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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.

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Utah Supreme Court

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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 Liquida-
tion of the Bank of Heber City,

Plaintiffs and Respondents,

vs.

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

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

vs.

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-Partner-
ship, 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.

J. RULON MORGAN,

Cross-Complainant,

vs.

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.

1266 Civil

1410 Civil

BRIEF OF RESPONDENTS

Appeal From Fourth District, Wasatch County.
Honorable Dallas H. Young, Judge.

CHENEY, JENSEN, MARR & WILKINS, GEORGE B. STANLEY,
PAUL B. CANNON AND DELBERT M. DRAPER,
Attorneys for Plaintiffs and Respondents.

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1266 Civil

1410 Civil

BRIEF OF RESPONDENTS

As stated by Appellants the case before the Court involved two actions, one numbered 1266 Civil and the other 1410 Civil, which were consolidated for trial. The Court made one set of Findings of Fact and Conclusions of Law, and one Decree.

We will first take up the argument of Appellants in case No. 1410 wherein A. C. Moulton and E. Dewey Moulton are plaintiffs. The Appellants have set forth their statement of the issues in that case commencing at page 3 of their brief. Before taking up each issue, we will make a further statement of the facts and the parties involved.

A. C. Moulton and E. Dewey Moulton held two promissory notes signed by Josie Baird Giles and J. Harold Giles, each dated January 1, 1931, upon which judgment was recovered on October 1, 1934 in the total sum of \$4,974.67, together with \$370.00 attorney's fees and \$14.20 costs of Court, which judgment bore interest at the rate of 8% per annum. There was no issue as to the validity of this judgment. The action on the promissory notes was case No. 1261 Civil and the file in that case is Plaintiffs' Exhibit 1. The \$15,000.00 promissory note executed by Vernor Baird and given to Josie Baird Giles was attached by the Sheriff in case No. 1261 Civil on July 7, 1934, and the promissory note taken into the possession of the Sheriff. Execution was issued on December 19, 1934. Notice of sale was posted and a copy was mailed to Morgan & Morgan on January 25, 1935 (Tr. 23, 35, 39, Ab. 118, 120). The promissory note

was sold by the Sheriff and purchased by A. C. Moulton and E. Dewey Moulton January 29, 1935. The mortgage follows the note as an incident thereto. *Smith v. Jarman*, 61 Utah 125, 211 Pac. 962. The records show that a purported release of the mortgage securing said promissory note dated January 26, 1935, was recorded January 28, 1935 at nine o'clock A. M., this release being by William H. Baird, Attorney in Fact for Josie Baird Giles. A new mortgage dated January 26, 1935 was executed by Vernor E. Baird and recorded January 29, 1935, for \$5,000.00 in favor of A. B. Morgan and J. Rulon Morgan, co-partners, doing business under the firm name and style of Morgan & Morgan. A warranty deed from Vernor E. Baird to Elizabeth J. Baird dated January 28, 1935 was recorded on the morning of January 29, 1935 at 9:05 A. M. The Power of Attorney from Josie Baird Giles to William H. Baird was not recorded until January 30, 1935. The Notice of Sale stated the sale would be held January 28, 1935 at ten o'clock A. M. The sale was postponed to January 29, 1935 at 9:30 A. M., at which time the sale was held. The appellants dispute that the sale was postponed on the 28th or that it was held on the morning of January 29th. The Trial Court so found, however, and further found that this postponement was at the request of J. Rulon Morgan, one of the attorneys for Josie Baird Giles. All of the above-mentioned documents which were recorded on January 28, 29 and 30 were acknowledged before J. Rulon Morgan as Notary Public and recorded at the request of J. Rulon Morgan or Morgan & Morgan. For the recording infor-

mation see Plaintiffs' Exhibit 2 which is the abstract of title on the property involved.

The following relationship exists between certain of the parties: James R. Baird and Elizabeth J. Baird were husband and wife, James R. Baird having died sometime prior to 1926. Vernor E. Baird and Josie Baird Giles, who is named as Josie Baird Giles Smith in the Complaint, were children of James R. Baird and Elizabeth J. Baird. William H. Baird was another son. J. Harold Giles married Josie Baird Giles in 1924 and was divorced from her by Interlocutory Decree dated July 16, 1934. (See the file in case No. 1256 Civil which was introduced as an exhibit in the case). Ray F. Smith married Josie Baird Giles subsequent to her divorce, the date of the marriage not being in evidence. Such marriage would necessarily have been subsequent to January 16, 1935, the date when the divorce from J. Harold Giles became final. Arthur Duke and Eulean Duke were the occupants of the ranch at the time of the trial. Elizabeth J. Baird, the mother of Josie Baird Giles Smith and Vernor E. Baird, died February 5, 1938 and J. Rulon Morgan is the executor of her estate (Amendment to Complaint, Ab. 38). J. Rulon Morgan is also named as a defendant as a surviving partner of the firm of Morgan & Morgan, attorneys. The \$15,000.00 promissory note attached and sold by the Moultons was given in October, 1929 to Josie Baird Giles by Vernor E. Baird, as the purchase price for a ranch sold to Vernor by Josie. There

is no issue in this case as to execution and delivery of this promissory note. It is admitted by the pleadings. It is also admitted that Vernor E. Baird paid \$10.00 on this note (Tr. 68, Ab. 126) and that he gave an additional check as a payment thereon, which was returned for insufficient funds (Tr. 54, Ab. 123). It is undisputed that Vernor Baird took possession of the ranch in 1929 (Tr. 271, Ab. 170). Joe Walker ran the farm for Vernor and remained there through the season of 1934 (Tr. 365, Ab. 200).

One of the issues raised in this case is as to whether or not the mortgage securing said promissory note was released so as to defeat the rights of the Plaintiffs. It is claimed in the pleadings of the Defendants and Appellants that there was an agreement to release this mortgage prior to the date of the attachment of said note or the levy of execution thereon. We do not admit the materiality of any agreement to release the mortgage as admittedly the release was not given until after the note was in the hands of the Sheriff under both the Writ of Attachment and Writ of Execution. A substantial portion of the testimony at the trial deals, however, with the question of whether or not there was a prior agreement to release the mortgage and to convey the property by Vernor E. Baird to Elizabeth J. Baird. The Court found there was no such agreement (Finding No. 14, Ab. 88). Of course if there was no such agreement the matter is disposed of. We believe that without question the Trial Court was correct in its finding. Assuming,

however, that there was such an agreement Respondents take the position that if any such agreement was made it was without consideration and therefore in fraud of creditors; that any such agreement is immaterial as it was never carried out or executed prior to the attachment or prior to the execution levied on the note; that such agreement being oral was void as against the attaching creditor and subsequent purchaser because it was in violation of the Statute of Frauds.

Appellants attempt to make a point of the fact that when the \$15,000.00 promissory note was purchased by the Moultons the bid was only \$100.00. The question of the \$100.00 bid is fully discussed hereafter. However, we wish to point out that at the opening of the case counsel for Plaintiffs stated that no deficiency judgment would be taken against Vernor Baird, that the judgment taken would be only for the amount of the judgment by the Moultons against Josie Baird Giles and her husband, J. Harold Giles, and that upon the payment of such amount the judgment against the Defendants would be released. Of course, the fact that only \$100.00 was bid for this note is no legal reason why it should not be enforced. However, since the Appellants have raised the question we point out that the Plaintiffs in case No. 1410 Civil are asking nothing except that which is owing to them. The proceedings are only an attempt to enforce an honest obligation. The Appellants on the other hand have done everything possible to prevent the payment of an honest obligation.

ARGUMENT REGARDING AGREEMENT TO RELEASE MORTGAGE,
THE CONSIDERATION FOR SUCH RELEASE AND CON-
VEYANCE BY VERNOR E. BAIRD TO ELIZABETH J. BAIRD.
(See pages 27 to 39 of Appellants' Brief).

Appellants claim that sometime in the year 1933 an agreement was made between Josie Baird Giles, Vernor E. Baird and Elizabeth J. Baird, their Mother, that Josie would release the mortgage, that Vernor would convey the property to Elizabeth free and clear of all encumbrances and that Elizabeth would release Josie of an indebtedness owing from Josie to Elizabeth. This is in fact what was attempted by the conveyances recorded on January 28, 29 and 30, 1935, except that Vernor E. Baird gave a mortgage of \$5,000.00 to the firm of Morgan & Morgan. The consideration claimed by Josie was that she, Josie, owed Elizabeth approximately \$6,000.00 (Tr. 76, 77, Ab. 128). The entire evidence of any such agreement between Elizabeth, Josie and Vernor was oral. There was not the slightest evidence in writing or in the acts of the parties showing that such an agreement was made excepting the instruments subsequently recorded. It is admitted by J. Rulon Morgan that he received notice of sheriff's sale, mailed by the sheriff on January 25, 1935 from Heber City (Tr. 39, 336, Ab. 120, 191). That he prepared the documents at or subsequent to that time, excepting the Power of Attorney, which he claims was executed December 12, 1934, but which document was not recorded until January 30, 1935, subsequent to the date of recording of all other documents. Josie Baird Giles

who is supposed to have signed the Power of Attorney in December 1934 was in California in January 1935. It is claimed she executed the Power of Attorney just prior to leaving for California. As to the \$6,000.00 consideration, Josie Baird Giles contended that she owed her Mother a promissory note of \$3,500.00, which was executed at the time of the closing of the James R. Baird estate in 1926. That the balance of the \$6,000.00 or \$6,500.00 which she owed was on account of money given her by her Mother (Tr. 76, 77, Ab. 128). The promissory note was never produced. She testified that she had an account book of monies advanced by her Mother (Tr. 96, Ab. 133). Such account book was never produced at the trial.

In considering the evidence of this indebtedness we call attention to a statement by this Court in the case of *Paxton v. Paxton*, 80 Utah 540 at 553, 15 P. (2d) 1051, wherein the following statement is made:

“It is quite generally held that a transfer or mortgage of property between near relatives which is calculated to prevent a creditor from realizing on his claim against one of such relatives is subject to rigid scrutiny. 27 C. J. 495, and cases there cited. Under the rule, a transfer or mortgage of property made to a near relative in consideration of past-due indebtedness will be sustained if attacked in a creditor's suit when, and only when, it is shown the debt is genuine, that the purpose of the grantee or mortgagee is honest, and that he acted in good faith in obtaining his title or lien. The burden, in such case, is cast upon the grantee or mortgagee to show the good

faith of the transaction by clear and satisfactory evidence. *Elliott & Co. v. Johnson*, 85 W. Va. 706, 102 S. E. 681; *Woody v. Tucker*, *Willingham & Co.*, 215 Ala. 278, 110 So. 465; *Flint v. Chaloupka*, 78 Neb. 594, 111 N. W. 465, 13 L. R. A. (N. S.) 309, 126 Am. St. Rep. 639; *Jones v. Beers*, 118 Ore. 317, 246 P. 711."

