

1967

United Factors, A Corporation v. T. C. Associates, Inc., A Corporation, And Harry R. Ulmer, Jr., Paul J. Sugar, And Sam Herscovitz : Brief of Appellants

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

UNITED FACTORS, A Corporation,

Plaintiff and Respondent.

- vs. -

T. C. ASSOCIATES, INC., A Corporation,
and HARRY R. ULMER, JR.,
PAUL J. SUGAR, and SAM HERS-
COVITZ,

Defendants and Appellants,

Case No.
11022

BRIEF OF APPELLANTS

Appeal from the Judgment of the District Court
of Salt Lake County

Hon. Joseph G. Jeppson, Judge

PETE N. VLAHOS

302 Eccles Bldg., Ogden, Utah

Attorney for Appellants

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FILED

DEC 4 - 1967

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS	2, 3, 4, 5, 6
STATEMENT OF POINTS	6, 7
ARGUMENT	7
POINT 1. THAT THE LOWER COURT ERRED IN DENYING APPELLANTS MOTIONS TO SET ASIDE THE STIPULATION AND IN DENYING APPELLANTS THE RIGHT TO FILE AN AMENDED ANSWER AND COUN- TERCLAIM	7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17
POINT 2. THAT THE LOWER COURT ERRED IN GRANTING JUDGMENT TO THE RE- SPONDENT ON THE STIPULATION BE- CAUSE THERE WAS NO CONSIDERATION FOR SAID STIPULATION EVEN THOUGH IT PURPORTED TO BE AN ACCORD AND SATISFACTION OF THE CLAIMS OF THE RESPECTIVE PARTIES.....	17, 18, 19, 20, 21, 22, 23
POINT 3. THAT THE LOWER COURT ERRED IN DENYING APPELLANTS MOTION TO FILE AN AMENDED ANSWER AND COUN- TERCLAIM SINCE THERE WAS TRIABLE ISSUES OF LAW AND FACT AND THERE- FORE CONTRARY TO THE LAWS OF THE STATE OF UTAH	23, 24, 25
POINT 4. THAT THE LOWER COURT ERRED IN DENYING APPELLANTS MOTION WHEN THE APPELLANT DID IN FACT HAVE A	

GOOD AND VALID DEFENSE OF MISJOIN- DER OF CLAIMS AND MISJOINDER OF PARTIES AND THEREFOR CONTRARY TO THE LAWS OF THE STATE OF UTAH	25, 26, 27, 28
POINT 5. THAT THE LOWER COURT ERRED IN GRANTING RESPONDENT A JUDGMENT SINCE THE COURT HAD NO JURISDIC- TION TO GRANT SAID JUDGMENT.....	28, 29
CONCLUSION	29, 30
AFFIDAVIT OF ATT. PETE N. VLAHOS ON STATEMENTS MADE IN LOWER COURT AND NOT IN TRANSCRIPT	31
AFFIDAVIT OF ATT. PETE N. VLAHOS AS TO SERVICE OF SUMMONS ONLY AND NOT A COPY OF THE COMPLAINT.....	32, 33

TABLE OF CASES CITED

Ralph A. Badger and Company v. Fidelity Build- ing and Loan Association, 75 P. 2d 669 (1938 Ut. S. Ct.)	21, 22
Davis Vincent Ballard, By Duane O. Ballard, Guar- dian ad Litem v. Wes Buist and Ronald Baxter aka Ronny Baxter, 333 P. 2d 1071, 8 Ut. 2d 308 (1959 Ut. S. Ct.	11
Baur v. Pacific Finance Co. et. al., 383 P. 2d 397.....	24
Browning v. Equitable Life Assurance Society of the United States, 72 P. 2d 1060 (1937 Ut. S. Ct.).....	20
Hancock v. Luke et. al., 148 Pac. 452.....	9, 15
Harman v. Yeager, 100 Ut. 30, 110 P. 2d 352.....	15

	Page
Hartford Accident and Indemnity Company v. Clegg, 135 P. 2d 919, (1943 Ut. S. Ct.).....	12
Johnson et. ux. v. Brinkerhoff et. al., 57 P. 2d, 1136 (1936 Ut. S. Ct.)	7, 8
Johnson v. Beck, et. al., 63 P. 2d 253.....	9
Klopstock v. Superior Court, 108 P. 2d 906, 910, 135 A.L.R. 318	14
Metropolitan State Bank, Inc. v. Arthur Cox, Tribune Grain Inc., Sullivan Inc., and William E. Rust, 302 P. 2d 188, (1956 Colo. Sup. Ct.).....	19
Sams v. Eccles, 11 Ut. 2d 289, 358 P. 2d 344.....	24
Stank v. Jones, 404 P. 2d 964, 17 Ut. 2d 96 (1965 Ut. S. Ct.)	26, 27
United States v. Memphis Cotton Oil Co., 288 U.S. 62, 53 S. Ct. 278, 280, 77 L. ed. 619.....	14

ANNOTATIONS

135 A.L.R. 318	14
1 Am. Jur. 217 Sec. 4	23
49 CJ 466	8
1 CJS Sec. 1, P. 462	18
1 CJS Sec. 3, P. 471	19
1 CJS Sec. 4, P. 473	18
71 CJS 275	15
77 L. ed 619	14

UTAH STATUTES CITED

Rule 3, U.R.C.P., 1953 as amended 1964.....	28, 29
Rule 4, U.R.C.P. 1953	11, 12
Rule 15, U.R.C.P., 1953	7, 12
Rule 19, U.R.C.P., 1953 as amended.....	25, 27, 28
Rule 20, U.R.C.P., 1953	27

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

UNITED FACTORS, A CORPORATION,
Plaintiff and Respondent.

