

1978

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 Respondents, Karl W. Tenney and Valley Bank and Trust Company

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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 cor- )  
poration; 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 RESPONDENTS, KARL W. TENNEY and  
VALLEY BANK AND TRUST COMPANY

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

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FILED

MAY 23 1978

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Clerk, Supreme Court, Utah

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poration; WAYNE A. ASHWORTH, Trustee;	)	
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COMPANY, a Utah banking corporation;	)	
FIRST SECURITY BANK OF IDAHO, N.A.;	)	
STATE OF UTAH and JOHN DOES 1 through 10,	)	
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BRIEF OF RESPONDENTS, KARL W. TENNEY and  
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DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

WILLIAM T. BLODGETT and  
FLORENCE G. 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. ASKEWORTH,  
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 RESPONDENTS, KARL W. TENNEY and  
VALLEY BANK AND TRUST COMPANY

STATEMENT OF NATURE OF THE CASE

This is an action by the Appellants to set aside a trust deed  
foreclosure on the basis of technicalities or fraud.

DISPOSITION IN THE LOWER COURT

On October 20, 1977, the lower court granted summary judgment  
in favor of respondents Joe Martsch, Wayne A. Askworth, Karl W. Tenney,  
and Valley Bank and Trust Company. On November 3, 1976, the lower court  
entered an order denying Plaintiffs-Appellants' motion to amend or alter  
judgment. On October 20, 1977, the lower court granted summary judgment in  
favor of respondent State of Utah. On December 30, 1977, Plaintiffs-Appellants  
obtained a judgment for \$21,000.00 against Raco Car Wash Systems for rentals  
due. This judgment is not related to the claims against the respondent parties.

Plaintiffs-Appellants, on December 30, 1977, voluntarily dismissed the action against the Defendant, Betty Purcell, who was alleged to have been pari delicto with the respondent Martsch. Process was not served on Doyle Nease and John Does 1 through 10.

#### RELIEF SOUGHT ON APPEAL

Respondents, Karl W. Tenney and Valley Bank and Trust Company, ask that the Appeal be dismissed and that the judgment of the District Court be affirmed.

#### STATEMENT OF FACTS

Prior to September 21, 1973, appellants were owners of the fee title of two contiguous parcels of ground in the South Salt Lake Area. The parcels were used for the conduct of one single business. Prior thereto, one parcel had been pledged as security by the Plaintiffs-Appellants for another loan. (Dep. W. Blodgett, P. 9 Lns. 5-7) (Dep. Throndsen, P. 27) Plaintiffs-Appellants leased a portion of their property to Raco Car Wash for the purpose of building a car wash, and were advised by counsel in relation thereto. (Dep. W. Blodgett, P. 11) In order to finance the building of the car wash, Betty Purcell, the agent of the car wash contacted Valley Bank and Trust Company and was informed that the entire property would have to be encumbered and the lease subordinated in order to secure the financing. (Dep. Throndsen, P 2, 12 and 13) There were no conversations or contacts between the Bank or the Plaintiffs-Appellants prior to the date of closing. (Dep. W. Blodgett, P. 14) the Plaintiffs-Appellants attended the closing, executed all of the documents and in their depositions acknowledged that they were obligated thereon and that there were no changes or alterations. (Dep. W. Blodgett, P. 16 and 17; and Dep. F. Blodgett, P. 4 and 5). The Blodgetts

and each of them advised that the documents were executed without coercion or specific representation other than those contained in the documents. (Dep. F. Blodgett, P. 20, Ins. 1, 4 and 15; Dep. Purcell, P. 31, Ins. 1 through 14)

The Bank would not have made the loan on the property which was subject to a prior encumbrance unless the entire property had been included. (Dep. Thronsdon, P. 27, 29 and 31)

On November 5, 1971 at a meeting conducted at Valley Bank and Trust Company, all documents were reviewed by the parties and the trust note and deed were executed. The trust deed describing both parcels of land, secures a debt in the amount of \$24,000.00 and was placed of record with the Salt Lake County Recorder on November 9, 1971.

Mr. Blodgett in his deposition acknowledged that security in addition to the Car Wash property was required:

Page 38, Ins. 12 - "...Of course I understood that it was the note I was guaranteeing because there wasn't enough on the subordination in the property."

