

1964

Gladys S. Bullough et al v. George Milton Sims et al : Brief of Appellants

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Bullough v. Sims*, No. 10039 (Utah Supreme Court, 1964).
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GLADYS S. BULLOUGH, WINIFRED S.
McDONALD, GRACE S. MALQUIST,
IRMA S. HANNIBAL, CLEVELAND K.
SIMS and LOUIS K. SIMS,

Plaintiffs-Respondents

vs.

GEORGE MILTON SIMS, ELMER L.
SIMS and BEVERLY SIMS CAND-
LAND,, Executors of the Estate of MIL-
TON K. SIMS, Deceased; GEORGE A.
SIMS, G. GRANT SIMS, ELMER L.
SIMS, SIMS REALTY COMPANY, a
corporation, EVELYN B. MAZURAN,
MARJORIE S. SIMS, LILLIAN SIMS
and ROBERT E. SIMS,

Defendants-Appellants

FILED
FEB 26 1964

Supreme Court, Utah

Case No.
10,039

GLADYS S. BULLOUGH, WINIFRED S.
McDONALD, GRACE S. MALQUIST,
IRMA S. HANNIBAL, CLEVELAND K.
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Defendants-Appellants

UNIVERSITY OF UTAH

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APPELLANTS' BRIEF

Appeal from the Findings, Conclusions and Judgments
of the District Court for Salt Lake County,
Hon. Marcellus K. Snow, Judge

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In the Supreme Court of the State of Utah

GLADYS S. BULLOUGH, WINIFRED S.
McDONALD, GRACE S. MALQUIST,
IRMA S. HANNIBAL, CLEVELAND K.
SIMS and LOUIS K. SIMS,
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APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action brought to fix and determine the correct purchase price to be paid to plaintiffs by defend-

ants under a Bill of Sale dated April 2, 1932 and an Agreement dated April 6, 1932 relating to the sale then by plaintiffs to defendants of their undivided interests in the assets of Salt Lake Transfer Company.

DISPOSITION BY LOWER COURT

At the request of the plaintiffs, the trial of the case was divided into two phases, the first as to the interpretation of the contractual relationships between the parties under the 1932 Agreement and determination of what measure of liability shall be applied. A separate trial was had thereafter to determine the amount of the purchase price payable to plaintiffs by defendants in which the trial court made, entered and filed its Findings, Conclusions and Judgment on those issues. Therein the court construed the 1932 Bill of Sale and Agreement as requiring a June 3, 1960 valuation of the assets, sold by plaintiffs in 1932, whereas defendants claim that the basis of valuation should be as of April of 1932. The court found that plaintiffs were not partners and that their 1932 Agreement was not void for fraud, mistake or undue influence. By a separate trial, the court then made Findings and entered Judgment against defendants for \$181,841.07 as being the 1960 value of the undivided interests sold in 1932, together with unpaid interest.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the trial court's Findings and Judgments insofar as they adjudge that defendants shall pay for the purchase of plaintiffs' share of the company assets as of their value on June 3, 1960 and ask that those Findings and Judgments be reversed and that the trial court be directed to determine the value of the assets as of April 6, 1932, the date of plaintiffs' Agreement Relating to Salt Lake Transfer Company. Defendants also attack the valuations as determined by the court and ask for reduction of those sums.

STATEMENT OF FACTS

Prior to April 2, 1932 the Salt Lake Transfer Company was a partnership operating in Utah with its office in Salt Lake City, consisting of George H. Sims (father) and two of his sons, George A. Sims and Milton K. Sims. The respective interests of the partners at that time were as follows:

<i>Partner</i>	<i>Shares in Assets</i>	<i>Share in Profits</i>
George H. Sims	3/5	1/3
George A. Sims	1/5	1/3
Milton K. Sims	1/5	1/3

On April 2, 1932, just prior to his demise, the father executed his Bill of Sale (Exhibit P-A) transferring his "right, title and interest" in the company to his nine children, each to have a $1/9$ th interest thereof (plaintiff Gladys S. Bullough actually received $2/9$ ths, one for herself and one for her brother, John.) Thus each child received from his and her father a 6.666% interest ($1/9$ th of $3/5$ ths) in the assets and $1/27$ th (3.711%) interest in the profits. This, then vested in George A. Sims and Milton K. Sims, the two surviving partners, each $10/27$ ths of the profits and $12/45$ th of the assets and they, on April 5, 1932, formed a new Salt Lake Transfer Company partnership with the two of them as sole partners. (Exhibit D-T)

On April 6, 1932, the surviving children (grantees in the Bill of Sale) executed the Agreement Relating to Salt Lake Transfer Company (Exhibit P-B) whereby each of the plaintiffs, who never had been partners "hereby sells and conveys" all of his or her interest, which they had just received from their father, to the two brothers as surviving partners, George A. and Milton K., who agreed (paragraph 3) "upon six months demand from the person so selling, to pay for each one-ninth to purchased one-ninth of the sum found as the value of the GEORGE H. SIMS interest as per Bill of Sale above mentioned." Then it was agreed that (paragraph 4) "until such purchase sum is demanded or is paid, it will pay one-twenty-seventh of the net monthly profits, if any, for each ninth so purchased."

The two brothers carried on their business as Salt Lake Transfer Company continuously from that date in April, 1932 until death of Milton K. Sims in 1959. The company still continues under terms of a 1946 partnership agreement between those two and their sons, Grant G. Sims and Elmer L. Sims. (Exhibit D-L) Following Milton K.'s death, discussions were had as to payment now to plaintiffs of the sums owing on the 1932 agreed sale price. The parties first agreed as to the amount to be paid and plaintiffs rejected a later tender of the purchase price and accrued interest made to each of them and filed this action June 3, 1960. The trial court construed such a filing as being the demand for payment referred to in paragraph 3 of the Agreement. (R. 111)

The facts shown by the record, which appear to defendants to sustain their contention that there was a sale made in 1932 based upon the 1932 values, the sale price however not to be paid to plaintiffs as sellers until after six months demand, are as follows:

1. the Bill of Sale from the father (Exhibit P-A) dated April 2, 1932 prescribes "In any case any Grantee wishes to withdraw his or her interest in the partnership property, the value of the same shall be appraised by Gladys S. Bullough and George A. Sims and the figure set by these two shall be binding upon the withdrawing Grantee";

2. said two, Gladys (a plaintiff) and George A. (a defendant) did in fact execute in 1947 a valuation of the assets as of April 1932 (Exhibits D - H and I), this was based upon the values as known to them and after a careful review of the books of the company by Mrs. Bulrough's husband. (R. 230, 243) ;

3. the Bill of Sale (Exhibit P-A) and the Agreement (Exhibit P-B) were executed in 1932, the depth of the Depression, when money was not readily available to pay for the interests of the brothers and sisters;

4. the said Agreement (Exhibit P-B) was a withdrawal by plaintiffs from the partnership and states that in 1932 the plaintiffs had a present intention to sell then and defendants an intention to buy then and there, but there was a deferred time of payment as shown by the following terms of said documents signed by plaintiffs:

(a) first it recognized the former partnership relationship of the father and two sons;

(b) it acknowledged the Bill of Sale from the father dated April 2, 1932;

(c) recites in preamble, "Whereas, these children of George H. Sims who have not been in the partnership

desire to sell their interest in the partnership to the two remaining partners and the latter are willing to purchase the same”;

(d) they “approve such Bill of Sale and of the method therein set forth for valuing the share owned by George H. Sims at the time of the execution of such Bill of Sale”;

(e) the present Salt Lake Transfer Company is designated as “vendees” and plaintiffs as “vendors”;

(f) vendees are said to “hereby purchase and each of the vendors hereby sells and conveys”;

(g) vendees assume all obligations of the former Salt Lake Transfer Company;

(h) “3. The present Salt Lake Transfer Company agrees, upon six months demand from the person so selling, to pay for each one-ninth so purchased, one-ninth of the sum found as the value of the GEORGE H. SIMS interest as per the Bill of Sale above mentioned.”;

(i) “until such purchase sum is demanded or is paid” vendees shall pay vendors one-twenty-seventh of the net monthly profits”;

(j) upon demand for the purchase price, “sellers right to share in the profits shall cease and he or she shall be entitled to interest on the sale price at six per cent per annum until paid”;

(k) “purchaser shall be entitled at any time to pay any seller the purchase price for his share plus accrued net profits or interest, to date of payment”;

(l) “each of the vendors” covenanted that no prior sale had been made by him or her.

Since that time, in lieu of a stated percent of interest on the unpaid purchase price, plaintiffs have each received as interest on such sale a sum equal to 1/27th of the net profits of the business, with a small sum being withheld occasionally with the knowledge and consent of plaintiffs. None of the plaintiffs have participated in the business since 1932 and the trial Court duly found (Par. 12 of Findings) that they were not partners since the date of their Agreement, April 6, 1932 (R. 111).

Defendants acknowledged liability for and are ready to pay to the plaintiffs the value of the interest sold and purchased in April 1932 plus any unpaid interest as required by the Bill of Sale and the Agreement, but defendants disagree with the trial Court’s interpretation that said valuation is to be as of June 3, 1960, the date of filing this action. After the trial of the initial phase,

defendants paid to plaintiffs \$48,000.00, representing \$8,000.00 each. Plaintiffs have received and retained the interests payments (3.711% of the profits each) since 1932 without complaint or objection as to the validity of their 1932 Agreement (R. 180, 221). None have participated in management of Salt Lake Transfer, (R. 158, 202, 221).

The defendants contend that the Agreement should be construed to mean that the purchase price is the value as of 1932 but it need not be determined until and when a demand for payment is made, and that at said time the purchase price will be fixed based on the valuations on the date of sale in 1932. In support of this the defendants contend that the continued payment to plaintiffs of a share of the net profits is interest and is not indicia of a continued ownership interest in the assets of Salt Lake Transfer Company. Within the meaning of their father's Bill of Sale, the Agreement was a "withdrawal" on April 6, 1932 by plaintiffs.

Shortly after the death of M. K. Sims in 1959, several of the plaintiffs met with George A. Sims and a discussion developed relative to completion of the sale and purchase of the family interests. At that time George offered to transfer to each one, stock having a value of \$18,000.00. Each agreed that such was a fair price and efforts were made to procure the stock that very day. but the safe deposit box section of the bank was

closed (R. 184 and 208). The next day, George withdrew his offer after a discussion with his partners. This is the nearest bona fide valuation on an eye to eye basis between the actual parties hereto.

