1971

George L. Taylor And Eva L. Taylor, His Wife v. Jack C. Turner : Appellants Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE L. TAYLOR and EVA L. TAYLOR, his wife,
Plaintiffs and Respondents,
vs.
JACK C. TURNER,
Defendant and Appellant.

APPELLANT'S

Appeal from the judgment of the
for Sevier County, Honorable

IRVING
72 East
Salt Lake
PATRICK
13 West
Cedar City, Utah
Attorneys for Defendant-Appellant

TEX R. OLSEN
76 South Main St.
Richfield, Utah
Attorney for Plaintiff-Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE L. TAYLOR and EVA L. TAYLOR, his wife,
Plaintiffs and Respondents,
vs.
JACK C. TURNER,
Defendant and Appellant.

Case No. 12322

APPELLANT'S BRIEF

STATEMENT OF NATURE OF CASE

Plaintiffs sued to quiet title to real estate and for payment of sums claimed loaned to Defendant and the Defendant denied Plaintiffs' ownership of the real estate and that any monies are owed by him to the Plaintiffs.

DISPOSITION BY LOWER COURT

The matter was tried before the Court and the Honorable Ferdinand Erickson entered a judgment quieting the title to the property in the Plaintiffs and entering judgment in favor of the Plaintiffs for the sum of $11,666.99.

RELIEF SOUGHT ON APPEAL

Defendant and Appellant seeks reversal of the judgment and for a judgment of no cause of action on both counts.

STATEMENT OF FACTS

This case encompasses family transactions. Plaintiffs are the sister and brother-in-law of the Defendant.

The case is basically composed of two separate transactions. The first transaction involves the development of a life insurance corporation in the country of Australia and financial transactions relating thereto.

The second transaction involved the disposition and sale of a residence in Salina, Utah.

The Turner family has a long history of joint business endeavors. Prior to the transactions here involved, the Plaintiffs in ventures with the Defendant, profited as follows:

A. $5,000.00 on an investment through Jack C. Turner in Uranium, Inc. (testimony of Mrs. Taylor R-A164).

B. An undisclosed profit in an investment in the Mayflower Corporation (testimony of Mrs. Taylor R-A165).

C. Approximately $5,000.00 in Magic Uranium and Federal Resources Corporation (testimony of Mrs. Taylor R-A171).

D. A profit from Atomic Fuel Extraction Company and in an insurance company organized in Hawaii (testimony of Mrs. Taylor R-A173, testimony of Mr. Turner R-A231).

E. A profit of $4,000.00 from Micro Copper Corporation wherein stock was bought at 10c a share and portions thereof sold at approximately $8.00 a share and wherein the Defendant still retains a substantial stock interest (testimony of Mr. Taylor R-A205, 206, testimony of Mr. Dowd R-A293).

F. $4,000.00 profit out of a joint venture with Mr. Turner relating to some mining claims (R-A200, 201 and 202).

The parties were also partners in some uranium claims in the canyon land areas wherein a nephew did assessment work. As above outlined, profits exceed $18,000.00 and the Plaintiffs retain stock of substantial value (testimony of Mr. Dowd R-A285, 286, and 289).

Following the patterns established in the prior speculative ventures, the Defendant, Jack C. Turner, approached the Plaintiffs and asked them if they would like to participate in a new venture involving the creation of a life insurance company in Australia. The Plaintiffs determined to invest in this company the amount of $7,000.00 and executed the "Pre-Incorporation Agreement" (Exhibit No. 1[illegible], Mrs. Taylor R-A131). Various negotiations occurred subsequent to that date and the Plaintiffs subsequently determined to increase their contribution to the venture. Mr. Taylor was not satisfied with some of the terms of the original Pre-Incorporation Agreement and a secretary was

