

1965

# Beehive Security Co. v. Fred G. Bush : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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BEEHIVE SECURITY COMPANY,  
a Utah Corporation,  
*Plaintiff-Appellant,*

-vs-

FRED G. BUSH, a/k/a GILES F.  
BUSH,  
*Defendant-Respondent.*

} Case No.  
10221

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BRIEF OF APPELLANT

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APPEAL FROM THE JUDGMENT OF THE  
THIRD DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY,  
HONORABLE STEWART M. HANSON, JUDGE

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## BRIEF OF APPELLANT

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### STATEMENT OF THE KIND OF CASE

This is an action to recover the sum of Nine Hundred Forty-Seven Dollars and Twenty-Nine Cents (\$947.29), balance due on a promissory note from the Defendant to the Plaintiff together with attorney's fees as provided in said note.

### DISPOSITION IN LOWER COURT

This case was tried without jury, the Court entering a judgment of No Cause of Action on Plaintiff's Complaint, from which judgment Plaintiff appeals.

## RELIEF SOUGHT ON APPEAL

Plaintiff seeks a new trial.

### STATEMENT OF FACTS

In this case the Plaintiff contended that on November 29, 1960, the Defendant executed and delivered to Plaintiff a promissory note (Exhibit P-8) and chattel mortgage (Exhibit P-9) for the payment of sums of money advanced in two checks of the Plaintiff, represented by Exhibits P-10 and P-11, which together with loan charges totaled Two Thousand Three Hundred Forty Dollars (\$2,340.00). Plaintiff denoted this account as Account No. 1600, the subject of this action. The Defendant contended that the signatures of Defendant contained on Exhibits P-8, P-9 and P-10 inclusive, were forgeries or in the alternative that the signatures of the Defendant were obtained through fraud and by trick.

It is undisputed that there were a series of loans and other transactions between the Plaintiff, the Defendant and third parties over a period of years. As to the genuineness of the signatures, the Defendant identified as genuine the signatures contained on Exhibits P-4 and P-5. As to the disputed signatures on the note and chattel mortgage (Exhibits P-8 and P-9) and on the disputed check (Exhibit P-10) the Defendant equivocated as to whether or not his signature was on these documents. It will be noted that on the disputed documents the signatures were in the form of "G. Fred Bush," while the admitted exemplars were executed, "Giles F. Bush."

The Plaintiff produced an expert witness, whose qualifications were admitted by Defendant's counsel by stipulation (TR-15), who stated that he examined the admitted exemplars of the Defendant's signature (Exhibits P-4 and P-5). The undisputed testimony of the expert witness was that even though a different first name and initial were used on Exhibits P-8, P-9 and P-10, that the signatures were consistent with and were written by the same hand.

It was established without contradiction that there was a balance due and owing on Account 1600, represented by the promissory note (Exhibit P-8) in the amount of Nine Hundred Forty-Seven Dollars and Twenty-Nine Cents (\$947.29) as of the date of trial.

Testimony was adduced to the effect that there was a good deal of confusion surrounding the application of payments to this account and as to the crediting of amounts which were received from this account and that the Plaintiff had suffered from many fictitious loans and other managerial and accounting problems. From this testimony the Court deduced that the Defendant was not liable to the Plaintiff on the alternative grounds in its memorandum decision as follows :

“There were many fictitious loans carried by the Plaintiff and that payments were switched back and forth between said loans, and, further, based upon the testimony of the Defendant, who appeared to be a very honest man, that he never received the monies involved in Plaintiff's First Cause of Action, it appears to the Court that *the loan in question was one of these fictitious loans,*

and in spite of the testimony of the expert, Goddard, the Court is of the opinion the Defendant did not sign the notes and mortgages in question, and if by chance it is his signature, that it was obtained by some kind of fraud or trickery.” (Emphasis Ours)

## ARGUMENT

### Point I

THE COURT ERRED IN FINDING THAT THE DEFENDANT DID NOT EXECUTE EXHIBITS P-8, P-9 AND P-10.

During the course of trial of this cause three witnesses testified relating to the Defendant’s execution of the question documents: the promissory note (Exhibit P-8), chattel mortgage (Exhibit P-9) and check (Exhibit P-10).

It will be noted that the Defendant had a series of business transactions with the Plaintiff corporation that extended over a period of years and at least one account, Account No. 1210, was extant at the time of execution of the questioned documents.

