1984

Floyd Webster v. Mary Lehmer And Charles Lehmer : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

FLOYD WEBSTER,	:	
Plaintiff-Respondent,	:	
vs.	:	Appeal No. 19339
MARY LEHMER and CHARLES LEHMER,	:	
Defendants-Appellants.	:	

BRIEF OF RESPONDENT

On Appeal From the District Court
of Summit County
HONORABLE J. DENNIS FREDERICK, District Judge

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NATURE OF THE CASE

Plaintiff/Respondent Floyd Webster seeks rescission of a contract for the sale of his home and lot in Deer Valley and Defendants/Appellants Mary and Charles Lehmer, in a counterclaim, pray for specific performance of the contract.

DISPOSITION OF THE CASE IN LOWER COURT

Webster commenced this action in the District Court for Summit County, Utah, on July 14, 1981, seeking rescission of the sale of his home and lot in Deer Valley. Lehmers answered the complaint and counterclaimed, seeking specific performance of the agreement.

At the conclusion of the trial to the court, conducted on January 18th through 20, 1983, the court announced its ruling in

... of Webster. (T. 414-419).[1/] The district court entered judgment (R. 367-369) and the ultimate findings of fact and conclusions of law were filed on June 29, 1983. (R. 493). The district court's judgment granted Webster's requested relief of rescission of the real estate agreement.

RELIEF SOUGHT ON APPEAL

Lehmers seek reversal of the district court's order of rescission of the real estate contract and for an order of specific performance in favor of Lehmers or, alternatively, a new trial. Webster asks that the judgment be affirmed.

STATEMENT OF THE FACTS

Since this is a case in equity it is the sum of the circumstances that is important. Appellants in their opening brief use fourteen pages to cover their statement of facts. Because it is the sum that is important, plaintiff will first point out the statements of the defendants that appear to be inaccurate or misleading and second set forth plaintiff's own statement of facts so that the entire matter can be seen in proper perspective.

1. Facts or Implications Set Forth In Appellant's Brief To Be Controverted In Whole or In Part.

[1/] References are to the Trial Transcript ("T"), the designated record from the District Court file ("R").

Paragraph 5 of the opening brief makes the statement that "In 1948 and continuing thereafter, the underlying fee simple interest and ownership of the subject property were held in independent ownership." We would acknowledge that record title - the underlying fee simple interest was in the mining company and its successors in interest but allege that there was a genuine issue as to right of possession and therefore ownership. Defendants acknowledged the distinction and recognized that Webster was the de facto owner of the property. (T. 309:4-14). On pages 6 and 7 of plaintiff's opening brief, they speak of the "sophisticated" mining machinery and allege "In conjunction with this mechanical work, Webster used and understood technical manuals and printed materials concerning the machinery and vehicles on which he worked and that "he readily understood complex mechanical manuals and also read the daily newspaper." These conclusions from the testimony are clearly non-sequitur or at least gross distortions calculated to mislead and are contrary to what was conspicuous to the trial judge. See Finding #5 and Conclusion #1. The statement on page 7 that "Webster had never relied upon the Lehmers for business advice or the conduct of his day-to-day affairs and Webster was capable of making his own independent decisions" is not completely accurate and conflicts with the evidence. See plaintiff's statement of facts and supporting references that follow. The statement at the top of page 7 that the contract "was read and understood by Webster

the Lehmers" is too absolute as will be hereinafter pointed out. On page 8 of the opening brief, there is the allegation that "In late October 1980, Webster decided to move from the subject property and live with his former neighbor, Mary Dudley, in Heber City, Utah. Webster advised Lehmers of that intention and by the end of November 1980 Webster had voluntarily removed himself from the subject property." This statement must be modified by the fact that Mr. Webster continued to sleep in the home from time to time during October, November and December. (T. 182-183). Again on page 10 there is a need to draw a distinction between title being in the name of and owned by Royal Street Land Company vis-a-vis the "record title" being reflected in said name. Page 11 of their brief claims, "The policy (50¢ a square foot) was not only undeclared and unpublished, it was not generally disseminated in the Park City area. The testimony is absolutely clear that Lehmers were not aware of any informal or ad hoc policy of Royal Street between October and December 1980." Both defendant Mary Lehmer and her witness Neil Clegg stated the contrary. See Neil Clegg's testimony (T. 334-335) and Lehmer's testimony (T. 269). On page 11 it is alleged that "On the other hand, Webster had been told by a neighbor, Neil Clegg, prior to October 1980, that Royal Street might have an informal policy in which the underlying fee title could be acquired and that Webster should check with Royal Street

to determine whether that policy would apply to his squatter's interests." The existence of said "conversation" is denied by Mr. Webster. (T. 146-147). Appellants statement of facts and conclusions and references on pages 12 and 13 of their opening brief need to be scrutinized. For example, the question to Mr. Webster was,

> Q. Now, with regard to whether the ground surrounding your property was owned by the BLM or by Royal Street, it didn't make any difference to you, did it, at the time you sold the property to Mrs. Lehmer?
>
> A. No, it didn't. (T. 147-148)

Mr. Campbell, thinking one thing but saying something else, asked concerning the property "surrounding" the Floyd Webster parcel. He did not inquire as to whether it made any difference as to who was the "record title" holder of the property upon which Mr. Webster's home was located, that is, the property that was subject to Floyd Webster's easement, his adverse possession claim, his squatter's interest. Of course it made no difference who owned the surrounding property. But what about the subject property? That is the important question. Further, what was Mr. Webster's understanding of the term "underlying property?" Did this term connote, to the old miner, the mineral or subsurface rights? The word "underlying" by dictionary definition means "lying beneath." Surface vis-a-vis subsurface or mineral interests; record title holder vis-a-vis de facto owner or adverse possession owner; Webster's home and lot vis-a-vis the surrounding property. What were we talking about, what was contemplated by the witness? How is

did Mr. Webster comprehend? How much distortion resulted from the suggestive form of the question? In fairness to the witness there needs to be a distinction drawn between record title and the right to possession, that is, ownership rights established by way of easement and/or adverse possession. Floyd Webster did make it clear that he would not have sold if he had known he was on mining company property. (T. 133, 175). The record is replete with examples of this witness giving simple but completely accurate responses to a question, which answers, on first impression, appeared to counsel to be either inaccurate or inconsistent. Page 14 alleges that Floyd Webster "was not under any disability" but that "Webster claimed at trial that he was a drunk, an alcoholic, and that he was depressed because of the death of his wife." It was primarily his friends and associates that were aware of this condition, not Mr. Webster (T. 205-206, 208), although he himself recognized that he was destitute and depressed. (T. 194-195). The allegation that "Lehmers were not aware of any claimed alcoholic problem of Webster" is contrary to the circumstantial evidence and there is an interesting, if not amusing acknowledgement, by Mary Lehmer to the reality of this "problem." On page 251 of the transcript Mrs. Lehmer was asked "You knew on October 7, 1980, that Floyd Webster had a drinking problem; did you not?" Answer. "No. I'm not aware of no drinking problem he has. He just likes to drink." The statement on page 14 that, "There is no testimony that in

