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Marvin R. Cox v. J.R. Berry v. L.P Slagle Joseph
Anderson Vivian Schellar, Robert Graham and
Riley Draper : Appellant's Brief On Appeal

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TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	6
POINT I:	
THE HOLD HARMLESS AGREEMENTS BETWEEN J. R. BERRY AND THE OTHER DIRECTORS OF THE CORPORATION ARE NOT VOID AS BEING AGAINST PUBLIC POLICY, NOR DO THEY LACK CONSIDERATION	6
POINT II:	
THE REMAINING GROUNDS FOR RESPONDENTS' MOTION TO DISMISS INVOLVE EITHER FACTUAL OR IMMATERIAL ISSUES, AND WOULD NOT SUP- PORT A JUDGMENT OF DISMISSAL	10
A. Contention that the Agreements Lack Consideration	10
B. Contention that the Hold Harmless Agreements are Conditional Upon All Directors Signing	11
C. Contention that the Agreements Were Conditional Upon the Corporation Signing the First Agreement	14
D. Contention that Berry Did Not Resign	15
E. Contention that the Meeting of November 11 Wherein The First Hold Harmless Agreement Was Signed Was Not a Valid Meeting	15
F. Contention That the Agreements Lack Delivery	16
G. Contention That the Agreement is Void Because of Uncertainty	16
CONCLUSION	17

TABLE OF CONTENTS — (Continued)

	Page
Authorities Cited	
Bank of U.S. vs. Chemical Bank & Trust Company, 246 N.Y.S. 595	13
Crespinel vs. Color Corporation of America, Calif., 325 P.2d 565	8
Elick vs. Schiller, Texas, 235 S.W.2d 494	13
Gerdes vs. Reynolds, 28 N.Y.S.2d 622	7
Joseph vs. Rabb, 81 N.Y.S. 546	8
Kaneko vs. Okuda, 195 C.A.2d 217, 15 Cal. Rptr. 292	12
Mitchell vs. Dilbeck, 10 Cal.2d 341, 74 P.2d 233	7
Mooney vs. Overland Willeys Motor Corporation, 204 F.2d 888	8
Ruffner vs. Sophie Mac Candy Corporation, Georgia, 132 S.E. 396	8
Schlosberg vs. Shannan and Luchs Company, D.C., 53 A.2d 722	13
T. F. Pagel Lumber Company vs. Webster, 231 Wis. 222 285 N.W. 739	7
Whitman vs. W. T. Grant Company,. 16 Utah 2d 81, 395 P.2d 918	2
Winter vs. Kitto, California, 279 Pac. 1024	13
Am. Jur. 2d Contracts §77	16
17 C.J.S. Contracts §62	12
§ 346 Fletcher Cyclopedia Corporations, Vol. 2	15
§ 348 Fletcher Cyclopedia Corporations, Vol. 2	7
28 University of Cincinnati Law Review 380	9
§ 16-10-4 (o) Utah Code Annotated	9

IN THE SUPREME COURT OF THE STATE OF UTAH

MARVIN R. COX,

Plaintiff,

- vs. -

J. R. BERRY,

Defendant and Third-Party

Plaintiff and Appellant,

- vs. -

L. P. SLAGLE, JOSEPH ANDERSON,
VIVIAN SCHELLAR, ROBERT GRA-
HAM and RILEY DRAPER,

*Third-Party Defendants
and Respondents.*

Case No.
10744

Appellant's Brief on Appeal

STATEMENT OF THE KIND OF CASE

This is an action by plaintiff Marvin R. Cox to recover certain funds allegedly borrowed by the defendant J. R. Berry as part of the purchase price for the purchase of the Homestead Hotel in Wasatch County. Defendant J. R. Berry filed a third-party complaint wherein he alleged to have been acting in a corporate capacity for Zions Investment Corporation, and claimed that by reason of certain hold harmless agreements be-

tween himself and the third-party defendants that said third-party defendants would be liable to him for any amount found owing to the plaintiff.

DISPOSITION IN THE LOWER COURT

The third-party defendants filed a Motion to Dismiss supported by affidavits. A counter-affidavit was filed by J. R. Berry in opposition to the Motion to Dismiss. The matter was heard before the Honorable Stewart M. Hanson, Judge of the Third Judicial District, and the Motion to Dismiss was granted in the form of a Summary Judgment.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the Summary Judgment of the District Court, and reinstatement of his third-party complaint against the third-party defendants.