There were defaults and no issue is created in relation thereto. Mr. and Mrs. Blodgett were contacted on many occasions and informed of the defaults. (Dep. Blodgett, P. 50, Ins. 20 to 24; Dep. Purcell, P. 61 and 62)

Wayne A. Ashworth, Attorney-at-Law, was duly substituted as trustee and the substitution together with an Affidavit of Notification were properly recorded. Notice of Default was given and recorded as required by statute and three months thereafter, notice of sale was posted, published and mailed as required by law and the affidavit of publication prepared. For of the Plaintiffs-Appellants their attorney, Mr. Robert Dyer were aware of



the time and date of the sale and had discussed the same with the attorney for the trustee, Mr. Sawaya. (Dep. Blodgett, P. 26) Further, the night before the sale, Valley Bank and Trust Company again notified the Plaintiffs-Appellants the time and place of sale and contacted Mr. Dyer, their attorney. (Dep. Blodgett, P. 28; Dep. Tenney, P. 28) The Plaintiffs-Appellants were personally present at the sale, listened to the bids, remained silent and refused to bid upon the property. Mr. Loren Pace bid the property for Mr. Joe Martsch for \$30,000 and the sum was then paid, a proper trust deed executed and recorded. As a result of the bidding, there was a surplus fund and in accordance with the Utah Code Annotated, 1953 as Amended, 59-1-29, said surplus was paid unto the County Clerk. (Affidavit, Donald Sawaya, P. 2)

Plaintiffs-Appellants admit that Mrs. Betty Purcell, conducted all of the negotiations and therefore would have been involved in any misrepresentation, and yet after over a years delay, dismissed the action as against Betty Purcell, the person who made the arrangements for the loan.

### ARGUMENT

#### POINT I

THERE IS NO GENUINE ISSUE OF MATERIAL FACT REQUIRING TRIAL.

As indicated in the Motion for Summary Judgment and the Statement of Facts herein, all of the material elements of the law suit are supported by the testimony of the Plaintiffs-Appellants:

1. Plaintiffs-Appellants admit the execution of the trust deed and note.
2. Plaintiffs-Appellants admit that there were no misrepresentations made to them by Valley Bank and Trust Company or any of its agents.

3. Plaintiffs-Appellants obtained independent counsel who advised them in relation to the lease agreement which contained subordination provisions and who represented them in relation to the sale of the property.

4. Plaintiffs-Appellants had actual notice of the substitution of trustees, notice of default, notice of sale and the time and date of sale.

There is no controversy as to what happened at the closing. The depositions of each party present have been taken and they all correspond indicating that no special representations were made, the parties were presented with the documents and in due course the documents were signed. It is apparent from Plaintiffs-Appellants' brief that if misrepresentations were made such were made by Betty Purcell, and yet:

1. Appellants have dismissed the action against Betty Purcell thereby terminating the action as to her.

2. There is no indication of any misrepresentation of Mrs. Purcell in either of the depositions of the Blodgetts, (Plaintiffs-Appellants).

The Plaintiffs, in their brief, state that the Bank did not intend to include all of the property. The Bank's intentions can only be gleaned from its agents, and as indicated in the Statement of Facts, the agents and each of them testified that they did intend to include all of the property and all of the property was included in the trust deed, the notice of default, etc.

Since there was an outstanding lease on a portion of the property, the lender required that that lease be subordinated to the trust deed and subordination is evidence of nothing more or less than the fact that the

Valley Bank and Trust Company, determined that it was provident to have the lease subordinate to the trust deed.

The only evidence of any relationship between the Plaintiffs-Appellants and Valley Bank and Trust Company is that from time to time there was a debtor - creditor, relationship, the typical banking arrangement which does not involve the duties of a fiduciary.

There are no disputed genuine issues of material fact. The Plaintiffs-Appellants by admission in their own depositions have eliminated all such issues.

Although Respondent can discern no issues of fact that remain for determination, nevertheless, if there are any issues, they are certainly immaterial and as this Court stated in the case of Abdulkadir vs. Western Railroad Company, at page 341:

We are in accord with the idea that the right of trial by jury should be scrupulously safeguarded. This, of course, does not go so far as to require the submission to a jury of issues of fact merely because they are disputed. If they would not establish a basis upon which plaintiff could recover, no matter how they were resolved, it would be useless to consume time, effort and expense in trying them."

