

2000

Marvin W. Hansen v. Reuel S. Kohler : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MARVIN W. HANSEN and
BEVERLY M. HANSEN,

Plaintiffs and Appellants,

vs.

REUEL S. KOHLER and
DOLORES M. KOHLER, his wife,

Defendants and Respondents,

EARSEL G. PIERCE and
PATRICIA B. PIERCE, his wife,

Intervening Defendants
and Cross Claimants.

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Case No. 14099

BRIEF OF RESPONDENTS KOHLER

Appeal From Judgment of District Court
of Box Elder County
Honorable VeNoy Christofferson, Judge

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Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
ARGUMENT	
I. The Warranty Deed Transferring the Howell Property to the Kohlers Was Not Intended as a Security Instrument.....	5
II. Any Modification of the April 2, 1967 Warranty Deed Was Required to be in Writing.....	11
III. The Doctrines of Resulting or Construc- tive Trusts are not Applicable.....	13
CONCLUSION.....	18

TABLE OF CASES AND AUTHORITIES

CASES CITED

<u>Bradbury v. Rassmussen</u> , 16 Utah 2d 378, 401 P.2d 710 (1965).....	16
<u>Bybee v. Stuart</u> , 112 Utah 462, 189 P.2d 118 (1948).....	6,13
<u>Chambers v. Emery</u> , 13 Utah 374, 45 Pac. 192, 195 (1896).....	7
<u>Corey v. Roberts</u> , 82 Utah 445, 25 P.2d 940 (1933).....	7
<u>Hansen v. Hansen</u> , 110 Utah 222, 171 P.2d 392 (1946).....	10
<u>Hawkins v. Perry</u> , 123 Utah 16, 253 P.2d 372 (1953).....	14

<u>Jewell v. Horner</u> , 12 Utah 2d 328, 366 P.2d 594 (1961)	8
<u>Kjar v. Brimley</u> , 27 Utah 2d 411, 497 P.2d 23 (1972)	5
<u>Northcrest Inc. v. Walker Bank and Trust Co.</u> , 122 Utah 268, 248 P.2d 692 (1952)	7
<u>Reese v. Harper</u> , 8 Utah 2d 119, 329 P.2d 410 (1958)	18
<u>Renshaw v. Tracey Loan and Trust Company</u> , 87 Utah 364, 49 P.2d 403 (1935)	15
<u>Skeen v. Marriott</u> , 22 Utah 73, 61 Pac. 296 (1900)	10
<u>Thornley Land & Livestock Co. v. Garley</u> , 105 Utah 519, 143 P.2d 283 (1943)	7

AUTHORITIES CITED

89 C.J.S., <u>Trusts</u> , §139	14
Restatement, Second, <u>Trusts</u> , §404	14
Restatement, Second, <u>Trusts</u> , Chapter 12, General Principles	14

STATUTES CITED

25-5-5 Utah Code Annotated 1953	12
61-2-11(4) Utah Code Annotated 1953	18

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Case No. 14099

BRIEF OF RESPONDENTS KOHLER

STATEMENT OF THE KIND OF CASE

This is an action to compel reconveyance of real property previously deeded to respondents Kohler, or to recover its net value, on the ground that the conveyance to the Kohlers was as security only. Intervening defendants sought damages from the Kohlers for breach of warranty, and against the plaintiffs for slander of title.

DISPOSITION IN LOWER COURT

After a trial, the court dismissed the action and the breach of warranty claim; and held plaintiffs liable for damages to the intervenors.

RELIEF SOUGHT ON APPEAL

Respondents Reuel S. and Dolores M. Kohler seek affirmance of the judgment.

STATEMENT OF FACTS

Respondent Reuel S. Kohler is a licensed real estate broker. In February, 1969, Kohler acted as broker for Kent Robinson in the sale of a four-plex in Salt Lake City. By the terms of an Earnest Money Agreement of February 28, 1969 (Exhibit 1), plaintiff Marvin W. Hansen agreed to purchase the four-plex for the price of \$39,400.00, with a down payment of \$7,500.00 represented by a conveyance of Hansen's home and land in Howell, Utah. Hansen further agreed to pay the present mortgage of \$200.00 per month, \$110.00 per month on Robinsons' equity and a \$2,000.00 balloon payment on or before May 15, 1969. Kohler was to receive a six percent commission (\$2,364.00) from Robinson for his services.

Thereafter, on April 1, 1969, a Uniform Real Estate Contract (Exhibit 2) was entered into between the Hansens and Robinsons containing the same essential terms included in the Earnest Money Agreement.

Mr. Robinson desired to sell the four-plex but did not want the Howell property. The Robinsons and Kohlers

therefore entered into a collateral agreement whereby the Kohlers would receive the Howell property in exchange for Mr. Kohler's agreement to waive the real estate commission and to pay Robinson \$2,000.00 (Tr. 23, Exhibit 6).

On April 2, 1969, in furtherance of that agreement, the Hansens executed a warranty deed (Exhibit 3) conveying the Howell property to the Kohlers. Robinson understood that the conveyance was to transfer the property to the Kohlers absolutely (Tr. 23).

Subsequently, a title search disclosed that the Howell property was subject to a \$19,000.00 mortgage (Tr. 13, 23, 36), and it was necessary to make some changes in the transaction. On April 28, 1969, a supplemental agreement (Exhibit 7) was executed. The Hansens agreed to pre-pay to the Robinsons \$1,000.00 of the \$2,000.00 due on May 15, 1969, to manifest their good faith. On June 12, 1969, the Hansens and Robinsons signed another agreement (Exhibit 8), intended to amend the April 1, 1969, contract as to the manner of the down payment:

1. Sellers agree to accept as part of down payment a 1967 Ford Thunderbird automobile. Buyer agrees to pay any and all indebtedness off against said vehicle, and transfer clear title to sellers.