called to the home of Mr. and Mrs. Taylor for the purpose of revising the agreement, which acknowledged an investment of $8,000.00 (Exhibit 12, Testimony of Jack C. Turner R-A233 and R-A167, 168 and 169). Mr. Taylor acknowledged his signature on the agreement (R-A179, 190). Although Mr. and Mrs. Taylor could not produce the evidence of the $8,000.00 contribution, Mr. Turner on direct examination, acknowledged that he received such a sum (R-A235). Mr. Turner went to Australia and created the corporation. The corporation issued a prospectus (Exhibit 15, R-A237, 262). Mr. Turner incurred a personal loss in the Australia venture of $17,300.00 (Exhibit 14) and testified that his total loss was approximately $30,000.00 (R-A236). The prospectus and the articles of incorporation provided for the issuance of the stock to Mr. and Mrs. Taylor through their agent, Mr. Turner (R-A263 and 265). After the corporation was organized and failed, an accounting was rendered and furnished to all parties (R-A236).

Although the Plaintiffs produced as evidence of their investment in the venture agreement only two checks dated January 11th and January 16th, 1962 in the amounts of $3,500.00 and $2,000.00 (total $5,500.00), Mr. Turner acknowledged that he received additional sums and that the Plaintiffs total investment in the venture was the sum of $8,000.00 (Exhibits 2, 3 and 12). The original Pre-Incorporation Agreement was revised at the request of Mr. Taylor and executed at a later date and on a second visit of Mr. Turner (R-A199, 233, 234).

As is apparent from the instrument (Exhibit 12), one of the venturers, Velva McBride, signed the agreement on January 12th and on a subsequent date the signatures of Mr. Goodyear and Mr. Taylor were obtained on the photocopy (R-A233, 234).

The Australian insurance venture failed. The parties were notified thereof (R-A236). Mr. Turner's financial condition was desperate and he testified "I was very destitute when I quit the Australian venture, I didn't have any money" (R-A240) and Mr. Turner borrowed from the Plaintiffs the sum of $1,500.00 and such loan is represented by Exhibit 4 and freely acknowledged by Mr. Turner on direct examination (R-A239). Although Mr. Turner claimed to have paid the loan in full (R-A240) he could prove only three payments (Exhibits 8, 9 and 10) totaling $975.00. The last payment was made on December 5th, 1966 and would result in a balance due on said loan of $525.00. All parties acknowledge that this $1,-500.00 loan was a separate and distinct transaction.

The home transaction is the next separate and distinct item of consideration. The home transaction occurred in late 1967, over five years after the date of the Pre-Incorporation Agreement (Exhibit 11, R-A163). Because of a neighborhood problem the Plaintiffs considered their home location in Salina as intolerable and desired to sell said home, buy a new home in a new location. Plaintiffs asked Mr. Turner if he would help them get a loan for this purpose (testimony of Mrs. Taylor R-A149). Mr. Turner agreed to help them and a short time later (R-A185) and in the presence of their sister, Lena Stocks, and

Mrs. Turner, Mr. Turner informed them that his lender would not loan to Mr. Taylor as he did not know him, but would loan a substantial sum to Mr. Turner and in order to accomplish the loan, the home would have to be transferred to Mr. Turner (Mrs. Turner R-A150, Mrs. Stocks R-A291, 292).

The best offer that the Taylors had received for the home was the sum of $10,000.00 (R-A149). Mrs. Taylor stated that she intended to pay Mr. Turner "what he was out on it" (R-A115). Mr. and Mrs. Taylor caused the deed to be prepared and delivered to Mr. Turner. Mr. Taylor testified at some length that he felt a duty to Mr. Turner to attempt to sell the property so that Mr. Turner could recoup on the loan he had made for the benefit of the Taylors; but specifically, under direct examination by his own counsel, on several occasions Mr. Taylor stated that it was Mr. Turner's home and that he had no interest in it (R-A187).

> "Q So in fact, it has always been regarded as your home so far as you're concerned; is that right?
>
> "A Not after I deeded to someone else, it ain't mine."

