

1951

S. W. Dowse v. Fred Kammerman and Vaugh D. Kammerman dba Kammerman Company : Brief of Appellants

Utah Supreme Court

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David A. West; Attorney for Appellants;

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IN THE SUPREME COURT OF THE STATE OF UTAH

— FILED

SEP 19 1951

S. W. DOWSE,

Respondent, Clerk, Supreme Court, Utah

VS.

FRED D. KAMMERMAN and
VAUGHN D. KAMMERMAN,
doing business as KAMMER-
MAN COMPANY,

CASE NO. 7719

Appellants.

Brief of Appellants

DAVID A. WEST,
Attorney for Appellants.

POINT 1.

Respondent's acts in
from Salt Lake County, know
on proceedings, levy, sale,
the property to Appellants,
for a valuable consideration
standing by for several years
general and special taxes,
in value, going to the heirs
to pay taxes and whose title
County, obtaining quitclaim
sideration, then bringing
constituted equitable estate
ing a defect in the County
auditor's affidavit.....

g the property involved herein
that the County's title was based
for delinquent taxes, selling
mediate predecessor in interest
putting the buyer into possession,
during which time buyer paid both
when the property had increased
the original owner who had failed
reportedly passed to Salt Lake
as from them for a nominal con-
tion to quiet title in himself,
against Respondent, notwithstand-
tle by reason of a missing
..... 2.

I N D E X

STATEMENT OF FACTS	1
STATEMENT OF ERRORS RELIED UPON	4
STATEMENT OF QUESTIONS INVOLVED.....	4

C I T A T I O N S

Volume 19 American Jurisprudence	4
Volume 51 American Jurisprudence	6
Grand Central Public Market v. U. S., 22 Fed. Supp. 119.....	6
Robbins vs. U. S., 21 Fed. Supp 403	6
Winston vs. Saugertias Farms, 21 N. Y. Supp. 2d. 841.....	7
Southern Pacific v. Industrial Commission, 91 Pac. 2d 700; 54 Ariz. 1	7
John H. Spohn Co. v. Bender, 64 P. 2d 152	7
Seifner vs. Weller, 171 S. W. 2d. 617, (Mo. case).....	7
Brisbon v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277 (Nebr. case).....	7
Montclair Trust Co. v. Russell Co., 39 A. 2d 641, 135 N. J. Eq. 570....	7
Fed. Land Bank of Omaha v. Houck, 4 N.W. 2d 213, 68 S. D. 449....	8
Pender v. R. L. Bird et ux, Utah 224, Pac. 2, 1057.....	9
Ferguson v. Etter, 21 Ark. 160, 76 Am. Dec. 361.....	11
Claybourne v. McLaughlin, 106 Mo. 521, 27 Am. St. R. 369	12

STATUTES REFERRED TO

78-1-1, Utah Code Annotated 1943.....	9
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S. W. DOWSE,

Respondent,

VS.

FRED D. KAMMERMAN and
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doing business as KAMMER-
MAN COMPANY,

Appellants.

CASE NO. 7719

Brief of Appellants

STATEMENT OF FACTS

S. W. Dowse, plaintiff and respondent, hereinafter called Respondent, instituted an action in the District Court of the State of Utah in and for Salt Lake County, against defendants and appellants, hereinafter called Appellants, to quiet title to Lot 7,

Block 1, Holland Subdivision, Salt Lake County, Utah, using the short form of complaint; to which Appellants filed an answer and cross complaint. In its answer Appellants alleged ownership in fee, and possession, and denied Respondent's claim; and as a further and separate defense, Appellants pleaded equitable estoppel, setting out facts which they claim constitute equitable estoppel of Respondent. In its cross complaint, Appellants pleaded quiet title, using the simple form of complaint.

At the trial of the case, the matters were submitted to the court, sitting without a jury, on an Agreed Statement of Facts, to which was attached as Exhibit A, a tax report for the year 1930, and also an abstract of title extended to March 28, 1951. These are a part of the designated record on appeal.

