

1986

McCracken v. Downs : Brief of Respondent

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH
DOCKET NO. 860349-CA

MARK McCRACKEN, KEDRICK
McCRACKEN, LILA P. McCRACKEN
and DORIS E. McCRACKEN

RESPONDENT'S BRIEF

Plaintiffs,

vs.

JERRY DOWNS and JERALD GREAVES

No. 21067

Defendants.

APPEAL FROM A JUDGMENT OF THE FIRST JUDICIAL DISTRICT
COURT IN AND FOR CACHE COUNTY, STATE OF UTAH
The Honorable VeNoy Christoffersen presiding

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and Respondents

FILED

MAY 19 1986

State Court Clerk

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CASES

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Driggs v. Utah State, Utah, 142 P2d 657.

Duckett v. Olsen, 699 P2d 734.

Edgar v. Wagner, 572 P2d 405.

Franklin Financial v. New Empire Development Company, 659 P2d
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Hucks v.Hanes 560 P2d 1142.

Meck v. Behrens 252 P 91.

Schofield v. Z.C.M.I., Utah, 39 P2d. 342.

Toland v. Corey, 24 P. 190.

STATEMENT OF FACTS

Sometime during September of 1978, Jerry Downs and Jerald Greaves approached Mark McCracken with a proposal to purchase the real property which is the subject of this action. (TR 15, 71, 72) Mr. Downs at trial testified that he knew at the time that the subject property was owned by Mark McCracken, his mother, his uncle and aunt. (TR 71, 91, also TR 14-18) Basic terms for the purchase of the property were discussed and generally agreed upon. (TR 23, 24, 71, 72) At the suggestion of Mr. Downs, a contract was prepared by Attorney Scott Barrett, who was identified by all parties as an independent attorney to represent all of the parties in preparing the document. (TR 20, 71, 72) Mr. Barrett prepared a draft purchase agreement as well as draft powers of attorney, which were subsequently picked up by Mr. Downs and delivered to Mr. McCracken and his family for signature. (TR 19, 73, 74, 108, 112) On or about October 5, 1978, Kendrick McCracken and Lila McCracken executed that certain Special Power of Attorney identified as Trial Exhibit 2, naming Mark McCracken as attorney in fact for them. (TR 17-19, 21-22, 73 Exhibit 2) On or about the 16th of October, 1978, Doris McCracken executed a similar power of attorney identified as Trial Exhibit 3. (TR 17-19, 21-22 Exhibit 3) Thereafter on the 19th day of October, 1978, Appellant, Jerry Downs and Jerald Greaves, and Respondent, Mark McCracken, individually and on behalf of Kendrick McCracken, Lila McCracken and Doris McCracken, executed that certain purchase agreement which has been identified as Trial Exhibit 1 and which is the subject of this

action for the sale and purchase of the Smithfield property. (TR 24-25, 74-77, 88, 122 Exhibit 1)

Mr. Downs requested Mr. McCracken to obtain the powers of attorney from Mr. McCracken's mother, uncle and aunt to facilitate closing the transaction. (TR 72 and 73) After the Purchase Agreement, (Exhibit 1) had been signed, Mr. Downs delivered it to Western States Title Company with instructions to have the matter recorded, which occurred on the same day. (TR 75, 76, Exhibit 1) The contract with the accompanying legal description was recorded in book number 239 page 778 entry number 417846 of the official records of the Cache County Recorder, identifying the contractual interest which Appellants claimed in the subject property pursuant to the Purchase Agreement. (TR 110, Exhibit 1) Appellants purchased the Respondent's property for the total sum of \$180,000.00 with \$500.00 paid down at the time that the contract was executed, and the remaining balance of \$179,500.00 to be paid over time. (TR 21, 22, 23, 26, 42, 43, 76, 79, 99, Exhibit 1). The contract at paragraph 1 b provides as follows:

"Buyers agree to pay an additional One Hundred and Seventy-nine Thousand and Five Hundred dollars (\$179,500.00) in the form of a Note secured by a deed of trust on the described property. Said Note shall be payable in full on the first of September, 1983. Provided, however, that, whenever buyers sell a lot or portion of the described property, they shall pay one-half of the gross sale price less real estate commission, if any, of said lot to Sellers to apply on said note." (Exhibit 1)

