

1948

S. W. Dowse v. Doris Trust Company : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

S. W. DOWSE,

Plaintiff and Respondent.

— vs. —

DORIS TRUST COMPANY, a cor-
poration,

Defendant and Appellant.

Case
No. 7220

BRIEF OF APPELLANT

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FILED

*Attorney for Defendant
and Appellant.*

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OLEKK, SUPREME COURT, UTAH

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

S. W. DOWSE,
Plaintiff and Respondent,

— vs. —

DORIS TRUST COMPANY, a corporation,
Defendant and Appellant.

} Case
No. 7220

BRIEF OF APPELLANT

STATEMENT OF FACTS

S. W. Dowse, the plaintiff and respondent (hereinafter referred to as plaintiff) instituted this suit against defendant and appellant above-named (hereinafter referred to as defendant) for slander of title to real property, alleging that as a result of malicious conduct on the part of defendant in recording an instrument (hereinafter referred to as the Notice), plaintiff suffered

\$5,000.00 general damages (par. 4 of his complaint), that he had to pay out \$250.00 attorney's fee to commence and prosecute an action to quiet title because of the filing of said Notice, and that therefore he was also entitled to \$5250.00 exemplary damages (par. 7 of complaint), and then in the prayer, asked for \$250.00 paid out to counsel to clear title and \$5,000.00 exemplary damages. (R. 1-6).

At the trial the court granted a motion for a directed verdict (R. 108) and directed a verdict in favor of the plaintiff for \$250.00 (R. 113-115), the amount alleged to have been paid for attorney's fee, and submitted the amount of punitive damages to the jury. The jury then brought in its verdict in which it found the issues in favor of plaintiff and against defendant, as directed, and assessed his damages in the sum of \$250.00 compensatory and \$500.00 exemplary damages, or a total of \$750.00 (R. 40-A); and judgment on the verdict was entered April 16, 1948. (R. 41).

Within the time allowed by order of the court, defendant's bill of exceptions herein was served and settled, defendant's demurrer to plaintiff's complaint, all exhibits or portions of exhibits received in evidence, the minute entries and entries in the Register of Action, and orders and proceedings of the court being incorporated therein and made a part thereof. (R. 122). Defendant's notice of appeal was served and filed June 26, 1948 (R. 45), and cost bond and stay bond filed herein. (R. 46).

The action grew out of a former suit, No. 76,888 in the Third Judicial District Court in and for Salt Lake County, Utah, in which the court entered judgment quieting title in plaintiff, and granting defendant \$1047.50. No costs were allowed either party. In the former action, the court set out in its findings that there was an oral agreement between plaintiff and defendant for the sale to defendant of the property involved in the action; that the defendant had paid \$1,000.00 on the purchase price thereof; that the full agreement was not reduced to writing, nor sufficient memorandum made, and hence was null and void, and no part ever carried out except the payment of the \$1000.00 (R. 11-12).

As to the Pleadings:

In his complaint herein, plaintiff alleged that on July 18, 1945, he acquired title to certain lots in Salt Lake County, Utah, described as Lots 1 to 11, Fox's Subdivision of Lot 2, Block 23, Five Acre Plat "A", Big Field Survey, from the Salt Lake Valley Loan & Trust Company; and on the 9th day of August, 1945, the defendant falsely and maliciously and with intent to encumber and cloud plaintiff's title, and to harass and vex him in the quiet enjoyment thereof, caused to be recorded in the office of the County Recorder of Salt Lake County, Utah, an instrument (hereinafter referred to as the Notice), of which the following is a copy:

“1008121 Doris Trust Company,
1430 South Main Street,
Salt Lake City, Utah, Aug. 9, 1945

NOTICE

To whom it may concern: That certain property described as: All of Lots one to eleven in Fox's Subdivision, an addition to Salt Lake City, Utah—was purchased for Doris Trust Company by S. W. Dowse, as their agent. That One Thousand Dollars has been paid toward the purchase price and that the balance, plus a reasonable commission will be paid on demand on delivery of deed.

(Signed) Addison Cain,
President, Doris Trust Co.

State of Utah :
County of Salt Lake : SS.

Addison Cain, being first duly sworn, did say that he is President of Doris Trust Company—has full knowledge of the within statement and that the same is true of his own knowledge.

(Signed) L. B. Cardon, Notary Public

(Seal) My commission expires May 26, 1948.”

(Recorded at request of Addison Cain, Aug. 9, 1945 at 2:50 M. fee paid \$.50.

