

1953

# Mike Dragos and Milka Dragos v. Teddy G. Russell and Manilla Russell : Brief of Respondents

Utah Supreme Court

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H. G. Metos; Attorney for Plaintiffs and Respondents;

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IN THE SUPREME COURT

of the

FILED

STATE OF UTAH MAR 12 1953

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Clerk, Supreme Court, Utah

MIKE DRAGOS, and MILKA  
DRAGOS, his wife,  
*Plaintiffs and Respondents,*

— vs. —

TEDDY G. RUSSELL and MANIL-  
LA RUSSELL, his wife,  
*Defendants and Appellants.*

\_\_\_\_\_  
BRIEF OF RESPONDENTS  
\_\_\_\_\_

H. G. METOS,  
*Attorney for Plaintiffs  
and Respondents.*

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# IN THE SUPREME COURT of the STATE OF UTAH

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MIKE DRAGOS, and MILKA  
DRAGOS, his wife,  
*Plaintiffs and Respondents,*

vs.

TEDDY G. RUSSELL and MANIL-  
LA RUSSELL, his wife,  
*Defendants and Appellants.*

Case No.  
7895

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## BRIEF OF RESPONDENTS

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### ARGUMENT

The original case before this Court was remanded for the following purpose:

“Additional evidence should be taken to determine what description is necessary to fix the boundary between the lots of the parties, so that the new line correctly coincides with the fence line which is conclusively shown to be north of the cabins.

“The problem concerning the location of the sewer cannot be determined by this Court upon the record.”

At the further trial the parties made the following stipulation as to the issues:

“MR. METOS: I think in order to make a proper record, there should be a stipulation in the record that all of the previous testimony that was offered and received, including the exhibits, should be considered as part of the evidence so we can refer to it.” (R. 33).

Mr. Livingston, Attorney for Appellants, stated that the issues to be further determined by the Trial Court were as follows:

“1. To know where the fence is, the fence has been removed; where as a matter of legal description, where the boundary should be fixed between the parties, and

“2. The location of the sewer, that doesn't appear in the evidence.

“It seems those are the two problems more strictly speaking.

“THE COURT: Those are the problems.” (R. 33).

On March 1, 1952 during the hearing of plaintiffs motion to amend the findings and conclusions of law, it was stipulated in open court between counsel for the parties:

“That the boundary between the property of the Plaintiffs and the Defendants be on the legal boundary line beginning from the corner point on the sidewalk of State Street and thence

due west 165 feet." (Line more particularly described, see Affidavit of Judge Baker).

Unfortunately, the reporter was not present to take down the stipulation, but a minute order to that effect was entered by the clerk (R. 74). The main reason for such stipulation was for the benefit of the defendants in that, the description now claimed by him gives to the plaintiffs part of their property for a distance of approximately 30 or 40 feet beginning from the sidewalk on State Street. Furthermore, the description zig-zagged to the western end of the boundary line. There is no testimony or any evidence in the record to the effect that the fence line zig-zagged. All of the witnesses who testified in the case and were asked the question of whether or not the line was straight, all stated that the fence extended straight from State Street to the western boundary line (R. 165, 174, 182).

The final judgment of the court in which this appeal is taken fixes the fence line between the two properties from east to west so that it veers northerly to the west end line to the point claimed by the defendant. The defendants' cabins are all south of the line established by the court. The sewer line has been removed by the defendants so that no improvement belonging to the defendants is now within or on the property belonging to the plaintiffs.

We believe that the statements made by the appellants in their brief at pages 8 to 10 concerning calculated interpelation from the tables in the Howard Chapin Ives,

Natural Trigonometric Functions, are conclusions on the part of the defendants. Whether the figures are correct or incorrect cannot be ascertained without cross-examining Mr. Ives or defendants' attorneys who wrote the brief. Further, the calculations appear to be immaterial.

The files in this case were lost. It was necessary for the purpose of this appeal to make out new papers. It now appears that an exhibit consisting of a map prepared by Art DuPaix is not in the files and exhibits now before the court. A copy of this exhibit will be offered at the time of the argument; it shows the boundary line that was finally decreed by the court and from which decree the present appeal has been taken.

