

1953

Rennold Pender v. S. W. Dowse and Pearl Dowse et al : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Pender v. Dowse*, No. 7949 (Utah Supreme Court, 1953).
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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED
MAR 2 - 1953

Supreme Court, Utah

RENNOLD PENDER,

Plaintiff and Respondent,

— vs. —

S. W. DOWSE and PEARL DOWSE,
his wife, JAY E. TREADWAY and
MARION MAVE TREADWAY, his
wife, and A. C. WHITTAKER,

Defendants and Appellants.

Case No. 7949

BRIEF OF APPELLANT, A. C. WHITTAKER

PUGSLEY, HAYES & RAMPTON

and

GORDON B. CHRISTENSON

Attorneys for Appellant,

A. C. WHITTAKER.

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INDEX

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	12
POINT ONE	13
THAT A. C. WHITTAKER IS A BONA FIDE MORTGAGEE FOR VALUE WITHOUT NOTICE OF ANY TITLE DEFECTS.	
POINT TWO	13
THAT THE RECORD TITLE REVEALED NO PATENT OR OTHER TITLE DEFECTS OR ANY INTERESTS OF PLAINTIFF; AND HE MAY NOT MAKE A COLLATERAL ATTACK ON THIS MORTGAGE OR THE SHERIFF'S DEED.	
POINT THREE	16
THAT ALL INTERESTS OF THE PLAINTIFF IN THESE THREE LOTS HAD BEEN COMPLETELY EXTINGUISHED BY THE SHERIFF'S SALE AND DEED.	
POINT FOUR	16
THAT THE SMALL AMOUNT OF CONSIDERA- TION AT THE SHERIFF'S SALE DID NOT PLACE A. C. WHITTAKER ON ANY DUTY OF INQUIRY.	
POINT FIVE	21
THAT PUBLIC POLICY FAVORS THE PROTEC- TION OF TITLES PASSING THROUGH SHER- IFF'S SALES.	
ARGUMENT	
POINTS ONE AND TWO	13
POINTS THREE AND FOUR	16
POINT FIVE	21

CASES CITED

Adams v. Pratt, 87 Ut. 80, 48 Pac. (2d) 444	19
Commercial Bank of Utah v. Madsen, 236 Pac. (2d) 343.....	22
Dickert v. Weise, 2 Utah 350	18
Lawley v. Hickenlooper, 61 Ut. 298, 212 Pac. 526	21
Local Realty Co. v. Lindquist, 96 Ut. 297, 85 Pac. (2d) 770	17
National Realty Sales Co. v. Ewing, 55 Ut. 438, 186 Pac. 1103....	20
Young v. Schroeder, 10 Ut. 155, affirmed U.S. Sup. Ct. 161, U.S. 334	20

AUTHORITIES CITED

21 Am. Jur. 305	13
59 C.J.S. 302	16

STATUTES CITED

U.C.A., 1943, Sec. 104-37-29	17
------------------------------------	----

OTHERS

1945 Sessions Laws, Chapter 106	22
Utah State Bar Assn. Title Standards, No. 10.....	22

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Defendants and Appellants.

Case No. 7949

BRIEF OF APPELLANT, A. C. WHITTAKER

STATEMENT OF FACTS

This is an appeal from the judgment and the order denying defendants' motions for new trial in this case wherein plaintiff sued to quiet his title to the property, to vacate and set aside a Sheriff's sale and Deed and for damages. The title of all the defendants' property at issue is predicated upon an execution issued January 4, 1950 on a cost bill in another proceeding between Messrs. Pender and Dowse. The Sheriff's sale was completed March 14, 1950, the certificate was issued and recorded March 23, 1950, no redemption was made and then a Sheriff's Deed was executed, delivered and recorded Sep-

tember 16, 1950 in favor of S. W. Dowse.

