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Leroy Hawkins v. Lorene Perry et al : Brief of Respondent

Utah Supreme Court

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Lothaire R. Rich; Faux, Rich & Kirton; Raymond R. Brady; Attorneys for Respondent;

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IN THE SUPREME COURT
of the
STATE OF UTAH

LEROY HAWKINS,
Plaintiff and Respondent,

vs.

LORENE PERRY, ALFRED T.
PERRY, and MRS. R. A. SCRIE-
VER, sometimes known as THEL-
MA SCRIEVER,
Defendants and Appellant.

Case No. 7786

RESPONDENT'S BRIEF

LOTHAIRE R. RICH
FAUX, RICH & KIRTON

AND

RAYMOND R. BRADY

Clerk, Supreme Court, Utah

Attorneys for Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	2
STATEMENT OF POINTS	6
ARGUMENT	7
1. The Law of Constructive Trusts	7
2. The Trial Court has made sufficient findings on the material issues to support the judgment.....	14
3. The Findings on the material issues are sufficient to support the judgment	18
4. There is sufficient evidence to support the decree that the plaintiff is entitled to the full beneficial interest in the property	19
4(a). Hearsay evidence as to Lorene Perry as being declarations against interest	26
5. That the evidence is insufficient to warrant finding which would support the awarding of a \$400.00 lien against the plaintiffs interest or to tax costs against the plaintiffs interest and assess plaintiff an attorney's fee in favor of Defendant Scriver	30

CASES CITED

Chadwick v. Arnold, 34 Utah 48, 95 Pac. 527	9, 13
Foresman v. Foresman, 167 N.E. 148	12
Haws v. Jensen, 209 Pac (2nd) 229	12, 13
Hungerferd v. Curtis, 110 Atlantic 650	22
McDonald v. Miller, 16 N.W. (2nd) 270	29
Mutual Life Insurance Co. of New York v. Frank, 50 Pac. (2nd) P. 480	16

TABLE OF CONTENTS (Continued)

	Page
Oliver v. Pratt, 3 Howe (U.S.) 333; 11 L. Ed. 622.....	21
Piper v. Eakle, 78 Utah 342; 2 Pac. (2nd) 909	15
Van Alen v. American National Bank, 52 N.Y. 1	21

TEXTS CITED

American Jurisprudence, Vol. 54, Trusts Sec. 272	21
Bancroft's Code Pleading, Practice and Remedies, Vol. 3, 10 Yr. Supplement, Sec. 1668 P. 2203, Sec. 1668	16
Bogart on Trusts, Section 452	7
Section 454	8
Section 481	10
Section 482	11
Section 495	12
Section 496	12
Jones on Evidence, 2nd Edition, Sec. 975, P. 1789.....	27, 28
Jones on Evidence, Page 1776	28
Scott on Trusts, Section 440.1	9, 10
Scott on Trusts, Sec. 44.2.....	12
Tiffany on Real Property, Sec. 483, P. 1093	22

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

In the latter part of May, 1943 (page 19) plaintiff, at that time a minor sixteen years of age (page 19, line 24; page 27, line 22), commenced working with defendant A. T. Perry (page 37, line 30), a minister of the Gospel (page 21, line 4; page 50, line 1), and a relative of plaintiffs (page 35, lines 22 and 23). About the middle of July, 1943 defendant, A. T. Perry, induced the plaintiff to give said defendant \$300.00 to make a down payment on a home at 223 East 7th South (pages 25, 26,

27 and 62) which \$300.00 was given to said defendant in the presence of three witnesses (pages 25, 51, 63 and 68). At the time the money was given to said defendant, A. T. Perry, said defendant told plaintiff that the property would be taken in the name of Perry and when the plaintiff became of age it would be transferred to plaintiff (page 29, line 1; page 36, line 19; page 48, line 10; page 71, line 15).

On July 15, 1943 the contract of purchase was entered into having the names of J. F. Taylor as the seller and A. T. Perry and Lorene Perry, his wife, as the buyers (see Exhibit A).

That the plaintiff has resided in the home from the time of purchase up to the present time (pages 30, 78, 80 and 81) while the defendants lived in the house only until the early part of 1944 (pages 30, 43, 75, 78 and 82).

The plaintiff has made all the monthly payments from the beginning of the contract until the present time (page 20, lines 29, 30; page 31, line 1), and is still making the monthly payments.

