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Ray Phebus, Joe T. Juhan and Ashley Valley Oil Company v. Wm. Stanley Dunford, Judge of the District Court, Uintah County, and N. J. Meagher :
Petitioners' Brief on Original Proceedings for Writ of Mandamus

Utah Supreme Court

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IN THE SUPREME COURT
of the State of Utah

RAY PHEBUS, JOE T. JUHAN, and
ASHLEY VALLEY OIL COMPANY,
a corporation,

*Plaintiffs and
Petitioners*

vs.

WM. STANLEY DUNFORD, Judge of
the District Court, Uintah County, and
N. J. MEAGHER,

*Defendants and
Respondents*

PETITIONERS' BRIEF

on

Original Proceedings for Writ of Mandamus

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Case No.
7187

PETITIONERS' BRIEF

STATEMENT OF THE CASE

This is an original mandamus proceeding to compel the trial judge to conform to the mandate of this court after appeal and the issuance of the remittitur. The judgment appealed from quieted title to real property against the appealing defendants, including Ray Phebus, one of the plaintiffs and petitioners herein, assessing costs against them and restraining them and those claiming or to claim by, through or under any of them from

going into possession of the property or asserting any adverse claim thereto. Upon the appeal this court reversed the decision of the lower court and remanded the case to that court for proceedings to conform to the opinion.

Ray Phebus, one of the appellants from the judgment that was reversed, seeks by this proceeding to have the judgment appealed from formally vacated of record and to be restored of record to the position that he was in prior to the entry of the erroneous judgment. Joe T. Juhan and Ashley Valley Oil Company are interested parties and were co-defendants and appellants with Ray Phebus in the appeal which resulted in the reversal. As to them, the trial court vacated of record the judgment appealed from, but, as interested parties, they join as plaintiffs and petitioners.

There is no controverted issue of fact herein. The facts, as set forth in the petition for an alternative writ of mandamus, as admitted by the return or answer on file herein, can be briefly summarized as follows:

1. Honorable Wm. Stanley Dunford was the trial judge in the action commenced on December 5th, 1944 in the District Court of the Fourth Judicial District in and for Uintah County, Utah, wherein N. J. Meagher, one of the defendants and respondents herein, is plaintiff and your petitioners together with others are defendants, and which action was brought to quiet title to certain lands situate in Uintah County, Utah; that judgment was entered in said action in favor of the plain-

tiff Meagher on or about April 15th, 1946, quieting plaintiff's title to said real property and adjudging, among other things, the following:

(a) That all adverse claims of the defendants, including petitioners herein, in the lands above described or any part thereof and all persons claiming or attempting to claim any interest therein by, through or under the said defendants, or any of them, were invalid and groundless.

(b) That an oil and gas lease of June 4th, 1924 and a Modification Agreement of May 21, 1927 were invalid and of no force and effect and cancelled.

(c) That the said Meagher was the true and lawful owner of all rights, titles and interests in the lands above described, except for a right of way and royalty interests in said decree specified.

(d) That the title to said lands be quieted against all claims or demands or pretensions of the said defendants or any of them, and that the said defendants, and each of them, including the petitioners herein, be perpetually enjoined from asserting any claim to said lands or any part thereof.

(e) That the said Meagher have judgment against the defendants, Ray Phebus, Joe T. Juhan and Ashley Valley Oil Company, petitioners herein, for costs and disbursements amounting to the sum of \$32.30.

2. That following the entry of said judgment your petitioners, Ray Phebus, Joe T. Juhan and Ashley

Valley Oil Company duly appealed to this court, the appeal being known as case number 6972, and on the 27th day of October, 1947 this court rendered its opinion on said appeal, by which the decision of the lower court was reversed and the case remanded to that court for proceedings to conform to the opinion, the decision being reported in the case of *Meagher v. Uintah Gas Co. et al*, 185 Pac. 2d 747; that the remittitur thereon was filed with the Clerk of the District Court of Uintah County, Utah on the 18th day of March, 1948.

3. That on the 23rd day of April, 1948 in open court at Vernal, Uintah County, Utah, before the District Court of said county, Honorable Wm. Stanley Dunford, one of the defendants and respondents herein, presiding, your petitioners moved the court for an order vacating and setting aside the judgment and decree of said court pursuant to the decision and mandate of this court in its case number 6972; that the motion was granted as to the petitioners Joe T. Juhan and Ashley Valley Oil Company, but that the trial court failed, refused and neglected and still does fail, refuse and neglect to set aside and vacate said judgment and decree as to Ray Phebus. In this connection it is alleged that the trial court wholly ignored and failed to follow and abide by the mandate and decision of this court aforesaid, but the defendants and respondents, by their answer herein, assert in effect, by denial, that the trial court in granting the motion as to Joe T. Juhan and Ashley Valley Oil Company and refusing to grant it as to Ray Phebus

did not ignore or fail to follow or abide by said mandate and decision.

