

1956

Heber W. Glenn v. J. A. Ferrell et al : Brief of Appellant

Utah Supreme Court

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In the Supreme Court
of the State of Utah

FILED

AUG 9 - 1956

HEBER W. GLENN,

Plaintiff and Appellant,

vs.

J. A. FERRELL, et al,

Defendant and Respondent.

Clerk, Supreme Court, Utah

No. 8523

BRIEF OF APPELLANT

RALPH & BUSHNELL

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In the Supreme Court of the State of Utah

HEBER W. GLENN,

Plaintiff and Appellant,

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J. A. FERRELL, et al,

Defendant and Respondent.

No. 8523

BRIEF OF APPELLANT

STATEMENT OF FACTS

From the 5th day of October, 1951, to May 6, 1952, the Appellant performed work on a farm in Utah County owned by the Respondent in grading and leveling of said property (R-10). In the spring of 1952, the farm was sold by the Respondent, who then moved to Montana. Suit was commenced by the Appellant to recover \$2,176.65, being the reasonable value of the work performed, and had a summons served upon the Respondent at Hardin, Montana (R-5). A motion to quash service of summons was filed by the Respondent on the

grounds that he was at that time a non-resident of the State of Utah (R-12). The motion was granted and thereafter the Appellant procured an order for publication of summons or, in the alternative, personal service on the Respondent as specified in Rule 4 (f) 2 of the Utah Rules of Civil Procedure (R-9), based upon an affidavit which, in addition to stating that the Respondent was not a resident of the State of Utah, advised the court that there was property within the State of Utah subject to attachment and "that it is the intention of the Plaintiff to attach said property and to proceed quasi in rem" (R-7). After securing such order, the Respondent was again personally served with a summons in the action (R-6).

Suit was also commenced against Sugarhouse Stake for the purpose of foreclosing a mechanic's lien against the property, but this action was dismissed (R-23), leaving the Appellant, as his only remedy, his claim against the Respondent through his property in the jurisdiction of the State of Utah.

At the time of the sale of the farm to Sugarhouse Stake, the Respondent deposited Certificate No. 33, being a certificate of water stock issued by Utah Lake Distributing Company, which was not in the name of the Respondent, but rather had been endorsed in blank by a previous owner. The certificate represented 300 shares, and the Respondent was only selling 198 shares with the farm to the Sugarhouse Stake. A writ of attachment was procured and left with the Salt Lake County Sheriff, who levied the writ of attachment on the Certificate No. 33, claiming only to have attached 102 of the 300 shares as being the property of the Respondent and recognizing the ownership of Sugarhouse Stake to the other 198 shares (R-15).

The default of the Respondent was entered on the 9th day of October, 1953 (R-16) and a judgment by default was procured. However, it was limited to such recovery as the Appellant might secure from the property of the Respondent heretofore attached and within the jurisdiction of the court (R-17). A writ of execution was issued on the 3rd day of December, 1953, directing the sheriff to levy against the property of the Respondent attached in the above entitled action (R-18).

Prior to the sheriff's sale, the original certificate No. 33 for 300 shares had been surrendered to the Utah Lake Distributing Company, with the consent of the Appellant, and new certificates had been issued, one to the Sugarhouse Stake and the balance for 102 shares returned to the sheriff, subject to the attachment. On the 31st day of March, 1955, the sheriff proceeded to sell the certificate for 102 shares and the Appellant was the high bidder and procured from the sheriff the certificate of stock pursuant to said sale. The return of the sheriff's sale was made on the 1st day of April, 1955 (R-19). On the 26th day of January, 1956, the Respondent filed a motion to vacate the attachment, judgment and judicial sale on the ground that the stock had not been properly levied upon pursuant to the writ of attachment and in compliance with Rule 64 C(e) of the Utah Rules of Civil Procedure (R-22). Although the sheriff had complied with the provisions of Section 16-3-13, U.C.A., 1953, being the provisions of the Uniform Stock Transfer Act, the court granted the motion of the Respondent and held that the attachment was not served in accordance with the statute and was therefore null and void (R-24). The appeal raises the sole issue of whether compliance

with Section 16-3-13, U.C.A., 1953, was a sufficient levy of the writ of attachment.

ARGUMENT

POINT ONE. STOCK OF A CORPORATION IS VALIDLY ATTACHED BY THE SHERIFF LEVYING UPON THE CERTIFICATE IN COMPLIANCE WITH SECTION 16-3-13 U.C.A., 1953 (SECTION 13, UNIFORM STOCK TRANSFER ACT.)

