

2000

William J. Colman v. 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
: Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM J. COLMAN, Plaintiff,
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.

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

A. J. BUTKOVICH and GENEVA
A. BUTKOVICH, his wife, Third Party
vs. Plaintiffs,

Case No. 14505

FIRST AMERICAN TITLE
INSURANCE COMPANY, a cor-
poration; and SECURITY
TITLE COMPANY, a corpor-
ation, Third Party
Defendants.

A. J. BUTKOVICH and GENEVA
A. BUTKOVICH, his wife, Third Party
vs. Plaintiffs -
Respondents,

SUMMIT COUNTY and PARK CITY,
a municipal corporation, Third Party
Defendant -
Appellant.

APPELLANT'S BRIEF

Appeal from an Order and Judgment
of the Third Judicial District Court
in and for Summit County
Honorable Ernest F. Baldwin, Judge

FILED

APR 23 1976

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Court on July 1, 1975, held that the plaintiff's claim to the real property was unsupported by fact, and reversed the trial court with instructions to dismiss plaintiff's complaint.

The trial court dismissed the plaintiff's complaint, and the Butkovichs filed a third party complaint against Summit County and Park City. The third party defendant, Summit County, filed an answer and counter-claim claiming title to the property. This is an appeal from the judgment and decree quieting title in the Butkovichs by the Honorable Ernest F. Baldwin.

DISPOSITION IN THE LOWER COURT

The trial court granted the third party plaintiffs' Motion for Summary Judgment and entered a decree quieting title to the property in the defendants and third party plaintiffs, the Butkovichs. The lower court also denied the Motion to Dismiss filed by the third party defendant and appellant, Summit County.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the decree quieting title in the third party plaintiffs reversed and to have a decree entered quieting title to the property in the third party defendant and appellant, Summit County.

STATEMENT OF FACTS

The third party plaintiffs and respondents, the Butkovichs, obtained 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. No auditor's certification was on the assessment rolls from 1935 through 1940, as required by Sections 59-8-7 and 59-7-9 U.C.A. 1953. The deeds from the County were void for uncertainty.

The description in the first Summit County Deed to the Butkovichs, dated July 6, 1964, read:

"Lots 21 to 32 inclusive Inc. Block 29, and 16 Lots in the rear of Block 29."

“All unplatted land in Block 29, and also land west of Block 29 and Lots 1 and A, PC 364.”

Thereafter a correctory deed was given by Summit County to the Butkovichs, dated April 15, 1965, which read:

“All unplatted land in this Block (29 PC) and all land West of this Blk. and Pt. lot 1: Pt. lot A.”

Mr. Butkovich had done a lot of tax title work (Tr. 78), and had bought a lot of tax title property from Summit County (Tr. 64). Prior to making the offer to Summit County for the tax deeds, Mr. Butkovich searched the records and came up with the description contained in the tax deeds (Tr.67). Mr. Butkovich either could not remember or did not want to remember many of the details of the transaction between himself and Summit County prior to the issuance of the tax deeds (Tr.75).

These are the sole conveyances out of Summit County upon which the Butkovich tax title is predicted.

On February 15, 1966, the Butkovichs executed and delivered to Security Title Company a warranty deed for lands in Block 29, Park City Survey somewhat similar to the description in the April, 1965, correctory deed and followed it by a metes and bounds description supplied by Mr. Butkovich. The same day, Security Title Company executed and delivered back to the Butkovichs “as joint tenants,” the identical property. The metes and bounds description did not appear until Mr. Butkovich delivered it in 1966 to Security Title Company for preparation of the two deeds. Mr. Butkovich said that the description (Exh. 5) was prepared by Mr. Raymond L. Griffith (Tr. 68) a surveyor for Mountain Fuel Supply. However, Mr. Griffith denied that he had prepared it or given it to Mr. Butkovich (Tr. 109).

