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Mary Parker v. S. R. Ross and Edith Ross : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

MARY PARKER, Administratrix
of the estate of Katie C. Johnson, etc.
deceased,

Plaintiff and Appellant,

vs.

S. R. ROSS and EDITH ROSS, his wife,
et al.

Defendants and Respondents

Case No. 7401

Brief of Appellant

Appeal from the District Court of Salt Lake County,
State of Utah, Honorable Joseph G. Jeppson,
Judge.

FILED

Milton V. Backman of

Oct 14 1966

BACKMAN, BACKMAN & CLARK,

Attorneys for Plaintiff and Appellant.

CLERK, SUPREME COURT, UTAH

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BRIEF OF APPELLANT

I.

STATEMENT OF FACTS

Appellant appeals from an order and judgment entered by the district court of Salt Lake County, Utah, dismissing appellant's complaint with prejudice and upon the merits thereof. (R. 45).

It is shown by the allegations of appellant's complaint that Katie C. Johnson was the owner of the fee title to the real property affected by this action. That the property was sold for general property taxes for the year 1924 and that Auditor's Deed issued thereon in 1929. That thereafter Salt Lake County issued a quitclaim deed covering said property

to one, Alton F. Lund who thereafter on January 7, 1946 conveyed the property to defendants and respondents S. R. Ross and Edith Ross, his wife. That S. R. Ross and Edith Ross, his wife filed quiet title action in the district court of Salt Lake County, Utah, naming Katie C. Johnson as defendant in said action. That service of process was had on Katie C. Johnson in said action by publication and decree quieting title in S. R. Ross and Edith Ross, his wife, was entered upon the default of Katie C. Johnson, on June 13th, 1946.

By appellant's second amended complaint, appellant adopted and made a part of her second amended complaint, the affidavit upon which the order for publication of summons was predicated (R. 34) which affidavit is attached to and made a part of appellant's first amended complaint (R. 20, 21, 22) by which it is evident that said action to quiet title was not filed until the year 1946.

Appellant, by her complaint alleges the fact that Katie C. Johnson died at Deer Lodge, Montana, during the month of August, 1919, leaving as her only heir at law, Alice Larson.

This action is brought for the purpose of setting aside the judgment and decree quieting title to the property affected by this action in Respondents Ross. Appellant proceeds as administratrix of the estate of Katie C. Johnson, deceased (R. 35). Appellant further alleges that the tax title, upon which the judgment and decree quieting title in respondents to the property affected by this action, was defective in that no auditor's affidavit was attached to the

assessment rolls and therefore the estate of Katie C. Johnson, deceased had a meritorious defense to said action (R. 36).

Respondents filed general and special demurrers to appellant's second complaint together with a motion to strike portions of appellant's complaint. The court sustained respondents' general demurrer, also the special demurrer to that part of paragraph 5 of the complaint reading as follows:

"That the periodical in which said summons was published, the South Salt Lake Herald was not a newspaper having general circulation in Salt Lake County, and the same is a periodical least likely to give notice to defendant in said action and to the parties interested therein and not a periodical most likely to give notice of such action." (R. 35) (R. 42)
and to appellant's paragraph 7, (R. 36 and 42).

The court further granted respondents' motion to strike from paragraph 6 of the complaint, the following:

"That plaintiff herein, through her agent, in using due diligence and in endeavoring to determine the whereabouts of Katie C. Johnson, the defendant in said action, made inquiry at the office of the City Police Department of Butte, Montana, the city in which said Katie C. Johnson resided for many years prior to her death, and the city shown by the records of Salt Lake County, Utah, in which said party resided and the city in which Mrs. R. E. Larson, the daughter of said Katie C. Johnson resided, the tax rolls of Salt Lake County reflecting the address of Katie C. Johnson as being in care of Mr. R. E. Larson, 702a West Park, Butte, Montana." (R. 35 and 42)

II.

SPECIFICATIONS OF ERRORS

Comes now the appellant and says that there is manifest error in the records, proceedings and judgment entered in this cause in this, to-wit:

(1) The court erred in sustaining respondents' general demurrer to appellant's complaint (R. 42), for the reason that said complaint states facts sufficient to constitute a cause of action against respondents and each of them.

(2) The court erred in sustaining respondents' special demurrer, part II (R. 38 & 42), for the reason that the allegations therein contained state with particularity the manner in which and the particulars claimed that the South Salt Lake Herald is not a newspaper having a general circulation in Salt Lake County, State of Utah.

(3) The court erred in sustaining respondents' special demurrer, par. III (R. 38 & 42) for the reason that it is not required that appellant state what the contents of the mail therein referred to was or when same was mailed, this inasmuch as appellant alleges the mail to have been that mailed by respondents and the contents and time of mailing were within the knowledge of respondents.

(4) The court erred in granting respondents' motion to strike the allegations contained in the first nine lines of par. 6 of appellant's complaint and also the word "Montana" contained in line 10 of said par. 6 (R. 35 & 42), for the reason that said allegations expressly show why and where-

in respondents failed to use due diligence in ascertaining the whereabouts of Katie C. Johnson.

III.

ARGUMENT

There being no bill of exceptions in this case, no trial having been had, and inasmuch as appellant's argument applies to each specification of error the specifications of error will not be separately argued.

This action is a direct attack on the original judgment and not a collateral attack thereon. It is a suit in equity to have the original judgment declared null and void.

