

1957

James E. Reed v. Hepburn T. Armstrong : Brief of Respondent

Utah Supreme Court

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J. Grant Iverson

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FILED

MAY 1 0 1957

Clerk, Supreme Court, Utah

In the Supreme Court of the State of Utah

JAMES E. REED,

Plaintiff and Appellant,

— v. —

HEPBURN T. ARMSTRONG,

Defendant and Respondent.

Case No. 8612

BRIEF OF RESPONDENT

J. GRANT IVERSON

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In the Supreme Court of the State of Utah

JAMES E. REED,

Plaintiff and Appellant,

— v. —

HEPBURN T. ARMSTRONG,

Defendant and Respondent.

Case No. 8612

BRIEF OF RESPONDENT

RESTATEMENT OF THE CASE

The statement of facts as set forth by appellant is correct, but incomplete. Respondent desires to set forth additional pertinent facts.

Appellant sued for the value of 67,000 shares of common stock of Wyoming Uranium Corporation. Under Exhibit A, a Contract dated July 14, 1954, set forth in appellant's Brief at pages 2 and 3 thereof, respondent received from appellant \$2000.00 of which \$1000.00 was to be utilized to obtain A.E.C. certification of certain

mining claims, and in the event legislation should be passed making such certification unnecessary the \$1000.00 would be returned to appellant. Respondent agreed to incorporate the Wyoming Uranium Corporation and to give to appellant 134,000 shares of the capital stock thereof for the \$2000.00 paid by appellant to respondent, provided, however, that in the event the aforesaid \$1000.00 was returned to appellant within ten days from the date of the Agreement, appellant should receive 67,000 shares only.

Almost immediately after July 14, 1954, respondent learned that A.E.C. certification would not be necessary, and he informed plaintiff of that fact, and that the \$1000.00 would be returned to plaintiff although it might not be within ten days. The Court found that plaintiff by oral agreement abrogated the ten-day condition and permitted the \$1000.00 to be returned within a reasonable time, and that the same was returned within a reasonable time and plaintiff agreed to accept 66,666 shares instead of 134,000 and that the agreement was executed by plaintiff and defendant.

On the 29th of July, 1954, almost immediately after the aforesaid oral agreement appellant gave respondent a check for \$1500.00 on the back thereof over signature of endorsement of respondent appears:

“Payment of \$1500.00 or part thereof as needed for 100,000 shares of stock in proposed Wyoming Uranium Company enlarges agreement of July 14, 1954.”

It is stipulated that the 100,000 shares of stock for which appellant paid \$1500.00 on July 29, 1954, has been delivered and 66,666 shares of stock have been delivered under the agreement of July 14, 1954.

Appellant's action is to recover the value of 67,000 shares which he claims is due to him under the Contract of July 14, 1954, because the \$1000.00 which was returned to appellant approximately forty-five days after receipt thereof was not returned within ten days.

The cause was tried upon appellant's complaint and respondent's Second Amended Answer. By his answer respondent alleged that the provision that 134,000 shares would be delivered to appellant under the Agreement of July 14, 1954, instead of 67,000 shares, in the event \$1000.00 was not returned within ten days, constituted an agreement for a penalty and was void and unenforceable as to the difference between 134,000 and 67,000 shares. The Court so found (R. 76).

As a Third Affirmative Defense respondent alleged that during the months of March, 1955, and November, 1955, respondent delivered the stock agreed to be delivered under the Agreements of July 14, 1954, and July 29, 1954, in the amount of 166,666 shares, and the same were accepted by appellant, and appellant waived claim to any additional shares of the capital stock of Wyoming Uranium Corporation. In the findings and judgment the Court failed to find on this issue, although in his oral order for judgment the Court found that the agreement for acceptance of 166,666 shares was executed.

Appellant is an Investment Dealer and acted as

Underwriter for Wyoming Uranium Corporation in the sale of 9,166,666 shares of said corporation's common stock. As such Underwriter he was required to furnish to each purchaser an Offering Circular. An Offering Circular must set forth all pre-organization stock.

The offering Circular for Wyoming Uranium Corporation was prepared by C. Allen Elggren (R. 34-35).

