

1951

George N. Anderson et al v. Marie T. Johnson and Chester N. Johnson : Brief of Appellant

Utah Supreme Court

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Preston & Harris; Attorneys for Appellants;

Recommended Citation

Brief of Appellant, *Anderson v. Johnson*, No. 7712 (Utah Supreme Court, 1951).
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In the Supreme Court of the State of Utah

GEORGE N. ANDERSON and
wife, IMOGENE T. ANDERSON,
LORENZO W. ANDERSON, here-
tofore known as LORENZO W.
ANDERSON, JR., and wife HAZ-
EL M. ANDERSON,

plaintiffs and appellants,

vs.

MARIE T. JOHNSON and
CHESTER N. JOHNSON,

defendants and respondents

Appeal from the District Court of Box Elder County, Utah

FILED

Honorable Lewis Jones, District Judge

Clerk, Supreme Court, Utah

PRESTON & HARRIS

Attorneys for Appellants.

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APPELLANT'S BRIEF

STATEMENT OF FACTS

Lorenzo W. Anderson, now deceased, was a resident of Brigham City, Box Elder County and was engaged most of his life in Civil Engineering. On the side, he formerly did some abstracting and conveyancing. He was the owner of the tracts of land described on page 9 of the files. It appears from the evidence that it was his desire to divide his property in his lifetime among

his children rather than subject the same to probate. George N. Anderson, Lorenzo W. Anderson, the plaintiffs and appellants, and Marie T. Johnson, defendant and respondent, are all of the surviving children of the senior Anderson. To distinguish between the deceased and his son, Lorenzo, I will refer herein to the surviving son as Ren and the senior Anderson, deceased, as "deceased".

The only property with which we are concerned in this appeal consists of Tract No. 2 which will be referred to as the Garland property and the tract described in paragraph 9 (c) (tr. 9) which I will refer to as the Promontory property.

The deceased, in furtherance of his desire to divide his property before death, made two sets of deeds with which this appeal is concerned. In March of 1943, he caused to be drawn a warranty deed to Ren which purported to convey to Ren the Garland tract and a $\frac{1}{3}$ undivided interest in the Promontory tract. Having made some previous conveyances to his daughter, Marie, and his son, George, he then drew other deeds granting a undivided $\frac{1}{3}$ interest in the Promontory property to each George and Marie. The question of the delivery of these 1943 deeds is the focal point of this case because in 1949 an additional set of deeds were drawn by the deceased in which all of the Promontory property was conveyed to his daughter, Marie and her husband. George Anderson was eliminated from any ownership

in the Promontory tract as was also Ren and a new deed drawn in Ren's favor conveying to him the same Garland tract.

The 1943 deeds were never recorded but all parties agreed in Court that they were executed as pleaded (tr. 182). The 1943 deeds were destroyed by Marie in 1949 (tr. 126). None of the appellants knew or were advised of the so-called destruction of the 1943 deeds until they came to Utah for their father's funeral. Marie, however, claims to have had her 1949 deed delivered to her by the deceased and she recorded her deed the day before her Father died (tr. 127). Marie testified rather fully as to the delivery of the 1949 deeds but was prevented from testifying as to the delivery of the 1943 deeds (tr. 119). Marie and Chester Johnson were called to testify as adverse parties by the appellants (tr. 117). The plaintiffs were called to testify as grantees and all were excluded from testifying as to transactions with deceased upon objection made by the attorney for the respondents. (tr. 183)

The appellants offered to prove by Marie Johnson the fact of the execution and delivery of the 1943 deeds and this offer as well as other testimony relating to all parties was excluded by the Court under the provisions of Section 104-49-2, (3), UCA, 1943, which will be referred to hereafter as the dead man's statute. (tr. 104) It is felt that this statement will be agreed to by opposing counsel so that continued repetition of the

facts and citations from the transcript are unnecessary. The Court stated the substance of its rulings as appears on page 115 of the transcript as follows:

“As to the '43 deeds, apparently we understand now there are two or three deeds made in 1943. The defendant, as an heir of Lorenzo Anderson, asserts this statute as to these '43 deeds and the Court is going to sustain the objection as to these conversations or any transaction which was equally within the knowledge of the witness, who is a party, and the deceased so the objection is sustained.”

