1969

Jerry Skousen v. Alvin I. Smith : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

JERRY SKOUSEN,
Plaintiff,

vs.

ALVIN I. SMITH,
Defendant.

Case No. 11598

BRIEF OF APPELLANT

Appeal from the judgment of the District Court of Salt Lake County, Honorable Stewart M. Hanson

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STATEMENT OF KIND OF CASE

This action was brought to recover on a non-negotiable promissory note signed by the defendant, Alvin I. Smith, Attorney, while he was representing a client in negotiations with respect to a real estate transaction in Arizona.

The defense is that no cause of action has yet accrued since the conditions expressly stated in the non-negotiable note have not yet occurred. The note provides: "It is understood and agreed that the drawer of this note shall not be liable hereunder until and unless payment is received from Clifford R. Walker on notes executed by him in the total sum of $13,-977.70".

The plaintiff pleads a second claim based on allegations that the defendant failed to take action required to recover on the two notes payable to the de-

fendant the collection of which was a condition precedent to the plaintiff's right to recovery.

DISPOSITION OF CASE IN LOWER COURT

The District Court granted judgment for the plaintiff for the amount of the note, interest and attorney's fees.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and judgment in his favor as a matter of law, or that failing, a new trial.

While it may not be within the issues in this case, in order to avoid further litigation, this defendant would consent to an order of this court to assign to the plaintiff an interest in the Walker notes or the judgment now entered against C. R. Walker to the full extent of the amount which has now accrued on the note held by the plaintiff. This would permit the plaintiff to directly move against C. R. Walker on that judgment if the plaintiff feels that he could effect recovery from C. R. Walker more expeditiously than the defendant and his counsel have been able to.

STATEMENT OF FACTS

This action was brought against the defendant on a non-negotiable promissory note which contains this clause:

> "It is understood and agreed that the drawer of this note shall not be liable hereunder until and unless payment is received from Clifford R. Walker on notes executed by him in the total sum of $13,977.70".

This note was signed in conjunction with two real estate transactions in which the Coronado Land Company, a partnership, was involved. The plaintiff is one of the partners of Coronado Land Company. (Tr. 50, L. 10)

Prior to January 15, 1962, Coronado Land Company, a partnership, of which plaintiff was a member was negotiating with one Clifford R. Walker for an exchange of two apartment houses in Phoenix, one of which was known as the Pharoah Apartments for some acreage in Arizona. Before that transaction could be completed, Walker was obliged to provide funds to cover delinquent mortgage payments and delinquent taxes on the Pharoah Apartments. The detail of that encumbrance is here set forth:

Property Taxes	$5,240.81	
Interest	60.68	
General Property Taxes and interest		5,301.49
Special Assessments	380.01	
Interest	4.50	
Total Special Assessments and interest		384.51
Total Taxes and Interest		5,686.00
Mortgage delinquency and interest amounting to	8,286.21	
Additional interest accrued before date of payment	5.49	
Total mortgage delinquency including interest		8,291.70
Total obligation to C. R. Walker		$ 13,977.70

Walker was not in funds to clear these obligations and the partnership of Coronado requested this defendant, then negotiating on behalf of his client, Stoller, with Coronado for the acquisition of the Pharoah Apartments, to determine whether Smith could arrange to provide the funds for Walker to cover the $13,977.70 on condition that Coronado would take one-half of the risk. On these terms Smith agreed with Coronado to have client Stoller make a loan of $13,977.70 to Walker. The seller suggested that the defendant act as intermediary (Tr. 55, L. 15-30) to disburse the $13,977.70 and then to receive payment on these promissory notes for monies advanced by his client and from the money so to be received that he pay over one-half thereof to his client, the buyer, and the other one-half to the seller of the property, the Seller's one-half being represented by the note herein sued upon. Smith was to receive $13,977.70 from his client Stoller and disburse the $13,977.70 paying $8,291.70 directly to the mortgagee and $5,-686.00 to the County for Taxes. In order to divide the risk equally between Stoller (Smith's client) and Coronado, Coronado on January 15, 1962 agreed it would accept a note for the $6,988.85 balance of the purchase price, exactly one-half of the $13,977.70 payable when Smith collected $13,977.70 from Walker. (Tr. 52, L. 6 to Tr. 53, L. 23)

> Q And did your client, Mrs. Stoller, advance that amount of thirteen thousand, some odd dollars, to pay these delinquent items?