2. Buyers agree to transfer title to home and acreage in Howell, Utah, to Reuel S.

Kohler and Dolores M. Kohler, his wife.
Warranty deed was executed 1 April 1969.

3. It is considered that Mr. Hansen
has made the May payment of \$310.00.

Buyers and sellers agree that this to-
gether with other terms defined in said
contract constitutes the down payment.

Notwithstanding this agreement, the Hansens claimed that
the conveyance to the Kohlers was only as security for the
real estate commission (Tr. 30). The claim, however, is
contrary to the evidence presented by Mr. Hansen.

After the transaction, the parties' conduct was consis-
tent with an absolute conveyance, but inconsistent with a
mortgage.

There was no note to evidence an obligation to pay the
real estate commission (Tr. 30); no discussion of interest
on the obligation (Tr. 31); no time for payment was agreed
upon (Tr. 31); the Kohlers were given possession of the pro-
perty (Tr. 32); they put a tenant in the property and were
permitted to collect the rents (Tr. 35); and tax notices
received by the Hansens were delivered to the Kohlers for
payment (Tr. 34).

The Kohlers conveyed the property to Earsel G. Pierce
and Patricia B. Pierce, the intervening defendants and cross
claimants herein, on October 18, 1971 (Exhibit 12).

ARGUMENT

POINT I

THE WARRANTY DEED TRANSFERRING THE HOWELL PROPERTY TO THE KOHLERS WAS NOT INTENDED AS A SECURITY INSTRUMENT.

The crucial factor in determining whether the conveyance of the Howell property to the Kohlers was absolute or as security is the intention of the parties at the time of execution and delivery of the warranty deed. Kjar v. Brimley, 27 Utah 2d 411, 497 P.2d 23 (1972). The undisputed testimony of Mr. Hansen indicates the absolute nature of the transfer:

Q: When you first entered into this transaction with Robinson, there was no question in your mind, was there, that you were going to transfer the Howell house?

A. None whatsoever.

Q. Absolutely?

A. True.

Q. You were to have no interest in that?

A. Right. (Tr. 22).

At the time of the transfer the Hansens knew of the transaction between the Kohlers and Mr. Robinson under which the Kohlers would acquire the Howell property:

Q. What did they tell you [as to why you were conveying the property to Mr. and Mrs. Kohler instead of the Robinsons]?

- A. They told me they had a little deal of their own pertaining to this property and for me to convey it directly to Mr. Kohler and they would handle the warranty deeds themselves, which wouldn't change my basic program.
- Q. So that you were still going to be obligated to give that Howell property free and clear?
- A. True.
- Q. That was your understanding, that it was to be free and clear, wasn't it?
- A. True.
- Q. And you weren't to get any cash back or anything else?
- A. That's right.
- Q. I suppose it was fairly clear in your mind that under the transaction between Kohler and Robinson, Robinson was going to convey or arrange the conveyance of the Howell property to the Kohlers?
- A. That was true.
- Q. And that was going to be as an absolute conveyance and not a mortgage?
- A. That's true. (Tr. 23).

The nature of the transfer itself indicates that an absolute conveyance was intended. The property was transferred by warranty deed and there was no competent evidence that it was meant to be something else. In Bybee v. Stuart, 112 Utah 462, 189 P.2d 118 (1948), the grantor executed a warranty deed, absolute in form, in return for the grantee's

premises to advance moneys necessary to pay off certain creditors who were about to foreclose on his land. Contemporaneous with the deed, and as part of the same transaction, an agreement was entered into whereby the grantee consented to reconvey the property upon the payment of the indebtedness. Under these particular circumstances the court properly held an absolute conveyance was not intended. The court did, however, comment on the nature of title generally transferred by virtue of a warranty deed:

It is true, of course, that a warranty deed, absolute in form, is presumed to convey a fee simple title, or at least whatever title the grantor has." 189 P.2d at 122.

A court in equity may show by parol evidence that a deed absolute on its face was given for security purposes only if the evidence is clear, definite, unequivocal and conclusive. Thornley Land & Livestock Co. v. Garley, 105 Utah 519, 143 P.2d 283 (1943); Corey v. Roberts, 82 Utah 445, 25 P.2d 940 (1933); Northcrest Inc. v. Walker Bank and Trust Co., 122 Utah 268, 248 P.2d 692 (1952). With respect to the standard and quality of evidence required to establish an oral trust the following language from Chambers v. Emery, 13 Utah 374, 45 Pac. 192, 195 (1896) has been cited frequently by this court:

In such event the proof must be strong, clear, and convincing, such as to leave no

doubt of the existence of the trust. Such a case is similar to one where it is attempted to convert a deed absolute into a mortgage, or where the reformation of a written instrument is sought on the ground of accident, mistake, or fraud. In all such cases the court will scrutinize parol evidence with great caution, and the plaintiff must fail unless it is clear, definite, unequivocal, and conclusive. Public policy, and the safety and security of titles to real estate, demand this rule, because such evidence is offered to overcome the strong presumption, arising from the terms and conditions of an instrument in writing, which is always the best evidence of title. If it were once established that the effect of the terms of a written instrument could be avoided by a bare preponderance of parol evidence, the gates to perjury would soon be wide open, and no person could longer rest in the security of his title to property, however solemn might be the instrument on which it was founded. 45 Pac. at 195.