Mr. Turner made the loan in the face amount of $11,000.00 and gave the net proceeds of said loan, the sum of $10,313.00, to Mr. and Mrs. Taylor (Exhibits 11 and 13). Although all parties attempted to sell the property, a satisfactory sale was not completed until a realtor, Tommy Tucker, listed the home at the request of all parties. (R-A280) The final sales price was the sum of $12,-

000.00 with a marginal down payment of $1,000.00 only (R-A283 testimony of Mr. Tucker). Mr. Turner had been required to pay the loan and costs and incidental assessments, etc. against the house as follows:

Amount	*Item*	*Reference*
$ 99.00	Additional insurance premium for updated insurance	R-A243
83.00	Land and Title Insurance Policy (Exhibit 19)	R-A253
1,527.88	Interest on loan (Exhibit 18)	R-A243
221.00	Additional insurance policy for extended period of note	R-A254
11,253.66	Payment of interest and principal of note	Exhibit 19
240.00	Commission on sale	R-A282
48.00	City of Salina curbing and gutter assessment	R-A282
10.00	½ of escrow fees	R-A282
59.19	Miscellaneous costs of Tucker Real Estate	R-A282
$13,541.73	Total	

Mr. Turner indicated that although he would like to have his loan and costs repaid by the Plaintiffs in accordance with the Taylor agreements and statements, he figured he was stuck with the deal and the loss; but nevertheless, offered to sell the contract to the Taylors

at a substantial discount and even suggested that the cash receipt of the amount of $7,000.00 would be sufficient (R-A248, 249).

From the evidence submitted to the trial court, we summarize the transactions of the parties in outline form as follows:

1. The parties, over a long period of time, have been co-venturers in speculative transactions.

2. In early 1962, the parties negotiated in relation to an Australian life insurance venture and executed Exhibit 1 which did not become effective as the minimum contribution of $10,000.00 required by said agreement was not obtained at that time. The parties revised the provisions of Exhibit 1 thereby creating Exhibit 12 and this exhibit, which was executed on or about January 16th, the date of the last contribution by the Plaintiffs (Exhibit 3) became the operative Pre-Incorporation Agreement as there were sufficient subscriptions to it to make it effective in accordance with its terms.

3. Over a year after the execution of the Pre-Incorporation Agreement, the Australian venture had failed, the Defendant was in desperate financial condition, borrowed the sum of $1,500.00 from the Plaintiffs and made payments thereon.

4. Over five years after the Australian venture and approximately four years after the $1,500.00 loan, the Plaintiffs, in order to change residential location, transferred the title to their Salina home to the Defendant in consideration of the receipt of the net mortgage proceeds obtained by Mr. Turner for the benefit of Mr. Taylor.

5. Although more than two years expired after the Salina residence transaction and before

the institution of this suit, the Plaintiffs had made no payments to Mr. Turner or for the benefit of the property and Mr. Turner's investment in the property now substantially exceeds the sales price of the property.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN CONSTRUING THE PRE-INCORPORATION AGREEMENT AS AN AGREEMENT INVOLVING A LOAN INSTEAD OF AN AGREEMENT INVOLVING A SPECULATIVE VENTURE.

Both Plaintiffs and Defendant based their cases on the Pre-Incorporation Agreement.

The Plaintiffs based their right to recapture $7,000.00 on the Plaintiffs' Exhibit 1 (Pre-Incorporation Agreement).

Both Mr. and Mrs. Taylor admitted that the Pre-Incorporation Agreement, Exhibit No. 1, was revised and amended at the specific instance and request of Mr. Taylor and that a subsequent Pre-Incorporation Agreement was executed by Mr. Taylor wherein Mr. Turner acknowledged receipt of $8,000.00 (R-A199, 233 and 268). In accordance with paragraph 5 of such agreement, it was not to become effective until such time as Mr. Turner had obtained contributions of the sum of $10,000.00. As is apparent from Exhibit 12, the sum of $15,000.00 was contributed and the agreement became effective on or about the date of the last visit of Mr. Turner to the Taylor's resi-

dence in Twin Falls, at which time Mr. Taylor subscribed the last page of the agreement and set forth his contribution in the amount of $8,000.00. The evidence is that the final execution occurred on or about January 16th, the date that Mr. Taylor delivered the $2,000.00 represented by Exhibit 3 (R-A199-233). As indicated by the testimonies of both Mr. and Mrs. Taylor and Mr. Turner, it was understood that the insurance corporation contemplated by the Pre-Incorporation Agreement was to be created in the country of Australia. Mr. Turner was appointed the agent of the adventurers by the Pre-Incorporation Agreement and left the United States, attended Australia and there created the Australian Pacific Life Assurance Limited, a corporation.

