

1939

W.A. Nielson v. John W. Smith, Albert S.
Wheelwright and Smith Land Co v. M.M. Johnson
: Consolidated Abstract of Record on Appeal

Utah Supreme Court

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J.D. Skeen, E.J. Skeen; attorneys for appellants.

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

W. A. NIELSON.

Plaintiff and Respondent,

vs.

JOHN W. SMITH. and J. CAMERON SMITH,
E. LINCOLN SMITH. POLLY SMITH. JOHN
W. SMITH and MAX GAILEY. Trustees of
the Smith Land Company. and SMITH LAND
COMPANY. a corporation.

Defendants and Appellants.

ALBERT S. WHEELWRIGHT, Trustee in Bank-
ruptcy of John W. Smith. Bankrupt,

Intervenor and Respondent,

and

SMITH LAND COMPANY, a corporation.

Plaintiff and Appellant,

vs.

M. M. JOHNSON, Receiver of Nielson-Burton
Company, formerly a co-partnership com-
posed of A. J. Nielson and Charles S. Burton,
CHARLES D. MOORE. WILSE A. NIELSON,

Defendants and Respondents.

No. 6199

No. 6198

CONSOLIDATED ABSTRACT OF
RECORD ON APPEAL

J. D. SKEEN,

E. J. SKEEN,

Attorneys for Appellants.

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IN THE
DISTRICT COURT
OF THE
FIRST JUDICIAL DISTRICT
IN AND FOR
BOX ELDER COUNTY
STATE OF UTAH

W. A. NIELSON,

Plaintiff,

vs.

JOHN W. SMITH and J. CAMERON SMITH, E.
LINCOLN SMITH, POLLY SMITH, JOHN
W. SMITH, and MAX GAILEY, Trustees of
the SMITH LAND COMPANY,

Defendants.

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COMPLAINT

Plaintiff complains of defendants and for
cause of action alleges:

- 01 1. That on or about the 22nd day of May,
1930, in the City Court in and for Brigham City,
Box Elder County, Utah, a judgment was duly
made and entered in favor of the plaintiff, W. A.
Nielson, and against the defendant, John W.
Smith, for the sum of \$54.90.

Trans.

2. That on or about the 16th day of August, 1930, a judgment was made and entered in the District Court of the First Judicial District in and for Box Elder County, Utah, in favor of Bertha K. Skeen and against the defendant John W. Smith for the sum of \$100.00. That prior to the filing of this action the said judgment was by Bertha K. Skeen duly assigned and transferred to this plaintiff, who is now the owner and holder thereof.

3. That on or about the 12th day of September, 1929, in the District Court of the Third Judicial District in and for Salt Lake County, a judgment was duly made and entered in favor of the plaintiff W. A. Nielson and against the defendant John W. Smith for the sum of \$1,278.92; that the said judgment was thereafter, and on the 14th day of September, 1929, duly docketed in the office of the County Clerk in and for Box Elder County, State of Utah.

4. That upon the entry of said judgments, execution was issued thereon and delivered to the Sheriff of Box Elder County and said executions were duly returned by the said Sheriff wholly unsatisfied and the said judgments, nor any part thereof, have not been paid.

5. That on or about the 1st day of October, 1930, the defendant John W. Smith was the owner of the following described property, to-wit:

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“Lot 4, Sec. 3, and Lots 1, 2, 3 and 4; the S $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 4, Twp. 14, North, Range 4 W; Lots 1 and 2 of Sec. 26 in Twp. 15 North, Range 6 w of Salt Lake Meridian, containing 319.72 acres.

“Lot 4 of Sec. 28, and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16, the said lots being in the N $\frac{1}{2}$ and the SE $\frac{1}{4}$ of Sec. 33 Twp. 15 North, Range 5 W., containing in all 473.67 acres, more or less. Together with 180 shares water stock of Pocatello Valley Pipe Line Company.”

subject to an agreement to pay the balance of the purchase price thereof, and that title to the said property was held in trust for the said John W. Smith to be transferred and delivered upon the payment of the balance on said purchase price.

6. That on or about the 8th day of October, 1930, the said John W. Smith caused the Smith Land Company to be organized as a corporation under the laws of the State of Utah, and transferred the said property and the whole thereof, and his interest therein to the said Smith Land Company, a corporation, with the intent to hinder, delay and defraud the plaintiff and the plaintiff's assignor and other of his creditors in the collection of their said obligations; that the said John W. Smith caused said corporation to issue 10,000 shares of its stock of the par value of \$1.00 per

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share, as a pretended or apparent consideration for the transfer of said land by him to it, and in fact no consideration of any kind whatever was paid for the transfer of said property, and all of the interest of the said John W. Smith therein; that thereafter and on the 20th day of April, 1931, the said John W. Smith permitted the charter of said corporation to be forfeited and the individual defendants named herein who were officers and directors of said Smith Land Company, thereupon became trustees of the property and assets of the said company; that the charter of said corporation has never been re-instated and the said property and the whole thereof is now held for the said John W. Smith in the record name of the said corporation, but for the sole purpose of keeping and holding the said property from the reach of his creditors, and for his sole and exclusive use and benefit, and the defendants other than John W. Smith have no claim or interest in said property or any part thereof, but hold the same in trust for the said John W. Smith, and for the plaintiff herein.

7. That the said property is dry farm land, and now has a crop of fall wheat growing and ready to harvest on a large part thereof. That the plaintiff is entitled to have the said property or its value applied to the satisfaction of the said judgments, and it is absolutely necessary that this

Trans.

court appoint a receiver to take possession of said property, and to harvest the crop and to hold and protect the same that it may be applied upon the said judgments so held by plaintiff against the said John W. Smith.

WHEREFORE, the plaintiff prays judgment,

1. That the transfer by John W. Smith of his right, title interest and ownership in and to the property herein described to the said Smith Land Company, be set aside, annulled and held for naught.

2. That the court forthwith appoint a receiver to take possession of all of the said property, together with all crops growing thereon and hold and protect the same until the claims herein made are determined, and that the court determine the amount of the plaintiff's claim and enter judgment herein therefor and that the property, or sufficient thereof to satisfy the same, then be applied to the satisfaction of the judgment held by plaintiff herein.

3. Plaintiff prays for general relief including his costs herein incurred.

D. A. SKEEN

(S) D. A. SKEEN

Attorney for Plaintiff

Duly verified. Filed July 9, 1935

COMPLAINT IN INTERVENTION

029 Comes now Albert S. Wheelwright, Trustee in the matter of the bankruptcy of John W. Smith, voluntary bankrupt, and, by leave of court, files this his complaint in intervention and complains of defendants and alleges as follows, to-wit:

1. Intervenor alleges that by order of court duly made and entered on the 3rd day of December, 1935, in the District Court of the United States for the District of Utah, he was duly appointed trustee in bankruptcy in the matter of the bankruptcy of John W. Smith, voluntary bankrupt, and, pursuant to such appointment, he thereafter duly qualified and is now the duly appointed, qualified and acting trustee in bankruptcy therein.

2. That thereafter, on petition duly filed in said bankruptcy proceeding, an order was made and entered on the 25th day of February, 1936, authorizing intervenor as such trustee to intervene in the above entitled action and file his complaint herein and join in the prosecution of the said action.

3. Intervenor adopts each and every allegation contained in plaintiff's complaint filed herein and by such adoption realleges the same as a part of his complaint in intervention, the same as if

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each and every paragraph in said complaint were set out and restated at length herein.

4. Intervenor further alleges that in said bankruptcy proceeding in the United States District Court for the District of Utah, the plaintiff herein, W. A. Nielson, duly filed the claim set out in said complaint, and the said claims were duly allowed in said bankruptcy proceedings as filed. That the said claims are still valid existing claims. That the intervenor herein claims the title and full right of possession of all property of the said bankrupt in existence or to which the said bankrupt had claim on the 9th day of October, 1935.

5. That since the filing of the complaint herein, the Smith Land Company has been reinstated as a corporation of the State of Utah, and by reason thereof is a necessary party defendant in the foregoing action.

WHEREFORE intervenor prays that the property set out and described in plaintiff's complaint, and by reference and adoption in the complaint in intervention, be adjudged to be the property of the said bankrupt and title and right of possession thereof vested in the intervenor as trustee in bankruptcy.

2. That it be adjudged and determined that the defendants and each of them have no right, title, claim or interest in the property set out and

Trans.

described in plaintiff's complaint, and this complaint in intervention, or any part thereof.

3. Plaintiff prays for general relief, including costs expended herein.

D. A. SKEEN

Attorneys for Intervenor.

Duly verified. Filed April 20, 1936

[TITLE OF COURT AND CAUSE]

AMENDED COMPLAINT

048 Comes now the plaintiff, W. A. Nielson, and by leave of court first had and obtained, files herein this, his amended complaint, to conform to the proof adduced upon the trial of the above entitled action, and therein complaining of the defendant, alleges:

1. That on or about the 22nd day of May, 1930, in the City Court in and for Brigham City, Box Elder County, Utah, a judgment was duly made and entered in favor of the plaintiff, W. A. Nielson, and against the defendant, John W. Smith, for the sum of \$54.90.

2. That on or about the 16th day of August, 1930, a judgment was made and entered in the District Court of the First Judicial District in and for Box Elder County, Utah, in favor of Bertha K. Skeen and against the defendant John W. Smith for the sum of \$100.00. That prior to the filing of this action the said judgment was by

Trans.

Bertha K. Skeen duly assigned and transferred to this plaintiff, who is now the owner and holder thereof.

3. That on or about the 12th day of September, 1929, in the District Court of the Third Judicial District in and for Salt Lake County, a judgment was duly made and entered in favor of the plaintiff W. A. Nielson and against the defendant John W. Smith for the sum of \$1278.92; that the said judgment was thereafter, and on the 14th day of September, 1929, duly docketed in the office of the County Clerk in and for the County of Box Elder, State of Utah.

4. That upon the entry of said judgments, execution was issued thereon and delivered to the Sheriff of Box Elder County and said executions were duly returned by the said Sheriff wholly **unsatisfied** and the said judgments, nor any part thereof, have not be paid.

That upon the issuance of an execution upon the judgment in favor of the plaintiff and against the defendant, John W. Smith, in the amount of \$1278.92, as set out in paragraph 3 hereof, the said defendant, John W. Smith, appealed said case to the Supreme Court of the State of Utah, and at the time of said appeal, filed in said action a supersedeas bond by which further proceedings upon said judgment were stayed pending the determination of said appeal. That said judgment

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was thereafter affirmed by the Supreme Court of the State of Utah, on or about the 8th day of March, 1933, but said judgment still remains wholly unsatisfied and no part thereof has been paid.

5. That on or about the 1st day of October, 1930, the defendant, John W. Smith, was the owner of the following described property, to-wit:

Lot 4, Sec. 3, and Lots 1, 2, 3 and 4; the $S\frac{1}{2}$ of the $NE\frac{1}{4}$ and the $SE\frac{1}{4}$ of $NW\frac{1}{4}$ of Sec. 4, Tp. 14 N. R. 4 W; Lots 1 and 2 of Sec. 26, Tp. 15 N. R. 6 W. S.L.M., containing 319.72 acres.

Lot 4 of Sec. 28, and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16, the said lots being in the $N\frac{1}{2}$ and the $SE\frac{1}{4}$ of Sec. 33, Tp. 15 N. R. 5 W. containing in all 473.67 acres, more or less. Together with 180 shares of water stock of Pocatello Valley Pipe Line Company.

subject to an agreement to pay the balance of the purchase price thereof, and that title to the said property was held in trust for the said John W. Smith to be transferred and delivered upon the payment of the balance on said purchase price.

6. That on or about the 8th day of October, 1930, the said John W. Smith caused the Smith Land Company to be organized as a corporation under the laws of the State of Utah, and transferred the said property and the whole thereof, and his interest therein to the said Smith Land Company, a corporation, with the intent to hin-

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der, delay and defraud the plaintiff and the plaintiff's assignor and other of his creditors in the collection of their said obligations; that the said John W. Smith caused said corporation to issue 10,000 shares of its stock of the par value of \$1.00 per share, as a pretended or apparent consideration for the transfer of said land by him to it, and in fact no consideration of any kind whatever was paid for the transfer of said property, and all of the interest of the said John W. Smith therein; that thereafter and on the 20th day of April, 1931, the said John W. Smith permitted the charter of said corporation to be forfeited and the individual defendants named herein who were officers and directors of said Smith Land Company, thereupon became trustees of the property and assets of the said company; that the charter of said corporation has never been re-instated and the said property and the whole thereof is now held for the said John W. Smith in the record name of the said corporation, but for the sole purpose of keeping and holding the said property from the reach of his creditors, and for his sole and exclusive use and benefit, and the defendants other than John W. Smith have no claim in trust for the said John W. Smith, and for the plaintiff herein.

6½. That the said defendant John W. Smith caused the Smith Land Company to be organized as a corporation in October, 1930, and at the time

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of its incorporation, transferred to it all of his interest in said real property as described in paragraph 5 hereof, and all other property then belonging to the said John W. Smith, and the said John W. Smith continued in possession of said real property, and continued to operate and farm the same, and continued to live and make his home upon said property, the same as he had done prior to the incorporation of said company, and prior to the transfer of said property to said corporation. That no record of the transfer of said property was made in the office of the County Recorder of Box Elder County, or elsewhere, and no deeds or assignments or other transfers of any nature were filed with the County Recorder of Box Elder County, covering the transfer of said property, and this plaintiff had no actual knowledge or notice of any nature with regard to said transfers. That this plaintiff was not informed of the incorporation and existence of said corporation, and was not informed of the transfer to said corporation of said property, and plaintiff did not have any notice of said transfer and did not secure any knowledge or receive any information with regard to the incorporation of said company and the transfer of said property from John W. Smith to said corporation until sometime during the spring or early summer of 1935, shortly prior to the filing of this action herein.

7. That the said property is dry farm land, and now has a crop of fall wheat growing and ready to harvest on a large part thereof. That the plaintiff is entitled to have the said property or its value applied to the satisfaction of the said judgments, and it is absolutely necessary that this court appoint a receiver to take possession of said property, and to harvest the crop and to hold and protect the same that it may be applied upon the said judgments so held by plaintiff against the said John W. Smith.

WHEREFORE, the plaintiff prays judgment,

1. That the transfer by John W. Smith of his right, title, interest and ownership in and to the property herein described to the said Smith Land Company, be set aside, annulled and held for naught.

2. That the court forthwith appoint a receiver to take possession of all of the said property, together with all crops growing thereon and hold and protect the same until the claims herein made are determined, and that the court determine the amount of the plaintiff's claim and enter judgment herein therefor and that the property, or sufficient thereof to satisfy the same, then be applied to the satisfaction of the judgment held by plaintiff herein.

3. Plaintiff prays for general relief, including his costs herein incurred.

D. A. SKEEN
Attorney for Plaintiff

Duly verified Filed June 22 1937

[TITLE OF COURT AND CAUSE]

AMENDED COMPLAINT IN INTERVENTION

079 Comes now Albert S. Wheelwright, trustee in
bankruptcy, intervenor herein, and by leave of
Court and by way of further pleading herein,
adopts each and every allegation contained in said
original complaint in intervention and in the
amended complaint of the plaintiff filed herein as
his own, and by reference herein re-alleges the
same herein as fully as if herein set out as in said
original complaint in intervention and in said
amended complaint, as his further and amended
complaint in intervention herein.

D. A. SKEEN and A. U. MINER
Attorneys for Intervenor.

Duly verified. Filed Jan. 12, 1938.

[TITLE OF COURT AND CAUSE]

ANSWER

056 Leave of Court being first had and obtained,
Comes now the defendant John W. Smith, and
makes answer to the amended complaint of W. A.
Nielson herein, as follows:

1. Admits that a judgment was made and

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entered against him and in favor of W. A. Nielson for approximately \$54.90.

2. Admits that a judgment was made and entered against him and in favor of Bertha K. Skeen for approximately the sum of \$100.00, but denies that said judgment was dated August 16, 1930, and alleges that said judgment was made and given long prior thereto and is barred by the provisions of Title 104 of the Code of Civil Procedure.

3. Admits that a judgment was made and given against him for approximately the sum of \$1278.92.

4. Admits that execution was issued upon one of said judgments and that the same was not satisfied by the Sheriff to whom said execution was delivered for service, and further answering paragraph No. 4, this defendant alleges:

That D. A. Skeen was the agent and attorney of the said W. A. Nielson and was authorized to initiate and to prosecute proceedings for the collection of the said judgments set out in paragraphs numbers 1 and 3, and as such agent and attorney, acted in all matters pertaining to the said judgments for the said W. A. Nielson, and further, the said D. A. Skeen is the husband of Bertha K. Skeen, and acted in all matters pertaining to the judgment alleged in paragraph number 2 of the said amended complaint as the agent and attorney

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for the said Bertha K. Skeen, and the said W. A. Nielson and Bertha K. Skeen and their successors in interest, are all alike chargeable with all of the acts of the said D. A. Skeen and all knowledge of facts acquired by the said D. A. Skeen are chargeable to the said W. A. Nielson and to Bertha K. Skeen and to their successors in interest; that the said D. A. Skeen, as such attorney and agent, caused an execution to be issued upon one of the said judgments and delivered to the Sheriff of Box Elder County, Utah, for service; that the said Sheriff, in the performance of his duties, made investigation of the property of this answering defendant, and made return on the said execution to the effect that this answering defendant was not the owner of property subject to the levy of an execution; that property owned by him was covered by mortgages and other liens, was exempt from execution under the provisions of the homestead law, and that any interest that this answering defendant had in or to said property had been sold or transferred prior to the return or said execution; that by said execution and the return of the Sheriff, the said D. A. Skeen was fully informed of the organization of the defendant Smith Land Company and of the transfer of this defendant's property to said corporation, or acquired knowledge of facts which would have put an ordinarily prudent person upon inquiry, which, if followed up, would have resulted in a discovery

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of all of the facts pertaining to the transfer of the said property, and if any cause of action even existed at any time, it is barred by the provisions of Title 104 of the Revised Statutes of Utah, 1933.

5. This defendant admits that he was, prior to the 1st day of October, 1930, the owner of a contract to purchase lands described in paragraph No. 5 of the amended complaint; that he held said lands subject to the payment of installments of principal and interest, taxes and other conditions; that said contract was in default; that he was without means to pay the taxes and the accruing installments thereon, and said contract was in grave danger of forfeiture; that at said time, there was residing with him his daughter, E. Lincoln Smith, and her two minor children who were wholly dependant upon this answering defendant for the necessaries and comforts of life, and any equity this answering defendant had in or to said land constituted a homestead and was not subject to levy of execution or forced sale under the Constitution of the State of Utah and the laws of Utah made pursuant thereto.

6. This answering defendant admits that he was one of the organizers of the Smith Land Company; that he conveyed his interest in and to said contract to said corporation and received stock therefor. Admits that at one time the charter of said corporation was forfeited but subject to re

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instatement, and alleges that thereafter the charter was reinstated and said corporation is now a legally organized corporate entity and is authorized to and is doing business. Except as admitted, denies the allegations of paragraph No. 6.

7. Except as admitted or qualified, defendant denies the allegations of paragraph No. 6½. This answering defendant alleges that the transfer of said property to the Smith Land Company was recited in the Articles of Incorporation of said Smith Land Company; that the Articles were duly recorded in the office of the County Clerk for Box Elder County and in the office of the Secretary of State; that said corporation took possession of the said land; that defendant was thereafter on said property only as the agent of the corporation; that the said corporation cultivated and seeded said land, paid all expenses in connection therewith, harvested all crops, paid the expense of harvesting the same; paid all taxes levied upon and against said property and made payment of all installments upon the contract for the purchase of said property and otherwise did all things pertaining to the possession, ownership, cultivation and use thereof; that the plaintiff lived in the immediate locality of said lands, was frequently on the same in conversation with officers of said corporation, and was fully informed as to all matters and things of which he sought information

Trans.

respecting the property of this answering defendant and of the Smith Land Company.

Wherefore, this answering defendant prays that plaintiff take nothing as against him; that said cause be dismissed as to him, and that he have his costs herein expended.

J. D. SKEEN E. J. SKEEN
Attorneys for Defendant

Duly verified. Filed July 8, 1937

[TITLE OF COURT AND CAUSE]

ANSWER

060 Leave of Court being first had and obtained,
Come now E. Lincoln Smith, Polly Smith and
Max Gailey, defendants above named; and make
answer to the amended complaint herein, as follows:

1. These defendants are not informed as to the matters and things set forth in paragraphs numbers 1, 2, 3 and 4 of the said amended complaint, and for want of information, deny the same.

2. Admit that John W. Smith was the owner of the lands described in paragraph number 5. Except as admitted, deny the allegations of paragraph number 5.

3. These defendants deny that they or any of them are trustees for the Smith Land Com-

pany, and allege that said corporation is duly authorized to do business as a corporation, and that they represent said corporation as directors and not otherwise.

4. These defendants are not advised of the matters and things set forth in paragraphs numbers 6½ and 7 and for want of information deny the same.

J. D. SKEEN, E. J. SKEEN

Attorneys for Defendants

Duly verified. Filed July 17 1937

[TITLE OF COURT AND CAUSE]

AMENDED AND SUPPLEMENTAL ANSWER

042 Comes now the defendant Smith Land Company and makes an amended and supplemental answer to the complaint of the plaintiff W. A. Nielson and the complaint in intervention of Albert S. Wheelwright, as follows:

I.

Admits the allegations of paragraphs numbered 1, 2 and 3 of the complaint herein except this defendant is not informed as to whether Bertha K. Skeen assigned the judgment described in paragraph number 2, and for want of information denies the same.

II.

