1965

Controlled Receivables, Inc. A Utah Corporation, and Claude D. Harman, An Individual v. Don Harman and Lila Harman, His Wife, and William Blake Harmon aka Blake Harman and Colleen Harmon, His Wife : Brief of Respondent

THE SUPREME COURT
THE STATE OF UTAH

TROLLED RECEIVABLES, INC., a Utah Corporation, and CLAUDE D. HARMAN, an individual,

Plaintiffs-Appellants,

— vs. —

N HARMAN and LILA HARMAN, his wife, and WILLIAM BLAKE HARMAN, aka BLAKE HARMAN and COLLEEN HARMAN, his wife,

Defendants-Respondents.

Case No.

RIEF OF RESPONDE

From the Judgment of the Third D
for Salt Lake County
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IN THE SUPREME COURT OF THE STATE OF UTAH

CONTROLLED RECEIVABLES, INC., a Utah Corporation, and CLAUDE D. HARMAN, an individual,

Plaintiffs-Appellants,

— vs. —

DON HARMAN and LILA HARMAN, his wife, and WILLIAM BLAKE HARMAN, aka BLAKE HARMAN and COLLEEN HARMAN, his wife,

Defendants-Respondents.

Case No. 10403

BRIEF OF RESPONDENTS

STATEMENT OF KIND OF CASE

This is an action to set aside a Deed to land located in Salt Lake County, State of Utah, executed and recorded in February and March of 1947. (Exhibit 1, R. 14-17)

DISPOSITION IN LOWER COURT

The District Court granted a Summary Judgment to the defendants, the matter having been argued on

three successive motions. Following the first motion and argument, plaintiffs were granted leave to amend. (R. 13) Following the second motion and argument, plaintiffs were granted leave to exhaust discovery devices. (R. 27A & 28) From judgment which followed the third argument plaintiffs have appealed.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the District Court's Summary Judgment.

STATEMENT OF FACTS

Respondents do not concede that the Statement of Facts appearing in Appellants' Brief is a correct Statement and issue will be taken hereafter with those items respondents contend are misstatements of fact. Respondents further contend that there are additional material and controlling facts not alluded to in Appellants' Statement. These additional facts are Exhibits 1 and 2 (of which Appellants make some passing notice) and Exhibits 3 and 4. Exhibit 4, a Quit-claim Deed executed December 27, 1963 and recorded December 30, 1963, is a correction deed running from Franklin M. and Marian P. Harman, brother and sister-in-law of Appellant Claude D. Harman to Claude D. Harman and Respondents as joint tenants in the identical language and names and order as provided on the Deed in question (Exhibit 1), to-wit: Claude D. Harman, Barbara Louise Harman, Blake Harman, Don Harman, and Larry Harman. This

Deed corrected an overlapping situation on the 1¼ acre parcel in issue.

While the property now in dispute in the court below consists of a parcel of land located in Granger, Salt Lake County, totaling 1¼ acres, the deed in issue (Exhibit 1) included in its terms said 1¼ acre parcel, together with a neighboring parcel totaling approximately 8 1/3 acres.

It is to be noted that in 1963 when the family sold the 8 1/3 acre parcel to one of the appellant corporations, Quit-Claim Deeds running from the children (including Respondents) to their father, Claude D. Harman were obtained, executed and recorded.

At the time of the third and final argument for Summary Judgment, May 18, 1965, two depositions of Claude D. Harman and depositions of C. Don Harman and William Blake Harman were published and made part of the record.

In Claude D. Harman's Deposition of April 2, 1965 (R. 40), the following testimony appears:

> "Q. Now sometime in 1963 you entered into a contract for the sale of this 8 1/3 acres to the north and east of your home property?
> A. Yes.
>
> Q. And have you received a quit-claim deed?
> A. They all signed.
>
> Q. — from each of the children on that?
> A. They all signed a quit-claim deed on that, yes, sir." (R. 40, P. 8)

Counsel for Respondents had been under the impression that those Quit-Claim Deeds had been introduced in evidence but discovered that the same were not part of the record on appeal. Said documents being of public record on file in Salt Lake County Recorder's Office, Respondents have herewith in connection with their argument in this matter supplementally filed a photostatic copy of said Deeds, and pursuant to the provisions of Title 78-25-1(3), Utah Code Annotated 1953, request this Court to take judicial notice of the same.

