

1940

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

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Utah Supreme Court

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Cheney, Jensen, Mark & Wilkins; George B. Stanley; Paul B. Cannon; and Delbert M. Draper; Attorneys for Plaintiffs and Respondents.

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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 Liquidation
of the Bank of Heber City,

Plaintiffs and Respondents,

vs.

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

1266 Civil

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.

1410 Civil

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.

SUPPLEMENTAL 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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MORGAN, as the Surviving Partner of the
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Cross-Defendants.

SUPPLEMENTAL BRIEF OF RESPONDENTS

On the day previous to the oral argument in this case Appellants served Respondents with a typewritten Reply Brief. Because of two new points raised in the Reply Brief which had not been mentioned in the original Brief of Appellants, Respondents asked and were granted leave to file this Supplemental Brief to deal with such new matters. Respondents have not yet been served with the printed Reply Brief but are assuming that it will be substantially in accordance with the typewritten Brief heretofore served.

The first new point raised by Appellants is, assuming the Appellants are sustained by this Court in their contention against the Bank of Heber City and its successor in interest and the case reversed as to this matter but not as to the remainder of the case, such reversal cannot benefit the Respondents, A. C. Moulton and E. Dewey Moulton, Plaintiffs in Case No. 1410 Civil, who are opposed to the bank, but who did not appeal. The Trial Court held that the claim of the Bank of Heber City is superior as to the water stock; that the claim of A. C. Moulton and E. Dewey Moulton is superior to all other parties both as to the water stock and to the real property.

Several Utah cases are cited by Appellants. The only two which appear analogous to the present situation are *Lowe & Company v. Leary*, 49 Utah 506, 164 Pac. 1052 and *Hansen v. Daniels*, 73 Utah 142, 272 Pac. 941. These cases we believe are clearly distinguishable. In the first case there were a number of claimants whose

rights to a lien against a fund were denied, the Court holding that the fund should be administered by a trustee in bankruptcy. Only part of the claimants appealed. None of the other claimants were parties to the appeal either as appellants or respondents. This Court made the following statement in regard to the rights of non-appealing parties:

“While it is true that there were other claimants, yet when the District Court rendered a decision adversely to their claims, that is, when the said court decided that the claim of the trustee in bankruptcy was superior to their claims, then, instead of appealing to this court as the plaintiffs have done, those claimants acquiesced in the decision of the District Court. All of those claimants thus have adopted the decision of the District Court as the law of the case, and hence have waived their rights to participate in the fund left in the hands of the school district. We can only help those who have attempted to help themselves. Nor is the trustee in bankruptcy in a position to help those claimants out of the dilemma in which they have placed themselves by acquiescing in the decision of the District Court. So far as they are concerned, therefore, *that court's decision is the law of this case.*”

The clear distinction between that case and the case before the court is that the District Court has found and adjudicated that the rights of A. C. Moulton and E. Dewey Moulton in and to the water stock and all real property are superior to the rights of Appellants. See Findings of Fact numbered 12 and 13 (Ab. 86 and 87), Conclusions of Law numbered 4, 5, and 6 (Ab. 98 and 99)

and paragraphs 2, 3, 4, 6 and 7 of the Decree (Ab. 105-106-107-108). Unless these portions of the Findings, Conclusions and Decree are reversed they must, according to the rule laid down in the Lowe case, remain as the law of the case. In the Lowe case the non-appealing parties had been given no rights by the Trial Court. Here the Moultons have been given complete priority over Appellants by the Trial Court. Unless this is reversed no legal manipulation can possibly put anyone but the bank ahead of the Moultons.

In the case of *Hansen v. Daniels*, cited by Appellants, the Trial Court had held that the non-appealing parties had no lien upon the property. In the case at bar a lien has been established.

It is noticeable that Counsel for Appellants has not referred to the case of *Garrison v. Davis*, 88 Utah 358, 54 Pac. (2d) 439, wherein it is held, Elias Hansen speaking for the Court, that certain non-appealing parties could have the advantage of a reversal upon appeal. That case, it seems to us, must necessarily be considered by the Court on this point. It was there held that where parties were owners in common of certain water, an appeal by one of those parties inured to the benefit of all. If where the parties are owners in common, such benefit results, a benefit must necessarily result where the non-appealing party not only has a common interest in the property but has an interest adjudicated to be superior to that of the appealing party. See also the case of *Buskirk v. Musick* (W. Va. 1925), 130 S. E. 435.

