

1949

Valley Investment Co. v. Los Angeles & Salt Lake Railroad Company : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the
State of Utah

VALLEY INVESTMENT CO.,
a Corporation,

Plaintiff and
Appellant,

vs.

LOS ANGELES & SALT LAKE RAIL-
ROAD COMPANY
a Corporation,

Defendant and
Respondent.

Case No.
7300

APPELLANT'S BRIEF

WILLIAM D. CALLISTER,
Attorney for Appellant.

CLERK, SUPREME COURT, UTAH

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LOS ANGELES & SALT LAKE RAIL-
ROAD COMPANY,

a Corporation,

Defendant and

Respondent.

Case No.

7300

APPELLANT'S BRIEF STATEMENT OF FACTS

The record shows that the above-entitled case came on for trial before the Honorable Roald A. Hogenson, one of the judges of the Third Judicial District Court in and for Salt Lake County, State of Utah, sitting without a jury, on the 7th day of April, 1948, William D. Callister appearing on behalf of the Plaintiff, and A. U. Miner appearing on behalf of the Defendant.

The record further shows that the Plaintiff and the Defendant, in open court, stipulated as follows, to-wit:

On March 29th, 1894, one Charles A. Dole had the

fee title to all of Lots 3 to 20, inclusive, and Lots 53 to 58, inclusive, of Block 5, and all of Lots 13 to 16, inclusive, Block 6, Dole's Addition, located in Salt Lake County, State of Utah (Tr. 40 and 41). On the said March 29th, 1894, the said Charles A. Dole conveyed said property to Oscar F. Hunter (Tr. 41), and the chain of title descended through various parties (Tr. 41 to 46, inclusive), to one Irene Hunter Chamberlain, who, on February 29th, 1936, received title through a bargain and sale deed. (Tr. 46) On November 21st, 1947, the said Irene Hunter Chamberlain, now known as Irene H. Chamberlain McAlpine, executed a quit-claim deed to the said property to Valley Investment Co., the Plaintiff herein (Tr. 47, and Exhibit "A", Tr. 79).

The general property taxes for 1930 on said property being unpaid, a treasurer's tax sale took place on December 22nd, 1930 (Tr. 49, and Exhibit No. 2, Tr. 79). The taxes for the years 1931, 1932, 1933, 1934, and 1935 also remaining unpaid, and there having been no redemption of the treasurer's sale for the unpaid 1930 taxes, an auditor's tax deed on said property was executed on March 31st, 1936, to Salt Lake County (Tr. 49, and Exhibit No. 3, Tr. 79). On November 7th, 1941, Salt Lake County executed a deed to said lots, naming Defendant as grantee (Tr. 49 and 50, and Exhibit No. 4, Tr. 79). The assessment rolls of Salt Lake County for 1930, and particularly the volume in which said property was assessed, did not have affixed thereto the two auditor's affidavits required by Sections 5982 and 6006, Compiled Laws of Utah 1917 (Sections 80-7-9 and 80-8-7, Utah Code Annotated 1943) (Tr. 69 and 70).

The Defendant has paid all taxes assessed against said

property for the years 1942 to 1947, inclusive (Tr. 50), and has been in possession of said property from August, 1941, to the present time, the Plaintiff and its predecessors in interest having not physically occupied said property since March 31st, 1936 (Tr. 51 to 67, inclusive).

After the trial had been concluded, and in due course, the Court found in favor of the Defendant and against the Plaintiff (Tr. 16), and made and entered its Findings of Fact, Conclusions of Law, and Judgment (Tr. 25 to 32, inclusive), to which Plaintiff objected, submitting therewith its own proposed findings of fact, conclusions of law, and decree (Tr. 17 to 24, inclusive).

The particular portions of the Findings, Conclusions and Judgment to which Plaintiff objected, are set out below (*italics added*):

"FINDINGS OF FACT"

"6. That under date of February 29, 1936, Mindwell C. Hunter by a bargain and sale deed conveyed or *purported to convey* to Irene Hunter Chamberlain McAlpine the property hereinabove described. That on November 21, 1947, by quit-claim deed said Irene Hunter Chamberlain McAlpine conveyed or *purported to convey* said property to the plaintiff Valley Investment Co." (Tr. 26)

"7. That said taxes as so assessed for the year 1930 were not paid to Salt Lake County, and that on the 22nd day of December, 1930, a *Treasurer's sale* of such property for delinquent taxes was made to Salt Lake County. That thereafter said taxes were not paid nor redeemed and on the 31st day of March, 1936, pursuant to the provisions of Section 80-10-66, Revised Statutes of

Utah of 1933, said property was *struck off* to Salt Lake County and an auditor's deed issued to Salt Lake County therefor based upon said *sale* which had been made on the 22nd day of December, 1930, on account of said delinquent and unpaid taxes assessed for the year 1930." (Tr. 27)

"9. That although said property was on December 22, 1930, *sold* for delinquent taxes assessed in 1930, said property was not at any time thereafter redeemed by plaintiff nor by any of the predecessors in interest of the plaintiff, nor were any of the taxes paid thereon, and subsequent taxes for the years 1931 to 1935, inclusive, were not paid and were added thereto; that after the issuance of the auditor's deed to Salt Lake County on March 31, 1936, said property was carried on the county rolls as property of Salt Lake County and no taxes were assessed against nor paid upon the same, *and during the summer of 1941 the defendant Los Angeles & Salt Lake Railroad Company negotiated with the County for the purchase of said property for the purpose of constructing thereover a spur track to serve the Remington Arms Plant. That as a result of said negotiations and for a valuable consideration the defendant Railroad Company purchased said property from the County and under date of November 7, 1941, Salt Lake County made, executed and delivered to the defendant a county deed by which it conveyed or purported to convey to the defendant the property hereinabove described.*" (Tr. 27 and 28)

"12. That the above described real property *was struck off and sold* to Salt Lake County on March 31, 1936, pursuant to the provisions of Section 80-10-66, Revised Statutes of 1933; *that by amendment contained in Chapter 101 of Laws of Utah of 1939, various portions of Chap-*

ter 10 of Title 80 of Revised Statutes of Utah 1933 were amended and by such amendment the provisions of Section 80-10-66, Revised Statutes of Utah 1933, relating to property being struck off to the County, were transferred to and embodied in Section 80-10-68, Sub. 6, and said Section 80-10-68 as so amended was thereafter incorporated in and carried unchanged into Utah Code Annotated 1943 as Section 80-10-68.” (Tr. 28 and 29)

“13. That although the real property hereinabove described was *sold to Salt Lake County* for delinquent taxes on the 22nd day of December, 1930, and although said property *was struck off* to Salt Lake County pursuant to Section 80-10-66, Revised Statutes of Utah 1933, and an auditor’s deed therefor issued to the County on the 31st day of March, 1936, and in spite of the fact that the defendant received a deed to said property from the County under date of November 7, 1941, and went into possession and has held possession of the same since November 7, 1941, neither the Plaintiff nor any predecessor in interest or title of the plaintiff has filed nor attempted to file any action for the recovery of said property or for the possession thereof during any of said period of time, nor at all, until the above entitled action was commenced herein by the filing of Plaintiff’s complaint on the 10th day of January, 1948.” (Tr. 29)

