IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

CHARLES K. INGLIS,	*	
Petitioner,	*	
v.	*	Case No. 61,530
THE FLORIDA BAR,	*	
Respondent.	*	
	*	

PETITIONER'S BRIEF

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INTRODUCTORY STATEMENT

Because of the manner in which these proceedings are filed, counsel is unable to index any portion of the record other than the testimony taken at the hearing. Therefore, counsel will refer to the transcript of the testimony as "R-(giving the page of the record)" and will refer to the Referee's Report as "RR".

FIRST POINT INVOLVED

DOES THE RECORD IN THIS CAUSE REFLECT THAT PETITIONER SHOULD BE REINSTATED AS A MEMBER OF THE FLORIDA BAR?

STATEMENT OF THE CASE

On February 12, 1964, The Supreme Court of Florida suspended Petitioner from the practice of law for eighteen (18) months and until he made restitution and demonstrated that he was rehabilitated. The Florida Bar v. Charles K. Inglis, 160 So.2d 701.

Petitioner filed his Petition for Reinstatement.

On May 6, 1982, The Florida Bar filed its Motion to Dismiss the Petition for Reinstatement.

The Chief Justice appointed a referee to hear the matter and referred it to him.

On January 9, 1982, the duly appointed referee denied the Motion to Dismiss.

On August 25, 1983, the matter came on to be heard before the referee for final hearing. (R160).

On December 8, 1983, the referee filed his Report and Recommendations recommending that Petitioner not be reinstated.

On January 27, 1983, Petitioner served a copy of his Petition for Review and caused the same to be filed.

STATEMENT OF THE FACTS

In 1961 during Petitioner's first two years of practicing law, he undertook to represent two brothers, William Myers and John Myers, to secure a purchaser for their remainder interests in some corporate stock. He secured an offer to purchase their remainder interests in said shares of corporate stock for fifty percent (50%) of its then market price. He misrepresented to his clients that he had found a purchaser willing to pay only thirty percent (30%) of the then market price of the stock, the clients relied on his representation and requested him to complete the transaction. The clients' remainder interests in the corporate stock was sold for $58,657.50, but he advised the clients that the interests were being sold for $35,194.50. He remitted $35,194.50 to the clients, paid the purchaser's attorney a commission of $5,800 and retained the balance of $17,597.25 for himself. Subsequently, when his clients discovered Petitioner's conduct, an action was brought by them against him which was settled by payment to the clients of $10,000, of which $10,000 the clients had to pay $3,333.33 as an attorney's fee so that they netted only $6,666.67. A disciplinary action was brought by the The Florida Bar as a result of the above mentioned conduct. This action resulted in Petitioner being suspended from the practice of law for a period of eighteen (18) months and until:

1. He paid the cost of the disciplinary proceeding.

2. He demonstrates that he is entitled to be reinstated in the practice of law.

3. He made restitution to his former clients in the full amount of $10,930.58 or exhibited written evidence that the matter between himself and his the former clients had been concluded satisfactorily.

The opinion of this Court reflecting the foregoing was filed on February 12, 1964 and is reported in 160 So.2nd 701.

The Court's opinion also reflects that when his unethical conduct was brought to his attention, he sought and followed the advice of an older and respected attorney; he admitted his misconduct and divulged the full facts of the situation; he cooperated with The Florida Bar in its investigation and displayed an attitude of penitence and remorse.

Petitioner, shortly prior to the opinion of The Supreme Court, closed his office, ceased practicing law and has not directly or indirectly practiced law since.

At the time of his suspension, Petitioner was a licensed real estate broker. Shortly subsequent to his suspension from The Bar, proceedings were initiated by the Florida Real Estate Commission to discipline him for the same conduct for which he was disciplined by The Supreme Court of Florida. This action resulted in Petitioner being suspended as a real estate broker in 1966 for a period of two years. His license as a broker was reinstated in 1968. (R.267).

Prior to the reinstatement of his broker's license, Petitioner was able to accept only relatively menial jobs and was unable to earn much more than a bare living. (R.251, 266).

In 1968 he began acting as a real estate broker and earned sufficient monies so that he was able to make complete restitution to one of his former clients and such restitution was made. (R.257, 258). The other former client had died leaving a widow and a daughter by a former marriage. (R.256, 258). The widow died leaving only a daughter by a former marriage. (R.256, 258). When Petitioner attempted to make restitution to this former client, it was necessary for him to make the arrangements through the personal representative of the estate of the former client's widow and the attorney for his former client's daughter. Petitioner attempted to negotiate a means of making restitution by making installment payments over a period of time and in these negotiations he was represented by James McEwen, a lawyer practicing in Tampa, who has been deceased for several years. These negotiations broke down so the restitution was not made. (R.259-260).

