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Roy Free v. Swen C. Jensen, Chris Jensen, Alma Jensen, and Regional Agricultural Credit Corporation of Salt Lake City, Utah : Brief of Appellants

Utah Supreme Court

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In the

Supreme Court of the State of Utah

ROY FREE,

Plaintiff and Respondent,

v.

**LEWEN C. JENSEN, CHRIS JENSEN
and ALMA JENSEN, his wife, RE-
GIONAL AGRICULTURAL CREDIT
CORPORATION OF SALT LAKE
CITY, UTAH, a corporation,**
Defendants and Appellants.

Case No.
6326

Appellants' Brief

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ROY FREE,

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GIONAL AGRICULTURAL CREDIT
CORPORATION OF SALT LAKE
CITY, UTAH, a corporation,

Defendants and Appellants.

Case No.
6326

Appellants' Brief

STATEMENT OF FACTS

The decree appealed from was entered in an action brought by the respondent to quiet title to a parcel of farming land located near Woods Cross in Davis County. The complaint is in the usual form except that it alleged that the defendants Chris Jensen and Alma Jensen were in possession of the premises. Since the validity of a tax title is one of the questions involved it becomes important to keep in mind the exact description of the property set

forth in the original complaint. That description is as follows: (Tr. 1-3).

Beginning at the Northeast corner of Section 34, Township 2 North, Range 1 West, Salt Lake Meridian; running thence South $22 \frac{5}{7}$ rods; thence West to Jordan River; thence North along the East bank to the North line of Section 33, East to beginning, containing 80 acres.

Also beginning $22 \frac{5}{7}$ rods South from the Northeast corner of Section 33 aforesaid; running thence South $52 \frac{1}{3}$ rods; thence West to the Jordan River; thence North along the East bank of the river to a point $22 \frac{5}{7}$ rods South from the North line of Section 33; thence East to beginning, containing 183 acres.

After the trial had begun the plaintiff, over the objection of the appellants, was permitted to amend the complaint by striking out the words "Section 33" in the second line of the second paragraph of the description and inserting in lieu thereof the words "Section 34." (Tr. 11). The defendants Jensen answered the complaint, denying plaintiff's title, claiming equitable ownership in themselves, and asserting that plaintiff's claim of title was founded upon a deed from Davis County which conveyed no title because of irregularities in the tax sale proceedings leading up to and including the auditor's deed. They also alleged that the plaintiff purchased the property from the county pursuant to a collusive arrangement between the plaintiff and the defendants Alice Farnworth and D. A. Skeen, which in effect created in the plaintiff a nominal title only, the real beneficiaries of the purchase being the defendants Farnworth and Skeen. (Tr. 28). The

defendant Regional Agricultural Credit Corporation of Salt Lake City also answered the complaint, and after putting in issue plaintiff's claim of title set up the lien of the judgment recovered by it against the defendant Alice Farnworth and her husband James Farnworth. This defendant further alleged that the defendant Alice Farnworth was the equitable owner of the property, subject to the lien of the judgment, and that whatever title the plaintiff acquired from Davis County was held in trust by him for the defendant Alice Farnworth. (Tr. 25.)

The defendants Alice Farnworth and D. A. Skeen conveniently defaulted although the latter did set up a mortgage in his favor given to him by his co-defendant.

Upon the issues raised by the above mentioned pleadings the court awarded the property described in the amended complaint to the plaintiff and quieted his title against all adverse claims of the defendants. (Tr. 23.) Upon the trial it was stipulated that the appellant Regional Agricultural Credit Corporation of Salt Lake City, Utah was awarded a judgment against the defendant Alice Farnworth and James Farnworth, her husband, in the amount alleged in that defendant's answer; that the judgment was docketed and filed in the office of the clerk of Davis County on March 15, 1935 and that it remained wholly unsatisfied. (Tr. 22.) It was further stipulated that the lien of this judgment was prior and superior to the mortgage of the defendant Skeen. (Tr. 41.) Although this mortgage was prior in time to the judgment, the defendant Skeen by agreement expressly made his mortgage subsequent and

inferior to the judgment in favor of the R. A. C. C. (Defs. Ex. 4.)

As the basis of his claim of ownership to the property described in the amended complaint the plaintiff introduced in evidence the auditor's deed to Davis County. This deed covers the following described property.

Beginning at the Northeast corner of Section 34, Township 2 North, Range 1 West, Salt Lake Meridian; running thence South $22 \frac{5}{7}$ rods; thence West to Jordan River; thence North along the East bank to the North line of Section 33, East to beginning, containing 80 acres.

Also beginning $22 \frac{5}{7}$ rods South from the Northeast corner of above Section; running thence South $52\frac{1}{3}$ rods; thence West to the Jordan River; thence North along the East bank of the river to a point $22 \frac{5}{7}$ rods South from the North line of Section 33; thence East to beginning, containing 183 acres.

Plaintiff then introduced in evidence a certificate of sale issued by the treasurer of Davis County. This certificate covers the following described property. (Plfs. Ex. B.)

Beg NE cor of Sec 34, Twp 2 N, Rg 1 W, SLM; S $22 \frac{5}{7}$ rds; W to Jordan River; N along E bank to N line of Sec 33, E to beg. cont 80 a. Also beg $22 \frac{5}{7}$ rds S fr NE cor of above Sec; S $52\frac{1}{3}$ rds; W to Jordan River; N along E bank of river to a pt $22 \frac{5}{7}$ rds S fr N line of Sec 33; E to beg. cont 183 A.

The notice of May sale recites that the County Commissioners will sell for cash on the 15th day of May, 1939, etc., pursuant to Section 80-10-68 of the Revised Statutes of Utah, 1933, the following described property, assessed in the following names, to wit: (Plfs. Ex. A.)

“JAMES FARNSWORTH—Beginning at the Northeast corner of Section 34, Township 2 North, Range 1 West, Salt Lake Meridian; running thence South 22 $\frac{5}{7}$ rods; thence West to Jordan River; thence North along the East bank to the North line of Section 33; thence East to beginning, containing 80 acres.

“Also beginning 22 $\frac{5}{7}$ rods South from the Northeast corner of the above Section, running thence South 52 $\frac{1}{3}$ rods; thence West to Jordan River; thence North along the East bank of the river to a point 22 $\frac{5}{7}$ rods South from the North line of Section 33; thence East to beginning, containing 183 acres.”

The deed under which plaintiff claims to have acquired title from Davis County is executed and acknowledged by the County Auditor. (Plfs. Ex. C.) It contains no preliminary recitals, although in the body of the deed it is stated that the conveyance is made in consideration of the payment by the grantee of the sum of \$643.40, delinquent taxes, penalties, interest and costs, constituting a charge against the property, which was sold to the County for non-payment of taxes for the year 1933 in the sum of \$127.49. It is also stated that the property was duly advertised and sold to the highest bidder at a public auction on the 15th day of May, 1939. The property is described substantially as it is described in the amended complaint. On the 7th day of December, 1933, James Farnworth conveyed to his wife, the defendant Alice Farnworth, the following described property:

Beginning at the Northeast corner of Section Thirty-four (34), Township Two (2) North, Range

One (1) West, Salt Lake Meridian, running thence South 22 5/7th rods; thence West to the Jordan River; thence Northerly along the East Bank of the Jordan River to the North line of Section Thirty-three (33) Township and Range aforesaid; thence East to the point of beginning. Containing 80 acres, more or less.

Also beginning 22 5/7th rods South of the Northeast corner of Section Thirty-three (33), Township and Range aforesaid, thence South 52 1/3 rods; thence West to the Jordan River; thence Northerly along the East Bank of the Jordan River, to a point 22 5/7th rods South from the North line of Section Thirty-three (33) aforesaid, thence East to the point of beginning. Containing 183 acres, more or less.

This deed was recorded April 2, 1934. Thereafter the property described in the amended complaint was assessed to the defendant Alice Farnworth notwithstanding the fact that she held the title to the first parcel only consisting of eighty acres. (Tr. 17.)

