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George D'Ambrosio and Theresa D'Ambrosio v. Francis C. Lund : Brief of Defendant and Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

APR 8 - 1960

GEORGE D'AMBROSIO and
THERESA D'AMBROSIO,

Plaintiffs and Respondents,

vs.

FRANCIS C. LUND,

Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No.
9202

BRIEF OF DEFENDANT AND APPELLANT,
FRANCIS C. LUND

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SUBJECT INDEX

| | Page |
|---|------|
| STATEMENT OF FACTS | 3 |
| STATEMENT OF POINTS | 6 |
| Point I | |
| The trial court erred in failing and refusing to make any findings of fact upon the material allegations of defendant's answer because the evidence is clear and uncontradicted that the plaintiff George D'Ambrosio agreed to accept stock in Cottonwood Uranium Corporation for his \$500.00; and, that the evidence is clear that the defendant complied with his instructions from the plaintiff to purchase stock of Cottonwood Uranium Corporation..... | 7 |
| Point II | |
| The trial court erred in making findings of fact which are not supported by the evidence. | 10 |
| Point III | |
| The trial court erred in granting judgment to plaintiffs on the theory that the money received by the defendant was never invested in the uranium company as agreed by the parties and that the defendant has not accounted for said funds because such theory is a variance from the pleadings and defendant did not have an opportunity to meet such issue. | 14 |
| Point IV | |
| The trial court erred in denying defendant's motion to amend the judgment because considering all of the evi- | |

| | Page |
|---|------|
| dence most favorable to the plaintiffs, the evidence is insufficient to support any money judgment and the sole relief to which the plaintiffs are entitled is the delivery of the certificate of stock in Cottonwood Uranium Corporation. | 18 |
| ARGUMENT | 7 |
| CONCLUSION | 20 |

INDEX OF AUTHORITIES

CASES

| | |
|--|----|
| Gaddis Investment Company vs. Charles H. Morrison, (Utah) 278 P2d. 285 | 9 |
| Malstrom vs. Consolidated Theatres, (Utah) 290 P2d 689.. | 10 |
| National Farmers Union Prop. & Gas Co. vs. Thompson, (Utah) 286 P2d. 249 | 16 |
| Parowan Mercantile Company vs. Gurr, (Utah) 30 P2d. 207 | 8 |
| Rock vs. Gustaveson Oil Company, (Utah) 204 Pac. 96 | 18 |
| Taylor vs. E. M. Royal Corporation, (Utah) 264 P2d. 279 | 15 |
| Van Noy vs. Gibbs, (Utah) 318 P2d. 351 | 19 |

IN THE SUPREME COURT of the STATE OF UTAH

GEORGE D'AMBROSIO and
THERESA D'AMBROSIO,

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BRIEF OF DEFENDANT AND APPELLANT,
FRANCIS C. LUND

STATEMENT OF FACTS

During July of 1954 the plaintiff George D'Ambrosio first discussed the question of investment of money with the defendant, Mr. Lund. Mr. Lund was forming a number of different corporations at that time. Mr. D'Ambrosio asked Mr. Lund if he (Lund) ever ran into a corporation where he (D'Ambrosio) could invest some money, he would like to invest (R. 19).

Subsequent thereto, Mr. Lund told Mr. D'Ambrosio he was forming a corporation and inquired if Mr. D'Ambrosio would like to invest in it (R. 19). Mr. D'Ambrosio was purchasing the stock for an investment (R. 20).

There is considerable conflict in the testimony as to just which corporation Mr. D'Ambrosio was to invest in or at least what the name of the corporation to be formed was going to be. However, this conflict would seem immaterial inasmuch as the plaintiff George D'Ambrosio stated that he was notified that his money had been placed in Cottonwood Uranium; that he made no objection thereto; and that he considered that Mr. Lund was making the investment pursuant to Mr. D'Ambrosio's instructions (R. 21). The stock certificate in Cottonwood Uranium Corporation was not delivered until after the commencement of the lawsuit when said stock certificate was tendered and delivered to the Clerk of the Court to be delivered to the plaintiffs.