While we believe that the case before the Court is clearly distinguishable from the cases of *Lowe v. Leary* and *Hansen v. Daniels* we believe that there are many courts which have held contrary to the *Lowe* case and that upon proper consideration this Court should overrule it, if it has not already been overruled by *Garrison v. Davis*. See *Walker's Executors v. Page*, 21 Grat. 636, 62 Vir. 636, and many cases cited in the dissenting opinion to the case of *Ottumwa Boiler Works v. M. J. O'Meara & Son*, 224 N. W. 803.

Another point raised in the Reply Brief which was not presented in the original Brief of Appellants is the reliance upon Sections 38-0-4, 38-0-10 and 38-0-13, Revised Statutes of Utah, 1933, for a homestead. It is claimed, apparently, that because the wife did not sign the pledge of the stock there could be no loss of homestead and this even though the husband is found to have been her agent duly authorized to pledge the stock. This on its face is falacious for the reason that the act of an agent is the act of the principal.

However, we wish to point out that if Josie Baird Giles Smith still held any interest in the stock after its pledge to the bank she sold that interest to Vernor Baird in October, 1929 and thereafter held only a lien upon such stock by reason of a mortgage back from Vernor. There is no povision that a homestead right exists in a lien. She was not thereafter using the water stock upon land owned by her as required by Section 38-0-4, Revised Statutes of Utah, 1933. The quotation of that section

in the typewritten Reply Brief of Appellants, omits the words "in supplying water to the homestead". The statement that she was using the water on her land after 1929 is contrary to the fact. The record shows that Vernor took a deed in 1929 and had possession to the end of 1934. It was deeded to Elizabeth Baird in January, 1935. The homestead in the water stock was therefore lost for three reasons. She pledged the stock by a duly authorized agent in May, 1929. She thereafter lost her interest by sale to Vernor. Thirdly she has no homestead in the water for the reason that it has not been used by her on her property since 1929.

Respectfully submitted,

CHENEY, JENSEN, MARR & WILKINS,

GEORGE B. STANLEY,

PAUL B. CANNON,

DELBERT M. DRAPER,

*Attorneys for Plaintiffs
and Respondents.*

In the Supreme Court of the State of Utah

JOHN A. MALIA, State Bank Commissioner of the
State of Utah, and HERBERT TAYLOR, as Exam-
iner in Charge of the Liquidation of the Bank of
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1266

Civil

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vs.

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J. RULON MORGAN, J. RULON MORGAN, as
the Surviving Partner of the Firm of Morgan &
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BANK OF HEBER CITY, RULON F. STARLEY,
State Bank Commissioner of the State of Utah, and
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RAY F. SMITH and JOSIE BAIRD GILES SMITH,
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Cross-Defendants.

Petition For Re-Hearing

PAUL B. CANNON,
DELBERT M. DRAPER,
GEORGE B. STANLEY,

Attorneys for Plaintiffs and Respondents.

In the Supreme Court of the State of Utah

No. 6253

JOHN A. MALIA, State Bank Commissioner of the
State of Utah, and HERBERT TAYLOR, as Exam-
iner in Charge of the Liquidation of the Bank of
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Petition For Re-Hearing

Come now 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, respondents in case No. 1266 Civil, and A. C. Moulton and E. Dewey Moulton, respondents in case No. 1410 Civil, and respectfully petition this Honorable Court to grant a re-hearing in the above entitled cause.

The specific reasons for requesting a re-hearing in case No. 1266 Civil are the following:

I.

The Court errs in the conclusion and statement that the signature of the owner must be indorsed upon the pledged certificates, or written authority of the agent must accompany the certificates.

In its opinion, this court holds that an agency may be established by conduct of the parties; that Harold Giles was the agent of Josie Baird Giles, but that he could not transfer her stock certificates without her indorsement of the certificates or written power of attorney to him, authorizing indorsement. This bar to transfer is said to rest on Section 18-3-1, R. S. U. 1933, and upon the alleged fact that, "there is no evidence in the case that would justify the belief that Mr. Giles was authorized to sign his wife's name to any instrument."

We respectfully submit that Section 18-3-1, supra, is not a bar, and that the record is full of evidence that justifies the belief that Mr. Giles was authorized to

borrow money for the business of himself and wife and to pledge their business property therefor.

Section 18-3-1, *supra*, must be read in conjunction with the whole of Chapter 3, of which it is a part. Perusal of the whole chapter discloses:

18-3-4. "Possession of Certificate Gives Preferred Right."

18-3-7. (4) The possession of the certificate may be reclaimed and the transfer thereof recinded, unless—
(a) The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful; or (b) The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights.

18-3-9. If the owner delivers the certificate without indorsement, with intent to transfer, he has obligation to indorse.

