

1941

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

Utah Supreme Court

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In
The Supreme Court
of the
State of Utah

ROY FREE,
Plaintiff and Respondent,
vs.

SWEN C. JENSEN, CHRIS JENSEN,
AND ALMA JENSEN, His Wife, AND
REGIONAL AGRICULTURAL
CREDIT CORPORATION OF SALT
LAKE CITY, UTAH, a Corporation,
Defendants and Appellants.

Appeal From District Court of the Second Judicial
District, in and For Davis County,
State of Utah.
Honorable Lester A. Wade, Judge

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

The appellants, Swen C. Jensen, Chris Jensen and Alma Jensen and Regional Agricultural Credit Corporation claim, in their brief, that plaintiff herein acquired no title by his deed from Davis County to the land in question. They contend first, that the auditor's tax deed is void because it was based upon a tax sale for delinquent taxes for the year 1933 which defendants claim were paid, and was, in legal effect, a redemption, and, second, that the title plaintiff holds, if any, was acquired as the agent of or in trust for defendant Alice Farnworth.

1.

Several pages of appellants' brief are devoted to the proposition that the tax deed in question is void because of mis-description of this land in certain of the tax proceedings. The only evidence before the Court, relative to these tax proceedings, is plaintiff's Exhibit A which is a published notice of the May sale, plaintiff's Exhibit B which is the certificate of sale, plaintiff's Exhibit C which is the auditor's tax deed and plaintiff's Exhibit E which is the check of J. R. Free to Davis County in the sum of \$656.30, the latter representing the purchase price of the tax title; and also a reference by defendants to the 1935 assessment roll of Davis County, page 58, line 34, which shows the description last above mentioned of the land in question.

We shall first call the Court's attention to Section 80-10-35 of the Revised Statutes, which provides this form to be used for tax sale certificates, and concludes:

"The certificate of sale signed by the county treasurer is prima facie evidence of the regularity of all proceedings connected with the assessment, notice, equalization, levies, advertisement and sale of the property therein described, and the burden of showing any irregularity in any of the proceedings resulting in the sale of property for the nonpayment of delinquent taxes shall be on him who asserts it."

The certificate of sale here described the land in question as follows:

Beg. NE cor. of Sec. 34, Twp. 2 N. Rg. 1 W,
S.L.M., S. 22-5/7 rds; W to Jordan River;
N along E bank to N line of Sec. 33, E to

beg. cont. 80 A. Also beg. 22-5/7 rds. S fr. NE cor. of above Sec. S 52-1/3 rds. W to Jordan River; N along E bank of river to a pt. 22-5/7 rds. S fr. N line of Sec 33 E to beg. cont. 183 A.

Counsel argue that the "above section" in the second part of the description means Section 33. The first description refers to the Northeast corner and so does the second description, the first starting at the Northeast corner and the other 22.5 rods south of the Northeast corner. The meaning of the description can, we think, be readily ascertained, without conjecture, from the description itself and without resort to extraneous evidence; and it meets the test stated in

Tintic Undine Mining Company v. Ercanbrack, 93 Ut. 561; 74 P. (2d) 1184, as follows:

"The description must be definite enough for the lien to attach to the property without extraneous evidence."

The delinquent list was not introduced in evidence, and for that reason it must be presumed that the description in the certificate of sale was taken from the delinquent list and harmonizes with it. The delinquent list for the year 1933 has disappeared, and cannot be found in the proper records of Davis County, and we are entitled to presume that in its description of the land in question, it was the same as in the certificate of sale; and secondary evidence of the list was not offered. But even if the description in the published list were as set out in the answer of the defendants Jensen (Ab. 15), it was sufficient under this Court's interpretation of

Rev. Sts. Utah, 1933, 80-11-6, which reads as follows:

“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.” (And see *Burton v. Hoover*, 93 Ut. 498, 74 P. (2d) 652).

As to the contention that the property had been improperly assessed, let us go directly to the assessment for the year 1933. Counsel admit that the property then stood in the name of James Farnworth. It is that year that respondent's tax title is based; and it is for that year's taxes that the property was sold.

Section 80-10-40 provides as follows:

“In case property assessed for taxes is sold to the County, it must be assessed in subsequent years for taxes in the same manner as if it had not been sold. While the certificate of sale is held by the County, the treasurer shall not sell for taxes the property covered by such certificate, but the sale under any such assessment must be postponed until the time for redemption under the previous sale shall have expired.”

That provision of the statute has been strictly followed by the assessor of Davis County, and the taxes against this property for the years subsequent to 1933 have been assessed in the same manner as if the property had not been sold. So there is absolutely no merit whatever to the question whether or not Farnworth later disposed of some or all of his interest in the property. There is no question raised at all about the validity of the

assessment for the year 1933. Furthermore, Section 80-10-38 provides as follows:

“Whenever property is sold for the non-payment of delinquent taxes, and the assessment is valid in part and void as to excess, the sale must not for that cause be deemed invalid, nor shall any grant subsequently made thereunder be held insufficient to pass a title to the grantee, unless the owner of the property or his agent, not less than six days before the time at which the property is advertised to be sold, delivers to the treasurer a protest in writing signed by the owner or agent, specifying the portion of the tax which he claims to be invalid, and the ground upon which such claim is based.”