As indicated on the 16th page of the prospectus (Exhibit 15), 120,000 shares were issued to Mr. Turner and he held such shares as agent for the parties (R-A 263, 264, 265). The adventure was a failure. Mr. Turner accounted (R-A 236) and it is interesting to note that neither of the Plaintiffs denied receiving an accounting and report.

In applying ordinary rules of construction to the agreement, Mr. Turner was appointed the agent of the parties for the formation of the corporation (paragraph 1 of Exhibit 12). The funds that were furnished to the venture were defined as "contributions" in several places in the Pre-Incorporation Agreement:

A. In the introductory paragraph, it is stated ". . . undersigned parties agree to contribute . . ."

B. In paragraph 4 line 3 ". . . the amount contributed by each of the investors . . ."

C. Paragraph 5 ". . . in the event said sum of $10,000.00 is not subscribed . . . agent will return any contributions . . . "

The word "contributions" has a well accepted definition and as indicated in Black's Law Dictionary, Third Edition, is defined as "the sharing of a loss or payment among several."

As indicated in paragraph 4 of the Pre-Incorporation Agreement, the parties signatory thereto are referred to as "investors." The term "investors" is substantially broader in scope than the word "lender" and it is interesting to note that in no place are the parties indicated as "lenders" and that the only time that the parties' "contribution" is to be returned is if the minimum amount of $10,000.00 was not subscribed.

The Plaintiffs have not claimed that the Pre-Incorporation Agreement is vague or ambiguous, but to the contrary, except for using said agreement as an acknowledgement of an amount due, have ignored said agreement. The agreement does not contain the elements of a promissory note as there is no time for repayment nor does it specify any interest rate. To the contrary, the "investors" "contributed" their funds to a venture in the expectation of a substantial profit. It is unfortunate that a profit did not occur and there is no question that if a profit had occurred, the parties would have been entitled to their proportionate shares thereof, would have claimed the same, and could have enforced their rights thereto under the terms of the agreement.

It should also be noted that this is not an unusual agreement among these parties for they have had many prior ventures.

In each case brought to the attention of the Defendant during the trial the Plaintiffs profited substantially and as indicated in the Statement of Facts, the profits exceeded $18,000.00.

Mr. Taylor also had a venture with Mr. Turner in relation to some uranium claims as indicated by the testimony of their nephew, Mr. Edward K. Dowd. There is no evidence of any prior loan transactions between the parties but substantial evidence as to prior speculative ventures. In view of the evidence and the plain interpretation of the agreement between the parties, the Court should have found that Mr. Turner complied with the Pre-Incorporation Agreement and that the Plaintiffs' interest thereunder were valueless as a result of the failure of the corporation.

The Utah Supreme Court has consistently upheld the rule that the express terms of a written contract may not be changed or nullified by parol evidence and that evidence of a conflicting parol agreement is inadmissible. The Honorable Justice Henroid in Jensen's Used Cars vs. James T. Rice, 7 Utah 2d 276; 323 Pac. 2d 259 P261 (1958) stated the rule rather succinctly:

> ". . . It is not unreasonable to hold one responsible for language which he himself espouses. . . . The rule excluding matters outside the four corners of a clear, understandable document, is

a fair one, and one's contentions concerning his intent should extend no further than his own clear expressions.