The facts which appellants claim demonstrate that the plaintiff purchased the property pursuant to a collusive plan to deprive the appellants of their interest in the property may be thus summarized. Under date of November 4, 1935 the defendant Alice Farnworth and her deceased husband entered into an exchange agreement with the appellants Chris Jensen and Alma Jensen whereby the Farnworths undertook to exchange the property in question for property in Salt Lake. (See defendants' Exhibit 3). The Farnworths agreed to pay the taxes for the years 1933 and 1934 which were then in default. As previously stated, the appellant R. A. C. C. had recovered a judgment against

the defendant Alice Farnworth in the sum in excess of \$1500.00 which was a lien upon the property when the exchange agreement was entered into. In this situation Mrs. Farnworth appealed to the plaintiff, who was a friend of the family, for assistance to prevent the loss of her interests in the property. (Tr. 29.) At first the plaintiff refused any aid but upon being repeatedly importuned finally consented to help her. She prevailed upon him to go to the office of her attorney, D. A. Skeen, who was also a friend of the plaintiff, and as above stated, held a mortgage on the property. (Tr. 29.) It was there decided that plaintiff should bid in this property at the tax sale. Skeen assured plaintiff that he, Skeen, would take the property off the plaintiff's hands. (Tr. 32.) Plaintiff repeatedly stated that he purchased the property to protect the interests of Mrs. Farnworth and Skeen and that Skeen assured him that when he, Skeen, took over the property Mrs. Farnworth's interests would be protected. (Tr. 36.) It was decided that immediately after bidding in the property an action would be brought in the plaintiff's name to quiet the title. Skeen accompanied the plaintiff to Farmington to bid in the property. (Tr. 28.) He examined the proceedings leading up to the sale and told the plaintiff that they were regular. (Tr. 28.) Immediately after bidding in the property the plaintiff and Skeen entered into a written agreement in which the plaintiff agreed to transfer the property to Skeen for the amount which plaintiff bid for it plus interest and his expenses (See Plaintiff's Exhibit D). This agreement recites that Skeen was not in a position to bid in the property himself and that it might be necessary

to quiet the title which Skeen undertook to do without charge. The complaint in the present action was prepared by Skeen. (Tr. 27.) Plaintiff knew of the judgment in favor of the R. A. C. C. (Tr. 37) and also knew of the exchange agreement with Jensens and that they were living on the property (Tr. 39.) Plaintiff admitted that he did not want the property (Tr. 39) and that he never examined the property although he did visit it at one time.

STATEMENT OF ERRORS

The appellants assert that the findings of fact which are numbered 11, 12, 13, 14, 15, 16 and 19 are not supported by any evidence and are contrary to the undisputed evidence, and that the conclusions and judgment of the court are contrary to the evidence and the law. More particularly stated, the errors relied upon are that the evidence discloses that the plaintiff acquired no title from Davis County because the deed under which he claims was not executed by any lawfully authorized officer; that the certificate of sale and assessment of the property are void because the property is not described with sufficient certainty and definiteness; that the plaintiff offered no evidence to prove that the tax sale under which he claims was lawfully conducted or properly made; that the property was sold at the tax sale for a sum largely in excess of the amount of any taxes lawfully assessed, thereby rendering the sale void. Appellants further assert that the court erred in rendering a judgment in favor of the plaintiff for the reason that the evidence disclosed that the plaintiff purchased the property at the tax sale pursuant to a collusive

and fraudulent arrangement entered into with the defendant Alice Farnworth and defendant D. A. Skeen for the purpose of depriving appellants of their rights in the property. Appellants also urge that the court erred in allowing the plaintiff to amend his complaint to describe an entirely different piece of property from that mentioned in the original complaint.

I. THE DESCRIPTION OF THE PROPERTY IN A CERTIFICATE OF SALE MUST BE DEFINITE AND CERTAIN AND RESORT TO EXTRANEEOUS FACTS IS NOT PERMISSIBLE TO RESOLVE AMBIGUITIES.

Buckner v. Sugg, 96 S. W. 184.

Cooper v. Lee, 27 S. W. 970.

Burton v. Hoover, 74 P. (2) 652, 93 Utah 498.

Allen v. Fitzgerald, 23 Utah 597, 65 P. 592.

Tintic Undine Mining Co. v. Ercanbrack, 93 Utah 561, 74 P. (2) 1184.

The description of the property as it appears in the certificate of sale has already been set forth. It is composed almost entirely of symbols, figures, abbreviations and contractions. The statute in force at the time the certificate was made provided that in the assessment of land or the advertisement and sale thereof for taxes initial letters, abbreviations, and figures may be used to designate the township, range, section or parts of sections (80-11-6, Revised Statutes of Utah, 1933). It will be observed that the statute does not authorize the use of initial letters, abbreviations or figures in the certificate of sale but for the purposes of this argument we shall assume it is broad enough to warrant the use of symbols and abbreviations in a certificate of sale. We do, however, emphasize that the use of

initial letters and abbreviations is authorized for no other purpose than to designate township, range, section or parts of section. It follows that symbols, abbreviations and figures to designate starting points, courses, distances or natural boundaries is without statutory justification. In *Tintic Undine Mining Company v. Ercanbrack*, supra, this court said that a description of the property in the certificate of sale "must be definite enough so the owner will know just what property is being sold and a prospective purchaser will know what particular property he could buy so as to determine its value." The test thus announced was undoubtedly sufficient to dispose of that case. The court did not attempt to confine the test to any definite limitations. It is therefore entirely permissible to adopt a more comprehensive test without in any way impairing the decision in the Ercanbrack case. In the case of *Buckner v. Sugg*, 96 S. W. 184, it is said:

"The description in tax proceedings must be such as will fully apprise the owner *without recourse to the superior knowledge peculiar to him as owner* that the particular tract of his land is sought to be charged with a tax lien. It must be such as will notify the public what lands are to be offered for sale in case the tax be not paid,"

and in *Cooper v. Lee*, supra, it is said that a description which is intelligible only to persons possessing more than the average intelligence, or the use and understanding of which is confined to the locality in which the land lies is not sufficient. It must be remembered in testing the sufficiency of a property description in a tax certificate we are not searching for the intent of the parties to the instru-

ment. The maker of the document does not intend to convey anything. Neither does the owner of the property by such an instrument convey or intend to convey anything. All that can be said is that the certificate affects no property except that which comes within the legal meaning of the language used.

In Devlin on Deeds, Section 1408, the author states the rule governing the interpretation of tax deeds as follows:

“The rule governing descriptions in tax deeds is thus stated by Mr. Justice Ruggles: ‘In a deed between individuals, a part of the premises conveyed may be rejected on account of its falsity, if after its rejection there is enough left to show clearly what the owner intended to convey. In this case, if the owner of the land had executed the deed, giving the boundaries correctly, the title might have passed, although the land was falsely described as to the village in which it lay. It would then present the question what the owner intended to convey. There is no such question here. The owner conveys nothing, and does not intend to convey anything. If the officers who undertake to convey for him intend to convey lands lying on one place by a deed describing them as lying in a different place, they intend to do what the statute, under which they profess to act, does not permit. . . ’ ”

It will be observed that the property is described in the certificate of sale by means of abbreviation of starting points, initial letters to indicate the meridian, figures and initials to indicate courses and distances, ends of courses and quantities. Many words necessary to make a definite and intelligible description are omitted. The manner in which the figures are arranged in the description makes it

impossible to determine what the total figure might be, thus rendering the distances and boundaries uncertain. Not even an experienced conveyancer or one possessing superior knowledge of conveying could say with any degree of certainty what property is affected by the certificate. It would require parol evidence and a decree of court to resolve the uncertainties and ambiguities and fix the location and boundaries of the property. The description wholly fails to meet the tests laid down under the authorities cited and therefore makes the certificate void.

