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 : Reply Brief

Utah Supreme Court

Robert W. Adkins; Summit County Attorney; Attorney for Appellant.
Ralph J. Marsh; Backman, Clark & Marsh; Attorney for Respondent.

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.

A. J. BUTKOVICH and GENEVA A. BUTKOVICH, his wife, Third Party
Plaintiffs,
vs.
FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation; and SECURITY TITLE COMPANY, a corporation,
Third Party
Defendants.

A. J. BUTKOVICH and GENEVA A. BUTKOVICH, his wife, Third Party
Plaintiffs-Respondents,
vs.
SUMMIT COUNTY and PARK CITY, a municipal Corporation,
Third Party
Defendant - Appellant.

Case No. 14505

APPELLANT'S REPLY BRIEF

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

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TABLE OF CASES AND AUTHORITIES

CASES CITED

STATUTES CITED

Utah Code Annotated, 1953:

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Appellant reaffirms its statement of facts in its initial brief and makes the following statements regarding respondents' statement of facts. The respondents assert that "the references on Page 2 [of appellant's brief] to the deeds to and from Security Title Company are irrelevant and do not accurately state where the description in those deeds came from." (Respondents' Brief, P. 4.) The attorney for the respondent apparently did not believe those deeds to be irrelevant when he offered Exhibit 11B, which contained those deeds to and

from Security Title Company, at the trial. The deeds to and from Security Title Company are relevant because they contain a substantially different description than is contained in either the Butkovichs' answer, counterclaim, third party complaint, or decree quieting title. The differences between the deeds to and from Security Title and the different description contained in all of the Butkovich pleadings was never explained either to the lower court or in the respondents' brief. The respondents allege that the appellant did not "accurately state where the description on" the deeds to and from Security Title came from. That inaccuracy was caused by Mr. Butkovich, because he testified that the description was prepared by Mr. Raymond L. Griffith (Tr. 68), but Mr. Griffith denied that he had prepared or given it to Mr. butkovich (Tr. 109). The inaccuracy created by Mr. Butkovich was glossed over, but never clarified nor explained, in the respondents' brief.

ARGUMENT

The Butkovichs argue in their brief that Summit County has no right to challenge their title. In reply to those issues Summit County will respond to those points.

POINT I

SUMMIT COUNTY IS NOT ESTOPPED FROM CHALLENGING ITS OWN DEED AND DENYING THE TITLE OF THE BUTKOVICHS.

In support of its argument that the County is estopped from challenging its deed, the Butkovichs cite the case of *Daniell vs. Sherril*, 48 So. 2d 736, 23 ALR 2d 1410 (1950), a decision from the State of Florida. It is interesting to note that the Butkovichs did not cite any Utah authority on this point, apparently because there is none that supports their position. In fact, the Utah law in this regard is clearly contrary to the position taken by the Butkovichs. The Court in *Duncan vs. Hemmelwright,* 112 Utah 262, 186 P2d 965, 968 (1947), clearly established that a county is not estopped from challenging the validity of its own tax deed simply because the county was the grantor. The Court said:

> Plaintiff also contends in support of his demurrer, that the defendants' answer alleges facts which estop Carbon County from denying the validity of plaintiff's tax deed, and that defendants stand in no better position than

> Carbon County, their grantor. Assumming for the purpose of this argument only, that the county could be estopped in a case like this, we find nothing in the answer from which it could be inferred that the county made any representations whatsoever, or that plaintiff relied upon any representations of the county in purchasing the tax deed. On the contrary, it is a well recognized principle that counties do not warrant tax titles. Purchasers of tax titles, take subject to the previous owner's right of redemption and to any defects or infirmities in the procedure through which the county acquired its interest. There is nothing in defendants' answer from which an estoppel against the county, or its successors in interest can be inferred.

Daniell vs. Sherill, supra, while it may be applicable in Florida, is clearly not good law in Utah. This matter is controlled by this Court's decision in *Duncan vs. Hemmelwright,* supra, and Summit County is not estopped from challenging the deeds to the Butkovichs. There is nothing in the record indicating that Summit County made any representations whatsoever to the Butkovichs regarding the property. It should be remembered that Mr. Butkovich researched the tax records prior to making the offer to Summit County for the tax deeds, and it was Mr. Butkovich who came up with the description contained in the tax deeds (Tr. 67). Summit County made no representations to Mr. Butkovich when he purchased the tax deeds at the private sale, and, therefore, Summit County is not estopped from challenging the deeds issued to the Butkovichs.