The Perrys and the Hawkins resided in the home from the time of the purchase until January of 1944, at which time the Perrys went to Portland, Oregon (page 82). Mrs. Perry claims that Mr. Hawkins was supposed to pay rent, pay the note and bank the money, but there was no testimony that either Mr. Perry or Mrs. Perry, either by mail, directly or indirectly, even though they

came through Salt Lake in 1945 and saw the plaintiff, *ever* asked the plaintiff for an accounting, or for any money at all from the time they left Salt Lake to the time Mrs. Perry came to Salt Lake in August, 1949, at which time Mrs. Perry testified she asked the plaintiff for some money and plaintiff told defendant, Lorene Perry, he didn't have any for her (pages 85 and 86). Mrs. Perry never did personally tell the plaintiff or claim that the home was hers and she never did ask if she could move into her own home, or that it be given back to her (page 94, line 6). She did say they asked for \$60.00 from plaintiff and received it (page 19) and she also asked for \$50.00 which the plaintiff never sent to her (page 95). In neither case was the demand made as if it was for money due and owing.

The first time defendant, Lorene Perry, ever asked for the return of the property to her was after March 14, 1950 after she had obtained her divorce from Mr. Perry on March 14, 1950 (page 87) and then notice was given by her attorney, a Mr. Hanni (page 86). See Exhibit "C", at which time there was no demand for rent, and notice wasn't given on the basis of non-payment for rent, but on the basis of a regular month to month tenancy.

In the divorce decree Mrs. Perry was awarded the property but there was no showing that the plaintiff was served with summons or ever advised that said real property was the subject matter of the suit, so that

4

the decree which was entered on March 14, 1950 would only settle the property rights between defendants, A. T. Perry and Lorene Perry, and would have absolutely no effect upon plaintiff's interest.

There is a direct conflict as to who made the payments on the original contract and note. The plaintiff definitely testified that he made all the payments personally, except once or twice when plaintiff gave Mrs. Perry the payments when he had to go to work (pages 30, 42 and 66). Mrs. Perry avers that she or her husband made the payments (pages 76, 77, 97 and 99). Actually there was no testimony to show that the Perrys made payments at all after January, 1944 when they left Salt Lake, and only six payments had become due up to the time the Perry left, so that the \$100.00 per month payments were not paid up at the time of leaving.

Mrs. Perry contended that the plaintiff was to pay rent himself, collect the rent on the apartment and make payments on the contract from the money collected (pages 82 and 83), while the plaintiff denies ever being a tenant (pages 33, 43 and 44). There was no evidence of any kind that the defendant, Perry, ever asked the plaintiff how much money plaintiff was supposed to have banked or collected or paid under the alleged instructions (page 84, lines 8 and 11). The only checking as to the status of the payments with the agent of defendant, Scriver, was done by Mrs. Perry *after* she returned in August of 1949 (pages 101 and 102).

The trial court found in favor of the plaintiff and against the defendants and decree was entered January 7, 1951 (pages 115 to 119) declaring the defendants, Perry, to be trustees for the use and benefit of the plaintiff and thereafter the court, upon motion of the defendants, having denied a motion for a new trial, made a minute order modifying the decree only to the extent that Lorene Perry has an equity in the property in the sum of \$400.00 and except for such modification the judgment and decree was to stand as entered (page 123), and an amended decree entered so providing on December 11, 1951. Defendants have appealed the amended decree and the respondent cross appealed from that portion of the amended decree allowing the defendants a lien of \$400.00 (page 157) and the portion awarding to defendant Scriever \$50.00 for attorney's fees.

STATEMENT OF POINTS

I.

THE TRIAL COURT HAS MADE SUFFICIENT FINDINGS ON THE MATERIAL ISSUES TO SUPPORT THE JUDGMENT.

II.

THAT FINDINGS ON THE MATERIAL ISSUES ARE SUFFICIENT TO SUPPORT THE JUDGMENT.

III.

THAT THERE IS SUFFICIENT EVIDENCE TO SUP-

PORT THE DECREE THAT THE PLAINTIFF IS ENTITLED TO THE FULL BENEFICIAL INTEREST IN THE PROPERTY.

IV.

THAT THE EVIDENCE IS INSUFFICIENT TO WARRANT FINDINGS WHICH WOULD SUPPORT THE AWARDING OF A \$400.00 LIEN AGAINST THE PLAINTIFF'S INTEREST OR THE AWARDING OF \$50.00 ATTORNEY'S FEE TO DEFENDANT SCRIEVER.

ARGUMENT

I.

THE LAW OF CONSTRUCTIVE TRUST.