The issues in this appeal relate solely to the issues between defendant and third-party plaintiff J. R. Berry and third-party defendants L. P. Slagle, Joseph Anderson, Vivian Schellar, Robert Graham and Riley Draper.

STATEMENT OF FACTS

Inasmuch as the trial court granted a Summary Judgment in favor of the respondents, the Supreme Court is obliged to consider the facts in the light most favorable to the party against whom the motion is made, which in this case is the appellant J. R. Berry. *Whitman*

vs. W. T. Grant Company, 16 Utah 2d 81, 395 P.2d 918. In this regard and for the purposes of this appeal, the facts as alleged in appellant's affidavit must therefore be considered as being true. Those facts are as follows (R-21):

1. That J. R. Berry is the defendant and third-party plaintiff in the above-entitled case.

2. That prior to November 11, 1965, J. R. Berry was president and a member of the board of directors of Zions Investment Corporation, a Utah corporation.

3. That prior to November 11, 1965, Zions Investment Corporation had acquired and was operating a certain property consisting of a resort in Wasatch County, Utah known as the "Homestead"; that when the Homestead property was purchased, J. R. Berry personally became obligated on various notes and obligations of the corporation in order to raise the necessary capital to make this purchase; that in order to secure the loans, advances, pledges of credit and guarantees which J. R. Berry made to the corporation, the Homestead property was held in the name of J. R. Berry; that all of the parties, including the officers, directors and stockholders of the corporation recognized the Homestead property as being the property of the corporation, and further recognized and acknowledged the security interest of J. R. Berry in and to said property; that on November 11, 1965, J. R. Berry still claimed a security interest in the Homestead property and record title to the property was in his name.

4. That in addition to the Homestead property, prior to November 11, 1965, J. R. Berry personally had agreed to guarantee other loans and obligations of the corporation.

5. That prior to November 11, 1965, various conflicts, disputes and disagreements arose between J. R. Berry and the other directors of the corporation; that J. R. Berry was requested to resign as president and director of the corporation; and that at a duly-called meeting of the board of directors held on November 11, 1965, in which all directors were given notice, and a quorum was present, including all of the third-party defendants, J. R. Berry agreed to resign as president and director of the corporation and to convey to the corporation the Homestead property on the condition that the third-party defendants personally agree to hold him harmless from any and all debts and obligations of the corporation for which he had become personally liable; that thereupon at said meeting the parties prepared two copies in longhand of Exhibit 2 attached to defendant's Third-Party Complaint (R-6); that all of the parties signed and executed said agreement and that J. R. Berry retained one copy, and the other executed copy was delivered to third-party defendants; that it was never the intention of any of the parties that any other directors sign the agreement other than those present at the meeting of November 11, 1965.

6. That following the meeting of November 11, 1965, and prior to the conveyance of the Homestead property to the corporation, all of the parties concluded that their

agreement should be reduced to a more formal instrument, and thus the document attached to defendant's Third-Party Complaint as Exhibit 3 (R-6a) was executed by the parties on November 17, 1965; that L. P. Slagle and Vivian Schellar were not present at the meeting of November 17, 1965, but that the remaining third-party defendants represented that they were in fact acting for and on behalf of the two absent parties, and that it would be unnecessary for them to sign the instruments; that based upon said representation and upon the prior agreement, J. R. Berry delivered to third-party defendants the conveyances to the Homestead property, thereby giving up his security interest; that all of the third-party defendants did immediately thereafter record or cause to be recorded said conveyances.

7. That J. R. Berry further in accordance with the agreement, did in fact resign as president and director of Zions Investment Corporation, and thereafter took no voice in the control and management of the corporation.

8. That the books and records of Zions Investment Corporation show a resolution in the following words:

"Discussion was had on the offer of Mr. Berry, in the best interest of the corporation, to resign as an officer and director, subject to his being held harmless from any contingent or direct liabilities he incurred while serving in such capacities. Upon motion of Graham, seconded by Anderson, the following resolution was unanimously adopted:

BE IT RESOLVED: That the resignation of Jack R. Berry be accepted, effective immediately,

and the corporation, and their directors, agree to fully hold him harmless from any claim of any kind asserted against him by reason of his activities as an officer and director of the corporation, including the several notes and mortgages upon which Mr. Berry appears as obligor, the proceeds of which were received by the corporation, and excepting from the said hold harmless provision, any and all acts of said Berry for and on behalf of the corporation determined by a court of competent jurisdiction to constitute a willful or intentional violation of law."

