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Laura Morris and Lucy Pocatello Johnson, Maude Pocatello Racehorse, Josephine Pocatello and Ray Pocatello v. Amasa L. Clark, Joseph E. Robinson, and Box Elder County : Reply Brief of Respondents

Utah Supreme Court

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Stephens, Brayton & Lowe; Attorneys for Respondents;

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No. 6248

In
The Supreme Court
of the
State of Utah

LAURA MORRIS, Special Admin-
istratrix of the Estate of Washing-
ton Pocatello and Minnie Pocatello,
His Wife, Both Deceased, and LUCY
POCATELLO JOHNSON, MAUDE
POCATELLO RACEHORSE,
JOSEPHINE POCATELLO and
RAY POCATELLO, Heirs of
Washington Pocatello and Minnie
Pocatello, Deceased,

Plaintiffs and Appellants,

vs.

AMASA L. CLARK, JOSEPH
E. ROBINSON and BOX ELDER
COUNTY,

Defendants and Respondents.

Respondents' Reply Brief

STEPHENS, BRAYTON & LOWE,
Attorneys for Respondents.

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STATEMENT OF THE CASE

This is an action brought in the District Court of the First Judicial District by the Special Admin-istratrix of the Estates of Washington Pocatello and Minnie Pocatello, his wife, and their heirs, to quiet title to a one-third interest in eighty acres of land situate in Box Elder County, Utah. The re-

spondents, defendants in the trial court, are Amasa L. Clark and Joseph E. Robinson, who deny the claims of the appellants, plaintiffs below, allege ownership in themselves and ask that title to said premises be quieted in them. (Ab. 1-94).

The trial court made very full and complete Findings of Fact against the claims of the appellants and in favor of the respondents and entered Judgment dismissing the appellants' complaint and decreed the respondents to be the owners of said property in fee simple and quieted the title to said premises in the respondents. (Ab. 111-146). The appellants have appealed to this Court.

The respondents objected, in the lower court, to the settlement of the Bill of Exceptions on the ground that the trial court had no jurisdiction to settle the bill and in due time moved this Court to strike the same. The motion was granted and the appeal is now before this Court on the Judgment Roll.

The appellants made thirty-nine Assignments of Error. All of these assignments, with one or two exceptions, are based upon the fact that the Findings are not supported by the evidence in the case. Any assignments not made upon the ground that the evidence does not support the same are not discussed in appellants' briefs and are, therefore, deemed waived.

ARGUMENT

The Bill of Exceptions in this case having been stricken, this case is now before the Court on the Judgment Roll. The appellants have made no Assignment of Error that the Findings of Fact and Conclusions of Law do not support the judg-

ment in this case. All assignments argued by the appellants go to the evidence in the case and this evidence cannot be considered, the Bill of Exceptions having been stricken.

Under Rule X of this Court relating to briefs, is provided:

“Errors assigned but not argued in the briefs will be deemed waived.”

It is well established in this jurisdiction that the Appellate Court will not consider any grounds or errors other than those properly assigned or specified. Errors assigned, or though assigned, not briefed or discussed, will not be considered.

See Vol. 4, C. J. S. Appeal and Error, Sec. 1218, citing under Note 98, the following Utah cases:

Gill v. Tracy, 13 P. (2d) 329; 80 Utah 127.
Advance-Rumely Thresher Co. v. Stohl,
283 P. 731; 75 Utah 124.

Roach v. Los Angeles & S. L. R. Co., 280 P.
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U. S. 661; 66 L. Ed. 423.

Sandall v. Sandall, 193 P. 1093; 57 Utah
150; 15 A. L. R. 620.

See also:

Notation after 104-41-26, Revised Statutes
of Utah, 1933.

Assignments of Error — Necessity —
Unless error is assigned there is nothing

to review. With Utah cases thereunder cited.

Also see:

Under 104-41-26, Revised Statutes of Utah, 1933, Notation:

Assignment of Error — Waived, if not argued, and Utah cases thereunder cited.

Where no evidence was brought up for review, the Supreme Court could not say that the evidence did not support the Findings of Fact.

Knapp v. Knapp, 73 Utah 268; 273 Pac. 512.