4. That notwithstanding the mandate and decision of this court on the appeal in the aforesaid action, the trial judge, in refusing to set aside and vacate the judgment and decree appealed from as to your petitioner, Ray Phebus, holds and asserts the former judgment and decree to be valid and effective as against the said Ray Phebus and does thereby prejudice the rights and interests of petitioners, Joe T. Juhan and Ashley Valley Oil Company in and to said lands. As to this, the defendants and respondents, by their answer, deny that in the refusal to set aside and vacate the judgment and decree appealed from as to Ray Phebus, the rights and interests of Joe T. Juhan and Ashley Valley Oil Company have been or are in anyway prejudiced.

5. It is alleged that plaintiffs and petitioners have no plain, speedy or adequate remedy in the ordinary course of law and that it is the duty of the defendant, Wm. Stanley Dunford, as such District Judge, to forthwith vacate and set aside the judgment and decree appealed from as against all of the defendants in said action and, particularly, the defendant Ray Phebus, one of the petitioners herein. These allegations, by the answer of the defendants and respondents, are denied.

6. The defendants and respondents affirmatively allege that the petitioners have a plain, speedy and adequate remedy in the ordinary course of law by presenting to the defendant judge their proposed Findings of

Fact, Conclusions and Decree, which they have so far not done; that the order entered by the trial judge on May 4th, 1948, following the motion of April 23rd, 1948 by which the Findings of Fact, Conclusions of Law and Decree in so far as the same affect the rights of Ashley Valley Oil Company and Joe T. Juhan were vacated and set aside, omitting Ray Phebus therefrom, was in all respects in conformity with the decision of this court.

The judgment in the action appealed from was against all three of the plaintiffs and petitioners herein and all three joined in the appeal. The reversal of the judgment affected all three of the appealing defendants alike, but, that, notwithstanding the trial judge in refusing to vacate the judgment against Ray Phebus in effect holds, and by necessary implication does hold, the title of Meagher, the prevailing party in the judgment appealed from, to be quieted as against Phebus and all claiming or to claim by, through or under him in and to the real property affected by said decree, the restraining order to be in effect as against him and all claiming by, through or under him, and in full force and effect as to costs awarded against Phebus in the trial of the action and upon which execution might issue. The effect of the order continues the judgment lien for costs as against all real property that Phebus might have in said county or elsewhere where the judgment might be docketed. This court is now asked to order the trial judge to vacate of record its judgment subsequently reversed as to all of the appealing parties and, particularly, petitioner Ray Phebus.

ARGUMENT

Upon the filing of the remittitur after appeal, the defendant judge was asked to formally remove, by declaring it to be a nullity, the encumbrance of record of its judgment which this court held to be without substance. The duty of the defendant judge in that particular and the reasons and points and authorities to support the issuance of the writ of mandamus in this action prayed for, involve a consideration of the following:

1. Effect of Reversal on Appeal and Remand Without Specific Instructions.

The opinion of this court in *Meagher v. Uintah Gas Co., et al*, case number 6972, and which for convenience will be hereinafter referred to by the case number, contains the following language: "The decision of the lower court is reversed, and the case remanded to that court for proceedings to conform to this opinion. Costs to appellants." The effect of the reversal with directions to proceed in conformity with the views expressed in the opinion filed puts the case in the same position in the court below as if no decree had ever been entered. In the case of *Larsen v. Gasberg*, 43 Utah 203, 134 Pac. 885, this court held:

"The rule is well settled that, where a judgment is reversed and a new trial granted without any specific instructions or directions, the case stands in the lower court precisely as it did before a trial was had in the first instance. The general rule in this regard is well stated in 3 Ency. L. & P. 579, in the following language: 'When a decree

is reversed and the cause remanded without specific directions, the decision of the court below is entirely abrogated, and the cause then stands in the court below precisely as if no trial had occurred, and that court has the same power over the record as it had before its decree was rendered, and it may permit amendments to the pleadings to the same extent that it might have done before the trial, and in the exercise of the same discretion, except that it is concluded by the legal principles announced by the appellate court. And where a cause is reversed and remanded with directions to proceed in conformity with the views expressed in the opinion filed, and it appears from such opinion that the grounds of reversal are of a character which may be obviated by subsequent amendments of the pleadings or the introduction of additional evidence, it is the duty of the trial court to permit the cause to be redocketed and to permit amendments to be made and evidence introduced on the hearing just as though it was then being heard for the first time.' The doctrine is tersely, and we think correctly, stated in 1 Ency. Pl. & Pr. 618, as follows: 'Where the appellate court reverses a judgment and remands the cause generally without any specific directions, amendments to the pleadings may be allowed upon the reinstatement of the case in the court below as if it had never been tried, although the appellate court may have adjudged the pleadings insufficient on demurrer.' Of course, as stated on page 620 of the same work, 'a party should not be allowed to amend so as to reopen questions which have been adjudicated by the appellate court.' '' (Italics ours).