The Court refused to sustain the mortgage in that case when there was no other evidence, except the statements of the parties to the transaction.

We agree with Appellants that a true picture of the evidence can be secured only by reading the transcript. We will, however, point out pertinent portions of the testimony material to our argument.

(a) WAS THERE ANY AGREEMENT TO RELEASE THE MORTGAGE AND CONVEY THE FARM?

The testimony of the Bairds was that in 1933 an oral agreement was made to release the \$15,000.00 note in consideration of a conveyance by Vernor to his Mother, Elizabeth, and a release by Elizabeth of the indebtedness supposedly owing from Josie to her Mother. Written evidence and acts of the parties subsequent to 1933 show clearly that they all considered that Vernor was still the owner of the ranch. We call attention to the answer of Josie Baird Giles in case No. 1266 Civil, filed by the Bank Commissioner on August 14, 1934 against J. Harold Giles and Josie Baird Giles for the foreclosure on the water stock. Josie verified her answer on October 11,

1934 and stated in paragraph 7 with regard to such stock:

“She sold said certificates of water stock and the water represented thereby to Vernor E. Baird and ever since said time said Vernor E. Baird has been and now is the legal owner of the same.
”

When this discrepancy was pointed out at the trial Josie's counsel inserted the amendment which now appears in the Answer and which adds that since 1933 Elizabeth J. Baird has been the equitable owner of said certificates. The amendment was not made until after the trial had opened (Tr. 246, Ab. 164). At the time the original answer was made Morgan & Morgan were advising her and the answer was prepared and sworn to subsequent to the time when Morgan & Morgan supposedly had been asked to prepare deeds for transfer of the real estate and water stock to Elizabeth. See testimony of J. Rulon Morgan (Tr. 343, 344, Ab. 193, 194). If an agreement had been made in 1933 to transfer the property to Elizabeth, and if the firm of Morgan & Morgan had been told to make out the papers consumating this transfer, such a situation was certainly not reflected by the verified answer of Josie in the action filed by the Bank of Heber City. The amended cross-complaint of J. Rulon Morgan as executor of the Estate of Elizabeth J. Baird, deceased, alleges that Vernor E. Baird began to use the water in 1929 and

“continued to use such water for irrigation purposes until the irrigation season of 1935”. (Ab. 56, para. 6).

The evidence shows that there was no transfer of the possession of the farm in 1933 and that Joe Walker, who was running the farm for Vernor, continued in possession through the year 1934. (Testimony of Josie Baird Giles Smith, Tr. 81, Ab. 129). In 1935 the property was leased to Josie’s then husband, Ray Smith. This, of course, was after the actual transfer of title from Vernor to Elizabeth and two years after the supposed agreement to convey to the Mother. Ray Smith could not have leased the property as Josie’s husband prior to 1935 as the Decree of Divorce from Harold did not become final until January of that year. Josie testified that the agreement with her Mother was that the property should be conveyed to her free and clear of indebtedness (Tr. 93, Ab. 132). When conveyed, instead of being free and clear of encumbrances it was subject to a mortgage for \$5,000.00 to the firm of Morgan & Morgan. When asked about this mortgage Josie first stated that she instructed William to give that mortgage, though she later changed this testimony and said she didn’t know why it was given (Tr. 114, 115, Ab. 138). Josie claims to have made the agreement with Vernor and her Mother in 1933 and not to have been able to close the transaction, making it necessary to leave a Power of Attorney with William dated December 12, 1934. Her testimony is that she lived with Vernor from October 1933 until the last of December 1934 (Tr. 129, 130, Ab. 141). It seems that Josie

was afraid to approach Vernor on the closing of this deal though she testified that she was keeping house for him for \$10.00 a month, out of which she had to run the house (Tr. 136, 137, Ab. 142). Surely Vernor under such circumstances and while Josie was living in the same house, could have been approached upon the matter of executing a deed to Elizabeth if the parties had already agreed upon giving such a deed. Josie testified that she was waiting to get the \$15,000.00 note. The transfer was made quickly enough without the \$15,000.00 note after the notice of sale was received by the firm of Morgan & Morgan. Morgan & Morgan even saw fit to take a \$5,000.00 mortgage to themselves without the surrender of the \$15,000.00 note to Josie. Vernor signed this obligation though *he* owed Morgan & Morgan nothing. (Tr. 371, Ab. 201).

Elizabeth Baird died in February of 1938 and Rulon Morgan was appointed her executor, yet his account as executor shows no collection of rent from the tenant on the ranch (Tr. 230, Ab. 160). Mr. Duke, who had been on the ranch since the death of Elizabeth Baird had paid considerable rent after February 1938 (Tr. 232 & 233, Ab. 160, 161). Vernor continued the listing of the ranch as his property and the \$15,000.00 note as a liability in the years 1933, 1934 and 1935 (See Exhibits 14 and 15). Appellants make the following statement regarding these exhibits at page 31 of their Brief:

“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.”

The testimony, we believe, does not support the statement that Mr. Mitchell knew that Vernor did not claim title to the farm. It shows that Vernor while he may have signed the applications in blank directed what should go on the statements and the statements were filled out accordingly. His testimony is as follows, (Tr. 380):

“Q. Well you made a statement in 1935 didn’t you Mr. Baird?

“A. Yes.

“Q. And you made that up from your 1934 statement didn’t you?

“A. Well I would say part of it was.

“Q. Part of it was taken from the old statement and part was new material? Is that right?

“A. That is what I would say. Yes.

“Q. And you told Mr. Mitchell what to put in that was new did you not?

“A. Yes sir.”

The penciled notations on Exhibits 14 and 15 which are the financial statements, were made by the Wasatch Livestock Loan to show what was to go in the new statements which were signed in blank (Testimony of Mr. Mitchell, Tr. 383, Ab. 204). Vernor Baird continued to instruct the Livestock Loan to put the farm on the state-

ment until October 26, 1936, when it was taken off (Testimony of Mr. Mitchell, Tr. 388, Ab. 205).

Mr. Mitchell stated that, (Tr. 388):

“For some time— we had known for some time we weren’t going to have the farm.”

Mr. Mitchell did not say that Vernor did not claim title to the farm. Of course, if it was mortgaged for \$15,000.00 which he was not able to pay it could easily be supposed that he would not have the farm very long. It was brought out that the budget allowed by the Wasatch Livestock Loan did not provide anything for the running of the farm. This was natural since the Wasatch Livestock Loan was not taking any of the money from the farm which could be used for running it or applied on the payment of the mortgage if Vernor so desired (Tr. 389-390, Ab. 204, 205). Vernor was very free at first to deny that he had given any statements listing this ranch as an asset (Tr. 367, Ab. 200).

The statement in the abstract of record of Mr. Mitchell’s testimony that, (Ab. 205):

“We knew that he did not claim title to the farm prior to the time the notation was made, because we made no provision for any payment on the farm. . . .”

is not borne out by the testimony. There was no reason given as to why no provision was made for payment on the farm except that they were not taking the proceeds from the farm (Tr. 389, 390).

At page 31 of Appellants' Brief it is stated that Elizabeth paid the assessment levied upon water stock in 1933. The matter of the payment by Elizabeth to the Lake Creek Irrigation Company will be taken up more thoroughly hereafter. She did not, however, make any payment in 1933. Admittedly the records of the Lake Creek Irrigation Company show that in 1934 the Company was given credit on its note to Elizabeth J. Baird for \$132.20, which was the entire balance due on her note. The total amount required to be paid was \$157.20. The difference of \$25.00 was paid by Vernor Baird. The records of the Company as read by Judge Hansen at the trial definitely show this. His statement is as follows, (Tr. 307, Ab. 180, 181):

“Paid March 13, 1934, amount of check turned back to Company to apply on assessment owed by Josie Baird Giles and Vernor Baird as shown above. Vernor paid \$25. Total \$157.20.”

If Vernor had no interest in the property why was he paying \$25.00 in 1934 and why was the assessment owed by Josie Baird Giles and Vernor Baird?

There was another assessment paid by Elizabeth in 1937 (Tr. 308, Ab. 181). This is immaterial as it was after the 1935 sale of the note and deed to the property. Certainly it cannot be claimed that the partial payment by Elizabeth in 1934 shows an equitable transfer of the property from Vernor to Elizabeth when Vernor was required to pay \$25.00 of the assessment. No doubt he was hard up and that was all he could pay. The Company

owed Elizabeth money and it is certainly within the realm of possibility that Elizabeth would give Vernor a temporary lift.

The following question and answer were given on direct examination of Vernor as to the possession of the ranch after the supposed deal in 1933, (Tr. 362):

“Q. Now what was done with respect to the ownership and operation of the ranch from that time on?

“A. Well went on about the same as it had been.”
This statement is omitted from the abstract.

On pages 28 and 32 of Appellants' Brief there seems to be some contention made that Josie had no right to sue Vernor on the promissory note for some other reason than the claimed agreement of 1933. The reason for this is set forth on Page 37 of Appellants' Brief where they state:

“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.”

We do not see upon what theory this contention is made unless it is that there was some kind of anticipatory breach of the duty of Josie to deliver the stock upon payment of the mortgage to her. At no time did the claim of the Bank exceed the amount due on the note from

Vernor to Josie. Had he paid his note the lien on the stock could have been readily discharged. If there is any merit to Appellants' contention, then every contract of purchase where the vendor maintains a mortgage on the property being purchased would be subject to cancellation at once by the buyer. Furthermore Vernor made no objection to the pledge of the stock to the Bank and never pretended to refuse payment on that account. R. S. U. '33, 104-37-27 is cited by Appellants (Page 29). This section of the statute deals with sheriff's sale. So long as the mortgage had not been released before the attachment or execution on the note, it has no application.

At page 33 of their brief Appellants mention the fact that Josie Baird Giles obtained her divorce from J. Harold Giles upon the ground of failure and refusal of the Defendant to provide Plaintiff with the common necessities of life. The file in that case was introduced over Respondents' objection apparently to show that Josie was without funds. Surely Respondents are not bound by the findings of the Court in a case to which they were not a party and which was never contested. Her testimony was that he would have paid her if he had had the money (Tr. 275, Ab. 171).

Rulon Morgan was called as a witness to explain the reason for taking the \$5,000.00 mortgage to Morgan & Morgan, which mortgage was prior in time to the conveyance to Elizabeth J. Baird. Rulon Morgan claims that one of the reasons for taking the mortgage was to assist Elizabeth J. Baird in the procuring of funds to

pay off the bank in case No. 1266 Civil in case she lost the suit. It is not only unusual for attorneys to be so solicitous of clients' financial arrangements, prior to the time when the necessity for financial assistance is necessary, but it also shows an extreme lack of confidence in the merits of the defense. It also appears that Vernor Baird, the signer of the \$5,000.00 promissory note, was in no way obligated to the firm of Morgan & Morgan (Tr. 371, Ab. 201).

