

1960

S. W. Morrison, Jr. v. Walker Bank & Trust Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

of the **FILED**
STATE OF UTAH T 27 1960

S. W. MORRISON, JR., Co-Administrator
of the Estate of Fannie P. Morrison,
deceased,

Plaintiff and Appellant,

—vs.—

WALKER BANK & TRUST COMPANY,
a corporation, Administrator with the
Will Annexed of the Estate of Chauncey
P. Overfield, also known as C. P. Over-
field, deceased,

Defendant and Respondent.

BRIEF OF APPELLANT

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Defendant and Respondent.

CASE NO.
9380

BRIEF OF APPELLANT

STATEMENT OF FACTS

Plaintiff appealed to this Court from the Order for Nonsuit, made and entered against him by the District Court of Salt Lake County on May 20, 1960 (R. 36), and, from the Order Denying Motion For New Trial, made and entered by that Court on June 13, 1960, (R. 38).

The sole issue is whether or not the District Court erred in denying plaintiff an opportunity to further prove his case by the testimony of two witnesses. It ruled that these witnesses were prohibited from testifying by the provisions of Section 78-24-2 Utah Code Annotated, 1953, (Who may not be witnesses.)

As appears from the pleadings, pretrial order and proffer of proof, which are part of the record, plaintiff's cause of action arose from a transaction during May of 1941 when Fannie P. Morrison borrowed \$3,500.00 from Chauncey P. Overfield and secured that loan with 16,136 shares of stock which she then owned in the Independent Coal and Coke Company. The transaction was negotiated and consummated by the agents for the respective parties, namely, S. W. Morrison, Jr., agent for Fannie P. Morrison, and Ione M. Overfield, agent for Chauncey P. Overfield. A receipt or other paper evidencing the terms of the transaction and acknowledging the deposit of the stock certificates as collateral security for the loan was signed. This memorandum was not produced. However, it remained in the possession of S. W. Morrison Jr. for some time. Because of a fire in his home and the resulting confusion, it was temporarily lost. No interest rate was entered thereon and the memorandum made no provision for foreclosing the pledged collateral and contained no power of sale.

The parties stipulated that the certificates of stock were never transferred into the name of Chauncey P. Overfield. Plaintiff's complaint is that, before the loan

became due, Chauncey P. Overfield, without the knowledge, permission or consent of Fannie P. Morrison, and, in direct violation of the trust imposed upon him to hold the stock merely as collateral for the loan, fraudulently had the stock certificates transferred on the books of the coal company to the name of his wife, Ione M. Overfield, and their two daughters, which transfers he concealed from Fannie P. Morrison and from plaintiff.

By the terms of the loan Chauncey P. Overfield was to have applied the dividends on the stock to repay the loan and interest thereon. Regular quarterly dividends were paid on this stock far in excess of the loan and any interest thereon, but Chauncey P. Overfield failed to return the redeemed stock. This was in direct violation and a repudiation of his trust.

At the time Chauncey P. Overfield violated and repudiated his trust by converting the stock to his own use, thru having it transferred to his wife and daughters, it had a value of \$16,395.00, and the dividends paid on the stock over and above the amount of the loan and any interest thereon amounted to \$28,020.34, or a total of \$44,415.34.

Fannie P. Morrison died intestate on November 27, 1941. S. W. Morrison Jr. is her son and also the co-administrator of her estate and, as such, is the plaintiff herein. Ione M. Overfield is the daughter of Fannie P. Morrison and is the widow of Chauncey P. Overfield.

He died testate on July 14, 1958. Walker Bank & Trust Company, the defendant herein, is the administrator with the will annexed of his estate. Ione M. Overfield repudiated the provision made for her in her husband's will and elected to take the statutory interest in his real property to which she was entitled as his surviving wife.

Within the time for filing claims in the estate of Chauncey P. Overfield, plaintiff filed a claim against the estate for the sum of \$44,415.34 aforesaid. The claim was denied and its denial gave rise to the suit for recovery in the District Court. Plaintiff asserts that Fannie P. Morrison never learned that Chauncey P. Overfield had violated and had repudiated the trust imposed upon him to hold her stock merely as collateral security for the \$3,500.00 loan. Neither did the plaintiff learn these facts until just prior to the time he filed his claim against Overfield's estate.

