

1940

John A. Malia and Herbert Taylor v. J. Harold Giles and Josie Baird Giles ; A. C. Moulton and Dewey Moulton v. Vernor E. Baird and Mary A. Baird, J. Rulon Morgan, J. Rulon Morgan as Partner of Morgan & Morgan, Elizabeth J. Baird, Bank of Heber City, Rulon F. Starley and Spencer C. Taylor, Arthur Duke and Eulean Duke, Ray F. Smith and Josie Baird Giles Smith, and J. Harold Giles ; J. Rulon Morgan v. Rulon F. Stanley and Spencer C. Taylor : Brief of Appellants

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)
Utah Supreme Court

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Elias Hansen; J. Rulon Morgan; Attorneys for Defendants and Appellants;

Recommended Citation

Brief of Appellant, *Malia et al v. Giles et al*, No. 6253 (Utah Supreme Court, 1940).
https://digitalcommons.law.byu.edu/uofu_sc1/690

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court, State of Utah

JOHN A. MALIA, State Bank Commissioner
of the State of Utah, and HERBERT TAY-
LOR, as Examiner in Charge of the Liquidation
of the Bank of Heber City,

vs.

Plaintiffs and Respondents,

J. HAROLD GILES and JOSIE BAIRD
GILES,

Defendants and Appellants,

**1266
Civil**

A. C. MOULTON and E. DEWEY MOULTON,

vs.

Plaintiffs and Respondents,

VERNOR E. BAIRD and MARY A. BAIRD,
His Wife, J. RULON MORGAN, J. RULON
MORGAN, as the Surviving Partner of the
Firm of Morgan & Morgan, a Co-Partnership,
ELIZABETH J. BAIRD, BANK OF HEBER
CITY, RULON F. STARLEY, State Bank
Commissioner of the State of Utah, and
SPENCER C. TAYLOR, as Examiner in
Charge of the Liquidation of the Bank of Heber
City, ARTHUR DUKE and EULEAN DUKE,
His Wife, RAY F. SMITH and JOSIE BAIRD
GILES SMITH, His Wife, and J. HAROLD
GILES,

Defendants and Appellants.

**1410
Civil**

J. RULON MORGAN,

vs.

Cross-Complainant,

RULON F. STARLEY, as Bank Commissioner
of the State of Utah, and SPENCER C.
TAYLOR, as Examiner in Charge of the
Liquidation of the Bank of Heber City,

Cross-Defendants.

BRIEF OF APPELLANTS

Appeal From Fourth District, Wasatch County.

Honorable Dallas H. Young, Judge

ELIAS HANSEN, J. RULON MORGAN,

Attorneys for Defendants and Appellants.

TABLE OF CITATIONS

Antelope Shearing Corral Co. v. Con. Wagon & Mach. Co., 54 Utah 355; 180 P. 597.	64
19 American Jurisprudence, Pages 642-643.	23
Berow v. Shields, 48 Utah 270; 159 P. 538.	23
Biddle v. Boyard, 13 Pa. St. 150.	18
Borstaw v. City Trust Company, 216 Mass. 330; 103 N. W. 915.	18
Bunker v. Coons, 21 Utah 164; 60 P. 549.	60-61
Christensen v. Beebe, 32 Utah 406; 91 P. 129,	63
Cole v. Sugar Company, 35 Utah 148; 99 P. 681.	23
Collins v. Smith, 57 Wis. 284..	53
(Table Continued)	

TABLE OF CITATIONS

(A Continuation)

6 C. J. 245, Section 469.	42
Note 17 in C. J., Page 245.....	42
6 C. J., Page 132.	45
7 C. J. S. 293.	45
Notes 2 and 3 to the Text of C. J.....	45
7 C. J. S., Pages 299 and 300,	47
7 C. J. S. 304,	47
7 C. J. S., Sections 111 and 112, Pages 276, 277.	47
7 C. J. S., 415:	42
10 C. J. S., Section 326, Page 823,	20
10 C. J. S., Section 328-B, Page 826,	20
22 C. J. 895	52
23 C. J. 432	42
23 C. J. 680	53

TABLE OF CITATIONS

Doran v. Miller, 124 Ill. App. 56; 151 Ill. 526, affirmed, 245 Ill. 200; 91 N. E. 1029.	18
Dos Passos v. Martin, 218 N. Y. 517.	44
Erskine v. Nimours Trading Corp., 239 N. Y. 32; 149 N. E. 273.	44
E. Birmingham Land Company v. Dennis, 95 Ala. 565; 5 So. 317.	18
Fletchers Cyclopedia of Corporations, Vol. 4, Page 595, Section 1866.	27
Fletcher Cyclopedia Corporations, Volume 12, Page 58, Section 5542.	18
Folsom v. Asper, 25 Utah 229; 71 P. 315.	60
Gallagher v. Abadie, 26 La. Ann. 343.	54
(Table Continued)	

TABLE OF CITATIONS

(A Continuation)

Giesy-Walker Co. v. Briggs, 49 Utah 205; 162 P. 876,	63
Gillman v. Tucker, 59 N. Y. supra 570; 13 N. Y. S. 804.	49
Hamilton v. Burch, 28 Ind. 233.	54
Hansen v. Mauss, 40 Utah 361; 121 P. 605.	60-61
Hatch v. Lucky Bell Min. Co., 25 Utah 405; 71 P. 865.	27
Henderson v. Hays, 41 N. J. 2387.	53
Hughes v. Watt, 26 Ark. 228.	53
Huish v. Fenkell et al, 85 Utah 253; 39 P. (2d) 330.	52
In re Johnson's Estate, 35 P. (2d) 305,	59
Judd v. The City Trust & Savings Bank, 133 Ohio St. 81; 12 N. E. (2d) 288.	41

TABLE OF CITATIONS

Kimball v. Lewis, 17 Utah 381; 53 P. 1037.	65
Kimball v. Salisbury, 19 Utah 161; 56 P. 973; 17 Utah 381, 53 P. 1037.	61
Knox v. Eden Mussee American Co., 148 N. Y. 441; 42 N. E. 988.	18
Lexington & W. C. R. Co. v. Chandler, 13 Metc. (Mass.) 311.	26
Morrison-Merrill & Company v. Close, 20 Utah 432; 59 P. 235.	20
Nielson v. Peterson, 30 Utah 391; 85 P. 429.	65
Payson Exchange Savings Bank v. Tiet- jen, 63 Utah 321; 225 P. 598.	60-61, 64
People v. Title Guaranty Trust Company, 230 N. Y. 578.	41
People v. Weil, 260 N. Y. S. 658.	41

(Table Continued)

TABLE OF CITATIONS

(A Continuation)

In re Phillips Estate, 86 Utah 358; 44 Pac. (2d) 699 and cases there cited.....	53
Place v. Riley, 98 N. Y. 1.	49
21 R. C. L. 1004:....	25
21 R. C. L. 1018	25
R. S. U. 1933, 6-0-25 .	40
R. S. U. 1933, 6-0-41	40
R. S. U. 1933, 104-18-3	45
R. S. U. 1933, 104-18-4,	47
R. S. U. 1933, 104-54-16.	47
R. S. U. 1933, 38-0-2:	57-64
R. S. U. 1933, 38-0-8:	57
R. S. U. 1933, 38-0-10:.....	57
R. S. U. 1933, 38-0-15:..	57-59

TABLE OF CITATIONS

R. S. U. 1933, 104-37-18.	50
R. S. U. 1933, 104-37-23.	50
R. S. U. 1933, 38-0-2.	57-64
R. S. U. 1933, 38-0-2 and 38-0-19	59-62
R. S. U. 1933, 38-0-9.	63
R. S. U. 1933, 38-0-19:	58
R. S. U. 1933, 38-0-13:	58-65
R. S. U. 1933, 38-0-4:	58-64
R. S. U. 1933, 18-3-7.	19
R. S. U. 1933, 18-3-19.	19-21
R. S. U. 1933, 40-2-1 to 10.	20
R. S. U. 1933, 104-37-27.	29
R. S. U. 1933, 18-4-10.	27
R. S. U. 1933, 38-0-1.	56

(Table Continued)

TABLE OF CITATIONS

(A Continuation)

R. S. U. 1933, 104-18-1 and 104-18-3,	46
R. S. U. 1933, 104-37-1, Subdivision 3,	48
Shumacker v. Green-Hanenea Copper Co., 157 Minn. 124. ..	18
Steese v. Steese, 251 N. Y. S. 164.....	44
Summerton Livestock Co. v. Early, 111 S. C. 154; 96 S. E. 518.....	48
Volker-Scowcroft Lumber Company, etal, v. Vance, et al, 36 Utah 348; 103 P. 970.....	64
West v. Tintic Standard Mining Company, 71 Utah 158; 263 P. 490... ..	20
Western Auto Company v. Gurnea, 73 Utah 423. 274 P. 862.....	47
Witcomb v. Geannini, 43 Cal. App. 227; 184 P. 881.	26

In the Supreme Court, State of Utah

JOHN A. MALIA, State Bank Commissioner of the State of Utah, and HERBERT TAYLOR, as Examiner in Charge of the Liquidation of the Bank of Heber City,

vs. Plaintiffs and Respondents,

J. HAROLD GILES and JOSIE BAIRD GILES, Defendants and Appellants.

1266
Civil

A. C. MOULTON and E. DEWEY MOULTON, vs. Plaintiffs and Respondents,

VERNOR E. BAIRD and MARY A. BAIRD, His Wife, J. RULON MORGAN, J. RULON MORGAN, as the Surviving Partner of the Firm of Morgan & Morgan, a Co-Partnership, ELIZABETH J. BAIRD, BANK OF HEBER CITY, RULON F. STARLEY, State Bank Commissioner of the State of Utah, and SPENCER C. TAYLOR, as Examiner in Charge of the Liquidation of the Bank of Heber City, ARTHUR DUKE and EULEAN DUKE, His Wife, RAY F. SMITH and JOSIE BAIRD GILES SMITH, His Wife, and J. HAROLD GILES, Defendants and Appellants.

1410
Civil

J. RULON MORGAN,

vs. Cross-Complainant,

RULON F. STARLEY, as Bank Commissioner of the State of Utah, and SPENCER C. TAYLOR, as Examiner in Charge of the Liquidation of the Bank of Heber City,

Cross-Defendants.

BRIEF OF APPELLANTS

THERE ARE TWO CASES INVOLVED IN THIS CONTROVERSY.

The appellants, J. Rulon Morgan, J. Rulon Morgan as executor of the last will and testament of Elizabeth J. Baird, deceased, J. Rulon Morgan, as

the surviving partner of the firm of Morgan & Morgan, Vernor E. Baird and his wife, Mary A. Baird, Josie Baird Giles (Smith) and her husband, Ray F. Smith, jointly and severally prosecute this appeal from the judgment of the District Court of Wasatch County, Utah. The judgment appealed from disposes of the issues raised in two causes of action, one numbered 1266 Civil, and the other numbered 1410 Civil. The two causes were tried together, and, upon stipulation of counsel, the cases were consolidated for all purposes. (Tr. 117; Ab. 75). Substantially all of the issues raised by the plaintiffs in Cause No. 1266 Civil are also raised by the pleadings in Cause No. 1410 Civil.

STATEMENT OF CASE IN NUMBER 1266 CIVIL

In case numbered 1266 Civil the Bank of Heber City and its examiner in charge, Herbert Taylor, Bank Commissioner of Utah, brought an action against Josie Baird Giles and J. Harold Giles to recover judgment on a note executed by J. Harold Giles for the principal sum of Two Thousand, Five Hundred Fifty (\$2550.00) Dollars. The note is dated April 26, 1933. There is no controversy as to the amount owing on the note. The question which divides the parties in 1266 Civil is whether or not the Bank of Heber City, and those in control of its assets, has a lien on forty-nine shares of water stock in the Lake Creek Irrigation Company as security for the payment of the note sued upon. The plaintiffs in that case contended that they do have such a lien by reason of the certificates having been hypothecated to the Bank of Heber City as security for the note. The appellants contend to the contrary, because, as they claim, the name of Josie Baird Giles (Smith)

was forged on the certificates and that no authority was ever given to J. Harold Giles to hypothecate the water stock as security for the note. The court below held that the plaintiffs in that case had a lien upon the certificates and entered a decree directing that said certificates be sold and sufficient of the proceeds derived from such sale be applied to the payment of the note. Appellants prosecute this appeal and seek a reversal of that part of the decree which awards plaintiffs a lien on the certificates and directs that the same be sold at sheriff's sale and sufficient of the proceeds from the sale be applied to the payment of the note, attorneys' fees and costs.

