

1940

Zion's Savings Bank and Trust Company v. Sterling P. Harris : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

In the matter of the Estate of ANNA
L. HARRIS, Deceased,

ZION'S SAVINGS BANK & TRUST
COMPANY, a Corporation,

Appellant,

vs.

STERLING P. HARRIS, Admini-
strator of the Estate of Anna L.
Harris, Deceased,

Respondent.

No. 6238

RESPONDENT'S BRIEF

Appeal from Third Judicial District Court
Salt Lake County, Utah

HONORABLE P. C. EVANS, *Judge*

J. D. SKEEN and

E. J. SKEEN,

Attorneys for Respondent.

TABLE OF AUTHORITIES CITED

	Page
Buxton In Re 14 Fed. Sup. 617.....	4
General Order 50 of the Supreme Court of the United States	3
Hines v. Farkas, 109 F. (2d) 289.....	4
Reynolds In Re 21 Fed. Sup. 369.....	4
Section 75 of the Bankruptcy Act.....	2

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The petition filed in the District Court (Abs. 2)
recites:

“That at the time of the death of Anna L.
Harris there was pending in the United States
District Court for the District of Utah a proceed-
ing under Section 75 of the Bankruptcy Act.”

Section 75 subsection (N) of the Bankruptcy Act
provides:

“The filing of a petition or answer with the clerk of the court or leaving it with the conciliation commissioner for the purpose of sending the same to the clerk of the court praying for relief under this section shall immediately subject the farmer and all his property wherever located for all the purposes of this section to the exclusive jurisdiction of the court.”

And further in proceedings under this section:

“The courts, the title, powers and duties of its officers, etc. ****shall be the same as if a voluntary petition for adjudication had been filed or a decree of adjudication had been entered on the day when the farmers petition asking to be adjudged a bankrupt was filed with the clerk of the court or left with the conciliation commissioner for the purpose of sending the same to the clerk of the court.”

It will thus be seen that the jurisdiction and control over the property existed in the federal court at the time of death.

Subsection (r) of Section 75 provides for the purposes of this section:

“*****The term farmer includes not only an individual who is primarily bona fide personally engaged in producing products of the soil and also ****and includes the personal representative of a deceased farmer.”

In so far as the jurisdiction of the United States District Court existed prior to and at the time of the death of Anna L. Harris, the statute last above quoted has no application. The jurisdiction of a court over property does not cease simply because of the death of

the owner. The proceeding is so far in rem that it continues. If that were not the rule great injustice might be done because of proceedings existing in the court before the death occurred.

Counsel exhibits great learning in directing attention to many federal cases which by no possible stretch of the imagination could have anything to do with this appeal. We will therefore pass without notice his very learned discussion.

General order fifty of the Supreme Court of the United States prescribes the method by which a personal representative initiates a proceeding, not the method by which he continues a proceeding pending at the time of the death of the debtor. The order of the District Court based upon the application made, allowed either the initiation of a new proceeding, or the continuation of the proceeding pending at the time of the death of the deceased. We consider it good practice to respect the comity of courts, and even though no rule of law or procedure required it, to present appropriate petitions to courts which might be interested in the same property. The fact that a petition was presented in this case which was unnecessary in order to sustain the jurisdiction of the federal court cannot be treated as an admission that without it the federal court was lacking in jurisdiction to continue the rehabilitation of the debtor's estate begun in her lifetime.

The filing of the petition by Anna L. Harris subjected her, "and all of her property" to the exclusive jurisdiction of the court. The jurisdiction was in personam and

in rem. Death, of course, terminated jurisdiction over the person but did not terminate jurisdiction over the property. The federal court did hold that pending the appearance of some representative having the right to speak. General order 50-9 does not apply to this case.