There is no evidence before the court that the owner or anyone interested in this property ever made any protest to the treasurer specifying that any portion of the taxes assessed against this land was invalid. The contention of counsel beginning with the last paragraph on page 10 of their brief, that the 1933 taxes were actually paid is insupportable in view of

Section 80-10-59, Revised Statutes of Utah, 1933, as Amended by the Session Laws of Utah, 1935,

which provides the manner of redemption for real estate taken over by the County for delinquent taxes. That section specifically provides that redemption certificate cannot issue from a tax sale until “all of the taxes subsequently assessed and all interest, penalties and costs” that have accrued thereon are paid. That same section provides,

however, that any person wishing to make payments toward redemption may do so in any sum in excess of \$10.00 and then provides further how the treasurer may apply such partial payments and how the same shall be distributed, as follows:

“First, against the interest accrued upon the delinquent tax for the last year included in said delinquent account at the time of payment;

“Second, against the penalty charged upon the delinquent tax for the last year included in the delinquent account at the time of payment;

“Third, against the delinquent tax for the last year included in the delinquent account at the time of payment;

“Fourth, against the interest accrued upon the delinquent tax for the next to last year included in the delinquent account at the time of payment;

“And so on until the full amount of the delinquent tax, penalty and interest upon the unpaid balances shall have been paid within the period of redemption as aforesaid. (L. '33, Ch. 61, Sec. 1, amending Rev. St. '33, Sec. 80-10-59).”

In the case before the Court the treasurer did exactly as the last mentioned section of the statute requires that he must do. When Farnworth paid the said sum of \$164.43 the treasurer applied it to the taxes for the last year, which was the year 1937, with its penalty, interest and costs, and then applied the balance on the 1936 taxes.

The section last cited also provides that anyone whose property has been sold for taxes, and for

which the four year period allowed for redemption has not expired, may have the redemption period extended for an additional year by paying an amount equal to that part of the delinquent tax which is four years delinquent, plus penalty, plus accrued interest on such delinquent tax, which accounts for Mr. Farnworth paying the exact amount of the taxes for 1933 plus penalty, interest and costs, so precisely set out by counsel on page 11 of their brief.

In answer to that we merely refer again to
 Section 80-10-59, Session Laws of Utah,
 1933, and to
 Section 80-10-61 as Amended by Session
 Laws of Utah, 1935.

These statutes simply make it impossible to pay the taxes for the year upon which the sale is based without paying all subsequent taxes because only one certificate of sale can be issued for a piece of real estate so long as any delinquent taxes remain unpaid, or unsettled, by the Board of County Commissioners or the State Tax Commission and there can be no redemption until all delinquent taxes have been settled.

The issues presented by this appeal were all carefully analyzed and discussed by the trial judge in a very full and complete opinion which appears as a part of the files of this appeal, and the appellant adopts this opinion and the reasoning and citations therein as sustaining his position on this appeal and respectfully refers this Court to a careful consideration of the said opinion without repeating or setting it forth in detail in this brief.

II.

The appellants enumerate the jurisdictional requirements of the valid May sale as follows: (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 offered for the amount of the taxes properly assessed; (c) that no sufficient bid was made for less than the whole of the property; and (d) that the property was sold for the amount of taxes properly assessed. (Appellants' brief, p. 18). As to the first requirement appellants say, "although a notice 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 Revised Statutes, Section 62-1-1 tells us what a newspaper of general circulation is and Section 104-50-2 provides:

"Evidence of the publication of a document or notice required by law or an order of a court or judge to be published in the newspaper may be given by the affidavit of the printer of the newspaper or his foreman or principal clerk annexed to a copy of the document or notice providing the dates when and the paper in which the publication was made."

In this case the affidavit annexed to a copy of the notice was filed but the point made by appellants is whether the affidavit is prima facie evidence that the newspaper, The Weekly Reflex, was a newspaper of general circulation in Davis County. We are not aware of any Utah decision on the precise question. In analogous matters it has been held that the affidavit should show that the newspaper is one of the character in which the statute author-

izes publication to be made (2 Bancroft Code Pr. and Rem. 1373, Sec. 949); and "unless otherwise provided by statute, the affidavit need not contain the numerous details as to the character of the newspaper; and in the absence of sufficient evidence to the contrary a publisher's affidavit reciting that the newspaper is properly qualified is sufficient to establish the fact that the newspaper is a legal newspaper."

7 Bancroft Code Pr. and Rem. 7739, Sec. 5851.

In 61 C. J. 1182, Sec. 1595, it is said:

"The prescribed method of proof is usually an affidavit made and recorded by an officer or the printer in whose paper the advertisement was published with a copy of the advertisement or newspaper annexed thereto," — citing *Rafferty v. Davis*, 54 Or. 77, 102 P. 305; *Herr v. Graden*, 59 Colo. 372, 148 P. 863.

The second requirement specified by the appellants is "that less than the entire tract was first offered for the amount of the taxes properly assessed." The Revised Statutes of Utah, '33, 80-10-68 as amended by the laws of Utah, 1933, Chapter 62, Section 1 provided that at the May sale of property the county commissioners should offer for sale "to the *highest bidder*" each parcel of real estate which had been conveyed to the county during the current year, and provided that

"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 party who will pay in cash the full amount of the taxes, penalties, interest and costs for the smallest portion of the entire parcel.*”

It will be observed that the statute does not require that less than the entire parcel should be first offered nor does that or any other statute provide that a record shall be made of the method of sale adopted at the auction. It is not required that an explanation of the method of sale shall be contained in the notice of sale, nor that it shall be explained by the crier at the auction. The tax deed to the plaintiff recites that the property had been duly advertised and sold to the “highest bidder” which, according to the statute, is the purchaser even if he only paid an amount sufficient to pay the taxes, etc., for the entire parcel. If any method of procedure is indicated in the statute it is that the auctioneer should first ask for bids for the entire parcel and then ask for further bids for less than the entire parcel. See

LeCompte v. Smith, 82 Kan. 543; 108 P.
810

Tieman v. Johnson, 114 La. 112; 38 So. 75.

