

1972

Layton Harris and Pearl A. Harris v. Eula Tilley : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Gary A. Weston; Attorneys for Appellants Dale Craft; Attorney for Respondent

Recommended Citation

Brief of Appellant, *Harris v. Tilley*, No. 12619 (Utah Supreme Court, 1972).
https://digitalcommons.law.byu.edu/uofu_sc2/3190

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

LAYTON HARRIS and
PEARL A. HARRIS,

Plaintiffs and Appellants

vs.

EULA TILLEY,

Defendant and Respondent

BRIEF OF APPEAL

Appeal from the Judgment
for Sale of Land

Honorable Secretary of State

FILED
CLERK
JULY 10 1911
SALT LAKE CITY
UTAH

DALE CRAFT

409 Boston Building
Salt Lake City, Utah

Attorney for Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
DISPOSITION OF THE CASE BY LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	3
POINT I	
THE LOWER COURT ERRED IN DETER-	
MINING THAT THE GIVING OF AN	
EQUITABLE MORTGAGE ON REAL PROP-	
ERTY DID NOT CONSTITUTE A WAIVER	
AND RELINQUISHMENT OF THE MORT-	
GAGOR'S RIGHT TO CLAIM A HOME-	
STEAD EXEMPTION INCIDENT TO THE	
FORECLOSURE OF THAT MORTGAGE	3

AUTHORITIES CITED

CASES

Bybee v. Stuart, 112 Utah 462, 189 P.2d 118	6
Hess v. Anger, 53 Utah 186, 117 P. 232	6
Hill v. Hill, 185 Kan. 389, 345 P.2d 1015	8
Tanner v. Lawler, 6 U 2d 84, 305 P.2d 882	5

STATUTES

Utah Code Annotated, 1943	
Section 78-1-13	6
Utah Code Annotated, 1953	
Section 28-1-1	4, 6
Section 57-1-14	6
Section 78-23-3	4, 6

OTHER AUTHORITIES

40 Am Jur 2d, Homestead, Sec. 115	4
40 Am Jur 2d, Homestead, Sec. 192	4

IN THE SUPREME COURT OF THE STATE OF UTAH

LAYTON HARRIS and
PEARL A. HARRIS,

Plaintiffs and Appellants,

vs.

EULA TILLEY,

Defendant and Respondent.

} Case No.
12619

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

Plaintiffs brought action against the Defendant in District Court case No. 188517 to recover amounts expended and the value of obligations incurred in maintaining certain real property of the Defendant and further, for an equitable lien against said real property to secure the payment of the Defendant's indebtedness to them. The trial court awarded Plaintiffs a judgment in the amount of the indebtedness, together with an equitable mortgage to secure that indebtedness. The Defendant appealed to this court on issues neither relevant nor subject of this appeal, and the lower court was affirmed.

Plaintiffs sued in District Court case No. 192613 to foreclose their equitable mortgage, whereupon they were awarded a decree of foreclosure and the property was sold at Sheriff's sale. Defendant duly filed her claim for a homestead exemption and moved the court to determine that the Plaintiffs' equitable mortgage was subject to her homestead exemption.

DISPOSITION OF THE CASE BY LOWER COURT

The lower court rendered its conclusions of law and judgment on July 27, 1971, determining that the equitable mortgage given by the Defendant was not within the scope of Sections 28-1-1 and 78-23-3, Utah Code Annotated, 1953, and that Defendants giving of said equitable mortgage did not constitute a waiver and relinquishment of her right to claim a homestead exemption incident to the foreclosure of that mortgage.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek a reversal of that judgment entered July 27, 1971, and a determination that the Defendants giving of an equitable mortgage to Plaintiffs constituted a waiver and relinquishment of her right to claim a homestead exemption incident to Plaintiffs' foreclosure of that mortgage.

STATEMENT OF FACTS

In 1964, Plaintiffs orally agreed to oversee and manage the rental of Defendant's residence at 1968 South 8th

East, in Salt Lake City, Utah. (R. 74, 75) In approximately October of 1965, the Defendant requested the Plaintiff, Layton Harris, to co-sign with her on a promissory note pursuant to her obtaining a loan to pay accrued and unpaid general real property taxes and to install a new roof and furnace in the residence situate on the subject property. (R. 75, 90, 100, 116) Said Plaintiff agreed to co-sign the note conditional upon the Defendant giving him a quit claim deed to the subject property to protect him in the event of the Defendant's default on the note. (R. 75) The Defendant obtained a loan from First Federal Savings and Loan Association on October 5, 1965 (R. 77, 91, 100) pursuant to which Layton Harris co-signed with her on a promissory note in the amount of the loan (R. 77, 102) and the Defendant gave Plaintiffs a quit claim deed to the subject property. (R. 102)

