1978

Royal Resources Inc. v. Gibralter Financial Corp. et al : Brief of Appellant

Utah Supreme Court

Richard J. Leedy; Attorney for Appellant;

IN THE SUPREME COURT OF UTAH

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ROYAL RESOURCES, INC. :

Plaintiff-Respondent. :

vs. : No. 15817

GIBRALTER FINANCIAL CORP., :
GIBRALTER SECURITIES CORP., :
(a wholly owned subsidiary of :
Gibralter Financial Corp.,)
LYNN DIXON, and GEORGE PERRY, :

Defendants-Appellants. :

- -

BRIEF OF APPELLANT LYNN DIXON

- -

Appeal from a Judgment of the Third Judicial
District Court, in and for Salt Lake County,
the Honorable Jay E. Banks, Judge

- -

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STATEMENT OF THE NATURE OF THE CASE

The appellant, Lynn Dixon, appeals from a judgment of the District Court of the Third Judicial District, Salt Lake County, in favor of the respondent Royal Resources, Inc., in the sum of $10,400 on non-jury trial, the Honorable Jay E. Banks, Judge.

DISPOSITION IN THE LOWER COURT

The respondent Royal Resources, Inc., plaintiff below, a corporation, filed suit in the District Court of the Third Judicial District on November 24, 1975, against Gibralter Financial Corp., Gibralter Securities Corp., a wholly owned subsidiary of Gibralter Financial Corp., Lynn Dixon and George Perry, seeking damages for monies allegedly had by the defendants. On June 17, 1976, an amended complaint was duly filed seeking judgment in the sum of $10,680 from the same named defendants. (R. 9) An answer denying the individual liability of Lynn Dixon and George Perry was duly filed. (R. 11) On the 22nd day of July, 1977, judgment was entered in favor of Royal Resources, Inc against the defendant

companies in the sum of $10,680 and trial was reserved against the individual defendants. (R. 24) Non-jury trial was held as to the liability of Lynn Dixon before the Honorable Jay E. Banks on the 19th day of April, 1978. At the time of trial, plaintiff abandoned its claim against George Perry and pursued its claim only against Lynn Dixon. Judgment was entered on the 15th day of May, 1978, in favor of the respondent and against the appellant, Lynn Dixon, in the sum of $10,400 plus interest. The appellant Lynn Dixon has appealed the judgment of the trial court.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the trial court's judgment with a direction to enter judgment in favor of the appellant and against the respondent or in the alternative for a new trial.

STATEMENT OF FACTS

Respondent Royal Resources, Inc. filed suit against Gibralter Financial Corporation, Gibralter Securities Corporation, Lynn Dixon and George Perry. (R. 2) Lynn Dixon, the appellent, is the only remaining party among the original defendants in the case. Royal Resources in its amended complaint Para. 3 (R. 9) alleged that on April 11, 1975, Royal Resources executed and delivered to the defendant Gibralter Securities a check in the sum of $7,680. It was further alleged on April 16, 1975, that Royal Resources executed and delivered to Lynn Dixon, registered agent of defendant corporation, two checks, one for $6,800 and one for $3,200. This transaction was on April 18, 1975. The two checks which were delivered to Lynn Dixon were received as Exhibits 1-P and 2-P and provide for payment to the order of Lynn Dixon and were signed by