The issue involved requires a consideration of two provisions of Utah statutory law. Rules 64 C(e) of the Utah Rules of Civil Procedure pertaining to the manner of executing writs of attachment advises as follows:

“Stocks or shares, or interest in stocks or shares, of any corporation or company may be attached by leaving with the president, secretary, or cashier or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ and by taking the certificate into custody, unless the transfer thereof by the holder is enjoined or unless it is surrendered to the corporation issuing it.”

Section 16-3-13, U.C.A., 1953, being a part of the Uniform Stock Transfer Act, specifies with reference to the attachment of stock as follows:

“Attachment or levy—Necessity of seizure of certificate—Right to New Certificate. No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a

certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it."

The stock certificate in this particular case was not in the name of the Respondent, but rather had been endorsed in blank and was considered to be street stock or a negotiable instrument. The sheriff did not serve a copy of the writ of attachment on the officers of the corporation as specified by the Utah Rules of Civil Procedure; however, the writ of attachment was levied upon the certificate as provided by Section 16-3-13. The issue presented, therefore, is whether compliance with Section 16-3-13 is sufficient as a valid attachment of the stock certificate.

Before discussing the particular point in question, it is felt that a brief reference to the legislative history and the common law prior to the adoption of the Uniform Stock Transfer Act would be helpful. At common law, certificates of stock were only evidence of a proportionate ownership in the corporation. As such, they were not considered property, nor were they accorded the dignity of negotiable instruments (4 Am. Jur. 776, Attachment and Garnishment, Section 351). Consequently, it was necessary to levy an attachment by serving the same upon the corporation just the same as if an attachment were to be levied upon an undivided interest in the property. The requirements contained in the Rules of Civil Procedure date back to the laws of the Territory of Utah, 1851-70, Section 127. At or about the time of the promulgation of the Uniform Stock Transfer Act, it was felt that commercial interests required that certificates of stock be treated as property and be made freely negotiable. Section 16-2-34, U.C.A.,

1953, provides that shares of stock are personal property; and in 1927 Utah adopted the Uniform Stock Transfer Act, which is now Section 16-3 U.C.A., 1953. The Uniform Stock Transfer Act made specific requirements which would make stock certificates negotiable instruments. Actual possession of the certificate became of paramount importance. An assignment of a stock certificate without delivery of the same was held to be ineffective as against bona fide purchasers or other persons who actually secured possession of the certificate itself. Consequently, it was necessary for the purpose of levying a valid attachment that the certificate actually be attached and held.

In *Hodes vs. Hodes*, 155 Pac. 2d 564, 176. Or. 102, the above distinction was discussed as follows:

“At common law, shares of stock of a corporation were not subject to levy or attachment. 6 C.J.S., Attachment, Section 395, page 212; 7 C.J.S., Attachment, Section 79; *Mills v. Jacobs*, 333 Pa. 231, 4 A. 2d 152, 122 A.L.R. 333; *Elgart vs. Mintz*, 123 N.J. Eq. 404, 197 A. 747. Legislation to enable creditors to reach this type of property has been enacted in most jurisdictions, by virtue of which shares of stock in incorporated companies may be attached. 7 C.J.S., Attachment, Section 79, Page 253. * * *

“The essential factors of the uniform stock transfer act have been adopted in thirty-six states and the Territory of Alaska. 6 U.L.A. 43, Page 6. The main purpose of that act is to make certificates of stock ‘as far as possible, the sole representative of the shares which they represent’. *Mills vs. Jacobs*, supra. (333 Pa. 231, 4 A. 2d 154); 6 U.L.A. 2, Commissioner’s note. By Section 1 of the uniform stock transfer act (Section 78-101, O.C.L.A.), a transfer of a stock certificate is made to operate as a transfer of the shares represented thereby,

without regard to the transfer on the books of the company. (Citation of authorities.)”

Section 1 of the Uniform Stock Transfer Act, being Section 16-3-1 U.C.A., 1953, specifies: “Title to a certificate and to the shares represented thereby can be transferred only by delivery of the certificate properly endorsed or by delivery of the certificate with a power of attorney, and said section then provides:

“The provisions of this act shall be applicable although the charter or articles of incorporation or code or regulations or bylaws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or be registered by a registrar or transferred by a transfer agent.”

Since the certificate attached by the sheriff in this case was not issued in the name of the Respondent, the serving of a writ of attachment to an officer of the corporation would not have reached any property shown to have been owned by the Respondent. The only basis upon which the Appellant could validly reach the interest of the Respondent in the negotiable stock certificates was to levy upon the certificate itself, which was accomplished by the sheriff in compliance with the stock transfer act.