That the above resolution is signed by J. R. Berry and by all of the above-named third-party defendants.

ARGUMENT

POINT I

THE HOLD HARMLESS AGREEMENTS BETWEEN J. R. BERRY AND THE OTHER DIRECTORS OF THE CORPORATION ARE NOT VOID AS BEING AGAINST PUBLIC POLICY, NOR DO THEY LACK LEGAL CONSIDERATION.

The Summary Judgment of the trial court does not state the ground upon which it is based. However, the principal point argued in the trial court involved the question as to whether the agreements of the directors to hold J. R. Berry harmless from debts of the corporation were illegal and void because the consideration therefore, either in whole or in part, was Berry's agreement to resign as president and director of the corporation. In appellant's opinion, this is the only point raised in respondents' motion involving strictly a question of law. It was successfully urged by the respondents in the lower court that such an agreement amounts to the

equivalent of a trustee being "bought out of office" and is contrary to public policy.

Appellant recognizes the general rule cited at §348 *Fletcher Cyclopedia of Corporations*, Vol. 2, to the effect that a corporate officer may not resign his position of trust for a pecuniary consideration, and that such an agreement is illegal and void. Fletcher points out that a director cannot accept payment for his resignation, *Mitchell vs. Dilbeck*, 10 Cal. 2d 341, 74 P.2d 233; that a director cannot resign in consideration of the corporation promising not to sue on his note given to the corporation, *T. F. Pagel Lumber Company vs. Webster*, 231 Wis. 222, 285 N.W. 739; and directors cannot resign en masse and sell stock at an excessive price to permit looting of the corporation by new officers, *Gerde vs. Reynolds*, 28 N.Y.S. 2d 622. It is submitted by the appellant that the rule of law stated by Fletcher, and the cases therein cited, do not uphold the position of respondents that an agreement merely to hold an officer or director harmless from an obligation in which the corporation is already the principal obligor is not a pecuniary consideration as that term is used in the cases, nor is it the type of thing that by nature should be void as against public policy.

Fletcher at §348, *Fletcher Cyclopedia of Corporations*, Vol. 2, after setting forth the general rule, also points out types of resignation agreements that are legal and not objectionable. The last sentence of said paragraph provides as follows:

"Where the person advancing the money necessary for working capital demanded that he be

elected president, it is proper for the directors to endeavor to secure the resignation of the person then president, and the latter may impose as a condition of his resignation, it seems, that he receive the amount owing him by the company and a reasonable allowance for giving up his salaried position, and that his stock be taken off his hands."

In *Crespinel vs. Color Corporation of America*, Calif., 325 P.2d 565, an agreement to pay a monetary consideration by the corporation to a resigning officer was upheld. The court held that where there is a bona fide transaction and when it is in the best interest of the corporation that a director resign, a reasonable allowance may be made for his resignation.

In *Joseph vs. Rabb*, 81 N.Y.S. 546, it was held lawful for a director to resign for the best interest of the corporation and to condition his resignation on being relieved of his stock and paid the amount owing him and a reasonable allowance for giving up his position.

In *Ruffner vs. Sophie Mac Candy Corporation*, Georgia, 132 S.E. 396, it was held that a corporation may in good faith to serve its best interests, accept the resignation of its director-president, and in consideration purchase his shares of the corporation at an agreed valuation.

In *Mooney vs. Overland Willeys Motor Corporation*, 204 F.2d 888, a director resigned after a derivative suit had been instituted against him, and in consideration the corporation agreed to indemnify him for expenses in

connection therewith. It was held in the absence of an ulterior motive such a contract was enforceable.

At 28 *University of Cincinnati Law Review* 380, appears a case note on the Crespinel case. In that article the author, after analyzing the recent cases, acknowledges that as a general rule, any bona fide agreement will be upheld.

§ 16-10-4 (o) Utah Code Annotated gives a corporation the power to indemnify directors and officers from expenses of litigation arising from their activities while acting as a corporate officer. If by statute a corporation can indemnify an officer for litigation expenses, it would seem that there should be no public policy against a corporation or its directors agreeing to indemnify an officer from an obligation where the corporation is already the principal debtor.

