

1960

# Lincoln C. White v. Western Empire Life Insurance Co. and A. A. Timpson : Brief of Appellant

Utah Supreme Court

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Cotro-Manes & Cotro-Manes; Attorneys for Defendants and Appellant;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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LINCOLN C. WHITE,

*Plaintiff and Respondent,*

vs.

Case No.  
9156

WESTERN EMPIRE LIFE INSURANCE  
COMPANY, a corporation, and A. A.  
TIMPSON, *Defendants and Appellant.*

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BRIEF OF APPELLANT

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FILED

MAR 10 1960

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Clerk, Supreme Court, Utah

COTRO-MANES & COTRO-MANES

*Attorneys for Defendants and  
Appellant*

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# IN THE SUPREME COURT of the STATE OF UTAH

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LINCOLN C. WHITE,

*Plaintiff and Respondent,*

vs.

WESTERN EMPIRE LIFE INSURANCE  
COMPANY, a corporation, and A. A.

TIMPSON, *Defendants and Appellant.*

} Case No.  
9156

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## BRIEF OF APPELLANT

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### STATEMENT OF THE CASE

This action was commenced on the 3rd day of February, 1959, by the plaintiff-respondent, Lincoln C. White, against the defendant-appellant, Western Empire Life Insurance Company, a corporation, and A. A. Timpson, to recover \$6,120.00 claimed to have been suffered as damages because the defendant insurance company and A. A. Timpson did not undertake to sell

for the respondent certain shares of stock for the sum of \$120.00 per share. This is an appeal pursued by the defendant and appellant, Western Empire Life Insurance Company, from a judgment made and entered in favor of the respondent and against the appellant in the sum of of \$6,120.00 and costs (R. 119).

The respondent, the Western Empire Life Insurance Company, is a corporation organized under the laws of the State of Utah as an "Old Line Legal Reserve" insurance company for the sole purpose of writing life insurance, health and accident policies. A. A. Timpson was President of said corporation and also acted as a licensed salesman to sell the company's securities, which the company was offering to the general public at \$60.00 per share, the offer being made by an offering circular, or prospectus (Exhibit D-5).

On January 3, 1958, a letter was addressed to the respondent, Lincoln White, on the company's stationery, and signed by A. A. Timpson as President (Exhibit P-3) stating that any stock that Lincoln White purchased from the Western Empire Life Insurance Company at \$60.00 a share would be sold after April 1, 1958, for \$120.00 a share. Mr. White, on December 31, 1957, purchased 20 shares of appellant's stock, which were the property of a salesman, Maurice Timpson (Exhibit D-9 Check Stub 294). Subsequently, on January 3, 1958, he purchased an additional 40 shares.

It has been the contention of the appellant that A. A. Timpson was without authority to make such an agreement or issue such a letter (Exhibit P-3) to the respondent, Lincoln C. White; and it was and it is the contention of the appellant

that appellant, as an insurance company, could not act as a broker or purchase its own stock, and that the alleged contract by and between A. A. Timpson and the respondent was, and it is an illegal contract.

The court below did not enter judgment in favor of the respondent, Lincoln C. White, and against A. A. Timpson, the other defendant, but the court did enter judgment in favor of the appellant and against A. A. Timpson on appellant's cross complaint.

The record discloses that the plaintiff, Lincoln White, collected a 12½% or \$400.00 commission (R. 49) on the shares of stock purchased by him (R. 55). The record further discloses that the plaintiff was buying the stock on account of friends residing in Coolrado, and received checks in payment therefore (R. 61). The record further shows that A. A. Timpson delivered a copy of the circular or prospectus (Exhibit 5) to Mr. White when he first contacted him and that the plaintiff accepted the prospectus or circular (R. 91). Plaintiff denied, however, receiving the same.

## STATEMENT OF POINTS

### POINT ONE

THE COURT ERRED IN FINDING THAT THE DEFENDANT, A. A. TIMPSON, HAD AUTHORITY TO BIND THE DEFENDANT CORPORATION.

### POINT TWO

THE COURT ERRED IN FINDING THAT THE

PLAINTIFF DID NOT RECEIVE A COPY OF THE OFFERING CIRCULAR OR KNOW THE CONTENTS THEREOF.

