

1956

# Marian S. Goeltz v. Continental Bank and Trust Company : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

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

Owen, Ward, Sheffield and Greenwood; Attorneys for Respondent;

---

## Recommended Citation

Brief of Respondent, *Goeltz v. Continental Bank and Trust Co.*, No. 8408 (Utah Supreme Court, 1956).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2439](https://digitalcommons.law.byu.edu/uofu_sc1/2439)

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

---

---

# IN THE SUPREME COURT OF THE STATE OF UTAH

MARIAN S. GOELTZ,  
*Plaintiff and Respondent,*  
vs.  
CONTINENTAL BANK AND TRUST  
COMPANY,  
*Defendant and Appellant.*

Case No.  
8408

FILED  
FEB 17 1950  
Clerk, Supreme Court, Utah  
**Respondent's Brief**

OWEN, WARD, SHEFFIELD  
and GREENWOOD

*Attorneys for Respondent*

---

---

## TABLE OF CONTENTS

	Page
ADDITIONAL STATEMENT OF FACTS .....	1
STATEMENT OF POINTS .....	4
ARGUMENT: .....	5
Point I.—The statute of limitations has no application to this case. ....	5
Point II.—There was no error on the part of the Court in refusing to allow Defendant bank to amend its answer to plead the statute of limitations. ....	8
Point III.—Plaintiff was in no way estopped to deny the validity of the pledge of the Knickerbocker Fund stock. ....	13
(A) The forgery on the other stock certificates pledged simultaneously and the forgeries on the promissory notes were patent. ....	13
(B) The trial court found against the defendant factually on the issue of notice as to defects in the transaction, and that finding is not reviewable on the appeal as to sufficiency of evidence or facts upon which based. ....	14
(C) The defendant bank was not an innocent party in this transaction entitled to rely upon the doctrine of a claimed estoppel. ....	15
(D) The defendant failed to establish that it was a holder for value without notice of the Knickerbocker Fund certificate. ....	17
(E) The Knickerbocker Fund certificate is not one of those in the possession of the de- fendant which plaintiff sued to recover. ....	17
Point IV.—There is no merit to appellant's contention that it had no notice of infirmity in the Knickerbocker Fund Certificate, nor in the assertion of this point on appeal. ....	18
CONCLUSION .....	19

plaintiff had been forged. These stocks were: Knickerbocker Fund, Mountain Fuel Supply Co., and Commercial Credit Co.

The signature of the plaintiff on the earlier stock certificates had also been forged with the exception of the signature on one stock certificate. All of the transactions concerning the loans and pledge of stock occurred between the bank and Francis B. Goeltz without any knowledge upon the part of the plaintiff, and the money realized from the loans was credited to the account of Francis B. Goeltz at said bank. These stocks had been wrongfully removed from Ure, Pett & Morris by Francis B. Goeltz, where they had been deposited by the plaintiff to her own account.

Plaintiff discovered the facts surrounding the loans and pledge of stock much later, (R. 52,-53) and immediately upon discovery, went to the Bank and demanded her stock and indicated to the Bank that the pledge was entirely wrongful, (R. 53,-58) and that the signatures on the notes purporting to be hers, were in fact forgeries. (R. 53-58)

The bank refused to return the stock to her on demand. The plaintiff had in the interim sold the stock before she knew of its pledge to the bank, and because of the economic compulsion involved and the advice received from her economic adviser which had led to the sale, found herself in a position where

she could not otherwise meet her contractual obligation than by consenting to substitute other stock for the pledged stock which the bank required of her. She consented only under the pressure of the situation and because of the economic compulsion involved, and protested that the bank had no right to make such demand, and only upon the understanding with the bank that she reserved all rights in the stock and was allowing the bank to hold the stock only under protest. This was fully understood by the bank . (R.51-58) These stocks were Goodyear Tire & Rubber Co. and Douglas Aircraft Co. stock.