Let us review the Assignments of Error made by the appellants. (Ab. 364-426). Assignment of Error No. 1 relates to matters set out in the Supplemental Answer of the respondents as being immaterial and relates to property not involved in this suit. The assignment is not discussed in appellants' brief and may therefore be disregarded.

Assignment of Error No. 2 relates to error by the trial court in admitting evidence over plaintiffs' objection. This error, as relied upon by appellants, is set out at page 35 of the Reporter's Transcript, evidenced by defendants' exhibits.

Since the Reporter's Transcript and the exhibits were shown in the Bill of Exceptions and the bill has been stricken, these matters are not before the Court.

Assignment of Error No. 3 relates to Finding of Fact No. 7. In support of this assignment appellants allege that the same is not supported by the evidence and record in the case. They rely upon numerous exhibits which are not before this Court for review.

Assignment of Error No. 4 relates to Finding of Fact No. 7. The appellants rely upon exhibits F

and G, shown in the stricken Bill of Exceptions. They are not now before this Court.

Assignment of Error No. 5 further relates to Finding of Fact No. 7. Again, appellants rely upon plaintiffs' exhibits K, defendants' exhibit 5, plaintiffs' exhibit M, and other evidence, none of which is before the Court for review.

Assignment of Error No. 6 relates to Finding of Fact No. 9. The appellants allege that this finding is contrary to the evidence and record in the case and rely upon exhibits H and M and other evidence, none of which is before this Court for review.

Assignment of Error No. 7 relates to Finding of Fact No. 9. Appellants allege that the finding is contrary to the evidence produced by both plaintiffs and defendants and rely upon plaintiffs' exhibits F, G, I and M and defendants' exhibit 5. None of these exhibits is before the Court for review.

Assignment of Error No. 8 relates to Finding of Fact No. 9. Appellants allege that the court should have found, from the evidence and record in the case, differently and rely upon exhibits H, M, and other evidence in support of its contention, none of which evidence is before the Court for review.

Assignment of Error No. 9 relates to Finding of Fact No. 9. The appellants allege that this finding is not supported by any testimony and rely upon exhibits K and M, neither of which exhibits is before this Court for review.

Assignment of Error No. 10 relates to Finding of Fact No. 9. Appellants allege that the evidence before the court and particularly exhibit M does not support this finding. This evidence is not before the Court for review.

Assignment of Error No. 11 relates to Finding of Fact No. 10. Appellants allege that this finding is

decidedly contrary to the testimony in the case and rely upon exhibits H, I, and M, and exhibit 5. These exhibits are not before the Court for review.

Assignment of Error No. 12 relates to Finding of Fact No. 11. Appellants contend that "in the face of the record and testimony furnished in this case," the court was not authorized to make such finding. The record and testimony referred to are not before the Court for review.

Assignment of Error No. 13 relates to Finding of Fact No. 13. Again, appellants complain that "in the face of the evidence and record in this case," the court could make no such finding. They rely upon exhibits 4, 5, I and J in support of their contention. These exhibits are not before this Court.

Assignment of Error No. 14 relates to Finding of Fact No. 11. The appellants contend "such finding, in the face of the record and evidence produced in court in this case, is error, and is so contrary to the facts, etc.," that the court is not authorized in making this finding. This evidence, referred to by appellants, is not before the Court for review.

Assignment of Error No. 15 relates to Finding of Fact No. 12. Appellants contend that this finding is contrary to the evidence and rely upon exhibit M. None of this evidence is before the Court for review.

Assignment of Error No. 16 relates to Finding of Fact No. 13. Appellants contend that this finding is contrary to the evidence and is not supported by the record in the case. They refer to exhibit 5 and certain testimony shown at page 45 of the Reporter's Transcript. All of this evidence was stricken with the Bill of Exceptions and none of the evidence is before the Court for review.

Assignment of Error No. 17 relates to Finding of Fact No. 13. Appellants contend that this finding

is contrary to the testimony of the defendants and further rely upon exhibit M. None of this testimony is before the Court for review.

