

1969

Peter Mckellar, Mary Helen Parsons, James Leslie
Mckellar, Charles Mckellar And Glen Mckellar v.
Nellie Mckellar : Appellant's Brief

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In The Supreme Court of the State of Utah

PETER McKELLAR, MARY HELEN
PARSONS, JAMES LESLIE McKEL-
LAR, CHARLES McKELLAR and ELLEN
McKELLAR,

Plaintiffs and Appellants,

-vs-

WELLIE McKELLAR,

Defendant and Respondent.

APPELLANTS

APPEAL FROM A JUDGMENT
THIRD DISTRICT COURT OF
Honorable Marshall

Clerk of the Court
BY
BUTLER
CARR
SHAW
Subscribed and sworn to
Signed
Attorney

FILED

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Clerk

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In The Supreme Court of the State of Utah

PETER McKELLAR, MARY HELEN
PARSONS, JAMES LESLIE McKEL-
LAR, CHARLES McKELLAR and GLEN
McKELLAR,

Plaintiffs and Appellants,

-vs-

NELLIE McKELLAR,

Defendant and Respondent.

Case No.
11456

APPELLANTS' BRIEF

STATEMENT OF CASE

This is an action by appellants (hereinafter referred to as plaintiffs) against Nellie McKellar, respondent (hereinafter referred to as defendant) to set aside a deed, a copy of which is attached to the amended complaint (R. 13), or an order of the Court declaring that the defendant holds the property that is the subject matter of this action in trust for the benefit of the heirs of Mary McKellar.

DISPOSITION AT TRIAL COURT

Upon motion of the defendant the trial court granted summary judgment against plaintiffs stating that there were

no material issues of fact to be determined at a trial, and also granted defendant's motion to quiet title to the property in the name of defendant.

RELIEF SOUGHT ON APPEAL

The plaintiffs seek a reversal of the judgment below and a remand of the case to the trial court for further proceedings and for trial.

STATEMENT OF FACTS

Plaintiffs are children of John M. McKellar and Mary McKellar. John M. McKellar and Mary McKellar owned the property that is the subject matter of this law suit as joint tenants. John M. McKellar died and his wife, Mary, as survivor, became the sole fee title holder of the property. Subsequent to John M. McKellar's death and prior to Mary McKellar's death, Mary McKellar executed a deed wherein she conveyed the subject property to her two daughters, Mary Helen Parsons and Montella McKellar Dick, and concurrently she executed an agreement that is marked Exhibit "A" and attached to plaintiffs' amended complaint (R. 13). This agreement indicates that the deed to Mary Helen Parsons and Montella McKellar Dick placed the property in trust and that they held the subject property for the benefit of all the sons and daughters, eight in total, of Mary McKellar. Mary McKellar died on or about May 5, 1945. Mary Helen McKellar Parsons and Montella McKellar Dick executed a deed to Frank McKellar and Nellie McKellar, his wife, which, by mistake, contained the subject property. Frank McKellar is deceased and his wife, Nellie McKellar, is the defendant in this action.

PLAINTIFFS' POSITION

The trial court's decision should be reversed and the case remanded for further proceedings and for a trial on the following grounds:

1. Plaintiffs pleaded facts indicating that the subject property was mistakenly included in a deed by Mary Helen Parsons and Montella McKellar Dick granting the property to defendant.

2. Plaintiffs pleaded facts showing that there was a trust executed by Mary McKellar for the benefit of her children, that the subject property was part of the trust and that the trust remained in effect and is still in effect for the benefit of plaintiffs.

ARGUMENT

POINT I

PLAINTIFFS' PLEADINGS AND AFFIDAVITS (R. 14-17) INDICATE THAT THE SUBJECT PROPERTY WAS MISTAKENLY INCLUDED IN THE DEED BY MARY HELEN PARSONS AND MONTELLA MCKELLAR DICK GRANTING THE SUBJECT PROPERTY TO DEFENDANT.

Paragraph 6 of the affidavit of Mary Helen Parsons (R. 16) states she was unaware that the property had been included in the deed until approximately November, 1966.

Mistake of fact, is, however, a well-recognized ground for interposition of a Court of equity. According to the circumstances, a court of equity will order the cancellation or reformation of a deed where it appears that a material mistake has been

made, or it may order that the party injured be compensated by a money payment, notwithstanding the fact that the deed embodies an executed contract.

