

1950

Leah C. Jones, Martha C. Whiting and Louise C. Beeton v. Mark B. Cook : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

LEAH C. JONES, MARTHA C.
WHITING AND LOUISE C.
BEETON,

Plaintiffs and Appellants,

VS.

MARK B. COOK,

Defendant and Respondent.

CLERK, SUPREME COURT, UTAH

FILED
JAN 9, 1980

BRIEF OF APPELLANTS

APPEALED FROM THE FOURTH JUDICIAL DISTRICT COURT,
IN AND FOR UTAH COUNTY, STATE OF UTAH.
WM. STANLEY DUNFORD, *Judge.*

ELIAS HANSEN,
Attorney for Appellants

CHRISTENSON & CHRISTENSON,
Attorneys for Respondent

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VS.

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Defendant and Respondent.

CASE No. 7424

BRIEF OF APPELLANTS

STATEMENT OF CASE

Plaintiffs and appellants prosecute this appeal from a judgment made and entered in favor of the defendant and against the plaintiffs on the 24th day of June, 1949. (J. R. 29) Notice of appeal was served and filed on September 16, 1949. (J.R. 36) Most of the evidence is documentary. The only substantial conflict in the evidence is whether or not Mark Cook, the deceased

father of the parties hereto, prior to his death made a gift of a Ford automobile to his son Mark B. Cook.

The action was brought by the plaintiffs against the defendant by filing a complaint on May 22, 1948. By the complaint the plaintiffs claimed to be the owners and entitled to the possession of one Ford Sedan automobile, Motor No. 6441914 of the value of \$1000.00, which was converted by the defendant to his own use and benefit to the damage of the plaintiffs in the sum of \$1000.00 for which amount plaintiffs prayed judgment against the defendant. (J. R. 1)

To the complaint the defendant answered. By his answer he denies the ownership of the automobile by the plaintiffs. He further alleges that his father died on July 30, 1943; that on July 1st, 1944 the last will and testament of his father was admitted to probate and he was appointed executor of the will; that he qualified as such executor and on August 18, 1948 a decree of distribution was entered and that he was finally discharged as executor on September 15, 1945; that an inventory and appraisement of the estate was filed in which the automobile was not listed; that the property of the estate was appraised but the automobile was not listed or appraised for the purpose of fixing inheritance taxes; that no objection was made by the widow or children of the deceased because the automobile was not listed; that an account was filed with the court in which the estate of Mark Cook, deceased, was being probated; that no objections were made thereto; that Irene B. Cook, the widow of the deceased gave a RECEIPT

to Mark B. Cook wherein she acknowledged the receipt of the property which was distributed to her; that the plaintiffs knew that Mark B. Cook claimed the automobile and that he had possession thereof; that neither the widow of the deceased nor the plaintiffs filed objection to the account or the proceedings had in the course of the probating of the estate of Mark Cook, that after the death of Irene B. Cook, and on or about June 21, 1947, the defendant herein filed a suit against the plaintiffs herein and then in that suit for the first time plaintiffs, as executrices of the estate of Irene B. Cook claimed to be the owners of said automobile. That notices of the various probate proceedings were given as by law required. That by reason of the facts alleged by the defendant herein the plaintiffs are estopped from claiming the automobile and that any claim that the plaintiffs may have had in or to the automobile is res adjudicata.

As a further defense the defendant alleges in his answer that plaintiffs alleged cause of action is barred under and by virtue of Title 104, Chapter 2, Subdivision 2 of Section 24, Utah Code Annotated, 1943. Nowhere in the answer does the defendant affirmatively allege ownership of the automobile in himself by reason of a gift by his father. So far as is disclosed by the answer defendant claims ownership of the automobile by reason of the probate proceedings notwithstanding the decree of distribution did not order the automobile distributed to the defendant herein. (J. R. 7 to 14)

To the answer of the defendant the plaintiffs filed a reply in which they admit the allegations of the defendant touching the probate proceedings. They also admit that Mark B. Cook, the defendant, during the time he was acting as executor had possession of the automobile as by law permitted; that Irene B. Cook held a life estate in said automobile until the date of her death which occurred on September 14, 1946.

Plaintiffs in their reply denied generally the other allegations of the answer of Mark B. Cook. (J.R. 15 to 17)

We have at some length directed the attention of the court to the pleadings because many of the pleaded facts, particularly those relating to the probate proceedings, are not and may not be contradicted.

