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Ray D. Williams, A. U. Miner, Mima Thomas, Ila Thomas Lambert, P. P. Thomas, Max Thomas, Joseph Hanson, Roland J. Hanson and Roy Hanson, Elberta Land and Water Company v. Oren E. Barney and Thelma Barney, The Bank of Spanish Fork, and Utah County : Brief of Appellants

Utah Supreme Court

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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RAY D. WILLIAMS, A. U. MINER,  
MIMA THOMAS, ILA THOMAS  
LAMBERT, P. P. THOMAS,  
MAX THOMAS, JOSEPH HAN-  
SON, ROLAND J. HANSON and  
ROY HANSON, partners under the  
name of ELBERTA LAND AND  
WATER COMPANY,

*Plaintiffs and Appellants*

vs.

OREN E. BARNEY and THELMA  
BARNEY, his wife. THE BANK  
OF SPANISH FORK, a corpora-  
tion; and UTAH COUNTY, a body  
politic and corporate of the State  
of UTAH,

*Defendants and Respondents.*

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**BRIEF OF APPELLANTS**

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**FILED**

**15 1949**

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**CLERK, SUPREME COURT, UTAH**

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of UTAH,

*Defendants and Respondents.*

Case  
No. 7336

## BRIEF OF PLAINTIFFS AND APPELLANTS

## STATEMENT OF FACTS

The plaintiffs are partners doing business as the  
Elberta Land and Water Company succeeding a former

partnership of the same name which had included Charles T. Dixon and A. T. Money but did not include plaintiffs Mima Thomas and Roy Hanson. Plaintiffs sue to quiet title to certain lands situated in Utah County. The answering defendants Oren E. Barney and Thelma Barney, his wife, by their answer disclaim as to all of the property except the following:

East one-half of the East one-half and the Northwest Quarter of the Northeast Quarter of Section 6, Township 11 South, Range 1 West, Salt Lake Meridian.

On the land described above, the answering defendants denied the claims of title and possession or right of possession of the plaintiffs and counterclaim in two causes of action to have title quieted in said answering defendants.

The plaintiffs received their title from the following sources:

a. From Lewis Thompson and wife to Utah Valley Land and Water Company by deed (plaintiffs' Exhibit "C") dated February 26, 1920 (no question was raised as to the right of the grantors in Exhibit "C" to pass good title and no question with regard to the title antedating the said Exhibit was presented).

b. Certificate of Sale under foreclosure by the First Security Bank of Provo (plaintiffs' Exhibit "D") against Utah Valley Land and Water Company, et al, dated November 21, 1933.

c. Assignment of the foregoing certificate by the bank to the Colorado Development Company, a corporation (plaintiffs' Exhibit "E") dated August 3, 1934.

d. Sheriff's Deed to Colorado Development Company, a corporation, (plaintiffs' Exhibit "F") dated August 16, 1934.

e. Quitclaim Deed (plaintiffs' Exhibit "G") from Colorado Development Company, a corporation, to O. A. Penrod dated November 27, 1937.

f. Quitclaim Deed (plaintiffs' Exhibit "H") from O. A. Penrod and wife to the Commercial Bank of Spanish Fork dated January 11, 1938, and recorded on December 29, 1944, in the office of the County Recorder of Utah County, Utah.

g. Quitclaim Deed (plaintiffs' Exhibit "I") from P. P. Thomas and Mima Thomas, his wife, Joseph Hanson, widower, and the Commercial Bank of Spanish Fork to Elberta Land and Water Company, a partnership, the plaintiff herein, dated March 29, 1945, and recorded on March 29, 1945, in the office of the County Recorder of Utah County, Utah.

The answering defendants Oren E. Barney and Thelma Barney claim the land by virtue of Auditor's Tax Deed (defendant's Exhibit 3) and quitclaim deeds dated November 3, 1941 from Utah County, (defendants' Exhibits 1 and 2), which deeds the defendants admitted were invalid because of the failure to advertise the May sale

for the required twenty-eight days and the absence of the affidavit from the tax rolls. (T. 77-78).

The defendants pleaded two further affirmative defenses and counter-claims which they maintained prevented the plaintiffs from asserting title as against the defendant and which they claimed would require the court to quiet title in defendants.