(b) WAS THERE A \$6,000.00 OBLIGATION OWING BY JOSIE BAIRD GILES TO ELIZABETH J. BAIRD?

The contention of Appellants is that Josie owed her Mother approximately \$6,000.00. That a portion of this was a \$3,500.00 note given "when the estate was settled" (Tr. 76, 77, Ab. 128). Josie testified that she gave this note because she took some of the most expensive ground (Tr. 77, Ab. 128). William Baird testified that at the time his Father's Estate was being settled his Mother, Elizabeth, advanced \$3,000.00 or more to the Estate (Tr. 138, Ab. 142). He testified that it was necessary to have the \$3,000.00 "to make the division" (Tr. 160, omitted from Abstract). Each of the children were required to give a note to settle this with their Mother (Tr. 161, Ab. 146). See also the testimony of Vernor Baird (Tr. 366, Ab. 200). Vernor was very definite that he gave his Mother only one note. William and Vernor were testifying with regard to the very money advanced by Elizabeth by reason of which Josie was supposed to have

given Elizabeth a \$3,500.00 promissory note. We submit that from the testimony the advance and the notes given were necessarily prior to distribution of the estate. We now call attention to the Final Account, Report and Petition for Distribution in the matter of the Father's Estate (See Plaintiffs' Exhibit 8). On page 6 of the Final Account it appears that the estate received \$3,165.00 on March 4, 1926 from Elizabeth J. Baird. William Baird was asked as to whether or not "this was the amount advanced to the estate". He said, (Tr. 163, 164, Ab. 146):

"I imagine it is. It is three thousand or more. I don't know just exactly."

It is therefore established by Appellants' own witnesses that the advance made by Elizabeth was prior to the division of the property and that the \$3,165.00 entered in the account was the money referred to. The account shows that this money was paid in full by cash and the giving of promissory notes,—the note of Josie being for only \$153.32, not \$3,500.00 (see page 23 of Exhibit 8). On that page of the account it appears that Elizabeth received \$500.00 in cash and promissory notes, which included the note of Vernor E. Baird of \$921.32, of William H. Baird of \$153.32 and of Josie Baird of \$153.32. William testified that his note was for one hundred and some dollars (Tr. 161, 164, Ab. 146). Vernor testified that he gave only one note and it was for \$900.00 (Tr. 365, 366, Ab. 200). It therefore appears that there was an advance of money by Elizabeth but the settlement was made in full without any note by Josie except the one

for \$153.32. Josie did pay her note of \$153.32 (see the notations on the back of Plaintiffs' Exhibit 10 and testimony of Josie, Tr. 291, 292, Ab. 175).

If Josie received more than her share in real estate why didn't she give her Mother part of the sheep distributed to her? She received 195 head of ewes and 3 bucks. (See the Decree of Distribution at page 25 of Plaintiffs' Exhibit 2). The sheep were sold for \$4,000.00 (Tr. 130, Ab. 141). Elizabeth herself received 585 ewe sheep and 9 bucks (page 23 of Exhibit 2). Certainly any discrepancy in values could have been adjusted by change in the distribution of sheep without giving additional promissory notes. All of the heirs signed the Petition for specific distribution of the property of the estate, in which the following statement is made, (pages 29 and 33 of Exhibit 8) :

“We, the undersigned, widow and children of James R. Baird, deceased, together with L. C. Montgomery, the Guardian ad-litem of Evelyn Baird a minor child, respectfully represent as follows, to wit:—

1. That we have met together, partitioned the property of said estate as nearly as can be done by us and to our satisfaction, one-third to the widow and one-ninth to each of six children having an interest in the said estate, the seventh child, John M. Baird with his wife Alice I. Baird having assigned all the right, title, interest, claim and demand of the said John M. Baird of, in and to the property of said estate to the petitioners herein, to be distributed to them the same as though the said John M. Baird had no interest.

The property partitioned to each of the undersigned by the action of all and subject to the approval of this court to be distributed to them as all of the remaining property of the said estate after paying costs and expenses of administration not already paid and of closing the estate and is as follows, to wit:—”

How could there, after such careful division of the property, be any necessity for further adjustment?

At page 34 of Appellants' Brief reference is made to a sale by Mrs. Baird to Josie of a part of the property to which Mrs. Baird was entitled. We submit there is no testimony in the record that Mrs. Baird sold any property to Josie.

We now consider the question of claimed advances made by Elizabeth after the closing of the estate. On cross-examination of Josie, she was continually asked for a definite itemization of this supposed \$3,000.00 indebtedness. The only items that could be given by her were a \$100.00 dentist bill, hospital and doctor bill of \$250.00, \$25.00 for an apartment and \$75.00 in 1932 when she moved. (She was asked, (Tr. 99, Ab. 134):

“Is that all you can tell us about this \$3,000.00 as to when you received it?”

to which she replied:

“Well, yes, it is right at the present.”

She said that she had an account of the indebtedness to her Mother (Tr. 94, 95, Ab. 133). Nothing further was

ever said at the trial about this account. Surely if any had existed counsel would not have overlooked it. That there was no definite obligation by Josie to pay her Mother whatever monies were advanced was shown by the following question and answer (Tr. 101, 102, omitted from Abstract).

“Q. Isn’t it a fact that that was just an allowance, Mrs. Smith, she gave you because she had money?

“A. Well I don’t know.”

We submit that the testimony with regard to the supposed \$3,000.00 indebtedness by Josie to her Mother on account of advances is not such as would permit a finding of consideration for the transfer as required within the case of *Paxton v. Paxton*, above cited.

DID ELIZABETH J. BAIRD PURCHASE THE STOCK CERTIFICATES FROM THE LAKE CREEK IRRIGATION COMPANY?

(See Appellants’ Brief, pages 25 to 27 and 54).

The evidence does not show that Lake Creek Irrigation Company ever acquired title to the stock. The stock in question has at all times stood in the name of Josie Baird Giles (Tr. 315-16, Ab. 184). No notice of the assessment or sale was ever given to Josie Baird Giles (Tr. 303, 304, 317, Ab. 178, 184). This was the only sale ever held by the Company (Tr. 317, Ab. 184). Assuming, however, that the Company had title to the stock, there is no record that the Company ever sold the stock

to Elizabeth J. Baird. On the contrary the records show that it was redeemed by Vernor. The following is taken from the minutes of the Company as read in evidence by Judge Hansen (Tr. 307, Ab. 180):

“ ‘Resolved that the stock sold for assessment and bought in by the Lake Creek Irrigation Company at their meeting of April 1, 1933 has been redeemed by the following stockholders by paying all obligations on the stock.

“ ‘Therefore, Be It Resolved that the old certificates be surrendered and the President and Secretary of the Company be authorized to issue new certificates to release the stock from the Treasury of the Company. The following shares were bought in by the Company April 8, 1933.’

“ ‘There are ten names written on the page and opposite the names are figures under the word ‘shares’. Among those names is Vernor Baird without the number of shares and a mere ditto mark, then it continues:

“ ‘The Secretary was authorized to pay the amount due Mrs. Baird as soon as the money is collected from the delinquent assessments.’ ”

Since the stock was redeemed by “the following stockholders”, Vernor Baird was the one who redeemed this stock.

No minutes appear anywhere in the records showing a sale to Elizabeth Baird. Mr. Crook, President of the Company, testified that the water stock was never sold to her (Tr. 214).

We particularly request the Court to refer to the Transcript, and not to the abstract, for this testimony, because the abstract report (pages 156-7) is at variance with the Transcript on this point. We submit that the testimony as given fails to show a sale of water stock to Elizabeth Baird at any time.

At page 213 of the Transcript appears the following:

“Q. And as these assessments fell due from time to time you merely took the assessments out of the money that the corporation was owing Mrs. Baird, isn't that it?

“A. No, sir; not always.

“Q. Well, I understand but most of the time?

“A. No, sir.

“Q. Do you know what part of this time as shown by these books?

“A. I know of one instance, yes, sir.

“Q. Is that all?

“A. That is all.”

At page 214 of the Transcript appears the following:

“Q. Do you recall at a time when the company agreed to sell it to Mrs. Elizabeth J. Baird?

“A. Not to Mrs. Elizabeth J. Baird, no sir.”

Except for the \$132.20 applied in 1934 on a portion of the cost of redemption by Vernor Baird the money owing

to Elizabeth by the Lake Creek Irrigation Company was paid from monies collected on assessments and applied on her note in favor of Hylton (Tr. 302-307, Ab. 177-181).

Appellants state at page 26 of their Brief that:

“The only reason a new certificate was not issued to Elizabeth J. Baird was because the old certificates were not surrendered to the Company.”

We submit that the testimony has nothing to do with a transfer to Elizabeth. Her name is not mentioned in connection with this testimony (Tr. 312, Ab. 182). It is much more likely that Mr. Crook had in mind a transfer of the stock to Vernor rather than a transfer of the stock to Elizabeth. If the stock had been sold to Elizabeth on the title of the Company secured by assessment, it would not have been necessary to secure the stock certificates as they would have been cancelled through failure to pay the assessments. However, for a transfer to Vernor from Josie the surrender of the certificates would have been necessary. We submit therefore that Mr. Crook, the President of the Company, could only have been thinking of a transfer from Josie to Vernor when he said that the transfer had not been made because “they couldn’t give us the old certificates”. In any event the name of Elizabeth J. Baird is not mentioned in connection with this statement. It appears to have been common knowledge that Vernor was using the water and he was treated in many respects as the owner on the books of the Company.

DO THE CIRCUMSTANCES UNDER WHICH THE NOTE WAS
LEVIED ON PRECLUDE THE MOULTONS FROM CLAIMING
TITLE TO THE NOTE?

(See pages 39 to 44 of Appellants' Brief).

We claim five distinct reasons, each of them adequate in itself, why George B. Stanley's possession of the note in no way precludes the Moultons from suit thereon or claiming title thereto:

1. The relationship of attorney and client has never existed between George B. Stanley and Josie Baird Giles.

2. Josie was told by Mr. Stanley to come and get the promissory note.

3. Josie was told long prior to the attachment that if the Moulton notes were not paid the \$15,000.00 note would be attached.

4. Neither Josie nor anyone on her behalf ever demanded the note until after it was in the hands of the Sheriff.

5. Josie has waived any objection to the circumstances of the attachment by failing to raise the objection in the action wherein the note was attached and sold on execution.

