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Ned O. Gregerson and Dixie Gregerson v. James L. Jensen and Nedra Jensen : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

NED O. GREGERSON and DIXIE)
GREGERSON. his wife,)

Plaintiffs/Appellants,)

vs.)

JAMES L. JENSEN and NEDRA)
JENSEN, his wife,)

Defendants/Respondents.)

Case No. 18354

APPEAL FROM JUDGMENT OF SIXTH JUDICIAL DISTRICT
COURT FOR SANPETE COUNTY, STATE OF UTAH,
THE HONORABLE ALLEN B. SORENSEN,
DISTRICT JUDGE BY APPOINTMENT, PRESIDING

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

<u>STATEMENT OF THE NATURE OF THE CASE</u>	2
<u>RELIEF SOUGHT ON APPEAL</u>	3
<u>STATEMENT OF FACTS</u>	3
<u>ARGUMENT</u>	12
<u>POINT ONE:</u> SEVERAL WRITINGS MAY BE CONSTRUED TOGETHER AS CONTAINING ALL TERMS OF A CONTRACT FOR A SALE OF REAL PROPERTY, NOTWITHSTANDING THE FACT THAT THEY ARE NOT SIGNED BY THE PARTY TO BE CHARGED	12
<u>POINT TWO:</u> TO RENDER THE CONTRACT UNEN- FORCEABLE WOULD BE TO PERPETRATE A FRAUD ON PLAINTIFF	16
<u>POINT THREE:</u> THE RECORD SUPPORTS A SUFFI- CIENT DESCRIPTION BASED ON THE CONDUCT OF THE PARTIES IN THE EVENT IT DISREGARDS THE LEGAL DESCRIPTION FOUND UPON THE DEED	17
<u>POINT FOUR:</u> DEFENDANT EDRA JENSEN IS BARRED BY LAW FROM CLAIMING A STATUTORY DOWER RIGHT	18
<u>POINT FIVE:</u> A NEXUS EXISTS BETWEEN THE REAL PROPERTY WHICH THE PARTIES STOOD UPON AND NEGOTIATED AND THE LEGAL DESCRIPTION FOUND ON THE WARRANTY DEED	20
<u>POINT SIX:</u> THE COURT SHOULD DECREE SPECIFIC PERFORMANCE IN FAVOR OF PLAINTIFF AND REQUIRE DEFENDANT TO DEED THE REAL PROPERTY DESCRIBED IN THE WARRANTY DEED TO PLAINTIFF FREE AND CLEAR OF ANY AND ALL ENCUMBRANCE INCLUDING THE MORTGAGE ON SAID PROPERTY	22
<u>POINT SEVEN:</u> TITLE TO THE SUBJECT PROPERTY WAS NOT IN THE NAME OF EDRA JENSEN AND THE FACT THAT DEFENDANT EDRA JENSEN WAS AN OCCUPANT OF THE SUB- JECT PROPERTY DOES NOT REQUIRE PLAINTIFF TO OBTAIN HER SIGNATURE ON A MEMORANDUM OR DOCUMENTS OF CONVEYANCE	24
<u>CONCLUSION</u>	33

AUTHORITIES CITED

STATUTES:

Utah Code Ann. § 75-2-113 (1953 as amended)	19
Utah Code Ann. § 57-1-6 (1953 as amended)	26

CASES:

<u>Gregerson v. Jensen</u> , 617P2d 369 (Utah 1980)	12
<u>Haspray v. Pasarelli</u> , 79 Nev. 203, 380 P2d 919 (1963)	14
<u>Flegel v. Dowling</u> , 54 Or. 40, 102 P. 178 (1909)	14
<u>Jacobson v. Cox</u> , 202 P2d 714 (Utah 1949)	16, 18
<u>Hunter v. Wetsel</u> , 84 N.Y. 549 (1881)	16
<u>Gee v. Baum</u> , 58 Utah 445, 199 P. 680 (1921)	19
<u>Boise Cascade Corporation v. Meyer</u> , 568 P2d 755 (Utah 1977)	19
<u>Hilton v. Thatcher</u> , 31 U. 360, 88 P. 20 (Utah 1906)	19
<u>Toland v. Corey</u> , 6 Utah 392, 24 P. 190 (1980)	28
<u>Burgess v. Independent School District No. 1</u> , 336 P2d 1077 (Okla 1959)	29

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JENSEN, his wife,)
)
Defendants/Respondents.)

Case No. 18354

NATURE OF THE CASE

The case was initially tried to Don V. Tibbs, sitting without a jury. At the completion of Plaintiffs' case, that Court granted judgment in favor of Defendants on Plaintiffs' complaint for specific performance, no cause of action. That decision was appealed to the Utah Supreme Court which reversed and granted Plaintiffs a new trial (Case No. 16339, filed September 4th, 1980; 617 P2d 369). The case was assigned to the Honorable Allen B. Sorensen for retrial. At the Pre-Trial Conference, the parties stipulated to the use of the trial transcript of the first trial, and the wife of Plaintiff-Appellant, Dixie Gregerson, was joined as a party plaintiff. At the second trial, Judge Sorensen granted judgment against Plaintiffs as to their request for specific performance, but granted judgment in favor of

Plaintiffs as against Defendants in the sum of \$350.00 plus interest at the legal rate from September 30th, 1971, and costs of court.

RELIEF SOUGHT ON APPEAL

Appellant seeks an Order of this Court reversing the judgment of the trial court and a ruling that as a matter of law, the agreement reached between Plaintiffs and Defendants is specifically enforceable and awarding to Plaintiffs the real property as more specifically described in a deed designated as Exhibit 7, free and clear of any and all encumbrance on said property.

