

1963

Rulon R. West v. Terry R. West and Flora E. West : Brief of Respondents

Utah Supreme Court

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APR 16 1964

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IN THE SUPREME COURT
of the
STATE OF UTAH

RULON R. WEST,
Plaintiff and Appellant,

vs.

TERRY R. WEST and
FLORA E. WEST,
Defendants and Respondents.

FILED

APR 21 1964

CLERK, SUPREME COURT, UTAH

Case No. 9870

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

PLEADINGS

Plaintiff and appellant shall hereinafter be referred to as "Rulon". Defendant and respondents Terry West and Flora West will hereinafter be referred to as "Terry" and "Flora".

"Ex." shall refer to Exhibit, "P", to paragraph, and "R", to Record.

Rulon's complaint in the first count sets forth verbatim paragraphs 6 and 12 of the partnership agreement between Rulon, Terry and Flora, R. 1, involving a motel operation called El Rancho enter-

prises and hereinafter referred to as El Rancho. A copy of the agreement is attached to Rulon's complaint, bearing the date, "October 1957". P 6 of said agreement is as follows:

6. The net profits of the business shall be divided between the partners in the following proportions: Rulon R. West, forty percent (40%); Terry R. West, forty percent (40%); and Flora E. West, twenty percent (20%); and the partners shall in like proportion bear all losses, including loss of capital.

P 12 is as follows:

12. If * * * the partnership shall be determined or expire during the joint lives of the partners, then the partnership shall be wound up, and the assets distributed in the proportions set forth in paragraph 6 above hereof.

Rulon's complaint also has attached thereto Ex B, R 5, wherein the attorneys for Rulon in writing demanded a winding-up of partnership affairs and a distribution to be made to Rulon of 40% in accordance with P 6 and 12 as pled in said complaint. Said Ex B, R 5 over signature of Rulon's attorney, reading in part as follows:

"Your partnership agreement provides that "if the partnership shall be determined or expire during the joint lives of the partners, then the partnership shall be wound up, and the assets distributed in the proportions set forth in paragraph 6 above hereof." Paragraph 12. Paragraph 6 provides for a *forty percent (40%) distribution to your father.*" (Emphasis Supplied.)

Terry filed an answer and counterclaim to Rulon's complaint in which Terry asserted that he entered into the partnership agreement in good faith and left school, gave up all other ambitions and endeavors in consideration of the promise of Rulon to make all capital investments and contributions with the understanding that should Rulon decide to wind up affairs and force an involuntary winding up onto Terry, that Rulon would transfer to Terry 40% of all the capital investments and advancements made and Rulon would have only 40% of everything returned to him, R 14, P 2.

Terry also alleged in said answer and counterclaim that pursuant to the notice of winding-up served upon him and identified as Ex B, R 5, attached to Rulon's complaint, that Terry entered into a dissolution agreement, which is attached to Terry's answer and counterclaim, identified as Ex 2, R 19 to 22, and Terry also pled and attached to said answer and counterclaim, Ex 1, R 18.

Ex 1, R 18 is pled and claimed as conclusive evidence of Rulon's carrying out his intention to take only 40% of everything or all interest in all assets of El Rancho with the balance of all assets and all interest, 40% to go to Terry and 20% to go to Flora.

In said Ex 1, R 18, over *Rulon's* signature, appears,

"1. The *contribution* made by Rulon R. West with respect to the 40% interest acquired by Terry R. West *was* and is a gift from Rulon R. West and Rulon R. West does agree to *file* a gift tax return in connection herewith so stating". Ex 1, R 18.

"2. * * *"

"3. The undersigned, Rulon R. West, further certifies that the *interest* in El Rancho enterprises were not only a gift to Terry R. West but also to Flora E. West and their *interests* were acquired by virtue of a gift. (Emphasis supplied).

Dated at Salt Lake City, Utah, this 2nd day of April, 1960.

(S) Rulon R. West

Terry also pled estoppel as against Rulon, alleging that Rulon was estopped to assert otherwise R 15, P 10.

Flora filed her answer in which she alleged that she was entitled to 20% of all assets and everything, including contributions under and by virtue of P 12 as set out in plaintiff's pleadings R 1 and further that Rulon had so intended, should he force a winding up. See R 29, P 7. Flora further alleged that said 20% was a transfer to her and was made conclusive under the agreement of April 2, 1960, which agreement is identified as R 18. See R 30, P 9 of her answer so alleging. Flora also pled estoppel, R 30.

Rulon filed a reply to the answer and counter-

claim of Terry wherein Rulon admitted the execution of Ex 1, R 18 wherein it was asserted by Terry and Flora that it constituted conclusive evidence of a complete transfer of 40% of everything and all interest to Terry and 20% of everything to Flora, and Rulon raised as the *ONLY* defense to said Exhibit, that it was without consideration.

Rulon next moved the Court for a Summary Judgment, representing to the Court and alleging and specifying,

“There is no genuine issue of any material fact * * *”. with respect to the issues in said first cause, see R 38, and that Rulon was entitled to judgment thereon as a matter of law.

Terry, after the filing of the motion for Summary Judgment, but before hearing thereon, filed an affidavit under oath, alleging that the consent to the dissolution was entered into with reliance on the declaration that Rulon would have returned to him only 40% of everything in accordance with his letter of March 21, 1960, wherein Rulon agreed to take only 40% and Rulon having so pled. See R 44 for the Exhibit, also R 5 and see R 40 to 44 for Terry's affidavit. In said affidavit, Terry further alleges that the dissolution was to be concluded with Rulon to get only 40% of everything as declared in P 6 and 12 of the contract R 1 and the election R 5 to wind up made by Rulon in his at-

torney's letter of March 21, 1960.