In Jewell v. Horner, 12 Utah 2d 328, 366 P.2d 594 (1961), the father transferred property to his daughter by an outright conveyance subject to life estates for him and his wife. After their death the plaintiff sons alleged the conveyance was in safekeeping for all the children. There was conflicting testimony as to the father's actual intent. The court relied on the absolute nature of the deed in holding for the daughter:

The transfer of his home by the father to Ethel was made by a deed absolute, subject only to the life estates, and the authorities are practically uniform to the point that to justify a court in determining from oral testimony that a deed which purports to convey land

absolutely in fee simple was intended to be something different, such as a trust, such testimony must be clear and convincing. The proof must be something more than the modicum of evidence which this court sometimes holds to be sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly-expressed deed, solemnly executed and delivered. 366 P.2d at 597.

Appellants allege that the Kohlers were to hold the deed to the Howell property and all instruments in trust until the deal was consummated. This allegation is contrary to the express terms of the warranty deed and has not been shown by a preponderance, let alone by clear and convincing evidence. The evidence establishes that the Kohlers received an absolute title to the subject property, and thereafter, Mr. Hansen gave him the keys to the home on the premises, did not challenge Kohler's right to put a tenant in possession and retain the rents, and even delivered tax notices on the property to the Kohlers for payment.

The agreement of June 12, 1969 (Exhibit 8), provides expressly that the conveyance to the Kohlers is to be part of the down payment. Mr. Hansen read the agreement before he signed it (Tr. 28). He was knowledgeable about deeds and mortgages (Tr. 21).

It is finally contended that subsequent to June 12, 1969, Kohler agreed to sell the property for Mr. Hansen

and to work out a settlement. Any such agreement could not establish a trust relationship. In Skeen v. Marriott, 22 Utah 73, 61 Pac. 296 (1900) the court stated:

* * * nor are declarations of a purpose to create a trust, or mere voluntary promises to give property to a person or persons, or to dispose of it in the future for the benefit of such person or persons, when such promises remain unfulfilled, sufficient to create a trust, or any right which a court of equity will enforce. Nor is a mere intention or mere voluntary agreement to create a trust, where the owner of the property contemplates some further action by him to make it effectual, sufficient to establish a trust. 61 Pac. at 300.

And in Hansen v. Hansen, 110 Utah 222, 171 P.2d 392 (1946) the court quoted the following from Breach on Trusts and Trustees, Sec. 52:

In the creation of a trust in personalty, as well as in real estate, the language employed must be definite and positive. * * * In addition to this, the proof of the trust must be unequivocal. The declaration of a purpose to create a trust is of no value, and a promise to make a donation at some future time, where there is no consideration, at best is only an imperfect gift, and will not be upheld as a trust. 171 Pac. 21 at 397.

The only testimony offered was that of Marvin Hansen. Plaintiffs did not call Kent Robinson, with whom the contract was made.

POINT II

ANY MODIFICATION OF THE APRIL 2, 1969, WARRANTY DEED WAS REQUIRED TO BE IN WRITING.

For the purpose of the original transaction, the Howell property was valued at \$7,500.00 and constituted Hansen's down payment on the purchase of the Robinson four-plex. When it was subsequently discovered the property was encumbered by a \$19,000.00 mortgage the property no longer was an adequate down payment and something else had to be done to assure performance of the contract. Mr. Hansen testified:

Q. And when that occurred [discovery of the mortgage] it looked like your deal with Mr. Robinson wasn't going to go through, didn't it?

A. Well, we had to do something, that was obvious.

The parties then agreed that Robinson, in addition to the Howell property, would accept as further down payment Hansen's 1967 Ford Thunderbird automobile. This agreement was set forth in the June 12, 1969, supplemental agreement which also contained the following provision:

Buyers agree to transfer title to home and acreage in Howell, Utah, to Reuel S. Kohler and Dolores M. Kohler, his wife. Warranty Deed was executed 1 April, 1969.

* * *

Buyers and sellers agree that this together with other terms defined in said contract constitutes the down payment.

As of April 2, 1969, there is no dispute that the Kohlers held title to the Kohler property in fee simple absolute. To subsequently divest the Kohlers of this interest would require a written surrender subscribed to by the Kohlers. Section 25-5-5 Utah Code Annotated provides:

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

The June 12, 1969, agreement does not on its face purport to divest in any manner the absolute nature of the Kohlers' interest in the Howell property. Rather, this agreement makes specific reference to the April 1, 1969, warranty deed and confirms its terms. Nothing in either the warranty deed or June 12, 1969, agreement substantiates appellants' contention that the Kohlers held the property in trust until the real estate commission was paid.

The trial court found that any agreements made subsequent to June 12, 1969, respecting reconveyance of the Howell property to appellants were too vague and uncertain,

were oral, and were without consideration. In Bybee v. Stuart, supra, this court held an oral surrender of an interest in property is ineffectual under the Statute of Frauds under circumstances similar to the case at bar.

The court stated:

[D]efendant testified to a conversation between himself and his brother, Oni, by which it is claimed Oni orally surrendered to defendant any interest he had in the property. The court found that such a conversation did take place, and his finding is cross-assigned as error by the appellees. However, the court found that this purported surrender was ineffectual under the Statute of Frauds - Secs. 33-5-1 and 33-5-3, U.C.A., 1943. Defendant contends that Oni Stuart's oral surrender of his interest in the premises was valid.

We deem it unnecessary to pass upon appellees' cross-assignment of error, since we are of the opinion that even if such conversation took place as was testified to by defendant, it was within the Statute of Frauds and therefore unenforceable. 189 P.2d at 122.

POINT III

THE DOCTRINES OF RESULTING OR CONSTRUCTIVE TRUSTS ARE NOT APPLICABLE.

Appellants in their brief rely on the equitable principles of a resulting or constructive trust to compel the Kohlers to either reconvey the Howell property or to pay appellants the difference between the \$7,500.00 "value" of the property and Mr. Kohler's commission. Reliance on these doctrines is unfounded, however, as the factual circumstances of this case preclude their applicability.