There is further evidence not noted in Appellants' Brief, showing an acknowledgement on the part of Appellant Claude D. Harman of the existence of a joint tenancy and a treating of the property as though jointly owned as indicated in his depositions and the depositions of Respondents Don Harman and William Blake Harman, which will be quoted in greater detail hereafter.

ARGUMENT

POINT NO. 1

THE TRIAL COURT COMMITTED NO ERROR IN GRANTING DEFENDANTS-RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

The controlling law Respondents maintain is well stated in 16 *AM JUR., Deeds,* Sec. 137, p. 515, as follows:

> "The recording of a voluntary deed by a parent to an infant child raises a presumption that the parent procured the recording of the deed, al-

though the deed was thereafter returned to the grantor who kept both the deed and the property in his own possession, *these circumstances being of small significance,* especially where the Statute makes the record admissible as original evidence of the conveyance and where the grantees are minors." (Emphasis added)

Cases are thereafter cited including annotations at 9 *L.R.A.* (*NS*) 224, *Annotated Cases* 1912A, 237 and *Annotated Cases* 1914A, 88.

See also *Houts* v. *Montes*, 204 Okla. 215, 228 P. 2d 651 (1951). The rule is therein succinctly stated as follows:

"Possession by the grantor of a deed to a minor child voluntarily made and recorded by an adult grantor *constitutes delivery to the grantee unless a contrary intention clearly appears.* 16 Am. Jur., Deeds, §§ 135, 136, 137, 151; Matson v. Johnson, 48 Wash. 256, 93 P. 324, 125 Am. St. Rep. 924; Tobin v. Bass, 85 Mo. 654, 55 Am. Rep. 392; O'Neal v. Turner, 197 Okl. 527, 172 P. 2d 1013; Anno. 129 A.L.R. 21-25, 38-41. The evidence on behalf of Gertrude Bonesteel does not clearly show that she had no intention to vest title in her son Clarence and it is not contended that it does. If she received the deed from the Register of Deeds and Clarence never possessed it, her possession constituted delivery." (Emphasis added)

In the April 2, 1965 deposition of Claude R. Harman (R. 40) the following questions and answers appear:

"Q. At the time these deeds were made out we refer to, that is to Franklin Harman and him back

to you and your children, were all of your children or any of your children of age?

A. No.

Q. They were all minoros at that time?

A. All minors at that time." (R. 40, P. 4)

The above questions and answers were between Claude D. Harman and his own counsel. On cross-examination in the same deposition:

"Q. All right. Getting back to the 1947 deed naming you and your children as joint tenants, you indicated it was suggested to you by your brother and sister-in-law?

A. Absolutely.

Q. And what was your discussion about joint tenancy, as to what it did?

A. Never, never mentioned at all.

Q. They just said, "Put it in joint tenancy," and you did it?

A. Just put their names on the deed so it wouldn't have to go to court if something happened to me. That was all that was ever thought about.

Q. Who prepared the deeds?

A. I don't know who prepared the deeds.

Q. You didn't type them up yourself?

A. No, I can't run a typewriter.

Q. Do you know whether your brother and sister-in-law did?

A. I don't know. I think they might have, I never seen them.

Q. You don't know who prepared the deeds?

A. No, I do not know. No, sir.

Q. You knew you were putting your children's names on the deeds along with your own?

A. That is right.

Q. And you did it deliberately, that was your intention to do just that, correct?

A. Just that." (R. 40, P. 15)

In his second deposition dated April 22, 1965 (R. 41), he adds the following testimony:

"Q. Your testimony is you didn't ever say the property was in joint tenancy?

A. I said it was in their names if I died, that was all there is to it.

Q. Isn't that joint tenancy?

A. I imagine it is. I don't know the legal terms for it." (R. 41, P. 10)

* * * *

"Q. And you didn't know what would happen by putting it in joint tenancy?

A. I never did at that time, no.

Q. And you did it anyway?

A. I did it anyway, yes.

Q. Because your brother suggested it?

A. That is right.

Q. And for that reason only?

A. For that reason only.

Q. Didn't he as a matter of fact explain to you that in joint tenancy it was then owned by all the joint tenants?

A. No.

Q. And that with a death the remaining joint tenants owned it?

A. No.

Q. And that this would avoid a probate?
A. No.

Q. In fact in your previous deposition you indicated that that was the explanation he gave you, didn't you, it would avoid a probate?
A. It wouldn't have to go through court; they could all get their share without going through court, that is all. Maybe that is what they said, I don't know.