- VS. -

T. C. ASSOCIATES, INC., A Corporation, and HARRY R. ULMER, JR.,
PAUL J. SUGAR, and SAM HERSCOVITZ,

Defendants and Appellants,

BRIEF OF APPELLANTS

STATEMENT OF THE KIND OF CASE

This is an action brought by United Factors against the defendant Corporation and Harry R. Ulmer, Jr. and Sam Herscovitz as individuals, on a guarantee agreement for T. C. Associates, Inc., a Corporation; that prior to the matter being tried on its merits, a stipulation was entered into which the appellants believe to be contrary to the laws of the State of Utah, and a Motion was filed to vacate the Stipulation and to allow the appellants to file an Amended Answer and Counterclaim and to set aside the stipulation; all of which was denied by the lower Court and a Judgment was entered based on the stipulation against the appellants as individuals and in favor of the respondent, from which the appellants as individuals appeal.

DISPOSITION IN LOWER COURT

Following the appellants Motion in open Court on the 15th day of August, 1967, the Third District Judge, Joseph G. Jeppson, denied appellants Motion to set aside the Stipulation and for leave to file an Amended Answer and Counterclaim and granted Judgment to the respondent upon their oral Motion in open Court.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the lower Court's Order denying appellants the right to file an Amended Answer and Counterclaim and for an Order setting aside the Stipulation and for an Order, ordering the case to be remanded back to the lower Court so that the appellants can assert all of their defenses both legal and equitable which it was not allowed to do in the lower Court.

STATEMENT OF FACTS

That appellants, who were the defendants in the lower Court, will be referred to in this Brief as appellants, and that the plaintiff and respondent in this Brief will hereinafter be referred to as respondent.

T. C. Associates, Inc. was a Utah Corporation doing business in Utah, and that the officers and incorporators of said Corporation were Harry R. Ulmer, Jr., Paul J. Sugar and Sam Herscovitz; that said Corporation was engaged in the furniture business with its principal offices in Salt Lake County, State of Utah.

Sam Herscovitz and Harry R. Ulmer, Jr. as individuals signed a written guaranty with the respondent, United Factors, which was later modified as to amount

by verbal agreement of the parties limiting the joint liability as guaranteed to \$10,000.00 for the account of Bailey-Schmitz for the extension of credit to the T. C. Associates, Inc. Corporation; that said guarantees were signed by Harry R. Ulmer, Jr. and Sam Herscovitz on May 3, 1965, and pursuant to said guarantees T. C. Associates, Inc. did commence to purchase merchandise from Bailey-Schmitz.

That Bailey-Schmitz did then assign its accounts receivable of T. C. Associates, Inc. to United Factors, a New York Corporation, which is the respondent in this Brief.

That without any knowledge or information and without the consent of the appellants, either corporately or individually, the Evans and Black Carpet Mills account was also sold and assigned to United Factors, who then proceeded to use the same guarantee of Harry R. Ulmer, Jr. and Sam Herscovitz even though it was not accepted nor authorized by the said appellants herein. (R30, 31 Answer)

That prior to June 8th, 1966, T. C. Associates, Inc. became delinquent in the payment of its accounts and the respondent by and through its attorney commenced legal action against T. C. Associates, Inc. and the individuals who were the alleged guarantors; Legal action was commenced by an Acceptance of Service of the Summons only by the appellants attorney, Pete N. Vlahos, but no Complaint was served on appellants by mailing to appellants or any of its authorized agents nor by

leaving a copy with the Clerk of the Court. (R. 1, 2, and 3) Said Acceptance was dated June 8th, 1966.

Shortly after appellants attorney, Pete N. Vlahos, accepted service of the Summons only, he was hospitalized for an apparent heart attack. The appellants were without any knowledge of the Acceptance of said Service by their attorney. On June 30, 1966, a default Judgment was entered against all of the appellants who were unaware of any pending legal action brought against them because they had no knowledge of a Summons being served on Pete N. Vlahos. Appellants attorney, Pete N. Vlahos having been hospitalized was unable to notify the appellants of the Summons because of his illness. (Transcript Page 9 and Affidavit of Attorney Pete N. Vlahos attached hereto.)

The appellants first became aware of the Judgment after it was entered against them and immediately thereafter did retain Attorney Herschel J. Saperstein to represent them. Attorney Herschel J. Saperstein by proper Motion in the lower Court had the Default Judgment set aside but the Order Appointing the Receiver was not vacated. Owing to the failure of the lower Court to vacate its Order Appointing Receiver (R17, 18 and 19), T. C. Associates, Inc. was compelled to file in Bankruptcy in the Federal District Court of Utah.

On or about September 19, 1966, the appellants, Harry R. Ulmer, Jr. and Sam Herscovitz, as individuals did enter into a Stipulation allegedly an accord and satisfaction for the unpaid debts allegedly due the

respondents by the Corporation, T. C. Associates, Inc. for which there was no consideration.

Shortly thereafter appellants Sam Herscovitz and Harry R. Ulmer, Jr. reengaged Attorney Pete N. Vlahos at which point Attorney Herschel J. Saperstein withdrew as Attorney of Record. Thereupon Attorney Pete N. Vlahos made a Motion to vacate the Stipulation and permit the appellants to file a Counterclaim and an amended Answer which was denied and for which the appellants seek relief therefrom. (R43, 44, 45)

When the lower Court heard appellants Motion as stated herein the lower Court stated "It did not care about the law" (Transcript Page 5) and would not allow the presentation of legal authority.