The evidence is conclusive that the fence was on the boundary line for a distance of 165 feet west from State Street to a telephone pole which is on plaintiff's land.

Edward B. McCabe, a previous owner of defendants' land testified:

"A. Yes, I remember the pole, but it never meant anything to me.

"Q. Was that near the fence?

"A. If I remember right it is pretty hard to say, but I would say it was about twenty inches north, sixteen to twenty inches north.

"Q. How long was that pole line in there, was it in there the entire time you had the property?

"A. Yes." (R. 197).

"Q. The telephone pole was not part of the fence, was it?

"A. No." (R. 200).

Hyrum Hendricks, another witness for the defendants, stated in reference to the telephone pole:

“Q. It wasn’t part of the fence, was it?

“A. No, it would be on the north.” (R. 182).

These witnesses testified in behalf of the defendants.

### CONCLUSION

The defendants have secured for themselves, by virtue of the judgment appealed from, everything that they could possibly be entitled to. All of their improvements are south of the boundary line. The boundary is in a straight line so that future purchasers of these properties can identify what they are buying. It should be borne in mind that the fence was torn down by the defendants so that most of the fence line cannot be ascertained, particularly west from the first telephone pole. The judgment is supported by ample evidence.

We submit that the judgment and decree of the court should be affirmed.

Respectfully submitted,

H. G. METOS,  
*Attorney for Plaintiffs  
and Respondents.*



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# In the Supreme Court of the State of Utah

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RENNOLD PENDER,

*Plaintiff and Appellant,*

vs.

T. C. JACKSON and RUBY G. JACKSON,  
his wife, CHARLES E. DAVEY, and  
JANE DOE DAVEY, whose true name  
is unknown, RALPH M. DAVEY, and  
BETH S. DAVEY, his wife, et al.,

*Defendants and Respondents.*

Case No. 7,896

**FILED**

BRIEF OF APPELLANT NOV 15 1952

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APPEAL FROM THE DISTRICT COURT, Salt Lake County, Utah  
SALT LAKE COUNTY, STATE OF UTAH,  
HONORABLE WILL L. HOYT, *Judge*

---

MILTON V. BACKMAN of  
BACKMAN, BACKMAN & CLARK  
and

R. S. JOHNSON

*Attorneys for Plaintiff  
and Appellant.*

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# In the Supreme Court of the State of Utah

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RENNOLD PENDER,

*Plaintiff and Appellant,*

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T. C. JACKSON and RUBY G. JACKSON,  
his wife, CHARLES E. DAVEY, and  
JANE DOE DAVEY, whose true name  
is unknown, RALPH M. DAVEY, and  
BETH S. DAVEY, his wife, et al.,

*Defendants and Respondents.*

Case No. 7,896

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

This is an action to quiet title in the plaintiff-appellant (Rec. 1, 2) to named realty, in simplest form. As filed, it encompassed numerous defendants and parcels of land (Rec. 1, 2). Since this phase of the action concerns only the defendants and respondents Charles E. Davey, Jane Doe Davey, Ralph M. Davey, and Beth S. Davey, and the unknown heirs, executors, administrators, and assigns, in the parcel of realty described as follows:

Commencing 53 rods North and 18½ rods East from the South quarter corner of Section 27, Township 1 South, Range 1 East, Salt Lake Meridian, and running thence East 11 rods; thence North 15.4 rods, thence West 11 rods; thence South 15.4 rods to the place of beginning, in Salt Lake County, Utah

(Rec. 1, 2), no further reference to other descriptions and defendants mentioned in the original complaint will be made herein. Action was commenced by filing appellant's complaint on September 18th, 1950 (Rec. 3). The answer and counterclaim of Ralph M. Davey and Beth S. Davey, his wife (defendants-respondents herein), claiming as successors to twenty-six twenty-sevenths of the interest in said property was filed August 3rd, 1951 (Rec. 5-7), and appellant's reply to counterclaim (Rec. 8) was filed August 31, 1951. Trial of the cause was had on March 26th and July 2nd, 1952 (Rec. 1, 95), and decree in favor of the defendants-respondents, Davey, was entered on July 2nd, 1952 (Rec. 108-110), determining them to own twenty-six twenty-sevenths of the ground in suit, and directing that the property be sold (as partition was impracticable) and the sale price (after allowing for certain adjustments of expenses and cross items between the parties hereto) be divided twenty-six twenty-sevenths to respondents and one twenty-seventh to appellant (Rec. 108-110). From this decree, and denial of motion for new trial (Rec. 113), plaintiff-appellant prosecutes this appeal (Rec. 114).

