

1941

Laura Morris and Lucy Pocatello Johnson, Maude Pocatello Racehorse, Josephine Pocatello and Ray Pocatello v. Amasa L. Clark, Joseph E. Robinson, and Box Elder County : Petition and Brief for Rehearing

Utah Supreme Court

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IN
The Supreme Court
OF THE
State of Utah

LAURA MORRIS, Special Admin-
istratrix of the Estate of Washing-
ton Pocatello and Minnie Pocatello,
His Wife, Both Deceased, and LUCY
POCATELLO JOHNSON, MAUDE
POCATELLO RACEHORSE,
JOSEPHINE POCATELLO, and
RAY POCATELLO, Heirs of
Washington Pocatello and Minnie
Pocatello, Deceased,

Plaintiffs and Appellants,

vs.

AMASA L. CLARK, JOSEPH
E. ROBINSON and BOX ELDER
COUNTY,

Defendants and Respondents.

No. 6248

PETITION AND BRIEF FOR REHEARING

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Washington Pocatello and Minnie
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Plaintiffs and Appellants,

vs.

AMASA L. CLARK, JOSEPH
E. ROBINSON and BOX ELDER
COUNTY,

Defendants and Respondents.

PETITION AND BRIEF FOR REHEARING

Appellants respectfully petition the court
that it grant a rehearing of the above case for the
following reasons, to wit; that the decision of this

court in said cause is erroneous, for the reasons hereinafter pointed out.

That in respectfully asking for this rehearing, Appellants assure the court that it is not made for the purpose of any delay or procrastination to prevent the filing in the Lower Court, of this Court's remittitur in the Cause; that Appellants are Indian wards of the United States Government, and intend if possible to appeal from said decision to the Supreme Court of the United States, and this petition for rehearing is made with humble and true sincerity, for the purpose of exhausting every effort for redress in the State Court of Utah, prior to trying to perfect appellants' appeal to the Supreme Court of the United States. And respectfully assert that this Court has erred in its decision filed on April 18th, 1941 for the following reasons;

First: The Appellants quote five paragraphs of the court's opinion which is as follows:

Plaintiffs' intestates were Shoshone Indians residing on the Fort Hall Indian Reservation in Idaho. The tract of land in question was not allotted land but was acquired by the ancestor of Washington Pocatello, one Yaotes Owa, through homesteading of the land and the issuance of patent from the United States. Yaotes Owa died in Box Elder County, Utah, in the late eighties. Probate proceedings on her estate were not commenced until 1917.

By a decree of distribution made therein, November 7, 1919, a one-third interest in the 80 acre tract in question was decreed to Washington Pocatello. However, about February 2, 1917—more than two years prior to the date of said decree—the said Washington Pocatello and his wife, Minnie, entered into a contract to sell the eighty acre tract to one U. F. Diteman, predecessor in interest of respondents herein, for a consideration of \$3200.00, payable \$200.00 in cash with annual installments of \$300.00 payable in December of each year, the last installment becoming due, therefore, in December 1926. A warranty deed reciting a consideration of \$3200.00 was executed by Washington and his wife Minnie, as sole heirs of Yaotes Owa, to the 80 acre tract, and said deed was deposited with the First National Bank of Pocatello, Idaho, as escrow depositary to be held by it until the full purchase price was paid, and thereupon to be delivered to the grantee therein named. An affidavit setting forth the terms of the agreement was executed by the cashier of the bank and filed of record in the office of the County Recorder of Box Elder County. Washington Pocatello died April 27, 1917—less than three months after executing said deed—and Minnie, his wife, died May 28, 1928.

“On January 12, 1920, one Charles E. Foxley was appointed administrator of the Estate of Washington Pocatello. The deed placed in

escrow, as hereinabove recited, was on November 10, 1919 filed of record with the County Recorder of Box Elder County, having been theretofore delivered by the escrow holder to an agent of the grantee therein named.

“At the time of the trial, the First National Bank of Pocatello, Idaho, had been liquidated. Foxley, the administrator of the Estate of Washington Pocatello had long since left the jurisdiction of the court. However, it appears from the pleadings that some time after his appointment as administrator and after the date when the deed was recorded, Foxley reported to the probate court that he had received \$995.00—property of the estate—from the First National Bank of Pocatello, Idaho. This report was never passed upon by the court.

