

1940

W.A. Nielson v. John W. Smith, Albert S.
Wheelwright and Smith Land Co v. M.M. Johnson
: Brief of Appellant

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 COM-
PANY, a corporation,

Defendants and Appellants.

ALBERT S. WHEELWRIGHT, Trustee in
Bankruptcy of John W. Smith, Bankrupt,
Intervenor and Respondent,
and

SMITH LAND COMPANY, a corporation,
Plaintiff and Appellant,

vs.

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

Defendants and Respondents.

BRIEF FOR APPELLANTS

J. D. SKEEN,

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Attorneys for Appellants.

No. 6199

No. 6198

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BRIEF FOR APPELLANTS

STATEMENT OF FACTS

A chronological statement of the facts out of which this litigation grew, aside from the findings in each of the cases, we think will do much toward eliminating the utter confusion that exists because of continuous litigation extending over a period of years.

On November 23, 1926, John W. Smith entered into a contract to purchase from M. M. Johnson, receiver of the Nielson-Burton Company, co-partnership, 473.67 acres of land together with 180 shares of the water stock of the Pocatello Pipe Line Company for the sum of \$10,118.78. Nothing was paid on account of the purchase price of the property at the time of the execution of the agreement. The first payment of \$2,000.00 was to be made on or before the 25th day of November, 1927, and \$2,000.00 each year thereafter. The contract is in evidence as Exhibit 3. It contained the usual provisions for the payment of taxes and the insurance of crops produced by the purchaser, and it contained a specific provision for the cultivation of the land, planting to fall wheat and for the application by the purchaser to the Federal Farm Loan Association for a loan upon the property to be paid to the seller and further that:

In the event the buyer shall default in the payment of special or general taxes, assessments or insurance premiums, as provided for, that the seller might pay the taxes and collect from the buyer with interest at the rate of one percent per month; that the buyer should make reports to the seller setting forth in detail the amount of land planted,

And further

“As security for the payment of any installment of the purchase price, any sums due and delinquent from previous years, and/or any sums which may become due from the purchaser of this contract within any particular year, the buyer hereby mortgages to the seller all crops of every kind and nature which shall be grown by him or his successors upon the said land during the year in which such payment or sums shall have become due.” (Exhibit 3—Abs. 75.)

And further

“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.” (Abs. 76.)

Smith was constantly in default on the contract. He failed to pay taxes, and the taxes from the beginning accumulated and in order to prevent loss of the property were paid by the seller. On November 25, 1930, an installment of \$2,000.00 came due with accumulated interest at seven percent per annum on the entire amount. The buyer had no means of making this payment by reason of which the contract was not only subject to forfeiture, but forfeiture was inevitable. (Abs. 78-79.)

Smith had been sued by Wilse A. Nielson, the son of A. J. Nielson, one of the partners in the business for which Johnson was made receiver. He had defaulted to the extent of \$1208.91 besides interest in December of 1929. (Exhibit E.) The taxes had not been paid for 1926, 1927 and 1928 and were delinquent for 1924 on part of the ground. The taxes amounted to \$410.79. (Exhibit E.) This amount was bearing interest at one percent per month. In addition to his troubles growing out of delinquencies, which he could not by any possibility cure,

three different judgments had been entered against him between September 12, 1929, and May 22, 1930. He had exhausted his credit at the banks and with relatives and it therefore became certain that if Johnson, the receiver, should so elect, the contract was at an end. (Abs. 82-83-89.)

Furthermore Smith's equipment was not such that he could cultivate the land economically and hope to be able to make enough money from the land to take up delinquencies and pay the contract out. His son, Cameron Smith, had credit sufficient to enable him to borrow \$1,000.00 from the bank and this he used to pay on the contract. He also had a new tractor which had cost him \$1500.00 and he was willing to transfer it so as to save the contract. (Abs. 82, 90.)

At that time, Smith had residing with him a dependent daughter and was entitled to a homestead exemption of \$2300.00. (Abs. 101.)

He and his sons and his daughters thereupon organized the Smith Land Company and by assignment transferred to the corporation the contract for the purchase of the land, the corporation assuming the balance due upon the contract. Cameron Smith was given credit for the \$1,000.00 paid to keep the contract alive. In addition to the contract there was transferred to the corporation the caterpillar tractor of a value of \$1500.00 and horses and farm equipment then on the place. (Abs. 67.) The caterpillar tractor was used to plow and cultivate the land and to harvest the crops. Cameron Smith, for the most part, operated the tractor and combine harvester and

plows. Stock of the corporation was issued to various members of the family and stock of the par value of \$2800.00 out of an authorized capital of \$10,000.00 was issued to John Smith as trustee which he testified was intended to be used to pay creditors including the plaintiff and his assignor in this case. The uncontradicted testimony is that John W. Smith was indebted to his daughter and to his mother and brothers for money borrowed in attempting to save the contract. (Abs. 82.) His testimony is that he offered to issue stock of the corporation to plaintiff and his assignor and that they refused to accept it. (Abs. 79.) Payments upon the contract were made by the corporation between November 28, 1930, and November 29, 1932. (Exhibit 9.)

