

1979

# Gold Oil Land Development Corporation, A Corporation v. Steven C. Davis And Kristi Ann Davis, His Wife, Wade R. Davis And Hrs. Wade Davis, His Wife, And Leo M. Bertagnole, A Single Man : Brief of Appellant Steven C. Davis

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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GOLD OIL LAND DEVELOPMENT )  
CORPORATION, a corporation, )  
Plaintiff and Respondent, )

vs. )

Supreme Court No. 16461

STEVEN C. DAVIS and KRISTI )  
ANN DAVIS, his wife, WADE R. )  
DAVIS and MRS. WADE DAVIS, )  
his wife, and LEO M. )  
BERTAGNOLE, a single man, )  
Defendants and Appellant. )

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BRIEF OF APPELLANT  
STEVEN C. DAVIS

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IN THE SUPREME COURT OF THE STATE OF UTAH

GOLD OIL LAND DEVELOPMENT )  
CORPORATION, a corporation, )

Plaintiff and Respondent, )

vs. ) Supreme Court No. 16461

STEVEN C. DAVIS and KRISTI )  
ANN DAVIS, his wife, WADE R. )  
DAVIS and MRS. WADE DAVIS, )  
his wife, and LEO M. )  
BERTAGNOLE, a single man, )

Defendants and Appellant.)

BRIEF OF APPELLANT  
STEVEN C. DAVIS

STATEMENT OF FACTS

In early 1977, Steven C. Davis became associated with Gold Oil Land Development Corporation, plaintiff-respondent herein (hereinafter referred to as "Gold"), a business enterprise concerned with the promotion and development of real property located in Utah County.

Defendant-Appellant Davis' involvement with Gold was precipitated by his acquaintance with Verdi R. White, Sr., chairman of the board of Gold.

During the period of his involvement with Gold, including the period encompassed by this cause of action, defendant-appellant Davis' activities were directed toward the prevention and resolution of disagreements with Gold

and purchasers of the property in Utah County in which Gold had acquired an option interest and securing other purchasers for the remaining acreage in this 142-acre tract.

The issue presented to the trial court was the validity of certain conveyances of acreage in the aforementioned tract of real estate. The first conveyance in question is a quit-claim deed dated March 17, 1977, and recorded in the office of the Utah County Recorder on May 3, 1977, as Entry Number 13261 (Defendants' Exhibit Number 1), wherein Gold conveyed approximately 12-1/2 acres to Leo M. Bertagnole. The second conveyance in question was evidenced by a quit-claim deed dated May 3, 1977, and recorded in the office of the Utah County Recorder as Entry Number 13263 on May 3, 1977 (Defendants' Exhibit Number 3), wherein Leo M. Bertagnole conveyed approximately 10 acres to Steven C. Davis and his wife, Kristi Davis.

The final judgment of the trial court determined also the effect of a subsequent conveyance by Steven Davis and Kristi Davis of approximately 10 acres. This transaction appears in the record as a warranty deed executed May 2, 1978, and recorded in the office of the Utah County Recorder, Entry Number 23471, on June 15, 1978. (Defendants' Exhibit Number 2). The court also determined the effect of the quit-claim deed acknowledged April 4, 1977, and recorded May 3, 1977, in the office of the Utah County Recorder

where approximately 12-1/2 acres were conveyed by Steven C. Davis and Kristi Davis to Leo M. Bertagnole.

Preliminary inquiry into the background of this lawsuit is essential. Hard feelings which culminated in this action arose between Verdi R. White, Sr., and Steven C. Davis in March, 1977, after Mr. White's return from a vacation. These hostilities were resultant from the senior Mr. White's categorization of Mr. Davis' activities during Mr. White's absence from the state. For reasons and by means irrelevant to this instant action, Mr. Davis had recorded a warranty deed from Gold to Steven C. Davis and Kristi Davis of approximately 142 acres in Utah County. (Plaintiff's Exhibit Number 12). Previously, in December, 1976, Gold had obtained from Mack Jacobsen and E. D. Jacobsen an option agreement for the purchase of approximately 142 acres in Utah County, the subject property of the aforementioned deed. (Plaintiff's Exhibit Number 4).

Upon learning of the above-described conveyance to Steven Davis and Kristi Davis, Mr. White, on behalf of Gold, is depicted as attempting to recover the property conveyed in the aforesaid warranty deed and to end the association with Mr. Davis.

On March 16, 1977, defendant-appellant Davis and Verdi R. White, Sr., met in the offices of James B. Medlin, an attorney, in an attempt to reconcile their differences.



Resultant from this meeting was an agreement (Plaintiff's Exhibit Number 4) wherein Steven C. Davis was given until 5:00 p.m., March 18, 1977, to consummate the negotiations currently in progress with Leo M. Bertagnole for the purchase of approximately 12-1/2 acres in Utah County. Furthermore, regardless of the outcome of the negotiations with Mr. Bertagnole, Steven Davis and Kristi Davis were to reconvey to Gold the entire Salem Hills acreage which Gold had acquired from Mack and E. D. Jacobsen.

The Salem Hills property was duly reconveyed to Gold and was not a matter in controversy at trial.

However, the negotiations between Steven C. Davis and Verdi R. White, Sr., Verdi R. White II, Fred Mowrey, James Medlin, and Leo M. Bertagnole on March 17 and March 18, 1977, were the subject of the instant trial.

Defendant-appellant Davis and defendant Leo M. Bertagnole maintained that all concerned parties had agreed on March 18, 1977, that Leo M. Bertagnole would purchase the acreage in question for \$10,000. The defendants further contended that the documentary proof of this consummated transaction is evidenced by an earnest money receipt and offer to purchase (Defendants' Exhibit Number 5), a check for the consideration price stated in the earnest money receipt and offer to purchase (Defendants' Exhibit Number 6), and a warranty deed from Gold to Leo M. Bertagnole (Defendants' Exhibit Number 1).