To the same effect is the expression of this court in the case of *Warren v. Robison*, 21 Utah 429, 61 Pac. 28:

“It will be noticed that the case was not ‘reversed and remanded,’ but simply ‘remanded,’ with directions to ‘proceed’; that is, sent back to the court below to proceed, the same as if no judgment of nonsuit had been entered, according to the rules of law announced in the opinion as governing the case. * * * In *Hawkins v. Railway Co.*, 39 C.C.A. 538, 99 Fed. 322, as appears from the syllabus, it was held: ‘When a decree is reversed, and the mandate does not direct the entry of any particular decree, but only that further proceeding be had not inconsistent with the opinion of the appellate court, the effect is to put the case in the same position in the court below as if no decree had ever been entered, and the court has the same authority to permit amendments of the pleadings to enlarge the issues, and admit further proofs, as it had before the entry of the decree.’ *Nelson v. Hubbard*, 13 Ark. 253; *Woolman v. Garringer*, 3 Mont. 405; *Commissioners v. Carey*, 1 Ohio St. 463; *West v. Brashear*, 14 Pet. 51, 10 L. Ed. 350; *Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; *Ex parte Sibbald*, 12 Pet. 488, 9 L. Ed. 1167. And, where an appeal is taken from a judgment of an inferior court entered under a mandate of the appellate court, the latter tribunal will construe its own mandate in connection with its opinion, to determine whether the inferior court proceeded in accordance therewith. *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432; *In re Sanford Fork & Tool Co.*, *supra*.”

The general rule is stated in *Hayne New Trial and Appeal*, Vol. 2, Sec. 299, pp. 1722-1723, as follows:

“The reversal of the judgment leaves the litigation in the situation it was in prior to entry thereof. The parties are in the same position as if no judgment had been rendered. ‘When the order . . . was reversed, it no longer had any vitality or force, and the result was to leave the proceeding where it stood before that order was made.’ When a decree is reversed, it is vacated, and the matter stands ‘as though no decree had ever been made.’ ‘When the order of the supreme court in the case of *London etc. Bank v. Bandmann*, 120 Cal. 220, was made, reversing the judgment of the court below, *that judgment was forthwith vacated*, and until action was taken by the court below in pursuance of the mandate to enter another judgment in accordance with the opinion of the supreme court, there was no judgment in existence in the case.’

“Nor is the effect essentially otherwise even though the judgment of reversal may be accompanied with modifying words. In the case of *Cowdery v. London etc Bank*, already cited in this connection, it was held that the legal effect of a reversal of the judgment with directions to enter judgment in accordance with the view expressed is to vacate the decree so reversed, and leave it as if it had never been rendered, although the mandate is in form a modification, and the trial court has received no specific directions as to the particular form of modified decree authorized. It was further said that the appellate court might have modified the decree, but, as it did not, no vitality is left therein for any purpose, and a new

decree must be entered. The case stands as an action pending with final judgment remaining to be entered." (*Italics ours*)

To the same effect is *Bancroft's Code Practice and Remedies*, Vol. 9, Sec. 7403, pp. 9734-9735:

"The effect of an unqualified reversal of a judgement is to vacate the judgment and render it without vitality or force. The proceeding is left where it stood before the judgment or order was made, and the parties stand in the same position as if no judgment or order had ever been rendered or made, with the exception that the opinion of the court on appeal must be followed so far as applicable. If the cause is reversed for a new trial or for further proceedings in the lower court, a mandate is usually required, but this is a matter which is treated in another chapter."

The expression used in *Hayne* New Trial and Appeal, *supra*, where the author quotes from *London etc. Bank v. Bandmann*, 120 Cal. 220, to the effect that the order of the Supreme Court reversing the judgment of the court below "forthwith vacated" the former judgment is the closest expression that we have found to the effect that the decision of the Supreme Court is self-executing. There is no specific provision in our Code, so far as we can determine, relating to the mechanics of removing from the record the cloud of the erroneous and reversed judgment in a suit where title to real property is involved, unless it can be said that the decision of this court automatically, and without more, accomplishes complete restitution in that regard.

By the rule stated in the foregoing authorities, it might be said that the motion made before the trial court to vacate and set aside its erroneous judgment and decree was unnecessary, but before coming to that conclusion, the practical aspects of the situation should be born in mind. In the first place, the judgment and decree appealed from restrained the defendants from going into possession of the property involved and from asserting any adverse claim thereto. Orderly procedure and due respect for the decree of a court of general jurisdiction would seem to us to encourage a formal motion to vacate. Furthermore, the judgment for costs, having been entered in a judgment docket and becoming a lien attaching itself to all of the real property of the judgment debtor, would immediately confront the examiner of the title to any real property in the name of the judgment debtor. The examiner would not necessarily know from an inspection of the judgment docket that the judgment of the trial court had been reversed. It is conceivable that the examiner of the record might in good faith require something more than a reference to expressions of the court in other cases to determine that the judgment had been vacated and set aside by a reversal. Good practice, it seems to us, would warrant the motion to vacate so as to remove all doubt but that the successful appealing defendant was reinstated to the same position that he was in prior to the entry of the erroneous judgment. The petitioners herein, by their motions to vacate the erroneous judgment, pursued a practice recognized as proper under the circumstances.

