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Vaughn L. Warr v. The Van Kleeck-Bacon Investment Company et al : Reply Brief of Defendants and Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

VAUGHN L. WARR, et al.,
Plaintiffs and Respondents,

VS.

THE VAN KLEECK-BACON
INVESTMENT COMPANY, and
THE VAN KLEECK MORTGAGE
COMPANY,

Defendants and Appellants,

JAY LARSEN,

Appellant and Intervener.

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**REPLY BRIEF OF DEFENDANTS
AND APPELLANTS**

AND

**JAY LARSEN, APPELLANT AND
INTERVENER**

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Case No.
7872

REPLY BRIEF OF DEFENDANTS AND APPELLANTS

AND

JAY LARSEN, APPELLANT AND
INTERVENER

POINT I.

BOTH VAN KLEECK COMPANIES WERE QUALIFIED TO DO BUSINESS IN UTAH WHEN THE WARR DEED WAS ACKNOWLEDGED AND DELIVERED TO THE VAN KLEECK-BACON INVESTMENT COMPANY.

Plaintiffs and respondents in their brief dwell upon the corporate status over the years of the Van Kleeck Companies both in Utah and Colorado and, although

they do not come right out and say so, are apparently attempting to convey the impression that when the Warr Deed was delivered neither company was qualified to transact business in Utah. This impression is contrary to the facts.

The Warr Deed (R. 24-5), which on its face states, "This deed is not intended as a mortgage," was dated April 19, 1921, acknowledged May 14, 1921, and after such acknowledgment duly delivered to the Investment Company and recorded.

At the bottom of page 6 of their brief plaintiffs state, "The Van Kleeck Mortgage Company qualified to do business in the State of Utah on the 2nd day of May 1921." Again on page 35 of their brief plaintiffs state that the Investment Company, the Grantee under the Warr deed, was formed in 1901 for a period of 20 years and that its corporate existence expired in 1921 *just a few months after the taking of the purported deed which was in fact only a mortgage.*

The fact is, therefore, and cannot be denied that on the date the Warr deed was acknowledged and delivered to the Investment Company both of the Van Kleeck Companies were in good standing and duly qualified to transact business in Utah.

POINT II.

PLAINTIFFS HAVE FAILED TO ESTABLISH THAT JAY LARSEN IS NOT A NECESSARY AND INDISPENSABLE PARTY TO THIS ACTION.

From page 37 to page 48, with a significant absence of legal authorities, plaintiffs argue that Jay Larsen is

not a necessary and indispensable party to this action and that his title has not been clouded for the reason that he is a bona fide purchaser for value of the surface rights and water stock involved in this action.

On pages 39 and 40 plaintiffs cite *Jones on Mortgages*, *Glen on Mortgages*, two New York cases and one Washington case, holding that Jay Larsen, as a bona fide purchaser for value, might take free and clear of a Court decree adjudging the Warr deed to be an equitable mortgage. These authorities may be of some value in assisting Jay Larsen to prevail over plaintiffs but they do not show that he is dispensable or that his record title is still free and clear.

We first point out that Jay Larsen's title has definitely been clouded by the judgment of the court below and because he holds under a warranty deed from the defaulting defendant, The Van Kleeck-Bacon Investment Company, is entitled under the authorities to intervene in the action. An abstract of title of the property would now show two owners of the water stock and surface rights, Jay Larsen and plaintiffs.

In the court below plaintiffs asked for a judgment clouding Jay Larsen's title and they got it. It is now too late for them to say, having gotten it, that they didn't want it in the first place. Plaintiffs' recorded judgment speaks louder than plaintiffs' unrecorded brief. Jay Larsen has the right to intervene here and have that judgment removed as a cloud on his title.

We next point out that plaintiffs' contention that Jay Larsen, as a bona fide purchaser, took free and

clear of the so-called infirmities of the deed absolute from the Warrs to the Van Kleeck Companies is directly contrary to the holding of this Court in *First National Bank of Price vs. Parker*, 57 Utah 290, 194 Pac. 661, 12 A.L.R. 1373.

The attention of the Court is directed to the fact that the court below, in paragraph 2 of its judgment, decreed that the Warr deed was not only an outlawed mortgage but also, in paragraph 4, decreed that the purported mortgage and *conveyance* to the Van Kleeck Companies was absolutely "void" because the companies were not qualified to do business in Utah. In this connection we refer to *Dunn vs. Utah Serum Co.*, 65 Utah 527, 238 Pac. 245, which held that a mortgage taken in Utah by a non-qualified foreign corporation was absolutely void in an action brought to foreclose the same. The decision of the court in the *Serum* case was largely based upon the prior holding of this court in the *Parker* case referred to above. The *Parker* case held that a bona fide transferee for value and holder in due course, whether by delivery or endorsement of a note payable to bearer, could not enforce such note against the maker of the note notwithstanding the provisions of the Negotiable Instruments Act where the payee of the note was a corporation not properly qualified to transact business in Utah. The Court held that the note was wholly void, not only in the hands of the non-qualified corporation payee itself, but also in the hands of its assignee or anyone deriving any interest or title therein from such non-qualified corporation.

