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

Utah Supreme Court

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In the Supreme Court of the State of Utah

LEAH C. JONES; MARTHA
C. WHITING and LEAH C.
BEETON,

Plaintiffs and Appellants,

vs.

MARK B. COOK,

Defendant and Respondent.

CASE NO.
7424

RESPONDENT'S BRIEF ON APPEAL

Appeal from the Fourth Judicial District Court of the
State of Utah, Hon. Wm. Stanley Dunford, Judge.

FILED CHRISTENSON & CHRISTENSON,
Attorneys for Defendant
and Respondent

MAR 11 1950

ELIAS HANSEN,
Derk, Supreme Court, Utah Attorney for Plaintiffs and
Appellants

INDEX

	Pages
Statement of Facts.....	1
Cross-Assignment of Error.....	13
Argument	14
I. The decree of distribution did not cover or distribute the automobile in question or any reversionary interest therein.....	16
II. The probate proceedings are res judicata of plaintiffs' claim to the automobile.....	22
III. The plaintiffs' claim to the automobile is barred by the Statute of Limitations.....	26
Conclusion	29

AUTHORITIES CITED

53 Am. Jur., sec. 176, p. 941.....	16
Boles v. Stiles (Calif).....	21
204 Pac. 848	
Briedwell, et al v. Henderson (Ore).....	21
195 Pac. 575	
23 CJ, sec. 383, pp. 1167, 1168.....	23
28 CJ, "Gifts", sec. 41(h), p. 646.....	20
28 CJ, "Gifts", sec. 45(k), p. 650.....	
28 CJ, p. 672.....	20
37 CJ, sec. 18, p. 699.....	27
54 CJ, sec. 243, p. 541.....	16
33 CJS, 1076, 1087.....	
38 CJS, sec. 18, p. 794	19
38 CJS, sec. 21, p. 801	19
38 CJS, sec. 24, p. 803	19
38 CJS, p. 808.....	20
Dee v. Hyland.....	28
3 Utah 308; 3 Pac. 388	
Jackson v. James.....	16, 21, 22
97 Utah 41; 89 P. 2d 235, 237	
Jensen v. James.....	16
50 Utah 485; 167 Pac. 827	
Jones v. Commercial Inv. Trust.....	16
64 Utah 137; 228 Pac. 896	

INDEX (Continued)

	Pages
Mandes v. Mendes (Calif)	21
217 Pac. 1078	
Moody v. Goodwin	21
53 Cal. App. 693; 200 Pac. 733	
Nichols v. Randall (Calif)	27
69 Pac. 26	
Pendell v. Thomas (Calif)	21
272 Pac. 306	
In re: Raleigh's Estate	25
48 Utah 138; 158 Pac. 705	
Reed, et al v. Knudson, et al.	20
80 Utah 428; 15 P. 2d 347	
In re: Reiser's Estate	27
57 Utah 434; 195 Pac. 317	
In re: Rice's Estate	23
111 Utah 428; 182 P. 2d 111	
Rice v. Rice	24
____ Utah ____; 212 P. 2d 685	
Sidney v. Wilson	21
67 Cal. App. 282	
Sontag v. Superior Court (Calif)	25
36 P. 2d 140	
Snow v. West	28
35 Utah 206; 99 Pac. 674; 136 Am. St. Rep. 1047	
Torsak v. Rukavina	30
67 Utah 166; 246 Pac. 367	
Utah Code Annotated, 1943:	
102-11-37	23
102-14-23	24
104-2-24(2)	26
Votaw v. Farm. Auto. Ins. Co. (Calif)	21
85 P. 2d 872	
Votaw v. Farm. Auto. Ins. Co. (Calif)	21
97 P. 2d 958	
Walls v. Walker	25
37 Cal. 424; 99 Am. Dec. 290	
Weideman v. Campbell, et al.	21
215 Pac. 885	
Whitworth v. Jones (Calif)	21
209 Pac. 60	

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C. WHITING and LEAH C.
BEETON,

Plaintiffs and Appellants,

vs.

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Defendant and Respondent.

CASE NO
7424

RESPONDENT'S BRIEF

STATEMENT OF FACTS

Appellants' "Statement of the Case" contains various items of argument which we shall not undertake to correct until we come to the division devoted to argument in this brief. Exception further must be taken because it does not set out a number of the important facts which are established by the record, and to which we will call attention in this statement. It also recites as "facts" testimony which, although appearing in the record, is controverted by other preponderating testimony. In other words, while there is

some evidence to support much of the statement presented by appellants, yet as to several of the facts claimed, other evidence preponderates. The court found against appellants, and in view of this, we are noting below facts contrary to those cited by appellants or in explanation of them, which we believe are supported by the preponderance of the evidence and which have been confirmed by the findings of the court.

With respect to pleadings, in addition to the denial of respondent's ownership of the automobile and the other matters mentioned in appellants' statement, the answer of defendant alleges fully the personal and other notices given to the plaintiffs of the probate proceedings (JR 8-9) and the personal knowledge of the plaintiffs concerning defendant's claims to, and possession of, the automobile (JR 10).

Appellants claim on page 4 of their brief that "they (the plaintiffs) 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." By this, it seems to be inferred that the defendant alleged that during the time he was acting as executor he had possession of the automobile as by law permitted and alleged that Irene B. Cook held a life estate in said automobile. This is contrary to the facts, since Mark B. Cook, at all times, both in his pleadings, in his testimony and by his conduct and otherwise, claimed and took the position that he had possession of the automobile under a personal claim of right and that neither Irene B. Cook nor the plaintiffs had any interest in the automobile (JR 10-11).