Section 404 of Restatement 2d, Trusts, indicates these circumstances in which resulting trusts arise:

A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein, unless the inference is rebutted or the beneficial interest is otherwise effectively disposed of.

There are three situations where a resulting trust may arise: (1) where a private or charitable trust fails in whole or in part; (2) where a private or charitable trust is fully performed without exhausting the trust estate; and (3) where property is purchased and the purchase price is paid by one person and at his direction the vendor transfers the property to another person. Restatement 2d, Trusts, Chapter 12, General Principles. None of the situations above-described are present in the instant case and it is therefore improper to consider this case under a resulting trust theory.

In order to establish a constructive trust there must be some fraudulent or unfair and unconscionable conduct in the transaction by which the trustee acquires the property rendering it inequitable for the trustee to retain absolute title. 89 C.J.S., Trusts, §139. In certain situations where a fiduciary relationship exists between the parties the courts in equity will presume fraud. In Hawkins v. Perry,

123 Utah 16, 253 P.2d 372 (1953), the court observed:

Equity imposes a constructive trust to prevent one from unjustly profiting through fraud or the violation of a duty imposed under a fiduciary or confidential relationship. 253 P.2d at 375.

In Renshaw v. Tracy Loan and Trust Co., 87 Utah 364, 49 P.2d 403 (1935), the court commented:

It is true that, upon the establishment of certain fiduciary relationship and transactions between the parties to that relationship, equity will presume fraud, the abuse of confidence, and place the burden of proving good faith and fairness upon the dominant party in the relationship. In such cases the presumption of fraud may be based upon the relationship alone and relieves the party from proving the fraud, but the fraud is nevertheless an essential element. By the presumption equity supplies that element. The relationships wherein such presumption has been indulged are parent and child, principal and agent, attorney and client, guardian and ward, executor or administrator and heir, beneficiary or distributee. In other cases the presumption of fraud has been given effect when there has been a relationship of confidence plus other circumstances tending to show that some advantage had been taken by the dominant party with a consequent abuse of confidence. 49 P.2d at 404.

In Renshaw the court had to determine whether a relationship of employer and employee alone would raise a presumption of fraud in a transaction where the employee loaned the employer some money. The court held the mere employee-employer relationship, standing alone, would not raise the presumption

of fraud and that facts establishing such an abuse of confidence placed as would warrant fraud would have to be shown. The court stated:

It is not every relationship to which the term "fiduciary" or "confidential" might be applied with some degree of reason or plausibility that will authorize, by itself alone, the creation of the presumption of fraud in the dealings between each other of those occupying that relationship. Every business transaction involves a certain amount of confidence and trust. Equity will not discourage transactions by creating presumptions of their fraudulent nature, except in those cases where the transactions occur between parties to relationships which by their very nature it is the policy of the law to protect one of the parties thereto on the theory that they are not dealing on an equal basis because of the confidence which one party to the relationship is presumed to have in the other. See Perry on Trusts and Trustees (6th Ed.) §194; 2 Pomeroy's Eq. Juris. (4th Ed.) §§955, 956. It is always a question, therefore, of the actual relationship between the parties that must be inquired into, and not whether the terms "fiduciary," "confidential," or "trust" can, with some degree of reason, be applied to the relationship. 49 P.2d at 404.

In Bradbury v. Rassmussen, 16 Utah 2d 378, 401 P.2d 710 (1965), the plaintiffs brought an action to declare null and void a warranty deed, a lease agreement, and a transfer of water stock certificates to their niece and her husband. Plaintiffs alleged that the defendant represented the transaction to be a sale of the farm and water stock when the documents, in fact, purported to make a gift of such property.

The court held the confidence and trust which plaintiffs had in the defendants was not sufficient to establish such a confidential relationship as would raise a presumption of unfairness in the transaction or a finding of undue influence. The court stated:

The relationship must be such as would lead an ordinarily prudent person in the management of his business affairs to repose that degree of confidence in the other party which largely results in the substitution of the will of the latter for that of the former in the material matters involved in the transaction. The doctrine of confidential relationship rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other. Mere confidence in one person by another is not sufficient alone to constitute such a relationship. The confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the confidence, and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other. 401 P.2d at 713.

This crux of this case is an attempt to show that documents are not really what they purport to be. The resulting trust doctrine is inapplicable because the factual context of the case is wholly inconsistent with the circumstances under which resulting trusts are derived. The constructive trust doctrine is equally inapplicable as an essential prerequisite to establishment of a constructive trust is a

showing of fraud or a fiduciary relationship which has been betrayed.

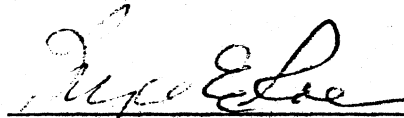
Mr. Kohler was never employed by Mr. Hansen to represent him in the subject transaction but was acting as a broker for the Robinsons. Mr. Kohler occupied a fiduciary relationship to the Robinsons, Reese v. Harper, 8 Utah 2d 119, 329 P.2d 410 (1958), but not to the Hansens. A real estate broker does not ordinarily represent both parties to a transaction. 61-2-11(4), Utah Code Annotated 1953. The transaction between the Kohlers and the Robinsons was an arms length transaction; and after April 2, 1969, Mr. Hansen knew the Kohlers were dealing in their own behalf with respect to the Howell property. Assuming a confidential relationship ever existed, the relationship would have terminated on April 2, 1969, when the warranty deed conveying the Howell property was transferred, and did not exist at the time of the June 12, 1969, transaction. The facts do not raise any presumption of fraud or unfairness in the transaction.