Dee R. Woolley. The checks are drawn on the account of Royal Resources, Inc. Para. 4 of the amended complaint alleged that the sums were advanced and loaned pursuant to a previous and ongoing course of conduct. (R. 9) The complaint alleged that there remained $10,000 unpaid on the April 16, 1975, transactions involving the two checks to Lynn Dixon plus a $400 unpaid fee and interest. Paragraph 7 of the amended complaint alleged that Dixon was liable individually in that he was acting as an agent for George Perry in his personal not corporate capacity. Paragraph 8 of the complaint alleged that the defendants were jointly and individually liable for monies had and received. A stipulation was entered into between the appellant and respondent at the time of trial on April 19, 1978. The stipulation was to the effect that the transaction of April 16, 1975 was pursuant to a course of conduct over a period of time engaged in by brokers and especially the corporate defendant Gibralter Securities Corporation. (R. 84) The transaction involved a procedure in the securities trading business known as early settlement. (R. 57) The course of business involved a practice whereby when Gibralter Securities made a stock transaction involving the sale of stock, which would normally require a seven-day settlement period, that the respondent Royal Resources, Inc. would advance sums of money by way of early settlement so that the customer of Gibralter could realize his money before the seven-day period. The early payment was discounted for cash. In the subject transaction, funds were paid over by Royal Resources to Lynn Dixon as the payee on the checks. The checks were endorsed by Lynn Dixon personally with his Utah driver's license for identification. (R. 57) The checks indicate nothing further by

way of endorsement. Dee Woolley was the agent of the respondent Royal Resources, Inc. and conducted the transactions for Royal Resources. Royal Resources, Inc. had been brought to Gibralter to finance the "one-day pays" (R. 61) by Richard Mason who worked for Gibralter Securities as well as having a financial involvement with Royal Resources. (R. 61) Royal Resources paid Mason a finders fee. In effect, Royal Resources would provide cash on a discount basis to pay out a client of Gibralter Securities who could not wait for the seven-day period required by the Securities Exchange Commission. Gibralter, in turn, would pay over the funds at the end of the seven-day period to Royal Resources which would make a profit on the basis of the amount discounted at the time of making the one-day pay over to Gibralter's client.

At the time of trial, Mr. Dee Woolley, the maker of the checks in question, testified that he had been an officer and director of Royal Resources, Inc. (R. 62) That the business of the respondent was the purchase of accounts receivable from brokerage customers of brokerage firms. (R. 64) Royal Resources would advance monies to the customer of the brokerage firm and in exchange they would receive an assignment from the customer of the proceeds of his sale of stock. (R. 64) Prior to any specific transaction Woolley would go to the bookkeeper of Gibralter Securities and determine whether a sale transaction had taken place. He would receive the monies due the brokerage company's customer at the end of the seven-day period. He would ascertain whether the customer of the brokerage firm had money coming by checking with Gibralter's accountant. (Tr. 65) This was done in all cases and in fact in the instant transaction he asked if a stock sale had been made

and the stock sold and was advised that a sale had taken place. (Tr. 65) Mr. Woolley would receive a 4% fee by discounting the amount given to the customer by that percentage. (Tr. 66)

The appellant Lynn Dixon was president of Gibralter Securities at the time of the transaction. (Tr. 75) He would handle the stock trades for his clients on behalf of Gibralter out of a personal trading account (Tr. 71) and would service some 2000 accounts in that fashion. (Tr. 71) Dixon testified that when a customer could not wait seven days for his money on a stock sale as required by the Securities Exchange Commission, Dee Woolley would advance early payment. (Tr. 72) Exhibits 1 and 2-P were identified as being part of an early payment transaction. (Tr. 68) A trade ticket would have been issued as part of the transaction (Tr. 68) although none could be found at the time of trial. The stock would be sold in the customer's account and the check obtained from Woolley cashed at Continental Bank and the money wired to the respective parties. (Tr. 67) Dixon testified that he negotiated the checks for a customer's account and wired the money to the customer possibly using his trading account for the transaction. (Tr. 70) Woolley would check and see if a trade had been made and would give a paper to Dixon that would be an assignment by the customer or person representing the customer. (R. 72) When the money would be received by Gibralter it, in turn, would be paid over to Royal Resources. Dixon could not say why the money had not been paid over to Royal Resources (R. 74) and there were no records on the paid account. (Tr. 74, 75) Dixon had no control over the pay-over of money to Royal Resources. (R. 75-76)

