

1964

Gladys S. Bullough et al v. George Milton Sims et al : Respondents' and Cross-Brief of Appellants

Utah Supreme Court

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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,

Plaintiffs-Respondents and Cross Appellants

vs.

GEORGE MILTON SIMS, ELMER L. SIMS
and BEVERLY SIMS CANDLAND, Executors
of the Estate of MILTON 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

GLADYS S. BULLOUGH, WINIFRED S.
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BEVERLY SIMS CANDLAND, Executors of
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Defendants-Appellants

RESPONDENTS' AND CROSS 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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Clk. Supreme Court, Utah

Case No.

10,039

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JUN 30 1964

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RESPONDENTS' AND CROSS APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action to determine whether plaintiffs are partners in the Salt Lake Transfer Company, or are co-owners, but not partners; to determine whether they have made a valid contract to sell their interests to defendants and, if they have made such a contract, to determine

whether plaintiffs' interests were sold in 1932 for 1932 values or in 1960 for 1960 values; and, if partnership be found, to obtain an order of partnership accounting and winding up, or, if sale be found, to determine the sales price as of the applicable date.

DISPOSITION BY LOWER COURT

The trial of the case was divided into two phases, liability and damages. The court held that plaintiffs were co-owners, but not partners, that they had made a contract (Ex. P-B) in 1932 which was not void for fraud, mistake or undue influence, that the contract permitted either party to terminate the co-ownership by notice to the other, that neither did terminate that co-ownership until 1960 when defendants tendered plaintiffs an insufficient amount for their share of the business and plaintiffs refused the tender and brought this action. The court, in the trial of the damages issues, found the value of plaintiffs' share of the company and undistributed profits, including interest from the sale date to judgment, to be \$229,842.07, of which \$48,000 has been paid by defendants, leaving \$181,842.07 still due.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek a determination affirming the trial court's Judgments, or, in the alternative, if the Findings and Judgments are to be reversed, a reversal directing the trial court to find that plaintiffs and defendants are partners, that the partners are the equitable owners of the real estate defendants transferred out of Salt Lake Transfer Company into their own corporation, Sims Realty Company, and that an accounting and winding up

of the affairs of said partnership be had.

STATEMENT OF FACTS

Respondents agree with some of appellants' Statement of Facts, disagree with some, and claim that additional facts must be considered to permit a correct determination of the appeal. Appellants' Statement of Facts is replete with argument, all of which argument respondents controvert. For example, appellants state that the two brothers, George and Milton carried on *their* business from 1932 to 1959. The facts show and the trial court found that the two brothers managed the business owned by plaintiffs and defendants from 1932 to 1959 and after Milt's death in 1959 it was carried on for all of the parties hereto until June 30, 1960.

On page 6 of their brief appellants state that George and Gladys did in fact execute a valuation of the assets under the 1932 agreement and that Exs. D-H and D-I were executed by Gladys (plaintiff) based on values known to her. The trial court found to the contrary, that there had never been a proper or binding valuation under either Ex. P-A or P-B (R. 111, Finding No. 7). That this finding is abundantly supported by the evidence is shown hereafter in Point VII of the Argument.

Appellants state the Bill of Sale (Ex. P-A) to have been executed at a time "when money was not readily available to pay for the interests of the brothers and sisters." The record is wholly silent on the availability of money to George and Milton in 1932 except for such information as can be derived from Ex. D-I which showed that George

and Milton each had an unencumbered interest of \$18,587.17 in a business whose only debt was \$2,266.35 of current accounts payable, and that they also had 1/9 of their father's interest, worth not less than \$3,614.00, making an aggregate ownership of not less than \$44,402.34, almost all in liquid assets. If the true value of the business in 1932 was \$95,000 as George indicates in Ex. D-C, George and Milton were just that much (\$5,623.54 for their share) better off in terms of cash and borrowing power. Under the trial court's decision for the plaintiffs, and the evidence that George and Milton were worth some \$50,000 in the depths of the Depression, it could be inferred that defendants did not *want* to buy in 1932, rather than that they were *unable* to buy.

Appellant states that the 1932 agreement was a withdrawal by plaintiffs from the partnership. The court found otherwise (R. 110, Finding No. 5).

At page 9, in discussing the meeting of the parties in 1959, appellants state that the parties agreed that \$18,000 was "a fair price" for plaintiffs' interests. No testimony is cited to that effect and none is in the record. Defendants themselves objected to the admission in evidence of the amount offered by George to his brothers and sisters on the ground that it was irrelevant, and it was only permitted in the record at all after stipulation that it had no probative effect as to value (R. 186). The record does show that \$18,000 each would have been acceptable to the plaintiffs then present, but none had made any examination as to the true value of his interest.

On page 10, appellants state that John Sims "agreed upon a valuation of \$10,000.00 for his 1/27th interest." They cite R. 757 as proof, and neglect to state that, after objection, they withdrew the question now cited as proof (R. 758). The only evidence actually in the record regarding John Sims' settlement with the defendants is at R. 769, where John is cited by George as saying he was hard up and needed money and would take \$10,000.00 cash for his interest. This cannot be seriously urged as probative of value. So far as the record shows John never got closer to the company books than Las Vegas, where the above settlement took place (R. 769).

ADDITIONAL FACTS

George A. Sims is the oldest of the nine brothers and sisters who are the plaintiffs and principal defendants in this action, Milton K. Sims, now deceased, is the next younger, the six plaintiff brothers and sisters are next younger and John Sims is the youngest. In 1932 John Sims was a minor and all of the others had reached their majority. Each of the plaintiffs testified that their family was close knit and harmonious, full of love and affection, that they loved and trusted George, that George, as the eldest brother was the family leader (R. 164), the "guide-post" of the family (R. 135), and that they relied upon him in 1932 when Ex. P-B was executed, as well as before and since that time. Each plaintiff testified to the same effect: Mrs. McDonald (R. 135-6 and R. 142), Mrs. Hannibal (R. 162-4), Mr. Cleveland Sims (R. 194 and 196), Mr. Louis Sims (R. 203 and 205), Mrs. Malquist (R. 214 and 216), and Mrs. Bullough (R. 222-3). The defendant, George A. Sims, characterized his relationship to the

plaintiffs as follows (R. 314-5):

“Q Mr. Sims, I think the testimony here shows that you are the eldest of the nine children?

A Yes, sir.

Q And when you started to work in the business some of the children were still very small, they were babies, were they not?

A Well, I started when I was 21, in the fall of '21, and the babies came along about every two years.

Q You mean yours or your father's?

A No. I didn't get married at that time.

Q In other words, some of your younger brothers and sisters are about 20 years young than yourself, are they not?

A I would imagine that's about right.

Q Now, in 1904, I believe, your father went to Europe on a mission?

A It was about that time.

Q And when he went on a mission he was gone how long?

A About two years.

Q And you stepped in and took charge of the business at that time?

A Yes, sir.

Q And you were living home with all your brothers and sisters?

A Until I got married.

Q And the testimony here showed that they

looked up to you as the elder brother and relied on you and loved you, would you say that's correct?

A I'd say that was right.

Q And during all the balance of your life and their lives, right up to the present time that has been pretty much the case, you have been the older brother looked up to?

A I would say they have, always.

Q And that was true in 1932 also, was it not, Mr. Sims?

A Yes, sir."

The trial court found that, at the time Ex. P-B was executed, the older George occupied a fiduciary position with relation to the plaintiffs (R. 110, Finding No. 3).

At the time of his last illness George H. Sims, who was the founder of the Salt Lake Transfer Company and the father of the nine persons referred to above, owned 60% of the Salt Lake Transfer Company and was entitled to one-third of its profits. The remaining portion of the Salt Lake Transfer Company was owned by the two eldest sons, George and Milton, each of whom owned 20% and each of whom was, under their partnership agreement with their father, entitled to one-third of the profits.

Two days before his death, and at a time when he was so ill he could not sign his name, indicating his signature by a feeble "x," George H. Sims (the father) transferred his interest in the Salt Lake Transfer Company to his nine children in equal undivided shares (Ex. P-A).

On April 4, 1932 George H. Sims (the father) passed away. All of his children were in Salt Lake and the plaintiffs testified that they were grief stricken. The daughters particularly testified as to their love for their father and as to the depth and completeness of their mourning and grief both at the time of his death and of his burial two days later (R. 141, 165, 205, 216 and 224). One daughter said the day of the funeral, April 6, 1932, "was about as sad a day as you could imagine" (R. 216), and another said she was in a state of shock and had to be helped (R. 165).