This appealing defendant, A. C. Whittaker, thereafter was requested to loan \$5000.00 to S. W. Dowse and his wife and was offered a first mortgage lien upon lots 2, 3 and 4 of Block 8, North Columbia Subdivision as security for the loan. Mr. Dowse procured a policy of title insurance showing himself as the owner and exhibited such to A. C. Whittaker (R. 173). He testified that: "I wouldn't be interested unless I knew the title was clear," (R. 124) and then in reliance upon a policy of title insurance issued after the mortgage from S. W. Dowse and Pearl Dowse had been recorded (R. 170), he loaned the \$5000.00 November 1, 1950. This loan has not been repaid and A. C. Whittaker claims a first mortgage lien on these three lots.

We shall summarize the facts in the case particularly as the same relate to the issue of the validity of the first mortgage of the defendant, A. C. Whittaker upon Lots 2, 3 and 4 of Block 8, North Columbia Subdivision in Salt Lake County, Utah. These lots are situated at the corner of 13th South and West Temple Streets and there is in evidence an abstract of title, introduced by the plaintiff, Exhibit "F" (R. 74).

The record shows that on October 30, 1950, S. W. Dowse and Pearl Dowse executed and delivered to this defendant, A. C. Whittaker, their Promissory Note, Exhibit 7 (R. 159) and a real estate mortgage, Exhibit "1" (R. 159). The said mortgage shows that the same was duly recorded and was executed to secure the loan made in the sum of \$5000.00 as evidenced by the said note and

mortgage. Prior to the execution of said note and mortgage and the making of the loan, Mr. Dowse exhibited to Mr. Whittaker a policy of title insurance, Exhibit 9 (R. 171), dated October 9, 1950, showing the title to said property vested in the name of S. W. Dowse, subject to certain minor tax and other liens, and Mr. Whittaker testified as to said matter as follows:

“Q. What is that please?

A. That is policy of title insurance in the name of S. W. Dowse for \$10,000, dated October 9th, 1950.

Q. Now, I will ask you whether or not this policy was ever showed to you prior to your seeing the policy just previously mentioned?

A. Yes, Mr. Dowse told me he had title insurance on this and I saw this.

Q. You saw this?

A. Yes.

Q. Prior to the transaction?

A. Yes.

Q. Did you or did you not rely on this?

A. I absolutely relied on this title insurance, yes sir.

Q. You absolutely identify this as the title insurance policy you saw?

A. Yes sir.” (R. 171-172)

Then at the time of closing the transaction, Mr. Dowse procured a policy of title insurance, Exhibit 8 (R. 110) and Mr. Whittaker testified in response to a question as to whether he had any evidence of the condition of the title to the property presented to him.

"A. I was furnished with title insurance.

Q. I will show you what has been marked Proposed Exhibit "8" and ask you to examine that and state what that is.

A. This is policy of title insurance covering the loan." (R. 160)

He testified on cross-examination as to the method of closing the loan.

"Q. Now then did you talk to the Insurance company before they issued the policy?

A. I did not, no sir.

Q. I take it Mr. Dowse went to them and got the policy and delivered it to you?

A. He did.

Q. He never discussed it with you?

A. Not the title.

Q. Did Mr. Dowse ever tell you he bought this property at execution sale?

A. Not prior to this — not prior to the mortgage.

Q. When did he tell you?

A. After this case was instituted, I was a party defendant.

Q. But you never yourself talked to the title people?

MR. CHRISTENSON: I object to that again. It is repetitious and furthermore it doesn't direct us to any time, particular subject or reference to this case.

Q. (by MR. DAINES:) I am referring to Defendants Exhibit "8" and I will ask you if you at any time ever talked to the title people before they issued this policy?

A. Before they issued this policy, no sir.

Q. Was the policy issued before or after execution of the mortgage?

A. The policy was delivered with the mortgage and note at the time I gave him the check for \$5,000.00." (R. 167-168)

Additional testimony by Mr. Whittaker relative to the transaction and issuance of the title insurance is found at page 120 of the Record:

"Q. Mr. Whittaker, prior to lending money on this property, did you, or did you not have a discussion with Mr. Dowse relative to a policy of title insurance?

A. Why we may have talked about title insurance.

Q. Did you ask for either abstract or title insurance?

A. Title insurance.

Q. And this was prior to the date you have testified that the policy was delivered to you, and that you paid the \$5,000 over to him?

