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William T. Blodgett and Florence G. Blodgett, His Wife v. Joe Martsch, Betty Purcell, Aka Betty Purcell Martsch, Doyle Nease, Raco Car Wash Systems, Inc., A Utah Corporation, Wayne A. Ashworth, Trustee, Karl W. Tenney, Valley Bank and Trust Company, A Utah Banking Corporation, First Security Bank of Idaho, N.A., State of Utah, and John Does, 1-10 : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM T. BLODGETT and
FLORENCE G. BLODGETT, his
wife,

Appellants,

-vs-

Case No. 15608

JOE MARTSCH, BETTY PURCELL,
aka BETTY PURCELL MARTSCH,
DOYLE NEASE, RACO CAR WASH
SYSTEMS, INC., a Utah corpora-
tion, WAYNE A. ASHWORTH,
trustee, KARL W. TENNEY,
VALLEY BANK & TRUST COMPANY,
a Utah banking corporation,
FIRST SECURITY BANK OF IDAHO,
N.A., STATE OF UTAH, and JOHN
DOES, 1 through 10,

Respondents.

BRIEF OF APPELLANT

APPEAL FROM SUMMARY JUDGMENT AGAINST APPELLANTS IN THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE
OF UTAH.

FILED

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FLORENCE G. BLODGETT, his :
wife, :

Appellants, :

-vs- : Case No. 15608

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IN THE SUPREME COURT OF THE STATE OF UTAH

-oOo-

WILLIAM T. BLODGETT and FLORENCE *
B. BLODGETT, his wife, *

Plaintiffs and *
Appellants, *

vs. *

Civil No. 15608

JOE MARTSCH, BETTY PURCELL, aka *
BETTY PURCELL MARTSCH, DOYLE NEASE, *
RACO CAR WASH SYSTEMS, INC. a Utah *
corporation, WAYNE A. ASHWORTH, *
trustee, KARL W. TENNEY, VALLEY *
BANK & TRUST COMPANY, a Utah *
banking corporation, FIRST SECURITY *
BANK OF IDAHO, N.A., STATE OF UTAH *
and JOHN DOES 1 through 10, *

Defendants and *
Respondents. *

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant seeks a reversal of the summary judgment
granted below against appellants in favor of the respondents.

DISPOSITION IN THE LOWER COURT

On October 20, 1977, the lower court granted summary
judgment in favor of respondents Joe Martsch, Wayne A. Ashworth,
Karl W. Tenney, and Valley Bank & Trust Company. On November 3,
1976, the lower court entered an order denying appellants' motion
to amend or alter judgment. On October 20, 1977, the lower court
granted summary judgment in favor of respondent State of Utah.

All remaining parties to the action were either dismissed without prejudice by appellants or judgment was taken against them. In the case of Doyle Nease and John Does 1 through 10, the parties were never served.

RELIEF SOUGHT ON APPEAL

Appellants seek a finding of error in the lower court's granting of summary judgment as to the respondents Joe Martsch, Wayne A. Ashworth, Karl W. Tenney, Valley Bank & Trust Company, and the State of Utah and asks this Court to remand the case back to the lower court for a trial on the merits.

STATEMENT OF FACTS

Prior to September 21, 1973, appellants were the owners in fee title of two contiguous parcels of ground in the South Salt Lake area near the Van Winkle Expressway. One parcel has been variously referred to in the pleadings as Parcel 1 or the car wash property. Subsequent to November 5, 1971, a car wash was erected on the said property. The other piece of property has been variously referred to as Parcel 2 or the grocery store property. The appellants had operated a grocery store business on the said parcel for many years. The two parcels were acquired by appellants at two separate times, the car wash property being acquired last.