Assignment of Error No. 18 relates to Finding of Fact No. 13. Appellants contend that this finding is contrary to the law and the evidence in the case. None of the evidence complained of is before the Court for review.

Assignment of Error No. 19 relates to Finding of Fact No. 14. The appellants complain that the evidence in the case does not support this finding. None of this evidence is before the Court for review.

Assignment of Error No. 20 relates to Finding of Fact No. 15. The appellants contend that this finding is not supported by the evidence in the case and rely upon exhibit M. None of this evidence is before the Court for review.

Assignment of Error No. 21 relates to Finding of Fact No. 15. Appellants allege that "from the record in this case before the court" the trial court should have found otherwise. This record, exhibit M, is not before the Court for review.

Assignment of Error No. 22 related to Finding of Fact No. 16. Appellants complain that this finding is not supported by the evidence in the case and particularly by exhibit 5. None of this evidence is before the Court for review.

Assignment of Error No. 23 relates to Finding of Fact No. 16. Appellants complain that this finding is not supported by the evidence and rely upon exhibit 5 and exhibits I and M. These exhibits are not before the Court for review.

Assignment of Error No. 24 relates to Finding of Fact No. 16. Appellants contend that this finding

is not supported by the evidence and the record in the case and that the court ignored the records and files in exhibit M. None of this evidence is before the Court for review.

Assignment of Error No. 25 relates to Finding of Fact No. 17. Appellants contend that this finding is untrue and quote certain testimony shown at page 12 of Reporter's Transcript. All of this testimony was stricken with the Bill of Exceptions and is not before this Court for review.

Assignment of Error No. 26 relates to Finding of Fact No. 17. Appellants contend that in the face of the evidence the court was not justified in making this finding. All of the record disclosed by this assignment was stricken and is not before the Court for review.

Assignment of Error No. 27 relates to Finding of Fact No. 19. It is alleged that this finding is contrary to the evidence and that the record in the case shows a contrary state of facts. None of this record, complained of, is before the Court for review.

Assignment of Error No. 28 relates to Finding of Fact No. 20. Appellants refer to various testimony and cite numerous pages of the reporter's notes in support of this assignment. None of this testimony is before the Court for review, the same having been stricken with the Bill of Exceptions.

Assignment of Error No. 29 relates to Finding of Fact No. 20. Appellants complain that the record shows to the contrary and rely upon exhibits 4, J, L and N. None of this evidence is before the Court for review.

Assignment of Error No. 30 relates to Finding of Fact No. 20. Appellants contend that the evidence

is to the contrary and rely upon exhibits O and J. None of this evidence is before the Court for review.

Assignment of Error No. 31 relates to Finding of Fact No. 24. Appellants contend that this finding is not supported by the evidence in the case, none of which is before the Court for review.

Assignment of Error No. 32 relates to Finding of Fact No. 25. It is contended that this finding is irrelevant and immaterial and that its injection only encumbers the issues. This is not ground for reversing the judgment in this case. Appellants further contend that the finding is not borne out by the record and the evidence in the case. None of this evidence is before the Court and the assignment is therefore of no value to the appellants.

Assignment of Error No. 33 relates to Finding of Fact No. 26. Appellants contend that this finding is largely a repetition of former findings and that the same is not supported by any evidence. Appellants review certain evidence which is not before the Court and contend that there is not a "scintilla of competent evidence anywhere in the record." Since there is no evidence for the Court to review, this assignment must be disregarded.

Assignment of Error No. 34 relates to Finding of Fact No. 27. Appellants contend that there is no evidence in the record to support said finding and rely upon exhibit M and other testimony, none of which is before the Court for review.

Assignment of Error No. 35 relates to Finding of Fact No. 28. Appellants review the evidence in the case including exhibit M in support of their contention. None of this evidence is before the Court and the assignment must be disregarded.

Assignment of Error No. 36 relates to Finding of Fact No. 29. Appellants contend that this finding

is not supported by the evidence, all of which is stricken and is not before the Court.

Assignment of Error No. 37 relates to Finding of Fact No. 30. Appellants review page 57 of the Reporter's Transcript. This testimony has been stricken and is not before the Court for review.