There is even a more fatal error in the description than that which is created by the abbreviations, initial letters, symbols, figures and omissions above referred to. It is impossible to determine the starting point of the second parcel. It purports to be some distance from the "above Sec." Assuming the word "Sec." stands for section it is impossible to know what section is meant. Two sections are referred to above the words "above Sec." One is Section 34 and the other is Section 33. The one next above is Section 33. If the words "above Sec." refer to Section 33 then it relates to property that is not involved in this litigation and is not embraced within the tax deed under which the plaintiff claims. The logical section referred to by the words "above Sec." would be the section next above referred to, which is Section 33. To say the least, we have thus created an ambiguity in the description which cannot be removed since we cannot resort to extrinsic evidence. Whether this description would be valid if contained in a deed between individuals is a matter of no concern because we are not dealing with any question of intention of the

party executing the certificate. It most assuredly is not definite enough or certain enough to enable a person with average intelligence to know just what property was being sold. Without the aid of parol evidence it would not be possible for even a person possessing superior knowledge of conveyancing to determine what property is affected. We submit that under the decisions above cited the description of the property in the certificate of sale must be held to be so uncertain and ambiguous as to render the certificate of no force or effect.

II. THE BURDEN RESTS UPON THE PLAINTIFF TO PROVE THAT THE STATUTORY REQUIREMENTS OF A VALID MAY SALE WERE STRICTLY COMPLIED WITH.

Utah Lead Company v. Piute County, 92 Utah 1, 65 Pac. (2) 1190.

Tintic Undine Mining Co. v. Ercanbrack, 93 Utah 561, 74 P. (2) 1184.

Jungk v. Snyder, 28 Utah 1, 78 P. 168.

Moon v. Salt Lake County, 27 Utah 435, 76 P. 222.

Asper v. Moon, 24 Utah, 241, 67 P. 409.

Bean v. Fairbanks, 46 Utah 513, 151 P. 338.

Hatch v. Edwards, 72 Utah 113, 269 P. 138.

Olson v. Bagley, 10 Utah 492, 37 P. 739.

Eastman v. Gurrey, 15 Utah 410, 49 P. 310.

Wall v. Kaighn, 144 P. 1100, 45 Utah 244.

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Davis v. Minnesota Baptist Convention, 16 P. (2) 48.

Hodgkin v. Boswell, 127 P. 985.

Gage v. Pumpelly, 115 U. S. 454, 6 S. Ct. 136,
29 L. Ed. 449.

At the time this sale was held the controlling statutory provisions are to be found in Section 80-10-68, Session Laws of Utah, 1933. This section provides that whenever a county has received a tax deed for any property sold for delinquent taxes the Board of County Commissioners must during the month of May in each year, after publication, offer for sale at the front door of the county courthouse at the time specified in the notice to the highest bidder each parcel of real estate which has been conveyed to the county during the calendar year pursuant to the provisions of Section 80-10-66. The first bid received in an amount sufficient to pay the taxes, penalties, interest and costs, including all taxes assessed subsequently to the date of the certificate of sale shall be accepted unless a further bid in an amount sufficient to pay said taxes, penalties, interest and costs for less than the entire parcel, shall be received, and the highest bid shall be construed to mean the bid of that bidder who will pay in cash the full amount of the taxes, penalties, interest and costs for the smallest portion of the entire parcel. The Board of County Commissioners shall at any time after the period of redemption has expired and before the sale, as herein provided, permit the redemption of such property.

It is as clear as can be made by the written word that the owner of property retains at least a qualified interest in it until it has been divested by the proceedings outlined in Section 80-10-68. Whether that interest be described as a right of redemption or some other legal or

equitable estate is a matter of no importance. Unquestionably it is a valuable property right. The owner cannot be divested of it except in the manner prescribed by the statute. Unless and until there has been "the sale as herein provided," the owner retains his qualified estate in the property. This is so because the County Commissioners *must* permit the owner to redeem his property. Since the statute says that the right of redemption persists until sale is had "as herein provided," a sale which is not in accordance with the directions specified in the statute would leave the right of redemption unimpaired. It inevitably follows also that the purchaser at an irregular sale would acquire no title. As authority for these almost self-evident propositions we have the decision of this court in the recent case of *Utah Lead Company v. Piute County*, supra, wherein the County Commissioners undertook to sell property without having first offered it at the May sale. It is there said:

"The County Commissioners have no authority to sell tax title land privately until the public sale was had. The sale to Young therefore of parcel number 1 was void."

Since a valid May sale is jurisdictional to divest the owner of his qualified estate and also to vest in the purchaser at such a sale any title, it was incumbent upon the plaintiff in this action to prove that the sale was conducted in strict accordance with the requirements of the statute. It must be kept in mind that at the time the plaintiff acquired his deed there was no statute making his deed *prima facie* evidence of either the facts recited in it or the regularity of any proceedings leading up to it.

In the absence of such a statute nothing is presumed in aid of the plaintiff's title. Without affirmative proof of strict compliance with the statute plaintiff fails to show any title. As pointed out by this court repeatedly, the last time in *Tintic Undine Mining Co. v. Ercanbrack*, supra:

“It is elemental, and settled beyond argument in this jurisdiction, that tax sale proceedings and statutes are strictissimi juris. The sales are made exclusively under statutory authority. The seller is making a sale not coupled with an interest, and derives his authority solely from the statute, and it is derived from no rule or principle of the common law. He can have no authority to sell except as he is made the agent of the law for that purpose, and, if the steps necessary to precede his action fail, he is not invested with legal right to make the sale; if one step fails, they all fail. The rule, therefore, is that all the preliminary requirements of the statute, made conditions to the exercise of the right and power to sell, and designating the various proceedings which culminate in the sale, must have been strictly complied with. The officers who execute this power should follow the steps outlined for its exercise with precision. It is a special jurisdiction and must be strictly pursued. As was said in *Wister v. Kemmerer*, 2 Yates 100, ‘An exact and punctual adherence to the laws can alone divest the title of lands on a sale for nonpayment of taxes.’ When the statutes governing the sale of lands for taxes direct an act to be done, or the manner, time, form, or place of doing it, such act must be done as prescribed, and the statutes must be strictly, if not literally, complied with.”

In *Olsen v. Bagley*, supra, the law is thus stated:

“The title to be acquired under statutes authorizing the sale of land for the nonpayment of taxes is

regarded as stricti juris, and whoever sets up a tax title must show that all the requirements of the law have been complied with."

In *Eastman v. Gurrey*, supra, it is said :

"In this case it was the duty of the plaintiff, as purchaser and holder of the tax deed, to show the regularity of all the proceedings. *Bucknall v. Story*, 36 Cal. 67: *Marx v. Hanthorn*, 148, U. S. 172, 13 Sup. Ct. 508."

And again in *Asper v. Moon*, supra :

"The requirements of the statute in this respect are essential, and the appellant has failed to show that they have been complied with."

In the case of *Davis v. Minnesota Baptist Convention*, supra, is a very clear statement of the point.

"It is also clear that, in the absence of a statute changing the rule, when a plaintiff in such a suit relies upon a tax deed to establish a perfect title in himself, 'the validity of a tax-sale will not be presumed from the mere deed of the collector unaccompanied by proof of the prior proceedings and their validity. On the contrary, in the absence of an enabling statute, the burden is upon any person who claims title to land derived from a sale thereof for taxes to prove, affirmatively and by proper evidence, that every mandatory provision of the law under which the sale was effected was strictly complied with, that each step in the proceedings, from the assessment of the taxes to the execution of the deed, was formally and regularly taken by the officers or persons legally authorized, and that he or his grantor was the purchaser at the sale.' 37 Cyc. 1452 and cases cited; 4 Coolsey's Law of Taxation (4th Ed.) 3024, Sec. 1550, and cases cited."

The jurisdictional requirements of a valid May sale, which under the authorities cited, must be affirmatively established by the plaintiff in order to prevail in this action are:

(a) A proper notice of the time and place of sale published in a newspaper having general circulation in the county.

(b) That less than the entire tract was first offered for the amount of the taxes properly assessed.

(c) That no sufficient bid was made for less than the whole of the property.

(d) That the property was sold for the amount of the taxes properly assessed.

