

1951

John R. Mitchell v. Merlin C. Palmer et al : Brief of Respondents

Utah Supreme Court

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IN THE
SUPREME COURT

OF THE
STATE OF UTAH

FILED

NOV 8 1951

JOHN R. MITCHELL,

Appellant,

vs.

**MERLIN C. PALMER, FLOYD
PALMER, JOHN FRANK PAL-
MER, DAVE CLAIR PALMER
and LOLA ALICE SCHIESS, and
FLOYD PALMER As Trustee for
above named defendants,**

Respondents.

Clerk, Supreme Court, Utah

Case No.
7706

BRIEF OF RESPONDENTS

**RICHARDS & BIRD AND
DAN S. BUSHNELL,**

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The action was commenced by the appellant in the lower court against the respondents, children of the appellant's wife by a prior marriage, to rescind two warranty deeds as having been procured by fraud and

false representations. The appellant also sought to recover Two Thousand Five Hundred (\$2,500.00) Dollars as the proceeds of two Postal Savings Notes owned by the appellant's wife and the mother of respondents, which notes were cashed and the proceeds given to the respondents allegedly because of false representations (R. 1-4).

The respondents in answer to the complaint denied any fraud or misrepresentations and alleged as an affirmative defense that the property conveyed by the deeds challenged by the appellant was purchased with the proceeds received from the sale of the Idaho property owned by the respondents and if the deeds were held invalid, the respondents requested the court to impress a trust upon the property in their favor (R. 18-19).

The court held that the appellant had no interest in the postal notes and granted a non-suit as to them at the close of the appellant's case (R. 124). After final submission of the case the court held that there had been no fraud or false misrepresentations made by the respondents and upheld the challenged deeds as being valid. Since the court found that the deeds were valid and subsisting, it ruled that the question of impressing a trust upon the property was, therefore, moot (R. 235).

STATEMENT OF FACTS

The statement of facts as contained in the brief of appellant is substantially correct; however, the respond-

ents feel that additional facts should be called to the attention of the court.

In 1937, after the death of the respondent's father, at a time when all of the respondents were of age, Mrs. Mitchell, the mother of the respondents, and who in 1943 became the wife of the appellant, conveyed certain Idaho property owned by her to Floyd Palmer as Trustee for the benefit of himself and his other brothers and sister, reserving a life estate in her favor (Ex. 16). Shortly after the marriage of the appellant and the mother of the respondents, one of the homes on the Idaho property as above mentioned was sold to a Mr. and Mrs. Hendricks for the sum of Seven Thousand (\$7,000.00) Dollars (R. 130, Ex. 6). At this time all of the children gave quit claim deeds on the property to their mother to enable her to make the sale (Ex. 5), all of which was known by the appellant (R. 131). A down payment of Two Thousand (\$2,000.00) Dollars was made by the Hendricks with which the mother of the respondents purchased a Postal Savings Note in the same amount (R. 50, 51). The balance of the contract was paid at the rate of Fifty (\$50.00) Dollars per month plus interest and on December 30, 1946, a payment of Two Thousand Five Hundred Fifty-Three and 97/100 (\$2,553.97) Dollars was received in full on the contract (Ex. 13, R. 174).

In September of 1946, the second home on the Idaho property was sold to a Mr. Thomas Palmer for a purchase price of Ten Thousand Five Hundred (\$10,500.00) Dollars cash (R. 133). At the time of this sale quit claim deeds were again obtained from the respondents

with the knowledge of the appellant (R. 134) and at that time the appellant and Mrs. Mitchell moved to Salt Lake City and purchased a home referred to as the Garfield Avenue property for the sum of Six Thousand Seven Hundred Forty-Seven and 84/100 (\$6,747.84) Dollars (R. 135). In December of the same year they purchased a home on Wilmington Avenue referred to as the Wilmington property for a purchase price of Eight Thousand Five Hundred (\$8,500.00) Dollars (Ex. 11, R. 136). At the time of the sale of the second home in Idaho Mrs. Mitchell purchased a second Postal Savings Note in the sum of Five Hundred (\$500.00) Dollars (R. 51). The balance of the proceeds received from the sale of the second home in Idaho was applied on the purchase of the homes in Salt Lake City.