A. Yes sir, yes indeed.

Q. And did you examine this policy of title insurance — well, did you read it?

A. Casually I read it." (R. 170)

The Promissory Note for \$5,000 was payable 2 years from date with interest payable semi-annually. As the interest was not paid during the first two semi-annual periods, this defendant declared the entire amount to be due and owing, made demand for payment and then when nothing was paid, on March 7, 1952 he started action to

foreclose the mortgage by case No. 94706 entitled A. C. Whittaker v. S. W. Dowse and Pearl Dowse (R. 160). Judgment was entered in favor of the plaintiff therein, A. C. Whittaker, for the amount of principal, interest, attorneys' fee and costs prayed for and a Decree of Foreclosure of the mortgage and Order of Sale were duly entered by the Court.

In the present litigation, an appraiser, representing the plaintiff, testified that in his opinion the value of the three lots affected by the mortgage and in which Mr. Whittaker asserts his interest was, as of the date of March 14, 1950, worth \$6,000.00. (R. 79). This appraisal was based upon the assumption that:

“Q. Mr. LeCheminant, you were asked the value of this property under execution sale, have you had opportunity to buy property under execution sale?

A. No, I haven't.

Q. Are you aware of the fact, an execution sale on real estate is subject to the right of redemption by the owner of the property?

A. I know that.

Q. The purchaser may or may not have title, depending on whether the owner redeems in that period of time?

A. My opinion of value is all based on good marketable title.

Q. Based further on the fact the vendor would furnish title?

A. It must be a good marketable title.

Q. And based further on the assumption the

vendor would give evidence of title either by abstract or title insurance?

A. 'That is correct.'" (R. 84)

As to the basic title in litigation, we shall direct our attention solely to these three lots on the corner of 13th South and West Temple. The abstract of title covering the same (Exhibit "G") is a part of the record and reveals the following background of title evidence: starting with 1916 there was a tax sale to Salt Lake County resulting in an Auditor's Tax Deed on Lot 2 on May 15, 1922. Then on all three lots there was a 1931 tax sale followed by an Auditor's Tax Deed dated April 10, 1936. The tax title there to was then sold to S. W. Dowse for \$750.00 by Deed of Salt Lake County dated August 27, 1945. This tax title was in turn sold by S. W. Dowse to Rennold Pender by Quit Claim Deed dated August 10, 1945, recorded September 4, 1945. No revenue stamps are affixed and only nominal consideration is stated. Thereafter Mr. Pender apparently procured Quit Claim Deeds from various heirs of former owners for nominal consideration only, and later completed a quiet title action against other claimants.

As of the dates of the Levy, Sheriff's Sale and Sheriff's Deed in Case No. 86895 (Jan. 4, 1950, Mar. 14, 1950 and Sept. 16, 1950) there was no recorded decree in the quiet title action, so the interests of Olive Trickett et al. were still outstanding of record and there were unpaid taxes owing to Salt Lake County for 1949 in the amount of \$161.36 and accrued 1950 taxes due on the premises. In addition there was a \$13.20 judgment lien

and the further judgment lien in favor of Morandi (Exhibit 11) for \$3068.44.

Let us examine the facts of the execution sale as revealed by an abstract of title on these three lots mortgaged to Mr. Whittaker. The judgment appears to be regular in all respects (see file in Case No. 86895 showing service of copies of the Findings, Decree and Cost Bill upon the attorneys for Mr. Pender and the admission of regularity thereof as stated in the pretrial order). The execution levy was duly recorded February 9, 1950 in Book 740, page 527 thereby giving constructive notice to Mr. Pender and all the world. The Sheriff's Certificate of Sale, dated March 15, 1950 was recorded March 23, 1950 and is regular and complete in each and every detail and gave constructive notice to Mr. Pender and all the world of the sale and right of redemption as provided by law. The Sheriff's Deed, dated September 16, 1950 was recorded on the same date and likewise was regular and complete in all details and particulars and gave notice to Mr. Pender and all of the world of the fact that title had passed without redemption and that S. W. Dowse was the owner of the title formerly claimed by Rennold Pender.