The parole evidence is directed primarily to the question of whether or not Mark Cook, during his lifetime made a gift of the property to his son Mark B. Cook. It probably should be noted at the outset that the trial court refused to make a finding on that question. However, we deem it necessary to direct the attention of the court to that phase of the case as otherwise the court might conclude that in the absence of evidence showing or tending to show that the automobile belonged to Mark Cook at the time of his death the plaintiffs failed to make out a prima facie case.

Before referring to the oral testimony the attention of the court is directed to the terms of the will of Mark Cook, deceased. The will of Mark Cook and

his wife Irene B. Cook was read into the record and will be found in the transcript at pages 27 to 29 of the transcript. It will be noted that Irene B. Cook if she survived her husband, which she did, was given a life estate in all the real property belonging to her husband at the time of her death.

Mark B. Cook the son, was given, subject to the life estate of Irene B. Cook, the real property, the water stock, farm machinery and implements used in connection with the farm. The plaintiffs were given, share and share alike, subject to the life estate of the mother Irene B. Cook all of the rest, residue and remainder of the property of every name and nature. (Tr. 27 and 28)

By the decree of distribution there was distributed to Irene B. Cook a life estate in all of the property owned by her deceased husband, Mark Cook.

There was distributed to Mark B. Cook, defendant herein, subject to the life estate of Irene B. Cook, the real estate, water stock, farming machinery and equipment.

Leah C. Jones, Martha C. Whiting and Louise C. Beeton were decreed, share and share alike, subject to the life estate of Irene B. Cook all the rest, residue and remainder of the estate. What constitutes the rest, residue and remainder is not listed.

It is also provided in the decree of distribution that: "any and all other property not now known or

discovered which may belong to said estate or in which said estate may have any interest be and the same is hereby distributed in accordance with said last will and testament. (Tr. 31 to 34)

The evidence shows without conflict that the automobile at the time of the death of Mark Cook and at all times since his death stood in his name in the office of the State Tax Commission. (See Plaintiffs' Exhibit "A") The signature on the certificate of registration in 1941 is that of Mark Cook, deceased. (Tr. 6) The other signatures of 1942, 1943, 1944, 1945 and 1946 are the signatures of Mark B. Cook, the defendant herein. (Tr. 80) The evidence also shows that the defendant in all of the probate proceedings of his father signed his name as Mark B. Cook. He so signed his name generally. (Tr. 81)

In addition to the certificate of registration standing in the name of Mark Cook the evidence shows that defendant Mark B. Cook was familiar with the procedure in order to transfer title. (Tr. 81) No claim is made that the certificate of ownership was ever signed by Mark Cook, the father of the parties herein. The evidence is to the contrary. (See photostatic copy of certificate of ownership, defendant's Exhibit 1.)

In addition to the foregoing evidence plaintiff Leah C. Jones testified that her father died on July 30, 1943 and her mother on September 14, 1946. That during his lifetime her father had in his possession the 1941 model Ford sedan. (Tr. 5) That in December, 1943,

after the death of her father as her mother was about to go to Arizona Mark B. Cook told his mother that it would be necessary for him, Mark B. Cook, to have the certificate of ownership of the Ford automobile in order to cross the state line into Arizona and that later the mother, Irene B. Cook, told Mrs. Jones that she had given the certificate of ownership of the Ford to Mark. (Tr. 108-109)

Mrs. Jones further testified that she had not seen the decree of distribution until the day of the trial. (Tr. 110) That she went to the place where and at the time when the hearing was had for the purposes of appraising the property for inheritance tax purposes. That she was told that there was no reason for her to remain and she left. (Tr. 111) That she did see a copy of the decree approving and allowing the Final Account of the executor and petition for final distribution of the estate among her mother's papers after her death. (Tr. 111) That in February, 1945, she wrote a letter to find out in whose name the automobile stood.