"(4) It was urged correctly that to admit matters outside a contract would do violence to the principle that one is bound by his manifestations of assent, and that, irrespective of such contention, such matters properly are excludable by the parol evidence rule, —which rule, counsel suggests, is one of substantive law rather than one of evidence. Whatever kind one calls it, the rule that excludes such evidence is a common sense rule."

Justice Crockett in February of 1969 in the case of E. N. Youngren vs. John W. Lloyd Construction Company 22 Utah 2d 207; 450 Pac. 2d 985 P987 affirmed this rule:

". . . When parties have negotiated on a subject and have thereafter entered into a written contract, it should be assumed that their prior negotiations are fused into the contract so that it represents their full agreement with respect thereto; and that, consequently, after its due execution, extraneous evidence should ordinarily not be permitted to add to, subtract from, vary, or contradict it."

Immediately thereafter in the case of Harold D. Rainford vs. William R. Rytting, 22 Utah 2d 252; 451 Pac. 2d 769, March 14th, 1969 Justice Callister, refused to allow parol evidence to establish a different contract and that reduced to written form.

All of the above cases sustain the law of the State of Utah as set forth in the Utah case of Erickson vs. Bastian 102 Pac. 2d 310; P313,1940:

> ". . . We have the terms of the written contract. The express terms may not be changed or nullified by parol testimony, nor may such parol testimony antecedent to the reduction of the agreement to writing be considered where the language of the agreement is clear, unquestioned and unambiguous. 'The evidence of the oral contemporaneous agreement, conflicting, as it does with the plain terms of the written contract, was inadmissible' . . ."

From the evidence adduced at this trial and the exhibits, it is apparent that each of the parties subscribed an agreement, the terms of which are plain and unambiguous. The Court should determine that the venture contemplated by the agreement was a failure and that the parties are entitled to nothing by reason thereof.

POINT II

THE COURT ERRED IN THAT IF THE COURT DETERMINED THAT THERE WAS AN ORAL AGREEMENT BY THE PLAINTIFFS TO LOAN MONIES TO THE DEFENDANT, THEN IT SHOULD HAVE DETERMINED THAT THE RECOVERY OF SUCH MONIES IS BARRED BY THE PROVISIONS OF THE STATUTE OF FRAUDS.

The evidence in this case is without contest that the monies transferred to Mr. Turner were for the purpose of going to Australia and there creating an insurance corporation. The terms and conditions of repayment of

the funds including interest, date of maturity, etc. are not at any place defined by any written instrument. Since the parties had agreed that Mr. Turner was not to make his initial accounting until over one year after the date of the instrument (Exhibits 1 and 12 Section 6), it is apparent that if repayment was contemplated it was not contemplated to be performed until after the accounting, a period in excess of one year and, therefore, under the provisions of Utah Code Annotated, 1953, Section 25-5-4 subparagraph 1, the agreement is void.

> 25-5-4 ". . . every agreement shall be void unless such agreement or some note or memorandum thereof is in writing subscribed by the party to be charged therewith:
>
> (1) Every agreement that by its terms is not to be performed within one year from the making thereof."

If the Court is to create a loan agreement involving the funds advanced in January of 1962, then reference must be made to the oral testimony relating to the purported loan. The only persons testifying that this transaction was a loan transaction were Mr. and Mrs. Taylor who both acknowledged that the advance was for the purpose of creating an insurance company in Australia (R-A129). Both Mr. and Mrs. Taylor indicated that the Pre-Incorporation Agreement was signed on or about the date the funds were advanced (R-A131, 195). It is therefor necessary to look to the operative Pre-Incorporation Agreement (Exhibit 12) to determine the conditions of the invest-

ment. All parties have indicated that the funds were advanced for the purpose of attending the country of Australia and there creating an insurance company and that the recoupment of the investment and profits, if any, were to be obtained from this source. It is apparent that the funds were not payable on demand or within a short period of time and, therefore, reference must be made to the Pre-Incorporation Agreement to determine the earliest possible date contemplated for the return of the investment. No party has testified as to a due date. Since Mr. Turner, by the provisions of the Exhibit No. 1, was required to account on January 15th, 1963 and by Exhibit No. 12 on January 13th, 1963, it is apparent that more than one year would expire before the accounting is to be rendered and, therefore, if this could be construed as a loan, then the loan payment cannot be implied as being due until after the expiration of one year and the Statute of Frauds would apply and the loan agreement should be determined void.