Evidence was adduced at the trial to show transfers of stock formerly in the name of Fannie P. Morrison directly to the wife and daughters of Chauncey P. Overfield. Evidence was also adduced to show the dividends which had been paid on said stock. However, when plaintiff attempted to prove the other details of the transaction by the testimony of S. W. Morrison Jr. and that of Ione M. Overfield, defendant objected citing Section 78-24-2 Utah Code Annotated 1953, (Who may not be witnesses) as his reason, and his objection was sustained. A proffer of proof covering the testimony which these witnesses would relate was made, at the conclusion

of which, the objection was again made and again sustained. Defendant then made a motion for a nonsuit on the grounds that there was no evidence to substantiate the allegations and claims of plaintiff. This motion the District Court granted.

Thus, plaintiff was denied the fundamental right of using the testimony of his witnesses in the proof of his case, and therefore, has appealed to this Court for relief.

STATEMENT OF POINTS

The Court erred in ruling that plaintiff's witnesses were not competent to testify.

ARGUMENT

The Court erred in ruling that plaintiff's witnesses were not competent to testify.

Prior to analyzing what is suggested as the proper interpretation to be placed on Section 78-24-2 Utah Code Annotated, 1953 (Who may not be witnesses), which is the sole issue involved in this appeal, one should realize that plaintiff was endeavoring to obtain redress of a wrong which he asserts was committed by a faithless trustee who fraudulently converted to his own use certain stock belonging to plaintiff's mother which had been turned over to the said trustee solely for the purpose of securing a loan. In doing this, plaintiff was using his con-

stitutional rights as set forth in Section 1 of Article 1 of the Utah Constitution providing in part that "all men have the inherent and inalienable right to * * * acquire, possess and protect property" and the constitutional guaranty set forth in Section 11 of that same constitutional Article providing as follows:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

The District Court of Salt Lake County was the tribunal in which he sought to obtain redress for the wrong done. By the court's ruling that the statute prohibited his witnesses from testifying, he was effectually barred from having his case decided on its merits. The particular statutory provision invoked as a bar to the testimony of plaintiff's witnesses was Section 78-24-2 Utah Code Annotated, 1953 (Who may not be witnesses), which states, in part, the following:

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 derived his interest or title or any part thereof, when the adverse party in such action, suit or proceeding claims or opposes, sues or defends, as guardian of an insane or incompetent person,

or as the executor or administrator, heir legatee or devisee of any deceased person, or as guardian, assignee or grantee, directly or remotely, of such heir, legatee or devisee, as to any statement by, or transaction with, such deceased, insane, or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent or 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.

The statutory provision quoted above specifies who cannot testify. It is antagonistic to the constitutional right that "all courts shall be open" and that "all men have the inherent and inalienable right to * * * acquire, possess and protect property." It is destructive of certain of those fundamental rights granted by the basic statutory provision set forth in Section 78-24-1 Utah Code Annotated, 1953 (Who may be witnesses), specifying who *can* testify. That Section provides in part as follows:

All persons, *without exception*, otherwise than as specified in this chapter * * * may be witnesses. Neither parties nor other persons who have an interest in the event of an action or proceeding are excluded * * *. (Emphasis supplied.)