At time of pretrial the lower Court found that the sole consideration for execution of the promissory note (Exhibit P-8) received by the Defendant, if any, was a check in the amount of One Thousand Three Dollars and Eighty-Three Cents (\$1,003.83), Check No. 4621 (Exhibit P-10) of the Plaintiff, which check was made payable to, “G. Fred Bush”. The check on the obverse side contained an endorsement in blank in the name of “G. Fred Bush”.

Defendant's attorney, at time of pretrial, admitted the genuineness of certain documents, Exhibits P-4 and P-5. The Defendant admitted in an unsure fashion that Exhibits P-2 and P-3 contained his signature (TR-10 and TR-12).

At trial, testimony was adduced from three witnesses relative to the questioned documents. Upon direct examination the Defendant testified as follows:

Q. Mr. Bush, I show you Exhibit P-8 where a written signature "G. Fred Bush," appears and ask you, isn't it true that is your signature?

A. It sure looks like the way I write "Bush," but I never sign my name, "G. Fred Bush". I don't know. (TR-12)

As to Exhibit P-9 the Defendant stated:

Q. I show you now Exhibit P-9, Mr. Bush, and ask you if it isn't true that Exhibit P-9 contains your signature, "G. Fred Bush?"

A. That is the same thing again. It looks exactly like I would make the "Bush," but I couldn't give you an answer if that was my signature, no. (TR-14)

As to Exhibit P-10 the Defendant stated:

Q. O.K. I show you further what are marked as, "Exhibits P-10 and P-11," and ask you to — Excuse me, just Exhibit P-10, and ask you to examine the face and reverse side of that. Isn't it true that the reverse side, in other words, the indorsement (sic) portion of Exhibit P-10, contains your signature, "G. Fred Bush?"

A. It could be the same with the others. It sure looks like it, but I sure don't recall of ever signing it, and I couldn't answer. (TR-14)



The Defendant denied cashing the check in the amount of One Thousand Three Dollars and Eighty-Three Cents (\$1,003.83) and denied receiving any proceeds from this instrument.

The second witness, Mr. Percy Goddard, testified relative to the signatures on the questioned documents, Exhibits P-8, P-9 and P-10. The qualifications of Mr. Goddard as a handwriting expert were admitted by the Defendant's counsel. Mr. Goddard testified that he had, on the weekend prior to trial, examined Exhibits P-2, P-3, P-4 and P-5, documents which, by the Defendant and his counsel's admission, contained the genuine signature of the Defendant in the form and style, "Giles F. Bush." Mr. Goddard in his expert capacity compared these admittedly genuine signatures with signatures on Exhibits P-8, P-9 and P-10, the questioned documents containing the signature, "G. Fred Bush". Mr. Goddard pointed out the similarities in the letters used consistently between the questioned and unquestioned documents and concluded that the questioned documents were written by the same hand that wrote the admitted exemplars (TR-17). The only other testimony adduced relative to the execution of Exhibits P-8 and P-9 was from the former President and Manager of the Plaintiff, Mr. B. Spencer Young, Jr., and it was his recollection that he had received Exhibits P-8 and P-9 in the form in which they were offered and received in evidence by the lower Court on or about the date they bore. (TR-6)

At no time did the Defendant deny the execution of the documents but rather he feigned poor recollection

(TR-48) and finally at the close of trial in specific relation to Exhibit P-10 the following colloquy occurred between the Defendant and Plaintiff's counsel:

Q. Do you deny that is your signature on the reverse side of that check, indorsing (sic) that instrument in blank?

A. Well, I couldn't tell you that I ever signed it. I couldn't tell you that.

Q. I am asking you a specific question. Do you deny that is your signature on Exhibit 10, indorsing (sic) that check in blank?

A. To the best of my knowledge it is.

From this testimony the lower Court in its Findings of Fact found that the Defendant did not sign the note or mortgage (Exhibits P-8 and P-9) and further found that the Defendant received no consideration from said note and mortgage, i.e. the Defendant did not receive, endorse and negotiate the check of the Plaintiff corporation (Exhibit P-10) even though such instrument bears the blank endorsement of one, "G. Fred Bush" and is stamped "Paid" through the First Security Bank. The Defendant represented himself to be a man who ran a business and was acquainted with the effect of a blank endorsement (TR-89).

We recognize that the Utah Reports are replete with cases from this Court which recognize the time tested rule that the evidence adduced at trial must be viewed in the light most favorable to the prevailing party below, and if there is sufficient, competent, believable evidence substantiating the Court's findings then the Judgment will be affirmed.

*Allen v. Radium King Mines Inc.*,  
11 Utah 2d 28, 354 Pac. 2d 578

*Christensen v. Christensen*,  
9 Utah 2d 102, 339 Pac. 2d 101

Further, as stated in Volume 5-A CJS, Appeal and Error, Section 1656 (9), p. 520:

“To justify a reversal, the failure or insufficiency of the proof must relate to a vital point in the case and amount to a complete absence of substantial supporting evidence . . .”

