

1960

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

Utah Supreme Court

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White, Arnovitz & Smith; Attorneys for Plaintiff and Respondent;

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED  
MAY 31 1960

LINCOLN C. WHITE,

*Plaintiff and Respondent,*

vs.

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

*Defendants and Appellant.*

\_\_\_\_\_  
Clerk, Supreme Court, Utah

} Case No. 9156

\_\_\_\_\_  
REPLY BRIEF OF RESPONDENT  
\_\_\_\_\_

WHITE, ARNOVITZ, & SMITH

*Attorneys for Plaintiff and  
Respondent*

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REPLY BRIEF OF RESPONDENT

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STATEMENT OF CASE

The District Court entered judgment for the Respondent, Lincoln C. White, against the Appellant, Western Empire Life Insurance Company, for damages suffered by the Respondent for failure of the Appellant to comply with its agreement to sell Western Empire Life Insurance Company capital stock. Lincoln C. White had bought 60 shares of the capital stock from the Appellants between December 31, 1957 and January 4, 1958 at a price of \$60.00 per share or \$3600.00. The Appellant was

engaged in an intensive selling campaign of its capital stock, under the direction of its President, A. A. Timpson. The extent of the president's activity and management of the stock selling campaign appears from the Minutes of the Meeting of the Board of Directors of Western Empire Life Insurance Company. (Ex. 9) At a more appropriate place in this brief we will quote excerpts of the minutes in support of this statement. We refer particularly to the January 4, 1958 meeting (Page 45 of Ex. 9) to show that it was of utmost importance to the Appellant that it sell its capital stock. The company was making a special effort to sell its capital stock and get in the purchase price forthwith. In order to sell some stock and get in the money, the president of the Appellant entered into an agreement with the Respondent to resell at \$120.00 per share, any stock which the Respondent purchased at \$60.00 per share, such resale to be made after April 1, 1958. (Ex. 3) Exhibit 3 is on the official stationery of the Western Empire Life Insurance Company which lists A. A. Timpson as the President of the company and the letter is signed by A. A. Timpson as the President of the company.

The Respondent paid the purchase price of 60 shares and later requested Appellant to sell the 60 shares of capital stock for \$7200.00, less the commission. Appellant did not sell the stock and the

judgment against the Appellant results from the failure and breach of agreement.

Appellant contends that the agreement was not within the authority of the president of the company or at least that part of the agreement requiring the company to resell the stock was not within the authority of the president of the company. It is admitted that the president had authority to sell the stock and receive the money for the benefit of the company but the Appellant disavows that part of the contract by which the Appellant bound itself to sell the stock of the Respondent after four months, at an advance in price. Thus, the Appellant has taken the benefit of the contract, retained the purchase price received, has never offered to return the purchase price but wishes to disassociate itself from that part of the contract which required the Appellant to sell the capital stock.

APPELLANT COMPLAINS OF THREE FINDINGS MADE BY THE COURT. THESE FINDINGS OF FACT SHOULD NOT BE DISTURBED BY THIS COURT.

The District Court found as a fact that the contract made by the corporation through its president agreeing to sell capital stock to the Respondent and also agreeing after the expiration of four months that it would resell that capital stock so

sold to the Respondent to a third person at an advance in price was a contract within the authority of the president of the corporation. The District Court found that the president of the corporation was authorized by the Board of Directors to sell capital stock of the Appellant corporation and incidental to making such sales, to agree to making resale of that stock at an advance in price to a third person. (R. 115) That finding of fact numbered 6, reads as follows:

That the defendant A. A. Timpson, president of the defendant corporation was authorized by the Board of Directors of the said corporation to sell capital stock of the defendant corporation and that the agreement made by the defendant corporation with the plaintiff was within the scope of the apparent and implied authority of the defendant, A. A. Timpson, as president of the defendant corporation; that the first sentence of Section 1, Article XI of the By-Laws of Western Empire Life Insurance Company reads as follows:

“The President shall exercise the general supervision and direction of the affairs of the company.”

That the said A. A. Timpson was not expressly authorized by the Board of Directors of the defendant corporation to write, sign and deliver such a letter to the plaintiff.