Where it appears that by mutual mistake of all parties the instrument does not conform to or express their intention or agreement, as where by mistake some material part of the instrument is omitted or the deed is drawn to convey a different interest or a greater or lesser estate than was agreed upon, relief may be had in equity against the other party to the conveyance or his privies and those who purchased from with notice of the mistake. Such relief should be sought promptly upon discovery of the mistake, to avoid any suggestion of laches on the plaintiffs' part. A grantor is not, however, chargeable with laches which will defeat his right to equitable relief from a mistake where he moves within a reasonable time after becoming aware of the mistake to have the matter rectified. 23 Am. Jur. 2d, 201-2 Deeds § 155.

It is generally agreed that equitable cancellation may be decreed on the ground of a material mistake made by one party only to a deed, including material mistake as to identity, situation, boundaries, title, or amount of land conveyed. A deed may be cancelled for a unilateral mistake on the part of the grantor which renders it inequitable for the grantee to have the benefit thereof, even though the parties dealt at arm's length and on an equal footing and the grantor was negligent, if his mistake was not a breach of duty. 33 Am. Jur. 2d, 203-4 Deeds § 156.

POINT II

PLAINTIFFS CONTEND THAT THEY ARE BENEFICIARIES OF THE PROPERTY THAT IS THE

SUBJECT MATTER OF THIS LAW SUIT AND ARE, THEREFORE, ENTITLED TO THEIR RESPECTIVE SHARES AS OUTLINED IN EXHIBIT "A" OF PLAINTIFFS' AMENDED COMPLAINT (R. 13).

Plaintiffs contend that the agreement attached to plaintiffs' complaint (R. 13) executed concurrently with the deed from Mary McKellar to her two daughters established a trust wherein the two daughters held the property as trustees for the benefit of all eight children of Mary McKellar. The agreement itself bears this out in the last paragraph of the agreement wherein it states that . . . "it is understood further, that in the event any one of the eight or any one of the above-named heirs die before the estate is exhausted or the funds completely used up, then in that case, that portion go to the issue or children of the one who dies, if the one who dies should die without issue or any children, then that part of the estate is to be divided equally among the remaining children listed above."

This language clearly indicates the grantor's intention was for the trustee of the property to divide the property equally among the eight children. When Mary Parsons McKellar and Montella McKellar Dick executed the deed, Exhibit "B" (R. 13) to Frank and Nellie McKellar, Frank and Nellie McKellar took the property as trustees.

If the property was held in actual trust, then the property would still be held as an actual trust today for the benefit of the beneficiaries. The law allows a substitute trustee to be named to a trust and that subsequent trustees are bound the same as their predecessors.

A substitute or successor trustee when appointed steps into the place of the old trustee, charged with the trust, and with all the powers and duties of the old trustee. He assumes the trust estate, sees to all imperfections and con onere, that is, subject to all

liabilities binding the trust estate in the hands of his predecessor. A deed from the old trustee to a new trustee cannot put the new trustee's powers beyond the control of the Court appointing him. 54 Am. Jur., 113 Trusts § 133.

Plaintiffs argue that the trust is still in effect today and that Frank and Nellie McKellar are trustees, and the children and heirs of Mary McKellar are the beneficiaries. Plaintiffs contend that Frank and Nellie McKellar received the property with knowledge that it was to be used for the benefit of all of the children of Mary McKellar.

POINT III

PLAINTIFFS CONTEND THAT IF FRANK AND NELLIE McKELLAR DO NOT HOLD THE PROPERTY AS ACTUAL TRUSTEES, THEY HOLD THE PROPERTY AS CONSTRUCTIVE TRUSTEES. IF PROPERTY IS HELD IN A CONSTRUCTIVE TRUST, THE BENEFICIARIES RETAIN AN EQUITABLE INTEREST IN THE PROPERTY AS TRUSTEES AND CAN FOLLOW THE PROCEEDS UNLESS THE TRANSFEREES ARE BONA FIDE PURCHASERS FOR VALUE AND WITHOUT NOTICE OF THE TRUST AGREEMENT.

"It is a fundamental rule having great practical application particularly in all those fields of law involving fiduciary relationships that equity will pursue property that is wrongfully converted by a fiduciary or otherwise compel restitution to the beneficiary. The rule is actually one of trust, since the wrongful conversion gives rise to constructive trust which pursues the property, its product, or proceeds in accordance with the rule. Hence, the rule well may be called 'The Trust Pursuit Rule,' or 'The Rule

of Trust Pursuit.' Under the rule, a trust will follow property through all changes in its state and form, so long as such property, its product or its proceeds are capable of identification. It will follow the property into the hands of the transferee other than a bona fide purchaser for value, or restitution will be enforced, at the election of the beneficiary, through recourse against the trustee or the transferee, personally or through compelling the transferee to perform the trust, except in so far as the transferee is protected as a bona fide purchaser for value. The Trust Pursuit Rule applies where a constructive or a resulting trust, as well as where an express trust has once affixed itself to property in a certain state or form.

