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Peter Mckellar, Mary Helen Parsons, James Leslie Mckellar, Charles Mckellar And Glen Mckellar v. Nellie Mckellar : Respondet's Brief

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Recommended Citation

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# In The Supreme Court of the State of Utah

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PETER McKELLAR, MARY HELEN PAR-  
SONS, JAMES LESLIE McKELLAR,  
CHARLES McKELLAR and GLEN Mc-  
KELLAR,

*Plaintiffs and Appellants*

-vs-

NELLIE McKELLAR,

*Defendant and Respondent*

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## RESPONDENT'S

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APPEAL FROM A JUDGMENT OF THE  
THIRD DISTRICT COURT OF THE STATE OF UTAH

Honorable Marcellus F. [Name obscured]

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# In The Supreme Court of the State of Utah

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PETER McKELLAR, MARY HELEN PAR-  
SONS, JAMES LESLIE McKELLER,  
CHARLES McKELLAR and GLEN Mc-  
KELLAR,

*Plaintiffs and Appellants,*

-vs-

NELLIE McKELLAR,

*Defendant and Respondent.*

Case no.  
11456

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## RESPONDENT'S BRIEF

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### STATEMENT OF CASE

This action was initiated by the Appellants (Plaintiffs below) against Nellie McKellar, Respondent (Defendant below) in an attempt to set aside a deed which was executed in favor of the Respondent and her deceased husband on May 5, 1947, and which was duly recorded at the Office of the Tooele County Recorder. Appellants' action was based upon the theory that a mistake had been committed by the grantors of the property. The Respondent defended upon the grounds that the conveyance was valid and also on the ground that if a mistake had been committed, the Appellants were barred by the Statute of Limitations, Section 78-12-26 (3), Utah Code Annotated, 1953, which limits the time for bringing an action

for fraud or mistake to three years. The Respondent counter-claimed for summary judgment based upon this statute and also upon the ground that the Respondent had acquired the land under the "Adverse Possession Rule," pursuant to statute.

The Appellants subsequently amended their complaint alleging that the mistake had been committed by a trustee and again the Respondent defended upon the grounds that an action to set aside a document based upon mistake or fraud was barred by the Statute of Limitations.

#### DISPOSITION AT THE LOWER COURT

Respondent moved for summary judgment in the Lower Court on the basis that no issues of law or fact remained to be determined by trial and the Lower Court granted the Respondent's motion and quieted title to the property in the name of the Respondent.

#### RELIEF SOUGHT ON APPEAL

The Respondent seeks the affirmation of the Lower Court's judgment.

#### STATEMENT OF FACTS

The Respondent is a sister-in-law of the Appellants. On December 17, 1942, Mary McKellar, the mother of the Appellants and the of the Respondent's husband conveyed to two of her children the land in dispute in this action. The deed from the mother to the two children was executed simultaneously with a separate agreement, which required the consent of two-thirds of all of the children if and when the property was to be reconveyed, sold, transferred, or otherwise encumbered. The

deed from the mother to the two daughters was recorded at the Office of the Tooele County Recorder on August 20, 1945. The agreement between the mother and the two daughters which was executed simultaneously with the deed was recorded on January 25, 1951.

On May 5, 1947, the two daughters, Mary Helen Parsons and Montella McKellar Dick, by Warranty Deed which recited the consideration of Ten Dollars (\$10.00) conveyed to Frank McKellar and the Respondent, Nellie McKellar, as husband and wife, the land in dispute in this action. Since that date, the Respondent and her husband, Frank McKellar, now deceased, have been in actual possession of said land and have fenced and improved the land by cultivation and have paid the taxes assessed by the Tooele County Assessor's Office. The Appellants brought an action twenty-one years after the conveyance in question, to set aside said conveyance from the two sisters to the Respondent and her deceased husband and base such action on the theory that a mistake had been committed by Mary Helen Parsons and Montella McKellar Dick in conveying the land in dispute to the Respondent and her deceased husband.