It will be recalled that there were nine children at the time of their father's 1932 Bill of Sale. One of said nine, John Sims, had the same interest as each of the six plaintiffs. He is a businessman engaged in operating an automobile sales business in California. After the death of the brother, M. K. Sims and shortly prior to the filing of this case in 1960, he met with George A. Sims and agreed upon a valuation of \$10,000.00 (R. 757 and 769), which sum was then paid to him for his 1/27th interest. The six remaining family members, plaintiffs herein, have each obtained judgment for the same 1/27th interest for \$27,358.88 plus \$5,152.63 retained earnings, which was valued in its entirety by John at \$10,000.00 in 1960 and by several of the plaintiffs themselves at \$18,000.00 in 1959 (R. 187) and by Mrs. Bullough, another plaintiff, in 1947 at \$3,614.41 exclusive of retained earnings (Exhibits D-H).

In the second phase of the trial, the court took evidence on the valuations of the assets as of June 3, 1960. Testimony as to values varied considerably and the details will be discussed in the Argument relating to Points VI, VII and VIII. The final gross valuation of

the assets (Salt Lake Transfer plus Sims Realty) at \$410,383.35 is a salvage value, but no allowance was given for the costs of liquidation or salvage.

The plaintiffs' Contentions raised at pre-trial for the first time the issues of "fraud, mistake, undue influence" (R. 85). The court required proof by clear and convincing evidence on this issue (R. 89). Not only was no proof given, but all of the plaintiffs testified that the only defendant present in 1932 when their Agreement was signed was their brother George A. Sims, and each one of them volubly expressed their great love and esteem for him (R. 136, 166-67, 194, 205, 214, 223). Finding No. 11 properly determined that the 1932 Agreement "is not void or unenforceable on the grounds of fraud, mistake or undue influence" (R. 111).

The remaining issue of fact was the contention of plaintiffs that they were partners in Salt Lake Transfer Company and hence entitled to an ownership share in the assets and to a winding up of the affairs because of the death of M. K. Sims in 1959. The issues and facts on this phase will be discussed more in particular in reply to the plaintiff's Cross Appeal, sufficient at this time to note that the record reveals, first that plaintiffs sold out their interests in 1932 to a partnership consisting of only two individuals, George A. Sims and M. K. Sims (Exhibit P-B); next, the state regulatory bodies, I.C.C. and Public Service Commission of Utah never

recognized any plaintiff as a partner, (Exhibits D-O, D-P, D-Q, D-R, D-S); none of the plaintiffs testified that any of them had participated in management at any time (1932 to now) (R. 158, 202, 221); and the only semblance of partnership evidence was that the income tax returns after 1941 reflected plaintiff's names as partners, though the testimony and returns are clear that prior to that time only the two true partners were shown, George A. and M. K. Sims, but in 1941 the Internal Revenue Service required the change for tax purposes. The court found (R. 111) "12. Plaintiffs and defendants were not partners at any time since April 6, 1932."

ARGUMENT

POINT I

A VALID SALE AND PURCHASE OF PLAINTIFFS' FRACTIONAL INTERESTS WAS ACCOMPLISHED IN APRIL 1932 WITH THE THEN AGREED PURCHASE PRICE TO BE PAID AT A LATER DATE.

The historical background of this matter helps us to view the issues as the parties must have viewed them when the two documents were signed in 1932 relating to the assets of Salt Lake Transfer Company. The father had been ill and he executed a Bill of Sale transferring his 3/5th interest in Salt Lake Transfer Company to his nine children just prior to his demise (Exhibit P-A.) During the four day interim between his demise and

the funeral, the two surviving partners, George A. Sims and Milton K. Sims formed the "present" Salt Lake Transfer Company partnership and following the father's funeral, the plaintiffs, together with their two brothers, the surviving partners, executed the Agreement Relating to Salt Lake Transfer Company, (Exhibit P-B). The business would have floundered had not the two surviving partners made an effective arrangement to buy out the fractional interests of their brothers and sisters acquired under the father's Bill of Sale. However, the two partners did not have the money with which to pay the purchase price then because of the severe Depression conditions, and hence agreed that they would pay such purchase price at a future date when demanded by the sellers or earlier, at the election of the buyers. In the meantime, in lieu of interest which might have been very oppressive had a fixed rate been set during this Depression period, the partners agreed to pay to their brothers and sisters each $1/27$ of the net profits of the business until the purchase price was demanded.

There can be no doubt as to the intent of a present sale and purchase of those interests acquired from the father, as the Agreement (Exhibit P-B) uses the present tense in the references thereto: the first being that the plaintiffs "desire to sell their interest"; the next, the defendants as the remaining partners "are willing to purchase the same." Then, the undersigned being all of the children, "approve such Bill of Sale and the meth-

od therein set forth for valuing the share owned by George H. Sims." This valuing is recited to be "at the time of the execution of such Bill of Sale." Obviously, four days after the execution of the Bill of Sale, there was no reason for including such language relating back to the Bill of Sale time unless it was the intention of all parties that the property should be valued as of said date, namely, April 2, 1932. That language referred to above was in the preamble of the Agreement and constituted the "withdrawal" referred to in the father's Bill of Sale.

Paragraph 1 of Exhibit P-B states that "each intends to be legally bound hereby." Such, of course, is in the present tense. Paragraph 2 recites that the "vendees hereby purchase and each of the vendors hereby sells and conveys." Such is certainly an unequivocal and unambiguous declaration of sale and purchase rather than agreement to sell and purchase in the future. Said paragraph 2 also includes the language "said purchasers hereby assume all obligations of the former partnership and agree to pay the same." Once again, this was a present assumption of the past obligations of the deceased father and other partners which then and there, relieved the plaintiffs of any obligation thereon.

The third paragraph recites that the "present Salt Lake Transfer Company agrees, upon six months demand of the person so selling, to pay for each 1/9 so pur-

chased 1/9 of the sum found as the value as per the Bill of Sale above mentioned." Here is the first future tense expression in the Agreement and it refers solely to the time of payment, and ties down the amount to be paid at such future date to the value of the father's interest "as per the Bill of Sale." A Creditor-Debtor relationship was created then and there, not a promise to buy or an option to buy.

In the next paragraph, defendants agree that "until such purchase sum is demanded or is paid" that 1/27 of the net monthly profits will be paid and that after such demand the interest on the sale price shall be 6% per annum until paid rather than a continuation of the interest predicated upon 1/27 of the net monthly profits, if any. In paragraph 6 the plaintiffs as "vendors" in the present tense, warrant that no prior sale or transfer of their interest "in the old partnership" has been made.

The relationship continued on through the Depression days and thereafter until following the death of M. K. Sims in 1959. Neither the sellers demanded their money, nor did the buyers offer to pay the agreed purchase price, though either party and any one of the sellers had the option to do so earlier. In the meantime, the interest obligation was paid to the family members as sellers annually, with a few exceptions, until the filing of this litigation. Defendants acknowledge that they must pay the balance owing on the unpaid accrued

interest to date of said law suit and also must pay 6% interest on the purchase price from date of filing the law suit until judgment.

That a valid sale and purchase was intended and accomplished then in 1932, may be seen clearly from the Agreement itself by use of the words in it normally associated with a present sale and purchase:

(Exhibit P-B)

Preamble —

“desire to sell their interest” —
“willing to purchase”

Paragraph 2 —

“vendee hereby purchases” —
“each of the vendors hereby sells
and conveys”

Paragraph 3 —

“the person so selling” —

Paragraph 4 —

“the purchase sum”
“interest on the sale price.”

Paragraph 5 —

“the purchaser” — “any seller”

Paragraph 6 —

“vendors” —

We can think of no words of art or of common usage which could be used which would more clearly and without ambiguity express the intent and fact of a present sale and a present purchase between the plaintiffs as "sellers" and "vendors" to their two brothers, the surviving partners who had formed the "present Salt Lake Transfer Company" as "purchaser" and "vendee."

The fact of an accomplished present sale and present purchase was in no manner diminished by the future payment provisions. The former partnership with their father had ended by his death on April 2nd. On April 5th, the two surviving partners George and M. K. (Exhibit D-T) formed the "present Salt Lake Transfer Company" and filed with the Salt Lake County Clerk their Affidavit of Assumed Name, the next month. Part of the brothers and sisters were here from out of the state for the father's funeral and each had a 1/15th interest which had been acquired four days before from their father. The two partners then and there bought those seven fractional interests which were outstanding.

The two partners agreed to pay for such when demanded and provided for interest until such purchase price was demanded at 1/27th of the net profits and at 6% per annum after demand and until paid. Nothing inconsistent with a present sale and purchase is to be inferred from the delay in payment of the purchase price. The relationship of the 1932 Depression years to

the deferment of the payment of the then agreed purchase price is understandable as well as the payment of interest on a percentage of profits basis rather than a fixed rate per annum.

POINT II

THE BILL OF SALE AND THE AGREEMENT EXECUTED IN 1932 ARE CLEAR AND UNAMBIGUOUS AND THE COURT ERRED IN ADMITTING PAROLE EVIDENCE OF PLAINTIFFS TO VARY OR "INTERPRET" SAME.

POINT III

THE AGREED PURCHASE PRICE WAS THE VALUE IN APRIL 1932 AND THE COURT ERRED IN CONSTRUING THE BILL OF SALE AND THE AGREEMENT AS REQUIRING PAYMENT BY DEFENDENTS OF A PURCHASE PRICE BASED ON A 1960 VALUATION.

The passage of time from 1932 to 1960, wherein an Agreement between the parties has not been challenged and no differences have arisen, seems to give some sanctity to the Agreement and indicate that it was not ambiguous. The very language itself is stated in clear, common terms which are easily understandable. The history of its execution and the Depression period make the contract logical.

For the plaintiffs to succeed in their attack upon their brother, George, for whom they profess so much love in their testimony, they must twist their Agreement from a present sale and purchase transaction to a deal to buy and sell an interest at some later date. This has been done by parole evidence over objections of defendants. At the very inception of this attempt by plaintiffs, objections were raised. The first plaintiffs' witness was Mrs. Winifred S. McDonald and objections were raised as soon as the issues of parole evidence arose and the court gave defendants a continuing objection (R. 138). Then at R. 141 we find:

"... MR. PUGSLEY: We object to this testimony on the grounds that apparently it's trying to lay a premise for altering. May we have a continuing objection to this line?"

THE COURT: "You may have a continuing objection as to parole evidence."

Similar objections were made and granted as to other plaintiffs when they testified, but the court proceeded to hear the evidence.

