

1951

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

Utah Supreme Court

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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 HAZEL M. ANDERSON,

Plaintiffs and Appellants,

VS

MARIE T. JOHNSON and CHESTER N. JOHN-
SON,

Defendants and Respondents.

RESPONDENTS' BRIEF

Appeal from the District Court of

Box Elder County, Utah

Honorable Lewis Jones, District Judge

FILED

SEP 6 - 1951

Clerk, Supreme Court, Utah

THATCHER & YOUNG
Attorneys for Respondents

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Plaintiffs and Appellants,

VS

MARIE T. JOHNSON and CHESTER N. JOHN-
SON,

Defendants and Respondents.

RESPONDENTS' BRIEF

ADDITIONAL STATEMENT OF FACTS

Lorenzo W. Anderson, a widower, died on or about the 22nd day of June, 1949, at Brigham City, Box Elder County, Utah, leaving as his sole and only surviving heirs plaintiffs George N. Anderson and Lorenzo W. Anderson, Jr., sons, and Marie T. Anderson Johnson, daughter. By their amended complaint George N. Anderson and Imogene T. Anderson, his wife, Lorenzo W. Anderson and Hazel M. Anderson, his wife, filed this action in the District Court of the First Judicial District of the State of Utah in and for Box Elder County against Marie T. Anderson Johnson and Chester N. Johnson, her husband. In the amended complaint

it is alleged that the plaintiffs Ren and George and the daughter Marie are the sole and only heirs-at-laws of deceased. It is further alleged in paragraph two that the deceased left estate consisting of real and personal property in Box Elder County. Plaintiffs then allege that during the month of March, 1943, the deceased made, executed and delivered several warranty deeds, one deed to Ren and wife as joint tenants in what is designated as tracts numbered 1 and 2, another deed to George and wife, and a third deed to Marie and Chester

The complaint further alleges that in 1946, George obtained a new deed from his father in lieu of his 1943 deed.

The complaint then alleges that the defendants on or about the 7th day of February, 1949, at a time when the decedent was incompetent, and by exercising undue influence on the deceased, obtained new deeds wherein the deceased left George out entirely; that he deeded the home and the Promontory farm to defendants and the Garland farm to Ren, but it is alleged that these deeds are void. The plaintiffs pray judgment establishing the validity of the 1943 deeds and declaring the 1949 deeds to be void.

The defendants by their answer denied the validity of the 1943 deeds and asserted that the 1949 deeds were valid. The pleadings require some analysis. The plaintiffs in effect say that the 1943 deeds are valid and if valid, the deceased left no estate. They then in effect say that if the 1943 deeds are not valid, neither are the 1949 deeds, and therefore the property descended to the heirs-at-law. On the other hand the defendants say that the 1943 deeds are invalid and that

the 1949 deeds are valid, but if the 1949 deeds are also invalid, then the property is an asset of the deceased and passed to his heirs. It is our understanding that the only question raised by the plaintiffs and appellants concerns the application of the so called dead man's statute, and the six statements of points relied on by appellants deal exclusively with this question. We shall therefore confine our argument to this matter.

ARGUMENT

Point 1. Section 104-49-2, U. C. A., 1943, in so far as it is applicable to the case in question, provides as follows:

“The following persons cannot be witnesses:

(3) A party to any civil action, suit or proceeding and any person directly interested in the event thereof and any person from, through or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party to such action, suit or proceeding claims or opposes, sues or defends as heir, legatee or devisee of any deceased person, 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, unless such witness is called to testify thereto by such adverse party so claiming or opposing, suing or defending in such action, suit or proceeding.”

As stated by Mr. Justice Larsen in the case of

Maxfield vs. Sainsbury
110 Utah 280
172 Pac. 2nd 122

“The cases like the language of the statute are not entirely free from confusion.”