“CONCLUSIONS OF LAW

“1. That the cause of action set forth or attempted to be set forth by plaintiff in its complaint is barred by the provisions of Section 104-2-5.10, Utah Code Annotated 1943, as so designated and enacted by Chapter 19, page 22, Laws of Utah 1943. (Tr. 29)

"2. That the cause of action set forth or attempted to be set forth by plaintiff in its complaint is barred by the provisions of Chapter 19, Laws of Utah 1943, designated as Section 104-2-5.10, Utah Code Annotated 1943, as amended by Chapter 8, page 19, Laws of Utah 1947. (Tr. 29 and 30)

"3. That the cause of action set forth or attempted to be set forth by plaintiff in its complaint is barred by the provisions of Section 104-2-6, Utah Code Annotated 1943, as amended by Chapter 20, page 22, Laws of Utah 1943. (Tr. 30)

"4. That the defendant is entitled to a judgment in its favor and against the plaintiff, 'no cause of action.'" (Tr. 30)

"JUDGMENT

"Now, therefore, it is hereby ordered, adjudged and decreed that the defendant Los Angeles & Salt Lake Railroad Company, a corporation, be and it is hereby given judgment in its favor and against the Plaintiff Valley Investment Co., a corporation, 'no cause of action,' and Plaintiff's complaint is hereby dismissed with prejudice. (Tr. 31)

"It is further ordered, adjudged and decreed, that the Plaintiff Valley Investment Co., a corporation, be and it is hereby barred and enjoined and prevented from hereafter prosecuting or maintaining any action for the recovery of the following described property or for the possession of any part or portion thereof, to-wit:

Lots 3 to 20 and Lots 53 to 58 of Block 5; and Lots 13 to 16 of Block 6, Dole's addition. (Tr. 31)

"It is further ordered that defendant be given judg-

ment for its costs herein incurred, hereafter to be taxed.”
(Tr. 32)

After having been served with a copy of the findings of fact, conclusions of law, and judgment, portions of which are set out above, and prior to the time the Court signed the same, the Plaintiff prepared and served on the Defendant, and filed with the Court, its proposed findings of fact, conclusions of law, and decree, portions of which are set out below, in the place and stead of those signed and filed by the Court:

“PROPOSED FINDINGS OF FACT

“6. That under date of February 29th, 1936, Mindwell C. Hunter executed a bargain and sale deed conveying said property to the said Irene Hunter Chamberlain; that on the 21st day of November, 1947, Irene Hunter Chamberlain McAlpine, formerly Irene Hunter Chamberlain, by quit-claim deed, conveyed all her right, title and interest in and to said property to the Plaintiff herein, Valley Investment Co.” (Tr. 18)

“7. that said taxes as so assessed for the year 1930 were not paid to Salt Lake County and that on the 22nd day of December, 1930, a purported Treasurer’s Sale of such property for delinquent taxes was made to Salt Lake County; that thereafter, said taxes were not paid, and on the 31st day of March, 1936, pursuant to the provisions of Section 80-10-66, Revised Statutes of Utah 1933, an auditor’s tax deed was issued to Salt Lake County therefor, based upon the said purported Treasurer’s Sale which had been made on the said 22nd day of December, 1930, on account of said delinquent and unpaid taxes assessed for the year 1930.” (Tr. 18 and 19)

"9. That neither the Plaintiff nor its predecessors in interest have paid the said taxes for the year 1930, nor for the years 1931 to 1935, inclusive; that after March 31st, 1936, the said property was carried on the tax rolls of Salt Lake County as property of Salt Lake County, and were not assessed; that on the 7th day of November, 1941, for a valuable consideration, Salt Lake County made, executed and delivered to the Defendant a county tax deed describing the property mentioned above." (Tr. 19)

"12. That since the Defendant took possession of the property herein described, in August, 1941, no action was brought heretofore against this Defendant, by the Plaintiff or its predecessors in interest; that the Defendant has held adversely against this Plaintiff and its predecessors for a period of six years and five months, and no longer; that the Plaintiff and its predecessors have not been in actual physical occupancy of said property during the said period." (Tr. 20)

"PROPOSED CONCLUSIONS OF LAW

"1. That the assessment of taxes on the property described above, for the year 1930, and the Treasurer's Sale on the 22nd day of December, 1930, of the same, are null and void. (Tr. 20)

"2. That the auditor's tax deed executed by the auditor of Salt Lake County, on the 31st day of March, 1936, in favor of Salt Lake County, is null and void, and is of no effect, and no interest in and to said property passed to the County of Salt Lake by virtue of it. (Tr. 20)

"3. That the payment of the consideration to Salt Lake County by the Defendant herein, on the 7th day of No-

vember, 1941, for a purported tax title, extinguished the lien for taxes and freed the property concerned from the encumbrance which theretofore existed; that the tax deed made, executed and delivered by Salt Lake County, on the said 7th day of November, 1941, to the Defendant, describing said property, conveyed no interest in and to said property to the said Defendant; that Plaintiff is owner of the fee title to the same. (Tr. 20)

"4. That the predecessor of the Plaintiff herein, holding legal title to the said property, by virtue of the provisions of Section 104-2-7, Utah Code Annotated 1943, also held constructive possession of the property concerned until the month of August, 1941, which included the first seven months of the seven-year period immediately prior to the commencement of this action; that the Plaintiff's predecessor in interest thus held possession of the property within seven years prior to the commencement of this action, as required by the provisions of Section 104-2-5, Utah Code Annotated 1943. (Tr. 20)

"5. That the property described above, was not conveyed to the County of Salt Lake by auditor's tax deed, and therefore does not come within the provisions of Chapter 19, page 22, Laws of Utah, 1943, designated as Section 104-2-5.10, Utah Code Annotated 1943, as amended by Chapter 8, page 19, Laws of Utah, 1947. (Tr. 20 and 21)

"6. That Chapter 19, page 22, Laws of Utah 1943, designated as Section 104-2-5.10, Utah Code Annotated 1943, as amended by Chapter 8, page 19, Laws of Utah 1947, does not provide a reasonable time in which to bring actions which accrued prior to the time of its enactment, for the recovery of real property conveyed to Salt Lake County prior to September 1st, 1939, by auditor's deed

under the provisions of Section 80-10-66, Revised Statutes of Utah 1933; that the provisions of the said Chapter 19, page 22, Laws of Utah 1943, designated as Section 104-2-5.10, Utah Code Annotated 1943, as amended by Chapter 8, page 19, Laws of Utah 1947, insofar as the same relate to real property conveyed to the county prior to September 1st, 1939, by auditor's tax deed, are unconstitutional and therefore void. (Tr. 21)

