

1949

## Sher Khan v. Perry Zolezzi, Inc. : Brief of Appellant

Utah Supreme Court

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Rich and Elton; Attorneys for Appellant;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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SHER KHAN,

*Respondent,*

vs.

PERRY ZOLEZZI, INC., a corpora-  
tion,

*Appellant.*

} Case No.  
7346

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## Brief of Appellant

# FILED

JUN 19 1963

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# IN THE SUPREME COURT OF THE STATE OF UTAH

SHER KHAN,

*Respondent,*

vs.

PERRY ZOLEZZI, INC., a corpora-  
tion,

*Appellant.*

Case No.  
7346

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## Brief of Appellant

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This is an appeal by Perry Zolezzi, Inc., a corporation, from two judgments entered December 30, 1948, on both counts of plaintiff's complaint as amended, and from the order of the trial court denying a motion for new trial of said defendant. The action was commenced against Perry Zolezzi, Inc., a corporation, and W. R. Perry. The defendant Perry was never served with summons, did not appear in said action except as a witness for plaintiff, and no judgment was taken against defendant W. R. Perry, the entire proceeding being against defendant Perry Zolezzi, Inc., a corporation, appellant herein.



## PLEADINGS

Plaintiff's original (R. 1-3) complaint alleged that on June 1, 1946, defendant W. R. Perry made, executed and delivered to plaintiff his promissory note in the sum of \$18,588.83, payable on or about six months after date at Eugene, Oregon, with interest at five per cent per annum from date, with reasonable attorneys fees in case suit or action be instituted to collect the note. A copy of the note was set forth in the complaint. It was further alleged that on or about July 1, 1946, defendant corporation, for valuable consideration, promised to pay the amount of said note to plaintiff, and that defendant corporation received property in the amount of the note from defendant W. R. Perry upon an undertaking to apply it pursuant to such promise, and to pay it to plaintiff. That the defendant corporation thereby assumed and agreed to pay the said note to plaintiff. That pursuant to such promise the defendant corporation on September 21, 1946, did pay to plaintiff the sum of \$3,588.83 to apply upon said note and reduced the balance of the note to the principal sum of \$15,000. Plaintiff had demanded from defendants, and each of them, said sum of \$15,000, plus interest, but that it had not been paid, and that the whole thereof is past due and owing, and that a reasonable sum to be adjudged as attorneys fees is the sum of \$1,500.00.

To this complaint defendant corporation interposed general and special demurrers, which were overruled. (R. 15, 16, 26).

Defendant corporation thereupon filed its answer, alleging that it had no information sufficient to enable it to answer the allegations as to the execution of said promissory note by defendant W. R. Perry, and therefore denied the same, admitted that defendant W. R. Perry, without authority of defendant corporation, caused the sum of \$3,588.83 of the funds of defendant corporation to be paid to plaintiff upon an obligation of said W. R. Perry to plaintiff, and denied the remaining allegations of said complaint. Defendant further answered and alleged that the purported obligation attempted to be set forth and alleged in plaintiff's complaint is barred by the provisions of Section 33-5-4, U.C.A. 1943. (Statute of Frauds). (R. 27, 28)

Plaintiff thereupon, by leave of court, filed an amendment to his complaint by adding a second cause of action, wherein as a second cause of action plaintiff alleged that on or about July 1, 1946, defendant Perry sold, transferred and delivered all of the assets and business of said W. R. Perry to defendant corporation for cash and credits in the sum of \$142,809.90, for the transfer to defendant Perry of \$50,000 of the capital stock of defendant corporation, which cash, credits and capital stock were paid by defendant corporation. That the defendant corporation became a purchaser of stock of goods, wares and merchandise in bulk from the said W. R. Perry otherwise than in the ordinary course of trade and in the regular and usual prosecution of seller's business, and that it did not demand from the seller at least five days previously thereto, and receive from the seller a statement

as provided for in Section 33-2-1, U.C.A. 1943, and did not notify at least five days previously thereto every creditor as shown by such verified statement of the proposed sale or transfer, and the time and condition of payment, and did not cause the purchase money for such property to be applied ratably to the payment of bona fide claims of creditors of said W. R. Perry. That by the provisions of Section 33-2-2, U.C.A. 1943, said sale to the defendant corporation was fraudulent and void. That defendant corporation assumed control over the assets of said W. R. Perry and sold and disposed of said assets without paying to the creditors their proportionate share of the full purchase price. That said plaintiff considered the said sale as being fraudulent and void and has attached the property of the defendant corporation. That at the time of said sale and transfer the said W. R. Perry was indebted to plaintiff as alleged in the first cause of action, and that the only payment thereafter was the payment by defendant corporation to plaintiff of the sum of \$3,588.83, leaving a balance of \$15,000, together with interest, which said sum, together with interest, was not the proportionate share of the purchase price to which plaintiff was entitled since the debts of defendant Perry, including the debt to plaintiff, amounted to the sum of \$142,809.90, and the defendant W. R. Perry transferred assets to defendant corporation having an agreed and reasonable value upon the date of transfer of \$192,809.90. That the assets transferred to defendant corporation by W. R. Perry have now been sold and disposed of by defendant corporation for a value in excess of the debts of W. R.

Perry, and that the proceeds realized therefrom are sufficient to satisfy the debt owing to plaintiff. That plaintiff has made demand upon defendants, but the same has not been paid, and that a reasonable attorneys fee is the sum of \$1500.00.

To plaintiff's complaint as amended defendant corporation interposed a general and special demurrer to each alleged cause of action separately, and also to the complaint as a whole, upon the ground that several causes of action are improperly united in said complaint as amended (R. 55-56).

Defendant corporation also interposed a motion to dismiss the second cause of action and for an order striking and expunging from said complaint as amended the alleged second cause of action, and the whole thereof, or in the alternative requiring and ordering plaintiff to elect between said alleged causes of action, as to which of the same he will stand upon as the basis for his remedy in said proceeding, upon the ground that the alleged causes of action and remedies sought are inconsistent in that the alleged first cause of action and remedies sought are inconsistent in that the alleged first cause of action by its terms seeks to enforce and secure the benefit for plaintiff of a purported contract, whereas under the alleged second cause of action plaintiff attempts to and seeks to repudiate, disavow and declare null and void as to plaintiff the said transaction as referred to in the first cause of action (R. 57).

Demurrer of defendant corporation was by the trial court overruled and defendant's motion was denied by the trial court on December 17, 1947 (R. 59).

Defendant corporation thereupon filed its answer to plaintiff's second cause of action, wherein it admitted upon information and belief that defendant W. R. Perry was, prior to the 29th day of July, 1946, indebted to plaintiff upon a certain promissory note approximately as set forth in plaintiff's first cause of action, and that said W. R. Perry thereafter paid to plaintiff the sum of \$3,588.83 from the funds of defendant corporation to apply thereon. Defendant corporation further admitted upon information and belief that W. R. Perry had not paid the balance of said obligation. Defendant corporation further admitted that the assets transferred to defendant corporation by defendant W. R. Perry had now been sold and disposed of by defendant corporation. The remaining allegations of plaintiff's second cause of action were denied.

As a first separate defense to plaintiff's second cause of action defendant corporation alleged that prior to the 29th day of July 1946, defendant W. R. Perry was indebted to certain secured and unsecured creditors in the sum of approximately \$164,000.00, including the obligation to plaintiff; that Perry was the owner of certain real property valued at approximately \$135,000.00, subject to a mortgage in the sum of approximately \$36,500.00, and certain supplies and accounts receivable valued at approximately the sum of \$30,000.00; that

defendant corporation agreed with defendant W. R. Perry that it would lend to said W. R. Perry the sum of \$50,000.00 and cause a mortgage in the sum of \$80,000.00 to be placed upon the real property of defendant Perry and assume and agree to pay said mortgage and accept conveyance of said real and personal property from W. R. Perry as full payment for \$50,000 of the common capital stock of defendant corporation, and issue to defendant W. R. Perry, or his order, 50,000 shares of its common capital stock; that it was a part of said agreement that said defendant W. R. Perry would, from said funds so to be made available to him by defendant and from the personal funds of said W. R. Perry, pay and discharge or cause to be paid and discharged by payment or compromise, or otherwise, all of said debts and obligations of said defendant W. R. Perry; that it was further a part of said agreement that said Perry was to pay and discharge all of said obligations of every name, nature, and description, and that in the event said Perry were to transfer to defendant corporation any property or assets in excess of the amount necessary to fully pay and discharge his subscription to capital stock in the sum of \$50,000, that the said defendant W. R. Perry should be given credit upon the books and records of defendant corporation for the amount of such excess, not to exceed \$10,000; that in compliance with said agreement said Perry transferred and conveyed said assets to defendant corporation, and said defendant corporation did and performed all things to be by it done and performed under its agreement with Perry, and that defendant corporation verily believed that there were no obligations of said



Perry outstanding and unpaid when it received from defendant Perry a conveyance of said assets, and that there was therefore no requirement on its part to comply with the provisions of Section 33-2-2, Utah Code Annotated 1943. Defendant corporation further alleged as a part of said first separate defense that plaintiff was, prior to the consummation of said agreement between defendant and Perry, or immediately thereafter, fully informed of said agreement between defendant and Perry and knew of the fact that defendant was to receive said assets free and clear of any demand or claims of creditors of said Perry, and of the fact that defendant was to commence its corporate existence without debts or obligations, save and excepting the secured obligation in the sum of \$80,000, and knew and understood that defendant would, pursuant to the terms of said agreement, cause shares of its capital stock to be issued to said Perry and would permit additional shares to the amount of \$50,000 to be subscribed for and fully paid by individuals other than said Perry upon the basis of such understanding and agreement with defendant Perry, and that notwithstanding such knowledge and information plaintiff failed to protest the same or to take other action to void said assignment and conveyance, but, on the contrary, consented thereto; that the plaintiff agreed with said Perry that plaintiff would look to Perry for payment of his said obligation from personal funds of Perry and would regard said obligation as a personal indebtedness of Perry; that defendant corporation accepted said conveyance and assignment of assets and

issued to Perry 50,000 shares of the capital stock of defendant corporation and accepted subscriptions for and payment of its capital stock from other persons, firms, and individuals in the sum of \$50,000 in the belief that Perry had fully paid and discharged, by payment, compromise, or otherwise, all of the debts and obligations of Perry; that by reason of said belief defendant corporation transacted business and incurred obligations in its own name from the date of its incorporation to the date of commencement of this action in the belief that the corporate defendant was obligated for only obligations created by itself. That by reason thereof plaintiff was guilty of laches in attempting at this time to question the validity of said sale and assignment by Perry to defendant corporation, and that plaintiff is estopped to question the validity thereof at this time.

Defendant further alleged as a part of said defense that plaintiff had accepted and received payment of the sum of \$3,588.83 from the funds of defendant corporation on account of said obligation of said Perry to plaintiff and as a credit upon said promissory note of said Perry.