### POINT THREE

THE COURT ERRED IN FINDING THAT THE ALLEGED CONTRACT WAS NOT CONTRARY TO LAW AND THEREFORE VOID.

### POINT FOUR

THE COURT ERRED IN FINDING THAT THE PLAINTIFF PURCHASED 60 SHARES OF STOCK FROM THE DEFENDANT CORPORATION AND FURTHER THAT THE CORPORATION GUARANTEED TO SELL 60 SHARES OF STOCK FOR THE PLAINTIFF.

## ARGUMENT

### POINT ONE

THE COURT ERRED IN FINDING THAT THE DEFENDANT, A. A. TIMPSON, HAD AUTHORITY TO BIND THE DEFENDANT CORPORATION.

The Court found that the president of the defendant corporation, A. A. Timpson, had authority to bind the corporation by the letter of January 3, 1958 (Exhibit P-3). It is submitted that the trial court erred in this finding.

In order for the Court to hold the corporation liable under the alleged contract, the plaintiff had to prove that the president, A. A. Timpson, had:



1. Express or implied authority to bind the corporation.
2. Apparent or ostensible authority to bind the corporation.
3. In the event the plaintiff could not show any of the above, then he would have to show ratification of the contract by the corporation.

The Court, under its Findings of Fact, number 6 (R. 115) found that Mr. Timpson, the president of the corporation, had no express authority from the Board of Directors to write, sign, or deliver such a letter as Exhibit P-3. The Court did find, however, that the making of such a contract was within the apparent or implied authority of the president. Such a finding is in error.

#### *Express or Implied Authority*

The plaintiff contends that the letter of A. A. Timpson was a guaraneted contract to sell the stock that he had purchased in the defendant corporation, and that under plaintiff's theory of the case, the letter was one of guarantee or suretyship on behalf of the corporation to pay plaintiff \$120.00 per share of stock on or after April 1, 1958 (R. 96).

The testimony and evidence established uncontrovertably that there was no express authority granted by the corporation to Mr. Timpson to enter into any contract with the plaintiff, or anyone, to repurchase stock (R. 115, Finding of Fact No. 6).

The law of agency and authority or corporate officers has been thoroughly passed upon by the courts of the United States. As stated in the annotation in 34 A.L.R. 2d 290, 291:

"Under the general rule that an officer of a corporation has no authority, merely by virtue of this office,

in the management of its business—that the president's duty is to preside at its meetings, the vice president's to do so in the president's absence, the secretary's to record the proceedings, the treasurer's to have custody of its funds—a corporation is not liable upon a contract of suretyship or guarantee made by an officer, in the absence of evidence that the contract was within the authority of the officer, as *expressly* or *impliedly* conferred upon him by statute, bylaw, or other act or acquiescence of its managing body, or was properly incidental to business entrusted to him by that body, or was within the ostensible authority as established by the practice of the company, or was ratified by the proper authority.” (Emphasis ours).

The plaintiff offered no proof or evidence whatsoever that the defendant, A. A. Timpson, was empowered to enter into any contract with the plaintiff, that the by-laws conferred this right upon him, or that the board of directors expressly or through acquiescence accepted such a contract. In fact, plaintiff merely presented the letter signed by Mr. Timpson and rested his case. He did not meet his burden of proof. There is no evidence, therefore, before the court that the defendant Timpson had implied authority to enter into such a contract.

The Supreme Court of the United States has ruled that in the absence of evidence of authority a salesman cannot bind his principal to a promise to repurchase securities. *Leach & Co. v. Lierson*, 275 U. S. 120, 72 L. Ed. (Adv. 75) 48 S. Ct. 57. It is admitted that there are those cases which do hold that the corporation is bound by the promise of an agent to repurchase or sell securities; however, it is interesting to note the observation made by the annotator in 34 A.L.R. 2d 515 in commenting:

"Even the most superficial examination of the authorities reveals that the courts are far more eager to protect the purchaser of securities than they are to protect the purchaser of other personal property. Many of these decisions were handed down in the 1930s and concerned stockholders who had never before been involved in stock transactions, and who knew nothing of what to reasonably expect would or could be included in an agreement for the sale of stock. A realization of the desperateness of their position relative to the position of a stock salesman is implicit in the rulings of the courts."