Upon the Court denying appellants Motion as indicated herein the respondent did then file a Judgment from which the appellants as individuals are appealing.

Appellants Attorney Pete N. Vlahos tried to point out to the Court that there were issues of law and fact that the Court should hear rather than grant respondent a Judgment since T. C. Associates, Inc. had assets in the Bankruptcy Court to pay respondent the money due it by T. C. Associates when distribution was made. As of the date of the writing of this Brief no distribution has been made. The Stipulation provided that all payments made by Appellants apply on the Bailey-Schmitz account and the balance from the Bankruptcy Court. (R 51, 52, 53)

Respondents attorney by the terms of the Stipulation

did receive \$500.00 attorney fees. When Judgment was entered he sought another \$2,000.00 making the total attorney fees \$2,500.00 altogether on an unpaid amount of \$2,736.54.

At the time of appellants Motion to vacate the Stipulation and to allow appellants to file an Amended Answer and Counterclaim appellants attorney Pete N. Vlahos did raise the issue that the appellants had a good and valid defense because of a misjoinder of claims and a misjoinder of parties and that said statement does not appear in the Transcript and is referred to herein by Attorney Pete N. Vlahos' Affidavit attached hereto.

STATEMENT OF POINTS

POINT 1. That the lower Court erred in denying appellants Motion to set aside the Stipulation and in denying appellants the right to file an Amended Answer and Counterclaim.

POINT 2. That the lower Court erred in granting Judgment to the respondent on the Stipulation because there was no consideration for said Stipulation even though it purported to be an accord and satisfaction of the claims of the respective parties.

POINT 3. That the lower Court erred in denying appellants Motion to file an Amended Answer and Counterclaim since there were triable issues of law and fact and therefore contrary to the laws of the State of Utah.

POINT 4. That the lower Court erred in denying appellants Motion when the appellants did in fact have a good and valid defense of misjoinder of claims and

misjoinder of parties and therefore contrary to the laws of the State of Utah.

POINT 5. That the lower Court erred in granting respondent a Judgment since the Court had no jurisdiction.

ARGUMENT

POINT 1.

THAT THE LOWER COURT ERRED IN DENYING APPELLANTS MOTIONS TO SET ASIDE THE STIPULATION AND IN DENYING APPELLANTS THE RIGHT TO FILE AN AMENDED ANSWER AND COUNTERCLAIM.

Under Rule 15 of the Utah Rules of Civil Procedure, 1953 the Code states as follows:

AMENDED AND SUPPLEMENTAL PLEADINGS

(A) AMENDMENTS

“A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty days after it is served. Otherwise a party may amend his pleadings only by leave of Court or by written consent of the adverse party; AND LEAVE SHALL BE FREELY GIVEN WHEN JUSTICE SO REQUIRES.” (Emphasis appellants.)

The above Rule has been fairly digested and explored in Utah law and the Landmark case concerning the amending of the pleadings is found in Johnson et. ux. v. Brinkerhoff et. al., 57 P.2d 1132, a 1936 Utah Case.

One of the points made by the appellant Brinkerhoff on the appeal was that Johnson was permitted to introduce a new and different cause of action other than that originally sued upon when he filed his second Amended Complaint and the Court found that the Amended Complaint was filed before trial and the defendant's Answer thereto was filed before trial of the cause. The Court stated on Page 1136:

"No prejudice is alleged or shown in allowing the filing of the second Amended Complaint or in refusing to strike such pleading. A more liberal rule will be applied in cases where amendments are offered under such circumstances than when offered during or after trial, where the parties may be taken by surprise or handicapped in the meeting of new allegations."

The Court further went on to state on Page 1136:

"The rule, however is toward liberality in allowance of amendments to pleadings for the purpose of permitting a complete adjudication of the matters in controversy and in the furtherance of justice. The rule is well stated in 49 CJ 466, as follows:

'Subject to such limitations as arise from the time at which they are sought and from their subject matter, the policy of the law is toward liberality in the allowance of amendments and to regard them favorably in order that the real controversy between the parties may be presented, their rights determined, and the cause decided on the merits without necessary delay, hence, to allow amendments is the rule; to refuse them, the exception.'

Justice Folland in the case of Johnson v. Peck, et. al., 63 P.2d on Page 253 stated:

“The policy of the law is toward liberality in the allowance of amendments and to regard them with favor to the end that the real controversy between the parties may be settled. The liberality exercised is greatest at the time suit is commenced and decreases as the suit progresses.”

That the question of pleadings and amendments to pleadings was fully digested in the case of Hancock v. Luke et. al., 148 Pac. 452.

In this case an action was brought by the plaintiff, an attorney, who brought an action on a contract and the defendant filed a lengthy Answer and no objections were interposed by either party to the pleadings until the case was called for trial when the plaintiff moved for Judgment on the pleadings which Motion was granted by the Court and Judgment for the plaintiff was entered accordingly. The facts further show that the Attorney for the defendant made a Motion to amend the Answer and what transpired is quoted on Page 456 as follows:

“Mr. Armstrong, for defendants: Now we make a Motion if the Court please to amend the Answer. Mr. Wilson for plaintiff: We wish to resist that Motion, of course, Your Honor, because it comes too late. In the first place, there isn't anything to amend. Mr. Armstrong: There are some allegations in the Answer that we hadn't noticed, having been called into the case just lately that, may be a little ambiguous. Mr. Snyder (for plaintiff): I submit, Your Honor, it is too late now. Mr. Wilson: I would like to be heard on it if the

Court has any idea of entertaining it. The Court: It will be overruled. Mr. Armstrong: Take an exception. Mr. Wilson: We ask for Judgment, Your Honor. The Court: You may have it. Mr. Armstrong: Exception. Mr. Wilson: We will draw it up later and serve it on counsel. The Court: We will just consider ourselves adjourned."