October 1980 Webster was incapable of handling or administering his affairs," is in dispute. The real issue was the extent of capability. In our statement of facts we reflect those matters that shed light on the matter. A statement on page 16 of the transcript reads: "At the date of the transaction, the Lehmers believed that the fair market value of Webster's squatter's right was not more than $5000.00." Our riposte: Mary Lehmer was an astute attorney, a sizeable landholder in Park City, she served on the committee that formulated Summit County's zoning ordinance and on the Park City Master Plan Committee, she was city attorney for 1968-70 and a council member from 1972-76, she was well aware of 50¢ a square foot policy and knowledgeable concerning possessory rights of the squatters, including Floyd Webster's, which squatter she had competently advised about their right to permanently reside on the land, and she had just three months before negotiated for and acquired record title to her 26,000 square feet of property in Park Valley for $2,000.00 from Royal Street Land Company and she knew that Floyd Webster and many of her neighbors with houses on Royal Street Land Company land - mining company land - were in a similar position to so purchase. (T. 39-46, 309:4-14). Circumstantial evidence was so clear and convincing to the contrary that in fact the trial court found her purported statement of belief to have been impeached. On page 16 we find the following statement

The only testimony offered at trial as to the fair market value of the squatter's rights sold by Webster to Lehmers on October 7, 1980, as amended on December 20, 1980, was that of Lehmers, viz., between $1500.00 to $5000.00." These statements are controverted as now hereinafter set out.

2. Plaintiff's Statement Of The Facts.

While in a state of extreme poverty and somewhat depressed, without heat or water in his small home (T. 106; 115:11-116:23; 194:18-195:13; 205:23-206; 208:18-24 Exhibit 17), Floyd Webster, a 61 year old unemployed miner with 25 years underground (T. 103:10-18) and an eighth grade education (T. 94:16-21), is called in off the street on October 7, 1980, while passing the home of his neighbors and friends, Ray and Mary Lehmer. (T. 101:10-102; 115:4-10; 167; 257:25-258:21). They lived next door to each other in Deer Valley. Mary Lehmer, successor to a "squatter," an attorney, former Park City Attorney and member of the City Council (T. 222:2-5; 405:9-10) acquired the record title to 26,000 square feet of property in Deer Valley just three months before for $2,000.00 from Royal Street Land Company (T. 41-45) and she knew that Floyd Webster and many of her neighbors with houses on Royal Street Land Company land--mining company land--had a "title problem" about which she had been active in counseling them. The problem results from living in a house on mining company land, a situation which she had in common with Floyd Webster and other neighbors and had extensively

researched. (T. 236-250). She and her husband had previously discussed Floyd Webster and his property and called him in from the porch as he passed by on the street, all part of a preconceived plan (T. 101, 102, 115, 257, 258) to acquire $240,000.00-$400,000.00 worth of property from a friend and neighbor for a sum slightly in excess of $5,000.00.

Mary Lehmer had counseled Floyd Webster as an attorney after his wife's, Alice's, death in 1975 and had also advised Alice. (T. 108:19-109 134:1-7; 223:5-6; 236:18-21; 245:21-246:17; 281:[illegible] Floyd Webster had met with her and her husband many times and done work for them without charge. (T. 106:20 to 108:5; 110 to 112). Floyd Webster "trusted" Mrs. Lehmer and her husband and "figured that she was a square-shooter" "her being an attorney." (T. 123:3-20; 193:7-10). During October and December of 1980 Floyd Webster had a drinking problem (T. 106:13-19; 134:15-20; 206-208) undoubtedly known to the Lehmers (T. 251:34) and they also knew he needed money. It was at a time when nothing seemed to "make any difference" (T. 147:20 to 150). But still it appears that he "would not have sold (his home and land) for $5,000.00" if he "had known that (his home) was on mining property." (T. 133, 169:8-9)

When he came into the house Mary and Ray Lehmer immediately offered Floyd Webster $5,000.00 for his house and interest in the property except for the right to live there for life and she [illegible] drew up an agreement in her handwriting which he and the Lehmers

... (T. 167 and Exhibit 11). Floyd Webster believed he had ... vested rights in the surface (T. 166:17-23, 178) possibly ... of the advice that attorney Mary Lehmer had given to him. ... 246:4-9). Floyd knew when he signed this agreement that Royal Street had a policy of selling title for 50¢ a foot to persons who had their homes on mining company land (T. 120:9-25; 163, 48:9-10, 60:19-20) and he also knew that property smaller than his had been sold for much more than $5,000.00. In fact, a smaller parcel than his sold for $190,000.00 between November 1980 and January of 1981. (T. 6-10, Exhibits 1-4). It was Floyd Webster's belief when he signed this agreement that the land under the subject house was owned by the Bureau of Land Management and not the mining company (T. 117-120; 149; 169; 217) and he thought that Ray and Mary Lehmer believed this too because he knew they were knowledgeable about the property situation in Deer Valley and he trusted that they would tell him if they knew otherwise. (T. 123). He recognized an economic difference created in part because of the 50¢ policy. (T. 175:21-25). And he would not have sold had he been aware that it was on mining property (property owned by Royal Street Land Company). (T. 133:14-21).