The plaintiff asserted at trial that, in accordance with the agreement prepared by Mr. Medlin (Plaintiff's Exhibit Number 4) and a letter from Verdi R. White, Sr., to Leo M. Bertagnole dated March 17, 1977 (Plaintiff's Exhibit Number 10), the negotiations for the purchase of the 12-1/2 acres in Salem Hills was never consummated. The plaintiff further contended that the four deeds described earlier evidencing various interests in this parcel of land were invalid and defective.

The trial court found that there may have been a conditional delivery of the deed from Gold to Leo Bertagnole but that the stated conditions were not met and thus the deeds in question were void of any legal force and effect.

Defendant-appellant Davis believes that the trial court erroneously decided that the deed from Gold to Leo Bertagnole was conditionally delivered, that the conditions were never fully complied with, and that the deeds from Leo Bertagnole to Steven Davis and Kristi Davis and from Steven Davis, Kristi Davis, and Wade Davis and the deed from Steven C. Davis and Kristi Davis to Leo Bertagnole were null and void.

#### DISPOSITION IN THE LOWER COURT

Trial in this matter was held on April 2, 1979, in the District Court of Salt Lake County.

On April 12, 1979, the Honorable J. Robert Bullock, judge of the District Court of Salt Lake County, State of

Utah, found that the delivery of a quit-claim deed to defendant Leo M. Bertagnole was conditional.

Furthermore, Judge Bullock found that the conditions necessary to effectuate a valid absolute delivery to defendant Leo M. Bertagnole had never been performed.

Lastly, the trial judge voided all subsequent conveyances of the subject property by defendant Leo Bertagnole and his grantees.

#### RELIEF SOUGHT ON APPEAL

Defendant-appellant Steven C. Davis seeks to have the lower court's decision reversed as a matter of law; in the alternative, the defendant-appellant seeks to have this court remand the matter to the lower court for a factual hearing on the merits of this case.

#### FIRST ARGUMENT

DID THE PLAINTIFF SUSTAIN ITS BURDEN  
OF PROOF AT TRIAL?

PLAINTIFF-RESPONDENT ANSWERS "YES."

DEFENDANT-APPELLANT ANSWERS "NO."

Parenthetical references found in the body of this brief are abbreviated so that "T" refers to testimony recorded in the trial transcript at the pages designated.

Defendant-appellant's initial argument, that the plaintiff did not sustain its burden of proof at the trial, is delineated into the following three distinct points:

1. That the findings of the lower court are not supported by competent evidence.

2. That much of the testimony and evidence presented at trial had no probative value in determining a central issue in dispute, as it dealt with matters remote in time; and

3. That the evidence clearly preponderates against the findings made by the trial court.

Each of these points are addressed below in the order rostered above.

The trial court concluded that "at best, there was a conditional delivery" and that the recorded deeds had no legal force and effect as the conditions precedent to a valid delivery thereof were never satisfied. (T166, T167).

Determination of whether there was an absolute delivery or conditional delivery of the quit-claim deed from the plaintiff-respondent to Leo M. Bertagnole (Defendants' Exhibit Number 1) was premised upon testimony of Verdi R. White, Sr. (T16, T17, T18, T25, T26), Fred Mowrey (T44), Steven Davis (T80, T81, T83), and Leo M. Bertagnole (T106) and a carbon copy of a letter purporting to state specified conditions precedent to the consummation of the conveyance of real estate to Leo M. Bertagnole. (Plaintiff's Exhibit Number 10).

Verdi R. White, Sr., testified at trial (T26) that the letter containing escrow instructions (Plaintiff's Exhibit Number 10) was dictated by him to Steve Davis. However, Mr. White could not recall affixing his signature to this document (T26). The original letter was not produced at trial, and Mr. White's signature on this letter (Plaintiff's Exhibit Number 10) cannot be proven or disproven. Therefore, the assumption of the trial court that Mr. White did commit himself, by the physical act of signing his name, to the stated principles and intentions is logically faulty and subject to great non-persuasion and disbelief. There was no testimony from any other witness that would categorically affix Mr. White's signature to this document (Plaintiff's Exhibit Number 10) and which would support the findings of the trial court.

Absent competent testimony that Mr. White did sign the document (Plaintiff's Exhibit Number 10), a reasonable belief that Mr. White did not intend to impose the conditions expressed within the document (Plaintiff's Exhibit Number 10) upon the negotiations for the sale of the 12-1/2 acres to Mr. Bertagnole should be sustained. Mr. White, Sr., dictated the document's contents and was present when the document was drafted. Logic mandates that Mr. White, Sr., would have immediately signed this letter (Plaintiff's Exhibit Number 10) if he were indeed attempting to impose the conditions therein on these negotiations. Furthermore, it

is only logical that Mr. White, Sr., would be able to recall signing this document (Plaintiff's Exhibit Number 10).

At trial, however, it was never demonstrated that Mr. White, Sr., signed the letter (Plaintiff's Exhibit Number 10) or even that he recalled doing so. It is defendant-appellant Davis' contention that there is no competent testimony or evidence indicating that the letter was signed by Verdi R. White, Sr. Certainly, if the person authorized to make business transactions and negotiations conditional fails to do so, it is neither within the prerogative or the ability of the trial judge to manufacture the existence of the conditions precedent. To blithely leap the parameters of logic and reasonableness alters the complexion of the litigation before the court and manifestly prejudices the party against whom the assumed conditions are imposed.