STATEMENT OF CASE NO. 1410

In case No. 1410 Civil, A. C. Moulton and E. Dewey Moulton brought an action to recover a judgment on a note for the principal sum of Fifteen Thousand Dollars and to foreclose a mortgage on a tract of land, together with the certificates of water stock held by the Bank of Heber City and other water rights appurtenant to the land covered by the mortgage. The note and mortgage sued upon by the Moultons is signed by Vernor E. Baird and his wife, Mary A. Baird, in favor of Josie Baird Giles (Smith), but the Moultons claim title to the note and mortgage by reason of having attached and later purchased under an execution sale the note and mortgage in an action brought by the Moultons against J. Harold Giles and Josie Baird Giles. The appellants, by their various answers, deny that the Moultons have any right to maintain their action because:

1.

The note and mortgage which the Moultons seek to foreclose was, prior to the time the Moultons attempted to levy on the note and mortgage, by

mutual agreement of Josie Baird Giles (Smith), Vernor E. Baird and Elizabeth J. Baird cancelled, and that pursuant to such agreement, prior to the attempted purchase of the note and mortgage by the Moultons at the sheriff's sale, such mortgage was released and the land and water right covered by the mortgage conveyed to Elizabeth J. Baird.

2.

That the Moultons did not acquire any title to the note and mortgage which they seek to foreclose because:

(a) The note and mortgage which the Moultons seek to foreclose was held by George B. Stanley, attorney for Josie Baird Giles (Smith) and Vernor E. Baird, and by him turned over to the sheriff of Wasatch County so that such sheriff could sell the same to satisfy a claim in favor of the Moultons, who were also represented by Mr. Stanley when he delivered the note to the sheriff.

(b) That the attachment, the execution, the notice of sale and the attempted sale of the note and mortgage were each and all null and void because not conducted in conformity with law and therefore they have no right, title or interest in the note and mortgage.

(c) That the Moultons having paid only, or pretended to pay, the nominal sum of One Hundred Dollars for the note for Fifteen Thousand Dollars, together with several years accrued interest thereon, such sale is unconscionable and void.

(d) That in any event the Moultons acquired only such interest in the note and

mortgage as was owned by Josie Baird Giles (Smith) at the time of the levy, and Josie Baird Giles (Smith) having no interest, or at most a defeasible right to the note and mortgage, the Moultons, by the attachment and levy of execution and sale, acquired no enforceable right in the note and mortgage which they seek to foreclose.

(e) That prior to the pretended purchase of the note and mortgage, the mortgage had been released and the property conveyed to Elizabeth J. Baird, which release and conveyance were of record in the office of the County Recorder of Wasatch County, Utah.

In case No. 1266 Civil, J. Rulon Morgan filed a cross-complaint against the State Bank Commissioner, the Bank of Heber City and Spencer C. Taylor, examiner in charge of the Bank of Heber City, in which it is claimed that Elizabeth J. Baird is the owner of the water stock in any event because of having purchased the same from the Lake Creek Irrigation Company after that company had purchased that water stock because an assessment levied thereon had not been paid, and also because the water right represented by the certificate of water stock had been acquired by Elizabeth J. Baird by reason of adverse use of such water by Elizabeth J. Baird.

The court below held that the Moultons were the owners of the note and mortgage upon which they sue and directed that the mortgage be foreclosed and the proceeds of the sale thereof be applied to the payment of the judgment which the Moultons held against J. Harold Giles and Josie Baird Giles (Smith), which judgment is in the sum of Four

Thousand Nine Hundred Seventy-four Dollars and sixty-seven cents, together with interest thereon from October 3, 1934, and costs in the sum of Fourteen Dollars twenty cents. The appellants prosecute this appeal to reverse the judgment in favor of the Moultons.

After the court below orally announced that the Bank of Heber City and its examiner in charge, Spencer C. Taylor, and the Bank Commissioner of Utah were entitled to prevail on their claim to a lien on the two certificates of water stock in the Lake Creek Irrigation Company, and also after the court below had orally announced that the Moultons were entitled to sue upon the fifteen thousand dollar note and foreclose the mortgage on the land and water stock mentioned and described in the mortgage, Josie Baird Giles (Smith) and J. Rulon Morgan, as executor of the estate of Elizabeth J. Baird, Deceased, filed a petition wherein Morgan, as executor of the estate of Elizabeth J. Baird, Deceased, sought to enforce a claim of homestead against the property involved in this controversy, by reason of the fact that Josie Baird Giles (Smith) had such claim at the time she conveyed the land and water stock covered by the mortgage to Elizabeth J. Baird and therefore Elizabeth J. Baird acquired an interest in the property so conveyed to her to the extent of any claim of homestead that Josie Baird Giles (Smith) had at the time of the conveyance to her mother, Elizabeth J. Baird. The court below denied any claim of a homestead. The appellants also attack that part of the judgment which denies the claim of a homestead for and on behalf of J. Rulon Morgan as executor of the last will and testament of Elizabeth J. Baird, Deceased.

ASSIGNMENTS OF ERROR IN CAUSE NO. 1266 CIVIL

The appellants have fifty-five assignments of error. Of these assignments those numbered 9, 24, 25, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54 and 55, Ab. 225 to 244, attack the findings, conclusions of law and decree with respect to the claim of liens by the plaintiffs in cause numbered 1266, the Bank of Heber City, its examiner in charge of the liquidation thereof and the Bank Commissioner of Utah.

THE QUESTIONS PRESENTED FOR DETERMINATION BY ASSIGNMENTS TOUCHING THE CLAIM OF A LIEN OF THE BANK OF HEBER CITY, THE EXAMINER IN CHARGE OF THE LIQUIDATION THEREOF AND THE BANK COMMISSIONER OF UTAH.

The questions presented for determination by the assignments affecting the claim of a lien of the Bank of Heber City, the examiner in charge of the liquidation thereof and the Bank Commissioner of Utah are these :

1.

May a husband, without the knowledge or consent of his wife, take certificates of water stock belonging to the wife and lawfully hypothecate the same to secure his personal note?

2.

If the husband takes such certificates of his wife without her knowledge or consent and hypothecates

them to secure his personal obligations to a bank, may such bank successfully maintain a lien on such certificates of stock as security for a note executed by the husband some four years after it first received the certificates, in the absence of the consent of the wife to have her water stock used by the husband for such purpose.

3.

May a bank successfully maintain the claim of being a bona fide holder for value of a certificate of stock where the blank endorsement on the back of such certificate is forged and known to be such by the officer of the bank who accepts the certificate as security for a loan.

4.

May a bank successfully maintain the claim of being a bona fide holder for value of a certificate of stock endorsed in very light lead pencil by a wife when such certificate is accompanied by another certificate of stock upon which the wife's signature is forged and the officer of the bank who accepts the certificates knows that the signature on the accompanying certificate is not that of the wife, where the husband presents the two certificates to secure a personal loan for himself.

5.

Does the fact that a husband attends to his wife's business and the wife occasionally draws checks on the husband's bank account preclude the wife from questioning the right of the bank to a lien on certificates of stock which have, without the knowledge or consent of the wife, been hypothecated to the

bank to secure the payment of his personal note, especially where there is no plea of an estoppel.

6.

May a bank which holds certificates of water stock maintain a lien thereon against one who has purchased the stock from the company which issued the same and which has levied an assessment thereon and because of non-payment of the assessment has purchased the same and resold it to another.

7.

May a bank which receives certificates of water stock from the husband of the owner thereof maintain a lien thereon where the water represented by the certificates of stock has been sold and by warranty deed conveyed to another who has used such water adversely under a claim of right for ten years prior to the time such owner's right is brought in question.

ASSIGNMENTS OF ERROR TOUCHING THE CLAIMS OF THE MOULTONS, PLAINTIFFS IN CAUSE 1410 CIVIL.

Of the fifty-five assignments of error filed, those numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, 47, 49, 51, 52, 53, 54 and 55 attack the proceedings had and the findings, conclusions and judgment made in favor of A. C. Moulton and E. Dewey Moulton, who were the plaintiffs in cause numbered 1410 Civil.

QUESTIONS PRESENTED FOR DETERMINATION IN THE ACTION BROUGHT BY THE MOULTONS IN CAUSE NO. 1410 CIVIL.

The questions presented for determination as to the Moultons, who were the plaintiffs in Cause No. 1410 Civil, are as follows:

1.

Does the preponderance of the evidence support the finding made by the court below to the effect that no agreement was had between Vernor E. Baird, Josie Baird Giles (Smith) and Elizabeth J. Baird, whereby the fifteen thousand dollar note was cancelled, the mortgage given to secure the same released, and the property covered by the mortgage conveyed by Vernor E. Baird to Elizabeth J. Baird in payment of money owing by Josie Baird Giles (Smith) to Elizabeth J. Baird.

2.

George B. Stanley having acted for Josie Baird Giles (Smith) and Vernor E. Baird in preparing the documents whereby Josie Baird Giles (Smith) sold and conveyed the land and water right to Vernor E. Baird and the note and mortgage from Vernor E. Baird and his wife to Josie Baird Giles (Smith), and he, George B. Stanley, having retained possession of the note, may a valid attachment or a valid sale under execution be made by a sheriff where the note was delivered to the sheriff by George B. Stanley so that he, George B. Stanley, and his other clients the Moultons, could collect their judgment against Josie Baird Giles (Smith) and J. Harold Giles.

3.

Was the affidavit of the Moultons for a writ of

attachment a sufficient compliance with the provisions of R. S. U. 1933, 104-18-1 and 104-18-3 to authorize the county clerk of Wasatch County, Utah to issue a writ of attachment.

4.

Did the wilful delivery of the note to the sheriff of Wasatch County, Utah, by George B. Stanley, the agent and attorney of Josie Baird Giles (Smith), without her knowledge or consent, constitute a valid levy of attachment or an execution sale of the note.

5.

Does the preponderance of the evidence, or any of the evidence, support the finding that George B. Stanley did not have possession of the note involved in this controversy as the attorney for Vernor E. Baird or Josie Baird Giles (Smith), or any of the defendants.

6.

Was the bond furnished by the Moultons for the writ of attachment a sufficient compliance with the provisions of R. S. U. 1933, 104-18-4 to authorize the sheriff to attach the note in question.

7.

Does the return of the sheriff show that he complied with the law in advertising the note for sale.

8.

Was it competent for the Moultons to show, over the objections of the appellants, that the return made by the sheriff was not in conformity with the facts.

9.

Does the evidence, including the testimony of the

sheriff, show that the notice of the time and place of the sale was posted as by law required.

10.

Does the preponderance of the evidence show that the sheriff sold the note to the Moultons as by the notice directed, or that the time of sale mentioned in the notice was postponed.

11.

Will a court of equity sustain the sale of a secured note for fifteen thousand dollars, together with several years accrued interest thereon, for the sum of one hundred dollars.

12.

In light of the fact that the water stock which Josie Baird Giles (Smith) sold to Vernor E. Baird was held and claimed by the Bank of Heber City, did not Vernor E. Baird have an absolute right to rescind the contract for the purchase of the land and water right covered by the mortgage and convey the property back to Josie Baird Giles (Smith) or her nominee, Elizabeth J. Baird.

13.

If Vernor E. Baird had an absolute right to rescind the contract of sale and purchase of the land and water right and the giving of the note and mortgage as evidence of the purchase price as against Josie Baird Giles (Smith), did he not also have such right as against any claim the Moultons may have acquired by the purchase of the note.