Appellant argues that the court erred in finding that the president of the corporation had author-

ity to bind the defendant corporation. It seems to counsel for the Respondent that this specification of error is stated far more broadly than the Appellant intended. There could be no question that the corporation authorized its president to sell its capital stock. We are certain that defendant intended only to assert that the part of the agreement which obligated the Appellant to sell stock at an advance in price at a later date was beyond the scope of the authority granted to the president. It is admitted that the president of the company was an authorized salesman of the Western Empire Life Insurance Company to sell its stock. (R. 14) We refer to R. 96 where the following evidence appears:

Q. (By Mr. N. J. Cotro-Manes, Attorney for the Western Life Insurance Company) Were you a salesman for the company were you an authorized salesman?

A. Yes sir.

Q. Talk loud.

A. I was acting as salesman for the company.

Q. Were you duly licensed by the insurance company to sell this stock?

A. Yes.

With this admission that the Appellant authorized its president to sell its capital stock, the Appellant raises this narrow point:



The president of the corporation who was duly authorized to sell stock of the company, having entered into a contract for the sale of stock to the Respondent and having agreed as part of the contract of sale to resell the stock at an advance in price after the expiration of four months, is this latter provision of the single contract within the scope of the authority of the president of the Western Empire Life Insurance Company?

In addition to the express admission by the Appellant and its counsel above quoted (R. 96) that the president was authorized to sell stock, the minute book of the corporation (Ex. 9) contains repeated references to this authority having been granted to the president, in fact, the president was the guiding spirit in the sale of the company stock. Excerpts from the minute book of the corporation follow:

#### EXCERPTS FROM MINUTES OF MEETINGS OF THE BOARD OF DIRECTORS:

(9th Paragraph on Page 41 of Minute Book. (Ex. 9) Meeting of October 21, 1957)

“The new stock issue should be ready within the month. Mr. Timpson made mention that the stock available, \$300,000. would be more than needed at this time and suggested 5,000 shares be kept in the treasury and brought out next year at \$120. \$10.00 per

share to go to capital and \$110.00 into surplus. Mr. Burton made a motion that Mr. Timpson go into it with the attorney and actuary and bring their recommendations to the next Board meeting. Mr. Hollingsworth seconded the motion. Passed unanimously."

Paragraph 1 on Page 43 of Minute Book. Meeting of November 11, 1957)

"Mr. Harmon inquired as to whether or not the Commissioner would be willing at this time to approve the transaction. Mr. Timpson replied he had not contacted the Commissioner at present, but would wait until the financial statement was ready before taking it up with him."

Paragraph 5 on Page 43 of Minute Book. Meeting of November 11, 1957)

"Mr. Timpson stressed the importance of the first of the year statement as being most important to the Company, and that it was imperative that the \$30.00 a share stock be paid for by the end of the year. It is for the best good of the Company that the \$60.00 stock be sold and paid for also. This statement will determine whether or not the Company will qualify in other states."

(Paragraph 6 on Page 44 of Minute Book. Meeting December 6, 1957)

"Mr. Taylor Burton asked how long it would take to get the financial statement out after the end of the year. Mr. Timpson reported that it takes several weeks to close the books and that we expect to get the \$30.00

stock issue closed out and most of the \$60.00 issue collected for the financial report. There is \$40,000. outstanding on the \$30.00 issue and another \$180,000.00 to be sold of the \$60.00 issue of stock."

(Paragraphs 4, 5, 6, 7 — Page 45 of Minute Book — Meeting January 3, 1958)

Discussion of the stock issues before the close of the year's business ensued. Mr. Timpson reported Monday January 6, 1958 would be the last day of the money on the \$30.00 stock to be turned in and that it was desirable to get as much of the \$60.00 issue in by the end of the week as it would help the financial statement. Mr. Hollingworth stated it was a bad time of the year for everyone and that if they could take a little longer to get the money in it might help the sale of the stock.

Mr. Timpson asked the Boards opinion as to whether or not they should cut the \$60.00 issue now and go into the new stock issue program. We will be able to go into Idaho with \$50,000.00 of surplus. The low surplus which we have now is due to the low cost of the first issue of stock, and most of the surplus has been spent in Home Office Expenses, and the office equipment and fixtures cannot be shown as admitted assets on the financial statement. It will, therefore, be to the company's advantage to promptly close out with a new issue as soon as possible.

D. R. Norton raised the question of turning the sale of the stock over to a broker. Mr. Harvey Glade of Provo, Manager of Hogle Investment Company in Provo contacted Mr.

