

1949

Parlan McFarlane v. Glenn Winters : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the
State of Utah

PARLAN McFARLANE, also known as
PARLANE McFARLAND,

Plaintiff and Respondent,

vs.

GLENN WINTERS,

Defendant and Appellant.

FILED

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APPELLANT'S BRIEF

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STATEMENT OF THE CASE

The plaintiff and respondent brought this action in the District Court of Sanpete County, State of Utah, to recover from the defendant and appellant the sum of \$2,299.25, together with interest thereon at the rate of 8% per annum from the 1st day of May, 1939, and plaintiff's costs. The Complaint alleges that on the 1st day of May, 1939, the plaintiff obtained a judgment against the defendant in the sum of \$1,381.40, together with interest in the sum of \$905.00.

and costs in the sum of \$17.80, making a total judgment of \$2,299.25, and that said sum had borne interest at the rate of 8% per annum from May 1, 1939 to May 1, 1947, when the Complaint was filed, and for that amount judgment was prayed. To that Complaint the defendant and appellant answered in his first defense that the plaintiff in the action was dead, and that he had been dead for more than twenty years prior to the commencement of the action. In his second defense he states that the action is barred by the provisions of Sections 104-2-21 and 104-2-38 of the Utah Code Annotated of 1943. For his third defense he pleads that on September 28, 1914 in case number 1050 between the same parties, judgment was entered in favor of the plaintiff and against the defendant for the sum of \$488.50, and that on September 7, 1922, an action was brought to renew the judgment and a judgment was entered by default in favor of the plaintiff and against the defendant for the sum of \$1380.40. He then pleads that that judgment was void for the reason that the defendant and appellant was never served with summons in said action, and that the court acquired no jurisdiction of the defendant; that the Sheriff's return of said Summons stated that he served it upon the defendant by leaving a copy of the Summons with Mrs. W. P. Winters at Price, Utah, at the usual place of abode of the defendant on September 15, 1922, and he alleges that Price, Carbon County, Utah, was not and never had been the usual place of abode of the defendant and appellant, but that his usual place of abode at that time was Sanpete County, State of Utah; that on May 1, 1939, the same action was brought in the court of Sanpete County for the

renewal of said judgment and wherein a judgment was obtained for the sum of \$2299.25, which the defendant alleges is a void judgment by reason that the former judgment heretofore referred to was void for lack of service of Summons, and the defendant alleges that an attempt to renew the judgment in the present action was void for the reason that the judgment which was attempted to be renewed was void and of no force and effect. The first judgment obtained for the sum of \$488.50 was the result of an automobile collision in 1914 on September 28th. This being true, it is shown that this is the fourth time the judgment has been sued upon for renewal. In the action the plaintiff prays for judgment in the sum of \$2299.25, together with interest at 8% from the 1st day of May 1939, and the defendant prays in his Answer that the plaintiff take nothing upon his said Complaint, but that the same be dismissed and that the defendant recover his costs.

STATEMENT OF FACT

The defendant and appellant appeals from the judgment rendered in favor of the plaintiff and respondent for the sum of \$2299.25, together with interest upon said sum, basing his claim principally on the allegations of his first defense to the effect that the plaintiff in the action is dead, and that he has been dead for more than twenty years prior to the commencement of the action.

ASSIGNMENT OF ERRORS

Comes now the defendant and appellant and makes the following assignments of error upon which he will rely for a reversal of judgment appealed from in this cause:

1. The court erred in the computation of interest in the entry of said judgment, it being shown that the first judgment obtained against the defendant and appellant was the sum of \$488.50, and that when that judgment was renewed, it was renewed for the principal sum, plus interest on said sum at the legal rate during the time subsequent to the entry of the first judgment. From that time on the record shows that the interest has been compounded every time the judgment has been renewed at least four times since the entry of the first judgment, and that the greater portion of the judgment now entered is a judgment for interest compounded upon interest.

2. The Court erred in denying the defendant and appellant judgment in the trial of said action in the District Court and in entering judgment in favor of the plaintiff and respondent in said action.

3. The court erred in denying defendant's motion for new trial.

ARGUMENT

The evidence in this case shows in effect the following facts:

That the plaintiff obtained a judgment in 1914 against the defendant for the sum of \$488.50, no part of this judgment has ever been paid. If it were to run at straight 8% interest from the date of its entry to the present time, there would be accumulated in interest the sum of \$1328.72, add the principal sum of \$488.50 to that sum and it gives a total of \$1817.22. However, by compounding this interest every

8 years and charging interest upon interest, a judgment in this case, if there is a judgment in this case, has accumulated to the sum of approximately \$4,000.00. We say that such a procedure is not intended by our statute or justified thereby, and should not be permitted to be carried through in the manner applied by the court in this action.

