

1949

Rennold Pender v. R. L. Bird and Mae C. Bird : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT

OF THE
STATE OF UTAH

FIL

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CLERK, SUPREME

RENNOLD PENDER,
Plaintiff and Appellant,

vs.

R. L. BIRD and MAE C. BIRD, his
wife, et al.

Defendants and Respondents,

Case No. 7344

Brief of Appellant

Appeal from the District Court of
Salt Lake County, State of Utah,
Honorable A. H. Ellett, Judge.

MILTON V. BACKMAN,
of BACKMAN & BACKMAN,
Attorneys for Plaintiff and Appellant.

INDEX



	<i>Page</i>
I. STATEMENT OF FACTS:	1
A. Plaintiff's appeal	1
B. Chain of title	3
C. Respondents' title defects	6
D. Statute of limitations	7
E. Trial proceedings and the evidence	8
II. SPECIFICATION OF ERROR	11
III. POINTS ARGUED BY APPELLANT	15

IV. ARGUMENT:

Point 1: Appellant was entitled to have his motion for judgment on the pleadings granted. The statute of limitations was no bar to appellant's action but was a bar to respondents' defense and counterclaim	16
Point 2: The court abused its discretionary power in refusing to permit appellant to amend his complaint at the commencement of the trial of said cause for the purpose of pleading estoppel because of laches	23
Point 3: Respondents cannot rely upon the evidence introduced by defendants, Frank B. Bowers and wife which is the evidence upon which the court rendered its decision	24
Notice as affecting priority	33
Pleading-issue raised by answer setting up general denial only	36
Point 4: Respondents failed to establish their title on which judgment quieting title in them and awarding them possession of the property could be entered	37

STATUTES CITED

	<i>Page</i>
Laws of Utah 1943:	
Chapters 18 and 19	8, 16
Laws of Utah 1945:	
Section 78-1-6	32
Laws of Utah 1947:	
Section 104-2-5.10	7, 8, 17, 18
Utah Code Annotated, 1943:	
Section 104-2-5	8, 16, 17, 18, 19
Section 104-2-5.10	8, 16, 18, 19, 20
Section 104-2-6	8, 17, 18, 20
Section 104-2-12	8, 17
Section 104-2-41	7
Section 104-9-1	36
Chapter 20	8, 17

CASES AND AUTHORITIES CITED

American Law Reports, Vol. 109, 746	34
Bozeivich v Slechta,— Utah—, 166 P2d 239	21
Burton v Hoover, 93 Utah, 493, 74 P2d 652	29, 40
Coburn v Bartholomew, 50 Utah, 566, 167 Pac. 1156	17
Corpus Juris, Vol. 49, Sec. 223, 194	36
Corpus Juris, Vol. 51, 234	37

Crystal Car Line v State Tax Com., 110 Utah, 451	
174 P2d 995	39
Eastman v Gurry, 15 Utah, 410, 49 P. 310	39
Gatrell v Salt Lake County, 106 Utah 409, 149 P2d 827 ..	38
Gibson v McGurrin, 37 Utah 158, 106 P. 669	22
Hancock v Luke, 49 Utah 26, 148 P. 452	24
Harman v Yeager, 100 Utah 30, 110 P2d 352	24
Harriss v Tams, 258, N.Y. 229, 179 NE 476	24
Hartford Accident & Indemnity v Clegg, 103 Utah 414	
135 P2d 919	24
Holland v Hotchkiss, 162 Cal. 366, 123 P. 258	30
Lawyer's Reports Annotated 1915 C page 492	30
Olsen v Bagley, 10 Utah 492, 37 P. 739	39
Oregon Short Line R. Co. v Hallock, 41 Utah 378	
126 P. 394	30
Peterson v Weber County, 99 Utah 281, 103 P2d 652	40
Petterson v Ogden City, — Utah —, 176 P2d 599	40
Pomeroy's Equity Jurisprudence, Vol. 2, Sec. 754	31
Thompson on Real Property, Vol. 8, Sec. 4506	33
Tree v White, 110 Utah 233, 171 P2d 398	40
Utah Lead Co. v Piute County, 92 Utah 1, 65 P2d 1190 ..	29
Western Beverage Co. v Hansen, 98 Utah 332, 96 P2d	
1105	40

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Defendants and Respondents,

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Brief of Appellant

I.

STATEMENT OF FACTS

A—PLAINTIFF'S APPEAL

This appeal arises through a suit instituted by plaintiff and appellant in the district court of Salt Lake County, Utah for the quieting of title to certain real property situated on South Main Street, in Salt Lake City, Utah, in which action

plaintiff and appellant named as defendants, R. L. Bird and Mae C. Bird, his wife, who claim title to said property by virtue of a County tax deed (Tr. 2) and also by virtue of a deed from Salt Lake City Corporation issued by virtue of a sale of the property for special assessments, (Tr. 5). The property has a 50 foot frontage on Main Street and is situated near the corner of Seventh South Street and is 80 feet in depth.

Plaintiff and appellant named Frank B. Bowers and Winifred S. Bowers, his wife, as parties defendant in addition to respondents. Frank B. Bowers and wife answered plaintiff's complaint denying the allegation of ownership in plaintiff and claiming fee simple title to the property described in the complaint in themselves (Rec. 59 to 61 incl.). Attention is directed to the fact that these defendants appeared on their own behalf and not on behalf of Bowers Investment Company, a corporation, which corporation was the record owner of the property in 1928 through which plaintiff and appellant claims title in fee.

Defendants Frank B. Bowers and Winifred S. Bowers have since the conclusion of the trial of said cause and since the entry of judgment by the trial court, disclaimed all right, title and interest in and to the premises described in appellant's complaint, together with any and all rights they or either of them have under their affirmative defense or counterclaim as against either the appellant or respondents Birds (Rec. 106), therefore this appeal is not being prosecuted as against defendants Bowers.

The property affected by this action is now and has been at all times unimproved vacant property and not enclosed

with a fence (Tr. 53), which condition existed until tax title to same was acquired by defendants and respondents Bird in 1945 when respondents caused an advertising sign or bill board to be placed upon said property and at which time plaintiff and appellant placed a tenant in possession who operated a used car lot thereon, (Tr. 53 and 54). Thus both appellant and respondents claimed actual possession of the property from 1945 to the date of trial of said cause, each making use of the property subsequent to the year 1945.