As the agreement of 10/7/80 didn't provide any time for the payment to Floyd Webster and he needed money, he went back to the ... residence three times in October and November of 1980 to obtain advances totaling $700.00. (T. 125-126; 179-182). When he

went again to their residence on 12/21/80 to secure an advance of $100.00 or $200.00 for Christmas, Mary Lehmer wrote up another agreement in his presence and he signed it. (T. 131:23 to 133; 2 This agreement provided that he would surrender his life estate in the property in exchange for payments by the Lehmers of (1) the "unpaid water, sewer, and scavenger charges of $356.20 needed to reinstall meter and connect water to my house," (2) "the 1980 taxes due and unpaid on my house," and (3) "the legal expenses and recording fees to terminate my dead wife's joint tenancy in my home." (Exhibit 12). Attorney Lehmer understood the significance of joint tenancy property. (T. 226:4-227:1; 230:16-22). She was knowledgeable concerning the laws of intestate succession and knew that if the property was not in joint tenancy, that Floyd Webster's two daughters were entitled to two-thirds of their mother's one-half interest. (T. 233-235). It was the intention of Mary Lehmer that this agreement written on the back of that of 10/7/80 would integrate and merge both agreements into the latter. Attorney Lehmer did not read or explain the agreements to Floyd Webster but left it up to him to read and comprehend. He was unable to adequately do so. (T. 130 to 131; 171:5-6). Three days later on December 24, 1980, the Lehmers rented the house for $250.00 a month. (T. 274:22-25). They did not pay the 1980 taxes, Arlene Nyman did so. (Exhibit 5). In January of 1981 Floyd Webster refused to execute a deed to the Lehmers or take any more money from them and on February 24th and 27th, 1981, his attorney orde

return to the Lehmers the full amount of their advances and expenditures. (Exhibits 23 and 24).

3. District Court's Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Floyd Webster, the plaintiff at the time of the transactions involved, October 7, 1980, and December 21, 1980, was a sixty-one year old miner of some thirty-three years of experience, twenty-five of which were underground, with an eighth grade formal education. Mary Lehmer, the remaining defendant, was a retired lawyer who practiced many years with considerable experience in real estate matters.

2. The plaintiff and the defendant were neighbors for several years and befriended one another. The plaintiff trusted the defendant and felt he could rely upon her advice which she gave him and his wife without charge from time to time over the years. The plaintiff placed confidence in the defendant to the extent that he felt that the confidence would not be abused and that defendant would not act contrary to his interest.

3. That plaintiff after the death of his wife in 1975 and through the time of the transactions became despondent and depressed to the extent that his personal affairs suffered; specifically, he suffered from a severe drinking problem. He lost his driving privileges prior to and had no drivers license at the time of the transactions involved here as a result of an arrest on a D.U.I. charge.

4. His water and gas had been shut off in approximately August of 1980. In October of 1980 he was unemployed. He was in need of money. His family was assisting him by providing food and money. His property taxes had not been paid for a period of four years and were delinquent for three years.

5. The plaintiff purchased the property in question, which became the family residence for approximately thirty-three years, with his wife as a tenant in common. The plaintiff has an obvious lack of mental capacity or training to independently understand the effect of the transaction involved. This was graphically illustrated by his attempt to read the contract, Exhibit D-11, during the testimony.

6. The defendant initiated the October 7, 1980, contact with the proposal and immediately thereupon wrote the contract. Plaintiff had no independent advice. The same occurred on December 21, 1980. The defendant had acquired the fee title to her own land which consisted of approximately 35,355 square feet within some six months or thereabouts prior to the transactions here in question from Royal Street Land Development Company, the mining company, for $2,000.00. The land which is the subject of this suit is a considerably smaller parcel.

7. The defendant knew the plaintiff's home was not on Bureau of Land Management (BLM) property as early as 1978 or 1979. Indeed, the defendant knew, having researched the matter, that

the so-called "squatters" had apparent adverse possessory rights against the mining company as early as 1972. The defendant knew that the plaintiff was a "squatter" and that the mining company had a policy of selling fee title to squatters for 50¢ a square foot well prior to October 7, 1980.

8. The plaintiff believed on October 7, 1980, and continued to believe until February the 18th of 1981 that his property was owned by BLM; yet, significantly, no discussion regarding fee ownership ensued during the contract negotiations. There existed grossly disparate sophistication regarding financial and real estate matters to the extent that the transaction was not considered by the court to be at arms length.

9. Both parties believed the property was held in joint tenancy when, in fact, it was held as tenants in common with an interest in the plaintiff's daughters since his wife had died intestate. The property had a potential fair market value at the time of the transactions to the plaintiff and his daughters of $240,000.00 to $400,000.00, which was contracted away for the sum of $5,000.00 plus the payment of miscellaneous items totaling $409.20.

10. The plaintiff would not have sold for that amount had he known the property was not on BLM property. The mining company would have sold him fee title for 50¢ a square foot. The court cannot see that the plaintiff was guilty of negligence let alone gross negligence in not being aware of fee ownership and so finds.

The court cannot say either that this unawareness was the result of inexcusable lack of due care and so finds.

11. The transaction of December 21, 1980, involved a possessory interest created by that of October 7, 1980. Three days later, on December 24, 1980, defendant rented the dwelling on the subject property for $250.00 a month and it has been continuously rented at or above that amount since that time. There were no legal expenses in connection with the severance of the non-existent joint tenancy. Defendant intended the two transactions to be integrated in one contract.

12. Defendant will not be seriously prejudiced by rescission except to lose the benefits of the unconscionable contract. It is possible to now restore defendant to the status quo - there being no evidence that defendant changed her position after the execution of the October 7, 1980, and December 21, 1980, writings.

13. The proof that established the existence of the foregoing facts was clear and convincing.

From the foregoing facts, the court concludes:

CONCLUSIONS OF LAW

1. There existed grossly disparate sophistication regarding financial and real estate matters to the extent that the transaction was not considered by the court to be at arms length.

2. The plaintiff was not guilty of negligence, let alone gross negligence, in not being aware of fee ownership nor was this

unawareness the result of inexcusable lack of due care.

3. Defendant will not be seriously prejudiced by rescission and it is possible to now restore her to the status quo.

4. There existed a unilateral mistake of fact on the part of the plaintiff regarding ownership of the property sufficient to warrant rescission; indeed the consequences of which were so grave that to enforce this contract would be unconscionable. This unilateral mistake of fact specifically related to a material feature of the contract, that is the purchase price, in accordance with the doctrine set forth in the case of Ashworth v. Charlesworth, 119 UT 650 (1951), and the plaintiff under the circumstances did not act negligently.

5. There existed a confidential relationship which has been adopted by the Supreme Court of Utah in the case of Blodgett v. Martsch, Utah, 590 P.2d 298 (1978), between the parties founded upon trust and friendship developed over a period of years, which trust and confidence were abused sufficient to warrant rescission. If a party in whom another reposes confidence misuses that confidence to gain his own advantage while the other has been made to feel that the party in question will not act against his welfare, the transaction is the result of undue influence in accordance with 13 Williston on Contracts, Section 1625.

6. There existed a mutual mistake of fact sufficient under the circumstances to warrant rescission. The title was held in

tenancy in common pursuant to Statute 57-1-5 of the Utah Code Annotated. Both parties believed the property was held in joint tenancy. As concerning the mutual mistake as to ownership of the property, such a unique set of circumstances were present that the principle of mutuality of right should apply, that is, the rights of the plaintiff and the defendants should be reciprocal.