Ms. Lois Crowder testified that she was the back office manager who kept the records of Gibralter Securities. (R. 76) Exhibit P-4 was received by stipulation which was a computer printout of the transfer of funds from Gibralter into Royal Resources. (R. 76) She indicated that Exhibit P-4 was kept differently than the customer ledgers at Gibralter Securities because Royal Resources was not actually a customer as far as stock transactions were concerned. (R. 77) She indicated that she would make a transfer to the Royal Resources account, Exhibit P-4, when a check was issued to Royal Resources and that the transaction involving the money paid to Mr. Dixon would not show on Exhibit P-4 for the reason that she never issued a check to Royal Resources. Before issuing a check, Mr. Woolley would give her a transfer and show her the copy of the trade ticket. She would check the stock account and receive the written assignment and based upon those documents issue a check to Royal Resources. (R. 78) Ms. Crowder testified that there had to have been a stock transaction and stock in the account but that she did not issue a check to Royal Resources because Royal Resources was considered a general creditor of Gibralter and not a customer and Gibralter Securities did not have the money to pay over to Royal Resources. She did not issue a check because the National Association of Securities Dealers (NASD) characterized Royal Resources as a general creditor. (R.78,80). She said that there was a stock transaction but since Royal Resources was not considered a customer but a general creditor they had to be paid out of the general funds of Gibralter Securities and that Gibralter went broke. (R. 80,81). She stated the reason that Royal Resources was not paid the money due it on a

stock transaction was because the funds were held by Gibralter in a general account and when Gibralter went broke there were no funds to pay over to Royal Resources. (R. 83)

A stipulation was entered into between counsel that on several occasions Mr. Dee Woolley went to Gibralter Securities and requested payment from the firm for the amounts in dispute and that at no time did he request payment from Mr. Dixon although Dixon was present on one occasion. (R. 84)

Prior to trial, respondent moved for the production of all records and transactions between the defendants and plaintiffs during the period of January 1, 1975, through June 30, 1975. (R. 26) Thereafter, plaintiff sought a coercive order from the court to compel compliance with the motion to produce documents. (R. 35) In response Lynn Dixon filed an affidavit in which he indicated that he was not nor had he ever been the custodian of the records of Gibralter Financial Corporation or Gibralter Securities Corporation, and that he had none of the records in his possession. At the time of trial, the appellant Lynn Dixon testified that he was employed in an entirely new occupation and had no records concerning the transaction. (R. 66, 70)

Based upon the above evidence, the trial court found that "the facts surrounding the transactions in this case in the absence of clarifying documents were peculiarly in the province and knowledge of" appellant Dixon. That the failure to produce documents raises a presumption that their contents are adverse to the defendants, (R. 46-47) and that because the checks were payable to Dixon (identified as defendant in the Findings of Fact) that in the absence of documents or evidence to the contrary a conclusion

that the monies were had and received by Dixon was proper. This failure to produce documents shifted the burden of proof to the defendants and that they did not meet the burden. (R. 46-47) In the conclusions of law, the court found that "the failure to produce essential documents through discovery and at the trial [sic] is construed as a matter of law to determine the contents" adversely to the defendants and that Dixon was liable in the amount of $10,400. The inference against Dixon was apparently based on a failure to produce by all defendants.

POINT I

THE TRIAL COURT ERRED IN HOLDING THE APPELLANT PERSONALLY LIABLE FOR FUNDS RECEIVED IN HIS CAPACITY AS AN AGENT.

