs. Brilliant*, 17 I11, 354 at 360; 65 Am Dec. 661, which states:

"Any kind of writing from a solemn deed down to mere hasty notes or memoranda,, books, papers or letters, will suffice."

Exhibit D and G are writings sufficient. They are of the books of account of the corporation prepared by the corporation's agents.

Exhibit D, an entry on the corporate books when the corporation took over the assets, specifically records that the credit accounts payable, Sher Khan \$18,588.83, was entered (in the words of the accountant): "To record receipt of assets and assumption of liabilities of W. R. Perry." These are the exact quotes from page 3 of the corporation General Journal.

Exhibit G, line 8, shows that there was a credit to W. R. Perry of \$21,564.11 in consideration of "transfer of assets of W. R. Perry." This is the rec-ordation on the account of W. R. Perry on the same General Journal entry (Exhibit D), showing that the corporation assumed liabilities of W. R. Perry.

Exhibit H, a letter written by Perry-Zolezzi, Inc., dated November 29, 1946, is also a sufficient writing. That letter states: "We will not be able to pay Sher Khan on December 1st but we will be in a position to do so by January 10th." This letter was written after September 21, 1946, upon which date the corporation had acknowledged the debt of \$18,588.83, by paying the corporate check in the amount of \$3,588.83 on the debt.

"When the party sought to be charged has admitted the contract in writing over his signature, the statute is complied with no matter to whom the writing may have been addressed." 27 C. J. 301.

EVEN IF THERE WERE NO WRITING THE AGREEMENT TO ASSUME THE DEBT IS ENFORCIBLE BECAUSE IT WAS A PROMISE MADE BY ONE WHO HAS RECEIVED PROPERTY OF ANOTHER UPON AN UNDERTAKING TO APPLY IT PURSUANT TO SUCH PROMISE.

“33-5-6 PROMISE TO ANSWER FOR OBLIGATION OF ANOTHER — WHEN NOT REQUIRED TO BE IN WRITING.

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:

(1) Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise, or by one who has received a discharge from an obligation, in whole or in part, in consideration of such promise.”

This section is a statutory enactment of the common law rule that where a promise is given to pay the debt of another in consideration of the receipt of property, that the agreement need not be in writing. The common law rule is set out in the case of *Feldman vs. Maguire*, 55 Pac. 872 (Ore.). The plaintiff was privileged to make proof under the pleadings of either a written or oral agreement. See 27 C. J. 378, N. 27, citing the case of *Slingerland vs. Slingerland*, 46 Minn. 100; 48 N.W. 605. The statement from C. J. reads as follows:

“A complaint alleging an agreement to convey real estate, without stating whether it was written or oral, and alleging also such a part performance as would take an oral agreement out of the statute, is supported by proof of either a written contract or an oral one partly performed.”

We will not repeat the matter already discussed to show that the defendant received \$18,588.83 worth of assets plus \$4310.40 and that it promised to pay this note owing to the plaintiff. If the defendant corporation takes the position that the debts of the defendant had all been paid except this note owing to Sher Khan, then the book entries of the corporation (see Exhibit D) show that the corporation received assets of \$40,152.94 in August 1946, in consideration of which it assumed and agreed to pay the note. We refer back to our discussion of this matter on page 8 of our brief.

EVEN IF THERE WERE NO WRITING ON THE CORPORATION BOOKS SHOWING THAT THE CORPORATION ASSUMED THE DEBT THE LAW WOULD IMPLY THAT WHERE THE CORPORATION RECEIVED THE ASSETS OF A PREDECESSOR BUSINESS THAT IT ASSUMED THE DEBTS OF THE PREDECESSOR BUSINESS.