The creditor-debtor relationship was established in 1932. At that time and for some years afterwards David Bullough, husband of plaintiff, Gladys S. Bullough, was the bookkeeper at Salt Lake Transfer Company. He was an accountant in his own right and sent

out statements annually to the plaintiffs (family members) showing the amount of interest paid to each one during the preceding year by way of 1/27th of the net profits. Exhibit D-F is one such notice, it having been produced from the files of Mrs. George S. Malquist (R .189). This exhibit refers to the year 1940 and was sent out by Mr. Bullough February 22, 1941 to the plaintiffs who were designated by Mr. Bullough as "creditors of Salt Lake Transfer Company." Bullough's own letterhead, manifests the understanding of the parties at a time much closer to 1932 than the plaintiffs oral self-serving declarations at a trial in 1962.

Plaintiffs have received and retained the benefits of their Agreement of April 6, 1932 throughout the years and now have tortured their sales agreement into something entirely foreign from the expressed intention of the parties at the time of execution thereof. There are no ambiguities in the Agreement which would leave room for extraneous oral interpretations by the parties, as the present tense language of "vendors" and "a vendee" selling and buying is clear and unmistakable. Plaintiffs would have this Court believe, and successfully convinced the trial Court, that they had merely agreed to sell their interests, which they received from their father, at some future date wholly undetermined and at a price for which no formula or time schedule was encompassed in the agreement.

The father in his Bill of Sale, prescribed that the oldest son and the oldest daughter, namely George H. Sims and Gladys Sims Bullough should, on behalf of all of the children determine the value of the interest which he conveyed to them in April, 1932.

The Agreement expressly acknowledges the acquisition by the plaintiffs of their interests under the Bill of Sale, and all of the parties "approve of such Bill of Sale and of the method therein set forth for valuing the share owned by George H. Sims at the time of the execution of such Bill of Sale." What is the reason for them agreeing to the valuing of the share at the time of the execution of such Bill of Sale if this was merely an agreement to sell at a future date at some value to be fixed as and when this pretended option of purchase has been exercised, or the option to sell has been declared by the plaintiffs? It would be unique in contract history for parties to agree to sell at an undetermined future date for an undetermined future price, the time and price to be ascertainable and determined by any of the eight parties to the Agreement and hence different of each one.

We have outlined above the details of the Agreement itself and its overwhelming language making clear the intention of the parties to sell and the intention of the parties to buy, and reciting in present terms the sale and the purchase of the interests which the plaintiffs acquired from the father. There is nothing unusual in

such an arrangement as the common business experience in the purchase of an automobile or a residence, or in the purchase of many other items of personal property or business interests are made upon an installment purchase program, or upon a future payment program. Particularly, there was nothing unusual during the Depression years for the parties to defer the time of payment of an agreed purchase price and to covenant to pay interest to the seller until the said purchase price has been paid in full. The ordinary real estate contract is typical of such a transaction where the purchase price is payable at the future date, either in a lump sum or an installment program with interest payable during the interim and with an option upon either the seller or the buyer to accelerate or define the future payment date by either the purchaser electing to pay on or before a certain date or by the seller electing to require the purchaser to refinance the sale through some financial institution as prescribed by the contract.

The only substantial difference in this transaction between the ordinary present sale and purchase of a business or property is the covenant that the purchasers shall receive a percentage of the "net monthly profits, if any, for each ninth so purchased." Such an arrangement has been recognized in commercial transactions for many years, either the percentage of the profits of a business sold or the percentage of the income on the property sold in lieu of interest. We direct the attention

of the court to the provisions of the Uniform Partnership Act, Sec. 48-1-4, which reads in part:

“(4) The receipt by a person of a share of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

* * * * *

(d) As interest on a loan, though the amounts of payment vary with the profits of the business.”

The transaction between the parties resulted in a present sale and present purchase of the undivided interests in the then assets of Salt Lake Transfer Company. Possession thereof was delivered and held continuously since April 1932 by the defendants. The plaintiffs have not since that period of time exercised or attempted to exercise any dominion over such assets so sold by them and this is further evidence of their “withdrawal.” The relationship of debtor-creditor was established. The issue of whether the plaintiffs had a vendor’s lien on the property for the unpaid purchase price has not been raised, but beyond that possibility, no contingency or remaining interest in the assets was vested in the plaintiffs following the sale on April 6, 1932. They had a right to be paid the unpaid purchase price, and they had a right to be paid the agreed interest thereon, but no higher or better interest, and absolutely no continuing ownership share in the assets.

The fact that there was no continuing interest in the assets is clearly demonstrated by the court's finding that the parties were not partners after April 6, 1932. The fact is that the Certificate of Public Convenience and Necessity subsequently issued by the Interstate Commerce Commission and by the Public Service Commission of Utah, as well as the titles to the real property, at no time showed an interest in the plaintiffs.

It is submitted to the court that the language of the Agreement is clear and unambiguous as to the fact of a present sale on April 6, 1932 of the then assets and the purchase thereof coupled with an obligation to pay the said purchase price based upon the value of the assets on the date of the father's Bill of Sale, four days prior thereto, as and when the sellers' demanded their money. There was only an obligation to pay the interest as prescribed by the Agreement in the meantime.

We are highly aware of plaintiffs' attempts to make something different of this Agreement by speculation and inuendo and by hypotheses and by inferences. No matter how much they "suppose" the language, there is no legal basis for reversal of the clear and direct language of the plaintiffs as "sellers" or "vendors" in the Agreement that each "hereby sells and conveys." This is not a mere option to sell in the future, nor a contract to sell in the future. It was a transfer and conveyance that very date, April 6, 1932. The Court should not write a new contract for the parties.

That the defendants permitted the plaintiffs to continue on for an extended period of time, thereby benefiting by the interest payments by way of 1/27th of the net profits for twenty-seven years, is not to be held as prejudicial to defendants' rights. Had anyone or more of the six plaintiffs elected to do so, they could have called for their money in 1932 or any year thereafter. Rather, they liked this type interest on the unpaid purchase price, and gladly received and retained such interest payments.

Few citations are needed to show the rule on contract interpretation that where the language is clear, as it is here on the issue of a present sale and purchase in 1932, such may not be tortured into some other meaning by construction or extraneous oral evidence. Likewise when a document of sale has been duly executed and delivered as in this case in 1932, one seeking to alter or modify the same must present clear and convincing evidence, see *Naisbitt v. Hodges*, 307 P. 2d 620, 6 Ut. 2d 116; *Pender v. Anderson*, 235 P. 2d 360, 120 Ut. 399.

It seems apparent from the relationship of the parties on April 6, 1932 that this was a clear agreement of the six plaintiffs to sell to their two elder brothers who were the surviving partners, the interests received from their father under his Bill of Sale. Having this in mind plus the present tense language of buy and

sell, vendor and vendee, buyers and sellers. We call to the court's attention a few of the more recent expressions relating to contract interpretation.

Maw v. Noble, 354 P. 2d 121, 10 Ut. 2d 440:

"We are in agreement with the well-recognized rule urged by the defendants that where there is uncertainty or ambiguity the contract should be strictly construed against him who draws it. But it is to be kept in mind that this rule applies only where there is some genuine lack of certainty, and not to strained or merely fanciful or wishful interpretations that may be indulged in. The primary and a more fundamental rule is that the contract must be looked at realistically in the light of the circumstances under which it was entered into, and if the intent of the parties can be ascertained with reasonable certainty it must be given effect."

Jensen's Used Cars v. Rice, 323 P. 2d 259, 7 Ut. 2d 276:

"Elementary it is that in construing contracts we seek to determine the intentions of the parties. But it is also elementary and of extreme practical importance that we hold contracting parties to their clear and understandable language deliberately committed to writing and endorsed by them as signatories thereto. Were this not so, business one with another among our citizens, would be relegated to the chaotic, and the basic purpose of the law to supply enforceable rules

of conduct for the maintenance and improvement of an orderly society's welfare and progress would find itself impotent. It is not unreasonable to hold one responsible for language which he himself espouses. Such language is the only implement he gives us to fashion a determination as to the intentions of the parties. Under such circumstances, we should not be required to embosom any request that we ignore that very language. This is as it should be. The rule excluding matters outside the four corners of a clear, understandable document, is a fair one, and one's contentions concerning his intent should extend no further than his own clear expressions."

Western Development Co. v. Nell, 288 P. 2d 452, 4 Ut. 2d 112:

"... where the intention of the parties can be ascertained from the instrument, arbitrary rules of law as to construction will not be invoked. *Haynes v. Hunt*, 96 Ut. 345, 85 P. 2d 861."

Driggs v. Utah State Teachers Retirement Board, 142 P. 2d 657, 105 Ut. 417:

"Our own court referred to this same principle in *Schofield v. Zion's C.M.I.*, supra, at page 288 of the Utah report, 39 P. 2d at page 345: 'It is elemental, in construing a contract, that its purpose, its nature, and subject-matter should be considered. A construction giving an instrument a legal effect to accomplish its purpose will

be adopted when it can reasonably be done, and between two possible constructions that will be adopted which establishes a valid contract.'”

It is not disputed that the Bill of Sale and Agreement were drafted by Mr. Irwin Clawson, attorney for the Salt Lake Transfer Company at that time. Equally, the plaintiffs do not dispute that they knew or could have known of the contract provision for 28 years and yet they accepted its benefits for that period of time before they raised any questions.

We do not find within these documents such ambiguities as would require the trial court to construe language adverse to defendants. The plain, clear and ordinary language of “buy and sell” means exactly that. No future sale was contemplated, intended or expressed. Merely a delayed payment date was left for the future.

That the plaintiffs knew and understood their Agreement or had an ample opportunity to know its contents and import for 28 years before raising a question, is shown by some of their testimony. None testified as to any refusal to give copies to them. Mrs. McDonald said that she'd never asked for a copy (R. 150). Mrs. Hannibal testified that she, in 1932, had asked her older brothers, Lou and Cleve (two of the plaintiffs) if it was alright to sign and had been told “yes” (R. 166-67) and later she received a copy of the Agreement (Exhibit

P-B). Mr. Cleveland K. Sims "Cleve" testified that a copy of the Agreement was given to him at the time of signing (R. 199).

Mrs. Hannibal, who then lived in Everett, Washington, testified that after she was home, she took her copy of the Agreement "to the finest attorneys on the Coast" (R. 178). None expressed any misunderstanding of the terms during this long period. The parties were in frequent communication with each other. Plaintiffs themselves characterized their relationship with George and M. K. as a "more united family, the most clanish family I have ever known" (Mrs. Malquist R. 213). Regular checks were remitted monthly to the plaintiffs and annual statements were sent to them as "creditors of Salt Lake Transfer Co." (Exhibit D-F) for 28 years, still no complaints or contentions of a different intent or understanding.