Fee simple title to the property vested in Bowers Investment Company, a corporation of Utah, in 1928 (Tr. 2) which corporation was in 1928 and has been at all times thereafter, a corporation in good standing (Tr. 57). Bowers Investment Company, a corporation was not made a party to the action either by the original complaint filed by plaintiff and appellant, by the answers and counterclaims of defendants and respondents, nor by the complaint in intervention filed by Frank B. Bowers and his wife or the answer and affirmative defense set up in the answer filed by said Frank B. Bowers and wife. Neither did Bowers Investment Company intervene in the action.

B—CHAIN OF TITLE

The abstract of title offered by plaintiff and appellant and received in evidence at the trial as plaintiff's Exhibit "A", being a supplemental abstract of title from date of Feb. 14th, 1928 at 4:22 p. m. shows the chain of title to said property as follows, it having been agreed that fee simple title in 1928 was vested in Bowers Investment Company, a corporation, the deed to said corporation is not

contained in the abstract, however all instruments affecting the title to said property thereafter are as follows:

Entry No. 1—Certificate of sale for Special taxes to Salt Lake City Corporation, dated Apr. 20, 1928 for sidewalk extension No. 217, consideration being \$87.01.

Entry No. 2—Certificate of sale for Special taxes to Salt Lake City Corporation, dated Apr. 20, 1928 for Sidewalk extension No. 217, consideration being \$65.46.

Entry No. 3—Tax Sale, from Salt Lake County Treasurer to Salt Lake County, dated Dec. 21, 1928, consideration being \$26.53, to which sale taxes for the following years in the following amounts were added:

1929—\$33.82

1930—\$24.35

1931—\$24.45

1932—\$28.35

1933—\$31.96

1934—\$32.63

Entry No. 4—Certificate of sale for special taxes to Salt Lake City Corporation, dated Sept. 16, 1935, for paving ext. No. 208, consideration being \$1126.68.

Entry No. 5—Auditor's Tax Deed issued to Salt Lake County, to carry into effect the tax sale dated Dec. 21, 1928 (entry No. 3 above), dated Mar. 13, 1936, for a consideration of \$25.27.

Entry No. 6—Recorder's Deed issued to Salt Lake City, a municipal corporation for sidewalk

extension No. 211, (entries 1 and 2 above) bearing date of Dec. 21, 1936, consideration being \$6854.14 covering the property affected and also other property.

Entry No. 7—Quit Claim Deed from Bowers Investment Co., grantor to V. Lynn Hansen, grantee, bearing date Oct. 6, 1937, recorded Feb. 14, 1938, consideration recited \$10.00 etc. *I. R. Stamp* \$.50

Entry No. 8—Recorder's Deed issued to Salt Lake City, a Municipal corporation for paving extension No. 208 (entry No. 4 above) bearing date Jan. 26, 1940, consideration being \$35,714.16 covering the property affected and also other property.

Entry No. 9—Deed of Salt Lake County, to R. L. Bird, (respondent) grantee, bearing date Sept. 5, 1945, the consideration recited being \$350.00.

Entry No. 10—Quit Claim Deed from V. Lynn Hansen and Milla Hansen, his wife, grantors, to Rennold Pender (appellant) bearing date of Aug. 14th, 1945, the consideration recited being \$10.00 and other good and valuable cons.

Entry No. 11—Recorder's Deed issued to Salt Lake City, a Municipal Corporation for paving extension No. 208 (entry No. 4 above) bearing date of Jan. 3, 1946, consideration being \$1126.68, this deed covers only the property affected and no other property.

Entry No. 12—Quit Claim Deed from V. Lynn Hansen and Milla A. Hansen, his wife, grantors to Frank B. Bowers, grantee, bearing date Jan. 25, 1938, the consideration recited being \$1.00, etc. *I. R. Stamp* \$.50. (This deed was not recorded until Jan. 17, 1946)

Entry No. 13—Quit Claim Deed from Salt Lake City, a Municipal corporation, grantor, to R. L. Bird, grantee, bearing date Feb. 26, 1946, the consideration recited being \$910.00 which deed covers the property affected and other property.

C—RESPONDENTS' TITLE DEFECTS

The county tax deed shown at entry No. 5 of the abstract is defective in that there was no Auditor's Affidavit attached to the assessment rolls for the year 1928, the year for which the property was sold for taxes (Tr. 5), this being one of the deeds upon which respondents rely for their title to the property. The other source of title on which respondents rely for their title is the Recorder's Deeds covering the special assessments levied by Salt Lake City Corporation.

Defendants and respondents introduced no evidence at the trial showing title passing to Salt Lake City Corporation by virtue of delinquent special assessments (Tr. 66), nor did respondents prove the regularity of the proceedings leading up to the sale of the property for special assessments (Tr. 66).

D—STATUTE OF LIMITATIONS

Respondents contended at the trial of the case that even if the county tax deed was defective, respondents were entitled to prevail under the statutes of limitation which were pleaded by defendants and respondents as an affirmative defense and counterclaim to plaintiff's complaint. (Tr. 7).

As to respondents' contention it is pointed out that the action from which this appeal is taken was filed by appellant on October 14th, 1947, that it is the second action filed by appellant for the quieting of title to the property affected, and against respondents. The first action was filed by plaintiff and appellant on May 9th, 1947 in which action defendants and respondents Birds were named parties defendants with other defendants, and in said complaint appellant named also all other persons unknown claiming any right, title, estate or interest in or lein upon the real property described in the complaint adverse to plaintiff's ownership or clouding plaintiff's title thereto, as parties defendant. This first action did not include Frank B. Bowers and Winnifred S. Bowers, his wife, as parties defendants however.

As has heretofore been said, the first action herein referred to was filed in the office of the County Clerk of Salt Lake County, Utah, by plaintiff on May 9th, 1947, which was four days before the effective date of Sec. 104-2-5.10, Laws of Utah, 1947. The first action was dismissed without having been tried on its merits (Rec. 39). This allegation contained in plaintiff's complaint was admitted by defendants' Birds by their answer, paragraph 2 (Rec. 43). However, at the trial of the case, respondents urged that plaintiff and appellant was not saved by Sec. 104-2-41 U.C.A. 1943 because of the fact that plaintiff and appellant brought Frank

B. Bowers and his wife into the second action, and that they were not made parties to the first action, although it was the same property involved in the action and respondents Bird were named parties defendant in both actions. Even if such contention were sound, and we think it is not, respondents waved such objection through their admission in their answer.

Defendants and Respondents also rely upon the statutes of limitation as a bar to appellant's action, having pleaded by their answer and counterclaim as a bar, Sec. 104-2-5, 104-2-5.10 UCA as added by Ch. 18 and 19, Laws of Utah, 1943 as amended and Sec. 104-2-6 UCA 1943 as amended by Laws of Utah, 1943 Ch. 20, (Rec. 43 and 45). Plaintiff and appellant also relies on the statute of limitation, Sec. 104-2-5, 104-2-6, 104-2-12 UCA 1943 and on Sec. 104-2-5.10 Laws of Utah, 1947, all of which appellant pleaded as a bar to respondents' action and counterclaim, and denied by his reply that his action was barred by the statute of limitation.