There is even a stronger case where there was no writing whatsoever, and even though the Bulk Sales Statute was not invoked under the pleadings in that case, nevertheless the court held that the new corporation had assumed the liabilities of the former

business. *S. & J. Supply vs. Warren* (Okla) 133 Pac. (2) 201. The court in that case held that the assumption may be express or it may be implied from the circumstances. The opinion is brief and it follows:

“A corporation organized to take over the business of a partnership or of an individual may assume the liabilities of the partnership or the individual and thereupon become liable to the partnership creditors. The assumption may, according to some authorities, be either express or implied. It may be implied from the circumstances. 13 Am. Jur. Corporations, Section 1249; *Lamkin vs. Baldwin & Lamkin Mfg. Co.* 72 Conn. 57; 43 A. 593, 1042, 44 L. R. A. 786; *Zeimer vs. C. G. Bretting Mfg. Co.* 147 Wis. 252, 133 N. W. 139, Ann Cas. 1912D 1275. This court in *Shirvin Operating Co. vs. Southwestern Electric C.*, 71 Okl. 25, 174 P. 1069, 1073, 15 A. L. R. 1104, said: “A long line of decisions may be found wherein it is held that when a corporation is merged into or absorbed by another, which continues its business, and where there is no substantial change of ownership, nor in the kind of business carried on, then the new corporation is but the successor of the former concern, and is liable as such for its debts.”

See also, *McCarthy vs. Liberty National Bank*, 73 Okl. 275, 175 P. 940, 7 A.L.R. 137; *Cunningham vs. Spencer*, 111 Okl. 217, 239 P. 444; *Burkholder vs. Okmulgee Coal Co.* supra. We are of the opinion that the case comes within the rule of a continuing corporation taking the place of, and the assets of, the for-

mer unincorporated entity. There is no denial that A. M. Strange, president of the S. & J. Supply Company, ordered and received all the goods, wares and merchandise as manager of the particular organization at the time the purchases were made. There is no denial that the account has not been paid.” (*Italics ours.*)

We conclude the First Cause of Action is sustained by proof of the writings to establish that the corporation defendant assumed and agreed to pay the defendant; second, that even if there were no writings that there was a promise by the defendant corporation to pay this note, and that having received property of the defendant, Perry, upon an undertaking to apply it pursuant to such promise, the case falls under the provisions of Section 33-5-6, U.C.A. 1943, and, third, even if there was not an express promise to pay the debt, that the promise is implied from the circumstances of the case. This third conclusion follows from the case of S. & J. Supply Company vs. Warren, hereinabove discussed.

It seems to us that we can conclude this discussion on the First Cause of Action by stating that subsidiary findings to which the defendant corporation objects are fully sustained by the evidence. The corporation did pay \$3588.83 on September 21, 1946, to apply on this note and the defendant, Perry, was the President and General Manager of the corporation, and had the authority to make the payment. It was so testified. The defendant pleaded lack of authority

on the part of Perry, the President and General Manager, but not one word of evidence was offered in support of that plea; in fact, the defendant offered no evidence whatever. Upon the question of payment of the \$3588.83 the evidence is that the corporation auditors and the stockholders holding 100% of the stock, knew of the payment and never made any objection to its having been made.

REPLY TO FIFTH ASSIGNMENT OF ERROR.

Appellant, the defendant corporation, contends that some of the properties transferred by Perry to the defendant corporation were not of the character of assets the transfer of which are subject to the provisions of the Bulk Sales Act. Appellant lists the properties which it considers to be in that classification on page 59 of its Brief. Respondent disagrees with that listing and herewith submits the asset section of the balance Sheet, Exhibit J, which lists all of the assets transferred by Perry to the corporation and their nature and character:

“ASSETS PAID IN By W. R. Perry as per OPENING ENTRIES

Item	1	Land	\$ 6,455.00	
Item	2	Building	93,800.94	
Item	3	Dwelling	1,595.50	
Item	4	Furniture & Fixtures	1,849.99	
Item	5	Machinery & equipment	32,945.14	136,646.57

Item 6	Merchandise	16,832.36	
Item 7	Supplies	11,401.41	
Item 8	Accounts Receivable	26,768.74	
Item 9	Meter Deposit	50.00	
Item 10	State Insur. Fund dep.	100.00	
Item 11	Prepaid Insurance	1,010.82	
Item 12	Prepaid Freight	310.68	
Item 13	Prepaid Taxes	37.70	
Item 14	Prepaid Expenses	7.55	56,519.26
			<hr/>
			\$193,165.83

We herewith list those assets which the corporation would admit are subject to the provisions of the Bulk Sales Act. They are the following:

Item 4	Furniture & Fixt.	\$ 1,849.99
Item 5	Machinery & Equipment ..	32,945.14
Item 6	Merchandise	16,832.36
Item 7	Supplies	11,401.41
		<hr/>
		\$63,028.90

Exhibit B stated that money to pay the debts was to be made available from the \$80,000.00 received on the mortgage of the real estate and the cash of \$50,000.00 (Ex. B. Par. VI quoted on page 9 of this brief.) This \$130,000.00 was more than enough to pay the debts of Perry, exclusive of the Sher Khan debt.