This Rule of Trust Pursuit has been recognized and applied in courts of equity from a very early period. It has been grounded on the principle of property that ownership continues and can be asserted by the true owner as against any withholding of the object to which the ownership pertains, whether such object of the ownership is found in the hands of an original holder or a transferee, or in a different form, so long as they can be identified." 54 Am. Jur. 190-1 Trust § 248.

"Where the sale of the trust property is unauthorized and a breach of trust, the trust follows such property into the hands of the transferee, irrespective of any security given by the transferee, unless the transferee is protected as a bona fide purchaser for value, the illegality of the transaction by which the trust property or funds are transferred does not effect the operation of the rule, where the beneficiary is not a party to that illegality." 54 Am. Jur. 195-6 Trusts § 252.

"The person to whom a transfer of trust property constituting a wrongful conversion of the trust property and a breach of trust is made, when not protected as a bona fide purchaser for value is liable and accountable as a constructive trustee in invitum and ex maleficio or de son tort. His liability commences at the moment of the transfer of trust property to him and continues until there is full restoration to the beneficiary. Such a transferee acquires no title whatever; he merely takes the place of his transferor, and becomes chargeable with the execution of the trust to the same extent that such grantor was chargeable before the transfer." 54 Am. Jur. 196-7 Trusts § 254.

In the case of *Webster v. Knop*, 6 U.2d 273, 312 P.2d 557, (1957) the court states:

"The second question is: Were the subsequent transferees having notice of the grubstake agreement and the original location in the names of the three parties to the agreement bona fide purchasers for value from the one who relocated so as to terminate the equitable constructive trust interest in the beneficiaries?

The equitable interest of a trust in the beneficiaries may be cut off as against a bona fide purchaser for value from the trustee or constructive trustee. He must have had no notice, and he must pay value. As stated in the Restatement, Restitution, §12 (a) adopted in the Peterson case: A person has notice of facts giving rise to constructive trust not only when he knows them, but also when he

should know them; that is when he knows facts which would lead a reasonable, intelligent and diligent person to inquire whether there are circumstances which would give rise to a constructive trust, and if such inquiry when pursued with reasonable intelligence and diligence would give him knowledge or reason to know such circumstances."

In the case of *Peterson v. Peterson*, 112 U. 554, 190 P.2d 135 (1948).

"The general rule in regard to the rights of beneficiaries to reclaim trust property is stated in 54 American Jurisprudence Trusts, par. 266:

The right of a beneficiary of a trust to reclaim trust property in the hands of a third person or to charge such third person as a constructive trustee is primarily a question of the status of such third person as a bona fide purchaser for value and without notice. Equities of the beneficiary of a trust in the property or funds of the trust are cut off by the trustee's alienation or encumbrance of such trust property or funds to a purchaser for value in good faith who has no actual or constructive notice of any breach of trust in the alienation or encumbrance, although this does not, of course, deprive the beneficiary of his remedies of enforcing the trust against the proceeds in the hands of the trustee or against the trustee personally. But to be so protected the purchaser must be both a purchaser for value in good faith, and without notice. Equities are cut off only to the extent that a person taking trust property or funds in good faith has given value.

One who acquires trust property with notice of a breach of trust or who is for any other reason not a purchaser in good faith is not protected as against equities of the beneficiary, but takes the property or funds charged or impressed with the trust, notwithstanding he gives full value in the transaction. On the other hand, one who has taken in good faith and without notice of any breach of trust is not protected if he gave no value. The purchaser, to be protected, must be a bona fide purchaser, not only at the time of the contract or conveyance, but until the purchase money is actually paid.

Good faith of one taking trust property is dependent upon having no notice, actual or constructive, of any breach of trust in the transaction, and of having made such inquiry as the law would impose upon the purchaser under the facts of the particular case."

"The general rule is that good faith in one taking a transfer or encumbrance of trust property or funds exists where he has no notice, actual or constructive, of any breach of trust in the transaction and has complied with such duty of inquiry as the law casts upon him, but a mere denial of all knowledge of fraud will not avail the purchaser from a trustee, if the transaction is such as a court of equity cannot sanction." 54 Am. Jur. 211 Trusts § 267.