2. It is the Duty of the Trial Court to Vacate Its Judgment After Appeal and Reversal.

In *Reynolds v. Harris*, 14 California 668, the court recognized a motion as being a proper remedy to vacate a judgment reversed on appeal; the court stating:

“It is again said that the proper form of proceeding is by action in the usual form and not by motion, but the authorities seem to be the other way, and we see no reason why, in this class of cases, there should be an exception to the usual and recognized authority of the Courts to prevent or to remedy an injurious and illegal execution of the process of its officers. (See the following cases in which this authority of the Court has been upheld: 3 Johns, Ch. 474; 5 Id. 29; Mobile Cotton Press vs. Moor & Magee, 9 Port. 679; 2 Yeates, 516; 1 Serg. & R. 2 Wend. 260; 7 Id. 88, 7 Gill & J. 512; 7 J. J. Marsh. 625.) * * *

“It is hard to see why a man buying in another’s property sold under a judgment rendered according to the forms of law, but against the principles of law, should obtain any advantage from his own judgment thus improperly obtained.

“It is true that as the error was the error of the Judge, he should not lose by it, but it is not so clear that he should make a profit by it. It is equally clear that the defendant should not suffer by any such improper judgment, if it can be avoided in consistency with a due respect to the rights of others. It would appear to be exact equity to set aside acts which have been illegally done, if this can be without injury to third persons; so that all parties whom the proceedings affect stand in the same position after as before

the acts so done. How could Raun insist that his judgment, rendered against law, should be enforced, when the error can be corrected without the slightest injury to him, and when he is reinstated to all the rights which he had before its rendition?

“Accordingly, the principle has been declared in cases innumerable, that when a judgment is reversed, the defendant is to be restored to all things which he has lost by the judgment. (See *Jones v. Harker*, 5 Mass. 264; *Cummings v. Noyes*, 10 Mass. 433.) In *Jackson v. Cadwell* (1 Cowen, 644), the Court say, the same reasons of policy which secure to an innocent purchaser a valid title do not exist when the judgment creditor becomes purchaser, and it would be the height of injustice to allow the party guilty of the irregularity to take advantage of it. It is true, that in that case the sale was set aside for errors in conducting it, but the principle would apply to an erroneous judgment, procured by the instrumentality of the plaintiff or his attorney.

“So in the case of *The Bank of the United States v. The Bank of Washington* (6 Pet. 19), it is said: ‘The reversal of the judgement gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment, and as between the parties to the judgment there is all the privity necessary to sustain and enforce such right.’

“Authorities might be multiplied indefinitely, to the same effect, but it is unnecessary. The current of authority, broken by only a case or two, goes directly to the point, that a party obtaining

through a judgment, before reversal, any advantage or benefit, must restore what he got to the other party, after the reversal.”

The appellants having been successful in reversing the judgment appealed from are entitled to complete restitution. Restitution is not dependant upon statute, and any statute such as Section 104-41-22 U.C.A. 1943 is cumulative. This is so stated in *Bancroft's Code Practice and Remedies*, Vol. 9, Sec. 7449, p. 9802:

“The remedy of restitution requires restoration of property which one has lost on account of the execution of an erroneous judgment, by the party who has obtained it. A party to a cause who has lost money or property under or by virtue of a judgment which is afterwards reversed is entitled to restitution, so as to be placed in statu quo with respect to his rights and advantages previous to the erroneous judgment. Such restitution is generally regarded as a matter of right, and does not depend upon the merits of the controversy between the parties, the probabilities of another judgment to the same effect, or the solvency of the party entitled thereof. ‘The defendant having been put out of possession by an abuse of the process of the law, the law must be just to itself, as well as to the defendant, by restoring him to that of which he was wrongfully deprived. When the defendant is restored to the possession, then, and not until then, will the court be in condition in which it can honorably to itself pass upon the further rights of the parties’.”

The judgment appealed from, when reversed, lacks vitality for any purpose as pointed out in *Larsen vs.*

Gasberg, Warren vs. Robison and other authorities cited above. It is a void judgment and once the remittitur is filed its lack of vitality is shown upon an inspection of the judgment-roll. An early California case characterizes a void judgment and which requires only an inspection of the judgment roll to demonstrate its want of vitality as "a dead limb upon the judicial tree, which should be lopped off if the power so to do exists." The court has inherent power to vacate such a judgment at any time and regardless of the expiration of the term at which the judgment was entered. This was the holding in the case of *People v. Greene et al.*, 16 Pac. 197, where the California court stated:

