

1967

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

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

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.A. Ladru Jensen and Ronald C. Barker; Attorneys for Third-Party Defendants and Respondents

Recommended Citation

Brief of Respondent, *Cox v. Berry*, No. 10744 (1967).
https://digitalcommons.law.byu.edu/uofu_sc2/3902

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 (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

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
GRAHAM AND RILEY DRAPER

*Third-Party Defendants
and Respondents*

Case No.
10744

RESPONDENTS' BRIEF ON APPEAL

Appeal from a Judgment of the
Third District Court of Salt Lake County
Honorable Stewart M. Hanson, Judge

A. LADRU JENSEN and
RONALD C. BARKER
2870 South State Street
Salt Lake City, Utah

PHILIP V. CHRISTENSEN *Attorneys for Third-Party*
55 East Center Street *Defendants and*
Provo, Utah *Respondents*
Attorney for Plaintiff

THOMAS, ARMSTRONG, RAWLINGS
& WEST, DAVID E. WEST
1300 Walker Bank Building
Salt Lake City, Utah

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

FILED

JAN 11 1967

State Supreme Court Clerk

TABLE OF CONTENTS

	<i>Page</i>
Statement of the Kind of Case	1
Disposition in the Lower Court	2
Relief Sought on Appeal	3
Statement of Facts	3
Argument	10

POINT I

A RESIGNATION OF DIRECTORSHIP FOR ANY ECONOMIC GAIN OR PROFIT IS ILLEGAL AND VOID	10
---	----

POINT II

THE UNFULFILLED CONDITIONS OF RESIGNATION EXPRESSLY STATED ON THE FACE OF EXHIBIT 2 DEFEAT THIRD-PARTY CLAIM FOR RELIEF	19
---	----

POINT III

ALLEGED MEMORANDUM AGREEMENT IS VOID FOR INDEFINITENESS OR IF REGARDED AS DEFINITE IS THEN VOID FOR ILLEGALITY IN AGREEING TO PAY ALL POSSIBLE CRIMINAL FINES AGAINST BERRY EXCEPT FOR EMBEZZLEMENT	20
---	----

POINT IV

NO CORPORATE ACTION POSSIBLE AT ILLEGALLY CALLED MEETING OF NOVEMBER 11, 1965	21
---	----

TABLE OF CONTENTS *continued*

Page

POINT V

THERE IS NO CONSIDERATION GIVEN BY BERRY IN THE ALLEGED CONTRACT OF NOVEMBER 16, 1965	22
---	----

POINT VI

ALLEGED AGREEMENT OF NOVEMBER 16, 1965 IS VOID FOR UNFILLED CONDITION THAT ALL FIVE DEFENDANTS SHOULD BECOME JOINT OBLIGORS	23
--	----

POINT VII

J. R. BERRY DID NOT PLEAD AND DOES NOT HAVE ANY SECURITY INTEREST	24
--	----

POINT VIII

FACTS CREATE AN ESTOPPEL AGAINST J. R. BERRY	26
CONCLUSION	27

AUTHORITIES CITED

CASES

Ballantine v. Rerretti 1941, 28 N.Y. Supp., 2d 688	13
Crispinel v. Color Corporation of America 1958, 2nd Dist. Cal. App., 325 P. 2d 565	17
Forbes et. al., v. Mc Donald et. al., 54 Cal. 98, 100	12
Gerdes v. Reynolds 1941, 28 N.Y. S. 2d 622, 626	13
Glehe v. Arnett 1924 38 Il. 763, 225 P. 797, 799	22
Joseph v. Ruff 1903 81 N.Y. S 546	14

TABLE OF CONTENTS *continued*

	<i>Page</i>
Mitchell v. Dilbeck 1937, 10 Cal 2d 341, 74 P. 2d 233	14
Mooney v. Eillis Overland Motors 1953, 204 Fed 2d 888	14
Raffner v. Sophie Mae Candy Corporation 1926, 132 S.E. 396	14
Sharrett v. Northfield Savings & Loan Ass'n., 1947, 262 App. Div. 835, 70 N.Y.S. 2d 870	12
T. F. Pagel Lumber Co., v. Webster 1939, 213 Wis. 222, 285 N.W. 789	13
Trumbo v. Bank of Berkeley 77 Cal App. 704, 709, 176 P. 2d 376	17
United States v. Mc Cue D. C. Coum. 178 Fed Supp. 426	21

STATUTES CITED

California Corporation Code 1952, Section 820	18
Utah Code Ann., 1953, Section 25-5-4- (2)	20

TEXTS CITED

13 American Jurisprudence 869, Section 888	13
28 Cincinnati Law Review 380-81	18
3 Corpus Juris Secundum Sections 140, 198, 200 and 201	25
17 Corpus Juris Secundum Section 227	21
Fletcher, Cyclopedia of Corporation Law, Per Ed., Section 348	11
12 L. R. A., 1071	15
Williston, Contracts 1938 ed., 1961 Reprint, Section 13 ..	19
Williston, Contracts 1938 ed., 1961 Reprint, Section 37 ..	21
Williston, Contracts, 1936 ed., Vol. IV, Section 1244	20

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
GRAHAM AND RILEY DRAPER

*Third-Party Defendants
and Respondents*

Case No.
10744

RESPONDENTS' BRIEF ON APPEAL STATEMENT OF THE KIND OF CASE

The original action was filed by Marvin R. Cox to recover \$5,000.00 loaned to J. R. Berry on October 27, 1964 with 10% interest thereon, founded on a written instrument (R. 1).

