1975

William J. Colman v. A. J. Butkovick and Geneva A. Butkovich, G. W. Anderson and Jeanne D. Banks : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

STATE OF UTAH

WILLIAM J. COLMAN,
Plaintiff-Respondent,

vs.

A. J. BUTKOVICH and GENEVA A. BUTKOVICH, husband and wife; G. W. ANDERSON and JEANNE D. BANKS, and all unknown persons who claim any interest in the subject matter of this action,
Defendants-Appellants.

Case No. 13868

APPELLANTS' BRIEF

Appeal from the Fourth Judicial District Court
Of Summit County, Honorable Allen B. Sorensen, Judge

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IN THE

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NATURE OF THE CASE

Plaintiff sued to quiet title to a parcel of property located in Park City, Utah, claiming ownership and adverse possession. The defendants Butkovich answered claiming title and possession superior to plaintiff's to all but a small part of the property claimed by plaintiff.

DISPOSITION IN THE LOWER COURT

After trial the lower court entered a decree quieting title to the property in plaintiff based on a finding that an affidavit gave plaintiff color of title. The lower court denied a motion to amend the findings of fact and conclusions of law and to alter the judgment filed by defendants.

RELIEF SOUGHT ON APPEAL

Appellants seek to have the decree quieting title in plaintiff reversed and to have a decree entered quieting title in defendants covering the property claimed by defendants.

STATEMENT OF FACTS

The defendants Butkovich obtained their title to the property by two quit-claim deeds from Summit County on July 9, 1964, and April 15, 1965. Summit County had previously, in 1915 and 1940, obtained title by Auditor's Tax Deeds resulting from tax sales in 1910 and 1935. The second deed from the County was given to correct a slight error in the description on the first deed (R. 62).

The Butkoviches thereafter requested Security Title Company to issue title insurance to them on this property. Security Title Company first had Butkoviches convey the property to Security Title Company, using a metes and bounds description, and Security Title Company reconveyed the property to Butkoviches using the same description.

The plaintiff claims his title through a deed to him from Robert T. Banks dated November 12, 1968. There is no conveyance of any kind to Robert T. Banks. However, Banks signed an affidavit asserting that he was trustee of the Assets Corporation which "became the majority owner" of the assets of Park City Townsite Company.

The history of the property involved in this action is contained in the abstract of title introduced in evidence as Exhibit No. 11. Since the entries in this abstract are not in chronological order, summaries of the chain of title were prepared and introduced into evidence as Exhibits 11A and 11B. Because of the numerous defects in the title claimed by Colman, these exhibits are set forth in full. In explanation of the exhibits, the legal description used in each conveyance is underlined and appears just ahead of the conveyances using that description and the numbers in parentheses indicate the page in the abstract where each conveyance is found.

EXHIBIT NO. 11A

According to Abstract of Title No. B-26963
Prepared by Western States Title
Insurance Company

NW ¼ SE ¼ § 16, T2S, R4E, SLB & M

United States of America

↓

(1) Frederick A. Nims — Patent 2/26/77

↓

(3) Edward P. Ferry — Quit Claim Deed 1/13/80

↓ Those Parts of the NW ¼ SE ¼ § 16, T2S, R4E,

not subdivided into lots and blocks and lying Southwest of Norfolk Avenue in Park City.

(6) David C. McLaughlin Warranty Deed 2/8/83

NW ¼ of SE ¼ § 16, T2S, R4E, SLM; also all of the unplatted land lying and being in the above mentioned legal subdivisions of land.

(44) Oliver C. Lockhart, Trustee Decree 8/19/14

Beneficiaries:

Edward P. Ferry 2/5
Amanda H. F. Hall 1/5 of 2/5
Hannah E. Jones 1/5 of 2/5
Heirs of Mary L. F. Eastman 1/5 of 2/5
Edward P. Ferry 1/5 of 2/5
Frederick A. Nims and David D. Erwin } 1/5

No conveyance from Oliver C. Lockhart

An undivided one-half of all the right, title, and interest of said Edward P. Ferry, of, in and to the Park City Townsite, situated in Summit, State of Utah.

William Montague Ferry, guardian of person and estate of Edward P. Ferry, a mentally incompetent person.

(10) The Michigan Trust Company Deed 12/26/13

All its right, title and interest in and for the Park City Townsite, situated in Summit County, State of Utah.