We submit that the plaintiffs knew they had made a sale, knew they were not partners, accepted and retained the benefits of their Agreement for 28 years before complaining and thus estopped themselves from now attempting to vary the terms of their Agreement. Their oral, self-serving declarations that they thought they were partners is negatived by their conduct. No such parole evidence should have been admitted to vary their 1932 Agreement.

POINT IV

THE COURT PROPERLY FOUND THAT NO PARTNERSHIP EVER EXISTED BETWEEN PLAINTIFFS AND DEFENDANTS; AND PLAINTIFFS HAVE ESTOPPED THEMSELVES FROM ASSERTING A PARTNERSHIP WITH DEFENDANTS.

After 28 years of dormancy, plaintiffs have suddenly asserted themselves as "partners." The obvious reason is that such would reap for them a share in the present assets of Salt Lake Transfer Company as they have increased in value. This scheme would relieve plaintiff's from their sale made in 1932. The plaintiffs, thus, had individually and collectively great financial temptations before them to claim the relationship of partners with their brothers George and M. K.

None denied the execution of the Agreement in 1932, where they sold and the "present Salt Lake Transfer Company" (George and M. K.) purchased the fractional interests given to plaintiffs four days before by their father's Bill of Sale. Not one testified that he or she had participated in the management of the company from that day forward. None of the plaintiffs had owned any share in the company before or after said April 1932 Agreement, except for four days, between their father's Bill of Sale on April 21, 1932 and their own Agreement on April 6, 1932. No partnership agreement was ever

signed by plaintiffs, but the actual partners had such partnership agreements and had duly filed their Affidavits of doing business under the assumed name of Salt Lake Transfer Company in 1932 (Exhibit D-T) and in 1947 (Exhibit D-U). In the face of such facts and their professed love for their elder brother, George, one would think that after 28 years the plaintiffs would be utterly embarrassed to attempt to be considered as partners at this late date and to demand a liquidation of the firm. Two items of evidence were introduced in their futile effort to overturn their 1932 Agreement and claim as partners;

(a) self-serving parole declarations that they thought they were partners (attempt to vary the terms of their 1932 Agreement); and

(b) Income tax returns of the company after 1941, which referred to the distribution of the shares of profits — (interest under the 1932 Agreement) as going in part to the plaintiffs as “partners” (Exhibit P-K and P-J).

One of the definitions of a partnership is “an association of two or more persons to carry on as co-owners a business for profit.” 48-1-3 U.C.A. 1953. In light of this language, let us evaluate the relationship created in 1932 by the Agreement signed by the plaintiffs. Except for the parole declarations of the plaintiffs, no semblance of a partnership existed. The plaintiffs *sold* as

“vendors” to “the present Salt Lake Transfer Company, a co-partnership consisting of George A. Sims and Milton K. Sims, vendees . . .” (Exhibit P-B). The next paragraph refers to plaintiffs selling their interest (which they had received from their father four days before) in “the former Salt Lake Transfer Company to “the present Salt Lake Transfer Company, a co-partnership, vendee.”

The preamble refers to the three partners in the old Salt Lake Transfer Company, George H. (the father), George A. and Milton K. Sims and then describes the father’s Bill of Sale of April 2, 1932 and then states that the plaintiffs, “children of George H. Sims who have not been in the partnership,” desire to sell their interests “to the two remaining partners and the latter are willing to purchase the same and have organized a partnership hereinafter described as the present Salt Lake Transfer Company.” These plaintiffs were hard put in trying to contend that they were partners in Salt Lake Transfer Company after that. The trial court properly found that they were not such partners.

The remaining contentions of plaintiffs on this abortive partnership claim, seems tied to the combination of payment to plaintiffs of a per cent of the profits and that their names appeared on tax notices after 1941. We’ve made it clear before that this percentage of profits was a method of interest payment namely 1/27th each

of the "net monthly profits, if any" and in the same paragraph states that after demand of payment, "he or she shall be entitled to interest on the sale price at six per cent per annum until paid." This manifests a creditor-debtor relationship.

Exhibits P-J, P-K are income tax returns of the partnership, beginning with the calendar year 1932 and continuing on. An inspection of the 1933 returns shows the two partners, George A. and Milton K. Sims plus "misc. minor interest," which referred to the distribution to the plaintiffs. The same designation was used in 1934 and 1935. In 1936 there was designated "interest credited to misc. members."

The 1937 return did not indicate any credit to plaintiffs. The 1938 return showed as partners only, George A. and Milton K. Sims. The 1939 return showed the same two names, then, with the designation "others (see schedule att.)," then the names of the six plaintiffs were reflected. 1940 followed the identical procedure. 1941 showed the two partners George A. Sims and M. K. Sims, along with the plaintiffs under schedule 'J,' "partners share of income and credits." Basically this same pattern then followed for the remainder of the years until after the death of M. K. Sims in 1959.

It is to be recalled that the change in showing the names of all of the plaintiff's under the schedule was

explained, first by defendant, Grant G. Sims (record 281):

Q. . . . "Did you do anything at that time to complain about listing in the income tax return under the heading of schedule I, Partners' Share of Income and Credits where it says schedule attached showing presumably all twelve partners; I assume that didn't alarm you?"

A. . . . "Throughout the — —"

Q. "First, would you answer my question. I asked you if that concerned or alarmed you and then make any explanation you want, please."

MR. PUGSLEY: "Just a moment. The question covers a lot of territory. I think the witness ought to be allowed to answer in his own words."

Q. (By Mr. Berol) "Very well. Please go ahead in your own words."

A. "There has been doubt as to handling this distribution of profits. In 1937 the family accepted a note. In many instances the reporting thereof has been a long term indebtedness, interest on note —"

Q. "Mr. Sims, I'm talking about this return of 1946."

A. "Well, I'm leading up to that. You have asked me whether or not I was concerned. I'm leading up to answer you how I was alarmed and how I have been disturbed over it. I went to my partner Elmer and I asked him why there has been a variance in reporting this, and he told me that at that time there was a letter from the Internal Revenue to put this distribution of profits someplace, and they designated it as a "Special Partner." Prior to 1940 it showed various ways of accounting it. The Internal Revenue, as I consider them, are not desirous of knowing how it comes to them except how much and under what classifications. And they gave us the term "Special Partner." Not an agreement or anything else, and for accounting purposes some auditor in the Internal Revenue Service placed those words in the mouth of our accountant and they have been carried forward as such."

Elmer L. Sims testified that he had been the office manager for the past fifteen years and had become familiar with the books and records and had signed annual reports for the Interstate Commerce Commission of the State of Utah, (Record 294) and that at no time were the family members, who were the plaintiffs, shown as partners on such reports to the Interstate Commerce Commission.

Exhibits D-O, D-P, D-Q, are photostats of a permit and two certificates issued by the Interstate Commerce Commission to the Salt Lake Transfer Company in 1941, 1943, and 1948, respectively. The first two bear

the names "George A. Sims and M. K. Sims, a partnership, doing business as Salt Lake Transfer Company, Salt Lake City, Utah," and the third one shows George A. Sims, M. K. Sims, Elmer L. Sims, and G. Grant Sims, a partnership, doing business as Salt Lake Transfer Company, Salt Lake City, Utah.

Exhibits D-R and D-S are certified copies of documents issued by the Public Service Commission of Utah, the first being based on a hearing in 1938 and duly issued in 1939. On page two finds:

"On the 6th day of March, 1934, George A. Sims and Milton K. Sims, a partnership doing business at Salt Lake City, Utah in the firm name of the Salt Lake Transfer Company, filed an application with the Public Utilities Commission for a permit under the provisions of Chapter 53, Laws of Utah, 1933, to operate motor vehicles for hire as a "contract carrier of property" in intrastate commerce over and upon "all highways and any where in the State of Utah." This application was docketed as Case 1544," and on page 3 finds:

"On April 3, 1936, and subsequent to the enactment of Chapter 65, Laws of Utah, 1935, George A. Sims and Milton K. Sims, doing business as the Salt Lake Transfer Company, again filed an application for a contract carrier permit under the provisions of Chapter 65, Laws of Utah, 1935, in which they sought authority to

engage in the transportation of property on occasional hauls over all the highways of the State of Utah, (Case No. 1849). On the same day, the Public Utilities Commission without a hearing granted to said applicants, Contract Carrier Permit No. 125, authorizing them to engage in the transportation of property by motor vehicle over all highways of the State of Utah without any restrictions as to commodities or routes," and on the appointed order, being Certificate of Convenience and Necessity #512, issues the certificate to "George A. Sims and M. K. Sims, a partnership, doing business as Salt Lake Transfer Company."

Exhibit D-S is a report and tentative order issued by the Public Service Commission of Utah, August 24, 1948 "and therein it recites the formation of the partnership in 1947, of George A. Sims, M. K. Sims, Elmer L. Sims, and Grant G. Sims, dba as a partnership under the name of Salt Lake Transfer Company" and transfers to the said partnership of four individuals, the exact operating rights then held by George A. Sims and M. K. Sims, a partnership dba Salt Lake Transfer Company.

Our Partnership Act, Section 48-1-4 (3) reads:

"The sharing of gross return does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived."

and Section 48-1-4 (4) (d) reads:

“The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(d) As interest on a loan, though the amounts of payment vary with the profits of the business.”

Now this parole evidence as to a partnership wherein under direct examination by their own counsel, each parroted the thought that he or she was a partner, was negated by their admissions that in the 28 year period not one had in any manner, participated in management or even attempted to so participate. The burden of proof was upon these plaintiffs to prove partnership. *Benson v. Rozzelle*, 85 Utah 582, 39 P.2d 1113. In that case an accounting and dissolution was sought and the partnership relationship was denied. The Utah Supreme Court held, among other things, that there was no partnership. “A partnership agreement, like any other express contract, requires a meeting of the minds of the parties thereto.” “In an action by alleged partner for accounting and dissolution of partnership, plaintiff has burden of proving the existence of the partnership.”

In our case, no meeting of minds occurred as to the plaintiffs becoming partners and they certainly have

failed in their burden of proof. They did not convince the trial Court and no substantial evidence of partnership appears in the record.