The following facts were testified to at the trial, there being no dispute as to the major portion of such testimony. The note and mortgage were prepared in 1929 by George B. Stanley at the request of Vernor Baird (Tr. 397, 410 and 411, Ab. 208, 211). Josie did not

request the work done or pay for the same. She did not testify that she ever had any other conversation with Stanley except that she demanded the note, she says, in 1933. Mr. Stanley says not until after it was in the hands of the sheriff (Tr. 398, Ab. 208). The relation of attorney and client therefore did not exist. George Stanley was not admitted to practice law until a year and a half after the preparation of the note and mortgage (Tr. 410, Ab. 211). The deed and mortgage were delivered to Vernor Baird (Tr. 410-411, Ab. 211). Vernor Baird recorded both of these documents (see Plaintiffs' Exhibit 2). Mr. Stanley testified that he wrote letters to Josie asking her to come and get the note (Tr. 398, Ab. 208). Josie was very certain that she received no letters at all from Mr. Stanley at any time (Tr. 107, Ab. 135, 136) though she had corresponded with Mr. Stanley on the subject as shown by her letter (Plaintiffs' Exhibit 6) which when shown to her, she admitted (Tr. 119, Ab. 138). Mr. Stanley called on Josie and her husband Harold in Heber City to get a settlement on the Moulton notes (Tr. 399, Ab. 208). He told her on at least three different occasions that if she didn't pay the Moulton notes he would attach the \$15,000.00 promissory note (Tr. 400, 412, Ab. 208, 211). Mr. Stanley testified that neither Josie nor anyone else ever demanded the note until after it had been taken by the Sheriff (Tr. 400, 401, 412, 415, Ab. 208, 209, 211, 212). Josie could have had the note at any time if she had asked for it (Tr. 413, Ab. 211). Appellants argue that under the circumstances it would have been unnatural for Josie not to have demand-

ed her note. If Josie expected to pay her notes to the Moultons, she would not necessarily have been concerned about her \$15,000.00 note remaining with George Stanley. We may assume that her intentions were honest at the time.

It must not be forgotten that there is no question in this case as to the delivery of the Vernor Baird note to Josie for the purpose of closing the transaction wherein she sold the farm and took a purchase money note and mortgage. The plaintiffs and defendants both so allege in their pleadings. Throughout the trial it was admitted that Vernor went into possession of the property and made a payment thereon. That the transaction was closed so far as Josie was concerned was beyond question. In the preparation of the note and mortgage Mr. Stanley received no information which was not clearly disclosed by the public records in the County Recorder's Office. The mortgage was recorded November 12, 1929 (see Plaintiffs' Exhibit 2). If Josie can avoid paying what is admittedly an honest debt to the Moultons by leaving the note with Mr. Stanley that is indeed a new way to avoid creditors. Surely the law should favor the payment of obligations rather than avoidance of them.

After George Stanley had informed Josie that he would attach the Vernor Baird note he filed suit on July 7, 1934 and Summons was served on the Defendants on that day. A Demurrer was filed on behalf of Josie Baird Giles on July 28, 1934 and another Demurrer was filed on behalf of J. Harold Giles on August 8, 1934. Prior

to the filing of the Demurrers a default had been entered which was set aside on motion of the attorney for the plaintiff. On the 20th day of August the Demurrers were overruled and notice thereof given to Morgan and Morgan. Default was again entered on October 1, 1934. Notice by the Sheriff that the promissory note which had been levied upon was admittedly mailed and received by Morgan and Morgan on January 25, 1935 (see Exhibit 12). In all of these proceedings the defendants though represented by attorneys never raised the question of the legality of the attachment and levy. We believe that Josie still thought she would pay her honest obligations. If she had any objection to the attachment and levy it should have been raised in those proceedings and she is now precluded from any such objection. See authorities cited in the next subdivision of this brief. We further call attention of the Court to the fact that Vernor Baird in 1938 went to George Stanley for further advice (Tr. 403, Ab. 209). At least that was the contention and certain evidence was excluded on that ground. If George B. Stanley was guilty of failure to deliver the note upon demand, is it likely that Vernor would have further consulted him as an attorney at law? To enforce the promissory note will aid the enforcement of an honest obligation such as was intended by the parties. If it is denied, the payment of a just obligation may be avoided. The Court knows of its own knowledge that the town of Heber City is a small country town. There are only two or three lawyers practicing there. Business transactions are pretty well known to everyone. George Stanley knew

no more with regard to this transaction by reason of his having prepared the instruments than he would have otherwise known. As an abstracter the whole matter necessarily came to his attention from the public records. The Trial Court found that the relationship of attorney and client never existed between Mr. Stanley and Josie. We do not see how any other finding could be made when there is no testimony that Josie ever went to Mr. Stanley's office except for the purpose of signing a deed. We call attention again to the fact that she never testified to any conversation ever had with Mr. Stanley regarding the making of these papers. She never employed him or paid him any money. If the contention of the appellants is correct that the knowledge acquired by Mr. Stanley in the preparation of this note could not be used, then the levy would have been just as invalid if the note had been in the possession of Josie herself or any other party, since it could still be contended that Mr. Stanley first learned of the note by reason of his having prepared it. The attack upon the attachment in these proceedings is collateral. Unless the attachment is void, the matter may not be raised here. See authorities cited in the next subdivision of this brief.

IS PLAINTIFF'S TITLE TO THE PROMISSORY NOTE AFFECTED
BY THE CLAIMED DEFECTS IN THE AFFIDAVIT FOR WRIT
OF ATTACHMENT?

(See pages 44 to 48 of Appellants' Brief).

The evidence shows that the writ of attachment was issued July 7, 1934 (plaintiffs' exhibit 1) and that

the sheriff took the note into his possession on that date (Tr. 8, Ab. 114). The writ of attachment was served on the defendants on July 7, 1934. Default was thereafter entered and was set aside on motion of plaintiffs' attorney. Demurrers were filed by the defendants which were overruled. Judgment was subsequently taken. The writ of execution was issued Dec. 19, 1934 while the sheriff still had possession of the note. There is no question in this case as to intervening rights between the date of the attachment and the date of writ of execution. The transfers appearing in the abstract were not dated until Jan. 26, 1935, and thereafter. The most that can be claimed for a defective attachment is that the date of priority changes to Dec. 19, 1934 instead of July 7, 1934, which in no way affects the rights of the parties. However, we believe that under the pleadings there is no question before the Court as to the validity of the writ of attachment. The plaintiffs allege in their complaint, paragraph 7, (Ab. 31):

“that on said 7th day of July, 1934, said note and mortgage were attached by the sheriff of Wasatch County under and by virtue of a writ of attachment issued in said action.”

The answer of Vernor E. Baird and Mary A. Baird, which was adopted by the other defendants, recites in paragraph 2 (Ab. 40):

“these answering defendants admit that the sheriff of Wasatch County attached the note and mortgage mentioned in plaintiffs' complaint in

the manner and under the circumstances herein-after alleged and not otherwise.”

The circumstances thereafter alleged are the circumstances as to the possession of the note by George B. Stanley. It appears, therefore, that the attachment is admitted by the pleadings, except so far as it is affected by the possession of Mr. Stanley. The defendants having admitted the attachment cannot be heard to complain of any irregularity. The defendants further waived any such irregularity by their appearance in the suit. The following statement is made in 4 *Am. Jur.*, page 932, Sec. 617:

“It is generally held that if a defendant in an attachment proceeding wishes to take advantage of any defect or irregularity in the proceeding, he must do so by motion or plea before answering to the merits, and that if he makes a general appearance or answers to the merits before such motion or plea, the defect or irregularity will be waived.”

See also *Sec. 616 on the same page, and Sec. 649 at page 940; 6 C. J. 433, Sec. 1004; 6 C. J. 441 as to attack on attachment after judgment.*

The question of the regularity of the attachment cannot be raised in a collateral proceeding but must be by direct attack. The following is a statement to that effect in 5 *Am. Jur.* page 174, Sec. 957:

“The record and judgment in the main action in an attachment or garnishment proceeding is

conclusive to the extent that other judicial records and judgments are conclusive. Such a judgment is not open to collateral attack unless it is void for lack of jurisdiction in the court rendering it, or was fraudulently secured. Defects and irregularities in the attachment suit are not open to inquiry in a collateral suit unless they were of such character as to void the attachment or garnishment and deprive the Court of jurisdiction in the proceedings.”

That the defect in the affidavit does not make the attachment void see *Annotation in 72 A. L. R. 120 at page 122*. The same is true of a defective bond. See the same *Annotation*, page 125.

IS THE EXECUTION FATALLY DEFECTIVE?

(See Appellants' Brief, page 48).

Appellants complain of the fact that the writ of execution did not require the Sheriff to satisfy the judgment out of the property attached as required by *Section 104-37-2, Subdivision (3), R. S. U. 1933*. The Sheriff had possession of the promissory note at the time the execution was issued. The defendants had been served with summons, had appeared in the action, and judgment had been rendered against them. The attachment proceedings were not necessary to give the Court jurisdiction, as the Court had personal jurisdiction of the Defendants. The failure of the writ of execution to require the officer to satisfy the same out of the attached property could do no more than give a date of priority as of the date of the writ of execution, which was

December 19th instead of July 7th. No party has been prejudiced by the failure of the writ to include the recital. The property attached was in fact retained in the possession of the Sheriff and sold on execution. Everything was done exactly as it would have been done had the writ of execution complied with *subdivision (3) of Sec. 104-37-2, R. S. U. 1933*. The defect, under the circumstances, is at most an irregularity which may not be attacked collaterally and has been waived by failure to raise the question in the prior case. *See 23 C. J. 693, Section 691* and authorities cited in portion of this Brief on the attachment question.

Appellants cite the New York cases of *Gilman v. Tucker*, 59 N. Y. Super., 570, 13 N. Y. S. 804, and *Place v. Riley*, 98 N. Y. 1, to the effect that the failure of the Writ of Execution to require the satisfaction of a judgment out of the attached property makes the Writ of Execution void. The section of the statute involved in that case is 645 of the New York Civil Practice Act formerly Section 1370 of the Code of Civil Procedure and is as follows:

“Where a warrant of attachment issued in the action has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment, as follows:

1. Where the judgment-debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the state, or otherwise than personally, pursuant to an order obtained for that purpose, and the judgment-debtor has not appeared in the action; out

of the personal property attached, and, if that is insufficient, out of the real property attached.

2. In any other case, out of the personal property attached; and, if that is insufficient, out of the personal property of the judgment-debtor; if both are insufficient out of the real property attached; and, if that is insufficient, out of the real property belonging to him at the time when the judgment was docketed in the clerk's office of the county or at any time thereafter."

New York also has a section regarding execution against property generally when no attachment has been issued. That section is 643 of Civil Practice Act and is as follows:

"An execution against property, if the judgment-roll is not filed in the clerk's office of the county to which it is issued, must specify the time when the judgment was docketed in that county. Except in a case where special provision is otherwise made by law, it must substantially require the sheriff to satisfy the judgment out of the personal property of the judgment-debtor; and, if sufficient personal property cannot be found, out of the real property belonging to him at the time when the judgment was docketed in the clerk's office of the county or at any time thereafter."

In the case of *Place v. Riley* the action had been commenced against a non-resident by attachment. The case might be distinguished on the ground that the case had been commenced by attachment rather than by personal service. However, the objection to the Writ of Execution was the failure to provide for the sale of

unattached personal property before the sale of attached real property. The Court said:

“It commanded the sheriff to collect the judgment out of the attached personal property of the judgment-debtor, and if that was insufficient, out of his attached real property, whereas the case was one under the second subdivision of Section 1370, by which the execution must go, first against the attached personal property, second against the other personal property of the judgment debtor, and lastly against the attached real property.”

