1974

Downey State Bank v. Major-Blakeney Corporation; Joseph L. Krofcheck, Et. Al. And Franklin D. Richards & Company v. Richard W. Ringwood : Brief of Appellant Joseph L. Krofcheck

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DOWNEY STATE BANK,

Plaintiff

v.

MAJOR-BLAKENEY CORPORATION; JOSEPH L. KROFCHECK, et. al.,

Defendant-Appellant

Case No. 15128

and,

FRANKLIN D. RICHARDS & COMPANY,

Intervenor-Respondent,

RICHARD W. RINGWOOD,

Intervenor.

BRIEF OF APPELLANT JOSEPH L. KROFCHECK

Appeal From The Judgment Of The Third Judicial District Court For Summit County, State of Utah, The Honorable Peter F. Leary, District Judge.

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STATEMENT OF THE CASE

Appellant, Dr. Joseph L. Krofcheck, was named a party defendant in the main action herein whereby Downey State Bank, Plaintiff, foreclosed certain first mortgages on land owned by said defendant. The within proceeding, in the court below, was ancillary to said main action.

In 1967, Appellant's predecessor, Major-Blakeney Corporation, acquired certain real property hereinafter identified as Parcel 12, inter alia, executing the aforesaid Downey Bank first mortgages in connection therewith. An associated company, Park City Utah Corporation, thereafter acquired said realty.

In 1971, Appellant purchased said Parcel 12, and other property, from Park City Utah Corporation, for value, and title passed to Appellant free and clear of encumbrances, except for the Downey Bank mortgages. A Warranty Deed conveyed said property to Appellant on October 22, 1971.

Over one year later, in November of 1972, one William S. Richards and his law firm recorded an attorney's lien against said Parcel 12 which then belonged to Appellant, and against approximately 29 other parcels of real estate also purchased by Appellant in 1971, as mentioned above.

Appellant, a California resident, held no interest in the Major-Blakeney Corporation, nor in Appellant's grantor, Park City Utah Corporation; and, Appellant had no knowledge of said lien filing, having never employed or otherwise associated with said William S. Richards or his law firm, which facts were known to Respondent herein. However, Appellant was later forced through economic pressure to sign a written lien release schedule prepared by the lienor, William S. Richards and his firm, dated February 11, 1974,

on the urging of Aopellant's grantor who informed Apoellant that said grantor, Park City Utah Corporation, had sought the advice of its legal counsel, still William S. Richards and his firm, and the lien release schedule was the only manner in which Appellant's land could be relieve of the lien burden. Said attorney's lien was intended as security for certain attorneys fees due from Appellant's grantor in favor of Richar and his firm.

Third parties,not joined in the within ancillary proceeding below, obligated to make the Downey Bank mortgage payments, but without Appel knowledge or notice said parties defaulted thereon. Thereupon, Downey filed its foreclosure suit and summoned Appellant by a Utah newspaper cation of summons, giving notice of its action to foreclose Parcel 12 four other parcels of real property. No actual, personal service or ot contact, by mail or otherwise, was made upon Appellant (a California r ident) until after the Sheriff's Sale covering said property, held on 9, 1974. Later that year, Appellant sought to have said sale set asi the foreclosure decree vacated, the latter having been entered on Marc 1974, all to no avail.

In connection with Appellant's attack on said foreclosure decree sale, the two purchasers at the said sale, Richard W. Ringwood and Fr D. Richards and Company, filed Complaints in Intervention in the main opposing Appellant's position and requesting that their respective She Sale title, acquired on April 9, 1974, be, in effect, quieted; and, s Intervenors further sought to have a dispute between themselves, conc Respondent's purported redemption of Parcel 12, adjudicated.

On April 10, 1976, after failing to prevail in his attack on the foreclosure decree and sale thereunder, Appellant purchased a large part of Parcel 12, from Intervenor Richard W. Ringwood, for $50,000.00 cash. All other adverse claims then existing between Appellant and said Ringwood, were also settled, pursuant to the written agreement of sale executed on said date.

On April 12, 1976, the aforementioned Complaints in Intervention were severed by the lower court from the main action herein: and, the claims made therein were established as the basis for proceeding in the severed action. Exhibit "B" has been annexed hereto, as a copy of the prayer from Respondent's Complaint in Intervention showing the nature of the subject matter to be determined in the severed proceeding.