STATEMENT OF FACTS

On September 29th, 1971, the Plaintiff and Appellant, Ned O. Gregerson, hereinafter referred to as GREGERSON, met with the Defendant James L. Jensen, hereinafter referred to as JENSEN, at a service station located in Gunnison, Utah, which was managed by Jensen. While at the station, Gregerson, who was with his father, asked Jensen if he would sell a piece of property Jensen owned in Gunnison, Utah. (First trial transcript, hereinafter referred to as T1; T1 11A:19-30; 12:1-17; 45:25-30; 46:6-16; 47:1-10; 48:5-19). Jensen indicated he was interested in the sale. (T1 12:2-9).

After this initial conversation at Jensen's place of business, Gregerson, his father and Jensen went to the property in question which is a parcel of unimproved real property located directly in back of Jensen's home in Gunnison, Utah. (Tl 26:10-14). The parties there viewed the land and continued negotiations. The property which the parties stood upon was enclosed by fences on all four sides. (Tl 37:24-30). Thus a fence separated the subject property from Jensen's home. The property at that time was being used as a pasture by Jensen. (Tl 38:8-9). The real property in question was immediately adjacent to the community hospital and Gregerson indicated his desire to locate a dental clinic upon it.

While the parties were upon the property, Jensen informed Gregerson that he would not sell the entire area because he needed adequate room for a cesspool and drain fields. (Tl 46:10-11; 47:4-6). Gregerson agreed to this request made by Jensen.

Also while the parties were on the subject property, a conversation took place wherein Jensen told Gregerson that he would sell his property north of where he kicked the dirt (Tl 48:11-15). The parties at that time agreed to a total purchase price of \$700.00 for the subject property. (Tl 12:2-9; 48:18-19).

5

After Gregerson and Jensen reached this agreement, Jensen returned to the service station. Gregerson and his father then went to a local contractor to investigate potential building plans. (T1 13:3-20).

On the following morning, Gregerson went to Jensen's house. Present at that time was Plaintiff, Ned O. Gregerson, his father, Owen Gregerson, his mother, Edna Gregerson, Defendant, James L. Jensen and Defendant, Edra Jensen. (T1 69:22-25). At that time, Gregerson delivered to Jensen a check in the sum of \$350.00 representing one-half of the purchase price. (T1 17:23-30; see Exhibit No. 1). On the face of the check, in the handwriting of Gregerson, is the following language in the lower left-hand corner:

"1/2 payment on land as agreed -
other 1/2 payment when deed delivered."

The check for \$350.00 was endorsed by Jensen and deposited in the joint bank account of J. L. Jensen and Edra Jensen, his wife. (T1 60:16-22; second trial transcript hereinafter T2; T2 11:6-12). Jensen has had the use of that money since September, 1971. In addition, Gregerson, at the time this action was filed, tendered the balance in the sum of \$350.00 to the Clerk of Sanpete County.

Jensen readily admits that he and Gregerson came to an agreement for the sale of the land and shook hands evidencing that agreement (T2 21:2-10).

Q. (by Mr. Chamberlain) Isn't it true that at that time you thought that by accepting the check and endorsing it and delivering the deed that you and Mr. Gregerson had in fact come to an agreement?

A. (by James L. Jensen) We did come to an agreement. We shook hands. He was going to be up on the first of the year to build. He was going to build a retaining fence, build an Amway warehouse and retire me in five years and a nice dental clinic that would make my property look nice.

While all parties were present at the house, Gregerson mentioned his concern about the property's legal description and whether James Jensen's wife, Edra, had an interest in the property. (T1 15:7-8; 24-30). By reason of that inquiry, Edra Jensen gave to Gregerson a Tax Valuation Notice which contained a description of both the unimproved area and the adjacent lot upon which the Jensen house was located. (T1 15:7-8; 24-30; T2 33:14-21; see Exhibit No. 2, copy of Tax Notice). Said Tax Notice was in the name of James Jensen only.

After the check was delivered to Jensen, Jensen told Gregerson that he (Jensen) would get a Release of Mortgage from the local banker, Cy Anderson, would get a deed made out for Gregerson and when that had been accomplished, Gregerson would be required to send the

balance due in the sum of \$350.00. Jensen told Gregerson that he would get that done the first part of the next week. (T1 19:20-30; 20:1-2). The check that Gregerson delivered to Jensen named James Jensen only inasmuch as the parties acknowledged that said Defendant held sole interest in the land. (T1 15:27; 19:18-19). In connection with record title, the parties stipulated that record title was only in the name of Defendant, James L. Jensen both at the time this transaction took place as well as at the present time. A certified copy of the deed whereby Jensen received title in his name only to the subject property was received by the Court at the second trial (Exhibit No. 8).

At the second trial, an unrecorded Conditional Sales Contract dated January 15, 1950, between Elnora Jensen as Seller and James L. Jensen and Edra C. Jensen as Buyers was received by the Court (Exhibit 10). Likewise, the court received as evidence an unrecorded Warranty Deed dated January 15, 1950 from James L. Jensen as Grantor to Edra C. Jensen as Grantee (Exhibit 9). Even though both documents were unrecorded, the court ruled as a matter of law that "The record deed at the commencement of this action was in Edra C. Jensen ..." (See Conclusion of Law No. 3). The record is absolutely clear that Gregerson was never

told of these unrecorded instruments even upon inquiry by Gregerson when the Tax Notice was prodeced. Thus Gregerson made the check payable only to "Jay Jensen".

