

1949

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

Utah Supreme Court

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IN THE
Supreme Court
OF THE
State of Utah

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 Respondents

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

RICHARDS & BIRD,
Attorneys for Respondent

FILED

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Brief of Respondents

Statement of Facts

Respondents do not agree that the appellant has stated all the material facts and take exception to the argumentative nature of the so-called Statement of Facts, particularly at pages 8 and 9 of his Brief.

References to the Record in this case will be according to the numbering of this Court, the transcript of testimony being R. 109 to 187.

At page 6 of his Brief, appellant refers to page 13 of Exhibit A as covering property not involved in this action. A comparison of this deed with Respondent's counterclaim (R. 19) discloses that the property involved is described with reference to two corners of Lot 19, Block 22, 5 Acre Plat "A" and that page 13 of Exhibit A involves but one parcel of land.

The statement at page 6 that there was no Auditor's Affidavit on the 1928 assessment rolls is troublesome. Counsel for appellant made the statement at a preliminary discussion and it was not denied by respondent. The trial court did not treat this discussion as evidence or as a pre-trial since evidence was required by testimony or stipulation on all those matters. See, for example, R. 177, 178 and 179.

The last paragraph on page 6 of Appellant's Brief states no evidence of title passing from Salt Lake City was introduced. But see page 13 of Exhibit A, also R. 177. Respondents' position was stated by counsel at R. 118 and 123-125; but this probably cannot be considered evidence.

The top paragraph on page 7 ignores Respondents' claim to prevail based on deed from Salt Lake City for delinquent special assessments. (Tr. 118, 123-125, 177, 178).

Appellant fails to state on page 8 of his Brief that

respondents relied also on section 104-29-1, U.C.A. 1943. (Tr. 122-123, 181, 182, 183).

Appellant's Brief states on page 9 that taxes were not paid by Bowers or Hansen for 17 years from 1928. There is no evidence on the years 1935 to 1945, inclusive. Taxes for 1928 to 1934 were covered by tax sale for 1928. (See pages 3 and 5 of Exhibit A). Respondents paid the taxes from 1946 to 1948, inclusive. (Tr. 177).

At page 10 Appellant's Brief says:

“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).

It is plain from the statements of the trial judge that respondent did not prevail primarily on the statute of limitations. (R. 180, 183)

“THE COURT: Well, if you have no title, how can you raise the statute of limitations on him? (R. 182).

“THE COURT: Well, I can rule on that statute of limitations.—I don't think it is necessary to make that, but for your benefit I will hold that.” (R. 183).

Appellant's Specification of Errors

Appellant has not argued his specifications of error

numbers 4, 6, 8, 9, 11, 13, 14, and respondent assumes they are abandoned.

Cross-Assignments of Error

1. The lower court erred in denying respondents' motion for judgment on the pleadings. (R. 64).

POINTS RELIED ON BY RESPONDENT

1. Appellant's cause of action was barred by the statute of limitations and respondent should have been given judgment on the pleadings.

2. If respondent cannot prevail on Point 1, then respondent should have been given judgment under sec. 104-29-2, U.C.A. 1943

3. The statute of limitations does not bar respondent's counterclaim.

4. It was not error to admit testimony that the deed from Bowers Investment Company to V. Lynn Hansen was in fact a mortgage transaction.

5. Appellant had no title to the property and judgment against him as to all parties was right.

6. Refusal to permit appellant to amend his complaint in the midst of the trial was not error.

7. Respondents' evidence of title was sufficient to support judgment quieting their title against plaintiff.

ARGUMENT

Point 1

Appellant's cause of action was barred by the statute of limitations and respondent should have been given judgment on the pleadings.

Two related question are involved in this Point:

A. Can appellant identify this action with his first suit against respondents and others, within 104-2-41, U.C.A. 1943?

B. Are sections 104-2-5, 104-2-5.10, Utah Code Annotated, 1943, as added by chapters 18 and 19, Laws of Utah 1943, and Section 104-2-6, Utah Code Annotated 1943, as amended by Laws of Utah 1943, chapter 20, applicable to appellant?

It is conceivable that both the appellant's suit and respondent's counterclaim are barred and that neither can move against the other. This Court should endeavor to avoid such a result. If these statutes bar actions by both tax title holders and those holding under the former owner there seems to be no practical method of resolving the dispute over this property.

These statutes of limitations were intended, and should be construed, to protect purchasers of tax titles after four years, particularly where the tax title holder has gone into possession.

Appellant commenced this suit Oct. 14, 1947, (R. 3) which was more than four years after the effective date of these statutes (App. Brief 19) and this action appears

to be barred unless protected by section 104-2-41, U.C.A., 1943, so as to give appellant the advantage of his first suit against respondents and others. (Third Amended Complaint, par. 2, R. 39).

Our position on this question is based on the assumption that the first suit involved an alleged cause of action against these defendants Bird and no other persons. Upon the failure of that action, not upon its merits, a new suit could be instituted within one year under the provisions of Section 104-2-41, U.C.A., 1943. Since the case at bar involves the addition of a new and allegedly necessary party (R. 39, par. 3) it is not the same cause of action and is therefore barred by the statutes discussed herein.

“It is established that in order to comply with statutory provisions of the character under consideration, where a new action is brought after a failure of a prior suit, the second suit must be based substantially upon the same cause of action, and the parties in each suit must be the same.” 34 Am. Jur. 232.