On April 23, 1969, the appellants executed a trust deed with respondent Valley Bank & Trust Company covering the store property. This was pursuant to a promissory note in the amount of \$30,000. (Karl Tenney Deposition, Ex.P-6) In late 1971,

appellants entered into a lease with Raco Car Wash Systems and Betty Purcell, defendants below, covering the car wash property. The leasees proposed to erect a car wash on the property. This lease, by its terms, specified that the car wash property was to be subordinated to assist the lessees in obtaining financing for the construction of the car wash. The lease further provided that no other property belonging to appellants was to be included. (Edgar Throndsen Deposition, page 35, Exs. P-3 and P-13) Mr. Throndsen, testifying on behalf of the respondent bank, admitted that the terms of the lease with regard to subordination had been reviewed by the bank prior to the closing of the loan for the financing of the car wash construction. (Throndsen Deposition, pages 51, 52)

The respondent bank proceeded to prepare the loan documents for the financing of the car wash. All negotiations were accomplished through dealings between the respondent bank and officers and agents of Raco Car Wash. (Throndsen Deposition, pages 22-33) Appellants had been customers of the respondent bank for some period of time and were well known to the bank. (Throndsen Deposition, page 27) Nevertheless, the respondent bank made no contact with the Blodgetts regarding the loan prior to notifying them of the closing date, at which time the documents for the closing of the loan were in final form. The notification of closing came the same afternoon as the closing. (William Blodgett Deposition, pages 14-15)

On November 5, 1971, appellants were called to the

respondent bank for the purpose of executing various documents on the car wash loan. Although there is some controversy about exactly what happened and what was said at the closing, the facts must be taken in a light most favorable to the appellants. In that regard, appellants were not informed by any of respondent bank's agents or officials or by defendant Purcell, who was also in attendance, that any property other than that described in the lease and known as the car wash property was being encumbered by the trust deed and note. (Affidavit of William T. Blodgett and Florence G. Blodgett, dated May 17, 1977) They did know, however, that the lease with Raco Car Wash covered ingress and egress over the store property. (William Blodgett Deposition, page 29) At the time of the closing, appellant William Blodgett told the bank officer conducting the closing that he did not understand fully what he was signing and therefore asked for copies of all documents signed. Respondent bank failed to provide any copies except for mailing a copy of the note. (William Blodgett Deposition, page 17) Mrs. Blodgett could not read any of the documents because of an eye problem. (Florence Blodgett Deposition, pages 12-13)

Although the respondents now claim that the trust deed signed on November 5, 1971 by appellants includes the store property as well as the car wash property and that it was necessary to have the store property as additional security for the loan, there is no indication in the loan committee minutes of any discussion of additional security requirements. (Thronsdon

Deposition, Ex. P-14) Mr. Throndsen himself has no independent recollection that such was discussed by the committee. (Throndsen Deposition, pages 29-30)

On July 28, 1972, appellants prepaid some \$20,000 owing on the April 23, 1969 trust deed and note covering the store property. On September 28, 1973 respondent bank issued a reconveyance of the property signed by respondent Tenney, and cancelled the trust deed and note. (Karl Tenney Deposition, pages 51-52, 54-55 and Exs. P-6 and P-10) The bank accepted the money which was not due until 1974 without advising appellants that the store property was included as part of the trust deed then in default. (Tenney Deposition, page 65) Nor did the bank apply any of the \$20,000 to remedy the car wash loan default. It is nevertheless claimed by respondent bank that at the time of the prepayment, the bank fully knew that the trust deed covering the car wash loan included the store property. (Tenney Deposition, page 62)

The note executed on November 5, 1971 became overdue in early 1972 and notices to this effect were sent to Betty Purcell Wartsch on numerous occasions. (Tenney Deposition, pages 23-26) At the same time, the respondent bank indicated to the Blodgetts that they wanted to work with the Blodgetts to make certain that the Blodgetts did not lose out on their property. (Throndsen Deposition, page 56; Donald Sawaya Deposition, pages 18-20, Ex.

The trustee sale was noticed up for September 20, 1973

at which time respondent Ashworth conducted a sale of that property allegedly covered by the trust deed. Prior to the sale three notices were posted, only one of which was posted in the precinct where the property was located. (Russel Weaver Deposition, pages 7-10, Ex. P-1) The date, time and place of the same was for September, 20, 1973 at 10:00 a.m. and the sale was to be for cash at the time of the sale. In fact, the money was not transferred until September 21, 1973 at about 9:00 a.m. (Sawaya Deposition, pages 10-11, Ex. F) No postponement was given by public declaration as that is set forth in Utah Code Annotated §57-1-27.