POINT V

PLAINTIFFS FAILED TO PROVE THEIR ALLEGATION THAT THEIR 1932 AGREEMENT IS UNENFORCEABLE OR VOID BECAUSE OF FRAUD, MISTAKE OR UNDUE INFLUENCE AND THE COURT PROPERLY FOUND THAT THE AGREEMENT WAS VALID AND ENFORCEABLE.

The plaintiffs were singularly silent as to any allegations of fraud, mistake or undue influence in their two complaints and their amended complaint. It was not until the actual day of pre-trial that the plaintiffs' attorney presented a document designated as "Plaintiffs' Statement of Facts, Contentions and Issues." There the very first contentions were "fraud, mistake and undue influence" and this bombshell was followed by several diverse and inconsistent positions relating to partnership or non-partnership status.

This fraud claim must have been a surprise to plaintiffs as they did not even know they were suing their brother George. Plaintiff, Mrs. Hannibal was asked about signing the Agreement on April 6, 1932 and told of asking her older brothers Cleve and Lou if they

thought it alright for her to sign and then, in response to their approval, she signed (R. 174). She testified in part:

Q. "You not only trusted George, but you also trusted Cleve and you trusted Lou, didn't you?"

A. "Why certainly."

Q. "And you still love and trust and respect them all, don't you?"

A. "That's right."

Q. "Even though you are suing George and the others?"

A. "I'm not suing George. I'm suing the Salt Lake Transfer Company, I think. Isn't that right?"

When she was asked about her intention to sue her brother George, her own counsel objected and asserted that she was bound by his actions.

When "Cleve," plaintiff Cleveland Kelly Sims, testified he was asked about his willingness to be bound by that 1932 Agreement, signed by him and his co-plaintiffs and attempts were made to ask him about any

claim of fraud. Once again, his own counsel intervened and protested that the plaintiff could not disclaim fraud even if he wanted to as he was bound because his attorney said there was fraud (R. 201). Apparently his attorney is the only one that knows of any semblance of fraud and was afraid to let his six clients approach the subject after their repeated declarations of love for their brother, George. This is a unique and wholly untenable position that a party cannot disclaim or withdraw from the, apparently, unauthorized allegations of fraud made by his attorney.

What is the measure of proof required of the plaintiffs on this fraud and undue influence issue? The court at pre-trial (R. 99) said that such contentions must be shown "by clear and convincing proof." The Amended Findings determined that the 1932 Agreement "is not void or unenforceable on the grounds of fraud, mistake or undue influence" (R. 111).

One of the more recent cases from your court has held as to this issue that fraud must be *pleaded and proved* as to the basic elements; *Dupler v. Yates*, 351 P.2d 624, 10 Utah 2d 251. Those elements are spelled out in *Pace v. Parrish*, 122 Utah 141, 247 P.2d 273 as follows:

(2) "This being an action in deceit based on fraudulent misrepresentations, the burden was upon plaintiffs to prove *all of the essential ele-*

ments thereof. These are: (1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage. See *Stuck v. Delta Land & Water Co.*, 63 Utah 495, 227 P. 791; *Jones v. Pingree*, 73, Utah 190, 273 P. 303; 23 Am. Jur. 773; 37 C.J.S., *Fraud*, Section 3, p. 215.”

That is the yardstick we apply to the various items in the findings and judgment of the trial court concerning which issues are raised on this appeal.”

Now we know that the plaintiffs are going to claim that the “clear and convincing proof” level does not apply as they now assert some confidential relationship. We should examine that claim as relating to their April 6, 1932 Agreement. Plaintiffs all testified that their father had just been buried that date and the family returned to the home after the burial for food and to visit. George A. Sims, their oldest brother, invited them all to come into the family parlor, but to leave the in-laws out. This was done and the Agreement was presented to them for reading and signing. Each approached this differently as is shown by their testimony. All had love for and confidence in George. All knew

that he had "run" the Salt Lake Transfer Company for several years, along with their brother Milton K., while their father had gone on two missions for his Church and had been less active in his declining years.

Two of the female plaintiffs testified that they were still grief stricken and paid little attention to reading it. Obviously the male plaintiffs read and understood its language. None of these were young children, the "girls" were all mature, married women and the "boys" were businessmen. "Cleve" to whom they turned for counsel in signing, tells us that he had been an agent for New York Life Insurance Company for many years (R. 198) and Louis K. testified that his experience with that company was even more extensive and that he had sold 8,000 policies, been in the first 10 highest agents in the U.S. for many years and was 73rd in the U.S. the preceding year (R. 210).

What did Louis K. say about the family going into the room and excluding the in-laws when considering the Agreement, "perfectly proper" (R. 205). He said he was capable of reading the document and "I think I understood everything" (R. 213). All of the plaintiffs professed great love for and confidence in George, then and now. Plaintiff Grace S. Malquist volunteered, "George has shown nothing but kindness and consideration for all of us all of his life."

Now their counsel would twist this into something wicked and evil. Certainly they loved and trusted their brother, George. He has never betrayed this trust. He and Milton on that day, bought from them and the plaintiffs sold to the "present Salt Lake Transfer Company" the interests which the family had held for four days.

The testimony was that their father's children "came along every two years" so that was no great difference in the ages of the parties. Three of the girls had their husbands in the next room. The fourth one, Irma, went back to Washington after the funeral and discussed the Agreement with her husband and "the finest attorney on the Coast" (R. 178). Not one of them has testified as to any false statement made by George, unless you consider the statement that he wanted the Agreement signed because he wanted to run the business, a false statement. None of the male plaintiffs contend that they were unable to know the terms of the Agreement.

At the time of trial, George was well over 80 years of age and he was unable to recollect back to the 1932 transactions as to details. Taking advantage of this, some of his younger brothers and sisters, the youngest being about 60 years of age, have tried to modify their Agreement by saying that they understood George to say he was going to run the business for them and they would be partners. This is directly opposite to the language and intent of the Agreement which was read and signed by them on April 6, 1932.

Counsel also desire to urge that something sinister existed in the fact that Mr. Irwin Clawson had prepared the Agreement for Salt Lake Transfer Company and George had it there to be signed right after the funeral. Certainly someone must prepare an Agreement and someone must present it for signatures. (The timing was dictated by the death of the father, April 3rd, the formation of a new partnership by George and Milt the next day and the fact that the majority of plaintiffs lived out of the state of Utah and were here only for the funeral.) Do plaintiffs contend that they would not have signed it the next day or the next week or month? No intimation of this is in the record. Louis K., who was just a few years younger than George and about 42 years of age in 1932, testified that no one forced him to sign, in fact, "one one asked me." (R. 212).

No unfairness has been demonstrated by plaintiffs. In *Perry v. McConkie*, 1 Utah 2d 189, 264 P.2d 852, the rule is announced that if because of friendship of the parties a fiduciary relationship exists, the fiduciary must show that the dealings were fair and in good faith. Viewed in light of the Depression time, we see nothing unfair in the proposal made and accomplished that day by the Agreement. Plaintiffs for four days, by reason of their father's April 2d Bill of Sale, had owned a minority interest in partnership assets.

The two surviving partners bought and the plaintiffs sold such interests. The purchase price was to be set at the value as of the Bill of Sale date as prescribed by their father in that Bill of Sale which said, "the value of the same shall be appraised by Gladys S. Bulough and George A. Sims and the figure set by these two shall be binding upon the withdrawing Grantee." (Exhibit P-A). There was nothing unfair in that. Gladys is one of the plaintiffs and George is a defendant. Each side was to be represented so no unfairness of price could be asserted.

As the money was not available then to pay the purchase price to plaintiffs as "withdrawing Grantees," 1/27th of the net profits was to be paid by way of interest until the purchase price was paid. Actually this has been a sum far in excess of normal interest, so no unfair advantage of plaintiffs has been taken there. George and Milton K. agreed with plaintiffs to a monthly salary of \$200.00 each. This level of compensation has been followed faithfully by them for 27 years until the death of Milton K. and up to trial as to George.

In conclusion of this phase, we desire to emphasize that there was no pleading of fraud, etc., but only a "contention" of plaintiffs' attorneys, there was no proof of fraud, there was no fiduciary relationship, there was no unfairness in the Agreement. Had any plaintiff thought otherwise, he or she could have asked for their money at any time between 1932 and 1960, but none did.

POINT VI

THE COURT ERRED IN DETERMINING THE PURCHASE PRICE VALUATION AS OF JUNE 3, 1960 AND PARTICULARLY ERRED IN IGNORING THE VALUATION SET IN 1947 BY THOSE DESIGNATED IN THE 1932 BILL OF SALE AND AGREEMENT.

The second phase of this case was a separate trial to determine the valuation of the interests sold by plaintiffs to defendants in 1932. The Court had already entered its Findings and Judgment (R. 109-115) that the Agreement was valid and enforceable. However, the Court determined that the sale price was not to be fixed until the date of a demand for payment by plaintiffs, which was June 3, 1960, the date of filing this action.

Throughout the 28 years, defendants have known that some day they must pay the purchase price and until then interest at the rate of 1/27th of the net profits must be paid to each defendant. The books and records reflect annual and often more frequent interest remittances. The plaintiffs were referred to as "Creditors of Salt Lake Transfer Company (Exhibit D-F in the statements sent out annually.

Defendants have at all times contended that the valuation as of 1932 was the purchase price set by the Agreement because that is when plaintiffs withdrew as

contemplated by the father's Bill of Sale. After the War, G. Grant Sims, son of George A., returned to Utah and considered leaving his position in the East and buying into Salt Lake Transfer Company by purchase of a part of his father's half interest. At that time a review of the Agreement and Bill of Sale were had and they sought to tie down this 1932 purchase price to a fixed figure so he would know what he was buying from his father.

The language requiring valuation by Gladys S. Bullough and George A. Sims was noted. This was not optional but was required by the father's Bill of Sale and the plaintiffs by their Agreement "approve of such Bill of Sale and of the method therein set for valuing the share owned by George H. Sims at the time of the execution of such Bill of Sale." (Exhibit P-A and P-B).

Thus, with the method of valuing being fixed and the time of valuing set, steps were taken in 1947 to have the two designated by their father and approved by the plaintiffs to set all the 1932 value. Exhibit D-H and D-I are the result of this request. Exhibit D-I is a reconstructed Balance Sheet at April 2, 1932. Plaintiff Gladys S. Bullough signed this along with George A.

Prior to signing this, her husband, David H. Bullough went to the office of Salt Lake Transfer Company and checked and verified this statement. He was

the accountant who had maintained the company books prior to 1930 and continuously until called into military service in 1940. Thus he was thoroughly familiar with the books and records. In 1947 he had returned home a Major, was in an independent business and in no way under any compulsion from or obligation to Salt Lake Transfer Company to verify the figures.

