

1956

## Q. T. Shepherd v. Max D. Holbrook and Blanche C. Holbrook : Brief of Respondents

Utah Supreme Court

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

UNIVERSITY, UTAH

of the

STATE OF UTAH

JAN 28 1957

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Q. T. SHEPHERD,

*Plaintiff and Appellant,*

vs.

MAX B. HOLBROOK, and  
BLANCHE C. HOLBROOK,  
his wife,

*Defendants and Respondents.*

} Case No. 8549

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BRIEF OF RESPONDENTS

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ON APPEAL FROM THE DISTRICT COURT  
OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF UTAH, IN AND FOR  
MILLARD COUNTY

HON. WILL L. HOYT, Judge

ALBERT J. COLTON  
of FABIAN, CLENDENIN,  
MOFFAT & MABEY  
*Attorneys for Respondent*

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

Q. T. SHEPHERD,  
*Plaintiff and Appellant,*

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BLANCHE C. HOLBROOK,  
his wife,

*Defendants and Respondents.*

} Case No. 8549

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BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

The respondents here accept the statement of plaintiff and appellant Shepherd with three significant qualifications: (1) Contrary to appellant's brief the judgment of the trial court was not a cryptic one sentence, but is set out in five paragraphs, (R. p 15-16) and was based upon extensive findings of fact and conclusions of law (R. p 9-14). (2) The effect of Paragraph 10 of the agreement between respondents Holbrook and the Barkers (Ex-

hibit 1) is more clearly understood if set forth in full. It provides:

“10. The buyers agree to farm and operate the chicken farm near Topaz, Utah in an efficient, economical and husbandlike manner and to maintain at all times, *until the sellers are paid in full*, approximately 8,000 laying chickens.” (Emphasis added)

(3) Respondents have not only contended that legal title is in them as to the chickens subject to the contract of sale, but they have also asserted that in any event they hold a security interest in the chickens on the ranch, of which plaintiff had knowledge (Amended Answer, 4th Defense, R. p 8).

## STATEMENT OF FACTS

Certain modifications of appellant Shepherd's statement of facts are necessary. The respondents dispute that three-fourths ( $\frac{3}{4}$ ) of the purchase price was paid by buyers as down payment on the ranch. This statement is based upon an incidental self-serving statement of the buyer unsupported by any substantial evidence. (R. p 79; Tr. p 63)

It should also be noted that the monthly payments to be made by the buyer on the unpaid balance of \$12,266.55, plus interest were to be a minimum

of \$100 a month and not wholly out of "net income" as indicated in appellant's brief.

Moreover, the assertion that appellant did "on the faith of the note and chattel mortgage" extend further credit to Barker is unsupported by the evidence and irrelevant here. Appellant in fact never made any attempt to tie subsequent credit granted to Barker to his chattel mortgage by which he attempted to secure previous credit advances.

## STATEMENT OF POINTS

### POINT I.

APPELLANT TOOK HIS MORTGAGE SUBJECT TO THE SECURITY INTERESTS OF RESPONDENTS.

### POINT II.

APPELLANT HAD NOTICE OF RESPONDENTS' SECURITY INTEREST.

### POINT III.

APPELLANT'S MORTGAGE IS SUBORDINATE TO RESPONDENTS' INTEREST BECAUSE IT WAS EXECUTED FOR PAST CONSIDERATION.

### POINT IV.

THERE WAS NO ERROR AS TO QUESTIONS OF EVIDENCE.

### POINT V.

THERE IS NO RIGHT OF SALE WHICH EFFECTS THE PRIORITY OF APPELLANT AND RESPONDENTS.

## ARGUMENT

### POINT I.

APPELLANT TOOK HIS MORTGAGE SUBJECT TO THE SECURITY INTERESTS OF RESPONDENTS.

No one has ever disputed the validity of appellant's mortgage. The sole issue in this lawsuit was whether this mortgage was subordinate to the interest of the Holbrooks in the same chickens. Appellant devotes his argument to the location of that illusive concept "title" and thereby seeks to resolve this case on the basis of legal semantics. It would be better to return to basic fundamentals. It is our contention that it is unimportant where "title" to the chickens is, or whether respondents' interest is that of a conditional vendor or whether it is that of an equitable mortgagee. In *either* case appellant was a mortgagee with notice of this interest and took his interest subject to it.