And on November 29, 1932, Charles D. Moore, who was then proposing to acquire title to the land and contract asked Smith, the Smith Land Company and Careron Smith to agree that if he acquired the contract that a new contract would be made by the terms of which the balance due would be fixed at \$4,000.00 payable in installments, \$1,000.00 cash and \$1,000.00 annually thereafter with eight percent interest. The agreement included the Smith Land Company, John W. Smith and J. Cameron Smith. A new form of contract was not executed but the proposal adopted the terms of the original contract and clearly recognized the interest of the Smith Land Company in and to it. (Abs. 59.) Numerous letters were addressed to the Smith Land Company by Charles D. Moore as owner of the land and the contract. He, at all times, recognized the Smith Land Company as a corporation

and as the owner of the contract. (See letters and receipt. Exhibit 9.)

On the 16th day of August, 1930, Bertha Skeen, a judgment creditor represented by her husband, D. A. Skeen caused execution to be issued out of the office of the clerk of the district court for Box Elder County and the sheriff, by praecipe was directed, to levy upon the defendants' property:

“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 the 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.”

D. A. Skeen
Attorney for Plaintiff” (Abs. 114.)

On December 3, 1930, a return was attached to the execution and deposited in the office of the sheriff. The execution was handled by Joseph R. Olsen, a deputy who thereafter died. There was attached to the execution as an exhibit the following letter.

To John Zundell:

“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 occupies 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.

Respectfully,
J. D. Skeen” (Abs. 113.)

The execution with the return and the exhibit with an additional notation by John H. Zundel, Sheriff to the effect that the matter was handled by Joseph R. Olsen, who was deceased, was filed June 26, 1937. (Abs. 114-115.)

The complaint in this case alleges the issuance of the execution and its return unsatisfied. (Abs. 2.)

On December 7, 1936, Wilse A. Nielson, the plaintiff herein, having become the owner and holder of the legal title to the land covered by the contract and of the contract, served notice of forfeiture of the contract for failure to pay the balance due upon the purchase price of the property amounting to the sum of \$2433.88. The notice specifies seven particulars wherein the purchaser was in default and by virtue of which the forfeiture was to be made. (Abs. 61.)

Immediately thereafter, the Smith Land Company procured part of the necessary money to make the payment from the sale of wheat and borrowed \$1900.00 from the wife of John W. Smith, made tender of the total balance due, and demanded a deed which the plaintiff Nielson refused. Suit was brought in Salt Lake County by the Smith Land Company for specific performance. (Abs. 87.) Wilse A. Nielson had brought suit July 9, 1935, and the two suits were consolidated by stipulation and were brought on for trial.

On October 10, 1935, John W. Smith was adjudged a voluntary bankrupt. He scheduled as debts: To Bertha Skeen, a judgment creditor \$100.00; to Wilse A. Nielson,

judgment creditor, \$54.90, and to Wilse A. Nielson, Judgment creditor, \$1278.00. As assets he scheduled a library of 1200 books of a value of \$500.00, five hundred shares of the capital stock of Smith Land Company pledged to Andrew W. Smith and a life insurance policy.

The record of the bankruptcy court shows a petition for confirmation of a sale of the land described in the complaint herein, an order confirming a sale to A. F. Turley for the sum of \$500.00 and a deed from the trustee in bankruptcy to A. F. Turley purporting to convey all of the Smith assets to Turley. (Abs. 44.)

The deed purporting to convey the title, dated April 14, 1937, from Albert S. Wheelwright, trustee to Aubrey F. Turley specifies all the right, title and interest in and to the following described property. Then follows description of the property covered by the contract from M. M. Johnson, receiver, to John W. Smith. (Exhibit B.)

On February 4, 1939, the district court made and entered an order reading:

“It is now 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, 1939. Filed April 4, 1939. (Abs. 116.)

A petition for review of the order of sale in the bankruptcy court was filed in the United States District Court for the District of Utah and the court is now holding the matter under advisement.

Separate findings were made in the two cases. In the Box Elder County case, the court found the execution and delivery of the contract and that at the time of the trial of the case, there was \$2433.88 due on the purchase price of the land. (Abs. 116-131.) There is no finding as to the amount due at the time of the assignment of the contract, on October 30, 1930. The court further found that John W. Smith on or about the 30th day of October, 1930, caused the Smith Land Company to be incorporated and transferred to it all of his property including the contract and that it was the *alter ego* of the said John W. Smith, that the transfer of stock to members of his family was wholly without consideration, except as to the stock transferred to J. Cameron Smith in the amount of \$1,000.00 and that Cameron Smith turned over to the association a tractor; that the organization of the Smith Land Company was a contrivance to evade and avoid the payment of his creditors; that it was made with intent to defraud his creditors; that Smith had continued to operate through and in the name of the Smith Land Company; that John W. Smith, on the 30th day of October, 1930, was not married, but was the head of a family having one married daughter and two minor children living with him and dependent upon him for support and maintenance; that he was entitled to a homestead exemption of \$2300.00:

“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.” (Abs. 123.)

That the organization of the Smith Land Company and the transfer of the property was made more than three years prior to the filing of the action:

“ . . . but the said transfer was not recorded with the County Recorder of Box Elder County, or at all, and the facts and 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.” (Abs. 123.)