POINT II

SUMMIT COUNTY IS NOT BARRED BY EQUITABLE ESTOPPEL FROM CHALLENGING THE TITLE OF THE BUTKOVICHS.

The Butkovichs argue that the County is equitably estopped from challenging the title of the Butkovichs because of its levy, assessment, and collection of taxes for previous years and because of Summit County's failure to refund or offer to refund the taxes collected on the property. In support of its argument, the Butkovichs cite only the decision in *Daniell vs. Sheril,* supra, which, as previously pointed out, is not good law in Utah. Certainly the assessment and collection of taxes does not bar the County (or any other claimant) from claiming title to the property. The Butkovichs in their argument have ignored the applicable Utah statutes regarding the repayment of the purchase price of an invalid tax title and the taxes paid by the purchaser for subsequent years. Section 59-10-65, U.C.A., provides:

> Every person who has purchased or shall hereafter purchase any invalid tax title to any real property in this state shall from the effective date of this

act have a lein against such property for the recovery of the amount of the purchase price paid to the county therefor to the extent that the county would have a lien prior to the sale by the county, but in no event shall the lien be greater than the amount of taxes, interest, and penalties, or the amount actually paid whichever is smaller; provided however, taxes paid by the purchaser for subsequent years after the purchase from the county shall be included in the amount secured by said lien, which has not already been recovered. Such lien shall have the same priority against such property as the lien for the delinquent taxes which were liquidated by such purchase except that it shall not have preference over any right, title or interest in or lien against such property acquired since the purchase of such tax title and prior to the effective date of this section for value and without notice and such lien shall bear interest at the legal rate for a period of not to exceed four years. Such lien shall be foreclosed in any action wherein the invalidity of such tax title is determined. If such lien is not foreclosed at the time of the determination of the invalidity of such tax title, any later action to foreclose such lien shall be forever barred, provided that where such determination was made prior to the effective date of this section such action may be commenced at any time within one year after such effective date.

This Court in *Farrer vs. Johnson,* 2 Utah 2d 189, 271 P.2d 462 (1954), interpreted Section 59-10-65. In that case, this Court held that the plaintiffs, the losing parties, were entitled to a tax lien pursuant to Section 59-10-65, U.C.A., and for closure thereof for the amount actually paid for the tax deeds, plus subsequent general taxes paid and interest at the legal rate for the statutory period. In the present case, the Butkovichs would be entitled to a refund and forclosure of the taxes paid, if the decision of the lower court is reversed. Under Utah law, Summit County does not have to refund or offer to refund the taxes collected. Summit County will do equity in this cae, i.e. refund the taxes, if the decision is reversed. This is the procedure clearly established by Section 59-10-65, U.C.A.

This Court many years ago determined that in a suit to quiet title that a plaintiff need not offer in the complaint to repay the taxes or other advances made by the defendants. *Burton vs. Hoover,* 93 Utah 498, 74 P.2d 652 (1937).

POINT III

THE INTEREST OF SUMMIT COUNTY WAS NEVER CONVEYED TO THE BUTKOVICHS.

The Butkovichs inaccurately assert that the only reference to Summit County being the owner of the property in this Court's decision in *Colman vs. Butkovich,* 538 P.2d 188 (1975)

was "after the tax deeds to the County * * * and prior to the conveyance of the title by the County to the Butkovichs in 1964. * * * There is no holding anywhere in that opinion that Summit County now holds title." That assertion by the Butkovichs is totally inaccurate. This Court at 538 P.2d 189 held: "The litigation here, under such circumstances, hardly could prevail where Summit County, the owner, was not named a party here." The litigation was initiated by Colman against Banks approximately seven yers after the tax deeds from Summit County. If Summit County's interest in the property had been extinguished by the tax deeds to the Butkovichs, as alleged by the Butkovichs, this Court surely would have not used the quoted language. The only interpretation that can reasonably be drawn from the quoted language is that the quiet title action between Colman and the Butkovichs could not result in a decree quieting title for either party, because the owner, Summit County, was not a party to the litigation. That interpretation is completely consistent with what this Court did in its direction to the trial court simply to dismiss the complaint, and it did not order any affirmative relief for the Butkovichs.

