

1962

John D. Glynn v. Marjorie Doctorman Dubin et al : Appellant's Petition for Rehearing and Supporting Brief

Utah Supreme Court

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John D. Glynn; In Propria Persona; Bernard L. Rose and Dean E. Conder; Attorneys for Defendant-Respondent;

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IN THE SUPREME COURT

of the

STATE OF UTAH

JOHN D. GLYNN,
Plaintiff and Appellant,

vs.

MARJORIE DOCTORMAN
DUBIN, aka MARJORIE
DOCTORMAN and DESERET
FEDERAL SAVINGS AND
LOAN ASSOCIATION, a
corporation,

Defendants and Respondents.

FILED

MAY 2 - 1962

Supreme Court, Utah

Case No. 9888

JUN 1 1962

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APPELLANT'S PETITION FOR
REHEARING AND SUPPORTING BRIEF

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} Case No. 9388

APPELLANT'S PETITION FOR
REHEARING AND SUPPORTING BRIEF

JOHN D. GLYNN, Plaintiff and Appellant in the above entitled matter, appearing in propria persona, pursuant to Rule 76(e) Utah Rules of Civil Procedure, respectfully petitions this Honorable Court for a rehearing in the above entitled cause upon the following grounds:

1. The decision of the Supreme Court is erroneous in that the necessary effect of such decision is to deprive plaintiff-appellant of his property without due process of law contrary to the 14th Amendment to the Constitution of the United States.

2. In addition to a denial of due process of

law, the force and effect of the decision of the Supreme Court is to render void or abrogate Section 30-4-4 of Utah Code Annotated, 1953.

3. The force and effect of the decision of the Supreme Court is to render void Sec. 25-1-8 of Utah Code Annotated, 1953, and to void any contract or conveyance effecting property mentioned in the petition made by either party to an action for divorce or separate maintenance irrespective of whether or not such contract or conveyance is bona fide, for consideration and not subject to attack under the Fraudulent Conveyance Act, 25-1-8, Utah Code Annotated, 1953.

WHEREFORE, Plaintiff-Appellant requests that a rehearing be granted, that the Court re-examine the facts and the law and that the judgment of the trial court be reversed with judgment in favor of plaintiff-appellant for partition of real property and for an accounting of rental income. Since defendant-respondent stated that she was satisfied with the evidence on her counter-claim (T.R. p. 35) no useful purpose would be served by a retrial and the judgment should be reversed forthwith.

JOHN D. GLYNN

In Propria Persona

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CERTIFICATE OF
PLAINTIFF-APPELLANT APPEARING
IN PROPRIA PERSONA

I hereby certify that I am appearing in propria persona herein and that in my opinion there is good cause to believe the judgment objected to is erroneous and that the case ought to be re-examined as prayed in the Petition, and that this Petition is not filed for the purpose of delay or to otherwise hinder the prosecution of this action.

JOHN D. GLYNN
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BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I

THE DECISION OF THE SUPREME COURT IS ERRONEOUS IN THAT THE NECESSARY EFFECT OF SUCH DECISION IS TO DEPRIVE PLAINTIFF-APPELLANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The opinion of the Supreme Court fails to discuss or answer *any* of the Points on Appeal set forth in Plaintiff-Appellant's Brief and the opinion fails to cite *any* case or statutory authority in support of its reasoning or decision. The opinion of the Supreme Court does not rest on the findings or conclusions of the trial court but instead rests on its own conclusions without regard to the findings of the trial court or the deficiencies of the findings or conclusions made by the trial court.

The force and effect of the decision of the Supreme Court is to deprive Plaintiff-Appellant of his property without due process of law contrary to the 14th Amendment to the Constitution of the United States. This denial of due process first flows from and arises out of the decision of the Supreme Court.