Counsel for respondent read to appellant the following from the Offering Circular:

"At the completion of the offering 1,500,00 shares that would be held by the promoters will represent 13.8% of the outstanding stock; the 166,667 shares held by Dr. Reed P. Larson for which he paid \$2500.00 will represent 1.5% of the outstanding stock."

and asked if he, the appellant, knew what was in the circular, to which he answered: "Certainly" (R. 64).

When respondent first went to appellant to solicit pre-organization money, appellant told respondent that he would obtain the money from a potential investor, Reed P. Larson, and that same day he went to the office of Reed P. Larson, which was in the same building as the office of appellant (R. 50). Appellant was asked why his name was not included in the Offering Circular as being entitled to any pre-organization stock. He answered it was the suggestion of Mr. Elggren that it would be better not to have an Underwriter shown as having received pre-organization stock (R. 56). Thus the stock claimed by appellant was shown in the Offering Circular as belonging to a client of appellant, Dr. Reed P. Larson.

The stock purchased under the Contract of July 14, 1954, and the check of July 29, 1954, were the only transactions in which Reed and Larson were involved jointly with Wyoming Uranium Corporation (R. 63).

Objections were sustained to questions asked Mr. Elggren concerning his discussion with appellant concerning the number of shares of pre-organization stock which he or Reed P. Larson were entitled to. The Court sustained the objections on the ground that the communications between Mr. Elggren and Mr. Reed were confidential, and that he was acting for appellant as well as Wyoming Uranium Corporation in the preparation of the Offering Circular.

The following offer of proof was made by respondent and refused by the Court:

"I offer to prove by this witness both in connection with this and the other objections which have been sustained to my questions, that this witness, if permitted to answer, would testify he discussed these matters with Mr. Reed and that Mr. Reed told him that the stock to which he was entitled, to which he and Mr. Larson together were entitled was 166,666 shares, and that the same should be noted in the Offering Circular and in the name of Mr. Larson, and that the 166,666 shares mentioned therein is the stock to which Mr. Reed, or Mr. Reed and Mr. Larson together would be entitled under the agreement, and the check, which have heretofore been introduced in this matter." (R. 39)

Respondent testified that during the ten-day period following the execution of the Agreement of July 14,

1954, he had received the information that the A.E.C. Mineral Leasing Act was going out. That on July 27th or 28th respondent returned to Salt Lake City and talked to appellant and informed him that the \$1000.00 received for A.E.C. certification would not be used, but would be returned to appellant, but that even though he wouldn't need the money for leases he could use more money for land operations. He stated they agreed to modify the original agreement and for the \$1000.00 which had been paid to him appellant would get stock for a penny and a half per share, that is, 66,000 shares of stock, and that he would not receive any stock for the \$1000.00 that had been sent to the A.E.C., and which would soon be returned to him, but that appellant would, however, give to respondent an additional \$1500.00 for which he would get another 100,000 shares of stock, which would make 166,000 shares of stock (R. 47).

Respondent stated:

"The \$1,000.00, if they didn't use it for leases, he got his money back, he got 66,000 shares for the original \$1000.00 I took to Lander and for this fifteen hundred he got an additional 100,000 and that is 166,000 shares, that is what I understood at the time, and what I understood until a year and a half later, that is what we put in the Offering Circular, and the stock then was 3c a share, and it wasn't until a year and a half later when the stock went up to 20c a share he said he would hold me to that ten days clause in there." (R. 47)

ARGUMENT

Appellant argues his case under three points:

“I. The Trial Court erred in its ruling that Clause B. of plaintiff’s Exhibit No. 1 constitutes a penalty and is unenforceable.

“II. The Trial Court erred in its admission of parol evidence to vary the terms of written contracts, plaintiff’s Exhibits No. 1 and No. 2.

“III. The Trial Court erred in permitting defendant to reduce his contractual obligation without consideration.”

It is the position of respondent that the Court did not err in any of the three particulars relied upon by appellant. In addition respondent submits that the Court erred in excluding the testimony of C. Allen Elggren and in failing to enter a finding to the effect that the oral agreement of appellant to accept 166,666 shares was fully executed, although the Court did make such finding in his oral decision. Respondent is, therefore, presenting his case under six points:

POINT I.

THE TRIAL COURT DID NOT ERR IN ITS RULING THAT CLAUSE B OF PLAINTIFF'S EXHIBIT NO. I CONSTITUTES A PENALTY AND IS UNENFORCEABLE.