In the case before the court, J. R. Berry did not receive any payment for his resignation. Although he was a large stockholder, he did not ask that the corporation or the remaining directors purchase his stock; he also had a salaried position with the corporation and asked for nothing as an allowance for giving up his position. The only thing he bargained for was that the remaining directors hold him harmless from corporate obligations, which as a matter of agency law the corporation as principal obligor would be required to do anyway. The cases cited by Fletcher in support of the general rule all seem to involve a detriment to the corporation or its stockholders. Here there is no detriment

or loss to the corporation. The corporation is actually in a better position from the standpoint of its creditors because of the additional personal guarantees. There is no evidence that the agreements were made in bad faith. The directors requested Berry to resign and agreed to hold him harmless from corporate obligations. The parties to the agreement were all fully competent to enter into a contractual obligation, and it would be unconscionable to permit respondents to now completely ignore and evade their solemn promises.

POINT II

THE REMAINING GROUNDS FOR RESPONDENTS' MOTION TO DISMISS INVOLVE EITHER FACTUAL OR IMMATERIAL ISSUES, AND WOULD NOT SUPPORT A JUDGMENT OF DISMISSAL.

In their Motion to Dismiss, respondents set forth several other grounds in support of the motion. These grounds, for the most part, involve factual questions and would not be a proper basis for a judgment of dismissal. Appellant will treat each of these grounds separately.

A. *Contention that the Agreements Lack Consideration.*

Respondents have claimed that the hold harmless agreements are invalid because they lack consideration. The consideration claimed is (1) Berry's agreement to resign as an officer and director of the corporation and (2) Berry's agreement to give up his security interest in the Homestead property. Appellant submits that either of these considerations would support a valid

contract. As to the agreement to resign, the authorities are covered under Point I of this brief. As to the giving up of the security interest, respondents have claimed that because of representations in the corporate prospectus and otherwise to the effect that the corporation was the owner of the Homestead property that Berry had a pre-existing duty to convey the property to the corporation. Berry never has claimed to be the owner of the Homestead property but claimed to be holding the title only as security for the liabilities he had personally undertaken for the corporation. His affidavit alleges that the corporation and all of its officers and directors acknowledged and recognized his security interest in the property. Whether J. R. Berry had such a security interest is strictly a question of fact.

B. Contention that the Hold Harmless Agreements are Conditional Upon All Directors Signing.

The hold harmless agreements relied upon by J. R. Berry consist of three documents. They are (1) the hand written agreement found at page 6 of the record herein, (2) the corporate resolutions signed by all parties and entered into the minute book of the corporation as shown at paragraph 8 of Berry's affidavit (R-24), and (3) the formalized agreement found at page 6-A of the record herein.

The first two documents referred to above were signed by all of the third-party defendants. The third document was signed by three of the five third-party defendants.

17 *C.J.S. Contracts* §62 sets out the general rules with respect to the required number of signatures on a contract. Beginning at page 735, it is stated as follows:

“The question as to whether those who have signed are bound is generally to be determined by the intention and understanding of the parties at the time of the execution of the instrument. The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that until executed by all it is inchoate and incomplete and never takes effect as a valid contract, and this is especially true where the agreement expressly provides, or its manifest intent is, that it is not to be binding until signed.

“Where these reasons do not apply, it is usually held that a party who signs and delivers an instrument is bound by the obligations therein assumed, although it is not executed by all of the parties named in it, as, for example, where all the parties recognize the validity of the contract and acquiesce in its performance. Usually, however, a party may, on signing, impose an enforceable condition that the agreement is not to be binding until signed by others.

“It is competent for the parties to adopt a written instrument as their contract without signing it, provided their intention to do so is clear.”

Cases cited for the above rule are as follows:

Kaneko vs. Okuda, 195 C.A. 2d 217, 15 Cal. Rptr. 292, holding that in the absence of showing that contract is not to be deemed complete unless signed by all parties, parties signing may be bound though others have not signed.

Elick vs. Schiller, Texas, 235 S.W. 2d 494, holding a contract is binding on those who sign it, in absence of a showing that signature was obtained by trick or artifice.

Winter vs. Kitto, California, 279 Pac. 1024, holding that where sufficient consideration for signers agreement is shown from the instrument itself, signer cannot be released because other persons failed to sign.

Bank of U.S. vs. Chemical Bank & Trust Company, 246 N.Y.S. 595, holding that one signing and delivering an instrument not signed by all parties intended is bound unless signer indicates to obligee intent not to be bound until others sign.

