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Jack E. Lake v. Robert J. Pinder : Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT OF
THE STATE OF UTAH**

JACK E. LAKE,

**Plaintiff and
Respondent,**

Clerk, Supreme Court, Utah

vs.

ROBERT J. PINDER,

**Defendant and
Appellant,**

Case No.

9382

STANDARD GILSONITE COMPANY,
a Utah corporation, and ROBERT M.
WILLIAMSON,

Defendants.

BRIEF OF APPELLANT

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STATEMENT OF FACTS

In the original complaint plaintiff, Jack E. Lake sued Standard Gilsonite, Pinder and Williamson. The latter were respectively President and Secretary of Standard Gilsonite but they were sued in an individual capacity. Williamson was never served and thus never became a party.

In the first complaint Lake alleged that Pinder

and Williamson, as trustees **for the corporation**, agreed to deliver 37,500 shares of Standard Gilsonite stock to plaintiff, and had violated their trust. He claimed to be damaged thereby. On June 11, 1959, plaintiff and Standard Gilsonite stipulated that Standard Gilsonite would deliver to Lake 6,500 shares of stock whereupon Lake would dismiss the action as to Standard Gilsonite Company. Accordingly, the action was dismissed as to Standard Gilsonite on the 15th day of June, 1959.

On February 1, 1960, without a motion or any notice to defendant Pinder, plaintiff amended his complaint, stating that Pinder, on behalf of the corporation, agreed to sell Lake 37,500 shares of stock; that Pinder then agreed to hold the same as trustee **for Lake**; that subsequently Lake and Pinder entered into a joint venture and that Lake agreed to let Pinder use Lake's stock to procure Pinder's contribution to the joint venture upon Pinder's agreement to replace the stock so borrowed; and that pursuant to this arrangement Pinder used 31000 shares of the stock he allegedly was holding for Lake, but that he failed to replace the same.

In his answer, defendant Pinder denied all material allegations of plaintiff's complaint.

At the trial the evidence was very conflicting. Lake testified substantially in accordance with the allegations of his complaint.

The so-called "trust" relationship between Pinder and Lake assertedly arose because on February

11, 1958, Standard Gilsonite Co. had agreed to trade 37,500 shares of its stock to plaintiff for 7,500 shares of stock owned by plaintiff in the L. H. & L. Mining Co. (T-60). Subsequently, plaintiff met Pinder, the president of Standard Gilsonite Co. (T-53) and on or about March 15, 1958, plaintiff delivered his L.H.&L. stock to Pinder in Denver, Colorado (T-66). In exchange, Pinder gave plaintiff a handwritten letter as follows, which was introduced as Exhibit 2:

"I hand you forthwith a receipt for 7,500 shares (Seven Thousand Five Hundred) L.H.&L. Mining stock as trustee to be delivered to Standard Gilsonite upon payment of Thirty Seven Thousand Five Hundred shares (37,500) of Standard stock. Said stock to be escrowed on delivery as mutually agreed.

**s/ R. J. Pinder
President Standard"**

It was uncontraverted that the L.H.&L. stock was actually delivered to Standard Gilsonite Co. by Pinder and that on January 19, 1959, Standard Gilsonite Co. issued the 37,500 shares in the name of Jack E. Lake in care of Standard Gilsonite Co (T-157).

Up to this point there is little dispute, except that Pinder denied that he held any property in trust for Lake except for the 7,500 shares of L.H.&L. stock which he took from Lake and delivered to Standard Gilsonite Co. (T-283, 305). Lake, on the other hand, claimed that Exhibit 2 constituted Pinder trustee of the 37,500 shares of Standard Gilsonite stock as well (T-185).

From this point on the testimony was conflicting on almost every detail.

Lake claimed to have owned the franchise for the State of Texas to distribute products manufactured by the Life Massage Co. (T-54). He testified that Pinder had expressed interest in the said company (T-54). The exact details of the alleged 'joint venture' into the Life Massage business are difficult to work out from Lake's testimony. At page 57 of the Transcript he testified:

" . . . he said that would be no problem to him to come up with that money, but he had to work it out when he returned to Denver, and I told him I would give fifteen percent interest in the company."

"So I told him he could have fifty percent interest in the company for putting up the necessary capital and he could take all of his money back out of the first earnings of the company . . . and then he told me no, that was too much. He said, 'I want you to run the operation.' He said, 'I'm not going to be active.' He said, 'I'll finance it. You will have to take care of all of the work of running it,' and he said, 'Let me have my finances back and I'll finance it'."

"THE COURT: 'Is this Pinder talking?"

- A. "Yes. He said he would be active and I won't be active.

"THE COURT: I heard you.

- A. "I said, 'Perfectly agreeable to me.'