The description of the property of the car wash as stated in the notice of sale and also as it appeared in the Daily Record as a published notice, describes the property as follows (after giving the starting point): "South 89 degrees 15'45" West 71.67 ft; North 0 degrees 20'50" East 0 degrees, 17'45" West 154 ft to Beginning." (Weaver Deposition, Exhibit P-2; Ashworth Deposition, Exhibit P-3) The true description of the car wash property is (after stating the point of beginning): "South 89 degrees 15'45" West 71.67 ft; North 0 degrees 20'50" East 154 ft; North 89 degrees 15'45" East 71.53 feet; South 0 degrees 17'45" West 154 ft. to Beginning." In other words, two courses of the metes and bounds description were left off and the description of the property to be sold was totally unclear, contrary to the requirements of Utah Code Annotated §57-1-25.

The purchaser at the sale was Betty Purcell Martsch

appearing either as an agent or a partner of respondent Joe Martsch (Pace Deposition, pages 4-8; Sawaya Deposition, pages 7-11). Respondent Joe Martsch was the common law husband of Betty Purcell Martsch and was involved in business dealings with her. At one time he was a director of Raco Car Wash Company. (Betty Purcell Martsch Deposition, pages 6, 58-59, 70; Raco Car Wash's and Betty Purcell Martsch's answers to amended complaint) Subsequent to the trustee sale, the car wash property was sold to the State of Utah for a sum which exceeded the amount paid by Martsch at the trustee sale. The details of the sale to the State were worked out by Betty Purcell Martsch. (Betty Purcell Martsch Deposition, pages 82-84)

ARGUMENT

POINT I

THE LOWER COURT DID NOT APPLY THE PROPER STANDARD FOR DETERMINING THE SUMMARY JUDGMENT

It is a clear principle in this State that in deciding whether to grant a summary judgment, the facts must be taken in a light most favorable to the party against whom the judgment is sought. As this Court has said recently, where a motion for summary judgment is granted "the party moved against is being defeated without the privilege of trial.." Rich v. McGovern, 551 P.2d 1266, 1267 (Utah 1976). Hence a court should be careful to

make certain that if a plaintiff's contentions and proposals as to proof of material facts, if resolved in his favor, would entitle him to prevail, . . . the motion for summary judgment should be denied and a trial should be had for the purpose of resolving the disputed issues of fact and determining the rights of the parties." Id. at 1267

In this case, it is clear that the lower court did not follow the proper rule. The summary judgment signed by the lower court in favor of respondents Joe Martsch, Wayne Ashworth, Karl Tenney and Valley Bank & Trust on its face makes statements completely contrary to the evidence taken in a light most favorable to the appellants.

For example, the summary judgment states that respondents made no representations to the plaintiffs that were false or incorrect. This is contradicted by numerous statements made by respondents or their officers in depositions taken in this case. As one example, appellants were required to sign the trust note as co-makers although it was represented to them that they were signing "on a standby basis". (William Blodgett Deposition, page 38) The officer in charge of the closing admitted he could see no basis for the appellants to sign the note at all. (Thronsdon Deposition, page 51) Therefore, with regard to the note, respondent bank misrepresented two significant things, namely that the Blodgetts had to sign at all and that they were only signing on a "standby" basis, when in fact, the note on its face shows the Blodgetts as co-signers.

the note.

One of the most significant misrepresentations is the inclusion in the trust deed signed by the Blodgetts on November 1, 1971 of more property than the car wash property. Respondent bank alleged that the documents were prepared in accordance with the agreement and understanding of the parties. The respondent bank had full knowledge of the contents of the lease between the Blodgetts and Raco Car Wash. That lease specifically provided for no other property to be subordinated by the Blodgetts than the car wash property. The inclusion in the trust deed of the grocery store property was therefore a misrepresentation that the respondent bank was handling the matter in accord with the agreement.