(19) The Assets Corporation Deed 12/28/16

No conveyance from the Assets Corporation

All the unplatted land and the unoccupied and unused land lying and being in the NE ¼ of the NE ¼ of Section 21, and the NW ¼ of the SE ¼ and the E ½ of SE ¼ of Section 16, Township 2 South, Range 4 East, Salt Lake Meridian.

(23) McCormick & Co., Bankers
Decree of Foreclosure
3/20/16 Rec. 9/16/49

v.

W. I. Snyder, as Trustee

(12) No buyer named (No sale stated)
Sheriff's Certificate of
Sale 5/23/16

(14) Park City Townsite Company
Assignment of Certificate
of Sale 11/21/16

NW ¼ of SE ½ of § 16, T2S, R4E, SLM

(16) Park City Townsite Company
Sheriff's Deed 11/21/16

No conveyance from Park City Townsite Company

The remaining assets of said Assets Corporation

(38) Robert T. Banks By own affidavit 11/12/68

"Assets Corporation became the majority owner of all the property and assets of said Park City Townsite Company except a small holding of W. J. Snyder."

All that part of the NW ¼ of the SE ¼ of § 16, T2S, R4E, SLM that lies Westerly of Norfolk Avenue.

Robert T. Banks, as Trustee and individually

(36) William J. Colman Warranty Deed 11/12/68

EXHIBIT NO. 11B

Chain of Title
According to Abstract of Title No. B-26963
Prepared by Western States
Title Insurance Company

Lots 21 to 32, inclusive, Block 29, Park City, also 16 Lots in rear of Block 29.

D. C. McLaughlin Estate

(43) Summit County Tax Sale 12/19/10

(47) Auditors Tax Deed 6/11/15

All of unplatted land in Block 29, and all land West of Block 29, and part of Lot 1; part of Lot "A"; Park City

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(49) Summit County Treasurer (Park City Townsite Co.)

Summit County Tax Sale 12/21/35
Marginal Auditors Tax Deed 5/25/40

(50) A. J. Butkovich and Geneva A. Butkovich Quit Claim Deed 7/9/64

(58) Correction Deed Quit Claim Deed 4/15/65

Lots 21 to 32 inclusive, Block 29, and 16 Lots in the rear of Block 29, all unplatted land in Block

29, and all land West of Block 29 and lots 1 and A, Park City Survey. Metes and Bounds description described to-wit:

BEGINNING at a point which is the S.W. corner of the N.W. ¼ of the S.E. ¼ of Section 16, T2S, R4E, SLB & M., and running thence Easterly along ¼ ¼ Section line a distance of 1200.0 feet, more or less to a point on the West Line of Lot 2, Block 29, Park City Survey and running thence N. 23°38′ W. 410 feet; thence S. 66°57′ W. 75 feet; thence, N. 23°38′ W. 455 feet to a point on the North Line of Block 28, Park City Survey; thence No. 66° 57′ E. 75 feet; thence N. 23°38′ W. 79.3 feet to a point on the N.W. corner of Lot 2, Block 27, Park City Survey; thence S. 66°57′ W. 75 feet; thence No. 23°38′ W. 50 feet; thence N. 66°57′ E. 75 feet to a point on the N.W. corner of Lot 4, Block 27, Park City Survey; thence 23°38′ W. 225 feet to a point on the N.W. corner of Lot 13, Block 27, Park City Survey; thence S. 66°57′ W. 75 feet; thence N. 23°38′ W. 55 feet; thence S. 66°57′ W. 75 feet, thence N. 23°38′ W. 50 feet, to a point on the North property line of First Street (line extended) thence along said North line (extended) N. 66°57′ E. 75 feet to a point on the S.W. corner of Lot 9, Block 26, Park City Survey; thence N. 23°38′ W. 144.8 feet to a point on the ¼ Section line of said Section 16; thence West along said ¼ line 490.0 feet to the center of said Section 16; thence S. along the ¼ line a distance of 1320.0 feet more or less to the point of beginning.

(31) Security Title Company

Warranty Deed 2/23/66

(33) A. J. Butkovich and
Geneva A. Butkovich
Quit Claim Deed 2/23/66

It should be pointed out that the order in which conveyance (19) appears above has been changed from that on Exhibit No. 11A to further clarify the chain of title.

