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In the Supreme Court
of the State of Utah

TONY FLEMETIS AND
KATINA FLEMETIS,
HUSBAND AND WIFE,
Plaintiffs and Respondents,

vs.

J. WILLIAM McARTHUR
AND MOSELLE McARTHUR,
HUSBAND AND WIFE,
Defendants and Appellants.

Case No.
7345

BRIEF OF APPELLANT

APPEAL FROM THE
FOURTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY
STATE OF UTAH

GEORGE E. STEWART,
Attorney for Defendants and Appellants.

FILED
1969
CLERK, SUPREME COURT, UTAH

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STATEMENT OF FACTS

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7345

BRIEF OF APPELLANT

STATEMENT OF FACTS

Plaintiff filed a complaint alleging that on January 26, 1945 Plaintiff entered into a written Escrow Agreement with the Defendants for the sale of certain real property, situated in Duchesne County, Utah and attached a copy of such Escrow Agreement to the complaint.

The said Escrow Agreement, insofar as it affects this cause of action, requires that before payment of

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the sum of Two Thousand ($2,000) Dollars is paid that an Abstract of Title shall be provided and presented with such Escrow which Abstract shall disclose that all encumbrances and liens shall be paid and that such abstract shall show it to be free from cloud or other encumbrances upon the title and that said abstract shall show said conditon to be true. That the Plaintiffs were to have five years in which to provide such abstract and if the same were not furnished that the forty (40) acre tract described as the Southeast quarter of the Southwest quarter of Section one Township one South, Range one West of the Uintah Special Meridian, should be eliminated from said contract.

The Plaintiff presented Abstract of Title, being Plaintiffs exhibit A, which is included within the files herein as the abstract disclosing title to be in such condition and as required in said Escrow Agreement.

Defendants filed their answer denying that the title of said property, as disclosed by such Abstract of Title was in compliance with the requirements of said Escrow Agreement, which said Escrow Agreement is as follows:

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ESCROW AGREEMENT

This agreement made and entered into this 26th day of January, A.D., 1945 by and between Tony Flemetis and Katina Flemetis as parties of the first part, and J. Wm. McArthur and Moselle McArthur as party of the second part in consideration of the discharge of the mutually dependant obligation of each other do hereby undertake and agree:

The parties of the first part do hereby agree to sell and to convey by proper Warranty Deed, free from lien, encumbrance or cloud upon the title the following described tract of land, situate in Duchesne County, Utah, to-wit:

> Lot 4; and the Southwest Quarter of the Northwest Quarter, and the West Half of the Southwest Quarter; Section 1 Township 1 South, Range 4 West;
>
> Also, the Southeast Quarter of the Southwest Quarter of Section 1, of said township, and Range of the Uintah Special Meridian.

The parties of the second part agree to purchase said property and conformable to the terms thereof *do* pay therefore the sum of Twelve Thousand (12,000.00) Dollars, payable as follows:

Eight Thousand ($8,000.00) Dollars at the time of the signing of this agreement, receipt of which is hereby acknowledged and the balance shall be paid in 5 equal annual installments at $800.00 each, payable on January 26th of each year, together with interest on all

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deferred payments at the rate of 4% per annum. Payments of additional amounts of principal may be made at any time at the option of the parties of the second part, provided however, it is understood and agreed that the last described 40 acre tract now stands in the name of Peter Flemetis and that title to the same shall be properly and suitably made by conveyance that all steps shall be taken either to quiet or to secure title free from any and all encumbrances and liens and until such title is obtained and can be conveyed that the party of the second part shall not be required to pay the sum of Two Thousand ($2,000.00) Dollars which said sum is included in the above specified purchase price, which amount it is agreed for the value of said property and if within 5 years the completed instruments are not obtained and provided and suitable abstract furnished, showing said title to be free from cloud or other encumbrances the party of the second part shall be relieved from making payment of said purchase price.

Parties of the first part are to pay all taxes and water assessments to this date and parties of the second part shall have possession and the profits and benefits from said property and shall likewise pay the property tax and water assessments upon said property during the continuance of this agreement.