The fact on which Appellants rely, as recited in the said Agreed Statement of Facts, are briefly as follows:

One Charles E. Pittorf acquired the fee title to the property February 26, 1907. General taxes were paid each year to and including the year 1929. The taxes were not paid for 1930, and in due course the Treasurer of Salt Lake County executed a tax sale thereon, dated December 22, 1930, to Salt Lake County, a municipal corporation. Thereafter, general taxes were added for the years 1931 to 1935, inclusive, amounting to \$49.99 in all; and under

date of March 31, 1936, Auditor's tax deed issued to Salt Lake County, a municipal corporation.

Some nine years later, Salt Lake County sold the property to S. W. Dowse, Respondent herein, dated April 24, 1945, under authority of Title 80, Chapter 10, Section 68, Utah Code Annotated 1943. (See page 26 of abstract); and on June 13, 1945, S. W. Dowse, Respondent, and his wife, Pearl B. Dowse, sold said premises to Doris Trust Company, a Utah Corporation, Appellants' immediate predecessor in interest, conveying by quitclaim deed; which corporation went into immediate possession, and such possession has continued to date of decree herein; that Appellants and their said predecessor in interest paid the general taxes on said property for the years 1946 to and including 1949, four years, in the total amount of \$10.61, and paid special assessment thereon levied by Salt Lake City, in the sum of \$93.04.

While the consideration paid by Appellants for said property to said Doris Trust Company is not mentioned in the Agreed Statement of Facts, revenue stamps attached (page 28 of abstract) show a consideration of \$1000.00.

From probate proceedings filed in 1950 in Salt Lake County, it appears that Charles E. Pittorf died July 12, 1912, leaving surviving him his widow and one daughter, both residing at the time in the State of Montana. On March 14, 1950, May G. Pittorf, the

widow, executed a quit claim deed to said property to Respondent, for the consideration of \$25.00, and on March 23, 1950, Grace P. Myers, the daughter of deceased, executed a quit claim deed to Respondent for \$10.00. Respondent thereupon caused to be probated the said estate of said deceased, and by virtue of said quit claim deeds, obtained an order of distribution to himself in said estate of said property and promptly thereafter filed the aforementioned suit to quiet title.

STATEMENT OF ERRORS RELIED UPON

1. The court erred in quieting title in Respondent, and in not quieting title in Appellants.

2. The court erred in not applying the principle of equitable estoppel against Respondent.

3. The court erred in deciding that the facts did not constitute ground sufficient to invoke and apply the doctrine and principle of equitable estoppel herein.

ARGUMENTS ON QUESTIONS INVOLVED

As shown under the title "Estoppel," 19 American Jurisprudence, at p. 601, Estoppels are of three kinds: (1) By Record, (2) by deed, and (3) by matter in pais, the first two being sometimes referred to as technical estoppels as distinguished from equit-

able estoppels or estoppels in pais; and the author concerns himself only with estoppels by deed and estoppels in pais.

Under the discussion of Estoppel by Deed, and the sub-heading "Effect of Quitclaim," p. 606, appears the following:

"Subject to qualification under special factual situations, it may be stated as a general principle that no estoppel arises from either making or accepting a quitclaim deed, except as to any right, title, or interest the grantor may have had or claimed at the time of conveyance. Such generalization is in full accord with the basic theory that a mere quitclaim is created where a deed is only a conveyance of the interest or title of the grantor in and to the property described, rather than of the property itself, and that a quitclaim passes all the right, title, and interest which a grantor has at the time of making the deed which is capable of being transferred by deed, unless a contrary intent appears, and nothing more."

Appellants accept the foregoing statement, but assert that in the instant case the first clause, "subject to qualifications under special factual situations," should apply as warranted by the special factual situations set forth herein.

Appellants assert, also, that the principle of equitable estoppel or estoppel in pais, or some application of what has been termed "quasi estoppels"

should be invoked in the instant case. Again quoting from Vol. 19, American Jurisprudence, page 633:

Equitable estoppels operate in their own field as effectually as technical estoppels do in theirs. Since, however, the principle which underlies equitable estoppel in its proper sense runs throughout all the transactions and contracts of civilized life, such estoppels cannot be subjected to fixed and settled rules of universal application, like legal estoppels, or hampered by the narrow confines of a technical formula. In other words, each case of estoppel must in the nature of things stand on its own bottom."

Further,

Equitable Estopples are invoked to further equity and justice by preventing a party from asserting his rights under a technical rule of law when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. *Grand Central Public Market v. U. S.*, 22 Fed. Sup. 119.