The court finds the entries of the judgments as hereinabove stated, the filing of a voluntary bankruptcy proceeding, the contents of the schedules, that John Smith acting through the Smith Land Company on July 1, 1938, deposited with the clerk of the district court of Salt Lake County \$2433.88. That at the time of the filing of the petition in bankruptcy the property and interest of John W. Smith therein constituted an asset and that it passed to

the trustee in bankruptcy and then the court finds that in the bankruptcy proceeding all the interest of Albert S. Wheelwright as trustee was sold to Aubrey F. Turley subject only to the homestead exemption of John W. Smith and the court further finds:

“That in the courts of the bankruptcy proceeding, costs expenses of administration accrued in said bankruptcy proceeding. That no funds have been provided by the said bankrupt to 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.” (Abs. 128.)

From the findings the court concludes that the transfer of John W. Smith to the Smith Land Company of his interest in the property was fraudulent.

“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.” (Abs. 130.)

The court entered the decree adjudging and decreeing the transfer void over and above a homestead exemption to the extent of \$2300.00.

“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.” (Abs. 131.)

In the Salt Lake County case, the court made substantially the same findings many of which were not in issue, drew substantially the same conclusions and entered a decree to the effect that the assignment of John W. Smith was void; that the defendant, Wilse A. Nielson, execute and deliver to John W. Smith and the Smith Land Company, a corporation, a deed of conveyance and transfer to them a certificate of stock for 180 shares and upon the execution and delivery of such a deed and stock that the clerk of the court pay to the said Wilse A. Nielson \$2433.88 theretofore deposited by the Smith Land Company with the clerk of the court as a tender of the balance due on the contract. John W. Smith was not a party to the Salt Lake City suit. (Abs. 135-152.)

ASSIGNMENT OF ERRORS

The assignment of errors are long and numerous comprising 40 in all and covering 11½ pages of the abstract. We will not reprint them but will summarize the specific points upon which we rely for the reversal of this case. The points are all covered by the assignments as follows:

1. The homestead exemption was pleaded and found without controversy. It did not constitute the subject matter of a conveyance in fraud of creditors because it was not and is not subject to a judgment lien, execution or forced sale. The contract was subject to forfeiture at the time of the assignment, long prior thereto and substantially all of the time subsequent thereto and until the tender of the balance due was made just before the institution of the Salt Lake case, and there is no finding that said contract was of a value in excess of \$2300.00. (Box Elder Case Assignments Numbers 1, 6, 15, 16, 18. Salt Lake Case Assignments Numbers 1, 6, 12, 13, 14, 16, 17.)

2. The corporation was recognized by plaintiff, Wilse A. Nielson and his predecessors in interest as a valid legally organized corporation as early as November, 1930, and at all times thereafter until tender by it of the \$2433.88 balance due on the contract, and plaintiff in the Box Elder County case and defendants in the Salt Lake County case are now estopped from denying the existence of the corporation and the ownership of the contract. (Box Elder Case Assignments Numbers 3, 12, 13. Salt Lake Case 1, 3, 4, 12, 13, 14, 16, 17, 18, 19.)

3. The Statute of Limitations ran two years before the institution of the Box Elder County suit and the cause of action, if one ever existed, was barred at the time the suit was brought. (Box Elder case Assignments Numbers 7, 11, 12, 13, 16, 17. Salt Lake case Assignments Numbers 13, 14, 15, 16, 17, 19.)

4. The court was without jurisdiction to enter any

judgment in favor of the intervenor, Albert S. Wheelwright for the reason as alleged that the United States Bankruptcy Court had confirmed a sale of the interest of the said trustee in and to said property, a deed of conveyance of the interest had been made and the purchaser, and Aubrey F. Turley was substituted as a party to the suit for the said trustee. (Box Elder Case Assignments Nos. 8, 9, 14, 16. Salt Lake Case Nos. 14, 18, 20.)

5. The court had no jurisdiction to enter any judgment based upon an order of the Bankruptcy Court, and the provision including in the judgment the costs and expenses alleged to have been taxed in the Bankruptcy Court were wholly without jurisdiction and void. (Box Elder case Assignments Nos. 8, 9, 14, 16. Salt Lake Case Nos. 19, 20.)

6. The judgment is not sustained by the evidence or by the findings. (Box Elder case, Assignments Nos. 1, 2, 3, 4, 5, 6, 7, 10, 16, 17. Salt Lake Case Assignments Nos. 1, 2, 3, 4, 6, 7, 12, 13, 14, 16 17.)

HOMESTEAD EXEMPTION

Under Article 22, Section 1 of the Constitution and Title 38 of the Revised Statutes of Utah, the homestead exemption is absolute. The numerous decisions of this court leave nothing open for argument. Smith was the head of a family under Section 38-0-5 and the property constituted a homestead exemption to the value of \$2300.00. It was not subject to a judgment lien under 104-30-15 because the statute makes it a lien only upon

property "not exempt from execution," and it was not subject to execution sale because of Title 38 and Title 104, Chapter 37, and it was not the subject matter of an attack for sale or other disposition in fraud of creditors.

The right to a homestead is an absolute right which neither the legislature nor the courts can infringe. *Panagopulos vs. Manning*, 93 Utah 198, 69 P. (2d) 614.

Neither the legislature nor the courts have the right to subject it to a forced sale. *Utah Builders Supply Co. vs. Gardner*, 86 Utah 257.