Cornelia S. Lund, Recorder, Salt Lake
County, Utah

(Signed) Cornelia S. Lund (R. 2)

Plaintiff then set out, par. 4 (R. 2) in his complaint,

“That the claim set forth in said instrument which was duly recorded as hereinabove set forth was false and without right whatever, and de-

defendant at time of recording said instrument as hereinabove set forth, had no estate, right, title or interest whatever in or to or upon said land or premises, or any part thereof; that the recording of said notice cast a cloud upon and a slander upon plaintiff's title to said property decreasing the value of said real estate and making it unmarketable all to the damage of said real estate and said plaintiff in the sum of Five Thousand (\$5,000.00) Dollars." (R. 2).

And further, par. 5, (R. 3), ". . . that plaintiff was required to engage counsel and pay said counsel the sum of \$250.00 to commence and prosecute an action to quiet the title to his said lands in order that he might remove the apparent cloud upon his title and make said title to said land marketable; . . ."

A copy of Decree and Judgment was attached to the complaint and made a part thereof. (R. 1-6).

Defendant filed a general and a special demurrer (R. 7) to the complaint, and on May 7, 1947, the demurrer was overruled (R. 9), and defendant given ten days to file an answer; that defendant filed its answer (R. 10-12), admitting filing the Notice mentioned, alleging that it had paid plaintiff the \$1,000.00 referred to in said Notice on the purchase price of the lots described therein; admitted judgment entered in the prior case, as shown by plaintiff's Exhibit "A" (R. 5, 6) in his complaint, and alleging that the said judgment was based on findings of fact and conclusions of law in said prior case, a copy of which was set out in defendant's

answer; and denying each and every other allegation. (R. 10-12).

No reply was filed.

STATEMENT OF ERRORS RELIED UPON

Defendant relies on the following errors for a reversal of the judgment appealed from:

1. The court erred in overruling plaintiff's general demurrer. (R. 9).

2. The court erred in overruling plaintiff's special demurrer. (R. 9).

3. The court erred in denying defendant's motion for dismissal of the complaint. (R. 50, 52).

4. The court erred in overruling defendant's objection to testimony. (R. 50, 52).

5. The court erred in admitting in evidence plaintiff's Exhibit C. (R. 80, 81).

(This exhibit was later changed to C-1 and C-2, R. 117).

6. The court erred in refusing defendant's motion for a directed verdict. (R. 107).

7. The court erred in granting plaintiff's motion for a directed verdict. (R. 106, 108).

8. The court erred in submitting the question of amount of exemplary damages to the jury. (R. 113).

9. The court erred with respect to each portion of Instruction No. 1 as given to the jury (R. 113-114) and to which defendant noted an exception. (R. 117).

10. The court erred in failing to charge the jury as set forth in each of defendant's requested instructions Nos. 1 to 5, inclusive. (R. 35-39).

A statement and arguments upon the particular questions pertinent to the claimed errors specified are below set forth under numbered POINTS. Such statement and argument with respect to any error relied upon appear below under the POINT bearing the same number as that given the above paragraph specifying that error.

STATEMENT AND ARGUMENTS UPON THE PARTICULAR QUESTIONS INVOLVED FOR DETERMINATION

POINT 1.

THE COURT ERRED IN OVERRULING PLAINTIFF'S GENERAL DEMURRER.

Slander of title is a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, causing him special damages, and the essential elements are uttering and publishing of slanderous words, falsity of words, malice, and special damages.—*Cawse v. Signal Oil Co.*, 103 P. 2d 729; 129 ALR 174 (Ore.).

Slander of title is a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, causing him special damage, and is not an action for defamation of character of the person, and is therefore distinguishable from ordinary libel or slander.—*Woodward v. Pacific Fruit & Produce Co.*, 106 P 2d 1043; 131 ALR 832 (Ore.).

To maintain an action for slander of title, it must appear that the words complained of were false, that they were maliciously spoken, and resulted in pecuniary injury to plaintiff.—*Potsi Zinc Co. v. Mahoney*, 135 P. 1078, 36 Nev. 390.

Plaintiff in an action for slander of title, must prove utterance and publishing of slanderous words, falsity thereof, malice, special damages, and interest in property slandered.—*Rittenhouse v. Johnson*, 17 P 2d 457, 161 Okl. 169.

From the foregoing “general definitions”, and cases hereinafter cited, it would appear that the essential elements of an action for slander of title, which plaintiff must allege and prove, are:

- (A) Uttering and publishing of slanderous words;
- (B) The falsity thereof;
- (C) Maliciously made or spoken;
- (D) Disparaging plaintiff's title and resulting in special damages.

Defendant asserts that plaintiff's complaint does not set out the above-mentioned essential elements; and asserts further, not only does it not set out the above-

mentioned essential elements, but that it does not set out any one of them.