Contrary to the assertions of Banks in his affidavit (page 38 of Exhibit No. 11) that the corporation was winding up and that he was named as trustee to dispose of the assets, no assets of the Assets Corporation were transferred to Banks and the corporation was not winding-up. Instead, the minutes of the directors' meeting on the date referred to in the affidavit (Exhibit No. 13) show that the secretary was instructed to reinstate the company in good standing, the president was authorized to negotiate a loan from the bank. Further, the corporation continued to exist, was conveying property, redeeming taxes, selling patented mining claims, all as a corporation, and depositing the proceeds of sales in a corporate bank account, in 1940, 1944 and 1961 (Exhibits No. 14 & No. 15).

Moreover, Banks wrote a letter on September 20, 1968, giving instructions on how to establish title to this property which he knew he didn't have. This letter was introduced as Exhibit No. 16 and is set forth in full under Point I of the Argument section of this brief.

After Butkovich received his deed to the property in 1964, he took a bulldozer on the property and blocked off entrances, drove in stakes and tied ribbons on trees

to mark the boundaries and put up "no trespassing" signs. He also cleared brush off the ground and leased the property to United Park City Mines Company for use as a ski run (R. 62-63, Exh. 20).

After Colman received his deed in 1968 he also claims to have posted "no trespassing" signs on the property and to have chased off Christmas tree cutters (R. 10). Beyond that he has taken no action with respect to the property that would show any ownership (R. 15). At the trial his attorneys admitted that he did not have possession of the property "within the meaning of the statute" (R. 74).

Upon learning of the claim of Butkovich to this property, Colman filed this action on June 24, 1971, praying for a decree quieting title in him based on ownership and adverse possession.

ARGUMENT

In this case the plaintiff, Colman, claims to be the owner of the fee title to the property in dispute. His claim of adverse possession was abandoned at trial because he didn't have possession (R. 74) and had not paid taxes for the required seven years. The defendants Butkovich are the owners of a tax title obtained by quitclaim deed from Summit County, which obtained title by Auditor's Tax Deed years earlier. While the validity of tax titles are often challenged, the validity of defendants' tax title is not relevant here because the plaintiff has the burden to establish his title first before he has

standing to challenge defendants' tax title. There are two fundamental points which require the reversal of the decree quieting title in plaintiff and the dismissal of plaintiff's case. These points will be considered first and then the arguments establishing defendants' right to have the property in dispute quieted in them will follow.

POINT I.

PLAINTIFF HAS NO TITLE TO THE PROPERTY AND THEREFORE NO STANDING TO CHALLENGE DEFENDANTS' TITLE.

A fundamental point of Utah law in cases of this kind is that plaintiff can prevail only on the strength of his own title and not because of any weakness in the title of defendants. *Olsen* v. *Park Daughters Investment Company*, 29 U. 2d 421, 511 P. 2d 145 (1973); *Music Service Corporation* v. *Walton*, 20 U. 2d 16, 432 P. 2d 334 (1967); *Babcock* v. *Dangerfield*, 98 Utah 10, 94 P. 2d 862 (1939). As to the quality of title which plaintiff must establish, this Court stated in the *Music Service* case, supra, at page 336, quoting from the earlier case of *Cottrell* v. *Pickering*, 32 Utah 62, 88 Pac. 696 (1907):

> ". . . Of course, where one proves a perfect chain of paper title from its original source, no proof of actual possession at all is required. In such event the presumption would be all sufficient and the title would be a complete and perfect title. But when this is not done, a title prima facie is shown by a grant from some one who held posses-

> sion, or by such grant and possession under it by the grantee . . ."

These same requirements are set forth in the *Babcock* case, supra.

In the instant case the plaintiff introduced only the deed from Banks to himself. He has no chain of title from the patentee, he has admitted that he did not have possession of the property, and he did not attempt to prove possession by his grantee, Banks, as required by the above cases. Therefore, he has shown no title in himself and his complaint should have been dismissed.

The chain of title, or lack of it, is shown on Exhibit No. 11A set forth in the Statement of Facts above. There are numerous defects in this chain, all of which should be obvious from reading Exhibit No. 11A, but are summarized here:

1. No conveyance from Oliver C. Lockhart (44).
2. The conveyance from William Montague Ferry, as guardian of Edward P. Ferry (10), at most, could convey a one-fifth beneficial interest in the "Park City Townsite," which is not the description by which his trustee took title.
3. The Assets Corporation, at most, received a one-fifth interest in the "Park City Townsite," whatever that is (19).
4. No conveyance from the Assets Corporation.
5. The Sheriff's Certificate of Sale (12) is in-

adequate since it does not indicate that the property was sold nor does it name a buyer.