Norton in regards to the sale of this company's stock and thought he would like to handle the sale of stock for us. After much discussion, it was recommended that Mr. Norton look into the possibility of having Mr. Glade handle the sale of stock.

A motion was made by Keith Knight in accordance with the board's recommendation that the \$60.00 issue of stock now be withdrawn from the markets as of Monday at 5:00 p.m., January 6, 1958, and that Mr. Timpson seek the commissioner's approval to sell another issue of stock at \$120.00.

The motion was seconded by D. R. Norton and carried unanimously.

The president of the company being authorized to sell the stock, it was within the scope of his authority to do whatever promoted and accomplished sales of stock. The president contacted this Respondent to sell stock to him; the Respondent refused to purchase. (R. 30) The president of the Appellant corporation then suggested that if the Respondent would purchase stock, the corporation would sell the stock for him at a later date at an advance price. The Respondent would not accept an oral agreement to that effect and instead insisted that that part of the agreement must be in writing, signed by the corporation. (R. 31).

Two separate letters were executed purporting to make an agreement that the stock would be sold at an advance in price, but the Appellant refused to

accept these two proffered letters, but finally accepted a letter executed by the corporation. (Ex. 3) Respondent then paid the price upon receiving this written agreement. The sale could not have been made without the delivery of the agreement to resell the stock at an advance in price. (R. 31) This incidental agreement to resell the stock was basic to the agreement of the Respondent to buy the stock. This incidental agreement was connected with the authority that had been granted to the president to sell capital stock of the company. The agreement to resell the stock was an integral part of the agreement, pursuant to which the respondent purchased the stock. In the words of the late Justice Wolfe, his concurring opinion in *Skirl v. Willowcreek Coal Company*, 92 Utah 474 69 P. 2d 502 at 507<sup>2</sup> "The work which the agent is really authorized to do must be such that the act which he does and in regard to which his authority is in question is usual or incidental or of the same nature *or reasonably connected with that work or authority which he actually has. . . .*" (Emphasis added) "The apparent authority of an agent must be gathered from the facts and circumstances of the transaction as shown by the evidence. 21 R.C.L. 854" *U. S. Bond and Finance Corporation v. National Building and Loan Association*, 80 Utah 62, 12 P. 2d 758 at 760<sup>2</sup>.

In the instant case the facts and circumstances

bring it within that line of cases dealing with the sales of securities with accompanying agreements to resell or repurchase, in which cases the courts jealously regard the rights of the buying public. This subject is fully annotated at 34 A.L.R. (2d) 519 et. seq. The annotator there makes a distinction between the sale of tangible items of personal property accompanied by a provision in the contract that the seller would subsequently resell the item of personal property and the sales of intangible property such as securities also accompanied by such agreement to resell. The subject of that annotation which is also the subject of this Brief is stated as follows:

“Is an agent’s agreement made contemporaneously with a sale of personal property, that the property sold may be returned by the purchaser, or that the principal will repurchase the property from, or resell the property for, the purchaser, binding upon the principal, notwithstanding that the agent lacks express authority to so agree?”

At the very beginning of the annotation, the annotator makes this summary:

“The cases discussed herein fall naturally into two primary groupings — those involving sales of stocks, bonds, and other securities, and those involving sales of other personal property. Although the rules of agency applicable to sales of either type are identical, it is interesting to note that the results reached by the courts in litigation concerning sales of

securities differ significantly from the results reached when the matter at issue relates to sales of other personal property.

Thus, in connection with the securities sales transactions, courts in a majority of jurisdictions have taken the view that an agent's agreement that the purchaser may return the securities, or that the principal will repurchase them from him, or resell them for him, is binding upon the principal as within the agent's actual authority (that is, within the authority necessarily implied from the authority expressly conferred upon, though not itself a subject of express authorization) or within his apparent authority (that is, the authority which an innocent purchaser might reasonably expect him to have).

And even in instances in which there have been findings that the agent's agreement for the return, repurchase, or resale of securities was unauthorized, the courts, through application of the theory of ratification, have frequently granted the purchaser the relief to which he would have been entitled had the agreement been held to bind the principal: in these cases it has been held that the principal, by retaining the benefits of his agent's contract, is barred from denying the agent's authority to make the return, repurchase, or resale agreement which served as an inducement for that contract."