As directed by the broad Constitutional and statutory provisions it would appear to be mandatory to require that the provisions of Section 78-24-1 be interpreted liberally to permit all persons to testify other than those

specifically excluded, and, to require that the provisions of Section 78-24-2 be interpreted strictly to exclude from testifying only those specifically designated to be excluded. This Court appears to have established that interpretation when it said in the case of *Sine v. Harper*, 118 Utah 415, 222 P2d 571 :

The question requiring an answer is, did the legislature intend to seal the mouths of agents when it used the words “or any person directly interested in the event thereof?” *In view of the fact that the section limits the introduction of testimony which might be of value in determining the ultimate truth, we are inclined to narrowly construe the quoted phrase.*” (Emphasis supplied)

As said by this Court in *Maxfield v. Sainsbury*, 110 Utah 280, 172 P2d 122 :

The purpose of the statute is to guard against the temptation to give false testimony in regard to a transaction with a deceased person by the surviving party, when the transaction is involved in a lawsuit and death has sealed the mouth of the other party. Furthermore, the statute seeks to put the two parties upon terms of equality in regard to giving evidence of the transaction. 3 Jones Ev. 790; *Miller v. Livingstone*, 31 Utah 415, 88 P. 338. *It was never intended that this section should be used for the purpose of suppressing the truth.* (Emphasis supplied.)

There are several controlling reasons why this statute should not have been applied to prohibit plaintiff's witnesses from testifying.

First, it should be noted that plaintiff's witnesses were not the principals to the transaction. They were merely agents for those principals.

In a very scholarly analysis of Utah's statute designating who may not be witnesses (78-24-2, *supra*), which appeared in an article in Vol. 13 of the Rocky Mountain Law Review, by the Honorable James H. Wolfe, former Chief Justice of this Court, he pointed out:

Although the question has apparently not been decided in Utah, there seems to be nothing in the statute which prevents the agent of a surviving party from testifying to transactions with the deceased. Other states have uniformly held that a party's agent is not incompetent.

Justice Wolfe then cited 21 A.L.R. 928. Subdivision II of that annotation provides in part at page 928:

In many jurisdictions the statutes relating to the competency of witnesses where the other party to the transaction is dead, contain, among other provisions, a provision that in actions by or against executors or administrators, in which judgment may be rendered for or against them, neither "party" shall be allowed to testify against the other to any transaction with or statement by, the testator or intestate, unless called to testify thereto by the opposite party, or required to testify thereto by the court. *Under such a statute it is generally held that an agent of the surviving party is not incompetent to testify as to transactions or communications with a person since de-*

ceased, in an action to which his principal and the executor or administrator of the deceased are parties, but to which he is not made a party. (Emphasis supplied)

Subdivision III of that same annotation then goes on to provide, in part, at page 931 :

In some instances the statutes contain a provision that in an action or proceeding where the adverse party sues or defends as executor, or administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, a "party in interest" shall not be permitted to testify in his own behalf as to any transaction had by him with, or as to any statement made to him by, the deceased. *In construing this provision it is generally held that an agent of the surviving party is not a party in interest within the meaning of the statute, and so is not incompetent to testify as to transactions had with the deceased.* (Emphasis supplied)

Again, at page 935 :

So, in each of the following cases, in which it was held that a husband or wife acting as agent for the other spouse was competent to testify as to transactions had with a person since deceased: *Porter v. Dunn* (1891) 61 Hun. 310, 16 N.Y. Supp. 77, reversed on other grounds in (1892) 131 N.Y. 314, 30 N.E. 122; *Whitman v. Foley* (1891) 125 N.Y. 651, 26 N.E. 725, reversing (1889) 26 N.Y.S. R. 878, 7 N.Y. Supp. 310; *Severcool v. Wilsey* (1896) 5 App. Div. 562, 39 N.Y. Supp. 413.

See also the supplemental annotation on this subject in 54 A.L.R. 264 and the subsequent citations not yet annotated.

S. W. Morrison Jr. is not a party to the suit as an individual. He is a party only in his representative capacity as co-administrator of the estate of Fannie P. Morrison, deceased. His testimony would not concern itself with conversations or transactions between himself either as co-administrator or as agent, and the decedent. It would concern itself with those matters negotiated and consummated by him as agent for his principal, Fannie P. Morrison, with Ione M. Overfield as agent for her principal, Chauncey P. Overfield.

Under the decisions referred to above these two agents should have been permitted to testify.

Second, to be excluded as a witness, the statute provides specifically, that the witness must be “a party to the action,” or a “person directly interested in the event thereof,” or a person “from, through or under whom such party or interested person derived his interest.”