A She did.

Q And that was done so the property would be clear when a trade was made with Stollers for the Pharoah Apartments?

MR. FRAZIER: We object to that as leading and suggestive.

THE COURT: It is that.
MR. ARNOVITZ: Well, I can rephrase it.
THE COURT: All right. Let him answer. It is leading.

A Under another agreement between Coronado and Cerene and Walker, Coronado had agreed to cause to be loaned to Cerene and Walker the thirteen thousands dollars in order to clear this up so the transaction could be made, and Cornado then asked me to have my client loan the money, and the money was so loaned, and Walker then gave those notes.

Q (By Mr. Arnovitz) And what relationship did the amount of the note given to Mr. Skousen, or to the Coronado Land Company have to the total of these two notes?

THE COURT: Well, it is half.
MR. ARNOVITZ: Yes, it is exactly one-half, but we wanted to show the reason for it, your Honor.

THE COURT: Go ahead.
A Under the purchase — under the purchase agreement which you have had marked as Exhibit —

THE COURT: "D-5."
A (Continuing) "D-5" $23,000.00 was the purchase price to be paid by Stoller to Cor-

onado. The purchase price was to be paid at the — May I have the exhibit to refresh my memory as to the amount? The purchase price was to be paid according to the agreement made with Coronado by the payment of cash of $16,011.15, and I was instructed by Coronado to deliver a note for $6,988.85 to Skousen, which that was one-half, the agreement being with Coronado that although Stoller would advance the full amount that the risk would be on Coronado to guarantee all amounts paid out over and above $23,000.00, so that Mrs. Stoller was to receive $6,988.85, at which time the balance would go to Skousen, and thereby the purchase price of $23,000.00 would have been paid.

Q In other words, adding to the $16,011.15 the $6,988.85 note would have made up the total purchase price of $23,000.00?

A Yes. Now, as this whole agreement as to the purchase price was completed, an agreement made with Coronado as a partnership and as the owner, we were instructed by them whom the note was to be paid to and how it was to be handled there.

On the following day on behalf of his client, Smith agreed to purchase the Pharoah Apartments for the sum of $23,000.00 subject to the foregoing encumbrances of $13,977.70 knowing that he already had in his hands the $13,977.70 for which Walker had executed the two notes with which to remove these encumbrances. Since the Coronado Land Company had agreed to accept one-half of the risk of the loan

to Walker, the method adopted to have them take the risk was to defer payment of $6,988.85 of the purchase price until such time as Walker paid the two notes.

The Coronado Land Company, a partnership, directed that the note for this amount be made payable to one of the partners, Jerry Skousen, the plaintiff herein. (Tr. 53, L. 19-23) This note is dated February 1, 1962, fifteen days after the dates of the two Walker notes and is made payable fifteen days after the date it was expected that the money would be received on the two Walker notes. This fifteen day interval between the date Walker was to pay the two notes amounting to $13,977.70 and the date when Smith would then have been obligated to pay the note of $6,988.85 to this plaintiff would have been sufficient time to have prevented any default by Smith in the payment of this note to the plaintiff.

The Walker notes were not paid on their due date of January 15, 1964. Beginning in January, 1964 Smith gave Walker notice that the two notes were coming due. (Tr. 35). When payment by Walker was not forthcoming, Smith contacted Walker. Walker was a resident of Calgary, Alberta, Canada. In April, 1964, Walker was in Salt Lake City to attend the Conference of the Church of Jesus Christ of Latter-day Saints and Smith located him in Salt Lake City and made demand upon him for payment of the two notes. Walker promised to make payment. When

Walker returned to Calgary, sometime after April, 1964, he sent a payment of $2,500.00 to apply on one of the notes and it was so applied.

Q Was the $2,500.00 credited to one of those notes? (Tr. 35, L. 1-2)

A It was.

