1966

William G. Gibbs and Mary Gibbs v. Don L. Buehner, et al.. and First Western Fidelity v. William G. Gibbs, et al.. : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTA

WILLIAM G. GIBBS and
MARY GIBBS,
Plaintiffs and Appellants

— vs. —

DON L. BUEHNER, et al.,
Defendants and Respondents

FIRST WESTERN FIDELITY,
et al.,
Cross Claimants and Respondents

— vs. —

WILLIAM G. GIBBS, et al.,
Third Party Defendants and
and Appellants

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BRIEF OF APPE

Appeal from the Judgment of the S
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— vs. —
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Cross Claimants and Respondents
— vs. —
WILLIAM G. GIBBS, et al.,
Third Party Defendants and
and Appellants

Case
No. 10706

BRIEF OF APPELLANTS

NATURE OF THE CASE

This is really a suit to determine which of the two groups of parties has been cheated by one Charles L. Wall (herein called "Wall"), erstwhile president of Guaranty Trust Deed Company, whose company is in bankruptcy and who is, himself, now appealing from conviction of federal securities acts violations. The group which has not been cheated will have the land with ref-

erence to which both groups dealt. The other has an action against Wall if they care to file it.

In essence, we have a quiet title action. The land in controversy is 61 acres (herein called the "Tract") in Davis County. In 1962, appellants entered into contracts with Wall under which appellants conveyed the Tract to a trustee from whom Wall would have become entitled to conveyance of the Tract upon satisfying certain conditions. Appellants claim the conditions were never satisfied. They obtained a default judgment against Wall rescinding the sales contract before the trustee conveyed legal title to Wall or anyone claiming under him. They contend their title was thereby fully restored subject only to the mortgage obligation set forth in that judgment.

Respondents have a variety of claims arising out of transactions with Wall after he contracted to buy the Tract and before the rescision of the sales contract. All the other respondents must stand or fall with respondent First Western Fidelity (herein called "Fidelity"), and, for the sake of brevity, we will concern ourselves only with Fidelity's claims.

Fidelity contracted to purchase the Tract from Wall while his contract with appellants was still in effect. It claims one or more of the following propositions are true: (1) That Wall substantially performed his contract with appellants so that appellants must now perform and give clear title to Fidelity as purchaser from Wall, or (2) that appellants, if they did not in fact receive the purchase

price for which they contracted, are estopped to deny it, or (3) that Fidelity has, by deeds already delivered to it, acquired legal title to the Tract as a bona fide purchaser for value without notice of any fraud Wall may have perpetrated in obtaining whatever interest he had.

STATEMENT OF FACTS

On June 27, 1962, appellants unquestionably owned the Tract (Record p. 128). On that date, they entered into an agreement (Exh. 5) with Wall which contemplated exchange of the Tract (valued at $183,000.00) for properties of the same value to be identified, appraised and accepted within thirty days. Pursuant to that agreement, appellants conveyed the Tract to Security Title Company (herein called "Security") as trustee. Wall did not produce properties within the thirty days, so the parties made a supplemental agreement (Exh. 6) on September 5, 1962. It provided, *inter alia,* that Wall could take title to the Tract (i.e. obligate appellants to instruct Security to convey it to Wall) by depositing with a trustee securities having a value at least 2½ times the unpaid balance of the purchase price.

To implement their agreement, Wall and appellants entered into an escrow agreement with Security (Exhs. 3 and 4). Security was instructed to convey the Tract to Wall when certain conditions had been satisfied. Security never did convey legal title to Wall or anyone else (Transcript p. 360). On October 3, 1962, Security executed and delivered to B. J. Investment Company an instrument in the form of a warranty deed to the Tract

(Exh. 20), but that instrument has been judicially determined to have conveyed a security interest only (Exh. 26).

Wall purported to deposit securities with the trustee. He did so by conveying to Security a property identified as the Pueblo Motel. To induce appellants to believe he had satisfied the conditions which would justify Security's conveying the Tract to Wall or his nominee, Wall made some representations about the Pueblo Motel (Exhibit 21, Transcript 170-74) which were untrue, which he knew to be untrue, and on which appellants placed some reliance. These representations will later be discussed in some detail.