"It is conceded by all of the authorities that a court will interpose to stay the execution of a void judgment. A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant. It is said a court whose process is abused by an attempt to enforce a void judgment will interfere for its own dignity, and for the protection of its officers, to arrest further action. *Mills v. Dickson*, 6 Rich. Law, 486. The most effectual method of doing this is by extirpating the judgment itself; by removing a form which is without substance. In New York, with a statute similar to section 473 of our Code, the courts have held that the power to vacate a judgment is inherent and is not limited by their Code, which only has reference to ordinary

defaults, (*Dinsmore v. Adams*, 48 How. Pr. 274,) and that the limitation does not apply to an unauthorized judgment, nor to a judgment entered without service of process, (*Simonson v. Blake*, 20 How. Pr. 484.) See cases cited in *Wharton v. Harlan*, *supra*. In this last case *McKinstry, J.*, in commenting upon the rule enunciated in *Bell v. Thompson*, *supra*, said: 'This technical rule as to action during the same term, never applied to a pretended judgment, in fact void, and could never have applied to statutory judgments entered by the clerk, which may be entered in vacation'."

The *Greene* case, *supra*, reiterates the fundamental principle that whenever possible a court should eliminate from its files and records anything of a redundant nature and should, so to speak, clear out the dead timber so as to leave of record only those things that have vitality and meaning. But here we have a situation that requires affirmative action in order to bring about complete restitution on the record. In a suit to quiet title, where real property is involved, those things that affect the record and constitute clouds on the title become and are the controlling matters, and it is the record title that must be restored and the clouds on the same expunged in order to bring about complete restitution. If the judgment was one for the payment of money and the money had been collected upon execution issued on the judgment subsequently reversed, it would be the money that the losing party on appeal would have to return to the successful appellant. If the successful appellant had been removed from possession by reason of the erroneous judgment, then it would be the possession that would have to be re-

stored. In *Pico v. Cuyas*, 48 Cal. 639, the court held that a motion addressed to the trial court was proper to the end that the moving party be restored to the possession of a hotel from which he had been dispossessed by reason of a judgment subsequently reversed. The report of the case contains a succinct statement of counsel in support of the motion as follows:

“That a plaintiff must restore to his opponent any advantage he obtained through his judgment, upon its reversal, is a very ancient doctrine. (*Jones v. Harker*, 5 Mass. 264; *Cummings v. Noyes*, 10 Mass. 433; *Jackson v. Cadwell*, 1 Cowen, 644; *Bank of United States v. Bank of Washington*, 6 Peters, 8.)

“The Supreme Court of California have indorsed the position in *Reynolds v. Harris*, 14 Cal. 667. They have sustained *Reynolds v. Harris* in *Polack v. Shafer*, (46 Cal. 270.)”

The right to restitution is implied and is not dependent upon any direct order by the appellate court to that effect. The right to make complete restitution is inherent in the trial court, notwithstanding the existence of the same right in the reviewing court. To this effect is 3 *American Jurisprudence*, p. 746, Sec. 1251:

“While reviewing courts have inherent power, if they see proper, to direct that restitution be made, they rarely exercise that power; the duty of taking and authorizing such steps as may be necessary to enforce the rights of the appellant arising from the reversal is usually confided to the trial court whose judgment was reversed.

It is clear that that court has jurisdiction, while the subject of the controversy and the parties are before it, to enforce restitution of what a party has lost by the enforcement of the judgment, and it is its duty to do so. A statutory provision authorizing a reviewing court on reversal, to make restitution of all property and rights lost by the judgment reversed, does not preclude the court below from exercising the same power. Nor are its right and duty to enforce restitution dependent upon any direct order for restitution by the appellate court. The right to such restitution is implied, and in subsequent proceedings for its enforcement it need not be shown that, by any mandate or express order, the reviewing court has directed that restitution be made. Moreover, the fact that a judgment was reversed for want of jurisdiction does not prevent either the reviewing court or the trial court from compelling restitution. *The court whose judgment or decree is reversed and annulled, having by its own act occasioned the wrong, possesses an inherent and summary jurisdiction to afford redress without reference to the peculiar nature of the controversy which it had erroneously determined.*" (Italics ours)

Hayne New Trial and Appeal, Vol. 2, Sec. 308, p. 1782, cites the Greene case, *supra*, and states that a void judgment requiring no more than a mere inspection of the judgment-roll to demonstrate its want of vitality can be relieved against at any time, however remote, by mere motion. The author states the rule in the following language:

"But it is to be remembered that the provisions of section 473 do not apply to judgments

which are void upon their face, and which require no more than a mere inspection of the judgment-roll to demonstrate their want of vitality. It has been said that such judgments are dead limbs upon the judicial tree, which should be lopped off, if the power so to do can be exercised. They bear no fruit for the plaintiff, and are a constant menace to the defendant. If the default judgment is void on its face, therefore, and its defects apparent on the judgment-roll, there is no time limit within which they are required to be presented as a ground for the relief contemplated by this section. It may be relieved against at any time, however remote, by mere motion. The attention of the courts need merely to be called to that which its own record demonstrates, and the judgment, order, or proceeding will be nullified without question."