POINT II.

THE TRIAL COURT DID NOT ERR IN ADMITTING PAROL EVIDENCE OF SUBSEQUENT MODIFICATION OF THE WRITTEN CONTRACT OF JULY 14, 1954.

POINT III.

THE TRIAL COURT DID NOT ERR IN PERMITTING RESPONDENT TO REDUCE A CONTRACTUAL OBLIGATION WITHOUT CONSIDERATION.

POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO PERMIT MR. ELGGREN TO TESTIFY AS TO CONVERSATIONS WITH APPELLANT CONCERNING STATEMENTS MADE IN THE OFFERING CIRCULAR RELATIVE TO PRE-ORGANIZATION STOCK TO WHICH APPELLANT OR REED P. LARSON WERE ENTITLED.

POINT V.

THE TRIAL COURT ERRED IN FAILING TO ENTER A FINDING TO THE EFFECT THAT THE ORAL AGREEMENT OF APPELLANT TO ACCEPT 166,666 SHARES WAS FULLY EXECUTED.

POINT VI.

THE TRIAL COURT ERRED IN FAILING TO ENTER A FINDING TO THE EFFECT THAT DEFENDANT DELIVERED 166,666 SHARES TO APPELLANT WHICH HE ACCEPTED AND WAIVED CLAIM TO ANY ADDITIONAL SHARES.

POINT I.

THE TRIAL COURT DID NOT ERR IN ITS RULING THAT CLAUSE B OF PLAINTIFF'S EXHIBIT NO. I CONSTITUTES A PENALTY AND IS UNENFORCEABLE.

Appellant's argument in effect is that the contract provides for a return of 67,000 shares of stock upon the happening of a condition subsequent, and is not a contract for a forfeiture or penalty. The gist of appellant's argument on this point is found in the last two paragraphs of his argument under his Point I on page 9 as follows:

“The condition subsequent that would entitle defendant to receive back 67,000 shares was beyond the control of either party. Defendant had nothing to perform, and no control over the condition and both parties knew of this and contracted in relation to it.

“It is respectfully urged that the legal relationship established was not for penalty. It may have been otherwise, if defendant had agreed to convey 67,000 shares, only, plus an additional 67,000 shares if he did not return the money in ten (10) days. Such is not the case and the agreement clearly shows such was not the intent.”

Appellant is wrong in his statement that respondent had nothing to perform and no control over the condition. Respondent could have returned the \$1000.00 the next day and eliminated any claim of appellant to the 67,000 shares in question. The form of the contract is not controlling, if in fact it provides for a forfeiture or a penalty. The nature of forfeitures and penalties is discussed at length in *Williston on Contracts*, Chapter 28, Vol. 3, pages 2169 to 2285, under the title “Excuse of Conditions and Promises Which Would Cause a Forfeiture or Penalty.”

The following is from *3 Williston on Contracts*, Section 769, page 2170:

“Though the law cannot create contractual obligations which were not based on the expressed intention of the parties, it can excuse the performance either of conditions or promises agreed upon by the parties for any reasons which seem to be just. The mere fact that a promise or condition is somewhat harsh or unfair in its opera-

tion is not enough to furnish such an excuse, but a principle of somewhat vague boundaries prohibits the enforcement of forfeitures and penalties. Though these two words are often used as synonyms, the word 'forfeiture' carries the implication of deprivation of something previously owned as distinguished from subjection to a liability, but the distinction is often blurred."

In the case at bar respondent is in effect deprived of property which he owned, if he is required to give the additional 67,000 shares of stock to appellant. As owner of the uranium claims which he agreed to convey to the corporation and receive stock in exchange therefor, he is in effect by giving stock being deprived of the value of so much of his mining claims as would be represented by the additional 67,000 shares of stock.

Under the section heading: "The Form of the Contract Cannot Make a Penalty Enforceable," *Williston on Contracts*, Section 782, page 2198, the author says:

"Numerous attempts have been made to achieve the desired result of making a penal sum recoverable in case of the nonperformance of a contract. If the question were wholly one of interpretation, such attempts would never be successful. It is not difficult to make clear beyond dispute that recovery of any amount named was contemplated and was intended if the promisor failed to fulfil his primary undertaking or any performance named as an alternative; but though the decisions are not wholly uniform principle and authority both justify the statement at the heading of this section."