The Court made the further statement:

“The statute is peremptory that executions in the cases specified ‘must require’ the sheriff to satisfy the judgment in the way pointed out. The evident intention of the second subdivision of the section was to prevent resort to the real estate of *an absconding or concealed debtor*, for the satisfaction of a judgment obtained in an action in which an attachment had been issued and levied upon his real estate, until after the remedy against his personal property, both attached and unattached, had been exhausted. This is in accordance with the general policy of the law, founded upon reasons less forcible perhaps now than formerly, but which it is nevertheless within the discretion of the legislature to maintain.”

We see that the objection of the Court was not the failure to require the Sheriff to sell the property attached but the failure to require the sale of unattached personal property prior to the sale of real property. The Court also emphasizes the fact that the statute uses

the word "must". The Utah statute says "shall". That the New York Court does not consider a general execution void for failure to require the sale of attached property is shown in the case of *Thomas v. Bogert*, reported in 33 Hun. 11. In that case an attachment had been issued and after judgment a general execution was issued in which no mention of the attachment was made. After the sale the attorney for the Plaintiff attempted to countermand the first execution and hold a new sale. The present action was brought to redeem the property from the first sale, which the Court held binding and could not be countermanded by the Plaintiff's attorney. The question before the Court is stated in the following language:

"It is insisted, however, that the plaintiffs are not entitled to judgment, because the first execution, under which the sale was made and of which the redemption is predicate, was invalid, for the reason that the execution was a general one and was unauthorized by the statute."

That the general execution which failed to refer to the attachment was not void is made clear by the following statement by the Court:

"It thus appears that the sale which took place under the first execution was binding upon the plaintiff, the defendant in the execution not having interposed any objection, and that the plaintiffs' testator being the grantee of the judgment debtor, took the proper steps to redeem."

The case of *Gilman v. Tucker* which was decided by the Superior Court of New York City followed the case

of *Place v. Riley* without regard to the reason given for the decision. Being decided by a court inferior to the courts deciding the other two New York cases, it cannot be the law of New York.

It is interesting to note that the annotator of *Gilberts' Civil Practice* (N. Y.) Volume 1, 1922, cites the case of *Thomas v. Bogert* as being the present law on the question of whether or not a general execution is void if it fails to mention the attachment, rather than the New York City case of *Gilman v. Tucker*. (See Annotation to sec. 645).

The case of *Swift v. Agnes*, 33 Wis. 228, makes the following statement in regard to a statute which provides for a general execution and a special execution when property is attached:

“Construing these statutes together (and certainly they are in *pari materia* and should be so construed), we are of the opinion that it is optional with the judgment creditor, in an action wherein the property of his debtor has been attached, to issue a special or limited execution, merely directing that the attached property be sold, or to issue an execution in the ordinary form, with the addition thereto of a special direction for the sale of the attached property.”

In Missouri it has been held that a failure to comply with a statute does not make the execution void. However, the Missouri law is the reverse of the Utah law in that where personal service is had on the defendant and a general judgment is entered, the statute says that the

execution must be against all the property of the defendant whether it is attached or not. The reason for the rule appears to be that the defendant may be permitted to surrender other property for the purpose of satisfying the judgment. There might also be third parties interested in claims against the property attached so as to make it advisable to sell other property. In the cases of *Kritzer v. Smith*, 21 Missouri 296, and *Wamsley v. Snow*, 53 S. W. (2d) 258, it was held that a failure to comply with the statute did not render the execution void. That the form of the writ is not grounds for collateral attack, see *21 Am. Jur. 259, Sec. 521*.

We submit that the failure to comply with subdivision (3) of Section 104-37-2 is at most an irregularity which is not subject to collateral attack. Also that it would be proper to construe the subdivision to apply only to actions where no personal judgment has been taken. That in cases where a personal judgment is taken the matter should be optional with the plaintiff. We call attention to *Sec. 88-2-2, R. S. U. 1933*, which provides:

“The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, *and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice.* Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.”

WAS THERE A PROPER NOTICE OF SALE?

(See pages 49 to 53 of Appellants' Brief).

It is contended by the Appellants that because the Notice of Sale stated that the sale would be held on the 28th and the Return shows a sale of the property on the 29th, there is no proper notice. We believe that there is a complete answer to this objection in that the sale is not subject to collateral attack because of a defective notice. The following statement is taken from *21 Am. Jur. 258, Sec. 519*:

“The general rule is that if there is any ground for relief against an execution, such relief must be sought in the original cause and not by a new and independent proceeding.”

That a judicial sale is not subject to collateral attack because of a defective notice see *Annotation in 1 A. L. R. at Page 1440*. The portion of this annotation at Page 1441 dealing with the time of sale has to do with the time of sale required in the statute and not to the time stated in the notice.

We believe that this is a complete answer to appellant's objection. However the plaintiffs in Case No. 1410 Civil assumed the burden of bringing out the facts with respect to the Sheriff's Sale and proved a postponement from January 28th to the 29th. Such proof was unnecessary. This is so not only for the reason that the notice of sale may not be attacked in a collateral proceeding, but the Sheriff's Return, so far as its recitals go, is con-

clusive in a collateral proceeding. The Sheriff's Return is as follows, (see Plaintiffs' Exhibit 1):

"I hereby certify that under and by virtue of the within and hereto annexed writ of execution by me received on the 19th day of December, 1934, I 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 o'clock A. M. of said day at the front door of the County 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:" (Here follows a description of the property):

"and sold the whole of the same to A. C. Moulton and E. Dewey Moulton the within named plaintiffs, for the sum of \$100.00, said purchasers being the highest and only bidders and said sum being the highest and only bid made, and I have given said purchasers a certificate of sale, and I herewith return said writ partly satisfied: to-wit, in the sum of \$100.00."

See Plaintiffs' Exhibit 1.

There is nothing irregular appearing on the face of the return.

The following is a statement of the rule in *21 Am. Jur. 247, Sec. 496*:

"As a general rule a sheriff's return of execution sufficient on its face is regarded as conclusive, so that it may not be contradicted in collateral proceedings for the purpose of invalidat-

ing the officer's acts or defeating rights acquired under them by averments to the contrary or by parol evidence in proof of such averments, before the return is vacated by due course of law."

See also, *Jones on Evidence*, Vol. 4, Sec. 1907 (2nd Ed.)

We believe that the plaintiffs proved a sufficient title to the promissory note by introducing in evidence the Sheriff's Return.

Assuming, however, that the appellants could properly attack the notice of sale or Sheriff's Return in this proceeding, the evidence introduced by the Plaintiffs cured any defect or irregularity. We call attention of the Court to *Section 19-19-12* which provides:

"The Return of the Sheriff upon process or notice is prima facie evidence of the facts in such return stated."

We believe this section has to do with proceedings in which there is a direct attack and does not by inference permit a collateral attack. Assuming further that the Appellants have destroyed the prima facie case of regularity of the sale by showing a notice of sale to be held on January 28th, the defect was properly cured by plaintiffs' evidence. The sheriff testified as to the facts with regard to the postponement of sale (Tr. 12, 18, Ab. 115, 116). We quote from the case of *Huish v. Fenkel*, 85 Utah 253, 39 Pac. (2d) 330, at page 263 of the Utah Report, cited by Appellants:

"But when the statute does not make the officer's return conclusive or the only evidence of

the manner of executing process, there seems to be no reason why the facts may not be shown by other competent evidence provided it is not attempted to contradict the return."

The sheriff's testimony offered by the plaintiffs in no way impeaches his own return or contradicts the same. He merely shows an additional fact not appearing in the return that he gave notice that the sale would be held on January 28th at ten o'clock and that he postponed the same to January 29th at 9:30 o'clock A. M.

The rule is clearly stated in *3 Bancroft Code Practice and Remedies*, page 2655, as follows:

"The return of the sheriff of his official acts under an execution is presumptively true. Facts omitted from the return may be supplied by parol evidence not inconsistent therewith."

Citing *Brusie v. Gates*, 80 Cal. 462, 22 Pac. 284; *Davis v. Baker*, 72 Cal. 494, 14 Pac. 102; *Ritter v. Scannell*, 11 Cal. 238, 70 Am. Dec. 775.

We call attention to the further fact that the Sheriff testified that the sale was postponed at the request of J. Rulon Morgan, one of the attorneys of record for the defendants, and the court so found (Tr. 12, Ab. 115, 85). The Sheriff might also be allowed to contradict a return where he is out of office so that an amended return could not be made by him. That the Sheriff at the time of the trial was out of office see Tr. 35.

Our position is: That the Sheriff's Return is regular on its face and may not be collaterally attacked. That the

failure to give proper notice of sale may not be collateral-ly attacked. That assuming an attack may be made in this proceeding it is proper to permit the Sheriff to add additional facts by oral testimony showing that the sale was postponed. That the postponement having been made at the request of J. Rulon Morgan, the attorney for the defendant in that case, they may not be heard to object. That since the Sheriff's term of office has terminated the real facts may be shown by oral testimony without an amendment of the Return, even though such testimony might contradict the Return already filed. It is, of course, clear that there is no contradiction in this case.

**IS THE TITLE OF THE PROMISSORY NOTE AFFECTED BY THE
AMOUNT OF THE CONSIDERATION BID AT THE SALE?**

(See pages 53 and 54 of Appellants' Brief).

No authority is cited by appellants that mere inadequacy of the amount bid invalidates a sale. The Utah case of *National Realty Sales Co. v. Ewing*, 55 Ut. 438, 186 Pac. 1103, holds contrary to appellants' contention. The testimony of A. C. Moulton was that he told Mr. Stanley to start the bid at \$100.00 (Tr. 395, Ab. 207). Unless necessity required, who would have bid more for this note under the circumstances? There had been a release of the mortgage filed of record the day previous. There was a new mortgage of \$5,000.00 to Morgan & Morgan and conveyance of the property recorded on the same day but prior to the sale. Josie, or her attorney in fact, by instruments prepared by her

attorney, had done everything possible to throw doubt on the validity of the note. An extensive law suit has resulted therefrom. The note may become valueless if appellants' contentions are sustained on this appeal. If the full amount of the judgment had been paid the judgment would have been satisfied and upon the determination of the invalidity of the note the plaintiffs' judgment would have been lost. On the other hand, the plaintiffs have offered to do equity. The following statement was made in open court on behalf of plaintiffs' prior to the trial, (Tr. 4, 5) :

“MR. CANNON: I would like to state that the obligation out of which this transaction has arisen is an obligation of Josie Baird Giles and J. Harold Giles in the form of promissory notes to the plaintiffs in this case: That we took judgment on those promissory notes. And I would like to state that if we could be paid the amount of the judgment, we don't care to insist upon any further payments, if we would receive our money under the judgment, plus interest.