Petitioner filed a petition in about 1969 to be reinstated. While this petition was pending, an information was filed charging Petitioner with aggravated assault which charge arose out of an alleged shooting of a two year old neighbor's child. (R.269). As a result of the filing of the information and because Petitioner had not made restitution to

the heirs of William Myers, his former client, his Petition for reinstatement was voluntarily withdrawn. (R.261). The criminal charge above mentioned was tried and resulted in a mistrial for the reason that the jury could not agree on a verdict. (R.270).

The information was amended and the Petitioner was charged with culpable negligence which resulted in injury to another person not including death. Petitioner filed a plea of nolo contendre to said charge, he was adjudged guilty, imposition of sentence was withheld and he was placed on probation for two years and ordered to pay $1.00 in court costs, which judgment was entered on February 15, 1972. (R.270,271).

After substantial effort, Petitioner located the heirs-at-law of William Myers and shortly before the hearing before the referee, he made restitution to one of them (R.261-263) and shortly subsequent to the hearing before the referee but before the filing of the referee's report, he made restitution to the other. (R.264-265).

At the hearing before the referee, Petitioner testified. It was his testimony that he had not since his suspension directly or indirectly engaged in the practice of law (R.266) and no evidence was offered controverting this. He testified that not only did he not harbor any malice or ill feeling toward anyone in relation to his suspension but, in fact, believed that he deserved the discipline which he received.

(R.249, 250). The Florida Bar offered no evidence to refute this. He assured the referee of his feeling of repentance (R.250) and his desire to practice law in an exemplary fashion in the future (R. 304) and The Bar did not attempt to refute this testimony. Petitioner did not attempt to prove that he had a good reputation for professional ability because such was not true. He testified that he had practiced law for somewhat less than three years immediately after 1959. It is obvious that such a short period of practice over twenty years ago could not establish a good reputation for professional ability. However, he testified that he had been engaged as a broker in the purchase, sale and exchange of real estate for fifteen years, he had kept up with the law relative to real estate and to income tax consequences of purchases, sales and exchanges of real estate. He assured the Court that he would devote his efforts to studying, refreshing and updating his knowledge as to other fields of law and that he would call in associate counsel to assist him when he found himself incompetent to handle any matter. (R.304-307, 313-314).

To prove that his character was such as to entitle him to reinstatement, he called various witnesses who had in recent years had an opportunity to observe Petitioner in his business transactions and they testified as to his character based upon said transactions.

These witnesses consisted of: 1.) Two lawyers who had represented him over the past several years and through such representation became familiar with the nature of his business transactions and his manner of conducting them. They testified that, based upon their observations, they believed that the Petitioner was honest and above board and that nothing had come to their attention that would reflect adversely on his character and his ability to practice law. (R.210-214, 286-294). 2.) He called another lawyer who had been inactive in the practice but had been engaged in the real estate business who testified that he was familiar with some of Petitioner's business transactions and based upon his knowledge believed that Petitioner was honest and nothing had come to his attention that reflected adversely on Petitioner's character and ability to practice law. (R.215-219). 3.) He called two realtors with whom he had engaged in business in recent years and who had had opportunities to observe him in these transactions. They testified that they believed him to be honest and had not observed anything that reflected on his integrity. (R.243-248). 4.) He called another witness who had acquired a business site through Petitioner's efforts and who had consulted with Petitioner on several occasions. This witness was not only well satisfied with Petitioner's method of doing business and believed him to be honest but had also referred other people to him. (R.253, 255).

The Bar produced several witnesses to testify primarily relative to Petitioner's character. These witnesses testified as to several specific matters which Petitioner will cover in detail.

THE STUBBS CASE.

Mr. and Mrs. Stubbs in 1968 or 1969 were neighbors of Petitioner. At said time their young daughter, aged about two, was shot in the arm and leg by a small caliber bullet. An information was filed charging Petitioner with aggravated assault, the criminal charge heretofore referred to. Mr. and Mrs. Stubbs (now Mrs. Grace Laura Smith) testified relative to their daughter's shooting and other matters. When analyzed, it is obvious that they had no personal knowledge relative to the actions of the Petitioner in this regard. However, from their testimony, it is obvious that they and Petitioner did not get along and had had some personal problems. (R.172-183).

THE FLAGG BUILDING.

