

1959

# Harold C. Fuller v. First Security Bank of Utah : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Gordon I. Hyde; Attorney for Plaintiff and Respondent;

---

## Recommended Citation

Brief of Respondent, *Fuller v. First Security Bank of Utah*, No. 9086 (Utah Supreme Court, 1959).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/3397](https://digitalcommons.law.byu.edu/uofu_sc1/3397)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

# In the Supreme Court of the State of Utah

HAROLD C. FULLER,

*Plaintiff and Respondent,*

vs.

FIRST SECURITY BANK OF UTAH,  
N.A., Executor of the Estate of Fae L.  
Fuller, Deceased,

*Defendant and Appellant.*

FILED

1959

Clerk, Supreme Court, Utah

Case

No. 9086

---

## RESPONDENT'S BRIEF

---

GORDON I. HYDE

Attorney for

Plaintiff and Respondent

---

---

# TABLE OF CONTENTS

*Page*

STATEMENT OF FACTS .....	1
--------------------------	---

## ARGUMENT:

POINT I. The execution of the deed was understood by both parties to be only an incident of the divorce proceedings and was not intended to be a present conveyance of the property unless the divorce proceedings were effected. The findings of the trial court are supported by the evidence.....	4
--	---

POINT II. The trial court ruled correctly in denying the defendant's motion for a new trial based upon new evidence discovered after the trial of the case.....	13
---	----

POINT III. The court did not err in the exclusion of evidence. Such evidence would in any event have made no difference to the ultimate decision in this case.....	15
--	----

CONCLUSIONS .....	16
-------------------	----

## CASES CITED

Angell v. Ingramm, 213 Pac. (2d) 944.....	10
Gappmayer v. Wilkenson, 53 Utah 236, 177 P. 763.....	12
Phillips v. Farmers Mut. F. Ins. Co., 175 N.W. 144.....	9
White v. Hendley, 35 Cal. App. 267, 169 P. 710.....	12

## STATUTES CITED

American Jurisprudence 16, P. 506.....	7
Utah Rules of Civil Procedure, Rule 59(a).....	14

# In the Supreme Court of the State of Utah

---

HAROLD C. FULLER,

*Plaintiff and Respondent,*

vs.

FIRST SECURITY BANK OF UTAH,  
N.A., Executor of the Estate of Fae L.  
Fuller, Deceased,

*Defendant and Appellant.*

Case  
No. 9086

---

## RESPONDENT'S BRIEF

---

### STATEMENT OF FACTS

The plaintiff in this action and his wife, Fae L. Fuller, had for some fifteen years been estranged, and the plaintiff had sought in vain to obtain the consent of Mrs. Fuller to a divorce (Tr. p. 31, lines 5-9). In the summer of 1957 Mr. and Mrs. Fuller agreed tentatively to the terms of a divorce, and they went to visit Mr. Frank E. Moss to discuss the obtaining of a divorce. Distribution of the property to be made in the divorce proceeding was agreed upon (Tr. p. 10, lines 14-23).

Pursuant to this understanding, Mr. Moss drafted a Complaint which, at the trial of this case, was introduced

in evidence and designated as "Exhibit 5" and in this Complaint he asked the court to award to Mrs. Fuller the property at 105 "B" Street, in Salt Lake City, and pursuant to the discussion and agreement of the parties in paragraph 6, he asked the court to exonerate Mr. Fuller from paying any alimony after the apartment house at 105 "B" Street had been paid for.

The Complaint as drafted asked the court to award to the plaintiff, Mrs. Fuller, the sum of \$40.00 per week for support and maintenance, and when the plaintiff examined the prepared Complaint he refused to sign the waiver prepared by the attorney because it was his understanding that no fixed alimony would be asked for. He thereafter talked to Mrs. Fuller, and it was agreed between them that no fixed alimony would be asked for, and that she would simply trust him to pay an amount necessary for her requirements in addition to her receiving the "B" Street property (Tr. p. 13, lines 9-12).

Subsequently Mr. Fuller was notified by Mr. Moss's office to come in and sign papers pursuant to the divorce, and believing that a complete understanding was had, and that the signing of the papers was necessary for the consummation of the divorce proceeding, he went to the office of Mr. Moss and was asked by his secretary to sign a deed pursuant to the request of Mr. Moss's secretary, but did not sign the waiver because the Complaint had not been amended as he understood it should have been (Tr. p. 12, lines 27-30 and p. 13, lines 1-18). Since Attorney Moss was not present he could not discuss with him the fact that he and Mrs. Fuller had agreed to eliminate the fixed alimony request from the Complaint (Tr. p. 13, lines 19-30).