As special damages seem to be the gist of an action for slander of title of property, without which the action could not be maintained, the "utterance of mere falsehood alone not being sufficient." (*Ward v. Gee*, 61 SW 2d 555), that phase of the complaint will be discussed first.

(D) *Special Damages*

The complaint does not allege that plaintiff suffered any special damages, and hence is fatally defective.

In an action for slander of title to property, plaintiff must plead special damages.—*Wittman Bros. v. Wittman Co.*, 151 N.Y. Sup. 813.

A complaint for slander of title must not only allege that the statement complained of was false and published maliciously, but that pecuniary damage resulted by reason thereof.—*Felt v. Germania Life Ins. Co.*, 133 N.Y. Sup. 519.

Plaintiff in an action for slander of title must allege and prove special damages, and it is not enough merely to allege generally that he intended to sell to any person who might buy, but he must allege and prove loss of sale to some particular person.—*Hubbard v. Scott*, 166 P. 33, 85 Ore. 1.

Defendant filing counter claim for slander of title must plead and prove special damages.—*Farmers State Bank of Harris, Iowa v. Hintz*, 221 N.W. 540, 206 Iowa 911.

Words spoken or written regarding property or title are not actionable per se, but special damages must be shown.—*Briggs v. Coykendall*, 224 N.W. 202, 57 N. D. 785.

A counterclaim pleading no special damages states no cause of action for slander of title—*Seeck & Kade v. Pertussin Chemical Co.*, 256 N.Y.S. 567, 235 App. Div. 251.

Recovery of damages for slander of title required proof that pending sale to named prospective purchaser was defeated.—*Houston Chronicle Pub. Co. v. Martin*, 5 SW 2d 170.

The rule requiring the complaint to allege special damages is well settled. Necessary to allege a loss of sale to some particular person or give the name of the prospective purchaser—*Burkett v. Griffith*, 27 P. 527.

An action for slander of title is not one for words spoken, but for special damages for losses sustained by reason of the speaking and publication of the slander of plaintiff's title.—*Hardin Oil Co. v. Spencer*, 266 SW 654, 205 Ky. 842.

In an action for slander of title, only special damages can be recovered, and such damages must be particularly pleaded.—*Cronkhite v. Chaplin*, 282 Fed. 579 (U. S. C. C. A. Okla.).

Special damages of a pecuniary nature is the gist of the action for slander of title, and such damages must be directly or particularly set out in the complaint; a general allegation of loss being insufficient.—*Dent v. Balch*, 104 S. 651, 213 Ala. 311.

To establish action for slander of title, words complained of must be false and maliciously spoken with reference to pending sale or purchase of property, and they must result in pecuniary loss or injury to party complaining and slander must be such as goes to defeat plaintiff's title.—
Lee v. Maggard, 85 P. 2d 654, 197 Wash. 380.

No allegation is made in the complaint that a pending sale was defeated, nor has any prospective purchaser been named, nor has any alleged damage been distinctly or particularly set out, or injury suffered by reason of loss of any such prospective sale.

In paragraph 5 of plaintiff's complaint appears the following (R. 3):

“ . . . that plaintiff was required to engage counsel and pay said counsel the sum of \$250.00 to commence and prosecute an action to quiet the title to said lands in order that he might remove the apparent cloud upon his title and make said title to said land marketable . . . ”

No allegation is set out as to whom such payment was made, or when, or whether the amount was reasonable for such service.

Defendant asserts that attorney's fees are not recoverable as damages in an action for slander of title.

In the case of *McGuinness v. Hargiss* (56 Wash. 162, 105 P. 233), respondent charged appellant with slandering their title to real estate, and sought damages and the removal from the record of the offending instrument

as a cloud upon their title. The claim for damages was general, with the exception of a special plea for attorney's fee. The court below made findings in favor of respondents, holding the recorded writing to be a slander and cloud upon respondents' title and awarding damages in the sum of \$350.00, and the case was brought to the Supreme Court on appeal. That court stated that there were only two questions involved: one, as to an existing contract; and the other, the question, are the respondents, upon the pleading and proofs, entitled to damages. In deciding the second question, the court held that the lower court erred, holding,

“... that in an action for slander of title it is the recognized rule that only special damages must be pleaded and proved. There was no plea nor proof of special damages, except the claim for attorney's fee for the prosecution of the action. We have uniformly held that in this state attorney's fee, either as damages or cost, other than statutory, are not recoverable.”

Other cases to the same effect:

Attorney's fees are not recoverable as damages in slander of title or jactitation suit.—*City of Shreveport v. Kahn*, 193 So. 461, 194, La. 55.