Martha C. Whiting testified that she went to the office of Judge Christenson, who represented Mark B. Cook, as executor of the estate of Mark Cook, and that she inquired about the automobile and was told by Judge Christenson that Mark had a right to use the automobile while he was acting as executor. (Tr. 121) Mrs. Whiting further testified that after the death of her father Mark came to his mother for the keys to the car and the mother gave them to him. (Tr. 43)

The evidence also shows that Irene B. Cook had the automobile insured in the name of Irene B. Cook after the death of her husband that she paid the insurance premium. Prior to the death of Mark Cook in June, 1943 he insured the automobile in the name of Mark Cook. (Tr. 37)

Notwithstanding there is no allegation in the answer to the effect that defendant Mark B. Cook paid the taxes on the automobile he testified that he paid the taxes for the years 1944, 1945, 1946, 1947, 1948 and 1949. (Tr. 56)

Mrs. Cook, the wife of the defendant, testified that, at a time not fixed in her direct examination, she and her husband, Mark B. Cook and her father-in-law Mark Cook, took a ride up Provo Canyon and Mr. Cook, the elder, said: "Mark, here is the certificate of ownership and extra set of keys to the car. I'm giving it to you with the understanding that you take Mother and I at any time we want to go." (Tr. 94) It will be observed that there is no allegation in defendant's answer to the effect that the automobile was given to him by his father. The evidence further shows that Mark B. Cook took his mother to Arizona after the death of his father but refused to permit the car to be used to take Mrs. Cook to Logan. (Tr. 131)

From the foregoing brief statement of the evidence it will be seen that such evidence is ample, if not conclusive, to show that the automobile was a part of the estate of Mark Cook at the time of his death.

We are mindful that this court may not review the conflicting evidence and determine the question of whether or not the automobile belonged to the estate at the time of the death of Mark Cook. However if the evidence is conclusive that the automobile belonged to the estate or if it should adopt the view expressed in the dissenting opinion in the case of *Jackson vs. James*, 97 Utah 41, 89 Pac. (2d) 235, then and in such case the plaintiffs are entitled to a judgment for \$800.00, the stipulated value of the automobile. (Trs. 50-51)

In the Findings of Fact the trial court expressly refused to make a finding as to whether or not Mark Cook had made a gift to his son Mark B. Cook. (J. R. page 21) The court based its judgment upon (1) the fact that in the probate proceedings the plaintiffs made no objections; and (2) upon the fact that the defendant had possession of and paid the taxes upon the automobile. (J. R. 20 to 29)

ASSIGNMENTS OF ERROR

Come now the plaintiffs in the above entitled action and assign the following errors upon which they rely for a reversal of the judgment made and entered on June 24, 1949 in the above entitled cause.

1. The trial court erred in that part of its finding of Fact No. 1 wherein it found: "that defendant has been in possession of said automobile with the knowledge of the plaintiffs, under claim in good faith made by the defendant that said automobile has been given to

the defendant by the said Mark Cook as a gift.” That such finding is without support in the evidence and is contrary to the preponderance thereof. (J. R. 21)

2. The trial court erred in making that part of its finding No. 2 wherein it is in effect found that no mention was made in the will of the automobile involved in this action. That such finding is without support in the evidence and is contrary to the clear preponderance thereof. (J. R. 21)

3. The trial court erred in making that part of finding of fact numbered 10 wherein it found: “That during or before the month of February, 1945 and long prior to the date of said decree the plaintiffs had full knowledge of the individual claim of the defendant to the ownership of said automobile, and of the defendant’s possession thereof pursuant to said claim, and that when said decree was made and entered, the said automobile and the facts with respect to defendant’s claim thereto were and had been known and discovered”. That such finding is without support in the evidence and is contrary to the preponderance thereof. (J. R. 25)

4. The trial court erred in making that part of finding numbered 11 wherein it found that the defendant delivered to Irene B. Cook all of the residue of the property belonging to the estate of said deceased. That such finding is without support in the evidence and is contrary to the clear preponderance thereof. (J. R. 25)

5. The trial court erred in making that part of its finding numbered 14 wherein it found that notwith-

standing their knowledge that the defendant claimed said automobile as his own personal property and by virtue of said claim the plaintiffs herein or either of them have ever made or filed any objection or protest on account of the failure of Mark B. Cook, as executor or otherwise, to list the said automobile or to report to the inheritance tax appraisers. That such finding is without support in the evidence and is contrary to the clear preponderance thereof. (J. R. 26)

6. The trial court erred by in effect finding that the plaintiffs are estopped to claim any right, title or interest in said automobile involved in this action to-wit: that certain Ford sedan automobile, Motor No. 6441914, and that the decree of final distribution is res adjudicata with respect to said automobile. That such finding is without support in the evidence and is contrary to the clear preponderance thereof. (J. R. 27)

