

1953

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

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

LaMar Duncan; Franklin Riter; Attorneys for Appellant;

---

## Recommended Citation

Brief of Appellant, *Pender v. Dowse*, No. 7949 (Utah Supreme Court, 1953).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/1889](https://digitalcommons.law.byu.edu/uofu_sc1/1889)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).



SEP 28 1953

Case No. 7949

LAW LIBRARY

---

---

**IN THE SUPREME COURT**  
**of the**  
**STATE OF 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.*

---

BRIEF OF APPELLANT, S. W. DOWSE

---

**FILED**

APR 4 1953

LAMAR DUNCAN AND  
FRANKLIN RITER,

*Attorneys for Appellant,*

S. W. DOWSE



# SUBJECT INDEX

	Page
PRELIMINARY EXPLANATION .....	1
STATEMENT OF FACTS.....	2
Pretrial Order .....	7
STATEMENT OF POINTS AND ARGUMENT.....	11

## I.

WHETHER A JUDGMENT DEBTOR AGAINST WHOM IS DOCKETED AN UNPAID MONEY JUDGMENT MAY BY AN INDEPENDENT COLLATERAL ACTION AGAINST THE JUDGMENT CREDITOR SECURE RELIEF FROM A SHERIFF'S SALE AFTER THE ISSUANCE BY THE SHERIFF OF HIS DEED OF CONVEYANCE TO THE JUDGMENT CREDITOR, WHO WAS THE PURCHASER AT SAID SALE OF THE JUDGMENT DEBTOR'S REAL PROPERTY WHICH WAS LEVIED ON PURSUANT TO A VALID WRIT OF EXECUTION ISSUED ON SAID JUDGMENT ON THE GROUNDS (A) OF IRREGULARITIES IN CONDUCT OF SALE; (B) OF INADEQUACY OF CONSIDERATION OR BID PRICE; (C) THAT THE SALE OR REAL ESTATE WAS EN MASSE INSTEAD OF IN SEPARATE PARCELS; (D) THAT THE JUDGMENT WAS NOT SATISFIED FROM AVAILABLE PERSONAL PROPERTY OF THE JUDGMENT DEBTOR BEFORE RESORTING TO HIS REAL PROPERTY; AND (E) THAT THE JUDGMENT DEBTOR HAD NO KNOWLEDGE OF THE LEVY AND SHERIFF'S SALE OF HIS REAL PROPERTY? IN GENERAL .....	12
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

1. Irregularities in conduct of execution sale which do not void the sale cannot be asserted, by a judgment debtor in an independent action collaterally attacking the sale and seeking to quiet title against the sheriff's deed after period of redemption has expired and sheriff's deed has issued to the purchaser.... 35
2. Inadequacy of consideration or of bid price at an execution sale, in absence of proof of acts of over-reaching or bad faith on the part of a judgment creditor, is not a valid ground to nullify the execution sale and cancel the sheriff's deed issued pursuant thereto in an independent collateral action instituted by the judgment debtor subsequent to the issuance of the deed.... 36
3. The objection that land was not offered for sale in separate parcels by the sheriff at an execution sale cannot be asserted in an independent action seeking to set aside the sale instituted after the sheriff's deed has issued to the purchaser at such sale.... 37



4. A sale of real property on execution is not void because the sheriff failed to satisfy the judgment out of unexempt personal property of the judgment debtor before resorting to real property of the debtor and such irregularity is not a ground to nullify the sale on a collateral attack thereon in an independent action. Such irregularity can only be asserted in a direct assault by way of motion to set aside the sale.....	38
5. Where, as in Utah, neither a legislative enactment nor Rules of Civil Procedure require the judgment creditor or the sheriff give personal notice of a proposed execution sale to a judgment debtor, the absence of such notice is no ground upon which to nullify the sale.....	38

## II.

WHETHER THE EXECUTION AND DELIVERY BY PENDER UNTO DORIS TRUST COMPANY, A CORPORATION, OF THE QUIT CLAIM DEED DATED JULY 22, 1949 (EX. J) EFFECTED A SATISFACTION AND DISCHARGE OF THE JUDGMENT FOR \$22,180.00 IN FAVOR OF DOWSE ENTERED IN ACTION 86,895, AND UPON WHICH THE WRIT OF EXECUTION WAS ISSUED?.....	42
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

## III.

WHETHER DOWSE PRACTICED ANY FRAUDULENT DEVICES UPON PENDER IN INITIATING THE SHERIFF'S SALE AND ACQUIRING THE REAL PROPERTY LEVIED UPON WHICH ENTITLES PENDER TO EQUITABLE RELIEF IN A COLLATERAL ACTION ATTACKING THE VALIDITY OF THE SHERIFF'S SALE AND SEEKING CANCELLATION OF THE DEED ISSUED BY THE SHERIFF TO DOWSE?.....	53
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

## IV.

WHETHER A CAUSE OF ACTION FOR SLANDER OR DISPARAGEMENT OF PROPERTY OR OF THE TITLE THERETO WAS ALLEGED AND PROVED IN THIS ACTION?..	60
-------------------------------------------------------------------------------------------------------------------------------------	----

## V.

WHETHER ATTORNEY'S FEES IN AN ACTION FOR SLANDER OF TITLE ARE ALLOWABLE?.....	64
-------------------------------------------------------------------------------	----

## VI.

WHETHER PUNITIVE DAMAGES ARE ALLOWABLE IN THIS ACTION?.....	67
SUMMARY .....	70



# INDEX OF CASES CITED

	Page
Adams v. Pratt, 87 Utah 89, 48 Pac. (2) 444.....	20
Baker v. Kale, 83 Cal. App. (2) 89; 189 Pac. (2) 57.....	62
Barquin v. Hall Oil Co., 28 Wyo. 164, 201 Pac. 352, 202 Pac. 1107 .....	62, 66
Batini v. Ivancich, 105 Cal. App. 391, 287 Pac. 523.....	25
Bauer v. Hertweck, 175 Cal. 278; 165 Pac. 946.....	37
Bechtel v. Weir, 152 Cal. 443, 93 Pac. 75, 15 A.L.R. (N.S.) 549.....	24
Beindorf v. Thorpe, 126 Okla. 157, 259 Pac. 242, 55 A.L.R. 1014.....	65
Bird v. Kitchens, ..... Ark. ...., 221 S.W. (2d) 795.....	35
Bock v. Losekamp, 179 Cal. 674; 179 Pac. 516.....	38
Bonner v. Lockhart, 236 Ala. 171, 181 S. 767.....	36
Burkett v. Griffiths, 90 Cal. 532, 27 Pac. 527, 13 L.R.A. 707.....	61, 63
Burton v. Kipp, 30 Mont. 275, 76 Pac. 563.....	30, 37
Chausse v. Bank of Garland, 71 Ut. 586, 268 Pac. 781.....	19, 45
Chesney v. Valley Live Stock Co., 34 Wyo. 378, 244 Pac. 216, 44 A.L.R. 1255 .....	44
City of Sanford v. Ashton, 131 Fla. 759, 179 So. 765.....	36
Clark v. Fell, 139 Pa. 469, 22 Atl. 649.....	38
Coghlan v. City of Boise, 36 Ida. 613, 212 Pac. 867.....	31
Coulters v. Meiggs, 58 R.I. 30, 191 Atl. 115.....	37
Culver v. Scarborough, 73 Cal. App. 441, 238 Pac. 1104.....	28
Dahl v. Prince, ..... Ut. ...., 230 Pac. (2) 1328.....	65
Davis v. Hearst, 160 Cal. 143, 116 P. 530.....	69
Dewey v. Loomis, 113 Kan. 750, 216 Pac. 271.....	37
Dickert v. Weise, 2 Ut. 350, 40 Pac. St. Reports, 350.....	17
Dickinson-Reed-Randerson Co. v. Markley, 117 Okla. 17, 244 Pac. 754 .....	37
Dixon v. Peacock, 30 Okla. 87, 141 Pac. 429.....	36
Drinkhouse v. Van Ness, 202 Cal. 359, 260 Pac. 869.....	65
Elliott & Healy v. Wirth, 34 Idaho 797, 198 Pac. 757.....	37
Fox v. Curry, 96 Mont. 212, 29 Pac. (2) 663.....	29
Frost v. Hanscome, 198 Cal. 500, 246 Pac. 53.....	59
Gross v. Simsack, 364 Pa. 337, 72 Atl. (2) 103.....	35, 36
Gudger v. Manton, 21 Cal. (2) 537, 134 Pac. (2) 217.....	61, 62, 63
Hamilton v. Waters, 93 Cal. App. 866, 210 Pac. (2) 67.....	36
Haugan v. Yale Oil Corp., 124 Mont. 1, 217 Pac. (2) 1084.....	30
Haycroft v. Adams, 82 Ut. 347, 24 Pac. (2) 1110.....	68
Hill v. Whitfield, 48 N.C. 120.....	55
H.O.L.C. v. Edwards, 329 Pa. 529, 198 Atl. 123.....	36
Horkan v. Eason, 10 Ga. App. 236, 73 S.E. 352.....	36
Jacobsen v. Wigen, 52 Minn. 6, 53 N.W. 1016.....	38
Johnson v. Gerald, 216 Ala. 581, 113 So. 447, 59 A.L.R. 348.....	65
Knapp v. Rose, 32 Cal. (2) 530; 197 Pac. (2) 7.....	27
Knox v. Noggle, 279 Pa. 302, 196 Atl. (2) 118.....	36