“THE COURT: Five thousand some odd dollars.

“MR. CANNON: That is the principal. And we would not insist upon deficiency judgments on the fifteen thousand dollar note that we have attached, if we can be permitted to foreclose the mortgage upon the farm. So that we are not in this case trying to reap more than the amount of our original judgment, if we can secure that amount.

“JUDGE HANSEN: That is, of course, not in your pleadings. You are seeking the amount

of your judgment and \$750 attorneys' fees and costs.

“MR. CANNON: That is correct. But we at this time offer, upon the payment of the original judgment, to release Josie Baird and J. Harold Giles from the deficiency which we now have against them, and also Vernor Baird and his wife on the fifteen thousand dollar note. We are not seeking to reap anything additional than that amount.”

The decree in the case now before this court does not provide for any deficiency judgment against Vernor E. Baird, the signer of the \$15,000.00 note. The amount of the judgment taken is not \$15,000.00, but merely the amount of the judgment in the action by A. C. Moulton and E. Dewey Moulton against Josie Baird Giles and J. Harold Giles plus interest and costs. There is not even any attorneys fees added for the foreclosure of the mortgage herein sued upon.

IS THERE A VALID HOMESTEAD CLAIM?

(See pages 55 to 67 of Appellants' Brief).

Just what position Appellants wish to take in regard to the claim of homestead is not clear. They are apparently taking three different positions which are more or less inconsistent. In case No. 1266 a claim was filed to a homestead in the water stock alone by Josie Baird Giles Smith and the Executor of Elizabeth J. Baird's Estate. In case No. 1410 the claim is made to a homestead right in the promissory note apparently for the benefit of Josie. A further claim is made to a homestead

right in the real estate on behalf of the Executor of the Estate of Elizabeth J. Baird (See petition in case No. 1266 at Pages 22-24 of the abstract and in paragraphs 6 and 7 of the petition in case No. 1410 at page 72 of the abstract). Appellants are not merely trying to straddle the fence, but in this instance the homestead right is being shifted to three different pieces of property,—the water stock, the note and the real property. It must necessarily be Josie's homestead right that forms the basis for all three of these claims.

We think that clearly there is no right of homestead in the certificates of water stock as claimed in case No. 1266. The statute quoted by Appellants *Section 38-0-4, R. S. U. 1933*, provides that the water stock,

“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 irrigating purposes.”

Josie conveyed the property, on which this water stock has been used, to Vernor Baird in 1929. She has never since had title to the same and it therefore could not be her homestead. Since she has had no real estate since 1929 she cannot claim she has used water on it since that time. Her claim in case No. 1266 is further answered by the fact that she consented to the pledge of the water stock to the bank. The Trial Court so found. We rely upon the argument on that phase of the case hereafter set forth, to show that she consented to the pledge of the stock. We further call attention to the fact that the Petition for

homestead in case No. 1266 does not state that Josie was a resident of Utah, except at the time the certificate of stock was delivered to the Bank of Heber City. The evidence shows that the stock was delivered to the Bank in 1929 (Tr. 179, Ab. 150). Under the petition in that case there is therefore insufficient showing as to residence to entitle Josie to a homestead.

The material facts with regard to the claim of homestead in case No. 1410 are important, and we therefore make the following statement in regard thereto: Josie sold and conveyed the only real estate which she then or has since owned in the State of Utah to her brother, Vernor E. Baird, October 10, 1929 and took a promissory note in the sum of \$15,000.00 in payment therefor. It is so pleaded by the plaintiff and expressly admitted by the defendant. It is admitted throughout the testimony that Vernor Baird went into possession of the property and remained in possession for several years. The title never reverted in Josie. After the attachment and levy of execution on the promissory note Vernor executed a deed to Elizabeth J. Baird. Prior to the execution of such deed a \$5,000.00 real estate mortgage was given to Morgan & Morgan. The mortgage which secures the promissory note held by the Plaintiff has priority over the conveyance by Vernor to Elizabeth. Under these facts we can see no possible reason why Elizabeth J. Baird or the Executor of her estate has any possible claim to a homestead based upon the purchase of the property from Josie Baird Giles.

While it appears that the pleading filed probably claims a homestead in the real estate rather than in the promissory note, we will nevertheless discuss the question of a homestead claim in the note as the proceeds of the sale of the homestead. It is said at page 62 of Appellants' Brief that 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. When it is admitted by pleadings as well as evidence that the note was "executed and delivered" it cannot be said that in contemplation of law she did not receive the note. The evidence shows and the court found that Mr. Stanley never refused to deliver the note to Josie and that she never demanded it from him prior to the time the Sheriff took it into his possession. Supposing Vernor Baird when he took the mortgage and had it recorded had also taken the promissory note and delivered it to a Bank where Josie could get it as she wished? Would this Court hold that she had never received the note? The note was at all times enforceable against Vernor. The parties so recognized in their own testimony when they claimed to have had an understanding in 1933 that the promissory note would be released. Under our statute the note is exempt for only one year from the date of sale.

Assuming for the purpose of argument that Mr. Stanley did refuse to deliver the note to Josie, this could not alter the situation. She had legal title to the note and was entitled to enforce its payment. If Mr. Stanley

had been guilty of conversion of the note it could in no way unravel the completed transaction of the sale of the property and payment therefor. Josie's remedy in the event of wrongful withholding of the note would be against him and not a claim against Vernor.

The homestead claim is further defeated for the reason that no claim of homestead was made at or prior to the time of the sale. Josie had notice of the sale as the Writ of Attachment was served on her on July 7, 1934, more than six months prior to the date of sale. (See the Sheriff's Return in Plaintiffs' Exhibit 1). She thereafter filed a Demurrer in the action and her attorney received a notice of the sale on January 26, 1935 (Tr. 39, Ab. 120). Her attorney testified that he was in the Courthouse on January 28, 1935, apparently to attend the sale (Tr. 40, Ab. 120). He recorded numerous documents which showed a very clear knowledge as to what was going on. No claim of homestead has been made by any party until nearly five years after the Sheriff's sale. Liberal as this Court has been, no case yet has held that a homestead may be claimed after Sheriff's sale and the complete vesting of title in the purchaser. We suggest the following illustration to show the evil of any rule which would permit the claim of homestead after completed sale.

Supposing "X" owes a \$1,000.00 note and that he is a wealthy man owning \$100,000.00 worth of real property in several parcels. The owner of the note sues "X", recovers judgment and levies upon one of the numerous

tracts of land owned by "X". A sale is held, the property purchased by the holder of the note, or a third party and the judgment is satisfied. After the sale is completed "X" then says: "No, I am the head of a family, I am entitled to a homestead exemption. I make my claim of homestead on the property which you have sold. The sale is void and I am entitled to recover in an action of ejectment." The rule as to when a claim of homestead shall be made cannot be different whether the debtor owns one or a hundred pieces of property. No one knows at the time of the sale what the defendant may own. In pressing this argument as to the failure to make a claim of homestead we do not, of course, admit that a homestead could have been claimed in this case at the time of the sale. The claim of homestead, however, comes at a time when Josie has long since removed from the State of Utah and has been a resident in the State of California for several years. The stipulation of facts with regard to the homestead admits that she was a resident of Utah only until 1935 (Ab. 77). None of the cases cited by Appellants go so far as to allow a homestead under the facts before the Court. .

The case of *Utah Builders' Supply Company v. Gardner*, 86 Utah 250, 39 Pac. (2d) 327, *Petition for Rehearing*, 86 Utah 257, 42 Pac. (2d) 989, indicates that a claim must be made at least prior to the Sheriff's sale. In the case of *Payson Exchange Savings Bank v. Tietjen*, 63 Utah 321, 225 Pac. 598, the Court does make a statement that the sale of homestead is absolutely void.

However, there was a claim of homestead made in that case prior to sale and therefore the statement of the Court goes no further than the case presented.

As to the amount of the homestead in the event it is allowed, Appellants claim the amount shall be calculated as if there were a husband, wife and minor child. The date of the interlocutory decree of divorce in the suit by Josie against her husband was July 16, 1934. The decree therefore became final January 16, 1935 and sale of the note took place January 29, 1935. See Sheriff's Return in Plaintiffs' Exhibit 1. Appellants are therefore in error when they state at page 59 of their Brief that they were husband and wife at the time the note was sold under execution sale. If a homestead is allowed it can be for only the \$2,000.00 for the head of the family and \$300.00 for the child, but we most earnestly urge that a homestead, in any amount, is not allowable in this case.

Having answered all of the contentions of the Appellants affecting the rights of the plaintiffs in Case 1410 Civil, we respectfully submit that the decision of the Trial Court should be affirmed.

ARGUMENT REGARDING LIEN OF THE BANK OF HEBER CITY AND ITS SUCCESSORS.

(See pages 13 to 25 of Appellants' Brief).

As heretofore pointed out, the ruling of the Court in favor of the Bank of Heber City giving it a first lien on the water stock was adverse to all of the other in-

interested parties in the action. A. C. Moulton and E. Dewey Moulton, however, have not appealed from that ruling. The Bank had filed a suit on the note of J. Harold Giles in which Answers were filed by Josie and Harold. This was case No. 1266. Practically the same issues were raised by a cross-complaint in the suit on the \$15,000.00 note, this being case No. 1410. The main issue on this phase of the case, was whether Josie authorized the pledge to the bank.

It is our contention that complete authority in Harold to deal with the property of Josie, in the manner in which he did deal with it, is shown by the circumstances under which they conducted their business.

Examination of the testimony will show the property and business status existing between Josie Baird Giles and J. Harold Giles, her husband. In 1926 Josie inherited both real and personal property from her father's estate (Tr. 264, Ab. 169).

