

1951

John R. Mitchell v. Merlin C. Palmer et al : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Mitchell v. Palmer*, No. 7706 (Utah Supreme Court, 1951).
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FILED

OCT 20 1951

IN THE Clerk, Supreme Court, Utah

SUPREME COURT

OF THE

STATE OF UTAH

JOHN R. MITCHELL,

Appellant,

vs.

MERLIN C. PALMER, FLOYD PALMER, JOHN FRANK PALMER, DAVE CLAIR PALMER AND LOLA ALICE SCHIESS, and FLOYD PALMER AS TRUSTEE FOR ABOVE NAMED DEFENDANTS,

Respondents,

Case No. 7706

Brief of Appellant

MILTON V. BACKMAN

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STATEMENT OF FACTS

1

Appellant is the surviving husband of Eliza J. Mitchell, who died on December 23rd, 1948 (R. 1). Eliza J. Mitchell was formerly Eliza J. Palmer, she is the mother of respondents.

Eliza J. Mitchell and appellant were, at the time of death of Mrs. Mitchell, the owners of two properties situated in Salt Lake City, Utah, one of which properties is situated on Wilmington Avenue, which was the family home of Mrs. Mitchell and appellant (R. 23) at the time of death of Mrs. Mitchell, the other property is situated on Garfield Avenue. Record title to both properties was in Eliza J. Mitchell and appellant as joint tenants and not as tenants in common and to the survivor of them at the time of the death of Mrs. Mitchell (R 24 and 25).

Prior to the death of Mrs. Mitchell, the Garfield Avenue property was sold on contract to E. E. Smith, who paid the sum of \$60 a month on the contract, these payments were made to the First Security Bank, Exchange Place branch, Salt Lake City, Utah and deposited to the joint bank account of Mrs. Mitchell and appellant (R 26). These contract payments were received by Mrs. Mitchell and appellant each month from the date of sale of the property to the time of the death of Mrs. Mitchell, and one payment, that made January, 1949, which was subsequent to the death of Mrs. Mitchell (Dec. 23, 1948), was received by appellant. All other payments made on the contract subsequent to the death of Mrs. Mitchell were made to respondents, this without the consent of appellant (R 27). There was an unpaid balance on the Smith contract of approximately \$5000.00 at the time of death of Mrs. Mitchell (R 28).

The properties herein mentioned were at the time of their acquisition, paid for by check out of the joint account of Mrs. Mitchell and appellant. (R 139-Ex. F). This account had been transferred by Mrs. Mitchell and appellant from a joint account maintained by Mrs. Mitchell and appellant

in the First Security Bank of Idaho, to which account both Mrs. Mitchell and appellant had contributed. That money contributed to the joint account by Mrs. Mitchell came from the sale of real property inherited by Mrs. Mitchell from her former husband, Mr. Palmer, the father of respondents, title to which had subsequent to the death of Mr. Palmer been placed in the name of Floyd Palmer as trustee. That money contributed to the joint account by appellant was from the sale of bonds and earnings of appellant.

Upon the sale of the Idaho property, respondents joined in deeds divesting themselves of the Idaho property, part of the proceeds from which went into the joint account of Mrs. Mitchell and appellant. That account was, for in excess of two years, treated at all times as the property of Mrs. Mitchell and appellant and was used and drawn on as they saw fit. No demand was ever made on the account by respondents nor was any action to impress the account with a trust ever taken by respondents.

A portion of the money received from the sale of the Idaho property was invested in postal savings bonds.

Appellant testified to the fact that prior to the death of Mrs. Mitchell, respondents Floyd and Merlin Palmer advised their mother, Mrs. Mitchell, and appellant that provided they would cash the postal savings bonds and invest the proceeds in Hart Music Company they would receive ten or twelve per cent interest on their money (R 23) and would save 40% discount which they might lose by retaining the bonds (R 43, 54), at the same time advising appellant that it would be necessary for him to sign papers to appoint Floyd Palmer, one of the respondents, as trustee. (R 34).