Respondent Tenney contacted the appellants on a number of occasions and assured them that respondent bank was willing to eliminate the interest of Betty Purcell and Raco Car Wash on the car wash property. In fact, the bank's only apparent intention was to sell the property at trustee's sale and to get the amount of its note paid out of that sale without any regard to the interest of the Blodgetts. Even as late as August 17, 1973, a letter from counsel for respondent Ashworth to counsel for appellants stated: "It is the banks [sic] intention to pursue the matter to the extent of terminating Mrs. Purcell's interest in the above referred to property." (Sawaya Deposition, Exhibit

Both respondents bank and Tenney on various occasions

had dealings with the Blodgetts after the trust deed note was in default, but at no time did they tell appellants of any claim the bank had to the grocery store property. If the respondents Tenney and bank really thought, as they apparently claim now, that the grocery store property was included in the trust deed, they misrepresented their dealings with the Blodgetts by making no reference at all to the grocery store property as being included in the trust deed or in any way being in jeopardy of default.

The respondents bank and Tenney accepted a prepayment covering the entire amount remaining due on the first trust note on the store property. The reconveyance was issued a few days after the trustee sale without any reference to any second trust deed or obligation. By accepting the money as a prepayment, but neither applying it towards any default on the note with Raco Car Wash nor informing the Blodgetts that the default on the Raco note affected in any way the store property, the respondents bank and Tenney withheld information from the Blodgetts, constituting a misrepresentation of the facts.

If for no other reason than the misrepresentations noted above, the summary judgment granted in favor of respondents Tenney and bank should be reversed. However, as will be discussed below, there are additional reasons why the summary judgment should be reversed as to all parties.

POINT II

RESPONDENT MARTSCH WAS NOT A BONA FIDE PURCHASE FOR VALUE

At no time prior to the trustee sale did respondent Martsch ever have any personal dealings with respondents bank, Penney, Ashworth or State of Utah. All of his dealings were through Betty Purcell Martsch, the owner and moving force behind Taco Car Wash, which company had caused the default of the trust note in the first place. Betty Purcell Martsch had had dealings with respondent bank in setting up the trust note and deed and had dealings with the Blodgetts in arranging for the lease and subordination of the car wash property. Therefore, at the time of the trustee's sale, Betty Purcell Martsch, bidding in at the trustee's sale in the name of Joe Martsch, either knew that the trust deed covered only the car wash property or knew that it was not the intention nor the understanding of the Blodgetts that the store property was included in the sale. Immediately after the sale, Mrs. Martsch made claim to the store property and sent notices to the store property tenants that Joe Martsch was the new owner. She also began negotiations to sell part of the property to the State. (Purcell Deposition, pages 79-83)

As indicated by the above, Joe Martsch was put on notice of all of the infirmities in the sale by the activities of his agent and wife, Mrs. Martsch. Specifically he knew that the trust deed either did not intend to convey the grocery store

property, or, if it did, that it was an error for it to be so included and should not have been considered the subject of the trustee's sale.

It is further apparent that, contrary to the statement made in the order of summary judgment granted by the lower court on September 24, 1976, respondent Joe Martsch through his agent made misrepresentations to appellants. Therefore, the summary judgment should be reversed and the matter be allowed to proceed to trial on its merits.

POINT III

THERE IS EVIDENCE RESPONDENTS BANK, TENNEY AND ASHWORTH BREACHED THEIR FIDUCIARY DUTY TO APPELLANTS

Respondents bank, Tenney, and Ashworth, held positions of fiduciary responsibility to the appellants. Fiduciary duties were created with respondents bank and Tenney because of the close relationship they had had with the appellants. The testimony is abundantly clear that appellants maintained a long banking relationship with the bank and with Mr. Tenney, and that appellants trusted the bank and Mr. Tenney completely. Hence, with regard to the preparation of the original trust deed and note as well as with regard to the dealings of the bank and Mr. Tenney in pursuing the default, the appellants were not prompted to make further inquiry into the matter because of their full and complete reliance upon Tenney and the bank to act in appellants'

est interest. The courts have held that:

Where it is alleged a bank has acted as the financial advisor of one of its depositors for many years and that the latter has relied upon such advice, it is a sufficient allegation that a confidential relationship in regard to financial matters does exist and that, if it is proved, the bank is subject to the rules applying to confidential relations in general. . . . [The bank] must disclose fairly and honestly to the client all of the facts which might be presumed to influence him in regard to his actions.

Stewart v. Phoenix Nat. Bank, 49 Ariz. 34, 64 P.2d 101 (1937).