The homestead may be sold and a good title passed. Revised Statutes Title 38-0-2.

"A homestead cannot be made the subject of attack by a creditor upon the ground that it was sold or conveyed in fraud of such creditor." (*Payson, etc., vs. Tietjen*, 63 Utah 321.)

The plaintiff in attacking a transfer must allege and prove that the value of the property exceeded the exemption allowed by statute. *Crosby vs. Anderson*, 49 Utah 167, 162 P. 75.

To hold as the lower court has done that a homestead conveyed continued to be subject to attack nullifies section 38-0-2 which reads:

" . . . when a homestead is conveyed by the owner thereof such conveyance shall not subject the premises to any lien or encumbrance to which it would not be subject in the hands of the owner; and the proceeds of the sale thereof to the amount of the exemption existing at the time of sale shall be exempt from execution or other process for one year

after the receipt thereof by the person entitled to exemption.”

The value at the time of the sale of the homestead is to be determined by the court, as stated by Justice Straup in *Giesy Walker Company vs. Briggs*, 49 Utah 205, 220, 162 P. 876.

“It is the amount of the exemption of the proceeds of a sale of a homestead which is fixed as of the time of the sale of the homestead not of the levy. But property subject to levy, whether proceeds of sale or other property, is as of the time of the levy; that is the creditor by levy may take only such property as at the time of the levy is not exempt and is subject to levy.”

In utter disregard of this statute, the court heard evidence as to the value of the land at the time of the trial and made a finding that the value then exceeded the homestead exemption of \$2300.00. No evidence was offered as to the value of the contract which was about to be forfeited and which then by the findings of the court constituted the homestead exemption of John W. Smith. No finding was made as to the value at that time, but on the contrary, the court treated the conveyance which was authorized by the statute quoted as utterly void and attempted to subject the land itself to a judgment seven years later.

By such a sale homestead property would be taken out of the class of property subject to mortgage and sale and the owners would be deprived of one of its principal values; that is the right of sale and disposition. The stat-

ute was enacted pursuant to the terms of the constitution, Article 22, Section 1 and cannot be disregarded.

The contract at the time of the assignment from John W. Smith to the Smith Land Company was subject to delinquencies in payments, delinquencies in taxes and failures to make report. The contract then was not subject to judgment lien or execution sale because there was a large balance due upon the contract and evidently when Nielson, through his attorney, directed the sale of the property by the sheriff, the directions were not followed up because there was no equity to be sold. The plaintiff alleges in the Box Elder County case that executions were issued and returned wholly unsatisfied. (Abs. 2.)

By reference to the abstract, page 112, it will be seen that execution was issued upon the request of Benjamin Spence, one of the attorneys for the plaintiff, and the sheriff was specifically directed to levy upon the property of John W. Smith. The execution was issued on the 16th day of August, 1930, about two months before the contract was assigned. The return was prepared by the deputy, since deceased, on December 3, 1930, to the effect that he had made due search and inquiry and no property had been found. Plaintiff was not in a position to controvert the return because he alleges the fact in the complaint, repeats it by adoption in the complaint in intervention and in the amended complaint filed June 22, 1937, and adopts it in the amendment to the complaint in intervention.

Nielson lived in the locality of the land. He saw the crops planted and harvested. He knew of the contract of

sale between Johnson and Smith and with a reservation of a lien upon the crops as security for the payment of the purchase price of the land; if, as now claimed, there was an appreciable equity in the contract, subject to sale, it would have been sold.

No evidence was offered or received as to any value in the contract on the 30th day of October, 1930, upon which the court could base a finding.

The court finds:

“ . . . that 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.” (Abs. 123.)

And further:

That the value was in excess of \$2300.00 at the time of the trial. (Finding No. 10, page 123 of the abstract.)

There is no evidence to support such a finding. Evidence was offered by the plaintiff as to the rental value of the land (Abs. 45) and as to the value of the land (Abs. 102) but nowhere as to the value of a defaulted contract, subject to forfeiture. There is evidence to the effect that the trustee sold the interest of John W. Smith in the property even after payments had been made from 1930 to date of sale, March 9, 1937, for the sum of \$500.00 which was the fair value of the property. (Abs. 44.) And there is evidence that on December 7, 1936, after payments had been made from October, 1930, to that date, that the contract was still subject to forfeiture and forfeiture was declared and notice thereof given, which,

but for the timely advancement of \$1900.00 by the wife of John W. Smith would have been final. (Abs. 60.) Evidence of the value of the land was of course not evidence of the value of the contract because payments on the contract were to be made before the contract had any value whatsoever. There is also the agreement of John W. Smith, the Smith Land Company and J. Cameron Smith to make a new contract for the purchase of the property for the sum of \$4,000.00, when Charles D. Moore acquired title thereto. (Abs. 59.)

We assume that this court knows and will take judicial notice of the fact that in 1929 the nation-wide depression came; that it grew steadily more severe; that loans upon farm property ceased to the extent that it became necessary for the United States Government to provide money with which to assist the farmer; that the market for wheat all but vanished and when a market was found the prevailing price for the years intervening between 1930 and 1933 was about 30c per bushel and that installment payments upon wheat land could not be made from crops produced. This is reflected in the fact that, although through the aid of J. Cameron Smith, \$6,000.00 had been paid on the contract, there was still \$4,000.00 unpaid on November 29, 1932, and \$2433.88 unpaid when the notice of forfeiture was given on December 7, 1936. It cannot be claimed by respondent that the contract was not in default because on the 7th day of December, 1936, he listed seven particulars wherein it was in default and then subject to forfeiture. Now, under the circumstances

what was the contract worth on October 30, 1930? There is no evidence.