Subsequent to the signing of the deed the parties agreed between themselves to postpone the divorce proceedings, and Mrs. Fuller advised Mr. Moss of this fact, and on November 22, 1957, Mr. Moss wrote a letter to Mr. Fuller, which letter has been introduced in evidence and designated as "Exhibit 7" in which Mr. Moss said:

"Your wife called this morning to say that she is willing to postpone any further action in the divorce proceedings until springtime because she knows that you will be having financial problems through the winter in the moving picture business.

She expressed confidence that you would continue to send her money for her support as you have been doing, and she is willing to postpone action so that your credit will reflect a part ownership in the equity of the apartment house. Consequently, I will keep these papers on file until some time next spring.

At your wife's suggestion I am enclosing statement for the time and paper work done to date.

Yours very truly,

MOSS & COWLEY

By /s/ Frank E. Moss."

Before the parties determined to resume the divorce and the property settlement the matter was interrupted by the untimely death of Mrs. Fuller. At the time of the death of Mrs. Fuller the property at 105 "B" Street was held in joint tenancy between Mr. and Mrs. Fuller. The First Security Bank, having been duly appointed as the Administrator of the Estate of Mrs. Fuller, contended that the deed executed pursuant to the divorce negotiations was a valid conveyance of the property. The plaintiff herein

filed suit against the First Security Bank to quiet title to the property at 105 "B" Street, contending that the deed was not a completed conveyance but was made pursuant to the contemplated divorce, and was never intended to be an intervivos gift or conveyance to Mrs. Fuller. The trial court held in favor of the plaintiff, and the defendant appeals.

### POINT I

THE EXECUTION OF THE DEED WAS UNDERSTOOD BY BOTH PARTIES TO BE ONLY AN INCIDENT OF THE DIVORCE PROCEEDINGS AND WAS NOT INTENDED TO BE A PRESENT CONVEYANCE OF THE PROPERTY UNLESS THE DIVORCE PROCEEDINGS WERE EFFECTED. THE FINDINGS OF THE TRIAL COURT ARE SUPPORTED BY THE EVIDENCE.

The defendant appellant argues at great length that it was the intent of the parties that the property at 105 "B" Street should be presently conveyed to Mrs. Fuller in order to provide income for her whether the divorce was consummated or not, and much argument is made of the fact that Mrs. Fuller actually collected the rents and paid the bills; however, the evidence is clear that Mrs. Fuller collected the rents and paid the bills prior to any divorce contemplated, and that she had always collected the rents and handled the money on this property (Tr. p. 22, lines 2-11). It is not difficult from the evidence to determine what the actual intent and understanding of the parties was. Mr. Frank E. Moss, a competent and qualified attorney of many years experience would certainly not have prepared a Com-

plaint asking that the property at 105 "B" Street be awarded by the court to the plaintiff, Mrs. Fuller, had the deed included as part of the property settlement contemplated in the divorce, been intended to be a present conveyance. If the property had already been conveyed there would have been no purpose to ask the court for relief in this respect. Further, it would be inconceivable that Mr. Moss would write the letter on November 22, 1957, designated as "Exhibit 7" in the proceedings, advising Mr. Fuller that Mrs. Fuller desired the divorce proceedings to be stayed until the following spring on condition that he continue to provide her with the support payments in order that his credit would reflect a one-half ownership in the property at 105 "B" Street. Surely if this property had already been conveyed such a scheme would be a fraud upon Mr. Fuller's creditors, and it would be highly unlikely that a respected and responsible attorney would be a party to such a fraud.

It is obvious from the letter of November 22 that the deed already deposited with the secretary of Mr. Moss was not intended to have any force and effect until the divorce had been consummated; and further, that Mr. Moss considered himself an escrow holder of these papers. Hence the language in the letter:

. . . "she is willing to postpone action so that your credit will reflect a part ownership in the equity of the apartment house. *Consequently, I will keep these papers on file until some time next spring.*" (Italics supplied).

*These papers* referred not only to the deed, but to the Complaint, waiver, and other documents drafted by Mr. Moss pursuant to the divorce agreement, and it was certainly

understood as of November 22, 1957, that these documents should not have any force and effect until the following spring. This is further substantiated by the testimony of Mr. Moss's secretary, Phyllis Porter, who testified that Mrs. Fuller called and asked that the papers be held in abeyance until the following spring (Tr. p. 35, lines 27-30; p. 36, lines 1-11). Mrs. Porter further testified that the instructions she had were to keep the papers, including the deed, in the file and to deliver them to no one, including Mrs. Fuller (Tr. p. 36, lines 10-14).