The following is from *3 Williston on Contracts, Section 777, page 2185*:

“Therefore, the first step toward a clear understanding of the matter, is to recognize that the determination of whether a particular provision is penal or merely provides for liquidated damages only, does not depend on the natural meaning of the language used by the parties. The legal effect of an instrument depends on rules of law which sometimes contradict the meaning of the instrument and the intention of the parties. Probably all that most courts mean—at any rate all that can be defended—is to say that the validity of the stipulation is to be ‘judged of as at the time of the making of the contract not as at the time of the breach,’ and this is undoubtedly true.”

At *Section 778, page 2190*, of the same work, the author states:

“Intention of the parties is a misleading and undesirable designation for this requirement and the first step toward clearing the confusion of the law on the subject is to drop the use of the phrase from the discussion. Even the suggested substitute of an inquiry whether the parties in good faith attempted to estimate the real injury is a somewhat artificial cloak for the true principle, for the only evidence that the court ever has before it bearing on the issue is whether the parties in good faith made such an estimate, beside their statement in the contract, that the sum named is liquidated damages or a penalty, (and to this, as has been seen, the court rightly pays little attention), is the reasonableness in fact of the amount; and the matter would be much simplified if it were clearly recognized and stated

that the reasonableness of the agreed sum looked at as of the time when the contract was made is the only important thing."

In *Section 779, page 2190*, of the same work the author states:

"In spite of the language of cases regarding the intention of the parties, there is little doubt that a sum named as liquidated damages in order to give effect must be reasonable in amount."

This Court has adopted the same rule in a number of cases including:

Bramwell Inv. Co. v. Ugglä, 81 Utah 85, 16 P.(2) 913, 916.

Dopp v. Richards, 43 Utah 332, 135 P. 98.

Thomas v. Foulger, 71 Utah 274, 264 P. 975.

Croft v. Jensen, 40 P.(2) 198, 82 Utah 12.

In the last cited case, *Croft v. Jensen*, the Court held that calling a sum to be paid under a contract liquidated or stipulated damages will not prevent the court from treating it as a penalty.

An interesting case cited and discussed at length by Williston in his treatise on Contracts to the point that the form of the contract is not controlling is *Maybury v. Spinney Maybury Co.*, 122 Me. 422, 120 Atl. 611. In that case a contract was made for the lease of certain machinery which provided for the payment on the last day of each calendar month of fixed rentals or royalties accruing for the use of the machines during that month. The contract provided that in all cases where lessee

should pay to lessor on or before the 15th day of the calendar month the rent or royalty for the next preceding calendar month, lessor would in consideration of such prompt payment grant a discount of fifty per cent of such rent or royalty due for such preceding calendar month. The Court held that although the contract denominated the difference between the larger and the smaller as a discount and had phrased the contract in terms appropriate to a discount, the Court was not precluded from seeking the intent of the parties to determine whether the smaller amount was in fact the actual debt and the larger sum was a penalty and that the only amount owing was the smaller amount even though payment was not made promptly within the fifteen days.

In the case at bar had the phrase "within ten days" been omitted there could be no question that the appellant would not be entitled to the additional 67,000 shares of stock. Thus, it appears that if the contract is enforced, respondent forfeits 66,666 shares of stock contracted at the time at $1\frac{1}{2}c$ a share, or a value of \$1000.00, for thirty or thirty-five days delay in returning \$1000.00. As is generally held, the damages for such delay would be reasonable interest. Interest at 6% per annum for a month and a half would amount to \$7.50. Thus it appears that the stipulated penalty in this case of \$1000.00 worth of stock, 66,666 shares, is for a delay which could not damage appellant more than \$7.50.

Thus, respondent repeats as stated in *Section 779, page 2191, of Williston on Contracts*:

"In spite of the language of cases regarding

the intention of the parties, there is little doubt that a sum named as liquidated damages in order to be given effect must be reasonable in amount This is but saying, that the reasonableness or unreasonableness of the stipulation is decisive."

Respondent submits that the Court did not err in its finding that the agreement to give an additional \$1000.00 worth of stock if the \$1000.00 was not returned in ten days provides for a penalty or forfeiture and is unenforceable.

POINT II.

