

1968

Mojave Uranium Company v. Mesa Petroleum Company : Respondent's Brief

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

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. James R. Brown and Robert G. Pruitt, Jr.; Attorneys for Respondent

Recommended Citation

Brief of Respondent, *Mojave Uranium v. Mesa Petroleum*, No. 11286 (1968).
https://digitalcommons.law.byu.edu/uofu_sc2/3417

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 (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

MOJAVE URANIUM COMPANY,
Plaintiff and Appellant,

- vs. -

MESA PETROLEUM COMPANY,
Defendant and Respondent.

Case No.
11286

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable Stewart M. Hanson, Judge

JAMES R. BROWN and
ROBERT G. PRUITT, Jr.
Attorneys for Respondent
1000 Continental Bank Bldg.
Salt Lake City, Utah 84101

HATCH & McRAE and
HERSCHEL J. SAPERSTEIN
Attorneys for Appellant
707 Boston Building
Salt Lake City, Utah 84111

FILED

SEP 6 - 1967

INDEX

Statement of Kind of Case	1
Disposition in Lower Court	2
Relief Sought on Appeal	2
Statement of Facts	2
Argument	
Point I—Confirmation of Standard's Plan of Arrangement Discharged Mojave's Claim	4
Point II—Mojave's Debt was not Revived	16
Point III—The Theory of Appellant is at Variance with its Theory below, however, Mesa did not create a Third Party Beneficiary Contract in the so-called Assumption Agree- ment	18
Conclusion	23

CASES CITED

In Re Beason's Estate, 49 Utah 24, 161 Pac. 678 (1916)	19
Evans vs. Shand, 74 Utah 451, 280 Pac. 239 (1929)	19
Fisher vs. Bank of Spanish Fork, 93 Utah 514, 74 P2d 659 (1937)	19
Frey vs. Frankle, 361 F2d 437 (1966)	13, 14, 16, 17
Gerson vs. Booth Lumber Company, 230 F2d 631 (1955)	7, 16
In Re Graco, Inc. 366 F2d 257 (1966)	8
In Re Kornbluth, 65 F2d 400 (1933)	13
Pettingill vs. Perkins, 2 Utah 2d 266, 272 P2d 185 (1954)	20
Poly Industries, Inc. vs. Mozley, 362 F2d 453	9, 16
Twenty Second Corp. Etc. vs. Oregon Short Line Railroad Company, 195 F Supp. 621 (1961)	19
Upton vs. Heiselt, 118 Utah 573, 223 P2d 428 (1950)	19
In Re Vulcan & Reiter Company, 162 F2d 92 (1947)	13, 16
Wm. H. Wise & Co. vs. Rand McNally & Company, 195 F Supp. 621 (1961)	15, 16

Zavelo vs. Reeves, 227 U. S. 625, 33 S. Ct. 365, 57 L. Ed. 676 (1913)	7, 11
---	-------

STATUTES

11 USC, 701, 799 (Chapter XI)	4
11 USC, Sec. 707 (Sec. 307)	6
11 USC, Sec. 708 (Sec. 308)	6
11 USC, Sec. 757 (Sec. 357)	11
11 USC, Sec. 767 (Sec. 367)	6, 9
11 USC, Sec. 771 (Sec. 371)	7, 9, 17
11 USC, Sec. 781 (Sec. 381)	7
11 USC, Sec. 786 (Sec. 386)	17
UCA, Sec. 16-10-71	21
Act of July 1, 1898, Chapter 541, 30 Stat. L. 544	7, 12

AUTHORITIES CITED

Collier's Bankruptcy Manual, Second Edition, pp. 1098-1099	8
9 Collier on Bankruptcy, 14th Edition Sec. 925 (5) pp. 340-341..	9

IN THE SUPREME COURT
of the
STATE OF UTAH

MOJAVE URANIUM COMPANY,
Plaintiff and Appellant,

- vs. -

MESA PETROLEUM COMPANY,
Defendant and Respondent.