"7. That the Plaintiff herein is entitled to a decree of this Court declaring, ordering and adjudging that the Plaintiff is the owner in fee simple of said real property, and that the Defendant has no right, title, estate, lien or interest whatever in or to said real property or any part thereof. (Tr. 21)

"8. That the Plaintiff is entitled to a decree of this Court forever enjoining and debarring the said Defendant from asserting any claim whatever in or to said real property adverse to the Plaintiff herein. (Tr. 21)

"9. That the Plaintiff is entitled to a decree of this Court for all costs of court herein expended." (Tr. 21)

"PROPOSED JUDGMENT

"Now, therefore, it is hereby ordered, adjudged and decreed:

"1. That the Plaintiff, Valley Investment Co., a corporation, is the owner in fee simple of the property described below, and that the Defendant, Los Angeles & Salt Lake Railroad Company, a corporation, has no right, title, interest, estate or lien whatever in or to said property or any part thereof:

Lots 3 to 20, inclusive, and Lots 53 to 58, inclusive, Block 5, and Lots 13 to 16, inclusive, Block 6, Dole's Addition. (Tr. 22)

"2. That the Defendant, Los Angeles & Salt Lake Railroad Company, a corporation, be and it is hereby forever enjoined and debarred from asserting any claim whatever in and to the said real property described above, adverse to the Plaintiff herein. (Tr. 22)

"3. That the Plaintiff, Valley Investment Co., be and the same is hereby awarded its costs herein expended, hereafter to be taxed." (Tr. 22)

Subsequent to the signing and filing of the findings of fact, conclusions of law and judgment by the said Court, the Plaintiff filed its motion for a new trial (Tr. 33), which was subsequently denied (Tr. 35).

Appellant, the Plaintiff below, contends that the trial Court, in making and entering its findings, conclusions and judgment, and in denying Plaintiff's motion for a new trial, committed error as follows:

STATEMENT OF ERRORS

Error No. 1.

The fact found by the trial court in its finding No. 6 (Tr. 26) to the effect that Mindwell C. Hunter "conveyed or purported to convey" the property involved in this action, to Irene Hunter Chamberlain McAlpine, who later "conveyed or purported to convey" the said property to the Appellant, does not conform to the stipulated and undisputed evidence produced at the trial.

Error No. 2

The fact found by the trial court in its finding No. 7 (Tr. 27) to the effect that a treasurer's sale of the property concerned to Salt Lake County took place, and that said property was "struck off" to Salt Lake County, is contrary to the stipulated and undisputed evidence produced at the trial.

Error No. 3.

The fact found by the trial court in its finding No. 9 (Tr. 27 and 28) to the effect that said property was "sold" for delinquent taxes assessed in 1930, and that during the summer of 1941, the Respondent "negotiated" for the purchase of, and did "purchase" said property, does not conform to the stipulated and undisputed evidence produced at the trial.

Error No. 4.

The fact found by the trial court in its finding No. 12 (Tr. 28) to the effect that said property was "struck off and sold" to Salt Lake County, is contrary to the stipulated and undisputed evidence produced at the trial.

Error No. 5.

The fact found by the trial court in its finding No. 12 (Tr. 28 and 29) to the effect that by amendment, Section 80-10-66, Revised Statutes of Utah 1933, relating to property being "struck off" to the county, were trans-

ferred to and embodied in Section 80-10-68, Sub. 6, is contrary to fact and law.

Error No. 6.

The fact found by the trial court in its finding No. 13 (Tr. 29) to the effect that said real property was "sold" to Salt Lake County in 1930, and was "struck off" to Salt Lake County in 1936, is contrary to the stipulated and undisputed evidence produced at the trial.

Error No. 7.

The trial court erred in not finding the facts as proposed by the Plaintiff herein (Tr. 18 to 20, inclusive), particularly paragraphs 6, 7, 9, and 12 thereof.

Error No. 8.

That the conclusion of law No. 1 (Tr. 29) to the effect that Plaintiff's cause of action is barred by the provisions of Section 104-2-5.10, Utah Code Annotated, as so designated and enacted by Chapter 19, page 22, Laws of Utah 1943, is erroneous and contrary to law.

Error No. 9

That the conclusion of law No. 2 (Tr. 29 and 30) to the effect that Plaintiff's cause of action is barred by the provisions of Chapter 19, Laws of Utah 1943, designated as Section 104-2-5.10, Utah Code Annotated 1943, as amended by Chapter 8, page 19, Laws of Utah 1947, is erroneous and contrary to law.

Error No. 10.

That the conclusion of law No. 3 (Tr. 30) to the effect that Plaintiff's cause of action is barred by the provisions of Section 104-2-6, Utah Code Annotated 1943, as amended by Chapter 20, page 22, Laws of Utah 1943, is erroneous and contrary to law.

Error No. 11.

That the conclusion of law No. 4 (Tr. 31) to the effect that Defendant is entitled to a judgment in its favor of "no cause of action", is erroneous and contrary to law.

Error No. 12.

That the trial court erred in not concluding as a matter of law that the assessment of taxes for 1930 on said property, and the Treasurer's Sale on December 22nd, 1930, are null and void. (Proposed conclusion No. 1, Tr. 20)

Error No. 13.

That the trial court erred in not concluding as a matter of law that the auditor's tax deed (Exhibit No. 3, Tr. 79) is null and void, and that no interest in said property passed to Salt Lake County by virtue of it. (Proposed conclusion No. 2, Tr. 20)

Error No. 14.

That the trial court erred in not concluding as a matter of law that the payment by Defendant for a purported

tax deed to said property, extinguished the lien for unpaid taxes, and that said tax deed conveyed no interest to Defendant, and that Plaintiff is the owner of the fee title to the same. (Proposed conclusion No. 3. Tr. 20)

Error No. 15.

That the trial court erred in not concluding as a matter of law that the Plaintiff's predecessor in interest to said property, under the provisions of Section 104-2-7, Utah Code Annotated 1943, held constructive possession of said property for seven months of the seven-year period immediately prior to the commencement of this action, as required by Section 104-2-5, Utah Code Annotated 1943. (Proposed conclusion No. 4, Tr. 20)

Error No. 16.

That the trial court erred in not concluding as a matter of law that inasmuch as the said property was not conveyed to the County of Salt Lake by Auditor's tax deed and was not struck off and sold to Salt Lake County, said property does not come within the provisions of Chapter 19, page 22, Laws of Utah 1943, designated as Section 104-2-5.10, Utah Code Annotated 1943, as amended by Chapter 8, page 19, Laws of Utah 1947. (Proposed conclusion No. 5, Tr. 20 and 21)

Error No. 17.

That the trial court erred in not concluding as a matter of law that inasmuch as Chapter 19, page 22, Laws of

Utah 1943, designated as Section 104-2-5.10, Utah Code Annotated 1943, as amended by Chapter 8, page 19, Laws of Utah 1947, does not provide a reasonable time in which to bring actions for the recovery of real property conveyed to Salt Lake County prior to September 1st, 1939, which accrued prior to the time of its enactment, is unconstitutional and therefore void, insofar as the same relates to such property. (Proposed conclusion No. 6, Tr. 21)

Error No. 18.

