

1940

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

Utah Supreme Court

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Albert S. Wheelwright; trustee.

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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 Cor-
poration, Plaintiff and Appellant,

vs.

M. M. JOHNSON, Receiver of Nielson-
Burton Company, Formerly a Co-Part-
nership, Composed of A. J. Nielson and
Charles S. Burton, CHARLES D.
MOORE, WILSE A. NIELSON,

Defendants and Respondents.

No. 6199

No. 6198

Appeal From First District Court, Boxelder County
Honorable Lester A. Wade, Judge

Brief of Respondents W. A. Nielson, and Albert S. Wheelwright Trustee in Bank- ruptcy of John W. Smith, Bankrupt

LEROY B. YOUNG, D. A. SKEEN, A. U. MINER,
Attorneys for Respondents W. A. Nielson,
and Albert S. Wheelwright, Trustee

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MOORE, WILSE A. NIELSON,

Defendants and Respondents.

No. 6199

No. 6198

Brief of Respondents W. A. Nielson, and Albert S. Wheelwright Trustee in Bank- ruptcy of John W. Smith, Bankrupt

We have carefully examined and considered
the so-called statement of facts which covers the
first thirteen pages of appellants' brief. As we

view it, the issues in these cases are clear cut and simple. The so-called statement of facts as set out is very argumentative, confusing and we think misleading and is not a statement but rather an attempted justification of the deliberate and studied plan and purpose of John W. Smith to defraud his creditors and his studied acts in carrying out this purpose.

The two cases present but one issue, that is, did the acts of John W. Smith in transferring his property amount in law to a transfer in fraud of creditors and incidentally was the cause of action resulting from such acts barred by the statute of limitations and further as incidental to the main issue, does the decree rendered herein conform to the established practice in such cases? With this general observation, we shall briefly state the facts as presented by the record.

STATEMENT OF FACTS

In 1930 John W. Smith was the owner of approximately 473 acres of land in Box Elder County and 180 shares of the stock of the Pocatello Valley Pipe Line Company and some other property, subject to an obligation to pay the balance of the purchase price of the land. The property stood of record in Box Elder County in the name of the seller, the contract of sale having been entered into by M. M. Johnson as receiver of Nielson-Burton Company, a co-partnership.

In 1929 Wilse A. Nielson recovered a judgment against John W. Smith in the District Court of the Third Judicial District, in the amount of \$1278.92, which judgment was docketed in the District Court of Box Elder County on September 14, 1929. On May 22, 1930, the City Court at Brigham City en-

tered a judgment in favor of the plaintiff, Wilse A. Nielson, and against John W. Smith for \$54.90.

On the 16th day of August, 1930, the District Court for Box Elder County entered a judgment in favor of Bertha K. Skeen against John W. Smith for the sum of \$100.00, being a judgment for costs awarded on the affirmance by this Court of a previous judgment by the District Court for Box Elder County. This latter judgment was, prior to the filing of the instant case, assigned by Bertha K. Skeen to Wilse A. Nielson and at the time of the filing of this complaint, Wilse A. Nielson was the owner of all three judgments. This case, being referred to as the Box Elder case, was filed in the District Court for Box Elder County on July 9, 1935.

On October 5, 1935, John W. Smith filed a voluntary petition in bankruptcy listing certain assets, *but not listing the real estate or water stock in question*. In his schedules John W. Smith, bankrupt, listed as his only creditors Bertha K. Skeen and Wilse A. Nielson, the plaintiff in this case, and listed as the only claims against him the three judgments above described. These judgments appear in his schedules as certified by the bankruptcy court to this Court in support of a motion to abate, at page 022 of the transcript as follows:

Name of Creditors and Addresses	Where and When Contracted	Name and Nature of Debt	Amount
W. A. Nielson, Tremonton Utah.	Brigham City, Utah. May 22, 1930	Judgment entered in City Court.	\$ 54.90
Bertha K. Skeen, Salt Lake City, 187 A Street	Brigham City, Utah. August 16, 1930.	Judgment entered in District Court	\$ 100.00
W. A. Nielson, Tremonton, Utah.	Salt Lake County, Sept. 29, 1929.	Judgment made and entered in Third Judicial District, Salt Lake County	\$1278.92

An adjudication in bankruptcy was immediately made and Albert S. Wheelwright, intervenor, was duly elected trustee in bankruptcy and immediately qualified and entered upon his duties as such. In 1930 the judgments enumerated appeared on the judgment docket in Box Elder County. On October 7, 1930, after the said judgments were entered against him, John W. Smith caused the Smith Land Company to be incorporated with its principal place of business at Brigham City, Utah, and transferred all of the property then owned by him, including his rights in the real estate and water stock above described to the Smith Land Company in full payment for the total 10,000 shares of its capital stock. The incorporators were all members of the immediate family of John W. Smith. Their names and the amount subscribed is as follows:

John W. Smith	2,000
J. Cameron Smith	1,000
C. Vivian Smith	1,700
E. Lincoln Smith	1,500
Polly Smith	1,000
John W. Smith, trustee	2,799
Max Gailey	1

The contract to purchase the real estate here involved in which John W. Smith was buyer was assigned to the corporation but the assignment was not recorded in the office of the county recorder. The stock as taken by John W. Smith was distributed around among members of his family. There was no apparent change of ownership of the real estate; there was no record change of the ownership and John W. Smith continued to occupy and operate the property consisting of a dry farm ranch, the same as before the assignment and up to the time of the filing of this action, taking crops

and rents therefrom and paying them on account of the balance of the purchase price.

