Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1977

Bennion Insurance Company, A Utah Corporation v. Lst Ok Corporation, A Utah Corporation, Morrish. Curtis, And Sadie P. Curtis, His Wife, Shell Oil Co., A Corporation And Sevier Count And Mil Ton D. Hendrickson v. Lst Ok Corporation, A Utah Corporation, Morrish. Curtis And Sadie P. Curtis, His Wife, And Ut Ah Title And Abstract Comp Any, A Utah Corporation : Appellants' Consolidated Brief

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2
Utah Supreme Court

Part of the Law Commons

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Grant M. Prisbrey; Attorney for AppellantsTex R. Olsen; Attorney for Respondents

Recommended Citation
Brief of Appellant, *Bennion Insurance v. IST OK Corp.*, No. 14849 (Utah Supreme Court, 1977).
https://digitalcommons.law.byu.edu/uofu_sc2/557

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

BENNION INSURANCE COMPANY,
a Utah corporation

No. 14848

Plaintiff and
Appellant,

VS.

1ST OK CORPORATION, a Utah corporation, MORRIS H. CURTIS, and SADIE P. CURTIS, his wife, SHELL OIL CO., a corporation and SEVIER COUNTY,

Defendants and
Respondents,

and

MILTON D. HENDRICKSON

No. 14849

Plaintiff and
Appellant,

VS.

1ST OK CORPORATION, a Utah corporation, MORRIS H. CURTIS and SADIE P. CURTIS, his wife, and UTAH TITLE AND ABSTRACT COMPANY, a Utah corporation,

Defendants and
Respondents.

APPELLANTS' CONSOLIDATED BRIEF

Appeal from the Judgment of the Sixth Judicial
Court for Sevier County Honorable David Sam
of the Fourth District sitting for Honorable Don V. Tibbs

FILED

JAN - 4 1977

Clerk, Supreme Court, Utah

Grant M. Prisbrey
2155 South Main
Salt Lake City, Utah 84115
Attorney for Appellants

Tex R. Olsen
Olsen & Chamberlain
76 South Main
Richfield, Utah 84701
Attorneys for Respondents

Sponsored by the S.J. Quinney Law Library, Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

AUTHORITIES CITED

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT OF THE STATE OF UTAH

BENNION INSURANCE COMPANY,
a Utah corporation

No. 14848

Plaintiff and
Appellant,

VS.

1ST OK CORPORATION, a Utah corporation, MORRIS H. CURTIS, and SADIE P. CURTIS, his wife, SHELL OIL CO., a corporation and SEVIER COUNTY,

Defendants and
Respondents,

and

MILTON D. HENDRICKSON

No. 14849

Plaintiff and
Appellant,

VS.

1ST OK CORPORATION, a Utah corporation, MORRIS H. CURTIS and SADIE P. CURTIS, his wife, and UTAH TITLE AND ABSTRACT COMPANY, a Utah corporation,

Defendants and
Respondents.

APPELLANTS' CONSOLIDATED BRIEF

STATEMENT OF THE KIND OF CASE

In these cases each plaintiff commenced an action to foreclose real estate mortgages which had been given to them by defendant 1st OK Corporation. The other defendants were joined because of interests appearing of record in their favor. The defendants Mr. and Mrs. Curtis were joined because of their interest appearing as a result of other related litigation which will be described later. Defendants Mr. and Mrs. Curtis filed an answer claiming that the instrument through which 1st OK Corporation claimed title from the Curtises was void

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

and that the mortgages could therefore acquire no interest in the real estate described in the mortgages.

DISPOSITION IN LOWER COURT

The issues in the case were heard by the Court on motions for summary Judgment. From judgments by the Court granted in favor of defendants Mr. and Mrs. Curtis, the plaintiffs appeal.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the judgments and a contrary ruling of the Supreme Court giving plaintiffs relief prayed for.