It was further alleged as a part of said first separate defense that plaintiff has attached and levied upon the moneys and funds of defendant corporation as its funds, proceeds from the sale of a portion of said assets so transferred and conveyed to defendant corporation by Perry, and that plaintiff has thereby ratified and approved said sale and is estopped to deny or seek to void said sale by Perry to defendant corporation, or to seek to set aside said sale as fraudulent or void.



It was further alleged as a part of said further defense that plaintiff wholly failed to take prompt action to question the validity of said sale or to void the same, notwithstanding the fact that plaintiff knew of same and knew of the fact that defendant corporation would issue 50,000 shares of its capital stock, fully paid, to Perry on the basis of said sale, and knew that defendant corporation would sell and dispose of its capital stock to others upon the belief that all of the debts and obligations of Perry were paid and discharged, and that defendant corporation had received said assets in the belief that said assets were free and clear from all claims and demands of creditors of Perry, including plaintiff, and that by reason of all of the matters and things set forth in said first separate answer plaintiff is estopped at this time to seek to avoid said sale and conveyance by Perry to defendant corporation, and that plaintiff is guilty of such laches as to deny to him the right to seek the aid of equity in said premises.

As a second further answer to plaintiff's second cause of action defendant corporation alleged that plaintiff, by filing its first cause of action herein, and by attaching the funds of defendant corporation, elected to treat said conveyance and transfer of property from Perry to defendant corporation as a valid conveyance and sale, and has elected his remedy herein (R. 60-66).

To this answer of defendant corporation plaintiff interposed a general and special demurrer to each separate defense (R. 70-73).

Under date of March 25, 1948 the trial court sustained plaintiff's general demurrer to the first separate defense of defendant (R. 76).

Plaintiff thereupon filed his motion to strike from the answer of defendant to the plaintiff's second cause of action the second separate defense of defendant, upon the ground that the second separate defense does not state a defense to plaintiff's second cause of action. That the court has heretofore ruled that plaintiff could bring its suit upon both causes of action, the first alleging an assumption of liability by defendant, and the second alleging implied assumption of liability under Chapter 2, Title 33, U.C.A. 1943 (R. 77).

Under date of April 14, 1948 the trial court made and entered its order granting plaintiff's motion to strike the second defense of defendant (R. 83).

Thereafter, on April 20, 1948, the action of the trial court in striking the second affirmative defense to the second cause of action was rescinded, and the court sustained plaintiff's demurrer to the second separate defense to the second cause of action without leave to amend (R. 84).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW FIRST CAUSE OF ACTION

2. That on or about the 10th day of July, 1946, the defendant, W. R. Perry, for a valuable consideration, made, executed and delivered to the plaintiff his certain promissory note in words and figures as follows, to-wit:

(Note set forth)

3. That on or about July 17, 1946, a promotion agreement was executed by W. R. Perry and Stephen Zolezzi for and on behalf of the defendant corporation. That the said W. R. Perry and Stephen Zolezzi subscribed for all of the capital stock of the defendant corporation, excepting one thousand (1000) of the one hundred thousand (100,000) shares of capital stock subscribed. That the one thousand (1000) shares that were not subscribed for by these two incorporators were subscribed for five hundred (500) shares for Leonard Elton and five hundred shares for L. W. Wrixon, both acting as the attorneys for the incorporators and for the corporation. That the other party to the said agreement was W. R. Perry. That by the terms of the said agreement, which is set out in Exhibit B, the promoters undertook, on behalf of the defendant corporation, to purchase said assets from W. R. Perry and as consideration for the said assets to assume and pay the debts owing by W. R. Perry and including the debt owed by W. R. Perry for the note hereinabove referred to, which was then held by this plaintiff, and to give to W. R. Perry Fifty Thousand Dollars (\$50,000.00) in capital stock in Perry Zolezzi, Inc., the

corporate defendant. That by the said agreement the corporate defendant assumed and agreed to pay the said note to the plaintiff. That on or about July 27, 1946 and on or about August 1, 1946, the defendant corporation received property consisting of cash and real and personal property to the agreed value of One Hundred Ninety Two Thousand Eight Hundred Nine Dollars and Ninety Cents (\$194,809.90) from W. R. Perry, and as part of the consideration therefor promised to pay this note to the plaintiff, and received the said property upon the undertaking pursuant to such promise to apply the property received to the payment to this plaintiff of said note and other debts of W. R. Perry, amounting in all to the sum of One Hundred Forty-Two Thousand Eight Hundred Nine Dollars and Ninety Cents (\$142,809.90). That pursuant to such promise the corporate defendant, on or about August 1, 1946, made entries upon its own books to record the fact that it assumed this note of Eighteen Thousand Five Hundred Eighty-Eight Dollars and Eighty-Three Cents (\$18,588.83) owing to the plaintiff, and that it agreed to pay the amount of this indebtedness to the plaintiff. That the defendant corporation thereby assumed and agreed to pay the said note to the plaintiff.

4. That pursuant to said promise the defendant corporation, on September 21, 1946, did pay to the plaintiff the sum of Three Thousand Five Hundred Eighty-Eight Dollars and Eighty-Three Cents (\$3,588.83), to apply upon the said note and reduced the balance of said note to the principal sum of Fifteen Thousand Dollars (\$15,000.00). That the payment so made was made by

the defendant corporation, acting through its President and General Manager, W. R. Perry. That during all of the times in question, W. R. Perry was the President and General Manager of the defendant corporation and authorized to transact all of the business of the defendant corporation.

5. That although the plaintiff has made demands upon the defendants, and each of them, for the said sum of Fifteen Thousand dollars, plus interest as provided in the said note, neither of the defendants have paid the said amount, and the whole thereof is past due and owing.

6. That a reasonable sum to be adjudged as attorney's fees for the attorneys for the plaintiff, in accordance with the terms of the note herein sued upon, is the sum of Two Thousand Dollars (\$2,000.00).

From the foregoing Findings of Fact on the First Cause of Action, the court now makes and enters the following:

That the plaintiff is hereby entitled to a judgment against the defendant corporation for Fifteen Thousand Dollars (\$15,000.00), plus interest at the rate of five per cent per annum, as is provided in said note, from the date of delivery to December 27, 1948, in the amount of Eighteen Hundred Eighty-One Dollars and Forty One Cents (\$1,881.41), or the sum of Sixteen Thousand Eight Hundred Eighty-One Dollars and Forty-One Cents (\$16,881.41), plus attorney's fees in the amount of Two Thousand Dollars (\$2,000.00), together with plaintiff's costs herein incurred.

## SECOND CAUSE OF ACTION

1. Adopts Findings of Fact numbers 1 and 2 as set out in the first cause of action.

2. That between the 27th day of July, 1946 and August 10, 1946, W. R. Perry sold, transferred and delivered all of the assets and business of the said W. R. Perry to the defendant corporation for cash and credits of One Hundred Forty-Two Thousand Eight Hundred Nine Dollars and Ninety Cents (\$142,809.90) and for the transfer to W. R. Perry of Fifty Thousand Dollars (\$50,000.00) of the capital stock of the defendant corporation, which cash, credits and capital stock were paid by the defendant corporation, except the sum of Fifteen Thousand Dollars (\$15,000.00) due to the plaintiff from W. R. Perry; that the defendant corporation became a purchaser of the stock of goods, wares and merchandise in bulk from the said W. R. Perry otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business; that the defendant corporation has pleaded in the first affirmative defense set out in its answer that it believes that there was no requirement on its part to comply with the provisions of Section 33-2-2 U.C.A. 1943, known as the Bulk Sales Act, and therefore it did not comply with the provisions of the State statute. That the defendant corporation, the purchaser as herein stated, did not demand from the seller, at least five days previously thereto, and receive from the seller a statement as provided in Section 33-2-1, U.C.A. 1943, and did not notify at least five days pre-

viously thereto, every creditor, as shown by such verified statement, of the proposed sale or transfer and the time and conditions of payment, and did not cause the purchase money for such property to be applied ratably to the payment of the bona fide claims of all creditors of the said W. R. Perry. That by the provisions of Section 33-2-2, U. C. A. 1943, the said sale to the defendant corporation was fraudulent and void. That nevertheless, the defendant corporation assumed control over the assets of the said W. R. Perry and sold and disposed of the said assets without paying to the creditors of W. R. Perry their proportionate share of the full purchase price, except as hereinafter stated. That the plaintiff has considered the said sale as being fraudulent and void as to the plaintiff and has attached the property of the defendant corporation, a part of which property were the assets transferred by W. R. Perry to the defendant corporation.

3. That at the time of the said sale and transfer, W. R. Perry was indebted to the plaintiff on a promissory note in the sum of Eighteen Thousand Five Hundred Eighty-Eight Dollars and Eighty-Three Cents (\$18,588.83), being the note set out in paragraph two of the Findings on the First Cause of Action; that the only payment thereafter made by W. R. Perry, or by the defendant corporation to the plaintiff was the payment made by the defendant corporation to the plaintiff of the sum of Three Thousand Five Hundred Eighty-Eight Dollars and Eighty-Three Cents (\$3,588.83) on September 21, 1946, to apply upon the obligations of the said note, leav-



ing a balance owing from the said W. R. Perry and the defendant corporation in the sum of Fifteen Thousand Dollars (\$15,000.00), together with interest as provided in the said note. That the said sum of Three Thousand Five Hundred Eighty-Eight Dollars and Eighty-Three Cents (\$3,588.83) was not the proportionate share of the purchase price to which this plaintiff was entitled, since the debts of the defendant Perry, including the debt to Plaintiff, amounted to the sum of One Hundred Forty-Two Thousand Eight Hundred Nine Dollars and Ninety Cents (\$142,809.90), and W. R. Perry transferred assets to the defendant corporation having an agreed and reasonable value upon the date of the transfer of One Hundred Ninety-Two Thousand Eight Hundred Nine Dollars and Ninety Cents (\$192,809.90); that the defendant corporation paid in full all of the other creditors of W. R. Perry, but paid to the plaintiff only the sum of Three Thousand Five Hundred Eighty-Eight Dollars and Eighty-Three Cents (\$3,588.83). That the books of the defendant corporation contain the fact that it did make this payment of Three Thousand Five Hundred Eighty-Eight Dollars and Eighty-Three Cents (\$3,588.83) to the plaintiff. That none of the officers or directors of the defendant corporation objected to the making of the said payment to the plaintiff; that the payment so made was made by the defendant corporation acting through its President and General Manager, W. R. Perry; that during all the times in question W. R. Perry was the President and General Manager of the defendant corporation and authorized to transact all of the business of the defendant corporation.



4. That upon the transfer of these assets by W. R. Perry to the defendant corporation, the defendant corporation made entries upon its books and records that it became indebted to the plaintiff in the amount of Eighteen Thousand Five Hundred Eighty-Eight Dollars and EightyThree Cents (\$18,588.83). That the officers and directors of the defendant corporation made no objection to the entries so made upon the books of the defendant corporation, showing this indebtedness by the defendant corporation to the plaintiff.

5. That the assets transferred to the defendant corporation by W. R. Perry have now been sold and disposed of by the defendant corporation, and it received an amount in excess of the debts of the defendant W. R. Perry, which existed at the time of the transfer, and that the proceeds realized therefrom are sufficient to satisfy the debts owing to the plaintiff.

