

1949

Kamas Securities Company v. Moses C. Taylor : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KAMAS SECURITIES COMPANY,
a corporation,

Plaintiff and Respondent,

—vs—

MOSES C. TAYLOR,

Defendant and Appellant.

Case No.
7398

BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL
DISTRICT COURT, SUMMIT COUNTY, UTAH

Hon. J. Allan Crockett, Presiding

FILED

1949
McKAY, BURTON, NIELSEN & RICHARDS

Salt Lake City, Utah

CLERK, SUPREME COURT, UTAH

Attorneys for Defendant and Appellant

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BRIEF OF APPELLANT

STATEMENT OF FACTS

This is an action commenced by the plaintiff corporation to recover a judgment against the defendant upon the following theories, as announced by the court at the trial and as appears at page 4 of the Record:

1. Did the defendant falsely represent to the plaintiff that the notes referred to were secured by approximately 30 shares of stock belonging to Elliott C. Taylor?

2. Was such representation false?

3. Did the plaintiff reasonably rely upon such representation?

4. Was plaintiff proximately damaged thereby?

5. Did the defendant wrongfully fail to accept the offer of Elliott C. Taylor in satisfaction of the obligation represented by the notes?

The plaintiff filed three complaints, the last of which, being designated as "Second Amended Complaint," was filed the day of the trial, September 20, 1948. In all of these complaints, the plaintiff is designated "Kamas Securities Company, a corporation, Plaintiff." This last complaint sets forth a claim that, in 1934, the defendant, acting in behalf of the Kamas State Bank, falsely represented to the plaintiff corporation that the Kamas State Bank held a certain certificate of stock owned by Elliott Taylor for 30 shares of stock in the Kamas State Bank as security for the payment of said note of \$2,000.00. This complaint further sets forth, in paragraph 4, that the note for \$2,000.00 was transferred from the Kamas State Bank to the plaintiff corporation on February 13, 1934, for a valuable consideration and that the note was transferred by endorsement. The complaint further sets forth, in this paragraph, that the defendant falsely represented to the plaintiff corporation, upon the transfer of said promissory note above alleged, that he was holding certificate for 30 shares of stock in the Kamas State Bank as security for the payment of

said promissory note, for and on behalf of the said plaintiff corporation; that the plaintiff corporation in accepting said promissory note and paying therefor the valuable consideration, as alleged above, relied upon the representations of the defendant, as alleged above; that the defendant represented at the aforesaid time that said certificate for 30 shares of stock in the Kamas State Bank had been endorsed in blank by said Elliott C. Taylor.

Paragraph 6 of the complaint sets forth that, in January, 1935, Elliott Taylor executed to the plaintiff corporation his renewal note and two notes for accrued interest, which notes were placed in and retained in the custody of defendant as secretary of the plaintiff corporation; that at said time the defendant falsely represented to the plaintiff corporation that he continued to hold the certificate of stock representing the 30 shares of stock as security for the payment of the renewal note and the two notes for accrued interest, relying upon the allegations hereinbefore alleged.

Paragraph 7 of the complaint sets forth that on many subsequent occasions the defendant reiterated the false representation to the other officers of the plaintiff corporation and to William D. Callister, its attorney, that the stock certificate had been and was being held by him, in his custody, as security for the indebtedness represented by the promissory note described in paragraph 3 and, later, as security for the indebtedness represented by the three promissory notes described in paragraph 6.

In paragraph 8 it is alleged that the plaintiff corporation, relying upon the false representations and feeling itself secure, allowed the statute of limitations to run on the notes.

Paragraph 9 sets out three occasions, between 1940 and 1943, when it is claimed the defendant represented to the other officers that Elliott Taylor had offered the 30 shares to the corporation in full settlement of the three promissory notes, and that the president, Knight, and vice president, Warr, and the attorney, William D. Callister, had particularly, on the 16th day of June, 1943, instructed the defendant to accept the 30 shares of stock in satisfaction of the promissory notes and to make the necessary transfer of the stock to the plaintiff corporation; and that the defendant wholly failed and refused to transfer the stock.

Paragraph 10 of the complaint sets out that, after the statute of limitations had run and after having refused to transfer the stock, the defendant, without the consent or authority of the plaintiff corporation, returned the stock to Elliott C. Taylor, in violation of his office of trust as the secretary of the corporation.

It was based upon the above allegations of the complaint that the court, at the time of trial, announced the theory of recovery as heretofore set forth. In other words, the recovery was to be the false representation of the defendant and his failure to follow the direction of the officers of the corporation in transferring the stock. There is no claim of any conversion in this case, but the claim is asserted to a breach of trust or responsibility by the defendant as an officer of the plaintiff corporation. As appears at page 168 of the Record, William D. Callister, the attorney for the plaintiff, stating the position of plaintiff corporation, testified:

Q. So your position and your advice is there

was never any pledge of this stock, there was never any security of the Kamas State stock?

A. After Mr. Taylor denied it, yes.

This would preclude any theory of the stock having ever been pledged, particularly in view of the complaint and the findings of fact wherein the allegation is always that the defendant falsely represented that there was a pledge.

The findings of fact, which follow closely the second amended complaint, set out in paragraph 4 that on the 13th day of February, 1934, the defendant, acting in behalf of the Kamas State Bank, falsely represented to the plaintiff corporation that the Kamas State Bank held a certain certificate of stock as security for the payment of the three promissory notes, and that the Kamas State Bank, for a valuable consideration, transferred the notes to the plaintiff corporation, in accepting the notes, relied upon the false representation as to the pledge of the security, and that at that time the defendant falsely represented that the 30 shares of stock had been endorsed in blank by Elliott C. Taylor.

Paragraph 7 of the findings sets out the fact that the defendant, on various occasions, reiterated the false representations that he held the stock as security.

The 8th finding of fact is that the plaintiff corporation, relying upon the false representations, permitted the statute of limitations to run against all three notes.

Paragraph 9 of the findings is to the effect that the defendant had, on the various occasions, represented to the officers and agents of the plaintiff corporation that Elliott C. Taylor had offered the 30 shares of stock to the plain-

tiff corporation in full settlement of the three promissory notes, and that the plaintiff corporation, through its attorney, Callister, had by letter of June 16, 1943, and by conversations in July and August of 1943, instructed the defendant to accept the 30 shares of stock as offered by Elliott C. Taylor in full satisfaction of the said promissory notes and to make the necessary transfer of the stock to the plaintiff corporation.

The 10th finding is that the defendant, acting fraudulently, and with intent to injure the plaintiff corporation, and in violation of his office of trust, returned the stock to Elliott C. Taylor in the forepart of 1944.

The 11th finding is that the stock, at the time it was returned, had a reasonable value of \$60.00 per share.

The 12th finding is to the effect that the Knight family owned 54 per cent of the stock of the plaintiff corporation and made a gift of shares of stock to Virgil King and Elmo Hoyt, two of the directors of the plaintiff corporation.

The 13th finding of fact is that, at a meeting of the plaintiff corporation in July, 1946, A. W. Warr requested legal action be brought against the defendant for the defendant's false representations and the return of the stock to Elliott Taylor, and the directors refused to accept the request of Warr to bring this action.

The 14th finding is that A. W. Warr, as president of the corporation and acting for the corporation,, and A. W. Warr, for himself individually and for others similarly situated, holding stock and debentures of the plaintiff company, brought this suit against the defendant to recover as-

sets which the defendant fraudulently deprived said corporation of.

The 15th finding is for damages in the sum of \$1800.00, being the reasonable value of the stock at the time it was wrongfully returned by the defendant to Elliott C. Taylor.

The court made a finding to be included as a part of paragraph 9 (a) of the findings in which it found that the defendant had in his possession the 30 shares of stock for the purpose of using the stock which belonged to Elliott Taylor in effecting a complete and final settlement of his account and the stock to be delivered to the corporation only upon the corporation accepting the stock in full and complete settlement and satisfaction of the indebtedness of Elliott Taylor; that since the year 1936 or 1937 the defendant had advised the Board of Directors that the stock was available to the corporation if accepted in full settlement; that at no time prior to June 16, 1943, had the Board of Directors of the plaintiff corporation communicated to the defendant that they accepted the offer of Elliott Taylor of the said shares of stock in full settlement of his indebtedness. It is to be noted, here, that the court had refused the request to find that the board of directors of the plaintiff corporation had ever acted to accept the offer. The court has made no finding on that request whatsoever except as above indicated.

The conclusions of the law is that plaintiff is entitled to a decree of the court declaring, ordering and adjudging the defendant to deliver the 30 shares of stock to the plaintiff and, in the event that he doesn't deliver the stock, that the plaintiff recover judgment for \$1,800.00 with interest

from the 1st day of September, 1944.

The judgment is that the plaintiff have judgment for the 30 shares of stock or for the sum of \$2,259.00, with interest at 8 per cent from the date of the judgment. The judgment also awards the plaintiff \$204.00 as costs of court.

The facts of this case as shown by the evidence are as follows:

Along with all of the other banks in the country, the Kamas State Bank was closed during the bank holiday declared by President Roosevelt. During the holiday, it became necessary for the bank to raise \$10,000.00 in cash before the bank examiner would permit it to open. This money was raised by the defendant and two other directors, and they never received any consideration for the money so raised, it being given to the bank as a gift. (R. pp. 183 and 198) Subsequently, the bank was required by the bank examiner to raise additional cash in order to qualify for the Federal bank deposit insurance. This required the bank to dispose of a number of its slow assets and replace them with cash. This program was presented to the stockholders of the bank and, accordingly, there were sold to the stockholders of the bank certain of the assets in exchange for cash furnished by the stockholders. The stockholders then turned the assets they had purchased from the bank over to the plaintiff corporation, which was then organized, in exchange for shares of stock and debentures of plaintiff corporation. Among the assets transferred to the stockholders were the three notes of Elliott Taylor, the \$2,000.00 note representing a renewal of his note given in 1929 and the note for \$500.00 and the one for \$250.00 having been given to the Kamas State Bank

to pay a stock assessment levied by the bank; the two notes representing the assessment on two certificates of stock owned by Elliott Taylor, one being for 10 and the other for 20 shares.

The representations as to the security for the notes of Elliott Taylor purported to take place at a meeting of the plaintiff corporation held subsequent to its incorporation and on February 13, 1934, which was the first annual meeting of the stockholders.

The articles of incorporation show that the plaintiff corporation had a capital stock of 2500 shares of a par value of \$1.00 per share, of which 2,000 shares were to be placed in the treasury to be disposed of by a resolution of the board of directors. The articles show \$500.00 of the stock to have been subscribed to and paid for by five of the original incorporators.

At the 1934 annual meeting in February it was determined that all of the outstanding stock be called in and stock be reissued in proportion to the amount invested in the company. The meeting adjourned to permit the cancellation and issuance of the new stock and reconvened on that day with the full 2400 shares of stock having been issued and being present.

The minutes of a directors' meeting of the same day show that the treasurer was instructed to issue debentures in \$1,000.00 amounts or fractions thereof pursuant to the instructions of the owners. The further directors' meeting earlier in the morning on that date is shown to have ordered the stock of the company turned back and a new issue of the stock in amounts proportionate to the amount of money invested by those to whom the ones making the

investment may direct, and that all of the stock authorized to be issued by the Company be issued in the same proportion to those to whom the money was invested may direct.

As to whether any representation or statement was made by Moses Taylor at the meeting of the plaintiff corporation in February, 1934, the testimony at the trial shows the following:

Warr, the party who signed the complaint for the plaintiff corporation, at page 41 of the Record was asked if Moses Taylor said anything in that meeting and answered that Moses Taylor had indicated there were \$38,000.00 worth of notes and that the money they would have to put up would be about \$34,000.00.

Q. In other words, there was a general discussion as to how much the assets would be that would be turned over by the depositors to the corporation?

A. Yes.

Q. Is that it?

A. There was no discussion as I know of. Mr. Taylor — Moses Taylor — told us just how much we had and we accepted it.

Q. There was nothing in detail presented to you?

A. No.

Q. Just lump sum large figures mentioned?

A. That's all.

At page 87 of the Record, Knight, another director of the plaintiff corporation and a witness for the plaintiff, states:

Q. Didn't you state at the time of your deposition in September, 1948, that the first recollection you had of any discussion ever being held as to these notes was in 1936?

A. I may have done, but I was also asked to refresh my memory on dates.

As appears at pages 87 and 88 of the Record, Knight said that he went to the minutes to refresh his recollection, then admits that the minutes didn't refresh his recollection but that there were some letters, and the testimony shows that he couldn't produce or describe the letters, which were supposed to have refreshed his recollection since the taking of the deposition. However, most important in Knight's testimony is his statement on cross-examination at pages 91 and 92 of the Record wherein he states:

Q. And, as Mr. Warr testified, then, merely the total of the notes with the list was shown?

A. The—

Q. That's the '34 meeting?

A. Each note and its amount was there.

Q. That was what was told the stockholders?

A. Yes.

Q. And it was lumped in one large sum?

A. Well, each note was listed separate and its amount.

Q. And it was also tabulated and totalled?

A. Yes.

Q. So, it was a general discussion, wasn't it?

A. Yes.

Q. They didn't discuss any particular notes, did they?

A. No.

Further, at pages 95 and 96, the witness, Knight, on cross-examination admitted that for all of the years from 1936 through 1944, inclusive, he could not state of any occasion when anything was said about the bank stock or of any individual who had said anything about the stock or anything in any manner or in any way referring to the bank stock.

At page 96 of the Record the witness, Knight, states that he never did know whether the stock was held as a chattel mortgage, as a pledge, or by way of offer, but he did know that, if the plaintiff corporation was to get the stock, they would only get it if they would accept it in full settlement of all of Elliott Taylor's obligations.

At page 100 of the Record, the witness, Knight, on cross-examination, was asked this question by the court:

Q. If you were to get the stock, then you had to take it as full settlement?

A. That was what we were always told.

THE COURT: There is no dispute about that, apparently; at least, that is Mr. Warr's testimony, too.

The entire deposition of Knight is in evidence, and at pages 27 and 28 of that deposition the witness Knight was asked if he could mention a conversation at any time and give the words that Moses Taylor used in connection with the notes or the bank stock. The witness refused to answer when asked:

Q. Why weren't you going to answer?

A. Because it would be pretty hard for a person to remember eight or nine years the exact words of a conversation with exact date of just such a conversation. All I can give you is the impression I gained at that time.