There follows in this annotation the cases which hold that if an agent is authorized to sell stock, that he has either implied authority or apparent authority to make the agreement to resell the stock. The

cases dealing with the sales of securities and which support this rule appear on Pages 515 through Page 519. Beginning on 519 following cases which the annotator states "appear to be a minority of jurisdictions" are found the cases which counsel for the Appellant has stated in his Brief at Page 16. Counsel has particularly referred to *Morse v. Illinois Power and Light Company* and *Murray v. Standard Pecan Company*, two Illinois decisions which are from the minority jurisdictions and it is evident from the statements by the annotator, at pages 520 and 521 that the only reason these cases held that it was not within the scope of authority of the agent to make an agreement to resell the securities was, that in each of these two cases the agent was not a general agent but merely a special agent. In those two cases, the sales were made by a salesman who was not an Officer of the company. The annotator at Page 520 states, "The stock salesman was, in the court's view a special agent with limited authority . . .".

It is clear therefore, that the president of the company who is authorized to sell capital stock of a corporation has implied authority to make a contract to either repurchase the stock or to sell it for the purchaser. The following appears at 2 Am. Jur. page 101, note 14.

"In *Wisconsin Lumber Co. v. Greene & W. Teleph. Co.* 127 Iowa, 350, 101 N. W. 742, 69 LRA



968, 109 Am St. Rep. 387, the plaintiff recovered in an action for the par value of certain shares of stock in the defendant company pursuant to a contract made in the name of the defendant corporation under its corporate seal, executed by the president and secretary, whereby the defendant agreed that in a certain contingency it would repurchase the plaintiff's stock and pay the par value therefor. As to the defense that the officers had not authority in fact to make the contract, the court said, *inter alia*: 'It clearly appears from the implied color which the answers must give in order that the defense may be considered at all, that these officers did in fact make the contracts as alleged in the petition, under the seal of the corporation, and that the defendant corporation has had and enjoyed the benefits of such contracts. This being true, the corporation cannot accept and rtify the contracts in so far as they were beneficial to it, and repudiate them in so far as they imposed any liability on its part. It accepted plaintiff's money on the strength of these contracts, and cannot, while retaining the same, be heard to say that its officers had no authority to make the contracts under which it was received. This is hornbook law.' "

There can be no question that Utah has this same rule. *Floor v. Mitchell*, 86 Utah 203, 41 P. 2d 281, holds that a corporation was bound by a separ-

ate collateral agreement to take the property sold, back, if it proved to be unsatisfactory, although a separate signed contract contained a provision that "The seller shall not be bound by any agreements or representations not contained in this agreement". This collateral agreement was never brought to the attention of the corporation. In the instant case the corporation did not deny that it was aware of the existence of this written agreement, Ex. 3. The annotation referred to cites this Utah case. Since our court has held that the collateral agreement in that case was within the implied and apparent scope of the authority of the traveling salesman, here the collateral agreement made by the president of the company and being the only written agreement, it is within the scope of the authority of the president of the corporation. Upon the authority of the case just cited, we respectfully submit that this court should affirm the decision of the District Court.

We now direct attention to some of the authorities cited by Appellants.

The quotation from 2 Am. Jur. 77 on Page 16 of Appellant's Brief reflects the minority view as is seen by reading further in the Am. Jur. Article on "Agency" Section 123, Page 101 and the 1959 Pocket Part Supplement to Section 123 (Page 14 of 1959 Supplement) We, therefore quote Section 123 with the supplement added portion :

Section 123. — Authority to Agree for Repurchase. — It is generally held that an agent who is authorized merely to sell personalty and to collect and turn over the money for the same has not the power to bind the principal by an agreement to repurchase the property, which promise is made by the agent as an inducement to the consummation of the sale. However, in most cases arising upon such an agreement to repurchase made by the agent, the courts, in order to conform with the justice of the situation, have granted relief to the purchaser on the theory that the principal, by accepting the purchase money or the proceeds of the sale, ratifies the agreement of the agent.

The courts in other jurisdictions have taken the view that an agent's agreement that the principal will repurchase the property or resell it for the buyer is binding upon the principal as within the agent's actual authority (that is, within the authority necessarily implied from the authority expressly conferred upon him, though not itself a subject of express authorization), or within his apparent authority (that is, the authority which an innocent purchaser might reasonably expect him to have).