6. The Sheriff's Deed (16) uses a different property description than that in the Decree of Foreclosure (23).
7. No conveyance from the Park City Townsite Company.
8. Affidavit of Robert T. Banks (38) is not competent to establish title since it is hearsay, self-serving and not the best evidence.
9. The description of the property in Banks' affidavit (38) is inadequate and shows on its face that the Assets Corporation was, at most, only a part owner of some unidentified assets.
10. There is no conveyance to Banks.

All of these defects in the title of plaintiff were admitted by plaintiff's own expert witness (R. 40-53). The plaintiff, however, overlooks all of these defects and relies solely on the affidavit of Banks to establish his title. The affidavit is, of course, hearsay and was properly objected to as such. It is thus inadmissible to establish any of the facts which it asserts. The fact that it was recorded does not make it admissible. That no effect is to be given to such self-serving recitals in recorded documents is established by *State Road Commission* v. *Thompson*, 17 U. 2d 412, 413 P. 2d 603 (1966). The facts in that case were almost identical to those now before the Court. There, the claimant of the fee title received a quit-claim deed from Harriet Allenbach. The deed contained a re-

cital that she was the widow of Jacob I. Allenbach, who was the record title holder at that time. This Court stated:

> "A recital in a deed which would indicate that the grantor is an heir or otherwise might deraign title from a record owner is merely a self-serving declaration. . . . 'The recital is, of course, no evidence in favor of anyone claiming under the grantor. It is no more competent as evidence, as against a stranger to the deed, of the facts stated, than it would be if embodied in a letter *or any other paper*'." (Quoting 6 Thompson on Real Property, § 3110 (1962 Replacement) (Emphasis added.))

In the *Thompson* case both parties had been paying taxes on the property although neither had been in actual possession. The claimant of the legal title had challenged the tax title of the other party and the tax title was proved to be defective. However, the Court held that since the party claiming the legal title had failed to prove its title (the hearsay recital in the deed being ineffective), it *had no standing* to challenge the tax title even though that tax title was defective. It would appear impossible to find a case more dispositive of the issues now before this Court. Giving the plaintiff the benefit of every doubt and accepting Banks' affidavit at face value, plaintiff has not proved his title and has no standing to challenge the title of defendants.

However, the plaintiff's difficulties with Banks' affidavit are only beginning. The most serious difficulty is

that the assertions in the affidavit are false and it appears that he attempted to establish title in himself by fraud. Banks was faced with two hurdles to get the property into his own name. In the admitted absence of any conveyances, he had to get title from Park City Townsite Company to Assets Corporation, of which he said he was a director and officer, and then to himself. The affidavit attempts to assert that since 1916 the Assets Corporation was the "*majority owner* of all the property and assets of Park City Townsite Company," and that in 1920 the President of Assets Corporation, by a resolution of Assets Corporation, "was directed to *take over the affairs* of Park City Townsite Company."

Such phraseology is hardly the epitome of legal precision. But it is clear in reading the affidavit in a manner most favorable to Banks and to plaintiff that the Assets Corporation was not the *sole* owner of the property and assets of Park City Townsite Company, and no attempt at all is made to show how plaintiff has succeeded to the other ownership interests. Moreover, it is difficult to understand how the resolution of one corporation to "take over the affairs" of another has any effect in accomplishing this.

Even ignoring these rather massive problems, the affidavit also asserts

> "That on or about the 19th day of October, 1936, at a regular meeting of the directors of said Assets Corporation, on motion duly made and passed the remaining assets of said Assets Corporation

> were transferred, assigned and delivered to me for the purpose of paying all obligations of said corporation and disposing of any remaining assets of the corporation and dispursing any and all moneys received from sale or disposal of said assets to the remaining stockholders of said corporation."