7. The trial court erred in making its finding numbered 16 wherein it found that for more than three years immediately prior to the commencement of this action the defendant Mark B. Cook has had and held in good faith the open, notorious and adverse possession of said automobile hereinabove referred to, and described and involved in this action, under a claim of individual right and with the knowledge of the plaintiffs and said possession and claim, and that said cause of action of the plaintiffs herein is barred under and by virtue of Title 104, Chapter 2, Subdivision 2 of Section 24, Utah Code Annotated, 1943. That such

finding is without support in the evidence and is contrary to the clear preponderance thereof. (J. R. 27)

8. The trial court erred in making its first conclusion of law wherein it concluded that plaintiffs are estopped to claim any right, title or interest in said automobile and that the decree of distribution is *res adjudicata* as to the right of the plaintiffs to recover the value of said automobile. That such conclusion of law is without support in either the evidence or the findings of fact and is contrary to law. (J. R. 27)

9. The trial court erred in making its conclusion of law numbered 2 in that such conclusion of law is without support in the findings of fact or conclusions of law and is contrary to law. (J. R. 27)

10. The trial court erred in making its conclusion of law numbered 3 in that such conclusion of law is without support in the evidence or the findings of fact and is contrary to law. (J. R. 28)

11. The trial court erred in making its conclusion of law numbered 4 in that such conclusion of law is without support in the findings of fact or conclusions of law and is contrary to law. (J. R. 28)

12. The trial court erred in awarding judgment dismissing plaintiffs' complaint. (J. R. 29)

13. The trial court erred in awarding costs to the defendant.

14. The trial court erred in admitting in evidence over plaintiffs' objection the verification to the inven-

tory and appraisement filed in the case of Mark Cook. (Tr. 62)

15. The trial court erred in failing to find upon the question of whether or not a gift of the automobile was made by Mark Cook to his son Mark B. Cook. (J. R. 21)

16. The trial court erred in failing to find that Mark Cook did not make a valid gift of the automobile to Mark B. Cook.

17. The trial court erred in failing to find for plaintiffs and in failing to award plaintiffs judgment against the defendant for the sum of \$800.00.

ARGUMENT

In our view there are three main questions presented by this appeal. They are:

First: Does the decree of distribution distribute the automobile to the plaintiffs herein?

Second: May an executor of an estate acquire title to either real or personal property of an estate or deprive the persons entitled to such property of all rights therein by neglecting to place the same in an inventory and appraisement and otherwise failing to account therefor?

Third: May an executor by paying taxes on the property of an estate which he is administering acquire title to such property by adverse possession?

IN LEGAL EFFECT THE DECREE OF DISTRIBUTION IN THIS CASE DISTRIBUTED THE REVERSIONARY INTEREST, IF ANY, OF THE ESTATE OF MARK COOK IN AND TO THE AUTOMOBILE TO THE PLAITIFFS HEREIN.

U.C.A. 1943, 101-3-9 provides:

“In a specific devise or legacy the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the court to sell the property devised and bequeathed in the cases herein provided.”

A similar provision is contained in the law of succession.
U.C.A. 1943, 101-4-2.

The will of Mark Cook and his wife Irene B. Cook devised and bequeathed to Irene B. Cook a life estate in all of the property owned by Mark Cook and to Mark B. Cook the reversionary interest in the real estate, farming machinery and water stock and to Leah C. Jones, Martha C. Whiting and Louise C. Beeton, share and share alike, all of the rest, residue and remainder of their estates of every name and nature. (Tr. 29)

The decree of distribution distributed the property to the persons entitled thereto “as described in the decree, and any and all other property not now known or discovered which may belong to said estate or in which said estate may have any interest be and the same is hereby distributed in accordance with said last will and testament.” (Tr. 30 and 31)

It will thus be seen that the reversionary interest in the automobile was bequeathed to the plaintiff and the decree of distribution is broad enough to include any and all interest that Mark Cook, deceased, had in the automobile.