Q. You are not pretending to tell me the exact words, now — that is still just a matter of impression?

A. Yes, that is the impression. I know the word "collateral" and "security" was used.

Q. Whether that was a chattel mortgage, or just how it was represented, you don't know?

A. No.

Q. And you never attempted to inquire?

A. No.

It is clear from the foregoing testimony of Knight that he and Warr were in harmony on the proposition that the only matter that was presented to the meeting by Moses Taylor, the defendant, was that the assets were worth so much money, and that nothing was said in detail about any of the notes. There is nothing in the testimony to show when the notes were transferred to the plaintiff corporation. It is clear that the plaintiff corporation did not raise the money that was paid to the Kamas Bank. That money had been raised and paid to the bank by the stockholders and depositors of the bank who took in exchange from the bank certain of its assets. These assets were then turned in to the plaintiff corporation in exchange for its stock and debentures. Facts further show that in 1936 the collection of the various obligations owing the plaintiff cor-

poration was taken out of the hands of Moses Taylor, the secretary, and the responsibility given to F. T. Knight, the witness heretofore referred to.

All of the minutes of the corporation are a part of the Record in this case, and the minutes of a special meeting of the board of directors, held November 23, 1936, show that F. T. Knight was authorized to arrange with an attorney to handle the collection of the notes of this company on a percentage basis. Defendant's Exhibit 3, a letter from Attorney Callister to the plaintiff company, dated November 21, 1936, reports that he investigated Elliott C. Taylor and that he found that he had neither an automobile nor real property in his name and that it would be futile to bring suit against him at that time unless assets were discovered. He recommended that it would be wise for the plaintiff corporation to take a judgment against Taylor in the near future for the purpose of prolonging the statute of limitations and to watch out for assets. The evidence shows that this letter was written pursuant to the employment of Callister by Knight for the plaintiff corporation, to collect on all of these notes and receive 25 per cent of all sums collected.

The minutes further show that at the meeting on November 19, 1938, the president was instructed as follows: "The president is further instructed to bring suit against any of the makers of the notes of the company that he feels can be collected by suit."

The evidence further shows that friction had developed between Knight, Warr, and the defendant, Taylor, and that is the reason that the collection of all of the notes was taken away from Moses Taylor and assumed by Knight

and Warr. The direct responsibility on the collection of the notes was continued in Knight until 1941 when, because of his absence from the state, the responsibility was given to Warr.

At Page 46 of the Record Warr states that at the 1934 meeting Elliott Taylor had told them that he had "put all this cash into the bank" . . . "Now I am willing to turn over my stock." . . . "That is all I can now do." In other words, at the 1934 meeting Elliott Taylor was telling them, then, he was willing to put in his stock in settlement of his obligation and that was all that he could do.

On the question of the reliance of the plaintiff corporation upon the representations of Moses Taylor that the stock was held as security and for this reason the statute of limitations was permitted to expire on the notes, we call the Court's attention to the Record at Page 47 wherein Warr states that at the February 26 meeting in 1940, "From the time we started on, that was our main discussion is the notes that was getting outlawed and what we could get settled for and one thing and another of that kind, and, at no time, at any time note was due and it hadn't been settled but what them notes all come up—"

Q. And at that meeting you had talked about foreclosure, hadn't you?

A. Yes.

Q. You thought there ought to be some action?

A. Yes, sir.

Q. Or at least a judgment foreclosure, is that it?

A. Yes, talked about foreclosure all along.

Q. The foreclosure, you do remember that, though?

A. Yes.

At Pages 50 and 51 Mr. Warr states that the directors, in 1936, gave to Mr. Knight the responsibility to secure an attorney and to proceed to bring actions and to collect upon the three notes; that between 1936 and 1938 the responsibility for making the collections on the notes was given to Mr. Warr, and he, himself, proceeded with the attorney to secure, by action or otherwise, a collection upon the Taylor notes. At Page 54 in connection with the collection on these Taylor notes Mr. Warr says: "I didn't say we could get cash, but I said we didn't take the stock because we weren't sure the stock was any good at that time."

At Page 73 Warr states that he left the notes with Callister, pursuant to the direction from the directors, with instructions to proceed to foreclose on the notes, and the matter was left, in 1941, with the specific direction to Callister to bring an action on the notes. At Page 73 Warr answers the question:

Q. The last action, direction, you gave was for Mr. Callister to bring an action on these notes?

A. Yes.

Q. You didn't tell him any different and haven't at any time, have you?

A. No.

Q. And you didn't have any contact with Moses Taylor from 1941 to the 1943 meeting, did you?

A. I don't remember having any.
At Page 76:

Q. So in spite of the fact that there was collateral you were determined to bring an action, then, in 1941?

A. Well, that was the only way to get it transferred. Taylor refused to transfer it or show us it was transferred.

Q. Back in '41?

A. Yes, or any other time.

In a directors' meeting, February 26, 1940, the directors determined to accept the stock of Elliott C. Taylor in settlement of his notes, provided arrangements could be made with Callister so that the 25 per cent fee agreed on for collected items would be cancelled, and F. T. Knight was given full authority to act. At the directors' meeting held October 14, 1941, the settlement of the Elliott C. Taylor note for the stock of the Kamas State Bank is referred to Warr to secure a release of the notes from Callister and to have the stock settlement accepted provided satisfactory arrangements can be made with Callister to withdraw the notes and not have them listed for the payment of 25 per cent as the amount collected as attorney's fees.

Prior contacts by Callister had been made with Elliott Taylor in attempting to secure collection, and the plaintiff was advised by Elliott that they could have the stock or they could have nothing as far as he was concerned. Warr indicated that he felt all along that he didn't want to have the plaintiff company take the stock, that instead he felt they could do better by taking a judgment against Elliott Taylor and realizing on it later. *At no time was any*

agreement secured from Callister that he would return the Elliott Taylor notes to the plaintiff corporation and withdraw any claim to attorney's fees if the corporation accepted the stock in full settlement. At no time had the board of directors of the plaintiff corporation ever agreed to accept the stock without the attorney withdrawing his claim to compensation, and the only directive in this matter is the minute entry of the board of October 14, 1941, which provided for Warr to take the stock in settlement if Callister would withdraw his fee.

In May, 1943, Moses Taylor advised Callister, by letter, being plaintiff's Exhibit B, of the number of shares of bank stock attached to the Elliott Taylor note and advised him that he would appreciate his recommendations on the stock and what claim he was maintaining if the stock was accepted as settlement of the notes. At page 55 of the Record, Warr then states:

Q. You remember a meeting held with the directors in 1943, don't you?

A. Yes.

Q. What month of the year was that held?

A. Well, it was in the midsummer sometime, but I wouldn't say when.

Q. What would be your best recollection as to the month?

A. Well, I'd say it was in June?

Q. Now, it could have been July?

A. Yes, I was here three months, then.

At page 59 the testimony was as follows:

Q. You remember that meeting in which there was this altercation between Mr. Knight and Mr. Moses Taylor? (Referring to 1943 meeting. See page 58)

A. Yes.

At page 60:

Q. Tell me this: At that meeting in which there was an altercation with Mr. Knight, can you tell me what Moses Taylor told the Board at that time?

A. I'm not sure.

At page 61:

Q. Now, going back to this '43 meeting — you have stated you have no recollection at all as to what Moses Taylor said at that time?

A. Appeals back to me — I know what you want me to say, and I'll say it.

Q. Wait a minute, you mean you have been refusing to testify because you thought —

THE COURT: No, you don't need to lecture him. He has said now he will answer your question; let him do it.

A. So many meetings; your question was, was there anything else said or anything happened, referring to that meeting?

Q. My question was: Do you remember what Moses Taylor said at the '43 meeting when there was the fight with Knight?

A. Yes, he said the notes was outlawed, and he sent the collateral back to it, to Mr. Taylor, because we didn't foreclose on him.

Q. Now, you are sure those were the words that were used?

A. That's the words he said.

At page 62:

Q. He might have said, then, "Elliott Taylor is now withdrawing his offer, and the stock is no longer available"?

A. I didn't say "he is now drawing," I said, "he had drawn."

Q. He said he had withdrawn —

A. He had taken his stock; he said, "I sent them back to the owner." I says —

Q. Tell you that he no longer could make a settlement because Elliott Taylor wouldn't accept it?

A. Then —

Q. All right, what were the words that he used?

A. He said that, that the notes had outlawed and that he had sent the stock back to the owner.

Following this meeting, Callister indicates in his testimony that in July and August he made demand upon the defendant, Taylor, to turn the stock over to him but that the defendant refused to do this.

The evidence then shows that nothing was done in this matter until the annual stockholders meeting held July 1, 1946, at which time the minutes of that meeting, Exhibit 1, which were signed by Warr and by Moses Taylor, show that directors were elected, and upon a motion unanimously

passed the meeting proceeded as a joint stockholders and directors' meeting. At this meeting Warr was elected president and Hoyt vice president. The minutes show that a discussion was brought up by Warr regarding a claim he felt the company had against the secretary, Moses C. Taylor, in reference to his actions on the notes of Elliott C. Taylor, but no conclusions were reached by the Board.

In explaining this matter, at page 66 of the Record, King states:

Q. Now, at the '46 meeting you were elected a director, if I understand?

A. Yes.

Q. And was there any discussion after your election to the office of director as to whether the company should bring a suit against Moses Taylor?

A. Why, yes. It was discussed there for some time, and it seemed to me that Mr. Warr was highly in favor of entering suit against Mr. Taylor for the collection of these notes, and — well, in fact, I stated rather positively that I was opposed to it; in fact, I think I said it seemed to me highly silly to make a court issue of something that could be decided right there in the meeting.

Q. Now, did Mr. Warr ask for authority in that meeting to sue Mr. Taylor?

A. That was the impression I had, yes.

Q. Was he given authority?

A. He wasn't.

At page 226 of the Record the question was asked Mr. King:

Q. And has the board of directors of the Kamas Securities Company at any time authorized the filing of this action?

A. None at all.

Q. This is solely an action of Mr. Warr?

A. That seems to be the case.

In his testimony, Moses Taylor, who has been president of the Kamas State Bank and secretary of the Kamas Securities Company since 1933, and who at the 1946 meeting was made a director of the plaintiff corporation and continued in office even though the control of this corporation is vested in the Knight family of which Warr and Frank Knight are members, testifies as to what actually occurred in relation to the Elliott Taylor notes and stocks.

At Page 184 of the Record Mr. Taylor states that Exhibit A, being the note for \$2,000.00, was executed in the fall of 1932. At Page 182 he states that Exhibits B and C arose out of transactions in 1933 at the time of the bank holiday. At Page 213 Mr. Taylor further states that the Exhibits B and C were evidence of the assessment that Elliott would have paid on his stock in the Kamas State Bank. In other words, as appears from Mr. Moses Taylor's testimony, the bank was required to raise \$10,000.00 to reopen which they did by assessment, and though the money was raised by three of the officers of the bank, including Moses Taylor, the obligation of each of the stockholders for his proportionate share was evidenced by notes where the sum was not paid by the stockholder in cash. Mr. Taylor states that the notes, Exhibits B and C, though they were made payable to the bank, should have in effect been made payable to Moses Taylor who advanced the money which was

to be raised by that assessment. Mr. Taylor states that this handling of the notes was careless but that there was no question that Exhibits B and C were part of the assets that went into Kamas Securities, the plaintiff corporation.

As appears at Page 214 of the Record, the transaction from which Kamas Securities was formed resulted from the formation of the Federal Deposit Insurance Corporation which required the liquidation of a number of the assets of the bank, and those assets being replaced by cash. The bank sold these assets to depositors and stockholders and, for their cash, transferred to them the assets of the bank, among which assets were Exhibits A, B and C. These assets were transferred to the stockholders and depositors of the bank, and they in turn formed the plaintiff corporation, the depositors and stockholders transferring to the plaintiff corporation the various assets in exchange for stocks and debentures. When these transfers were made, when the various stockholders secured their stock, does not appear at any place in the Record. The notes are not endorsed. There is no record to show which stockholders transferred the notes to the plaintiff corporation, and the only indication in the Record as to this matter is contained at Page 214 where, in answer to the question on cross-examination, Mr. Moses Taylor states:

Q. The Kamas Securities Company paid for them the same as they did the other notes, did they not?

A. Yes.

Q. Were these notes included among the assets of the Kamas State Bank then?

A. No, they weren't.

Q. Well, when you totalled up the amount of the notes turned over to the Kamas Securities Company, you had to make the entry of that total, did you not, in the books of the Kamas State Bank?

A. I don't know whether — I don't think your question is correct. See, when the notes were taken out of the assets of the bank, the checks were secured from the depositors and those entries were entered that way; later on the securities company was organized.

In other words, there is nothing in the evidence or in the entire record which shows that the plaintiff company ever paid anything of value for the notes, Exhibits A, B and C, and the inference, of necessity, must be that no consideration was paid for these particular notes. They were merely added to the assets of the plaintiff corporation and were not in fact, certainly as to two of the notes, Exhibits B and C, ever the assets of said corporation and were never transferred to the bank from individuals and then back to the plaintiff corporation as assets coming from the bank. The defendant submits, therefore, that there is nothing in the Record at any point showing any consideration paid for the notes, whether they had been transferred, under what circumstances, what monies were paid for the notes, whether face value or otherwise, or whether any monies, any stocks, or any debentures were issued by the plaintiff corporation for said notes.

In fact, Moses Taylor made clear that the notes B and C which were actually his personal property were tossed in as part of the assets going to the plaintiff corporation for which the defendant never did receive anything of value whatsoever.

SPECIFICATIONS OF ERROR

1. The court erred in overruling the general demurrer of the defendant to the amended complaint for the reason that said amended complaint does not state a cause of action and the overruling of the demurrer is contrary to law.

2. The court erred in overruling the defendant's general demurrer to the second amended complaint as it appears at page 124 of the transcript for the reason that said second amended complaint does not state a cause of action, and the overruling of the demurrer is contrary to law.