7. The two transactions are integrated, but if they were not they should each be separately rescinded.

8. The foregoing findings of fact and these conclusions of law were established and are supported by clear and convincing evidence. (R. 493-499).

4. Comment on Appellant's Reference To Matters Not In Evidence. (See footnote 2, page 5 of Appellant's Brief and various references to depositions in Statement of Facts, etc.).

All depositions were published, but the court did not consider the depositions in toto as having been offered and received as evidence. Portions did become part of the evidence as used at time of trial during cross examination pursuant to Rule 32(a)(1) of the Utah Rules of Civil Procedure. The depositions were neither formally offered nor admitted during the trial - they were not received in toto pursuant to Rule 32(a)(2). The court drew a distinction between (a) a deposition being published and for use for a specific purpose formally proposed by counsel during the trial, and (b) a deposition being formally offered and admitted

a trial to be considered in its entirety. In the latter case, opposing counsel is put on notice and has an opportunity to respond and rebut. This matter was presented to the trial court and ruled upon. (R. 373-374; 392; 489-490; 493). We believe that the depositions in toto as well as other matters not received in evidence strengthen and support plaintiff's position, but consider it improper to insert the same within the brief inasmuch as they are not part of the evidence offered and received. Defendants effort to use non-evidentiary matters is improper.

ARGUMENT

Point I

FAIR MARKET VALUE OF THE SUBJECT PROPERTY WAS MATERIAL AND PROPERLY ADMITTED

The total consideration Lehmers paid for the property was slightly in excess of $5,000.00. The fair market value was between $240,000.00 to $400,000.00. It is self evident why defendants adamantly resisted and still resist any evidence that would reveal this gross desparity, for Lehmers had contracted to pay only 1½% to 2½% of the fair market value.

Ultimate Issue In Condemnation Cases Vis-a-vis An Equity Case. We are dealing with a case in equity. "Equity considers factors which may be irrelevant in actions at law, such as the unfairness of a party's conduct. . . the hardship in granting or denying relief. Although an equity court no longer has complete

discretion in granting or denying relief, it may exercise wide judicial discretion in weighing the factors of fairness. . . ." this court on appeal will reverse the trial court only where an abuse of this discretion is clearly shown." Warren v. Dixen Ranch Company, 123 Utah 416, 419.

The cases cited by defendant accurately set out the general principles of law that apply in an ordinary condemnation case where the ultimate issue of fact is "fair market value" or the cash amount that must be paid for the property taken. An eminent domain proceedings is an action in law and not in equity. The ultimate issue is just compensation.

If, as the Warren case holds, "an equity court. . . may exercise wide judicial discretion in weighing the factors. . ." and may consider "factors which may be irrelevant in actions at law," then the following facts should be considered and weighed and the conclusions that are self evident should not be ignored. Here are the facts:

(a) The property was appraised to have a value of $240,000.00 by Pia. (T. 69).

(b) Brown, Lehmers' appraiser, acknowledged that property was worth $300,000.00 to $400,000.00. (T. 380).

(c) Floyd Webster and his wife had resided on and possessed the property for more than 35 years having purchased it from his wife's mother in 1948. (T. 95, 102, Exhibit 10).

(d) Royal Street Land Company had a policy of selling the property to squatters for 50¢ a square foot, which policy was well known and was in existence on October 7, 1980, and on December 21, 1980, and had been in effect for several years. (T. 18, 22, 39, 40-43, 56).

(e) Royal Street would have sold any interest or claim it had in the property to Floyd Webster for the price of 50¢ a square foot. (T. 48, 60).

(f) Lehmers knew of the policy. (T. 41-45; 269-287).

(g) Lehmers believed and had advised others that it was not even necessary to pay the 50¢ a square foot. (T. 309).

(h) Lehmers purchased the property for approximately $5,000.00 - about 2% of its fair market value.

If a court of equity can weigh the factors, it may also consider the sum of the factors. The disparity between the $5,000.00 contract price and the $240,000.00 to $400,000.00 fair market value is so clear that we might refer to this as a res ipsa loquitur situation.

"Equity looks to the substance and not to the shadow, to the spirit and not the letter. . . . It seeks justice rather than technicality, truth rather than evasion, common sense rather than quibbling." State v. Tyler County State Bank, 282 SW 211, 45 ALR 1484, 1484. "Equity will not suffer a wrong without a remedy. It is elastic in that it looks to the substance rather than the form,

and will never be applied to reach an inequitable result, or permit itself to be frozen into a position of applying mechanical rules so that it becomes crystallized." Cannon v. Bingham, 283 SW 2d 169, 174.

The lower court did not error by denying Lehmers' Motion In Limine. It had a right, if not an absolute duty, to apply its X-rays to all masks and covers and see through to the real substance and to find the answer to the question, "What was the property really worth?"

The inadequacy of consideration is not only relevant to the issues of undue influence and mistake of fact, it constitutes a ground for rescission of and by itself in an instance such as the present one. In discussing the various exceptions to the general rule that the adequacy of the consideration is for the parties rather than the courts, C.J.S. puts it this way:

> "Where the inadequacy (of consideration) is so gross as to shock the conscience and common sense of all men, it may amount both at law and in equity to proof of fraud, oppression, and undue influence. Where the inadequacy is such as to shock the moral sense, other circumstances such as fraud, mistake, misapprehension, surprise, irregularity, or anything else which conduces to the inadequacy of the price, will be readily seized to void the agreement." (Emphasis added) 17 C.J.S., Contracts 128, p. 846-7.

POINT II

RESCISSION BASED ON THE UNILATERAL MISTAKE WAS JUSTIFIED

What is the testimony concerning the unilateral mistake? Lehmer at first did not know whether the home and lot was situated on BLM property or "mining" property. She had this to say.

A. It's a quit claim deed which Mr. Webster told me was the deed from his grantor to him and his wife.

Q. When did you first receive that?

A. I was first showed it when he asked me into his house after his wife's death to inquire into his rights in this mining property. I looked at it primarily to see that he had lived on the property for more than 20 years.

(T. 223:2-8).

Q. And with Bill and Mary Dudley?

A. I knew their property was definitely on BLM land.

Q. So they had a separate problem?

A. Yes, and when I first talked with Floyd, I did not know if his land was on Bureau of Land Management lands or not.

(T. 241:14-21).

But later at the time of sale she had a definite belief.