Thereafter, on or about June 1st, 1948 papers were handed to Mrs. Mitchell while in a grave ill condition (R 168) for her signature and to appellant for his signature, at which time as appellant testified, it was represented to appellant and to Mrs. Mitchell that the papers were those previously discussed to effect a saving of discount on the postal savings bonds and to make it possible to invest in Hart Music Company, and as appellant testified, in reliance upon such statement he and Mrs. Mitchell signed the papers (R 22).

Appellant testified that it was many months after the death of Mrs. Mitchell before appellant discovered that he had executed documents divesting appellant of title to the two properties (R 43). It was admitted that Mrs. Mitchell did not execute any documents in the presence of Mr. Hart, a brother-in-law of respondent Merlin Palmer, who appears as Notary Public on the deeds by which title to the property was conveyed (R 164). Witness Hart, the Notary Public, admitted that the documents were not at the time they were purportedly executed by Mrs. Mitchell acknowledged to have been signed by Mrs. Mitchell, that it was not until September or October, 1948 when they were acknowledged (R 145) which was many months after respondent Merlin Palmer had taken the documents and deposited them in the safety deposit box. A conflict appears in the evidence as to whether appellant executed documents in the presence of Mr. Hart, whose jurat appears on the deeds in question.

Both respondents Merlin Palmer and Floyd Palmer testified to the fact that they were instructed when the documents were handed to Merlin Palmer, to not record the same (R-193, 209) inasmuch as Mrs. Mitchell and appellant were

contemplating the sale or exchange of the properties for a duplex (R 194).

It is admitted that at the time appellant executed the documents and they were taken possession of by respondent, Merlin Palmer, that no consideration passed to appellant (R 191). Appellant had no property other than the two properties herein described (R 196).

The documents when taken by respondent, Merlin Palmer, were taken to a safety deposit box at a bank which box stood in the joint names of Mrs. Mitchell, in appellant and in respondent Merlin Palmer. (R 193). The deeds were not removed from the deposit box until after the death of Mrs. Mitchell when they were removed from the deposit box by respondent Merlin Palmer without the knowledge or consent of appellant (R 205). The deeds were recorded in the office of the County Recorder of Salt Lake County, Utah, by respondent Merlin Palmer six days after the death of Mrs. Mitchell, also without the knowledge or consent of appellant (R 193 Ex D and E).

Some time after the deeds were signed, Mr. Osmond, a real estate agent, was employed to endeavor to sell the Wilmington Avenue property and to procure a duplex for appellant and Mrs. Mitchell so that they would realize the income therefrom because of appellant's advance age (R 230), appellant was unable to work, appellant being 71 years of age at the time (R 25).

Respondents never at any time made demand on appellant for the installment payments being received from the sale of the Garfield Avenue property or any part thereof during the lifetime of Mrs. Mitchell.

The trial court found that appellant when he signed the two deeds involved in the action, signed the deeds knowingly and willingly, and there were no misrepresentations as to the nature or content of the instrument made by the respondents, and the deeds, when signed, were complete except for the signatures of the grantors and the jurat of the notary, that appellant knew and intended, when said instruments were executed, to convey to the grantee named therein any and all interest he had in the property described in the deeds, reserving only to himself a life estate in what is referred to as the Wilmington property; that said deeds are valid and subsisting deeds, and the appellant has a life estate in the Wilmington property and a life estate in all of the personal property described in Exhibit 1.

The court further found that the manner of execution and acknowledgment of the deeds is of no consequence and that the question of a trust being impressed upon the property is moot.

The court held that the question of intent to execute the deeds on the part of appellant was not material. The court did not take into consideration the fact that no consideration was paid to appellant for the execution of the deeds.

The court made no finding on the question of delivery of the deeds nor the right of appellant to a life estate in not only the Wilmington Avenue property but also in the Garfield Avenue property contract by which this property was sold to Smiths. The court ruled that there was no question of delivery involved in the case (R.197).