Thereafter the bank refused to return the stock to the plaintiff, and indicated to her that they would sell the same to realize on the pledge to reimburse for the loans which had not been repaid. (R. 59)

At the time a deposition was taken the plaintiff was unable to locate her records of the deposit of the original stocks with Ure, Pett & Morris and refresh her memory concerning their deposit several years earlier with that brokerage, but indicated that she thought the stocks had been endorsed by her prior to being placed with Ure, Pett & Morris, although she expressed doubt that she had signed them all. Subsequently she located some old stock records and became convinced that she had not endorsed at least one of the certificates since it had been acquired

subsequent to the original deposit. She made a full and complete explanation of these circumstances to the court, and indicated that her best recollection therefore was that if her signature was on that particular stock certificate, that it had been placed there by someone else, and without her authorization. (R. 50) Subsequently the stock certificates involved, or photostatic copies thereof, were introduced, and two of the three bore signatures that in no way corresponded with the signature of the plaintiff, and were, in fact, obvious forgeries, apparent to anyone. (R. 137, 138) One signature in all the documents involved was a bona fide signature of the plaintiff, and was so patently different from the others as to leave no doubt as to the fact that they were not signed by the same person. Ex. 1, 2, 14, 15, 16.

### **STATEMENT OF POINTS**

- I. The statute of limitations has no application to this case.**
- II. There was no error on the part of the Court in refusing to allow Defendant bank to amend its answer to plead the statute of limitations.**
- III. Plaintiff was in no way estopped to deny the validity of the pledge of the Knickerbocker Fund stock.**
  - (A) The forgery on the other stock certificates pledged simultaneously and the forgeries on the promissory notes were patent.**
  - (B) The trial court found against the defendant factually on the issue of notice as to defects in the trans-**

**action, and that finding is not reviewable on this appeal as to sufficiency of evidence or facts upon which based.**

**(C) The defendant bank was not an innocent party in this transaction entitled to rely upon the doctrine of a claimed estoppel.**

**(D) The defendant failed to establish that it was a holder for value without notice of the Knickerbocker Fund certificate.**

**(E) The Knickerbocker Fund certificate is not one of those in the possession of the defendant which plaintiff sued to recover.**

**IV. There is no merit to appellant's contention that it had no notice of infirmity in the Knickerbocker Fund Certificate, nor in the assertion of this point on appeal.**

### **Point I.**

**The statute of limitations has no application to this case.**

Plaintiff's complaint sets forth the fact that the stocks wrongfully retained by the defendant were the stocks which had been substituted, under protest, for the earlier and illegally pledged stocks. The complaint alleges that the demand by the defendant that such stocks be substituted was wrongful that the assertion by the bank that they would retain those stocks and not return them to the plaintiff was wrongful, and that its refusal to return them to the plaintiff was wrongful, as were the threats to dispose of the stock to realize upon them as security. (R. 1-3)

The suit was for the specific purpose of recovering from the defendant the stocks which it held, that is, 6 shares of Douglas Aircraft Company Stock and 25 shares of Goodyear Tire and Rubber Company stock.

The only way in which the stock formerly pledged wrongfully by Francis B. Goeltz appears in the picture is by reason of the fact that a review of the circumstances surrounding the pledge of that stock was necessary in order to determine whether the defendant had a right to hold the substituted stock based upon its claim that the earlier stock had been rightfully pledged. The court found that the bank had no right to the original stock, hence it had no right to claim the subsequently acquired stock.

The time element which is involved can only be measured from the date of the subsequent acquisition of stock, that is, the Douglas Aircraft and the Goodyear stock. Since that acquisition and detention was without right, based as it was upon the wrongful possession of the original stock, the subsequently acquired stock was also wrongfully acquired and wrongfully held, and the demand by the bank that the stock be pledged in exchange for the prior stock was wrongful, as was its subsequent retention by the bank and the refusal to return it.

Thus, this was not a suit to recover stock in the



possession of a converter for a period in excess of the Statute of Limitations, but one for the return of stock wrongfully held for a briefer period, and based upon their wrongful act in requiring the deposit of the stock and their wrongful detention of it thereafter. No claim is made by the defendant that the Douglas and Goodyear stock had been held for a period in excess of the limitations period, nor is such the case. It is the subsequent wrongful detention of that stock which is the issue of this case.

In fact, the action could not be one for the return of the stock first wrongfully held by the bank, that is, the stock wrongfully pledged by Francis B. Goeltz, since that stock was returned to plaintiff under circumstances heretofore indicated.

Defendant in its argument loses sight of the wrongful acts complained of in its argument seeking to date the period of limitations from an earlier wrongful act of detention of other stock.

