

1951

# Glen L. Nicewinter v. David H. Nicewinter and Geneva C. Nicewinter and Marie M. Diner : Brief of Respondent

Utah Supreme Court

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Joseph S. Nelson; Attorney for Respondent;

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

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GLEN L. NICEWINTER,  
*Plaintiff and Respondent,*

vs.

DAVID H. NICEWINTER and  
GENEVA C. NICEWINTER,  
*Defendants and Appellants.*

MARIE M. DIENER,  
*Defendant.*

FILED  
SEP 14 1961  
Clark, Supreme Court, Utah

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**RESPONDENT'S BRIEF**

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*Attorney for Respondent*

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Case No. 7669

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RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Respondent agrees with the Statement of Facts in appellants' brief in so far as they are set forth from the record. However, this controversy arises out of the interpretation of a joint venture agreement between two

brothers, but in appellants' Statement no facts are set forth concerning the inducement which persuaded plaintiff to join defendant in his apartment house venture and nothing is set forth as to the terms and provisions of their agreement except these meagre words:

“An understanding was reached as a result of these discussions on or about the 23rd day of February, 1948.”

Since this appeal grows out of the provisions of that understanding as interpreted by Judge Ellett and the enforcement responsibilities thereof as interpreted by Judge Van Cott, we believe that a more amplified statement of its primary provisions would be helpful, and believe these two provisions are fundamental, to wit:

It is agreed between plaintiff Glen L. Nicewinter and defendant David H. Nicewinter that all money and the value of the property supplied by plaintiff would be repaid to him and that he would not lose anything.

It was also understood between said brothers that the said property should be sold to the best advantage and thereupon an accounting should be made between them in accordance with the foregoing terms of their agreement (R. 7 and 8, par. 8-9).

## STATEMENT OF POINTS

Respondent will answer and argue the nine points posed by the appellants in the order set forth and argued in appellants' brief. The first three of these points are

grouped and argued together (although in their argument they are presented in a different order: 2, 3, 1), and points No. 4 and 5 are also grouped and argued together. Respondent will answer and argue said points in the same order they are presented as points in argument and the same groupings as adopted by appellants.

In addition, respondent contends that this appeal is abortive in that it is concerned with an interlocutory decree which contemplates and provides for a subsequent and final judgment.

### POINTS NO's 1, 2 AND 3

Following appellants' example, respondent groups these three points in the order argued by appellants:

### ARGUMENT

### POINTS NO's 2, 3 AND 1

Appellants' argument is presented in sequence of Point 2, Point 3, and Point 1, being concerned in that sequence with Judge Van Cott's Findings of Fact, Conclusions of Law, and Decree, respectively. Therefore, for ready comparison, we feel constrained to follow the same order:

### POINT NO. 2

(re: Findings of Fact)

APPELLANTS' CONTENTION THAT THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH

11 OF THE FINDINGS OF FACT (R. 23), THE SAME BEING UNSUPPORTED BY THE EVIDENCE.

The text of paragraph 11, R. 23, follows:

“11. That said decree further provided that plaintiff should be repaid all monies and property which he has put into said enterprise in the event there was not enough to repay both of them for all their contributions thereto, and said monies and property to be repaid has been determined by Decree of this court to be adjudicated to be a sum of \$8,000.00 to be repaid in the event there was not even enough to repay both of them for all their contributions thereto.”

Answering, we submit excerpts from the text of Judge Ellett's Decree and Findings and Conclusions:

“It is further ordered, adjudged and decreed that so far as possible there shall be repaid to Glen L. Nicewinter all monies and property which he has put into said enterprise in the event there is not enough to repay said venturers for all their contributions.” (R. 5).

“8. It was also agreed between plaintiff Glen L. Nicewinter and defendant David H. Nicewinter that all money and the value of the property supplied by plaintiff would be repaid to him and that he would not lose anything” (R. 7).

“6. That the plaintiff did pay into said firm in cash and the purchase of materials the sum of \$8,000.00 \* \* \*” (R. 7).

“That defendant David H. Nicewinter further agreed

that plaintiff would not lose any of the money which he contributed to said joint venture\*\*\*" (R. 8).

Respondent submits that the said quotations from R. 5, R. 7, and R. 8 amply support Judge Van Cott's Findings of Fact concerned in Point 2, if only Judge Van Cott's reference to Judge Ellett's "Decree" is construed liberally and according to its obvious intent to embrace Judge Ellett's "Findings" and "Conclusions."