Mr. T. N. Bleak, who was the chief civil deputy in the office of the Salt Lake County Sheriff at the time of the Sheriff's Sale in question, testified concerning the procedure followed at the Sheriff's Sale and particularly as to the method of giving notice of the time of the said sale on cross examination:

“BY MR. PUGSLEY (On behalf of the defendant Whittaker)

Q. Mr. Bleak what notices were posted prior to the time of the sale?

A. The notice of levy was first posted, I think, on the — the copy of notice, levy and the copy of execution were first recorded with the Recorder of the County, and then the law requires that we either post or serve the tenant in possession of the property a copy of notice of levy, which was done, and afterwards we were on February, or close to February the 17th the first notice of sale was published in the Salt Lake Times and for four weeks, and there was no demand on my part made of Mr. Pender, or no copy served on him personally after it was recorded in the Recorder's office.

Q. Are there any notices posted about the City and County Building in Salt Lake relative to these sales?

A. Yes there are usually three.

MR. DAINES: I move to strike the word "usually".

A. There are three in my handling of foreclosure sales, all the sales under execution, three notices are posted at the County Building.

Q. (by Mr. Pugsley) Are there also notices posted in three public places in Salt Lake County?

A. The notice of sale is always posted on the property, one copy, and two copies in the precinct in addition to the one posted at the county building.

Q. Is that the customary posting done in this sale?

A. That was the way —

MR. DAINES: Just a minute —

MR. PUGSLEY: Let me finish.

Q. (by Mr. Pugsley) Is that the customary posting you did on all this type of execution sales?

MR. DAINES: I object, it is incompetent, irrelevant and immaterial.

THE COURT: It is overruled.

A. That was always the custom in the sheriff's office to post notices just in that manner in all real estate sales.

Q. That was done in this sale?

A. Yes." (R. 142-143)

"BY MR. PUGSLEY: (On behalf of the defendant Whittaker)

Q. May I ask one further question?

Do you know how many notices were posted on this property there in question?

A. I don't recall now, Mr. Pugsley, but it is my recollection I posted notices on each one of the pieces of property that were listed on the praecipe as long as they were contiguous to each other, as long as the lots were contiguous to each other, I only post one copy of the notice on each piece of property.

Q. Those not contiguous you posted separate notices?

A. I posted separate notice on those not contiguous to each other.

MR. PUGSLEY: That is all.

Q. You posted on three or four pieces of property? (by Mr. Daines)

A. Four or five as I remember, Mr. Daines, I

posted on the corners or in the immediate vicinity of all the pieces of property.” (R. 144)

The Court did not make any findings contrary to the evidence stated by the said deputy sheriff and the Court did not find that any lack of notice existed or failure of any recording of the time of sale or the certificate of sale or Sheriff's Deed. The only findings made by the Court relating to the procedure of the sale were as follows :

“13. That the property, at the time it was offered and sold at Sheriff's Sale was offered and sold enmasse and that said property was not at any time offered at sale in separate parcels. That it was apparent that more than enough property required to be sold to satisfy said judgment, was being sold at the sale. That defendant S. W. Dowse and his attorney, LaMar Duncan, were the only persons present to bid at said sale. That no return was attached to the execution showing that the sheriff had made any attempt to satisfy the judgment by the sale of unexempt personal property belonging to plaintiff.”

“15. That the levy so made by the sheriff was excessive and the price for which the property was bid in was grossly inadequate and the said sale was accompanied by irregularities. That the public record under which the sale was had reflected these facts.”

The Sheriff issued in his regular and customary form a Certificate of Sale, Mar. 23, 1950, and after the expiration of the six months redemption period, a Sheriff's Deed, dated Sept. 16, 1950. These were both duly recorded and contain nothing on the face thereof to reveal

to any purchaser, title examiner or other person that the said sale was conducted in any but the regular statutory manner. There is no evidence of record to show or imply that A. C. Whittaker had any actual notice of the procedure followed by the Sheriff in the advertising, offering or sale of said property nor of the comparatively nominal amount paid for the property by Mr. Dowse.