Petitioner, Mr. Morgan, Mr. Thayer and Mr. Kirby each acquired an undivided one quarter interest in a parcel of real estate (R.190). They were not partners but were mere co-owners (R.190). The four co-owners entered into a lease whereby they were to construct a building on the land and then lease the land so improved to Flagg Brothers which lease would grant to Flagg Brothers an option to purchase the property. (R.187, 193). All four co-owners signed the lease and the option. Morgan, Thayer and Kirby without the knowledge of Petitioner

entered into an agreement with Flagg Brothers changing the terms of the lease and reducing the option price. (R.193-196, 299). The optionees elected to exercise the option as amended by three of the four co-owners (R.300) and Petitioner refused to execute a deed conveying his one quarter interest. (R.300). Flagg Brothers brought suit for specific performance against the other three co-owners (R.301) as a result of which an accord was reached between Petitioner and the other three co-owners and Petitioner executed a conveyance conveying his one quarter interest. (R.301-302).

THE BORROW PIT.

Petitioner, Morgan, Thayer and Kirby each acquired an undivided one quarter interest in an undeveloped parcel of land known as the Water's Avenue Borrow Pit. They were not partners but were merely co-owners. (R.190, 275). The borrow pit had been purchased with monies borrowed from a bank. (R.276). The taxes and mortgage payments exceeded the income from the borrow pit (R.190, 276-278) and every year each co-owner had to pay out 25% of the deficit. (R.191).

Mr. Morgan was called as a witness by The Florida Bar. He testified that he, Mr. Kirby and Mr. Thayer told Petitioner that they wanted to sell their interests in the land (R.191) and that they would be willing to sell their interests for $29,000. (R.192). Petitioner made no representations to the three co-owners as to the value of their interests. (R.192,

193). Morgan, Kirby and Thayer entered into a contract to sell their undivided interest in the land to Petitioner for $29,000 and their interests were sold and conveyed to Petitioner for said sum.

Petitioner testified relative to this transaction. He testified that when Morgan, Thayer and Kirby came to Petitioner and said they had to get rid of the borrow pit, Petitioner prepared a listing offering the pit for sale. He listed it in the Florida Real Estate Exchange, not as a broker, but as an owner. (R.278). About a year later, Petitioner was put in touch with a potential purchaser (R.279) and one of the conditions of the potential purchase was that Petitioner would have to enter into a long term management contract with the purchaser. (R.280). Petitioner prepared a contract (Petitioner's Exhibit 1) (R.281) for the purchase of the borrow pit for $29,000. He presented the contract to Morgan, Thayer and Kirby and told them:

> "I said, 'Gentlemen, this contract has a provision in it, the second one from the top, on the back, that this contract is really an option because you know I don't have money enough to pay all of us $29,000, except that I have a potential for a simultaneous purchaser that also insists upon a management contract. And none of the

three of you want to or are willing to join me in that management contract. I am willing to do it for: Number one, getting the sale made and getting out of the negative cash flow; and number two, that that will go to a differential, and I am going to make some money.'" (R.282).

(Emphasis Supplied)

Petitioner sold the property for the total sum of $75,000 of which he paid a real estate commission of $12,000. At the same time, Petitioner entered into a long term contract whereby he agreed to manage the borrow pit for 20% of the net profits. (Petitioner's Exhibit 9) (R.283). Up until the sale of the pit, it had never made any net profits but Petitioner believed that subsequent to the sale, it should make a profit of approximately $500 a month of which he would receive 20% as his compensation. (R.283, 284).

THE SALE OF THE BROOKSVILLE FORD DEALERSHIP.

The Bar called Mr. William C. Lowry and Mr. Harold Tucker to testify relative to this matter. Lowry and Tucker owned a Ford dealership in Brooksville together with the real estate upon which said business was located. (R. 200). Petitioner, as broker, found a prospective purchaser for the real estate and the dealership. (R.206). The method of sale consisted of two five-year leases of the real estate and an option to

purchase said real estate. The parties had trouble agreeing to the amount of the rent for the second five-year term. (R.207). Lowry and Tucker suggested that in order to make the sale, Petitioner should agree to waive his commissions on the rents for the second five-year term of the lease (R.207) and that Petitioner agreed thereto. (R.207, 222). Petitioner denied entering into said agreement. Petitioner testified that he did not waive the commission on the second five-year trm of the lease. The buyer and sellers reached an agreement. The transaction was closed and the Petitioner was not at the closing. (R.47)). Tucker and Lowry withheld the entire amount of Petitioner's commission (R.208) which commission amounted to approximately $30,000. (R.230-231). Petitioner sued Tucker and Lowry for the commission and recovered approximately $30,000 which was paid by Tucker and Lowry. (R.230,231). During the course of the litigation involving the commission, Gary Peacock, a witness called by the Petitioner, represented Petitioner. (R.295). During the litigation, Tucker and Lowry filed a complaint with the Florida Real Estate Commission to the effect that Petitioner did not have an appropriate sign on his office. (R.107). As one of Tucker's and Lowry's defenses in the litigation, they pled that he was not entitled to any commission because he had not been in compliance with the Florida Real Estate Code. (R.127-128). While this litigation was pending, Petitioner suggested that the matter be arbitrated

by a lawyer, H. Eugene Johnson, and Tucker and Lowry apparently agreed. Johnson prepared an arbitration agreement which was signed by Tucker and Lowry and delivered to Petitioner. Petitioner discussed the agreement with his attorney, Peacock, who suggested that the agreement as drafted by Johnson left two issues open:

1.) The affirmative offense that Petitioner was not entitled to a commission because he was not in compliance with the Florida Real Estate Code.