Leah C. Jones, one of the plaintiffs, testified that she was interested in keeping track of the car even before her

father's death (Tr 11) and she knew that the defendant was using the car whenever he wanted to (Tr 13). The plaintiffs first decided in February of 1945 that there was a question in their minds as to whom the car belonged (Tr 13) and apparently had in mind making a claim as early as February, 1945, but the date a claim for the car was communicated by the plaintiffs was in May, 1948, when plaintiffs' attorney made a demand (Tr 14).

The defendant was the only one that had any possession of the car after the father's death as far as the plaintiff, Leah C. Jones, knew (Tr 14). The three plaintiffs and Irene B. Cook were present in court when the estate of their father was ordered distributed and they made no objections to the distribution (Tr 15). They knew that there was a decree of distribution and that it was sent over to their mother's place and the witness, Jones, saw it at least after her mother's death. The witness also knew Mark went on using the car (Tr 15).

Although the plaintiff, Jones, had taken an interest in the car before she was appointed administratrix of her mother's estate, she at no time said anything to Mark. She knew Mark had gotten the license plates to the car in 1945 (Tr 16-17). She stated that the question of taxes didn't concern her in 1945. Although it was uncontradicted that Mark had paid all taxes, she stated that all that concerned her was who owned the car (Tr 16). She knew that no one else had the possession of the car excepting the defendant and perhaps his wife, sometimes (Tr 17). She said she didn't think that the hearing of the appraising of the estate was the time to make any objections (Tr 17).

While there was a policy of insurance issued to Irene B. Cook in June, 1944, this policy was issued in the absence

of the defendant, the agent telling Mrs. Cook that there had been a policy in May, 1943, which had lapsed and she was asked to renew it (Tr 38). This was in June, 1944, before Mark B. Cook was appointed executor. The insurance was not for damage to the car itself but was for public liability and property damage to others (Tr 39).

The plaintiff, Martha C. Whiting, was also called as a witness, the third plaintiff not testifying. She admitted that none of the sisters were known to use the car either before or after her father's death; the mother, Irene B. Cook, asked Mark to let the car go up to Logan on a trip on which one of the plaintiffs' sons was to drive and Mark refused (Tr 46). This was about the 24th of July, 1944. The defendant at that time said he needed the car. While the witness stated that Mark kept the car at times in the garage of his mother's place, she admitted that he had other things in the garage belonging to him, among which it seemed to the witness, was a tractor (Tr 50).

Mark B. Cook testified that he received the certificate of title to the car in question the first part of May, 1943 (Tr 55) and had it in his possession ever since then (Tr 78). He denied that he later obtained the certificate from his mother as claimed by the witness, Leah C. Jones (Tr 79-80). It should be observed that the claim of plaintiffs that defendant actually received the certificate from his mother rather than from his father is based on hearsay (Tr 115).

After receiving the certificate, he had the car in his possession and claimed it as his own, and the first time he was ever notified that claim was made to the car, other than by himself, was in 1948, when he received a letter from plaintiffs' attorney (Tr 60).

It is apparent that the court, in view of his findings, believed Mark Cook.

He also testified that his name was Mark B. Cook and that he was also known as Mark Cook and Mark Cook, Jr., he further testified that his name was in the phone book as Mark Cook, Jr. (Tr 80). It thus was readily apparent why he did not consider it necessary to change the name on the certificate of title from Mark Cook.

He further testified that the automobile was kept in his father's garage up to the winter of 1943-44, after which he kept it at his place and has never kept it at his mother's place since. He further testified that he had had the car exclusively in his possession from 1943 (Tr 87).

He was appointed executor of his father's estate in July, 1944. He first learned that his father had made a will after his mother had returned from Arizona and his mother returned in April, 1944 (Tr 88). It will thus be seen he had possession of, and claimed, title to the car at least a year before he knew that his father had made a will. He further testified that in the winter of 1943-44 the reason he kept the automobile at his father's garage was because heavy snow made it impractical to keep it at his home (Tr 89). He did not then have a garage himself, but fixed up one at the end of the winter and at all times after that, kept the car in his own garage (Tr 89).

The defendant did not know about insurance when his mother took it out. When the policy was delivered to her, she told Mark she wanted to keep the insurance up so he wouldn't get into trouble. The defendant told her he would have to pay for it, but that he didn't want that kind of insurance as it was only liability insurance and wouldn't include collision insurance on the car; the defendant himself,

in June, 1945, took out full coverage (Tr 106). He paid his mother for the liability policy and took it home (Tr 104) a few days after it was delivered to her.

Mrs. Mark B. Cook testified that she first saw the certificate to the car the day Mr. Cook gave it to the defendant. His father had asked the son to take him for a ride, and on this ride, in the presence of Mrs. Cook, Mark and the witness, at a time when they were stopped at Deer Creek Dam, the father handed Mark the certificate of ownership and the extra set of keys to the car and stated, "I am giving it to you with the understanding that you take mother and I at any time when we want to go." (Tr 94). There was a set of keys in the car and he also gave Mark the extra set of keys (Tr 95). The witness further testified that Mr. Cook said, "I am giving you the car. I am giving you the car with the understanding you take mother and I when we want to go." (Tr 100).