3. The court erred in its third Finding of Fact wherein it found that on or about the 13th day of February, A. D. 1934, the Kamas State Bank had in its possession a certain promissory note payable to the order of the Kamas State Bank of Kamas, Utah, one year from the date thereof in the sum of \$2,000.00, bearing interest at the rate of seven per cent per annum, which promissory note had been executed and delivered by one Elliott C. Taylor, and that in addition the bank had in its possession on the 13th day of February, A. D. 1934, two promissory notes of Elliott C. Taylor, dated the 9th of May, 1933, for \$500.00 and the 9th of May, 1933, for \$250.00, for the reason that said finding is contrary to and not supported by the evidence.

4. The court erred in its fourth Finding of Fact in this:

A. That it found that the defendant falsely represented to the plaintiff corporation on the 13th day of February, 1934, that the Kamas State Bank held a certain certificate of stock as security for the payment of three promissory notes, for the reason

that said finding is contrary to and not supported by the evidence.

B. That it found that the Kamas State Bank for a valuable consideration transferred the promissory notes to the plaintiff corporation by endorsement, for the reason that said finding is contrary to and is not supported by the evidence.

C. That it found that upon the transfer of the three promissory notes from the Kamas State Bank to the plaintiff corporation the defendant stated he was holding 30 shares of stock as security for the payment of the promissory notes, for the reason that said finding is contrary to and is not supported by the evidence.

D. That it found that the plaintiff corporation relied upon the representation of the defendant and that the defendant represented the certificate had been endorsed in blank by Elliott Taylor, for the reason that said finding is contrary to and not supported by the evidence.

5. The court erred in its seventh Finding of Fact wherein it found that on various occasions the defendant represented that the stock was held as security for the various notes and renewals, for the reason that said finding is contrary to and not supported by the evidence.

6. The court erred in its eighth Finding of Fact in that it found that the plaintiff corporation relied upon the false representation of the defendant and feeling itself secure permitted the statute of limitations to run against the various notes, for the reason that said finding is contrary to and not supported by the evidence.

7. The court erred in its ninth Finding of Fact wherein it found that for the period from the 16th day of June,

1943, to the end of August, 1943, A. W. Warr was in California, for the reason that said finding is contrary to the evidence.

8. The court erred in its tenth Finding of Fact wherein it found:

A. That the defendant was acting in collusion with his brother, for the reason that said finding is contrary to law and is not supported by the evidence. Further, that there is no issue made or supporting this finding in the evidence.

B. That the stock was fraudulently, and with intent to injure the plaintiff corporation, and in violence of the office of trust, returned by the defendant to his brother, for the reason that said finding is contrary to law and is not supported by the evidence.

C. That not until less than two years prior to the commencement of this action were the other officers of the plaintiff corporation informed of the return of the stock to Elliott Taylor, for the reason that said finding is contrary to law and contrary to the evidence.

D. That not until two years prior to the commencement of the action did the officers find that the representations were false and untrue, for the reason that said finding is indefinite as to what statements were made, is not supported by and is contrary to the evidence, and the truth is that the plaintiff corporation and its officers at all times were advised that the stock was held for settlement only.

9. The court erred in its eleventh Finding of Fact in that the court found that the stock was of the reasonable

value of \$60.00 per share on the date the stock was returned to Elliott C. Taylor, for the reason that said finding is not supported by the evidence, is contrary to law and could not be a measure of damage under any theory for which relief is sought by the plaintiff corporation.

10. The court erred in its twelfth Finding of Fact wherein it found:

A. That the defendant made a gift of ten shares of stock of the plaintiff corporation each to Virgil King and Elmo Hoyt, for the reason that said finding is surplusage and not supported by any issues raised by the pleadings, is contrary to law and at variance with the pleadings.

B. That Virgil King and Elmo Hoyt did not own any of the debentures of the corporation, for the reason that said finding is contrary to and not supported by any evidence, is immaterial and contrary to law and not supported by any issue, and is at variance with the pleadings.

11. The court erred in its thirteenth Finding of Fact wherein it found that said Virgil King and Elmo Hoyt, acting in collusion with said defendant and for the purpose of protecting said defendant in his fraudulent acts, refused to act favorably on said request of Mr. Warr, for the reason that said finding is not supported by the evidence, is contrary to the evidence and is at variance with and not supported by any issue raised by the pleadings.

12. The court erred in its fourteenth Finding of Fact wherein it found:

A. That A. W. Warr, acting for himself individually and for others similarly situated holding stock and debentures of the plaintiff company,

brought this suit against the defendant, for the reason that said finding is contrary to law, is contrary to and not supported by the evidence, and is outside of any issue raised by the pleadings of the plaintiff.

B. That the defendant fraudulently deprived the corporation of assets. That said finding is contrary to law and to the evidence and is not supported by any issue.

13. The court erred in its fifteenth Finding of Fact where in it found:

A. That the plaintiff had been damaged in the sum of \$1,800.00, for the reason that said finding is contrary to the evidence and contrary to the law.

B. That the stock was wrongfully returned by the defendant to Elliott C. Taylor, for the reason that said finding is contrary to the evidence and to the law.

C. That the reasonable market value of the stock at the time the stock was returned was the sum of \$1,800.00, which finding is contrary to the evidence and to the law and is indefinite for the reason that the date of the market value is not found by the court.

14. The court erred in making its Conclusions of Law wherein it determined:

A. That the plaintiff is entitled to a decree of the court declaring, ordering and adjudging the defendant to deliver to the plaintiff 30 shares of stock in the Kamas State Bank, for the reason that such a conclusion is contrary to law and is not supported by the pleadings and is not supported by the findings.

B. That, in case the defendant does not deliver the stock to plaintiff, plaintiff have and recover judgment against the defendant for \$1,800.00, together with interest at the rate of six per cent from the first day of September, 1944, for the reason that said conclusion is contrary to the law and is not supported by the findings.

15. The court erred in failing to find from the affirmative defense of the defendant that the action was not brought by the plaintiff corporation, that such action had **never been authorized** by the board of directors and that such directors had never authorized filing of this action; that such refusal of the court to so find is contrary to the law.

16. That the court erred in failing to make a finding on the separate defense of the defendant to the effect that the action of the plaintiff is barred because of the laches of the plaintiff, it appearing that no action was brought from the 13th day of February, 1934, until October 16, 1946, and is barred by the Statute of Limitations. 104-2-24 U. C. A. 1943.

17. The court erred in refusing to grant the motion of the defendant for a new trial, which refusal is contrary to law.

18. The court erred in entering its judgment in favor of the plaintiff and against the defendant for 30 shares of stock or for the sum of \$2,259.00 for the reason that said judgment is not supported by the findings or the conclusions and is contrary to law.

19. The court erred in entering its judgment in favor of the plaintiff and against the defendant for the sum of \$204.00 as costs of court for the reason that said court costs

are not supported by any memo of costs as required by law and such entry of judgment is contrary to law.

20. The court erred in failing to find as requested by the defendant that on or about 1936 or 1937 Elliott Taylor forwarded to the defendant two certificates of stock totalling 30 shares of Kamas State Bank for the purpose of effecting a complete and final settlement of his account with plaintiff, for the reason that said failure to find on this material fact is contrary to law and the rights of this defendant, and this requested finding is fully supported by the evidence and there is no evidence to the contrary.

21. The court erred in failing to find as requested by the defendant that the plaintiff and its officers had been advised of the fact that Elliott C. Taylor had forwarded the stock and that the officers were advised that they could have the stock only if they accepted it in full and complete settlement and satisfaction of all the indebtedness of Elliott Taylor to the plaintiff corporation, for the reason that the failure to so find is contrary to law and this fact is uncontroverted and supported by the evidence and is a material issue to be found by the court.

22. The court erred in failing to find as requested by the defendant that at no time had the board of directors of the plaintiff corporation accepted the offer of Elliott Taylor of the shares of stock in full settlement of his indebtedness, for the reason that the failure to so find as requested is contrary to law; that said fact is a material fact and uncontroverted and fully supported in the evidence.

23. The court erred in failing to find that the board of directors of the plaintiff corporation had refused to accept the offer of Elliott Taylor to deliver the 30 shares

of Kamas State Bank stock in full satisfaction of the indebtedness of Elliott C. Taylor. That said finding is a fact uncontroverted in the evidence and is a material issue in this case, particularly in view of the minutes of the corporation represented in Exhibit F, showing a meeting of February 26, 1940, and a meeting of October 13, 1941, wherein the board determined that the offer would be accepted only if the notes could be taken from the attorney and he waive his claim to 25 per cent.

24. The court erred in overruling the objection of defendant to the introduction of the testimony of the witness DeWitz as to the value of Kamas State Bank stock, as appears at page 296 of the Record, which ruling is contrary to law.

25. The court erred in overruling the Special Demurrer of the defendant to the Amended Complaint of plaintiff and, particularly, the second grounds of said demurrer wherein the defendant claimed the complaint was uncertain wherein it alleged: "for a valuable consideration paid by the plaintiff corporation," for and upon the reason that defendant was not able to ascertain what, if any, consideration was paid by the plaintiff, and the recital of the court to require the plaintiff to set forth in its complaint the consideration paid is contrary to law.

26. The court erred in overruling the objection of the defendant to the testimony of the plaintiff's counsel Callister to the value of the stock, as the objection appears at 256 of the Record, for the reason that the ruling of the court permitting Callister to testify is contrary to law.

ARGUMENT

The various and numerous assignments of error heretofore set forth will be argued under the following numbered specifications with the argument under these various subjects to be so organized as to include all of the various specifications and without waiving any of such specifications. The various subjects are as follows:

I. The court erred in failing to sustain the general and special demurrers to the various complaints.

II. The Findings are not supported by the evidence; the Conclusions are not supported by the Findings, and the Judgment is not supported by the Evidence, Findings or Conclusions.

III. The action on behalf of the plaintiff corporation is unauthorized and is void and a nullity.

IV. This action is barred by the statute of limitations, particularly the provisions of Sections 104-2-22 and 104-2-24, U. C. A. 1943, and, further, that the action is barred because of the actions of the plaintiff.

V. The court erred in its Findings as to the value of the stock and in giving its judgment based upon the value found.

VI. There was no offer of the stock which the corporation could accept.

VII. The court erred in entering judgment for costs.

I

THE COURT ERRED IN FAILING TO SUSTAIN
THE GENERAL AND SPECIAL DEMURRERS TO
THE VARIOUS COMPLAINTS.

At all times during the argument on the pleadings, in the presentation of the case at pretrial and in the trial of the case, W. D. Callister, attorney for respondent, has claimed that this action was not one for conversion but was one for breach of trust as an officer of a corporation. The final and complete answer to the contention of the respondent's counsel is the fact that neither his pleadings nor his evidence show that the defendant was ever an officer of the Kamas Securities Company during any of the times complained of. That this is an actual fact is evidenced by Article IX of the Articles of Incorporation of the Kamas Securities Company. This article states that:

“The officers of this corporation shall be three directors, one of whom shall be President, and one of whom shall be Vice-President; also a secretary and treasurer who may or may not be a stockholder or director, and who shall be appointed or employed by the Board of Directors. *No one shall be an officer or director who is not a stockholder.*”

The evidence shows that the defendant was never a stockholder nor a director of the Kamas Securities Company during the times complained of, and the evidence shows that the defendant was appointed secretary at the February 13, 1934, meeting. These facts are mentioned at this time to show the court that there is substance to our contention for the general demurrers, for, as a matter of law and as a matter of fact, there is no relationship of an

officer to the company, and the evidence itself shows merely the relationship of an employee with the company, and, further shows the employment was gratuitous. The only allegation of the relationship between the defendant and the plaintiff corporation is contained in paragraph 2 of the Second Amended Complaint with the bare recital that the defendant, from the 13th of February, 1934, to the date of the filing of the complaint was the secretary of the plaintiff corporation. *There is no allegation at any other place in the complaint setting forth the relationship of the defendant to the plaintiff, other than the allegation as to his position as secretary.*

If this action could be maintained at all for the breach of a fiduciary relationship, then the facts setting up that fiduciary relationship must be made to appear in the complaint. From the complaint and by the evidence, the defendant was only an employee. There being no such relationship in fact and none appearing from the complaint, the action, if it could be maintained, could be as one only for fraud. In the case of *Kinnear v. Prows*, Utah, 16 P. 2d 1094, the court held that the elements necessary to constitute actionable fraud are as follows:

“(1) A representation; (2) its falsity; (3) its materiality; (4) speaker’s knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer’s ignorance of its falsity; (7) his reliance upon its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.”

Though the plaintiff has claimed that its action is one for fraud of an officer, there is nothing in this complaint

to show that he was an officer at the time any representation was made in 1934. The whole basis that the fraud is a breach of any fiduciary duty is negated by paragraph 4 of the complaint which states that the defendant was acting for the Kamas State Bank. This makes the action appear to be one in which the defendant was acting to defraud the plaintiff and to permit the benefit to go to the bank, and yet such theory is not followed in the pleadings. The use of the word "falsely" is a conclusion only of the pleader and as used in paragraph 4 and the balance of the complaint could be construed only as an allegation that the fact was not true, but it cannot be construed by the use of the word "false" only as being a willful or fraudulent representation or lay the basis for a recovery in an action for fraud. This court has determined that the use of the word "false" is a conclusion of the pleader and adds nothing to the complaint. The pleader is required to set forth the facts. Particularly does the use of the word "false" lose all efficacy of willfulness or fraud, because the complaint subsequently sets forth the fact that the defendant did have the stock and complains of the fact that the stock was returned to Elliott Taylor.

In paragraph 9 of the complaint the plaintiff sets forth the fact that the corporation was advised by the defendant that the stock had been offered by Elliott Taylor in full settlement of the three promissory notes. There is no allegation in paragraph 9 that the corporation had accepted this offer. There is no allegation as to how long the offer was to remain in force. There is no allegation as to what action the corporation had taken at the time the offer was presented to it, and, therefore, paragraph 9 loses its efficacy because there is nothing to show that as far as the offer is

concerned any relationship had been created which had been violated in any way by the defendant. The fact is that the complaint shows the statute of limitations had run on all of the notes by January of 1942. Paragraph 9 states that, as of May 25, 1943, a year and four months after the statute of limitations had run, the defendant had advised the other officers and agents that Elliott C. Taylor had offered the shares, but it doesn't appear, from paragraph 9, when the offer was made, or that as of May, 1943, there was any representation that there was an existing valid offer from Elliott Taylor, and the statement is only that, on May 25, 1943, the defendant told them that Elliott C. Taylor had offered the stock as settlement. This certainly cannot be in any manner construed to allege an offer of the stock in settlement by Elliott Taylor on May 25, 1943.

