

1963

# Kamas State Bank v. J. Buys Cummings and Mary Cummings et al : Brief of Appellants

Utah Supreme Court

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Hatch & Chidester; Attorneys for Appellants;

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

JAN 7 - 1963

Clerk, Supreme Court, Utah

KAMAS STATE BANK,  
A Utah Corporation,

Respondent and Plaintiff,

- vs -

J. BUYS CUMMINGS and  
MARY CUMMINGS, et al.,

Appellants and Defendants.

Case No.  
9798

## BRIEF OF APPELLANTS

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# TABLE OF CONTENTS

	Page
Statement of Facts . . . . .	1
Argument . . . . .	8
I. THE TRIAL COURT ERRED IN HOLD- ING THE OPTION AGREEMENT VIOLATES THE RULE AGAINST RESTRAINTS ON ALIENATION	
II. THE TRIAL COURT ERRED IN NOT PERMITTING APPELLANTS TO PRESENT EVIDENCE OF A POTENTIAL FRAUDULENT CONVEYANCE OF SAID PROPERTY BY THE MORTGAGEE TO RESPONDENT . . . . .	
	15
III. THE RESPONDENT DOES NOT HAVE STANDING TO ATTACK THE TRANSFER FROM JOE BOURGEOIS AND JOAN BOUR- GEOIS TO J. BUYS CUMMINGS AND MARY CUMMINGS . . . . .	
	17
IV. RESPONDENT IS NOT BEFORE THE COURT WITH CLEAN HANDS . . . . .	
	20
V. THE COURT ERRED IN GRANTING RESPONDENTS MOTION FOR SUMMARY JUDGMENT BECAUSE IT HAD BEFORE IT DISPUTED FACTS CONSTITUTING A VALID DEFENSE IF TRUE. . . . .	
	21

## AUTHORITIES CITED

Cummings vs. Nielson (Utah 1912), 42 Utah 157 . . . . .	19
Knight vs. Chamberlain (Utah 1957) 6 Utah 2d 394, 315 P2d 273 . . . . .	19
Disabled American Veterans vs. Hendrixson et al. (Utah 1959), 9 Utah 2d 152, 340 P2d 416 . . . . .	22

# TABLE OF CONTENTS (CONT.)

Page

<b>Bullock vs. Desert Dodge Truck Center, Inc. (Utah 1960), 11 Utah 2d 1, 354 P2d 559 . . . . .</b>	<b>22</b>
<b>Restatement of Property, Restraints</b>	
Section 406 . . . . .	11
Section 413 (2)(a) . . . . .	10
Comment on Section 413 (2)(a). .	9
 117 ALR, 1095 . . . . .	 15
50 ALR, 1315 . . . . .	20
 24 Am. Jur., Fraudulent Conveyances § 145 . . . . .	 18

**KAMAS STATE BANK,  
A Utah Corporation.**

**Case No.**  
**9798**

- vs -

J. BUYS CUMMINGS and  
MARY CUMMINGS, et al.,

**Appellants and Defendants.**

## BRIEF OF APPELLANTS

## STATEMENT OF FACTS

On or about the second day of January, 1959, J. Buys Cummings petitioned the District Court of the Fourth Judicial District in and for Wasatch County for Letters of

Administration in the Estate of Joseph W. Cummings and Mary Ann Cummings, his deceased father and mother. Thereafter J. Buys Cummings was duly appointed Administrator of said estate.

The assets of the estate consisted entirely of the real property described in the pleadings in this case.

The heirs of the Estates of Joseph W. Cummings and Mary Ann Cummings, deceased, were:

J. Buys Cummings	son
Wallace E. Cummings	son
William M. Cummings	son
John D. Cummings	son
Nola Fletcher	daughter
Sophia Langfore	daughter
Celestia Duke	daughter
Phyllis Peoples	daughter

At the time of his death Joseph W. Cummings had encumbered the aforementioned land with a welfare lien in the amount of One Thousand Eight Hundred Dollars (\$1800.00) On the 30th day of April, 1958, Marion G. Fletcher and Nola Fletcher, his wife, Joseph F. Bourgeois and Joan Bourgeois, his wife, and J. Buys Cummings and Mary Ann Cummings, his wife, formalized and placed in writing an agreement theretofore entered into wherein the Appellants herein agreed to sign a certain Quit Claim Deed dated April 3, 1958, conveying the property subject hereto, to Nola Fletcher and Marion G. Fletcher as joint tenants with full rights of survivorship and not as tenants in common with the understanding that the said Marion G. Fletcher and Nola Fletcher would convey the same to Joseph F. Bourgeois and Joan

Bourgeois. Said grantees agreed to retire the lien of the State Welfare Department of the State of Utah and pay the costs of the probate.