George Anderson is a resident of the State of Idaho and Ren is a resident of the State of California and during the last few years of the deceased's life, he lived with Marie in Brigham City and the appellants claim that the only way that proof of execution and delivery of the 1943 deeds was by cross examination of the respondents and examination of the appellants as to transactions had with their father. The same objection was sustained as to Chester Johnson even though he is not an heir of the deceased (tr. 188). Similar rulings of the Court as to other witnesses appear on tr. 104, 105, 106, 107, 108, 116, 117, and other places in the record so numerous as to make an unwarranted length of this statement of facts. The Court ruled that if an objection was raised by a grantee, the objection should be overruled but if it was raised by an heir, it should be sustained. (tr. 107)

The appellants maintain that the method the deceased used in making the deeds of 1943 and those of 1949 were the same and that therefore, if there was a delivery of the 1949 deeds, there also was a delivery of the 1943 deeds, the earlier date being at a time when all parties agree that the deceased was in good mental and physical condition and that excluding transactions with the deceased pertaining to the 1943 deeds and to permit similar transactions with the deceased of the 1949 deeds was prejudicial. (tr. 321, beginning at line 2). Furthermore, between the dates of the two sets of deeds, the deceased had made a will sometime during the year of 1947, (tr. 249) the terms of which were entirely inconsistent with the execution of the 1943 deeds as well as those of 1949.

While there are a great many more facts of interest, it is thought that the foregoing is sufficient to inform the Court of the prejudicial error committed by the Court sufficient to grant a new trial.

*STATEMENT OF POINTS RELIED ON
BY THE APPELLANTS*

That the Court erred in the following respects:

FIRST: In its ruling that the provisions of Section 104-49-2 sub-section 3, UCA 1943, commonly known as the "dead man's statute", applied to make incompetent to testify in this case either or any of the defendants and the plaintiffs.

SECOND: In sustaining defendants' objections as to any conversations that any of the plaintiffs claimed to have had with the deceased Lorenzo W. Anderson.

THIRD: In its holding that one of the defendants, Marie T. Johnson, called by the plaintiff on cross examination, was incompetent to testify as to any statement by, or transaction with, such deceased, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such deceased person, by reason of the provisions of said "dead man's statute."

FOURTH: In its holding that one of the defendants Chester N. Johnson, called by the plaintiff on cross examination, was incompetent to testify as to any statement by, or transaction with, such deceased, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such deceased person, by reason of the provisions of said "dead man's statute."

FIFTH: In its holding that one of the plaintiffs, George N. Anderson, called by the plaintiff on direct examination, was incompetent to testify as to any statement by, or transaction with, such deceased, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such deceased person, by reason of the provisions of said "dead man's statute."

SIXTH: In it holding that one of the plaintiffs, Lorenzo W. Anderson, Jr., called by the plaintiff on direct examination, was incompetent to testify as to any statement by, or transaction with, such deceased, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such deceased person, by reason of the provisions of the said "dead man's statute."

ARGUMENT

Point 1. The so called "dead an's statute" does not apply to make incompetent any of the parties to this cause because neither of the parties are suing or defending as heirs or administrators; neither are either of them defending as the assignee or grantee of any heir or devisee of the deceased. And furthermore, the basis upon which the Court sustained counsel's objection has long since been abolished under our statutes by deleting the provision preventing a grantee of a deceased person to testify. The original "dead man's statute" simply prevented the testimony of a person as to transactions with a deceased person, "where the matter of fact must have been equally within the knowledge of both the witnesses and the deceased." As stated by Justice Wolfe in *Burnham vs. Eschler*, 208 P. 2d 96.

"The plaintiff's husband was entirely competent to testify as to statements made by the plaintiff's deceased mother to the effect that certain bank deposits belong to the plaintiff."

It appears to me, at the outset that the decision of this Court in *Maxfield v. Sainsbury*, 172 P. 2d 122 was written for the express purpose of guiding future litigation involving the dead man's statute. Chief Justice Larsen states: "It was never intended that this section should be used for the purpose of suppressing the truth. On the contrary, the statute's sole purpose is to prevent the proving by false testimony of claims against the estate of a deceased person."