CONCLUSION

The Hansens conveyed the Howell property to the Kohlers by warranty deed. Mr. Hansen was aware of both the nature and consequences of such a conveyance, and clearly intended to divest himself of all incidents of ownership in the subject property. While the parties are in disagreement as to

the nature of the title held by the Kohlers after the discovery of the encumbrance on the Howell property the decision of the trial court should be affirmed on two grounds: (1) the appellants have failed to prove by clear and convincing evidence that the warranty deed was meant as a security instrument rather than an outright transfer of property, and (2) to change what was formerly a clear transfer of property to a security instrument would have to be in writing and subscribed to by the Kohlers.

Respectfully submitted,



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TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
ARGUMENT	
I. The Warranty Deed Transferring the Howell Property to the Kohlers Was Not Intended as a Security Instrument.....	5
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CONCLUSION.....	18

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<u>Reese v. Harper</u> , 8 Utah 2d 119, 329 P.2d 410 (1958).....	18
<u>Renshaw v. Tracey Loan and Trust Company</u> , 87 Utah 364, 49 P.2d 403 (1935).....	15
<u>Skeen v. Marriott</u> , 22 Utah 73, 61 Pac. 296 (1900).....	10
<u>Thornley Land & Livestock Co. v. Garley</u> , 105 Utah 519, 143 P.2d 283 (1943).....	7

AUTHORITIES CITED

89 C.J.S., <u>Trusts</u> , §139.....	14
Restatement, Second, <u>Trusts</u> , §404.....	14
Restatement, Second, <u>Trusts</u> , Chapter 12, General Principles.....	14

STATUTES CITED

25-5-5 Utah Code Annotated 1953.....	12
61-2-11(4) Utah Code Annotated 1953.....	18

IN THE SUPREME COURT OF THE STATE OF UTAH

MARVIN W. HANSEN and)	
BEVERLY M. HANSEN,)	
Plaintiffs and Appellants,)	
vs.)	Case No. 14099
REUEL S. KOHLER and)	
DOLORES M. KOHLER, his wife,)	
Defendants and Respondents,)	
EARSEL G. PIERCE and)	
PATRICIA B. PIERCE, his wife,)	
Intervening Defendants)	
and Cross Claimants.)	

BRIEF OF RESPONDENTS KOHLER

STATEMENT OF THE KIND OF CASE

This is an action to compel reconveyance of real property previously deeded to respondents Kohler, or to recover its net value, on the ground that the conveyance to the Kohlers was as security only. Intervening defendants sought damages from the Kohlers for breach of warranty, and against the plaintiffs for slander of title.

DISPOSITION IN LOWER COURT

After a trial, the court dismissed the action and the breach of warranty claim; and held plaintiffs liable for damages to the intervenors.

RELIEF SOUGHT ON APPEAL

Respondents Reuel S. and Dolores M. Kohler seek affirmance of the judgment.

STATEMENT OF FACTS

Respondent Reuel S. Kohler is a licensed real estate broker. In February, 1969, Kohler acted as broker for Kent Robinson in the sale of a four-plex in Salt Lake City. By the terms of an Earnest Money Agreement of February 28, 1969 (Exhibit 1), plaintiff Marvin W. Hansen agreed to purchase the four-plex for the price of \$39,400.00, with a down payment of \$7,500.00 represented by a conveyance of Hansen's home and land in Howell, Utah. Hansen further agreed to pay the present mortgage of \$200.00 per month, \$110.00 per month on Robinsons' equity and a \$2,000.00 balloon payment on or before May 15, 1969. Kohler was to receive a six percent commission (\$2,364.00) from Robinson for his services.

Thereafter, on April 1, 1969, a Uniform Real Estate Contract (Exhibit 2) was entered into between the Hansens and Robinsons containing the same essential terms included in the Earnest Money Agreement.

Mr. Robinson desired to sell the four-plex but did not want the Howell property. The Robinsons and Kohlers

therefore entered into a collateral agreement whereby the Kohlers would receive the Howell property in exchange for Mr. Kohler's agreement to waive the real estate commission and to pay Robinson \$2,000.00 (Tr. 23, Exhibit 6).

On April 2, 1969, in furtherance of that agreement, the Hansens executed a warranty deed (Exhibit 3) conveying the Howell property to the Kohlers. Robinson understood that the conveyance was to transfer the property to the Kohlers absolutely (Tr. 23).

Subsequently, a title search disclosed that the Howell property was subject to a \$19,000.00 mortgage (Tr. 13, 23, 36), and it was necessary to make some changes in the transaction. On April 28, 1969, a supplemental agreement (Exhibit 7) was executed. The Hansens agreed to pre-pay to the Robinsons \$1,000.00 of the \$2,000.00 due on May 15, 1969, to manifest their good faith. On June 12, 1969, the Hansens and Robinsons signed another agreement (Exhibit 8), intended to amend the April 1, 1969, contract as to the manner of the down payment:

1. Sellers agree to accept as part of down payment a 1967 Ford Thunderbird automobile. Buyer agrees to pay any and all indebtedness off against said vehicle, and transfer clear title to sellers.

2. Buyers agree to transfer title to home and acreage in Howell, Utah, to Reuel S.

Kohler and Dolores M. Kohler, his wife.
Warranty deed was executed 1 April 1969.

3. It is considered that Mr. Hansen
has made the May payment of \$310.00.

Buyers and sellers agree that this to-
gether with other terms defined in said
contract constitutes the down payment.

Notwithstanding this agreement, the Hansens claimed that
the conveyance to the Kohlers was only as security for the
real estate commission (Tr. 30). The claim, however, is
contrary to the evidence presented by Mr. Hansen.