Before Security in fact parted with legal title, appellants discovered the falsity of Wall's representations. They then sued to rescind their contract with Wall, and, on November 10, 1964, obtained a judgment (Exh. 21) declaring the contract to be rescinded and their title to the 61 acres to be restored subject to an encumbrance in the amount of $43,600.00 in favor of Fidelity, which had paid the B. J. Investments Company mortgage and succeeded to the mortgagee's interest.

So far as Fidelity is concerned, the record reveals that it contracted with Wall to purchase the Tract on September 10, 1962 (Exh. 9) when Wall had an equitable interest. Thereafter, Fidelity quitclaimed the Tract to Security on October 3, 1962 (Exh. 16), took a warranty deed from Wall on October 4, 1962 (Exh. 18) and took a special warranty deed from B. J. Investments Com-

pany on November 24, 1964, (Exh. 20) after notice of appellants' suit against Wall and filing of *lis pendens* (Record, p. 131; Transcript, p. 87). None of these transactions could have vested legal title in Fidelity because none of its grantors held it.

With reference to estoppel, the record reveals these facts, all established by Fidelity's own evidence:

Fidelity was aware as early as September 27, 1962, that Security held title to the Tract under an agreement which would justify conveyance to Wall *only* if certain conditions were met (Transcript, p. 278). Fidelity was nevertheless "relying" on the representations of Mr. Rayl and Mr. Sorenson that Wall would immediately satisfy the conditions and that title would be "forthcoming" (Transcript, p. 275). To assure itself that Wall could in fact deliver marketable title to the Tract, Fidelity did *not* demand that Wall produce or record a deed from Security. Instead, Fidelity relied on a statement by appellant William Gibbs, made on September 27, 1962, that "Charlie and I have about settled our difficulties and are about ready to close" (Transcript p. 278) and on a note left for Mr. Kump, Fidelity's counsel, by one Patsy Mortenson on October 4, 1962. Mr. Kump testified that Patsy wrote that Mr. Gibbs said, "Got Charles Wall matter approved and confirmed last night, keep smiling." (Record, p. 282.) On October 2, during a telephone conversation, Mr. Gibbs told Mr. Kump that the transaction with Wall "was just about ready to be completed but had not yet been completed" (Record, p. 281).

With reference to the degree of Wall's satisfaction of the conditions which alone would have entitled him to a conveyance of the Tract, we have only the testimony of Mr. Gibbs and Wall. Both testified that the Pueblo Motel, encumbered as it was when Wall conveyed it to Security, had no value in excess of its mortgage, and that Wall deliberately misrepresented its value in an effort fraudulently to obtain a deed. Fidelity adduced no evidence that the transfer of the Pueblo Motel satisfied the security requirements of the Gibbs-Wall contract or that it had any value.

DISPOSITION BELOW

The trial court concluded that Fidelity was entitled to a conveyance of the Tract free from any claim of appellants and entered its decree accordingly. Appellants are unable to determine on what theory the court proceeded.

RELIEF SOUGHT ON APPEAL

Appellants seek an order of this Court annulling the judgment and decree herein, for the reason that the conclusions are against the law and the findings against the evidence, and declaring appellants to be the owners of the Tract subject to the rights of Fidelity as mortgagee.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN MAKING CERTAIN FINDINGS WHICH ARE BASED SOLELY ON THE COURT'S DETERMINATION NOT TO BELIEVE THE WITNESSES.

The trial court adopted 45 findings of fact in this case. Collectively, they give little indication of the court's theory, and appellants are uncertain whether the court is persuaded (1) that Wall performed his agreement with appellants so that he, or his assignee, is now entitled to appellants' performance, or (2) that appellants are estopped to deny Wall's performance, or (3) that Fidelity has somehow acquired legal title, by instruments already delivered to it, as a bona fide purchaser.

In any event, the court made certain findings against appellants even though not just a preponderance but all of the evidence is to the contrary. We will state the findings we believe to be in this category separately and comment on the evidence under each such finding.