Case No.
11286

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action brought by Mojave Uranium Company against Mesa Petroleum Company, the successor in interest to Standard Gilsonite Company, upon a contractual agreement between Mojave and Standard. The agreement consists of an unsecured obligation in the amount of \$20,000.00 for the release of an earlier claim Mojave asserted against Standard which was secured by a second mortgage upon personality of Standard.

DISPOSITION IN LOWER COURT

The trial court, upon hearing reciprocal motions for summary judgment, denied that of Mojave's and granted Mesa's upon the grounds that Mojave's claim was "barred under the provisions of the Bankruptcy Act."

RELIEF SOUGHT ON APPEAL

Mesa Petroleum Company seeks an affirmance of its Summary Judgment since as a matter of law, Appellant's claim is barred.

STATEMENT OF FACTS

Respondent agrees generally with the facts as stated by Appellant, however, Respondent feels that some pertinent facts have not been stated and further desires to correct certain erroneous conclusions which have been stated as fact.

Sometime during the period of 1957-1961 Mojave allegedly loaned (R. 1) to Standard certain sums of money which was uncertain both as to the amount and as to the source of the funds so loaned. (Depo. 43 & 45) At any rate, Mojave held a second mortgage on certain personal property of Standard which bears the date of March 2, 1960. (Ex. P-17) Standard became financially distressed during 1960-1962 and was constantly besieged by suits, demands of creditors and repossessions. (Depo. 5, 16 & 17)

A closer examination must be given to the origin

of the agreement reached between the parties which constitutes exhibit P-6 and P-7. Mr. Robert J. Pinder, past president of Standard and close relative of the officers of Mojave, represented Mojave in the negotiations which culminated in the agreement. (Depo. 6, 11, 16, 38, 39) These alleged loans were made during the period of Pinder's presidency. The corporate entity of Mojave is and was of serious doubt, having had its charter revoked by Nevada and having failed to qualify to do business in Utah. (R. 5, 6, 7; Depo. 46) Further, there was serious question as to the validity of the alleged loans. (Depo. 40, 41, 43, 44, 45) Because of these questionable aspects of the Mojave claim, together with the fact that the security was either nonexistent, dissipated or worthless (Depo. 17, 19, 40, 41) and the additional threat of a Chapter X proceeding (Ex. P-6), Mojave desired to become an unsecured creditor. The sole consideration given to Standard for this privilege was the release of the worthless security. (Depo. 41)

A close examination must be given the financial balance sheets to which the Appellant places great weight. These balance sheets were prepared under extremely difficult circumstances and reflect almost in total the unverified recollections of Pinder. (Depo. 6, 11, 16, 17, 38, 39) Disputes and questions were raised on a number of the claims including that of Mojave's. (Depo. 43, 45, 46) No documentation other than the balance sheets of Standard has been discovered verifying the alleged loan or loans between Mojave and Standard. Mr. Bruce

Coke, Counsel for Standard at the time of the Chapter XI proceedings, informed the accountants who prepared the financial sheets for Standard of the serious questions regarding the validity of the Mojave claim (Depo. 43, 44, 45), and stated that he specifically recalls informing the accountants that the principals of Standard had reservations regarding the Mojave claim. (Depo. 45) This same question of validity was conveyed to Mesa. (Depo. 29)

POINT I

CONFIRMATION OF STANDARD'S PLAN OF ARRANGEMENT DISCHARGED MOJAVE'S CLAIM.

The Chandler Act, which was passed in 1938 and is the present day statutory provision relating to Bankruptcy, gives broad relief for financially distressed businesses by means of composition and/or extension of *unsecured* obligations. The Chandler Act affords relief that could not and cannot be obtained at common law. Chapter XI proceedings under the 1938 Act are set forth in detail, together with the effects of these proceedings, in United States Code, Title 11, Section 701 et al.