In 1931 the Smith Land Company failed to pay the corporation tax and its charter was forfeited and continued as forfeited until after this action was filed, when it was reinstated.

In the bankruptcy proceeding no property nor exemption was listed, and Albert S. Wheelwright as trustee, did not receive any money or other property, but asserted the right to the real estate and all interests of John W. Smith in it at the time the petition in bankruptcy was filed and claimed the right to administer that property as a part of the bankruptcy estate, to the exclusion of the bankrupt and the corporation.

M. M. Johnson as receiver of Nielson-Burton had deeded the land, subject to the contract of sale with John W. Smith, to C. D. Moore. C. D. Moore claimed the right, as against John W. Smith and the Smith Land Company and Wheelwright as trustee, to forfeit this contract because of its default. Wilse A. Nielson, in order to protect against such forfeiture, purchased the rights of C. D. Moore in the contract and in the land and the deed to the property was recorded in his name in Box Elder County. Succeeding to the rights of Johnson and Moore, Wilse A. Nielson served notice of default upon the bankrupt, the Smith Land Company and Wheelwright. John W. Smith then, acting for himself through the Smith Land Company, tendered to Wilse A. Nielson the balance of the purchase price and suit was filed in the name of Smith Land Company against Wilse A. Nielson, Moore, Johnson and others for a specific performance of the contract

of sale. This case will be referred to as the Salt Lake County case.

Albert S. Wheelwright, claiming all the rights of John W. Smith, filed his complaint in intervention in the Box Elder County case and the case was carried on by him as trustee as originally filed by Nielson as a creditors bill. By stipulation the two cases were tried together but separate findings and decrees were entered in each case. In the Box Elder County case the trial court held and found and decreed that the transfer of the real estate and all interest in it and the water stock of John W. Smith was made with the intention to hinder, delay and defraud his creditors and was therefore fraudulent and void. The court also determined the total amount then due on the three judgments owned and held by Nielson and determined that there was no money available to pay the costs of the bankruptcy proceeding and adjudged the total of these judgments and the amount of costs in the bankruptcy court, to be a first and prior lien on the property in favor of Albert S. Wheelwright, as trustee in bankruptcy. The court further found that the Smith Land Company was organized as a mere contrivance and instrumentality by John W. Smith to accomplish his fraudulent purpose and was his alter ego. In the Salt Lake County case the court decreed the conveyance of the property to John W. Smith and the Smith Land Company by Nielson, upon the payment to Nielson of the balance of the purchase price, but subject to the lien of the judgment entered in the Box Elder County case in the amount found to be the aggregate of all three judgments held by Nielson and the costs incurred in the bankruptcy proceeding.

We make brief reference to the pleadings as presenting the issues on this appeal.

PLEADINGS — BOX ELDER COUNTY CASE

The complaint in the Box Elder County case, as amended, is the ordinary creditors bill. It alleges the entry and ownership of the judgments by the plaintiff, the ownership of the property by John W. Smith, the organization of the Smith Land Company by John W. Smith, to whom the property was transferred for 10,000 shares of stock of the par value of \$1.00 per share, the lapse of the charter of the corporation during the year following its organization for failure to pay the corporation tax, the fact that the transfer to the corporation covered all property of the defendant, John W. Smith; that he was insolvent and that the transfer was made with intent to hinder, delay and defraud the creditors of John W. Smith and that the corporation was holding the property in trust for John W. Smith and the plaintiff as his creditor; that the property at all times stood in the name of the seller and there was no change in possession or use of the property and the plaintiff had no notice of the transfer and the fraud connected therewith until within three years prior to the filing of the plaintiff's action.

The allegations of this complaint were adopted by the Trustee in Bankruptcy, Albert S. Wheelwright, who, under order of court, filed a complaint in intervention and thereafter became the real plaintiff.

The defendant, John W. Smith, by his answer as amended, admitted the entry of the judgments and as to one of them pleaded the statute of limitations. He further admitted that execution had been

issued and was not satisfied. That he was one of the organizers of the Smith Land Company but denied that it was organized or any transfer was made with intent to hinder, delay and defraud creditors. The other defendants, except the Smith Land Company, admitted the ownership of the property in John W. Smith and in effect denied all other allegations. By an amended and supplemental answer the Smith Land Company alleged, among other things, the ownership of the real estate in John W. Smith and his defaults under the contract to purchase and further alleged that after the plaintiff's complaint was filed, the corporation caused its charter to be reinstated and further alleged that if the plaintiff had any cause of action it was barred by limitation.

The Smith Land Company further alleged that since the filing of the complaint, Nielson acquired the ownership of the land and the contract of sale from M. M. Johnson and served notice of the forfeiture of the Smith Land Company, that the defendant company had tendered the balance due on the contract and become entitled to a deed; that the defendant company had taken possession of the property and cultivated it and made many installment payments to the seller and the plaintiff, Nielson, was estopped from denying the ownership of the property by the Smith Land Company. In its previous answer the company had alleged that the plaintiff and his attorney knew of the transfer of the property by Smith to the corporation at the time and more than three years prior to the institution of the action.