All parties acknowledge that no promissory note or deed of trust securing the same was ever executed or recorded. (TR 43, 84, 110, 120) No payment in the form of a note or otherwise was made against the remaining balance of \$179,500.00, except that during the month of August and September of 1980, five subdivision lots were sold and one-half of the proceeds was delivered to the Sellers and applied against the outstanding contractual balance. (TR 119, 120) Once the contract was executed, the Sellers had no further obligation whatsoever. (TR 77, 86, 87). Sellers had fully performed except to provide a deed to the property upon payment of the outstanding balance or execution of the note and trust deed. (TR 33, 47) Mr. McCracken was ready willing and able to execute such a deed upon the execution and delivery of the note and trust deed specified in the purchase Agreement. (TR 32, 33, 47)

The record of title to the subject property reveals that in July of 1978 Kendrick and Lila McCracken quit claimed to themselves as trustees in trust of the Kendrick McCracken Family Revocable Trust, their undivided one-half interest in the property. (TR 6) Kendrick and Lila McCracken appointed Mark McCracken their true and lawful attorney-in-fact, (TR 2). Mr. McCracken said he had no authority to enter into a joint venture only the written contract for sale and related documents. (TR 34) The parties understood and intended that the Power of Attorney authorized Mark McCracken to act in the sale transaction for Kendrick and Lila individually and also in their trustee capacity. (TR 37-39, 52, 71-72, 75-77, 89, 91) Three of the warranty deeds conveying the subdivision lots in August and

September of 1980 were executed by Mark McCracken as an attorney-in-fact for, among others, Kendrick and Lila McCracken as trustees. (Exhibit 8) Appellant Downs caused these warranty deeds to be prepared by Western States Title Company and to be subsequently recorded. (TR 92-94) And on or about April 23, 1984, Kendrick McCracken and Lila McCracken individually and as trustees of the Kendrick McCracken Family Revocable Trust deeded to Mark McCracken all of their interest in the subject property which deed was recorded on the 27th of April, 1984, in the official records of the Cache County Records office. (Exhibit 7)

Mr. Downs and Mr. Greaves had engaged in the development of the property into a residential subdivision and had gained approval of a final plat of subdivision, which was approved by the city of Smithfield, the first phase of said approved subdivision plat recorded as a result of the efforts of himself and Mr. Greaves, and at their request, in the official records of the Cache County Records office on the 21st day of August 1980. (TR 91-93) Said subdivision had been officially approved on or about the 28th day of November 1978 (Exhibit 4) Mr. Downs further acknowledged that he and Mr. Downs and Greaves executed the owners dedication of the subdivision plat and requested Mr. McCracken to execute the same individually and as attorney-in-fact for the other Sellers. (TR 91-93).

After execution of the purchase agreement on the subject property Mr. Downs and Mr. Greaves had full possession and use of the property from and after the date of the purchase agreement except for the permissive conditional use granted Mr. McCracken

of farming the unused property until development was completed in return for Mr. McCracken paying the annual irrigation water assessments. (TR 32, 33, 56, 63, 64, 65, 68, 69, 85, 91, 94, 99, 102) The actual benefit over the years of such conditional use was nominal. (TR 63-65).

After September of 1980, no significant development or effort of any kind was made to complete the subdivision project or sell the property. (TR 118) Mr. Downs had made some effort to sell one additional lot but was unsuccessful and acknowledged that he and Mr. Greaves had essentially done nothing with the project since that date because of the depressed real estate economy. (TR 119) No other moneys had been paid under the contract to the McCrackens except as recited above. (TR 120)

On January 15, 1981, Mr. Greaves, Mr. Downs, and Mr. McCracken went to the office of Attorney Barrett. (TR 61, 106 Exhibit 11) There was some concern about the purchase agreement because although it had been signed and recorded, The Buyers had not delivered a note and trust deed to the Sellers, and Sellers had not signed a deed or a trust deed and note to the Sellers. (Exhibit 11) All parties mutually agreed before Mr. Barrett "that since the purchase agreement had been recorded and since they were not in disagreement as to the amount that had been paid to date (approximately \$30,000.00 to McCracken) leaving a balance of \$149,500.00 due under the agreement, that they would just leave things as they are." (Exhibit 11).