Expenses of a suit to establish title cannot be recovered.—*Cohen v. Minzesheimer*, 118 N. Y. S. 383.

In an action by option holder for slander of their title by statement that the option had terminated, plaintiffs could not recover attorney's

fees in defense of prior suit by owner to forfeit option.—*Hubbard v. Scott*, 166 Pac. 33, 85 Or. 1.

Lessors suing lessees for defamation of title following refusal to cancel lease of record following forfeiture, could not recover attorney's fees; attorney's fees not being recoverable in an action for defamation of title.—*Barquin v. Hall Oil Co.*, 201 P. 352, 28 Wyo. 164.

In the last mentioned case, the court further held:

“Defamation of title of property was not considered harmful at common law and not actionable unless special damages were shown. And since these special damages are the gist and heart of the action, a peculiar strictness governs in respect to the pleadings and evidence. As was said in *Griffin vs. Isbell*, 17 Ala. 186: ‘There is perhaps no other civil action which has been treated so strictly by the courts.’ Hence the special damages must be specially pointed out or the petition is demurrable.”

(A) *Uttering and Publishing of Slanderous Words.*

Plaintiff alleges in his complaint, par. 3 (R. 1), that the defendant

“... caused to be recorded in the office of the County Recorder of Salt Lake County, State of Utah, the following . . .”

(referring to the Notice above mentioned); and after setting out the Notice in the complaint, in par. 4 (R. 2), also alleges:

“That . . . the instrument was duly recorded . . . that the recording of said notice cast a cloud upon and a slander upon plaintiff’s title . . .”

In other words, plaintiff claims that the recording of the instrument was the thing that cast a cloud and a slander upon plaintiff’s title; nothing else being relied upon so far as “publishing” and “uttering” is concerned. There is no allegation that anyone saw it or was influenced by it.

By virtue of Section 78-3-2, 1943 Utah Code Annotated,

“Every conveyance, or instrument in writing affecting real estate executed, acknowledged or proved, and certified, in the manner prescribed by this title, . . . shall, from the time of filing the same with the recorder of record, impart notice to all persons of the contents thereof . . .”

And Section 78-2-6 of the said Code provides that,

“The certificate of acknowledgement of an instrument by a corporation must be substantially in the following form:

‘State of Utah, County of Salt Lake.

On the day of personally appeared before me, who being by me duly sworn (or affirmed) did say that he is the president (or other officer or agent, as the case may be) of (naming corporation), and that said instrument was signed in behalf of said corporation by authority of its by-laws (or of a resolution of its board of

directors, as the case may be), and said
acknowledged to me that said corporation executed the same.' ”

The acknowledgement shown in the Notice set out in par. 3 of plaintiff's complaint (R. 2) is not in substantial form or compliance as required by the statute above referred to, and the Notice was not entitled to be recorded, and therefore not published. “Since notice from a record is a creature of statute, the statute giving it such effect must be complied with.” *Doris Trust Co. v. Quermbach et al*, 103 Utah 120,127. The entry on the record of an instrument which is not entitled by the statute to be recorded is not legally a record and did not give . . . constructive notice of its contents. *Ib.* p. 128.

Since the sole act of publishing or uttering was the recording of the instrument, as alleged in the complaint, and relied upon as the act of slander of title, defendant asserts there was no publishing, as shown on the face of the complaint.

(B) *Falsity of the Words.*

The complaint does not deny the falsity of the words.

To maintain an action for slander of title, it must appear that the words complained of were false.—*Potsi Zinc Co. v. Mahoney*, 135 P. 1078, 36 Nev. 390.

To establish action for slander of title, words complained of must be false.—*Lee v. Maggard*, 85 P 2d. 654, 197 Wash. 380.

The complaint in an action for slander of title must allege the uttering and publishing of the slanderous words, as well as the falsity and maliciousness of the statement.—*Stovall v. Texas Co.*, Tex. Civ. App. 262 SW 152.

In plaintiff's complaint, after setting out the Notice, and in paragraph 4 (R. 2), he alleges:

“That the claim set forth in said instrument which was duly recorded as hereinabove set forth was false and without right whatever . . .”

Plaintiff has not set out in his complaint what words were false; neither has he denied that any of the words set out were false. He merely alleges that the “claim” set forth was false. This is not a denial of any slanderous words.

(C) *Malice.*

There is not one act of malice set out in the complaint.

In par. 3 of the complaint (R. 1), plaintiff alleges that on or about August 9, 1945, the defendant,

“falsely and maliciously and with intent to encumber and cloud plaintiff's title to said lands, and to harass and vex plaintiff in the quiet enjoyment thereof, caused to be recorded . . .” the Notice.