The plaintiff, in this case now before the court, is a person well versed in business and in the selling and buying of securities (R. 34, 37), and the fact that he required not one but three letters of guarantee (Exhibits P-1, 2, 3) shows that he was no novice to the business world.

This case, now before the court, also differs from any other case that the writers of this brief have been able to find, due to the fact that the agreement guaranteed the buyer a profit of \$60 per share or a 100% profit within a four-month period. Any person who would enter into such an agreement with anyone has certainly a duty to ascertain what authority such an agent making an agreement of that magnitude had. Failure to ascertain that authority would estop the purchaser of the stock from asserting the claim that he was an innocent purchaser.

### *Apparent or Ostensible Authority*

On the subject of apparent or ostensible authority, American Jurisprudence states:

"It is a fundamental and well settled rule that when, in the *usual course of the business of a corporation*, an

officer or other agent is held out by the corporation or has been permitted to act for it or manage its affairs in such a way as to justify third persons who deal with him in inferring or assuming that he is doing an act or making a contract within the scope of his authority, the corporation is bound thereby, even though such officer or agent has not the actual authority from the corporation to do such an act or make such a contract."

13 Am. Jur. 870, Corporations, 890  
(Emphasis ours).

The business of the defendant corporation is that of a life insurance company, not a stock brokerage house. One of the leading cases, *Stoneman v. Fox Film Corp.*, Mass. 4 N.E. 2d 63, 107 A.L.R. 989, points out the law with regard to activities of officers of a corporation which are without the scope of the corporation's authorized activities. In that case the corporation was organized to deal in film processing and developing and to own and lease land in connection therewith. The president of the company entered into a contract to buy and lease theaters and theater property. The Supreme Court of Massachusetts, in ruling that the corporation was not bound by the contract made by the president, stated:

"The burden was upon the plaintiff to show that the defendant was responsible for the representations upon which he relied. He must show that these representations were either made or ratified by those having authority to bind the defendant in these particulars." Citing cases. "It is apparent that no actual authority or ratification of this nature was shown."

The court then went on to say:

"The bylaws of the defendant gave William Fox, by virtue of holding the office of president, which included

that of general manager, no implied authority to negotiate for the leasing or acquisition of theaters.”

The bylaws of the Western Empire Life Insurance Company, Exhibit D-8, in enumerating the duties of the president, provide as follows:

“The president shall exercise the general supervision and direction of the affairs of the company. He shall preside at all meetings of the stockholders and of the board of directors at which he may be present. However, at his pleasure he may appoint another person to preside at any stockholders meeting.

“He shall, with the secretary, sign all certificates of stock and shall also execute any contracts or instruments in writing which the board of directors may lawfully authorize and direct.”

While it is true that the bylaws permit the president powers to carry on the business of the corporation, this does not mean that he can do things which are beyond the purposes for which the corporation was formed.

The *Stoneman v. Fox* case went on to say, in this respect:

“The president and general manager of such a corporation as the defendant, has no unlimited power but is restricted to doing those things which are usual and necessary in the ordinary course of the corporate business.” Citing cases.

American Jurisprudence states in its work on corporations:

“The strict rule laid down by a number of authorities is that the president of a corporation, aside from his duties as presiding officer at director’s meetings, has, by virtue of his office, no inherent power to act or

contract for the corporation greater than that of any other director. His authority must be derived from the corporation or the board of directors or by statute."

13 Am. Jur. 876, Corporations, 891

This rule is followed in the State of Utah. The case of *Lochwitz v. Pine Tree Min. & Mill. Co.*, 37 U. 349, 108 P. 1128, 1130, held:

"Under our statute, therefore, the president, as such, of a corporation, has ordinarily only the powers of a director, or such as may be directly conferred upon him by the Board of Directors."

The Supreme Court then quoted from 4 Thompson on Corporations 4619:

" 'The board of directors to whom the authority to bind the corporation is committed is not the individual directors scattered here and there, whose assent to a given act may be collected by a diligent canvasser, but it is the board sitting and consulting together in a body. Individual directors, or any number of them less than a quorum, have no authority as directors to bind the corporation. And this is equally the rule, although the director who assumed to do so may own a majority of the shares.' "

The plaintiff sought to show that Mr. Timpson was a principal stockholder of the defendant corporation. Under the Utah rule, it is of no consequence. The Massachusetts court in the *Stoneman* case cited above likewise ruled that ownership of stock makes no difference.