Subsequently, the Intervenors and Appellant, who had a greater interest in Parcel 12 at this point than Intervenor Ringwood, all filed motions for summary judgment in the severed proceeding. The lower court declined to rule on the same, but instead set the matter for trial.

Between the time the proceeding was severed, and the time of trial, the Appellant was served by all the pleadings and other documentation incident to the severed action, whether by the Intervenors or the Court Clerk. In any case, Respondent- Intervenor, served Appellant with all pleadings prepared by it, and Appellant participated in the matter until the day of trial.

On October 26, 1976, a trial was held by the lower court presumably to adjudicate the claims in and to Parcel 12.

DISPOSITION IN LOWER COURT

Despite Appellant's aforesaid appearance and participation in said lower court proceedings prior to the date of trial, on the day of the

hearing, October 26, 1976, Appellant's counsel, although ready to proce (Transcript: Pgs 1-2), was precluded by the court below from participat at said trial on the ground that Appellant "is not a proper party befor the court" (Transcript: Pgs 4-5); and, further, Appellant's said counse was not allowed to assist Intervenor Ringwood's counsel in the matter (Transcript: Pgs 32, 40) as previously agreed (Transcript: Pg 5, lines 15-30). From said action by the lower court, this Appellant, Joseph L. Krofcheck, M.D., has taken his appeal.

RELIEF SOUGHT BY THIS APPEAL

Appellant asks this Honorable Supreme Court to remand the matter pu portedly tried by the court below on October 26, 1976, back to the Dist Court with instructions that Appellant is a proper party thereto and he should be permitted to introduce competent evidence embraced by the ple ings, the prior stipulation and Appellant's interest in the subject mat Parcel 12, the real property at issue; or, in the alternative, that the judgment entered by the lower court be reversed on the basis of Interve Richard W. Ringwood's appeal number 15207 herein, whose position is ent consistent with and supportive of Appellant Joseph L. Krofcheck, herei

STATEMENT OF FACTS

In the year 1967, Major-Blakeney Corporation executed certain mort in favor of Downey State Bank, plaintiff in the main action herein, in connection with the former's purchase of a Parcel 12, and other proper Thereafter, said Parcel 12, and other land, was acquired from said mor by Park City Utah Corporation.

Later, certain litigation ensued whereby the latter corporation so

to quiet title of said Parcel 12, and other property, through Civil No. 4143, in the court below. Said court upheld Park City Utah Corporation's position, and partitioned said Parcel 12, inter alia, to said corporation.

William S. Richards, and his law firm, represented said corporation in its effort to quiet title to said Parcel 12, and other land, in said Civil No. 4143 action. No attorney fees were awarded in that suit, but the title acquired by said corporation was still encumbered by the Downey Bank purchase money mortgages executed originally by Major-Blakeney Corporation (supra.).

The total attorney fees admitted to by Richards and his law firm, in said Civil No. 4143 action, involving said Parcel 12, and other realty, was $6,000.00 due and then owing from Appellant's predecessor, Park City Utah Corporation, to said Richards and his firm for services rendered in said suit, (Record: Pg 23, Paragraph 11).

Shortly after the final partitioning judgment in said Civil No. 4143 action, entered on July 23, 1971, pursuant thereto William S. Richards executed and recorded quit claim deeds to Parcel 12, and other real estate covered by that judgment (Record: Pgs 35-36, Paragraphs 1-3).

Thereafter, Appellant purchased said Parcel 12, and other property, from said Park City Utah Corporation. A Warranty Deed, subject only to the Downey Bank mortgages, conveyed fee title thereof to Appellant on October 22, 1971, recorded as entry 114249, Book M-33, Pages 647-648, in Summit County, Utah, (Record: Pg 25, Paragraph 19).

Over one year later, on November 15, 1972, William S. Richards recorded his notice of attorney's lien against said Parcel 12 and blanketing approximately 29 other parcels (Record: Pgs 80-82), which lien purported to secure

Richards' claim of approximately $39,000.00, for attorney fees incurred Appellant's grantor in various lawsuits besides the aforesaid Civil No. action which "produced" Parcel 12, inter alia. Said $6,000.00 fee amount attributable to said latter suit was also included in the larger sum, (Pg 24, Paragraphs 16, 17).