Mr. J. R. Berry in turn filed a third-party action against five defendant directors of Zions Investment Corporation. This alleged claim rests on an alleged memorandum agreement of indemnification, dated November 11, 1965 (Ex. 2, R. 6). A further claim against three of said five directors rests upon an alleged more formal agreement of November 16, 1965 (Ex. 3, R. 6a-9). Mr. Berry's complaint prays that the third-party defendants pay his debt if Mr. Marvin R. Cox secures judgment against him.

The third-party defendants contended that the naked resignation of a director and president of a corporation for an indemnification promise of economic value is an illegal consideration as against public policy. A defense to the alleged agreement of November 16, 1965 was that it states on its face a lack of consideration. Additional defenses are that both alleged agreements are void for unfilled conditions, that the alleged memorandum is void for indefiniteness, and that the facts create an estoppel against J. R. Berry.

DISPOSITION OF THIRD-PARTY COMPLAINT IN THE LOWER COURT

The third-party defendants filed motions to dismiss and for summary judgment, since one of said defendants had filed an answer. Defendants' motions were supported by three affidavits with numerous exhibits. A counter-affidavit was filed by J. R. Berry. The motions were heard before the Honorable Stewart M. Hanson, Judge of the Third Judicial District and were granted in the form of a summary judgment.

RELIEF SOUGHT ON APPEAL

The third-party defendants pray that the Summary Judgment of the District Court be affirmed.

STATEMENT OF FACTS

During 1963 and until November 17, 1965 Mr. J. R. Berry was President and a Director of Zions Investment Corporation, a Utah corporation. During 1963 and until late on November 11, 1965 J. R. Berry was promoter, chief salesman, supervisor of salesmen, supervisor of the Company Prospectus of March 1, 1965 and general manager of company operations. According to said Company Prospectus the corporation sold canyon building lots on its Swiss Alpine properties, situated a short distance Southwesterly from the Homestead near Midway in Wasatch County, Utah during 1963 and 1964 for \$159,893.46 in cash and contracts (R. 18).

On December 27, 1963 at a meeting of the Executive Committee J. R. Berry represented to the corporation that he believed it could and should secure an option to purchase the Homestead property. On said date the corporation authorized Berry to negotiate for the purchase by the corporation of the Homestead property. The corporation authorized a price of \$350,000, with a down payment of \$115,000 and a conservative, easy-to-meet, annual payment of \$21,000 until paid with interest at 6% on the purchase price (Minutes R. 30-31). Mr. Berry borrowed personally at 10% interest rate, *supra*.

The corporate minutes of December 27, 1963 clearly show that there was no intent on the part of the corpor-

ation that its duly appointed agent Berry should negotiate for the purchase of the Homestead for the corporation as an undisclosed principal. The authorization shows a clear intent that the agent should conduct such negotiations on an open and above-board relationship with the owners of the Homestead for the corporation and report back to the corporation. If there were in J. R. Berry's mind on December 27, 1963 a secret intent that he would purchase the Homestead for himself and wife for his own personal purpose to be divulged nearly two years later, he studiously avoided the slightest suggestion of such intent. In violation of his fiduciary obligation he negotiated the purchase of the Homestead for himself and purchased it for himself and wife, not purporting to act for the corporation (R. 30-31, 19).

No corporate minutes and no affidavit of any conference with any corporate officer is had showing at any time that the claim of a security interest was ever mentioned by J. R. Berry or anyone connected with the corporation. This new idea of a security interest for an agent who violates his agency for his own interest was advanced for the first time in the affidavit of J. R. Berry on the 21st day of September 1966 on the stationery of "Law offices of Thomas, Armstrong, Rawlings and West" (R. 23). What are the facts that are supported by the uncontradicted evidence appearing from the affidavits filed in this case?

First, President and Director J. R. Berry called all directors and stockholders meetings when he had concluded that any such meeting was necessary. He managed the corporate properties and affairs "in a manner

primarily as if" they "were his own, making incomplete reports to the Board of Directors only when he wanted to and only to the extent he determined" (Affidavit of Directors Draper, Graham, and Anderson R. 53).