The first cause of counterclaim alleges that the lands in issue were conveyed to O. A. Penrod by the Colorado Development Company by quit claim deed upon Penrod's payment to it of \$2500, which sum, or the greater part thereof, was supplied to him by the Commercial Bank of Spanish Fork by and through P. P. Thomas, one of the plaintiffs, and that on or about December 8, 1937, P. P. Thomas and O. A. Penrod advised the users of water of the old Utah Valley Land & Water Company, which included these defendants, that if they, the users, would repay the \$2500 advanced by the Commercial Bank of Spanish Fork, that they could have the property purchased by Penrod from the Colorado Development Company, and that assessments were levied against the water users from which the bank was paid in full, and thereupon the defendants, with the other water users, became entitled to the purchases made by Penrod including the described lands. That at that time the lands had been sold to Utah County for taxes, and that thereafter O. A. Penrod purchased some of the same lands from Utah County, and that under these facts, the plaintiffs now have no equitable right to claim the lands in issue.

The second cause of counterclaim sets up that prior to the purchase of the lands from the Colorado Development Company O. A. Penrod was a member of a committee of residents of Elberta, Utah, and surrounding territory, to investigate the possibilities of acquiring the water rights of the Utah Valley Land & Water Company, and the land of the Colorado Development Company, which was formerly irrigated by such water, and as such obtained an option to purchase, and thereafter did acquire all of the water rights of the Utah Valley Land & Water Company and certain of the lands held by the Colorado Development Company, all of which had previously been sold to Utah County for delinquent taxes. Some of the land purchased by Penrod had not previously been, and no water could be supplied from the system as it was constructed. That Penrod, with the financial help of P. P. Thomas, as president of the Commercial Bank of Spanish Fork, purchased from Utah County much of the land that had been formerly irrigated by the system conveyed to Penrod by the Utah Valley Land & Water Company, and that thereafter, on or about June 3, 1940, while he was still record owner of the lands in question here, and at a meeting with the County Commission of Utah County, Penrod informed a committee of the land owners that he and his associates had bought all the land they wanted from Utah County and that the people living in and about Elberta could go ahead and buy from the county the balance of the land that had been sold to him by the Colorado Development Company and which had been sold to Utah County for delinquent taxes. That in



reliance upon the statement and representation of Penrod, defendants purchased the land in issue here under a contract from the county, and upon completion of payment received the county's deeds, and that now the plaintiffs as remote grantees from Penrod are estopped from asserting any claim to the property, or that the tax procedure under which defendants purchased was invalid.

The plaintiffs presented their documentary evidence through exhibits by stipulations of the parties and then rested. The defendants then put on evidence both by documents and oral testimony. At the conclusion of defendants' testimony and after defendants rested, plaintiffs moved the court for an order dismissing the affirmative answers and counter-claims of the defendants and for judgment on the complaint (T. 75-76) which motion the court denied.

The court found that the plaintiffs were not bonafide purchasers without notice and for value of the land in issue and were estopped to set up the claim that the quit-claim deeds from Utah County conveying the land to the defendants are invalid and that the plaintiffs and each of them are estopped to claim the land involved in this action. The court thereupon entered its decree in favor of the defendants and against the plaintiffs and decreed that the defendants Oren E. Barney and Thelma Barney, his wife, are the owners of the property in controversy and quieting title in said property in said defendants. Defendants were awarded costs in the action.

From the judgment of the District Court plaintiffs appeal.

### ASSIGNMENT OF ERRORS

1. The court erred in denying plaintiffs' motion for a dismissal of defendants' counter-claims and for judgment in favor of plaintiffs.

2. The Findings of Fact (R. 51-55) are not supported by the evidence.

3. The Findings of Fact (R. 51-55) do not support the Conclusions of Law (R. 55-56).

4. The Findings of Fact and Conclusions of Law are insufficient to support the Decree (R. 57-58).

5. The court erred in admitting hearsay testimony and other inadmissible evidence on the part of the defendants over objections of the plaintiffs.