This rule was affirmed in *Platz v. International Smelting Co.*, 61 Utah 342, 213 Pac. 187, where the court said at page 349:

“It may be admitted that when an action fails otherwise than upon the merits the statute of limitations does not run, and a new action may be instituted between the same parties and upon the same cause of action within one year. Also

that the plaintiff is entitled to the benefits of Comp. Laws of Utah, 1917, Sec. 6484.”

This was an action brought against the wrong corporation initially because the corporation had changed its name upon dissolution of the original and the second suit was held to be within the statute because the difference in identity of the defendants was immaterial.

An Annotation on this question appears at 3 A.L.R. 824, and the rule as to identity of the defendants is annotated at pages 826 to 828. The Utah case seems to be in accord with the general rule that parties defendant need not be identical if they are substantially identical, but no case goes so far as to permit the addition of entirely new and necessary parties. At page 827 the annotation refers to two cases involving quiet title suits which show the significance of the very question here involved.

“Where the first suit was against various defendants occupying various parts of the land sued for, and it was severed as to A as to his part of the land, and later there was a nonsuit in regard to him, it was held that the statute applied to a new suit against A. *East Tennessee Iron & Coal Co. v. Lawson* (1895) Tenn., 35 S. W. 456. But where, in a similar case, the new suit added other necessary defendants, it was held that the statute did not apply. *East Tennessee Iron & Coal Co. v. Walter* (1895) Tenn., 35 S. W. 459.”

In *Jordan v. Commissioners of Bristol County* (Mass), 167 N.E. 652, it was held that although a statute

extends the benefit of the limitation statute for one year for mere irregularity or formal errors which are corrected upon the second suit, a mistake in naming the wrong defendant is not within the statute.

And, in *Luft v. Factory Mutual Liability Insurance Co.* (R. I.), 155 At. 526, where a plaintiff brought suit for personal injuries against the insured and an insurance company which was dismissed because the wrong insurance company was named and then a second suit was brought naming the correct insurance company as defendant, the court held:

“There is no merit in the plaintiff’s further contention that they may prosecute their suits under the provision of Section 9, Chapter 334, G. L. 1923, which permits the bringing of a new suit within one year if the original action was for any cause abated. That statute is not applicable in the case of a defendant which was a stranger to the original action. See *Mackel v. Pawtucket Gas Co.*, 48 R. I. 485, 139 A. 308.”

The second suit must be on the same cause of action as the first suit in order to come within the protection of this statute. *Williams v. Nelson*, 45 Utah 255, 145 Pac. 39, 41.

Appellant therefore lost the protection of the statute (104-2-41) when the second suit was brought against additional and necessary parties, and also because the first suit failed on the merits. (See Point 2.)

Appellant does not contend that the statutes (104-2-5, 5. 10 and 6) are not applicable to one claiming under

the original owner against the tax title holder, but concedes that by arguing that the statutes apply to both parties, (App. Brief, 19-20) and either or both may be barred if the action, defense, or counterclaim be filed after four years from the effective date of the statutes.

This compels appellant to face the provisions of sec. 104-29-2, U.C.A. 1943.

Point 2

If respondent cannot prevail on Point 1, then respondent should have been given judgment under sec. 104-29-2, U.C.A. 1943.

Respondents submit that if this Court finds the case at bar is a cause of action different from that stated in No. 80375, appellant may not have the benefit of 104-2-41 and is therefore barred by the time provisions of 104-2-5.10, U.C.A., 1943, as amended.

If the court finds the case at bar the same cause of action as No. 80375, appellant is barred because he may not sue twice on the same cause of action unless he is protected by a dismissal without prejudice under 104-29-1.

The case of Pender v. Mose Alix, et al., No. 80375, was dismissed on motion of defendants Bird after the appellant had refused to amend following the sustaining of respondents' demurrer. The order of dismissal was as follows:

“The demurrer of the defendants, R. L. Bird and Mae C. Bird, to the complaint of the plain-

tiff having been sustained on September 11, 1947, by the Honorable Joseph G. Jeppson, Judge of the above entitled court, on the grounds and for the reason that there was a misjoinder of parties defendant, that separate causes of action herein are improperly united, that several causes of action are not separately stated, that paragraph 8 was ambiguous in not disclosing to which property the claim of any defendant related and for the ground that paragraph 8 was uncertain in not disclosing whether the claim of each defendant was as to all property described in the complaint or as to only certain parcels, and if the latter then to which parcels, and the said defendants having given the plaintiff notice of the ruling on said demurrer on September 17, 1947, thereby giving plaintiff until September 28, 1947, within which to amend his complaint, which time was extended by the court upon application of the plaintiff to and including October 8, 1947, and the plaintiff having failed to amend his complaint within the time allowed by the court, and the default of the plaintiff in failing to amend having been duly entered on October 10, A. D. 1947;

IT IS THEREFORE ORDERED that the complaint be dismissed as to the defendants, R. L. Bird and Mae C. Bird.

Dated this 18th day of October, 1947.

(s) ROALD A. HOGENSON
District Judge''

A recent Utah case held that such an order of dismissal barred an attempted second suit. *State v. Cali-*

ifornia Packing Corporation, 1944, 105 Utah 191, 145 P. 2d 784, at 786.