George and Milton were not so grieved as to distract their minds from business. They had their attorney, Irwin Clawson, draw for them the document which is Ex. P-B and it was in George's hands, ready for presentation as soon as their father was interred. According to the unanimous testimony of the six plaintiffs and without any contradictory testimony from any other source, George presented this document to his younger brothers and sisters almost immediately after they returned to the family home from the cemetery on the day of the funeral (R. 140-143, 165-7, 194-6, 204-5, 215-17, and 225-6). Other relatives and friends had come to the house and Gladys Bullough, among others, was occupied trying to see that they were fed and cared for. At this time George A. Sims (defendant) said he wanted to talk with his brothers and sisters, and called them into the front parlor, particularly excluding their husbands and wives, closed the doors dividing the parlor from the rest of the house and presented the 1932 agreement, Ex. P-B, for signature. He stated, according to the unimpeached and uncontradicted

testimony of the six plaintiffs, that the document had to be signed so that he could be assured of the management of the family business. His statements in this regard were variously reported:

Winifred McDonald (R. 141) "He said we were to sign it so that he and Milt would take charge of the business for all of us with no interference." and (R. 143) "He was just going to take care of the business for us."

Irma Hannibal (R. 166-7) "And George said, 'Well, this is so that the business will go on just as it has been going on. This is so that Milt and I can go on managing the business.'"

Louis Sims (R. 205) "And then he had an agreement, I think, to run the business and he asked us to sign it. And I think the statement he made was so we wouldn't be bothered about the running of the business, and so we all signed it."

Grace Malquist (R. 218) "George told us that it was very urgent and I imagine that's why he did it the same day. He said it was very urgent. I don't know why, but he said it was very urgent to form a new partnership immediately because of my father's death. He said, 'And I have to have this signed to continue to operate the transfer company.' And he said, 'I want this signed,' and he said, 'I don't want any interference from the management of it with the other members of the family,' which is perfectly reasonable."

The defendant George Sims himself says of the occasion, in reply to a question by Mr. Pugsley as to whether he made any declarations to his brothers and sisters, or required them to sign the 1932 agreement (R. 309): "I can't remember. It was something there, but I can't remember that."

There was no long perusal or any discussion of the meaning of the agreement, nor any argument by the grief-stricken younger brothers and sisters. Each of them testified that he relied on George's honor, fairness, leadership and love and signed the document. One or two thought they saw copies of the contract, others had never read it.

Each of the plaintiffs testified that they never challenged the right of George to exercise the management of Salt Lake Transfer Company without interference from them, that they understood they had, as represented on the day of their father's death, given the right to control the operation of their company to their beloved elder brothers, and that they had never sought to interfere in the management since that date, although they had always considered themselves as owners and partners, having each received a patrimony of one-ninth from their father. Each year they received an accounting of the profits, showing them listed among the owners.

Copies of all partnership returns filed by the Salt Lake Transfer Company from the time of the death of the parent of the parties hereto until the year 1960 are in evidence (Exs. P-J and P-K). In the Federal return for

the year 1932 (P-J) the defendant, George A. Sims, referred to himself as a "Trustee" for the one-third interest owned by the nine children. In the appropriate portion of the 1933 income tax returns, he referred to the nine children as being "partners or members" calling all nine (including himself and Milton) owners of "Misc. Minor Interest." In 1934 he showed the plaintiffs as partners and again referred to them as "Misc. Minor Interests." In 1935 he again indicated the participation of his brothers and sisters in the proprietary portion of both income tax returns referring to them in Utah return as "Misc. (Interests)" and in the Federal return as "Miscellaneous (Interest)." In 1936 he showed the partners or members as being George A. Sims, M. K. Sims and, on the Federal return "Interest credited to miscellaneous members" and on the State return "Miscellaneous (Interest on Investment)." In 1937 and 1938 George A. and Milton K. Sims showed themselves as the only persons listed as owners (partners) in the appropriate place in the schedules. In 1939 on the Federal return in Schedule "J" "Partners Share of Income and Credits" George and Milton listed all of the plaintiff brothers and sisters as well as themselves as being owners and showed the amount of ordinary net income and the distribution of charitable contributions among the owners. In 1940 George and Milton showed in Schedule "J" that they and the seven brothers and sisters were the partners. *Losses on the sale of stock were distributed to the owners, including the six plaintiffs herein, pro rata and charitable deductions were distributed to the owners pro rata, each according to the amount of his interest. Each year thereafter until the commencement of this suit, all of the plaintiffs were*

shown as partners on the income tax returns and were treated as owners for the purpose of distributing dividends and any other items which, under the tax law, have a separate tax effect on owners and are accounted separately from partnership net profit.

The last income tax return filed by defendants prior to this litigation was prepared by defendants' accountants on March 23, 1960 and is for the year 1959. Each of the plaintiffs is listed on the returns for that year as a partner. On June 3, 1960 this suit was filed and thereafter defendants ceased to list plaintiffs on the tax returns as partners.

It is to be noted that each of these returns, beginning with the 1932 return which was prepared in 1933 after the death of the father of the parties, was wholly prepared by the defendants, without any consultation with plaintiffs. The record is clear that none of the plaintiffs interfered with the management of the company by defendants after agreeing on April 6, 1932 that they would not do so.

Each year from 1932 to 1960 the plaintiffs were advised by defendants what the profit or loss had been, and in the years 1939 and 1940 defendants sent plaintiffs copies of the profit and loss statement and operating statement, in each instance showing them as partners. Some of the letters showing the distribution of profit have been lost, but the copies of the 1939 and 1940 profit and loss statements and of the letters showing partnership profit distribution from 1942 through 1958 are in evidence aggregately marked Ex. P-E. In the years 1946, 1950, and 1951

the document was entitled "Distributions of Partnership Profits for Year" and in the other years the reference was to "Salt Lake Transfer Company Profits."

According to the income tax returns (Ex. P-J and P-K) Robert B. Sims and Elmer L. Sims, sons of Milton K. Sims, were shown as partners for the first time in 1942 and their names were placed on the bottom of the list of partners after the plaintiffs' names. This same order of listing continued through 1945. In 1946 G. Grant Sims was added at the end of the list of partners on the returns and on the list of owners and distribution of income sent out to each of the plaintiffs (Ex. P-E, pages 12 and 13). In 1947 Elmer L. Sims and G. Grant Sims moved themselves up the list of partners and were listed next after Milton K. Sims and George A. Sims, with the plaintiffs listed after them and the partner R. B. Sims listed last. This method of listing continued except that in 1948 the partner R. B. Sims was changed to Mrs. R. B. Sims (later called Mrs. T. H. Mazuran), she being substituted in his place because of his death. Mrs. Sims (Mazuran) is described by the defendant, Elmer Sims, as owning and exercising all of the incidents of partnership except that she doesn't participate in management (R. 299).

At the time of the death of George H. Sims (the father) the partnership owned Kennecott Copper Company, Anaconda Copper Company, Utah Power and Light and Z.C.M.I. stock. The dividends from this stock were regularly shown in the partnership income tax return (Ex. P-J and P-K). In 1940 the Anaconda and Kennecott stocks, which had been purchased in 1929 (Ex. D-F) and

had a high basis were sold at a loss and the loss was distributed to the partners (Ex. P-E and page 3 of the 1940 Federal income tax return in Ex. P-J). In June, 1946 the Utah Power and Light Company stock of the Salt Lake Transfer Company was distributed to the owners of that company. Each of the plaintiffs received 23 shares and the capital account of each plaintiff was charged with the cost of that stock on the books of the company, to-wit, \$275.31 (Ex. P-E, page 20).

On March 29, 1952 Elmer L. Sims wrote to each of the plaintiffs and a copy of the letter is in evidence (Ex. P-E, Page 20). In that letter he advised Mr. Malquist (the husband of the plaintiff, Grace Malquist, and the one who kept track of her interest in the Salt Lake Transfer Company for her) that an adjustment had been made on the depreciation schedule in the course of an audit. In that letter he made the following statement: "According to their audit the amounts of \$773.09 for 1949 and \$2,278.27 for 1950 is correct, and these adjustments had been issued to *all the partners*." In the ensuing years the amount of the adjustment as it relates to each of the plaintiffs is shown in the report of profits made to them (Ex. P-E, Pages 21 et seq.).