They amounted to \$124,221.07. The only debt of Perry outstanding when the above listed assets, subject to the provisions of the Bulk Sales Act, were transferred, was the one debt owing to the plaintiff Sher Khan in the amount of \$18,588.83. The \$63,-028.90 worth of assets transferred was three times more than needed to pay this debt.

DISCUSSION OF APPELLANT'S POINTS 1, 2, 3 and 6

If this court holds that the plaintiff has stated and sustained either its First or Second Causes of Action, then the remainder of this brief becomes academic.

At the beginning of our brief we mentioned we would discuss Assignments 1, 2, 3 and 6 after answering the Assignments of Error directed at the First and Second Causes of Action on their merits.

We preface our discussion with some general statements concerning the doctrine of "Election of Remedies":

"It has been said that the doctrine is a harsh rule which is not to be extended and that it is to be applied by the court with a wide discretion in order that it may not be made an instrument of oppression." 28 C.J.S. 1058.

"The purpose of the doctrine of election of remedies is not to prevent recourse to any remedies but to prevent double redress for a single wrong." 18 Am. Juris 131, note 13.

Assignments 1, 2 and 6 are essentially the same and we shall discuss them together. In each of these Assignments the appellant relies on the same general proposition stating that:

In the First Assignment of Error, "plaintiff seeks to enforce the contract in the First Cause of Action, and invalidate it in the Second Cause of Action," (as to first Assignment of Error see R. 57 quoted at page 2 of our brief); as to the Second Assignment of Error stating (App. Br. p. 35): "That by filing his First Cause of Action and by attaching funds of defendant corporation on the basis of a valid contract plaintiff had elected to treat the sale by Perry to the corporation as valid, and that he had elected his remedy in the case"; as to the Sixth Assignment of Error (App. Br. p. 74) "(He (plaintiff) is the one who seeks to enforce the contract in the First Cause of Action and invalidate it in the Second Cause of Action."

Appellant contends that the plaintiff has treated a contract as valid in the First Cause of Action and that in his Second Cause of Action he has treated the same contract as invalid.

At the outset we assert that a complete answer is that in the First Cause of Action we refer to an entirely different contract than the contract to sell and purchase that is referred to in the Second Cause of Action. The First Cause of Action pleads a contract that the appellant received property upon a promise to apply it to the payment of the respondent's debt,

and that cause of action is sustained by proof of the receipt of the property in the amount of \$18,588.83 that was set aside for the Sher Khan debt and the promise to pay the debt of the plaintiff. The Second Cause of Action refers to a sale and the transfer of assets of not only \$18,588.83, but a transfer of all of the assets of a seller to a buyer (this corporate defendant), and on account of which sale the law imposes a duty to deliver a proportionate share of the purchase price to each creditor of the seller.

The two causes of action are based upon separate and distinct facts. In the First Cause of Action we plead the assumption of the debt and then proved the contract by which the debt was assumed and it was supported by the consideration of the transfer of the real property from Perry to the corporate defendant. That is sufficient to permit recovery. The Second Cause of Action may be considered to be proven by showing the transfer of the personal property making the sale subject to the Bulk Sales Act, and therefore by force of statute the corporate defendant is liable for this debt. Thus, in the Second Cause of Action, we need not prove or rely upon anything that was alleged or proved in the First Cause of Action. This view is supported in 28 C.J.S. 1065, which states:

“The doctrine does not require an election between distinct causes of action arising out of separate and distinct facts.”

In order for the causes of action to be inconsistent, one of the causes must admit a fact and the other deny the same fact, not a legal conclusion. See *Jaloff vs. United Auto*, 120 Ore. 381, 250 Pac. 717, where the following statement is found:

“In order that an election to pursue one remedy shall preclude resort to another, the two must be inconsistent. It follows that a person may pursue any number of consistent concurrent remedies until he obtains satisfaction from some of them. No estoppel by election arises where there is but one cause of action and alternative or different forms of relief are sought.”