Said affidavit further alleges that Terry entered the partnership with the express understanding that it was the intention of the partners that should Rulon force an involuntary winding-up onto Terry, that Rulon would receive back only said 40%. Rulon did not either deny or put at issue said affidavit or object to the Court's receiving same in evidence.

Counsel for Terry moved the Court that all depositions be published, which motion was granted by the Court R 107-12 and that all pleadings, affidavits, interrogatories and answers to interrogatories also be considered by the Court and received into evidence, as well as all other pleadings, which motion was also granted R 110. Rulon's counsel made no objections to any pleadings, admissions, affidavits, exhibits or any objections of any kind.

Rulon's counsel then moved the Court for a Summary Judgment, wherein he admitted everything in the affidavit, since it was not denied, and he still represented to the Court that there was no genuine issue of any material fact with respect to the said first count, and he made no objections to pleadings or evidence or affidavit. The Court entered its judgment R 110 to 112, resolving the issues in favor of Terry and Flora, which judgment constitutes the basis of this appeal.

FACTS

Terry changed all future plans and left all future ambitions to go into a new field and operate El Rancho, the subject of said partnership, and he did so for Rulon, at Rulon's request and with the express understanding that Rulon would advance all capital and that Rulon could not at his whim and after sacrifice and change of position made by Terry and when the business was built up, terminate Terry's interest in the partnership with Terry being thrown out of his occupation and forced to change position again, unless Rulon's withdrawal from all assets, including all capital contributions and advancements was made to be limited to only 40% and all of the balance, 40% to go to Terry and 20% to go to Flora. See R 1, P 6 and 12 wherein Rulon himself has pled said contract so asserting. Moreover, this was part of Rulon's estate planning being carried out by his attorney's to avoid inheritance taxes on a half million dollar estate.

Terry, in good faith, went into and operated the motel. When Rulon elected to wind up, Rulon served notice that he elected to wind up in accordance with P 12 by asserting in his letter drafted by his attorneys and identified as Ex "B", attached to Rulon's complaint R 5, wherein he claimed only 40% was to be returned to him, moreover the sworn evidence before the Court which was not even con-

tradicted or objected to was that Rulon supplied the capital and Terry gave up his future plans and all understood in order to protect Terry, Terry was to have said 40% distributed to him as indicated in P 12, R 1. See Terry's deposition page 21. The same attorney who drafted the notice for Rulon R 5 also appeared and was present representing Rulon when Ex 1, R 18 was discussed and executed, wherein Rulon made conclusive his intentions of withdrawing only 40%, with the balance of everything 40% to go to Terry and 20% to go to Flora. See R 101-20 for admissions by Rulon's counsel in this respect.

ARGUMENT

POINT I

THE APPELLATE COURT WILL NOT REVERSE THE LOWER COURT WHERE THERE IS SUFFICIENT EVIDENCE TO SUSTAIN THE COURT'S POSITION.

The fact that Rulon agreed to file a gift tax return, which was never denied, constituted an admission of a completed and executed gift and showed his intention on this issue conclusively. Since the above evidence and all other facts and pleadings recited as considered by the Court is not only sufficient to sustain the Court's decision but conclusive on the issue, counsel deems it unnecessary to further elucidate the subject.

POINT II

HAVING REPRESENTED TO THE COURT THAT THERE WAS NO GENUINE ISSUE OF FACT AND HAVING NO DENIAL TO THE AFFIDAVIT, EXHIBITS OR EVIDENCE AND MAKING NO OBJECTION TO HAVING SAME RECEIVED IN EVIDENCE, THE LOWER COURT WAS REQUIRED TO ACCEPT ALL EVIDENCE AS TRUE AND RESOLVE THE ISSUES IN ACCORDANCE THEREWITH.

Justice Henroid, in the case of *Labco Construction vs. Caldwell*, 382 P. 2d 206 U, stated:

“For this court to reverse the trial court under such circumstances would deify a mockery of our rules and pre-trial procedure”.

Counsel suggests that the Court consider the application of the same rationale to the case at bar, since after taking the position that there was no genuine issue of fact, and submitting the same to the Court, to then complain because the ruling was adverse is even worse than action taken in the above-quoted case.

Again this is so elementary and obvious, counsel sees no necessity for citing further authorities in this respect. Moreover, counsel is estopped from asserting that certain facts may be in dispute when he himself represented to the Court that there were no facts in dispute.

POINT III

NEW MATTERS CANNOT BE RAISED FOR THE FIRST TIME IN THE APPELLATE COURT.

The only defense pled or raised by Rulon to

the contract, the election to take only 40% and to the conclusive evidence set forth in Ex 1, R 18 and the affidavit was that Ex 18 was without *consideration*.