This writer asks the Court to notice the similarity as to what occurred in the Hancock case and what transpired at the hearing on August 15th, 1967, when appellants attorneys asked the Court as follows:

Mr. Vlahos: "I may cite various cases concerning it."

The Court: "I do not care about the law, but the reason why. (Transcript Page 5)
and further the Court went on to state on Page 6 of the Transcript as follows:

"The law is no excuse."

The Court in the Hancock case on Page 456 stated:

"Why, then, was the offer to amend not timely? In case pleadings are assailed, must a party move to amend before he is apprised of what the ruling of the Court will be? We think not. We are of the opinion, therefore, that the Motion for leave to amend is timely. We are also of the opinion that, under the circumstances, it constituted reversible error for the Court to deny the Motion for leave to Amend."

And in setting forth the general law of the case the Court stated on Page 457 as follows:

"We can see no reason whatever why the defendants in this case should be denied the right of

amendment when the exercise of that right is a matter of daily occurrence in our court of justice. True, motions for judgments on the pleadings may be rare, but that is no reason why the right of amendment should be denied when timely proposed as in the case at bar."

The Court in the case of Davis Vincent Ballard, by Duane O. Ballard his Guardian Ad Litem v. Wes Buist and Ronald Baxter aka Ronny Baxter, 333 P.2d 1071 8 Utah 2d, 308, 1959 Utah Case.

The Brinkerhoff case was cited by the Court in allowing the plaintiff upon proper Motion to amend the Complaint to allow the Guardian Ad Litem, Duane O. Ballard to represent his minor son, David Vincent Ballard and the Motion was granted and the plaintiff Duane O. Ballard was appointed as plaintiff's Guardian Ad Litem after which the Guardian Ad Litem moved the Court for permission to Amend the Summons and Complaint to show that plaintiff was suing by his Guardian Ad Litem since the defendant was a minor and was in the Armed Services of the United States and the Court denied permission to amend the Summons and Complaint and granted a Motion by respondent's attorney to quash the Summons and dismiss the action.

The Court stated on Page 1073 and 1074 as follows:

"In the instant case when the Court allowed a guardian ad litem to be appointed it should have allowed his motion to amend the process and pleadings to show that the suit was being prosecuted by the infant through his guardian ad litem under the provisions of Rule 4 (h) U.R.C.P.

1953 which provides that:

‘At any time in its discretion and upon such terms as it deems just, the Court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.’ ”

And the Court went on further to state Rule 15, of the U.R.C.P. 1953 and stated on Page 1047 as follows:

“The amendments could prejudice none of the parties, but could only tend to serve justice. To disallow the amendments was an abuse of discretion. It has always been the rule in this state to be liberal in the allowance of amendments to the end that there can be a complete adjudication of a controversy upon the merits and so that justice may be served.”

And the Court stated in the Ballard case that the matter be remanded and the lower Court was reversed with directions to follow the high Court’s decision.

Another case that was similar wherein the Court allowed four amended Complaints was in the case of Hartford Accident and Indemnity Company v. Clegg, 135 P.2d, 919, a 1943 Utah Case:

The facts are briefly that the defendant was elected as treasurer of the Board of Education for Tooele County and on two different occasions he had bonds posted with the Hartford Accident and Indemnity Company, one for \$10,000.00 and one for \$20,000.00, and with the Board of Education’s approval the defendant placed

said sums of money in the Tooele County State Bank on December 24, 1930, and on January 14, 1931. One week after the defendant commenced his second term as treasurer, the bank closed its doors and failed and the Board of Education had on deposit a sum in excess of \$141,000.00, a portion of which they recovered from the assets of the bank and a portion of which they sued the Hartford Accident and Indemnity Company. A settlement of \$14,500.00 was arrived at after which the Hartford Accident and Indemnity Company brought action against Clegg for Clegg's failure to use care in depositing said sums of money and for failure to obtain sufficient security to see that the bank had ample funds to pay its depositors.

A trial was had in this matter and after the trial was over the Court made a minute entry on Page 921 as follows:

"The within entitled matter having been by the Court taken under advisement, the Court now renders its decision that Judgment be entered against the plaintiff and in favor of the defendant."

Thereafter the plaintiff made a motion to amend its Complaint which motion over defendant's objection was granted by the trial Court, a second amended Complaint was filed and a demurer to it was sustained. Demurrers to the third amended complaint which was filed was also sustained. The fourth amended Complaint which was filed sought recovery of \$14,500.00 on the theory of equitable subrogation and on the fourth amended Complaint the Court awarded Judgment to the Hartford In-

surance Company from which this appeal was taken.

One of the contentions raised by the defendants was that the Court erroneously allowed plaintiff to amend to state an entirely new cause of action and the Court in deciding this issue stated on Page 922 as follows:

“However, the rule that a new or different cause of action cannot be introduced by amendment cannot be taken literally. As pointed out by the California Supreme Court in a recent case, *Klopstock v. Superior Court*, 108 P.2d, 906, 910, 135 A.L.R. 318:

‘It is obvious that the unqualified way in which the rule is sometimes stated * * * cannot be accepted; for the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action, and in these, and often in the case of new parties, a new cause of action is in fact for the first time introduced. All that can be required therefore (to use the language of Mr. Pomeroy), is that a wholly different cause of action shall not be introduced.’”