14.

Does the evidence support the finding that Elizabeth J. Baird did not, during her lifetime, purchase certificates No. 64 and 68 from the Lake Creek

Irrigation Company, which had acquired such certificates by purchasing the same to pay delinquent assessments thereon.

15.

Did not Josie Baird Giles (Smith) have a right to the claim of a homestead to the note in question which she had an absolute right to release upon the condition that Vernor E. Baird convey the property covered by the mortgage in question to her mother, Elizabeth J. Baird.

ARGUMENT TOUCHING THE CLAIMED LIEN
OF THE BANK OF HEBER CITY AND ITS
SUCCESSORS.

In the main there is no conflict in the evidence touching the claimed lien of the Bank of Heber City and its successors. These facts are established without any conflict in the evidence:

Prior to May 21, 1929, J. Harold Giles had, from time to time, borrowed money from the Bank of Heber City, and given his notes as evidence of the loans. On or about May 21, 1929 he executed a renewal note for Seventeen Hundred Dollars (Tr. 181; Ab. 151). At the time the Seventeen Hundred Dollar note was given to the bank, J. Harold Giles deposited with the bank two certificates of stock in the Lake Creek Irrigation Company. On the back of each certificate was endorsed in blank the name of Josie Baird Giles. In neither of the certificates was there a specified person named as endorsee. There was a blank space for the endorsee, but the blank was not filled in. The signature of Josie

Baird Giles on Certificate No. 68 is not her signature. (Finding 24; Ab. 95). All of the evidence supports that finding. The signature on Certificate No. 64 is written in very faint lead pencil. There is a cross in front of the signature. The court found that the signature on Certificate No. 64 is the signature of Josie Baird Giles (Finding 24; Ab. 95). There is a conflict in the evidence as to whether or not the signature on Certificate No. 64 is that of Josie Baird Giles. J. Harold Giles testified that the signature on the back of Certificate No. 64 looks like the signature of Josie Baird Giles and that he would say it was her signature. (Tr. 299; Ab. 176). Josie Baird Giles testified that the signature on Certificate No. 64 looked something like her signature but that her best judgment was that it was not her signature. (Tr. 258 to 263; Ab. 166 to 169).

All of the evidence is to the effect that Josie Baird Giles did not authorize anyone to sign her name to either of the certificates and that she did not authorize her then husband, J. Harold Giles, to deliver the same to the Bank of Heber City as security for any loan. (Testimony of Josie Baird Giles, Tr. 258-259; Ab. 168). Such is also the effect of the testimony of J. Harold Giles (Tr. 295 to 299; Ab. 175-176). While the name of W. Emer Murdock appears as a witness to the signature of Josie Baird Giles, no claim is made by Mr. Murdock, or anyone, that Josie signed either of the certificates in his presence. Mr. Murdock placed his signature on the certificates so that they could be turned over to the Federal Reserve Bank as security. (Tr. 183; Ab. 151). Thus the evidence shows, without conflict, that Josie Baird Giles did not authorize her then husband, J. Harold Giles, to hypothecate

either of the certificates to secure the loan made to J. Harold Giles.

We have attacked the court's finding that the signature on Certificate No. 64 is that of Josie Baird Giles (Assignment 44; Ab. 242), but as the evidence is brief and there are in the exhibits signatures of Josie Baird Giles which she signed at the time of the trial, and also her signature in the divorce proceedings against J. Harold Giles, we direct this Court's attention to those signatures, which the Court, if it deems the matter material, may examine. It may here be said that no claim is made that J. Harold Giles had any interest in either of the certificates. They were the absolute property of Josie Baird Giles. They were part of the property which she inherited from her father. (Finding 24; Ab. 95). At the time the Seventeen Hundred Dollar note was executed and the certificates left with the bank, J. Harold Giles signed a pledge agreement, Exhibit B-2. The pledge agreement does not purport to bind Josie Baird Giles. After the Seventeen Hundred Dollar note was signed, payments were made thereon and renewal notes signed for any balance unpaid on the original note and for additional money loaned to J. Harold Giles. Josie did not sign any of these notes. At one time a payment of Fifteen Hundred Dollars was made on the Seventeen Hundred Dollar note, reducing it to Two Hundred Dollars. (Testimony of Riley C. Draper, Tr. 200-201; Ab. 154).

The evidence also shows that Josie kept the certificates in an envelope in her trunk (Tr. 280-281; Ab. 172). The first that Josie learned that the bank held her certificates was in 1933 when her mother, Elizabeth J. Baird, wrote to her while she was in California. That was after the Bank of Heber

City had closed, which was on August 29, 1933. When Josie came back to Utah she made inquiry at the bank as to her certificates and was informed that the note and certificates were held by the Federal Reserve Bank at Salt Lake City. Later Josie went to Salt Lake City and asked to see the certificates. She was informed that the certificates were in the vault and that she was unable to see them. She informed the bank that she had not signed the certificates. She was informed by the bank that there was a cross opposite her name and probably the certificates had been sent to her for her signature. (Tr. 253, 255; Ab. 166-167).

Notwithstanding there was no pleading which even remotely suggested that Josie Baird Giles was estopped from setting up the defense that she did not sign or authorize anyone to sign the certificates and did not authorize J. Harold Giles to hypothecate her certificates as security for a loan made by the bank to him, the court below admitted evidence tending to show that J. Harold Giles attended to the business of his then wife, Josie Baird Giles, from 1926 to 1929, and that Josie Baird Giles at times drew checks on the account of her then husband, J. Harold Giles, about like the other wives in Heber City. (Testimony of Josie Baird Giles, Tr. 268 to 290; Ab. 168 to 194. Testimony of J. Harold Giles, Tr. 295-296; Ab. 175-176; Testimony of Mr. Murdock, Tr. 198; Ab. 153). It also appears that in about 1929 Josie Baird Giles sold a home for the sum of about Twenty-five Hundred Dollars. The money she secured from the sale of the home she loaned to her husband, J. Harold Giles, and took his note for Twenty-five Hundred Dollars. (Exhibit No. 11; Tr. 291; Ab. 174-175).

Suit was brought on the note involved in this litigation on August 14, 1934. It was upon substantially

the foregoing evidence that the court below made its findings and rendered its judgment, holding that the plaintiff Bank of Heber City, Spencer C. Taylor in charge of the liquidation of the bank, and the State Bank Commissioner of Utah had a lien upon the certificates of stock as security for the payment of the note.

The appellants have, by their assignments of error, attacked those findings, by which the trial court in effect found that Josie Baird Giles (Smith) had hypothecated the certificates of stock to the Bank of Heber City, and that it and its successors have a lien upon the stock as security for the payment of the note of J. Harold Giles. The assignments which attacked such findings are 14, 15, 41, 43, 44, 45 and 46; Ab. 233 to 242. By assignments No. 48, 50, 51 and 52, Ab. 242, 243, appellants have attacked Conclusions of Law No. 2, 5, 6 and 9, where the court below concluded that the Bank of Heber City acquired and still holds a valid lien upon the two certificates of stock involved in this controversy. By assignment No. 49 appellants attack that part of the decree wherein it is directed that the stock be sold and the proceeds be applied by the bank to the payment of the amount owing upon the note of J. Harold Giles. All of these assignments of error may well be discussed together, and we shall so discuss them.

The Bank of Heber City did not acquire a lien on the certificates of stock and its successors do not have such a lien. The law is well settled that since certificates of stock are not negotiable instruments, a transferee acquires no better title than his transferor had unless the circumstances are such as to create an estoppel in his favor. It follows that a transfer of a certificate of stock, even to a bona

fide purchaser or pledgee by one who has no title or authority to transfer the same, gives the transferee no title to the stock as against the true owner, unless the latter is, for some reason, estopped to assert his title, or except in those jurisdictions which have adopted the Uniform Stock Transfer Act.

Fletcher Cyclopedia Corporations, Volume 12, Page 58, Section 5542.

Among the cases cited in support of and which do support the text are the following:

E. Birmingham Land Company v. Dennis, 95 Ala. 565; 5 So. 317.

Doran v. Miller, 124 Ill. App. 56; 151 Ill. 526, affirmed, 245 Ill. 200; 91 N. E. 1029.

Borstaw v. City Trust Company, 216 Mass. 330; 103 N. W. 915.

Shumacker v. Green-Hanenea Copper Co., 157 Minn. 124.

Knox v. Eden Mussee American Co., 148 N. Y. 441; 42 N. E. 988.

Biddle v. Boyard, 13 Pa. St. 150.

In the absence of a statute the law announced in the foregoing text and cases seems to be well settled and to the effect that shares of stock represented by a certificate are in the main subject to the same rules of law that apply to the sale of personal property, and that certificates are not in any sense negotiable instruments.

We do not have the Uniform Transfer Act, but we do have a number of statutory provisions touching the transfer of stock in a corporation. The owner of a certificate of stock does not pass title thereto

if the delivery is made without authorization of the owner, unless the certificate has been transferred to a purchaser for value in good faith, without the notice of any fact making the transfer wrongful, where the injured person has elected to waive the injury or has been guilty of laches in endeavoring to enforce his right.

R. S. U. 1933, 18-3-7.

“The person to whom a certificate was originally issued is the person appearing by the certificate to be the owner thereof and of the shares represented thereby, until and unless he endorses the certificate to another specified person, and thereupon such other specified person is the person appearing by the certificate to be the owner thereof until and unless he also endorses the certificate to another specified person. Subsequent special endorsements may be made with like effect.”

R. S. U. 1933, 18-3-19.

As to Certificate No. 68 which contains a forged blank endorsement, the authorities are all to the effect that such an endorsement did not convey any right or title to the Bank of Heber City. The law to that effect is so uniform that we refrain from citing cases in support thereof. Such is the law even where the endorsee does not know the signature on the certificates is forged. Mr. Murdock testified that he had cashed checks signed by Josie Baird Giles drawn on the account of J. Harold Giles. In such case Mr. Murdock cannot be heard to say that he did not know the signature of Josie Baird Giles or that the signature on Certificate No. 68 was not a forgery. Whatever right a hus-

band had in the property of his wife under the old common law, there can be no controversy that the law in this jurisdiction gives to the wife the same right to own and dispose of her property as is given to a husband.

R. S. U. 1933, 40-2-1 to 10.

A husband cannot, without the wife's consent, give a lien on the property of his wife.

Morrison-Merrill & Company v. Close, 20
Utah 432; 59 P. 235.

While there is evidence in this record tending to show that the signature on Certificate 64 is that of Josie Baird Giles, still, even if that be true, the bank may not be said to have received that certificate without notice of its infirmities. The fact that Certificate No. 64 accompanied Certificate No. 68, which was forged, is a circumstance that should have put the bank on notice. So also the fact that the signature was in very faint lead pencil and the signature was not witnessed when received by the bank indicates that there was some irregularity connected with the signature of Josie. The bank could not close its eyes to those irregularities.

10 C. J. S., Section 326, Page 823, and
10 C. J. S., Section 328-B, Page 826,
and cases there cited.

West v. Tintic Standard Mining Company,
71 Utah 158; 263 P. 490.

Moreover, the Bank of Heber City is chargeable with notice of the fact that Josie Baird Giles was the owner of the certificates and the stock represented thereby at the time they were delivered to the bank by J. Harold Giles. That is true even though the blank endorsement on the certificates

were in all respects regular. It will be noted that the name of the transferee does not appear on the certificates. Josie Baird Giles therefore appeared to be and was the owner thereof until and unless she endorsed the certificates to a specified person.

