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Utah Farm Production Credit association v. Cox,
Jeffrey J. and Elliott J. A Co-Partnership, Elliott J.
Cox, Jeffery J. Cox, Yvonne Cox, Blanche. Cox,
United States of America, Tracy-Collins Bank and
Trust Company, Bank of Ephraim : Breif In Answer
To Petition For Rehearing Utah Farm Production
Credit association : Brief of Appellant Utah Farm
Production Credit association

Utah Supreme Court

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David B. Boyce; Attorney for Appellant Earl Jay Peck, Ross C. Blackham ; Attorney's for Respondent and Petitioner

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH FARM PRODUCTION
CREDIT ASSOCIATION,

Plaintiff-Appellant,

vs.

Case No. ~~7588~~ 16885

COX, JEFFREY J. and ELLIOTT J.
a co-partnership, ELLIOTT J.
COX, JEFFREY J. COX, YVONNE
COX, BLANCHE COX, UNITED STATES
OF AMERICAN, TRACY-COLLINS BANK
AND TRUST COMPANY, BANK OF
EPHRAIM

Defendant-Respondents.

BRIEF OF APPELLANT
UTAH FARM PRODUCTION CREDIT ASSOCIATION

Appeal from Judgment
in favor of defendants in the
District Court of Sanpete County, Utah
Honorable Don V. Tibbs

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FILED

MAY 23 1980

Clerk Supreme Court Utah

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BRIEF OF APPELLANT
UTAH FARM PRODUCTION CREDIT ASSOCIATION

NATURE OF THE CASE

This case is a dispute over whether the appellant made and breached a loan commitment to the respondents and, if so, the damages to the respondents from the breach.

DISPOSITION IN THE LOWER COURT

The trial court found that the appellant breached a loan commitment to the respondents and that the respondents were damaged in the sum of approximately \$44,000.00, which amount was offset against the judgment entered in favor of the appellant (not appealed) and that because of the offset the appellant was

not entitled to any attorney's fees in connection with its judgment.

RELIEF SOUGHT ON APPEAL

Appellant requests the Court to reverse that portion of the judgment that gave respondents an offset and that denied appellant's claim for attorney's fees.

STATEMENT OF FACTS

1. That the respondents are indebted to the appellant in the sum of \$167,995.29, plus eight percent (8%) per annum from December 18, 1978, in connection with a promissory note.

(Findings of Fact 1-2)

2. That said note was secured by real and personal property and respondents agreed to pay a reasonable attorney's fee if suit was brought to foreclose. (Findings of Fact 14)

3. That suit to foreclose was brought and a reasonable attorney's fee is \$15,000.00. (Transcript 82)

4. That the appellant, through one of its loan officers, entered into negotiations to loan money to the respondents for 1977, for the respondents turkey growing business, in addition to the amount previously loaned as reflected above. (Transcript 235, 239)

5. That the negotiations concerned two loans, one of which was to be a seven year loan payable annually and the

second of which was to be payable February 6, 1978, more than one year after it would have been made. (Transcript 128-130, 270-271A; Defendants 'Exb. 30, Pg. 12, attached to Steve Adamson's deposition)

6. That the loan officer did not have authority to authorize the loan the respondents were requesting because of the amount. (Transcript 268)

7. That the loan committee had to authorize the loan and no such authorization was ever made. (Transcript 252, 313)

8. That nothing was done by the appellant to justify the respondents in concluding that the loan officer or anyone else had apparent authority to authorize the loan. (Transcript 118, 120)

9. That no loan was ever made to the respondents for 1977. (Findings of Fact 21)

10. That the respondents did not seek any alternate source of financing even though they could have received financing from the Moroni Feed Company for 1977. (Transcript 106, 121, 136-138)

11. That the respondents elected not to attempt to remain in the turkey business for 1977 and elected to pursue other business ventures. In particular, Jeffrey Cox went to work with Moroni Coal Company in April 1977, and received a salary that he would not have otherwise received if he had

remained in the turkey business. There was a substantial increase in profits in the Moroni Coal Company for 1977 and they were reinvested in the company. Jeffrey Cox was a 46-47% shareholder in Moroni Coal Company when the profits were made and his return may have been the reason for the increase in profits. In determining respondents' damages, the trial court only credited appellant with the salary and not the benefit to Mr. Cox's stock and the benefit to the respondents' business. (Transcript 139-142; 328-335)