7 Utah 2d 53; 318 P. 2d 339.

All of the primary material facts results from admissions or statements of the Plaintiffs-Appellants and as this Court noted in the case of Dupler vs. Yates,

The primary purpose of the summary judgment procedure is to pierce the allegations of the pleadings, show that there is no genuine issue of material fact, although an issue may be raised by the pleadings, and that the moving party is entitled to judgment as a matter of law

...the pleadings are not sufficient to raise an issue of fact.

....

Upon a motion for summary judgment, the courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant's case or specify in an affidavit the reason why he cannot do so.

10 Utah 2d 251; 351 P. 2d 624, 636 and 637.

As the Court has noted, it would be useless to consume the time, effort and expense of the Court in trying this case merely for producing evidence as to immaterial facts. Further, the Plaintiffs-Appellants have the duty to produce some evidentiary matter in contradiction, and none has been adduced.

There are no factual issues of relevant material facts and this is a classic case for the granting of a summary judgment in order to relieve the trial courts of undue expenditure and time and allow the legal issues to be determined and, as in this case, appealed.

## POINT II

### DEFENDANTS-RESPONDENTS, AS A MATTER OF LAW, ARE ENTITLED TO SUMMARY JUDGMENT

It is difficult from the generalized pleadings of the Plaintiffs-Appellants, to determine the specific theory of their case; therefore, we will treat each possible theory as though the same had been plead with specificity.

There is no confusion as to the terms of the written instrument nor question as to the interpretation of said instrument and therefore they cannot be revised by parol evidence.

In 30 Am Jur 2d §1016, "... Stated otherwise, the intention of the parties as evidenced by the legal import of the language of a valid written contract cannot ordinarily be varied by parol evidence of a different intention." It states in the case of Fox Film Corporation vs. Ogden Theatre Co., Inc.,

[1] In the absence of fraud or mistake, the classical rule to the effect that parol evidence is not admissible to contradict, vary, add to, or subtract from the terms of a valid written instrument is generally applied in cases of this kind. ... In cases involving complete contracts signed by the parties thereto and purporting to contain all their promises, representations, and undertakings, the rule is more strictly applied.

82 Utah 279; 17 P. 2d 294, 296 (Sup Ct Utah, 1932)

If the Complaint is based on a mutual mistake of fact, then it is necessary that the Defendants, Valley Bank and Trust Company and Mr. Karl Tenney were confused or misunderstood one of the salient facts, as a unilateral mistake of fact is not actionable. Deseret Nat. Bank of Salt Lake City vs. Burton et al. 53 P. Rep 215, (Sup Ct Utah, Judge Johnson) at pages 216 and 217, "... Equity will not reform a written contract unless the mistake is proved to be the mistake of both parties. ... It follows that the mistake which it may correct in such a writing must be, as it is justly expressed, a mistake of both parties to it; ..."

The officers of the Bank, including Mr. Tenney, the only persons connected with this loan on behalf of the Bank, each testified in their deposition that it was their intention to cover the entire property, the loan would not be made unless the entire property stood as security for the loan,

that the loan was presented to the Loan Committee on the basis of the entire property being obligated and approval was obtained on that basis. (Dep. Thronsdon, P. 27, 29 & 31; Dep. Tenney, P. 61) In addition, the Plaintiffs-Appellants allege and acknowledge that the Defendant, Betty Purcell, negotiated the loan, and she testified it was her understanding that the entire property was to be obligated. (Dep. Purcell, P. 43):

Q. Was there any discussion with regard to the trust deed which was signed, as to the nature of the Trust Deed?

A. As I said, Mr. Thronsdon repeatedly told them to make sure they were aware of what they were signing.

Q. All right, but did he discuss what it was, the nature of it?

A. Yes.

Q. What did he say:

A. He told them, he said, "Now, you understand that if this is not paid, you are in danger of losing all of your property?"

Q. He said that?

A. Yes sir, he said that.

Betty Purcell, representing herself and Raco Car Wash Systems, Inc., and Plaintiffs-Appellants, the Blodgetts, were the borrowers. Valley Bank and Trust Company was the lender. Therefore, they are on the opposite sides of the commercial transaction and their mental intentions or concealed thoughts could not be imputed to the Defendant-Respondent, Valley Bank and Trust Company. No relationship of agency existed or, as a practical matter, could exist among the persons on opposite sides of the financial transaction.