THE TRIAL COURT DID NOT ERR IN ADMITTING PAROL EVIDENCE OF SUBSEQUENT MODIFICATION OF THE WRITTEN CONTRACT OF JULY 14, 1954.

Written contracts may be modified by parol agreements. *17 C. J. S. Section 373, page 857.*

As stated in *Smith v. Washburn*, 54 Ida. 659, 34 Pac. (2d) 969:

"It is the general rule of law that parties to an unperformed contract may, by mutual consent, modify it by altering, excising and adding provisions, and such modification may be by parol agreement though the contract is in writing."

The Court found that appellant consented to the modification to provide that for the \$1000.00 which would be returned in a reasonable time no stock would be given. The essence of modification in this case is merely an extension from ten days to a reasonable time within which

to return the \$1000.00. As stated in *17 C.J.S., Section 506, page 1080*:

“The time for performance of a written contract may be waived by parol,” citing *Opjon v. Engebo*, 73 Wash. 324, 131 Pac. 1146.

In *Parker v. Weber County Irr. Co.*, 65 Utah 354, 236 Pac. 1105, this Court held that a written instrument may be modified by a subsequent parol agreement.

Appellant in his Brief at page 10 and 11 cites *Verdi v. Helper State Bank*, 196 Pac. 225, to the point that a written certificate of deposit could not be modified by parol agreement. In that case the Court stated at page 228:

“Whether there was a modification of the terms of the certificate respecting the payment of interest or whether a new agreement was entered into whereby the bank agreed to pay the interest, is a question of fact upon which we express no opinion. Moreover, the evidence in that regard must be limited to the allegations of the complaint.”

A reading of that case will disclose that the Court did not hold that a written certificate of deposit could not be subsequently modified by an oral agreement.

If appellant is arguing that the written contract of July 14, 1954, cannot be modified by parol because the parol agreement was embodied in the agreement on the back of the check, the answer of respondent to that proposition is that the statement on the back of the check is not a complete contract, did not integrate the

agreements of the parties, and, therefore, the oral agreement is admissible.

On this matter *McCormick on Evidence at page 431*, in discussing whether a memorandum purports to be a complete writing, and, therefore, would bar parol agreement, the author states:

“The writing is still the sole criterion by which to determine whether it is ‘complete,’ but it is the writing considered in the light of all the surrounding circumstances. All, that is, except one. You may consider the entire situation leading up to the signing of the writing except the most crucial of all data, i.e., the purport of the alleged agreement which has been left out of the writing.”

The author goes on to discuss the proposition that it is for the judge to control the admission of such evidence, and at *page 435*, quoting from Wigmore upon the question of whether the parties intended the signed document to displace the oral agreement, states:

“‘In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation.’”

In this case there is no mention in the writing covering the oral agreement to provide that under the contract of July 14, 1954, only 66,666 shares would be delivered.

POINT III.

THE TRIAL COURT DID NOT ERR IN PERMITTING RESPONDENT TO REDUCE A CONTRACTUAL OBLIGATION WITHOUT CONSIDERATION.

Appellant argues that the Court was in error in allowing the oral modification of the Contract of July 14, 1954, to provide that the 66,666 shares need not be delivered if the \$1000.00 was returned within a reasonable time instead of within ten days. He argues that a consideration is required for the modification of the agreement.

This is no doubt true of executory contracts, but in this case, as respondent has pointed out several times already in his Brief, appellant accepted the lesser amount of stock and by furnishing an Offering Circular to each prospective purchaser of stock he not only evidenced his complete acceptance of the modification, but in effect made a contract with the purchasers of stock to the effect that if they made a purchase of stock, that the value of their stock would not be diluted by the delivery to him or anyone else of additional shares of preorganization stock for which no more money would be paid.

The law on the matter of the requirement of a consideration for an executed modifying agreement is stated in *17 C.J.S. 861, Sec. 376*, under the heading of Contracts-Modification-Consideration, as follows:

“While consideration is necessary to support a modification of a contract, a new consideration has been held unnecessary at least where the contract is executory or the modification merely explanatory, and an executed modified agreement

will not be disturbed for want of consideration Where a modified agreement has been fully executed it will not be disturbed for want of consideration and there are cases which hold that where one party has performed a modified agreement to such an extent that it would work a fraud or injury on the other party to repudiate it, the modified contract will be sustained.”