"MR. TUFT: I can't hear you, Mr. Lake.

- A. "I told him it was perfectly agreement with me if that was satisfactory to him. That he would receive

a third of the income of the company. That would be net. I would give him one third after all of the operating expenses and he would get all of his financing back first. I would receive the expenses and living expenses until such time as he received his capital back."

There is no further testimony in the record with respect to the details of the alleged "joint venture" except Mr. Pinder's denial that a joint venture or partnership ever existed (T-284, 294, 306-307).

Evidence was also introduced which showed that on March 20, 1958, Pinder gave a check to Lake for \$1,000. On the back of the check was the legend, "Loan to be secured by Standard Gilsonite stock. Payable 6 months." Below this legend were affixed the signatures of Jack Lake and Stanley J. Lake. This check was introduced as Exhibit 26.

On April 9, 1958, Pinder gave Lake another check for \$1,000. On the back of this check was the word "Loan." Below appeared the signature of Jack Lake. This check was introduced as Exhibit 25.

There was also evidence that in addition to these two checks Pinder had advanced Lake \$500 by telegraphic money order (T-177) and an additional \$200 also in cash on another occasion. (T-292-93).

Lake explained these amounts first of all by admitting that they constituted loans to him personally (T-170). After the noon recess, however, Lake testified that the \$2,500 constituted an advance by Pinder for the Life Massage venture (T-188, 189). Lake also testified that he could not testify "Yes" or "No" as

to whether the checks were marked "Loan" when given to him. (T-171) (See also T-211 and 125).

Pinder stated that the checks and the other \$500 were personal loans which he made to Lake personally until Pinder could get to Texas to complete the sale of some of Lake's Standard Gilsonite stock which was at that time subject to escrow agreement with the company (T-285, 286), and further that the legends were on the backs of the checks at the time they were given to Lake (T-286). Pinder further testified that the loans to Lake were repaid to Pinder out of the proceeds of the first sale of Lake's stock. The testimony of both parties indicated that 31,000 shares of Lake's stock in Standard Gilsonite Company had been sold in two transactions. The first such transaction occurred on April 11, 1958. On that date through Pinder's efforts 16,000 shares of stock were sold to McGee Enterprises of Hereford, Texas at 25c per share. Lake testified that he signed an authorization for the company to transfer his shares (T-74). The authorization was introduced as Exhibit 22 and as follows:

STATE OF TEXAS

KNOW ALL MEN BY THESE PRESENTS:

"COUNTY OF DEAF SMITH

'The undersigned, Jack E. Lake, does hereby transfer and assign to McGee Enterprises, of Hereford, Texas, 16,000 shares of stock in Standard Gilsonite Co. and I do hereby authorize R. J. Pender or any other person named by Taft McGee to issue and deliver said stock of said corporation to the Said McGee Enterprises. The undersigned does hereby ac-

knowledge the payment of \$4,000.00 as the complete consideration for said stock and from this date on the ownership of said stock shall be in said purchaser regardless of the date of the issuance and delivery thereof.

"In Testimony whereof witness my hand on this the 11th day of April, 1958.

s/ Jack E. Lake

"THE STATE OF TEXAS

"COUNTY OF DEAF SMITH

"BEFORE ME, the undersigned authority on this day personally appeared Jack E. Lake, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

"GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 12th day of April, 1958.
(Seal)

s/ James W. Witherspoon
Notary Public in and
for Deaf Smith County,
Texas"

Thereupon, Lake received a check for \$4,000 (T-74). He then gave Pinder the check for \$4,000 and Pinder gave Lake a check in return for \$1,300 (T-76). The \$1,300 check was introduced as Exhibit 24.

Lake explained this transaction as follows:

That he met Pinder in Houston and asked him about the money Pinder was to put into their joint venture; that Pinder, to raise some money, proposed to borrow some stock from Lake and sell the same

to McGee and Witherspoon agreeing to replace the borrowed stock with stock of his own; that thereupon Pinder took the proceeds of the sale and gave Lake \$1,300 to cover Lake's expenses (T-73-76).

Pinder explained the transaction as follows, denying that any joint venture existed:

That as soon as Lake delivered his 7,500 shares of L.H.&L. stock he began to talk of the possibility of selling his Standard Gilsonite stock because the Life Massage business was more important to Lake; that Pinder told him that the Standard Gilsonite stock was in escrow because it was investment stock and was very difficult to sell; that Lake asked if Pinder knew of anyone who would buy it on a long range investment basis; that some people in Texas agreed to buy 15,000 or 16,000 shares; that Pinder could not get to Texas immediately to complete the transaction; that Lake would call Pinder 3 or 4 times a day about the stock; that Lake's financial condition was critical, and on one occasion he told Pinder that his car had been repossessed; that Pinder loaned Lake \$2,500 because he knew he could obtain repayment as soon as the sale was completed; that to protect himself he put the legends on the backs of the checks sent to Lake; that as soon as the transaction was completed and the stock sold, Pinder took the \$4,000 check from Lake and gave Lake his own check for \$1,300 plus \$200 cash, thus regaining the \$2500 which he had previously loaned Lake (T-285-287, 289, 291-299).