R. S. U. 1933, 18-3-19.

There being no specified person to whom the certificates were endorsed, the bank knew, or should have known, that the certificates belonged to Josie Baird Giles. In this connection it may be observed that J. Harold Giles in signing the pledge agreement did not even purport to pledge the interest of his wife Josie in either of the certificates. There is not in this record the slightest suggestion that J. Harold Giles had any interest in the certificates except that in his testimony he suggests "I took the certificates to the bank because I thought we were in business-partnership — was married and I was doing her business." If a husband, upon such a pretext, can dissipate his wife's estate, then indeed is the law touching the right of a married woman to own, and control her property rendered a farce. It is quite common for a husband to do business (whatever may be meant by business) for his wife, and the wife to do business for the husband, but that does not authorize the husband nor the wife to confiscate the property of the other spouse. So far as appears, Josie never at any time authorized her husband to convey away or pledge her property for the debts of her husband. The mere fact that J. Harold Giles ran the farm and sheep belonging to Josie does not justify or even tend to justify the conclusion that he had a right to take Josie's stock to the bank and use the same to secure his note. Nor is there any evidence in this record which shows or tends to show

that Josie Baird Giles received any consideration for her interest in the stock certificate; nor that she received any of the money derived from the notes which Harold signed at the bank. On the contrary, she loaned to her husband, J. Harold Giles, the sum of Twenty-five Hundred Dollars, no part of which was ever repaid to her. Nor is there any evidence which shows, or tends to show that Josie was guilty of any laches in asserting her right or that the Bank of Heber City was misled by anything which Josie did or failed to do with respect to the notes of her husband. It further is made to appear, without conflict, that no renewal note was executed after Josie learned that her then husband had hypothecated the certificates of stock. The trial court's finding No. 24, Ab. 94 and 95, seems to squint at the notion that Josie Baird Giles was and that J. Rulon Morgan as executor of the last will and testament of Elizabeth J. Baird is estopped from questioning the claimed lien on the stock certificates. It is, to say the least, extremely doubtful if the findings made by the court below are sufficient to support the conclusion of law and decree to the effect that the Bank of Heber City acquired a lien on the stock to secure the Seventeen Hundred Dollar note executed by J. Harold Giles at the time the stock certificates were delivered to the bank, much less the Twenty-five Hundred Dollar note sued upon in case No. 1266 Civil.

It is the uniform holding of the authorities that one who relies upon an estoppel must plead and prove the facts so relied upon. In this case the bank and its representatives do not plead an estoppel and offer no proof in support thereof, except that J. Harold Giles tended to the business of Josie. Apparently attending to her business means that he ran the farm and the sheep belonging to

Josie. That an estoppel must be pleaded and proven has been the repeated holding of this Court.

Berow v. Shields, 48 Utah 270; 159 P. 538.

Cole v. Sugar Company, 35 Utah 148; 99 P. 681.

The essential elements of equitable estoppel as relating to the party estopped are:

“1. Conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than and inconsistent with those which the party subsequently attempts to assert.

2. Intention or at least expectation that such conduct shall be acted upon by the other party.

3. Knowledge, actual or constructive of the real facts.”

As relating to the party claiming the estoppel they are:

“1. The lack of knowledge and of the means of knowledge of the truth as to the facts in question.

2. Reliance upon the conduct of the party estopped.

3. Action based thereon of such a character as to change his position prejudicially.”

19 American Jurisprudence, Pages 642-643.

The evidence in this case does not show the presence of any one of those elements above enumer-

ated as to any estoppel of either Josie Baird Giles or her successor in interest, J. Rulon Morgan as executor of the Last Will and Testament of Elizabeth J. Baird, nor is the Bank of Heber City, nor its successor in a position to evoke estoppel because, as heretofore pointed out, it cannot be heard to say that it did not know the stock belonged to Josie Baird Giles, nor did Josie Baird Giles do anything which was calculated to mislead the bank. Nor is there any pleading or evidence which supports or tends to support a claim that Josie Baird Giles or her successor in interest has waived her right to the stock freed from any claim of the bank, or that either of them have ratified the acts of J. Harold Giles in hypothecating the stock certificates.

Even though it should be conceded, contrary to all the evidence, that Josie Baird Giles consented to the hypothecation of her stock in 1929 as security for the Seventeen Hundred Dollar note then executed by J. Harold Giles, still such fact would not support the claim of the Bank of Heber City and its successors that the certificates may be held as security for the note sued upon in Cause No. 1266 Civil. It is elementary that a surety may not be held on an obligation to which he has not consented to be surety. In this case all of the original obligation was paid off except possibly the sum of Two Hundred Dollars. The time for paying the indebtedness of J. Harold Giles to the bank was extended many times. Such is the evidence and such is the finding of the court below. (Testimony of Riley C. Draper, Tr. 200-201, Ab. 254; Finding No. 21, Ab. 94). There is a complete lack of evidence tending to show that Josie Baird Giles consented that the certificates of stock might be held by the bank as security for the payment of any renewal or any

notes of J. Harold Giles. The law applicable to this phase of the case is thus stated in

21 R. C. L. 1004:

“It is fundamental that any agreement or dealing between the creditor and the principal in an obligation or debt which essentially varies the terms of the contract without the consent of the surety will release the surety from liability.”

In the same volume at Page 1018 it is said:

“It is a familiar rule that if a creditor, by positive contract, with the principal debtor and without the consent of the surety, extends the time of payment he thereby discharges the surety.”

Numerous cases are cited in support of the foregoing text, but the law as therein stated is so familiar that we refrain from citing further authorities.

ELIZABETH J. BAIRD, HAVING PURCHASED THE STOCK CERTIFICATES BECAUSE THE ASSESSMENTS THEREON HAD NOT BEEN PAID, IS THE OWNER OF THE CERTIFICATES.

By their assignments appellants attack the finding of the trial court to the effect that Elizabeth J. Baird did not purchase and was not the owner of certificates numbered 64 and 68. Touching the assessments levied against those certificates the evidence shows: On February 7, 1933, an assessment of Three Dollars per share was levied upon all the primary stock of the Lake Creek Irrigation Company. Notice of the assessment was sent to the

stockholders and published in the Wasatch Wave. (Tr. 302-304; Ab. 177-178). The stock upon which the assessment was not paid was bought in by the Lake Creek Irrigation Company and by action of the Board of Directors the stockholders whose stock was sold were given until October 1, 1933 to redeem the stock. (Tr. 304-305; Ab. 178-179). The secretary of the company was authorized to see if the Bank of Heber City would redeem the stock of Josie Baird Giles (Smith). (Tr. 306; Ab. 179). The bank was notified of the assessment but did not pay the same. (Tr. 318; Ab. 185). Under date of February 7, 1934, Mrs. James R. Baird, who is one and the same person as Elizabeth J. Baird, paid the amount owing upon the stock of Josie Baird Giles (Smith). (Tr. 307; Ab. 180-181). The only reason a new certificate was not issued to Elizabeth J. Baird was because the old certificates were not surrendered to the company. (Tr. 311-313; Ab. 182-183). While the records of the Lake Creek Irrigation Company are not as complete as might be desired, still such records do show that a substantial compliance with the laws of this State relating to the levy and collection of assessments was duly made. Any uncertainty in the records as to a compliance with the law is made certain by the oral testimony of J. Thomas Crook, president of the Lake Creek Irrigation Company. (Tr. 300-320 and 327; Ab. 176-185). When a stockholder is given personal notice of an assessment there is no necessity of giving any other notice.

Witcomb v. Geannini, 43 Cal. App. 227; 184 P. 881.

Lexington & W. C. R. Co. v. Chandler, 13 Metc. (Mass.) 311.

In this case the Lake Creek Irrigation Company was not required to give the Bank of Heber City

notice because it was not a record owner of the stock and in any event the bank may not at this late date be heard to complain of any irregularities in the making of the assessment or in advertising the stock for sale.

Hatch v. Lucky Bell Min. Co., 25 Utah 405;
71 P. 865.

In this connection it may be observed that an irrigation company such as the Lake Creek Irrigation Company is not required to publish notice of assessments.

R. S. U. 1933, 18-4-10.

If the stock was lawfully sold because of the non-payment of assessment, it follows that the claimed lien of the bank has ceased to exist.

Fletchers Cyclopedia of Corporations, Vol.
4, Page 595, Section 1866.

Thus, in any event, any lien that the Bank of Heber City may have had on the water stock represented by the certificates numbered 64 and 68 must give way to the rights of Elizabeth J. Baird.

ARGUMENT TOUCHING THE CLAIM OF THE MOULTONS TO THE FIFTEEN THOUSAND DOLLAR NOTE AND MORTGAGE ON THE LAND AND WATER TO SECURE THE PAYMENT THEREOF.

As one of the defenses to the suit brought by the Moultons in Civil Case No. 1410 the appellants claim that before the Moultons attempted to levy on the note in question Josie Baird Giles (Smith) and Vernor E. Baird had agreed to cancel the transaction and had further agreed that the property

covered by the deed and mortgage should be conveyed to Elizabeth J. Baird in payment of the debt which Josie Baird Giles, (Smith) owed to her mother, Elizabeth J. Baird. This being an equity suit, appellants are entitled to have this Court review the evidence and pass upon the weight thereof. In a number of the assignments of error appellants have attacked the findings of the trial court to the effect that no such agreement was entered into: Assignments Numbered 12, 13, 14, 21, 23, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 41 and 45

By assignments numbered 48, 49, 50, 51, 52 and 53 appellants attack the conclusions of law which are to the effect that the Moultons are the owners of the note and have a lien on the land and water stock as security for the payment of the note. For similar reasons appellants by assignment No. 54 attack the decree. A substantial portion of the evidence before the trial court, either directly or indirectly touches the question of whether or not the agreement had between Josie Baird Giles (Smith) and Vernor E. Baird for the sale and purchase of the land and water stock was by mutual agreement between Josie and Vernor cancelled. One of the questions which we deem of controlling importance is whether or not the evidence is such as requires a finding that such agreement was entered into before the attempt was made to attach the note. While evidence was offered touching the question of whether Josie owed her mother any money, and if so, the amount thereof, such question is not in our view of controlling importance. That is to say, if Josie was without right to enforce payment of the note against Vernor at the time the Moultons attempted to attach the note, then, and in such case, the Moultons cannot prevail in their suit on the note. Such is the law indepen-

dent of statute and such is the express provision of our statute.

R. S. U. 1933, 104-37-27.

If Josie could not enforce the fifteen thousand dollar note against Vernor, the same may not be enforced by the Moultons. The Moultons have not levied an attachment or execution on the land and water stock covered by the mortgage, but only upon the note. If the Moultons have any claim against the land or water stock it must be because they acquired title to the note pursuant to the attachment execution. While the appellants offered evidence as to the circumstances under which Elizabeth J. Baird acquired the land and water stock, such evidence was offered because the transaction whereby Mrs. Baird acquired the land and water was inseparably connected with and in a sense was a part of the transaction whereby Josie released Vernor from an obligation to pay the note.

It is difficult in a brief, without repeating the entire testimony, to give a reviewing court a word picture of all of the evidence. We shall, however, direct the Court's attention to those portions of the evidence which in our view clearly show wherein the truth lies: On October 10, 1929, Josie, who was then the owner of a tract of land and a water right used to irrigate the land, conveyed the same to her brother Vernor. Some of the water right was represented by two certificates of capital stock in the Lake Creek Irrigation Company. The certificates are numbered 64 and 68. Other water appears to have been appurtenant to the land. Nothing was paid on the purchase price of the land and water at the time of the transaction, but Vernor and his wife Mary executed a note for the principal sum of Fifteen Thousand Dollars, payable

on or before ten years after date. To secure the payment of the note a mortgage was executed by Vernor and his wife Mary. (Ab. 82 to 84). By the terms of the mortgage on the land and water it is alleged that

“This mortgage is given collaterally with a chattel mortgage of even date herewith made by the mortgagors in favor of the mortgagee to secure the payment of one certain promissory note.” etc. (Ab. 36).