Further, par. 6 (R. 3),

“that the acts of said defendant have been actuated by malice, and that said defendant has

been guilty of oppression and malice in his actions aforesaid . . .”

Again, in par. 7 (R. 3),

“that by reason of said acts of malice and oppression of defendant towards plaintiff as hereinabove set forth plaintiff has suffered damage . . .”

One searches the complaint in vain for a single, solitary act alleged on the part of the defendant, except only “that he caused to be recorded” the Notice. All other allegations are conclusions of a general nature of what his intentions were, and not a solitary statement of any act on which to base such conclusions as to his intentions.

Findings of malice required to support slander of title action, must be based on facts indicating its existence.—*Briggs v. Coykendall*, 224 N.W. 202, 57 N.D. 785.

A person is not liable in damages merely for being unsuccessful in defending or asserting judicially what he believes to be his right.—*Clark v. Tensas Delta Land Co.*, 136 So. 1, 172 La. 913.

Malice or want of good faith and want of probable cause are essential elements of the action of slander of title and damages cannot be recovered where it appears that such element is absent and the defendant is asserting a bona fide claim in good faith though without right.—*Ward v. Mid-West & Gulf Co.*, 223 P. 170, 97 Okla. 252.

Words spoken or written regarding property or title are not actionable per se.—*Briggs v. Cockendall*, 224 N.W. 202, 57 N.D. 785.

Malice is a necessary ingredient to entitle plaintiff to recover in an action for slander of title and the action cannot be maintained if the claim was asserted by defendant in good faith or if the acts complained of were founded on probable cause or were so prompted by a reasonable belief, although the statement may have been false.—*Local Federal Sav. & Loan Ass'n. of Oklahoma v. Sickles*, 165 P. 2d 328.

Malice is a necessary ingredient of an action for slander on title, and must be both alleged and proven, since a claim of title asserted in good faith will not constitute a basis for an action of slander of title.—*Waterhouse v. McPheeters*, 145 S.W. 2d 766 (Tenn.).

Before liability on theory of "slander of title" can be established the party accused must have acted maliciously and the fact he had no claim, itself does not establish malice since, if he only had reasonable grounds to believe he had an equity or legal title in the lands, assertion of his claim could not be slander of title.—*Allison v. Berry*, 44 N.E. 2d 929, 316 Ill. App. 261.

Filing or recording of an instrument such as a lien is not actionable per se, but must be maliciously levied.—*Gudger v. Manton*, 123 P. 2d 635.

Defendant asserts that because the only act on the part of the defendant set out in plaintiff's complaint, that of recording the Notice, he has failed to allege malice as required in an action for slander of title.

The question of Malice will be further discussed under Point 2.

POINT 2

THE COURT ERRED IN OVERRULING PLAINTIFF'S SPECIAL DEMURRER.

Defendant believes that the matters referred to in par. 1 (R. 7) of his special demurrer are covered by his general demurrer, so will pass to the second paragraph of his special demurrer, viz:

“That said complaint is uncertain in that it cannot be determined from paragraph 4 thereof or said complaint what constitutes the ‘claim’ which plaintiff alleges to be false and without right.” (R. 7).

As stated in *Potso Zinc Co. v. Mahoney*, 135 P. 1078, 36 Nev. 390, it must appear that the words complained of were false. Defendant was entitled to know just what was the “claim” which plaintiff alleged was false, since he did not allege the falsity of any words. In alleging that the above “claim” was false, did he mean that Doris Trust Company falsely claimed residence at 1430 South Main Street, Salt Lake City, Utah; or that Addison Cain falsely claimed to be the President of Doris Trust Company; or that the payment of \$1,000.00 was a false claim; or that the lots mentioned were not in Fox’s Subdivision or not in Salt Lake City, Utah; or that they were purchased for Doris Trust Company by S. W.

Dowse; or that the payment of \$1,000.00 was on the purchase price of the lots, etc?

Defendant alleges that the complaint was not certain as to the above matters and that par. 2 of his special demurrer should have been sustained.

In his special demurrer (R. 7), the defendant set forth, par. 4,

“That said complaint is uncertain in that it cannot be determined therefrom what were the acts of oppression and what were the acts of malice on the part of the defendant, as alleged in said complaint.”

Malice being one of the essential elements of an action for slander of title, it must be based on facts indicating its existence. (*Briggs v. Coykendall*), heretofore referred to). No such basic facts appear in the complaint, and hence this paragraph of defendant's special demurrer should have been sustained.

POINT 3 and POINT 4

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DISMISSAL OF THE COMPLAINT; AND IN OVERRULING DEFENDANT'S OBJECTION TO TESTIMONY THEREUNDER.
(R. 50, 52).