Mr. Mark McCracken made numerous inquiries of Appellants during the subsequent three years from 1980 to September 1 of 1983 to determine the Appellants' intentions of honoring the

contract. (TR 26-30, 66, 67) On at least one such occasion Mr. Downs indicated that he had until September 1, 1983 to make any payments, and that Mr. McCracken would simply have to wait and see what took place. (TR 66) The remaining balance of \$149,500.00 was not paid on September 1, 1983 and has not since been paid by the Appellants. (TR 120) As a consequence, Respondent's brought this action for recovery of the balance due and for a judgment requiring the Appellants to execute a standard note and trust deed as contemplated under the terms of the agreement for the recovery of the principal sum of \$149,500.00 and further for an order authorizing the resale of the subject real property and application of the proceeds from that sale towards the outstanding judgment and a deficiency judgment against Appellants should the sale of the property fail to produce sufficient proceeds to satisfy Respondents' claim. (TR 30)

The value of the remaining property was at trial approximately Seven Thousand Dollars (\$7,000.00) per acre for a total of \$55,000.00 to \$60,000.00. (TR 65)

Mr. McCracken said he had no authority to enter into a joint venture only the written contract for sale and related documents. (TR 34).

SUMMARY OF ARGUMENTS

1. Respondents have fully performed to the extent reasonably possible, under the contract, and specific performance is an appropriate remedy.

2. Appellants have improperly attempted to use evidence not presented at trial in support of their appeal.

3. Valid authority existed on the part of sellers to convey the property under the agreement.

4. The transaction and relationship between the parties was one of a purchase and sale contract not a joint venture.

STATEMENT OF ARGUMENTS

POINT I

RESPONDENTS HAVE FULLY PERFORMED TO THE EXTENT
REASONABLY POSSIBLE UNDER THE CONTRACT, AND
SPECIFIC PERFORMANCE IS AN APPROPRIATE REMEDY.

It is undisputed that the trial court sitting without a jury has jurisdiction to entertain equitable remedies. Allen v. Barnes 12 P 912 (Utah). The facts clearly establish that the parties intended to enter into a purchase and sale contract. The Sellers intended to sell the subject property and the Buyers intended to purchase the same.

Appellants totally ignore the fact that a precondition to Sellers' performance under the contract was Buyers' delivering their note and trust deed to the Sellers. There was certainly no point in Sellers deeding the property to Buyers if that would result in Sellers prejudicing or losing their security interest in the property. Certainly the Buyers had no reasonable expectation of receiving a deed or title insurance to the property absent delivery of the promissory note and trust deed. Significantly, Buyers sustained no prejudice and if anything obtained an advantage by their failure to deliver the note and trust deed. It is further significant that Buyers were the principals who initiated the transaction, and took the lead in

causing the documents to be prepared and established the he relationship with the title company in this matter. (TR 71-76) Appellant Downs testified that he knew who the owners of the property were and knew the status of title. (TR 71, 91) Indeed no evidence was ever presented at trial to suggest that the property was anything but free and clear since the date the contract was initially executed. Mr. McCracken testified that he was the owner of the property and the property was clear of liens. (TR 14-18, 49) It is also significant that the parties met in January of 1981 and acknowledged that the note, trust deed and warranty deed and title insurance had not been exchanged and all parties agreed that they would proceed under the existing circumstances and that the contract balance then owing of \$149,000.00 would be paid in accordance of the contract i.e. September 1, 1983. (TR 61, 106, Exhibit 11)

Under the circumstances the trial court had the option of either awarding monetary damages i.e. \$149,500.00 plus interest from the due date of September 1, 1983, or alternatively ordering an equitable remedy that would afford both parties the benefit of their bargain and the protections contemplated under the contract i.e. execution of the note and trust deed and foreclosure of the same. The Court in its discretion elected the latter remedy. Relief may be granted under circumstances where the party requesting such relief has exercised reasonable efforts to discharge his own obligation. See Bradford v. Alvey & Sons Utah 621 P2d 1240 (1980), see also Huck v. Hanes Utah 560 P2d 1142.