The parties, through their attorneys, stipulated after an examination of the bank statements of the appellant and Mrs. Mitchell that commencing with August 31, 1946, at which time there was a balance of \$1,841.60 in their joint checking account in the First Security Bank of Idaho at Preston, Idaho, all deposits subsequent to said date and until the Salt Lake properties were paid for were made by Mrs. Mitchell (R. 173-175). The more substantial ones were as follows: \$2,553.97 on December 30, 1946 (Ex. 13) and \$9,920.20 on September 24, 1946 (Ex. 14). Assuming equal ownership of the \$1,841.60 balance the most the appellant could have contributed to the purchase of the Salt Lake property was \$920.80. At the time of Mrs. Mitchell's death there was a balance

in the joint account of \$2,164.68 (Ex. 15), which appellant retained and most of which was derived from the sale of the Garfield property.

According to the respondents, at the time they executed quit claim deeds conveying the Idaho property back to their mother for the purpose of selling the same, it was understood among them and their mother that when she purchased the property in Salt Lake City, title to the same would be held in the same manner as title had previously been held to the Idaho property (R. 169).

When the Salt Lake property was purchased, title was taken in the name of the appellant and Mrs. Mitchell as joint tenants. During the early part of 1948 and on numerous other occasions, Mrs. Mitchell told Joel Hart, an attorney who had prepared the papers concerning the Idaho property, that she wanted the Salt Lake property to be fixed up the same way that the Idaho property had been (R. 158-162). On Decoration Day of 1948, Mrs. Mitchell was too ill to go to Preston, Idaho and as a result thereof Mr. Floyd Palmer came to Salt Lake City on the 31st day of May, 1948, to see how his mother was getting along. During this visit Mrs. Mitchell told Floyd Palmer in the presence of the appellant and Merlin Palmer that she would like to have the property fixed up the same way the Idaho property had been (R. 178, 202). As requested deeds were prepared conveying the Salt Lake homes to Floyd Palmer as Trustee, reserving a life estate in the appellant in the Wilmington Avenue home (Ex. D, E). These are the deeds which the appel-

lant seeks to set aside as having been obtained by fraud and misrepresentation.

The deeds were signed by the mother of the respondents at her home in the presence of the appellant and Merlin Palmer (R. 183). The appellant admits that he signed some documents at that time, but that he did not know they were deeds. Instead he claims he thought they were papers making Floyd Palmer Trustee of the postal notes. The respondents maintained that after Mrs. Mitchell signed the deeds, the appellant and Merlin Palmer went to the Hart Music Company in Sugar House and the appellant there signed the deeds in the presence of Joel Hart and Merlin Palmer (R. 184). After the execution and acknowledgment had been made, the deeds were handed to Merlin Palmer in the presence of the appellant (R. 185), and from that time on Merlin Palmer retained complete control and dominion over the same, even though they were deposited in a safety deposit box held in the names of himself and Mr. and Mrs. Mitchell (R. 192-193).

STATEMENT OF POINTS

POINT I.

THERE IS SUFFICIENT COMPETENT EVIDENCE TO SUSTAIN THE TRIAL COURT'S HOLDING THAT THE DEEDS WERE VALID IN ALL RESPECTS (REPLY TO APPELLANT'S POINTS 1, 2 AND 4).

POINT II.

THE COURT PROPERLY RULED THAT EVEN ASSUMING THE DEEDS WERE NOT ENTITLED TO BE RECORDED THAT FACT WOULD NOT AFFECT THEIR VALIDITY BETWEEN THE PARTIES TO THE DEEDS (REPLY TO APPELLANT'S POINT 3)

ARGUMENT

POINT I.

THERE IS SUFFICIENT COMPETENT EVIDENCE TO SUSTAIN THE TRIAL COURT'S HOLDING THAT THE DEEDS WERE VALID IN ALL RESPECTS (REPLY TO APPELLANT'S POINTS 1, 2 AND 4)

At the close of the trial, the court took the matter under advisement and subsequently dictated a decision. This decision was relied upon by counsel for the respondents as being sufficient to constitute Findings of Fact and Conclusions of Law and a judgment was prepared based thereon. Part of the court's decision is as follows:

"The first question presented is as to the validity of the two warranty deeds set forth in plaintiff's complaint, and which plaintiff seeks to have declared null and void on the grounds that said plaintiff's signature to said deeds was obtained by fraud and misrepresentation on the part of the defendants. The court sees no escape from the conclusion, and has no doubt, about the fact that the plaintiff, when he signed the two deeds involved in the action, being Exhibits D and E, signed the deeds knowingly and willingly,

and there were no misrepresentations as to the nature or contents of the instrument made by the defendants, or any of them; and the deeds, when signed, were complete except for the signatures of the grantors and the jurat of the notary; the court finds that the plaintiff knew and intended, when said instruments were executed, to convey to the grantee named therein any and all interest he had in the property described in the deeds, reserving only to himself a life estate in what is referred to as the Wilmington property, being Exhibit D; that said deeds are valid and subsisting deeds, and the plaintiff has a life estate in the Wilmington property described in Exhibit D." (R. 234).