6. That although the plaintiff has made demands upon the defendants, and each of them, for the payment of said sum of Fifteen Thousand Dollars (\$15,000.00), plus interest as provided in the said note, neither of the said defendants have paid the said amount, and the whole thereof is past due and owing.

7. That a reasonable sum to be adjudged as attorney's fees to be allowed for the enforcement of the payment of this note, as is provided in said note, is the sum of Two Thousand (\$2,000.00) Dollars.

From the foregoing Findings of Fact the court now makes and enters the following:

1. That the plaintiff is hereby awarded judgment against Perry Zolezzi, Inc., a corporation of the State of Utah, for the sum of Fifteen Thousand Dollars (\$15,000), plus interest at the rate of five per cent per annum, as is provided in the said note, from the date of delivery to December 27, 1948, in the amount of Eighteen Hundred Eighty-One Dollars and Forty-One Cents (\$1,881.41), or the sum of Sixteen Thousand Eight Hundred Eighty-One Dollars and Forty-One Cents (\$16,881.41), plus attorney's fees in the amount of Two Thousand Dollars (\$2,000.00), and plaintiff's costs herein expended.

2. That the sale and transfer of the assets from W. R. Perry to the defendant Perry Zolezzi, Inc., a corporation, be held fraudulent and void as to this plaintiff.

3. That the value of the assets transferred by W. R. Perry to the defendant corporation being in excess of the amount of the debts owing by W. R. Perry and the value of the assets being more than sufficient to pay each of the creditors of W. R. Perry the full amount of their claims against W. R. Perry, including the claim of this plaintiff, with interest and attorney's fees added, the defendant corporation shall pay the amount of this judgment to the plaintiff.

4. That the judgment herein rendered on the First and Second Causes of Action are not cumulative, but the satisfaction of one judgment will satisfy and discharge the other.

## JUDGMENT

On plaintiff's First Cause of Action plaintiff is hereby awarded judgment against the defendant corporation for Fifteen Thousand Dollars (\$15,000.00), plus interest thereon at the rate of five per cent per annum from date of delivery to December 27, 1948, in the amount of Eighteen Hundred Eighty-One Dollars and Forty-One Cents (\$1,881.41), amounting to Sixteen Thousand Eight Hundred Eighty-One Dollars and Forty-One cents (\$16,881.41), together with attorney's fees in the amount of Two Thousand Dollars (\$2000.00), and plaintiff is also awarded his costs expended herein.

On plaintiff's Second Cause of Action plaintiff is hereby awarded judgment against the defendant corporation for Fifteen Thousand Dollars (\$15,000.00), together with interest at the rate of five per cent per annum from date of delivery to December 27, 1948, amounting to Eighteen Hundred Eighty-One Dollars and Forty-One Cents (\$1881.41), making Sixteen Thousand Eight Hundred Eighty-One Dollars and Forty-One Cents (\$16,881.41), together with attorneys fees in the amount of Two Thousand Dollars (\$2000.00), and plaintiff shall also have his costs herein expended.

That the sale and transfer of the assets from W. R. Perry to the defendant corporation is hereby declared to be fraudulent and void as to the plaintiff.

That the value of the assets transferred by W. R. Perry to the defendant corporation, being in excess of

the amount of the debts owing by W. R. Perry and the value of the assets being more than sufficient to pay each of the creditors of W. R. Perry the full amount of their claims against W. R. Perry, including the claim of this plaintiff, with interest and attorney's fees added, the defendant corporation is hereby required to pay the amount of said judgment to the plaintiff herein.

That the judgment rendered herein on Plaintiff's First and Second Causes of action are not cumulative, and the satisfaction of one judgment will satisfy and discharge the other. (R. 96-103, 105-106).

## STATEMENT OF FACTS

Defendant corporation was organized in July, 1946. Its capital of \$100,000 was paid in by \$50,000 cash paid in by Stephen Zolezzi and \$50,000 cash and property paid in by W. R. Perry who had been a member of a partnership known as Neilson and Perry, then owned by Perry, which owed debts and obligations in the sum of \$164,000, of which \$36,500 was a mortgage on certain real property which had an agreed value of \$135,000. The remaining obligations were unsecured, among which was a note of plaintiff in the sum of \$23,588.83. A fund of \$168,000 to pay all liabilities of Neilson & Perry and Perry was provided as follows:

\$80,000 by a new mortgage on the real estate

\$50,000 cash to Perry to be loaned by the corporation

\$10,000 cash from Perry

\$18,000 turkey drafts owned by Perry

\$10,000 accounts receivable owned by Perry and to  
be converted into cash

Perry was to pay his \$50,000 subscription to the capital stock of defendant corporation by paying in the \$4,000 residue of the above fund after payment of all debts and obligations and by transferring to the corporation the equity in the real estate, \$55,000, plus \$30,000 (the agreed value of certain supplies and prepayments in the sum of \$15,000, together with additional accounts receivable and assets in the sum of \$15,000), making a total of \$89,000, from which was to be deducted \$40,000 of the \$50,000 loaned by the corporation to Perry. The remaining \$10,000 of the \$50,000 loaned by the corporation to Perry for his use in paying all debts of Neilson & Perry and Perry was to be repaid by Perry to the corporation and was to be a corporate asset, thus paying Perry's subscription in full.

Perry was to be President and General Manager of the defendant corporation and was to engage in the business of buying, processing and selling turkeys.

The fund for payment of all liabilities of Neilson & Perry and Perry was to be deposited in First National Bank to be disbursed upon written direction of Perry, but only after receipt of a certificate of title insurance showing title to the land, buildings and equipment free of liens and incumbrances in the defendant corporation, subject only to the new mortgage in the sum of \$80,000 and current taxes.

This proposed transaction was represented by a pre-organization agreement between Perry and Zolezzi (Exhibit "B").

One of the provisions of that agreement was as follows:

"(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 or \$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.)"

This preorganization agreement was dated July 17, 1946. Prior thereto Perry had paid \$5,000 on plaintiff's obligation and had executed the note in question in this case, signed by himself, dated June 1, 1946, but not delivered to plaintiff until July 11, 1946 (R. 131).

The articles of incorporation of defendant corporation were dated July 16, 1946 and filed July 22, 1946. On July 27, 1946 Perry conveyed the real property to defendant corporation, and on the same date a mortgage on the property was executed by defendant corporation for \$80,000 to the bank, and the sum was deposited to the credit of the corporation on August 6, 1946. (R. 201) On July 27, 1946 Perry also transferred other assets, stock in trade, merchandise, fixtures, furniture and ac-



counts receivable to the corporation pursuant to the provisions of Exhibit "B".

Moneys were withdrawn for the payment of creditors of Neilson & Perry and Perry through Mr. Wilson of the Bank and a Mr. Duke, an employee of Neilson & Perry and Perry; later secretary of defendant corporation (R. 138, 201).

The corporation held a meeting of the Board of Directors at San Francisco, California, on July 29, 1946, at which the corporation accepted the conveyances from Perry of the real and personal property for the sum of \$89,000, giving him credit for \$40,000 on his \$50,000 note and issuing him 49,000 shares of stock. It was also provided in the minutes (Exhibit I) that in the event the fair value of the assets ultimately contributed by Perry should be less than the value specified (\$4000 cash and \$30,000 miscellaneous assets) that the \$40,000 credit on the note should be reduced, or in the event it was more that the credit on the note should be increased.

The corporation, however, did not commence doing business until September 3, 1946 (R. 135). In the meantime Perry did business in the name of W. R. Perry, Turkeys, using the corporate facilities and property.

The company books were opened on September 3, 1946, and the opening entries were made by Mr. Duke and Wells, Baxter & Miller, Mr. Perry's accountants, as directed by Mr. Perry (R. 159, 160). In setting up the corporate books they listed as an account payable by the

corporation the obligation to plaintiff in the sum of \$18,588.83 and gave Perry credit for \$21,564.11 for "receipt of assets and assumption of liabilities of W. R. Perry."

On February 21, 1947 Perry paid \$3588.83 to plaintiff by company check and the same was entered on the corporate books.

In March 1947, Perry ceased to be President, Manager and stockholder of the defendant corporation and severed his connection with the company.

Plaintiff seeks to hold the corporation liable upon the promissory note upon three theories:

1. That on or about July 1, 1946, it for valuable consideration, promised to pay the note and assumed and agreed to pay the same.

2. That on the same date it received from Perry certain property in the amount of the note upon an undertaking to apply the same, pursuant to such promise, to pay it to plaintiff.

(This was the first cause of action.)

3. That in the sale from Perry to defendant corporation in July 1946, there was no compliance with the Bulk Sales Law and that the corporation has disposed of the property received from Perry and hence the sale was fraudulent and void as to plaintiff and therefore the corporation is liable on the note to plaintiff.



(This was the second cause of action pleaded by plaintiff by way of amendment to his complaint.)

Judgment was entered in favor of plaintiff on both causes of action.

Such additional facts as may be pertinent will be discussed and referred to in connection with the respective assignments of error.

## SPECIFICATIONS OF ERROR

1. The trial court erred in overruling defendant's general and special demurrer to plaintiff's complaint as amended (R. 55, 56, 59), and in denying defendant's motion to strike the second cause of action (R. 57, 59), and in denying defendant's motions to require plaintiff to elect between the two repugnant and self destructive causes of action (R. 57, 59, 90, 127, 128, 178, 179).

2. The trial court erred in sustaining, without leave to amend, plaintiff's demurrer to defendant's second affirmative defense alleging an election of remedies by Plaintiff which barred plaintiff's second cause of action (R. 65-66, 70-73, 84).

3. The trial court erred in sustaining plaintiff's general demurrer to defendant's first affirmative defense to the second cause of action (R. 62-65, 70-73, 76, 84).

4. The trial court erred in admitting immaterial and incompetent evidence with reference to plaintiff's

first cause of action (R. 49, 128; 91, 129); and in failing to grant defendant's motion to strike the same (R. 198, 199); and in finding the following facts as to the first cause of action: That by the terms of a certain promotion agreement, Exhibit "B", the promoters undertook on behalf of defendant to have defendant assume and pay the note of plaintiff; that by the terms and provisions of said Exhibit "B" defendant assumed and agreed to pay the note of plaintiff (R. 97, 98); that on or about July 27, 1946 and August 1, 1946, defendant, as part of the consideration for receipt of certain property from W. R. Perry, promised to pay the note of plaintiff and received said property upon an undertaking to apply the property to the payment of said note (R. 98); that pursuant to said promise defendant made entries upon its own books and records of the fact that it assumed the note and that it agreed to pay the debt to plaintiff, and that defendant thereby assumed and agreed to pay plaintiff (R. 98); that pursuant to said promise defendant on September 21, 1946 did pay plaintiff \$3,588.83 on the note (R. 98); that Perry as president and general manager of defendant was authorized to transact all business of defendant, including the making of said payment (R. 98, 102); and in concluding as a matter of law that plaintiff was entitled to judgment on the first cause of action (R. 99); and in entering judgment in favor of plaintiff and against defendant thereon (R. 105-106)).