Second, J. R. Berry negotiated ONLY for himself and wife for his own herein-claimed, personal interest (antagonistic to the corporation) in purchasing the Homestead. He was not authorized to act in a secret manner for the corporation as an undisclosed principal. He did not purport to act on behalf of the corporation which is in fact and law an essential requirement before a valid legal ratification can occur. *Mechem, Outlines of Agency*, 4th ed., Sec. 203. Mr. Berry borrowed \$5,000.00 from Marvin R. Cox, plaintiff, solely on his own credit and another \$20,000 from other parties similarly to make his own down payment of \$25,000 on his own personal purchase with his wife of the Homestead on December 1, 1964 (R. 4). Neither Berry nor his wife personally furnished any of the purchase price. Only Berry signed the written agreements to secure the funds for the down payment (R. 1).

Third, J. R. Berry did not during the entire year of 1964 call any director's meeting and/or report to any members of the board that he was financing his own purchase of the Homestead. The first board of directors meeting at which he reported the purchase of the Homestead was held March 25, 1965 nearly four months after he purchased the Homestead for himself and wife (Secretary Anderson's affidavit R. 26 and 35-36).

Fourth, the plan and scheme which Mr. J. R. Berry pursued was to call a stockholders' meeting to be held on

February 20, 1965. It was called (R. 32). He reported there the personal purchase of the Homestead and proposed there a contract with the corporation that he and his wife would assign their rights and convey their interests in the Homestead purchase contract to the corporation if the corporation would vote by all its stockholders assembled "to assume all duties and obligations of First Parties" (Mr. and Mrs. Berry) in the said acquisition (R. 6a and 19).

The minutes of that stockholders' meeting were supposed to have been drafted by Mrs. Kathleen Berry, whom Mr. Berry nominated to act as secretary of the meeting which nomination was approved (R. 32). They are susceptible of an interpretation that the said proposed agreement of J. R. Berry was understood and was approved unanimously by the stockholders (R. 32). The fact and law is that there could be no ratification of Mr. and Mrs. Berry's actions. She had never been appointed as an agent of the corporation, and Mr. Berry in buying the Homestead for himself and wife did not purport to the seller to be acting for Zions Investment Corporation within the scope of his authority. (R. 30-32 & 19).

Fifth, promptly after the stockholders' meeting of February 20, 1965 J. R. Berry furnished information for and supervised the printing of a company "PROSPECTUS" dated March 1, 1965. Therein is confirmed publicly the agreement for and the assignment to the corporation of the Homestead purchase contract of the Berrys. (R. 19).

The Prospectus declares the Homestead to be the property of the corporation and on page four thereof reads as

follows:

The contract was assigned by this group to the company and accepted by the company at a special meeting of the stockholders on February 20, 1965. Mr. Berry received no bonus—for his efforts. Others of the group are to be repaid the sums paid by them on the purchase price in capital stock of the company at \$1.25 per share or by return of their cash plus interest (10% simple) on or before October 31, 1965. The Company must make a payment of \$50,000 on or before April 1, 1965 and at that time assume possession of the property (R. 19).

Sixth, a board of directors meeting was duly called and held March 25th, 1965. Mr. Berry reported that he had been unable to raise money to pay the \$50,000 payment on the Homestead purchase contract due April 1, 1965 (R. 35). A resolution was passed authorizing the corporation to borrow \$50,000 and pledging the directors to co-sign the note (R. 36). The note was signed as agreed (R. 37) and nearly six months later demand made upon the directors for payment of \$39,262.20 on October 25, 1965 (R. 38). In signing said \$50,000 note the third-party defendants fully relied upon the representations of Berry and upon the agreement of Berry and wife reaffirmed in print on page 4 of the Prospectus (R. 19) that the corporation at the February 20th stockholders meeting had accepted the offered assignment of the Homestead purchase contract and had become bound to reimburse Mr. Berry for his loans made in acquisition of said contract (R. 54). The Prospectus unequivocally stated that the Homestead was the property of the corporation (R. 19). This was repeatedly told to stockholders (R. 54, 59, 60 and 61), of-

ficers, prospective stock purchasers and prospective condominium purchasers (R. 54, 59, 60 and 61) by Berry and his salesmen.

Seventh, J. R. Berry makes a controlling admission in his pleadings, Exhibit 3 thereof, (R. 6a) which over his signature reads as follows:

WHEREAS, First Parties have held the said property and rights as trustees for Second Party since on and after a certain meeting of the stockholders of Zions Investment Corporation held, in Salt Lake City, Utah on the 20th day of February, 1965, whereat the stockholders accepted the conveyance of said property and rights and agreed to assume all duties and obligations of First Parties (Mr. and Mrs. Berry) respecting the said acquisition; . . . (R. 6a).

The foregoing is a binding admission that the Berrys were legally bound to assign all their interest and rights as trustees to the corporation prior to the signing of the alleged agreements of November 11th and 16th, 1965. They had received valid consideration for said obligation.

Eighth, Mr. Berry repeatedly made informal statements of glowing sales reports. For example, he reported sales of lots during 1964 for \$159,893.46 on which cash of \$76,818.32 was realized (R. 19) and in a letter to Secretary Anderson on July 21, 1965 stated that "in these past months" preceding June 30th sales were made in the total of \$155,500.00 (R. 41). However, as usual, regarding expenditures, Mr. Berry reported only that "Our cash outlays are considerable." When the directors were served with a demand on October 25, 1965 to pay nearly \$40,000 personally on the corporate note to First Security

State Bank the dissatisfactions with corporate management by Mr. Berry became acute. Later bankruptcy of the corporation resulted (R. 16).