Plaintiff appellant acquired a tax deed to the realty in question under date of June 7th, 1939, recorded same June 29th, 1939 (Rec. 13, 14, Exhibit "A"), paying therefore \$44.33 (Rec. 14, Exhibits "A", "B"), and appellant paid all taxes on said realty for each of the years 1940 to and including 1949 (Rec. 14, 15, 16, Exhibits "C", "D"). It was stipulated that the county recorder (or someone from that office) if called, would

testify as to the truth of the facts shown in the certified copy of the records offered as Exhibit "E"—Tax Sale Certificate, and it was so received (Rec. 16, Exhibit "E"). Appellant testified (Rec. 17-19, 45-52), that he took possession of the ground by going on it in 1939, and at least once each year, subsequently, straightened up the ground, kept weeds down, and put up "For Rent" signs on the property of the types like Exhibits "G" and "H", and "No Trespassing" signs of similar kind to Exhibit "F", and replaced the signs when they were down or removed. Appellant had the property plowed in 1949 by McEwan W. Voorhees (Rec. 16, 40-41, 53-55). Placing of the signs by appellant during years 1945-1949 and the driving of stakes to support or hold them, was witnessed by Jessie W. Lamont (Rec. 56) according to stipulation made as to her testimony if she had been called as a witness. James F. Choules and wife, testifying for the respondents stated that they never saw any such signs, although they lived in the immediate vicinity (Rec. 57-64), as did William A. Cannon also resident in the neighborhood since about 1946, (Rec. 64-74). Another of respondent's witnesses, Moroni Fox (Rec. 74-79) noticed a "for rent" sign on the property about 1948-1949, and respondent Ralph M. Davey, removed such a sign (Rec. 80-81) after March of 1949 from the property. It also appears that respondent Davey knew in 1939 of the issuance of tax deed to the appellant (Rec. 82, 87, 91), that respondent Davey paid the 1939 taxes (Rec. 84, 87, Exhibit "4"), and the 1950 and 1951 taxes (Rec. 84, Exhibits "5", "12").

Other than to go by the property and stop every sixty days or so in the summertime (Rec. 86), except during the years 1942-1946 (Rec. 93), and to remove several loads of soil in 1950 from the lot (Rec. 84-86), respondent Davey did nothing with respect to the physical handling of the ground; although, in 1942 he had probate proceedings instigated in one estate (Rec. 90), and concluded other probates in 1948 (Rec. 92). Until respondent Davey acquired the interest of his various relatives, claiming as heirs of the original owners, in 1948-1949 (Rec. 91) he claimed only a one-fifteenth interest in the ground in question. It also appears that appellant filed an action to quiet title against the same ground as here involved about 1941 (Rec. 42, 97), but after some sort of negotiations, (Proposed Exhibits "M", "N") with some of co-heirs with respondent Davey, whereby it was proposed that the property be sold and proceeds be divided half to appellant and half to other parties, if the action were dismissed; such dismissal followed in 1945 (Rec. 97), but the agreements were apparently never formally consummated. In 1942, appellant acquired by quitclaim deed an undivided one twenty-seventh interest in the premises from an heir of one of the original owners (Exhibit "3"). It was stipulated that if the county treasurer were called, he would testify that auditor's affidavits were not currently attached to the 1934 assessment rolls, pursuant to which year's delinquent tax sale plaintiff-appellant's tax deed was issued. (Rec. 13, 94.) Other facts will be detailed in connection with development of the arguments.