After the meeting at the house concluded, Gregerson, his father and Don Anderson, a local contractor, returned to the property in question to determine if it was large enough to accommodate an office building and parking lot. (T1 38:24-26; 64:26-29; T2 29:15-24). Defendant Jensen was present at that time and in his presence, Gregerson, his father and Don Anderson, using the description on the Tax Valuation Notice, measured the pastured area, excluding the land which Jensen indicated he needed for a cesspool and drain fields. The result of these measurements indicated that the existing fence accurately bordered the Jensen property. (T1 36:25-30; 37:1-30; 38:1-30; 39:1-10; 64:26-39). At that time, at least one iron state was placed on the corner of the property. (T1 64:30; 65:11-23).

Jensen testified at the second trial that he was not present while the measurements of the property were made. However, in the transcript of the first trial at page 54, the following questions and answers were exchanged:

Q. (by Mr. Chamberlain) Do you recall being at the property -- I think you have probably already testified to this -- when Don Anderson

came and measured the property?

A. (by James L. Jensen) I can't remember being there when Don was but if Don said I was there, Don is an honest man because I must have lost track because I didn't help with any chaining or anything like that.

Q. And you don't know whether Don Anderson was there at that time or not?

A. He might have come in. I don't know and he's an honest man and if he said he was there, and he said I was there, and so I just can't remember whether he came with Owen or Ned, when Owen and Ned and myself was there or not.

Don Anderson testified that Jensen was present (T1 37:13-15).

After the measurements were taken Gregerson went to several local banks to determine if he could obtain a construction loan (T1 20:12-23). Initially, Gregerson was turned down by one bank, but finally located financing at the bank in Salina. Gregerson then returned to the service station managed by Jensen and told him that he could get the loan, but that he would need Jensen to obtain a Release of Mortgage and would need the deed prepared and delivered to him pursuant to their agreement.

Jensen had initially told Gregerson that he had an outstanding mortgage on the property, but told Gregerson that he was sure the bank would release the mortgage on the pasture portion of the property as he had done in a previous transaction of a similar nature. (T1 12:10-17; 49:21-22). At the second trial, Jensen

also testified that he could obtain a Release of Mortgage on the subject property (T2 20:6-10).

Gregerson then left Gunnison, Utah and returned to Texas to complete his military obligation. When Gregerson did not receive the deed from Jensen for two weeks thereafter, Gregerson telephoned Jensen and inquired about the delay. Jensen explained that he had simply failed to get the deed but assured Gregerson that he would take care of the matter immediately. (T1 21:2-9).

Gregerson thereafter called Jensen during the first part of November of that year to see why he had not received the deed (T1 21:10-15) but was never told by Jensen that a deed had been prepared and delivered to the bank even though it had been just two days after the agreement was made and the first half of the purchase price paid. Gregerson made other inquiries of Jensen thereafter, but Jensen failed to respond and deliver the deed. Unknown to Gregerson at the time of the first trial, a deed was prepared relating to the property in question and delivered to the local bank. (T1 48:21-29; 49:26-27; 50:23-29). A copy of the deed was received by this court at the second trial (Exhibit 7).

Jensen testified that the father of Ned O. Gregerson, Owen Gregerson, delivered the deed to him

about two days after the conversation at Jensen's home where the check for \$350.00 was delivered (T2 7:13-29). Jensen took the deed to his banker in Gunnison since he apparently recognized the need to obtain a release of mortgage (T2 7:30; 8:1-4).

An analysis of the deed indicates a detailed description, shows James L. Jensen and Nedra Jensen, his wife, as Grantors and Ned O. Gregerson and Dixie C. Gregerson, his wife, as joint tenants, with full rights of survivorship, and not as tenants in common, as Grantees. The deed is dated the "_____ day of October, 1971." At the time of the first trial, Jensen testified that the only reasons he did not sign the deed and deliver it to Gregerson were the misspelling of his wife's name ("Nedra" instead of "Edra") and the advice of the local banker, Cy Anderson, that Jensen should await the arrival of Gregerson before signing the document and delivering it. (T1 50:27-30; 51:1-4; and 21-25; 52:21-30; 53:1-25). Jensen also testified that the banker recognized the misspelling of Edra Jensen's name and that the deed could be changed (T2 8:29-30; 9:1-4). Jensen further testified at the second trial that he thought that by accepting the check and endorsing it that he agreed to the terms of the sale, i.e., delivery of the deed when the full payment was made, (T2 21:2-14) but that he now takes

the position that he has changed his mind and claims that he was not required to deliver the deed until Gregerson came and constructed the building upon the subject property. Of course, Gregerson could not start any construction nor could he obtain a loan until the deed was delivered and a Release of Mortgage obtained. (See also T1 51:21-30; 52:1-6).

Concerning ownership of the land itself, Jensens have admitted in their Amended Answer that "James L. Jensen and Ned O. Gregerson negotiated in regard to a contract for a sale of real property" Furthermore, Defendant, Jensen, testified that the only property he owned in Gunnison, Utah was his home and the property behind it. (T1 44:6-13). Jensen further testified that he did not own any other property in Gunnison, Utah. (T1 44:10-13).

ARGUMENT

POINT I.

SEVERAL WRITINGS MAY BE CONSTRUED TOGETHER AS CONTAINING ALL TERMS OF A CONTRACT FOR A SALE OF REAL PROPERTY, NOTWITHSTANDING THE FACT THAT THEY ARE NOT SIGNED BY THE PARTY TO BE CHARGED.