E—TRIAL PROCEEDINGS AND THE EVIDENCE

Both plaintiff and defendants and respondents Bird filed their motions for judgment on the pleadings in said cause (Rec. 57) and (Rec. 63) each of which motions were argued orally before Honorable Roald A. Hogenson, and by the filing of written briefs by each of said parties, and on June 21, 1948 Judge Hogenson denied the motion of each party (Rec. 64).

The evidence shows, as is reflected by the abstract of title, plaintiff's Exhibit "A", that neither Bowers Investment Company, which company held the fee simple title in 1928, or V. Lynn Hansen to whom Bowers Investment Company

conveyed the property in 1937, nor Frank B. Bowers and Winnifred S. Bowers, his wife or either of them, paid taxes on said property, either general or special, subsequent to the year 1928 and for in excess of 17 years, all after title passed from Bowers Investment Company to V. Lynn Hansen. It is further evident that these taxes accrued to a substantial amount of money, this without even computing interest thereon over this period of in excess of 17 years.

Defendants and respondents also rely in addition to the **statutes of limitations** upon the testimony of witness V. Lynn Hansen in order to defeat plaintiff's and appellant's title (Tr. 64). However not one of the instruments of record as shown in the chain of title reflect anything but the fact that the title to the property passed from Bowers Investment Company to V. Lynn Hansen by deed without restrictions or conditions attached thereto and said deed bears a documentary internal revenue stamp. Neither is there a word of evidence, either documentary or oral, showing that appellant was informed of the fact that the deed which conveyed title to V. Lynn Hansen from Bowers Investment Company, was a mortgage only or that it was given and taken as security. Neither did Hansen in any one of his conversations during negotiations leading up to the delivery by Hansen of the deed to appellant, advise appellant of such fact. Appellant relied upon the county records when he paid the consideration and took his deed from Hansen (Tr. 39).

At the conclusion of the evidence, the court ruled that title to the property was at the time of trial still in Bowers Investment Company, that it had never passed out of that corporation and that the deed given by that company to V.

Lynn Hansen was only for security (Tr. 57 and 60). The trial court further granted judgment in the matter of appellant vs Frank B. Bowers and Winnifred S. Bowers, his wife, for no cause of action (Tr. 60).

The trial court also granted judgment in favor of respondents on the tax title shown by respondents (Tr. 68) and awarded respondents a money judgment against appellant in the sum of \$125.00 being the amount of rental received by appellant from the property during the period appellant had a used car dealer in possession of the property as his tenant (Tr. 69). Judgment was also granted to respondents for the possession of the property (Tr. 69) the trial judge giving as his reason for finding in favor of respondents, that appellants' action was barred by the four year statute of limitations (Tr. 71).

II.

SPECIFICATION OF ERRORS

Comes now the above-named appellant, and says that there is manifest error in the records, proceedings, and judgment entered in this cause in this, to-wit:

1. The court erred in denying appellant's motion for judgment on the pleadings (Rec. 64), for the reason that respondents' defense and counterclaim is barred by the statute of limitations as pleaded in appellant's reply.

2. The court erred in admitting evidence on behalf of defendants Frank B. Bowers and Winnifred S. Bowers, his wife, which evidence was adopted by respondents as their evidence, which evidence was timely objected to by appellant, as follows: answer to question: (V. Lynn Hansen called by defendants Bowers as witness) Q Did Mr. Bowers give you anything as security for the payment of that indebtedness (Tr. 19), for the reason that respondents by said examination put in issue the fact that the deed given by Bowers Inv. Co. to Hansen was in fact a mortgage and not a deed, without having pleaded such fact.

3. The court erred in admitting evidence on behalf of defendants Frank B. Bowers and Winnifred S. Bowers, his wife, which evidence was adopted by respondents as their evidence, which evidence was timely objected to by appellant, as follows: answer to question: (V. Lynn Hansen called by defendants Bowers as witness) Q Now that you have examined that, I will ask you if that is the paper which Mr. Bowers gave you as security for the indebtedness (Tr. 19), for the reason that respondents by said examination put

in issue the fact that the deed given by Bowers Investment Co. to Hansen was in fact a mortgage and not a deed, without having pleaded such fact.

4. The court erred in admitting all of the testimony of witness Hansen regarding the transaction between Hansen and Bowers (Tr. 19 to 21 inclusive) which was timely objected to for the reason that respondents by said examination put in issue the fact that the deed given by Bowers Investment Co. to Hansen was in fact a mortgage and not a deed, without having pleaded such fact.

5. The court erred in sustaining respondents' objection to appellant's request for leave to amend his reply to respondents' answer and counterclaim by adding to paragraph 9 thereof, the following: "The defendants are estopped from claiming title or reimbursement because of laches", (Tr. 34 and 35) for the reason that estoppel was a good defense to defendant's counterclaim, which defense must be specially pleaded; appellant was entitled to the benefit of the doctrine.

6. The court erred in admitting evidence introduced on behalf of defendants Bowers which was adopted by respondents over a timely objection by appellant, as follows: answer to question: Q Mr. Pender, how much did you pay Mr. Hansen for that? (Tr. 39) for the reason that consideration is expressed in the deed which was in evidence and it is presumed that it was a fair consideration, failure or insufficiency of consideration not having been put in issue by the pleadings.

7. The court erred in its conclusions as expressed as follows: "I think Mr. Pender has no title. I am not too

certain that the defendant Frank Bowers has. It strikes me that the title is in the Bowers Investment Company, that they never gave the title away. They retained the title. The only thing they ever gave was a security, and then Frank Bowers tried to convert this security into a deed back to himself, and he would get nothing out of it, and the title has been, is now, and always was in the Bowers Investment Company, subject only to such rights as Mr. Hansen may have." (Tr. 57) for the reason that Bowers Investment Company was not a party to the action. There is no evidence on which the court could so find and for the further reason that the title as between Bowers Inv. Co. and Hansen was not in issue.

8. The court erred in its finding that the statute of limitations barred appellants action (Tr. 71) for the reason that such finding is not supported by the evidence, in that there was no competent evidence to the effect that appellant's action was barred.

9. The court erred in its refusal to adopt the Findings of Fact and Conclusions of Law proposed and submitted by appellant, for the reason that said findings of fact and conclusions of law as proposed are in accordance with the evidence.