In this case the plaintiff admits that he is relying on the doctrine of constructive trust wherein equity requires the imposition of trust in such cases as the present instance.

There are two theories on which a trust can be imposed upon this property: First, the enforcement of a trust based on the purchase money agreement called a Resulting Trust and Second, the imposition of a Constructive Trust which may be imposed by reason of fraud, or confidential or fiduciary relationship.

With respect to the resulting trusts generally, *Bogart on Trust*, Section 452, page 1350 states that resulting trusts and uses were well known before the statute of frauds was written in 1786, and that the stat-

ute of frauds had no application to resulting or constructive trust, and that the eighth section to old English rule referring back to the seventh section requiring instruments to be in writing stated:

“The seventh section has no application to trusts which arise or result by the implication of the law.”

Quoting further:

“In the U. S. where every express trust of realty is required to be manifested or proved by writing there is a section or clause corresponding to the English act excepting resulting trust. No matter what the particular wording of the excepting clauses the courts have been unanimous in holding that they were intended to cover all resulting and constructive trusts. It is, therefore, commonplace that it is legally possible for a cestui of a resulting trust to obtain a decree in his favor without introducing any documents setting forth the trust or introducing any written evidence.”

Quoting from Section 454, pages 1357 and 1358 of the same works it states:

“The courts of equity have therefore established the doctrine that normally the payor of the purchase price of property, real or personal, is entitled to be decreed to be beneficiary of a trust if the conveyance runs to another with the consent of the payor.”

In the the particular case at hand that is exactly

the situation and the plaintiff is entitled to be declared the trustee of the property under the theory of resulting trust.

The defendant makes much of the quotation, that to impose a resulting trust the title must be taken according to the instructions of the person who pays the purchase money. This was done in the present instance, as he took it in his name but added his wife's name. The mere addition of his wife's name would neither add or take away from the trust, and to cause a resulting trust to be defeated by such a device would be a travesty on justice, as any person could be instructed to take property in his own name and be given the money for that purpose and then take the property in the name of still a third party and defeat the trust.

In the present instance, if the case fails as a resulting trust there is still the fact that this is a constructive trust.

In the present case if A. T. Perry took the property with the intention of having his wife's name put on the contract to defeat the very purpose of the payment of the \$300.00 then there would have been an intentionally false and verbal promise accompanied by an element of positive fraud and the trust would be *ex maleficio* as set forth in *Chadwick v. Arnold* as quoted in appellants' brief. This is supported by *Scott on Trusts*, see Sec. 440.1, page 2243. It states as follows:

“Similarly “A” can enforce a constructive trust where he directed “B” to use “A’s” money in purchasing land in the name of “A” but “B” wrongfully used “A’s” money in purchasing the land in his own name. Here also “A” can follow his money into the land. In these cases “B” holds the land upon a constructive trust rather than a resulting trust.”

In *Scott* as quoted by appellant we see nothing that would defeat the trust. Putting Lorene Perry’s name on the contract would only change the trust from resulting to constructive trust.

The law has set up the constructive trust to do away with the fraud in the taking of property, and the courts have said, as set forth in *Bogart on Trust*, in Section 481, page 76, that where persons act by an intermediary, such as minors, spendthrifts, or mentally incompetent there is a fiduciary relationship. Equity has always taken an active interest of fostering and protecting these intimate relationships which it calls fiduciary. It has exclusively developed one of the most important of relationships, namely: the trust.

Section 481, pages 78 and 79 states:

“The exact limit of the term, “fiduciary relations are impossible of statement.” Equity refuses to bind itself by an all inclusive definition. It reserves the freedom to declare relationships to be fiduciary upon the particular facts of the case.”

Quoting further on "Confidential Relationships," page 81, Section 482, under constructive trust, it states:

"But there are other cases where there are just as great intimacy, disclosure of secrets, intrusting of power and superiority of position in the case of the representative but where the law has no special designation for the position of the parties it cannot be called trustee or executorship and yet is so similar in its operation that it should have like results."

It sets out the case of the sickly father deeding property to his son to be used for a specific purpose which failed as a specific trust, but due to the kinship the court felt justified in holding the son to be trustee of the father at the time the deed was made and that the disparity of position because of age, youth, education or mental weakness in confidential relationships may cause the court to look upon the representative as trustee for the weaker party and cites the parishioner and the priest, supported by numerous cases cited in annotation on pages 81 to 87 under the section. This theory is shown at pages 92 and 93 of the same work. It reads as follows:

"Some other courts have stated that in a confidential relationship the principal is entitled to believe the statute of fraud will not be asserted.