By this abbreviated statement of facts, this defendant, A. C. Whittaker, does not waive the other pertinent facts or law that may be presented by the other defendants jointly or severally in defense of their respective positions. This defendant asserts that there is no factual or legal basis for vacating the Sheriff's sale and Deed to S. W. Dowse.

STATEMENT OF POINTS

POINT ONE

THAT A. C. WHITTAKER IS A BONA FIDE MORTGAGEE FOR VALUE WITHOUT NOTICE OF ANY TITLE DEFECTS.

POINT TWO

THAT THE RECORD TITLE REVEALED NO PATENT OR OTHER TITLE DEFECTS OR ANY INTERESTS OF PLAINTIFF; AND HE MAY NOT MAKE A COLLATERAL ATTACK ON THIS MORTGAGE OR THE SHERIFF'S DEED.

POINT THREE

THAT ALL INTERESTS OF THE PLAINTIFF IN THESE THREE LOTS HAD BEEN COMPLETELY EXTINGUISHED BY THE SHERIFF'S SALE AND DEED.

POINT FOUR

THAT THE SMALL AMOUNT OF CONSIDERATION AT THE SHERIFF'S SALE DID NOT PLACE A. C. WHITTAKER ON ANY DUTY OF INQUIRY.

POINT FIVE

THAT PUBLIC POLICY FAVORS THE PROTECTION OF TITLES PASSING THROUGH SHERIFF'S SALES.

ARGUMENT

POINTS ONE AND TWO

THAT A. C. WHITTAKER IS A BONA FIDE MORTGAGEE FOR VALUE WITHOUT NOTICE OF ANY TITLE DEFECTS.

THAT THE RECORD TITLE REVEALED NO PATENT OR OTHER TITLE DEFECTS OR ANY INTERESTS OF PLAINTIFF; AND HE MAY NOT MAKE A COLLATERAL ATTACK ON THIS MORTGAGE OR THE SHERIFF'S DEED.

The burden of proof in this type of case, as in many others, is definitely on the plaintiff and we submit that there has been no evidence of any character to show that the defendant, A. C. Whitaker had any notice whatsoever of the interest now asserted by Pender in and to these three lots.

21 Am. Jur. 305:

“Ordinarily, the party seeking to vacate an execution has the burden of proof, and the court must presume the execution to have been regular, until proof has been adduced to the contrary; but where the circumstances are such as to make the execution prima facie invalid, he who seeks to sustain it must introduce evidence to prove its validity.”

The evidence shows a good marketable title of record and a complete reliance on the part of Mr. Whittaker on the marketability thereof as shown by the policy of title insurance issued in such form as to reflect his mortgage as a first lien upon the property. He testified that Mr.

Dowse had never advised him of any interest asserted by Mr. Pender and there had been no occasion to discuss any such matter between them at the time of making the loan. It was not until after this action had been instituted and Mr. Whittaker had been served with Summons that he made inquiry of Mr. Dowse concerning the claims of Mr. Pender. The evidence is without dispute that the three lots in question were vacant and there was nothing about them that would indicate an ownership interest that might be asserted by Mr. Pender. Without any admission as to any pretended signs on certain war surplus materials behind the service station on other lots in the law suit, it must be kept clear that nothing appears in the record indicating a sign or personal property or other item that would excite the inquiry of Mr. Whittaker or anyone else dealing with or insuring the title to the three lots at the corner of 13th South and West Temple.

The record title of the property showed no residual interest or claim that might be asserted by Mr. Pender after the expiration of the redemption period and the issuance of the Sheriff's Deed to Mr. S. W. Dowse. The execution creditor and purchaser, prior to the issuance of the policy of title insurance and the passing of the money from Mr. Whittaker to him, had paid off the outstanding tax encumbrances and recorded the necessary documents to eliminate the outstanding adverse interests that had been subjects of quiet title actions at an earlier date. One does not know what would be expected of a purchaser or mortgagee if he must investigate, by personal inquiry, each and every step of a recorded title and

probe into the details of all judicial sales that appear of record in a regular and complete form.