Denies the allegations of paragraph number 5 except this answering defendant alleges that on the 23d day of November, 1926, the defendant

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John W. Smith contracted to purchase from M. M. Johnson, Receiver, lands described in paragraph number 5, and that on the said 1st day of October, 1930, the said John W. Smith was the owner only of said contract of purchase of said lands; that after the making of said contract the said John W. Smith became greatly in arrears in the making of payments and in payment of taxes, said taxes having remained delinquent for the years 1926, 1927 and 1928, and there was due or about to become due a payment on said contract of \$2000.00, which the said John W. Smith was unable to make, and the said Smith was without funds with which to meet the expense of plowing and seeding said land, his equipment was lacking in efficiency and it became and was apparent that without procuring other and additional equipment and assistance in the cultivation of said land, he would become further delinquent in the performance of said contract, and would forfeit all interest therein; that his son J. Cameron Smith was the owner of a tractor and other valuable equipment and was willing to join in the organization of a corporation for the purpose of providing the necessary labor, equipment and capital to cultivate said land and to provide the necessary means of effectively cultivating said land, and thereupon the said John W. Smith, the said J. Cameron Smith and others organized this answering defendant corporation

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and conveyed to it the property described in the complaint herein; that this corporation, since said date, has fully complied with the terms and conditions of the said contract between the said Johnson and the said Smith, and is the full and exclusive owner of said property.

This answering defendant further alleges that the plaintiff was fully informed of the organization of this answering defendant corporation, was likewise fully informed of the status of said contract of sale and of the necessity for prompt and continuous payments of money to M. M. Johnson and his successor in interest until the full purchase price of said property, amounting to the aggregate sum of \$10,118.78, besides interest, was paid. Also, the said plaintiff was informed that the defendant corporation was in possession of said land, cultivating, seeding and harvesting the crops therefrom and paying taxes from time to time levied and assessed against the same, and plaintiff is now estopped from denying the ownership of said property.

This defendant further alleges that if any cause of action existed that the same is barred by the provisions of Title 104-22-24 of the Revised Statutes of Utah, 1933.

III.

Further answering and by way of supplemental answer, this defendant alleges:

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That after the filing of the complaint herein, on or about the 7th day of December, 1936, the plaintiff acquired the contract of sale of said land to the said John W. Smith, and on the 7th day of December, 1936, elected to hold this answering corporation as the owner of said contract and on said date notified this corporation that it was in default by reason of its failure to pay taxes; its failure to pay the purchase price of said property under the terms of the contract so assigned to it by the said Smith; of its failure to properly cultivate said land, to maintain fences and buildings in good condition, to carry crop insurance; of its failure to render a written report of the land cultivated by in, and by reason of such defaults, the said plaintiff demanded performance within 30 days of the date of said notice, to-wit: prior to January 7, 1937, in default of which the said plaintiff gave notice that he would forfeit the interests of this defendant in said contract; that on said date there was due on account of the purchase price of said property to the said plaintiff as the owner of the said contract and as holder of the legal title to said real estate the sum of \$2433.38, and on the 10th day of December, 1936, this answering defendant tendered the said \$2433.38 to the plaintiff and demanded of the plaintiff that he perform said agreement by executing and delivering to this answering defend-

ant a good and sufficient deed of conveyance of the title of said property with an abstract of title thereto, and plaintiff refused to convey said title to this defendant.

Defendant further alleges that plaintiff, by acquiring title to said contract and electing to hold this defendant to the performance of the said contract and demanding payment of the balance of the purchase price of said property, plaintiff waived any right which he may have had (and this defendant denies that he had any legal rights in said matter) to have the conveyance of said property or the transfer of said contract set aside or annulled.

WHEREFORE this defendant prays that plaintiff take nothing as against it and that it have its costs herein expended.

J. D. SKEEN E. J. SKEEN

Attorneys for Answering Defendant

Duly verified. Filed May 14, 1937

[TITLE OF COURT AND CAUSE]

ANSWER

062 Leave of court being first had and obtained,
Comes now the Smith Land Company and
and makes answer to the Amended Complaint
herein as follows:

1. Admits that a judgment was entered against John W. Smith in favor of W. A. Nielson

Trans.

in the City Court for Brigham City of \$54.90.

2. Admits that a judgment was made and given in the District Court of the First Judicial District against John W. Smith in favor of Bertha K. Skeen in the sum of \$100.00, but denies that the said judgment was made and given on the 16th day of August, 1930, and alleges that said judgment was made long prior thereto and is barred by the provisions of Title 104 of the Revised Statutes of Utah, 1933.

3. Admits that a judgment was made and given in the District Court of the Third Judicial District against the defendant John W. Smith and in favor of W. A. Nielson on or about the 14th day of September, 1929.

4. Admits that after the entries of said judgments, an execution was issued upon one of the said judgments and delivered to the Sheriff of Box Elder County, State of Utah, with directions to make the same out of the property of the defendant John W. Smith, and admits that the Sheriff made return upon said execution to the effect that the defendant John W. Smith was not the owner of property subject to levy and sale, and further answering paragraph No. 4 of the said Amended Complaint, this defendant alleges:

That D. A. Skeen was the agent and attorney of the said W. A. Nielson and was authorized to initiate and to prosecute proceedings for the col-

Trans.

lection of the said judgments set out in paragraphs numbers 1 and 3, and as such agent and attorney, acted in all matters pertaining to the said judgments for the said W. A. Nielson, and further, the said D. A. Skeen is the husband of Bertha K. Skeen, and acted in all matters pertaining to the judgment alleged in paragraph number 2 of the said amended complaint as the agent and attorney for the said Bertha K. Skeen, and the said W. A. Nielson and Bertha K. Skeen and their successors in interest, are all alike chargeable with all of the acts of the said D. A. Skeen and all knowledge of facts acquired by the said D. A. Skeen are chargeable to the said W. A. Nielson and to Bertha K. Skeen and to their successors in interest; that the said D. A. Skeen, as such attorney and agent, caused an execution to be issued upon one of the said judgments and delivered to the Sheriff of Box Elder County, Utah, for service; that the said Sheriff, in the performance of his duties, made investigation of the property of John W. Smith, and made return on the said execution to the effect that the defendant John W. Smith was not the owner of property subject to the levy of an execution; that property owned by him was covered by mortgages and other liens, was exempt from execution under the provisions of the homestead law, and that any interest that the defendant John W.

Trans.

Smith had in or to said property has been sold or transferred prior to the return of said execution; that by said execution and return of the Sheriff, the said D. A. Skeen was fully informed of the organization of the answering defendant Smith Land Company and of the transfer of the property of John W. Smith to this defendant corporation, or acquired knowledge of facts which would have put an ordinarily prudent person upon inquiry, which, if followed up, would have resulted in a discovery of all of the facts pertaining to the transfer of the said property, and if any cause of action ever existed at any time, it is barred by the provisions of Title 104 of the Revised Statutes of Utah, 1933, Chapter 2, Section 24.

5. This answering defendant admits that the said John W. Smith, prior to the 1st day of October, 1930, was the owner of a contract to purchase lands described in paragraph No. 5 of the amended complaint; that the said John W. Smith held said land subject to the payment of installments of principal, interest, taxes and other conditions; that said contract was in default; that the said Smith was without means to pay the installments or the taxes and said contract was subject to forfeiture and in danger of being forfeited; that at said time there was residing with the said John W. Smith, a dependent daughter, F. Lincoln Smith, and her two minor children who were

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wholly dependent upon the said John W. Smith for the necessities and comforts of life, and any equity that the said Smith had in or to said land was then exempt as a homestead and not subject to execution or forced sale under the Constitution and laws of the State of Utah.

064 6. This answering defendant admits that the said John W. Smith was one of the organizers of this corporation; that he conveyed his interest in said land contract to said corporation and received stock therefor; that others, including J. Cameron Smith, transferred to this answering corporation a valuable tractor, valuable for use in the cultivation of the land covered by said contract, and shortly before this corporation was organized, the said J. Cameron Smith advanced to John W. Smith the sum of \$1000.00 to be used in payment of the installments upon said contract, and the said money so advanced by the said J. Cameron Smith was actually used in paying matured and delinquent installments upon said contract and the said J. Cameron Smith thereupon acquired an equitable interest in said contract. This answering defendant admits that its charter to be a corporation was at one time forfeited subject to reinstatement and alleges that it was duly reinstated and is a legal corporate entity and is authorized to do business under the laws of the State of Utah. Except as admitted or qualified,

this answering defendant denies the allegations of paragraph No. 6.

7. This answering defendant alleges that property described in the amended complaint herein was transferred to it in consideration of the issuance of stock as recited in the Articles of Incorporation; that the Articles of Incorporation were duly recorded in the office of the County Clerk for Box Elder County and in the office of the Secretary of State; that this corporation took possession of said land immediately upon its organization and the defendant John W. Smith has been upon said land only as the agent of this corporation since said date; that this corporation plowed said land with the tractor transferred to it by the said J. Cameron Smith, weeded and sowed said land, harvested all crops grown thereon, paid all expense incident to said work, paid all taxes levied upon and against said property, paid all installments on said contract to purchase, excepting the last installment, and has heretofore tendered payment thereof to the said W. A. Nielson as the successor in interest of the title to said property and the contract of the sale thereof to this corporation; that this corporation has at all times since its organization, to-wit: on or about the 1st day of October, 1930, been recognized by the owner of said contract and by all persons having any interest in said land or contract as the

Trans.

legal owner and holder thereof; that the plaintiff has lived in the immediate locality of said land at all times since 1930, has frequently been upon said land and has, on occasions, carried on extended conversations with the officers of said corporation, and was fully informed of all matters and things pertaining to the organization of this answering defendant and of the transaction of business by it as the owner of said contract, or if not, so fully informed of all facts, had such knowledge of facts as would have put an ordinarily prudent person upon inquiry, which, if followed up, would have resulted in the acquisition by the plaintiff of all facts pertaining to the transfer by the said John W. Smith to this answering defendant of the property described in the complaint, and if any cause of action against this defendant respecting said property ever existed, it is now barred by the Provisions of Title 104, Chapter 2, Section 24, Subdivision 3 of the Revised Statutes of Utah, 1933.

This answering defendant further alleges that during the time it has been the owner of said contract of purchase and possession of said land, it has transacted business as a separate legal entity, contracted debts, incurred obligations to its stockholders, all of which the plaintiff well knew or by exercise of reasonable diligence might have known, and plaintiff is now estopped by his acts and by

Trans.

long delay in asserting his rights if any he has from challenging the legality of the transfer of said property to this defendant.

WHEREFORE the defendant Smith Land Company prays that plaintiff take nothing as against it, and that it have its costs herein incurred.

J. D. SKEEN E. J. SKEEN

Attorneys for Defendant

SMITH LAND COMPANY

Duly verified Filed July 21, 1937

[TITLE OF COURT AND CAUSE]

REPLY

053 Comes now the plaintiff, W. A. Nielson, and by way of reply to the amended and supplemental answer of the defendant, Smith Land Company on file herein admits, denies and alleges as follows:

1. This plaintiff denies that he was fully informed of the organization of the said Smith Land Company, or of the status of said contract of sale as alleged in paragraph 2 of said amended and supplemental answer, and denies that he had any information that the defendant corporation was in possession of said land, and in that connection, this plaintiff alleges that he was not informed as to the organization of said Smith Land Company, or of the transfer to it of the property of the defendant, John W. Smith, had no notice thereof,

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and no knowledge or information with regard thereto whatsoever, until sometime during the spring or early summer of the year 1935, shortly prior to the filing of this action herein, and that upon securing such information, and upon learning of the incorporation of said company and the transfer of said property to it, this plaintiff immediately prepared and filed this action.

2. Plaintiff denies generally and specifically each and every other affirmative allegation in said amended and supplemental answer contained and the whole thereof.

IRVINE, SKEEN & THURMAN

Attorneys for Plaintiff

Duly verified. Filed June 22, 1937

PLEADINGS IN THE CASE OF SMITH LAND
COMPANY V. JOHNSON, ET AL., NO. 58486,
SALT LAKE COUNTY.

[TITLE OF COURT AND CAUSE]

COMPLAINT

Plaintiff complains of the defendants and for cause thereof alleges:

- 1 1. That the plaintiff is a corporation duly organized and existing under the laws of the State of Utah, with its principal place of business at Tremonton, Box Elder County, State of Utah; that the Farmers State Bank of Woodscross is a

Trans.

banking corporation duly organized under the laws of the State of Utah with its principal place of business at Woodscross, Davis County, State of Utah, and that at all times hereinafter mentioned, M. N. Johnson was Receiver of the Nielson-Burton Company, formerly a co-partnership composed of A. J. Nielson and Charles S. Burton.

2. That on the 23d day of November, 1926, at Salt Lake City, the defendant M. M. Johnson, as Receiver of Nielson-Burton Company, formerly a co-partnership composed of A. J. Nielson and Charles S. Burton, the latter now deceased, entered into a written agreement with one John W. Smith of Bluecreek, Utah, by the terms of which the said M. M. Johnson as Receiver agreed to sell and the said John W. Smith agreed to buy the following described real estate situated in the County of Box Elder, State of Utah, to-wit:

Lot 4 of Sec. 28, and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16, the said lots being the N $\frac{1}{2}$ and the SE $\frac{1}{4}$ of Sec. 33, Tp. 15 N. R. 5 W. S. L. M., containing in all 473.67 ac. more or less, together with 180 shares of the water stock of Pocatello Valley Pipe Line Company.

That by the terms of the said agreement the buyer agreed to pay to the seller the sum of \$10,118.78, payable in installments; that a copy of the said agreement is attached hereto marked Exhibit "A" and made a part of this complaint

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3. That pursuant to the terms of said contract, the said John W. Smith took possession of said land on the date of said agreement and prior to the 9th day of December, 1936, and said Smith and this plaintiff paid the entire purchase price of said land as specifically stated in said contract, excepting only the sum of \$2433.38; that after the execution of said agreement, the defendant M. M. Johnson as Receiver, sold and conveyed to the defendant Bank of Woodscross the real estate, which the said Johnson as such Receiver, had contracted to sell to the said Smith, and assigned to the said Bank of Woodscross all right, title and interest in and to said agreement, and thereafter, the said Bank of Woodscross sold and conveyed said land to the defendant Charles D. Moore, and assigned to him said contract of the sale thereof, and thereafter the said Charles D. Moore sold and conveyed said land to Wilse A. Nielson and assigned to him said contract, and the said defendants and each of them have at all times, while taking and transferring title to the said real estate, been fully informed of the rights of the said John W. Smith and his assignee in and to said land.

4. That on the 8th day of October, 1930, for a valuable consideration, the said John W. Smith assigned and transferred his interest in and to said real estate and the contract of sale thereof to this plaintiff, and plaintiff is the owner and

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holder thereof; that notice of said assignment was duly given to the said M. M. Johnson, Receiver, and to each successive owner of said real estate, and defendants herein named and each of the said defendants, excepting the defendant Wilse A. Nielson, assented to and approved of the assignment of said agreement; that the said plaintiff and its predecessor in interest, prior to the 9th day of December, 1936, paid the entire purchase price of said land, excepting the sum of \$2433.38, which payments were accepted as tendered by the owner of said real estate and said contract, and on the said 10th day of December, 1936, plaintiff tendered the said sum of \$2433.38 to the defendant Wilse A. Nielson and demanded the conveyance to it of the unencumbered legal title to said land, with Abstract of title in accordance with the terms and provisions of said agreement, and the said Defendant Wilse A. Nielson refused to accept the tender of the balance due upon said contract to-wit: the sum of \$2433.38, refused unconditionally to convey the legal title of said land to plaintiff; that plaintiff thereupon demanded performance of said agreement, but each of the said defendants, to-wit: M. M. Johnson, Receiver of the Nielson-Burton Company, Charles D. Moore, Farmers State Bank of Woodcross and Wilse A. Nielson, severally refused to perform said agreement by conveying said land in accordance with the terms

Trans.

of said agreement; that in order to protect its rights, under said agreement, plaintiff has been compelled to employ counsel to enforce the said agreement; it has been necessary for plaintiff to incur expense in attempting to procure title to said land to institute this proceeding for the enforcement of its rights under the said agreement, and has been deprived of the title to said land, all to its damage in the sum of \$1000.00.

Wherefore, plaintiff prays for a decree of this court requiring the defendants and each of them to specifically perform said agreement Exhibit "A" to this complaint, and to execute and deliver to the plaintiff a good and sufficient deed as provided in said agreement together with an abstract showing clear title in the grantor to the said premises.

Plaintiff prays for damages in the sum of \$1000.00 and for costs of this proceeding.

J. D. SKEEN, E. J. SKEEN

Attorneys for Plaintiff

Duly verified. Filed Jan. 12, 1937

(The provisions of the contract, Exhibit "A" to the complaint, are summarized in this abstract at page 36.)

[TITLE OF COURT AND CAUSE]

AMENDMENT TO COMPLAINT

Amendment to paragraph number 3 to be

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known as paragraph 3-A as to defendant, Charles D. Moore.

46 That on or about the 9th day of November, 1932, the defendant, Farmers State Bank of Woodscross, sold and assigned said contract, attached to the Complaint as Exhibit "A," to the defendant, Charles D. Moore, and on or about the said date, conveyed legal title to the land described in said complaint, to the said Charles D. Moore, and the said Charles L. Moore thereupon and in consideration of the payment to him of the sum of \$4000.00 on account of the purchase price of said real estate, with interest thereon at the rate of 8% per annum, in writing by numerous letters the exact dates of which are unknown, undertook and agreed to, and did, assume the contract, Exhibit "A," and by said contract, in turn, agreed to convey to plaintiff the legal title to said land, and to deliver to the plaintiff an abstract of title thereto. Plaintiff paid to the said Charles D. Moore the whole of the balance of the purchase price of said land, with interest, excepting only the sum of \$2433.88. The said defendant, Charles D. Moore, in violation of his agreement to convey said land to plaintiff, as aforesaid, on the 31st day of October, 1936, conveyed title to said land to the defendant, Wilse A. Nielsen. Before the institution of this suit plaintiff offered to pay to the said Charles D.

Trans.

Moore the balance of the purchase price of said land, to-wit: the sum of \$2433.88, and demanded performance of said agreement, and said defendant refused to perform the same for the reason that he had theretofore conveyed said land away and was unable to perform.

Amendment to paragraph number 4.

Plaintiff amends paragraph number 4 by striking out the following words, to-wit: "excepting the defendant, Wilse A. Nielsen."

WHEREFORE, plaintiff prays for general relief as against the said defendant, Charles D. Moore.

J. D. SKEEN, E. J. SKEEN

Attorneys for Plaintiff

Duly verified. Filed April 14, 1937

[TITLE OF COURT AND CAUSE]

AMENDED ANSWER OF WILSE A. NIELSON

43

Comes now Wilse A. Nielson, one of the defendants herein, and, by leave of Court, files this Amended Answer to conform to the proof submitted on the trial of the foregoing action and alleges as follows:

1. This defendant admits that at some time subsequent to the 23rd day of November, 1926, one John W. Smith held a contract with M. M. Johnson, as receiver in the Nielson-Burton Com-

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pany, by the terms of which the said John W. Smith had agreed to buy certain real estate, as specifically described in said contract.

2. This defendant further admits that the said John W. Smith received possession of certain land pursuant to the terms of said contract, and held the possession of the said land and still holds possession of the same.

3. This defendant denies generally and specifically each and every allegation in paragraphs 2 and 3 of said complaint, except as is hereinabove specifically admitted or qualified.

4. This defendant denies generally and specifically each and every allegation in said complaint contained, and the whole thereof, except as is hereinabove specifically admitted or qualified.

5. By way of further answer, this defendant alleges that at the time the above entitled action was filed, there was pending in the District Court of the First Judicial District in and for Box Elder County, an action in which Wilse A. Nielson was plaintiff, and the plaintiff herein, Smith Land Company, and John W. Smith and others were defendants, involving the title to the real estate and property described in plaintiff's complaint herein. That on and prior to the 11th day of July, 1935, John W. Smith was the owner of the property described in plaintiff's complaint.

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That on or about the 8th day of October, 1930, John W. Smith was insolvent and for the purpose of hindering, delaying and defrauding his creditors, caused a corporation to be formed as the plaintiff, Smith Land Company, and on or about said date transferred said property, and the whole thereof, to the said Smith Land Company, with said intent to hinder, delay and defraud his creditors. That the said transfer being in fraud of creditors, was void. That thereafter, on or about October 7, 1935, the said John W. Smith filed a voluntary petition in bankruptcy and was thereafter adjudicated a bankrupt, and on or about the 19th day of November, 1935, Albert S. Wheelwright was appointed trustee in bankruptcy of the said John W. Smith, a bankrupt. That thereafter, the said trustee duly qualified as such, and such proceedings were had that the said trustee duly sold, assigned and transferred the said property, and the whole thereof, as a part of the assets of the said bankrupt to one Aubrey F. Turley, which sale was duly confirmed by the Court, and a trustee's deed duly issued and delivered to the said Aubrey F. Turley, and the sale price of said property duly paid over to the said Albert S. Wheelwright, trustee in bankruptcy. That in said action, pending in the District Court of the First Judicial District, in and for Box Elder County, wherein Wilse A. Nielson was plaintiff and the

Trans.

Smith Land Company and others were defendants, and Albert S. Wheelwright, as trustee, was intervenor, it was determined, decided and adjudicated that the said alleged transfer relied upon herein as the basis of the plaintiff's claim, was in fraud of creditors and void, except as to the extent of such homestead right as was held by John W. Smith in said property at the time of the said attempted assignment and sale of said property to the plaintiff herein. That the said real estate was of a value in excess of the amount of any homestead rights of John W. Smith at the time such attempted transfer was made. That by reason of the said transfer being in fraud of creditors of the said John W. Smith, the plaintiff is not entitled to recover herein or to receive any conveyance to the said property, except to the extent of the homestead interest of John W. Smith in said property at the time of the said attempted transfer of the said property, and that only upon condition that the plaintiff first pay to the defendant, Wilse A. Nielson the balance of the purchase price specified in said contract to be paid, with legal interest thereon.