That the trial court erred in not concluding as a matter of law that Plaintiff is entitled to a decree of the court adjudging Plaintiff to be the owner of said property, and that Defendant has no right, title, estate, lien or interest whatever in said property or any part thereof. (Proposed conclusion No. 7, Tr. 21)

Error No. 19.

That the trial court erred in not concluding as a matter of law that Plaintiff is entitled to a decree of the court forever enjoining and debarring Defendant from asserting any claim whatever in or to said property adverse to the Plaintiff. (Proposed conclusion No. 8, Tr. 21)

Error No. 20.

That the trial court erred in not concluding as a matter of law that Plaintiff is entitled to a decree of the court for all costs of court. (Proposed conclusion No. 9, Tr. 21)

Error No. 21.

That the judgment of the trial court in favor of the Defendant and against the Plaintiff, "no cause for action," and dismissing Plaintiff's Complaint with prejudice (Tr. 31) is contrary to law.

Error No. 22.

That the judgment of the trial court barring and enjoining the Plaintiff from hereafter prosecuting or maintaining any action for the recovery of the said property or for the possession of any part or portion thereof (Tr. 31), is contrary to law.

Error No. 23.

That the judgment of the trial court awarding Defendant its costs herein (Tr. 32) is contrary to law.

Error No. 24.

That the trial court erred in not decreeing that the Plaintiff is the owner in fee simple of said property and that the Defendant has no right, title, interest, estate or lien whatever in or to said property or any part thereof. (Tr. 22)

Error No. 25.

That the trial court erred in not decreeing that the Defendant be forever enjoined and debarred from asserting any claim whatever in or to the said property adverse to the Plaintiff. (Tr. 22)

Error No. 26.

That the trial court erred in not decreeing costs to the Plaintiff. (Tr. 22)

Error No. 27.

That the trial court erred in denying Plaintiff's motion for a new trial. (Tr. 35)

ARGUMENT NO. 1

**PLAINTIFF'S PROPOSED FINDINGS OF FACT
SHOULD HAVE BEEN SIGNED AND FILED
BY THE TRIAL COURT.**

Even a cursory examination of the findings signed and filed by the trial court leads one to the conclusion that the court was very careless in the terminology therein used, and completely disregarded undisputed evidence introduced by stipulation between the opposing parties. As a result, these findings are contrary to the evidence, as indicated below:

(a) In paragraph 6 of said findings (Tr. 26), the court twice used the expression "conveyed or purported to convey", referring to Plaintiff's chain of title to the property concerned. The actual facts were that the fee title was traced down to February 29th, 1936, at which time it was in Mindwell C. Hunter, who on that date conveyed it to Irene Hunter Chamberlain, Plaintiff's predecessor in interest (Tr. 46). At that time, not even the audit-

or's tax deed, which later in this brief will be shown as void (Argument No. 2), had been executed. Then, on November 21st, 1947, the said Irene Hunter Chamberlain, now with the surname of McAlpine, quit-claimed to the Plaintiff (Tr. 47, and Exhibit "A", Tr. 79), and thereby conveyed to Plaintiff all her right, title and interest to the property. (Section 78-1-12, Utah Code Annotated 1943.)

Thus, the trial court, had it followed the evidence, should have found that Mindwell C. Hunter executed a bargain and sale deed conveying the property to Irene Hunter Chamberlain, who, under the surname of McAlpine, by quit-claim deed, conveyed all her right, title and interest to the Plaintiff, which findings were proposed by the Plaintiff (Tr. 18).

(b) The trial court, in paragraphs 7, 9, and 13 of its findings, used the expression "treasurer's sale", and referred to the property as having been "sold" for the 1930 delinquent taxes (Tr. 27 to 29). As a matter of fact and of law, as will be shown later (Argument No. 2), the treasurer's sale was void for lack of the proper auditor's affidavits in the assessment rolls (required by Sections 5982 and 6006, Compiled Laws of Utah 1917, known as Sections 80-7-9 and 80-8-7, Utah Code Annotated 1943). Only a purported sale took place, and the findings should have so stated, as was proposed by the Plaintiff in its findings No. 7 and 9 (Tr. 18 and 19).

(c) Again in its findings Nos. 7, 12 and 13 (Tr. 27 to 29), the trial court used grossly misleading terms. The court repeatedly referred to the property as having been "struck off and sold" to Salt Lake County. Also, in paragraph 12, the court made a finding to the effect that the provisions of Section 80-10-66, Revised Statutes of Utah

1933, "relating to property being struck off to the County" (Tr. 28 and 29), when amended by Chapter 101, Laws of Utah 1939, "were transferred to and embodied in Section 80-10-68, sub. 6." This is an absolute mis-statement of the fact and of the provisions of the law, as will now be shown.

Section 80-10-66, which provided the method of foreclosing the tax lien prior to September 1st, 1939, does not even contain the expression "struck off and sold". To accomplish the foreclosure, it directs the county auditor to convey to the county by auditor's tax deed all property sold at the treasurer's sale, which remains unredeemed at the expiration of the redemption period. Also, there is no sale therein provided. This statute remained effective until September 1st, 1939.

However, the 1939 Legislature completely revised the procedure to foreclose the tax lien. Chapter 101, Laws of Utah 1939, referred to in paragraph 12 of the trial court's findings, to accomplish this purpose, repealed the provisions relating to the execution of the auditor's tax deed. In fact, the last nineteen lines of Section 80-10-66, which provided for the auditor's tax deed, were deleted in the amended enactment of said Section. Section 80-10-68 was enacted in its stead, and provides for a public crying auction sale to be held by the county auditor each May, of properties remaining unredeemed at the expiration of the redemption period. Not one clause of those nineteen deleted lines mentioned above was incorporated into 80-10-68, or any subdivision therein contained. This new foreclosure statute, for the first time, provides for the striking off and selling tax properties to the county (Section 80-10-68 (6)).

In the case at bar, an auditor's tax deed was executed. The property never was "struck off and sold" to the coun-

ty. To find that it was is not only untrue, but is using an expression which cannot be found in the statutes in effect at that time. In addition, for the trial court to find that the provisions in effect prior to September 1st, 1939 (Section 80-10-66), were transferred to and embodied in Section 80-10-68 (6), is absolutely false.

Thus, the trial court should have found, merely, that an auditor's tax deed was issued on March 31st, 1936, which conforms to the evidence, and which was proposed by Plaintiff (Tr. 18 and 19).

(d) The trial court found, in paragraph 9 of its findings (Tr. 27 and 28), that the Defendant "purchased" the property from the county. This is not true. As will be pointed out in Argument No. 2 herein, where supporting cases will be cited, no interest passed to the Defendant at the time it paid for, and received the county deed. The only legal effect of this transaction was to discharge any lien that may have theretofore existed (Argument No. 2).