## STATEMENT OF POINTS

## POINT I

TRIAL COURT ERRED IN DENYING APPELLANT'S ADVERSE POSSESSION.

## POINT II

ORDINARY USE OF OCCUPANT MAY COMPREHEND HOLDING LAND FOR INVESTMENT, SPECULATION, LEASE, RESALE, OR THE LIKE.

These two points will be subdivided under the following subheadings or groupings for discussion and argument,

- (A) POSSESSION OF THE GROUND.
- (B) OCCUPANCY OF THE GROUND.
- (C) THE ORDINARY USE OF THE OCCUPANT.
- (D) ADVERSE POSSESSION REQUIREMENTS OF APPLICABLE STATUTES.
- (E) PRESUMPTIONS.

## POINT III

DOCTRINE OF TELONIS vs. STALEY SHOULD BE OVERRULED.

## ARGUMENT

## POINT I

TRIAL COURT ERRED IN DENYING APPELLANT'S ADVERSE POSSESSION.

## POINT II

ORDINARY USE OF OCCUPANT MAY COMPREHEND HOLDING LAND FOR INVESTMENT, SPECULATION, LEASE, RESALE, OR THE LIKE.

(These two points are consolidated for argument under the several subheadings as indicated hereafter.)



## (A) POSSESSION OF THE GROUND :

It is patently evident, and not controverted (Rec. 17-19, 45-52) that appellant took possession of the ground in question under claim of right pursuant to tax deed (Exhibit "A"), issued on June 7, 1939, by going actually, and physically upon the property, shortly after receiving his deed, clearing up the trash and weeds, placing "for rent" and "no trespassing" signs thereon, and, that he continued such acts, and maintained an uninterrupted possession right on through and down to the time of trial, and had had the lot plowed in 1949 fall season. No one interfered with appellant's control in such manner as to oust or hinder him, although by the testimony of respondent and some of his witnesses, it appeared that they, too, did sometimes go on the vacant ground in question, but such were only minor trespasses that might happen in any neighborhood upon vacant lots.

## (B) OCCUPANCY OF THE GROUND :

Having taken possession of the ground, plaintiff is deemed an occupant. See *Twiggs vs. State Board of Land Commissioners*, 27 Utah 241, 75 Pacific 729, at page 731, where the court said :

"Occupancy does not necessarily include residence. Webster defines 'occupancy' as the 'act of taking or holding possession'; and an 'occupant' as one who has the actual use or possession, or is in possession of a thing.' In 2 Ralph. & Lawrence's Dictionary, 893, we find that in its usual sense, occupancy is when a person exercises physical control over the land."

From 1939 onward, no one ousted appellant, no one brought any suits to enjoin him from performing any act that he performed on the land, and he continued in actual uninterrupted possession. There is no evidence of any person, including respondents, or their predecessors, who did or performed any act or acts sufficiently inconsistent with appellant's occupancy during the period 1940-1949, to gainsay that fact. And, as stated in 1 Jones Commentaries on Evidence (2nd Edition), Page 40:

“*Section 268. Possession. — Possession of either realty or personalty, once proved, is presumed to continue until the contrary is shown.* Thus it is proved at a given time “B” was seized of land. The presumption is that such seisen continues, and the burden is on him who alleges disseisin.”

Nothing contained in the transcript of the evidence shows anything to indicate appellant's possession was terminated or ousted.

Furthermore, in the case of *West End Brewing Company vs. Osborne*, 238 N.Y.S. 345, 227 App. Div. 340, the Court held, in determining whether or not a tax deed purchaser had complied with statutory requirements of serving notice of expiration of redemption period on an occupant of land, that as no notice had been given to an owner maintaining an advertising sign on the ground, that the statutory requirements had not been met, and stated:

“Actual possession is the same as *pedis possessio* or *pedis positio*, and this means a foothold on the land, an actual entry, and possession in fact, and standing upon it as a real demonstra-

tive act done. Churchill vs. Onerdank, 59 N.Y. 134, 136. 'Actual possession is usually evidenced by occupation \* \* \* \* or by appropriate use according to the particular locality and quality of the property. 48. C. J. 780. The lots were not vacant [referring to an advertising sign thereon] . . . . The location was suitable for advertising, and the plaintiff erected the sign and used and maintained it to advertise its product. Although its name as owner did not appear thereon, nevertheless, its products were advertised. The use was an appropriate one, according to locality, *and constituted actual occupancy . . . .*'

It would seem to follow, that appellant's maintenance of signs would be a further act of occupancy.