These affirmative allegations of the original and amended and supplemental answer were denied in a reply by the plaintiff.

PLEADINGS — SALT LAKE COUNTY CASE

The complaint of the Smith Land Company, as amended, is a simple complaint for specific performance against M. M. Johnson, as the original party to the contract of sale, and his successors in interest, including Wilse A. Nielson in whom title was vested at the time the action was filed. The amended answer of Wilse A. Nielson admits the original contract and John W. Smith, as purchaser, took possession under the contract and denies generally the other allegations of the complaint. Then, by further answer, alleges the pendency of the Box Elder County case and states further generally the allegations of the complaint as amended in the Box Elder County case as above detailed.

FINDINGS AND DECREE — BOX ELDER COUNTY CASE.

The cases were consolidated for trial but separate findings and decree were entered. In the Box Elder County case the court found, on all of the material issues presented to the effect that John W. Smith was the owner of the property in 1930, subject to the balance of the purchase price, and that the judgments were entered as alleged and admitted by the defendants; that John W. Smith caused the corporation to be organized as a contrivance to be used in hindering, delaying and defrauding his creditors; and that after transferring his property to the corporation he was insolvent; that the effect was to hinder, delay and defraud his creditors, including the plaintiff and that the corporation had no separate existence but was his alter ego and that upon receiving the stock for the trans-

fer of all of his property, the stock had been distributed, wholly without consideration, among the members of his family as a further step in his plan and purpose to hinder, delay and defraud his creditors. That the property stood of record in the name of the seller and that no record of the transfer of the property was made in the office of the county recorder and the plaintiff had no knowledge of the transfer, or any facts connected therewith until within three years prior to the filing of the action. That the plaintiff, Wilse A. Nielson, was the owner of all three judgments described in the complaint, aggregating in total the sum of \$2529.36; that in the bankruptcy proceeding Albert S. Wheelwright was the Trustee in Bankruptcy of John W. Smith and that Smith had caused to be deposited in the Salt Lake City case, as a tender, the balance of \$2433.88 remaining unpaid on the purchase price; that title to the property and all interest of John W. Smith therein passed to Albert S. Wheelwright, Trustee in Bankruptcy, subject to the homestead rights of John W. Smith. That Albert S. Wheelwright, as such Trustee in Bankruptcy, had in due course of the bankruptcy proceedings offered for sale and sold to Aubrey F. Turley the said property and all rights of John W. Smith therein and Aubrey F. Turley had paid therefor. That the plaintiff was the only creditor of John W. Smith listed or appearing in the bankruptcy proceeding; that John W. Smith had not paid the costs of the said bankruptcy proceeding and there had accrued certain costs and expenses of the bankruptcy proceeding, to pay which there were no funds available.

From this the court concluded that the Smith Land Company was organized as a vehicle or contrivance to be used and that it was used by John

W. Smith in hindering, delaying and defrauding his creditors; that the attempted transfer was fraudulent and void to the extent that the property was necessary to be applied to the complete satisfaction of the said judgments and all costs incurred in the bankruptcy proceeding, for which Albert S. Wheelwright became entitled to a judgment and first lien on the said property and the whole thereof, subject to the homestead exemption. The decree adjudged the assignment and transfer by John W. Smith to the Smith Land Company to be fraudulent and void and further that upon the payment of the balance of the purchase price, Albert S. Wheelwright was decreed to have a first and prior lien on the said property in the amount of \$2529.36, being the amount of the judgment, with interest, and also for the additional amount of \$1247.19 being the amount of costs and expenses as determined by the bankruptcy court in the bankruptcy proceeding; and further decreeing that the judgment be satisfied upon the payment, within 60 days, of the said amounts, in default of which Albert S. Wheelwright would become entitled to proceed to foreclose his lien upon the said property.

FINDINGS AND DECREE — SALT LAKE COUNTY CASE.

In the Salt Lake County case the court made findings on all material issues, following, in effect, the findings in the other case, as above detailed, and the court then concluded that Wilse A. Nielson, upon the payment to him of the balance of the purchase price, as tendered, should execute a deed as called for by the contract, to John W. Smith and the Smith Land Company and upon delivery of the

same, with abstract and water stock, to the county clerk, the clerk was directed to deliver the check tendered and held by him to Wilse A. Nielson. The court in this case decreed the property to be conveyed subject to the lien as fixed and determined and decreed in the Box Elder County case.

ARGUMENT

Twenty-two assignments of error are printed in the appellants' abstract. In the brief, appellants discuss only part of these assignments of error and group them under five separate heads. Under the rule of this Court, we assume that all assignments of error not included in the argument in appellants' brief are waived and we shall give no attention to them.

The fundamental question presented by this appeal is the effect of a transfer by an insolvent debtor of all of his property to a corporation, organized by him where he takes in exchange all of its stock, as against the rights of existing creditors.

PLAINTIFFS' BRIEF

The cases on this subject are rather numerous, and the majority of them hold, with very little qualification, that where a debtor transfers his property to a corporation in consideration of the stock of the corporation, and receives no other consideration for the transfer except the stock of the corporation, the transfer may be considered as fraudulent and may be set aside or the property reached in the

hands of the corporation by the creditors of the debtor so making the transfer.