After Mr. Butkovich mysteriously came up with the metes and bounds description to the property, it was discovered that the metes and bounds description included some residences owned by other persons (Tr. 75). Mr. Butkovich admitted on cross-examination that when he received the tax deeds from Summit County that he did not have any idea that the residences were on the property (Tr. 75).

It is apparent from the testimony of Mr. Butkovich that what he intended to do by preparing, or having prepared, the legal description was to include in it all of the unclaimed

or unoccupied land in the general vicinity of Block 29. The following dialogue between Mr. Butkovich and Mr. Puglsey on cross-examination reveals this:

Q You said you have done a lot of tax title work. I presume you can read a map reasonably well? (Tr. 78).

A Yes. (Tr. 78).

Q Your deed, if I may approach the witness, this is a copy of Exhibit P-1 and P-2. The one in 1964 reads: "Also land west of Block 29." Now I ask you to look at the Exhibit 10, and you see Block 29 in the lower left-hand portion of it? (Tr. 79).

A Right. (Tr. 79).

Q If you were to take a direction west from that, that would be a strip the width of the Block 29 going straight west, would it not? (Tr. 79).

A That seems so, yes (Tr. 79).

Q But the legal description that you now are asserting title to, not only encompasses that, but it goes all the way up to First Street and then goes back to the quarter section line, doesn't it? (Tr. 79).

A Uh-huh. (Tr. 79).

Q So by having this legal description you have grossly expanded the territory over and above that covered by the deed even if the deed were valid? (Tr. 79).

A *All I did was what Bob McCardle told me, it was vacant ground and unclaimed ground and to have a description made of this piece of property and put it on a deed.* (Tr. 79).

Both plaintiff Colman (who is not involved in this appeal) and the Butkovichs had paid taxes on the property. However, the Butkoviches had not fenced, cultivated, or occupied the land (a hillside in the Park City area) (Tr. 115).

Mr. Robert B. Jones, is a Utah licensed land surveyor, employed by Bush and Gudgell (Tr. 16). He has made 400 to 500 surveys in the Park City area and did one on this property (Exh. 8). He was later asked about the possibility of platting, locating, or surveying the descriptions contained in the two deeds from Summit County to the Butkovichs, which read, 1964, "All unplatted land in Block 29 and also land west of Block 29," and in 1965, "also land west of Block 29." To both of these inquiries he answered in the negative (Tr.

Apparently, the Butkovichs were unable to determine what property the deeds from Summit County (Exh. 1 and 2) convey because the Butkovich deed (Exh. 3) to the Security Title Company and Security Title Company's quit-claim deed to Butkovich (Exh. 4) contain a different description than is contained in either the Butkovich's answer, counterclaim, third party complaint, or in the decree quieting title. It is apparent that the Butkovichs are attempting to include in the decree quieting title substantially more property than is described in the warranty deed to Security Title and the quit-claim deed from Security Title in 1966. The Butkovichs did not explain the discrepancy between the description contained in Exhibits 3 and 4 and the descriptions which appear in their pleadings and the decree.

This court in its decision of July 1, 1975, in *Colman vs. Butkovich*, supra, at 189, after considering both Colman's claim and the Butkovichs' claim to the subject property reversed the trial court with instructions to dismiss Colman's complaint. This Court did not hold that the Butkovich's were entitled to a decree quieting title in themselves, but only held that Colman's claim to the property was "unsupported by fact or simple legal and equitable principles." This Court decided that the title to the property was in the County, not in either Colman or the Butkovichs. This Court said:

"The litigation here, [the quiet title action between Colman and the Butkovichs] under such circumstances, hardly could prevail where *Summit County, the owner*, was not named a party here." (Emphasis added.)

The lower court completely disregarded this Court's decision in *Colman vs. Butkovich*, supra, and quieted title to the property in the Butkovichs. The Butkovichs, after the case was remanded with instructions to dismiss the complaint, did not present any additional evidence to substantiate their claim to the property. The Butkovichs' claim to the property had twice been rejected by the courts, once by the lower court and once by this Court's decision in *Colman vs. Butkovich*, supra, of July 1, 1975. The lower court apparently did not want to follow this Court's decision in *Colman vs. Butkovich*, supra, and quieted title in the Butkovichs.