Mark used the car almost every day (Tr 103).

Leah C. Jones on rebuttal admitted that in February, 1945, before she had contacted her attorneys, she was watching the car and that the plaintiffs discussed the car between themselves and that her sisters and she discussed it and that her mother discussed the way things were going (Tr 117). She knew about these discussions when the final account and petition for distribution were heard (Tr 117).

She further testified that she knew the car was not in the inventory (Tr 126) and thereafter, she said she couldn't answer the question as to whether she knew it was not in the inventory; she said that they thought about the car but they didn't want to bring it up because their mother had ill health (Tr 127). She further testified, "We didn't want

trouble with Mark", and further said she thought the car belonged to them. She further testified that she didn't recall saying anything about the car to Mark (Tr 182); that they didn't say anything about it to Mark's attorney (Tr 127) and that they didn't care to fuss about the car while their mother was alive (Tr 128). She further testified that while they wrote to the State Tax Commission in February, 1945, they didn't say anything to Mark about the car "because it wouldn't have done any good. We knew from experience." (Tr 192). She further testified that she knew her mother went over and asked for the car so that the son of the witness could drive it to Logan and that Mark refused her (Tr 131).

There was received in evidence as defendant's Exhibit 5 the inventory and appraisement in the estate of Mark Cook, deceased, and the certificate that the same contained a true statement of all of the estate of the said deceased which had come to the knowledge and possession of the executor (Tr 62). The inheritance tax report and appraisement filed in the estate of Mark Cook, deceased, was also received; this report and appraisement contained no reference to the automobile in question; also, the order prescribing notices of inheritance tax appraisement (Defendant's Exhibit 7) (Tr 63) and the notice of the hearing given by the tax appraisers (Defendant's Exhibit 8) and the proof of the service of notice upon each of the plaintiffs (Defendant's Exhibit 9) (Tr 64, 72).

Defendant's Exhibit 10, being proof of posting and mailing notices of the hearing of the petition of final distribution, was received in evidence, showing both posting as required by law and also service by mailing upon all of the plaintiffs, together with others (74-75).

The decree allowing and approving the final account in the matter of the estate of Mark Cook, deceased, was received in evidence. Since, in appellants' "Statement of the Case", they assume to interpret this decree by a fragmentary reference to a recital concerning "unknown or undiscovered property", we are quoting in full the pertinent provisions and stipulations made at the trial with respect thereto:

"Mark B. Cook, executor of the last will and testament of Mark Cook, deceased, having on the 6th day of August, 1945, filed in this court the final account of said executor together with a petition for final distribution of the residue of the estate of said deceased, and said account and petition coming on regularly to be heard before the court the 18th day of August, A. D. 1945, and it having been made to appear to the court at said hearing that notice thereof had been given for the time and in the manner ordered by the court and as provided by law, and the court having heard sworn evidence on behalf of the petitioner in support of said petition, and it appearing therefrom to the satisfaction of the court that due and legal notice to the creditors of said decedent has been given for the time and in the manner required by law, and further, that a decree showing that such due and legal notice has been given, has heretofore been made and filed herein as provided by law; and it further appearing from the evidence that all of the claims and debts against the decedent and against his estate and all inheritance taxes due and payable and all property taxes payable by and or on account of said estate and all debts, charges and expenses of administration have been duly and fully paid and discharged, and that said estate is now in a condition to be closed.

"IT IS, THEREFORE, HEREBY ORDERED, AD-

JUDGED AND DECREED: that the final account of said executor, Mark B. Cook, be and the same is hereby approved, allowed and settled, and that the residue of said estate of Mark Cook, deceased, as hereinafter particularly described, 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 of said decedent and as hereinafter set out, to-wit:

“To Irene B. Cook, surviving widow of said deceased, all of the estate and property of said deceased for her use and benefit during her natural life, with the remainder or reversionary interest therein to be distributed as hereinafter specifically provided; said property above referred to and hereby distributed is described as follows, to-wit:

“And Judge, you want me to read all of the descriptions of the real estate?

MR. CHRISTENSON: I don't think so.

THE COURT: It describes the property without the automobile?

MR. HANSEN: I don't know about all of the property, probably not. We might read on this. There are one, two, three, four, five, six, seven, eight, nine—there are nine tracts of land.

MR. CHRISTENSON: There is no question about him having received the real estate, I take it, and it's been distributed?

MR. HANSEN: The nine tracts of land described and then follows this: (Reading)

“Water stocks. 1 share Mapleton Irrigation Co., cert. No. 506. 5½ shares Springville Irrigation Co., cert.

No. 171. 96 shares Big Hollow Irrigation Co., cert. No. 1 for 72 shares, cert. No. 12 for 24 shares.

"Farm machinery and equipment. Combine harvester, scraper, double disk, cultivator, horse, cow, calf. Together with any and all other farm equipment and other property now upon or used in connection with said real property and belonging to said estate.

"Household furniture belonging to said deceased.

"To Mark B. Cook, son of said deceased, the reversionary interest in all of the above described real estate, water stock and all farm machinery and equipment and livestock belonging to the estate or used in connection with said real estate, subject only to the life estate in Irene B. Cook, widow of said deceased;

"To Leah C. Jones, Martha C. Whiting and Louise C. Beeton, daughters of said deceased, the reversionary interest in and to all of the rest, residue and remainder of the estate of said deceased, in equal undivided shares, subject however, to be held by said Irene B. Cook, surviving widow of said deceased, during her natural life, who is entitled to the use and enjoyment of all of the income therefrom as long as she may live.

