

1960

S. W. Morrison, Jr. v. Walker Bank & Trust Co. : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Samuel C. Powell; Attorney for Respondent;

Recommended Citation

Brief of Respondent, *Morrison v. Walker Bank & Trust Co.*, No. 9308 (Utah Supreme Court, 1960).
https://digitalcommons.law.byu.edu/uofu_sc1/3753

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Case No. ~~9380~~ 9308

**IN THE SUPREME COURT
of the**

STATE OF UTAH FILED
20 1960

S. W. MORRISON, JR., Co-Administrator of the Estate of Fannie P. Morrison, deceased,

Plaintiff and Appellant,

Vs.

WALKER BANK & TRUST COMPANY, a corporation, Administrator with the Will Annexed of the Estate of Chauncey P. Overfield, also known as C. P. Overfield, deceased,

Defendant and Respondent.

Respondent's Brief

SAMUEL C. POWELL,
Attorney for Respondent
614 Eccles Building
Ogden, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1 - 4
ARGUMENT:	
POINTS RELIED UPON:	
Point 1. THE TRIAL COURT DID NOT ERR IN REFUSING TO PERMIT TESTIMONY TO BE GIVEN BY S. W. MORRISON, AND IONE M. OVERFIELD UNDER SECTION 78-24-2, UTAH CODE ANNOTATED, 1953.....	4 - 11
Point 2. STATUTE OF LIMITATIONS THE ACTION IS BARRED BY EITHER THE PROVISIONS OF SECTION 78-12-25 OR SECTION 78-12-23 UTAH CODE ANNO- TATED, 1953	11 - 13
Point 3. LACHES THE PLAINTIFF IS GUILTY OF LACH- ES IN FAILING TO ASSERT AN AL- LEGED RIGHT	13 - 14
Point 4. STATUTE OF FRAUDS THE ACTION IS BARRED BY THE PRO- VISIONS OF SECTION 25-5-4 UTAH CODE ANNOTATED, 1953	15 - 18
Point 5. NO PROPER CLAIM AGAINST THE ESTATE OF THE DECEDENT UPON WHICH THIS ACTION IS FOUNDED HAS BEEN PRESENTED AS REQUIRED BY STATUTE	18 - 19

	Page
Point 6. THE ACT OF S. W. MORRISON, JR., AS CO-ADMINISTRATOR IN FILING THE PURPORTED CLAIM AND COM- MENCING SUIT THEREON IS INVALID..	19 - 20
CONCLUSION	20 - 21

INDEX OF CASES AND AUTHORITIES

STATUTES:

Section 75-7-1, Utah Code Annotated, 1953.....	2
Section 78-24-2, Utah Code Annotated, 1953.....	4, 5
Section 28-24-8, Utah Code Annotated, 1953.....	10
Section 78-12-25 Utah Code Annotated, 1953.....	11, 13
Section 78-12-23, Utah Code Annotated, 1953.....	11, 13
Section 25-5-4, Utah Code Annotated, 1953.....	15
Section 75-9-5, Utah Code Annotated, 1953.....	17, 18
Section 75-9-11, Utah Code Annotated, 1953.....	18
Section 75-11-1, Utah Code Annotated, 1953.....	19

CASES:

Maxfield vs. Sainsbury	
110 Utah 280, 172 Pac. 2nd 122	5
Porter vs. Dunn	
30 N. E. 122	10
Whitman vs. Foley	
25 N. E. 725	10
Severcool vs. Wilsey	
39 N. Y. Supp. 413	10
Hammond vs. Hopkins	
143 U. S. 224, 36 L Ed. 134	14
Dennison vs. McCann, et al (Ky)	
197 So. Western 2nd 248	14

	Page
Grotes Estate (Pa)	
135 Atl. 2nd 383	14
General Talking Pictures Corporation vs. Hyatt	
144 Utah 362, 199 Pac. 2nd 147	19
Utah Loan and Trust Co. vs. Robert Barbutt	
6 Utah, 342 23 Pac. 758	20

IN THE SUPREME COURT

of the

STATE OF UTAH

S. W. MORRISON, JR., Co-Administrator of the
Estate of Fannie P. Morrison, deceased,

Plaintiff and Appellant,

Vs.