The question presented to this court involves the application and construction of this statute as applied to the undisputed facts. The four plaintiffs all claim an interest in the property as grantees of the deceased under the 1943 deeds. With respect to these deeds the sole and only issue was whether or not the deceased, during his lifetime, made a valid legal delivery of the deeds. The evidence shows conclusively that the deeds were never recorded, no life estate was reserved therein and that the deeds remained in the possession and under the control of the deceased until shortly before his death when he directed that these old deeds be destroyed after the execution and delivery of the 1949 deeds. The plaintiffs claim to be the owners of this property as grantees. Therefore, each and all of them are not only parties to the action but they are claiming a direct interest in the subject matter of the suit. They brought this suit against their sister. Therefore, all of the heirs-at-law are before the court as parties. They could have brought the suit against an administrator of the estate of the deceased, or they were within their rights in bringing the suit by joining all of the heirs either as plaintiffs or defendants. The defendant Marie T. Johnson is the only other heir of the deceased. There can be no question but what the plaintiffs are parties to a civil action and that they are also each and all directly interested in the event thereof. The only question then for determination is the position of the defendant Marie T. Johnson. It is our contention, and it was the view of the trial court, that in so far as the question of the validity

of the 1943 deeds are concerned the defendant Marie T. Anderson Johnson was defending as an heir of the deceased. If the plaintiffs had established the validity of the 1943 deeds, then they would have taken from the estate all of its assets. The defendant, as an heir of the deceased, was defending against their claim. She defended on the grounds that these deeds were never legally delivered and that therefore the property belonged to the deceased up to 1949. And she further claimed that if the 1949 deeds were also invalid, as claimed by plaintiffs, then the property belonged to the deceased at the time of his death; likewise the plaintiffs claimed that if the 1943 deeds were invalid for lack of delivery, that the 1949 deeds were also invalid, and the property belonged to the estate. It seems therefore, clear to us that the plaintiffs, by their action, were making an assault upon the estate and that they were directly interested in the event thereof. It also seems equally clear that in the defense of the 1943 deeds the defendant was defending as against the validity of these deeds as an heir of the deceased. The statute applies, not only when the adverse party to the action sues or defends as an executor or administrator, but it also applies equally when the adverse party sues or defends as an heir of the deceased person. Paraphrasing the language used by this court in the case of

Rasmussen vs. Sevier Valley Canal
Company
40 Utah 371, 121 Pac. 741,

the plaintiffs and each of them were interested in the event thereof. They were suing the only other heir of the deceased. She was defending said suit as an heir and under the statute the plaintiffs and each of them

were incompetent to testify to any fact which was equally within their knowledge and that of the decedent unless they were called on behalf of the defendant heir. We think that this case is governed by

Clark vs. Clark
74 Utah 290
279 Pac. 502.

As we understand counsel for appellants, he does not deny the fact that the evidence sought to be obtained from the four plaintiffs was equally within their knowledge and the knowledge of the decedent. So it is merely a question of whether or not the prohibition of the statute applied in this case with respect to the proffered evidence of the plaintiffs. The fact that there are two sets of deeds involved in this case somewhat complicates the situation. It seems to us clearly that had there been no deeds executed in 1949, the position of defendants would be unassailable. The only question, it seems to us, is whether or not, in view of the fact that the defendant claims as a grantee of the deceased under a subsequent set of deeds in any way changes her position in so far as her defense regarding the 1943 deeds is concerned. We do not believe the fact that there were other subsequent deeds executed in 1949 in any way changes her position, when she is opposing the validity of the 1943 deeds as an heir of the deceased and when she is claiming that these deeds are invalid, and when, as noted supra, the plaintiffs are making a direct assault on the estate by claiming ownership in this property by reason of the alleged delivery of the deeds in question.

With that thought in mind we stated our position very frankly to the court. It was, that when defendant Marie T. Johnson sought to establish the validity of the 1949 deeds then she was in precisely the same position as the plaintiffs, and the plaintiffs were in precisely the same position as the defendant, that is that they would then be defending as against the 1949 deeds as heirs of the deceased and therefore the defendants would likewise be prohibited under the statute from testifying to any fact concerning the 1949 deeds which was equally within their knowledge and that of the decedent. In the trial of the case the transcript will disclose that no attempt was made by the defendants to testify to any facts concerning the execution and delivery of the 1949 deeds which was equally within their knowledge and that of the decedent, except as to some matters which were brought out by the plaintiffs' counsel in his asserted right of cross-examination. We have read the Maxfield vs. Sainsbury case relied upon by appellants and we can see nothing in this case which in our opinion supports appellants' position.