Nevertheless, whether the bid of the person who offers to pay the taxes for the entire parcel or the bid of the person who offers to pay the taxes for less than the entire parcel is accepted, that person becomes the “highest bidder.” The appellants do not present any authorities although in almost every State they have or have had similar statutes. See

61 C. J. 1195, 1196, 1209, 1348, Secs. 1610, 1612, 1632, 1900, and Notes.

We have no statute as in some jurisdictions under a kindred procedure that if there are no bids to pay the taxes, etc., for less than the entire parcel and this must appear of record.

61 C. J. 1195, Section 1611.

In 61 C. J. 1209, Sec. 1632 it is said:

"Under a statutory requirement that the sale must be to the highest bidder the *record* must show that the party who purchased was the highest bidder." But "under a statute which provides that the land shall be sold to the highest bidder a sale of the entire tract is valid although a sale of a **proportion** of the tract would have been sufficient to pay the taxes due."

61 C. J. 1195, Sec. 1610, cites
Merchants Trust Co. v. Wright, 161 Cal.
149; 118 P. 517.

In 61 C. J. 1196, Sec. 1612, Note 49 (a) it is said:

"Sold to the highest bidder. A deed which recites that the land was sold to the highest bidder is void.

Carpenter v. Gann, 51 Cal. 193."

That cannot be true under our statute, according to which the purchaser on either of the alternative terms, is the highest bidder. Of course a deed which shows that the sale was conducted contrary to the statute may be void on its face.

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

61 C. J. 1345, Sec. 1896.

Finally in

61 C. J. 1209, Sec. 1632, Note 50, it is said:

“Evidence of highest bidder — where the record of the sale showed that by its terms the highest bidder should be the purchaser and that a certain person was the purchaser it was evidence that such person was the highest bidder,” — citing *Smith v. Messer*, 17 N. H. 420.

The appellants say: “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. The italicized statement depends on the point of view, consequently we deny it.”

In 61 C. J. 1197, Sec. 1614, it is said:

“A valid sale may be made of several contiguous tracts or parcels, which are assessed as a whole and the tax cannot be arbitrarily apportioned, that is, a part of a tract, assessed as a whole, cannot be sold for a portion of the tax, and such an apportionment has been held in some jurisdictions void, and elsewhere voidable, unless there is legal cause for staying as to a part.”

The third jurisdictional requirement of a valid May sale specified by the appellants is, “(c) that no sufficient bid was made for less than the whole of the property.” We are not so sure that we understand this objection, but perhaps the following quotation from

61 C. J. 1191, Sec. 1605, constitutes an answer:

“It is always the intention that land offered at tax sale shall bring not less than the whole amount of the taxes due on it, with lawful costs and charges, and in some

States this is expressly required by statute, so that a sale for a less amount is invalid. But this condition being fulfilled, *the mere inadequacy of the price paid considered with reference to the true or market value of the land is no valid objection to the sale*, but gross inadequacy, of price may justify the courts in laying stress on other matters constituting in themselves only irregularities and so finding ground to set the sale aside."

The fourth jurisdictional requirement of a valid May sale specified by appellants is, "that the property was sold for the amount of the taxes properly assessed." Regarding this objection, appellants say: "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 those assessments. It was established that the assessment of taxes subsequent to the year 1933 was invalid." The basis of this objection is the following statement in 61 C. J. 1192, Sec. 1606: "If real property is sold at tax sale for an amount exceeding the aggregate of taxes, costs, penalties, and charges for which the land is legally and actually liable, in a number of jurisdictions the sale is entirely void and passes no title," — citing *Asper v. Moon*, 23 Utah 241; 67 P. 409. A similar proposition is stated in *Mammoth City v. Snow*, 69 Utah 204; 253 P. 680, as follows: "Where there is no sufficient description of property assessed to identify it with reasonable certain-

ty, taxpayer may enjoin collection of tax or if property is sold for non-payment of tax he may treat sale as nullity and have it set aside or certificate or deed based thereon canceled."

The tax sale here is not one that the appellants may treat as a nullity for the reasons urged by them.

Laws of Utah 1935, Chap. 87, Sec. 1.

61 C. J. 1335, Sec. 1872, Note 11 (a).

This Court has recently held, that

"where a description in tax sale proceedings is too vague or too indefinite to notify the *owner* that it is his property that is being taxed and insufficient to inform prospective purchasers as to what property is to be sold, the resulting tax title after sale is void."

Ferguson v. Mathis, 96 Utah 412; 85 P. (2d) 827.

And in Mammoth City v. Snow, *supra*, this Court held that payment of taxes by the owner under an assessment insufficiently describing the property was good; citing Shackleford v. McGlasken, 27 N. M. 456; 202 P. 690; 23 A. L. R. 75. See also 61 C. J. 1398, Sec. 1982, note.