R 18 was executed and delivered to Terry in compliance with and to conform to P 6 and 12 of the contract as pled by Rulon R 1 and also conforming to his election and notice to wind up and take only 40% of everything, R 5. Moreover, the partnership contract provided that Terry would undertake operations with the understanding that a transfer of 40% of the entire interest to Terry and 20% to Flora of everything would be made by Rulon if an involuntary winding-up was forced on Terry. Rulon elected to force a winding-up and declared his intention to take only 40% of the entire interest, and Ex 1, R 18 was executed and delivered to Terry wherein Rulon under advice of his attorney signed a statement that his 40% contribution to El Rancho was a gift to Terry and Flora and he certifies thereto. All terms of the agreement R 6 to 10 demonstrate ample consideration, as does the letter R 5 and election of Rulon to take only 40%; demonstrating Rulon's intent and understanding with respect to said P 6 and 12 of the contract.

Moreover, when Rulon agreed to file a gift tax return, he conclusively demonstrated an unequivocal intention that he intended a gift and that all

acts had been accomplished to make it completely executed, completed and transferred.

Even if Ex 1, R 18 had not been given in fulfillment of commitment and even lacked all the strength and considerations of conforming to and completing the matter in accordance with the contract P 6, 12, R 1 and the election R 5 and had the Court ignored all of said evidence and ignored affidavits and all else, the Court would still have been compelled to resolve the issues as it did for the following reasons: The defense, by admitting R 18 and by pleadings raising *one issue only*, and only *one* defense thereto, to-wit: no *consideration* with respect to R 18, which is what counsel for Rulon did, the lower court must still be affirmed.

NO CONSIDERATION IS NECESSARY:

Reed vs. Knudson, 15 P. 2d at 349 80 U. 428, "no consideration is necessary to support an executed gift".

See also 24 Am. Jur. 758 "53 *Generally*. It is a general rule that a completed gift inter vivos is irrevocable by the donor, his heirs, and personal representatives, and is not revoked by the property being mentioned in a will. A gift inter vivos from parent to child, when fully executed, is irrevocable. A gift cannot be revoked on the ground that it was made under a mistake".

Counsel in desperation not in pleadings or in evidence before the lower Court but for the first

time before this Court asserts some impropriety in the execution of Ex 1, R 18, despite the fact that it was done in accordance with the requests made by Rulon's attorney in his estate planning program and drafted in compliance with the understanding with Rulon's attorney and discussed, considered and executed by Rulon at the requests of the attorney of Rulon and in the presence of Terry, Rulon's attorney, and Terry's attorney R 101. Moreover, since impropriety of execution was not pled, it cannot now be raised for the first time in the Supreme Court, even if it were proper to raise such issue and even if there was some justification to be heard on said issue. Here it has been demonstrated that even if such issue had been properly pled and considered and even if the Supreme Court was to re-try the fact, which of course it cannot, still the issue must be resolved as it was, and the lower court affirmed.

In bringing up King Lear and Santa Claus, appellant is deliberately trying to conceal the fact that in estate planning of Rulon's half million dollar estate, what was done by the firm representing Rulon and appellant was proper, including the \$80,000.00 the daughters got in stock.

ANSWER TO APPELLANT'S BRIEF

The answer to Point I of Rulon's brief 48-8-37 Utah Code Annotated, 1953, provided as follows:

“In settling accounts between the partners after dissolution, the following rules shall be observed, *SUBJECT TO ANY AGREEMENT TO THE CONTRARY.*” (Emphasis supplied).

The part to which emphasis is supplied is a complete answer to the point raised by appellant, since there have always been three agreements to the contrary: (First) P 6 and 12 of the contract R 1, (Second), notice and election of winding up R 5, (Third), dissolution agreement and agreement of transfer of Rulon’s interest by gift and promise to file gift tax return, making it conclusive, R 18.

Moreover, P 12, R 1 would be surplusage and completely meaningless unless it is considered as compelling Rulon to distribute, when winding up under said circumstances, 40% to Terry and 20% to Flora of all capital investments and advancements.

Throughout the brief of the appellant, he refers to “accountant Terry”. We appreciate the fact that appellant has conceded the qualifications of Terry West in this field. The greater portion of the brief of appellant is an attempt on the part of counsel for appellant, Mr. Roe, to qualify himself as an accountant.

“Accountant Terry” suggests that from an accounting standpoint, Mr. Roe, who is not an accountant, has demonstrated in his brief that he is not

qualified to advise this Court on the subject for the following reasons.

Appellant's argument that "liabilities to partners" includes contributions to capital is patently incongruous. Section 48-1-15 (UCA, 1953) requires each partner to be "repaid his contributions" *after* "all liabilities, including those to partners, are satisfied. . . ." If, "liabilities to partners" includes "contributions" to capital, these contributions will be satisfied when the liabilities of the partnership are satisfied and there will be no "contribution" left to be "repaid". Clearly, as used in Section 48-1-15, the expression "[liabilities] to partners" was used in its ordinary sense of a debt liability such as that arising from money actually loaned as a creditor and not in the technical, legal sense of a contribution made by a partner as capital.

The position of appellant that the money paid by Rulon was a loan is directly contrary to the prohibition against such a position as made and provided for in the partnership contract itself, wherein it states at 3B, R6, as follows:

"3B. Any further sums which any partner shall with the consent of the other from time to time contribute for capital purposes which shall be credited to his capital account."

No evidence was before the Court showing any modification of said controlling accounting procedure.

By Appellant's own admission (Appellant's brief, p. 9), all sums contributed by any partner were in fact credited to his capital account. This procedure was strictly in accord with Partnership Article 3(b) which requires that all contributions of a partner for capital purposes shall be credited to capital accounts. Such procedure was followed at all times prior to the Dissolution Agreement of April 2, 1960. Clearly, then, as understood by the parties, the sums contributed were capital contributions and not "loans" or "advances".