It is not disputed that on December 7, 1959, Dr. Martin F. Dubin executed in favor of Plaintiff-

Appellant a quitclaim deed of his interest in the property which is the subject matter of the instant action, and that said deed was recorded on said date. It is also not disputed that on said date Plaintiff-Appellant in consideration of the execution of said deed paid Dr. Dubin the sum of \$100.00, executed a promissory note in Dr. Dubin's favor for \$5,000.00, and cancelled legal fees owing to Plaintiff-Appellant in the amount of \$3,000.00. It is also not disputed that a like quitclaim deed was executed by Dr. Dubin in favor of Plaintiff-Appellant on December 8, 1959. Further, there is no dispute that the action pending on December 7, 1959, between Dr. Dubin and his wife was dismissed on December 8, 1959. Importantly, there is no dispute that *Plaintiff-Appellant was not named as a party* to either the suit pending on December 7, 1959, or to the suit filed on December 8, 1959. Plaintiff-Appellant was not served with process either personally or constructively as to either suit, nor was Dr. Dubin restrained by court order from disposing of or encumbering the property held in joint tenancy as is provided in an action for separate maintenance by Section 30-4-4, Utah Code Annotated 1953. Plaintiff-Appellant was not advised by any means that his rights under either the deed of December 7, 1959, or December 8, 1959 would be determined at the hearing or trial of the action filed on December 8, 1959.

Defendant - Respondent Marjorie Doctorman Dubin admitted in her pleadings to the instant action by Plaintiff-Appellant that he stated a cause of action for partition of real property. Apparently, the position of Defendant-Respondent was that the deeds were void under the Utah Fraudulent Conveyance Act, Utah Code Annotated Section 25-1-8. However, the decision of the Supreme Court does not discuss the serious deficiencies in the findings of the trial court on this theory, but rather the decision holds that since Plaintiff-Appellant knew of the action for separate maintenance (improperly amended to an action for divorce) that under no circumstances could Dr. Dubin convey any interest in the property not subject to divestment, irrespective of whether or not such conveyance was made in good faith and not fraudulently under Section 25-1-8 of Utah Code Annotated, 1953.

The main point of the instant petition for rehearing is that Plaintiff-Appellant has been denied due process of law. The Supreme Court of the United States has decided many cases in which the question was whether or not the type of notice given *to a party to an action* was sufficient to constitute due process of law. In the instant case Plaintiff-Appellant *was not a party* to either of said actions and *was not given any notice* that his rights under his deed were to be determined by either of said actions.

At the trial of the action filed December 8, 1959, no mention was made to the court by Defendant-Respondent of the fact that the instant Plaintiff-Appellant had been conveyed Dr. Dubin's interest even though she and her two counsel personally knew of said fact. This is borne out by the transcript of record of said trial which is an exhibit to the instant action. The United States Supreme Court has stated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314, 315, 94 L.Ed. 865, 873, 874, 70 S. Ct. 652; *Covey v. Somers*, 351 U. S. 141, 146, 100 L.Ed. 1021, 76 S. Ct. 724:

“An elemental and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

“The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U. S. 385, 394, 58 L.Ed. 1363, 1368, 34 S. Ct. 779. *This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.*” (Emphasis supplied)

In *Grannis v. Ordean*, 34 S. Ct. 779, 234 U. S. 385, 58 L.Ed. 1363, the United States Supreme Court stated:

“If in the action the court has jurisdiction over the res the judgment in order to be binding with respect to the interest of a non-resident who is not served with process within the state, must be based upon constructive notice given by publication, mailing, or otherwise, substantially in the manner prescribed by the law of the state.”

In *Griffen v. Griffen*, 66 S. Ct. 556, 327, U. S. 220, 90 L.Ed. 635 it was held that:

“Due process forbids any exercise of judicial power substantially affecting a defendant’s rights without notice.”

The court also stated that “Notice by personal or substituted service cannot, consistently with due process, be dispensed with, even in the case of judgment in rem with respect to property within the jurisdiction of the court rendering the judgment.”