William H. Baird, Josie's brother, testifying on her behalf, said:

"Josie got around \$3,000.00 more than her share. She got some sheep. Josie got some sheep because they were building up a business. Josie and her husband were trying to get a start in the sheep business, and so they received some sheep instead of mother. They had the range lands and wanted to go in the sheep business. They went into the sheep business for a short time and then the business blew up." (Ab. 143)

Josie and Harold were married in 1924 and were divorced in 1934. Concerning their relations during marriage, Josie testified:

“During that time I did not know very much about my husband’s business. He had two different businesses. He had the sheep first and then the ranch. He had the sheep when I inherited them from my father. That was in 1926 when the estate was divided. He managed the sheep. I do not know what he was doing with the sheep or know anything about the money he was getting. At that time, he was providing for me. I think he had a checking account, which I was permitted to draw against. That condition did not exist during all the time I was married to Mr. Giles. We traded the ranch in 1929 and sold the sheep. I think it was in October of that year. From October, 1929, Mr. Giles was farming the Lake Creek farm. That farm belonged to me. He didn’t earn much money on the farm. I knew he borrowed money from the bank but did not know how much. I do not know that the borrowed money was used for our living, but we lived on—I drew on the money for one year, that is, until 1930.” (Ab. 169)

She further testified:

“After we traded the farm, we kept the sheep for awhile. Then they were sold. I think probably we sold the sheep before the farm * * * I had the sheep before I got the farm. Harold had charge of the sheep until I got the farm. Mr. Giles took care of the sheep while they were on the farm. * * * I think now we sold the sheep before we sold the farm.” (Ab. 170)

She testified further:

“I stated that I received about \$4,000.00 from the sheep. That was the sheep that Harold Giles was running in 1926 to the fall of 1929. I am not sure but that we sold the sheep before the farm. It could have been in 1928 when we sold them. We paid that money to the Bank of Heber City. That is the best recollection I have now. I know we paid the money we got from the sheep to the Bank of Heber City. The money was paid on the debts we had acquired, that is, my husband and I. *
* * I didn’t know how much money Harold had borrowed from the bank. The debt had to be settled, and I was willing to use the money for that purpose. I do not know what part of the twenty-six hundred went to the bank. I didn’t turn the money over to the bank. My husband took care of that. I gave him the money.” (Ab. 171-172)

On this point, she testified further:

“I do not know how my husband used the money. He could have used it in a checking account. I don’t know. I don’t recall ever asking him how he used the money. I really don’t know whether he used any of it in a checking account. I went to the bank and had him cash some checks for me and wrote other checks. * * * There was no money in the bank that he could have drawn against after 1930. If there had been money after 1930, I would have felt free to draw against that account.” (Ab. 174)

Notwithstanding there was no money in the bank to draw on after 1930, still they continued their joint busi-

ness ventures. For example, see joint notes executed by them to the Moultons in 1931—Complaint in Exhibit 1.

The husband, Harold, made a significant showing. In his sworn answer, respecting the water certificates, he said:

“Defendant admits that said certificates of stock were in the name of defendant Josie Baird Giles and that said certificates of stock were endorsed in blank on the back of said certificates by said defendant, Josie Baird Giles, a long time prior to this transaction.” (Ab. 12-13)

The transfer referred to was the pledging of the certificates to the bank in 1933. His answer further alleges (Ab. 13) that the certificates were obtained by the bank in 1933 by false representations and fraudulent conduct.

When put on the stand to support his story, he testified, on his direct examination, that he delivered the stock to the bank in 1929, not 1933, and that he did not know whether his wife had told him he might pledge them in 1929 or not.

The undisputed record shows that the exact date of the pledge was May 21, 1929 (Tr. 179, Ab. 150). This pledge is therefore prior to the sale of the land and water to Vernor Baird, and prior to the mortgage back to Josie and prior to every other transaction mentioned in either case. So the question, was Harold authorized to pledge the certificates, remains paramount.

His direct testimony on the point is so brief that we quote it in full from the transcript.

Questions by Judge Hansen:

“Q. Are you at this trial resisting the action against you?”

“A. Why, I am resisting it against my wife, not against me. I don’t care what they do to me.

“Q. You did file an answer, through Mr. Morgan, your attorney?”

“A. Yes.

“Q. I will ask you, Mr. Giles, if you now have an independent recollection of delivering to the bank of Heber City two certificates of stock?”

“A. Yes, sir.

“Q. I will show them to you so that you will know which ones they are. One is marked Defendants’ Exhibit G, Certificate No. 68, in Cause No. 1266. Will you examine that. The other is Defendants’ Exhibit F, in case No. 1266. Let’s see, they are each for 24½ shares, I believe?”

“A. Yes.

“Q. Have you a recollection now, Mr. Giles, as to when those certificates were delivered to the Bank of Heber City?”

“A. Well, I don’t know exactly. It was some time in ’29.

“Q. You think it was some time in ’29. At the time you delivered those two certificates to the Bank of Heber City, did your wife Josie Giles tell you that you might so deliver them to the Bank of Heber City?”

“A. I don’t know.

“Q. Have you any recollection about that now?

“A. No.

JUDGE HANSEN: “I think that is all.” (Tr. 293-4)

The foregoing testimony constitutes all the direct resistance put up by Harold to the case against his wife. The circumstances under which he delivered the water certificates to the bank, however, were brought out on cross-examination, and as abstracted by his counsel, read as follows:

“I delivered the certificates to the bank in 1929. I remember that. I received possession of the certificates at the home. I just took them to the bank. I was in the habit of dealing with my wife’s property. I never had any conversation with my wife about dealing with her property. I handled the property that she inherited. I talked to her some about the property. I heard her testify about drawing on the account and she did draw on the account. I managed the farm. There was water on the farm and the water was represented by the certificates. I have seen the certificates at the home. I am not certain when the certificates came into my wife’s possession, but I think it was some time in 1927. I had the certificates several times I guess. I do not know that she ever had knowledge that they were in my possession. They were just around the home. I don’t know that I ever had them in my possession to her knowledge. I had no discussion with her at the time I took the certificates to the bank. I don’t remember whether she was home at that time or not. I took the certificates to the bank

because I thought we were in business partnership—was married, and I was doing her business. I thought we were partners. The signature on Exhibit F looks like her signature and I would say it is her signature. The signature on Exhibit G does not look like her signature. It was there when I took it to the bank. I do not know who wrote that signature. I don't think it is my writing, but it could be. It isn't my wife's handwriting anyway." (Ab. 175-6)

The record, as made by the defendants themselves, establishes a business and property status between Josie and Harold Giles, which is so clear and convincing that none can mistake its existence and character.

William Baird, the brother, says that Josie and Harold were in business together. That Josie got some sheep for the express purpose of building up a business. That they had range land and water and were in fact in the sheep business together.

Josie called the business her husband's business—the sheep business and the ranch business, to which she contributed both the sheep and the ranch. What he contributed in money or property does not appear, but he did give his whole time, attention, and skill to the management of the business. There was no provision for wages or compensation for Harold's services. The proceeds from the business and the property used in the business were used indiscriminately by Josie and Harold to pay their living expenses and their business debts. Josie gave him an absolute free hand. She did not know what he was doing with the sheep or the ranch or

the money he was getting. She was content to know that he was providing for her and allowing her to draw against the bank account. When it came to selling and trading and paying business obligations, Josie's characteristic remarks were: "We traded the farm;" "We sold the sheep;" "We sold the farm;" "We paid the bank;" "We paid the debt my husband and I had acquired."

It was, therefore, no idle conclusion on Harold's part, when he said: "I thought we were partners."

The record is replete with evidence of Josie's acquiescence in Harold's borrowing from the bank, which she treated as her own obligation.

Even her counsel at the trial, by the form of their questions, treated Harold's obligations as Josie's obligations. Beginning on page 96 of the transcript, Josie is testifying to the sale of a house. These questions and answers appear:

"Q. What did *you* do with the money you received from that house?

"A. *We* had to pay bank bills with it.

"Q. What bank did *you* owe?

"A. Heber City Bank." (Tr. 96-97)

See also Tr. 122 and 123. She testified that she sold 195 ewes and 3 bucks and the money went for expenses, most of it to the Bank of Heber City (Tr. 121, 122, 131, Ab. 139, 141).

"Q. Whose notes were they?

“A. They were notes my husband had signed for running the business.” (Tr. 131)

In view of all the foregoing transactions, it is well nigh impossible to treat the handling of the water certificates as unauthorized. Josie drew most of the money that went into the bank (Tr. 198, Ab. 153). Harold borrowed \$1700.00, May 21, 1929, and made many renewals until the \$2550.00 note sued on was given in 1933. Harold Giles borrowed from the bank constantly from September, 1926, down to the time of the pledge agreement of May 21, 1929, and some of the notes evidencing the indebtedness were signed by Josie. (See Tr. 249, Ab. 165-166 and Plaintiffs' Exhibit 13 introduced by stipulation). During the time when Josie admits Harold was running the business, the notes generally were signed by Harold and not by Josie. The certificates as pledged were endorsed. Josie would not testify that the signature on Certificate No. 68 was in Harold's handwriting (Tr. 260, 261, Ab. 168). On the question of the handwriting on the certificates of stock, we submit that the signature on certificate No. 64 was placed there by Josie herself. (See comparison with her signature given at the trial on Exhibit B-3 and her signature on the pleadings. The handwriting on certificate No. 68 appears very likely to have been Harold's. He testified that it might be his signature (Tr. 299, Ab. 176). Compare his signature on Exhibit B-1, which is his promissory note sued on in case No. 1266, and his signature on the pleadings.

Harold was asked whether or not at the time the two certificates were delivered to the bank his wife told him he could deliver the certificates. He stated, (Tr. 294-299, Ab. 175, 176):

“A. I don’t know.”

When asked how he got possession of the certificates, he stated:

“A. Why they were home, I just took them to the bank.

“Q. Were you in the habit of dealing with your wife’s property?

“A. Yes.”

* * * * *

“Q. Did you have the management of the property that she inherited?

“A. Yes.

“Q. And you never talked with her about the management of the property?

“A. Oh, some, but I don’t know what she said.

“Q. But you were the manager, and you heard her testimony how she drew on your account?

“A. Yes.

“Q. And that is the fact, is it?

“A. Yes.”

* * * * *

“Q. You managed the farm did you?

“A. Yes.”

* * * * *

“Q. And was there water with the farm?

“A. Yes.

“Q. Do you know whether or not that water was represented by any certificates?

“A. Yes.

“Q. Had you seen the certificates?

“A. Yes.

“Q. Where had you seen them?

“A. Home.”

* * * * *

“Q. In '27. Did you ever have them in your possession? I mean did she ever deliver them over into your possession?

“A. I had them several times I guess.

“Q. With her knowledge?

“A. Well, I don't know if it was her knowledge. Just like you would have anything else around home.”

* * * * *

“Q. Then state under what circumstances you took them, and by what right you took them.”

* * * * *

“A. Well, I took them to the bank because I thought we were in business partnership, was married, and I was doing her business.

“Q. You thought you were partners?

“A. Yes.

“Q. I will ask you to look at Defendants' Exhibit 'F', at the signature on the back thereof, and

see whether or not you recognize that signature.

“A. It looks like her signature.

“Q. Would you say it is her signature?

“A. Yes.” (Tr. 295-299)

Harold testified that while the signature on Certificate No. 68 did not look like her signature it was on there when he took it to the bank (Tr. 299, Ab. 176).

Appellants seem to think that respondents rely upon estoppel to establish their right to the water as against Josie Baird Giles. In this they are mistaken. Our case rests on clear principles of agency.

The manner in which an agency may arise is clearly shown by the following authorities:

“Apparent authority, or ostensible authority, as it is also called, is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing. Accordingly, as defined by the American Law Institute, an apparent agent is one who, with or without authority, reasonably appears to third persons to be authorized to act as the agent of another.