# INDEX OF CASES CITED—(Continued)

	Page
Lawyers Co-op. Pub. Co. v. Bennett, 34 Fla. 302, 16 So. 185.....	37
Local Realty Co. v. Lindquist, 96 Ut. 297, 85 Pac. (2) 770.....	71
Marr v. Marr, 73 N.J. Eq. 643, 70 Atl. 375.....	37
McAlvay v. Consumers Salt Co., 112 Cal. App. 383, 297 Pac. 135.....	37
McGuinness v. Hargiss, 56 Wash. 162, 105 Pac. 233.....	66
McIntire v. Chevrolet Motor Co., 115 Cal. App. 187, 1 Pac. (2) 40..	59
McLain Land & Investment Co. v. Swofford Bros. Dry Goods, 11 Okla. 429, 68 Pac. 502.....	37, 54
Mitchell v. Alpha Hardware & Supply Co., 7 Cal. App. (2) 52, 45 Pac. (2) 442.....	27
Moropoulos v. Fuller Co., 186 Cal. 679, 200 Pac. 601.....	59
Morris v. Winans, 30 Cal. App. 575, 159 Pac. 213.....	24
Mortimer v. Young, 53 Cal. App. (2) 317, 127 Pac. (2) 950.....	38
Mt. Vernon National Bank v. Morse, 128 Ore. 64, 264 Pac. 439.....	31
Murphy v. Booth, 36 Ut. 285, 103 Pac. 768.....	68
Myers v. Sanders, 7 Dana (Ky.) 507.....	55
National Realty Sales Co. v. Ewing, 55 Ut. 438, 186 Pac. 1103.....	18
Oliver v. Dougherty, 8 Ariz. 65, 68 Pac. 553.....	33
O'Reilley v. McLean, 84 Ut. 551, 37 Pac. (2) 770.....	45
Owens v. Owens, 347 Mo. 80, 146 S.W. (2) 569.....	58
Pavlovich v. Watts, 46 Cal. App. 103; 115 Pac. (2) 511.....	37
People v. Taylor, 36 Cal. 255.....	68
Plains Land and Improvement Co. v. Lynch, 38 Mont. 271, 99 Pac. 847 .....	31
Prudential Ins. Co. of America v. Bohlken, 40 Fed. Supp. 494.....	58
Rauer v. Hertweck, 175 Cal. 278, 165 Pac. 946.....	34
Raymond v. Halborn, 23 Wis. 57.....	37
Reed v. Gourley, ..... Tex. C.A. ...., 109 S.W. (2) 242.....	37
Ross v. Sweeters, 119 Cal. App. 716, 7 Pac. (2) 234.....	69
Rugg v. Tolman, 39 Ut. 295, 117 Pac. 54.....	68
Sellers v. Johnson, 207 Ga. 644, 63 S.E. (2) 904.....	36, 37
Sheehan v. All Persons, etc., 80 Cal. App. 393, 252 Pac. 337.....	36
Sikes v. Beaver, ..... Sup. Ct. Ga. ...., 157 S.E. 467.....	36
Smith v. Randall, 6 Cal. 47, 2 Pac. St. Rep. 47.....	23, 26, 38
Solomon v. Neubrecht, 300 Mich. 177, 1 N.W. (2) 501.....	36, 38
Spencer v. Commercial Company, 36 Wash. 374, 78 Pac. 914.....	66
St. Joseph Stock Yards Co. v. Love, 57 Ut. 450, 195 Pac. 305, 25 A.L.R. 569.....	65
St. Paul Trust & Savings Bank v. Olson, 52 N.D. 315, 202 N.W. 472 .....	37
Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392.....	69
Thomas v. Thomas, 44 Mont. 102, 119 Pac. 283.....	28, 30
Trabing v. California Navigation Co., 121 Cal. 137, 53 Pac. 644.....	69
Tripp v. Bagley, 75 Ut. 42, 282 Pac. 1026.....	68



# INDEX OF CASES CITED—(Continued)

	Page
Victor Investment Co. v. Roerig, 22 Colo. App. 257, 124 Pac. 349 .....	21, 54, 57
Watt v. McGalliard, 67 Ill. 513, 124 Pac. 349.....	57
White v. Adams, 52 Cal. 435, 1 Pac. States Rep. 435.....	36
Whitworth v. McKee, 32 Wash. 83; 72 Pac. 1046.....	32
Yoder v. Gevens, 179 Va. 229, 18 S.E. (2) 380.....	58
Young v. Schroeder, 10 Ut. 155, 37 Pac. 252, 161 U.S. 334, 40 Law. Ed. 721, 16 Sup. Ct. 512.....	55

## INDEX OF TEXTS CITED

	Page
A.L.R. Vol. 1, pp. 1442, 1443.....	40
A.L.R. Vol. 150, p. 720.....	65
AM. JUR.—CONSPIRACY, Vol. 11, Sec. 4, p. 544.....	59
AM. JUR.—EXECUTIONS, Vol. 21, Sec. 519, pp. 258-259.....	16
AM. JUR.—LIBEL AND SLANDER, Vol. 33, Sec. 350, pp. 314-315..	61
AM. JUR.—DAMAGES, Vol. 15, Sec. 142, p. 551.....	65
AM. JUR.—COSTS, Vol. 14, Sec. 63, p. 38.....	65
AM. & ENG. ENC. LAW, Vol. 25, p. 1079.....	66
ANN. CAS. 1913B 616.....	30
C.J. Vol. 23, pp. 693, 694, Sec. 691.....	39
C.J. Vol. 15, Sec. 1, p. 996.....	59
C.J.S.—DAMAGES, Vol. 25, Sec. 50, p. 531.....	65
CYC. Vol. 25, p. 561.....	66
FREEMAN ON EXECUTIONS (3d Ed.) Sec. 279.....	33
STORY'S EQUITY JURIS, Vol. 1, Sec. 245.....	35

## UTAH RULES OF CIVIL PROCEDURE

Rule 69 .....	12
Rule 69 (b) .....	12
Rule 69 (d) .....	13
Rule 69 (e) (1).....	13
Rule 69 (e) (3).....	14
Rule 69 (e) (6).....	14
Rule 69 (e) (f) (3).....	15
Rule 69 (f) (5).....	15



# IN THE SUPREME COURT

## of the

# STATE OF 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, S. W. DOWSE

---

### PRELIMINARY EXPLANATION

Counsel for Appellant S. W. Dowse (hereinafter designated Dowse) sought to adopt the statement of facts contained in the brief of Appellant A. C. Whittaker heretofore filed in this Court and cause. The Whittaker brief, however, treats of only one facet of this litigation and for this reason counsel for Dowse find it necessary to make a more elaborate statement of the facts in order to present their client's cause in an adequate manner. This



apology is made because counsel realize the necessity of conserving the time and energies of the Court.