The doctrine of Equitable Estoppel or quasi estoppel has been extended to prevent a wrong being done, when in good conscience and honest dealing, a party ought not to be permitted to repudiate a previous statement, declaration, or action. *Robbins v. U. S.*, 21 Fed. Supp. 403.

"Estoppel" is a special plea in bar which

happens when a man has done some act or executed some deed which precluded him from averring anything to the contrary, but one who invokes the doctrine of estoppel must have acted in good faith. *Winston v. Saugerties Farms*, 21 N. Y. Supp 2d 841.

Estoppel exists when the party sought to be estopped, with full knowledge of all the facts bearing on the situation, takes a position which is inconsistent with one assumed later. *Southern Pac. v. Industrial Commission*, 91 Pac. 2d. 700; 54 Ariz. 1.

Under the doctrine of acquiescence or quasi estoppel, regularity or validity of act procured by one himself cannot be raised. *John H. Spohn Co. Bender*, 64 P 2d 152.

Generally a party will not be permitted to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him. *Seifner v. Weller*, 171 S. W. 2d 617. Mo. case.

“Estoppel” means the preclusion of a person from asserting a fact by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by adjudication on his rights, which he cannot be allowed to call in question. *Brisbon v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks*, 279 N. W. 277. Neb. case.

There is a species of “equitable estoppel” sometimes called quasi estoppel, which has its base in election, waiver, acquiescence or even

acceptance of benefits, and precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by such party, and no concealment or misrepresentation of existing facts on one side or ignorance thereof on the other are necessary. *Montclair Trust Co. v. Russel Co.* 39 A 2d 641, 135 N. J. Eq. 570.

The doctrine of quasi estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits, and this principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him, and the doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit. *Fed. Land B. of Omaha v. Houck*, 4 NW. 2d 213, 68 S. D. 449.

Applying the principles set out in the foregoing to the case before the court:

Respondent purchased the real property involved, with other property, from Salt Lake County, a municipal corporation, and received a conveyance from said County as provided by statute. Respondent then sold the property so purchased to Appellants' immediate predecessor in interest for "\$10.00 and other valuable consideration"—the exact price not being shown,—conveying by quitclaim deed (page 27 abstract).

Section 78-1-1, Utah Code Annotated, 1943, defines "conveyance" as follows:

The term "conveyance" as used in this title shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, aliened, mortgaged, encumbered, or assigned, except wills, and leases for a term of not exceeding one year.

As stated in *Pender v. R. L. Bird and Mae C. Bird*, No. 7344 in the Supreme Court of Utah, 224 Pac. 2d 1057, the Court held, . . .

That even assuming that the tax title from the county was defective, it gave the defendant R. L. Bird color of title which was clearly superior to the claim of record title asserted by plaintiff which was shown to be invalid. Thus, there was before the court a plaintiff with no vestige of title and defendants with color of title who were in possession. . . .

Notwithstanding the vestige of title of Respondent, Appellants were in possession of the premises under color of title purchased from Respondent and by reason of it, June 13, 1945; from which time Appellants and their predecessor in interest paid general and special taxes.

In 1950 (after a series of recisions, holdings, among other things that failure to supply Auditor's affidavits constituted a defect of title), the Respond-

ent, apparently, checked the record, found one such affidavit missing, sought out the heirs of the former title holder, obtained quitclaim deeds from them for a nominal consideration, to wit, \$25.00 to one, and \$10.00 to the other, filed probate proceedings, had distribution made to him on the strength of the said quitclaim deeds, and then brought the action to quiet title on the land he had theretofore sold for a valuable consideration.

Was his conduct in conformity with equity and good conscience? Is his conduct not inconsistent with the position previously taken? A suit to quiet title being an equitable action, is he coming into court with clean hands? Did his action in purchasing the property from the county and then selling it for a valuable consideration not constitute an acquiescence under the doctrine of quasi estoppel? Is he not on the one hand retaining the price paid to him for the land, and on the other, trying to get the same land back on a technical rule of law?