The trial court rendered judgment against Lynn Dixon in his individual capacity. It is submitted that the judgment of the trial court is erroneous in that the evidence clearly establishes that Lynn Dixon's receipt of monies from the respondent Royal Resources, Inc. was not in an individual capacity but in his capacity as an agent for Gibralter Securities and the clients of Gibralter Securities. Further, it is submitted that the facts clearly demonstrate that Dee Woolley of Royal Resources dealt with Lynn Dixon in a stock transaction for a one-day payout knowing that Dixon was an agent of Gibralter Securities and acting on behalf of a third person selling their stock. The very nature of the transaction envisioned a payment by Lynn Dixon over to the seller of stock in exchange for an assignment to Royal Resources of the seller's right to receive payment at the end of seven days. The only reason that Royal Resources did not receive payment was because they were considered a general creditor of Gibralter Securities, and when the latter corporation went broke, the funds that would have been

paid over to Royal Resources were no longer available. Dee Woolley appeared at Gibralter Securities at a time when Lynn Dixon was present and made demand upon Gibralter Securities for payment. At no time did he make demand on Lynn Dixon personally. In the respondent's amended complaint, it is alleged that the funds were paid over "pursuant to a previous and ongoing course of conduct." The allegation is that "the funds were loaned to the defendants" without identifying Lynn Dixon. With reference to the specific allegation as to Lynn Dixon's liability, Paragraph 7 of the respondent's amended complaint alleges ". . . Dixon is liable individually in that he was acting as an agent of George Perry in his personal not corporate capacity." Thus, it is clear from all of the evidence that Lynn Dixon was acting as an agent. The Restatement of Agency 2d, § 320 provides:

> "Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract."

A principal is disclosed according to Comment a of the Restatement of Agency 2d, § 320, when the other party has notice that the agent is acting for a principal and the principal's identity. Comment a also provides:

> "One who purports to contract on behalf of a designated person does not manifest by this that he is making a contract on his own account, and only where he so manifests does the agent become a party to a contract which he makes for the principal. In the absence of other facts, the inference is that the parties have agreed that the principal is, and the agent is not, a party."

Section 328 of the Restatement of Agency 2d adds:

> "An agent, by making a contract only on behalf of a competent disclosed or partially disclosed principal whom he has power so to bind, does not thereby become liable for its nonperformance."

Comment a to Section 328 of the Restatement of Agency 2d observes:

> "One who makes a contract only on account of another ordinarily does not himself contemplate responsibility for its performance. His function is performed if he causes a contract to be made between his principal and the third person. He guarantees neither the honesty nor the solvency of the principal." (Emphasis added)

Generally, an agent is not responsible for money had and received where the money is paid over by the agent to his principal. 3 Am.Jur. 2d Agency, §§ 301, 302. In 3 Am.Jur. 2d Agency, § 294, the general rule is stated:

> "If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon, unless credit has been given expressly and exclusively to the agent and it appears that it was clearly his intention to assume the obligation as a personal liability and that he has been informed that credit has been extended to him alone."

Cases applying these principles have generally rejected claims of liability against persons such as the appellant who were acting simply as an agent for a third person.

In Merit Motors v. Bartholomew, 179 Pa. Super. 576, 118 A.2d 277 (1955), plaintiff, an automobile seller, brought action on the purchase price of an automobile against the buyer, and against Allstate Insurance Company on the theory that the insurance company had agreed to finance the sale. In holding that plaintiff could not recover against Allstate, the court cited § 320 of the Restatement of Agency and stated:

> "It is well established that a person acting as an agent for a disclosed principal is not, in the absence of special circumstances, a party to the contract."

A similar result was reached holding the president of a corporation not liable on a corporate printing debt, Revere Press, Inc. v. Blumberg, 431 Pa. 370, 246 A.2d 407 (1968).