The problem is that the minutes of that directors' meeting on October 19, 1936, which have been admitted in evidence as Exhibit 13, show that Banks' recital of what happened is totally false! Rather than show that the remaining assets of Assets Corporation were transferred to Banks for purposes of paying all obligations, disposing of any remaining assets and "dispursing (sic)" all moneys received from sale of assets to the remaining stockholders, as Banks alleges, the minutes show that the secretary was instructed to reinstate the company in good standing by payment of delinquent franchise taxes, and to redeem certain mining claims from delinquent taxes. The president, Mr. Ferry, was authorized to negotiate a loan from the First National Bank of Salt Lake City. These are hardly the acts of a company undergoing dissolution. The only reference in those minutes vaguely reminiscent of the Bank's affidavit is authorization to Mr. Ferry (*not* Mr. Bank) to "take over the affairs of the company with a view to disposing of its property." It is not clear from the minutes what company is meant by "that company," but even if it were intended to be the Park City Townsite Company, such authority was clearly not given to Banks.

Far from being a corporation which in 1936 had authorized Banks to wind up its affairs, the corporation in 1940 and 1944 was conveying property, without any reference to Banks, and was redeeming claims from delinquent taxes as shown by the minutes in Exhibit 14.

Exhibit 15 is the minutes of a board meeting of the Assets Corporation in 1961, which Banks signed as Secretary. These minutes authorize the sale of certain patented claims, and report the sale of other claims, the proceeds from which were deposited in the corporate bank account. Obviously, Banks was far from acting as a trustee to liquidate the corporation.

Far more serious is a letter from Banks himself written shortly prior to the date of his deed to plaintiff, which has been admitted in evidence as Exhibit 16 and which shows most clearly that Banks himself knew his claim to title was improper.

The letter in its entirety is as follows:

> "Yours of 9-16 and 9-17 with Earnest Money Agreement arrived yesterday. The price is O.K. and I am enclosing 2 signed copies of the E.M.A.
>
> "Now — how to get title to this acreage. I have gotten the papers from the auditor who is still ill, and given them to my son Bill — and he will go thru them in the next few days — and dig out and give me anything that has any reference to Park City Townsite — and I'll send them to you.
>
> "When I received all the data on the Assets Corp. from the lawyer in Idaho Falls, who had

received them from your office after Geo. Critchlow died they included stock book — seal — minute book and ledger of the Assets Corp. — but nothing of this nature of the Park City Townsite Co. What happened to these I don't know, only George knew the story. The only thing I know of the Townsite Co. are in the minutes of the Assets Corp. and contained in the pages I cut out of the Minutes Book and mailed to you — and from the old ledger which I quoted to you in full specifying that the Assets Corp. took over the Townsite Co. at an assumed value of $2300 — That was Dec. 20 -1916. This valuation was later raised to $25,000 in August 10th 1922 — and that's it unless Bill can dig up something. George Critchlow must have had the stock book at one time because in the minutes, which I sent you, they issued 10 shares each of Townsite stock to Bill Ferry and F. Tom Boise — I suppose to qualify as directors — or some such purpose -

"I've thought this over and I think we would get into a hell of a mess trying to prove Park City Townsite Co (given or sold) to Assets Corp. (no longer an entity) and the Assets Corp. had sold everything left to me for $1.00.

"Instead lets say I am the Park City Townsite (anything which is left) which is true. In order to do this — lets have, say 100 printed letterheads and envelopes, using your Salt Lake address and printing my name Robert T. Banks Trustee."

"Then you write a letter to Blanch R. Young Treas. Summit Co. and state that the properties listed under Park City Townsite Co. W. A. Snyder Trustee should be changed to Robert T.

Banks Trustee inasmuch as W. A. Snyder has been dead for several years . I will sign this letter.

"Then say we have received the Valuation notices of these properties and wish to pay the taxes when tax notices are mailed out in Oct this year — and the notices should be mailed to 414 Walker Bank Bldg.

"If this is O.K. I will then open a checking account at Walker Bank under the name of Park City Townsite Co., Robert T. Banks Trustee — I used to have 2 accounts at the Bank where I was well known — under the name Robert T. Banks — and Robert T. Banks Mgr. — and borrowed money from them from time to time — Then I will pay the taxes from this Townsite Acct.

"This will in no way involve you as I am only using your office and you are acting as my atty.

"If you think it best you could go up to Coalville in advance and set things up with the Co. Treasurer, before sending the letter. Let me know what you think of this idea — If O.K. then I could deed the properties to Coleman under my signature as Trustee.