The latest Utah cases on the subject are:

Kennedy vs. Griffith, 98 Utah, 183; 95 Pac. (2) 742;

Commercial Bank vs. Spanish Fork, 153 Pac. (2) 547;

Salt Lake City vs. Industrial Commission, 81 Utah, 212; 17 Pac. (2) 239.

See also *Labor Hall Association vs. Danielson*, 163 Pac. (2) 167; 161 A.L.R. 1079.

Where the law affords distinct but not inconsistent remedies, the election to follow one does not operate as a waiver of the other. See *Electrical Prod. vs. Haniotis*, 170 Okla. 144; 39 Pac. (2) 36.

“The fact that the plaintiff had previously attempted to hold the defendant liable as a

party would not prevent a subsequent suit against him as guarantor of the same contract since one remedy was not inconsistent with the other." *W. R. Rawleigh vs. Burkholder*, 50 Ga. App. 514; 1 S.E. (2) 609.

Secondly, even though it be stated that the First and Second Causes of Action are based upon the same contract, the plaintiff in its First Cause of Action treated the contract as valid as between the seller and the buyer, and the plaintiff did likewise in his Second Cause of Action, that is, treat the contract of sale as being valid as between the seller and buyer, adding only the entirely consistent allegation that as between the buyer's and seller's *creditors*, the contract by force of statute was null and void. In both causes of action, as between the seller and buyer, the contract is treated as being valid. At no time does the plaintiff attempt to assert that the contract was valid between the buyer and the plaintiff, the creditor. In the Second Cause of Action the allegation is that the contract is so far invalid insofar as it affects the plaintiff, and that allegation is in no wise contrary to a conclusion that the contract is valid as between the plaintiff and the defendant. To sustain the Second Cause of Action it is necessary only to assert the invalidity of the contract between the buyer and the plaintiff, not between the buyer and the seller. This view is sustained by the following cases:

"The existing creditors who are not paid may attack the sale only to the extent neces-

sary to collect their debts. They may not in any other sense void it or set it aside." *Dodd vs. Raines*, 1 Fed (2) 658.

"However, notwithstanding the statutory provision that the sale shall be void, it is not a nullity. As against creditors of the seller or transferors it is not void, but voidable in proper and timely proceedings, brought by creditors to set it aside and as is shown *infra*, Section 485, that the sale is a violation of the statutes in no way affects the validity thereof as far as the immediate parties to it are concerned." 37 C.J.S. 1327, note 93.

As this last quotation shows, the Second Cause of Action does not attempt to plead that the sale is invalid as between the parties to the sale. By force of the statute under such facts the sale is invalid as to creditors. Therefore, in the Second Cause of Action, the most that can be found is an allegation that the sale is invalid as to creditors. In the First Cause of Action, the most that can be found is that the sale is valid as between the buyer and the seller. Since the defendant's premise is that plaintiff in his First Cause of Action treated the contract as valid, and in the Second Cause of Action as invalid, there is no basis for the application of the doctrine of the election of Remedies.

Thirdly, it cannot actually be said that the plaintiff treated the contract as being valid or invalid in the Second Cause of Action. The plaintiff proceeded, in his Second Cause of Action, as the statute directs,

namely, to disregard the contract. The remedy of a creditor under the provisions of the Bulk Sales Act is not set out in Chapter 2 of Title 3 which is the Bulk Sales Act, but for the remedy of any creditor as to whom a transaction is fraudulent is stated in 33-1-15, U.C.A. 1943 which reads:

“Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when a claim is matured, may, as against any person, except a person for fair consideration, without knowledge of the fraud at the time of the purchase; * * *

(1) have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

(2) Disregard the conveyance and attach or levy execution upon the property conveyed.”

Thus, proceeding under subdivision 2, the plaintiff is not required to say whether the contract is valid or not; he is merely privileged to disregard it. See *Flaks vs. DeBerry*, 53 Wyo. 203, 79 Pac. (2) 825, 116 A.L.R. 1191. The court states at 1194 of the A.L.R. annotation:

“The right of the creditor to disregard the conveyance and attach the property presupposes that the title, for the purpose of enabling the creditor to enforce his claim, remains in the grantor. See *American Trust vs. Kaufman*, 276 P. 35, 119 Atl. 749, *Rutherford vs. Carr*, 99 Tex. 101; 87 S.W. 815; *Bigelow on Fraudulent Conveyances* page 464. The attachment gives

the creditor a lien which (at least before the uniform Fraudulent Conveyance Act) was necessary as the basis of an action to set the conveyance aside. See *Platte County Bank vs. Frantz*, 33 Wyo. 326, at 336; 239 Pac. 531; Glenn on Fraudulent Conveyances, Section 35."