Schlosberg vs. Shannan and Luchs Company, D.C., 53 A. 2d 722, holding that mere expectation that another will sign does not necessarily prevent those signing from being bound even though expected party does not sign.

In the instant case, the affidavit of J. R. Berry states that it was not the intention of any of the parties that any additional parties sign the first two instruments. Again, this involves a question of fact. The evidence would show that appellant and third-party defendants were all of the directors present at the meeting where the documents were signed and that there was no discussion that any other party would sign the same. Further, the third typewritten document had the names of the five third-party defendants typed in for signature, indicating that there was no intent for any additional signatures.

As to the third instrument, it is true that it was contemplated that five parties should sign. Whether

the three who signed intended to be bound is again a question of fact. Berry's affidavit alleges that the signers expressly stated to him that it would be unnecessary for others to sign. They accepted the instruments conveying the homestead property and recorded them. It would seem that after having accepted the benefits of their bargain they cannot now say that they had no intention to be bound. In any event, either of the first two documents would impose liability upon all of the third-party defendants even if the third document, which was signed by only three of the respondents, were a complete legal nullity.

C. Contention that the Agreements Were Conditional Upon the Corporation Signing the Agreement.

It was contended in respondent's motion to dismiss that the first agreement, the hand written agreement, was not properly executed by the corporation because it was signed by Joseph Anderson, Secretary. The signature line does not say Secretary of what. This contention is completely without merit. Mr. Anderson signed the agreement in two places — once for himself personally and once as secretary for the corporation. The agreement refers to Zions Investment Corporation so there can be no misunderstanding as to what corporation signed the agreement. Mr. Anderson, as shown by his affidavit, also is in fact the secretary of Zions Investment Corporation. The only possible interpretation is that Mr. Anderson signed the agreement for himself and for Zions Investment Corporation. Even if the corporation had not signed this agreement, it would be immaterial as to the liability of the third-party defendants. This

is so (1) because of the same reasons and authorities cited under Point II B. of this brief and (2) the corporation, as principal obligor, would be liable to Berry anyway for obligations of the corporation which Berry personally guaranteed.

D. Contention that Berry Did Not Resign.

Respondents claims that the hold harmless agreement was invalid because Berry did not resign his office as President and Director of the corporation. This is clearly a factual matter. Berry's affidavit states that he did resign. There is also a corporate resolution signed by all of the parties accepting the resignation.

According to §346 Fletcher Cyclopedia Corporations, Vol. 2, the resignation of an officer is a factual question and all that need be shown is something evidencing a clear intent to resign. Further, the resignation need not take place at a regular corporate meeting.

E. Contention that the Meeting of November 11 Wherein The First Hold Harmless Agreement Was Signed Was Not a Valid Meeting.

Respondents have contended that the corporate meeting of November 11 wherein the first hold harmless agreement was signed was not a valid meeting because the notices of the meeting were two days late in getting out.

Whether or not the meeting was proper is not even a material fact in this case. Appellant's theory is that the third-party defendants are liable on a personal agreement. The corporation was already liable as a simple matter of agency law.

Appellant is unaware of any principle of law that would require a formal directors meeting to bind an individual, not the corporation, to a contract.

F. *Contention That The Agreements Lack Delivery.*

This contention merely concerned the fact that appellant failed to allege delivery of the instruments in his complaint. The trial court at the time of hearing permitted an amendment by interlineation so this point is no longer involved on appeal.

G. *Contention That The Agreement is Void Because of Uncertainty.*

The first agreement between the parties purports to indemnify Berry for "all activities which I participated in while President and Director of the Corporation, excepting embezzlement." Appellant contends that there is nothing vague or ambiguous about the word "all." However, even if there were an ambiguity or uncertainty, the court is not involved with the question of statutory interpretation. If ambiguous, extrinsic evidence is generally permissible in interpreting contracts. This is a case where the legal maxim *id certum est quod certum reddi potest* (that is certain which can be made certain) is applicable. See *Am. Jur. 2d Contracts* §77.

CONCLUSION

Based upon all of the foregoing authorities, appellant respectfully submits that the summary judgment of the trial court dismissing defendant's third party complaint be reversed.

Respectfully submitted,

THOMAS, ARMSTRONG,
RAWLINGS & WEST

By David E. West

*Attorneys for Defendant and
Third-Party Plaintiff and
Appellant*

1300 Walker Bank Building
Salt Lake City, Utah