

1970

Ted W. Hillstead And Robert B. Jackson v. J. J. Leavitt And P.R. Leavitt, His Wife, And Wayne H. Sipe : Brief of Plaintiffs And Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

TED W. HILLSTEAD and
ROBERT B. JACKSON, *Plaintiffs,*

vs.

J. J. LEAVITT and P. R. LEAVITT,
his wife, and WAYNE H. SIPE,
Defendants.

Case No.
12028

Brief of Plaintiffs and Appellants

**Appeal from Judgment of the Third Judicial District Court
for Salt Lake County, State of Utah
Leonard W. Elton and Gordon R. Hall, Judges**

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ROBERT B. JACKSON, *Plaintiffs,*

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his wife, and WAYNE H. SIPE,
Defendants.

Case No.
12028

Brief of Plaintiffs and Appellants

STATEMENT OF THE KIND OF CASE

This case consists of three causes of action, the first to have recognized a foreign judgment against the defendants, J. J. Leavitt and Wayne H. Sipe; the second to have a conveyance of property to the defendant, J. J. Leavitt's wife, P. R. Leavitt, declared null and void as to the plaintiffs and a receiver appointed therefore; the third for damages on the parties' real estate

contract against the defendant, J. J. Leavitt, accruing since entry of the foreign judgment in the State of Nevada.

DISPOSITION OF LOWER COURT

The District Court, Judge Elton presiding, acknowledged the judgment of the State of Nevada against the defendant J. J. Leavitt and gave judgment as prayed on the first cause of action, but the Court dismissed with prejudice the second and third causes. Plaintiffs understood the Court to have ruled that the second and third causes were dismissed without prejudice (Tr. 190, L. 13 to L. 30) (Tr. 111) and (Tr. 86). An order in supplemental proceedings determined that the defendant J. J. Leavitt was the sole name on a bank account but the Court through Judge Hall denied plaintiff's motion for garnishee judgment. (Tr. 195-196). Plaintiffs filed a separate notice of appeal. (Tr. 194).

RELIEF SOUGHT ON APPEAL

Appellant requests the Court to consider the two appeals as one matter, inasmuch as the same case is involved, and to reverse the orders denying plaintiffs' second and third causes and to also reverse order denying garnishee judgment.

STATEMENT OF FACTS

On June 21, 1965, the defendants, Wayne H. Sipe and J. J. Leavitt, commenced legal action against Ted W. Hillstead and Robert Jackson in Clark County, State of Nevada. A counterclaim was filed by the defendants on July 13, 1965 for fraud and breach of contract. On September 27, 1967 the defendants obtained a judgment for \$54,350 against the plaintiffs. (See Exhibit 1-D)

On November 17, 1967 Jackson and Hillstead filed an action on the judgment obtained in Nevada, asking that at least one-half of a conveyance to Mrs. J. J. Leavitt of a motel in Price be declared the property of J. J. Leavitt and that a receiver be appointed to hold said property for the benefit of the plaintiffs (Tr. 47-50).

The Alpine Motel, the subject of the second cause, was obtained by the Leavitts through a trade for a lodge in Wyoming with Layton Harris and Pearl A. Harris (Tr. 96-99). Both Mr. and Mrs. J. J. Leavitt conveyed the Wyoming Lodge to Layton Harris and in exchange only Mrs. Leavitt received the motel. The Wyoming Lodge was obtained in a trade for real property in Utah County (Tr. 26-33) which was held for three months in the name of Mrs. Leavitt (J. J. Leavitt Dep. L. 23, P. 9). These houses in Utah County were obtained through a trade for livestock from a farm in Pingree, Idaho (Tr. 177, L. 1-30) which in turn came from another farm in Hagerman, Idaho which was

purchased in both names (Tr. 185, L. 1-19) for which no cash was paid but on which payments of \$32,500 were paid after it was acquired (Tr. 186, L. 1-11).

POINTS URGED FOR REVERSAL

1. The Court erred first in holding that the actions complained of were not contemporary with the obligation of the foreign judgment (Tr. 188, L. 21-27) and second in ruling that there was any necessity for such action to be contemporary with the obligation (Tr. 189, L. 1-5).

2. Refusal of the Court to allow testimony of defendants' financial status was improper (Tr. 186, L. 22 to Tr. 187, L. 3).

3. The Court erred in refusing to allow evidence as to third cause of action as to the damages incurred by the plaintiffs subsequent to the judgment (Tr. 172, L. 30 to Tr. 174, L. 11).

4. The Court erred in refusing plaintiffs' motion for garnishee judgment.

ARGUMENT

POINT 1

The Court erred in holding that the actions complained of were not contemporary with the obligation

of the judgment and also in ruling that there was any necessity for such action to be contemporary with the obligation.

The Court justified its refusal to appoint a receiver and to declare the conveyance null and void by stating that the judgment obtained in September 1967 was not contemporary with the purchase of a farm in 1962 (Tr. 188). This analysis constitutes a failure to comprehend the facts of the case. A counterclaim was filed in this matter as early as July 13, 1965 (Ex. 1-D). The defendants J. J. Leavitt and P. R. Leavitt jointly conveyed the Wyoming property in October 1967 over two years after they initiated the action (Tr. 98) and (Tr. 188) and within a week or two of the date of the judgment in the Nevada Court (Tr. 7). Throughout the years that the plaintiffs have been pursuing the defendants, Leavitt alleges that he didn't know about the lawsuit (J. J. Leavitt Dep. L. 7, P. 20 to L. 7, P. 21) and that he didn't authorize the lawsuit. This position has been refuted by the testimony of his attorney in Nevada (Tr. 62-64) and a copy of Leavitt's check made payable to this attorney (Tr. 64).