And in citing the following case it was stated:

“In *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 53 S. Ct. 278, 280, 77 L.ed. 619, Cardozo J., states that the term “cause of action” may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the application of the principle of *res judicata*.”

The Court further went on and stated on Page 922:

“We have consistently encouraged all proper

amendments to pleadings to the end of having a full hearing on the merits of the entire controversy. *Hancock v. Luke*, 46 Utah 26, 148 Pac. 452." *Harman v. Yeager*, 100 Utah 30, 110 P.2d, 352." This trend toward a liberal construction of the term is looked upon with favor in other jurisdictions.

Although the appellants in the instant case does not intend introducing a new cause of action the case is only cited to show the liberality of the Utah Courts in granting leave to amend pleadings with the end result being that the parties will be given their day in Court and justice will prevail. It is stated in 71 C.J.S. 275:

"The fact that new matter may have been known to the appellant at the time the original pleadings was filed is not necessarily sufficient grounds for denying the right to amend."

The case that is almost identical in point both in facts and in law is the case that was cited previously which is the case of *Harman v. Yeager, et. al.*, 110 P.2d 352, a 1941 Utah case.

The facts of the *Yeager* case are almost similar to the procedural circumstances as to the case presently before the Court, and the facts briefly are as follows:

The plaintiff instituted an action against defendant, *Yeager*, and others to quiet title to a small tract of land in Salt Lake County. The Complaint was in the usual form for actions to quiet title and an Answer was filed with no demurrer to the Answer and when the case was called for trial plaintiff upon suggestions of trial Court moved for a Judgment on the pleadings. Defendant,

Yeager, then asked leave to amend their Answer and the Court denied the request for leave to amend and entered Judgment on the pleadings in favor of plaintiff quieting the title.

Defendants then obtained new counsel who moved the Court to vacate the Judgment and hear the cause on its merits, tendering a new and an amended Answer. The Motion was denied and Yeagers appealed. The Court stated on Page 354 as follows:

“When a demurrer is interposed timely, that is, before the cause is set for trial, so that the pleadings may be examined and considered and if necessary amended where such can be done without serious inconvenience to the parties, the public, and the orderly procedure of the Court’s business, it may be well to examine them quite critically and resolve all doubts against the pleader.”

The Court further stated on Page 354:

“But when a party fails until the cause is called for trial to demurrer and call the attention of the Court and counsel to what he thinks substantial defects in a pleading, the pleading should be liberally construed in favor of the pleader with all reasonable inference from the facts pleaded indulged with a view to a trial on the merits and doing substantial justice between the parties.”

And the Court then went on to cite the Hancock case which stated:

“The Courts generally do, and always should, require the parties to proceed to the merits, if such a course is permissible, after getting the allegations and averments contained in the pleadings,

and the necessary inferences arising therefrom a liberal construction and application." . . .

"Viewing the Motion therefore as a speaking demurrer, when the answer was held to be bad and the defendant sought to amend, they should have been granted such right unless under the facts admitted there was no reasonable probability that they could state a defense or make an issue on a matter material to plaintiff's cause of action."

There are too numerous cases to cite before this Honorable Court; the question that Court's should construe pleadings liberally. Even in view of all these cases the lower Court denied appellants Motion to amend its Answer and leave to file a Counterclaim. There would certainly be no prejudice to either party if appellants Motion had been granted, since most of the monies had already been paid to the respondent by the appellants when the appellants discovered additional information that would give them good and valid defenses against the allegations made by the respondent. This writer believes the Court to be in error in denying appellants Motion.

POINT 2.

THAT THE LOWER COURT ERRED IN GRANTING JUDGMENT TO THE RESPONDENT ON THE STIPULATION BECAUSE THERE WAS NO CONSIDERATION FOR SAID STIPULATION EVEN THOUGH IT PURPORTED TO BE AN ACCORD AND SATISFACTION OF THE CLAIMS OF THE RESPECTIVE PARTIES.

As is stated by many writers an accord and satisfaction is no different than an ordinary contract and there must be consideration in order to have an accord and satisfaction agreement.

In the instant case, the Stipulation that was entered into was for the exact amount due and owing allegedly to the respondent by the appellants. The Stipulation contains no facts nor recites any statement of any consideration given or sought by either party (R 51, 52, 53). This is further substantiated by the Judgment of the respondent accompanied by his Affidavit which sets forth the payments made by the appellants to the respondent and is computed out by the respondent for the same amount that the respondent is claiming (R 55, 56). The Stipulation that the appellants signed contained no consideration nor any consideration even if it was an accord and satisfaction, said matter has been decided numerous times and the following cases are set forth as evidence of same.

In 1 C.J.S. Accord and Satisfaction, Section 1, Page 462, it stated as follows:

“An ‘accord’ is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other than or different from what he is, or considers himself, entitled to; and a ‘satisfaction’ is the execution, or performance, of such an agreement.”

In 1 C.J.S. Accord and Satisfaction, Section 4, Page 473, it states as follows:

“Except where a statute otherwise provides * * * an accord and satisfaction, like any other contract, must, in order to be valid and effectual, be founded upon a proper consideration, and where there is no consideration, the accord is

nudem pactum, and so invalid and unenforceable. The consideration may present itself in any of numerous different shapes or guises, but in some form or other it must be present — there must be either some advantage, or presumed or assumed advantage, accruing to the party who yields his claim, or some detriment to the other party.”

