

1967

M & S Construction & Engineering Company v.
Clearfield State Bank and Vern M. Smith, et al.. :
Brief In Answer To Petition For Rehearing

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JUN 22 1967

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

UNIVERSITY OF UTAH

M & S CONSTRUCTION AND
ENGINEERING COMPANY,
Plaintiff-Appellant,

vs.

CLEARFIELD STATE BANK,
Defendant-Respondent,

VERN M. SMITH, et al,
Additional Defendants-Appellants.

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Case

No.

10708

**BRIEF IN ANSWER TO PETITION
FOR REHEARING**

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IN THE SUPREME COURT of the STATE OF UTAH

POINT ONE: THE COURT SHOULD DENY APPELLANT'S PETITION FOR REHEARING

The issue of Statute of Frauds has been thoroughly reviewed by this Court, and extensively dealt with in briefs previously filed by both Appellant and Respondent.

Appellant devoted nearly one-half of its main brief to this issue, and saw fit to devote an additional 19 pages of its reply brief to the same question. This was in derogation of Rule 75 (P) (2), U.R.C.P., that a reply brief shall be limited to *new matter* set forth in respondent's brief. Despite this, Appellant now seeks to again argue the same question, which has been exhaustively reviewed by this Court and set at rest in a unanimous opinion. Further, Appellant has now filed a 'Supplemental' brief, bringing to 4 the Appellant's briefs now on file in this case.

The reference to the parties considering this point as 'peripheral' is hardly accurate. Respondent raised the specific issues in its Answer (R-10), pre-trial order (R-36) requested instructions (R-71), exceptions to the trial court's refusal to so instruct (T-246), Statement of Respondent's Points on Appeal (R-122), Brief of

Respondent, page 38. The issue was reviewed by Appellant in its Reply Brief at page 57.

The law is clear that the issue of the Statute of Frauds, like other questions, should be submitted to jury under proper instructions. 37 C.J.S. Frauds, Statute of, Sec. 291:

“Instructions in actions involving the statute of frauds should clearly and correctly state the applicable law and be in conformity with the pleadings, issues, and evidence.”

The main authority Appellant relies on, *Verdi vs. Helper State Bank*, (1921), 57 U. 502, 196 P. 225, is clearly not in point. There the question involved a certificate of deposit, a *written negotiable instrument*. It needs no citation of authority to agree that written instruments are interpreted by the Court, not reviewed as an issue of fact.

The cases cited by this Court in its opinion are controlling of the question. *San Francisco Brewing Corporation vs. Bowman*, 343 P 21, (1959), involved an *oral* contract with the identical section of the Statute being invoked by defendant. The California Court held it was error to refuse to submit the issue to the jury, saying:

“Upon this record, the first sentence was a correct statement of the law, and if, on any view of the evidence, the statute was applicable, plaintiff was entitled to have the jury so instructed.”

Sugar vs. Miller, 1957, 6 U 2d 433, 315 p2 862, is also in point. It holds that the question of the Statute

of Frauds should be submitted to the jury under the proper instructions when an oral contract of guarantee was involved.

Kimmel vs Foster Freight Lines, Inc., 1954, 267 S.W. 2d 533, is also of interest. In that case the identical statute was plead by defendant against plaintiff's claim of an oral contract of employment. The court held the issue should be submitted to the jury for determination.

Additional cases holding the duration of oral contracts to be a jury question, and requiring submission of the issue to the jury under proper instructions, are *W. P. Brown & Sons vs. Rattray*, Ala., 1939, 192 So. 851, *Blanton Co. vs. Stewart*, Ark. 1930, 33 S. W. 2d 50, and *Scotton vs. Wright and Sanders*, Texas, 1926, 280 S.W. 908.

This Court's decision has no reference to a "majority" or "minority" rule, as appellant insists. The entire question of the agreement, its terms and existence, was in dispute. The special interrogatory did not, nor was it intended to do other than resolve the question of the existence of an alleged agreement to loan. The *duration* issue was never presented to the jury and could not possibly have been considered by it in answering "yes" or "no" to the special interrogatory submitted by the court.

Appellant's most recent brief states:

"The question put to this Court on appeal is whether or not the trial court erred in making a determination that the agreement violated the

Statute of Frauds. This question has not been answered by this Court.”

This assertion is patently wrong; this court did answer the question in the affirmative, holding the question of the Statute of Frauds to be one for the jury “based on whatever facts might relate to the wording of the agreement and its interpretation.”

These facts include the length of time of performance of the Steenberg prime contract and the M & S subcontract, testimony of witnesses and all other salient evidence bearing on the question of the length of time the loan agreement required for performance. Respondent does not claim that pertinent evidence was refused on this issue; it is our claim (1) the interrogatory does not as a matter of law provide the answer to the issue of the statute, and (2) the jury, in the absence of instructions and argument, could not and did not make any meaningful determination of fact with regard to the length of time required for performance of the loan agreement.

We respectfully submit Respondent is entitled to a determination of this issue by a finder of fact, and the opinion of this court was not in error.

All of the matters in Appellant’s Brief and Petition have been previously briefed and argued to this court.

The petition for rehearing should be denied.

Respectfully,

OLMSTEAD, STINE & CAMPBELL
Attorneys for Respondents