As this court knows, sellers in the State of Utah, of both real and personal property, have shown marked preference for the use of title retaining techniques to give them security for their unpaid purchase price, rather than real or chattel mortgages. In the instant case, the Holbrooks sold a stocked chicken ranch (which obviously comprises both land and chickens.) There were 8,000 laying hens on the property at the time. These hens represented a substantial portion of the value of the property, not only because of their worth per unit,

but because together they constituted a going concern. The buyers gave the sellers certain real property as down payment and agreed to pay the unpaid balance of \$12,266.55, together with interest in minimum installment payments of \$100.00 per month. The buyer agreed by contract to keep the same number of chickens on the property at all times and the contract further provided that, in the event of default in payment by the buyers, the sellers could re-enter and take possession of the "premises".

Appellant contends this contract only gave the sellers the right to re-enter the ground. He springs on the use of the word "premises" and seeks to restrict this term to real property only. He argues that "premises" should be restricted in meaning so that the sellers' security was only that of returning to a denuded farm robbed of its principal asset. Buyer and seller alike admit that they intended no such restrictive interpretation and respondents vigorously maintain that the contract says no such thing.

It is well established that the meaning of the term "premises" is dependent on the circumstances in which it is used and has no fixed legal significance. *O'Connor v. Great Lakes Pipe Line Company*, (CCA 8, 1933) 63 Fed. 2nd, 523, 526. In *Bankers' Trust Company v. Maxson*, (1926) 100 N.J.E. 1, 134 Atlantic, 875, 878, the Court held that, whenever

a mortgage is made upon goods and chattels and the bill prays for the sale of the mortgaged premises, the "premises" mentioned would include both the real estate and the chattels described in the mortgage. As a Texas court has held, "the word premises has, in legal parlance, a meaning so broad and varied that its interpretation in a given case, is to a great extent governed by the context". *Comeaux v. State* (1931) 118 Tex. Cr. 223, 42 S.W. 2d 255, 258. See also *Leach Co. v. Trace* (1929) 199 Wis. 292, 226 N.W. 308 where a contract of sale of both real and personal property provided that title to the "premises" should not be vested in the buyer until payment. The court held that the seller retained an interest in the personal property superior to attaching creditors.

Not only did the buyer and seller not intend the term to be so restricted, but no person could, in the light of the general nature of the contract, reasonably think that a seller would so restrict his security. Such an interpretation ignores and makes unnecessary the covenant to maintain 8,000 birds at all times until the Holbrooks were paid in full. For what other purpose would such a clause appear in a contract?

It is submitted that the only reasonable interpretation to be placed on this contract was that the sellers reserved the right to resume possession of the ranch, chickens and all. This meaning is clear

regardless of where "title" to the chickens is or was.

As the contract was to run for many years beyond the life of a chicken, it was obvious that defendants may have had to resume possession of the ranch at a time when the original number had been replaced by other chickens. The buyer would have had to so replace them in order to comply with the covenant to maintain the same number of chickens.

But the fact remains that sellers reserved the right to repossess at any time on default as security for the unpaid purchase price. Whether we label this a conditional sale or an equitable mortgage, it is in any case, clearly a security interest reserved in the sellers.

As Shepherd concedes, what is covered by the contract depends on the intention of the parties as gathered from the language of the agreement considered with reference to the situations of the parties and their objects. (Appellant's Brief p. 8)

"In determining whether a transaction is a sale or a mortgage, the intention of the parties as ascertained from the whole transaction is controlling." 14 C.J.S. page 583.

"An instrument by which one party agrees to sell, and the other to purchase, certain personal property, and which provides that the vendor shall have a lien on the property until the purchase price is paid, is in the nature of a mortgage . . ." 14 C.J.S. page 586.

Here is an interest in the chickens which a court would unquestionably protect as between buyer and seller.

Now how does this security interest of defendants affect a third party? The trial court expressly found that a "reasonably prudent person in these circumstances would have made inquiry of defendants (the Holbrooks) as to the security interest of defendants in the chickens" (Finding of Fact #11). Assuming therefore that appellant had been a lender carefully examining title prior to making a loan, even *then*, the trial court has found that with the facts at his command he would have had notice of the Holbrook's interest imposed upon him as a matter of law.

