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IN THE SUPREME COURT OF THE STATE OF UTAH

RST SECURITY BANK OF
AH, NA, as Administrato
the Estates of GEORGE
TTON BUCKLEY and PEARL
RDOCK BUCKLEY,

Plaintiffs and
Respondents,

vs.

CILLE BUCKLEY HALL,

Defendant and
Appellant,

Case no.

12837

BRIEF IN ANSWER TO PETITION FOR REHEARING

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TABLE OF CONTENTS

Page

ANSWER TO PETITION FOR REHEARING 1

ARGUMENT:

POINT I:
THE PETITION SUBMITTED BY THE APPELLANT IS SIMPLY A REARGUMENT OF THE SAME MATTER THAT HAS ALREADY BEEN PRESENTED TO THE COURT PREVIOUSLY. 1

POINT II:
THE APPEALS COURT WILL NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE TRIAL COURT WHERE THERE IS EVIDENCE TO SUPPORT THE TRIAL COURT'S DECISION. 3

POINT III:
ON APPEAL, THE EVIDENCE IS TO BE CONSTRUED IN THE LIGHT MOST FAVORABLE TO THE RESPONDENTS. 4

POINT IV:
ONE WHO CONVERTS PROPERTY OF AN ESTATE IS A PROPER PARTY IN INTEREST. 5

CONCLUSION 7

TABLE OF AUTHORITIES

CASE CITATION:

Page

Beck vs. Jeppesen,
1 Utah 2(d) 127,262 P. 2(d)
760 4

Brown vs. Pickard,
4 Utah 292, 9 P.573, 11P 512. 3

Buehner Block Co. vs. Glezos,
6 Utah 2nd 226, 310 P. 2(d) 517 . . . 4

In Re Burt's Estate,
58 Utah 353, 198 P. 1108. 5

Cummings vs. Nielsen,
42 Utah 157, 129 P. 619. 3

Dahlquist vs. Denver & Rio Grande
Co., 52 Utah 438, 174 P. 833. 2

Harrison vs. Harker,
44 Utah 541, 142 P. 716. 2

Jones vs. House,
4 Utah 484, 11 P. 619. 3

Monteplier vs. National Surety Co.
97 Vermont 111, 122 A. 484, 33
ALR 389. 6

In Re McKnight,
4 Utah 237, P. 299. 3

In Re Estate of Rice,
111 Utah 428, 129 P. 2(d) 111. 6

TABLE OF AUTHORITIES
Continued

Page

Stanley vs. Stanley,
97 Utah 520, 94 P. 2(d) 465 3

Swanson vs. Sims,
51 Utah 485, 170, P. 774. 2

Yaffe vs. Bank of Chelsea,
271 P. 2(d) 365 6

UTAH STATUTES:

75-11-5 5
75-11-6 5
75-11-18 6

RULES OF CIVIL PROCEDURE:

Rule 76 (e) (1) 1

TEXT CITED:

72 C.J.S., Principal and Surety,
Section 245, Page 699 6

50 AM JUR, Suretyship,
Section 172, Page 1017 6

IN THE SUPREME COURT OF THE

STATE OF UTAH

FIRST SECURITY BANK OF UTAH, NA, As Administrator of the Estates of GEORGE HATTON BUCKLEY and PEARL MURDOCK BUCKLEY,	*	
Plaintiffs & Respondents,	*	
vs.	*	Case no. 12837
LUCILLE BUCKLEY HALL,	*	
Defendant & Appellant.	*	

BRIEF IN ANSWER TO PETITION FOR REHEARING

POINT I

THE PETITION SUBMITTED BY THE APPELLANT IS SIMPLY A REARGUMENT OF THE SAME MATTER THAT HAS PREVIOUSLY BEEN PRESENTED TO THE COURT.

Rule 76 (e) (1) says in part:
"...the petition shall be supported by a brief of the authorities relied upon to sustain the points listed in the petition..."

The Brief submitted by Appellant contained not one single quoted case, statute, rule or authority to support the position of the Appellant.

Attorney for the Appellant on appeal was not a part of the matter as it was tried before the Trial Court and can therefore probably be excused for being ignorant of the fact that the Trial Court Judge at pre-trial of the matter, determined that as a matter of law, the claim made by the stock in question as a proported gift was totally and completely inconsistent, and mutually exclusive with the claim of a summary distribution. Rulon J. Morgan, who then represented the Appellant, was required by the Court to elect either to make proof that there had been a gift or to elect to make proof that there had been a distribution, he elected the former and therefore the Court ruled that there could not be any evidence received on the latter.

Our Supreme Court has held that new points first brought to the Supreme Court's attention on application for rehearing, though they were just as available on the original hearing cannot be considered. (See Harrison vs. Harker, 44 Utah 541, 142 P. 716; Swanson vs. Sims, 51 Utah 485, 170 P. 744; Dahlquish vs. Denver & Rio Grande Company, 52 Utah 438, 174 P. 833.) The same would apply to a point not decided by the Trial Court and raised for the first time on appeal.

Our Supreme Court has also held that to justify a rehearing a strong case must

be made. The Supreme Court must be convinced firmly that it either failed to consider some material point in the case, that it erred in its conclusions or that some matter has been discovered which was unknown at the time of the original hearing. (See In Re McKnight, 4 Utah 237, P. 299; Brown vs. Pickard, 4 Utah 292, 9 P. 573, 11 P. 512.)