Substantiation that the letter drafted March 17, 1977 (Plaintiff's Exhibit Number 10), and the aforescribed testimony relating to the contents therein are not competent evidence is found in 31 Corpus Juris Secundum, Evidence, Section 2, at page 816:

By "competent" evidence is meant that which the very nature of the thing to be proved requires as the fit and appropriate proof in the particular case. "Competent evidence" means evidence which tends to establish the fact in issue and does not rest on mere surmise or guess...

Precedential case law from this state's highest court also demands the introduction and consideration of competent evidence.

An offer of proof must be certain, sufficient, and intelligible and must definitely state the facts sought to be proved. It must show the materiality, competency, and relevancy of the evidence offered. Dansak v. Deluke, 12 Utah 2d 302, 366 P.2d 67, 70 (1961).

Conjecture of the purest form and testimonial extrapolation premised upon surmise and guess were proffered to prove that Verdi R. White, Sr., did affix his name to the letter drafted March 17, 1977 (Plaintiff's Exhibit Number 10), and that the negotiations for the sale of the Salem Hills property was structured by conditions precedent. Such evidentiary offerings are clearly beyond the realm of competent evidence and must be found inadmissible. Dansak, supra.

Clearly, the assumption by the trial judge that the sale of the parcel of property in Salem Hills to Leo Bertagnole was conditional merely because several parties to the transaction were involved in the drafting of a letter detailing a future desire to impose conditions upon the transaction is erroneous and constitutes patently harmful error to the defendant-appellant Davis.

The above-complained of assumption by the trial judge manifestly falls within the test utilized by the Supreme

Court of Utah in Del Porto v. Nicolo, 27 Utah 2d 236, 495 p.2d 811 (1972), to determine if reversible error was committed. The court stated at page 814:

To be considered along with the foregoing is this further proposition relative to errors which are assigned in attempting to reverse a judgment: the inquiry is not merely whether some error may have been committed. It is whether there was any error of a sufficient nature that it is reasonable to believe that it adversely affected the appellant or deprived him of a fair trial in such a way that in the absence of such error there is a reasonable likelihood that the outcome would have been different.

Certainly, the erroneous categorization of the delivery of the quit-claim deed to Leo Bertagnole (Defendants' Exhibit Number 1) as being conditional rather than absolute altered the probable outcome of this litigation. Furthermore, the erroneous characterization which was formulated upon a faulty assumption premised upon non-persuasive testimony is so egregious to defendant-appellant Davis that reversal of the lower court's findings is the only mandated course of action.

In conjunction with the testimony of Verdi R. White, Sr. (T16, T17, T18, T25, T26), Fred Mowrey (T44, T80, T81), Steven Davis (T80, T83), and Leo Bertagnole (T106) regarding the contents of the letter of March 17, 1977 (Plaintiff's Exhibit Number 10), the court utilized the document (Plaintiff's Exhibit Number 10) to substantiate its findings



that the delivery of the quit-claim deed to Leo Bertagnole was conditional.

The document (Plaintiff's Exhibit Number 10) is not competent, admissible evidence and should not have been given significant credibility by the trial court. Counsel for the defendant-appellant Steven Davis objected at trial (T17) that the letter (Plaintiff's Exhibit Number 10) was violative of the original document or "best evidence" rule.

McCormick, in his book, The Handbook Law of Evidence, 1954, at page 409, defines this rule in the following manner:

The specific tenor of this requirement needs to be definitely stated and its limits clearly understood. The rule is this: in providing the terms of a writing, where such terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent.

Among the policy reasons given for this rule, Professor McCormick, supra, cites a rationale that is explicitly appropriate to this cause of action:

The policy justification for the rule preferring the original writing lies in the fact (a) that precision in presenting to the court the exact words of the writing is of more than average importance, particularly as respects operative or dispositive instruments, such as deeds, wills, and contracts, since a slight variation in words may mean a great difference in rights. . . .  
McCormick, supra, at page 410.

At trial conclusive substantiation that the negotiations with defendant Bertagnole were conditional were

almost exclusively dependent upon a carbon copy of the letter drafted March 17, 1977. (Plaintiff's Exhibit Number 10). No viable explanation was proffered at trial which accounted for the absence of the original letter.

It is not the author's intent to suggest that there were any alterations made. In large part, the "best evidence" rule was promulgated to prevent the introduction and utilization of untrustworthy evidence at trial. However, the point cannot too strongly be made that the original letter was not produced at trial nor was there any accounting made for the non-availability of the original. Essentially no precautions were taken to assure that altered evidence was not before the court for consideration.

Furthermore, the carbon copy of the letter (Plaintiff's Exhibit Number 10) was improperly admitted into evidence. Assuming that this document (Plaintiff's Exhibit Number 10) is secondary evidence, the uncontroverted reality is that the exhibit was accepted in evidence in total absence of a foundation for its admissibility being laid. 32 Corpus Juris Secundum, Evidence, Section 882, page 163. Stevens v. Gray, 259 P.2d 889 (1953).

This piece of evidence (Plaintiff's Exhibit Number 10) is violative of the "best evidence" rule. Furthermore, justification for the submission of a copy was never tendered, nor was there any attempt made to lay a foundation

for its acceptance as secondary evidence. Fatally defective for so many reasons, it (Plaintiff's Exhibit Number 10) should never have been a determinative factor in the resolution of this action.

Equally significant and deserving of careful attention is the intended utilization of this carbon copy. (Plaintiff's Exhibit Number 10). Any credence given to the contents of the letter (Plaintiff's Exhibit Number 10) significantly changes the legal meaning of not only the quit-claim deed from plaintiff-respondent to defendant Bertagnole (Defendants' Exhibit Number 1) but also all subsequent conveyances such as that from defendant Bertagnole to defendant-appellant Davis. (Plaintiff's Exhibit Number 3).