Even if the transaction was not contemporary with the judgment the Court should have declared the transaction fraudulent as to the plaintiffs. Sec. 25-1-7 U.C.A. 1953 reads:

“Every conveyance made, and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or de-

fraud either present or future creditors is fraudulent as to both present and future creditors.”

By having the Alpine Motel conveyed to Mrs. J. J. Leavitt, J. J. Leavitt was attempting to defraud the plaintiffs. Transactions between husband and wife should always be subject to close scrutiny. Our Court has stated in *Cardon v. Hooper*, 106 Ut. 560, 151 P2 99, that in a suit to set aside conveyance from husband to wife, no actual fraudulent intent will be required when there was no fair value or consideration given and the effect of the transfer is to render the grantor insolvent.

The Court also stated in *Ned J. Bowman Company v White*, 13 Utah 2d 173, that:

“Under our statutes a creditor with a matured claim may have a conveyance set aside to the extent necessary to satisfy his claim, where such conveyance was made without fair consideration and would render the person making it insolvent. Under these circumstances the conveyance constitutes statutory fraud and the existence of a subjective intention to defraud is not required. A creditor may also have a conveyance set aside if it was made with actual intent to hinder, delay or defraud present or future creditors.” (Citing 25-1-15 (1), 25-1-3, 25-1-4.

The alleged conveyance by which Mrs. Leavitt obtained the Alpine Motel certainly left J. J. Leavitt insolvent (Tr. 129-151). There certainly was no consideration given by Mrs. J. J. Leavitt to J. J. Leavitt. Mr. Leavitt did state that his wife sold a violin to get

them started in their operations (Tr. 184, L. 3-15). However, Mrs. Leavitt in her deposition indicated that it was traded when the parties were first married (P. R. Leavitt Dep. L. 15, P. 16 to L. 7, P. 17). J. J. Leavitt also stated that the equity in the farms were acquired from the efforts put into them after they were acquired without down payments. (Tr. 184, L. 19 to Tr. 186, L. 12 and J. J. Leavitt Dep. P. 10-12). Both of these farms were in the joint names of P. R. Leavitt and J. J. Leavitt (J. J. Leavitt Dep. P. 12 P. 27-28) (Tr. 185, L. 17-18) (Tr. 181, L. 25-30). Mr. Leavitt openly stated that the motel in Price was obtained from the \$25.00 investment in the farm in Idaho and the property traded off the farm in Pingree (Tr. 177-178).

POINT 2

Refusal of the Court to allow testimony of the defendant J. J. Leavitt's credit status was improper (Tr. 186, L. 22 to Tr. 187, L. 3).

The effort to obtain the information set out above was to show why the property had been in the name of Mrs. Leavitt alone. Mr. Leavitt had worked the farms (Tr. 187, L. 17 to L. 20) which were in both parties' names and which were traded for the Utah County property. Why all of a sudden should property be placed in the wife's name alone? The absence of a jury ruled out the possibility of prejudice and an answer would have shown the number of judgments

and debtors. Although the lodge in Wyoming was not originally in J. J. Leavitt's name he did execute a mortgage on the property when it was obtained (Tr. 178, L. 11 to L. 20).

The questions, which the Court objected to, were posted to determine why the property was not placed in J. J. Leavitt's name (Tr. 186, L. 15 to L. 18). The only answer was that the property belonged to his wife notwithstanding the evidence to the contrary.

When asked why his wife's name was not on the bank account of the Alpine Motel, he answered that "she is not well and she's awfully heavy" (Tr. 152, L. 17 to L. 22) yet he admitted that Mrs. Leavitt did the maid work and handled the office work (Tr. 145, L. 30 to Tr. 146, L. 3 and Tr. 143, L. 8).

POINT 3

The Court erred in refusing to allow evidence as to third cause as to damages incurred by the plaintiffs subsequent to the judgment (Tr. 172, L. 30 to Tr. 174, L. 11).

The contract which is the basis for the judgment and lawsuit (Ex. 1-D, pages 8, 9 and 10) provided that the defendants would assume certain obligations set out on page 10. The plaintiffs are still paying on the note of Homer Hansen and the refusal to allow this evidence was error.

POINT 4

The Court erred in refusing plaintiffs' motion for garnishee judgment. (Tr. 195-196).

J. J. Leavitt admitted under oath that he was the only individual authorized to write checks on the Alpine Motel (Tr. 141, L. 21 to Tr. 142, L. 5). That even his wife was not authorized to sign checks. The original garnishment answer (Tr. 121) indicated that J. J. Leavitt, d/b/a Alpine Motel, had an account in Walker Bank & Trust Company in the amount of \$521.22. However, for some reason an amended answer was filed (Tr. 124) volunteering that P. R. Leavitt claimed sole interest in the checking account and that Walker Bank was unable to determine to what extent it is indebted to J. J. Leavitt.

Much more could be said but if the Court is going to be impressed, enough has been said. Plaintiffs submit that the defendants are attempting to defraud the creditors of J. J. Leavitt. While it is understandable that J. J. Leavitt and his wife would want to preserve his assets, they should not be allowed to make a mockery of our courts by sham and deceit. Plaintiffs should be allowed to attach the interest of J. J. Leavitt in the property now held by his wife.

Respectfully submitted,

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