## STATEMENT OF FACTS

Dowse appeals from a judgment of the District Court of the Third Judicial District of the State of Utah in and for Salt Lake County made, entered and filed on November 22, 1952, in favor of Plaintiff and Respondent Pender and against Defendant and Appellant Dowse and other defendants. By this judgment the title in the Plaintiff and Respondent Pender was quieted as to certain real property hereinafter described; a certain Sheriff's Certificate of Sale and a certain Sheriff's Deed hereinafter described, were vacated and declared of no force and effect; a mortgage executed by Dowse and his wife in favor of Appellant A. C. Whittaker was nullified and a warranty deed executed by Dowse and his wife to J. E. Treadway and Marion Mave Treadway, his wife, was also nullified. By this judgment the Respondent Pender was also awarded the sum of \$754.08, net balance of rentals, the sum of \$500.00 for punitive and exemplary damages, the sum of \$1,000.00 attorney's fees and costs with 6% interest from the date of judgment (R. 249-250).

Plaintiff's amended complaint seeks to quiet title in Plaintiff and Respondent to certain real property hereinafter described situate in Salt Lake County, State of Utah, and also attempts to allege facts upon which a claim of slander of title is based (R. 24-29). Dowse in his answer denied generally and specifically the allegations of the amended complaint (R. 30-31).



The present litigation is a sequence of a certain action commenced and prosecuted in the aforesaid District Court by Dowse, then in the role of plaintiff, against the present plaintiff and respondent Pender then in the role of defendant. This action bore number 86,895 (Exhibit 1). Said action resulted in a judgment dated November 4, 1949, in favor of Dowse against Pender which, among other things, awarded Dowse his costs in said action (Exhibit A). Copy of this judgment and decree was duly served upon the attorney for Pender on November 4, 1949 (R. 89-90). Thereafter counsel for Dowse served upon Pender's attorney the bill of costs (R. 90-91-180). These costs amounted to the sum of \$22.80 (R. 25). No motion to retax costs was filed and, accordingly, judgment for this amount was duly docketed in favor of Dowse against Pender (Exhibit I; R. 91, 96, 97).

On January 4, 1950, Dowse caused execution to issue on the judgment in his favor and against Pender (Exhibits 10 and H) directed to the sheriff of Salt Lake County commanding him to collect the aforesaid judgment and costs together with the costs of execution. Based on this execution the said sheriff, on February 7, 1950, levied on the following described real property situate in Salt Lake County, State of Utah:

Lots 2, 3, 6 and 7, Block 4, North Columbia Sub-division; Lots 1, 19 and 20, Block 6, North Columbia Sub-division; Lots 2, 3, 4, 13 to 21, inclusive, Block 8, North Columbia Subdivision.

This levy was made in the manner required by law (Exhibit H, R. 142-143).



After the sheriff had given notice of the time and place of sale (R. 142, 143, 144, 182, 183, 184) as required by law, public sale of the real property upon which levy was made was held at the west front door of the City and County Building in Salt Lake City, Utah (R. 184) on March 14, 1950, at 12:00 o'clock noon (Ex. I). Deputy Sheriff Bleak conducted said sale. Present thereat in addition to Deputy Sheriff Bleak was Dowse and his attorney, Mr. LaMar Duncan. Neither Plaintiff and Respondent Pender nor his attorney were present (R. 139). At said offering Dowse bid the sum of \$47.46 which was the highest and only bid made. Constituting this bid was the original sum of \$22.80, representing the judgment in favor of Dowse with interest, costs and sheriff's fees. On March 15, 1950, the Sheriff of Salt Lake County issued to Dowse his Certificate of Sale (Exhibit I) which describes the real property hereinabove described. This certificate was recorded in the Office of the County Recorder of Salt Lake County, Utah, on March 23, 1950, in Book 750, page 544, Records of said County.

No redemption was made from said sale and on September 16, 1950, after the full period of six months allowed for redemption had expired the Sheriff of Salt Lake County issued his deed conveying the above described real property to Dowse (Exhibit K). Said deed was duly recorded by Dowse in the office of the County Recorder of Salt Lake County, Utah, on September 16, 1950, in Book 798, page 499, Records of said County.

Subsequent to the issuance and recordation of said Sheriff's Deed, to-wit, on October 19, 1950, Dowse and



wife conveyed Lots 2 and 3, Block 4, North Columbia Sub-division to the defendants and appellants Treadway (Exhibit 6 and M). The deed of conveyance was recorded in the Office of The County Recorder of Salt Lake County, on October 20, 1950, in Book 808, page 617 Records of said County. The legal position of the Treadways in this case will be presented by their counsel in a separate brief and no attempt will be made by counsel for Dowse to discuss this aspect of the case.

On October 27, 1950, Dowse and wife borrowed the sum of \$5,000.00 from the Defendant and Appellant Whittaker and to secure the repayment thereof executed and delivered unto Whittaker their certain mortgage bearing said date covering Lots 2, 3 and 4, Block 8, North Columbia Subdivision (Exhibit L). This mortgage was recorded October 31, 1950, in the Office of the County Recorder of Salt Lake County, Utah, in Book 811, page 528 Records of said County. Whittaker, through his counsel, has filed his brief in this Court elucidating his legal position in this litigation. Counsel for Dowse commend this brief for earnest consideration by the Court and will not attempt to enter upon this area of the case.

It appears clearly from the evidence that the real property involved in this action consists of lots within the North Columbia Subdivision (Exhibit G). Lots 2 and 3 of Block 4 are contiguous. They are separated from Lots 6 and 7, Block 4 by intervening Lots 4 and 5 not involved in this case. These four lots are situate at the northeast intersection of Paxton Avenue and West Temple Street in Salt Lake City. Lots 1, 19 and 20, Block 6, and Lots



13 to 21, Block 8, are situate on Richards Street and represent one composite area. Lots 2, 3 and 4, Block 8, are adjacent and are situate at the northeast corner of the intersection of 13th South and West Temple Streets in Salt Lake City (Exhibits C, D, E, F, G, 4).

According to Deputy Sheriff Bleak all of the real property was offered for sale at the public vendue as a whole (R. 139) and there was no request made to offer any of the property separately (R. 139, 140). Also, according to Bleak separate notices of sale, four in all, were posted on each non-contiguous group of Lots (R. 144). As opposed to Bleak's testimony Mr. LaMar Duncan, attorney for Dowse, in action 86,985, testified that Bleak offered for sale Lots 2, 3, 6 and 7, Block 4, as a separate unit; Lots 1, 19 and 20, Block 6, as a separate unit, and Lots 2, 3, 4, 13 to 21, Block 8, as a separate group (R. 184, 185). There (sic) were not offered each separate lot but the bid was in three parcels (R. 185).

It appears that at the time the deputy sheriff made his levy there was delivered to him by Duncan, as attorney for Dowse, a praecipe dated January 31, 1950 (Exhibit X) wherein the sheriff was requested to levy and sell Lots 2, 3, 6 and 7, Block 4, Lots 1, 19 and 20, Block 6, Lots 2, 3, 4, 13 to 21 inclusive, Block 8, "all of which real property stands in the name of Rennold Pender upon the records of the County Recorder of Salt Lake County" (Exhibit X).