5. The trial court erred in finding as a fact that there was no compliance by defendant with the Bulk Sales Law in the particulars enumerated (R. 100, 101)

and that the sale by Perry to defendant was fraudulent and void. (R. 100, 101) and that plaintiff considered the same fraudulent and void (R. 100, 101), and that plaintiff did not receive his proportionate share of the property subject to the Bulk Sales Law which was conveyed by Perry to defendant (R. 100, 101); and in concluding as a matter of law that the sale was fraudulent, void and invalid as to all property conveyed (R. 103); and in making and entering its judgment and decree on the second cause of action that said sale of all of said property was fraudulent, void and invalid as to plaintiff, and that defendant was liable to plaintiff for the amount of the note (R. 105, 106).

6. The trial court erred in making and entering inconsistent, repugnant and self-destructive findings of fact, conclusions of law and judgments on the two separate counts (R. 97-106).

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S GENERAL AND SPECIAL DEMURRER TO PLAINTIFF'S COMPLAINT AS AMENDED AND IN DENYING DEFENDANT'S MOTIONS TO REQUIRE PLAINTIFF TO ELECT BETWEEN TWO REPUGNANT AND SELF-DESTRUCTIVE CAUSES OF ACTION.

Plaintiff's original complaint was drawn upon an alleged cause of action involving two theories, viz., that

defendant corporation had assumed and agreed to pay the note of Perry to plaintiff and that as a part of said transaction Perry had delivered to defendant corporation certain property which defendant corporation undertook to apply to the payment of said note.

These allegations of the complaint were denied and defendant pleaded the Statute of Frauds.

Thereafter, by ex parte leave of court, plaintiff filed an amendment to his complaint, adding a second cause of action, alleging that the sale of assets by Perry to defendant corporation was void and fraudulent because of failure to comply with the Bulk Sales Law.

Defendant promptly moved to strike this amendment or to require plaintiff to elect as to which cause he would stand on for recovery. This motion was denied by the trial court. (R. 70-73, 59)

It is axiomatic that plaintiff may not by amendment plead an additional or different cause of action, and this court has clearly stated the proposition in *Combined Metals, Inc. v. Bastian, et al*, 71 Utah 535, 267 Pac. 1020 as follows:

“\* \* \* It, of course, is familiar doctrine that where allegations of a declaration are repugnant to and inconsistent with each other, they thereby neutralize each other and render the declaration bad on general demurrer; that a cause of action alleged in an amended petition, though founded in the same grievance or injury as that described in the original, is a different

cause of action, if it is dependent upon different grounds for holding the defendant responsible for the wrong alleged; and that the power of a court to permit an amendment of a pleading does not authorize an importation which in effect introduces a new or different cause of action. *Hancock v. Luke*, 46 Utah 26, 148 P. 452; *Johnson v. American S. & R. Co.*, 80 Neb. 255, 116 N. W. 517; *Kirton v. Atlantic Coast Line R. R.*, 57 Fla. 79, 87, 49 So. 1024; *Herlihy v. Little*, 200 Mass. 284, 86 N. E. 294; *Altpeter v. Postal Tel. Cable Co.*, 26 Cal. App. 705, 148 P. 241; *Blair v. Brailey* (C.C.A.) 221 F. 7.”

Plaintiff contended that the second cause of action was but a second count upon the same cause of action, and upon this theory the ruling and subsequent rulings of the trial court with reference to the same subject were based. Therein the court was in error.

Not only is the second cause of action an additional and different cause of action, but it is in fact repugnant to, destructive of, and incompatible with the first, just as the first is repugnant to and destructive of the second. The two could not stand together under oath as the sworn claim of plaintiff as his cause of action.

We are entirely familiar with the rule which permits a plaintiff to set forth his cause of action in several counts, upon any one of which he may or may not recover. They may be based upon different theories and need not be entirely consistent but they cannot be repugnant or self-destructive. A plaintiff may not in one allegation state that there was a contract between the parties and in the next allegation, whether in the same or a separate

pleading, allege that there was no contract. He may not allege validity of a transaction for one purpose and allege invalidity of the same transaction for a different purpose. They are repugnant and self-destructive and, as this court has said, it is the same as no allegation at all.

How could the conveyance of assets by Perry to the Corporation be a valid consideration for the assumption of a debt of a third person as alleged in the first cause of action if such conveyance was void and of no effect as alleged in the second cause of action, and vice versa?

This proposition was raised by defendant by special demurrer, by motion to strike, by motion to require plaintiff to elect at the commencement of the trial, by similar motion at the conclusion of the evidence, and by motion for new trial.

The trial court persisted in the error, even to the extent of making inconsistent and repugnant findings of fact and of entering a separate judgment on each of these self-destructive causes of action, as will be hereafter presented in this argument.

The court should have granted the motion to strike the second cause of action or sustained the demurrer or required plaintiff to elect.

That these two causes of action are repugnant and self-destructive is self-evident. One cause is based on an express contract, alleged to be valid, for assumption of a debt by a third person in consideration of a convey-



ance of property to the third person. The second cause of action alleges that the same contract alleged in the first cause of action was fraudulent, null and void.

This error may be raised by special demurrer where it appears on the face of the pleadings and by motions requiring an election on the part of the pleader. Defendant pursued both remedies.

1 American Juris. 469:

“Sec. 83. Consistency of Several Causes of Action.

“By necessary implication, causes of action which may be joined must have the element of consistency to the extent that a choice of one does not create a waiver of the opportunity to turn to the other. Causes of action which are in their nature incongruous or inconsistent cannot be united in the same petition, even though they arise out of the same transaction or out of transactions connected with the same subject of action. Causes of action are inconsistent with each other when they cannot stand together; when, if one is true, the other cannot be; or when one defeats the other. Thus, causes of action for breach of contract to convey property and for breach of warranty of authority to sell cannot be joined. Nor can one, in the same action, treat a contract as rescinded and at the same time rely upon the contract as existing.”

41 American Juris. 534:

“Sec. 537. Generally—While, ordinarily, the proper method of raising a question of misjoinder of causes of action, when that objection

is apparent upon the face of the pleading, is by a demurrer specially assigning the misjoinder as a ground of objection, in a number of jurisdictions objections to the improper blending of several causes of action, or the misjoinder of causes of action, may be raised by a motion to compel the plaintiff to elect upon which cause of action he will proceed. And where the plaintiff pleads two inconsistent causes of action, he will be compelled to elect. But where a complaint contains two or more counts, and each sets forth a separate and distinct cause of action, the plaintiff will not be required to elect on which count he will proceed, provided there is no misjoinder of causes of action; neither will election be enforced where, otherwise, the causes are not improperly blended. Thus, where, under the practice in a particular jurisdiction, the plaintiff may declare and recover upon any one or more of several causes of action on contract *which are not inconsistent with each other*, he will not be required to elect as to which contract he will rely on."

The doctrine announced in the Bastian case has consistently been reaffirmed by this court.

In Hartford Accident & Indemnity Co. v. Clegg, 103 Utah 414, 135 Pac. (2d) 919, this court said:

"\* \* \* It is well established, as defendant contends, that the power of the court to permit an amendment to the pleadings does not extend so far as to permit the importation of an entirely new and different cause of action. Grover v. Cash, 69 Utah 194, 253 Pac. 676; Combined Metals, Inc., v. Bastian, 71 Utah 535, 267 Pac. 1020; Peterson v. Union Pacific R. Co., 79 Utah 213, 8 Pac. (2d) 627; Newton v. Tracy Loan & Trust Co., 88 Utah 547, 40 Pac. (2d) 204."



This should be specially true where the new cause of action is repugnant to and destructive of the first cause of action.

The most recently followed is *Powell v. Powell*, ..... Utah ....., 188 Pac. (2d) 736, wherein this court said the following:

“It being impossible to reconcile the repugnant and inconsistent allegations of the complaint and to determine whether the cause of action vested in the administrator or the beneficiaries, the general demurrer was properly sustained. It is unnecessary to treat the questions raised by the special demurrer, as was stated by this court in the case of *Combined Metals, Inc., et al v. Bastian et al.*, 71 Utah 535, 554, 267 Pac. 1020, 1026: ‘\* \* \* It, of course, is familiar doctrine that where allegations of a declaration are repugnant to and inconsistent with each other, they thereby neutralize each other and render the declaration bad on general demurrer; \* \* \*.’”

See also *Walser v. Moran*, 42 Nevada 111, 173 P. 1149.

See also *Lynn v. Knob Hill Improvement Co.*, 177 Cal. 56, 169 P. 1009.

On the matter of requiring an election between counts which are repugnant and destructive, see Sections 653 and 654, 1 Bancroft Code Pleading 942, 943. Where the causes of action are improperly united an election should be required.

*Warfield v. Krueger*, 96 Cal. App. 671, 274 Pac. 764.

Peppers v. Metzler, 71 Colo. 234, 205 Pac. 945.

Whitson v. Pac. Nash Motor Co., 37 Idaho 204, 215 Pac. 846.

## POINT II

THE TRIAL COURT ERRED IN SUSTAINING, WITHOUT LEAVE TO AMEND, PLAINTIFF'S DEMURRER TO DEFENDANT'S SECOND AFFIRMATIVE DEFENSE ALLEGING AN ELECTION OF REMEDIES BY PLAINTIFF WHICH BARRED PLAINTIFF'S SECOND CAUSE OF ACTION.

To plaintiff's second cause of action defendant corporation pleaded as a second affirmative defense 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; hence the second cause of action could not stand.

This point was first raised upon defendant's motion to strike the second cause of action, which was denied, and again upon the demurrer of plaintiff to defendant's second affirmative defense, which was sustained without leave to amend (R. 84). Therein the trial court erred.

By the first cause of action plaintiff alleged a valid contract, for consideration, by which it was claimed defendant corporation had assumed and agreed to pay the

note of Perry held by plaintiff. By that action plaintiff elected his remedy and could not thereafter contend that the same sale was void and the consideration for the agreement non-existent. Such election having been made, plaintiff had to stand thereon. He not only took decisive action by commencing the action on the theory of validity of the contract, but also attached funds of defendant.

Cook v. Covey Ballard Motor Company, 69 Utah 161, 253 Pac. 196:

“It is well settled that one who is induced to make a sale or trade by the deceit of a vendee has the choice of two remedies upon his discovery of the fraud; he may affirm the contract and sue for his damages, or he may rescind it and sue for the property he has sold or what he has paid out on the contract. The former remedy counts upon the affirmance or validity of the transaction, the latter repudiates the transaction and counts upon its invalidity. *The two remedies are inconsistent, and the choice of one rejects the other, because the sale cannot be valid and void at the same time.* Stuart v. Hayden (C.C.A.) 72 F. 402, 5 Page Contracts, Sec. 3023.”