At the trial the appellants were both present in person and represented by counsel and it was their burden to proceed with an attack upon plaintiff's prima facie showing which they had admitted by paragraph 1 of their answer (R. 10). This express admission obviated the necessity of plaintiff proving these facts "as a solemn admission by the adverse party is the highest form of proof." *Gatrell vs. Salt Lake County* (106 Utah 409, 149 P (2nd) 827).

### POINT NO. 3

(re: Conclusion of Law)

APPELLANTS' CONTENTION THAT THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 1 OF THE CONCLUSIONS OF LAW (R. 23), THE SAME BEING UNSUPPORTED BY THE FINDINGS OF FACT OR THE EVIDENCE.

The text of par. 1, R. 23 follows:

"That all interest of Glen L. Nicewinter and David H. Nicewinter and Geneva C. Nicewinter

in and to the hereinafter described real property together with the contract for the purchase thereof from Marie M. Diener should be sold to the highest bidder of the said Glen L. Nicewinter and David H. Nicewinter in open court for cash and that the liquidated sum of \$8,000.00 due to the said Glen L. Nicewinter may be applied as cash in the bidding at said sale, and\*\*\*\*”

Except for the limitation as to bidders, all of this text is sustained by Judge Van Cott's Findings of Fact, and the new element of limiting the bidders to the brothers is sustained by respondent's stipulation (R. 20) “that the above entitled court by said judge may sell said property and all interest therein to the highest bidder as between plaintiff Glen L. Nicewinter and David H. Nicewinter as defendant.”

#### POINT NO. 1 (re: Decree)

APPELLANTS' CONTENTION THAT THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 1 OF THE DECREE (R. 30, 31), THE SAME BEING UNSUPPORTED BY THE EVIDENCE.

Text of paragraph 1 of the Decree (R. 30, 31) follows:

“IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all interest of Glen L. Nicewinter and David H. Nicewinter and Geneva C. Nicewinter in and to the real property located in Salt Lake County, State of Utah, and described hereinafter be sold to the highest bidder as between the said Glen L. Nicewinter and David H. Nicewinter in open court for cash, and that the liquidated sum of \$8,000.00 due to the said

Glen L. Nicewinter as adjudged by this court by Decree dated the 28th day of April, 1950, may be applied by him as cash in bidding at said sale, and\*\*\*”

Judge Van Cott’s Decree follows logically out of his Conclusions above and it is thus amply supported.

The above quotations from Judge Ellett’s Judgment, including his Findings and Conclusions, were all admitted by appellants (R. 10) and, taken as a group, amply sustain Judge Van Cott’s Decree of Sale. Respondent admits that the use of the words “as adjudged by this court by Decree” in Judge Van Cott’s Decree and Findings above are used loosely to embrace Judge Ellett’s Findings of Fact and Conclusions of Law, but submits that the objection is only technical, does not overcome the result that the facts were found in judicial process and admitted (R. 10) by appellants. Judge Ellett’s Findings and Decree are not now before this court for review, and, for the purposes of this appeal from Judge Van Cott’s order of sale, the Judgment (Findings, Conclusions and Decree) of Judge Ellett is conclusive.

Appellants go wholly outside of the record in dragging in an assertion that appellant David H. Nicewinter has an investment in excess of \$12,000.00. The record indicates that appellant has paid in but \$2,500.00 (R. 19), but it is admitted that respondent has paid in \$8,000.00 (R. 7, R. 10). Other than those investments the record indicates that their contributions are equal (R. 8).

Under these circumstances it would be “unjustly

advantageous'' (Ap. Bf. p. 11) to appellants to deprive respondent of the benefits of his bargain (R. 7, par. 8).

Appellants find in the stipulation (R. 20) no justification for making available to respondent the \$8,000.00 credit. We rely upon the findings of Judge Ellett for the \$8,000.00 credit, not upon the stipulation. We do rely on the stipulation to answer any objections to the sale which Geneva C. Nicewinter might have by reason of a statutory interest or otherwise. Answering the objection that the stipulation was not executed by the parties but by counsel it must be presumed that their counsel acted only after consultation and approval of their clients; especially in view of the record (R. 33, 34), wherein the objections filed made no attempt to repudiate or disavow the stipulation.

The doubt raised by counsel as to whether the stipulation refers to the same contract as that introduced in evidence is captious. It has the same date, the same seller, the same purchaser David H. Nicewinter and the substitution of Glen L. Nicewinter for Geneva C. Nicewinter by mutual agreement indicates that the parties litigant conceded that by the proceedings before Judge Ellett, Geneva's interest in said contract was only nominal but that Glen's interest therein had been established as incident to the establishment of his admitted one-half interest in the said joint venture with David.