It appears from the above statement that the decision rendered by the trial court was without any reservations or hesitancy as to what the facts established.

Since the errors urged by the appellant in Points 1, 2 and 4 are primarily concerned with the sufficiency of the evidence and the court having found in favor of the respondents the rule on appeal is fundamental that if there is any competent evidence to support the decision of the trial court said decision will be affirmed.

Only a portion of the evidence which supports the judgment of the trial court is reviewed herein. Joel Hart testified as follows upon cross-examination concerning a conversation had with Mrs. Mitchell at the time he prepared the deeds quit claiming the Idaho property back to Mrs. Mitchell:

- “Q. Who gave you the instructions and the direction to fill in those portions of each of these deeds which you have testified to having filled in?
- A. Mrs. Mitchell, originally.
- Q. At the time the deeds were made?
- A. At the time the property was * * * the deeds in Idaho were made. * * *
- Q. Well, that * * *
- A. * * * conveying away the property.
- Q. That was the deeds in Idaho, is that correct?
- A. But she mentioned that she wanted this property she was going to buy in Salt Lake fixed up the same way as the property was in Idaho.
- Q. Well, that was in Idaho she said that, wasn't it?
- A. It was in Idaho in view of property, or contemplated buying in Utah.” (R. 169)

After the appellant and Mrs. Mitchell had purchased the property in Salt Lake the same witness testified concerning a further conversation with Mrs. Mitchell and in the presence of the appellant, which occurred at the Sugar House Music Company in approximately February or April of 1947 (R. 158-162). His testimony is as follows:

“Mrs. Mitchell mentioned to me that she would like to have her property fixed up in the same manner which the Idaho property had been fixed, so that the children would be named as * * * or so that Floyd would be named * * * Floyd Palmer * * * would be named as Trustee for the rest of the children.” (R. 162)

Mr. Hart testified that he had other such conversations with Mrs. Mitchell (R. 162).

Merlin Palmer, one of the respondents, testified concerning a conversation had with his mother on May 31, 1948, in the presence of the appellant and his brother Floyd Palmer. Part of the conversation is as follows:

“Mother said that she would like the property put in the trusteeship in the same fashion it had been in Preston, Idaho—on the Preston, Idaho property—with Floyd as Trustee and all the rest of the children in it under him.” (R. 178)

In this same conversation the witness further testified that the appellant stated as follows:

“He said that all he wanted was a place to stay for the rest of his life, and mother said the same thing.” (R. 179)

Mr. Palmer further testified that at the request of his mother the appellant secured an envelope (Ex. 12) containing the deeds to both pieces of property from which legal descriptions were secured for the preparation of the deeds which the appellant seeks to have rescinded (R. 180-181).

Concerning the conversation on May 31 at the Wilmington home in the presence of the appellant, Floyd Palmer testified that his mother stated as follows:

“‘Floyd, while you are down here, I would like to have this property fixed the same as the

Idaho property was,' she says, 'I have just neglected doing it.' She said, 'I have been up to Mr. Richard's office once, going to have him do it, but he wasn't in.' She said, 'Mr. Mitchell and I went up, but he wasn't there,' and otherwise she just neglected having it done. She said, 'I would like to have this fixed up just as soon as possible.'" (R. 202)

Floyd Palmer further testified concerning this conversation:

"Mother stated, she says, 'I want this property fixed the same as it was in Idaho, or in Preston, but,' she says, 'in Preston, he had no life estate,' but she says, 'here, I would like to make some provision where he would have a place to live.' At that instant, Mr. Mitchell looked up; he was sitting in my father's over-stuffed leather chair; he looked up, he says, 'Yes, all I want is a place to live.'" (R. 202)

After the deeds had been prepared Merlin Palmer testified that Joel Hart placed one small cross on the deeds indicating the place where Mrs. Mitchell was to sign the deeds (R. 182, Ex. DE). Mr. Palmer then took the deeds to his mother's home where she signed them as indicated, after which Mr. Mitchell and Mr. Palmer returned to the Sugar House Music Company and Mr. Mitchell signed the deeds in the presence of Merlin Palmer and Joel Hart (R. 183, 184). After Mr. Mitchell signed the deeds and they were notarized by Mr. Hart, the deeds were given to Mr. Palmer in the presence of Mr. Mitchell (R. 185).