Respondent says that the Bankruptcy Court found it to be worth \$500.00 and authorized its sale for that amount, and upon that sale, Aubrey F. Turley, the purchaser, was substituted as a party intervenor and asked to be decreed the owner of the property. In the absence of other evidence, the court could find only \$500.00 value in the property, certainly not a value in excess of \$2300.00. Until it is shown by proper pleading and evidence that there was property on October 30, 1930, subject to judgment lien, execution and sale, then there could be no finding of a conveyance in fraud of creditors.

**THE PLAINTIFF, W. A. NIELSON, IN THE BOX
ELDER COUNTY CASE AND DEFENDANT
IN THE SALT LAKE COUNTY CASE IS
ESTOPPED BY PRIVITY OF CONTRACT
AND BY HIS OWN ACTS FROM QUESTION-
ING THE LEGALITY OF THE INCORPORA-
TION OF SMITH LAND COMPANY OF THE
OWNERSHIP OF THE CONTRACT.**

Bigelow on Fraudulent Conveyance, page 481, referring to Coke, the author says:

“Referring to the statute of 13th Elizabeth, Coke says that if there is fraud at the outset of a transaction, that is actual fraud, nothing afterwards can anyways salve and amend the matter. That is to say in the language of later times, the fraud of the stat-

ute of Elizabeth cannot be purged. Whether and how far that is true in cases arising under the penal provisions of the statute we do not here inquire; the question here is of the civil administration of the law.

The rule of Coke however is not to be taken too broadly. It requires no citation or authority to show that a creditor who assents e. g. to an assignment by his debtor, containing a provision sufficient to avoid it as fraudulent, such as a trust for the debtor, is barred by his consent from raising objection afterwards to the assignment for any cause known to him when he assented. Indeed it is apprehended that Coke's rule was not intended to apply to cases of present or subsequent consent or ratification by the creditor; that the statute is not to be understood as making the transaction void in such a sense as to prevent subsequent recognition of it as binding; and that the creditor's consent will always take away the taint."

In 2 Pomroy's Equity Jurisprudence, Section 916, page 1914, the author says:

" . . . while the party entitled to relief may either void the transaction or confirm it, he cannot do both. If he adopts a part he adopts all. He must reject it entirely if he desires to obtain relief."

And again, Section 964, page 2089, the author says:

"Where a party originally had a right of cancellation or of action to defeat or set aside a transaction on the ground of actual or constructive fraud, he may lose such remedial right by a subsequent confirmation by acquiescence, and even by mere delay or laches."

In Bigelow on Estoppel (sixth edition), page 744, Section 2, the rule is concisely stated:

“So also one who accepts the terms of a deed or other contract must accept the same as a whole; one cannot accept part and reject the rest. Thus, a party actively affirming a transaction such as a contract or a purchase by receiving and retaining money upon it, is estopped thereafter to deny the force of any of its express or implied terms or conditions,”

and see following cases with these facts in mind.

The rule applicable to the facts disclosed in this record is clearly stated in 1 Fletcher on Corporations, Section 356, page 755, as follows:

“The estoppel of a person dealing with a pretended corporation to deny its legal incorporation also operates against persons who stand in his shoes, or in other words, who are in privity with him. Thus, it clearly operates as against his executor or administrator, or his heirs, and against one to whom he assigns his contract with the pretended corporation.”

In *McLaughlin v. Park City Bank*, 22 Utah 484, 63 Pac. 589, the court said:

“While a creditor is under no obligation to accept the provisions of an assignment made for his benefit, yet he cannot hold an assignment good in part and bad in part. If he ratifies it at all he must stand by it. He cannot accept that part which is beneficial to him, and repudiate the balance of it. Nor can he receive the benefits of the assignment while he is in actual hostility to it, claiming in the

courts that it is fraudulent and void and refusing to accept its benefits. He cannot claim benefits under it and at the same time attack it for fraud, and utterly destroy its validity as to him. Burrill on Assignments, Secs. 476-77-79; Jeffries Appeal, 33 Pa. St. 39; Valentine v. Decker, 43 Mo. 583; Beifield v. Martin, 37 Pac. 32; Alder v. People's Bank, 46 S. W. 536; O'Brien v. Glenn, 17 S. W. 1030.

If a creditor accepts the benefits of an assignment knowing the facts he cannot, ordinarily, impeach or repudiate it thereafter, on the ground that it is illegal and fraudulent. So, having repudiated it altogether, he cannot take under its provision as other creditors would do who have accepted it. The reason of this rule is that he is not entitled to two inconsistent, adverse or conflicting rights. One is necessarily a denial of the other. Burrill on Assignments, (6th ed.) 441; Alder v. Bank, 46 S. W. 536."