12. That the respondents' turkey growing operation had suffered losses for the four years previous to 1977. (Plaintiff's Exh. 31-34)

13. That in negotiating with the respondents for a loan for 1977, the appellant projected 900,200 pounds of turkey would be processed. No profit was projected for 1977 by either party. (Transcript 227, 273-274)

14. That prior to the time that the respondents discontinued their turkey growing operation they took delivery of 20,000 poults which were subsequently sold by them to a grower who processed 312,560 pounds from them. (Transcript 106-107)

15. That whether the respondents would have actually been able to get delivery of the other 40,000 poults would have

depended on whether the Board of Directors of the selling company decided to accept the purchase order. (Transcript 177)
The offset was based on the assumption that the respondents would have had 60,000 turkeys. (Transcript 328-335)

16. That the buyer of the 20,000 turkeys from the respondents reimbursed the respondents for the turkeys. The respondents presented no evidence as to the amount and said amount was not deducted from their claimed profits. (Transcript 107, 328-335)

17. That some expenses such as gas and fuel (other than for brooding), rent and taxes were not deducted from the claimed profit. (Defendants' Exh. 30, page 12; Transcript 328-335)

18. That for those growers that sold through the Moroni Feed Company the average profit per pound of turkey processed was four cents (4¢) and the average dividend was six cents (6¢) per pound. (Transcript 200, 207)

19. That the dividend would not be paid until 1982 and would depend on the availability of money in Moroni Feed Company at that time. (Transcript 210)

20. That the abilities of growers differ and no evidence was introduced to show that the respondents were average. (Transcript 209)

ARGUMENT

POINT ONE

LOST PROFITS ARE NOT RECOVERABLE FOR BREACH OF A LOAN AGREEMENT WHERE THE BORROWER FAILS TO MITIGATE DAMAGES

The measure of damages for breach of a contract to lend money is the difference between the contract interest rate and the increased interest rate the borrower is obligated to pay in procuring a new loan. Restatement, Contracts §343 (1932); 5 A. Corbin, Contracts §1078, at 446 (1964); 36 A.L.R. 1409 at 1410-1411; 22 Am Jur 2d §608, Damages. Ordinarily damages for breach of a contract to loan money cannot be more than nominal because the money may usually be procured elsewhere at the same rate. 36 A.L.R. 1409; 22 Am Jur 2d §69, Damages; Bank of New Mexico v. Rice, 429 P.2d 368 (N.M. 1967); Investment Service Company v. Smither, 556 P.2d 955 (Ore. 1976); Consolidated American Life Ins. Co. v. Covington, 297 So. 2d 894 (Miss. 1974).

Like all other jurisdictions, the measure of damages in Utah for breach of an agreement to loan money is the difference, if any, between the contract interest rate and the increased interest rate the borrower is obligated to pay in procuring a new loan. Cox Corp. v. Dugger, 583 P.2d 96 (Utah 1978). The measure of damages is set forth in the dissenting opinion which, as far as the measure of damages is concerned, is in no way inconsistent with the majority opinion. It say as follows:

"The normal measure of damages for breach of a contract to loan money is the difference, if any, between the interest rate contemplated in the contract, between the parties, and the rate the borrower obtained in the alternate loan; plus the expense of obtaining the second loan. But where the borrower is unable to obtain money elsewhere, and the defendant knew of the particular purpose for which the money was needed, special damages may be recovered, provided they are not speculative or remote." (Emphasis added)

Under the law of this state, special damages are only recoverable "where the borrower is unable to obtain money elsewhere." This is because general damages (increase in interest rate in second loan) are generally the only damages where another loan is obtained.

In the case at bar the respondents seek only special damages which would not have arisen if they had obtained an alternate loan. As a matter of law, special damages are not recoverable because the respondents made absolutely no effort to obtain another loan even though they could have received financing from the Moroni Feed Company for 1977. (Transcript 106, 121, 136-138)

It is the duty of the borrower to mitigate damages by attempting to secure the money from other sources. 36 A.L.R. 1416; 22 Am Jur 2d §69, Damages; Restatement, Contracts §343 (1932); 5 A. Corbin, Contracts §1078, at 446 (1964); Davis v. Small Business Inv. Co. of Houston. 535 SW2d 740 (Tex. Civ. App.

1976). No substantial damages may be recovered where it does not appear that the money was unavailable elsewhere upon the same terms. 36 A.L.R. 1416-1417. Where there is no proof of an attempt to get a loan from another source or no reason why such an attempt was not made, no cause of action has been proven.