The doctrine of after acquired title, as asserted by the Butkovichs, is not applicable in this instance. Rather than being a situation of after acquired title, the facts of the case clearly indicate that the deed of Summit County to "all land west of this block" conveyed nothing to the defendant. It is not a case of the County conveying title to the property it did not have, and then subsequently acquiring title to it. In this sitution the County obtained title at the original tax sale to Summit County, and never transferred title to the Butkovichs. The title to the property involved has been in the County for forty years.

Even assuming that this were a situation of after acquired title, that doctrine does not apply to tax deeds from the County. The Butkovichs again rely on *Daniell vs. Sherril,* supra, which while it may be good law in Florida, is clearly contrary to the law of Utah. In *Duncan vs. Hemmelwright,* supra, this Court clearly held that the doctrine of after acquired title does not apply to tax deeds from the County. This Court at 186 P.2d 968 held:

> Plaintiff next contends that the answer shows title to the land in plaintiff by operation of the doctrine of after acquired title. It is plaintiff's contention that if the county acquired any interest in the land in question under the bankruptcy proceedings, such after-acquired title passed immediately to the plaintiff. The contention also is without merit. The deed from the county to

plaintiff, was a quitclaim deed. A quitclaim deed does not convey and after-acquired title. 7 Thompson on Real Property, Permanent Ed., Secs. 3845, 3846, pp. 310-312; 4 Tiffany Real Property, 3d Ed., Sec. 1231, p. 642.

The title to the property has been, and remains in Summit County. The Butkovichs acquired nothing by the tax deed from Summit County, and the doctrine of after acquired title is inapplicable.

POINT IV

THE FACT THAT THE AUDITOR'S AFFIDAVITS WERE NOT ATTACHED TO THE ASSESSMENT ROLL WAS ARGUED BEFORE THE LOWER COURT.

The respondents allege that the County did not raise in the lower court the fact that the auditor's affidavits were not attached to the assessment roll with respect to the property here involved. The respondents allege that "this is the first time in this case that this assertion has been made. It was not brought to the attention of the lower court. It appeared nowhere in the record of this case." This was presented to the lower court. However, it does not appear in the record, because the hearing on the motion for summary judgment was not reported. The County attempted to order a transcript of the hearing but could not do so because the hearing and the arguments of counsel were not recorded.

The responsibility for the failure of this to appear of record is solely that of the counsel for the County. Having only been involved in this case for a few weeks prior to the hearing, counsel mistakenly believed that Exhibit 11A, the Abstract of Title prepared by Western States Title Insurance Company for the Butkovichs was the same Abstract of Title which counsel for the plaintiff Colman has given to the County, and which had been prepared by Security Title Company. The Abstract of Title prepared by the Security Title Company on the property involved included the lack of the required auditor's affidavits on file, while the abstract prepared for the Butkovichs did not. Counsel for the County did not discover this error until he was preparing his brief on appeal. The lack of the auditor's affidavit was argued by counsel before the lower court, and is not raised for the first time on appeal, as alleged by the Butkovichs. Since this issue was presented and argued before the lower court, it should be considered by this Court.

POINT V

SUMMIT COUNTY IS NOT BARRED BY THE STATUTE OF LIMITATIONS FROM MAINTAINING THIS ACTION TO RECOVER THE PROPERTY.

The respondents allege that Summit County is barred by the Statute of Limitations in Section 78-12-5.1 and 5.2, U.C.A. The respondents maintain that these sections bar any action or defense against the holder of a tax title unless the party bringing the action or asserting the defense has had possession of the property within four years of such action.

The various statutes dealing with limitations of actions and with adverse possession have been subject to a number of legislative enactments and to a considerable number of decisions by the Court in recent years. These amendments, together with the other pertinent sections of the Code, are now numbered as Sections 5, 5.1, 5.2, 5.3, 6, 7, 7.1, 8, 9, 12, and 12.1 of Chapter 12, Title 78 of the Utah Code Annotated 1953.