The trial court determined that the quit claim deed had been given to Plaintiffs to secure Defendant's payment to them of amounts they incurred in managing and maintaining the subject property for the Defendant and in making installment payments on the promissory note. The court therefore adjudged the deed to be an equitable mortgage. (R. 5)

ARGUMENT

POINT I

THE LOWER COURT ERRED IN DETERMINING THAT THE GIVING OF AN EQUITABLE MORTGAGE ON REAL PROPERTY DID NOT CONSTITUTE A WAIVER AND RELINQUISHMENT OF THE

MORTGAGOR'S RIGHT TO CLAIM A HOMESTEAD EXEMPTION INCIDENT TO THE FORECLOSURE OF THAT MORTGAGE.

Plaintiffs recognize that the homestead exemption, as constitutionally created, arises immediately upon the qualification of the head of the family, but submit that the exemption may be successfully raised against subsequent obligations and liens only if not previously waived or relinquished.

At 40 Am. Jur. 2d, Homestead, it is recognized that:

"In the absence of constitutional or statutory restrictions, the owner of a homestead may mortgage the property, and thereby subject it to sale under foreclosure proceedings." Sec. 115

"Waiver may generally be done in a deed or mortgage." Section 192

Neither Article XXII, Sec. 1 of the Utah Constitution, wherein the homestead exemption is created, nor any statute of this State, prohibits the conveyance or mortgaging of homestead property. Rather, at Section 28-1-1, Utah Code Annotated, 1953, it is provided:

"A homestead consisting of land, appurtenances and improvements, . . . shall be exempt from judgment lien and from execution or forced sale, *except upon* the following obligations: . . . (2) *Judgments obtained on debts secured by lawful mortgage on the premises* and on debts created for the purchase price thereof." (Emphasis added)

It is further provided at Section 78-23-3, Utah Code Annotated, 1953:

"No article or species of property mentioned in this chapter *or in the title Homesteads is exempt from execution* issued upon a judgment recovered for its purchase price, or any portion thereof, or *upon a judgment on foreclosure of a mortgage or other valid lien thereon, . . .*" (Emphasis added)

In *Tanner v. Lawler*, 6 U 2d 84, 305 P. 2d 882, this court recognized the application of the Code Section cited first above and in accord therewith, determined that the claim of a foreclosing mortgagee is not subject to the homestead exemption of the mortgagor.

It is clear from statute and judicial precedent, that a Utah mortgagor is deemed to have waived his homestead exemption as against his foreclosing mortgagee. The issue then remaining, is whether this waiver is effectively made by the giving of an equitable mortgage, or whether it is limited only to a giving of an instrument which on its face, constitutes a mortgage at law.

This Court has not been called upon to determine whether the aforementioned Code Sections contemplate the giving of an equitable mortgage. The Sections themselves make no attempt to differentiate between legal and equitable mortgages and Plaintiffs submit that no such distinction is contemplated nor would be appropriate.

It is noted that the quit claim deed given by the Defendant to the Plaintiffs, and which the lower court has construed as a mortgage, did not specifically provide for nor recite a waiver of Defendant's homestead. However, such a provision or recital in the instrument is not neces-

sary in order to effect a waiver of the homestead exemption. The hereinabove cited Code Sections 28-1-1 and 78-23-3, specifically provide that a judgment obtained on foreclosure of a mortgage takes priority over the homestead exemption of the mortgagor. In addition, Section 57-1-14, Utah Code Annotated, 1953, sets forth an approved form of a statutory mortgage, *which form is notable for its complete absence of any specific provision with reference to the mortgagor's homestead exemption*. Said Section, in making reference to the form therein suggested, further provides:

"Such mortgage when executed as required by law shall have the effect of a conveyance of the land therein described, *together, with all the rights, privileges and appurtenances thereunder belonging*, to the mortgagee, his heirs, assigns and legal representatives, as security for the payment of the indebtedness therein set forth," (Emphasis added)

This section obviously contemplates the pledge of any and all interests of the mortgagor. No provision is made for an implied reservation of the homestead interest. This court in *Bybee v. Stuart*, 112 Utah 462, 189 P. 2d 118, in construing former Section 78-1-13, Utah Code Annotated, 1943, which Section was identical to the subject present Section, determined that the statutory form need not be followed, but is only a suggested form. The Court has further recognized in *Hess v. Anger*, 53 Utah 186, 117 P. 232, that a deed absolute in form, executed and delivered as a security rather than a conveyance of title, will be construed as a mortgage. It is therefore apparent that

Utah law does not require a waiver of homestead to be expressly recited in the mortgage instrument in order for that waiver to be effective.