On November 13, 1952, the plaintiff proposed the form of Findings of Fact, Conclusions of Law and Judg-



ment (R. 251). On November 14, 1952, Dowse served and filed his Objection to the Proposed Findings of Fact, Conclusions of Law and Judgment (R. 236-238). The Court overruled and denied the Objections and signed and filed the Findings of Fact, Conclusions of Law and Judgment on November 22, 1952 (R. 239-250). On November 26, 1952, Dowse served and filed his Motion for a New Trial (R. 253). This motion was denied on December 20, 1952, (R. 253A). On December 22, 1952, after due notice, the Court permitted plaintiff to amend his Amended Complaint by adding certain allegations thereto in order to conform to proof (R. 259). Dowse filed his Notice of Appeal to the Supreme Court on January 19, 1953 (R. 267) and on the same date filed with the Clerk of the District Court his Designation of Record on Appeal (R. 265-266). On January 28, 1953, Dowse filed with the Clerk of the Court his Undertaking on Appeal (R. 269-270). The Record on Appeal was filed with the Clerk of the Supreme Court on January 30, 1953.

## PRETRIAL ORDER

On June 13, 1951, a pretrial of this action was held before the Honorable A. H. Ellett, a Judge of the above entitled Court. A pretrial order was made, entered and filed by him on June 22, 1951 (R. 32-35) which was never amended or changed. All pleadings were merged into the order (R. 35). By this Order counsel agreed upon certain facts. (The facts pertaining to the Whittaker mortgage and the conveyance of property to the Tread-



ways are specifically excluded from this recital.) The facts agreed upon were:

"1. That there was a case filed between S. W. Dowse as plaintiff and Rennold Pender, defendant, on August 25, 1949, being case No. 86895; that the matter was tried on November 3, 1949, before the Honorable Roald A. Hogenson; that on said day the court announced that he would give judgment to the plaintiff, S. W. Dowse, quieting title to the property involved in the lawsuit, and would give judgment in favor of the defendant for no cause of action insofar as that suit related to a slander of title.

"2. That on November 4, 1949, Milton V. Backman, attorney for defendant, Rennold Pender, received copies of findings of fact, conclusions of law, and a decree in case 86895 and that in said decree paragraph 4 stated that plaintiff should have and recover his costs herein; that on November 9, 1949, a cost bill in the amount of \$22.80 was served upon Harland W. Clark of the firm of Backman, Backman & Clark, the attorneys for the defendant.

"3. That no motion to retax costs was ever made nor was an appeal from the judgment ever taken.

"4. That thereafter and on the 4th day of January, 1950, an execution was issued and placed in the hands of the sheriff of Salt Lake County, and that at said time a praecipe was issued by attorney for S. W. Dowse, plaintiff, in said matter, wherein the sheriff of Salt Lake County was directed to sell the interests of the defendant, Rennold Pender, in and to the real property described in paragraph 1 of plaintiff's amended complaint herein.



"5. That S. W. Dowse agreed to pay Rennold Pender the sum of \$100.00, which sum was paid to the defendant, Rennold Pender, on or about the 29th day of November, 1949, and that the defendant, Rennold Pender, agreed to give to S. W. Dowse a quitclaim deed to the property involved in the lawsuit in case No. 86895 filed in this court; and that the deed covering said property was delivered to S. W. Dowse on or about the 29th day of November, 1949, and was recorded on said date.

"6. That the purpose of making the agreement whereby Dowse was to pay Pender \$100.00 and Pender was to sign a quitclaim deed was to enable Dowse to complete a pending sale which he then had.

"7. That the real property described in paragraph 1 of plaintiff's amended complaint consists of three non-contiguous parcels of land and was described as consisting of nineteen separate lots.

"8. That while Rennold Pender claims in this action that the sale was made as one parcel, counsel are agreed that the sale was made in not more than three parcels.

"9. That S. W. Dowse did not direct the sheriff to sell any personal property and that the sheriff sold no personal property in satisfying the judgment under the execution placed in his hands.

"10. That S. W. Dowse bid the property described in paragraph 1 of plaintiff's amended complaint in for the sum of \$47.46, being the principal costs of \$22.80, \$.50 for execution, \$.63 interest to sale date, \$23.53 sheriff costs, making a total amount of \$47.46, and that no other property was sold by the sheriff." (R. 32, 33, 34).



The Court defined the issues of fact to be tried as follows:

"1. Did the sheriff offer the property which was sold pursuant to execution as one parcel?

"2. What was the value on March 14, 1950, of the various parcels of land described in plaintiff's complaint and sold by the sheriff under the execution in case No. 86895?

"3. Was there personalty belonging to Rennold Pender at the time of the execution sale which was available for the satisfaction of the judgment which S. W. Dowse held against him?

"4. Did S. W. Dowse agree to satisfy the judgment in connection with the transaction wherein he paid \$100.00 to Rennold Pender and received a quitclaim deed from Pender?

"5. Did Rennold Pender agree to forego an appeal in case 86895 in connection with the transaction mentioned in paragraph 4 above?

"6. \* \* \*

"7. \* \* \*

"8. \* \* \*

"9. \* \* \*

"10. Did S. W. Dowse act maliciously in directing the sheriff to sell the real property under the execution herein and if he did, what would be the amount of punitive damages to assess against S. W. Dowse in case Rennold Pender prevails in this lawsuit?

"11. What has been the reasonable rental value since the 14th day of March, 1950, of the real property sold at sheriff's sale under the execution in case No. 86895?



“12. Did S. W. Dowse slander the title of the realty described in paragraph 1 of plaintiff’s amended complaint by causing the same to be sold at sheriff’s sale and to be mortgaged and sold to the other defendants in this action?

“13. Did Rennold Pender have actual notice that a sale of the real property described in paragraph 1 of his amended complaint was to be made upon execution?” (R. 34, 35).

The order fixed the issues of law as follows :

“1. Was the sheriff’s sale under execution void by reason of not offering the real property by separate lots?

“2. Can the plaintiff, Rennold Pender, in this proceeding attack the judgment for \$22.80 given in case 86895?” (R. 35).

## STATEMENT OF POINTS AND ARGUMENT

### I.

**WHETHER A JUDGMENT DEBTOR AGAINST WHOM IS DOCKETED AN UNPAID MONEY JUDGMENT MAY BY AN INDEPENDENT COLLATERAL ACTION AGAINST THE JUDGMENT CREDITOR SECURE RELIEF FROM A SHERIFF’S SALE AFTER THE ISSUANCE BY THE SHERIFF OF HIS DEED OF CONVEYANCE TO THE JUDGMENT CREDITOR, WHO WAS THE PURCHASER AT SAID SALE OF THE JUDGMENT DEBTOR’S REAL PROPERTY WHICH WAS LEVIED ON PURSUANT TO A VALID WRIT OF EXECUTION ISSUED ON SAID JUDGMENT ON THE GROUNDS (A) OF IRREGULARITIES IN CONDUCT OF SALE; (B) OF INADEQUACY OF CONSIDERATION OR BID PRICE; (C) THAT THE SALE OF REAL ESTATE WAS EN MASSE INSTEAD OF IN SEPARATE PARCELS; (D)**



**THAT THE JUDGMENT WAS NOT SATISFIED FROM AVAILABLE PERSONAL PROPERTY OF THE JUDGMENT DEBTOR BEFORE RESORTING TO HIS REAL PROPERTY; AND (E) THAT THE JUDGMENT DEBTOR HAD NO KNOWLEDGE OF THE LEVY AND SHERIFF'S SALE OF HIS REAL PROPERTY?**

The provisions of Rule 69 Utah Rules of Civil Procedure are pertinent in determining the correct answer to the question here propounded. For convenience of the Court the following excerpts from the Rules of Civil Procedure are here inserted.

“The writ of execution must be issued in the name of the State of Utah, sealed with the seal of the Court and subscribed by the clerk. \* \* \* It must intelligibly refer to the judgment stating the court, the county where the same is entered or docketed, the names of the parties, the judgment, and, if it is for money the amount thereof and the amount actually due thereon. It shall be directed to the sheriff of the county in which it is to be executed and shall require the officer to proceed in accordance with the terms of the writ; provided that if such writ is against the property of the judgment debtor generally it shall direct the officer to satisfy the judgment with interest out of the personal property of the debtor and if sufficient personal property cannot be found then out of his real property. \* \* \*” (Rule 69 (b)).