Basically, there are two routes a petitioner under Chapter XI can elect to take with respect to *unsecured* obligations: (1) a plan can be merely an "extension of time" within which to pay creditors, or (2) a plan can be a "composition," provided certain conditions are met, which satisfies and pays in full the *unsecured* obligations, together with contingent unsecured obligations of any

secured creditors which may arise after exhaustion of the security.

Standard, predecessor of Respondent, chose the latter route, seeking a composition of the unsecured creditors. On May 25, 1962 Standard filed a direct petition under Section 322 of the Chandler Act. A proposed plan of composition was submitted on June 12, 1962, and subsequently on August 13, 1962 an Order of Confirmation of the plan was granted by the Referee in Bankruptcy.

An agreement was consummated between Mojave and Standard wherein Appellant became an unsecured creditor in the amount of \$20,000. The formal agreement was executed sometime in June 1962. (Ex. P-6 & P-7) The *sole* consideration for this agreement was the release of the security. (Depo. 41) Appellant was aware of the Chapter XI proceedings, and knew of the legal consequences following the release. Appellant could either release the worthless and non-existent security, or face proceedings under Chapter X of the Chandler Act. (Ex. P-6 & P-7) There is no argument that at this date Appellant did in fact release its security.

The real question before this Court is what effect, if any, did the confirmation of Standard's Chapter XI proceedings have upon the agreement of June, 1962 which placed Mojave in the status of an *unsecured* creditor? The language of the Act itself answers this decisive question.

SECTION 307:

“(1) “creditors shall include the holders of all unsecured debts, demands or claims of whatever character against a debtor. . . .”

SECTION 308:

“A creditor shall be deemed to be “affected” by an arrangement only if his interest shall be materially and adversely affected thereby.”

SECTION 367:

“Upon confirmation of an arrangement —

(1) the arrangement and its provisions shall be binding upon the debtor, upon any person issuing securities or acquiring property under the arrangement and upon all creditors of the debtor, whether or not they are affected by the arrangement, or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable;” (emphasis added)

SECTION 371:

“The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement.” (emphasis added)

It is *upon confirmation* that the rights of the parties are crystallized and become fixed under the clear and concise language of the Statute. Confirmation was realized on August 13, 1962, well after Mojave became an unsecured creditor. Mojave, being an *unsecured* creditor of Standard's *upon confirmation*, was and is bound by that Order.

Appellant would have this Court believe that the critical time is the date of filing of the original petition. That date is important only to determine whether Mojave was in fact a creditor per se. Appellant cites a very old case decided under a completely different Act as the controlling case law. *Zavelo v. Reeves*, 227 U.S. 625, 33 S. Ct. 365, 57 L. Ed. 676 (1913) actually interpreted the 1898 Act. The present day provisions of the Chandler Act is decisive that "*upon confirmation . . .*" the rights of the parties are determined and bound. In *Gerson v. Booth Lumber Company*, 230 F.2d 631 (1955) which was decided after passage of the Chandler Act, Justice Fee of the Ninth Circuit Court of Appeals stated at page 633:

"It is correct to say that a *plan of arrangement is not binding on the debtor or the creditors of the debtor until it has been confirmed by the order of the Referee.*" (emphasis added)

Congress gave further expression to the importance of the binding effect of the arrangement upon *unsecured* creditors which are *unsecured* on the critical date of confirmation in Section 381. This provision refers to proceedings wherein bankruptcy in the usual sense becomes necessary after a confirmation has failed and the debtor is adjudged a bankrupt. This generally occurs when the terms of the arrangement have been breached or become impossible. It then becomes necessary to provide for the unsecured obligations incurred *after* the confirmation. Section 381 states:

"Where, after the confirmation of an arrange-

ment, the court shall enter an order directing that bankruptcy be proceeded with . . .

(1) the unsecured debts incurred by the debtor *after the confirmation* of the arrangement and before the date of the entry of the final order directing that bankruptcy be proceeded with shall, unless and except as otherwise provided in the arrangement or in the order confirming the arrangement, share on a parity with the prior unsecured debts of the same classes, provable in the ensuing bankruptcy proceeding, and for such purpose the prior unsecured debts shall be deemed to be reduced to the amounts respectively provided for them in the arrangement, less any payment made thereunder;"

Obviously there is no need to provide for a creditor who was unsecured at the time of confirmation since Congress had already provided that they would be bound upon confirmation.