STATEMENT OF FACTS

Plaintiff-Appellant Bennion Insurance Agency received a note and mortgage from defendant 1st OK Corporation on October 2, 1973. Plaintiff Milton D. Hendrickson received a note and mortgage on a different piece of property on the 12th day of February, 1974. Defendant 1st OK Corporation defaulted on the note and mortgage in each case. Bennion Insurance Agency filed an action to foreclose its mortgage on or about May 25, 1976. Milton Hendrickson filed his complaint to foreclose about October 10, 1975. 1st OK Corporation had acquired its interest in the real estate in question from defendant Morris H. Curtis and Sadie P. Curtis. Between the time of the giving of the notes and mortgages to Bennion and Hendrickson and the commencement of the foreclosure actions, litigation had developed between 1st OK Corporation and Mr. and Mrs. Curtis. On August 19, 1974, 1st OK Corporation filed a complaint in the District Court of Sevier County. Mr. and Mrs. Curtis filed a counter-claim asking that the transaction be rescinded because of the fraudulent representations of plaintiff's President, Orland K. Fiandaca. That litigation was resolved in favor of Mr. and Mrs. Curtis. 1st OK Corporation appealed to the Utah Supreme Court. That case was handled as case No. 14334 by the Supreme Court. On May 17, 1976 the Supreme Court affirmed the issues on appeal in favor of Mr. and Mrs. Curtis. Thereafter Mr. and Mrs. Curtis filed motions for summary judgment in each case now on appeal. The plaintiffs in each action requested a change of Judge pursuant to the rules of

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

civil procedure because of some language in the original decree in the case of 1st OK Corporation versus Mr. and Mrs. Curtis. In that decree the Court recited that all parties claiming through, by or under 1st OK Corporation had void claims against the property even though they had not been made parties to the action. The plaintiffs in the present actions were concerned about this language and the position of the Judge who signed the decree. The District Judge for the Sixth Judicial District readily obliged and removed himself from the case. The motions for summary judgment were heard by Judge David Sam of the Fourth Judicial District.

The Curtis motions for summary judgment were based on affidavits by Morris H. Curtis which were substantially identical through the fifth subparagraph of paragraph 10 of the affidavit. The affidavit in the Hendrickson case contained additional allegations with respect to whether or not Mr. Hendrickson may have been a bona fide purchaser for value or not. The basic portions of the affidavits of Morris H. Curtis recite generally the history of the transactions between 1st OK Corporation, its President Orland K. Fiandaca, and Mr. and Mrs. Curtis. While this affidavit naturally includes the biases of Mr. and Mrs. Curtis as filtered through the mind of their attorney the affidavit is generally corect through the subparagraph (5) of the first 10 paragraphs. Other paragraphs in the Hendrickson affidavit are not pertinent here because the Court below must have based its determination on matters other than the subsequent paragraphs in the Hendrickson case. The Court granted the Curtis motions for summary judgment in a memorandum that recited only that the deeds from Mr. and Mrs. Curtis to 1st OK Corporation were void ad initio. The attorney for Mr. and Mrs. Curtis was ordered to prepare findings of fact and conclusions of law. The plaintiff-appellants herein objected to the findings of fact for the reason that they did not provide a lawful basis for entry of the judgment against the plaintiffs. The District Court declined to require amendment of the findings of facts. The matter is now before the Supreme Court essentially on the affidavits of Morris H. Curtis and the affidavits of the plaintiffs respecting their own motions for summary judgment and the memoranda submitted to the Court with respect to these motions. I will not recite further factual material for the reason that the factual material recited in the Curtis affidavit will be analyzed at considerable length in the argument.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

ARGUMENT

In view of the very general finding of fact on which the District Court judgments are based and in view of the wealth of material presented in the Curtis affidavits it is to some extent necessary to speculate on the basis for the District Court judgment.

POINT I
THE PLAINTIFF-APPELLANTS ARE NOT BOUND BY THE ORIGINAL DECREE IN CASE NO. 6860 IN THE DISTRICT COURT OF SEVIER COUNTY BETWEEN 1ST OK CORPORATION AS PLAINTIFF AND MR. AND MRS. CURTIS AS DEFENDANTS.