However, in an effort to bolster his argument for repayment of his so-called "loans" or "advances", Appellant urges that the sums he "advanced" were bona fide "loans" to the partnership and thus Appellant qualifies as a creditor of the partnership, notwithstanding the fact that such a contention is contrary to the uniform practice of accounting by the partnership and the plain meaning of Partnership Article 3(b). Obviously this is an attempt to bring such sums contributed by Rulon within the category of "liabilities to partners" as that term is used in UCA §48-1-37 since Appellant states [Appellant's brief, p. 34] that "There is no reason to suppose that the parties meant to adopt a different meaning for "liabilities to partners".

Unwittingly, no doubt, Appellant has cited to the court the precise reason why the parties could

not conceivably have intended to use those terms in the manner in which Appellant says they are used in the Utah Code. The Code sweepingly includes as liabilities of the partnership not only bona fide loans made by partners, which admittedly would be liabilities of the partnership, but also all capital and profit accounts. In other words, there never could be any "net assets" as that term is used in the Agreement of April 2, 1960, if Appellant's contention is correct. "Net assets" means assets remaining after payment of liabilities, and the logical conclusion of Appellant's argument is that all capital and profit accounts would have to be closed as if they, too, were true liabilities of the partnership.

But clearly such an interpretation was not intended by the parties since they expressly stated that after "paying all partnership liabilities (including liabilities to partners)," the "net assets" should be distributed to the partners. By using the term "net assets", the parties obviously intended to confine the term "liabilities to partners" to the customary accounting meaning of actual debt such as liabilities to outsiders.

Following Appellant's contention would require that Rulon's contributions to capital be deemed liabilities of the partnership in the same sense as liabilities to creditors, thus leaving nothing for the

term "net assets" to act upon. Such an interpretation would render that term meaningless, notwithstanding it is otherwise defined by dictionary, accounting texts and case law. In Kohler, *A Dictionary for Accountants*, 278 (1952) the term "net assets" is defined as "the excess of the book value of the assets of an accounting unit over its liabilities to *outsiders*." (Emphasis added.) In Webster's Int. Dictionary 166, (2d ed., 1953) net assets equals "the excess of value of resources over liabilities to creditors as distinct from surplus which is in excess over all liabilities, including those to owners." In Montgomery, *Auditing* 382 (8th ed. 1957), "capital" is used by accountants to describe the equity of an owner in a business and is represented by the excess of total assets over total liabilities which equals "net assets". In *Commonwealth v. Union Trust Co.*, 345 Pa. 298, 27 A.2d 15, 18 (1942), the court states, "The amount of its net assets, constituting its capital, surplus and undivided profits, is a bookkeeping balance obtained by subtracting its liabilities from its gross assets; it is the shareholders' equity in the assets of the company." The court in *Oram v. Kirchik*, 58 NYS.2d 431, 433 (Sup.Ct. 1945) gave a similar definition.

Moreover, where a partner contributes capital and leaves it in the partnership for use by the part-

nership in its business, such capital is not the same as an ordinary debt of the partnership. As was stated in *Seaboard Surety Co. v. H&R Construction Corp.* 153 F.Supp. 641, 649 (1957), "This amount is due them not as an unpaid creditor but as a return of capital."

Although courts often speak of the return of capital as a debt of the partnership, it is in no sense a conventional liability of the partnership unless it is a bona fide loan or advance but is merely a distribution of capital among the partners according to a written agreement or understanding derived from the whole situation. See *Hunter v. Allen*, 147 P.2d 213 (1944). All of the Appellant's cases purporting to show that there should be a return of capital are factually distinguished from the present case in which we have an express agreement decreeing the percentages in the distribution of capital upon dissolution, as well as a factual situation completely consistent with the written agreement.

Furthermore, Appellant argues that Respondent is bound by the Agreement of April 2, 1960. If Respondent is bound, so likewise is Appellant who must then abide by the plain meaning of that document as well as the obvious understanding of the parties as evidenced by the accounting procedures and practices prior to April 2, 1960.

Even assuming, *arguendo*, Appellant's strained

contention that "liabilities to partners" include partners' capital and profit accounts, how does this help Appellant? He cannot take an expression out of context from one of the agreements which supplement the Articles of Partnership because it benefits his position, but arbitrarily reject the remainder. If, therefore, the expression "liabilities to partners" is to be accepted, so also should the provisions adjusting the capital accounts to reflect the transfer of capital from Rulon to Terry and Flora. Once this is done, it is immaterial whether Appellant's theory is adopted or not, since payment to partners will automatically be made on a 40-40-20 basis because the adjusted capital accounts will be in that ratio.

Respectfully submitted,

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courts proceed with dispatch to ascertain and apply legal principles to undisputed facts and it is just as desirable that they proceed with equal dispatch to apply principles of equity to similarly undisputed facts; and, since we have failed to perceive any sound reason why the Supreme Court should have intended to make a distinction between law and equity as regards summary judgment, we conclude that it neither intended to make one nor did." 31.21

This is not to say that a court must always grant a motion for summary judgment in an action seeking "equitable relief" merely because there is no dispute as to the facts. If such relief seems inappropriate, the court can refuse to grant it, just as it might do after a trial. But if there are no factual issues and the court believes equitable relief appropriate, it is fully empowered to grant a motion for summary judgment awarding such relief.