“Unless the execution otherwise directs the officer must execute the writ against the property of the judgment debtor by levying on sufficient amount of property if there is sufficient, \* \* \*. When there is more property of the judgment debtor than is sufficient to satisfy the judgment



and accruing costs within view of the officer, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated is amply sufficient to satisfy the judgment and costs. \* \* \* (Rule 69 (d)).

“(1) Notice. Before the sale of the property on execution notice thereof must be given as follows: \* \* \* (3) In case of real property, by posting a similar notice, particularly describing the property, for 21 days, on the property to be sold, at the place of sale, and also in at least 3 public places of the precinct or city where the property to be sold is situated, and publishing a copy thereof at least 3 times, once a week for 3 successive weeks immediately preceding the sale, in some newspaper published in the county, if there is one.” (Rule 69 (e) (1)).

“(3) Conduct of Sale. All sales of property under execution must be made at auction to the highest bidder, between the hours of 9 o'clock a.m. and 5 o'clock p.m. After sufficient property has been sold to satisfy the execution no more shall be sold. Neither the officer holding the execution nor his deputy shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery it must be within view of those who attend the sale, and it must be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. All sales of real property must be made at the courthouse of the county in which the property, or some part thereof, is situated.



The judgment debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the officer must follow such directions." (Rule 69 (e) (3)).

"(6) Real Property. Upon a sale of real property the officer shall give to the purchaser a certificate of sale, containing: (1) a particular description of the real property sold; (2) the price paid by him for each lot or parcel if sold separately; (3) the whole price paid; (4) a statement to the effect that all right, title, interest and claim of the judgment debtor in and to the property is conveyed to the purchaser; provided that where such sale is subject to redemption that fact shall be stated also. A duplicate of such certificate shall be filed for record by the officer in the office of the recorder of the county. The real property sold shall be subject to redemption, except where the estate sold is less than a leasehold of a two-years' unexpired term, in which event said sale is absolute." (Rule 69 (e) (6)).

"(3) Time for Redemption, Amount to be Paid. The property may be redeemed from the purchaser within six months after the sale on paying the amount of his purchase with 6 per cent thereon in addition, together with the amount of any assessment or taxes, and any reasonable sum for fire insurance and necessary maintenance, upkeep, or repair of any improvements upon the property which the purchaser may have paid thereon after the purchase, with interest on such amounts, and, if the purchaser is also a creditor having a lien prior to that of the person seeking redemption, other than the judgment under which



said purchase was made, the amount of such lien, with interest." (Rule 69 (f) (3)).

"If no redemption is made within six months after the sale, the purchaser or his assignee is entitled to a conveyance; \* \* \* If the debtor redeems, the effect of the sale is terminated and he is restored to his estate. \* \* \*" (Rule 69 (f) (5)).

The judgment against Pender in the amount of \$22.80 in action No. 86895 stands as a valid judgment. The issuance of the writ of execution on said judgment at the behest of the judgment creditor Dowse was in all respects free from legal defects. Under question is the method of the sheriff in conducting the execution sale. If there were irregularities in such sale Pender had a quick and easy method of bringing such irregularities to the attention of the Court. A motion by him to set aside the sale and recall the sheriff's certificate of sale made at any time during the period of redemption would have afforded him complete relief. This is the usual and ordinary remedy available to a judgment debtor who believes that an execution sale has been unfairly or illegally conducted by the sheriff. Pender did not avail himself of this remedy but waited until one and a half months had expired after the sheriff's deed had issued to commence the present action. He is, therefore, collaterally attacking the execution sale in the present litigation with resultant limitations upon such course of action. Review of pertinent authorities will quickly show that he is narrowly confined in his present attack and that many of the grounds upon which he alleges the sale to be void cannot be raised in the



present action even though they might have been the basis for setting aside the sale had he availed himself of a direct attack upon it through a motion to set it aside.

“The general rule is that if there is any ground for relief against an execution, such relief must be sought in the original cause, and not by a new and independent proceeding. This rule is upheld of course, not merely in regard to original writs of execution, but also in regard to alias and pluries writs of execution. The rule prevails where the collateral attack is sought to be made because of a clerical error or because of an irregularity committed by the execution officer, such as a sale made in violation of a stay of execution, or after a defective appraisement, or without any appraisement, or, in general, because of defects or irregularities in connection with the execution which do not render it void, particularly where no one sustains an injury thereby and where the sale has been confirmed. There are, however, some cases in which a confirmation of the sale is held not to preclude a collateral attack thereon. The collateral attack may be made where the execution is void, and the same remedy is available in certain cases of fraud. These general rules are applicable to execution deeds which may not be impeached collaterally for mere irregularity, although the defendant in execution may deny the validity of such a deed if made to one who was not the purchaser, but a stranger to the proceedings.” (21 Am. Jur. Executions, Sec. 519, pp. 258-259).

Pender attacks the execution sale on the theory that it was void because (a) of irregularities in conduct



of sale; (b) of inadequacy of consideration or bid price; (c) that the sale of real estate was en masse instead of in separate parcels; (d) that there was available personal property of sufficient value and amount to satisfy the judgment with interest and costs without resorting to his real property; (e) that he had no knowledge of the levy and sheriff's sale of his real property, and (f) that Dowse was guilty of fraud.

The present discussion will be directed to points (a), (b), (c), (d) and (e).

There are four cases decided by the Utah Supreme Court which are of particular interest in determining the validity of the sheriff's sale under points here involved. The first is *Dickert v. Weise*, 2 Ut. 350; 40 Pac. States Reports, 350. This was a mortgage foreclosure proceeding wherein it was contended that the foreclosure sale was void because the property was not sold separately but sold en masse. The attack was a direct attack on appeal from the judgment and from an order overruling the motion to set aside the sale. It was, therefore, unlike the present collateral action. The Court wrote:

“But it urged that the sale was not properly conducted; that the property was not sold separately as required by statute, but was all sold together, and that the sale should, therefore, be set aside.

“The statute requires that when real estate is to be sold on execution, and is composed of several known lots, they shall be sold separately. In this case the parcels of property were offered separately by the officer, but there were no bid-



ders. Thereupon the officer offered all of the property together, and it brought the whole amount of the judgment and costs. The object of the statute, no doubt, was to have the property sell for the highest possible price, and this view of the statute is borne out by the language of the section itself. C.L., Sec. 1448.

“The object of the law was secured, and the action of the court below in overruling the motion to set aside the sale was proper.”

The second case is *National Realty Sales Co. v. Ewing*, 55 Ut. 438; 186 Pac. 1103. The action was a collateral attack by way of an action to quiet title against a purchaser of land on execution sale by the judgment debtor's grantee. It was contended that the levy and sale were excessive and irregular for the reason that the real property sold consisted of several distinct parcels of land of much greater value than the amount of the judgment under which it was sold and that the said lands were all sold as one parcel. The judgment upon which the sale was held was for \$154.00, interest and costs. Pursuant to a writ of execution the sheriff sold the property to the judgment creditor for the amount of the judgment and issued a certificate of sale. After the period of redemption expired sheriff's deed was issued to the purchaser and within a year the property was sold by him for \$1,600.00. The new owner placed a mortgage thereon for \$2,000.00. As to the inadequacy of consideration the Supreme Court ruled:

“It does seem that the property now under consideration was sold under the execution for an inadequate price. However, mere inadequacy



of price was not sufficient to invalidate the sale when the proceedings were fair and regular and there is nothing in the record to suggest fraud or concealment."

With respect to the claim that the land was composed of more than one parcel, the Court commented:

"Under our statute, Comp. Laws Utah, 1917, Sec. 6934, with respect to execution sales, Henry S. Tanner or the plaintiff, could have directed the sale of the property to have been made in parcels, if he so desired. The land was, as the testimony shows, but one parcel within the meaning of the law. Moreover, the plaintiff could have then asserted its claim of ownership, which it did not do."

