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Gust Papadopoulos v. Marion Defabrizio : Reply Brief of Appellant

Utah Supreme Court

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No. 6377

In
The Supreme Court
of the
State of Utah

GUST PAPADOPULOS,
Plaintiff and Respondent,
vs.

MARIO DEFABRIZIO,
Defendant and Appellant.

Appeal From the Third District Court of Utah,
for Salt Lake County
Honorable P. C. Evans, Judge

Appellant's Reply Brief

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STATEMENT

Respondent has objected to parts of appellant's statement of facts, and he has made a statement of his version of the facts of the case.

Appellant objects to respondent's statement of facts, and to his arguments thereon, and, therefore, must request a complete examination of the entire record.

Appellant respectfully shows that respondent's brief contains fallacies and artifices. It strings together some propositions that are indisputably true, and covertly assumes that others mingled with them, but not distinctly asserted, are also true. It also uses the artifice of truthfully stating a series

of facts, but suppresses one, or more, of the controlling ones.

Respondent has been misled by overlooking some facts which completely nullify the validity of his reasoning. He loses sight of important elements, and gets only a partial view of the things he is investigating and discussing. His facts are made to fit a theory or a hypothesis by suppressing material indisputable facts, and by advancing mere conclusions.

Respondent overlooks the stipulations and objections of counsel, and the rulings of the trial court, and findings Nos. 4 and 5, and appellant's brief, page 27, quoted:

“During the trial it was stipulated by counsel, and then ruled by the trial judge, that said two tenants could not try the titles of their landlords. The court said: ‘Mr. Gray and the County might litigate that’ — not the tenants. (B. E. 193; Tr. 161). That was the right ruling.”

So, the trial court did not try the titles, and did not permit the tenants to try titles, and did not convert an alleged trespass case between tenants into an action under R. S. U. 1933, 80-10-35. And respondent did not prove any tax sale, and he did not offer any certificate of tax sale as provided in 80-10-35, R. S. U. 1933, or otherwise, or at all. There is no legal evidence to support any tax title. Appellant stands on the record.

The seven sections of freehold lands described in the pleadings and exhibits are held under patents of the U. S. A., which granted these lands “to have and to hold with the appurtenances thereof unto the claimant and the heirs and assigns of the claim-

ant forever." This freehold can be taken from the patentee only by conveyance or descent. The tenure of lands does not depend upon the payment of taxes. Tax rolls are not evidence of legal title. Salt Lake County, which has released its tax liens, has never had even the semblance of legal seizin of a square foot of these lands. These lands have never been sold to discharge tax liens.

The Utah Supreme Court has stated that the treasurer's "sale" to the County is not a sale. The treasurer's certificate operates to fix the date from which the tax lien bears interest. The legal situation is that the County had a legal lien and that the legal seizin continues to follow the record title.

The auditor's deed to the County at the maturity of the lien is not predicated on an unredeemed "sale" and can therefore not operate as a conveyance of the freehold. The effect of the auditor's deed is to give to the County the power to sell its tax lien at public May sale or at subsequent private sale, or alternatively to sue to have the freehold subjected to judicial sale as specifically prescribed by the statutes.

Here we have two tenants, commonly called Pappas and Defa, under written leases from the common landlords, L. H. Gray and Western Land Association, who had the legal seizin and record title, on

"Marginal land, on the fringe of the wheat land, and on the fringe of grazing land which centers around the water hole on Section 31 — both tenants in possession."

Pappas a shepherd grazing his sheep, and Defa a farmer with an

"Idea that he could extend the wheat belt west into the hills, and with this in mind

made a lease with Gray on April 6, 1938. When Pappas learned from Defa that Gray no longer owned Section 31, Pappas immediately went to Salt Lake County to secure a lease. Salt Lake County gave Pappas a lease on May 4, 1938, (and an option to purchase) on contiguous sections, excluding Section 31. Pappas acknowledged his landlord Gray had no title to Section 31, and recognized Defa's lease with Salt Lake County for Section 31, and did in no way interfere with Defa's harvesting his crop under his lease with Salt Lake County for 1938. The harvest was not completed until 1939. In reliance upon Gray's title which Defa had repudiated, Defa began to plow and plant Section 31 in 1940. It is the trespass of plowing up the feed for Pappas's flock with the loss of grazing and damage to his sheep (after May 20, 1940) of which the respondent complains.'