The title, having appeared to the mortgagee and the title insurance company as being full and complete and that the mortgage was a first lien upon the property, we find that the present action is a collateral attack upon the mortgage by one who is not a party thereto. The Sheriff was not made a party defendant. The appeal period on the judgment for costs had expired, the appeal period on the cost bill had expired, the redemption period had expired and the Sheriff's Deed had issued, and for all appearances the plaintiff, Pender, had been fully divested of any semblance of ownership in and to the three lots mortgaged to A. C. Whittaker. Plaintiff does not contend that the sale by the Sheriff was "void" but only voidable.

One of the most serious flaws in the plaintiff's proceeding is that he has made a collateral attack upon the deed issued by the Sheriff, without making the Sheriff a party defendant, and also that the plaintiff has endeavored to impeach this written document as well as the Sheriff's Certificate of Sale by parol evidence. The action of the Trial Court in permitting such an impeachment of the deed and Certificate of Sale opens a wide field for litigation on almost every title that has passed through a Sheriff's sale at any point in its history. An element of uncertainty will be injected in the conveyancing practices throughout the State of Utah of such magnitude that no one will be willing to risk the approval of an abstract of title nor the issuance of a policy of title insurance if at any stage a Sheriff's conveyance or other judicial pro-

ceeding such as a probate sale, receiver's sale, foreclosure of mortgage, or execution on judgment is involved.

It is the position of this appealing defendant that it is in violation of the Constitution of the State of Utah to allow the judgment of the Court to stand in this case, as such deprives this defendant of his property rights without just compensation and without due process of law.

POINTS THREE AND FOUR

THAT ALL INTERESTS OF THE PLAINTIFF IN THESE THREE LOTS HAD BEEN COMPLETELY EXTINGUISHED BY THE SHERIFF'S SALE AND DEED.

THAT THE SMALL AMOUNT OF CONSIDERATION AT THE SHERIFF'S SALE DID NOT PLACE A. C. WHITTAKER ON ANY DUTY OF INQUIRY.

It is well settled that a mortgagee such as A. C. Whitaker, who was in good faith loaned \$5,000.00 upon property that is appraised at \$6000.00 in value, is regarded as a bona fide purchaser thereof.

59 C.J.S. 302: Rights of Mortgagee

“A mortgagee of reality is regarded as a purchaser thereof; and, if his mortgage is supported by an actual present consideration and is given and taken in good faith and without fraud, he is to be treated as a bona fide purchaser for value, and as such protected against adverse claims of which he has no notice, actual or constructive, including not only prior deeds or other conveyances of the premises, but also all other liens on them or claims of interest in them, such as prior mortgages or vendor's liens.”

It is not contended by the plaintiff that this Sheriff's

Sale is *void*, but merely that there are some matters or confidential relationship or minor irregularities that should permit the avoidance of the transaction at this late date. Therefore, any interest that the plaintiff had in the three lots was completely extinguished by the Sheriff's execution, sale and deed thereon. If there is a re-vesting of the title back in the plaintiff as a result of the present proceedings, such title must be subject to the bona fide first mortgage lien asserted by Mr. A. C. Whit-taker.

Our Supreme Court has considered some of these issues, and we should like to refer to one of the more recent decisions. *Local Realty Co. v. Lindquist*, 96 Utah 297, 85 Pac. (2d) 770. Therein your Court considered the rights of the parties during the redemption period and held that a purchaser at execution sale acquires all the right, title, interest and claim of the debtor, including the right of possession, legal title, and rights to crops harvested during the redemption period, after expiration of the redemption period and not before. The court cited *Sec. 104-37-29, U.C.A., 1943*, which reads:

“Upon a sale of real property, the purchaser is substituted for and acquires all the right, title, interest and claim of the judgment debtor there-to;”

The court pointed out that the legal title does not pass under a mortgage foreclosure sale until the sale is consummated by a conveyance since there would be no necessity for a conveyance if the legal title had already passed, but after the conveyance then the title vests absolutely in the grantee from the sheriff.