Each of the plaintiffs testified that he or she understood that his position with regard to the Salt Lake Transfer Company was that of part owner and a partner after April 6, 1932, but that he had agreed not to interfere with George and Milt's management of the jointly owned family business. The testimony of the plaintiff, Winifred McDonald, in that respect is typical (R. 145):

"Q (By Mr. Tanner) I asked you, Mrs. McDonald—I'll repeat the question. Did you have an understanding on April 6, 1932 and subsequent thereto as to whether or not you were a partner in the Salt Lake Transfer Company? Now, you may answer that yes or no.

A Yes. I was part owner and a partner as near as I know without any interference.

Q Is that your understanding?

A Absolutely."

There was no contrary testimony by any party to the April 6, 1932 agreement.

Plaintiff, Mrs. McDonald, testified that in 1954, defendant, George Sims, then managing head of the Salt Lake Transfer Company, had a conference with her and Claron Spencer at the Zions First National Bank in which George Sims stated that Mrs. McDonald then owned a share of the Salt Lake Transfer Company, which share he estimated to be then worth \$18,000.00 (R. 147 to 150). This was not denied by George Sims.

Plaintiff, Louis Sims, testified that in 1956 defendant, George Sims, offered to buy Louis Sims' interest in the Salt Lake Transfer Company for \$16,000.00, but that when he (Louis) offered to buy George's share on the same basis, George refused and no deal was made (R. 207-8). He further testified that again, in 1959, George offered to buy the interest of each family member for \$18,000.00 apiece, but later withdrew the offer (R. 208-9). This was never denied by George Sims. Grant Malquist, the husband of one of the plaintiffs, was present on the 1959

occasion and states that, after a discussion of the necessity for new arrangements among the brothers and sisters because of the effect of Milt's death on their partnership, George said that the boys (defendants Elmer and Grant) were not content to go on with the arrangement that had been in effect for many, many years (R. 185). He then describes what occurred as follows (R. 187):

"A He said he would offer each family member who happened to be in the partnership an amount of \$18,000 in stock and that he would use the current quoted price of the stock as shown in the newspaper on that date and that was entirely satisfactory to the members present. We inquired that that offer be also made to the other partners and he indicated it would. And with that he said, 'If you wish, I'll go down to the bank and get the stocks right now.' So I offered to drive him down and we drove to a bank, I don't remember the name of it. It was on 2nd South between Main and State. But it was late in the afternoon when we arrived there. The bank was closed. George came out and told me that and we drove back to the house. And he said, 'We'll renew this tomorrow morning.' Do you wish me to go on?

Q Yes, continue to say what he said or did.

A The following morning he called me on the telephone at the residence of Mr. and Mrs. David H. Bullough and said, 'Grant, the deal is off.' He said, 'I had a meeting last night with my sons and our attorney,' and he said, 'the deal is off.'

Q So the transaction was not consummated?

A It was not consummated."

Defendant Elmer Sims testified that \$27,000.00 of the

accumulated profits belonging to plaintiffs were kept in the Salt Lake Transfer Company as *working capital* (R. 295).

Defendant, George Sims, testified regarding the ownership of the Salt Lake Transfer Company as follows (R. 316):

"Q Actually the transfer company was considered being owned one-third by you, one-third by Milt, then one-third by all nine of you as brothers and sisters?

A Yes."

ARGUMENT

GENERAL

All the issues of liability revolve around the answers to these questions: Is Ex. P-B a valid agreement? If so, what is its proper interpretation in light of its terms, the conditions as they existed, and the conduct of its parties at the time of its execution and thereafter? Among other things, the answer to these questions is dispositive of whether the defendants' transfer to themselves of all of the realty of the Salt Lake Transfer Company was wrongful, and whether they must put it, or its equivalent in money, back into the communal pot.

It is plaintiffs' contention that the relationship of trust and confidence found to exist between the defendants George and Milton Sims and the plaintiffs is significant in two principal aspects, first, as it relates the state of the burden of proof on the question of whether the 1932 agreement is void for fraud, and whether it was carried,

and, second, if the agreement is not void, as it relates to the question of how its terms should be interpreted, the fiduciary having been the scrivener.

It is the plaintiffs' contention that the evidence of partnership recited in the Statement of Facts also has dual significance, first, as it relates to the disputed finding (against the plaintiffs) that no partnership existed between the parties after April 6, 1932, and, second, as it relates to defendants' contention (the trial court found to the contrary) that the only proper interpretation of the 1932 agreement is that plaintiffs ceased to be owners of any portion of the Salt Lake Transfer Company in 1932, having consummated a sale and transfer of their patrimony to George and Milton on the sad day of their father's funeral.

Plaintiffs further contend that defendants are on the horns of a dilemma. Either they must stand on the 1932 contract (Ex. P-B) and claim a 1932 sale at 1932 prices, in which case the contract must be set aside for fraud, mistake or undue influence, or they must admit parol evidence to show that the contract actually was an option or contract to sell in future, rather than a 1932 sale, in which case the contract is valid, but the sales price is the value at the time the option or call was exercised, which is the 1960 price. In either event, defendants lose. This is developed more extensively in Point I hereafter.

The argument in this brief will be directed first to the points raised by plaintiffs in their cross-appeal and then to the points of the defendants' appeal.

POINT I

THE TRIAL COURT ERRED IN FINDING THAT EXHIBIT P-B WAS NOT VOID OR UNENFORCEABLE ON THE GROUNDS OF FRAUD, MISTAKE OR UNDUE INFLUENCE.

The trial court, both in the pretrial order (R. 89) and in the conduct of the case, held plaintiffs to the burden of proving fraud, mistake or undue influence by clear and convincing evidence. This misconceives both the burden of going forward and the quantum of proof in an action where the defendant occupies a fiduciary relationship to the plaintiffs.

The rule is that, where the relation between the parties is one of trust and confidence, the courts of equity hold that it raises a presumption of undue influence and throws upon the dominant party the burden of establishing the fairness of the transaction and that it was the free act of the other party.

The *Restatement of the Law of Contracts* states the rule as follows:

“Sec. 497. *Definition and Effect of Undue Influence.*

Where one party is under the domination of another, or by virtue of the relation between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and voidable.”

Williston on Contracts, Revised Ed. Vol. 5, Sec. 1625 at pages 4540 and 4541 says:

“ * * * Undue influence, ‘is not necessarily a fraudulent influence though it frequently is so It is a paramount influence, and when it is used for the benefit or advantage of him who exercises it for such a selfish purpose it may well be called ‘fraudulent’, and the law so regards it; but there may be cases where it is not actually fraudulent but in a moral sense innocent though not harmless.’ But ‘as far as the execution of instruments is concerned, the term *fraud* ordinarily suggests the idea of deception; whereas undue influence suggests the idea of coerced volition.’ ” * * *

Thorne v. Reiser, 60 N.W. 2d 784, 245 Iowa 123, at page 788:

“The law concerning confidential relationships and their effect upon the transactions between parties to them is too well-settled to require much discussion. Not the law but the facts trouble the courts in such cases. * * * In the Sours case we pointed out that such relationship is not restricted to any special or particular form. There may be no legal or family relationship between the parties. The relationship nevertheless exists ‘when one has gained the confidence of the other and purports to act or advise with the other’s interest in mind.’ Restatement of the Law of Trusts, section 2(b); 37 C.J.S., Fraud (and other authorities).

“ * * * This does not mean there was anything wrong or fraudulent in the relationship itself or that there was any misrepresentation or undue influence exercised by defendants. But the relationship, if shown to exist, casts upon the dominant party, before he can avail himself of any benefit growing out of the transaction between them, the burden of showing the contract ‘was fairly procured without undue influence or other circumstance tending to impeach its fairness’,

Curtis v. Armagast, 158 Iowa 507, 138 N.W. 873, the burden of proving his compliance with equitable requisites."

Sizemore v. Miller, 247 P. 2d 224; 196 Ore. 89:

" * * * In arriving at the above conclusion, the trial court overlooked the principle of law, which is well-established in this jurisdiction, that where a confidential relationship exists between parties, when taken in connection with other suspicious circumstances, an inference of undue influence may be justified so as to require the beneficiary to proceed with the proof and present evidence sufficient to overcome the adverse inferences, and *that slight evidence is sufficient to set aside an agreement between them on the ground of undue influence. Ingraham v. Struve*, Or., 246 P. 2d 858; *In re Southman's Estate*, 178 Or. 462, 168 P. 2d 572." (accent added.)