The defendant had no right to the original stock because of the fact of its wrongful pledge as found by the court, and since defendant had no right in the original stock, it had no right to demand of plaintiff that she substitute other stock, and no right to retain such other stock. The detention of the subsequent stock was a separate and distinct wrongful act, and one which plaintiff sued to establish and recover for.

The basis for examination into the original pledge was for the purpose of determining whether defendant could rightfully insist upon the substitution of other stock and the retention of that stock. It has no basis whatsoever in the determination of the period of limitations. The true issue involved, that is, that defendant had no right to retain the subsequent stock was found factually in favor of the plaintiff. It was determined by the court that possession by the bank of the original stock was wrongful and that they were charged with notice of the defect in their holding, hence they had no right to hold the stock later acquired.

## Point II.

**There was no error on the part of the Court in refusing to allow Defendant bank to amend its answer to plead the statute of limitations.**

Defendant makes much of the fact that there was a change in testimony of the plaintiff between the time of the taking of her deposition in this matter, and the time of trial. It is true, that at the deposition Mrs. Goeltz testified that she had signed all three certificates, she thought. She did express doubt that she had signed some stocks (Dep. 22). She indicated also, that it was only the stock in her original folio which she had received from an inheritance which she had signed (Dep. 4, 5, 22). At that time she had not had the opportunity to review the old files and

records concerning the original deposit with Ure, Pett & Morris, to determine which stocks had been in the original folio. At the trial she made it entirely clear that an examination and search of her records on the subject revealed that at least one of the three stocks had not been in the original investment folio and hence had not been signed by her. (R. 50) She had no other source of reference at that time, and her testimony on this score was entirely substantiated by the stock certificates when they were produced. (R. 134-138 Ex. 14, 15, 16) Two of the certificates were not signed by her, and had been no part of the original folio.

The bank had full knowledge of the time at which Francis B. Goeltz had pledged the original stocks in security of a loan from that bank, hence the information was entirely available to the bank at all times from which it could and should have asserted its claimed defense of statute of limitations. Nothing about the testimony of the plaintiff at the time of the deposition lulled the defendant into failing to assert this defense. The plaintiff had no accurate information as to exactly when Francis B. Goeltz pledged the stocks, even at the time of the filing of her complaint. This was information solely within the possession of the defendant bank so far as plaintiff was concerned.

The statute of limitations as a defense was available to the defendant to plead as a bar, if it deemed

it applicable, at the time it filed its answer. Nothing about the testimony of plaintiff at the deposition changed that picture. The fact that plaintiff did or did not sign the stock certificates did not affect the defense of limitations which could have been asserted by the defendant at the time of filing its answer. In fact, defendant raised the defense of laches and certainly had in mind this general problem at the time of filing its answer.

There is absolutely nothing about the facts of this case which would in any way justify the inclusion of the defense of limitations after the trial of the case. The issue could and should have been raised in defendant's pleadings well in advance of the trial in order the plaintiff have the opportunity of meeting the issue. Instead, the issue is sought belatedly to be raised after all of the evidence was in.

Plaintiff feels that this issue of amendment to plead the Statute of Limitations is fairly represented by the following quotations from 34 Am. Jur. 351, Sec. 447:

“ . . . where the defendant does not plead the statute of limitations, an order made after the trial granting the parties the privilege of amending their pleadings to conform to the facts proved does not entitle the defendant to file an answer pleading the statute, and if filed, the court may strike such answer plead-

ing the statute, it appearing that the original did not amount to a pleading of the statute and was insufficient to furnish the basis for such an amendment.”

and at Section 448:

“In general, the refusal of permission to plead the bar of the statute of limitations by way of amendment to an answer already filed will not be regarded as an abuse of discretion, unless it is made to appear that the amendment will be in furtherance of justice. Because of the strict nature of this defense, it should be pleaded in the first instance, and allowed no grace of right thereafter, where it is claimed solely as a legal advantage; and hence, the refusal to allow an amendment pleading the statute of limitations is within the discretion of the court and will not ordinarily be disturbed.”

To like effect see *City of St. Paul v. Bielenberg* 164 Minn. 72, 204 N.W. 544; *Steiner v. Amsel*, 18 Cal. 2d 48, 112 P. 2d. 635.

Certainly the furtherance of justice would not have been served by allowing the defendant in the present instance to plead and rely upon the statute of limitations in the face of the fact that a patent forgery existed of which the defendant was charged with notice.