Walker also had agreed to make further payments of $2,500.00 per month until the total of $13,977.70 plus interest was paid. After April, 1964 when no further payments were being received, Smith continually attempted to pressure Walker into making these payments. (Tr. 37) Smith had a difficult time to contact Walker in Calgary and Smith knew that he usually came to Conference in Salt Lake City twice a year and when he was unable to contact Walker here, he hired private detectives to check the hotels to see if he could find him in order to serve him with summons and sue on the notes, but he was unable to trace him down in Salt Lake City. Smith went to Calgary in the Fall of 1966 and spent a day trying to find Walker in Calgary. (Tr. 37) Smith found his office closed and no one answered at Walker's home in Calgary. Smith went through Calgary again a week later and was unable to contact him. After Smith returned to Salt Lake City, in November, 1966 he requested Irwin Arnovitz, his associate, to take whatever steps were necessary to effect recovery of the Walker notes. Irwin Arnovitz, referred the matter to Calgary counsel and Mr. Smith made an advance of $200.00 in court costs to commence suit against Walker. Coun-

sel in Calgary then advised that Walker could not be located in Calgary and that Walker was probably in Utah. Smith then tried to locate Walker in Utah; Smith had met Walker's father-in-law, President Tanner, and had his secretary call Mrs. Tanner to find out where her daughter and son-in-law (Walker) were living and Mrs. Tanner gave her an address in Orem, Utah. Soon after that an action was started on the two Walker notes. Smith talked to Walker shortly afterward and Walker told him that summons had been served on him just ten days after he came back to Orem.

The suit against Walker was commenced in the District Court of the Fourth Judicial District in and for Utah County, Case #31235 on September 12, 1967. During the pendency of the suit, negotiations were carried on with Walker in an effort to collect these notes. Exhibit R3. Walker agreed with Smith that he would contact Mr. Frazier, Skousen's attorney and pay him the amount of the Skousen note and would obtain from Frazier a dismissal with prejudice of this suit and agreed to pay Smith the amount due to his client but after first paying Skousen. Smith agreed that Walker could pay Skousen before paying him but unfortunately Walker has paid neither one. Counsel for Smith attempted to obtain some security from Walker which could be applied to the payment of both Walker notes and received an assignment of some funds alleged to be due to Walker from the Banner Corporation and on which there was some expec-

tation that there would be paid to Walker a rather large sum. (Ex. D-4) When the assignment was executed on May 10, 1968 and the assignment was accepted by the Banner Corporation on May 16, 1968, it was expected that Walker's one-third interest would exceed $100,000.00 and that the $13,977.70 would be paid in full. Like many such transactions, the payment of $100,000.00 did not materialize and indeed no sum was paid over by the Banner Corporation for the benefit of Walker or for the payment of the amount due to Mr. Smith's client. Because of this inability to force Walker to pay the $13,977.70, Smith was unable to fulfill the obligation which he had gratuitiously undertaken and for which he received no benefit of any kind but has suffered the burden of attempting to collect the Walker notes, has expended his money to pay court costs in Canada and in Utah and has suffered the burden of defending this action. Mr. Frazier, counsel for the plaintiff, examined Mr. Smith as to why he had signed this promissory note.

(Tr. 55, L. 14) CROSS-EXAMINATION
BY MR. FRAZIER:

Q Mr. Smith, how come you happened to sign this promissory note?

A I was acting as an intermediary for the parties because my client did not want to be — She didn't know all of the details of this. I was merely a nominee, part of collection and the paying out, acting between as a negotiator and the intermediary between Coronado, Walker and Stoller.

MR. FRAZIER: I have no further questions.

REDIRECT EXAMINATION

BY MR. ARNOVITZ:

A Now, as a matter of fact you have never had any financial interest in this personally at all?

THE COURT: You are not claiming anything. This is in your answer.

MR. ARNOVITZ: No, we don't, but just for the purpose of the record, counsel has just opened that matter up, and I want to amplify it.

Q (By Mr. Arnovitz) You have had no financial interest in this transaction, and none of the proceeds would come to you in any way?

A In no way.

ARGUMENT

POINT I

NO CAUSE OF ACTION HAD ACCRUED TO THE PLAINTIFF ON THE NOTE HEREIN SUED UPON AND THE COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR DISMISSAL AND NON-SUIT.

This point was raised by the defendant at the very outset of the trial. The execution of the note having been admitted, the court suggested that the burden to go forward would be on the defendant but the defendant raised the point: "That there is no liability under the note unless and until the two notes executed by C. R. Walker are paid in the total amount of $13,977.70". Counsel for the defendant then con-

tinued (Tr. 28) — "It seems to me that it is incumbent upon them first to show that such amount has been paid; if that amount hasn't been paid there is no claim accrued as yet" — Plaintiff's counsel then agreed that he had the burden of establishing the facts to show that the note had become payable and that a cause of action had accrued. (Tr. 28 and 29)

The execution of the note was admitted by the defendant as was the fact that the defendant has received one payment of $2,500.00 on one of the notes. (Tr. 34, L. 17 Tr. 35, L. 2)

A I received $2,500.00 on one of the notes.