Sparks v. Sparks, 225 P. 2d 238; 101 C.A. 2d 129:

" * * * What constitutes undue influence and what constitutes sufficient proof thereof depend upon the facts and circumstances of each particular case. It 'is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded.' *Longmire v. Kruger*, 80 Cal. App. 230, 239, 251 P. 692, 696. There are certain relations from the existence of which the law will infer special confidence, not only those of husband and wife, parent and child, counsel and client, etc., but in numerous cases where the facts proved will warrant the inference. *Bradley Co. v. Bradley*, 37 Cal. App. 263, 267, 173 P. 1011. A confidential relation in fact should be the test. Where a grantor has trust and confidence in the integrity and

fidelity of the grantee and the latter takes advantage of the grantor relief will be afforded. *Steinberger v. Steinberger*, 60 Cal. App. 2d 116, 122, 140 P. 2d 31. *One who holds a confidential relationship will be presumed to have taken undue advantage of his trusting friend unless it shall appear that the latter had independent advice and acted not only of his own volition but with full comprehension of the results of his action.* *Cox v. Schnerr*, 172 Cal. 371, 379, 156 P. 509.

“Persons standing in a confidential relation toward others will not be permitted to retain benefits which the others have conferred upon them unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred were independently advised with reference to the transaction. *Burrows v. Burrows*, 126 Cal. App. 323, 329, 28 P. 2d 1072. *No one who holds a confidential relation toward another will be permitted to take advantage of that relation in favor of himself or deal with the other terms of his own making. In every such transaction the law will presume that the person who held an influence over the other exercised it unduly to his own advantage.* *Khoury v. Barham*, 85 Cal. App. 2d 202, 212, 192 P. 2d 823. (accent added.)

Perry v. McConkie, 1 Ut. 2d 189, 264 P. 2d 852, at page 854.

“ * * * Our conclusions are further justified when it is noted that, although fraud must be proved by clear and convincing evidence, we have adopted an exception to the principle in the case where, because of the kinship of the parties, a fiduciary relationship exists, as it does here, — requiring in such cases that the fiduciary assume the burden of proving that his dealings with such beneficiary were fair and in good

faith. * * * ”

The facts to which the foregoing law must be applied are these. The trial court found (R. 110) as follows:

“3. On April 6, 1932 at the time of the preparation and execution of said agreement, the said George A. Sims and Milton K. Sims occupied a position of trust and confidence with relation to plaintiffs.”

This finding is amply sustained by the evidence set forth in this brief in the Statement of Facts on pages 5 to 7. All of the parties to the 1932 agreement who testified, including the defendant, George A. Sims, agreed that defendants looked up to him as their elder brother, relied on him and loved him. Each of the plaintiffs testified that they relied on George's good faith, love and affection and trusted him when he said that the contract (Ex. P-B) was just so he and Milton could take care of the business *for them all, the family*, without having to worry about the others interfering with the management. George did not deny that he so represented, but, instead, affirmed that the others relied upon him (Statements of Facts, *supra*, pages 6 and 7).

If this court were to hold that, by a strict four-corners construction of the April 6, 1932 agreement, George had, by using the trust and confidence of his unsuspecting brothers and sisters, succeeded in slipping their share of the business out from under them at depression prices, with no obligation to pay for it until some unascertained day in the future, with the sole and exclusive right to allocate earnings between capital investment and profits

(Ex. P-B, Par. 5) and with no obligation to pay for the use of their property unless he could make a profit with it, the court would be giving its blessings to an unconscionable result.

Sparks v. Sparks, *supra*, states that one who holds a confidential relationship will be *presumed* to have taken unfair advantage of his trusting friend (here they were brothers and sisters) unless it shall appear (1) that the latter had independent advice, (2) acted of his own volition, and (3) had a full comprehension of the results of his action. *Thorne v. Reiser*, *supra*, says he can only avail himself of benefit from the questioned transaction if he shows the contract to have been procured without undue influence or other circumstance tending to impeach its fairness, and *Perry v. McConkie*, *supra* (Utah case), says the fiduciary has the burden of proving that his dealings with the beneficiary were (1) fair and (2) in good faith.

There was no word uttered, even by George himself, on the matter of the state of his and Milt's mind in 1932, that is, on their *good faith*. The timing of the contract to coincide with the period of maximum grief and distraction, the deliberate exclusion of spouses, and the demanding insistence that the contract be signed then and there militates against good faith. These facts, combined with the shifted burden of proof and the silence of the defendants require a determination that no good faith was shown.

The *Sparks v. Sparks* standard gains defendants nothing. Defendants (1) deliberately excluded plaintiffs from

independent advice, (2) deprived them of the exercise of their own volition by timing and by insistence on immediate signing, and (3) by the statements that the business was to be "continued for us," and the subsequent conduct consonant with partnership and co-ownership, kept the beneficiaries from comprehending that anyone claimed they (plaintiffs) had already sold their inheritance.

Did defendants sustain the other half of their burden under the *Perry v. McConkie* doctrine? Did they show the contract to be fair? All evidence on this point outside the two documents themselves (Ex. P-A and Ex. P-B) was objected to by defendants and admitted only over their objections. This evidence shows plaintiffs to have received substantial profits, to have been treated as co-owners, to have shared in the increased values of the Utah Power and Light stock held by the partnership, to have been charged with a share of the loss on the decreased value of the copper company stocks, and to be now offered \$3,614.41 each for their share, plus some undistributed profits. If the plaintiffs were not deprived of their inheritance in 1932, they would have received the same amount of profits and the stock, and \$27,358.88 each for their share (R. 370-A, Finding 3). In other words, the transaction under examination is unfair in result if it did what defendants claim, and the only way it might be fair is if it is what plaintiffs claim it to be, a contract to sell upon demand at the price to be fixed when the demand is exercised, that is, a contract to sell in 1960 at 1960 prices.

Thus plaintiffs conclude that, under the evidence, either the contract is void because defendants failed to sustain

their burden of proving good faith, or, if defendants did prove good faith, the defendants have achieved a position astride the dilemma referred to.

If the 1932 contract was not a contract of *present sale at 1932 prices* but was, instead, a contract *to sell* at such future time as either party demanded, with all parties entitled to the full growth of their share and the increase in value of the assets it represented then it may be a *fair* contract.

If, however, the contract was a 1932 sale, at 1932 prices, with the brothers and sisters to take the risk of leaving their money in the company, not even getting interest unless there was profit, *sharing* fully in the cost of purchasing or developing land, trucks, other franchises and other assets, but *not sharing* in those assets thus acquired at plaintiffs' expense when they mature, develop or increase in value, *then* the contract was *unfair, overreaching, and fraudulent*.

Hence, if this court holds that no parol evidence or evidence of conduct can be used to explain, alter or modify the 1932 agreement, it necessarily follows that the court must then find that agreement to be void and unenforceable. The facts requiring this result are as follows:

(a) Plaintiffs pleaded fraud, mistake or undue influence in their Statement of Contentions served prior to the December 12, 1961 pretrial conference (R. 85). This pleading was incorporated in the Pretrial Order of December 13, 1961 (R. 88-90). The plaintiffs objected in writing to the nature and extent of the burden the Pre-

trial Order placed on them as to the fraud issue, stating that plaintiffs claimed a fiduciary relationship, with its resultant effect on the burden of proof (R. 91-2). The objection was served on defendants December 20, 1961. Two months later, February 19, 1962, this issue went to trial, with the claim of fraud, mistake or undue influence, and the claim of fiduciary relationship, clearly and timely pleaded.

(b) At the trial, plaintiffs proved that the fiduciary relationship existed.

(c) Defendants adduced *no evidence of any* kind showing that the contract was fair, just or equitable, other than the contract itself and proof of distribution of some of the profits over the years and reinvestment of some of the profits as working capital.

(d) Unless the contract is fair, just and equitable on its face, defendants have failed to carry the fiduciary's burden of going forward with the proof and proving by clear and convincing evidence that the contract is fair, just and equitable to the beneficiaries of the trust.

(e) The defendants having thus failed, the contract must be held void because of the presumption against the fiduciary in his dealings with those as to whom he occupies a fiduciary relationship.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS AND CERTAIN OF THE INDIVIDUAL

DEFENDANTS WERE NOT PARTNERS.

POINT III

THE TRIAL COURT ERRED IN FAILING TO ORDER AN ACCOUNTING AND WINDING UP OF SAID PARTNERSHIP.

Should the court have found that a partnership existed among the parties?

If the 1932 agreement is held to be void, we must then look to the conduct of the parties to determine their relationship. The pertinent conduct is as follows:

- (a) They were co-owners of the business.
- (b) They shared the profits in an agreed proportion.
- (c) They shared the losses when any occurred.
- (d) The plaintiffs had exercised their right to participate in the management by agreeing that George and Milton have sole management on their behalf.
- (e) Except for two years, the plaintiffs were, either individually or collectively, shown as partners on all Federal and State income tax returns filed by defendants between 1932 and 1960.
- (f) All shared in credit for charitable contributions made by Salt Lake Transfer Company as shown in the partnership returns, which credits are deductible only by co-owners.