WHEREFORE, this defendant prays that the plaintiff take nothing by its complaint, that the complaint be dismissed, and that this defendant recover his costs herein incurred.

D. A. SKEEN
A. U. MINER

Attorneys for Defendant,
Wilse A. Nielson.

Duly verified. Filed March 2, 1939

[TITLE OF COURT AND CAUSE]

OBJECTIONS

95 Comes now the plaintiff and objects to the entry of an order by the above entitled court directing the Clerk of the District Court to deliver to the defendant Wilse A. Nielson the sum of \$2433.38, which is being held by the Clerk as a tender heretofore made by the Smith Land Company, upon the following grounds, to-wit:

That the said sum on deposit with the Clerk represents the full balance due upon a real estate contract originally made by John W. Smith and M. M. Johnson, receiver; that by the terms of said contract the Smith Land Company, as assignee of John W. Smith, is entitled to a good and sufficient warranty deed covering the land described therein upon payment of the balance due, and the plaintiff therefore objects to the payment of the money to the present holder of the contract, unless at the time said money is paid, a warranty deed covering said land is tendered to the plaintiff, and the other obligations of the seller under said contract are fully complied with

by the said Wilse A. Nielson or his predecessors in interest.

J. D. SKEEN, E. J. SKEEN
Attorneys for Plaintiff

Filed March 30, 1939

CONSOLIDATED BILL OF EXCEPTIONS

The consolidated cases were called for trial May 18, 1937, before the Honorable Lester A. Wade, Judge of the District Court for the Second Judicial District, LeRoy B. Young, A. U. Miner, and D. A. Skeen appearing for Wilse A. Nielson and for Albert S. Wheelwright, Trustee in Bankruptcy, Intervenor, J. D. Skeen and E. J. Skeen appearing for Smith Land Company, plaintiff in the Salt Lake County case and for the defendants Smith Land Company, et al., in the Box Elder County case.

MR. J. D. SKEEN: We will stipulate that they may be tried together.

MR. D. A. SKEEN: May the records show that Mr. Young is appearing for Albert S. Wheelwright, as Trustee, and for his successor.

MR. YOUNG: We have a purchasers deed which will be introduced here.

B.E. Mr. Young offered in evidence Articles of In-
5 corporation of Smith Land Company, also card record filed in Box Elder County showing charter forfeited on April 6, 1931 and reinstated the 9th day of October, 1935.

Trans.
B.E.

14 Stipulated that John W. Smith was adjudged
a voluntary bankrupt October 10, 1935.

Scheduled under A-3, Unsecured Claims, W. A. Nielson; When and where contracted: Brigham City, Utah, May 22, 1930. Judgment: City Court, \$54.90. Bertha K. Skeen, Ogden Utah: Judgment entered District Court, \$100.00. W. A. Nielson, Tremonton, Utah, Salt Lake County, September 29, 1929: Judgment entered District Court for \$1278.92. No other creditors listed.

Scheduled under B-2, Personal property: Library of 1200 books, valued at \$500.00. B-3, Choses in Action, Stocks: Scheduled 500 shares of the capital stock of Smith Land Company, pledged to Andrew Smith as security for payment of debt of \$900.00. Value, \$250.00. Policy of Insurance: Washington National Life Insurance Company of Chicago, \$1000.00, No value. Property claimed to be exempt; Private library,
B.E. \$500.00. Unsecured claims, \$1433.00. Books
16 valued \$500.00. Stocks \$250.00.

Trustee's Report and Petition filed February 24, 1936, offered and received in evidence. Truth of statements in petition not admitted.

B.E. Order of Referee, dated December 22, 1936,
17 received in evidence.

Petition for Confirmation of Sale in Bankruptcy Court received in evidence.

Order Confirming Sale to A. F. Turley and

Trans.

deeded March 9, 1937, signed by McConnell, Referee, received in evidence.

B.E. Copy of testimony of John W. Smith in Bankruptcy Court marked "Exhibit A." Plaintiff offered in evidence Trustee's Deed, "Exhibit B."
20 Ordered April 14, 1937.

B.E. S. A. MARBLE called as a witness.
23

Known John W. Smith five or six years. Farming Rock House Ranch. Witness testified that in 1930, reasonable rental value of land would be \$3.00 per acre. Passed his judgment upon an average of 20 bushel per acre each year upon the land and taking 1/3 of that to be \$3.00.

B.E. CROSS-EXAMINATION

28

B.E. Had seen a tractor there working since 1930, and had seen the same tractor in operation harvesting a crop. Had heard it said that Cam Smith harvested it. Knew Cam Smith at Tremonton.
29

JAMES ROBERTS called as a witness.

B.E. Had seen 480 acres of land and had seen John Smith around there. Had seen a tractor doing plowing and had seen horses on the ground. Before 1930, practically everything was done with horses. Tractors on the place since then.
31

Rented land during previous five years. Had

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given a third of the crop for the land. Figured
to a third of the crop at an average of 20 bushel
B.E. to the acre and at a price of from 70c to \$1.00,
33 would say \$2.50 an acre would be fair rental.

Had never farmed the land. Would not know
how much was grazing land or how much was
farm land. Had never inspected it to determine
B.E. the acreage of plowing. Had seen a tractor at
34 work on the ground since 1930.

RE-DIRECT EXAMINATION

Smith still living on the land to best of his
knowledge.

RE-CROSS-EXAMINATION

B.E. Had seen Smith at Rock House when witness
35 had been there.

WILSE A. NIELSON, plaintiff, testified as
follows:

B.E. He knew the Rock House property and John
37 W. Smith. Saw Smith plant crops. Saw Smith
around the place during harvesting. As far as he

B.E. knew conditions continued the same as always.
38 First learned about the Smith Land Company
about the time the complaints were filed. Had

B.E. judgments recorded and never got anything out
39 of them. Had made efforts to locate the property

B.E. belonging to John W. Smith. Learned that Smith
40 Land Company owned the land 1935.

“Q. Did you ever learn anything to the ef-

Trans.

fect that the Smith Land Company owned this land?"

"A. I did. It was about 1935, as I remember. It was the time this suit was filed. I was in there checking through some records on some land, and I saw that the property was in the name of the Smith Land Company which I supposed was John W. Smith's."

Had not known it before. Had not heard and did not know that Smith Land Company made any claim to the 480 acres of land. John W. Smith was former owner, buying it from C. D. Moore. Records showed the receiver for Nielson-Burton Company owned it.

"Q. Have you been familiar with this land during the last 15 years, and the way it has been operated out there?"

A. Yes, sir.

B.E. Am familiar with the rental value. Had rented
40 and leased land. Would say from \$3.00 to \$3.50 would be a reasonable rental, taking into consideration the rotation.

B.E. CROSS EXAMINATION

41 Did not see recorded copy of the contract from Johnson, Receiver to Smith on the records in the County Recorder's Office.

Q. What did you see there that put you on notice that this land had been transferred,—that the equity in it had been transferred?

Trans.

A. I think some of the land was listed in the Smith Land Company's name on the tax notices.

Q. It was listed that way on the tax notice?

A. That is the way I remember it.

Q. You learned that from the Treasurer's office, did you?

A. I think it would be either the Treasurer or the Recorder.

Q. Which office were you in when you learned that?

A. Well, I had been in several of them.

Q. Which office were you in when you learned that this property was transferred by John Smith to the Smith Land Company?

A. I think it was the County Treasurer's office.

Q. You think it was the County Treasurer's office?

A. Yes, sir.

Q. Did you then go to the County Recorder's office and find a recorded assignment of this contract from John W. Smith to the Smith Land Company?

A. No, I didn't go down there.

B.E. D. A. Skeen was his attorney in all suits
42 against John Smith. Conferred with Ben Spence
from time to time respecting collection of judgments and conferred with D. A. Skeen. Had

B.E. negotiations with C. D. Moore with respect to

the purchase of the land and contract.

Q. And during those negotiations I will ask you if you went into the question as to whether or not payments had been made on the contracts,—whether they had been kept alive?

A. Yes, sir.

B.E. 44 Some payments had been made, some were due and some were delinquent, and witness determined the amount of the delinquencies and the balance due on the contract. Moore had the credits on the contract and during the negotiations the matter of the Smith Land Company came up. Moore said they wanted to transfer the property to the Smith Land Company. Understood it had not been done. Did not know in 1935 that the contract had been transferred to the Smith Land Company.

Q. Well, then, what did you find out there in the Treasurer's office at Brigham?

A. That there was some property listed to Smith Land Company.

Q. Oh, that it was listed to the Smith Land Company?

A. Yes, sir.

Q. Was that the property that is described in these pleadings?

A. I wouldn't say that it was. It was other property that I was looking up.

Q. All you learned in Brigham was that

Trans.

there was such a concern as Smith Land Company and that it had land in Box Elder County?

B.E. A. Yes.

45

Q. Is that all you learned there?

A. Yes.

Q. And then you went straight-away and brought suit to set aside this conveyance, on that information?

A. In case they had conveyed any other land I had a judgment on.

Q. Well, didn't you go into the records and find out just what property had been transferred to the Smith Land Company, when you saw that tax record?

A. Not all of it, no.

Q. You brought this suit, then without making any further investigation?

A. Yes.

Q. Did you have your attorney investigate it?

A. I asked him to check up on it, yes.

Q. Had you asked him previously to check up on this land and levy on it and collect your judgment?

A. Yes.

Q. And when did you ask him to do that?

A. Oh, I would think about 1935. At the time this—

Q. Did you have your attorney check up on

this as early as 1930; during the year 1930?

A. Well, I wouldn't say as to that. I don't remember the year.

Q. Well, let me see,—you asked your attorney to check up and to collect this judgment for you right after you got it, didn't you?— Just as soon as the judgment matured?

A. I think that would be natural for a man to do.

Q. That would be natural, and that is what you did, isn't it?

A. I don't remember the date on it, but I know I have talked to him relative to the matter several times.

B.E. Q. You knew, did you not, Mr. Nielson, that
46 the only property John Smith had was this Rock House property, that he was purchasing on contract, didn't you?

A. That was not my understanding. He had other properties that I thought were his.

Q. He had other properties?

A. Yes.

Q. You knew he had that; you knew he had the contract?

A. On the Rock House property?

Q. Yes.

A. I knew that, yes.

Q. You were a party to selling him that back, were you not?

Trans.

A. No, I wasn't.

Q. Your father was, then—A. J. Nielson—
wasn't he?

A. I don't know as to that.

Q. You are right sure that you don't know
that?

A. I don't know that. My understanding
was that—

Q. As a matter of fact, didn't your father
claim a commission for selling that to Smith, and
then he transferred that commission contract to
you, and you sued on it, and that is the basis of
this judgment?

A. No, sir.

Q. You knew that? Your father claimed a
commission for selling this property to Smith?

A. No, sir, I didn't know that.

Q. That he was interested in it?

A. He had been interested in it with Nielson-
B.E. Burton, and then the next that I knew about it,
47 it was in the hands of the receivers. And their
dealings I didn't know anything about. I wasn't
interested.

Didn't know that the judgment for \$1200.00
was based on a transaction connected with the sale
to Smith of the Rock House property. Couldn't
B.E. say that the notes were connected with the orig-
48 inal Smith deal.

Q. Now, when you procured this judgment

Trans.

you had Ben Spence and D. A. Skeen check up to ascertain the status of Smith's property and to collect the judgment, did you not?

A. That is what they were hired for.

Q. Yes; and you went so far as to cause executions to be issued against Smith at that time?

A. Yes, sir.

Q. In 1930,—is that right?

A. Well, I wouldn't be sure as to the date, but it is about that time.

Q. About that time?

A. Yes, sir.

Q. And the executions were put in the hands of the Sheriff of Box Elder County,—and at that time you were living at Blue Creek, were you?

A. That is as I remember it.

Q. Did you have a talk with the Sheriff about selling the Smith property?

B.E. A. I don't think I did. I think I left that for
50 my attorneys to do.

Q. You left that for your attorneys?

A. Yes, sir.

Q. Do you know whether your attorneys gave directions to the Sheriff as to what property to sell—to levy upon?

A. I couldn't answer that, I am sure.

Q. Well, now, you lived in Blue Creek, and saw Smith on that property?

A. Yes, sir.

Trans.

Q. —Saw him farming it, plowing it, and harrowing it, and seeding and harvesting it. —Of course; you knew what Smith's property was, didn't you?

A. Yes; I knew the property was farmed.

Q. Yes,—and you knew that John Smith was taking off a wheat crop from year to year,—you saw him doing that, didn't you?

A. I saw him harvesting.

Q. You saw him harvesting—

A. I don't know that I ever saw him taking any wheat off.

Q. You saw him harvesting wheat, didn't you?

A. Wheat and weeds, yes, sir.

Q. And you knew he was not leaving it in
B.E. the field, didn't you?

51 A. I don't think he left it in the field.

Q. Then he would be taking it off?

A. Yes; but I didn't see him take it off.

Q. When you caused these executions to be issued and put in the hands of the Sheriff, did you inquire of the Sheriff or of D. A. Skeen or Ben Spence as to why they didn't levy on that land and upon the wheat crop that was being harvested?

A. I can't say that I did.

Q. Well, you wanted your money, didn't you?

Trans.

A. That is what I got the judgments for.

Q. Yes; and if you saw property there subject to execution and you directed your attorney to levy on it and sell it, and he didn't do it, you would make an inquiry, wouldn't you, as why he didn't do it?

A. Well, I think you would.

Q. You would naturally do that, wouldn't you?

A. Why certainly.

Q. Now, since I have suggested these conditions to you, do you remember of inquiring of the Sheriff or your attorney as to why the wheat and the land wasn't levied upon?

A. No, I don't.

Q. You don't remember specifically doing that?

A. No, I don't remember.

Q. But you think in all human probability, with the ground here and the land here and the judgment here and the execution here, and with your directions to your attorney to take one or the other or both and satisfy the judgment, that if he didn't do it you would naturally inquire as to why, wouldn't you?

A. I think a man would.

Q. Yes, of course you would. You knew Charlie Moore at that time, did you not, in 1930?

A. Yes, I knew Charlie.

Q. Did you talk to him occasionally?

A. Well, I would think I did.

Q. Yes. Charlie would go out there to Blue Creek once in a while to see how that contract was going on, did he not?—Didn't you see him out there?

A. No, I don't think I did.

Q. Did you know M. M. Johnson?

A. No, I didn't know Mr. Johnson.

Q. Don't know him personally?

A. No, sir.

Q. Where would you see Moore,—in Salt Lake or some other place?

A. I as I remember it, it would be in Salt Lake. I saw him occasionally down here.

Q. With this judgment, did you make inquiry to ascertain whether or not that contract was really worth levying on in 1930?

A. From whom?

Q. Of anybody? Did you ask Moore about it?

A. No, I didn't.

Q. Did you have your attorney inquire about it?

A. I think I talked to my attorney about it, yes.

Q. And did he or did some one tell you that the contract was far delinquent and that the taxes had not been paid for three or four years at the

Trans.

time the Smith Land Company took this contract over?

A. I don't think I had any information of that kind.

Q. Didn't you, in 1930, really consider that that contract wasn't worth saving; the balance due on it was so great and the taxes were so far delinquent, that there was no equity there to levy on?

A. No, I never felt that way about any of that property.

B.E. Q. You didn't feel that way about it?

53 A. No.

Q. Now, I want you to look at this paper, Exhibit One,—is that your signature at the bottom of the second page?

A. I think may be it was.

Q. That is your signature?

A. It looks like it; it could be.

Q. Do you know Frances Schluter?

A. The name sounds familiar, but I couldn't say that I know him.

Q. Do you know Vivian S. Fox?

A. Yes.

Q. Where is she employed?

A. I think, in Mr. Skeen's office.

Q. And Frances Schluter is a stenographer in his office too, isn't she?

Trans.

A. There is one there by that first name. I don't know what her last name is.

Q. Who drew this paper, Exhibit One?

A. Mr. Skeen, I think.

Q. D. A. Skeen?

A. Yes.

Q. Now, at the time that instrument was drawn you knew all about the original contract from Johnson, Receiver, to Smith, and assignment from Smith to Smith Land Company?

A. What is the date on that?

Q. Seventh of December, 1936, after this suit was filed; long after.

A. Yes.

Q. Fully informed of all that, were you?

A. Yes, sir.

Q. And you discussed it with your attorney, and then you decided to draw up this notice?

B.E. Witness saw tractor on the place. Passed it
54 on the road and saw a tractor plowing there. Knew it was supposed to be Cam's outfit. Someone told him it was Cam's tractor.

B.E. Took plow points to Jack Winn on the place
56 to be sharpened. Winn was working Cam Smith's shop on the place.

RE-DIRECT EXAMINATION

Bond on Appeal was given in Nielson vs. Smith.
Received in Evidence.

59 Remittitur, Supreme Court in Nielson, Respondent vs. Smith, No. 43064, received in evidence.

No collection on Judgments. Received contract and deed of property from C. D. Moore.

Exhibit C., offered and received in evidence, reads as follows:

“Blue Creek, Utah, November 29, 1932.
To Charles D. Moore.

In consideration of your acquiring title to the Box Elder Farm I am now purchasing under contract through M. M. Johnson, Receiver, and of purchasing the seller's equity in the contract of sale, assuming you are able to do so, I AGREE on behalf of myself, the Smith Land Company, and J. Cameron Smith, to make a new contract with ourselves as purchasers and you as seller, the total price to be Four thousand Dollars (\$4000.00), exclusive of taxes which may be due and owing and delinquent in favor of Box Elder County, which amount is to be paid One thousand dollars (\$1000.00) down, i. e., as of the date and on the same conditions as the old contract, and the remaining \$3000.00 to be paid One thousand dollars (\$1000) on December 15th, 1933, plus interest; \$1000.00 (One thousand Dollars) plus accrued interest on December 15th, 1934; and One thousand dollars (\$1000.00) plus accrued interest on December 15th, 1935. The interest rate is to be eight per cent (8%) per annum, and all other terms and conditions are to be the same as those embodied in the present contract.”

(Signed) “JOHN W. SMITH.”

Trans.

Witness received letter at the time he received the contract.

B.E.

RE-CROSS-EXAMINATION

61

Caused Exhibit 1 to be prepared, sworn to and mailed. Exhibit 1 is as follows:

NOTICE

“To John W. Smith and to Smith Land Company, a corporation, and to Albert S. Wheelwright, Trustee in bankruptcy of John W. Smith, Bankrupt:—

You are hereby notified that by reason of your default in the performance of the covenants and conditions of that certain contract entered into by and between M. M. Johnson, as receiver of Neilson-Burton Company and John W. Smith on the 23rd day of November, 1926, covering the following described property, located in Box Elder County, Utah:—

Lot 4 of Sec 28, and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16, the said lots being the N $\frac{1}{2}$ and the SE $\frac{1}{4}$ of Sec. 23, Tp. 15 N. R. 5 W. S. L. M. containing in all 473.67 acres, more or less, together with 180 shares of water stock of Pocatello Valley Pipe Line Company,

that the undersigned, as the present owner of said property, and of said contract and all rights acquired thereunder by the seller therein named, hereby gives you written

notice of such defaults and hereby makes demand for performance of the covenants set out in said contract to be performed by the purchaser therein named, the defaults being:

1. Failure to pay taxes on said property.
2. Failure to pay the purchase price specified in said contract to be paid within the time and in the manner specified in said contract as modified.
3. Failure to properly farm and cultivate the said land, and particularly to keep it free from noxious weeds, consisting of white top, and other weeds.
4. Failure to properly summer fallow fifty per cent of said land in accordance with the customary methods prevailing in that locality.
5. Failure to place and maintain fences and buildings in good condition.
6. Failure to carry proper insurance upon the crops as provided in said contract.
7. Failure to render to seller upon June 1st and September 15th of each year a written report of land planted to crop and the kind and/or amount of grain harvested therefrom, and your failure to hold the crops grown on said ground as security for the payment of the installments due under the terms of said contract.

Upon your failure to comply with the terms and the covenants and conditions set out in said contract within thirty days after

Trans.

this written notice of default and demand for performance, and to pay the cost and expenses of enforcing the said agreement, the undersigned, as present owner of said property and all rights of the seller in said contract named, will declare a forfeiture of all rights of the purchaser, and any successor to said purchaser, under the said agreement, and will take immediate possession of the said property and the whole thereof, and otherwise enforce all rights of the seller, or his assigns under the said contract.

Dated this 7th day of December, 1936.

(Signed) WILSE A. NIELSON''

Duly verified:

Received in evidence.

B.E.

A. F. TURLEY called as witness.

62

Same A. F. Turley was named in Trustee's Deed, Exhibit B. Exhibit B recites the filing of a voluntary petition in bankruptcy by John W. Smith; the adjudication; the appointment of Albert S. Wheelwright, Trustee; the order of Referee authorizing Trustee "to sell and convey all the right, claim and interest of the said bankrupt in and to the property hereinafter described"; that the sale was held and confirmed, and

"NOW, THEREFORE, KNOW YE that I, the said Albert S. Wheelwright, as trustee in bankruptcy of John W. Smith, bankrupt, by virtue of the power and authority in me vested, as aforesaid, and in consideration of the sum of Five hundred Dollars (\$500.00) to me in hand paid by the said Aubrey F. Turley, party of the second part, the receipt

whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Aubrey F. Turley, his heirs and assigns forever, all my right, title and interest in and to the following described property:

Lot 4 of Section 28, and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16, the said Lots being in the North half and the Southeast quarter of Section 33, Township 15 North, Range 5 West, containing in all 473.67 acres, more or less, together with 180 shares of water stock of Pocatello Valley Pipe Line Company.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, to have and to hold the said above granted premises with the appurtenances thereof, unto the said party of the second part, his heirs and assigns forever, to his or their own proper use and behoof as fully and absolutely as the said party of the first part can and ought to do pursuant to the Statute and his authority as aforesaid.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) ALBERT S. WHEELRIGHT
As Trustee in Bankruptcy of
the estate of John W. Smith

Signed, sealed and delivered in the presence of
C. V. ZINN (Signed)

Trans.

