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A Problem for the Title Examiner

Lyman Chalkley
University of Kentucky

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A PROBLEM FOR THE TITLE EXAMINER.

The doctrine of notice which requires the examiner of titles to take cognizance not only of the bare recitals in deeds, but to make enquiry and ascertain the facts and circumstances of which there may be only an intimation, a suggestion, contained in a word or phrase, throws upon him the responsibility of exercising great acumen and often subtlety in determining the exact transaction. Dates, the relation between the parties growing out of former operations, the amount named in the consideration and many other data, sometimes contained in the instrument itself and sometimes to be gathered outside, must be thrown together and a story woven which may prove the recital to be false, or that the transaction is fraudulent. Not all the stories of mystery are contained in the experiences of detectives who discover the murderer. Even business operations may contain a fraud which is hidden behind a maze of details and single acts which have been cunningly made use of for the purpose of concealing the tort. But it is rare that there is not a blind spot in the cunning of the wrong doer. One of the usual oversights is the utter oblivion of the fact that, in order to cover up a series of tracks formerly made, a second series must be left, and that the second series only postpones ultimate discovery one step—in many cases giving further evidence to aid the investigator.

Such a case is, apparently, the following which is taken from the records in the clerk's office of one of the western counties of Kentucky. It has never gotten into the courts, although the title has been examined and passed repeatedly, and the property has changed hands several times upon the faith of such examinations and reports. The transaction suggested in the recitals and surrounding circumstances has never been noticed, and that, too, although the title has been through a chancery proceeding and sold under decree. Further, the person interested was a party to that proceeding and represented by counsel of standing.

The record discloses the following facts :

(1) In 1865 Richard Davis died testate, devising his real estate to his seven children equally. Among the seven children were a son, Robert, who was nominated one of the executors; a daughter, Sally, who never married; and a daughter, Mary, who married Stokes and had two children. Robert was the oldest son and was reputed to be a man of affairs and a good business man. He was a prosperous manufacturer and trader, and attended to all the money matters of his brothers and sisters, and after Richard's death conducted Richard's business and administered the estate pending the time when the youngest child reached full age, when the estate was to be divided according to the terms of the will.

(2) On October 6, 1871, Mary Stokes together with her husband executed to Robert Davis a mortgage on her one-seventh interest in consideration of "their indebtedness to said party in the sum of three thousand dollars delivered by their note at hand of even date herewith and due six months after date."

(3) On August 6, 1878, the will of Sally Davis, dated July 2, 1878, was admitted to record. The will contained the following items:

"Third. I give and bequeath the residue of my estate of every kind and description to my brother, Robert Davis, and my nephew, Richard Stokes, and my niece, Sally Stokes, of which one-half and fifteen hundred dollars in value is to go to my said nephew and niece, and the residue to my brother, the said Robert Davis.

"The portion devised to my said nephew and niece to be holden by their mother, Mary Stokes, in trust for them with power to sell, control and use the same as she may think best for the said children, free from the control of courts or persons. I desire, however, that my brother, Robert Davis, assist her in the management of said trust.

"I hereby appoint my brother, Robert Davis, and my sister, Mary Stokes, executor and executrix of this my will, and request that the county court shall not require security of them as such, and that no security shall be required of my said sister as trustee for the said children."

(4) On April 6, 1881, Mary Stokes together with her husband executed to Robert Davis a deed of bargain and sale to the property mortgaged in conveyance (2) above. The consideration named was twenty-one hundred and one dollars cash in hand paid and receipt acknowledged. This deed was acknowledged and recorded April 8, 1881.

(5) On April 8, 1881, Mary Stokes and her husband executed a deed of conveyance to Robert Davis, having the following recitals:

"Between Mary Stokes, trustee, wife of Henry Stokes, and the said Henry Stokes who unites with his wife in the con-

veyance, the said Mary acting and making this conveyance as trustee for her two children, Richard Stokes and Sally Stokes, both of whom are infants and under age, and by virtue of a power conferred upon her as such trustee of her said children by the will of her deceased sister, Sally Davis.