This court in *Madsen v. Madsen*, 78 Utah 84, 1 Pac. 2d 946, holds that when the judgment of the trial court has been vacated on appeal "it can only mean that the judgment is set aside, vacated, and annulled, and, having been thus swept from existence, the lower court has no power to breathe into any part of it the breath of life." The court quotes with approval from other authorities to the effect that the trial court, after a judgment has been reversed, should put the litigants back where they were when the initial mistake was committed, and to that end should retrace its steps, if necessary, the court quoting from the Nebraska court as follows:

" 'When the judgment of a trial court has been reversed in an error proceeding, the court should retrace its steps to the point where the

first material error occurred. It should put the litigants back where they were when the initial mistake was committed.' *Missouri, K. & T. Trust Co. v. Clark*, 60 Neb. 406, 83 N. W. 202, 203.'

To the same effect is *Hathaway v. McConkie*, 85 Utah 21, 38 Pac. 2d 300:

"* * * The law is well established that, upon the reversal of a judgment because of lack of jurisdiction, the court directing the reversal retains jurisdiction of the parties and the subject-matter for the purpose of placing the parties in the same position that they were in before the judgment so rendered was entered. The law in such case is thus stated by the Supreme Court of the United States in the case of *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 11 S. Ct. 523, 524, 35 L. Ed. 151:

'But here the jurisdiction exercised by the court below was only to correct by its own order that which, according to the judgment of its appellate court, it had no authority to do in the first instance; and the power is inherent in every court, whilst the subject of controversy is in its custody, and the parties are before it, to undo what it had no authority to do originally, and in which it, therefore, acted erroneously, and to restore, so far as possible, the parties to their former position. Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal. * * *

'We are of opinion that the proceeding to enforce the restitution in the cases mentioned is under

the control of the court, and that all needed inquiry can be had to guide its judgment in a summary proceeding, upon motion of the parties; the only requisite being that the opposite party shall be heard, so that in directing restitution no further wrong be committed. The restitution is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction.'

"Other cases where the same doctrine is announced are *Texas L. & Irr. Co. v. Sanders et al.*, 101 Tex. 616, 111 S. W. 648; *Lipp v. Hunt*, 29 Neb. 256, 45 N. W. 685; *Polack v. Shafer*, 46 Cal. 270; *Pico v. Cuyas*, 48 Cal. 639; *Paul v. Armstrong*, 1 Nev. at page 82.'" * * *

" * * * To hold that a court may either grant or refuse restitution of property as suits its fancy without being advised as to the merits of the controversy would be to substitute caprice for rules of law. The petitioners were as a matter of law entitled to be restored to the possession of the property in question upon the dismissal of the action for want of jurisdiction.

"Defendants further contend that mandamus is not the proper remedy to review a matter such as that here presented. The question thus presented is not free from difficulty. It is well established that a writ of mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction but not to control its discretion while acting nor to reverse its judgment when made. On the other hand, where a judgment is entered, it becomes the duty of the court to enforce such judgment, and, in case of its refusal, the party aggrieved may by mandamus compel its enforcement. There is no discretion in a court

as to whether it will or will not enforce its judgment. *Ketchum Coal Co. v. Christensen*, 48 Utah, 214, 159 P. 541." * * *

* * * "In order that petitioners may reap the full fruits of the reversal of the city court judgment it is necessary that an order of re-restitution issue placing them as near as may be in the same position that they were in before the void judgment was rendered. To deny petitioners a writ of re-restitution is to deny them rights which for the present are fixed and determined by the order dismissing the action. In substance, if not in form, the refusal of the court below to grant petitioners re-restitution of the premises in dispute was to deny them the right to enforce their judgment. In such case the right of petitioners to a writ of restitution may be enforced by a proceeding in mandamus. *Ketchum Coal Co. v. Christensen*, *supra*."

Again bearing in mind that the judgment appealed from in the Meagher case affected the title to real property and imposed costs upon the defendants, who were successful in their appeal, the mere suggestion of a possibility that title might be clouded by the erroneous and void judgment should require the formal vacation and setting aside thereof. The authorities above stated demonstrate the requirement of full and complete restitution and that a motion to vacate and set aside is an appropriate remedy. The respondent trial judge recognized the appropriateness of the motion when he ordered the void judgment vacated as against Joe T. Juhan and Ashley Valley Oil Company. In failing to act upon the motion of Ray Phebus he misconstrued the mandate of

this court, and to correct that situation mandamus is an appropriate proceeding.

3. This Court Can Construe its Opinion on Application for Writ of Mandamus.

This court in *Warren vs. Robison*, supra, held:

“And, where an appeal is taken from a judgment of an inferior court entered under a mandate of the appellant court, the latter tribunal will construe its own mandate in connection with its opinion to determine whether the inferior court proceeded in accordance therewith.” *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432; *In re Sanford Ford & Tool Co.*, supra.