Gladys testified that she knew of her husband's familiarity with the 1932 books and records of Salt Lake Transfer Company and she relied upon his representations to her and his investigation of the values when she signed the valuations in 1947 (R. 231, 235-36). Exhibit D-I is the actual balance sheet as of April 2, 1932 and Exhibit D-H is a Memorandum which recites the Bill of Sale, the Agreement and that Gladys and George had investigated the values and had reached an agreement as to the same and then established such at \$3,614.41 for each share owned by the plaintiffs. This was signed by them and witnessed by her husband, David H. Bullough. If nothing else, this valuation by Mrs. Bullough of her interest and the similar interests of the other plaintiffs is a binding admission against interest. "A declaration by an owner of property stating the value thereof is admissible where value is an issue." 20 *Am. Jur.* 490.

Should she be allowed to renege from this? We think not. Should the other five plaintiffs be allowed to ignore the method of valuation prescribed by their

father in his Bill of Sale to them and adopted by them? We think not. This method of valuation is akin to a condition precedent which adheres to the claim of each plaintiff as it is part and parcel of the Bill of Sale by which their only interests came to them and reposed in them for four days.

Mr. Bullough acknowledged that he was very familiar with the Salt Lake Transfer Company and its books and that in 1947 and before his wife signed the Balance Sheet and Memorandum he verified the figures with Mr. Grant Gay and Mr. Elmer L. Sims at the company office (R. 243). He then testified that he advised his wife to sign the Balance Sheet and the Memorandum (R. 246). His testimony is confirmed by his wife and by Mr. Grant Sims who told of Mr. Bullough checking the audit, discussing the details and the signing (R. 256-259). The fact that the valuation as of April 1932 was made in 1947 instead of 1960 should make no difference as the 1932 value was clearly ascertainable from the books and records. The element of good will was not included in Exhibit D-I, the Balance Sheet, as Mr. Bullough testified that "no great value was left on the intangibles." (R. 246). On this phase, the record shows that said date preceded any issuance of certificates or permits by the State of Utah or the Interstate Commerce Commission.

The trial Court therefore should have awarded judgment to the plaintiffs for the sum thus set by the designated individuals plus any unpaid interest. No dispute has ever existed as to the unpaid interest, in fact, that sum has now been fully paid to plaintiffs. The trial court erred in valuing the assets sold in 1932 at their 1960 figure. The inconsistency of this position is demonstrated by the fact that though all six sold and conveyed their interests in 1932 and agreed to have their brother and sister value such as of the 1932 Bill of Sale, yet, if the Court were right, any one of the plaintiffs could have demanded their money at different times and each would receive a different purchase price for the same undivided interest. Such was not the intent of the Bill of Sale or Agreement.

POINT VII

THE COURT ERRED IN NOT CONSIDERING THE VALUATION AGREED UPON BETWEEN THE PARTIES IN 1959 FOLLOWING DEATH OF D. K. SIMS.

Without admitting the propriety of valuing the 1932 interest at a later date, we urge that the Court should weigh as persuasive evidence the uncompleted transaction wherein following the demise of Milton K. Sims, George A. offered to plaintiffs \$18,000.00 each (this included the unpaid interest) and the plaintiffs agreed such to be reasonable valuation and fair and accepted the offer (R. 187). This offer of plaintiffs

to effectuate a settlement at a certain price is admissible evidence against them as an admission in fixing the value at or near the time when the offer was made. (20 Am. Jur 491 and citations.) Another contemporaneous valuation was the sale and purchase of the same fractional interest made by plaintiffs' brother, John, in 1960 for \$10,000.00 (representing the 1932 value plus accrued interest). This was an arms length transaction between two businessmen (R. 769). Such is the only contemporaneous settlement actually completed on the identical interests owned by each of the plaintiffs. By referring to this as a settlement, we do so only on the assumption that the unvalued goodwill omitted from the 1932 Balance Sheet might possibly have some minor worth which would account for the difference between the \$8500.00 principal and interest and the \$10,000.00 paid.

POINT VIII

ASSUMING A 1960 PURCHASE PRICE VALUATION, THE COURT ERRED IN ITS FINDINGS AND JUDGMENT AS IT USED A SALVAGE VALUE BASIS WITHOUT ANY ALLOWANCE FOR LIQUIDATION OR SALVAGE EXPENSE.

At the trial of the second phase of the case, evidence of accountants and appraisers was taken in pursuance of the Court's earlier order, and the Court took evidence from plaintiffs witnesses on the June 1960 valuation of the Salt Lake Transfer assets. Sims Realty, Inc. is a

corporation to which the partners had conveyed the realty owned and used by Salt Lake Transfer Company, hence, it was stipulated that if a 1960 valuation were to be used by the Court, the assets of Sims Realty should be included. By inadvertence, references are made to June 30 in the evidence rather than June 3, 1960 the actual date of filing the complaint by plaintiffs in this case.

We shall review the various bases for valuation which were placed in evidence. There are four possible approaches for the Court to take in determining the amount due to the plaintiffs in this case. These are as follows :

A. Valuation as of April 1932, plus accumulated unpaid net earnings since that date in lieu of interest.

B. Valuation as a going concern as of June 3, 1960.

C. Salvage value as of June 3, 1960.

D. Valuation based on contemporary "sale" or on tax valuation.

A. Valuation as of April 6, 1932.

In its Order of May 3, 1962, the Court rejected the contention of the defendants that the amount which should be recovered by the plaintiffs is the agreed valuation as of April 6, 1932, plus their undrawn share of the earnings since that date. This ruling, however, is still subject to revision. After the defendants paid to the plaintiffs \$48,000.00 to apply on the ultimate judgment in this case, an interim appeal was taken to the Supreme Court. The defendants resisted the appeal on the grounds that there was no final or appealable judgment. Apparently the Supreme Court agreed with this position, because it declined to entertain the appeal.

Without wanting to unduly labor this matter, we wish to point out that the Court has found that the plaintiffs are creditors and not partners. That being so, it appears that their values should be fixed as of the time they became creditors. A creditor's position of debt-claim does not grow as to the principal, but only by interest accumulations. In this case, as the Court has found that the plaintiffs are entitled to earnings in lieu of interest, the position that should be taken appears clear. The plaintiffs are entitled to their value of the property as of April 6, 1932, plus accumulated but undrawn earnings since that date.

B. Valuations as a Going Concern.

Plaintiffs presented no evidence to the court as to the valuation of Salt Lake Transfer or Sims Realty Company on a going concern basis. The sole evidence in this regard came from Professor Frank Stuart of the University of Utah, Business Research Bureau (R. 623). Because Salt Lake Transfer and Sims Realty in effect form one composite operating unit, Professor Stuart arrived at a value of both companies as a single unit and as a going concern, based upon the capitalization of their earnings. As Professor Stuart testified, this is what the property in question is worth as a business which is not to be broken up into its composite parts but sold as a business which is going to continue in operation and which is going to continue to earn a return for the owners. It was Professor Stuart's opinion, based upon this approach, that the two companies combined were worth approximately \$135,000.00 (R. 627-629). The plaintiffs, therefore, under this approach should each be entitled to recover $6\frac{2}{3}$ of the \$135,000.00, plus, of course, their accumulated and undrawn earnings. The sum to which this would amount will be summarized later in the appendix to this brief.

C. Salvage Value.

It was stated by Professor Stuart on cross-examination, and indeed it can be concluded by the Court in the absence of such a statement, that there are times when the composite value of the assets of a company,

less its liabilities, are worth more than the company value as a going concern. In such a case two things are evident — (1) the owners of the company would be better off if it ceased to do business and proceeded to liquidate the assets and invest the money in another enterprise; and (2) the intangibles of the firm, i.e., goodwill, operating rights, etc., have no value at all.

One thing, however, should be borne in mind, and that is that the salvage value of a firm is not arrived at merely by valuing the individual material assets and deducting therefrom the liabilities, because this ignores entirely the question of the cost of salvaging a firm, which may be much or little, depending upon the nature of a firm. We do not wish to imply to the Court that it would take overly long or would be unduly expensive to liquidate the Salt Lake Transfer and Sims Realty assets. However, it cannot be doubted that considerable time and considerable expense would be entailed in such a proceeding, and if this Court is to take the position that this company is more valuable for salvage than as a going concern and proceed to value it on that basis, then due consideration must be given to the cost of salvaging. The salvage and other values considered by the trial Court are:

1. ROLLING STOCK

There is a great variance between the parties in regard to the evaluation of the rolling stock of Salt

Lake Transfer Company. Plaintiffs called a Mr. Phillips (R. 389 and R. 546), who valued the trucks and tractors at \$151,700.00, and a Mr. Paramore (R. 425), who valued the trailers at \$102,750.00. Mr. Grant Sims valued trucks, tractors and trailers all together at a total of \$122,996.77. The Court's Memorandum set such at \$175,000.00.

All of these witnesses were working with the same list of equipment and all of their appraisals were based upon the same original costs, as these were taken from the books and records of the company. The difference in their appraisals appears to result from the difference in depreciation adopted by the various appraisers. Plaintiffs applied to the new price of the equipment the depreciation schedule set forth in Exhibit P-10, whereas the defendants applied the schedule reflected in Exhibit D-27 (R. 748).

It cannot be doubted that, except for such bias as result from his being a party to the suit, Mr. Grant Sims is the best qualified of any of the appraisers so far as rolling stock is concerned. His long experience in this field, both with Salt Lake Transfer and with Burlington Transportation Company (R. 745), has qualified him uniquely to appraise accurately the valuation of tractors, trucks and trailers. In view of the well recognized tendency of "impartial" expert appraisers to color their appraisals to suit the interests of the parties by whom they are hired, the relative accuracy

of Exhibits P-10 and D-27 should be weighted by evidence in the case other than the ability or self-interests of the various experts.

This Court can take judicial notice that the rate of depreciation tends to decline rather than increase as the equipment gets older. The most damning refutation of Mr. Phillips figures, however, came from his own lips. He stated that in arriving at his valuation he had used as an aid the Truck Blue Book, which on the first day of his testimony he did not have in Court with him. After a day's recess he got this book, however, and counsel cross-examined him in regard to the valuation shown by the Blue Book, and particularly in regard to the rate of depreciation as established by the Blue Book when applied to like equipment of varying ages. By taking a typical piece of equipment through a seven-year period to the age of seven years, the greatest age indicated in the Blue Book, and comparing the values in each year, it became apparent that his Exhibit P-10 was valueless.