The Lockwitz case cited by Appellant states the general rule that a corporation acts through its Board of Directors but here the by-laws gave special powers to the president and the board itself authorized the president to sell the capital stock. That case is not authority here because here we have only the narrow question whether the president acted

within the apparent or implied scope of the authority that was granted to him by the board of directors and the by-laws of the corporation.

*Aggeller v. Musser Seed Company*, cited by Appellant on Page 15 of its Brief (a three to two decision) is based upon the facts in that case. The majority opinion indicates that if the supervision and direction of the affairs of the company had been delegated to the president (as in this case), the decision of the majority would have been different. We have already quoted the finding of fact #6 of this court (R. 115), that the by-laws state: "That the president shall exercise the general supervision and direction of the affairs of the company". The majority opinion does not question the following authority quoted by the losing party in that case but simply states: "We are doubtful whether the facts disclosed by the evidence are sufficient to bring the case within the rule announced in the excerpts last above quoted". The excerpts quoted are at the top of Page 938 and are taken from Section 2033 and 2034, Fletcher Cyc. Corps. Volume 3 and they read as follows:

"The management of the entire business of a corporation may be entrusted to its president either by express resolution of the directors or by their acquiescence in a course of dealings. \* \* \* If the president is expressly named or appointed as general manager, or

if he be put in active charge of all or a part of the corporate business, or if he is held out or permitted to act in behalf of the corporation in all matters or in regard to matters in a particular place, then his authority is measured by the rules relating to the authority of general or branch managers and not by the rules relating to the authority of a president by virtue of his office. \* \* \* If the directors turn over the full and absolute management of all corporate affairs to the president and in no way interferes with his acts, he has power to do any act which the directors could authorize or ratify”.

The District Court, considering the facts and circumstances in the instant case, made the finding that the agreement of the Appellant corporation with the Respondent was within the scope of the apparent and implied authority of the president of the Western Empire Life Insurance Company. It is the responsibility of the trier of the facts to make the determination as to the scope and extent of the agent's authority. See subject “Agency” Vol. 2 Am. Jur., Section 454. It is there stated: “It is the settled general rule that this question of the scope and extent of the agent's authority is to be decided from all the facts and circumstances in evidence and is to be determined by the triers of the facts. The apparent authority of an agent to act as the representative of his principal is also to be gathered from all the facts and circumstances in evidence and

ordinarily this is a question of fact for the jury's determination". Authority cited for this statement is *U. S. Bond and Finance Corporation v. National Building and Loan Association*, 80 Utah 62, 12 P. 2d 758, 17 P. 2d 238. The 1959 cumulative supplement to this section cites for the same proposition, the Utah case of *Park v. Moorman Manufacturing Company*, 241 P. 2d 914, 40 A.L.R. 2d 273. At Page 919<sup>2</sup> of *Park v. Moorman*, the following statement appears: "The question, like other questions of implied or incidental authority is usually a question of fact."

The Judge of the District Court acting as the trier of the fact, has found that this agreement and the whole of it was within the authority of the president of the corporation. There is ample evidence in support of this finding and that finding should not be disturbed by this court. *Child v. Child*, 8 Utah (2) 261, 332 P. 2d 981, *Christensen v. Christensen*, 9 Utah (2) 102, 339 P. 2d 101. In making this finding of fact, the court must have considered that the president of the insurance company, having the authority to sell the capital stock, had the authority to perform collateral acts and make collateral agreements which are related to the responsibility of selling the capital stock. *Park v. Moorman*, 121 Utah 339, 241 P. 2d 914. We quote from Page 919:

"It is also evident that in order to get

this busines, McCullough had the authority common to all general managers to perform collateral acts which were incidental to this responsibility. As stated in Mechem on Agency, Section 1781: 'Wherever the doing of a certain act or the transaction of a given affair or the performance of certain business is confided to an agent, the authority to so act will, in accordance with a general rule often referred to, carry with it by implication the authority to do all of the collateral acts which are the natural and ordinary incidents of the main act or business authorized. The speaking of words, — the making of statements, representations, declarations, admission, and the like — may as easily be such an incident as the doing of any other sort of act.'

Further, 'Since the authority for the doing of these incidental acts, however, springs from the authority to do the main act it must ordinarily end with it. The incidental thing must be a part of the main thing. It must occur before the main act is completely ended: it must take place while that is still going on.'