This legal metamorphosis was accomplished in direct contravention of the ancient sagacious mandate that a deed must be construed as any other document, that is by first referring to the four corners of the instrument itself.

The conveyance from plaintiff-respondent to defendant Leo Bertagnole was effectuated by a quit-claim deed that is absolute on its face. (Defendants' Exhibit Number 10). Likewise, there are no expressed conditions appearing on the conveyance from defendant Bertagnole to defendant-appellant Davis. (Plaintiff's Exhibit Number 3).

It is incumbent that the grantor clearly evidences his intent whenever appropriate. Verdi R. White, Sr.,

had ample opportunity to ensure that language making the conveyance to Leo Bertagnole (Defendant Exhibit Number 1) conditional appear on the face of this instrument. (Defendants' Exhibit Number 1).

Whether this elementary precaution was intentionally or unintentionally neglected is of no legal consequence. The conveyance from plaintiff-respondent to defendant Bertagnole and all subsequent transfers involving the Salem Hills property and the parties to this action must be proclaimed valid. Where construction of a deed is necessary to determine an individual's interest in real property, the deed is construed in favor of the grantee and in favor of vesting title. 4 Tiffany Real Property, Section 978. Meagher v. Uintah Gas Co., 225 P.2d 989 (Utah 1953).

Judicial adherence to the above-stated proposition by the Supreme Court of Utah is also found in Wood v. Ashby, 253 P.2d 351 (1953), at page 353:

It is generally concluded that a deed is to be construed most strongly against the grantor and most favorably to the grantee. (Citations in text omitted.) It is also construed that in this state that a deed should be construed so as to effectuate the intentions and desires of the parties, as manifested by the language made use of in the deed. (Citations in text omitted; emphasis added by author.)

The language "hereby quit-claims" found in the deed from the plaintiff-respondent to the defendant Leo Bertagnole

(Defendants' Exhibit Number 1) indicates a contemporaneous desire to effectuate the conveyances to defendant Bertagnole. Adherence to the language of present intent utilized by the plaintiff-respondent and the axiomatic proposition construing a deed in favor of the grantee is resultant in a valid conveyance from plaintiff-respondent to defendant Bertagnole.

In a decision that was grievously erroneous and singularly prone to disdain the "best evidence" rule and case law precedent from this jurisdiction, the trial court declared invalid the interests of defendant Bertagnole and defendant-appellant Davis to the property in Salem Hills because certain conditions precedent were not met. A judicially proper determination of defendant-appellant Davis' interest in the ten acre parcel of land in Salem Hills is possible only by a reversal of the lower court's decision.

The action initiated by the plaintiff-respondent focused upon the rightful ownership of approximately 12-1/2 acres of real property in the Salem Hills area of Utah County.

As evidenced by the matters specifically rostered in its complaint, the plaintiff-respondent petitioned the court to consider and arbitrate only those transactions involving the parties named in this action and the conveyance of this acreage in Salem Hills.

Indeed, the issue presented to the court was not overly complex in substance or chronological occurrences.

However simple the issue central to this action, presentation of the plaintiff-respondent's prima facie case was notable for the inordinate amount of time devoted to the presentation of testimony and evidence utterly lacking in probative value essential to deciding it.

Nearly all of this cumbersome testimony and evidence dealt with events preceding the negotiations between the parties to this suit for the divesture of the 12-1/2 acres from plaintiff-respondent.

Every witness who testified at trial was requested or allowed to explain their particular knowledge of the development of the Salem Hills area in Utah County and the business associations between the parties involved in this action. Verdi R. White, Sr. (T7, T8, T9, T10, T11, T24, T30, T128, T129); Fred Mowrey (T35, T36, T37, T38, T39, T42, T46, T47, T48, T49); Steven C. Davis (T52, T53, T54, T45, T57, T58, T59, T60, T61, T62, T63, T64, T65, T66, T67, T69, T70, T71, T72, T73, T75, T76, T77, T92, T137, T138, T144); Leo M. Bertagnole (T101, T102, T103, T104, T108, T111, T113, T114).

Inquiring into the above-described matters was not conducive to a judicial pronouncement characterized by its unwavering impartiality or intelligibleness.

Nearly every communication detailing the background of this action was irrelevant and immaterial. Dansak,

supra. Such digressions should have been quickly halted. Each item of documentary evidence explaining historical matters preceding this action, such as Plaintiff's Exhibit Number 9, dealt with matters collateral to the primary subject of this action and was totally void of any probative value.

Much of these incidental offerings of background data were unsympathetic and prejudicial to defendant-appellant Davis' posture before the court. Note the judge's characterization of the proceedings as "argumentative." (T67).

Additionally, the effect of this cumulative, non-probative testimony was to confuse the attorneys and the judge. Note the court's difficulty in relating the testimony being given and the subject matter of this litigation. "How do you get to the 12-1/2 acres?" (T62) "I think that is true, Mr. White. I have difficulty in relating it to the 12-1/2 acres that I thought was the subject of this lawsuit." (T68).

The defendant-appellant Steven Davis is mindful and appreciative of the effort evidenced by the trial court to comprehend the issues presented at trial and to relate the testimony offered in court to the subject matter of the lawsuit. No fault may be found with the trial court's attentiveness at trial.

The matter of particular concern to defendant-appellant Davis is that numerous matters which were not germane to

the central issue were allowed to obliterate the issue at hand and possibly preclude a clear and fair consideration of the merits of this litigation. Thus, the defendant-appellant petitions this court to reverse the decision of the lower court or to remand the matter for retrial without the taint of the aforescribed irrelevant matters.

