

1977

# Jack H. Pitts and Sandra J. Pitts v. Kimberly B. McLachlan and Craig McLachlan : Reply Brief of Appellants

Utah Supreme Court

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the Court, and that "the matter so certified and transmitted constitutes the record on appeal."

Rule 75(p) (2) provides for the making of a statement of facts and in the second paragraph gives the Respondent the right to set forth portions which he controverts, providing that Respondent

"\* \* \* shall make a statement of the facts as he finds them, giving reference to the pages of the record supporting his statement and controverting appellant's statement."

Respondents in their Brief at page 2, lines 12-26, and page 4, lines 13-19, recite alleged facts which are not part of the record on appeal and were not before the trial court and cannot be considered by this Court, if the rules and procedure for appeal mean anything.

Respondents were free to file affidavits in opposition to the motion of Appellants for amendment of their summary judgment, and failed to do so. Had such affidavits been filed, the attempted allegations could have been dealt with. If this Court were a fact-finding body, and if the allegations involved material facts, it would be reasonable to respond to the matters referred to from pages 2 and 4 of Respondents' Brief. Appellants assert that none of these matters was before the trial court and Appellants do not stipulate that the statements referred to at pages 2 and 4 are factual or

may properly be considered by this Court.

At page 5 of their Brief, Respondents speculate in lines 17-24 as to what the trial court might have considered. Appellants suggest that the trial court did not have the file before it, might have formed a hasty opinion that the motion of Appellants should be hastily disposed of, and thereafter did not follow the arguments of counsel. In support of this, Appellants reason that had the trial court listened attentively to the arguments and examined the file in detail, it could not have made the ruling it did.

At page 5 of their Brief, Respondents speculate again that if the relief Appellants seek were granted, there would be done to the Respondents "a gross injustice" (line 4). If the Court will examine this statement carefully, it will appear that it is predicated upon the proposition that taking something from the Appellants is not an injustice and that giving to the creditors of Respondents and to the Respondents a great benefit at the expense of the Appellants is not an injustice, but to deprive the Respondents and their creditors of that windfall would be "a gross injustice". The argument is further bottomed upon the supposition that the execution sale would not bring a fair price for the property. If Respondents were interested in protecting the property, they

would guarantee a fair price. There is no indication any place in this record that Appellants are attempting to do anything except be paid for the property which they sold under contract.

#### ONE NEW ISSUE

Although not properly a part of the Reply Brief, Appellants beg leave to introduce a new issue and a new point which subsequent research has brought to their attention. Appellants concede that Respondents should have the right to file a responsive brief as to this point.

The original Brief of Appellants allows the position that the obtaining of a judgment was a performance of the contract of sale and that title to the property passed to someone and that the vendor's lien was thereby destroyed. Appellants do not concede this to be the established law.

There is authority that the theory is not "performance of the contract" but a question of whether the judgment effectuates a merger of the cause of action into the judgment. There is also a corollary that rights existing or causes of action existing and not necessarily involved in the granting of the judgment persist, and further, that to meet the requirements of justice, the merger will have such limited effect as is compelled.

This doctrine is summarized in 46 Am.Jur.2d, Judgment

¶ 390 and 393. For instance, in Paragraph 393 appears this statement:

"The general rule is that a lien securing a debt which becomes merged in a judgment is not affected by such merger. If a debt is of such a character that a lien is given by common law or statute, the merger of the judgment does not involve a merger of the lien, and the latter may continue until the debt is satisfied."

Am.Jur.2d cites, among other cases, Adams v. Davies, 107 Utah 579, 156 P.2d 207, 159 ALR 852.

The Adams case deals with a question of a merger of one judgment into a later judgment but discusses the more general rule of merger, and at page 210 of 156 P.2d, cites from other cases the following:

"The doctrine [of merger] will be applied only when the ends of justice will be thereby subserved."

and

"It is also the law that merger is largely a question of intention and to a great extent depending on the circumstances surrounding each particular case and that the courts will always presume against it whenever it will operate to the disadvantage of a party."

and again

"The rule is, however, that where the ends of justice require the judgment does not annihilate the debt, and that the doctrine of merger will be carried no further than the ends of justice demand."

and again

"It will not be there applied to destroy the security of a decree as a lien to the defeat of justice."

And then this Court, again on page 210 of 156 P.2d, in commenting on Batten v. Lauther, 74 W.Va. 167, 81 S.E. 821, 823, said:

"It was also said there that the first judgment would not be extinguished unless actually satisfied. To summarize the rules applied to the merger doctrine: The lesser security is absorbed by the greater security, as the cause of action by the judgment; the rule of merger is not inflexible and will be applied only when the ends of justice require; when such result is not in keeping with justice, the merger doctrine will not be allowed to impair the security of judgments as liens. Merger is the absorption of a thing of less importance by a greater whereby the lesser ceases to exist but the greater is not increased; as to whether there is a merger may depend to a great extent upon intention and the circumstances of each particular case--the first judgment being a right and property of the creditor, it cannot be merged in a second judgment against his will or over his objection, in the absence of strong equitable reasons therefor; \* \* \*." Pages 210-211.

This limitation on the doctrine of merger applies a further and forceful reason for permitting justice to be done in this case by avoiding a windfall to Respondents and doing equity to the Appellants. Their property should not be taken from them without the payment agreed to in the contract. The vendor's lien should not be merged into the judgment and

hence into the Sheriff's deed until the debt has been paid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing Reply Brief of Appellants was served on the Respondents this 10th day of June, 1977, by mailing true and correct copies thereof, postage prepaid, to David M. Bown and Stephen R. McCaughey, attorneys for Respondents, 321 South 600 East, Salt Lake City, Utah 84102.

*Virginia Jale*