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William J. Colman v. A. J. Butkovick and Geneva A. Butkovich, G. W. Anderson and Jeanne D. Banks : Reply Breif

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

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' REPLY BRIEF

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

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—Continued

STATUTES CITED

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Because Respondent has chosen to ignore the fatal defects in his title to the property involved in this action, but instead has claimed the benefit of the Marketable Record Title Act, and challenged the adequacy of Appellants' title, Appellants deem it necssary to file this reply to the new issues raised in Respondent's Brief.

STATEMENT OF FACTS

Appellants reaffirm their statement of facts in their initial brief and make the following clarifications of assertions made in Respondent's statement of facts:

On page 4 of Respondent's Brief it is asserted that the property described on the Warranty Deed from Robert T. Banks to Wlliam J. Colman "had been vested in 1916 in The Assets Corporation and in Park City Townsite," presumably referring to the Park City Townsite Company. This statement is untrue since The Assets Corporation never had any more than a one-fifth interest in "the Park City Townsite" which is not the same description in the deed to Colman (See Ex. 11A). Furthermore, the Park City Townsite Company received a defective Sheriff's Deed, after a defective Sheriff's sale, which, in any event, was subject to all prior interests in the property that had not been conveyed. As pointed out on page 11 of Appellants' Brief there were prior unconveyed interests in the property which constituted defects in the title of these two corporations.

Respondent further states on page 4 of his brief that "no other title claimant appears of record from 1916 until the 1968 Warranty Deed to Plaintiff." This statement, of course, ignores the Auditor's Tax Deeds to Summit County in 1915 and 1940 and the deeds from Summit County to Butkoviches in 1964 and 1965.

Respondent again claims that his expert witness, Robert B. Jones, testified that he could not locate the

property described on the deeds to Butkoviches. However, when Jones was given the complete description on the deeds, he testified that the property could be located (Tr. 33-34). See also Tr. 90-91 where it was established without dispute that the initials "P. C." are a standard, well-known and commonly accepted designation for property in the Park City Townsite.

ARGUMENT

POINT I.

PLAINTIFF'S RELIANCE UPON THE MARKETABLE RECORD TITLE ACT IS MISPLACED SINCE HE DOES NOT HAVE THE REQUIRED "UNBROKEN CHAIN OF TITLE OF RECORD" NOR IS THE BANKS' AFFIDAVIT A "TITLE TRANSACTION." PLAINTIFF HAS NO "COLOR OF TITLE" NOR "PRIMA FACIE" TITLE.

Respondent's Brief claims that his title is "direct" starting with a Sheriff's Deed to the Park City Townsite Company and a deed to The Assets Corporation in 1916. This starting point, of course, ignores the seven defects in the title leading up to those two deeds. These defects are listed on pages 11 and 12 of Appellants' Brief.

Plaintiff then asserts that the 1968 affidavit of Robert T. Banks "fully explains" how Banks received his interest in the property from the Park City Townsite Company and The Assets Corporation. Far from being

a document which "fully explains" this asserted transfer of interest, the Banks' affidavit

1) states on its face that The Assets Corporation was only a part owner of the property,

2) describes no real property but refers only to "the remaining assets of said Assets Corporation,"

3) is hearsay and therefore inadmissible to establish any of the facts which it asserts,

4) is a self-serving recital incompetent as evidence to establish title, *State Road Commission* v. *Thompson*, 17 U. 2d 412, 413 P. 2d 603 (1966),

5) assumes, incorrectly, that a resolution of one corporation to "take over the affairs" of another corporation may legally accomplish that take-over,

6) is false and fraudulent, since it is contradictory to the minutes of the directors' meeting of The Assets Corporation, to which it refers, and to Banks' own letter suggesting the fraud set forth in the affidavit, and

7) is ineffective to convey or affect title to any real property, since it was not "entitled to recordation" without the legal description of the real property allegedly affected thereby. § 57-3-10, U. C. A., *Crompton* v. *Jenson*, 78 Utah 55, 1 P. 2d 242, 244 (1931).

This affidavit, upon which Colman rests his entire claim to title, has abosluately no effect to establish title in anyone. It certainly is not the "prima facie evidence"

of title claimed by Colman in his brief. Prima facie title "is shown by a grant from someone who held possession, or by such grant and possession under it by the grantee . . ." *Music Service Corporation* v. *Walton*, 20 U. 2d 16, 432 P. 2d 334, 336 (1967). Since Colman failed to show possession by himself or his grantor, he has failed to establish a prima facie title and his complaint should have been dismissed.