Appellant owed no part of said fees, was an innocent purchaser of P 12, for value, and had never been a client, or otherwise in a relation with Richards and his law firm (Record: Pg 25, Paragraph 20).

Later, under economic pressure due to an inability to use his prop clouded by the Richards attorney's lien, Appellant confronted his gran demanding they it relieve the burden of such cloud. Whereupon, said gr corporation presented Appellant with a written lien release schedule, pared by Richards and his firm who were still the grantor's attorneys, dated February 11, 1974, which instrument required Appellant's acknowl ment thereon as to said lien release schedule. Appellant had no knowle of the details of Richards' fee claims, nor any liability whatever th (Record: Pg 25, Paragraph 21).

Thereafter, the sum of $15,500.00 was paid to Richards and his fir (Record: Pg 25, Paragraph 18) for application toward releasing the rea covered by the lien, although only $6,000.00 was due for the matters r lated to the Civil No. 4143 suit that produced the Parcel 12 and other tracts of land, (Record: Pg 20; Pg 26, Par. 22).

At no time did Richards and his firm release their lien against a Civil No. 4143 real property, including the subject Parcel 12, despit payment of $15,500.00 (supra.) when the total fee therefor was only $

(Record: Pg 26, Paragraph 22).

Payments upon the Downey Bank mortgages, covering Parcel 12, and other property, were to be tendered by third persons who are not parties to the instant severed proceeding in the court below. However, the said persons defaulted on said payments, without Appellant's immediate knowledge (who resided in California), and said mortgages were foreclosed under a decree of the court below dated March 4, 1974, whereby Richards junior attorney's lien was also foreclosed.

On April 9, 1974, Parcel 12, and other property, were sold at a Sheriff's Sale pursuant to the said decree of foreclosure.

Richard W. Ringwood was the succesful bidder at said sale for Parcel 12, and Respondent acquired the remaining four parcels offered at said sale.

During the redemption period which followed the sale, Respondent attempted to redeem said Parcel 12 from Ringwood, as assignee of part of the William S. Richards subject attorney's lien, although said lien had never been reduced to judgment (Record: Pgs 14-15), nor otherwise adjudicated. Richard W. Ringwood rejected said redemption effort on the part of Respondent. (Record: Pg 138, second paragraph).

About the time of said redemption effort Appellant attacked the original foreclosure decree and sale thereunder, but did not prevail. In connection with said attack, Ringwood and Respondent, as the judicial sale purchasers, filed Complaints in Intervention opposing Appellant and seeking to, in effect, quiet title to their respective interests in the sale properties and adjudicate the redemption claim of Respondent concerning Parcel 12.

Exhibit "B" has been attached hereto, being a copy of Respondent's pray from its said Complaint in Intervention, showing the nature of the subj matter to be determined in the court below, since the record on appeal not contain all the pleadings of the main action.

On April 10, 1976, having failed in his attack on the foreclosure a and sale thereunder, Appellant purchased back most of Parcel 12 from Ri and said parties settled all other claims, inter se, in connection wit Parcel 12 and the litigation arising therefrom. Appellant paid said Rir $50,000.00 cash consideration for said interest in Parcel 12.

On April 12, 1976, the lower court severed the claims made under th Complaints in Intervention, from the main action herein (Record: Pgs 5.

Thereafter, Respondent also sold its entire interest in the Parcel redemption claim, which it had previously acquired by assignment throu William S. Richards' attorney's lien, to parties fully outside these proceedings (Record: Pg 16), in, or about, the month of May, 1976.

Subsequently, various motions, counter motions and other document were filed by Appellant and the said Intervenors, in the proceedings be (Record: Pgs 35-50). No ruling was made by the court below, on said mo but instead the matter was set for trial on October 26, 1976.

During the entire tenure of said severed proceedings, until the da trial, the Respondent, Intervenor Ringwood and the Court Clerk all ac ledged Appellant's undersigned counsel as attorney of record for Appe therein, by serving upon him, and otherwise naming him in said capaci in the records of the court below, (Record: pgs, 9, 10, 12, 13, 28, 2 32, 34, 52, 57, 77 and 79). Further, said record discloses Appellant'

motion for summary judgment was filed shortly after these proceedings were severed below, with extensive affidavits and material annexed thereto, indicating Appellant's clear interest in Parcel 12, and involvement with the subject attorney's lien upon which Respondent bases its purported redemption of such parcel (Record: Pgs 35-50).

