

1955

Vito Todaro and Guiseppe Fontana v. J. D. Gardner : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Richards, Bird & Bushnell; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *Todaro v. Gardner*, No. 8239 (Utah Supreme Court, 1955).
https://digitalcommons.law.byu.edu/uofu_sc1/2269

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

✓

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

FILED
JAN 18 1956

VITO TODARO and
GUISEPPE FONTANA,

Appellants,

—vs.—

J. D. GARDNER,

Respondent,

Clerk, Supreme Court, Utah

Case No. 8239

BRIEF OF RESPONDENT

STATEMENT OF FACTS

RICHARDS, BIRD & BUSHNELL,
By Dan S. Bushnell
Attorneys for Respondent

TABLE OF CONTENTS

	Page
Statement of Facts.....	1
Statement of Points.....	6
Point I. The Judgments of the Arizona Courts on A Cause of Action for Money Loaned is not Res Judi- cata on a Separate and Distinct Cause of Action for Money Advanced in Contemplation of a Sale of Real Property	6
Point II. The Court Properly Awarded Interest to Respondent on the \$5,000.00 for the Period of Time the Money was Wrongfully Withheld by Appellants.....	27
Conclusion	29

INDEX OF AUTHORITIES

30 Am. Jur. Sec. 172.....	15
30 Am. Jur. 946, Sec. 210.....	10
50 C.J.S. Sec. 649.....	10
Sec. 15-1-5 U.C.A. 1953.....	28
Adams v. Powell, 142 So. 537, 225 Ala. 300.....	24
Citizen State Bank v. McRoberts, 29 Ariz. 173, 239 Pac. 1028..	17
Commercial Bank of Spanish Fork v. Spanish Fork Southern Irrigating Company, 107 Utah 279, 152 Pac. 2d 547.....	12
Detroit Heating and Lighting Company v. Stevens 20 Utah 241, 58 P. 193.....	12
Dowdy v. Calvi, 125 Pac. 873, 14 Ariz. 148.....	15
Geagen's Estate, 41 A. 2d 213, 136 N.J. eq. 239.....	23
Goldsmith-Leslie Co. v. Whitehead, 152 S.E. 589, 41 Ga. App. 287.....	23
Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608.....	20
Hansen v. Jones 115 Colo. 1, 168 P. 2d 263.....	21
Hanson v. S. & L. Drug Co., 212 W. 731, 203 Iowa 384.....	23

INDEX OF AUTHORITIES--(Continued)

Harrison v. Remington Paper Co. (C.C.A.) 140 F. 385, 3 L.R.A., (N.S.) 954, 5 Ann. Cas. 314; 15 R.C.L. 964, Sec. 439	15
Lauberdale v. Industrial Commission, 60 Ariz. 443, 139 Pac. 2d 449	16
Lee v. Johnson 216 Pac. 2d 722 (Ariz. 1950)	16
Lorang v. Flathead Commercial Company 119 Pac. 2d 273, 112 Mont. 146	20
Lovell v. Hammond Co. 66 Conn. 500, 34 Atl. 511.....	16
Maine v. Losser Auto Exchange 129 So. 533, 10 La. App. 65....	22
Morgan v. Barrett, 17 Ariz. 376, 153 P. 449.....	14
O'Niel v. Martin 182, Pac. 2d 839, 66 Ariz. 78.....	15
Orminski v. Highland Electrical Supply Co. 62 N.E. 2d 14, 326 Ill. App. 392.....	18
Pillsbury v. Early 324 Ill. 562, 155 N.E. 475, 477.....	19, 20
Pinkerton v. Pritchard 223 Pac. 2d 933, 71 Ariz. 117.....	16, 17
Shenck v. State Line Telephone Co., 238 N.Y. 308, 311 312, 144 N.E. 592, 593.....	19
Snow v. Alley, supra 156 Mass. 193, 30 N.E. 691.....	19
Sulurian Oil Co. v. Neil, 277 Ill., 45, 115 N.E. 114.....	20
Utah-Idaho Central Railway Company v. Industrial Commission, 84, Utah 364, 35 Pac. 2d 842.....	11
Wasatch Min. Co. v. Crescent Min. Co. 7 Utah 8, 16, 24 Pac. 586 Aff'd. 151 U.S. 317, 38 Lawyers Edition 177, 14 S. CT. 348.....	28
Wells v. Robertson, 277 Ill. 534, 115 N.E. 654.....	20
Welsh, Driscoll & Buck v. Buck 64 Utah 579, 232 Pac. 911.....	12
Williams v. Williams, 256 Pac. 356, 32 Ariz. 164.....	13

IN THE
Supreme Court
OF THE
State of Utah

VITO TODARO and
GUISEPPE FONTANA,

Appellants,

—vs.—

J. D. GARDNER,

Respondent,

Case No. 8239

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The Appellants in their Statement of Facts review primarily the court proceedings which first occurred in the State of Arizona and subsequently in the District

Court in the State of Utah. In order to more accurately understand the contentions of the Respondent, in maintaining that the cause of action litigated in the State of Utah, was a different cause of action than the one litigated in the Arizona courts and therefore the doctrine of res adjudicata is not applicable, a statement of the facts and negotiations giving rise to the circumstances leading up to the litigation is felt to be necessary.