In this case the owner, Alice Farnworth, paid the taxes for 1937 and part of them for 1936. The description of property in the assessment roll need not be more definite than in a tax deed, and as to the latter, it has been said (61 C. J. 1353, Sec. 1914), that "in the absence of statutory requirement the deed need not follow the form appearing in the tax list, it being sufficient if the land be definitely identified even though this be in different language or abbreviations from the tax list;" and, "further," if the description (in the tax deed) is such that it furnishes means by which the land may be

identified with reasonable certainty, that is all that the law required. It is not necessary that the deed should of itself describe lands so that they may be located by the deed alone, but it is sufficient if the description contained in such deed furnishes the means by which the lands may be identified. The description may be incomplete or inaccurate, and yet to make the deed valid, if it leaves no doubt about the identity of the property, and where the deed is definite and certain enough to enable those familiar with it readily to recognize the land intended to be sold, a technical inaccuracy or clerical error will not invalidate it.

III.

IN THE THIRD DIVISION OF THEIR BRIEF APPELLANTS ARGUE THAT THE COUNTY AUDITOR WAS WITHOUT POWER TO EXECUTE A DEED TO A PURCHASER AT THE MAY SALE — IT IS RESPONDENT'S CONTENTION THAT THE DEED GIVEN WAS MERELY VOIDABLE AND AMENDABLE BY GIVING A NEW DEED — BUT IF NOT, THAT NO DEED WAS NECESSARY; AND, FURTHER, THAT APPELLANTS ARE NOT IN A POSITION TO OBJECT TO THE AUDITOR'S DEED.

The discovery that the Davis County deed to the paintiff was executed by the wrong official was apparently made while appellants were preparing their brief filed here. At the trial, they only made the general objection to the introduction of the deed in evidence that it was irrelevant and incompetent. They did not mention the objection and ruling in

the abstract of record; nor is it the subject of an assignment of error. The appellants Jensen, in their answer, pointed out specifically all the defects which they supposed invalidated the plaintiff's title. The respondent contends, therefore, that those appellants are not now in a position to contend that the deed was invalid. They contend that if the first deed were insufficient, they were entitled to a new deed.

There are many Court decisions holding that the execution and delivery of a tax title is necessary to vest title in the purchaser at a tax sale; but this Court will find that such decisions are based on the statutes of the particular States. The Supreme Court of Iowa has held that "under statutes providing that no title to land sold for taxes vests in grantee unless a tax deed has been executed, acknowledged, and recorded, until no adverse interest is divested;" and that "a tax deed furnishes the taxpayer the official evidence of his title and authorizes him to enter upon the possession and enjoyment of the estate." The pertinent Iowa statutes were cited. In

Spaulding v. Ellsworth, 39 Fla. 76; 21 So. 812,

it was held that "a purchaser at a tax sale had not even a prima facie right to the land purchased by him or its possession until the execution and delivery of a deed therefor;" and the Court said that the deed is the final consummation of the sale referred to in this section, means the completed sale, accomplished by the execution and delivery of the deed. The opinion shows that the necessity of a deed was deduced from various statutes of that State. The decision in *Burgin v. Rutherford*, 56 N. J. Eq. 666; 38 A. 854, is to the same effect. And

in 61 C. J. 1331, Sec. 1864, it is said: "Under some statutes, it is the rule that the purchaser at a tax sale, by his performance of all that is necessary to entitle him to a deed, becomes invested with title at the expiration of the period of redemption, although the deed has not yet issued to him," (citing *Youngs v. Povey*, 127 Mich. 297, 86 N. W. 809; *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322); however it seems to be more generally held that the execution and delivery of a tax deed is necessary to vest title in the purchaser." And see

61 C. J. 1360, 1395, Secs. 1928, 1975.

In other States we find an opposite rule, also based on their statutes. In

Cooper v. Board of Commissioners, (Okl.),
105 P. (2d) 1052, the Court held

"Not every statutory provision regarding issuance of tax deed is mandatory;" and "where all official acts leading up to the sale of property for delinquent taxes down to and including a resale of such property, had been regularly performed and the purchaser had done all that the law required him to do in order to entitle him to a deed, purchaser's right to deed was not lost by failure, neglect or refusal of county treasurer to execute, acknowledge and deliver such deed within the statutory time."

In *McCague Inv. Co. v. Mallin*, 23 Wyo.
201; 147 P. 507, the Court said, that

"where the time for redemption has expired, and the purchaser had paid the price and was entitled to a deed, failure of the county treasurer to execute and deliver deed, or of the county commissioners to

cause it to be executed and delivered, did not invalidate the sale by the county.”

In *Cavender v. Phillips*, 41 N. M. 235; 67 P. (2d) 257,

the dissenting judge referred to New Mexico cases of the same kind. He said:

“We stated in *Witt v. Evans*, 36 N. M. 365; 16 P. (2d) 60, 61: ‘Under the statute in question the deed is of slight importance. The sale itself, applicable from recordation of the certificate divests the owner of legal title. Section 442. The right to redeem from the tax here in question lapsed not later than January 27, 1926. (New Mexico cases). On that date the county had ‘complete legal title,’ which on March 28, 1927, it passed to the appellant by assignment of the certificate. Evidently the office of the deed was not to pass a legal title which the grantees already had or to divest the original owner of a title which he had already lost. It was preserved in the system as a conventional muniment of title, as prima facie evidence of certain facts, and (originally) but not after repeal of Section 458 (Laws 1925, c. 102, Section 28) to prevent reversion of title to the original owner on failure to demand title within the 6 years.’”