* * *

“Where a demurrer to the complaint is sustained on the ground that it fails to state facts sufficient to constitute a cause of action, and the defendant (plaintiff?) refuses to plead further, and the court dismisses the action for that reason, such judgment of dismissal will prevent the maintenance of a new action for the same cause of action where the allegations in the two complaints are substantially the same, and no substantially new facts are alleged in the new complaint. This is true even though the court was incorrect in holding that the original complaint did not state a cause of action.” (authorities cited)

Since the complaint as to defendants Bird in the second action, No. 81647, avers substantially the same facts as the complaint in the first action, No. 80375, appellant should be barred from bringing the case at bar.

As stated, by way of argument, in the California Packing case at page 786 of 145 p. 2d:

“A dismissal of action after a demurrer has been sustained and plaintiff has refused to plead further is not mentioned in Section 104-29-1 as a ground for a ‘dismissal without prejudice’ so it must come under Section 104-29-2 and be ‘with prejudice’.”

And so here, since the order of dismissal in the first suit was not upon any of the grounds stated in 104-29-1

the case falls within 104-29-2 and the instant suit, not following a dismissal not upon the merits, cannot be revived.

To repeat: If the cause of action is different, the second suit does not come within the protection of 104-2-41 and is barred by the statutes of limitations. And if the cause of action is the same it is barred by the dismissal on the merits under 104-29-2.

Point 3

The statute of limitations does not bar respondents' counterclaim.

A cursory reading of the statutes suggests that their purpose was to compel fee owners who lose their property at tax sales to take action within four years from the date of sale to the county, or forever hold their peace. A study of these statutes, as amended, suggests the possibility that both the purchaser of the tax title and the original fee owner must within four years from the date of tax sale bring action for recovery of possession or involving the title of lands sold to the county.

These sections are all so similar that they are confusing. As we analyze them, they are reconciled as follows: 104-2-5 as amended simply adds to the previous provision for actions involving recovery or possession of lands a shorter period than seven years for actions to recover property "held by another under tax deed." This limitation was elaborated by 104-2-5.10 which applied specifically to property sold pursuant to 80-10-68

(6), which provision was enacted by Laws of Utah, 1939, Chapter 101. This section (104-2-5.10) applied both to actions for recovery or possession and to defenses or counter claims for recovery or possession, restricting the maintenance or setting up of either. Upon amendment in 1947 this section was made applicable also to the property sold to the county prior to 1939 under the earlier law, which was 80-10-66, R.S.U., 1933, and the restriction on defenses was eliminated. As applied to the case at bar, this means that there was no restriction as to the defense after the effective date of the 1947 amendment (May 13, 1947), if it be assumed that this is a suit involving recovery or possession of lands. Since the defense in this action was interposed subsequent to May 13, 1947, to-wit: February 4, 1948, it is not barred by 104-2-5.10. If then this is a suit for recovery or possession, it could be that the action is barred originally by 104-2-5, and now by 104-2-5.10, but that the defense is not barred.

104-2-6 does not relate to recovery or possession of real property but to actions "founded upon the title to real property or to rents or profits out of the same."

In analyzing these statutes, we should not overlook the intent of the legislature as indicated by 104-2-5 to protect tax titles. The interest of the state is to apply property taxes equally and compel all property to bear its fair share of the load. If tax titles are made invulnerable they are made valuable and the county will be better able to sell them for all of the delinquent taxes.

In 104-2-5 the bar of the statute is placed against

“actions brought for the recovery of real property held by another under tax deed.” This is not ambiguous and deals with possessory actions. 104-2-5.10 still deals with possessory actions and would be inconsistent with the other statute if it barred actions and counterclaims by tax title holders. And the omission of the word “defenses” is consistent with that. If the former owner is in possession and continues in possession he may defend that possession and preserve the status quo even after four years from the auditor’s deed has run; but if such former owner needs affirmative relief his claim will be barred after four years.

But 104-2-6 does not deal with possession—it deals with “title to real property or to rents or profits out of the same” and the former owner is denied right of action or defense because of his delay. The former owner may be considered to have abandoned his claim and is not in possession to give notice of claim, so the legislature’s intent to settle tax titles requires that the former owner have no right to interfere with the title after four years.

This approach harmonizes the statutes and is backed by reason. The former owner is compelled to take his action within four years unless he is in possession, in which case he can defend his possession but cannot expand it by action or counterclaim.

It is doubtful whether any other view could be upheld under the constitution. These statutes commence to run from the auditor’s deed to the county. At that time there is no tax title holder and no cause of action. To

permit the statute to start running at that time might bar the remedy before the right of action has materialized from a sale by the county to a prospective tax-payer. This would tend to depreciate the values of tax titles, and would be based upon a violation of constitutional principles in barring a remedy before the right has become actionable.

This principle was thus stated in *Taylor v. Miles*, 5 Kansas 498, 7 Am. Rep. 558, at 566:

“A statute of limitation can only be applied where one person has received or suffered some injury from another person either in contract or tort. It must operate to bar a *cause of action*, for it seems absurd to say that a cause of action can be barred if no cause of action has ever accrued.”

This court has recognized the principle by its holding in *State Tax Commission v. Spanish Fork*, 99 Utah 177, 100 Pac. 2d 575, 131 ALR 816 that a cause of action accrues when it becomes remediable in the courts, with all prerequisites cleared away. In that case this Court quoted with approval the following statement from *Sweetser v. Fox*, 43 Utah 40, 48-49, 134 P. 599, 602, 47 LRA (NS) 145, Ann. Cas. 1916 C 620:

“It is a rule of universal application that a cause or right of action arises the moment an action may be maintained to enforce it and that the statute of limitations is then set in motion. The test, therefore, is, Can an action be main-

tained upon the particular cause of action in question? If it can, the statute begins to run.”