Prior to June 27, 1947, Respondent had made preliminary investigations concerning the possible purchase of building's constructed by the appellants at Phoenix, Ariz. (R. 18) The buildings had been constructed pursuant to priorities issued by federal agencies wherein the builders were required to give veterans first priority on a monthly rental basis; (R. 68, 71) The buildings were built as a series of duplexes; (R. 49) however, they were susceptible of being used as a motel. (R. 5) On the 27th day of June, 1947, the Respondent had negotiations with the Appellants and their attorney (R. 19) as result of which instructions were given to a Title and Escrow Company for the purpose of preparing an Escrow Agreement contemplating a sale of the property. (R. 23) At the time of these negotiations the Appellants were being pressed by creditors for payments owing on the property and were anxious to have use of any deposit which might be made by the Respondent. (R. 24, 25, 66) The Respondent agreed to deposit \$5,000.00 to show his good faith but refused to sign any documents until he had had an opportunity to review the contemplated sale with

his attorneys at Salt Lake City and to determine if the building could be used as a motel without risk of violating Government regulations requiring that property be given to veterans for rental units on a monthly basis. (R. 21, 22) A receipt was prepared by the title company for the deposit of the \$5,000.00 by the Respondent and the Appellant signed this receipt. (R. 26) The form used for the receipt was an Earnest Money Agreement. (R. 26) However, it varied from the usual preliminary agreement which is normally signed by the purchaser who makes a deposit subject to approval by the sellers. (R. 26) In this case the purchaser made the deposit but refused to sign the agreement and the sellers signed the agreement evidencing receipt of the \$5,000.00. The Escrow Company didn't acknowledge receipt of the money since it was paid direct to the seller for immediate payment of obligations on the property. It is the theory of the Respondent that the above transaction constituted merely an oral agreement to purchase subject to an express condition precedent.

The Respondent, after advancing the \$5,000.00, made further investigation and received information from a newspaper that a criminal complaint had been filed against the Appellants for violation of the federal regulations previously mentioned. (R. 27, Ex. D-5) The Respondent further conferred with one of his attorneys, Mr. Richard L. Bird (R. 28) at Salt Lake City who wrote a letter to attorneys in Arizona requesting that they further check into the matter of the regulations and the

criminal action. (R. 59, Ex. D-13) In addition, the Respondent and Mr. Lynn S. Richards went to Phoenix, Arizona, and after further investigation at the federal agencies involved, concluded that the property could not be safely operated as a motel free from government regulations and advised the attorney for the Appellants that no contract could be made and demanded return of the \$5,000.00. The attorney for the Appellants stated he would request a return of the money. (R. 32, 52, 53)

At no time did the Respondent sign any agreement agreeing to purchase the property. The only document signed was a receipt heretofore mentioned, signed by the Appellants acknowledging receipt of the \$5,000.00.

The suit in the trial court in Arizona was based upon two counts: The trial court found upon the first count, namely, that the Respondent had loaned the money to the Appellants to meet pressing obligations owing on the property. (Ex. D-16 page 21) The Supreme Court of the State of Arizona reversed the trial court holding that the transaction did not constitute a loan and limited their decision to that factual determination. (Ex. P-18) After the judgment in the trial court in Arizona and before a reversal by the Supreme Court, the Respondent had received payment by virtue of garnishment proceedings on the trial court judgment. Although the Supreme Court had reversed the judgment in favor of the Respondent, since he had received the \$5,000.00, there was no need for him to institute a second proceeding in Arizona courts on the correct theory for recovery of his money.

The Appellants, however, commenced a suit in Utah based upon a minute entry of the trial court ordering the Respondent to return the \$5,000.00 collected on the judgment which had been reversed. This minute entry judgment was merely an order of restitution; not based upon any trial, and was therefore not an adjudication on the merits as to which of the parties was ultimately entitled to the money. In the Utah action an affirmative defense sets out the foregoing circumstances and claims the right to retain the money on the basis that no contract was ever made and the funds were advanced upon the expressed condition precedent that if the property could not be operated as a motel, the money would be returned. The Respondent's theory of the facts and circumstances, were in practically all respects, substantiated even by the testimony of one of the Appellants who testified in the Utah District Court. Mr. Todaro testified: (R. 72)

“Q. Was anything said about what would happen if the deal didn't go through?

A. Well, the only thing Mr. Gardner says, “If the government has got some restriction on,” he says, “I will turn it back.”

Q. He said if the government has got some restrictions on, he will turn it back?

A. “And I will take the money back.” He says, “I won't go through with the deal.”

Q. If that was so, then you were to give him back his money?

A. Yes.”

Later, on redirect examination Mr. Todaro attempted to explain that the above conversation was had after the money had been paid. But since the court found in favor of Respondent and Appellants do not challenge the finding, any conflict in the evidence must be resolved in favor of Respondent.