On October 26, 1976, the matter was tried, with Appellant's counsel present but unable to proceed on Appellant's behalf by reason of the lower court's ruling that Appellant was not a proper party (Transcript: Pg 5). From said ruling, Appellant has taken his appeal herein.

ARGUMENT

POINT I: UNDER THE FACTS AND LAW OF THIS CASE, APPELLANT IS CLEARLY A PROPER PARTY.

By way of a factual summary of Appellant's involement herein, the following outline condenses and confirms his unbroken interest in Parcel 12:

1.) Over one year prior to the recording of Respondent's subject lien Appellant, as a bona fide innocent purchaser for value acquired fee title to Parcel 12, on October 22, 1971;

2.) Appellant signed his acknowledgement on the original lien release schedule prepared by William S. Richards' firm, the lienor, which document formed a substantial part of Respondent's evidence-in-chief below, (Record: Pgs 83-88; Respondent's Trial Exhibit No. 2);

3.) Although never personally notified by mail or served with summons, Appellant, a California resident was made a party defendant to the main action herein;

4.) Appellant later appeared in said main action with a motion to vacate the default decree and set aside the Sheriff's Sale of April 9, 1974;

5.) Failing in his lower court attack on the decree and sale, on Apr 10, 1976, Appellant purchased back a large portion of Parcel 12 from the successful bidder under the Sheriff's Sale, prior to the severance of th within matter below on April 12, 1976, for $50,000.00.

Thus, the foregoing unimpeachable facts were obviously sufficient le basis for Appellant's full participation below. Utah law, when applied t said facts, renders the lower court's ruling in this respect a material, prejudicial error, by virtue of these rules:

> " Persons having a joint interest shall be made parties...When perso who are not indispensable, but who ought to be parties if complete r lief is to be accorded...the court shall order them summoned..." (Emphasis added)
>
> Rule 19 (a) and (b), U.R.C.P. (Note: Use of the term "shall", indica this admonition is jurisdictional, not merely discretionary)
>
> " Parties may be dropped or added...at any stage of the action."(Our
>
> Rule 21, U.R.C.P.
>
> Additional authorities hold as follows on the subject:
>
> "Thus, it is declared that all persons who have a material interest the litigation, or who are legally or beneficially interested in the subject matter of the suit, and whose rights or interests are s to be concluded thereby, are necessary parties."
>
> 59 Am Jur 2d Parties, Section 12
>
> "The interest that a party must have in the subject matter of a sui in order to be a necessary party thereto is a present, substantial interest, as distinguished from a mere expectancy or future contin interest."
>
> Green v. Grant, 143 Ill 61, 32 NE 369
>
> In support of the rule see this Utah based case, in the federal cou
>
> Silver King Coalition Mines Co. v. Silver King, etc. (CA 8 Utah) 2

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Based on said facts, outlined above, it is highly probable that Appellant is not only "necessary", but is an indispensable party, according to these views:

" Indispensable parties to an action are those whose interests in the subject matter are so interrelated, and would be so directly affected by the judgment, that a complete and equitable adjudication of the controversy cannot be made unless they are joined in the action."

Foster v. Stewart, (La.) 161 So. 2d 334

" A person is an indispensable party when the judgment to be rendered necessarily must affect his rights."

Hartman Ranch Co. v. Assoc. Oil Co., 10 Cal 2d 232, 73 P2d 1163

" For an absent person to be indispensable he must have a direct interest in the litigation; and if this interest is such that it cannot be separated from that of the parties to the suit**, if the court cannot render justice between the parties in his absence, if the decree will have an injurious effect upon his interest, or if the final determination of the controversy in his absence will be inconsistent with equity and good conscience, he is an indispensable party."

59 Am Jur 2d Parties, 361 (**How can the joint interest in Parcel 12, Appellant and Ringwood, be separated and a full adjudication have taken place? We think this is impossible, particularly when defenses available to Appellant are likewise precluded by the lower court!)