The Appellants in accordance with the terms of said agreement signed said Quit Claim Deed and the same was recorded in the Wasatch County Recorder's Office on January 6, 1959, in Book 34 of Records, pages 224-227.

Nola Fletcher and Marion G. Fletcher in accordance with the terms of the agreement then Quit Claimed the property to Joseph Bourgeois and Joan Bourgeois on the 5th day of January, 1959, which deed was recorded in the Wasatch County Recorder's Office on January 6, 1959, in Book 34 of Records, pages 223.

This Agreement which is Plaintiff's Exhibit #5, was recorded in the Wasatch



County Recorder's Office on April 27, 1959, in Book 34 of Records, pages 581-583. The above mentioned deeds appear of record as Plaintiff's Exhibits No. 3 and 4.

Nearly four months later Joseph Bourgeois and Joan Bourgeois obtained a loan from the Plaintiff-Respondent in the amount of Five Thousand Six Hundred Thirty Five Dollars (\$5,635.00) and on the same date, August 5, 1959, executed and delivered to the Respondent a Mortgage on the above property as security for the payment of the aforesaid obligation.

The proceeds of this loan were used to pay off the Welfare lien, property taxes, home improvement loan obtained by Joseph Bourgeois for materials for improvement, for recording costs, title

insurance to secure the loan, and the aforesaid costs of probate with the balance going to Joe Bourgeois and his wife.

In accordance with the terms of the aforesaid Agreement, Joseph Bourgeois and Joan Bourgeois on November 21, 1961, conveyed the aforesaid property by Warranty Deed to J. Buys Cummings and his wife, which deed was recorded November 27, 1961, in Book 41 of Records, page 286 of the Wasatch County Records. In exchange for this Warranty Deed the Appellants tendered to the Defendants Joseph Bourgeois and Joan Bourgeois and the Respondent, Kamas State Bank, the payment for the said property in the amount of Four Thousand Eighty Dollars (\$4,080.00). This tender was refused by the Respondent and the Mortgage being in default, the

Respondent commenced this suit to fore-close the Mortgage. The Appellants counterclaimed for a decree quieting title as against the Respondent. The matter came on for pre-trial and during said pre-trial Respondent moved the court for Summary Judgment. The trial court asked for written briefs which were submitted. Upon receipt of these briefs the Motion for Summary Judgment was granted, the Court stating as its grounds that the aforesaid agreement constitutes a promissory restraint on alienation and is void as against public policy. The court then heard evidence on the extent of the debt and entered its decree of foreclosure. There has been no opportunity for the Appellants to present evidence concerning the terms or validity of said option agreement. The Findings

of Fact approved by the Court were non-disputed facts stipulated to by counsel for the aid and benefit of this Court on appeal. All facts in dispute do not appear.

The provision in the agreement in question reads as follows:

"If, at any time, the said Marion G. Fletcher, Nola Fletcher, Joseph F. Bourgeois and Joan Bourgeois or any of them determine that they shall sell said premises, before they shall sell them to any other person, they hereby agree to permit the said J. Buys Cummings and Mary Cummings to purchase the same for an amount equal to the principal amounts which they have paid on the above referred to State Welfare Lien, together with the value at the time of all permanent capital improvements placed upon said premises. Parties further agree that this right shall constitute a lien against said property for and during the period of the life of J. Buys Cummings, but that upon his decease, such rights shall terminate".

## ARGUMENT 1

THE TRIAL COURT ERRED IN HOLDING THE

OPTION AGREEMENT VIOLATES THE RULE  
AGAINST RESTRAINTS ON ALIENATION

The trial court, in granting the Summary Judgment of the Respondent, relied upon the rule set forth in the Restatement of Property, Restraints § 413 (2)(a). The comment on § 413 (2)(a) on page 2444 was specifically pointed out. The Court found as a matter of law that since the terms of the agreement in question called for the purchase at a fixed price, it violates the rule as therein set forth.

There was no opportunity afforded Appellants to submit evidence that would fulfill the requirements of the recognized exception to said rule as set forth therein.

It is acknowledged that the Restatement is not necessarily law in Utah, but since such reliance was placed thereon by

the trial court, further development seems appropriate. § 413 states as follows:

(1) A promissory restraint or forfeiture restraint on the alienation of a legal estate in land which is in the form of a provision that the owner of the estate shall not sell the same without first offering to a designated person the opportunity to meet with reasonable expedition, any offer received, is valid, unless it violates the rule against perpetuities.