Testimony from several witnesses clearly indicated that the plaintiff-respondent was amendable to the purchase of the option for the 12-1/2 acres by Leo Bertagnole for the sum of ten thousand dollars (\$10,000). Steven Davis stated that Verdi R. White, Sr., and other associates of the plaintiff-respondent were present in Leo Bertagnole's office and uttered no objections when the purchase price of ten thousand dollars (\$10,000) for the option on the 12-1/2 acres was agreed upon. (T76, T77, T78, T79, T80, T90, T96, T135). Leo Bertagnole also testified that all the parties involved were reconciled to the purchase price of ten thousand dollars (\$10,000). (T105, T109, T118, T119, T120, T121). Fred Mowrey testified that Verdi R. White was present during the negotiations for the purchase price but left before the earnest money agreement was drawn up. (Defendants' Exhibit Number 5). (T49).

On March 18, 1977, subsequent to the agreement that Leo Bertagnole was to purchase the option for the 12-1/2 acres for the sum of ten thousand dollars (\$10,000), an



earnest money agreement (Defendants' Exhibit Number 5) was drafted. This earnest money agreement (Defendants' Exhibit Number 5) is signed by Leo Bertagnole and defendant-appellant Davis.

The stated consideration of one hundred dollars (\$100) (Defendants' Exhibit Number 5) was paid to Jim Medlin, an attorney who was acting as an agent for both Verdi R. White, Sr., the plaintiff-respondent's president, and Steven Davis, the defendant-appellant. (Defendants' Exhibit Number 6). (T109, T110).

Upon execution of the earnest money agreement (Defendants' Exhibit Number 5), Leo Bertagnole was given a quit-claim deed (Defendants' Exhibit Number 1). This quit-claim deed (Defendants' Exhibit Number 1) was prepared in the office of Mr. Bertagnole.

Jim Medlin was an attorney who was openly representing Verdi R. White, Sr., the president of plaintiff-respondent, and defendant-appellant Steve Davis. During the two-day period that negotiations for a mutually agreeable purchase price were being conducted, Mr. Medlin was vested with the ostensible authority to bind the plaintiff-respondent. To argue that he could not bind the plaintiff-respondent is a non-meritorious, untenable position. Restatement of Agency, 2d, Section 170.

Numerous decisions from the Supreme Court of this state support the proposition that the principal will be

bound by the acts of his agent. B and R Supply Company v. Bringham, 28 Utah 2d 442, 503 P.2d 1216 (1972); Skerl v. Willow Creek Coal Company, 92 Utah 472, 69 P.2d 502 (1973); Santi V. Denver and Rio Grand Western Railroad Company, 21 Utah 2d 155, 442 P.2d 921 (1968).

However, we recognize that there may be circumstances created by the principal, or for which it is responsible, and upon which a third party reasonably can and does rely, and in which instance the principal may be bound by the representation made. Santi, supra.

Clearly, Verdi R. White, Sr., was instrumental in catalyzing the manner and method by which the negotiations with the defendant Bertagnole were conducted. Likewise, the plaintiff-respondent is bound by the agent Medlin's acceptance of the ten thousand dollars (\$10,000) as the purchase price, the one hundred dollar (\$100) consideration, and the executed earnest money agreement. (Defendants' Exhibit Number 5).

Shortly thereafter, defendant-appellant Steve Davis and Kristi Davis conveyed their interest in this property to Kristi Davis and Wade Davis. (Defendants' Exhibit Number 2). This deed was also recorded.

The evidence presented at trial to document the purchase price that was acquiesced to by all the concerned parties, the valid delivery and recordation of each conveyance undeniably preponderates and overwhelms any evidence attempting to prove the antithesis of the above.

There can be no defensible argument that the trial court's decision is correct. Significant evidence of considerable quantity and quality substantiates a conclusion totally antithetical to that of the trial court.

In the time honored and universally accepted rule that a finding or verdict must be supported by substantial evidence, the modifying objective "substantial" has been used advisedly to indicate a higher degree of proof than just any evidence of any kind. The requirement is that the evidence must be sufficient in amount and credibility that, when considered in connection with the other evidence and circumstances shown in the case, would justify some, but not necessarily all, reasonable minds acting fairly thereon, to believe it to be truth. And conversely, if when so considered, the court is convinced that it is so inconsequential, or so clearly lacking in credibility, that no jury acting fairly and reasonably could so believe, it cannot properly be regarded as substantial evidence. Utah State Road Commission v. Steele Ranch, 533 P. 2d 838 (1975) at page 890.

The testimony of the witnesses Mowrey, Bertagnole, and Davis paralleled and corroborated that of one another for the most part. Even where there are different recollections of events or discrepancies, they are minor.

Defendant Bertagnole's interest in the 12-1/2 acres in Utah County was filed and recorded. The quit-claim deed which evidences his interest in the property (Defendants' Exhibit Number 1) is not apparently conditional, nor are the recorded conveyances to defendant-appellants Steven Davis, Kristi Ann Davis, and Wade Davis.

Reason and logic dictate the correct conclusion that there was a valid delivery and conveyance of the involved acreage to the defendant Bertagnole and the defendant-appellant herein.

The determination made by the trial court as the fact finder in this instance is flagrantly erroneous. Careful examination of the relevant facts, testimony, and evidence permits no other conclusion. Incapable of being supported by the record in this matter and unabashedly pejorative of the interests of the defendant-appellant Davis, the lower court's decision must be reversed.

#### SECOND ARGUMENT

WAS THERE A VALID DELIVERY OF THE  
QUIT-CLAIM DEED FROM GOLD OIL LAND  
DEVELOPMENT CORPORATION TO LEO M.  
BERTAGNOLE?

DEFENDANT-APPELLANT ANSWERS "YES."

PLAINTIFF-RESPONDENT ANSWERS "NO."