Equally captious is the objection that Marie M. Diener is not a party to the stipulation. That "she most certainly has a direct interest in the proceedings" was

manifest by her presence in court and her testimony at the time set for the sale (R. 44-49). Her right to have paid to her the balance of \$2,900.00 and interest owing her for her vendor's title in said real property has never been questioned and all rights of the other parties litigant are recognized as subject to her first claim which she has set forth in a letter and statement of account (R. 17, 18).

Contrary to appellants' allegation that Geneva C. Nicewinter and Marie M. Diener's interests have been ignored it appears that respondent has gone out of his way to see that their interests are given every consideration. The sale of the property was subject to Mrs. Diener's interest (R. 31), and is only an intermediate step in process of a final settlement and when the case is finally determined the interest of Geneva C. Nicewinter, assuming she has such any interest, and the interest of Marie M. Diener will be fully protected.

#### POINT NO. 4

APPELLANTS' CONTENTION THAT THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 2 OF THE DECREE (R. 31), THE SAME BEING UNSUPPORTED BY THE FINDINGS OF FACT OR THE EVIDENCE.

#### POINT NO. 5

APPELLANTS' CONTENTION THAT THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 4 OF THE CONCLUSIONS OF LAW (R. 24), THE SAME BEING UNSUPPORTED BY THE FINDINGS OF FACT OR THE EVIDENCE.

We present and argue these points as a group as did appellants.

In No. 4 the appellants claim as unsupported by the Findings of Fact or the evidence the following paragraph 2 of the Decree (R. 31):

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said sale shall be conducted in the courtroom of Judge Ray Van Cott, Jr., at 9:15 o’clock A.M. on Friday, the 9th day of March, 1951, and that notice of said sale shall be given by serving upon the said Franklin Dunn Richards, attorney, a notice thereof at least five days prior to said sale, and that the property and premises herein referred to are described as:

Commencing at a point 2 rds. North of the Southwest Corner of Lot 5, Block 18, Plat “A”, Salt Lake City Survey, and running thence North 4 rds.; thence East 10 rds.; thence South 4 rds.; thence West 10 rds. to the place of beginning, subject to and together with a contract dated September 25, 1947, with Marie M. Diener, seller, and together with all furniture, furnishings and appliances appertaining to said joint venture premises, and.”

In No. 5 appellants claim as unsupported by the Findings of Fact or the evidence paragraph 4 of the Conclusions of Law (R. 23, 24), which follows:

“That the property and premises herein referred to are located in Salt Lake County, State of Utah, and particularly described as:

Commencing at a point 2 rds. North of the Southwest Corner of Lot 5, Block 18, Plat “A”,

Salt Lake City Survey, and running thence North 4 rds.; thence East 10 rds.; thence South 4 rds.; thence West 10 rds. to the place of beginning, subject to and together with a contract dated September 25, 1947, with Marie M. Diener, seller, and together with all furniture, furnishings and appliances appertaining to said joint venture premises.”

Notwithstanding the words “furniture, furnishings and appliances” do not appear in the previous pleadings they were always contemplated as incident to, and embraced within, the property of the joint venture. This is substantiated by (1) the stipulation (R. 20), and (2) the fact that this order of sale is an interlocutory proceeding looking to a final adjudication between the parties pending which the proceeds of sale of their joint venture interests are to remain in the custody of the clerk.

That the joint venture here involves not merely the real property but the personal property thereunto appertaining has never before been questioned. Even at the time the defendants threw all objections they could think of at the proposed decree of Judge Van Cott, it did not even enter their minds to object to the use of these words, “sale of the furniture, furnishings and appliances appertaining to said joint venture premises” (See R. 33, 34).

The stipulation of sale concerns “property at 725-733 South 2nd East, Salt Lake City, Utah” and the contract incident thereto, and recites that said court “shall

sell said property and all interest therein'' (R. 20), under which inclusive words may reasonably be included all furniture, furnishings and appliances appertaining to the joint venture premises.

If it were claimed that "property at 725-733 South 2nd East, Salt Lake City, Utah" was not the res of the joint venture, it is unthinkable that appellants would have neglected to offer that as a specific objection among their list of objections (R. 33, 34).

At any rate, in the execution of this interlocutory decree wherein the proceeds of sale are deposited with the clerk, the rights of appellants are adequately safeguarded. Yes, even the res is preserved, because one of the parties litigant will be the buyer and will continue under the court's jurisdiction until final decree. Appellants cannot be prejudiced.