The record of this case will be searched in vain for a single word of evidence tending to establish any of these indispensable requisites of a valid sale. Although a notice of sale was put into evidence there was no proof that it was published in a newspaper having general circulation in the county, or that it was posted in five public places. The statute, of course, requires a public auction at which the property is offered to the best bidder. The best bidder is the one who offers the amount of the taxes plus interest, penalties, and cost for the smallest portion of the property. In this case the property consisted of several acres divided into two parcels each separately described. The County Commissioners were therefore required to first offer the parcels separately. Such is the very minimum requirement of the law. Only in the event

that no bid was made for either parcel could the Commissioners offer the entire property. Since the May sale is the procedure which cuts off the qualified estate of the owner (sometimes described as the right of redemption) it is a proceeding in invitum and no presumption can be indulged that the public officials performed their duties in conducting the sale. There being no affirmative proof that proper notice was given or that the sale was properly conducted there is a missing link in the plaintiff's chain of title.

Not only is there an absence of proof of a valid sale, there is affirmative proof of a void sale. The amount of the taxes for the year 1933, including interest and penalties, for which the property was sold to Davis County, was the sum of \$127.40. The property was sold to the plaintiff for the sum of \$643.40. The difference between the two sums apparently represents the amount of taxes assessed subsequent to the year 1933, although there was no evidence showing the amount of these assessments. It was established that the assessment of taxes subsequent to the year 1933 was invalid. As pointed out in the statement of facts on the 7th day of December, 1933 James Farnworth conveyed to Alice Farnworth eighty acres of the property described as:

“Beginning at the Northeast corner of Section 34, Township 2 North, Range 1 West, Salt Lake Meridian, running thence South 22 $\frac{5}{7}$ rods, thence West to the Jordan River, thence northerly along the east bank of the Jordan River to the north line of Section 33, Township and Range aforesaid, thence East to the point of beginning,”

the deed being recorded April 2, 1934. The record title to the rest of the property remained in James Farnworth. Notwithstanding the fact that James Farnworth appeared at all times to be the owner of record and whose address was known to the assessor, all of the property was, beginning in the year 1934 and thereafter, assessed to Alice Farnworth.

The statute (Section 80-5-12, Revised Statutes of Utah, 1933) provides that if the name of the owner or claimant of any property is known to the assessor or if it appears of record in the office of the county recorder where the property is situated the property must be assessed to such name; if unknown to the assessor, and if it does not appear of record as aforesaid, the property must be assessed to unknown owners. Section 80-5-4, R. S. Utah, 1933, provides that the county assessor must ascertain the names of all taxable inhabitants and all property in the county subject to taxation and must assess such property to the person by whom it was owned or claimed or in whose possession or control it was at 12:00 noon on the first day of January next preceding. No mistake in the name of the owner or supposed owner of property renders the assessment thereof invalid. Construing these sections, this court in *Tintic Undine Mining Co. v. Ercanbrack*, supra, held that when the name of the owner appears of record in the office of the county recorder the property must be assessed to such person and that an assessment of property in the name of "A" when it stands on the record in the name of "B" is not a mistake in the name of the owner as that term is used in the statute. The court there said:

".....What then is the meaning of the italicized sentence about a 'mistake in the name'? Clearly, that means when the owner is unknown to the assessor and does not appear of record in the recorder's office, the property may be assessed to the claimant, or to the unknown owners and the claimant, or to the person in possession. Or, if my property, which should be assessed to Martin M. Larson, was assessed to Martin A. Larson or perhaps to *Morten M. Larson*, that would be a mistake in the name of the owner which would not affect the validity of the assessment. But to assess my property in the name of W. H. Folland is not a mistake in the name of the owner but is an assessment in the name of another person not the owner. The clause does not mention mistakes in the ownership, in the person who is the owner, but mistakes in the *name of the owner*."

In that case the property was assessed in part to a stranger to the record owner. There were other errors, but the decision makes plain the point that an assessment of property in the name of "A" when the record title stands in the name of "B" is a void assessment. In the face of this decision and the prior cases above cited there is not the faintest basis for a contention that an assessment to Alice Farnworth of property standing upon the records in the name of James Farnworth is a mere mistake in the name of the owner. By the conveyance from James Farnworth to Alice Farnworth there was a segregation of the property into two parcels. It then became the duty of the assessor to assess one parcel to Alice Farnworth and the other parcel to James Farnworth. Instead of performing this duty, he assessed the entire property to Alice Farn-

worth. The assessments were a nullity and could create no lien against the property.

It being established that the assessments beginning with the year 1935 were void and that the county offered and sold the property for a sum including these illegal assessments, the only inquiry remaining is whether the sale is thereby rendered invalid.

It is submitted that the decisions of this court and the plain intent of the statute require an affirmative answer to this question. It is expressly decided in the case of *Utah Lead Company v. Piute County*, supra, that a May sale conducted in the manner outlined in the statute is a condition precedent to the right of the county to sell property which it has taken over for delinquent taxes. Such a sale is the only method of bringing about a forfeiture of the owner's qualified estate in the property. While one of the purposes of the May sale is to collect the taxes due and get the property back on the tax rolls, another equally obvious purpose is to protect the owner's interest by requiring the County Commissioners to offer and sell at public auction the smallest part of the property that will realize the amount of the taxes due. In other words, the purpose is to enable the county to collect the taxes due it with the least possible loss to the owner. Surely no one will contend that if the Commissioners sold a portion of the property for enough to pay the delinquent taxes the part unsold would remain the property of the county. Such a sale would operate as a redemption of the part not sold. The unsold portion would either remain in the owner or would revert to him by operation of law.

Since the May sale is simply a part of the procedure for the collection of taxes and since the county is required to sell the smallest portion of the property that will realize the amount of the taxes due, it would completely frustrate the evident purpose and intent of the statute if it should be held that the county could offer and sell the property for more than the amount of the taxes lawfully assessed. It would be equivalent to holding that the county can use the property which it acquires by auditor's deed for speculative purposes. Since the county holds the property solely for collecting the taxes and is required to collect those taxes out of the smallest parcel, it inevitably follows that a sale for more than the taxes actually due is in violation of law and transfers no title to the purchaser.

There is and can be no distinction between the case at bar and the case where the invalid assessment was levied prior to the issuance of the certificate of sale. It is true that in the latter case the County has no title whatever at the time of the May sale, whereas in the present case we are assuming that the certificate of sale and the auditor's deed are valid. In either situation the property is sold for taxes that are not due which is the thing the statute does not permit.

It is inaccurate to say that the county under the 1933 statute acquires the title or ownership of the property by virtue of the certificate of sale and auditor's deed. What it actually acquires is merely a lien for the taxes that are due. It is only by virtue of a valid May sale that it acquires any greater estate.

That a tax sale of property is void if the property is

sold for more than the amount of taxes lawfully assessed has long been the settled law of every jurisdiction where the question has arisen. In *Hodgkin v. Boswell*, supra, the plaintiff sought to set aside a tax deed to the defendant and quiet title. The sale under which the defendant claimed was made for delinquent taxes for the years 1895, 1896, 1897, 1898 and 1899. In the years 1895 and 1896 the property was assessed to the plaintiff under his correct name, Frank E. Hodgkin. In the remaining years it was assessed to F. E. Hodgkins. The sale was a lump sum for all taxes. The statute of Oregon like our own required the property to be assessed in the name of the owner. The Supreme Court of Oregon held that the assessments in the name of F. E. Hodgkins were void, and since the sale was for taxes which were in part illegally assessed it was void and the purchaser acquired no title. The following quotation is made from the opinion:

“It is true that for two years (1895 and 1896) the property appears to have been assessed against plaintiff under his correct name; but, where legal and illegal items are grouped together in a single sale, the whole sale is void on account of the excessive levy. We quote from Cooley on Taxation (2d Ed.) p. 497: ‘It has been shown in a preceding chapter that an excessive levy is void, whether it is made excessive by including with lawful taxes those which are unlawful, or in any other manner. If the levy would be void, there would, of course, be nothing to uphold a sale. And, if a valid levy were to be increased afterwards by unlawful additions, the sale would be equally bad. The statutory power is a power to sell for lawful taxes and lawful expenses, and, if it is exceeded by including unlawful items of either class, the power is exceeded, and its exercise is invalid in

toto from the manifest impossibility of saving the sale in part when the invalidity extends to the whole. It is to be presumed, when the sale has been made for a sum in part illegal, that some undefined and undefinable portion of the land has gone to satisfy an illegal demand, and that such part would not have been sold at all if only what was lawful had been called for.' ”