### POINTS FOR ARGUMENT

It is believed that the errors assigned can be best consolidated and covered in argument under the following headings:

#### I.

*The plaintiffs evidence established in them a good title and there was no competent evidence sufficient to defeat such title.*

(a) *The evidence permitted to be introduced by defendants to attack plaintiffs' title was inadmissible and*

*incompetent under the statute of frauds, Sections 33-5-1 and 33-5-3, Utah Code Annotated, 1943, and was further inadmissible as being hearsay.*

## II.

*The findings of fact are not supported by the evidence.*

## III.

*The findings of fact do not support the conclusions of Law or the Decree.*

## III. (a)

*There was no competent evidence sufficient to raise an estoppel in defendants' favor and to thus prevent plaintiffs from asserting claim to the subject property or to estop plaintiffs from attacking the validity of defendants' title.*

## ARGUMENT

### 1.

*The plaintiffs evidence established in them a good title and there was no competent evidence sufficient to defeat such title.*

There can be no doubt, nor have defendants ever questioned, that the instruments introduced by plaintiffs in support of plaintiffs' title were ample and sufficient to establish title in them unless for some reason they were estopped from asserting their title. This was recognized

by the court in its memorandum opinion. (Record 38). The record and plaintiffs' exhibits "C," "D," "E," "F," "G," "H," and "I" speak for themselves and clearly establish in the plaintiffs' a good title to the property. It is believed that no argument need be made with regard to this particular phase of the case, except as covered under other headings herein.

### I (a).

*The evidence permitted to be introduced by the defendants to attack plaintiffs' title was inadmissible and incompetent under the statute of frauds, Sections 33-5-1 and 33-5-3, Utah Code Annotated, 1943, and was further inadmissible as being hearsay.*

During the course of the trial the defendants were permitted to introduce evidence and testimony at various times with regard to conversations had by the defendants with persons other than the plaintiffs, or any of them, and outside the presence of the plaintiffs, or any of them. (T. 37-39, 47, 65).

Testimony was permitted to be given by Valeria Bauer that at a meeting of county commissioners on June 3, 1940, attended by several persons, not including any party to this action, O. A. Penrod stated that he and his partners had all the land they now desired. (T. 37-39). Excerpts from the minutes of such meeting were also permitted to be introduced. (T. 47). Earl Barney (the father of the defendant Oren E. Barney) was present at such meeting and was permitted to testify concerning

conversations and happenings there. (T. 50). Later the defendant Oren E. Barney was permitted to testify concerning statements his father made to him as to conversations at said meeting. (T. 65-67).

As above stated, at no time was any party to this action present at any such meeting or when any such conversations allegedly took place. Clearly such testimony was inadmissible as hearsay and cannot in any way bind these plaintiffs. True in several instances in connection with the admission of such testimony, and in fact other very questionable testimony, the court indicated that the admissibility of such testimony was questionable but stated that inasmuch as the case was being tried before a judge rather than before a jury it was deemed such testimony would be received "pro forma" for what it was worth and if he did not later think it was admissible or competent or relevant he would disregard it. In that connection, while we appreciate the fact that courts are often more lenient with the admissibility of evidence in a matter being tried before a judge without a jury, it seems to us that in this case such procedure was carried far beyond the realms of legal propriety. We submit that judges are only human and when a judge, regardless of his honesty or integrity or his confidence in his own ability to separate the wheat from the chaff, permits indiscriminately the admissibility of all kinds of testimony, whether relevant or otherwise but which may, if considered, be persuasive, that such judge no matter how he may try does not and cannot erase from his mind the effect of such testimony; and where, as here, such an

abundance of testimony was admitted in such a way it seems to us that it was prejudicial error to do so.

During the course of the trial testimony was permitted to be introduced concerning promises allegedly made by one O. A. Penrod, the remote grantor of the plaintiffs, at a meeting attended by a group of residents of Elberta and vicinity, (of which group the defendants were not members) to the effect that if certain payments were made by the group of water users attending such meeting that such water users could have the property purchased by Penrod from the Colorado Development Company (which included the subject property). It was alleged that P. P. Thomas was present at such meeting and acquiesced in the statements of Penrod, P. P. Thomas then and there being president of the Commercial Bank of Spanish Fork, which had advanced money with which Penrod purchased said property. Under any theory if such promises were made they were nothing more than verbal promises to transfer an interest in real property in the event certain things were done by the water users who attended the meeting. Clearly those oral statements and agreements, if in fact made, fall within the statute of frauds and were not admissible or competent to establish any agreement or understanding with regard to the transfer or promises to transfer an interest in the real property in question. (*See Sections 33-5-1 and 33-5-3, Utah Code Annotated, 1943.*)

## II.

*The findings of fact are not supported by the evidence.*

Under Finding No. 15 the court, in addition to other things, found: "That O. A. Penrod aided defendants in making their selection of the land purchased by defendants from Utah County." There is not one word of evidence in the entire record to support this finding. In fact there is no evidence that the defendants ever talked with or had any dealings with O. A. Penrod as to this property. All of the evidence is to the contrary. Neither of the defendants were present at the meeting with the commissioners on June 3, 1940. Perhaps the court became confused because there was a man named "Barney" who was present at that meeting but that was the father of the defendant, namely: Earl Barney. (T. 37-39 and 50). The defendant Oren Barney's testimony is to the effect that his wife and father accompanied him to the county commission's office when he made his selection of the land which he purchased (T. 64) and nowhere is it indicated that Penrod or any of the defendants had anything to do with such selection or were present when it was made.

