

1940

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

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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
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,

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

Appellants' Brief on Respondents' Petition for Rehearing

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

Appellants' Brief on Respondents' Petition for Rehearing

An examination of the brief in support of the peti-
tion for rehearing and a re-examination of the

original briefs filed in this cause, show that there is nothing of substance in the brief in support of a rehearing that was not discussed at length in the original briefs. We however deem it advisable to briefly answer the latest argument of respondents.

On page two of their brief criticism is made of the statement in the opinion heretofore rendered where it is said 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.”

An examination of the evidence shows that this Court was absolutely right in making the foregoing statement. There is not in this entire record a scintilla of evidence that shows, or ‘tends to show, that prior to or after the transaction here involved Mr. Giles ever signed or was ever authorized to sign his wife’s name to any written instrument.

It is the apparent position of respondents that because Mr. Giles operated his wife’s farm and used the water represented by the certificates of stock belonging to his wife, he thereby acquired a right to mortgage or sell the farm and water stock. The fact that Josie’s husband operated the farm and cared for her sheep does not justify the conclusion that Mr. Giles had either apparent or implied authority to hypothecate the shares of water stock.

“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 himself out as possessing.”
2 Am. Jur. 83, and cases there cited.

“The apparent or implied authority of an agent cannot be so extended as to permit him to depart from the usual manner of

accomplishing what he is employed to effect. Nor can he enlarge his powers by unauthorized representations and promises. . . . Moreover the apparent authority for which the principal may be liable must be traceable to him and cannot be established solely by the actions and conduct of the agent; the principal is only liable for that appearance of authority caused by himself. . . . Furthermore, a party dealing with an agent must prove that the facts giving color to the agency were known to him when he dealt with the agent and that he believed the agent was acting within his authority. If he has no knowledge of such facts he does not act in reliance upon them and is in no position to claim anything on account of them."

2 Am. Jur. 85.

"**Authority conferred on an agent to sell, though accompanied with the possession of the property to be sold, confers no actual or ostensible authority to apply or transfer the property in payment of his own debt, and one who so takes the property, though in good faith, cannot ordinarily hold the same against the principal.**"

2 Am. Jur. 97.

"It is also accepted, that an agent is not authorized to pledge the property, goods or securities of his principal merely because he is authorized to sell them."

2 Am. Jur. 98.

An application of any one of the foregoing principles to the facts in this case will defeat the claim of the bank to a lien on the water stock in question. All of the evidence affirmatively shows that Harold

Giles did not have authority to hypothecate the stock; nor is there any evidence which calls for the application of the doctrine of implied or ostensible authority of an agent to bind the principal, or that the bank relied upon anything that Josie had done or failed to do which was calculated to mislead the bank into the belief that Mr. Giles had authority to hypothecate the stock. The note which the bank claims is secured by the stock, is the note of Mr. Giles. Moreover, the language of

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

provides that a certificate of capital stock in a corporation may be transferred only,

“(1) By delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby or

(2) By delivery of the certificate and a separate document containing a written assignment, and the assignment or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.”

The foregoing provisions are as clear as the English language can make them to the effect that shares of stock cannot be transferred by parol. The owner of the stock must sign his name, indicating an intention to dispose thereof or some interest therein. In such particular the transfer of stock is similar to the transfer of real estate. In the absence of a written instrument signed by the party to be bound, an attempted transfer is a nullity.

Such provisions dispose of the claim of the bank to a lien on Certificate No. 68. Josie Baird (Giles) was the owner, and apparent owner, of that certificate. She did not endorse that certificate. She made no written assignment thereof nor gave to anyone a power of attorney to transfer the same.

It is argued that other provisions of Chapter 3 tend to modify the provisions of Section 18-3-1. We can find no language in the other sections of that chapter which support such contention. There are other provisions of the chapter which may defeat a claimant to stock even though there has been a compliance with Section 18-3-1. Under the provisions of Section 18-3-7

there is granted the right to rescind notwithstanding there has been an endorsement

“where the endorsement or delivery was procured by fraud or duress or if the delivery of a certificate was made without authority from the owner, unless the certificate has been transferred to a purchaser for value in good faith without notice of any fact making the transfer wrongful, or the injured person has elected to waive the injury or has been guilty of laches in endeavoring to enforce his rights.”

As to Certificate No. 64 it will be noted that under the provision of

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

Josie had a right to rescind the action of her husband unless the bank was a purchaser for value in good faith without notice of any facts making the transfer wrongful, or unless she elected to waive the injury or was guilty of laches in endeavoring to enforce her right.

The opinion of this Court to the effect that the bank had notice of facts that preclude the said bank

from claiming that it acted in good faith is in accord with the repeated holdings of this Court and with the law as announced by the authorities generally. One who has notice or knowledge of facts which if followed up would lead to the acquiring of knowledge of the ultimate fact, may not claim that he was without knowledge of such ultimate fact.

Reese-Howell Co. v. Brown, 48 Utah 142;
158 P. 684.