Passing all of the discussions in appellant's brief foreign to the questions before the court, we come to page 19 and there find that counsel has seen fit to rest the case upon two district court cases: In re: Buxton, 14 Fed. Sup. 617 and in re: Reynolds 21 Fed. Sup. 369. The first from a district court in Illinois and the second from a district court in Oklahoma. Both of these cases have been disapproved by the Circuit Court of Appeals of the Fifth Circuit in Hines v. Farkas 109 F. (2d) 289 decided January 22, 1940. The statutes of these states are not essentially different from the statutes of Utah. We consider it unnecessary to discuss or to quote from this case. The reasoning appears to be sound and we think the case should be followed.

Respectfully submitted,

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Attorneys for Respondent.

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APPELLANT'S REPLY BRIEF

Appeal from Third Judicial District Court,
Salt Lake County, Utah
Honorable P. C. Evans, *Judge*

THOMAS & THOMAS,
FILED *Attorneys for Appellant*

MAY 25 1940

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TOPICS

	Page
I. General Order 50(9).....	1
II. The Jurisdiction Of The Bankruptcy Court.....	4
III. The Weight Of Authority And Better Reason- ed Cases Are Against The Administrator.....	6
IV. The Administrator Does Not Deny The In- sufficiency Of The Petition Or The Court's Abuse Of Discretion.....	9
V. The Powers Of The Probate Court And Its Administrator Are Questions Of State Law. The State Court's Determination Herein Will Be Final And Binds The Bankruptcy Court	11
VI. Conclusion	15

AUTHORITIES

Buxton, in re: 14 F. Supp. 616.....	6
Cloward, in re: 95 U. 453. 82 P. (2d) 336.....	6
Erie R. Co. vs. Tompkins 304 U. S. 64. 58 S. Ct. 817.....	12
Hines vs. Farkas 109 F. (2d) 289.....	7
Reynolds, in re: 21 F. Supp. 369.....	6
Swift vs. Tyson 16 Pet. 1, 10 L. Ed. 865.....	11
Thompson vs. Magnolia Petroleum Co. 60 S. Ct. 628. Adv. Sheet No. 11, April 15, 1940.....	13

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APPELLANT'S REPLY BRIEF

1. GENERAL ORDER 50(9)

The administrator argues that no order of the probate court was necessary to authorize him to resort to the bankruptcy court to apply for a revivor of the bankruptcy proceedings, claiming that he might have done so without. This is indeed a surprising departure of thought. Below he petitioned and his counsel argued

most strenuously for the order in question. They considered it necessary then. Their application is conclusive upon that proposition. And it is no less strange to find the administrator and his counsel present on this appeal resisting a reversal of an order which they now characterize as unnecessary. If it is unnecessary, why do they bother to sustain it?

As an alternative, the administrator argues that General Order 50(9) applies only to administrators who seek to *initiate* and not to *revive* a Frazier-Lemke proceedings (App. Br. 13). This is not so. It applies to both.

Assuming for argument that a state probate code would permit a probate court to authorize its creature, the administrator, to enter into bankruptcy, which we have shown is not so in Utah, an administrator would first have to be authorized by the probate court to seek a revivor in the bankruptcy court for he is only the creature, no more, of the probate court and his powers would not extend to shaking off at will the jurisdiction of his creator and submitting the estate to some other court, without that creator's consent. And certainly if the probate court *forbade* him, he could not enter into bankruptcy whether to institute or to revive a proceeding, for not even a probate court is so powerless as to lack full control over its own officer and creature, the administrator.

All this is upon considerations only of general law. Respondent says General Order 50(9) prescribes a method by which an administrator "*initiates*" a proceeding, not that by which he revives one (Resp. Br. 3). This is

not so. The words "*initiate*," "*institute*" or "*commence*" do not appear. The word used is "*effect*." The language is only in regard to an administrator who desires to "*effect*" a composition or extension under Section 75. Now an administrator who seeks to revive is endeavoring no less to "*effect*" an extension than one who seeks to initiate a proceedings. The object is the same—to "*effect*" an extension under Section 75—in both instances.

And in promulgating the Order the Supreme Court only recognized the general law—a law of necessity and order among courts—that the bankruptcy court should be officially apprized by the probate court that the administrator (1) was in fact administrator and (2) had obtained authority of his creator to go to the bankruptcy court. These fundamental and indispensable facts the Supreme Court says must appear by the certificate of the probate court attached to the administrator's petition in the bankruptcy court.