STATEMENT OF POINTS

1. The court erred in finding that appellant intended by the deeds to convey to the grantees his interest in the properties.

2. The court erred in holding that there was no question involved in the case of delivery.

3. The deeds were not entitled to be recorded and do not act to convey title to the real property.

4. The court erred in not considering the question of intent and delivery of the deeds.

ARGUMENT

Point 1.

THE COURT ERRED IN FINDING THAT APPELLANT INTENDED BY THE DEEDS TO CONVEY TO THE GRANTEES HIS INTEREST IN THE PROPERTIES.

The court found that appellant intended by the two deeds involved to convey to the grantees his interest in the property reserving only to himself a life estate in what is referred to as the Wilmington property and personal property, but the court did not find and the evidence could not support a finding of the fact that appellant intended by the deeds to pass title to any of the properties immediately upon the death of Eliza J. Mitchell. Such a finding was necessary to effect the passing of title by the deeds during the lifetime of appellant. Even if it were conceded for the purpose of argument that the evidence did support the court's findings as entered, it must appear that the delivery was

intended to be irrevocable. See 28 C.J.639 (now 38 C.J.S., Gifts, Sec.25) as cited by this court in *Losee v Jones*, 235 P2d 132, at page 136, in which the court speaking through Mr. Justice Crockett said:

“In the case of *Singleton v Kelly*, 61 Utah, 277, 212 P.63, this court approved the applicable principles which have almost universal acceptance; That where a grantor executes a deed and places it in the hands of a third party for delivery after the death of the grantor, with the intent that the deed and its delivery are absolute, that the title in fact passes and the third party then holds the deed as trustee for the grantee. The court also recognized that if the delivery is conditional, as where the grantor intends to retain control over the property and the right to revoke the deed, then such a deed does not pass title. In *Reed v Knudson*, 80 Utah 428, 15 P2d 347, an assignment of one-half interest in certain property was upheld where the assignment was left for delivery by the attorney who prepared it for the donor. Therein we approved the rule quoted from 28 C.J. 639 (now 38 C.J.S., Gifts Sec.25), to the effect that if the deed and its delivery was intended to be irrevocable, then the third party is trustee for delivery of the deed and title passes. *But if the intent is that the third party is subject to further directions and control of the grantor, then the third party is merely the agent of the grantor and the title does not pass.* See also *Burnham v Eschler*, Utah 1950, 208 Pd 96; and *Gappmayer v Wilenson*, 53 Utah 236, 177 P.763.” (Italics added)

In the instant case it is clearly apparent from the testimony of respondents Floyd and Merlin Palmer that control of the properties remained in Mrs. Mitchell and appellant, it having been admitted that they were instructed to not record the deeds inasmuch as Mrs. Mitchell and

appellant were considering exchanging the properties for income property.

There is not one bit of evidence to the effect that the deeds were to be recorded upon the death of the one grantor, Mrs. Mitchell even though appellant who was the other grantor survived her. Neither is there any evidence to the effect that the life estate was to be created only in the Wilmington property and the personal property and not in the Garfield Avenue property. The record is lacking altogether of such evidence. In the testimony of witness Merlin Palmer we find the following:

“Well he (Joel Hart) pointed out, or he said that the life estate was here, and indicated where it was written in.” (R.191) “I told him that the property would, when it went back to the way it had been in Idaho, in Preston, Idaho, that it would be, that he would have a life estate in the property, and could live in the house as long as he was living.” (R 192).

There is not testimony to the effect that it was explained to appellant that the life estate would apply to the one property only and not to both.

Witness for respondents, Merlin Palmer testified to the fact that he took the deeds to the deposit box which was in the bank to which appellant, Mrs. Mitchell and Merlin Palmer each had access, and left them there until after the death of Mrs. Mitchell when he removed them from the deposit box without the knowledge and consent of appellant, he caused them to be placed of record in the office of the recorder of Salt Lake County, Utah. This witness also testified to the fact that he paid no consideration to appellant at the time he obtained the deeds (R 191).