The evidence of the forgery as characterized by

the authority on the subject, Mr. Goddard, was such that anyone should have known of its being a forgery, without special training. Council for Defendant stipulated that Mr. Goddard would testify "anyone can see it." (R. 138) The defendant has failed completely and utterly to indicate in any way whatsoever how the interests of justice will be advanced and aided by his being allowed to belatedly impose this asserted defense.

Practically, the belated effort to insert the statute of limitations as a defense after all evidence on both sides had been introduced stemmed from the fact that defendant after hearing the evidence and observing the exhibits realized the futility of its position relative to any substantive defenses in the case, and seized upon the statute of limitations as a last straw, belated defense to the inevitable.

Certainly the factual picture here involved, that is, an innocent plaintiff and a defendant charged with knowledge, as found by the court, does not justify the reversal of the trier of facts on the basis of an abuse of discretion, which is necessarily the test required to be met.

It is respectfully submitted, that the defendant showed no ground for the amendment of his answer to justify the same in the furtherance of justice; that in fact no such justification exists; that plaintiff

established on the contrary an obvious and patent forgery observable to the untrained as well as the trained person; that defendant was charged with knowledge of the forgery, and could not blind itself to that forgery; that defendant was bound thereby and wrongfully demanded a substitution of stocks and a wrongful detention of the same, and that plaintiff is entitled to the return of the same. That the defendant has a judgment against the true wrongdoer—Francis B. Goeltz, and should be required to pursue that debtor.

### Point III

**Plaintiff was in no way estopped to deny the validity of the pledge of the Knickerbocker Fund stock.**

There are several reasons why the argument of the defendant at point three of its brief is without merit, which reasons are hereinafter treated as subdivisions hereof.

**(A). The forgery on the other stock certificates pledged simultaneously and the forgeries on the promissory notes were patent.**

One basis upon which the defendant in this case is stripped of any right or ability to claim the benefit of the Knickerbocker Fund stock certificate which bore the signature of Marian Story Goeltz, is the manner in which the possession of that certificate was obtained.

This is well illustrated by the colloquy between court and counsel (R. 123), wherein the court said:

Court: “. . . But if he brings in three of them and one we say is a forgery, does that one apple spoil the whole basket?”

Mr. Billings: “I would say it did, if the forgery was so apparent as to put us on notice on those two.”

Actually, the factual picture is much more favorable to the plaintiff than even this statement, since the signature on the notes were patent forgeries—characterized as very crude by Mr. Goddard (R. 86) and “obvious” (R. 88), and the testimony of Mr. Goddard as stipulated by counsel (R. 138) with reference to the forged signatures on the stock certificates “that anyone can see it,” and the Knickerbocker signature was genuine signature.

In view of this testimony and stipulation, it is difficult to see how the defendant can now claim the benefit of that pledge, obtained as it was in conjunction with obvious forgeries.

**(B) The trial court found against the defendant factually on the issue of notice as to defects in the transaction, and that finding is not reviewable on this appeal as to sufficiency of evidence or facts upon which based.**

The trial court found that the defendant was charged with notice of the forgery of plaintiff's name



on the other stock certificates and promissory notes. The defendant made no objection to the findings as entered by the trial court below, at which time he could have challenged the sufficiency of the evidence, the form of the finding, or the legal propriety thereof. He did none of these things. Nor did the defendant see fit to set out in his statement of points in this case any point challenging this or other findings so that a review thereof might be had. This it was obliged to do under Rule 75 (d), since there was not a designation for inclusion of the complete record and all proceedings. Nor did the defendant see fit to raise the issue of sufficiency of the evidence to sustain the findings by any designation of such an issue in its brief.

Respondent therefore takes the position that the bank has no issue before the court under this statement of point relied upon which is reviewable in any way in which the bank could be granted any relief.

**(C) The defendant bank was not an innocent part in this transaction entitled to rely upon the doctrine of a claimed estoppel.**

The defendant was not an innocent party in the present case. The court made an express finding that the defendant was charged with notice, as indicated above. The fact that the bank was not an innocent party has been established, and that issue is

at rest for the reasons heretofore indicated under (B) above.