If Appellants' case is based on fraud, then there must be alleged and proven fraudulent representation of the material facts by the Defendants-Respondents.

The Plaintiffs-Appellants, and each of them, testified that the Defendants-Respondents made no representation at or before the time of closing, that the documents had not been altered, and that the documents were presented to the parties prior to the closing. (Dep. W. Blodgett, P. 14, 17 and 39) (Dep. F. Blodgett, P. 6 and 20) (Dep. Purcell, P. 43) In fact, Mr. Throndsen of Valley Bank and Trust Company cautioned the Plaintiffs-Appellants frequently to read the documents and that all their property was involved. (Dep. Purcell, above quoted; Dep. Throndsen, P. 40 & 63)

The Plaintiffs-Appellants have admitted that the documents are genuine, have not been altered, were executed by them without coercion or undue influence or misrepresentation, that they received the funds represented by the Note, that there was a default in the loan payment, that they received notice of default and notice of sale and in fact were present at the sale. Indeed, if there were fraudulent representations made, we can find none in the record. Such representation, if present, would have to occur in the relationship between the Blodgetts, Plaintiffs-Appellants and their agent and lessee, Betty Purcell. Plaintiffs-Appellants have dismissed their action against Betty Purcell, and there remains no issue to be litigated by a trial court if the matter is returned to it for further proceedings. Moreover, Mr. Martsch had no conversations or relationship with Valley Bank and Trust Company.

POINT III

THE TRUSTEE'S DEED WAS PRIMA FACIE BINDING UPON  
PLAINTIFFS-APPELLANTS

The Utah Statute provides that the trustee's deed may contain recitals stating compliance with the foreclosure proceedings and that such recitals are prima facie evidence of compliance and are conclusive in relation to bona fide purchasers.

Sale of trust property by trustee - Payment of bid - Trustee's deed delivered to purchaser - Recitals - Effect. - (1) ... The trustee's deed may contain recitals of compliance with the requirements of this act ... including recitals concerning any mailing, personal delivery and publication of the notice of default, any mailing and the publication and posting of notice of sale, and the conduct of sale; and such recitals shall constitute prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

Utah Code Annotated, 1953 as amended 75-1-28.

The trust deed that is the subject of this action provides, "Paragraph 11, ... The recitals in the trust deed of any matters or facts shall be conclusive proof of the truthfulness thereof...." and thereby the Plaintiffs-Appellants by the execution of the trust deed agreed that the trustors would be conclusively bound by the recitations contained in the Trustee's deed. The Trustee's deed contains appropriate recitals relating to compliance with the sale requirements. (Exhibits to Sawaya Affidavit)

The effect of these recitals and the trustors' agreement to the conclusiveness thereof has been considered by many cases and a landmark case that has been many times cited with approval is Sorenson vs. Hall, wherein the Court stated:



...The only evidence offered by the defendants to dispute plaintiff's title as shown by the three deeds above mentioned was evidence which tended to refute the recitals in said trustee's deed....

....

...The trust deed under which the plaintiff claims title to said real property provides: "... (page 668) such recitals shall be conclusive proof of the truth of the facts recited." ... The recitals are relied upon as binding the interest of the trustors. To this extent, at least, they are effective....

....

... The law announced therein has become a rule of property upon which rests the validity of the title to thousands of pieces of real property in this state of incalculable value, and its revocation at this time by this court would render invalid an untold number of contracts and undertakings which have been entered into by the parties thereto in reliance upon the rule of property established by the decisions above cited.

28 P.2d 667 (Cal. Sup. Ct. 1934) This doctrine and case have been reviewed and affirmed many times, typical of such affirmations are: Cobb et al. vs California Bank et al. 57 P. 2d 924 (Sup Ct. Cal.), " ... The appellants herein were concluded by these recitals in the trustee's deed." Bechtel vs. Wilson et al. 63 P. 2d 1170 (Cal. App. 1st) page 1172, "...the evidence is conflicting, but we need not consider it because the recitals in the trustees' deed of due and proper posting is made conclusive evidence thereof by the deed of trust and this alone is sufficient to sustain the trial court's findings on that issue."