Colman claims, on page 15 of his brief, that he has "an unbroken chain of title of record" to the property for over forty years as required by the Marketable Record Title Act. He has obviously misread that Act and, therefore, the pertinent sections thereof are set out in full:

> Section 57-9-1, U. C. A.
>
> Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, shall be deemed to have a marketable record title to such interest as defined in section 57-9-8, subject only to the matters stated in section 57-9-2. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in
>
> (1) the person claiming such interest or
>
> (2) some other person from whom, by one

> or more *conveyances* or *other title transactions* of record, such purported interest has become vested in the person claiming such interest: *with nothing appearing of record*, in either case, *purporting to divest such claimant of such purported interest.*

To claim the benefit of the Marketable Record Title Act Colman must prove a conveyance to him more than forty years ago or one or more conveyances or "other title transactions" of record to him from some other person to whom a conveyance was made more than forty years ago, with nothing appearing of record "purporting to divest" Colman of his purported interest. Since the deed to him was not made more than forty years ago, he must rely on the second alternative. Obviously, the affidavit of Banks is not a conveyance but is it a "title transaction" within the terms of the statute? This phrase is defined by the statute as follows:

> Section 57-9-8(6), U. C. A.
>
> The words "title transaction" mean any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, referee's, guardian's, executor's, administrator's, master in chancery's, or sheriff's deed, or decree of any court, as well as warranty deed, quitclaim deed, or mortgage.

This definition limits the term "title transaction" to various kinds of deeds and probate proceedings, all of which are effective to pass title to real property. The phrase in the definition referring to "any transaction

affecting title" can certainly not include the Bank's affidavit, even if it were accepted at face value. This Court has held such hearsay and self-serving documents completely ineffective to convey any interest in property. *State Road Commission* v. *Thompson*, 17 U. 2d 412, 413 P. 2d 603 (1966). The affidavit, therefore, clearly has no effect upon the title. To claim that the ex parte, self-serving, false and hearsay affidavit of Banks is a "title transaction" within the terms of the Marketable Record Title Act, as Colman claims, is asking this Court to close its eyes to reality and integrity.

Furthermore, Colman has no unbroken chain of title of record because there are documents appearing of record "purporting to divest" the interest of his predecessors, namely, the Auditor's Tax Deeds to Summit County and the deeds from Summit County to the Butkoviches. These recorded documents, according to § 57-9-1, U. C. A., deprive Colman of his unbroken chain of title of record, and, therefore, Colman has no marketable record title. However, even if he had a marketable record title, the Act makes such title expressly subject to the matters in § 57-9-2, the applicable provisions of which are:

> Section 57-9-2, U. C. A.
>
> The marketable record title shall be subject to:
>
> (1) All *interests* and *defects* which are *inherent* in the muniments of which such chain of record title is formed; . . .
>
> . . . .

> (4) Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record is started;
> . . .

This section would make Colman's title, assuming he had title, subject to the tax title of the Butkoviches, since the tax title is an "interest arising out of a title transaction which has been recorded subsequent" to the root of title. Colman's title would further be subject to "all interests and defects which are inherent in the muniments" forming his chain of record; that is, all interests and defects in the Banks' affidavit upon which Colman relies. See the list of defects in that affidavit on page 4, above.

The discussion on page 17 of Respondent's Brief concerning documents "purporting to divest" pursuant to § 57-9-1, U. C. A., attempts to show that the deed from Banks to Colman purports to divest the grantor's title and, therefore, Colman must have title. No one will argue that the deed from Banks to Colman divests Banks of whatever title he had. Since Banks had no title to convey, Colman has a cause of action against Banks, or his estate, under the warranties in his deed. However, Colman has completely misread the Marketable Record Title Act because it provides that any document "purporting to divest" title *prevents a marketable record title from arising*. Therefore, Colman's argument that his deed purports to divest title from his grantor defeats his

own claim to the benefits of the Marketable Record Title Act. The deed to him is in fact a "wild deed," since his grantor nowhere appears in the chain of title, and is therefore ineffective to convey any title.

POINT II.

THE VALIDITY OF APPELLANTS' TAX TITLE IS NOT RELEVANT IN THIS PROCEEDING. NEVERTHELESS, THEIR TAX TITLE IS VALID AND THEIR PROPERTY DESCRIPTION IS ADEQUATE.

In Point I of Appellants' initial brief it was established that Colman, as plaintiff, could prevail in this case only on the strength of his own title and not on any weakness of defendants'. It was further established that Colman had no standing to challenge the tax title of Butkoviches even if that tax title might be defective. Nevertheless, Colman ignores all of the cases and the long established law on these points, and then proceeds to challenge the validity of the tax title. His sole claim of authority for this tack is dictum from *Huntington City* v. *Peterson*, 30 U. 2d 407, 518 P. 2d 1246 (1974). Contrary to Colman's claim, that case *does not* stand for the proposition that the burden is on the tax title holder to establish his title by showing the regularity of all tax proceedings. That case held that the tax assessment and levy were not made prior to the time the tax-exempt city acquired title, therefore the tax assessment was invalid and the tax sale and tax deed were void. That was

the only ground upon which the plaintiff challenged the defendants' tax title. *Furthermore, the plaintiff in that case first established its own title before challenging the defendants' tax title. In the case now before this Court the plaintiff, Colman, has not established his own title and therefore has no standing to challenge the defendants' title.*

To further emphasize Colman's burden to prove his own title, rather than just claim that his title is better than the tax title, it should be noted that the plaintiff in a quiet title action cannot prevail, even when all defendants are in default, unless he produces evidence of his title and possession. Section 78-40-13, U. C. A., requires such evidence to be produced, even where a default judgment is sought, and requires the Court to "enter judgment in accordance with the evidence and the law." Colman must affirmatively establish his title and, having failed to do so, would not even be entitled to a default judgment.