In *Hansberry v. Lee*, 61 S. Ct. 115, 311 U. S. 32, 85 L.Ed. 22, 132 ALR 741 it was specifically held that the enforcement of a judgment against the person or property of one not designated as a party nor made a party by service of process violates the due process clauses of the Fifth and Fourteenth Amendments. In *State of Missouri ex rel Hurwitz v. North*, 46 S. Ct. 384, 271 U. S. 40, 70 L.Ed. 818 it was held that *notice of suit* and opportunity for

hearing are requisites of due process. See also: *Lambert v. People of the State of California*, 78 S. Ct. 240, 355 U. S. 225; *Shelly v. Kraemer*, 68 S. Ct. 836, 334 U. S. 1, 92 L.Ed. 1161, 3 ALR 2d 441.

In the instant case the judgment of the Utah Supreme Court could not have been given without depriving Plaintiff-Appellant of due process of law. The basis of the Court's opinion was to hold that the judgment rendered by the trial court in the action filed on December 8, 1959 determined the instant Plaintiff-Appellant's rights even though the instant Plaintiff-Appellant *was not named as a party in said suit*, was not served personally or constructively with service of process and the deed under which the instant Plaintiff-Appellant claims his rights was not mentioned in the pleadings nor at the time of trial even though the existence of such deed was known at the time of filing of the action and trial thereof by the instant Defendant-Respondent and her two counsel. Under Utah law, the instant Defendant- Respondent could have made the instant Plaintiff-Appellant a party to her action filed on December 8, 1959, but she did not choose to do so and to permit her now to use the decision in that action to deprive Plaintiff-Appellant of his property is a flagrant violation of due process of law.

POINT II

IN ADDITION TO A DENIAL OF DUE PROCESS OF LAW, THE FORCE AND EFFECT OF THE DECISION OF THE SUPREME COURT IS TO RENDER VOID OR ABROGATE SECTION 30-4-4 OF UTAH CODE ANNOTATED, 1953.

The opinion of the Supreme Court states that the original action for separate maintenance placed the property within the jurisdiction of the court and that "Dr. Dubin could not make any conveyance thereof except subject to adjudication by the court." This is contrary to Section 30-4-4 of Utah Code Annotated, 1953, the Utah cases of *Adamson v. Adamson*, 55 Utah 544, 188 Pac. 635 and *Nielson v. Nielson*, 30 Utah 391, 85 Pac. 429, and cases and authorities from other jurisdictions cited in Appellant's Brief at pages 23, 24, 25 and 27 through 34.

Section 30-4-4, Utah Code Annotated, 1953, specifically provides that in an action for separate maintenance the plaintiff in such action may procure from the court an order enjoining and restraining the defendant from disposing of or encumbering real property involved in such action and that when the order is filed with the county recorder where the property is located "from the time of filing such order the property described shall be charged with a lien in favor of plaintiff to the extent of any judgment which may be rendered in the action".

It is obvious that the Utah legislature has de-

terminated that until such time that a court order is obtained and filed with the county recorder that there cannot be a lien created as to the property in question. In the instant case no such order was obtained. A *lis pendens* does not take the place of such order. The effect of the Supreme Court's opinion is to render void or 'abrogate the legislative enactment and to create a lien merely upon the filing of a petition for separate maintenance. This the Court cannot do since there is no ambiguity or defect in the code section which can possibly support the statutory construction inherent in the Court's opinion. In fact, the force and effect of the Court's opinion is to render useless or as an idle act the filing of a *lis pendens* since the Court states that any conveyance may be held to be invalid irrespective of whether or not such conveyance was bona fide and not in violation of the Fraudulent Conveyance Act, Section 25-1-8, Utah Code Annotated, 1953.

It is important to note that the deed executed by Dr. Dubin on December 7, 1959, in favor of Plaintiff-Appellant was delivered and recorded on said date and prior to the action filed on December 8, 1959, or the *lis pendens* filed on said date. The Court's opinion fails to state how Plaintiff-Appellant's rights under the deed of December 7, 1959, could be effected by a later filed action against Dr.

Dubin who at the time of the filing of said action had previously conveyed his interest in the property to Plaintiff-Appellant.