Again by Justice Wolfe: "On the one side is a person who is seeking to protect the integrity of the estate or to recover assets claimed to belong to it; on the other side is a person who seeks to subtract from the estate or resisting recovery of claimed assets. The statute is for the benefit of the first side and operates against the opposing party".

In the case at bar there is no estate. Both sides contend that one of the two sets of deeds are valid. If both sets are void for one reason or another then we have the peculiar situation where both parties are trying to protect the estate by adding to the assets, and no assault is being made on the estate, and therefore, the statute cannot apply.

The Utah case of *Mower v. Mower*, 228 P. 911 held that grantees in a deed who were also heirs of the deceased did not disqualify them as witnesses as to the delivery of the deeds in question. This case is squarely in point. And this decision and holding was followed in *Brown v. Skeen*, 58 P. 2d 24. The Court said: (approving the *Mower* case)

“The question arose as to whether or not certain of the children of a deceased who were heirs were disqualified under the statute from testifying to having seen a deed in possession of their mother, grantee of their father. In that case the court held that even though it were assumed that the children had an interest in the event of the suit by reason of the fact that they were heirs of the deceased, that interest was with the plaintiff and not with the defendant, so that the adverse party, their mother, was not defending as administrator, heir, or legatee or devisee of the deceased, but was defending in her own right as grantee under the deed, so that the express terms of the statute did not exclude those children from being witnesses as to the possession of the deed”.

The lower Court even prevented the husband of the defendant, Marie T. Johnson from testifying as well as the wives of George and Ren Anderson. (tr. 158, 159, 100, and 206)

The following ruling of the Court is typical and shows clearly how the Court unduly restricted the proof of the plaintiff's case in the following words at page 206 when the Court was speaking to an adverse witness, Marie T. Johnson.

“I don't want you to tell the jury anything your father said concerning the 1943 deeds nor do I want you to tell the jury any transaction you had with your father.”

The whole record shows the manner in which the “dead man's statute” was used to establish the de-

livery of the '49 deeds which were favorable to the respondents and to prevent the establishment of the '43 deeds.

This is clearly brought out in the testimony of Marie Johnson (tr. 320, 321) where she says "The 1949 deed he gave us" and on page 321, she states "In 1949 he gave us the deed and told us to keep it."

These deeds, of course, are the ones that the respondents were trying to establish and naturally there would have been no objection from their counsel.

Justice Wade, in the concurring opinion in the Burnham case (Supra) said in speaking of the testimony of the husband:

"Under those circumstances, the temptation not to tell the truth is often beyond the capacity of some people to resist."

We have the reverse in this case where we call the adverse party and the only possible objection that could be made to their testimony whether they were competent or not was made in order to exclude the truth from the record. That is the reason why our statute provides an exception when called by the adverse party.

In *Staats vs. Staats*, 226 P. 677 the Utah Court said:

"This is not an assault upon the estate of the deceased, but is purely a controversy between the

children who, as a matter of course, are heirs of the deceased and in this instance also his devisees, and the defendant who is the widow of the deceased and who refuses to abide by the provisions made for her in her husband's will."

That case discussed the matter of whether the widow who renounced the will was talking as an heir or in her own right and the Court said:

"Indeed that can be the only basis of her claim since she refused to take under her husband's will but elected to insist upon her statutory interest of 1/3. In view, therefore, that she claimed her share of the estate in her own right, the other heirs are competent witnesses."

That statute has no application where the controversy arises between or among heirs and merely involves questions relating to their respective rights as such and where there is no assault upon the estate.

In our case, there is certainly no assault upon the estate as no estate exists. It is merely a controversy between the parties as grantees to deeds.

If all of the deeds had been held void for one reason or another, it would be creating an estate rather than making an assault upon an estate so that we contend that all of the witnesses are competent to testify.

Points 2, 5 and 6. These points are treated together because they involve the plaintiffs. In *Miller vs. Livingston*, by the Utah Supreme Court in 88 P. 338 Mr. Justice Straup stated that the statute in this

regard is intended to protect states and relates to proceedings wherein the decision sought by the party so testifying would tend to reduce or impair the estate and does not relate to the relative rights of the heirs or devisees as to the distribution of an estate in a proceeding by which the estate itself is not in either event to be reduced or impaired.