Collier's Bankruptcy Manual, Second Edition, edited by Edelman and as revised by William T. Laube and W. J. Hill (1968) pages 1098-1099 states:

"An arrangement becomes effective *only upon confirmation by the Court.*" (emphasis added)

Confirmation is the vital and key step which binds and discharges all unsecured obligations. The importance of the confirmation is expressed in *In Re Graco, Inc.*, 366 F2d 257 (1966) at page 260 as follows:

"It is clear that the determination of the referee is not supposed to be a perfunctory one, and the fact that the plan has been accepted by a requi-

site majority of creditors does not dispense with the need for the referee to exercise his 'own independent judgment.' " (citations omitted)

The recent case of *Poly Industries, Inc. vs. Mozley*, 362 F.2d 453 (1966) gives a clear and decisive ruling of the Chandler Act. The court states, at page 456:

" . . . *the confirmation* of a Chapter XI arrangement acts the same as a discharge in bankruptcy . . . "

The obligation to Mojave, if any, *upon confirmation* was discharged by the terms and conditions of the arrangement. On August 13, 1962 the rights of the parties were fixed and became binding upon Mojave as well as the other general unsecured creditors.

Appellant would have us believe that since no specific reference to the Mojave debt appears in the Order of Confirmation and the Arrangement that under Section 371, the obligation to Mojave, if any, was not barred or satisfied. However, as Exhibit P-3 shows, the plan is for "*all unsecured general claims.*" This provision applies to Appellant. It is well established that the scope of Section 361 is sweeping and the term "all unsecured general claims" is broad enough to include Appellant.

In speaking of the provisions of Section 367 (1), *Collier on Bankruptcy*, 14th Edition, Volume 9, Section 9.25 (5), page 340-341 states:

"That reference to creditors is a sweeping one. It is not essential to confirmation that an arrangement be accepted by all creditors, but creditors

who have not accepted the arrangement as well as creditors who have accepted it, are bound upon confirmation. A creditor cannot escape the effect of an arrangement by not filing a proof of claim; such a creditor, as well as creditors who have filed their claims, is bound upon confirmation. Nor is it material whether a creditor's claim has been scheduled, or is allowed, or is even allowable, or whether the creditor is affected by the arrangement. That creditor is nevertheless bound by the arrangement and its provisions upon confirmation. Even if an unscheduled creditor did not know of the proceeding, he is bound upon confirmation. Even if a creditor is affected by the arrangement, and it makes no provision for him, so that he could have successfully opposed its confirmation, he is nevertheless bound by the arrangement and its provisions upon confirmation."

It is apparent from the foregoing that Appellant is bound upon confirmation to the provisions of the arrangement. On August 13, 1962, Appellant was an *unsecured* creditor, who had actual notice of the proceedings (see Exhibit P-6), who could have availed itself of the same provisions which were applicable to *all general unsecured creditors*. The release was given under the guise of benefiting Standard, when in fact Mojave knew that the alleged security was dissipated, non-existent and worthless. In addition there was serious doubt whether there was ever any obligation due Mojave. Mojave saw an opportunity to trade an absolutely worthless and questionable claim into an unsecured claim. It did so and should be held to the effect of that transaction.

The arrangement provided all unsecured creditors with equal rights to share in a distribution approved by a majority of the creditors which is binding upon *all unsecured creditors upon confirmation*.

The fact that the appellant neither filed its claim, nor participated in the distribution is immaterial. Mojave cannot be permitted to have the benefit of its bargain, or what was bargained for on its behalf by the other unsecured creditors, and later say it didn't mean to be bound as an unsecured creditor. The ramifications of the release were known to both Standard and Mojave, and the law is unequivocal that *upon confirmation* the parties are bound.