"No greater authority can be inferred from the circumstances that William Fox held a majority of the

voting shares of stock or that he held the power of domination of the corporation." Citing cases.

Stoneman v Fox Film Corp., Mass.  
4 N.E. 2d 63, 107 A.L.R. 989

The Utah case of Lochwitz v. Pine Tree Mining and Milling, cited above, further stated, with regard to the powers of the president:

"As we have pointed out, under our statute (Sect. 324. Comp. Laws 1907, now 16-2-21, Utah Code Anno., 1953) the powers of the corporation must be exercised by a quorum of the board of directors when assembled as a body. *The president, therefore, could not make a binding contract, nor modify an existing one unless authorized to do so by such a quorum.*" (Emphasis ours).

See also on this subject the Utah case of Copper King Mining Company v. Hanson, 52 U. 605, 176 P. 623.

As under Utah law the president could have no apparent authority, did he then have any ostensible authority? As stated before, under the plaintiff's theory, this alleged contract is one of guaranty. The Michigan case of In Re Union City Milk Company, 329 Mich. 506, 46 N.W. 2d 361, 34 A.L.R. 2d 283, plainly sets forth the law with regard to guarantees and ostensible authority.

"The ostensible authority of the general manager was limited to the conduct of the business for which the corporation was formed.

"Authority to bind the principal by a contract to guaranty or suretyship is not ordinarily to be implied from the existence of a general agency. In 2 CJS, Agency, Sect. 106, p. 1269, it is said: ' . . . such a

contract is extraordinary and unusual and so not normally within the powers accruing to an agent by implication however general the character of the agency; ordinarily the power exists only if expressly given. Consequently a manager, superintendent, or the like, of business or property cannot ordinarily bind his principal as surety for third persons.' "

*Duty to Ascertain Extent of Agent's Authority*

The plaintiff knew he was dealing with the president of the defendant corporation. His testimony was that he, personally, did not know anything about the corporation, who the officers were, who the board of directors were, or what the financial condition of the company was (R. 35, 36, 37). He based his assumption of the status of Mr. Timpson being that of president of the corporation upon the information from one other individual and Mr. Timpson himself. As Mr. Timpson was, therefore, an agent of the corporation, the plaintiff had the legal duty of ascertaining the scope of the president's authority if he expected to hold the corporation liable under a contract executed by this officer.

"The general rule of agency that a person dealing with an agent must use reasonable diligence and prudence to ascertain whether the agent acts within the scope of his powers, and is therefore presumed to know the extent of the agent's authority, is fully applicable to persons dealing with another as the officer or agent of a corporation."

13 Am. Jur., 872, Corporations, 891

The plaintiff cannot blindly plunge into a contract with an agent or officer and then seek to hold the corporation liable, when a phone call or inquiry to the directors of the company



would have revealed the extent of the authority of those who would bind the corporation.

"The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and like a railroad crossing suggests the duty to 'stop, look and listen', and if he would bind the principal he is bound to ascertain not only the fact of agency, but the nature and extent of the authority, and in case either is controverted the burden of proof is upon him to establish it. In fine, he must exercise due care and caution in the premises."

Brutinel v. Nygren  
17 Ariz. 491, 154 P. 1042

The plaintiff, by his own testimony, failed to use prudence or caution, but proceeded blindly.

The Supreme Court of Utah has settled this matter conclusively in the case of Aggeller v. Musser Seed Company, 73 U. 120, 272 P. 933, a case which involved the president of a Utah corporation entering into a lease agreement unknown to the other officers or directors of a corporation. In that case, this Supreme Court said:

"It does seem that where a party deals with the officers of a corporation with which it is wholly unacquainted, and of the existence of which it is not informed, it is not in a position to hold such corporation liable for the unauthorized acts of its officers."

American Jurisprudence states:

"A person dealing with a known agent is not authorized under any circumstances blindly to trust the agent's statements as to the extent of his powers; such person must not act negligently, but must use reasonable

diligence and prudence to ascertain whether the agent acts within the scope of his powers."

2 Am. Jur. 76, Agency, Sect. 95

Plaintiff's own testimony gives no doubt but what he acted with complete negligence in this matter and a complete lack of diligence to ascertain the extent of Mr. Timpson's authority (R. 36, 40, 41, 44).