10. The court erred in making and entering its findings of fact to that portion of finding number 2, as follows: "for the purpose of securing an obligation of the Bowers Investment Company to the said Hansen", for the reason that there was no competent evidence to support or warrant said finding, in that there was no issue raised by the pleadings as to any obligation existing between Bowers Investment Company and Hansen.

11. The court erred in making and entering its findings of fact number 3, for the reason that such finding is not supported by the evidence, in that there was no competent evidence to the effect that any obligation existed between Bowers Investment Co. and Hansen at the time the deed was delivered by Bowers Investment Co. to Hansen.

12. The court erred in making and entering its finding of fact to that portion of finding number 12, as follows: "That plaintiff knew that V. Lynn Hansen and Milla Hansen were not the owners of the land described in finding No. 1; and that plaintiff was not a bona fide purchaser for value," for the reason that there was no competent evidence to support or warrant said finding, in that there was no issue raised by the pleadings as to lack or failure of consideration, and such finding is against the evidence.

13. The court erred in adopting respondent's conclusions of law.

14. The court erred in overruling the motion of appellant for a new trial, as shown on page 97 of the transcript.

15. The court erred in rendering judgment in favor of the respondents and against the appellant, as shown on pages 94-95 of transcript.

16. The court erred in its denial of judgment in favor of appellant and against respondent.

III.

POINTS ARGUED BY APPELLANT

The foregoing specifications of error, will be argued under the following propositions or points:

1. Appellant was entitled to have his motion for judgment on the pleadings granted. The statute of limitations was no bar to appellant's action but was a bar to respondent's defense and counter-claim.

2. The court abused its discretionary power in refusing to permit appellant to amend his complaint at the commencement of the trial of said cause for the purpose of pleading estoppel because of laches.

3. Respondents can not rely upon the evidence introduced by defendants Frank B. Bowers and wife which is the evidence upon which the court rendered its judgment.

4. Respondents failed to establish their title on which judgment quieting title in them and awarding them possession of the property could be entered.

IV.

ARGUMENT

Point 1.

APPELLANT WAS ENTITLED TO HAVE HIS MOTION FOR JUDGMENT ON THE PLEADINGS GRANTED. THE STATUTE OF LIMITATIONS WAS NO BAR TO APPELLANT'S ACTION BUT WAS A BAR TO RESPONDENTS' DEFENSE AND COUNTER-CLAIM.

This is an equity action, a suit to quiet title and to recover possession of real property, together with the rents, issues and profits therefrom. Appellant filed the usual short form pleading alleging that he was the owner of the property and in possession thereof and that defendants, R. L. Bird and Mae C. Bird, his wife, Frank B. Bowers and Winnifred S. Bowers, his wife, and all other persons unknown claiming any right, title, etc. which follows the statute as to unknown defendants, claimed some interest or title in and to the property, and prayed for judgment declaring appellant to be the owner in fee simple of the property and adjudging the defendants to have no estate or interest in said property.

Defendants and respondents Birds, answered appellant's complaint denying title in appellant and claiming title in themselves and alleging as one of the bases of their title an auditor's deed issued to these defendants which deed is based on a sale for delinquent taxes for the year 1928 on which the Auditor's deed issued Mar. 13th, 1936. Respondents further plead Secs. 104-2-5 and 104-2-5.10 UCA 1943, as added by Chapters 18 and 19, Laws of Utah,

1943 as amended and Sec. 104-2-6 UCA, 1943 as amended by Laws of Utah, 1943, Chapter 20 as a bar to plaintiff's action.

Appellant filed his reply to defendants Bird's answer and counter-claim denying the allegations contained in the counter-claim and pleaded Secs. 104-2-5, 104-2-6 and 104-2-12, UCA 1943, and Sec. 104-2-5.10 Laws of Utah, 1947 as a bar to these defendants' and respondents' counter-claim.

Defendants Frank B. Bowers and Winnifred S. Bowers, his wife, answered appellant's complaint denying title in plaintiff and appellant and alleged that these defendants are the owners of said property, all of which are but general allegations.

By his complaint, which is his third amended complaint, plaintiff and appellant further alleged that he did, on the 9th day of May, 1947 file an action to quiet title in him and against defendants Birds which affected the property described in plaintiff's complaint, which action was dismissed as to defendants Birds without having been tried on its merits. Which allegation was admitted by defendants Birds.

Defendants and respondents Birds filed their motion for judgment on the pleadings as did plaintiff and respondent.

This court has held that motions for judgment on the pleadings are not proper when applied for by a defendant to the action and when filed it is treated as a general demurrer. See *Coburn v. Bartholomew*, 50 Utah, 566 in which this court in treating of such a motion said at page 570:

“Such a motion is not usual on the part of a defendant unless it be where a defendant's counterclaim is either

admitted or not denied, in which case his relation to the question is that of a plaintiff. A motion for judgment on the pleadings is essentially a proceeding on the part of a plaintiff. 23 Cyc. 769."

In the instant case appellant denied the allegations contained in respondents' counterclaim.

This case is that type of action which our legislature contemplated that Secs. 104-2-5, 104-2-5.10 and 104-2-6 UCA 1943 as amended and the new section 104-2-5.10 Laws of Utah, 1947 would apply to, respondents' counterclaim not having been filed within either four years from the date of sale of the property (1928) or within four years from the date of the issuance of auditor's deed (Mar. 13, 1936). This fact is evidenced by the allegations contained in paragraph 8 of defendants' Birds' affirmative defense which reflects the fact that the tax sale bears date, December 21st, 1928 and the auditor's deed bears date March 13th, 1936.

That part of Section 104-2-5.10 Laws of Utah, 1947 which applies is as follows:

. . . "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."

From a reading of the above cited law it is evident that respondents were required to file action or to set up a counterclaim to an action either on or before December 21st, 1932 which is four years from the date of the sale of the property, or on or before March 13th, 1940, which is four years from the date of the issuance of auditor's deed, otherwise respon-

dents are not saved from the effect of the above statute. Respondents filed their answer and counterclaim on Feb. 4th, 1948.

The statutes apply differently and a distinction is made between those actions involving only the recovery or possession of land and those actions brought for the recovery of real property held by a defendant under a tax deed. As the instant case is one for the recovery of real property held by defendants under a tax deed, we may eliminate from consideration section 104-2-5, Laws of Utah, 1943 because that section brings the case at bar under the provisions of section 104-2-5.10, Laws of Utah, 1943, which is as follows:

Limitations of Actions-Real Estate Sold to County Under Section 80-10-68—Four Years.