See also Tone v. Halsey Stuart & Co., 286 Ill. App. 169, 3 N.E. 2d 142 (1936).

It should be further noted that the bank had already entered into a trust deed with the Blodgetts prior to the Raco Car Wash deal. The bank was not only the beneficiary but also the trustee of that trust deed. As such, the bank could not with impunity further encumber the store property without explicit approval from the Blodgetts after a full explanation of the same. As was stated in Holman v. Ryon, 56 F.2d 307 (D.C. Cir. 1932):

A trustee named in deed of trust to secure a loan sustains a fiduciary relationship to the debtor as well as to the creditor.

56 F.2d at 310. The same court in a similar case said further:

The law requires of a trustee in such circumstances that he act fairly toward both parties and in the best interest of each and not for the exclusive benefit of either, because, after he has acted the right of redemption is lost.

Swill v. Ballard, 58 F.2d 517, 519 (D.C. Cir. 1932). This

concept has further been enunciated by other courts. See, e.g.,

Huffman v. Gould, 327 Ill. App. 423, 64 N.E.2d 773 (1946) (the trustee to act "for the best interest of all parties."); Wilson v. Hayes, 193 S.W.2d 107 (Tenn. 1945). See also 55 Am Jur 2d Mortgages §17.

With regard to the Raco Car Wash loan, the trusteeship was passed to respondent Ashworth shortly before the trustee's sale. In that regard Mr. Ashworth had a fiduciary relationship not only to the bank but also to the Blodgetts, as established above.

It is clear, therefore, that the respondent bank, one of its principal officers, respondent Tenney, and the trustee under the Raco Car Wash trust, respondent Ashworth, all had a confidential relationship with the appellants. They were under a duty to act in the best interests of not only the bank but also the Blodgetts. That they failed to do this is clear from the facts of the case.

The Blodgetts were never consulted by the bank that any additional property would be required of them for the purposes of the Raco Car Wash note other than the car wash property itself. The Blodgetts were not the ones seeking the loan but were tied in only because of the lease. The lease specifically said that no other property other than the car wash property was to be subordinated. Nevertheless, and despite the foregoing, the respondents now claim that they felt entitled to include as security additional property, not belonging to Raco or Mrs. Martach, but belonging to the Blodgetts. They did so, neither consulting

the Blodgetts at the time of the signing of the obligations or at any time prior or subsequent thereto. Moreover, the Blodgetts owned other property at the time, but they were not consulted as to whether they would prefer to have such other property put up as additional security, if any at all. It is clear that the respondents were guilty of the grossest kind of misconduct in capriciously and arbitrarily dealing with the property of those to whom they owed a fiduciary duty without their consent or even knowledge.

It should be further noted that as the note continued in default and as the time for the trust deed sale neared, the respondent bank made no effort to inform the Blodgetts that any property other than the car wash property was in jeopardy. Nevertheless, it was clear from the respondent bank's own appraisals that the store property was worth many times over the value of the car wash property. Respondents bank and Tenney had a duty to inform the appellants that it would be foolish to let the property even go to sale.

At the time of the sale Mr. Ashworth had been appointed trustee. As discussed above, he had an obligation to act in the best interests of both the beneficiary and the debtor. Under those circumstances he had a duty to advise the parties that two parcels of land were being sold and that it might be in the best interest of all to sell the parcels separately. At the very least, he had a duty to advise of that possibility. It is clear that he made no such representation to the parties and therefore

was guilty of a breach of his fiduciary duty to the Blodgetts.

POINT IV

THERE IS SUFFICIENT EVIDENCE TO ESTABLISH THAT THE TRUSTEE'S SALE WAS OF NO VALIDITY

The summary judgment alleges that the sale was conducted in all manners required by law. This is obviously in error as noted in the Statement of Facts above. The notices were not given as required. The property was ambiguously described in the trust deed, making it impossible to determine what was being sold, much less whether there were two parcels instead of one being sold.

The description of the property as sent and posted by Ashworth in the notice of sale is so inaccurate that any potential buyer could not determine from the notice how big the piece is. Only two courses of a metes and bounds description were given in the notice.

If in fact there were two parcels to be sold, respondent Ashworth did not make that declaration to the parties in attendance. Further he did not advise any of the parties, particularly the appellants, whether the parcels could be sold as two separate parcels.