Therefore, in this case we have proceeded under the provisions of subdivision 2 of Section 33-1-15. It is important to note that the law does not say that the transfer is invalid. It only states that the creditor may *disregard* it.

Fourth, the doctrine of Election of Remedies applies when a person who has sued in affirmance of a contract then proceeds to a contrary remedy, a rescission of the contract. The remedy provided by the Bulk Sales Act is not to rescind the contract of sale; it is rather an affirmance of the contract of sale, and asks only that the proceeds of the sale be applied as the statute directs. Even though one cause of action would be considered to be in affirmance of the contract and one in disaffirmance of the contract, we desire to point out to the court that the doctrine of Election of Remedies in such a situation applies only when the action is between parties to the contract. Third persons who are not privy to the contract are not bound by the rule. See 28 C.J.S. 1076, Note 23, where the following quotation is taken from the case of *Newmann vs. Guaranty Trust Company of New York*, 276 N.Y.S. 873; 243 App. Div. 632:

“The limitation of the right to prosecute simultaneous actions in affirmance and disaffirmance of contract, such as an action to recover damages for fraud and action for money had and received, relates only to actions between the parties to the contract.”

In the Second Assignment of Error the appellant contends that by levying a writ of attachment against the funds of the appellant, the plaintiff elected to treat said conveyance and transfer of property from the defendant, Perry, to the defendant corporation as a valid conveyance, and has elected his remedy herein.

This attachment was levied in April of 1947, or nearly nine months after the original conveyance from Perry to the defendant corporation was made. By that time the defendant corporation could have had other property different from that acquired from the defendant, Perry. Even if the attachment were made against the property originally transferred to the defendant corporation, still according to the case of *Hartford Accident & Indemnity Company vs. Jerasik* (1931) 235 N.W. 836; 254 Michigan 836,

“The institution of an attachment against the property in question in another county is not an election of remedies which will prevent the plaintiff from bringing a suit in equity to set aside a quit-claim deed in a fraudulent conveyance.”

Though the plaintiff did not prevail for reasons

with which we are not concerned in this action, the plaintiff in the case of *Electrical Products vs. Smyser*, 143 Pac. (2) 452, proceeded with both causes of action exactly as the plaintiff has done in the instant case. The court stated:

“The appellant contends that it was entitled to recovery, first, because the plaintiff agreed to assume to pay the indebtedness, and, second, because in making the transfer and sale the parties did not comply with the Bulk Sales Law.”

In this action we have proceeded in that same manner. The defendant in the case just quoted from did not raise the contention here made that there has been an election of remedies.

We respectfully submit that the doctrine of Election of Remedies does not apply for the four reasons which we have discussed.

FURTHER DISCUSSION OF ASSIGNMENT OF ERROR NO. 3 AS IT RELATES TO THE DOCTRINE OF ESTOPPEL

We can do no more in discussing this Second Assignment of Error than submit to this court the discussion on the Second Assignment of Error that was contained in our brief submitted to the trial court. The following is quoted from that brief:

“At the trial, counsel complained of the fact that Judge Ellett had stricken the first affirmative defense, wherein the corporate de-

fendant pleaded that this plaintiff was estopped to claim a violation under the Bulk Sales Statute. First it pleaded that it had believed that the Sher Khan debt was paid in full by the time the transfer was made to it and that that belief rose from a representation of the plaintiff (See paragraph 1, page 4, of Defendant's Answer to Amendment to Plaintiff's Complaint adding Second Cause of Action.) It also pleaded that the basis of the estoppel as against this plaintiff was: "That the plaintiff orally consented to the sale and that the plaintiff agreed with the defendant Perry that the plaintiff would look to the defendant Perry for the payment of said obligation from his personal funds and would regard said obligation as a personal indebtedness of the defendant W. R. Perry." Although the court generously stated that if such facts could be proved he would permit proof of them, the defendants offered no evidence of the facts which it contended were sufficient to create an estoppel. We must of course assume that they have no such evidence, not only from their failure to adduce the evidence but from the fact that the written books and records of the corporation set out contrary facts. However that may be, even if they could establish those facts it would not create an estoppel because it was not pleaded that the corporate defendant suffered a loss by reason of the alleged misrepresentation or that it acted to its detriment on account of those alleged misrepresentations. It does not plead that because of these alleged misrepresentations it paid the amount directly to Perry or that it expended the money in another way. The elements of an estoppel are clearly set out in the case of Barber vs. Anderson (Utah) 274