FINDING NO. 13

"Wall represented that the Glendale property — the Pueblo Motel — had substantial value. Plaintiff William Gibbs did not rely on Wall's representations to a material extent, but relied on appraisals by other persons and on information obtained from telephone calls to building and loan officers, and their opinions of value and income,

and was motivated primarily by the family disunity and urgent need to dispose of the 61.23 *acres.''*

Mr. Gibbs is, of course, the only witness competent to testify as to the representations on which he relied in making decisions with reference to the Tract. He tesified (transcript, pp. 69-75) that Wall (then associated with the L.D.S. Church and president of an apparently legitimate business with advertised assets in the millions) came to him in September of 1962 and proposed to transfer to a trustee, as the security which would justify immediate conveyance of the Tract to him under Exhibit 6, the Pueblo Motel. He then made reference to an appraisal of the property which valued it sufficiently above its mortgage to qualify it as security. To corroborate his story, he called accomplices in California who talked with Gibbs. Every utterance or writing on which Gibbs could possibly have relied, however, emanated from or was solicited by Wall. No one but Wall represented that the appraisals were reliable and that the value had not changed. It was the total presentation by Wall, although cleverly corroborated, which was false, known by Wall to be false, made to induce a response, and relied upon at least to the extent that appellants permitted the Tract to be mortgaged. We submit that all the information Gibbs received on the day of Wall's presentation was communicated to Gibbs by or through Wall and is part and parcel of Wall's misrepresentation.

FINDING NO. 14

"The Pueblo Motel is in Eagle Rock, which adjoins Glendale, which fact was not shown to be a material representation or unknown to Mr. Gibbs at the time of the agreement."

Gibbs testified (transcript, p. 70) that Wall said the Pueblo Motel was in Glendale, that he (Gibbs) believed it and had no information to the contrary, and that Eagle Rock is "quite a different area" from Glendale (p. 77). There is *no* evidence that Gibbs knew the property was actually in Eagle Rock. There is *no* evidence that Eagle Rock and Glendale are equivalent business environments. Section 558 of the Restatement of Torts says "a fact is material if its existence or non-existence is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction in question." The location of a business property is certainly a factor to be considered by a reasonable man in determining whether or not to acquire it.

FINDING NO. 15

"The Pueblo Motel was not timely rejected by the William Gibbs group, which attempted to hold that property and still have the opportunity of bettering their position over other creditors of Wall and give them an advantage in this action over the other creditors of Wall."

The evidence is uncontradicted that the Pueblo Motel was transferred to Security only to secure Wall's obligations to make eventual payment of the purchase price

for the Tract. This was Gibb's testimony (Transcript p. 63) Gurr's testimony (Transcript p. 372) and Wall's testimony (Transcript of July 5 hearing, p. 43). Gibbs was under no contractual obligation to reject whatever security was offered. It was merely true that, if acceptable security was deposited with the trustee, Wall would become entitled under the September 5 contract (Exhibit 6) to a conveyance from the trustee. Whether or not the Pueblo Motel was temporarily considered to be acceptable security is unimportant. It was discovered to be valueless before Security conveyed the Tract, and any right to conveyance Wall might have claimed was adjudged to have terminated.

There is no shred of evidence that appellants attempted to hold the property to gain an unconscionable advantage over other creditors of Wall. As a matter of fact, appellants never held it at all. Appellants took no action with reference to the Pueblo Motel. They were not accepting it as an exchange property, and the trustee, in Mr. Gurr's words, understood "that it was just given as security, and Mr. Wall should keep it because he expected to get it back."

A reasonable construction of the Exhibit 6 Agreement (i.e. the provision that Buyer reserves the right to withdraw posted securities) is that Wall could at any time have withdrawn the Pueblo Motel, had he wished, so long as the Tract remained intact and unencumbered with the trustee.

Finally, the evidence is that the Pueblo Motel was acquired by mortgage foreclosure in April of 1964 for the

amount of the first mortgage against it (Transcript p. 78). Appellants enjoyed no advantage over the Wall creditors by virtue of Wall's having conveyed this worthless equity to Security. Even if they had enjoyed an advantage, however, it was exactly what they bargained for.

We would challenge respondents to produce from this record a document which imposed a contractual duty upon appellants to reject the Pueblo Motel as security or to take any action they failed to take.