"Others have asserted the confidential relation doctrine is employed to prevent the statute of frauds from being an instrument of fraud."

Mr. Tanner sets forth that the statute of frauds

prevents a deed under an oral promise to be held for another.

Section 495 of the same works states that a deed under an oral promise to hold for another generally is prevented by the statute of frauds, but sets forth exceptional cases, and one of these is the confidential relationship, and under Section 496 quotes *Foresman v. Foresman*, 167 N.E. 148, as follows:

“The rule is now well settled by repeated judgments of this court that the statute (Statute of Frauds) does not obstruct the recognition of constructive trust affecting an interest in land with a confidential relationship would be abused if there were repudiation of a trust already declared.”

In *Haws v. Jensen*, *Supra*, the court further sets forth the rule as follows:

“A constructive trust being an equitable remedy to prevent unjust enrichment arises by operation of the law and is not within the Statute of Frauds.”

In *Haws v. Jensen* there is also cited a quotation from *Scott on Trust*, Volume 1, Section 44.2 as cited and set forth verbatim in appellant's brief at page 13. This very clearly sets forth the theory that trusts will be imposed where there is a fiduciary or confidential relationship.



We do not disagree with the theory as cited in *Chadwick v. Arnold, Supra*, but contend that the holding strengthens the case of the respondent as the placing of the name of defendant, Lorene Perry, on the contract would be an element of positive fraud.

Inasmuch as there are also facts in the record which clearly show a confidential or fiduciary relationship even if the rule set forth in *Chadwick v. Arnold* fails as to trusts ex maleficio then the ruling of *Chadwick v. Arnold* would not apply and the rule as set forth in *Haws v. Jensen, Supra* would more correctly state the law of this particular case.

We cite appellant's brief, page 14, second paragraph in support of our contention which requirements as there set forth are exactly as we contend for the evidence in this case: (1) there was confidential or fiduciary relationship; (2) defendant took property in his own name intending to convey when plaintiff reached his majority; (3) defendant breached his agreement.

Clearly from all the evidence presented there is ample ground for the establishment of a constructive trust by reason of the fiduciary relationship, namely: fellow workers working together and the plaintiff was a relative of the defendant and on the same basis the imposition of a constructive trust by reason of the confidential relationship between the two parties.

Further, the very disparity in the age as previously

set forth would be sufficient grounds for equity to impose a constructive trust.

II.

THE TRIAL COURT HAS MADE SUFFICIENT FINDINGS ON THE MATERIAL ISSUES TO SUPPORT THE JUDGMENT.

In the original findings of fact and conclusions of law the trial court found that Alfred T. Perry entered into a contract to purchase and was trustee for the benefit of the plaintiff (page 115, paragraph 3).

On the 16th day of November, 1951 the Judge by a minute order, shown at page 123, ordered that the decree be modified and amended to provide that Lorene Perry have an equity of \$400.00 against the Perrys. That except for the modification, the judgment and decree were to remain as heretofore set up.

That prior thereto, after considerable argument and discussion, by counsel for both sides, the judge in attempting to mollify (in the opinion of these attorneys) the appellant had made the above order. Pursuant to the form thereto and now relies on the failure to include above mentioned order the appellant prepared the amended findings of fact and conclusions of law to con-reversal. It has been held in a number of instances that complete findings in the amended findings as basis for if there are to be specific findings on particular questions they must be requested. Here if the appellant had

wanted findings he should have so requested them, and we do not feel now that he should be allowed to complain that they are not complete findings. However, we feel it would have no bearing on this particular case as the findings set forth the fact that A. T. Perry was a trustee for the plaintiff and there is substantial evidence to support this.

The appellant contends that there should be specific findings as to the elements constituting the trust to require there be specific findings on these facts would be entirely immaterial and incompetent. In order to overthrow the decree there must be evidence to the contrary that there has not been a trust established or the findings, if made, would not support the judgment and findings as made.

Appellant cites *Piper v. Eakle* in 2 Pac. (2d) 909. In that case there were no findings at all on the counter claim and there was very much dispute as to another material fact on which no findings were made. Therefore, the court said there should be findings on these two particular points. However, at page 910 the court held:

“That although a trial court erred in not making findings upon all of the material issues where it appears that no findings other than in support of the judgment would have been permissible, the judgment will be affirmed.” Citing *Snyder v. Allen*.