Under the Utah statute the further rights of the owner, as, for example, a statutory right to redeem, or, by action, to contest the tax title, never has depended on the execution of the tax deed. nor the rights of the owners, such as his right of possession, never have depended on the execution and delivery of the deed. The Revised Statutes of

Utah 1933, 80-10-68, provided, that, "The clerk is authorized to execute deeds therefor (the property) in the name of the county," and as amended by laws of Utah, 1933, Chapter 62, Section 1, the statute in force at the time of the sale in this case, Section 80-10-68 provided, "the county clerk is authorized to execute deeds for all property sold pursuant to this section in the name of the county and attest the same by his seal, vesting in the purchaser all of the title of the State (and others) in the real estate so sold." The same section provided, that "the board of county commissioners shall, at any time after the period of redemption *and before the sale* as herein provided, permit the redemption of such property." And see, *Telonis v. Staley*, (Utah), 106 P. (2d) 163. The decision in *Richardson v. State Tax Com.*, 92 Utah 503; 69 P. (2d) 515, is not opposed to this contention.

The general rule is, that the power vested in an official to execute a tax deed is not exhausted until a deed is made in compliance with the law. 61 C. J. 1333, 1360, Secs. 1870, 1928. If a specific objection to the admissibility of the plaintiff's tax deed had been made he could easily have obtained a new deed, and obviated the objection. In *Sheafer v. Mitchell*, 109 Tenn. 181; 71 S. W. 86, it was said: Objections made to the reading of evidence and exhibits in the court below must be clear and specific, that the party may have the opportunity to cure the defect and not be taken by surprise when that opportunity may not be had." This is a well recognized rule, and the principle of it has widespread application.

There is a further objection, which applies only to the appellants Jensen. They, in their answer, perhaps unnecessarily, pointed out as we have already stated, what they conceived were all the defects in the proceedings; and now, they are precluded from urging other defects.

In 49 C. J. 288, Sec. 352, it is said, that "whatever is admitted in a special defense operates so far as a modification of a general denial." The same rule applies to all pleadings. In a suit to quiet title, the plaintiff may allege his title and possession, or right of possession, in general terms; but if, after alleging title in general terms, he attempts to set out facts or sources or title by specific averments, the latter ordinarily control. *State v. Rolio*, 71 Utah 91; 262 P. 987. And if a plaintiff files a reply, whether necessary or not, he must reply to the whole answer or counterclaim, and his denials must reach everything he intends to deny. *Cain v. Stewart*, 47 Utah 160; 152 P. 465.

IV.

THE QUESTION PRESENTED BY PROPOSITION IV OF APPELLANTS' BRIEF WAS NOT PRESENTED TO THE TRIAL COURT; AND THERE ARE NO ASSIGNMENTS OF ERROR PRESENTING THE POINT MADE BY IT EXCEPTING THE CONTRADICTORY ONES CONTAINED IN THE 16TH ASSIGNMENT OF ERROR, VIZ (1) THAT THE PROPERTY ACQUIRED BY HIM WAS HELD IN TRUST FOR DEFENDANT, ALICE FARNWORTH AND (2) TO AID AND ASSIST HER TO DEFRAUD APPELLANTS. (Ab. 94).

The points argued under the foregoing proposition suggest a total departure from the case tried in the court below. As we have heretofore shown, the appellant, Regional Agricultural Credit Corporation alleged in its answer that any title vested in the plaintiff or claimed or asserted by him in or

to said property is held by him in trust for the defendant, Alice Farnworth; and that the appellants Jensen alleged in their answers that James Farnworth and Alice Farnworth and D. A. Skeen procured the plaintiff to purchase said property from Davis County for and on their behalf and that the plaintiff acted merely as the agent of the Farnworths and Skeen in the purchase of said property. And that said Farnworths or Skeen furnished the money to the plaintiff to purchase said purported tax title and by reason thereof they allege that the actual purchasers of said tax title were said Farnworths or said Skeen.

There was not a suggestion of a conspiracy to defraud in the answers nor was there any evidence of fraud except an attempt by appellants by the testimony of the plaintiff to show what the constructive fraud, which is incidental to the establishment of constructive trusts was. The above were the simple allegations of the answers upon the issues made upon which the case was tried; but now appellants, in their brief filed here, say: "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 interest therein. The participants in the scheme were the defendant Alice Farnworth, her attorney, D. A. Skeen, and the plaintiff." (Appellants' brief, pp. 31-32).

The appellants Jensen attempted to plead a resulting trust (65 C. J. 1040, Section 97) and although the allegation of the Regional Agricultural Credit Corporation that the plaintiff held the property in trust for the defendant Alice Farnworth was purely a conclusion of law (Sav. & Loan Society v. Davidson, 97 F. 696), we must assume that it at-

tempted to plead either a resulting or constructive trust.

Rubin v. Midlinsky, 321 Ill. 436; 152 N. E. 219.

Alexander v. Spaulding, 160 Ind. 176; 66 N. E. 219.

The evidence does not show, nor do the appellants now claim, that Alice Farnworth advanced money to the plaintiff with which to purchase the tax title and the question of a resulting trust may be eliminated; and we shall argue the case on the theory that all the appellants by their pleadings claim is that plaintiff held the property as the constructive trustees of Alice Farnworth and D. A. Skeen.