FINDING NO. 16

> *"The holding of said property by the William Gibbs group has not been in good faith."*

This is typical of the amorphous and unanswerable findings made by the trial court in this proceeding. The court finds appellants acted in "bad faith" and do not have "clean hands." This is a quiet title action, essentially, and hardly a proceeding in equity. If a "clean hands" doctrine has application, however, the court should specify the conduct of the stigmatized party which is reprehensible.

There is no evidence that appellants violated any contract with or failed in any duty toward respondents. They had no business relationship with respondents. The suggestion that appellants lost their virtue by permitting Fidelity to rely on Patsy Mortenson's note is particularly ridiculous. Fidelity took a warranty deed

to the Tract from Wall on October 4, 1962. Fidelity didn't have to rely and could not, in the exercise of reasonable business judgment, have relied on Patsy. Before Fidelity proceeded with its transactions, it should have demanded a conveyance from Security. Certainly, this would have been the businesslike way to assure that Wall had satisfied the Gibbs-Wall contract conditions. The obvious reason Fidelity didn't make such demand is that Fidelity knew the conditions for conveyance had not been met.

FINDING NO. 18

> *"Plaintiffs have failed to prove their damage as to the Pueblo Motel by its not having the full value represented by Wall and have failed to show that they have suffered any damage by reliance on Wall's representations as to the Pueblo Motel."*

Appellants have, if the trial court's decision is upheld, lost $65,000.00, the unpaid portion of the purchase price on which they and Wall agreed. They have lost it because they relied on Wall's representations as to the value of the Pueblo Motel. Except for that reliance, appellants would not have done whatever it is that, in the view of the trial court, has soiled their hands.

FINDING NO. 20

> *"The Eagle Rock property at one time appears to have had the value represented by Wall. A change of freeway made the location less desirable and the property less valuable. Whether Mr. Wall knew of the change or that the property had become less valuable, or the extent of the loss of value of the property was not shown."*

Wall testified (Transcript of July 5 hearing, p. 44) and made an affidavit (Record p. 279) that he knew, when he repesented to Gibbs that the Pueblo Motel was a $300,000.00 property, that a new freeway had been proposed which would shunt most of the traffic away from Colorado Blvd., that the property was really worth little in excess of its mortgage and that the deterioration of the property and its environment had greatly decreased its value since the appraisals were made. Mr. Gibbs testified that Wall had made these admissions to him. We can conceive of no kind of evidence which would constitute a "showing" if these kinds will not.

FINDING NO. 21

> *"The failure of the plaintiffs to produce Mr. Wall as a witness when they had him under subpoena affects the credibility of plaintiffs' witnesses, including the testimony of William Gibbs as to the state of mind and representations of Mr. Wall and as to their good faith and clean hands."*

The Court's readiness to find bad faith and unclean hands — where appellants are concerned — is nowhere better exemplified than in this finding. In the Court's view, a party loses all privilege to seek equity if he subpoenas a witness and then decides against calling him. All the parties had the same opportunity to subpoena Wall. His prosecution in federal court was well publicized. While Wall may have expressed repentence, appellants had no control over his testimony and were obliged to regard him as adverse. We have searched in vain for any authority for the proposition that a litigant

who subpoenas a witness must call him. There is no precedent or text support for the idea that a litigant disqualifies himself for equitable relief by his failure to call a subpoenaed witness.

FINDING NO. 27

> *On or about that date First Western Fidelity was informed by William G. Gibbs that the closing of the Gibbs transaction with Wall was assured, which statement was made after Gibbs was informed that First Western would not authorize release of its property by Stanley Title Company until title to the* 61.23 *acres was assured."*

The evidence about Gibbs' "assurance" has already been reviewed. On September 27, (assuming Fidelity's account is accurate) he said "Charlie and I have about settled our differences and are about to close." On October 2, Gibbs said the transaction with Wall "had not yet been completed." Beyond that, we have a note to Mr. Kump from Patsy Mortenson to the effect that the "Wall matter" had been "approved and confirmed."