See respondent's brief, pp. 3 and 4, for the above quotations. Upon the foregoing statement Pappas claims the right to trespass and feed the crop of wheat planted by Defa.

And upon the foregoing statement of facts respondent now claims \$250 for "loss of lambs" between May 20th and June 7th, 1940. He quotes part of paragraph 8 of the complaint (Resp. Brief, page 17) and suppresses the other parts. The full paragraph reads:

"On or about April 25, 1940, plaintiff drove his 2000 head of sheep on said property for the purpose of grazing, shearing and lambing said sheep, and plaintiff kept said sheep on said property until on or about

June 7, 1940, when plaintiff left with one-half of said sheep *and their lambs*, the remainder of the sheep being kept on said property until on or about June 15, 1940, when plaintiff took them away."

That is the only place in the complaint where respondent mentioned "*lambs*," and there he shows that "*plaintiff left (the property) with the lambs on or about June 7, 1940.*" He does not allege the loss of any lambs at any time — and he did not lose any lambs. He sold said lambs the following September for \$4.85 as shown by his own testimony in this case. And he was in possession of said Section 31 and the water springs thereon from April 25th to June 15th, 1940, as shown by his own pleading and testimony in this case.

All sheepmen know that with seven sections of grazing land, and with but "one watering place," it is necessary for ewes to leave their lambs some considerable distance in order to obtain water, and that it is physically impossible to prevent ewes from losing their lambs. Lambing took place in April, and the trial court found: "That on or about May 20, 1940 to and including June 1, 1940, defendant plowed a portion of the above described property" after the lambing season, "thereby causing the loss of approximately fifty lambs" *but does not find the value of said lambs*. There is no finding of fact to sustain said alleged damages.

Let's stop, look and listen. Let's study said paragraph 8 of the complaint just quoted. This is the gist of the pleading. This is the alleged possession and right of possession upon which this action for alleged trespass is predicated. This kind of possession will not support any action for alleged tres-

pass. The complaint does not state facts sufficient to constitute a cause of action for alleged trespass and injunction. The trial court erred in overruling the demurrer to the complaint. The respondent plead himself out of court. And by his statement he admits himself out of court. There is no pleading to support finding No. 10 as to any damages whatever. Appellant objected every time, and in every way, the law gave him the opportunity to do so. See appellant's brief.

Note the possession plead and quoted. Pappas argues he was not in possession in 1938; and that he herded his sheep off in 1939; and that he did not molest Defa's possession in 1938 and 1939. But that on April 25, 1940, he drove his sheep onto said property, and that he kept said sheep on said property until June 15, 1940, when he took them away and surrendered the alleged possession to Defa — and, of course, to his landlord, L. H. Gray. When he commenced this action in January, 1941, he had been out of possession about six months or more. He pleads, admits and argues that Defa was in possession in 1938, 1939 and 1940 and farming said lands under his said lease of April 6, 1938 under the common landlord, L. H. Gray, and that he herded off his sheep as therein provided.

The crux of this case is: "A crop believed to be grain which crop is now growing upon said property which crop renders the land useful for the purposes of grazing" as alleged in paragraph 9-c of plaintiff's verified complaint. That shows the motives of the plaintiff in commencing this action, and the afterthought about damages which he did not allege and the findings do ^{not} sustain, and the law does not support. He is precluded and estopped by his acts.

Appellant asserts that the following are

INDISPUTABLE FACTS

1.

On March 15, 1935, L. H. Gray and Western Land Association were the owners, and in the sole possession of the Barney Canyon Ranch, containing approximately seven sections of land shown in Exhibit No. 2 — a photostatic copy of the map annexed to the lease. On that day they leased and let said lands to Gust Pappas, this respondent, for a term of five years ending December 31, 1939, for grazing of sheep, and under this lease the respondent went into possession of said lands, and paid rents to said landlords for the years 1935, 1936 and 1937, and retained possession of said lands under said lease until December 31, 1939, as shown by the records and files in the transcript and bill of exceptions. A copy of said lease is annexed to the complaint, but for some reason, perhaps Sec. 104-2-14, it was suppressed by respondent.