Salt Lake City v. Salt Lake Investment
Co. 43 Utah 183; 134 P. 603.

Gibson v. Jensen, 48 Utah 244; 158 P. 426.

Wright v. Bailey, 45 Utah 584; 147 P. 899.

The bank was familiar with the signatures of both Mr. and Mrs. Giles. They both drew checks on the bank. The bank is thus chargeable with knowledge of the fact that the signature on one of the certificates was not the signature of Mrs. Giles, the owner of the stock. There was no witness to the purported signature of Josie Baird Giles on either of the certificates. The two certificates were delivered to the bank at the same time. If such facts did not put the bank on notice that there was probably something wrong about the right of Giles to hypothecate the stock, it is difficult to conceive of a state of facts short of actual knowledge that would have that result.

The cases of Brown v. Wright and Garfield Banking Co. v. Argyle cited by respondents recognize the general rule. The facts in those cases are so unlike the facts in this case that neither of them lends support to the claim that respondent bank was a purchaser in good faith without notice of the lack of authority of Mr. Giles to hypothecate the stock, nor is there any evidence in this case tending to show that Josie waived her right to the stock

freed from the claimed lien of the bank, or that she was guilty of any laches. When she returned to Utah soon after she learned from her mother that the bank held the stock, she went to the bank and was informed that the stock was held by the Federal Reserve Bank. She then went to the Federal Reserve Bank and asked to see the certificates but the bank informed her that they were in the vault and she could not see them. She then informed the bank that she had never signed the certificates. Tr. 255; Ab. 168.

Neither the Federal Reserve Bank nor the Bank of Heber City loaned any money on the certificates after Josie informed them of her claim to the stock freed from any claim of the banks. Respondents seem to claim something because Josie did not make a formal demand for the certificates. Having asked for and been denied the opportunity to see the certificates, and having informed the bank that she did not sign the same, such statements clearly constituted notice to the bank that she claimed the certificates. Moreover, a demand would have been useless and therefore unnecessary. The law does not require the doing of a useless thing.

VanDyke v. Ogden Savings Bank, 48 Utah
606; 161 P. 50.

Pool v. Motter, 55 Utah 288; 185 P. 714.

Cummings et ux v. Nielsen et al, 42 Utah
169; 129 P. 619.

Obrecht v. Land and Water Co., 44 Utah
270; 140 P. 117.

The statement is made on page four of respondents' brief that "it may be held without undue stretching of the facts that Josie Giles and her husband, Harold Giles, were partners; . . . that Mr. Giles had full power to handle all property and business of

Josie; . . . that borrowing money on security was a regular practice of Harold Giles from the day of marrying Josie Baird in 1924 to the time of their divorce in 1934.”

The evidence does not support those statements. So far as appears, Harold never at any time either before or after the transaction here involved borrowed any money on the security of Josie's property. We do not know just what is meant by the statement that it does not require an undue stretching of the facts to conclude that Josie and her husband Harold were partners. It certainly would require an undue stretching of the evidence to find that a partnership existed between Josie and Harold. All that can be said under the evidence is that Harold operated the property belonging to Josie in about the same manner as any husband operates the property belonging to his wife where the husband is and the wife is not a farmer. It is quite apparent that Josie did not regard Harold as having any right to her property. When she sold her home and loaned the money to Harold she took a note as evidence of the loan.

It is said on page six of respondents' brief that because there was the following notation on the back of the note which Harold gave to Josie, “\$1505.35, Bank — 7th October,” that therefore Josie had complete knowledge of Harold's dealings. That Josie knew that Harold borrowed money from the bank is not questioned, but to say that she knew that Harold had hypothecated the stock, is to ignore the evidence and engage in pure speculation.

Contrary to the statement made by respondents on page six, it was \$1500.00 and not \$1505.35, that was paid to the bank on October 7, 1929. In any event, the fact that Harold paid some of the money loaned

to him by his wife, on his note at the bank does not even remotely tend to show that Josie authorized or knew that Harold had hypothecated her stock as security for the loan.

The inquiry is made on page seven of respondents' brief, "Why did she take a note from her husband, Harold Giles?" The answer to such inquiry is obvious. She took the note the same as any other person loaning money takes a note, namely, as evidence of the loan made to her husband and with the hope that sometime he would repay the money thus loaned to him.

Touching case No. 1410 Civil, it is again argued that George B. Stanley was not the attorney for Josie Baird Giles (Smith) and that the interest of Vernor E. Baird was and is not adverse to the interest of the Moultons. It is true that Mr. Stanley testified that Vernor employed him. However, he prepared the documents for both Vernor and Josie. The mere fact that Vernor made the arrangements with Mr. Stanley is not of controlling importance. Obviously Vernor could act for himself and Josie in employing an attorney to draw up the necessary documents to consummate the deal. The relation of client and attorney may be created by contract which is implied, as well as expressed. The services rendered by Mr. Stanley were as much for the benefit of Josie as for Vernor. Moreover, as we pointed out in our original brief (pages 43 and 44) if Mr. Stanley was not the agent for Josie, the note and mortgage were never delivered — never became the obligation of Vernor and no action can be maintained thereon.