Assignment of Error No. 38 relates to Conclusions of Law. Appellants contend "that such conclusions are not supported by the evidence, the record before the court, the law of the case, as pointed out in plaintiffs' assignments of error, therefore the court erred in such conclusions." Since the evidence referring to plaintiffs' assignments of error has all been stricken, this evidence is not before the Court for review. Under the findings as made, we submit, the court could have made no other conclusions of law.

Assignment of Error No. 39 relates to the Judgment and Decree made and entered in the case. It is alleged that the court erred in "Paragraphs 1, 2, 3, 4 and 5 of the Decree on the grounds that said Decree, or any part thereof, is not supported by the evidence, the record and the law of the case, but is contrary to the evidence, record and law of the case as pointed out in plaintiffs' assignments of error." It will be noted that the appellants do not make an assignment that the Findings of Fact and Conclusions of Law do not support the Judgment. They rather rely upon the failure of the evidence to support the Judgment. This assignment, upon the record of this Court, can avail them nothing.

Since appellants' original brief was prepared by the attorneys for the appellants prior to the granting of respondents' Motion to Strike the Appel-

lants' Bill of Exceptions and since the assignments of error argued in said original brief were predicated upon the evidence in the case, the matters therein considered need not be reviewed by us at this time.

This Court, at the time of granting respondents' motion to strike the bill of exceptions granted attorneys for appellants permission to file a Supplemental Brief, if they desired, wherein they might set forth their position why the judgment of the lower court should be reversed on the judgment roll. There has been filed with this Court a brief statement of facts from the judgment roll, designated Supplemental Brief of Appellants.

Appellants in this supplemental brief rely upon two points for a reversal of the judgment, on the judgment roll. Neither of these matters was assigned as error, except that the evidence introduced in the case did not support the same. Since the bill of exceptions has been stricken, the evidence cannot now be reviewed and the points, without specific assignment of error, cannot now be reviewed by this Court.

The first point raised under this supplemental brief questions the right of the First National Bank of Pocatello to deliver the deed covering this property. The trial court found that the deed was placed in escrow with the bank to be held by it until the consideration recited in the deed was paid, at which time the deed was to be delivered to the grantee. (Ab. 117). The court further found in finding No. 9 (Ab. 120-121) that the consideration was paid to the bank and that the deed was regularly delivered. The rule is well established, in such cases, that the delivery of a deed by the escrow holder, upon pay-

ment of the consideration, takes effect as of the date of its first delivery to the escrow holder.

“The Delivery of a Deed in escrow renders it absolute when the condition upon which it was made is fulfilled, and the Deed takes effect from the date of the first delivery.”

Gammon v. Bunnell, 22 Utah 421.

This Court in the same case says:

“The delivery of this deed in escrow rendered it absolute when the condition upon which it was made was fulfilled. The evident intention of the parties was that if within a reasonable time *after the death of the grantors* the plaintiff should pay to Martha Ann Gammon Roberts \$300, evidenced by her receipt, then the deed was to be delivered to the plaintiff. One dollar of this consideration was acknowledged paid, and the plaintiff went into immediate possession of the premises. The object of the delivery in escrow was to secure the payment of the price to Mrs. Roberts. When that was paid, or offered to be paid, and refused, the plaintiff had a right to the deed. The purpose of the escrow having been accomplished the plaintiff held the deed in the same manner he would have held it if it had been delivered to him in the first instance. The intention was that it should be the deed of the grantee when the condition was complied with, and when complied with it would take effect from its first delivery.

Devlin on Deeds, Secs. 328, 329.

Price v. Pittsburgh R. R., 34 Ill. 33.

Bostwick v. McEvoy, 62 Cal. 496.

Ruggles v. Lawson, 12 John 285.

Davis v. Clark, 48 Pac. 563.

Wheelwright v. Wheelwright, 3 Am. Dec. 66."

Thompson on Real Property, Vol 4, under
Delivery of Deeds, Section 3961, says:

"Relation Back to First Delivery. A relation back to the first delivery is allowed only in cases of necessity, to avoid the effect of events happening between the first and second delivery which would otherwise prevent the operation of the deed as intended. In such cases the deed is given effect by relation from the first delivery, in order that the operation of the deed may not be frustrated by events transpiring after the first delivery and before the second has taken place. Thus, in case the grantor dies before the happening of the event upon which the second delivery is to be made, it may be necessary to resort to the doctrine of relation to give the deed effect.