Q When did you receive that payment?

A I believe it was in April of '62, or what is the date of the note?

THE COURT: February 1st.
THE WITNESS: Of what year?

THE COURT: 1962.
THE WITNESS: I mean April of 1964.

Q (By Mr. Frazier) You received $2,500.00 from Mr. Walker in payment on one of his notes?

A Yes.

Q How many notes were there comprising the $13,000.00 as alleged or set forth on that promissory note?

A Two notes.

Q And was the $2,500.00 credited to one of those notes?

A It was.

The plaintiff offered no other evidence as to the time when the note became payable nor any evidence to explain the ambiguity in the note. Thus on a Motion for non-suit, the District Court had only the four corners of the note and the single fact that one payment of $2,500.00 had been made on one of the notes in April, 1964 from which the court could find that the note had become payable before this suit was commenced.

The clause in the note as to the time payable reads:

> "It is understood and agreed that the drawer of this note shall not be liable hereunder until and unless payment is received from Clifford R. Walker on notes executed by him in the total sum of $13,977.70".

The plaintiff's contention must be that the note became payable in April, 1964 when the one payment of $2,500.00 was received on one of the notes. The condition in the note is — "payment—on notes—in the total sum of $13,977.70". The meaning of the phrase becomes clear and obvious when the phrases in this clause of the note are put in their proper grammatical sequence. When that is done, the clause reads without inserting a single letter or word as follows: "It is understood and agreed that the drawer of this note shall not become liable hereunder until and unless payment is received in the total sum of $13,977.70 from Clifford R. Walker on notes executed by him".

Likewise, the clause is crystal clear, when the letter "n" in the word "on" is changed to the letter "f" so that the clause as so changed would read:

> "It is understood and agreed that the drawer of this note shall not be liable hereunder until and unless payment is received from Clifford R. Walker of notes executed by him in the total sum of $13,977.70".

Counsel for the plaintiff is asking the court to read the clause as though the article "a" preceded the word "payment". However, no evidence was offered to that effect and on the contrary the plaintiff testified that what he had requested Smith to do was to *collect* the notes that were due from Mr. Walker and not merely to obtain a payment from Mr. Walker so that his note would become payable. (Tr. 31, L. 26 to Tr. 32, L. 1) Had any such evidence been offered defendant has in its possession a letter written by the plaintiff to Mr. Frazier his attorney, a copy of which he mailed to the defendant in which he acknowledged that the note in suit did not become payable until full payment of the two Walker notes. That evidence would have been offered in rebuttal, if plaintiff had given any testimony that there was an agreement that the note should be interpreted as though it read, "a payment". We attach that letter as an appendix to this Brief.

From the following question of counsel for the plaintiff, we have an indication that he interpreted the Skousen note as providing that it did not become

payable until Smith collected the two notes from Walker.

> Question by Mr. Frazier: Did you have any conversation with Mr. Smith specifically about taking action against Mr. Walker in *collecting* the notes that were due from Mr. Walker?
>
> A. Yes. I felt my security was being impaired. I had numerous conversations with him asking him to proceed and get this *collected.* (Emphasis ours) (Counsel is of the opinion that the word "this" should be "these") (Tr. 31-32)

Accordingly, it seems clear that the plaintiff knew that this note was not payable until and unless the notes executed by Walker in the total sum of $13,-977.70 were collected — not partly collected.

The answer given by the plaintiff likewise suggests the same thing, when the plaintiff used the word "security". There is nothing in the note to Skousen stating it is a secured note, as indeed it is not. What Skousen must have meant by the use of the word "security" was that whatever funds he was to receive in payment of his note would have their origin in the collection of the two Walker notes.

The District Court ascribed a meaning to the word "payment" that does not conform to either the dictionary or legal definition of that word. No evidence was offered that the word "payment" was to have a meaning different from its dictionary or legal

meaning. Webster's Imperial Dictionary defines payment as:

> "The thing given in discharge of a debt or fulfillment of a promise".

The same dictionary defines the word "pay" as follows:

> "To get rid of or satisfy as a debt, duty, or obligation, by performing an action required or by delivery of something or some amount in satisfaction; to satisfy ones debts, duties or obligations".