Point 2.

THE COURT ERRED IN HOLDING THAT THERE WAS NO QUESTION INVOLVED IN THE CASE OF DELIVERY (R 193).

As heretofore stated, there is no evidence supporting the judgment that the deeds if valid, were to take effect during the lifetime of appellant.

It is also clearly evident that monies which belonged not only to Mrs. Mitchell but also monies belonging to appellant were deposited in the joint account from which the properties in question were purchased.

It is also evident that respondents considered that appellant and Mrs. Mitchell retained a life estate in the Garfield Avenue property sold to Smith's on contract, the payments on which were received by appellant and Mrs. Mitchell each month during the lifetime of Mrs. Mitchell. There is not a word of evidence which would support a finding that the life estate in the contract was to terminate on the death of Mrs. Mitchell and not on the death of both Mrs. Mitchell and appellant.

It is a general rule of law that manual tradition of a deed is not enough, but that the transfer of possession must be with the intent of presently passing title, and must not be hampered by the reservation of any right of revocation or recall.

This point is annotated in 56 A.L.R. at page 746.

In *Weber v Christen*, 121 Ill. 91, 11 N.E. 893 and *Churchill & A. Co. v Ramsey*, 48 S.D. 237, 203 N.W. 502 citing R.C.L. it is said:

“When the grantor intends to retain the beneficial title, recordation of the deed is not a delivery of it.”

and in 8 R.C.L.-Deeds, at Sec. 52 the law is stated as follows:

“The rule cannot be extended (referring to legal effect of delivery) so as to make a mere handing to the grantee a delivery, where the circumstances show no delivery is intended, as where the deed is placed in the hands of a grantee with the understanding that it shall be returned to the grantor if he should call for it, but if he should not, it is to be placed of record on his death, the delivery in such case being incomplete.”

at Sec. 53 it is said:

“While the rule that the grantor must part with all dominion and control over his deed does not mean that he must put it out of his physical power to procure repossession of it, nevertheless, if the deed remains within the grantors control and liable to be recalled, there is, according to almost unanimous authority, no delivery, notwithstanding that he has parted with its immediate possession. *He must retain no right to reclaim or recall it.*” (Italic added)

The above law is applicable to the instant case because it is admitted not only by word but by act in appellant and his wife receiving all payments on the contract during the lifetime of Mrs. Mitchell.

Respondents would have the deeds in this case perform the functions of a will which cannot be.

Point 3.

THE DEEDS WERE NOT ENTITLED TO BE RECORDED AND DO NOT ACT TO CONVEY TITLE TO THE REAL PROPERTY.

Section 78-2-1 UCA 1943 provides- Acknowledgement: "Every conveyance in writing whereby any real estate is conveyed or may be affected *shall be* acknowledged or proved and certified in the manner hereinafter provided.

78-2-5 PARTY MUST BE KNOWN OR IDENTIFIED.

"No acknowledgment of any conveyance whereby any real estate is conveyed or may be affected shall be taken unless the person offering to make such acknowledgment shall be personally known to the officer taking the same to be the person whose name is subscribed to such conveyance as a party thereto, or shall be proved to be such by the oath or affirmation of a credible witness personally known to the officer taking the acknowledgment."

78-2-2 WHO AUTHORIZED TO TAKE ACKNOWLEDGMENTS.

"The proof or acknowledgment of every conveyance whereby any real estate is conveyed or may be affected shall be taken by some one of the following officers: (1) *If acknowledged or proved within this state*, by a judge or clerk of a court having a seal, or *a notary public*, county clerk or county recorder."

It is admitted that the notary public took the acknowledgment within the state of Utah and that he was not commissioned as a notary public in the state of Utah at the time he attached his jurat.