In *Whitney v. Whitney*, 181 Pac. 2d 245 (Okl.), the same rule was announced:

“In *State ex rel. First Nat. Bank vs. Ogden*, Judge, 173 Okl. 285, 49 P. 2d 565, 566, the rule stated in *State ex rel. Devonian Oil Co. v. Smith*, Judge, 138 Okl. 89, 280 P. 433, was relied upon in holding:

‘It is the province of this court to construe its own mandate in connection with its opinion, and, if it finds that the trial court has misconstrued the same, the mistake may be corrected by writ of mandamus from this court’.”

The return or answer to the petition on file herein states no fact in justification for failing to set aside the judgment successfully appealed from as against Ray Phebus. The respondent judge in effect says that he was under no obligation to vacate the judgment as against Phebus, even though he did so as against Juhan and

Ashley Valley Oil Company. In this, and if that be the contention of the respondent judge, he has attempted to construe the decision of this court which, so far as the motion to vacate was concerned, was not his prerogative. The general rule is well stated in *American Jurisprudence*, Vol. 3, Sec. 1237, p. 733:

“After the reviewing court has determined a case before it and remanded such case to the lower court, the latter is without power to modify, alter, amend, set aside, or in any manner disturb or depart from the judgment of the reviewing court, even during the continuance of the term in which it was rendered. The judgment of the higher court is not reviewable in any way by the court below, in the exercise of its equitable powers, or otherwise. The lower court cannot vary or examine the decree of the higher court for any other purpose than execution, give any other or further relief; review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. It can only proceed to execute the mandate and settle so much as remains to be done, without rescission or modification.

“If the lower courts were authorized to disobey the mandate, litigation would never be ended and the supreme tribunal of the state would be shorn of that authority over the inferior tribunal with which it is invested. But the rule has long prevailed that there must be an end to the litigation of a particular cause, and that an alleged injured litigant, in order to establish what he may deem the justice of the cause, may not have, de novo, trial after trial, ad infinitum. * * *”

Also *American Jurisprudence*, Vol. 3, Sec. 1229, p. 726:

“* * * The mandate of the reviewing court, or, as it is called in some jurisdictions, the ‘re-mittitur’ or ‘Procedendo,’ these terms being used synonymously in this sense, remitting the case to the lower court is the official mode of communicating its judgment to the inferior tribunal the judgment of which has been reviewed. By this means, the lower court is advised of the judgment or decision of the reviewing court reversing, affirming, or modifying the judgment of the lower court, and is directed to enforce, or reverse and set aside, the judgment, as the case may be.”

Also *American Jurisprudence*, Vol. 3, Sec. 1234, pp. 730-731:

“After a case has been determined by the reviewing court, the duty of the latter is to comply with the mandate of the former. The mandate of the reviewing court is binding on the lower court and must be strictly followed and carried into effect according to its true intent and meaning, as determined by the directions given by such reviewing court. Public interest requires that litigation shall come to an end speedily, so that when a cause has been tried to judgment, and the merits of the trial determined upon appeal, the trial court, upon remittitur, has no power but to obey the judgment of the appellate court. * * *”

This court, in its decision, in the Meagher case on appeal clearly states the admitted fact that Ray Phebus was one of the appellants. The language of reversal, with

costs to the appellants, is clear and unequivocal. Beyond that the trial court, in view of the authorities stated above, can go no further except that in a subsequent appropriate proceeding the decision of this court must be looked to to determine the law of the case and its applicability to subsequent proceedings. As to the mandate, however, and the reversal of the judgment appealed from as to all of the appealing defendants there can be no question. In view of the answer filed herein, with all of the facts admitted, the reversal by this court does not distinguish as between the petitioner Phebus and the petitioners Joe T. Juhan and Ashley Valley Oil Company. By ruling upon the motion, granting it as to Juhan and Ashley Valley Oil Company and excluding Ray Phebus therefrom, the respondent judge acted contrary to the mandate of this court.

4. Mandamus is a Proper Remedy.

When the trial judge fails or refuses to give effect to the remittitur, or misconstrues it, or acts beyond its province in carrying it out, it becomes the duty of the appellate court to enforce compliance by writ of mandamus. This court in *Ketchum Coal Co. v. Christensen*, 48 Utah 214, 159 Pac. 541, so held:

“Broadly speaking, superior courts never control nor attempt to direct inferior courts or tribunals before judgment while acting merely judicially or in matters of discretion. After judgment, however, when the inferior court or tribunal has exhausted its discretionary powers, the superior court will compel the enforcement of

judgments, regardless of the nature or character of the proceeding. Before an action has proceeded to judgment there ordinarily are ample statutory remedies provided for the correction of errors of judgment and for an abuse of discretion. No such remedies are, however, necessary after judgment, since, when that point is reached, judicial discretion ends and it then becomes the duty of the courts to enforce their judgments, and if they refuse or neglect to do so mandamus will lie to compel them to discharge the duty, which is one imposed by law. Any other course would compel men, in vindicating their legal rights, to have recourse to the primitive methods of applying brute force. Courts are instituted to prevent recourse to such methods. But if courts can successfully refuse to do their duty they merely invite men to have recourse to such methods.”