After the bid was made on behalf of respondent Martson, his agent could not meet the qualifications of the trustee's sale notice, namely that the money was to be paid in cash or by

cashier's check the day of sale. Yet the trustee permitted the sale to continue onto the next day in violation of the law on trustee's sales and of the notice of the sale itself. Utah Code Ann. §§57-1-25,-27.

POINT V

THE GROCERY STORE WAS NOT THE SUBJECT OF THE TRUST DEED.

There is not only sufficient evidence to allow this matter to go to trial on the question of the improper manner and form in which the sale was conducted, there is also sufficient evidence that the trust deed covered only the car wash property. This Court in a very recent case held that under the circumstances presented by this case parol evidence can be introduced to indicate the true construction of the deed. Jensen v. Manila Corp. of The Church of Jesus Christ of Latter-day Saints, 565 P.2d 63 (Utah 1977).

It is clear from an analysis of the instant case in a light most favorable to the appellants that neither they nor the bank ever intended the grocery store property to be included in the trust deed. Just as it was a mistake (as the bank now admits) for the bank to have required the Blodgetts to sign as co-signers on the note, so it was a mistake to have shown the grocery store property on the trust deed in the form executed. As discussed above, the bank never discussed the store property

at their real estate meeting. No new appraisal was made of that property. It is was not even noted on any of the car wash loan work papers of the bank. Those work papers discuss only the car wash property. The amount of the loan involved was for \$24,000, which is much less than the bank's own appraised value of the car wash property with improvements of \$38,000. (Thronson Deposition, page 19. Moreover, if additional security was needed, it certainly did not involve the taking of a trust deed on a piece of property with an equity in the Blodgetts in excess of \$100,000. The Blodgetts owned less valuable property which, if it had been necessary and acceptable to the Blodgetts, could have been used. Further, the bank reconveyed the grocery store property to the Blodgetts a few days after the sale, which act contradicts the claim that the store property was sold at the trustee's sale.

In short, there was no reason at all for the respondent bank to have included the grocery store property in the trust deed. All evidence taken in a light favorable to appellants shows that the bank did not intend to include the same.

The trust deed describes a right of ingress and egress over the store property. An interpretation of the trust deed easily permits the construction that the description of the grocery store property was only for the purpose of identifying the property over which the car wash property had rights of ingress and egress. Nothing more. Without the inclusion of the store property description, there is no way of showing the

judgment for ingress and egress.

By reason of the summary judgment granted respondents, there has not been an opportunity to present evidence on these points. The allegation that the grocery store property was not part of that property to have been sold and that the State of Utah and Joe Martsch are constructive trustees of the property was in the complaint and fully supported by evidence sufficient for the lower court to have denied the summary judgment. That the lower court did not deny the summary judgment was in error and this Court should reverse the same and remand the case for a trial on its merits.

POINT VI

THERE IS SUFFICIENT EVIDENCE TO ESTABLISH THAT RESPONDENT MARTSCH WOULD BE UNJUSTLY ENRICHED

It is alleged in the pleadings, and there was no contradictory evidence introduced, that the grocery store property was worth around \$200,000 at the time of the trustee sale. Shortly after the trustee's sale, the car wash property was sold to the State of Utah for \$40,000. As early as the bank appraisal in 1971 the car wash property was appraised at \$38,900. (Thondsen Deposition, Exhibit P-12) Yet the amount bid in at the trustee's sale was only \$30,000.

On the sale to the State of Utah of the car wash property, respondent Martsch made a profit of about \$10,000. To

have received additional property as well would be unconscionable; not only in light of the tremendous value of the grocery store property but also in light of the relationship of Martsch to the Blodgetts.

This Court has held that a gross inadequacy of a price may be sufficient in itself to note infirmities in the grantor's title (in this case, the trustee's title), Lawley v. Hickenlooper, 61 Utah 293, 212 P.526 (1922). Moreover, such a gross inadequacy of price paid in at the trustee's sale can be sufficient to totally set aside the sale. Pender v. Dowse, 1 Utah 2d 283, 265 P.2d 644 (1954); Crofoot v. Tarman, 147 Cal. App. 2d 43, 305 P.2d 56 (1957); Handy v. Rogers, 143 Colo. 1, 351 P.2d 819 (1960).