(2) A promissory restraint or forfeiture restraint on the alienation of a legal estate in land which is in the form of a provision

(a) that the owner of the estate shall not sell the same without first offering to sell to some designated person, either at a fixed price, or at a percentage of the price offered by another person, or

(b) that the owner of the estate shall pay a certain percentage of the sale price to some designated person,

is valid if, and only if, the restraint is valid under the rules stated in §§ 406-411.

The Restatement recognizes as valid a restraint that requires the sale at a fixed price if it fulfills the rules set forth in Restatement of Property,

Restraints, §§ 406-411.

§ 406 sets forth the rules for validity of such restraints as applied to indefeasible possessory estates in fee simple, to-wit:

§ 406. Subject to the exception stated in s 413(1) (preemptive provision), a restraint on the alienation of a legal possessory estate in fee simple which is, or but for the restraint would be, indefeasible is valid if, and only if,

(a) the restraint is a promissory restraint or a forfeiture restraint, and

(b) the restraint is qualified so as to permit alienation to some though not all possible alienees, and

(c) the restraint is a reasonable under the circumstances, and

(d) if the restraint is a forfeiture restraint, the requirements of the rule against perpetuities are satisfied.

Application of the agreement in question clearly demonstrates that we have at bar a promissory restraint not restricted as to possible alienees, and that <sup>s</sup> § 406(d) is not applicable.

The question remaining under these rules is whether or not the restraint is reasonable under the circumstances. We quote from Comment pages 2406, 2407:

". . . The following factors, when found to be present, tend to support the conclusion that the restraint is reasonable:

1. the one imposing the restraint has some interest in land which he is seeking to protect by the enforcement of the restraint;

2. the restraint is limited in duration;

3. the enforcement of the restraints accomplishes a worthwhile purpose;

4. the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained;

5. the number of persons to whom alienation is prohibited is small (see Comments j and k);

6. the one upon whom the restraint is imposed is a charity.

The following factors, when found to be present, tend to support the conclusion that the restraint is unreasonable:

1. the restraint is capricious;

2. The restraint is imposed for spite



or malice;

3. the one imposing the restraint has no interest in land that is benefited by the enforcement of the restraint;

4. the restraint is unlimited in duration;

5. the number of persons to whom alienation is prohibited is large (see Comments j and k).

Applying this to the case at bar, Appellants if given an opportunity to present evidence will prove:

A. That Appellants are attempting to protect their inheritance from the estates of Joseph W. Cummings and Mary Ann Cummings, the consideration given for said option.

B. That the option does not last beyond the life of J. Buys Cummings and that at the time of the execution of said agreement the said J. Buys Cummings was an elderly man.

C. That in addition to the protection of said inheritance aforesaid, the purpose of the agreement was to assist the indigent grantees. The evidence will show that at the time of the execution of said agreement, Joe Bourgeois and his family were destitute and that they lacked the minimum necessities of life, including a roof over their head. The arrangement worked out made it possible to obtain a home at a cost far below the market value of the property. It was feared by the heirs that should Joe Bourgeois be permitted to dispose of this property, either voluntarily or involuntarily, then before very long his dependants would again be out of a home. The Appellants contemplated that so long as said property was employed as a home for the family of this

man, they would forego realization of their inheritance. Subsequent facts tend to show that the fears of these heirs were not unfounded.

D. There is no restriction affecting the number of persons who may purchase said property except as exists with any valid option.

E. That the type of conveyance is in no way limited.

F. That the restraint is in no way capricious or imposed for spite or malice. A definite purchase price or the mode of determining purchase price are accepted requirements for the validity of such agreements. See Annotation at 117 ALR 1095.

## ARGUMENT II

THE TRIAL COURT ERRED IN NOT PERMITTING APPELLANTS TO PRESENT EVIDENCE OF A POTENTIAL FRAUDULENT CONVEYANCE OF SAID PROPERTY

## BY THE MORTGAGE TO RESPONDENT

The court had before it evidence that the purchase price was Four Thousand Eighty Dollars (\$4,080.00) under the agreement and evidence that the market value of said property was much more. Facts before the court make it clear that Joe Bourgeois, Joan Bourgeois and the Respondent were fully aware of the divergence between the option price and market price. The Findings of Fact #10 leaves little doubt that the Respondent was aware of the purchase price because it handled the payout of the sums constituting the purchase price under said agreement. The Appellants submitted proof (affidavit of John L. Chidester) that not only did Respondent have constructive knowledge of said option, but also had actual knowledge

thereof.