Q. And maybe you really asked them what joint tenancy was about at the time, didn't you?
A. I don't remember asking." (R. 41, P. 11-12)

* * * *

"Q. Precisely. And, Mr. Harman, at the time in 1947 when you had these deeds made to Mr. Frank Harman, your brother, and back again, who prepared them?
A. Their attorneys. I don't know who the hell prepared them.

Q. You don't know who prepared them?
A. No, I do not.

Q. You just remember signing it to him and getting a deed back from him—
A. That is right.

Q. —to you and your children?
A. That is right.

Q. And you knew at the time the deed ran to you and your children?
A. That is right.

Q. And it was your intention to put their names on that deed, right?
A. That is exactly right." (R. 41, P. 16-17)

Contrary to the statement and implication in Appellants' Brief claiming that the 1947 Deed (Exhibit 1)

was recorded without his "knowledge or consent," Claude D. Harman's testimony in that connection was as follows:

> "Q. Incidentally back to the deeds in joint tenancy, the straw deed to your brother and back again, who had it recorded, who took the deeds in to be recorded, or were they recorded?
>
> A. They were never recorded that I know of, unless Frank did, my brother out there. I never brought it in and had it recorded. (R. 40, P. 16)

Exhibit 1 itself shows that it was recorded at the request of Claude's brother Franklin M. Harman — the straw man. There is no testimony that said recording was against Claude D. Harman's wishes or without his consent.

In connection with the quit-claim deeds running from the children back to Claude D. Harman supplementally filed as part of the record and noted above, contrary to Appellants' assertion in their Brief that said deeds were obtained without consideration and that Claude D. Harman sold the 8 1/3 acre parcel to Pancake, Inc., without his children's consent, the following testimony is illuminating:

> "Q. Okay, thanks. But you did, as you indicated, get quit-claim deeds from all of the children relating to the 8 1/3 acres, is that correct? You say it was your property—
>
> A. Absolutely.
>
> Q. —And that you considered it yours. Why did you go to the trouble of getting deeds from them if you didn't think they owned anything?

A. When it was turned over and put their names on it, the way Marian signed it and Frank signed it, I had to get a quit-claim deed.

Q. From them?

A. From them.

Q. Why?

A. To clear the ground so I could give Pete a clear title to it.

Q. To clear it from what?

A. Whatever the hell they wanted to.

Q. From their interest in the property, right?

A. Absolutely." (R. 40, P. 20)

Of further importance is the testimony of Don Harman concerning the 8 1/3 acres as follows:

"Q. Did your father ever ask any advice from you in taking care of the property?

A. When we sold the back ground, we all agreed and met and I contacted my brother in Phoenix on the sale of the back ground. At that time he did ask advice on the sale of the back property.

Q. As a matter of fact isn't that time the first time you became aware that you were named along with your brothers and sister and your father as joint tenants on this property?

A. No, sir, definitley not.

Q. Your father entered into a contract for the sale of that 8 1/3 acres, wasn't it, earlier?

A. I don't know the size; it is eight and something. Yes.

Q. And that was property that was also described in the deed that Franklin Harman executed as a

straw man to your father and all of you children as joint tenants, wasn't it?

A. Yes.

Q. Thereafter, did you and your wife execute a quit-claim deed conveying your interest in the property to your father?

MR. MADSEN: By that property, what are you referring to?

MR. RICHARDS: The 8 1/3 acres.

A. *Yes, sir, after we all agreed as a group of children, with father present, that we would sell it.* We contacted my brother, who is a CPA on proceedings to sell it and tax proceedings." (R. 42, P. 15) (Emphasis added)

Respondent Blake Harman in his deposition gave the following testimony about Exhibit 1, the deed Appellants seek to have voided:

"Q. As to the acre and a quarter piece, you indicated that you claimed an interest in that in 1947 as of the time you said the deeds were recorded, is that correct?