Pac. 136 at 1382. See also *Cook vs. Cook* (Utah) 174 Pac. (2) 434 at 436. The court there affirms the *Barber vs. Anderson* case and states:

“To constitute an estoppel there must be conduct amounting to a misrepresentation or concealment of material facts; these facts must be known to the party sought to be estopped and unknown to the party who claims the benefit of the estoppel and who relying upon such conduct acted upon it to his loss. See *Barber vs. Anderson*, 73 Utah 357; 274 Pac. 136, wherein this court discussed the elements of estoppel. In the instant case there is no misrepresentation or concealment of any material fact known to respondent and unknown to appellant.”

So in the instant case, while corporate defendant pleaded that it believed that the debt of Sher Khan was paid, it does not say that it entertained that belief because of a misrepresentation of the plaintiff. Therefore, the very first essential element is lacking, namely, misrepresentation.

Secondly, the corporate defendant cannot with good grace contend that it did not know that the debt of Sher Khan was unpaid. Its own books testified to that fact and its own records show that it had made a payment on that account.

Third, the corporate defendant did not plead any injury to itself and so in fact the first separate defense was wholly insufficient to set up an estoppel and the court so held and therefore struck the first separate defense.

If that were not enough, the court in the case of *H. C. Bay Company vs. Ridnour*, 206 S.W. (S.D.) 463 held that a buyer in a case coming under the Bulk Sales Act must comply with the statute and may not safely rely on the seller's statement that he has no creditors. On this point we also cite the following:

“Good faith on the part of the transferee will not excuse his failure to comply with the statutory requirements.” *Galbreath vs. Okla. State Bank*, 36 Okla. 8070, 130 Pac. 541.”

CONCLUSION

Respondent respectfully submits that the judgment of the lower court should be affirmed. The procedural blocks which the appellant seeks to set up lack substance. One judgment only was obtained on both causes of action and both causes of action were directed at the effort to collect only one debt. The corporation defendant by seeking a reversal of the judgment seeks to enrich itself at the expense of the plaintiff. This corporation defendant should not be unjustly enriched by this large sum of money and hence this judgment should be affirmed.

Respectfully submitted,

WHITE, WRIGHT & ARNOVITZ
Attorneys for Respondent.

SCHEDULE NO. 1 (A)

Balance sheet taken from Exhibit "B", peragraph 9, which sets out what the proposed balance sheet of the corporation was to show, namely, a net worth of \$100,000.00, in order to meet the requirements of the agreement, if the debt of Sher Khan were not assumed.

ITEM NO.

ASSETS:

1. Cash transferred from First National Bank of Salt Lake City, after paying in full all outstanding liabilities of the partnership.....		\$4,000.00
2. Total cash and cash items to be delivered to First National Bank, Paragraph 6 hereof.....	168,000.00	
3. Less: Liabilities (Paragraph 5 hereof)	<u>164,000.00</u>	
4. Cash represented by stock subscription of Mr. Perry, Laverne Perry and Leonard Elton.....		1,000.00
5. Land buildings and equipment....		135,000.00
6. Supplies and prepayments (received from the partnership).....		15,000.00
7. Accounts receivable, supplies and other assets to be received from Mr. Perry out of his personal assets		15,000.00
8. Unpaid balance of \$50,000.00 note executed by Mr. Perry.....		<u>10,000.00</u>
9.		<u><u>\$180,000.00</u></u>

LIABILITIES AND CAPITAL:

10. Note to First National Bank of Salt Lake City, secured by First Mortgage or deed of trust on plant and properties		80,000.00
11. Capital Stock: Stock owned by W. R. Perry (including stock held in names of Laverne Perry and Leonard W. Elton as nominess)	50,000.00	
12. Stock owned by Stephen Zolezzi, (including stock held in name of L. W. Wrixon as nominee).....	<u>50,000.00</u>	<u>100,000.00</u>
13. TOTAL LIABILITIES AND CAPITAL		<u><u>\$180,000.00</u></u>

SCHEDULE NO. 1 (B)

Balance sheet to show what assets would be required to be taken over from Perry to give the new corporation a net worth of \$100,00.00 as required by Exhibit "B", Paragraph 9, when the debt of Sher Khan was assumed.