American Jurisprudence goes on to state in its work on agency:

"It has accordingly been held that a corporation authorizing an agent to sell its stock and collect and turn over the money for it is not bound by his agreement to repurchase the stock, as the duty was upon the purchaser to acquaint himself with the extent of the agent's authority."

2 Am. Jur. 77, Agency, Sect. 95

This statement of the law has been sustained in the following jurisdictions and cases Paul Murry v. Standard Pecan Company, 309 Ill. 226, 140 N.E. 834; Morse v. Illinois Power & L. Co., 294 Ill. App. 498, 14 N.E. 2d 259; Eberlein v. Stockyards Mort. & T.Co. , 164 Minn. 323, 204 N.W. 961; Seifert v. Union Brass & Metal Mfg., 191 Minn. 362, 254 N.W.273; Overton v. First Texas State Ins. Co., Texas, 189 S.W. 514; Wright v. Iowa Power & L. Co., 223 Iowa 1192, 274 N.W. 892.

The Utah rule, based upon the statutes of this state which hold that an officer cannot bind the corporation without the consent of the board of directors (Lockwitz v. Pine Tree Min. & Mil. Co., cited above; Aggeller v. Musser Seed Co., cited above), would bring this state into the jurisdictions which hold that the officer cannot bind a corporation upon a promise to repurchase or resell stock.

## *Ratification*

A corporation, to ratify the acts of an officer who has done an act which he was not authorized to do, must meet certain requisites. These are: intent to ratify the actions of the officer and a knowledge of the material facts. *Aggeller v. Musser Seed Company*, cited above.

The plaintiff introduced no evidence that the corporation ever intended to ratify the contract, and, further, he did not show that the corporation knew of the contract or of the material facts of the transaction. As there is no evidence to sustain any contention of a ratification, this writer feels that no citations of authority are necessary.

## POINT TWO

THE COURT ERRED IN FINDING THAT THE PLAINTIFF DID NOT RECEIVE A COPY OF THE OFFERING CIRCULAR OR KNOW THE CONTENTS THEREOF.

The record shows that the plaintiff is operating a department store known as "FAIM" and that it is a million dollar institution (R. 37). The record further shows that the plaintiff sold 40 shares of stock of the defendant corporation to business associates in Denver, Colorado (R. 54), who paid for the shares by check (R. 54) but later backed out of the deal. In fact, the plaintiff admitted that the stock was purchased by him for them in the first instance (R. 55). The plaintiff denied any knowledge of the defendant corporation's activities, financial condition, or business. He further denied that he had ever

seen the offering circular (Exhibit D-5) or that he knew the contents thereof (R. 36, 56). Mr. Timpson testified that Mr. White received a copy of the offering circular (Exhibit D-5) (R. 91).

It is inconceivable that any business man would invest \$3,600.00 without some investigation. The plaintiff's story was that he did not even ask whether or not the company was selling insurance or whether or not the company was solvent or bankrupt or anything else. Such a story is hardly believable but when added to the fact that he sold it to business associates of his, the story becomes completely unbelievable.

The court erred in not finding that the plaintiff received the offering circular.

By receiving the offering circular, the plaintiff is estopped from denying the contents and the limitations of representations made by agents contained therein.

"The general rule is that one who deals with an agent, knowing that he is clothed with a circumscribed authority and that his act transcends his powers, cannot hold his principal, \* \* \* "

2 Am. Jur. 80, Agency, Sect. 99

The offering circular contains the written extent of authority of all agents selling stock of the defendant corporation.

"No salesman or any other person has been authorized to give any information or to make any representations on behalf of the company other than those contained in the offering circular, and if given or made such information must not be relied upon as having been

authorized by the corporation or its officers and directors.”

Offering Circular (Exhibit D-5)  
Western Empire Life Insurance Company

In *Schuster v. North American Hotel Company*, (1921) 106 Neb. 672, 184 N.W. 136, 186 N.W. 87, it was held that where a contract for the subscription of stock contains the provision that “no conditions, agreements or representations,” other than those printed in the instrument shall bind the company, the agents of the company, who sell the corporate stock and procure the execution of the subscription contract, clearly act outside the limits of their ostensible authority when they make an oral authority promise, as an additional stipulation and obligation of the company, that the company will, upon request, accept a return of the stock and repay the consideration, with interest; and the fact that the agents acted fraudulently in such a case would not fix responsibility upon the company.