The Appellants do not argue the sufficiency of the evidence to justify the trial court's decision that the Respondent was entitled to retain the money, but rather the appeal is the sole issue that the judgments of the Arizona courts constitute a defense of res judicata to any determination of the matter on the merits by the Utah Court.

STATEMENT OF POINTS

POINT I

THE JUDGMENTS OF THE ARIZONA COURTS ON A CAUSE OF ACTION FOR MONEY LOANED IS NOT RES JUDICATA ON A SEPARATE AND DISTINCT CAUSE OF ACTION FOR MONEY ADVANCED IN CONTEMPLATION OF A SALE OF REAL PROPERTY.

The first three points of the Appellant's brief are all based upon the same argument; namely, that the court committed error by failing to rule that the judgments of the Arizona courts were res judicata as to the cause of action raised by the affirmative defense.

For that reason the Respondents will answer the arguments of those points under the single point above mentioned.

To determine if *res judicata* is a defense in this action and to better understand the arguments of the parties, the scope of the Arizona decision should be clearly understood.

The judgment of the Arizona trial court was entered in favor of the Respondent and against the Appellants on the first cause of action which was for money loaned. (D-16 H-12) Part of the decision of the Arizona Supreme Court is as follows:

‘The sole question to be determined in this case is whether the evidence substantiates plaintiff’s cause of action for money loaned. * * *’

“A careful and close analysis of the plaintiff’s testimony shows that he nowhere testified directly to having made a loan. The sum and substance of his testimony is to the effect that he had orally agreed to purchase the property; that all of the terms and conditions had been agreed upon except one, * * *”

“It must be remembered that the judgment under consideration is predicted solely on a complaint for money loaned. The cause of action is not for a rescission of the contract and was not tried on that theory, and did not seek the return of the \$5,000 on this basis. * * *”

“Plaintiff having failed to produce any direct testimony or any testimony from which an inference might be reasonably drawn to substantiate the theory of a loan, we are compelled to hold that the judgment is wholly unsubstantiated by any

competent evidence. Undoubtedly the trial court was influenced by the fact that the defendants, some days after the abandonment of the contract by plaintiff, were able to and did sell the court for \$210,000 but upon different terms. Counsel have also argued that it would be unfair and inequitable to allow defendants to retain the money upon the theory that such retention would constitute an unjust enrichment. This argument has no place here because such a suggestion would have to be predicated upon the theory of a contract and its rescission. We are not here concerned with the rights of a purchaser in a contract for the sale and purchase of land where the right of rescission is claimed or the attempt is made to avoid a forfeiture. Plaintiff basis his right to recover the \$5,000 here involved and the judgment of the trial court was based solely upon the ground of a loan to defendants. As above pointed out, this claim is wholly unsupported by the plaintiff's evidence though giving it, and all reasonable inference to be drawn therefrom, full faith and credit.

"The judgment of the lower court is reversed and the cause remanded to the trial with directions to enter judgment for the defendant. * * *"

From the judgment of the trial court and the decision of the Supreme Court, it is clear that the only issue adjudicated and determined by those decisions was whether the Respondent was entitled to the return of the money on the theory of money loaned. The trial in the Utah District Court was on a completely different theory, namely, that no contract was made or consummated, that funds were advanced in anticipation of the

purchase of property for a motel upon an expressed condition precedent. There was never any written agreement signed by the Respondent. The Appellant in his testimony virtually admitted that the money was advanced subject to the Respondent satisfying himself that the properties could be operated as a motel free and clear of any government regulations to the contrary. It is the contention of the Respondent that the adjudication of these issues constitutes a separate cause of action.

A distinction should be made between a whole or different cause of action and component issues or parts of the same cause of action. There is no serious argument with the citations of authorities and the proposition stated by the Appellants in their brief that all issues of a cause of action which may, can, or ~~shall~~ ^{should} be litigated in a trial, must be so litigated, and that a decision on the merits as to that cause of action is a bar to any further attempt to relitigate any such issues; however, the rule of law is substantially different where the cause of action, even though based upon the same facts, is different in the second suit or trial.

In reply to the first three points of Appellants brief the Respondent submits that there is only one essential issue for determination by the court, namely, do the judgements rendered by the Arizona Courts constitute res judicata as to the affirmative defense, set off, or counterclaim interposed by the Respondent. It will be conceded at the outset that if the affirmative defense, set off, or counterclaim as interposed by the Respondent

is the same cause of action as has been litigated in Arizona, it would be *res judicata* and the Utah Courts would be required to give full faith and credit to the Arizona decisions. On the other hand, if the issues raised in the set off, affirmative defense, or counterclaim are different and constitute a different cause of action, then it would not be *res judicata* and the full faith and credit clause of the Federal Constitution would have no application.