Appellants have been unable to find but few cases somewhat analogous to the one before the court. The following general statement is found in Vol. 51 American Jurisprudence, page 979, Sec. 1137:

Estoppel to Deny Validity of Title.—
The principles of equitable estoppel in pais may be invoked against the owner of land which has been sold for taxes when he seeks

to attack the title of the purchaser at the tax sale. Their application in a particular case is determined by the general principles of estoppel. . . .”

In the instant case, the Respondent was the purchaser at the tax sale, yet he himself is attacking his own tax title.

In *Ferguson vs. Etter*, 21 Ark. 160, 76 Am. Dec. 361,

At a sale for taxes, made by Sheriff, Nov. 3, 1851, complainants and Maddux, the testator, became the purchasers, to whom deed was made, containing the usual recitals.

At time of sale, Maddux was in possession under a lease from one Miller, who was the former owner; and after the sale, continued in possession until the day of his death, recognizing the validity of the sale and holding under it.

By will he devised his undivided interest, his devisees being defendants in the bill.

The defense was that the sale for taxes was void and did not divest the title of Miller, which the defendants allege is outstanding and paramount.

Some of the objections relied on to impeach the validity of the sale relate to the assessment of the lots, others relating to the assessment for back taxes for

a period anterior to the formation of the State Government.

The court held that,

Whether well taken or not, it is immaterial to inquire, as the defendants are estopped to set them up. . . . it was lawful for Maddux to become purchaser of the premises, and having become such purchaser jointly with complainants, and the deed of the Sheriff to him and complainants, as tenants in common, being prime facie evidence of valid legal title, and having held the premises under the tax title thus acquired, and enjoyed the rents and profits, he could not have been heard to set up an outstanding title in a stranger, in order to defeat a petition (to partition).

The case of *Claybourne v. McLaughlin*, 106 Mo. 521, 27 Am. St. R. 369, was an action in ejectment to recover possession.

Answer: General denial, estoppel and laches in bringing suit.

The estoppel plea: The property was sold for delinquent taxes against plaintiff and purchased by S. A. Wright, and that defendants are in possession, and claim title under mesne conveyances from him; that under the sale, there was a surplus of \$76.81 after payment of taxes, which plaintiff demanded and received, thus ratifying the sale.

Defendants also alleged, in substance, that plaintiff with knowledge of all the facts, stood by for years and saw defendants and grantors enter into possession, and make valuable improvements.

Some objections were made to the validity of the (tax) sale and deed. The Court found for the defendants, holding,

“It is a well recognized principle of law of estoppel that no person will be allowed to adopt that part of the transaction which is favorable to him, and reject the rest, to the injury of those from whom he derives the benefit, (citing *Austin v. Loring*, 63 Mo. 22).

“When a sale of land is made, no person can be permitted both the money and the land. And it has been held, in the application of this principle, that it makes no difference whether the proceedings under which the sales occurs are voidable, or wholly void in consequence of want of jurisdiction that when those who are entitled to avoid a sale adopt and ratify it, by receiving the whole or any part of the purchase money, equity will preclude them from setting it aside subsequently, for reasons that are too plain for statement. . . . The principle which these cases illustrate, and which is founded upon common honesty and good faith, is invoked in this defense. While the delinquent taxes were alien on this land, it was also an obligation resting up plaintiff personally, which good citizenship required them to discharge. This they neglected to do. The land was sold to satisfy the charge. . .

To permit plaintiffs to affirm the sale, and hold the proceeds in one hand, and reject the sale, and take the land with the other would be an encouragement of bad faith which courts of equity will not allow.

Respondent was presumed to know the defect, yet he sold what he knew to be a defective title for a valuable consideration, pocketed that consideration, put the buyer into possession, stood by for several years, let the buyer from him pay the taxes, both general and special, and then when the property had increased in value, slipped around and bought up for a nominal consideration the record title from the ones who had neglected for twenty years to pay any taxes (by reason of which he bought the title from Salt Lake County), then after obtaining the record title, brought an action to repudiate his former action and repossess the land.

Appellants assert that this case may be determined, not by extensive citing of analagous cases—there being few to be found of similar import—but by review of the agreed facts, and by the application of plain principles of equity.

We therefore contend that the judgment appealed from should be reversed and that entry of judgment for Appellants should be ordered.

Respectfully submitted,

DAVID A. WEST,
Attorney for Appellants.