Under Finding of Fact No. 17 the court found:

"That the plaintiffs had notice of defendants' claim of title through P. P. Thomas, Max Thomas and Joseph Hanson."

There is absolutely nothing in the evidence to support such a finding. Nowhere can any evidence be found which

would show that P. P. Thomas or Max Thomas or Joseph Hanson had at any time prior to the time the property was transferred to plaintiffs or even at any time prior to the commencement of the action known of the representations and actions which are attributable to O. A. Penrod on June 3, 1940. No one ever testified that Penrod or anyone advised the plaintiffs, or any of them, or anyone acting for them as to such statements or activities of Penrod nor is there any evidence whatsoever to show that at the time the plaintiffs or their immediate grantors received the deed to the property in question that plaintiffs had any notice at all of the claim of the defendants.

Under Finding No. 18 the court found as follows:

“That P. P. Thomas had knowledge of the facts constituting equitable estoppel in favor of defendants at the time the Commercial Bank of Spanish Fork, P. P. Thomas and wife and Joseph Hanson conveyed the property in issue to plaintiff as partners.”

As will be hereinafter pointed out it is our contention that Finding No. 18 is not in any respect a finding of fact but is entirely a conclusion of law. This matter, however, will be covered in another part of the argument. In connection with such finding, however, it should be stated that there is absolutely no competent evidence to support the finding made. Because of the ambiguity of the finding as to just what facts “constituting an equitable estoppel” are referred to, it is difficult to meet



this matter squarely. However, for purposes of this part of the argument, we must assume that the court referred to the representations and statements attributed to O. A. Penrod and to his alleged activities in connection therewith on June 3, 1940 when it is contended that Penrod stated that he and his "partners" or "workers" had purchased all the land they wanted. With regard to such matter the record is absolutely void of any evidence whatsoever indicating that P. P. Thomas knew of the supposed representations or statements or conduct of Penrod. If Penrod in fact made such statements there is nothing in the record to show who was referred to by "his partners" or "workers" or to show that any of the defendants were included or intended by him to be included therein. Even if Penrod had expressly mentioned the plaintiffs or any of them as being his "partners" or "workers," such declaration by him would not be competent to establish such relationship. There is no evidence that P. P. Thomas or any of the plaintiffs or their immediate grantors acquiesced in or joined Penrod in connection with such statements or agreed or intended to be bound by such statements or actions by Penrod. There is nothing to show that dealings previously had by P. P. Thomas and Thomas' associates with Penrod were such that Penrod represented them or was in any way in a position to speak for them or that Penrod was bound to or that he did convey to Thomas or his associates any information as to the representations which he may have made to the defendants, and certainly there is nothing to show that any of the defendants were "partners" or "workers" of Penrod.

Even, therefore, if P. P. Thomas knew of these representations at the time of the transfer of the property to the plaintiffs such representations were in no way binding upon Thomas or any of the plaintiffs. They were all made after title had been transferred from Penrod and he was in no position to speak for or bind any person having title to the property and particularly in no position to bind the plaintiffs or their immediate grantors.

Under Finding No. 19 the court finds:

“That plaintiffs are not bona fide purchasers without notice and for value of the land in issue and are estopped to set up the claim that the quit claim deeds from Utah County, conveying the land to defendants, are not valid against plaintiffs.”

With regard to such finding and particularly the finding that the plaintiffs were not purchasers for value it is interesting to note the statement of the court in his memorandum decision (T. 47) to the effect that: “The evidence disclosing a recited consideration merely, with no value paid, the plaintiffs who may not have had notice of the defendants’ claim are still not protected against the equity.” Where in the evidence is there anything from which it can be concluded that “there was no value paid”? The deeds to the plaintiffs and their predecessors all recite a consideration. There is nothing to show that such consideration was not in fact paid and the rule certainly is that where a consideration is recited it is presumed to have been paid. The defendants did not introduce any evidence to refute such presumption and we

must presume that a valuable consideration was paid as is recited in the deeds. (16 Am. Juris, p. 653).