POINT III

THE FORCE AND EFFECT OF THE DECISION OF THE SUPREME COURT IS TO RENDER VOID SECTION 25-1-8 OF UTAH CODE ANNOTATED 1953, AND TO RENDER VOID ANY CONTRACT OR CONVEYANCE AFFECTING PROPERTY MENTIONED IN THE PETITION MADE BY EITHER PARTY TO AN ACTION FOR DIVORCE OR SEPARATE MAINTENANCE IRRESPECTIVE OF WHETHER OR NOT SUCH CONTRACT OR CONVEYANCE IS BONA FIDE, FOR CONSIDERATION AND NOT SUBJECT TO ATTACK UNDER THE FRAUDULENT CONVEYANCE ACT, SECTION 25-1-8, UTAH CODE ANNOTATED, 1953.

The decision in the instant case rendered by the Supreme Court is contrary to and overrules *Adamson v. Adamson*, Utah, 55 Utah 544, 188 Pac. 635 and *Nielson v. Nielson*, 30 Utah 391, 85 Pac. 429. Said decision is also contrary to cases and authorities cited in Appellant's Brief pages 27 through 34. Importantly, it is to be noted that nowhere in the Court's opinion is there any indication that the conveyances made by Dr. Dubin to Plaintiff-Appellant were fraudulent within the requirements of Section 25-1-8, Utah Code Annotated, 1953. Apparently, the Court did not care to discuss this point since to do so would have necessitated an examination of the serious defects in the findings to enable said code section to be applicable. Rather, the Court

completely ignored the pleadings in the action and determined that because Plaintiff-Appellant knew of the two actions he could not receive any conveyance which would not be subject to divestment by adjudication by the Court. As Plaintiff-Appellant has heretofore stated in this brief said conclusion is contrary to the explicit terms of Section 30-4-4, Utah Code Annotated, 1953. The force and effect of the Court's decision is either to create by "judicial legislation" an unwarranted expansion of the scope of the Utah Fraudulent Conveyance Act or to nullify said code section. The court by its decision has disabled civilly either party to a divorce or separate maintenance action from making any contract or conveyance affecting property described in the petition to anyone aware of the action even though such contract or conveyance be bona fide, made in the utmost good faith and not in any respects fraudulent. This not the law in any other state. It has not been the law in Utah. In *Adamson v. Adamson*, Utah, 55 Utah 544, 188 Pac. 635, a divorce action, the grantee (father of the husband) knew of the action and purchased one half of the property from his son. The court upheld the conveyance. In *Nielson v. Nielson*, 30 Utah 391, 85 Pac. 429, it was held that the husband in a divorce action had a right to sell his interest in the property subject only to his wife's one third interest in case she continued to

be his wife and survived him. See also *Sun Insurance Co. v. White*, 123 C. 196, 55 P. 902, where a conveyance was upheld in an action in which a *lis pendens* was filed and in which the plaintiff grantee had actual notice of the divorce action. The court in the instant case has failed to discuss or distinguish the series of cases cited in Appellant's Brief, pages 28 through 34, in which conveyances made to the husband's attorney in a divorce action were held to be as valid as any other conveyance made for valuable consideration and without intent to hinder, delay or defraud creditors or other persons. The Court has, in effect, rendered void the Fraudulent Conveyance Act or failed to apply it and has stated that if an action for divorce or separate maintenance is filed that any conveyance made may be held to be invalid, and it is immaterial that: (1) there was a valuable and fair consideration for the transfer, (2) there was no fraudulent intent by the grantor, (3) there was no knowledge by the grantee of any fraudulent intent of his grantor, or (4) that the wife may or may not be a "creditor" or "other person" under the statute.

CONCLUSION

It is respectfully submitted that on the law and the facts, the decision of the trial court should be reversed with judgment in favor of Plaintiff-Appellant for partition of real property, and for an accounting of rental income. Since Defendant-Respondent stated that she was satisfied with the evidence on her counter-claim (T.R. p. 35) no useful purpose would be served by a retrial and the judgment should be reversed forthwith.

Respectfully submitted,

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