We refer to Section 44-0-4 of the 1943 Annotated Code:

“Interest on Judgments. Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties which shall be specified in the judgment; *other judgments shall bear interest at the rate of 8% per annum.*” (Italics ours.)

It is just a little difficult to conceive how, out of this situation, one would attempt to compound his interest every eight years when the judgment was renewed when the only action taken on the matter was the renewal of the judgment. One would hardly expect to take a note for six years at a specified interest and then if the note were not paid before the statute of limitation run upon it, and it was necessary to renew it, that the party making the note would be expected in that renewal to have the interest figured and added to the principal and then make a new principal out of the combined sum on a renewal note and have the entire combination then bear interest again at the rate of 8% per annum. It would appear to us that such a computation of interest would be a usurious enterprise, and that fact is definitely established when it is shown, as hereinabove, that a straight 8% interest on the judgment obtained for the full time would render the

total amount due now at approximately \$1817.22, when the last judgment entered is for some \$4,000.00, twice and one-fourth the amount that the judgment should be.

We, therefore, submit that the court erred in rendering judgment, as in this case rendered, for the amount specified therein.

Assignment of error two goes to the important question in this case and that is as to whether or not the evidence supported the defendant's first defense that the plaintiff was dead and had been dead for more than twenty years prior to the commencement of the action.

We wish to refer to the testimony in the transcript on this particular point. Mrs. Anna C. McFarlane, a witness for the plaintiff testified that she was the former wife of the plaintiff in this action; that she last saw the plaintiff in 1921 (T. p. 11), and that she had never seen nor heard from him since that time (T. p. 12); that she had received no written communication from him, had received no telegrams, no telephone conversations and no other word of any kind since 1921 (T. p. 13; that she thinks he left home when he did leave because he was not contented, and because his family was a burden to him (T. p. 14); that if her husband were alive now, he would be 63 years old; that he was born in 1884 (T. p. 15). She stated that his mother received a card from him in 1941, a short time before his mother died; that she did not see the card, but she saw the envelope it was in; that she saw the handwriting on it, and it was the handwriting of her husband, Parlan McFarlane; that the envelope had a

California postmark on it (T. p. 18); that the envelope contained a Mother's Day card, and that it was sometime in May when she saw it (T. p. 19); that she did not see the card, but she saw the envelope; that the envelope was laying on the kitchen table in Mrs. Taylor's home in Manti (T. p. 20); that she did not see the card, but the envelope looked as though it had a card in it (T. p. 21); that she recognized the handwriting as that of her husband's (T. p. 22).

It will be noted that this envelope-on-the-table transaction was twenty years after Parlan McFarlane had been gone and no word had been received from him by his wife or family.

Wanda McFarlane Larsen testified that she was born October 18, 1916, and that she does not remember her father at all (T. p. 25).

William McFarlane testified that he was a brother of Parlan McFarlane; that he had never seen him since he left Manti in 1921 (T. p. 28); that the only thing he had ever heard of him was that Bruce Axelson and Wilford Fishneck had brought some communication to him regarding his brother, Parlan McFarlane from California; that the mother of these boys died in July of 1941; that at the time Parlan McFarlane did not attend the funeral, did not send any word concerning the matter, in fact no word was received from him at all (T. p. 29 and 30); that Wilford Fishneck had told him that he had seen his brother in California in 1925, and that Ezra Madson from Ephraim has seen Parlan McFarlane in California in 1929 (T. p. 31). At that time he was running a paint shop and that he requested that no word be given his

family about him; that he, William McFarlane, had been furnishing money to renew the judgments on this particular lawsuit ever since the first judgment was entered in favor of his brother, and that he had done so without any request or suggestion from his brother, the plaintiff, whatsoever (T. p. 32); that he had in like manner renewed the judgment at least three times and perhaps four (T. p. 33). He testified that he had seen a card sent to his mother on Mother's Day by his brother Parlan McFarlane; that he identified the card by the handwriting on the envelope addressed to his mother (T. p. 35); that he took care of his mother's correspondence (T. p. 36). He stated that the envelope was dated, but the card was not. There was nothing on the card; that he does not know where the card is (T. p. 37); that the address on the envelope was in his brother's handwriting; that he could tell his brother's handwriting because, as he said, "I can write and you can tell my handwriting anytime, and I can tell a McFarlane handwriting." That there was some checks in the possession of his wife signed by him, but no comparison of those checks were made. (T. p. 38). That it was written in indelible pencil, and that the only thing he noticed about it was a postmark from California (T. p. 39).