"I don't want to do anything dishonest and if later I get in trouble I can show from records the Park City Townsite belonged to Assets Corp. — and I bought everything that was left of the Assets Corp. when the Corp. was dissolved.

"But in my opinion it would take a lot of time and expense to go that way rather than the way I suggest.

"I don't think it advisable for you to come up here until we see what Bill digs up.

"I am enclosing 50.00 for a trip to Coalville and the stationery — if more say so.

"I think the price you got is a good one and shows the ski activity in and around Park City.

"Let me hear from you."

In summary, Banks says, "Now — how to get title to this acreage . . . I've thought this over and I think we would get into a hell of a mess trying to prove Park City Townsite Co. (given or sold) to Assets Corp. (no longer an entity) and the Assets Corp. had sold everything left to me for $1.00. Instead let's say I am the Park City Townsite . . ."

But for some reason Banks changed his mind and less than two months later asserted by affidavit as a fact an allegation which he acknowledged would get him "into a hell of a mess" — that Park City Townsite Company gave or sold to Assets Corporation, which in turn transferred to him.

Surely a false, self-serving, hearsay affidavit cannot establish title, nor even color of title, in plaintiff. This Court has held that not even a contract of purchase is a written instrument upon which color of title can be based. *Memmott* v. *Bosh*, ... U. 2d ....., 520 P. 2d 1342 (1974). Plaintiff has no title and, therefore, no standing to challenge defendants' title. His relief is in a claim

for fraud or on the warranties in his deed against Banks for return of his purchase price.

POINT II.

PLAINTIFF'S ACTION IS BARRED BY THE STATUTES OF LIMITATION.

The statutes of limitations as they apply to this case read as follows:

Section 78-12-5.1

> . . . with respect to actions . . . brought . . . for the recovery or possession of or to quiet title or determine the ownership of real property against the holder of a tax title to such property, no such action . . . shall be commenced . . . more than four years after the date of the tax deed, conveyance or transfer creating such tax title unless the person commencing . . . such action . . . or his predecessor has actually occupied or been in possession of such property within four years prior to the commencement . . . of such action . . .

Section 78-12-5.2

> No action . . . for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced . . . against the holder of a tax title after the expiration of four years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other purchase(r) thereof at any public or private tax sale . . . provided, however, that this section shall not bar

> any action . . . by the owner of the legal title to such property where he or his predecessor has actually occupied or been in actual possession of such property within four years from the commencement . . . of such action . . .

It is established by the evidence that the Defendants Butkovich are the holders of a tax title obtained from Summit County in July, 1964. The tax title itself was created much earlier when the property was conveyed to Summit County in 1915 and 1940. This action was commenced in June of 1971, more than four years from the date of the creation of the tax title. Therefore, under provisions of the above statutes, no action can be brought unless the Plaintiff Colman has "actually occupied or been in actual possession" of the property involved. Thus, the only important question is whether or not the Plaintiff Colman has satisfied this requirement of *actual* occupation or possession.

Mr. Colman stated at the trial that he had not lived on the property, nor constructed anything on it, nor put up a fence, nor planted anything, nor cultivated it, nor plowed it, nor occupied it. His only acts with respect to the property, according to his own testimony, were to inspect it, to show it to others, to chase away Christmas tree cutters and to place some temporary "no trespass" signs on the property. His attorneys conceded at the trial that he did not have possession of the property at any time as required by the statutes.

The only cases which have construed the foregoing

statutes have not discussed what constitutes actual occupation or possession, but in each case the party challenging the tax title had not occupied nor possessed the property. Under the cases which consider constructive possession of property, the acts of Colman with respect to this property would not even constitute constructive possession. This is so because the purpose of the statute requiring possession is to "bring it home" to the world and to any party interested in the property that the party in possession is making a claim to that property. The case of *Day* v. *Steele*, 111 Utah 481, 184 P. 2d 216 (1947), was decided under a claim of adverse possession, as the Plaintiff was claiming here but abandoned that claim at trial, although not construing the statutes quoted above since those statutes were not passed until later. That case held that leveling the property, dumping loads of dirt thereon, clearing weeds, storing junk on the property, allowing the use of the property for a carnival and placing a commercial sign on the property was not sufficient to constitute adverse possession. Referring to other cases where the adverse possession was held sufficient, the Court in *Day* v. *Steele* said, "the changes were such that they would apprise anyone that the land was being used in the manner in which the owner would so use it. The changes were substantial and of a permanent nature such as remained visible for the duration of the statutory period and not temporary acts or such as could be mistaken for mere occasional trespasses." The acts of ownership in *Day* v. *Steele* were certainly more substantial and

more permanent than those of Colman with respect to the property involved here, and yet those acts were held insufficient.