(e) The trial court, in paragraph No. 9 of its findings, again failed to follow the undisputed evidence, as it found that the Defendant "negotiated" for the property in question in the summer of 1941. Absolutely no evidence appears any place in the transcript of testimony to support such a finding.

Thus, it must be concluded that the findings signed and filed by the trial court served only to confuse the real issues, and a false foundation was thereby laid for the conclusions of law and judgment which followed. On the other hand, the findings as proposed by the Plaintiff not only avoided useless repetition (see paragraphs 10 to 14 of the trial court's findings, Tr. 28 and 29), but set forth the ultimate facts produced at the trial. Consequently, these

findings should have been signed and filed by the trial court.

Having now disposed of Errors No. 1 to 7, inclusive, the foundation is laid for a discussion of the principles of law applicable to the fact situation which is before this Court.

ARGUMENT NO. 2.

DEFENDANT'S TAX TITLE IS DEFECTIVE

The true facts which should have been found by the trial court being that the fee title on February 29th, 1936, descended to Irene Hunter Chamberlain, and that she quit-claimed on November 21st, 1947, to the Plaintiff, the next logical step is to determine whether the tax title of the Defendant cuts off the rights of the Plaintiff's predecessor in interest, and therefore, the Plaintiff itself.

Briefly, it is the position of the Plaintiff that the treasurer's sale on December 22nd, 1930, was void; that the subsequent auditor's tax deed dated March 31st, 1936, also was void; and, consequently, that the Defendant received no interest in and to the property by virtue of the county deed to it dated November 7th, 1941.

The stipulated evidence shows (Tr. 69 and 70), and the trial court found (Finding No. 8, Tr. 27) that the two auditor's affidavits required by Sections 5982 and 6006, Compiled Laws of Utah 1917 (Sections 80-7-9 and 80-8-7, Utah Code Annotated 1943) were not attached to the assessment roll for the year 1930.

The Plaintiff respectfully refers this Court to the following cases: *Telonis v. Staley*, 104 Utah 537, 144 Pac. (2) 513; *Tree v. White*, 171 Pac. (2) 398; *Petterson v.*

Ogden City, 176 Pac. (2) 599; Equitable Life and Casualty Insurance Co. v. Schoewe, 105 Utah 569, 144 Pac. (2) 526. In all of these Utah cases, the lack of either of the two auditor's affidavits has been held to be fatal to the treasurer's sale and the auditor's tax deed. In the Equitable Life & Casualty Insurance Co. v. Schoewe case, supra, the court on page 527 stated: "We hold that both of these auditor's affidavits are essential, and that both must be executed and attached to the assessment roll By reason of the failure of the County Auditor to execute and attach his affidavits to the assessment roll as required by the statutes, the tax sale for the year 1936 was invalid, and the tax deed issued to Plaintiff and Appellant is likewise invalid."

Thus, in the instant case, the treasurer's sale of the property for the unpaid 1930 taxes, and the subsequent tax deed issued by the county auditor on March 31st, 1936, are invalid. Consequently, the conveyance by the county on November 7th, 1941, to the Defendant is void and of no effect.

The Plaintiff contends that the Defendant, when it received the county deed on November 7th, 1941, received absolutely no interest whatever in and to the property concerned. In Anson v. Ellison, 140 Pac. (2) 653, another Utah case, wherein the tax title was held to be void, and the holder thereof attempted to assert a lien for the taxes originally assessed and which he had paid, this Court said: "The lien which is given to the County is a right to resort to the property for the tax debt, but where the tax debt is paid by a sale to a private purchaser, the debt is paid and the right to resort to the property is gone. There is no right to resort to the property for a reimbursement of the purchase price paid to the County. The statute gives no such

right nor does the law. The principle of caveat emptor applies." Please see also *Sorensen v. Bills*, 70 Utah 509, 261 Pac. 450, and *Reeve v. Blatchley*, 106 Utah 259, 147 Pac. (2) 861, at page 863.

There is but one conclusion: Inasmuch as no interest passed to the Defendant by virtue of the county deed, the fee title remained in Irene Hunter Chamberlain McAlpine, who, on November 21st, 1947, quit-claimed all her interest to the Plaintiff. Thus, the trial court should have signed and filed paragraphs 1, 2 and 3 of Plaintiff's proposed conclusions of law (Tr. 20), as set out in Errors No. 12, 13 and 14, to the effect that the treasurer's sale and the tax deed were null and void; that no interest passed to the Defendant by the county deed; and that the Plaintiff is the owner of the fee title.

ARGUMENT NO. 3

PLAINTIFF'S ACTION IS NOT BARRED BY THE PROVISIONS OF SECTION 104-2-5, UTAH CODE ANNOTATED 1943.

The next logical step in the discussion of the respective rights of the Plaintiff and the Defendant in and to the property concerned, is to determine whether the rights of the Plaintiff have been cut off by any one of the several statutes of limitation relied upon by the Plaintiff. The first one considered herein is Section 104-2-5, Utah Code Annotated 1943, referred to in Defendant's Amendment to Amended Answer (Tr. 14), which the trial court ignored in its findings of fact and conclusions of law.

The Amendment to Amended Answer, as set up by the Defendant (Tr. 14), alleges in substance that neither the Plaintiff nor its predecessor in interest was seised or possessed of the property within seven years of the commencement of this action.

The Plaintiff relies upon the provisions of Section 104-2-7, Utah Code Annotated 1943, which provides, in substance, that the possession of real property is presumed to be in the one establishing a legal title to the property, and that the occupation of the same by any other person shall be deemed to have been under and in subordination to the legal title, unless it shall affirmatively appear that the property has been held and possessed adversely to the legal title for seven years before the commencement of the action.

In the instant case, Plaintiff's predecessor had legal title, as shown in Argument No. 2, to which the Plaintiff succeeded. The Defendant did not take possession until August, 1941. This action was filed on January 10th, 1948 (please see reverse side of Complaint, Tr. 2), which was six years and five months afterwards. Thus, the first seven months of the seven-year period prior to the bringing of this action must be credited to the Plaintiff's predecessor. Consequently, the provision of Section 104-2-5, Utah Code Annotated 1943, requiring possession within seven years, has been met, and the trial court should have so concluded as a matter of law, as proposed by Plaintiff in conclusion No. 4 (Tr. 20), and referred to in Error No. 15.

ARGUMENT NO. 4.

PLAINTIFF'S ACTION DOES NOT COME WITHIN THE PROVISIONS OF CHAPTER 19, PAGE 22, LAWS OF UTAH 1943, DESIGNATED AS SECTION 104-2-5.10, UTAH CODE ANNOTATED 1943.

For the purposes of this brief, Appellant appends names to the statutes concerned, as follows:

Section 80-10-66, Revised Statutes of Utah 1933, which provided the procedure to foreclose the county tax lien by an auditor's tax deed, shall be referred to as the "Auditor's Tax Deed Statute".