We contend, therefore, that the court correctly interpreted the statute when he held that neither of the plaintiffs could testify as to any fact which was equally within their knowledge and that of the decedent concerning the 1943 deeds. We shall have more to say hereafter regarding the question of whether or not the court adhered to his ruling.

Point 2. The other point raised by appellants is with respect to the ruling of the trial court concerning

the right of plaintiffs to call the defendants on cross-examination and to pursue this cross-examination concerning alleged facts equally within the knowledge of the deceased and the defendants. Reverting to the statute, it expressly provides that no person can be a witness when the adverse party to such action claims or opposes, sues or defends as an heir as to any matter of fact which must have been equally within the knowledge of both the witness and the deceased, *unless such witness is called to testify thereto by such adverse party so claiming or opposing, suing or defending in such action.* In other words, the statute does not say that the evidence is incompetent. The statute says the person cannot be a witness as to such matters unless such witness is called by the executor, administrator, heir, legatee or devisee who is defending the action. In other words, with respect to the 1943 deeds, the defendant who was defending as against their validity was the only person who could call a disqualified witness to testify concerning matters equally within the knowledge of the deceased and the witness. That is a right which is accorded the executor or heir who is defending and is not a right accorded to the person who is making an assault upon the estate. The defendants were placed in a peculiar position in this case when they were called by the plaintiffs for cross-examination. As their attorney, the writer was confronted with a situation as to whether he should object to the competency of the witness or not. If counsel stood by and permitted this cross-examination without objection, then the question would arise as to whether or not defendant thereby waived the benefit of the statute. If such examination without objection could be deemed to be a waiver, then

of course it would open up the whole subject and would permit plaintiffs to go into the matters elicited on the cross-examination. Prior to the adoption of the new rules plaintiffs could not have called defendants for a cross-examination unless defendants had taken the stand and testified regarding some matter or fact equally within the knowledge of the witness and the deceased. In other words, defendant would have the right, not the plaintiff, to determine whether or not she chose to open up the question and thereby waive the statute. Plaintiffs seem to contend that under the new rules they can force a defendant to waive this privilege by the expediency of cross-examination. The new rules do not purport to in any way change, modify or abrogate the dead man's statute and we do not believe it was the intent of the legislature to repeal, modify or change this statute by implication. The question squarely presented, therefore, is whether or not a plaintiff can call an administrator or heir by cross-examination and force such person to answer concerning matters which the defendant as such administrator or heir may claim the belief.

We further contend that, if erroneous, no prejudicial error resulted from the ruling of the court because the court thereafter permitted plaintiffs to pursue in a searching and persistent cross-examination of both of the defendants with respect to the 1943 deeds. See Transcript, pages 198 to 204, cross-examination of Chester N. Johnson, and Transcript, pages 117 to 129 and pages 205 to 217, cross-examination of Marie T. Johnson. Certainly the court permitted plaintiffs' counsel unlimited rights of cross-examination. We contend,

therefore, that the court correctly construed the statute both with respect to the proffered testimony of the plaintiffs, which was rejected, and to the proffered testimony of the defendants elicited on cross-examination, but that in any event the court subsequently receded from his previous ruling, to the point where he permitted counsel full and complete latitude in his cross-examination of the defendants.

RESPONDENTS' STATEMENT OF ADDITIONAL POINTS FOR THE PURPOSE OF HAVING CONSIDERED OTHER AND ADDITIONAL MATTERS THAN THOSE RAISED BY APPELLANTS

The court erred in the following respects:

1. Notwithstanding the trial court ruled that the dead man's statute prevented plaintiffs from testifying as to matters equally within the knowledge of plaintiffs and the deceased respecting the alleged 1943 deeds, yet the court erroneously permitted plaintiffs to testify at great length concerning "matters of fact" and "transactions with the deceased in relation thereto" which were equally within the knowledge of the witness and the deceased.