Section 357 of the Chandler Act provides:

“An arrangement made within the meaning of this Chapter may include —

(1) provisions for treatment of unsecured debts on a parity one with the other, . . .”

In effect, Mojave is now before this Court seeking a better and more desirable position than other general unsecured creditors. Appellant would seek to negate the proceedings insofar as they apply to it based on the release of the worthless security and its failure to participate in the distribution under the plan.

Zavelo v. Reeves, *supra*, is not the controlling case as Appellant would have us believe. *Zavelo*, a 1913 case, was decided by a Court interpreting the provisions of the Act of July 1, 1898, Chapter 541, 30 Stat. L. 544,

which had a total of two sections relating to compositions (to be distinguished from corporate arrangements). These two sections were codified as sections 12 and 13 of Chapter 3 of the 1898 Act. The only pertinent provision was section 12 (e) wherein it was stated:

“(e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Wherever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.”

Under the old 1898 Act, a petitioner in bankruptcy could offer a composition to his creditors and, if accepted, would not be formally adjudicated a bankrupt. He could pay to his creditors the compromised amount and the case against him would be dismissed. All of this was changed by the Chandler Act of 1938. The 1938 Act, together with its amendments, specify in detail the remedies and relief available to a financially distressed corporation under Chapter XI, as well as Chapter X. Contrast the two meager provisions of the 1898 Act with the 100 sections contained in Chapter XI alone. It is the provisions of the Chandler Act of 1938 and its subsequent amendments that are controlling of this controversy. It is *upon confirmation* that unsecured creditors are bound. It is the sweeping and broad provisions of the Chandler Act which state clearly and concisely that the alleged Mojave debt is barred.

The next two cases are illustrative of the vast differences between the 1898 Act and the Chandler Act.

The Court in *In Re Kornbluth*, 65 F.2d 400 (1933) at page 401 stated:

"In the usual proceedings, the debtor is adjudicated a bankrupt, and divested of his property. But, where the proceedings result in the confirmation of an offer of composition, the case is dismissed, even though the debtor has not yet been adjudicated a bankrupt. (citations omitted) The debtor is reinvested with all of his property except such as may have been deposited with the court to secure performance of the composition."

Contrast *Korbluth* with the current, clear, and unambiguous language of Section 367 and the judicial pronouncement in *In Re Vulcan & Reiter Co.*, 162 F.2d 92 (1947), a per curiam decision, which is indicative of the provisions of Chapter XI. At page 94 it states:

". . . It makes no difference that petitioner did not actually consent to the composition, the consent of the majority in number and amount of creditors has the same legal effect as actual consent by petitioner. Creditors, including petitioner, having received what they bargained for or what was bargained for in their behalf as the case may be, have no further claim to receive the balance of their original claims from *any* source." (Court's emphasis)

Another very recent case expressive of the new provisions dealing with this particular issue is *Frey v. Frankle*, 361 F.2d, 437 (1966), decided by the Tenth Circuit Court of Appeals on April 15, 1966, (rehearing denied June 17, 1966). In that case discussions were held between Frey, who was then president of the corporation

which had filed Chapter XI proceedings, and Frankle, the successor in interest under the proceedings, wherein Frey was to be given an option to purchase one-third of the new stock which was to be issued, together with a five-year contract of employment with the reorganized corporation at a salary of \$2,000.00 per month. This plan was rejected by the creditors and not approved, and a subsequent plan which did not contain these provisions desired by Frey was approved. The Court states (at page 442) through Justice Pickett:

“The parties are substantially in agreement that from the beginning of the negotiations between Frankle and Frey, it was contemplated that Frey would be employed by the reorganized corporation and would have an option to acquire sufficient shares to assure him one-third interest in the controlling stock. These contemplated provisions were submitted to and considered by a committee representing the creditors of the corporation, and were not included in the plan which was submitted to the Court for approval. Although Frey, in his first cause of action, alleged that his employment and stock purchase option should have been included in the plan, it was not, and *when the order of confirmation became final, the rights of the party were fixed as of its entry.* (citations omitted) When the *plan became effective*, Frey’s position with the corporation was terminated, and he had no legal right to employment.” (emphasis added).