The Section known as 80-10-68 (6), Utah Code Annotated 1943, which became effective September 1st, 1939, and which replaced the Auditor's Tax Deed Statute as the means of foreclosing county tax liens, by providing that all properties not struck off to the public at a public, crying auction sale in May of each year, shall be struck off and sold to the county by the county auditor, shall be called the "Struck Off and Sold Statute".

Chapter 19, page 22, Laws of Utah 1943, designated as Section 104-2-5.10, Utah Code Annotated 1943, which provides a four-year limitation period on property struck off and sold to the county under the Struck off and Sold Statute (Section 80-10-68 (6)), shall be called the "Struck Off and Sold *Limitation* Statute."

The said Struck Off and Sold *Limitation* Statute (Section 104-2-5.10, Utah Code Annotated 1943) as amended by the provisions of Chapter 8, page 19, Laws of Utah 1947, whereby the limitation statute is extended to include

property conveyed to the county prior to September 1st, 1939, under the Auditor's Tax Deed Statute (Section 80-10-66, Revised Statutes of Utah 1933), shall be called the "Combination Limitation Statute."

In considering Plaintiff's Errors No. 8 and 16, it is contended by the Plaintiff that the Struck Off and Sold *Limitation* Statute, by its own provisions, excludes the property concerned in this action.

The Struck Off and Sold *Limitation* Statute (Chapter 19, page 22, Laws of Utah 1943, designated as Section 104-2-5.10, Utah Code Annotated 1943) reads as follows:

"No action for the recovery of real property struck off and sold to the county, as provided by section 80-10-68 (6), Utah Code Annotated 1943, or for the possession thereof shall be maintained and no defense or counter-claim to any action involving the recovery of property, or the defense of title to property, sold at such tax sale, or public or private sale, or for possession thereof, shall be set up or maintained, unless the same be brought or set up within four years from date on which the sale was held. *Provided, however,* that an action may be maintained or defense set up within four years from the effective date of this act with respect to real property sold prior to said effective date."

As will be observed, this Struck Off and Sold *Limitation* Statute, by its own provisions, is very limited in its scope. In the first place, it includes only property foreclosed under the provisions of the Struck Off and Sold Statute (Section 80-10-68 (6)). No reference is made to property conveyed to the county under the Auditor's Tax Deed Statute.

Secondly, this Struck Off and Sold *Limitation* Statute

does not pretend to protect the assignee of the county's interest in the original treasurer's sale, after he secures his tax deed. Neither does it protect the public who buys in at the crying auction sale under the provisions of the Struck Off and Sold Statute (Section 80-10-68 (4) and (5)). It only protects the county in regard to property which is struck off and sold to it.

There is another point about this statute that must not be overlooked, as it is vital in determining its application. The limitation period therein provided runs from the "date on which the *sale* was held". Also, an action or defense is permitted within four years from the effective date of the act "with respect to real property *sold* prior to said effective date."

The Court's attention is respectfully called to the following expressions in the Struck Off and Sold *Limitation* Statute: "sold at such tax sale"; "from the date on which the sale was held"; "real property sold prior to said effective date"; "real property struck off and sold to the county, as provided by section 80-10-68 (6), Utah Code Annotated 1943." These expressions are consistent, only, with one conclusion: The Struck Off and Sold *Limitation* Statute is a limitation statute on property "struck off and sold" to the county under the provisions of the Struck Off and Sold Statute, and on none other.

This conclusion becomes more certain when one considers the Struck Off and Sold Statute and the Auditor's Tax Deed Statute, which it replaced in 1939. Each of these two tax lien foreclosure statutes provides a distinct method of foreclosing the tax lien. The procedure in each is entire-

ly different from that of the other, not only in manner, but also in the timing of the requirements and events therein set forth.

In view of the foregoing, it would defy all reason to conclude that the Struck Off and Sold *Limitation* Statute, specifically referring only to property struck off and sold to the county under the provisions of the Struck Off and Sold Statute by section number, includes, also, property conveyed to the county under the Auditor's Tax Deed Statute.

In the instant case, the foreclosure of the alleged tax lien took place March 31st, 1936, under the Auditor's Tax Deed Statute (Section 80-10-66, Revised Statutes of Utah 1933), several years before the Struck Off and Sold Statute was enacted. The property never was *struck off and sold*. It necessarily follows that no date of *sale* can be established from which the limitation period can run. Only an invalid auditor's tax deed was executed as shown in Argument No. 2 herein.

As a result, there is but one final conclusion. The Plaintiff's action does not come within the provisions of Chapter 19, page 22, Laws of Utah 1943, designated as Section 104-2-5.10, Utah Code Annotated 1943, herein called the Struck Off and Sold *Limitation* Statute. Thus, the trial court was in error in concluding as a matter of law that this statute did bar Plaintiff's action (Error No. 8), but should have concluded otherwise (Error No. 16) as proposed by the Plaintiff (Tr. 20 and 21).

ARGUMENT NO. 5.

PLAINTIFF'S ACTION DOES NOT COME WITHIN THE PROVISIONS OF CHAPTER 19, PAGE 22, LAWS OF UTAH 1943, DESIGNATED AS SECTION 104-2-5.10, UTAH CODE ANNOTATED 1943, AS AMENDED BY CHAPTER 8, PAGE 19, LAWS OF UTAH 1947.

In proper sequence, the next issue to discuss is whether or not the property in the case at bar comes within the provisions of the Combination Limitation Statute, which is the original Struck Off and Sold *Limitation* Statute as amended by the 1947 Session Laws, which reads as follows:

"No action for the recovery of real property struck off and sold to the County under the provisions of Section 80-10-68 (6), Utah Code Annotated 1943, or conveyed to the County prior to September 1, 1939, by auditor's deed under the provisions of Section 80-10-66, Revised Statutes of Utah 1933, or for the possession thereof, shall be maintained, and no counterclaim for the recovery of such property or for the possession thereof shall be interposed unless the same be brought or interposed within four years from the date of such sale, or within four years from the date of the issuance of such auditor's deed."

Having already eliminated that part of the statute quoted above which refers to property "struck off and sold to the County" (Argument No. 4), we now pass on to consider whether the new provision relating to auditor's tax deeds applies to the property in question.

In the instant case, the purported treasurer's sale in 1930 and the auditor's tax deed predicated thereon, which

was executed March 31st, 1936, are invalid, as shown conclusively in Argument No. 2. Briefly, at the time the purported treasurer's sale was made, the county only had a lien for the unpaid taxes, which continued to the date of the auditor's tax deed. As concluded in Argument No. 2, the tax deed being invalid, the county still only had a lien for the unpaid taxes. In other words, the execution of the auditor's tax deed in 1936 to Salt Lake County made absolutely no change in the status of the property nor that of the parties concerned, and conveyed nothing whatsoever to the County, being a nullity. The supporting cases are set out in said Argument No. 2, and will not be repeated in this argument.