§ 1233. Time for Motion

As originally adopted, Rule 56(a) provided that a party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment might move for a summary judgment at any time after a responsive pleading had been served. Under this provision a plaintiff could not move for summary judgment until after the defendant had served a responsive pleading to the complaint.³² Where a defendant moved for summary judgment before answer plaintiff could not make a counter motion for summary judgment until after an answer was served.³³ In an interpleader action one defendant could not move for summary judgment until after the other defendant had answered their claim.³⁴

By the amendment to Rule 56(a) the provision as to time was changed to allow a party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment to move for a summary judgment at any time after the filing of the complaint and to file a responsive pleading thereto at any time thereafter.

31.21 *Elias v. Manis*, Tex.Civ.App. 1956, 292 S.W.2d 836, 838.

(32) Decisions under former rule

Begnaud v. White, C.A.6th, 1948, 170 F.2d 323.

Peoples Bank v. Federal Reserve Bank of San Francisco, D.C.Cal. 1944, 58 F.Supp. 25, appeal dismissed 149 F.2d 850.

U. S. v. Williams S. Gray & Co., D.C. N.Y.1945, 59 F.Supp. 665.

Kent v. Hanlin, D.C.Pa.1940, 35 F. Supp. 836.

33. *Viking Press v. Galt*, 194, N.Y.1941, 26 N.Y.S.2d 114. See also, *Frog v. Galt*, 194, N.Y.1941, 26 N.Y.S.2d 114. App.D.C. 226.

Peoples Bank v. Federal Reserve Bank of San Francisco, D.C.Cal. 1944, 58 F.Supp. 25, appeal dismissed 149 F.2d 850.

34. *U. S. v. Williams S. Gray & Co.*, D.C. N.Y.1945, 59 F.Supp. 665.

to obtain a declaratory judgment to move for summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. The Advisory Committee Note states that this amendment is in the interest of more expeditious litigation and that the 20 day period gives a defendant time to secure counsel and determine a course of action.³⁴ Such an interval is unnecessary if defendant himself moves for summary judgment.³⁵ Therefore a claimant is no longer required to wait for a responsive pleading by his adversary before moving for summary judgment.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, under Rule 56(b), move for a summary judgment at any time.³⁶ A defending party may make the motion at any time after a pleading stating a claim against him is served upon him.³⁷ A defendant is not required to file an answer before moving for summary judgment.³⁸ However, the court may require a defendant to file an

34. "Very likely this shows an excess of caution; thus a distinguished member of our Advisory Committee made an offer—as yet unaccepted—to cut his trousers if anyone could ever show any precipitate action in any lawsuit to offset the more usual interminable delays. But at any rate the protection is here." Clark, *The Summary Judgment*, 1952, 36 Minn.L. Rev. 367, 370.

35. Advisory Committee Note, Appendix, Volume 3A. For a criticism of the delay caused by the original provision see dissenting opinion of Circuit Judge Clark in *U. S. v. Adler's Creamery*, C.C.A.2d, 1939, 107 F.2d 987, 992.

36. *Johnson v. Johnson & Co.*, D.C. Ga.1952, 2 F.R.D. 291.

37. *Gifford v. Travelers Protective Ass'n of America*, C.C.A.9th, 1946, 153 F.2d 209.

38. A defending party may move for summary judgment at any time after a pleading stating a claim against him is served upon him if it clearly ap-

pears that no valid claim against him exists. *U. S. v. William S. Gray & Co.*, D.C.N.Y.1945, 59 F.Supp. 665.

38. *Gifford v. Travelers Protective Ass'n of America*, C.C.A.9th, 1946, 153 F.2d 209.

Lindsey v. Leavy, C.C.A.9th, 1945, 149 F.2d 899, certiorari denied 66 S. Ct. 331, 326 U.S. 783, 90 L.Ed. 474.

Miller v. International Freighting Corp., D.C.N.Y.1951, 97 F.Supp. 60.

Security Trust Co. of Rochester, N. Y., v. Woodward, D.C.N.Y.1947, 73 F.Supp. 667.

Compare: On defendant's motion for summary judgment, which was objected to because no answer had been filed, defendant's supporting affidavit could be considered in place of answer, or, if a formal answer should be required, it might be filed by amendment at any time, even after final judgment. *U. S. ex rel. Laughlin v. Eicher*, D.C.D.C.1944, 56 F. Supp. 972.

specifically stated the reason why I
 eyed the filing of such suit * * * was
 reliance upon the good faith of the ne-
 gations instituted by and the assurances
 de by Mr. White through his attorney."
 e foregoing statements are what this
 ness would testify to if this case went
 trial. Whether the jury would accept
 h testimony at its face value or reject
 is not the present question. Taking it
 its face value on the motion for sum-
 ry judgment, it clearly puts in sharp
 ue the defendant's claim that the bank's
 uidators did not rely upon the repre-
 sentations and negotiations of White.

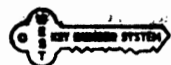
[6] The authorities indicate that the
 al judge should be slow in passing upon
 motion for summary judgment which
 uld deprive a party of his right to a trial
 jury where there is a reasonable indica-
 n that a material fact is in dispute. Com-
 re Sartor v. Arkansas Gas Corp., 321
 S. 620, 64 S.Ct. 724, 88 L.Ed. 967, where
 affidavits of eight witnesses on behalf
 the defendant were, under the circum-
 nces in that case, insufficient to author-
 the Court to sustain defendant's mo-
 n for summary judgment.