And in Kerslake v. Brower, et al., Oregon, 66 P. 437, it is said:

"A creditor of the assignor, whether provided for by the assignment or not, who wishes to repudiate the trusts of the assignment on the ground that they are illegal and a fraud upon the honest creditors of the assignor must apply to set aside the assignment as fraudulent and void against him as a creditor, instead of coming in under the assignment itself as a preferred creditor or otherwise."

Pratt v. Adams, 7 Paige, 615, 641. And Mr. Chief Justice Gibson says: "The books are full of cases which show that a party shall not contest the validity of an instrument from which he draws a benefit, nor affirm it in part and disaffirm it in part." Irwin

v. Tabb, 17 Serg. & R. 419. See also Frierson v. Branch, 30 Ark. 453; Adler-Goldman Commission Co. v. People's Bank, 65 Ark. 380, 46 S. W. 536; O'Bryan v. Glenn, 91 Tenn. 106, 17 S. W. 1030, 30 Am. St. Rep. 862; McLaughlin v. Bank (Utah), 63 Pac. 589. The reason of this rule is that a creditor is not entitled to two inconsistent and adverse rights. He is required to elect which one he will adopt, and the election of one is necessarily the rejection of the other."

Let us take a glance at some of the evidence. As early as November 28, 1930, about one month after the corporation was organized and the contract was assigned, C. D. Moore, as attorney for M. M. Johnson, wrote demanding payment of the \$2,000.00 installment then due and closed:

"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,"

and so continued the letters 27 in all and a receipt being a part of them received in evidence as Exhibit 9. (Abs. 88.)

Furthermore, Moore proposed acquiring this land and the contract personally and to make certain as to the balance due and for the purpose of eliminating continuous delinquencies he had Smith write a proposal on behalf of himself, the Smith Land Company and J. Cameron Smith to fix the balance of the purchase price at \$4,000.00 payable in installments of \$1,000.00 instead of \$2,000.00 and to increase the interest from seven to eight percent. It is unthinkable that any person would contend that after all

these letters had been written, and money continuously collected upon the contract in response to the letters that either Johnson or Moore could have defended a suit on the contract upon the grounds that the Smith Land Company was not the owner of the contract and that it in fact was not a legal entity.

But Nielson steps into the shoes of Moore as the Assignee of Johnson and takes all rights which they held and assumed all obligations. He says in his notice:

“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.” (Abs. 60.)

As he acquired the rights under the contract he assumed the obligations. He took it as it was with the Smith Land Company as the owner and he assumed the obligation under the contract to convey the land to the Smith Land Company as owner and not otherwise. He could not blow hot and cold by demanding money from the Smith Land Company and denying its existence in the same breath. He could not demand money from any organization without legal existence and without obligation and then deny its right to the consideration for the money paid. That is precisely what he sought to do. The notice is addressed to John W. Smith and to “Smith Land Company,” a corporation. It says:

“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 Nielson-Burton Company and John W. Smith on the 23rd day of November, 1936, covering the following described property, located in Box Elder County, Utah," then follows a description of the land, etc. (Abs. 60.)

How comes it that the Smith Land Company was in default in the performance of the covenants and conditions if it had no legal existence and if it were not obligated on the contract? That notice was given with full knowledge of all the transactions affecting the contract since its execution and admittedly by the pleadings Nielson knew all of these facts from and after 1935. And continuing after specifying seven different particulars wherein the Smith Land Company was in default, Nielson said:

"Upon your failure (certainly directed to the Smith Land Company) to comply with the terms and the covenants and conditions set out in said contract within thirty days after this written notice of default and demand for performance and to pay the costs and expenses of enforcing the said agreement, the undersigned as present owner of said property and of all rights of the seller in said contract named will declare a forfeiture of all rights of the purchaser, *and any successor to the said purchaser*, under the 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,"

and that was dated December, 1936, and signed Wilse A. Nielson. (Abs. 61.)

It would not be contended that upon payment of the balance of the purchase price, Wilse A. Nielson was not

obligated to convey the land in accordance with the terms of the contract and the notice clearly recognized "any successor to the said purchaser" and hence Nielson was obligated to convey to the assignee of the purchaser. No question of the assignability of the contract is or could be raised. Within the thirty day period the money was tendered by Smith Land Company as successor of John W. Smith but the tender was refused because the Smith Land Company had no legal existence and was not the owner of the contract. The money was then deposited with the Clerk of the Court and Nielson took the money at the same time denying the existence of the payor and of its right to receive the deed. He assumed inconsistent positions which have never been permitted since the law of contracts came into existence.

In the light of these authorities can there be any doubt that when Nielson served notice of intention to forfeit upon the Smith Land Company, he elected to treat it as the owner of the contract and as being obligated to pay him the money which he demanded. He was no doubt barred from prosecuting the suit to set aside the assignment of the contract by becoming the transferee of the land and the contract. He sought, as he states, to in some form merge the judgments into the contract by acquiring the title of the ownership of the land and the contract and he took the title with an obligation to convey upon receipt of the balance of the purchase price under the same conditions that the land was held by Moore. He acquired no greater rights than Moore himself held and he assumed all the obligations and limitations which

Moore had subjected himself to by his continuous demands upon the Smith Land Company for money and the response of the Smith Land Company to the demand by payment to him on account of the purchase price of the property. The estoppel was in every respect complete.