"In consideration of fifteen hundred and twenty-four dollars and ten cents paid and to be paid by Robert Davis, the party of the second part, of which the sum of eleven hundred and twenty-four dollars and ten cents have been paid by the said Robert in settlement and which payment is hereby acknowledged by the said Mary, trustee, and the sum of four hundred dollars are to be paid by the said Robert to the said Mary, trustee, as aforesaid, on or before the first day of March, 1882, the said Mary, trustee, as aforesaid, and by virtue of and in the execution of the power under the said will of her said deceased sister, and her husband the said Henry, do by these presents bargain, sell and convey unto the said Robert all the right, title and interest of her two said children, Richard Stokes and Sally Stokes, which they have under the said will of the said Sally Davis, and which interest is as follows, to-wit: one undivided fourteenth in the following real estate (as described in (2) and (4)) * * to have and to hold the whole of said interest in said property unto the said Robert Davis, his heirs and assigns forever.

[Signed]

Henry Stokes.

Mary Stokes,

Trustee of her children,

Richard and Sally."

This deed was acknowledged by "Mary Stokes, trustee," on April the eighth, 1881, and admitted to record the same day, being the same date as (4) above.

(6) On the next day succeeding (4) and (5), that is, on April 9, 1881, Robert Davis made this entry on the margin of (2) by way of release: "This mortgage having been paid off, is hereby released, April 9, 1881. Robert Davis."

(7) On November 30, 1881, the will of Mary Stokes, dated November 16, 1881, was admitted to record. It contains the following clauses:

"I give and devise the whole of my estate, real and personal and mixed and choses in action, to my two children, Richard Stokes and Sally Stokes. * * * I wish my executor to sell (certain property). He shall out of the proceeds of such sale pay (certain debts), and after the payment of my funeral expenses, invest the residue of the proceeds of the sale in other real estate, bank stocks or bonds for the use and benefit of my said two children, and may resell said real estate, bank stock or bonds and invest the proceeds in other like securities for the benefit of my said two children as often as he shall think it to their interest to do so. I appoint my brother, Robert Davis,

guardian of my said two children and also executor of this my will, and request that no security shall be required of him either as guardian or as executor."

(8) When Richard Stokes reached the age of fourteen, Robert Davis appeared with him in court and was chosen guardian and qualified, and at the same time he was appointed guardian of Sally and qualified, but made no settlement of accounts. Shortly afterward, in 1890, Sally died without issue, intestate and unmarried, and her portion went to Richard by the terms of her mother's will.

(9) In 1892 Richard Stokes reached his majority, whereupon Robert Davis stated his account with him as administrator of his mother and as guardian both of himself and his sister, Sally. There were not several accounts in the various capacities, but a single account in which Robert charged himself with the deferred payment mentioned in (5), which was balanced against his commissions as executor and guardian. This account was reported by the commissioner and allowed by the court in August, 1893.

(10) On September 2, 1893, Robert Davis entered on the margin of the record of (5), in his own handwriting, the following:

"The purchase money mentioned in this deed having been all paid, I, Robert Davis, now trustee for the children of Mary Stokes, hereby release the lien retained to secure the deferred payment mentioned in this deed, September 2, 1893.

"Robert Davis, Trustee."

(11) In 1895 Robert Davis died intestate, leaving his surviving brothers and sisters and the descendants of those deceased his heirs. A chancery cause was brought by his administrator to wind up a partnership of which Robert was a member, and settle Robert's estate between his heirs and representatives, and to secure a division among the heirs of Richard Davis. Richard Stokes was made a party to this cause as the representative of his mother, and as such, heir of Robert Davis, in which capacity he appeared. There was a decree of sale under which the one-seventh of Richard Davis' land which descended to his daughter Sally by Richard's will, devised by her to Mary as trustee for her children, and as to which Mary executed a deed (5) as trustee to Robert Davis, was sold as the property of Robert and the proceeds distributed among his heirs. In this proceeding the validity of the title of Robert Davis to Sally's seventh was not mentioned nor the good faith of the transaction by which he acquired it questioned.