"Because the statute says, 'signed by the owner' it is claimed that no one other than the actual and lawful owner of the certificate could legally or rightfully confer title to another, and, as Thomas Wright, Jr., when he indorsed and transferred the certificate to the plaintiff, was not the real owner of the certificate, the plaintiff acquired no right therein. So construing the statute, a bona fide purchaser for value can acquire title only from the real or actual owner or his duly authorized agent. Such a construction renders the principle of caveat emptor to its full extent applicable to all sales and deliveries of stock certificates, the same as it is applicable to

chattels. * * * Under the facts as found the appellant is estopped from disputing the ownership of the certificate in Thomas Wright, Jr. * * * Lastly, it is also urged that the plaintiff was not a bona fide purchaser, and was put upon inquiry as to the validity of Thomas Wright's title and given notice of some infirmity or defect in his title because the plaintiff did not have a transfer made on the books of the company. * * * That may have been a suspicious circumstance of more or less weight, but, when considered in connection with the whole of the transaction, is not in itself of such controlling force as to overthrow the finding of bona fides, or to justify a contrary finding." *Brown v. Wright*, 48 Utah 633, 61 Pac. 448.

"The finding of the court is that neither of the banks who loaned money upon the certificate had any notice so far as Argyle was concerned. In view of that, therefore, the equities of the plaintiff are superior to those of the appellant." *Garfield Banking Co. v. Argyle, et al.*, 64 Utah 572, 232 Pac. 541.

The law as above stated must be applied to the following facts:

1. Harold Giles was the agent, and it may be held without undue stretching of the facts, the partner of Josie Baird Giles with full power to handle all property and business of Josie Baird Giles, which indisputably was their joint business, and to do all things necessary and desirable to the conduct of that business. Borrowing money on security was the regular practice of Harold Giles from the day he married Josie Baird in 1924 to the time of their divorce in 1934. (See Plaintiff's Exhibit

13.) The lower court held that "they operated and managed their business affairs without distinction as to ownership thereof." (Ab. 95) This court in its opinion held that Josie Baird Giles indorsed one of the certificates and that J. Harold Giles signed the name of Josie Baird Giles to the other. This court further held in its opinion that all of the property was owned by her, and that all of the notes were signed by him. For five years previous to the pledge, he had been borrowing money for their joint business upon her property from the Bank of Heber City. We submit that the bank under such circumstances and findings is a bona fide holder for value.

2. Josie Baird Giles (Smith) testified that she first learned of the pledge in 1933. At no place in her testimony or in her pleadings did she recind the action of her husband in pledging the stock. She made no demand for it from the Bank or its liquidators. She at no place repudiated the action of her husband in pledging the stock. She ratified all of his actions and many times testified that he was handling all of the "business." What he did was satisfactory to her.

The court errs in the conclusion and statement that there is no evidence to show that Josie Baird Giles knew, or should have known, of the pledge.

Attention is called to Plaintiff's Exhibit 10. This is a promissory note made on the day Josie sold her home in Heber City (Ab. 133; Tr. 96-97). A careful comparison of the signatures of Josie Baird Giles and the

writing on the note show that the note was made out by her and all of the endorsements on the back are in her handwriting. Notice the "B" in the word "Bank" and her signatures.

The notations on the back of the note show a complete knowledge of Harold's dealings on the part of Josie. "\$1505.35 Bank — 7th Oct." This corresponds with the records in the Bank. (Ab. 154; Tr. 200) "\$153.00 to mother." This corresponds with the Decree of Distribution in the Estate of James R. Baird wherein Josie gave her mother a note for \$153.33 to balance the estate affairs. (Plaintiff's Exhibit 8) Then follow several items showing payments to various individuals, sundries, shoes, insurance, lights and wiring. All of this bookkeeping was carefully kept by Josie herself and not by Harold. Further, Josie in her testimony showed that the husband and wife worked together in this deal when she testified that "We used the money to pay bills at the Heber City Bank, but I don't know exactly the amount we paid to the bank." (Ab. 133; Tr. 97) The money represented by this note was used to pay Josie's debts as well as those of Harold Giles at the bank. Josie kept account of the money paid to the bank on the note secured by the pledged stock owned by Josie. It would take a long stretch of the imagination to conclude from the foregoing that a careful bookkeeper such as Josie was, requiring such accountings from the husband as she required, knew nothing of the pledge of the water stock to the bank in the midst of all of the dealings in which the stock was involved.

Why did she take a note from her husband, Harold Giles? The note was to pay her bills as well as his. Nothing is in the record to show. The only logical supposition was that Josie might be protected for the return of the pledged water stock after its release by the bank.

We submit that Case No. 1266 is in no way related to Case No. 1410 except for the purpose of trial. The law followed by the lower court was the same as that followed by the court on appeal. The lower court having heard the testimony of the witnesses and judged their demeanor in open court should be followed in its findings and the judgment of the lower court sustained on the appeal, in Case No. 1266 Civil.