The case of *Dickert v. Weise* was early decided by our Court (2 Ut. 350) as to validity of a Sheriff's sale. Under a decree of foreclosure the officer offered two lots and had no bidders and then offered them together and sold them to plaintiff on a bid under the judgment. It was held that such a sale was not invalid.

The status of the record in this case now before the Court is that the execution sale was conducted, the redemption period was past and the Sheriff's Deed issued. The record is complete with the evidence that notices were given as required by the statute of Utah for the sale of the said property; that plaintiff frequently passed the property; that the plaintiff's agent, Mr. Lartch, who operated a service station on the adjacent property, observed the lots in issue and could and should have seen the notices and advised the plaintiff thereof; in addition the plaintiff had constructive notice of the levy and sale by the recording of the execution levy, the posting of notices upon the property, the posting in three public places in Salt Lake County, the posting of notices at the Court House and the publication thereof in the Salt Lake Times, a newspaper of general circulation within the county, to which the plaintiff's attorney subscribed during the period of the publication of the notice. The only attack that apparently has any reason behind it is the claim that the property was not sold in separate parcels by the Sheriff. The testimony of the Deputy Sheriff, T. N. Bleak, was that he made the recording of the notices, the posting and publication thereof and conducted the sale in the customary manner, but that because there

were no other bidders present, he did not do the useless thing of requiring a separate bid on each individual lot involved in the property, but offered the same by reading the legal descriptions of the property out loud to the bidders present. The only bidders present were Mr. Dowse and his attorney, Mr. LaMar Duncan, who both testified that the property was offered in three parcels and that three separate bids were made by Mr. Duncan on behalf of Mr. Dowse for the same.

We urge that the claim, that the Sheriff's Sale is voidable because of the failure to offer each lot separately, is not well taken in light of the decisions of our Supreme Court. In the case of *Adams v. Pratt*, 87 Utah 80, 48 Pac. (2d) 444, the court held on a mortgage foreclosure sale, which is a situation very similar to an execution sale, was not void because of the sale of the property en masse.

“Nor do the authorities support plaintiff's contention that the sale of the property in the mortgage foreclosure suit en masse is void. On the contrary, this court has held that it is proper in the mortgage foreclosure suit to sell the property en masse if bids for the separate lots or parcels cannot be had. *Dickert v. Weise*, 2 Utah 350. The cases are generally to the effect that a sale of property en masse, even where it should be sold separately, is not such an irregularity as renders the sale void. *Burton v. Kipp*, 30 Mont. 275, 76 P. 563; *Thomas v. Thomas*, 44 Mont. 102, 119 P. 283, Ann. Cas. 1913B, 616; *Fox v. Curry*, 96 Mont. 212, 29 P. (2d) 663; *Batini v. Ivancich*, 105 Cal. App. 391, 287 P. 523; 23 C. J. 532-535.”

It is to be noted that the Sheriff's Certificate of Sale and the Sheriff's Deed do not reflect any of the pre

tended deficiencies in procedure and hence a mortgagee for value, such as this defendant Whittaker, would have absolutely no notice thereof. The matter of inadequacy of price has been considered by our Court at an earlier time and we find in the decision in the case of *Young v. Schroeder*, 10 Ut. 155, *Affirmed by U.S. Sup. Ct.* 161, U.S. 334, the following law; that though courts sometime set aside a sale where great inadequacy of consideration exists, coupled with irregularities attending the sale, yet they will not set aside a sale after the redemption period has expired where the irregularities are merely formal and technical and did not have a direct tendency to prevent the realizing of a fair price for the property sold. Certainly the burden of proof that the plaintiff had in this case has not been discharged in showing that other bidders were prevented from offering higher or better prices for the property by the pretended irregularity of the Sheriff's failure to offer each individual lot separately at the time of the sale. Certainly if other or better bids could have been procured, it was up to the plaintiff to produce evidence thereon. No other bidders were present to make any different offers.