We submit the implications of the Supreme Court order are equally applicable in proceedings to initiate or to revive and that the order of the probate court is necessary in either instance both by general law and General Order 50(9) as well.

II. THE JURISDICTION OF THE BANKRUPTCY COURT

Counsel make much of the fact that the administrator's intestate died while the bankruptcy proceedings were pending in federal court and after the jurisdiction of that court attached. The implication of their argument when followed to a conclusion is that the proceedings in the bankruptcy court actually suspended the state laws of descent and distribution. For if regardless of statutes of descent, an administrator can seize upon the property of the heirs to whom it otherwise descends by state law and by his own whim substitute the administration of a federal court (admittedly without probate powers) for that of a probate court, and withhold it from them three years under the Frazier-Lemke moratorium, statutes of descent are certainly suspended. None of the heirs, not one of them, may want the bankruptcy proceedings instituted, or if already instituted, maintained over the property. They all may prefer the probate court upon whom the law enjoins that duty to administer and distribute it. Bankruptcy, as it is to most people, may be most distasteful to them. They may desire and have ample means themselves to discharge the debt upon the property and receive it at once at the hands of the probate court—not three years hence. Yet these heirs, the owners in law and to whom the property descends by state law, cannot prevent a selfish administrator from resorting to bankruptcy and withholding the property—their own property—from them if he will. This is exactly where respondent's argument will lead us.

But the death of the intestate while the Frazier-Lemke proceedings pended should not complicate the case. The state law of descent attached immediately nevertheless. True, the federal court already had jurisdiction of the property. But this court is not trying the question: What shall the federal court do now? That question is for that court to determine after this court has said the order here was invalid and has set it aside. At that time the federal court will be confronted with what to do in a case in which the Almighty has deprived it of a party and the state law and probate court have refused to provide a new one for it. Quite likely the federal court will be obliged to dismiss. It could hardly do otherwise, being permanently without a party to the cause. But that is not for this court. This court is trying the questions of state law regarding statutory powers of probate courts and administrators. The problem in the federal court is one for that court later on.

III. THE WEIGHT OF AUTHORITY AND BETTER REASONED CASES ARE AGAINST THE ADMINISTRATOR

By our opening brief we showed that probate proceedings are purely statutory and that the probate court and administrator have only those powers granted by the Code. (App. Br. 14-15) in re: Cloward, 95 U. 453, 82 P. (2d) 336.

We also cited the only authorities then known to us upon the power of the administrator and the probate court to submit the *real* property to a bankruptcy court. Both held they could not because the real property was vested in the heirs. (App. Br. 19) in re: Buxton, 14 F. Supp. 616. In re: Reynolds, 21 F. Supp. 369.

Thus we showed the administrator was powerless upon two propositions: (1) Because the Probate Code fails to empower him and (2) Because the *real* property involved vested in and belonged to the heirs.

The administrator has not attempted to answer the first proposition. He does not even discuss it. And obviously he cannot, for such a proposition as that probate courts and their administrators have only those powers conferred by statute is altogether unanswerable. This court has so held. In re: Cloward *supra*. So in failing to attempt an answer, the administrator must be held to have conceded this proposition. In fact, in face of the Cloward case, he cannot dispute it. And in face of this concession all other propositions become unimportant, for to admit the court and its administrator have no power *under the Code* to enter into bankruptcy, leaves

the order to fall of its own weight and it becomes vain for the administrator to argue any other propositions.