Concerning the credibility of the appellant's testimony and in corroboration of respondents' evidence the appellant himself admits signing an agreement (Ex. 1) soon after the death of Mrs. Mitchell which recites that furniture, household fixtures, appliances, etc., "will be held intact until dissolution of the life estate." Although the appellant claims he did not read the first part of the agreement he did check the listing of the items thereon and admits that he told the respondents that the furniture should stay with the house because he needed them (R. 60). At the same time, the appellant signed an agreement with the respondents (Ex. 2) by which it was agreed that the respondents would make no claims upon the bank account; however, the appellant was to pay all of the hospital and doctor bills pertaining to Mrs. Mitchell's last illness and the expense of burial, etc.

The appellant further admits that he did not receive any payments except one after Mrs. Mitchell's death from the purchasers of the Garfield Avenue property (R. 27). On March 25, 1949, a letter was written to the appellant by Floyd Palmer, one of the respondents (Ex. 3), in which Mr. Palmer makes a demand for the \$60.00 payment received by the appellant after Mrs. Mitchell's death and further states in the letter as follows:

"As to the life estate you have in the Wilmington property, you are to keep all expenses up on this property, also fire insurance."

In this same letter it is suggested that the respondents would build the appellant a home to live in at

Preston, Idaho, having in mind selling the Wilmington Avenue property. Although the appellant admits receiving this letter and discussing with Floyd Palmer the suggestion that he move to Idaho and also admits writing a card dated May 2, 1949 (Ex. 5), in which he tells Mr. Floyd Palmer that he has decided to stay in Salt Lake, the appellant testified that he did not know anything about the deeds and the life estate reserved to him until the early part of 1950 when a real estate agent investigated the records at the ~~City~~^{County} Recorder's office (R. 43). In view of this and other evidence, it is obvious that the court was justified, if not compelled, to hold that the appellant intended to make the conveyance shown by the deeds, which lack of intent is urged as error in the first point of the appellant's brief.

The second point questions the issue of delivery of the deeds. It is not disputed that the appellant did in fact deliver the documents which he signed; however, the appellant's position would appear to be that although there was a delivery in fact, such a delivery was not valid in law since it was obtained by fraud. But since the court found "there was no misrepresentation as to the nature or content of the instrument" and that the appellant signed the deeds "knowingly and willingly" and intended to convey any and all interest he had in the property except the life estate, it is obvious that the delivery in fact was a good delivery at law.

The appellant also challenged the delivery of the deeds on the ground that the grantors retained some control over the same. According to the respondents,

after the signing of the deeds at the Hart Music Company in Sugar House, Joel Hart then handed them to Merlin Palmer in the presence of the appellant (R. 171, 185). Merlin Palmer then deposited the deeds in a safety deposit box to which he and the appellant and Mrs. Mitchell all had access (R. 192-3). This Honorable Court has held that if there is a valid delivery initially, the fact that the deed is left in a place equally accessible to the grantors and grantees will not render the delivery invalid. *Wilson v. Wilson*, 32 Utah 169, 176, 89 P. 643; *Chamberlain v. Larsen*, 83 Utah 420, 438, 29 P. 2nd 355.

The appellant also offered evidence to the effect that the deeds were not recorded because there was a possibility that the Wilmington property would be sold and the proceeds used to purchase a duplex for Mrs. Mitchell which would give her a place to live and income during her life. It is not disputed that such was the reason for not recording the deeds; however, the respondents submit that such fact does not support the contention that there was not a valid delivery. Respondents were dealing with their mother and if she would have been happier in a duplex, they naturally were willing to transfer their interest in the two homes into a duplex subject to a life estate.

At the time of the sale of the Idaho property it was an inconvenience to prepare and secure quit claim deeds from all of the children. At the time of the conveyance of the Salt Lake property to the respondents there was a "For Sale" sign on the Wilmington property and the

possibility of a sale was anticipated. If the deeds were recorded, it would again be inconvenient to secure deeds from all of the children if the transfer of interests were made upon the purchase of a duplex. No doubt the respondents and their mother contemplated that if a sale were made, the deeds would be cancelled and new deeds prepared arranging title in the same manner on the duplex. However, this possibility was in no way asserted as a condition upon the delivery of the deeds. The request not to record the deeds does not without more constitute a conditional delivery of the same.