See also 34 Am. Jur. 47; 54 C.J.S. 204.

The Court should hold that the counterclaim of the tax title holders is not barred and that they should have had judgment on the pleadings and on the evidence.

Point 4

It was not error to admit testimony that the deed from Bowers Investment Company to V. Lynn Hansen was in fact a mortgage transaction.

Appellant considers this matter under Point 3 of his argument. He argues that there was no evidence that he got nothing by his deed from Hansen and also that the evidence was not admissible because the issue was not raised by the pleadings. The two positions are inconsistent.

Was the evidence admissible?

The evidence was of two kinds: that Hansen had no title to convey because his was only a security interest and that Hansen told Pender he owned nothing from which it follows that Pender was not a bona fide purchaser for full value.

No contention is made that evidence of lack of good faith or of notice of lack of title was improperly received. Appellant squarely objected, however, to introduction of evidence that Hansen's deed from Bowers Investment Company was actually a mortgage (R. 125-126, 131.)

The answer of defendants Bowers alleges that appellants "have no right, title or interest in said real property as described in plaintiff's Third Amended Complaint and that no other party has any right, title or interest in and to said property." (R. 60) In effect this is a denial of appellant's title and an assertion of their own title. Appellant so characterizes it. (App. Brief, 36.)

Appellant's Brief (pp. 36, 37) belabors a point about pleading equitable title. There was no effort to show equitable title in Bowers, but legal title, as claimed in their answer. Proof that Hansen got equitable title only defeated Bowers as well as appellant. (R. 172).

Appellant has no support for the view that the evidence was inadmissible for the purpose of defeating appellant. There was no request to limit its effect and it was already admissible under the general denial to show no title in appellant.

"Para. 1998. Right To Show That Deed was Intended as a Mortgage Under Denial of Ownership. In actions in ejectment and suits to quiet title or to foreclose a vendor's lien, a denial in the answer of an allegation of ownership in the complaint raises an issue upon which the defendant may show that a deed under which plaintiff claims title was given as security for a debt, and was intended as a mortgage." Bancroft, Code Pleading, P. 3432.

General rules of pleading sustain the court in admitting this evidence.

“As a rule, a general denial is a complete defense unless inconsistent with the specific allegations of the answer. It puts in issue every material allegation of the complaint, that is, every material allegation constituting the cause of action. For example, it puts in issue allegations as to nonpayment of the note sued on, ownership, title, and value, as well as an allegation that defendant claims some interest in the land described in the complaint.” Bancroft, Code Pleading, P. 612.

“Under a general denial evidence is admissible as to all matters which go to prove that the plaintiff never had any cause of action, even though such matters going to the original cause be affirmative in their character. Under this rule evidence of any fact is admissible which is inconsistent with and thus negatives the plaintiff’s cause of action.” Bancroft, Code Pleading, P. 962.

That evidence showing an instrument in form a deed was in fact a mortgage is admissible is hardly open to question, so far as the parol evidence rule is concerned. *Brown v. Skeen*, 89 Utah 568, 58 P. 2d 24, 32; *Bybee v. Stuart*,, Utah, 189 P. 2d, 118, 122.

Point 5

Appellant had no title to the property and judgment against him as to all parties was right.

Appellant does not argue this point in his Brief, but is content to rely on a quit claim deed from V. Lynn Hansen, who appeared to be owner of record. (Exhibit A, pages 7 and 10).

The Court found (R. 90) and the evidence established (R. 131, 141) that appellant's grantor had only a mortgage interest in this property. Hansen could thereby convey only that which he had, and since the mortgage had been paid (R. 132) Hansen had nothing. Section 78-1-12, U.C.A. 1943.

In *Nix v. Tooele County*, 101 Utah 84, 118 P. 2d 376 at page 377 this Court said:

“Plaintiff's title is founded upon quit-claim deeds. Such deeds do not imply the conveyance of any particular interest in property. See Section 78-1-12, R.S.U. 1933, as compared with Section 78-1-11, R.S.U. 1933. Plaintiffs acquired only the interest of their grantors, be that interest what it may.”

This is the rule stated in the annotations at 44 A.L.R. 1266, and 162 A.L.R. 556. See also *Messenger v. Peter*, 129 Mich. 93, 88 N. W. 209.

Appellant is not a purchaser in good faith and for value and has no standing to claim that his interest is superior to any other interest.

On the question of good faith and payment of value by appellant it is not directly material whether the conveyance from the Bowers Investment Company to Hansen (Exhibit 1) is a deed in legal effect or a mortgage. If the deed conveyed fee title from Bowers Investment Company to Hansen, the title apart from tax deeds is in F. B. Bowers, for Hansen conveyed to F. B. Bowers at a date prior to the deed to appellant (Exhibits 3 and

5). Even though the deed to F. B. Bowers was not recorded it prevails over a deed to a purchaser who first records but who does not purchase either in good faith or for full value. If the conveyance from Bowers Investment Company to Hansen is found by this court to be in fact a mortgage, then the title apart from tax deeds is in the Bowers Investment Company. Evidence is in the record (R. 132) that the obligation owing Bowers Investment Company to Hansen, for which the deed was security, was paid by the Bowers Investment Company.