The plaintiff George D'Ambrosio gave Mr. Lund a check for \$500.00 on or about the 26th day of September, 1954, which fact was admitted upon pretrial. The \$500.00 was given by Mr. Lund to one Fred D. Kipp, who was a promoter and director of the corporation. Mr. D'Ambrosio's name was listed on the list of stock to be issued and the \$500.00 was placed in a bank account used by the incorporators by Mr. Kipp (R. 13). Mr. D'Ambrosio made several demands for his stock and each time a demand was made upon Mr. Lund by Mr. D'Ambrosio, he, Mr. Lund, would attempt to locate the officers and see if he could get the certificate issued and each time made a demand upon the corporation (R. 26-27).

In plaintiffs' original complaint (R. 1) plaintiffs alleged that defendant was given a check in the sum of \$500.00, which fact was admitted. The plaintiffs further alleged that the check was given for stock in a corporation to be formed by the defendant and alleged on information and belief that the corporation was never formed and that demand was made for the return of the money, which demand was refused and that defendant never tendered stock to the plaintiffs. The defendant answered, admitting that he had received the check in the sum of \$500.00 and denied each and every other allegation.

As a separate defense, the defendant alleged that the plaintiff George D'Ambrosio gave him instructions to purchase stock in a corporation which was to be formed by certain clients of the defendant. That the defendant purchased said stock pursuant to the instructions of the plaintiff George D'Ambrosio of Cottonwood Uranium Corporation, a Nevada corporation. That said stock has now been issued by the corporation and said stock was tendered to the clerk of the District Court to be delivered to the plaintiffs (R. 2).

At the pretrial of the matter, it was admitted that defendant got the check for \$500.00 for the purpose of purchasing stock. Plaintiffs claimed at pretrial that the defendant was liable for the refund of the \$500 with interest on two theories: First, that the corporation was never formed; and, Second, that in the event it was formed that the defendant failed to deliver the stock and that there was a difference in the value between the time when the stock should have been delivered and the present time, which would be the measure of damages and

that that amount is \$500.00. In defense, the defendant contended that the corporation was formed and that the corporation was Cottonwood Uranium Corporation of Nevada. Further, the defendant contended that the stock in Cottonwood Uranium Corporation was purchased pursuant to plaintiff George D'Ambrosio's instructions.

The case was tried before The Honorable Stewart M. Hanson, one of the judges of the Third Judicial District Court in and for Salt Lake County, State of Utah, sitting without a jury.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT ERRED IN FAILING AND REFUSING TO MAKE ANY FINDINGS OF FACT UPON THE MATERIAL ALLEGATIONS OF DEFENDANT'S ANSWER BECAUSE THE EVIDENCE IS CLEAR AND UNCONTRADICTED THAT THE PLAINTIFF GEORGE D'AMBROSIO AGREED TO ACCEPT STOCK IN COTTONWOOD URANIUM CORPORATION FOR HIS \$500.00; AND, THAT THE EVIDENCE IS CLEAR THAT THE DEFENDANT COMPLIED WITH HIS INSTRUCTIONS FROM THE PLAINTIFF TO PURCHASE STOCK OF COTTONWOOD URANIUM CORPORATION.

POINT II

THE TRIAL COURT ERRED IN MAKING FINDINGS OF FACT WHICH ARE NOT SUPPORTED BY THE EVIDENCE.

POINT III

THE TRIAL COURT ERRED IN GRANTING JUDGMENT TO PLAINTIFFS ON THE THEORY THAT THE MONEY RECEIVED BY THE DEFENDANT WAS NEVER INVESTED IN THE URANIUM COMPANY AS AGREED BY THE PARTIES AND THAT THE DEFENDANT HAS NOT ACCOUNTED FOR SAID FUNDS BECAUSE SUCH THEORY IS A VARIANCE FROM THE PLEADINGS AND DEFENDANT DID NOT HAVE AN OPPORTUNITY TO MEET SUCH ISSUE.

POINT IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO AMEND THE JUDGMENT BECAUSE CONSIDERING ALL OF THE EVIDENCE MOST FAVORABLE TO THE PLAINTIFFS, THE EVIDENCE IS INSUFFICIENT TO SUPPORT ANY MONEY JUDGMENT AND THE SOLE RELIEF TO WHICH THE PLAINTIFFS ARE ENTITLED IS THE DELIVERY OF THE CERTIFICATE OF STOCK IN COTTONWOOD URANIUM CORPORATION.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING AND REFUSING TO MAKE ANY FINDINGS OF FACT UPON THE MATERIAL ALLEGATIONS OF DEFENDANT'S ANSWER BECAUSE THE EVIDENCE IS CLEAR AND

UNCONTRADICTED THAT THE PLAINTIFF GEORGE D'AMBROSIO AGREED TO ACCEPT STOCK IN COTTONWOOD URANIUM CORPORATION FOR HIS \$500.00; AND, THAT THE EVIDENCE IS CLEAR THAT THE DEFENDANT COMPLIED WITH HIS INSTRUCTIONS FROM THE PLAINTIFF TO PURCHASE STOCK OF COTTONWOOD URANIUM CORPORATION.