Wilford Frischnecht, a witness for the plaintiff testified that he saw Parlan McFarlane in Oakland, California in 1925 (T. p. 65).

Bruce Axelson testified that he saw Parlan McFarlane in San Francisco in 1928 or 1929 (A. p. 66); that it was on Howard Street between 3rd or 4th; that he went down there to get a bus on their way to Los Angeles, but he did not do much

talking to him, but that his brother did. He said he was going on a paint job out at Palo Alto (T. p. 67); that on Cross Examination, the witness testified that he knew Parlan McFarlane as a young boy, but admitted that he left Manti when the witness was but 8 years of age; that the last time he talked to him he asked if his mother was still alive and asked how Bill was; that he first denied being Parlan McFarlane, but after talking to him a little while he asked if his mother was still alive, but he never stated who his mother was to whom he was referring (T. p. 72).

A Louise Cox, a witness for the plaintiff, testified that she thought she saw Parlan McFarlane last summer in Provo (T. p. 73); that she and her daughter were walking up the street in Provo and they saw a man whom they thought was Parlan McFarlane; that he had cotton on his eye and dark glasses over the cotton, one eye being bandaged (T. p. 82 and 83). That he did not recognize them, and the witness testified that she thought it was because he did not want to recognize them (T. p. 83 and 84).

As we view the testimony, the only testimony there is of Parlan McFarlane being in existence within the statutory period of the last eight years, is the fact, that certain people saw an envelope laying on the table in his mother's home that had a card on it that had no handwriting whatsoever; that it had an address to his mother with a California postmark on it, and the testimony of this Mrs. Cox who says she saw him in Provo; that is the only testimony that seems to bring us within the pervuew of the statutory period of seven years after which a person is presumed to be dead, and we do not believe that

the testimony is sufficient upon which to base a judgment, certainly it would seem strange if the man Mrs. Cox saw in Provo was him, that no relative in Utah saw him at that time, and though she testified that the man was wearing working clothes, indicating that he was employed in or around about Provo, and then this mysterious card that these people saw but no one could produce, although it must be remembered that William McFarlane knew about this judgment and had paid the costs of those renewals some three times up to that time, and yet he did not feel that the card was of any importance or significance in establishing that his brother was still alive. We do not believe that such evidence would supply the burden of proof required of the plaintiff to support a judgment in an action brought for that purpose.

In opposition to this slight evidence, we have the evidence of the defendant, Glenn Winters, who testified that he had seen Parlan McFarlane around the streets in Mount Pleasant; that he was at the first trial of the case and saw him at that time; that he had made an effort to locate Parlan McFarlane prior to the last trial of this action (T. p. 42); that he had inquired of Will McFarlane and Mrs. McFarlane (Parlan McFarlane's wife); that his wife had told him that she had last heard from him in Salt Lake City; that he contacted the Police Department of Salt Lake City, but that they could not find him; that he had the bookkeeper of the Utah Power & Light Company search their records back 25 to 26 years and they could find nothing concerning Parlan McFarlane; that he had the telephone directory of Salt Lake City and the City Directory searched (T. p. 43), also, the register of Vital Statistics; that

he had made inquiries in San Francisco and Ely, Nevada, and other places; that he had directed letters be sent to practically every County Seat west of Mississippi River, all that they could find, and that they had written the Peace Officers in all of those cities requesting that a search be made for him, all of which was of no avail (T. p. 44); that he had contacted the Eastman Kodak people of San Francisco for the reason that Parlan McFarlane was in the photography business in Mount Pleasant; that of all the inquiries he made, he received back only two replies which were marked Exhibits "A" and "B" and are part of the record; that he had a search made through the United Mine Workers of America through their Welfare Department, but could find no trace of him (T. p. 46); that he has three cousins in San Francisco, and he had them make a search of San Francisco to see if they could locate him, and they could find no trace of him in San Francisco T. p. 47).

We, therefore, submit that the evidence in this case shows that Parlan McFarlane, plaintiff, is, as a matter of law, dead, and that he did not authorize any one nor did anyone have any right to bring this action on his behalf.

Concerning the legal proposition that absence creates a presumption of death, we refer to the following authorities:

17 Corpus Juris, 1166, which reads as follows:

"The presumption of the continuance of life is overcome or displaced by the presumption of death which arises from the unexplained absence from the person from his last or usual place of residence for a sufficiently long period of time without having been heard of during such period . . . The presumption of death from unexplained absence is not, however,

a presumption of law, but a mixed presumption of law and fact which may be rebutted, and it will not be indulged where the circumstances of the case are such to account for the absence of the person without assuming his death, and it has been held that he who relies upon an unexplained absence must not only prove it, but must also produce evidence to justify the inference that death is the probable reason why nothing is known about the missing person."

