

1965

State of Utah, By and Through Its Road Commission v. Polly Thompson, Also Known as Polly Thompson Brittain, Utah Power & Light Company; Morgan Guaranty Trust Company of New York; A. P. Neilson and Lillie M. Neilson, His Wife; Gerhardt Drechsel and Erna A. Drechsel, His Wife; Ben H. Da Vis and Dorothy M. Davis, His Wife; Donald W. Layton and Helen D. Layton, His Wife; Mary Izetta Ogden Mchale; and Phyllis Lucille Moore (Defendants), Utah Power & Light Company and Morgan Guaranty Trust Company of New York (Appellants) Vs. A. P. Neilson and

Lillie M. Neilson, His Wife: Petition For Rehearing
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.F. Gerald Irvine and Robert B. Porter; Attorneys for Appellants

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AUG 25 1966

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,

Plaintiff,

vs.

POLLY THOMPSON, also known as POLLY THOMPSON BRITTAIN, UTAH POWER & LIGHT COMPANY; MORGAN GUARANTY TRUST COMPANY OF NEW YORK; A. P. NEILSON and LILLIE M. NEILSON, his wife; GERHARDT DRECHSEL and ERNA A. DRECHSEL, his wife; BEN H. DAVIS and DOROTHY M. DAVIS, his wife; DONALD W. LAYTON and HELEN D. LAYTON, his wife; MARY IZETTA OGDEN McHALE; and PHYLLIS LUCILLE MOORE,

Defendants.

Civil No. 10308

UTAH POWER & LIGHT COMPANY and MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Appellants,

vs.

A. P. NEILSON and LILLIE M. NEILSON, his wife,

Respondents.

PETITION FOR REHEARING

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NEILSON and LILLIE M. NEILSON, his
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A. DRECHSEL, his wife; BEN H. DAVIS
and DOROTHY M. DAVIS, his wife; DON-
ALD W. LAYTON and HELEN D. LAYTON,
his wife; MARY IZETTA OGDEN McHALE;
and PHYLLIS LUCILLE MOORE,

Defendants

UTAH POWER & LIGHT COMPANY and
MORGAN GUARANTY TRUST COMPANY
OF NEW YORK,

Appellants,

vs.

A. P. NEILSON and LILLIE M. NEILSON,
his wife,

Respondents.

Civil
No. 10308

PETITION FOR REHEARING

STATEMENT OF THE CASE

The State Road Commission of Utah sought to condemn a tract of land in Salt Lake County, Utah, and joined as defendants thereto the appellants, Utah Power & Light Company and its mortgagee, Morgan Guaranty Trust Company of New York, and the respondents, A. P.

Neilson and Lilly M. Neilson, his wife. The right of the Commission to take the property and the amount offered therefor is not in dispute and the only issue raised concerned the ownership of the property and the right to the proceeds.

It must be kept in mind that the appellants and the respondents were both defendants before the trial court. Following the filing of a stipulation as to the facts with the trial court, it found for the defendants, A. P. Neilson and his wife, and this judgment has now been affirmed on appeal.

Appellants, Utah Power & Light Company and Morgan Guaranty Trust Company of New York, by this petition seek a rehearing of this cause and in support thereof submit that this Honorable Court misconceived the factual matters contained in this stipulation and placed upon these appellants a greater burden of proof than was required of them.

ARGUMENT

POINT I

THAT THE COURT MISCONCEIVED THE FACTUAL STIPULATION AS STIPULATED BY THE PARTIES

The opinion of this court states:

"Inasmuch as there is a total lack of evidence as to what estate Jacob I. Allenbach may have had, and there was neither probate nor determination of heirship, the fact that Harriet was his widow does not show that she had any interest in the subject property, and there would be nothing more than conjecture upon which to so conclude."

We submit that the foregoing statement by the Court is not in accord with the stipulation of facts entered into by the parties hereto nor does it conform with the Findings of Fact made by the trial court. On the contrary, it was agreed and found that Jacob I. Allenbach was vested with the fee simple title to the property at the time of his death; and it was further agreed and found that Harriet Allenbach was his wife and widow (R. 34). It must follow as a matter of law that Harriet Allenbach became the owner of at least a one-third interest upon the death of her husband and these appellants clearly have succeeded to that interest.

We, therefore, urge upon this Court that the appellants do have a substantial interest in the property and that our assertions as to the lack of interest in the respondents should and must be determined.

POINT II

THAT THE COURT HAS BY INFERENCE CAST UPON THE APPELLANTS A BURDEN OF PROOF THAT THEY SHOULD NOT BE REQUIRED TO ASSUME.

In its decision, this Court has inferentially cast upon the appellants a burden of proof not required of them for the reason that they were not the plaintiffs before the trial court. Both the appellants and the respondents were defendants in the lower court and it is not proper to now treat one differently than the other; and we submit that it is error to examine solely appellants' title and not that of the respondents.

CONCLUSION

For the reasons hereinabove set forth, we respectfully petition this Honorable Court for a rehearing of this cause.

Respectfully submitted,

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