Included in the cases cited in support of this general rule of law is a Utah case directly in point—*Nordfors v. Knight*, 60 Pac.(2d) 1115, 1118, 90 Utah 114. In that case plaintiff contracted to purchase certain lands from defendant for the sum of \$3500.00, payable \$1750.00 cash upon the execution of the agreement, and \$1750.00 at a later date. Before the second payment became due plaintiff informed defendant that he would not pay \$1750.00 because the property was not worth the purchase price, but he would pay \$1250.00, which defendant agreed to accept. Subsequently plaintiff sued defendant stating that not all the land agreed to be delivered was delivered, and defendant counterclaimed for \$500.00, alleging that there was no consideration for the reduction of the balance of the purchase price from \$1750.00 to \$1250.00. The Court found that the payment of \$1250.00 was made, at which time plaintiff accompanied defendant to the bank and received the contract, deed and abstract of title, and that no further claim was made until the suit was brought over the boundary lines, at which time defendant counterclaimed for the additional \$500.00. The Court found against defendant on his counterclaim. The Court stated:

“We think the evidence fully sustains the findings of the court. It may be conceded that as a general rule a consideration is necessary to sustain a contract modifying an existing contract, but as stated in 13 C.J. 592, Sec. 607, ‘where a modified agreement has been fully executed it will not be disturbed for a want of consideration.’ See, also, *Vigelius v. Vigelius*, 169 Washington 190, 13 Pac. (2d) 425; *Davis v. Culmer*, 221 Mo. App. 1037, 295 S.W. 803. The modifying agreement in this case was fully performed, and the deed, abstract and original agreement delivered to plaintiff by defendant himself. The deal was finally closed and considered closed by both parties for over two years. The whole transaction showed an intent, which was fully and completely carried out, to perform and accept performance under the new agreement and a mutual abandonment of the old agreement. It must follow that defendant, under the facts of this case, cannot now claim that the agreement thus performed is a nullity for want of consideration.”

Other recent cases on this subject to the same effect are:

Idaho Gold Dredging Corp. v. Boise Payette Lbr.

Co., 62 Ida. 683, 115 Pac.(2d) 401;

Meyer v. Strom, 37 Wash. (2d) 818, 226 Pac. (2d) 218;

Julian v. Gold, 214 Cal. 74, 3 Pac.(2d) 1009.

POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO PERMIT MR. ELGGREN TO TESTIFY AS TO CONVERSATIONS WITH APPELLANT CONCERNING STATEMENTS MADE IN THE OFFERING CIRCULAR RELATIVE TO PRE-OR-

GANIZATION STOCK TO WHICH APPELLANT OR REED P. LARSON WERE ENTITLED.

The Court struck the testimony of Mr. Elggren upon the theory that Mr. Elggren was acting as attorney for plaintiff, and that any communications made were confidential and privileged.

Mr. Elggren testified that he was not employed by Mr. Reed, but that he was acting as attorney for Wyoming Uranium Company in the preparation of the Offering Circular (R. 35).

If Mr. Elggren had been acting for Mr. Reed, the testimony would still be admissible. It is only as to confidential communications that the attorney may not testify.

As stated in *McCormick on Evidence*, page 190:

“It is the essence of the privilege that it is limited to those communications as to which the client either expressly made confidential or which he would reasonably assume under the circumstances would be understood by the attorney as so intended. . . . Wherever the matters communicated to the attorney are intended by the client to be made public or revealed to third persons, obviously the element of confidentiality is wanting.”

In this matter all conversations between Mr. Elggren and Mr. Reed which were the subject of the testimony which was not admitted had to do with the amount of stock to which Mr. Reed, either in his own name or in the name of Dr. Reed P. Larson, was entitled so that the amount thereof could be stated in the Offering Circu-

lar and the information communicated through the Offering Circular to every prospective purchaser of Wyoming Uranium Company stock. Nothing could be farther from the thought that this was a confidential communication as it was intended to be made public, and, therefore, under the law as stated above, it should not have been excluded.

POINT V.

THE TRIAL COURT ERRED IN FAILING TO ENTER A FINDING TO THE EFFECT THAT THE ORAL AGREEMENT OF APPELLANT TO ACCEPT 166,666 SHARES WAS FULLY EXECUTED.