Ninth, on November 9, 1965 President J. R. Berry gave a notice by telegram that a directors' meeting would be held on November 11, 1965, only two days after the sending of the notice (R. 40). Not all directors received the notice before the meeting (R. 28). Only six of nine directors attended the illegally called meeting (R. 28). No written waivers of notice or of approval of the meeting of any alleged action thereat were ever made by any of the absent directors. The corporate articles required five days notice for a legal call of a directors' meeting (R. 28).

Third-party plaintiff Berry in paragraph 8 of his statement of facts has printed what he states to be a corporate resolution of November 11, 1966 (Berry's brief pp. 5-6). Obviously there can be no corporate resolution at an illegally called and held corporate meeting. Plaintiff pleads Exhibit 2, the alleged memorandum agreement of Berry's third party complaint. (R. 6). The alleged resolution set out in Berry's brief pp. 5-6 although of no legal force does nevertheless serve one purpose. It shows the clearly stated conditions which are found in said Exhibit 2 that "the corporation, and their (all) directors (must) agree to fully hold him harmless from any claim," as a condition precedent to his alleged resignation as director and President.

Tenth, J. R. Berry states in his brief, page 3, that "the directors and stockholders—recognized and acknowl-

edged the security interest of J. R. Berry in and to said property," meaning the Homestead. There is no truth whatever in said statement. There is no support in any of the pleadings or documents cited in the affidavits for any such allegation. The truth is that the mention of an alleged security interest by the fiduciary-breaching J. R. Berry appeared for the first time when J. R. Berry and his attorney filed his counter-affidavit in this case. No appellate court decisions were cited by Berry that there can be any security interest in an agent who made an unauthorized contract for himself for his conflicting personal benefit to the detriment of his principal.

Eleventh, the conditional and indefinite alleged memorandum agreement reads as follows:

11-11-65

I hereby resign from my position as a director and President of Zions Investment Corporation *providing that the existing Directors and the Corporation save me harmless fro many and all activities* which I participated in while President and Director of the corporation. (Excepting embezzlement.)

Robert H. Graham

J. R. Berry

Vivian M. Scheller

R. C. Draper

Accepted - Secretary

L. P. Slagle

Joseph Anderson, Jr.

Signed before me this 11th day of November 1965.
Joseph Anderson, Jr.

Gordon Christensen, Notary

ARGUMENT

POINT I

A RESIGNATION OF DIRECTORSHIP FOR ANY ECONOMIC GAIN OR PROFIT IS ILLEGAL AND VOID.

Fletcher, Cyclopaedia or Corporation Law, Per. ed. Section 348 declares the law applicable to the present fact situation to be as follows:

Sec. 348. Validity of agreement to resign for pecuniary consideration.

It has been held that an agreement to resign as a corporate officer, for a pecuniary consideration, is void as against public policy. Thus, it has been said that if the whole or a part of a consideration be that a trustee resign his trust, the consideration is illegal. It is *contra bona mores*. Trustees of corporations owe duties to others besides themselves; they have been placed in a position of trust by the stockholders, and to those stockholders they must be faithful. It is a violation of that trust for them to be *bought out of office*. They may resign when they please, but they must not make profit or benefit to themselves in the matter of such resignation. 61 *Sharrett v. Northfield Savings & Loan Assn.*, 272 App. Div. 835, 70 N.Y.S. (2d) 870, citing *Fletcher Cyc. Corp. (Perm. Ed.)* Sec. 348. *Forbes v. McDonald* 54 Cal. 98; *Ballentine v. Ferretti*, 28 N.Y.S. (2d) 668.

In other words, directors cannot accept payment in any form or guise for their resignations and delivery of control or for the substitution of others in their place and are accountable for any monies so received. 62 *Mitchell v. Dilbeck* 10 Cal. 2d 341, 74 P.2d 233; *McClure v. Law* 161 N.Y. 78, 55 N.E. 338, 76 Am. St. Rep. 262; *Gerdes v. Reynolds*, 28 N.Y.S. 2d 822, 651, s.c. 30 N.Y. 2d 755; *Porter v. Healey* 244 Pa. 427, 91 Atl. 428. Note 1 *Dodd & Baker, Cases on Business Associations* 604.

Contract to cause directors to resign and for others to be named by another corporation is *ultra vires*

under New Jersey law *Hold v. California Development Company* 151 Fed. 3, and *T.F. Pagel Lumber Co. v. Webster* 231 Wis. 222, 285 N.W. 739. (Italics supplied for emphasis.)

A brief analysis of some of the cases cited by *Fletcher, supra*, will show the wide application of the general rule that selling one's offices by resigning for economic gain or profit is illegal.