“By their pleadings, in addition to setting forth the facts hereinabove recited, plaintiffs alleged that the deed placed in escrow was delivered by the depositary upon payment of only \$1,000 of the consideration recited therein and agreed to be paid, that defendants had full knowledge of such facts when they purchased the premises and hence were not bona fide purchasers thereof. Upon these issues the trial court found in favor of defendants and against plaintiffs. On the issue of payment vel non of the full consideration to the deposi-

tary before the delivery by it of the deed, the court made the following finding:

“ . . . that the depositary bank had no right to deliver the Deed to said property without a full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the Deed was regular on its face, recited the consideration of \$3200.00 and from the evidence in the case the Court finds that said \$3200.00 recited in the Deed was paid to said Escrow Holder and that the transaction with said Bank was not fraudulent. . . ”

Appellants again humbly and respectfully assert that the trial court erred in its findings, and, that this Court has erred in sustaining and affirming the finding of the trial court, for the reason that by making such finding the trial court, and, this Court by sustaining and affirming such finding has thrown the burden upon the appellants to prove by a preponderance of evidence that a deed placed in escrow not to be delivered until the performance of the condition expressed in said escrow, was fully performed and complied with before the delivery of the deed, in other words that Appellants must prove by a preponderance of the evidence that the deed was wrongfully delivered, which finding is contrary to the great weight of authority, to, the effect, that when it is shown that the deed was placed in escrow not to be delivered until the full performance of the condition expressed in the escrow agreement, the

budren is upon the person claiming title by virtue of that deed to prove by a preponderance of the evidence, that the conditions of the escrow agreement was fully performed and complied with before the deed was delivered, and that unless the person claiming under said deed does prove that it was validly delivered, the deed is void and of no force and effect and passes no title to the property. And, more particularly in this case where the defendants by their answer and supplemental answer, pleaded the deed as their title, and asked affirmative relief, for the court to quiet title in them for the said undivided one-third interest involved.

Appellants have cited such a long array of weighty authority on this question in their former briefs, that it appears useless to quote further authority, but so as the Court will have some of the authorities before it we again cite the following:

C. J. Vol. 21, 894, 895.

Kavanaugh vs Kavanaugh, 260 Ill. 179, 103
N. E. 65.

Black vs Shreve, 13 N. J. Equity, 455.

Balfour vs Hopkins, 93 Fed. 564.

This is an action to quiet title, and involves a property right and for an accounting of the rents and profits, and title to property, and is an action in equity. The defendants by answer and supple-

mental answer denied the plaintiffs title pleaded this deed as giving them title, and asked for affirmative relief and the lower court granted defendants affirmative relief. That placed upon the respondents the burden of proving valid delivery of the deed. Appellants go no further for authority for this rule of law, than the Supreme Court of the State of Utah:

Corpus Juris, lays down the rule of law as follows:

“Where defendant pleads an affirmative defense, and sets up in his answer facts in avoidance, the burden of proof is upon him. So, too, the burden of proving allegations in a cross bill necessary to entitle defendant to affirmative relief rests upon him to the same extent as if he had brought an original action to obtain the same relief.”

C. J. Vol 22, Sec. 17, Page 74.

The only Supreme Court case that the authors of Corpus Juris cites in support of that rule is a case from the Supreme Court of the State of Utah, wherein the Court held as follows:

“The burden of making such proof was on the defendants for the additional reason that the decree dismissed plaintiffs complaint, and awarded to the defendants the relief sought by them in the cross complaint. The burden

of proving the allegations of the cross complaint, necessary to entitle the defendant to the decree rendered, rests upon them in the same manner and to the same extent that it would have done had they instituted an original action to obtain the relief prayed for in the cross complaint.”

Herriman Irr. Co. vs. Butterfield Min. etc Co.,
19 Utah 453. 57 Pac. 537, 51 L. R. A. 930.

This decision of the Supreme Court of Utah, is considered such sound law, that it is quoted in Corpus Juris, and reported in L.R.A.

It is admitted in the pleadings, and found by the lower court, and also found by this court that the plaintiffs and appellants, the heirs of Washington Pocatello, are the only living heirs of Ya-toes Owa the original patentee of the said 80 acres. And that they are Indians, wards of the Government, living on the Fort Hall Indian Reservation in Idaho. Despite this finding, the lower court, and this Court, have overlooked the United States Statute cited by the appellants in their briefs namely that in trials or right of property between Indians and white men, that once it is shown that the Indian had previous ownership or possession the burden is upon the white man. And appellants again quote that statute.

Trial of Right of Property; burden of proof:

“In all trials about the right of property in

which an Indian may be a party on one side, and a white person on the other, the burden of proof rests upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." Act of Congress, June 30, 1834, C161, Sec. 22, 4 Stat, 763, R. S. Sec. 2125 U. S. Code Compact Edition Sec. 194.