Defendant based his motion and objection on his contention that the complaint was fatally defective and did not state a cause of action. The same arguments apply here as are set out under defendant's POINT 1,

and will therefore not be repeated, but referred to in support of the claimed error of the court hereunder.

As the matters hereinbefore discussed relate to the pleadings, it is thought advisable, before taking up the remaining Points on which defendant relies for reversal of the judgment, briefly to review the evidence in the case, as it pertains to the four essential elements constituting slander of title, i.e., (A) The Words Published; (B) Falsity of Words Published; (C) Maliciousness; and (D) Special Damages.

THE EVIDENCE

(A) *As to Words Published.*

Defendant admitted in his answer the filing of the Notice.

There is no testimony in the record that the filing of the Notice decreased the value of the property, or thwarted any sale, or that anyone because of seeing it on that account had refused to purchase the property.

Defendant further asserts that because the notice was not acknowledged as required by law, referred to hereinbefore in discussing this topic under POINT 1, there was no publication.

(B) *Falsity of the Words Published.*

While the plaintiff in his complaint has not alleged that any of the words in the Notice were false, merely alleging that,

“That the claim set forth in said instrument which was duly recorded as hereinbefore set forth was false and without right whatever, and defendant at time of recording said instrument as hereinabove set forth, had no estate, right, title or interest whatever in or to or upon said land or premises . . .”

it might be well to break down the Notice and call attention to the following:

(1) The words, “That One Thousand Dollars has been paid towards the purchase price . . .”

Defendant’s Exhibit 2, a check for \$1,000.00, dated July 31, 1945, on the face of which was written “First on Lot 13th So. and 1st West St.” payable to the order of Selwin Dowse and endorsed “Selwin Dowse” “S. W. Dowse” was received in evidence. (R. 75).

Plaintiff testified that that check was received by him and cashed by him, being the same \$1,000.00 referred to in the Notice sued upon, paid towards the purchase price of the lots referred to; that it was paid; and that that statement, “That One Thousand Dollars has been paid towards the purchase price,” was not a false statement, (R. 73); and that he (plaintiff) was selling the lots to him (defendant). (R. 74).

(2) The words, “. . . and that the balance, plus a reasonable commission will be paid on demand on delivery of deed.”

Plaintiff further testified, in response to questions, (R. 74) as follows:

Q. And the statement: "that the balance plus reasonable commission will be paid upon demand of the deed," is that correct?

A. It is correct so far as if he had paid the correct balance, I would have delivered the deed to him, yes.

Q. If he had paid the balance owing you would have been willing to give him the deed?

A. Yes, certainly.

Q. So that part of the statement is all right?

A. It is all right.

Q. So that isn't a false statement?

A. No.

(3) The words, "That certain property described as: All of Lots one to eleven in Fox's Subdivision, an addition to Salt Lake City, Utah—was purchased for Doris Trust Company by S. W. Dowse, as their agent . . ."

The plaintiff testified that he had an agreement with Doris Trust Company about the purchase of the Lots 1 to 11 Fox's subdivision, that he was selling the property to him (meaning Doris Trust Company), under which agreement he was to pay the balance. (R. 73, 74).

On Redirect Examination, Mr. Dowse testified that the above-quoted statement was untrue. (R. 78), meaning no doubt that part, the lots "was purchased for Doris Trust Company by S. W. Dowse, as their agent" was not true.

Everything else in the Notice is admitted by plaintiff to be true, except the statement,

“was purchased for Doris Trust Company by S. W. Dowse, as their agent.”

It is apparent from the record that there was a misunderstanding as to just what were the terms of the deal or agreement between plaintiff and defendant with respect to the sale and purchase of the lots in question.

Plaintiff in par. 4 of his complaint (R. 2) alleges that,

“... the defendant at the time of recording said instrument as hereinabove set forth (Aug. 9, 1945) had no estate, right, title or interest whatever in or to or upon said land or premises, or any part thereof; ...”

and yet he admits under oath on the witness stand that he did have an agreement to sell the property to the defendant and that the defendant had paid \$1,000.00 thereon.

Mr. Addison Cain testified (R. 94) that he prepared the Notice in question, and that when he filed it (Aug. 9, 1945) he put therein what at the time of filing he believed to be the agreement between them, and he believed the statements therein were true. (R. 95).

Plaintiff introduced in evidence his Exhibit C, a letter dated August 20, 1945, from Doris Trust Company to plaintiff, in which appears the following: (R. 80, 81)

“Herewith we are returning your check for One Thousand Dollars and notify you now in

writing that we are tendering you the balance of the Fifteen Hundred dollars you paid out for us on the purchase price of Lots 1 to 11 Fox's Subdivision together with the regular fee of 5% \$150. for your purchase, . . ."