A leading case on the subject, and a well considered case, is the case of

First National Bank v. F. C. Trebein Company, an Ohio case reported in 52 N.E. 834.

In that case Trebein formed a corporation which was called the F. C. Trebein Company. Prior to the forming of this corporation, Trebein had been carrying on a business of buying, selling and milling grain, and in that business he owned two or three mills, elevators, considerable real estate and water rights and capital stocks and other personal property. His personal financial affairs came to be somewhat involved and he learned that he was going to become further liable on outstanding notes which he had endorsed personally for another company. This condition existed in the latter part of the year 1894. In December of 1894 and January of 1895, Trebein conveyed real and personal property to his wife to the value of over \$40,000.00, claiming it was in part payment of a prior indebtedness due to the wife. He also transferred real estate of the value of \$2100.00 to his daughter, claiming it was a fulfillment of a promise of a wedding gift he had made some six months previous. He also pledged a large amount of corporate stocks to his wife as collateral for a balance of \$8700.00 which he claimed was due her over and above the \$40,000.00. The transfer of such property to his wife and daughter was not involved in the particular case reported, the Court merely stating that another action was pending with regard to those transfers. After such transfers the defendant, Tre-

bein, owned real estate and milling property worth somewhere in the neighborhood of \$60,000. On January 22, 1895, he formed a corporation, incorporated for \$60,000, with 600 shares of a par value of \$100.00 each, and conveyed all of his property to the corporation except that which he had previously transferred to his wife and daughter. There was some question whether the property transferred to the corporation was actually worth \$60,000.00 or not, but no point was made of that by the court. Of the 600 shares issued upon the incorporation of the F. C. Trebein Company, Trebein himself took 596 shares. One share each was issued to his wife, his daughter, a son-in-law and a brother-in-law, each of whom paid \$90.00 a share for the one share of stock delivered to them. Of the 596 shares issued to Trebein, he retained one share and pledged the balance to three banks as security for notes covering obligations which the banks had previously held against him.

The same contention was made in that case as was made by the defendant, John W. Smith, in this case; that is, that his sole intent and purpose in forming the corporation was to try and protect his creditors, and he attempted to prove his point by showing that he had pledged practically all of the stock to his creditors on their obligations. The same argument was made by John W. Smith in this case, claiming that he gave stock to some of his creditors, who were members of his family, and offered stock to the plaintiff, Nielson, the only other creditor still holding obligations against him.

The Ohio Supreme Court held that, regardless of the fact as to whether he had really intended to ultimately pay his creditors out by means of the

stock or otherwise, the transfer operated to hinder and delay the creditors and the Court said that it was —

“clearly satisfied that the conveyance by Trebein of his property to the corporation was made to hinder and delay creditors, and should have been so declared by the (trial) court and ordered administered for the benefit of all his creditors, . . .”

The trial court had considered that Trebein had acted in good faith and gave judgment in his favor. The Supreme Court reversed the trial court, saying:

“. . . The court found that this was all done in good faith. But, in view of the facts, we are unable to see how the court could have meant more than that he meant no wrong by it. Good faith in law, however, is not to be measured always by a man's own standard of right, but by that which it has adopted and prescribed as a standard for the observance of all men in their dealings with each other. When one conveys all his property to another with the intention of hindering and delaying his creditors, or a part of them, in pursuing their legal remedies against him and his property, his conduct in law is deemed fraudulent, however honestly he may have intended to deal with all his creditors in the future.”

The Supreme Court of Minnesota, in

Benton v. Minneapolis Tailg. & Mfg. Co.,
76 N.W. 265, said:

“We have already stated his financial condition and that his indebtedness largely exceeded his assets. He must have in-

tended the necessary consequences of his own acts. He transferred nearly all of the goods found in his wholesale store, and all of the fixtures therein contained, available personal property and about all he had, and he closed out the business previously carried on, and accepted as full payment stock shares in a corporation which was nothing but an experiment and which shares had no market value whatsoever. He converted his available personal property into that which was much less available for the payment of his indebtedness; and the transaction had a direct and immediate tendency to hinder, delay and defraud his creditors. Further than this, it was admitted that, of the stock issued to McLeod, in payment of the property, he immediately turned over shares of the par value of \$5,000 in payment of a note for the amount held against him by his mother-in-law, Mrs. Pratt and that soon afterwards he pledged the balance of his shares — par value \$4,600.00 — with defendant Ellison as security for a loan of \$1500.00 made by the latter to him. . . . That he pledged shares having a par value of more than three times the amount of money borrowed and that Ellison required such a pledge, indicate quite clearly that these gentlemen did not have a very exalted opinion of the real value of shares in defendant corporation. Taking into consideration all of the circumstances as they were shown on the trial . . . it is very plain that McLeod and Pratt, at least, entered into a conspiracy to hinder, delay and defraud McLeod's creditors, organ-

ized the corporation, having that intent and purpose in mind, and then to complete and consummate the fraud caused the goods and fixtures to be transferred to it, and the stock shares to be issued in pretended payment. These facts justified the finding on which was rested the order for judgment against McLeod, Pratt and the corporation."