Cumlative to the foregoing is the question of whether Dr. Krofcheck's position as an original party defendant in the main action can be abrogated, although having a continuing interest in the subject matter (Parcel 12), by the severence technique employed herein. This authority comments on this aspect as follows:

"Where all of the several parties defendant joined in the action are proper parties, the right to dismiss, discontinue, or nonsuit as to one, or less than all, and to continue the action against the others, generally depends on whether all the named defendants are necessary parties to the action." (Emphasis added)

24 Am Jur 2d 34, Section 41

POINT II: APPELLANT LEGALLY MADE HIS APPEARANCE BELOW, WHICH APPEARANCE RECOGNIZED BY THE RECORD AND RESPONDENT.

Although the specific ruling which has propelled this appeal involv whether Appellant is a proper party, the Respondent has, through prior argument to the court below, also claimed that Appellant did not in fac make a legal appearance in the proceedings below. However, Appellant's efforts in this regard started shortly after these proceedings were severed in April of 1976.

In May, 1976, Appellant filed his motion for summary judgment, with extensive affidavits annexed thereto dealing directly with the subject matter of the action (Record: Pgs 35-50). Respondent opposed said motio by attempting to ameliorate the adverse facts described in Appellant's affidavits, with a counter-affidavit of one Gary A. Frank (Record: Pgs 58-77). The legal effect of Appellant's said motion for summary judgmen clearly constitutes a general appearance in the severed proceedings bel according to this authority:

> " Inclusion in a motion...of other than jurisdictional grounds may render an appearance general...Motions of this character which have been held to have such result include motions..for summary judgment (Emphasis added)
>
> 6 CJS Appearances, Section 25 (b.)

Thereafter, Appellant participated further in June, 1976, by filing his notice for hearing said summary judgment motion, which motion-notic was served on Respondent (Record: Pg 53) and the other parties. These actions, filing the motion in the first place and the notice afterwards constitute more than is minimumly required to establish a general appea ance, as indicated by this rule:

"...if the attorney goes further and seeks in any way to participate in the case, an appearance is effectuated (Citing cases)"

6 CJS Appearances, Section 21

The record on appeal will further disclose that despite Appellant's effort to have his day in court, his motion and the other pending motions with hearings scheduled thereon were continued several times with the court below declining to rule thereon favoring instead a trial on the merits.

Appellant's counsel appears throughout the file of this case as the attorney of record for Appellant; and, the other parties, including Respondent as well as the Court Clerk, continued to serve Appellant's counsel with the various pleadings and other documentation incident to this action, right up to trial (Statement Of Facts, supra.).

Finally, if it should be argued that an effective severance has taken place barring Appellant's participation, consideration must be given to this rule:

" Nor should a severance as to defendants be ordered where it will deprive one of them of a substantial right or where the severance would not serve any useful purpose (Citing much authority)."

1 CJS Actions, Section 119 (b) (2)

POINT III: HAD APPELLANT BEEN PERMITTED TO PARTICIPATE AT TRIAL, HE WOULD HAVE CONTINUED WITH HIS MERITORIOUS DEFENSE WITHIN THE SCOPE OF RESPONDENT'S COMPLAINT IN INTERVENTION AND ITS CASE-IN-CHIEF.

In conjunction with the defenses of Richard W. Ringwood to the purported redemption of Parcel 12 by Respondent, as reffered to in the former's collateral appeal (Utah Supreme Court Number 15207), the Appellant herein was fully prepared to amplify his own defenses, that were clearly before

the lower court but never ruled on (Record: Pgs 35-50), had he been per
to do so at the trial of October 26, 1976, as follows:

A. Respondent's Attorney's Lien Was Filed On Parcel 12 Long After The Lien Debtor's Interest Therein Ceased

Facts set forth in the record on appeal, never challenged by Respon anywhere in said record or at trial, disclose that just after Appellant' grantor of Parcel 12 had title thereto partitioned and quieted, the ori lienor, William S. Richards, executed and recorded in 1971 quit claim d to said parcel, inter alia, just prior to the recording of Appellant's t to said land (Record: Pgs 35-36, Paragraphs 1-3). Thereafter, Warranty were recorded from Park City Utah Corporation, the lien debtor, to Appe on October 22, 1971 (Record: Pg 25, Par. 19) covering Parcel 12 and oth property.