ARGUMENT

POINT I

THE COURT ERRED IN FAILING TO DISMISS THE THIRD PARTY COMPLAINT BECAUSE THE BUTKOVICHS FAILED TO FILE AN UNDERTAKING AS REQUIRED BY SECTION 63-30-19.

At the time the Butkovich's filed the third party complaint against Summit County, they should have posted an undertaking as required by Section 63-30-19, U.C.A. 1953, which provides:

“At the time of filing the action the plaintiff shall file an undertaking in a sum fixed by the Court, but in no case less than the sum of \$300.00, conditioned upon payment by the plaintiff of taxable costs incurred by the governmental entity in the action if the plaintiff fails to prosecute the action or fails to recover judgment.”

This Court has consistently recognized that in suits against governmental entities, that the plaintiff must comply with the provisions of the state statutes governing such suits. In *Peterson vs. Salt Lake City*, 118 Utah 231, 221 P.2d 591 (1950), the plaintiff brought an action against Salt Lake City to recover for injuries received in a fall on a defective sidewalk. The plaintiff had filed an unverified claim for damages within 30 days, but the Court held that the verification of the claim after the 30 day period was not sufficient to comply with the statute. The Court said:

“We cannot disregard the plain mandate of the statutes above quoted. It is the prerogative of the legislature to make such conditions precedent to the maintenance of an action against a city or town as it sees fit and the courts cannot relieve parties from the obligation of meeting those conditions.

The law in Utah is in conformity with the general case law throughout the country regarding compliance with statutory conditions in initiating legal action against a governmental entity. The general law is well summarized in 56 Am. Jur. 2d, *Municipal Corporations*, § 848, which provides:

“The right to sue a county is limited to cases wherein the legislature has ordained that it shall be liable to suit. This limitation is founded upon the theory that since there is no remedy against the state without its consent there may be none against the county, which forms an integral part of the sovereign state. By virtue of such limitation, the legislature may prescribe the conditions under which a county

may be sued. While counties are generally vested by statute with the capacity both to sue and be sued, *since they are not subject to suit except by statute, the mode of suit pointed out by the statute must be strictly followed.*" (Emphasis added.)

In *Standahl vs. Splivalo*, 13 C.A.2d 85, 56 P.2d 298 (1936), the California District Court of Appeal considered the same question as is presented to this Court. In that case, the plaintiff had filed suit against the State of California and several individuals alleging negligent operation of an automobile owned by the State of California and operated by a State employee in the scope of his employment. California, at that time, had a statute similar to our Section 63-30-19, which required that "at the time of the filing of a complaint, the plaintiff shall file therewith an undertaking in such sum, but not less than \$500.00, as the judge of the court shall fix." The plaintiff did not file the undertaking, and the trial court dismissed the action against the State of California. The court in so holding said:

These Code provisions are plain. It was necessary for the plaintiff to file the undertaking in order to maintain the action as against the state. For failure to file the undertaking the court properly granted the motion to dismiss the action as to the state of California.

The language of Section 63-30-19 is clear and unequivocal. The use of the word shall, rather than may, indicate a legislative intent to require, as a condition precedent, the filing of an undertaking when a suit is initiated against a governmental entity. In the present case, the Butkovichs did not even attempt to comply with this section, and the complaint should have been dismissed.

POINT II

THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST SUMMIT COUNTY AND IN QUIETING TITLE TO THE PROPERTY IN THE BUTKOVICHS.

Rule 56(c) Utah Rules of Civil Procedure provides in part:

"* * * The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This section has been interpreted by this Court in *Bullock vs. Deseret Dodge Truck Center, Inc.*, 11 Utah 2nd 1, 354 P.2d 559 (1960), wherein this Court held:

A summary judgment must be supported by evidence, admissions and inferences which when viewed in the light most favorable to the loser shows that, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor.