A. Yes.

Q. How old were you in 1947?

A. Seventeen — sixteen, seventeen.

Q. Were you aware of those deeds at the time they were recorded?

A. I was told about them at that time.

Q. At that time?

A. Yes.

Q. By whom?

A. By my father.

Q. What were you told about them?

A. That the title had been transferred to all our names and that it could not be disposed of without the signature of all the children.

Q. Did he indicate that you had a present interest in the property therefore?

A. Yes.

Q. And you learned this at the time this transfer occurred in 1947?

A. Yes." (R. 43, P. 23)

With regard to his father's acknowledging the existence of a joint tenancy, the witness alluded to a conversation had in the office of an attorney by the name of John Rokich in Magna, Utah, at the time Claude D. Harman had engaged Mr. Rokich to prepare his will. The pertinent parts of the testimony are as follows:

"Q. Had any subsequent conversations been had between you and your father about that situation prior to any contact by Pete Harman or 35-40 Corporation?

A. Yes. When my father had his will drawn in— again I can't give you an exact date there. I was still going to the University — we went out to the attorney in Magna by the name of John Rokich, my father, myself and Rokich was present, and discussed the terms that my father wanted in his will. The discussion —

Q. Was there any discussion had about the title to that property?

A. This was brought up and Rokich asked how the property was handled and Dad said it was held in all of the names, therefore there would

be no question as far as the will was concerned about this property . . ."

". . . Q. This was a discussion with Rokich at the time?

A. Yes.

Q. And was the phrase "joint tenancy" used?

A. I can't say that the term itself was used.

Q. But the discussion was to the effect that the property need not be mentioned in the will?

A. Yes.

Q. And this was when again?

A. It had to be in the 1948 or '49." (R. 43, P. 24)

In corroboration of this statement is the testimony of Respondent Don Harman as follows:

"Q. Now when did you first know or have any inkling that you and your brothers and sister were named as joint tenants with your father on a deed involving the home property? And I am speaking only of this property all the time unless I might include one other piece; but I am particularly speaking of this home.

A. Ever since I was a young child, my father always told us kids, 'Don't worry, I couldn't sell this property if I wanted to.' My father drank a lot and I feel — I don't know — I feel this is why he put it in joint tenancy.

The rest of the brothers and sister and myself have always had the understanding that it was in joint tenant, this is as far I will say — it was in joint tenancy.

Q. How far back did you know it when you say that?

A. I could not recall, but as a child." (R. 42, P. 12)

And again:

"Q. As a matter of fact your father never told you that, did he?

MR. MADSEN: Told him what?

Q. Told you that this was held in joint tenancy?

A. It was a matter of fact that it was held in joint tenancy.

Q. I am asking you that, he never told you that?

A. Yes, my father has told us time and time again, all of the children, that it was in joint tenancy and that he could not sell it without our signatures on the paper.

Q. Tell me when that was said approximately. If you can't tell exactly, make it as nearly as you can.

A. I would say all through my life." (R. 42, P. 14)

This matter is alluded to repeatedly in Don Harman's deposition (R. 42) at pages 17, 18, 24-26, and 28-29.

The above evidence, documentary and testimonial, demonstrates a clear admission on the part of Claude D. Harman of a creation of a joint tenancy in 1947. Notwithstanding that he does not now presently remember whether or not he then fully understood all the implications of joint tenancy, the deeds were executed and delivered with his knowledge and consent.

In each of the cases cited by Appellants in support of their position of non-delivery, there was evidence either in the form of a testamentary provision in the deeds themselves or in parol evidence at the time of de-

livery of the deeds to the intended parties, showing that no title was to vest until the demise of the grantor. All of said cases are not in point since there is *no* indication on the deed itself (Exhibit 1) showing a testamentary intent nor is there any statement in Mr. Claude D. Harman's deposition relating to the time of execution and delivery of these deeds placing any restriction, condition, escrow arrangement, or other type of reservation suggesting that no title pass.