Shortly after Mrs. Fuller had advised to hold everything in abeyance, Mr. Moss submitted a bill for the work done to date to Mr. Fuller, which was paid by him (Tr. p. 36, lines 15-20). The defendant's own witness, Mr. Frank E. Moss, testified that when the initial papers pursuant to the divorce were drafted, and the deed had been signed by Mrs. Fuller, Mrs. Fuller called and asked that the entire matter be held in abeyance, and that everything be held up until she called him again (Tr. p. 56, lines 27-30; p. 57, lines 1-5).

Mr. Moss further testified:

**"THE COURT:** Well, is it your understanding from your conversation with these persons that this deed was executed as a part of this divorce proceeding and settlement of her property rights in that divorce?

**A.** Well the two coincided, Judge, and I am sure that this deed grew out of this whole conversation. However, I understand that he had executed the deed and given it to her for the property.

**THE COURT:** For what reason?

**A.** Preparatory to the divorce.

THE COURT: I see.

MR. HYDE: And in consideration of her agreement to divorce him, isn't that true?

A. At least in part, yes." (Tr. p. 62, lines 25-30; p. 63, lines 1-8)

Hence, it was clear both to the plaintiff and to the plaintiff's attorney that the deed signed in the office of Mr. Moss and held in the file as part of the divorce papers was not to be delivered or effective until the divorce was completed, and that the deed was given, as Mr. Moss testified, in consideration at least in part for the divorce. (Tr. p. 63, lines 3-8).

It is elementary law that a deed is only effective if it is signed with the intent of making conveyance to the grantee, and that if the deed is signed pursuant to a plan which is never consummated, then there is no valid conveyance and the title remains where it was prior to the execution of the deed.

In 16 American Jurisprudence, p. 506, the text writer explains the legal effect of a delivery by a grantor to a third person of a deed to take effect on the happening of a contingency; i.e., in this case, the completion of the divorce proceedings:

"Section 123, Conditional delivery to grantee—an instrument may be delivered in escrow to a third person to be kept by such third person until the performance of a condition or the happening of an event, which, on the performance of the condition or the happening of the contingency specified, becomes operative as a deed and passes legal title."

The court in this case made a specific finding that it was understood between the parties that all documents per-

taining to the divorce proceedings, including the deed executed by the plaintiff to the "B" Street property, would be held until the divorce was consummated (Tr. p. 71; par. 4 of Findings of Fact). This finding of the trial court was impelled by the evidence of the witnesses called at the trial of this case.

The plaintiff, Harold C. Fuller, testified repeatedly that the only purpose he had in executing the deed was to complete the necessary papers for the obtaining of the divorce, and that it was never his intention that title to the property should pass until the divorce was obtained (Tr. pp. 19 and 20; p. 28, lines 27-30; p. 30, lines 1-20). Mr. Moss's secretary, Phyllis Porter, had been instructed to keep the deed with the rest of the divorce papers and not deliver them to anyone (Tr. p. 36, lines 7-14). It was obviously the understanding of Mr. Moss, the attorney for Mrs. Fuller, that the deed would be held in escrow in his office subject to the completion of the divorce proceedings because he did not record the deed. He asked for the award of the property in his Complaint, which would have been a vain pleading had the property already been conveyed prior to the obtaining of the decree, and he testified that the giving of the deed was at least in part the consideration for the divorce. The court made special inquiry of Mr. Moss as to whether or not the deed was part of the divorce proceedings, and Mr. Moss testified as follows:

"THE COURT: Well, is it your understanding from your conversation with these persons that this deed was executed as a part of this divorce proceeding and settlement of her property rights in that divorce?"

A. Well the two coincided, Judge, and I am sure that this deed grew out of this whole conversation. However, I understand that he had executed the deed and given it to her for the property.

THE COURT: For what reason?

A. Preparatory to the divorce.

THE COURT: I see.

MR. HYDE: And in consideration of her agreement to divorce him, isn't that true?