Duly acknowledged.”

Witness testified that he immediately paid to the Trustee the sum of \$500.00.

CROSS-EXAMINATION

65 Took a receipt for money paid. Did not get the money from D. A. Skeen or W. A. Nielson. Paid by check and had cancelled check at home. Did not have a deal with D. A. Skeen or W. A. Nielsen to repay the money if he did not get the property, but figured that if he did not get the property the bankruptcy court would pay back the money.

66 Had not examined the contract between Smith and Johnson. Did not know Charles Moore. Had not talked with anyone to ascertain what the balance due upon the contract for the purchase of the land was. Made the offer at the instance of Wheelwright. Talked with him personally. Wheelwright did not show him a copy of the contract. Did not tell him how much there is yet to be paid on the contract of purchase. Did not ascertain the amount of delinquent taxes before purchasing. Had previously talked with D. A. Skeen in Salt Lake. Was nothing said about recovery of the \$500.00 paid if he did not get the property. Paid the \$500.00 and got the receipt. That was all there was to it. Talked with W. A. Nielson.

Trans.

B.E. Nothing said about returning \$500.00 if he did
67 not get the property.

Was just taking a chance on getting his money back. Did not receive any contract at all from Wheelwright, and nothing except the receipt. Check given has been cashed.

B.E. STEPHEN S. CARTWRIGHT called as witness for plaintiff.
70

Opened an account at Walker Bank for A. S. Wheelwright, Trustee in Bankruptcy on May 14, 1937, and received from him two checks for the aggregate sum of \$500.00 for deposit.

B.E. J. CAMERON SMITH called as witness, testified as follows :
72

Son of John W. Smith. E. Lincoln, sister, married a man by name of Smith. Divorced. Resides at Bluecreek. C. Vivian Smith, sister, single, residing in Salt Lake. Polly Smith, wife, residing at Tremonton. Clarence F. Smith, brother of John W. Smith, lives at Garland. Max Gailey, brother-in-law, resides at Tremonton. Wife is sister of Polly Smith. E. Lincoln Smith resided with John W. Smith, her father, at Bluecreek. C. Vivian Smith is about 30 years of age, residing with her grandmother. Elida H. Smith, deceased, wife of John W. Smith.

B.E. Witness is Vice-President of Smith Land Company. Wife is secretary. Wife has been secre-

Trans.

75

tary three or four years. Smith Land Company has books. Has a minute book. Loose stock certificates. Have no other regular books. Never needed. Bank checks and statements principal books. Has thousand shares of stock in Smith

B.E.

77

Land Company. Helped on the ranch to pay for stock. Helped every year for seven or eight years. Mostly after 1930. Paid for stock because he put up money to Charley Moore in 1930, after the incorporation. Put up \$1061.00. Was blacksmithing at Tremonton. Paid the \$1061.00 to the Bank. Borrowed the money out of the Bank and gave it to Dad. Gave the checks to Dad and he went down and gave them to Moore. Think there were two Ogden State Bank Cashier's checks. Money was not put up to Smith Land Company and a check paid to Charley Moore. It was the fall of the incorporation of the Smith Land Company.

CROSS-EXAMINATION

Had a tractor at the time the Company was incorporated. Got it from Landis & Company. Described the tractor in the Articles of Incorporation. Transferred it to the Corporation. Paid \$1560.00 for it.

B.E.

80

Exhibit 2 offered and received in evidence. Exhibit 2 is as follows:

ASSIGNMENT

“In consideration of Ten Thousand (\$10,000.00) Dollars, the undersigned, joint and several owners of the property described in the Articles of Incorporation of the Smith Land Company and hereinafter described, hereby sell, assign and transfer to the Smith Land Company the following described real, personal and mixed property, to-wit:

A contract between M. M. Johnson, receiver, and John W. Smith, for the purchase of the following real estate:

Lot 4 of Section 28, and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16, the said lots being the North half ($N\frac{1}{2}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section 33, Township 15 N. Range 5 W., Salt Lake Meridian, containing in all 473.67 acres more or less, together with 180 shares of the water stock of Pocatello Valley Pipe Line Company.

Also an equity in the following:

Lot Four (4), Section Three (3); Lots One (1), Two (2), Three (3) and Four (4); the South half of the North-east quarter ($S\frac{1}{2}NE\frac{1}{4}$) and the South-east quarter of the Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of Section Four (4), Township Fourteen (14) North, Range Four (4) West; Lots One (1) and Two (2) of Section twenty-six (26) in Twp. Fifteen (15) North, Range Six (6) West of the Salt Lake Meridian, containing 319.72 acres.

Trans.

Also the following described personal property:

One Modern 15 Caterpillar tractor, #PV 4531, thirty (30 horses, four (4) mules and all wagons, plows, harrows, farming equipment, tools, grain harvested or to be harvested and every other species of property of every character located upon or used in connection with the land hereinabove first described.

The transefer of the above described property is subject to the payment of the indebtedness of John W. Smith upon the contract for the sale of the real estate first above described; also the indebtedness to the State Securities Bank of Brigham City, Utah, referred to in said articles of incorporation, and to the taxes levied upon or against said property for the year 1930.

And the said Smith Land Company by its duly authorized officers are, by this instrument, authorized to take and hold immediate and exclusive possession and control over said property.

IN WITNESS WHEREOF we have hereunto set our hands this 4 day of October, 1930.

(Signed) JOHN W. SMITH

B.E.

(Signed) J. CAMERON SMITH"

81

Duly Witnessed.

Tractor used at the Rock House place is the same tractor as described in Exhibit 2 and now at at the Rock House. Was used 1931 and each year thereafter. Witness ran the plowing all the time

Trans.
B.E. and then the harvesting was turned over to him
83 also.

RE-DIRECT EXAMINATION

Bought the Tractor about the time of the incorporation. Paid cash. Father did not help pay for it. Bought it from Landis & Company. Cut grain two or three weeks with tractor for others one year. Had a boy who changed off with him in running the tractor. Man changed off with him and he paid him. Company was supposed to pay him.
B.E. 84
85

RE-CROSS EXAMINATION

Run the tractor himself cutting hay and plowing. Ran it 24 hours a day and had a man who changed off with him. Plaintiff rests.

Whereupon defendants move for judgment of non-suit, as follows:

“MR. J. D. SKEEN: Your Honor, the defendants now move the Court for judgment of nonsuit, on the ground that the Plaintiff not only has failed to prove lack of consideration and fraud, but has proved affirmatively a consideration and has introduced no evidence whatsoever even tending to establish fraud, whereas in cases of this kind fraud must be shown by strong and convincing testimony; and on the further ground that it appears from the complaint that the cause of action arose on the 8th day of October, 1930,

Trans.

and, being predicated upon fraud, it is barred by the three-year statute of limitations. And upon the further ground that the party in interest elected to treat this contract as a contract that was assignable—as a valid, and subsisting, contract, and cannot now take the inconsistent position of asserting and maintaining it to be fraudulent. Even though fraudulent from the beginning, it would be made valid by a party dealing with the contract as though it were a valid and subsisting contract.

B.E. We have some authorities on this matter,
87 if your Honor would hear from me; but it seems to me a total absence of evidence even tending in a remote degree to show fraud.”

Wednesday, May 19, 1937. Plaintiff moved we open the case.

B.E. Counsel indicated they intended to file a reply
88 in the form of a general denial. Exhibit d, being a certified copy of the articles of incorporation, was offered and received in evidence.

B.E. Wilse A. Nielson recalled, testified:

89 Had known property in the vicinity of the land in question for twenty or thirty years. Farmed 2500 acres. 90% dry farm. Had bought and sold land. Had an opinion as to the fair cash market value of the land in question. Worth around \$30.00 an acre. Most of the 473 acres of land tillable. Grazing land worth \$5.00 per acre. Did not think Pocatello Pipe Line Stock had any value. Was not familiar with other property

Trans.

consisting of horses, mules, wagons, plows, etc. Knew all of the land in 1930 and had his attorneys Spence and D. A. Skeen investigate it. Knew of the land and the contract under which Smith was buying it in 1930. Did not recollect specifically telling his attorneys to levy on any certain property, but turned it (the judgment) over to

B.E. them to try to collect. Would say the property

94 was worth more in 1930 than in 1926. Thought it was worth more than \$10,118.00 in 1926. Had nothing to do with either of the checks paid Wheelwright by Turley. Bought the contract and deed from Moore together with a merger of interest such as would enable him "to collect my money." Would say that the Johnson, receiver, contract and the other land, the value of which is testified to, and the water, was of a value of

B.E. \$10,000.00. Would think it of a value in excess of

99 \$10,000.

John W. Smith testified that he was one of the defendants. Had $\frac{1}{3}$ interest in the Water Hollow Spring on October 9, 1930, for stock and domestic use, about five miles from the Johnson property and piped right to the property. There was no water in it on October 9, 1930. Good stream now. For ten years it ran a regular stream and for three or four it did not wet the soil. Quits running every year about winter. The water right cost witness \$1200.00. About

Trans.

B.E. 3 miles of pipe 3 and 4 inches, wood, in fairly
102 good condition.

30 head of horses, part work horses, part
range horses and colts. Worth \$30.00 or \$40.00
a head. Four small mules worth \$25.00 to \$30.00
each. Two or three plows and a harrow or two
and two harnesses and general tools. One plow
was a two-way plow, a gang plow and a sulky
B.E. plow worth \$50.00. Balance of equipment worth
103 \$100.00.

B.E. Grain had just been planted for the following
104 year on October 9.

D. A. Skeen testified that he was one of the
attorneys in the case and had to do with the ef-
forts to collect the judgments. Took transcript
of judgment, forwarded it to Brigham City and
either filed or assisted in filing the exceptions to
the sureties on the stay bond on appeal. That
was all that was done till after the appeal was
terminated in 1933.

Q. Did you make any investigation to ascer-
tain the condition of this particular property, as
to whether or not, in your opinion, a judgment
could be satisfied—did you make some investiga-
tion about it?

A. Yes; I talked to Mr. Moore sometime along
the line, and I think, in a word, said to him that
I was going to attach the wheat crop, and he
replied that—with the statement “you couldn’t

Trans.

do that," because he had a mortgage on it under the terms of his contract.

Q. On the wheat?

A. On the wheat.

Q. Then of course the interest was applied on the large judgment?

A. Yes, on the large judgment. And I think an execution was issued at my request on the other judgment, and returned unsatisfied. I don't recall now of anything further that was done with it.

Q. And did you know of the existence of an incorporation named The Smith Land Company, or of any purported assignments, until sometime later—I will put it this way: When did you first learn of that?

B.E. 107 A. The first that I knew of that, according to my present recollection, was in the spring or early summer of 1935.

Q. That was the first time you ever heard of it?

A. Yes. I think I looked at the records in Brigham City. That is my present recollection.

Q. And you communicated that fact to your client, Mr. Nielson, did you?

A. Yes. And later on I filed an action—we filed an action.

CROSS-EXAMINATION

Recollection was that he talked to Moore in

Trans.

1935. Did not think he talked with Moore before he had executions issued.

Q. You have in mind that immediately on the issuance of the judgments you cause executions to issue?

A. I think on the Brigham City Judgment, which represented damages for destruction.

Q. Never mind about what it represented; go ahead. Did you cause an execution to be issued on that?

A. Yes, I think I did.

Q. In 1930

A. Whatever the date of the judgment was.

Q. Would you say immediately after the issuance of the judgment?

A. Well, some time later.

Q. Would it be a week or month? Judgment was entered in May, of 1930?

A. Well, the record will show when I caused execution to issue. I don't recall now.

Q. Your recollection is that it was soon after the issuance of the judgments?

A. Soon after.

Did not recall talking to John Smith about the judgment. Smith never called at his office to talk about a plan to pay the judgment. Never talked with Smith about the organization of Smith Land Company, except during the examination in the Bankruptcy Court. Smith did not go to

Trans.

his office and talk about the organization of the Smith Land Company, and issuance of stock to pay his creditors. Did not know whether he talked with Spence about it. Did not go to the office and talk about the organization of the Smith Land

B.E. Company about the time of the organization.

109 Spence did not have charge of the judgments. Looked at the articles of incorporation at Brigham City. Did not see an assignment. Did not recall writing the Sheriff and telling him what to levy on. "Was in Brigham City on something else, and I imagine my attention was then called to the Smith Land Company in some way or such a name and I went and looked at it and found the articles there with the charter forfeited." Talked

B.E. with Spence about a matter of briefs in the Supreme Court.
111

JOHN W. SMITH, a witness for the defense, testified as follows:

Exhibit 3 offered and received in evidence. Exhibit 3 is a contract between M. M. Johnson, as Receiver of Nielson-Burton Company, a co-partnership, and John W. Smith, dated November 23, 1926, whereby M. M. Johnson contracts for sale to Smith 473.67 acres of land, together with 180 shares of the water stock of the Pocatello Pipe Line Company for a consideration of \$10,118.78, to be paid \$2000.00 on or before the 25th day of November, 1927 and \$2000.00 on or before the 25th

Trans.

day of November each and every year thereafter until the total consideration is paid with interest at the rate of 7% per annum. To secure payment of the purchase price payable in any particular year, the buyer mortgages all crops to the seller. The buyer agrees to pay all taxes accruing after the date of the contract, to insure the crops, to take immediate possession of the property and to repair all buildings and fences, plant the crops, to make application for a loan from the Federal Farm Loan Association, to report to the seller on the 1st day of June and the 15th day of September the amount of the lands that have been planted, the kind of crops harvested, and it is further agreed that:

“In the event the purchaser shall fail to make any of said payments, or to perform any of the covenants herein by him agreed to be performed within thirty (30) days after written notice of default and demand for performance of the covenant or covenants as to which it may be claimed he is in default shall have been served upon him by the seller personally, or in the manner provided by law for serving notices, or by letter addressed to him at Ridgedale, Idaho, the seller, at his option, may declare a forfeiture of all of the rights of the purchaser under this agreement, and the seller shall thereupon be released from all obligation in law and equity to convey the said property; and upon such forfeiture being declared all rights of the buyer hereunder, and all and any interest that he

may have in the said premises shall immediately cease and terminate, and the said buyer shall become at once a tenant at will of the seller, anything herein to the contrary notwithstanding, and the seller may keep and retain all payments theretofore made by the buyer on account of the purchase price as compensation for the use of the said property and as liquidated damages for the failure of the buyer to fully perform the contract of purchase on his part, and the seller may at his option re-enter and take possession of the said property, without legal process, as in his first and former estate, together with all improvements and additions made by the buyer thereon, including any and all crops growing upon said land at the time of the said election to terminate and forfeit the said contract, and the said additions and improvements and growing crops shall remain with the land and become the property of the seller. It is specifically agreed that time is of the essence of this agreement.

It is hereby mutually agreed that should the payments herein mentioned be made after their respective due dates in any amount and accepted by the seller, or should any covenant be performed by the buyer after the time or in a different manner than required, the acceptance of such payment or payments and/or the delayed, varied or partial performance of the said covenants shall not be construed to constitute a waiver on the part of the seller of any of the provisions of this agreement.

When the entire purchase price has been

Trans.

paid and all terms and conditions have been complied with, the seller, or his successors in interest, agrees to convey to the buyer all of his right, title and interest in and to the said premises by Receiver's deed free of encumbrances, except as above mentioned, and except as may be caused by or through the buyer, and to deliver abstract of title to date.

The buyer agrees to pay all costs and expenses that may arise from enforcing this agreement, including a reasonable attorney's fee of not exceeding \$500.00.

IN WITNESS WHEREOF, the parties hereto have signed their names the day and year first above written.

WITNESS:

CHAS. D. MOORE

(Signed) M. M. JOHNSON, as Receiver

Seller

(Signed) JOHN W. SMITH

Buyer

B.E. Lived in vicinity of property since 1924. Had
112 borought and sold land. The consideration stated
in the contract is a fair value of the land. Value
had not changed between 1926 and 1930. Asked
as to the status of the contract, Exhibit 3, at the
time of the organization of the Smith Land Com-
pany. Witness testified that there was a payment
falling due in November of \$2000.00 and interest,
and the contract carried a payment of \$2000.00 a
year principal with accrued interest and taxes.
The statement in the articles that the contract
was fully paid except the sum of \$2000.00 was

Trans.

B.E.

114

not accurate. It should have been \$2000.00 which fell due in November and other deferred payments on the contract not then due. Had no means of meeting payments when the corporation was organized. Had a conference with D. A. Skeen or Ben Spence or both of them and talked over the contract with them.

“Sometime early in October, after the corporation was formed, I went to D. A. Skeen’s office and told him what I had done and that I had reserved stock for the payment of creditors and asked him—”

Whereupon Mr. Young objected upon the ground of hearsay. Whereupon the following colloquy occurred in court:

“THE COURT: Is it your contention that Mr. Skeen wasn’t Mr. Nielson’s attorney at that time?

MR. YOUNG: He admits he was his attorney and had been getting these judgments.

THE COURT: Is it your contention that if he went in and told the attorney that the principal would not be bound by it?

B.E.

115

MR. YOUNG: That is my position. I appreciate there are certain facts that would bind a client. Whether this does after a judgment has been entered is a question on which I want to reserve my exception.”

Whereupon the witness continued:

Trans.

“A. I told D. A. Skeen I had organized the Smith Land Company and reserved a block of stock for creditors, and asked him if he would take some of that stock in satisfaction of these judgments.

Q. What, if anything, was said with respect to the transfer of the land to the Smith Land Company?

A. I told him that I had transferred these two contracts.

Q. That is, the M. M. Johnson, Receiver, contract,—and what other?

A. And the sales certificate from the State of Utah for a half-section over the mountain. And then I transferred all the equipment I had there on the place.

Q. What did D. A. Skeen say?

A. He says—after I got through with this he says, ‘We will take that matter up with Mr. Spence. Mr. Spence has that in charge.’

Q. Then what did you do?

A. He says,—‘Mr. Spence will be here this afternoon.’ Well, in the afternoon I met Mr. Spence.”

B.E.
116

Objection was made and overruled and the witness continued.

“A. I told Mr. Spence of my conversation with D. A. and what D. A. said; that I was to take it up with him, because he had that matter in

Trans.

charge, and I told him that we had organized Smith Land Company—we had reserved a block of stock for our creditors, and would he take a block of that stock in satisfaction of these judgments? and he said he would consider it and let me know. Well, three or four days, or possibly a week, after that, I went back to the office again, and found Mr. Spence and asked him if he had considered the proposition that I presented to him a few days before, and he said he had. And I says: ‘Well, what is your decision in the matter?’ He says,—‘Well, our people wouldn’t be interested.’ ”

Witness was withdrawn and Albert S. Wheelwright testified, as follows:

B.E. Trustee in Bankruptcy. Filed petition for au-
118 thority to sell interest of John Smith in the con-
tract. Offered it for sale. Talked with Turley,
who offered \$500.00. Did not have copy of the
contract I was selling. Had description of the
property. He gave two checks, one for \$300.00
and one for \$200.00. Witness gave Turley re-
ceipts for them. Held the checks from March 9
to March 14. Directed by his attorney, D. A.
B.E. Skeen, to keep the checks. Gave deed on May 14,
121 Exhibit B.

CROSS-EXAMINATION

Held the checks to see whether an appeal was going to be taken.

Trans.
B.E.

John W. Smith recalled.

122

Borrowed money from four or five banks and contracts. Borrowed from E. Lincoln Smith \$660.00, and from C. Vivian Smith \$480.00. They had homesteads and got the use of 320 acres of land each and got the grazing fees collected from the homesteads. Caused \$1700.00 par value stock to be issued to C. Vivian Smith. She gave use of the land and cash, and the continued use of the land to the Smith Land Company. For those things she got 1700 shares. One year Smith Land Company got 150 bushel of wheat and grazing fees around \$100.00 a section. \$50.00 ~~for~~ grazing fees and 150 bushels of wheat and 70 bushels another year off C. Vivian Smith's land and used it to seed Rock House. Got \$660.00 for the issuance to E. Lincoln Smith of 1500 shares. The grazing fees and the company got the continued use of the land. Got from J. Cameron Smith \$1000.00 in money, a tractor that cost \$1500.00 and Cameron's individual services on the place and in harvesting custom acreage.

B.E.

125

Polly Smith took care of two grandchildren left to him to take care of. Fed and clothed them for two or three years, and nursed his wife for four or five months. For the \$1000.00 Cameron Smith put up and the tractor he turned over to the company he got 1000 shares of stock issued to him. Asked as to the use of the term "John W. Smith, Trustee," the witness said:

“A. Well, I had creditors that I hoped to get to come in and help make this thing go. It was a dead and defunct business on my hands unless I could get help from some one.

Q. What did you mean by that, that you were unable to carry the contract?

A. Yes, sir; I couldn't make that \$2000.00 payment that was immediately due, and I couldn't make future payments. I knew that by experience I had had with past payments, because I had to borrow money to make them. I had lost credit at the bank. I went to six or eight banks to borrow money, and nobody would finance me. I went to my creditors who held judgments, and they wouldn't take the stuff. And so I had a thing that I couldn't make go unless I could get help, and I went to these parties and tried to get them to take this stock; so to try to clear this thing and I could meet the payments.

B.E. 126

Q. The question was as to why you had this issued to John W. Smith, as Trustee. What did you propose to do with it?

A. I proposed to pay these debts with it, and getting new money to go on with.

Q. Was it out of that stock you were offering to pay these judgments?

A. Yes, sir.

Q. And D. A. Skeen and Spence refused to accept?

Trans.

A. Yes, sir."

Witness thought \$10,000.00 was a fair value
B.E. of all the property turned over to the corpora-
127 tion.

Since organization, Smith Land Company has sold one section of land for \$3100.00. Soon after the Smith Land Company was incorporated it failed to pay the tax. Did not have any money. All taxes and accounts were in arrears. Were sued for gas and other things because it couldn't pay. All money it get hold of went to keep alive the contract. Subsequently the taxes were paid and the corporation reinstated.