The first paragraph above under Sec. 348 within quote marks is quoted verbatim from the 1880 California case of *Forbes et al. v. McDonald et. al.* 54 Cal. 98 at p. 100. It is the corporate law today and has been ever since 1880 in a situation which exists here. It was *contra bona mores* for Mr. J. R. Berry to attempt to bargain away his offices of Director and President for a valuable pecuniary consideration. Neither he nor those claiming through him can legally state any claim for relief on such grounds.

In the case of *Sharrett v. Northfield Savings and Loan Association* 1947, 272 App. Div. 835, 70 N.Y. Supp (2d) 870 which cites *Fletcher on Corporations* on the above question; the plaintiff sought to enforce payment of a life pension alleging that the Port Richmond Association (merged into the defendant) contracted with him to that if he would resign his offices of director and secretary and refrain from seeking reelection to office, and remove his real estate and insurance office from the building in which the offices of the association were located, the association would give him a pension for life paying him \$200 per month.

Held, the contract to resign as a director for a personal

benefit to himself was a legally insufficient consideration.

In the above case part of the consideration given would have been good and valid consideration had it been given by itself. However, in the earlier case of *Ballantine v. Ferretti* 1941, 28 N.Y. Supp. (2d) 688 the court broadly declared that:

Contracts by which corporate officers or directors take pay "(economic benefits)" for their action as such are contrary to public policy, because of their nature and general tendency, without inquiry into any given case whether harm resulted in fact or whether complaint was actually made and that the law would not ordinarily undertake to apportion the entire consideration paid upon an illegal transaction merely because the transaction would have been legal if part of it had been eliminated,—.

The Supreme Court of New York in *Gerdes v. Reynolds* 1941, 28 N.Y.S. 2d 622, 625 declared flatly the law to be:

A corporate officer cannot legally "accept pay in any form or guise, direct or devious for their own resignation." (note 19.)

In the case of *T. F. Pagel Lumber Co. v. Webster* 1939, 231 Wis. 222, 285 N.W. 789, one of the defenses raised by Webster on an action on his promissory note was that he had agreed to resign and did resign as director and manager of the company. On the defense of such resignation as consideration the Wisconsin Supreme Court wrote:

If Pagel agreed to resign in consideration of a promise not to sue on his note, the contract was illegal and void because contrary to public policy 13 Am. Jr. 869 Sec. 888. See *Koelbel v. Tecktonius* 1938, 228 Wis. 317, 280 N.W. 305.

Plaintiff Berry agrees with the above statements of law (Plfs. brief 7), but argues that an alleged agreement to pay the debts of another is not an agreement of pecuniary or measurable monetary value. This argument is palpably unsound. The measure if Berry could prevail would be \$5,000 plus 10% interest.

Plaintiff also argues that the above rule of law is not applicable to his case. He cites four cases each of which presents an entirely different fact situation from this case. The facts of this case fall squarely within the above rule of law. There is here no negotiation for an agreed sale of Mr. Berry's stock to the corporation or the directors, which would by itself be a valid contract. There is here no dispute regarding J. R. Berry's salary of \$1,000 per month being unpaid or any agreement whatever regarding that item. There is not in the alleged memorandum agreement of 11-11-65 *supra* any consideration recited other than the naked and exclusive offer to resign and the alleged resignation of J. R. Berry as President and Director.

An enlarged but brief analysis of the cases cited by plaintiff will show their inapplicability to the fact-situation here. The SALE OF STOCK CASES cited by Plaintiff except the pertinent, California *Mitchell* case, which is added here, are:

Joseph v. Ruff (1903) 81 N.Y. Supp. 546, *Mitchell v. Dilbeck* (1937) 10 Cal. 2d 341, 74 P. 2d 233, *Mooney v. Willis Overland Motors* (1953) 204 Fed. 2d 888, and *Raffner v. Sophie Mae Candy Corporation* (1926) 132 S.E. 396.

The *Joseph* case was an action by the Trustee in Bankruptcy to set aside an alleged preferential transfer of corporate moneys to Mr. Ruff in the purchase of his stock by the corporation and the compromise of other claims which occurred more than four months prior to the filing in bankruptcy and while the corporation was still solvent. Held that the corporation could lawfully buy and pay for the stock as had been done while the corporation was solvent. The resignation was an incidental and necessary legal occurrence upon performance of the valid agreement for the sale and purchase of all of the Director's stock.

The *Mitchell* case, *supra*, upholds the general rule stated by Fletcher Section 348 *supra* in the following language:

“While directors may resign when they please, they must not make a profit to themselves in the matter of their resignation and to be bought out of office would be a violation of their trust. See authorities cited in 12 L.R.A. 1071.” The court affirmed the rule of *Forbes v. McDonald* 54 Cal. 98, the leading case declaring a situation like the alleged Berry Hold Harmless agreement is *contra bona mores*, a breach of trust, illegal and void.