Appellants contend that is the law of the land today, and applies in this case, because not only are the appellants Indians, but their ancestors through whom respondents claim title were all Indians.

This double burden of proof, was not only on the respondents in the lower court but it followed them to this court, and for that reason respondents had no standing in law or equity to move to strike appellants bill of exceptions, as the burden is upon them to bring before the appellate court the entire record to show to the appellate court that the trial court had sufficient evidence before it to grant the respondents the affirmative relief they prayed for, and, that the trial court granted.

Second: Appellants very respectfully assert; that this being an action to quiet title, and the respondents having answered, setting up affirmative relief in the form of an affirmative answer which is the same as a cross complaint, and praying for affirmative relief that title be quieted

in them, and the lower court having decreed affirmative relief to respondents, and dismissed appellants action, and the lower court having within its discretion permitted appellants to file their Bill of Exception, so as to bring the entire record before this court; that this court erred, in striking appellants bill of exception on the motion of respondents; that by so striking said bill of exception on the motion of respondents; that this Court relieved the respondent of the burden that the Supreme Court of the State of Utah, by its former decision in the case of *Herri-man Irr. Co., vs. Butterfield Min. etc. Co.*, reported in 19 *Ut.* at page 453 and other decisions, has placed on respondents, without overruling the law laid down in the former decision.

Third: Further, the appellants respectfully assert that this Court erred in striking appellants bill of exceptions, for the reason that this is a suit in equity, and it is the duty of this court to pass upon both the question of law and fact. The appeal in this case was taken upon both questions of law and fact, and from the whole thereof, see, page 157, Abstract of Record. Appellants believe it is not necessary to quote or call to this court's attention the provisions of the Constitution of the State of Utah, or the law enacted by the Legislature of Utah pertaining to the provisions of the Constitution relative to that point, we will rest this point on the recent decision of this court, filed January 3rd, 1939, wherein Justice Moffat held:

“This being an equity case we are required to examine the evidence and determine the facts for ourselves. It has sometimes been stated that the review of an equity case under our Constitution and laws is a trial de novo upon the record. In equity cases the review in this court in effect is a trial de novo on the record,” *Jensen vs Howell*, 75 Utah, 64, 282 Pac, 1034, 1038. “In equity cases, this court is authorized to review both questions of law and of fact,” *Independent Oil & Gas Co. vs Shelton et al.*, 79 Utah, 384, 6 Pac. 2d, 1027, 1032.”

Federal Land Bank of Berkley vs Salt Lake Valley Sand and Gravel Co., et al
Utah, 85 Pac. 2d, 791.

In the case of *Jensen vs Howell*, the Court said:

“This case is one in equity. In this jurisdiction the binding effect of findings of the trial court in law cases is different from equity cases. In the former, the findings as a general rule, are approved if there is sufficient competent evidence to support them, and, primarily are not disturbed, unless it is manifest that they are so clearly against the weight of the evidence as to indicate a misconception, or not a due consideration of it. In the latter, our duty and responsibility in approving or disapproving findings when challenged are

more comprehensive. In such cases on an appeal and a review on questions of both law and fact, and on a challenge of the findings, the review in effect is a trial de novo on the record. On such a review, if, after making due allowance as to the better opportunity of the trial court to observe the demeanor of witnesses, or determining their credibility and the weight of their testimony, we on the record nevertheless are persuaded that a challenged finding is against the fair preponderance or greater weight of the evidence, or not supported by it, we disapprove it, and make or direct a finding or remand the case for further proceedings: otherwise we affirm it.”

Jensen vs Howell, Supra, 75 Utah, 64.

Therefore appellants respectfully assert that this court erred in striking the Bill of Exceptions on respondents motion. And affirming the decision of the lower court, quieting title in that undivided one-third interest in respondents. This Court in its opinion in this case does not even say that it is an action in equity.

Fourth: Deed placed in escrow, alleged wrongfully delivered; relation back to time of delivery.

Appellants respectfully assert that both the trial court and this court has mistakenly applied the doctrine of relation back to the time of execution of this deed in this case.

The trial court held, and this court quoted the holding of the trial court as follows:

“.....that the depository bank had no right to deliver the Deed to said property without a full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the Deed was regular on its face, recited the consideration of \$3200.00 and from the evidence in the case the Court finds that said \$3200.00 recited in the Deed was paid to said Escrow Holder and the transaction was not fraudulent.”