In defendant's answer (R. 2) and in the pretrial order (R. 4) the defendant raised as an affirmative defense the issue that the defendant purchased stock in Cottonwood Uranium Corporation pursuant to the instructions of the plaintiff George D'Ambrosio and that said stock was issued and tendered to the Clerk of the District Court to be delivered to the plaintiffs. The trial court made no finding of fact with regard to these issues and made no finding as to what disposition should be made of the stock certificate in Cottonwood Uranium Corporation which was placed in evidence. The only finding of fact which could be considered as touching upon this matter is Finding No. 8, which reads: "There is no evidence that the \$500.00 given to the defendant by plaintiff ever went in to Cottonwood Uranium Corporation." Such finding is, of course, not supported by the evidence as will hereinafter be pointed out. The best evidence in the record as to whether or not the stock was purchased in Cottonwood Uranium Corporation is plaintiffs' Exhibit No. 2 which was admitted in the evidence and is a certificate of stock for 500 shares of \$1.00, par value, stock.

The Supreme Court of the State of Utah in the case of *Parowan Mercantile Company vs. Gurr*, (Utah) 30 P2d. 207,

held with regard to making findings on all material issues as follows:

The law is well settled that the findings when compared with the pleadings must be within the issues and be responsive thereto, and must cover the material issues raised by the pleadings, whether they arise because of allegations in the complaint and denied by the answer, or upon affirmative defense pleaded in the answer, or upon a counterclaim, denied by answer thereto or treated as denied, and this is required whether evidence be introduced or not upon such issues, and if there be no finding upon a material issue the judgment cannot be supported. (Citing cases).

In a later case decided after the adoption of the new rules, the Supreme Court of the State of Utah in the case of *Gaddis Investment Company vs. Charles H. Morrison*, (Utah) 278 P2d. 285, considered a case wherein the defendant's answer raised an issue of abandonment of the contract and the trial court made no finding with regard to such issue. The court held:

Utah Rules of Civil Procedure, Rule 52 provides: 'In all actions tried upon the facts without a jury * * * the court shall, unless the same are waived, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * * .' It appears that the judgment was based principally upon the findings that the contract was entered into and the commission had not been paid, totally disregarding defendant's answer to the complaint. It has been frequently held that the failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial. *Hall v. Sabey*, 58 Utah 343; 198 P. 1110; *Baker v. Hatch*, 70 Utah 1, 257 P. 673; *Prows v. Hawley*, 72 Utah 444,

271 P. 31; *Simper v. Brown*, 74 Utah 178; 278 P. 529; *West v. Standard Fuel Co.*, 81 Utah 300; 17 P.2d 292; *Pike v. Clark*, 95 Utah 235, 79 P.2d 1010.

We submit that the failure to make a finding with regard to whether or not the defendant purchased stock in Cottonwood Uranium Corporation was prejudicial to the defendant. A finding that such stock was not purchased could not possibly be supported by the evidence and a finding that the stock in Cottonwood Uranium Corporation was purchased pursuant to the instructions of the plaintiff George D'Ambrosio would, of necessity, require a conclusion of law that the defendant had complied with the instructions of plaintiff and consequently judgment should or would have to be entered in favor of the defendant with regard to the money judgment and judgment granting to plaintiffs their stock in Cottonwood Uranium Corporation would be the only judgment which could be supported by such a finding.

POINT II

THE TRIAL COURT ERRED IN MAKING FINDINGS OF FACT WHICH ARE NOT SUPPORTED BY THE EVIDENCE.

It is recognized by appellant that the cardinal rule on appeal with regard to the evidence supporting the findings of the trial court is that if there is any substantial evidence supporting the finding, it will not be disturbed. *Malstrom vs. Consolidated Theatres*, 290 P.2d. 689. However, the cases all recognize that there must be some substantial evidence to support any finding of fact.