From the citations of the C.J.S. it would appear to be analogous to instant case because there was in fact no consideration. The Stipulation that was signed was no different than what the respondent was already claiming. All that the appellants are seeking at this time is that the matter may be heard and tried by a jury with all of the facts presented to avoid an unconscionable injustice resulting to the appellants.

In the case of Metropolitan State Bank, Inc. v. Arthur Cox, Tribune Grain Inc., Sullivan Inc., and William E. Rust, 302 P.2d 188, a 1956 Colorado case the Court on Page 192, 193 stated as follows:

“We think it sufficient to direct attention to the statement of the Rule as set forth in 1 C.J.S. Accord and Satisfaction, Section 3, P. 471 in support of our conclusion.”

‘Inasmuch as an accord and satisfaction is dependent upon contract, and requires a meeting of minds of the parties, the relevant facts must be known to both parties, in order to render it valid and effectual, and each party must be apprised of the contentions of the other. So an accord and satisfaction entered into through or as a result of mutual mistake of fact, where such a mistake by one of the

parties as to amount to a complete difference between what he supposed he was receiving or giving up and what was in fact received or given, so as to constitute a want of meeting of the minds or an absence of consideration.'

* * *

The Court further stated:

"An agreement and its performance cannot constitute an accord and satisfaction of a claim or demand, the existence of which was unknown to the creditor when he made the agreement, nor does the giving and receipt of a thing or promise amount to or effect an accord and satisfaction where it is the result of coercion or what is known as "business compulsion."

As an analogy to the instant case this writer draws the Court's attention to the fact that a Motion to set aside the Stipulation and for leave to file an Amended Answer and Counterclaim would not have been made had not facts existed which did not become known to the appellants until after the agreement was entered into.

In the case of *Browning v. Equitable Life Assurance Society of the United States*, 72 P.2d 1060, 1937 Utah case:

The facts in the instant case although not identical to the case at hand show that the plaintiff, an oral surgeon, was injured and filed a claim with the defendant under an insurance policy he had with the company; he claimed a partial disability and some days of total disability as a result of this injury. Subsequent to this, the defendant payed the plaintiff on this claim and later the plaintiff claimed total disability which the insurance

company refused to pay and the lower court held in favor of the plaintiff from which the insurance company appealed claiming the defense of accord and satisfaction.

The Court in affirming the lower Court's decision stated on Page 1067 and 1068 as follows:

"His stating on the claim form and admitting the correctness of a statement which specified an item in pursuance of the claim for partial disability would seem at the most to involve only an opinion of the plaintiff at the time he signed the papers that he was for the time partially disabled. If, as a matter of ultimate fact, arrived at through legal interpretation of provisions of the policy, together with a conclusion from the evidence, his then opinion against himself was wrong, it would not seem to be conclusive." * * *

Was it an accord and satisfaction? An accord is an agreement between the parties, one to give a performance the other to receive or accept, such agreed payment or performance in satisfaction of a claim. The "satisfaction" is the consumation of such agreement. There must be consideration for the agreement. Settlement of an unliquidated or disputed claim where the parties are shown to be apart in good faith presents such consideration.

"Where the claim is definite and no dispute but an admittance of its owing, the agreement to take a lesser amount even followed by satisfaction is not good unless attended by some consideration. In this case we do not see the elements of an accord and satisfaction."

In the case of Ralph A. Badger and Company v.

Fidelity Building and Loan Association, 75 P.2d 669, a 1938 Utah Case:

The facts were that the plaintiff Badger became the owner of fifty shares of capital stock known as Investors Guarantee Stock which were issued by the defendant and which provided that the defendant promised to pay upon maturity of the certificate the sum of \$5,000.00 and when the time for maturity arrived the defendant refused to pay said \$5,000.00 and the plaintiff was informed by the defendant that payments were not being made on withdrawals and payment on the certificate for fifty shares of stock were refused. The plaintiff had received these certificate from one Arthur and Cecelia LeClerc and had been reissued two twenty-five certificate stocks and when the Fidelity Building and Loan Association refused to honor one of the certificates the plaintiff sent the certificates to the Atlas Realty Company in Ogden, Utah, and sold one of the twenty-five shares certificates for \$1,250.00, said sum being one-half of the value of said certificate.

The plaintiff later discovered that the Atlas Realty Company had acted as agent for the defendant in procuring said certificates and that the money paid therefore had been furnished by defendant and the certificate had been surrendered to the defendant by the Atlas Realty Company and had been cancelled. The plaintiff then brought suit to recover the difference between the face amount of the certificate and the amount he had received from the Atlas Realty Company for the certificate.

The lower Court found for the plaintiff and the Fidelity Building and Loan Association appealed raising as a defense the accord and satisfaction. The Court stated on Page 676 the elements of an accord and satisfaction and quoted 1 Am. Jur. Page 217, Section 4.

"The discharge of claims by way of accord and satisfaction is dependent upon a contract expressed or implied; and it follows that the essentials necessary to valid contracts generally must be present in a contract of accord and satisfaction. Therefore, the following elements are essential: (1) A proper subject matter, (2) competent parties, (3) an assent or meeting of the minds of the parties, and (4) a consideration." * * *

The Court further stated on Page 676:

"Where the claim is definite and no dispute but an admittance of its owing, the agreement to take a lesser amount even followed by satisfaction is not good unless attended by some consideration."