Pinder also denied that he had ever agreed to replace Lake's stock, and further testified that Lake had never asked him to replace any stock (T-295-296).

The parties also testified that on April 17, 1958, another transaction occurred in which 15,000 shares of Lake's Standard Gilsonite stock were sold for 30c per share. Lake testified that Pinder told him he'd have to sign another stock power. He further testified that he didn't understand the transaction until Lake's brother who was present explained it to him and said it was "a fair deal." Lake thereupon wrote and signed in his own handwriting, the authorization (T-81), which was introduced as Exhibit 21, and which stated as follows:

**"April 17, 1958
Houston, Texas**

**"First National Bank
of Hereford, Texas**

"Dear Sir,

"There is a check drawn on Mr. McGee and Mr. Whitherspoon account by a Mr. Pinder, in the amount of \$5,000.00 which is in for collection now, it is in payment of 15,000 shares of Standard Gilsonite stock, this letter is to serve as a stock power for said 15,000 shares of stock. I am sending this letter as stock power at the request of Mr. Pinder.

"Signature guaranteed

"By R. J. Pinder

Pres. Std. Gilsonite

**Sincerely,
s/ Jack E. Lake
Room 29
Buffalo in Hotel
9051 South Main St.
Houston Texas"**

This stock power then forwarded with a sight draft made payable to Jack E. Lake, which was honored (T-199). The proceeds were deposited by Lake in a bank account on which the only signatory was Lake (T-178). Both parties agreed that Pinder received none of the proceeds of the second sale (T-82,, 197-98).

Lake, however, claimed these proceeds were to be part of Pinder's contribution to the "joint venture" and that Pinder agreed to replace this stock with his own shares. Pinder again denied that a joint venture ever existed or was contemplated, and denied that he ever agreed to act as trustee of Lake's stock or to replace any of Lake's stock with his own (T-305).

With respect to the alleged joint venture, Lake testified that the business had not been successful because Pinder, who was supposed to contribute \$12,000 to \$13,000 only contributed the \$9,000 derived from the stock sales heretofore mentioned.

On cross examination Lake admitted that his was the only signature on the bank account opened in the company name in Houston, Texas (T-178), that he had never formed a corporation (T-179), that he had never taken a lease on any premises in Texas (T-179), that he used the money for his personal needs, except that \$2,600 had gone for equipment which was subsequently liquidated (T-179), in order for Lake to live (T-181), that he had never taken out a business license in Texas (T-199), and that he had

never filed any action for the damage he allegedly suffered in the Life Massage joint venture (T-201).

At the conclusion of the trial, the Judge, who sat without a jury, observed that there was a conflict in the testimony, and announced his decision as follows:

"THE COURT: I will tell you gentlemen there are a few things here, as you both agree, there is a conflict between the witnesses as to what this was, but there are a few things that I think I can attach to as being some indication to the clue of this matter. There is one matter, Mr. Pinder's story that he is repaying these loans out if this \$4,000.00, that all fits very well, but with the one exception I think these checks show that the writing on that one where the loan is secured by the stock is over the bank stamp. I think that is——

"MR. TUFT: Could we have that examined your honor?

"THE COURT: Well, just let me finish. I think that is quite clear, that it appears to me that writing is on top, which refutes the idea that there was a loan; that that check was given for that.

"Well now, we have an old rule of law and evidence that if a witness falsifies about one thing you can disbelieve his testimony on others. While Mr. Pinder's story of this loan — and it fits into the \$4,000.00 — would be quite convincing if it were not for the fact that I think that that is not borne out and the contrary is borne out by the writing on that check.

"MR. TUFT: Could we have it examined, Your Honor?

"THE COURT: You can have it examined, but I am not going to continue the trial for that.

"MR. McCULLOUGH: Can I point out one thing, if that contention be true, the endorsements are certainly not in the customary place.

"THE COURT: Yes, that is right. But that is quite clear that that is above the stamp. You can see the print underneath it.

"Now I think the best evidence here of what the value of this stock is what they sold it for and while there may be other sporadic sales for a dollar and later on some more I think the value that they agreed on at the time they sold this, whatever their arrangement was, is the best evidence of its value. That Mr. Pinder was to act as trustee of course the receipt shows that; so there must have been some trust. This \$5,000.00 that was received went into a bank account for this Life Massage, if I understand the evidence, and there are checks and a bank account to show that. The 31,000 shares that are in dispute and the 30c a share would be \$9,300.00 is the amount that I believe the plaintiff is entitled to and, for the reasons that I have stated, that will be the judgment, in favor of the plaintiff and against the defendant for the sum of \$9,300.00 and court costs."