2.) Disposal of the pending complaint before the Real Estate Commission filed by Tucker and Lowry.

These provisions were added to the arbitration agreement as paragraphs numbered one and two and the remainder of the agreement was left unchanged. Petitioner signed the agreement and returned it to Tucker and Lowry. Tucker and Lowry took the agreement to H. Eugene Johnson's office. The agreement as changed was not approved and the arbitration never occurred.

Of significance are the following salient facts:

1.) Petitioner had been active as a real estate broker from 1968 to 1983 and no complaints against him had been filed with the Florida Real Estate Commission other than the complaint of Tucker and Lowry above referred to which was dismissed. (R.269).

2.) Petitioner had not been arrested for any offense since 1964 other than the offense which resulted in his

adjudication of guilt of culpable negligence arising out of the wounding of the Stubbs child. (R.269).

3.) It is apparent from the record in this case that The Bar investigated thoroughly and actively opposed the Petition for Reinstatement despite which it was unable to offer any evidence other than as to the above specified incidents.

FIRST POINT INVOLVED

DOES THE RECORD IN THIS CAUSE REFLECT THAT PETITIONER SHOULD BE REINSTATED AS A MEMBER OF THE FLORIDA BAR?

The question involved is stated in the above manner recognizing that it is Petitioner's burden to demonstrate that he should be reinstated. It is Petitioner's position that he has carried this burden, that the referee misconstrued the effect of the evidence and that this Court should reinstate Petitioner despite the referee's recommendation.

All of the cases hold that it is the burden of the Petitioner to offer evidence demonstrating that he has conducted himself personally and in the life of his community to justify a conclusion that he has repented of his misdoings, the Disciplinary Order has impressed him with the vital importance of ethical conduct in the practice of law, and that he is morally equipped to resume a position of honor and trust among the ethical practioners of The Bar. The basic elements which should be covered in the showing to be made by the Petitioner are:

1. Strict compliance with the specific conditions of the Disciplinary Order, such as payment of costs;

2. Evidence of unimpeachable character and moral standing in the community;

3. Clear evidence of a good reputation for professional ability;

4. Evidence of a lack of malice and ill feeling by the Petitioner toward those who by duty were compelled to bring about the disciplinary proceedings;

5. Personal assurances supported by cooperating evidence, revealing a sense of repentance, as well as a desire and intention of the Petitioner to conduct himself in an exemplary fashion in the future;

6. In cases involving misappropriation of funds, restitution is important.

In re: Dawson 131 So.2nd 472 (Fla. 1961). In re: Robert Duncan Timson 301 So. 2d 448.

The referee recognized that the record reflected strict compliance with the Disciplinary Order and he specifically so found. (RR2).

He likewise recognized that the Petitioner had practiced law for only approximately 3 1/2 years, between 1959 and the suspension order, and had not practiced since and that under these circumstances, he did not have any reputation for professional ability. The referee found "....that while Mr. Inglis has not established proof of a good reputation for professional ability, this is not an adverse finding since he has not had the opportunity to so establish his reputation."

(RR5).

The referee specifically found that Petitioner has a genuine sense of repentance for his prior misconduct and has accepted full responsibility for his suspension and harbors no ill will or malice toward those responsible therefor. (RR5).

The referee recognized the difficulties in making some of the restitution required but found that the Petitioner has met the requirements of restitution. (RR5,6).

Notwithstanding the foregoing, the referee recommended that Petitioner not be reinstated because he had failed to demonstrate that he was of unimpeachable character and moral standing in the community. The referee based this finding and recommendation soley upon the "Borrow Pit" incident and the "Stubbs Case". He specifically found that the other incidents were not "tainted with that degree of impropriety which would justify denial of the Petition for Reinstatement." (RR4). It is therefor necessary to carefully analyze the referee's findings of fact relative to these two incidents to determine whether the findings are based upon any substantial evidence in the record.

THE BORROW PIT.