If Fidelity really believed that Patsy's cryptic note constituted an assurance that Wall could now demand the Tract from Security, it is hardly credible that Fidelity would not have demanded the deed; Fidelity took a warranty deed from Wall on the very date of that note.

Finding after finding was made without any foundation in the evidence at all. To support the findings, the court merely categorized appellants as near perjurers (Record p. 263). The Court particularly so cate-

gorized Mr. Gibbs and Mr. Marshall, both members of the bar and of good reputation whose testimony in this case was unimpeached. The Court did so on the sole basis that they have a financial interest in the outcome of the suit. It would indeed be shocking to learn that a court may disregard or discredit the testimony of litigants just because they are litigants. The Court, on the other hand, eulogized Mr. Kump (who also has a financial interest in the outcome of the suit) even though Mr. Kump's testimony is not essentially different from Mr. Gibbs' as to their communications.

POINT II

THE COURT ERRED IN FINDING THAT THE ELEMENTS OF FRAUD DID NOT EXIST IN THE RELATIONSHIP BETWEEN APPELLANTS AND WALL.

At the outset, it should be noted that appellants had a judgment against Wall when this suit began, and that judgment constituted a judicial pronouncement that Wall had perpetrated a fraud against appellants. As between appellants and Wall, the issues relating to fraud were res adjudicata. (See 30 Am. Jur., Judgments, Section 226.)

The trial court, however, adopted specific conclusions that the elements of fraud were absent in the Gibbs-Wall relationship. (Record, p. 308, Conclusion 5, 6, and 7.) We believe the court requires little edification on the elements of fraud. They are (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person and in the

manner reasonable contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. (37 CJS, Fraud Par 3; *Nielson* v. *Leamington Mines and Exploration Company,* 48 Pac. 2d 439, 87 Utah 69; *Kinnear* v. *Prows,* 16 Pac. 2d 1094, 81 Utah 135; *Guaranty Mortgage Company* v. *Fling,* 240 Pac. 175, 66 Utah 128, 23 Am. Jur., Fraud and Deceit, Sec. 20; Restatement of Torts, Sections 526-549.)

The evidence in this record as to the elements of fraud is voluminous. It consists of the following:

A. Mr. Gibbs' Testimony that:

1. Wall told him on September 22, 1962, that the Pueblo Motel had a value of $300,000.00, that revenues from its operation would capitalize at or above that figure and leave substantial excess after servicing the mortgage debt of $129,000.00, that no depreciation or deterioration in value had occurred in the year or so since last appraisal.

2. Subsequent investigation revealed that, at the time Wall made the statements, the Motel was not producing enough revenue to service its debt, the property was deteriorated, the highway on which it depended relocated, and the mortgage in default.

3. Wall admitted to him in 1964 that he, Wall, knew (from having just tried to refinance the Motel) that his 1962 statements were false when he made them and that he had all the facts then which Gibbs' later investigation revealed.

4. He did not know of falsity of the Wall representations.

5. He relied on Wall's representations in dealing with the Tract, i.e., permitting it to be mortgaged.

6. Wall was, at the time he misrepresented the Pueblo Motel, associated with the business activities of the L. D. S. Church and president of an apparently successful lending institution.

B. Mr. Wall testified at the July 5 hearing, gave his affidavit (R. 277-9) and stipulated (Exh. 29) that:

1. He told Gibbs in September of 1962 that the Pueblo Motel was worth $300,000.00 on the basis of its revenues and that the Motel was producing substantially in excess of the income necessary to service its debt.

2. That he knew, when he made those statements, that they were false in that the highway was about to be relocated away from the property, he had just tried and failed to borrow additional money against the Motel, and the existing mortgage was in default. (Trans of July 5 Hearing, p. 33.)

3. He was, when he made the misrepresentations, associated with the business offices of the L. D. S. Church and president of Guaranty Trust Deed Corporation. (Transcript of July 5 Hearing, p. 17, 18.)

C. The default judgment (Exh. 21) for appellants and against Wall on a complaint charging all the elements of fraud, that default being an admission of every material allegation of the complaint (*Credit Men* v. *Bowman*, 38 U. 326, 113 Pac. 63; *Jensen* v. *Barrick*, 15 U. 2d 285, 391 P. 2d 429.)