A partial amount paid on an obligation is not "payment" but one installment of a given number of installments that may be required to make payment of an obligation. The word "payment" does not require the addition of any word or article to be correctly understood. Definitions of the word "payment" as they appear in Vol. 31-A, Words & Phrases at page 216, 217, 233 and 234 follow:

> Page 216 — "Payment" meant in full and not in part or a compromise for a part. in re Thornwall's Estate, 10 N.W. 2d 35, 233 Iowa 626.
>
> "Payment" of an obligation connotes fulfillment of it according to its terms. *Stone vs. Webster*, 144 P.2d 466, 468, 65 Idaho 392.
>
> Page 217 — "Payment" of a debt is made by debtor's delivery to creditor of money or some other valuable thing, and creditor's receipt thereof, for purpose of extinguishing debt. *Moses vs. United States*, D.C.N.Y., 28 F. Supp. 817, 818.
>
> Page 233 — "Payment signifies the discharge

of a debt, obligation of duty. In re Gray's Estate, 290 NYS 603, 607, 160 Misc. 710.

"Payment" implies satisfaction or discharge of an indebtedness or claim. *Dennett vs. Goelet*, 256 NYS. 393, 395, 143 Misc. 195.

"Payment" implies discharge of an obligation according to its terms or by something given or received of agreed value equal to the debt or liability. *Crutchfield vs. Johnson & Latimer*, 8 So. 2d 412, 414, 243 Ala. 73.

"Payment" is a mode of extinguishing a debt. *Bradford vs. Richard*, 16 So. 487, 489, 46 La. Ann. 1530.

Page 234 — "Payment is generally understood as a discharge of the debt or obligation by a compliance with the terms of the obligation, and, if the obligation calls for a money discharge, then there cannot be payment except by paying the full amount called for in money, or the representative of money. *Casper vs. Mayer*, 43 P. 2d 467, 472, 171 Okl. 457 — citing *Continental Gin vs. Arnold*, 52 Okla. 569, 153 P. 160, 2.

The word "payment", which is not a technical term, means the discharge in money or its equivalent of a debt or obligation or the actual or constructive delivery by a debtor to his creditor or money or its equivalent with intent to thereby extinguish the debt, and acceptance thereof by creditor with same intent. *Indiana Dept. of State Revenue, Ind. Revenue Bd., Ind. Gross Income Tax Division vs. Colpaert Realty Corp.*, 109 N.E. 2d 415, 419, 231 Ind. 463.

The word "payment" has a specified and

> clear meaning, which is that a claim has been paid. *Readings vs. McMenamin*, Del., 39 A. 463, 464, 1 Pennewill, 15.

Thus if we substitute for the word "payment" its legal definition, the clause would then have this meaning: "It is understood and agreed that Smith shall not be liable hereunder until and unless funds discharging or extinquishing notes executed by C. R. Walker in the total sum of $13,977.70 are received by Smith".

How incongruous it would be to believe that a clause would be placed in a note to defer the accrual of a cause of action on a note to a time when "a payment" would be received on a note amounting to $13,977.70. Thus the condition of the note could be met by making a nominal payment of $1.00 or $100.00. Under the ruling of the District Court if Walker had paid Smith $100.00 on the $13,977.70 note then Smith became immediately liable to pay and discharge the Walker note. The intermediary would then be put in the untenable position of being forced to pay the note and interest amounting in all to approximately $8,000.00 when he would have collected only $100.00.

The fifteen day interval between the maturity date of the Walker notes, January 15, 1964 and February 1, 1964 the original maturity date of the note in question, conclusively shows that it was the full payment of the Walker note that was the condition required before plaintiff's note was to be paid on February 1, 1964. That was the source of funds that the

"intermediary" Smith expected to apply to the payment of the Skousen note. It was never intended that Smith should pay this note out of his funds, but it was clear that it was the intention that the source of funds that the intermediary Smith was to apply to the payment of this note was the monies to be received from Walker. This becomes ever clearer when it is noted that the real estate transaction was closed on January 16, 1962. This note, a part of that transaction, was deliberately dated fifteen days after the transaction was closed.

The furthest limit to which the plaintiff would testify as what facts there were to show that the note was payable at the time of the commencement of this action is this statement: "When I was informed that Mr. Walker had paid him $2,500.00, then I *felt* that my obligation should be satisfied". (Tr. 32, L. 9-11) (Emphasis ours) The plaintiff did not testify that there was any conversation at the time of the execution of the note to the effect that his note would become payable when $2,500.00 was paid on one of the Walker notes. Again it is clear, that the plaintiff knew that this note was not payable unless and until the full amount of the two Walker notes were collected.