It is the position of Plaintiffs that this Court has directly ruled in favor of Plaintiffs at the time of the first appeal. In Gregerson v. Jensen, 617 P2d

369 (Utah 1980), the Court, after outlining the facts, stated:

"This Court has previously held that several writings may be construed together as containing all the terms of a contract for the sale of real property, notwithstanding the fact that they are not all signed by the party to be charged. Where more than one writing is used to satisfy the requirements of the Statute of Frauds, however some nexus between the writing must be shown. This requirement may be satisfied either by express reference in the signed writing to the unsigned one, or by implied reference gleaned from the contents of the writings and the circumstances surrounding the transaction. In the latter instance, parol evidence may be used to connect an unsigned document to one that has been signed by the person to be charged. As explained in Good v. Payne Furniture Co.:

"A memorandum consisting of several signed and unsigned writings will satisfy the Statute of Fraud so long as those writings clearly refer to the same subject matter or transaction. Parol evidence will be considered if it convincingly shows that the signed and unsigned writings are connected to one another and have been assented to by the parties."

In the present case, the check which Gregerson delivered to Jensen, who endorsed it and deposited the proceeds in his joint checking account, was inscribed by Gregerson with the notation: "1/2 payment on land as agreed - other 1/2 payment when deed delivered." Thus while not referring expressly to a specific deed, the notation on the check evidences the expectations of the parties that a deed would be involved in the transaction. Added to this implied

reference to the newly discovered deed or the contents of that deed which expressly refer to the parties in question and specifically describe the subject matter property."

The Court further elaborated in ruling for Plaintiff as follows:

"Considering the implied reference found in the signed writing, the contents of the deed, the fact the deed was in the custody of the bank within a few days after the delivery of part-payment, and Jensen's acknowledgment of the propriety of the deed, we believe the true writings evidence a single transaction and should be read together as fulfilling the requirements of the Statute of Frauds.

If the writings are united as one memorandum of the contract then the deficiency of an inadequate designation of the property to be conveyed is eliminated and cannot be relied upon to deny specific performance."

At the risk of citing what was apparently obvious to the Court at the time of the ruling on the first appeal, the Court should also be directed to the language cited with approval in that decision as being the underlying logic in this area of the law. The Court cited with approval, Haspray v. Pasarelli, 79 Nev. 203, 380 P2d 919 (1963); as explained in Flegel v. Dowling, 54 Or. 40, 102 P. 178 (909):

"... when all writings adduced, viewed together in light of the situation and circumstances of the parties at the time they were written, show unmistakably that they relate to the same matter, and constitute several parts of one connected transaction, so that the mind can come to no other

reasonable conclusion from the evidence so offered than that they were each written with reference to those concurrent or preceding, then there is such a reference of the one to the other as satisfies the rule, although reference in express terms does not appear. The rule is one founded on reason; and when as practical men, we look at the writings, and see inhering in them evidence which entirely satisfies the mind that they all relate to one general transaction, there is no reason why they should not be so construed. There is in such a case a direct reference of the one to the other within the meaning of the law." at 181-182. (Quoting from *White v. Breen*, 106 Ala. 159, 19 Southern 59 (1894); see generally 81 A.L.R.2d 991.

It appears therefore that this Court has ruled on the very issue concerning the Statute of Fraud defense relied upon by Defendants. This Court's decision is the latest statement by the Utah Supreme Court, and clearly manifests that Plaintiff indeed made out a prima facie case for specific performance. By reason of the first appeal, this Court apparently remanded the case for a new trial because the newly discovered deed had not been received in evidence by the first trier of fact. In the second trial, the Court received as evidence the newly discovered deed, but ruled it and the endorsed check did not constitute sufficient memorandum to meet the requirements of the Statute of Frauds, even in light of this Court's ruling. Since the Supreme Court has apparently ruled that a prima

facie case for specific performance was established, the second trial court should have determined if the evidence submitted by Defendants at the second trial in any way overcame the prima facie case established by Plaintiffs. A careful reading of the second trial transcript indicates that Defendants did not in any way rebut the facts as established by the transcript of the first trial, nor the evidence submitted by Plaintiffs at the second trial.

POINT II.

TO RENDER THE CONTRACT UNENFORCEABLE WOULD
BE TO PERPETRATE A FRAUD ON PLAINTIFF.

The purpose of the Statutes of Fraud has long been recognized that its purpose is to prevent the perpetration of a fraud.

Plaintiff's principal attack on the judgment of the trial court involves the application of the Statute of Frauds. His contention is that the statutes prohibits the original contract from being declared valid and binding on the original signers. We approach this question by directing attention to the principal that the statute should be used for the purpose of preventing fraud and not as a shield by which fraud can be perpetrated. Jacobson v. Cox, 202 P2d 714 (Utah 1949).

Had Gregerson tendered to Jensen cash instead of the check, the Statutes of Frauds would likely have

direct application. In Hunter v. Wetsel, 84 N.Y. 549 (1881) the Court states:

The purpose and object of the statute should not be forgotten. Its aim is to substitute some act for mere words, to compel the verbal contract to be accompanied by some fact not likely to be mistaken, and so avoid the dangers of treacherous memory or down right perjury. The delivery of the check was such an act. The giving of a check is an overt act much easily proved, and less susceptible to misconstruction or perjury than the payment of a sum in currency. It is objected that a draft or check of a debtor is only conditional payment, and not satisfaction of the debt for which it is given, in absence of some agreement to the contrary. That, it is submitted, has nothing to do with the application of the Statutes of Frauds. The statute is not concerned with the legal affect of the payment; it says nothing about the payment being unsatisfaction, wholly or in part, of the vendor's claim. The purpose of the Statutes of Frauds is fully satisfied by the physical delivery of the instrument, the overt act indicating that there was a bargain between the parties. (Emphasis added).