In construing a decree of distribution recourse as to its meaning may be had to the will and if there is any ambiguity or any matters are omitted the terms of the will are incorporated into the decree of distribution. 34 C.J.S. 453 and cases cited in the foot note. The case of *In re: Effersons' Estate*, 259 Pac. 919; 70 Utah 258 is among the cases there cited. It is clear that the automobile was not distributed to the defendant and if it was not distributed to the plaintiffs, any interest or title of Mark Cook, deceased, remains suspended in mid air. The trial court did not find that the automobile belonged to the defendant, and so far as the record title is shown in the office of the State Tax Commission the automobile is still owned by Mark Cook, deceased. The provisions of *Article 4, U.C.A. 1943, 57-3a-62* requires that one who claims to be the owner of a motor vehicle which he operates upon the public roads of this state must be the registered owner of such automobile so operated.

From what has been said it follows that if the plaintiffs have been divested of the right, if any, that Mark Cook had in the automobile it must be because they did something or failed to do something resulting in their becoming divested of such title or interest.

PLAINTIFFS ARE NOT ESTOPPED FROM BRINGING
THEIR ACTION IN CONVERSION FOR THE VALUE
OF THE AUTOMOBILE.

By assignments numbered 1, 3, 5, 7 the plaintiffs attack the findings of the trial court to the effect that the plaintiffs knew that Mark B. Cook claimed to be the owner of the property before, during and after he became the appointed and acting executor of his father's estate. An examination of the evidence will show that such finding is wholly without support in the evidence. The evidence is to the contrary. The facts disclosed by the evidence are these: The certificate of ownership at all times stood in the name of Mark Cook in the office of the State Tax Commission without there ever having been any transfer to Mark B. Cook or anyone else. (Plaintiffs' Exhibits "A" and "B". Tr. 6-7-8) Up to the time of the death of Mark Cook the automobile was at all times kept in his garage and was also kept there part of the time after his death. (Tr. 5-10) In February, 1945 Mrs. Jones wrote to the Tax Commission and learned that the automobile had not been transferred from her father's name. (Tr. 13) Mrs. Jones knew that Mark was driving the car because her mother could not drive a car. (Tr. 14) Mrs. Jones knew that her mother claimed a life estate in the car. (Tr. 21) Hilton A. Robertson testified that he insured the automobile in the name of Irene B. Cook after Mark Cook's death and in Mark Cook's name before he died. (Tr. 36-39) Mrs. Whiting testified that after her father's death Mark came to his mother and secured the keys

to the automobile. (Tr. 42) Mrs. Whiting testified that Mark refused to let his mother take the car to go to Logan about July 24, 1944. (Tr. 47-48) That the car was in the garage at the home of Mr. and Mrs. Mark Cook (49), but after Mrs. Cook went to Arizona the car was gradually kept more of the time at Mark B. Cook's residence.

Mark Cook testified that part of the time after he claimed he had possession of the certificate of ownership it was kept in his father's garage. (Tr. 86) He further testified that he had never told his sisters that he had the certificate of title to the automobile. (Tr. 90)

Both Mrs. Jones and Mrs. Whiting testified that they had no actual knowledge of what was contained in the inventory and appraisement or the decree of distribution until after the death of their mother. (Tr. 110 and 122)

The foregoing contains a summary of all the evidence we are able to find in the record touching the claimed knowledge of the plaintiffs that Mark B. Cook claimed to be the owner of the automobile. None of such evidence lends support to the findings to the effect that plaintiffs had any knowledge that defendant claimed to be the owner of the automobile. All of the evidence is to the contrary. The fact that Mark B. Cook had possession of the automobile may not be said to advise or even tend to give notice to the plaintiffs that defendant claimed the automobile. The plaintiffs were not in any event entitled to the possession of the auto-

mobile until the death of their mother which occurred on September 14, 1946. (Tr. 6) Mark Cook was in no condition to drive the automobile for some time before his death (Tr. 9), and Mrs. Cook was unable to drive an automobile. (Tr. 14) Thus if the plaintiffs are estopped from claiming the automobile or its value it must be because they failed to assert their rights in the probate proceedings. It should be observed that when the probate proceedings were being had it was a matter of sheer speculation as to whether the plaintiffs would ever receive any right of value in the automobile. It may well have been worn out before their right to its possession vested in them.

It has repeatedly been held by the courts of record in California that the settlement of an executor's account and the allowance thereof by the court in the absence of an appeal is conclusive against all persons interested in the estate but only as to such matters as were actually included in the account or objections thereto and actually passed upon by the court. *Sontag vs. Superior Court, in and for Los Angeles County*, 36 Pac. (2d) 140; *Wallis vs. Walker*, 37 Cal. 424; 99 Am. Dec. 290; *Tobelman vs. Hildebrandt*, 72 Cal. 315, 14 Pac. 20; *Estate of Adams*, 131 Cal. 415, 63 Pac. 838; *Estate of Ross*, 179 Cal. 335; 182 Pac. 303; *Estate of Clary*, 203 Cal. 335; 264 Pac. 242; *In re: Evans Estate*, 144 Pac. (2d) 625.