In the Appellants brief numerous quotations from both American Jurisprudence and *Corpus Juris Secundum* were set out. Respondents respectfully submits these additional quotations from those authorities should be cited.

30 Am. Jur. 946, Judgments, Sec. 210:

“The doctrine of *res judicata* is not available as a bar to a subsequent action if the judgment in the former action was rendered because of a misconception of the remedy available or of the proper form of proceeding. In such situation, the plaintiff is entitled to bring the proper proceeding to enforce his action.”

50 C. J. S., Judgments, Sec. 649, Theory of Action or Recovery:

“Where plaintiff is defeated in an action based on a certain theory of his legal rights or as to the legal effects of a given transaction or state of facts through failure to substantiate his view of the case, this will not as a rule preclude him from renewing the litigation, without any change in the facts, but basing his claim on a new and more correct theory. It has been held that

this rule applies where plaintiff * * * in the second suit * * * alleges a different ground of liability on the part of defendant, where he fails to establish defendant's liability under a written instrument, and afterward seeks recovery as on a resulting trust or on the ground of fraud or mistake, where, having failed to establish a specific lien on property, he sues again on the ground of the personal liability of defendant; where, having sued for the price of property and failed to prove a sale, he brings a new action for its use or detention; where an unsuccessful attempt to enforce a liability under a statute is followed by an action to hold the same defendant liable on the same facts as at common law or vice versa; where the two actions are brought under different statutes; or where, after an adverse decision in an action brought under state law, plaintiff sues in the state court under a federal law. A similar rule as to the right to bring a second action on a different theory obtains in equity; where the equities of a second bill are materially different from the first, although the origin of both is the same, the adjudication of the first is no bar to the second."

In *Utah-Idaho Central Railway Company vs. Industrial Commission*, 84 Utah 364, 35 Pac. 2nd 842, 94 A. L. R. 1423, the Utah Supreme Court quoted with approval from an Indiana case as follows:

"A party who imagins he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one; which is not inconsistent with his true and effectual remedy, which he should have pursued in the first instance (Citing Au-

thorities.) Election of remedies is the act of choosing between the different modes of procedure and relief allowed by law on the same state of facts, which modes may be termed co-existing remedies. (Citing Text.) The result of appellee's first action led him where he was in the first instance, and his present action to enforce his only remedy is not inconsistent therewith."

"In either case he had no chance of any other existing remedy. That he in the first instance and on the facts misconceived the remedy, and pursued one which the law did not afford him, did not thereafter bar or estoppe him on the same facts from pursuing the only legal remedy that in the first instance was open to him."

In *Welsh, Driscoll & Buck vs. Buck*, 64, Utah 579, 232 Pac. 911, the court held that a judgment, in a foreclosure suit against an estate, dismissing the suit for want of equity, because the instrument sued on as a mortgage was not such in fact, was not a bar to a later assertion of such claim in the Probate Court. In so doing the court stated:

"The plaintiffs had erroneously taken the view that they held a mortgage, which they sought to establish and foreclose and thereby satisfy their claim. There is ample authority to the effect that, where a mistake had been made in the pursuance of a remedy, such a mistake is not a bar to the presenting of proper action." (Citation of Authorities)

The case of *Detroit Heating and Lighting Company vs. Stevens* 20 Ut. 241, 58 P. 193 also holds in accordance with the foregoing rule.

More recently the Utah Supreme Court in *Commercial Bank of Spanish Fork vs. Spanish Fork Southern Irrigating Company*, 107 Utah 279, 152 Pac. 2nd 547, held that a prior mandamus suit seeking to compel the defendants to recognize the plaintiff as a stockholder wherein it was held that the stock certificate was void did not bar the subsequent suit to recover damages resulting from the issuance of the void certificate stating the rule previously enumerated to the effect that "The fact that a party by mistake invokes a remedy not available to him under the facts of the case will not prevent him from pursuing a proper remedy which is available."

Since our courts are only required to give to an Arizona decision the same effect as would the Arizona courts, it is submitted that the Arizona cases would not hold that the prior decision is *res judicata*, but rather the Arizona law is in conformity with the law of Utah as stated above. A brief review of some of the Arizona cases is as follows:

Williams vs. Williams, 256 Pac. 356, 32 Ariz. 164. This was an action to secure the second foreclosure of the same mortgage, on the same property, differing from the first foreclosure in the respect that the Grantee of the mortgagor was not made a party to the first foreclosure. Subsequent to the first foreclosure the plaintiff brought a suit to quiet title against the present defendant, which suit was concluded against the plaintiff. The plaintiff in his present complaint set out the two prior actions showing incomplete relief, since the present defendant was not made a party to the first suit and in the second

suit because of an improper choice of remedies. In the present action the court set aside the first foreclosure proceedings and granted a judgment in favor of the plaintiff. The defendant asserted that the prior quiet title proceedings between the parties was *res judicata* as to this suit. The court in overruling this defense of the defendant stated as follows:

"The plea of estoppel by the judgment in the action to quit title is not good for the reason that the issues in that case are not involved in this. The action to quit title was an assertion or contention by plaintiff that his foreclosure against the mortgagor and the sale thereunder, followed by sheriff's deed, give him title as against the mortgagor's grantee, Mattie L. Williams. This proposition was unsound, as the law is well settled that a grantee of the mortgagor must be made a party defendant in the foreclosure before her interest can be taken from her or subjected to a sale for the payment of the mortgage debt. This suit is an admission of that fact and seeks, not to question Mattie L. Williams' title to a one-half interest in lot 23, but to subject it in a legal way to the payment of the mortgage debt. It admits her title. In the action to quiet title the question as to whether plaintiff's mortgage had been paid and satisfied by reason of the first foreclosure was not involved. It was apparent that the mortgage debt still subsisted, so far as defendant Mattie L. Williams' interest was concerned, and in a proper proceeding, such as this, could be foreclosed. The issue here was not in that case and could not have been therein determined. The causes of action in the two cases are different and the parties are not the same.

Morgan vs. Barrett, 17 Ariz. 376, 153 P. 449; Harrison vs. Remington Paper Co. (C. C. A.) 140 F. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; 15 R. C. L. 964, Sec. 439.

We quote as applicable to the facts of this case, from 34 Corpus Juris, 798, as follows:

‘The estoppel extends only to the exact point raised by the pleadings and decided, and does not operate as a bar to a second suit on other claims or issues, or against other parties.’ ”

O’Niel vs. Martin, 182, Pac. 2d 839, 66 Ariz. 78. The Court quoted with approval part of Section 172, 30 Am. Jur. Judgments Section 172, part of which is as follows:

“A final judgment rendered by a court of competent jurisdiction, on the merits, is conclusive as to the rights of the parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand, and cause of action. If, however, the two suits do not involve the same claim, demand, and cause of action, such effect will not be ordinarily given to the prior judgment. In this respect, it is worthy to notice that there must be not only identity of subject matter, but also of the cause of action, so that a judgment in a former action does not operate as a bar to a subsequent action, where the cause of action is not the same, although each action relates to the same subject matter.”

Dowdy vs. Calvi, 125 Pac. 873, 14 Ariz. 148. The court in denying a plea of abatement urged by reason of a prior suit, stated as follows:

"Both pleas are bad when attacked by a demurer, because, as a general rule, money is not repleviable property, and where such suit was commenced therefor its pendency or disposition adverse to plaintiff does not affect his right to pursue a valid remedy for its conversion. Lovell vs. Hammond Co., 66 Conn. 500, 34 Atl. 511."

Lee vs. Johnson 216 Pac. 2d 722 (Ariz. 1950). As to the issue of whether a prior suit involving the property in question was res judicata in the present action the Court stated as follows:

"In the prior decisions we have pointed out the distinction between the effect of a judgment operating by way of estoppel in a later action upon a different cause of action and a judgment operating by way of a bar against a second action upon the same cause of action. Both are frequently referred to as res judicata. Lauderdale vs. Industrial Commission, 60 Ariz. 443, 139 Pac. 2d 449. Before a prior judgment may bar a subsequent suit between the same parties or their privies, there must be an identity not only of the subject matter but also of the cause of action. This being a suit upon a possessory cause of action, the prior judgment quieting title is not a bar to the present suit."

Pinkerton vs. Pritchard 223 Pac. 2d 933, 71 Ariz. 117. The second suit involved the same parties and concerned the same strip of land. The court concluded that the first suit was in ejectment and the present suit was in trespass. In the first suit there was a determination that one of the parties had an easement over the property owned by the other for roadway purposes. Now the sec-

ond suit is brought to determine if the easement can be used for storage and other purposes. The Trial Court in the present suit granted a motion for dismissal of the case upon the grounds of res judicata and entered judgment accordingly.

Upon appeal the Supreme Court set out extensively the pleadings in the first suit and then concludes that the two causes of action were different and in doing so stated as follows:

“But counsel for defendant says these obstructions were there on this trip when the former case was tried and that these facts should have been presented to the court at that time and that under the rule laid down by this court in numerous decisions all matters in issue, or which could have been in issue, are conclusively settled by the judgment in that cause. This is undoubtedly the law in this state. *Citizen State Bank vs. McRoberts*, 29 Ariz. 173, 239 Pac. 1028. But the question as to what use defendant Pritchard was putting the property at the time of the former trial was not a material issue in that case. It was wholly immaterial there whether he was using it as a junkyard, as a storage place or as a vegetable garden or whether or not he was putting it to any use whatsoever. It was granted defendant was wrongfully withholding its possession from plaintiff and was then asserted he was the owner in fee too. That was the sole issue in that case.”

The Supreme Court then reversed the decision of the Trial Court even though, as a dissenting judge stated:

“They have virtually re-written the judgment entered in the first suit and have read into

the complaint in the instant action matters which no wise appear therein."