“With respect to the derivation of the agent’s apparent authority to begin with, the power and authority of an agent may safely be deemed by persons dealing with him in good faith to be at least equal to the scope of the duties ordinarily conferred upon agents or agencies of that character. Apparent authority may also be, and often is, derived from a course of dealing or from the fact that a number of acts similar to the one in

question were assented to, ratified, or not disavowed by the principal. The acquiescence of the principal in an extension of his authority by an agent in the transaction in question may be sufficient to create the appearance of authority in the agent to do such act; the acquiescence in, and consequent scope of, such authority, is to be determined not only by what the principal actually does know of the acts of the agent within the employment, but also as to what he should, in the exercise of ordinary care and prudence, know the agent is doing in the agency transaction. In such case, the appearance of authority is created because of the fact that the third person is entitled to assume that the principal is cognizant of the exercise of authority and would forbid it if it were unauthorized. As stated by the American Law Institute, except for the execution of instruments under seal, or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act may be created by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. It is also to be noticed that the actual instructions of the principal to the agent do not govern the case, unless the person dealing with him had notice or was put upon inquiry as to his real authority. Stated inclusively, then, the rule is that if a principal, acts or conducts his business, either intentionally or in a negligent manner, or fails to disapprove of the agent's act or course of action, and thereby leads the public to believe that his agent possesses authority to act or contract in the name of the principal, such principal is bound by the acts of the agent within the scope of his apparent authority as to any person who, upon the faith of such holding out, believes, and has reasonable ground to believe,

that the agent has such authority, and in good faith deals with him." (2 Am. J. pages 82-84, Sec. 101-103).

The following statement is taken from the case of *Dierkes v. Hauxhurst Land Company*, 80 N. J. Law 369, 79 Atl. 361, 34 L. R. A. (N. S.) 693 at Page 696:

"And, as the fact of agency and the extent of the authority are matters peculiarly within the knowledge of the defendant, the courts have not compelled plaintiff to call hostile witnesses to prove this element of his case, but it may be inferred from certain facts and circumstances that would fairly give rise to such an inference. It is stated in 31 Cyc. Law & Proc. p. 1662, that, 'as a general rule, the fact of agency cannot be established by proof of the acts of the pretended agent, in the absence of evidence tending to show the principal's knowledge of such acts, or assent to them. Yet when the acts are of such a character, and so continued, as to justify an inference that the principal knew of them, and would not have permitted the same if unauthorized, the acts themselves are competent evidence of agency.' This, it will be observed, is not on the theory of estoppel in favor of a party contracting with the supposed agent because the conduct of the principal amounted to holding him out as such agent, but is a rule of evidence, permitting a jury to find agency as a fact and not merely estoppel to deny it. And, while the question has arisen for the most part in contract cases, the rule has also been applied in action of tort."

See also *Restatement of the Law of Agency*, Volume 1, Section 31, Comment on Sub-section (1): a; Section 43, Comment a and c; Section 159, Comment a, b, and e.

Also: Sec. 22, 35, 94.

Assume for the purpose of argument that Josie did not know that Harold was pledging the water stock. Would she have objected had she known? There is nothing in the evidence indicating that she would have. When she did learn that the stock was pledged she made no effort to reclaim it. She merely sought to verify the existence of the pledge.

The stock was pledged in 1929. Josie says that she learned about it first while she was in California. She moved to California in 1931. (Tr. 98; Ab. 134). She made inquiries at the Bank of Heber City and at the Federal Reserve Bank when she returned to Utah in 1933. We may now note the purpose of the inquiries as disclosed by the transcript beginning at page 254:

“Q. What did Mr. Draper say to you at that time?

“A. He said they had the certificates all right, they had been presented to the bank. And I told him I didn’t think so. And he said, well, he did. And I asked him if we could see them, and he said they were in Salt Lake. I thought he said that the Federal Reserve had taken them over”

Inquiry was made at the Federal Reserve and request to see the certificates was made, but they were in a vault and not available.

“Q. After you received that information, did you do anything further with respect to that matter, trying to find out about these certificates?

“A. No. I think that was the last time I tried to get to see them.” (Tr. 255).

By her own testimony Josie had nothing in mind except to see whether her husband had really pledged the stock.

Thus matters stood till August 14, 1934, when the Bank Commissioner filed an action seeking to foreclose the Bank's lien on the certificates.

Josie filed a separate answer in this case. (Ab. 7-11). To the allegations in the complaint that Harold had pledged the certificate, she merely answered that she knew nothing about it. (Ab. 8).

Following the institution of this action, the matter stood without anything being done until November 15, 1938, when the Moultons brought a suit against Vernor Baird et al., seeking to foreclose a mortgage on certain real estate, including the water certificates held by the bank. In this suit, Josie again filed a separate answer, (Ab. 50) but nowhere in it does she allege that Harold wrongfully pledged the certificates to the bank in May, 1929. The Moultons alleged in their complaint, paragraph 9 (Ab. 32) that Harold delivered the certificates to the bank after October 10, 1929, “without the knowledge or consent of the rightful owners thereof.” This allegation Josie admits, but makes no other allegation concerning the matter. The proof shows without dispute that Harold delivered the stock to the bank before October 10, 1929, to wit, on May 21, 1929. (Tr. 294; Ab. 175).

Josie knew at all times after October, 1933, that the bank claimed a lien on the certificates, yet neither she nor her alleged successors in interest made any attempt to repossess the stock or to have the lien declared invalid by any court.

The Moultons were the first to challenge the bank's lien in 1938. It was not until the case had been tried that Josie asked leave to re-open and challenge the bank's lien. This she did December 13, 1939. (Ab. 22). In her petition for re-opening the case, she claims the water as against all other claimants on the ground that it was used "to irrigate their homestead." "Their" meaning the homestead of Josie and Harold. Even here she fails to allege that Harold was without authority to pledge the stock as of May 21, 1929, or at any other time. There she says:

"J. Harold Giles was without authority to sell or hypothecate the same without the consent, approval and execution of a lien by your petitioner Josie Baird Giles."

When this allegation was made the court had already annouced from the bench his finding that she had consented to and approved the pledge, so she alleged a new requirement to the validity of the Bank's lien, to wit: "Execution of a lien by" herself.

The homestead angle of the case having been argued heretofore, we now merely call attention to the fact that from 1933 to 1939, Josie, with full knowledge of the Bank's claim of lien, made no challenge against said

lien, and put forth no effort to recover it. She did not ever say that the stock had been wrongfully pledged. The most she ever said was that if it had been pledged she didn't know anything about it. But it was pledged and she knew it for six years without challenging it. How could she? She joined her husband in business. She left the entire management of the business to him. He had to borrow money to run the business. This she knew, and this she acquiesced in. She shared the proceeds of the loans. She recognized the debts as her own by helping to pay them. To the very end she breathed no word of impropriety against Harold's conduct of the business. She didn't even charge him with bad judgment. He was a good husband; what was his, was hers always. She drew on the bank account without let or hinderance, and stopped drawing only because there was no more money to draw.

Their business was a combination of ranch, water and sheep. The money borrowed was to further the business. Can it be doubted in face of all the foregoing that Harold had full authority to do all that was necessary to be done to further the business including the pledging of the business property to secure business loans.

We think not. If Josie so put her affairs in the hands of her husband, Harold, as to give the appearance that he had authority to pledge the water certificates standing in her name, the Bank holds those certificates free from her equities. *Garfield Banking Company v. Argyle*, 64 U. 572; 232 P. 541.

In effect, appellants argue that even if an agency or partnership is established, still there was no authority to renew the note and pledge of May 21, 1929, in 1933, which renewal of 1933 was sued on by the Bank Commissioner. This is not so. See, *Interstate Trust Company v. Headlund*, 51 U. 543, 171 P. 515; *Gray v. Kappos*, 90 U. 300, 61 P. (2d) 613; *Key v. Thomas Lyons Co.*, 198 P. 928 and *Healy v. Ginoff*, 220 P. 539.

Again appellants argue (Appellants' Brief 17):

"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. (Citing authorities). 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, * * *."

This whole argument falls simply because it is not true. We do have the Uniform Transfer Act. See Chapter 55, Laws of Utah, 1927, and Chapter 3 of Title 18, Revised Statutes of Utah, 1933.

The very first section of this act provides :

“Title to a certificate and to shares represented thereby can be transferred only:

“1. By delivery of the certificate indorsed either in blank * * * by the person appearing by the certificate to be the owner of the shares represented thereby;”

“Stock shall be deemed personal property.”
18-2-33, Revised Statutes of Utah, 1933.

“Water stock is no different from any other stock.” *George v. Robison*, 23 U. 79; 63 P. 819; *Supply Ditch Company v. Elliott*, 15 P. 691 (Colo.); *O’Mara v. Newcomb*, 88 P. 167 (Colo.).

Appellants argue that the delivery of the certificates to the Bank in this case were unauthorized and that the endorsement on Certificate No. 68 was forged. (Appellants’ Brief 19).

We have already shown how completely Harold was authorized to pledge the stock, which includes, of necessity, all the acts necessary to effectuate the pledge, which would include endorsing the certificates. Manifestly, Josie endorsed certificate No. 64, and manifestly Harold endorsed the other. No one denies that Harold endorsed No. 68. He admitted that it might be his writing. (Tr. 300; Ab. 176). Compare this endorsement with his signature on Exhibit B-1.

“While it is said to be usual and better that an agent’s signature should appear upon the instrument yet this is not in all cases necessary, and an agent authorized to sign the name of his prin-

principal may effectually bind him by simply affixing the name of such principal as if it were his own."

2 C. J. S. 1348, Sec. 2, and cases cited.

"As a general rule an instrument should recite the power under which the agent acts unless the intention to execute the power appears from the instrument or the surrounding circumstances."

2 C. J. S. 1354, Sec. 132.

From the foregoing it appears that the pledge by Harold was in all respects legal and binding, and we observe that it makes no difference in this case whether the certificates be treated as negotiable instruments or mere personal property. If Harold had mortgaged the sheep to secure a loan instead of pledging the certificate, the question would still be: Did he have the authority?

Having fully proved the issue as to the certificates in the affirmative, we submit that the decree of the lower court should stand.

Merely to preserve our rights we call attention to Page 9 of Appellants' Brief, paragraph 7, where a question is raised as to the effect of the use of the water on the farm as against the rights of the bank which held the certificates of stock. This question is not argued in the Brief and we presume therefore that it is waived and will not be considered by the Court. We call attention however to the Transcript, page 324 and pages 328 and 329, where it appears that the water represented by the certificates was conveyed to the corporation. The company was therefore not a mutual company where the stockholders remain the owners of the water. The waters

in this instance were actually conveyed to the corporation and certificates issued to stockholders.

Section 100-1-10, Revised Statutes of Utah 1933 provides:

“Water rights shall be transferred by deed in substantially the same manner as real estate except when they are represented by shares of stock in a corporation;”

It seems to us that under the Utah law there can be no adverse use under the facts in this case. Water stock is personal property as heretofore shown. However, we shall not pursue this point further for the reason that it is not argued by appellants.

Respectfully submitted,

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