WALKER BANK & TRUST COMPANY, a corporation,
Administrator with the Will Annexed
of the Estate of Chauncey P. Overfield, also
known as C. P. Overfield, deceased,

Defendant and Respondent.

STATEMENT OF FACTS

Fannie P. Morrison died on the 28th day of November, 1941. On the 6th day of December, 1941, a petition for Letters of Administration upon her estate was filed in the District Court of Salt Lake County, by S. W. Morrison, Jr., a son of the decedent, and Ione M. Overfield, a daughter of the decedent, requesting their appointment as administrators. On the 20th day of April, 1942, Letters of Administration upon her estate were issued to S. W. Morrison, Jr., and Ione M. Overfield, and since said time they have continued to act as such administrators.

In the petition it is alleged that the estate of the decedent consists of notes, accounts receivable, and choses in action, of the value of \$4,000.00. No inventory of the estate has ever been filed, (See Probate File Fannie P. Morrison), although under Section 75-7-1, Utah Code Annotated, 1953, the administrator must file and make a return to the Court, within three months after his appointment, a true inventory and appraisement of the estate of the decedent which has come to his knowledge and possession.

Chauncey P. Overfield died on the 14th day of July, 1958. He died leaving a will, which was admitted to probate in the District Court of Salt Lake County. Ione M. Overfield, his wife, was named as executrix thereof. She, however, waived her right to act as such executrix and petitioned for the appointment of Walker Bank & Trust Company as Administrator with the Will annexed. Walker Bank & Trust Company was appointed and qualified as such administrator with the Will annexed on the 7th day of August, 1958. Since then the Bank has acted as such administrator.

Notice to Creditors in relation to the Overfield Estate was published as required by law, and on the 29th day of January, 1959, the last day for presentation of claims, there was presented to the Administrator of the Overfield Estate, a Creditor's Claim by S. W. Morrison, Jr., as co-administrator of the Estate of Fannie P. Morrison, deceased. The claim is for \$44,415.34, and is purportedly for 16,395 shares of stock of Independent Coal and Coke Company, at \$1.00 per share par value, or \$16,395.00, and for dividends purportedly retained

over and above complete discharge of obligation for which the above stock was claimed to have been pledged as collateral, with interest at the rate of 6% per annum to January 20, 1959, in the amount of \$28,020.34. The claim was disallowed and rejected by the Walker Bank & Trust Company as administrator of the estate of Chauncey P. Overfield on the 29th day of January, 1959, and notice of rejection of the claim was given to S. W. Morrison, Jr., co-administrator of the Estate of Fannie P. Morrison, deceased, by the Walker Bank & Trust Company as Administrator with the Will Annexed, and notice of rejection of such claim was filed with the Clerk of the District Court of Salt Lake County, on the 30th day of January, 1959.

On the 29th day of April, 1959, S. W. Morrison, Jr., as co-administrator of the Estate of Fannie P. Morrison, deceased, filed a complaint in the District Court of Salt Lake County, against the Respondent herein, for an accounting of stock alleged to have been converted by the decedent, Chauncey P. Overfield, and for judgment against the Walker Bank & Trust Company, as such administrator in the amount of \$44,415.34, plus interest and costs, and later by an amended complaint it was alleged by S. W. Morrison, Jr., co-administrator of the Estate of Fannie P. Morrison, deceased, that Fannie P. Morrison had borrowed some \$3,500.00 from Chauncey P. Overfield, and to secure the payment thereof had delivered to the said Chauncey P. Overfield, as Trustee under an express trust or a trust implied by law, approximately 16,136 shares of capital stock of Independent Coal and Coke Company, with a further allegation that the stock was to be held by him

as such trustee until said loan shall have been repaid through the application of dividends declared upon the stock.