Such minor trespasses, and the like, as committed by respondents, and others, strangers to the land, would not interrupt the possession and/or occupancy of appellant, for the rule is, as stated in *Weyse vs. Biedebach*, a California District Court of Appeal Case, 261 Pac. Rep. page 1086 (1089):

"The rule is well established in California, that *the use and occupation requisite to adverse possession do not always require 'constant' use.* Myers v. Berven, 166 Cal. 484, 137 P. 260. It is enough that the property be devoted to the ordinary use of the occupants, and temporary abandonments or periods of vacancy which evince no intention of abandonment do not interrupt the possession . . . ."

(C) THE ORDINARY USE OF THE OCCUPANT:

This phrase as used in the Utah Statutes [Sec. 104-2-9, Utah Code Annotated, 1943, Sec. 104-12-9, Chapter

58, Laws 1951, Page 182-3] is not further defined therein, and it is inherent in the wording, that the determinative use is to be “fixed” by the “occupant” of the ground, and, it can readily be seen, that, land can be put to as great a variety of usages, as the fertile brain of mankind can devise. Similarly worded statutes in California have been liberally interpreted, as shown by the following language from *Posey vs. Bay Point Realty Company*, a California Supreme Court decision, reported in 241 Cal. 708, 7 Pac. 2d, 1020, where the court says:

“[3, 4] . . . . If but slight use can be made of land claimed adversely, then the requirements of continuous and uninterrupted occupancy are satisfied, if such slight use as can be made is made thereof. This is the plain meaning of the clause “for the ordinary use of the occupant”; it means a use appropriate to the location and character of the property, each case resting upon its own peculiar facts.”

It should furthermore be kept in mind that our present section 104-2-9, U.C.A. 1943 or section 104-12-9, Chapter 58, Session Laws 1951, has, in substantially the same form been on the statute books since before the compilation of laws of 1876. In the days of its original enactment, the landholdings, and real property questions, embraced the home, the homestead or farm, timber, pasture, or agricultural ground. Even so-called “urban” landholdings of that period commonly included large enough lots or tracts to permit gardening, maintaining a cow, and the like. So, in viewing the sections of that statute, it will be found that all the modes of “usage”

of the occupant were those pertinent to a predominantly agricultural community life, identified with the times. Briefly, let us list them:

- (1) Cultivating or improving the land,
- (2) Protecting it by a substantial inclosure,
- (3) Where used for obtaining fuel, or fencing timber for purpose of husbandry, or for pasturage, or the ordinary use of the occupant, while uninclosed.
- (4) Where a known farm lot has been partly improved, the portion of such farm or lot that may have been left uncleared or uninclosed according to usual course and custom of the adjoining county is deemed to have been occupied for the same length of time as the parts improved and cultivated.

But, time marches on, and use appropriate in 1876, while still applicable to rural holdings, have, in urban areas and centers been superseded by other uses, and other uses appropriate to the location and character of the property and the present time.

Now, just as the Utah Supreme Court, in *Spangler vs. Corless*, 61 Utah 88, 211 Pacific 692, in construing the exemption statutes, in the case of the "one horse, with vehicle and harness or other equipment used by a physician, surgeon, . . ." as exempted by the statutes, to mean, in the light of later times, that when the horse drawn vehicle was superseded by an automobile, the latter would likewise come within the purview of the statutory exemption, so, the Court must now con-



sider that the transition from a rural to an urban use area, will introduce into our economy other uses and bases for holding ground, and, the construction of the term "ordinary use of the occupant", must be made in a manner befitting current conditions.