Davis v. Small Business Inv. Co. of Houston, supra; AMR' Enterprises, Inc. v. United Postal Sav. Ass'n, 567 F2d 1277 (5th Cir. 1978); Gooden v. Moses Bros., 13 So. 765 (Ala. 1893). It is inequitable to require a lender to pay damages that the borrower could have avoided.

Rather than get another loan, Jeffrey Cox went to work with the Moroni Coal Company. That resulted in profits to that Company and he was a 46-47% shareholder. The profits were reinvested in the Company. The appellant was not credited with that benefit to the respondents, but only with Cox's salary. Even if the appellant was given credit for the profit and even if it was not enough to cover all the respondents alleged damages, respondents would still not get the difference in damages because the mitigation must, as a matter of law, be in the form of an attempt to get another loan before special damages are recoverable. Furthermore, for all we know, the profit to Moroni Coal Company was more than the damages claimed by the respondents for the alleged breach of loan agreement. (Transcript 139-142) Respondents want the profits from two businesses for the same year when they could not have been two

places at once, at least not effectively.

Even the limited credit that the appellant was given was incorrectly calculated. Respondent, Jeff Cox, testified that he went to work for the Moroni Coal Company in the beginning of April, 1977, for the sum of \$200.00 per week. (Transcript 139, 141) Accordingly, the trial court gave the appellant a credit for \$7,200.00 representing 36 weeks at \$200.00 per week. Since Cox worked all but January - March, he worked 39 weeks and the amount should have been \$8000.00.

POINT TWO

THE LOAN OFFICER WHO ALLEGEDLY AUTHORIZED THE LOAN
HAD NO AUTHORITY

The appellant's loan officer did not have authority to authorize the loan because of the amount. (Transcript 268) The loan committee had to authorize the loan and no such authorization was ever made. (Transcript 252, 313) Nothing was done by the appellant to justify the respondents in concluding that the loan officer or anyone else had apparent authority to authorize the loan. (Transcript 118-120) An agent has apparent authority when the principal has made it appear that the agent has authority and not when the agent has made it appear that way. Malia v. Giles 114 P.2d 208; (Utah 1941); Bank of Salt Lake v. Corporation of President of Church of Jesus Christ of Latter Day Saints, 534 P.2d 887 (Utah 1975). In the case at bar, the

respondents' testimony was that their conclusion that the loan officer had authority was based solely on his acts and not on anything that the appellant did. (Transcript 118-120) One dealing with a supposed agent is bound to ascertain his capacity. Dohrmann Hotel Supply Company v. Beau Brummel, Inc., 103 P.2d 650 (Utah 1940).

In this case the undisputed evidence was that the agent had no express or implied authority. It is also undisputed that he had no apparent authority because the respondents testified that the only conduct that may have given the appearance of authority was that of the agent and not of the principal. Therefore, even if there was an agreement by the loan officer to make a loan, such is invalid and not binding on the appellant. There is no evidence to support the trial court's finding regarding authority.

POINT THREE

THE DAMAGE FOUND IN THIS CASE WAS NOT CONTEMPLATED BY THE PARTIES AND IS NOT RECOVERABLE

Damages recoverable for breach of contract are limited to those that are reasonably supposed to have been in the contemplation of the parties as the probable result of its breach at the time of the contract. Cox Corp. v. Dugger 583 P.2d 96 (Utah 1978); Pacific Coast Title Ins. Co. v. Hartford Acc. & Ind. Co., 325 P.2d 906 (Utah 1958). In the case at bar, the respondents had suffered losses in the four preceding years.

(Transcript 154, 158, 166) At the time that the appellant negotiated with the respondents regarding the 1977 loan, neither party projected any profit to be made by the respondents for that year. (Transcript 273-274) Apparently the parties expected the respondents to break even after four years of losses, in a step towards profitable years in the future. Therefore, as a matter of law, the appellant is not liable to the respondents, even if there would have been profits, because such were not in the contemplation of the parties at the time of the contract as required by law. Even if there was evidence to support Finding of Fact No. 21, that appellant decided to suffer a loss rather than make the loan, the contemplated loss was nominal.