Thereafter plaintiff presented Findings of Fact and Conclusions of Law and a judgment which were signed by the trial Judge on September 14, 1960. On September 21st defendant filed a motion to amend the Findings and Conclusions to conform to the Findings which the court announced from the bench. According to the terms of an affidavit of defendant's attorney, he also sought to present to the trial judge photostatic copies to demonstrate the condition of the two checks with respect to the

legends on the reverse side at the time they cleared the bank, which was rejected by the trial court.

STATEMENT OF POINTS

I

THAT THE FINDINGS OF FACT ARE CONTRARY TO THE EVIDENCE ADDUCED AT THE TRIAL.

II

THAT THE EVIDENCE IS IN SUFFICIENT TO JUSTIFY THE CONCLUSIONS OF LAW AND JUDGMENT.

III

THAT THE TRIAL COURT ERRONEOUSLY APPLIED THE MAXIM "FALSUS IN UNO, FALSUS IN OMNIBUS" TO DISCREDIT DEFENDANT'S TESTIMONY.

ARGUMENT

I

THAT THE FINDINGS OF FACT ARE CONTRARY TO THE EVIDENCE ADDUCED AT THE TRIAL.

Appellant respectfully submits that the Findings of Fact signed by the trial court are contrary to the evidence adduced at the trial in the following particulars:

a) The court erred in finding that defendant agreed with the plaintiff to deliver the L.H.&L. Mining Company "only upon the payment to the plaintiff of 37,500 shares of the capital stock of Standard Gilsonite Company." (T-16).

The foregoing statement advanced by plaintiff's counsel and adopted by the trial court does not even conform to the testimony of the plaintiff himself.

At page T-62 the plaintiff testified:

" . . . but the balance he (Pinder) would act as trustee and *he would not deliver my L.H.&L. stock until he made sure they would issue the 37,500 shares . . .* " (Emphasis added).

We submit there is a substantial difference in these two versions, inasmuch as the 37,500 shares were finally issued by Standard Gilsonite Company and it was never proved at the trial that defendant did deliver the L.H.&L. stock prior to such a time as he "made sure they would issue the 37,500 shares."

b) That the trial court erred in finding as a fact "that the defendant breached his trust agreement and delivered the plaintiff's L.H.&L. stock to Standard Gilsonite Company immediately upon his return to Salt Lake City from Denver, Colorado." (T-16).

In the first place the statement "that the defend-

ant breached his trust agreement" is properly a conclusion of law and not a finding of fact. In the second place, as noted above under subdivision a), even plaintiff's own testimony did not prove any breach of agreement on the part of defendant in delivering the L. H. & L. stock to Standard Gilsonite Company immediately upon his return to Salt Lake City, since the evidence did not show that at that time there was anything which would lead defendant to believe that Standard Gilsonite would not issue the 37,500 shares agreed upon to plaintiff. It is true that there was considerable delay on the part of the company in issuing the stock. The company secretary, whose duty it was to complete the transfer testified that the company experienced difficulty in accomplishing the transfer of the L.H.&L. stock (T-268). However, the record clearly shows that as soon as all requirements for the transfer were completed (see Exhibit 19, and also T-268-272), 37,500 shares of stock were finally issued to plaintiff on January 19, 1959 (T-157).

c) That the court erred in finding that "the defendant, Robert J. Pinder, agreed with the plaintiff that he would advance to the venture \$15,000 to provide capital for the organizational expenses, including the living expenses and expenses already incurred by the plaintiff, Jack E. Lake, while in training with the Life Massage and Home Equipment Company in Denver, Colorado. " (T-17).

According to the testimony of Lake, Pinder was to advance \$12,000 to \$13,000 (T-67, 127, 200; 201; 222). Furthermore, the record is totally devoid of any evidence which would indicate that the expenses already incurred by Lake in Denver were to be borne by Pinder, or were to come out of any funds advanced by Pinder.

d) That the court erred in finding that "Pursuant to this agreement the defendant advanced the sum of \$2,000.00." (T-17).