POINT III

THE COURT ERRED IN FAILING TO DETERMINE THAT THE RECOVERY OF ANY FUNDS ADVANCED IN 1962 WAS BARRED BY THE STATUTE OF LIMITATIONS.

The Pre-Incorporation Agreements are the only written memorandums of agreements signed by the parties to be charged. If the action is based on the written agreements, then the collection thereof is barred by the six year Statute of Limitations. The agreements were

dated and executed in January of 1962 and the complaint in this action was filed on June 4th, 1969 — a period of over seven (7) years and five months after the dating, executing and delivery of the agreements.

Section 78-2-1 of the Utah Code Annotated, 1953 provides that civil actions can be commenced only within the periods prescribed in Chapter 12 of Title 28 of said Code.

Section 78-12-23 of the Utah Code Annotated provides that all actions based on "any contract obligation or liability founded upon an instrument in writing" shall be commenced within six years.

Assuming that the Plaintiffs really wanted to enforce the provisions of the Pre-Incorporation Agreement they would, nevertheless, be barred from such suit or any suit on those agreements by reason of the above referred to statute.

Since the Pre-Incorporation Agreement (Exhibits 1 and 12) do not contain any of the elements of a promissory note or an obligation to pay monies, then it must be presumed that the Plaintiffs' action was based on an oral contract. The initial sums advanced by the Plaintiff to the venture are indicated by Exhibits 1 and 12 wherein the Defendant, Jack C. Turner, acknowledged receipt of $8,000.00 and by Exhibits 2 and 3 which, in part, support the acknowledged advances. All of these documents are dated in January, 1962.

There is no evidence of any payments being made by the Defendant, Jack C. Turner, to the Plaintiffs or any acknowledgement of any debts that can be related to or referred to this specific transaction until the filing of the complaint herein and, therefore, if the action is based upon the oral contracts, the contracts would arise at the time the funds were contributed and most certainly would be barred by the provisions of Utah Code Annotated 78-12-25 which provides that "an action upon a contract, obligation or liability not founded on an instrument in writing . . ." must be filed within four years.

The Plaintiffs did advance to Mr. Turner during the year of 1963, $1,500.00 . This amount was advanced over a year and one-half after the original contributions to the joint venture agreement and is a separate and distinct financial transaction between the Plaintiffs and the Defendant. The Defendant admitted that this was a loan and made payments in relation thereto, which payments are indicated by Exhibits 8, 9 and 10 totaling $975.00. Although the Defendant, Jack C. Turner, testified that he had paid the account in full, nevertheless, by reason of the failure of written proof payment, the Court could find that he owed the Plaintiffs the difference between the amount advanced and the amount of documented payments or the sum of $525.00.

POINT IV

THE TRIAL COURT ERRED IN DETERMINING THAT THE SALINA RESIDENCE WAS THE PROPERTY OF THE PLAINTIFFS FREE AND CLEAR OF ANY CLAIMS OF THE DEFENDANT.

In 1967, the Plaintiffs were the owners of a residence in Salina and because of neighborhood problems desired to move to a new location. They had attempted the sale of the home, but had been unsuccessful in obtaining satisfactory down payment or refinancing (R-A149). As a result of a family conference and at the specific instance and request of the Plaintiffs, the title was transferred to the Defendant, Jack C. Turner, who delivered to them the sum of $10,313.00 (Exhibit 11) at a cost to him of $11,000.00 (Exhibit 13). No documents, memoranda or receipts of any type were executed among the parties other than the deed to Mr. Turner which was absolute and recorded (R-A210). The Defendant, Jack C. Turner, has paid all costs, assessments and expenses relating to the said property since the date of its acquisition by him and as outlined in the Statement of Facts, such expenses, total $13,541.73, all of which are out of pocket costs.