2. The court erred in permitting plaintiffs' attorney to pursue a prolonged and searching inquiry of the defendant Marie T. Johnson as to what she believed concerning the validity of the 1943 deeds and likewise erred in permitting plaintiffs' attorney to pursue the same cross-examination with respect to what the defendant Chester N. Johnson believed concerning the validity of the 1943 deeds.

3. The court erred in overruling defendants' motion for dismissal and for not granting defendants' motion to withdraw from the jury any issue as to mental incapacity and for not granting defendants' motion withdrawing from the jury the issue of undue influence and also in denying defendants' motion for a directed verdict.

4. The court erred in failing to give the following instructions requested by the defendants: Requested instructions numbered 1, 4 and 5.

We desire to briefly discuss defendants' additional points for the purpose of having this court consider these matters in its opinion.

RESPONDENTS' POINT 1. NOTWITHSTANDING THE TRIAL COURT RULED THAT THE DEAD MAN'S STATUTE PREVENTED PLAINTIFFS FROM TESTIFYING AS TO MATTERS EQUALLY WITHIN THE KNOWLEDGE OF THE PLAINTIFFS AND THE DECEASED RESPECTING THE ALLEGED 1943 DEEDS, YET THE COURT ERRONEOUSLY PERMITTED PLAINTIFFS TO TESTIFY AT GREAT LENGTH CONCERNING MATTERS OF FACT AND TRANSACTIONS WITH DECEASED IN RELATION THERETO WHICH WERE EQUALLY WITHIN THE KNOWLEDGE OF THE WITNESS AND THE DECEASED.

If respondents are correct in their contention that the dead man's statute applied as to the plaintiffs and prohibited them from testifying concerning matters and facts and transactions with the deceased equally

within their knowledge and the knowledge of the deceased, then we think it must inevitably follow that the court erred in subsequently admitting testimony of the plaintiffs concerning facts and transactions with and which must have been equally within the knowledge of the deceased and the witness so testifying. See Tr. 103 to 108 relative to the ruling of the court. Notwithstanding the court's ruling he thereafter permitted these plaintiffs to testify concerning matters, facts and transactions which were equally within the knowledge of the witness so testifying and the deceased concerning the 1943 deeds. See testimony of George N. Anderson commencing at page 109 to 117; testimony of Imogene Anderson, Tr. 157 to 160 and 161 to 171. See also Tr. 180 to 184, subsequent ruling of the court; testimony of Lorenzo W. Anderson, Jr., Tr. 137 to 151.

As we construe the statute, the incompetency of the witness is much broader than merely prohibiting conversations between the deceased and the witness. The statute makes this very clear because the prohibition extends 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." We desire to call attention specifically to the concurring opinion of Mr. Justice Wolfe in the case of Maxfield vs. Sainsbury concerning this matter.

RESPONDENTS' POINT 2. THE COURT ERRED IN PERMITTING PLAINTIFFS' ATTORNEY TO PURSUE A PROLONGED AND SEARCHING INQUIRY OF THE DEFENDANT MARIE T. JOHNSON AS TO WHAT SHE BELIEVED CONCERNING

THE VALIDITY OF THE 1943 DEEDS AND LIKEWISE ERRED IN PERMITTING PLAINTIFFS' ATTORNEY TO PURSUE THE SAME KIND OF CROSS-EXAMINATION WITH R E S P E C T TO WHAT THE DEFENDANT CHESTER N. JOHNSON BELIEVED CONCERNING THE VALIDITY OF THESE DEEDS.

See cross-examination of Marie T. Johnson, commencing on page 215. See also cross-examination of Chester N. Johnson, page 201 to 205. It is our theory that much of this cross-examination was improper for the reason that no evidence on direct examination was offered concerning the matter. It is also our view that the cross-examination as to what the defendants may have believed concerning the validity or the non-validity of these deeds is entirely immaterial. Many people erroneously believe that an undelivered executed deed passes a good title on death. The only question which the jury was called upon to determine was the intent of the grantor, not the belief of the grantees.