In the case at bar John W. Smith transferred every vestige of property of every nature which he had, including his horses, cows, farm tools, and everything, the same as McLeod had transferred his furniture and fixtures previously used in his tailoring business. John W. Smith continued to live upon and occupy the property as his home, the same as he had done previous to the forming of the corporation, just as McLeod after the forming of his corporation continued to do his tailoring business in the Minneapolis store he had operated previously. The only conclusion that can possibly be reached in the case at bar is that the defendant Smith did a farming business prior to the incorporation and, after the formation of the Smith Land Company, John W. Smith continued to do the farming business the same as he had done before. It was simply John W. Smith doing the same business after having attempted to put on a new coat. That this is true is further emphatically borne out by the fact that in Smith's own testimony he stated that he was heavily indebted, his creditors were pressing him, and he could not go on, and that he formed the corporation to enable him to go on and work out. It is further borne out by the fact that immediately after the forming of the corporation, he allowed its charter to be forfeited for non-

payment of the franchise tax. This testimony is very clear and shows, beyond any doubt, that Smith's only purpose in forming a corporation was to hinder, delay and defraud his creditors in the collection of their just claims.

Another case which is very instructive on the points in issue, is the case of

Matchan v. Phoenix Land Investment Company, 198 N.W. 417.

The judgment of the trial court was affirmed by the Supreme Court, which stated:

"Where a corporation has been organized and used as an instrument of fraud; *where as here, an individual has incorporated himself in order to hinder and, if possible defraud creditors, courts will go as far as necessary in disregarding the corporation and its doings in order to accomplish justice.* Such a corporation is a mere parasitic growth, a mass of fungus, which will be lopped off clean whenever necessary to sound results. }

"The fraudulent organizer of a corporation, intending to conceal his property from his creditors, cannot disinfect and immunize his work by admitting to its expected benefits one or more favored ones among his creditors. *The corporation does not rid itself of guilt or its results simply by admitting one or more innocent stockholders. That would indeed be an easy and convenient method of perpetrating fraud. It is not permissible on any ground. Wrongdoers cannot escape justice simply because their associates are not all bad.*"
(Italics ours).

We direct the attention of the Court, without further comment, to the following cases:

Colo. Trading Co. v. Acres Comm. Co., 70 Pac. 954.

Kellogg v. Douglas County Bank, 48 Pac. 587.

National Bank v. Havens, 156 Atl. 645.

Harris v. First National Bank, 149 Southern 86.

Lawton v. Allard Realty Co., 168 Southern 768.

Alliance Trust Co. v. Streater, 161 Southern 168.

Pittsmond Copper Co. v. O'Rourke, 141 Pac. 849.

Bennett v. Minott, 44 Pac. 288.

Paxton v. Paxton, 15 P. (2d) 1051; 80 Utah 540.

Zuniga v. Evans, 48 P. (2d) 513; 85 A.L.R. 133; 87 Utah 198.

Johnson v. Cook, 146 N.W. 343 (Michigan).

Bourgeois v. Risley Real Estate Company 88 Atl. 199 (New Jersey).

Shapiro v. Wilgus, 287 U.S. 348; 77 L. Ed. 355.

Planters & Miners Bank v. Willeo Cotton Mills, 60 Ga. 169.

Kurran v. Rothschild, 60 Pac. 1111.

Buell v. Rope, 39 N.Y. Sup. 475.

We shall next discuss the homestead exemption. The courts generally have gone to the full extent in recognizing and protecting the homestead

exemption granted by the Constitution and the statutory proceeding for working it out.

We assert at the outset that the court here in this decree has given proper consideration and protection to whatever homestead rights exist. In order to get clearly before us the manner in which this question is presented, it is necessary to refer back briefly to the facts and the findings.

~~There can be no claim that notice was given by recording the articles, by analogy to our recording statutes.~~

~~Sections 78-1-6 and 78-3-2, Revised Statutes of 1933,~~

~~because these sections refer to conveyance of real estate which, when acknowledged and recorded, impart notice and provide that "subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice."~~

The action was originally brought as a bill in equity to set aside the transfer as fraudulent and void.

When the defendant, John W. Smith filed his petition in bankruptcy and the adjudication was made and the intervenor, Albert S. Wheelwright, was appointed trustee, Wilse A. Nielson ceased to be an actor in that proceeding. All property rights of the bankrupt passed to the Trustee in Bankruptcy. For a full discussion of the rights of a trustee in bankruptcy in such case we direct the Court to a consideration of

Farkas v. Katz, 54 Fed. (2d) 1061:

"By the challenged transfer, the bankrupt reserved a substantial benefit to himself; the transfer resulting in his retaining complete control of the transferred assets

and the beneficial ownership of a 98 per cent interest in them. *A necessary effect of the transfer was to hinder or delay creditors by putting the transferred assets beyond the reach of legal process in their favor.* The bankrupt is presumed to have intended the necessary or ordinary consequences of his intentional act. The transaction being in substance a transfer by the bankrupt to himself of substantially all his assets, and it being presumed that the bankrupt and the corporation dominated by himself intended to hinder or delay the former's creditors, the conclusion follows that the transfer was fraudulent and voidable at the instance of a creditor who did not consent to it or of the trustee in bankruptcy when he is appointed.