"The following described property included in the inventory and appraisal herein for inheritance tax and other purposes was held in joint tenancy by said deceased, and is now the individual property of said Irene B. Cook, to-wit: 213-American Wholesale Grocery Co., stock cert. No. 8 for 18 shares, cert. No. 175 for 40 shares, total 58 shares. Utah Wholesale Grocery Co. stock, cert. No. 860 for 111 shares. Springville Banking Co. stock, cert. No. 266 for 10 shares. U. S. War Savings Bonds, C33216793E-\$100; C3321-6794E - \$100; C16000163E - \$100; C16988096E - \$100; L6125490E-\$50; Q21659673E-\$25.

"Done in open court this 18th day of August, 1945.
Joseph E. Nelson, Judge."

It will thus be noted that the decree specifically defines the property included in the estate and as referred to in the recitals to which appellants called attention, and in detail sets out the items without any reference to the automobile.

Among other things, the court determined in its findings of fact:

"1. That on May 24th, 1941, one Mark Cook, now deceased, became the owner of a certain Ford sedan automobile, motor No. E-441914, referred to in plaintiff's complaint and defendant's answer, and that he continued the possession thereof until on or about the first week in May, 1943, when the possession of said automobile was delivered by said Mark Cook to the defendant, his son, and that ever since said time, the defendant has been in possession of said automobile with the knowledge of the plaintiffs, under the claim in good faith made by the defendant that said automobile had been given to the defendant by the said Mark Cook as a gift, and that defendant has since said time paid all taxes on said automobile, both county and state, out of his own funds. Whether there was in fact a valid gift of said automobile the court makes no finding by reason of the other determinative findings which follow. (JR 20-21)

"10. 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." (JR 24-25)

Irene B. Cook acknowledged receipt of "all of the prop-

erty distributed to me under the decree of distribution.” (JR 25, finding No. 11).

The court further found:

“14. The court further finds that notwithstanding their knowledge that the defendant claimed said automobile as his own personal property and possession of the same by virtue of said claim, neither Irene B. Cook, nor the plaintiffs herein, or either of them, have ever made or filed any objections or protests on account of the failure of Mark B. Cook as the executor aforesaid, or otherwise, to list the said automobile involved in this action in the inventory and appraisement as a part of the estate of said Mark Cook, deceased; nor have they, or either of them, ever made or filed any objection or protest on account of the failure of said Mark B. Cook as the executor aforesaid, or otherwise, to list said automobile in his report to the Inheritance Tax Appraisers or his failure to have the same appraised therein; nor have the said plaintiffs therein or said Irene B. Cook, or either of them, ever made or filed any objection or protest to the failure of said Mark B. Cook as such executor or otherwise, to list said automobile in his final account filed in said estate or in the petition for final distribution of the residue of the estate of said deceased, nor of his failure to have the same included in the decree of final distribution, nor have the plaintiffs ever made or filed any claim whatsoever, or in any way notified defendant that they claimed any interest in said automobile until long after the time for appeal from the decree of final allowance of the said final account and from the said final decree of distribution had expired in the matter of the estate of Mark Cook, deceased.

“15. That the decree allowing and approving the final account of said Mark B. Cook, as the executor of the will of said Mark Cook, deceased, and the decree there-

in of final distribution dated September 5th, 1945, are res judicata and that the plaintiffs herein are thereby estopped to claim any right, title or interest in said automobile involved in this action, to wit: that certain Ford sedan automobile, Motor No. E-441914.

"16. The court further finds 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 the 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 of said possession and claim, and that the 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."

CROSS-ASSIGNMENT OF ERROR

We believe that the findings as made by the trial court finally dispose of the case. We also believe, however, that the court, in addition, should have found on the issue raised by the complaint alleging ownership in the plaintiffs and the answer denying such ownership that the plaintiffs were not the owners of said car, but that said car had been given by Mark Cook, defendant's father, as a gift to the defendant during the first week of May, 1943, and that the defendant was ever since said time, and now is, the owner of said car.

We therefore submit in the event this court should determine that the defenses of res judicata and Statute of Limitations do not dispose of the case, the judgment in favor of the defendant should nevertheless be sustained by this court under the following cross-assignment:

1. The court erred in failing to find that plaintiffs were not, and never have been, the owners of the automobile in question, and in failing to find that the plaintiff became the owner of said automobile during the first part of May, 1943, by gift from his father and that ever since said time, he was, and now is, the owner of said automobile, which finding is required by the undisputed evidence.

ARGUMENT

The plaintiffs state three main questions as being presented:

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

Our position on this proposition is that not only does the decree of distribution fail to distribute the automobile to the plaintiffs, but that irrespective of the decree of distribution, the automobile was not a part of the estate of the deceased and could not have been included in the decree as it was the property of the defendant by gift from his father. Under this heading, therefore, we shall answer the corresponding arguments of appellants and also defendant's cross-assignment.

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 appraisal and otherwise failing to account therefor?

This question as stated by appellants is in the nature of a straw man because it assumes that the plaintiffs are entitled to the property, and that the property was part of the estate. We will discuss this question in relation to the decisions of the court which indicate that the decree of

distribution in this case could be attacked only for extrinsic fraud. We will show that the record fails to indicate extrinsic fraud, that there are no pleadings raising such issue and that the case was not tried on any such theory. We will also show that the plaintiffs knew about the claims of defendant throughout the course of the probate proceedings and intentionally chose not to contest them. Rather than use the phraseology of plaintiffs in discussing these questions, we shall discuss them under the heading, "Are the claims of the plaintiffs *res judicata* by virtue of the decree and other proceedings of the probate court?"