In *Gage v. Pumpelly*, supra, the statute provided that the owner of property should have a certain period to redeem after the sale of the property. The county court having jurisdiction ordered the property sold for delinquent taxes which it found to be due and the property was pursuant to the judgment sold. Part of the taxes for which the county court ordered the property sold had not in fact been properly assessed. The Supreme Court held that under the controlling decisions of the State the sale was void. We quote from the opinion :

“But the latest adjudication by the State court of the question under consideration was *Riverside Co. v. Howell*, 113 Ill. 259. That was ejectment for the recovery of land, the defendant claiming title under a tax deed based upon a judgment of the County Court. The validity of the sale was questioned upon the ground, among others, that a part of the taxes, for the non-payment of which the sale was ordered, were illegal and void. The argument was made there, as in this case, that the judgment of the County Court was conclusive as to all matters that could, or ought to have been, passed upon in rendering it, and if it included too much taxes, or illegal taxes, it was only error to be remedied by appeal. But the court, finding that certain taxes included in the judgment were invalid, held that no title passed by the sale,

observing that 'the authorities are to the effect, that when a part of the tax for which a sale of real estate is made is illegal, the sale is void,' citing *McLaughlin v. Thompson*, 55 Ill. 249; *Kemper v. McClelland's Lessee*, 19 Ohio, 308; *Gamble v. Witty*, 55 Miss. 26; *Cooley on Taxation*, 295, 296; *Hardenburg v. Kidd*, 10 Cal. 402."

The proposition has been fully adopted in this jurisdiction by the decision in *Asper v. Moon*, supra, wherein a partially invalid assessment was involved. The sale included the amount of the invalid assessment and it was held that it was void. Although there were other objections to the assessment, the court expressly decided that the partial invalidity of the assessment nullified the sale. The decision concludes thus:

".....And as one of the lots was wrongfully assessed, and the amount of such assessment was not deducted from the amount of the assessment for which the lots classified with said lot were offered for sale and sold the sale of said lots was void, under said decisions."

It appears from the tax deed that the amount of the delinquent taxes including penalties, interest and costs on the date of the May sale was \$643.40. Apparently, the amount bid by the plaintiff was \$656.30. He introduced in evidence his check to Davis County for the last stated amount as evidence of the amount bid at the sale. If the recitals in the deed are correct, then the property was sold for more than the amount of taxes, penalties, interest and costs, even if all assessments were regular and valid. No attempt was made to show how much taxes were actually

due and there was nothing to indicate that the recital of the amount of taxes in the deed to the plaintiff was incorrect. It is thus conclusively demonstrated that the property was sold for more than the amount of taxes due even if it be assumed that all assessments are valid. This, as we have shown above is in violation of the statute and renders the sale void.

III. THE COUNTY AUDITOR IS WITHOUT POWER TO EXECUTE A DEED ON BEHALF OF THE COUNTY TO A PURCHASER AT THE MAY SALE AND A DEED SO EXECUTED CONVEYS NOTHING.

Mathews v. Blake, 92 P. 242.

Sayre v. Sage, 108 P. 160.

Macbeth v. Stunkard, 164 N. E. 711.

At the time the tax deed to the plaintiff was issued the statute (80-10-68, Session Laws of Utah, 1933) provided that when property has been sold at the May sale the County Clerk is authorized to execute deeds in the name of the county and attest the same by his seal vesting in the purchaser all of the title of the State, of the county, and of each city, town, school or other taxing district interest in the real estate so sold. No deed so executed is to be found in the record nor is there any deed which by any rules of construction could be said to be in even substantial compliance with this statute. On the contrary, the deed under which the plaintiff claims is executed by the auditor of Davis County and is acknowledged and attested by such auditor. It might be noted in passing that the statute referred to

was amended so as to authorize the auditor to execute the deed on behalf of the county and provides form of such deed. The amendment, however, did not go into effect until long after the deed to the plaintiff was issued. It is thus apparent that the county auditor had no more power or authority to execute the deed under which the plaintiff claims than an ordinary private citizen would have. It was as ineffectual to vest any title in plaintiff as a blank piece of paper. No rule of tax title law is more firmly established than the one which announces that a public official who executes a tax deed on behalf of the county or state acts under a naked power and cannot divest either the county or the owner of any interest in the property except by an exact compliance with the statute creating the power. In *Macbeth v. Stunkard*, supra, the plaintiff claimed under a tax deed. The statute required that tax deeds shall be executed by the county auditor under his hand and seal and witnessed by the county treasurer and acknowledged before the county recorder or any other officer authorized to take acknowledgments. The certificate of acknowledgment annexed to the deed under which the plaintiff claimed title recited that the deed was acknowledged by the county auditor before George E. Hubbard who signed the certificate without indicating that he was an officer of any kind. The opinion says:

“.....So far as the tax deed and the certificate of acknowledgment are concerned, there is nothing to indicate that Hubbard was authorized to take the acknowledgment. The deed, not being acknowledged as required by law, was not entitled to be recorded. Not being executed as required by the statute, it was neither prima facie evidence of the regularity of the

sale and the prior proceedings, nor was it prima facie evidence of a good and valid title in the grantee named in the deed. We hold the tax deed was invalid, in so far as it attempted to convey any title to Agnes Donahey."

In *Mathews v. Blake*, supra, the tax deed involved purported to be signed by the treasurer of the county and acknowledged before a notary public. The statute required it to be acknowledged by the treasurer before the clerk of the District Court. The Supreme Court of Wyoming held that such a deed was void and was not even admissible in evidence to show color of title under the adverse possession statute.

".....Where the statute directs the execution of a deed by a public officer, and requires it to be executed in a particular manner and to be witnessed or acknowledged before a particular officer, the witnessing or acknowledging of the deed in that manner is a part of its execution, and without such witnessing or acknowledgment is void upon its face. The rule is stated in Black on Tax Titles, Section 208, as follows: 'A rule of primary importance is that the execution of a tax deed must conform strictly to the statute; that is, any directions which the law may give in regard to its signature, seal, witnesses, or acknowledgment must be duly complied with, or the conveyance will be invalidated. Thus, if the act requires that tax deeds shall be authenticated by the addition of the seal of the county, and this be omitted, the deed will be void; nor will it even be admissible to show color of title under the special limitation of the revenue act.' It was held in *Reed v. Merriam*, 15 Neb. 323, 18 N. W. 137, that, 'whatever may have been the object of the Legislature in requiring the treasurer to attest the execution of a tax deed by his seal, the pro-

vision is one that cannot be dispensed with, and the want of a seal is no valid excuse. A treasurer acts under a naked statutory power in executing a tax deed, and, unless he comply with the provisions of the statute, the deed will be void.' ”

In *Sayre v. Sage*, supra, the statute required the tax deed to be attested by the official or private seal of the treasurer. The deed in question bore no such seal and the Supreme Court of Colorado held it to be void.

“.....The treasurer, in executing such deed, acts under a naked statutory power, and in order that it shall be valid, it must comply substantially with the provisions of the statute prescribing its form. That it must be attested by the official or private seal of the treasurer is a positive requirement of the statute, and is as necessary to its validity as any other. Without one or the other of the seals specified it is void. *Sutton v. Young*, 4 Neb. 319; *Deputron v. Young*, 134 U. S. 241, 10 Sup. Ct. 539, 33 L. Ed. 923; *Gue v. Jones*, 25 Neb. 634, 41 N. W. 555; *Reed v. Merriam*, 15 Neb. 323, 18 N. W. 137; *Gage v. Starkweather*, 103 Ill. 559; *Reed v. Morse*, 51 Kan. 141, 32 Pac. 900.”

The deed in question having been executed by an officer without authority to do so was wholly ineffectual to vest any title whatever in the plaintiff. It was as ineffectual as it would be if executed by the plaintiff's attorney.

In the remaining pages of this brief we shall assume for the purpose of argument that all of the proceedings leading up to the tax deed issued to the plaintiff were in all respects regular and in strict conformity with the statute. We shall assume further that plaintiff acquired an apparent title under his deed. Upon these assumptions we will now

endeavor to demonstrate that whatever title plaintiff acquired at the tax sale must be decreed to be held by him as a trustee and is not such title as will divest the appellants of their interests in the property. In other words, the payment made by the plaintiff to Davis County and the issuance of the deed were a mere redemption from the delinquent tax sales.