“The general rule is that payment of the mortgage debt ipso facto et eo instanti extinguishes the mortgage.” (36 Am. Jur. Sec. 406, 891, and cases cited.)

“ * * * it is certain that the mortgagee’s interest, whatever name may be given it, is terminated by payment of the debt secured * * * and no conveyance by the mortgagee is necessary to perfect the mortgagor’s estate.” (36 Am. Jur., Sec. 413, 894 and cases cited.)

The question whether appellant may defeat this interest which is prior in time arises only if appellant is a purchaser in good faith for full consideration.

Appellant purchased with notice of ownership of the property in someone other than his grantor. He claims through Hansen who told him prior to completing the transaction that he (Hansen) did not own the property. The record on page 135 reads:

“Court: You were asked to tell what you said to Mr. Pender.

“A: Well, in substance, I told him I didn’t own the property.”

Since appellant was notified directly that his grantor did not own the property which was to be conveyed, appellant was put on notice that some other person owned the property. Appellant could not in good faith expect to obtain rights greater than his grantor had to convey, even over an unrecorded interest when knowledge had been brought home to appellant that his grantor had no interest. Appellant states (App. Brief 28) that there is no evidence that Hansen advised appellant during negotiations that the deed held by him was only a mortgage, and hence argues that appellant could not have had notice. This is not controlling for it is not essential to constitute lack of good faith that appellant receive a full explanation of his grantor’s lack of title.

A later purchaser who had information of a fact or facts that would put a prudent man on inquiry, and which would, if pursued, lead to actual knowledge of the state of the title, is not a purchaser in good faith. Possession of the land in one other than the grantor is sufficient fact to put on inquiry. (Toland v. Corey, 6 Utah 392, 24 P. 190, aff’d 154 U. S. 499, 14 S. Ct. 1144.) The same result should follow if the purported grantor informs the later purchaser that he is not the owner.

It is not essential that appellant be informed by Hansen of the exact state of the title.

“To charge a person with notice of an outstanding equitable interest it is not necessary that he have notice of the identity of the holder thereof; it is sufficient if he has notice that the title of the person from whom he buys is subject to the outstanding interest.” (55 Am. Jur., P. 1070.)

Since Hansen told appellant that he did not own the property, appellant had notice that the title he purchased was subject to an outstanding interest.

Appellant lacked good faith for he deliberately ignored interest outstanding against the title of his grantor. (55 Am. Jur., Sec. 687, p. 1069).

“The (recording) statute was not enacted to protect one whose ignorance of the title is deliberate and intentional, nor does a mere nominal consideration satisfy the requirement that a valuable consideration must be paid. Its purpose is to protect the man who honestly believes he is acquiring a good title, and who invests some substantial sum in reliance on that belief.” *Wisconsin River Land Co. v. Selover*, 135 Wis. 594, 116 N. 265, 16 L.R.A. (N.S.) 1073 (1908).

Substantially the same language is used in *Beach v. Faust*, 2 Cal. 2d 290, 40 P. 2d 822 (1935).

Appellant cites authorities in his brief at pages 33 to 35 to establish good faith in appellant but the cases are not analogous to the case at bar. The section quoted from *Thompson on Real Property*. Vo. 8, Sec. 4506, contains within itself the reason why appellant did not purchase in good faith.

“ * * * reasonable diligence * * * is held satisfied by the examination of the public records *unless he has notice of defects not disclosed by the records.*”

Respondents submit that appellant had notice of defects not disclosed by the records—that his grantor did not have title — and therefore examination of records alone was not reasonable diligence. Respondents also submit that appellant was “wilfully blind” (App. Brief 34) to the defects in his grantor’s title.

The annotation at 109 A.L.R. 746 et seq., cited by appellants (Page 34) is not in point with the case at bar for it is limited to authorities dealing with notice to defeat good faith from sources such as “reputation in the community”, “common rumor”, “hints”, “general reports”, and “casual conversation by strangers”. Appellant did not learn of defects in his grantor’s title by any of these sources. Appellant was told directly by his grantor.

The case of *Hall v. Livingston* (App. Brief 35) is not in point for the purchaser was told “by a certain person, prior to the purchase that such person understood” the property was subject to a trust. The information did not come from an immediate source such as grantor; the court held the information to be only a “common rumor”. Respondents submit that the information obtained by appellant was a direct statement of defect in the title from appellant’s grantor. The section quoted by appellant at page 35 from *Hall v. Livingston*

is incomplete and does not reveal the entire view of the court. The court continues:

“It is not meant, by this (that notice must be more than would excite a cautious and wary purchaser) that a purchaser can be affected only by some *direct and positive statement* from the party interested; notice may be implied from circumstances (if clear and unequivocal).”

It is the court's position, therefore, that if a purchaser received a direct and positive statement, such would be a fortiori lack of good faith.

The case of Raymond v. Flavel is not in point because the court found no evidence showing that any defect ever existed.

Furthermore, appellant did not pay sufficient value to Hansen to obtain the protection of the recording statutes to defeat a prior unrecorded interest.

The record discloses the amount paid by appellant to Hansen to be nominal. The record (143, 144) reads:

“Q. (of Mr. Hansen): Is your recollection of the transaction that the amount was large considering the property or that it was a nominal consideration?

A. I would say that it was almost nil relative to the value of the property.”

* * * *

“Q. Do you recall whether it was less than a hundred dollars?