It is hereby mutually agreed that this contract, Warranty Deed for said property and Abstract of Title to said property and the water certificate shall be placed with the Roosevelt State Bank to be by it held in Escrow for the faithful performance of the terms

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thereof, and said Bank is hereby authorized to receive and receipt for payments made upon the purchase of said property and it is likewise authorized to deliver the deed and other files when the purchase price of said land has been made, provided further that said bank is authorized to deliver the deed and other files when the purchase price of said land has been made, provided further that said bank is authorized to deliver the deed for the 160 acre tract with abstract therefore and the water certificate when the sum total of Ten Thousand ($10,000.00) Dollars has been paid, provided that the parties of the first part have not then supplied the necessary abstract and other papers for a full conveyance of the 40 acre tract from all encumbrances clouded upon title or other lien.

It is further agreed that all of said property is to be conveyed free and clear of all encumbrances or cloud upon the title and is to supply Abstract of Title disclosing the title to be in such condition.

It is hereby agreed that the time is the essence of this agreement and said parties of the second part fail to make any payment of principal as herein provided or fail to make payment of taxes and water assessments that the parties of the first part shall have the right and option to terminate said agreement by giving 60 days written notice of intention to terminate and if within said period the delinquent payments are not made said contract shall thereupon terminate and the parties of the first part will receive back the instrument placed in Escrow.

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It is understood and agreed that as a part of the consideration for the sums herein specified that the parties of the first part hold two individual leases from the Indian Department and likewise hold a part of a third lease which is held in conjunction with other parties and it is mutually understood and agreed that said leases shall be transferred to parties of the second part and the rental money for the year 1945 shall be paid by parties of the first part.

Executed in triplicate this day and year, first above written.

TONY FLEMETIS
KATINA FLEMETIS
Parties of the First Part

J. WILLIAM McARTHUR
MOSELLE McARTHUR
Parties of the Second Part.

The court rendered its judgment herein by which it decreed that title was a good and marketable title and that said abstract complied with the requirements of the Escrow Agreement. From such judgment and decree and the determination of said matter the defendants appeal.

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ASSIGNMENTS OF ERROR

That the Court erred in determining:

1. Title to be free from lien, cloud or encumbrance.
2. That the Abstract of Title disclosed the title of said property to be free from lien, cloud or encumbrances.
3. That the court erred in determining the title as shown in said Abstract to be a substantial compliance with the requirements of the Escrow Agreement.

ARGUMENTS

Entry 4 of the Abstract of Title is the patent to said land executed June 3, 1914 to Morris Thompson and in said patent there is a reservation as follows:

> "Subject to any vested and accrued water rights and mining, Agriculture, Manufacturing or other projects and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local custom, laws and decrees of the courts; and there is reservations from the land hereby granted right of way thereon for ditches or canals constructed by the authority of the United States."

This reservation within the patent comes under the Act of Congress dated August 30, 1890, contained in 26 Stat., 371, Title 43, USCA Section 945. It has been

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construed in the case of Griffith vs. Cole, 264 Fed. 369; also in U. S. vs. Haga, 271 Fed. 41.

By such reservations the courts have construed the same to be a limitation of the title and it likewise would not only cover any physical canals or laterals now constructed but would be a retaining of a right within the property at any future time to construct canals, laterals, or ditches under the authority of the United States, and is therefore a continuing limitation which may completely change the value of the land as such canals are constructed to the detriment of the land. It is the defendant's contention that such limitation is a definite limitation of title and is such as would not permit the transfer by plaintiffs except subject to such cloud and lien upon the title, and therefore is a complete violation of the terms of the Escrow Agreement.

Entry 5 of said abstract is an auditor's tax deed issued for the non-payment of 1914 general taxes, and said property was sold to Duchesne County, Utah.

Entry 6 of said abstract is a quit claim deed from Duchesne County to Caroline Thompson.

Entry 7 is an auditor's tax deed conveyed to Duchesne County, dated April 10, 1937, and was based upon the general tax sale for the year 1932.