POINT FOUR

THE "AGREEMENT" IS VOID UNDER THE
STATUTE OF FRAUDS

In this state, certain agreements are void unless in writing. The Statute of Frauds in this regard is set forth in §25-5-4, Utah Code Annotated, 1953 as follows:

"In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

(1) Every agreement that by its terms is not to be performed within one year from the making thereof." (Emphasis added)

In the case at bar the court has determined that the appellant breached an oral agreement to loan money to the respondents. If there was an agreement, the undisputed terms of that agreement would have to be that there were to be two loans in January 1977 and that one of the loans was to be payable February 1978, and the other loan was to be payable in seven years. (Transcript 127-130, 270-271A) Therefore, by the very terms of the agreement that the court has found the appellant made, performance was not to be within one year from making thereof. Consequently, the agreement is void and unenforceable under the Statute of Frauds.

Alternatively, if there was no agreement as to the dates of repayment, the agreement would still be void. This is because where no time for repayment of a loan is stipulated, the law implies that it is to be repaid immediately or at the time selected by the lender. 17 Am Jur 2d §338, Contracts. In that event the respondents could not claim any damages for breach of a loan agreement because the the responents would not have had the right to use the money for the year that it would take to make the profit. 36 A.L.R. 1412; Restatement, Contracts §343 (1932), Comment a.

POINT FIVE

LOST PROFITS ARE NOT RECOVERABLE

The Supreme Court of Utah, citing Jenkins v. Morgan, 260 P.2d 532 (Utah, 1953), has previously said that "... damages

for anticipated profits are contingent upon so many uncertainties that they are speculative and therefore not recoverable,..." Van Zyverden v. Farrar, 393 P.2d 468 (Utah 1964).

POINT SIX

DAMAGES ARE NOT RECOVERABLE BECAUSE THE RESPONDENTS
FAILED TO PROVE THEM WITH REASONABLE CERTAINTY

In another opinion concerning the recoverability of lost profits and concerning the need for damages to be established with reasonable certainty, the Supreme Court of Utah said:

"The basic and general rule is that loss of anticipated profits of a business venture involves so many factors of uncertainty that ordinarily profits to be realized in the future are too speculative to base an award of damages thereon. The other side of the coin is that damages to a business or enterprise need only be proved with sufficient certainty that reasonable minds might believe from a preponderance of the evidence that the damages were actually suffered." Howarth v. Ostergard, 515 P.2d 442 (Utah 1973).

There are several reasons why the respondents failed to prove damages with reasonable certainty as required by law. These reasons are: (1) the evidence was that it was not reasonably certain whether the respondents could have acquired the last 40,000 poults, (2) the uncontroverted evidence was that whether the respondents would have recovered a dividend

from the Moroni Feed Company would have depended on the availability of money in the Moroni Feed Company in 1982 from which to pay dividends and no evidence was introduced to show that such was reasonably certain and (3) there was no evidence to show that the respondents were average turkey growers. Therefore, the proof of the respondents has failed because, even if the average grower earned a certain amount of profit, the evidence is not reasonably certain that these respondents would have also earned such a profit. In fact it is totally uncertain.

It is Not Reasonably
Certain That the Respondents Could Have Acquired
the Last 40,000 Poults

It is essential in every claim for lost profits to prove that there was an opportunity to realize the profits. Dunn, Recovery of Damages for Lost Profits, 146, §1.2 (1978). The respondents first failure of proof in this regard was in not proving with reasonable certainty that they could have acquired the last 40,000 poults. Whether the order for 40,000 poults would have been accepted would have been at the option of the Board of Directors of the selling company. (Transcript 177) This means that the damage award is speculative as to 2/3 of the amount since it is only reasonably certain that respondents would have had 1/3 of the turkeys to grow and sell.

Whether the Respondents Would Have Recovered a Dividend from
the Moroni Feed Company is Speculative

The damage award for lost profits was from two sources. The first was the average profit per pound for turkeys sold to the Moroni Feed Company and the second was based on the dividend that Moroni Feed Company paid to members like the respondents. The dividend is speculative and unrecoverable as a matter of law because of the fact that it would not be paid until 1982 and would be dependent upon money being available in the Moroni Feed Company in 1982 from which to pay the dividend. (Transcript 210) No evidence was introduced to show that it is reasonably certain that the Moroni Feed Company will have the money available in 1982.