Section 78-3-1 UCA 1943 provides for the recording of documents signed and certified by the officer taking the same as provided in this title. In a footnote to this section we are referred to the code of Iowa having comparable provisions wherein it is said that instruments affecting real estate are not deemed lawfully recorded unless previously

acknowledged or proved in manner provided by statute.

Witness Hart, the notary, admitted he did not receive the acknowledgment of the deeds by appellants wife until several months after the deeds were executed. Nevertheless Mr. Hart took the acknowledgment and handed the deeds to respondent Merlin Palmer.

We have direct conflict in the testimony of Mr. Hart the notary and that of Merlin Palmer in that Mr. Hart testified to the fact that he neither read or explained the deeds to appellant at the time appellant signed the documents. Mr. Merlin Palmer testified to the fact that he did both and further that Mr. Hart explained the effect of and meaning of a life estate to appellant. Appellant denied that the document had been read or explained to him in any way by anyone. No explanation is made as to the reason for taking the appellant before Mr. Hart when it was recognized that he was not commissioned as a notary in the state of Utah, if appellant was in fact taken before him.

No consideration having passed from the grantees to appellant it was incumbent on respondents to prove that a gift was intended, this is particularly true when it is contended that title passed with the handing of the deed by Mr. Hart the notary to respondent Merlin Palmer. In the case of *Szekeres v Reed*, (Cal. 3/7/50) 215 P2nd 522, it is said:

“In absence of consideration, grantee must show that gift was made with a full knowledge of all facts and with a complete understanding of effect of transfer.”

The evidence clearly shows lack of understanding and intent on the part of either grantor to part with the title to the properties. Intent is indispensable to a legal delivery

as was held in the Szekeres case. Both deeds were placed under control of appellant in the joint deposit box after execution thereof. The grantors intended to sell the Wilmington Avenue property after the deeds were executed and employed Mr. Osmond, witness for plaintiff, to show them income property, it being their intention as stated to Mr. Osmond to convert the Wilmington Avenue property into income in order that Mr. and Mrs. Mitchell might have some certain income for their old age.

Not only must there be a showing of intent to convey but it must be shown that the intent is to presently pass title even though the right to possession and enjoyment may not accrue until some future time.

Szekeres vs Reed, *supra*.

9 Cal.Jur. p. 153.

Appellant by the conveyance of his property, gave away the sole means of his support.

There was not inducement shown for the execution of the deeds, it is not reasonable to suppose that any reasonable man would give away his sole means of support as is stated in the Szekeres case *supra* in the following language:

“There is no doubt, of course, that the deed was handed to appellant in attorney Wright’s office by Oswald, but the very question at issue is the intent with which that manual delivery was made. The trial court had the right to consider the fact in 1923, when Oswald, without limitation, is supposed to have divested himself of the title to the ranch, he was 49 years of age, not in ill health, and solely dependent upon the ranch for his support. It is not reasonable to suppose that

any reasonable man, under such circumstances, would give away his sole means of support.”

It is elementary that one retaining a life estate in property must maintain the same including the payment of taxes. By the act of conveying the Garfield Avenue property which was sold under contract and which was contributing to appellant the sum of \$60 a month, appellant gave up his only means of support and the only means whereby he could pay taxes on the Wilmington Avenue property.

Point 4.

THE COURT ERRED IN NOT CONSIDERING THE QUESTION OF INTENT AND DELIVERY OF THE DEEDS.

The allegations of appellant's complaint support his prayer for relief by which appellant prays among other things that the deeds and each of them be declared null and void and of no force or effect, and that it be decreed that defendants or either of them have no right, title, claim or interest in any property described.

CONCLUSION

There being no evidence in the case on which the court could find that appellant intended to dispose of his property by deed during his lifetime and the court not having found that the deeds were intended to take effect upon respondents taking control thereof, the judgment of the District Court should be reversed.

Respectfully submitted,

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