A. I am sure it was, sir.

Q. Do you recall whether it was less than fifty dollars?

A. I am inclined to think it was.”

And on page 151:

“Q. Mr. Pender, how much did you pay Mr. Hansen for that (the deed)?

A. Twenty-five dollars.”

This amount of consideration is not adequate to enable appellant to be a bona fide purchaser for value.

“ * * * protection (as a bona fide purchaser) has been denied where the amount paid was so insignificant in comparison with the value of the property as to be deemed unsubstantial * * * .”
(55 Am. Jur., Sec. 737, P. 1103).

In the following cases the amount paid was so small that the court denied protection as a bona fide purchaser: Wisconsin River Land Co. v. Selover, 135 Wis 594, 116 N.W. 265, 16 L.R.A. (N.S.) 1073 (1908), (paid \$5, assessed for \$150), (See annotation 16 L.R.A. (N.S.) 1073); Ten Eyck v. Witbeck, 135 N. Y. 40, 31 N.E. 944 (1892), (paid \$10, worth \$20,000); Bailey v. Colombe, 45 S. D. 443, 188 N.W. 203 (paid no more than \$100, worth \$5,000); Dunn v. Barnun, 2 C.C.A. 265, 51 Fed. 355 (paid \$100, worth \$30,000); Ochenknowship v. Dunaj, 244 N.Y.S. 267, aff'd 232 A. Div. 441, 251 N.Y.S. 589 (1930),

(required consideration to be "valuable" in the sense that a "fair equivalent is given for the property granted".) In the Wisconsin River Land Co. case, *supra*, which is closely in point with the case at bar, the court denied protection as a bona fide purchaser and stated:

" * * * circumstances surrounding the purchase which conclusively show the wilful failure on the part of the defendant to make inquiry when inquiry was loudly suggested only reinforce the conclusion that the defendant purchased for a song only a mere possibility of title and that he was fully aware of that fact."

It must appear that a purchaser under a quit claim deed is intending to purchase the land, and not merely a chance of title. (McDonald v. Belding, 145 U. S. 492, 36 L. Ed. 788, 12 S. Ct. 892; Moelle v. Sherwood, 148 U. S. 21, 37 L. Ed. 350, 13 S. Ct. 426.)

Several courts have held that if a purchaser pays only a nominal consideration, such purchaser is by this fact alone put on notice that the title of his vendor is subject to unknown interests, and is therefore not an innocent purchaser. (Wisconsin River Land Co. v. Selover, *supra*; and Ten Eyck v. Witbeck, *supra*). While appellant in the case at bar had actual notice of an outstanding interest, the nominal amount paid is an additional factor to negative good faith. The record reads on page 152, after Mr. Pender had testified that he paid \$25 for the property:

“Q. What would you say the present value of this piece of property is, Mr. Pender?

A. In my estimation, property is worth just what you can get it for.

Q. Wouldn't the market on this property in your opinion bring more than \$5,000?

A. I wouldn't know. * * *

Q. Well, you do know that property * * * south on Main Street * * * has considerable value now, don't you?

A. It has a certain value, reasonable value. I would say it at least had the assessed value.
* * *

Appellant (App. Brief, 29) argues that respondents may not assert that appellant has not paid valuable consideration because the amount respondents have paid for the tax deed does not represent the full value of the property. On the question of bona fides of appellant, it is not material what amount respondents paid for the tax title. The issue does not turn on who paid the most consideration, but on priority of rights. The controlling point is whether appellant is entitled to the protection of the bona fide purchase doctrine to defeat a prior unrecorded interest. If appellant has not paid adequate consideration, the unrecorded prior interest is not cut off and the title is in F. B. Bowers or the Bowers Investment Company. And this will be decided without reference to evidence of amount paid for the tax deeds.

Appellant apparently asserts the position that the

consideration is not nominal because they will be forced to pay the tax liens on the property before they can get clear title. (App. Brief, 29-30). Whether appellant may now or in the future have to pay the tax liens or any other expenses incident to ownership is not material to the bona fides of appellant at the time he took a quit claim deed of the property from Hansen for \$25. For appellant to avail himself of the bona fide purchase doctrine, he must show that he paid sufficient value to *Hansen*, his grantor.

Even if the value of the property is reduced by the amount of the tax liens which appellant asserts he must pay in order to quiet title, the remaining value of the property is several thousand dollars. Then for this interest, appellant paid \$25. This is still nominal consideration.

Point 6

Refusal to permit appellant to amend his complaint in the midst of the trial was not error.

This is argued by appellant as his Point 2. (App. Brief, 23-24). He says this motion was made "at the commencement of the trial of the case". Actually this motion was made in the middle of the trial. (R. 146).

Appellant's authorities indicate that permitting such amendment would probably not have been an abuse of discretion, and nothing more. Appellant made no offer of proof, indicated nothing about the nature of his claim

and has not shown any prejudice resulting from the denial of the motion.

Appellant was not prejudiced by denial of his attempt to plead laches since appellant failed to establish his own title. Estoppel of respondents from claiming title because of laches could not be asserted against respondents to prevent respondents from showing that appellant had no title. Since the basis for the judgment of no cause of action of appellant against respondents is appellant's lack of title, appellant could not have used evidence of estoppel even though it were pleaded.

Apart from prejudice, the proposed amendment was untimely.