Thus, after said debtor, under Respondent's attorney's lien, had be fully divested of its interest in Parcel 12, said lien was then recorde against Appellant's property over one year later, on November 15, 1972. (Record: Pgs 23, Paragraph 13; 80-82).

Apparently William S. Richards, the original lienor under Responden attorney's lien, thought his claim followed his debtor-client's real pr erty into Appellant's hands. Such is not the law in Utah, as shown by t recent (1972) case similar to the within cause (except, relating to a judgment for attorney's fees, which Respondent's claim is not) involvin land which had been sold by the attorney's lien debtor to others whereb the latter's land, as grantee, was held to be not liable under said lie as indicated in this decision:

" The lien which this statute (78-51-41, U.C.A.) gives the attorney is upon his client's cause of action and/or judgment; and with respect thereto he stands in no better position than his client. For the same reasons stated above, indicating that the plaintiff's judgment does not run against either [third party, in Appellant's position], any lien the plaintiff's attorney may have thereon [the judgment] is likewise not effective against them [land conveyed to innocent third parties, like Appellant]." (Emphasis and brackets added)

Lundeberg v. Dastrup, (Utah 1972) 497 P2d 648, @ page 650, second column.

It is to be emphasized that said foregoing case (497 P2d 648) is making a particular limiting reference to that part of said statute (78-51-41, U.C.A.) which grants an attorney's lien on a judgment "in his client's favor and to the proceeds thereof in whosesoever hands they may come."

Respondent's lien in question was of course never reduced to judgment (Record: Pgs 14-15) hence failing the criteria of Rule 69 (f) (1), U.R.C.P.. However, even if the same had been this Utah case seems to give priority to a valid deed, such as that by which Appellant acquired Parcel 12, predating said judgment, as follows:

" A judgment lien is subordinate and inferior to a deed which predated it whether recorded after such judgment or whether not recorded at all."

Kartchner v. State Tax Comm., (Utah) 294 P2d 790

Further to the rule expressed in Lundeberg (supra.) are these views in support thereof from other jurisdictions:

"...where an attorney recovering lands for his client failed to take steps to enforce his lien, or so to make the record that it would be notice to one whose duty it was to inquire, the lien would not attach as against a purchaser for value after judgment without notice."

Charles v. Whitt, 218 SW 994

"...if an attorney neglected to proceed to enforce his lien until a third person [such as Appellant] had in good faith, purchased the property recovered, he should be held to have waived his lien."

Fillmore v. Wells, 15 P 343

"....an attorney's charging lien covers only the interest of his c in the property charged, and is subject to any rights in the prope which are valid against the client at the time the lien attaches. (Emphasis added)

In Re Gillaspie, (D.C.) 190 Fed. 88

" A statute conferring a lien should not be construed so as to im the lien, by implication, on the property of one who is not respor ble for the debt."

53 C.J.S. 852

"As a general rule a valid lien created on real or personal propert is enforeceable against the property in the hands of any person wh sequently acquires it, except a bona fide purchaser for value with notice of the lien [Precisely the situation in Appellant's case]. (Emphasis and brackets added)

53 C.J.S. 859

It should be repeated that Appellant was the owner of Parcel 12 no only at the time Respondent's lien notice was recorded, but was likew owner at the time of the Downey Bank foreclosure decree and sale here which action Respondent relies upon for its redemption effort. These circumstances are similarly analized in another judicial sale attempt redemption case (except the redeeming creditor's claim had been reduc to judgment), as follows:

"...Laws of 1917, p. 426, allowing judgment creditors to redeem l sold on execution, the term 'judgment creditors' means judgment c of the person or persons whose lands are sold under execution, an have judgments or decrees capable of enforcement by a sale of the to be redeemed; and a judgment creditor of one who had no title t interest in the land could not redeem [i.e. creditor of Park City Corporation, Appellant's grantor, can not redeem land sold to App Parcel 12]" (Emphasis and brackets added)

Leach v. Torbert (Colo.) 204 P 334

In Support of the rule:

Exparte Wood (New York) 4 Hill 542

Utah law clearly intends that conveyances such as the Parcel 12 Warranty Deed to Appellant, recorded in October, 1971, (supra.), shall impart notice to the public, including Respondent, since the Richards lien purchaser-assignee (Respondent) "shall be deemed to purchase and take with notice" [Section 57-3-2, Utah Code Anno.] in view of Appellant's earlier recorded deed.