We submit that the following findings of fact are not supported by any evidence and that some of them, as indicated, are contrary to the only evidence in the record with regard to the particular subject.

(a) That portion of Paragraph 3 which states that plaintiff George D'Ambrosio never appeared as a stockholder in any company as a result of the payment of the \$500.00 to the defendant.

(b) That portion of Finding No. 6 which states "to the best of plaintiffs' knowledge (Cottonwood Uranium) has no assets, that no other stock has been issued except the 500 share certificate to the plaintiffs which was delivered in July, 1958, after this action was begun."

(c) Finding No. 7.

(d) Finding No. 8.

The negative finding in finding of fact No. 3, that George D'Ambrosio never appeared as a stockholder in any company as a result of the payment of \$500.00 is contrary to the evidence. There is absolutely no evidence in the record which would justify such a finding. The only evidence with regard to whether or not George D'Ambrosio was a stockholder in Cottonwood Uranium Corporation is the testimony of Mr. Lund. When asked by plaintiffs' counsel, "Was an order ever put in to Cottonwood Uranium which was for \$500.00 worth of stock for Mr. D'Ambrosio at the time that it was incorporated?". Mr. Lund answered, "His name was listed, yes." Question: "In what manner was it listed?" Answer: "On the list of stock to be issued" (R. 13). The only other evidence

in the record with regard to whether or not Mr. D'Ambrosio was a stockholder in Cottonwood Uranium Corporation is the stock certificate itself, Plaintiffs' Exhibit No. 2, which was admitted in evidence (R. 30).

Finding of fact No. 6 makes two findings which are not supported by any substantial evidence. Such finding states, "To the best of plaintiffs' knowledge (Cottonwood Uranium Corporation) has no assets." A perusal of the testimony of the plaintiff George D'Ambrosio on both direct and cross examination (R. 16-22) indicates there is not one scintilla of evidence with regard to whether or not plaintiff had any knowledge as to whether or not the corporation did or did not have assets. No question was asked the plaintiff Mr. D'Ambrosio on either direct or cross examination concerning this issue. Nowhere in the record was the issue raised as to whether or not the corporation had any assets with the exception of one question which plaintiffs' counsel asked the defendant (R. 12). The defendant was asked, "Do you know whether the corporation has any properties at this time?" Answer: "No."

With regard to the issuance of stock, other than the 500 shares, there is no evidence in the record to support the court's finding that there was no other stock issued. The only reference made thereto is a question by plaintiffs' counsel (R. 15) wherein defendant was asked "Do you know whether the first 100 certificates were ever issued?" Answer: "No, I don't know."

Finding of fact No. 7 is the finding of an ultimate fact that said stock is without value. The transcript of the proceedings in this case is short, consisting of some twenty-two

pages (R. 7-29). A perusal of the entire record indicates that there is not one scintilla of evidence that said stock is without value. While finding of fact No. 7 seems to be a finding that the stock, as of the time of judgment, was without value, the record indicates that money was paid into the corporation at the time it was formed and that it had assets consisting of uranium properties at the time that it was formed (R. 10). Thereafter, no questions were asked with regard to the disposition of the assets or of the moneys that were paid into the corporation upon its formation. Thus, no direct substantial evidence exists in the record to justify finding of fact No. 7 that said stock is without value.

Finding of fact No. 8 is a negative finding that there is no evidence that the \$500.00 given to the defendant by plaintiff ever went into Cottonwood Uranium Corporation. This finding is not only not supported by the evidence, but is contrary to the only evidence in the record with regard to the disposition of the \$500.00. The testimony of the defendant, Mr. Lund, (R. 9 and R. 13) sets forth the disposition that was made of plaintiffs' \$500.00. In essence the testimony indicates that the money was given to Fred D. Kipp, a promoter and director of the corporation. The \$500.00 was placed by Kipp in a bank account used by the incorporators of Cottonwood Uranium Corporation. An order was put in to Cottonwood Uranium for \$500.00 worth of stock at the time it was incorporated and that the plaintiff George D'Ambrosio's name was listed on the list of stock to be issued. Further, the stock was issued and tendered into court.

There being no substantial evidence in the record to sup-

port the foregoing findings of fact, such findings must fail. The conclusions of law are not justified by the findings and, therefore, the judgment should be reversed.