The Court stated:

“The language of the act is not only that the contract shall be wholly void in the hands of the corporation and its assigns, but it goes farther than any of the other statutes relied upon, in that it makes the contract void in the hands of anyone obtaining any right or title through or from such non-complying corporation.”

The Court below having decreed the conveyance from the Warrs to the Investment Company to be absolutely void, Jay Larsen could get no better title to the surface rights and water stock from the Investment Company than he could get to cattle purchased for value without notice from a thief.

POINT III.

PLAINTIFFS HAVE FAILED TO SHOW THAT DEFENDANTS HAVE NO MERITORIOUS DEFENSE.

It is, of course, elementary that the merits of the case are not to be tried on a motion to set aside a default judgment. All that is necessary is that the Court satisfy itself that the defendant has on supporting affidavits a meritorious defense and interposes an answer which if true would constitute a defense to plaintiffs' claim.

Upon a trial of the case we will show that the original note executed by the Warrs to the Mortgage Company was a Denver note, payable, effected, delivered, and to be performed in Denver. In extinguishment of this debt, and not to secure any other or different debt,

the Warrs deeded the property by Warranty Deed to the Investment Company at the request of the Mortgage Company. It is not unusual for a creditor to take property from his debtor in extinguishment of the debt and to direct the debtor to convey the property to some designated third person. The reason why the Mortgage Company requested the Warrs to deed the property to the Investment Company was to keep the mortgages on the property intact and prevent their common law merger. It hoped eventually to find another purchaser of the land who might assume the mortgages.

On pages 29 and 30 of plaintiffs' brief much point is made of the *Dunn v. Utah Serum Co.* case. In that case (see page 541 of opinion) both note and mortgage "were made and entered into and by their terms are to be performed within this state" at a time when the mortgagee was not properly qualified but was in fact engaged in doing business in Utah. In the case at bar the note, as heretofore pointed out, was a Denver note, payable, effected, and to be performed in Denver. We likewise emphatically deny and on a trial will prove, if the point is relevant at all, that the mortgage company was not doing business at the time the original mortgages were executed so as to attach any infirmities against such mortgages. In any event and notwithstanding that the Court below in error declared the Warr conveyance void, the *Dunn* case is not applicable to the case at bar for the reason that the mortgage company as mortgagee did not and never has come into the Courts of Utah to foreclose its mortgages against the Warrs.

The *Serum* case, although holding a mortgage void when the non-qualifying foreign corporation comes into the Courts of this State to foreclose its mortgage, never has been held to prevent a mortgagor from voluntarily recognizing his obligation and paying his debt voluntarily.

POINT IV.

PLAINTIFFS FAILED TO SHOW THAT THE DEED ABSOLUTE FROM THE WARRS SHOULD BE CONSTRUED AS A MORTGAGE.

On page 32, plaintiffs' refer to the case of *Bybee v. Stuart*, 112 Utah 462, 189 Pac. (2) 118. This case merely held that a deed absolute should be construed as a mortgage where it is shown that the deed was given to secure a debt. This law is also expressed in *Brown vs. Skeen*, 89 Utah 568, 58 Pac. (2) 24, and in *Duerden vs. Solomon*, 33 Utah 468, 94 Pac. 978.

As heretofore pointed out, this doctrine is completely inapplicable to the case at bar for the simple reason that the Warranty Deed from the Warrs to the Investment Company was given, not to secure a debt, but to extinguish an antecedent debt owing from the Warrs to the Mortgage Company. The case at bar, we respectfully submit, is governed by the decision of this Court in *Thornley Land and Livestock Co. v. Gailey*, 105 Utah 519, 143 Pac. (2) 283. The omission of this case in plaintiffs' brief is significant. In the *Thornley* case this Court held that a deed absolute accompanied by an agreement to redeem or buy the land back within

one year should be construed, not as a mortgage, but as a conditional sale, where it appears, among other things, that the deed was given to extinguish an earlier indebtedness evidenced by mortgage. The Court stated:

“He already had a mortgage, so what would be gained by a deed absolute if it were to be construed as an equitable mortgage and require foreclosure.”

For other cases on this point, we refer the Court to 79 A.L.R. 937 and the annotation contained therein entitled, “Deed absolute on its face, with contemporaneous agreement for option for re-purchase by Grantor as a mortgage vel non.”

Respectfully submitted,

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