In challenging the adequacy of the description in the tax title involved here, Colman relies on several cases, all of which involve legal descriptions that applied to more than one parcel of land or to land that was nonexistent. In *Edwards* v. *City of Santa Paula*, 292 P. 2d 31, 36 (Calif., 1956), the property was described as Lots 20 to 31 "being a portion of Lot 14, Block 68, City of Santa Paula, Map No. 20." The problem existed because there were two maps of that designation, one of which showed a Lot 14 "so placed and of such a size that

lots 20 to 31 could not possibly be parts of it," and the other of which showed two lots numbered 14, neither of which could contains lots 20 to 31. The description being impossible to locate, the deed was held to be defective.

In *Meyerkort* v. *Warrington*, 19 So. 2d 433 (Miss. 1944), the description was "Pt. Sec. 28 Tp. 12 R. 3 E," with other parcels similarly described. With no indication as to whether the township is North or South and no designation of which part of the section was intended, this description obviously could not be located. The same defect, that is, failure to designate the township and range, resulted in a defective title in *Burton* v. *Hoover*, 93 Utah 498, 74 P. 2d 652 (1937). That case, however, has been limited by the later case of *Keller* v. *Chournos*, 102 Utah 535, 133 P. 2d 318 (1943), which considered the failure to designate the township "North" and the range "West" not fatal where the location in Box Elder County must of necessity be "North" and "West". The court took judicial notice of such facts.

The description here, property in Summit County, Utah, to wit: "all unplatted land in this Block (29 P. C.) and all land West of this Blk." with reference to the sale for delinquent taxes against the prior owners, D. C. McLaughlin Estate and Park City Townsite, refers to only one possible tract of land. The designation "P. C." is a standard, well-known abbreviation for property in the Park City Townsite in Summit County (Tr. 90-91), and such abbreviations "having local significance" are authorized by § 59-11-6, U. C. A. This property descrip-

tion does not run West "to the Pacific Ocean, to the West line of Utah, Summit County or to the summit of the next mountain" as Colman so facetiously suggests. It obviously runs to the West boundary of the Park City Townsite. There is only one black 29 in the Park City Townsite and only one Park City Townsite in Summit County, Utah. Ownership in all the property West of the Park City Townsite was in the United States Government and was therefore not assessed (Tr. 88-90). There were no surrounding landowners to be confused by this description. It could not apply to any other land. *Ferguson* v. *Mathis*, 96 Utah 442, 85 P. 2d 827 (1938), relied upon by Colman, 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. This is also true here. Further, the quotation on pages 6 and 7 of Respondent's Brief from *Edwards* v. *City of Santa Paula*, above, conveniently omitted the following from the middle of the quotation, without any indication of the omission:

> "If the land is described by some name or designation, evidence will be received for the purpose of showing that the tract in controversy was well and generally known by that name or designation."

Under Colman's own authorities the tax title description in this case must be considered adequate and

valid. No one was misled or confused. Colman's predecessors in title have not paid any taxes on this property at least since 1935! Surely they did not expect this property to be free of the taxes all other landowners are required to pay to preserve their ownership! They knew that it would have been sold for taxes and should not be allowed to come in at this late date to attempt reconstruction of their title by fraud and challenge the validity of the County's tax title. This was certainly one of the motivating factors behind the statutes of limitations in sections 78-12-5.1 and 78-12-5.2, U. C. A., barring any challenge after four years. See Point II of Appellants' Brief. These limitations statutes apply whether the tax title is valid or not. § 78-12-5.3, U. C. A. It is interesting that all of the cases relied upon by Colman were decided long before the passage of these limitations statutes and he is therefore left to rely upon ancient rulings superceded by modern statutes and cases.

CONCLUSION

Because of the numerous defects in plaintiff's claim of title, he had no title and therefore no standing to challenge the title of defendants. His reliance upon the Marketable Record Title Act is without merit since the Banks' affidavit is not a "title transaction" and he does not have an "unbroken chain of title of record." He does not have a prima facie title because he failed to show a conveyance from the record holder or possession in himself or his grantor. His challenge of the adequacy of the defendants' tax title was barred by the statutes of

limitations and by his lack of standing. Furthermore, the tax title description was adequate because it could apply to only one piece of property. Neither the record owner nor anyone else was confused or misled by that description. Therefore, the decree quieting title in plaintiff should be reversed and title to the property in dispute should be quieted in defendants.

Respectfully submitted,

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