In *Wilson v. Wilson*, 32 Utah 169, 89 P. 643, the father as grantor had deeds prepared conveying numerous tracts of land to his sons and had the deeds given to one of the grantees who placed them in a safety deposit box to which the grantor also had access. The grantor remained in possession of the residence, which was conveyed by one of the deeds, and otherwise participated and lived off from the business also conveyed to the sons.

In *Woolley v. Taylor*, 45 Utah 227, 144 P. 1094, a father had a deed prepared conveying his home to his daughter, which deed was given to the grantee after execution and acknowledgment but was not recorded until after the grantor's death. During the remainder of the grantor's life he resided in the home, paid the insurance and taxes, and made improvements thereon.

In *Chamberlain v. Larsen*, 83 Utah 420, 29 P. 2d 355, the grantor had a deed prepared conveying the property to her sister. The conveyancer thought he gave the

deed back to the grantor after acknowledging her signature. The deed was kept in a safety deposit box in the name of the grantor; however, both the grantor and grantee went to the box together on numerous occasions. There was testimony that after the date of the deed the grantor stated she wanted to sell the property. Also the grantor paid the insurance and taxes until her death. After the grantor's death the grantee stated that she did not know whether the place was hers or whether it went to someone else.

In all three cases the Supreme Court held there was a valid delivery. In the *Chamberlain* case the trial court held there was not a valid delivery, which ruling was reversed on appeal. In these cases the court has stated two rules which should be applied to this case.

First: That a deed duly executed and acknowledged and shown to be in the possession of the grantee is self-proving both as to the execution and delivery and the presumption raised by such facts can only be rebutted by clear and convincing evidence.

Second: That a delivery may be made which is sufficient to convey a present interest to be enjoyed in the future. Such being the case continued acceptance of the benefits and assumption of the burdens of the property by the grantor is not inconsistent, especially when a family relation exists, with a valid delivery of the deeds.

After reviewing the file in this action having in mind the law developed in the three cases mentioned above,

the conclusion that the trial court correctly decided the case cannot be denied.

Point 4 of the appellant's brief claims there was error in not considering the question of intent and delivery of the deeds which is obviously the same issue raised by Points 1 and 2 as herein discussed. In line with the recent Utah Supreme Court case of *Morley v. Willden, et al.*, 235 P. 2d 500, it appears sufficient to state that, "A careful examination thereof (the record) leads us to conclude that the trial court's findings and decision are supported by a fair preponderance of the evidence and should remain undisturbed, * * *."

POINT II.

THE COURT PROPERLY RULED THAT EVEN ASSUMING THE DEEDS CHALLENGED HEREIN WERE NOT ENTITLED TO BE RECORDED THAT FACT WOULD NOT AFFECT THEIR VALIDITY BETWEEN THE PARTIES TO THE DEEDS (REPLY TO APPELLANT'S POINT 3).

1. The court in its decision stated as follows:

"Questions have been raised about the deeds not being certified or acknowledged in the ways provided by the statutes of Utah. So far as this case is concerned, that matter is of no consequence, as an acknowledgment is not necessary to the validity of a deed as between the parties, and is a requirement merely with respect to recordation." (R. 235)

There can be no question but what the court's deci-

sion, as quoted above correctly states the law in Utah. Title 78, Chapter 1, Section 6, 1943, Utah Code Annotated as amended provides in part as follows:

“Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the Recorder of the County in which such real estate is situated, but shall be valid and binding between the parties thereto without such proofs, acknowledgment, certification or record, and as to other persons who have had actual notice.”

This provision of the present law is substantially identical with a similar section of the earlier laws of Utah as construed in *Murray v. Beal*, 23 Utah 548, 65 P. 726, which held that an instrument need not be validly acknowledged in order to be effective between the parties.

CONCLUSION

The evidence not only fails to show by clear and convincing proof that there was no delivery of the deeds or that the appellant did not intend to convey the property, but rather the court was compelled to find that the appellant knowingly and willingly made the conveyances and that there was a valid delivery of the deeds. The decision as dictated by the court shows the court had no doubt concerning the facts established by the evi-

dence. Considering the statutory and case law of Utah, it is manifest that the decision of the court based upon such facts was legally compelled. The decision required by the record and the law is likewise a fair and equitable determination of the case and therefore should be affirmed.

Respectfully submitted,

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