Weight must be given to the use of the words "total sum". The New Century Dictionary, Vol. 2, published 1942 by D. Appleton — Century Co. defines the word "total" as "the total amount, sum or aggregate (as, add the several times to find the to-

tal); "all", "whole", "entire"; "constituting or comprising the whole", "entire (as the total amount expended").

Similarly, the words "unless" and "until", the dictionary cited above states that the word "unless" is generally followed by a "specification of some condition". The condition here is that Smith has no liability unless payment is received in the total sum of $13,977.70 discharging in full the two notes of C. R. Walker.

It is respectfully submitted that the plaintiff presented no evidence whatever to the effect that the note became payable prior to the commencement of this action and that defendant's motion for a non-suit and a dismissal should have been granted.

POINT II

PLAINTIFF HAS NOT ESTABLISHED ANY FACTS TO SUSTAIN THE SECOND CLAIM

The intermediary Smith was diligent in his efforts to collect the Walker notes. The statement of facts relates the activities of Smith in trying to collect the Walker notes. They reach all the way from constant pressure on Walker to pay the notes to having a detective try to locate Walker, to himself trying to locate Walker in Calgary, to calling Walker's mother-in-law in Salt Lake for information as to his whereabouts, to advancing $200.00 of his own money to sue Walker, to having his associate file a suit when Walker was finally located. Smith never asked Skou-

sen to participate in the expenses of suit or to advance attorney's fees or to pay for the private detective. Smith did all this without Skousen in a sincere effort to collect the Walker notes. Paraphrasing, if he was not a gratuitous bailee, he certainly was a "gratuitous intermediary". There is no evidence that there was any time after January 15, 1964, that the notes owing by Walker could have been collected with or without suit. There is no evidence of any negligence on the part of Smith and no evidence of any damage to Skousen. Damages could have resulted to Skousen only if it could have been shown that between January 15, 1964 and September 12, 1967 a judgment against Walker could have been collected. The evidence is clear that when suit was brought and judgment entered that Smith's counsel, who obtained the judgment against Walker, has not been able to satisfy that judgment.

POINT III

THE ALLEGATIONS OF PLAINTIFF'S SECOND CLAIM CONSTITUTE AN ACKNOWLEDGEMENT THAT PLAINTIFF KNEW THAT HIS NOTE WAS NOT PAYABLE UNTIL SMITH COLLECTED THE TWO WALKER NOTES.

The allegations in Paragraph 1 of plaintiff's Second Cause of Action give the plaintiff's interpretation of the conditional clause in the note:

> "That in addition to the allegations set forth in the First Cause of Action, Defendant has failed, neglected, and refused, and does

now fail, neglect or r e f u s e to take action against Clifford R. Walker on the promissory note which the Defendant holds against Clifford R. Walker; and as a result, the defendant is attempting to postpone the time of payment on his own promissory note to the plaintiff and that the defendant is guilty of laches, has not acted in good faith, and has prevented the plaintiff from collecting on his promissory note because of the misconduct and failures of the Defendant."

Plaintiff there interprets the conditional clause as allowing the defendant to postpone the time of payment of the note, something which defendant could do only by failing to collect the note. Therefore, plaintiff acknowledges that the collection of the Walker notes is a condition precedent to the liability of the defendant on the note in suit. Plaintiff further alleges the defendant has not acted in good faith in failing to file suit against Walker. This makes it clear that the plaintiff wanted an action to be brought against Walker for the recovery of $13,977.70 because he knew that Smith would not become liable until collection of this amount was made. The allegation that Smith has prevented the plaintiff from collecting on this note is to the same effect. The only way Smith could prevent Skousen from collecting on his note was to refuse to collect from Walker. Again this is an acknowledgement that Smith does not become liable to Skousen until he collected the two Walker notes. See —3 Corbin on Cntracts, Page 42:

"We must observe on the other hand that

if the second party knows the meaning that the first party intended to convey by his words, then he is himself bound by that meaning of the words. The same is true if he had reason to know what the first party intended."