It should be obvious from the above quoted statutes and related statutes, however, that more, in the way of possession, is required under Sections 78-12-5.1 and 78-12-5.2 than under other statutes. These sections require *actual* occupation and *actual* possession, which can only mean actually residing or conducting a business on the property so as to make it obvious to anyone at any point in time that the property is owned by someone. This requirement of actual occupation is in contrast to the requirements of other possession or adverse possession statutes. For example, the first sentence of Section 78-12-5.1, which applies only when no tax title is involved, only requires the party to be "seized or possessed" of the property. The first sentence of Section 78-12-7.1, which also applies only when no tax title is involved, requires the property to be "held or possessed adversely." The first sentence of Section 78-12-12.1, which applies to a party claiming adverse possession, requires the land to be "occupied and claimed". In none of these statutes is the word "actual" used in connection with occupation or possession and obviously the legislature had a greater requirement in mind when it used the word "actual" in Sections 78-12-5.1 and 78-12-5.2. The ordinary and usual meaning of that word requires residence or conducting of a business upon the property claimed. This has not been done according to the admission of the plaintiff,

and therefore the plaintiff's Complaint should have been dismissed.

Furthermore, Colman did not receive his deed to the property until November of 1968. This was more than four years after Butkoviches received their tax title in July 1964 and, of course, many years after the county received its deeds in 1915 and 1940. Colman makes no claim of ownership or possession prior to the date of his deed and, of course, would have no right to do so. Under the case of *Peterson* v. *Callister,* 6 Utah 2d 359, 313 P. 2d 814 (1957), aff'd on rehearing, 8 U. 2d 348, 334 P. 2d 759 (1959), plaintiff has no right to make any claim for this property after four years have expired. The Court there stated at page 816:

> If read literally and not in context with the entire statute, some of the wording might make it appear that one holding a tax title, say, for twenty-five years, who commences an action thereon, could be defeated if a defendant having a record interest in the property could show that he had possession of the property, even for a brief time, within the four years next prior to the commencement of the action. We believe the legislature had in mind a four-year statute of limitations barring claims against tax titles, which four-year period dated from the initiation of the tax title, during which period any claimant against the tax title must have had possession of the property to protect any claim he might have. Any other interpretation does not square with the general nature and purpose of the act, and could lead to novel and, we believe, unintended results, so as

> to defeat the entire purpose of a statute that seems to be designed to settle, not confuse, and to make certain, not uncertain, titles based on statutory liquidation of tax charges.

In *Pender* v. *Alix*, 11 Utah 2d 58, 354 P. 2d 1066 (1960), summary judgment was held "inescapably" proper where no possession was shown within four years of the issuance of the tax deed by the party attacking the tax title. There is no dispute of these facts here. Colman did not have any kind of possession, let alone *actual* possession, within four years from the date of the tax deeds to the county in 1915 and 1940 nor within four years from the date of the deed to Butkoviches in July, 1964, nor at any time for that matter. Dismissal of Colman's complaint and judgment for Butkoviches should be "inescapable".

POINT III.

TITLE TO THE PROPERTY SHOULD BE QUIETED IN DEFENDANTS BUTKOVICH.

The adverse possession statutes as applicable to the claim of Defendants Butkovich is as follows:

Section 78-12-7.1

> . . . if in any action any party shall establish prima facie evidence that he is the owner of any real property under a tax title held by him and his predecessors for four years prior to the commencement of such action and one year after the effective date of this amendment he shall be

> presumed to be the owner of such property by adverse possession unless it appears that the owner of the legal title or his predecssor has actually occupied or been in possession of such property under such title or that such tax title owner and his predecessor have failed to pay all the taxes levied or assessed upon such property within such four-year period.