The Court erred in granting summary judgment for the Butkovich's because they failed to establish that they were entitled to have the title to the property quieted in them. Judge Sorenson when he originally tried the case between Colman and the Butkovichs ruled that "the tax deed held by the defendants [the Butkovichs] is void from its inception" (R. 152.) Judge Sorenson's decision that the Butkovichs' tax title was void from its inception was not reversed by this Court. All this Court reversed in its decision of July 1, 1975, was that the plaintiff Colman did not have title to the property, and, therefore, the complaint should be dismissed. This Court ruled against Colman; it did not rule in favor of the Butkovichs. This Court recognized that both the title of Colman and the Butkovichs were void, and that Summit County was the real owner of the property. This Court said:

"* * * and the auditor's deed to the county long since had placed the title in the county, not in Banks. The litigation here, under such circumstances, hardly could prevail where *Summit County, the owner, was not named a party here.*

* * *

We are convinced that the plaintiff's claim is unsupported by fact or simple legal and equipable principles, and we are impelled to reverse the trial court, which we do, with instructions to dismiss the complaint." (Emphasis added.)

Had this Court concluded by its decision of July 1, 1975, that the Butkovichs were entitled to a decree quieting title in them, surely it would have said so. The fact that it did not clearly shows that the Butkovichs, like Colman, were not the true owners of the property. However, the lower court, for some unknown reason, did not want to follow this Court's decision. The lower court totally disregarded the decision of this Court, and arbitrarily entered judgment for the Butkovichs. Between this Court's decision of July 1,

1975, and the date on which the lower court entered summary judgment for the Butkovichs, the Butkovichs did nothing to establish their title to the property other than file a motion for summary judgment.

The Butkovichs have attempted to do in this proceeding exactly what they criticized Colman for doing in the earlier proceeding. In the earlier appeal, the Butkovichs rightly criticized Colman's actions in challenging the validity of the tax title, because Colman had the "burden to establish his title first before he has standing to challenge defendant's tax title." (Appellant's Brief, Case No. 13868, 9 and 10). The Butkovich's motion for summary judgment was based entirely on the assertion that Summit County had no interest in the property. The Butkovichs were simply condemning Summit County's title rather than establishing their own. It is clear from this Court's decision in *Colman vs. Butkovich*, supra, at 189, that in order to prevail in a quiet title action, a party must do more than simply condemn the title of his opponent:

"Plaintiff says such deed was void because it was vague in description. This assertion seems premature and a stranger to this litigation, since, as state above, the plaintiff, before asserting it, must first prove his own good title, _____ which he has failed to do."

The Butkovichs have twice before failed to prove their good title to the property, once before Judge Sorenson and once before this Court. All the Butkovichs could do in support of their motion for summary judgment was to condemn Summit County's title, but did not establish their own. This Court should reverse the lower court because the Butkovichs failed to prove their own good title to the property.

POINT III

THE TAX DEEDS WERE A NULLITY AS TO THIS PROPERTY, VOID BECAUSE OF TOTALLY DEFECTIVE DESCRIPTION.

The law in Utah is that a legal description must be adequate to identify the property if a conveyance is to be effective. This applies to tax deeds as well as to ordinary conveyances. *Burton vs. Hoover*, 93 Utah 498, 74 P.2d 652 (1937) involved a quiet title action on lands in Wasatch County. The tax title was based upon a purported description of lands, "sec.

7-5-4” and “Sec. 18-5-4.” This Court held that notwithstanding the legislative authorization for abbreviations (now Section 59-1-6 U.C.A. 1953) the tax deed was void as no realty was described as the township and range were not indicated.

The deficiencies in the Butkovich deeds are obvious. No perimeter, length, or depth of the land can be ascertained. One might argue that the north-south dimensions of the property could be ascertained because it is “also land west of Block 29,” but how far west and how deep the parcel runs, one cannot determine by any means of legal construction. Mr. Butkovich recognized the apparent insufficiency of the tax deed and he went to Summit County and procured a new deed in April of 1965, which said, as to this portion, “and all land west of this Blk.”