This is the incident where Petitioner, Morgan, Thayer and Kirby each owned an undivided 25% interest in a Borrow Pit. Petitioner purchased the interest of Morgan, Kirby and Thayer and simultaneously sold the entire Borrow Pit to a stranger for a profit.

As to this incident, the referee found:

> "Mr. Inglis testified that he and his co-owners were finding it difficult to keep up with the debt service on the borrow pit land, and his two co-owners directed that he, as a real estate broker, sell the property for their joint benefit."

(Emphasis Supplied)

If, in fact, Morgan, Kirby and Thayer requested Petitioner 'to sell the property for their joint benefit' and Petitioner undertook to do so, he became the agent of the sellers owing them a fiduciary duty. If he purchased their interest knowing or even believing that he could sell the same for more than his purchase price, such conduct would be a breach of this duty.

There is no evidence in the record to support the finding that his two co-owners directed that he, as a real estate broker, sell the property for their joint benefit. Dale Morgan, the sole witness offered by The Bar relative to this matter, testified:

> Q. "And didn't the three of you, Mr. Kirby, Mr. Thayer, and yourself, tell Mr. Inglis that you wanted to sell your interest in that land, isn't that right?
>
> A. Yes sir.

Q. And based upon that, wasn't a contract of sale entered into between you, Mr. Kirby, Mr. Thayer and Mr. Inglis?

A. Yes sir. (R.191)

. . . . . .

Q. Let me ask you another way. As a matter of fact, didn't you, Mr. Thayer, and Mr. Kirby tell Mr. Inglis that you would be willing to sell it for $29,000?

A. I'm sure that is true.

Q. And you were willing to sell it for $29,000, were you not?

A. We did.

Q. Did he make any representations to you that it was worth $29,000?

A. Did who make any?

Q. Mr. Inglis. Did Mr. Inglis make any representations to you as to the value of that land?

A. No sir." (R.192).

Morgan's testimony does not support a finding that the co-owners directed Petitioner, as a real estate broker, to sell the property for their joint benefit or that Petitioner undertook to do so. Mr. Inglis testified as follows:

Q. "What led up to your purchase? What happened?

A. "They came in to see me one day and said 'Let's get rid of the borrow pit. We have reduced the mortgage down to $24,000. We can't afford the payment each month. We are broke. Let's sell the borrow pit.'

I said, 'All right, but I will start the solicitation of sales to see if we can do it.'

But I said, 'You have got to understand and consent that I have got to do this out in the creative market.'

And I said, 'You have got to consent that we are going to pay somebody else a 10% commission.'

And we went through the whole thing. And so, I prepared the listing, which we used at the state level in the Florida Real Estate Exchange orders, offering the pit for sale as an owner along with two other owners. The three of us were owners, and I was offering it as an owner, not as a broker." (R.278).

Approximately a year later a potential purchaser of the Borrow Pit was found. Petitioner testified as follows:

> A. "All right. At the time I got an indication that somebody was interested from Miami, but they said, 'you have got to tell us what is your bottom price? What is your real price?'
>
> I said, 'I can't tell you. I have got to get back with the sellers.'
>
> I got back with Mr. Morgan and Mr. Thayer and we sat down. And I said, 'You have got to tell me what you want.'
>
> And they said, 'We don't know.'" (R.279).
>
> . . . . . .
>
> Q. "Now let's talk about Kirby, Morgan and Thayer. What did they tell you they wanted for the property?
>
> A. They agreed - -
>
> Q. What did they tell you they wanted for it?
>
> A. $29,000.
>
> Q. Did they tell you they'd be happy with that figure?
>
> A. Yes Sir." (R.280,281).

. . . . . .

Q. (By Mr. Earle). "Now, when you presented Petitioner's Exhibit 1 to Mr. Morgan, Mr. Thayer and Mr. Jordan - - or Mr. Kirby, rather - - did you tell them that you had a prospect?

A. Yes Sir.

Q. For the retail sale of that property?

A. I said, 'Gentlemen, this contract has a provision in it, the second one from the top, on the back, that this contract is really an option because you know I don't have money enough to pay all of us $29,000, except that I have a potential for a simultaneous purchaser that also insists upon a management contract. And none of the three of you want to or are willing to join me in that management contract. I am willing to do it in exchange for: Number one, getting the sale made and getting out of the negative cash flow; and number two, that that will go to a differential, and I am going to make some money.'

Q. Did they tell you that they would be happy to make $29,000 for the property?

A. Yes Sir, they did. They just said, 'Just get us enough to pay off the $29,000 and pay off the closing.'" (R.282).

The testimony of Petitioner does not reflect that Morgan, Kirby and Thayer or any of them asked the Petitioner, as a real estate broker, to sell the property for their joint benefit. As a matter of fact, Petitioner's statement to them that "you have got to consent that we are going to pay somebody else a 10% commission" negatives the finding that Petitioner was acting as a broker. It reflects simply that these co-owners wanted to sell their respective interests in the property and asked Petitioner, not as a broker but as a co-owner, to assist them in that regard.