After reading the decision rendered in the former suit between the parties involved in this action, one can only conclude that the Supreme Court of Arizona went to great lengths to reverse the Trial Court as against the present Respondent and technically and narrowly construed the pleadings and the decision to support such reversal. Especially is this true after reading the decision in *Pinkerton vs. Pritchard*, supra, where the converse approach was applied. In any event the present Appellants have not shown on what basis they are entitled to the money. They did not show in the prior action that they had a contract which entitled them to forfeit the down payment, they did not show that there was even a contract. They did not show that even if there were a contract, there had been a breach of that contract on the part of the Respondent entitling them to retain the money, nor have they shown any other grounds or basis by which they should be entitled to recover the money, and they apparently are unwilling to challenge the holding of the trial court on the merits.

Some of the recent decisions from other jurisdictions supporting the rule of law quoted above are as follows:

In *Orminski vs. Highland Electrical Supply Co.*, 62 N. E. 2d 14, 326 Ill. App. 392, the appellate court state as follows:

"The federal court having held on defendant's motion that the Fair Labor Standards Act did not cover plaintiff's employment, the judgment entered is res judicata as to his right of action under the act. It is conclusive on the question

of the applicability of that statute, but not of any claim for overtime independent of the statute. 'The doctrine of res judicata is not available as a bar to a subsequent action if the judgment in the former action was rendered because of a misconception of the remedy available***' 30 Am. Jur., Judgments - 210, citing, with many other cases in federal and state courts, *Schenck v. State Line Telephone Co.*, 238 N. Y. 308, 311, 312, 144 N. E. 592, 593, 35 A. L. R. 1149, where Justice Cardoza said: 'The plaintiff thought he had a remedy at law, and so thinking sued for damages. In truth he had no such remedy, for, irrespective of his knowledge of the fraud, his right of action for damages had been barred by lapse of time. The defendants have blocked his recourse to a remedy which he had not. They now say that because of his mistake, he must be held to have renounced forever the remedy he had. 'There would be no sense or principle in such a rule.' Holmes, J., in *Snow v. Alley*, supra (156 Mass. 193, 30 N. E. 691).''

"The situation presented here is analogous to that involved in *Pillsbury v. Early*, 324 Ill. 562, 155 N. E. 475. There plaintiff brought suit for the specific performance of an alleged oral agreement of the decedent, John Early, to give to plaintiff at his death the farm on which decedent and his parents were living in consideration of plaintiff's services in caring for decedent and his parents; this bill was dismissed for want of equity; plaintiff filed her claim in the Probate Court against decedent's estate, claiming the reasonable value of the services rendered by her; the claim was allowed. In overruling the defense that the decree in the chancery suit was res judicata as to

all matters involved in the claim against the estate, the Supreme Court said (324 Ill. at page 565, 155 N. E. at page 477): “***where the former adjudication is relied on as an answer and a bar to the whole cause of action, it must appear that the things sought to be recovered and the cause of action in both suits are the same (Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608; Sulurian Oil Co. v. Neil, 277 Ill. 45, 115 N. E. 114), and that the former judgment necessarily involved the determination of the same fact, to prove or disprove which it is offered in evidence (Wells v. Robertson, 277 Ill. 534, 115 N. E. 654.) The issues in the chancery case and in the instant case were not the same.”

In *Lorang v. Flathead Commercial Company*, 119 Pac. 2d 273, 112 Mont. 146, the plaintiff to the second suit brought the first action alleging an expressed contract (oral) wherein he claimed that the defendant agreed to pay him \$175.00 per month together with a reasonable percentage of the net profits earned in the store operated by defendant. On the trial of the first case, after all of the evidence was introduced, the court sustained a motion for a directed verdict in favor of the defendant on the grounds that the parties had not Agreed upon a definite rate of compensation. In the second action the defendant urged the prior judgment as being *res judicata*. Concerning this issue the court on appeal stated as follows:

“Assuming, without so deciding, that the judgment in action No. 8936 was and is a bar to another action to enforce the express contract, it was not a bar to the maintenance of this action

which was brought to recover on a quantum meruit. The general rule applicable is stated in 34 C. J. 806, as follows: 'Where a plaintiff is defeated in an action based on a certain theory of his legal rights or as to the legal effects of a given transaction or state of facts through failure to substantiate his view of the case, this will not as a rule preclude him from renewing the litigation, without any change in the facts, but basing his claim on a new and more correct theory.' To the same effect is 30 Am. Jur., Judgments, section 210, page 946. And the author in 34 C. J., at page 807, states: 'The general rule that a judgment for defendant will not bar a subsequent action by plaintiff based on a new and more correct theory applies where plaintiff, in an action to recover on an express contract for services to be rendered or goods to be furnished, has been defeated on the ground that the contract was invalid, or was not proved, or had not been fully performed.'

The court properly held that the judgment in case No. 8936 is not a bar to the maintenance of this action."