In *Chausse v. Bank of Garland*, 71 Ut. 586, 268 Pac. 781-783, the Court said:

"The allegations of the complaint concerning the disproportionate bids of the defendant bank for the several tracts of real estate at the last foreclosure sale present no independent grounds for legal redress. Judicial sales, otherwise regular, may not be impeached for disproportionate or inadequate prices. The right of the complaining party to bid higher, or, as in this case, to redeem any one of the tracts sold, is the protection which the law affords from the matters complained of. The hardship resulting to the plaintiff in the present case arose out of the failure of the bank to make higher bids for tracts 1 and 2 of the real estate sold. The amount a prospective purchaser shall bid at such sales cannot be regulated by law. There being no irregularity or wrongful or unlawful act alleged in the proceed-



ings it follows that the complaint failed to state a cause of action."

*Adams v. Pratt, District Judge, et al.*, 87 Utah 80; 48 Pac. (2d) 444, is the fourth case of concern. It was an original proceeding in the Supreme Court for a writ of prohibition against Judge Eugene E. Pratt when he sat as a judge of the Second Judicial District Court in and for Davis County. There had been a prior mortgage foreclosure action by Barnes Banking Company against the petitioner Adams. Judgment had been entered in favor of the Bank and the mortgaged property ordered sold to satisfy the judgment. The property was bid in as one parcel by the Banking Company. No redemption was made from the sale and sheriff's deed issued to the Bank. Thereafter the Bank applied for a writ of assistance to place it in possession of the mortgaged premises. At that point Adams moved the District Court for an order to vacate and set aside the writ on the grounds that he had filed a petition in the United States District Court of Utah for debtor's relief and as a consequence the Federal Court had exclusive jurisdiction of the property. The State District Court first stayed the writ and then refused further stay. At this point in the litigation Adams filed a suit against the Barnes Banking Company wherein he sought to have the sale of the mortgaged property set aside because the same was sold in one parcel. This action was not prosecuted to conclusion. The Federal District Court by order in the debtor's relief proceedings permitted the Banking Company to pursue its remedies in the District Court of



Davis County and authorized the latter Court to adjudicate the controversy between the parties. Following the action of the Federal Court, Adams instituted the proceedings for the writ of prohibition against Judge Pratt. As to the point raised by Adams that the mortgage foreclosure sale was void because the property was sold en masse the Court said:

“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. \* \* \* For stronger reasons it may not be said that the court below was without jurisdiction to issue the writ of assistance here brought in question.”

The leading case in Colorado where the statutes direct the manner of conducting an execution sale similar to the provisions of the above quoted Rules of Procedure in Utah is the case of *Victor Investment Co. v. Roerig*, 22 Colo. App. 257, 124 Pac. 349. This was a collateral attack to set aside an execution sale and to cancel the sheriff’s deed on a judgment for \$113.85 and costs. The property had been bid in at the sheriff’s sale for the sum of \$100.00. The value of the property was at least \$2,000.00, encumbered with a mortgage of \$1,200.00. The trial court concluded that inadequacy of price and



circumstances of unfairness justified it in nullifying the sale. The following excerpts from the Court of Appeals' opinion are pertinent:

"We have not been referred to any authority in support of the conclusion that under such circumstances the bid of \$100.00 for the property at the execution sale was grossly out of proportion to its true value. The general trend of judicial opinion seems to be to the contrary, especially where the debtor is allowed by law a right of redemption from the sale. 'At judicial sales, where there is a redemption, it is a well-known fact that lands, unless where necessary to secure the debt, are rarely sold at anything approximating their real value. Such purchases are not looked upon as a desirable mode of investment. There is seldom competition. The creditor, for the most part, has to take the land in satisfaction of his debt and wait for it to be redeemed.' \* \* \*"

"It is probably true that the officer in making the levy followed the usual custom of filing a certificate of levy with the county recorder, and it is a matter of presumption that a duplicate of the certificate of sale issued to the purchaser was recorded, as provided by law. It is not claimed that appellee did not have knowledge of the judgment against him, and he also knew that it was unsatisfied. His remaining in ignorance of the execution was due to inattention to his own affairs. as was also his failure to protect whatever equity there was in the family residence by taking advantage of the homestead law. It would seem, then, that he has only himself to blame for his misfortune, from which equity is powerless to relieve him. The courts are without power to arbitrarily extend the statutory period for re-



demption, for the purpose of relieving the hardships of individual cases, in the absence of some recognized ground for equitable interference. The attitude of the appellant in holding to the advantage obtained through legal forms may be characterized as hard and unconscionable, but such shortcomings are cognizable only in foro conscientiae, and not in foro legis. To sustain the decree of the district court upon the facts appearing in this record would be to declare the execution of a sheriff's deed, after sale under execution and expiration of the time allowed for redemption, the excuse for the institution of a new litigation. The judgment must be reversed."

There are many California decisions involving the power of Court to set aside an execution sale and sheriff's deed issued pursuant thereto on both direct and collateral attack. One of the earliest cases is *Smith v. Randall*, 6 Cal. 47; 2 Pacific States Reports 47. This was a direct attack upon the execution sale by way of an order to show cause. The trial court set aside the sale but on appeal the Supreme Court sustained the sale. Reversing the trial court's judgment the Supreme Court wrote:

"The respondent contends that the seizure and sale of said land was illegal and void, because: 1st. The notice of sale did not particularly describe the land, and said notice was not posted twenty days before the day of sale. 2d. That defendant being the owner of personal property sufficient to satisfy the judgment, could not waive the necessity of having such personal property sold in preference to the land, because the rights of the mortgagee would be prejudiced by a sale of the land. 3d. The land consisted of separate



parcels, and was sold as one tract. 4th. The price for which the land was sold is greatly inadequate to its value.

“It has been often decided that the provisions of statutes similar to ours, with respect to levy and notice of sale under execution, are merely directory, and the failure of the officers to comply with the requirements of the law, in this respect, would not vitiate such sale, but the party aggrieved by his neglect is left to his remedy by an action against the officer. 6 Mun. 111, 3 Bibb, 216. This rule is founded in justice and sound policy.”

*Bechtel v. Weir*, 152 Cal. 443; 93 Pac. 75; 15 LRA (NS) 549. This decision holds that the failure of the sheriff to sell separate parcels of land separately and in selling them en masse does not render the sale void subject to collateral attack. Here the court said:

“We have so far considered the question of the sale to the extent of determining that, at the worst, it was not void, but voidable merely, and that respondent’s remedy was by direct proceedings within a seasonable time to vacate the sale, — proceedings which were never taken. But equally demonstrable is the proposition that, in the absence of fraud and injury shown, the sale en masse of the two parcels of land, under the circumstances indicated by the sheriff’s return, was not even irregular, but was a perfectly valid exercise of power.”

Another California case which is relevant to this discussion is *Morris v. Winans*, 30 Cal. App. 575; 159 Pac. 213. An execution sale was held upon a judgment for \$189.62. No motion was made to set aside the execu-



tion nor the sale thereon and a sheriff's certificate of sale and deed were issued to the purchaser. The execution debtor commenced an independent collateral action to declare null and void the sheriff's certificate and deed. It appears that there had been a first judgment in the action which was vacated on appeal and upon re-trial a new judgment was entered in favor of the plaintiff. The writ of execution through error described the first judgment but in all other particulars was regular and conformed to the second judgment properly setting out the amount thereof, etc. The following excerpt indicates the limitation in collateral attacks against an execution sale:

“It is claimed, first, that the execution sale was void because in the writ the date of the entry of judgment was misstated in that the date given was that of the first judgment which had been set aside, and not of the last and final judgment in the action. If this irregularity rendered the writ entirely void, plaintiff was entitled to relief; otherwise not. If the writ was merely irregular and subject to an amendment, the plaintiff cannot attack it in this way as against the defendant, a purchaser for value.”

The court decided that the irregularity described did not render the sale void.