Defendant pleads the Statute of Frauds as a defense against this action and the provisions of Utah Code Annotated 25-5-1 provide that no interest in real property shall be created or maintained except through an instrument in writing subscribed.

> 25-5-1 ". . . No estate or interest in real property, other than leases for a term not exceeding

> one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

The Plaintiffs did not remain in possession but moved to their new residence and they exercised no dominion over the property (R-A127).

The Defendant also pleads the provisions of Section 25-5-3 of the Utah Code Annotated which prohibits the determination of interest in real estate unless the same are represented by a writing subscribed by the party to be charged.

In determining whether the consideration paid by the Defendant was adequate, it should be noted that in accordance with the testimony of the Plaintiffs, the best offer the Plaintiffs had been able to obtain prior to transferring to the Defendant, was the sum of $10,000.00 (R-A149) and that their total investment in the property was $12,900.00 (R-A148) and that after a lapse of approximately two years the property was sold through a broker for a total consideration of $12,000.00 with $1,000.00 down payment (Exhibit 19 R-A283). Since Mr. Turner's purchase price of the property was $11,000.00 and represented by cash payment after costs of sale of $10,313.00 (Exhibits 13 and 11) it is apparent that Mr. Turner paid the actual cash

value of the property even without taking into consideration the additional costs and assessments that he has been required to contribute to said property as per the itemization in the Statement of Facts and totaling $13,541.73.

The Plaintiff, Mr. Taylor, stated under cross-examination, that he did not claim any ownership in the property (R-A187).

A substantial consideration was paid for the property, the new owner exercised dominion thereof to the exclusion of the seller and the Court should quiet the title to the property in Mr. Jack C. Turner, the Defendant, subject only to the interest of Audrey Turner (Joint Tenant) and the purchasers of the property under real estate contract.

POINT V

ASSUMING THE COURT COULD FIND REASONS TO AVOID THE APPLICATION OF THE STATUTE OF FRAUDS AND DETERMINE THE LEGAL TITLE TO THE SALINA PROPERTY WAS HELD BY MR. TURNER IN TRUST FOR THE PLAINTIFFS, THE TRIAL COURT ERRED IN NOT DETERMINING THAT SAID TRUST WAS SUBJECT TO THE INDEBTEDNESSES INCURRED BY MR. TURNER FOR THE BENEFIT OF THE PLAINTIFFS AND THE PROPERTY.

There is no dispute in the evidence as to the circumstances surrounding the residence transaction. It occurred at a family meeting and all persons there, including the independent witness, Mrs. Lena Stocks, stated that the

transaction was completed to accommodate the Plaintiffs. Mr. Taylor testified as follows:

(R-A211)

> "Q And did you feel you had any duty to pay the money back that was borrowed on the place?
>
> "A I felt is was my duty to try and sell it"

and then again Mr. Taylor testified:

(R-A210)

> "Q And what arrangement was there between you and Mr. Turner for the loan to be repaid when he borrowed it for you?
>
> "A He said he would try and sell it."

and then again Mr. Taylor testified in relation to this loan:

(R-A188)

> "A Well we have to have the money to get out of the neighborhood on account of health.
>
> "Q And what was the purpose of the loan?
>
> "A That was the purpose of the loan.
>
> "Q And how did you intend to repay this particular loan?
>
> "A Why, put it up for sale."

Mr. Taylor's admissions against interest and agreement to repay are substantiated by independent testimony. As indicated by Mrs. Taylor's testimony, her sister, Mrs. Lena Stocks, was present at the meeting where the residence transaction was discussed (R-A153) and Mrs. Stocks testified as follows:

(R-A292)

"Q Did they ask him to acquire a loan?

"A Yes.

"Q Do you recall any conversation about who was to be responsible for the loan or how it was to be paid?