POINT III.

THE RECORD SUPPORTS A SUFFICIENT DESCRIPTION BASED ON THE CONDUCT OF THE PARTIES IN THE EVENT IT DISREGARDS THE LEGAL DESCRIPTION FOUND UPON THE DEED.

Gregerson and Jensen both acknowledged that they went to the real property in question that was behind Jensen's house and that Jensen "kicked the ground" as to where the point of beginning was to be. Furthermore, the property was enclosed on all four

sides by a fence, with one section of the fence separating the subject property from Jensen's home. The unsigned and undated deed accurately describes the subject property, and appears to have been done by someone with skill and competence in land surveying. In addition, a comparison between Exhibit 8 (the Warranty Deed from Jensen's mother to James L. Jensen), and Exhibit 7 (the Warranty Deed from Defendants to Plaintiffs), would allow a reasonable mind to determine the land which was the subject of the transaction. Even without a comparison of the deeds, however, the Court can determine from the actions of the parties as to the amount of property which Jensen agreed to sell to Gregerson. In Jacobson v. Cox, 202 P2d, 714, (Utah 1949) the court states:

"Plaintiff's next attack revolves around the claim that the original contract is unenforceable because the property is not described with certainty and definiteness. We overrule this contention. People who reside in far away rural communities cannot be charged with unreasonable accuracy in describing unsurveyed land. The only reasonable means by which a person can describe property located on a public domain, and which has never been surveyed, is by reference to natural monuments. The original parties to the contract could not have described the land by metes and bounds without going to the expense of running a survey. They apparently considered this unnecessary as all parties knew the exact location of the property involved; had been familiar with, and used it for many

years; had described it in all documents by reference to fences, natural monuments, size and occupancy. In spite of the misdescriptions in the record, the original owners knew and the present litigants know the location of the piece of property in dispute."
(Emphasis added).

POINT IV.

DEFENDANT EDRA JENSEN IS BARRED BY LAW
FROM CLAIMING A STATUTORY DOWER RIGHT.

In 1975, the Uniform Probate Code was adopted by the State of Utah. As part of the revision in the probate law, the legislature abolished both the estates of dower and curtesy. Section 75-2-113, UCA, provides as follows:

"Dower and curtesy Abolished. - The estates of dower and curtesy are abolished."

The Utah Supreme Court has yet to determine the constitutionality of the statute quoted above, and thus until challenged, that law is controlling.

Furthermore, it is elementary law that a wife's dower interest does not vest until the death of her husband. Gee v. Baum, 58 Utah 445, 199 P. 680 (1921); Boise Cascade Corporation v. Meyer. 568 P2d 755 (Utah 1977). In Hilton v. Thatcher, 31 U. 360, 88 P. 20 (Utah 1906), the court ruled that dower, as an interest, was subject to the control of legislative power, and therefore, until it vested by the death of

20

the husband, the legislature could modify, abrogate, increase, or diminish it at its pleasure.

Thus, Defendant Edra Jensen, did not need to join in the conveyance of the real property to Gregerson because she does not have a dower right. In addition, (1) she did not own any record title in the subject property; (2) the transactions, which are the subject of this matter, took place, at least in part, in her presence; (3) she delivered the Tax Notice to Gregerson which indicated that the property was only in the name of her husband, James L. Jensen; (4) the check in the sum of \$350.00 was deposited into the joint account of James L. Jensen and Edra Jensen, his wife, and therefore subject to withdrawal in full by either of said parties; (5) the Warranty Deed was prepared for her signature and Defendant James L. Jensen was willing to submit it to her for her signature, save and except her name was misspelled and his banker advised him to wait until Gregerson returned to the area and (6) she made no mention of documents which conveyed title to her, if in fact she knew of these documents.

POINT V.

A NEXUS EXISTS BETWEEN THE REAL PROPERTY WHICH THE PARTIES STOOD UPON AND NEGOTIATED AND THE LEGAL DESCRIPTION FOUND ON THE WARRANTY DEED.

The record of the second trial indicates some concern on the part of the trier of fact that there was no evidence indicating that the real property which the parties walked upon and discussed was the same real property described in the Warranty Deed. In answer to the court's concern, the record and exhibits in this matter indicate as follows:

1. Defendants admit by their Amended Answer that Plaintiff and Defendants had negotiations for the real property owned by Defendants as described in Plaintiffs' Complaint.

2. The only real property owned by Defendants is their home in Gunnison, Utah and the adjacent "pasture property".

3. That property was measured, in the presence of Defendant J. Jensen, stakes were pounded, and Jensen even indicated the portion that he needed to reserve for his own use.

4. Jensen testified at both the first and second trials that he and Gregerson had reached an agreement concerning that particular parcel of land for the purchase price of \$700.00.

5. A check for one-half of the purchase price was delivered by Gregerson to Jensen the day after the parties reached that agreement.

6. Within a matter of days, a deed was prepared by a party apparently unknown to Plaintiff and Defendant. In any event, the deed ended up in the hands of Defendant James L. Jensen, who in turn delivered the deed to the bank, indicated his willingness to sign the same, save and except the misspelling of his wife's name and the advice of a local banker to await the return of Gregerson. Certainly if Jensen objected to the legal description found upon that deed, he took no exception to the same and even indicated his willingness to sign the same.