The very case relied upon by the defendant and quoted at length in its brief at page 21, *Adams v. Silver Shield Min. & Co.*, 82 Ut. 586, 21 P. 2d 886, which incidentally held against the claimed holder for value, and hence against the position of the defendant in the present case, indicates in the quotation used by the defendant in its brief, the basis for estoppel in a proper case, that is: "Where one of two innocent people must suffer, the true owner, by delivering the certificate indorsed in blank has enabled the third party to perpetrate the wrong and therefore should be estopped from asserting his ownership."

Since the bank was not an innocent party to the transaction by which it came into the possession of the Knickerbocker certificate, it is not entitled to the benefit of any estoppel as against the true innocent party in the proceedings, that is, the plaintiff.

In the case of *Malia v. Giles*, (Utah), 114 P. 2d 208, a case wherein the husband had pledged stocks belonging to his wife in security of his obligation and had forged her signature thereon, the court held that the pledgee could not rely upon such a pledge since husband could acquire no authority to forge his wife's name. Likewise here, the bank cannot rely upon forged signatures, and with notice of the forged

signatures rely upon a single valid signature in a tainted transaction.

**(D) The defendant failed to establish that it was a holder for value without notice of the Knickerbocker Fund certificate.**

Before the defendant could prevail in any event on a theory of estoppel, it would be incumbent upon defendant to establish affirmatively that it was a bona fide holder for value without notice of defects. This is an affirmative burden which the defendant was bound to sustain. *West Coalinga Oil Field Corp. v. Robinson*, (Cal.), 194 P. 2d 554; *Thomas v. Atkins*, 52 F. Supp. 405; *Bank of U. S. v. Cooper Business Corp.*, 261 N. Y. S. 687; *First National Bank v. Van Horn*, 2 S. W. 2d 333.

Defendant not only failed to sustain such a burden, but to the contrary, the findings of the court were against the defendant on this issue.

**(E) The Knickerbocker Fund certificate is not one of those in the possession of the defendant which plaintiff sued to recover.**

Much of what has been said under Point I, is applicable to the argument which respondent makes at this point. That is, the bank does not have possession of the Knickerbocker stock, the suit was for the recovery of the Goodyear and Douglas Aircraft stocks,

and the assertion of this claim by the defendant at this point loses sight of the true nature of the suit.

**IV. There is no merit to appellant's contention that it had no notice of infirmity in the Knickerbocker Fund certificate, nor in the assertion of this point on appeal.**

What has been said with reference to point III heretofore provides a complete answer to Point IV of appellant's brief, and reference thereto is made, particularly in answer to the argument as to whether there is a dissimilarity in the signatures sufficient to put a person of affairs on notice. Point III (A). The testimony there set out and the balance of the testimony given by Mr. Goddard certainly removes any doubt in this respect, as does even a casual examination of the questioned documents.

What has been said at point III (B) and (C) of respondent's brief with respect to the fact that the findings in this matter are at rest, is also applicable to point IV sought to be raised by the appellant, and is also conclusive of this issue, and provides a full and complete answer to it.

As an answer to the assertions of counsel that there is no evidence but that defendant treated the pledged stock as that of plaintiff's husband, it does not appear that this is a matter which could or should be determinative of the case. However, far from indicating that the defendant treated the pledged

stock as that of the husband, the affidavit of the Vice-President of the bank in support of a Motion for Summary Judgment in this case certainly indicates to the contrary, as do par. 1 of Defendant's first Counterclaim, par. 1 of its Second Counterclaim and par. 1 of its Third Counterclaim, and the prayer for relief against the plaintiff. (R. 6, 7, 8.)

### CONCLUSION

It is respectfully submitted that the trial court after having carefully followed the evidence in this case and the exhibits thereof, made its findings and decision based upon a fully sustainable view of the case, and a correct view of the case. That none of the points raised by the appellant on this appeal have merit. That the case does complete and substantial justice to all parties, as decided by the trial court, and places the burden upon the bank to proceed against the proper culprit for the collection of the money he owes the bank, and it relieves a totally innocent party and protects her rights. The appellant has failed to attack the findings of the court on any of the issues that are involved, that those findings thus are the law of the case, and the defendant is bound by them, and that the judgment should be affirmed by this court.

Respectfully submitted  
OWEN, WARD, SHEFFIELD  
and GREENWOOD

*Attorneys for Respondent*