The amended complaint further alleges that during the lifetime of Chauncey P. Overfield, he received dividends from said stock sufficient to re-pay the loan and interest on said purported loan, and the amended complaint alleges that he refused to return the stock to the plaintiff or to account for the value of it; that the stock was transferred between May and November, 1941 to Ione M. Overfield and to the two daughters of Overfield. It is claimed that Fannie P. Morrison and S. W. Morrison, Jr., as such administrator, had no knowledge of such transfers.

The Walker Bank & Trust Company, as administrator with the Will annexed of the decedent, Chauncey P. Overfield, denies that a loan was ever made by Overfield to Fannie P. Morrison, as alleged herein, denies that Overfield ever received stock in his lifetime, or that there was a trust ever created as alleged, and denies that he transferred, or caused to be transferred, the stock allegedly belonging to Fannie P. Morrison, to Ione M. Overfield, his wife, and to his daughters, and sets up further defenses which will be set forth in the argument.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN REFUSING TO PERMIT TESTIMONY TO BE GIVEN BY S. W. MORRISON AND IONE M. OVERFIELD UNDER SECTION 78-24-2, UTAH CODE ANNOTATED, 1953.

At the trial of this case it was stipulated and admitted by both the plaintiff and the defendant that Ione M. Overfield is the wife of C. P. Overfield, and that Ione M. Overfield is the daughter of Fannie P. Morrison, and that S. W. Morrison, Jr. is the son of Fannie P. Morrison, and both are heirs and beneficiaries in the estate of Fannie P. Morrison, deceased, (Tr. 16), and as a matter of fact, and it is not disputed, that they are the sole heirs and beneficiaries of the estate of Fannie P. Morrison. Both S. W. Morrison, Jr. and Ione M. Overfield derive their interest in said estate from their mother, Fannie P. Morrison, and subject to the rights of creditors, the costs and expenses of administration, they will be the recipients of all the property belonging to the estate of their mother, Fannie P. Morrison.

In the case of *Maxfield vs. Sainsbury*, 110 Utah 280, 172 Pac. 2nd 122, which is cited by the appellant and construing Section 78-24-2, Utah Code Annotated, 1953, it is stated as follows:

“The purpose of the statute is to guard against the temptation to give false testimony in regard to a transaction with a deceased person by the surviving party when the transaction is involved in a law suit and death has sealed the mouth of the other party.”

In this case the co-administrator of the estate of Fannie P. Morrison, deceased, is seeking judgment against the administrator of the Overfield estate and if successful there would be subtracted from the Over-estate assets now claimed by the Overfield Estate, and which are part of the Overfield estate.

Continuing further in the opinion the Court states:

“For the purpose of clarification, we shall eliminate the parts of the statute which do not have a bearing on our question. It then reads:

The following persons cannot be witnesses:

* * * * *

(3) A party to any civil action * * * and any persons directly interest^d in the event thereof * * * when the adverse party in such action * * * claims or opposes, sues or defends * * * as the executor * * * of any deceased person, * * * as to any statement by * * * such deceased * * * person * * * which must have been equally within the knowledge of both the witness and such * * * deceased person unless * * * called to testify thereto by (the executor).”

Morrison is attempting to prove the transaction purportedly entered into with Overfield through his testimony and the testimony of Ione M. Overfield, wife of the decedent. At least this is the offer he is making. Morrison, as co-administrator, has a direct interest in this action and the alleged transaction involving the Overfield Estate. He is the plaintiff in this action. He is basing his claim for suit entirely upon an alleged transaction between himself and Overfield. He is offering testimony of a co-administrator. Whether he will be able to produce such testimony is problematical, but assuming it was produced, the other co-administrator has a direct interest in the action. The matters pertaining to the alleged transaction are equally within the knowledge of the offered witnesss and the deceased.

S. W. Morrison, Jr. and Ione M. Overfield, as individuals, are both interested directly in the transaction involved in this action and the outcome thereof. They will be the owners of all the property in the estate of Fannie P. Morrison after creditors are satisfied, funeral expenses paid and probate proceedings completed. Morrison and his sister do not have a small interest in the estate, they are to be the recipients of the whole estate. The degree of the interest which such witness has in the transaction and in the final adjudication of an action should be taken into consideration in determining whether such witness is eligible to testify against a deceased person. To permit testimony of such person and under such conditions opens the door for the giving of false testimony in regard to a transaction with a deceased person and nullifies the very purpose for which the so-called Dead Man's Statute was enacted.