No rehearing will be granted where nothing new and important is offered for consideration. (See Jones vs. House, 4 Utah 484, 11 P. 619; Cummings vs. Nielson, 42 Utah 157, 129 P. 619.)

POINT II

THE APPEALS COURT WILL NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE TRIAL COURT WHERE THERE IS EVIDENCE TO SUPPORT THE TRIAL COURT'S DECISION.

Both Point I and Point II of the Appellant's petition and brief have reference to factual determinations which were made by the District Court.

In the opinion rendered by the Supreme Court the majority decision correctly left to the finder of fact the ultimate determination of those factual issues. (Stanley vs. Stanley, 97 Utah 520, 94 P. 2 (d) 465.) At the pretrial, the Judge and attorneys mutually agreed that the only issue to be determined was whether or not a gift had been made by the deceased

Father to the Mother and then in turn from the Mother to the Appellant. The question of a distribution of the estate was not an issue before the Court and was immaterial and the Court so ruled it. The only evidence of a gift was from Appellant (which was subsequently ruled out as barred by the Dead Man's Statute) and from Lavon Christensen, whose evidence was so patently rehearsed and based on hearsay that the trial judge did not believe any of it.

POINT III

ON APPEAL, THE EVIDENCE IS TO BE CONSTRUED IN THE LIGHT MOST FAVORABLE TO THE RESPONDENTS.

Inasmuch as the Trial Court found in favor of the Plaintiffs, the Respondents herein, they are entitled to have a review of the evidence and every reasonable inference fairly to be drawn therefrom in the light most favorable to the Respondents. (Buehner Block Company vs. Glezos, 6 Utah 2 (d) 266, 310 P. 2(d) 517; Beck vs. Jeppesen, 1 Utah 2(d) 127, 262 P. 2(d) 760.)

The evidence presented by the Respondents indicates that the stock in question, which belonged to the deceased George Hatton Buckley continued to be and remained the property of his estate from the time of his death until the present because it was in fact, not disposed of through any statutory or legal means.

All of the children of the two deceased persons agreed that although other items of their parents personal belongings were divided among them, that there was never at any time any discussion concerning the stock certificates or the ownership thereof and they were certainly not part of any informal distribution between the three children of the two deceased parents. The stock was fully within the control of George Hatton Buckley from and after the purported gift, and was after that time displayed by George to his son Gerald (Trial Transcript Page 188 and 189.)

POINT IV

ONE WHO CONVERTS PROPERTY OF AN ESTATE IS A PROPER PARTY IN INTEREST.

Point III of the petition for rehearing asks the Court to make a determination that the proper action for the Administrator to take is against the stock company which transfered the stock unlawfully rather than against the Appellant who converted to her own use stock and proceeds fromsale thereof in the name of her deceased Father.

The representative of an estate under Section 75-11-5, Utah Code Annotated, 1953 as amended, is entitled to bring an action for the recovery of any property, real or personal or to determine any adverse claim thereon. (See In Re Burt's Estate 58 Utah 353, 198 P. 1108.) Under 75-11-6, the

Administrator may maintain actions against any person who has wasted, destroyed, taken or carried away or converted to his own use, the goods of the intestate. Under 75-11-18 any person suspected of having taken wrongful possession of any of the effects of the decedent may be ordered into Court to account for and deliver the same to the Administrator of the Estate. (See In Re Estate of Rice, 111 Utah 428, 182 P. 2(d) 111.)

The fact that there may be others, including the Mercur Dome Gold Mining Company, the transfer agent and the bonding company who issued the bond to permit an unlawful transfer of stock without probate, constitutes such other parties purely to be sureties, with the Appellant herein remaining the principal.

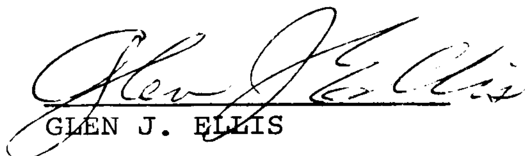
The right of the creditors (in this case Administrator) to maintain an action against the principle exists independently of this rights as against the surety and he may maintain an action against the principal independently or against the principal and the surety. (See 72 C.J.S. Principal and Surety, Section 245, Page 699, also 50 AM JUR Suretyship Section 172, Page 1017.) The remedies against both the principle and surety are not inconsistent, but are merely cumulative; both may be pursued at the same time until the Plaintiff's damages are satisfied. (See Monteplier vs. National Surety Company, 97 Vermont 111, 122 A. 484, 33 ALR 389.) The Case of Yaffe vs. Bank of Chelsea, 271 P. 2(d) 365,

held that the undertaking of a surety is absolute and that he is directly liable to the creditors, and the creditor may sue either the principal, endorsor or guarantor, or all of them at his option.

CONCLUSION

The basic dispute between the Administrator of the Estate and the Appellant herein, was a factual one, involving the question of whether there had been an actual gift of stock, or whether there had been actual involuntarily distribution of the estates of an estate. The Trial Court found in favor of the estate and ruled that the evidence to the contrary was given by the Appellant herein was barred by the Dead Man's Statute. Under the remaining evidence the proponderance was in favor of the Respondent and that factual decision should be upheld by the Appellate Court.

Respectfully submitted this 15th day of March, 1973.



GLEN J. ELLIS