J. I. Kelley Co. v. Pollock & Bernheimer,
57 Fla 459; 49 So. 934; 131 Am. St.
Rep. 1101.

First Nat. Bank v. F. C. Trebein Co., 59
Ohio St. 316; 52 N.E. 834.
13 R.C.L. 480, 543 . . .”

Also

Volume I, Fletcher Cyc. Corporation Perm.
Edition, page 166, paragraph 44:

“Instances abound where fraudulent transfers to the hindrance of corporate creditors were set aside or held invalid, some to fabricated or controlling corporations, on the strength of this general principle (discussing the proposition that courts will disregard the corporate entity where necessary to prevent fraud). . . . Thus where a corporation is organized or maintained as a device in order to evade an outstanding

legal or equitable obligation, the courts, even without reference to actual fraud, refuse to regard it as a corporate entity." Citing numerous cases.

In this same volume at page 48 of the Supplement, are gathered numerous cases and reference is made to an interesting article on this subject in 32 Michigan Law Review, at page 551.

We quote the following from the Supplement:

"Corporation formed to defraud creditors. 'Where the corporate form is used by an individual for the purpose of evading the law, or for the perpetration of a fraud, courts will not permit the legal entity to be interposed so as to defeat justice.' Trachman v. Trachman, 117 N. J. Eq. 167; 175 Atl. 147."

The following cases consider the rules as to ignoring the corporate entity under such circumstances.

Isaacson v. Union Trust Company, 275 Pac. 529.

Adams v. Morgan, 52 Pac. (2d) 643.

Mosier v. Lee, 261 Pac. 35.

Security Warehouse Company v. Hand, 206 U.S. 415; 51 L. Ed. 1117.

Brown v. Kossove et al, 255 Federal 806.

Childs v. Stees, 293 Federal 826.

The bankrupt failed and refused to schedule this property or any interest in it and *failed* and *refused* to claim in his schedules any homestead exemption in the property. Under the authorities, he thereby waived the homestead right entire-

ly. We direct the Court's attention to the following:

7 Corpus Juris, page 357, Section 627:

"(627) 9. Claim of Exemption — a. Necessity for. The bankrupt must affirmatively claim his exemptions in order to be entitled thereto in the bankruptcy proceedings." Citing cases.

In re Webb, 219 Federal 349.

In re Barklaw, 282 Federal 892.

In re Moran, 105 Federal, 901:

"Const. Va., Art. 11, Sec. 1, relating to homestead exemptions, provides that every householder or head of a family, 'shall be entitled . . . to hold exempt from levy,' etc., property, real or personal, not exceeding in value \$2,000. HELD, that such provision merely gives the debtor a privilege of exemption, and does not create an absolute exemption of any particular property, which will prevent the title to such property from vesting in the debtor's trustee in bankruptcy, under Bkr. Act 1898, Sec. 70a, where the exemption is not claimed in his schedules."

In re Baughman, 183 Fed. 668.

In re Friedrich, 100 Fed. 284.

Notwithstanding this, however, after Nielson had, in effect, ceased to be the plaintiff and all rights had passed to Albert S. Wheelwright, the trustee, the defendant, John W. Smith, pleaded his homestead exemption right in this action, and presented evidence to the effect that by reason of a dependent daughter living with him, he was the head of a

excess of the homestead amount, was wholly immaterial on the trial of this case.

We direct the Court's attention to the case of
Crosby v. Anderson, 49 Utah 167; 162
Pac. 75.

The Court said, at page 173:

"Moreover, under our statute, the appraised value of the homestead, if it is appraised, does not control as is the case in some jurisdictions, but, under Section 1162, no bid can be considered and the homestead cannot be sold unless the amount of the bid exceeds the exemption allowed by the statute, regardless of what the appraisement may be."

We further urge that the evidence conclusively shows that the property in question was of a value *far in excess* of the sum of \$2300.00, the amount of exemption found. That is practically without dispute, though some argument is urged that the testimony on this point goes to the value of the contract rather than to the value of the real estate. But we think, fairly considered, the evidence conclusively establishes that the property at the time in question was — over and above the balance due on the purchase price — of a value far in excess of the homestead exemption amount.

Under the findings and decree ample provision is made to fully protect the homestead rights of John W. Smith, if the determination of the court that the corporation was but his alter ego and had no separate existence be overruled, but, on the other hand, and we think the decision of the court is clearly to this effect and supported by substantial evidence that the corporation was but the alter ego

of John W. Smith, had no separate existence and he continued in possession and ownership of all property interests under the contract to purchase and must show the conditions existing now or at the time of the sale of the property as to his right to a homestead. And considering the facts in this light, he is now a single man, not the head of a family and has no homestead exemptions under our statute. As to the procedure and the time of testing the right and extent and manner of protecting the homestead exemption where the property involved is of a value in excess of the homestead, we direct the Court's attention to the case of

Thompson v. Reynolds, 59 Utah 416; 205
Pac. 516.

Every homestead right that the defendant John W. Smith has or that of the Smith Land Company as his grantee, if it is a corporate entity, can be fully protected by the proceeding provided by the judgment of the trial court.

Our statute provides for full protection of existing homestead rights at the time of sale of the property on execution by the officer.