"Every time I got a crop the whole thing was sold and went to Moore or Johnson or Nielson, and then I started out bare-handed and alone to make another crop."

Having reference to lien upon the crops pro-
B.E. duced. Whenever crop was sold the holder of the
129 contract claimed the proceeds. The right under the provision of the contract by the terms of which the crop was mortgaged was exercised from year to year. 1930 there was a maturing payment of \$2000.00 and he had no money to meet it and no money to plow and seed for the following year and it was then that Cam advanced the \$1000.00. After 1930 the corporation did business with Charles B. Moore. Check for \$770.00 was used to make a payment of a half section. Exhibit 4 is offered

Trans.

and received in evidence. Exhibit 4 comprises seven checks. One, February 2, 1931, M. M. Johnson, Receiver, \$300.00, Signed Smith Land Company by J. Cameron Smith; one December 19, 1934, \$300.00, payable to C. D. Moore, signed Smith Land Company by J. Cameron Smith; one December 30, 1930, for \$288.31, payable to M. M. Johnson, Receiver, signed Smith Land Company by J. Cameron Smith; one January 27, 1931 to Johnson, Receiver, for \$500.00, signed Smith Land Company by J. Cameron Smith; one May 10, 1935 to C. D. Moore, \$200.00, signed Smith Land Company by J. Cameron Smith; one February 25, 1935 for \$200.00 to C. D. Moore, signed Smith Land Smith by J. Cameron Smith. The money \$770.00 used for other purposes, signed Smith Land Company by J. Cameron Smith. The money was received from wheat raised on the place and from members of the family who put up money for it, and the company managed to plow and seed the land with the tractor and all of the plowing was done by the tractor. Witness Bl. 131 could not have plowed, seeded the land and made the payments on the contract after 1930. Max Gailey and Cam had lights on the plow and plowed all night and other men changed off with Cam at different times and Cam always harvested the crops. Since 1930 witness treated the Rock House as his home anytime he unlocked the door

Trans.

B.E. and went in, but he had another home 8 miles
133 distant, and received no compensation for his
B.E. work and had taken no part of the crops. Had his
135 necessary food. No regular income.

The last balance had with Mr. Moore on the contract was in 1935. Witness, being asked the circumstances under which he signed Exhibit C, said:

“A. We were discussing the payment due on the 26th of November, that year, and Moore said if we would consent to rewriting the contract that the payment could be cut in two and he would take half the payment, one thousand dollars and interest and taxes, and not two thousand. And after we talked it over I wrote the proposition—

Q. You made a memorandum, did you?

A. I took a lead pencil, and says: ‘Now, you state what you want and I will write it,’ and I wrote this, and then after I got it written I read it to him back, and he says: ‘Yes, that is it exactly,’ and he says: ‘I will have it put up; I will have my stenographer write it in type and we will sign it.’ This is what I wrote and what I
B.E. read back to him and what he said was the condi-
136 tions.’ ”

Witness referred to memorandum, Exhibit 5, which reads as follows:

“A. (reads) ‘One thousand dollars payment on old due date and condition.

Trans.

‘Due date December 15th. Thirty days grace after notice. Unpaid taxes at Brigham not in new amount due. New amount due after \$1000.00 paid, \$3000.00; payable in installments of \$1000.00 and accrued interest each year. Other conditions of contract identical. Sign as Smith Land Company, and John W. Smith and J. Cameron Smith sign personally. Rate of interest eight per cent.’ ”

B.E. Exhibit 5 offered and received in evidence.

137 After Exhibit C was signed, no new contract was written up.

Received Exhibit 1 through the mail at Ridgeway, Idaho. Exhibit 1 is the notice of intention to forfeit the contract, signed by W. A. Nielson. No controversy as to the amount due. Bought a cashier's check with money received from the sale of wheat by the Smith Land Company and with a check of his wife for \$1900.00 money borrowed

B.E. by the Smith Land Company. Cashier's check
139 for \$2343.00 was exhibited. Made payable to the order of Wilse A. Nielson, \$2343.00, drawn on Walker Bank & Trust Company. Took the check to a house at Simpson Avenue, supposed to be the residence of W. A. Nielson in Salt Lake City. Told Mother and Sister of Wilse A. Nielson that he had the check for him and asked him to accept it and was directed to take it to Dave Skeen, and after telephone call stated they would not accept the money. Then took the check to the office of

Trans.

D. A. Skeen and asked him to accept the check and he would not take it, then sent a registered letter to W. A. Nielson. Addressed to Tremonton. B.E.
140 The draft was left with Skeen & Skeen to be delivered to D. A. Skeen or W. A. Nielson. There-upon an offer was made to deliver the check upon an execution and delivery of a deed with an abstract showing clear title to the property. Exhibit 6 was identified as the notice sent out.

Exhibit 7 and 8 received in evidence. Exhibits 7 and 8 are notices of the tender of the balance due upon the contract. Mailed to W. A. Nielson at Tremonton.

Exhibit 9 was offered and received in evidence. Exhibit 9 is a pack of 27 letters addressed to the Smith Land Company on various dates B.E.
142 from November 28, 1930, and all demanding money.

We quote the letter of November 28, 1930 as a fair sample, as follows:

“Charles D. Moore, Attorney and Counselor at Law, 602-3 Boston Building, Wasatch 3811, Salt Lake City, Utah. November 28th 1930. To Mr. John W. Smith, Ridgedale, Idaho. Dear Sir:

On behalf of Mr. M. M. Johnson, I wish to notify you that an installment of \$2000.00 together with interest at the rate of 7% per annum from the 25th November 1929 on the unpaid balance of the purchase price became due on the 25th November of this year under your contract of November 23rd 1926 for the

purchase by you from him, as Receiver of Nielson-Burton of the lands in Sections 28 and 33 in Township 15 North, Range 5 West, in Box Elder County, Utah.

This demand is made by me for him to comply with the terms of the contract.

In view of the assignment by you to the Smith Land Company, I am sending a similar letter to it. I am also mailing a copy of both addressed jointly to you and the Company at Blue Creek.

B.E.
145

Very truly yours, Chas. D. Moore."

CROSS-EXAMINATION

Witness made payments of \$2000.00 per year, November 27, November 28, November 29, or \$6000.00 by November 1930. On face of contract reduced more than 50%. Did not pay the taxes. The taxes pile up as a new feature in the price of the contract. Three or four threats to cancel the contract prior to 1930. The letters complaining of being in arrears and in the nature of threats.

B.E.
148

Raised about 3000 bushels of wheat in 1930. Price was about 80c. had crop available for use less the cost. About the same expense in 1930 as 1929. 1930 wheat—\$2576.90 shown in a back entry. The harvesting cost \$625.00 and the marketing \$736.46. Taxes \$283.52. Left better than \$1000.00

B.E.
149

Kept records after 1930. Did not get the money used to pay the check for \$770.00 from

Trans.

the sale of wheat. Paid Johnson \$288.31, December 30, 1930. First payment made after the corporation was organized. Got it from the sale of wheat. Paid Johnson \$500.00 January 27, 1931, received from the sale of wheat. February 2, 1931, \$300.00 received from the sale of wheat.

The witness stated Johnson and Moore stopped payment on the checks from the Globe Milling Company for wheat and the Milling Company paid the wheat money direct to them, amounting to \$2800.00. Cam Smith paid \$1000.00 immediately after the incorporation of Company. Had the Security Savings Bank of Brigham City and the First National Bank of Brigham City as creditors when the company was organized. They held collateral and were paid off.

Had other creditors. Owed his mother for cash he got from her. \$1000.00. Owe Clarence Smith Seven Hundred odd dollars. Owed S. M. Smith, brother, and Andrew Smith, a son. Issued to J. Cameron Smith 1000 shares of stock; to C. Vivian Smith, 1700 shares for money borrowed and use of her homestead. Owed Cameron Smith for a tractor he put in and \$1000.00. Indebted E. Lincoln Smith \$600.00. Issued to her 1500 shares. Did not list other creditors in bankruptcy besides Nielson, and the only creditors who took stock for their claims were members of his family.

BENJAMIN SPENCE, a witness called by plaintiff, testified:

Thinks he met John W. Smith for the first time today. Had no memory of ever having seen Smith at any time prior, or remember of ever having a conversation with him respecting the Smith Land Company.

CROSS-EXAMINATION

Believes he appeared in the case of Nielson vs. Smith while with Irvine, Skeen and Thurman. Did not remember of ever having been in Court during the trial of a case. Did work for W. A. Nielson from time to time as attorney. Did not know of contract between M. M. Johnson and Smith. Knew only of contract in which Moore was acting as attorney through hearsay. Knew of the organization of the Smith Land Company only through hearsay. Had slight recollection of Smith Land Company. "But I have a recollection now of hearing of his (Smith) incorporating some land company or something and transferring his assets to that corporation." Could not say definitely that he heard it through D. A. Skeen or Wilse Nielson. "But inasmuch as I was connected with the case like I was, I would volunteer to say that that was where I heard it from—through a discussion of some of the facts in the case or through assisting at some time in the case,

Trans.

that information may have come to me through them.”

Left the office of Irvine, Skeen & Thurman about three years ago. Had nothing to do with Wilse Nielson or his litigation after the appeal was taken in that case, Nielson v. Smith. Did not know Johnson and had nothing to do with Moore. Best recollection that the information as to the incorporation of the Smith Land Company and transfer by Smith of his assets to it came through Mr. Nielson. Could not say when it was. He had nothing to do with it since the inception of the case except signing as attorney. That was all done around D. A. Skeen’s office. Any information he got was from that office and from interested parties.

B.E. 161

RE-DIRECT EXAMINATION

Talked to D. A. Skeen about this case within the last year. Did not state that he got that information around that office and before leaving there three or four years ago. Did not have anything to do with the case after he left the office three years ago. Did not remember of having said anything to Wilse Nielson about the case. Did work on the case, and in doing that discussed the facts with D. A. Skeen, and went into various matters affecting the collectibility of the judgment.

B.E. 165

John W. Smith recalled.

Trans.

Certificate No. 5 for 1000 shares of stock was issued to Polly Smith. 1 share to Max Gailey. 2000 shares issued to Smith. 1299 shares issued to witness as trustee. Was not intention to prevent creditors from taking property. Incorporated company to save the contract so the company would have something. Did not incorporate the company with the idea that in so doing could save the property and not permit creditors to get it, but to save the property so Smith Land Company would have something to meet its obligations. Figured the three judgment creditors would take stock and go along with the rest. Did not talk with Young until the incorporation was made. Supersedeas bond was put up and J. Cameron Smith and wife were bondsmen. Expected to reverse the case in the Supreme Court. Went to D. A. Skeen's office and tendered stock in payment of the judgment before the judgment was affirmed. Three years before it was affirmed. D. A. Skeen told him to talk with Spence.

B.E.

172

1500 shares of stock was issued to Hannah C. Smith out of the 2799. 500 shares issued to S. M. Smith, a brother. Was indebted to him. 799 shares was issued to Carolina Hansen, his mother-in-law, and pledged 1000 shares to son Andrew for a debt.

B.E.

174

Debts were evidenced by notes. Notes were not taken up when the stock was issued. Signed

Trans.

note to his mother six years ago before the incorporation. Signed note when he borrowed the money, \$1000.00. Used the money to pay M. M. Johnson. Had receipt showing payment in 27, 28 or 29. Thinks there was a credit on the note when the stock was delivered. Signed note to John Glen. Clarence, Cameron and witness signed it. Did not give daughters promissory notes. Borrowed money from E. Lincoln Smith while the Johnson contract was going on. Stock was to apply on what he owed her. Was not for the purpose of using her as a dummy.

Appeared before Referee in Bankruptcy and gave testimony. May never have mentioned before the referee the matter of having the grazing of the land as consideration for the stock. No mention was made of taxes in the letter from Moore in 1930. Four years of taxes accumulated and Moore paid them. Johnson paid the taxes for number of years then collected with 12% interest. \$2000.00 and interest was paid in 1930.

B.E. Moore does not say anything about taxes in the
180 letter. Called to the attention of witness four years later. On December 31, 1929 Moore wrote

B.E. calling attention to taxes. Total amount due in
181 1929, exclusive of taxes was \$2000.00 and \$428.00 interest.

Exhibit E was offered and received in evidence. Was better condition in 1930 than in 1929

Trans.

with respect to the amount due on the contract.

Plaintiff's Exhibit A was offered in evidence.

A copy of the stenographic record, which was taken at the hearing of John W. Smith, was received in evidence. Was immediately made general manager of the corporation. Authority never revoked. Minutes authorized John W. Smith and Cameron Smith to borrow \$1000.00. Meeting held December 9, 1936. Meeting held December 31, 1936.

B.E. Former Superintendent of Schools Salt Lake
185 County. Brought into court account book. Stack
of checks.

B.E. Plaintiff's Exhibit F, account book offered in
evidence.

186 Exhibit G. was offered in evidence.

Exhibit H was offered in evidence.

Had no election of directors. No stockholders' meeting since 1930.

RE-DIRECT EXAMINATION

B.E. Met Mr. Spence probably 1930 and had seen
187 him probably half a dozen times. Saw him twice
in D. A. Skeen's office with reference to this block
of stock that he wanted him to take. Qualification
of sureties was taken before Judge McKinney
and Mr. Spence was there.

Defendants offered in evidence the order of the court with respect to the certification of the sureties.

“In the District Court of the Third Judicial District, County of Salt Lake, State of Utah. W. A. Nielson, Plaintiff, against John W. Smith, Defendant. Entered Order. Case No. 43064, dated October 24, 1929. James W. McKinney. This matter comes now before the court for justification of sureties, Benjamin Spence appearing in behalf of the plaintiff and J. D. Skeen appearing in behalf of the defendant; whereupon Mrs. Alida H. Smith and J. Cameron Smith were sworn, and examined. The court being now sufficiently advised in the premises, It is Ordered that the bond, or undertaking, on appeal, be approved.”

Explained in detail his plan to D. A. Skeen, and at conclusion, probably 20 minutes or half an hour talk, he said, “Take the matter up with Spence, he has the matter in charge,” and then witness went to Spence, and Spence dismissed what he had to say after full explanation with remark, “I will consider it and let you know.”

Conversations had in D. A. Skeen's office in Walker Bank Building, Wanted them to suggest, did not offer a specific amount without asking him that they would be interested and take some. They would not take any of it. Corporation did not assume any debt due from witness to any creditor other than the debt on the contract. All other creditors took stock. Expected, if he could, to give his daughters something additional.

B.E.
189

Trans.

Brother agreed to pay the note they were all on when he gave them the stock. That was the reason they were not scheduled in bankruptcy.

RE-CROSS EXAMINATION

The debt to his son Andrew was outlawed and that is why he did not list it in bankruptcy. Attorneys did not advise him with respect to the distribution of his stock. Listing of 500 shares of stock as pledged to Andrew Smith instead of 1000 shares, was a mistake. Did not list his mother because she had taken stock. The pledging of the stock to his mother and Andrew have obliterated the debt.

RE-DIRECT EXAMINATION

Since the incorporation, the Smith Land Company has incurred other debts in addition to the debt on the contract. Taxes of various kinds. Owed the First National Bank of Brigham about \$400.00. Had done business with it since about 1930. Owed Mrs. Deakin \$1900.00. She has security.

RE-CROSS EXAMINATION

B.E. \$1900.00 is \$1900.00 brought in to tender Niel-
193 son.

Bank has chattel mortgage on crop.

J. Cameron Smith, witness for defendants,
testified:

Trans.

Shown Exhibit F, stated it contained an account of money loaned Smith Land Company by way of paying off bills. Have not been repaid operating expenses. Actually paid the cash out and had received no money in return.

Shown Exhibit 10, being two notes attached with a clip, one dated November 20, 1929 for \$550.00, and one dated February 3, 1930 for \$500.00; first signed J. W. Smith, J. Cameron Smith and the second signed J. Cameron Smith. Got the money from the bank and witness repaid it with check for \$1063.33. Check marked Exhibit 11.

Exhibit 11 offered and received in evidence. Never repaid money except by the issuance to him and his wife of the stock.

CROSS-EXAMINATION

B.E. Money was borrowed and sent down to Mr.
198 Moore by cashier's check. It was sent before the Smith Land Company was formed. Money was loaned to father before the corporation was organized. If had not helped out on the land he would not have had anything to make it. The corporation was formed and witness took 1000 shares of stock. It was my money that kept her going. That was what the money was borrowed for and sent down for. Expense account to Smith Land Company was my expense to the Smith

Land Company. Had slips at home from which the entries were copied.

Wilse A. Nielson, recalled.

B.E. 201 Testified he was not home when check for \$2433.38 was tendered. Had notice that the money was available.

Reconvened at Brigham City January 3, 1938.

B.E. 211 Stipulated that judgment in Bertha Skeen against John W. Smith case, No. 4171, is dated May 26, 1928 and filed May 29, 1928. Defendants offered in evidence execution issued out of the District Court on the 16th day of August, 1930, with the precipe and the Sheriff's return and with correspondence attached thereto, beginning with a letter dated April 15, 1930; the injunctive order and letter of D. A. Skeen, dated April 30, 1930; the cost bill and letter dated April 6, 1930; the execution, Exhibit A attached to Sheriff's return of the execution. Objection by plaintiff as incompetent, irrelevant and immaterial.

JOHN H. ZUNDEL called as witness, testified:

Sheriff of Box Elder County. Joseph R. Olsen was deputy, now deceased. Upon execution in case of Bertha K. Skeen against John W. Smith, with Exhibits, testified that Mr. Olsen handled the matter. After Olsen's death, in going through files found a partial return that Mr. Olsen made out and witness just completed the return and

Trans.

signed his name to it. Exhibit A, purporting to be a letter from J. D. Skeen to himself, was one of the papers attached to the return. It is Mr. Olsen's writing. Received in evidence.

B.E.
213

CROSS-EXAMINATION

Exhibit A was attached to the execution and there was also attached a precipe. All were attached together and found in the office. Found them in a basket of unsigned papers. They were private papers. Had not handled them himself. Did not know anything about it until June, 1937.

B.E.
216

RE-DIRECT EXAMINATION

If any interested party had called at the office for the papers they could have had them.

Exhibit A attached to the return was read in evidence as follows:

“Mr. John H. Zundel,
Sheriff

Dear Sir:—

John W. Smith has requested me to advise you that he has no money or property out of which the execution you hold against him might be satisfied. The property he occupy was purchased on contract and title reserved to both the land and the crops, any equity he might have had was sold some time ago.

B.E.
218

Respectfully,
J. D. Skeen.”

"MR. YOUNG: Did you write this yourself?

MR. J. D. SKEEN: No, I went to the Sheriff and asked for a return, for that return.

MR. YOUNG: This is evidently yours.

MR. J. D. SKEEN: That is a copy of what I wrote to him.

MR. YOUNG: You don't have the original or any copies in your own office, do you, Mr. Skeen?

MR. J. D. SKEEN: The file in this matter I have looked for but was unable to find."

Stipulated that no execution was issued in the other cases. Report from the Treasurer of taxes subject to objection as to the materiality was read into the evidence upon stipulation.

Taxes, 1926 to 1928, amounting to \$357.92 paid by M. M. Johnson. Taxes, 1929, amounting to \$123.39 paid by Columbia Trust Company, Treasurer supposes. Taxes, 1930 to 1933, amounting to \$539.77 paid by Charles D. Moore. Taxes since
B.E. 221 1934, amounting to \$387.40 not paid.

John W. Smith further testified, as follows:

Lived at Rock House in 1930. Daughter Edna and two children with him. She was divorced. Children are of the ages of six and nine. Daughter had no other home and no means of support and nothing except homestead, entry previously referred to. Did not know where divorced husband lived and he did not provide anything for

Trans.

her support. Had had the daughter and her two children since the youngest child was 1½ years old. She would go out to work at times and then return. When she was out to work witness took care of the children and provided for them. Daughter and children had no other person to provide for them. Daughter's husband prevailed upon her and the children to live with witness on premises to get work and support her and the children, but they never heard from him again.

B.E.
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CROSS-EXAMINATION

Children are now in Salt Lake living with their mother. Have been there for three years. Left when she married again about three years ago. While living with him, she did the house work, and got board for herself and children. Lived together.

B.E.
226

CROSS-EXAMINATION, continued

Married since the death of his former wife, on the 8th of December, four years before. She has considerable property and he lives part of the time with her and part of the time at the Rock House.

B.E.
228

CHARLES ROBERTS, being sworn, testified:

Lived in Blue Creek during summer about 24 years. Bought and sold property. Knows of the Rock House property. Passed the property some-

Trans.

times. Knows that the Rock House property was worth about \$20.00 per acre in October, 1930.

CROSS-EXAMINATION

Was appraised at \$20.00 an acre seven years ago. About the same as he paid for land in 1926. Knew of no sales in 1920. May have been land sold for \$30.00 or \$40.00 an acre, did not know.

JOHN W. SMITH, CROSS-EXAMINATION continued:

E. Lincoln Smith was one of the incorporators of the company. There was set apart to her 1500 shares of stock. Stock never produced any dividends.

Articles of Incorporation received in evidence.

Daughter homesteaded a section of grazing land in that locality and never received anything she could use to support herself and children. Took stock for the money she had previously given witness and the use of her land. Lost the homestead when the Smith Land Company purchased it at tax sale. For a series of years grazing land had no value.

B.E.
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ERNEST FREEMAN testified:

Represents the Federal Land Bank and Deputy Assessor in Box Elder County. Knew of the Rock House property for 15 years. Had an opinion as to its value in October, 1930. Of a value

Trans.

B.E. in the vicinity of \$20 an acre for farm land. Sage
239 brush land from \$5.00 to \$10 an acre.

CROSS-EXAMINATION

Would not change opinion if it should appear that land had sold from \$30 to \$40 an acre (because sales are funny things).