It is an elementary rule of law that a witness's testimony is no stronger than upon cross-examination. On cross-examination the plaintiff admitted that the \$2,000.00 advanced by Pinder were personal loans to the plaintiff (T-169, 170).

e) That the court erred in finding that "the defendant did not intend to deliver the stock to the plaintiff as agreed, but intended to defraud him of his stock." (T-19)

Any possible fraud on the part of the defendant was neither pleaded nor proved in this action. The Utah Rules of Civil Procedure require that the acts constituting any alleged fraud be set forth with specificity in the complaint. The only allegations of plaintiff's amended complaint with respect to the 31,000 shares of stock which defendant allegedly agreed to replace were "but that the defendant, Robert J. Pinder, has failed and refused to deliver the 31,000

shares of stock to which the plaintiff is entitled." (T-9, 10)

At the trial the defendant denied that he had ever agreed to replace any stock for Lake, and contended that the sales were for Lake's benefit and Lake received the proceeds thereof, less the amounts which Pinder had previously loaned to Lake.

It is respectfully submitted that the allegations of the amended complaint do not raise any issue of fraud, and that there is no evidence in the record to justify the court's finding in this respect.

f) That the court erred in finding that "the defendant did not cause the 37,500 shares of stock due the plaintiff to even be issued until May of 1959. That he thereafter caused the stock to be transferred to persons other than the plaintiff." (T-20).

The uncontroverted evidence shows that the stock was issued January 19, 1959 (T-157). Further evidence, which is also uncontroverted, shows that the defendant was not the active officer in arranged for the transfer of the stock of Standard Gilsonite Company, but that such was the duty of the company secretary, Robert M. Williamson, who actually performed the duty and received the shares from the transfer agent (T-268, 269).

Stipulations of plaintiff's counsel at the trial, and the testimony of Gale Holt, comptroller of Stand-

ard Gilsonite Company, who was produced as a witness on behalf of the plaintiff, indicate that 6500 shares of stock were delivered to plaintiff, and were traded by him on the open market (T-165, 166). The remaining 31,000 shares were covered by the two stock transfers previously executed by plaintiff personally. On March 4, 1960, a 15,000 share certificate issued in the name of Jack E. Lake was transferred to Taft McGee (T-162). On April 8, 1959, a 16,000 share certificate issued to Jack E. Lake was transferred to a Harold Dunn (T-158). The evidence indicated that a stock power covering these shares had been executed by plaintiff in favor of McGee Enterprises (See Exhibit 21).

While Mr. Dunn's connection with McGee Enterprises is not shown by the testimony, it is respectfully submitted that when the plaintiff executed the stock power he knowingly gave up his right to have those 16,000 shares issued and delivered to him by the company.

II

THAT THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE CONCLUSIONS OF LAW AND JUDGMENT.

The defendant respectfully contends that conclusion No. 2 "That the defendant is liable to the plaintiff for the reasonable value of the 31,000 shares of stock which has never been delivered to the plain-

tiff . . . " is not supported by the Findings of Fact or the evidence.

This case was tried on the theory that defendant, while acting as a trustee for plaintiff of 37,500 shares of Standard Gilsonite stock, converted 31,000 shares from plaintiff. (See T-8-10, 28, 92 160-161.) We submit that the Findings of Fact and plaintiff's testimony itself do not support the proposition that defendant was ever a trustee of plaintiff's Standard Gilsonite stock or the proposition that defendant converted any of the said stock. For convenience and clarity the foregoing matters will be treated separately.

a) As to whether defendant was a trustee for plaintiff of Standard Gilsonite stock.

Plaintiff's testimony with respect to the alleged trust of Standard Gilsonite stock, except for one variance, is well summarized in Finding of Fact Nos. 2 and 3, the important details of which are as follows:

a) On February 11, 1958, the Board of Directors of Standard Gilsonite Company approved the sale of 37,500 shares of stock to plaintiff in exchange for 7,500 shares of stock in L. H. & L. Mining Co. owned by plaintiff.

b) On March 15, 1958, plaintiff delivered his stock in the L. H. & L. Mining Co. to defendant in Denver, "and the defendant agreed with the plaintiff to take the said stock as trustee **and to deliver the same to Standard Gilsonite Com-**

pany . . .” (Emphasis added)

c) “The defendant requested that the plaintiff permit the defendant to receive the plaintiff’s stock **to be issued** in Standard Gilsonite Company as trustee for the plaintiff . . .” (Emphasis added)

d) That defendant represented to plaintiff that because of his knowledge of the market for said stock that he could arrange sales for the plaintiff at “the best possible price.”

e) “That the defendant did not take into his possession and custody the 37,500 shares of stock as he had agreed to do . . .”

Even viewing the foregoing in the light most favorable to plaintiff, these findings will not support a conclusion that defendant ever acted as a trustee of plaintiff’s 37,500 shares of Standard Gilsonite stock.

According to the Restatement of Trusts, Vol. 1, sec. 75:

“An interest which has not come into existence . . . cannot be held in trust.”

The comments on this section make the matter even clearer.