IV. THE PURCHASE BY THE PLAINTIFF OF THE PROPERTY AT THE MAY SALE WAS MADE FOR THE PURPOSE OF DEFRAUDING THE APPELLANTS OF THEIR INTEREST IN THE PROPERTY AND THEREFORE OPERATED SIMPLY AS A REDEMPTION.

Guldner v. Guldner, 203 N. W. 289.

Adams v. Snyder, 20 P. (2) 827.

Blotcky v. Solberman, 281 N. W. 496.

Fair v. Brown, 40 Iowa 209.

Turner v. Edwards, 292 N. W. 257.

First Congregational Church v. Terry, 107 N. W. 305

Adams v. Snyder, 20 P. (2) 827.

Quinby v. Meyer, 148 So. 869.

Riley v. Bank, 23 P. (2) 362.

Baird v. Fischer, 220 N. W. 892.

Des Moines Bank v. Eisenmenger, 235 N. W. 390.

Norton v. Myers, 77 N. W. 298.

Chrisman v. Hough, 47 S. W. 941.

McCready v. Fredericksen, 41 Utah 388, 126 P. 316.

McAlpine v. Zitser, 10 N. E. 901.

It is impossible to read the evidence even in the most casual manner without being at once convinced that the

purchase of this property by the plaintiff was the final act of a conspiracy to deprive the appellants of their interests therein. The participants in the scheme were the defendant Alice Farnworth, her attorney, D. A. Skeen, and the plaintiff. The defendant Alice Farnworth had previously attempted to forfeit the interests of the Jensens created by the exchange agreement between her and them. She then decided to resort to the old and familiar device of cutting off bothersome liens by acquiring a tax title. She realized, of course, that she could not acquire the tax title in her own name. Accordingly, she appealed to her old and trusted friend, the plaintiff. She informed him that she was about to lose this property and beseeched him for aid. She prevailed upon him to go to the office of her attorney who likewise was a friend of the plaintiff. Here in this conference the details of the plan were worked out. It was decided that the plaintiff should bid in the property and hold it for the benefit of Farnworth and Skeen. It is true that the plaintiff did not expressly state in his testimony that he agreed to bid in and hold the property for the benefit of Farnworth and Skeen, but the undisputed facts and his admissions establish that agreement beyond any reasonable doubt. Those facts and admissions likewise establish with certainty that Farnworth and Skeen agreed to protect and save the plaintiff harmless should the tax title fail and that if it should be upheld the property would be either reconveyed to Farnworth and Skeen or sold and the proceeds divided among them. It is not necessary to resort to any inferences to discover that the arrangement and plan were as above outlined.

In the first place Skeen was Mrs. Farnworth's attorney at the time the property was bid in and had been such for a number of years. She was indebted to him for legal services and the mortgage which he set up in this action was given to secure payment for those services. He was likewise the attorney and friend of the plaintiff. He prepared the complaint in this action. She is the one who agreed to pay Skeen for preparing this complaint and clearing the title. Skeen undertook to clear the title without any obligation whatever being incurred by the plaintiff. Under this arrangement it is most natural that we would expect the defendants Farnworth and Skeen to default in the action. That is precisely what they did. It is impossible to overestimate the significance of these defaults. It indicates the fullest cooperation with the plaintiff. While nominally named as defendants they are in reality plaintiffs. If the plaintiff in this action purchased this property for his own use and benefit why should he call upon the attorney of Mrs. Farnworth to prepare this complaint and why should Mr. Skeen prepare this complaint without any charge whatever to the plaintiff? The plaintiff insisted in his testimony that he purchased this property at the urgent solicitation of the defendant Alice Farnworth and D. A. Skeen and that he bid in the property solely for the purpose of protecting them.

"Q. And you bid it in at his solicitation and at his request and at the request of Mrs. Alice Farnworth? That is true isn't it?

"A. Well, not absolutely. I wouldn't say a request. They solicited me and wanted me to.

"Q. Mr. Skeen and Mrs. Farnworth solicited

you and prevailed upon you to come with her and bid in this property at the sale?

"A. Yes.

"Q. And you bid it in to protect Mrs. Alice Farnworth and Mr. Skeen, didn't you?

"A. Not Mr. Skeen particularly at all.

"Q. All right, we will make it Mrs. Farnworth. That is correct isn't it?

"A. Yes. I might say this, Mr. Bagley, as you have in your deposition there, that I first made this first loan down on the Sugarhouse property. I became very well acquainted with those people..... and my sympathy rather went out to the family as they told me about their condition, and so on, and when this situation came along they told me about their going to lose this property out here in Davis County and they solicited me and wanted me to help them out, and I told them no, that I wasn't interested and the son came down a number of times and tried to get me to help him out, and I finally told him that I would rather not. He then wanted to know if I wouldn't come up to the office and talk it over with he and Mr. Skeen, so I went up and talked the situation all through with Mr. Skeen and him and I finally decided that I would help them out in doing so. And in our conversation I told Mr. Skeen and Mr. Farnworth as I told Mr. Farnworth before at my own office that I was only doing it because of the interest and my sympathy went out to them and I would like to help them if I could. And I told Mr. Skeen the same thing."

He then discussed with Mr. Skeen the matter of the fee owing by the Farnworths to Skeen.

"And I told him that my interest was simply to see that they were protected all the way through, the Farnworths, and that he would be fair in taking care

of the account and whatever came he would be fair in taking care of the account with Mr. Farnworth."

"Q. Now, if you should prevail in this action, of course you have no intention of depriving Mr. Skeen of his mortgage lien on the property have you?

"A. Oh, no, no.

"Q. And you have no intention of depriving Mrs. Farnworth of any interest that she has in the property?

"A. Why, no.

"Q. In other words, you bid in this property to protect them and to help them out, didn't you?

"A. Yes. I did it as an accommodation all the way through to clear the property and make a satisfactory arrangement to everybody."

Of course, this testimony completely eliminates any thought or suggestion that the plaintiff bid in the property for any purpose other than for the use and benefit of Farnworth and Skeen. By these statements and admissions he completely strips himself of the character of a good-faith bidder at a tax sale. Whether by this testimony he clothes himself with the robes of a trustee or those of a mere agent it is not necessary to determine. The law fastens one or the other status upon him because he participated in a fraudulent device. He made himself a party to the scheme of Farnworth and Skeen to cut off the rights of appellants in this property. The plaintiff repeatedly speaks of protecting the interests of Farnworth and Skeen. What did the interests of Farnworth and Skeen need protection against? Certainly they would have no interest to protect if the plaintiff bid in the property for himself. Assuming the tax sale to be valid, if the plaintiff became

a purchaser in his own right, everybody would be cut off. It is apparent that Farnworth and Skeen needed protection against the outstanding and superior title and lien of the appellants. The result of the plaintiff's admissions, therefore, is that he purchased this property for the purpose of freeing it from the appellants' interests and thus protect Farnworth and Skeen. Farnworth employed Skeen to prepare the complaint which would clear the title. It is self-evident, therefore, that when the plaintiff speaks of clearing the title he means clearing it of the claims of the appellant. The purpose of clearing the title was to protect Farnworth and Skeen.

If Farnworth or Skeen had furnished the money to the plaintiff to bid in the property no court would hesitate a moment to hold that the transaction was a mere redemption from the tax sale. What actually took place in this case is exactly equivalent to that supposition. Skeen agreed with the plaintiff to take the property over as soon as the plaintiff bid it in.

The latter testified:

"A. As a matter of fact, Mr. Bagley, Mr. Skeen assured me he would take it off my hands.

"Q. Mr. D. A. Skeen assured you that he will protect you and take this property that you bid in at the sale off your hands?

"A. Yes.

"Q. That was the understanding?

"A. That was the fact in the case, Mr. Bagley."