It is a well settled rule that if either of the parties die before the condition is performed, and afterwards the condition is performed, the deed is good, and will take effect from the first delivery."

The authority cited by appellants, as to the termination of agency upon death of the principal, is good law but is not applicable to the facts of this case. In this matter, the trial court has found (Ab. 116-17)

“That on or about February 2, 1917, Washington Pocatello and Minnie Pocatello, his wife, entered into a contract to sell said eighty acres of land to one U. F. Diteman for a consideration of \$3200.00; . . . That said Washington Pocatello and Minnie Pocatello, his wife, as sole heirs of Yaotes Owa, made, executed and delivered a warranty deed for said eighty acres of land to U. F. Diteman, which said deed recited a consideration of \$3200.00 and was deposited with the First National Bank of Pocatello, Idaho, as escrow depositary, the said bank to hold said warranty deed until the consideration of \$3200.00 was fully paid, at which time said deed so left in escrow was to be delivered by said bank to said U. F. Diteman.”

The trial court further found (Ab. 120-21):

“the court further finds that said warranty deed was by the First National Bank of Pocatello, Idaho, delivered to U. F. Diteman, or some person acting for him, and that the said deed which on its face recited a consideration of \$3200.00, was regularly filed for record in the office of the County Recorder of Box Elder County, Utah, on November 10, 1919 at 4 P. M., in Book 15 of Deeds, at page 440; . . . That the said A. I. Grover did from November, 1919, claim ownership of said lands; that said deed was not void but was a valid deed and passed title to the undivided one-third interest of said property to U. F. Diteman; that the depositary bank had no right to deliver the deed to said

property without a full compliance with the terms and obligations of the escrow agreement but the court finds that the deed was regular on its face, recited the consideration of \$3200.00 and from the evidence in the case the court finds that said \$3200.00 recited in the deed was paid to said escrow holder and that the transaction with said bank was not fraudulent; the court further finds that although Washington Pocatello had title before the property was decreed to his estate, that it was unnecessary to specifically enforce the escrow agreement under the provisions of Section 7741, Revised Statutes of Utah, but the bank upon payment of the consideration aforesaid, was justified in delivering said deed to the grantee therein.’’

From the findings of the court, as aforesaid, the said bank, as escrow holder, was fully justified in delivering said deed and said deed took effect from the delivery of said deed by grantors to said bank, as escrow holder. Since the trial court has held that the provisions of the escrow agreement were complied with and the consideration was fully paid, the bank could do nothing other than deliver the deed and it became effective as of the date of its deposit with the bank.

We see no occasion to further comment on this matter as the question is not properly before this Court under the record in this case.

The second point raised by the supplemental brief is that this Court must take judicial notice of probate file No. 355 in the matter of the Estate of

Washington Pocavello, in the District Court of Box Elder County.

Again, we say this is a matter not covered by any assignment of error, on the part of the appellants.

The abstract shows that this file was received in evidence by the trial court (Ab. 246). Since the bill of exceptions has been stricken, this probate file, with the other evidence in the case, is not before the Court for review.

This Court in a similar case said:

“The plaintiff offered and the trial court received in evidence the files in case No. 9174, civil, of the district court of Weber County, Utah. The documents thus received in evidence are not made a part of the bill of exceptions and are not brought up for review on this appeal. The court made findings of fact evidently based upon the proceedings had in said case No. 9174, civil; and in the absence of any showing to the contrary we must assume such findings are supported by the evidence.”

Thomas v. Foulger, 71 Utah 274; 264 Pac. 975.

The appellants cite 23 C. J., Sec. 1918, at page 110, in support of their contention. This section relates to the trial court and its records. Section 1920, page 113, of the same citation, relates to the right of court to take judicial notice of other cases and states the rule as follows:

“Courts, including those of probate, cannot in one case take judicial notice of their own records in another and different case,

even though the trial judge in fact knows or remembers the contents thereof.”

