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

Utah Supreme Court

LeRoy B. Young, D.A. Skeen, A. U. Miner; attorneys for respodents
W.A. Nielson, Albert S. Wheelwright; trustee.

In the Supreme Court of the State of Utah

W. A. NIELSON,
Plaintiff and Respondent.
vs.
JOHN W. SMITH, AND J. CAMERON SMITH, E. LINCOLN SMITH, POLLY SMITH, JOHN W. SMITH and MAX GAILEY, Trustees of the Smith Land Company, and SMITH LAND COMPANY, a Corporation,
Defendants and Appellants.
ALBERT S. WHEELWRIGHT, Trustee in Bankruptcy of John W. Smith, Bankrupt, Intervenor and Respondent,

No. 6199

AND

SMITH LAND COMPANY, a Corporation, Plaintiff and Appellant,
vs.
M. M. JOHNSON, Receiver of Nielson-Burton Company, Formerly a Co-Partnership, Composed of A. J. Nielson and Charles S. Burton, CHARLES D. MOORE, WILSE A. NIELSON,
Defendants and Respondents.

No 6198

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

Respondent's Reply Brief

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and Albert S. Wheelwright, Trustee.

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No. 6198

Respondent's Reply Brief

MOTION TO STRIKE BILL OF EXCEPTIONS

We desire to file a short brief in support of respondent's Motion to Strike Appellants' Bill of Exceptions. An examination of the bill shows that there is no order by the trial judge, incorporated

therein, settling the bill. Laws of Utah, 1933, Section 104-39-4, provides the method for preparing, service and settlement of the Bill of Exceptions. After detailing the various steps to be taken in its preparation, service and settlement by the trial judge, sub-division 6 provides:

> "When settled the bill must be signed by the judge with his certificate to the effect that the same is allowed, and it shall then be filed with the clerk."

There is in the judgment roll a purported order settling the bill. We contend the same cannot be considered. This order is not made a part of the judgment roll by Statute 104-30-14.

Eckman v. Hicks et al, 272 Pac. 931.

It has been repeatedly held that any orders in the judgment role, not a part thereof, cannot be considered on appeal.

Neesley v. P. R. Co., 35 Utah 259; 99 Pac. 1067.

Hulse v. Swicegood, 49 Utah 89; 162 Pac. 89.

Hoagland v. Hoagland, 19 Utah 103; 57 Pac. 20.

Hecla G. M. Co. v. Gisborn, 21 Utah 68; 59 Pac. 518.

Lindsay v. Smart, 43 Utah 554; 137 Pac. 837.

Taylor v. Paloma M. Co., 51 Utah 500; 171 Pac. 147.

Perry Irrig. Co. v. Thomas, 74 Utah 193; 278 Pac. 535.

Madsen v. Hodson, 69 Utah 527; 256 Pac. 792.

When matter is improperly included in judgment roll, it cannot be considered unless in the Bill of Exceptions.

Lindsay v. Smart, 43 Utah 554; 137 Pac. 837.

It will be recalled that previous to the amendment of the statute, orders extending time for preparation, service and settlement of Bills of Exception were not a part of the judgment roll, and many cases hold that unless the orders were made a part of the bill, the same could not be considered, even though a part of the judgment roll. The statute, however, was amended in 1925 to include orders extending time (Chapter 52, Session Laws, Utah, 1925). Nowhere does the statute include the order settling the bill. We contend, therefore, that our motions should be granted. If the Bill of Exceptions is stricken, then the only question remaining is whether the findings support the judgment. We contend that there can be no question that the findings do support the judgment.

Keller v. Chournos, 76 P. (2d) 626.

BY WAY OF REPLY WE FILE THE FOLLOWING AS COVERING THE MATTERS TO BE CONSIDERED ON THIS APPEAL:

Findings Numbers 4, 5, 6, 7 and 8, all relate to the organization of the corporation, the purposes thereby attempted to be accomplished, that its organization was fraudulent in fact and in law, and merely the alter ego of defendant John Smith. An examination of appellants' brief under the heading "Assignment of Errors" (pages 13 and 14), classify all points upon which appellants rely for a reversal of the case. An examination of these six

points discloses that nowhere is it contended that the above findings are not supported by the evidence, and nowhere do appellants in their brief argue the insufficiency of the evidence to sustain these findings. Appellants now, in their reply brief, attempt for the first time, to argue the insufficiency of the evidence to sustain at least some of these findings. We contend that under the many and repeated holdings of this Court, appellants have waived any such assignments of error. The following are only a few of the many cases on this question:

Jensen v. Utah Railway, 72 Utah 366; 270 Pac. 349.

Roach v. Los Angeles Ry. Co., 74 Utah 545: 280 Pac. 1059.

Brown v. U. P. Ry. Co., 76 Utah 475; 290 Pac. 759.

Felkner v. Smith, 77 Utah 410; 296 Pac. 776.

Smith v. Carbon Co., 90 Utah 560; 63 Pac. 259.

Harrington v. Bldg. & Loan, 91 Utah 74; 63 P. (2d) 577.

DOES THE EVIDENCE SUPPORT THE FINDINGS?

We recognize that this is a suit in equity and that this Court has a right to review the evidence. We submit, however, that this Court is bound by a long line of decisions as to the following statement:

> "This Court is authorized by the State Constitution to review the findings of the trial courts in equity cases, but the findings of the trial courts on conflicting evidence, will

not be set aside unless it manifestly appears the court has misapplied proven facts or made findings clearly against the weight of the evidence."

Olivero v. Eleganti, 61 Utah 475; 214 Pac. 313, 315.

Klopenstine v. Hays, 20 Utah 45; 57 Pac. 712.

Singleton v. Kelly, (Utah); 212 Pac. 66.

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Zuniga v. Evans, 87 Utah 198; 215 Pac. (2d) 513, 520.

Wilcox v. Cloward, 88 Utah 503, 510 et seq; 56 Pac. (2d) 1, 5.

Hoyt v. Upper Marion Ditch Co., 94 Utah 134, 141; 76 Pac. (2d) 234, 237, (a 1938 decision with the opinion of Mr. Justice Wolfe).

We submit that an examination of the testimony contained in the bill of exceptions, the written exhibits and the deducible inferences to be drawn therefrom amply supports the findings of the court with respect to the purposes attempted to have been accomplished through the incorporation of this company, and the court's disregarding the corporate fiction and therefore, this Court will not set aside the findings.

CONCLUSION

If, as we have heretofore pointed out, findings Numbers 4, 5, 6, 7 and 8, find support in the evidence, then there can be no question but what the court correctly applied the law. We do not deem

it either necessary or advisable to go into this question in view of the fact that we have submitted the cases in our main brief.

Counsel in his reply brief seems to place considerable stress on the fact that John W .Smith was insolvent, and was about to lose his contract, and this was his reason for forming the corporation. It seems rather far fetched to say that John Smith improved his financial standing to any appreciable extent by forming a corporation, transferring all of his assets to it, and issuing stock to himself and members of his family, none of whom put any capital into the corporation, save and except Cameron Smith, who put a tractor into the corporation. We say, and the evidence amply sustains the proposition, that John Smith continued to operate the farms after the incorporation just the same as before, that the income from the farm was used to carry the contract; that it made no difference that he incorporated because the corporation added nothing to his financial set up. The judgment of the trial court is eminently fair and should be sustained.

Respectfully submitted,

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