The purchaser at the judicial sale of the land which had been the property of Richard Davis, and which was devised by him to his heirs, now offers it for sale, claiming a clear and indefeasible title in fee simple.

It will be noticed that there has never been a division among the heirs of Richard except of the proceeds of this sale.

From these facts it will appear that, in 1865, Robert Davis stood toward his sister Mary in a relation of the closest confidence and trust. He had been pointed out by their father as the one having the judgment and experience to conduct a flourishing business; as being discreet, tactful and honest. He was her oldest brother, and by his will were to be determined the most vital common concerns of herself and her brothers and sisters. The education and training of her minor brothers and sisters had been entrusted to his direction. In a word, he had been designated by their father as his immediate personal representative in all matters concerning the family and clothed with power and authority. The relation of dependence was further strengthened by the acquiescence and concurrence of her husband. An additional bond between the brother and sister was created by the loan to her and her husband of three thousand dollars on October 6, 1871, secured by a mortgage upon her undivided share in her father's estate, which obligation became due on April 6, 1872. Beginning with this transaction, the sixth, eighth and ninth of April became critical dates in her relations with her brother.

Affairs stood in this situation until 1878, when her sister Sally devised one-half of her one undivided interest in their father's estate to Mary's children, constituting Mary as trustee, "with power to sell, control and use the same as she may think best for her said children, free from the control of courts or persons." There was the qualification, however, that it was her desire that their brother Robert assist her in the management of the said trust. The remainder of the undivided share Sally devised to Robert, thus drawing still more closely the relation of dependence between them. Sally, further, appointed Robert and Mary jointly executors of her estate, and declared her confidence in Robert by requesting that no security be required of him.

So matters between them remained until April 6, 1881, three years. On that date Robert stood in four distinct capacities towards Mary.

(1) He was executor of her father's estate, of which there had been no accounting and no division.

(2) He was her individual creditor in three thousand dollars.

(3) He was quasi co-trustee with her of her children.

(4) He was co-executor with her of their sister Sally's estate.

On the nominal dates of April 6, April 8 and April 9, 1881, took place the following transactions between them, affecting the capacities (2), (3) and (4).

I. On April 6, 1881, Mary conveyed to Robert by absolute deed the property mortgaged by her to Robert on October 6,

1871, to secure the loan of three thousand dollars which became due April 6, 1872, upon which interest would be due on April 6, 1881. It is significant that this deed does not mention the mortgage. Although this deed is dated April 6, it was not acknowledged and recorded until April 8, at the same time with the next succeeding instrument which was dated April 8. The consideration mentioned in this deed was two thousand one hundred and one dollars, acknowledged to have been received in cash.

II. On April 8, 1881, Mary, declaring that she acted in the capacity of trustee and in exercise of the power given her in Sally's will, executed an instrument purporting to convey to Robert that portion of Richard's estate which had been devised to her as trustee of her children by her sister Sally. This instrument was acknowledged by Mary and admitted to record on the same day as its date, which was the same day as the acknowledgment and admission to record of the deed of April 6. The consideration mentioned was one thousand five hundred and twenty-four dollars and ten cents, made up as follows: One thousand one hundred and twenty-four dollars and ten cents paid by Robert "in settlement," and the sum of four hundred dollars left outstanding as a deferred payment and obligation of Robert to Mary, trustee.

This instrument recites, "bargain, sell and convey unto the said Robert all the right, title and interest of her two said children, Richard Stokes and Sally Stokes, which they have under the said will of the said Sally Davis," from which it will appear that Mary did not intend, nor did she accomplish, the conveyance to Robert of the legal title which remained in her. In fact, the legal estate has never gone out of her unless to Robert by adversary possession for the statutory period, or by descent or devise to her son Richard.

III. On April 9, 1881, the day after the acknowledgment and recording of the two former instruments, Robert marked satisfied, as having been paid off, the mortgage dated the sixth of October, 1871, for three thousand dollars which became due on April 6, 1872, and had never been satisfied.