The *Ruffner* case *supra*, was another case in which the corporation purchased all the stock of the Director and President, who thus disqualified himself for office and resigned as an incidental and legally necessary step to the valid sale of all of the stock of said person. The court held that the purchase of the stock and the concomitant resignation being in good faith and to serve the best

interests of the corporation was a *valid stock purchase by the corporation from its President and Director at reasonable value therefor* and declared that purchase by a corporation of its own stock is valid.

Where the stock is not retired but is held for resale and reissue and the purchase was not prejudicial to creditors after the transaction was completed.

The *Mooney* case *supra* like the other cases cited by plaintiff's attorney, David E. West, are cases mainly dealing with the question of whether a corporation can legally purchase stock from a director or whether such transaction may be set aside as improper dealing of an agent and trustee with his principal, the corporation.

The *Mooney* case, *supra*, was one in which the plaintiff stockholder had sold all his stock to the corporation and resigned and sought to recover from the corporation the expenses including legal fees for defending a minority stockholders suit against him under claim of statutory right of a Delaware statute 44 Del. Laws c. 125 Apr. 15, 1953 allowing such actions against the corporation by its director who had been sued for mismanagement or fraud.

The case involved the question of fact as to whether the director coming in had the best interests of the corporation at heart and the court comments on that fact in citing with approval the rule of illegality of bargaining a resignation of office for economic value and cites with approval "2 Fletcher Cyclopedia of Corporations Sec. 348", but again as in the other cases distinguishes the fact situation from the situation existing in the *Berry* case and in the cases cited by *Fletcher* Sec. 348, *supra*.

Nor can Third-party Plaintiff J. R. Berry take any comfort from the California case of *Crispinel v. Color Corporation of America* (1958) (2nd Dist. Cal. App.) 325 P. 2d 565. In that case plaintiff was employed for $\frac{1}{4}$ of full time in counselling the board and officers and employees at a salary of \$13,000 per month under a written contract which provided that (par. 6)

“Crespinel understands that it may be necessary for the business of the corporation that a seat on the board of directors be available, for instance in the event that other financial interests become associated with Cine color” and he agreed to terminate his employment and resign “at the request of the majority of the board.”

The request was made, the resignation had, a large sum in partial settlement paid to Crispinel. He, however, sued for \$14,500 claimed due, received judgment which was affirmed. The defense was that the agreement was illegal because it contained the agreement to resign at request of the board. The court held that the particular agreement was not violative of public policy but affirmed the general rule that an agreement like that of the *alleged Berry hold harmless agreement would be invalid in California*. The court in rendering its opinion in the *Crespinel* case wrote; after citing the case of *Trumbo v. Bank of Berkeley* 77 Cal. App. 704, 709, 176 P. 2d 376, 379 as establishing the general rule in the Berry situation:

A director may not contract away his discretionary vote or director's position for a consideration. Such agreement is violative of public policy and is void.

The Court in analyzing the particular facts of the

Crespinel case said that the particular contract was distinguishable from the situation wherein a director had bargained away his position as a director for a consideration. The consideration which Mr. Crispinel received was for his contract of services, not for his resignation.

Nor can any help be found for Mr. J. R. Berry in his desire to be free from all responsibility for his own bad management by having five directors pay all of his debts during more than two years except the debt which would amount to an embezzlement,—in the note in 28 *Cinn. L. Rev.* 380-81. That law note by some bright law student is centered around the *Crispenel* case, *supra*. After distinguishing the valid stock sale cases from the situation here of an attempt to force other directors to buy Mr. Berry out of office the note writer concludes; regarding the two distinguishable fact situations:

Where the circumstances appear questionable and the director has in fact 'sold out' a breach of his fiduciary duty becomes apparent and his contract would be void in spite of the statute permitting him to deal with his company.

The note writer is here referring to the amendment of the *California Corporation Code Sec. 820* (1952) which dispensed with the former rule disqualifying a director from dealing in any way with his corporation for his own benefit. If plaintiff wished to raise the question of a reasonable price for a resignation by a director and President, he should state the fact by affidavit that he was attempting to bargain away his offices for a certain or an approximate amount of thousands of dollars and then argue that the true figure would be reasonable under the

circumstances. This he has not done.

POINT II

THE UNFULFILLED CONDITIONS OF RESIGNATION EXPRESSLY STATED ON THE FACE OF EXHIBIT 2 DEFEATS THIRD-PARTY CLAIM FOR RELIEF.

Exhibit 2, the resignation instrument, is expressly conditional on its face. It is clearly not a bilateral agreement of promise for a promise. *Williston, Contracts* 1938 ed., Sec. 13.

It is stated as a unilateral, conditional act of resignation for contemplated future acts of saving harmless as indemnitors the drafter of the instrument provided that "the corporation and" (all) "existing directors save me harmless." The affidavit of Director Robert H. Graham shows that only five directors' names appear on Exhibit 2 out of nine directors other than Berry (R. 16, and see also Secretary Anderson's affidavit, R. 28, 37). The condition of all existing directors signing is not fulfilled. Exhibit 2 has no validity. If the offer is not accepted by performance of the act stated as a condition precedent then no unilateral contract arises. The condition of indemnification is not performed and Berry was still a Director, albeit an inactive one, until November 17, 1965 when the resignation became automatically effective by reason of corporate article SIXTH(c) (R. 28).