Citing

In re Evans, 42 Utah 282; 130 Pac. 217,
the author states the reason for the rule as follows:

“Reason for Rule. As a rule the judgment and proceedings in another case than that on trial, even between the same parties, will not be taken notice of by the court of its own motion. Otherwise matters might be considered that a party has no opportunity to meet and explain.”

Hutchins v. George, (Vt.), 104 A. 108, 109.

Trial and Appellate Courts. (1) We hold that a trial court cannot in one case take judicial notice of its own records in another and different case, even though between the same parties and in relation to the same subject matter.”

Oliver v. Enriquez, 16 N. M. 322, 326; 117 P. 844; Ann. Cas. 1913A 140.

“(2) ‘What the trial court cannot judicially notice (in this behalf) the appellate court cannot notice when sitting in review of its judgment,’

Pacific Iron etc. Works v. Georig, 55 Wash. 149; 104 P. 151.”

Since this probate file was offered in evidence, Exhibit M, and made a part of the record and since this file has been eliminated from the record through the bill of exceptions having been stricken, we cannot believe that counsel is serious in this con-

tention. Furthermore, there is no assignment of error covering the same.

The findings of the trial court (Par. 26, Ab. 138) show that the respondents, Amasa L. Clark and Joseph E. Robinson, purchased said premises in good faith, for value and that they are the owners of the same. The finding in this respect is as follows:

“26. The court further finds that the defendants, Amasa L. Clark and Joseph E. Robinson, claim said premises as owners in fee simple; that the defendants purchased said premises in good faith and without notice or knowledge of any claims or matters set out by plaintiffs in their complaint herein, except as is hereinbefore expressly found; that the defendants, at the time they purchased said premises, were furnished with an abstract of title covering said property which said abstract of title had been approved by the State of Utah in the making of a prior loan on said premises for \$7500.00; that A. I. Grover, defendants’ immediate predecessor, entered into the possession of said premises under claim of ownership on or about November 3, 1919, and on or about said date began to farm said premises as the owner thereof; that at all times since on or about the 3rd day of November, 1919, until the 12th day of March, 1925, when said A. I. Grover conveyed said premises to defendants, the said Grover occupied and cultivated and improved said premises, protected the same by a substantial enclosure, paid all taxes each year levied and assessed upon said

lands and claimed to own the same continuously, openly notoriously, peaceably and under claim of right each and every year as his property, in fee simple, as against all persons whomsoever; that since the said conveyance to defendants under date of March 12, 1925, those defendants have claimed, occupied and farmed said premises each and every year as their property and defendants during all of said years have claimed said premises in fee simple, have each year and at all times cultivated and improved said property and protected said premises by a substantial enclosure, and each and every year defendants have paid all taxes levied and assessed against said land and have continuously, openly, notoriously, peaceably and under claim of right claimed to be the owners of said premises in fee simple as against the plaintiffs, the administrator of said estate, and all the World; that at no time until the filing of the complaint herein was any claim ever made by the plaintiffs or any other person as to the ownership of said premises hostile to these defendants; that when said A. I. Grover entered upon said premises the property was uneven and had insufficient water right and could not be farmed to best advantage; that the said A. I. Grover and these defendants spent much time, labor and money in the improvement and leveling of said premises and in the purchasing of additional water right for said premises, all of which said amounts were paid by said A. I. Grover and these defendants; that the defendants are in-

nocent purchasers of said property for value and are now the owners, in possession, seized in fee simple of said property.’’

The trial court further found (Ab. 141-142):

“27. That A. I. Grover is now dead, that Albert Saylor is long since dead, that U. F. Diteman is no longer a resident of this State and is now aged and infirm and is unable to remember or testify as to the facts in this case; that the First National Bank of Pocatello, Idaho, is insolvent and has been liquidated and that all instruments in connection with the escrow agreement, except as offered in evidence, have been destroyed; that by reason of the long lapse of time, nearly twenty years, the parties hereto are unable to procure testimony in support of their claims or to refute the same; that the claims of plaintiffs herein are now stale claims; that if the said First National Bank of Pocatello, Idaho, escrow holder, made any unauthorized delivery of said deed, then the administrator of said Washington Pocatello Estate and the heirs of said estate, by their subsequent acts, waived the performance of the conditions and ratified said delivery and by said subsequent acts raised a presumption of ratification of said delivery and are now estopped to deny the validity of said delivery; that the plaintiffs are now estopped by reason of laches, silence and other conduct on their part and on the part of the administrator herein, as heretofore found, from at this time prosecuting this action.