Section 38-0-14, 15-16, Compiled Laws,
1933:

"38-0-14. When Value Greater Than Exemption. If the homestead selected is of greater value than is exempted under this title and consists of two or more separate pieces of land, the person entitled to the exemption may select which he will retain and which shall be partitioned or sold. If the debtor so elects, the homestead may be sold, and after paying the judgment debtor the value of the homestead the balance of

the money shall be applied on the judgment.’’

“38-0-15. Id. Sale on Execution. The homestead shall not be sold if the bid does not exceed the value of the exemption, when the homestead is in one piece; but if the homestead is in more than one piece, then the officer and the judgment debtor shall proceed as hereinafter provided to determine the value of each piece of property claimed as exempt, and no piece shall be sold unless the bid therefor is greater than the appraised value thereof.”

“38-0-16. Id. Appraisal. If the officer having the execution and the person claiming the exemption cannot agree as to the value of the homestead, or the partition thereof, the officer shall select one appraiser and the person claiming the exemption another appraiser, both being householders of the vicinity, to whom the officer shall administer an oath to fairly and justly appraise and set apart the exempt property concerning which there is a disagreement. In case of disagreement of the appraisers, they shall choose a third person, who shall also be sworn, and the decision of any two such appraisers when made shall be final. The appraisers shall report to the officer their appraisal of the property claimed as a homestead. If the person entitled elects to have the property partitioned, it shall be the duty of the appraisers to set apart such homestead as the person entitled shall select and be entitled to, and the property not set apart as

homestead shall be subject to sale under execution.”

Next in argument appellants urge estoppel. This is a very far-fetched idea and we are unable to understand its application, in any sense, to this case. As above pointed out, the court has found that the Smith Land Company was the alter ego of John W. Smith, that it was a fictitious, non-existent entity, so far as this property was concerned, and used merely as a convenience and contrivance to aid John W. Smith in completing his fraudulent intent and purpose. But aside from this, where is there any basis for estoppel as applied to the Trustee in Bankruptcy? Wilse A. Nielson testified, and this is without dispute, that he never heard of the corporation until just before he filed the action in 1935. When the petition in bankruptcy was filed and the trustee appointed, Nielson ceased to have any interest in the matter, except in the form of a claim in the bankruptcy proceeding. The full title and right vested in the Trustee in Bankruptcy, and as such he had no dealings with the company. The dealings between the company and C. D. Moore or the title holder of the property cannot affect the Trustee in Bankruptcy and at the time Wilse A. Nielson purchased the title to the property and the right to receive the balance of the purchase price, he had no standing in the bankruptcy court, except as a creditor. He had no dealings with the corporation and there is no representation or other basis for invoking the doctrine of estoppel and further there is no element of change of position so far as the Smith Land Company is concerned, which would be any basis for estoppel.

Certainly John W. Smith as found to be guilty of the studied plan, purpose and intent and act of defrauding his creditors, is not in a position to

urge estoppel and neither Nielson or the Trustee in Bankruptcy received any benefits or gave any recognition to the corporation as a basis of estoppel as against them. In the brief counsel say that when Nielson served notice of intention to forfeit the contract, under the terms of the contract he thereby elected to treat the corporation as the owner of the property. This, we think, is very far-fetched and of no significance at all because the notice was served upon John W. Smith, it reading, (Exhibit 1) :

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

And further we point out that Nielson, at this time, was in a position, in a sense, adverse to that of the Trustee in Bankruptcy. We think it needs no citation of authority to sustain this position.

The next point urged is that of the statute of limitations. Counsel, in their brief, base their whole contention under this head, apparently on the fact that the plaintiff alleged the issue of execution and its return unsatisfied, and do not make a full statement of the fact which is that the return of he sheriff was not made and was never signed by the deputy who handled it and was not filed in court and made a public record, even by the sheriff until after this suit was filed and on the 26th day of June, 1937, as appears in the transcript, page 277.

The uncontradicted evidence and the finding of the court is that there is no apparent change in the relation of John W. Smith to this property. It was known that he was buying it under a contract. The undisputed evidence is that Nielson never heard of the assignment or transfer of this contract.

which appeared nowhere except by way of recital in the articles of incorporation of Smith Land Company, of which the plaintiff, Nielson, had no knowledge until about the time the suit was filed and to which articles he was under no duty in any sense to look. It is true that knowledge of facts that would cause a reasonable man to make inquiry charges him with notice of what such inquiry would reveal. But nowhere in the evidence is there any basis for the application of this rule and therefore the authorities cited by counsel have no application. Failing to find any evidence and apparently in desperation to support their position, counsel in their brief, at page 31, boldly state:

“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.”

We ask, *what circumstances? What facts were apparent on every hand to put Nielson on inquiry?* We challenge counsel to point out in the record any such thing. Neither the circumstances nor facts exist that would warrant such statement. It is a mere explanation of hopeless prejudice on the part of the appellant in an effort to support his position and without findings of the court that knowledge or facts or circumstances pointing to knowledge exist. The question at issue is *not* whether the plaintiff or Mr. Skeen had notice that the execution had been returned unsatisfied. The question involved in this case is whether or not the *plaintiff had notice* that the Smith Land Company had been organized and that the defendant John W. Smith had assigned his contracts and all

of his property to this corporation without any consideration.