The substitution of the word “all” for the word “also” has cured nothing, and has only accentuated the obvious indefiniteness and inadequacy of the description. All land to the west of that would extend to the Pacific Ocean.

The first deed in July of 1964 has no identification other than Summit County, and certainly there are many Block 29’s in Summit County. When the 1965 “correctory” quit claim deed was procured from Summit County, the complete description is as follows:

“All unplatted land in this Block (29 P.C.) and all land West of this Blk. and Pt. lot 1: Pt. lot A.”

The property which the Butkovichs are claiming, and which the lower court quieted title to, lies west of Blocks 26, 27, 28, and 29. Immediately west of Block 29 lies a dedicated street, Norfolk Avenue. The evidence showed that the end lines of Block 29 do not lie due east and west, but lie in a northwesterly-southeasterly angle. Any extension of the lines due west of the block would include land which is not west of Block 29. The Butkovichs have converted the description “all land west of this block” to mean land north, northwest, west, southwest, and south of the block.

Undoubtedly, the Butkovich tax deeds do not close. The description as “lands west of Block 29” do not give the property a westerly boundary. This court in *Howard vs. Howard*, 12 Utah 2nd 407, 367 P.2d 193 (1962), held that the deed was insufficient to describe any

ascertainable parcel of realty, because the grantor's description in the deed did not close.

This Court said:

“The grantor's intention should be given effect if reasonably determinable. However, we consider that under the facts here a grant is not sustainable. Either it is impossible to determine what Howard had in mind or, conjecture indulged, one would have to divine that any number of areas could be said to have been intended. In such case, abstractors and lawyers should be able to turn down a title based on the contentions of such an asserted illusory intention of a deceased.”

As in the *Howard* case, the property in the present proceeding does not close.

The Butkovichs would like the court to speculate that the westerly boundary closes at the quarter section line. However, that is sheer speculation; it is just as reasonable to assume that it closes at the section line, or at the westerly boundary of Summit County, or of the State of Utah, or of California, or it could be speculated that the westerly boundary stopped at Norfolk Avenue, the public street west of Block 29 in Park City, Utah.

The fact remains that in order for someone to close the description, they have to speculate as to a convenient location to do so. At the trial, the Butkovichs called a witness who attempted to establish the west and north boundaries of the property claimed by the Butkovichs. However, the witness could do nothing more than speculate as to the boundaries of the property. Although the witness indicated that there was a well defined westerly boundary, his testimony indicated that it was nothing more than a quarter section line, no more well defined than any other quarter section line. The witness admitted that the description is indefinite, and that he could not conclusively locate with any precision the property described simply as “land west of Block 29.” The following testimony of the witness indicates the speculativeness of his testimony:

A My answer to this question would have to be based entirely on assumption where it says “All land lying west of the Block” is surely indefinite, and yet because there is a well defined boundary out there to the west and north it would appear to me to be the intention to thus include that portion of the land within this description. (Tr. 98)

* * *

you refer to the west boundary there are you also referring to the west boundary of the Park City Townsite? (Tr.99)

A This I am not positive of, as I answered before, from the fact of the legal description under the U.S. patents and these early documents and Exhibit 11 it would appear to me that this is intended to be the Park City Townsite. (Tr.99)

* * *

Q (By Mr. Marsh) If you had a description before you that said "All unplatted land west of Block 29 in the Park City Townsite," and you have answered that would be the land west of Block 29, my question is what is the westerly limit of that description? (Tr. 100)

A Under the circumstances it would be the west line of the southeast quarter of the section. (Tr. 101)

* * *

THE COURT: How did you arrive at that line as being the boundary of the townsite? (Tr.101)

A Because, Your Honor, that is the forty acres along with some others that again is included in these documents. (Tr. 101)

THE COURT: But apparently it's uncertain, isn't it? (Tr. 101)

A In my mind I couldn't clearly establish the boundary of the townsite. I have just assumed -- (Tr. 101)