“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 counterclaim 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.*”

(The effective date of this act is May 11th, 1943)

As to appellant's action, his complaint was filed on May 9th 1947 which was within the four year period provided for by the above cited act. However respondents' answer, defense and counterclaim were not filed as hereinbefore

pointed out, until Feb. 4th, 1948, which was approximately nine months after the four year period of limitations. Therefore appellant was saved by his timely filing of his action, while respondents were not within time, all because the property was sold prior to the effective date of the act, auditor's deed having issued Mar. 13th, 1936 based on tax sale for taxes of the year 1928.

As is herein pointed out, appellant is saved from the running of the statute, the act of 1943 and also as this section is amended by section 104-2-5.10, Laws of Utah, 1947, having brought his action May 9, 1947 or two days before the effective date of the 1943 act (May 11, 1943, plus 4 years, May 11, 1947). Therefore the first part of the 1943 act herein above quoted has no application as against the rights of appellant but applies only as against respondent. Said act is a bar to respondents' defense and counterclaim inasmuch as respondents' defense and counterclaim were neither one filed within the four year period.

For the same reason, respondents' counterclaim and defense are also barred by section 104-2-6 Laws of Utah, 1943, which is as follows:

"104-2-6. Limitation of Actions-Real Estate-Seizen and Possession within Seven Years, Exception Property Held Under Tax Deed.

"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.*"

The above section invokes the provisions of section 104-2-5.10 in those actions where the property is held under tax deed.

Section 104-2-6 above cited applying to possession of property in all cases excepting where the property is held under tax deed brings up the question of possession, not as the same affects the rights of appellant, but as the rights of respondents are effected. Appellant pleaded that he and his predecessors in interest were in possession of the property for in excess of 20 years. Respondents' right of possession was questioned at all times from the date they received their deed, on Sept. 5th, 1945. Respondents claimed no possession or right to possession prior to Sept. 5th, 1945, therefore they could not rely and did not rely upon the seven year statute.

Respondents cannot claim possession through any predecessor in interest based on their tax title as has been held by this court in the case of Bozievich v Slechta, found in 166 P2d at page 239, this because the County never at any time had a tenant in possession of the property during the period which the county held tax title to the property.

In the Bozievich case at page 241 the court said:

"Issuance of an auditor's tax deed did not give the county possession. It was the act of placing tenants in actual possession which initiated possession by the county."

There is no evidence in this record showing that the county had a tenant in possession of the property at any time.

Appellant established by the evidence the fact that fee title to the property vested in him which carries with it the presumption that appellant was entitled to possession and was in actual possession as was held by this court in the case of *Gibson v. McGurrian et al.* 37 U. 158 in which the court said:

“One who claims the title to property and brings an action to quiet title, under Comp. Laws 1907 Sec. 3511, providing that an action may be brought by any person against another who claims an estate or interest in real property, adverse to him, to determine such adverse claim, need not prove that he is in possession, or entitled thereto, but it is sufficient if he establishes that the legal title is in him, and that defendants have no right, title, or interest adverse to him in the premises. On proof by plaintiff in an action to quiet title, that the legal title is in him, the law presumes that he was in constructive possession; and, in the absence of evidence to the contrary, it will be presumed that he was entitled to the actual possession of the land in controversy, and proof that the legal title is in plaintiff is sufficient to support a finding that he is entitled to possession.”

Now it appears that the purpose of all of the statutes of limitations as herein referred to and as pleaded by both appellant and respondents is to compel fee owners who lose their property through tax sales to take action within four years from the date of sale to the county and also require the tax title purchaser to bring his action within a period of four years. That is to say, the purpose of the enactment by the

legislature appears to be to put the titles at rest by freezing conditions as they exist after a period of four years and while this might appear to place a tremendous premium on possession to the land, still it appears to be reasonable that unless a person pursues his remedy within a period of four years he shall be considered to have abandoned it.

With the evidence as pleaded by the respective parties before the court, appellant's motion for judgment on the pleading should have been granted.

Point 2.

THE COURT ABUSED ITS DISCRETIONARY POWER IN REFUSING TO PERMIT APPELLANT TO AMEND HIS COMPLAINT AT THE COMMENCEMENT OF THE TRIAL OF SAID CAUSE FOR THE PURPOSE OF PLEADING ESTOPPEL BECAUSE OF LACHES.

Appellant requested leave to amend his complaint at the commencement of the trial of the case on motion, which motion was denied by the trial court. The amendment proposed by appellant would not have injected into the case a new or different cause of action, neither was the amendment as proposed such that it would have taken additional time for respondents to gather evidence to rebut or deny the allegation as proposed. It was not an amendment which would be supported by evidence but was founded solely upon a legal principal, and would have permitted a complete adjudication of the matter in controversy; it would have been in furtherance of justice to have permitted the amendment. As it was, it was an obstruction of justice to have denied the

amendment. Appellant was prejudiced by the ruling of the court.

This court has repeatedly held that amendments to pleadings, particularly if made prior to the trial of the cause should be granted with liberality, in fact this court has consistently encouraged all proper amendments to pleadings to the end of having a full hearing on the merits of the entire controversy.

See Hartford Accident & Indemnity Co. v Clegg, (Utah)
135 P2d 919.

Hancock v Luke, 46 Utah 26, 148 P. 452,
Harman v Yeager, 100 Utah 30, 110 P2d 352

In the Hartford Accident Case this Court quoted from the New York case of Harriss v Tams, 258 N.Y. 229, 242, 179 N. E. 476, as follows:

“The power to permit amendments is denied only if a change is made in the liability sought to be enforced against the defendant.”

The amendment should have been allowed and appellant should have been permitted to urge his proposed estoppel.

Point 3.

RESPONDENTS CANNOT RELY UPON THE EVIDENCE INTRODUCED BY DEFENDANTS FRANK B. BOWERS AND WIFE WHICH IS THE EVIDENCE UPON WHICH THE COURT RENDERED ITS DECISION.

Respondents adopted as their evidence, the testimony introduced over the objection of appellant, of V. Lynn Han-

sen, a witness called to testify on behalf of defendants Frank B. Bowers and his wife.

