

at law. The property in question, at the time of Mr. Brain's death, was worth about \$4000. Shortly before his last illness, the deceased, they aver, entered into negotiations with the Zion's Savings bank, through B. H. Schettler, its cashier, to obtain a loan of \$2000, which was to be secured by mortgage on the Brain brickyard property; that on the day preceding his death the deceased sent a request to Mr. Schettler to prepare a draft of said mortgage; that Brain had for years had intimate business relations with Mr. Schettler, and had entire confidence in his business capacity, integrity and friendship; that about 8 p.m. on May 22nd—and within a few hours of Mr. Brain's death—Mr. Schettler, accompanied by a notary public, went to the Brain residence, presented a paper having the general appearance of a mortgage—and which plaintiffs aver the deceased believed to be such—and without explanation or statement as to its contents this was signed by Mr. Brain. At Mr. Schettler's request the plaintiff Annie Peters Brain, as the wife of deceased, also signed and acknowledged the document, but without knowing its actual contents. About twelve hours later, this being after Brain's death, plaintiffs discovered that, instead of its being a mortgage, the deceased and Annie Peters Brain had, in fact, signed a deed conveying the premises in dispute to Mary B. Brain. Hence the plaintiffs now insist that B. H. Schettler, Mary B. Brain, and others to them unknown, entered into a conspiracy to cheat and defraud the plaintiffs and the other heirs at law. They also declare that the deed was made without the knowledge or consent of the deceased and Annie Peters Brain, and that it would never have been executed by either of them had they known the true facts. The deed, they say, was fraudulently obtained, has been recorded in the office of the county recorder, and constitutes a cloud upon the title to the property. They therefore ask that it be declared void.

Answering the complaint, defendant denies that the plaintiff Annie Peters Brain was the wife of Edward Brain at the time of his death, or that the property mentioned was at the time of Mr. Brain's death, or is now, of the value of \$4000, or more than \$3000. Denial is further given to the allegations that on May 22nd, 1890, when Brain was fatally sick, he directed that a deed of his brickyard property be carried to B. H. Schettler, that he sent a request to that gentleman to prepare a draft of mortgage thereon to secure any loan, or that deceased stated that he and plaintiff would execute the same. She likewise denies that at any time deceased signed or acknowledged any instrument in writing without fully understanding its contents or being informed by Mr. B. H. Schettler or other person as to the nature thereof. She denies that subsequent to Mr. Brain's death, and about twelve hours after the execution of the deed, plaintiffs discovered that, instead of the said mortgage, the deceased and Annie Peters Brain had signed and acknowledged a deed of the premises, conveying the same to Mary B. Brain; denies that Mary B. Brain and B. H.

Schettler, either with or without others, conspired to cheat, wrong, or defraud plaintiffs or the other heirs at law; denies that the deed mentioned in the complaint was made without any or adequate consideration passing therefor, or without the knowledge or consent of the deceased or Annie Peters Brain. She further denies that plaintiffs, or either of them, are interested in said property, that the deed was fraudulently obtained, or that it constitutes a cloud upon the title, to the damage of plaintiffs. She then goes on to allege that in the month of October, 1852, the deceased and herself, believing themselves to be in every way legally competent to do so, intermarried, and from that time until November, 1883, a period of over thirty-one years, they regarded themselves in law and in fact, as husband and wife. During the period named there were born to them five children, three of whom are now living, the youngest being twenty-three years of age. In November, 1883, they were informed, however, that the marriage was illegal, because at the time it was contracted the deceased had a wife living and undivorced, who had long before separated from him, and, as he supposed, had been legally divorced. When she married the deceased she owned several hundred dollars' worth of property, which was sold and the proceeds given to Brain for investment in land situated in Salt Lake City. The lots purchased with it (and now worth about \$50,000) were afterwards sold, and the proceeds used by deceased, who gave her the premises named in the complaint for a home. For more than twenty years past she has occupied the same as her home, and until 1883 (when she ceased to live with him as stated) deceased also resided there. Several years ago, and before his alleged marriage with the plaintiff Annie Peters Brain, deceased made a life lease of the premises to defendant, and many times afterwards promised to convey to her the title to them. He, however, failed to do so until May 22nd, 1890, when in fulfillment of a promise, and for a valuable and adequate consideration, he executed the deed freely and voluntarily and with a full knowledge of its purport and effect; that at deceased's request Annie Peters Brain signed and acknowledged the deed. Defendants say she has no other home than that mentioned in the complaint, and no other property than the household goods and furniture therein, which are of comparatively small value. She asks that her title to the premises be ratified and confirmed, that she have her costs in this behalf, and such other relief as to the court may seem equitable and just.

The witnesses for the plaintiffs are James Maxwell, Annie Peters Brain and Mrs. Lucas; and for the defendant Mary B. Brain, B. F. Schettler and Joseph E. Taylor.

His honor said this was an action to set aside a deed executed by the late Edward Brain and his wife, Annie Peters Brain. The cause, as set out in the complaint, was that the deceased on the day before his death, and his wife, signed the deed without knowing its contents; in other words, that they were fraudulently led to believe that it was a mort-

gage. It appeared from the evidence that the defendant married Mr. Brain some thirty-six years ago, at which time he had another wife; and eight or ten years since he married the plaintiff, Annie Peters Brain. After the marriage with her he obtained a divorce from his first wife and then again married the plaintiff, making her his lawful wife. It further appeared that he deceased and defendant lived together on the property involved in the dispute, as man and wife, until Brain's marriage with the plaintiff; and that Brain had given the defendant a life lease on the property. It seemed that Mr. Taylor, one of the witnesses in the case, had tried on one or two occasions to persuade the deceased to execute a deed in favor of the defendant, feeling that, having raised a family by her, he ought to do so; and about two weeks before his death Mr. Brain expressed his intention of adopting the suggestion. Just before he was taken sick, however, he told a Mr. Maxwell that he did not think he would. Annie Peters Brain stated, in the course of her testimony, that the deceased told her that Mr. Taylor wanted him to execute a deed in favor of Mary B. Brain, but that he would not do it. To another person it was said deceased stated he intended to give all his wives a home.

Deceased was attacked with pneumonia on May 17th in last year, but he was not thought to be dangerously ill until a few hours before he died. The plaintiff had testified that at the time the deed was executed he was in a high state of fever, and at times during the day was "flighty." She did not think him competent to understand the nature of the deed. Mrs. Lucas also stated that the deceased was somewhat "flighty" on that particular day; and Dr. Pratt, who attended Mr. Brain in his last illness, said she was at the house twice on the 22nd May; his mind then appeared to be unclouded. She was not present when the deed was executed, but must have been there shortly before. Mr. Schettler likewise testified that the deceased's mind was clear when he signed the document, and that he talked rationally. Mr. Iverson, the notary public, made a similar statement. The plaintiff had declared that when the paper was brought to her to sign she thought it was a mortgage, and such was her husband's impression. On the other hand, Mr. Schettler stated that he first handed the mortgage to the parties, called for a pen and ink for them to sign it, then took out a deed and said to them, "Here is that deed;" when Mr. Brain remarked, "I know what the old lady wants; she wants Charlie (meaning the son) to build a house on that lot. Well I believe I will sign it;" and accordingly, after vacillating somewhat, he did attach his signature.

The only question under the circumstances was whether there was sufficient evidence to warrant the court in finding that the execution of this deed was procured by fraud; was the deceased deceived and misled, and owing to his mental and physical condition at the time did the evidence authorize the inference that he did not understand what he was doing? The acknowledgment of a deed or instru-