## POINT NO. 6

APPELLANTS' CONTENTION THAT THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 5 OF THE FINDINGS OF FACT (R. 22), THE SAME BEING UNSUPPORTED BY THE EVIDENCE.

Text of paragraph 5 of the Findings of Fact (R. 22):

"5. That said property is being purchased from defendant Marie M. Diener and that defendant Geneva C. Nicewinter is the wife of David H. Nicewinter and has some statutory interest in defendant David H. Nicewinter's interest therein."

Counsel presumes that "as a result of the written contract, Exhibit 'A' (R. 19) she (Geneva C. Nicewinter)

had a one-half interest in the real property.” That might have been presumed until proved otherwise. Judge Ellett’s Decree reciting that Glen and David have a joint venture in said property and that the profits and increase of value shall be divided share and share alike upon sale thereof, and that each of said brothers and his wife shall have reasonable living quarters out of said premises pending sale thereof” (R. 4, 5) sufficiently, and for the purpose of this action conclusively, overcomes the presumption that Geneva had a one-half interest in the real property, as claimed, or that her rights were totally ignored.

### POINT NO. 7

APPELLANTS’ CONTENTION THAT THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 7 OF THE FINDINGS OF FACT (R. 22), THE SAME BEING UNSUPPORTED BY THE EVIDENCE.

Text of paragraph 7 of the Findings of Fact (R. 22) follows:

“7. This court further found that each of said brothers and his wife shall have reasonable living quarters out of said premises pending sale thereof and further ordered that within a reasonable time said premises shall be sold to the best advantage and thereupon an accounting shall be made between them in accordance with the terms of this order, and”

Appellants are correct in saying that they denied in paragraph 2 of the answer (R. 10) plaintiff’s allegation that the parties “shall have reasonable living quarters

out of said premises pending the sale thereof.” However, in paragraph 1 of their answer (R. 10) appellants did concede:

“7. that it was also agreed between plaintiff Glen L. Nicewinter and defendant David H. Nicewinter that each of them would have a reasonable living out of said premises for himself and his wife and that each did so receive his living and board therefrom” (R. 7). But the winner of the argument as to point No. 7 would have only a pyrrhic victory inasmuch as the Decree (R. 30, 31) is entirely silent with respect to the subject matter of this point, nothing is claimed therefore, it is the basis of no order, and appellants are in no wise prejudiced.

## POINT NO. 8

APPELLANTS’ CONTENTION THAT THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 8 OF THE FINDINGS OF FACT (R. 22), THE SAME BEING UNSUPPORTED BY THE EVIDENCE.

Paragraph 8 of the Findings of Fact (R. 22) follows:

“8. That a reasonable time has now expired but said premises have not been sold.”

Again appellants are correct in their statement that the allegation of the complaint concerning this subject matter is denied by his answer.

The only purpose for such a Finding of Fact would be to lay a foundation for the order of sale of the apartment house property, but in view of appellants’ stipulation for sale (R. 20) such a Finding is entirely super-

fluous and the Decree (R. 30) is amply sustained without reference to, or support from, said Finding.

In view of appellants' prayer (R. 11), "for a judgment of this court terminating and dissolving the joint venture" and that "the subject of the venture be placed on the market for sale" it was entirely unnecessary to support by evidence the proposition that a reasonable time had expired. Nor can appellants be prejudiced by the allegation that "said premises have not been sold." If they had been sold we would not be up here . . . at least not until after an accounting—a final decree—which must hereafter be adjudicated by the trial court.

## POINT NO. 9

**APPELLANTS' CONTENTION THAT THE TRIAL COURT ERRED IN MAKING AND ENTERING PARAGRAPH 9 OF THE FINDINGS OF FACT (R. 22), THE SAME BEING UNSUPPORTED BY THE EVIDENCE.**

Paragraph 9 of the Findings of Fact (R. 23) follows:

"9. That defendant David H. Nicewinter received approximately \$400.00 per month gross rentals from said premises, for which he has made no accounting to plaintiff, notwithstanding plaintiff's demand therefore and notwithstanding that said business is a joint venture."

Proof of plaintiff's having demanded an accounting appears in the record (R. 36, 37). Proof of a joint venture appears in R. 7, par. 4. Proof that plaintiff was entitled to an accounting is found in Judge Ellett's Find-

ings and Decree (R. 4, 8) admitted by appellants (R. 10).

As to the \$400.00 a month we allow that at this time we would have no more right to submit the "For Sale" advertisements published at appellants' instance concerning the income from said premises than he has to allege, without any support, that appellant has made a \$12,000 investment.