Another error the trial court made was in reducing the dividend 10% per year to reach a present value amount. That was apparently the custom in the community. Appellant is not bound by custom but only by what the present value of the dividend would actually be. An allowance for future damages must be reduced to its present worth. St. Louis-San Francisco Ry. Co. v. Fox, 359 P.2d 710 (Okla. 1961) Since it was not in this case, the damage award is erroneously calculated as well as unjustified for the other reasons stated herein.

There Was No Evidence to Show That the Respondents
Were Average Turkey Growers and Would
Have Earned Such a Profit

The award to the respondent was made on the assumption that since the average member of the Moroni Feed Company made certain profits, that the respondents would have realized the same profits. There is nothing in the record to indicate that the respondents were average. Not all growers made the same profit. The abilities of growers differs. (Transcript 209)

To introduce evidence of another's experience requires proof of the additional fact in the chain of inference that the other operator ran its business in a comparable way. Dunn, Recovery of Damages For Lost Profits, 146, §5.8 (1978). In the case at bar, the respondents rely totally upon evidence of the profits of others. There is nothing in the record to prove that the respondents business was in any way comparable. On the other hand, the only evidence in the record is evidence that the respondents lost money in the preceding four years and there is nothing in the record to indicate that the other growers also lost a similar amount of money in those years. Therefore, the only inference that can be drawn from the evidence is that the respondents were not comparable.

In the case of Mullen v. Brantley, 195 S.E.2d 700 (Va. 1973), there was a claim for lost profits by the owner of a Shakeys Pizza Parlor and he introduced evidence of profits derived at other Shakeys Pizza Parlors and the national average

of all such restaurants. The Court said that such evidence did not present a reasonable basis upon which to judge with any degree of reasonable certainty what the profits would have been at the location in question. The same is even more true in the case at bar. The average of the other growers is, by itself, no basis for an award to these respondents. There was absolutely no evidence to even show that the respondents' facility was comparable or that they ran their business in a comparable way.

Lost profits were awarded in the case of Archer-Daniels-Midland Co. v. Paull, 188 F.Supp. (W.D. Ark. 1960), because the plaintiff proved that other businesses in the area that were used in comparison had substantially similar facilities and were conducting there business in a similar manner. In the case of Butler v. Westgate State Bank, 602 P.2d 1276 (Kan. 1979), it was held that the operators capability in running his business was a factor to be considered in determining whether an award for lost profits should be made. In the case at bar the respondents have failed to prove comparability in any way and their proof therefore fails.

POINT SEVEN

TO RECOVER DAMAGES FOR LOST PROFITS REQUIRES A HISTORY OF PRIOR BUSINESS SUCCESS

In this state, as well as other jurisdictions, the law is that damages for lost profits are speculative unless

there is a successful business history. In the case of Jenkins v. Morgan, supra, the Supreme Court of Utah, citing other authorities, said:

"... before special damages for loss of profits to a general business occasioned by the wrongful acts of another may be recovered, it must be made to appear that the business had been in successful operation for such a period of time as to give it permanency and recognition, and that such business was earning profit which could be reasonable ascertained and approximated."

In the case at bar, the respondents business had lost money for the four previous years. (Plaintiff's Exhibits 31-34) Since the respondents did not have a business that had been in successful operation, the damages claimed are unrecoverable as a matter of law. The past history makes the damages too uncertain.

POINT EIGHT

THE RESPONDENTS FAILED TO PROVE NET PROFITS

Even in a case where the plaintiff is entitled to an award for lost profits, the award is limited to net profits and not gross profits. 22 Am Jur 2d §178, Damages. The burden of proof is on the plaintiff to show an amount that represents net profits and it is his burden to recognize, prove, and deduct all expenses so that the amount claimed represents net profits and not gross profits. Dunn, Recovery of Damages for Lost Profits, 146 §6.3 (1978).

In the case at bar, the respondents failed to meet their burden of proof. Certain expenses were not deducted. For example, when the respondents discontinued their turkey growing operation, they sold the 20,000 turkeys that they had taken delivery of but they presented no evidence as to the amount they received and it was not deducted from their claimed profit. (Transcript 107, 328-335)

Another example is in connection with fuel expenses. When the parties were negotiating concerning the loan, a budget of anticipated expenses was prepared. (Defendants' Exb. 30, Page 1) Those expenses had to be deducted to arrive at net profits. One of the expenses on the projected budget was for "gas and fuel, including brooding." Only the brooding expense was taken into account and not the gas and fuel for the trucks, etc. (Transcript 108-111) The appellant was not given credit for that portion of that expense. Therefore, the respondents have failed to meet their burden of proof because not all expenses have been deducted.