The amendment, if permitted, would have introduced a new issue requiring additional preparation and evidence. It was not offered prior to the trial but later in the proceedings—at 3:32 P.M., of the day of trial (R. 146).

Point 7

Respondents' evidence of title was sufficient to support judgment quieting their title against appellant.

This is appellant's Point 4.

How the court rules on respondent's claim cannot concern appellant if appellant has no title.

In *Campbell v. Union Savings and Investment Co.*, 63 Utah 374, 226 P. 190, 193, the plaintiff alleged he was the owner in fee simple and in possession of certain

land and the defendant claimed through a mortgage. The defendant's claim was judged invalid and judgment was given for plaintiff. The defendant appealed and this Court affirmed, and stated:

“True it is that defendant now insists that the plaintiff's proof of title is deficient. In view, however, of defendant's answer and counterclaim, that fact cannot affect her rights in the property. Let it be remembered that the court's judgment is expressly based upon the allegations of the complaint, the averments of the answer, and those in the reply. If, therefore, the defendant has shown no right to or interest in the premises, which it has not, how can it be heard to complain that the court erred in adjudging plaintiff to be the owner as against the defendant? Certainly plaintiff's title, however defective it may be, is nevertheless ample to withstand the assaults of the defendant so long as the defendant shows no right, title or interest whatever in the property.”

In *Fares v. Urban*, 46 Utah 609, 151 Pac. 57, at page 58 the court implies that an appellant who has no title cannot successfully dispute a ruling permitting plaintiff to show additional title:

“Appellant thus failed to prove title by adverse possession and, since he also failed to prove any other title, the court was clearly justified in finding against his claim of title. . . . If it were conceded, therefore, that respondent had failed to prove a good title, or that the court had erred, as claimed by appellant, in permitting her to set

up an additional title . . . yet it must also be conceded that her title is certainly good as against appellant, since he established no valid claim or title, either in law or equity, and for that reason also any error the court may have committed in the particular just stated could not have affected, and did not affect any of his rights."

"Having failed to establish title in himself, he cannot complain of insufficiency of the evidence upon which the court adjudged title to be in the defendant." *Hopkins v. Slusher*, 266 Ky. 300, 98 S.W. 2d 932, 108 A.L.R. 662.

So long as the judgment against appellant is affirmed the ruling on respondent's counterclaim and affirmative defense are comparatively unimportant. Respondents' quarrel then becomes one with Bowers and Bowers Investment Company. Appellant carefully points out that Bowers filed a disclaimer. (App. Brief, 2). This was undoubtedly filed to avoid risk of costs under 104-57-2, U.C.A. 1943. But appellant slyly argues that this disclaimer was an admission that Bowers had never had a real claim and that he abandoned whatever claim he had. (App. Brief, 33). This disclaimer was never served on respondents and counsel saw it for the first time after the appeal was perfected. Had this been served on respondents we would have moved to correct it to show that Bowers had sold his interest to respondents for many times what appellant paid Hansen for a quit claim deed. Surely appellant knows that the suggestion at page 33 of his Brief is both incorrect and improper.

And furthermore, since appellant asserts title in himself he cannot improve his position by virtue of the disclaimer of Bowers. *Pacific Bond and Mortgage Co. v. Beaver County*, 97 Utah 62, 89 Pac. 2d. 476 at 478.

What interest are respondents shown by the record to have?

They have a deed from Salt Lake City which is not a redemption or payment of special assessments but a deed made following an offering and sale at public sale. (R. 177, 178; Exhibit A, pages 11 and 13).

They have a prima facie title from certificate of sale and auditor's deed for general taxes. (R. 178-180; Exhibit A, pages 3, 5, 9). Appellant says one of the auditor's affidavits was missing from the 1928 assessment rolls. (App. Brief, 6). This is not in evidence. (Sec. R. 117, 178-180).

They have paid taxes for 1946, 1947 and 1948. (R. 177).

They are in possession. (R. 91 Finding No. 10).

The regularity of the city's special assessment procedure was discussed (R. 118-119, 123-125, 180), but was not inquired into as the Court and counsel believed a remand and new trial would be necessary in any event if appellant obtained a reversal. (R. 182-183).

The appellant having failed to show title, respondents can prevail on the fact of possession found by the court, and admitted by appellant's failure to deny the allegations of paragraph 6 of the counterclaim. (R. 20, 54).

The Utah statute 104-57-1, U.C.A. 1943 has not been construed on this particular question—the sufficiency of possession to quiet title. But courts in other jurisdictions construing identical and similar statutes have held that possession is sufficient. In *Crandall v. Goss*, 1917, 30 Ida. 661, 167 Pac. 1025 at 1027, possession not sufficient to give plaintiff adverse possessory title was held sufficient to support a judgment quieting title. The Idaho statute construed was identical with the present Utah 104-57-1.

“this action may be maintained by respondent for possession of land in controversy and for purpose of quieting his title thereto as against appellant.”

To the same effect is *Child v. Morgan*, 51 Minn. 116, 52 N.W. 1127; and *Knight v. Anderson*, 38 Minn. 384, 37 N.W. 796 (possession of land sufficient to quiet title even without proof by plaintiff of his interest in the land).

In *Bremer v. Bigelow*, 8 Kan. 496, actual possession was held to be sufficient to give occupant right to quiet title against any person claiming an adverse interest. The Kansas statute is practically the same as the present 104-57-1. To the same effect are *Wilson v. Glenn*, 123 Kan. 16, 254 Pac. 694; *Cramer v. McCann*, 83 Kan. 219, 112 Pac. 832; *Giltenan v. Lemert*, 13 Kan. 476; *Giles v. Ortman*, 11 Kan. 59.