28. That the plaintiffs' first cause of action is barred by the Statutes of Limitation of the State of Utah and particularly by the provisions of Sections 104-2-5, 104-2-6, 104-2-7, 104-2-19, and by Subsection 3 of Section 104-2-24 of the Revised Statutes of Utah, 1933."

The appellants in their original brief complained that the evidence in the case did not justify the court in making its findings on the Statutes of Limitation, in that they did not apply against Indians. The record (not now before this Court) disclosed, and the trial court found (Ab. 129) that an administrator of this estate was appointed by the Probate Court of Box Elder County, January 12, 1920 and that said administrator at all times, from the date of his appointment to the date of the filing of the complaint herein, represented said estate and the heirs of said estate.

The record disclosed that these and many other Indians' estates were probated in Box Elder County more than twenty years ago. The United States had its U. S. District Attorney present and never questioned the jurisdiction of the Probate Court in these matters. Titles passed and reputable loaning companies, including the State of Utah, approved the titles. The United States Government, through its Indian Agencies, has refused to interfere in these matters, as was disclosed by the testimony of the Indian Agent at the trial of the case. These matters are not before the Court on appeal since the Bill of Exceptions has been stricken. We mention them, in passing, since the points were argued in the appellants' original brief.

The appellants, in said original brief, cite numerous cases involving Indian lands where the premises are under the jurisdiction of the Federal Government. The testimony of the Indian Agent, in this case, was to the effect that these lands were never under the jurisdiction of the Fort Hall Indian Agency. The Circuit Court of Appeals in the case of

United States of America v. Corporation of
the Church of Jesus Christ of Latter-
Day Saints, No. 1686 (January term,
1939), 101 Fed. (2d) 156,

holds that similar lands are no longer under the jurisdiction of the United States. The patent, in the instant case, was issued under the Act of 1875 and the trust period expired five years thereafter. The whole law of the case was discussed in the opinion of Judge Tillman D. Johnson when he rendered his decision in said Church case on July 31, 1937, which opinion was set out in the transcript of record of said case. The pleadings, in the instant case, as disclosed by appellants' third amended complaint, disclose that the United States Government and Fort Hall Indian Agency at all times refused to interfere in this matter. These pleadings disclose that the appellants were so advised on numerous occasions (Ab. 29-30) and yet twenty years thereafter they came into the District Court of Box Elder County and sought relief.

The law of the case is well stated in

14 R. C. L. P. 121, Section 15,
thereof, reads in part as follows:

“In bringing a suit in a State Court, an Indian is subject to the same laws relating to the prosecution of suits which govern

any citizen of the State, including the statute of limitation."

A very interesting case cited under the foregoing quotation is

Trujillo v. Prince, a New Mexico case, reported in 78 Pac. (2d) 145.

The Court in discussing the rights of Indians in land without the Reservation, says in part as follows:

"This reservation of power in the State implies the consent of Congress to acquisition by reservation Indians of land and property outside of an Indian reservation and outside of lands and property granted to him by Congress, which outside property will become subject to taxation. It is manifest that it would be idle for Congress to stipulate that the State could tax certain lands and property of Indians if the Indians are powerless to acquire such lands and property. The power to tax property carries with it the power of the State to dispose thereof to enforce the payment of delinquent taxes. The courts will be open to the Indian taxpayer to make any defenses which are open to other taxpayers similarly situated. Such defenses would doubtless be open to the personal representative of a deceased taxpayer. The State could doubtless enforce its claim for taxes against a deceased Indian's estate composed of property not in the field of restricted or qualified ownership. Suit to quiet title to land of Indian delinquent taxpayers acquired at tax sales would not likely be defeated because the Indian taxpayer was dead. His heirs and the admin-

istrator of his estate could doubtless, in appropriate circumstances, be made parties to such a suit. It would seem, therefore, that the cause of action which an Indian acquires when a tort is committed against him is property which he may acquire or become invested with, particularly if the tort is committed outside of an Indian reservation by one of our citizens who is not an Indian, and where such Indian is killed as a result of such tort the cause of action survives."