The second express condition on the face of Exhibit 2 is that the corporation—Zions Investment Corporation—should become a signing indemnitor on the alleged agreement. The instrument shows on its face that the corpor-

ation did not sign. Section 25-5-4 (2), Utah Code 1953 requires that an agreement to answer for the debt of another is void unless there is an agreement "in writing *subscribed* by the party to be charged." The purported signature "accepted Joseph A. Anderson Jr. Secretary" is merely *descriptio personae* of the individual signing and is not in law a subscribed signature of the corporation, Zions Investment Corporation.

The significance of a condition is declared as follows:

Williston, Contract, Vol. IV, 1936, Sec. 1244. "When non-compliance with a condition on which a contract is delivered by a surety relieves him from liability. If the surety delivers his contract to the creditor upon a condition or in return for a counter-promise, and the creditor fails to observe the condition or to keep the promise, he cannot hold the surety; but often the *surety's contract is not delivered by him directly to the creditor, but to the principal or a co-surety to whom some condition is stated. It is common situation for a surety to have signed a bond or other contract, and the principal or a co-surety who was expected to join in the contract, and whose name is perhaps recited in the instrument as a party, to have failed to execute it. The signature of the principal or co-surety may be altogether lacking, or it may appear to be signed without authority.*"

POINT III

ALLEGED MEMORANDUM AGREEMENT IS VOID FOR INDEFINITNESS OR IF REGARDED AS DEFINITE IS THEN VOID FOR ILLEGALITY IN AGREEING TO PAY ALL POSSIBLE CRIMINAL FINES AGAINST BERRY EXCEPT FOR EMBEZZELMENT.

One phrase in the memorandum reads:

. . . save me harmless from any and all activities which I participated in while President and Director of the corporation. (Excepting embezzlement.)

This should be construed most strongly against the drafter J. R. Berry. The word "activities" is broader than the word "debts." If the word "activities" be construed in its broadest meaning it would then make an agreement to pay all criminal fines which might be imposed for negligent or reckless driving of an automobile while Berry was President of the corporation and for violation of the state securities act, and for securing money by false pretenses by fraudulent representations made in selling stock and condominium units etc., except embezzlement. The word "activities" appears all too elastic to be definite enough to be contractual. *Williston, Contracts* 1938 ed., Sec. 37.

If the word "activities" be definite enough to be contractual and would, if otherwise valid, hold Mr. Berry harmless from criminal fines of any and all kinds except embezzlement then the memorandum is illegal as against public policy in tending to exonerate one from criminal responsibility of fines.

An agreement by the terms of which one person assumes punishment for the guilt of another is improper and void. 17 C.J.S. Sec. 227 citing *United States v. McCue*, D.C. Conn., 178 Fed. Supp. 426.

POINT IV

NO CORPORATE ACTION POSSIBLE AT ILLEGALLY CALLED MEETING OF NOVEMBER 11, 1965.

The undisputed fact is that the corporate article SIXTH (b) required five days notice of a directors' meeting (R. 28). Berry sent a telegraph notice on November 9, 1966 calling a directors' meeting two days later (R. 40). Only six directors responded to the notice. There were no waivers made or filed by any of the three absent directors (R. 28).

On the foregoing undisputed facts the following case gives the clearly established rule of corporation law showing the resolution claimed by plaintiff (plf's brief p. 5) of no legal effect.

Where the call of a corporate meeting does not conform to the requirements of the statute or the corporate articles if the statute allows a shorter time of notice by article or by law contract the meeting is invalid and attempted action thereat is also invalid. *Glehe v. Arnett* (1924) 38 Id. 763, 225 Pac. 797, 799.

POINT V

THERE IS NO CONSIDERATION GIVEN BY BERRY IN THE ALLEGED CONTRACT OF NOVEMBER 16, 1965.

The above statement of facts shows that on and after February 20, 1965 J. R. Berry and wife were legally bound to assign the Homestead purchase contract to the corporation (minutes R. 32; Company Prospectus R. 19; last paragraph p. 1 of alleged agreement of November 16, 1966, R. 6a).

It is elementary contract law that promising to do what one is already legally bound to do (here assign the Home-

stead purchase contract to the corporation (R. 6a, last paragraph of page 1 of Exhibit 3) is no consideration for the promise of another. Necessarily the alleged agreement of November 16, 1965 is void for lack of consideration moving to the defendants.

POINT VI

ALLEGED AGREEMENT OF NOVEMBER 16, 1965 IS VOID FOR UNFILLED CONDITION THAT ALL FIVE DEFENDANTS SHOULD BECOME JOINT OBLIGORS.