Paragraph 10 of the complaint is a complete contradiction of all previous allegations because it sets forth that the defendant had in his possession the stock and that he returned it to the owner, Elliott Taylor, claiming that this was done fraudulently and with intent to injure the plaintiff corporation. The use of the words "fraudulently" and intent to injure the plaintiff corporation" do not add any efficacy to the complaint unless the complaint sets forth in its facts that the plaintiff was the owner of the stock or the return of the stock breached any right which the plaintiff had. The complaint is entirely void of any such allegations, and there are no facts to show that the corporation had any right to the stock at the time it was returned. The plaintiff states the fact to be that it had no rights of security on the stock, sets up the fact that it knew the stock was in the possession of the secretary and knew it was in his

possession for the purpose of settlement. There is no allegation that the plaintiff was or became the owner of the stock. There is an allegation that the stock at all times belonged to Elliott Taylor, was his property, and from the complaint the return of the stock to Elliott Taylor could have violated no duty.

We sincerely submit to the court that this complaint does not state a cause of action against Moses Taylor.

As will be more specifically set forth in subsequent argument, the court erred in overruling the special demurrer of the defendant in which the defendant requested the court to require the plaintiff to set forth in the complaint the consideration paid for the note. As the action is not one brought upon the note itself but is one brought upon fraud, the plaintiff could not in any event recover any greater sum, together with interest, than paid for the note. This was an essential part of the complaint in setting forth damages, and the failure of the court to require the pleading of that sum, together with the failure of the court to require evidence on that matter, was reversible error.

II

THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE; THE CONCLUSIONS ARE NOT SUPPORTED BY THE FINDINGS, AND THE JUDGMENT IS NOT SUPPORTED BY THE EVIDENCE, FINDINGS OR CONCLUSIONS.

The third finding of fact is that the Kamas State Bank had in its possession on February 13, 1934, three promissory notes, which are set forth in the finding.

The fourth finding of fact is to the effect that the defendant, acting in behalf of the Kamas State Bank, of which he was cashier, falsely represented to the plaintiff that the Kamas State Bank held the thirty shares of stock of Elliott C. Taylor in the Bank as security for the payment of the three notes; that the Kamas State Bank, for a valuable consideration, paid by the plaintiff corporation, transferred the three promissory notes to the plaintiff corporation by endorsement.

These findings are not supported by any evidence whatsoever.

Counsel for plaintiff has always been under the mistaken belief that the plaintiff corporation purchased certain assets from the Kamas State Bank by paying cash to the Kamas State Bank. This was not and never has been the fact. The Bank, in order to qualify for federal deposit insurance, was required to exchange certain of its assets for cash. This required the Bank then to find a buyer for those assets, and this was accomplished by having the depositors and stockholders buy certain of the assets from the bank. This policy was followed, and numerous depositors and stockholders paid in various sums to the Bank, in exchange for which they received certain assets of the Bank. The defendant attempted to make that procedure clear to the attorney for plaintiff on Page 214 of the Record when he was asked the question:

“Q. Well, when you totalled up the amount of notes turned over to the Kamas Securities Company, you had to make the entry of that total, did you not, in the books of the Kamas State Bank?

A. I don't know whether—I don't think your

question is correct. We, when the notes were taken out of the assets of the bank, the checks were secured from the depositors, and those entries were entered that way; later on, the Securities Company was organized."

It further appears from the evidence that the assets of the plaintiff company approximated \$48,000. (R. 184)

The depositors and stockholders, after they had purchased the assets of the Kamas State Bank, then determined they would form the plaintiff corporation.

This would clearly show that the Kamas State Bank did not at any time receive any consideration from the plaintiff corporation for any of the assets which eventually were owned by the Kamas Securities Company, and the finding that the Kamas State Bank, for a valuable consideration, transferred the notes to the plaintiff corporation is entirely contrary to and is not supported by the evidence. There is no evidence as to who purchased the three promissory notes complained of from the Kamas State Bank, and the evidence is that two of the notes never were property of the Bank.

The finding that Moses Taylor, the defendant, was acting in behalf of the Kamas State Bank, of which he was cashier, is likewise contrary to the evidence and unsupported for the reason that the only dealings that the Bank had on its assets were with its stockholders and depositors to whom it sold its assets for cash, and this was accomplished before the plaintiff corporation came into existence. The finding that the Kamas State Bank had made any representation to the plaintiff corporation by its cashier, the defendant, is entirely contrary to and not supported by the

evidence, because for the same reason the evidence shows there was never any dealing between the plaintiff corporation and the Bank.

The plaintiff corporation dealt with its stockholders who had purchased assets and which assets the stockholders were turning over to the plaintiff corporation. This error is a material one and represents an attempt of the plaintiff corporation to support its contention that representations were made as to the notes at the February, 1934, meeting by tying in the transaction with the bank, which it would like to claim was selling the assets to the plaintiff corporation, and that in order for the Bank to make the sale the defendant made these representations. Clearly the defendant had nothing to gain personally in the sale of the assets, and the plaintiff has been attempting to reach the defendant by connecting him as cashier of the bank. This is contrary to the actual fact and finds no support whatsoever in the evidence. This finding further represents that the Court and the plaintiff corporation did not understand or appreciate the mechanics under which the plaintiff corporation got its assets.

As indicated, the fourth finding is to the effect that at the February, 1934, meeting the defendant falsely represented to the plaintiff corporation that the Bank held security for the notes. In the first place, the evidence shows that at that time the Bank had qualified for the federal deposit insurance, had received its cash, and no longer held the notes — they having been transferred to some depositor or stockholder, the details of which were not brought out in the trial. The evidence further is to the effect that nothing was said about any particular note or asset at the February

meeting of 1934; that to the contrary the various assets that had been taken out of the bank were before the meeting in tabulated form, and nothing was discussed about them except by totals.

The testimony of both Knight and Warr is as follows, at Page 41 of the Record:

“Q. In other words, there was a general discussion as to how much the assets would be that would be turned over by the depositors to the corporation?

A. Yes.

Q. Is that it?

A. There was no discussion as I know of; Mr. Taylor, Moses Taylor, told us just how much we had and we accepted it.

Q. There was nothing in detail presented at all?

A. No.

Q. Just lump sum, large figures mentioned?

A. That’s all.”

On Page 87 of the Record, Knight admitted that at the time of his deposition he had no recollection of any discussion prior to 1936. However, he claims he was asked to refresh his recollection, and though he could not tell how that was accomplished, he nevertheless states at Pages 91 and 92 of the Record in reference to the 1934 meeting:

“Q. They didn’t discuss any particular notes, did they?

A. No.”

Under the well-established principle of this Court that the witnesses' testimony would be no stronger than it is left on cross-examination, the attempt of Knight to recall any statement at the 1934 meeting can be no stronger than it is stated above.

We sincerely submit to this Court that there is no evidence of any statement as to the notes or securities which can be discovered in this evidence as regards the 1934 meeting. In further support of this, and we feel it is conclusive, is the testimony of Knight and Warr as appears at Page 100 of the Record as follows:

" . . . if you were to get the stock, then you had to take it as full settlement?"

A. *That was what we were always told."*

"THE COURT: There is no dispute about that, apparently; at least, that is Mr. Warr's testimony, too."

Further and conclusive on this matter is the statement of Knight as appears at Page 121 of his deposition, wherein he states:

"In what manner this stock of Elliott Taylor's was held, who held it, and in whose name it was, whether it was a chattel mortgage on it, a pledge, an agreement, or whether it was merely held to be offered in settlement, you never inquired?

A. , No.

Q. And you never found it, did you?

A. No, I don't believe I ever did because I had always taken Mr. Taylor's word on it. It was there and any time we were ready to accept it, it

would be turned over if we would take it in full settlement."

This deposition of Knight's was taken in September, 1948, before the various amendments to the complaint were made, and it is very clear and evident that as far as Knight was concerned, he had always been told and given to understand that the stock was there for the purpose of effecting a final and complete compromise and for that purpose only, and that the plaintiff corporation could have the stock only if it took it in full settlement.

Knight and Warr are the only witnesses for the plaintiff on the matter of any representations of the defendant prior to the employment of Mr. Callister as counsel in 1936. It is interesting to note, too, that Mr. Callister received his first knowledge of there being any stock involved in 1940 in a conversation with Elliott Taylor, and though Mr. Callister had been collecting on the notes and making investigations on them for four years, he had never been advised of any security or any representations as to any security. This even though the Statute of Limitations had run on two of the notes prior to the time Mr. Callister was advised as to the stock.

We submit that the evidence will not permit any finding of any representation made in 1934, and will not permit any finding that the bank transferred the assets to the plaintiff, or that the defendant acted in behalf of the plaintiff.

As to the seventh Finding of Fact wherein the court finds that the defendant represented falsely that the stock was held as security for the various notes and renewals, it is submitted that the records, as in this brief elsewhere

pointed out, disclose that both Knight and Warr knew "all along that there was only one way they could get the stock and that was to accept it in full settlement." Assuming for the purpose of argument that their statement was correct that the defendant told them the stock was held as security, the fact remains that they knew also that there was only one way they could get the stock and that was to take it in full settlement. That destroys entirely any claim that the corporation was misled or any of the directors were misled by any statement of Mr. Taylor. There was no misunderstanding in the minds of Knight or Warr as to the manner in which the stock was held and the purpose for which it was held. It is submitted that these people have never been misled at any time by any statement of Taylor, for he has constantly told them that the stock was available for them only if they would take it in full settlement. The corporation never accepted this proposition, and we submit that any finding as to such representation was not supported by the evidence.

Particularly is the Finding, that the defendant, on the 25th of May, 1943, represented that the stock was held by him as security, contrary to the evidence, because the Finding is based, as far as the evidence is concerned, upon the letter of that date, and there is nothing in that letter which would support any such finding. In fact the letter is clearly to the contrary because it states that the corporation should talk with Elliott about making a compromise.

Finding No. 8 of the court, that the plaintiff corporation relied upon the false representations of the defendant and feeling itself secure permitted the statute of limitations to run, is so contrary to the evidence as to make it appear

ridiculous. Warr, who had the complete authority, as president of the company, to settle the Taylor notes, states in his examination that, as pointed out elsewhere in this brief, he instructed Callister to bring an action on the notes in 1941 and had never told Callister otherwise. Both Knight and Warr testified that they never knew and never discussed the date of the notes or the fact that the statute of limitations had run upon them. The fact is, by Warr's statement, they had determined that they would not rely upon the stock but had instructed their attorney to bring action. The Finding is entirely fallacious, because there was no knowledge or information on the part of the plaintiff corporation other than that there could have been no pledge of the stock because they could only get it, and it was available to them, only if taken in full settlement. This was not a pledge relationship, there was no information or no reason, in January of 1942, for the corporation to rely upon any pledge, and assuming there was a pledge they could not reach the stock if the statute of limitations had run against the notes. Under our statute there is only one way in which the plaintiff could have realized upon the stock and that was to bring an action to foreclose. It could have been forced to bring this action whether it proceeded in any event by sale. If the plaintiff corporation could not support its sale of the stock by an action in the courts for foreclosure because its action would have been barred on the notes, then there was no remedy to plaintiff and it could not have held or have any claims to the stock. The finding of the court on this matter was entirely error.

The ninth Finding of Fact, that A. W. Warr was in California from the 16th of June, 1943, to the end of August, 1943, is entirely contrary to the evidence, for the

witness Warr stated in his cross-examination that the meeting in 1943 was held in midsummer, that it was his best recollection it was held in June or July, and his testimony can be left no stronger that it was on his cross-examination. The attempt of the court to make such a finding is entirely contrary to the evidence.

The tenth Finding of the court, that the returning of the stock by the defendant was fraudulent and with intent to injure the corporation and in violation of the office of trust, is entirely contrary to the law and the evidence. There was no evidence to show that the corporation had any right to the stock. As a matter of law, the corporation had no right to the stock. Elliott Taylor was the owner of the stock, and in 1943 when the stock was returned by the defendant to Elliott Taylor, Elliott Taylor was the owner and entitled to the possession of the stock. The returning of the stock to him was certainly neither collusive nor fraudulent and could not be held so because, as a matter of fact, he was legally entitled to the possession of it.

The tenth Finding, that the other officers of the plaintiff corporation were not informed of the return of the stock to Elliott Taylor for less than two years prior to the commencement of this action, is grossly error because Judge Crockett will have to be bound by the uncontradicted evidence that at a meeting of the directors held in the summer of 1943 the directors Knight and Warr were advised by the defendant that this stock had been sent to Elliott Taylor. This matter is more completely argued elsewhere in this brief.

The court erred in its twelfth Finding of Fact wherein it found that the defendant had made a gift of shares of

stock to King and Hoyt and that King and Hoyt acted in collusion with the defendant for the purpose of protecting the defendant in his fraudulent acts and refused to act favorably on the request of Warr, for the reason that such finding is entirely contrary to law and to any issue in this case, and is entirely unsupported by the evidence. The plaintiff has never amended its complaint, and any issue of this kind is not made a part of its complaint, and, though the defendant had set up in his answer that the action had not been brought by the corporation as there was no authority for the acts of Warr, the plaintiff in its reply merely denied that affirmative matter. There is no issue before the court on any other matter than the question as to whether Warr had been authorized to file the action as the president of the corporation. The question of fraud or collusion in preventing him from bringing the action was never made an issue in this case. This finding not being supported by any issue and such issue never having been before the court, the attempt of the court to make a new issue out of that and incorporate it in the Findings without the foundation appearing in the pleadings and without the defendant ever being apprised of the purpose or the issue maintained is entirely contrary to law.

The thirteenth Finding of Fact wherein the court found that King and Hoyt acted in collusion for the purpose of preventing the favorable action on the request of Warr is likewise void for the same reason.

The fourteenth Finding that Warr brought this action for himself individually and others similarly situated, was entirely erroneous and is elsewhere in this brief more specifically argued and set forth. The attempt of the court to

make a finding of this kind when it is not supported in any manner whatsoever by the pleadings or the evidence was gross error.