We construe that to be the law in this particular instance and refer to *Bancroft's Code Pleading, Practice and Remedies*, Volume 3 of 10-Year Supplement, page 2203, Section 1668 which states:

“Recent cases have applied the settled rule that a judgment supported by findings will not be reversed for failure to find on a material issue where it appears that the findings if made would have been adverse to the appellant.”

And cites under footnote 6 a number of cases from numerous jurisdictions to support this proposition. Among them is the case of *Mutual Life Insurance Co. of New York v. Frank*, 50 Pac. (2nd), page 480, with particular direction to 485 where it quotes:

“Appellant contends that the court erred by failing to find in accordance with the evidence that the insured gave the policies to the appellant by making her the beneficiary thereof and delivering the instruments to her. The omission is harmless. It is apparent that specific findings on that subject would be adverse to the appellant. A failure of the court to adopt findings upon an issue raised by answer is not reversible error when the findings if made to support the judgment would necessarily be adverse to the appellant.”

Applying this rule to the case at hand it is very clear from the judgment and decree as entered that the findings if in support of the judgment and decree would have been adverse to the appellant. Further, there is specific evidence of a promise on the part of A. T. Perry,

a predecessor in interest to the appellant, to hold the property for the plaintiff and deed it to him when he became of age (pages 25, 26, 27, 29, 52, 53, 54, 55, 62, 63, 64, 69, 70, 71). This evidence was not even controverted and the very physical facts which are admitted by the appellant tend to support the theory that the appellant claimed no ownership until and at a later date.

There is also substantial evidence which is not controverted to indicate that a fiduciary relationship existed between the plaintiff and defendant, Alfred T. Perry. The plaintiff was a boy of sixteen years of age, a relative of A. T. Perry, worked with A. T. Perry, and later lived with him, and A. T. Perry was a minister of the gospel (pages 19, 21, 27 and 35). None of these facts were controverted and in view of the apparent very close relationship and the disparagement in the age there could have been only one conclusion or one finding if it had been made, that there was a fiduciary relationship. This would be the only conclusion that could be drawn in support of the judgment and decree and if so it is not necessary to have a finding to support that proposition, as clearly shown by the law which has been cited, which is the prevailing rule of law as to this jurisdiction.

The same facts of evidence as set forth above would clearly indicate that if a finding had been made on a confidential relationship, there could have been only one result, namely, that a confidential relationship existed.

So the court, if the finding had been made, could only have found: (a) that the appellant or predecessor in interest promised to hold the property for the plaintiff and deed to him at a later time; and (b) that either or both a confidential or fiduciary relationship existed or even further that A. T. Perry fraudulently obtained the money intending to have his wife's name put on the contract to defeat the trust. In the first instance the constructive trust could be established by the relationship and in the second instance there would be fraud and a constructive trust ex maleficio could be imposed, which in either case would support the Conclusions of Law and Judgment and Decree, and as stated where it appears that the findings if made would be adverse to the appellant, if made, the judgment will not be reversed for failure to find on a material issue.

III.

THAT THE FINDINGS ON THE MATERIAL ISSUES ARE SUFFICIENT TO SUPPORT THE JUDGMENT.

The court is referred to the original findings (page 115) the minute order of November 16 (page 123) which order clearly indicates that all findings and the judgment as originally entered are still in effect except as to the \$400.00 lien, and to the amended findings (page 151).

From the reading of these findings it is clear that the court found that the defendant A. L. Perry was the trustee for the plaintiff and that any money, if paid by

the Perrys, was paid for the use and benefit of the plaintiff (see minute order (P. 123)) and under all of the evidence as previously set forth and the law governing the sufficiency of findings in this case it is clear that the court has made sufficient findings to support the judgment. (Refer to previous point for law and argument.)

IV.

THAT THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE DECREE THAT THE PLAINTIFF IS ENTITLED TO THE FULL BENEFICIAL INTEREST IN THE PROPERTY.

After this case has been tried and argued to the Court, the trial judge made the following observation from which we make a verbatim quotation. "Now the burden thereof, Mr. Shelton, if you want to assume it, is to establish that, as a matter of law, *Mrs. Perry stands in any better position than Mr. Perry would in regard to this property.*" The Court further said "Or, putting it another way, suppose this had been a deed, now to them in joint tenancy, which Mr. Perry had negotiated and had just put his wife in as a joint tenant with him, and he died before the property was conveyed so that the title would vest in entirety in her, could she avoid the trusteeship? In other words, could he avoid his trusteeship by simply taking a deed and making some one else a co-tenant or joint-tenant with him, and then dying?"