For our opponent to argue that this finding fails of support is one thing; but he goes far beyond, saying: "such finding . . . we are advised is contrary to the facts" (Ap. Bf. p. 19). This last statement questions the integrity, not merely the support, of the finding and suggests that in fairness we be allowed to offer on this hearing on appeal, some tell-tale news clippings sponsored by appellants.

But even if the court cannot take judicial knowledge that nine apartments at 725-733 South 2nd East in Salt Lake City would bring "approximately \$400.00 per month gross," and even if there were no support whatsoever for this finding, it is not fatal to the interlocutory order of sale here appealed from.

The Conclusions of Law do not rely on this finding, no order results therefrom, nor is followed into the decree, and as a result appellants are in no wise prejudiced, and in further proceedings which are provided for after the sale they will have ample opportunity to traverse.

Our opponent acknowledges that the decree "contemplates an ultimate accounting between these parties"

(Ap. Bf. 19), thus conceding its interlocutory character and its amenability to modification upon proof to be given before final decree. *Salt Lake City vs. Industrial Commission*, 82 U. 179, 22 P. 2nd 1046.

## RESPONDENT'S POINT NO. 1

JUDGE VAN COTT'S DECREE (R. 30, 31) HERE APPEALED FROM IS AN INTERLOCUTORY ORDER OR DECISION WITHIN THE PURVIEW OF 72 (b) OF UTAH RULES OF CIVIL PROCEDURE.

Our rules of civil procedure provide for an appeal to the Supreme Court (a) from all final judgments, and (b) from Interlocutory Orders or Decisions. Respondent contends that the order of Judge Van Cott which appellants seek now to have reversed is an interlocutory order or decree.

“Interlocutory orders or decrees are defined by Blackstone as ‘such as are given in the middle of a case, in some plea, proceeding or default which is only intermediate and does not finally determine or complete the suit.’” *Hirsch Co. vs. Scott*, 100 So. 157, 158; 87 Fla. 336.

Now let's look at Judge Van Cott's decree: Firstly it orders a sale. It describes the res to be sold. It refers to the incident real estate contract of vendor Diener of said real property, makes the sale of the real property subject to said contract, and restricts the res to the interests therein of the contestants herein, it fixes the time and place of sale, provides the manner of notice, provides that respondent may use in bidding a cash credit previously

found owing him by another division of the same court, accedes to a written stipulation of all contesting litigants limiting the bidding to two persons: The party responsible for said debt, and the party who is entitled thereto; provides that possession be given the successful bidder within a specified time. Finally this decree provides that, having complied with all the terms next above ordered concerning said sale, the proceedings are nevertheless not final: They are only intermediate; and all the provisions concerning said sale do not finally determine or complete the suit, in these final words: "the proceeds from said sale shall be deposited with the clerk of this court for disposition in accordance with an account to be subsequently adjudicated herein." (R. 31)

The decree now under review is essentially just an intermediate order of sale incident to, and precedent to a final adjudication winding up a joint venture. It clearly comes within the Blackstone definition of an interlocutory order or decree.

## CONCLUSION

This interlocutory decree amply protects the interests of all persons involved either directly or indirectly specifying that all proceeds from said sale shall be deposited with the clerk of the Court for disposition in accordance with an account to be subsequently adjudicated herein and limiting the property to be sold to contestants who remain under the court's jurisdiction.

Paramount policy of law is to permit litigants to obtain review of rules of trial courts, but there is also

the rule that cases shall not be appealed piecemeal or in installments, and what constitutes final judgment will be determined by application of these two rules. *Attorney General vs. Pomeroy*, 93 U. 426, 73 P. 2nd 1277, 114 A.L.R. 726.

While it is true that a final judgment is not made by the constitution a condition precedent to the jurisdiction of the Supreme Court to entertain an appeal, nevertheless it is a condition precedent, except in rare instances, to entertaining the appeal because of the ancient policy of the law based on sound principles (modifying *North Point Consol. Irrig. Co. vs. Utah & Salt Lake Canal Co.*, 14 Utah, 155, 46 P. 824, 826).

Appellants are appealing from an interlocutory order without ever having complied with conditions precedent, that is, to serve upon the adverse party, and file in the Supreme Court, a petition to grant an appeal "setting forth the order complained of and the grounds and reasons for an appeal before final judgment" as required by Rule 72(b) of Utah Rules of Civil Procedure.

No order having ever been issued authorizing this appeal respondent moves that it be dismissed.