But appellant does not even occupy this category. Shepherd, as a feed man, extended credit to the buyer. The amount of credit began to soar dangerously. As his position became more precarious, Shepherd sought desperately for a means of securing this past indebtedness.

Appellant at that time, as the trial court has found, *knew* that the buyers were purchasing the ranch on contract from the Holbrooks. (Finding of Fact #10) He examined the chattel mortgage records and found that the contract had not been filed. Despite appellant's knowledge of the existence of a contract and his familiarity with the poultry busi-

ness, and his admission that the poultry on a stocked turkey farm constitutes a substantial portion of the value of such farm (R. p 51; Tr p 35), he at no time inquired of the Holbrooks as to whether they had any interest in such property. Indeed, why should appellant have inquired? He was not carefully checking title prior to making a loan. He was a worried creditor happy to take whatever security he could get from a failing debtor and he finally succeeded in obtaining the chattel mortgage. Subsequently, he found what he felt was a sufficient ambiguity in respondents' asserted security interest that he thought would warrant litigation. But appellant himself admits that he was in no way induced by the alleged ambiguity to enter into the transaction. He claims that he had never read the contract. (The buyer testified that he had, in fact, shown the contract to plaintiff prior to the signing of the chattel mortgage with plaintiff. (R. p. 71-72; Tr. p. 55-56).

The basic issue of this action, then, resolves itself to this: Even assuming that legal "title" was not in respondents as to the replaced chickens, they clearly had an equitable security interest in these. What are their rights, as opposed to appellant, to the chickens where this security interest was not filed in accordance with the provisions of our chattel mortgage legislation?

## POINT II.

### APPELLANT HAD NOTICE OF RESPONDENTS' SECURITY INTEREST.

It is, of course, well established that the filing statutes only protect a subsequent mortgagee from previous unfiled mortgages if he is a mortgagee in good faith for value without notice. (*Volker Lumber Co. v. Utah and Oregon Lumber Company*, (1915) 45 Utah 603, 148 Pac. 365) ; *Deseret Bank v. Kidman*, (1903) 25 Utah 379, 71 Pac. 873. *Pulsipher v. Chinn*, (1927) 69 Utah 401, 255 Pac. 439). Plaintiff does not meet these requirements and thus does not receive the protection of the statute.

The trial court, in the light of all the evidence, found that "a reasonably prudent person in these circumstances would have made inquiry of defendants as to the security interest of defendants in the chickens". (Finding of Fact #11) By reason of this, the trial court has concluded that appellant had constructive notice of the interest of defendants. (Conclusion of Law No. 1) This finding in itself subordinates appellant to the Holbrooks without any further discussion.

One court has summed up this situation admirably when it said:

On the other hand the proposition is established by an absolute unanimity of authority and is equally true both in its application

to constructive notice and to actual notice not proved by direct evidence but inferred from circumstances, that if the party obtains knowledge or information of facts tending to show the existence of a prior right in conflict with the interest which he is seeking to obtain, and which are sufficient to put a reasonably prudent man upon inquiry, then it may be a legitimate and perhaps even necessary inference that he acquired the further information which constitutes actual notice . . . finally, if it appears that the party has knowledge or information of facts sufficient to put a prudent man upon inquiry and that he wholly neglects to make any inquiry or, having begun it, fails to prosecute it in a reasonable manner, then also an inference of actual notice is necessary and absolute . . .

“How is Waddington’s action to be regarded in equity? He proceeded to close the transaction regardless of the information he had. His reason for doing so is plain. He was not making a loan on behalf of his company. He was getting security for a pre-existing debt and naturally would take a second mortgage if he could do no better. Knowledge of the prior mortgage did not deter him because he was seeking a lien upon the interest the mortgagor had in the property mortgaged, whatever that interest might be.” *Cambridge Production Credit Assn. v. Patrick* (Ohio) 1942), 45 NE 2d 751, 144 ALR 323.