The evidence is clear that Respondents, even after the

meeting in 1981 with Attorney Barrett contacted Appellants on several occasions inquiring of the Buyers' ability to perform under the contract and make payment. On each occasion Sellers were assured that the contract would be honored, and on one occasion, Mr. McCracken was informed by Mr. Downs that the contract did not require payment until September 1, 1983, and he would have to wait until then. (TR 26-30, 66, 67) Respondents acted responsibly and promptly under all of the circumstances. Respondents caused no delay in the enforcement of the agreement and caused no disadvantage to Appellants. Indeed the cause of action for which the trial court ultimately granted relief did not arise until September 1, 1983, and could not under the terms of the contract. (Exhibit 1)

POINT II

APPELLANT HAS IMPROPERLY ATTEMPTED TO USE EVIDENCE NOT PRESENTED AT TRIAL IN SUPPORT OF THEIR APPEAL.

Appellants in their appeal brief suggest that the Court erred in judgment, and alledge that title to the subject property was at some time after the execution of the purchase and sale contract encumbered by acts of Respondent. In support of such allegation, Appellants rely upon exhibits indentified as 13 and 14. No such evidence, however, was ever introduced at trial and exhibits 13 and 14 have never been received in any of these proceedings, even after trial by the Court. Appellants entire argument suggesting wrong doing or adversely affecting the title to property by Respondents, is without any merit and can not be raised now having not been raised at trial.

"Matters not presented to the trial court may not be raised for the first time on appeal."

"The burden is on the parties to make certain that the record they compile will adequately preserve their arguments for review in the event of an appeal."
Franklin Financial v. New Empire Development Company 659 P2d. 1040 (Utah 1983), see also Duckett v. Olsen 699 P2d. 734 (Utah 1985).

POINT III

VALID AUTHORITY EXISTED ON THE PART OF SELLERS TO CONVEY THE PROPERTY UNDER THE AGREEMENT

Respondents agree with Appellants' statement that, generally speaking, a trustees' powers and duties can not be delegated to others. This does not mean, however, that ministerial duties, such as executing documents for the sale of trust property, can not be delegated to agents or attorneys. As stated in Meck v Behrens, 252 P. 91 (Wash), "It is undoubtedly the rule that, while a Trustee may delegate to someone else a purely ministerial duty, he may not delegate to another his discretionary powers.

The case of Dodge v. Stickney, 62 N.H. 330 (1882), is quoted in 50 A.L.R., 214, 216 as follows:

"It is, however, permissible for a Trustee to employ an agent to perform ministerial duties connected with the execution of a trust. If a Trustee can not in the exercise of due caution, employ agents, and rely on their judgment and honesty in the transaction of business matters pertaining to the Trust, without being held responsible for a successful issue in every instance, many estates would remain unsettled for want of sufficiently courageous Trustees. ... If it is reasonably necessary for a Trustee to employ agents or attorneys, and if he uses ordinary care in their selection and proper supervision over the business entrusted to them, he can not be held liable for his discretion resulting without fault on his part."

In the instant action, Kendrick and Lila McCracken as Trustees of the Kendrick and Lila McCracken Revocable Trust, properly delegated their ministerial duty to Mark McCracken to execute documents necessary for the sale of the property. Kendrick and Lila did not delegate any discretionary or supervisory powers to Mark McCracken over the Trust. Instead, they made a decision to sell a portion of the trust property and granted Mark McCracken power of attorney to complete the transaction after their decision.

In addition, assuming arguendo that Kendrick and Lila did not act as Trustees to sell trust property, any defect in the sale was cured by the subsequent special warranty deed (Exhibit 7) executed by Kendrick and Lila as individuals and as trustees to Mark McCracken. As provided in Section 57-1-10, Utah Code Annotated and recited below, such subsequent conveyance to Mark McCracken has the effect of transferring any interest he obtained thereby to ultimately Greaves and Downs as Purchasers of the property under the recorded contract.