In *Hansen v. Jones*, 115 Colo. 1, 168 P. 2d 263, the plaintiff brought an action for money had and received against numerous defendants including A. J. West, President of the defendant bank. Prior to this action the plaintiff had sued A. J. West for conversion of personal property and a judgment of dismissal was entered in that action. The judgment in part provided as follows:

"That the evidence is totally lacking in anything which connects the defendant with possession, dominion or control of the cattle or the sale thereof. The defendant had control over the pro-

ceeds, the price received at the sale. It may be that there was a conversion of money. If there was a conversion of anything it was of the price and not of the cattle and the plaintiff cannot recover. Let judgment enter dismissing the cause."

The defendant in the subsequent action introduced the prior judgment as *res judicata* as to him. On this particular point the court states as follows:

"Upon the face of the decision in the former case, it would seem that the judgment of dismissal was rendered because of plaintiff's misconception of the remedy available, and, in effect, was without prejudice to his right to sue for the proceeds. In such circumstances plaintiff was 'entitled to bring the proper proceedings to enforce his cause of action.' 30 Am. Jur., p. 946, section 210"

The court also state:

"Under conditions somewhat analagous, we have held, upon the principle first mentioned, that the dismissal on the merits of a cause of action upon an expressed contract was not a bar to the institution of a new action upon an implied contract or upon quantum meruit." (Citation of Authorities).

In *Maine vs. Losser Auto Exchange* 129 So. 533, 10 La. App. 65 the plaintiff had brought a prior action against the same defendant wherein the plaintiff alleged that he had sold the car to the defendant, and he sought to recover the purchase price. In the prior action the decision was given for the defendant. The plaintiff then instituted an action on the grounds that the defendant was liable to the plaintiff as a bailee. The defendant

urged as a defense *res judicata* and estoppel. The court in discussing these defenses stated as follows:

“A reading of the decision in that suit shows that this court did not pass upon the question of whether defendant was liable as bailee, and based its refusal to hold defendant liable solely on the grounds that a Contract of Sale was alleged but not proven. This court said: ‘The plaintiff’s counsel argues that the defendant is liable to him as a depository or broker because he failed to take proper precautions for the safety of his property. Without discussing the merits of this contention we observe that it is a totally different cause of action from that set out in plaintiff’s petition and inconsistent herewith ***.’”

“It is plain, then, that since, in that case, the liability *vel non* of defendant as bailee was not considered, and since the question of whether or not there is liability as bailee is the only question presented here, the first suit does not constitute *res judicata*.”

In *Goldsmith-Leslie Co. v. Whitehead*, 152 S. E. 589, 41 Ga. App. 287 a suit in Trover to recover property from a conditional purchaser was not barred by previous judgment on purchase-money notes.

In *Hanson v. S. & L. Drug Co.*, 212 W. 731, 203 Iowa 384 the plaintiff was required to elect between open account or account stated and elected to stand on account stated, and it was held that the judgment denying recovery was not a bar to a subsequent action on open account.

In *in re Geagen’s Estate*, 41 A. 2d 213, 136 N. J. eq.

239 a judgment of nonsuit in an action at law against an administrator based on fraud in administration of estate was not *res judicata* in subsequent proceedings in orphans' court to hold administrator liable to estate for depletion thereof resulting from his negligence in carrying out duties as administrator.

In *Burke v. Willard*, 144 N. E. 223, 249 Mass. 313 a judgment for defendant tenant in action by mortgagee to recover for use and occupation, on ground that defendant was a tenant at sufferance, did not bar a subsequent action by mortgagee in tort to recover mesne profits accruing after entry, on theory that tenant was trespasser.

In *Adams v. Powell*, 142 So. 537, 225 Ala. 300 a dismissal of wife's heirs' suit, seeking specific performance on theory that wife purchased land from husband was not *res judicata* of suit to quiet title by same heirs on theory transaction constituted equitable mortgage.

The Appellants quote extensively from a motion and argument for a rehearing filed with the Arizona Supreme Court and then argue that since the petition advances the same theory as the one tried in the Utah District Court, the denial of the petition constitutes an adjudication of that theory. Such is not the case. No opinion was written in denying the petition.

A denial of a petition for rehearing does not adjudicate the issues argued in the petition. Such a petition suggests that the decision of the Court is wrong and should be reconsidered. The denial of the petition af-

firms the original holding as being the court's final decision. The Arizona Court in denying the petition for rehearing merely affirms that the court did not err in holding that the action was solely to recover money loaned. The decision and rule of the court, therefore, is contained in their written decision. To determine the extent and the effect of the holding of the Arizona Supreme Court one must look to its written decision which clearly states that the sole issue for determination is one of whether the record will support a cause of action for money loaned.