The Supreme Court of Utah held that an oral trust was created between the heirs of Mrs. Maria A. Haws when she executed a deed to her daughter, Amber Haws, on the 18th day of August 1927. Mrs. Haws continued to live upon the premises until her death on March 24, 1939. Fifteen days after the death of Maria A. Haws, Amber Haws married the defendant. Amber died on March 16, 1945. After Amber's

death defendant proceeded to probate the estate and acquire title to the property through the probate court. The same day defendant was granted title by the probate court, plaintiffs, the sons and daughters of Maria A. Haws and brothers and sisters of Amber Haws, filed the action to create a trust by virtue of the deed dated August 18, 1927. The court held that an oral constructive trust was created for the benefit of the heirs of Maria A. Haws when she executed the deed to Amber Haws. *Haws v. Jensen*, 116 Ut. 212, 209 P.2d 222 (1949).

The Haws case is analagous to the McKellar case. Mary McKellar, the mother of plaintiffs, executed a deed to her two daughters and at the same time created a trust for the benefit of the two daughters plus the remaining children. The property was subsequently conveyed by the two daughters to Frank and Nellie McKellar. The intent of the mother was clearly for the children to receive an equal portion of the property. The plaintiffs allowed defendant and her husband to use the property because they were in close proximity as stated in the affidavits (R. 14-17). Paragraphs 6 and 7 state that plaintiffs met with Frank McKellar and it was decided that Frank could use the property. However, at no time did plaintiffs relinquish their rights as beneficiaries under the trust.

POINT IV

DEFENDANT MISTAKENLY CONTENTS THAT PLAINTIFFS RELINQUISHED THEIR RIGHT, TITLE AND INTEREST TO THE SUBJECT PROPERTY.

Plaintiffs executed a document entitled "Release and Consent," a copy of which it attached to plaintiffs' brief

(R. 24). Plaintiffs intended by the document only to allow the sale of the property specifically set forth in the document.

The Agreement, Exhibit "A" attached to plaintiffs' Amended complaint (R. 13), states that "the purpose of this agreement is to supplement that certain GRANT DEED MADE and dated this same day and said second parties have full power to sell, mortgage, rent, lease or other means of getting gainful use from said land and/or lands. Such selling or mortgaging, however, to be done only with the consent of 2/3 of the majority of the above named children of Mary McKellar." The release and consent (R. 24) simply stated that Frank McKellar "may proceed with the sale and conveyance of any and all real property involved by the terms of said agreement or involved in the Warranty Deed from Mary McKellar to Mary Helen McKellar Parsons and Montella McKellar Dick dated December 17, 1942. . . ."

Therefore, if the release and consent is interpreted by the Court as authority to Frank McKellar to sell the subject property, it in no way relinquishes plaintiffs' right to the proceeds from the sale. Therefore plaintiffs are still entitled to their interest in the property.

POINT V

PLAINTIFFS' COMPLAINT IS NOT BARRED BY VIRTUE OF THE STATUTE OF LIMITATIONS.

Defendants at the hearing relied on the case of *Auerbach v. Samuels*, 10 U.2d 152, 349 P.2d 1112 (1960) wherein the Court held that a constructive trust is subject to the statute of limitations.

Even under the plaintiffs' theory of wrongful distribution and constructive trust, the period within which an action must be commenced begins to run from the time the person entitled to the property knows, or by reasonable diligence and inquiry should know, the relative facts.

Plaintiffs did not have knowledge that the property had been conveyed to Frank and Nellie McKellar as evidenced by their affidavits Paragraphs 5 & 6 (R. 14-17). Therefore they had no reason to make inquiry or a diligent search as to whether or not the property had been conveyed because Frank and Nellie McKellar were given the right to use the property by plaintiffs, as stated in their affidavits (R. 14-17). Plaintiffs contend that this fact would preclude a duty of inquiry on plaintiffs to discover the conveyance of the subject property to Frank and Nellie McKellar.

In *Jones Min. Co. v. Cardiff Min. and Mill Co.*, 56 U. 449, 191 P.426 (1920) an action to have the defendants declared trustees of a certain mining claim for the benefit of plaintiff corporation, wherein plaintiff alleged collusion between the defendants and the only director of the company to deprive the company of its interest in the claim, the Court stated that in all such cases the statute of limitation commences to run from the time when the complaining party discovered the wrong complained of or from the time when he was apprised of such facts and circumstances with respect thereto as would put a person of ordinary intelligence and prudence upon inquiry.