The law, as we understand it, is that strangers such as the appellants cannot sue the alleged promisor, in this case the plaintiff, to establish or enforce a constructive trust in favor of the promisee, in this case Alice Farnworth or D. A. Skeen;

Powell v. International Harvester Co., 41 N. D. 220; 170 N. W. 559.

Beauchamp v. Bertig, 90 Ark. 351; 119 S. W. 75-82; 23 L. R. A. (N. S.) 659, 665.

Brace v. VanEps, 12 S. E. 191; 80 N. W. 197, 199.

In re Reynolds Estate (Neb.), 268 N. W. 480;

but we shall, as briefly as possible, refer to the law on the question of such trusts to show that the appellants did not try this case in the District Court on the theory that the plaintiff and respondents Farnworth and Skeen had conspired to defraud the appellants of their rights in the property.

It is held that a constructive trust arises from fraud, actual or constructive, and that such a trust arises

not primarily from the parol agreement to acquire and hold property from the principal, but from fraud and undue influence connected therewith.

Westphal v. Heckman, 185 Ind. 88; 113 N. E. 299.

And what is called "constructive fraud" is shown in such cases as

Harras v. Harras, 68 Wash. 258; 110 P. 1085.

Bryan v. Douds, 213 P. State 221; 62 A. 929; 110 Am. St. Reports 554.

Brood & Erie Building & Loan Ass'n v. Barnhard, 12 Pa. Supra 345; 180 A. 386.

It consists in such facts as these: That by reason of the agreement of the promisor to purchase for another, the latter was lulled into inactivity and was prevented from protecting his rights in the land or refrained from doing so and the promisor was enabled to secure the land at a price materially below its actual value.

There is a great difference between an action to establish an active trust which embraces only technical fraud and one that is based upon fraud as the substantive cause of action as for instance a conspiracy to defraud the plaintiff of his rights. As was said in

Unkel v. Robinson, 163 Cal. 648; 126 P. 485:

"True, the appellant is seeking to establish a constructive trust but such a trust may arise under various circumstances which may embrace no element of fraud or even technical fraud within the law. Here the constructive trust which appellant en-

deavors to have established is based on fraud as a substantive cause of action."

It has been held that a mortgagee of land cannot have a tax title annulled because of fraud between the owner of the land and the tax purchaser where such fraud is not alleged in the complaint.

Federal Land Bank v. Hill, 170 La. 118;
129 So. 654.

61 C. J. 1440, Section 2047.

But whether that is generally true or not, the appellants could not establish a constructive trust against Alice Farnworth and D. A. Skeen or hold them for a conspiracy to defraud appellants of their rights, unless they were parties to the action or issue.

Holian v. Holian, 265 Mass. 563; 164 N. E. 475.

Meldrim v. Doyle, 124 Cal. App. 514; 12 P. (2d) 997.

Neil v. Wideman, 59 Ark. 5; 26 S. W. 5.

And that would have required a cross complaint, which in this case was not filed. In the appellants' brief we find the statement that "the defendants Alice Farnworth and D. A. Skeen conveniently defaulted *although the latter did set up a mortgage in his favor given by his co-defendant.*" Mr. Skeen filed an answer setting up his mortgage and he participated in the trial so it is difficult to see how he "defaulted" unless it is the notion of appellants' counsel that he should have made an issue of something alleged in their answer, which he or Mrs. Farnworth was not called upon to do.

The testimony does not show a constructive trust, nor fraud of any kind. The statements of Mr. Free that he would protect Mrs. Farnworth were too vague to found a constructive trust upon.

Carpenter & Carpenter v. Kingham (Wyo.),
109 P. (2d) 463.

And see

Brown v. Murray, 94 N. J. Equity 125; 118
A. 534.

Miller v. Kyle, 107 Kans. 368; 191 P. 492.

In the Wyoming case involving a receiver's sale, the court said the receiver had a right to sell his interest to anyone he pleased, with the consent of the court, and the defendant had the right to buy it, and added "there was no fraud in that." The same can be said here of the plaintiff. The cases holding that one who is acting as an agent in the purchase and who takes the title in his own name is regarded as having purchased for his principal and will be held as trustee, are not in point here. Such cases suppose an employment, such as in the case of real estate brokers

Quinn v. Phipps, 93 Fla. 805; 113 So. 419;
54 A. L. R. 1172.

Johnson v. Hayward, 74 Neb. 157; 103
N. W. 1058; 5 L. R. A. (N. S.) 112.

Harrop v. Cole, 85 N. J. Equ. 22; 95 A. 378.

Jackson v. Pleasonton, 95 Va. 654; 29 S. E.
680;

and so it is said that an *agent* cannot acquire title at a sale of land for taxes, as whatever interest he does acquire will be held by him in trust for his principal.

Peabody v. Burri, 255 Ill. 592; 99 N. E. 378.

We find the word "agent" often misused by the pleader in this class of cases, but whatever its meaning, there was no such employment or agency in this case.

In 61 C. J., Section 1996, it is said that:

“Generally speaking, fraud in the procurement of a tax deed is ground for its cancellation in equity whether the fraud is actual or constructive,” citing, among other cases, *Guldner v. Guldner*, 199 Iowa 986; 203 N. W. 289, cited by appellants herein. The only right the appellants had in the property here in question at the time of the transaction here complained of, if any, was the right of redemption and if we ignore their claims of trust, all they could ask even if the plaintiff and certain of the defendants had conspired to defraud them by causing them to lose the right of redemption (which, obviously, they never had the thought of exercising), was to be allowed to redeem.