We have only been able to find one case which presented the problem of a conflict between the old type attachment provisions and the provisions of the Uniform Stock Transfer Act. Such a problem was presented in *Nevael Investment Corporation vs. Schrunk*, 279 P. 2d 518, 203 Or. 268, decided February 2, 1955.

Section 78-113 O.C.L.A. of the Oregon law is the same

provision as Section 16-3-13 U.C.A. 1953, more particularly the provision of the Uniform Stock Transfer Act. Section 7-206 O.C.L.A. is the Oregon counterpart of Rule 64 C(e) 5 of the Utah Rules of Civil Procedure. Part of Section 7-206 O.C.L.A. is as follows:

“Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same, or if it be a debt, then with the debtor, *or if it be rights or shares in the stock of an association or corporation, or interests or profits thereon, then with such person or officer of such association or corporation as this code authorizes a summons to be served upon; * * ** (Emphasis added.)

In the above mentioned case, suit was brought against the sheriff who had attached certificates of stock being held in escrow, but had failed to serve a copy of the writ upon an officer of the corporation. The issue before the court was the validity of the attachment. It was there argued, as in this case, that since the sheriff had not complied with the specific rules on attachment and had only complied with the section of the Uniform Stock Transfer Act, there had not been a valid attachment. The comment of the Court concerning this problem is as follows:

“Plaintiff first claims that the attachment was ineffective because service of garnishment was not made on the officers of the West Coast Burner & Furnace Company in compliance with Section 7-206, O.C.L.A., ORS 29.170. The Uniform Stock Transfer Act, Section 78-113, O.C.L.A., ORS 58.130, sets out the procedure for attachment where corporate stock is involved. Referring to the above section Mr. Justice Bailey, speaking

for the court in *Hodes vs. Hodes*, 176 Or. 102, 155 P. 2d 564, 566, had this to say:

“Whether or not the plaintiff’s shares of stock are subject to attachment and sale on execution is governed by Section 78-113, O.C.L.A. (Section 13 of the uniform stock transfer act), * * * *

‘Three alternative means are specified in the section last quoted for making effective on attachment or levy on stock, to wit: (1) by actual seizure of the certificate; (2) by surrender of the certificate to the corporation which issued it; and (3) by enjoining the holder from transferring it. * * *

(1) Since the stock was seized by the sheriff under the attachment it was unnecessary to give notice to the West Coast Burner & Furnace Company.”

It is evident that the Oregon Court did not consider the two requirements as being cumulative but rather compliance with the provisions of the Stock Transfer Act was sufficient. Further, the Court held that a purported assignment of the stock prior to the levy of the writ of attachment only operated as a promise to transfer and that without actual delivery of the stock certificate, the attaching creditor stood in the position of a bona fide purchaser and the attachment was sufficient to cut off the rights of the purported assignee.

Under the circumstances of the case now before the court, it would be requiring a futile act to hold that it would be necessary to serve the writ of attachment on the corporation. No stock appeared in the name of the Respondent on the records of the corporation, and consequently there would be no evidence as far as the records of the corporation are concerned of any ownership in the Respondent subject to attachment. The corporation under the Uniform Stock Transfer Act

could not transfer any shares without actual receipt of the certificates. Since these had been attached, there was no danger of such a transfer or injury to any other person. The certificate was in one county and the office of the corporation was in another county. To give effect to both statutes would require the issuance of a second writ of attachment and the service of the same, all of which would appear unnecessary since the actual stock certificate had been attached.

In view of the Oregon case, the purpose and intent of the Uniform Stock Transfer Act, and the legislative history of the two sections, it would appear that the Appellant should not be defeated in this matter by the claims of a non-resident seeking to escape liability on legal technicalities. Especially is this true in view of Rule 61 of the Utah Rules of Civil Procedure wherein it states:

“No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”

If there has been any error, at most it was a harmless error which should be disregarded in compliance with the foregoing rule. There has been no affidavit of merits or claim that the complaint of the Appellant is not valid or justified. The Respondent and his counsel knew of the proceedings taking place in the above mentioned court and were advised of the contem-

plated sheriff's sale of the certificate in question. Under the circumstances, it would appear unfair and inequitable to permit the Respondent to escape his liability after approximately three years' delay on the basis that a useless act had not been performed by the sheriff.

It is respectfully submitted that this court should hold that stock of a corporation is validly attached by the sheriff levying upon the certificate in compliance with Section 16-3-13 U.C.A., 1953, and therefore the judgment of the trial court be reversed.

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