Entry 8 of said abstract is a quit claim deed from Duchesne County to one Carolina(e) Thompson, which is recorded in Book 14 of deeds at page 469. There is no instrument in said abstract disclosing that the title of

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Carolina Thompson has been divested of him or that his wife has been divested of her inchoate right. Likewise, if there is a possibility that the grantees from such quit claim deeds are one and the same person, nothing in said abstract would disclose the same and it would leave the abstract with a cloud upon the title.

Entry 10 is a mortgage from the Farmers Irrigation Company, a corporation to the United States of America and the Moon Lake Water Users Association, which mortgage was dated February 18, 1935, and is recorded in book 19 of mortgages at pages 642-646. That there is nothing in said abstract that would show in any way or manner release of said mortgage or anything to infer that said land is not fully impressed with liability and lien and cloud of said mortgage.

In the presentation of this cause plaintiff has proceeded upon the theory that the restriction within said Escrow Agreement required only that the title be "A Marketable Title." This probably comes from the theory and from the fact that in the uniform real estate listing contract used quite generally, provision is made that the title shall be "Marketable Title." This appears to have been the theory taken by the court in making his findings and judgment, although the same does not in any manner comply with the restrictions and reservations contained.

As to the first proposition that title must be free from cloud, lien or other encumbrance, and be trans-

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ferred by proper Warranty Deed, our statute 78-1-11, U.C.A. 1943, provides under effect of Warranty Deeds:

> * * * "which covenants from the grantor, his heirs and personal representatives, that he is lawfully seized of the premises; that he has good right to convey the same; that he guarantees the grantee, his heirs and assigns in the quiet possession thereof; that the premises are free from all encumbrances; that the grantor and his heirs and personal representatives will forever warrant and defend title thereof in the grantees, his heirs and assigns against all lawful claims whatsoever. Any executions to such covenants may be briefly inserted in such deed following the description of the land."

Booth v. Wyatt, 54 Utah 550, "The term conveyance as used in deed of conveyance means every right to or interest in land which may exist in third persons to diminution of value of land but coexistent with passing of fee by conveyance."

State vs. Alter, 11A N.W. 293, defines Fee as follows: "The phrase Fee Simple means an absolute title or estate in lands wholly unqualified by any reversion, reservation or condition, or limitation or possibility of any such thing, present or future, or precedent or subsequent, and it follows of necessity that where a grant is made expressly persuant to and in compliance with the act of the legislature requiring the creation of such an estate as to the validity for any purpose, the grantor is estopped to allege anything in contravention of the legislative intent or in diminution of the estate described."

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Conrad vs. Parker, 85 Pac. 810. The court says: "Fee Simple, and Fee Simple absolute are equivalent terms and well defined legal expressions, and an estate in fee simple is the greatest that one can possess."

Adams vs. Reed, 11 Utah 480. At page 497 and top of 498, the court holds: "A fee simple estate is the largest in land known to the law. It is an absolute estate in perpetuity and excludes any qualification, restriction, or limitation."

Quoting from syllabus: "Representations as to the character of ones title to land are more than expressions of opinion when they are confirmations of matters of fact and inducements to a contract, and when untrue and material they are fraudulent."

In the proceeding the plaintiff has sought to avoid the limitations and clouds upon the title by evidence that the same were either known or that they were such as could be observed by defendant and that the mortgage referred to does not constitute a cloud. It is the defendant's contention that the contract is the obligation, and must be complied with; that the plaintiff assumed definite obligations as stated in the Escrow Agreement and that it is required of them to have the abstract cleared up, relieving those restrictions or clouds. That the reservation in the patent is a qualification and reservation that is completely fatal; that the abstract does not show the tax deed to Carolina(e) Thompson to have been cleared up or that Carolin*a* and Caroline are one and the same person, if such might exist. It is our

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contention that the mortgage in the abstract is a definite limitation and until it is either released, a waiver had as to this land, or some instrument relieving such mortgage obligations, that it constitutes such a cloud upon the title as is contemplated by and restrictions under the Escrow Agreement.

Respectfully submitted,

GEORGE E. STEWART,

Attorney for Defendants and Appellants.

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