Counsel for the defendant, Lorene Perry never did

either in his oral argument or in his written brief attempt to answer the legal proposition as above stated by the trial court. We have consistently taken the position that as a general rule of law, it is clearly established that the beneficiary of a trust can follow the property into the hands of any third person, unless said third person is a bona fide purchaser for valuable consideration without notice.

Mrs. Perry in her examination on the witness stand never once contended that she was either (a) a bona fide purchaser, or (b) that she gave valuable consideration for her alleged claim to this real property. At the most, the claim of Mrs. Perry and her counsel was to the effect that her husband had paid *some* money towards the purchase price, and that was one reason why she was entitled to an interest in the property. The evidence clearly discloses that Mrs. Perry herself never paid anything except a claimed \$50.00 for her alleged claim, and any alleged in the property is based only on the mere fact that her husband placed her name on the deed, and that as a result thereof, she became his joint owner in the property. There is no evidence of any kind to show that she was even involved in the transaction between the plaintiff and her divorced husband (pages 81-82). In answer to questions propounded by her attorney, Mr. Shelton, we quote verbatim (p. 81) :

“Q. Was there ever any conversation between you and Mr. Perry and Hawkins concerning

the purchase of this property at 223 East 7th South?

- A. *Not a thing. I never knew anything about it, heard anything about it, until this past year after the court had signed me my decree granting me that. That is when all this junk came up about this property.*"

We cite:

"It is a clearly established principle in equity jurisprudence that whenever a trustee has been guilty of a breach of trust, *and has transferred, by sale or otherwise*, the trust property or funds to any third person, the cestui que trust has full right to follow such property or funds into the hands of such person unless he stands in the predicament of a bona fide purchaser for a valuable consideration without notice. *Oliver v. Piatt*, (1845) 3 How. (U.S.) 333, 11 L. ed. 622.

"The general rule is that the beneficiary who can trace his money or property misappropriated by the trustee may recover it from any transferee who did not receive it for value without notice of its character. *Van Alen v. American Nat. Bank* (1873) 52 N. Y. 1."

Further, Am. Jur. Volume 54, Section 272 on trustees, at page 215 states:

"That marriage, relationship between a trustee and his transferee does not constitute such value as to cut off equities of a beneficiary in trust property or funds in the hands of the transferee."

In support of this proposition in *Hungerferd v. Curtis*, 110 Atlantic 650, the Court held that the deposit of trust funds in the name of a wife, did not entitle the wife to the funds and that they could be recovered.

In *Tiffany on real property*, at page 1093, Section 483, it is stated:

“In order to claim priority as against one whose rights have first accrued, one must be a purchaser for value, and one who receives a conveyance based on a merely ‘good,’ as distinguished from a ‘valuable,’ consideration, takes subject to all prior conveyances or incumbrances.”

It further states:

“One is not a purchaser for a valuable consideration, within the rule, unless he has parted with money or money’s worth in consideration of the conveyance.”

Counsel for the defendant during the oral arguments at the conclusion of the trial, contended among other things, that the divorce decree gave her the interest of her divorced husband in *lieu of alimony*, and, therefore, she took whatever interest her husband had in said property and gave a valuable consideration.

To refute this contention, the divorce decree introduced in the case of *Lorene Perry v. Alfred T. Perry*, No. 87337 in the Third Judicial District Court, and we particularly called to the trial court’s attention, paragraphs

3, 4, 5 and 6 of that decree. In paragraph 3 of the decree, she was awarded the custody of the minor children. In paragraph 4 of said decree she was awarded all of defendant's interest in and to the household furnishings. In paragraph 5 of said decree, she was awarded \$15 per month for each of the five children as support money, and in paragraph 6 of said decree she was awarded \$15 per month *as alimony*. Therefore, the appellant's contention above mentioned falls flat because of the express provisions in said decree as enumerated above.

It is significant to note that Mrs. Perry never at any time made any demand for the regular payment to her of any money received from rent of the premises, and it is further significant to note that from 1943 or 1944 until the divorce was granted in 1950, a period of about seven years did Mrs. Lorene Perry, the appellant in this case, ever assert verbally, in writing, or by attorney or by agent; that she was the owner of, or the part owner, or real property in question until after her divorce decree that she claimed any right, title or interest in and to the was granted to her (page 100). When she moved to Salt Lake City in August of 1949 she didn't go to 223 East 7th South Street in Salt Lake City, and say to Mr. or Mrs. Hawkins or to the both of them "This is *my* house, you are only the caretaker here, I am going to move in and take possession of *my* property." She never even went near the Hawkins' and she never went near the real property in question, but instead she took rooms at the St. Louis Hotel, 243 West South Temple in Salt Lake City