* * * * *

The specific reason for requesting a re-hearing in case No. 1410 Civil is the following:

The court erred in finding that George B. Stanley represented conflicting interests.

To support this contention, the following argument is made:

In order to represent conflicting interests in this matter, George B. Stanley must be the attorney for Josie Baird Giles (Smith); or

Vernor E. Baird must have had a property interest in the note, mortgage and water stock attached in the relationship of creditor; or

The interests of Vernor E. Baird must have been adverse to the interests of the Moultons.

To consider the first proposition, this court found that George B. Stanley was the attorney for Vernor E. Baird in the preparation of the deed, note and mortgage. It did not find that he was at all an attorney for Josie Baird Giles (Smith). The lower court found that George B. Stanley was not in the relation of attorney and client to any of the parties. There is no further argument necessary on this point.

In considering Vernor's interest in the note, it is necessary to quote some of the court's opinion. The court said that George B. Stanley "placed his client's property in the hands of third parties, to the client's detriment." The record does not bear out this statement. Vernor E. Baird had no property interest whatever in the note and mortgage attached. The note and mortgage belonged to Josie Baird Giles (Smith) who was not the client of George B. Stanley. There is no showing in the record that George B. Stanley had in his possession any property belonging to Vernor E. Baird.

The record does not show any conflict of interest between Vernor E. Baird and the Moultons. There has been no harm come to Vernor E. Baird because of the attachment of the note and mortgage. After the attachment, he conveyed all of his interest in the mortgaged property to his mother on January 26th, 1935. At the time of the commencement of the action in 1410 Civil,

Vernor E. Baird had no interest in the property sought to be foreclosed. His pleadings show that he disclaimed any interest therein. (Plaintiff's Exhibit 1) It was stipulated before the trial commenced that no deficiency judgment would be taken in the action, and this offer was made in open court at the commencement of the trial by the Moultons. (Tr. 4-5) The foreclosure was necessary TO OBTAIN PAYMENT OF THE DEBT DUE AND OWING BY JOSIE BAIRD GILES TO THE MOULTONS. Josie still owed the debt when the foreclosure commenced even though J. Rulon Morgan, her attorney, had prepared a series of conveyances the result of which was intended to release her from paying her honest obligation.

The court further states: "But for the acts of Mr. Stanley, Vernor Baird's obligations to his sister would have been peaceably settled." There is nothing in the record to show that they were not peaceably settled. The attachment was made July 7th, 1934. The sale which took place on January 29th, 1935 would have done nothing more than substitute the Moultons for Josie Baird Giles as owners and holders of the note sued upon in 1410 Civil. Settlement of the obligation between the Moultons and Vernor E. Baird was impossible after January 29th, 1935 for the reason that Vernor had conveyed all of his interest in the mortgaged property to his mother. This impossible situation was created by J. Rulon Morgan, who prepared the deed from Vernor to his mother, the mortgage from Vernor to Morgan & Morgan, the release of

mortgage (Defendant's exhibits D, E and I) on January 26th, 1935. Vernor was out on the desert and William H. Baird took the deed and mortgage out for him to sign. (Ab. 201; Tr. 370-371) After this, he took no interest in the matter, even though he signed pleadings, as is evidenced by the fact that the trial commenced on September 11th, 1939 (Tr. 2), and Vernor did not appear until September 18th, 1939. (Tr. 357-358) Several times mention is made that Vernor will later be at the trial, the most conspicuous of which is made by Judge Hansen, when speaking of Vernor E. Baird, he states: "For your information, we hope to have him here today." (Tr. 282) This was in the latter part of the trial and the statement when studied carefully shows that Vernor had no interest in the trial, and the other defendants were hopeful that he might show up to testify for them.

George B. Stanley was still representing Vernor E. Baird on February 4th, 1938. (Ab. 201; Tr. 371) Would he have an adverse attorney still do work for him?

Respondents and their Counsel respectfully submit that the opinion of the Court is in error in the particulars noted, and that a re-hearing of this cause should be granted.

PAUL B. CANNON,

DELBERT M. DRAPER,

GEORGE B. STANLEY,

George B. Stanley

*Attorneys for Plaintiffs
and Respondents.*

We, the undersigned, Paul B. Cannon, Delbert M. Draper and George B. Stanley, Attorneys for plaintiffs and respondents in the above entitled cause, hereby certify that in our opinion the foregoing Petition for Re-hearing of said cause in this Court is meritorious and is well founded in fact as well as in law.

PAUL B. CANNON,

DELBERT M. DRAPER,

GEORGE B. STANLEY.

Paul B. Cannon
Delbert M. Draper
George B. Stanley