POINT III

THE TRIAL COURT ERRED IN GRANTING JUDGMENT TO PLAINTIFFS ON THE THEORY THAT THE MONEY RECEIVED BY THE DEFENDANT WAS NEVER INVESTED IN THE URANIUM COMPANY AS AGREED BY THE PARTIES AND THAT THE DEFENDANT HAS NOT ACCOUNTED FOR SAID FUNDS BECAUSE SUCH THEORY IS A VARIANCE FROM THE PLEADINGS AND DEFENDANT DID NOT HAVE AN OPPORTUNITY TO MEET SUCH ISSUE.

The plaintiffs in this action proceeded to trial upon two theories: First, that the corporation was never formed; and, Second, that in the event it was formed that the defendant failed to deliver the stock and that there was a difference in the value between the time when the stock should have been delivered and the present time which would be the measure of damages and that that amount is \$500.00. Apparently, plaintiffs abandoned their second theory because there is no evidence at all in the record with regard to the value of the stock at different times nor is any finding of fact made with regard to the value of the stock at the time it should have been issued or at the time it was issued. No mention is made as to when the stock should have been delivered, nor is there any showing or finding that the defendant was under any duty to deliver the stock. With regard to the first theory, to-wit, the corporation

was never formed, the evidence adduced at trial shows conclusively that such corporation was formed and that the plaintiffs acquiesced in the purchase of stock in Cottonwood Uranium Corporation. The plaintiff George D'Ambrosio on cross-examination (R. 21) when asked, "You considered he was making the investment pursuant to your instructions at that time?" Mr. D'Ambrosio answered, "Yes." Mr. D'Ambrosio testified that he was notified that his money was being placed in Cottonwood Uranium, and, further, that he made no objection at the time he was told that his money was to be invested in Cottonwood Uranium.

The trial court's conclusion of law, to-wit, "The money was never invested in the uranium company as agreed by the parties and the defendant has not accounted for said funds," while, we submit, is not supported by the evidence as hereinbefore set forth, does set forth the theory upon which the trial court apparently felt that plaintiffs should have judgment against the defendant. It should be noted that the plaintiffs sought no amendment of his pleadings nor did he demand any relief in the nature of an accounting for said funds upon the theory that the money was never invested in the uranium company as agreed by the parties. This court in the case of *Taylor vs. E. M. Royal Corporation*, (Utah) 264 P2d. 279, considered a situation wherein the plaintiff sued to recover on an express contract and the trial court charged the defendant with liability under quantum meruit. This court posed the question and answered the same as follows:

Quaere: Under our new rules can one recover on a contract implied in law where he pleads and attempts to prove an express contract, seeking no amendment

of his pleadings, demanding no relief under and urging no claim under a quantum meruit or other theory?

Plaintiff says Rule 54(c)(1), Utah Rules of Civil Procedure resolves the question affirmatively. We disagree. The rule reads in part that " * * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. * * * "

* * *

It is true that our new rules should be "liberally construed" to secure a "just * * * determination of every action," but they do not represent a one-way street down which but one litigant may travel. The rules allow locomotion in both directions by all interested travelers. They allow plaintiffs considerable latitude in pleading and proof, to the point where some people have expressed the opinion that careless legal craftsmanship has been invited rather than discouraged. Be that as it may, a defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary's claims. Also he must be protected against surprise and be assured equal opportunity and facility to present and prove counter contentions,—else unilateral justice and injustice would result sufficient to raise serious doubts as to constitutional due process guarantees.

Again in the case of *National Farmers Union Prop. & Gas Co. vs. Thompson*, (Utah) 286 P2d 249, this court held:

Notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice, if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it. This is recog-

nized in Rule 15(b) which recites that such liberal amendments shall be allowed if the issue is tried "by express or implied consent of the parties."