[7,8] The fact that both parties make
 tions for summary judgment, and each
 tends in support of his respective mo-
 n that no genuine issue of fact exists,
 es not require the Court to rule that no
 issue exists. Each, in support of his
 n motion, may be willing to concede
 rtain contentions of his opponent, which
 ncession, however, is only for the pur-
 se of the pending motion. If the mo-
 n is overruled, the concession is no long-
 effective. Appellants' concession that
 genuine issue of fact existed was made
 support of its own motion for summary
 gment. We do not think that the con-
 sion continues over into the Court's sepa-
 te consideration of appellee's motion
 summary judgment in his behalf after
 ellants' motion was overruled. M.
 ower & Co. v. United States, 7 Cir., 140
 d 367, 369; Walling v. Richmond Screw
 chor Co., 2 Cir., 154 F.2d 780, 784.

The complaint states that the appellants,
 ying on the negotiations and appellee's

of filing suit before February 15, 1947
 wrote defendant on February 15, 1947 as
 to the amount they would recommend to
 the Court as a settlement of the admitted
 debt, * * * "In the present state of the
 record this allegation of fact has not been
 denied. If appellee desires to controvert
 this allegation of estoppel he can do so
 by filing his answer upon the remand of
 this case, together with any other proper
 defenses available to him. On the issue
 or issues of fact thus made, the parties are
 entitled to their jury trial.

Judgment of the District Court is re-
 versed and the case remanded for further
 proceedings in accordance with the views
 hereinabove stated.



HICKMAN v. TAYLOR et al. No. 9579.

United States Court of Appeals
 Third Circuit.

Argued June 25, 1948.

Decided Oct. 18, 1948.

1. Death \Rightarrow 95(2)

In action by administrator for death
 of a seaman, as to which the Federal
 Employers' Liability Act was applicable no
 recovery could be had for the economic
 value of the decedent's life for the period
 of his probable life expectancy. Jones Act,
 46 U.S.C.A. § 688; Federal Employers'
 Liability Act §§ 1, 9, 45 U.S.C.A. §§ 51,
 59.

2. Seamen \Rightarrow 29(1)

Where marine superintendent of rail-
 road whose car float with freight cars on
 board sank in river, arranged for removal
 of cars from float by engaging tug owners
 to tow car float to shipyard and superin-
 tendent merely assented to plan of tug own-
 er whereby tug was attached to hawser of
 sunken float during night and sunken float
 caused the tug to sink, railroad was not lia-
 ble for death of seaman on board tug.

y 15th a cable had been sent to Fern-
There then was quoted in full the
le of May 15th, probably for the
son, as contended by FAR, that it
ld not be certain that the May 15th
le had been received by Fernseh. In
clusion, the cable stated: "Our di-
tors have approved agreement (stop)
aiting your answer." This cable in-
ated that the necessity of a confirm-
g cable had been eliminated and that
that was lacking was Fernseh's ac-
tance. It seems clear that Fernseh
derstood from the cable of May 28th
at a confirming cable from FAR was
longer necessary. Fernseh's cable of
ne 14th stated: "We accept your of-
r in your cable of May 28, 1941. Con-
ler abrogation of existing agreements
d mutual assignment of patents as
nding." A fair reading of this cable
ows that Fernseh understood that the
st act necessary for consummating the
ansaction had been done. Also on June
th, Fernseh cabled authority to Mr.
artin (patent attorney and secretary
FAR) to execute the formal assign-
ent on Fernseh's behalf. Fernseh
ould hardly have put such power in
AR's hands had it not regarded the
ntract as complete. It cannot be gain-
id that at this stage of the correspond-
nce such an interpretation was a rea-
nable one. Thus, the facts on and be-
ore June 14, 1941, demonstrate that no
nfirmatory cable from FAR was re-
quired to consummate the contract.

This conclusion is supported by the
ubsequent acts and declarations of FAR
nd Fernseh. Much argument was
ressed, pro and con, on this point, both
t the court below and on this appeal.
lowever, this phase of the case has
een dealt with by Chief Judge Leahy so
xtensively, and with such particularity,
hat no more need be said here than
hat his opinion in this regard is adopted.

(3) Defendant finally contends that it
vas error for the court below to grant
summary judgment in favor of FAR,
since there was a genuine issue of fact
is to the time when Fernseh's accept-

ance was sent. This contention is well
founded. The general denials in defend-
ant's answer put this question of fact
in issue. Moreover, it was brought to
the attention of the court below when,
at the hearing on the motions for sum-
mary judgment, defendant stated:

"It is perfectly clear to me, Your
Honor, and I think the plaintiff will
have to concede it—that if the time
when the cable was sent is signifi-
cant, there is an issue of fact as to
that. And if the court must decide
that question, then neither motion
can be granted. We take a view of
the case which suggests to us that
the question need not be decided and
that possibly, therefore, there is no
issue of fact."

FAR's motion for summary judgment
was premised on the theory that the
correspondence between it and Fernseh
demonstrated that an assignment was
consummated upon the deposit by Fern-
seh of an acceptance cable with the Ger-
man cable office on June 14, 1941, prior
to 1:10 P. M. (the effective date of the
Executive Order). It was essential,
therefore, to FAR's case that it be shown
that Fernseh's acceptance was sent be-
fore 1:10 P. M. on June 14, 1941.