Consequently, the property in question, having never been conveyed to the County of Salt Lake by auditor's tax deed or otherwise, does not come within the express provisions of this Combination Limitation Statute. Thus, this statute does not apply to the case at bar, and the trial court should have so concluded as a matter of law, cited herein as Errors No. 9 and 16, and which was proposed by Plaintiff (Proposed conclusion No. 5, Tr. 20 and 21).

ARGUMENT NO. 6.

SECTION 104-2-6, AS AMENDED BY
CHAPTER 20, PAGE 22, LAWS OF UTAH
1943, DOES NOT BAR PLAINTIFF'S AC-
TION.

Section 104-2-6, as amended by Chapter 20, page 22, Laws of Utah 1943, reads as follows, that part of which was added by said amendment being shown in italics:

"No cause of action, or defense or counterclaim to an

action, founded upon the title to real property or to rents or profits out of the same, shall be effectual, unless it appears that the person prosecuting the action, or interposing the defense or counterclaim, or under whose title the action is prosecuted or defense or counterclaim is made, or the ancestor, predecessor or grantor of such person was seised or possessed of the property in question within seven years before the committing of the act in respect to which such action is prosecuted or defense or counterclaim made; *provided, however, that with respect to actions involving real property held under tax deed, the action must be brought or defense or counterclaim interposed within the time prescribed by section 104-2-5.10 of this code.*"

This act is so drawn, that "with respect to actions involving real property held under tax deed," defenses as well as actions themselves are barred. Thus, should this Court apply this section to Plaintiff's action as a bar, it should also apply it to the Defendant's defense as a bar, and it, in effect, becomes a nullity.

The amendment to Section 104-2-6 was enacted at the same session of the Legislature at which the Struck Off and Sold *Limitation* Statute was enacted. It is very evident that its purpose was to make special provision in Section 104-2-6 for property "held under tax deed", and in so doing, refers to the Struck Off and Sold *Limitation* Statute for the limitation period and the kind of tax properties to which it applies.

Thus, the property concerned is placed right back into the provisions of the Struck Off and Sold *Limitation* Statute and the Combination Limitation Statute. These matters have been discussed at length in Arguments No. 4 and 5 herein, and will not be repeated.

However, the conclusion is just the same. The property in this case was neither "struck off and sold to the County", nor was it conveyed to the county under auditor's tax deed. Consequently, neither does Section 104-2-6, as amended by Chapter 20, page 22, Laws of Utah 1943, apply to it, and the trial court should have so held (Error No. 10).

In Argument No. 7, it will be shown that the Combination Limitation Statute is unconstitutional, and, therefore, is void. This being the case, then the unconstitutionality of it will also affect the validity of Section 104-2-6, insofar as the same relates to property conveyed to the county by auditor's tax deed.

ARGUMENT NO. 7.

CHAPTER 19, PAGE 22, LAWS OF UTAH 1943, DESIGNATED AS SECTION 104-2-5.-10, UTAH CODE ANNOTATED 1943, AS AMENDED BY CHAPTER 8, PAGE 19, LAWS OF UTAH 1947, IS UNCONSTITUTIONAL, INsofar AS THE SAME RELATES TO PROPERTY CONVEYED TO THE COUNTY BY AUDITOR'S TAX DEED PRIOR TO SEPTEMBER 1st, 1939.

The original enactment of Section 104-2-5.10, herein referred to as the Struck Off and Sold *Limitation* Statute, passed by the 1943 Legislature as Chapter 19, page 22, provided a four-year limitation period for property struck off and sold to the county as provided by the Struck Off and Sold Statute, Section 80-10-68 (6), and for none

other (Argument No. 4). Prior to that time, one attempting to uphold a tax title was required to rely upon seven years of adverse possession. But this statute, insofar as property struck off and sold to the county was concerned, reduced the limitation period from seven years of adverse possession, to the expiration of a four-year period from the date the property was struck off and sold to the county, without any requirement of adverse possession. However, the Struck Off and Sold *Limitation* Statute, by its express terms, provided four years in which to bring actions on property sold prior to the effective date of the act.

But when the 1947 Legislature amended the Struck Off and Sold *Limitation* Statute by Chapter 8, page 19, Laws of Utah 1947, herein called the Combination Limitation Statute, it enlarged its provisions to include property conveyed to the county by auditor's tax deed prior to September 1st, 1939, under the provisions of Section 80-10-66, the Auditor's Tax Deed Statute. This had the effect of reducing the limitation period on actions involving this class of properties from seven years of adverse possession, to the expiration of a four-year period from the date of the execution of the auditor's tax deed, without any requirement of adverse possession. But unlike the Struck Off and Sold *Limitation* Statute, the Combination Limitation Statute did not provide any time in which to bring actions which had accrued prior to the effective date of the act. In fact, inasmuch as more than four years had elapsed between September 1st, 1939, after which no auditor's tax deeds were issued to the county under the Auditor's Tax Statute, and May 13th, 1947, the effective date of the Combination Limitation Statute, its effect was

to cut off completely and summarily, all actions on such property without exception.

It is herein conceded that the Legislature may reduce the limitation period on legal actions. But it is contended by the Plaintiff that in so doing, the Legislature must provide a reasonable time in which to file actions which theretofore had accrued, which the Utah Legislature failed to do in this instance, or the statute, insofar as it relates to such actions, is unconstitutional.

In support of this proposition, the Plaintiff cites 34 Am. Jur. pages 33 and 34, under the title "Limitations of Action", paragraph 28, "Shortening of Statutory Period," which reads in part as follows:

"Unless forbidden by the State Constitution, the legislature may constitutionally shorten periods of limitation fixed by previously existing statutes, and make the amendment applicable to existing causes of action, provided a reasonable time is left in which such actions may be commenced. The question as to what shall be considered such a reasonable time is for the determination of the legislature, and is in no sense a judicial question. Unless the time allowed is so manifestly insufficient that it becomes a denial of justice, the court will not interfere with the legislative discretion.

"... It is clear, however, that a statute which declares that a period already lapsed shall bar an action upon a contract is an arbitrary destruction of contractual rights, and therefore, unconstitutional, as would also be a statute which practically denied a party the right to sue on an existing cause of action, by shortening the period of limitations without leaving a reasonable time thereafter in which to bring the action."

These same principles are announced in 12 Am. Jur., Constitutional Law, paragraph 445, "Statutes of Limitation"; also in *Mulvey v. Boston*, 197 Mass. 178, 83 N. E. 402, and many other cases cited in the footnotes of both citations in Am. Jur., *supra*.

In *Chapman v. Douglas County*, 107 U. S. 348, 27 L. ed. 378, 2 S. Ct. 62, the court held that an existing right of action cannot be taken away by shortening the period of limitation to a time which has already run.