The provisions of Utah Code Annotated, 1953, codifying

sections 6 and 7 of the Uniform Partnership Act, relating to this point are:

“48-1-3. ‘Partnership’ defined. — A partnership is an association of two or more persons to carry on as co-owners a business for profit. * * *”

“48-1-4. Rules for determining the existence of a partnership. — In determining whether a partnership exists these rules shall apply:

(1) Except as provided by section 48-1-13, persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by entireties, joint property, common property, or part ownership, does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns 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.

(4) 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:

- (a) As a debt by installments or otherwise.
- (b) As wages of an employee or rent to a landlord.
- (c) As an annuity to a widow or representative of a deceased partner.
- (d) As interest on a loan, though the amounts of payment vary with the profits of the business.
- (e) As the consideration for the sale of the good

will of a business or other property by installments or otherwise.”

Rowley on Partnership, 2nd Edition, Vol. 1, at pages 103 and 104:

“The requisites and essential elements of a partnership are implicit in the definition. In an opinion of great force and clarity, Andrews, J. stated ‘Partnership results from contract, express or implied. If denied, it may be proved by the production of some written instrument, by testimony as to some conversation, by circumstantial evidence. If nothing else appears, the receipt by the defendant of a share of the profits of the business is enough. * * * Assuming some written contract between the parties, the question may arise whether it creates a partnership. If it be complete, if it expresses in good faith the full understanding and obligation of the parties, then it is for the court to see whether a partnership exists. It may, however, be a mere sham intended to hide the real relationship. Then other results follow. In passing upon it, effect is to be given to each provision. Mere words will not blind us to realities. Statements that no partnership is intended are not conclusive. If on the whole, a contract contemplates an association of two or more persons to carry on, as co-owners a business for profit, a partnership there is. * * * On the other hand, if it be less than this, no partnership exists.’ ”

At pages 164 to 166:

“Up until the year 1860 there was one test almost universally applied by which to determine the existence of a partnership. That test was: if the parties share in the profits of a business or transaction they are partners, at least as to third persons. It is now

recognized that although one shares in the profits of a business he is not necessarily a partner for that reason alone. A general realization of the many exceptions which exist to the profit sharing test and its consequent untrustworthiness led to its modification. In its modified form the rule was often stated thus: *‘Two or more persons who contract together to carry on a business and share in the profits as common owners thereof are partners.’* In other words, in order to constitute one a partner his right to share in the profits must result from the fact that he is a part owner of them. If the per cent of the profits due him is a mere personal obligation owed him by his associate such person is not a partner. Regardless of the fact as to whether profit sharing, intention or other matters, are regarded as tests in any particular jurisdiction, all, perhaps, hold profit sharing to be an essential element of partnership.* * *” (emphasis added)

At page 170:

“ * * * ‘The salient features of an ordinary partnership are (1) a community of interest in profits and losses, (2) a community of interest in the capital employed and (3) a community of power in administration. These are the primary tests and constitute the indicia of the existence of a partnership.’ ”

At page 173:

“E. CONTROL.

The use of the test of control to determine the existence of a partnership is of recent origin, but has been of increasing use. As stated by the draftsmen of the Uniform Partnership Act ‘To state that partners are co-owners of a business is to state that they each have the power of ultimate control.’ The idea of con-

trol as a test of partnership has been denominated as the 'principal trader test' and thus expressed by one writer: 'The ultimate inquiry in all cases is whether the party claimed to be a partner has become by agreement a principal trader in the business with another. In other words, has he a right to participate as principal trader in the management of the business? If he has, he is a partner. If he has not, he is not a partner, with a single exception, which, however, is rather apparent than real. The exception is this: *A person may be a partner, even though he has by express agreement entrusted the control of the business exclusively to his associates in the business.* The question, strictly speaking, is not whether the party has a right to control the business as principal trader in the particular case, but whether he would have such right in that case by virtue of the agreement between himself and another, in the absence of any express provision conferring that right upon his associate in the business. If it appears that he would have had such right had it not been for his agreement to the contrary, then he is a partner, and his agreement merely operates as a surrender to his associate of a right which he would otherwise have enjoyed. * * *

(Emphasis added.)

At pages 176 to 177:

"F. SHARING OF LOSSES.

* * * Where other essential elements of the partnership relation — such as the sharing of profits, co-ownership of the business and the right of control — are present, the duty to share losses is ordinarily implied unless there is an agreement to the contrary. The parties need not agree to share losses, and it is usually sufficient that they enter into a relation with

an idea of profit under an agreement that there is to be a community of interest in the profits as such. An agreement providing merely for a division of profits and not of losses may be a partnership agreement. And where one party furnishes the capital and the other party the services in a business, and they agree to share the profits, but without any reference to losses, it may constitute a partnership. It has been held that a sharing of losses is not essential to a partnership. An agreement to share profits usually implies an agreement to bear losses in the absence of a stipulation to the contrary, although the absence of an agreement to share losses is sometimes considered a circumstance against the existence of a partnership. * * *

At page 141:

“The Uniform Partnership Act provides that no prima facie inference of partnership shall be drawn if a share of the profits of a business was received as a debt by installments or otherwise.

“Clauses (a) and (d) of subsection 7 (4) of the Uniform Partnership Act are similar in that they deal with a relation that may be either a debtor-creditor relation or one of partnership. However, (a) appears to relate to debts owing creditors where claims arose in the course of trade and who made arrangements with the financially embarrassed debtor to permit continuance of the business in an effort to secure payment; or, as stated in one case to ‘ * * * increase the amount recoverable on their claims’; while (d) appears to relate to loans made a partnership which might result more favorably than if interest were charged and which carry an element of risk. Historically this may have occurred as a device to escape the consequences of usury. The distinction is more clearly

brought out in the equivalent provisions of the English statute. Then too, these situations may exist in combination, the creditor first postponing his debt for a share of the profits and later making a loan or advance to the debtor."

At page 142:

"The sharing of profits is probably the only so-called essential element of the partnership relation that is absolutely indispensable."

At page 147:

"As a general rule it is held that a partnership exists where persons share in the profits of an enterprise as profits and not as a measure of compensation for services, property or opportunity in aid of the business; or, otherwise stated, when they may be said to be the co-owners of the business. * * *"

At age 168:

"* * * It is not what the parties call their relation that determines but what they actually agree upon in their contract. It is the intent to do those things which constitute a partnership that should usually determine whether or not that relation exists between the parties."

Point III could have merit only if the court should have found that a partnership existed. If the trial court's finding in this regard is reversed and partnership found, the only remedy under law and the pleadings would be to declare a dissolution as of the date of Milton's death in 1959 and order an accounting and winding up. In this case, the defendant partners' admitted taking of the partner-

ship realty should be set aside and the property and its proceeds restored to the partnership.

POINT IV

ANY DOUBTS OR UNCERTAINTIES AS TO THE MEANING OR EFFECT OF EXHIBIT P-B MUST BE RESOLVED AGAINST THE DEFENDANTS.

The court found (R. 110) that the 1932 agreement was a document prepared by the attorney for the defendants, George and Milton, on their behalf and that plaintiffs had no part in the preparation or drafting of that agreement. Defendants and their predecessors were, then, the persons who prepared the contract under discussion. The court further found that said George and Milt occupied a position of trust and confidence with relation to the plaintiffs, as has been previously discussed. The defendants other than George and the estate of Milton are assignees of a portion of their interests and would stand in the same shoes so far as this contract is concerned.

The trial court found that, under the facts and conditions as he understood and determined them, the 1932 agreement was a valid and binding contract, but that it had a different meaning and effect than defendants contended for. He held that the contract, despite its recitals and some of its wording, was not a contract under which plaintiffs sold their inheritance to defendants in 1932, but was, instead, a contract under which either plaintiffs or defendants could require a sale to be made at any time they chose, plaintiffs, individually or collectively, by demanding payment and defendants by proffering payment,

with the price to be determined by the fair market value of the interest *at the time the demand for payment, or profer of payment was made*. Necessarily this implies that, until the sale is thus effected, the parties continued to be co-owners.

The rule of construction urged in this point appears to be admitted by defendants, who cite *Maw v. Noble*, 354 P. 2d 121, 10 Ut. 2d 440, a case approving the rule.