The *Frey* case, *supra*, illustrates two vital points applicable to our controversy. First, the court reaffirmed the clear language of the statutes by emphasizing that

the rights of the parties were fixed *when the order of confirmation became final*. Secondly, the negotiations spoken of between the parties were *after* the original petition was filed, but *prior* to the confirmation. The plan became *effective* and Frey no longer had any rights even though the newly organized corporation retained Frey some six months after the confirmation at \$2,000.00 per month.

The case of *Wm. H. Wise & Co. v. Rand McNally & Company*, 195 F. Supp. 621 (1961) controls the issues before this Court. Wise filed its petition under Chapter XI on November 16, 1955. Rand filed a proof of claim May 23, 1956 as a secured creditor. Wise objected to Rand's claim on several grounds. Finally on July 27, 1956 a stipulation was entered into wherein one-half of Rand's claim became unsecured and the remaining one-half was secured. At pages 623 and 624 of the Reporter it states:

"This was followed by the filing, in the arrangement proceeding, of a stipulation between the parties, dated July 27, 1956, which fixed the value of the 13,915 copies held by Rand at \$10,017.59, one-half the indebtedness admitted by Wise. In its capacity as unsecured creditor, Rand accepted Plaintiff's plan of arrangement which was affirmed on August 2, 1956. The sum of \$10,017.59 was allowed Rand as an unsecured claim for which it might receive payments under the plan."

The confirmation was August 2, 1956, after the stipulation which made Rand an unsecured creditor. The arrangement was binding upon Rand.

Respondent submits that the clear and decisive language of the Chandler Act, together with the recent cases under its provisions of *Frey v. Frankle*, supra; *In Re Vulcan*, supra; *Wm. H. Wise & Co. v. Rand McNally & Company*, supra; and *Gerson v. Booth Lumber Company*, supra, controls the subject matter of this action and should be decisive in upholding the lower Court.

POINT II

MOJAVE'S DEBT WAS NOT REVIVED.

Appellants' contention is totally incorrect that the written promise to pay the sum of \$20,000 for the release of the Appellants' secured position constitutes a revival or reaffirmation which survives the Chapter XI proceedings. It is this very accord and satisfaction, or secondary agreement, or novation, or whatever one labels it, that is barred and satisfied under the Chapter XI proceedings.

In *Poly Industries, Inc. vs. Mozley*, 362 F.2d 453 (1966) the Court at page 456 stated with clarity the effect of the confirmation as follows:

“. . . the effect of Section 371 is to . . . provide that . . . *the confirmation* of a Chapter XI arrangement acts the same as a discharge in bankruptcy . . .”

It is this discharge in bankruptcy, effective *upon confirmation*, that is a bar to Mojave's *unsecured* claim.

Mojave being represented by Pinder in the negotiations with Standard, knew that the security was in fact worthless. Mojave made the decision to abandon

the worthless and non-existent security to better itself at the expense of other parity unsecured creditors. The very purpose of the Chapter XI proceedings, and one of the fundamental requirements by legislative command, is that the arrangement before being confirmed be made in good faith and for equal protection to creditors of the same class. Mojave desired to be an unsecured creditor because of the inadequacy of the security. The sole consideration for the agreement on the part of Standard was to obtain a release of the security. Mojave reaped the benefit of its bargain and now after the passage of five years desires to be relieved of that bargain. Mojave's insistence of additional considerations outside of the Chapter XI proceedings would wreck havoc with the provisions of *res adjudicata* of the clear and unambiguous language of the Chandler Act of 1938 where in Section 371 states:

"The confirmation of an arrangement shall discharge a debtor from all of his unsecured debts and liabilities provided for by the arrangement . . ."

As was stated in *Frey vs. Frankel*, *supra*, at page 442,

" . . . when the order of confirmation became final, the rights of the parties were fixed as of its entry."