for two months (page 103). Then she went to Ogden and stayed for two or three weeks, and then she moved to a Mrs. Washington's house and stayed there approximately ten days to two weeks (page 104), and then she went to Portland, Oregon, where she stayed until she secured her divorce (page 105). Does this appear to be the normal conduct of a person who later comes into Court and claims the ownership to a valuable piece of property? It is significant to note that after she secured her divorce decree and learned that the decree provided that she might have some interest in the real property here involved, she retained an attorney to serve a notice on the plaintiff herein in which she asked for possession of the premises, but never made any demand for any back rent (p. 109). She admitted on the stand that she wanted the property for herself and that she even tried to get a loan on the property although she had not even once in seven years, advised the plaintiff that she felt she had an interest in said real property.

We therefore submit to the court from the facts as shown by the transcript and from the law as quoted above, it is very clear that a trust *was* established; that there is very little evidence that the defendant Lorene Perry at any time paid anything for the property which she now claims, that she stands in no better position than her divorced husband stood at the time the divorce decree was entered, and that she gave nothing in the way of a valuable consideration for the recital in the divorce decree in her favor. To hold otherwise but have the effect

of quieting title and determining rights as against persons, not parties to a suit, which is contrary to law and equity.

We submit this final question to the court in substantiation of our position. Let us assume no divorce decree had been entered as between the Perrys, could Mr. Perry himself by any stretch of the imagination successfully defend the action herein brought by the plaintiff? In view of the fact that four witnesses have testified under oath that when the plaintiff paid the \$300 to Perry, that Perry agreed to purchase the property in his own name and hold the same for the plaintiff, who was then a minor, could Perry now come into court and say, "this property is mine because I paid some of my money along with the purchase price money advanced by the plaintiff?" The answer is obvious, Perry himself wouldn't have a leg to stand on — and if *he* didn't have any right, title and interest in the property, how then can his wife now successfully contend that she is the owner of property which she received from her divorced husband, who didn't own the property himself?

We also again refer to the evidence which was uncontroverted that the money paid to A. T. Perry under an agreement to transfer to the plaintiff when he became of age and fact of the confidential or fiduciary relationship is clearly shown by the evidence.

IV. (a)

HEARSAY EVIDENCE AS TO LORENE PERRY AS BEING DECLARATIONS AGAINST INTEREST.

The appellant makes much of the fact that the testimony was hearsay as to Lorene Perry. This is true as it was made out of her presence. However, there is a well established rule of law which permits the introduction of statements which are declarations against interest.

Appellant contends that the statements could not be heard against Lorene Perry. As previously pointed out she was in exactly the same position as A. T. Perry, as she was a successor in interest to A. T. Perry not being a bona fide purchaser and therefore subject to all the defenses which might be raised as against A. T. Perry.

It has been clearly established that such is the case when the court held in effect that Lorene Perry was not a bona fide purchaser.

It has been brought out in appellant's brief that before a declaration against interest is admissible the declarant must have some present interest at the time the statement is made. This is only another way of saying that declarant cannot make a statement against interest if he has no interest. For example: "A" says I am going to deed the State Fair Grounds to "B" to be held in trust for "C." At the time "A" makes the statement "A" does not own any interest whatsoever in the State Fair Grounds. "A" later acquires the title to the State Fair Grounds and subsequently makes a deed to "B"

without at that time saying anything about a trust in favor of "C." It is held that the early statement about the trust is not admissible as it was not against declarant's interest at the time it was made.

This would not be true in the present instance as there would clearly be a declaration against interest as A. T. Perry received the \$300.00 for a specific purpose and he actually had possession of the money at the time of making the statements and any statements made by him in derogation of his right of ownership of the money or in derogation of his right to use it as he saw fit would clearly be admissible as a declaration against interest. The fact that he did not then have an interest in the property would be immaterial, as his declaration is as to the money and the statements were clearly against his interest and would be admissible to show under what terms and conditions A. T. Perry accepted the money.

In *Jones on evidence*, Second Edition, Page 1789, Section 975, it states:

• "Admission made by a party or one in privity to a party need only have been made at some time during an existence of an interest contrary to such admission in order to be admissible."

This is clearly true in this instance as the statement contrary to the interest of A. T. Perry was to the effect that he was accepting the money with the idea that the property would be taken in his name and held in trust for the plaintiff.