ITEM NO.

ASSETS:

1. Cash and other assets transferred to new corporation after paying all outstanding liabilities of the partnership excepting account of Sher Khan consisting of the three items:		
(a) Cash required by paragraph 8	\$4,000.00	
(b) Amount reserved for Sher Kahn account	18,588.83	
(c) Amount paid in lieu of note of	10,000.00	
plus: cash of	1,000.00	
	<u>11,000.00</u>	
less: paid in by equipment	1.646.57	9,353.43
		31,942.26
2. Total cash items and the equivalent made available for payment of debts as per Paragraph 6		156,163.33
3. Less: Liability actually paid as per Paragraph 5 of agreement (see Schedule "C")		<u>124,221.07</u>
4. Cash represented by stock subscription of Mr. Perry, Laverne Perry and Leonard W. Elton		—
5. Land, buildings and equipment (see Exhibit ("J"))		136,646.57
6. Supplies and prepayments (received from the partnership)		15,000.00
7. Accounts receivable, supplies and other assets to be received from Mr. Perry out of his personal assets		15,000.00
8. Unpaid balance of \$50,000.00 note executed by Mr. Perry		—
9.		<u><u>\$198,588.83</u></u>
LIABILITIES AND CAPITAL:		
10. Note to the First National Bank of Salt Lake City, secured by First Mortgage or deed of trust on plant and properties		80,000.00
11. Capital Stock:		
Stock owned by W. R. Perry (including stock held in names of Laverne Perry and Leonard W. Elton as nominees)	50,000.00	
12. Stock owned by Stephen Zolezzi (including stock held in name of L. W. Wrixom as nominee)	<u>50,000.00</u>	100,000.00
13. Note due to Sher Khan		18,588.83
14. TOTAL LIABILITIES AND CAPITAL		<u><u>\$198,588.83</u></u>

SCHEDULE NO. 1 (C)

Actual balance sheet of Perry-Zolezzi, Inc., at the conclusion of the opening entries.

ITEM NO.

ASSETS

1. Fixed assets taken over by corporation (see Exhibit "J").....	136,646.57
2. Merchandise, supplies, accounts receivable, etc., taken over by corporation from Perry (Exh. "J")	56,163.33 355.93
3. Cash on hand	56,519.26 9,733.40
(For explanation of this item see Note No. 1 below)	
4. TOTAL ASSETS:	<u>\$202,899.23</u>

LIABILITIES:

5. First National Bank for mortgage indebtedness	80,000.00
6. Owing to W. R. Perry on account of contribution of assets in excess of amount required as shown by Liability Section of Exhibit "J"....	4,310.40
7. Owing because of assumption of debt of Sher Khan.....	18,588.83
8. Capital stock	<u>100,000.00</u>
TOTAL:	<u>\$202,899.23</u>

Note No. 1: On the record (page 201), Mr. Duke testified that there was a balance of cash on hand after the formation of the corporation of "about \$9700.00." Instead of accepting that approximate figure, counsel has prepared a tabulation from the record in this case that shows that the exact amount of cash on hand was \$9,733.40 and we have therefore used that exact figure instead of the approximation made by Mr. Duke. The exact calculation is determined from the following facts introduced into evidence, namely:

Cash received from First National Bank on mortgage.....	80,000.00
Cash received from Zolezzi for his contribution to capital stock	50,000.00
Total available cash with which to pay debts of Perry:.....	\$130,000.00
less: Debts of W. R. Perry actually paid by the corporation (see liability section of Exhibit "J").....	120,266.60
BALANCE of cash remaining in the hands of the corporation	\$9,733.40

NOTE: The top part of this computation shows that after giving effect to the transfers actually made, the corporation had a net worth of \$100,000.00 which was the exact net worth contemplated by the promotion agreement.