The precision with which interpretations of said recording statute operate, is evident in the recent Utah case of Wilson v. Schneiter's Riverside Golf Course, 523 P2d 1226 where it was held that the "party who first recorded notice of purchase prevailed" in a dispute over overlapping land descriptions. Given such hair-splitting as in that case, Appellant's factual basis can stand with complete impunity as to his priority against Respondent's too-late recording date for the subject attorney's lien.

B. Respondent's Lien Clouding Title To Parcel 12, Partitioned in Civil No. 4143, Was Illegally Based On Fees For Outside Lawsuits.

Facts before the lower court, unchallenged by Respondent,disclose that Civil No. 4143, in the Summit County District Court, partitioned and quieted title of Parcel 12, inter alia, for which not more than $6,000.00 can be attributed to attorney fees, costs and expenses favoring William S. Richards, the original lienor, and his firm, against Appellant's grantor (Record: Pg 23; Paragraphs, 11, 12, 13). Further, the sum of $15,500.00 cash had been paid said Richards for application upon said lawsuit's fees subsequent to the attorney's lien filing of record (Record: Pg 25, Par. 18) thereby discharging the said indebtedness incurred for Civil No. 4143 (Record: Page 26, Par. 22; Pg 20) prior to the Downey Bank foreclosure herein.

Moreover, said attorney's lien notice as filed on November 15, 1972 (Record: Pgs 80-82) purported to secure fees, costs and expenses incurr by Appellant's grantor relative to several other lawsuits (Civil Number 4119, 4194, 4222, and 4275) none of which had been then adjudicated re- sulting in judgment, or otherwise. Of the $39,000.00 total attorney's l claim, approximately $33,000.00 thereof represented charges by the lier William S. Richards and his firm, for fees and costs concerning matter still unresolved outside the Civil No. 4143 suit which embraced Parcel (Record: Pg 24, Par. 17). The lower court files for the above-mentione outside suits not only involved different issues, but there were many parties joined with Appellant's grantor who were not involved with sai Civil No. 4143 action by which Parcel 12 was partitioned and thence so to Appellant, (Record: Pg 45, last sentence)

The impropriety of lumping together all fees, costs and expenses various other lawsuits then under prosecution, and the involvement of different clients therein, with the Parcel 12-Civil No. 4143 action (one having gone to judgment as of the date the Respondent's lien was f is illustrated by this fundamental doctrine of law:

> "...an attorney's charging lien extends only to fees and disburse rendered in the particular action in which they were incurred, an not cover a general balance due the attorney, or charges rendered other causes." (Emphasis added)
>
> 97 ALR 1134, 1st Column, Par. 3, (citing over 100 cases, from all dictions)

As indicated earlier in this brief, only Civil No. 4143 had gone ment as of the Respondent's lien filing date, for which the $6,000.00 due and subsequently paid off before foreclosure and Respondent's pur

thereof. The other suits were unresolved, and as of the date of this brief, the one requiring the greatest amount of Richards' time thereon, Civil No. 4275, is still pending and untried in the court below. In any case, Richards and his law firm ceased as attorneys for Appellant's grantor, and the latter's associates, before most of said remaining suits went to judgment or were even tried. From the decision of this Utah case the relevancy of such facts are discussed, resulting in an adverse ruling applicable to Respondent's lien position herein:

> "[3, 4] It is to be noted that the statute above set forth, [78-51-41, U.C.A.] gives to an attorney what is called a charging lien which attaches to a verdict, report, decision or judgment in his clients' favor and to the proceeds thereof. At the time of the order purportedly giving liens to the attorney, the plaintiff had no verdict, report, decision, nor judgment in his favor, and of course he had no proceeds therefrom. [Same facts as applied to Appellant's grantor and said other outside lawsuits]. The statute gives a lien to the attorney on the fruits of his labor so as to protect him against an unjust enrichment on the part of the non-paying client. It is not intended to give a general lien on any other assets of the client."
>
> Midvale Motors, Inc. v. Saunders (Utah 1968) 442 P 2d 940, second col.
>
> In support of that case see also:
>
> Bishop et al. v. Parker et. al. (Utah) 134 P 2d 180

C. The Parcel 12 "Proceeds" From Civil No. 4143 Are Not Of A Type Which Can Be Subjected To Respondent's Attorney's Lien.