The appellants herein are not bound by the decree of the District Court of Sevier County in case no. 6860 between 1st OK Corporation and Mr. and Mrs. Curtis. They were not parties to that litigation and cannot be bound by that litigation because they were not parties to it. *Federal Land Bank of Berkeley vs. Pace,* 87 UT 156, 48 P2d, 480. The recital in the judgment and decree in that case no. 6860 was of no binding effect as to the present plaintiffs even though the Supreme Court affirmed the decision of the District Court in case no. 14334. The issue of the effect of the decree as to persons who are not parties to case no. 6860 was not an issue raised in the Supreme Court in the case between the 1st OK Corporation and Mr. and Mrs. Curtis. The Supreme Court undoubtedly did not intend to adjudicate the rights of any persons not parties to that litigation especially where no such issues were raised before the Court.

We can only speculate as to whether or not the District Court was influenced or affected by the language in case no. 6860 which would seem to preclude the rights of Bennion and Hendrickson in this case. the Court in its findings did not make specific reference to that determination.

Since that decree and the decision of the Supreme Court were made part of the Curtis affidavit it is probably desirable for the Supreme Court to make it clear that the plaintiff-appellants in these cases were not bound by the determination of the District Court of Sevier County in case no. 6860 or the decision of the Supreme Court in case no. 14334.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

POINT II

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE DEED FROM MR. AND MRS. CURTIS TO 1ST OK CORPORATION WAS VOID AB INITIO.

The principal issue in these cases is whether or not the deed from Mr. and Mrs. Curtis to 1st OK Corporation was absolutely void as against all the world at the time of its original execution or whether it was only voidable in a court of equity as between the parties to the deed itself. The tests are set forth in 23 Am Jur 2d Deeds, section 142.

> Whether the deed is void at law or only voidable in equity depends upon the character of the fraud perpetrated on the injured party. Generally, it may be said that if the grantor's signature to a deed is procured by fraudulently reading the instrument to him in terms different from the real ones or by fraudulently misrepresenting its terms or its character, provided such fraud or misrepresentation goes to the essential of the deed and does not relate to mere details, or if by trick or fraud an instrument other than the one the grantor intended to sign is substituted and is signed by the grantor and it cannot be said that the signing resulted from the grantor's inattention or negligence in signing something without knowing its contents, the instrument is void at law.

The concepts set forth in this section of Am Jur basically set forth six tests which may be used to determine whether or not a deed should be determined to be one which can be set aside as being void at law. These tests are:

1. Fraudulent reading of the instrument to the grantor.
2. Fraudulently misrepresenting the terms of the deed, or
3. Its character.
4. Whether the fraud goes to the essentials of the deed rather than relating to mere details
5. Substitution by trick or fraud.
6. The grantor cannot benefit from his own inattention or negligence in signing something without knowing its contents.

We must measure the material in the narrative of the Curtis affidavit to test these concepts. In evaluating the nature of the conduct of 1st OK Corporation or its President Orland K. Fiandaca we should first of all separate the actions or representations of Mr. Fiandaca prior to the execution of the originating deed and those activities of 1st OK Corporation which occurred after the execution of the orginating deed. It appears that prior to the execution of the deed that there were essentially three types of representation that were made by Fiandeca: 1. He and his corporation possessed the necessary skill. There is no

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

fraud here. This has never been controverted. 2. Fiandaca and his corporation were solvent and financially able to perform. 3. The parties were dealing with 70 acres of land instead of 91 as later calculated. If we look to the time after the execution of the originating deed we can count at least nine actions which Mr. and Mrs. Curtis complained of in the dealings of Mr. Finadaca. All of these nine actions must necessarily relate to the concept of confidential relationship and have nothing to do whatever with whether or not the originating deed was void at law. Paragraph six of the affidavit essentially alleges that Fiandaca indicated that he was able and willing to perform the functions which the Curtises desired to have performed with respect to the freeway interchange property. A reading of the entire affidavit would show that the only material misrepresentations of existing facts related to the personal solvency of Mr. Fiandaca and the degree of financial strength of his corporation. The affidavit does not indicate that Mr. Fiandaca was in fact insolvent at the time of these negotiations or representations. The prime problem with respect to solvency involved a question of the strength and viability of 1st OK Corporation. There is in fact no evidence in the affidavit that 1st OK Corporation was insolvent. The weakness of the Fiandaca case at this moment appears to be that he puffed his corporation and failed to make a full, candid and complete detailing of all of his personal financial history and failed to advise Mr. and Mrs. Curtis that the corporation may have been organized on a rather thin financial basis. There is apparently no question whatever of the willingness of Fiandaca and his corporation to perform. The only other representation in that paragraph was that the Curtises would do well if they were to become involved with Fiandaca's corporation and make a deal with him. That was not a representation of an existing fact but a promise of future performance, a mere set of contractual type promises.