The referee also found as a fact that:

"Mr. Inglis did not inform his associates and co-owners that he had contracted to sell the property for the $75,000, and they were totally unaware of it until after the transaction was completed."

There is no evidence in the record that, at the time Morgan, Thayer and Kirby gave Petitioner an option to buy, Petitioner "had contracted to sell the property for the $75,000." The only testimony in this regard is the testimony of the Petitioner. Exhibit 1, the agreement between Morgan, Thayer and Kirby on the one hand and Petitioner on the other, reflects

that it is a mere option given by them to the Petitioner for the purchase of their interest in the property. Petitioner testified that at the time said option was signed, he was negotiating with the prospective purchaser. There is no other testimony relative to this matter. Morgan testified that he had no knowledge that at the time Exhibit 1 was executed there was a prospective purchaser. (R.186). Petitioner testified that he told them that he had a "potential for a simultaneous purchaser." And he was "going to make some money." (R.282). This testimony is indeed credible.

The referee further found:

> "Mr. Inglis protests that he had no fiduciary duty to his co-owners since they were not 'partners' in the legal sense of the word and that, when he insisted they make their own appraisal of the property, the transaction then became one of arm's length."
>
> . . . . . .
>
> "Mr. Inglis protests that there was no wrongdoing on his part and, while this position may be legally correct, the referee finds that <u>as an associate engaged in the joint venture with other men</u>, Mr. Inglis owed them a moral duty to disclose

> that he was going to make many thousands of dollars at their expense; and his failure to so inform them reflects adversely upon his moral fitness."

If, in fact, Petitioner and his co-owners were associates engaged in a "joint venture", the law is clear that each owed the other a very strict fiduciary duty identical to the duties owed by one partner to the other. If this relationship existed and Petitioner knew or believed that he was going to sell the land at a profit, he breached this duty when he purchased their interest.

The testimony of Morgan and Petitioner does not reflect that the Petitioner was engaged in a joint venture with Morgan, Thayer, Kirby, or any of them. The record reflects that each of the parties owned an undivided one-quarter interest as tenants in common in the property known as the Borrow Pit. It reflects that there were no contracts between them in any way relating to their tenancy in common of this property.

The leading case on this subject of joint ventures in Florida is Kislak v. Kreedian, 95 So.2d 510 (Fla. 1957). In this case the Supreme Court recognized that:

> "It has been universally held that while 'joint adventure' and partnership are separate legal relationships, both relationships are governed by the same

rules of law. The laws governing partnership are applicable to joint adventures."

Section 620.59, Florida Statues, provides among other things:

"In determining whether a partnership exists, these rules shall apply: (2) joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership of itself does not establish a partnership, whether the co-owners do or do not share any profits made by the use of the property."

This definition precludes the tenancy in common of the parties in and of itself from creating a partnership.

Kislak v. Kreedian, supra, further holds:

"It is an elemental principle that the relationship of joint adventurers is created when two or more persons combine their property or time or a combination thereof in conducting some particular line of trade or for some particular business deal. There must be an agreement to share jointly on some agreed basis in not only profits but also losses. The relationship

must arise out of a contract, expressed or implied. Such a contract is an indispensable prerequisite:

'As between the parties, a contract is essential to create the relation of joint adventurers. The contract need not, however, be expressed or be embodied in a formal agreement, or particularly specify or define the rights and duties of the parties. It may be inferred from the conduct of the parties or from facts or circumstances which make it appear that a joint enterprise was in fact entered into. The consideration for a contract of joint adventurers may be a promise, expressed or implied, to contribute capital or labor to the joint enterprise.' 30 Am Jur, Joint Adventurers, Section 9, P681.

. . . . . .

In addition to the essentials of an ordinary contract, in contracts creating joint ventures there must be (1) a community of interest in the performance of the common purpose, (2) joint control or right of control, (3) a joint proprietary

> interest in the subject matter, (4) a right to share in the profits, (5) a duty to share in any losses which may be sustained."
>
> (Emphasis Supplied)

In the instant case, there was no common purpose. There was no joint control or right of control, each of the parties having the ability to sell or convey their one-quarter interest in the real property exclusive of the rights of others and no party had a right to bind any other party. Likewise, there was no joint proprietary interest in the subject matter other than the mere right of possesion of the whole. Each party had the absolute control of his undivided one-quarter interest.