A decision from the Wyoming Supreme Court is instructive in this case in view of the express allegation in respondent's complaint that Dixon acted as an agent. In reversing a judgment the court observed, Thomas v. Gonzelas, 79 Wyo. 111, 331 P.2d 832, 834 (1958):

> "The amended petition is ambiguous. It fails to state a clear cause of action against Emett Thomas. It is therein alleged that Emett Thomas acted as agent for the Cheevers in ordering electrical equipment, impliedly asserting that he did so within the scope of his authority. It is stated in 2 Restatement, Agency, § 328, p. 724: 'An agent, by making a contract only on behalf of a competent disclosed or partially disclosed principal whom he has power so to bind, does not thereby become liable for its nonperformance.' In the comment to that section it is said:
>
> > 'One who makes a contract only on account of another ordinarily does not himself contemplate responsibility for its performance. His function is performed if he causes a contract to be made between his principal and the third person. * * *'
>
> In 3 C.J.S. Agency, § 215, p. 119, it is stated:
>
> > 'An agent who contracts on behalf of a disclosed principal and within the scope of his authroity, in the absence of an agreement otherwise, or other circumstances showing that he has expressly or impliedly incurred or intended to incur personal responsibility, is not personally liable to the other contracting party * * *'
>
> There is no allegation in the second amended petition which discloses that the appellant Emett Thomas intended to bind himself personally."

In Roller v. Smith, 88 N.M. 572, 544 P.2d 287 (1975), the New Mexico Court of Appeals ruled that plaintiff had no claim for relief against the defendant agent for the balance due on the

sale of an automobile. The court stated:

> "[I]t is well established that an agent acting within his authority for a disclosed principal is not personally liable unless he was expressly made a party to the contract or unless he conducts himself in such a manner as to indicate an intent to be bound."

From these cases and the facts of the instant case, it appears that as a matter of law, the trial court erred in imposing liability against Lynn Dixon. Dixon was acknowledged as a "registered agent" for defendant corporation in plaintiff's amended complaint. (R. 9) It was stipulated that demand was made by plaintiff for payment from Gibralter Securities and not Dixon. Dee Woolley who made out the checks payable from respondent to Lynn Dixon acknowledged that it was his practice to determine from Gibralter Securities if a stock sale had been made before making the one-day loan and that he did so as regards the instant transaction. (R. 65) Mr. Woolley's dealings were part of a course of dealing with Gibralter Securities and he would take an assignment of the client's right to payment. (R. 66) The appellant gave over the money to the stock seller, and his trader's account was simply a vehicle to service Gibralter Securities clients. In accord with practice when Gibralter received the money from the stock sale, it would be paid over to Royal Resources. Dixon had no control over the pay over to Royal Resources. Before a payover would be made, Dee Woolley would present Lois Crowder of Gibralter Securities with a transfer and trade ticket. The reason payment was not made by Gibralter in the instant situation was because Gibralter did not have the money to pay off its general creditors. These facts clearly show no liability on the part of Dixon since he was merely an agent. This court should reverse with directions for a judgment for appellant.

POINT II

THE TRIAL COURT ERRED IN DRAWING AN EVIDENTIARY CONCLUSION FROM THE FAILURE TO PRODUCE DOCUMENTS WHERE THE DOCUMENTS WERE NOT UNDER THE CONTROL OF THE APPELLANT AND WERE AS EQUALLY ACCESSIBLE TO THE RESPONDENT AS THE APPELLANT IF THEY WERE IN FACT IN EXISTENCE.

Prior to trial, respondent moved for production of all records and transactions between plaintiff and defendants during the period from January 1, 1975 through June 30, 1975. The production request was addressed generally to the "defendants." In response to the motion, the appellant filed an affidavit in which he indicated that he was not nor had he been the custodian of the records of Gibralter Financial Corporation or Gibralter Securities Corporation and that he had none of the records in his possession. At the time of trial, the appellant testified that he was employed in a new occupation and had no records concerning the transaction. In paragraph 6 of the appellant's affidavit, he stated:

> "Affiant continues to stand ready to give testimony, depositions, and affidavits on behalf of Plaintiff but cannot produce documents that have not been in his care and custody or his possession from the closing of Gibralter Securities Corp."