The Respondent answered alleging that the conveyance was a bona-fide conveyance in that the Appellants released, consented to, and ratified the transaction between the two sisters and the Respondent and her deceased husband by a document entitled "Release and Consent," dated June 20, 1953, and recorded July 3, 1953, signed by all of the Appellants. Moreover, the Respondent affirmatively pled as a defense the Statute of Limitations for fraud and mistake pursuant to Section 78-12-26 (3), Utah Code Annotated 1953, which limits the time for bringing an action for fraud or mistake to three years. As an additional affirmative defense, the Respondent has pled the

seven years Statute of Limitations for adverse possession. The Respondent has further counter-claimed upon the adverse possession and at the hearing for the motion for summary judgment introduced evidence as to its color of title and further showed that she had been in open and hostile possession for a period of twenty-one years and that the Respondent or her deceased husband had paid all of the taxes during those years and further fenced and improved the land by cultivation.

### RESPONDENT'S POSITION

The Trial Court's judgment should be affirmed for the following reasons:

- (1) The conveyance was a bona-fide conveyance since all of the Appellants released, consented to, and ratified the conveyance complained of.
- (2) The Respondents obtained the land by adverse possession.
- (3) The Appellants' action, based upon mistake, is barred by the Statute of Limitations pursuant to Section 78-12-26 (3), Utah Code Annotated, 1953.

### ARGUMENT

#### POINT I

THE CONVEYANCE WAS A BONA-FIDE CONVEYANCE SINCE ALL OF THE APPELLANTS RELEASED, CONSENTED TO, AND RATIFIED THE CONVEYANCE COMPLAINED OF.

The pleadings show that there is no dispute as to the Warranty Deed between the mother and the two daughters or



as to the agreement which was executed simultaneously with that Warranty Deed, and there is no dispute as to the dates of the filing of said documents. Similarly, there are no disputes as to the Warranty Deed executed by the two sisters in favor of the Respondent and her deceased husband or the dates of filing of said document.

The Respondent, at a hearing for its motion for summary judgment, introduced into evidence a document entitled "Release and Consent" which document was signed by all of the Appellants to this action, a part of which reads as follows:

"Know All Men by these Presents

That we, the undersigned being legal heirs of John M. McKellar, deceased, and Mary McKellar, deceased, husband and wife, and being beneficiaries under the terms of that certain agreement between Mary McKellar, and Mary Helen McKellar Parsons, and Montella McKellar Dick, dated December 17, 1942, and recorded January 25, 1951, in Book 'F' of Bonds and Agreements at Pages 93-5, *do hereby unconditionally consent and agree that Frank McKellar, a beneficiary, named in said agreement may proceed with the sale and conveyance of any and all real property involved by the terms of said agreement or involved in the Warranty Deed from Mary McKellar to Mary Helen McKellar Parsons and Mary McKellar Dick dated December 17, 1942, and recorded August 20, 1945, in Book '4-A' of Deeds at Page 588 in Tooele County Recorder's Office, and in which any of the undersigned heirs of said deceased persons may have an interest.* (Emphasis added)

The "Release and Consent," a portion of which was quoted above, was signed by Mary McKellar Dick, Peter Mc-

Kellar, Mary Helen McKellar Parsons, J. Leslie McKellar, Joseph G. McKellar, Charles A. McKellar, and Glen E. McKellar, and includes all of the Appellants who brought the present action. The release was properly executed, acknowledged, and notarized on June 3, 1953, and was recorded on July 3, 1953.

It is obviously by the terms of that "Release and Consent" that at least two-thirds of the heirs *released and consented to any and all conveyances of any and all of the lands described in the original deed which was conveyed from the mother of the parties to the two daughters and from the two daughters to the Respondent and her husband*. Although prior approval may not have been obtained for the conveyance of the property from the two daughters to the Respondent and her husband by the "Release and Consent" cited above, all of the heirs and all of the Appellants ratified the conveyance and should be bound by such ratification.

The Appellants argue, however, that either an actual or constructive trust was created although none of the documents in question or in evidence show any intent of appointing the Respondent or her deceased husband as alternative trustees for the rest of the heirs. In support of their contention, the Appellants cite a statement of law relating to circumstances involving the wrongful conversion of property by the appointed fiduciary. The Respondent was a bona-fide purchaser from the fiduciaries in this case and if the terms of the trust agreement were not met in the first instance, the "Release and Consent" signed and recorded subsequently sufficed to correct any earlier defects in the conveyance. The Respondent or her deceased husband never acted in any fiduciary capacity for the other heirs.