See also 3 Corbin on Contracts, Page 44:

"How is a court to find out whether either party knew or had reason to know the intent or understanding of the other? Knowledge of such a factor may be proved by any evidence that is ordinarily admitted to prove a state of mind. This would include the party's own admissions, his actions from which knowledge may be inferred, testimony of statements and information given him from which knowledge may reasonably be inferred, and the usages and meanings of third persons with which he probably was familiar. The fact that one had 'reason to know' is some evidence that he did know; but is far from conclusive".

"The court will not interpret the words of an agreement so as to hold one party bound in accordance *with the wholly unexpressed intentions and meanings and understandings of the other*. A contractor is bound in accordance with the meaning that he induces another to understand and act upon, if he knows or has reason to know that the other will so understand and act. And in determining whether or not he has reason to know, the court should be advised of all the surrounding circumstances; of the meaning that is given to the language of the agreement by the parties; *of communications between the parties during preliminary negotiations and during the execution of the writing; and of subsequent interpretations and*

practical application by either party that is assented to or acted upon by the other." (Em phasis ours)

PONIT IV

THE PLAINTIFF'S FAILURE TO OFFER ANY EVIDENCE THAT THE INTERPRETATION OF THE NOTE AS TO WHEN DEFENDANT BECOMES LIABLE UNDER IT WAS DIFFERENT FROM THE EVIDENCE OF THE DEFENDANT MAKES IT NECESSARY FOR THE DISTRICT COURT TO FIND IN ACCORDANCE WITH THE EVIDENCE OF THE DEFENDANT

The defendant testified as to the facts and circumstances at the time of the delivery of the note that the meaning of the allegedly ambiguous phrase is that the maker is not to be liable on the note until and unless he received payment of the total sum of $13,-977.70 on two notes executed by Walker. The payee of the note produced no evidence of a different interpretation and, therefore, the interpretation of the maker of the note is the only possible interpretation to be adopted by the court. See — *Clark vs. State Street Trust Company,* 169 N.E. 897, 270 Mass. 140, referred to in Note 40 of 3 Corbin on Contracts, Page 38:

> "The aim of all interpretation of writings is to ascertain the meaning intended to be attached to the words by the parties who used them, and to effectuate the true purpose of the parties as there ascertained. All rules are ancillary to that dominating one".

POINT V

THERE IS NO FINDING THAT THE NOTE SIGNED BY THE DEFENDANT WAS PAYABLE AT THE TIME OF THE COMMENCEMENT OF THIS ACTION.

Finding of Fact #2 states that the note was payable within two years provided the drawer of the note had received payments on promissory notes which the defendant held on C. R. Walker. There is no evidence that the defendant had received payments on the notes "within two years after the date of the note." The note is dated February 1, 1962 and for any payment to have been received within two years from date, the payment would have had to have been made before February 1, 1964. The only payment was in April, 1964. Accordingly, under this Finding of Fact, the note was not payable and the defendant had no liability thereunder at the time of the commencement of this action.

Finding of Fact #3 signed on March 9, 1969 recites that the note is now past due and payable. There is not a finding that the note was payable at the time of the commencement of the action. Since there is no finding that this note was payable when the action was commenced, there is no basis for the Conclusion of Law that the plaintiff is entitled to judgment.

POINT VI

FINDING OF FACT No. 4 WHICH FINDS THAT THE DEFENDANT HAS RECEIVED IN EXCESS OF $2,500.00 IN PAYMENTS ON NOTES IS CONTRARY TO THE EVIDENCE IN THREE PARTICULARS.

1. There was only one payment.

2. There was a payment on only one note.

3. The payment was $2,500.00 and not in excess of $2,500.00.

The Finding that there was a payment on notes is prejudicial since such finding would indicate that one of the conditions precedent to the note becoming payable had been met. The condition precedent required payment of both notes.

POINT VII

THE FINDINGS OF FACT DO NOT SUSTAIN A JUDGMENT ENTERED IN FAVOR OF THE PLAINTIFF.

One of the facts essential to the entry of judgment is a finding that the conditions in the note making the defendant liable on the note have occurred. As referred to above, one of the conditions required to make the defendant liable was that collection had been made on notes executed by Walker. There is no finding that collection of $13,977.70 was made on notes signed by Walker. There is no finding that the note in question was payable at the time of the commencement of the action.

POINT VIII

FINDING OF FACT No. 4 IN PART IS CONTRARY TO THE EVIDENCE AND IN PART IS NOT SUPPORTED BY THE EVIDENCE. THUS THERE IS NO EVIDENCE TO SUSTAIN PLAINTIFF'S SECOND CLAIM.