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?

This proposition is, in a sense, another false issue, as it assumes that the automobile was property of the estate which he was administering, and ignores the proof not only that the automobile had been given to the defendant prior to the death of Mark Cook, but that the defendant came into the possession of the automobile before the death of the donor, before he had made any will, before the defendant knew of the existence of any will and long before he was appointed executor; and that defendant had claimed the automobile as his own, with the knowledge of the plaintiffs during all that time. Furthermore, the proposition as worded makes the gist of the adverse possession payment of taxes, while disregarding the other elements which serve to bar the claim.

Therefore, the third proposition also can more properly be discussed under the question of "Whether the claim of the plaintiffs is barred by the Statute of Limitations."

I. The decree of distribution did not cover or distribute the automobile in question or any reversionary interest therein.

The decree of distribution did not distribute the automobile; first, because by its terms the automobile was excluded and not covered; and second, because the deceased during his lifetime already had made a valid gift of the automobile to the defendant.

In plaintiffs' "Statement of the Case," it is said, "We are mindful that this court may not review conflicting evidence and determine 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 of Jackson v. James, 97 Utah 41, 89 P. 2d 235, then and in such case, the plaintiffs are entitled to a judgment for \$800.00, the stipulated value of the automobile." We believe that in each of the premises upon which plaintiffs rely they are in error, but certain other inquiries should first be considered.

We may note in passing that the burden was upon the plaintiffs to show ownership and conversion, and they must prevail, if at all, on the strength of their own title, 53 Am. Jur. Sec. 176, p. 941; Jensen v. James, 50 Utah 485, 167 Pac. 827; Jones v. Commercial Inv. Trust, 64 Utah 137, 228 Pac. 896. On the other hand, proof of actual possession of property or the performance of acts of dominion over it raises a presumption of ownership. 54 C. J. Sec. 243, p. 541.

Now, did the decree of distribution either actually or purportedly distribute the automobile to plaintiffs?

The plaintiffs claim through the decree of distribution in the Mark Cook estate on the basis of the contention that even though the automobile was not specifically listed in the report, nor in the inventory and appraisement, nor in the proceedings for inheritance tax, it nevertheless was distributed by the general provisions of the decree of distribution, as follows:

“It is therefore hereby ordered, adjudged and decreed that the final account of said executor Mark B. Cook be and the same is hereby approved, allowed and settled, and that the residue of said estate of Mark Cook, deceased, as **hereinafter particularly described**, and any and all other property **not now known or discovered**, which may belong to the said estate or which said estate may have any interest in, and the same is hereby distributed in accordance with the last will and testament of the said decedent, and as **hereinafter set out, to-wit:**” (Emphasis added)

(Then is described specific property, not including the automobile.)

It seems clear from an examination of the above quoted provision from the decree that the court directly distributed the residue of the estate, “as hereinafter particularly described” The automobile in question was not listed therein.

The plaintiffs in their testimony show very clearly that prior to the date of this decree they had full knowledge of the claims of Mark B. Cook, and the court so found.

Leah C. Jones, as early as February of 1945, knew of the claim of the defendant to the ownership of the car and she investigated at the State Tax Commission office in Salt Lake. She also knew that the defendant was using the car in ways inconsistent with his fiduciary duty to the estate

had the car belonged to it, and that he paid taxes on it from his own resources.

Martha C. Whiting knew of the defendant's use and of his keeping of the car, and his assertion of ownership was brought clearly to her attention on the 24th of July, 1944, when the defendant refused a request to permit her son to drive the car to Logan. The car was known, discovered and discussed on all sides, and in fact plaintiffs intentionally refrained from raising any issue and from questioning the defendant's right. Under these facts, it cannot be said this property was "not known or discovered" at the time of the hearing of the final account.

The final account and decree of distribution in its material parts was read into the record (Tr 33-34). While the recital of the decree referred to "other property not now known or discovered," the decree itself is specific as to the property decreed and provides that "said property above referred to and hereby distributed is described as follows:" (Then follows the description of specific property, not including the automobile in question; the description neither directly or indirectly includes other property, whether discovered or undiscovered) (Tr 34).

It also seems significant that in the will of Mark Cook and Irene B. Cook, while the plaintiffs were named as residuary legatees, a large number of the items covered by such residuary clause were specified in the will itself, even to the extent of reference to "cash in any bank or banks," capital stock or various named companies, and "household furniture and furnishings." It seems natural that if the automobile were owned or claimed by the decedents, or either of them, at the time the will was made, it would have been mentioned, as it was the only item of property claimed by

the residuary legatees which was not specified (Tr 29).

In addition to the fact that the decree of distribution does not purport to cover the automobile, there is another reason why it was not distributed as a part of the estate of Mark Cook, deceased, to-wit: Because it did not belong to Mark Cook, the father, at the time of his death, he having given it to the defendant in May, 1943. The automobile was given by Mark Cook to the defendant the first part of May, and the will was made out on the 26th day of May, 1943 (Tr 29).