The attempt of the court in its Conclusions of Law to direct the defendant to deliver 30 shares of stock to the Kamas State Bank or, in the alternative, to pay a sum as cash is obviously contrary to law and is error for the reason that this action was never conceived to be one for replevin but is one for fraud for a false representation. There is no claim of any ownership of the stock by the corporation. In fact, Callister in his testimony stated directly to the court that they made no claim to ownership and that the representation of the defendant as to the pledge was false. If it was false, then the corporation, of course, did not own the stock.

The court erred in refusing to find, as requested by the defendant, that the stock was sent to the defendant in 1936 or 1937 by Elliott Taylor for the purpose of effecting a complete and final settlement of the account. This is an important and essential fact in this case, and the failure of the court to so find as requested is contrary to law. The failure of the court to find, as requested by the defendant, that at no time had the plaintiff corporation accepted the offer of Elliott Taylor to give the shares of stock in full settlement of his indebtedness, is error, for on this fact the evidence is uncontradicted. It is a material fact, and any attempt to hold the defendant unless such offer had been accepted by the Board was grossly error.

Likewise, the refusal of the court to find that the Board of Directors had refused to accept the offer of set-

tlement was gross error as such request is supported by the uncontradicted evidence in the case.

The court erred in overruling the special demurrer of the defendant wherein the defendant had requested the court to require the plaintiff to specify what consideration had been paid for the notes. This matter is more fully argued elsewhere, and we submit that the entire basis for the recovery of any damages would require that the plaintiff plead and prove the consideration paid for the notes.

We submit that Judge Crockett was grossly in error in overruling the objection of the defendant to the permitting of Callister to testify to the value of the bank stock. Defendant's objection and the ruling of the court appear at page 256 of the Record.

Callister's qualifications were that of an attorney with no experience in accounting, and the court permitted him to testify that the stock had a value of \$116.00 a share, which figure was arrived at by dividing the capital stock of the corporation into a net figure which Callister had received by telephone from Mr. Knapp, the state bank commissioner, and he in turn had reportedly taken the information from a bank statement of the Kamas State Bank in Mr. Knapp's office. This matter is more fully argued elsewhere in this brief, and we submit that the court committed gross error in permitting Callister to give testimony as to the value of the stock.

In conclusion on the defendant's objections to the various assignments of error directed to the findings of the court, we would like to point out that at page 155 of the Record plaintiff's counsel Callister stated in answer to Judge Crockett's question:

"THE COURT: Weren't you interested in whether or not there was a chattel mortgage or other pledge of this stock?

A. I had no information to the effect there was any such, so of course there was no interest there.

We submit that nothing could be more conclusive of fallacy of all of Callister's claims as to letting the statute of limitations go by and of reliance upon any pledge or mortgage than his own admission to Judge Crockett that he was never interested.

At page 163 of the Record Callister states that he went to see Taylor in 1943 at the request of Knight, and the court will notice in the Record that Knight was the one who had the fight with Taylor at the 1943 meeting when told that the stock had been sent back to Elliott Taylor. This definitely ties in the time when the corporation had notice of the return of the stock. At page 165 Callister states there had never been any agreement as to his fee and he had never agreed to waive his fee, nor did he, and we submit this as conclusive of the fact that the condition upon which the offer of settlement might have been accepted was never met and is conclusive of the fact that the corporation never accepted the offer.

At page 175 Callister admits that when the defendant told him he would have to talk with Elliott he asked him why he would have to talk with Elliott. Defendant refused to answer and yet Callister never followed that matter up.

III

THE ACTION ON BEHALF OF THE PLAINTIFF CORPORATION WAS UNAUTHORIZED AND IS VOID AND A NULLITY.

Defendant's Exhibit 1, minutes of the meeting of the stockholders and directors of plaintiff corporation, held July 1, 1946, shows the annual meeting of the stockholders of plaintiff corporation to have been held in Kamas, Utah, July 1, 1946. The stockholders at that meeting adopted an amendment to the Articles increasing the directors from three to five, which was done on motion of A. W. Warr. Upon motion, the five directors, being Knight, Hoyt, King, Warr and Taylor, were unanimously elected as directors.

The minutes further recite that all of the above named directors being present, the meeting was then continued as a joint stockholders' and directors' meeting. Officers were elected and following this, Arthur Warr presented to the meeting the claim he felt the Company had against Moses C. Taylor in reference to his action on the notes of Elliott E. Taylor. The minutes further recite that no conclusions were reached by the Board. In his testimony at Page 65 of the Record appears the following:

“Q. No question about the fact before all stockholders and directors at that meeting, some mention about the Taylor claim?

A. Yes.

Q. But there was no conclusions rendered, no action taken by the Board of Directors, was there?

A. Not at that time, no, because we broke

up in a row again. We didn't get a chance to finish. There was no objections or sanctions.

Q. No authority given anyone; nothing done?

A. No; nothing done."

At Page 66 of the Record Warr further states that no other action on this matter was ever taken by the Board of Directors, there being one subsequent directors' meeting in June of 1948, and that no authorization to file or continue this action was given at that time.

On Page 224 of the Record the witness Virgil A. King, one of the directors, states that at the 1946 meeting he was elected a director, and further states:

"It was discussed there for sometime and it seemed to me that Mr. Warr was highly in favor of entering suit against Mr. Taylor for the collection of these notes, and I stated rather positively that I was opposed to it; in fact, I think I said it seemed to me highly silly to make a court issue of something that could be decided right there in the meeting.

Q. Now, did Mr. Warr ask for authority in that meeting to sue Mr. Taylor.?

A. That was the impression I had; yes.

Q. Was he given authority?

A. He was not."

The evidence stands uncontroverted that A. W. Warr, as president and director of the plaintiff corporation, at a directors' meeting asked authority to bring an action against Moses Taylor on the matter of the Elliott Taylor notes; and it further stands uncontroverted in the evidence that the directors refused to give that authority to the president,

and, in fact, denied him that authority. The matter then having been submitted to the board of directors of the plaintiff corporation, and they having determined not to bring such an action, the question remains as to whether under those circumstances the president can sue in the name of the corporation and contrary to the determination of the Board bring such an action. In other words, can the president of the corporation act separately and apart from and contrary to the express desire and determination of the board of directors?

We would like also to call the Court's attention to the minutes of the plaintiff corporation from the time of its incorporation, being plaintiff's Exhibit F, and to point out that in every instance where an action was to be commenced on any of the notes or obligations due the corporation, the authority for that action has always been first presented to the board and the authority taken only where the board has specifically granted that authority.

In support of this we call the Court's attention to the minutes of the meetings of February 15, 1935, June 20, 1935, August 26, 1935, November 18, 1935, all of which are instances in which the board itself considered and acted upon any settlement on any obligation and authorized the secretary and other officers to take action whenever any legal action was contemplated.

The minutes of February 10, 1936, permitted F. T. Knight to employ an attorney to make arrangements for the collection of all notes owned by the company. And again, on November 23, 1936, on the report of Knight to the Company, he was authorized to employ the attorney on a percentage basis.

Throughout all of the subsequent minutes relative to the settlement of notes and other matters, these questions have been referred to and handled by the Board of Directors. This company not being an active company, but merely one for the collection of notes, necessarily the authority of its officers is limited, and they have no designated duties except as given them by the board of directors, and the board of directors on all matters has reserved its complete authority and the officers have only such authority and such duties as would be delegated to them by this board, and have no general authority or right to act either by reason of the delegation of authority by the directors or by its By-laws or Articles of Incorporation.

By-law No. 6, which is a part of Exhibit F, provides that a board of three directors is to manage the affairs of the company. It also provides that the directors shall have the general management and control of the business affairs of the company, and shall exercise all the powers that may be exercised or performed by the corporation. The only authority given to the president by the By-laws, which is By-law No. 7, is that the president shall preside at all meetings of the stockholders.

Section 18-2-20, U. C. A. 1943, provides that the corporate affairs of the corporation shall be exercised by the board of directors, and in construing this section the Supreme Court of the State of Utah, in the case of *Anderson et al vs. Grantsville North Willow Irrigation Co.*, 51 Utah 137, 169 Pac. 168, has held that the authority to manage and control the corporation and conduct its business is left exclusively to the board of directors and not to the stock-

holders, and the action of the board of directors shall supersede even that of the stockholders.

In construing this statute, likewise in the case of *Copper King Mining Co. v. Hansen*, 62 Utah 605, 176 Pac. 623, this Court has held that where authority is given a president to act as the agent of the company in selling treasury stock, and at a subsequent meeting, without reference to that authority the board of directors has made other provisions, the authority of the president has been rescinded by implication. Clearly, therefore, any authority which Warr may have hoped to have had as president of his corporation would definitely have been terminated and withdrawn by the refusal of the board of directors to give him authority to file the action against Taylor in the 1946 meeting.

In the Copper King case, *supra*, and in the case of *Lochvitz v. Pine Tree Mining & Milling Co.*, 37 Utah 349, 108 Pac. 1128, our Court has held that the president as such has only the power of a director plus such powers as the board of directors has conferred upon him.

It is worthy of note, too, in the Grantsville North Willow case, *supra*, this Court has held that where the directors of a corporation refused to authorize the transfer of shares of stock, the president and secretary did not have authority to make a transfer, even though there was a resolution of the stockholders vesting the officers with such power.

Legion against Vivisection, Inc., et al v. Grey, 63 N. Y. Sup. (2d) 920 (1946), was an action for libel brought by the corporation as plaintiff against four individuals as de-

fendants. The Court, in dismissing a judgment in favor of the corporation and against the individuals, said as follows:

“Another compelling reason exists for setting aside the verdict of the jury and for dismissing the second cause of action. The record is not entirely devoid of proof establishing the authority to prosecute the action on behalf of the corporate plaintiff. There is not a scintilla of evidence to show that the institution of the action in the corporation’s behalf was authorized, or that such action was later ratified by proper resolution of the Board of Directors. On the contrary, it would seem that the corporate action was instituted by the individual plaintiff upon his own volition, without the consent or authority of the representative members of the corporation. Such proof is vital, particularly where the controversy is one between ranking members of the corporation concerning the administration of the corporate affairs.

“Defendant’s motions are granted to the extent of setting aside the verdict as to the second and fifth causes of action, and the same are dismissed on the law.”

9 Fletcher Cyc. Corporations, Sec. 4216, states:

“Suits by corporations must be instituted and defenses made as other acts by corporations must be done by proper authority. The proper persons to authorize the commencement of a suit or the interposition of a defense on behalf of the corporation are primarily the directors, but the power may be vested in the president or other managing officer.
* * * An officer of a corporation merely as such has no power to bring any suit his fancy may dictate.”

Again, in Paragraph 4219 of the same volume, it is stated:

“The general control of actions resides in the directors. Incident to the control over suits would be the authority to make compromises which may be in the directors or by the manager or officer within the limits of the delegated authority.”

Another case that is even stronger is the case of *St. Bernard Trappers Association v. Michel*, 162 L. A. 366, 110 So. 617. In this case the company made an assignment of a lease through its treasurer. Subsequently, a mass meeting was held of some 800 trappers and members of the association and they repudiated the assignment and directed that a suit be brought to declare it null and void. The president of the association then employed counsel and commenced an action and resigned from his position the following day. A Board of Directors' meeting held after this resignation repudiated this action of the president and employed counsel to dismiss the action. The motion to dismiss was denied by the trial court.

“The primary question presented for decision arises on the motion to dismiss, which motion was filed at the instance and on behalf of the Board of Directors of plaintiff corporation, and this, of course, involves the question as to whether or not a suit instituted by the president of a corporation can be thereafter continued and prosecuted to judgment by such president and intervening stockholders of the corporation, against the will and over the protest of the said Board of Directors, who are charged under the charter and under the law with the management of the affairs of the corporation.”

The statute in Louisiana authorizes the president of a corporation to bring an action for the corporation. The court, however, in this case stated that the purpose of this statute is to avoid the necessity of a special resolution to that effect and to prevent technical objections to want of authority. This court in reversing the trial court and dismissing this suit then goes on to say:

“It is perfectly manifest that it was never the intention of the law maker to confer on the president of a corporation the authority to institute and prosecute a suit in opposition to the wishes and against the protest of the Board of Directors of the corporation, and more especially was it not the intention to authorize such president to seek by judicial process the undoing of the acts of the corporation legally passed by the Board of Directors in the exercise of the powers and direction vested in said Board by its charter or by the law.”

Thus, in this case we have a statute authorizing the president of the corporation to bring an action on behalf of the corporation but the court decided that where the Board of Directors had the managerial powers of the corporation its actions are determinative.

It is also important to note that this is not a stockholder's action. A stockholder's action requires the stockholder to have a derivative right and to have asked the corporation to sue where the right of action is in the corporation in the first instance and the stockholder has been denied such right. When such action is brought by the stockholder, it is brought in his name and should be brought in behalf of those other stockholders similarly situated. The pleadings of the case make it obvious that the action was

an action by the corporation and not the stockholder's action.

"All or any number of the stockholders may, in a proper case, unite in bringing a suit in behalf of the corporation. But if all are not joined as plaintiffs by name, the suit should be brought in behalf of those joined and all other stockholders similarly situated, and the fact that it is so brought should be alleged in the complaint. Stockholders who do not join as plaintiffs are proper though not necessary parties defendant.

"The corporation must be made a party where the action, though in the name of the stockholder, is in reality brought for its benefit." Bancroft Code Pleadings, Vol. 2, Sec. 1213.

In the file is a letter of Judge Crockett's under date of May 13, 1949, in which he indicates his doubt as to the president of the corporation having authority to bring this action. Judge Crockett states in that letter that in his own opinion,

"The suit actually is a stockholders' suit brought in right of the corporation against the secretary and managing officer."

The judge further states in this letter that he feels that our court's determination in *In Re Rice's Estate*, 111 Utah, 182 P. 2d 111, would permit the court to proceed to handle this as a stockholders' case. In this we feel that Judge Crockett is entirely in error. In the proceeding in the Rice case the court held the petition stated a cause of action, that all of the parties necessary in that action were before the court, that whether the court heard the matter in the probate division or the civil division, or whether

the file was entitled in the civil or the probate division, would be immaterial in view of the general jurisdiction of our district courts.