It appears that the court concluded that the plaintiffs were not purchasers for value merely because their deed and that of their immediate grantor recited a consideration of "One Dollar and Other Good and Valuable Considerations." (R. 47-48, 55). There was no testimony that value was not in fact paid. The claim of the defendants that they are entitled to rely upon the representations allegedly made by Penrod and others was that they had acquired property in 1943 (Ex. 10) from James Mikkelsen, who was one of the persons present at the meeting of the County Commissioners on June 3, 1940. It is interesting to note that this deed (Ex. 10) quotes a consideration of "One Dollar and other valuable consideration." It is difficult to understand why the one dollar and other valuable considerations recited in that deed should be considered as a valuable consideration which would establish such documents as one upon which the defendants could rely and the one dollar and other valuable considerations recited in the deed under which the plaintiffs claim should be considered by the court, without any evidence whatsoever, to be not a valuable consideration. With regard to the question of notice of the claims of the defendants, we have referred to that hereinabove.

## III.

*The findings of fact do not support the conclusions of Law or the Decree.*

The court failed to make findings on all of the material issues involved in this case. By the complaint of the plaintiffs it was alleged that: "The plaintiffs as such partnership are the owners in fee simple of the subject property." The court made no finding whatsoever on the question of the plaintiffs' ownership of the property. The only finding made was with regard to a claimed estoppel as against the plaintiffs in asserting title against the defendants. It is our contention that such is not a sufficient finding upon the material issue as to plaintiffs' ownership.

This court has held in many cases that in a case tried to the court without a jury the court must find on every issue, either affirmatively or negatively as the evidence may be, and thus give the defeated party an opportunity to assail the finding as not being supported by the evidence and that a failure to find on any material issue is reversible error. *Thomas vs Clayton Piano Company*, 47 Ut. 191; 151 Pac. 543. *Mendelson vs. Roland*, 66 Ut. 487: 243 Pac. 798. *Prows vs. Hawley*, 72 Ut. 444; 271 Pac. 31. *West vs. Standard Fuel Co.*, 81 Ut. 300; 17 Pac. (2) 292.

Finding No. 15 (T. 54) of the court referred to the purported statements and representations of O. A. Penrod on June 3, 1940 when a committee of residents of Elberta and vicinity waited upon the Utah County Com-

missioners, such statements purporting to have been to the effect that Penrod and his associates had bought all the lands from Utah County that they wanted and that the people living in and about Elberta could go ahead and buy the balance of the land that had been sold to Penrod by the Colorado Development Company and which had been sold to Utah County for non-payment of taxes. There is no evidence whatsoever that Penrod was associated with the plaintiffs or their immediate grantors at the time of the making of the statements attributed to him under date of June 3, 1940 and no evidence whatsoever that the plaintiffs or any of them or their grantors knew of such statements or in any way acquiesced or joined therein. Even if they knew of the statements having been made there is nothing to indicate that by "his associates" Penrod referred to the plaintiffs or any of them and even if they knew of such statements they would have had no reason to believe that Penrod intended to refer to them.

As a matter of fact it was never testified that Penrod ever referred to his "associates" as the court found. What he allegedly said was that he and his "partners, or workers" had all the land they now desire. (T. 39). Certainly there was nothing to tie any plaintiff in as a "partner" or "worker" of Penrod.

With regard to Finding No. 16 there is no evidence whatsoever to support such a finding. Nowhere can it be found from the evidence that Penrod dealt with P. P. Thomas, Max Thomas or Joseph Hanson or any of them

or any of the plaintiffs with regard to the land in question subsequent to the time Penrod deeded the land to plaintiffs' immediate grantor on January 11, 1938. (Exhibit "H"). Even if there were anything to indicate that P. P. Thomas, Max Thomas and Joseph Hanson were dealing with Penrod and the people of Elberta and with Utah County in respect to these lands (which evidence is not in the record) it could not be concluded therefrom that Penrod was a partner of or so associated with the plaintiffs or any of them so that Penrod's statements or activities would bind the plaintiffs or put them on notice of anything.