Points 3 and 4. Under the rulings of the lower Court, it should be apparent that the Court entirely misconstrued the meaning of the "dead man's statute." Rule 43 (b) Utah Rules of Civil Procedure make the right of cross examination of a witness as broad as possible and in part states as follows:

"A party may call an adverse party" etc.

It is interesting to note at this point that the words "adverse party" are exactly the same in the "dead man's statute" as contained in the rules which goes on to say that "Such witnesses thus called may be contradicted and impeached by, or on behalf, of the adverse party." The word "adverse party" is used in its ordinary means, according to Webster's Collegiate Dictionary, "acting against, opposed, opposite."

Certainly the adverse party in this case as far as the plaintiffs are concerned, are the defendants and the adverse parties so far as the defendants are concerned, are the plaintiffs.

The objection presented by counsel for the defendants (tr. 105) is enlightening where Mr. Young objects upon the grounds that they are defending the validity of the 1949 deeds, and therefore, contend to be defending as grantees, but as to the 1943 deeds, he seems to contend that they are heirs. The Court seemed to take Mr. Young's view of the matter because at page 107 the Court said:

“If (the objection) is raised as an heir, it should be sustained. And a logical following through under Mr. Young's theory of the case as stated in the record, I should, as to the 1943 deeds, sustain the objection.”

This ruling was sustained throughout the case without any thought given to the fact that the defendants were called by the plaintiff, the plaintiff being the adverse party to the witness called. The calling of these witnesses by plaintiffs and appellants certainly waived the statute, but as I recall, the oral arguments before the Court, Mr. Young claimed that he was entitled to defend against the 1943 deeds as heirs, and therefore the statute applied, and to uphold the 1949 deeds as grantees, and therefore the statute did not apply (tr. 105)

An Annotation carried in 159 ALR 416 follows two other earlier Annotations cited therein, and which states the rule to be:

“The general rule stated in the earlier Annotations that subject certain qualifications, the cross examination of a witness concerning trans-

actions or conversations with a deceased party, amounts to a waiver of the incompetency of the witnesses with respect to such matters and renders him incompetent to testify thereto as against the examining party.”

It should not be necessary to cite further authorities, but I want to earnestly state to the Court that I have searched diligently for authorities holding to the contrary, and have found none, and I hope that counsel for the adverse party will correct me if there are such opposite cases.

The only possible reason that counsel would object to his clients testifying would be to prevent their testimony concerning the 1943 deeds. Let us assume that they would tell the truth concerning the transactions with the deceased. If the truth was that the deeds were never delivered, then the testimony certainly would not have been damaging to him. This Court has said many times that the purpose of the statute was to prevent the tendency of witnesses to favor their own theory of the case. The purpose of the statute is certainly not to prevent the Court and Jury from hearing the truth. If the manner of handling the two sets of deeds by the deceased Anderson was the same in 1943 as it was in 1949, then all parties to this case must admit that the 1943 deeds were valid. This is so because Marie testified (tr. 322) that all of the deeds of '43 were held in the same place and she further testified that Ren told her to file the 1943 deeds and she asked someone else

about filing them and they told her not to, but she did not remember who that was, and that "as long as Dad was alive (tr. 323) not to file them." She apparently believed therefore, that she had a right to file the '43 deeds so that it appears that the '43 deeds were delivered but not filed.

Now in the case of the 1949 deeds, so far as the appellants were concerned, these deeds were still held; these were not physically delivered to the appellants but respondents claim that these deeds are valid.

If, therefore, both deeds were treated in the same manner by the deceased, then the first deeds, in point of time, are valid and respondents were both persons who had this knowledge and should have been permitted to testify to both transactions.

The continual objections and the sustaining of these objections had such an effect upon Marie's testimony (tr. 215) that she seemed to believe that the transactions of '43 were similar because once when Ren was there on a visit, she got the '43 deeds and showed them to Ren. She testified that she thought that they were gotten from their Dad's desk. She was asked if she then thought that her Father had fixed up his property by execution of the 1943 deeds and she said she could not remember. She was asked if she thought her Father had fixed up the property and she answered, "I'm trying to figure out—well, I don't know how to answer

without implicating Dad in it.”

Her further answer on page 215 is indeed revealing where she answered as follows:

“Well, Dad, all his life had made deeds. As I stated yesterday, he made deeds continuously and each deed was supposed to be “the” deed—what should I say? I don’t know how to word it.”