* * *

Q (By Mr. Pugsley) And it does extend west of the line that you have elected to designate as the point of the subdivision? I mean -- (Tr. 103)

A Of the original Townsite. (Tr. 103)

Q I will have you look at the little insert at the bottom of Exhibit 9, and is it not a fact that there is a designation of First Ward, Second Ward, and Third Ward which likewise extends well to the west? In fact, to the complete west line of section 16? (Tr. 103)

A Yes. (Tr. 103)

Q Now during the recess I asked you also to look at a map which seems to be a zoning map of Summit County, which is against the south wall. Does that also show it includes all of section 16 in Park City? (Tr. 103)

A That could be the present boundaries of the municipality of Park City. (Tr. 103)

Q The fact is you don't know where the west boundary of Park City is, do you? (Tr. 103)

A No. (Tr. 103)

* * *

Q (By Mr. Pugsley) Do you know what the west boundary is now? (Tr. 104)

A No, I don't. (Tr. 104)

The witness said the west boundary of the property described in the tax deeds was the west line of the southeast quarter of the section, and that this line was also the west boundary of Park City. However, this was shown to be inaccurate, because he admitted later that he did not know the location of the west boundary of Park City, and that the west boundary was probably further west than he had earlier testified.

The deeds to the Butkovichs are void because the descriptions therein are too vague and uncertain to describe any parcel of land which might lie west of Block 29. There is no starting point of the description and the area is not defined. In *Scott vs. Woodward*, 34 C.A. 400, 167 P. 543 (1917), the California court was faced with the same question, i.e., whether the deed was a valid conveyance when the west boundary was not specified. The court held:

“But, whatever may be the legal effect of the instrument, or whether it purports or was intended to be either a deed or a mortgage, it is clear that it is without force as either, because the property which constitutes the subject-matter thereof is not so described as to facilitate an identification of the particular land or premises to which it relates. *It will be noted that the land as it is described in the instrument is not given a westerly boundary, and, so far as the instrument shows to the contrary, there is no limit to the extension of the tract westerly.* Again, as so described, the tract is bounded on the north and east by the lands of ‘Robinson and Bodega Avenues,’ and ‘on the east by the land of McChristian.’ *Thus, it will be observed, that the description is indefinite and uncertain.*” (Emphasis added.)

It might be well to again specify the uncertainties and ambiguities in the tax deeds.

1. The deed recites no township, range, or section in which the land is supposed to lie.

2. There is no starting points; there is no west boundary; the north and south boundaries are not definite and are open to different constructions; there is no closing point.

3. There is no area defined.

Any one of these omissions would be sufficient under the law to render the deeds on their face ambiguous, uncertain, or indefinite, which would render the deeds void.

Apparently, the Butkovichs have been unable to determine what property the deeds from Summit County (Exh. 1 and 2) convey because the Butkovich deed (Exh. 3) to Security Title and the legal description contained in Security Title Company's quit-claim deed to Butkovich (Exh. 4) contain a different description than is contained in either the Butkovich's answer counter-claim, third party complaint, or in the decree quieting title. It is obvious that the Butkovichs are attempting to include in the decree quieting title substantially more property than is described in the warranty deed to Security Title and the quit-claim deed from Security Title. As time goes on, the Butkovichs continue to expand the boundaries of the property they claim pursuant to the tax deeds. Apparently, the Butkovichs believe that the property, like rabbits, increase with the passage of time. The Butkovichs have taken two tax deeds with vague descriptions, mysteriously added a legal description, and then continue to expand on that legal description to include homes which are owned by persons who have not even been joined in the lawsuit. The following dialogue between Mr. Pugsley and Mr. Butkovich illustrates the brazen attempt by Mr. Butkovich to include all property in the general vicinity of Block 29, without regard to the nature or occupancy of the property involved.

Q (Continuing by Mr. Pugsley) Now when this description was prepared that you are asserting as the ownership of the property now, isn't it a fact that that includes some residences at the -- (Tr. 75).