Even if perchance there were some evidence in the record that the plaintiffs at the time of taking the title had through some source learned that the defendants' claimed an interest in the land what difference would this make where they also had information that such claims were invalid and had no legal force? They owed no obligation to defendants to protect defendants' interests. So far as the record shows they paid a valuable consideration for the land and if the defendants contended that there was no valuable consideration paid the burden was on the defendants to show this. No evidence was introduced or offered for such purpose.

In regard to Finding No. 18 quoted above on page 13 such certainly is not a finding of *fact* which might properly support any conclusion of law or decree. No. 18 is purely a conclusion of law. What "evidence constituting equitable estoppel" does the court refer to? It is a well

recognized principle of law that findings must be sufficiently specific and certain as to ascertain just what is found and decided, without resorting to the evidence or the pleadings. *Doe vs. Doe*, 48 Ut. 200; 158 Pac. 781; *Prows vs. Hawley*, 72 Ut. 444, 450; 271 Pac. 31. Certainly Finding No. 18 does not meet such requirement. It would be impossible to make any conclusion of law from the broad general statement referred to in Finding No. 18 because we would have to go to the transcript of the evidence to try to determine what facts constituting equitable estoppel were referred to by the court and in that connection we would have no way of determining which evidence and which facts the court referred to thereby.

### III. (a)

*There was no competent evidence sufficient to raise an estoppel in defendants' favor and to thus prevent plaintiffs from asserting claim to the subject property or to estop plaintiffs from attacking the validity of defendants' title.*

The courts decision and judgment in favor of the defendants was based entirely upon the conclusion of the court that the plaintiffs were estopped to claim the land or, to put it differently, that there were facts constituting an equitable estoppel in favor of the defendants so as to prohibit the plaintiffs from asserting the validity of defendants' tax title. The question of estoppel was set up by the defendants in two causes of counterclaim. The

first such counterclaim was to the effect that Penrod bought the lands in question from the Colorado Development Company; that the Commercial Bank of Spanish Fork, by P. P. Thomas, its president, advanced the purchase money; that both agreed to convey to the users of water the lands purchased upon the water users payment of \$2500.00 which payment the water users made and as some of such water users the defendants became entitled to the conveyance. If we conclude that there was sufficient evidence to support such contention then in any event the most we have is a verbal promise by Penrod and the Commercial Bank through its president that the defendants would be entitled to a conveyance of real property. In the first place any evidence with regard to such matter was inadmissible and should not have been permitted because it was in contravention of the statute of frauds. The verbal promise, to convey the land could not be enforced by reason of the statute of frauds, but in any event the most that ever was alleged or proven was that there was an unfulfilled promise to make a conveyance of real property. None of the elements of equitable estoppel were involved in connection with such matter and such principle could not be invoked with regard thereto.

With regard to the other cause of counterclaim of the defendants the only thing of any substance whatsoever and the thing upon which the court seems to base its determination of equitable estoppel was the representations allegedly made by O. A. Penrod on June 3, 1940 when a committee of residents of the Elberta vicinity



waited upon the Utah County Commission and it was asserted that Penrod made the statement that he and his associates had bought all of the land from Utah County that they wanted and that the people living in and about Elberta could go ahead and buy from the county the balance of the land that had been sold to Penrod by the Colorado Development Company and which had been sold to Utah County for non-payment of taxes. The actual testimony with regard to what Penrod is alleged to have said at the meeting appears on page 39 of the transcript wherein Mrs. Valeria Bauer testified: "He stated to me that he and his partners, or workers, I do not know just how he stated it, that was working with him had all the land that they now desire; that all those with water rights had been taken care of and if the people so desire they could have all that remained." Certainly there was nothing to show that any of the plaintiffs nor the Commercial Bank was "partner" or "worker" of Penrod or was "working with" Penrod.

In this connection it should be borne in mind that the property in controversy was transferred from Penrod to the Commercial Bank of Spanish Fork by quit claim deed dated January 11, 1938. Hence at the time of the alleged representations and activities of Penrod on June 3, 1940 he did not have legal title to the property in controversy. The doctrine of promissory estoppel, according to all of the authorities, is applied only in cases of promises or representations as to an intended abandonment of an existing right. (19*Am. Jur.* 658). This court has recognized the limitation of application of this

doctrine in the case of *Elliott vs. Whitmore*, 23 Ut. 342 at 354 as follows:

“\* \* \* Even taking these conversations in the most favorable view for appellant, there was absolutely no statement upon the part of the defendants of an intended abandonment of an existing right \* \* \*. It has frequently been held that an estoppel will not arise simply from a breach of promise as to future conduct, or from a mere disappointment of expectations. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right.”