The Court in rendering his order for judgment stated:

“It is the further holding of the Court that the contract dated July 14, 1954, was modified by a subsequent oral agreement which abrogated the ten day provision and permitted the \$1000.00 to be returned within a reasonable time, and the \$1000.00 was returned within a reasonable time and plaintiff at the same time in the oral agreement agreed to accept 66,666 shares of stock under the agreement of July 14th, as is right, and *that agreement was executed by the plaintiff and defendant.*” (R. 71) (Italics ours)

By oversight the Finding upon this matter was omitted in the Findings of Fact and Conclusions of Law. It is true that the Findings of Fact and Conclusions of Law were prepared by Counsel for respondent. However, the law imposes the burden upon the Court to make full findings upon all matters additional.

POINT VI.

THE TRIAL COURT ERRED IN FAILING TO ENTER A FINDING TO THE EFFECT THAT DEFENDANT DELIVERED 166,666 SHARES TO APPELLANT WHICH HE ACCEPTED AND WAIVED CLAIM TO ANY ADDITIONAL SHARES.

As a Third Affirmative Defense respondent alleged that during the months of March, 1955, and November, 1955, respondent delivered the stock agreed to be delivered under the agreements of July 14, 1954, and July 29, 1954, in the amount of 166,666 shares and the same were accepted by appellant and appellant waived claim to any additional shares of the capital stock of Wyoming Uranium Corporation.

Respondent has set forth above the evidence that appellant accepted the 166,666 shares and made no claim for the additional 66,666 shares for a long time thereafter, during which time the stock had risen in value from 3c to 19½c a share.

Under the subject of Contracts the matter of Waiver is discussed in *12 Am. Jur., 918, Section 354*:

“Strict and full performance of a contract by one party may be waived by the other party as a condition precedent may be waived by the party in whose favor they are made.”

As stated in *Woodard v. Speck*, 117 Okla. 27, 245 Pac. 630, as Syllabus 2 to the case:

“Where there has been a breach of contract for sale of land sufficient to cause forfeiture and party entitled thereto either expressly or by conduct waives forfeiture or acquiesces in breach he will be precluded in enforcing forfeiture.”

The law is that the fact of agreement may be implied from a course of conduct in accordance with its existence as stated in *Smith v. Washburn*, 54 Ida. 659, 34 Pac.(2d) 969: and 17 C.B.S. 861: Sec. 376

“So assent may be implied from acts of one party in accordance with the terms of the change proposed by the other and assent to new terms of performance even if invalid as a contract will serve as an estoppel excusing what otherwise would be a default.”

In the case at bar, if it were concluded that the oral modification of the agreement of July 14, 1954, were inadmissible, still the evidence is before the court that respondent told appellant that the \$1000.00 would be returned within a reasonable time instead of within ten days, and that nothing would be paid to appellant for said \$1000.00. It is not necessary under the law as stated above to establish that there was a complete parol agreement to such proposition. The fact is that appellant performed in accordance with that statement of the respondent and should be estopped after the contract was fully executed in accordance with said statement of respondent to claim the additional shares.

See also *Condit and Conser v. Moon Motor Co.*, 129 Ore. 161, 276 Pac. 265, in which the Court cites *Williston on Contracts*, Sec. 90, as follows:

“‘Assent may be indicated by acts as well as by words.’”

In this case, as has before been stated, appellant distributed Offering Circulars which stated that the

stock was given for \$2500.00 in the amount of 166,666 shares, and as respondent testified:

“That is what we put in the Offering Circular and the stock then was 3c a share and it wasn’t until a year and a half later when the stock went up to 20c a share that he said he would hold me to that ten-day clause in there.”

In this case an estoppel or waiver is particularly appropriate under the circumstances as stated by respondent.

SUMMARY

Appellant has received stock at 1½c per share for all moneys paid by him. It was the intent of the agreements between respondent and appellant that he should purchase stock at 1½c per share. Respondent delivered the stock on that basis and appellant accepted it in full execution of the contract. By the Offering Circular appellant in effect represented to his customers that no more stock was due to him. To require respondent to pay 19½c a share for stock which was worth 3c a share when the agreement was executed would work a gross inequity. Justice has been accorded appellant.

Respondent submits that the Trial Court was right in its rulings and its decision, and that the appeal should be dismissed.

Respectfully submitted,

J. GRANT IVERSON

Attorney for Respondent.