The instant case does not come within that line of cases which are predicated on nonresidence of the defendant. Had defendant been living at the time process was attempted to be served, then we would have an entirely different case. Here we have a case in which process was attempted to be served against a deceased person. There is no statute in this state which permits process against a deceased person but on the contrary, the legislature of this state has made provision for proceeding in an action for the recovery of possession of property against executors or administrators in all cases in which the same might have been maintained by or against their respective testators or intestates. (Sec. 102-11-5 UCA 1943).

We say that due diligence was not exercised in the action through which title was decreed to be in respondents. Neither were the statutory requirements met by respondents in

that action in which default judgment was entered through publication of summons.

It is clearly evident that the agent for respondents in the quiet title action made a useless search of records in Salt Lake County, Utah, as is stated was done, when it was evident from the source of inquiry that Katie C. Johnson was not and had not been a resident of Salt Lake County, Utah. Such inquiry as it appears was made, was on its face useless and would avail respondents nothing whatsoever other than to avoid acquiring actual knowledge of the fact that Katie C. Johnson was, at the time, deceased.

Respondents did not use due diligence in their efforts to locate Katie C. Johnson; that is, not the diligence contemplated by the Legislature in enacting the law on this subject. Due diligence could only have been shown by doing that which appellant did in determining the fact that Katie C. Johnson was deceased. The court never did obtain jurisdiction of Katie C. Johnson, or her representatives or heirs. That which respondents did in endeavoring to locate Katie C. Johnson did not meet the intent and spirit of the law.

The Utah court has said in the case of Liebhart v. Lawrence, 40 Utah, 243 (259) that the law abhors and forbids the taking of property from a person without notice and without his day in court.

In the Liebhart case *supra*. the court further says at page 261:

“Non residents, as well as residents have a right to acquire and hold property in this state. In the absence

of proof of actual service, proceedings affecting their property require careful scrutiny; and the court, before entering a judgment taking it from them and giving it to another, should see to it that not only one, but that every requirement of the statute providing for a constructive service has, *both in letter and spirit* been strictly complied with. *The spirit and intent of the statute is to give the non resident notice of the proceedings against or affecting his property, if that can be done.*" (Italics added).

It is clearly evident from the language used in the above cited case, that the statute has not been complied with in letter and spirit simply by determining that the defendant was not a resident of Salt Lake County, Utah. The respondents were required to go further and to be diligent in making their inquiries.

In this argument, appellant is not unmindful of the fact that a distinction can be made in the facts of the Liebhart case and in those in the instant case to a certain extent. In the Liebhart case copies of the summons and complaint were not mailed nor attempted to be mailed by the plaintiff whereas in the instant case mail was directed to Katie C. Johnson by the agent of respondents although it is not evident at this time whether the mail contained a copy of the summons and complaint or something else. Even if copies of the summons and complaint were enclosed the following dicta found in the Liebhart case at page 261 might be and we think will be applied in this case:

"Here comes a litigant into court by a proceeding affecting the property of a nonresident who for many years had the record title, except as his rights thereto

may have been divested by the tax sale, and seeks to take it from him, and to claim it for himself. He causes an affidavit to be filed by an agent that the nonresident 'resides out of the State of Utah, and that his place of residence is to the affiant unknown,' without even stating that the place of such residence is unknown to the litigant. The clerk manifests no concern about it, and on the affidavit alone directs and causes the summons to be published, not in a 'newspaper designated as most likely to give notice to the person to be served', but in a weekly periodical least likely to give such notice. No effort and no inquiry is made to ascertain or to discover the place of plaintiff's residence. The fact of the place of residence was regarded as wholly immaterial, and that all that was necessary to know was that the plaintiff was a nonresident."

It is to be noted that in the instant case neither the litigant nor his agent stated in the affidavit upon which the order for publication of summons was based that the place of residence of Katie C. Johnson is unknown to affiant or to the litigant.

It is evident in the instant case as in the Liebhart case *supra*, the fact of the place of residence, and we might here add, whether defendant Katie C. Johnson was living or dead, was regarded as wholly immaterial, and that all that was necessary to know was that the defendant, Katie C. Johnson was a nonresident.

The affidavit upon which the order for publication was made in the instant case does no more than to repeat the language or substance of the statute. This is not sufficient.

Said the court in the case of *Ricketson v. Richardson*, 26 Cal. 149, cited by the Utah court in the *Liebhart* case:

“An affidavit which merely repeats the language or substance of the statute is not sufficient. To hold that a bald repetition of the statute is sufficient is to strip the court or judge to whom the application is made of all judicial functions, and allow the party himself to determine in his own way the existence of jurisdictional facts—a practice too dangerous to the rights of defendants to admit of judicial toleration.”

It has further been held that an affidavit has no probative force or evidentiary value when given by one who does not purport to have any knowledge of the fact deposed, either from personal knowledge or from inquiry or investigation. Such an affidavit is defective and is open to direct attack.

See *Liebhart v. Lawrence*, *supra*.

Bothell v. Hoellwarth, 10 S.D. 491, 74 N.W. 231,

Nicoll v. Midland Svgs. L. Co. 21 Okla. 591, 96 Pac. 744;

McLaughlin v. McCann, 123 App. Div. 67, 107 N. Y. Supp. 762;

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Mackubin v. Smith, 5 Minn. 367;

Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576;

Noble v. Aune, 50 Wash. 73, 96 Pac. 688.

We ask, what knowledge did affiant expect to acquire, what knowledge could affiant acquire by making