Further, based upon the testimony of Lois Crowder, the critical records dealing with the respondent's right to payment would be the assignment and the trade ticket and the records of the transaction would be in the individual customers account. Thus, some of the critical records would be in the possession of Royal Resources, Inc. Even so, the trial court found that the facts surrounding the transaction in the case were peculiarly within the province of the appellant Dixon. Based on this finding, the court concluded that the failure to produce the documents raised a presumption that their contents were adverse to the defendants

and that the burden of proof was shifted to Dixon concerning the transaction. It is submitted that this constituted a misapplication of the evidentiary law justifying this court reversing and granting a new trial. In 31 C.J.S. Evidence § 156(b) it is stated:

> "The unexplained failure or refusal of a party to judicial proceedings to produce relevant and competent documentary evidence or an article which would tend to throw light on the issues authorizes, under certain circumstances, an inference or a presumption unfavorable to such party.
>
> Possession or control of such evidence by the party against whom the inference or presumption is sought to be invoked, is necessary; the rule does not apply where the evidence is equally available to both parties. Further, it must appear that there has been an actual suppression or withholding of the evidence; no unfavorable inference arises where the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for."

See inferentially, McIntyre v. The Ajax Mining Co., 17 Utah 213, 53 Pac. 1124 (1898). See also, 29 Am.Jur. 2d Evidence § 178. It is well settled that before any adverse inference can be drawn from the non-production of evidence that the evidence in question must be identified and must be peculiarly within the power of one party to produce. In the instant case, Dixon had no access to the records of Gibralter Securities nor was there any showing of any documentation actually in existence which would have clarified the matter which was within the power of Dixon to produce. Indeed, the records of Gibralter Securities were as accessible to respondent as they were to Dixon. Further, respondent had access to particular documents such as trade tickets and assignments which also would have had a direct

bearing upon the issue. In Jones on Evidence, 6th Ed. § 3.93, it is stated:

> "No unfavorable inference arises from a failure to produce evidence which is not within the control of the party who has failed to produce it, . . ."

It is therefore submitted that under the facts before the trial court, there was no basis to draw an unfavorable inference or presumption with reference to any claimed failure of the appellant to produce documents relating to the transaction in question. Even so, it is submitted that such a negative inference cannot shift the burden of proof nor affirmatively establish the plaintiff's case. In 31 C.J.S. Evidence § 156, it is stated:

> "Inferences from the suppression of documents or failure to produce them on notice increase the weight of evidence produced by the other party as to the contents of the documents, or as to the facts to which the documents are relevent, but do not constitute independent evidence of a fact."

29 C.J.S. Am.Jur. 2d § 177 states the rule:

> "While the spoliation of evidence may raise a presumption or inference against the party guilty of such act, it does not relieve the other party from introducing evidence tending affirmatively to prove his case, insofar as he has the burden of proof. This presumption or inference does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's cause."

See also, 1 Jones on Evidence, § 3.93, p. 329. In National Life and Accident Insurance Co. v. Eddings, 188 Tenn. 512, 221 S.W.2d 695 (1949), Eddings sued the defendant insurance company to recover on an industrial insurance policy. The company defended on the grounds that plaintiff had not been in sound health at the time the policy was taken out. On appeal, the issue before the

Tennessee Court was how far the inference arising from a party's failure to produce evidence may supply evidence against such person. The plaintiff Eddings had refused to consent to the taking of depositions of his treating physicians who had provided treatment for him immediately prior to the time he took out a policy with the defendant. The insurance company contended that in addition to the unfavorable inference from the failure to produce such evidence which was peculiarly within the plaintiff's control, that such inference was sufficient to establish the facts of the defense of the defendant insurance company. The Tennessee Court indicated that such evidence "does not amount to substantive proof which can be substituted for a fact required to make out his adversaries case * * * it cannot be treated as affirmative evidence of a fact otherwise unproved." The court also indicated that the presumption or inference from the non-production of evidence is not sufficient to supply independent evidence of a fact unproved by other evidence. The court stated the rule:

> "Thus, the failure to produce books and papers which have been called for does not raise the inference that, if produced, they would establish the facts which it is alleged they would prove. The only inference that may be drawn is that the testimony if given would not have been favorable to the party who did not produce the evidence. Evidence of such conduct is persuasive rather than probative and cannot be invoked as substantive proof of any facts essential to the case of the opponent. The rule has been stated that the presumption will not supply a missing link in an adversary's case and cannot be treated as independent evidence of a fact otherwise unproved. It has been stated that the presumption arising from the nonproduction of evidence does not relieve the other party from the burden of proving his case."

In the instant case, the effect of the ruling of the trial court was to relieve Royal Resources of the normal plaintiff's burden of proving its claim for relief and to substitute a negative inference as substantive proof. This is contrary to the accepted rule with reference to the use of inferences from the non-production of evidence. The rule with reference to non-production of evidence is a mere inference not a true presumption, Presumptions in Utah: A Search for Certainty, 5 Utah L.Rev. 196 (1956); Wigmore, Evidence, 3d Ed. § 2424, § 291, p. 182; Utah Rules of Evidence 13 and 14. As the New Hampshire court recognized in Stocker v. Boston and Maine Railroad, 84 N.H. 377, 151 A. 457, 459 (1930), it "* * * is no more than saying that proof must rest upon evidence and not upon its absence." The burden of proof does not shift under these circumstances, Rule 1(4) Utah Rules of Evidence. In Koesling v. Basamakis, 539 P.2d 1043, 1046 (Utah 1975), this Court observed:

> "The burden of persuasion does not shift, however, and remains upon the party asserting the proposition. Thus, where, as here, the proponent has the burden of persuading the trier of fact by a preponderance of the evidence, that is, that the asserted proposition is more likely than not, he carries that burden throughout the trial. Having adduced sufficient evidence to show or tending to show the existence of the proposition, and having thus met his burden of production, he nevertheless suffers the risk of nonpersuasion or disbelief.

It is submitted this court should reverse and grant a new trial.

POINT III

THE RESPONDENT WAS PRECLUDED FROM HAVING JUDGMENT AGAINST THE APPELLANT WHEN IT PREVIOUSLY TOOK JUDGMENT AGAINST THE TWO CORPORATE DEFENDANTS.

The plaintiff below, Royal Resources, Inc., in its amended complaint named Gibralter Financial Corporation, Gibralter Securities Corporation, Lynn Dixon and George Perry as defendants. (R. 9)

George Perry was released from the action at trial. The amended complaint listed Lynn Dixon as registered agent of defendant corporation, listed the monies paid over as short-term loans to defendants and indicated that the defendants were jointly liable. (R. 9, 10, etc.) On the 22nd of July, 1977, while the action was still pending against the appellant Dixon, Royal Resources took judgment against both corporate defendants for the same amount and on the same causes of action as was eventually involved in the judgment against the appellant Dixon. In that judgment, it was expressly indicated that Dixon and Perry would agree to fully cooperate with plaintiffs in seeking redress from a Federal agency, SCIPIC (Securities Investor Protection Corporation) for the purposes of obtaining federal insurance compensation for the loss. (R. 24) In his affidavit of March 6, 1978, Dixon indicated a further willingness to assist Royal Resources in the satisfaction of its judgment by recovery against SCIPIC. Thereafter, the respondent continued to pursue its action against Dixon.

It is submitted that respondent cannot have judgment against Gibralter Securities Corporation, Gibralter Financial Corporation and the appellant Dixon. The Restatement of Contracts § 119(1) provides:

> "A judgment rendered by a court of competent jurisdiction within the United States against one or more joint promisors, or against one or more joint and several promisors, upon a joint promise, discharges the joint duty of the other joint promisors."

This rule is applicable to actions against a principal and an agent. Restatement of Agency 2d, § 336b. See also Comment e.