The court in its Finding No. 14 has attempted to lay the foundation for the application of the decision of the court in *In Re Rice's Estate*, supra, for the court has found that A. W. Warr, as president of the plaintiff corporation, acting for the benefit of the corporation and also acting for himself individually and for others similarly situated, holding stock and debentures of said Kamas Securities Company, brought this suit against the defendant. The court has attempted to avoid the fact that the action was one of the corporation by converting it into a stockholders' suit. We submit that an action by a corporation and an action by a stockholder in a derivative suit are two entirely separate types of action.

Vol. 13 of the *Fletcher Cyclopedia Corporations*, Perm. Ed., Para. 6006 states:

"The facts which entitle a stockholder to sue in place of a corporation must be alleged. This includes the facts to show that he is a stockholder and such a stockholder as is authorized to sue and that the corporation itself has either refused or unreasonably failed to bring the action."

That the complaint must contain an allegation that the plaintiff is a stockholder at the time of the commencement of the suit and of the time when he demanded that the suit be brought is clearly established by *Fry v. Rush*, 63 Kansas 429, 65 P. 2d 701.

In paragraph 6007, Fletcher, in his work supra, points out that the federal rule specifically sets forth that the

plaintiff must allege he was a shareholder at the time of the transaction of which he complains. It is further pointed out in paragraph 6008 of the work by Fletcher, *supra*:

“The complaint must show that a proper demand on the directors, or corporate officers, or stockholders, or on both, has been made and expressly or impliedly refused, or must show that such a demand would be useless. This rule is well settled and admits of no exceptions. Such allegations constitute a part of the cause of action to show the right of the plaintiff as a stockholder to sue.”

The complaint has never been amended, nor has leave to amend ever been asked by the plaintiff. It stands as an action commenced by the plaintiff corporation to recover against the defendant for fraud perpetrated upon the corporation. Without the allegations sufficient to permit the action to be a stockholders' derivative suit, and without a stockholder a party to and bringing the action, the court cannot determine the action to be a stockholders' action. The court, too, is under the misapprehension that all of the parties necessary for this action were before the court. This is not so, because the corporation itself was not made a party to the action, and this is necessarily so. If there was no authority to bring the action in the name of the corporation by Warr as president, then the entire proceeding is a nullity and no action was before the court. Warr as an individual or as a stockholder was not before the court as a party. The pleadings do not set this forth, and, if Warr is not a party to the proceeding as an individual or stockholder and the allegations in connection with a derivative suit are not made to appear by the complaint, this proceeding could not be further maintained by him.

Conclusive on this matter is the following quotation from the case of *Gaines v. Gaines Bros. Co.*, 56 P. 2d 863, wherein the court states at page 867:

“ ‘The rule is that shareholders cannot, ordinarily, sue in equity to redress wrongs done to the corporation. The ordinary remedy for such injuries is to be sought primarily through corporate action. But if the directors are guilty of a breach of trust, injurious to the corporate assets, or to the rights of the shareholders or some of them, and if the corporation refuses to institute proper proceedings to restrain or redress such injuries, one or more of the shareholders may proceed in their individual names. In such case, however, it is necessary that the petition contain averments sufficient to create an exception to the general rule, and to establish in petitioners the right to thus proceed.’ See *Cassidy et al v. Rose et al*, 108 Okl. 282, 236 P. 591.”

The Answer of the defendant affirmatively set forth the issue that the action was not one commenced by the plaintiff corporation, that there had been no authority granted for commencing the action, and that A. W. Warr specifically had no authority to file the action in the name of the plaintiff corporation. To this affirmative issue the plaintiff corporation filed a reply denying all of the affirmative allegations of the Answer. The issue raised by the Answer required more than a general denial and required that the plaintiff corporation set forth facts which would substantiate the authority to bring the action in the name of the corporation. This was not done, and on the pleadings themselves the court should have granted the motion of the defendant to dismiss the action. Certainly, under these issues, Judge Crockett could not arbitrarily determine

in his mind that he would make this a stockholders' suit. The fact that A. W. Warr appears in the action as a witness does not make him a party to the action. We submit that Judge Crockett was entirely in error in attempting to convert this action into a stockholders' suit.

The attempt of Judge Crockett to extend the principle announced by this court in *In Re Rice's Estate* to the facts in the instant case was grossly error. The corporation must be a party to the action, and apparently Judge Crockett thought that it became immaterial whether that was accomplished by the corporation bringing the action itself or whether the action was brought in behalf of the corporation by a stockholder. The inability of Judge Crockett to apply that principle in this case comes from the fact that once the fact is established that the president of the corporation neither by statute, articles, by-laws, or explicit or implied authority by the board of directors, had authority to file the action in the name of the corporation, then the corporation was not before the court.

Warr as a stockholder was not a party to this action. It is much like a tort action in which "A" is charged for negligence in the driving of an automobile. "B" appears as a witness in behalf of "A", and the court, without amendment to the pleadings or otherwise, grants judgment against "B".

We submit that the district court had jurisdiction over the subject matter of this action, if any there was, but it did not have jurisdiction over any party, and the attempt to apply the *Rise* case doctrine or extend it to such a situation as this is certainly a fallacy.

Conclusive of this is the statement of the court at page

116 in the Pacific citation of the Rice case wherein the court states:

“If we keep in mind the fact that there is no separate probate court in this state and that the district court has original jurisdiction in matters not excepted by the Constitution, we realize the question is not so much one of jurisdiction as it is one of procedure.”

At page 115 of that case the court points out that the executrix and trustee had appeared generally, and so the court was not without power to proceed.

We submit that the Rice case could not apply in this instance because the corporation had never appeared and the Rice case is one of procedure and not of jurisdiction of the parties.

At page 16 of the Utah Report of *Trip v. Third District Court*, 89 Utah 8, 56 P. 2d 1355, our court sets out the requirements of a complaint in a stockholders' derivative suit as the showing of a stockholders' position as such plus a demand upon the corporate authorities and a refusal.

IV

THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS, PARTICULARLY THE PROVISIONS OF SECTIONS 104-2-22 AND 104-2-24, U. C. A. 1943, AND, FURTHER, THAT THE ACTION IS BARRED BECAUSE OF THE LATCHES OF THE PLAINTIFF.

If any characterization can be given the action brought by the plaintiff, it would be one for fraud. In the

original complaint in paragraph 8 the plaintiff states that the defendant in collusion with his brother Elliott fraudulently and with intent to injure the plaintiff corporation, and in violation of his office of trust as secretary, returned the stock to Elliott. In the amended complaint the plaintiff characterizes all of the statements of the defendant relative to his holding the stock as security as being false. It must be assumed, therefore, that the plaintiff has not at any time maintained that the stock was held as security, but it is a fact that it was not — this because he characterizes the representation as false that any stock was held as security. The plaintiff has stated at the trial and in the argument of the demurrers that this action was not one for conversion but had to do with the responsibility of an officer to a corporation. That this is so is evidenced by the court's determination of the issues at the time of trial. Again in paragraph 10 of the amended complaint the plaintiff characterizes the return of the stock by the defendant as being done in collusion with Elliott Taylor, fraudulently, and with intent to injure the plaintiff corporation, and in violation of the office of trust, and alleges further in said paragraph 10 that the plaintiff had no knowledge of such acts for less than two years prior to the filing of the action — this undoubtedly because of the three-year statute in connection with the limitations on actions for fraud.

We desire to point out at this time that the defendant's answer to the second amended complaint affirmatively sets up that the action is barred by the provisions of 104-2-24, U. C. A. 1943, and sets up the affirmative defense of laches in that no action was commenced from the 13th day of February, 1934, and to this answer the plaintiff filed only a general denial by reply and set no affirma-

tive issue to relieve it from the bar of the statute of limitations. Under the authority of *Clawson v. Boston Acme Mines Development Company*, 72 Utah 137, 269 P. 147, there could be no issue raised by plaintiff under the issues in this case other than the fact that the period for the statute of limitations had not expired. This action, therefore, being one for fraud in either falsely representing a fact to the corporation or fraudulently and by collusion with intent to injure the corporation returning the stock, would be barred within three years from the time the plaintiff corporation had knowledge of the facts constituting the fraud. In this connection we would like to point out to the court that the record is clear that there was only one directors' meeting in 1943.

In his cross-examination Warr was asked:

“Q. Do you remember a meeting held with the directors in 1943?

A. Yes.

Q. What month of that year was that held?

A. Well, it was in the midsummer sometime, but I wouldn't say when.

Q. What would be your best recollection as to the month?

A. Well, I'd say it was in June.

Knight, who was an officer and director, in his cross-examination at page 266, states that he had a recollection of the 1943 meeting at the time he assaulted Moses Taylor. Moses Taylor in his testimony at page 190 gives the date of the meeting as June or July, 1943. At page 61 of the Record, in speaking of what took place that this meet-

ing in 1943, the witness Warr after dodging the matter for considerable time and frankly admitting that he knew what counsel was trying to get at says that at that meeting Moses Taylor told the board of directors of the plaintiff corporation that the notes were outlawed and he had sent the collateral back to Elliott Taylor because the directors didn't foreclose on Elliott.

Again, at page 62, Warr states that Moses Taylor told them at that meeting in reference to the shares of stock, "I sent them back to the owner." At page 63 Warr states that Moses Taylor told them the stock wasn't there at the bank and that it had been sent back to the owner, Elliott.

The Finding of Fact No. 10, that not until within two years of the commencement of this action did the plaintiff corporation discover that the said representations of the defendant that he had returned the stock were false and untrue, is entirely contrary and unsupported by the evidence.

A well established principle by our court is represented in paragraph 189 of 54 C. J. S. where it states:

"Knowledge by the defrauded person of facts which in the exercise of proper diligence would enable him to learn of the fraud ordinarily is equivalent to discovery of the fraud."

As indicated above, when the defendant told the directors at the meeting in the midsummer, June or July of 1943, that he had returned the stock to Elliott Taylor, advising them that he no longer had it and what he had done with it, there could have been no other knowledge or no other fact which could have brought home so vividly to the officers of the corporation the fact that the defendant

no longer had the stock, and, if they had any claim on the stock or for any redress in connection therewith, they were on knowledge at that time and moment of all the facts which could ever be disclosed to direct them to proceed with any action they felt they might have. The evidence shows that they never got any further or better knowledge of any fact at any later date different than the fact that the stock had been returned. There was no other further knowledge necessary. They were completely advised of all facts necessary to put them on complete notice when they were told at that meeting that the stock had been returned. It is fundamental that knowledge of all of the facts is necessarily knowledge of the fraud.

It is further submitted that notice of facts sufficient to put the other officers on inquiry as to all of the facts appears from the testimony of Callister himself. At page 129 of the Record, Callister stated that sometime the latter part of June or the first part of July, 1943 — he did not remember the exact date — he called the defendant by phone and asked him to transfer the stock, and at that time the defendant told him he wanted to see Elliott about it first. At page 130 of the Record, Callister stated that he went up to see the defendant at his home in Kamas, Utah, in July or August of 1943, and again told him to transfer the stock, and at that time the defendant again told him he wanted to see Elliott about it first. Callister states he asked him why he should see Elliott, and the defendant gave him no answer. Callister had done nothing on this matter, as far as the evidence and the Record discloses, as far as the collection of the notes was concerned, for several years prior to his sudden burst of activity in the summer of 1943. This was the time when the fight between the de-

fendant and Knight took place at the directors' meeting and would certainly account for the attempts on the part of Callister to have the stock transferred. Undoubtedly he was advised of the directors' meeting.

Also, at page 131 of the Record, Callister indicates that he had no knowledge in 1943 of the minutes of the 1941 meeting, so definitely the condition that he, Callister, had to waive his fee if the stock was accepted had never been met because Callister, in the Record, indicates he has never waived, and he didn't intend to waive, his fee on that matter.

The Record is complete with the consultations between Callister, Knight and Warr during 1943 and during the summer of 1943, and the combination of all of these factors is certainly strong enough to assure the fact that the various officers in the corporation were put on notice of all facts in connection with this stock, its return, and the conditions upon which it had been held by Taylor.

It is perhaps well at this time to call the court's attention to the fact that the defendant's advice to Callister, that he would have to see Elliott first, is further support of his letter of May 25 to the effect that any compromise at that time would have to be worked out by Elliott. The entire record is conclusive of the fact that all of the directors at the meeting in the midsummer of 1943 were advised that there was no longer any opportunity for them to get the stock, and as this action was not commenced until October 16, 1946, there had been more than three years elapse since the directors and the plaintiff had complete knowledge, and this action was barred by the statute of limitations.

Where or how the court attempts to make a finding that the plaintiff corporation had no knowledge of this fact for less than two years is so far beyond comprehension as to indicate a complete disregard for the evidence by the court. The Record shows the meeting of 1943 in the summertime by all of the witnesses, and it shows no other contact, no other directors' meetings and nothing done on this matter whatsoever between the time of that meeting and the occasion of Mr. Callister's visit to the defendant at Kamas, Utah, in the summer of 1946.

It is submitted that the knowledge of the facts sufficient to inform this plaintiff corporation and its officers that there never was a pledge, that there never was any security — chattel mortgage or otherwise — as to the stock, occurred from the very beginning of the transaction. We have elsewhere in this brief pointed out the testimony of both Knight and Warr and the comment of Judge Crockett that they were both unanimous in it that from all times and from the very beginning both Knight and Warr knew that there was only one way the corporation could get the stock and that was if it would take it in full settlement. Such knowledge on their part, certainly from 1936, if not 1934, is knowledge of a fact so contrary to the claimed security relationship that it must be held that they had knowledge of this fact from the very beginning. This admission of Knight and Warr, if not conclusive of the fact that they were misstating and misquoting the defendant as to any matter of security, is certainly an admission of facts sufficient to cause the statute of limitations to have run against any claim on their part that they thought there was a security relationship in connection with the stock.

Certainly, the direction to Callister by Warr in 1941 to bring suit on all the Taylor notes and his refusal to accept the offer of settlement is conclusive of knowledge on his part, then, that there was no security arrangement, that there was no reliance on the statute of limitations, or, if the stock had security, to let the statute run, particularly in view of his testimony and that of Knight's that they never did know what the dates of the notes were.

The burden of proof was upon the plaintiff to establish that the action was not barred by the application of the statute of limitations and the plaintiff has not sustained that burden. *Salt Lake City v. Salt Lake Investment Co.*, 43 Utah 181, 134 P. 603.