We are mindful that under the provisions of *U.C.A. 1943, 102-11-37*, which is taken from the California

Code, the settlement of an account of an executor or administrator is, in the absence of fraud, conclusive as to all matters stated in the account and as to matters which have been litigated in the probate proceeding. It was so held *In re: Raleigh's Estate*, 48 Utah 128; 158 Pac. 705. In the case of fraud such doctrine does not apply. *Weyant vs. Utah Savings and Trust Company*, 54 Utah 181; 182 Pac. 189.

In the case of *In re: Rice's Estate*, Utah; 182 Pac. (2d) 111, there is reviewed a number of Utah cases dealing with the question of whether or not a proceeding for the determination of the title to property claimed by the estate and also claimed by some one else must be tried in the probate matter or by an ordinary action at law or suit in equity. The conclusion is reached that it might be tried as a part of the probate proceeding or as an independent action and cases holding that the case may not be tried as a part of the probate proceeding are overruled. In the course of the opinion it is said on page 117 of 182 Pac. (2d) that a decree of distribution in probate proceedings after due and legal notice, by a court having jurisdiction of subject matter is conclusive as to the funds, property, items and matters covered by and properly included within the decree until set aside or modified by the court entering the decree in the manner prescribed by law or until reversed on appeal.

In that case the court cites *U.C.A. 1943, 102-11-37* hereinbefore referred to and also *U.C.A. 1943, 102-14-23*.

The latter provision provides that mistakes in settlement may be corrected at any time before final settlement and discharge and after that time by an action in equity on such showing as will justify the interference of the court.

In this case nothing was said about the automobile in the probate proceedings. The court certainly did not distribute the automobile to the defendant. As we have heretofore pointed out any interest which Mark Cook had in the automobile after the death of Irene B. Cook was distributed to the plaintiffs.

The language of the decree of distribution wherein it states that there is distributed to Leah C. Jones, Martha C. Whiting and Louise C. Beeton, daughters of said deceased, the reversionary interest in and to all the rest, residue and remainder of the estate of said deceased in equal, undivided shares clearly includes everything belonging to the estate not devised or bequeathed to Mark B. Cook. The automobile is included within such language just as clearly as the other personal property which was bequeathed to the plaintiffs.

THE DOCTRINE OF RES ADJUDICATA DOES NOT PRECLUDE THE PLAINTIFFS FROM MAINTAINING THIS ACTION.

Most of what we have said under the preceding heading is applicable to the claim that the title to the automobile has been adjudicated, as we understand defendant's position, in his favor. There is a total

absence of any language in the decree of distribution awarding the automobile to the defendant. As we have heretofore pointed out the decree of distribution awards to the plaintiffs the reversionary interest of all property of the estate not awarded to the defendant.

The authorities are generally to the effect that where the legal title to property stands in the name of the decedent it is the duty of the executor or administrator to include the same in the inventory and appraisal, especially where the claim is made by the representative. *33 C.J.S. 1088*, and cases cited in foot note. That such is the duty of an executor or administrator in the case of an automobile seems to be essential under the provisions of our motor vehicle law. *U.C.A. 1943, Article 4, Sec. 57-32-62*.

If the defendant in this case had placed the automobile in his inventory and then sought to have the same distributed to him the other persons interested in the estate would have had notice of such claim and been given an opportunity to resist the same. Under the facts disclosed by the evidence in this case and the law applicable to said evidence as announced by the trial court an administrator may acquire title to property by failing to list the same in the inventory and if the persons entitled to the property fail to discover the neglect then they are precluded from recovering that to which they are justly entitled. Such doctrine is at war with well established principles of law. An executor or administrator occupies a fiduciary relation to the persons entitled to the proceeds of the estate which he

is administering and if he claims any interest adverse to others interested in the estate it is his duty and obligation to bring home to them his adverse claim. In this case there is nothing which shows or tends to show that the defendant claimed the automobile until after the death of Irene B. Cook.