A. At least in part, yes." (Tr. p. 62, lines 25-30; p. 63, lines 1-8)

The letter of November 22, 1957, designated as "Exhibit 7" is further evidence of both the understanding that Mr. Moss, the attorney for Mrs. Fuller, had and the understanding that Mrs. Fuller had of the delivery of this deed into escrow; otherwise, there would have been no point in Mr. Moss stating that Mrs. Fuller was willing to postpone the action in order that the plaintiff's credit would reflect the ownership in the apartment house. Pursuant to the understanding of all parties, the deed was never delivered into the possession of the deceased, and hence upon the death of the deceased the title to the property passed to the other joint tenant, the plaintiff in this action.

In the case of *Phillips v. Farmers Mut. F. Ins. Co.*, 175 N.W. 144, the grantor delivered a warranty deed into the hands of a broker for the purpose of effecting a sale of a property, the deed naming the broker as grantee. The court held this delivery was a conditional delivery, and that no title passed thereby. It can scarcely be imagined that if Mrs. Fuller had renounced her agreement to seek the divorce that Mr. Fuller would nonetheless have considered

the deed a present conveyance of the property which he had purchased and maintained for so many years.

In the case of *Angell v. Ingramm*, 213 Pac. 2d, 944, it was held that an attempted delivery of an instrument placed in escrow by the escrow holder in violation of the terms of the escrow agreement, passed no title to the property to the grantee.

We submit that if Mrs. Porter or Mr. Moss had made a delivery of the deed to Mrs. Fuller prior to the time the divorce was procured that the deed would have been ineffectual to pass title. This problem need not be faced, however, since no delivery was ever made by the escrow holder, and at the time of death of Mrs. Fuller the documents were still held in escrow pursuant to the understanding and instructions of both parties.

The evidence clearly shows, and the court so found, that Mr. Moss was advised that the parties were going to proceed no further with the matter, whereupon Mr. Moss billed Mr. Fuller for the work done to date, and the bill was paid by the plaintiff, Harold F. Fuller. The deed to the "B" Street property remained in the file and was not delivered to either party (Tr. p. 72; par. 6 of the Court's Findings of Fact).

Following the death of Mrs. Fuller, the deed delivered to Mr. Moss's office was recorded. The defendant points to the fact that the plaintiff thereafter wrote to his daughter who was the sole beneficiary under the will of Mrs. Fuller as if she was the owner of the property. What would any ordinary lay person assume without having consulted with an attorney? The First Security Bank had

taken the property over as part of the estate and had doubtless advised him that the legal effect of the giving of the deed into escrow amounted to a legal conveyance.

"Q. Now since the death of your wife, who has collected the rents?

A. Well, the bank has been collecting the rents, the Security Bank.

Q. Have you ever objected to the Bank collecting the rent?

A. *I didn't know my legal rights in this until I talked to an attorney, my attorney, and naturally I let them use high-handed methods and go ahead and handle it and I didn't know where I stood until I talked to Gordon.*" (Tr. p. 25, lines 1-9).  
(Italics supplied).

If the opinion of a lay person were the criterion of what legal effect the court should give the transaction then the uncontradicted testimony as to what the daughter said to her father would be significant:

"I told my daughter at the time it was a terrible thing to happen and she said, 'Well, Dad, it is your property. I don't want it.'" (Tr. p. 25, lines 21-23).

"She said, 'Dad I don't want this property. It is your work. I don't want your home.'" (Tr. p. 25, lines 27-30).

I submit that any lay person advised by the bank that the title was lost to him under these circumstances would probably believe that it was until advised otherwise by an attorney and would doubtless have acted just as did this plaintiff.

The citations which the appellant uses to support its position are all cases without relevance to the facts of this case. *Gappmayer v. Wilkenson*, 53 Utah 236, 117 P. 763 is a case where the delivery was absolute and unconditional. In the case before this court the deed was delivered as part of the documents to effect a divorce proceeding which was never completed and was discontinued at the request of the grantee named in the deed. One of the reasons given by the grantee herself and her lawyer for stopping the proceedings in this case was so that Mr. Fuller would retain his interest in this very real estate until the following year. (See Exhibit 7). (Tr. p. 35, lines 23-30).

In this case it was obviously the intent of Mrs. Fuller, Mr. Moss and Mr. Fuller that the delivery of the deed be effected to pass title only when the divorce was obtained.

In none of the cases cited by appellant was there a conditional delivery into escrow as was the case here. In this case the deed was never given into the possession of the deceased, but was held in the attorney's files pursuant to agreement, to be used only when and if the divorce was obtained. In all the cases cited the deeds were delivered to the grantee or someone for the grantee with the intent that they take effect when delivered. We have no argument with the decision in *White v. Hendley*, 35 Cal. App. 267, 169 p. 710, where land was conveyed in consideration for the grantee caring for the grantor. This case is not applicable to facts where a deed is delivered into escrow, not to take effect until the other papers are signed and the divorce completed. Every day thousands of deeds are delivered to attorneys, banks, and escrow holders pursuant to a contemplated transaction—it would be a monstrous

result to hold that these deeds passed title and the grantee named therein became vested with title even though the transaction of which the deed was only a part did not go through.