Widersum v. Bender, 172 Mass., p. 36; 52 N. E. 717.

However, in this case, each of the appellants in their pleadings asserted the trust on behalf of the defendants Farnworth and Skeen against the plaintiff as trustee on the theory the title had vested in him. In that case the tax deed forms a part of the plaintiff's title and in granting relief the court could not set aside or cancel the deed as was done in the cases cited in appellants' brief.

Luscombe v. Grigsby, 11 S. D. 408; 78 N. W. 357.

This case was briefed to the Court, and in the brief furnished by the respondent, we said:

The defendant, Regional Agricultural Credit Corporation, pleads as a defense, “That any title which may be vested in the plaintiff or claimed or asserted by him in or to said property above mentioned is held by him in trust for the defendant, Alice Farnworth, and said plaintiff has no estate, right, title,

claim or interest in or to said property of any kind or character prior or superior to the lien of this defendant's judgment and decree as aforesaid," and further, that the defendant, Alice Farnworth, "is now the owner in fee simple of said property subjected to the lien of this defendant's judgment and decree" set forth in the answer.

The purport of this defense, (and it is only such) would therefore seem to be, that while Alice Farnworth is the owner of the legal title, and probably that defendants Jensen are the owners of the equitable title, both of these titles are subject to an equity in favor of the Regional Agricultural Credit Corporation. Many actions to quiet title, and perhaps of ejectment, have reached the Supreme Court of this State in which the defendant alleged or claimed that the plaintiff held the legal title as a constructive trustee for him. Preliminarily, we shall mention the following cases of that character:

Kahn v. Old Telegraph Min. Co., 2 Utah
174.

Silver City Min. Co. v. Lowry, 19 Utah
334; 57 P. 11.

Scott v. Crouch, 24 Utah 377; 67 P. 1068.

Helstrom v. Rodes, 30 Utah 122; 83 P. 730.

In this case, the theory of the defendant, Regional Agricultural Credit Corporation, is, that the plaintiff bought the tax title from Davis County at the request and for the benefit of Alice Farnworth; although he used his own money for that purpose. We shall concede, for the purpose of this argument that a plaintiff, including a counter-complainant, may seek to have a constructive trust established in certain property, and, in the same action ask to have his title quieted. Upon proper pleadings that may be done.

California Trust Co. v. Cohn, 114 Cal. App. 763; 299 P. 811.

Thompson v. Reynolds, 59 Ut. 416; 204 P. 576.

American Min. Co. v. Trash, 28 Idaho 642; 156 P. 1136.

By that we mean that if in an action to quiet title, equitable relief is asked for, sufficient grounds therefor must be pleaded. It was so held in

Glasmann v. O'Donnell, 6 Ut. 446; 24 P. 537,

and numerous Utah and other cases which we shall hereinafter mention.

It is elementary, that one of the necessary elements to sustain an action to quiet title is, that plaintiff must be the owner, either legal or equitable, of the title sought to be quieted (51 C. J. 247, Sec. 224), and it has been often held, as in

State v. Rolio, 71 Ut. 91; 262 P. 987,

that "in an action to quiet title, the plaintiff may allege his title, ownership, and possession in general terms, and thereunder prove whatever title he has." But the procedure of the defendant Regional Agricultural Credit Corporation is not so simple. It is in the position of a plaintiff who is seeking to have a trust established, and, in the same action asking to have his title quieted. The ordinary procedure in establishing a constructive trust is that pursued in

Chadwick v. Arnold, 34 Ut. 48; 95 P. 527,

in which the plaintiff pleaded the defendant's verbal promise to purchase plaintiff's property at foreclosure sale and convey it to her, and also the fraud characterizing the promise. And in a case like that before the Court, the principal relief sought is the establishment of a constructive trust,

and the prayer to quiet title is merely incidental to that principal relief.

It is the law of this State, and, we presume, in most of the States, that if the plaintiff, in an action to quiet title, alleges title or ownership in general terms, the defendant may, under a general denial, prove fraud; but that does not mean that he may prove a constructive trust, and the fraud essential to its establishment, without specially pleading the fraud. This is illustrated by the case of

Steinour v. Oakley State Bank, 45 Idaho
472; 262 P. 1052.

In that case, a mortgage had been foreclosed against plaintiffs, and, as they alleged, they failed to redeem within the statutory time, because they were misled by the agreement or voluntary assurance of the purchaser that they should have additional time to redeem. The Court, citing

Security State Bank v. Kramer, 50 N. D.
20; 198 N. W. 79,

(to which the cases therein cited, we invite the Court's especial attention) compared the case to one of trust and fraud, in which the remedy is exclusively in equity. The plaintiff, had however, brought an ordinary action to quiet title, alleging ownership in general terms; and regarding this the Court says:

“Appellants (plaintiffs) have wholly failed to ask the trial court for an award permitting them to redeem, nor have they pleaded any facts on which they could predicate such a request. Not until a court of equity, upon a proper bill, shall have awarded the right to redeem and the redemption has been effected, can appellant have any title to quiet.”