### POINT III.

APPELLANT'S MORTGAGE IS SUBORDINATE TO RESPONDENTS' INTEREST BECAUSE IT WAS EXECUTED FOR PAST CONSIDERATION.

In addition to the above argument, it is well established that a mortgage for past consideration is subordinated to even nonrecord prior mortgagees.

Here as the trial Court has found, the buyers of the ranch, "at plaintiff's request and to evidence said existing indebtedness . . .", executed a note for \$4750.00 and "to secure said note, the Barkers executed to plaintiff a Crop and Chattel Mortgage". (Finding of Fact #9).

"A mortgage without consideration must yield to one given on good consideration. A subsequent mortgage taken in consideration of an antecedent debt is inferior to a prior mortgage regardless of whether or not the first mortgage was recorded." 14 Corpus Juris Secundum page 927.

"It is clear that a chattel mortgage given to secure a debt already owing by the mortgagor or by a third person is in all respects valid and binding as between the parties . . . A mortgagee taking a mortgage solely for an antecedent debt is, however, not deemed a bona fide purchaser or mortgagee for value. Such a mortgagee is not considered a mortgagee in good faith so as to be protected by the statutes requiring the filing and renewal of mortgages. He will take his mortgage subject to prior mortgages notwithstanding he has

no notice thereof and they are not filed or renewed as required by law." Eager, *The Law of Chattel Mortgages and Conditional Sales*, Dennis & Co. 1941, p. 47.

"According to the weight of authority, a mortgage for a pre-existing debt does not constitute the mortgagee a bona fide purchaser or mortgagee for value. . ." 10 Am. Jur. p. 852.

The United States Supreme Court has affirmed this principle with regard to chattel mortgages. (*People's Savings Bank v. Bates*, 120 U. S. 556, 30 Lawyer's Edition 754) In that case plaintiff took a chattel mortgage on February 7. On February 11 the defendant bank took a chattel mortgage to secure a certain past indebtedness of the debtor. Defendant bank filed its chattel mortgage prior to plaintiffs. The principal question to be decided was whether the defendant bank was a mortgagee in good faith and thus entitled to the protection of the filing statute. The defendant bank sought to apply cases applicable to negotiable instruments which held that the fact that the consideration was for past debts was not material. The United States Supreme Court expressly repudiated this and cited as the proper doctrine that "whatever the rule may be in the case of negotiable instruments, it is well settled that *the conveyance of lands or chattels as security for an antecedent debt will not operate as a purchase for value or defeat existing equities.*" (Page 758, emphasis added.)

It is obvious from these authorities that, whether or not plaintiff had actual or constructive notice in this case, he is precluded from asserting any priority because of the nature of the consideration which was the basis for his mortgage.

#### POINT IV.

THERE WAS NO ERROR AS TO QUESTIONS OF EVIDENCE.

Plaintiff expresses concern over the admission of certain testimony by the buyer and sellers as to their intent in making their contract and their understanding of its meaning. No one disputes the general rule that a document which is a full integration and is *clear and unequivocal* on its face cannot be varied by oral testimony as to the third party. But can anyone say that this document *clearly and unequivocally* provides that while the seller may re-enter the bare land and resume possession of it, that he would have no control over or rights to its principal asset, the chickens? It is submitted one cannot. To give plaintiff his fullest due, it can only be said that the contract is possibly ambiguous as to this point. (Although defendants do not concede that anyone applying common sense instead of tortuous legalism, could read this contract in its whole context, and believe that it did not give defendants the security they claim). Assuming *arguendo* some ambiguity, the trial court has found that plaintiff knew

of this contract and had constructive notice of the interest of defendants. It has found that a reasonably prudent person would have inquired of defendants as to their interests. Upon inquiry, defendants, (the sellers) would have told the inquirer what they thought the contract meant and what they intended it to mean. Nor would the buyer disagree — he also believed that the contract had only one meaning in this regard. Such testimony thus had direct bearing on the good faith of plaintiff, and of the nature of the notice he would have received if he had made inquiry.

In addition, let us assume that a third party “P” wishes to plan a course of conduct, the success of which is dependent upon the meaning of a writing between “X” and “Y” who are accessible to “P”. Although “X” and “Y” do not disagree at all as to the meaning of the writing, the writing is on its face ambiguous (i.e., it could reasonably be given one of two interpretations). Surely the third party cannot, to protect his own interests, place a diametrically opposite interpretation on the contract and then subordinate the rights of “X” and “Y” thereto!