Section 57-1-6 Utah Code regarding the necessity of recording notices of contract and interests in property, (which incidentally Appellants took advantage of) provides:

"Neither the fact that an instrument, recorded as herein provided, recites only a nominal consideration, nor the fact that the Grantee in such instrument is designated as Trustee, or that the conveyance otherwise purports to be in trust without naming the beneficiaries or stating the terms of the trust, shall operate to charge any third person with notice of the interest of any person or persons not named in such instrument or of the Grantor or Grantors; but the

Grantee may convey the fee or such lesser interest as was conveyed to him by such instrument free and clear of all claims not disclosed by the instrument or by an instrument as recorded as herein provided setting forth the names of the beneficiaries, specifying the interest claimed and describing the property charged with such interest."

Mr. Downs and Mr. McCracken both testified that it was Mr. Downs who suggested that a Power of Attorney be obtained to facilitate an expeditious closing of the transaction. (TR 19, 20, 71-74, 108, 112) Mr. Downs indicated that he knew that Lila and Kendrick McCracken owned and held interest in the subject property prior to entering into the contract, and he had solicited and obtained the services of the title company to assist him in completing the transaction and had reviewed this information with Attorney Barrett. (TR 71-76)

"The demands of this section [57-1-6] are answered if a party dealing with the land has information of a fact or facts that would put a prudent man upon inquiry and would, if pursued lead to actual knowledge of the state of the title." See Toland v. Corey Utah 24 P. 190.

Appellants are now estopped from asserting as an affirmative defense lack of authority to proceed when they in fact failed to exercise a prudent inquiry and had constructive notice of the circumstances of title and elected to proceed with the transaction.

Section 57-1-10 of the Utah Code provides as follows:

"If any person shall hereafter convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the Grantee, his heirs, successors or assigns, and such conveyance shall be as valid as if such legal estate had been in the Grantor at the time of the conveyance."

The potential conflict of title created by Kendrick and Lila McCracken's Quit Claim Deed in trust of July 1978 is cured by the subsequent special warranty deed (Exhibit 7) executed by Kendrick and Lila McCracken as individuals and trustees to Mark McCracken. The subsequent deed (Exhibit 7) itself evidences the original intent of the McCrackens which was to sell the property under the purchase agreement (Exhibit 1) and as a matter of equity, Respondents would have been estopped from selling the property contrary to the purchase agreement and the rights of the Appellants.

POINT IV

THE TRANSACTION AND RELATIONSHIP BETWEEN THE
PARTIES WAS ONE OF A PURCHASE AND SALE CONTRACT
NOT A JOINT VENTURE.

The Purchase Agreement identified as Exhibit 1 speaks for itself. The parties acknowledged that this is the only agreement which they entered into, and although it was not fully performed represents the contract they intended. (TR 71-76, 88, Exhibit 11)

"A construction giving an instrument a legal effect to accomplish its purpose will be adopted when it can reasonably be done, and between two possible constructions that will be adopted which establishes a valid contract. Schofield v. Z.C.M.I. 39 P2d 342 also Driggs v. Utah State 142 P2d 657.

The only reasonable interpretation of the document is that it is, as it is entitled: a purchase agreement and not an agreement of joint venture. The document clearly identifies the Respondents as "Sellers" and the Appellants as "Purchasers", and "Buyers". The document specifically provides that the "Buyers

are desirous of purchasing said property for development and subdivision and Sellers are agreeable to sell the same."

Paragraph 1 of the agreement provides that the "Sellers agree to purchase all of the property and that the Buyers agree to pay for the property in installments." Paragraph 2 of the agreement provides that it was expressly understood and agreed that the Buyers shall be the developers and subdividers and the Sellers shall have no part in nor control over the subdivision or sale of the lots. The only possible suggestion of a joint venture is the provisions of paragraph 1c of the agreement, which states as follows:

"Provided, further, that Buyers and Sellers agree that the Buyers are preparing a preliminary Plat for subdivision which will subdivide the property into Twenty-seven (27) lots and that the buyers will sell said lots at the best possible price. If, after all the lots have been sold, more than a gross sales price of Three hundred Sixty Thousand Dollars (\$360,000.00), less any real estate commissions, have been realized by the Buyers, then Sellers shall receive as additional compensation for the purchase and sale of their property, one-half (1/2) of all of the proceeds from the sale of said lots exceeding Three Hundred Sixty Thousand Dollars (\$360,000.00)."