The lower court had more than ample evidence to permit the case to go to trial on the merits because of the gross inadequacy in price between the value of the property respondent Martsch claims to have acquired at the trustee's sale and the amount he paid for the same.

There is even a further basis why the trustee's sale should be vacated. The agent acting on behalf of respondent Martsch was the very person who had every reason to know that the trust deed should not have included the grocery store property. She further was the very person by whom the default of the trust note was brought about. The agency relationship between respondent Martsch and Betty Purcell Martsch is more than that of an ordinary kind. The two were living together as man and wife

had business dealings together, and at one time respondent Martsch was a director of Raco Car Wash. The knowledge of Betty Purcell Martsch can be and should be imputed to respondent Joe Martsch.

Combining the gross inadequacy of the price paid at the trustee sale, irregularities of the trustee sale, and the knowledge of Betty Purcell Martsch imputed to respondent Joe Martsch, it is obvious that the trustee's sale should be set aside. The appellants have established many elements as a basis for rescission of the sale, or in the alternative, a valid claim for damages. Hence the lower court improperly granted the summary judgment.

POINT VII

THE RESPONDENTS ARE GUILTY OF FRAUD IN THEIR DEALINGS WITH APPELLANTS

The respondents claim that the grocery store property was included in the trustee's sale. In this regard they are guilty of fraud towards the appellants. Appellants have alleged (and, as shown this brief, have established) a fiduciary relationship between them and the respondents bank, Tenney, and Worth. The cases have held that under such circumstances, the burden now shifts to the respondents to show that there was no fraud and that they acted in good faith. 37 Am. Jur. 2d, Fraud and Deceit, §§441-442. Taking the evidence in the light

most favorable to appellants, the three said respondents have not established good faith conduct and the matter should be submitted for trial on that point.

With regard to respondent Joe Martsch, it is clear that all of the elements of fraud, defined by this court in Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952), have been met sufficiently to permit the case to go to trial. Martsch in acting through his agent made representations, both affirmative and by not speaking when obliged to do so, that were false. The misrepresentations were to the effect that the only property covered by the trust deed was the car wash property. Obviously, those misrepresentations, which continued throughout the course of appellants dealings with respondent Martsch's agent, constituted a material fact which was false according to the present assertions of respondent that he is entitled to the grocery store property. It is obvious that had the Blodgetts known the grocery store property was included in the trust deed, they would have acted much differently than they did. They would not have paid respondent bank \$20,000 to retire the first trust deed on that property. They would not have permitted the property to go to sale and, had it gone to sale, they would have certainly bid in on the property. By making the false representations which she did on behalf of respondent Martsch, Betty Purcell Martsch was obviously acting to keep the Blodgetts from taking the above described action. This permitted respondent Martsch to acquire the property cheaply. It is also obvious

the Blodgetts relied upon the dealings and representations of Betty Purcell Martsch acting in her capacity as agent for Joe Martsch and therefore were induced not to act, all to their injury and damage. Under such circumstances, the courts have held that the imposition of a constructive trust on the one involved in the fraud is proper. In re Estate of Rose, 108 Ariz. 101, 493 P.2d 112 (1972); Goldsby v. Juricek, 403 P.2d 454 (Okla. 1965).

Since a prima facie case is established against respondents Martsch, bank, Tenney, and Ashworth on the basis of fraud, the lower court incorrectly granted the summary judgment as to those four.

POINT VIII

THE STATE OF UTAH IS NOT A BONA FIDE PURCHASER FOR VALUE

At the time the State purchased the car wash property from respondent Martsch, by its own action it made clear that it did not accept the trustee's sale as being complete. As one of the conditions of the purchase, it required Raco Car Wash to give a Quit-Claim Deed to respondent Martsch. (Affidavit of William M. Florence Blodgett, dated May 17, 1977, Exhibit B) The State also had a title search performed and therefore was aware of all of the defects in the title by reason of the problems with the State sale.

The rights of the State of Utah as to the car wash

property are clearly tied to those of respondent Martsch. As established above, the Court should grant appellants the right to trial against Martsch. Since there were enough aspects of the case to put the State of Utah on notice about the defects in title, this court should likewise reverse the summary judgment granted in favor of the State of Utah and permit a trial on its merits.