It may be that this action partakes of the nature of one in equity because of the claimed fiduciary relation between the defendant and the plaintiff corporation. We certainly claim that none such has been set out by the pleadings or by the evidence, but, if plaintiff's counsel's hopes can be maintained, it would be, we assume, in the nature of an action in equity.

It is submitted that, therefore, the claim of laches in this matter is a complete bar to any hope of recovery the plaintiff might have. The Record shows that in 1936 these notes were taken away from the secretary and placed in the hands of Knight and he employed Callister to see that collection was received. The plaintiff corporation permitted 12 years to elapse before taking any action of any kind in this matter. In 1936 Callister made an investigation revealing that Elliott Taylor had no assets and advised the company that he had none, that it should bring an action to preserve its rights and to prevent the statute of limitations

from running. The corporation chose to ignore his advice until 1941 when the president claims he directed plaintiff's attorney to bring such an action and, further, the president states he never gave any advice to Callister other than to commence action on the notes. Callister, as attorney for the plaintiff, has prepared pleadings in which he claimed they relied upon the security and didn't bring the action, letting the statute of limitations run. We submit that there is no evidence to support this, and the evidence is entirely contrary as indicated above, and the fact was at that time, according to Warr, the stock had no value, and he had determined he wouldn't accept it in full settlement. The plaintiff corporation then proceeded to let the statute of limitations run on the notes, and we submit that by that action they have precluded any hope of recovery on any basis they might conjure up, because, as a matter of law and by the statutes of our state, they had no right, legally or otherwise, to rely upon the fact that they could still hold the stock even though they could not sue upon the notes. Knight, Callister and Warr all indicate that they never knew what the relationship was, whether collateral, whether mortgage, pledge, or offer of settlement, as has been pointed out elsewhere in this brief.

We submit that the law is well established that where no relationship at all is given as to security it will be presumed to be a chattel mortgage if anything. But it is our contention that it matters not whether it be a chattel mortgage or a pledge. The law is still to the effect that, if the plaintiff corporation had no right of action upon the notes because of the statute of limitations, it had no further claim nor any right as to the stock. Any claim to any right of possession under such a mistaken belief in fact and law is

entirely fallacious. By their own latches and carelessness, if they have any claim, if they had any right in the notes, they would lose that by their own careless acts, and they no longer had any claim to the stock, assuming that they did at any time.

Letting this matter pend an additional period of time from January, 1942, when the last of the notes became outlawed, until this action was brought in October, 1946, is a further indication of the entire lack of good faith and diligence which a court of equity would require of any plaintiff.

The argument we have submitted above on the matter of latches and the false principles of the plaintiff, that it was still entitled to the stock after the limitations had run on the note, we desire to likewise apply in our contention that the Judgment and Conclusions in favor of the plaintiff were contrary to law.

In the case of *Bainbridge v. Stoner*, a California case, 106 P. 2d 423, the court held that in an action to hold an officer of a corporation liable under a constructive trust for property fraudulently acquired from the corporation the action, though one in equity, was nevertheless controlled by the three-year limitation for fraud actions, and at page 427 the court states:

“No repudiation of a constructive trust is necessary to set the statute of limitations in motion. A cause of action in favor of the corporation and its stockholders arose when Stoner acquired the property of the corporation, and the statute commenced to run against the appellants at least as soon as they knew, or should have known, what he had done.”

The court then proceeds to hold that the statute of limitations began to run by implied notice through the advertisements in the sale of the corporate property under the judgment for foreclosure. At page 428 the court states:

“The word discovery as used in the statute is not synonymous with knowledge. And the court must determine as a matter of law when, under the facts pleaded, there was a discovery by the plaintiff, in the legal sense of that term. Consequently, an averment of lack of knowledge within the statutory period *is not sufficient*; a plaintiff must also show that he had no means of knowledge or notice which followed by inquiry would have shown the circumstances upon which the cause of action is founded. Moreover, he must also show when and how the facts concerning the fraud became known to him.”

The court in this case holds as a fatal defect in the plaintiff's pleadings its failure to set forth the manner in which it acquired knowledge of the fraud. Applying this to the principle case, we submit that the plaintiff here by its pleadings, if not by its entire case, failed to allege a material and essential part to protect it against defendant's motion to dismiss.

We sincerely urge upon the court that by the entire case and by the pleadings this action was barred by the statute of limitations, and the court erred in failing to so hold.

V

THE COURT ERRED IN ITS FINDING AS TO THE VALUE OF THE STOCK AND IN GIVING ITS JUDGMENT BASED UPON THE VALUE FOUND.

In its eleventh Finding the court found that the stock was of the reasonable value of \$60.00 per share on the date the stock was returned, which date the court had previously found was during the forepart of 1944. The plaintiff had attempted by various means to establish a value for the stock in the trial at Coalville. It called as its witness the defendant Moses Taylor to establish that value, and at page 249 of the Record the court asked Mr. Taylor if the stock had a market value in June of 1943, and he answered, "No, it did not." He always advised the court that there had been no transfer or sales at or about that time, nor had there been any for a period of ten years prior to 1943. Further, Mr. Taylor advised the court that if the stock had been offered for sale in 1943 there would have been no purchaser. In fact, after going through the matter of the credits and debits of the bank, plaintiff's counsel asked Taylor this question:

"Q. How was it with such a statement like that that they didn't close you?"

So that with the statement as to the bank's debits and credits as late as of 1943 counsel for plaintiff, himself, was surprised that the bank had not been closed.

Counsel for plaintiff introduced evidence of his personal analysis of a purported set of figures given to him over the phone by the bank commissioner which the court states at page 283 of the Record left it somewhat doubtful about the value of the evidence concerning the value of the stock, and so for this purpose the court permitted a continuance to allow the plaintiff to introduce evidence as to value. Subsequently, plaintiff produced a Herbert DeWitz, an investment salesman for J. A. Hogle and Company, who intro-

duced testimony as to the value of the stock. DeWitz stated that he had examined some balance sheets at the State Capitol for a period from the end of 1940 through 1943, but he does not state whose or what balance sheets he investigated while at the State Capitol. He then states that he investigated the First Security Corporation, an active trader on bank stocks and "more active than any other local bank stocks." (R. 289) Objection was made to the introduction of any of this testimony, as appears at page 290 of the Record. The court attempted to qualify DeWitz, as appears at page 291 of the Record, and he is shown to be a graduate of a university and a salesman of stocks.

At page 291 the witness states that the only knowledge he has of the assets or liabilities of the bank is from the records that are required by law to be filed with the State Bank Examiner. As appears at 293, the witness states that if he was to make an examination under a hypothetical instance given him by the court it would have to be through book value, through earnings records, dividend records, and weighing against similar securities.

Also at 293 appears the fact that part of the information the witness would require was not available to him from the examination of the records at the State Capitol. In voir dire the witness, at 294, states that his entire estimate as to value is based upon a comparison of the First Security Bank stock and the records at the State Capitol. The witness stated he didn't know who the management of the Kamas State Bank was, that he didn't know whether the stock was closely held, and admitted that this information should be taken into consideration in determining value of the stock.

At 295 the witness also testifies that the matter as to the manner in which the stock is held is a factor in determining value. At 296 the matter of dividends and operating expenses was found to be an important factor in determining value, and, at the same page, after this examination, objection was again made by the defendant to the introduction of any testimony of the witness DeWitz.

Subsequently, the witness DeWitz sets up a formula which he had prepared by taking the record of the First Security Corporation and by making a comparison between its book value and its market value, then applied that same formula to the stock of the Kamas State Bank.

The evidence shows that the First Security Corporation is one of the largest in the intermountain west with capital surplus, undivided profits and contingent reserves of \$9,705,894.00; that its operations extend into at least two states; that its stock is widely held; that it is an active trader, dealt in daily, with its value quoted on the market and listed in each daily paper.

The witness DeWitz further states at pages 310 and 311 that he has never before gone to the bank commissioner and taken his figures on an annual report as a basis for giving a client a figure for the purchases of stock.

At page 314 of the Record DeWitz states that in order for him to determine the market value of the Kamas State Bank for any given year he would have to know the value of the First Security Bank Stock.

At page 316 of the Record DeWitz states that the First Security Bank is the largest bank in the state and the Kamas State Bank is one of the smallest.

It is submitted that there is no competent evidence from which the court could have found the value of the stock to be \$60.00 per share, for the reason that the attempted analysis of a bank statement by Callister is no competent evidence. The testimony of Taylor for the plaintiff was to the effect the stock had no value, and the testimony of DeWitz becomes incompetent because his testimony is based purely upon a comparison of stock values which is contrary to law and is actually a situation which he, himself, had never before used, nor is it shown to be a practice which is used in advising or determining the values of stock.

In the case of *Patterson v. Plumber*, 86 N. W. 111, the plaintiff sought to recover damage for the breach of an alleged contract to sell and transfer stock. The agreed price of the stock in the contract was \$135.00, and for his damages on the breach the plaintiff sought to show the value of the bank stock, introducing in evidence the bank's report to the comptroller general. In this case plaintiff had the cashier of the bank identify the report and what it contained and introduced the report in evidence. In holding that the court could not use this report by itself to show the value of the stock, the court states:

"The claim that this report is competent evidence to establish the value of the bank stock on the date of the alleged contract is necessarily based upon two propositions: First, that the report itself proves the value of the property owned by the bank; second, that each shareholder in said bank was entitled to one five-hundredth part of such property, or its value, for each share owned. * * * It is apparent that, if either of these propositions are not sustained, this theory of proving value which we are

considering must fall. * * * *If there is no evidence as to the property owned by this banking corporation, or evidence of the value of such property, it matters not that each share is entitled to its proportion, no value of the property having been shown.* * * * The proposition that a holder of stock in a national bank is absolutely entitled to any of the property of the corporation is not correct. * * * The report of the cashier to the comptroller is not evidence of the value either of the property or the stock. It does not purport to give an estimate of the value of either. * * * It is also apparent that the sum deduced from such reports as book value are purely arbitrary, and have no reference to actual value. *This can be seen at once by considering that the actual value of the stock would necessarily rise or fall with changes in the actual value of the property of the corporation, but the book value would not change.* * * * It is sufficient to say that it did not furnish evidence of the value to the assets or data from which the actual value of the stock could be deduced."

In this case the court announces the general rule that,

"The fact that shares of stock have no known market value will not prevent recovery where the actual value is ascertainable in an action to recover damages. The value may be shown by showing the value of the property and business of the corporation."

In the principal case the court denied recovery for the reason that the plaintiff had relied solely upon the cashier's report as a matter from which the court could find value. This value the plaintiff in the action had hoped to show by dividing the number of shares into the net value of the corporation, which, of course, the court re-

fuses. In this same case the court announces that evidence could be submitted of witnesses properly informed on the subject. To be properly informed would be to have the witness informed as to the value of the property and the business of the corporation, as indicated by the court in its opinion.

We submit that, the witness DeWitz having testified that he was not familiar with the management, with the dividend record, with the properties and with the distribution of stock, and upon his admission that these were all matters to be taken into consideration in determining values, any testimony he gave would be incompetent as he would not be advised or in a position to testify. We submit, further, that the attempt on the part of DeWitz to give a value to the Kamas Securities stock by working out a formula for the First Security Bank stock and applying it to the other stock is likewise contrary to law and is no basis upon which a witness can testify as to values. If such were permitted, any individual could select a stock and make a comparison as to book records and set up a value. Certainly does this become a dangerous practice in the use of the witness DeWitz's testimony, for he stated that without knowledge as to the value of the First Security stock he could not testify as to the value of the Kamas State Bank stock. This court will surely not permit, as a standard of determining values of the stock of a small closely held country bank, the taking of the stock of the largest bank in the state, which is freely traded upon the market, and which large bank stock is listed in the newspaper and has a known market value and whose stock is traded in daily, and the setting up of a formula based upon its earnings and market price and apply that to the small country bank to determine the value

of the stock of that country bank. Certainly, the fact that DeWitz is employed in a stock brokerage house and he is not acquainted with even the locality in which the Kamas Bank is located and knows nothing of its business, makes him no more qualified by his occupation than any other person. Unless he goes into the books of the company, appraises its property, and familiarizes himself with similar types of operations, he cannot give any testimony concerning value.

We desire to submit, further, to the court that Judge Crockett and counsel for plaintiff were entirely in error in attempting to set a value of the stock as of 1944 in order to determine the basis of the damage suffered by the plaintiff, if any. Counsel for plaintiff has prepared his case and submitted his findings upon the basis that there was a false representation made in 1934 and that in reliance upon that false representation the plaintiff paid out a valuable consideration.

For any such act as that which occurred in 1934 the damage of the plaintiff would be only the amount that it paid in reliance upon the representation. Surely it could not receive damages for anything in excess of that. There is nothing in the findings to indicate what the plaintiff corporation paid for the notes for from all that appears in the record and in the findings the plaintiff paid nothing whatsoever. If it paid nothing for the notes, it hasn't been damaged in any particular and, in any event, it has only been damaged to the amount that the plaintiff corporation put out for the notes. This rule is clearly established and appears in Vol. 27 C. J., Para. 239, as follows:

“The general rule applicable to the measure of

damages for fraud is that such an amount should be awarded to plaintiff as will compensate him for the loss occasioned by the fraud, or as it has been expressed, plaintiff is entitled to recover damages adequate to the injury which he has sustained. Plaintiff can recover the entire amount of his loss occasioned by the fraud, but the recovery must be limited to the actual loss. The number of false representations made does not affect the measure of damages."

In the case of *Crews v. Dabney*, 1 Litt. (Ky.) 278, an action for fraudulently misrepresenting the situation of the maker of a note, the amount of the note was not the measure of damages but was the amount which the plaintiff paid for the note with interest thereon.

In the case of *Kinnear v. Prows*, Utah, 16 P. 2d 1094, our court held that:

"The measure of the damages sustained by the purchaser where a purchase has been induced by fraud is, according to the weight of authority, the difference between the real value of the property purchased, and the value which it would have had had the representations been true."

In the case of *Hecht v. Metzler*, 14 Utah 408, 48 P. 37, this court held:

"In such actions as an action for fraud and the sale of chattels it has usually been held that the measure of damages is the difference in value between the land as it would have been if as represented and as it actually was at the time of sale."

and further:

"In case of sales where there is a fraudulently false representation of quantity, quality or title, the

measure of damages is the difference in value between that which is actual and that which is represented to exist."