There is not a scintilla of evidence in the record to show that the sheriff of Box Elder County ever learned that the contract has been assigned to this corporation or that Mr. Smith transferred his property.

There is not a scintilla of evidence that the sheriff ever attempted to make any levy. This Court knows, that it is not unusual for an execution to be issued and placed in the hands of the sheriff and for the sheriff to make demand for settlement and upon the defendant's refusal or neglect to pay, to return the execution and this is the usual proceedings in the absence of specific directions in writing to levy upon some particular property. There is no evidence that the executions which were issued were any more than demand executions; no evidence that any demand was made to levy upon this particular property and even if there had been, the evidence conclusively shows that the defendant John W. Smith immediately put up a supersedeas bond and had an order staying further execution and further proceedings in the case pending an appeal to the Supreme Court, and that the remittitur from the Supreme Court affirming the judgment did not come down until within three years prior to the filing of this action. The plaintiff, having the supersedeas bond, and thinking the judgment would be paid, clearly had no duty to make any investigation or any attempt to collect on his judgment further and, in fact, was restrained by court order from doing so.

Neither is there a scintilla of evidence in this record to show that the plaintiff, W. A. Nielson or

Mr. D. A. Skeen knew of the organization of the corporation nor of the transfer of the contract. They have both testified positively that they did not know of these facts. There is no contention that they had any constructive notice from the records of Box Elder County. No transfer was recorded. There was nothing in the filing of the articles of incorporation to even put them on inquiry. There is no statute which makes the filing of the articles notice and there can be no analogy to the general recording statute, Sections 78-1-6 and 78-3-2, Revised Statutes of 1933, which statute provides that conveyances of real estate must be acknowledged and recorded and when recorded the record shall impart notice "and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice."

We submit that the argument of appellant on this point of the statute of limitations wholly fails and this point is of no consequence. There was substantial evidence in support of the allegation as to when the facts on which the fraudulent conveyance was based were learned and the court so found. This then completely answers defendants' argument on that point.

Under the next heading "The Judgment As to Albert S. Wheelwright is Void," counsel for appellant seek to argue for A. F. Turley and apparently predicate their whole case in this regard on the fact that A. F. Turley was substituted for Albert S. Wheelwright and therefore the court could not grant a judgment for Albert S. Wheelwright. The trustee, however, was not dismissed out of the case, but continued through as a party

to the case and the final judgment was entered accordingly.

Under the authorities it was ^{not} necessary to substitute A. F. Turley for Wheelwright, his rights having accrued after the action was filed and the intervention made by Albert S. Wheelwright. The court proceeded with the case, apparently on this theory and concluded that Wheelwright was entitled to a judgment fixing the lien evidently on the theory that the rights of A. F. Turley would be worked out through the Trustee in Bankruptcy. We refer the Court to the testimony too of Turley to the effect that he understood that if he did not get the property, he would get his money back from the Trustee in Bankruptcy, to whom he paid it. It will be noted also that the trial court decreed the title to the property in question in appellants, subject to the lien of the plaintiff's judgments and the bankruptcy costs and expenses and gave to the Trustee in Bankruptcy a lien for this entire amount. Obviously then if the Trustee in Bankruptcy acquired no title he did not convey title to Turley and Turley was not entitled to judgment but in the bankruptcy proceeding would be entitled to have his money refunded. But, aside from this, Turley has not appealed and this appellant may not challenge the judgment for him on this appeal. This Court, in the case of

Sorensen v. Bills, 70 Utah 509; 261 P.
450, page 516

disposed of this point finally when it said:

"The District Court, by its decree, required plaintiff to pay defendant all sums paid by him to Millard County and all sums paid by him in redemption of the drainage tax sale. No appeal is taken by

plaintiff from this judgment; hence we must conclude that he is satisfied with it. In any event, the question is not here for review, and we are not called upon to determine whether that part of the judgment of the court was erroneous or not. We are simply holding that in this case, on the face of the record as reflected by the stipulation, the defendant has not been injured by the decree of the court, and was denied no legal or equitable right in the judgment entered."

One other point urged, and we have above referred to it, we think with sufficient explanation, is that the court in working out equity and in order to protect the rights of Nielson to have his judgments paid in full through the Trustee in Bankruptcy required that as a condition, the Trustee in Bankruptcy be given a lien, not only for the amount of the judgments with interest as determined, but for the amount of such costs as determined by the bankruptcy court, using the determination made by the bankruptcy court as a yardstick in this proceeding. We submit that this is entirely proper practice and does not in any sense delegate any jurisdiction or function of the lower court, but takes as a fact a determination made by the bankruptcy court as a basis for doing complete justice in this equity proceeding.

Since this appeal was taken and the record made up the appellant has served a motion for an order authorizing the filing in this Court of a copy of an order of the U. S. District Court in the matter of the bankruptcy of John W. Smith. We take this opportunity to resist such motion and object to the filing of any such order as not in accordance with any recognized practice or proceeding in this

Court and not in any sense binding upon this Court. and therefore wholly irrelevant and immaterial. The cases now before this Court on these appeals result from a full trial and final decision of the District Court and are here for review on the record of that trial only.

We respectfully submit that the motion should be denied and the judgments of the trial court should be in all respects affirmed and this litigation brought to an end.

Respectfully submitted,

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