Witness Hansen was permitted to testify over the objection of appellant to the fact that the deed given to him by Bowers Investment Company, the owner of the fee simple title in 1928 was given and received by him as security for monies owed to him and not for the purpose of conveying title. Appellant made timely objection to this evidence and gave as his reasons for the objection the fact that appellant was taken by surprise, that the evidence injected into the case a new issue which appellant was not prepared to meet. There was not one word contained in the pleadings of the fact that the deed given by Bowers Investment Company to Hansen was given as security only. As has been pointed out heretofore, Bowers Investment Company was not even a party to the action, neither was Bowers Investment Company represented at the trial of the case. Counsel for Frank B. Bowers urged the fact that the deed shown in the chain of title from Hansen to Frank B. Bowers had the effect of a reconveyance of the property originally conveyed by Bowers Investment Company, the corporation, the original grantor and owner, to Hansen. Such a contention is absolutely ridiculous, but even so, it apparently influenced the trial court's decision. Hansen testified to the fact that in 1937 he was a paint contractor employed as a painter for Bowers Investment Company and Frank B. Bowers (Tr. 18) and because Mr. Bowers, (not Bowers Investment Company) was indebted to Hansen at that time, Mr. Bowers gave Hansen the deed to the property, (Tr. 18 and 19).

Now Mr. Hansen could not testify with certainty even with the help of his counsel to the fact that the deed which

the court received in evidence was in fact the deed given to him by Mr. Bowers as security for the indebtedness, (Tr. 20).

There is no question from the testimony of witness Hansen of the fact that if there was an indebtedness, it was Frank B. Bowers and not the corporation who was indebted to him (Tr. 20). If however, the court is of the opinion that there was an indebtedness owing by the corporation to Hansen at the time the deed was given, then witness Hansen admitted that at the time he received the deed he satisfied the obligation at least in part (Tr. 25). Witness Hansen also testified to the fact that at the time he delivered the deed to Frank B. Bowers he was sure he received consideration for the deed, that money passed between them, which testimony is as follows as found on page 28 of the transcript:

Q Now at the time you gave a deed back to Frank B. Bowers of this same property, do you recall that transaction Mr. Hansen?

A I don't recall it very clearly. xxx I certainly don't remember the specific time. I am sure I did it.

Q Do you remember what consideration took place between you?

A. No sir.

Q Do you recall whether any money passed from Mr. Bowers to you at that time?

A Well I am sure that it did.

Q. You are sure that it did. Your negotiations at that time were with Frank B. Bowers, were they?

A Yes.

No explanation was made or even attempted to be made to show why the deed which was given by V. Lynn Hansen to Frank B. Bowers was not recorded for over 10 years (Tr. 20). Frank B. Bowers did not explain why he failed to pay taxes on the property during all those years, and during which time Frank B. Bowers held the deed unrecorded. Not until after the recording of the deed from V. Lynn Hansen to appellant did Frank B. Bowers record his deed.

It is contended and we think the evidence clearly shows that the property, being at the time situated near the business section of town and having been assessed with general and special assessments which accrued to a substantial sum, so much so that neither Bowers Inv. Co., V. Lynn Hansen, or Frank B. Bowers were willing to pay these taxes, that the property was abandoned and after so many years it is possible that Hansen forgot that he held title to the property. Hansen of course wanted to disclaim any interest in the property. He did not want to assume and pay all of the taxes which were assessed against the property. This court will, we think, take judicial notice of the fact that a stranger to a title is in a much more favored position when he takes property over after it has been sold for general and special taxes, than is the owner of the fee title. The stranger may redeem or buy in the property for a small percentage of the amount of taxes owing whereas the owner of the fee title cannot do so, therefore Hansen was not interested in the property, being obliged to pay the delinquent assessments. Not until the values of property generally increased was anyone interested in this property.

Respondents contended at the trial of the case that the consideration paid by appellant was unconscionable and was

not valuable consideration for the deed but the evidence as shown by the testimony of appellant is to the effect that when appellant negotiated with Hansen for the purchase of the property, appellant was informed of the fact that the property had been sold for taxes and that special assessments had been levied in a substantial sum against the property.

The court found that appellant was put on notice of the fact that Hansen held title to the property as security and that the appellant was not a bona fide purchaser of the property for value, but there is no evidence in the record to support such a finding. Not one word of evidence. Appellant testified to the fact, which is undisputed, that he relied upon the county records in negotiating with Hansen for the deed to the property, that he found title to the property in Hansen and so informed Hansen, and that the property was subject to unpaid general and special taxes since the year 1928. Hansen did not advise appellant at any one of his conferences of the fact that he held the property as security only and that the deed held by him was in fact a mortgage; the record is wholly lacking of such evidence. Hansen did not testify to the fact that he so advised appellant.

The testimony of Mr. Hansen as to his meeting with appellant as found on page 23 of the transcript is to the effect that Mr. Pender called on Hansen and asked for a quit claim deed. Mr. Hansen called his attorney. Hansen told appellant that he (Hansen) did not own the property. There were several contacts had between appellant and Hansen and Hansen did not accept the first offer made by appellant (Tr. 28). Appellant testified to the fact that there was nothing said at any one of the conversations had with Hansen to the effect that Hansen did not own the property

but that all negotiations and conversations were regarding the price to be paid by appellant. (Tr. 39). This was not denied by Hansen.

While Respondents contend that the consideration paid by appellant to Hansen for the quit claim deed is unconscionable and it is evident that respondents convinced the trial court of this fact, still respondents do not consider it unconscionable for them to take the property which they endeavored to prove has such great value, upon payment by respondents of the sum of \$350 for the county tax deed and the sum of \$910.00 for the city deed. Attention is invited to the fact that not only did the city deed cover the property affected by these proceedings but it covered other properties also. This court will, we think, take judicial notice of the fact that before appellant can acquire good title to the property free and clear of tax liens, appellant must redeem and pay off these taxes. Such has been the law as laid down by this court in equity actions in numerous cases some of which cases are those of Utah Lead Co. v Piute County, 65 P2d 1199 in which this court said:

“The title to parcel No. 2 be quieted in plaintiff subject to his paying to Young all legitimate taxes assessed against said property paid by him, together with costs and penalties paid by the latter with interest on such payments to time of consummation of decree.”

and in Burton v Hoover (Utah) 74 P2d 652 in which case the court said:

“For the reason stated, the judgment in favor of defendant is reversed, but as the plaintiff has invoked the aid of a court of equity to vacate the tax deeds, he must do equity, and at least to the extent to which the attempted purchase by defendant has relieved his prop-

erty of liens, he must as a condition to obtaining such relief, reimburse the defendants, together with interest on such amount at the legal rate from the date of payment until repaid."

in the Burton case the court cited the cases of Oregon Short Line R. Co. v Hallock 41 U 378, 126 P. 394.

Holland v Hotchkiss, 162 Cal. 366, 123 P. 258, L.R.A. 1915 C., 492

and the Utah Lead case herein above cited.