Counsel cites at page 32 of his brief the very distinction between this case and all the cases cited:

"(7-9) as a general rule, a delivery of a deed must be absolute and unconditional, *unless it is in escrow*. Further it appears in (30) C.J.S. Title Escrows, p. 7, also 21 C.J.S., p. 873 note 96 p. 878 note 31, 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 upon a condition not expressed in the instrument." (Appellant's Brief, p. 32).

This language states the rule correctly. In our case the deed was not delivered to Mrs. Fuller although the parties were negotiating directly between themselves and it could have been had it been their intention to effect a present conveyance of the property. The deed was delivered to the attorney's secretary, Mrs. Porter, who was instructed to hold it with the other papers and to deliver it to no one—not even Mrs. Fuller.

## POINT II

THE TRIAL COURT RULED CORRECTLY IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL BASED UPON NEW EVIDENCE ALLEGEDLY DISCOVERED AFTER THE TRIAL OF CASE.

The defendant in its Brief argues that though acting diligently it was unable to discover certain new evidence

which would have resulted in a different ruling by the trial court. There is nothing set forth in the Affidavit upon which the Motion was made that would excuse the defendant from not discovering the alleged evidence prior to the trial of the case. The defendant had ample time for discovery and to examine and interrogate all witnesses having any knowledge of the transaction, and his failure to do so would not permit him to reopen the case on the basis of Rule 59. Rule 59(a) of the Utah Rules of Civil Procedure provides that the court in its discretion may order a new trial for the reason that newly discovered evidence has been uncovered "which he could not, with reasonable diligence, have discovered and produced at the trial." There is absolutely no showing of any reasonable diligence on the part of the defendant to discover the alleged evidence.

The alleged evidence is of two types:

a) That the deed was actually delivered to Mrs. Fuller on November 15, 1957.

b) That on March 3, 1958, the mortgage on the "B" Street property was increased and the money received was loaned to the son of Mr. and Mrs. Fuller.

With reference to both alleged bits of evidence, there was no showing made to the court of a reasonable cause why the alleged evidence could not have been discovered in the ordinary pre-trial discovery and produced at the trial of the case. All of the witnesses who would have had knowledge of such information were produced and examined by both parties. The alleged evidence that the deed had been delivered to Mrs. Fuller was certainly contrary to all of the evidence the witnesses produced both for the plaintiff and the defendant. Mrs. Phyllis Porter testified that

the documents were never at any time released from her file until after the death of Mrs. Fuller. An examination of the Affidavit in support of the Motion will show no valid grounds for the failure to produce the alleged evidence.

In regard to the fact that the parties on March 3, 1958, obtained a mortgage on the property and that the money was loaned to their son, is a further indication that both parties considered as of that time that they jointly owned the property, and the alleged evidence that a note was given by the son to his mother prior to her death would certainly be inadmissible if offered to prove that the son considered the property belonged to his mother. It would not make any difference what the son's opinion was, and there may have been many reasons for his giving a note to his mother which would be perfectly consistent with the view of the court that the property remained the property of both parties until the death of Mrs. Fuller.

### POINT III

THE COURT DID NOT ERR IN THE EXCLUSION OF EVIDENCE. SUCH EVIDENCE WOULD IN ANY EVENT HAVE MADE NO DIFFERENCE TO THE ULTIMATE DECISION IN THIS CASE.

Counsel argues that the exclusion of the Fae L. Fuller Will and the inventory were improperly excluded from the evidence. It is submitted that any person making a Will would include in the Will the disposition of all their real and personal property which they owned at the time of the making of the Will, or which they anticipated receiving

thereafter, and this would certainly be no evidence of the status of the title as of the time of the death of the decedent. Even had this been admitted, it would have certainly not influenced the decision of the court in this case.

### CONCLUSIONS

It is submitted that the Findings of Fact, Conclusions of Law, and Judgment in this case are fully supported by the evidence and that the court gave full consideration to the evidence presented and to the Motion of the defendant to grant a new trial, and that the final decision in this case was correct.

Respectfully submitted,

GORDON I. HYDE

Attorney for Plaintiff  
and Respondent