The offered witnesses were properly excluded from testifying as to the purported agreement alleged to have been entered into between C. P. Overfield and Fannie P. Morrison in her lifetime.

Plaintiff claims the loan of \$3,500.00 to Fannie P. Morrison was consummated by C. P. Overfield; that Ione M. Overfield acted as agent. This the defendant denies, but assuming that the loan was made as alleged, defendant contends that the offer of testimony made by the plaintiff contradicts the alleged agency. It is stated (Tr. 18) in the offer that on the 5th day of May, 1941, Fannie P. Morrison, represented by Seth W. Morrison, applied to Ione M. Overfield for a loan of approximately

\$3,500.00. Ione M. Overfield, it is claimed, stated she would be unable to make such loan from her own personal funds, but would call her husband to see if he would. She was advised that *she* might make a loan (Tr. 19). Ione M. Overfield made the loan. She delivered a check, or checks, to S. W. Morrison, Jr., aggregating \$3,500.00. The stock was delivered to Ione M. Overfield (Tr. 19). Ione M. Overfield signed a paper, or receipt, acknowledging deposit of the shares of stock as collateral for the loan (Tr. 19). Later after the death of Mrs. Morrison, it is claimed, Overfield asked what the assets of the estate consisted. S. W. Morrison, Jr. listed various mining stocks and mentioned the stock pledged with Mrs. Overfield (Tr. 20).

Later in 1942, and in years subsequent thereto, it is claimed, S. W. Morrison, Jr., inquired of his sister, Ione M. Overfield, concerning the situation regarding the stock of the Independent Coal and Coke Company, and it is further claimed that Mrs. Overfield promised, or assured him that any matters in connection with the same would be taken care of or straightened out relative to the same. (Tr. 20).

The offer further states that Ione M. Overfield and C. P. Overfield either maintained a joint Bank account at the Irving Trust Company, or that funds in an account of Mrs. Overfield in fact were those of her husband, subject to withdrawal by her with his consent. (Tr. 20). The whole alleged transaction, according to the offer, was with Ione M. Overfield individually and not with C. P. Overfield. Whether the purported money loaned came from an individual account of Ione M. Overfield, or whether it came from a joint account with her

husband, or whether it came from an account of Mrs. Overfield, which was in fact her husband's, subject to withdrawal by her upon his express consent, is of little consequence to prove an agency. She made the purported loan according to the offer. She delivered the checks. The stock was delivered to Ione M. Overfield. (Tr. 20). There is no evidence or offer of evidence that C. P. Overfield ever came into possession of the stock. The stock claimed was transferred directly from the name of Fannie P. Morrison, prior to her death, to Ione M. Overfield and to her two daughters. Plaintiff admits that the stock was never in the name of C. P. Overfield. (Tr. 23). Ione M. Overfield and her daughters received the dividends alleged to have been paid from the year 1941, and apparently are still receiving the dividends therefrom. (Tr. 20).

Morrison, the co-administrator, claimed he had no knowledge that the stock had been transferred to Ione M. Overfield and her two daughters. As administrator of the estate of Fannie P. Morrison, he would, or should have known that the stock had been transferred to someone otherwise he, as administrator, would have been receiving the dividends during this time.

The burden of proof was upon the plaintiff to establish facts sufficient to sustain the complaint by preponderance of the evidence. These facts cannot be sustained upon mere speculation or inference. There is no evidence presented or offered to establish the claim upon which this action is founded.

The plaintiff cites certain authorities in which it is held that the husband or wife, acting as agent for the

other spouse, was competent to testify as to transactions had with a deceased person.

In the case of Porter vs. Dunn, 30 N. E. 122, the husband sued on a common law right to avail himself of the profit or benefit from the wife's services as a nurse for a deceased person, and in permitting the wife to testify the Court held that this was a right which was independent of any claim which the wife individually had and permitted the testimony.