The deed executed by Josie, the note and mortgage executed by Vernor and his wife, and a chattel mortgage were all made out by George B. Stanley. The deed and mortgage were acknowledged by him as a notary. The deed and real estate mortgage were delivered to Vernor. The note was left with and retained by George B. Stanley until he delivered the same to the Sheriff of Wasatch County at the time George B. Stanley brought suit for the Moultons. The chattel mortgage was never completed but was retained by Mr. Stanley. Thus, Josie did not personally receive either the note, the real estate mortgage or the chattel mortgage. (Testimony of Josie Baird Giles (Smith), (Tr. 64-72; Ab. 125-127; Tr. 82-83; Ab. 129; testimony of George B. Stanley, Tr. 405-412, Ab. 210-211). Josie's testimony on both direct and cross examination is to the effect that Vernor was unable to pay the note. That he paid only ten dollars thereon; that at one time he gave her a check but the same was returned because of insufficient funds (Exhibit B). That she went with Vernor to Salt Lake to see what could be done about making payment. That he was unable to secure any money. (Tr. 66-72, Ab. 126-127; Tr. 79, Ab. 128-129; Tr. 92-94; Ab. 132; Tr. 105, Ab. 135). The testimony

of William H. Baird is to the same effect (Tr. 144-147; Ab. 143). It is also the testimony of Vernor E. Baird, (Tr. 360 to 363, Ab. 199; Tr. 367, Ab. 200). It also appears from the records of the Lake Creek Irrigation Company and the testimony of its president that the assessment levied upon the water stock in 1933 was thereafter paid by Elizabeth J. Baird. (Tr. 306-309, Ab. 180-181; Tr. 311-312; Ab. 182, 183).

According to the testimony of George B. Stanley, Josie failed to call for the note until after it was attached, notwithstanding he, Stanley, informed her that he would levy on the note for the Moultons if she did not come and get it. (Tr. 412; Ab. 211). There is no evidence to the contrary. It does appear that Vernor signed a blank application for a loan with the Wasatch Livestock Loan Company, in which application the note, listed as a liability, was filled in by an employee of the loan company. (Exhibits 14 and 15, dated November 3, 1933 and October 24, 1934, respectively). Neither of these exhibits were filled out when signed, and J. Clyde Mitchell, a witness called by the Moultons, testified that the Wasatch Livestock Loan Company knew that Vernor did not claim title to the farm at the time the application was made. Thus, the testimony of Mr. Mitchell in no way impeaches but corroborates the testimony of Vernor to the effect that the note was regarded as cancelled and the only reason that it was not returned to Vernor is because it was held by Mr. Stanley. It will also be noted that in the affidavit for a writ of attachment in Case No. 1261, Plaintiffs' Exhibit 1, made by the Moultons under date of June 21, 1934, before George B. Stanley, notary public, it is averred that the defendants are endeavoring to conceal their property and that plaintiffs are

apprehensive that unless a writ of attachment is issued, the defendants will dispose of or conceal their property. The only property that Josie owned was the fifteen thousand dollar note and mortgage, excepting the note signed by her husband, J. Harold Giles, for the sum of Twenty-five Hundred Dollars. Obviously if Josie should conceal or sell the note of J. Harold Giles, such concealment or sale would not prevent the Moultons from collecting on the notes signed by Josie and J. Harold Giles. If Josie was attempting to dispose of her property as alleged in the affidavit, it must have been the fifteen thousand note because she owned no other property and had no income excepting what her mother gave her. (Tr. 128; Ab. 140; Finding No. 28; Ab. 97).

As heretofore indicated the question of whether or not Josie was indebted to her mother is not of controlling importance, for the reason that any claim that the Moultons have is founded upon the note and that alone. If Josie had no right to sue Vernor and his wife on the note, the Moultons have no such right because, as we have pointed out, the Moultons, by the proceedings had, could at most acquire only such right as Josie had. However, the question of whether Josie owed her mother any money may bear indirectly on the principal question. The evidence on this phase of the case is likewise all to the effect that Josie did owe her mother about six thousand dollars at the time Vernor conveyed the real estate and water covered by the mortgage to his mother. Josie testified that at the time her father's estate was settled she received more than her share of the estate and that she gave her mother a note for thirty-five hundred dollars, and that her mother furnished Josie with the money for the support and maintenance of

herself and the minor child. (Tr. 76, 79, 85, 93, 94 and 99; Ab. 128, 130, 132 and 134). Such is also the testimony of Wm. H. Baird (Tr. 143, 162; Ab. 143-146). That Josie received money for her own support and for the support of her minor child is established beyond any question of a doubt. J. Harold Giles did not give Josie any money for her support or the support of her minor child after the spring of 1930. (Tr. 167; Ab. 170).

Josie expected and agreed to pay her mother from the money which Vernor was to pay Josie; but only ten dollars was ever paid by Vernor on the note and mortgage. On July 9, 1934 Josie brought an action in the District Court of Wasatch County for a divorce from J. Harold Giles. The ground for the divorce was the failure and refusal of the defendant to provide plaintiff with the common necessities of life. In the complaint and the findings of the court it was alleged and found that defendant J. Harold Giles had failed to provide Josie Baird Giles with the common necessities of life and that the plaintiff Josie had no means or money with which to pay the clerk the filing fee or the officers for serving process. (Files in Case 1256, which were admitted in evidence and are all part of the record on appeal). It will be noted that the divorce action was filed nearly a month before the sheriff served the writ of attachment.

Some of the files in the probate proceedings of the estate of James R. Baird, deceased, father of Josie, were received in evidence. (Exhibit No. 8). It will probably be contended that these files tend to impeach the testimony of Josie and her brothers Vernor and William. There is, however, nothing in such file which in any manner conflicts

with the testimony of either William, Josie or Vernor. It was made to appear that Elizabeth J. Baird, the mother, advanced some money to the estate of James R. Baird, deceased, to pay the expenses of the administration. In order to balance the account in the probate proceedings it was necessary to make provisions for reimbursing Mrs. Baird for the money so advanced. This was done by a number of the children giving Mrs. Baird notes. Such transaction does not in any way tend to show that Josie did not, as both she and William testified, receive more than her share of the estate and that she gave her note to her mother for Thirty-five Hundred Dollars. If Mrs. Baird sold to Josie a part of the property which Mrs. Baird was entitled to, there was no occasion for such a transaction to appear in the probate proceedings. That Josie did receive more than her share and that she gave her note therefor, is established without any conflict in the evidence. (Testimony of Josie, Tr. 73-76, Ab. 128-129; Tr. 85 to 88, Ab. 130-131; testimony of Wm. H. Baird, Tr. 44, Ab. 143). That Elizabeth J. Baird advanced money for the support of Josie and her child is established without doubt. Not only is there no evidence to the contrary, but the surrounding circumstances show that such must have been the fact.

Josie and her child of necessity required money for food, shelter and clothing. All of Josie's property was tied up in the note which Vernor and his wife gave her, but upon which only ten dollars was paid, and the note of her husband, J. Harold Giles, for Twenty-five Hundred Dollars upon which nothing was paid. Josie's husband provided nothing for her support after the spring of 1930, and because of such failure Josie filed suit for divorce in 1934. Josie received nothing when she signed the notes

sued upon by the Moultons in the action where an attempt was made to levy upon and sell the fifteen thousand dollar note. (Tr. 123; Ab. 139). The Moultons make no claim to the contrary. In her testimony on both direct and cross examination Josie testified as to the money she received from her mother. There is not the slightest reason to disbelieve the same. It also appears that the Moultons paid only one hundred dollars for the fifteen thousand dollar note, which would seem to indicate that even the Moultons knew or believed that the note was of little or no value. It would probably serve no useful purpose to here repeat all of that testimony. Doubtless, the members of the Court will read the same. We earnestly urge that such testimony be read and feel confident that when the same is reviewed the members of the Court will be convinced that Josie spoke the truth when she testified that in 1933 she owed her mother about six thousand dollars. The court below committed grievous error when it held that she was not indebted to her mother, Elizabeth J. Baird.

We have already directed the Court's attention to the evidence touching the agreement between Josie and Vernor to cancel the note, but before leaving this phase of the case we wish to call attention to circumstances independent of direct evidence which point unerringly to appellants' contention that Josie and Vernor had agreed that the note should be cancelled and the only reason that it was not returned to Vernor was because it was held by Mr. Stanley, who, shortly after Josie brought the divorce action against her husband, J. Harold Giles, conceived of the idea that it was high time to levy on the fifteen thousand dollar note if he was to be able to satisfy the claim of his newly

acquired clients, the Moultons, and incidentally enable him to secure an attorney's fee of three hundred seventy dollars. Mr. Stanley testified that he prepared the deed from Josie to Vernor for the fifteen thousand note, the real estate mortgage to secure the note and a chattel mortgage, which had never been completed. Mr. Stanley further testified that neither Josie nor Vernor ever called for the note and that he told Josie that he was going to levy on the note for the Moultons at least on three occasions and still Josie did not make any attempt to get the note until after it was delivered to the sheriff.

Here was a note representing a small fortune, at least to one reared in the country as was Josie, and yet, if Mr. Stanley is to be believed, she did not consider the note of sufficient importance to even ask for the same, and that notwithstanding, she was told at least three times that if she did not call for the note it would be disposed of for whatever the Moultons were willing to pay on the notes which they held against Josie and her husband. Such behavior on the part of Josie is so contrary to human experience that even if the obligation on the note had in fact been cancelled by reason of the agreement between Vernor and Josie, it is most improbable that Mr. Stanley's testimony in such particular is true. If the note in fact had not been cancelled such conduct on the part of Josie is almost beyond belief. The evidence shows, and this Court will take judicial notice of the fact, that about the time Josie and Vernor entered into the contract for the sale and purchase of the farm and water stock the price of farm produce and livestock began to decline in value and that by 1932 and 1933 farmers and livestock owners were unable to pay the running expenses of their business, much less pay interest and principal on a fifteen thousand

dollar note. In this case it also appears that Vernor owed a substantial sum to the Wasatch Livestock Loan Company.

When Josie brought the action for divorce she was without funds to pay the filing fee and cost of serving process. If the fifteen thousand dollar note was at that time a subsisting obligation it is indeed difficult to believe that her brother Vernor would not have advanced her sufficient money to bring the divorce action or that she would be so forgetful of the truth as to verify a complaint wherein it is alleged she was without money with which to bring the divorce action. Under these facts and circumstances what was more natural than that Josie should conclude that Vernor could not possibly pay the note and that to save the expense of foreclosure the note should be cancelled, which, as the evidence offered by the appellants shows, was done. It is also significant that soon after the evidence shows the agreement was entered into between Vernor and Josie and Mrs. Baird, the latter arranged to and did pay the assessment on the certificates of stock which represented the water used to irrigate the land covered by the mortgage. If the trial court's findings are to be sustained it was Vernor's obligation to pay the water assessments, but there is nothing which shows or tends to show that Vernor concerned himself about the water assessments.

It also appears that Vernor did not retain possession of the farm after the year 1933. (Tr. 362-363; Ab. 199). Moreover, if the trial court's finding with respect to the lien of the Heber City Bank is to be sustained, Vernor had a right to rescind the contract of purchase and repudiate the note as to Josie, and likewise as to the Moultons, who in any event acquired no greater right than Josie had at

the time of the levy. If Josie in fact hypothecated the water stock which was used to irrigate the land to pay all present and future obligations of J. Harold Giles, such action by Josie constituted a breach of the covenant of the deed to Vernor and gave the latter, upon a discovery of the breach, a right to rescind the note upon reconveying the land and water to Josie or her nominee, Mrs. Baird, just as was done.

An attempt was made to impeach Wm. H. Baird by Mr. Stanley as to what was said by William before the County Commissioners. (Testimony of Wm. H. Baird, Tr. 170, Ab. 147; testimony of George B. Stanley, Tr. 404, Ab. 208). It is, to say the least, strange that if the statements testified to by Mr. Stanley occurred before the numerous witnesses that he claims were present, none of those witnesses were called to corroborate what Mr. Stanley claims to be the fact. In any event, the attempt to impeach Wm. H. Baird is without value. No one claims that any consideration passed from Vernor to Mrs. Baird at the time the land and water were reconveyed by Vernor to his mother. The conveyance was made to the mother as part of the agreement that the fifteen thousand dollar note should be cancelled. If Wm. H. Baird did make the statement that Mrs. Baird did not pay Vernor anything for the deed, such statement, if made, in no way tends to contradict the facts as testified to by appellants' witnesses.