There is absolutely no evidence controverting any aspect of appellants' presentation with reference to

Wall's fraud. We agree, of course, that the existence of two elements of fraud, the materiality of the representations and the right of the recipient to rely on them, involve the application of principles of law. We will comment on these legal principles separately:

A.

MATERIALITY OF WALL'S REPRESENTATIONS

Wall said the property was in Glendale when it was actually in Eagle Rock; he said it produced income which would justify its appraisal at $300,000.00. Both of these statements were false. Were they material?

The Restatement of Torts, Section 538, says, "a fact is material if its existence or non-existence is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction in question." The value of the security, in this case, was the only concern of the sellers. If the value was there, they could be sure of payment if they permitted the Tract to be alienated. If the value was not there, they could not be sure.

The editors of A.L.R. have reviewed the leading cases on this subject and reached this conclusion: "It is held almost automatically and as a matter of law that the past or present rents, profits, income or dividends of the subject matter of a contract is material and that representations concerning these matters are material." (27 ALR 2nd, 14.)

False statements as to the location of property will alone justify rescission of a sales contract. "It is a well settled principle that false statements or misrepresentations as to the location of real property which is the subject matter of a transaction constitute actionable fraud." (23 Am. Jur., Fraud & Deceit, Sec. 52.)

B

APPELLANTS' RIGHT TO RELY

There was nothing about Wall's history or appearance in 1952 which should have evoked appellants' distrust. He purported to speak knowledgably about a business property as its owner. It was a property 750 miles distant with which appellants were unfamiliar. The view of the Restatement (Restatement of Torts, Sec. 540) is that, "the recipient in a business transaction of a fraudulent misrepresentation of facts is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation." The cases from every jurisdiction adopt the concept that, in our complex business world, a buyer has the right to rely on a seller's representations about a business property which is the subject of their transaction. In 27 ALR 2d 14, the annotator's summarization on this point is this:

> "The representee has a right to rely upon a positive statement concerning the past or present rents, profits or income, and need not conduct an investigation to learn whether the statement is true or false. . . . It should also be noted that the

average businessman or lawyer is not able to make such an examination of the books of a business as would reveal the falsity of statements as to profits of the business where it is of some size and in such case he is entitled to rely on the seller's representations."

The suggestion that Wall's false statements can be dismissed as mere puffery is particularly out of harmony with the authorities. Statements about the level of business income are simply not in that category. Nor can it be contended that Wall was only making representations about the Motel's value as of some previous date. Even if Wall had not specifically represented, as he did, that the $300,000.00 valuation was justified by *current* income, appellants could have relied on the implication that Wall knew nothing incompatible with that valuation. The Restatement, Section 539, states the legal proposition: "A statement of opinion in a business transaction upon facts not disclosed or otherwise known to the recipient may reasonably be interpreted as an implied statement that the maker knows of no fact incompatible with his opinion."

This record compels confirmation of appellants' default judgment against Wall as against Wall and anyone claiming an equitable interest under him. The trial court's findings and conclusions to the contrary are the grossest error. There is serious question (particularly in view of Fidelity's notice of the Gibbs-Wall fraud action) that respondents can look behind the default in any event. The law favors the conclusiveness of judgments as against the parties and their privies. A typical state-

ment of the doctrine is this statement from American Jurisprudence:

> "The general rules as to the conclusiveness of judgments apply to a judgment by default, which is ordinarily just as conclusive an adjudication between the parties and privies as one rendered after an answer and contest. Thus, the fact that a judgment is rendered by default has been held not to prevent it from operating as a basis for the application of the doctrine of res judicata. When properly rendered, such a judgment has been regarded as conclusive and binding between the parties and privies as to matters properly alleged in the complaint or petition in the former proceeding and necessarily involved and passed upon." (30 Am. Jur., Judgments, Sec. 226.)

POINT III

WITHOUT REFERENCE TO WALL'S FRAUD OR THE JUDGMENT APPELLANTS OBTAINED BASED UPON IT, APPELLANTS ARE ENTITLED TO HAVE THE TRACT'S TITLE QUIETED IN THEM BECAUSE THE SALES CONTRACT HAS NEVER BEEN PERFORMED BY THE BUYER.