The plaintiff had actual notice of the extent of the authority of the salesman who sold him the stock. This salesman being the president of the corporation would not in any way alter the actual notice. The burden of ascertaining the scope of the authority of the president was still upon the plaintiff.

In a California case similar to the one now before the court, *Kilbride v. Moss*, (1896), 113 Cal. 432, 45 P. 812, a director, large stockholder and vice president of a corporation agreed orally to purchase back stock if the purchaser wanted. The Court said:

“The corporation from which he purchased the shares of capital stock owed him no duty in the premises after such purchase was consummated, except the

general obligation to him, common with all other shareholders, to fairly and impartially conduct the business of the company in such a manner as would best promote the interests of all concerned. The corporation simply sold him 6,000 shares of its stock, and received payment therefor. This closed the incident so far as the company was concerned. It was the defendant who entered into the contract with him  
\* \* \* .”

### POINT THREE

THE COURT ERRED IN FINDING THAT THE ALLEGED CONTRACT WAS NOT CONTRARY TO LAW AND THEREFORE VOID.

Under the terms of the letter (Exhibit P-3), the defendant, A. A. Timpson, was to have sold the stock of the plaintiff. Plaintiff contends that this letter also meant the corporation. Plaintiff's theory as announced in open court by his counsel was to the effect that this letter was a guaranty to pay \$120.00 per share to the plaintiff for each share of stock he purchased from the defendant corporation. Who was to buy the stock or who was to sell the stock was immaterial. If the defendants could not find a buyer, then they were to buy it themselves. This theory makes this a contract not to sell, but one to buy. (R. 96).

The Utah law is clear and specific upon the conditions under which a corporation can repurchase its own securities.

“Purchase or redemption by company of own shares of stock—When allowable—Written agreement between company and shareholder.—A corporation may purchase or redeem one or more shares of any and all classes of its own capital stock in any of the following cases:

(a) To collect or compromise, in good faith, a debt, claim or controversy with any shareholder.

(b) From one who, as an employee, other than as an officer or director, has purchased the shares from the corporation under an agreement reserving to the corporation the option to repurchase, or obligating it to repurchase the shares;

(c) Upon the exchange or surrender of such shares for other shares in order to carry out provisions of its articles authorizing conversion of its shares;

(d) Upon a merger or consolidation with, or by distribution of the assets of, another corporation;

(e) Pursuant to a written agreement between the corporation and a shareholder thereof that upon the death of such shareholder the corporation shall purchase, redeem or cancel the shares of stock of the corporation owned by the shareholder, provided the following requirements are met:

(1) Within thirty (30) days next following the execution of said agreement, the following documents be filed with the secretary of state.

(a) A written notice of such agreement, which notice shall contain the name of the shareholder, the number and classes of shares to be purchased, redeemed or cancelled, the date of the agreement and the consideration to be paid by the corporation;

(b) An affidavit executed by an appropriate corporate officer reciting that there is no reasonable ground to believe that the corporation by the performance of such agreement will be rendered unable to satisfy its debts and liabilities when they fall due and that such agreement was not entered into for the purpose nor could it reasonably have the effect of impairing, defeating or delaying the payment of the just debts and obligations of the corporation;

(2) That the consideration to be paid by the corporation for such purchase, redemption or cancellation be no greater than the fair value of said stock, which shall be presumed to be the amount specified in the agreement, in the absence of clear and convincing proof to the contrary; and provided further, that nothing in this subsection shall be construed to impair the validity of any such purchase or redemption meeting the requirements of any other provision of this section;

(f) In any case where the use of the funds or property of a corporation for such purchase or redemption would not cause the impairment of that portion of its assets acquired as consideration for its shares or that portion which has been treated as payment for shares allotted as stock dividends."

16-2-16, Utah Code Annotated, 1953

The plaintiff offered no evidence and did not contend that any of the documents, required by law to be filed with the Secretary of State, State of Utah, had been filed or the provisions of the Utah law otherwise complied with to enable the corporation to repurchase its own stock.