Stout v. Washington Fire and Marine Insurance Company, 385 P. 2d 608, 14 Ut. 2d 414, a decision of this court handed down Dec. 11, 1963, states:

“(1) Any doubts or uncertainties as to the meaning or effect of the policy must be construed so as to resolve said doubts or uncertainties against the defendant who prepared the contract.”

POINT V

WHEN THERE IS ANY AMBIGUITY OR UNCERTAINTY IN A CONTRACT, THE CONSTRUCTION GIVEN BY THE PARTIES THEMSELVES WILL BE FAVORED.

The above rule is set forth in the following text and adopted as the law of the state of Utah in the following Utah cases:

Williston on Contracts, Third Edition, Vol. 4, Sec. 623 at page 789-790.

“Sec. 623. Secondary Rules: An Interpretation

Given by the Parties Themselves Will be Favored. An important aid in the interpretation of contracts is the practical construction placed on the agreement by the parties themselves. The process of practical interpretation and application is a further indication by the parties of the meaning which they have placed upon the terms of the contract they have made. Courts give great weight to these expressions, be they acts or declarations. * * ”

Woodward v. Edmunds, 57 P. 848, 20 Utah 118.

“ * * *. If, however, there should be any doubt as to the interpretation which is thus placed upon the contract under consideration, such doubt would seem to be removed by the acts and conduct of the parties themselves in relation thereto. The evidence clearly shows that from 1894, when the respondent first leased the herd, the sheep were, about the time of the expiration of each successive lease, counted out to the appellant, marked with his permanent mark, and then again delivered over to the lessee. *They were constantly treated by the parties as the lessor's property.* Again they were so treated when, on August 25, 1897, while the last lease was yet in force, the respondent himself went to the appellant, and again sought to lease the same sheep which he then had in his possession, under the lease hereinbefore construed, and actually signed an agreement which was then and there drawn up for another term, and contained practically the same terms and conditions as the one which was about to expire although, owing to some disagreement between the parties, the instrument was not executed by the appellant. Manifestly, by their acts and conduct, the parties to the instrument construed it as one of bailment merely, and, *where there is any ambiguity in a contract, the practical construction which the parties to the instrument*

have given it before any controversy arose between them should be adopted by the court. This court so held in Peay v. Salt Lake City, 11 Utah, 331, 40 Pac. 206.” (Emphasis added.)

Hardinge Co. v. Eimco Corp. (Utah 1954), 266 P. 2d 494, 1 Ut. 2d 320.

1. “***. It is fundamental that if effect can be given to both of two apparently conflicting provisions in a reasonable reconciliation that interpretation will control. *Williston on Contracts, sec. 622.*”
2. “***. Further, in the interpretation of contracts, the interpretation given by the parties themselves as shown by their acts will be adopted by the court. 3 *Williston on Contracts, sec. 623.*” (Emphasis added.)

POINT VI

THE 1932 AGREEMENT (EX. P-B) IS UNCERTAIN AND AMBIGUOUS, CONTAINS CONFLICTING PROVISIONS AND IS NOT COMPLETE WITHIN ITS FOUR CORNERS.

Defendants rely on Ex. P-B as being so clear, certain, understandable and unambiguous as not to permit recourse to evidence outside its four corners as an aid to its construction. Plaintiffs submit that the contract is so uncertain, ambiguous and incomplete that it can only be understood and interpreted by recourse to all the facts and circumstances surrounding its execution, and the conduct of the parties during the 28 years it was (according to the trial court’s finding) in full force and effect prior to this litigation.

The lack of certainty is apparent when one seeks the answer to the key questions significant to a contract of sale, a contract to sell, or a partnership agreement with buy-out provisions. Such questions are:

1. What is the purchase price?
2. When does title pass?
3. How are profits to be determined?
4. Does a share of profits include a share in unearned increment in asset values if the asset is sold during the period of profit splitting, and before payment of the purchase price? If the asset is held?
5. When must seller's share of the profits be paid him? May buyer hold those profits and use them? If buyer does hold part of seller's profits, must he pay seller interest for their use?

Let us consult the disputed contract and see how certain it is in the above regards:

1. *What is the purchase price?* Is it established with certainty? The contract says:

“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.”

How many dollars is that? Parol evidence is necessary to identify the Bill of Sale and show that it is the document referred to in the contract. Ex. P-B is obviously incomplete in and of itself on the matter of price. Does the purchase price become certain when Ex. P-A (the Bill of Sale) is located, identified, and admitted in evidence and considered in connection with Ex. P-B? It says:

“In 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.”

Does this add certainty? On its face it appears to *defer* valuation until one of the children “wishes to withdraw his or her interest,” but doesn’t say whether the wish must be subjective or expressed. It seems clear from the testimony that none of the plaintiffs ever *wished* to withdraw, or thought they had done so. Certainly they didn’t sign Ex. P-B because of any *wish* on their part. It was forced on them by George who said it must be signed if the business was to continue. The first time they even expressed a *willingness* to withdraw was in 1959 when some of them said they’d take \$18,000 but George wouldn’t pay it.

May one “withdraw” without wishing to, by signing Ex. P-B? Does one “withdraw” before or after he ceases to share in the profits? The agreement, even aided by the Bill of Sale, furnishes no certain answer to these questions.

The contract, even aided by Ex. P-A, fails to tell us the time as of which the valuation is to be made. As of the time of the *wish*? As of the time of the *withdrawal*? Or, as of the time of the *payment*? How can a price be *certain* which is to be the result of a valuation to be made as of a date which is not clearly specified? *The price cannot be determined from the 1932 agreement without outside help.*

Even if the *time* when the valuation was to be made were certain, the contract is uncertain and ambiguous as to the *standard of evaluation*. Is it to be the fair market value or the book value? Is it to be valued as a going business? Is the value to be a cash sales price or a time price? Or is the choice of the standard of evaluation to be at the free, unfettered, final and binding option of the two valuers? The document itself simply doesn't tell us. Either the answer must be presumed or postulated, or the court must consult extrinsic evidence as an aid.

2. *When does title pass?* Paragraph 2 of the contract says "vendee, hereby purchases, and each of the vendors hereby sells and conveys all the latter's interest." Paragraph 6 says "Each of the vendors covenant that *no sale or transfer of the interest in the old partnership has been made* by such vendor."

Paragraph 6 clearly *does not say* "that no sale or transfer of an interest in the old partnership has *heretofore* been made." The contract must be strongly construed against the scrivener and the inference drawn which is less favorable to defendants.

Referring again to the language of Ex. P-A, one could hardly suppose that a *withdrawal* has been made if no *sale* has been made. A contract to sell in the future could be held to be an agreement to *withdraw in the future*, and the trial court so held. It would be difficult to conclude that the trial court clearly erred in so doing.

3. *How are profits to be determined?* Paragraph 5 of the contract includes the provision that “the partners of the present partnership shall be the sole judge of what is a capital investment.” Are they also to be the sole judge of whether profits are to be determined by usual accounting methods, and whether the accounting standards of the Public Service Commission and Interstate Commerce Commission are “usual”? Reference to extrinsic rules of construction would seem to be required.

Under the 1932 agreement, when a “capital investment” purchased out of what might otherwise have been “profits” is sold, do vendors share in the proceeds of the sale to the extent of the gain? Or only to the extent profits were diverted from vendors to purchase the capital asset? Or neither? The answer to this question determines plaintiffs’ participation, or lack of it, in a fleet of rolling stock valued by the trial court (R. 369) at \$175,000.00. The question is very material. Can the contract be said to be so complete and free from certainty in this regard as to require extrinsic evidence to be excluded and the trial court reversed?

Each of the other questions runs into a similar vacuum when one seeks to pin the answer down with clarity and

certainty. It cannot even be told from the contract when plaintiffs are to receive their share of the profits. Is it to be on demand, or at stated intervals? Perhaps they are to be paid at "reasonable" intervals. If so, what is reasonable must be determined *by evidence outside the contract*.

The trial court did not err in admitting extrinsic evidence to clarify the 1932 agreement. It had to look to the conduct of the parties to supply enough answers to permit the contract to be enforced at all. The alternative to admitting extrinsic evidence, both written and parol, would have been to declare the contract so vague and incomplete as to be unenforceable. Since it is the trial court's duty under such circumstances to refer to extrinsic evidence when it is available, it cannot be said that the trial court erred by doing so.

POINT VII

THE COURT DID NOT ERR IN FINDING THAT THE PURPORTED VALUATION MADE IN 1947 WAS NOT A VALUATION BINDING UNDER THE 1932 AGREEMENT.