It should be plain that had Marie been permitted to testify to the transactions with the deceased, that some revealing testimony would have gone to the jury. But of course her testimony was excluded under the provision of the “dead man’s statute.”

The rule applicable is well stated in 58 Am. Jur. 210:

“The law recognizes that it may sometimes be to the advantage of the person for whose benefit the statute prohibiting a witness from testifying concerning transactions or statements of deceased persons, and conducive to the ends of justice, to permit the disqualified witness to testify; and to this end a person for whose benefit the statute exists may exercise discretion in making an incompetent witness competent.”

Again at page 212: “The general rule is, subject to certain qualifications, that the cross-examination of a witness concerning transactions or conversations with a deceased party, concerning which the witness did not testify to on the direct examination, amounts to a waiver of the incompetency of the witness with respect to such

matters, and renders him incompetent to testify as against the examining party.”

It should be obvious that as appellants, they are the protected and adverse parties, and can waive the incompetency; and appellant only can waive; that as to respondents they are the protected parties against incompetent witnesses of the adverse parties in the suit, and only they can waive.

Marie was permitted to testify that in 1949 (tr. 125) her dad made a deed to respondents, and was by him instructed to destroy the 1943 deeds (Tr. 126). She kept here deed, and recorded it the day before her Father died, but never did deliver Ren’s 1949 deed to him, and it was never tendered until during the Court proceedings (Tr. 126).

Equally frank testimony concerning transactions involving the 1943 deeds would have undoubtedly changed the outcome of the case. The Court ruled (Tr. 206) Marie testifying: “I’m going to sustain your objection (respondent’s) insofar as any alleged statement of the deceased is concerned. I just want the witness to understand it . . . the witness is directed not to give us any statements of her father concerning any 1943 transaction or to relate any transactions with her father, but outside of that go ahead.” This ruling was apparently on the erroneous theory of opposing counsel as follows: (Tr. 118) “If they’re (referring to Marie Johnson) called on behalf of the party who is defendant, the party

defending may waive the statute, but not the party who is seeking to establish the evidence. That's my understanding of the statute."

There can be no doubt but that, aside from keeping evidence of the 1943 transactions from the jury, the rulings of the Court had an influence on the jury because of the instruction of the Court to the jury: (Tr. 119) "So the jury will understand what we're doing, at this time, unless the court changes its mind the objections are sustained as to the 1943 deeds, and the theory being, gentlemen, that any transactions had with the deceased Lorenzo Anderson cannot be testified to by any of these people here. As to the 1949 deed, there may be a different ruling as we go along." Such an instruction cannot help but influence the deliberations of a jury for a layman would naturally feel that by judicial ruling the 1943 deeds were a nullity, and this would leave them nothing to do by find that the 1949 deeds were delivered. And that is exactly happened.

I find one positive statement that a grantee is not protected by the statute:

"A grantee is not protected under a statute protecting executors, administrators, heirs, legatees, or devisees of any deceased person, where the GRANTEE IS DEFENDING AS SUCH, AND NOT AS HEIR OR DEVISEE". (Caps mine) 58 Am. Jur. 201". (Note: the Annotation cited in support of this must contain a mis-print, for 122 ALR 255 is on another subject. However, I do find an Annotation in 66 ALR 1041 where

the cases are split as to whether a grantee or assignee or decedent can be construed as a representative of decedent. But, all of the cases cited are old and only deal with statutes using the word "representative and decedent". Our statute specifically omits any mention of a representative of decedent.

To recapitulate all points: (1) All parties are grantees of deceased and as such are therefore competent witnesses; (2) defendants and respondents are not defending as heirs, but as grantees, and are competent witnesses; (3) defendants and respondents were called to testify by the adverse party and if otherwise incompetent, the objection was waived by plaintiffs and appellants; (4) the exclusion of the testimony of each of the parties as to transactions with deceased was prejudicial error, and each exclusion sufficient to grant a new trial; (5) the repeated rulings of the Court as to the exclusion of evidence relating to the 1943 deeds was misleading to the jury and prejudiced their deliberations against appellants.

Respectfully submitted,
PRESTON & HARRIS
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