In the case herein the Plaintiffs-Appellants claim a defective posting, they admit, however, receiving actual notice and attending the

and . . . Similar issues have also been treated and many times reaffirmed in California. The significant case in this regard is, Stevens vs. Plumas Eureka Annex Mining Co., et al., where in the Court states as follows:

Appellant's first contention is that the plaintiff failed to prove a valid trustee's sale, in that there was no proof of posting notices of the time and place of the sale of the property . . . Furthermore, if there was a defect in the notice of sale (which has not been shown), we are of the view that it was waived by appellant when it had notice, attended the sale, and, according to the record tendered a bid, and also tendered an amount it deemed sufficient to cover the amount due.  
(Emphasis added)

41 P. 2d 927 (Sup. Ct. Cal., March 25, 1935)

The Plaintiffs-Appellants further claim inadequacy of price at the time of sale. This problem was treated by the Court in Stevens vs. Plumas Eureka Annex Mining Co. case, (id.) and then reaffirmed on many occasions.

Page 928, . . . it is a settled rule that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made; . . .

....

We find no substantial (in fact, not any) evidence to support appellant's contention that the trustee making the sale was guilty of fraud, . . .

In the above cited case, the property was sold for \$3,990 and the appellants claimed it had a value of \$190,000.

The Plaintiffs-Appellants object because the cash was not paid on the day following sale, and the case of Sorensen vs. Hall (supra) dealt with that problem as follows: Page 668, " [5] The contention . . . that the sale

was not consummated because the actual cash was not paid at the precise time of sale, are so lacking in merit that a discussion of them is unnecessary ...'. Plaintiffs-Appellants complain that the subject property was not sold as two distinct parcels rather than as a unit. Utah Code Annotated 57-1-27 vests the entire discretion in the trustee as does the trust deed. In addition, the Plaintiffs-Appellants were present and did not make any request for the separate sales of the parcels and therefore waived the right to complain.

The sale herein was legally proper and conducted in accordance with the trust instrument, and therefore, divested the trustors, Plaintiffs-Appellants of their interest in the property.

#### CONCLUSION

The trustee's sale was concluded in accordance with the agreements of the Plaintiffs-Appellants and technical defenses are not available to them as the same are waived by actual notice and the fact that they were present at the sale and made no objection thereto.

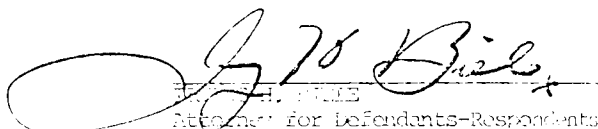
By Plaintiffs-Appellants' own testimony, it is established that these defendants made no false representation or failed to disclose a material fact. The property was carefully described in the trust deed which Plaintiffs-Appellants executed and subsequent to the sale the identical description appears in the Trustee's deed. There being no factual issues involving relevant material acts, the case therefor was properly determined by the Trial Court as a matter of summary judgment. The Plaintiffs-Appellants' own testimony eliminates any basis of law or equity to sustain this suit, and in the orderly, efficient and economical administration of justice this is a proper case for summary judgment.

We respectfully submit that the judgment of the District Court,  
Honorable R. Saxe, Judge, be affirmed and the appeal sustained.

DATED this 22<sup>nd</sup> day of May, 1976.

Respectfully submitted,

BENEF, BASLAM & BARCH

  
G. J. B. BARCH  
Attorney for Defendants-Respondents  
Valley Bank and Trust Company and  
Karl W. Tenney

CERTIFICATE OF DELIVERY

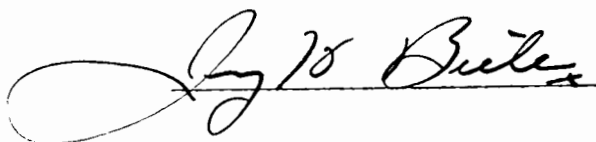
I hereby certify that on the 23<sup>rd</sup> day of May, 1978, I delivered two copies of the Brief of Respondents, Valley Bank and Trust Company and Karl W. Tenney, to the following:

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A handwritten signature in cursive script, appearing to read "J. H. Butler", written over a horizontal line.