“a) An interest may not be in existence because the thing which would be the subject matter of the interest is not in existence, or because

although the thing is not in existence no one has an interest in it . . . A person can, it is true, make a contract binding himself to create a trust of an interest if he should thereafter acquire it; but such an agreement is not binding as a contract unless the requirements of the law of contracts are complied with. (See comment b).

“Thus, if a person gratuitously declares himself trustee of such shares as he may thereafter acquire in a corporation not yet organized, no trust is created. The result is the same where instead of declaring himself trustee, he purports to transfer to another as trustee such shares as he may thereafter acquire in a corporation not yet organized. In such a case there is at most a gratuitous undertaking to create a trust in the future, and such an undertaking is not binding as a contract for lack of consideration (see comment b). So also, if a person declares himself trustee of the next picture he will paint or the next calf his cow will conceive and bear, no trust is created.

'b) Liability on contract. If a person purports to declare himself trustee of an interest not in existence, or if he purports to transfer such an interest to another in trust, he is liable as upon a contract to create a trust if, but only if, the requirements of the law of contracts are complied with (See sec. 30).

"c) Where settlor subsequently acquires an interest. If a person purports to declare himself trustee of an interest not in existence or if he purports to transfer such an interest to another in trust, no trust arises even when the interest comes into existence in the absence of a manifestation of intention at that time (See sec. 26—intention to create a present trust)."

From the foregoing it should be clear that at the time of the meeting in Denver on March 15, 1958, no trust of Standard Gilsonite stock was created, inasmuch as plaintiff owned no stock in Standard Gilsonite Company at that time. The most that such a transaction could amount to is promise by defendant to create a trust in the future for the benefit of plaintiff. However, the Findings indicate that no consideration was given defendant for such promise, which was therefore gratuitous and unenforceable, even though plaintiff subsequently acquired an interest in the stock.

Furthermore, the Findings disclose that defendant never took possession of plaintiff's shares (T-16). The uncontroverted testimony at the trial indicated that the shares were never issued by Standard Gilsonite Company until January 19, 1959. Inasmuch as this action was commenced June 16, 1958, it is not likely, and it was not alleged, that there was any manifestation of an intention by defendant to hold any shares in trust for plaintiff after January 19, 1959.

The only trust shown by the evidence to have existed was with respect to plaintiff's shares of L. H. & L. Mining Company for the purpose of delivering the same to Standard Gilsonite Company. It is uncontroverted that the shares were so delivered. Furthermore, no damages were pleaded or proved with respect to any alleged breach of this trust.

b) As to whether defendant converted plaintiff's stock in Standard Gilsonite Company.

The alleged conversion of plaintiff's Standard Gilsonite stock arose out of two sales of plaintiff's stock to a Mr. Weatherspoon and his associates.

On April 11, 1958, plaintiff executed Exhibit 22 which purported to transfer 16,000 shares to McGee Enterprises of Hereford, Texas on a "when issued" basis. On April 17, 1958, plaintiff executed Exhibit 21, which plaintiff described as a stock power, to transfer 15,000 shares of stock to McGee and Wither-spoon.

Plaintiff testified that each of the sales were actually made for the benefit of the defendant, and that defendant agreed to replace the stock so transferred with stock of his own.

There are at least four reasons why these transactions do not amount to conversion by the defendant.

1) There can be no conversion of property not yet in existence.

In **Bertleson v. Van Deusen Bros. Co.**, 37 Idaho 199, 217 Pac. 983, the evidence disclosed that a man and wife named Berry had agreed to sell plaintiff the 1917 hay crop to be grown on their land at \$8.00 per ton. Plaintiff had tendered part payment. After the crop was grown and stacked the Berry's repudiated the contract, whereupon plaintiff measured the crop and tendered the balance, which the Berry's refused. Thereafter, they sold the crop to the defendant, who had no notice of plaintiff's prior dealing with the Berry's. Plaintiff brought suit against defendant in claim and delivery. At the trial judgment was awarded plaintiff against defendant, who appealed.

The Supreme Court of Idaho reversed, holding that the contract between plaintiff and the Berrys was executory at the time it was made, and that no title passed to plaintiff, without which they could not maintain an action for claim and delivery. The Court also indicated that the same result would obtain on a suit for conversion, and stated that the plaintiff's only remedy was to sue the Berrys for the breach of their contract to deliver the hay.

In the present case the evidence does not show the date at which plaintiff became entitled to receive 37,500 shares of stock from the Standard Gilsonite Company. The evidence merely shows that on March 15, 1958, plaintiff gave his L. H. & L. stock to defendant for delivery to the Standard Gilsonite Company (T-117); that it was delivered to the com-

pany sometime later; and that some delay and difficulty was experienced getting the L. H. & L. stock transferred into the name of Standard Gilsonite Company.