Concerning the length of absence, we quote from 17 Corp, Juris 1167:

"At common law the rule was that a presumption of death arose from an unexplained absence of seven years, and this is the rule which prevails in nearly all jurisdictions, although in a few jurisdictions a shorter period has been prescribed by statute."

Quoting now from Jones Commentaries of Evidence Vol. 1, page 473, we have the following:

"It is thus stated in the Massachusetts case, that if a man leaves his home and goes into parts unknown and remains unheard from for the space of 7 years, the law authorizes to those that remain, the presumption of fact that he is dead, but it does not authorize him to presume therefore that any one of those remaining in the place which he left has died."

Again on page 476, we have the following:

"It need hardly be added that this presumption of death from absence is not a conclusive presumption. It is one of fact, and is subject to be controlled by the facts of the case. It is one which varies in weight according to the circumstances. The presumption may be rebutted in the same manner as any other presumption of fact by proof of circumstances which are inconsistent with its existence as a logical conclusion."

Of course, there is nothing in this case that will meet such a situation.

Again on page 477 of the same volume:

"Evidence having been adduced sufficient to create a presumption of death from absence of the missing person for seven years or more, unaccompanied by circumstances accounting for such absence on any hypothesis other than death, the burden of rebutting such presumption devolves upon the party asserting the continuance of life . . . but it is not rebuttable on mere rumor, it must be evidence of a tangible nature such as a declaration of an intention to leave the home for some good reason . . . It may be that if the evidence here offered had been admitted (a general report among the absentee's friends that he was living) the cross examination would have shown it to be mere vague rumor, and if so, unworthy of credit, but if there was such report and intelligence as to the absent man among his friends and former acquaintances as was offered to be shown, the weight to be given it was for the jury."

In the case of *St. Martin vs. Hendershott*, an Oregon case, 160 Pac. 373 at page 374:

"Isaac Arquette, so far as known, had no lineal descendants, and since he has not been heard from by his acquaintances or any member of his family for more than seven years, he is therefore presumed to be dead."

In the case of *American National Insurance Company vs. Hattie Hicks*, 75 A.L.R. 623, quoting from the syllabus, we have the following:

"Where, while a life insurance policy was in force, the insured, whose family relations were happy and who had no known enemies disappeared, and was not

again heard from, the trial court in an action brought after the expiration of seven years has created a presumption of death is warranted in finding that the death occurred before the policy had lapsed by reason of non-payment of premiums."

And then quoting from the decision at page 629, we have the following:

"The fact that death after an absence of seven years, successively, by a person is fixed by the statute when the fact of absence is established as was done in this case, but the time of death of such individual must be determined by the jury or by the court in trying the case without the intervention of a jury." *Soverign Camp W. O. W. vs. Boden*, 117 Texas 229; 1 SW (2nd) 256; 61 AIR 682.

In the case of *Kansas City Life Insurance Company vs. Dora Marshall*, 61 A.L.R. 1321, quoting from the syllabus, we have the following:

"The death of an unheard of absentee may likely be presumed from evidence of facts and circumstances other than those showing exposure to danger which probably resulted or might probably have resulted in his death without regard to the duration of the absence, and that some time before the expiration of the seven year period."

Again in the case of *Lulu L. Goodier vs. Mutual Life Insurance Company of New York*, 34 A. L. R. 1383, quoting from the syllabus, we have the following:

"The presumption of continued life of one who has disappeared from his home and the knowledge of his family, in the absence of proof to the contrary, continues for seven years. At the end of that time and not until then it ceases to operate, and the pre-

sumption of death takes its place. The latter presumption is to the effect only that the missing one is not then alive and does not prove death at any precise time within the seven year period."

Quoting from the case at page 1387, we have the following:

"The presumption of death attending disappearance followed by 7 year's absence with no tidings of the missing one and no evidence that he has been seen alive during that period, does not help plaintiff. The presumption cannot be permitted to show death at any time within the 7 year period. It comes into operation at the end of 7 years absence simply as a logical substitution for the presumption of continued life which at that moment ceases to operate. Certainly the inference of death after seven years cannot by itself prove death before that time. The rule of the presumption extends merely to the fact that death from and after the end of the period. It is not understood to specify anything further—for example the time of death within that period." Wigmore ev. Section 2531: "Where, in a note the authorities are gone into at length. (The irreconcilable conflict of authority as to whether or not the presumption of death from absence raises any presumption as to the precise time of death is dealt with in the annotation of *Butler vs. Supreme Court*, 53 Washington 118, 101 Pac. 481.)