Point VI of defendants' brief contends that the court erred in "ignoring the valuation set in 1947 by those designated in the 1932 bill of sale and agreement." Defendants *assume* the court ignored Ex. D-H, when in fact the court considered it carefully and, in light of all the facts and circumstances, found that it was not a valid and binding valuation. Finding No. 7 (R. 111) reads as follows:

"There has never been a proper or binding valua-

tion of plaintiffs' interests within the contemplation of said agreement or within the contemplation of the Bill of Sale (Exhibit "A" herein) by which plaintiffs obtained their interest in the Salt Lake Transfer Company."

Plaintiffs are entitled to have the evidence viewed most favorably to them in determining if this finding is sustained. The pertinent facts are these:

It was not until June 30, 1960, that the time for valuing plaintiffs' share of the partnership arrived. This is the time that defendants exercised their right to buy plaintiffs' interest and offered payment of \$8,579.40. Defendants could have exercised their right any time in the preceding 28 years and thus fixed an earlier time of valuation but chose not to do so. The bill of sale says:

"In 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."

There was no contract provision for valuation prior to withdrawal and particularly no authority for the valuation claimed in 1947. The 1932 contract was, and was construed by the court to be, more a matter of fixing the terms for *continuing* the joint business of the parties than it was a *withdrawal*. There being no *withdrawal* until defendants exercised their rights to expel plaintiffs, that is, until 1960, no purported valuation at a different time would qualify under the Bill of Sale. Since the parties

hadn't made a 1960 valuation, the court proceeded to do so.

Gladys S. Bullough never made a valuation at any time. The evidence is that *her husband* discussed the books and records with Grant Sims and his accountant, and that Ex. D-H was drawn up under Grant's direction and in accord with his partisan interpretation of the Bill of Sale and 1932 agreement. Either D-H or D-I, and defendants never established which, was simply placed before Gladys at her home at 7:30 a.m. one morning by George, who assured her when she demurred (R. 235-6) "It's perfectly all right, Sis. We have just got to do it for the records."

Her testimony (R. 235) was that, although she did sign Ex. D-H, she did not participate in deriving the figures in the accounting, did not make an evaluation or have estimates made, and did not check on the fair value of real estate or franchises. To hold that all six of the plaintiffs were bound by such a travesty of a valuation would be a gross injustice.

The man who did participate in the preparation of Ex's. D-H and D-I, David H. Bullough, testified (R. 246) that he prepared them on the assumption that he was to try to find the April, 1932 worth of the Salt Lake Transfer Company and that that was what Ex's. D-H and D-I represented. The trial court held this to be a wrong legal theory and hence an invalid premise.

The evidence amply sustains the trial court's conclusions that the purported valuation of 1947, being based on an invalid premise and erroneous theory, having been

made by the wrong person (David instead of Gladys), having been made without estimates, valuations or accounting, and having been made before any of plaintiffs withdrew to withdraw was not a proper or binding valuation of plaintiffs' interest. No other result could have been reached under the evidence.

POINT VIII

THE COURT DID NOT ERR IN FINDING THAT THE ABORTIVE ATTEMPT OF THE PARTIES TO REACH A SETTLEMENT IN 1959 WAS NOT A BINDING VALUATION.

In Point VII, as in Point VI, defendants assume that the trial court *ignored* evidence which it considered and weighed with the other evidence. Nothing about the 1959 discussion between George and some unidentified persons, who included the plaintiff, Louis Sims, and Grant Malquist, husband of one of the plaintiffs, recommends their proposed price as a valuation. None of plaintiffs saw the books or had any idea of the state of the business. They simply said they would take \$18,000 for their shares and not attempt any formal or complete valuation. George refused to pay it. To hold that a plaintiff cannot recover more than the lowest acceptable offer of compromise would introduce a new and dangerous concept to our law.

The entire conversation is set forth at page 16 of this brief. Its primary significance is that it constitutes a recognition by the principal defendant that the plaintiffs were his co-owners and partners as late as 1959.

POINT IX

ASSUMING A 1960 PURCHASE PRICE, THE COURT DID NOT ERR IN ITS FINDINGS AND JUDGMENT AS TO THE AMOUNT TO BE PAID PLAINTIFFS BY DEFENDANTS.

Having concluded that the 1932 agreement was valid and enforceable, the court was faced with the problem of determining the price at which plaintiffs' interest in the Salt Lake Transfer Company had been sold to defendants at the June, 1960 date of sale. The trial court decided that each plaintiff was entitled to receive from defendants all undistributed portions of his share of the earnings, together with the value of his 6-2/3% share of the Salt Lake Transfer Company, including the real property previously diverted by defendants into Sims Realty, Inc., and its rents and profits.

The trial court concluded, and adjudged, that the value of the Salt Lake Transfer Company was an amount not less than the fair market value of all of its parts. It concluded that this was a fair and proper way to evaluate the proportional interests of the plaintiffs because it only required the defendants to pay the fair price of the things the defendants received and it gave to the plaintiffs, as the proceeds of their sale, the fair value of the things they transferred over. Since the sale from plaintiffs to defendants had been accomplished without an intermediary real estate agent or salesman, no part of the purchase price had to be lost to either party as an expense of the sale between them. This seems an eminently fair and proper

way to approach the subject.

Plaintiffs employed a certified public accountant skilled in transportation company accounting and had him determine from the books and records of the Salt Lake Transfer Company what portion of the earnings plaintiffs should have received in the years 1932 to June, 1960 and deduct the amount actually paid. This result is set forth in Ex. P-16 and there seems to be no substantial conflict between the parties on this one point.

The accountant then proceeded to determine from the books and records of the Salt Lake Transfer Company the book value of the company exclusive of certain items which could be expected to have a fair market value different from their book value. The items thus separated were the real estate (separately appraised as the value of Sims Realty, Inc. because it had been set aside by defendants into Sims Realty), the rolling stock, certain investments having an undisputed value of \$3,312.00 and the intangibles, consisting of the franchises, certificates and operating rights, all of which are regularly marketable. This procedure is the usual procedure followed in ascertaining the true market value of any business that includes among its assets items whose actual fair market value may be different, whether greater or smaller, than the book value.

The accountant determined (Ex. P-16) that the book value of the Salt Lake Transfer Company exclusive of the real estate, rolling stock, investments and operating rights was a negative \$34,017.09. This was not the subject of any

substantial dispute. The next problem was to determine the fair market value of the separately valued assets of the Salt Lake Transfer Company and witnesses were called for that purpose.

Plaintiffs called the most eminent, experienced and capable truck appraiser in these Western United States to appraise the motorized equipment. Defendants called no independent expert at all, relying upon the testimony of the defendant, G. Grant Sims only. Plaintiffs called Ray Paramore, a ten-year veteran of the new and used heavy trailer sales business at Salt Lake City to appraise the trailers. Defendants called no independent expert, relying on the testimony of the defendant, Grant Sims, only.

To establish the value of the franchises, certificates and operating rights, plaintiffs called two independent experts, Walt Utzinger, a man who had actually marketed a number of authorities similar to those of the Salt Lake Transfer Company, and Leonard D. Seifers, Vice-President and Assistant to the President of Interstate Motor Lines, Inc., one of the most efficient, experienced and capable operators in the motor truck industry, an expert on the marketing of franchises, certificates and operating rights. Both of these witnesses were wholly impartial, having no interest whatever in the outcome of the litigation. The defendants relied solely on the testimony of the defendants, Grant Sims and Elmer Sims.

Defendants called a young assistant professor from the University of Utah named Frank K. Stuart who was serving on the faculty at the University at the same time

he was in the process of writing his thesis looking toward obtaining his Ph.D. degree. Mr. Stuart testified that he based his estimate of value solely upon the earnings of the company. He stated, when asked whether he had made an examination of the Salt Lake Transfer Company, that, he "would not really call it an examination, it wasn't a detailed examination" (R. 631). He further stated that he had not verified such things as whether the company operated on its own real property or that of others (R. 631), and that he didn't know whether the company had any franchises or operating rights. In the latter regard his testimony is as follows (R. 647):

"A (Mr. Stuart) *** I don't know what their rights are — where they have to go. I don't even know whether they have rights or not to deliver to Clearfield.

Q And even though you don't know whether they have rights or not, and even though you don't know whether they have land or not, you would still feel that \$135,000.00 is a fair valuation for this company, is that right?

A As a going concern."