On page eight of respondents' brief it is contended that this Court was in error when it said that

“George B. Stanley placed his clients’ property in the hands of third parties, to the clients’ detriment.”

Respondents then proceed to argue that there was no conflict of the interests of Vernor E. Baird and the Moultons. Such statement is made in the face of the fact that the Moultons in this very suit sought judgment against “Vernor E. Baird and Mary A. Baird his wife, for the principal sum of \$15,000.00, together with interest thereon at the rate of seven percent per annum from October 10, 1934 until paid. For the further sum of \$750.00 as and for attorneys’ fees,” for the foreclosure of the mortgage, and “for judgment and execution against the defendants Vernor E. Baird and Mary A. Baird his wife, for any deficiency which may remain after applying all of the proceeds from the sale of said premises, water rights and water stock properly applicable to the satisfaction of plaintiffs’ judgment.”

It would indeed be a new doctrine, to hold that there is no conflict of interest between plaintiffs who seek such a judgment and a defendant who may be compelled to satisfy such a judgment. But it is said on page nine of respondents’ brief that it was stipulated before the trial commenced that no deficiency judgment would be taken in the matter. We repeat what we said in our original brief, that there was no such stipulation, but apparently plaintiffs’ counsel realized that it would be unconscionable to receive full payment of a note for \$15,000.00 principal and several years’ interest when such note was bid in for only \$100.00. No such generosity was shown when the note was purchased and when the suit was brought, and the only reasonable conclusion permissible under the facts disclosed by this record is that no such concession was given because of a desire to accord to any of the defendants fair play

but was done in an attempt to cover up if possible, what had theretofore been done.

When Plaintiff Addison C. Moulton was being cross examined at the trial, he stated that he did not make any bid beyond \$100.00, and would have been a "damn fool" to bid against himself." (Tr. 396; Ab. 207).

On page nine of respondents' brief it is urged that because Josie signed a note as security for her husband, that therefore Mr. Stanley was at liberty to disregard his obligation to both Vernor and Josie. This too is a doctrine without support either in law or good morals. Nor will either Josie or Harold be released from paying their honest obligations by reason of the opinion heretofore rendered by this Court.

In their brief, exception is also taken to the statement of the Court's opinion wherein it said that

"but for the acts of Mr. Stanley, Vernor Baird's obligation to his sister would have been peaceably settled."

The evidence shows such statement to be in accord with the fact. Josie and Vernor had, according to all the evidence, agreed upon a settlement. Vernor was to have his note returned to him, and the property and water stock was to be conveyed to their mother. It is further said that

"there is nothing in the record to show they were not peaceably settled."

No exception is or can be successfully taken to the further language in the opinion of the Court wherein it is said:

"Instead the Bairds are forced through a law suit with strangers to the transaction,

simply because the attorney upon whom Mr. Baird relied, instead of looking after his client's interests, by taking advantage of certain legal processes, placed his client's property in the hands of third parties to the client's detriment."

It might well be added that if the present clients of Mr. Stanley shall prevail, Vernor Baird may well be called upon to respond in damages because of the warranties contained in the deed which he executed and delivered to his mother.

It is finally suggested that because Vernor Baird was out with sheep and did not return until some time after the trial began, that therefore "Vernor had no interest in the trial and the other defendants were hopeful that he might show up to testify for them." Here again respondents seem to contend that Vernor was not at all concerned as to whether or not his agreement with Josie and his mother should be held for naught; whether a deficiency judgment which might run into thousands of dollars might be rendered against him and his wife, or whether he should be compelled to make good the warranties contained in the deed to his mother.

If Vernor was so dumb as to be unconcerned about such matters it would seem a proceeding against him could be had only through a guardian. We had always understood the law to be that a party litigant has a right to appear by counsel and if such a party finds it impossible or inconvenient, or if for any other reason he chooses not to attend court throughout the trial, such fact is not evidence that his cause should fail.

Respondents are likewise in error when they say on page ten of their brief that George B. Stanley was

still representing Vernor E. Baird on February 3, 1938. Mr. Stanley testified, Tr. 402; Ab. 209: "I do not know whether I was his attorney on February 3, 1938, because the work was not done at his request but for his benefit. He come to get the deeds." The fact that Vernor called for a deed does not, in the light of the evidence in this case, justify the conclusion that Mr. Stanley was not the attorney for Vernor in the transaction here involved. Mr. Stanley admits that he was.

In their brief, on page nine thereof, respondents again criticise the action of J. Rulon Morgan for preparing the documents necessary to consummate the agreement theretofore had between Josie, Vernor and his mother. In our original brief we have discussed this phase of the case, and no useful purpose can be served by enlarging upon what is there stated.

The petition for rehearing should be denied.

Respectfully submitted,

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J. RULON MORGAN,

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and Appellants.