The plaintiffs did considerable pious breast-beating in regard to the valuation of the rolling stock by showing in the case of some of the newer equipment it actually valued it higher than the Blue Book figure. This means little, however, as there were only a very few pieces of equipment in that category. The great bulk of the Salt Lake Transfer rolling stock was in the

category where Mr. Phillips' appraisal was grossly inflated because of the understatement of depreciation established from his own lips. Exhibit D-28 prepared under the direction of Mr. Elmer Sims applies to the purchase price of each piece of equipment the depreciation rate testified to by Mr. Grant Sims, the depreciation rate rejected by Mr. Phillips, but substantiated by Mr. Phillips' own testimony.

Mr. Parimore's exhibit valuing the trailers, Exhibit P-4, turned out to be one of the most carelessly prepared documents that can be imagined. As pointed out by Mr. Grant Sims in his testimony, Mr. Parimore in Exhibit P-4 valued quite a number of the used pieces of equipment at a price actually above their purchase price. The most unusual thing he did, however, was to place different valuations, in a number of instances, on identical equipment. If Mr. Parimore had actually seen the equipment as of the date his appraisal was effective, such a difference in the appraisal as to identical equipment might well be explained on a difference in condition. It must be remembered, however, that Mr. Parimore did not see the equipment at the time. He testified, as did both Mr. Sims and Mr. Phillips, that in valuing the equipment some 2½ years after the effective date of his valuation, he had to assume average condition for each piece of equipment. How do you explain varying valuation on identical equipment when you are assuming identical condition? The only answer

is that Exhibit A-4 was hurriedly and carelessly prepared in an effort to build up valuation and not to arrive at accurate valuations.

The defendants submit, therefore, that the valuation on the rolling stock as established by Mr. Grant Sims in the amount of \$122,996.77 should be accepted by this Court as being accurate rather than the \$175,000.00 found by the trial Court.

2. SIMS REALTY, INC.

The plaintiffs in their Brief make much of the fact that the defendants did not call an independent realtor for the purpose of appraising the four parcels of real property which make up the great bulk of the assets of the Sims Realty Company. The defendants did not call a realtor because of the feeling of counsel that a fair valuation of these tracts of realty can be obtained from Exhibit P-5, introduced by the plaintiff's witness Cook.

We are not in agreement with the conclusions advanced by Mr. Cook, but it appears that from an examination of P-5 any person, whether realtor or not, can obtain sufficient basic data on which to arrive at a fair valuation of these properties. This data, when properly analyzed, leads to the conclusion that the appraisal of Mr. Grant Sims, placing the value of this

property at between \$75,000.00 and \$100,000.00, is very near to accurate, and that the appraisal of the \$152,100.00 reported by Mr. Cook and Mr. Johns is patently exhoritant.

Exhibit P-5 lists the four tracts of real property as Parcels A, B, C and D. For purposes of discussion here, we will list them similarly.

Parcel A: This parcel is located on the north side of 4th South Street, a little west of midway between Main and West Temple Streets. It has a frontage of 66 feet and an area of 10,890 square feet. On the property is located a building which is without value. In fact, Cook and Johns in their analysis reached the conclusion that the presence of the building, rather than enhancing the value of the land, actually detracts from it by \$5,000.00. In arriving at their valuation of \$55,000.00, Cook and Johns assumed a valuation of \$5.50 per square foot for a total of \$59,896.00, less \$5,000.00 for demolition of the existing building. They ignored the matter of frontal footage. However, the valuation they have placed worked out to a figure of \$833.00 per frontal foot.

The market comparison price which they have attached to their exhibit, however, shows that the highest price paid for land in that vicinity was the Newhouse Realty property, which sold in 1961 for \$767 per frontal foot and \$4.93 per square foot. This court, from its

knowledge of the area in question, however, can take notice that the Newhouse Realty property is of considerably more value on a frontal footage basis or on a square footage basis than is the Sims property. To begin with, the Sims property has a small frontage and considerable depth, and has no access from any direction except from 4th South Street. The Newhouse Realty property on the other hand is bounded by city streets on three sides and appears to be one of the most desirable pieces of property in this section of town. Averaging the two comparable sale figures out to give effect both to square footage and frontal footage, we arrive at a valuation on the real property of \$33,957, assuming it was not encumbered by a worthless building. Deducting Cook and John's estimate for demolition in the amount of \$5,000.00 we arrive at a valuation on this property of \$28,957. This seems consistent with the purchase price paid by Sims Realty. This property was purchased in 1938 for a total purchase price of \$18,238.74. During the ensuing 22 years, undoubtedly the real property increased considerably in value. At the same time, however, the building depreciated. The figure of \$28,957 for Parcel A, therefore, appears to be well supported by the basic data in Exhibit P-5.

Parcel B: Parcel B is on the North side of 2nd South street almost to 1st West street. It has a frontage of 50 feet and a depth of 120 feet, and contains 6,000 square feet. Cook and Johns arrive at a value of \$24,000 for

this property on the basis of a valuation of \$4.00 per square foot. They ignore entirely the frontal footage approach to valuation. They arrive at a value of the improvements on that land at a figure of \$9,513.

Referring to their market comparison sheet, however, the only comparable sale in recent years is that of the tract of the Greek Orthodox Church, only a block and a half away on a much more highly travelled street. The price paid for the Greek Orthodox Church property was \$302 per frontal foot and \$1.83 per square foot. Applying these valuations to the Sims Realty property, we would arrive at a value of \$15,100 on a frontal footage basis and \$10,980 on a square footage basis. Taking an average of these two to give effect to both, a valuation of \$13,020 is arrived at for the real property. This land was purchased in 1937 by Sims Realty Company for \$1,650. Certainly it has not increased in value more than 8 times during the intervening years.

In 1937 Sims Realty Company paid \$4,600 for the building. While it has been modernized slightly since that time, it has also been subject to normal depreciation. There appears to be no more reason for assigning to the building today a greater value than it had when purchased. Adding these figures together, it appears from Exhibit P-5 that fair valuation of Parcel B would be \$17,620.

Parcel C: Parcel C is an unimproved tract of land at 5th West and South Temple Streets, used by the company for open storage of mobile equipment. The company acquired this tract in six different parcels between 1932 and 1956 at a total cost of \$18,253.26. The tract contains 153,164 square feet. Cook and Johns used a valuation of 35¢ per square foot in arriving at a valuation of \$53,600, to which they added \$1,400 for fencing. An examination of comparable sales in the vicinity, however, indicates that a similar piece of property purchased by Hawa in December of 1961 ran only 27¢ per foot. The Hawa property is located only a block from the Sims Realty property. While it may be possible that the property might bring more than 27¢ a foot if held for a long period, in all probability on a reasonably quick sale it would bring somewhat less, probably not more than the 26¢ per square foot paid by the Overland Moving Company for similar property on 4th West and South Temple, less than a block from the subject property. Applying a valuation of 26¢ per square foot to the Sims Realty property, we arrive at a valuation of \$39,822.64. This is more than twice what the company paid for the property, some of it purchased as recently as four years before the valuation date. Adding to the bare value of the property the value of fencing, it appears that a fair valuation on Parcel C is \$41,220.64.

Parcel D: Parcel D is a small tract having a 66 foot frontage and 165 foot depth, located at 130 South 5th West. A small building used for storage is located on

the property. Cook and Johns valued the real estate at \$90.00 per frontal foot or 50¢ per square foot, which yields a valuation of \$6,000. Their schedule of comparable sales, however, fails to bear this out. The nearest comparable sale to this property is shown as item 3 on their Market Comparison Chart, which is a tract of land only one block from that which was purchased in 1961 by Hawa. The price paid by Hawa was \$45.00 a frontal foot or 27¢ a square foot. Applying these valuations to the Sims Realty property, we arrive at a valuation of \$2,970 on a frontal basis and \$2,940 on a square footage basis. This property was purchased by Sims in 1941 for a total price of \$3,825.61, which was divided on the books as \$485.85 for land and \$3,339.76 for buildings. Assuming the buildings are still worth what they were originally, as appears logical, depreciation offsetting appreciation in value, a fair valuation on Tract D is \$6,309.

If salvage value is adopted by this Court, then it appears that a fair valuation of the Sims Realty properties is \$94,106, less a reasonable charge for selling commissions in the amount of approximately \$5,000, or a net that should be charged to these defendants of \$89,000. This figure is within the price range testified to by Mr. Grant Sims. The trial Court's finding of \$105,000.00 is too high for the facts.

3. NON-TANGIBLE ASSETS

In attempting to arrive at a valuation on a salvage basis, the most difficult things to value, of course, are the intangibles, including the franchises, permits and good will. A general test adopted for valuation of intangibles belonging to a company is the earnings of the company over and above a reasonable return on the investment in tangible assets. For example, if the investment in tangible assets is \$200,000 over and above liabilities, and a reasonable return on the type of business, considering its hazards and uncertainties, is 8%, the value of the intangibles would be determined by capitalizing the average yearly earnings over and above \$16,000. On the other hand, if the company is not earning a reasonable return on its tangible assets, its intangibles are worth nothing. It follows, therefore, as testified to by Professor Stuart, that when a company is worth more for salvage of its tangibles than it is as a going concern, its intangibles are without value. Therefore, if the plaintiffs are going to maintain for a valuation on the tangible assets over and above liabilities more than the \$135,000 which Professor Stuart testified was the value of the company as a going concern, then no value should be assigned to the intangibles, and certainly no value can be assigned to that ethereal thing called good will.

Operating rights are worth only what they will earn. While there may be some market for operating rights by a competitor such as Mr. Seifers, who wishes

to get rid of his competition, this does not appear to be a well enough established or stable enough market upon which to predicate any valuation. It is conceded by the plaintiffs that "the valuation of the intangibles of Salt Lake Transfer Co., that is, the franchises, certificates, operating rights and good will, is a difficult task," and again "it is unlikely, perhaps impossible, to find a situation where operating rights are precisely the same from company to company." This is certainly borne out by the testimony of Mr. Seifers. His basis for valuation of operating rights is made from a background of the operation of a highly successful company — a company which has extensive regular route interstate transcontinental operating rights which have yielded excellent operating ratios.* On the other hand, Salt Lake Transfer's operating rights are, for the most part, in a field where the competition is heavy and where the return is relatively bad. On cross-examination, Mr. Seifers stated that the operating ratio of Interstate Motor Lines, with which he is connected, varied from 85 to 88. On the other hand, the operating ratio of Salt Lake Transfer, according to the testimony of Mr. Gay, has not dropped below 95, and in 1960 was actually above 100. This court can take judicial notice that the Public Service Commission of Utah has held that an operating ratio of from 90 to 92 is within a safe range. An operating ratio of

*Operating ratio is the test generally used by regulatory commissions to determine the adequacy of the earnings of motor transport companies. Simply stated, the operating ratio is the percentage relationship which operating expenses bear to operating revenues before the application of any income tax.

below 90 is that of an extraordinarily successful company, while a company operating at an operating ratio of above 92 is in some danger, the danger increasing, of course, the higher the operating ratio rises.