As a matter of fact, on the same day that plaintiff bid in the property he and Skeen entered into a written agreement

whereby Skeen undertook to purchase the property. While this written agreement contains language appropriate to an option it is clear that it was the intention of the parties to enter into a binding agreement and that such is the legal effect to be given to the instrument. But whether this document incorporates binding agreement or not is immaterial, for the evidence, as we have pointed out, clearly shows that there was an understanding and oral agreement between the plaintiff and Skeen whereby the latter should take over the property after it had been bid in by the plaintiff.

The written agreement referred to is a most significant document and itself reveals the attempt of the parties to obscure the conspiracy that existed to deprive the appellants of their rights in the property. In the first place, the date of the instrument has been altered. The date when it was actually entered into and the date which it originally bore is May 15th. The "15" is obliterated and the figures "22nd" inserted in lieu thereof. The date of its acceptance by the plaintiff is May 15th. It recites: "I (Skeen) understand you have purchased the property . . . at the May tax sale . . . I have not checked the tax proceedings." As a matter of fact, Skeen knew that plaintiff had purchased the property at the May sale because he accompanied the plaintiff to Farmington and was present when the latter bid in the property. The plaintiff testified that Skeen examined the tax proceedings before the bid was made and assured the plaintiff that they were regular and in due form. Although Skeen was present in court when the plaintiff gave his testimony as above he did not undertake

to deny it or qualify it in any way. Skeen further says in the agreement that he was not in a position to purchase the property at the tax sale. At a later point in this brief we will make it perfectly clear just why Skeen was not in a position to bid in the property himself. He then graciously undertakes to institute and prosecute for the plaintiff any action necessary to quiet title to the property in consideration of plaintiff giving a first and prior option to purchase the property, "in order that I might realize on my mortgage." The amount of the purchase price fixed in the agreement is the exact amount of the bid made by the plaintiff with interest and expenses added. Skeen apparently later discovered that the amount of the expenses should be fixed in a minimum amount in order to make it appear that the plaintiff was making a profit in selling the property. He therefore inserted the words in his own handwriting "not less than \$50.00" after the word "expenses." It will be observed from the agreement that Skeen proposes to bring a suit to quiet title in the plaintiff notwithstanding he assumes that the tax proceedings are valid and vested in the plaintiff the title free and clear of all liens, judgments, etc. We have heretofore demonstrated that there was no occasion to bring any suit to quiet title as against Mrs. Farnworth and surely Skeen would not propose to quiet title against himself. The proposal to quiet title, therefore, was to eliminate the appellants. As stated in the agreement Skeen was "not in a position to purchase the property at tax sale myself" because being a lawyer he was familiar with the well-established rule that a junior lienholder cannot cut off a prior lien by the

device of bidding in the encumbered property at a tax sale. He knew that in such cases "equity will relieve against such oppression and teach the grasping creditor moderation in his demands and that he cannot destroy others to build up his own fortunes." See *Fair v. Brown*, 40 Iowa 209; *Quinby v. Meyer*, 148 So. 869; *Riley v. Bank*, 23 P (2) 362; *Baird v. Fischer*, 220 N. W. 892; *Des Moines Bank v. Eisenmenger*, 235 N. W. 390; *Norton v. Myers*, 77 N. W. 298; *Chrisman v. Hough*, 47 S. W. 941; *McCready v. Fredericksen*, 41 Utah 388, 126 P. 316. He therefore undertakes to bring the suit to quiet title in the name of the plaintiff in order to eliminate the appellants and after thus purifying the title, take over the property from the plaintiff.

It is not possible to reconcile the purchase of this tax title by the plaintiff upon any reasonable theory of a good-faith bidder. He bought the property at the urgent solicitation of Farnworth and Skeen after the former had told him that she was about to lose her interest in the property. He bought it for the avowed purpose of protecting their interests against the danger of loss which was threatened by the judgment against her and the exchange agreement which she made with the Jensens. He agreed with them that after acquiring the tax title he would clear off the outstanding interests and reconvey the property to Mrs. Farnworth's attorney for her and his benefit. Mrs. Farnworth's attorney went with the plaintiff to bid in the property. He examined the tax proceedings leading up to the sale and he advised the plaintiff to make the purchase. Skeen prepared the complaint in this action. He did so without charge to the plaintiff. The cost of the litigation was to be borne by Mrs. Farn-

worth and Skeen. Skeen made himself a party to the action along with Mrs. Farnworth for the obvious purpose of making it appear that the plaintiff was the real owner of the property and claiming it adversely to them. Of course, they made default as everyone fully understood they would do. So far as the action to quiet title against Farnworth and Skeen was concerned it was a fictitious and collusive proceeding. It was a mere form to give the appearance of solemnity to what in reality was a sham. It was just a step in the scheme to deprive the appellants of their rights. The authorities condemn such a scheme and strike down the apparent title thus acquired. In *Turner v. Edwards*, supra, the plaintiff purchased property at a tax sale. Her mother was the life tenant, the remainder-over being vested in the children of the decedent by a former marriage. The life tenant failed to pay the taxes and the plaintiff purchased the property with her own money. Plaintiff brought suit to quiet her title and the remaindermen claimed that there was collusion between the plaintiff and her mother, the life tenant, to have the plaintiff bid in the property. There was evidence that soon after the period for redemption had expired the life tenant attempted to sell the property. This fact, together with the fact that the plaintiff was the daughter of the life tenant, was sufficient to show that the purchase of the property by the plaintiff was the result of a collusive arrangement. The court said:

“Collusion is a secret agreement and co-operation for a fraudulent or deceitful purpose. Webster’s New International Dictionary (2d) 1935. It implies a secret understanding whereby one party plays into another’s hands for fraudulent purposes. W. E. Bow-

en Improvement Co. v. Van Hafften, 209 Mo. App. 629, 238 S. W. 147; Brainerd Dispatch Newspaper Co. v. County of Crow Wing, 196 Minn. 194, 264 N. W. 779, 780; Lindstrom v. National Life Ins. Co. of United States, 84 Or. 588, 165 P. 675, 677. In its legal significance it involves an agreement between two or more persons to defraud another of his rights by forms of law or to obtain an object forbidden by law. Burt v. Clague, 183 Minn. 109, 235 N. W. 620. It is a general rule that fraud renders voidable everything into which it enters. The court will look through any form of instrument or proceedings, no matter how solemn, in order to prevent a party from profiting by his own fraud. It is immaterial that he has conformed to all the formal requirements of the law. 3 Dunnell, Minn. Dig., 2d Ed. & 1937 Supp., section 3834; Baart v. Martin, 99 Minn. 197, 108 N. W. 945."

In *Adams v. Snyder*, supra, the plaintiff brought suit to foreclose a mortgage executed by Rudolph Snyder, who was a son-in-law of S. J. Eisberg, who later became the owner of the property. S. J. Eisberg conveyed the property to his brother, S. N. Eisberg, who in turn conveyed it to a corporation of which S. J. Eisberg was president. Still later the corporation conveyed to S. N. Eisberg and M. J. Eisberg, brothers of S. J. Eisberg. The taxes were allowed to become delinquent and the county brought suit to foreclose the tax lien and the property was sold to Strauss, a brother-in-law of M. J. Eisberg. S. J. Eisberg was a bidder at the sale. Strauss bid \$441.67 in excess of the taxes and costs. As soon as Strauss acquired title at the tax sale M. J. and S. N. Eisberg conveyed the property by quitclaim deed to him. Strauss bid in the property with his own funds and there was no evidence that there

was any agreement between him and the Eisbergs that Strauss would reconvey the property to them or that he would protect their interests. Plaintiff claimed that there was fraud and collusion between Strauss and the Eisbergs to defeat her mortgage. The court found such collusion to exist from the fact that the Eisbergs had prevailed upon Strauss, who was their relative, to bid in the property, and that Strauss knew that the Eisbergs were endeavoring to free the property from the lien of the plaintiff's mortgage. The court said :

“The facts and circumstances already set forth strongly tend to show collusion clear down to the purchase at the tax sale. It was a family affair, and all appear to have cooperated to the same end, that is, to defeat the mortgage, but only Strauss had the hardihood to defend against the charge and the inculcating facts and circumstances alleged and shown. The different steps of action and inaction manifestly point to the same purpose, the defeat of plaintiff's mortgage, even to the care taken to have competition among themselves at the sale and thus giving it the appearance of innocence and validity. It is said that there is no direct evidence that defendants combined for the illegal purpose. Conspiracy to defraud cannot always be shown by direct evidence. Those engaged in a conspiracy to defraud rarely admit the common purpose, but in such cases circumstantial evidence suffices. When there is collusion, each of the parties charged evincing a knowledge and approval of the acts of the others, all in furtherance of the conspiracy, proof of the separate acts of several persons may be shown, and it has been said: ‘The greater the secrecy that is observed regarding the object of such concurrence, the stronger is the evidence of conspiracy.’ 5 R. C. L. 1104.”