The relationship between the parties was simply that of co-tenants, each owning an undivided one-quarter interest in common with the others. To determine whether or not the Petitioner was guilty of any wrongful conduct in his purchase from his co-tenants and his sale at a profit to a stranger, it is necessary to determine the duties of the co-tenants to each other arising out of the co-tenancy itself.

The cases on this subject speak generally of the relationship of trust and confidence existing between tenants in common, but cases citing such trust and confidence are limited to special situations where in actuality no trust and confidence is involved and the writer has found no case holding

in effect that there is such a relationship between co-tenants. Most of the cases where this language is used involve situations where one co-tenant pays a lien or encumbrance encumbering the entire fee simple title and not the interest of a single co-tenant. The basis for these holdings is simply that each co-tenant has an equal duty to pay liens, encumbrances or charges against the entire fee simple title and one co-tenant by merely performing his duty cannot divest the other co-tenants of their interests. See 20 Am Jur 2d 165, Co-tenancy and Joint Ownership, Section 69 et seq. Thus, when one co-tenant pays the taxes or a mortgage or a judgment lien encumbering the entire fee simple title, courts have uniformally held that the payment was for the benefit of all of the co-tenants and that each co-tenant can benefit therefrom by contributing his prorata share of the payment. These holdings have no relationship to trust and confidence.

On the other hand, it has been uniformally held that where there is a lien, charge or encumbrance encumbering the interest of only one co-tenant, another co-tenant can acquire said lien, charge or encumbrance and thereby divest his co-tenant of his interest therein. Most of these cases are old, but there are no cases contra. The Supreme Court of Oregon considered a case where one tenant in common acquired a judgment against a co-tenant, levied thereon and at Sheriff's sale bought in the co-tenant's interest in the property. In holding that the

holder of the judgment had the right to buy in his co-tenant's interest in the property, the Court said:

> "His right to buy at a sale under an execution to which he was a stranger is even clearer. While a tenant in common will be charged as a trustee if he purchases an outstanding hostile title, the weight of authority entitles him to buy the moiety of his co-tenant at a public sale thereof under legal process running against the property of the co-tenant." Webster v. Rogers, 171 Pac. 197 (Supreme Court of Oregon 1918).

In a similar case, The Supreme Court of Minnesota arrived at the same conclusion and stated:

> "The confidential or trust relationship between the co-tenants, arising from their community of interest, did not preclude any of them from purchasing the undivided interest of another upon an execution sale affecting such interest only. Such relationship only prevents a purchase of an interest hostile to the common title." Murray v. Murray, 198 N.W. 307 (The Supreme Court of Minnesota 1924). See Annotation A.L.R. 905.

It requires no citation of law to establish that one tenant in common can without the consent of his co-tenants:

1. Mortgage his undivided interest;

2. Sell his undivided interest;

3. Destroy the joint tenancy by partition.

The law is clear that the purchase by a tenant in common of the share of one of his co-tenants is not the purchase of an outstanding hostile claim of title against the joint interest, within the general rule, and the principle which prevents one tenant from buying in an outstanding title for his own use does not apply. 54 A.L.R. 905 and cases cited therein.

The law is equally clear that a co-tenant contracting for the purchase of the share of his co-owner can deal at arm's length with the co-owner just as though he were a stranger. Thus, a co-tenant contracting for the purchase of the share of his co-owner is under no obligation to disclose that he has had previous offers or even that he has previously agreed with another to sell the whole of the property at a higher rate. Matthews v. Bliss, 22 Pick 48 (Mass. 1839), McMahon v. McMahon, 157 So. 2d 494 (Miss. 1963).

The law recognizes that one tenant in common can hold possession of the entire property adversely to his co-tenants and acquire title to the entire property thereby. Kennedy v. Vandine, 185 So.2d 693 (Fla. 1966), 2 Fla Jur 2d 70, Adverse Possession, Section 44. Petitioner submits that the only duty

owed by one tenant in common to another is simply not to acquire a claim, demand or lien upon the whole property in an effort to divest his co-tenants. The true rule as to agreements and conveyances between co-tenants is well stated in 86 C.J.S. 462, Tenancy in Common, Section 71, as follows:

> "Ordinarily, one tenant in common may deal with a co-tenant with respect to the common property, so that tenants in common may contract with each other concerning the disposition of the common property, or concerning its use and the disposal of the income therefrom and one co-tenant may mortgage his undivided interest to another tenant in common. Agreements entered into by tenants in common are as binding between them, their heirs, personal representatives, and assigns, as if between strangers, if they do not otherwise conflict with the relationship of tenancy in common, and the rights of the respective parties, which are dependent on a construction of the terms of the agreement, are held to be enforceable, either at law or in equity, for purposes of offense or defense.