But he does so nevertheless. Hurdling the first and certainly the all important question he arrives at the second. It is: Can the administrator submit the *real* property to the bankruptcy court when it is not even his to do with but belongs to the heirs under the statutes of descent? He cites *Hines vs. Farkas*, 109 F. (2d) 289. The case was from Georgia. Apparently the statutes were similar to ours. The two decisions referred to by us, holding the administrator is powerless over the real property for bankruptcy purposes were cited. The answer of the court was, "We do not agree," hardly more. Significantly, the lower court had followed the *Buxton* and *Reynolds* cases, their logic being reasonable to the mind of that judge, he, too, being of opinion the administrator was without power to take the heirs' property to a bankruptcy court. The case is binding only in the Fifth Circuit. It is not binding upon this court. This court is free to follow the weight of authority and the better reasoned cases and to interpret the Probate Code of Utah for itself. Compare the full, logical reasoning and well-considered opinions in the *Buxton* and *Reynolds* cases with the scant discussion in the *Hines* case. Consider when by the laws of descent property vests in heirs whether someone else, the administrator, may deprive them of it regardless of state laws of descent and state rules of property which are supreme and we submit the answer, immediately apparent, is that the administrator may not.

The reasoning of the two cases relied upon by appellant is the better and they are the weight of authority. The administrator may not submit the heirs' property to the bankruptcy court.

IV. THE ADMINISTRATOR DOES NOT DENY THE INSUFFICIENCY OF THE PETITION OR THE COURT'S ABUSE OF DISCRETION.

By our opening brief we showed the petition failed to state facts sufficient to constitute a cause of action. If for no other reason, the order thereon is erroneous. We refer the reader to our opening brief for this discussion. (App. Br. 24).

We also showed that the court had a duty to appraise the situation and was obliged to exercise a sound discretion in deciding the petition of administrator who already for one year in the probate court, and whose intestate for another year before him in the bankruptcy court, had journeyed without avail and who failed to appear here until five days before sheriff's deed, and still failed, even by way of allegation, to offer any solution. And we demonstrated that upon appraising this situation and in considering the time already wasted, the total and unexplained inaction of the administrator, and finally the utter lack of any suggestion of hope calculated to extricate the estate, the heirs and the mortgagee from this predicament a sound discretion should have been indulged and should have led the court to deny the petition, failing which the court's action constituted a thorough abuse of discretion in the circumstances.

Respondent's brief deals with neither of these propositions, the sufficiency of the petition or the abuse of the court's discretion. He denies neither. Failing to controvert them he must concede their correctness. By similar quiescence he has conceded, as we have seen, a

third proposition entirely devastating to his cause, viz., That probate courts and administrators have only those powers conferred by the Code and the latter nowhere confers the power sought here. Thus failing to controvert them the administrator admits three propositions we contended for: (1) That he and the probate court are under the Code bereft of the powers claimed, (2) the petition lacks facts to state a cause of action, and (3) the court abused its discretion in granting the petition.

V. THE POWERS OF THE PROBATE COURT AND ITS ADMINISTRATOR ARE QUESTIONS OF STATE LAW. THE STATE COURT'S DETERMINATION HEREIN WILL BE FINAL AND BINDS THE BANKRUPTCY COURT.

This court need entertain no doubt upon the efficacy of its decision to be rendered here.

Questions of state law, statutory and otherwise, are exclusively for state courts. Their interpretation is binding on all others.

Time was until just recently (1938) when federal courts were bound as to state law only by positive state statutes on a subject but were otherwise free to apply their own reasoning to matters of general or unwritten state law even though the result might be exactly opposite to the settled decisions of the highest state court upon the subject. This was by rule of the early United States Supreme Court decision in 1842 in the famous case, *Swift vs. Tyson*, 16 Pet. 1, 10 L. Ed. 865. And for nearly 100 years this rule obtained. But in too many instances the decisions of the state and federal courts were at war upon substantive questions of unwritten state law. Abuses became the rule rather than the exception. For example, it was even possible for a non-resident plaintiff to take his case to the highest state court and if defeated take a voluntary nonsuit and then renew the controversy in the federal court. See *Erie R. Co. vs. Tompkins* (note 9) *infra*. The injustice and confusion resulting from *Swift vs. Tyson* provoked continuing agitation against its rule throughout the 96 years

of its force by many of our country's outstanding lawyers, among them Mr. Frankfurter. Frankfurter, *Distribution of Judicial Powers Between Federal and State Courts* (1928) 13 Cornell L. Q. 499. See *Erie R. Co. vs. Tompkins* (note 6) *infra*.