The next representation appears in paragraph eight of the affidavit. We are told that Mr. Fiandaca represented that the tract of land in question contained 70 acres where later computations after the fact made it appear that the amount of real estate involved approximately 91 acres. It should be clear here that there is no copy of any deed or any description where on the face of the deed it purports to show that there were 70 acres involved in the deal. The 70 acre versus 90 acre problem is apparently all a matter of oral representation. The copy of the deed of May 25, 1973 which is attached as an exhibit to the Curtis affidavit makes no reference to the acreage involved in the deal.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Machine-generated OCR, may contain errors.

In evaluating the contents of the affidavit then we must make these observations: 1. There was no fraudulent reading of the deed to Mr. and Mrs. Curtis. 2. There was no fraudulent misrepresentation of its terms. 3. There was no misrepresentation of the character of the instrument. They were signing a deed and they knew they were signing a deed. 4. The deed described the land to be conveyed exactly. There was never apparently any question whatever of the land involved in the 1st OK Corporation-Curtis transaction. The land description was apparently always the same. The correction deed of May 23, 1973 was only made to change the point of beginning of the land description to tie it to an established survey corner rather than tying the land description to an ephemeral point on a proposed interstate highway right of way. The representation with respect to acreage was a mere detail. 5. There is no allegation in the affidavit that thee was any substitution by trick or fraud of one instrument for another at any time. 6. It is not fair to say that Mr. and Mrs. Curtis were not negligent with respect to the only minor element in the entire relationship of the parties which might even possibly be construed to relate to whether or not we are dealing with a deed that is void at law. They can only really complain about the acreage discrepancy. It appears that the acrege discrepancy never surfaced during all of 1972, 1973, 1974 but only came to light at the pretrial in case no. 6860 in mid 1975. They apparently had no complaint whatever about the land involved in their transaction with 1st OK Corporation for 3½ years. Then it finally became another bit of evidence in the complex pattern of relationships between 1st OK Corporation and themselves. It is fair to say, in fact that Mr. and Mrs. Curtis were negligent. If there was something they signed that was not right they apparently signed instrument after instrument after instrument containing this description. There is no allegation in the affidavit that Mr. Fiandaca knew that there was more acreage in the land described than 70 acres.

The tests that we have referred to above are tests that are common law tests involving the concept of fraud in factum meaning fraud in the act of the execution of the deed such as will support the common law plea of non est factum. 23 Am Jur 2d Deeds Section 142. This type of fraud is distinguished from fraud in the inducement or fraud arising from misrepresentation of a material fact which would only give rise to a suit in equity to avoid the deed as between the parties.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Section 137 of 23 Am Jur 2d Deeds distinguishes between the meaning of void and voidable with respect to deeds. The distinction essentially is that in a court of law as distinguished from a court of equity, the only plea which will avoid the operation of a deed is a plea of non est factum, meaning that the deed is not that of the grantor. In order that a deed may be void at law there must be a finding and conclusion in favor of the grantor on the naked issue of deed or no deed. The deed is then void at law for all purposes whether the claimant under it is the grantee himself or an innocent purchaser from the grantee. Voidable deeds, on the other hand, are those deeds which may be set aside as between the parties on the ground of fraud in the inducement, that is, misrepresentations which induce the parties to enter into a contract with each other or confidential relationship.

POINT III

THE ACREAGE DIFFERENCE IS INSUFFICIENT TO BASE A DETERMINATION OF FRAUD IN FACTUM

The respondents apparently claim that the acreage difference is so substantial that it amounts to a conveyance of different property than was intended originally by the parties. It is understandable that they should emphasize the acreage matter. If they cannot win on the acreage issue then they cannot prevail in these cases. It is interesting to note that this emphasis really is increased in the current cases where it was at most just one more element in the relationship that existed between Fiandaca and Mr. and Mrs. Curtis. That this is the case is born out by the findings of fact and conclusions of law in case no. 6860 which make no reference whatever to the acreage aspect of that relationship.