With this rule of law in mind let us examine the facts as established by the evidence most favorable to the defendants and appellees. The plaintiffs' immediate grantor received the property in question by quit claim deed from O. A. Penrod and wife to the Commercial Bank of Spanish Fork, said deed being dated the 11th day of January, 1938. (Exhibit “H”). Subsequent to that time, so far as the record shows, Penrod never had any interest in the property in question. No where in the record is there anything to show, or from which an inference might be drawn, that the Commercial Bank of Spanish Fork or for that matter any of the plaintiffs subsequent to such transfer had any dealing with Penrod in connection with any project relating to the ownership of this property.

Inasmuch as Penrod had no interest or title in the land in question, in so far as anything in the record appears, and so far as appears had no authority to speak

for the plaintiffs or plaintiffs' immediate grantor, it certainly could not be said that Penrod, by his statements and representations and actions at the meeting on June 3, 1940 intended the abandonment of an existing right. Penrod had no existing right. He knew he had no existing right in so far as the lands in question are concerned because he and his wife had transferred any interest which he previously had by deed dated the 11th day of January, 1938, more than two years previous to the time of said meeting. We, of course, cannot speculate as to what Penrod's reasons might have been for making the statements attributed to him. But certainly the plaintiffs are not bound by anything which Penrod did on that date. This is not a situation where the acts of the grantor are binding upon the grantee in connection with representations concerning the title to real property. There certainly is no rule of law which prescribes that a grantee shall be bound by the activities or representations of his grantor made after the time when the grantor has transferred title out of himself. From the time title was transferred out of Penrod his right to make representations of any kind with regard to the title to the property in question ceased and any representations which he chose to make thereafter would have no binding force or effect as against his grantee or the successors of such grantee.

There having been "no existing right" in Penrod at the time he made the statements and representations on June 3, 1940 and there being no evidence whatsoever to indicate that the plaintiffs or their grantor had author-

ized Penrod to speak for them or acquiesced in his having done so, there certainly could not have been present the necessary elements to give rise to a promissory estoppel. In the first place there could not have been on the part of Penrod an intention to abandon an existing right in connection with any representations made, and even if there had been, such could not have extended to and bound the plaintiffs or plaintiffs' immediate grantor.

The statement attributable to Penrod at the meeting of June 3, 1940 and concerning which the witness Valeria Bauer (T. 39) and the witness Earl Barney (T. 50) testified to was objected to as hearsay. Not only were none of the plaintiffs present at the meeting when such statement was allegedly made but neither were the defendants Oren E. or Thelma Barney present. The defendants, the Barneys, were not residents of nor were they property owners in the vicinity of Elberta at or during any of the time the representations were allegedly made or activities carried on which they claim constituted an estoppel as against the plaintiffs (T. 64). They did not acquire their first property in that vicinity until November 13, 1940. (T. 50 and Ex. 9). Certainly none of the representations referred to were made to the defendants and they had no right or reason to rely upon the same.

Even if there were representations made which might otherwise constitute an equitable estoppel (which was not established), nevertheless the defendants could not take advantage of such representations if they were not the persons to whom such representations were made,

or at least of the class to which the representations were made. In this case they were neither.

As stated in 19 American Juris, page 645: "An admission or statement will not work an estoppel if it was addressed to and designed solely for the information of another and was not intended to influence the conduct of the person who claims the estoppel." See also *Kinney vs. Whiton*, 44 Conn. 262, and *Bell vs. The Maccabees* 82 S. W. 2nd 229.

The only evidence at all that the defendants, the Barneys, ever knew of any of the alleged representations upon which they rely for an estoppel was the inadmissible hearsay upon hearsay which was brought out from the defendant, Oren E. Barney, while he was testifying as a witness. At page 65 of the transcript the following appears:

"Q. Did you have any conversation with your father with respect to this land?

A. I did.

Q. Prior to your making the purchase?

A. Right.

Q. Did he make any statement to you with respect to any statement that had previously been made by Mr. Penrod to himself or any group?

Mr. Anderson: Just a moment. We object to that as calling for a conclusion of the witness. The Court: That objection is overruled.

Q. You may answer.

A. He did.

Q. What did he say?

Mr. Anderson: Just a moment. Wish our general objection to go to this; and further, that it is hearsay \* \* \*

“The Court: Yes. You may proceed.