> In transactions of sale of their interests, co-tenants do not stand in a relationship of mutual trust and confidence toward each other, but deal as adverse parties . . . . . ."

From all of the foregoing, it is apparent that Petitioner, in purchasing his co-tenants' interest and reselling the same at a profit, violated no principles of law and no duty to his co-tenants.

The referee did not find that Petitioner was guilty of any wrongful conduct in this matter. He admitted that Petitioner's position "may be legally correct" but characterized it as the violation of a "moral duty" and "dubious". Petitioner urges that unless his conduct violated some principle of law or equity so that it was, in fact, illegal, it cannot be considered immoral or dubious in the context of this proceeding.

The record does not reflect that Petitioner's co-tenants objected to his conduct or even believed that it was wrong and they took action to rectify it. It should be assumed, therefore, that they did not consider his conduct wrongful, immoral or dubious.

THE STUBBS CASE

The Stubbs child was shot and Petitioner was charged with and tried for the felony of aggravated assault. A mistrial was entered because the jury could not agree on a verdict.

Subsequently, the charge was amended to culpable negligence, a misdemeanor requiring no intent to harm the child. Petitioner pled nolo contendre to this charge, was found guilty, placed on two years unsupervised probation and ordered to pay $1.00 in court costs.

The referee found:

> ". . . . . .Mr. Inglis was charged with a felonious assault by shooting an infant child. . . . . Mr. Inglis denies that he was guilty of the offense, notwithstanding that he, in the Circuit Court of Hillsborough County, Florida, entered a plea of nolo contendre and was found guilty to the lesser charge of culpable negligence. In view of his adjudication of guilt of the crime by a court of competent jurisdiction, Petitioner's claim of innocence must fail."

This finding, if read literally, is not supported by the evidence. The felonious assault charge was amended to a charge of culpable negligence, a misdemeanor requiring no proof of intent, and it was to this charge that Petitioner pled nolo contendre and it was on this charge that he was found guilty. Petitioner urges that the charge to which he pled nolo contendre and the charge on which he was found guilty requires

no intent to injure the child and therefor does not reflect on Petitioner's moral character.

Further, Petitioner points out that the sentence of the trial judge reflects that he did not consider Petitioner's conduct as being of a serious nature.

CONCLUSION

A reading of the record in this case inescapably leads to the conclusion that The Florida Bar thoroughly investigated Petitioner's conduct from the time of his suspension in 1964 until 1983. It further reflects that The Bar in an adversary manner opposed his reinstatement. During the last fifteen (15) years of this, Petitioner had actively engaged in business primarily as a real estate broker. Yet, The Bar was able to turn up and did turn up only the Borrow Pit matter and the Stubbs case matter which the referee found reflected adversely on his moral character.

This Court in its opinion filed in 1964 found that:

> "Respondent is a young man now thirty-two (32) years old and the transgression occurred over two (2) years ago during his first two (2) years in practice. He sought and followed the advice of an older, respected attorney when his unethical conduct was brought to attention. He admitted his misconduct and divulged the full facts of the situation. He has cooperated with The Florida Bar in its investigation and has displayed an attitude of repentance and remorse....."

Thus, from the time his unethical conduct was brought to his attention and until 1983, the only conduct militating against his reinstatement in the view of the referee were the Borrow Pit and Stubbs incidents which, when analyzed, Petitioner suggests do not adversely reflect on his moral character. The Court in its opinion found:

> ". . . . . .We therefor feel that Respondent has demonstrated qualities which indicate that he is a proper subject for rehabilitation, which after all is one of the primary objectives of disciplinary proceedings."

Petitioner suggests that his conduct from the time his unethical conduct came to his attention and until this time demonstrates that he is a proper subject for rehabilitation and that he has rehabilitated himself and should be reinstated.

Respectfully submitted,

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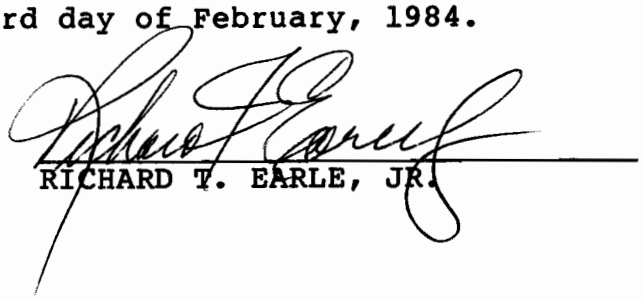
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Petitioner's Brief have been furnished by regular U. S. Mail to JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, Tallahassee, Florida 32301 and MS. DIANE LUTZ, Staff Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, Florida 33607 this 3rd day of February, 1984.



RICHARD T. EARLE, JR.