The real property encompassed by the Civil No. 4143 action, including Parcel 12, upon which Respondent's subject lien was filed, was not legally "recovered", it was instead partitioned. The services of the Richards law firm in connection with said Civil No. 4143 suit were for defending and protecting Appellant's grantor's title to said property in the form of a

partitioning suit. Hence, on still another ground the subject attorney's lien notice appears invalid as shown by this authority:

> " In a majority of jurisdictions in which an attorney has a lien on specific property recovered, an attorney has no lien on property fo his services in successfully defending or protecting the title ther the mere protection or defense of the title not being considered a covery of the property involved." (Emphasis added)
>
> 93 ALR 689, (b)

Numerous cases from many other jurisdictions are cited under the fo rule, with the specificity of partitioning suits, comparable to Civil I included therein. Two of said cases are cited as: Gibson v. Buckner, 4 1034 and Gladney v. Rush, 56 SW 448.

CONCLUSION

Beyond Appellant's obvious position as a necessary party, having m full and proper appearance that was recognized by Respondent and the Co Clerk, as well as Intervenor Ringwood, (POINTS I and II), the detailed elements relating to Respondent's lien's invalidity, ab initio, were c before the court below (POINT III) and constituted a basis for Appella participation at trial, which was denied him.

DATED this 27 day of June 1977.

Respectfully submitted,

s/ DRS

DON R. STRONG, Attorney for Appellant, Joseph L. Krofch

SERVED the foregoing Appellant's Brief this 27 day of June 19 mailing two copies of the same, postage prepaid, to Respondent's coun to Intervenor Richard W. Ringwood's counsel, at the addresses set for the cover of this brief.

APPENDIX B

[Resoondent's prayer from its Complaint in Intervention, Civil No. 4473-A. The Intervenor Richard W. Ringwood's prayer, and Complaint in Intervention, is similar, as qualified in the attached brief].

that Franklin D. Richards & Company is a redemptionor entitled to redeem the said Parcel 12 from the Sheriff's Sale and an issue exists between the Intervenors which must be resolved by the Court herein.

WHEREFORE, the Intervenor, Franklin D. Richards & Company, prays for relief herein as follows:

1. For an Order vacating the Order of October 2, 1974; denying the Motion of the defendant, Joseph Krofcheck, in all particulars with prejudice and upon the merits, and adjudging that Intervenor, Franklin D. Richards & Company, is the owner in fee of the properties sold at the said Sheriff's Sale free and clear of any right, title or claim of any other party to this action.

2. In the event the Court declines to grant the relief sought by paragraph 1 herein or in the event orders favorable to Intervenors in said matter be reversed on appeal, then the Intervenor, Franklin D. Richards & Company, prays for an Order and Decree adjudging that the Intervenor has a good and valid lien upon the properties purchased and redeemed by it to secure payment of the sums paid for purchase of the properties, together with redemption fees, interest, reasonable attorney's fees and costs; providing for foreclosure of said lien; and ordering and directing the plaintiff herein, Downey State Bank, to account for moneys paid by the purchasers at the Sheriff's Sale and to

make restitution of said sums to the Intervenor, Franklin D. Richards & Company, together with redemption fees, interest, attorney's fees and costs.

3. For an Order adjudging that Intervenor, Franklin D. Richards & Company, has effected a valid and lawful redemption of Parcel 12 and is the owner of all interests acquired by Richard W. Ringwood as purchaser of said property at the Sheriff's Sale and directing the Sheriff of Summit County to execute and deliver to said Franklin D. Richards & Company a good and sufficient Sheriff's Deed to said property.

4. For costs of this action and for such other and further relief as the Court may deem just and equitable in the premises.

DATED this 31st day of December, 1974.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By _____
Grant Macfarlane, Jr.
Attorneys for Intervenor, Franklin D. Richards & Co.
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Copies of the foregoing Complaint in Intervention were mailed, postage prepaid, this 31st day of December, 1974, to:

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By _____
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