If Plaintiff is to obtain specific performance in this case, the legal description for that land must, by implication, come from the deed itself. If the check and the deed are to be read together as constituting a memorandum which satisfies the Statute of Frauds, then the deed, chargeable to the Defendant by his possession and delivery, must be read as constituting the description upon which Plaintiff and Defendant agreed.

POINT VI.

THE COURT SHOULD DECREE SPECIFIC PERFORMANCE IN FAVOR OF PLAINTIFF AND REQUIRE DEFENDANT TO DEED THE REAL PROPERTY

DESCRIBED IN THE WARRANTY DEED TO PLAINTIFF
FREE AND CLEAR OF ANY AND ALL ENCUMBRANCE,
INCLUDING THE MORTGAGE ON SAID PROPERTY.

The first trial in the above-entitled matter was held on September 27th, 1978. In 1971, when Plaintiff and Defendant negotiated concerning this matter, Defendant James L. Jensen indicated that he had a mortgage on the subject property, but that he would have no difficulty in obtaining a release of the same. Plaintiff's Complaint was filed on August 16th, 1977, and both Defendants were served on August 24th, 1977. From that time forward, both Defendants had notice of Plaintiff's claim to Defendants' property and that in the event Plaintiff prevailed, Defendants would be required to convey the real property specified in Plaintiff's Complaint and to obtain a Release of Mortgage on the same at the time of delivery. However, just nine days prior to the first trial on this matter, the Defendants, with full knowledge of this pending litigation and knowing that the trial was scheduled for September 27th, 1978, intentionally increased the mortgage on the subject property to \$12,000.00.

Plaintiff maintains that this was an attempt on the part of Defendants to perpetrate a fraud so that in the event Plaintiff did in fact prevail, it would be difficult to obtain the same Release of Mortgage

Defendants had previously committed to obtain and thus thwart the good faith effort of Plaintiff.

At the time of the first trial when Plaintiff and Plaintiff's counsel learned that Defendants had intentionally increased the mortgage on the property, a Lis Pendens was thereafter filed during the first appeal process.

By reason of the increase of the mortgage by Defendants, Plaintiffs thereafter amended their Complaint to ask the court to order Defendants to convey the real property described in the Warranty Deed to Plaintiff free and clear of any and all encumbrances and specifically the increased mortgage.

At the second trial before this court, Defendant Jensen testified that the unpaid balance of that mortgage was approximately \$10,000.00 and that the value of his home was in the neighborhood of \$40,000.00. Thus, there appears to be ample equity in the subject property whereby Defendants could in fact obtain a Release of Mortgage and convey to Plaintiff said real property free and clear. Defendant James L. Jensen agreed initially to release said mortgage and convey said property free and clear to Plaintiff; likewise, he should now be obligated to honor that commitment and do what he promised to do in the first

place. To rule otherwise would be to allow Defendant to perpetrate a fraud against Plaintiff and the court.

POINT VII.

RECORD TITLE TO THE SUBJECT PROPERTY WAS NOT IN THE NAME OF EDRA JENSEN AND THE FACT THAT DEFENDANT EDRA JENSEN WAS AN OCCUPANT OF THE SUBJECT PROPERTY DOES NOT REQUIRE PLAINTIFF TO OBTAIN HER SIGNATURE ON A MEMORANDUM OR DOCUMENTS OF CONVEYANCE.

The second trial court ruled in Conclusion of Law no. 3, as follows:

3. The record deed at the commencement of this action was in Edra C. Jensen's name. The Defendant, Edra C. Jensen, was in possession of the premises and the Plaintiff was on notice of her interest.

It was clearly an error on the part of the lower court to determine that record title was in the name of Edra C. Jensen, particularly when the parties stipulated that record title was in the name of James L. Jensen, and Exhibit 8 so indicates. While Exhibit 9, the Warranty Deed from James L. Jensen to Edra C. Jensen, was received by the court, the record is absolutely clear that neither said deed, nor Exhibit 10, the Conditional Sales Agreement between Elnora Jensen as seller and James L. Jensen and Edra C. Jensen, was of record. Certainly, a prospective purchaser is entitled to rely upon record title as compared to unrecorded instruments.

Admittedly, a prospective purchaser is placed on a duty to make inquiry of a prospective seller if other parties are occupying the premises in addition to the occupant who seeks to sell the property occupied. It is submitted that Plaintiff recognized this duty and made inquiry as to whom the check should be made payable since he was negotiating in the presence of both Defendants. Upon making that inquiry, Plaintiff was given the Tax Notice on the subject property by Edra Jensen, said Tax Notice indicating that the property was only taxed in the name of her husband, James L. Jensen. By reason of the same, Plaintiff testified that he made the check payable only to James L. Jensen.

The trial court apparently found the unrecorded warranty deed from James L. Jensen to Edra C. Jensen, dated January 15, 1950, and the unrecorded Conditional Sales Agreement by and between Elnora Jensen, the mother of James L. Jensen, as seller and James L. Jensen and Edra C. Jensen, as buyers somehow imparted notice to Plaintiff and thus Plaintiff took subject to the interest of Edra C. Jensen.

Utah Code Annotated 57-1-6 provides:

57-1-6. Recording necessary to impart notice--Operation and effect--Interest of person not named in instrument.--
Every conveyance of real estate, and every instrument of writing setting forth an

agreement to convey any real estate or whereby any real estate may be affected, to operate to notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such proofs, acknowledgment, certification or record, and as to all other persons who have had actual notice (Emphasis added).