Salt Lake City v. Industrial Commission, 81 Utah 213, 17 Pac. (2d) 239:

“\* \* \* The law applicable to the election of remedies is thus stated in 9 R. C. L., p. 960: ‘An election of a remedy which has the effect of an estoppel in pais or an estoppel by record, in that class of cases in which the remedies are really inconsistent, is generally considered made when an action has been commenced on one of such remedies. Some courts go so far as to say that in such cases the choice of a remedy once made can-

not be withdrawn or reconsidered though no advantage has been gained nor injury done by the choice, and no injury would be done by setting the choice aside. But the more reasonable rule is that the mere bringing of an action which has been dismissed before judgment, and in which no element of estoppel is paid has arisen, that is, where no advantage has been gained or no detriment has been occasioned, is not an election.'

"To the same effect is the statement of law in 20 C. J. 29-32, and cases cited in the footnotes. While there is some conflict in the adjudicated cases as to the effect of the mere commencement of an action, the authorities are quite generally agreed that it is the first decisive act of election that is binding and that subsequent acts may not be said to constitute an election. Thus it is said in 20 C. J. 34, 35: 'The doctrine of election of remedies applies to the first decisive act of election, and makes it a defense to the prosecution of a second inconsistent suit or remedy.' "

Robison v. Robison, 57 Utah 215, 203 Pac. 340.

Howard v. Paulson, 41 Utah 490, 127 Pac. 284:

"The great weight of authority is to the effect that, where the duty to elect applies, then the bringing of an action based upon one of the remedies or rights constitutes an election which is irrevocable except in case of mistake of fact or some other good and sufficient legal excuse.

Peppers v. Metzler, 71 Colo. 234, 205 Pac. 945:

" 'A remedy based on the theory of the affirmation of a contract or other transaction is inconsistent with a remedy arising out of the same facts and based on the theory of its disaffirmance

or rescission, so that the election of either is an abandonment of the other.' ”

As applied to fraudulent conveyances, 37 C. J. S. 1136, section 305 states :

“A creditor cannot obtain relief on the theory that his debtor’s conveyance was void and of no effect and on the theory that the debtor effectively conveyed the property.”

The same rule applies with reference to fraudulent sales under the Bulk Sales Act. 37 C. J. S. 1328, sec. 478.

### POINT III

THE COURT ERRED IN SUSTAINING PLAINTIFF’S GENERAL DEMURRER TO DEFENDANT’S FIRST AFFIRMATIVE DEFENSE TO DEFENDANT’S SECOND CAUSE OF ACTION, ALLEGING WAIVER, ESTOPPEL AND ELECTION OF REMEDY.

This right under the Bulk Sales statute is a personal one which may be waived by the creditor or may be lost by electing some other remedy. If the creditor, for example, chooses to waive his rights and treat the sale as valid and elects a remedy on the basis of a valid sale, the creditor loses his right under the statute and must stand or fall as to his rights in the light of his election. He cannot do both. He may also permit an estoppel to arise.

37 C. J. S., 1328, Sec. 478, under Fraudulent Conveyances.

Bulk sales law is for the benefit of creditors and they may or may not elect to claim the benefit of it.

Castleman v. Stryker, 109 Ore. 326, 219 Pac. 1081.

Creditors may waive their rights or estop themselves from asserting invalidity.

Kinney v. Yoelin Bros., 76 Colo. 136, 230 Pac. 127.

Coleman v. Costello, 115 Kan. 463, 223 Pac. 289.

Whitehouse v. Nelson, 43 Wash. 174, 86 Pac. 174.

Chelsea Sales Corp. v. Jacobs, 193 So. 402.

Wolfe v. Bellfuir Hat Co., 47 N. Y. S. (2d) 908.

Torreyson v. Burnbaugh, 105 Mo. App. 435, 79 S.W. 1002.

A creditor who consents to or acquiesces in sale waives his rights and is estopped, particularly if he asserts rights under the sale and attempts to obtain the proceeds.

Palo Sav. Bk. v. Cameron, 184 Iowa 183, 168 N.W. 769.

Marshall v. Leon, 267 Ill. App. 242.

Schramm and Schmieg v. Shope, 200 Ia. 760, 205 N.W. 350.

Kinney v. Yoelin Bros., Supra.

In last named case creditor attached proceeds in hands of buyer. This affirmed the sale.

Acceptance of a note may be a waiver.

*Starr Piano v. Sherer*, 97 Ind. App. 77, 185 N.E. 665.

*Schramm-Schmieg v. Shope*, *Supra*.

Creditor with knowledge of sale must act promptly or within a reasonable time or lose its rights.

*Lietchfield v. Heinicke*, 200 Ia. 958, 205 N.W. 774.

See also *Andrew v. Rivers*, 207 Ia. 343, 223 N. W. 102.

Under defendant's first affirmative defense to the second cause of action defendant could have established that this election, waiver and estoppel were accomplished at the time of the original transaction. The trial court erred in eliminating a consideration of these defenses to the second cause of action by sustaining plaintiff's demurrer thereto. (R. 76).

On this entire proposition, from beginning to end, the trial court erred in its rulings with reference to this Bulk Sales Law and therein it deprived defendant of its right to have the real merits of the case heard and tried. Apparently the trial court felt that a sale of property, subject to the Bulk Sales Law, created a liability on the part of the purchaser regardless of anything that the creditor might do or not do.



Plaintiff and the court were under the impression that the Bulk Sales Law is different from other remedies; that it cannot be waived; that such a sale cannot be ratified or approved by creditors affected by it; that a creditor whose rights are affected, with full knowledge of the facts and that others will act to their prejudice in reliance thereon owes no duty to speak up if he does not approve the same; and that in spite of such acceptance and waiver he may at any time later, after others have acted, and notwithstanding his own conduct, step in and repudiate the transaction. We respectfully submit that such is not the law.

Then and there it was the duty of plaintiff to act and have his status determined.

If the corporation was to assume and pay his note there was a proper way to have that accomplished by an instrument in writing in compliance with the Statute of Frauds.

If the corporation was not to assume and pay his note he had the right to take appropriate action for the protection of his interest by then and their impounding the assets.

On the other hand he could, with full knowledge thereof, accept the transaction as it was and look only to the signer of the note for payment and leave his status unimpaired as a personal creditor of Perry.

He could also elect to treat the sale as valid and take his chances as to whether he could prove a legal

liability on the part of defendant under the first cause of action.

All of these proper defenses were comprehended within its first affirmative defense and it should have been permitted to present its evidence with reference thereto.

Defendant's first affirmative defense came squarely within the rule announced by the Supreme Court of Oregon in *Rice v. West*, 80 Ore. 640, 157 Pac. 1105, which case arose under the Bulk Sales Law. The law was not complied with, but the creditor knew of the transaction and consented thereto and agreed to look to the seller rather than enforce his rights under the statute. The Supreme Court said as follows:

“\* \* \* The purchaser did, however, obtain a statement which contained all the information required by the statute, although the oath was lacking. Even where the statute is strictly complied with a creditor loses his right to void the sale if he makes no move to protect his claim. Rice was notified, and then in effect consented to the sale by saying that he would look wholly to the Wests for the payment of his account. Every benefit which the statute has designed for the creditor was made available to Rice, and yet he not only in effect gave his approval to the sale, but he waited for two years before making any move to repudiate such approval and void the sale, and he has therefore waived his right to claim the benefit of the statute. The transaction between Hume and the Wests was characterized by honesty and fair dealing; nothing was concealed from Rice, but on the other hand he was inform-

ed of the truth ; there was no attempt to deceive or defraud ; and although the statute was not technically observed nevertheless Rice was informed of all that he would have known, even though the statute had been literally followed. If the bulk sales statute had been strictly complied with, nevertheless, his own conduct would have precluded him from now calling upon that statute for aid and by the same token he ought not to be heard to say that a failure to take a formal step in a technical way will relieve him from what would otherwise be a complete waiver on his part."

#### POINT IV

THE TRIAL COURT ERRED IN ADMITTING IMMATERIAL AND INCOMPETENT EVIDENCE WITH REFERENCE TO PLAINTIFF'S FIRST CAUSE OF ACTION ; AND IN FAILING TO GRANT DEFENDANT'S MOTION TO STRIKE THE SAME ; AND IN FINDING THE FOLLOWING FACTS AS TO THE FIRST CAUSE OF ACTION : THAT BY THE TERMS OF A CERTAIN PROMOTION AGREEMENT, EXHIBIT "B", THE PROMOTERS UNDERTOOK ON BEHALF OF DEFENDANT TO HAVE DEFENDANT ASSUME AND PAY THE NOTE OF PLAINTIFF ; THAT BY THE TERMS AND PROVISIONS OF SAID EXHIBIT "B" DEFENDANT ASSUMED AND AGREED TO PAY THE NOTE OF PLAINTIFF ; THAT ON OR ABOUT JULY 27, 1946 AND AUGUST 1, 1946 DEFENDANT, AS PART OF THE CONSIDERATION FOR RECEIPT OF CERTAIN PROPERTY FROM W. R. PERRY, PROMISED TO PAY THE NOTE OF PLAINTIFF AND RECEIV-

ED SAID PROPERTY UPON AN UNDERTAKING TO APPLY THE PROPERTY TO THE PAYMENT OF SAID NOTE; THAT *PURSUANT TO SAID PROMISE* DEFENDANT MADE ENTRIES UPON ITS OWN BOOKS TO RECORD THE FACT THAT IT ASSUMED THE NOTE AND THAT IT AGREED TO PAY THE AMOUNT OF SAID INDEBTEDNESS TO PLAINTIFF AND THAT DEFENDANT THEREBY ASSUMED AND AGREED TO PAY THE NOTE TO PLAINTIFF; THAT *PURSUANT TO SAID PROMISE* DEFENDANT ON SEPTEMBER 21, 1946 DID PAY TO PLAINTIFF \$3,588.83 ON THE NOTE; THAT PERRY, AS PRESIDENT AND GENERAL MANAGER OF DEFENDANT WAS AUTHORIZED TO TRANSACT ALL OF THE BUSINESS OF DEFENDANT, INCLUDING THE MAKING OF SAID PAYMENT; AND IN CONCLUDING AS A MATTER OF LAW ON THE FIRST CAUSE OF ACTION THAT PLAINTIFF WAS ENTITLED TO JUDGMENT FOR HE UNPAID AMOUNT OF THE NOTE, PLUS INTEREST AND ATTORNEYS FEES; AND IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT ON THE FIRST CAUSE OF ACTION.

On the first cause of action the trial court found that on or about July 17, 1946 by preorganization agreement the promoters of defendant corporation obligated it to assume and pay this note, and that on or about July 27, 1946 and August 1, 1946 defendant corporation, as a part of the consideration for the receipt of certain

property from Perry, promised to pay the note in question and received said property upon an undertaking to apply the same to payment of the note. It further found that pursuant to such promise it made entries upon its own books of the fact that it assumed the note and that it thereby assumed and agreed to pay the note.

Defendant assails these findings of fact upon the following grounds:

1. Insufficiency of the evidence to sustain the same.
2. Errors of the court in admitting immaterial and incompetent evidence with reference thereto.
3. That the evidence, if admissable, was insufficient to meet the Statute of Frauds.
4. That the findings, if sufficient and supported by competent evidence, are destroyed and rendered nugatory by the findings, conclusions and judgment on the second cause of action; hence could not sustain such a promise, if made.