There can be no question as to the delivery, for not only was the car itself in the possession of defendant, but the certificate of title and the extra set of keys were handed to the defendant. A symbolical delivery alone is sufficient, but here we had both. See 38 CJS, Sec. 18, p. 794; also Sec. 21, p. 801.

Where the property is already in the possession of the donee, no change in possession is necessary to effectuate a gift. 38 CJS, Sec. 24, p. 803.

It is argued by the plaintiffs that the gift to the defendant of the automobile in May, 1943, was conditional, and the condition having been broken, the gift failed. By the undisputed evidence, there was a gift, and plaintiffs are forced to concede this, but they seem to rely upon the claim of condition broken. There is no evidence of any broken or violated understanding, and on the other hand, the undisputed evidence is that even after the father's death, the defendant took his mother to Arizona in the car. Because he would not entrust the car to the son of one of the plaintiffs, shows no broken condition, and could in no way affect the gift; on the contrary, it brought home defendant's adverse position as against the plaintiffs.

A gift must be absolute and unconditional. Thus, a gift inter vivos is not effective if delivery to the donee is made conditional on the donor's death, or non-return, or in case anything happens to him. But the mere fact that the gift is accompanied by a condition or qualification not inconsistent with the vesting of title in the donee does not render it invalid. Thus a gift on the condition that the donee shall give a part of the property to a designated third person is a valid gift. 28 CJ, "Gifts," Sec. 41(H), p. 646.

The appellants argue (p. 27 of their brief) that there is nothing in the evidence that Mark B. Cook accepted the gift.

The acceptance of a gift, beneficial to the donee and otherwise complete, will be presumed unless the contrary is made to appear. 28 CJ, "Gifts," pp. 672; 38 CJS, p. 808. Not only is there such a presumption, but the evidence affirmatively shows, and the court found, that ever since the change of possession in May, 1943, the defendant held possession under claim of right. The plaintiffs' argument that defendant repudiated the condition of the gift by refusal to take his mother to Logan is without merit in point of law, as has been seen above, and also in point of fact for the request came from one of the plaintiffs for her son to drive the car, and as far as the record shows, this was the only request. His refusal to turn the car over to the son was a clear assertion of his right to the car, and again put the plaintiffs on notice thereof.

The delivery of a gift is a matter of intent, and intent is to be arrived at from all the facts and circumstances of the case. Reed, et al, v. Knudson, et al, 80 Utah 428, 15 P. 2d 347.

There is nothing in the record which indicates in any

way that the gift was not made as testified by the defendant's wife and all other facts and circumstances, including possession, omission from the estate with knowledge of plaintiffs, and exercise of dominion by defendant. Even the evidence relied upon by plaintiffs support the gift, for on the insurance, while the mother paid for the liability insurance "so Mark would not get into trouble," the defendant reimbursed her, and he himself took out full coverage, including collision insurance.

As to argument that without an endorsement by Mark Cook, the father, of the certificate of ownership, there could be no valid gift, the case of *Jackson v. James*, 97 Utah 41, 89 P. 2d 235, seems to dispose of such contention. This case also cites numerous cases reflecting the Utah law of gifts. The plaintiffs, in their brief, seem to hold that this court should now adopt the dissenting opinion in the *Jackson* case. We submit that the majority opinion reflects the proper rule of law, it is fully in accord with reason and other authority, and there is no reason why it should not be followed in this case.

The failure to comply with the law of signing the legal title and having the transfer required, does not make a transfer of an automobile unlawful so as to prevent the equitable title to the automobile passing to the purchaser or donee. *Mandes v. Mendes*, (Calif) 217 Pac. 1078; *Briedwell et al, v. Henderson*, (Ore) 195 Pac. 575; *Weideman v. Campbell, et al*, 215 Pac. 885; *Whitworth v. Jones*, (Calif) 209 Pac. 60; *Pendell v. Thomas*, 272 Pac. 306; *Sidney v. Wilson*, 67 Cal. App. 282; *Moody v. Goodwin*, 53 Cal App. 693, 200 Pac. 733; *Boles v. Stiles*, (Calif) 204 Pac. 848; *Votaw v. Farmers Auto Ins. Co.*, 85 P. 2d 872; *Votaw v. Farmers Auto Ins. Co.*, 97 P. 2d 958, especially 962.

Property need not be included in the inventory which the decedent transferred either by gift or sale during his lifetime, and the title thereto does not vest in the executor or the heir. 33 CJS, pp. 1076, 1087.

II. The probate proceedings are res judicata of plaintiffs' claim to the automobile.

We perhaps should notice at the outset in this division the last (unnumbered) heading of plaintiffs' brief, pp. 28-29, under which it is contended that the trial court erred in admitting in evidence the certification to the inventory and appraisal filed in the estate of Mark Cook. The resourceful but dubious argument is advanced that the exhibit mentioned was testimony of transactions with the deceased in contravention of Utah Code Annotated, 1943, 104-49-2. The plaintiffs, themselves, put in evidence the decree of distribution in the estate matter (Tr 30-34). Bearing on the question of notice of plaintiffs' claims and on what plaintiffs were charged with knowing, and as to the proceedings before the probate court, the inventory and appraisal, together with the certification thereof, was received. The plaintiffs made no objection to the inventory and appraisal, but objected to the verification thereof by the executor. Such objection had no merit, because it, in no way, or indirectly, was as to communications with the deceased. The same comment as was made by the court in *Jackson v. James*, 97 Utah 41, 89 P 2d 237, seems appropriate here: "In this connection, appellant argues that the court erred in permitting plaintiff to testify, contending that she was barred by the provisions of Sec. 104-49-2, RS of Utah, 1933. Plaintiff did not testify as to any transactions had with the deceased, or as to any conversations

with him, and there was consequently no error in permitting her to testify as a witness."