Ione M. Overfield is not a party to the action. She is not one from, through or under whom such party or interested person derived his interest. The only interest she claimed in the Overfield estate was the interest she

was entitled to in the estate by her own right as the surviving wife of the decedent, Chauncey P. Overfield. She had rejected the provision made for her in his will and had elected to take the statutory interest to which she was entitled in and to his real property, by virtue of being his surviving wife. (R. 26) This Court has repeatedly held under such circumstances that the wife does not take as an "heir" but takes in her own right. See *Staats v. Staats*, 63 Utah 470, 226 P. 677.

Even should it be assumed that Ione M. Overfield was an "heir" of Chauncey P. Overfield before she renounced the provisions of his will and elected to take in her own right, there is a serious question as to whether such an interest as that of an "heir" is an interest sufficiently direct to make her incompetent as a witness. In the case of *Sine v. Harper*, 118 Utah 415, 222 P. 2d 571, wherein this Court discussed that phase of the problem here involved, it was said:

In the annotation in L.R.A. 1917A 32, cases are cited holding that the interest in the action must be pecuniary, direct, immediate, and not uncertain, contingent or remote, and that a husband is not incompetent because he may become a beneficiary under his wife's will or succeed to her property by her intestacy. We held in *Olson v. Scott*, 61 Utah 42, 210 P. 987, that 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 belonged to the plaintiff. *Mower v. Mower*, 64 Utah 260, 228 P. 911, and the general rule on this point as stated

in 58 Am. Jur. 195, Sec. 319, are in accord with this result. See also *Clawson v. Wallace*, 16 Utah 300, 52 P. 9.

Neither Ione M. Overifeld nor S. W. Morrison Jr. were parties as individuals to this action. The interest in the transaction which Ione M. Overfield may have had as an heir at one time which she rejected, and the interest which S. W. Morrison Jr. did have in the transaction as an "heir," were not interests sufficiently direct to make them incompetent as witnesses. And, as set forth above, since Ione M. Overfield and S. W. Morrison Jr. were agents, rather than principals, in the transaction, they should not have been declared incompetent as witnesses. Any relevant and material testimony which they could have given with respect to the transaction should have been admitted in evidence.

Finally, to be rendered incompetent as a witness, it is specifically provided that "any statement by," "transaction with" or "matter of fact whatever," *"must have been equally within the knowledge of both the witness and such * * * deceased person * * *."* (Emphasis supplied)

In this case the loan was not negotiated by the principals or either of them. It was negotiated entirely by

and thru their respective agents. The authorization to proceed on behalf of Chauncey P. Overfield arose by means of telephone conversations between him, one of the principals, and, Ione M. Overfield, his agent. (R. 28-29) The shares of stock involved were secured from Walker Bank & Trust Company when an existing loan against this stock was paid by means of a check or checks aggregating \$3,500.00 drawn on the Irving Trust Company of New York City given S. W. Morrison Jr. by Ione M. Overfield. These certificates were then delivered to Ione M. Overfield by S. W. Morrison Jr. Ione M. Overfield then gave S. W. Morrison Jr. a written memorandum reciting the terms of the loan being consummated and acknowledging the delivery of the certificates as collateral security for the loan. None of the aforesaid conversations or acts took place in the presence of either principal to the transaction. While each principal was no doubt bound by the acts of his respective agent, it cannot be said that the "statements," "transactions" or "matters of fact" consummating said transaction were "equally within the knowledge" of the witnesses and the deceased.

Unless they were "equally within the knowledge" of the witnesses and the deceased, Section 78-24-2, Utah Code Annotated, 1953, (who may not be witnesses), is not applicable and the witnesses should have been allowed to testify.

CONCLUSION

A careful analysis of the statute involved, the circumstances under which the loan was consummated, and, the pertinent court decisions interpreting similar statutory provision, reveals that the District Court erred in ruling that S. W. Morrison Jr. and Ione M. Overfield were not competent witnesses. The case should therefore be reversed and remanded for trial before the District Court.

Respectfully submitted,

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