The above Exhibit, written shortly after the check payment, and the filing of the Notice, would seem to corroborate defendant's contention as to what he considered to be the terms of the deal, at the time he filed the Notice.

C. *Malice.*

Plaintiff testified that defendant agreed to pay \$2625 for the property, subject to delinquent taxes, and agreed to pay \$1,000 down (R. 65); that he ordered a tax search, that Mr. Cain said the tax search was all right and that he would come up and pay \$500.00 more; that he came back the same day and made demand to give him the deed for \$500.00 more (R. 66); that plaintiff refused to give the deed for \$500.00 more, as that was not the price agreed upon; that he (Mr. Cain) said he would take me into court; if necessary, go to the Supreme Court, and plaintiff advised him he was at liberty to do so. (R. 67); that plaintiff thought he told defendant at that time, if he didn't want it he would give him his money back (R. 82); to which defendant replied "nothing doing", he wanted the property and he was going to get it. (R. 83).

Mrs. Dowse, wife of plaintiff, also testified that she was present when Mr. Cain came in and asked that

they make out the deed while she was present and close up the deal; that her husband replied “for the first price you agreed on first”; that Mr. Cain said, “no you only paid \$1500 for that property and that is all you are going to get out of me,—you are not going to make a profit out of me”; that he further said that her husband only paid \$1500.00 for it and he would take him through the Supreme Court if necessary to get that property for that price (R. 86); that Mr. Dowse said he would give him the \$1,000.00 back and forget the whole thing, or go through with it as originally agreed. (R. 87).

This evidence so far as it reflects defendant’s attitude, supports defendant’s contention that the deal was on a commission basis, except as to plaintiff’s statement that he was to receive \$2625.00 for the property, subject to the taxes.

Defendant affirms that there is no evidence introduced to show malice as an element of a slander of title action. There was a deal pending between the parties; defendant had paid \$1,000.00 thereon; plaintiff alleges that the defendant agreed to pay \$2625 for the lots, subject to taxes. He further testified, however, that at the time of making the deal with defendant, the lots had been sold to Salt Lake County ten years prior, for delinquent taxes for 1933, (R. 76), and that he did not get it until a year after the deal with defendant (R. 77); that subsequent to July 18, (1945) he had to pay back taxes, had to pay off sewer taxes, had to get a new abstract, and had to bring an action against Salt Lake

County as they first refused to give him a tax deed, (R. 55); that he was prevented from getting tax deed as one of the county commissioners wanted the property himself. (R. 82).

Mr. Cain testified that after paying the \$1,000, there were other conversations; that plaintiff was trying to get the taxes adjusted and we couldn't close the deal because he didn't get the amount of taxes ascertained that he would have to pay to the county. (R. 94).

D. *Special Damages.*

There is no evidence in the record showing or tending to show any special damages suffered by plaintiff.

POINT 5

THE COURT ERRED IN ADMITTING IN EVIDENCE PLAINTIFF'S EXHIBIT C. (R. 80, 81).

The Notice was filed August 9, 1945. Exhibit C, later identified as C-1 and C-2 (R. 117) showed transactions subsequent to the filing of the Notice; Exhibit C-2 being check dated August 17, 1945, which plaintiff sent to Addison Cain, and C-1 a letter returning the check to plaintiff.

These exhibits have no bearing on special damages, publishing and uttering malicious words, the falsity of published words, or malice alleged to have been exhibited in filing the Notice.

It is impossible to determine what effect they had

with the jury in its determining of exemplary damages; or what weight the court gave to these exhibits in granting plaintiff's motion for a directed verdict.

POINT 6

THE COURT ERRED IN REFUSING DEFENDANT'S MOTION FOR A DIRECTED VERDICT. (R. 117).

Defendant asserts that defendant's motion for a directed verdict should have been granted both on the law and on the evidence: on the law for the reasons hereinbefore set forth under Point 1; and on the evidence, as follows:

All of the statements in the Notice were admitted or evidence given in support thereof, except that defendant testified the statement, that the property was purchased for the Doris Trust Company by S. W. Dowse as their agent, was untrue.