A similar matter of consideration of inadequacy of price is found in the case of *National Realty Sales Co. v. Ewing*, 55 Utah 438, 186 Pac. 1103. Therein the court held that an execution sale is not invalidated by inadequacy of price as against the judgment debtors grantee where the proceedings were fair and regular and there is nothing of notice to the grantee that would suggest fraud or concealment. Certainly the policy of the law is that

an execution sale that appears regular in all respects should be protected by the courts otherwise the exchange and transfers of property would be interminably confused and prejudiced. The mere fact that a small amount of money was paid at the Sheriff's Sale did not place this defendant, Whittaker, on any duty of inquiry. The record is full of title deficiencies that may be pointed out to show that a bona fide purchaser at a Sheriff's Sale would not pay any sum in excess of that actually paid as the purchaser would be faced with numerous difficulties in redemption of delinquent taxes, clearing up title problems and removing outstanding judgment liens. As we pointed out in the Statement of Facts, the only witness as to value was a real estate man who testified that his evidence presumed a good marketable title, free from all encumbrances, together with a Warranty Deed and abstract of title. No one testified as to the reasonable value of this property at execution sale, having in mind the status of the same.

POINT FIVE

THAT PUBLIC POLICY FAVORS THE PROTECTION OF TITLES PASSING THROUGH SHERIFF'S SALES.

As indicated above, the free exchange of property involves a matter of public policy that dictates respect for titles passing through execution sales as well as through the regular course of conveyance. A decision by our Supreme Court at one time inferred that a small amount of consideration alone would place a purchaser on a duty of inquiry, but the Legislature felt that such decision — *Lawley v. Hickenlooper*, 61 Ut. 298, 212 Pac. 526, was unlawful, and Section 78-1-6 was amended by

Chapter 106 of the 1945 session of the Legislature to provide that:

“Neither the fact that an instrument recorded as herein provided recites only nominal consideration . . . shall operate to charge any third person with notice of the interest of any person or persons not named in such instrument or of the grantor or grantors;”

The Utah State Bar Association has adopted certain title standards, one of which, No. 10, reads as follows:

“The mere fact that a deed recites a nominal consideration, or that the grantee in the instrument is designated as trustee, or that the conveyance otherwise purports to be in trust should have no significance, and title can be conveyed by the named grantee as in ordinary cases. A nominal consideration or indication of trust is no longer notice of equitable interest unless the instrument itself, or some other independent instrument, is recorded setting forth the names of the beneficiaries, specifying the beneficial or equitable interest held and describing the property charged with the trust. See Chapter 106, 1945 Session Laws. (The rule is otherwise until May 8, 1946, as to instruments recorded prior to May 8, 1945.)”

All of these reflect the general policy of the law that the court will sustain a bona fide purchase for value or mortgagee for value even though the chain of title reflects a small amount of consideration. More recently in the case of *Commercial Bank of Utah v. Madsen*, 236 Pac. (2d) 343 your Court held that where a mortgage foreclosure sale was regularly held and fairly conducted, it would not be set aside in the absence of fraud merely

because a higher bid was offered. Likewise the Court held therein that the fact that the land sold at mortgage foreclosure was described as Lots 1 and 2 did not make separate tracts of an otherwise unified parcel within the statute relating to execution sales of real property.

Plaintiff elected not to sue the Sheriff whose deed establishes the title. We submit, therefore, that the first mortgage lien of A. C. Whittaker should be sustained in all respects and that regardless of the outcome of the litigation between Mr. Pender and Mr. Dowse, the mortgage lien of A. C. Whittaker must be protected and judgment quieting title against the same should be reversed.

We urge the Court to consider the effect of the present action of the District Court upon this title when viewed as a precedent by lawyers and title insurance companies throughout the State of Utah. What lawyer will feel safe in executing an opinion approving a title that has passed through any type of judicial sale, knowing that a collateral attack may be brought to impeach the recorded documents upon which the title is passed. The far reaching effect of this decision will be felt in not only foreclosure and execution sales, but also in the probate of estates of decedents, guardian's sales, receiverships, etc. The innumerable land titles that have passed through judicial sales will all be placed in jeopardy and a chaotic title condition will result if the action of the District Court is sustained.

We urge that this Court reverse the judgment of the District Court and direct said Court to enter findings and

judgment that the mortgage held by A. C. Whittaker is a first lien upon the premises described therein.

Respectfully submitted,

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