"A Well, they were supposed to have practically a sale for the house at the time, there was a fellow interested, and it was supposed to be sold very shortly.

"Q That was the way the loan was to be paid?

"A Yes, by a resale of the home, they were to repay the loan."

It is apparent that the parties intended this loan to be repaid and Mr. Turner to be reimbursed his out-of-pocket expenses. Mr. Turner could not sue his sister and brother-in-law for the amounts involved as he had no written memoranda of the agreement.

As indicated in the Statement of Facts, Mr. Turner's investment in the home at this time is the sum of $13,-541.73 which amount, substantially exceeds the sales price of the property, which was the sum of $12,000.00. Mr. Turner received no allowance for the use of his money but did receive coincidentally with the delivery of the funds to Mr. and Mrs. Taylor, the sum of $500.00 to compensate him for expenses incurred in obtaining the loan. The check for the loan proceeds was dated September 25th, 1967 and cleared the bank on September 29th, 1967 (Exhibit 11) and the check from Mr. and Mrs. Taylor to Mr.

Turner to defray incidental expenses was dated September 28th, 1967. The entire transaction was completed within three days.

Although the Court could determine from the evidence that Mr. Turner held the property for the Taylors in trust subject to the repayment of the charges and expenses against said property, it appears that after making all just allowances for charges and expenses there is no equity! The Court should settle the accounts of the parties by quieting the title in Mr. Turner requiring him as a result of his neglect in not obtaining written evidence of the agreement to absorb the losses that have accrued and may accrue as a result of the time sale, future maintenance, etc. of the premises.

CONCLUSION

If the Court wished to ignore documents and other formalities and consider this as one general family accounting, then it is apparent that the Plaintiffs have profited substantially for they acknowledge in excess of $18,000.00 in profits from joint enterprises to which there should be added the $14,516.73 expended by Mr. Turner on the real estate and delivered in cash to the Plaintiffs. The Plaintiffs, through Mr. Turner, have profited to the gross accountable extent of $32,516.73 and have retained an undisclosed amount of stock equities. Against this profit they show expenditures of $8,000.00 as per the Pre-Incorporation Agreement, $1,500.00 as per the loan in February of 1963 and $500.00 paid for expenses in obtaining the mortgage on the Salina residence or a total of

$10,000.00. In a general, over all, accounting judgment should issue to the Defendant for the difference.

Obviously, the Court should not ignore the form and context of the separate transactions as this would create a chaotic situation and an unfair result. The Plaintiffs are entitled to profits on prior transactions without the necessity of accounting or setting the same off against subsequent transactions. Prior transactions should be viewed only to determine the nature of the relationship between the parties and to aid the Court in interpreting the Pre-Incorporation Agreement.

The record dramatically establishes that the parties were venturers in many speculative transactions and the novelty of the Australian Life Assurance venture is only that this venture failed. The Plaintiffs accepted their profits on prior ventures but now, at this late date, disclaim having assumed any risk in the only unprofitable venture. The terms and conditions of the Pre-Incorporation Agreement are not confusing or ambiguous. Mr. Turner has performed all of those things required of him by said agreement, including spending two years of his life in Australia, losing a substantial amount of his personal fortune and accounting. The Court should require the entry of a judgment of no cause of action in relation to the Pre-Incorporation Agreement and the funds represented thereby.

With relation to the Salina residence transactions, it is apparent that the Defendant has invested more in said residence and for the benefit of the Plaintiffs than is rep-

resented by the sales price of said residence and the balance due on the $1,500.00 loan; to-wit: $525.00 and this honorable Court should quiet title in the Defendant, Jack C. Turner, in and to said residence and require the Plaintiffs to pay over and deliver to Mr. Turner the net rentals and payments received by them subsequent to the date of the transfer of the real estate.

Respectfully submitted,

IRVING H. BIELE
72 East 4th South, Suite 280
Salt Lake City, Utah

and

PATRICK H. FENTON
13 West Hoover Avenue
Cedar City, Utah

Attorneys for Defendant and Appellant