A. F. TURLEY called and testified:

That he was familiar with land in that country. Had an opinion as to the value of the land in question. Thinks land in Pocatello valley was worth \$30 an acre at that time, which would include this land.

CROSS-EXAMINATION

He is the fellow who purchased the property from Wheelwright, and who gave him \$500.00 for it.

“Q. And you think that is the fair value of the land?

A. Well, I know it is worth more than that.

Q. Then what did you figure that \$500.00 was
B.E. the fair value for, the lawsuit?
244

A. No.

Considered \$500 as purchasing Smith's equity in the Rock House property and knew he was owing \$2400.00 on the purchase price. Did not
B.E. agree to pay Nielson's judgment in addition to
246 the \$500.

W. A. NIELSON recalled.

Testified property was worth approximately \$30.00 an acre in 1930.

CROSS-EXAMINATION

B.E. Did not know his father and C. S. Burton sold
249 the land for \$20 an acre.

D. A. SKEEN recalled and testified for plaintiff.

Having his attention called to Case No. 4171, Bertha K. Skeen against John W. Smith, and return of execution with Exhibit A, a letter bearing the name of J. D. Skeen, testified had never heard of this.

“Q. And did you ever talk to either Joseph R. Olson, deputy sheriff of Box Elder County, or any other person purporting to represent the Sheriff’s office of Box Elder County, relative to this execution or what disposition had ever been made of it?

A. I don’t recall that I ever talked to them or had any information with respect to it. I am certain, however, that I never saw or heard of this letter, Exhibit A, or any amended return prior to seeing it in court this morning.”

CROSS-EXAMINATION

Drew the original complaint against Smith in this particular action and signed as attorney and notary. Attention called by question to the allegation of the complaint that execution was issued,

Trans.

B.E.

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delivered to the Sheriff of Box Elder County and executions were returned wholly unsatisfied.

Testified:

“A. Well, I am not just sure how many executions were issued, but I think one was issued out of the City Court, but I am not sure as to that.

Q. Now, you have said here this morning and stipulated that your counsel participated in this and stipulated that no executions were issued?

A. I say, I am not sure as to that.

Q. Do you want to withdraw your stipulation?

A. I made no stipulation. I heard the comments with respect to it here.

B.E. Q. Was execution issued out of the judgment
in Salt Lake?

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A. I think not.”

“Q. You drew this complaint and you swore Nielson to it; also executions were issued?

A. Well, I say, I would have to refer to the record now, after seven years' time. I don't recollect all the details of it. Execution was issued in this case.

Q. Yes. The return on the execution in that case, or information that you got from Nielson, you made the basis of this allegation that the executions had been returned by the Sheriff unsatisfied?

A. Well, I don't know that I got any infor-

mation from Mr. Nielson. I know that he never called my attention to this letter. The judgment out of Salt Lake County was docketed in this county, but whether an execution issued on that I can't tell you this minute. I know I was endeavoring to collect the judgment.

Q. Well, we will go back.—You swore Nielson to the fact that execution was issued. Now you have stipulated that execution was not issued in two of the cases, and that the Sheriff had made his return 'wholly unsatisfied.' Now, I will ask you again, where did you get your information to that effect, that the execution was unsatisfied, if you didn't get it from the Sheriff or his deputy?

A. I knew that the Sheriff never had returned any money and produced or made anything out of the execution.

Q. Who told you that?

A. Well, my files, they would show that.

B.E. Q. Did the Sheriff tell you that?

253 A. I don't recall ever talking to the Sheriff."

Prepared the complaint in the Wheelwright Intervention and signed it as attorney. Drew the amended complaint which he presumed contained the same allegations that executions were returned unsatisfied.

B.E. 255

"Q. Where did you get that information when you drew this amended complaint and he denied that the Sheriff had made that return?

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A. That is the impression I had.

Q. And you drew all these papers on impressions?

A. The records were all here in Box Elder County, and I haven't checked everything in the City Court proceedings. If you say they don't show return and execution, I suppose that is the situation."

B.E. Original files in case of W. A. Nielson, plaintiff, against John W. Smith, defendant, No. 5535, filed August 28, 1937, offered and received in evidence as an exhibit.
259

Decree in Bertha K. Skeen against John W. Smith, dated 26th day of May, 1928, filed.

Copy of letter received in evidence. Letter-head: IRVINE, SKEEN & THURMAN. Addressed: P. RUSSELL WIGHT.

"Dear Mr. Wight:—

I have sent an affidavit and an order to Judge Harris at Logan to be presented to him tonight or in the morning, and am asking that it be sent back to you by Special Delivery.

I enclose my check for \$2.50 for issuing it, and wish that you would issue it immediately upon its receipt and then if you will kindly hand it to Sheriff Zundell, he will arrange to go out and serve it at once.

I wish to thank you in advance for this courtesy, and ask that you kindly mail me

Trans.

receipt and advise the return date fixed by the Judge.

B.E.
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Sincerely yours,
(Signed) D. A. Sken''

Letter to Russel Wight, Re: Skeen vs. Smith,
as follows:

“Dear Sirs:

I am enclosing affidavit and order that just reached me special delivery.

The affidavit fails to allege that the remittitur from the supreme court has been filed and you should not enter this Order until the remittitur has been filed.

I have written to the attorneys that I have signed the order and mailed to you to save delay but have asked you not to enter the order or file the affidavit until the remittitur has been filed. I suggest you do not file the affidavit until you receive further word from them since they may wish to amend it to show the filing of the remittitur. This can better be done before filing.

B.E.
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With kind personal regards, I am,
Yours truly,
(Signed) M. C. Harris.”

And order of the District Court, Box Elder County, Bertha K. Skeen vs. John W. Smith and Elida H. Smith:

“It appearing to the Court from the affidavit filed herein that in the above entitled action the court has heretofore entered a judgment awarding plaintiff the following described property:

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All of Lots 11, 12, 13, and 14, Section 33, Township 15 North, Range 5 West, Salt Lake Meridian, situate in Box Elder County, Utah;

that the said judgment so entered has been affirmed by the Supreme Court of the State of Utah, and that defendants John W. Smith and Elida H. Smith are interfering with plaintiff's possession of said property and by means of threats and intimidation toward plaintiff's agents, are preventing plaintiff and her agents from entering upon the said property, all in violation of said decree and the order of this court, and while so entering upon said property, in violation of the decree and order of this court, the said John W. Smith damaged and destroyed property of the plaintiff.

NOW, THEREFORE, IT IS ORDERED that John W. Smith and Elida H. Smith be and they hereby are enjoined and restrained from entering upon or into possession of the said property hereinabove described or any part thereof, or from interfering with the sole and exclusive possession of said property by plaintiff, or her agent, and it is further ordered that the said John W. Smith and Elida H. Smith be and appear before this Court on the day of April, 1930, at o'clock M., to show cause if any they have why they should not be punished for contempt of court.

B.E.
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Dated April 16th, 1930.

(Signed) M. C. HARRIS, Judge."

Letter from D. A. Skeen to P. Russell Wight,

Apr. 30, 1930:

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“Dear Mr. Wight:

I am enclosing remittitur in the case of Bertha K. Skeen vs. J. W. Smith and Elida H. Smith, together with my check for \$1.50 to cover the filing fee on the same.

Will you kindly file this remittitur?

I sent to Judge Harris an affidavit for an order to show cause and order in this case, and he stated that he had signed the order and had directed that the affidavit be not filed until the remittitur came down. I am advised that Smith has surrendered now, so that it will not be necessary to file these papers and I suggest that you simply hold them among the papers as unfiled or destroy them and return to me my check for \$2.50.

I will send on the cost bill just as soon as I am advised that the remittitur has been filed.

B.E.
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Yours very truly,
(Signed) D. A. Skeen”

Letter from Clerk to Irvine, Skeen & Thurman, Attention Mr. D. A. Skeen, May 1, 1930:

“Gentlemen:

Receipt is acknowledged of remittitur in the case of Bertha K. Skeen vs. J. W. Smith and Elida H. Smith, together with your check for \$1.50.

The remittitur is being filed as of May 1st.

We are returning to you herewith your check in the amount of \$2.50 dated April 16 and No. 2089. Also, affidavit of D. A. Skeen which accompanied your check.

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Respectfully,
County Clerk.”

Trans.

Praeipie in the District Court for Box Elder County, Bertha K. Skeen vs. John W. Smith and Elida H. Smith:

“To the Clerk of the Above Named Court:

You will please issue execution in the above entitled case against the defendants on the judgment entered herein for costs in the amount of \$100.00.

Attorney for plaintiff
(Signed) Benjamin Spence”

(Marked on Back: No. 4171-60

“Title of this court and this cause.)

B.E. 272 ‘Praeipie for Execution. Filed August 16, 1930. P. Russell Wight, Clerk, by Louis Ingram, Deputy Clerk.’”

Execution in the District Court for Box Elder County, Bertha K. Skeen vs. John W. Smith and Elida H. Smith:

“THE STATE OF UTAH SENDS GREET-
ING:

TO THE SHERIFF OF BOX ELDER
COUNTY:

WHEREAS, ON THE 26TH DAY OF May, A. D. 1928, BERTHA K. SKEEN, as Plaintiff, recovered a judgment in the District Court First Judicial District, County of Box Elder of the State of Utah against John W. Smith and Elida H. Smith, his wife, as Defendants, for the sum of One Hundred and no/100 (\$100.00) costs Dollars in—together with \$—— cost and disbursements at the date of said judgment, and accruing costs as appears to us of record.

AND WHEREAS, the said judgment was docketed in the office of the Clerk of the District Court of the First Judicial District of the State of Utah, in and for the County of Box Elder, on the 16th day of August, 1930, and the sum of One hundred and no/100 (\$100.00) Costs DOLLARS with interest at the rate of 8 per cent per annum and the cost of suit taxes thereon at DOLLARS is now at the date of this writ, actually due on said judgment.

Now, you, the said Sheriff in and for Box Elder County, are hereby required to make the said sums due on said judgment with interest as aforesaid, and costs and accruing costs to satisfy the judgment in full out of the personal property of said debtor, or if sufficient personal property of said debtor cannot be found, then out of the real property in your jurisdiction belonging to him on the day whereon said judgment was docketed in the said Court, or any time thereafter, and make return of this writ within 60 days after your receipt thereof, with what you have done endorsed thereon.

WITNESS, Hon. Melvin C. Harris, Judge of the District Court of the First Judicial District of the State of Utah, in and for the County of Box Elder, with the seal thereof affixed this 16th day of August, A. D. 1930.

(Signed) P. Russell Wight, Clerk,
By (Signed) Louise Ingram, Deputy.
(COURT SEAL.)

(Marked on back: 'Accrued Costs, \$1.00')''

Letter, Exhibit A, attached to Execution, from
J. D. Skeen to John H. Zundel, Sheriff:

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“Dear Sir:

John W. Smith has requested me to advise you that he has no money or property out of which the execution you hold against him **might be satisfied**. The property he occupy **was purchased on contract and title reserved** to both the land and the crops, any equity he might have had was sold some time ago.

B.E.
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Respectfully,

J. D. Skeen,”

Praeipie in the District Court for Box Elder County, Bertha K. Skeen vs. John W. Smith and Elida H. Smith:

“TO THE SHERIFF OF BOX ELDER COUNTY:

You will please proceed to levy upon any property, either real or personal, which you may locate belonging to defendants in Box Elder County, State of Utah, and advertise the same for sale pursuant to the execution and levy as soon as you may do so.

B.E.
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(Signed) D. A. SKEEN,
Attorney for Plaintiff”

Sheriff's Return: State of Utah, County of Box Elder, SS:

“I, John H. Zundel, Sheriff of the County of Box Elder, State of Utah, do hereby certify and return, that I received the within and hereunto annexed writ of execution, on the 26th day of September, 1930, and that by virtue of the same I have made demand upon the within named defendant John W. Smith, for the payment of the within judgment, with interest and costs, all as more fully appears

in the within writ of execution, the defendant stated then and there if I would call J. D. Skeen he would take care of the within judgment as he had the money to pay said judgment. I did take the matter with J. D. Skeen, and on or about the 7th day of November, 1930, I received a letter from said J. D. Skeen, a copy of said letter is hereto attached and marked exhibit 'A' and made part of this return.

I do further certify and return that I have made due and diligent search and inquiry within my jurisdiction and have been unable to find any property belonging to the within named defendant, but what is mortgaged or exempt from execution, upon which to levy in satisfaction of the within writ.

I therefor return the within writ unsatisfied.

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Dated at Brigham City, Utah, this 3rd day of December, 1930.

John H. Zundel,
Sheriff of Box Elder County, Utah
By

Deputy

Sheriff's Return, State of Utah, County of Box Elder, SS:

"I, John H. Zundel, Sheriff of Box Elder County, State of Utah, do hereby certify and return, that I received the hereunto attached execution on the 26th day of September, 1930, and that the same was handled by Deputy Sheriff Joseph R. Olsen, now deceased; that he made a return on the said execution as unsatisfied.

Dated this 26th day of June, 1937.

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(Signed) JOHN H. ZUNDEL,
Sheriff, Box Elder County, Utah
(Marked on Back: 'No. 4171-61' (Title of
this court and cause.) 'Execution on Return.
Filed June 26, 1937. C. Henry Nielsen, Clerk,
By Lysle Richardson, Deputy. Recorded, ex-
ecution Book 4, Page 537.')

B.F.
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[TITLE OF COURT AND CAUSE]

ORDER

092 It appearing to the Court from the evidence presented herein that since the filing of the above entitled action and the intervention hereon of Albert S. Wheelwright, Trustee in Bankruptcy of John W. Smith, a bankrupt, the right, title and interest of the said Albert S. Wheelwright as Trustee in Bankruptcy of John W. Smith, a bankrupt, has been assigned, transferred and passed to Aubrey F. Turley.

IT IS NOW THEREFORE ORDERED that Aubrey F. Turley be and he hereby is substituted herein for Albert S. Wheelwright, Trustee in Bankruptcy of John W. Smith, a bankrupt, and as such substitute is hereby made a party to this action with all rights and liabilities accruing to him as such substituted party.

Dated this 4th day of February, 1939.

Lester A. Wade
JUDGE

Filed April 4, 1939.

[TITLE OF COURT AND CAUSE]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

094 This cause came on regularly for trial before the Honorable Lester A. Wade, sitting in the above entitled court at Salt Lake City, as judge thereof, pursuant to written stipulation of the parties filed herein for the trial of the said cause before the said judge at Salt Lake City, Utah, on the 18th day of May, 1937, on the plaintiff's complaint as amended and the answers of the defendants as amended and the complaint in intervention of Albert S. Wheelwright, Trustee in Bankruptcy of John W. Smith, bankrupt, LeRoy B. Young, A. U. Miner and D. A. Skeen appearing as attorneys for the plaintiff and for Albert S. Wheelwright, trustee intervenor, and J. D. Skeen and E. J. Skeen appearing for the defendants, and the Court having heard the evidence both oral and documentary submitted by the respective parties and the matter having been argued and submitted on briefs of counsel for the respective parties, and the Court being fully advised, now makes the following

FINDINGS OF FACT

(1) That on the 17th day of May, 1937, the following stipulation, signed by the parties here-

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to through their respective counsel, was filed in the above entitled action :

“It is hereby stipulated by and between the above entitled parties, through their respective counsel, that the above entitled action may be tried at Salt Lake City, Utah, before Judge Lester A. Wade, and evidence and matters therein may be heard and considered by Judge Lester A. Wade at Salt Lake City, Utah, with the same effect and for all intents and purposes the same as if said case were being tried at Brigham City, Box Elder County, Utah.

“Dated this 17th day of May, 1937.”

and it was further stipulated that the above entitled action and the action of Smith Land Company, a corporation, plaintiff, vs. M. M. Johnson, Receiver of Neilson-Burton Company, formerly a co-partnership composed of A. J. Nielson and Charles S. Burton, Charles D. Moore, Wilse A. Nielson and Farmers State Bank of Woods Cross, a banking corporation, defendants, filed in the District Court of the Third Judicial District in and for Salt Lake County, and pending for trial therein might be tried together and the evidence offered should be considered by the Court as offered in each action and be taken by the Court as the basis for the decision in each such action.

(2) That at the time of the filing of the action herein, the charter of the defendant Smith Land Company, a corporation, organized on or

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about October 4, 1930, had, by proclamation of the Governor of the State of Utah, been forfeited, in accordance with law, for non-payment of corporation taxes and had not been reinstated until after the filing of this action, and at the time of the trial of this action the charter of the Smith Land Company had been revived and reinstated so that the Smith Land Company was then standing as a corporation, organized under the laws of the State of Utah.

(3) That on or about the first day of October, 1930, the defendant John W. Smith was the owner of a contract to purchase the following described real estate and personal property in Box Elder County, State of Utah:

Lot 4 of Section 28 and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16, the said lots being located in the North half ($\frac{1}{2}$) and the Southeast quarter of Section 33, Township 15 North, Range 5 West, S. L. M., containing in all 473.67 acres more or less, together with 180 shares of water stock of Pocatello Valley Pipe Line Company,

for the original consideration of \$10,118.78, on which payments had been made, and the contract provided for the transfer of said property by receiver's deed to John W. Smith upon the payment of the balance of the purchase price thereof. That there had been paid upon the purchase price of the said contract at the time of the trial of this

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action, payments to the seller thereof or his successor in interest, so that there remained unpaid the sum of \$2433.88.

(4) That on or about the 30th day of October, 1930, John W. Smith, for the purpose of hindering and delaying his creditors and preventing them from realizing upon their judgments, caused to be organized under the laws of the State of Utah the Smith Land Company, which corporation was a form or shield only and in fact had no separate existence but was the alter ego of the said John W. Smith. That the said John W. Smith caused other members of his family to join him as incorporators but they were his nominees only and he, at all times, formulated the policies and dominated the affairs of the said corporation. That the said John W. Smith, in order to carry out the said plan and purpose of the said corporation, assigned and transferred all of his right, title and interest in the said real and personal property covered by and described in said contract to purchase to the said Smith Land Company and received as the sole consideration therefor 10,000 shares of stock of the par value of \$1.00 per share, being the total amount of stock issued by said corporation and covering the apparent consideration for the transfer of the said property to the said corporation.

(5) That the said stock as so received by the

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said John W. Smith and so paid for by him, except only a few shares retained for himself, were transferred and distributed to members of his immediate family and the said transfer to said members of his family was wholly without consideration except that the said John W. Smith was then indebted to his son, J. Cameron Smith, in the amount of \$1,000.00, and that after the organization of the corporation, Cameron Smith turned over to the corporation a tractor which was applied in part payment of his stock.

(6) That the organization of the said Smith Land Company was a mere contrivance of the said John W. Smith conceived for his own convenience and benefit and to carry out his plan and purpose to evade and avoid the payment of his creditors and the subjecting of his property to the payment of judgments held by said creditors, and the said corporation was intended to be used and was actually used by the said John W. Smith as a vehicle through which to transact business and conceal his assets from his creditors and to hinder and delay the said creditors in the enforcement of their rights as judgment creditors.

(7) That the organization of the said corporation and the transfer and assignment of the said contract covering the said real estate to the said corporation by John W. Smith was done and made with the intention and for the purpose of

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hindering, delaying and defrauding the creditors of the said John W. Smith and the transfer by the said John W. Smith of the said stock so issued to him in the Smith Land Company to the members of his immediate family was likewise made with the intention as a part of his plan and purpose to hinder, delay and defraud his creditors. That at the time and as a result of said transfer, the said John W. Smith was rendered wholly insolvent and was unable to pay and discharge his debts.

(8) That the said John W. Smith, notwithstanding he has pretended to operate through and with and in the name of Smith Land Company, has continued in possession of the said property and the whole thereof and farmed, cultivated and harvested and received the benefits and proceeds of all crops grown on said land and has continued so to do up to the time of the trial of this action. That the said land is dry farm land located in Box Elder County, capable of producing and has actually produced, from farming operations thereon, crops of a substantial value each year during the entire period since the organization of the said corporation, and the said John W. Smith has during all of said time received the said crops and the proceeds therefrom.

097 (9) That on or about the 30th day of October, 1930, at the time of the transfer of the said

property to the said Smith Land Company, John W. Smith was not a married man but was the head of a family having one married daughter with two minor children living with him on the said property and dependent upon him for support and maintenance. That at the time of the filing of this action the said dependent daughter of said John W. Smith had ceased to live with him and be dependent upon him for her support.

(10) That at the time of the transfer of the said property and the contracts covering the purchase of the same and all rights thereunder by John W. Smith to Smith Land Company, the said property was of a value of \$30.00 per acre and the equity and interest of the said John W. Smith in said land at said time was of a value far in excess of \$2300.00. And at the time of the trial of this action, the said property so held under the contract to purchase thereof and the equity of the said purchaser and his successors in interest under said contract was of a value far in excess of \$2300.00 over and above the balance of the purchase price and all liens against said property.

(11) That the organization of the said Smith Land Company and the transfer of said property as herein found, was made more than three years prior to the filing of this action but the said transfer was not recorded with the County Recorder of Box Elder County, or at all, and the facts and

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circumstances connected with the said transfer were not called to the attention of the plaintiff and his assignor of said judgment or either of them, and the plaintiff and his said assignor of said judgment did not know of the said transfer and did not have knowledge of facts sufficient to charge them or either of them with knowledge of such transfer until within three years prior to the filing of this action or until within one year before the 11th day of July, 1935.

(12) That on or about the 22nd day of May, 1930, a judgment was duly made and entered in the City Court in and for Brigham City, Box Elder County, Utah, in favor of the plaintiff, W. A. Nielson, and against the defendant, John W. Smith, for the sum of \$54.90.

That on or about the 12th day of September, 1929, a judgment was duly made and entered in the District Court of the Third Judicial District in and for Salt Lake County, Utah, in favor of W. A. Nielson and against John W. Smith for the sum of \$1278.92, which judgment was thereafter, on September 14, 1929, duly docketed in the office of the County Clerk of Box Elder County, Utah; that thereafter execution was issued on said judgment, and costs accrued thereon in the amount of \$11.70.