Other expenses such as real estate taxes and real estate payment for the property used in raising the turkeys, were not deducted. Admittedly, these are fixed expenses, that the respondents would have had whether they remained in the business or not. Nevertheless, they are expenses that would have reduced net profit.

There was also a projected expense for \$500.00 for rent that was not deducted. (Transcript 111)

Interest expense is another expense that is incorrect. The trial court gave the appellant credit for \$9,000.00, which the court said represents the amount of interest that the respondents would have paid on the loan if they had received it. When respondents filled out a "Request for Contract of Guarantee" they projected interest in the amount of \$25,000.00. (Defendants' Exb. 30, Page 10) That amount is more realistic. Respondents' testimony was that the amount to be borrowed was \$368,100.00. (Transcript 124-125) No evidence was introduced to show the interest rate but even if it had only been ten percent (10%) per year, that would have been \$36,810.00 in interest for the year and yet the appellant was only credited with \$9,000.00. Even if partial payments had been made during the year to reduce the interest, no evidence was introduced to show the likelihood of those payments or the amounts, therefore, the reduction is not justified.

POINT NINE

PREJUDGMENT INTEREST SHOULD NOT HAVE BEEN ALLOWED

After damages for lost profits in the amount of \$40,927.60 were awarded, an additional amount of \$4,000.00, representing prejudgment interest, was added into the award. This

was improper because (1) prejudgment interest is not recoverable on an unliquidated claim and (2) there was no evidence from which the sum of \$4,000.00 could have been calculated.

The Utah Supreme Court has held that prejudgment interest is no allowable where damages are are unliquidated. Bjork v. April Industries, Inc., 560 P.2d 315 (Utah 1977).

The rationale behind this rule of law is very logical. The party that is indebted in an unknown and unliquidated amount cannot pay that amount until it is determined and, therefore, should not be charged with prejudgment interest until it is determined. In the case at bar, this is even more true because the respondents claimed the sum of \$627,000.00 in their counterclaim. Perhaps it would have been different if respondents had made demand for the amount the court found they were entitled to.

There is further error in the rate of interest awarded. From the ruling it cannot be determined how the amount of \$4,000.00 was calculated but it would appear that the court took the sum of \$40,927.60, representing the offset, and added ten percent (10%) for interest and rounded off to \$4,000.00. Apparently, this was on the theory that the appellant was charging the respondent with interest at ten percent (10%) per annum and if the respondents had an offset, then they would have

saved interest if they had been credited with it at the time that it was due. (Transcript 332) The fallacy in that thinking is that it was never legally a credit during the time that it was unliquidated. Furthermore, it is totally independent from the indebtedness due from the respondents to the appellant on the notes. The second fallacy is in the fact that the note from the respondents to the appellant, under which the appellant was awarded judgment, only called for interest at the rate of 8.01 percent per annum with an adjustment possibility. (Plaintiff's Exb. 18) However, no evidence was introduced to show that the amount was increased. Therefore, the prejudgment interest was not only improper as a matter of law, because it was unliquidated, but was erroneously calculated because ten percent (10%) per annum was not within the evidence. The trial court had no right to estimate an amount.

POINT TEN

ATTORNEY'S FEES SHOULD NOT HAVE BEEN DISALLOWED

The undisputed testimony at the trial was that a reasonably attorney's fee for the appellant is the sum of \$15,000.00. Attorney's fees were denied because the respondents succeeded on a portion of their counterclaim. The decision and the rationale behind the decision are illogical and against the law.

Where the holder of a note containing a provision for the payment of attorney's fees brings an action on the note and the plaintiff's recovery is lessened, but not completely extinguished by the defendant's recovery on a counterclaim, the allowance for attorney's fees should be proportionately reduced based on the difference between the amount due on the note and the defendants' recovery on the counterclaim. Morgan v. Virginia-Carolina Chemical Co., 106 So 136 (Ala. 1925); Pioneer Constructors v. Symes, 267 P.2d 740 (Ariz 1954); Bon Giovanni v. Fickett, 10 P.2d 539 (Cal. 1932); State Trust & Sav. Bank v. Hermosa Land and Cattle Co., 240 P. 469 (N.M. 1925); Meadow Valley Land & Invest Co. v. Manerud, 159 P. 559 (Ore. 1916); Tompkins v. Galveston Street R. Co., 23 S.W. 25 (Tex. 1892); Ward v. Boydston, 134 S.W. 786 (Tex. 1911); Ware v. Paxton, 266 S.W. 2d 218 (Tex. 1954).