The evidence shows that defendants Butkovich are holders of a tax title and have paid the taxes for all years since acquiring the tax title. Therefore, Section 78-12-7.1 presumes the defendants Butkovich to be the owners of the property by adverse possession. Unless *actual* occupation by Colman is shown, the title to the property is presumed to be in Butkoviches. As shown under Point II above, the admissions of Colman established that he did not have actual possession of the property and there is no evidence available to overcome the presumption of title in Butkoviches. There being no dispute of these facts, defendants are therefore entitled to judgment quieting title in them.

The position of plaintiff at the trial has been to ignore his own lack of title and only attempt to show some weakness in defendants' tax title. Plaintiff overlooks the point that the validity of defendants' tax title is irrelevant. Section 78-12-5.3, Utah Code Annotated, states:

> The term "tax title" as used in Section 78-12-5.2 and Section 59-10-65, and the related amended Sections 78-12-5, 78-12-7, and 78-12-12,

> means any title to real property, *whether valid or not*, which has been derived through or is dependent upon any sale, conveyance or transfer of such property in the course of a statutory proceeding for the liquidation of any tax levied against such property whereby the property is relieved from a tax lien.

The purpose of the legislature in passing these sections of the Code was to lay to rest any questions as to the validity of tax titles after four years. Defendants' tax title has been held for more than the required four years and, therefore, its validity cannot be challenged. *Layton* v. *Holt*, 22 Utah 2d 138, 449 P. 2d 986 (1969).

Furthermore, the claimed problem of identifying the land deeded to Butkovich from Summit County, was resolved by plaintiff's own expert witness who testified that he could locate that description with the reference in the deed to Park City (R. 33-34). It was established that the initials "P.C." on the deed is a standard, well-known and commonly accepted designation for property in the Park City Townsite (R. 90-91). There is no question about the location of this property. Both the witnesses for plaintiff and defendants testified that they could locate the property on defendants' tax deed.

Since the location of the property described on the deeds to defendants was not in doubt, the plaintiff's attempt to show a weakness in defendants' title failed. Again, the validity of defendants' tax title is not relevant since plaintiff failed to show actual possession of the

property by him. Title to the property should, therefore, have been quieted in defendants.

POINT IV.

THE LOWER COURT ERRED IN SUSTAINING THE OBJECTION TO THE EXPERT TESTIMONY LOCATING THE PROPERTY DESCRIBED ON EXHIBITS 1 AND 2.

The witnesses for both plaintiff and defendant established that the property described on the deeds to defendants could be located on the ground and therefore the location was not in dispute. However, when the defendants' expert witness was asked his opinion as to the location of this property, the court sustained the plaintiff's objection on the assumption that "extraneous evidence as to where the property is located" is not admissible (R. 91-94).

The authority relied upon by the court in refusing to admit this evidence was *Ferguson* v. *Mathis*, 96 Utah 442, 85 P. 2d 827 (1938). Far from being authority for plaintiff's position, that case held the description of the property involved to be sufficient and not misleading and relied upon testimony of numerous witnesses that the alleged faults in the description were common parlance and that there was no other land in the County to which the description would apply. Furthermore, this Court has recently stated that parol evidence is admissible to apply, though not to supply, a description of lands in a

contract and that it "may be used for the purpose of identifying the description contained in the writing with its location on the ground." *Davison* v. *Robbins*, 30 U. 2d 338, 517 P. 2d 1026 (1973).

Defendants made a proffer of proof as to the location of this property (R. 94-98) wherein the witness stated that the boundaries of this property were well defined because of well defined boundaries to the West and North and no assessment had been made of the surrounding property still owned by the United States. The testimony was for the purpose of identifying the description in the deed with its location on the ground. There was no other property in the county to which this description would apply. Therefore, this evidence should have been received on the authority of the *Ferguson* and *Davison* cases, supra.

CONCLUSION

Because the plaintiff has no title himself he has no standing to challenge the title of defendants. Even if he did have some claim of title, his action against defendants is barred by the statutes of limitations The statutes presume the title to be in the defendants since no actual possession has been claimed or proved by plaintiff. The question of vagueness or ambiguity in the deeds to defendants should never have been reached by the court because plaintiff had no title and no standing to challenge defendants' title and because of the bar of the statutes of limitations. Yet, the alleged vagueness or ambiguity was

removed by testimony from witnesses for both plaintiff and defendants and by the proffer of proof which should have been received. Therefore, the decree quieting title in plaintiff should be reversed and title to the proprty in dispute should be quieted in defendants.

Respectfully submitted,

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