That on the 16th day of August, 1930, judgment was made and entered in the District Court

in and for Box Elder County, Utah, in favor of Bertha K. Skeen and against the defendant John W. Smith, for the sum of \$100.00. That prior to the filing of this action, the said judgment was by Bertha K. Skeen assigned and transferred to Wilse A. Nielson. That Wilse A. Nielson is the owner of said judgments and each of them, and the said judgments remain wholly unsatisfied.

(13) That on the 28th day of August, 1937, the plaintiff Wilse A. Nielson, as the owner of said judgments, duly filed an action in the District Court of Box Elder County, State of Utah, to revive and renew the said judgments described in Finding No. 12 herein, and each of them, and the said John W. Smith appeared in said action and filed an answer, admitting the entry and existence of said judgments, and asking a stay thereon by reason of the pendency of bankruptcy proceedings, and the said action is now pending for trial.

(14) That this action was duly filed in the above entitled court on the 11th day of July, 1935; that thereafter and on the 7th day of October, 1935, John W. Smith filed a voluntary petition in bankruptcy in the United States District Court for the District of Utah, and such proceedings were had therein and thereunder that on the 19th day of November, 1935, Albert S. Wheelwright was duly appointed trustee in bankruptcy of the

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estate of the said John W. Smith, a voluntary bankrupt, and the said Albert S. Wheelwright immediately thereafter filed his oath and bond and ever since said time has been and now is the duly appointed, qualified and acting trustee in bankruptcy of John W. Smith, voluntary bankrupt.

(15) That John W. Smith, in his said bankruptcy petition and schedules, listed and filed as claims, a judgment entered in the City Court of Box Elder County, on March 27, 1930, in favor of W. A. Nielson, in the amount of \$54.90; a judgment entered in the District Court of Box Elder County, State of Utah, on August 6, 1930, in favor of Bertha K. Skeen and against John W. Smith for the sum of \$100.00, and a judgment entered in the District Court of the Third Judicial District for Salt Lake County in favor of W. A. Nielson and against John W. Smith for \$1278.92 entered on September 29, 1929.

(16) That the said John W. Smith on filing his said petition in bankruptcy did not list or schedule the said property so described in finding No. 3 herein, and in said contract, or any interest therein, as owned or claimed by him and did not claim the said property or any interest or portion thereof as exempt property. That the said John W. Smith, acting through the Smith Land Company, on January 4, 1938, deposited

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with the Clerk of the District Court in and for Salt Lake County, in an action pending between the plaintiff Wilse A. Nielson and the Smith Land Company, et al., a cashier's check for the sum of \$2433.88 as a tender of the payment of the balance of the purchase price of the said property.

(17) That at the time of the filing of the said petition in bankruptcy in the District Court of the United States for the District of Utah, the said property and the interest of John W. Smith therein constituted an asset and was a part of the property and estate of the said John W. Smith to be administered in the said bankruptcy proceedings and by reason of the said transfer by the said John W. Smith of the said property to the said Smith Land Company, with intent to hinder, delay and defraud his creditors and in fraud of his creditors, the said interest of the said John W. Smith in said land, subject to the payment of the balance of the purchase price thereof and subject to any homestead rights of the said John W. Smith, passed to and became vested in Albert S. Wheelwright, trustee in bankruptcy of John W. Smith.

0100 (18) That the said Albert S. Wheelwright, in the course of the due administration of the said bankruptcy estate of John W. Smith, caused the said Real Estate and all interest of the said

Trans.

John W. Smith therein to be duly offered for sale under orders of the court having jurisdiction in said bankruptcy matter and said Albert S. Wheelwright as such trustee sold and transferred by trustee's deed to Aubrey F. Turley all of the right, title and interest of John W. Smith in and to the said property and the whole thereof, and pursuant thereto and by order of said court, the said Albert S. Wheelwright, as such trustee, reported the said sale to the Court and the said sale was by the said Court duly confirmed and the consideration for the said transfer was paid by the said Aubrey F. Turley to the said Albert S. Wheelwright and the said Albert S. Wheelwright delivered to said Aubrey F. Turley a deed transferring all right, title and interest of the said John W. Smith in said property to Aubrey F. Turley and at the time of the trial of this action the said Aubrey F. Turley was the owner of all of the right, title and interest of the said John W. Smith so attempted to be transferred in fraud of his creditors in and to the said property and the whole thereof, subject only to the homestead exemption rights of the said John W. Smith.

(19) That in the courts of the bankruptcy proceeding, costs and expenses of administration accrued in said bankruptcy proceeding. That no funds have been provided by the said bankrupt to

Trans.

pay the said costs and expenses. That the only asset of the said bankrupt out of which the trustee may pay the said cost and expenses and the said judgments of Wilse A. Nielson as set out in the findings herein, is the property described in these findings.

(20) That the total amount of the judgments described in finding No. 12, including interest and costs accruing thereon, up to April 1, 1939, is \$2529.36, and the whole amount thereof is now due and unpaid.

From the foregoing Findings of Fact the Court draws the following

0101

CONCLUSIONS OF LAW:

1. That the defendant, Smith Land Company, as organized as a corporation by John W. Smith, was and is but the alter ego of John W. Smith and was organized and maintained as a vehicle or contrivance for the convenience of John W. Smith in hindering, delaying and defrauding his creditors.

2. That the transfer by John W. Smith to the Smith Land Company of all of his interest and rights in and to the following described property in Box Elder County, State of Utah, to-wit:

Lot 4 of Section 28 and lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16, the said lots being located in the North half (1/2) and the South-

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east Quarter of Section 33, Township 15 North, Range 5 West, containing in all 473.67 acres, more or less, together with 180 shares of water stock of Pocatello Valley Pipe Line Company,

was and is fraudulent and void as to the plaintiff, W. A. Nielson, as a judgment creditor of the said John W. Smith and as to Albert S. Wheelwright, trustee in bankruptcy of John W. Smith, a bankrupt, to the extent that the said property was and is necessary to be applied to the full and complete satisfaction of the said judgments set out in the findings herein and of all costs and expenses of administration incurred as determined in the said bankruptcy proceedings of John W. Smith in the said bankruptcy court.

3. That the intervenor, Albert S. Wheelwright, is entitled to a judgment adjudging, determining and fixing a lien upon the said property in these conclusions described, and the whole thereof, for the total amount of the said judgments as entered, with costs and interest accruing thereon to April 1, 1939, and for the full amount of the expenses of administration of the said bankruptcy proceeding in said bankruptcy court as fixed and determined therein, the said judgments alone as set out in the findings herein, with interest and costs accruing to April 1, 1939, being in the amount of \$2529.36.

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4. That at the time of the said transfer by John W. Smith to the Smith Land Company, the said John W. Smith was entitled to a homestead exemption in said real property to the extent of \$2300.00.

5. That upon the payment by the Smith Land Company to W. A. Nielson of the sum of \$2433.88, as the balance of the purchase price due on said property, the intervenor, Albert S. Wheelwright is entitled to a judgment and decree and an order of sale of said property to satisfy the said liens in full, together with the costs and expenses of such sale.

6. The plaintiff and intervenor are entitled to recover their costs herein.

Done in open Court this 3rd day of April, 1939.

LESTER A. WADE,
Judge.

Filed April 4, 1939.

[TITLE OF COURT AND CAUSE]

0103

DECREE

This cause came on regularly for trial before the Honorable Lester A. Wade, sitting in the above entitled court at Salt Lake City, as Judge thereof, pursuant to written stipulation of the parties filed herein for the trial of said cause be-

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fore the said judge at Salt Lake City, Utah, on the 18th day of May, 1937, on the plaintiff's complaint as amended and the answers of the defendants as amended and the complaint in intervention of Albert S. Wheelwright, 'Trustee in Bankruptcy of John W. Smith, bankrupt, LeRoy B. Young, A. U. Miner and D. A. Skeen appearing as attorneys for the plaintiff and for Albert S. Wheelwright, trustee, intervenor, and J. D. Skeen and E. J. Skeen appearing for the defendants, and the Court having heard the evidence both oral and documentary submitted by the respective parties and the matter having been argued and submitted on briefs of counsel for the respective parties, and the Court being fully advised, and having heretofore made its findings of fact and conclusions of law,

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED:—

(1) That the assignment and transfer by John W. Smith to and into the name of Smith Land Company, on or about the 30th day of October, 1930, of his right, title, claim and interest in and to the property described in paragraph two of this decree, is hereby adjudged and decreed to be fraudulent and void as to all of said property and rights and interest therein of the said John W. Smith, over and above a homestead exemption therein to the extent of \$2300.00.

(2) That upon the payment by the Smith Land Company to Wilse A. Nielson of the sum of \$2433.88, the intervenor, Albert S. Wheelwright, trustee in bankruptcy of John W. Smith, a bankrupt, have, and he hereby is given, granted and decreed a first and prior lien in, to and upon the following described real estate and property in Box Elder County, State of Utah, to-wit:—

Lot 4 of Section 28 and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16, the said lots being located in the North half ($\frac{1}{2}$) and the Southeast quarter of Section 33, Township 15 North, Range 5 West, Salt Lake Meridian, containing in all 473.67 acres more or less, together with 180 shares of water stock of Pocatello Valley Pipe Line Company,

in the amount of \$2529.36, and a further lien in the amount of \$1247.19 being the amount of costs and expenses of administration in the bankruptcy proceedings of John W. Smith, a bankrupt, as fixed and determined by the bankruptcy court in which said proceeding is pending.

(3) It is further ordered, adjudged and decreed that upon the payment of the total amount of the said liens to Albert S. Wheelwright, with interest and costs accruing thereon, within sixty days of the entry on this decree, the said liens shall be fully satisfied and discharged and the said Albert S. Wheelwright shall satisfy the same of record.

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(4) It is further ordered, adjudged and decreed at the expiration of sixty days from date hereof, the amount of said liens not being then paid in full, with costs and interest accruing thereon, an order of sale of the said property and the whole thereof shall issue directing the Sheriff of Box Elder County to proceed with the sale of the said property in foreclosure of said liens and that said real estate be sold by the Sheriff of Box Elder County, according to the law and practice of this Court as in sales upon execution, and that from the proceeds of said sale, said Sheriff shall first deduct the costs and expenses thereof, and thereafter apply the net proceeds of said sale to the amount due on said liens to the intervenor, Albert S. Wheelwright, with interest and costs and expenses of sale as aforesaid. In the event the amount realized from said sale shall be in excess of the amount of said liens, with interest and costs accrued thereon and expenses of sale, the said excess shall be paid to the defendants John W. Smith and Smith Land Company.

That the intervenor, Albert S. Wheelwright, or any other party to this action, may become a purchaser at said sale, and that the Sheriff, upon such sale execute a certificate of sale and deed to the purchaser. That the said purchaser be let into possession of the said premises upon the production of the Sheriff's certificate of sale thereof.

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(5) That plaintiff and intervenor are entitled to recover their costs herein, taxed in the amount of \$.....

Done in open court this 3rd day of April, 1939.

LESTER A. WADE,

Judge.

Filed April 4, 1939.

DISTRICT COURT FOR SALT LAKE
COUNTY, STATE OF UTAH, CASE NO. 58486:

[TITLE OF COURT AND CAUSE]

99 FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause came on regularly for trial before the Honorable Lester A. Wade, sitting in the above entitled court at Salt Lake City, as judge thereof, on the 18th day of May, 1937, on the plaintiff's complaint as amended and the answers of the defendants as amended, LeRoy B. Young, A. U. Miner and D. A. Skeen appearing as attorneys for the defendant Wilse A. Nielson and J. D. Skeen and E. J. Skeen appearing for the plaintiff, and the Court having heard the evidence both oral and documentary submitted by the respective parties and the matter having been argued and submitted on briefs of counsel for the respective parties, and the Court being fully advised, now makes the following:

FINDINGS OF FACT

1. That the charter of the defendant, Smith Land Company, a corporation, organized on or about October 4, 1930, was, by proclamation of the Governor of the State of Utah, forfeited in accordance with law for non-payment of corporation taxes on the 20th day of April, 1931, and was thereafter reinstated and at the time of the trial of this action the charter of the Smith Land Company had been revived and reinstated so that the Smith Land Company was then standing as a corporation, organized under the laws of the State of Utah.

2. That on or about the first day of October, 1930, the defendant, John W. Smith, was the owner of a contract to purchase from M. M. Johnson, as receiver of Nielson-Burton Company, the following described real estate and personal property in Box Elder County, State of Utah:

Lot 4 of Section 28 and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16, the said lots being located in the North half ($N\frac{1}{2}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section 33, Township 15 North, Range 5 West, S. L. M., containing in all 473.67 acres more or less, together with 180 shares of water stock of Pocatello Valley Pipe Line Company

for the original consideration of \$10,118.78, on which payments had been made, and the contract provided for the transfer of said property by

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receivers' deed to John W. Smith upon the payment of the balance of the purchase price thereof. That said purchase price had been paid down so that there remained unpaid thereon, at the time of the trial of this action, the sum of \$2433.88.

3. That the said contract and all rights thereunder and the said real property represented thereby, were by the seller and owner of said property duly assigned, transferred and conveyed to Wilse A. Nielson. That by the terms of the said contract, the said M. M. Johnson agreed, upon the payment of the full purchase price, to convey to the buyer all of his right, title and interest in and to said premises by receiver's deed, free from encumbrances, except as might be caused by or through the buyer, and to deliver abstract of title to date.

4. That on or about the 30th day of October, 1930, John W. Smith, for the purpose of hindering and delaying his creditors and preventing them from realizing upon said judgments, caused to be organized under the laws of the State of Utah the Smith Land Company, which corporation was a form or shield only, and in fact had no separate existence, but was the alter ego of the said John W. Smith. That the said John W. Smith caused other members of his family to join him as incorporators, but they were his nomi-

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nees only, and he, at all times, formulated the policies and dominated the affairs of the said corporation. That the said John W. Smith, in order to carry out the said plan and purpose of the said corporation, assigned and transferred all of his right, title and interest in the said real and personal property covered by and described in said contract to purchase to the said Smith Land Company, and received as the sole consideration therefor 10,000 shares of stock of the par value of \$1.00 per share, being the total amount of stock issued by said corporation and covering the apparent consideration for the transfer of the said property to the said corporation.

101 5. That the said stock as so received by the said John W. Smith, and so paid for by him, except only a few shares retained by himself, were transferred and distributed to members of his immediate family and the said transfer to said members of his family was wholly without consideration except that the said John W. Smith was then indebted to his son, J. Cameron Smith, in the amount of \$1,000.00; that after the organization of the corporation, J. Cameron Smith turned over to the corporation a tractor which was applied in part payment of his stock.

6. That the organization of the said Smith Land Company was a mere contrivance of the said John Smith, conceived for his own conven-

ience and benefit and to carry out his plan and purpose to evade and avoid the payment of his debts to creditors and the subjecting of his property to the payment of judgments held by said creditors, and the said corporation was intended to be used and was actually used by the said John W. Smith as a vehicle through which to transact business and conceal his assets from his creditors and to hinder and delay the said creditors in the enforcement of their rights as judgment creditors.

7. That the organization of the said corporation and the transfer and assignment of the said contract covering the said real estate to the said corporation by John W. Smith was done and made with the intention and for the purpose of hindering, delaying and defrauding the creditors of the said John W. Smith, and the transfer by the said John W. Smith of the said stock so issued to him in the Smith Land Company to the members of his family, was known to them as a part of his plan and purpose to hinder, delay and defraud his creditors. That at the time and as a result of the said transfer, the said John W. Smith was rendered wholly insolvent and was unable to pay and discharge his debts.

8. That the said John W. Smith, notwithstanding that he pretended to act through the said corporation, continued in possession of the

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said property and the whole thereof and farmed, cultivated and harvested and received the benefits and proceeds of all crops grown on said land and has continued so to do up to the time of the trial of this action. That the said land is dry farm land located in Box Elder County, Utah, capable of producing and has actually produced, from farming operations thereon, crops of a substantial value each year during the entire period since the organization of the said corporation, and the said John W. Smith has, during all of said time, received the said crops and the proceeds therefrom.

9. That on or about the 30th day of October, 1930, at the time of the transfer of the said property to the said Smith Land Company, John W. Smith was not a married man, but was the head of a family, having one married daughter with two minor children living with him on the said property and dependent upon him for support and maintenance. That at the time of the filing of this action, the said dependent daughter of said John W. Smith had ceased to live with him and be dependent upon him for support.

10. That during all of said time since the organization of said Smith Land Company, and the attempted and pretended transfer of said land and property to said Smith Land Company, the said property was of a value of \$30.00 per

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acre and the equity and interest of the said John W. Smith in said land at said time was of a value far in excess of \$2300.00. That at the time of the time of this action, the said property so held under the contract to purchase thereof and the equity of the said purchaser and his successors in interest under said contract was of a value far in excess of \$2300.00 over and above the balance of the purchase price and all liens against said property.

11. That on the 7th day of October, 1935, John W. Smith filed a voluntary petition in bankruptcy in the District Court of the United States for the District of Utah, and such proceedings were had therein and thereunder that on the 19th day of November, 1935, Albert S. Wheelwright was duly appointed trustee in bankruptcy of the estate of the said John W. Smith, a voluntary bankrupt, and the said Albert S. Wheelwright immediately thereafter filed his oath and bond, and ever since said time has been, and now is, the duly appointed, qualified and acting trustee in bankruptcy of John W. Smith, voluntary bankrupt.

12. That John W. Smith, in his said bankruptcy petition and schedules, listed and filed as claims, a judgment entered in the City Court of Box Elder County, on March 27, 1930, in favor of W. A. Nielson, in the amount of \$54.90; a judg-

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ment entered in the District Court of Box Elder County, State of Utah, on August 6, 1930, in favor of Bertha K. Skeen and against John W. Smith for the sum of \$100.00 and a judgment entered in the District Court of the Third Judicial District for Salt Lake County in favor of W. A. Nielson and against John W. Smith for \$1278.92 entered on September 29, 1929; that the said judgment in favor of Bertha K. Skeen was, prior to the filing of this action, duly assigned to W. A. Nielson. That the said judgments so scheduled and listed by John W. Smith, were theretofore duly entered at the times, in the amounts and in the respective courts as so listed, and said judgments remain wholly unpaid and unsatisfied.

13. That at said time of October 1, 1930, the said judgments so listed by the said John W. Smith in his bankruptcy schedules were standing of record in the said courts against the said John W. Smith and the plaintiff W. A. Nielson was then the owner of the said judgments and all rights accruing thereunder and no part of the said judgments had been paid.

14. That the said John W. Smith on filing his said petition in bankruptcy did not list or schedule the said property so described in said contract, or any interest therein as owned or claimed by him, and did not claim the said property or any interest or portion thereof, as exempt prop-

erty. That the said John W. Smith, acting through the Smith Land Company, on January 4, 1938, deposited with the clerk of the above entitled court a cashier's check for the sum of \$2433.88 as a tender of the payment of the balance of the purchase price of the said property.

15. That at the time of the filing of the said petition in bankruptcy in the District Court of the United States for the District of Utah, the said property and the interest of John W. Smith therein constituted an asset and was a part of the property and estate of the said John W. Smith to be administered in the said bankruptcy proceedings, and by reason of the said transfer by the said John W. Smith of the said property to the said Smith Land Company, with intent to hinder, delay and defraud his creditors and in fraud of his creditors, the said interest of the said John W. Smith in said land, subject to the payment of the balance of the purchase price thereof, and subject to any homestead rights of the said John W. Smith, passed to and became vested in Albert S. Wheelwright, trustee in bankruptcy of John W. Smith.

16. That the said Albert S. Wheelwright, in the course of the due administration of the said bankruptcy estate of John W. Smith, caused the said real estate, and all interest of the said John W. Smith therein to be duly offered for sale un-

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der orders of the court having jurisdiction in said bankruptcy matter and said Albert S. Wheelwright, as such trustee, sold and transferred by trustees' deed to Aubrey F. Turley all of the right, title and interest of John W. Smith in and to the said property and the whole thereof, and pursuant thereto and by order of said court, the said Albert S. Wheelwright, as such trustee, reported the said sale to the Court and the said sale was by the said Court duly confirmed and the consideration for the said transfer was paid by the said Aubrey F. Turley to the said Albert S. Wheelwright and the said Albert S. Wheelwright delivered to said Aubrey F. Turley a deed transferring all right, title and interest of the said John W. Smith and of Albert S. Wheelwright, Trustee in Bankruptcy of John W. Smith, in said property to Aubrey F. Turley, and at the time of the trial of this action the said Aubrey F. Turley was the owner of all of the right, title and interest of the said John W. Smith so attempted to be transferred in fraud of his creditors in and to the said property, and the whole thereof, subject only to the homestead exemption rights of the said John W. Smith. At the time of the filing of the said bankruptcy petition by John W. Smith and of the transfer of the said property by Albert S. Wheelwright, Trustee in bankruptcy of John W. Smith, to Aubrey F. Tur-

ley, the said property was of a value of \$30.00 per acre and of a value far in excess of any and all homestead rights of John W. Smith therein and over and above all indebtedness thereon.

17. That the said judgments set out and described in paragraph 12 were, at the time of the filing of this action, valid and subsisting judgments, owned by W. A. Nielson, and that on the 28th day of August, 1937, an action was duly filed by W. A. Nielson against John W. Smith in the District Court of the First Judicial District in and for Box Elder County, Utah, for the purpose of re-establishing and renewing the said judgments and each and all of them, in which action John W. Smith appeared as defendant and filed an answer admitting the entry and existence of said judgments, which said action is still pending for trial in said Court.