In *Cramer v. McCann*, *supra*, the court stated:

“The appellants (defendants who had no title) can only prevail upon their cross petition upon the strength of their own title, and not upon the weakness of their adversary’s.

Never having acquired any title to the real estate themselves, they were not entitled to affirmative relief, and appellee (seeking to quiet title) having been in peaceable possession of the property under a claim of title when the action was brought, the judgment, (quieting title in appellee) so far as any rights of appellants are concerned, is affirmed.”

See also annotation 46 L.R.A. N.S. 502 which collects authorities in accord. Cases cited to be contra construe statutes which differ materially from U.C.A. 104-57-1.

44 Am. Jur. states the rule: (at 37)

“Proof of the simple fact of possession of property has been held as a general rule to entitle the possessor to maintain a suit to quiet title against . . . a claimant without title. . . .” (Cases cited).

51 C. J. states the rule: (at 172)

“But under many statutes providing for actions for the determination of adverse claims, it has been held that one in possession of, and claiming title to, land may maintain the action without further evidence of title.” (Citing cases).

Utah authorities by dictum and implication sustain

the position that possession is sufficient interest to quiet title. In *Babcock v. Dangerfield*, 1939, 98 Utah 10, 94 P. 2d 863, the court held that prima facie title was sufficient to enable a plaintiff to quiet title, even though a plaintiff must succeed on the strength of his own title. The court did not hold that prima facie title was the only interest which was sufficient to quiet title. The court at 864 quoted language with approval from *Redmond v. McLean*, 32 Cal. App. 729, 164 P. 15:

“At the trial plaintiff, in support of his claim, testified that at the commencement of the action he was, and for a long time prior thereto had been, in possession of said lot. . . . This evidence, uncontradicted, was sufficient as a prima facie showing to establish plaintiff’s right as against defendant to a decree quieting his title to the lot so described.”

A claim of possession was therefore ruled to be sufficient.

In *Mercur Coalition Min. Co. v. Cannon*, 1947, Utah....., 184 P. 2d. 341 at 342, the court found that the plaintiff did not have possession but by dictum indicated that possession would be sufficient:

“Appellant relies on the rule of law that actual possession under a claim of ownership makes out a prima facie case against a stranger to the title, and unless controverted by one claiming an interest in the property is sufficient to justify a decree quieting title in the plaintiff. If

the evidence was sufficient for the court to make a finding that appellant was in actual possession under a claim of ownership, then it would be necessary for the defendant to establish an interest in himself."

Appellant argues that the title conveyed to respondents by Salt Lake City could not be valid because based on an assessment prior to the sale for general taxes (App. Brief, 39-40). Appellant cites *Petterson v. Ogden City*, Utah, 176 P. 2d. 599, and *Western Beverage Co. v. Hansen*, 98 Utah 332, 96 P. 2d. 1105, as so holding.

Let it be assumed here that the tax title from the county was invalid for failure of the auditor to include no affidavit on the 1928 assessment rolls. This means that no valid general tax assessment was made and there is therefore nothing to interfere with the inquiry of whether the city's title based upon special assessments was valid. The *Western Beverage* case holds simply that a valid general tax lien takes precedence over an otherwise valid city tax lien. The *Petterson* case holds the general tax deed in that case to be void and then considers the validity of the city's special assessment lien. It is patent that if Ogden City followed assessment procedures correctly it would ultimately prevail in that controversy. That rule should be applied to this case, if this question should be considered.

SUMMARY AND CONCLUSION

Appellant has not shown himself entitled to any relief in this Court from the judgment of the trial court that his quit claim deed was ineffectual to pass title, both because the consideration paid was nominal and because appellant had notice that his grantor had no title. This being true, appellant is in no position to question this Court in affirming the judgment of the District Court.

Beyond this, respondents have shown that they were in possession of the property and are therefore entitled to the decree quieting their title against appellant, without consideration of whether the tax title or the deed from Salt Lake City or the payment of taxes for three years gave to respondents a sufficient title to support a judgment quieting title. The Court should therefore affirm the judgment of the District Court.

The first question raised chronologically was the motion for judgment on the pleadings, raising the special statutes of limitations applicable to land where county tax deeds have been given. Appellant's suit was brought after the 4-year period had run and appellant did not bring himself within Section 104-2-41, U.C.A., 1943, because additional and necessary parties were added to the first suit which was commenced within time. These statutes protect the holder of the tax titles, and particularly where such holder is in possession, and the respondents should have prevailed on that motion and

should prevail in this Court should it be considered. And if the Court should conclude that appellant came within the protection of 104-2-41, then he should be barred by Section 104-29-2 because the first suit failed on its merits and the bringing of the same suit a second time was barred by this statute. The trial judge did not rule on this question but indicated that if it became material his ruling would be against the appellant.

This leaves undisposed of in the trial court the validity of the title respondents obtained from Salt Lake City and the claim of Bowers Investment Company, which could have been interpleaded on the court's own motion. It appears unnecessary that either of these matters be inquired into and unnecessary that a new trial be ordered for the purpose of examining into any further matters.

The judgment of the District Court should be affirmed and respondents should have their costs.

Respectfully submitted,

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