It is likewise apparent that the testimony of Mr. Utzinger in this case cannot be given very great credence. Mr. Utzinger testified that his company was operating at a loss at the time he sold his operating rights for substantial sums. Anyone hearing this might well ask just why would anybody pay anything for operating rights which were losing money. Only one of two answers is available. Either the prospective purchasers decided that Mr. Utzinger's operating loss resulted from poor management and that his rights with proper management could yield a reasonable rate of return on the amount paid, or there might be a case where there was a purchaser who was already operating and who happened to need the particular rights which Mr. Utzinger offered for sale in order to supplement certain rights which the purchaser already had. No other explanations are available. Is either of these bases sufficient, however, to establish a market value on other and different rights? There is no factor in this case which would indicate that the rights of Salt Lake Transfer Company would yield a greater return under different management. Furthermore, it appears that the rights which Salt Lake Transfer has are rights which are subject to a great deal of competition from like operating rights held by competing companies. It is highly speculative

whether any competing company could be found which would have operating rights which would need supplementing by the particular rights which Salt Lake Transfer might have for sale.

To attempt to place any substantial value on any rights owned by Salt Lake Transfer would be speculative in the extreme. The fact that Mr. Elmer Sims testified that he would not sell the operating rights for \$280,000, for to do so would put him out of a job and render his tangible assets valueless, has no effect here. Quite obviously, they would be very foolish to sell the operating rights unless they were taken along with a package deal for the entire company, as to do so would merely leave them with certain antiquated assets of doubtful value on their hands and no way to use them.

Even the valuation of \$50,000 put on the operating rights by Mr. Elmer Sims and Mr. Grant Sims is obviously no more than an educated guess, but represents certainly the maximum that this court should accept if it proceeds with valuation on a salvage basis. The only cost basis of these operating rights is the sum of \$3,000 paid to Hadley Transfer for the general commodity authority purchased by S. L. Transfer. The trial Court's valuation at \$150,000.00 appears to be a compromise figure.

D. Valuations by Comparable Sales and Tax Appraisals

There are two "purchase and sale" agreements of interest in the combined Salt Lake Transfer-Sims Realty operation which should be taken into consideration by the court in fixing a valuation:

1. The John Sims Transaction:

The most recent of these was the settlement of an interest identical to that held by these plaintiffs by Mr. John Sims to his brother, George A. Sims, in 1959. Indeed this appears to be the most persuasive evidence in the entire case as to the amount which should be paid to the plaintiffs. It should be borne in mind that George A. Sims acquired from John Sims not just John Sims' claim on the business, but also his proportionate share of the accumulated and undistributed earnings. This was an arms-length transaction arrived at by a knowledgeable and discriminating seller with a knowledgeable and discriminating buyer, where neither was under any compulsion to complete the transaction. John Sims was no neophyte in the business world. The evidence is that he was a successful automobile dealer in San Bernardino, Calif. (R. 760), and therefore had knowledge not only of business, but to some extent of automotive values. He voluntarily transferred his interest, identical with these six plaintiffs, within one year of the time used as the valuation date in this case, for the sum of \$10,000. We should also be mindful that George A. Sims is one of the two designated by the father in 1932 to make a valuation of the assets.

2. The Elmer Sims Purchase:

In January of 1953, Elmer Sims purchased from his father, Milton K. Sims, a 1/20th interest in the partnership for the sum of \$14,000, which would indicate a value on the whole of \$280,000. (R. 691) Two factors must be taken into consideration, however, in evaluating this sale. The first is that it was made right near the conclusion of the Korean War, when Salt Lake Transfer Company, along with nearly every common carrier in the country, had experienced a period of unparalleled prosperity. The company's net earnings for several years had equalled or exceeded \$50,000. On the other hand, we are attempting to value this property as of 1960, at which time the company during the four preceding years had averaged less than \$20,000 per year net profit, and at which time the company during the year 1960 was actually in a net loss situation.

The second factor which must be subject to adjustment if the Elmer Sims purchase is to be used as a basis for valuation, is the fact that Elmer was purchasing not only a portion of his father's interest in the partnership assets, but also a portion of his father's interest in the accumulated but undistributed earnings which everyone agrees, in reaching a valuation in this case, we must treat separately as a liability of the company before reaching a net valuation.

3. The Inheritance Tax Appraisal:

The plaintiffs placed in evidence during the trial of the case the inheritance tax appraisal on the estate of Milton K. Sims, which included a 30% interest in both Salt Lake Transfer and Sims Realty. Expanding this 30% interest as set forth in the inheritance tax appraisal to 100%, we would arrive at a total valuation on the two companies of \$365,000. Two matters must be taken into consideration, however, in using this figure as a valuation factor. The first of these is that appraisal was not made by Mr. Sims at all, but was made by inheritance tax appraisers of the State of Utah, who were not present in this case for cross-examination. As such, it is highly improbable that this was competent evidence at all, and if it was held to be competent in view of the absence of opportunity for cross-examination, it should be given very little weight.

The second factor which must be taken into consideration in regard to these figures is that they valued not only Milton K. Sims 30% interest in the company assets as a going concern, but also his 30% interest in the accumulated but undrawn earnings of the Salt Lake Transfer Company, which everyone in this case agrees must be eliminated from consideration, or, in other words, treated as a liability in arriving at a valuation for purposes of this case.

CONCLUSION

The 1932 Agreement of the plaintiffs made a sale then and there to the new Salt Lake Transfer Company.

Deferment of payment of the purchase price and interest thereon was an accepted incident of a Depression sale. Their beloved brother, George acted in good faith and must not be penalized now because he let the plaintiffs receive their favorable interest payments for a long time and did not close them out the first opportunity when money was available.

We urge the Court to reverse the findings and judgment of the trial Court that these interests, sold and bought in 1932, are to be valued as of 1960. Should the Court disagree with that position, we urge that the valuation finally fixed be reduced to conform with the contemporaneous values set by plaintiffs or at least upon a salvage basis and that it be returned to the Court to take evidence as to the necessary costs and expenses of such liquidation and salvage.

No hardship will result to plaintiffs by providing them with payment for the value of their interests as of the date of their sale in 1932. Their 28 years of acquiescence in the debtor-creditor relationship should foreclose this belated effort to have the court made a new and different contract from that expressed by their 1932 Agreement.

Respectfully submitted:

PUGSLEY HAYES, RAMPTON &
WATKISS

HARRY D. PUGSLEY
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Attorneys for defendants.

APPENDIX ON VALUATIONS

The result of the various bases of valuation contended for by the parties in this case may be summarized as follows:

A. Valuation as of April 6, 1932:	
Appraised valuation of assets by Mrs. Bullough and Mrs. Sims as of April 6, 1932	\$ 21,686.46
Accumulated but undrawn earnings....	30,581.79
	<hr/>
Total	52,268.25
B. Valuation as a going concern as of June 30, 1960:	
Testimony of Professor Stuart as to valuation as a going concern	
\$135,000 x $6\frac{2}{3}\%$ x 6	\$ 54,000.00
Accumulated but undrawn earnings....	30,581.79
	<hr/>
Total	84,581.79
C. Salvage Value:	
1. Under valuations contended for by plaintiffs:	
Rolling stock	\$254,450.00
Franchises	365,000.00
Sims Realty Co. real property	152,100.00
Other assets of Sims Realty Co.	11,088.44
	<hr/>
	782,638.44
	<hr/>
Less agreed excess of liabilities over other assets	34,017.09
	<hr/>
	748,621.35

x $6\frac{2}{3}\%$ x 6	299,448.54
Plus accumulated and undrawn earnings	30,581.79
	<hr/>
Total	330,030.33
Less a reasonable cost of salvage	?
	<hr/>
Total	?

2. Under valuations contended for by defendants:

Rolling stock	122,996.77
Franchises	50,000.00
Sims Realty Co. real property.....	89,000.00
Other assets of Sims Realty Co.....	11,088.44
	<hr/>
	273,085.21

Less agreed excess of liabilities over other assets

34,017.09

Total

239,068.12

x $6\frac{2}{3}\%$ x 6	95,627.24
Plus accumulated and undrawn earnings	30,581.79
	<hr/>

Total

126,209.03

Less a reasonable cost of salvage

?

Total

?

3. Salvage Values set by the trial Court:

Sims Realty, Inc. — realty.....	\$105,000.00
Rolling stock	175,000.00
Investments	3,312.00
Intangibles	150,000.00
	<hr/>
	\$328,312.00

D. Other bases of valuation:

1. Sum paid to John Sims:	
\$10,000 x 6.....	\$ 60,000.00
2. Value agreed upon by plaintiffs in 1959 after death of M. K. Sims:	
\$18,000.00 x 6	108,000.00
3. Value based upon Elmer Sims purchase \$280,000 minus accrued but undrawn earnings of defend- ants, \$84,252.37	195,747.63
x $6\frac{2}{3}\%$ x 6	78,298.80
Plus accrued but undrawn earnings of plaintiffs	30,581.79
Total	<hr/> 108,880.59
4. Based upon inheritance tax appraisal:	
\$370,850 minus accumulative earn- ings of defendants x $6\frac{2}{3}\%$ x 6.....	118,639.20
Accumulated earnings of plaintiffs	30,581.79
Total	<hr/> 149,220.99

In each instance the amount shown would be less the \$48,000.00 already paid to the plaintiffs by Salt Lake Transfer Company.

The defendants urge that the court reverse the lower Court's holding and declare the defendants entitled to recover judgment based upon the 1932 valuation plus cumulative earnings, or a total of \$52,268.25, minus \$48,000 already paid, or a balance of \$4,268.25.

If the court orders a valuation as of June 3, 1960, the most persuasive evidence as to valuation of that date is the price paid to John Sims for his entire interest, including his interest in the accumulated and undrawn earnings, or a total of \$60,000, minus \$48,000, or a balance of \$12,000.

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