Even these provisions, however, identify the parties as "Buyers" and "Sellers" and specify that any additional funds from the sale of property in excess of Three Hundred and Sixty Thousand Dollars (\$360,000.00) payable to the Sellers was to be identified "as additional compensation for the purchase and sale of their property."

Mark McCracken testified at trial that subparagraph "c" was included in the contract as consideration for the fact that no interest was charged for the five year term of payment of the

agreed contract price, and further that such an allowance was given as an accommodation to the purchasers to encourage a successful development and sale of the property and further in anticipation of property value increase and thereby obtaining a higher compensation for the purchase and sale of the property.
(TR 23)

The evidence is clear that both parties relied upon the contract and therefore are entitled to enforcement of the same. Appellants caused the contract to be acknowledged by a notary public in proper form and recorded and thereby asserted their claim in and to the subject property and have established a lien and recorded claim of interest against and to the property to the present time. Section 57-1-6 of the Utah Code provides:

"every instrument in writing setting forth an agreement to convey any real estate or whereby any real estate can be affected, to operate as notice to third person shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the county in which the real estate is situated, but shall be valid and binding between the parties thereto without such proofs acknowledgment, certification of record, and as to all other persons who have had actual notice."

That the parties continued to treat the transaction as a purchase and sale of the property is further evidenced by Attorney Barrett's testimony and his memo to his Greaves and Downs file (Exhibit 11). As stated in paragraph 2 of Attorney Barrett's memo, the parties had "mutually agreed" that they were not in disagreement as to the provisions of the agreement or their actions thereunder and that they could proceed under the Purchase Agreement. The parties also were in agreement as to the remaining balance due under the agreement being \$149,500.00.

(emphasis added) It must be concluded there would be no "balance due under the agreement" if the agreement were treated as anything other than a purchase and sale of the property. There would be no balance due under a joint venture.

Attorney Barrett's memo also indicates that the parties preferred to "leave the situation as it is and not to have any deeds exchange hands yet! (emphasis added) It is quite apparent that the parties intended to transfer deeds as contemplated in the Purchase Agreement but that the transfer could take place at a later date. This further indicates that the parties continued to treat the transaction as a purchase and sale of the property even more than two years after signing the agreement.

At no time did any of the parties contemplate their transaction to be a joint venture agreement or anything other than a purchase agreement. (TR 88) Mr. McCracken testified that he had no authority to enter into a joint venture, only a sale contract (TR 34) The following considerations evidence that no joint venture was contemplated:

(a) The agreement was not for the purpose of making joint profit. The payments received by McCrackens from the sale of property were, as stated in the Purchase Agreement, payments on the purchase price and were made in a manner consistent with the contract. Once Respondents had received the purchase price of the property, Appellants would receive all remaining proceeds from the sale of remaining lots.

(b) There was no combination of property, money, affects, skill, labor nor knowledge. Respondents merely sold the property to Appellants. The Appellants were to subdivide the property, obtain subdivision plats and make any improvements to the property and to obtain Purchasers for the property. Additionally, it was Appellants who held themselves out as developers and approached Respondents for the purpose of purchasing their property. They did not request Respondents to join them in any common venture.

(c) Although both parties had an interest in seeing that the subdivision was successful and in selling lots from the subdivision, the interest of Appellants and Respondents was very different and conflicting. Respondents hoped that the lots would be sold in order to receive the purchase price of the property, but other than that, Respondents anticipated receiving the purchase price for the property whether or not the Appellants sold the lots. Respondents did not join with Appellants in actually subdividing the property and did not in any way participate in obtaining purchasers for the lots. As such, there was no community of interest or common purpose.

(d) There was also no joint propriety interest in the subject matter, i.e. property. Mark McCracken signed the deeds to Progressive Homes and signed the subdivision plat only as a convenience and not in exercising

any joint venture control over the property. Respondents obtained permission from Appellants to farm the property but had no right in directing the improvements, divisions, or sales of the property.

(e) Respondents had no right to control or share in the profits nor was there any obligation to share in losses. As stated above, once Respondents received the purchase price of the property it was Appellants who would receive all profits from the sale of lots. Appellants were still obligated to pay the purchase price of the property whether or not lots were ever sold.