In the case of Whitman vs. Foley, 26 N. E. 725, the husband had no interest in the claim, and the court permitted him to testify.

In the case of Severcool vs. Wilsey, 39 N. Y. Supp. 413, it was held that the spouse, as agent, had no interest in the matter direct or financial.

None of these cases are in point with the instant case. Both S. W. Morrison, Jr. and Ione M. Overfield stand to gain a direct financial interest if the claim of the co-administrator in the Morrison estate is established, and, therefore, neither of these persons should be permitted to testify in this matter.

We believe that the offer of testimony made by the co-administrator of Ione M. Overfield is overstated; that the co-administrator will be not be able to produce her testimony as offered. Further it is the contention of the defendant that Ione M. Overfield, wife of C. P. Overfield, would not be a competent witness under the provisions of the Statutes of the State of Utah, Section 28-24-8, Utah Code Annotated, 1953.

Plaintiff in his brief cites provisions of the Con-

stitution of the State of Utah, Sections I and II of Article I, and states that his rights have been violated because of his witnesses being barred from testifying. In answer to this, defendant contends that no constitutional rights of the plaintiff have been violated at his trial in the District Court because of the ruling that S. W. Morrison, Jr. and Ione M. Overfield were not competent to testify. He was permitted to offer testimony in proof of his action. He was not barred from prosecuting his claim. The mere fact that certain testimony offered was excluded under the law did not take away any of his constitutional rights.

POINT 2.

STATUTE OF LIMITATIONS

THE ACTION IS BARRED BY EITHER THE PROVISIONS OF SECTION 78-12-25 OR SECTION 78-12-23 UTAH CODE ANNOTATED, 1953.

The amended complaint of the plaintiff (paragraph 3) alleges as follows:

“3. During approximately May, 1941, said Fannie P. Morrison borrowed \$3,500.00 from said Chauncey P. Overfield and to secure payment thereof delivered to said Chauncey P. Overfield as trustee under an express trust or a trust implied by law, approximately 16,136 shares of capital stock of Independent Coal and Coke Company, a corporation, to be held by him as such trustee until said loan shall have been repaid with the right to apply the dividends upon said stock in repayment of said loan and under the

obligation to return said shares of stock to said Fannie P. Morrison upon repayment of said loan.”

The evidence introduced by the plaintiff clearly shows S. W. Morrison, Jr. was a stockholder of the Independent Coal and Coke Company from the month of March, 1941, through June, 1947. (Tr. 13). He was paid the same dividends per share as other stockholders on 1000 shares of stock owned by him during this period of time (Tr. 12). Under the allegations of the complaint the right to apply the dividends upon the stock in repayment of the alleged loan was granted with the obligation to return the stock to Fannie P. Morrison upon repayment of the loan.

S. W. Morrison, Jr., the co-administrator, is a man of business experience and well knew that the dividends on this stock would be payable to the person, or persons, in whose name, or names, the stock was registered on the books of the Company, and it must have been transferred to someone from the name of Fannie P. Morrison, otherwise he, as administrator of the estate of Fannie P. Morrison, would have received such dividends.

As a stockholder of the Independent Coal and Coke Company, he knew, according to the testimony introduced by the plaintiff, that applying the dividends declared and paid on the stock to the purported loan of \$3,500.00, with interest thereon at 6% per annum, the loan would have been paid off in December, 1943, (Tr. 21) and the obligation to return the stock accrued in December, 1943. Yet, knowing this, he took no legal action to obtain the stock. The Statute of Limitations

started to run in December, 1943, and the action became barred by either the provisions of Section 78-12-25 within four years thereafter, or under Section 78-12-23 within six years thereafter, so that even under the longest period of time, the claim, or action thereon, became due and was barred during the month of December, 1949. More than nine years beyond that time elapsed and after the death of C. P. Overfield, before S. W. Morrison, Jr., as co-administrator, asserted any claim to the stock. C. P. Overfield is not here to defend this action. His mouth is closed forever. The defendant will discuss the equitable side of this case in the succeeding point.