CONCLUSION

At the time the appellants entered into a lease arrangement on the car wash property, they agreed to subordinate the car wash property for the purposes of establishing a loan to the lessee. They, however, had no idea nor any reasonable expectation that any other property would be included. The bank had had long dealings with appellants and they had every reason to trust the bank. Moreover the bank held a position of fiduciary responsibility to them because of that long relationship and because of the trustor/trustee relationship established by a previous trust deed.

A reading of the trust deed document signed by the appellants can reasonably be interpreted to mean that the description of the grocery store property was included simply to establish the property over which the rights of ingress and egress was granted. The bank, through the respondent Tenney, continued to work with the appellants once the trust deed note was in default. Appellants were promised that something would

worked out to terminate the interest of Raco Car Wash and Betty Russell Martsch and that the bank would continue to help the appellants on the property.

If, as respondents now claim, the grocery store property was included in the trust deed and was so included intentionally, then the respondent bank had a duty to so advise the appellants at the time of the signing of the trust deed. The bank had a duty again, as the note was in default and as the trustee sale was nearing, to advise the Blodgetts of all the property which was included. Certainly as part of the friendly cooperation of the bank through respondent Tenney in advising the Blodgetts that the bank was willing to work with them on getting rid of the lessee's interest, the bank and Tenney made affirmative misrepresentations. They not only misled the Blodgetts as to what the bank intended to do at the trustee sale, but also lulled the Blodgetts into believing there was no danger in the car wash property. To pour salt into the wound, they could obviously tell the Blodgetts had no idea the grocery store property was in any danger, yet said nothing. The situation tried out for the bank to affirmatively advise the Blodgetts of the impending peril.

If the grocery store property was not intentionally but negligently included in the trust deed, then the bank has a responsibility for damages to the Blodgetts because of its negligence. The language of the trust deed is poorly drawn and should be construed against the party which drafted it, namely

the bank.

The trustee at the time of the trustee's sale handled the sale improperly. The notice of sale was defective in its language. It was posted improperly. The sale itself was conducted improperly, the money being received the day after the sale. The trustee did not advise the parties that two parcels were involved or that the parcels could be sold separately. It is clear that the trustee acted not only negligently and improperly but also in violation of his fiduciary duty to the appellants.

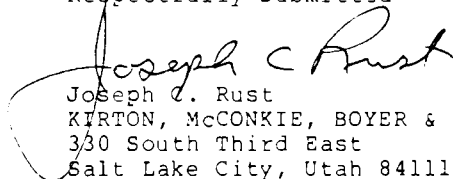
Joe Martsch bought in at the sale through his agent who had a great deal of knowledge about the whole transaction and therefore knew or should have known that only the car wash property was to be sold. Moreover, the agent of Joe Martsch had been working actively with the State of Utah prior to the sale in order to arrange a purchase of the car wash property. She had facts to warrant the belief that the sale of the car wash property to the State would bring around \$10,000 more than the amount owed to the bank. To make a claim now that the grocery store property was also included in the sale, contrary to the lease documents, contrary to the understanding of the Blodgetts, and contrary to good conscience, would be compounding the evil done when Mrs. Betty Pursell Martsch was even allowed to bid on behalf of respondent Martsch.

The State of Utah stands in a position no better than respondent Martsch and the motion for summary judgment as to it

would also be denied.

The lower court had before it many facts which, taken in a light most favorable to the appellants, more than adequately support a judgment for the appellants. That the lower court did not review the same in a light favorable to the appellants is obvious from the record. This Court therefore has a duty to reverse the lower court's decision and to permit this case to go to trial on the merits.

Respectfully Submitted

A handwritten signature in cursive script, reading "Joseph C. Rust". The signature is written in dark ink and is positioned above the typed name and address.

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CERTIFICATE OF HAND DELIVERY

I certify that I personally delivered two (2) copies
each of the foregoing Brief of Appellants to the following:

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DATED this 24th day of April, 1978.

A handwritten signature in cursive script, appearing to read "Gayle J. Dunt", is written over a horizontal line.