The uncontroverted testimony of the comptroller of Standard Gilsonite Company indicates that plaintiff's stock was not issued until January 19, 1959, which was long after the dates of all the transactions in question (T-157).

2) In order to prove a conversion of his stock, plaintiff must show that he had the right to possession of the stock at the time of the alleged conversion.

In **Christensen v. Pugh, 84 Utah 440, 36 P.2d 100**, the Supreme Court of Utah sustained a demurrer to plaintiff's complaint, where the complaint showed that plaintiff's stock with plaintiff's consent was subjected to a bailment which had never been terminated. See also **53 Am. Jur., Trover and Conversion, sec. 68** and cases cited therein.

The physical evidence adduced by plaintiff demonstrates that plaintiff's stock was to be escrowed (See Exhibit 1, T-355). Mr. Williamson, who arranged the exchange of stock with plaintiff testified that he (acting for Standard Gilsonite Company) and Lake had agreed to escrow the plaintiff's stock with Williamson for one year (T-261).

Lake himself admitted that an escrow was con-

templated (T-111) but stated that the escrow holder was to be his attorney or bank (T-112, 172).

Furthermore, as pointed out in the preceding subdivision, the evidence in this case does not show that plaintiff was entitled to have the stock issued to him by Standard Gilsonite Company at any time prior to January 19, 1959.

3) No action for conversion can be maintained where the plaintiff consents to the specific acts of defendant of which he complains.

Thus, in **Christensen v. Pugh, supra**, the Utah Supreme Court stated:

“In this action plaintiff pleads that he delivered or caused to be delivered, to defendant Pugh the property in question, to be used by Pugh as collateral in Pugh’s deal and business, for Pugh’s benefit, and not for plaintiff’s use, business or benefit. The transfer of possession was a willful and voluntary act of the plaintiff, and he cannot now assert that Pugh obtained possession in defiance of his title or his right of possession, and so maintain an action in conversion simply because Pugh may have had ulterior motives. It follows, therefore, that plaintiff’s first ground of conversion fails.”

In the present case the uncontroverted evidence discloses that plaintiff knew of the two sales of his stock and that he not only consented to such sales, but that he voluntarily executed the documents necessary to complete the sales. In fact the second sale was completed after plaintiff, who claimed he did not understand the transaction, had consulted with

his brother, and after plaintiff was advised by his brother that it seemed to be "a fair deal". (T-80-81)

4) Acceptance by the plaintiff of the proceeds of the sale of the property alleged to have been converted operates as a ratification or waiver of the alleged acts of conversion.

In the case of **Dimock v. United States National Bank, 55 N.J.L. 296, 25 Atl. 926**, Dimock and others had given the United States National Bank (hereinafter referred to as the bank) a note for \$50,000, which was secured by corporate stock. The note authorized the bank to sell the stock before maturity if 1) the market value of the stock depreciated below the loan balance, **and** 2) the promisors failed to pay the difference between the loan balance and the lower value of the stock after notice to do so. Prior to maturity of the note many banks failed, and the promisors were forced to make an assignment for the benefit of their creditors. At that time the market value of the stock had fallen below the loan balance. Instead of calling upon the promisors to pay the difference, the bank sent a notice to the promisors demanding payment of the note in full. Thereafter, but still before maturity of the note, the bank sold the stock and applied the proceeds to the loan balance. Several years later, this suit was brought by the bank to recover the deficiency.

The defendants alleged that the bank had converted their stock by its unauthorized sale of the stock, and sought to recover the highest value the

stock had attained between the date of the conversion and the time of the trial.

The Court of Errors and Appeals of New Jersey held that the bank had converted the stock by its unauthorized sale; that the correct measure of damages was the so-called "New York Rule," which the court stated to be the majority rule, and which would allow as damages the highest intermediate value of the stock between the time of the conversion and a reasonable time after the owner received notice of it.

However, the court also found that the promisors had notice of the sale immediately after the sale, and had never objected to the sale; and that on two occasions the promisors had set forth a list of their creditors which contained the name of the bank and showed as a balance due the bank approximately the difference between the loan balance and the proceeds of the sale. The court then said:

"The defendants had the election either to ratify the sale, and claim the benefit of it, or repudiate it, and hold the plaintiff in damages. The act of the defendants in applying the proceeds of the sale as a credit on the plaintiff's note is so positive and emphatic an act of ratification and adoption that it cannot be retracted."

The judgment was thereupon affirmed.