Q. (By Mr. Smedley) On October 7, 1980, you knew that the Webster house was on mining company property; did you not?

A. I surely believed that, yes.

(T. 250:18-21).

Q. Did you have an opinion as of October 7th, 1980, as to whether or not Floyd Webster was a squatter?

A. I have.

Q. What was that opinion?

A. That he was a squatter on mining property.

(T. 268:17-21).

While Mrs. Lehmer's opinion gravitated towards the belief that the Webster home was on "mining" property, Floyd Webster arrived at the conclusion that he was on BLM land, and so believed at the time of the sale. He testified:

> Q. At the time you signed this document, who did you believe owned the property upon which your house is situated?
>
> A. Who owned the ground?
>
> Q. Yes. Who did you believe owned the ground?
>
> A. I believe the BLM did, the Bureau of Land Management.
>
> Q. Why did you believe that?
>
> (T. 117).

He then goes on to explain why he so believed. (T. 117 to ... Counsel for the defendants tried to impeach and belittle the basis for his belief by calling as their final witness a Stephen Schirf and by attempting to prevent that cross examination which would remove the mask and result in their gambit being played in vain. Notwithstanding Schirf reluctantly acknowledged the very truth of what he had been called upon to discredit. (T. 401:10-13). His testimony strengthened the integrity of plaintiff's position as did each of defendant's previous witnesses, Brown, Clegg, and Lehmer.

Ironically part of the parcel was in fact on BLM land. (T. 235 and 405).

Floyd Webster was aware of the 50¢ a square policy.

He disclosed on the witness stand:

Q. What difference does it make whether the land is owned by BLM or whether it was owned by the mining company or Royal Street?

A. Well, the only difference I can see that BLM ground, you can't buy that.

(T. 175).

Q. (By Mr. Smedley) Mr. Webster, if on October 7th, 1980, you had known that your property was on mining property or property owned by Royal Street Land Company other than BLM property, would you have sold it for $5,000?

A. No.

Q. Why not?

A. I think that I could get more out of my property. It was valued more.

(T. 133).

Q. (By Mr. Smedley) With respect to the contract you signed on October 7th, 1980, do you feel that Mary was fair with you on that day?

A. I figured she was, yes.

Q. Do you feel that she is fair now?

A. No.

Q. Why not?

A. Well, I figured that she knew that I was not on BLM ground.

Q. If you were not on BLM property, did you expect Mary Lehmer to advise you that your land was not on BLM property?

A. I would expect her to, yes.

Q. Why?

A. Well, I trusted her.

Q. Why did you trust her?

A. For being a friend, a neighbor, I figured I trusted her.

(T. 123).

Page 111 of the transcript may give some insight as to why he might have felt that his trust was plausible.

Defendants rely heavily upon the precise wording from part of a sentence out of a Florida Case cited in Ashworth v. Charlesworth, 231 P.2d 724 (Utah 1951) and then sarcastically castigate the old gentleman for the things "he blithely assumed" and the things he failed for "more than 33 years" to do. Our response is simple. Although the "ordinary diligence" doctrine states a fundamental principle of equity jurisprudence this principle is not, in its application, so much an absolute rule to be followed by the courts as it is a guide for determining whether under the circumstances relief should be granted, for there is also an established maxim that equity will not suffer a wrong to be without a remedy, and this is probably the most important of the principles which are addressed to the court. But even this "most important" principle is not absolute and thus we must address the Ashworth v. Charlesworth argument.

We believe that the "ordinary diligence" test can be met by simply being sensitive to the circumstances. Perhaps the

...page in Maryland Casualty Company v. Kransnek, 174 So 2d 541 ...more accurately sets our the fundamental principle that was applied in the Ashworth case. The Florida court declared:

> "Equitable relief on the basis of unilateral mistake going to the substance of the agreement will be granted where the mistake did not result from an inexcusable lack of due care under the circumstances and the plaintiff's position has not been so changed in reliance on the contract that it would be unconscionable to order rescission."

Assuming the above, then first of all there must be lack of due care and second this lack of due care must be inexcusable under the circumstances.

Was Mr. Webster's failure to check out the ownership (BLM v. mining) "inexcusable lack of due care under the circumstances?"

What were the circumstances? A 61 year old miner with an eighth grade education was called in off the street on the spur of the moment by his friends and neighbors; his friends and neighbors had him in their home court; he was there by invitation; they knew the purpose of the invitation, he did not; the friends and neighbors were people he trusted, one was an attorney that he had done things for "just. . . as a favor, as a friend;" he was indigent and had a drinking problem; the water to his home had been turned off, so had the gas; he was unemployed; his hosts had discussed off and on their plan for acquiring his property; he had not given ...thought to selling his home; for him there was the ...availability of independent advice; they had the benefit of

legal training and some 39 years of law practice, of advocac and of training in the art of persuasion; they had bought and sold a number of homes, all arms length transactions; in all h life he had only purchased one home for the sum of $600.00 from his wife's parents. (Plaintiff's Statement of the Facts gives transcript page for each of the above facts).

He did not ask them to purchase. He had not even thought about selling. Yet he is criticized for not anticipating and not having been prepared for the above unexpected execution of m "plan." Defendants seem to feel that the old minor should have been aware that every man is to fare in this world according to his management and everyone prospered according to his genius, his knowledge, his plans and schemes and training.

It was the mosaic effect, the sum of the circumstances, including the gross disparity between the potential fair market value and the price contracted that caused the court to conclud

> "There existed a unilateral mistake of fact on the part of the plaintiff regarding ownership of the property sufficient to warrant rescission; indeed the consequences of which were so grave that to enforce this contract would be unconscionable. This unilateral mistake of fact specifically related to a material feature of the contract, that is the purchase price, in accordance with the doctrine set forth in the case of Ashworth v. Charlesworth, 119 UT 650 (1951), and the plaintiff under the circumstances did not act negligently." (R. 498).