The evidence is undisputed that neither the warranty deed nor the Uniform Real Estate Contract were recorded. Therefore, the issue is whether or not the possession of the property by Edra C. Jensen provided actual notice to Plaintiff, and if so, what is the legal effect of the same.

Plaintiff does not dispute that the possession of the property by Edra C. Jensen required Plaintiff to make inquiry of the same. The record is very supportive of Plaintiff's position, inasmuch as Plaintiff did in fact make inquiry by the following exchange found on page 14 and 15 of the Transcript of the first trial:

Q. (by Mr. Chamberlain) and when did you have a conversation with Mr. Jensen again?

A. (by Ned O. Gregerson) Well, after this conversation took place, we met at his house and this actually took place, this other meeting took place before I met with Don.

Q. At his house, you mean?

A. No, the next day we came down early and Edra was getting ready to send the kids to school. There was my mother and my dad and James was in the house and Edra was getting the kids ready for

school and she came in and she set down and discussed it. They were remodeling their house at this time.

Q. And was there conversation at that time concerning this property?

A. Yes.

Q. Would you tell us what was said?

A. We were concerned about the legal description and, at this time, that copy we have there--

Q. There was a conversation concerning the property; is that correct?

A. You bet, and Mrs. Jensen went and found that and this is what she give to me.

Q. Let me hand you what is Exhibit No. 2 and I will ask if you can identify that item.

(Witness looks at exhibit).

A. Yes.

Q. Tell us what it is.

A. Valuation Notice for the year 1971, where all the property's listed, the whole house.

Q. Who gave you that document?

A. Edra did.

Q. That document, and did she do it on or about September 30, 1971?

A. That morning. Part of the discussion at that time was who was the property named in and they didn't know for sure and they pulled this out at this time and said--well, they decided this was one of the reasons the check should be written to James Jensen because that's the name the property was in as near as we could tell.

Utah courts have generally required a prospective purchaser to make inquiry concerning other occupants of the property. Toland v. Corey, 6 Utah 392, 24 P. 190 (1890). However, Utah law, along with practically all other jurisdictions, recognize that said duty is fulfilled if one makes inquiry of that occupant and is

told by that occupant that he or she, as the case may be, claims no interest in the property.

At the time of the conversation as outlined above took place, Plaintiff was present, together with his father and mother, and both Mr. and Mrs. Jensen were present. Apparently Mr. and Mrs. Jensen, at that time when the bargain was being struck, failed to remember that some 21 years prior to that time, a Warranty Deed had been prepared conveying the title from James L. Jensen to his wife Edra C. Jensen or that a Conditional Sales Agreement was likewise in existence. Therefore, Plaintiff did basically what he was told, that is, he made the check payable only to "Jay Jensen" and who thereafter endorsed it and deposited it into the bank account of both Defendants.

The question then becomes whether or not Plaintiff fulfilled the burden imposed upon him in making the inquiry so that he becomes a bona fide purchaser for value without notice as to the interest, if any, of Defendant Edra C. Jensen. In the case of Burgess v. Independent School District No. 1, 336 P2d 1077 (Okla 1959), the court went to great lengths to explain first of all the duty imposed, and secondly what inquiry must be made to meet that burden. In Burgess, Plaintiff maintained that the possession of the property constituted actual notice of the property and that the

School District failed to make inquiry by reason of that fact. The evidence showed that the School District did in fact make inquiry and ruled against Plaintiff's position. The court in Burgess recited the Oklahoma statutes concerning constructive and actual notice, and then stated:

Such statutes imposed on a purchaser of real property the duty to inquire with reasonable diligence as to the rights of anyone, other than the record owner, in possession of such property. The duty imposed is to make diligent inquiry as extinguished from acquiring the correct information.

The trial court found, and the Supreme Court affirmed, that the School District made a diligent inquiry, and quoted with approval the basic law in this particular area:

"When a person has notice of circumstances which put him upon inquiry, and he actually makes due inquiry into the circumstances and either fails to discover the existence of any rights in conflict with his own or becomes satisfied that the suspicions which have been awakened are unwarranted, or that a change in the circumstances has obviated the grounds of his apprehension, he is to be regarded as having acted bona fide and without notice of the fact..." 66 C.J.S. Notice § 11, p. 645.

"The presumption or implication of notice, based upon the rule heretofore stated that notice of facts putting one on inquiry would have revealed, is not a conclusive one. If it appears that the person sought to be charged with notice was not heedless of the warning signals, but made inquiry and used due diligence

to discover the facts of which he had knowledge and yet failed to obtain knowledge thereof, the inference of notice is rebutted and he is not affected thereby." 39 Am.Jur. Notice, §14.

"It is a well established, as it would seem to be apparent, that diligent but fruitless investigation into the existence of the facts concerning which one is put upon inquiry places the unsuccessful questant once more in the position of immunity from notice. In the language of Judge Selden in a leading case (Williamson v. Brown, 15 N.Y. 354):

"The phraseology uniformly used, as descriptive of the kind of notice in question, sufficient to put the party upon inquiry, would seem to imply that if the party is faithful in making inquiries, but fails to discover the conveyance, he will be protected. The import of the terms is, that it becomes the duty of the party to inquire. If, then, he performs that duty is he still to be bound, without any actual notice?