In the recent case of *Street v. Fourth Judicial District Court*, — Utah —, 191 Pac. 2d 153, (Pac. Adv. Sheets, Apr. 23, 1948) this court stated:

“The rule in this state, and in most other jurisdictions, is that resort to mandamus may be had to compel an inferior court to comply with the mandate of a superior court. The rule was well stated in the opinion of Mr. Justice Ephraim Hanson in the case of *Utah Copper Co. v. District Court*, 91 Utah 377, 64 P. 2d 241, 250: ‘The rule is well established and there does not seem to be anything to the contrary that when a case has been determined by a reviewing court and remanded to the trial court, the duty of the latter is to comply with the mandate of the former. The mandate is binding on the lower court and must be strictly followed and carried into effect accord-

ing to its true intent and meaning as determined by the directions given by the reviewing court. When the trial court fails or refuses to obey or give effect to the mandate or remittitur, or misconstrues it or acts beyond its province in carrying it out, it becomes the province and duty of the appellate court to enforce compliance therewith, and it is generally recognized that such may be done on writ or order of mandamus. The lower court upon remand of a case from a higher court, must obey the mandate or remittitur and render judgment in conformity thereto and has no authority to enter any judgment not in conformity with the order. Whatever comes before and is decided and disposed of by the reviewing court is considered as finally settled and the inferior court to which a mandate issues is bound by the decree as the law of the case and must carry it into execution according to the mandate, and after the reviewing court has determined the case before it and remanded it to the lower court, the latter is without power to modify, alter, amend, set aside, or in any manner disturb or depart from the judgment of the reviewing court; that the judgment of the higher court is not reviewable in any way by the court below and the lower court cannot vary or examine the decree of the higher court for any other purpose than execution, or give any other or further relief or review it even for apparent error upon any matter decided on appeal, or meddle with it further than to settle so much as has been remanded'."

It may be that the respondents, by their answer denying any duty to set the judgment aside as to the petitioner, Ray Phebus, are relying upon an obvious mistake in language used by this court in the Meagher de-

cision. At one place in the decision it is stated: "On January 19, 1945, Phebus quit claimed his interest to Juhan." This is a correct statement. At another place it is stated: "Phebus apparently has conveyed what interest he has to Meagher." That statement is incorrect. In the record before this court on appeal and before the trial court, there was no conveyance from Phebus to Meagher. This court, however, did not determine any question of title and expressly stated that the relinquishment of possible claims does "not, however, affect the issues as submitted to us." The fact remains that Phebus was a moving party in the appeal to this court against whom a judgment had been entered determining title, awarding costs and enjoining him from asserting any claim or title on his part or those claiming under him. This judgment, in its entirety, was reversed and the trial judge now refuses to give full effect to remittitur. The trial judge holds that the judgment was not reversed as to Phebus and, therefore, the necessity of this proceeding.

5. Juhan and Ashley Valley Oil Company Are Adversely Affected.

This court in its decision in the Meagher case states:

"Briefly the above sets out the chain of title of the various parties concerned, leaving as interested parties in the proceedings, plaintiff Meagher, and defendants Ashley Valley Oil Company and Juhan. Phebus apparently has conveyed what interest he has to Meagher. It may be that some of these transfers and assignments,

which so far as the abstract is concerned appear inconsistent, are in fact merely efforts to clear title by relinquishment of possible claims. They do not, however, affect the issues as submitted to us.”

The Meagher action was commenced on December 5th, 1944. Phebus quitclaimed to Juhan under date of January 19, 1945, during the pendency of the action. Juhan, in part, claims by, through and under Phebus. If the original judgment is permitted to stand, then Juhan is out of the picture to the extent of the interest quitclaimed to him by Phebus and, regardless of the intention, the language used by this court and the issues raised by the pleadings and at the trial, a question of title will have been determined. Juhan has a real and substantial interest in requiring the trial judge to set aside and vacate the judgment heretofore entered against the Petitioner, Phebus, one of the successful appellants from that judgment. By the denial of the motion to set aside and vacate the judgment, the respondents herein are circumventing the mandate and decision of this court.

CONCLUSION

The respondent judge, having acted in part upon the motion to vacate the erroneous judgment, should now be required by the order of this court to clarify the record as to the Petitioner, Phebus. To do otherwise would be to permit the respondent Meagher to gain an advantage not contemplated by the issues raised and would result in his being able to turn to his advantage a

void judgment. The trial judge, having presumed to act upon the motion to vacate, should now be required to grant the motion in its entirety and, to that end, an unqualified writ of mandamus or order should issue from this court.

Respectfully submitted,

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