The foregoing circumstances should be compared with the comments of Justice Latimer in the Ashworth v. Charlesworth case. The Supreme Court, Latimer, J., held that the evidence sustained the trial court's findings that the defendants bid had not been based upon a mistake, at least a mistake that would justify a rescission. The defendants were subcontractors doing business as painting contractors. They bid and their bid was accepted. In affirming the trial judge Justice Latimer's opinion contained the following observations concerning the circumstances:

> Plaintiffs invited. . . the defendant partnership, to submit bids on the painting of the bridge. The invitation to defendants was extended in September, 1947. . . . At that time, Larsen told Charlesworth that plaintiffs had a contract to construct and paint the bridge at Green River and asked if defendants would be interested in submitting a bid. A few weeks later Charlesworth was in plaintiff's office in Salt Lake City and Larsen had the blueprints of the bridge on his desk. He told Charlesworth that they were the plans for the bridge which the parties had previously discussed. According to Larsen's testimony Jack Charlesworth then examined the plans. . . . Toward the latter part of September, 1947, Larsen called Jack Charlesworth in Ogden and asked what his price would be for the painting of the bridge. Charlesworth said he would call Larsen back and give him a price. Charlesworth then discussed the matter with his father, called Larsen, and, over the telephone, gave a price of $500 for the work. On October 3, 1947, Jack Charlesworth caused a letter to be sent to plaintiffs in which he submitted a bid for the painting of the bridge. . .for the sum total of $500. . . . After receipt of defendants' telephonic bid, plaintiffs prepared a contract which was signed by Jack Charlesworth on October 15, 1947. . . . The defendants were painting contractors of considerable experience; they knew that plans and specifications

had been prepared for the particular job; they were able to read and interpret such plans; and no reasonable excuse appears to justify their failure to see and know what was clearly exhibited by the drawings and specifications. In the early part of the preliminary negotiations detailed plans were submitted to them and the trial court found that Jack Charlesworth saw and had an opportunity to make a careful examination of them. . . . After making an inspection of the plans and specifications, defendants were not rushed into submitting a bid. On the contrary, they were given ample time in which to carefully consider their contract price and to make any further inquiry or investigation desired by them. Several days expired between the time Jack Charlesworth looked over the plans and the time he was contacted over the telephone. Thereafter, the amount of the bid was discussed between the two defendants before they submitted their written offer to the plaintiffs. This offer was followed by the preparation of a formal written contract, which was submitted to the defendants for consideration. . . But, in view of all the facts and circumstances, we cannot hold that the trial judge abused his discretion in denying defendants relief because of the claimed failure to disclose. Plaintiffs believed they were dealing with contractors who were competent to estimate painting costs. They had not previously contracted for the painting of bridges and were unfamiliar with the manner or method of estimating the costs of that type of work. Plaintiffs knew that defendants had ample opportunity to examine the plans and specifications. (119 Utah 653, 657, 658, 659, 660).

Citing Ashworth v. Charlesworth as "the controlling case" appellants quote only a portion of only one sentence to support their position. They interestingly leave out the qualifying words and it is also interesting that their quote comes not from the language of Justice Latimer but is selected from a portion of a single sentence of a cited Florida case. Justice Latimer

emphasized portions of said authorities. The portions he emphasized includes such qualifying phrases as "generally" and "where there is no. . . inequitable conduct." Ashworth v. Charlesworth, 119 UT 650, 656 and 657. A complete reading of the Ashworth case would convince even the casual reader that the case could be used to support the trial judge in his decision in favor of Webster and against the defendants Lehmers.

Should not a court of equity consider how the old miner was suddenly drawn into the act and how he was not advised by Attorney Lehmer to consult with a disinterested friend or counsel? We find the following language in Am Jur:

> In general, it may be said that wherever advantage is taken of a party under circumstances which mislead, confuse, or disturb the just result of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning, where proper time is not allowed to the party and he acts improvidently, or if he is importunately pressed, if those in whom he places confidence make use of strong persuasions, if he is not fully aware of the consequences, but is suddenly drawn in to act, if he is not permitted to consult disinterested friends or counsel before he is called on to act in circumstances of sudden emergency or unexpected right or acquisition in these and many similar cases, if there has been great inequality in the bargain, courts of equity will assist the party on the ground of fraud, imposition, or unconscionable advantage. 27 Am Jur 2d, Equity, p. 549, sec 24.

If the court concluded based on all the evidence and the impression of the witnesses that defendants knew of or suspicioned

plaintiff's mistake, then was not rescission properly granted irrespective of any possible lack of due care. Williston on C (3rd Ed) puts it this way (Section 1557, page 243):

> "Knowledge by one party to a bargain that the other is under a mistake as to such a matter as would make the transaction voidable if the mistake were mutual, if accompanied by any circumstances deemed inequitable. . . will have the same effect as mutual mistake in justifying rescission."

We might also want to consider the language of Cardozo on this issue of neglect or mistake.

> "True, indeed, it is that accident and mistake will often be inadequate to supply a basis for the granting or withholding of equitable remedies where the consequences to be corrected might have been avoided if the victim of the misfortune had ordered his affairs with reasonable diligence. United States v. Ames, 99 U.S. 35, 47, 25 L.Ed. 295; Grymes v. Sanders, 93 U.S. 55, 23 L.Ed. 798; Noyes v. Clark, 7 Paige, N.Y., 179 (32 Am.Dec. 620). The restriction, however, is not obdurate, for always the gravity of the fault must be compared with the gravity of the hardship. Noyes v. Anderson, 124 N.Y. 175 (26 N.E. 316, 21 Am. St. Rep. 657); Lawrence v. American National Bank, 54 N.Y. 432; Ball v. Shepard, 202 N.Y. 247, 253, 95 N.E. 719. Let the harship be strong enough, and equity will find a way, though many a formula of inaction may seen to bar the path. Griswold v. Hazard, 141 U.S. 260, 284, 11 S.Ct. 972, 999, 35 L.Ed. 678." Cardozo, C. J., dissenting in Graf v. Hope Building Corp., 254 N.Y. 1, 171 N.E. 884, 888, 70 A.L.R. 984.

POINT III

RESCISSION BASED ON MUTUAL MISTAKE AS TO ONE'S INTEREST IN LAND

Was the non-existence of a "joint tenancy" a mistake of fact or a mistake of law? Or perhaps both exist. Assuming that it is a mistake of law only, then defendant might argue that equity does not relieve against mistakes of law. But this rule has been frankly or actually modified in a good many cases when dealing with mistake as to one's interest in land. Those cases which grant relief may be classified as follows: (1) those that frankly grant relief in cases of mistake of law; (2) those which grant relief because there is also present undue influence, fraud, or other ground of equitable cognizance; (3) those cases which call the mistake a mistake of fact, or say that it is analogous to a mistake of fact.

In an interesting case, Greer v. Higgins, Mississippi, 338 Southern Reporter, 2d 1233, we are confronted with a widow and second wife of a decedent, together with her children, who brought an action against the decedent's first wife and her children, seeking to have a deed to defendants cancelled on the ground that it had been executed under the misapprehension that the decedent had died intestate. The supreme Court of Mississippi held that the doctrine of mutual mistake of fact was applicable and that the deed therefore should be set aside.