We have thus briefly summarized the evidence touching appellants' claim that by agreement the fifteen thousand dollar note was cancelled long before it was levied upon and that the court below was in error in its finding and conclusion to the effect that the note was a subsisting obligation

owing by Vernor E. Baird and his wife Mary at the time Mr. Stanley turned the note over to the sheriff of Wasatch County. The action of the Moultons being, as it is, founded on the fifteen thousand dollar note, such note must be a binding obligation, as otherwise the action of the Moultons must fail. If the note was cancelled before the same was delivered to the sheriff of Wasatch County, there is nothing upon which an action can be founded.

THE PRETENDED LEVY ON THE FIFTEEN
THOUSAND DOLLAR NOTE UNDER THE
CIRCUMSTANCES DISCLOSED BY THIS
RECORD PRECLUDES THE MOULTONS
FROM CLAIMING TITLE TO THE NOTE.

We have already directed the attention of the Court to the evidence which shows that George B. Stanley prepared the deed from Josie to Vernor, the fifteen thousand dollar note and the real estate mortgage to secure the same, and a chattel mortgage which was never executed. The deed and real estate mortgage were delivered to Vernor and the note sued upon in this action was retained by Mr. Stanley until it was delivered to the sheriff of Wasatch County under the pretense that the sheriff was attaching the same. Both the sheriff and Mr. Stanley, somewhat reluctantly, admitted such to be the fact. (See testimony of Virgil Fraughton, Tr. 156, Ab. 115; testimony of Mr. Stanley, Tr. 414, Ab. 212). Mr. Stanley further testified that he was not an attorney at all when he made out the deed, note, real estate and chattel mortgages; that he was admitted to practice in May, 1931, and that he had never been the attorney for Josie Baird

Giles (Smith). (Tr. 400; Ab. 206). Mr. Stanley further testified that he made the papers out at the request of Vernor and that he was to deliver the note to Josie. (Tr. 410-411; Ab. 211).

It is provided by the statutory law of this State that:

“It is the duty of an attorney and counsel

5. To maintain inviolate the confidence and at every peril to himself to preserve secrets of his client

9. To comply with all duly approved rules and regulations prescribed by the board of commissioners of the Utah State Bar and to pay the fees provided by law ”

R. S. U. 1933, 6-0-25

“An attorney and counselor who receives money or property of his client in the course of his professional business and who refuses to pay or deliver the same to the person entitled thereto within a reasonable time after demand is guilty of a misdemeanor ”

R. S. U. 1933, 6-0-41

The rules of the Utah Bar provide:

“Rule 6, Paragraph 3 thereof: The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidence, and forbid also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with

respect to which confidence has been reposed.”

“Rule 57, The duty to preserve his client’s confidence outlives the lawyer’s employment, etc.”

It is suggested that because Mr. Stanley was not an attorney at the time he made out the documents for Vernor and Josie he should not be held to the code prescribed for attorneys. That the work of preparing the documents for Josie and Vernor was practicing law is, so far as we are advised, supported by all the authorities.

People v. Title Guaranty Trust Company,
230 N. Y. 578.

Judd v. The City Trust & Savings Bank,
133 Ohio St. 81; 12 N. E. (2d) 288.

People v. Weil, 260 N. Y. S. 658.

It would be strange indeed to say that one who unlawfully practices law may disregard the rules applicable to one who is entitled to practice. The authorities teach that the law does not so favor one who is not admitted to practice. Any other rule would reward rather than punish one engaged in the unlawful practice of law.

Moreover, the work which Mr. Stanley undertook before he was admitted to practice was never completed. He testified that he undertook to complete the transaction by preparing the chattel mortgage and to deliver the note to Josie. He never did either. He was an attorney when he delivered the note to the sheriff in furtherance of the scheme to make Vernor pay the note in full and to deprive Josie of any interest she might have had in the note. In doing so he used the knowledge and confidence reposed in him by Vernor and Josie in an

attempt to benefit himself and his newly acquired clients, the Moultons. Such attempts are uniformly condemned by the courts, and an attachment or execution levied under such or similar circumstances are to be held void and of no effect whatever. The law is thus stated in

7 C. J. S., 415:

“It may be stated as a general rule that when a levy is effected by any improper means as for instance by the use of any fraudulent device to obtain possession of property it will be invalid ”

To the same effect is the law stated in

6 C. J. 245, Section 469.

A number of cases will be found in the footnote to the text in

Note 17 in C. J., Page 245.

The same rule applies to execution. A levy which is procured through fraud, trickery or trespass is invalid. When the officer or creditor or other person representing the creditor fraudulently or wrongfully acquires possession of property for the purpose of levying on it, or where the property is brought within the jurisdiction of a court for the purpose of being levied on through any fraud or other wrongful act, the courts uniformly strike down a sale had under such circumstances.

23 C. J. 432 and cases there cited.

That Mr. Stanley, in wilfully turning the fifteen thousand dollar note to the sheriff, used the knowledge he acquired while acting for Josie and Vernor, cannot admit of doubt. That he wrongfully delivered the note to the sheriff, entrusted to him

to be delivered to Josie, is equally clear. He seeks to justify his wrongful act in such respect by the claim that he warned Josie he was going to do the wrongful act at least three times before he did it. He does not claim, however, that either Josie or Vernor authorized him to deliver the note to the sheriff so that the sheriff could sell it for whatever the Moultons were willing to pay — in this case the sum of one hundred dollars.

The courts of this and other States have gone a long way in requiring that attorneys exercise the utmost good faith towards their clients. Public policy requires that those standards be not relaxed. If in this case the action of Mr. Stanley in turning the fifteen thousand dollar note over to the sheriff, which he was obligated to deliver to Josie, under the pretext that the same was attached and sold under execution for the sum of one hundred dollars shall be approved, then indeed may an attorney reap a handsome reward for himself and one of his clients, at the expense of another client. The law does not permit an attorney nor his client to collect an obligation, no matter how valid the claim may be, by such procedure. As appears from the authorities heretofore cited, a valid levy upon property by either attachment or under execution must be free from the taint of fraud, trickery or unlawfulness before any rights may be acquired as result of a levy and sale.

The Moultons claim and the court below found that George B. Stanley did not have possession of said note as the attorney for Vernor E. Baird, Mary A. Baird or Josie Baird Giles (Smith), or for any of the defendants; that George B. Stanley at no time has been or acted as attorney for Josie Baird Giles (Smith). (Finding No. 14; Ab. 88). We have attacked that finding. If, as the court found, Mr.

Stanley did not have possession of the note for either Josie or Vernor, we are at a loss to conceive from this record for whom he secured and retained possession of the note. Mr. Stanley apparently had no doubt about the fact that he held the note for Josie. He testified that at least three times he told Josie to come and get the note. If, as the court found, Mr. Stanley was not holding the note as Josie's agent, then, and in such case, the note was never delivered. Josie could not maintain an action on a note which had never been delivered to her, and by the same token the Moultons may not maintain an action on the note, because they acquired no greater right than Josie had at the time of the levy. An undelivered note is not subject to be levied upon by attachment or writ of execution.

Erskine v. Nimours Trading Corp., 239

N. Y. 32; 149 N. E. 273.

Dos Passos v. Martin, 218 N. Y. 517.

Steese v. Steese, 251 N. Y. S. 164

THE AFFIDAVIT FOR THE WRIT OF ATTACHMENT WAS FATALY DEFECTIVE SO THAT THE CLERK WAS WITHOUT AUTHORITY TO ISSUE A WRIT OF ATTACHMENT AND THE SHERIFF WAS WITHOUT AUTHORITY TO LEVY UPON THE FIFTEEN THOUSAND DOLLAR NOTE.

An examination of the affidavit filed by the Moultons shows that the same does not comply with the law. The grounds and the only grounds upon which the Moultons sought and secured a writ of attachment was that:

“The defendants own or hold an interest in real and personal property; that they

are endeavoring to conceal, that the plaintiff may not realize upon any judgment which may be obtained in the above entitled action and that plaintiffs are apprehensive that unless a writ of attachment is issued the defendants will dispose of or conceal their property; that execution on any judgment obtained in this action will be returned without satisfaction.”

It will be observed that nowhere in the affidavit is there any allegation that the amount of the indebtedness claimed as owing to the Moultons is an obligation over and above all legal counter-claims.

R. S. U. 1933, 104-18-3 requires such an allegation.

“Where the statute requires the affiant to show that defendant is indebted to plaintiff in the amount specified, or that the latter is entitled to recover such an amount over and above all legal payments, setoffs or counter-claims, compliance with this statute is essential to cover jurisdiction to issue the writ.”

7 C. J. S. 293.

To the same effect is

6 C. J., Page 132.

Numerous cases are cited in the footnotes, particularly

Notes 2 and 3 to the Text of C. J. in support thereof.

Moreover, the affidavit for the attachment does not comply with the requirements of

R. S. U. 1933, 104-18-1 and 104-18-3,

in that it does not set forth any of the grounds mentioned in 104-18-1 as required by subdivision 5, 104-18-3. Apparently an attempt was made by the affidavit to come under either subdivision 3 or 6 of R. S. U. 1933, 104-18-1, but the affidavit does not comply with either. It is not alleged that the defendants, or either of them, have assigned, disposed of or concealed or are about to assign, dispose of or conceal any of their property with intent to defraud their creditors. Obviously the defendants had a perfect right to either conceal or dispose of their property to pay debts owing to other creditors, or for any other reason so long as such acts were not for the purpose or with the intent to defraud their creditors. Nor does the affidavit bring the Moultons within the provisions of Subdivision 6 of R. S. U. 1933, 104-18-1.

No facts whatever are set forth in the affidavit which shows or tends to show that the Moultons were justly apprehensive of losing their claims unless a writ of attachment issue. Apparently there was a very good reason why the affidavit did not so allege, namely, there are no facts justifying the issuance of an attachment. If the fact be as the record shows, that the only property which Josie had was the fifteen thousand dollar note, which was in the possession of Mr. Stanley and which Josie refused to call for, notwithstanding Mr. Stanley had told her at least three times to come and get the same, there was no basis in fact for an attachment.

“Where plaintiff is required by statute to charge that defendant is acting with in-

tent to defraud his creditors and the affidavit fails so to charge, it is insufficient to sustain an attachment.”

7 C. J. S., Pages 299 and 300, and cases cited in the footnote.

Where plaintiff is required to show that there is a probability of losing his debt, that fact should appear by a sufficient allegation. The reasons for the apprehension of losing the debt should be shown by a statement of facts upon which the fear of loss is based and facts should be set forth showing that the property owned or possessed by defendant subject to attachment probably will not be available to execution when the judgment is had.

7 C. J. S. 304, and cases there cited

Among the cases so cited is one from this jurisdiction:

Western Auto Company v. Gurnea, 73
Utah 423. 274 P. 862.

An affidavit for an attachment must be made in compliance with the form and requisites provided by statute and the facts required to be stated in the affidavit must appear therein with the required particularity or the court acquires no jurisdiction to issue the writ.

7 C. J. S., Sections 111 and 112, Pages
276, 277.

Moreover, the bond for the attachment is fatally defective in that the bond shows on its face that it is not executed on the part of the plaintiff as required by

R. S. U. 1933, 104-18-4,

and is not executed by two sureties as required by

R. S. U. 1933, 104-18-4 and

R. S. U. 1933, 104-54-16.

While the name of Chas. Anderson is signed on the bond, it does not appear in the body of the bond that he obligated himself on the bond, and likewise, while the name of Chas. Anderson is signed at the end of the verification, it does not appear that he was sworn. In such case the bond was insufficient to justify the issuance of a writ of attachment.

Summerton Livestock Co. v. Early, 111
S. C. 154; 96 S. E. 518.