MR. WARNOCK: North. (Tr. 75).

Q -- north end of the property, one that Mr. Andy Hurley owns and some of the others, aren't they included in the description you have there? (Tr. 75).

A I think so. (Tr. 75).

Q And did you intend, when you made this bid for the

property and paid to the County some eight hundred thirty-six dollars, to gain those residences, too? (Tr. 75).

A I didn't have any idea they were on the property at the time. (Tr. 75).

Q As a matter of fact, it wasn't until you had this new legal description prepared taking in the twenty acres that they were even involved, isn't that true.? (Tr. 76).

A That legal description is brought up on that map by Bob McCardle. I didn't have any idea what was on it at all. (Tr. 76).

Q You're the one that supplied it to them? You got them somewhere and you don't know where? (Tr. 76)

A Whose name is that on the bottom of that paper? (Tr. 76)

Q Whose name name is it? You tell the Court. (Tr. 76)

A It says "Ray Griffith." (Tr. 76)

Q Who put it there? (Tr.76)

A Not me. (Tr.76)

Q That isn't his signature, is it? (Tr. 76)

A I think it is. (Tr. 76)

Q You know that he's here today? (Tr. 76)

A I know it. (Tr. 76)

Q And if he were to say he didn't prepare it and it isn't his signature you wouldn't dispute that, would you? (Tr. 76)

A I certainly would. (Tr. 76)

Unless reversed by this Court, the Butkovichs will have successfully completed a land grab of twenty acres to which they are not entitled. This Court should not permit the Butkovichs to continue to expand the legal description and the area claimed ad infinitum.

Assuming that the initials P.C. in the deeds to the Butkovichs refer to Park City rather than some other location, all that the description could possibly describe would be Lots 21 to 32 inclusive and sixteen lots in the rear. The remainder of the description in the first quit-claim deed specified "all unplatted land in Block 29 and also land west of Block 29"

(Exh. 1). The phrases "also land west of Block 29" and "all land west of this Block" (Exh. 2) describe nothing.

POINT IV

THE DEEDS TO THE BUTKOVICHS ARE VOID BECAUSE THE REQUIRED AUDITOR'S AFFIDAVITS WERE NOT ON THE ASSESSMENT ROLL.

Section 59-8-7, U.C.A. 1953, provides in pertinent part:

"On or before the third Monday of September, the County Auditor must deliver the corrected assessment roll to the County Treasurer, with an affidavit attached thereto and subscribed by him as follows:

I, _____, county auditor of the county of _____, do swear that I received the accompanying assessment roll of the taxable property of the county from the assessor, and that I have corrected it and made it conform to the requirements of the county board of equalization and state tax commission; that I have reckoned the respective sums due as taxes and have added up the columns of valuations, taxes, and acreage as required by law."

The auditor's affidavit attached to the pertinent assessment roll is a condition precedent to a valid tax deed based thereon. The absence of such affidavit would make a tax title fatally defective. *Farrer vs. Johnson*, 2 Utah 2nd 189, 271 P.2d 462 (1954). This Court in *Jenkins vs. Morgan*, 113 Utah 534, 196 P.2d 871 (1948), held that the failure to make or subscribe the auditor's affidavit does not in any manner affect the validity of the assessment; however, the affidavit is a condition precedent to a valid tax deed from the county.

Since there was no auditor's certificate on file for the assessment rolls, the tax deeds to the Butkovichs are void; and no portion of the property claimed by the Butkovichs was conveyed to them by the tax deeds.

CONCLUSION

The Butkovichs have not proven any title to the real property here involved. The tax deeds were fatally defective as to this property, and no portion of this property was conveyed to the Butkovichs. Unless the decision of the lower court is reversed, the Butkovichs will be the record owners of more than twenty acres of real property in Park

City to which they have no legal right or title. Therefore, the decree quieting title in the Butkovichs should be reversed and title to the property should be quieted in Summit County.

Respectfully submitted,

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