The court reasoned as follows:

> In 17 C.J.S. Contracts § 144, at 894, it is said: "A mutual mistake (of facts) is one common to both parties to a contract, each laboring under the same misconception; more precisely, it is one common to both or all parties, wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement. The mistake may apply to the nature of the contract, the identity of the person with whom it is made, or the identity or existence of the subject matter; but in order to relieve a party from liability on the contract, the mistake must relate to a material fact, past or present. Misrepresentation or fraud is not essential to proof of a mutual mistake."
>
> There can be no doubt that when the parties executed the deeds to each other in September 1970 they were all laboring under the mistaken belief that Mr. Greer had departed this life intestate. There can be no doubt that the mistake was mutual and there can be no doubt that the mistake was material. The deeds would not have been executed but for the mistaken belief as to the non-existence of the will.
>
> We are, therefore, of the opinion that the facts of this case present a clear case for the application of the doctrine of mutual mistake of fact and that, accordingly, the deed executed by the appellants and their mother to the appellees should be cancelled and set aside. Greer v. Higgins, 338 S.2d 1233, 1236.

13 Williston on Contracts, 3d ed, Section 1589, makes it clear that ". . . if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that the agreement is liable to be set aside as having proceeded upon a common mistake." p 568. (Emphasis added) He then states: "Mistake as to title to land is relieved against." p 569.

One reason that rescission is appropriate is because this was not a simple mistake as to the ownership of a one-third interest in the land, but had to do with the existence of a special relationship between the co-owners. If it had been simply a matter of deficiency in acreage, then an abatement (an adjustment of the purchase price) might have been the remedy which would best do justice. However, in this case it would have required the court to create a common ownership in the old family home between Lehmers and the children of the plaintiff who felt their father had been taken advantage of. That type of hostile marriage was never contemplated by either plaintiff or the defendant. The "joint tenancy" mistake itself was so important that it determined the conduct of the mistaken parties.

Another reason that the mutual mistake justifies rescission is because defendants, Lehmers, stipulated and acknowledged that the severance of the joint tenancy was a condition precedent to Webster receiving the purchase price of $5000.00.

> A. (Mary Lehmer) I told him that he would have to do that for himself a few years earlier when we discussed when I had no intention of buying his property.
>
> Q. Why would he have to do it, Mrs. Lehmer?
>
> A. I wouldn't have given him the money unless I had him sign that thing and produce a death certificate before I gave him the $5,000.

Q. So you would not have given him the $5,000 as payment for the purchase of the house as contained in the October 7th, 1980, agreement unless he had severed the joint tenancy on the property, is that correct?

MR. CAMPBELL: I stipulate to that, Your Honor. She's already answered the question. That repetitious.

MR. SMEDLEY: I'm asking for an answer from the witness.

THE COURT: Well, overruled.

Q. (By Mr. Smedley) Would you answer the question.

A. I would have had that done or I would not have given him the money. That's why I did it on December 21st to get things in readiness.

(T. 264).

This is a court of equity and thus we are to look to the substance rather than the form. It seems clear that the substance of what was intended before Lehmers would pay, was to effect the passing of Alice Webster's interest to Floyd Webster.

Mr. Campbell stipulated that "unless he (Floyd Webster) had severed the joint tenancy" the Lehmers "would not have given him the $5,000 as payment." Mary Lehmer confirmed this when she stated "I would have had that done or I would not have given him the money."

Floyd Webster did not have the ability to perform the substance of what was intended. Going through the form of severing a non-existing joint tenancy would not have produced the results contemplated. The only advantage would have been to mislead the

county recorder or those examining the record title or potential purchasers into believing that the deceased wife's interest had passed to the plaintiff and the children had no claim.

There was not only mutual mistake, but also present ground of equitable cognizance. "The principle of mutuality of right should apply, that is, the rights of the plaintiff and the defendants should be reciprocal." (Conclusion of Law #6).

POINT IV

THE FIDUCIARY OR CONFIDENTIAL OR DOMINANT-SERVIENT RELATIONSHIP BETWEEN THE PARTIES WHEREBY PLAINTIFF MANIFESTED DEPENDENCE AND TRUST IN DEFENDANTS AND ENTERED INTO THE SUBJECT AGREEMENTS AS A RESULT THEREOF.

Floyd Webster at 61 with an eighth grade education had been an underground miner for 30 years. In the fall of 1980 he was unemployed and without funds and had a drinking problem. These things defendants knew. Floyd Webster did work for the Lehmers without charge and met with them as friends. He knew that Mary Lehmer was very knowledgeable regarding the title problem with the mining company and she had advised both him and his wife in her capacity as an attorney. Floyd Webster believed that they would not act contrary to his interests, and he trusted them. He believed the house was on Bureau Land Management ground and he sold property with $240,000.00 to $400,000.00 for $5,000.00. The Lehmers knew the property was on mining company land.

If these things were shown by clear and convicing evidence, then plaintiff established an additional cause for rescission.

13 Williston on Contracts (3rd Edition) sec. 1625, p. 776, puts it this way:

> If a party in whom another reposes confidence misuses that confidence to gain his own advantage while the other has been made to feel that the party in question will not act against his welfare, the transaction is the result of undue influence.
>
> The confidence moving from one party places the other party in a position of dominance and influence analogous to a confidential or fiduciary relationship. It is not the existence of this relationship which is undue but its misuse. There is a technical difference between a fiduciary relationship and a confidential relationship, but most courts ignore it because in practical effect the result is much the same in either case. . . .
>
> Where the party alleging undue influence has made a case for the existence of a putative fiduciary or confidential relationship, any gain realized by the dominant party will be presumed to have been the result of abuse of the relationship and prima facie voidable. It is then up to the dominant party to rebut this presumption by showing the servient party had full knowledge of all the circumstances, independent advice or an opportunity to obtain it, and that the transaction was fair and not the result of undue influence.
>
> A vital part of this proof is that the party claiming to be the victim of undue influence had independent advice or an opportunity to obtain such advice. Proper independent advice means that the alleged victim had the benefit of a full and private conference with someone who could give competent advice and was disassociated from any gain or loss by the transaction.

"Additional circumstances involved in any determination of undue influence include age, mental condition, physical infirmities, and the consideration exchanged for the benefit received. These are all elements which will be considered by the courts when making a determination as to the existence of undue influence."

Section 1626, p. 800,

"The various circumstances of age, infirmity, or weak-mindedness of the promisor, or inadequacy of consideration will not usually be sufficient for proof of undue influence - these are merely elements of the proof.