Let us, therefore, first examine the evidence and see whether it was sufficient and whether it was properly admitted for consideration by the court.

The statutes involved are as follows:

33-5-4 U.C.A. 1943:

“In the following cases every agreement shall be void unless such agreement, or some note or

memorandum thereof, is in writing subscribed by the party to be charged therewith.

\* \* \* \* \*

“2. Every promise to answer for the debt, default or miscarriage of another.

\* \* \* \* \*

33-5-6 U.C.A. 1943:

“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.”

The court found that the transaction complied with both statutes.

Defendant contends that it satisfies neither.

It will be observed that the basis of both statutes is a valid promise or undertaking on the part of the third party to pay the debt of another. In one case it must be in writing; in the other it may rest in parole; but in both cases it must be a certain, definite and enforceable contract for valid consideration.

No party to this transaction testified to any such understanding or as to any such promise. Perry appeared and testified for plaintiff but he was silent on this

subject. The evidence of the promise, if such there was, must be gleaned by innuendo or deduction from the following:

### THE PREORGANIZATION AGREEMENT (EXHIBIT "B").

This agreement between Perry and Stephen Zolezzi (the principal stockholders of defendant) makes reference to the note of plaintiff and provides as follows:

“(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 or \$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.)”

Defendant contends that this agreement was not binding on the corporation, should not have been admitted in evidence over its objection, did not satisfy either statute, and in any event did not contain a promise to have the corporation assume and pay the note. The corporation never at any time adopted this agreement of the promoters, never received the conveyances pursuant thereto, and by its first meeting completely omitted any reference to the Sher Khan obligation. (See Ex. I)

Agreements of promoters are not binding on the corporation unless adopted by them expressly or impliedly



by receiving property in consideration thereof. This corporation did neither. It accepted conveyance on the basis of its own independent action after it was organized.

Tanner v. Sinaloa Land & Fruit Co., 43 Utah 14, 134 Pac. 586.

Murry v. Monter, 90 Utah 105, 60 Pac. (2d) 960.

The case does not come within the doctrine announced in Wall v. Mining & Smelting Co., 20 Utah 474, 59 Pac. 399, because it never adopted the agreement but instead set up its own status and expressly provided how its opening entries should be made. According to its action the Sher Khan note was to be paid by Perry from the funds provided for him for such purpose. This case comes squarely within the doctrine announced in the Murry case. Nor did the preorganization agreement, assuming, without admitting, that it was admissible, provide that defendant corporation should assume the liability. It provided that if Perry gave the corporation money equal to the amount of the Sher Khan debt that the corporation should take the funds "subject to" the claim of Sher Kahn.

The most that can be said for such a provision would be that Perry might use company funds to pay the debt. This is vastly different from saying that the note becomes a company liability.

Courts have uniformly held that taking property "subject to" a debt, does not create an independent liability on the part of the grantee.

Of course, what actually occurred was that Perry transacted business on his own account between July 22, 1946 and September 3, 1946, made paper profits, revalued the assets, had the books set up on the basis of the status on September 3, 1946, and his auditors and bookkeepers make the entries he directed, including an entry in favor of Sher Khan as a creditor, and then called it square. Mr. Duke, Perry's former employee and later secretary of the Company, testified that no such additional money was received by the company. It was a paper transaction.

It did not satisfy the Statute of Frauds. It was never signed by the corporation or adopted by it.

New Jersey Mfrs. Casualty Ins. Co. v. Bersick, 119 N.J. Law, (N.J.), 194 A. 438.

“Where release, whereby corporation was to indemnify individual against certain suits, was not signed by corporation or by its duly authorized agent for that purpose, it was unenforceable as against corporation under statute of frauds (2 Comp. st. 1910, p. 2612, sec. 5).”

Taylor v. R. D. Scott & Co., 149 Mich. 525, 113 N.W. 32.

“Where plaintiff made a written proposition to defendant corporation and the trustees of an estate to which a majority of the corporate stock belonged, to purchase defendant's manufacturing plant and some material, and the proposition was indorsed “accepted,” followed by the signatures of the four trustees as such, who were also four of the five directors of the corporation, there was not such a contract in writing binding

on the defendant corporation as to satisfy the requirements of the statute of frauds.”

Asbury v. Hugh L. Bates Lodge No. 686, F. & A. M.,  
62 Ohio App. 430, 24 N.E. 2d 638:

“Written minutes in lodges books, signed by secretary, or resolution to accept offer to sell realty to the lodge, do not satisfy the requirements of the statute of frauds. Gen. Code, sec. 8621.”

McCaffrey v. Town of Lake, 234 Wis. 251, 290 N.W.  
283.

“A record of the minutes of a town board meeting, signed by a town clerk and showing the passage of a motion that town attorney be retained ‘for the ensuing term,’ was not a ‘memorandum’ of contract employing such attorney nor ‘signed by the party to be charged’ so as to satisfy the statute of frauds. St. 1937, sec. 241.02.”

## BOOK ENTRIES:

When Perry finally ceased his individual operations under the name of W. R. Perry, Turkeys, under which he was paying his liabilities and at the same time transacting business for his own account, he had his auditors and bookkeeper make opening entries for the new corporation, defendant. Instead of doing so in accordance with the directions and actions of the board of directors at its meeting on July 27, 1946 (Exhibit I) he had them give himself credit for additional assets (paper profits) accrued in the meantime and had them set up the Sher Khan obligation as a company liability (R. 159, 160).

This action of Perry was never authorized or ratified by the directors of defendant and comes squarely within the following cases :

Aggeller & Musser v. Blood, 75 Utah 120, 272 Pac. 933.

Jackson v. Bonneville Irr. Co. 66 Utah 404, 243 Pac. 107.

Electrical Products v. El. Camp, Inc., 105 Mont. 386, 73 Pac. (2d) 199.

Kelly v. Galloway, 156 Ore. 301, 68 Pac. (2d) 474 and 66 Pac. (2d) 272.

Earl v. Roberts Fuel Oil, 147 Ore. 646, 35 Pac. (2d) 238.

Smith v. Steele Motor Co., 53 Ida. 238, 22 Pac. (2d) 1070.

Perry had the auditors on September 3, 1946, set up the initial entries for the new corporation. In doing so he had an entry made showing an account payable to Sher Khan in the sum of \$18,588.83. Mr. Duke testified that this was done by direction of Perry.

This did not satisfy the statute of frauds.

New Jersey Manufacturers Cas. Ins. Co. v. Bersick, 119 N.J. Law 68, 194 Atl. 438.

Taylor v. R. D. Scott & Co., 149 Mich. 525, 113 N.W. 32.

Asbury v. Hugh L. Bates Lodge No. 686 F. & A. M.,  
62 Ohio App. 430, 24 N. E. (2d) 638.

Particularly is that true when the individual making the entries or causing them to be made is the individual who is being benefitted thereby. Perry was acting for himself, in his own interests, casting his liabilities on the company.

Western Securities Co. v. Silver King Consolidated,  
57 Utah 88, 192 Pac. 664.

Lois Grunow Memorial Clinic v. Davis, 49 Ariz. 277,  
66 Pac. (2d) 238.

Elggren v. Woolley, 64 Utah 183, 228 Pac. 906, quoting from 14 (a) C.J., sec. 1891, p. 122.

If the corporation was to be bound by any such procedure it would have required some action by the Board of Directors. Perry could not act for the company in a matter in which his interests were adverse.

A manager or president may not saddle his personal liabilities onto a corporation unless the board of directors wills it so.

No one testified that Sher Khan knew anything about these transactions. The record is absolutely silent as to any communication to him or from him. He did not testify in the case. He had no communication from defendant corporation.



He had a payment from corporate funds. This is not sufficient to satisfy the Statute of Frauds. The most that can be said for it is that Perry was paying company funds that were "subject to" the liability.

The defendant objected to all of this evidence. The objection should have been sustained. (R. 128.)

There is one more piece of evidence which may be considered at this time, to-wit, Exhibit "C", from independent auditors addressed to the corporation, referring to the Sher Khan obligation as having been assumed by the corporation.

This letter was not addressed to plaintiff nor was it signed by defendant. It was pure heresay.

It does not satisfy the Statute of Frauds. Such a writing must be a writing *subscribed to by the defendant corporation*, not a letter to it by someone else.

Defendant's objection to this evidence should have been sustained.

Much of plaintiff's evidence was directed to an effort to reconcile the opening entries as made by Perry with the opening entries which he was authorized to make by the directors. The fact still remained that the directors never authorized Perry to assume his own obligations on behalf of the corporation, and it would have taken corporate action to create such a liability.

If Perry had testified, which he did not, that there was an agreement that the company should assume this

liability, the entries made pursuant to such agreement would have been competent to substantiate the fact that the agreement was being carried out, but standing alone in direct opposition to the action of the Board as to what its opening entries should be, they were without authorization, and incompetent. They are not evidence of the *promise*.

The court found that Perry, as president and manager, had authority to make these entries and payment on account. No one testified to any such authority. A manager or president has no implied authority to deal for his corporation in a matter involving his own affairs, which this was. He was causing a corporation to assume and pay his note. It would take express action of the Board of Directors to bind the corporation in a matter of that kind, as we see from the foregoing authorities.

Nor can Sher Khan say that he was in any way misled. He did not testify that he ever heard of any such agreement. In fact, he did not testify at all. Had not the court erroneously eliminated such evidence by sustaining plaintiff's demurrer to defendant's affirmative defenses as heretofore presented, the real merits of his situation as a creditor would have been developed. He knew that Perry, his debtor, was president and manager of defendant; hence could not act for the corporation on the matter of assuming his debt. As a business man he should have had his situation clarified at the time. If the corporation was to assume it he should have received a commitment from the corporation to that effect; otherwise he should have taken prompt action to see that the



transaction was not consummated until he was satisfied. He did neither. His situation called for action on his part before others became involved with their money. This is a much stronger case of notice of lack of authority than was held to be such in *Compton v. Jensen*, 78 Utah 55, 1 Pac. (2d) 242, where this court held that the fact that the owner of property acted as Notary Public on a release of mortgage was notice that he was acting without authority.

Under both provisions of the statute there must be some testimony to the effect that there was an agreement. To comply with one provision it must be in writing, authorized, and to comply with the other it may be oral, but an agreement to assume liability is necessary in both cases. The *agreement* or *undertaking* is the foundation of both.

Mere receipt of property is not sufficient in either case.

But assuming, without admitting, that this evidence was sufficient, it was all destroyed and rendered void when, as hereinafter presented, the court decreed it to be void and of no effect and unenforceable as to plaintiff, in the second cause of action. If it was void it was not valid and could not have been a valid and binding contract as found by the court to be such on this cause of action.

## POINT V

THE TRIAL COURT ERRED IN FINDING AS A FACT THAT THERE WAS NO COMPLIANCE WITH THE BULK SALES LAW AND THAT THE SALE BY PERRY TO DEFENDANT WAS VOID, AND THAT PLAINTIFF DID NOT RECEIVE HIS PROPORTIONATE SHARE OF THE PROPERTY CONVEYED WHICH WAS SUBJECT TO THE BULK SALES LAW; AND IN CONCLUDING AS A MATTER OF LAW THAT THE SALE WAS VOID; AND IN ENTERING JUDGMENT FOR THE PLAINTIFF ON THE SECOND CAUSE OF ACTION.