[4, 5] FAR argues on appeal, how-
ever, that there is not the slightest doubt
but that Fernseh's June 14th cable was
dispatched prior to 1:10 P. M. As
"clearly proving" this contention FAR
relies heavily on a detailed affidavit of
an expert from RCA Communications,
Inc. wherein the *opinion* is rendered
that the cable was transmitted before
1:10 P. M. on June 14th. But, although
an affidavit filed in support of a motion
for summary judgment may be consid-
ered for the purpose of ascertaining
whether an issue of fact is presented,
it cannot be used as a basis for deciding
the fact issue. *Frederic Hart and Co.*
v. Recordgraph Corp., 3 Cir., 1948, 169
F.2d 580. In addition, it is obvious
from a reading of the affidavit that it
is nothing more than an opinion. Sum-

88 L.Ed. 967.³ Other evidence is similarly pressed as substantiating this point of FAR, but it is manifest that even when this evidence is considered, there remains considerable doubt as to the truth of the matter. The law is clear that one who moves for summary judgment has the burden of demonstrating that there is no genuine issue of fact. *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, 3 Cir., 1951, 190 F.2d 817. FAR has not met the burden here.

[6] FAR also contends that since defendant cross-moved for summary judgment, it is now precluded from questioning the propriety of disposing of the case upon such a motion. But, it is well established that cross-motions for summary judgment do not warrant the trial court granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed. *Walling v. Richmond Screw Anchor Co.*, 2 Cir., 1946, 154 F.2d 780, certiorari denied, 1946, 328 U.S. 870, 66 S. Ct. 1383, 90 L.Ed. 1640; *Begnaud v. White*, 6 Cir., 1948, 170 F.2d 323; *Lloyd v. United Liquors Corp.*, 6 Cir., 1953, 203 F.2d 789, 794. 6 *Moore, Federal Practice* § 56.13 (2d ed. 1953).⁴

[7] In the instant case there was a genuine issue of fact as to the time when Fernseh's cable was sent, and accordingly the court below erred in granting summary judgment in favor of FAR.

3. It was there held that affidavits of eight witnesses on behalf of the defendant were insufficient to sustain defendant's motion for summary judgment.

4. In *Begnaud v. White*, 6 Cir., 1948, 170 F.2d 323, 327, the Court succinctly stated the applicable rule as follows:

"The fact that both parties make motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the Court to rule that no fact issue exists. Each, in support

of his own motion, may be willing to concede certain contentions of his opponent, which concession, however, is only for the purpose of the pending motion. If the motion is overruled, the concession is no longer effective. Appellants' concession that no genuine issue of fact existed was made in support of its own motion for summary judgment. We do not think that the concession continued over into the Court's separate consideration of appellee's motion for summary judgment in his behalf after appellants' motion was overruled."



**INTERSTATE NATURAL GAS CO.
v.
SOUTHERN CALIFORNIA GAS
CO. et al.
No. 13373.**

United States Court of Appeals
Ninth Circuit.
Dec. 29, 1953.

Action by natural gas company against another such company, alleged obligated to transport as a carrier natural gas belonging to plaintiff, for refusal to so transport gas. The United States District Court for the Southern District of California, Central Division, William M. Byrne, J., 103 F.Supp. 31, entered order granting defendant's motion to dismiss, and plaintiff appealed. The Court of Appeals, Orr, Circuit Judge, held, inter alia, that questions to whether public convenience and necessity required defendant to transport through its pipelines gas belonging to plaintiff, and if so, how much and what rates, and as to what facilities services should be abandoned to accommodate plaintiff, were within the primary jurisdiction of the Federal Power

of his own motion, may be willing to concede certain contentions of his opponent, which concession, however, is only for the purpose of the pending motion. If the motion is overruled, the concession is no longer effective. Appellants' concession that no genuine issue of fact existed was made in support of its own motion for summary judgment. We do not think that the concession continued over into the Court's separate consideration of appellee's motion for summary judgment in his behalf after appellants' motion was overruled."

declaratory judgment. The patent was prayed also by defend-

both sides moved for summary judgment. The court granted motion for plaintiff, made findings of fact, conclusions of law and entered judgment. The questions of infringement and damages were not adjudicated.

[1-2] The trial court exceeded the permissible limits of determination of disputed questions without trial. A motion for summary judgment cannot be granted simply because both sides move.

[3] An indispensable prerequisite for such a judgment is the absence of a material question of fact. But it is obvious that there were postulates of fact involved in the diametrically opposite positions of the respective litigants. Both contentions of fact could not be true.

[3-7] It is then said the proof was summary and was all before the trial court. If this were conceded, there are still questions of fact to be resolved which an appellate court is not permitted to adjudicate. Trial de novo, which was formerly the rule in admiralty, ecclesiastical courts and in some chancery cases, definitely abolished in civil cases in the federal courts by the rules restricting review. No authority is given except to District Courts to make new findings of fact. Presently our sole function as to such findings is to re-examine judicially, criticize and set aside if

clearly erroneous.² The existence of the basis of fact in documentary form or in agreed statement of the parties does not transmute such propositions into questions of law.³

It is true that all the facts might have been stipulated. But even then, submission upon that basis would require a trial. At the trial an opportunity should be given to introduce evidence. Here, as we understand the record, there was an effort to present some testimony which was precluded because it was indicated the nature of a summary judgment prevents the trial of any issue of fact.⁴ No comment is required. The case must be remanded for trial.