The following is the copy annexed to the complaint:

EXHIBIT A

This agreement of lease is entered into at Salt Lake City, Utah, the 15th day of March, 1935, by and between L. H. Gray, agent lessor and Gust Pappas lessee. WITNESSETH:

The leased premises is the Barney Canyon Ranch in Salt Lake County, State of Utah, containing approximately seven sections of land, a map of which is attached. The lease is for a period of FIVE years unless sooner terminated by a sale of the property, and is for the grazing of sheep, lambing and shearing. Should a sale be

made at lambing and shearing time such sale is not to interfere with lambing and shearing for that year.

This lease begins January 1, 1935 and ends on December 31, 1939. The lease price is \$400.00 for the year 1935 and \$500.00 each year thereafter, payable one-half at shearing time and the other half at sale of lambs in the fall. This includes all my ranch above the track of B. & G. Ry.

Failing to make said payments, the lease stands terminated without further notice.

L. H. GRAY (signed).

GUST PAPPAS (signed).

2.

On April 6, 1938, said L. H. Gray and Western Land Association leased and let to appellant, Marion Defa, for a term of six years, ending April 6, 1944, approximately 300 acres of said land, under a written crop lease, a copy of which lease was plead at length in the answer and counterclaim, and received in evidence as Exhibit 3, and quoted on pages 18, 19 and 20 of appellant's brief. No reply to this answer and counterclaim was filed. This lease provides:

"This lease is not to interfere with the grazing lease to Gust Pappas for the spring of 1938. After that suitable arrangement is to be made with Pappas to herd his sheep off of the grain or wheat."

That accounts for the more than remarkable statement in respondent's brief at pp. 9 and 27:

"Respondent took possession of Section 31 in the spring of 1939 and protected appel-

lant's crop by hiring two extra sheep herders (Tr. 73, 75).''

''The evidence establishes that respondent was in possession in 1939, placed extra men to protect the wheat, and permitted appellant to harvest his crop without molestation (Tr. 73, 75, 112, 113, 115, 158).''

Of course, appellant and respondent were both in possession in 1939, as provided in said leases, and as provided by Sec. 104-60-4, Revised Statutes of Utah, 1933. That is indisputably true; and it is also indisputably true that both tenants were in possession on May 4, 1938; and that said landlords, L. H. Gray and Western Land Association, were, and now are, in possession, and they are the owners of said lands; and that said landlords own an undivided one-fourth of the crops of wheat grown on said land; and that they directed the clearing, plowing and planting thereof by this appellant, Defa; and that the respondent purposely suppressed said facts when he prepared Finding of Fact No. 4. That is prejudicial and reversible error.

3.

At all times mentioned said landlords, L. H. Gray and Western Land Association, were in possession of all of said lands under said two tenants and under said two written leases. The said landlords had, and now have, legal rights to the rentals provided in both of said leases. Neither of said tenants can legally question the possession, nor right of possession, of said landlords. The said landlords are protected by, and both of said tenants are subject to and barred by, the provisions of

104-2-14, Rev. Stat. of Utah, 1933,

which reads:

''104-2-14. — Possession of Tenant Deemed Possession of Landlord. — When the re-

lation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of seven years from the termination of the tenancy, or, where there has been no written lease, until the expiration of seven years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord; but such presumption cannot be made after the periods herein limited."

In the case of

Woodbury v. Bunker, 98 Utah, at Page 222,
this Court said:

"So long as the tenant remains in possession, his possession is that of the landlord, and he cannot by words or acts, make his possession, or that of one whom he permits upon the premises, a possession adverse to the landlord."

That is the law of this State. That is the general rule and it is supported by the weight of authority and sound legal reasoning.

"The doctrine is not merely technical but is founded in public convenience and policy, because it tends to encourage honesty and good faith between landlord and tenant, and is, undoubtedly, well rooted in sound morality."

16 Ruling Case Law, Par 137, Page 650.

4.