The agitation against the injustice and confusion resulting from *Swift vs. Tyson* did not attain fruition until two years ago (1938) when the Supreme Court finally and expressly overruled that case and adopted the more sensible and just rule that questions of state law unwritten as well as written are exclusively for state courts and the federal courts are bound by and must follow their interpretation. *Erie R. Co. vs. Tompkins*, 304 U. S. 64, 58 S. Ct. 817. It was said by way of introduction:

“The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.”

And after an historical discussion of *Swift vs. Tyson* the confusion and injustice incident to its doctrine and the necessity for its overruling, the court squarely overruled it and said:

“Except in matters governed by the Federal Constitution or by acts of Congress, *the law to be applied in any case is the law of the state*. And whether the law of the state shall be declared by its Legislature in a *statute* or by its highest court in a *decision* is not a matter of *federal* concern.” (Italics added)

The effect of this new and just doctrine binding federal courts to state court interpretation of state law as applied to bankruptcy is now revealed in the very recent

case (March 25, 1940) which followed the Tompkins case, viz., Thompson vs. Magnolia Petroleum Company. 60 S. Ct. 628. (Adv. Sheet No. 11, April 15, 1940). Two federal Circuit Courts of Appeal had reached opposite conclusions upon the effect of old right of way deeds to railroad companies of Illinois lands overlying a rich oil field discovered in 1938. Whether these documents conveyed a fee with the consequent right to drill for and capture the underlying oil or simply an easement for road-bed purposes was the question. *No applicable state court decision upon the subject had ever been rendered.* Should the federal court let the railroad's trustee in bankruptcy be heard in the bankruptcy court about a matter of state law as yet wholly undetermined by the highest court of Illinois and be put to the risk of guessing in advance what the state court might later hold to be the law? Or should the trustee in bankruptcy be remitted to an action as plaintiff in the state court where the question would be authoritatively and conclusively decided? The answer was obvious. At least to the United States Supreme Court it was obvious. It said:

“Decision with which the federal court of bankruptcy is here faced calls for interpretation of instruments of conveyance in accordance with Illinois law. Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable. And the difficulties of determining just what should be the decision under the law of that State are persuasively indicated by the different results reached by the two Circuit Courts of Appeal that have attempted the determination. Unless the matter is referred to the

State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined *contrary to the law of the State which in such matters is supreme.*” (Italics added) Thompson vs. Magnolia Petroleum Company supra.

And so the Supreme Court ordered the trustee in bankruptcy to prosecute the case in the state court of Illinois. The reason being that the law of the state as interpreted by the state court would be supreme. The doctrine of Erie R. Co. vs. Tompkins supra is thus logically projected into bankruptcy matters. Thus federal courts in bankruptcy are bound by the state law as interpreted by the state courts no less than they are in civil cases. The federal court of bankruptcy in the matter of this administrator’s attempt to revive the Frazier-Lemke proceedings in question will be bound by this court’s decision here. When this court decides, as we confidently assert it will and must under our state probate statutes, that an administrator is powerless and a probate court is bereft of authority to empower him to enter into or *revive* a bankruptcy, the question will be authoritatively concluded once and for all by the highest court of the land empowered to deal with it. The federal court of Utah and all others will then be bound. None may dispute it.

And so we say again this court need entertain no doubt upon the efficacy of its decision to be rendered here.

VI. CONCLUSION

Again, as in our opening brief, we say whether an administrator who is a statutory creature should be empowered to resort to bankruptcy is a question exclusively for the state legislature. It has not yet ordained that he may. If it be intended that he shall, that body must first say so. The courts may not introduce the absent power into the statute.

Moreover, the realty having devolved upon the heirs, the administrator's limited powers by the weight of authority and the better reasoned cases do not admit of his subjecting it to a bankruptcy court.

Furthermore, the petition lacks facts to state a cause of action and the court abused its discretion in granting the order and the same must be reversed with costs.

THOMAS & THOMAS,
Attorneys for Appellant

Dated May 20, 1940.