[8-10] But it should not be conceived that this action is founded upon a technicality. The lawyers for the respective parties, by the cross-motions, superinduced the idea that no factual questions were involved. But the utmost which can be said in a patent validity case is that it is a "mixed question of law and fact." The implications of this phrase are misleading.⁵ It is realized that the learned trial judge took this action under the pressure of a heavy calendar and in order to save time for the parties and attorneys. As often happens, the shortcut did not accomplish the desired end.⁶ In a patent case there are three interested parties, the patent holder, the user of an accused device and the public. The interest of the

"* * * it is well established that cross-motions for summary judgment do not warrant the trial court granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed." *T. A. R. Liquidating Corporation v. Prowell*, 3 Cir., 200 F.2d 375, 382; *Berglund v. White*, 6 Cir., 170 F.2d 323, 327.

A finding upon summary judgment will be set aside if there is dispute about the "fact." Where after trial the court weighs the evidence, documentary and testimony, there is a strong policy for affirmation on appeal, which is crystallized in Rule 52, Federal Rules of Civil Procedure 28 U.S.C.A.

3. *Waialua Agricultural Company v. Maneja*, 9 Cir., 178 F.2d 603, 608.

4. Federal Rules of Civil Procedure, 56(d).

5. A clearer statement has been given judicially. "The question of invention being a question of fact, to be determined, however, by rules of law. *Poppenhusen v. Falke*, Fed.Cas.No.11280, 5 Blatchf. [46] 49, we are constrained to hold the patent valid on a fact finding of invention in its subject matter." *Radiator Speciality Co. v. Buhot*, 3 Cir., 39 F.2d 373, 376. At the time of that opinion, there was trial de novo in appellate courts in patent cases.

6. See *Doehler Metal Furniture Co., Inc. v. United States*, 2 Cir., 149 F.2d 130, 135.

appropriation by entrepreneurs through fallacious letters patent. The formal parties plaintiff and defendant cannot be allowed to dictate the course of the litigation lest the public suffer.

[11,12] Because of the peculiar character of the process of reconsideration by a court in a field where presumption of validity of an administrative finding has, to say the least, been weakened,⁸ any tendency to abolish trial in patent cases for consideration of documents in camera should be curbed. Furthermore, apparently as a direct result of the improper failure to hold a trial, the findings of fact which were made were entirely inadequate. Here again, the lawyers seem to have presented the court with formalistic pronouncements of "ultimate fact," which are in effect conclusions. An administrative grant of letters carries a presumption of validity but does not state on its face the invention involved or differentiate the device from earlier patent or contrivances already dedicated to the public.

[13,14] The court must find facts which support three essentials: novelty, utility and invention. Mere conclusions

are contained in this record, are of no avail. No opinion was before this Court. There is indication neither why the trial judge thought the device was an invention nor why the patented article was differentiated from the prior art. It is well known that a single patent has been upheld in one circuit and held invalid in another.⁹ In a famous case, the Supreme Court held a patent invalid¹⁰ when attention was called to a device which had been in the public domain for many years prior to the alleged invention, although it had previously sustained the identical patent in a prior case where this evidence of anticipation was lacking. In the interest of the public, the importance of a specific declaration on the contested issues by the trial court either in opinion or in findings cannot be overemphasized.¹¹ Otherwise, the burden is placed on this Court of trying patent cases on the first instance rather than exercising the normal function of review.

The summary judgment is vacated, the petition for declaratory relief is reinstated and the cause remanded for trial and appropriate and specific findings of fact.

7. "It is the public interest which is dominant in the patent system." *Mercoid Corporation v. Mid-Continent Investment Co.*, 320 U.S. 661, 665, 64 S.Ct. 268, 271, 88 L.Ed. 376.

8. See *Myers v. Beall Pipe & Tank Corporation*, D.C., 90 F.Supp. 265, 268.

9. Conflicting views of appellate courts concerning the validity of the same patent has led the Supreme Court to grant certiorari in many cases. For example, see *Jungersen v. Ostby & Barton Co.*, 275 U.S. 560, 69 S.Ct. 269, 93 L.Ed. 235; *Dow Chemical Co. v. Halliburton Oil Well Cementing Co.*, 324 U.S. 320, 65 S.Ct. 647, 89 L.Ed. 973; *Universal Oil Products Co. v. Globe Oil & Refining Co.*, 322 U.S. 471, 64 S.Ct. 1110, 88 L.Ed. 1399; *Cuno Engineering Corporation v. Automatic Devices Corporation*, 314 U.S. 84, 62 S.Ct. 37, 86 L.Ed. 58; *Maytag Co. v. Hur-*

ley Machine Co., 307 U.S. 243, 59 S.Ct. 857, 83 L.Ed. 1264. See also *Triplett v. Lowell*, 297 U.S. 638, 56 S.Ct. 645, 80 L.Ed. 949. In such cases perforce, the Supreme Court exercises an independent function in relation to facts.

10. See *Smith v. Hall*, 304 U.S. 174, 58 S.Ct. 711, 81 L.Ed. 1649; and *Snow v. Snow*, 294 U.S. 1, 55 S.Ct. 374, 76 L.Ed. 721.

11. "Besides, the defense of want of patentable invention in a patent operates, not merely to exonerate the defendant, but to relieve the public from an asserted monopoly" *Haughey v. Lee*, 151 U.S. 282, 285, 14 S.Ct. 331, 332, 38 L.Ed. 162. It is imperative that the courts do not receive submission of such controversies on an inadequate basis laid by interested parties.