In *Gilbert v. Ackerman*, 139 N. Y. 118, 53 N. E. 753, 45 LRA 118, the court said (page 120):

"... The only restriction upon the legislature in the enactment of statutes of limitation is that a reasonable time be allowed for suits upon causes of action therefore existing. *Rexford v. Knight*, 11 N. Y. 308; *People v. Turner*, 117 N. Y. 227. The question of reasonableness, naturally and primarily, is with the legislature; and when the question is brought before the court the surrounding circumstances are regarded in determining whether the legislature, in prescribing a period of limitation, has erred to the prejudice of substantial rights. The claim against another is property; and if a statute of limitations, acting upon that right, deprives the claimant of reasonable time within which suit may be brought, it violates the constitutional provision that no person shall be deprived of property without due process of law."

This lack of providing a reasonable time in which to bring actions which had accrued before the effective date of a limitation statute, wherein the period is shortened, has been held, universally, to be a violation of the "due process" clause of the Federal Constitution, and of the constitutions of the various states. In fact, so universal is

this principle of law, that no case to the contrary can be found.

In the case at bar, our Legislature, in enacting the Combination Limitation Statute, not only failed to provide a reasonable time in which to file actions which had theretofore accrued, but declared a period already lapsed to bar such actions. In view of the authorities hereinabove cited, which adhere to a universal principle of constitutional law, this Combination Limitation Statute is in violation of the due process clause of the Constitution of the United States (Amendment XIV), and of the Constitution of the State of Utah (Article I, Section 7).

Thus, insofar as the said Combination Limitation Statute (Chapter 19, page 22, Laws of Utah, 1943, designated as Section 104-2-5.10, Utah Code Annotated 1943, as amended by Chapter 8, page 19, Laws of Utah 1947) relates to property conveyed to the county by auditor's tax deed prior to September 1st, 1939, it should have been declared unconstitutional by the trial court, as proposed by the Plaintiff in its conclusion No. 6 (Tr. 21). In failing so to do, the said trial court erred (Error No. 17).

ARGUMENT NO. 8.

DEFENDANT IS NOT ENTITLED TO AFFIRMATIVE RELIEF.

The Defendant, in its Amended Answer (Tr. 12), prays "that said plaintiff be hereafter forever enjoined and debarred from asserting any claim whatever in or to said property adverse to defendant." The Amended Answer (Tr. 10 to 12, inclusive) and the Amendment to the

Amended Answer (Tr. 14), do not contain a counterclaim nor a cross-complaint. The Defendant merely pleaded specially to each paragraph of the Complaint, and then set up an affirmative defense.

Plaintiff contends that inasmuch as no counterclaim was set up by the Defendant, and no fee paid to the county clerk therefor, the said Defendant was not entitled to a judgment barring and enjoining the Plaintiff from hereafter prosecuting or maintaining any action for the recovery of the property concerned (Tr. 31), and the trial court was in error in granting such affirmative relief (Error No. 22).

SUMMARY

By way of recapitulation, the Plaintiff summarizes the foregoing arguments as follows:

1. The trial court grossly disregarded undisputed, stipulated evidence, thereby laying a false foundation for conclusions of law and judgment, as follows:

(a) The trial court should have found that Irene Hunter Chamberlain McAlpine had the fee title, which she quit-claimed to the Plaintiff.

(b) The findings that a "treasurer's sale" took place and that the property was "sold" for the 1930 delinquent taxes, are not supported by the law and the evidence.

(c) The findings that the property was "struck off and sold" to the county, and that certain provisions of the Auditor's Tax Deed Statute were transferred to and incorporated into the Struck Off and Sold Statute, are not true.

(d) The finding that Defendant "purchased" the property from the county is not supported by the law and the evidence.

(e) No evidence exists in the transcript that Defendant "negotiated" for the property in the summer of 1941.

2. The treasurer's tax sale and the auditor's tax deed predicated thereon are void for lack of the two auditor's affidavits required by law; nothing was conveyed by the county to the Defendant by virtue of the county deed; and Plaintiff, therefore, is the owner of the fee title.

3. Plaintiff is not barred by Section 104-2-5, Utah Code Annotated 1943, as its predecessor in interest had possession during seven months of the seven-year period preceding the filing of this action.

4. Plaintiff's action is not barred by the provisions of the Struck Off and Sold *Limitation* Statute, for the reason that the property, having been the subject of an auditor's tax deed and having not been struck off and sold to the county, does not come within the provisions of said statute.

5. Plaintiff's action does not come within the provisions of the Combination Limitation Statute, for the reason that the tax deed was invalid, and no conveyance of the property to the county took place, as required by the provisions of said statute.

6. Plaintiff's action is not barred by the provisions of Section 104-2-6, as amended by Chapter 20, page 22, Laws of Utah 1943, for the reason that said statute refers to the provisions of the Struck Off and Sold *Limitation* Statute and the Combination Limitation Statute, which are shown herein not to apply, the latter being unconstitutional.

7. Plaintiff's action is not barred by the provisions of the Combination Limitation Statute, for the reason that said statute violates the due process clause of both State and Federal Constitutions, in not providing a period of time in which to file actions which accrued prior to its effective date.

8. The Defendant, having not pleaded a counter-claim, should not have been granted affirmative relief.

CONCLUSION

In view of the foregoing arguments, there is no alternative but to conclude that the Plaintiff succeeded to the fee title to the property concerned, and that said title of Plaintiff is not abrogated by any of the statutes of limitation relied upon by the Defendant. Thus, in the instant case, the Plaintiff and not the Defendant, should have prevailed and been granted judgment by the trial court quieting its title in and to this property.

Thus, it follows naturally, logically, and without further argument, that the trial court should have concluded as matters of law, in addition to those set out in the foregoing arguments, and should have rendered judgment, as follows:

The trial court should not have concluded and adjudged in favor of the Defendant "no cause of action" (Tr. 31), cited herein as Errors No. 11 and 21.

The trial court should have concluded and rendered judgment that Plaintiff is the owner of said property, and that Defendant has no right, title, estate, lien or interest whatever in the same, as proposed in Plaintiff's conclusion No. 7 and paragraph No. 1 of Plaintiff's proposed judg-

ment (Tr. 21 and 22), cited as Errors No. 18 and 24, and should have enjoined said Defendant from asserting any claim to the same adverse to the Plaintiff (Plaintiff's proposed conclusion No. 8, and proposed judgment, paragraph No. 2, Tr. 21 and 22), cited herein as Errors No. 19 and 25.

The trial court should have concluded and rendered judgment awarding costs to the Plaintiff, as proposed by Plaintiff's conclusion No. 9, and judgment paragraph No. 3, and not to the Defendant (Tr. 21, 22 and 32), and cited herein as Errors No. 20, 23 and 26.

Because the findings of fact, conclusions of law and judgment as signed by the trial court are contrary to the facts and the law, the said court should have granted Plaintiff's motion for a new trial (Tr. 34 and 35), cited as Error No. 27.

For the reasons set forth herein, the Plaintiff and Appellant contends that the judgment of the trial court as made and entered, together with the findings of fact and conclusions of law upon which the same is predicated, are not supported by the stipulated and undisputed evidence, and are contrary to law.

Respectfully submitted,

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