That holding of the trial court is the essence of the whole Finding of Fact, and the decree of the trial court, wherein the said Court granted affirmative relief to the respondent at their request, and quieted title in respondent against the appellant for a valuable property right, and this Court declines to determine from the evidence and the record in this case what evidence, if any, was submitted to the trial court, that gave the trial court the right to make such a finding, because, the respondent, in order to relieve themselves of the burden placed upon them by law and the decisions of this court moved this court to dismiss the Bill of Exceptions, that contained the full record of the trial court. If the ruling of this Court(in the three cases cited supra, is correct, wherein this Court held that in cases of equity, the hearing in the Supreme Court must be, de novo, and that the Court is required to examine the record and pass

on both questions of fact and law, then how can the Court strike the Bill of Exceptions that the trial court in its discretion settled in order to place the full record before this Court.

The doctrine quoted by this Court in support of its ruling on the relation back of this deed, is based upon the one paramount provision, "When the condition upon which the instrument is to take effect is performed." There is no room for argument, and requires citing of but few authorities necessary, in support of that cardinal fundamental principal of law, that it is only "when the condition upon which the instrument is to take effect, has been fully complied with," in an escrow agreement, and, then only in the cause of justice, will the delivery of the deed in fiction related back to the time of its execution.

And the duty was and is upon this Court before it can affirm that finding of the trial court, to examine the complete record. Then can this Court avoid that duty by striking the Bill of Exceptions on the motion of the Respondents.

Appellants know of no better authority, that it is only when all the conditions are fully performed, and that justice requires the doctrine of relation back be enforced, then the former opinion written by this Court in the case of Charles E. Foxley vs J. Y. Rich, a case involving the same Charles E. Foxley mentioned in this case, and from Box Elder County, Utah, wherein the Court said:

“There may be circumstances under which the deed placed in Escrow, when all the conditions are performed, will relate back to the time of its execution but this is the case only when justice requires that the doctrine of relation back be enforced. The title, therefore, remained in J. Y. Rich until respondent had complied with the conditions imposed upon him, namely until he made the final payment and paid the taxes assessed against the property.”

Charles E. Foxley vs J. Y. Rich, 35 Utah, 162.

The appellants beg the patience of this court to again quote a later opinion of this court, quoted in appellants former brief, wherein the court said:

“The controlling question is, does the evidence disclosed by the record sustain the trial Court?

(1) This is an action in equity in which it becomes **our duty** to determine questions of fact as well as questions of law.

(2) The lease of the property in question being admittedly in the plaintiff, the burden was upon the defendant to establish his equitable rights, if any, by the preponderance of the evidence.”

Hargraves vs. Burton, 59 Ut. 575.

In the case at Bar, it is admitted that the deed

was placed in escrow not to be delivered until the full sum of \$3000 was paid to the escrow depository. It is admitted even by this court that Washington Pocatello, was dead, long before the property was decreed, that the court decreed an undivided one-third interest to his estate, that long after his death and after the property was decreed, that the grantee in the escrow or his agent obtained that deed and filed it of record. The burden is upon any one claiming under that deed to prove to this Court, that every condition of that escrow agreement was fully complied with.

At this point appellant wishes to cite a few more very recent authorities, that holds that a deed placed in escrow, and obtained by the grantee and filed of record, without the full compliance with every condition specified in the escrow agreement passes no title, and is not good even in the hands of an innocent purchaser. We call the court's attention to a recent case of the Supreme Court of Oklahoma, which contains a very exhaustive analysis of the law, namely:

Home Stake Royalty Corporation et al vs.
McLish 103 Pac 2d, 72, (decided May 28,
1940.)

Tucker et al vs. Kanatzer et al, 25 N. E. 2d,
p. 823. (Ill.)

Rothney vs Rothney, 107 Pac 2d, 294 (Cal.)

Noakes vs. Noakes, 287 N. W. 445 (Mich.).

This Court quotes Thompson on Real Property Permanent Edition this authority we have not access to, but, we have access to Thompson on Real Property, six volumns, and under the title Burden of proving valid delivery; says:

“The burden of proving the delivery of a deed rests upon the party who claims it was delivered.”

Thompson on Real Property, Sec. 3866, Vol. 4 P. 942. On the doctrine of relation back this authority says:

“A relation back to the first delivery is allowed only in cases of necessity, to avoid the effect of events happening between the first and second delivery which would otherwise prevent the operation of the deed as intended.”

Thompson Real Property, Sec. 3961, Vol. 4, P. 1044.