In the case of *Benjamin vs. District Grand Lodge So. 4, Independent Order B'nai B'Rith*, 152 Pac. 731, again quoting from the syllabus:

"Where to prove the fact of insured's death, the presumption under Code of Civil Procedure, Section 1963, subdivision 26, that a person not heard from in seven years is dead, must be relied on. The cause of

action on the benefit certificate providing for payment on satisfactory evidence of his death does not arise until lapse of such time."

In the case of the *Praetorians vs. Phillips*, 88 Pac. 2nd 647 at 650, we have the following:

"It will thus be seen that the general rule is that where a person disappears and is not heard from for a period of seven years, upon a showing of due diligence, search and inquiry, it will be presumed that he is dead. This alone, however, will not give rise to a presumption that such person died prior to the last day of said 7 year period or at any particular time within said period."

In the case of *Fink vs. Prudential Insurance Company of America*, 90 Pac. 2nd, at page 762, quoting from syllabus No. 6, we have the following:

"Disputable presumption enumerated in statute that one not heard from in 7 years is dead was not intended to create new rule concerning effect of 7 years unexplained absence, but was merely intended to state the existing law.

Syllabus No. 7:

"The rule permitting inference of death from 7 years unexplained absence is a rule of necessity.

Syllabus No. 9:

"In absence of special circumstances such as old age, search and inquiry promptly instituted and prosecuted with reasonable diligence are requisites to a presumption of death rule.

There can be no question at all concerning the presumption of death of a party who has been absent and unheard of for the 7 year period, and there too can be no question of a

party's right to proceed in cases such as the case at bar on such a presumption.

Let us not lose track of the situation in this case under which the plaintiff left his home, his wife and his family. The evidence does not show that there was any family trouble that had existed between him and his wife prior to his leaving home, no more than ordinary difficulties that arise in any home where the marital relations exist and are operating. The evidence shows that the plaintiff in this action did not leave home because of any trouble with his wife or family, but left his home in quest of a job and never returned. Viewing the evidence we have referred to as being the evidence introduced at the trial of this case of a continued life of the plaintiff, it seems inconceivable that a man would leave his family consisting of a wife and several small children on the pretext of going to find employment and then never contacting them again either by visit, correspondence or in any other manner for a period of more than 25 years, and then to address a Mother's Day card to his mother, under the circumstances attending such sending of such card as divulged by the evidence, a plain card in an envelope without a word of writing upon it to his mother with whom he had had no difficulty whatsoever, addressing it to her merely as "Mrs." and eliminating her first name, with no return address upon it, such procedure seems absolutely unexplainable, and particularly the identification on the pencilled writing on the envelope by a man who had aged from 25 to 30 years since anyone of them had seen him or seen his handwriting, and then the absence of the document in evidence at the time of the trial of this case. Let us not forget

that the brother who has carried on the litigation over all these long years testified that he saw the envelope and recognized his brother's handwriting thereupon, and yet he does not preserve such evidence to present at the trial of the case to show that the presumption of death through the absence of his brother is untrue, and the evidence of Mrs. Cox who saw the man with the bandaged eye at Provo and testified that it was Parlan McFarlane and who was within three feet of him when she saw him and yet she did not stop him and he did not recognize her and she was never able to catch up to him to determine definitely his identity and yet he did not run, he walked up the street from the time she first saw him. It would seem inconceivable if the man she saw was Parlan McFarlane, and let us not lose track of the fact that he evidently was in working clothes indicating that he was employed at or near Provo, Utah, and yet with all of his friends and relatives so near to where he was, not one other person ever saw him even though many of these people were his relatives, and his wife and children were still in Sanpete County, living there. This being the only evidence the plaintiff has to overcome the presumption of his death, we cannot understand how such evidence could be received to overcome the presumption as we understand the rule to be that a presumption takes substantial evidence to overcome it.

We then have the testimony of the defendant wherein it shows that he extended great effort by personal inquiry, by innumerable letters sent out and some to acquaintances in San Francisco who was acquainted with the plaintiff and who made a diligent search in San Francisco, but was unable to locate

him. His evidence of inquiry is substantial as against faint presumption upon the part of the plaintiff.

We submit, therefore, that the court erred in granting judgment for the plaintiff in this case, and that the judgment so entered should be, by this court, reversed and remanded to the District Court of Sanpete County, with instructions to enter judgment in favor of the defendant—no cause of action.

Respectfully submitted,

E. LeROY SHIELDS

Attorney for Defendant and Appellant