RESPONDENTS' POINT 3. THE COURT ERRED IN OVERRULING DEFENDANTS' MOTION FOR DISMISSAL AND FOR NOT GRANTING DEFENDANTS' MOTION TO WITHDRAW FROM THE JURY ANY ISSUE AS TO MENTAL INCAPACITY AND FOR NOT GRANTING DEFENDANTS' MOTION WITHDRAWING FROM THE JURY THE ISSUE OF UNDUE INFLUENCE AND ALSO IN DENYING DEFENDANTS' MOTION FOR A DIRECTED VERDICT.

At the conclusion of plaintiffs' case respondents moved the court for a dismissal of plaintiffs' case on the theory that there was no evidence to submit to the jury either:

1. That the deceased had delivered the 1943 deeds; or

2. That the deceased had failed to deliver the 1949 deeds; or

3. That deceased at the time of the execution thereof was mentally incompetent or acting under undue influence.

The court denied the motion. We confidently believe that a review of the plaintiffs' evidence fails to disclose any evidence upon which the court, as a trier of the facts, or the jury, could find a valid legal delivery of the 1943 deeds. The evidence discloses the following undisputed facts evidencing non-delivery:

1. At the time he signed the 1943 deeds, deceased was in good health. No suggestion is made as to why, at that time, he would want to divest himself of all of his property thereby leaving him destitute.

2. He retained no life estate in the property.

3. The deeds were never recorded.

4. He thereafter continued to treat the property as his own, collecting and retaining the rents, entering into leases of the Promontory property, signing a right-of-way agreement with his brother Cephus on the Garland property, paying the taxes and exercising generally all right of ownership.

5. The possession of these deeds was retained by the deceased. He kept them in a special compartment in his own desk in his own home.

Each and all of these facts, which are undisputed, in the absence of evidence to the contrary, shows conclusively that the deceased never intended a delivery of the deeds. The evidence further shows that during his lifetime decedent had made many deeds. One time making his wife grantee, another time making Marie grantee. In fact the evidence shows he made dozens of deeds which apparently he considered as merely testamentary in character. We contend the evidence conclusively shows that when he signed the 1943 deeds it was his intent that the same was merely testamentary in character and that he did not intend to deliver said deeds or to pass any present interest in the property.

Conversely we contend, with respect to the 1949 deeds, that the evidence conclusively shows a then present intent to make a present delivery of these deeds. The testimony of John W. Phillips is conclusive on this point. Decedent's declaration to Marie to record her deed shows conclusively an intent at that time to make an absolute unconditional delivery.

We further contend that there was no evidence upon which the jury could have found either that the deceased was incompetent at the time he executed and delivered the 1949 deeds or that he was acting under duress or undue influence. If the court was correct in denying the defendants' motion to dismiss, he should have granted the motion to withdraw these issues from

the jury. With respect to incompetency, there was evidence, which is not disputed, that in 1947 or thereabouts the deceased suffered a stroke and that he was very ill. It is conceded that there were times during that period when his mind was affected. However, there was no evidence of any mental incapacity at the time he signed the 1949 deeds. It was admitted by everyone that his health greatly improved, and the testimony of John W. Phillips, Dr. Moskowitz, his brother Cephus Anderson to the effect that at the time he signed the deeds his mind was clear and that he understood and fully appreciated the nature of the act which he was doing, stands undisputed in this record.

**RESPONDENTS' POINT 4. THE COURT ERRED
IN FAILING TO GIVE D E F E N D A N T S'
REQUESTED INSTRUCTIONS 1, 4 and 5.**

We have already discussed the matters covered by defendant's requested instruction number 1 for a directed verdict. If there was evidence of mental incapacity or undue influence, then the court should have given to the jury defendants' requested instructions number 4 and 5. We do not believe that the court in his instructions covered the matters contained in either of these requests and we also believe that the requested instructions contain a correct statement of the law. We contend that the errors assigned by appellants for a reversal cannot be sustained and that the judgment should be affirmed.

Respectfully submitted,
THATCHER & YOUNG
Attorneys for Respondents