*Batini v. Ivancich*, 105 Cal. App. 391, 287 Pac. 523. This action is of particular interest in this instant case. This was a collateral attack upon a sheriff's sale and deed issued pursuant thereto. It was agreed that there was no irregularity as to any proceedings up to the



time of the issuance of the writ of execution under which the sheriff's sale was made. The appellants contended in making the sale no legal or sufficient notice thereof was given and that the property sold consisting of three parcels of real estate was sold en masse. In disposing of the first contention the Court confirmed the doctrine of *Smith vs. Randall*, supra, in the following language:

"Plaintiff rests his claim upon a sheriff's deed. Defendants contend that the deed is void and of no effect. Both sides here agree that the sole question presented both in the court below and here is on the validity of said sheriff's deed. The trial court held that the deed was effective to transfer title and entered its decree in favor of plaintiff, and the defendants appeal. At the outset, it may be noted that no claim of irregularity is made as to any proceeding up to the time of the issuance of the writ of execution under which the sheriff's sale was made. In other words, the writ of execution was regularly issued. Appellants contend that in making the sale no legal or sufficient notice thereof was given and that the property sold, consisting of three parcels of real estate, was sold en masse.\* \* \*"

"As stated, a review of the cited authorities will disclose, beyond dispute, that our courts are still committed to the earlier rule. Particularly is this true where the attack is collateral and no showing, other than of defective or insufficient notice, is made. Doubtless much well-directed criticism may appear justifiable and many plausible arguments might be advanced against the holding. But all of these arguments have been weighed and considered and found insufficient to



disturb the rule. Obviously, the courts have had in mind the harmful results following an easy voiding of judicial sales and have decided that mere deviation from the statute would not bring such results, unless by the statute itself so provided. And further than this, the courts have always lent a willing ear to the debtor who could show fraud or unfairness in the sale of his property, and where a proper showing has been made full relief has followed. No such showing is attempted here."

As to the second contention the court held that such action by the sheriff did not render the sale void but only voidable and that such defect could only be reached by direct motion to set aside the sale.

*Mitchell v. Alpha Hardware & Supply Co.*, 7 Cal. App. (2d) 52; 45 Pac. (2d) 442, decided that in a collateral attack upon an execution sale after the period of redemption had expired that it is too late to attack the sale on the ground that the property was sold en masse instead of in separate parcels. In support of its conclusion the court cited *Gregory v. Bovier*, 77 Cal. 121, 19 P. 232.

*Knapp v. Rose*, 32 Cal. (2d) 530; 197 Pac. (2d) 7. By an independent action in equity the plaintiff sought to set aside a sale upon writ of enforcement. The court after discussing the difference under California practice between a writ of execution and a writ of enforcement held that such objection was an irregularity which could be raised only by a motion to set aside the sale and not by separate proceeding for that purpose. The



court cited *Culver v. Scarborough*, 73 Cal. App. 441, 144; 238 Pac. 1104, 1105, and quoted the following from said decision:

“At the outset it may be stated as a general rule supported by many authorities that a proceeding to set aside a sale under execution, excepting where some special facts are alleged which may create jurisdiction in a court of equity, the proper procedure is by motion to vacate the sale in the action under which it is claimed any irregularities occurred.”

Passing to the State of Montana there is an interesting group of decisions very much in point. The first is *Thomas vs. Thomas*, 44 Mont. 102; 119 Pac. 283. This case was a collateral attack upon a foreclosure sale. The purchaser after receiving the sheriff's deed petitioned the court to be put in possession of the property. The appellant contested this application primarily because the premises consisted of several known lots and parcels of land which were not sold separately. The court said:

“\* \* \* The statute requiring known pieces and parcels of land to be sold separately is merely directory. At most, the sale in gross is voidable, and not void. It is not open to collateral attack. There is not anything in the statute to indicate an intention on the part of the lawmaking body to declare the sale void for failure to sell separately, and there are, we think, many reasons, founded in equitable considerations, why it should not be so considered.\* \* \* At most, the failure to sell separately is a mere irregularity, which may or may not result in prejudice to the defend-



ant. If he deems himself aggrieved, he may move to have the sale set aside and the property resold, or he may proceed by bill in equity. Either method would constitute a direct attack upon the sale. But he ought not to be permitted to remain silent and inactive until demand is made for possession, and then resist such demand by collateral attack upon the proceedings leading up to the sale."

*Fox vs. Curry*, 96 Mont. 212, 29 Pac. (2d) 663. The plaintiff in this action recovered a money judgment and caused execution to be issued thereon. Defendant moved to set aside the sale and upon denial of his motion appealed. Although this was a direct attack on the sale the appellate court refused to reverse the judgment. In part it said:

"It is noteworthy that the defendant, the judgment debtor, or some one representing him, might have been present at the sale, and might have directed the order in which the property should be sold. But he was not there, nor was he represented. The sale was made at public auction, and the only persons present were the sheriff and Mr. Young. After the sheriff was apprised of the condition upon which Mr. Young would bid, it would have been an idle ceremony to have offered the parcels separately. Had there been other persons present, doubtless it would have been the imperative duty of the sheriff to offer them separately. The fact that the property was sold in gross under the circumstances is not a sufficient reason for setting the sale aside. So far as the record shows, the entire transaction was in good faith. In the circumstances, the property could have been sold only in the manner



in which it was, in gross. And 'the creditor is not to be foreclosed of his effort to collect his debt by the mere want of bidders for the different parcels.' *Burton v. Kipp*, supra; *Thomas v. Thomas*, 44 Mont. 102, 119 P. 283, Ann. Cas. 1913B, 616. If the judgment debtor had attended the sale, of which it must be held that he had due notice, and had he required the property to be sold in separate parcels, as was his right, then the provisions for redemption would have afforded protection to him, and he might have made redemption of any parcel sold. That he did not follow this course is his own fault."

*Haugan vs. Yale Oil Corporation*, 124 Mont. 1, 217 Pac. (2d) 1084. Under the Montana probate practice a proceeding for the private sale of decedent's land is separate from the administration of his estate, although it arises in the course of the administration and is in the nature of an action of which the presentation of the petition is the commencement and the order confirming sale is the final judgment. The jurisdiction over it is not included in the general jurisdiction over the administration. After an order confirming the private sale of real estate by an administrator with the will annexed and after his delivery of deed to the purchaser two minor devisees in an independent action sought to quiet title to the real estate involved. The petition for the sale of the property and the order to show cause complied with the requirements of the statute. Jurisdiction was, therefore, conferred upon the court. The publication of the notice of sale by the administrator with the will annexed did not comply with the provisions of the statute. It was held that since the court held jurisdiction



over all of the parties interested in the estate that irregularities in the conduct of the sale could only be shown upon direct appeal “\* \* \* The regularity could not be attacked in a collateral proceeding.\* \* \*” This decision was based upon the prior ruling of the Court in *Plains Land and Improvement Company vs. Lynch*, 38 Mont. 271, 289; 99 Pac. 847.

The decision of the Supreme Court of Idaho in *Coghlan vs. City of Boise*, 36 Ida. 613; 212 Pac. 867, involved a collateral attack by way of an action to quiet title to a certain parcel of land which had been sold pursuant to a judgment entered in a judicial foreclosure of a tax lien. Under the Idaho statute a judgment debtor being present at an execution sale of real property had the right to direct the order in which such property should be sold. The court said:

“The sale of separate parcels of real property en masse in disregard of [the statute] is not void, but only voidable and subject to be set aside on timely and proper application, and a sale en masse is not prohibited by said section where the lots or parcels cannot be separately sold.”

*Mt. Vernon National Bank vs. Morse*, 128 Ore. 64; 264 Pac. 439, contains the following statement:

“The order of the court striking the allegation from the answer is sustained. Sale of land or an interest therein on execution without the statutory notice is an irregularity when the court has jurisdiction of the subject matter and of the parties. For the purpose of directing a sale



of the real property, the court, in the state of Washington, had jurisdiction both of the parties and the subject-matter. The sale was confirmed. Defendant's attack thereon is collateral and is therefore not available to defendant in this action."