It appears from the evidence (Rec. 35), that appellant has purchased and held property at tax sales; and, from other cases in this Court, such as *Parker vs. Ross*, 217 Pac. 2d 373, *Pender vs. Bird*, 224 Pac. 2d 1057. *Pender vs. Anderson*, 235 Pac. 2d 360, that appellant deals in real property and real property interests. It follows that as a concomitant principle, that realty is now, often held, particularly in newly growing or developing areas, or in changing areas, as vacant ground, rather than for primary agricultural, residential, or the like use, and not infrequently, as an investment, rental, or speculative venture.

So, it is urged, that in locations such as this, especially, since it appears that residents of the locality (Rec. 71) wanted the school board to add it to the school playground, that it would be a perfectly proper and consistent use of the occupant to hold it for investment, resale, for rent, to whomever might buy, as one of the "ordinary uses" permitted to an occupant. The Court should therefore find that appellant's usage of the ground, both factually and legally, falls within the scope of the statutory definition.

(D) ADVERSE POSSESSION REQUIREMENTS OF APPLICABLE  
STATUTES:

Considering now, the several factors necessary to

gain title by adverse possession under a written instrument, it is to be noted:

- (a) Appellant went into possession under a tax deed.
- (b) That appellant took actual physical possession of the land and occupied the same.
- (c) That the land was used for the ordinary purposes or usage of the occupant-appellant.
- (d) That the land was continuously occupied and claimed for seven years by the appellant and, that he paid all taxes during such 1940-9 period, as required by the provisions of Section 104-2-8 U.C.A. 1943, or by Section 104-12-8, Utah Session Laws 1951, Ch. 58.

It is now elementary law that the validity of the instrument in writing under which appellant entered, is no barrier to obtaining title by adverse user, even if such instrument were invalid for any reason. It should be held that the trial court was in error, in not finding for appellant on the issue of adverse possession, and, that ordinary use of the occupant was maintained in this instance and under the circumstances detailed herein.

(E) PRESUMPTIONS:

Counsel are not unmindful of the situation that might be created by the provisions of Section 104-2-7, U.C.A. 1943, or 104-12-7, Ch. 58, Session Laws, 1951, which in the form therein set forth, or in the amended further form of Section 104-2-7, Chapter 19, Session Laws, 1951, might be applied to this set of

facts, based on the theory that respondents, for the purposes of suit might be presumed to have established such title, as would give them a theoretical possession, and subordinate other titles to theirs. However, a careful reading of the wording in the section, and the provisions thereof, will show that no benefit can be squeezed therefrom for respondents.

Previous references to this statute in cases, seem to have construed it as reading:

“ . . . the person establishing *THE LEGAL TITLE* to such property, shall be presumed to have been possessed, etc. . . . ”

whereas, the statute now and always has read:

“ . . . the person establishing *A LEGAL TITLE*, to such property, shall be presumed to have been possessed, etc. . . . ”

Now, it must be conceded, from the following authorities, that a legal title may be based on a tax title, a title by adverse possession, by record title, and so forth:

“[3] As we have previously stated, appellee based his right to redeem on his tax title which was entirely disconnected from his judgment lien. Certainly, a tax title, which is *prima facie* valid, is a ‘legal title’, which authorizes the holder thereof to redeem real estate.” —Murray vs. Holland, Indiana, 27 N.E. 2nd, 126.

“[1] . . . It is true that, in an action under this statute to quiet title, the plaintiff must have both title and possession, but this does not mean that he must have paper title to the land. It only means that he must be claiming the land under



such a title as would give him the right to possession of it, and this character of title may rest on adverse possession . . . .” —Turner vs. Bowens, Ky. 203 S.W. 749.

“[3] The title acquired by limitations is a legal title, and not an equitable title, . . . .” —Houston Oil Company vs. Ainsworth, Texas, 192 S.W. 614.

“[17] The term “legal title” has no absolute or strict meaning . . . . It is not necessarily the record title for legal title may be acquired by possession.” —Barnes v. Boyd, 8 Fed. Sup. 584.