The significance of the quantity of land in a deed is discussed in the following treatises.

> Quantity is regarded as the least reliable of all descriptive particulars in a conveyance and yields to calls for monuments as well as to courses and distances, unless there is a clear intent to convey a certain quantity. 23 Am Jur 2d Deeds, Section 240.
>
> Quantity is the least reliable of all descriptive particulas in a conveyance and the last to be resorted to. 12 Am Jur 2d Boundaries Section 75.
>
> The quantity of land named in a deed is ordinarily one of the lowest in the scale of importance. *Thompson on Real Property,* Section 1053, 1962 Replacement.

Paragraph five of the Curtis affidavit indicates that the respondents knew that their property would be bisected by interstate highway 70. While the description conveyed by the

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Digitized by Standard Digitizing System for Utah Supreme Court Briefs
Machine-generated OCR, may contain errors.

Curtis-1st OK deed is a metes and bounds description it should be noted that the actual calls and distances set forth in that description are simple and clear and would give the parties to the deed a clear idea. Mr. and Mrs. Curtis had to know what property was embraced in the transaction. They knew what property 1st OK was going to manage. They knew where the 1st OK property adjoined their own reserved property.

We can speculate that the consideration or asking price for the property in question may have been higher if they had been certain of the quantity of land involved when they were talking prices. As a practical matter, however, both parties to that deed undoubtedly knew what land was involved in the deal. If Fiandaca actually misrepresented the acreage it would have been only another bit in the chain of circumstances that helped convince the District Court and jury that he hadn't treated Mr. and Mrs. Curtis as well as they should have been treated.

Whatever the acreage issue may have been between Mr. and Mrs. Curtis and Fiandaca it is practically irrelevant as it relates to the equities of Bennion and Hendrickson. The Hendrickson property contained approximately 42,500 square feet or a little less than an acre. The Bennion property contained approximately 41,800 feet or a little less than an acre. These properties were located at or near the prime corners on the North side of the freeway interchange. If there was an acreage problem involved in the Curtis-1st OK deed it is clear that the extra acreage would be in the fringe areas of the deal. It is obvious that the intent of the Curtis-1st OK deal was to include the prime acrage nearest the on and off ramps of the interchange.

If the acreage problem had really been the key problem existing between the respondents and 1st OK Corporation then the proper remedy would not have been a remedy to rescind the entire transaction. The proper remedy would have been an action to reform the deed to conform with the acreage intentions of the parties. Since acreage was not the critical concern of the respondents in case no. 6860. the Curtises merely pursued their equitable remedy to undue the entire deal with 1st OK Corp. once they had concluded that they had received shabby treatment during the course of their relationship with 1st OK Corporation.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

POINT IV

CONFIDENTIAL RELATIONSHIP CASES DO NOT GIVE RISE TO VOID DEEDS

Litigation to cancel a deed on the basis of violation or abuse of a confidential relationship is an equitable procedure. "Where a confidential relationship operates to cause the substitution of the will of the grantee for that of the grantor in a deed, the deed may be avoided." 23 Am Jur 2d Deeds Section 149. In *Roberts vs. Humphrey* 365 P2d 370 the Oklahoma courts found a confidential relationship. It considered the case to be an equitable case. It called for cancellation of the deed on equitable principles.

In the case of *1st OK Corp. vs. Curtis* no. 14334 the opinion of Justice Ellett made the following statement:

> This is a case in equity and so the jury was only advisory. The court made its findings and under Article VIII Section IX, of the Utah Constitution. This Court on appeal can review both the law and the facts.

The principal issue involved in case no. 14334 was the question of whether or not the Curtises had properly pleaded a case of confidential relationship in their counterclaim. There is no reference whatever to common law principles of fraud in factum or non est factum.

A reference to the findings of fact and conclusion of law in case no. 6860 which is attached as exhibit to the Curtis affidavit shows that that case was based on fraudulent inducement and representation and confidential relationship and not on any common law basis which would make the deed void as against all the world and the appellants in this case.