The objections raised bear no relationship to the evidence objected to, and moreover any possible substance to the objection could not raise or involve any prejudice, since it was admitted by plaintiff that the automobile was not included in the inventory and in any event, since in the absence of a finding on the issue of ownership or gift, it could not possibly have been considered by the court as plaintiffs infer. In short, the inventory and appraisal being admissible, there was no reason why it should be admitted piecemeal. See 23 CJ, Sec. 383, pp. 1167, 1168.

Now, passing to the principal question as to the binding effect of the proceedings in the probate court.

In re: Rice's Estate, 111 Utah, 428, 182 P. 2d 111, it is held that a decree of distribution in probate proceedings after due and legal notice by a court having jurisdiction of the subject-matter, is conclusive as to the fund 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 described by law or until reversed on appeal.

Cases are then cited and a reference is made to Sec. 102-11-37, UCA, 1943:

"The settlement of the account, and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator either individually or upon his bond, at any time before final distribution"

The court then says: "This section and the two quoted cases do not hold that a person defrauded by the acts of an executor or administrator is without means to correct the injustice. Section 102-14-23, UCA, 1943, sets out a remedy to the person so injured.

" 'Mistakes in settlement may be corrected before final settlement and discharge, and after such time by an action in equity, on such showing as will justify the interference of the court.'

"Being limited to his relief in equity, has the petitioner stated facts sufficient to constitute a cause of action against the executrix or trustee? To do this he must allege facts to show fraudulent acts or conduct on the part of the executrix sufficient to establish 'extrinsic fraud.' "

On the second appeal, *Rice v. Rice*, _____ Utah _____, 212 P. 2d 685, which related to the sufficiency of the evidence and not wholly to the pleadings, the court held that the evidence showed extrinsic fraud sufficient to authorize the intervention of a court of equity, while recognizing that judgments must be sustained and "not for anything but the most compelling reasons" set aside. In the *Rice* cases, the claims of the executrix originated under the will at the expense of the other legatee. In the instant case the defendant came into the possession and ownership of the car before the death of the testator. It was never a part of his estate, and the plaintiffs knew of defendant's claims prior to the time the defendant even knew there was a will. The defendant here made his claim in good faith with the knowledge of plaintiffs as the court found. The plaintiffs intentionally raised no issue during the probate proceed-

ings; they attended the hearing at which the property in the estate, not including the automobile, was ordered distributed. They said or did nothing until long after the decree of distribution had become final and, as a matter of fact, until just a short time before the commencement of the present action. In this action, they did not attack in their pleadings, or at the trial, the probate decree by an action in equity but have brought a purely legal action for conversion, and the case was tried on the theory of conversion. There was no fraud, overreaching or imposition. See also *In re: Raleigh's Estate*, 48 Utah 138, 158 Pac. 705.

If, under such circumstances, a probate decree could be impeached, there would be little hope of finality to any decree. Judgments of courts, whether in law or equity, should not be lightly disregarded or set aside, particularly when attacked collaterally.

On page 18 of their brief, plaintiffs cite *Sontag v. Superior Court*, 36 P. 2d 140; *Walls v. Walker*, 37 Cal. 424, 99 Am. Dec. 290, and other cases in support of the proposition that settlement of an executor's account in the absence of an appeal is conclusive only as to such matters as were actually included in the account. Most of these cases involve direct proceedings in the probate court itself, and illustrate the usual remedies of proceeding for correction or supplementing of successive accounts in the same proceeding. Thus, in *Sontag v. Superior Court*, an account was approved expressly without prejudice to the subsequent claim in question. None of these cases are in point as to the case here. They have no application to a situation involving the approval of a final account and report, and a decree of final distribution and the acceptance of that decree by the heirs,

without appeal or petition to modify or correct, and a subsequent collateral attack in a purely law action.

At no place in the pleadings is it alleged by plaintiffs that there was any fraud, either intrinsic or extrinsic. There seems no pleading to invoke any inquiry as to whether the decree of the probate court should be set aside in the exercise of any equity powers, the issues raised by the pleadings being: first, whether plaintiffs were the owners of the automobile; second, was there a conversion? Third, whether the plaintiffs' claims to the property were res judicata by virtue of the probate proceedings; and fourth, whether the claims of the plaintiffs were barred by the Statute of Limitations.

The plaintiffs claim that they were the owners of property when the claimed conversion occurred, and the defendant denied such ownership and proved that he was the owner, both by reason of a gift from his father and by reason of the defenses of res judicata and the Statute of Limitations. No pleadings for the purpose of, or authorizing, the setting aside of the decree of the probate court were filed and no evidence is disclosed which would justify the setting aside of the probate decree even though there were proper pleadings before the court.

III. The plaintiffs' claim to the automobile is barred by the Statute of Limitations.

As a further defense and bar to the action alleged by the plaintiffs against the defendant, the defendant sets up Section 104-2-24 (2), UCA, 1943, which is in these words, so far as pertains to the matter involved here: "Within three years * * * * (2) an action for taking, de-

taining or injuring personal property, including actions for specific recovery thereof."