The Court said that the rule which, in quieting title cases, permits instruments to be attacked for fraud, is confined to cases of fraud in the execution, delivery, etc., of instruments. The Utah cases are to the same effect; and so in

Silver City Min. Co. v. Lowry, 19 Ut. 335; 57 P. 11, an action to quiet title, the Court said:

“If true, the respondent (plaintiff) is mistaken in the remedy which would be to bring an action in equity to compel the owners of the Clarissa to deed it to the respondent on the ground that the appellants were trustees of the respondent.”

In Kahn v. Old Telegraph Min. Co., 2 Ut. 174, 195, it was said:

“While it is conceded that, under the system of code pleading, an equitable defense may be set up in an action of ejectment, it is also well settled that such defense must contain all the essentials of a bill in equity, and the issue thus made is triable by the court without a jury, as an equitable issue.”

And the Court held (see 19th paragraph of syllabus), that —

“In an action of ejectment, the question is as to who has the better title; therefore, before the defendant can prevail on an inferior or equitable title, he must first, in equity, subject the better title to him. He must become an actor and invoke equitable affirmative relief.”

If the legal title to the property involved stands in one party, and the other claims a constructive trust, the burden is upon the latter to show that the holder

of the legal title is not entitled to retain it, but holds it in trust for him.

Scott v. Crouch, 24 Ut. 377; 67 P. 1068.

And as the defendant, Regional Agricultural Credit Corporation, claims that the plaintiff bought the county's tax title for Alice Farnworth, it should have alleged and proved facts showing that the purchase was false and fraudulent. This, that defendant has failed to do.

In 3 Pomeroy's Eq. Jur. (4th Ed.), in discussing this section it is said that, under the circumstances mentioned by him, equity impresses a trust even "in favor of one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein," and we shall not deny that if there had been a transaction between the plaintiff and Alice Farnworth, which was pretended and collusive, and under which Mrs. Farnworth remained the beneficial owner, the defendant, Regional Agricultural Credit Corporation might ask for a judicial declaration of a trust in her favor and that that defendant's judgment continued as a lien thereon. But we do not believe that the named defendant could, any more than a stranger, enforce as a constructive or other trust, the voluntary agreement of the plaintiff, if any such agreement were made, to purchase the tax title to Mrs. Farnworth's property and convey the same to her. The evidence does not show such an agreement, but if it did, it would not be a sufficient basis of a constructive or other trust, nor does the evidence show the fraud which must characterize the agreement. "The fraud," it was said in

Beebe v. Beebe, 252 N. Y. S. 310,

must be something more than a mere breach of an agreement." In

Funk v. Engel, 235 Mich. 195; 209 N. W. 160,

it was said that, "Defendant's breach of his promise to do certain acts in the future is not, standing alone, fraud." And in

Neagle v. McMullan, 334 Ill. 163; 165 N. E. 605,

it was held, that "mere breach of grantee's oral promise to hold property conveyed for another does not constitute such fraud as to take the case out of the statute of frauds."

The respondent also cited

Ives v. Granger, 42 Utah 608; 134 P. 169.

Deseret Irr. Co. v. Bishop, 92 Utah 220; 67 P. 210.

In all of the cases we have cited, the plaintiff or counter-complainant sought to establish a constructive trust; and the rule ordinarily applied to such cases is stated, in

Joseph v. Evans, 338 Ill. 11; 170 N. E. 10, to be that "an oral agreement for the conveyance of real estate to be enforceable must be clear and definite in the terms, free from doubt and suspicion and for a valuable consideration." In

Helstrom v. Rodes, 30 Ut. 122; 83 P. 730, Justice Straup referred to the insufficiency of the complaint and findings relating to a trust, as follows:

"It is not alleged in the answer nor found by the court, that in locating the claim or obtaining the patent, plaintiff or the owners of the Lily Lode were guilty of any

fraud or wrong, or that any act or thing was done by them to defeat any right of the defendant or his grantee, nor does the evidence show any such facts."

Counsel in their brief have picked out isolated parts of the testimony which, standing alone, might justify an inference that *Mr. Free intended to permit the Farnworths or Mr. Skeen to buy this property back from him*. He states he was not interested in owning a farm and did not want a farm but had a moral interest in the Farnworths. *There is no testimony that he ever talked with Mrs. Farnworth about buying this property*. He did talk with Mr. Farnworth, Jr., whom the record shows had no interest in the property at all. He looked to Mr. Skeen for an assurance that the title would be clear or he would have a first lien on the property for his money. *No note was taken; no agreement made, oral or written*, which placed Free under any obligation to Mrs. Farnworth. Later, because of the mortgage, Mr. Skeen had against the property, Mr. Free gave Mr. Skeen an option to buy the property. For the option Mr. Skeen agreed to clear the title and, upon exercise of the option, to pay the money advanced, with interest, and all expenses incurred by Mr. Free. Such an option was perfectly legal and proper, and we repeat neither Mr. Skeen nor Mr. Free thereby incurred any obligation to the Farnworths or anyone else interested in the property.

None of the parties interested saw fit to exercise the right given to them to buy the property, so why should they now complain? We submit that an examination of the evidence on this phase clearly establishes a valid tax sale, and no relation, agree-

ment or obligation of the plaintiff Free, indicated by the evidence or the law, could prevent him from being a bona fide legal purchaser of this property from the county at tax sale with the right to hold, resell or handle the property as he might see fit.

It is respectfully submitted that the judgment of the trial court should be in all respects affirmed with costs to the respondent.

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