In foot note under Section 975 is quoted from *Bibb v. Hunter*, 79 Ala. 351 as follows :

“A declaration of trust made by the trustee at the time of the creation of the trust has been held sufficient to establish the existence thereof as against him.”

This is supported by numerous cases as cited.

In *Moore v. Butler*, 48 New Hampshire 161, it states :

“However, a declaration of trust made by a trustee has been held to be binding.”

In the last two cases these would be just as admissible against a privity of interest with the trustee as is clearly shown in *Jones on Evidence*.

In further support of the theory that the statements could be used, *Jones on Evidence*, Vol. 2, Second Ed. Page 1776 states :

“Declarations of a husband made at the time of purchase of certain property as to whether he was buying for himself or his wife and as to whose money was paying for the land are admissible on the issue as to whether a trust in favor of the wife results.”

Applying the principal stated in the above paragraphs “*a fortiori*” there would be more reason to hold statements as to the purpose of the purchase in the creation of the trust as being admissible against a party

other than a wife than there would be where the trust was in favor of the wife.

The case of *McDonald v. Miller* 16 Northwestern 2d Page 270, supports the view of *Haws v. Jensen* in practically every particular and states:

“In an action to establish a constructive trust in connection with a conveyance of real estate a declaration of the grantor made prior to or contemporaneously with an execution and delivery of conveyance were admissible in support of a trust under heresay rule. . . .”

And further states:

“There are two principles upon which a court of equity acts in exercising its remedial jurisdiction. . . . One is that it will not permit the Statute of Frauds to be used in an instrument of fraud and the other that when a person through the influence of a confidential relation acquires title to property or obtains an advantage which he cannot conscientiously retain, the court to prevent the abuse of confidence will grant relief.”

From the above citations there can only be one conclusion, namely: That the statements as to the trust are declarations against the interest of A.T. Perry and as such were admissible as to any parties in privity with him or successors in interest to him who are not bona fide purchasers.

V.

THAT THE EVIDENCE IS INSUFFICIENT TO WARRANT FINDINGS WHICH WOULD SUPPORT THE AWARDING OF A \$400.00 LIEN AGAINST THE PLAINTIFF'S INTEREST, OR TO TAX COSTS AGAINST THE PLAINTIFF AND ASSESS PLAINTIFF AN ATTORNEY'S FEE OF \$50.00 IN FAVOR OF DEFENDANT, SCHRIEVER.

It is very clear that the order granting a \$400.00 lien on the property in favor of the appellant was made to appease or mollify the appellant as there is not sufficient evidence in the record to indicate that appellant or her husband paid money as stated.

We have filed a cross appeal from the order of the court from paragraph 3 of the amended decree signed by the trial judge in which the plaintiff was ordered to pay to defendant, Thelma Catherine Scriver, the sum of \$50 for the use and benefit of her attorney, and also with respect to paragraph 5 herein, the court required each party to bear his own costs. Concerning the award of attorney's fees to Mrs. Scriver, we are unable to find any statutory authority granting the court authority to make such an award, nor do we find any case ever cited by the Supreme Court of this state that would justify the trial court to make such an award, and we, therefore, pray that that portion of the Court's order be reversed.

We also cross appealed from paragraph 2 of the amended decree entered December 11, 1951 wherein the

defendant, Lorene Perry was allowed the sum of \$400 and interest from July 15, 1943 at the rate of 6%. Since the court in its amended decree found that the plaintiff was entitled to judgment against the defendant, and declaring that he is the true and lawful purchaser under the uniform real estate contract of July 15, 1943, and that the defendants, Alfred T. Perry had no right, title or interest in said property except said \$400, we contend that being the prevailing party we are entitled to have the costs taxed against the defendant, Lorene Perry, and we further submit that the uncorroborated statement of the defendant that she or her husband paid \$100 a month for five or six months, without producing any receipts in court or without producing any records or documents by the party to whom the alleged payments were made, is nothing but a self-serving statement and was made solely for the purpose of trying to salvage something out of the property in the event that the court ruled against her (page 79).

CONCLUSION

The respondent respectfully represents to the Honorable Court that the judgment of the lower court should be sustained as to the imposition of the trust as there is ample and sufficient evidence to support all the necessary findings and to support the judgment and decree as entered, giving the respondents the full, beneficial interest in the property.

That the respondents' cross appeal be granted and the lien and costs as assessed against the respondent be stricken and disallowed.

Respectfully submitted,

LOTHAIRE R. RICH
FAUX, RICH and KIRTON

and

RAYMOND R. BRADY
Attorneys for Respondent