Because of the law as laid down by this honorable court and because of the fact that as appellant testified, appellant was aware of the fact that there were unpaid and delinquent general and special assessments against the property, it is evident that appellant will be required to pay a larger consideration for the property in order to clear his title than would respondents, therefore respondents argument is unsound. There is no evidence supporting the courts finding that because Hansen conveyed for a nominal consideration appellant was put upon notice. We ask, who complains about this unconscionable price paid by appellant? No one other than the tax title purchasers.

It was contended by respondents that appellant was further put upon notice of the fact that Hansen had no title because Hansen conveyed by quit claim deed and therefore appellant was not a bona fide purchaser for value. The trial court in its finding No. 12 found that plaintiff knew that V. Lynn Hansen and Milla Hansen were not the owners of the land described in finding No. 1; (which is the property affected by the action) and that plaintiff was not a bona fide purchaser for value. For the court to so find robs the

recording act of its virtues as is said by Pomeroy in his Equity Jurisprudence Vol. 2, at Sec. 754 in which we find the following:

“The taking of a quit claim deed does not negative presumption of good faith,” (footnote)

and Sec. 754 is as follows:

“Some of the ablest text writers and jurists of this country hold to the view that a grantor cannot by any form of deed do more than convey all his right, title and interest; that a quit-claim will convey a perfect fee-simple title, just as effectually as a warranty deed, if in fact the grantor at the time of executing the deed has such a title; that a quit claim deed no more implies that the grantor doubts the goodness of his title than a warranty deed implies that the grantor considers the title unsafe without the support of covenants and assurances involving personal liability for damages; *and that a purchaser who relies upon the public records showing a clear title in the grantor, even though he takes a quitclaim deed, cannot be denied the character of a bona fide purchaser without robbing the recording acts of their virtue.*”

This view has received the sanction of the United States Courts.

As has heretofore been pointed out, the property affected by this action was at all times vacant, it was not under cultivation, it was not enclosed by a fence, there was nothing of a physical nature which would suggest ownership in anyone other than the record owner.

The trial court's having held that appellant had notice of the fact that Hansen did not own the property is wholly con-

trary to the evidence. Even the deed by which Hansen acquired title from Bowers Investment Company contained a documentary internal revenue stamp importing consideration. This contradicts the fact that no consideration was paid by Hansen and of course it was admitted that consideration was paid by Hansen in satisfying an obligation existing between him and Bowers.

The fact that the deed from Bowers Investment Co. to Hansen recited only a nominal consideration did not charge appellant with notice of the fact that Hansen had no interest in the property. Such is the law of this state as is given by Sec. 78-1-6 Laws of Utah, 1945 which is as follows:

78-1-6 Acknowledgment-Recording-Notice.

“Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such proofs, acknowledgment, certification or record, and as to all other persons who have had actual notice. *Neither the fact that an instrument, recorded as herein provided, recites only a nominal consideration, nor the fact that the grantee in such instrument is designated as trustee, or that the conveyance otherwise purports to be in trust without naming the beneficiaries or stating the terms of the trust shall operate to charge any third person with notice of the interest of any person or persons not named in such instrument.*”

If the facts of this case were as contended by respondents and as found by the court, why did not Bowers Investment Company, by its officers, or V. Lynn Hansen intervene in the case and protect their interest, if any either had? Neither appeared on their own behalf but total strangers to the title come into court and attempt to set aside conveyances for their own gain, and this as against a bona fide purchaser of the fee title for value. It is clearly evident that Frank B. Bowers claimed nothing in the premises and that if he ever at any time claimed an interest that he abandoned that interest in his not having recorded his deed received from Hansen for in excess of 10 years, and in permitting the property to go to tax sale for both general and special taxes for so many years. That he now files his disclaimer is evident of this fact.

NOTICE AS AFFECTING PRIORITY

As to the matter of whether from the evidence introduced in this case, appellant was put upon notice of fact as contended, that Hansen had no title which he could convey to appellant. Even if it were competent which we do not concede and provided it had been properly pleaded in order to make it competent, there are not sufficient facts proven to support such a finding. We find the following law and authorities on this subject in support of this contention, to-wit:

Thompson on Real Property, Vol. 8, Sec. 4506—Reasonable diligence in inquiry, says:

“Only reasonable diligence in acquiring knowledge is required and this is held satisfied by the examination of the public records unless he has notice of defects not disclosed by the records. (with numerous cases cited)”.

and Thompson says further in this same section:

“It has been said that mere want of caution on the part of the purchaser in making inquiry, as distinguished from fraudulent or willful blindness, is not sufficient to charge him with constructive notice.”

There is no evidence in this case to the effect that appellant had notice of defects not disclosed by the records. Appellant did make inquiry of the record owner and the fact that Hansen said he did not own the property which is denied was not sufficient to put appellant on notice of fact that someone else owned the property when Hansen did ^{not} so inform appellant. Many people will say they do not own property when it has gone to tax deed over a period of many years and especially may one such as appellant whom the evidence shows has dealt in many tax title properties, assume that one does not claim ownership of property after it has gone to tax sale. This is the usual position of fee owners. They consider their property lost as a result of tax sales.

In 109 ALR at page 746 we find the law as follows on the question of notice:

“It is well established that vague or general rumors, reports, surmises, covert insinuations, or general assertions, based on hearsay and made by strangers or those not interested in the property, as to the existence of a title or interest in some third person or persons whose title or interest is not recorded, do not constitute notice of title or interest in such third person, *or impose upon a purchaser or mortgagee the duty of inquiry.*”

The fact that Hansen said he did not own the property did not impose the duty of further inquiry on appellant when he knew the record title was in Hansen.

The annotation above quoted also goes on at page 749 and says:

“A general report that there is an outstanding claim or conveyance without defining what sort of claim or to whom is not notice to the purchaser.”

In the case of *Hall v Livingston* found in the above annotation it being a case where a purchaser was told prior to the purchase that it was understood the property was charged with a trust, and the purchaser was not thereby charged with notice, the court said:

“The notice, to affect him, must be more than would excite the suspicion of a cautious and wary purchaser. It must have been so clear and undoubted, with respect to the existence of the prior right, as to make it fraudulent in him, afterwards, to take and hold the property.”

and in *Raymond v Flavel* (Oregon), also found in the above annotation, which is a case closely in point with the instant case, it was held that a statement made to a prospective purchaser, warning him against buying the land because of the possibility of future trouble with persons claiming an outstanding equity in the property, who afterwards brought the action, was insufficient to affect his rights as a bona fide purchaser, because the testimony, taken in its strongest light, gave no suggestion of any fact of a tangible nature bearing any indication whatever of the existence of a secret trust in the property.