In the case now before the court the evidence and the Findings of Fact indicate that the plaintiff received the proceeds of the sales of the stock for

which recovery is now sought, except for \$2,500, most of which plaintiff admitted he had received from defendant as loans. (T-170)

Defendant respectfully submits that any one of the foregoing factors would preclude the court from finding that defendant had converted plaintiff's stock. It should also be remembered that the court found as a fact that defendant never took possession or custody of plaintiff's 37,500 shares of stock. Accordingly, it would be legally impossible for the defendant to act as a trustee of plaintiffs' stock, or to convert the same.

According to the case of **Christensen vs. Pugh, supra**, the most frequently quoted definition of conversion is:

"Conversion consists either in the appropriation of a thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the owner's right, or in withholding the possession of the property from the owner under a claim of title inconsistent with his own."

In view of the fact that defendant never took possession or custody of the stock, and that the plaintiff knew of the sales, consented to them, and received the proceeds thereof, it cannot be said that defendant did any of the acts contained in the above definition necessary to prove a conversion.

III

THE TRIAL COURT ARBITRARILY AND CAPRICIOUSLY APPLIED THE MAXIM "FALSUS IN UNO, FALSUS IN OMNIBUS" TO DISCREDIT DEFENDANT'S TESTIMONY.

During the course of the trial, the plaintiff testified that defendant, on three occasions, had advanced him funds totalling \$2,500. The plaintiff explained these, and the court found as a fact that they were part of a larger amount (\$15,000) which defendant was to advance plaintiff as organizational expenses, including living expenses of plaintiff in connection with the joint venture in the Life Massage business. Defendant, on the other hand, contended that these were merely loans to plaintiff which were ultimately repaid out of the proceeds of the first stock sale, plaintiff receiving the balance of the proceeds.

On the backs of Exhibit 25 and 26 (two checks in the amount of \$1,000 each) were legends indicating these were loans. At the trial plaintiff testified that he could not say whether the legends were there when he cashed the checks (T-171). Defendant insisted they were there when the checks were deposited (T-286). At the conclusion of the case the trial court stated that it appeared to him that the legends were written **over** the bank's cancellation stamps, and thus, would not support defendant's story of the loans, which was quite convincing other-

wise. The court then applied the maxim that where "a witness falsifies about one thing you can disbelieve his testimony on others." (T-332)

At the time defendant's counsel moved to amend the Findings of Fact he attempted to present to the court photostats of the exhibits obtained from the bank showing that the legends were on the checks at the time they cleared the bank. However, the court rejected the offer (T-30), and also refused to adopt the defendant's proposed findings which included the court's actual findings with respect to why it chose to disbelieve defendant's testimony (See T-23-26).

In **4 Jones on Exedince sec. 2471 (2d Ed.)** we find the reason for the adoption of the maxim "falsus in uno, falsus in omnibus." After stating that the maxim originally applied to one who had been convicted of perjury, the author states, quoting Judge Story:

"Where a party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, *if the fact turn out otherwise*, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound upon principles of law and morality and justice to apply the maxim falsus in uno, falsus in omnibus. What ground of judicial belief can there be left when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?" (Quoting from *The Santissima Trinidad*, 7 Wheat. (U. S.) 283, 5 L. ed. 454.) (Emphasis added)

Jones further states, among others, the following limitations on the application of the maxim:

- 1) The testimony concerning which the witness has sworn falsely must relate to a material point **in issue**.
- 2) Such testimony must have been given by the witness intentionally, and he must have known it to be false. **(4 Jones on Evidence sec. 2472, 2d Ed.)**

We respectfully submit that both limitations militate against the application of the maxim in this case. Defendant's testimony that the legends were in place on the checks when given to plaintiff was not controverted by plaintiff. Consequently, this point was never in issue. In the second place, an examination of the photostats supplied by defendant's bank shows defendant's testimony to have been true, rather than false (See T-30).

We respectfully submit that this adds new meaning to the statement of the trial judge, "while Mr. Pinder's story of this loan—and it fits into the \$4,000.00—would be quite convincing if it were not for the fact that I think that it is not borne out and the contrary is borne out by the writing on that check." (T-332) Thus, in his findings from the bench the trial judge announced, in effect, that he would believe Pinder's testimony except that the writing on the checks appeared to be added after the checks had

cleared the bank. In view of this statement, and in view of the fact that all the physical evidence introduced corroborates Pinder's version of the "loans" and the alleged joint venture, we submit that the weight of the evidence clearly indicates that there was no joint venture in the Life Massage business, and that it was error for the court to find otherwise.

CONCLUSION

Defendant respectfully submits that the Findings of Fact are not supported by the evidence and are contrary to the evidence in the particulars hereinabove set forth; that the court improperly discredited defendant's testimony; and that in any event the evidence at the trial will not justify the Conclusions of Law and the judgment entered against the defendant on any theory.

WHEREFORE, we respectfully request that this Honorable Court reverse the judgment heretofore entered by the trial court.

Respectfully submitted,

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