Under those statutes the holder of a tax title cannot claim absolute ownership to the real property based solely upon holding the tax title for four years after purchase from the County. The sections above referred to must be read together, and they specify the elements of adverse possession and that the holding of a tax title for four years after purchase from the County is only one of those elements.

The Butkovichs have not fenced, cultivated, or occupied the land (a hillside in the Park City area) (Tr. 115).

This Courin in *Lyman vs. National Mortgage Bond Corporation,* 320 P.2d 322, 7 Utah 2d 123 (1958), thoroughly interpreted Section 78-12-5.1 and 5.2, U.C.A. 1953. In that case the plaintiffs had secured a tax deed from the county in 1941 and had since been in actual possession, had cultivated the property and improved and fenced it. However, they failed to show payment of taxes for four consecutive years even though the evidence was clear that those taxes not paid were subsequently redeemed. However, the Court held that the plaintiffs did not bring themselves within the statute, and the holding of that case is controlling in the case at bar:

> "In Bowen v Olson, decided in 1953 under Section 78-12-12, U.C.A. 1953, prior to the 1951 amendment, we held that a redemption from a delinquent tax assessed against this property claimed by adverse possesion under a tax

sale did not constitute a payment of taxes levied and assessed upon such property within the meaning of that statute. After a careful consideration we adopted the majority rule on that question and we are not now inclined to overrule that decision but adhere thereto. The facts in that case are not distinguishable from the facts in this case.

"Plaintiffs contend that a different result is rquired by the 1951 amendments to Section 104-2-5, U.C.A. 1943, which is the same as 78-12-5.1, Pocket Supplement to Volume 9, U.C.A. 1953, and Section 104-2-5.10, Laws of Utah for 1951, which is the same as Section 78-12-5.2, Pocket Supplement to Volume 9, U.C.A. 1953. In plaintiff's brief these sections are referred to as statutes of limitation as distinguished from the other sections previously cited above, which are referred to as adverse possession statutes. Hereinafter these designations will be used to distinguish the two sets of statutes.

"These sections forbid the commencement or maintenance of an action or defense claiming ownership or right of possession to real property, unless the claimant was seized, possessed or occupied such property within seven years prior to the commencement of such action. Where the adverse party, in such action, claims under a tax title the limitations period is shortened to require seizure, possession or occupation within four years after the creation of the tax title claim. These statutes are different from the adverse possession statutes considered above in that they contain no requirement that the adverse party to the claimant in such action must have had adverse possession and paid all taxes assessed against such property during the limitations period. In fact, the limitation statutes make no mention of any rights which the adverse party must have in order to invoke the provisions of these limitation statutes.

"A very strict construction of these statutes might require a holding in plaintiff's favor even though they have failed to show payment of the taxes for the period required by the adverse possession statutes, for it is clear that none of the defendants have actually occupied or been in possession of the property within the prescribed limitations period. However, plaintiff's can prevail only if we hold that defendants' claims are barred under these limitations statues by their failure to occupy or be in possession of the property within the prescribed period, regardless of whether plaintiffs have proved a valid claim to this property. Such a holding would leave the plaintiffs in possession although they have failed to establish any valid claim to such property under the adverse possession statutes previously discussed on which their claims are based or by any other means.

"We do not think that such construction of these statues was intended. Plaintiffs must succeed on the strength of their own claim and not alone on the weakness of the defendants' claims in order to succeed. The mere failure of the defendants to show that they have actually occupied or been in possession of this property is not sufficient to bar their rights to recover the property where, as here, plaintiffs have failed to establish any valid claim or right to the property in themselves. These limitation statutes, although they do not expressly so provide, only bar the right of a party to maintain an action to recover real property where the opposing party established a right of possession or ownership in the property. This plaintiffs have failed to do, so the decision must be reversed."

CONCLUSION

The Butkovichs do not have and 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 respondents. The Butkovichs have made a brazen attempt to acquire ground to which they have no title, and is in fact owned and occupied by other persons not joined in this action and who reside on the property. This Court has already determined in the earlier proceedings that Summit County was the real owner of the property. Unless the principals of res judicata and stare decises are dead, 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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