His testimony is fairly summed up by the following question and answer (R. 635):

"Q (Mr. Tanner) *** For example, your evaluation of this company at \$135,000.00 is made quite irrespective of whether or not the company's assets include \$150,000.00, \$200,000.00 or \$50,000.00 cash in addition to the real estate, is it not?

A The assets are only as valuable as what they can produce."

In summary, Mr. Stuart did not contest the valuation of any of the assets evaluated by plaintiffs' independent expert witnesses, contending only that, irrespective of the fair market value of any of its component assets, no company is worth any more than its average earnings multiplied by a given multiple, and that \$135,000.00 was the figure he got when he picked certain years, averaged the income and multiplied it out. The trial court concluded that this approach was not the proper approach for determining the sales price between plaintiffs and defendants and so adjudged in the first trial (R. 114-5). The trial court found against Mr. Stuart's testimony, apparently concluding that it had no probative value in this case, being unsound in both concept and execution.

Of overriding significance is the fact that defendants failed to call a single independent expert witness as to the value of the real estate, the rolling stock or the franchises. From their failure to call a real estate appraiser to challenge the appraisal of plaintiffs' experts, Edmund D. Cook, M.A.I. and Augustus B. C. Johns, M.A.I., S.R.A., one can only infer that the real estate appraisers known to and presumably consulted by defendants and by defendants' capable and experienced counsel all came up with an appraised value for the real estate which was equal to or in excess of that claimed by plaintiffs' witnesses. Plaintiffs' appraisal (Ex. D-2) is full, detailed and complete. It was in the hands of defendants and their counsel for the whole of the six-day trial and could readily be read, analyzed, and evaluated by any of the many other professional real estate appraisers of this community. It would be unreasonable to assume that defendants and their at-

torneys were so negligent as to fail to consult a real estate appraiser.

It is equally significant that defendants called no independent witnesses as to the fair market value of the motorized rolling stock or the trailers, even though they had available to them in this community all of the usual purveyors of new and used equipment, and even though defendants are, as to most such persons, old and valued customers. It is reasonable to assume from this that the independent appraisers arrived at values in excess of those shown by plaintiffs' witnesses. It is not reasonable to assume that defendants' capable and experienced attorneys were so slovenly in the discharge of their duties that they failed to consult the purveyors of equipment so readily available to them.

Again it is significant that defendants, whose counsel appear before this court regularly as the representatives of many outstanding transportation companies, failed to call a single independent expert to challenge the appraisals of Mr. Utzinger and Mr. Seifers regarding the value of the franchises, certificates and operating rights of the Salt Lake Transfer Company. Defendants have been engaged in the transportation industry for many decades. If, as the court may assume, defendants and their counsel consulted independent appraisers regarding the evaluation of the said franchises, certificates and operating rights, it may be supposed that they would have called some of their friends or acquaintances to challenge the appraisal of plaintiffs' experts, were it not for the fact that their consultations with other experts resulted in

appraisals by those experts which were equal to or in excess of those of plaintiffs' witnesses.

Plaintiffs' only quarrel with the findings of the trial court as to the value of the separately valued assets of the Salt Lake Transfer Company and of the real estate of the parties is that, in each instance, the court determined the value to be very substantially lower than the value set by the independent expert appraisers. Despite this objection, plaintiffs deem that they are bound by a determination of fact made by the trier of the fact when there is any competent evidence in the record to sustain it. Plaintiffs believe and urge that this same rule applies with equal force to defendants. There is an abundance of evidence to support the valuations made by the trial court, and there is an abundance of evidence which would support a very substantially higher valuation in regard to each disputed item.

A comparison between the testimony of plaintiffs' expert witnesses as to value and the trial court's finding in that regard is as follows:

1. Real Estate owned by Sims Realty:

Plaintiffs' witnesses (Ex. D-2)	\$152,000
Court's finding (R. 368)	105,000
Difference	<hr/> \$ 47,000

2. Rolling stock:

Plaintiffs' witnesses (Exs. P-1 and P-4)	\$254,450
Court's finding (R. 369)	175,000
Difference	<hr/> \$ 79,450

3. Franchises, certificates and operating rights:

Plaintiffs' witnesses (not less than

\$255,000 nor more than \$365,000)

\$255,000 - 365,000

Court's finding (R. 369)

150,000 - 150,000

Difference

\$105,000 - 215,000

A more complete and detailed memorandum regarding values and valuations is found in the record on appeal (R. 331 to 344 incl.). The court's particular attention is invited to said memorandum and to Ex. P-16. The fact analyses and details included in said memorandum are not reproduced in this brief in full because the briefs of counsel herein are already very long and plaintiffs want to avoid any unnecessary enlargement of them.

Defendants have devoted a very substantial portion of the argument under Point VIII of their brief to the proposition that the better evidence as to value is that given by their witnesses or that arrived at by counsel's own unsupported analysis of the appraisal report of plaintiffs' real estate appraisers. Plaintiffs submit that defendants are not entitled to a reversal of the trial court's findings of fact simply because they prefer the valuation of their own witnesses. They are entitled to reversal only when the record is without credible evidence to support the trial court's findings of fact. In this instance, the best evidence sustains the trial court's findings and there is ample evidence which could (and in plaintiffs' opinion should) sustain a far larger judgment than that rendered.

In their zeal, defendants have made statements in their

brief which are grave distortions of the state of the record. An example, by no means the only one, is the following statement on page 70 of appellants' brief regarding John Sims' compromise with George Sims:

"*** This was an arms-length transaction arrived at by a knowledgable and discriminating seller with a knowledgable 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, ***."

The only evidence on this subject is the testimony of Grant Sims (R. 760) and George Sims (R. 769) as follows:

"Q What business is he (John) in?

A (Grant Sims) He sells trucks and automobiles in San Bernardino, California.

Q Do you mean just as a salesman?

A He is the owner of an agency, but he possibly sells.

Q An experienced businessman?

A Of many years.

Q Experienced in the buying and selling of motor vehicles?

A That is true."

"THE WITNESS (George Sims): John asked me if I would buy his interest. I said: 'Well, John, how much do you want for it?' And he said: 'I will take ten thousand dollars.' He was talking about being hard up and needed money, and I said: 'John, I will

give you ten thousand dollars.' And I wrote out a check ***."

The disparity between the record and the brief is glaringly self evident.

Defendants urge that the trial court used a salvage value basis in arriving at its findings and judgment and that salvage value cannot be rightfully ascertained unless you determine the liquidation or salvage expense. By analogy to debating terms, defendants first set up a straw man and then destroy it.

In the first place, there is nothing in the record to indicate that the court used a salvage value basis for its evaluation and, in the second place, there is nothing about the contract between the parties to indicate that they intended any sales commissions or sales expenses to be deducted from the purchase price, since no such expense was to be incurred. It should be noted that if defendants are actually concerned that they are overcharged in the trial court's determination of value, they need only agree to an accounting and winding up. In that event all costs of sale and sales commissions would in fact be deducted before the balance is distributed among the partners according to their ownership. Their unwillingness to do this could evidence a belief that the damages here awarded are, as plaintiffs have contended, very substantially less than the actual worth of plaintiffs' interests in the company.

There would be no more justification for requiring the amounts to be paid by defendants to plaintiffs for their

interest in the Salt Lake Transfer Company to be reduced by a theoretical cost of sale or sales commission than there would be for inserting a sales commission in an action between the vendor of real estate and vendee of real estate where no sales agent was involved, and deducting this theoretical, unincurred cost from the sales price set in the real estate contract. There was no commission incurred in the sale from plaintiffs to defendants, no commission is anticipated in future, and the only evidence is that defendants propose to continue to operate the business they have thus purchased and not to incur a sales commission.

CONCLUSION

The trial court's interpretation of the contract between plaintiffs and defendants is amply justified by the terms of that contract, the facts and circumstances surrounding its execution and the conduct of the parties in the years since it was made. Plaintiffs' only complaint is that the trial court should have, under the evidence and the applicable rules of law, found the 1932 agreement to have been void and further found the status of the parties in relation to one another to have been that of partners, with the partnership dissolved by the death of Milton K. Sims in 1959. The amount of damages found by the trial court are abundantly supported by the evidence, and the evidence would have supported damages in a far greater sum.

Under these circumstances, plaintiffs respectfully urge the court either to affirm the judgment of the trial court,

or, if that judgment is to be varied on appeal, to hold that the 1932 agreement between the parties is void and unenforceable and that the relationship of the parties during the intervening years has been that of partnership, and to order an accounting by defendants of the partnership's conduct and assets, including the real property diverted to Sims Realty Company, and a winding up of the business.

Respectfully submitted,

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