Q. (By Mr. Worthen) Had you had correspondence with your father with respect to this land?

A. Not this particular piece.

Q. But I mean with respect to the land out there.

A. The land out there, yes. He said it was up for sale the county had it for sale for county taxes. And so I sent a money order up to him with some money to purchase some of this property. That the piece I had specifically in mind, he said at the time that Penrod wouldn't turn loose of it for some reason, the piece of ground I wanted and that he was holding the money for. So when we come up in September we got in the car and come over here to the county auditor, don't recall whether recorder or auditor, and went through the records there. Got out the records of land for sale that the county had for sale out in that district, and they had this ground here up for sale at that time. So I met with the county commissioners, Mr. Clark and Mr. Johnson and Mr. Murdock, and told them I would like to buy that piece of property. And they wanted to know what offer I would make, and I asked them what they wanted for the ground, and they said a dollar an acre. And I told them all right, I would like to purchase

it. So I made application to purchase the ground and paid my down payment on the property at that time."

It will be observed that the witness was directly asked and over objection permitted to answer the question as to whether or not his father made any statements to him with respect to statements previously made by Mr. Penrod. The witness in answering such question never at any time stated what, if anything, he had been told that Penrod had done or said with regard to the land. The quoted excerpts from the testimony is the only thing in the record which would indicate any knowledge on the part of the defendants, the Barneys, of this alleged representation. There is nothing anywhere to show that the Barneys ever knew of the representations and certainly there is nothing to show that at the time they purchased the tax titles from Utah County they ever knew of such alleged representations or if they did that they relied upon said representations or if they did so rely that they thereupon changed their position to their detriment. With this state of the record we would have to resort to the highest degree of speculation to conclude that the defendants, the Barneys, ever knew of the representations or relied thereon in connection with their purchase of the property. The whole truth of the matter is that they did not so rely but merely purchased tax titles in the regular course of dealing believing that they were complying with the statutes and were buying good tax titles. When they later learned that the tax titles were defective defendants had to search for and if neces-

sary invent some means of endeavoring to defeat the good and valid title of the plaintiffs. It is obvious from the record that at the time the defendants, the Barneys, purchased the tax titles from Utah County they did not know of nor did they have in mind any representations with regard to such property, or affecting the same, which might have been made by Penrod or by any plaintiff or any one authorized to speak for the plaintiffs.

Furthermore the record is absolutely void of evidence to indicate that any person under whom the defendants, the Barneys, claim any rights in connection with this property ever relied upon any representations of the plaintiffs, or anyone authorized to act for them and upon such reliance changed their position to their detriment.

In fact the defendants have failed entirely to establish any of the necessary elements to constitute an equitable estoppel as against the plaintiffs.

Certainly if an estoppel were to be found in favor of the defendants, the Barneys, it would have to be predicated upon circumstances existing at the time they acquired their interest in the property in controversy, that is on November 3, 1941, because nowhere is it alleged or proven that the plaintiffs or Penrod or anyone allegedly in position to act or speak for the plaintiffs did anything or made any representations subsequent to that time on which an estoppel could be predicated. The defendants, the Barneys, were not of the class of people to whom any of the representations were allegedly made



and on November 3, 1941, such defendants had not acquired any interest from any person who was of that class so as to be in a position to claim privity. It was not until 1943 that the defendants, the Barneys, acquired some property from Mikkelson (which property was not that here in controversy) (Ex. 10). They cannot then rely upon the interest purchased in 1943 to relate back and affect the purchase by them of the property in controversy some two years before.

They never attended any meeting when any of the representations were made upon which they rely for estoppel; they were not of the class to whom any of such representations were allegedly made; there is no evidence whatsoever that they ever knew of any such representations when they acquired any of their property or when they made any purchase of tax titles from the county and certainly therefore it could not be concluded that they relied upon any such representations to their detriment.

## CONCLUSION

The sum and substance of the evidence and testimony presented in this case shows that the plaintiffs received the title to the land in controversy through various deeds, the validity of which are undisputed. The answering defendants, Oren E. Barney and Thelma Barney, received quit claim deeds from Utah County covering the property in question which deeds were admittedly invalid. There was no evidence or testimony sufficient to

raise an equitable estoppel as against the plaintiffs and in favor of the defendants.

We respectfully submit that the decision of the lower court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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