

1961

# William D. Johnson v. Robert Crail, Henry M. Scheurn and Daniel S. Bushnell : Reply of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

MAR 10 1961

WILLIAM D. JOHNSON,

*Plaintiff and Appellant,*

vs.

ROBERT CRAIL, HENRY M.  
SCHEURN and DANIEL S.  
BUSHNELL,

*Defendants and Respondents.*

Clk. Supreme Court, Utah

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REPLY OF APPELLANT

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Case No. 9291

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REPLY OF APPELLANT

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Comes now the Appellant and here replies to Points II, III and IV of Respondents' Brief.

STATEMENT OF POINTS

POINT I

RESPONDENTS' CONTENTION THAT APPELLANT CANNOT RAISE THE ISSUE THAT ISSUANCE OF THE STOCK WAS NOT AN "ISOLATED TRANSACTION" ON APPEAL IS IN ERROR.

POINT II

RESPONDENTS' ARGUMENT THAT TRANSACTION WAS EXEMPT AS AN ISSUANCE TO A CORPORATION IS IN ERROR AND IS NOT A PROPER SUBJECT FOR THIS APPEAL.

## POINT III

RESPONDENTS' ARGUMENT THAT APPELLANT CANNOT QUALIFY UNDER THE STATUTORY CAUSE OF ACTION IS SPECIOUS, IN ERROR, AND NOT A PROPER SUBJECT FOR THIS APPEAL.

## POINT IV

THE STIPULATIONS ENTERED INTO AND APPROVED BY THE TRIAL COURT ARE BINDING UPON THE RESPONDENTS.

## ARGUMENT

## POINT I

RESPONDENTS' CONTENTION THAT APPELLANT CANNOT RAISE THE ISSUE THAT ISSUANCE OF THE STOCK WAS NOT AN "ISOLATED TRANSACTION" ON APPEAL IS IN ERROR.

In Respondents' Point II, we are told that Appellant has raised the issue of whether the complained of transaction was "an isolated transaction" for the first time on appeal. This is not the fact.

The order of the District Court dismissing Appellant's Second Cause of Action, which order is the subject of this appeal, was pursuant to motion of defendants, and by its terms was based upon consideration of briefs submitted to the respective parties. In the plaintiff's reply brief, there filed, the issue of "an isolated transaction" was argued.

As to that portion of the pre-trial order dated September 28, 1959, (R. 9) (Respondents' Brief P. 16), counsel for appellant moved the Court on October 12, 1959 that said paragraph be stricken "pursuant to the

provisions of 61-1-22, U.C.A. 1953.” (R. 13) This motion was denied October 22, 1959. (R. 14) The motion was again raised at subsequent pre-trial and taken under advisement (R. 23), but has never been acted upon except by implication in the courts pre-trial order dated April 25, 1960 (R. 25) and the order of dismissal appealed from (R. 27).

Section 61-1-22, U.C.A., 1953, provides, “It shall not be necessary to negative any of the exemptions or classifications in this chapter provided in any complaint, information or indictment or in any writ or proceedings laid or brought under this chapter, and *the burden of proof of any such exemption shall be upon the party claiming the benefit of such exemption or classification.*” (emphasis added)

This being the law, it did not appear equitable to impose upon plaintiff the limitations of the paragraph complained of.

However, even if the objectionable paragraph is permitted to stand, it does not by its language deprive the Appellant of the issue of “isolated transaction.”

In the Statement of the Case stipulated to by all of the parties to this appeal, (Supplemental Record, filed September 27, 1960, Page 1), it is stipulated as follows:

“Deeds of conveyance were received from Empire Mining Company, an Iowa Corporation, and W. D. Johnson, in consideration for which 40,000 shares of said stock were issued to W. D. Johnson, the plaintiff. Bills of sale were received from Fred B. Grube and Grube Harman Mining

Company, a partnership, for which 20,000 shares of said stock were issued to Fred B. Grube.”

In the objectionable paragraph in the pre-trial order, the trial court merely brands these two issues of stock as “a single transaction”. The cases cited on Page 12 of Appellant’s original Brief support the proposition that “an isolated sale means one standing alone, disconnected from any other.” The language of the paragraph in the pre-trial order compels a conclusion on the part of the plaintiff that the issue of 40,000 shares of stock to W. D. Johnson was not “an isolated transaction”. If the Respondents desired to make that claim the burden was upon them to prove it under 16-1-22, U.C.A., 1953.