After the transaction, the parties' conduct was consis-
tent with an absolute conveyance, but inconsistent with a
mortgage.

There was no note to evidence an obligation to pay the
real estate commission (Tr. 30); no discussion of interest
on the obligation (Tr. 31); no time for payment was agreed
upon (Tr. 31); the Kohlers were given possession of the pro-
perty (Tr. 32); they put a tenant in the property and were
permitted to collect the rents (Tr. 35); and tax notices
received by the Hansens were delivered to the Kohlers for
payment (Tr. 34).

The Kohlers conveyed the property to Earsel G. Pierce
and Patricia B. Pierce, the intervening defendants and cross
claimants herein, on October 18, 1971 (Exhibit 12).

ARGUMENT

POINT I

THE WARRANTY DEED TRANSFERRING THE HOWELL PROPERTY TO THE KOHLERS WAS NOT INTENDED AS A SECURITY INSTRUMENT.

The crucial factor in determining whether the conveyance of the Howell property to the Kohlers was absolute or as security is the intention of the parties at the time of execution and delivery of the warranty deed. Kjar v. Brimley, 27 Utah 2d 411, 497 P.2d 23 (1972). The undisputed testimony of Mr. Hansen indicates the absolute nature of the transfer:

Q: When you first entered into this transaction with Robinson, there was no question in your mind, was there, that you were going to transfer the Howell house?

A. None whatsoever.

Q. Absolutely?

A. True.

Q. You were to have no interest in that?

A. Right. (Tr. 22).

At the time of the transfer the Hansens knew of the transaction between the Kohlers and Mr. Robinson under which the Kohlers would acquire the Howell property:

Q. What did they tell you [as to why you were conveying the property to Mr. and Mrs. Kohler instead of the Robinsons]?

A. They told me they had a little deal of their own pertaining to this property and for me to convey it directly to Mr. Kohler and they would handle the warranty deeds themselves, which wouldn't change my basic program.

Q. So that you were still going to be obligated to give that Howell property free and clear?

A. True.

Q. That was your understanding, that it was to be free and clear, wasn't it?

A. True.

Q. And you weren't to get any cash back or anything else?

A. That's right.

Q. I suppose it was fairly clear in your mind that under the transaction between Kohler and Robinson, Robinson was going to convey or arrange the conveyance of the Howell property to the Kohlers?

A. That was true.

Q. And that was going to be as an absolute conveyance and not a mortgage?

A. That's true. (Tr. 23).

The nature of the transfer itself indicates that an absolute conveyance was intended. The property was transferred by warranty deed and there was no competent evidence that it was meant to be something else. In Bybee v. Stuart, 112 Utah 462, 189 P.2d 118 (1948), the grantor executed a warranty deed, absolute in form, in return for the grantee's

premises to advance moneys necessary to pay off certain creditors who were about to foreclose on his land. Contemporaneous with the deed, and as part of the same transaction, an agreement was entered into whereby the grantee consented to reconvey the property upon the payment of the indebtedness. Under these particular circumstances the court properly held an absolute conveyance was not intended. The court did, however, comment on the nature of title generally transferred by virtue of a warranty deed:

It is true, of course, that a warranty deed, absolute in form, is presumed to convey a fee simple title, or at least whatever title the grantor has." 189 P.2d at 122.

A court in equity may show by parol evidence that a deed absolute on its face was given for security purposes only if the evidence is clear, definite, unequivocal and conclusive. Thornley Land & Livestock Co. v. Garley, 105 Utah 519, 143 P.2d 283 (1943); Corey v. Roberts, 82 Utah 445, 25 P.2d 940 (1933); Northcrest Inc. v. Walker Bank and Trust Co., 122 Utah 268, 248 P.2d 692 (1952). With respect to the standard and quality of evidence required to establish an oral trust the following language from Chambers v. Emery, 13 Utah 374, 45 Pac. 192, 195 (1896) has been cited frequently by this court:

In such event the proof must be strong, clear, and convincing, such as to leave no

doubt of the existence of the trust. Such a case is similar to one where it is attempted to convert a deed absolute into a mortgage, or where the reformation of a written instrument is sought on the ground of accident, mistake, or fraud. In all such cases the court will scrutinize parol evidence with great caution, and the plaintiff must fail unless it is clear, definite, unequivocal, and conclusive. Public policy, and the safety and security of titles to real estate, demand this rule, because such evidence is offered to overcome the strong presumption, arising from the terms and conditions of an instrument in writing, which is always the best evidence of title. If it were once established that the effect of the terms of a written instrument could be avoided by a bare preponderance of parol evidence, the gates to perjury would soon be wide open, and no person could longer rest in the security of his title to property, however solemn might be the instrument on which it was founded. 45 Pac. at 195.

In Jewell v. Horner, 12 Utah 2d 328, 366 P.2d 594 (1961), the father transferred property to his daughter by an outright conveyance subject to life estates for him and his wife. After their death the plaintiff sons alleged the conveyance was in safekeeping for all the children. There was conflicting testimony as to the father's actual intent. The court relied on the absolute nature of the deed in holding for the daughter:

The transfer of his home by the father to Ethel was made by a deed absolute, subject only to the life estates, and the authorities are practically uniform to the point that to justify a court in determining from oral testimony that a deed which purports to convey land

absolutely in fee simple was intended to be something different, such as a trust, such testimony must be clear and convincing. The proof must be something more than the modicum of evidence which this court sometimes holds to be sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly-expressed deed, solemnly executed and delivered. 366 P.2d at 597.