We are of the opinion that reasonable action was

taken by the defendant in his efforts to collect the notes from Walker. There is no need to repeat the evidence in the record. The defendant recited the action taken by him in his efforts to collect the notes in response to plaintiff's counsels questions as follows:

Question by Frazier: "In between the time the notes were executed and the time the action was filed against you, what a c t i o n, if any, had you taken against Mr. Walker to collect on the promissory notes you held from him"? Smith recited what action he had taken, see Tr. 35, 36, 37, 39 and 40.

The second clause of the Findings of Fact on plaintiff's Second Claim reads: "B e c a u s e of the Statute of Limitations and the possibility of plaintiff losing his cause of action on the promissory note, his action would appear to have been appropriately taken". The Court made a finding with reference to the Statute of Limitations although the court had sustained an objection to the question inquiring whether the plaintiff had become concerned about the Statute of Limitations. (Tr. 31, L. 19-26). Therefore, there is no evidence in the record that would sustain the Conclusion of Law which was included as a part of the Findings of Fact i.e. that "his action would appear to have been appropriately taken". Moreover, the evidence as to the action taken by Smith to collect the note referred to immediately above, clearly demonstrates that such conclusion of law is unwarranted.

CONCLUSION

Counsel for defendant is of the opinion that plaintiff has not stated a claim against the defendant — that the evidence of the plaintiff does not establish a claim and that the defendant's Motion to Dismiss should have been granted. Counsel for defendant urges this court to reverse the judgment and enter an order that defendant had no liability on the note in question at the time of the commencement of this action.

Defendant restatees his offer to assign to the plaintiff an interest in the judgment that has been entered against Walker to the full extent of the amount that has accrued to date on the note held by the plaintiff. Defendant would go further and even assign the entire Walker judgment to the plaintiff if plaintiff would now agree to act as intermediary and pay over to the defendant any excess over the amount that has accrued on plaintiff's note, if and when full collection is made from Walker.

In such event, defendant's counsel would continue to give all possible assistance to collect the Walker notes. Defendant makes this offer with the consent of his client. Defendant has acted diligently as intermediary and with his client's consent will even go to this extent to assist the plaintiff.

Respectfully submitted,

IRWIN ARNOVITZ
1309 Deseret Building
Salt Lake City, Utah 84111
Attorney for
Defendant and Appellant

APPENDIX

March 6, 1968

Mr. Leon Frazier
Attorney-at-Law
P. O. Box 976
Provo, Utah
Dear Leon:

I had a telephone conversation, day before yesterday, with Cliff Walker whereby he asked me if something could be worked out with he and Alvin Smith to bring this matter to a satisfactory conclusion. I told Mr. Walker that I was agreeable to anything as long as my position was made secure and that I would receive the money as promised.

Mr. Walker also told me that he was going to be required to give a deposition regarding this note and that this deposition was for the sum and sole purpose of stating that the Twenty-five Hundred Dollars, received and acknowledged, was not applied against the subject Thirteen Thousand and Nine Hundred and Seventy-seven Dollars and Seventy Cents note from Walker to Smith, made as a condition in the promissory note in the amount of Six Thousand and Nine Hundred and Eighty-eight Dollars and Thirty-five Cents, on the date of February 1, 1962, from Alvin to me.

I wish to go on record to you and to all concerned that I have several letters in my file from Cliff Walker stating that he had paid and applied Twenty-five

Hundred Dollars on this said obligation and that the balance would be forthcoming, to Alvin, in the very near future so that I would receive the balance of my money. Also Alvin Smith acknowledged to me that he had received Twenty-five Hundred Dollars from Cliff Walker on ths obligation. However, regardless of the circumstances prevailing, I would be most happy to come to Salt Lake City and sit down with you and Alvin and Cliff Walker, if I can be of assistance in bringing this matter to a satisfactory conclusion and get it dismissed from the courts.

I think Mr. Walker will recall one instance in my office when he admitted to me in front of other witnesses that he had paid Twenty-five Hundred Dollars on this obligation. At that time he was in route to Mexico and I advanced him Three Hundred Dollars from my personal account, check number 2515, to cover his expenses into Mexico.

Hoping this information clarifies the situation.

Sincerely,
Jerry Skousen

JS:go

CC: Mrs. Alvin Smith
Mr. C. R. Walker