Appellants allude to an exhaustive annotation in 31 A.L.R. 2d, beginning at page 532 and running for 78 pages thereafter. That annotation collects the cases construing instruments in the form of deeds which contain provisions indicating an intent to postpone or limit the rights of the grantee until after the death of the grantor. This annotation is supplementing an earlier annotation found at 11 A.L.R. 49. At pagr. 555, the annotator writes:

> "As pointed out in the original annotation, under the established rule of law that parol evidence is inadmissible to contradict or vary the terms of a written instrument whose language is unambiguous, the admission of the parol evidence upon the question of the intent of the maker of an instrument in the form of a deed, containing provisions indicating an intent to postpone or limit the rights of the puported grantee until the maker's death, *is limited strictly to cases in which the language of the instrument is ambiguous and the intent of the maker as to the interest intended to be passed is not clerlay apparent therefrom.*" (Emphasis added)

Contrary to the assertion of appellants "that there is some conflict between the decisions of different jurisdictions," those cases there collected in the annotation just cited show that the overwhelming weight of authority supports the paragraph above quoted.

There being absolutely no ambiguity on the face of the 1947 deed evidencing a testamentary intent that document is not now subject to ancillary attack by use of parol evidence.

Respondents wish to raise a further issue of laches. Since this deed was executed and recorded eighteen years ago and since plaintiff-appellant Claude D. Harman has in the interim executed, in company with one of the defendant-respondents and wife, a mortgage on the property (Exhibit 2), and since, further, a correction deed was obtained in 1963 acknowledging the joint tenancy with his knowledge and consent; and further, he obtained quit-claim deeds from his children when selling the 81/ acre parcel in 1964, respondents maintain that the rule of *Preas* v. *Phebus,* 2 Ut. 2d 229, 272 P. 2d 159, 162 (1954) applies.

In that case a party to a contract for royalties from a producing oil well sought to invalidate the contract by virtue of a non-performance cancellation clause contained in the contract. This court upheld the contract with the following language:

> "Since the plaintiff made no attempt to avail himself of this right for many years, during which time a producing well was discovered on the prop-

erty and large sums of money were expended by defendants in developing the structure, the plaintiff cannot now enforce a breach of which has been waived and indeed barred by the Statute of Limitations. 1 Tiffany, The Law of Real Property (3rd ed.) pp. 336-348; 31 L.R.A. 673; Westmoreland, Etc., Natural Gas Co. v. DeWitt, 130 Pa. 235, 18 A. 724, 5 L.R.A. 731; Deming Investment Co. v. Lanham, 36 Okl. 773, 130 P. 260, 44 L.R.A., N.S., 50."

Appellants have further urged in this appeal that they are entitled to a trial on the separate and distinct claim of quiet title asserting such a cause of action was spelled out in their amended complaint. Respondents maintain, however, that a quiet title action cannot arise unless plaintiffs-appellants succeed in their action to have the deed (Exhibit 1) set aside. This issue was also alluded to in the *Preas Case* cited above, and the language of the court in that connection is also relative here:

"Plaintiff next contends that this action is fundamentally one to quiet title; *that a cause of action will not arise until there is knowledge of a hostile claim;* and that plaintiff was not aware of defendants' claim until he first saw the endorsement on the royalty check received from Equity Oil Company in November 1948. We do not agree. Plaintiff was fully aware of the failure of defendants to adhere to the conditions set forth in Exhibit C and he failed to exercise his option to effect a reconveyance. *He was aware of the material facts; he simply misconstrued the law* by assuming that the assignment would automatically terminate. Whether we construe his failure to act as a waiver of his rights or state that this rights are barred by the Statute of Limitations, we reach the same

point expressed by this court in *Meagher v. Utah Gas Co.*, Utah 255 P2d 989, 994." (Emphasis added)

As in the case cited, plaintiff Claude D. Harman here was aware of all the facts, and while he may have misconstrued or misunderstood fully the nature of joint tenancy, his acts were deliberate and intentional. A quiet title action cannot arise until, as quoted above, "a hostile claim arises"; and since Claude D. Harman's own tenancy, assuming the deed in issue is upheld, is a co-tenancy and arises out of the same document as does the interest of the defendants-respondents herein, such interest cannot be sufficiently hostile to give rise to a quiet title action.

Whether or not Claude D. Harman has the right to reimbursement from defendants-respondents for taxes, clearly, his possession is not adverse to that of his children nor is there any allegation in any of the plaintiff's pleadings, nor evidence in any of the depositions which show that Claude D. Harman ever asserted an interest hostile to that of the defendant-respondents, nor has he ever demanded reimbursement for any taxes.

CONCLUSION

For the foregoing reasons, defendants-respondents submit that the trial court committed no error in granting the Summary Judgment below, and the same should accordingly be affirmed.

Respectfully submitted,

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