Appellants allege that the Kohlers were to hold the deed to the Howell property and all instruments in trust until the deal was consummated. This allegation is contrary to the express terms of the warranty deed and has not been shown by a preponderance, let alone by clear and convincing evidence. The evidence establishes that the Kohlers received an absolute title to the subject property, and thereafter, Mr. Hansen gave him the keys to the home on the premises, did not challenge Kohler's right to put a tenant in possession and retain the rents, and even delivered tax notices on the property to the Kohlers for payment.

The agreement of June 12, 1969 (Exhibit 8), provides expressly that the conveyance to the Kohlers is to be part of the down payment. Mr. Hansen read the agreement before he signed it (Tr. 28). He was knowledgeable about deeds and mortgages (Tr. 21).

It is finally contended that subsequent to June 12, 1969, Kohler agreed to sell the property for Mr. Hansen

and to work out a settlement. Any such agreement could not establish a trust relationship. In Skeen v. Marriott, 22 Utah 73, 61 Pac. 296 (1900) the court stated:

* * * nor are declarations of a purpose to create a trust, or mere voluntary promises to give property to a person or persons, or to dispose of it in the future for the benefit of such person or persons, when such promises remain unfulfilled, sufficient to create a trust, or any right which a court of equity will enforce. Nor is a mere intention or mere voluntary agreement to create a trust, where the owner of the property contemplates some further action by him to make it effectual, sufficient to establish a trust. 61 Pac. at 300.

And in Hansen v. Hansen, 110 Utah 222, 171 P.2d 392 (1946) the court quoted the following from Breach on Trusts and Trustees, Sec. 52:

In the creation of a trust in personalty, as well as in real estate, the language employed must be definite and positive. * * * In addition to this, the proof of the trust must be unequivocal. The declaration of a purpose to create a trust is of no value, and a promise to make a donation at some future time, where there is no consideration, at best is only an imperfect gift, and will not be upheld as a trust. 171 Pac. 21 at 397.

The only testimony offered was that of Marvin Hansen. Plaintiffs did not call Kent Robinson, with whom the contract was made.

POINT II

ANY MODIFICATION OF THE APRIL 2, 1969, WARRANTY DEED WAS REQUIRED TO BE IN WRITING.

For the purpose of the original transaction, the Howell property was valued at \$7,500.00 and constituted Hansen's down payment on the purchase of the Robinson four-plex. When it was subsequently discovered the property was encumbered by a \$19,000.00 mortgage the property no longer was an adequate down payment and something else had to be done to assure performance of the contract. Mr. Hansen testified:

Q. And when that occurred [discovery of the mortgage] it looked like your deal with Mr. Robinson wasn't going to go through, didn't it?

A. Well, we had to do something, that was obvious.

The parties then agreed that Robinson, in addition to the Howell property, would accept as further down payment Hansen's 1967 Ford Thunderbird automobile. This agreement was set forth in the June 12, 1969, supplemental agreement which also contained the following provision:

Buyers agree to transfer title to home and acreage in Howell, Utah, to Reuel S. Kohler and Dolores M. Kohler, his wife. Warranty Deed was executed 1 April, 1969.

* * *

Buyers and sellers agree that this together with other terms defined in said contract constitutes the down payment.

As of April 2, 1969, there is no dispute that the Kohlers held title to the Kohler property in fee simple absolute. To subsequently divest the Kohlers of this interest would require a written surrender subscribed to by the Kohlers. Section 25-5-5 Utah Code Annotated provides:

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

The June 12, 1969, agreement does not on its face purport to divest in any manner the absolute nature of the Kohlers' interest in the Howell property. Rather, this agreement makes specific reference to the April 1, 1969, warranty deed and confirms its terms. Nothing in either the warranty deed or June 12, 1969, agreement substantiates appellants' contention that the Kohlers held the property in trust until the real estate commission was paid.

The trial court found that any agreements made subsequent to June 12, 1969, respecting reconveyance of the Howell property to appellants were too vague and uncertain,

were oral, and were without consideration. In Bybee v. Stuart, supra, this court held an oral surrender of an interest in property is ineffectual under the Statute of Frauds under circumstances similar to the case at bar. The court stated:

[D]efendant testified to a conversation between himself and his brother, Oni, by which it is claimed Oni orally surrendered to defendant any interest he had in the property. The court found that such a conversation did take place, and his finding is cross-assigned as error by the appellees. However, the court found that this purported surrender was ineffectual under the Statute of Frauds - Secs. 33-5-1 and 33-5-3, U.C.A., 1943. Defendant contends that Oni Stuart's oral surrender of his interest in the premises was valid.

We deem it unnecessary to pass upon appellees' cross-assignment of error, since we are of the opinion that even if such conversation took place as was testified to by defendant, it was within the Statute of Frauds and therefore unenforceable. 189 P.2d at 122.

POINT III

THE DOCTRINES OF RESULTING OR CONSTRUCTIVE TRUSTS ARE NOT APPLICABLE.

Appellants in their brief rely on the equitable principles of a resulting or constructive trust to compel the Kohlers to either reconvey the Howell property or to pay appellants the difference between the \$7,500.00 "value" of the property and Mr. Kohler's commission. Reliance on these doctrines is unfounded, however, as the factual circumstances of this case preclude their applicability.

Section 404 of Restatement 2d, Trusts, indicates these circumstances in which resulting trusts arise:

A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein, unless the inference is rebutted or the beneficial interest is otherwise effectively disposed of.

There are three situations where a resulting trust may arise: (1) where a private or charitable trust fails in whole or in part; (2) where a private or charitable trust is fully performed without exhausting the trust estate; and (3) where property is purchased and the purchase price is paid by one person and at his direction the vendor transfers the property to another person. Restatement 2d, Trusts, Chapter 12, General Principles. None of the situations above-described are present in the instant case and it is therefore improper to consider this case under a resulting trust theory.