We submit that it is self-evident that the defendant had no opportunity, in view of the status of the pleadings, to present evidence with regard to the investment of the \$500.00 or to account to the plaintiffs for said funds. At the conclusion of plaintiffs' case the defendant moved to dismiss on the grounds that the plaintiffs had not proved that they were entitled to recover. This motion was denied and thereafter the only testimony which defendant adduced was some testimony with regard to the name of the corporation and the fact that each time he received a demand from Mr. D'Ambrosio for his stock, that he attempted to locate the officers and get the certificate issued (R. 25-27). It was not until the findings of fact and conclusions of law were signed by the trial court that defendant had an opportunity to determine that the trial court was granting judgment on a theory not embraced within the pleadings or the pretrial order. Be that as it may, it would appear that in view of the status of the record and defendant's contention that the findings of fact and conclusions of law were not supported by the evidence that the judgment of the trial court will, of necessity, have to be reversed. However, should the court be of the opinion that the findings of fact are supported by the evidence and the conclusion of law, that the money was never invested in the uranium company as agreed by the parties and that the defendant has not accounted for the funds, is justified, we then submit that in view of the foregoing rules that the judgment of the trial court must be reversed and the defendant be given an opportunity to meet these issues.

POINT IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO AMEND THE JUDGMENT BECAUSE CONSIDERING ALL OF THE EVIDENCE MOST FAVORABLE TO THE PLAINTIFFS, THE EVIDENCE IS INSUFFICIENT TO SUPPORT ANY MONEY JUDGMENT AND THE SOLE RELIEF TO WHICH THE PLAINTIFFS ARE ENTITLED IS THE DELIVERY OF THE CERTIFICATE OF STOCK IN COTTONWOOD URANIUM CORPORATION.

A review of the entire transcript of the proceedings before the trial court and plaintiffs' complaint (R. 1) indicates that the matter the plaintiffs complain of was that the stock was never tendered to the plaintiff. The plaintiff admitted that when he was advised by the defendant, Mr. Lund, that his money had been invested in Cottonwood Uranium Corporation that he, the plaintiff, considered that Mr. Lund was making the investment pursuant to the plaintiffs' instructions (R. 21). The plaintiff indicated that numerous times he made demand upon Mr. Lund for the stock (R. 18). Even assuming that Mr. Lund, and not the officers of the corporation, was under a duty to issue the stock to the plaintiffs, and, we submit, that there is no evidence in the record that Mr. Lund had any such duty, still on the status of the record the plaintiffs are not entitled to recover a money judgment. The only measure of damages for the failure to deliver the certificate would be the difference between the market price when the plaintiffs were entitled to a delivery and the market price when delivery was actually made. See *Rock vs. Gustaveson Oil Company*, (Utah) 204 Pac. 96.

Furthermore, it should be noted that the plaintiffs could have dealt with their interest in the corporation at any time after its formation. The only evidence in the record with regard to the plaintiffs' ownership of an interest in Cottonwood Uranium Corporation prior to the time that the certificate of stock was issued and tendered into court was the testimony of Mr. Lund (R. 13) that Mr. D'Ambrosio's name was listed on the list of stock to be issued. We submit that this is sufficient to constitute Mr. D'Ambrosio a stockholder in the corporation, Cottonwood Uranium Corporation. Mr. D'Ambrosio in effect became a subscriber to stock in the Cottonwood Uranium Corporation and under the principles set forth by this court in the case of *Van Noy vs. Gibbs*, (Utah) 318 P2d. 351, would have allowed the plaintiffs, had they so desired, to sell or transfer their interest in the corporation without the necessity of having the stock certificate. In that case this court held:

It is generally held that stock certificates are evidence or muniments of title. Before stock certificates are issued, the subscribers to stock in a corporation own rights in respect thereto which may be sold or transferred. To hold otherwise would prevent a subscriber from dealing with his rights in a corporation prior to the issuance of stock certificates.

Therefore, we submit that there be no possible theory upon which the plaintiffs are entitled to a money judgment; that the judgment of the trial court should be set aside and a judgment of no cause of action be entered in favor of the defendant, Francis C. Lund. And, that it be ordered that the stock certificate in Cottonwood Uranium Corporation be delivered to the plaintiffs.

CONCLUSION

In view of the foregoing reasoning and authorities and the numerous errors committed by the trial court in this case, we submit that this matter should be remanded to the trial court with instructions to make findings that the defendant complied with his instructions from the plaintiff George D'Ambrosio to invest \$500.00 in a uranium company; that such money was invested in Cottonwood Uranium Corporation pursuant to the instructions of the plaintiff George D'Ambrosio and enter its judgment that the plaintiffs are entitled to a delivery of the 500 share stock certificate in Cottonwood Uranium Corporation which is in evidence. Or, in the alternative, that defendant should be granted a new trial.

Respectfully submitted,

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