There is no allegation in the complaint as to the value of the stock in 1934, at the time the purported transfer to the plaintiff company took place.

It is submitted that the court erred in awarding as damages and as the measure of damages the value of the stock as of September, 1944, an arbitrary date selected by the court, as the date the stock was returned to Elliott Taylor.

VI

THERE WAS NO OFFER OF THE STOCK WHICH THE CORPORATION COULD ACCEPT.

Once again, we desire to point out to the court that this action was not one for conversion. The court in its judgment and conclusions has determined, nevertheless, that the plaintiff Kamas Securities Company is awarded a judgment against the defendant for 30 shares of stock in the Kamas State Bank or in the alternative for \$2,259.00. The judgment for the return of the stock could only be substantiated by an action based on conversion. Yet the complaint contains the allegation, always, that the representation that the stock was held as security was false, so necessarily this admits that the stock held by Moses Taylor was not held by the corporation as security.

Findings Nos. 9 and 9 (a) are to the effect that the defendant had in his possession 30 shares of the Kamas State Bank stock, which belonged to Elliott Taylor, for the purpose of using the stock in effecting a complete and final

settlement of the Elliott Taylor account, and the stock was to be delivered to the corporation only upon the corporation accepting the stock in full and complete settlement. There is no finding by the court that the plaintiff corporation had ever accepted this offer. The finding is that Callister and Frank T. Knight had directed the defendant to transfer the stock, the finding being that these individuals told the secretary to accept the stock in full satisfaction.

The Minutes for the meeting of October 13, 1941, and those for February 26, 1940, both provide that the settlement of the Elliott Taylor notes for the stock of the Kamas State Bank in full settlement "will be accepted provided satisfactory arrangements can be made with the attorney to withdraw the notes and not have them listed in payment of the 25 per cent."

The Minutes of 1940 provide that it would be accepted only if the 25 per cent is to be cancelled.

No authority is given by the Board of Directors to accept this transfer in full satisfaction except as the attorney's fees of Mr. Callister were to be cancelled. The Finding No. 9 that June 16, 1943, the defendant was instructed to transfer the stock is not supported by the evidence because the letter of Mr. Callister, Exhibit G, of June 16, 1943, which was supposed to represent that direction, is to the effect that Callister and Knight had determined the only thing to do was to transfer the stock and nothing is mentioned that the transfer was to be in complete settlement. As to Callister's fees on this matter, he states he would have to take that up with Frank Knight and Warr later. So that the conditions upon which the offer of full settlement by the corporation were attached by the Board of

Directors, that the fee was to be cancelled, had not been determined in June of 1943 at the time the letter was sent. There is nothing in the evidence to show that any agreement had been made or arrived at at any time between Callister and Knight and Warr as to what his fee would be in the matter, and certainly there is no evidence of any arrangement that would be satisfactory to Knight or Warr or, what is more important, should have been satisfactory to the Board of Directors, as the Board had indicated the fee would have to be cancelled entirely to be satisfactory.

Taking the plaintiff's position, then, at its best and considering that there was an offer to deliver the stock in full settlement, there never had been a valid acceptance of that by the corporation, and, certainly, Moses Taylor, the Secretary of the plaintiff corporation, with knowledge of the conditions for full settlement which had been attached by the Board, could not proceed to make the transfer in fairness to Elliott Taylor unless the transfer could be approved by the Board of Directors or the Board of Directors had taken action approving it. What we think is more important and decisive of this matter is the fact that the last reported offer of the stock in full settlement appears in the Minutes of the directors' meeting of October 13, 1941, at which time the Board of Directors did not accept the offer. The acceptance of it was made conditional, and there is nothing to show that any offer of the stock was made subsequent to October 13, 1941. The letter of May 25, 1943, of Moses Taylor to Mr. Callister states in part as follows:

"It might also be a good idea to give Elliott a chance of making a compromise settlement on the

note and that he might be in a position to discuss this with the Company.”

This clearly indicates that as of May 25, 1943, the matter of transferring the stock in full settlement was a matter that would have to be negotiated, then, with Elliott Taylor, and there is nothing in that letter that does not clearly indicate that the transfer as of that date would have to have the approval of Elliott Taylor. Again, in this letter, Moses Taylor indicates the conditions that the Board had made in previous meetings as to the claim of Mr. Callister, for he asks him to advise him of the claim he is going to make if the stock were to be accepted in full settlement. The condition, therefore, of the offer to transfer the stock in full settlement shows that it had been made to the corporation in the 1941 directors' meeting; that the corporation had refused to accept it unless conditions could be made satisfactory to the corporation between it and its attorney. The settlement, according to the 1941 minutes, was given to A. W. Warr, and he was to secure a release of the notes from Callister. No authority was given to Knight to make this settlement in 1941. If the settlement was to be made, Warr was to withdraw the notes from Callister and not have them listed for the payment of the 25 per cent as the amount collected as attorney's fees. This stands, then, as an offer that has been rejected by the plaintiff corporation, and certainly the passage of time of a year and a half is more than a reasonable time to accept any offer in any event.

We submit that the action of the Board in the 1941 meeting constituted a rejection of the offer as far as Elliott Taylor was concerned unless he gave authority to renew that offer, and none appears in the evidence, nor does any

renewal of the offer appear in the evidence by anyone purporting to act in behalf of Elliott Taylor. Then there was no offer which the corporation could accept. The direction of Callister and Knight to Moses Taylor to transfer the stock had no authoritative effect whatsoever because there was no offer which the corporation could have accepted, the conditions had not been met and they had no authority to act for the corporation as that was in A. W. Warr.

The failure of Moses Taylor to make the transfer gave no cause of action to the plaintiff, nor was the plaintiff damaged in any way, because it had no right to the stock and no offer which it could accept. In returning the stock to Elliott Taylor the defendant did nothing other than what he was legally bound to do because Elliott Taylor was the owner of the stock and, his offer having been rejected and there being no renewal of the offer and no acceptance of any purported renewal, then Elliott Taylor was the rightful owner and the stock should have been returned to him.

Arthur W. Warr, who was given the authority to negotiate for such settlement by the directors in their 1941 meeting, states that the offer to take the stock in full settlement came up in 1936 and he said he wouldn't take the stock "because we weren't sure the stock was any good at that time."

Again at page 72 of the Record and subsequent pages Warr states that in 1941 he gave the notes to Callister for Callister to bring suit upon them, and the last direction and the last action he took was to give to Mr. Callister all of the Taylor notes, not only those of Elliott but all of the Taylor family notes, to bring an action on the entire group, and Mr. Warr states at page 74 of the Record that he never

at any time told Callister to do other than to proceed with his action on all of the notes including those involved in this action.

It is interesting to take the exact words from the transcript on this point where they appear at page 73:

“Q. And that is the last action, direction, you gave was for Mr. Callister to bring an action on these notes?

A. Yes.

Q. You didn't tell him any different and haven't at any time have you?

A. No.

Q. And you didn't have any contact with Moses Taylor from 1941 to the 1943 meeting, did you?

A. I don't remember having any.”

Again, at page 75, Mr. Warr testifies:

“Q. Why, then, did you tell Mr. Callister to sue in 1941?

A. Well, there was other Taylor notes besides the Elliott Taylor, and I wanted him to bunch the whole bunch up.

Q. You wanted him to sue all—

A. Yes, if we had got the judgment against them, that would also include the collateral or security we was holding, whatever you might call it, and we would have the whole thing.

Q. So, in spite of the fact that there was collateral, you were determined to bring an action, then, in '41?

A. Well, it was the only way to get it transferred; Taylor refused to transfer it and show us it was transferred.

Q. Back in '41?

A. Yes, or any other time."

This testimony shows clearly that as far as Warr was concerned the corporation had definitely determined not to accept the offer in full settlement, and he had given instructions to the attorney to bring an action and to foreclose on whatever security there might be. It further shows clearly the fact that as early as 1941 all of these officers were advised of the fact that they could get the security only if it was accepted in full settlement.

The Restatement of the Law, A. L. I., Contracts, paragraph 35, is to the effect that an offer may be terminated:

- A. By rejection by the offeree.
- B. Lapse of time.
- C. Revocation by the offeree.

Paragraph 36 provides that an offer is rejected when the offeror is justified in inferring from the conditions or conduct of the offeree that the offeree intends not to accept the offer or to take it under further advisement. It further provides that a communication from the offeree to the offeror stating in effect that the offeree declines to accept the offer is a rejection. Here, the determination of Warr and his instructions to the attorney to bring suit on the notes and to get the stock by such action certainly amounts to a rejection of any offer. The recital of the minutes, that the offer would be accepted only if the attorney waived his

fees, and when we find that the attorney has not waived his fees, would certainly amount to a rejection.

If this were not sufficient, the Restatement provides in Paragraph 40 that if no specified time for the acceptance of the offer is mentioned then the offer expires at the end of a reasonable time. As to what is a reasonable time is a question of fact depending upon the nature of the contract proposed. Certainly, the expiration of more than a year and a half is an unreasonable time. The plaintiff corporation could not proceed to let time go by as it did in this instance and then change its position and expect the offer to be determined as being still in full force and effect. A reasonable time in this instance would be adequately fulfilled within the time it would take Warr to contact the attorney and give an answer and this could certainly have been done in less time than a year and a half.

It is submitted that the failure of the court to make a finding as to what was a reasonable time is fatal in this case. In this connection the Finding No. 9 states that on numerous occasions between the 26th of February, 1940, and the 25th of May, 1943, and on the 13th of October, 1941, the defendant represented that Elliott Taylor had offered the 30 shares of stock in full settlement. Other than the dates in 1940 and 1941 which are the dates of the meetings of the directors the only other offer would be the letter of May 25, 1943, of Moses Taylor, which certainly could not be construed to be an offer, because the letter of May 25 states that it might be a good idea to give Elliott a chance to make a compromise settlement on the note and he might be in a position to discuss this with the Company. There is nothing in this letter which constitutes or could be con-

strued to be an offer or renewal of the offer to accept the notes in full settlement. Particularly is it necessary to construe the letter of May 25, 1943, because the second paragraph of the letter refers to Aaron C. Taylor's note with five shares of Kamas State Bank Stock, and following this is the statement:

"I talked with Frank Knight after your telephone conversation suggesting he give us authority to have this stock transferred in settlement of the notes and that it might also be a good idea to give Elliott a chance of making a compromise settlement on the note and that he might be in a position to discuss this with the Company."

The transfer of the stock in settlement of the note refers to Aaron C. Taylor's stock in the note and it indicates that as to Elliott it would be well for the Company to discuss with him his note and stock. Certainly there is nothing in the letter of May 25, 1943, which would be construed an offer or a renewal of an offer.

We submit, therefore, that the evidence is clear that the 30 shares of stock belong to Elliott Taylor; that there is no offer or acceptance of offer; there is no security, nor was there any right in the plaintiff corporation to hold the stock, nor was there any obligation on the defendant other than to return the stock to its rightful owner.

VII

THE COURT ERRED IN ENTERING JUDGMENT FOR COSTS.

In paragraph 2 of the Judgment the court awards to the plaintiff the sum of \$204.00 as costs of court. On De-

ember 9, 1948, plaintiff's counsel served upon defendant proposed Findings and the proposed Judgment. The first Findings served by the plaintiff are not in the file. To these Findings the defendant, on the 15th day of December, filed objections, and on the 3rd day of January, 1949, the plaintiff served upon defendant amended Findings of Fact and Conclusions of Law without the defendant ever having appeared or argued the objections submitted. On the 6th day of January, 1949, the court signed the Judgment which was filed by the clerk the 17th day of January, 1949.

The memorandum of costs was served on counsel for the defendant the 9th day of December, 1948, about a month and a half prior to the time judgment was entered. There was no stipulation or understanding whatsoever in connection with the said memorandum, and it is submitted that, under the provisions of the statutes of this state, a memorandum of costs not having been served after the judgment was entered, the said memorandum was fatally defective and would not support the awarding of the judgment including costs, the entry of costs in this matter being a function of the clerk to be entered after the judgment was signed and filed by the judge. The awarding, therefore, of costs by the judge in his Judgment being contrary to law, we submit that the court erred in entering a Judgment for costs.

Conclusive of error of the court in this matter is the case of *Houghton v. Barton*, 49 Utah 611, 164 P. 471. In that case the court states:

“Costs being unknown at common law, statutes authorizing them are strictly construed * * * *
one of the conditions imposed by statute in this state

in a case of this kind where the entry of the judgment is not stayed is that the cost bill must be delivered to the clerk and a copy served upon the adverse party within five days after the notice of the decision of the court. In the case at bar this was not done, but on the contrary the cost bill was filed and served, as stated, eight days before there was a decision or judgment in the case. This was not a substantial compliance with the requirements of the statute. The cause, however, is remanded with directions to the lower court to modify the judgment by disallowing the cost taxed the respondent.”

CONCLUSION

In conclusion we submit to this Honorable Court that, inasmuch as the defendant was not a director, was not even a stockholder, and was only a gratuitous employee, there is no foundation in the complaint or by the evidence to make a cause of action based upon a breach of any trust relationship. Necessarily, for this as well as the many other reasons pointed out in this brief the Findings are not supported by the evidence, the Conclusions are not supported by the Findings, and the Judgment is not supported by the evidence, Findings or Conclusions.

The board of directors having refused the president the authority to sue, we sincerely submit that there was no action by the plaintiff corporation, as A. W. Warr had no authority to bring an action in its name. The plaintiff by its own laches having failed to bring any action upon the notes or keep them in good standing since 1935 and by its own action in this respect having precluded itself from any recovery whether or not there be security or otherwise,

then by its own latches this court will bar it from maintaining this action.

Likewise, any claim in this matter is barred by the statute of limitations, for this plaintiff had complete knowledge of all of the facts from which any claimed fraud could arise since 1934 and certainly since June or July, 1943.

It is further submitted that there was no valid offer which the corporation could accept, and no recovery could be permitted on that theory, and in any event the court erred in permitting the introduction of evidence in the manner it did relative to the value of the stock and the date of determining its value.

The court further erred in entering judgment for costs and in failing to find upon the material issues raised by the defendant.

WHEREFORE, defendant sincerely requests that this court enter its order reversing the lower court and dismissing this action.

Respectfully submitted,

McKAY, BURTON, NIELSEN
and RICHARDS

*Attorneys for Defendant
and Appellant.*