In *Guldner v. Guldner*, supra, the plaintiff brought suit to set aside a tax deed issued to Jacob Guldner. She had been married to Hugo Guldner, brother of Jacob, but obtained a divorce from him. In the divorce decree the plaintiff was awarded two-thirds interest in the property with the right to use and occupy all of the property and receive all of the rents and income therefrom as long as she lived. The other one-third was awarded to Hugo; that is, he retained such one-third interest by the decree. A short time before the decree was entered the property was sold for delinquent taxes. It was bid in by Peck who was an attorney connected with the firm of attorneys representing Jacob Guldner. The latter furnished Peck with the money to bid in the property. Jacob took an assignment of the certificate of sale and shortly after the divorce was granted acquired the tax deed. It appeared that plaintiff and her husband had been having trouble before the divorce was granted and Jacob knew of this trouble. Hugo had falsely informed his wife at the time of the divorce that the taxes had been paid, although there was no evidence that Jacob knew of the false representation made by Hugo. There was no evidence whatever that Hugo furnished Jacob the money which the latter gave to Peck to bid in the property, and there was no evidence of any agreement on the part of Jacob to reconvey the property to Hugo. Notwithstanding the absence of such direct evidence the court found that there was collusion between Hugo and Jacob to deprive the plaintiff of her interest in the property. We quote from the opinion:

“Jacob Guldner was conversant with the family relations between Hugo Guldner and his wife, and their troubles. The association of these two brothers

for some time prior to the divorce proceedings was intimate. It seems that Jacob ran a restaurant, and Hugo boarded with him most of the time. Jacob Guldner never, at any time prior to the service of his notice on the wife to dispossess her, advised her about his owning the tax deed. He made no effort to serve a notice on her of the taking of the tax deed, and another peculiar circumstance is that his brother moved out of said property about three days after Jacob Guldner had served notice on him with reference to the deed.

"The tax certificate, when it was originally issued, was issued to G. H. Peck, who was an attorney connected with the firm of attorneys representing Jacob Guldner. It is shown by the evidence that Peck at no time had an money with which to purchase tax deeds, and we are quite satisfied from the record that the deed was in fact purchased for and at the instance of Jacob Guldner. We are further satisfied from the record that there was a secret understanding between Jacob Guldner and his brother Hugo, and that they combined to defeat this woman of her rights in the property.

"The whole record in this case abundantly satisfied us that the appellee was wholly ignorant of the exact situation as it relates to this tax sale, and that her husband lulled her into security. while the brother Jacob carefully refrained and secreted from her the knowledge of his relation to the property and his relation to this tax sale. The action of the appellant Jacob Guldner seems to us not to have been in good faith. . . .

"Of course, fraud in the procurement of the tax deed will always be available as a basis for equitable relief. *Connolly v. Connolly*, 63 Iowa, 202, 18 N. W. 868; *Leas v. Garverich*, 77 Iowa, 275, 42 N. W. 194. It need not be actual fraud, but may be constructive fraud. *First Congregational Church v. Terry*, 130

Iowa, 513, 107 N. W. 305, 114 Am. St. Rep. 443; Ellsworth v. Cordrey, 63 Iowa 675, 16 N. W. 211; Dohms v. Mann, 76 Iowa 723, 39 N. W. 823; Lynn v. Morse, 76 Iowa 665, 39 N. W. 203.

“Close family ties, intimate associations, or actual trust and confidence, are also matters that should be considered in cases of this kind. Lampman v. Lampman, 118 Iowa 140, 91 N. W. 1042; Bettendorf v. Bettendorf, 190 Iowa 83, 179 N. W. 444, 945.”

In the case of *First Congregational Church v. Terry*, 107 N. W. 305, 114 A. St. Rep. 443, a testatrix had devised a tract of land to her brother for life with remainder to the plaintiff church. The life tenant allowed the taxes to become delinquent and the property was bought in at tax sale by one Terry, a friend of the life tenant. Terry conveyed the land to Park, who on the same day in turn conveyed it to the wife of the life tenant and to her children. The remainderman brought suit to cancel the tax deeds. The tax deeds were held to be merely a redemption of the taxes. The court said:

“.....Collusive and fraudulent agreements are not often made in the presence of persons other than those participating in the fraud. In the nature of things they are difficult to prove by direct evidence, and must be established in whole or in part by proof of collateral circumstances. They are carried on under the cover of secrecy, and the participants are rarely found to be frank and candid witnesses. And while, generally speaking, fraud is not to be presumed, yet when all the circumstances combined present a showing that can be reconciled with no reasonable theory of good faith, courts will not hesitate to place the stamp of invalidity upon the transaction. In the case before us a careful examination of the

abstracts and of the transcript convinces us beyond all doubt that the acquiring of the tax title was brought about by a wrongful and collusive arrangement between the life tenant, Edward J. Hale, his wife, Elsie J. Hale, his father in law, Park, and their mutual friend and confident, Terry, with the express purpose and object of eliminating the interests of the remaindermen.

"We shall not extend the opinion to state the testimony at length. It is enough to say that soon after coming into the life estate Hale began to seek the help of a friend to procure a tax title to the land, and circumstances demonstrate that Terry, an old and intimate acquaintance, was complaisant enough to serve his purpose. Hale left the tax of 1896, a matter of some twelve dollars, to become delinquent. At the treasurer's sale Terry, who never before or since purchased a piece of land for taxes, bought it in. Within a few days after the deed was procured he conveyed the property, worth one thousand to fifteen hundred dollars, to Park for the amount of his investment in it, less than one hundred dollars, and immediately and as a part of the same transaction and pursuant to Terry's request Park conveyed it to Hale's wife and children. Terry said that he knew the condition of the title and that from the outset he intended to do just what he did do; that is, obtain a tax title and transfer it to Hale's family. Whether Park was a party to the arrangement originally, or was called in later to serve as a conduit through which to pass the title from the purchaser to the Hales and thereby add to the difficulty of tracing the fraud, is immaterial. He does not pretend to have taken the title for any other purpose than to give the benefit of it to his daughter and her family. While Terry swears that he never mentioned to Hale the matter of his purchase of the land for taxes, it must be presumed that Hale knew perfectly well what was

going on in this respect. Notice of the impending conveyance by the treasurer was served upon him, and, if he did not rest in the certainty that the certificate was in the hands of a friend on whom he could rely, it is incredible that he would permit this valuable property which furnished him home and shelter for life to pass from his hands for the trifling sum required to redeem it. Terry's story is broken, halting, and incoherent, and in every line betrays confusion not unusual in a witness who will not willingly tell an untruth, but finds perfect frankness embarrassing. It is not at all improbable that Hale harbored the feeling that his sister ought to have devised the land to him absolutely, nor was it entirely unnatural that his personal friends should sympathize in that feeling and be easily persuaded that to assist him in cutting out the remaindermen and transmitting his life estate into a fee in himself or in members of his immediate family would be a meritorious act. But this sympathy, however amiable and pardonable in itself, cannot be allowed to disguise the legal wrong involved in evading the effect of the testator's will and diverting the property from the purposes to which she had dedicated it."

In none of the cases above cited do we have such clear and convincing evidence of a scheme to eliminate outstanding prior interests in property by those having inferior interests as that found in the present case. Here we have unequivocal acts, omissions and admissions that point with certainty to the collusive arrangement. In the cases cited, such collusive arrangement was found to exist notwithstanding the absence of direct and positive proof.

We respectfully submit that plaintiff acquired no title under the tax sale proceedings, but if it should be held other-

wise the purchase of the plaintiff constituted in law merely a redemption.

Respectfully submitted,

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