The recent case of *Austin Rice vs. Erma Rice, Executrix and Trustee in the Matter of the Estate of David L. Rice, deceased*, decided by this court on December 21, 1949, but not yet reported or final, announces principles of law which are applicable here. In this case, as in the Rice case, the executor did not mention to the court that Mark Cook left an automobile standing in his name. Nor did he inform the appellants that he claimed the automobile. On the contrary he signed his father's name to the certificate of registration which was calculated to mislead the appellants to believe that he recognized the ownership of the automobile to be in his father. Defendant did not seek to have the automobile distributed to himself. On the contrary he failed and neglected to inform the court that the legal title to the automobile stood in the name of his father. Moreover as we have heretofore pointed out the decree of distribution distributes to the appellants herein "the reversionary interest in and to all of the rest, residue and remainder of the estate."

The automobile, if it belonged to Mark Cook, having been distributed to and vested in the appellants upon

the death of their mother there was no occasion to have the decree of distribution amended. The decree vested the ownership of the automobile in appellants the same as it vested in them the ownership of the other personal property. That being so and the respondent having appropriated the automobile to his own use the appellants elected to bring this action in conversion.

PLAINTIFFS' RIGHT TO MAINTAIN THIS ACTION IS NOT BARRED BY THE PLEADED STATUTE OF LIMITATION.

There are three reasons why the provisions of *Title 104, Chapter 2, Subdivision 2 of Section 24, Utah Code Annotated, 1943*, are not available as a defense to this action. They are:

First: An executor or administrator may not acquire title to property which he is administering by adverse possession. *53 C.J.S. page 954, Sec. 19; 54 C.J.S. Sec. 6, page 162; 34 C.J.S. Sec. 733, page 756* and cases cited in foot notes. See also *Hatch vs. Hatch*, 46 Utah 116, 148 Pac. 1096.

The decree of distribution in this case was signed and filed on September 5, 1945. (J. R. 24) Mark B. Cook was discharged as executor on September 12, 1945. (J. R. 25) The complaint in this action was filed on May 22, 1948, summons was served on the defendant on May 22, 1948. It will thus be seen that the action was commenced well within three years after the decree of distribution was made and filed:

Second: Moreover the plaintiffs were not entitled to the possession of the automobile until the death of their mother which occurred on September 14, 1946. (Tr. 5) These appellants could not be heard to complain if Irene B. Cook, who held a life estate in the automobile saw fit to permit her son Mark to use the automobile. Nor were the plaintiffs required to make inquiry as to who was paying the taxes. While Mark B. Cook was acting as executor it was his duty to pay the taxes and after his discharge it was the duty of Mrs. Cook to pay the taxes. If she was content to let Mark pay the taxes for such use as he made of the automobile it was no concern of these appellants. They were without the right to maintain the action until they were entitled to the possession of the automobile and probably not until they made demand for the possession of the automobile. 46 *Am. Jur.*, page 33, Sec. 55. Also 53 *Am. Jur.*, page 945, Sec. 181.

Demand for possession was not made by the plaintiffs until on or about May 12, 1948. (Defendant's Exhibit 4)

Third: One who conceals property or the ownership thereof may not be heard to plead the bar of the statute of limitations during such time as he conceals such ownership, or one who conceals the existence of a cause of action may not be heard to plead the bar of the statute of limitations during the time of such concealment, especially where there is a fiduciary relation. 54 *C.J.S.*, 221; *Peteler vs. Robison*, 81 Utah 535; 17 Pac. (2d) 244.

THE TRIAL COURT ERRED IN FAILING TO FIND ON ALL ISSUES RAISED BY THE PLEADINGS AND IN FAILING TO FIND THAT THE PLAINTIFFS WERE ENTITLED TO A JUDGMENT AGAINST THE DEFENDANT FOR THE SUM OF EIGHT HUNDRED DOLLARS.

As we have heretofore in this brief pointed out the trial court failed and refused to find on the question of whether or not the claimed gift was ever made by Mark Cook to his son Mark B. Cook. We have assigned such failure as error in assignments 15, 16 and 17.

It has been repeatedly held by this court that it is error for the trial court to fail to find on all material issues. Among the numerous cases so holding are: *Everett vs. Jones*, 32 Utah 489; 91 Pac. 360; *Prows vs. Hawley*, 72 Utah 444; 271 Pac. 31; *Belnap vs. Fox*, 69 Utah 15; 251 Pac. 1073; *Hatch vs. Baker*, 70 Utah 1; 257 Pac. 673.