In order to establish a constructive trust there must be some fraudulent or unfair and unconscionable conduct in the transaction by which the trustee acquires the property rendering it inequitable for the trustee to retain absolute title. 89 C.J.S., Trusts, §139. In certain situations where a fiduciary relationship exists between the parties the courts in equity will presume fraud. In Hawkins v. Perry,

123 Utah 16, 253 P.2d 372 (1953), the court observed:

Equity imposes a constructive trust to prevent one from unjustly profiting through fraud or the violation of a duty imposed under a fiduciary or confidential relationship. 253 P.2d at 375.

In Renshaw v. Tracy Loan and Trust Co., 87 Utah 364, 49 P.2d 403 (1935), the court commented:

It is true that, upon the establishment of certain fiduciary relationship and transactions between the parties to that relationship, equity will presume fraud, the abuse of confidence, and place the burden of proving good faith and fairness upon the dominant party in the relationship. In such cases the presumption of fraud may be based upon the relationship alone and relieves the party from proving the fraud, but the fraud is nevertheless an essential element. By the presumption equity supplies that element. The relationships wherein such presumption has been indulged are parent and child, principal and agent, attorney and client, guardian and ward, executor or administrator and heir, beneficiary or distributee. In other cases the presumption of fraud has been given effect when there has been a relationship of confidence plus other circumstances tending to show that some advantage had been taken by the dominant party with a consequent abuse of confidence. 49 P.2d at 404.

In Renshaw the court had to determine whether a relationship of employer and employee alone would raise a presumption of fraud in a transaction where the employee loaned the employer some money. The court held the mere employee-employer relationship, standing alone, would not raise the presumption

of fraud and that facts establishing such an abuse of confidence placed as would warrant fraud would have to be shown. The court stated:

It is not every relationship to which the term "fiduciary" or "confidential" might be applied with some degree of reason or plausibility that will authorize, by itself alone, the creation of the presumption of fraud in the dealings between each other of those occupying that relationship. Every business transaction involves a certain amount of confidence and trust. Equity will not discourage transactions by creating presumptions of their fraudulent nature, except in those cases where the transactions occur between parties to relationships which by their very nature it is the policy of the law to protect one of the parties thereto on the theory that they are not dealing on an equal basis because of the confidence which one party to the relationship is presumed to have in the other. See Perry on Trusts and Trustees (6th Ed.) §194; 2 Pomeroy's Eq. Juris. (4th Ed.) §§955, 956. It is always a question, therefore, of the actual relationship between the parties that must be inquired into, and not whether the terms "fiduciary," "confidential," or "trust" can, with some degree of reason, be applied to the relationship. 49 P.2d at 404.

In Bradbury v. Rassmussen, 16 Utah 2d 378, 401 P.2d 710 (1965), the plaintiffs brought an action to declare null and void a warranty deed, a lease agreement, and a transfer of water stock certificates to their niece and her husband. Plaintiffs alleged that the defendant represented the transaction to be a sale of the farm and water stock when the documents, in fact, purported to make a gift of such property.

The court held the confidence and trust which plaintiffs had in the defendants was not sufficient to establish such a confidential relationship as would raise a presumption of unfairness in the transaction or a finding of undue influence. The court stated:

The relationship must be such as would lead an ordinarily prudent person in the management of his business affairs to repose that degree of confidence in the other party which largely results in the substitution of the will of the latter for that of the former in the material matters involved in the transaction. The doctrine of confidential relationship rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other. Mere confidence in one person by another is not sufficient alone to constitute such a relationship. The confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the confidence, and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other. 401 P.2d at 713.

This crux of this case is an attempt to show that documents are not really what they purport to be. The resulting trust doctrine is inapplicable because the factual context of the case is wholly inconsistent with the circumstances under which resulting trusts are derived. The constructive trust doctrine is equally inapplicable as an essential prerequisite to establishment of a constructive trust is a

showing of fraud or a fiduciary relationship which has been betrayed.

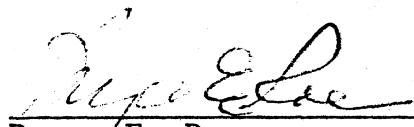
Mr. Kohler was never employed by Mr. Hansen to represent him in the subject transaction but was acting as a broker for the Robinsons. Mr. Kohler occupied a fiduciary relationship to the Robinsons, Reese v. Harper, 8 Utah 2d 119, 329 P.2d 410 (1958), but not to the Hansens. A real estate broker does not ordinarily represent both parties to a transaction. 61-2-11(4), Utah Code Annotated 1953. The transaction between the Kohlers and the Robinsons was an arms length transaction; and after April 2, 1969, Mr. Hansen knew the Kohlers were dealing in their own behalf with respect to the Howell property. Assuming a confidential relationship ever existed, the relationship would have terminated on April 2, 1969, when the warranty deed conveying the Howell property was transferred, and did not exist at the time of the June 12, 1969, transaction. The facts do not raise any presumption of fraud or unfairness in the transaction.

CONCLUSION

The Hansens conveyed the Howell property to the Kohlers by warranty deed. Mr. Hansen was aware of both the nature and consequences of such a conveyance, and clearly intended to divest himself of all incidents of ownership in the subject property. While the parties are in disagreement as to

the nature of the title held by the Kohlers after the discovery of the encumbrance on the Howell property the decision of the trial court should be affirmed on two grounds: (1) the appellants have failed to prove by clear and convincing evidence that the warranty deed was meant as a security instrument rather than an outright transfer of property, and (2) to change what was formerly a clear transfer of property to a security instrument would have to be in writing and subscribed to by the Kohlers.

Respectfully submitted,



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