THE BOX ELDER COUNTY CASE WAS BARRED BY THE STATUTE OF LIMITATIONS.

The assignment of the contract to the Smith Land Company was made on October 4, 1930. (Abs. 67.) The suit was filed July 9, 1935. Nielson, the plaintiff, lived neighbor to John W. Smith and his land was near the Smith land. He was constantly in touch with Smith and observed the operations on the land. The complaint alleges that upon the entry of the judgment set out in the complaint, execution was issued and delivered to the Sheriff of Box Elder County and said executions were duly returned by the sheriff wholly unsatisfied and "the said judgments or any part thereof have not been paid." Fortunately the praecipe for the issuance of the execution, the execution and the return are all in the record. The sheriff was directed to levy upon the real or personal property and advertise the same for sale, "as soon as you may do so." The sheriff received the execution on September 26, 1930, and made his return the 3rd day of December, 1930. It is true the writ was not filed in the clerk's office. But the plaintiff alleges the return. He was fully informed, otherwise he would not have alleged

the contents or the character of the return. The return is that:

“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 up 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 a 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 therefore return the within writ unsatisfied.” (Abs. 114.)

The letter from J. D. Skeen to the sheriff attached to the return as Exhibit A says the property that he, “John W. Smith,” occupied was purchased on contract and title reserved to both the rent and the crops. “Any property he might have had was sold some time ago.” Add to this information, which, as observed, the plaintiff alleges he had and what more could have been told to the plaintiff which would have added to his means of knowledge as of December 3, 1930, and yet he did nothing whatsoever until July 9, 1935. The bar of the Statute of Limitations, 104-2-24 was pleaded. We may say, as this court said in *Smith v. Edwards*, 81 Utah 244, 17 P. (2d) at page 271:

“No inquiry of any nature seems to have been made.”

If an inquiry had been made, it is apparent that the facts would have been disclosed, if any facts other than those given had been desired. It is true that the letter did not state to whom the property had been sold or what was received, but even before the sheriff's return Moore, as attorney for Johnson, had received notice for in the letter of November 28, 1930, he said so. (Exhibit 9.)

Nielson conferred with Moore, sought to attach the crops but was unable to because the contract was in default, and Moore said his client had a mortgage. It is inconceivable that in the circumstances Nielson did or could have closed his eyes to the facts which were apparent on every hand. Under the statute as construed in the following cases the suit was barred.

Gibson v. Jensen, 48 Utah 244, 158 P. 426;

Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807;

Pearsall v. Smith, 149 U. S. 231, 37 L. ed. 713;

Jones Mining Co. v. Cardiff Mining & Mill Company, 56 Utah 449, 191 P. 426;

Salt Lake City v. Salt Lake Inv. Co., 43 Utah 181, 134 P. 603;

Lady Washington Co. v. Wood, 113 Cal. 482, 45 P. 809.

See numerous cases cited:

37 C. J. 939;

27 C. J. 761;

Wood on Limitation of Actions, Section 276 b (11).

The rule is well stated in the case of Jones Mining Co. v. Cardiff Mining and Mill Company, *supra*, 56 Utah reports at page 458.

“In all such cases the statute begins to run from the time the complaining party discovered the wrongs complained of or when he was apprised of such facts and circumstances with respect thereto as would put a person of ordinary intelligence and prudence upon inquiry. The law is stated to that effect by this court in the case of Gibson v. Jensen, 48 Utah, 248, 158, Pac. 426, and in Salt Lake City v. Investment Co., 43 Utah, 181, 134 Pac. 603. If therefore the facts and circumstances which came to the knowledge of the plaintiff corporation were such as would have caused a person of ordinary prudence and intelligence to act, then it should have acted, and the statute of limitations was set in motion as to it.”

In the case of Salt Lake City v. Salt Lake City Investment Company, *supra*, this court quoted with approval the following language of the Supreme Court of California:

“The rule is well established that the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine and inactive, and afterwards allege a want of knowledge that arose by reason of his own laches or negligence.” (Shain v. Sresovich, 104 Cal. p. 405; 38 P. page 42.)

There is not a word of evidence that Smith concealed the facts. The articles of incorporation were filed in the county clerk's office and the Secretary of State's office. They described the land involved in suit and were public records.

It is apparent that W. A. Nielson had the means of knowing about the assignment and the cause of action, of any, was barred nearly two years before suit was commenced.

THE JUDGMENT AS TO ALBERT S. WHEELWRIGHT IS VOID

Albert S. Wheelwright, as trustee in bankruptcy in the matter of John W. Smith, filed a complaint in intervention in the Box Elder County case on April 20, 1936, with the attorney who appeared for the plaintiff. He filed an amended complaint in intervention, January 12, 1938, with the same attorney. On the trial of the case, the plaintiff introduced in evidence, a petition for an order confirming a sale in bankruptcy of the interest of the bankrupt in the property covered by the contract between John W. Smith and M. M. Johnson; also, the order confirming the sale and a deed. (Abs. 43, Deed—Exhibit B.) Signed and acknowledged April 14, 1937, and on February 4, 1939, the court made an order reciting the sale of the interests of the trustee to Aubrey F. Turley, and continuing:

“It is now therefore ordered, that A. F. Turley be and he is hereby substituted herein for Albert S.