One Thousand dollars had been paid towards the purchase price (R. 75); the parties had entered into some agreement for the sale and purchase, (R. 73, 74); the deal was still pending when the Notice was filed, as indicated by Exhibit C. (R. 81); the court made findings in the former case to the effect that there was an oral agreement, with insufficient memoranda in writing to make it enforceable, Def's. Exhibit 4 (R. 89, 92), in which it also found that on May 11, 1946, defendant made a demand on the plaintiff for the refund or repayment of the \$1,000.00 paid on the agreement; that plain-

tiff refused to pay the same or any part thereof; and that as of February 28, 1947, the plaintiff was the owner as against defendant, and that defendant then had no right, title or interest therein; that defendant was entitled to repayment of the \$1,000.00, with interest from May 11, 1946 (date of demand for repayment) and that "each party shall bear his own costs."

POINT 7

THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR A DIRECTED VERDICT. (R. 107).

Defendant asserts that in view that the complaint was fatally defective, as set out in his discussion under Point 1, it was error to grant the motion.

Further, there was no evidence received showing special damages; all of the statements in the Notice were admitted to be true by plaintiff, except as to a minor statement therein which plaintiff testified was untrue; there was no evidence of malice as a basis for a slander of title action.

In granting the motion for a directed verdict, the court made the following statement:

"Well, I shall grant the motion of the plaintiff for directed verdict, that means a verdict in what sum do you contend?"

To which Mr. Backman, one of the attorneys for the plaintiff, replied,

“Well, we contend we have shown the damages of \$250. which was the amount incurred by the plaintiff in clearing his title.” (R. 108).

Defendant affirms that the granting of the motion for directed verdict in view of that admission by counsel, to the effect that the alleged damage of \$250. was the amount incurred by the plaintiff in clearing his title, was error.

Calling attention again to defendant's Exhibit 4 (R. 89, 92), based on its Findings of Fact therein, the court in its Conclusions of Law held, that each party shall bear his own costs.

Now to grant the plaintiff \$250.00, the amount incurred by him in clearing his title, when the court refused to grant him any costs in the case where he alleges he paid the \$250.00, would be a most unusual procedure; and would constitute a collateral attack on the prior judgment.

POINT 8

THE COURT ERRED IN SUBMITTING THE QUESTION OF AMOUNT OF EXEMPLARY DAMAGES TO THE JURY. (R. 113).

Under Point 1, subheading (C), defendant has called attention to Malice as it applies to actions for slander of title.

Without showing malice, one cannot prevail in such an action, to obtain special damages suffered. In other

words, in the instant case, plaintiff would have to prove malice even to obtain special damages.

If he has proven such malice as would warrant the verdict for the special damages alleged, then it would appear that defendant would have to be guilty of "super" malice in order to justify the court in submitting the question of exemplary damages to the jury; it would have to be "malice on malice".

To justify recovery of "exemplary damages", act causing injury must be done with evil intent and purpose of injuring plaintiff, or with such wanton and reckless disregard of his rights as evidences wrongful motive.—*Calhoun v. Universal Credit Co. et al*, 106 Utah 166, 146 P. 2d 284.

Defendant asserts that there is no evidence in the record whatever to warrant submitting to the jury the question of amount of such damages.

Further, that in an action for slander of title only special damages are recoverable.

POINT 9

THE COURT ERRED WITH RESPECT TO EACH PORTION OF INSTRUCTION NO. 1 AS GIVEN TO THE JURY (R. 113-114) AND TO WHICH DEFENDANT NOTED AN EXCEPTION.
(R. 117).

The Court erred in its first paragraph of Instruction No. 1, wherein the jury was directed to find the issues in favor of the plaintiff and against the defendant.

No special damages having been shown or proved, this instruction should not have been given.

The court erred in its second paragraph of Instruction No. 1, wherein it stated that compensatory damages are damages awarded for injuries actually sustained resulting from an act by a person against whom the issues are found, in this case against the defendant, for the reason that compensatory damages are not recoverable in an action for slander of title.

The court erred in its third paragraph of Instruction No. 1, wherein it directed the jury to fix the amount of plaintiff's compensatory damages, that is the amount shown by the evidence, for the reason that only special damages and not compensatory damages are recoverable.

The court erred in its fifth paragraph, and also to all of paragraph 6 of Instruction No. 1.

POINT 10

THE COURT ERRED IN FAILING TO CHARGE THE JURY AS SET FORTH IN EACH OF DEFENDANT'S REQUESTED INSTRUCTIONS No. 1 TO 5, INCLUSIVE. (R. 35-39).

The record does not show that defendant took exceptions to the court's failure to instruct the jury as requested.

The record in this case does not indicate that another trial might disclose new facts or improve or change plaintiff's proof of his claimed cause of action.

We contend that the judgment appealed from should be reversed and that entry of judgment for defendant should be ordered.

Respectfully submitted,

DAVID A. WEST,
*Attorney for Defendant
and Appellant.*