Applying the terms of the statute to our facts: If it is argued that respondents have any benefit from such statute by virtue of the presumption, then, it may be answered that appellant likewise has the benefits of the presumptions, since he has a legal title under and by virtue of his tax deed. If nothing more appeared, there might be a stalemate over the effects of such presumptions. See the parallel set out as situation (2), 1 Jones Commentaries on Evidence, 2nd Edition, at page 610, Section 357 on Conflicts, Relative Weights and Presumptions on Presumption. But, as between the two legal title holders, appellant was the one who brought the suit, not the respondent, and appellant’s evidence showed him to be the more aggressive actor respecting the ground, as he had it plowed, had weeded it, put up signs, occupied, and paid the taxes on it, and by analogy to the situation (2) discussed in Jones on Evidence, appellant by “introducing some other testimony to meet his burden of proof”,

has overcome any benefit of the presumption that might be claimed for respondents, who would likewise lose any presumption in their favor by reason of the provision of the same statute which says, following the mention of the presumption, "unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action." which is truly the case here as above set out.

### POINT III

DOCTRINE OF TELONIS vs. STALEY SHOULD BE OVERRULED.

*Telonis vs. Staley*, 104 Utah 537, 144 Pac. 2nd 513, enunciated the principal that absence of the auditor's affidavits from assessment rolls would invalidate the tax sale procedure based on sales for years with no affidavits on the rolls. This doctrine was bottomed on the theory that (1) No remedial legislation to relieve from this failure had ever been enacted, and (2) That the necessity of protecting the taxpayer in relying on the rolls, required affixation of the affidavits.

Permit us to say, in passing, that it is not our intent to burden the Court herein at this junction with repetition of the arguments in favor of the contrary view, as so ably and fully expressed in *Telonis v. Staley*, in former opinion in 106 Pac. 2d 163, 99 Utah 336, and the dissenting opinion of Mr. Justice Larson beginning at page 519 of 144 Pacific 2nd 513, as members of the court are as fully cognizant of them as are counsel,

but to point out that in addition to all the arguments expressed in those opinions, that our legislature by the successive acts of amendment to our statutes of limitation relating to tax sales, Sections 104-2-5.10 and related sections of Chapter 19, Laws of Utah, 1943 (since declared unconstitutional) and in Sections 104-2-5 to 104-2.5.11, Chapter 19, Session Laws Utah, 1951, has been in effect, trying or making those remedial acts or curative acts, without which the court has previously held, such affidavits of the auditor were indispensable requisites. Furthermore, it seems most anomolous to say that such affidavits are a necessity for the protection of the taxpayer and his rights, and for his reliance, in order to set aside tax sales, and still, not to pursue the logical sequence of such reasoning to hold the lack of such affidavits make the procedure of the taxing unit absolutely void; yet, as in *Steele vs. San Luis Obispo*, 152 Cal. 785, 93 Pac. 1020, the taxpayer was denied recovery of taxes in proceedings against the taxing unit.

For these and other reasons, it is respectfully urged that the court reconsider its former holding, and, announce that it will no longer sustain attacks on tax deeds, based on such alleged defects as lack of auditor's affidavits on the assessment rolls, since it is apparent that the real and only purpose of such affidavits is to authenticate the tax rolls in such wise as to obviate proof by witnesses other than the rolls themselves of their correctness, and, to give the treasurer a basis for proceeding to collect the taxes listed therein—for surely the paramount doctrine of protection of the public revenue, and sustaining

the acts of its taxing officials, when they did perform their duties in accordance with law, and in such manner, as not to cause any real prejudice to any taxpayer, especially where it cannot be shown that any exception to the lack of such affidavits was taken at the time or year of assessment to halt in the beginning the evil complained about, should prevail.

## CONCLUSION

IT WAS ERROR, on the part of the trial court to deny the plaintiff-appellant his right to have his title to the premises in question quieted, and, to hold that he was not holding such premises adversely to the respondents, and, that his tax title was invalid.

WHEREFORE, the plaintiff and appellant prays this Honorable Court to reverse the holding of the trial court, and to remand the same for further proceedings in accordance with the principles set forth herein, or for the Supreme Court to find for appellant, and order recasting of the findings, conclusions, and decree directly.

Respectfully submitted,

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