Fifth: Appellants respectfully assert that this Court erred, the third last paragraph of its opinion wherein the Court said:

“Argument is made in favor of appellants title, to the effect that by the decree of determination of heirship and of distribution in the estate of Yaotes Owa there was distributed

to the estate of Washington Pocatello a one-third interest therein, and that such decree establishes title of the heirs. Further, that title to such interest having vested in the heirs of Washington Pocatello upon the latter's death, it could thereafter be divested only by the act of the heirs themselves or by decree of a competent court. But all this disregards the escrow deed executed by the heirs' intestates and the finding that the agreed purchase price was paid to the escrow holder at the time of delivery of the deed. Under such finding by virtue of the doctrine of relation back of title to the time of delivery of the deed (which we consider applicable under the facts as found by the trial court), in effect, no interest vested in the heirs or in his estate."

Appellants respectfully assert, that the trial court, and now, this Court has mistakenly injected the doctrine of relation back, which is not a rule or principle of law, but a mere fiction in law.

The doctrine of "relation back from the date a deed is delivered to the date of its execution is a mere fiction in law," and only invoked by courts of competent jurisdiction, when it is proven and shown by a preponderance of the evidence, supplied by the party claiming under the deed, that he is in equity with clean hands, that he has performed every condition that was imposed upon him to perform, and that it is in the furtherance of justice that the fiction of relation back be en-

forced by the court. Individuals can not invoke the doctrine of relation back to rob the heirs of an estate of their just property.

The trial court and this Court has found and held that Washington Pocatello, died April 27th, 1917. We need go no further than the laws of Utah, and the decisions of this court to assert that on that date, whatever interest Washington Pocatello, had in that 80 acres of land and all property immediately on his death vested in his heirs: This Court has held in a decision handed down less than one year ago, namely on the 13th day of September, 1940, that immediately upon the death of a person his estate, both real and personal, immediately vests in his heirs, the court quoting from decisions of Oklahoma, after carefully stating that the statutes of Oklahoma were indetical with the Laws of Utah, Section 101-4-2. R. S. of Utah, quoted the law as follows:

“The property, both real and personal of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the county court, and to the possession of an administrator appointed for the purpose of administration.”

Again on the same page the Court quoted:

“Upon a person dying intestate, the heirs of such person become immediately vested with the estate, and the estate is indefeasible,

subject to the control of the county court and the possession of and management by the administrator, and it is his duty simply to preserve the estate until distribution to the heirs, unless, and in the manner provided by statute, the necessity should arise for sale."

Again this court on the same page said by quotation:

".....all property, both real and personal, of all persons who die intestate passes to the heirs of such intestate, subject to the control of the county court and subject to administration."

In re Harris' Estate. Zion's Sav. Bank & Trust Co. vs. Harris. Utah (Sept. 13, 1940) 105 Pac 2d, 461.

The interest of Washington Pocatello, in the said 80 acres of land, became vested in his heirs on the 27th day of April, 1917, and they had intermediate rights, that could and can only be, taken from them through their own acts, ~~on~~ the decree or judgment of a competent court:

Thompson on Real Property, treats of this subject under the title Validity of Intermediate Rights as Against Second Delivery:

"Intermediates rights are valid as against second delivery. The doctrine of relation, being but a fiction in law, can not be applied to

the prejudice of the intervening rights of third parties.”

Thompson Real Property, Vol. 4, Section 3962, P. 1045.

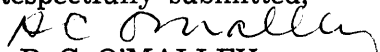
Appellants respectfully assert, that the trial court had no right to invoke the fiction of the doctrine of relation back, in violation of Section 102-11-26 Revised Statutes of Utah, and hold that a deed placed in escrow and delivered 19 months after the death of the grantor was valid and related back to the date of the execution, unless the court was furnished clear and convincing proof by the respondents, that the full amount of the sum mentioned in the escrow agreement was paid before the deed was delivered, and that it was in the furtherance of justice that the fiction in law of relation back be involved

That Appellants further respectfully assert that this Court has no right to affirm that finding of the trial court invoking that fiction in law, unless this Court has examined the record, and evidence that the burden was on respondent to produce, in order to avoid procedure under Section 102-11-26 Revised Statutes of the State of Utah, that the Legislators of the State of Utah enacted for the protection of estates of deceased persons.

Therefore Appellants respectfully petition this Court to grant a rehearing in the above entitled matter, and restore the Bill of Exceptions,

and carefully consider the full record in the case,
before permitting its present decision to become
final.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "P. C. O'Malley", written over the printed name.

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