Ironically if Mr. Mccracken had no authority as suggested in Appellant's brief, then he had no authority to enter into a joint venture either. Clearly the only authority given Mark McCracken was to enter into the sale contract, and to execute documents necessary to accomplish its purposes.


CONCLUSION

Appellants have received the entire benefit of the contract. Respondents have been prejudiced and damaged. Appellants are attempting to renege solely because the present economic conditions make it difficult to sell the property purchased for profit. The economies of subdivision development, however, is of little importance to the legal and equitable issues of the case. The risk of subdivision development was a burden borne solely by Appellants. The trial court appropriately entered findings consistent with the evidence presented and a judgment consistent with law and equity. Where there is substantial evidence in the

record to support the trial court's decision, that judgment should not be disturbed on appeal. (see Edgar v. Wagner 572 P2d. 405 (Utah). The judgment should be affirmed.

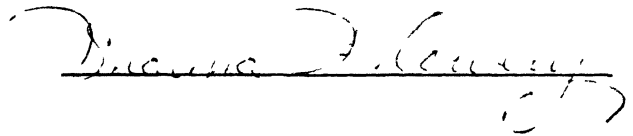
DATED this 9 day of May, 1986.

JENKINS, MCKEAN & ASSOCIATES


James C. Jenkins

CERTIFICATE OF MAILING

I do hereby certify that a true and correct copy of the foregoing was mailed to George Preston, Attorney at Law, 67 East 100 North, P.O. box 3700, Logan, Utah, 84321, by depositing the same with the U.S. mail postage prepaid and addressed as stated this 9th day of May, 1986.


Diana D. Lewis

ADDENDUM

57-1-6. Recording necessary to impart notice—Operation and effect—Interest of person not named in instrument.—Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such proofs, acknowledgment, certification or record, and as to all other persons who have had actual notice. Neither the fact that an instrument, recorded as herein provided, recites only a nominal consideration, nor the fact that the grantee in such instrument is designated as trustee, or that the conveyance otherwise purports to be in trust without naming the beneficiaries or stating the terms of the trust, shall operate to charge any third person with notice of the interest of any person or persons not named in such instrument or of the grantor or grantors; but the grantee may convey the fee or such lesser interest as was conveyed to him by such instrument free and clear of all

claims not disclosed by the instrument or by an instrument recorded as herein provided setting forth the names of the beneficiaries, specifying the interest claimed and describing the property charged with such interest.

57-1-10. After-acquired title passes.—If any person shall hereafter convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, his heirs, successors or assigns, and such conveyance shall be as valid as if such legal estate had been in the grantor at the time of the conveyance.

PLAINTIFF'S
EXHIBIT
#1

417846
8.50

STATE OF UTAH
COUNTY OF CACHE SS
FILED AND RECORDED FOR
WESTERN STATES TITLE CO.
Oct 19 4 05 PM '78

MICHAEL L. GLEED
COUNTY RECORDER
DEPUTY

PURCHASE AGREEMENT

THIS AGREEMENT made and entered into this 19th day of October, 1978, by and between JERRY DOWNS and JERALD GREAVES, hereinafter referred to as Purchasers and MARK McCRACKEN, on behalf of himself and as attorney in fact for KEDRICK McCRACKEN and LILA P. McCRACKEN, husband and wife, and DORIS E. McCRACKEN, hereinafter collectively referred to as Sellers, is made with reference to the following facts:

WHEREAS, Sellers are the owners of certain real property in the City of Smithfield, County of Cache, State of Utah, consisting of 9.57 acres, more or less, a more particular description of which is attached hereto and incorporated herein as Exhibit "A", and

WHEREAS, Buyers are desirous of purchasing said property for development and subdivision and Sellers are agreeable to selling the same.