"The party alleging undue influence can, however, avoid this direct burden of proof by simply proving that he was the servient member of a confidential or fiduciary relationship. Courts hold that this raises a rebuttable presumption of undue influence requiring the dominant party to come forward with proof of the fairness of the transaction.

"This doctrine has been held applicable to a wide variety of confidential and fiduciary relationships, it is in fact applicable to any situation where, in fact, influence was acquired or confidence reposed, whether the basis for the reposing of this confidence is moral, social, domestic or merely personal."

The American Law Institute Restatement of Law, 2d, Contracts 2d, Section 208 reads:

If a contract or a term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract. . . .

Two pertinent comments under this section appeared to be applicable to this case.

c. Overall Imbalance. Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a

determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performances. See Sections 79,364. Such a disparity may also corroborate indications of defects in the bargaining process, or may affect the remedy to be granted when there is a violation of a more specific rule. Theoretically it is possible for a contract to be oppressive taken as a whole, even though there is no weakness in the bargaining process and no single term which is in itself unconscionable. Ordinarily, however, an unconscionable contract involves other factors as well as overall imbalance.

d. Weakness in the Bargaining Process. A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms. Factors which may contribute to a finding of unconscionability in the bargaining process include the following: belief by the stronger party that there is reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

Section 208 is supported by Section 364. Effect of Unfairness.

(1) Specific performance or an injunction will be refused if such relief would be unfair because

(a) the contract was induced by mistake or by unfair practices;

(b) the relief would cause unreasonable hardship or loss to the party in breach or to third persons, or

(c) the exchange is grossly inadequate or the terms of the contract are otherwise unfair.

In citing Hatch v. Hatch, 46 Utah 218, (a voluntary conveyance to a son), and Bradbury v. Rasmussen, 16 Utah 2d 378, (a transfer to a niece reared as a daughter), appellants cite cases where "the testimony. . . and conduct completely negative the possibility of a mistake" (16 Utah 2d 385) and where the transfers were not inequitable and there were not present grounds of equitable cognizance. Appellants also omit such qualify language as,

> The doctrine of confidential relationship rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other. Mere confidence in one person by another is not sufficient alone to constitute such a relationship. The confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the confidence, and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other. Bradbury v. Rasmussen, 16 Utah 2d 378, 383,

and

> No general or hard and fast rule which shall govern or control in all cases can be promulgated, but every case must, to a very large extent, be determined upon the facts and circumstances present in that case. All that we can say, therefore, is that in this case the findings and conclusions of the trial court in refusing to set aside the deeds in question upon the ground of undue influence and want of mental capacity are not only clearly sustained by the evidence, but in our judgment, the findings and judgment are in accord with the greater weight of the evidence. Hatch v. Hatch, 46 Utah 218, 231.

Constructive Fraud. No part of the jurisdiction of the court is more useful than that which it exercises in watching and controlling transactions between parties standing in a relationship of confidence to each other. A party in a "semiconfidential" relationship who gains an advantage, "by superior knowledge and artful silence," whereby he drives an exhorbitant and unconscionable bargain is guilty of constructive fraud against which relief in equity will be granted. Gierth v. Fidelity Trust Company, 93 NJ Eq 163, 115 A 397, 18 ALR 976. Constructive fraud, sometimes called fraud in law, or implied fraud rests less upon furtive intent than actual fraud, it need not involve dishonesty or the element of deceit. Am Jur states:

> A mistake relievable in equity is said to be some unintentional act, omission or error, arising from ignorance, surprise, imposition, or misplaced confidence. Equity undoubtedly has jurisdiction to grant relief against a mistake amounting to constructive fraud. Accordingly, equity may and should always intervene to prevent unjust enrichment. . . by virtue of a mistake. 27 Am Jur 2d p. 552, Equity 28.

The evidence was clear and convincing as to an "overall imbalance." The sum total of the circumstances clearly corroborated plaintiff's claim that rescission was a proper relief and a remedy which would best do justice.

The evidence was clear and convincing that there was a unilateral mistake as regarding record fee ownership - plus

learning on October 7, 1980, that his property was claimed by the Bureau of Land Management; defendant knowing that the fee ownership was reflected in private ownership and thus subject to any valid adverse possession claims of plaintiff and to any applicable statute of limitations.

The evidence disclosed beyond a reasonable doubt that both parties believed the property was held in joint tenancy, when, in fact, it was held in tenants in common with an interest in the plaintiff's daughters.

Because of plaintiff's condition and his circumstances, because he was called in off the street with no advance notice or independent advice, because the proposal was that of the defendants by previous "plan", and because the writing was immediately drafted by defendant, Mary Lehmer, a skilled legal advisor and friend and neighbor, and thereupon signed by plaintiff without having had an opportunity to contemplate, seek independent advice, and/or search out ownership, the court was persuaded by clear and convincing evidence that plaintiff was not guilty of negligence in not being aware of record fee ownership and that his unawareness was not the result of inexcusable lack of due care and that rescission was proper.

POINT V

APPELLATE COURT TO GIVE CONSIDERABLE DEFERENCE TO FINDINGS AND JUDGMENT OF TRIAL COURT

Even in a proceedings in equity, "it is. . . well establish that because of the advantaged position of the trial court" the appellate court will "give considerable deference to his findings and judgment." Jacobson v. Jacobson, 557 P.2d 156, 158 (Utah 19

CONCLUSION

It is axiomatic that in the realm of equity, no formula is absolute and no rule is without exception. Defendants ignore this axiom and attempt to dissect and to establish absolutes from isolated particulars. Very simply, the court found that because of the "sum of the circumstances" that the plaintiff was entitled to relief. The salient points were (1) plaintiff (under a unique set of circumstances) was called in off the street on the spur of the moment into the home of his neighbors and friends without advance warning, (2) the gross disparity between the potential fair market value at the time of the transaction to the plaintiff and his daughters and the price paid, (3) both parties were acting upon a mutual mistake of substantial proportions, and (4) the existence of a unilateral mistake which was critical. The supporting evidence to these matters was not only clear and convincing but almost unchallenged.

Plaintiff's right to equitable relief rests upon the peculiar facts and circumstances. The ultimate issue. . . Which remedy would best do justice? The trial court appropriately determined that rescission was a proper remedy, i.e., returning the parties to the positions they occupied before entering into the contract.

Dated this 26th day of April, 1984.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I herewith certify that two copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Robert C. Campbell, Jr., and D. Barney Gesas of Watkiss & Campbell, 310 South Main Street, Suite 1200, Salt Lake City, Utah 84101, on this 26th day of April, 1984.

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