The plaintiff offered no evidence as to the financial condition of the corporation as of April 1, 1958, the date of the purported repurchase, which would enable the corporation to repurchase its own stock in the event that the statute (16-2-16, Utah Code Annotated, 1953) had been complied with. There was nothing before the court upon which the trial court could base a finding that the corporation could repurchase its own stock without impairing the capitalization of the company.

The defendant corporation, as a matter of law, could not repurchase its own securities. Therefore, any contract which



obligates the corporation to do just that is, as a matter of law, void.

"It may therefore be said to be a fundamental principal of the law of contracts that a contract must have a lawful purpose and that transactions in violation of law cannot be made the foundation of a valid contract."

12 Am. Jur. 643, Contracts, 149

If this purported contract had been one of sale instead of buy, still it would have been unenforceable because of the "blue sky laws" of the State of Utah. They hold that only registered dealers and salesmen may sell securities within the State of Utah. 61-1-15, Utah Code Annotated, 1953, as amended by session laws of 1957. Certain sales are exempted under the provisions of 61-1-6. However, none are applicable to the facts in the case now before the court. This was not an isolated transaction, as seen from the various letters that the plaintiff had in his possession. Likewise, the defendant corporation could not act as the representative of the plaintiff as, according to the plaintiff, the corporation was obligated to buy the stock itself, and one cannot be a principal and an agent at the same time.

The plaintiff knew at the time of the purchase of the stock that the defendant corporation had no authority to sell its stock for \$120.00 per share. Therefore, there was a condition precedent to the formation of any contract, that is, approval for the sale of stock at \$120.00 from the Insurance Commissioner of the State of Utah.

In the California case of *Campbell v. Mulian Merger Mines*, 295 P. 1040, the court denied recovery to a buyer of stock where it was shown that at the time of the sale of the

stock, the buyer knew that the seller did not have permission from the securities commission to sell the stock. The court reasoned that the buyer was equally guilty of wrongdoing with the seller in violating the laws of the state, and therefore would not grant him any relief.

#### POINT FOUR

THE COURT ERRED IN FINDING THAT THE PLAINTIFF PURCHASED 60 SHARES OF STOCK FROM THE DEFENDANT CORPORATION AND FURTHER THAT THE CORPORATION GUARANTEED TO SELL 60 SHARES OF STOCK FOR THE PLAINTIFF.

The evidence shows that 20 shares of stock were purchased by the plaintiff on December 31, 1957 (Exhibit P-4, certificate No. 294). The plaintiff admits that the date on the certificate was correct (R. 50). The check issued by the plaintiff for the payment of the 20 shares was dated the 31st day of December and the bank stamps indicate one cancellation of January 2, 1958, another one of January 3, 1958, and a paid stamp showing a date of January 3, 1958. It is to be noted that the check was deposited with the Sugarhouse Branch of the Walker Bank and Trust Company. This necessitated the check going through the Salt Lake Clearinghouse and then to the First Security Bank of Utah, Main at First South Office. The "paid" stamp showing the date of January 3rd was affixed by the First Security Bank (31-1) when it arrived there on the 3rd of January after being cleared through the Salt Lake Clearing House on the 2nd of January, the earliest stamp appearing on the check.

The evidence further shows that the stock was purchased from Maurice D. Timpson and not from the defendant corporation (Exhibit D-9, check stub 294).

The letter of guarantee on which the plaintiff seeks to rely was not dated until the 3rd day of January, 1958, or some three days after the sale of the 20 shares of stock.

As these twenty shares of stock had already been sold to the plaintiff prior to the making of the agreement, there was no consideration for the making of the agreement and therefore as there is no consideration the contract, if there was one, fails for the lack of consideration. Further the letter of January 3rd specifically states that the offer was limited to stock purchased from Western Empire Life Insurance Company (Exhibit P-3). As the 20 shares of stock were the property of Maurice Timpson, the purchase was not from Western but from Timpson. Therefore, the only stock covered by the letter of January 3, 1958, Exhibit P-3, are the 40 shares, which are represented by stock certificate No. 368, Exhibit P-4.

The court erred in finding that the letter of January 3, 1958, Exhibit P-3, signed by A. A. Timpson, covered 60 shares of stock and that the guarantee to sell at \$120.00 per share was applicable to 20 shares of stock sold prior to the date of this letter and purchased from Maurice Timpson.

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