The Statute of Limitations operates as a bar in equity as well as law. It does not operate as a rule of evidence by producing a presumption of payment only, but as a positive bar. See 37 CJ, Sec. 18, p. 699.

The same text states:

"The general rule with respect to debts or money demands is that the statute of limitations are regarded as barring that remedy, and not as extinguishing the cause of action."

Citing authorities, including re: Reiser's Estate, 57 Utah 434, 195 Pac. 317:

"But with respect to actions for the recovery of real or personal property, the weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of personal, as well as real property, with an assertion of his ownership for the period which, under the law, would bar an action for its recovery by the real owners, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his rights."

In *Nichols v. Randall*, (Calif) 69 Pac. 26, the court said:

"Statutes of Limitations have become rules of property. They are vital to the welfare of society and are favored by law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving stability and security to human affairs. Important public policy lies at their foundation. They stimulate to activity and prevent negligence. While time is constantly destroying the evidence of

rights, they supply its place by presumption which renders proof unnecessary.”

In *Snow v. West*, 35 Utah 206, 99 Pac. 674, 136 Am. St. Rep. 1047, it is indicated that an action for claim and delivery against the sheriff and judgment creditor to recover damages sustained by reason of alleged wrongful seizure and sale of property claimed to be exempt from execution was within Section 102-2-24, and the three-year Statute of Limitations applied.

In the case of *Dee v. Hyland, et al*, 3 Utah 208, 3 Pac. 388, which was brought for the recovery of the possession of a horse, or in case possession could not be had, the value thereof, the defendant pleaded the Statute of Limitations. The court held that inasmuch as the horse had been in the possession of the defendant and his predecessors in interest for more than three years, the Statute applied although plaintiff claimed and proved that he had no knowledge of the whereabouts of the horse until shortly before the action was commenced.

Aside from the above mentioned principles of law, claims under the preceding division applies here.

Both Leah C. Jones and Martha C. Whiting testified to the refusal of the defendant to permit the son of Mrs. Whiting to drive their mother and others to Logan on or about the 24th of July, 1944 and in the following February, the two witnesses were sufficiently concerned about the defendant's claims that the plaintiff, Leah C. Jones, made a personal investigation as to the condition of the title to the car. She further testified that she knew that the taxes were being paid by the defendant. Certainly, all were charged with the knowledge that in the accounts rendered

in the estate of Mark Cook, deceased, there were no claims for taxes upon the automobile.

The court found that the plaintiffs knew of the defendant's assertion of title sometime in February of 1945. We think they knew of such claim long prior to this time. Taking, however, the date found by the court, we have this situation:

The complaint in the instant action was filed on May 22nd, 1948. The three-year Statute of Limitations, beginning to run before February of 1948 or before. Thus, the instant action was brought approximately three months after the expiration of the statutory period. The action is therefore further barred by reason of the Statute of Limitations.

Plaintiffs' argument that defendant was a trustee and therefore the Statute did not run in his favor ignores the facts that the rights and claims of defendant originated prior to the death of his father and that, as the court found and the undisputed evidence disclosed, the plaintiffs had knowledge of his adverse claims long prior to his appointment as executor, and in fact, before he knew there was a will. There never was a trust in this case as far as the automobile was concerned, and the authorities cited by plaintiffs are not in point.

CONCLUSION

The arguments advanced by plaintiffs in support of their claim that the judgment should be reversed are more dexterious than sound. There was a gift, but failure to so find could not be prejudicial to the plaintiffs. The failure of Mark Cook to endorse the title certificate is immaterial, but can be understood in view of the parties having the

same name. This case does not involve a suit in equity for the impeachment of a decree for extrinsic fraud. There is no such proceeding involved, and if there were, the evidence fails to show and fraud or overreaching, exerinsic or intrinsic. The plaintiffs have had their day in court. They had knowledge of the rights of defendant since February, 1945, or before. Their present claim is barred both by the Statute of Limitations and under the doctrine of res adjudicata.

It is the position of defendant that the trial court was correct in holding that the decree settling the final report and account and decree of distribution in the probate case was res judicata; and that the trial court was further correct in holding that the plaintiffs' cause of action was barred by the Statute of Limitations. If both of these holdings were erroneous, and only then, would the question of whether there was, in fact, a gift of the automobile to the defendant in May, 1943, be material. Where a plea of res adjudicata is properly sustained, the failure of the court to make specific findings on the contentions of the plaintiff is not error. *Torsak v. Rukavina*, 67 Utah 166, 246 Pac. 367.

If it should be determined that the court were in error in determining the case on the issues of res judicata and the Statute of Limitations and that it should have made findings as to the ownership of the property as of the time of the commencement of plaintiffs' action, it is the position of respondent that nevertheless, the judgment should be sustained under the cross- assignment of error, as the evidence shows without conflict that the automobile was given to the defendant in May, 1943, and that he was the owner of said automobile at the time of the commencement of this action and at all times since the first part of May, 1943. Failure to find on an issue where the evidence is without

conflict, as we have endeavored to show is the case as to the issue of gift, would not justify a reversal of the judgment.

However, we submit that the court did not err in deciding the case on the Statute of Limitations and the plea of res judicata. On either and both of these phases, the findings, conclusions and judgment finally dispose of this case. The claimed assignments of error of the plaintiffs are not well taken, and none of them are well taken.

The judgment of the lower court in dismissing the plaintiffs' complaint should be affirmed, with costs to defendant and respondent.

Respectfully submitted,

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