Defendant-appellant Davis contends that the decision of the lower court must be reversed as it is in absolute, direct contravention of the judicial precedent found in this state and numerous other jurisdictions.

Sagacious adherence to the legal axiom that a decision of a lower court will not be disturbed except for reasons judicially sanctioned is abundant in the case law of this

jurisdiction. Elton v. Utah State Retirement Board, 28 Utah 2d 368, 603 P.2d 137 (1972). Utah State Road Commission v. Steele Ranch, 533 P.2d 888 (1975). Branch v. Western Factors, Inc., 28 Utah 2d 361, 502 P.2d 570 (1972).

However, as is noted in Elton, supra, and Hardy v. Hendrickson, 27 Utah 2d 251, 495 P.2d 28 (1972), a manifest misapplication of the law by the trial court requires a reversal of the lower court's decision.

On appeal, the evidence is viewed in the light most favorable to sustain the lower court, and the findings will not be disturbed unless they are clearly against the weight of the evidence or it manifestly appears that the court misapplied the law to the established facts. Hardy, supra, at pages 29 and 30 (citations in text omitted).

It should also be noted that, in this instance, the decision of the lower court is not to be cloaked with any presumption of accuracy as the subject matter of this appeal dictates that the defendant-appellant be given a trial de novo by this court.

It is true, as plaintiff asserts, that this action to avoid deeds is one in equity upon which this court has both the prerogative and the duty to review and weigh the evidence and to determine the facts. Del Porto, supra, page 812.

Adhering to this tenor of a judicially sanctioned trial de novo, the Utah Supreme Court, in Lake v. Hermes Associates,

552 P.2d 126 (1976), delineated its task of interpreting the documentary evidence admitted at trial.

The defendant places reliance on the standard presumption of credibility and verity to be accorded the findings and judgment of the trial court. However, in a case of this nature, where the resolution of the controversy depends on the meaning to be given documents, the trial court is in no more favored position and is no better able to determine the meaning of such documents than is this court. Therefore, as to such an issue, those presumptions do not apply. Lake, supra, at 128.

The contention of the defendant-appellant Davis that the lower court erroneously applied the controlling law to this cause of action is premised upon a dual-pronged argument. First, defendant-appellant Davis maintains that the earnest money agreement (Defendants' Exhibit Number 5) embodies all the terms relevant to the conveyance of property by the plaintiff-respondent to defendant Leo Bertagnole.

The earnest money receipt (Defendants' Exhibit Number 5) was drafted on March 18, 1977 (T42, T45, T76, T77, T78, T109, T110, T119), one day antecedent to the letter of March 17, 1977 (Plaintiff's Exhibit Number 10) (T16, T17, T25, T26, T80, T90, T133).

Lines 41 and 42 of the earnest money agreement state:

It is understood and agreed that the terms written in this receipt constitute the entire preliminary contract between the purchaser and seller and

that no verbal statement made by anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein . . .

Thus, the terms of the letter dated March 17, 1977 (Plaintiff's Exhibit Number 10), were extinguished and merged into the terms contained within the earnest money agreement (Defendants' Exhibit Number 5). Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977); Bowen v. Olsen, 576 P.2d 862 (Utah 1978); Rasmussen v. Olsen, 583 P.2d 50 (Utah 1978).

As noted by the court in Stubbs, supra, collateral acts which are to be performed by a party will not be excused by application of the principle of merger.

However, there are no collateral acts mandated by this letter. (Plaintiff's Exhibit Number 10).

Thus, the terms, spirit, and intent of this letter (Plaintiff's Exhibit Number 10) were merged into the earnest money agreement (Defendants' Exhibit Number 5) and forever put to rest. Plaintiff-respondent's attempts to revive the letter (Plaintiff's Exhibit Number 10) amount to little more than futile attempts to permeate a legal barrier premised upon sound legal rationale and fortified by unswerving judicial adherence.

Defendant Bertagnole was vested with title to the property in Salem Hills when the quit-claim deed (Defen-

dants' Exhibit Number 11), absolute on its face, was delivered to him.

Furthermore, like any other property owner, he was able to divest himself of this property at his will for terms acceptable to him. This is precisely what he did a short time after the quit-claim deed to him from plaintiff-respondent (Defendants' Exhibit Number 1) was recorded in Utah County. His grantees are Steven C. Davis and Kristi Ann Davis. A duly-recorded quit-claim deed (Plaintiff's Exhibit Number 3) conveys ten acres of property in Salem Hills to them. Steven Davis and Kristi Davis subsequently conveyed their interest in this property to Wade Davis and Kristi Davis. (Defendants' Exhibit Number 2). This deed was also recorded. Each of these individuals should be recognized as the owners of their respective parcels of property. Reversal of the lower court's decision is fundamental to a sound resolution of this action not only because of the trial court's erroneous categorization of the documentary evidence but also because it is in irreconcilable juxtaposition with the law applicable to this action.

Defendant-appellant Davis' second argument is that there was an unconditional delivery of the quit-claim deed to defendant Bertagnole. (Defendants' Exhibit Number 1).

26 Corpus Juris Secundum, Deeds, Section 48, relates the general rule that a validly delivered deed that is void



of any express conditions will pass absolute title to the grantee.