"In *Linneback v. Howerton*, 181 Ark. 433; 26 S. W. (2d) 74, 76, the Supreme Court of Arkansas, considering the jurisdiction of a probate court of Arkansas to appoint an administrator on the estate of a Cherokee Indian residing in Oklahoma, having property in Arkansas, said: 'We are unable to discover anything in the acts of Congress referred to and quoted by the appellee regarding the jurisdiction of Indians and their property that would preclude the courts of this State from dealing with property of an Indian, whether alive or dead, which is situated within the borders of this State. At most, these statutes were intended to apply to the personal and property rights of Indians in the Indian Territory, now a part of the State of Oklahoma, reserving to the government of the United States the right to preserve by law the property and other rights of the Indians acquired by treaty or otherwise, and could not have, and were not intended to have, any extra territorial effect'."

It is quite evident that the land in the instant case has long since passed from the jurisdiction of the United States Government. The Government has refused and still refuses to prosecute an action. The Federal Court has held that land similarly acquired has passed from the control of the United States Government and dismissed the action wherein the Government sought to retain jurisdiction over the same. In the recent Federal Court case,

U. S. v. Church, 101 Fed. (2d) 156, *supra*, the Government in its complaint prayed relief in part as follows:

"1. That said defendants, and each of them, be required to deliver up each and every instrument, document or writing purporting to evidence title in and to any of the lands of the defendants.

2. That it be adjudged and decreed that each and every of the attempted transfers of record as shown by the plaintiff's complaint be declared to be null and void and of no effect.

3. That each of said defendants' possession or exercising any control whatsoever of any of the lands of the patentee, be required to forthwith surrender such possession or control to the patentee of said lands and to the legal heirs thereof."

Judge Johnson held against such contention and ordered that the Government's complaint be dismissed with prejudice.

This is an action to quiet title. Appellants, in their original brief, contended that they were co-tenants

with the respondents and that respondents' possession was their possession. In appellants' complaint they alleged notice of respondents' hostile claim and their complaint further disclosed that they petitioned the Fort Hall Indian Agency for relief. There can be no doubt but that the filing of the deed on the 10th day of November, 1919, (Ab. 121) gave notice to the World of an adverse claim of appellants' predecessor in interest, as against Washington Pocatello and his heirs. Our statutes, Sections 104-2-5, 104-2-6 and 104-2-7, in actions for the recovery of real property, require that the plaintiff, his ancestor, grantor or predecessor in interest is seized or possessed of the property within seven years before the commencement of the action. It is now a unique position, in the face of these facts, for the appellants to contend that they were co-tenants with the respondents. Such cannot be the law. This Court cannot review these matters since the evidence is not before the Court, the Bill of Exceptions having been stricken.

As we have heretofore said, the findings in this case are very complete and fully support the respondents' answer. The trial court has dismissed the complaint and has quieted title to said property in the respondents.

On appeal, the appellate Court assumes that the findings are supported by the evidence.

Thomas v. Foulger, 71 Utah 274; 264 P. 975.

This Court, in a similar case, where the bill of exceptions was stricken, said:

"The errors assigned relate wholly to the admission of certain testimony on the part of the plaintiff, the giving of certain in-

structions, and the refusal of the Court to instruct as requested by defendants. The Bill of Exceptions not being before the Court, these assignments cannot be considered. No contention is made that the pleadings do not support the judgment. The allegations, if true, without doubt entitle the plaintiff to the relief sought."

Ukon Water Company v. Rooker, 56 Utah
294; 190 Pac. 778.

We respectfully submit that the findings fully support the judgment in this case and since the appeal to this Court is upon the judgment roll, there must be an affirmance of the Decree of the lower court.

Respectfully submitted,

STEPHENS, BRAYTON & LOWE,
Attorneys for Respondents.