The approach taken in those cases is reasonable and logical. If the rationale is followed that any counterclaim that is successful to any degree precludes attorney's fees entirely, then some absurd results would follow. For example, suppose defendant was liable on a note for \$1,000,000.00 and said defendant had a counterclaim for \$100.00 or suppose defendant was awarded \$1.00 in nominal damages. Certainly in that event the counterclaimant's recovery should not preclude attorney's fees. Logically, it should be reduced proportionately. In this case,

the counterclaim reduced the judgment by twenty-seven percent (27%). Reducing the attorney's fees proportionately would leave an award for attorney's fees in the amount of \$10,988.50.

Of course, appellant contends that the counterclaim should be dismissed and that therefore, attorney's fees need not be reduced.

CONCLUSION

Because of the speculative nature of damage claims for lost profits, this Court has been reluctant to make any award except where it is proven with reasonable certainty. In the case at bar it cannot be said that the claim has been proven with reasonable certainty. In fact, there are many uncertainties.

There are at least five major independent reasons why the counterclaim should be dismissed. If the law is found to be in favor of the appellant in connection with any one of these, then the counterclaim must be dismissed as a matter of law. They are as follows:

1. The respondents failed to mitigate damages by failing to make any attempt to get an alternate source of financing. Under the case of Cox Corp. v. Dugger, supra, the special damages claimed by the respondents must be denied for failure to attempt to mitigate. The respondents discontinued their turkey operation and had a very successful year in the Moroni Coal Company and they want the profit from both ventures

even though they could not have been in both places at the same time.

2. The loan officer had no express, implied or apparent authority to make any loan. The evidence is undisputed.

3. Damages for lost profits must have been within the contemplation of the parties at the time of the contract. Since they were not contemplated by either party the counterclaim must be dismissed.

4. Any agreement that by its terms is not to be performed within one year is void unless in writing under the Statute of Frauds. The agreement that the trial court found that the appellant made was an agreement to make a loan that by its terms would not have been payable within a year. Therefore, since it was not in writing, it is void and unenforceable.

5. The respondents failed to prove that they were average turkey growers or that they ran their business in a way that was comparable to the other growers or that their facility was in any way comparable. Therefore, there is a crucial missing link in the chain of evidence. In other words, there is no connection between the fact that other growers earned a certain profit and that therefore the respondents would have earned such a profit.

6. There was no prior history of successful operation. Again, as a matter of law, this makes the damage award too speculative.

There were several other errors in the trial. Although these only reduce the counterclaim, the counterclaim would still be entirely dismissed if any of the errors stated above are found in favor of the appellant. These additional errors are:

1. An \$800.00 error in calculating the salary to Jeff Cox for the time that he went to work for Moroni Coal Company. This additional amount should have been credited to the appellant.

2. Since it is not reasonably certain that the respondents could have taken delivery of the last 40,000 poult, two-thirds (2/3) of the counterclaim award is speculative.

3. Since it is speculative as to whether the dividend will be available in 1982, the sum of \$28,940.40, representing the dividend portion of the counterclaim award, is speculative.

4. Since not all of the expenses were deducted from the claimed profits, the amount of the counterclaim is incorrect and this would require its dismissal entirely because the respondents have failed to meet their burden of proof.

5. The award must be reduced \$4,000.00 because prejudgment interest is improper because prejudgment interest cannot be awarded on an unliquidated amount and because there was no evidence to support the amount calculated by the trial court.

As a matter of law the counterclaim should be dismissed and appellant should be awarded a reasonable attorney's fee.

Even if the counterclaim were allowed, at best for the respondents, the attorney's fee would only be proportionately reduced under the law.

In summary there are too many reasons against allowing the counterclaim and offset to remain. There would be nothing inequitable about denying the counterclaim and precluding the respondents from obtaining money that they never had and money that it is not reasonably certain that they could have had. In fact, it appears most uncertain.

Dated this 22 day of May, 1980.

Respectfully submitted,

David B. Boyce
David B. Boyce

CERTIFICATE OF MAILING

This is to certify that two copies of the within Brief of Appellant were serve this _____ day of May, 1980, be mailing them in a sealed envelope, postage prepaid, addressed as follows:

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