In this case, McCullough's main authority was to sell the product and to train salesmen to sell it. In order to do this, certain statements were required to be made. Such statements sprang from the main authorization and, in this case, were a part of the main act; occurring before the main act of selling plaintiff was ended and in fact made while carrying out the main job of selling to the plaintiff."

## DISCUSSION OF POINTS 2 AND 4 IN BOTH OF WHICH APPELLANT CONTENDS THAT

## THE COURT ERRED IN MAKING CERTAIN FINDINGS.

In Point 2, Appellant complains that the Court erred in finding that the plaintiff did not receive a copy of the Offering Circular and in Point 4, that the Court erred in finding that the plaintiff purchased 60 shares of stock and also erred in finding that the offer to sell was with respect to 60 shares of stock rather than 20 shares of stock.

In connection with these contentions of Appellant, there is evidence in support of each of these findings of fact and again the finding of the trier of the facts should not be set aside. The testimony of the Appellant is that a copy of the Offering Circular was given to the Respondent and Respondent testified that he did not receive it. The court made a finding that the Respondent did not receive a copy of the Offering Circular. Against such a finding the case referred to at Page 19 of Appellant's Brief has no validity for in that case there was a subscription contract signed by the purchasers of the stock which contained provisions that "no conditions, agreements, or representations other than those printed above shall bind the company." In the instant case, there was no signed subscription contract or any fact which came to Respondent's notice that an agreement on the part of the company to resell the stock was beyond the scope of the author-



ity of the president of the corporation. Nor is the case *Kilbride v. Moss*, also cited at Page 19 of Appellant's Brief, in point as is evident from the quoted portion of the case. That case was brought against an officer of the company and there is nothing in the decision dealing with the question of the scope of authority of an agent of a corporation.

Appellant also complains that the court erred in making two other findings of fact. The court found that the Respondent purchased 60 shares of stock. (Ex. D-6) is for two checks, one of \$1200.00 and one of \$2400.00 or a total of \$3600.00 which represents the purchase price of 60 shares of the capital stock. The checks are those of Lincoln C. White, the Respondent in this case. The court found that he purchased these 60 shares of stock. The Respondent had intended transferring some of these shares of stock to some friends of his in Denver, Colorado, but it appeared that these friends later did not wish to take over these shares of stock. (R. 35)

It appears that these findings made by the District Court are supported by evidence and should not be disturbed.

POINT 3 OF THE APPELLANT IS THAT THE COURT ERRED IN FINDING THAT THE ALLEGED CONTRACT WAS NOT CONTRARY TO LAW.

The appellant argues this proposition from the viewpoint that this agreement obligated the corporation to redeem its own capital stock and that redemption of its capital stock would be violative of Section 16-2-16, U.C.A. 53. This collateral agreement to resell the stock does not constitute an agreement on the part of the corporation to redeem the stock. Even if it did, sub-division "F" of the quoted section of the statute would permit this corporation to redeem this stock. The evidence shows that redemption would not cause the impairment of that portion of its assets acquired as consideration for its sales. The court made a finding of fact that the corporation had a surplus of \$50,000.00 and that the payment of \$6120.00 for the purchase of such capital stock would not cause the impairment of that portion of the defendant corporation's assets which were acquired as consideration for its shares and then the court went on to conclude that the contract is not contrary to the laws of the State of Utah and is not an illegal contract. This finding of the court that the purchase of such stock would not cause the impairment of that portion of its assets acquired as consideration of its sales of stock is fully supported by the evidence. The Minutes of the meeting of January 3, 1958 already set forth in this brief, contains the following statement: "Mr. Timpson asked the Board's opinion as to whether or not they should cut the \$60.00 issue now and go into the new

stock issue program. We will be able to go into Idaho with \$50,000.00 of surplus". This showed that the corporation had a \$50,000.00 surplus and it is permitted to redeem this capital stock out of this surplus.

## CONCLUSION

Respondent respectfully submits that the three points in Appellant's argument deal with Appellant's contention that the court erred in making certain findings of fact. We have indicated that each of the findings are sufficiently supported by the evidence and we respectfully submit that these findings should not be disturbed.

Respondent does not believe that the agreement made by the Appellant was to redeem its own capital stock, but even if it was an agreement to redeem its own capital stock, it is legal for the corporation to do so inasmuch as the corporation had a surplus of \$50,000.00 at the particular time when it made this agreement.

We respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

WHITE, ARNOVITZ, & SMITH  
*Attorneys for Plaintiff and  
Respondent*