The lower court determined from the evidence deduced at trial, that Plaintiffs and Defendants intended that the quit claim deed delivered by Defendant to Plaintiffs was to secure any indebtedness incurred by Defendant and owed to Plaintiffs incident to the Plaintiffs' management of the Defendant's subject property and therefore, that it was an equitable mortgage rather than an absolute conveyance of title. The record shows there to have been a voluntary delivery of that document. The court determined that a mortgage was thereby intended and therefore, it follows that the giving of that mortgage was a voluntary act of the Defendant. In other words, the Defendant incurred the mortgage no less voluntarily than had she done so by the delivery of a statutory mortgage. There is nothing in the record to indicate that the parties had discussed the homestead to which Defendant may have been entitled and it is doubtful that Plaintiffs would have accepted any mortgage wherein the homestead was expressly exempted.

The lower court, invoking its equitable jurisdiction, determined that the Defendant intended to give Plaintiffs a mortgage. There was nothing before the court to indicate that Defendant intended to give Plaintiffs any right or interest less than that which she would have given had she executed and delivered a statutory mortgage. The risk assumed by Plaintiffs incident to co-signing Defendant's

promissory note was no less than it would have been had they been given a statutory mortgage by Defendant to secure performance on the note. Therefore, it was inconsistent for the lower court to grant Plaintiffs a mortgagees' interest any less than that which they would have held under a statutory mortgage.

The Kansas Court in *Hill v. Hill*, 185 Kan. 389, 345 P. 2d 1015, was confronted with the question of whether an equitable mortgage was subject to a claimed homestead exemption. Therein said case, it was found that the Plaintiffs had loaned money to Defendant's husband to be used in purchasing certain real estate. In return for the loan, Defendant's husband gave a promissory note to Plaintiffs wherein it provided that Plaintiffs were to have an interest in the purchase of property to the extent of the amount of that loan. Defendant's husband died and the real property passed to the Defendant as surviving joint tenant. Plaintiffs thereafter sued Defendant requesting the court to determine that the note represented an equitable mortgage on the property which they were entitled to foreclose. The court held:

"Money borrowed from a third person by the purchaser of a homestead, and paid to the vendor, is purchase-money for which the purchased property is liable to such third person where the transaction between the parties to the lending transaction contemplates security for the obligation. The purchase-money mortgage arising from such transaction takes priority over the homestead exemption . . . and it matters not that such purchase-

money mortgage may be an equitable mortgage."
(Emphasis Added) 345 P. 2d 1024

The Kansas Court was confronted with a purchase money mortgage rather than a mortgage, which as in the instant case, was given to secure a loan obtained after the property had been purchased. The ruling of that court is nevertheless relevant, since the Utah Code Sections hereinabove cited, make the homestead exemption subject to a foreclosure of a mortgage regardless of whether that mortgage secures a debt created for the purchase price of the property or otherwise. Therefore, there is no reason to distinguish between an equitable mortgage as in the case at bar and an equitable mortgage given to secure purchase money. Equity has re-vested the Defendant with title to the property subject of this proceeding, and given Plaintiffs only a mortgage to secure the obligations which they have assumed incident to their agreement with the Defendant. Equity surely was not served when the lower court determined the Plaintiffs' mortgage interest to be less than that which they would have enjoyed had they taken a statutory mortgage. Such determination prevented the Plaintiffs from recouping the full amount of the obligation owed to them by the Defendant. Such recoupment was obviously intended as is evidenced by the giving and acceptance of the equitable mortgage.

Plaintiffs respectfully submit that pursuant to the voluntary giving of the equitable mortgage, subject hereof, Defendant has waived any homestead exemption vest-

ed in her at the date that said mortgage was given and therefore, that the lower court judgment of July 27, 1971 should be reversed and the court directed to enter its order directing that the homestead of the Defendant is subject to the foreclosure of Plaintiffs' mortgage lien.

Respectfully submitted,

BETTILYON & HOWARD
GARY A. WESTON

333 South Second East
Salt Lake City, Utah 84111

*Attorneys for Appellants,
Layton Harris and Pearl A. Harris*