In 3 Am.Jur. 2d Agency, § 309, it is stated:

> "[T]he rule followed almost universally is that if the third party, after learning the facts and the identity of the principal, brings suit and recovers judgment against the agent, this is an election against the agent which will bar a subsequent action against the principal, regardless of whether the judgment is or is not satisfied. A judgment against the principal will likewise have the effect of barring a subsequent action by the third person against the agent."

In the instant case, it is submitted that judgment cannot be had against the corporate defendants and their agent Dixon for the same indebtedness. If Dixon was a fully disclosed agent of Gibralter Securities, judgment may not be had against him as only the principal is liable. If Dixon were deemed an agent for a partially disclosed or undisclosed principal, judgment may not be had against both the agent and the principal. Rather, the plaintiff must make an election. In Costello v. Kasteler, 7 Utah 2d 310, 324 P.2d 772 (1958), this Court recognized the rule before referenced and indicated that prior Utah authority, Love v. St. Joseph Stock Yards Co., 51 Utah 305, 169 Pac. 951 (1917), supported the same conclusion. In the Costello case, this court stated:

> "Appellants further contend that the court erred in granting judgment against both of them since the court found that at the time of the negotiations for the services appellant Kasteler did not disclose to respondent that he was acting as the agent for the appellant Uranium Chemical Corporation and the law is well settled that where a contract is entered into with the agent of an undisclosed principal for the use and benefit of the principal an election must be made as to whether the agent or the principal will be held liable, but a judgment cannot be obtained against both. As authority appellant cites Love v. St. Joseph Stock Yards Co., 51 Utah 305, 169 P. 951. That case does contain a dictum to that effect and respondent concedes that the majority rule in the United States is to the effect that

after discovery of an undisclosed principal a judgment cannot ordinarily be obtained against both the principal and the agent. As stated in 118 A.L.R., page 704, note 111:

> 'It has generally been held that where the agent and undisclosed principal are joined, the plaintiff may not have judgment against both, but must, prior to judgment, elect to hold one or the other.'

Ordinarily plaintiff would not be entitled to judgment against both."

In the case the Court went on to note that a failure to demand an election might constitute a waiver. However, the Court indicated that an election could be made on remand. It is submitted, however, that in the instant case respondent has in fact made an election. Respondent saw fit to take judgment first against Gibralter Securities and to enlist the aid of the appellant Dixon in satisfying the judgment through a claim against SCIPIC. This conduct certainly was in the nature of an election and precludes a judgment from being entered against the appellant Dixon. Restatement of Agency 2d, § 210a. It is therefore submitted that this Court should reverse with instructions to enter judgment in favor of the appellant.

CONCLUSION

The evidence in this case clearly establishes that the appellant Lynn Dixon acted as an agent for Gibralter Securities. The testimony of respondent's officer Dee Woolley, the principal party acting for respondent in the transaction in question and the testimony of all other persons shows appellant received no personal gain from monies had and received from respondent. The monies were received as an agent and respondent was entitled to compensation on a stock transaction from Dixon's principal Gibralter Securities.

Under these circumstances, no judgment of individual liability was properly rendered against Dixon and appellant submits that the case should be reversed with directions to enter judgment in favor of Dixon. Appellant further submits that the trial court misapplied an evidentiary standard in determining that negative inferences could be drawn against appellant from the failure to produce documents where the documents were not shown to be in existence or subject to production by appellant Lynn Dixon. Further, even if an evidentiary inference could have been drawn, the trial court acted improperly in suggesting that it shift the burden of proof and in effect provide substantive evidence in support of the respondent's case. Finally, it is submitted that respondent could not have judgment against both the principals and agent in this case and having taken judgment first against the principal and thereafter seeking the agent's aid in the satisfaction of that judgment is precluded in having judgment against the agent Lynn Dixon. It is therefore submitted this Court should reverse.

Respectfully submitted,

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