It may here be noted that the words "on the part of the plaintiff" would seem to be the equivalent of "by the plaintiff."

THE EXECUTION ISSUED IN CAUSE 1410
WAS FATALLY DEFECTIVE AND CON-
FERRED NO AUTHORITY ON THE
SHERIFF OF WASATCH COUNTY TO
SELL THE FIFTEEN THOUSAND DOL-
LAR NOTE INVOLVED IN THIS CON-
TROVERSY.

We have a statute.

R. S. U. 1933, 104-37-1, Subdivision 3,
which provides:

"If property has been attached in the
action it (the writ of execution) shall re-
quire the officer to satisfy the same so far
as may be done out of the attached prop-
erty."

Notwithstanding the sheriff had taken possession
of the fifteen thousand dollar note under the writ
of attachment, the execution issued in cause No.

1261 did not comply with the mandatory provisions of the law above quoted and therefore the sheriff was without authority to advertise for sale or sell the note.

Gillman v. Tucker, 59 N. Y. supra 570; 13 N. Y. S. 804.

Place v. Riley, 98 N. Y. 1.

THERE IS NO EVIDENCE THAT NOTICE OF SALE OF THE NOTE WAS EVER POSTED AS BY LAW REQUIRED.

The return of the sheriff on execution is a part of the files in Civil Case No. 1261, which files were offered in evidence by the Moultons and received. In that return it is recited among other things

“That the sheriff did on the 21st day of January, 1935 levy on the property hereinafter described and noticed the same for sale as the law directs, and on the 29th day of January, 1935 at 9:30 A. M. of said day at the front door of the court house in Heber City, Wasatch County, Utah, the time and place fixed for said sale, I did attend and offer for sale at public auction for lawful money of the United States the property described as follows.”

Then follows a description of the fifteen thousand dollar note and the mortgage to secure the payment thereof, certain interests in water stock, a mortgage on water appurtenant to the land; all of which was sold for one hundred dollars. The evidence conclusively shows that the only notice of sale given by the sheriff was a notice, a copy

of which was received in evidence and marked as Plaintiffs' Exhibit 4. Another copy is marked Plaintiffs' Exhibit 12.

It will be noted that by the said notice the sale was to be had on January 28, 1935, at 10:00 o'clock, A. M. The sheriff proposed to sell the interest of the defendants in the fifteen thousand dollar note, mortgage given to secure the note, an interest in some water stock held by the Bank of Heber City, 49 shares of the primary stock, 34 shares of first-class high water right, 23 shares of second-class high water right and 8 shares of third-class high water right of the Lake Creek Irrigation Company, representing water right appurtenant to the lands described in the mortgage. We assume that the Moultons will not claim that under the proceedings had any land, interest in land, water stock or water appurtenant to the land was levied upon or sold or attempted to be sold by the sheriff.

The sheriff was without authority to sell real estate pursuant to the notice. No publication was had in a newspaper, nor was notice posted for twenty days as required for the sale of real estate.

R. S. U. 1933, 104-37-18.

Nor did the sheriff, according to his testimony, offer for sale or sell anything other than the fifteen thousand dollar note. Had the sheriff attempted to sell all of the property designated in the notice as a whole, his actions in such particular would doubtless be void as offending against the provisions of

R. S. U. 1933, 104-37-23.

We shall therefore confine our discussion to the note and if respondents claim that the sheriff sold

anything other than the note we may wish to meet such claim in a reply brief.

While the notice of sale indicated that the sale was to be had on the 28th day of January, 1935 at 10:00 A. M., the return of the sheriff shows that the sale actually took place on the 29th day of January, 1935, at 9:30 A. M. An examination of the return shows that the 29th representing the date of January and the hour 9:30 have both been changed. The trial court permitted the sheriff, Virgil Fraughton, to testify over the objection of appellants that on the 28th day of January he postponed the sale to the next day at 9:30. Appellants assign such ruling as error. (Assignments 3 and 4; Ab. 225-226). The sheriff further testified that as he recalled Mr. Morgan called on the 'phone and asked to have the sale postponed, but he could be mistaken. (Tr. 16; Ab. 115). That a year or so ago Mr. Morgan came into the sheriff's office and made inquiry about the sale, but that he, the sheriff, did not then recall or say anything about postponing the sale. The sheriff further testified that he made a memorandum of postponing the sale in a book. Over objection of appellants the book was received in evidence as Plaintiffs' Exhibit 5. The admission of the book into evidence is assigned as error (Ab. 226). The memorandum about postponing the sale is the last entry on that page of the book and the only entry in the book relating to sales. J. Rulon Morgan testified that he did not call up the sheriff about postponing the sale; that he was at Heber City on the 28th day of January, 1939; that he watched to see what the sheriff did about the sale. That the sheriff did not postpone the sale. (Tr. 39-42; Ab. 120-121). Wm. H. Baird testified that he was with J. Rulon Morgan on January 28, 1935, and that the sheriff did not

appear at the front door of the court house and postpone the sale. (Tr. 43-44; Ab. 121). Notwithstanding this state of the record, the trial court found that J. Rulon Morgan did call up the sheriff and the sheriff did postpone the sale. Appellants have assigned such finding as error. (Assignments 16, 17, 18, 19, 20, 21, 22; Ab. 231-232). While it is competent for the sheriff, if need be, to refresh his memory by referring to the book, Exhibit 5, the entry therein was not competent evidence.

22 C. J. 895.

When the sheriff makes a return as required by law, such return becomes a public record and may not be varied by the sheriff's oral testimony. If the return is in error it may, with leave of court, be amended, but until amended it is conclusively presumed to state the truth.

Huish v. Fenkell et al, 85 Utah 253; 39 P. (2d) 330.

Moreover, in light of the uncertainty of the testimony of the sheriff as to what occurred in connection with the sale, and in light of the written return made by him, soon after the sale, and the testimony of Mr. Morgan and Wm. H. Baird, there is little room for doubt as to where lies the preponderance of the evidence touching the failure of the sheriff to either make or postpone the sale on the date fixed in the notice. Moreover, neither in the sheriff's return nor in his oral testimony is there any evidence that a notice was posted in three public places. The return merely recites that the notices were posted as required by law, which is a pure conclusion. The oral testimony of the sheriff adds nothing to such conclusion. If the sheriff did not postpone the sale and sold the prop-

erty at a subsequent date, a sale on the latter date was equivalent to a sale without notice.

In the absence of a proper notice of sale the same is void or of no effect.

Henderson v. Hays, 41 N. J. 2387.

Hughes v. Watt, 26 Ark. 228.

Collins v. Smith, 57 Wis. 284.

In re Phillips Estate, 86 Utah 358; 44 Pac.
(2d) 699 and cases there cited.

THE CONSIDERATION PAID FOR THE NOTE
WAS SO GROSSLY INADEQUATE THAT
A COURT OF EQUITY WILL NOT PERMIT
THE SALE TO STAND.

There are expressions in some cases to the effect that courts will not set aside a sale solely because of an inadequate price. However, when there are irregularities in the proceedings antedating the sale, or where there is any unfair dealing in connection with the sale in addition to gross inadequacy of price, the courts uniformly refuse to recognize the validity of a sale.

23 C. J. 680 and cases there cited.

We have heretofore pointed out that there were irregularities in every step had in the proceedings whereby the Moultons pretended to attach and sell under execution the fifteen thousand dollar note. Many of such proceedings, as we have pointed out, were not mere irregularities, but were so contrary to law as to render the levy and sale of the note void and of no effect. We shall not repeat what we have heretofore said.

Some of the present counsel for the Moultons seem to have appreciated the fact that to purchase a fif-

teen thousand dollar note upon which there was nearly six years accrued interest for one hundred dollars is so shocking to the conscience of a court of justice that at the trial they stated that they would not ask for a deficiency judgment against Vernor and would credit on the judgment against Josie and J. Harold Giles the amount they will realize from a sale of the property. Such promise, which the court below improperly characterized as an agreement, does not alter the situation or support the sale of the note.

Hamilton v. Burch, 28 Ind. 233.

Gallagher v. Abadie, 26 La. Ann. 343.

CERTIFICATES OF STOCK NUMBERED 64 AND 68 HAVING BEEN PURCHASED BY ELIZABETH J. BAIRD FROM THE LAKE CREEK IRRIGATION COMPANY, WHICH ACQUIRED TITLE THERETO BECAUSE OF A FAILURE TO PAY ASSESSMENTS, ARE NOT IN ANY EVENT SUBJECT TO A LIEN AS SECURITY FOR THE PAYMENT OF THE FIFTEEN THOUSAND DOLLAR NOTE.

What we have heretofore said touching the sale of the two certificates of stock numbered 64 and 68 in connection with the claim of the Bank of Heber City is applicable to the claims of the Moultons. We shall not repeat our contention in such respect. If Mrs. Baird acquired title to the two certificates, as appellants contend she did, it necessarily follows that the Moultons have no valid claim against such certificates.

JOSIE BAIRD GILES SMITH AND J. RULON MORGAN, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF ELIZABETH J. BAIRD, HAVE A RIGHT TO A HOME-STEAD IN THE FIFTEEN THOUSAND DOLLAR NOTE AND THE LAND AND WATER STOCK COVERED BY THE MORTGAGE.

After the trial court orally announced what his decision would be, Josie Baird Giles Smith and J. Rulon Morgan, as executor of the estate of Elizabeth J. Baird, deceased, filed a petition in these causes, wherein they alleged, among other things, that from October 10, 1921 up to July 16, 1934, Josie Baird Giles and J. Harold Giles were husband and wife. That there was one minor child, the issue of the marriage, who at all times from the date of her birth to and including February 1, 1935, resided with said Josie Baird Giles and was dependent upon her for support. That prior to the time that Josie Baird Giles made, executed and delivered the warranty deed to Vernor E. Baird on October 10, 1929, Josie Baird Giles, and her husband, resided upon the property mentioned and described in the mortgage and used the property as their home and for the support of Josie and her husband, J. Harold Giles, and the child, the issue of the said marriage, and that Josie also used the water right represented by the certificates of stock, together with the water appurtenant to the land to irrigate the same.

That neither Josie Baird Giles nor J. Harold Giles, at any time prior to February 1, 1935, owned any real estate other than that mentioned. That Josie Baird Giles was at all times, prior to February 1, 1935, an actual and bona fide resident of Wasatch County, Utah. That on October 10, 1929, Josie

Baird Giles made a deed to the property mentioned in the complaint filed herein and that Vernor E. Baird, and his wife, Mary, delivered to George B. Stanley the note and mortgage mentioned and set out in the complaint; that Josie Baird Giles never received any payment on the note excepting the sum of ten dollars, and that she never, at any time, received the fifteen thousand dollar note. The petitioners claimed that Josie Baird Giles was entitled to a homestead exemption of any interest that she might have in the note and the property given to secure the same and that Elizabeth J. Baird was entitled to any exemptions that Josie may have had to the property covered by the note. (Ab. 70 to 72). An answer was filed to the petition, which in the main denies the allegations in the petition (Ab. 73). Thereafter a stipulation was entered into between the parties as to the facts, which will be found on page 75 of the abstract.

The claim to some or all of the property involved in this controversy, or the proceeds to be derived from the sale of such property, must of necessity proceed upon the assumption that the issues raised in the main case have been properly decided against the appellants. In our argument that J. Rulon Morgan, as executor of the last will and testament of Elizabeth J. Baird as grantee of Josie Baird is entitled to any homestead exemption that Josie was entitled to assert, we of course do not wish to concede that there is any occasion under the facts in this case to rely upon a homestead.

The statutory provisions upon which we rely are

R. S. U. 1933, 38-0-1.

“A homestead consisting of lands, appurtenances and improvements, which lands may be in one or more localities, not ex-

ceeding in value with the appurtenances and improvements thereon the sum of \$2,000.00 for the head of the family and the further sum of \$750.00 for the spouse, and \$300.00 for each other member of the family, shall be exempt from judgment lien and from execution or forced sale." etc.