Neither the respondent nor the appellant secured any legal *lease* from Salt Lake County. Both

agreements of May 4, 1938, Exhibits No. 1 and H, recite:

Salt Lake County "*hereby appoints the Second Party as agent for the First Party for the sole and only purpose of guarding, protecting and preserving the above described property from the 4th day of May, A. D. 1938.*"

This in legal effect appointed L. H. Gray, the landlord and legal seizin owner and holder of the record title, because the said tenants were then in possession under said L. H. Gray. Neither of the tenants paid anything to Salt Lake County for said *agreements, which are not leases under the laws.*

5.

Said agreement of May 4th, 1938, Exhibit H, provided:

"Second Party (Gust Pappas) is hereby granted *an option to purchase* said property on terms acceptable to First Party."

And that accounts for the allegation that "Pappas immediately went to Salt Lake County" to avoid payment of \$500 rent for 1938 to L. H. Gray, and to purchase the tax lien and get a tax title on May 4, 1938, at the May sale. This is shown by Exhibit K, Bill of Exceptions, page 172.

"The broad view is taken that a tenant cannot become directly or indirectly a purchaser at a tax sale and thereby acquire any title which he may assert against his landlord. The remedy of the tenant is rather to discharge the assessment himself and deduct the amount from the rent. If the tenant was at the time indebted to the landlord for rent in the amount of taxes, he

should pay such taxes, and he is precluded from purchasing or leasing for his sole benefit.”

Williams v. Morris, 95 U. S. 444; 24 U. S. (L. Ed.) 360.

Notes: 15 Am. Dec. 690; 89 A.S.R. 84; 53 L.R.A. 940; 15 Eng. Rul. Cas. 305.

6.

The appellant, Defa, secured the agreement of May 4, 1938, Exhibit No. 1, for Section 31, because he had half of the said work done under said lease of April 6, 1938 from said landlord, L. H. Gray. (Tr. 64 to 68, and Appellant's Brief, p. 31). That agreement was to protect himself and his landlord, L. H. Gray. And he completed the plowing and planting according to the said lease of April 6, 1938, and at all times Defa has performed and kept his said lease with L. H. Gray, and not adverse to him. All of that testimony is in the bill of exceptions, and it has been abstracted in appellant's brief, and it has not been denied, or explained otherwise. So it stands as another indisputable fact

7.

There was no eviction of any one at any time. Pappas had his camp and sheep on Section 31 on May 4, 1938. He did not move off until June 15, 1938, and he used parts of Section 31 every year from 1935 to and including June 15, 1940, notwithstanding his lease expired on December 31, 1939, and notwithstanding the extended explanation on page 11 of respondent's brief. That is the only watering place on said seven sections of land described in said leases. And, of course, it is unreasonable to believe that Pappas did not water his sheep and use said Section 31 in April, May and

June of each year. All of the pleadings, exhibits, and testimony sustain that fact, and there is no dispute whatever. So that is another indisputable fact.

8.

Finally, the legal relationship of landlord and tenant between Pappas and Gray did not terminate until December 31, 1939. The lease between Defa and Gray does not terminate until April 6, 1944. The original landlord, L. H. Gray, and the tenant, Defa, at all times after April 6, 1938 were and now are in the possession, and Pappas was a trespasser after the expiration of his said lease on December 31, 1939.

CONCLUSION

By his own pleadings and admissions in the record, the respondent has plead himself out of court. He is precluded and estopped, and in good conscience and equity, of right ought to be precluded and estopped from maintaining this action against Defa. As a tenant of L. H. Gray, on May 4, 1938, respondent had \$500 rentals in his possession and was under legal duty to protect the property and the possession for his landlord, L. H. Gray. And as an honest man, with clean hands in equity, he should have gone to his landlord, and not to the County, when he learned of the non-payment of taxes, and provided the money to pay such delinquent taxes from said rentals. And when he saw Defa plowing and planting wheat in 1938 to be harvested in 1939 he should have stopped him, or had

his landlord stop him, and not stand by and see Defa spend thousands of dollars clearing, plowing and planting said lands in 1938, and by hiring herders to keep his sheep off the wheat crop in 1939! Respondent is now in U. S. A., where, thank God, there are still laws and equity and courts to enforce them. The judgment of the trial court denies the appellant due process of law which is guaranteed by the Constitution and laws of this State.

The judgment appealed from should be reversed with costs.

Respectfully submitted,

C. E. NORTON,
Attorney for Plaintiff
and Appellant.