Standard's Order of Confirmation became final by its own terms on the 7th day of September, 1962. It is *res adjudicata* to the rights of Mojave and Standard. No application has been timely filed under Section 386

to set aside or modify the arrangement. To allow Mojave to usurp to a higher and more preferred position by its own self dealing on dubious claims is to thwart completely the language of the present day law and the case law which is decisive of the issue before the Court.

POINT III

THE THEORY OF APPELLANTS IS AT VARIANCE WITH ITS THEORY BELOW, HOWEVER, MESA DID NOT CREATE A THIRD PARY BENEFICIARY CONTRACT IN THE SO-CALLED ASSUMPTION AGREEMENT.

Appellant's claim, according to the pleadings and counsel's argument (R. 76 and top of 77) is an action based on simple contract for loans allegedly made to Standard. All of the proceedings in the lower court were in accord with this theory.

Pursuant to Motion of Appellant dated March 25, 1968, Appellant was granted leave to amend its Complaint. (R. 49) At this time Appellant had at its disposal the records and files of Respondent, Bruce Coke's deposition, and had in fact concluded its discovery. No further discovery by either party was made from and after March 25, 1968. The Amended Complaint filed March 25, 1968 (R. 46-48) does not set out any different theory for relief than the original Complaint except that it pleads the written agreement between the parties. Mojave made its Motion for Summary Judgment on April 10, 1968. (R. 52) Argument before the lower court was recorded at request of counsel for appellant. (R. 67-89) It is very evident that the only theory argued by

counsel is the direct contract of Mojave and Standard. But now, Appellants assert an entirely different theory: A third party beneficiary contract between Mesa and Standard for the benefit of Mojave, which is raised by Appellant for the first time on appeal. (App. Brf. 14-20)

A new theory may not be raised upon appeal, *Twenty Second Corp. Etc. v. Oregon Short Line Railroad Co.*, 36 Utah 238, 103 Pac. 243 (1909); *In re Beason's Estate*, 49 Utah 24, 161 Pac. 678 (1916); *Evans v. Shand*, 74 Utah 451, 280 Pac. 239 (1929); *Fisher v. Bank of Spanish Fork*, 93 Utah 514, 74 P.2d 659 (1937); *Upton v. Heiselt*, 118 Utah 573, 223 P.2d 428 (1950). In the *Evans* case, this Court stated at 240 Pac.:

"The rule is well settled that on an appeal the parties are restricted to the theory on which the case was prosecuted or defended in the court below which on appeal must be adhered to and cannot be shifted. * * * Whatever liberality may be accorded procedure, there nevertheless are certain fundamental principles which cannot be disregarded. These, among others, are that pleadings are the judicial means to invest the court with subject-matter jurisdiction and to limit issues and to narrow proofs; that courts cannot make a complaint for one thing stand for a different thing; that recovery must be *secundum allegata et probata*, which is but a necessary deduction from the maxim that what is not judicially presented cannot be judicially decided; that the statement of the cause of action or ground of defense as laid binds the court as well as the parties; and that there must be no departure is but another statement of the maxim that it is vain to prove

what is not alleged. These principles are primary.
(Citations omitted).

This Court stated in *Pettingill vs. Perkins*, 2 Utah 266, 272 P.2d 185 (1954) at pages 186 and 187 of the Pacific Reporter:

“Generally, appellate courts will not review a ground of objection not urged at trial court. . . . Having by his own pleadings, evidence, and instruction tried and rested . . . upon the theory that the mother’s negligence would bar the father, he is bound thereby, as the law of the case. He cannot now on appeal shift his theory and position.” (Citations omitted).

Appellant now suddenly on appeal shifts its theory of recovery to that of a third party beneficiary contract which theory has not been plead nor argued. Appellant is bound under its theory of moneys due under an alleged loan to Standard; they have no standing to urge upon this court a completely different theory now.