In the instant case before this Honorable Court it will be noted that the Stipulation is identical with the amount claimed due and owing by the respondent in its complaint; there certainly could not have been any consideration for a new agreement which is identical with what the respondent was already claiming. Therefore this writer submits that there was no consideration for the Stipulation.

POINT 3.

THAT THE LOWER COURT ERRED IN DENYING APPELLANTS MOTION TO FILE AN AMENDED ANSWER AND COUNTERCLAIM SINCE THERE WAS TRIABLE ISSUES OF LAW AND FACT AND THEREFORE CONTRARY TO THE LAWS OF THE STATE OF UTAH.

The lower Court either ignored or overlooked the

laws of the State of Utah as layed down by this Court in the case of Baur v. Pacific Finance Co. et. al. found at 383 P.2d 397. In that case the Court held and stated as follows:

“We have heretofore declared, the granting a motion to dismiss, which deprives the party of the privilege of presenting his evidence, is a harsh measure which Courts should grant only when it clearly appears that taking the view most favorable to the Complaint and any facts which might properly be proved thereunder, no right to redress could be established; and unless it so clearly appears, doubt should be resolved in favor of allowing him the opportunity to present his proof.”

See also: Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344.

In citing the above cases this writer draws the Court's attention to the appellants Answer (R 29, 30, 31, 32, 33, 34) wherein the appellants have denied all of the allegations contained in the respondent's Complaint (R1 and 2) and denied the guaranty of any amount to Evans and Black Carpet Mills d/b/a E&B Carpet Mills, Inc. That all respondents and the assignors are out of state corporations with no registered agents in Utah.

Further, the appellants stated set offs against two of the assignors of the respondent who are not parties to this action (R 33, 34.) The Stipulation signed by the appellants also make provisions to exclude their set offs and this writer submits to this Honorable body that the assignor Bailey-Schmitz is an indispensable party

as set forth under the Utah Rules of Civil Procedure 1953 under Rule 19.

NECESSARY JOINDER OF PARTIES:

“Subject to the provision of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs and defendants. When a person who should join as a plaintiff refuses to do so, or his consent cannot be obtained, he may be made a defendant or, in proper cases, an involuntary plaintiff.”

This writer submits that unless Bailey-Schmitz is forced to become a party in this action that justice will not be obtained and the result would be unconcionable because the appellants would have to bring legal action in the State of California against Bailey-Schmitz on their setoff when all of said issues should be handled at one time in an effort to avoid multiple suits.

It would appear therefore to this writer that there were triable issues of law and fact, the Court should have allowed the appellants the right to file an amended Answer and Counterclaim and if necessary such additional pleadings as to join all necessary parties before the Court so that equitable and substantial justice would be done to all of the parties concerned.

POINT 4.

THAT THE LOWER COURT ERRED IN DENYING APPELLANTS MOTION WHEN THE APPELLANTS DID IN FACT HAVE A GOOD AND VALID DEFENSE OF MISJOINDER OF CLAIMS AND MISJOINDER OF PARTIES AND THEREFORE CONTRARY TO THE LAWS OF THE STATE OF UTAH.

The Utah Supreme Court in the recent case of

Stank v. Jones, 404 P.2d 964, 17 Utah 2d 96, a 1965 Utah Case, decided this issue.

The facts in that case were that the plaintiff, a resident of Colorado, filed a Complaint containing twelve causes of action which were allegedly assigned by seven independent corporations and creditors and with each cause having unrelated facts. The twelve cause of actions were assigned for purposes of suit and collection; the assignors retained a two-thirds interest in the amount to be collected which was \$76,000.00.

The Supreme Court of the State of Utah stated on Page 965 and 966 as follows:

“Obviously, the seven assignors could not have joined as plaintiffs and asserted their diverse and unrelated claims in one action against the defendant. Why, then, should they be allowed to do indirectly what they could not do directly?

* * *

The claim of misjoinder was raised for the first time on this interlocutory appeal. However, in view of the fact that this accumulation of unrelated claims and the attempt to fuse them into a composite one produces an incongruity disruptive of proper and orderly procedure, we are impelled to remand this cause for proceedings in accordance with the conclusion stated in this opinion.”

The Supreme Court in the Stank case held there was a misjoinder of parties sent it back to the lower Court and reversed the lower Court which held for the plaintiff on its Complaint. In the concurring opinion the Court stated:

“Rule 20 (permissive joinder) the latter is conclusive in requiring that even if there could be a joinder the claims must at least arise out of the same transaction, — a circumstance wholly absent here.”

The facts in the instant case before this Honorable body is almost identical to the Stank case in that the respondent in its original Complaint filed two unrelated causes of action against the appellants (R 1, 2) and further the respondent in its Complaint stated that the appellants would not be entitled to any setoffs, defenses or counterclaims which is contrary to the laws of the State of Utah as stated in the Stank v. Jones case on Page 966.

“An assignee does not acquire any greater right than that possessed by his assignor.”

It would appear therefore that when appellants attorney in arguing his Motion argued that there was a misjoinder of claims and a misjoinder of parties the Court should have granted appellants Motion to file an Amended Answer and Counterclaim and if necessary bring in all the necessary parties since two of the assignors are foreign corporations and unless the appellants can bring in these parties they would be irreparably injured. Even the Stipulation provides that the appellants reserve the right to any setoffs against one of the assignors, to-wit: Bailey-Schmitz Company.

Rule 19 of the Utah Rules of Civil Procedure 1953 as amended state as follows:

“Necessary joinder of parties (a) Necessary join-

der. Subject to the provisions of Rule 23 and of Subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, or his consent cannot be obtained, he may be made a defendant or, in proper cases, an involuntary plaintiff."