Appellants should be given an opportunity to present evidence that may show that the Respondent was participating in a fraud designed to get around the option agreement and thereby defeat the interest of the Appellants.

### ARGUMENT III

THE RESPONDENT DOES NOT HAVE STANDING TO ATTACK THE TRANSFER FROM JOE BOURGEOIS AND JOAN BOURGEOIS TO J. BUYS CUMMINGS AND MARY CUMMINGS

The evidence before the court construed most favorably for the Appellants shows that the Appellants entered into an agreement feeling that they had a binding and valid option. It may also be concluded that all parties without fraud or collusion felt they had bound themselves to a valid option. The Respondent,

after actual notice of said option, made no effort to subordinate the interest of the Appellants to the mortgage or to determine whether or not the Appellants felt they had a binding option.

There was no effort on the part of the Respondent to determine whether or not the Appellants were prepared to purchase the property at the time of the mortgage. There was no notice given Appellants of the loan.

The parties to said agreement in no way contest the terms or the validity of said option agreement. There has been no evidence presented by Respondent of a fraudulent conveyance. The prevailing rule is set forth in 24 Am. Jur., Fraudulent Conveyances § 145, to-wit:

" . . . creditors who have contracted debts under such circumstances that know-

ledge of previous voluntary transfers must be imputed to them cannot be regarded as hindered, delayed or defrauded by such transfers, and therefore, they may not attack such conveyances for the purpose of obtaining collection of their debts."

The Respondent was aware of the equitable interest in the Appellants and aware that it may ripen into full legal title. It would appear that Respondent would thus not be in a position to contest the transfer for the collection of this debt.

Such option agreements are recognized as valid in Utah. *Cummings et ux. vs. Nielson et al.*, 42 Utah 157. They are also protected as any other interest in real property by the Recording Act, *Knight vs. Chamberlain*, 6 Utah 2d 394, 315 P2d 273.

For a general treatment of intervening sales or mortgages that conflict with a prior recorded option see 50 ALR 1315

(1) Intervening Sale or Mortgage.

ARGUMENT IV

RESPONDENT IS NOT BEFORE THE COURT WITH  
CLEAN HANDS

The Respondent is before the court attempting to set aside the option agreement under the following circumstances.

A. It relies upon a legal technicality to attempt to defeat the interest of Appellants.

B. It had actual knowledge of the interest of Appellants.

C. It failed to make any effort to determine whether or not the parties felt bound by the terms of said option.

D. It determined to attempt to defeat said interest of Appellants on said



legal technicality.

E. Had it made any effort to inquire it could have determined that the parties to said agreement felt they had interred into a valid option.

F. It seeks merely to protect the title insurance company, the agent of whom determined that they would take the risk (see affidavit of John L. Chidester) in making said loan.

#### ARGUMENT V

THE COURT ERRED IN GRANTING RESPONDENTS MOTION FOR SUMMARY JUDGMENT BECAUSE IT HAD BEFORE IT DISPUTED FACTS CONSTITUTING A VALID DEFENSE IF TRUE.

The affidavit of John L. Chidester presents sufficient evidence to raise the issue of a fraudulent conveyance.

The stipulated Findings of Fact, together with the terms of the agreement are sufficient to raise the issue of whether or not the option agreement is valid under the

tests set out in the Restatement, *supra*.

The aforementioned affidavit presents sufficient evidence to raise the issue of the Respondents standing to attempt to set aside the option.

The requirements of Rule 56, Utah Rules of Civil Procedure leave little doubt that the granting of a motion for Summary Judgment must be based upon the undisputed facts and that if any material fact is disputed such motion will not lie. *Disabled American Veterans vs. Hendrixson et al.*, 9 Utah 2d 152, 340 P2d 416. In the case of *Bullock vs. Desert Dodge Truck Center, Inc.*, 11 U2d 1, 354 P2d 559, the court stated as follows:

"A summary judgment must be supported by evidence, admission and inferences which, when viewed in the light most favorable to the loser, show that "there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law," such showing must preclude all reasonable possibility that the loser could, if given a trial produce evidence which would reasonably sustain a judgment in his favor."

The Respondent failed to produce any evidence that would show that the agreement in question does not fulfill the requirements of the Restatement, supra.

#### CONCLUSION

The Court erred in granting the motion for summary judgment as there are material issues raised upon which the facts are in dispute.

Respectfully submitted,

HATCH & CHIDESTER  
Attorneys for Appellants  
and Defendants