R. S. U. 1933, 38-0-2:

"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 the exemption "

R. S. U. 1933, 38-0-8:

"It shall be the privilege of either the husband or the wife to claim and select a homestead to the full extent prescribed in this title on the failure of the other, being the judgment debtor, to make such claim or selection."

R. S. U. 1933, 38-0-10:

"A homestead claimant may make a declaration of homestead in the manner provided in the next two sections, but a failure to make such declaration shall not impair the homestead right."

R. S. U. 1933, 38-0-15:

"The homestead shall not be sold if the bid does not exceed the value of the ex-

emption when the homestead is in one piece." etc.

R. S. U. 1933, 38-0-19:

"If homestead property is sold on execution, the proceeds paid the judgment debtor shall be exempt from execution or other process for one year after receipt thereof by the person entitled to the exemption."

R. S. U. 1933, 38-0-4:

"Water rights and interest either in the form of corporate stock or otherwise, owned by the judgment debtor shall be exempt from execution to the extent that such rights and interest are necessarily employed in supplying water to the homestead for domestic and irrigation purposes."

R. S. U. 1933, 38-0-13:

"If the owner is married, no conveyance or encumbrance of, or contract to convey or encumber, the premises selected and recorded as a homestead prior to the time of such conveyance, encumbrance or contract is valid unless both the husband and wife join in the execution of the same."

The provisions of our homestead law have been before and construed by this Court on so many occasions that we do not deem it necessary to examine cases from other jurisdictions touching the matters raised in the petitions of Josie Baird Giles (Smith) and J. Rulon Morgan.

The Petitioners contend: That Josie Baird Giles (Smith) was entitled to a claim for a homestead to the amount of \$2,000.00 for herself, \$300.00 for her

minor child, and \$750.00 for her husband. As to her right to a homestead for herself and the child there would seem to be no serious doubt. It will probably be contended that in any event Josie had no right to make the claim of \$750.00 for J. Harold Giles in light of the fact that she secured an interlocutory decree of divorce from him on July 16, 1934. However, the divorce did not become final until six months after it was granted and therefore J. Harold Giles was the husband of Josie Baird Giles at the time the note was delivered to the sheriff, as well as at the time the note is claimed to have been sold under execution sale. It is held

In re Johnson's Estate, 35 P. (2d) 305, that the entry of divorce decree does not at once terminate marriage relationship and give the parties the status of single persons; that the marriage relationship is dissolved when decree becomes final which is six months after the date of entry.

It will be observed that

R. S. U. 1933, 38-0-2 and 38-0-19 provide that the proceeds derived from the sale of a homestead shall be exempt from execution for one year after *receipt* thereof by the person entitled to the exemption. Moreover, if Josie was entitled to claim a homestead exemption for herself and the minor child, the sale of the note for only one hundred dollars was a nullity.

R. S. U. 1933, 38-0-15 provides:

"The homestead shall not be sold if the bid does not exceed the value of the exemption when the homestead is in one piece," etc.

The note was one obligation and the sheriff was without authority to sell the same until and unless

the claim of a homestead was first satisfied. In the case of

Payson Exchange Bank v. Teitjen, 63 Utah 321; 225 P. 598, at Page 325 of the Utah report it is said:

“The great weight of authority, under statutes similar to ours, is to the effect that a judgment is not a lien against premises impressed with the homestead character and subject to the homestead use, and that an attachment or execution attempted to be levied thereon is absolutely void.”

And again on Page 326 of the Utah report it is said:

“The fact, however, is that in legal effect an order of a court directing a sale of exempt property is stillborn, and, like an execution, is without any effect whatever.”

It will probably be contended by the Moultons that the sheriff being without notice of the claim of homestead by anyone, such claim was waived. There are some cases from our own Supreme Court which hold that a homestead claim may be made at any time before sale. Among the cases so holding are

Hansen v. Mauss, 40 Utah 361; 121 P. 605.

Payson Exchange Savings Bank v. Tietjen, 63 Utah 321; 225 P. 598.

Bunker v. Coons, 21 Utah 164; 60 P. 549.

Folsom v. Asper, 25 Utah 229; 71 P. 315.

None of these cases, however, are authorities for the converse, namely that the homestead right is waived unless asserted at or before sale. In any

event none of these cases aid the Moultons, for the obvious reason that before the sale of the note in question, the mortgage had been released and property covered by the mortgage conveyed to Elizabeth J. Baird, both of which instruments had been placed of record in the office of the County Recorder of Wasatch County before the sale of the note, and such recording imparted notice to all persons dealing with the property that Josie Baird Giles and her mother, Elizabeth J. Baird, claimed that the property was not subject to sale.

Moreover, in the absence of notice of levy and sale to the claimant, the right to assert a homestead is not waived.

Kimball v. Salisbury, 19 Utah 161; 56 P. 973; 17 Utah 381, 53 P. 1037.

Notice to sheriff before sale is sufficient. Bunker v. Coons, Hansen v. Mauss and Payson Exchange Savings Bank v. Teitjen, *supra*

Indeed it is said in the Teitjen case, *supra*, at Page 326 that:

“It may also be doubted whether an officer or anyone else under any circumstances may sell or dispose of a homestead without becoming liable unless he does so with the consent and approval of the homestead claimant, and if such claimant be married, then with the consent of both husband and wife.”

Following the last quotation this Court cites cases which it apparently believes support the doctrine that a sale of a homestead right is a nullity unless consented to by the parties interested.

It will probably be contended on behalf of the

Moultons that Josie Baird Giles (Smith) does not bring herself within the provisions of

R. S. U. 1933, 38-0-2 or 38-0-19

because the note was executed considerably more than one year prior to the date of the sheriff's sale thereof. It will be remembered that all of the evidence is to the effect that Josie never, at any time, had the actual custody of the note. She did not in the language of the statute, "receive" the proceeds of the sale of the land and shares of capital stock which she conveyed or agreed to convey to Vernor. The only evidence in the record is that of Josie where she testified that she received only \$10.00 from Vernor, which of course would pay the interest for only a few days. If, as we assumed in preparing our pleadings in the original action, Mr. Stanley had conceded that he was the attorney for Josie and that as such his possession of the note was the possession of Josie, there might be merit to a claim that Josie had "received" the note, which was the proceeds of the sale. However, he disclaims any such relation to Josie and apparently takes the position that he was not the agent or attorney for Josie. If such be the fact, then in contemplation of law, Vernor never parted with the note, in which event it would be idle to say that Josie had received the proceeds of the sale of the farm.

It is in effect stated in the findings that Josie could have received the note had she so desired. The statute does not either by express words or by implication say that the proceeds of the sale of exempt property shall be exempt for one year after the party claiming the exemption could have received such proceeds. Quite to the contrary it says "after the receipt thereof." To construe this

language to mean after the claimant could have received the proceeds would be doing violence to the express provisions of the statute.

The principles announced by this Court in the cases of

Christensen v. Beebe, 32 Utah 406; 91 P.
129, and

Giesy-Walker Co. v. Briggs, 49 Utah 205;
162 P. 876,

preclude the Moultons from successfully making the claim that Josie had received payment for the farm and water stock.

If the note of Josie was exempt from levy on execution she had a right to dispose of it as she saw fit. The Moultons could not complain if she gave it away, cancelled it or sold it to someone else. In other words, the Moultons could not by the levy of an attachment or execution deprive her of such right. Even though she did not have a right to dispose of the whole note, she none the less had an absolute right to dispose of such part of the note as equalled her exemption. If she chose to cancel the note and mortgage in return for the farm she had, within the limits of her exemptions, a right to do so.

R. S. U. 1933, 38-0-9.

In such case the Moultons have no just cause to complain.

Moreover, Elizabeth J. Baird acquired the exempt property free from any claim of the judgment creditors of Josie. If one entitled to a homestead exemption is unable to convey the exempt property freed from the claim of the judgment creditor, then of course the hands of the judgment creditor are

tied so that such a person could not dispose of property to which he has an absolute right unfettered by any claim of the judgment creditor. Such is the clear pronouncement of our statute and such has been the doctrine repeatedly announced by this Court

R. S. U. 1933, 38-0-2.

Payson Exchange Savings Bank v. Teitjen,
63 Utah 321; 225 P. 598.

Antelope Shearing Corral Co. v. Con.
Wagon & Mach. Co., 54 Utah 355; 180
P. 597.

Volker-Scowcroft Lumber Company, et al,
v. Vance, et al, 36 Utah 348; 103 P.
970.

By the levy of an attachment and execution on the note and the taking the same by the sheriff, Josie could not be deprived of her right of a homestead claim in her own right or be deprived of her right to convey such exempt property to others. To permit such a result would constitute a limitation or deprivation of the right, which the law does not countenance. This right was exercised by Josie before the sale insofar as she was able to exercise the right.

As to the claim of a homestead exemption to the stock held by the bank:

We have already directed the Court's attention to

R. S. U. 1933, 38-0-4.

where it is provided that water used upon exempt real property is exempt. As early as 1898 our Supreme Court held that the homestead exemption is not a mere privilege conferred upon the head

of a family, but an absolute right, intended to secure and protect the home against creditors, as a means of support to every family in the State, and no waiver of the homestead right could affect the interest of the wife and children composing the family.

When the homestead consists of one or more pieces of land within the value limited by statute, and is established by selection or occupancy, the constitution and statute enacted under it are a positive prohibition against levy and sale thereof by creditors of the owner of the homestead.

Kimball v. Lewis, 17 Utah 381; 53 P. 1037.

We have also heretofore called the Court's attention to

R. S. U. 1933, 38-0-13

That section was construed in the case of

Nielson v. Peterson, 30 Utah 391; 85 P. 429.

By a divided Court it was held that a husband could mortgage his interest in property used as a residence by the family where there was no recorded declaration of a homestead. Mr. Justice Straup in a dissenting opinion took the view that the wife not having joined in the mortgage had a right to lay claim to and preserve the home for herself and family. In that case it was expressly held that the husband was without authority to mortgage any interest that the wife might have. The stock involved in the case belonged to the wife. Her interest could not be jeopardized by any act of the husband. Certainly her right as an owner to homestead property is entitled to as much protection as

would have been accorded her if she had declared a homestead in her husband's property. If the rights of a married woman, especially in property which constitutes a homestead may be disposed of by the husband in the manner shown by the evidence in this case, then indeed has the wife a long way to travel before she is emancipated.

We submit the claim of a homestead as against the attachment and sale under execution by the Moultons should be sustained, and likewise upon this record, if for no other reason, the claim of a homestead right in the water stock precludes the bank from maintaining its lien.

The evidence in this case shows that at the request of Elizabeth J. Baird a note for five thousand dollars was given to Morgan & Morgan for the purpose of securing them in the payment of a fee and to enable them to, if possible, secure money to protect the water stock held by the Bank of Heber City. The note was given just before the deed was executed by Vernor to his mother. Vernor signed the mortgage because his mother was in California. The mortgage by Vernor to Morgan & Morgan and the deed from Vernor to his mother were placed on record a day or two before the sheriff sold the fifteen thousand dollar note. It also appears that Wm. H. Baird as attorney in fact for Josie released the mortgage of record a day or two before the note was sold. Of course we do not contend that the execution and recording of these instruments could affect any lien or claim that the Moultons may have had in the land covered by the mortgage. The firm of Morgan & Morgan of course knew that such was the law, but

the recording of those instruments would preclude anyone who might have purchased the note at the sheriff's sale from claiming that he was an innocent purchaser of the note, believing that it was secured by a mortgage. As these transactions do not affect the questions presented for determination on this appeal, we refrain from further discussion of the same.

We submit that the judgment and decree appealed from should be reversed and the trial court directed to recast its findings of fact, conclusions of law, decree and judgment to the end that appellants be awarded judgment to the effect that neither of the respondents has any lien on the water and land involved in this litigation, and that appellants be awarded their costs.

Respectfully submitted,

J. RULON MORGAN,

ELIAS HANSEN,

Attorneys for Appellants.