POINT V

THE APPELLANTS OCCUPY THE PREFERRED POSITION IN EQUITY

"When both parties to a transaction are innocent, and the loss must fall upon one, it should be the one who in law most facilitated the fraud." *Heavey vs. Commercial Nat. Bank of Ogden City,* 75 P727. 27 Am Jur 2d Equity, Section 146.

In these transactions, however innocent Mr. and Mrs. Curtis may have been in this case, they started the chain of events with 1st OK Corp. that ultimately enabled the appellants to become entrapped innocently in mortgage transactions. As between

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

respondents and appellants the respondents should be required to stand the loss.

POINT VI

THE SUPREME COURT SHOULD MAKE A PUBLIC POLICY DETERMINATION FAVORING STRICT CONSTRUCTION IN FRAUD IN FACTUM CASES.

There are relatively few fraud in factum cases to be found in reported cases. There are larger numbers of cases allowing the voidability of deeds in cases of fraudulent inducement, fraudulent representation and confidential relationship cases. There is good reason for this state of affairs. Grantees convey, mortgage and otherwise finance their activities with their property. While there are undoubtedly select cases that justify the application of common law fraud in factum concepts the recognition of fraud in factum circumstances should not come on the basis of light or unsubstantial grounds. That legal recognition should be allowed only in cases of forgery or cases that are tantamount to forgery. To allow otherwise would tend to make less secure land titles in our modern society. To do otherwise might provide a hunting license for disgruntled grantors to disrupt the lives of innocent third parties on the basis of insufficient grounds. The fraud in factum area should be carefully reserved by judicial decision for only the most clear cases of deed or no deed.

POINT VII

THE SUPREME COURT SHOULD GRANT PRIORITY OF INTEREST IN FAVOR OF APPELLANTS OVER RESPONDENTS

A ruling favorable to appellants on the foregoing issues would put these cases in a posture for further ruling by the Supreme Court or for the issuance of instructions or guidelines to the District Court of Sevier County. A determination favorable to the appellants would pose priority questions with respect to the interests of appellants and respondants. The general rules of priority are as follows:

1. Transfers of the legal title to land rank, between themselves according to priority in time. (*Tiffany on Real Property,* section 1257)

2. As between interests or claims of a purely equitable character, that is, enforceable in equity alone, the rule as previously stated is that between equal equities priority of time will prevail, that is, they will rank according to the time of their accrual. (*Tiffany,* section 1260)

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

3. As between a legal estate and an equitable interest the legal estate will prevail in the absence of a bona fide purchaser problem. (*Tiffany*, section 1258).

In this case respondents conveyed all of their legal estate to Utah Title and Abstract Company. Utah Title and Abstract conveyed to 1st OK Corp. Having thus divested themselves of legal title respondents had no apparent legal or equitable interest. Upon concluding that they had been maltreated by 1st OK Corp. respondents asserted equitable interests in the property by their counter claim in case no. 6860. The priority of the respondents becomes fixed at the time of successful prosecution of their suit for equitable relief. The priority of the appellants comes when they receive and record their mortgages.

Since the interests of appellants and respondents are both equitable interests their priority should be determined by the rule of first in time is first in right. The Supreme Court should, therefore, order that the mortgage equity of the appellants is superior to the rights of respondents and direct the District Court of Sevier County to proceed with foreclosure of the mortgages in these cases. The respondents would, of course, have equities of redemption which would protect them if real estate values on the Hendrickson and Bennion properties justify exercise of those rights.

CONCLUSION

The respondents' position should be characterized by the Court as an equitable position. The nature of the underlying deed is not properly subject to attack on a fraud in factum basis. The appellants should not be bound by the decree of the District Court of Sevier County in case no. 6860. The Supreme Court should determine that the appellants are in a superior priority position over the respondents. The Supreme Court should reverse the decision of the District Court and direct the District Court of Sevier County to procede with foreclosure of the mortgages of the appellants.

Respectfully submitted,

GRANT M. PRISBREY
Attorney for Plaintiff and Appellant

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.