This is essentially a quiet title action. Appellants unquestionably held fee title to the Tract in 1962. They entered into a contract for its sale on September 5, 1962. Under that contract, the buyer was entitled to conveyance when he (1) transferred to appellants acceptable exchange properties valued by Zions Savings Bank at $183,000.00, or (2) paid the purchase price in money or both money and exchange properties, or (3) deposited with the trustee securities having a value 2½ times the

value of any unpaid balance of the purchase price. (Exh. 6.)

No one contends that the purchase price has been paid. Appellants may not lawfully be compelled to convey, therefore, unless the sales contract has been performed by the buyer in the deposit of security.

There is evidence that property, the Pueblo Motel, was conveyed to the trustee as security for something. The property so "deposited" did not, however, have a value 2½ times the $65,000.00 unpaid balance. It had no value. That appellants or respondents or both may have been temporarily deceived does not alter the basic fact of non-performance by Wall or by any assignee of Wall.

On this record, there can be no valid finding of performance or substantial performance by Wall. If this is Fidelity's theory, it has utterly failed in its proof. Even if appellants' judgment against Wall were set aside, Fidelity would be obliged to pay $65,000.00 to become entitled to a deed under the Exhibit 6 contract.

POINT IV

THE EVIDENCE DOES NOT REVEAL A SITUATION WHERE THE DOCTRINE OF ESTOPPEL CAN BE INVOKED AGAINST APPELLANTS.

A second theory on which Fidelity may have proceeded in this case is that appellants represented to Fi-

delity that Wall had performed his contract under such circumstances that appellants may not now deny that performance.

We have already commented on the nature of the communications between Gibbs and Kump. In total, they do not amount to a representation that Wall had sufficiently performed to be entitled to a deed. Against the background of the transactions then in contemplation, it appears that Gibbs was only indicating the deposited security was sufficient to justify the mortgage which was in fact consummated. Even Fidelity does not appear to have construed the Gibbs message as a representation that Wall was now entitled to a deed from the trustee. If Fidelity had so construed the message, it would certainly have demanded conveyance from Security, because Fidelity then had Wall's deed to the Tract.

Even if the Gibbs' communications had been unequivocal, however, we do not have an estoppel situation. The most quoted definition of estoppel (see *Public Utilities Comm.* v. *Jones,* 54 U 111, 179 Pac. 745) is set out in the American Jurisprudence discussion at 28 Am. Jur. 2nd 628:

> "It is the principle by which a party who knows or should know the truth is absolutely precluded from denying any material fact which he has, by words or conduct, induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them, thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial were allowed."

This is a somewhat involute statement, but it points up the distinct similarity between the elements of estoppel and fraud. It must be true, inter alia, that the party against whom the doctrine is invoked (1) knew the true facts, (2) induced the invoking party to believe otherwise and (3) was in such relationship to the invoking party that the invoking party had a right to rely on whatever the estopped party said.

In the instant case, it does not appear that appellants ever said anything to Fidelity except that the deal with Wall was "almost" closed. This is not the kind of representation which will support an estoppel. Quoting American Jurisprudence again (19 Am. Jur., Estoppel, Section 52): "The truthful statement as to the present intention of a party with regard to his future acts is not the foundation on which an estoppel may be built." A more definitive assurance from Gibbs is produced by Fidelity only in the form of a note left for Mr. Kump by his secretary. The message on the note is not shown to be a quote; it is cryptic and the rankest hearsay. Appellants were not permitted to examine the writer of the note. Such notes are, we find, admissable "under the shop book rule." The language of the note does not suggest, however, Gibbs' willingness to permit any different alienation of the Tract than actually occurred.

Even if the Gibbs communications were exactly as Fidelity represents them, however, it does not appear that appellants knowingly misinformed Fidelity. Indeed, as soon as they became aware of the falsity of their information, they brought appropriate action and gave notice to Fidelity.