## POINT II

RESPONDENTS’ ARGUMENT THAT TRANSACTION WAS EXEMPT AS AN ISSUANCE TO A CORPORATION IS IN ERROR AND IS NOT A PROPER SUBJECT FOR THIS APPEAL.

Respondents urge in Point III of their Brief that the sale of 40,000 shares of stock to W. D. Johnson was exempt for the reason that it was a sale to a corporation. They cite the trial court’s memorandum “Decision” (Supplemental Record filed November 4, 1960) as though it were conclusive on this factual question and binding on this Court.

The trial court made and entered this memorandum after hearing evidence as to whether the plaintiff was the real party in interest on the plaintiff’s *First* Cause of Action. The court severely curtailed what evidence it would hear from the plaintiff at that time, and as



it pointed out in its memorandum, the plaintiff “produced no evidence of being authorized to take title in himself for the stock.” This question was not fully explored. There was no reason for requiring further evidence on that subject, since defendants themselves prepared and issued to the plaintiff herein the stock certificates in question. If the issuance of them to this plaintiff was not proper, it was incumbent upon defendants to so show, they having the burden.

Pursuant to this memorandum “decision” the respondents prepared, and caused to be signed and entered, Findings of Fact, (Supplemental Record filed Nov. 4, 1960), the 6th paragraph of which stated in part “At the time of the alleged restitution or commencement of this action, the plaintiff was not the owner of the stock received from Prudential Oil & Minerals Company.” To this finding the plaintiff objected, and upon motion of plaintiff the entire paragraph was stricken from the findings of fact, and the trial court’s judgment there was confined strictly to the issues of the Plaintiff’s *First* Cause of Action (general fraud), and the necessary facts incident thereto, not to the second cause, now before this court.

The Appellant is entitled to his day in court in order to determine, among other things, the fact of ownership of said 40,000 shares of Prudential stock, under said second cause of action.



## POINT III

RESPONDENTS' ARGUMENT THAT APPELLANT CANNOT QUALIFY UNDER THE STATUTORY CAUSE OF ACTION IS SPECIOUS, IN ERROR, AND NOT A PROPER SUBJECT FOR THIS APPEAL.

Respondents' argument under Point III of their brief is somewhat comparable to the argument of the man who was convicted of murdering his mother and father, but urged the court to have mercy on him since he was an orphan.

That respondents' received valuable consideration for the 40,000 shares of Prudential stock is not denied. Whether the consideration came from the plaintiff directly or in part from some one else in his behalf, is of no moment, and may be decided by the trial court. The sole, material inquiry is, who received the stock and who possessed it at the time of the commencement of this action, all certificates running in favor of the plaintiff.

A condition precedent to recovery under 61-1-25, U.C.A., 1953, is the tender back to the seller of the stock. Only the recipient of the stock, in possession of the stock, could make such a tender. See *Prudential Oil & M. Co., Crail & Scheurn vs. Hamlin*, (1960) 277 Fed. 2d, 384, 387 and Rule 17 (a), U.C.A., 1953.

## POINT IV.

THE STIPULATIONS ENTERED INTO AND APPROVED BY THE TRIAL COURT ARE BINDING UPON THE RESPONDENTS.

The "Statement of the Case" stipulated to by the parties and approved by the trial court is binding upon the respondents. Said stipulated facts clearly state that, (1) the appellant executed a deed of conveyance in part consideration for the sale of the 40,000 shares of Prudential stock and (2) the said 40,000 shares of stock were issued to the appellant. Respondents can not now be heard to urge a contrary portion of a "memorandum decision" which was in existence at the time of said stipulation in order to defeat that stipulation. Points III and IV of Respondents' Brief are improper argument, out of order and not proper subjects for this appeal. See 50 Am. Jur., p. 612 and Pasco Holding Company v. Wells, 126 Fla. 339 171, So. 674.

### CONCLUSION

We respectfully refer to page 13 of our main brief, under the heading "Conclusion".

The issue of this appeal is joined in Point I of Appellant's brief and Point I of Respondents' brief. The remainder of the points raised and argued by respondents are without merit, and can only serve to confuse and mislead. The letters of the Attorney General do not treat the points in issue in this cause.

Respectfully submitted,

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