If there had been disagreement between the contracting parties as to the meaning of a writing ambiguous on its face, then courts or third parties must look further in interpreting the document and

might have to rely upon legal presumptions. But, of course, this is just not the case here.

Plaintiff refers to Rule 1 of Section 19 of the Uniform Sales Act (Section 60-2-3 Utah Code Annotated 1953) to determine the intention of the parties here. First, it is questioned whether the sales act applies here — his contract was not essentially one for the sale of “goods”, nor is it severable. 2 Williston on Sales § 466 et seq; *Battle Creek etc. Co. v. Paramount Baking Co.*, (1943) 88 Utah 67, 39 p. 2d 323. Moreover the statute cited is prefaced by the words “unless a different intention appears”. It does *not* say “appears from a writing alone”. Here, clearly a different intention did appear. Intent, unless precluded by the parole evidence rule, (obviously not applicable here if ambiguity of the writing is conceded) is usually best shown by oral testimony. It is submitted that this statute would only apply in three instances: (1) where no reference at all to the disputed fact was made; (2) where the writing is ambiguous and the parties thereto disagree; (3) Where, for some reason, the parties have perpetuated a fraud on a third party. Clearly none of these apply here.

Even more clearly, in the light of these facts, the intent of the parties as to the meaning of the contract was of material assistance to the trial court in interpreting this ambiguous document. One the

testimony of the buyer and seller was received, the possible ambiguity disappeared. As plaintiff should reasonably have inquired of these parties, what he would have learned from such inquiry is of the greatest significance.

#### POINT V.

THERE IS NO RIGHT OF SALE WHICH EFFECTS THE PRIORITY OF APPELLANT AND RESPONDENTS.

The duty of the buyer to maintain at all times the same number of chickens on the property is coupled with the obvious fact that the life span of a laying hen is shorter than the term of the contract. This makes it obvious that the buyer would have to dispose of some chickens and replace them with others.

Appellant contends that this right of disposition makes defendants' rights to the chickens void as to appellant. This argument has two obvious defects. First, the authorities cited by plaintiff apply only to conditional sales contracts. Let us assume that in this case rather than use the drafting techniques actually applied, the respondents took a chattel mortgage on the chickens, which expressly covered replacement. Appellant certainly would not contend that the implied right to dispose of chickens in order to replace them deprives the first mortgagee of his priority as against a subsequent encumbrancer

with notice of this interest. Although not as artfully drafted, the instant contract creates, if nothing else, at least an equitable mortgage in the chickens and their replacements.

Second, the rule cited by appellant is taken from the Uniform Conditional Sales Act. On its face it applies only to "purchasers for value in the ordinary course of business." (Appellants brief, page 28). The rule is well established by the majority of decisions that the mere fact that a conditional buyer is authorized to resell his goods in the ordinary course of business does not make the sale an absolute one as far as his *creditors* are concerned. (See 47 Am. Jur., page 62) This court as early as 1894 made it clear that it adhered to this view. *Hirsch v. Steel* (1894) 10 Utah 18, 36 Pac. 49. As plaintiff was without question a creditor of the buyer, he comes within the rule and the arguments advanced by appellant are inapplicable.

### CONCLUSION

Appellant in his conclusion attempts to argue the equities of this case. It is submitted they are not convincing.

We have here a case where a buyer and seller employed counsel who, however inartistically, attempted to adapt the standard clauses of the Uniform Real Estate Contract to the sale of a stocked chicken ranch. There was never any question that

the parties intended the contract to cover the chickens and the additions to the standard form should make this clear to any third party with notice of it.

After five years during which respondent had not even been paid enough to meet the interest provided for in the contract, charity at last had to be tempered by reason and the sellers took steps to repossess the ranch and a cash settlement was made. Sellers returned to a badly under-stocked and run down ranch which they are now attempting to run.

Appellant knew of all of this, yet he seeks to take advantage of alleged verbal deficiencies subsequently ascertained to better his position. This attempt the trial court repudiated and it is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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