Wheelwright, trustee in bankruptcy of John W. Smith, 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.” (Abs. 116.)

Finding No. 18, Abstract 127 is:

“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 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.”

The proceeding leading up to the sale by Albert S. Wheelwright to Aubrey F. Turley of all of the right, title

and interest of John W. Smith in and to the property, confirmation of the sale and the conveyance of the property and the allowance in the court of bankruptcy of costs and expenses of administration that had accrued, the finding that there was no money with which to pay the same and that the total amount of the judgments pleaded with interests amounted to \$2429.36 were all recited in finding 18, 19, and 20. (Abs. 127.) And the court concluded:

“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” (Abs. 130)

the same being the property described in the contract for the total amount of the judgment and costs and for the full amount of the expense of administration of the said bankruptcy proceeding in said bankruptcy court and as fixed and determined therein in the amount of \$2529.36.

And further, that upon the payment by the Smith Land Company (Abs. 131) of the sum of \$2433.88 as the balance of the purchase price due on said property, the intervenor, Albert S. Wheelwright, trustee in bankruptcy of John W. Smith, bankrupt, is entitled to a judgment and decree and an order of sale of said property to satisfy the said liens in full, together with costs and expenses of such sale.

The court decreed, that the assignment by John W. Smith to the Smith Land Company was 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.”

“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, 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:” and then follows the description of the real estate, “in the amount of \$2529.36 and a further lien in the amount of \$1247.00 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.” (Abs. 133.)

At this time, it is necessary to refer to the original decree and the judgment roll in the Box Elder County case. It will be observed that the judgment was dated April 3, 1939, and filed April 4, 1939. Notice of the judgment was given on April 12, 1939. It will be observed further that the figures \$1247.19 are written in ink. We call attention to an instrument purporting to be signed by J. T. McConnell, referee in bankruptcy, dated April 11, 1939, and by which he purports to fix the costs and expenses including some \$750.00 attorneys' fees at \$1247.19. That instrument was filed in court May 1, 1939. A certified copy of the proceedings in the federal district court will show that the order purporting to fix the fees was appealed from and the matter of fixing the fees and the costs and expenses has been suspended. Evidently some

clerk wrote in the figures in the judgment, ten days after it was signed by the judge and filed.

The mere statement of the facts respecting the items of \$2529.36 and the \$1247.19 condemn the judgment as void. Upon what theory can the court find that Wheelwright has sold his entire interest in the property giving a deed covering the full interest and then impress a judgment lien upon the property for the sum of \$2429.36 in his favor? And this too, after finding that the interest of John W. Smith in the contract to the extent of \$2300.00 was exempt. Not only is such a judgment not supported by the evidence or the findings but upon its face, it is erroneous, if not utterly void.

Furthermore, the court apparently in utter disregard of his own records provided for the entry of judgment by the Clerk for the amount of a judgment of some other court of an entirely different jurisdiction which was to be thereafter entered—a thing that is unthinkable. This was not a suit upon a judgment or another court. It could not have been because no such judgment was entered. It is an attempt to execute a judgment to be entered by a federal court through and by means of an execution of the state court. There is no support under the law for any such proceeding. If a judgment under the state practice could be predicated upon a judgment of the federal court, not then entered, in the same state, certainly it could be done only upon proper pleadings and proof, none of which are in the records in this case.

An effort was made at the time of the filing of the transcript in this case to procure an order of the court

authorizing the filing of a certified copy of an order of the United States District Court in the matter of John W. Smith showing that an appeal had been taken from an order of the referee purporting to allow attorneys' fees and expenses and that the matter was held under advisement by the Federal Court, but for conditions over which appellant had no control the motion could not then be heard. The motion is now made.

The court will bear in mind that the order of the referee in bankruptcy was filed in the District Court for Box Elder County after the entry of the judgment. The clerk evidently inserted the amount specified as costs in the bankruptcy proceeding in the judgment which had theretofore been entered. An appeal was then taken from the order of the referee and to date no costs or expenses have been allowed. Until the district court passes upon the matter, there is no basis for the inclusion of the amount in the judgment and certainly there is no authority in the state court to enter judgment upon a federal court order and to issue execution for its collection.

It is competent to show these matters by a certified copy of the federal court order as it would be competent to show that a judgment appealed from has been paid or that anything subsequent to the entry of the judgment has happened to suspend or nullify the judgment. *County of Dakota v. Henry H. Glidden*, 113 U. S. 222; 28 L. ed. 981.

In conclusion, we say that each point specified in this brief supported by the assignments of error is fatal to the judgment entered. That is to say—the suit could not

in the first instance have been sustained because the property was exempt. The plaintiff was estopped from questioning the existence of the Smith Land Company and of the ownership of the contract. If a cause of action had existed, it was barred by the Statute of Limitations. Albert S. Wheelwright having ceased to be a party to the suit could not be a judgment creditor. No judgment could be entered in favor of Aubrey F. Turley except to the extent of the value of the contract of November 30, 1930, in excess of \$2300.00 and there was no finding justifying any such judgment even as to Turley. The court was wholly without jurisdiction or power to insert, or to permit to be inserted, any order of the Federal Bankruptcy Court and any order of that court has been suspended if not set aside. And finally, the judgment in and of itself is erroneous, if not void upon its face.

Respectfully submitted,

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