NOW, THEREFORE, the parties hereto agree as follows:

1. Sellers agree to sell and Buyers agree to purchase all of the property described in Exhibit "A" attached hereto, consisting of 9.57 acres more or less, in the City of Smithfield, County of Cache, State of Utah, and Buyers agree to pay for said described property the amounts, in installments as follows:

a. As a downpayment, Buyers agree to pay to Sellers contemporaneous with the execution of this Agreement, the sum of Five Hundred Dollars (\$500.00), receipt of which is acknowledged by the Sellers.

b. Buyers agree to pay an additional One Hundred Seventy-nine Thousand, Five Hundred Dollars (\$179,500.00) in the form of a Note secured by a Deed of Trust on the described property. Said Note shall be payable in full on the First of September, 1983. Provided, however, that, whenever Buyers shall sell a lot or portion of the described property, they shall pay one-half of the gross sale price less real estate commissions, if any, of

A TRUE COPY
CERTIFIED THIS 5TH DAY OF
JULY 19 85
MICHAEL L. GLEED
RECORDER OF CACHE COUNTY, UTAH
BY K. Jones DEPUTY

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said lot to Sellers to apply on said Note.

c. Provided, further, that Buyers and Sellers agree that the Buyers are preparing a preliminary plat for subdivision which will subdivide the property into twenty-seven (27) lots and that Buyers will sell said lots at the best available price. If, after all of the lots have been sold, more than a gross sales price of Three Hundred and Sixty Thousand dollars (\$360,000.00), less any real estate commissions, has been realized by the Buyers, then Sellers shall receive as additional compensation for the purchase and sale of their property, one-half (1/2) of all of the proceeds from the sale of said lots exceeding \$360,000.00.

2. It is further understood and agreed that the Buyers shall be the developers and subdividers and that Sellers shall have no part in nor control over the subdivision or sale of the said lots.

3. Closing of this Agreement by Sellers deeding the subject property to the Buyers and Buyers delivering their Note and Deed of Trust to the Sellers shall be on or before November 20, 1978, at the sole election of the Sellers.

4. It is agreed that this entire Agreement is contingent upon approval of a final plat of subdivision being approved by the City of Smithfield. In the event said plat is not approved for any reason within one year from the date of this Agreement, then the Buyers, at their option, may recind the agreement by deeding the described property back to the Sellers in return for the Promissory Note. In such event, the Sellers shall retain the Five Hundred Dollar (\$500.00) downpayment.

5. It is understood and agreed that Buyers shall pay all subdivision and development costs, including real estate taxes after the calendar year 1978. Sellers shall pay the 1978 real property taxes assessed against the subject property.

6. Sellers agree to provide to Buyers a policy of title insurance at Sellers' expense within ninety (90) days after the

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execution of this Agreement.

7. As Buyers sell any lot or lots, the Seller agrees to execute and deliver to the designated title company a reconveyance from the Deed of Trust on any such lots, releasing said lots from the lien of the Deed of Trust.

8. This Agreement constitutes the entire agreement of the parties hereto and no amendments or changes may be made except in writing, executed by the party to be charged.

9. This Agreement shall be binding upon the heirs, executors, successors and assigns of the parties hereto.

DATED this 19th day of October, 1978.

BUYERS:

Jerry Downs
Jerry Downs

Jerald Greaves
Jerald Greaves

SELLERS:

Mark McCracken
Mark McCracken

On behalf of himself and as
Attorney in Fact for:

Kedrick McCracken and
Lila P. McCracken, husband
and wife, and
Doris E. McCracken

STATE OF UTAH)
 : ss.
County of Cache)

On this 19th day of October, 1978, personally appeared before me JERRY DOWNS, JERALD GREAVES and MARK McCRAKEN, the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

Paul H. Hester
Notary Public

NOTARY PUBLIC
STATE OF UTAH
COMMISSION EXPIRES MAY 15, 1982

Commission expires: May 15, 1982

Residing in Logan, Cache County, Utah

EXHIBIT "A"

Beginning at the West side of street, 11.75 chains South of a point 14.50 chains East of the Northwest Corner of Lot 5, Block 2, Plat "C" Smithfield City Survey, and running thence West, 10.0 chains; thence South, 2.0 chains; thence East 10.0 chains, m/l, to the West side of said street; thence North, 2.0 chains along the West side of said street, to the point of beginning. Containing 2.0 acres, m/l. 08-110-0029

Beginning at a point on the West side of street, 13.75 chains South of a point 14.5 chains East of the Northwest Corner of Lot 5, Block 2, Plat "C" Smithfield City Survey, West 10 chains; South, 8 chains; East 10 chains; North, 8 chains to beginning. Containing 7.57 acres. 08-110-0031