POINT 3.

LACHES

THE PLAINTIFF IS GUILTY OF LACHES IN FAILING TO ASSERT AN ALLEGED RIGHT.

While contending that the Statute of Limitations clearly applies, the defendant has also pleaded laches. The evidence shows that the plaintiff has slept on his rights. Years have passed without asserting alleged rights, and more than seventeen years since the alleged transaction. No action was taken by the plaintiff to assert the alleged rights during the lifetime of C. P. Overfield. He waited until after the death of Overfield to bring the action. Overfield was never given the opportunity of refuting the claim during his lifetime. He is gone. His estate cannot have the benefit of the evidence from him. It is prejudiced because of the dilatory acts of the plaintiff, and because of such delay the evidence which might be available in defense of this

action cannot be obtained. It was held in the case of Hammond vs. Hopkins, 143 U.S. 224, 36 L Ed 134:

“Where the seal of death has closed the lips of those whose character is involved and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence.”

In the case of Dennison vs. McCann, et al (Ky) 197 So. Western 2nd 248, a daughter's action to set aside a deed executed by her mother to another daughter on ground of undue influence was barred by laches, where daughter with knowledge of the deed admittedly waited bringing the action until after mother's death, a period of eighteen months. The Court said:

“Neither can it be disputed that her delay has closed the mouth of the principal participant in the transaction she is questioning. The time for her to have attacked the deed was prior to the mother's death.”

In re. Grotes Estate (Pa) 135 Atl. 2nd 383. The Court states:

“Laches arises when a defendant's position or rights are so prejudiced by length of time and inexcusable delay, plus attendant facts and circumstances, that it would be injustice to permit presently the assertion of a claim against him.”

POINT 4.

STATUTE OF FRAUDS

THE ACTION IS BARRED BY THE PROVISIONS OF SECTION 25-5-4, UTAH CODE ANNOTATED, 1953.

Section 25-5-4, Utah Code Annotated, 1953, provides:

“CERTAIN AGREEMENTS VOID UNLESS WRITTEN AND SUBSCRIBED.— In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

(1) Every agreement that by its terms is not to be performed within one year from the making thereof.”

The claim which was filed by S. W. Morrison, Jr. as co-administrator of the Estate of Fannie P. Morrison is as follows:

“16,395 shares of stock of Independent Coal & Coke Co. Wyo. at \$1.00 per share, par value	\$16,395.00
Dividends retained over and above complete discharge of obligation for which the above stock was pledged	28,020.34
as collateral, with straight interest at 6% per annum to January 20, 1959.	
TOTAL	\$44,415.34

This action is based upon a purported claim which

was filed in the estate of Chauncey P. Overfield. The claim is not founded upon any written instrument. The scope of the claim cannot be widened to include something beyond that which is stated therein.

Paragraph 3 of the Amended Complaint of the plaintiff in this action provides as follows:

“3. During approximately May, 1941, said Fannie P. Morrison borrowed \$3,500.00 from said Chauncey P. Overfield and to secure payment thereof delivered to said Chauncey P. Overfield as trustee under an express trust or a trust implied by law, approximately 16,136 shares of capital stock of Independent Coal and Coke Company, a corporation, to be held by him as such trustee until said loan shall have been repaid with the right to apply the dividends upon said stock in repayment of said loan and under the obligation to return said shares of capital stock to said Fannie P. Morrison upon repayment of said loan.”

It will be noted that under the allegations of said paragraph the alleged shares of capital stock of the Independent Coal and Coke Company were to be held by the alleged trustee until said loan shall have been repaid with the right to apply the dividends upon said stock in payment of said loan. It is evident from the evidence introduced in this case that this alleged agreement was not to be performed within a period of one year. The claim does not show that it was in writing. Neither is there any evidence introduced of any writing concerning this agreement. If there was any writ-

ten instruments concerning this alleged agreement, it was necessary that it be incorporated within the claim filed with the administrator of the estate of Chauncey P. Overfield.