We respectfully submit that there is no substantial evidence to support the Findings of Fact of the Court below. All testimony and inferences drawn from the testimony adduced at trial leads to the inescapable factual conclusion that the Defendant did execute and deliver to the Plaintiff the promissory note, (Exhibit P-8) the chattel mortgage, (Exhibit P-9) and received as consideration therefore, the check (Exhibit P-10) in the amount of One Thousand Three Dollars and Eighty-Three Cents (\$1,003.83). Such check was endorsed in blank by the Defendant and subsequently negotiated and paid. To disregard such testimony flies in the teeth of no less an authority than St. Thomas Aquinas, who stated in his *Summa Theologica*, Part 1 of Second Part Q, 105, Article 2, reply to objective 8:

“In the business affairs of men there is no such thing as demonstrative and infallible proof, and we must be content with a certain conjectural probability, such as that which an orator employs to persuade. Consequently, although it is quite possible for two or three witnesses to agree to a falsehood, yet it is neither easy nor probable that

they succeed in so doing; therefore their testimony is taken as being true, especially if they do not waiver in giving it, or are not otherwise suspect. Moreover, in order that witnesses might not easily depart from the truth, the Law commanded that they should be most carefully examined, and that those who were found untruthful should be severely punished, as stated in Deut. 19. 16, seqq.”

## Point II

THE COURT ERRED IN ITS CONCLUSION THAT IF THE DEFENDANT DID SIGN THE DOCUMENTS THAT ARE THE SUBJECT MATTER OF THIS ACTION THAT THE DEFENDANT'S SIGNATURE WAS OBTAINED THROUGH SOME MANNER OF FRAUD OR TRICKERY.

The Court below found in its memorandum decision that if the signatures of the Defendant were not forged, then these signatures were obtained through some kind of “fraud or trickery”. It is worthy of note that Defendant's counsel in framing his Findings of Fact for the signature of the Court, did not allude to this horn of the lower Court's dilemma.

That there were many problems relating to the operation of the industrial loan business of the Plaintiff goes without saying. The record in the instant case, from the time of pretrial, wherein Defendant's counsel produced pretrial Exhibit One (Exhibit P-13), led to a dismissal of Plaintiff's Second Cause of Action and to the reduction of the amount claimed due from Defendant to Plaintiff on Account No. 1600, by the sum of One Thousand Dollars (\$1,000.00) together with interest, in-

surance and other charges. In the Court below Plaintiff sought recovery of only amounts which could be shown as advanced to Defendant (Exhibit 10) less payments credited to Defendant's account. Certain erroneous credits to the subject account were pointed out to the trial Court and a complete rationalization of this account was testified to by Plaintiff's witness (TR-51).

To say the operations of Plaintiff during the period when the transactions with the Defendant occurred were in keeping with sound business practices would be the furthest thing from fact. The Plaintiff, after maneuvering itself through a series of transactions such as these with the Defendant, became insolvent and is presently undergoing Reorganization Proceedings under the provisions of Chapter X of the Bankruptcy Act.

On the other hand, the Court below concluded that the issue certified in paragraph 7 of the pretrial order,

“. . . that the signature was obtained by fraud and trick . . .” was supported by fact at the trial of this cause.

The landmark Utah case on fraud, *Pace v. Parrish*, 122 Utah 141, 247 Pac. 2d 273, sets forth with clarity the required elements for proof of fraud, and the requirement that such proof of the respective elements must be made by clear and convincing evidence. Such was the rule as adopted by the Court recently in the case of *Universal C.I.T. Credit Corporation v. Rex L. Sohm, et ux*, 15 Utah 2d 262, 391 Pac. 2d 293.

In the instant case no attempt was made by the Defendant to establish the elements of fraud save the Defendant's testimony that he signed the note in question (Exhibit P-8) in blank. Suffice to say that the Defendant also endorsed the check (Exhibit P-10) in blank.

### CONCLUSION

Counsel recognizes the respte this Court has for the trier of the fact, and, further, that the trier of the fact is the sole person who can judge the credibility of the witnesses producing such facts, but where, as in the case now before the Court, there is no substantial evidence to support the Findings of the Court below, and there is no proof, as a matter of law, to substantiate the allegation of fraud and trickery so as to vitiate this transaction, we urge that this Court should find that the Court below erred and the Plaintiff should be granted a new trial.

Respectfully submitted,

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