If a finding is not material or if the evidence is such that a finding, if made, must be against the party complaining then and in such case the error is not prejudicial and the failure to find on all issues will not result in a reversal of the judgment.

We have heretofore set out the evidence touching the claimed gift and also the evidence in conflict therewith. We shall not repeat all of such evidence, except to observe that the same is not sufficient to support a

finding that Mark Cook made a valid gift of the automobile. In order to be effectual a gift must be fully executed, for the reason that there being no consideration therefore no action will lie to enforce it. *Wood vs. Wood*, 87 Utah 394; 49 Pac. (2d) 416; *Helper State Bank vs. Creer*, 95 Utah 320; 81 Pac. (2d) 359; *Holman vs. Deseret Savings Bank*, 41 Utah 340; 124 Pac. 765; *Christensen vs. Ogden State Bank*, 75 Utah 478; 286 Pac. 638. See also 38 C.J.S. page 793, Sec. 16.

It is said in the Holman case that to constitute a gift inter vivos the donor must be divested of, and the donee invested with the right of property in the subject matter of the gift. It must be absolute, irrevocable, without any reference to its taking place at some future period. The donor must deliver the property and part with all present and future dominion over it.

In this case the defendant must prevail, if at all, on the oral testimony of Mrs. Mark Cook wherein she testified that Mark Cook said to his son: "Mark, here is the certificate of ownership and extra set of keys to the car. I'm giving it to you with the understanding that you take Mother and I at any time we want to go." (Tr. 94) That Mr. Cook then handed to Mark the extra set of keys and the certificate of ownership. It will be observed that the gift was conditioned upon Mark taking the father and mother for a ride whenever they wanted to go.

There is nothing in the evidence that Mark B. Cook accepted the gift. The authorities teach that there must be: "An unmistakable and unconditional acceptance on the part of the donee to the validity of a gift *inter vivos*. It is immaterial whether delivery and acceptance are contemporaneous or which precedes the other, acceptance need not be immediate, it is sufficient if the gift is accepted before revocation by death or otherwise. 38 C.J., page 807-808, Sec. 29.

On cross examination Mrs. Mark B. Cook gave the following answer to the following question: "Q. All right, as I recall your testimony, it was this: That he stated to Mark that he would give him the car if he would take the father and the mother out for a ride when they wanted to go? A. Not if, with the understanding that we would take them, or Mark would take them when they wanted to go. (Tr. 99)"

There is no evidence that Mark B. Cook accepted the gift before the death of his father. There is evidence that he repudiated the conditions accompanying the gift when he refused to take his mother to Logan or to permit the use of the automobile for such purpose. (Tr. 97) (Tr. 131) Thus according to defendant's own evidence Mark B. Cook was not given the absolute possession of the automobile. Such possession as he had was at all times subject to the right of the father

and mother to the use of the car when they desired to go for a ride. So also is there an absence of any evidence that Mark B. Cook accepted the claimed gift but on the contrary the evidence shows that Mark B. Cook refused to comply with the conditions imposed as a condition of the gift, not to mention the other evidence showing that a gift was not made.

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE THE VERIFICATION TO THE INVENTORY AND APPRAISEMENT FILED IN THE ESTATE OF MARK COOK.

The apparent purpose of admitting in evidence the verification to the inventory and appraisement in the Mark Cook estate was to get before the court evidence that Mark Cook gave the automobile to Mark B. Cook. Such evidence not only is a conclusion but offends against the provisions of *U.C.A. 1943, 104-49-2*. That Mark B. Cook is incompetent to testify as to transactions had between him and his father is clearly provided by subsection 3 of the above cited provision of our statute would seem clear. That being so he may not indirectly testify that the property listed in the inventory and appraisement is all the property belonging to the estate. To permit such testimony is in effect permitting him to testify that the automobile was not a part of the estate because the same was given to him.

We mention this matter at this time because if and when a new trial is had the trial court may repeat the error.

It is submitted that the judgment appealed from be reversed and that the trial court be directed to enter judgment in favor of the plaintiffs and against the defendant for the sum of \$800.00, the stipulated value of the automobile, or if that is not done that a new trial be ordered and that plaintiffs be awarded their costs herein.

Respectfully submitted,

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and Appellants.*