It does not appear that appellants undertook to induce Fidelity to do anything or that they stood to gain by Fidelity's transaction with Wall. Fidelity continually importuned Gibbs even though it had no right to demand information from him. There was absolutely no contractual or business relationship between them. If this was *inducement* as between Gibbs and Fidelity, *Fidelity was the inducer.*

Finally, there is no showing that Fidelity changed its position for the worse in reliance on anything Gibbs said. Any payments Fidelity made are either now recoverable or (as in the case of the South Davis Water District demand) satisfied an already existing obligation.

In short, this is not a situation where the ends of justice demand that appellants be estopped to deny that Wall performed his contract. Appellants haven't lied; they are the victims of lies. They did not "induce" Fidelity; they were solicited by Fidelity. They owed no duty to Fidelity, but their responses to Fidelity's questions were as accurate as their information would permit. "The doctrine of estoppel should be applied cautiously and only when equity requires it to be done. In determining the application of the doctrine, the counterequities of the parties are entitled to due consideration." (28 Am. Jur. 2nd 631.) Appellants stand to lose $65,000.00 by reason of Wall's deceit if they are estopped. Otherwise, Fidelity merely recovers from escrow the consideration previously paid.

POINT V

FIDELITY IS NOT A BONA FIDE PURCHASER.

Fidelity cannot claim to have acquired legal title to the Tract by any deed heretofore received by it. It has deeds from Wall, who had the equitable title of a purchaser, and B. & J. Investments Co., which had the equitable title of a mortgagee. The second deed was executed after Fidelity had notice of appellant's suit against Wall. Fidelity is, in fact, simply a purchaser from a buyer who had not obtained legal title at the time of his resale and who defaulted on the basic contract. This is a familiar situation in the law. The second buyer, even if he has paid full consideration, has consistently been denied, the status of bona fide purchaser. In determining whether a purchaser is "bona fide", the courts first look to the nature of his title. There is no such thing as a bona fide purchaser without legal title. This is a general principle of the law of sales whether the property is real or personal. In their treatise on Sales, the editors of *Corpus Juris Secundum* say (77 C.J.S. 1085):

> "In order for a transaction to entitle a person to claim protection as a bona fide purchaser, there must be a completed delivery of the property to the purchaser as owner. . . . It is necessary in order to be a bona fide purchaser that the interest acquired be a legal title, and the good faith acquisition of a merely equitable title or interest does not suffice for this purpose.

and, with specific reference to realty, *American Jurisprudence* (55 Am. Jur., Vendor & Purchaser, Sec. 766) says this:

> "The protection afforded a bona fide purchaser of real estate extends, as a general rule, only to persons purchasing and acquiring the legal title, and not to the purchaser of an equitable interest; and since the interest of a purchaser of real estate before a conveyance is a mere equitable interest, it is regarded as insufficient to afford the purchaser protection against an earlier equal equity."

Section 172(d) of the Restatement of Restitution contemplates almost exactly the instant fact situation:

> "Thus, if a transfer of land is procured by fraud, and the fraudulent transferee . . . contracts to sell the land to another, the other is not a bona fide purchaser since the title to the property has not been transferred to him, and his equitable claim is subject to the prior equitable claim of the defrauded person, even though the other pays value without notice of the fraud."

and his general doctrine has been adoted by virtually every court which has considered the problem. (See *Sequin* v. *Maloney,* 198 Ore. 272, 253 P. 2d 252, 35 A.L.R. 2d 1412).

CONCLUSION

Appellants seek to quiet title to land they once agreed to sell for a purchase price they have never received. Respondents are people who dealt with appellants' buyer and acquired equitable interests in the land. Each of the parties has taken some action in reliance on Wall's misrepresentations. We submit, however, that appellants, as defrauded sellers, must prevail against the claims of purchasers of equitable interests from appellants' fraudulent buyer.

The trial court, forming prejudices beyond comprehension, made findings against the evidence and adopted conclusions inconsistent with its findings. It supports the findings by unreasonably exercising a discretion not to believe witnesses and, presumably, by assuming that to disbelieve a witness establishes the opposite of what he has said.

We cite as error and as evidence of improper trial the characterization of appellants' witnesses, including two members of the bar, as nearly perjurous, when their testimony was not even impeached. We submit that the decision of the trial court ignores the evidence and offends the law.

Reespectfully submitted,

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