Section 75-9-5 Utah Code Annotated, 1953, provides as follows:

“CONTENTS OF CLAIM — VERIFICATION. — Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant or someone in his behalf that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim is not due when presented, or is contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant he must set forth in the affidavit the reason why it is not made by the claimant. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the claim is founded on a bond, bill, note or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it is lost or destroyed; in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. - - - ”

In the offer of testimony by S. W. Morrison, Jr.,

co-administrator of the estate of Fannie P. Morrison, at the trial of the action, and after the pleadings were made by each party and the issues joined, an attempt is made to show that the loan was payable on or before one year after the making of the same. This is contrary to Paragraph 3 of the amended complaint. The plaintiff is bound by the claim and by the allegations of the complaint. Therefore, the agreement is void under the Statute of Frauds.

POINT 5.

NO PROPER CLAIM AGAINST THE ESTATE OF DECEDENT UPON WHICH THIS ACTION IS FOUNDED HAS BEEN PRESENTED AS REQUIRED BY STATUTE.

Section 75-9-11, Utah Code Annotated, 1953, insofar as it is applicable to this case provides:

“PRESENTATION A PREREQUISITE TO SUIT—ENFORCEMENT OF LIENS EXCEPTED.—No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, - - - -”

In the offer made by the plaintiff at the trial of this action it is asserted that some written instrument was executed pertaining to this alleged transaction.

Section 75-9-5, Utah Code Annotated, 1953, the contents of which are set forth in Point 4 of this Brief, requires that if the claim is founded upon a bond, bill,

note or other instrument, a copy of such instrument must accompany the claim and the original must be exhibited if demanded unless it is lost or destroyed, and if lost or destroyed, claimant must accompany his claim by an affidavit containing a copy or particular description of such instrument stating its loss or destruction. The plaintiff has failed to conform to the statutory provisions in presenting his claim.

This court in the case of General Talking Pictures Corporation vs. Hyatt, 144 Utah 362, 199 Pac. 2nd 147, held that the plaintiff had failed to comply with the statutory procedure for filing a claim against the decedent's estate in that it failed to accompany its claim with a copy of the instrument upon which the claim was founded, and that because of such failure, the claim was not sufficient under the statute to maintain an action against the executrix of the estate thereon.

POINT 6.

THE ACT OF S. W. MORRISON, JR., AS CO-ADMINISTRATOR IN FILING THE PURPORTED CLAIM AND COMMENCING SUIT THERON IS INVALID.

Section 75-11-1, Utah Code Annotated, 1953, provides as follows:

“WHEN THERE ARE SEVERAL NAMED OR APPOINTED. — When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust required by the will as effectually for every purpose as if all were

appointed and were acting together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state or laboring under any legal disability from serving, or if he has given his co-administrator authority in writing to act for both; and where there are more than two executors or administrators the act of a majority is valid."

In this case, there is no evidence before the Court that Ione M. Overfield was absent from the State of Utah at the time of the filing of the claim, or the filing of the action, or that she was laboring under any legal disability from serving as such co-administrator, nor is there any evidence before the Court that she has given Morrison, as co-administrator, any authority in writing to act for the both of them in making such claim and filing such suit.

In the case of Utah Loan and Trust Company, appellant vs. Robert Barbutt, respondent, 6 Utah, Page 342, it was held that the act of one executor in executing a lease was without authority, and the lease was invalid because his co-executor had not signed said lease, it being shown that the executors were within the Territory of Utah and free from any legal disability, and the executor signing said lease had no written authority from the other to sign such lease.

CONCLUSION

Defendant states that in view of the evidence which

was introduced in this case by the plaintiff and under the defenses pleaded and raised by the defendant, there are ample grounds to sustain the judgment of the Court in granting a non-suit upon the grounds that there was no evidence to substantiate the allegations and claims of the complaint. The judgment of the District Court should, therefore, be affirmed.

Respectfully submitted,

SAMUEL C. POWELL
Attorney for Respondent
614 Eccles Building
Ogden, Utah