18. That in an action pending in the District Court of Box Elder County, State of Utah, entitled "W. A. Nielson, plaintiff, v. John W. Smith, J. Cameron Smith, E. Lincoln Smith, Polly Smith, John W. Smith and Max Gailey, trustees of Smith Land Company, and Smith Land Company, a corporation, defendants; Albert S. Wheelwright, Trustee in bankruptcy of John W. Smith, Bankrupt, Intervenor," being case No. 5245, a judgment was made and entered determining the said judgments referred to in these findings in

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the total amount, including interest and costs to date, of \$2529.36 to be and constitute a first and prior lien against all interest of John W. Smith and the Smith Land Company in the said property, in paragraph 2 of these findings described, and further adjudging the amount of costs and expenses of administration in the matter of the bankruptcy of John W. Smith, as determined by the Referee in Bankruptcy therein, to be and constitute a lien against the said property, and the whole thereof, in favor of Albert S. Wheelwright, trustee in bankruptcy.

From the foregoing Findings of Fact, the Court now makes the following

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CONCLUSIONS OF LAW

1. That the plaintiff, Smith Land Company, as organized as a corporation by John W. Smith was, and is, but the alter ego of John W. Smith, and was organized and maintained as a vehicle or contrivance for the convenience of John W. Smith in hindering, delaying and defrauding his creditors.

2. That the transfer by John W. Smith of the following described property, to-wit:

Lot 4 of Section 28, and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16, the said Lots being located in the North half (N $\frac{1}{2}$) and the Southeast Quarter (SE $\frac{1}{4}$) of Section 33,

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Township 15 North, Range 5 West, containing in all 473.67 acres more or less, together with 180 shares of water stock of Pocatello Valley Pipe Line Company,

by assignment to and in the name of the Smith Land Company and the transfer of the contract held by him to purchase the same was fraudulent and void as to the judgment creditors of John W. Smith, and as to Albert S. Wheelwright, trustee in bankruptcy of John W. Smith, a bankrupt, to the extent that the said property was necessary to be applied to the satisfaction of the said judgments and the costs and expenses of administration in the said bankruptcy proceedings so instituted by the said John W. Smith, as determined by the said bankruptcy court, and except as to the homestead interests of John W. Smith in said property in an amount and to the extent of \$2300.00 only.

3. That John W. Smith and the Smith Land Company, upon the payment of the balance of the purchase price of \$2433.88 to W. A. Nielson by the delivery and payment to him of a cashier's check in said amount, now held by the County Clerk of Salt Lake County, in this action, are entitled to have delivered to them deed of conveyance to the said property, and the whole thereof, by W. A. Nielson, said deed of conveyance to John W. Smith and Smith Land Company, as grantees,

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and the title conveyed thereby to be subject to a first and prior lien and obligation in favor of Albert S. Wheelwright, trustee in bankruptcy of John W. Smith, Bankrupt, in the amount of \$2529.36 for the payment of said judgments, and also subject to a further lien in such amount as found and determined by the Bankruptcy Court In the Matter of the Bankruptcy of John W. Smith, Bankrupt, as covering all costs and expenses of administration in said bankruptcy proceeding, and as determined by the Court in that certain action in the District Court of Box Elder County, State of Utah, entitled "W. A. Nielson, plaintiff, vs. John W. Smith, J. Cameron Smith, E. Lincoln Smith, Polly Smith, John W. Smith and Max Gailey, trustees of Smith Land Company, and Smith Land Company a corporation, defendants; Albert S. Wheelwright, Trustee in bankruptcy of John W. Smith, Bankrupt, Intervenor," being case No. 5245.

4. That upon the delivery to the Clerk of this Court, by W. A. Nielson, of a deed of conveyance to John W. Smith and the Smith Land Company, as set out in these conclusions, conveying all of the right, title and interest in said real property acquired by M. M. Johnson, as receiver of Nielson-Burton Company, subject to the lien and encumbrances in the amounts set out in No. 3 of the Conclusions herein, and free from

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other encumbrances, except as may have been caused by or through John W. Smith or the Smith Land Company, and an abstract of title to date covering said property, and delivering a certificate representing 180 shares of stock of the Pocatello Valley Pipe Line Company, to the Clerk of the Court, the said W. A. Nielson, is entitled to have delivered to him and to receive from the Clerk of the said Court the cashier's check payable to his order, in the amount of \$2433.88, now held by the Clerk of this Court.

5. Plaintiff is entitled to recover its costs herein taxed in the amount of \$.....

Done in Open Court this 3rd day of April, 1939.

LESTER A. WADE,

Judge.

Filed April 8, 1939.

[TITLE OF COURT AND CAUSE]

DECREE

109 This cause came on regularly for trial before the Honorable Lester A. Wade, sitting in the above entitled Court at Salt Lake City, Utah, as Judge thereof, on the 18th day of May, 1937, on the plaintiff's complaint as amended and the answers of the defendants as amended, LeRoy B. Young, A. U. Miner and D. A. Skeen appearing as attorneys

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for the defendant Wilse A. Nielson, and J. D. Skeen and E. J. Skeen appearing for the plaintiff, and the Court having heard the evidence both oral and documentary submitted by the respective parties, and the matter having been argued and submitted on briefs of counsel for the respective parties, and the court having heretofore made and filed herein findings of fact and conclusions of law:

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the assignment and transfer by John W. Smith to and into the name of Smith Land Company, on or about the 30th day of October, 1930, of his right, title, claim and interest in the property described in paragraph two of this decree, is hereby adjudged and decreed to be fraudulent and void as to all of said property and rights and interest therein of the said John W. Smith over and above a homestead exemption therein to the extent of \$2300.00.

2. That the defendant herein, W. A. Nielson, forthwith execute and deliver to John W. Smith and Smith Land Company, a corporation, a deed of conveyance to the following described property, to-wit:

Lot 4 of Section 28, and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16, the said lots being located in the North half (N $\frac{1}{2}$) and the Southeast

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Quarter (SE $\frac{1}{4}$) of Section 33, Township 15 North, Range 5 West, S. L. M., containing in all 473.67 acres, more or less, together with 180 shares of water stock of Pocatello Valley Pipe Line Company,

and to deliver the said deed, together with a certificate representing 180 shares of stock of Pocatello Valley Pipe Line Company to the Clerk of the above entitled Court, the said deed of conveyance to recite therein that the said deed is given and the title to the property therein conveyed, subject to a first and prior lien thereon in favor of Albert S. Wheelwright, Trustee of John W. Smith, Bankrupt, in the amount of \$2529.36, and also subject to a further lien in favor of Albert S. Wheelwright, Trustee of John W. Smith, to cover costs and expenses incurred in said bankruptcy proceedings, to the extent of and in the amount as determined by the District Court of the First Judicial District in and for Box Elder County, Utah, in that certain action entitled "W. A. Nielson, plaintiff, v. John W. Smith and J. Cameron Smith, E. Lincoln Smith, Polly Smith, John W. Smith, and Max Gailey, Trustees of the Smith Land Company, and Smith Land Company, a corporation, defendants, Albert S. Wheelwright, Trustee in Bankruptcy of John W. Smith, Bankrupt, Intervenor," being case No. 5245, and as determined and specified in the decree entered in the

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said action. The said conveyance to cover and convey all of the rights, title and interest acquired by M. M. Johnson, as receiver, and as acquired by W. A. Nielson, by subsequent transfer and conveyance from M. M. Johnson, as receiver, and free from all other liens and encumbrances except as hereinabove mentioned, and except as having attached by reason of any act or neglect of John W. Smith, or the Smith Land Company, or either of them

3. That said deed and transfer of stock and abstract be delivered to the Clerk of this Court for the said grantees and, upon the deposit of said deed and certificate of stock and Abstract, that the Clerk of this Court forthwith deliver to W. A. Nielson that certain Cashier's Check held by him, as deposited by John W. Smith and Smith Land Company, on or about the 4th day of January, 1938, and in the amount of \$2433.88, made payable to W. A. Nielson.

4. That the plaintiff, Smith Land Company, recover its costs herein, taxed in the amount of \$.....

Done in Open Court this 3rd day of April, 1939.

LESTER A. WADE,
Judge.

Filed April 8, 1939.

[TITLE OF COURT AND CAUSE]

ASSIGNMENTS OF ERROR

Come now Smith Land Company, a corporation, John W. Smith, J. Cameron Smith, E. Lincoln Smith, Polly Smith and Max Gailey, and make the following Assignments of Error:

In the case of W. A. Neilson, vs. John W. Smith, et al., Case No. 5245, Box Elder County

1. The court erred in making finding of fact No. 4 for the reason, that said finding is not supported by the evidence and is contrary to the evidence in this, that the Smith Land Company was a corporation regularly organized pursuant to the laws of the State of Utah; that at the time of the organization of said corporation, the said John W. Smith was the head of a family living in the State of Utah and dependent upon him for their support and maintenance; that the contract of purchase of the real estate described in finding No. 3 was largely in default and subject to forfeiture; that the whole interest in and to said real estate constituted the homestead of the said John W. Smith was exempt from execution or forced sale, and was not the subject matter of a fraudulent conveyance; and for the further reason that the evidence was that the said John W. Smith received a full consideration for his equity in said property. (Tr.,

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096, Ex. D, B. E. 80, 116, 221, 114-125, Abs. 119, 66, 75, 77, 81, 89, 100, 120.)

2. The court erred in making finding of fact No. 5 for the reason that the evidence was that the said John W. Smith was indebted to members of his family and that J. Cameron Smith paid to said corporation \$1,000.00 in money and transferred to it a tractor of the value of \$1500.00. (Tr., 096, B. E. 116-126, Abs. 81, 66, 81, 120.)

3. The court erred in making finding of fact No. 6 because it is contrary to the evidence for the same reasons as those stated in assignment of error No. 1 above and that it is a conclusion of law and is not supported by the evidence in the case and for the further reason that the evidence, without conflict, shows that the said corporation was regularly organized and was recognized as a corporation by the said W. A. Nielson and his predecessors in interest from the date of its organization up to and including the 8th day of December, 1936. (Tr., 096, Ex. 1, 9, B. E. 83-85, 135, Abs. 120, 81, 84.)

4. The court erred in making finding No. 7 for the reason that the evidence shows that the contract was assigned to the corporation as payment for stock, part of which was issued to creditors of the defendant John W. Smith and part of which was held for the benefit of other creditors including the plaintiff and his assignors and for the further reason that there is no evidence of any

character, which would support a finding that members of the family knew of or participated in any plan to defraud creditors or that there was ever any such plan. (Tr., 097, B. E. 125, Abs., 120, 81, 84, 67.)

5. The court erred in making finding No. 8 for the reason that the evidence, without conflict shows that the said Smith Land Company took charge of said land, cultivated and farmed the same, produced and harvested crops and applied the proceeds of the sale thereof in the payment of delinquencies on the said contract of sale. (Ex. 4, H, Tr., 097, B. E. 129, 148-153, Abs. 121, 81, 84.)

6. The court erred in making finding of fact No. 10 for the reason that said finding is predicated upon the value of the land being purchased under contract and not upon the value of the interest of the said John W. Smith in and to said land and for the further reason that said finding is vague, uncertain, and does not form the basis of any conclusion or judgment because there is no finding of the value of the said contract at the time of the making of the assignment thereof to the defendant, Smith Land Company, and no finding to the effect that at the time of the assignment, the contract was delinquent and subject to forfeiture. (Tr., 097, Ex. 3, B. E. 125, 52 and 89, Abs. 122, 75, 86, 87.)

7. The court erred in making finding of fact No. 11 for the reason that by the return of the

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sheriff, upon execution (issued upon the judgment described in the complaint), with the exhibit attached to said return, the said plaintiff was affirmatively notified of the transfer of the contract to the said Smith Land Company on the 3rd day of December, 1930, said notice having been given by letter from J. D. Skeen to John A. Zundel, the sheriff and attached as an exhibit to the sheriff's return of execution, which letter reads as follows:

John A. Zundel
Sheriff

Dear Sir:

John W. Smith has requested me to advise you that he has no money or property out of which the execution you hold against me (him) may be satisfied. The property he occupied was sold on contract and title reserved to both the land and crops. Any equity he may have had was sold some time ago.

Respectfully,

J. D. Skeen

(Tr., 098, B. E. 249-253, 41-54, 274, Abs. 122, 110, 111, 112, 113, 46, 50.)

8. The court erred in making finding of fact No. 17 for the reason that all right and title of the said John W. Smith in and to said land had been lawfully conveyed by him on the 4th day of October, 1930 and said property was not subject to the jurisdiction of the United States District Court. (Tr., 0100, Ex. 2, B. E. 80, Abs. 126, 66.)

9. The court erred in making finding of fact

No. 18 for the reason that the said Albert S. Wheelwright, if he owned any interest in said property, did not legally sell the same and any proceeding purporting to be a sale of said property has been suspended by the United States District Court for the District of Utah. (Tr., 0100, B. E. 62-67, Abs. 127.)

10. The court erred in making finding of fact No. 19 for the reason that the District Court of Box Elder County had no power, jurisdiction or right to make any order whatsoever respecting costs and expenses of the United States District Court. (Tr., 0101, Abs. 128.)

11. The court erred in making finding of fact No. 20. (Tr., 0101, Abs. 128.)

12. The court erred in drawing conclusion of law No. 1. (Tr., 0101, Abs. 128.)

13. The court erred in drawing conclusion of law No. 2. (Tr., 0101, Abs. 128.)

14. The court erred in drawing conclusion of law No. 3, for the reason that the said Albert S. Wheelwright, if he ever at any time, had any interest in said property, ceased to have any interest therein prior to the making of said conclusion. (Tr., 0102, 092, Abs. 129.)

15. The court erred in making conclusion of law No. 5. (Tr., 102, Abs. 130.)

16. The court erred in making and entering judgment in form adjudging and decreeing that

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the interest of John W. Smith in and to the contract of purchase of the land described in the findings herein was void in its entirety for the reason that the court has found and adjudged that the said John W. Smith was the head of a family, was entitled to a homestead exemption in said contract and said homestead exemption could not be the subject of a fraudulent transfer and the transfer of the homestead was a valid and legal transfer. (Tr., 0103, Abs. 131.)

17. The court erred in making and entering judgment to the effect that upon payment of the sum of \$2433.88, the intervenor, Albert S. Wheelwright, trustee should have and be given a decree and a first lien upon the real estate therein described, the sum of \$2529.36, for the reason that the estate and Albert S. Wheelwright by the evidence and by the findings was found and determined to be without any interest whatsoever in the said proceeding and for the further reason that the court was entirely without power or jurisdiction to enter judgment for costs incurred in the United States Court and for the further reason that the order purporting to allow costs in the said United States Court has been set aside and suspended. (Tr., 0103, Abs. 132.)

18. The Court further erred in adjudging that the said Albert S. Wheelwright should satisfy a lien of record for the reason that the said Al-

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bert S. Wheelwright is without any interest whatsoever in the subject matter of the litigation. (Tr., 0103, 092, Abs.)

19. The court erred in failing and refusing to make a finding of fact upon the issue of estoppel pleaded in the amended and supplemental answer of the defendant, Smith Land Company. (Tr., 0103, Abs. 19.)

ASSIGNMENTS OF ERROR IN THE CASE OF SMITH LAND COMPANY VS. JOHNSON. CASE NO. 58486.

1. The court erred in making finding of fact No. 4 for the reason that said matter was without and beyond the issues in said case, and for the further reason that the said finding is contrary to the evidence in this, that the Smith Land Company was a regularly organized corporation, and, for a valuable consideration, acquired the interest of John W. Smith in and to said contract of purchase and the said contract to the extent at least of the homestead exemption to John W. Smith could not be the subject matter of a fraudulent conveyance; that defendant and his predecessors in interest at all times after the assignment of joint contract to plaintiff recognized plaintiff as the lawfully organized corporation and as the owner of said contract and is and was estopped from questioning plaintiff's corporate existence or the

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ownership of said property. (Tr., 100, Ex. 19, C, B. E. 221, Abs. 136, 31, 35, 37.)

2. The court erred in making finding of fact No. 5 for the reason that said finding is wholly contrary to the evidence in this, that the uncontradicted evidence is that the said John W. Smith was indebted to the said transferees of the said stock and for the further reason that the subject of said finding was not within the issues in the case. (Tr., 101, B. E. 122-126, Abs. 137, 31, 35, 37, 81.)

3. The court erred in making finding of fact No. 6 for the reason that the said finding is contrary to the evidence in that the said corporation was legally organized, gave valuable consideration for said contract of purchase, assumed and agreed to pay delinquencies thereon, and said corporation was at all times recognized by Wilse A. Nielson and his predecessors in interest as the owner of said contract. The said Wilse A. Nielson is estopped from asserting and contending that the said corporation was not the owner thereof. (Tr., 101, Ex. 1, 9, C, B. E. 122-125. Abs. 137, 81, 86, 31, 35, 37.)

4. The court erred in making finding of fact No. 7, for the reason that it is contrary to the evidence in this that the evidence shows that the corporation was organized in good faith and consideration was given for the stock. (Tr., 102, B. E. 122-126, Abs. 138, 66.)

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5. The court erred in making finding of fact No. 8 for the reason that the evidence shows that said corporation, immediately upon receipt of the assignment of the contract of sale of said land, entered into possession thereof, and at all times cultivated, farmed and harvested the crops therefrom, and from the year 1938, said Wilse A. Nielson and his predecessors in interest recognized said corporation as the owner of said contract of sale and demanded throughout said period the payment of the purchase price of said land by the said corporation. (Tr., 102, Ex. 4, H., B. E. 129, 148-153, Abs. 138-84.)

6. The court erred in making finding No. 10 for the reason that the value of the said land was not in issue in the said case and there is no evidence forming the basis for any finding to show that the contract was of a value in excess of \$2300.00; on the contrary the evidence conclusively shows that the contract of sale of said property by M. M. Johnson to John W. Smith was subject to forfeiture on the 4th day of October 1930 and said contract had no value whatsoever on said date. (Tr., 103, Ex. 1, 9, C., B. E. 125-129, Abs. 139, 31, 35, 37, 59, 58, 75.)

7. The court erred in making finding No. 12 for the reason that said finding was without and beyond the issues in said case. (Tr., 103, Abs. 140, 31, 35, 37.)

8. The court erred in making finding No. 13

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for the reason that said finding is without and beyond the issues in said case. (Tr. 104, Abs. 141, 31, 35, 37.)

9. The court erred in making finding No. 14 for the reason that the evidence conclusively shows that the Smith Land Company deposited a cashier's check for \$2433.88 and demanded a deed to said premises. (Tr. 104, B. E. 137-142, Ex. 6, Abs. 141, 86, 87.)

10. The court erred in making finding No. 15 for the reason that said finding is not in issue in said cause, constitutes a conclusion of law and is contrary to the evidence in this, that the interest of John W. Smith in said contract passed to plaintiff who was at all times recognized by W. A. Nielson and his predecessors in interest as the lawful owners thereof. (Tr. 104, Ex. 1, 9, C, B. E. 135-139, Abs. 142, 83, 87; Ex. 9, 66, 59.)

11. The court erred in making finding No. 16 for the reason that said finding is without and beyond the issues in said case. (Tr. 105, Abs. 142, 31, 35, 37.)

12. The court erred in drawing conclusion of law No. 1. (Tr., 106, Abs. 145.)

13. The court erred in drawing conclusion No. 2. (Tr. 107, Abs. 145.)

14. The court erred in drawing conclusion No. 3. (Tr. 107, Abs. 146.)

15. The court erred in drawing conclusion of law No. 4 for the reason that the said Smith

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Land Company is entitled to a deed conveying title of said property to it in accordance, with the contract. (Tr. 108, Abs. 147-75.)

16. The court erred in making and entering a decree purporting to set aside and annul the assignment of the contract between the said M. M. Johnson and John W. Smith to the Smith Land Company upon the ground that such assignment was fraudulent and void for the reason that said matter was not before the court for adjudication. (Tr. 109, Abs. 149, 31, 35, 37.)

17. The court erred in adjudging and directing the conveyance of said property to John W. Smith and the Smith Land Company for the reason that the said Smith Land Company was entitled to a deed of conveyance thereof and John W. Smith was not a party to said suit. (Tr. 109, Abs. 149, 31, 35, 37.)

18. The court erred in failing and refusing to make a finding of fact upon the issue of estoppel pleaded in the amended and supplemental answer of the defendant, Smith Land Company. (Tr. 0103, Abs. 31, 35, 37.)

19. The court erred in assuming to impose conditions as to the delivery of the said deed of conveyance contrary to the contract of sale of said property, and in authorizing the delivery to the said Wilse A. Nielson of the said sum of \$2433.00 without requiring the said Wilse A.

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Nielson to comply with the terms of the contract assumed by him. (Tr. 109, Ex. 3, Abs. 149.)

20. The court erred in making and entering judgment subjecting said property to a lien in favor of Albert S. Wheelwright, trustee in the sum of \$2529.36 or for any other sum incurred as costs and expenses in bankruptcy proceeding, for the reason that said matter was not in issue, was not before the court and the court was wholly and entirely without jurisdiction to make and enter any judgment in said matter respecting the bankruptcy proceeding. (Tr. 109, Abs. 149, 31, 35, 37.)

21. The court erred in holding and deciding that the plaintiff, W. A. Nielson, as creditor and as owner and successor in interest of M. M. Johnson to the legal title to the real estate described in the contract of sale from M. M. Johnson to John W. Smith was not estopped by his acts and by the acts of his predecessors in interest from asserting and claiming that the Smith Land Company was not regularly and legally organized and was not a separate legal entity; and holding further that the said W. A. Nielson, the owner of the said land and the said contract, was not estopped from asserting and claiming that the said Smith Land Company was not the actual and bona fide owner of the said contract and that the assignment of said contract was not free from

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legal or other objection for the reason that the said W. A. Nielson in person and his predecessors in interest recognized the assignment of said contract as a valid transaction and in recognizing said fact received money from the said Smith Land Company, and by express terms contracted to convey to it legal title to said land upon payment of the balance due upon the said contract. (Tr. 109, Abs. 149, 75, 66, 59, Ex. 9.)

J. D. SKEEN, E. J. SKEEN,
Attorneys for Appellants