As a general rule, a delivery of a deed must be absolute and unconditional unless it is in escrow. Further, as appears in Escrows, Section 7, as a general rule, a delivery in escrow may be made only to a third person not a party to the transaction, and there can be no such delivery to the grantee on a condition not expressed in the instrument. Accordingly, while there is some authority to the contrary, it is generally held that delivery to the grantee of a deed absolute on its face will pass complete title to him regardless of any condition or contingency on which its operative effect is made to depend, provided, of course, there is otherwise a sufficient delivery under the rules stated supra, Sections 41-47, without reservation of control or dominion over the deed by the grantor. To thus vest complete title in the grantee, however, it is essential that it shall be the intention of the grantor that the instrument shall become operative, without further act on his part, on performance of the condition, and the rule applies only to those deeds which are on their face complete contracts, requiring nothing but delivery to make them perfect, and does not apply to those which on their face import that something besides delivery is necessary to be done in order to make them complete. 26 Corpus Juris Secundum, supra. See also 6 Powell on Real Property (1977), Section 897.

The following discussion from 23 American Jurisprudence 2d, Deeds, Section 92, is in accord with the above-stated axioms.

From the general rule that is essential to an escrow that the instrument be delivered to a stranger to the

instrument, the view evolved that a deed cannot be delivered in escrow to the grantee therein. Under this view, the effect of a direct delivery of a deed to the grantee cannot be obviated by the intention of the parties that it shall operate as an escrow; in other words, a deed delivered to the grantee with the understanding that it is not to be operative until some condition precedent shall have been performed by the grantee, or some contingency shall have happened, is fully operative, at least as between the grantor and an innocent purchaser, notwithstanding the condition is never performed or the contemplated event never happens. In such cases, the grantor, by the act of handing the deed to the grantee, in fact passes title to the grantee; to permit him to set up the condition by parol would contradict his deed, and hence, parol evidence as to such delivery or condition is inadmissible.

From the facts presented at trial, it must be concluded that the delivery to defendant Bertagnole was sufficient to transfer title to him. The quit-claim deed conveying the property to defendant Bertagnole (Defendants' Exhibit Number 1), written in the present tense, is unconditional in its terms. Furthermore, if the letter of March 17, 1977 (Plaintiff's Exhibit Number 10), is interpreted to signify a desire by Verdi White, Sr., to place the quit-claim deed in escrow, it must be noted that nothing in the trial record documents an attempt by the grantor to place the quit-claim deed (Defendants' Exhibit Number 1) with Security Title Company, the named escrow agent.

However, the only method to determine if the delivery to defendant Bertagnole was conditional is precluded by judicial fact, as such investigation is violative of the parol evidence rule. 23 Am. Jur. 2d, supra.

Thus, the proper conclusion is that title to this property was vested in defendant Bertagnole when the quit-claim deed (Defendants' Exhibit Number 1) was delivered to him. Verdi R. White's departure to record the deed from Steven Davis and Kristi Davis to the plaintiff-respondent (Plaintiff's Exhibit Number 14) without further instructions to his agent, James Medlin, is conclusively demonstrative of his intent to bind the plaintiff-respondent to the just concluded negotiations with defendant Bertagnole. (T28, T29, T45, T78, T79, T119). This, in the words of one very distinguished scholar, is sufficient to construe the intent of the grantor to make a valid delivery on the deed.

8 Thompson on Real Property (1963), Section 4227.

Furthermore, the grantees of defendant Bertagnole, Steven Davis and Kristi Davis, were in actuality vested with title to the property conveyed to them by defendant Bertagnole (Defendants' Exhibit Number 3). These conveyances evidenced by the following exhibits (Defendants' Exhibit Number 1, Defendants' Exhibit Number 2, and Plaintiff's Exhibit Number 3) should be given unclouded legal cognizance.

Lastly, the plaintiff-respondent was not able to meet or properly rebut the presumption operative in this state that the recording of a deed is evidence of its delivery. Chamberlain v. Larsen, 83 Utah 420, 29 P.2d 355 (1934); Controlled Receivables, Inc. v. Harman, 17 Utah 2d 420, 413 P.2d 807 (1966).

Furthermore, this presumption is to be rebutted by "clear and convincing evidence." Chamberlain, supra, and Controlled Receivables, Inc., supra.

Both Corpus Juris Secundum and American Jurisprudence 2d maintain that the recording of a deed is factual proof of the absolute delivery of the deed. 26 Corpus Juris Secundum, Deeds, Section 44; 23 American Jurisprudence 2d, Deeds, Section 94.

As detailed in the trial proceedings, the plaintiff-respondent relinquished the quit-claim deed to defendant Bertagnole, as grantee (Defendants' Exhibit Number 1), to their agents James Medlin and Steven C. Davis. Implicit in the agreement between Verdi R. White, Sr., and Steven C. Davis (Plaintiff's Exhibit Number 4) is the understanding that Steven C. Davis will undertake to consummate a sale of the 12 acres in Salem Hills as the agent for the plaintiff-respondent. Explicit in this same agreement (Plaintiff's Exhibit Number 4) and from the subsequent tenor of the

negotiations with the defendant Bertagnole is the status of James Medlin as an agent of the plaintiff-respondent.

...Some courts hold that no intent to make delivery appears where the recorder was expressly instructed that the deed was to be delivered to the grantor, or the grantor's agent, but other courts recognize the presumption of delivery arising from the fact that the grantor caused the deed to be recorded even where the deed, after recording, was returned to the grantor...  
23 Am. Jur. 2d, Deeds, Section 94.

The latter position is the one which has been adopted in this jurisdiction and several others. Chamberlain, supra; Controlled Receivables, Inc., supra; State, By Pai v. Thom, 563 P.2d 983 (1977); Takacs v. Takacs, 317 Mich. 72, 26 N.W.2d 712 (1947); Dyer v. Skaden, 128 Mich. 348, 87 N.W. 277 (1901); In Re Hume's Estate, 128 Mont. 223, 272 P.2d 999 (1954).

The rule seems to be well settled that a deed duly executed and acknowledged and shown to be in the possession of the grantee is self-proving both as to execution and delivery, and that the recording of a deed is likewise evidence of delivery. Chamberlain, supra, at page 361.