The net result of these three transactions is that on the days April 6 to 8, Mary paid to her brother Robert her personal obligation of three thousand dollars with interest, and conveyed to him land held by her in trust for her children to the value of four hundred dollars. Or, to put it otherwise, Mary conveyed to Robert in payment of her own personal obligation to him of three thousand dollars, two interests in land—one her own, in her own right; the other, held by her in trust for her children; and above all, the conveyances and the operation of this contrivance took place with her oldest brother with whom she was on the closest terms of intimacy and dependence; who had lent her money, who was the executor of her father's estate, who was

enjoined upon her as her confidential adviser, who was her co-executor of her sister's estate, who was her co-trustee for the benefit of her children of the very land conveyed. Or, to put the proposition in still a third way, Robert received from Mary, in payment of her personal debt of three thousand dollars, two interests in land, one being trust interest held by her for the benefit of her children and in which Robert was her co-trustee in all except seisin of the land. In return, Mary received a release of the debt of three thousand dollars secured by the mortgage, together with a receipt for the interest, which was her personal affair, and Robert's obligation for four hundred dollars to her as trustee for her children.

The situation will be made plainer by an analysis of the considerations mentioned. It will be remembered that the original debt of Mary to Robert was three thousand dollars which became due on April 6, which was one of the interest periods. Taking the rate of interest as 15%, which was not unusual at that time, interest for six months would be two hundred and twenty-five dollars. Taking the interest as 7½%, which would be unusual, the interest would be, for one year, two hundred and twenty-five dollars. In order to consummate the deal with appearance of verity, Robert should receive three thousand dollars, and two hundred and twenty-five dollars, and four hundred dollars, in all thirty-six hundred and twenty-five dollars. He did receive property valued at two thousand one hundred and one dollars, and one thousand five hundred and twenty-four dollars, in all three thousand six hundred and twenty-five dollars.

Unfortunately for Robert, he inserted in the deed from Mary to him, conveying the trust interest, the phrase "paid by the said Robert 'in settlement,' and which payment is hereby acknowledged by the said Mary, trustee." Trustees are not permitted to receive trust property "in settlement," but must keep such property separate and intact, and this is especially the case in dealings with co-trustees. The rule would be still more rigidly enforced in a case where, as here, there were outstanding personal obligations between the parties. The burden would be upon him to show a settlement of trust account with Mary, as to which there is no intimation of record, which would justify her conveying to him the trust corpus. But it is doubtful whether the chancellor would entertain any effort of his at explanation. It would seem more consistent that the whole transaction be set aside as fraudulent *per se*.

In addition, Robert never settled accounts as executor of his father, Richard. He made no settlement and rendered no accounts to any one until his sister Sally had been long dead, his sister Mary had died, his niece Sally had died, and his nephew Richard Stokes came of age. He seems to have grouped his various capacities in that settlement, and immediately after-

wards, styling himself "now trustee for the children of Mary Stokes," entered upon the margin of the deed to him by "Mary Stokes, trustee," a release of the deferred payment of four hundred dollars. It will be readily seen that this release is inoperative. The record does not disclose that Robert was ever trustee of this interest for the benefit of Mary's children. If he was such trustee, being also the debtor in the deed, he could not make a release. And although he had been trustee formerly, he was not trustee at the time of entering the marginal release, since he was discharged upon the settlement with Richard.

Robert Davis overreached himself in resorting to a very cheap and flimsy subterfuge to cover up his tracks, of which every subsequent purchaser had notice from the recitals in the instruments themselves, which subterfuge was not only a fraud but a breach of faith and a breach of trust as well. Although he took possession of the trust property, he never did so under claim of the legal title, in hostility to the rightful owner, since his color of title under which he claimed did not purport to invest him with the legal title, and because the relation of trust and confidence in which he stood to the owner of the legal estate made it necessary for him to declare unequivocally that it was his intention to hold adversely. Moreover, his claim was never that he held by a hostile title, but that he held the same title which was otherwise in Mary Stokes and then in Richard Stokes.

LYMAN CHALKLEY.