Now let us take a look at the second cause of action (second count).

The trial court found as a fact that the defendant failed to require compliance with the Bulk Sales Law and further found the following detailed facts: That defendant failed to demand the statement from Perry; that it failed to notify creditors; that it failed to cause the purchase money to be prorated; that plaintiff had no notice of the sale; that the sale was fraudulent and void; that plaintiff considered the sale fraudulent and void; and that \$3,588.83 was not the proportionate share of the purchase price to which plaintiff was entitled.

The issue as to whether defendant did or did not comply with the Bulk Sales Laws was raised by defendant's second cause of action and by defendant's denial in its answer.

The subject matter as to whether defendant did or did not comply with the Bulk Sales Law was never mentioned in the case. There is no reference to it in the pre-trial conference record or in any of the testimony.

Plaintiff contented himself with defendant's allegation in its first affirmative defense that no compliance with that law was necessary because all creditors were to be paid by Perry from the fund provided for his use in doing so.

That affirmative allegation that compliance was not necessary did not do away with the defendant's denial of plaintiff's allegation. When the trial court sustained plaintiff's demurrer to that affirmative defense it ceased to exist as an issue and there remained only plaintiff's allegation and defendant's denial.

An allegation that no compliance was necessary is certainly not an admission, in the presence of a denial, that there was no compliance.

The court will search in vain for any evidence on this subject.

This cause of action, therefore, must fail for lack of evidence to support the findings.

Let us, however, consider the matter a little further as a matter of academic interest and see where it leads us.

The Bulk Sales Law is as follows :

“33-2-1. Purchaser Must Demand List of Creditors.

It shall be the duty of every person who shall bargain for or purchase any portion of a stock of goods, wares or merchandise in bulk otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, or any portion of the property, furniture, fixtures, equipment or supplies of a hotel, restaurant, barber shop or other business, used in carrying on such business, otherwise than in the regular course of trade, before paying to the seller any part of the purchase price thereof, or delivering any promissory note or other evidence of indebtedness therefor, to demand of and receive from such seller a sworn statement in writing, substantially as hereinafter provided, of the names and address of all the creditors of the seller, together with the amount of the indebtedness due or owing by the seller to each of his creditors, and it shall be the duty of the seller to furnish such statement, which shall be verified by oath to substantially the following effects: \* \* \*”

Plaintiff proceeds upon the theory that by this statute all of the assets conveyed by Perry to the corporation were subject to that statute. The trial court adopted that theory and only upon that basis could it have found that the sum paid to plaintiff (\$3588.83) did not represent its fair proportion of the assets subject to the Bulk Sales Law. Therein the court erred.

The Bulk Sales Law makes fraudulent and void only the sale of such property as is subject to that law. Sales

of other property are valid unless a creditor can invalidate them upon other grounds not alleged in this case. It is therefore important to determine what assets which were conveyed are covered by the statute.

Prior to 1923 our statute had been construed by this court as having no applicability to property other than a stock of goods, wares and merchandise.

Swanson v. DeVine, 49 Utah 1; 160 Pac. 872.

In 1923, after decision of the Swanson case, the legislature amended the statute to include "any portion of the furniture, fixtures, equipment or supplies of a hotel, restaurant, barber shop or other business, used in carrying on such business."

It is defendant's contention that the Bulk Sales Law as thus amended does not apply to the following assets of Perry included in the conveyance to defendant:

Real Estate .....	\$135,000.00
Accounts Receivable .....	36,768.74
Prepaid Insurance .....	1,010.82
Deposit—State Ins. Fund ....	100.00
Meter Deposit .....	50.00
	<hr/>
	\$162,929.56

It is plaintiff's contention, which was adopted by the trial court, that the 1923 amendment affects all property of every business being sold other than in the ordinary

course of business. It is the contention of defendant that the purpose of the 1923 amendment was to bring within the statute the property, furniture, fixtures, equipment and supplies of hotels, restaurants, barber shops and other businesses of a similar nature where such supplies and equipment are used to carry on such business; that it was not the purpose of the amendment to bring within the statute all property of all sellers.

Let us take two concrete examples to illustrate the point. Utah has become an industrial and distributing point for the intermountain country. Would it be contended, for example that every time ZCMI, Cudahy Packing Company, Geneva Steel, Utah Power & Light, Mountain States Telephone & Telegraph, Western Union, or one of our transportation agencies, sells a piece of its real property that it must comply with the Bulk Sales Law? Utah is also a great mining State. Would it be contended that every time Kennecott Copper, A. S. & R., or United States Smelting & Refining Company sells a portion of its mining ground that it must comply with the Bulk Sales Law? Of course the legislature never intended by the 1923 amendment to accomplish any such ridiculous result, and yet by the interpretation given to this statute by the trial court as the law of this State, no corporation or individual, large or small, regardless of its state of solvency, may sell any portion of its property *used in carrying on its business* without complying with the Bulk Sales Law.

We submit that the 1923 amendment has no such effect, and that the only portion of the property of Perry



conveyed to the corporation which was subject to the Bulk Sales Law was the stock of goods, wares, and merchandise of the agreed value of \$15,000.00. It will readily be seen that such amount prorated to common creditors in the sum of \$131,500 left plaintiff in fact overpaid.

The 1923 amendment should be construed in accordance with the intention of the legislature. Bulk Sales Laws are in derogation of the constitutional right to transfer property and transact business through free right of contract, and are strictly construed. The principal asset of Perry conveyed to the corporation was the real estate, having an agreed value of \$135,000.00. It is this property which is mainly involved in the interpretation of the Bulk Sales Law. Courts have uniformly held that real estate, accounts receivable, and other intangibles do not come within the provisions of the Bulk Sales Laws affecting goods, wares and merchandise, fixtures, etc.

Re Elliott (1942), 48 Fed. Supp. 146.

Ventrilla v. Tortorice, (La.) 107 So. 390.

Farrell v. Paulus, 309 Mich. 441, 15 N.W. (2d) 700

Hall v. Corrine, (Tex.) 230 S. W. 823.  
37 C. J. S. 1337.

Nelson v. Sherwood, (Ill.) 258 Ill. App. 168.

Peterson v. Freeburn, 204 Ia. 644, 215 N. W. 746.

Hood Rubber v. Dickey, 167 Okla. 304, 29 Pac. (2d)  
115.



Plaintiff, however, contends that because our legislature by the 1923 amendment included "or any portion of the property, furniture, fixtures, equipment or supplies of a hotel, restaurant, barber shop or other business used in carrying on such business" that the legislature intended thereby to comprehend all property of every business used for the purpose of carrying on such business. This amendment has to do with only the property, furniture, fixtures, equipment and supplies of a hotel, restaurant, barber shop or other business.

That it was the intention of the Legislature to bring within the Bulk Sales Law only fixtures of certain types of business and not to make the law all-inclusive is clearly manifest from a reading of the title to the 1923 amendment, as follows :

"An act relating to the sale in bulk of merchandise, furniture, fixtures, or equipment of stores, hotels, restaurants, barber shops, or any place of business wherein the furniture, fixtures or equipment so sold in bulk are used in carrying on said business." (Laws of Utah 1923, page 172.)

Had the Legislature intended to include *all* property of every kind by every business of any kind, it would not have so limited its applicability to particular kinds of property of particular types of business.

This type of statute comes clearly within the rule of statutory construction adopted by this court in the recent case of *Perris vs. Perris*, 202 Pac. (2d) 731.

See also *Rospigliosi v. Glenallen Mining Co.*, 69 Utah 41, 252 Pac. 276, where this court refused to construe

general language of the usury law in accordance with broad language in violation of the clear intent of the Legislature, and in doing so used the following strong language:

“It is true that it is the duty of courts to enforce the plain intent of the statute when the parties entitled to the benefit of the statute ask for its protection. Courts do not, however, and ought not, so interpret a legislative act that the property of one citizen is forfeited and lost to another, unless the plain and unequivocal mandate of the Legislature admits of no other construction.”

The Legislature did not expressly include real property of all business concerns and expressly understood that it was including only fixtures and other similar property of certain limited types of business.

This rule of statutory construction was also applied in *State v. Navaro*, 83 Utah 6, 26 Pac. (2d) 955, where this court said:

“By the rules of construction the relative or qualifying words are to be applied to the words immediately preceding or following, unless the legislative intent is indicated that a different application be made. 59 C. J. 985.”

It is a uniform rule of statutory construction that where the words “or other business” follow a specific enumeration of particular types of business, that the statute is construed to mean other businesses of a similar type to those which are specifically enumerated, which defendant is not. That this was the intention of the legis-

lature is made clearly manifest by the fact that it added after the words "or other business," the words "used in carrying on such business." It was the clear intent of the legislature to bring within the purview of the Bulk Sales Law furniture, fixtures, and equipment in business establishments where the furniture, fixtures, and equipment are the principal assets which are used in the conduct of the business. In fact the entire amendment shows on its face that it was intended to accomplish exactly that result. Also, the words "or any portion of the property" are expressly limited to that type of business.

In the case of *Mattecheck v. Pugh*, 153 Ore. 1, 55 Pac. (2d) 730, it was attempted to bring apartment house equipment within the Bulk Sales Law, which applied to "all of the fixtures or equipment used, or to be used, in the sale, display, manufacture, care, or delivery of goods, wares, or merchandise, including movable store or office fixtures, wagons, auto trucks or other vehicles," because the statute expressly stated that it applied whenever thereby substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed. The Supreme Court of Oregon held that such general language "must be deemed to have reference to the kinds of business defined in the other parts of the statute; that is, to businesses engaged in the sale, display, manufacture, care or delivery of goods, wares and merchandise," and refused to extend the statute beyond the intention of the legislature.

The rule of *ejusdem generis* applies to the 1923 amendment, and the statute should be held to apply only

to sales of goods, wares and merchandise and to fixtures, equipment, furniture, and other property of a similar type, of hotels, restaurants, barber shops and other businesses of a similar type.

In the case of *Kirkley v. Portland Electric Power Co.*, 136 Ore. 421, 298 Pac. 237, the court, in construing a statute, said the following:

“In construing this provision of the statute, we apply the rule of *ejusdem generis*, in accordance wherewith such terms as ‘other,’ ‘other thing,’ ‘others,’ or ‘any other,’ when preceded by a specific enumeration, are commonly given a restricted meaning and limited to articles of the same nature as those previously described. 25 R.C.L. 997, sec. 240, note 18; 36 Cyc. 1120, note 45.”

In *White v. Moore*, 46 Ariz. 48, 46 Pac. (2d) 1077, a provision of the income tax law was involved and the question was as to the classification to which the taxpayer belonged. The rule of statutory construction was announced to the effect that under the rule of *ejusdem generis* whenever the general words “or any other business” follow a particular enumeration of types of activities, that those general words are intended to mean other kinds similar to those specifically named.