POINT VI

DEFENDANT CONTENDED THAT BECAUSE
THE DEED TO HER AND HER DECEASED HUS-

BAND WAS RECORDED THIS WOULD IMPART NOTICE TO PLAINTIFFS. 57-3-2 U.C.A. (1953) states:

Every conveyance, or instrument in writing affecting real estate, executed, acknowledged or proved, and certified, in the manner prescribed by this title, and every patent to lands within this state duly executed and verified according to law, and every judgment, order or decree of any court of record in this state, or a copy thereof, required by law to be recorded in the office of the County Recorder shall, from the time of filing the same with the Recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice.

In the case of *Berendsen v. McIver*, 126 C.A. 347, 272 P.2d 76 (1954).

Defendant contends that pursuant to § 1213, Civil Code, plaintiff had constructive notice of the contents of the deed because it was recorded. Section 1213 does not apply to a grantee of the particular deed recorded. The section provided for constructive notice to "subsequent purchasers and mortgagees" only. As said in 22 Cal. Jur., p. 724, Section 12: "The mere recording of an instrument is not notice of a mistake therein"

Plaintiffs contend that the fact that the deed was recorded does not give notice to plaintiffs. It would be harsh, indeed, to require all beneficiaries of a trust (adults and minors alike) to check the records periodically to determine

whether or not a trustee had conveyed the property in which they have a beneficial interest.

POINT VII

PLAINTIFFS CONTEND THAT FRANK AND NELLIE McKELLAR DID NOT PAY ANY VALUE FOR THE PROPERTY.

The deed indicates "\$10.00 and other good and valuable consideration." Plaintiffs contend that they have not received any consideration for the property as stated in the affidavits Paragraph 9 (R. 14-17). In 17 Am. Jur. 2d 433 Contracts, § 90. Recitals of consideration and effect thereof:

The true rule appears to be that recitals of consideration, unless intended themselves to embody a contractual right or obligation, may be contradicted, inasmuch as the consideration of a written instrument is generally open to inquiry. In a case in which the consideration for a written contract is mentioned merely by way of recital or as a receipt, the parol evidence rule does not preclude the admission of extrinsic evidence to show the true consideration, even though such consideration is different from that expressed.

It is the general practice to recite in practically all deeds as consideration, "Ten Dollars (\$10.00) and other good and valuable consideration," regardless of whether or not an actual consideration has been given.

A court of equity in decreeing a constructive trust, is bound by no unyielding formula, but is free to effect justice according to the equities peculiar to each transaction

wherever a failure to perform a duty to convey property would result in unjust enrichment, *Haws v. Jensen*, 116 U. 212, 209 P.2d 229 (1949). *Bogert on Trusts and Trustees*, Part I, 1946 Edition, § 471. Defendant would clearly be unjustly enriched by prevailing in this action; therefore, the Court should remand this case to the trial court for trial so that justice may be done.

CONCLUSION

Summary judgment is a drastic remedy and Court should be reluctant to deprive litigants of an opportunity to fully present their contentions upon a trial, and therefore summary judgment should be granted only when under the facts viewed in the light most favorable to plaintiffs they could not recover as a matter of law. *Welchman v Wood*, 9 U.2d 25, 337 P.2d 410 (1959).

Summary judgment as a remedy should be granted with great caution. *Watkins v. Simonds*, 11 U.2d 46, 354 P.2d 852 (1960).

Summary judgment should only be granted if there are no material issues of fact to be determined by a trial.

Plaintiffs contend that the following issues of fact remain to be determined by the trial court:

1. Whether or not the conveyance of the subject property by Mary Helen Parsons and Montella McKellar Dick to Frank and Nellie McKellar was made by mistake.

2. Whether or not Frank and Nellie McKellar were bona fide purchasers for value.

3. Whether or not Frank and Nellie McKellar had actual knowledge that Mary Parsons McKellar and Montella McKellar Dick held the subject property as trustees.

4. Whether or not plaintiffs had knowledge of the transfer and whether or not they are subject to the statute of limitations.

5. Whether or not plaintiffs had a duty to make a reasonable search or diligent inquiry to determine of the subject property had been conveyed.

Because of these material issues of fact to be determined by the trial court, plaintiffs respectfully request that the case be remanded to the trial court for a trial.

Respectfully submitted,

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