To successfully defeat this presumption and annul the conveyances in question, the plaintiff had to meet its burden of proof with clear and convincing evidence.

And not only is the burden of proving nondelivery upon the plaintiffs, but the inference of delivery arising from the possession of the deed by the grantee and from the recording thereof is entitled to great and controlling weight and can only be overcome by clear

and convincing evidence. Chamberlain, supra, at page 36.

Or, as the court more recently stated:

Of prime importance is the rule that one who asserts the invalidity of a deed must so prove by clear and convincing evidence. The recording of a deed raises a presumption of delivery, which presumption is entitled to great and controlling weight and which can only be overcome by clear and convincing evidence. Controlled Receivables, Inc., supra, at page 809.

The nature of evidence sufficient to overcome the presumption and validity of a recorded deed is detailed in 23 Am. Jur. 2d, Deeds, Section 126:

When a presumption of a deed arises, nothing except the most satisfactory evidence of non-delivery can prevail against it; a mere preponderance of the evidence is not sufficient.

At trial, Verdi R. White, Sr., made several admissions that he had delivered the deed to the agents, Steven Davis and James Medlin, who were authorized to negotiate the sale of the 12-1/2 acres to defendant Bertagnole. (T17, T18, T19, T20, T22, T27, T28). There was not a single allegation or an iota of proof at trial that the quit-claim deed (Defendants' Exhibit Number 1) had not been given to an agent for delivery to the grantee upon the successful completion of the negotiations.

Independant recollection from the defendant-appellant Davis (T80, T31, T84, T85, T36, T87, T135, T136) and the

defendant Leo Bertagnole (T108, T122, T123) related that Verdi R. White, Sr., delivered the deed to an agent of the plaintiff-respondent.

The admissions aforementioned by Verdi R. White, Sr., are significant. These admissions conclusively and thoroughly defeat any claim by the plaintiff-respondent that there was no delivery of the quit-claim deed to defendant Leo Bertagnole (Defendants' Exhibit Number 1).

Furthermore, Mr. White's testimony alone is sufficient to permanently silence the allegations of the plaintiff-respondent that the delivery was conditional. Counsel for the plaintiff-respondent asked Mr. White if he had ever authorized the delivery of the quit-claim deed (Defendants' Exhibit Number 1) to Mr. Bertagnole. He responded, "Only on the grounds that they complete the sale." (T20).

Testimony, which has already been detailed elsewhere in this brief, places Mr. White in Mr. Bertagnole's office until some time after the purchase price for the property had been established. In other words, relinquishment of the deed by the president of the plaintiff-respondent did not occur until after he was satisfied that a valid purchase of the property had been made.

Any assertion that there was a conditional delivery to defendant Leo Bertagnole is inherently affected with frailty that reasonably casts doubt upon its accuracy and truthfulness.

In addition, any allegation that there was no delivery of the deed (Defendants' Exhibit Number 1) is patently absurd. There was a total absence of proof to sustain this allegation.

Furthermore, as discussed previously, the act of recording a deed creates a presumption of delivery in this state. Chamberlain, supra; Controlled Receivables, Inc., supra.

The conveyance to Leo Bertagnole (Defendants' Exhibit Number 1) was recorded in Utah County on May 3, 1977. On this date, the conveyance of ten acres to Steven Davis and Kristi Ann Davis (Defendants' Exhibit Number 3) was also recorded. The conveyance to Wade Davis and Kristi Davis from Steve Davis and Kristi Davis (Defendants' Exhibit Number 2) was recorded on June 15, 1978. These conveyances are prima facie proof of title in the respective grantees and should be so recognized.

There is no evidence, much less evidence of a clear and convincing nature, that dictates this annulment. However, there is ample authority that the decision of the trial court is an undeniable, unfortunate misapplication of the controlling law. Reason, logic, and equity dictate that the lower court's decision be reversed.



## CONCLUSION

The lower court erred in its finding that the delivery of a quit-claim deed for approximately 12-1/2 acres in Utah County to defendant Leo M. Bertagnole was conditional. Defendant-appellant Davis relies heavily upon this court's rulings in Chamberlain v. Larsen, supra, and Controlled Receivables, Inc. v. Harmon, supra. The court's holdings in both of these cases are patently applicable in the instant case. In each of the above-cited cases, the court maintained that the recording of a deed created a presumption of delivery which could only be rebutted by clear and convincing evidence.

Elicited at trial was the fact that the plaintiff's president delivered the quit-claim deed naming defendant Bertagnole as the grantee to his agent after he and other representatives of the plaintiff were present during negotiations for the purchase of this property.

Competent documentary evidence to support the allegations that there was a lack of delivery to defendant Bertagnole, or that any delivery to the defendant Bertagnole was conditional, was lacking. Competent testimony to support these allegations was also absent at trial.

At trial, the plaintiff failed to present evidence of a sufficiently clear and convincing nature to rebut the presumption operative in this jurisdiction. A legally

correct decision would, therefore, have rejected the allegations found in the plaintiff's complaint and denied them their requested relief.

Denial of defendant-appellant Davis' appeal to vest title in the grantees of defendant Bertagnole and Steven C. Davis would be a misapplication of the law applicable to this action and defeat justice.

Wherefore, the defendant-appellant respectfully prays to have the lower court's order reversed as a matter of law; in the alternative, the defendant-appellant seeks to have this court vacate the lower court's decision and remand back for a factual hearing on the merits of this matter.

DATED this 6th day of September, 1979.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Defendant-Appellant Davis was served on counsel for the respondent, Woodrow D. White, 2121 South State Street, Salt Lake City, Utah, this 6th day of September, 1979.

  
Carolyn L. Driscoll