It would appear therefore that under our Rules of Civil Procedure and in lieu of the Stank case that the Court erred in not granting the appellants the Motion as stated herein.

POINT 5.

THAT THE LOWER COURT ERRED IN GRANTING RESPONDENT A JUDGMENT SINCE THE COURT HAD NO JURISDICTION TO GRANT SAID JUDGMENT.

Rule 3 of the Utah Rules of Civil Procedure 1953 as amended in 1964 provides the following:

"Rule 3. Commencement of action. (a) How Commenced.

A Civil Action is commenced (1) by filing a complaint with the Court, or (2) by the service of a Summons. If the action is commenced by the service of a Summons, the Complaint, together with the Summons and Proof of Service thereof, must be filed within ten days after such service and a copy of the Complaint shall be served upon or mailed to the defendant if his address is known; if unknown, a copy must be deposited with the Clerk for him, or the action thus commenced shall be deemed dismissed and the Court shall have no further jurisdiction thereof; provided however, that the foregoing provisions shall not change the require-

ment of Section 12-1-8 Utah Code Annotated, 1953.”

This writer draws the Court’s attention to the document entitled Acceptance of Service of Summons dated June 8, 1966, and signed by the instant writer (R 3). The record is devoid that a copy of the Complaint was ever received or that the appellants attorney ever acknowledged the acceptance of a copy of the Complaint and this writer draws the Court’s attention to the Complaint (R 1, 2) and note that nowhere does a Certificate of Mailing show that a copy of the Complaint was at any time ever mailed to the appellants attorney, whose address was well known since the Acceptance of Service had previously been mailed to him and this writer draws the Court’s attention to the fact that all other documents in the record show Certificates of Mailing with the exception of the Complaint which at no time shows that a Complaint was mailed to appellants attorney or that a copy of the Complaint was filed with the Clerk’s Office and as stated in Rule 3, since this is jurisdictional, the failure of the respondent to either mail a copy of the Complaint to the appellants or to file a copy with the Clerk of the Court, the Court lost the jurisdiction to enter any further orders and that all orders entered thereunder are void and should be dismissed.

CONCLUSION

For the foregoing reasons it is respectively submitted that the failure of the lower Court to grant appellants Motion to set aside the Stipulation and for leave to file an Amended Answer and Counterclaim should have been granted and the lower Court erred in granting

Judgment to the respondent since the Court had lost its jurisdiction and the matter should be reversed and remanded back to the lower Court where the matter should be dismissed in its entirety with all monies paid thereunder being returned to the appellants by the respondent. That as alternative relief the appellant is requesting that the matter be remanded back to the lower Court so that the appellants can file an Amended Answer and Counterclaim so as to assert all of its legal and equitable defenses in Court so as to receive and avail themselves of due process of law.

Respectfully submitted,

PETE N. VLAHOS

*Attorney for Appellants
and Defendants*
302 Eccles Building
Ogden, Utah

AFFIDAVIT

STATE OF UTAH

ss.

COUNTY OF WEBER

PETE VLAHOS, being first duly sworn upon his oath deposes and says:

That he is an Attorney practising law in Ogden, Utah, with his offices at 302 Eccles Bldg., Ogden, Utah, and authorized and licensed to practice law by the State of Utah in and for the State of Utah.

That as a duly licensed attorney your affiant herein came to represent the defendants and appellants in the matter before this Court and on or about August 15th, 1967, appeared before the Honorable Joseph G. Jeppson, upon a Motion to set aside a Stipulation and for leave to file an Amended Answer and Counterclaim.

That included in your affiant's argument to the Court was the fact that there was a misjoinder of parties and a misjoinder of actions which the transcript is void of.

That this Affidavit is given in support of appellants argument to the Supreme Court as one of the points that the lower Court erred in denying appellants Motion.

DATED this 13th day of November, 1967.

PETE N. VLAHOS

Subscribed and sworn to before me this 13th day of November, 1967.

JOLENE ZANDEL

Notary Public

Residing at Ogden, Utah

My Commission Expires 6-5-69

AFFIDAVIT

STATE OF UTAH

ss:

COUNTY OF WEBER

PETE N. VLAHOS, being first duly sworn upon his oath deposes and says:

That he is a duly dicensed attorney authorized to practice law in the State of Utah with his offices located at 302 Eccles Bldg., Ogden, Utah.

That on or about June 8th, 1966, your affiant herein accepted service of a Summons in the matter of United Factors, a Corporation vs. T. C. Associates, Inc., pending in the District Court of Salt Lake County, bearing Civil No. 165056.

That on or about June 13th, 1966, your affiant was stricken what was his doctor thought to be a second heart attack within two months and was hopsitalized at the St. Benedict's Hospital from that date until September 1st, 1966, when your affiant again resumed the practise of law at his same address hereinafter designated.

That your affiant further states that at no time during said period of time did he receive a copy of a Complaint and that his Acceptance was only for the Summons and not for a Complaint which has never been mailed or served upon your affiant herein.

That this Affidavit is given in support of the appellants Appeal before the Supreme Court of the State of Utah which is pending and for which Briefs are to be filed.

DATED this 13th day of November, 1967.

PETE N. VLAHOS,

Affiant and Attorney for Appellant

Subscribed and sworn to before me this 13th day of November, 1967.

JOLENE ZANDEL

Notary Public

Residing at Ogden, Utah

My Commission Expires 6-5-69