Exhibit 3 of plaintiff's complaint shows on its face that the alleged agreement of November 16, 1965 was to be a joint obligation of the five defendant directors named as Third parties therein, had it been supported by consideration and had the condition that all five sign thereon been fulfilled. The agreement while naming the five defendants as Third parties does not state that the alleged agreement of indemnification is to be joint and several. On the obligation on the earlier \$50,000.00 note the directors pledged to each other their obligation of contribution. By having all five defendants sign, a right of contribution would then exist provided the agreement were otherwise legal.

The affidavits of both parties are unequivocal in swearing that it was a condition that all five defendants sign the alleged November 16th agreement. The insistence of that mutual intent is found in J. R. Berry's affidavit as follows:

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

that their agreement should be reduced to a more formal instrument . . . 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, . . . (R. 23).

The last clause is wholly immaterial in view of the legal requirement, *supra*, that indemnitors must subscribe their agreement otherwise no liability can arise. (Utah Code 1953, Sec. 25-5-4(2)).

However, the first clause of the above quotation shows Berry concurring with the Directors in their sworn statement that it was the mutual intent that all five directors should sign before there could be any liability on the directors, had the agreement been otherwise valid. (Directors' affidavit, R. 17). The condition was never fulfilled. Vivian Schellar and L. P. Slagle never signed the agreement and continued to refuse to sign it (R. 17).

POINT VII

J. R. BERRY DOES NOT PLEAD AND DOES NOT HAVE ANY SECURITY INTEREST.

As stated in the foregoing statement of facts, J. R. Berry never made any claim of a security interest until the filing of his affidavit about September 20, 1966. He does not plead any claim of a security interest. The law does not allow a wrongdoing agent any security interest, especially when he surrenders possession of the property on which is claimed a possessory lien. The law is stated in *Corpus Juris Secundum* as follows:

3 C.J.S. 140. In the absence of full knowledge and consent on the part of his principal, an agent may not acquire any right or title in the subject matter of the agency by the use of his position.

An agent found guilty of breach of duty in this respect will be regarded as holding his newly acquired interests as trustee for his principal 39 since all rights, title or interests inure to the benefit of the principal and the agent may be compelled to transfer them to the latter 40 and to account for all profits and benefits gained thereby.

While an agent is ordinarily "entitled to reimbursement for as much of the purchase money as represented by his own funds" . . .

. . . An agent cannot recover from his principal in any transaction in which the agent's interest was antagonistic to the principal, unless such interest was fully and fairly disclosed to the principal and the principal's consent secured.

3 C.J.S. Sec. 198. A failure of the agent to keep and render proper accounts may deprive the agent of his right of reimbursement for expenses, losses or damages *arising from his performance of his duties* under his agency.

3 C.J.S. Sec. 200. If an agent is performing his duties as authorized then he gains "a specific lien upon the principal's property in his possession for his expenses during the course of his agency with reference to that property."

3 C.J.S. Sec. 201. An agent's lien may be extinguished or lost by yielding possession of the property and upon waiver of his right it is permanently lost.

In this case J. R. Berry asked the corporation at the

stockholders' meeting on February 20, 1965 simply to agree to reimburse him for his costs of acquisition of the Homestead for himself and wife and the corporation agreed. He delivered possession to the corporation on April 1, 1965 when the directors had signed to be liable for \$50,000 second payment on the Homestead, and claimed no lien at that time or in November 1965 and the lien, if it ever existed was lost when the directors became obligated relying on the fact that he had assigned the purchase contract to the corporation. 26a

POINT VIII

FACTS CREATE AN ESOPPEL AGAINST J. R. BERRY.

The undisputed facts are that on February 20, 1965 Berry represented to the stockholders that he was assigning his purchase contract of the Homestead to the corporation (R. 32) and that he caused to be published in the company Prospectus that such had been done.

The undisputed facts are that purchasing stockholders, persons purchasing condominium contracts and particularly the five defendant directors relied and acted on the representations that the Homestead purchase contract had been so assigned to the corporation. That at the time defendants signed the \$50,000.00 note as co-makers to make the April 1, 1965 down payment by the corporation they fully relied upon the representation in the Prospectus (R. 19) and representation repeatedly being made by Mr. Berry and the salesmen whom he supervised to persons purchasing stock (R. 54, 59, and 60) and to persons purchasing condominiums (R. 41, 54, 57, 58, 62

and 63) that the Homestead purchase contract had been assigned to the corporation and that the corporation fully owned its own unencumbered equity in the Homestead. These facts created an equitable estoppel against J. R. Berry to later claim that the directors must pay his debts and liabilities incurred over a three-year period in order to have him assign his dry trust rights and interests in the Homestead property to the corporation.

CONCLUSION

Defendants respectfully submit that the above facts and the applicable law indicate that the summary judgment of the trial court should be affirmed.

Respectfully submitted,

A. Ladru Jensen
1536 Harvard Avenue
Salt Lake City, Utah and

Ronald C. Barker
2870 South State Street
Salt Lake City, Utah

*Attorneys for Third-Party
Defendants.*