Sound reason and logic lies behind this Court’s refusal to allow Appellant to switch theories at the appeal stage. First, no ruling has been made based on the new theory upon which an appeal can be taken. Secondly, the Respondent has had no opportunity to establish and present to the Court any defense or defenses it may have to the new theory.

The mischief is evident in this instance because the agreement between Mesa and Standard has never been introduced into evidence. It is this third party contract which the Appellant is desirous of this Court to rule

upon, yet it is conspicuous by its absence. No merger agreement, unless specifically spelled out, grants any creditor or group of creditors a different claim than that which existed prior to the merger. Yet Appellant, in its new theory would have this Court impose a "shedding" of valid and substantial defenses. Appellant would have this Court interpret an agreement which is not even part of the record and impose liability on Respondent, while denying Respondent the benefits of the assets obtained for assuming those liabilities.

Assuming *arguendo* that the new theory is properly before this Court, it is insufficient to establish liability. Mesa in the merger agreement now stands in the shoes of Standard in respect to the defenses as well as the liabilities. *Utah Code Annotated*, Section 16-10-71 not only allows, but asserts without qualification, that Mesa's assertion of the bar in bankruptcy is proper. It states:

"When such merger or consolidation has been effected:

* * * *

(d) Such surviving or new corporation shall thereupon and thereafter possess all the *rights, privileges, immunities . . .* of each of the merging or consolidating corporation(s) . . ." (emphasis added)

The "Agreement of Purchase and Sale and Plan of Reorganization" dated July 6, 1965, between Standard and Mesa, while its absence from the record is indicative that this new theory was never considered by the lower Court, by its very terms and conditions is not a third

party beneficiary contract. It is a simple merger agreement wherein Mesa became Standard. Whatever defense or defenses Standard could assert against Mojave, Mesa could and can now assert. Mesa has in fact asserted these defenses. No objection was expressed by Mojave in the lower Court to these defenses. Mesa, in the lower Court, argued the discharge in Bankruptcy. This in effect is Standard's defense. The record below is silent of any objection to this defense and Mojave never challenged it as being inapplicable.

Reason and logic would further dictate that Appellant's theory is incorrect. The conclusion reached by Appellant would allow all of the creditors of Standard to assert a third party beneficiary contract and completely negate the Chapter XI proceedings and the clear, unequivocal provisions of the Chandler Act as enunciated by Congress. This conclusion is intolerable. The only logical conclusion one can reach about the effect of the merger agreement is that Mesa is Standard. In becoming Standard, Mesa did not benefit any third party, but simply stepped into the shoes of Standard and would be answerable, as Standard would have been, to that third party. The bar in bankruptcy is a *right, privilege and immunity* which Mesa acquired from Standard in the merger. The entire record below dealt with the contractual obligation of Standard to Mojave, if any, and the defense of the Chapter XI proceedings to that obligation.

CONCLUSION

The lower Court was correct in granting Respondent's Motion for Summary Judgment and denying Appellant's Motion for Summary Judgment. The uncontroverted facts place Appellant as an *unsecured* creditor upon the date of confirmation. Mojave released their security to become an unsecured creditor knowing of the Chapter XI proceedings. Mojave simply placed itself in a better position by trading an extremely dubious claim with equally dubious security, for an unsecured position in the hope of receiving payment. When Mojave learned of the merger into Mesa, it withheld filing its claim in the bankruptcy proceeding and ultimately brought this action.

The decisive provisions of the Chandler Act, and the cases cited to the Court heretofore, dispel any doubt whatsoever that as a matter of law, Respondent was and is entitled to a Summary Judgment.

Appellant's *new theory* is not controlling for the reasons that it was never raised at the lower Court, and further that the Merger Agreement granted Respondent all of the defenses available to Standard, one of which is the Chapter XI proceedings. It is, therefore, respectfully submitted that this Court affirm the decision of the lower Court.

Respectfully submitted,

JAMES R. BROWN and
ROBERT G. PRUITT, Jr.
Attorneys for Respondent
1000 Continental Bank Bldg.
Salt Lake City, Utah 84101