PLEADING—ISSUE RAISED BY ANSWER SETTING UP GENERAL DENIAL ONLY

Defendants Bowers attempted to prove equitable title in them as did respondents Birds, for the purpose of defeating plaintiff's title. Neither respondents Birds or defendants Bowers pleaded facts sufficient to permit evidence on this issue. Respondents' answer and counterclaim contains no allegation on this matter and Defendants Bowers' answer simply denies title in plaintiff and alleges that they are the owners of the property. Counsel for Bowers contended that such general denial and allegation of ownership under affirmative defense put in issue the title to the property by virtue of which evidence of the fact that the deed given by Bowers Investment Company to Hansen was in fact not a deed but a mortgage and that the deed was taken as security for an indebtedness.

Section 104-9-1 UCA 1943 under pleadings (Answer) provides:

“The answer of the defendant must contain:

- (1) General and special denial of each material allegation, etc.
- (2) A statement of *any new matter constituting a defense* or counterclaim.”

and in 49 Corpus Juris, Sec. 223, at page 194. Equitable Defenses, we find the law stated as follows:

“The general rule is that to be available, an equitable defense must be pleaded, and must contain sufficient averments to satisfy all the requirements of a good bill in equity. It must state facts sufficient to constitute a defense.”

In 51 Corpus Juris at page 234—Equitable title we find the law stated as follows:

“Generally, defendant to avail himself of an equitable title as against plaintiff’s legal title, should specifically plead it. An answer setting up an equitable interest under a contract should allege the fairness of the contract and the adequacy of the consideration.”

and at the same page under the subject Adverse Claim, it is said:

“It has been held that, in statutory proceedings to determine adverse claims, defendant, relying on an adverse claim in himself, must plead the nature of his claim, although the nature of his claim need not be set forth at length where this has already been done in the complaint.”

The court should not have permitted any evidence to come into the record under the state of the pleadings to the effect that Hansen took title to the property as security only or that the deed was in fact a mortgage and not intended to convey title to the property.

Point 4.

RESPONDENTS FAILED TO ESTABLISH THEIR TITLE ON WHICH JUDGMENT QUIETING TITLE IN THEM AND AWARDING THEM POSSESSION OF THE PROPERTY COULD BE ENTERED.

We contend that defendants and respondents had no meritorious defense and established no right to any judicial

relief. Appellant conclusively established title in him. Respondents had the burden of going forward with evidence to present a valid defense or some right to affirmative relief under their counterclaim. See *Gatrell v Salt Lake County*, 106 Utah 409, 149 P.2d 827. Respondents offered no evidence in support of their answer and counterclaim except to show payment of taxes.

It was admitted by respondents at the trial of the case that one of the auditor's affidavits was omitted from the assessment rolls for the year for which the property was sold to the county for delinquent general taxes. Therefore respondents acquired nothing but a lien on the property for the payment of taxes as has been the rule of this court repeatedly. This title failing, the only other color of title which respondents had upon which to rely was that acquired from the city. The abstract of title shows certificates of sales for special assessments at entries No. 1 and No. 2 for sidewalk assessments, and at entry No. 4 a certificate of sale for paving assessments on which sales Recorder's Deeds issued from the Treasurer to Salt Lake City, a municipal corporation, and on Feb. 26, 1946 Salt Lake City conveyed by Quit Claim Deed, the property affected by this action, together with other properties, to respondents. Respondents introduced no evidence as to the regularity of the proceedings leading up to the sale of said property to Salt Lake City for the special assessments. Counsel for respondents asked counsel for appellant if he would stipulate as to the regularity of such proceedings which counsel for appellant refused to do. (Tr. 11, 12, and 13).

The evidence shows that respondents, instead of taking an assignment of the Certificate of sale for special taxes from the city, redeemed the special taxes (See abstractor's

certificate) and thus extinguished the lien of the special taxes, and therefore it is our contention that the lien of the special taxes having been extinguished, even if respondents had proved by the evidence the regularity of the proceedings leading up to the sale of the property for special taxes, which they failed to do, respondents acquired nothing by the quit claim deed from Salt Lake City.

We have no statute which makes a special tax proceeding prima facie evidence of the regularity of the proceeding leading up to the sale of the property such as we have under sales for general taxes.

This court has held that the failure of any one of the prerequisites of a valid sale is as fatal to the sale as the failure of all thereof. See *Olsen v Bagley*, 10 Utah 492, *Eastman v Gurry*, 15 U. 410 and *Crystal Car Line vs State Tax Com.* (Utah) 174 P2d 995.

It is our further contention that the lien for special taxes is extinguished and this court has so held in the cases of *Petterson v Ogden City* and *Western Beverage Co. v Hansen* in each of which cases it was said that where after a lien for special improvements had accrued there was levied a general tax against such property which was sold to satisfy the latter tax, the sale for general taxes extinguished the municipal lien for special improvement taxes.

It is evident that the lien for special improvements had accrued in the instant case prior to 1928; the certificate of sale bears date Apr. 20, 1928. The Tax Sale for general taxes bears date of Dec. 21, 1928. Therefore the property was sold to satisfy the tax of 1928 and the sale thus made extinguished the lien for special improvement taxes, therefore respondents' special tax title could be of no force or effect.

Attention is invited to the fact that appellant's action

was filed prior to the effective date of the 1947 act making general and special tax liens equal.

In line with the decisions of this court, because appellant has invoked the aid of a court of equity to vacate the tax deeds, he is willing to do equity, but in so doing appellant should be required to pay only the amount found necessary to relieve the property of the lien of the general tax, being the sum of \$350.00 together with interest on said amount from the 5th day of September, 1945, the day on which the deed issued from Salt Lake County, to respondents together with taxes subsequently assessed and paid by respondents less rental value of the property. We think our position as herein expressed finds support in the following decisions of this court, to-wit:

Burton v Hoover, (Utah) 74P2d 652.

Tree v White, (Utah) 171 P2d 398.

Peterson v Weber County, (Utah) 103 P2d 652

and particularly the cases of Petterson v Ogden City 176 P2d 599,

and Western Beverage Co. vs Hansen,
98 Utah 332, 96 P2d 1105.

Wherefore appellant prays that the judgment and decree entered herein be vacated and that appellant have judgment quieting title against respondents upon paying to respondents such sum or sums as may be found to be equitable, and for an order requiring respondents to surrender possession of the premises to appellant and for an accounting of rents for the period of time during which respondents have had

the use of said property which sum shall be credited to the taxes found to be owing by appellant to respondents; also for costs including costs on this appeal.

Respectfully submitted,

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Received copies of the foregoing Brief of Appellant this

—— day of May, 1949.

Attorneys for Defendants and Respondents