"Hence an instruction that one is affected with notice if he has knowledge of fact sufficing to put him on inquiry is erroneous for its failure to discover the effect of inquiry honestly and efficiently prosecuted. The therapeutic powers of diligent research are unimpaired by the facts that the information received was inaccurate or that the informant did not possess complete information concerning the motive for the interrogation. As a corollary, even though no inquiry be made, if in fact it would have been fruitless, notice does not arise from the knowledge of inquiry-provoking circumstances. Of course a mere assertion of futility will not suffice. It must be proved that the questioning was barren of results, or that it would have been fruitless. In determining the

issue of utility or inutility, it must be remembered that the investigator is not required to solve close or doubtful questions of fact, nor to delve with beaverine industry through complex and perplexing data." Merrill on Notice, sec. 461, p. 423.

The court in Burgess further recognized that such a rule is consistent with recording statutes:

The primary purpose of the recording statutes is to provide means for making public all claims of title and interests in real property. It is incumbent upon persons claiming such interests to see that their claim or interest is correctly described. Persons who wish to keep their interests in lands secret must do so at their own peril and not rely upon the cloak of the doctrine of constructive notice to protect such interests. (Emphasis added).

Plaintiff has addressed previously the fact that Edra Jensen did not have any ownership rights in the subject property under Point VII. Suffice it to say that those same arguments apply to any "possessory" rights of Mrs. Jensen. Furthermore, the record is lacking of any attempt on the part of Mrs. Jensen where she took any immediate steps to repudiate the transaction entered into between her husband and Plaintiff.

Defendant Edra C. Jensen was (1) a party to at least some of the negotiations; (2) produced the Tax Notice which indicated her husband's name only; (3) was present when the check was delivered and made payable to her husband only, and (4) had at least implied

notice that the check was deposited to the joint account of herself and her husband. Certainly these facts and her subsequent silence and acquiescence manifests her acceptance of the transaction consummated, if she did in fact have any interest in the property.

CONCLUSION

This Court should reverse the judgment of the trial court and order the specific enforcement of the contract entered into between Gregerson and Jensen, using the description provided by the warranty deed received by the trial court as evidence at the second trial.

The Court should require the real property to be conveyed free and clear of all encumbrances, directing Jensen to obtain a Release of Mortgage on the subject property.

DATED this 27th day of May, 1982.

Respectfully submitted,



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34
CERTIFICATE OF MAILING

I hereby certify that on the 28th day of May, 1982, I mailed two (2) copies of the within and foregoing BRIEF to Mr. Dale M. Dorius, Attorney for Defendants-Respondents, P. O. Box U, 29 South Main Street, Brigham City, Utah 84302, first class postage prepaid.


Secretary

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF AUTHORITIES	
STATEMENT OF THE FACTS	2
QUESTIONS PRESENTED	1
ARGUMENT	5

POINT I

THE WARRANTY DEED WITH WHICH APPELLANT SEEKS TO CHARGE RESPONDENTS IS DEFECTIVE AND MAY NOT BE USED TO SUPPLEMENT THE ENDORSED CHECK . . .	5
--	---

POINT II

HOLDING THAT THE STATUTE OF FRAUDS HAS NOT BEEN SATISFIED IN THIS CASE IS NOT INCONSISTENT WITH THE COURT'S DECISION IN THE FIRST APPEAL . . .	7
--	---

POINT III

RESPONDENTS ARE NOT BOUND BY THE NOTATION "1/2 PAYMENT ON LAND AS AGREED, OTHER 1/2 PAYMENT UPON DELIVERY OF DEED" WHICH APPEARS ON THE CHECK ENDORSED BY JAMES JENSEN	8
---	---

POINT IV

APPELLANTS ARE NOT ENTITLED TO SPECIFIC PER- FORMANCE UNDER THE DOCTRINE OF EITHER PART PERFORMANCE OR SUFFICIENT MEMORANDA TO SATISFY THE STATUTE OF FRAUDS	9
---	---

TABLE OF CONTENTS
(CONTINUED)

PAGE(S)

POINT V

PAROL EVIDENCE SUPPORTS FINDING THAT NO ORAL CONTRACT AS SUCH WAS EVER MADE BETWEEN THE PARTIES AND THAT IF, ARGUENDO, ANY CONTRACT COULD BE IMPLIED, APPELLANT FAILED TO COMPLY WITH THE PROVISIONS THEREOF	13
--	----

POINT VI

APPELLANT FAILED TO DISCHARGE HIS DUTY UNDER THE DOCTRINE OF INQUIRY NOTICE	14
--	----

CONCLUSION	15
----------------------	----

TABLE OF AUTHORITIES

PAGE (S)

CASES CITED

<u>Baugh v. Logan City</u> , 27 U.2d 291, 495 p. 2d 814 (1972)	12
<u>Coleman v. Dillman</u> , 624 p.2d 713 (Ut. 1981).	9
<u>Ferris v. Jennings</u> , 595 p.2d 857 (Ut. 1979)	10
<u>Gregerson v. Jensen</u> , 617 p. 2d 369 (Ut. 1980).	7
<u>Holmgren Bros. v. Ballard</u> , 534 p. 2d 611 (Ut. 1975)	11,12,13
<u>In re Roth's Estate</u> , 2 U. 2d 40, 269 p. 2d 278 (1954)	10
<u>Montgomery v. Barrett</u> , 40 U. 385, 12 p. 569 (1912)	10
<u>Ryan v. Earl</u> , 618 p. 2d 54 (Ut. 1980).	10

TREATISES CITED

73 Am. Jur. 2d Statute of Frauds §§ 360, 362, 368, 369, 377, 379, 380, 381, 401, 405, 406, 435 . . .	6,7,8,9 10 & 11
2 Corbin on Contracts § 520.	8
Williston on Contracts § 585	8
Restatement of Contracts § 210	8