## POINT II

## THE RESPONDENT OBTAINED THE LAND BY ADVERSE POSSESSION.

The Respondent by her counter-claim is entitled to have the property quieted in her through adverse possession. By her counter-claim, the Respondent pled that she has been in open hostile and adverse possession of the property in question for more than twenty-one years in that she and her deceased husband have paid the taxes pursuant to statute for the entire duration of their possession of the property. The pleadings show that the Respondent and her deceased husband, by a conveyance deed and recorded in 1947 through possession of all of the land in dispute, and the evidence shows that the land was cultivated, improved, and protected by substantial enclosure during the twenty-one years that the Respondent owned said land. The Appellants have not provided any evidence to the contrary and should not now be heard to deny that the Respondent obtained the ground in question by adverse possession.

## POINT III

## THE APPELLANTS' ACTION, BASED UPON MISTAKE, IS BARRED BY THE STATUTES OF LIMITATIONS PURSUANT TO SECTION 78-12-26 (3), UTAH CODE ANNOTATED, 1953.

The Appellants' primary basis for this action is the theory that the land in question was conveyed to the Respondent and her deceased husband in 1947 by mistake and that this mistake was committed by a trustee and the mistake should therefore be corrected by the Court notwithstanding the passage of more than twenty-one years since the alleged mistake.

The Respondent's reply to the contention of mistake is that if a mistake had in fact been committed, the mistake had been ratified by all of the heirs by the document entitled "Release and Consent" heretofore referred to. Notwithstanding this "Release and Consent", however, the Appellants' contention is without merit since the statute which bars an action based upon fraud or mistake if brought after three years does not distinguish mistakes committed by a trustee from mistakes committed by someone other than a trustee.

Certainly, no such distinction was intended by the statute and the Supreme Court of Utah in *Parr vs. Zions First National Bank, et al.*, 13 Utah 2d 404, 375 P. 2d 461, held that a Statute of Limitation is applicable and is effective in cases involving guardianship and trustees as well as persons acting in their own behalf.

Appellants deny that the Statute of Limitations referred to is applicable in this case because they contend that the mistake was not known to them until a very short time before this action was commenced. The records contradict the Appellants' contentions, however.

The deed from the two sisters to the Respondent and her deceased husband was executed and recorded on May 5, 1947. The recording of the deed was sufficient under our statute to give all third persons notice of the conveyance and notice was at least constructively given to all of the Appellants by recording. Our recording statute reads:

57-1-6. Recording necessary to impart notice—Operation and effect—Interest of person not named in instrument.—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 all other persons who have had actual notice. Neither the fact that an instrument, recorded as herein provided, recites only a nominal consideration, nor the fact that the grantee in such instrument is designated as trustee, or that the conveyance otherwise purports to be in trust without naming the beneficiaries or stating the terms of the trust, shall operate to charge any third person with notice of the interest of any person or persons not named in such instrument or of the grantor or grantors; but the grantee may convey the fee or such lesser interest as was conveyed to him by such instrument free and clear of all claims not disclosed by the instrument or by an instrument recorded as herein provided setting forth the name of the beneficiaries, specifying the interest claimed and describing the property charged with such interest.

Moreover, the Appellants were given actual notice in June of 1953 of the conveyance which they now complain of. The document entitled "Release and Consent" refers to "any and all real property" involved in the original deed between the mother and her two daughters and between the two daughters and the Respondent and her deceased husband. By signing that document, the Appellants admitted knowledge of the transaction complained of and indeed were given actual knowledge and notice.

It is Respondent's contention that if in fact a mistake had been committed, the mistake was ratified by all of the heirs

by the "Release and Consent" signed by the Appellants and recorded at the County Recorder's Office. Furthermore, it is Respondent's contention that if a mistake had in fact been committed by the trustees and the mistake was not ratified by the heirs, the Appellants are still barred from bringing this action by the three-year Statute of Limitations.

### SUMMARY

The Respondent submits that the Appellants' case is barred by the three-year Statute of Limitations for fraud and mistake, and further submits that the Respondent is entitled to have title quieted in her under the Adverse Possession Rule, and therefore the Lower Court's ruling should be affirmed.

Respectfully submitted,

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