This, in effect, is what this court did in the *Swanson* case when it refused to include equipment and small incidental articles like rubber heels, shoe laces, etc., within the provisions of our original bulk sales law. See also *Farrell v. Paulos*, 309 Mich. 441, 15 N. W. (2d) 700.

Where a sale or transfer of property is made, part of which is within the statute and part without the statute, the statute affects only the validity of the transfer of that portion of the property which is covered by the statute. 37 C.J.S., Sec. 481 (f), under Fraudulent Conveyances.

Texas Hide & Leather Company v. Bonds, et al, 155 Okla. 3, 8 Pac. (2d) 20.

See also 50 Am. Juris. 244, Sec. 249 "Statutes."

We respectfully submit that the second cause of action cannot be sustained for the following reasons:

1. That there was no evidence to the effect that there was no compliance with the Bulk Sales Law.

2. That the Bulk Sales Law has no applicability to the major portion of the assets conveyed, and that the payment which plaintiff received was more than he would have been entitled to under the Bulk Sales Law as a common creditor of Perry as applied to the portion of the assets subject to the Bulk Sales Law.

3. That the finding of the trial court that the sale was fraudulent and void is repugnant to and destroyed by the finding and judgment of the trial court in the first cause of action that such sale was valid, and that plaintiff, by reason thereof, was entitled to recover on the basis of a valid assumption by defendant of plaintiff's obligation, as elsewhere in this brief presented.



## POINT VI

THE TRIAL COURT ERRED IN MAKING AND ENTERING INCONSISTENT, REPUGNANT AND SELF-DESTRUCTIVE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENTS ON THE TWO SEPARATE COUNTS.

The trial court then did the most remarkable thing of all:

1. It found as a fact that the sale was valid and that plaintiff was entitled to the benefit thereof as a third party beneficiary, and concluded as a matter of law the defendant was by express agreement indebted to plaintiff on the note on the first cause of action.

2. It found as a fact that the sale was fraudulent and void and concluded as a matter of law that defendant was indebted to plaintiff on the same note on the second cause of action because the agreement was invalid; that the transfer and sale to defendant corporation by Perry was fraudulent and void as to plaintiff; that the value of the assets transferred by Perry was in excess of the amount of debts owed by Perry and more than sufficient to pay all creditors in full with interest and attorneys fees;

3. Ordered judgment in favor of plaintiff on each cause of action;

4. Entered judgment in favor of plaintiff on each cause of action separately.

Defendant respectfully submits that the findings of fact, conclusions of law and judgments are inconsistent, irreconcilable, repugnant to each other, and self-destructive.

Assuming, without admitting, that these two causes of action are but separate counts of the same cause of action, there is still only one cause of action, calling for only one set of facts, and one conclusion of law therefrom, upon the basis of which only one judgment may be entered.

Pike v. Clark, 95 Utah 235, 79 Pac. (2d) 1010.

In Bank of America Nat. Trust & Savings Ass'n v. Superior Court of Los Angeles County, 20 Cal. (2d) 697, 128 Pac. (2d) 357, the court states :

“These arguments are all predicated upon a fundamental fallacy. They assume that there can be a piecemeal disposition of the several counts of a complaint. They assume, when there is more than one count in a complaint, and a demurrer is interposed and sustained, and a judgment of dismissal entered, that there are as many separate judgments as there are counts in the complaint. That is not the law. There cannot be a separate judgment as to one count in a complaint containing several counts. On the contrary, there can be but one judgment in an action no matter how many counts the complaint contains. (De Vally v. Kendall de Vally O. Co., Ltd. 220 Cal. 742, 32 P. 2d 638; Mather v. Mather, 5 Cal. 2d 617, 55 P. 2d 1174; Potvin v. Pacific Greyhound Lines, Inc., 130 Cal. App. 510, 20 P. 2d 129. In the DeVally case, supra, a demurrer was sustained and a



judgment entered dismissing two counts of a four count complaint. The court held that the judgment was premature, and dismissed the appeal from it, and stated (220 Cal. at page 745, 32 P. 2d at page 639): 'Although the matter is not mentioned by counsel for either side, it appears that the court should not have given a judgment herein until the final disposition of the entire cause. The law contemplates but one final judgment in a cause. As stated in the case of *Nolan v. Smith*, 137 Cal. 360, 361, 70 P. 166, quoting from *Stockton, etc., Works v. Glen's Falls Ins. Co.*, 98 Cal. (557) 577, 33 P. 633: There can be but one final judgment in an action, and that is one which, in effect, ends the suit in the court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversy.' ''

Also, see *Lutyen v. Ritchie*, 37 Idaho 473, 218 Pac. 430.

The facts found by the court to sustain that cause of action must be consistent and not repugnant and self-destructive.

If the facts found are repugnant to each other they are self destructive and amount to no findings of fact, and will not sustain either judgment, or both judgments.

On the first cause of action the court found that there was a valid contract or undertaking on the part of defendant to pay this note, and that it received property of Perry in consideration of a promise to apply that property to plaintiff's liability against Perry. The consideration for that promise on defendant's part, so the court found, was the conveyance of these assets. If that was

true the transation could not be fraudulent, invalid and void.

By its findings of fact, conclusions of law and judgment on the second cause of action, the transaction which was the basis for the first cause of action was held to be null and void as to plaintiff. If that was true it could not have been valid and binding.

How can both of these propositions be true?

This court has had occasion to examine and discuss the situation wherein material findings are inconsistent with each other in the case of Independent Oil & Gas Co. v. Shelton, et al, 79 Utah 384, 6 Pac. (2d) 1027. Th trial court made a finding that a defendant had knowledge of the existence of a certain mortgage and also that the same defendant had no knowledge of the covenants contained in the same mortgage. This court, in setting aside one of the findings, stated:

“Having reached the conclusion upon this record that, the court below properly found that at the time the property was conveyed to the Shell Oil Company it had no knowledge of the covenants contained in plaintiff’s mortgage restricting the use of the property, it must follow that any finding inconsistent with the finding thus approved must give way to the finding which is in accord with the evidence. In a suit of equity, where findings are inconsistent with each other, and one of such findings is supported by the evidence, the latter finding will be set aside. Sandberg v. Victor Gold & Silver Mining Co., 24 Utah 1, 66 P. 360. The finding that the Shell Oil Company knew of the existence of plaintiff’s mortgage

on September 3, 1929, when the deed from Mr. and Mrs. Shelton was delivered to the Shell Oil Company, is disapproved and set aside.”

It will be noted that the foregoing was an equity case. In a case at law the judgment cannot stand.

In *Rand v. Columbian Realty Co., et al*, 13 Cal. App. 444, 110 Pac. 322, one count of complaint in an action to recover money alleged that defendants obtained the money under a scheme to defraud through an agent or title-holding branch, and alleged an express promise of repayment, and another count was in *indebitatus assumpsit* alleging indebtedness to plaintiff for money had and received, with an allegation of an express promise to repay it, the amount being the same in both counts. The court found against plaintiff on the first count, which involved all facts upon which an agency might be predicated, and found for plaintiff on the second count, which finding could only be supported on the theory that the court determined under the evidence that the money was received fraudulently, or by means of some agent or representative. The appellate court, in holding the two findings inconsistent, stated:

“All presumptions are in favor of the correctness of the findings of the trial court and its conclusion. The finding that the money was received as alleged in the complaint, and the complaint alleging a contract of repayment, can only be supported upon the theory that the court determined under the evidence that the money was received fraudulently and through misrepresentation, or by means of some agent or representative as above suggested. This finding, however, which it

must be presumed the court based upon the evidence in the record, is entirely inconsistent with the other finding in connection with the first cause of action which related to the same facts and circumstances surrounding the transaction. These two findings are so at variance that a reversal of the judgment is made necessary.”

Also in the case of *Darrah v. Lang*, 119 Cal. App. 552, 6 Pac. (2d) 989, the same court stated:

“The effect of the finding that the transfer was made with intent to defraud the creditors of the plaintiff is to render the deed valid and binding. It required a decree holding that the defendant is the owner of the property in fee. By necessary implication, it is a determination that the plaintiff has no right, title or interest in the land.

“The court, however, adopted another finding to the effect that the defendant holds the title to the property in question, in trust, to secure the repayment of claims for specified sums of money which were found to be due from the plaintiff to the grantee. If the defendant merely holds the property in trust to secure the payment of these claims, the deed becomes a mortgage, and the legal title remains in the plaintiff. In that event the plaintiff had a right to an adjudication that he is the owner of the legal title to the property subject to the lien as security for the payment of the defendant’s claims. 51 C. J. 267, sec. 255. These inconsistent findings may not be harmonized. They are in irreconcilable conflict. One of them holds that the defendant is the legal owner of the property. The other one determines that he merely holds an equitable title therein to secure the payment of certain ascertained claims. It is impossible to say which finding should control the court in rendering the judgment.

“Where material findings are in irreconcilable conflict, it becomes necessary to reverse the judgment. 2 Cal. Jr. 1030, sec. 612; Boyle v. Boyle, 97 Cal. App. 703, 276 Pac. 118; Huling v. Secombe, 88 Cal. App. 238, 263 Pac. 362.”

Knudson v. Adams, et al, 137 Cal. App. 261, 30 Pac. (2d) 608; Henderson et ux v. Nixon, 66 Ida. 730, 168 Pac. (2d) 594.

If the contract alleged in the first cause of action was binding on defendant, for the use and benefit of plaintiff, and plaintiff was claiming and demanding and recovering as a third party beneficiary on the basis of the first cause of action, it could not have been a fraudulent and void transaction as found to be the fact and as decreed by the court in the second cause of action. If that contract was ever made it occurred during July or August 1946, before the note became due. It either occurred or it did not. If it did occur then plaintiff's claim was taken care of by assumption of liability on the part of defendant.

On the other hand, if that contract was fraudulent and void as to plaintiff, and if plaintiff regarded it as such, as found by the court in the second cause of action, it could not be a valid consideration for a contract for the benefit of plaintiff in the first cause of action.

Plaintiff cannot legally enforce contract for his benefit, which he himself repudiates as fraudulent and void and which he has the court decree to be void.

Kinney v. Yoelin Bros., 76 Colo. 136, 230 Pac. 127.

Coleman v. Costello, 115 Kan. 463, 223 Pac. 289.

C. J. S. 1328, Sec. 478 Fraud. Con.

Wolfe v. Bellfuir Hat Co., 47 N.Y.S. (2d) 908.

The principles announced by this court in the Bastian, Powell and Covey Ballard cases, *supra*, are equally applicable to findings and judgment.

Let us bear in mind that plaintiff is the one who is endeavoring in this proceeding to have the transaction declared to be both valid and invalid. He is the one who seeks to enforce the contract in the first cause of action and invalidate it in the second cause of action.

These are all specific findings of fact. It is not a case of inconsistency between specific and general findings. They are all specific and diametrically opposed to each other and self-destructive. This court may not say which was right and which was wrong, nor may this court in this case make its own findings of fact. This is a law case for collection of a note upon which defendant either is or is not liable.

We respectfully submit that these findings, conclusions and judgments cannot stand.

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