Parts of the decision are as follows:

"The sole question to be determined in this case is whether the evidence substantiates plaintiff's cause of action for money loaned. ***"

"A careful and close analysis of the plaintiff's testimony shows that he nowhere testified directly to having made a loan. The sum and substance of his testimony is to the effect that he had orally agreed to purchase the property; that all of the terms and conditions had been agreed upon except one, ***"

"It must be remembered that the judgment under consideration is predicated solely on a complaint for money loaned. The cause of action is not for a rescission of the contract and was not tried on that theory, and did not seek the return of the \$5,000 on this basis. ***"

"Plaintiff having failed to produce any direct testimony or any testimony from which an inference might be reasonably drawn to substantiate

the theory of a loan, we are compelled to hold that the judgment is wholly unsubstantiated by any competent evidence. Undoubtedly the trial court was influenced by the fact that the defendants, some sixty days after the abandonment of the contract by plaintiff, were able to and did sell the court for \$210,000 but upon different terms. Counsel have also argued that it would be unfair and inequitable to allow defendants to retain the money upon the theory that such retention would constitute an unjust enrichment. This argument has no place here because such a suggestion would have to be predicated upon the theory of a contract and its rescission. We are not here concerned with the rights of a purchaser in a contract for the sale and purchase of land where the right of rescission is claimed or the attempt is made to avoid a forfeiture. Plaintiff bases his right to recover the \$5,000 here involved and the judgment of the trial court was based solely upon the ground of a loan to defendants. As above pointed out, this claim is wholly unsupported by the plaintiff's evidence though giving it, and all reasonable inferences to be drawn therefrom, full faith and credit.

“The judgment of the lower court is reversed and the cause remanded to the trial court with directions to enter judgment for the defendant. ***”

It is obvious from the foregoing decision that the holding of the court merely concludes that the Respondent is not entitled to recover the sum of \$5,000 on the theory of money loaned. The decision specifically excludes any intimation as to the results which might be secured upon a retrial on a different theory. It is further

clear from the decision and the facts of the case that neither the Respondent nor the Appellant have had adjudicated or determined their respective rights which reference to the sum of \$5,000. The only holding is that the Respondent is not entitled to the money on the basis of money loaned.

The Utah trial court found upon the merits of the case in favor of the Respondent. The Appellants do not challenge such a determination. Since the action is not barred by the decision of the Arizona court, the judgment should be affirmed.

POINT II

THE COURT PROPERLY AWARDED INTEREST TO RESPONDENT ON THE \$5,000.00 FOR THE PERIOD OF TIME THE MONEY WAS WRONGFULLY WITHHELD BY APPELLANTS. (Reply to Appellants, Point IV)

The Appellants main contention under Point IV is that they cannot understand upon what theory the court awarded interest. The court found that the Respondent was entitled to have the \$5,000.00 deposit returned to him and therefore assessed interest for the wrongful withholding of said money for the period of September 5, 1947 to November 2, 1949. The Appellants on appeal have not challenged the court's findings on the factual issues.

The record shows that on July 14 the Respondent with his attorney met with the attorney for the Appellants and advised them that the contract could not be consummated and demanded a return of the money. (R. 55)

On August 29, 1947 a letter was written to the Appellant's attorney again demanding repayment of the \$5,000.00. (Ex. P-8) A second letter dated September 5, 1947 written by the Respondent likewise demanded return of the \$5,000.00. The court apparently took the last date of demand for the purpose of computing interest. Two garnishee judgments were entered by the Arizona court on the 2nd day of December, 1949 by virtue of which Respondent received payment of the \$5,000.00. Copies of these judgments were introduced, although unmarked as an exhibit, as part of the record received from the Arizona courts.

The court having found that the Respondent was legally entitled to a return of his \$5,000.00, it properly awarded damages for the period of time that said money was wrongfully withheld, namely, from September 5, 1947 to November 2, 1949. Interest was computed at the legal rate of 6 per cent per annum as provided by Sec. 15-1-1, Utah Code Annotated, 1953.

It has long been established in Utah that interest is allowed on debts overdue even in absence of a statute or contract providing therefor. Wasatch Min. Co. vs. Crescent Min. Co. 7 U. 8, 16 24 Pac. 586 Aff'd 151 U. S. 317, 38 Lawyers Edition 177, 14 S. CT. 348.

Even though the Appellants secured an order of restitution for return of the money, at all times, according to the holding of the Utah trial court, the Respondent had a counter claim and setoff against the judgment for

restitution and therefore there would be no offsetting amount for interest on the Appellants' judgment.

In view of the court's findings, not challenged by the Appellants, and the statutes and cases in the State of Utah, it is manifest that the court properly awarded interest to the Respondents.

CONCLUSION

Giving full faith and credit to a decision of a sister state is not here involved. The issue is whether the decision of the Arizona court is *res judicata*. The determination of this issue is resolved by determining if the same cause of action was litigated by the Utah court. The Arizona decision by its very terms limits itself to an adjudication of a cause of action for money loaned. The Utah court litigated a different cause of action of money deposited in contemplation of a written contract to be formed after the resolving of a condition precedent. The condition precedent was never resolved and therefore the Respondent was entitled to have returned to him the deposit. The trial court so found. The Supreme Court should affirm that decision.

Respectfully submitted,

RICHARDS, BIRD & BUSHNELL

Attorneys for Respondent

716 Newhouse Building

Salt Lake City, Utah