*Whitworth v. McKee*, 32 Wash. 83; 72 Pac. 1046, was a collateral attack by way of an independent action to set aside a sale of real property on an execution. The defendant contended that because the sheriff had not made search for personal property with which to satisfy the writ before levying upon the real property, the sale was void. The court said:

"\* \* \* it is not the rule that a sale of real property is void merely because the sheriff failed to return that he had been unable to find sufficient personalty to satisfy the writ before levying upon the real estate of the judgment debtor, even when the statute expressly provides, which ours does not, that the sheriff shall first levy upon the debtor's personal property. In a collateral action brought to set aside the sale, it will be presumed that the officer performed his duty in this respect. But statutes of this character are rarely held mandatory: the better rule is that they are directory merely, furnishing a ground upon which a confirmation of a sale might be successfully resisted, were it shown that there was personal property out of which the judgment could have been satisfied, but they do not make a return of the sale of real property, which fails to show that no personal property could be found out of which the judgment could be made, void on its face. On the contrary, such a return is good as against any form of attack other than



direct assault. Freeman on Executions (3d Ed. Sec. 279.)”

*Oliver v. Dougherty*, 8 Arizona 65; 68 Pac. 553 was a collateral assault on a sheriff's sale on execution by way of an action to quiet title. An Arizona statute provided that the writ of execution must require the officer to satisfy the judgment out of personal property of the debtor before resorting to his real property. It was claimed the sheriff did not conform to the mandates of this statute. The court answered this contention as follows:

“\* \* \* Such a provision incorporated in an execution according to the requirements of a statute is but a direction to the sheriff, and it is such a direction as the judgment debtor may require him to comply with before sale. It nowhere appears in the evidence that Oliver made any such demand. The appellants offered evidence to show that, at the time the execution was levied and the sale was made, Oliver had personal property, which offer was denied by the court, and we think properly. There was no offer to show that Oliver had made a demand upon the sheriff that the sheriff refused, and that the purchaser at the sale knew of all those conditions, but it was for the first time to show that the judgment debtor had property. Whether he had ample personal property to satisfy the judgment, or not, cannot affect the title of an innocent purchaser. If the sheriff was executing the writ not in conformity with its terms, and was either ignorant of the fact that the judgment debtor held personal property, or, being aware of it, was purposely avoiding his duty, it was the right and it became the duty of the judgment debtor



to call the attention of the sheriff to the fact that he had personal property, and that he was willing to turn it over for that purpose, and, if he refused to do so, to compel him by proper processes to first make the money out of the personal property which the judgment debtor was turning over to him. If the judgment debtor neglected to so protect himself, and permitted the sheriff to proceed to sell real estate, the sale is valid, especially where there is an innocent purchaser. With the evidence as it stood on the record, the court was justified in refusing to admit evidence of the existence of personal property."

*Rauer v. Hertweck*, 175 Cal. 278; 165 Pac. 946, was an action wherein a judgment debtor attempted to quiet title to real property against a purchaser at an execution sale on a judgment entered against plaintiff. He contended that neither the judgment plaintiff, sheriff nor execution sale purchaser notified him of the proposed sale. In overruling this contention the court said:

"But there was no obligation upon them to give him any such notice. The statute defines how notice of an execution sale must be given. To say that a sale may be set aside because some other notice was not given would be to amend the statute, and this we cannot, of course, do. When the officer conducting the sale has done the acts prescribed by the Code, he has done his full duty. He is not required to search for the debtor and give him any further notice than that which the law exacts. Nor is any such duty imposed upon the judgment creditor."



With respect to inadequacy of consideration as a grounds for nullifying a sheriff's sale on collateral attack after issuance of the sheriff's deed the following statement by Judge Story is most pertinent:

“\* \* \* Inadequacy of consideration is not of itself a distinct principle of relief in equity. The common law knows no such principle. The consideration be it more or less supports the contract. Common sense knows no such principle. The value of a thing is what it will produce, and admits no precise standard. If courts of equity were to unravel all these transactions they would throw everything into confusion and set afloat the contracts of mankind. Such a consequence would of itself, be sufficient to show the inconvenience and impracticability, if not injustice, of adopting the doctrine that mere inadequacy of consideration should form a distinct ground of relief.” (1 Story's Equity Jurisprudence, Sec. 245).

The appellant Dowse cites the following additional authorities as sustaining the legal principles herein asserted by him to be applicable in the instant case:

- 1. Irregularities in conduct of execution sale which do not void the sale cannot be asserted, by a judgment debtor in an independent action collaterally attacking the sale and seeking to quiet title against the sheriff's deed after period of redemption has expired and sheriff's deed has issued to the purchaser:**

Bird v. Kitchens, ..... Ark. ....; 221 S.W. (2d) 795;

Gross v. Simsack, 364 Pa. 337; 72 Atl. (2d) 103;



Knox v. Noggle, 279 Pa. 302; 196 Atl. (2d) 118;  
Bonner v. Lockhart, 236 Ala. 171; 181 South.  
767;  
Horkan v. Eason, 10 Ga. App. 236; 73 S.E.  
352;  
Dixon v. Peacock, 30 Okla. 87; 141 Pac. 429;  
Sheehan v. All Person, etc., 80 Cal. App. 393;  
252 Pac. 337;  
Sellers v. Johnson, 207 Ga. 644; 63 S.E. (2d)  
904;  
White v. Adams, 52 Cal. 435; 1 Pac. States.  
Rep. 435;  
Hamilton v. Waters, 93 Cal. App. 866; 210  
Pac. (2d) 67.

- 2. Inadequacy of consideration or of bid price at an execution sale, in absence of proof of acts of overreaching or bad faith on the part of a judgment creditor, is not a valid ground to nullify the execution sale and cancel the sheriff's deed issued pursuant thereto in an independent collateral action instituted by the judgment debtor subsequent to the issuance of the deed.**

Knox v. Noggle, *supra*;  
Gross v. Simsack, *supra*;  
H.O.L.C. v. Edwards, 329 Pa. 529; 198 Atl. 123,  
124;  
Sellers v. Johnson, *supra*;  
Sikes et al. v. Beaver, et al., ..... Sup. Ct. Ga.  
.....; 157 S.E. 467;  
City of Sanford v. Ashton, 131 Fla. 759; 179  
South 765;  
Solomon v. Neubrecht, 300 Mich. 177; 1 N.W.  
(2d) 501;



Lawyers Co-op. Publ. Co. v. Bennett, 34 Fla. 302; 16 South 185;

Sellers v. Johnson, 207 Ga. 644; 63 S.E. (2d) 904;

Marr v. Marr, 73 N.J. Eq. 643; 70 Atl. 375;

McAlvay v. Consumers Salt Co., 112 Cal. App. 383; 297 Pac. 135;

Bauer v. Hertweck, 175 Cal. 278; 165 Pac. 946;

Pavlovich v. Watts, 46 Cal. App. 103; 115 Pac. (2d) 511;

Dewey v. Loomis, 113 Kan. 750; 216 Pac. 271;

Elliott & Healy v. Wirth, 34 Idaho 797; 198 Pac. 757;

McLain Land & Investment Co. v. Swofford Bros. Dry Goods, 11 Okla. 429; 68 Pac. 502;

Dickinson-Reed-Randerson Co. et al. v. Markley, 117 Okla. 17, 244 Pac. 754;

St. Paul Trust & Savings Bank v. Olson, 52 N.D. 315; 202 N.W. 472;

Burton v. Kipp, 30 Mont. 275; 76 Pac. 563.

- 3. The objection that land was not offered for sale in separate parcels by the sheriff at an execution sale cannot be asserted in an independent action seeking to set aside the sale instituted after the sheriff's deed has issued to the purchaser at such sale.**

Raymond v. Halborn, 23 Wis. 57;

Coulters v. Meiggs, 58 R.I. 30; 191 Atl. 115;

Reed v. Gourley, ..... Tex. C.A. ....; 109 S.W. (2d) 242.



4. A sale of real property on execution is not void because the sheriff failed to satisfy the judgment out of unexempt personal property of the judgment debtor before resorting to real property of the debtor and such irregularity is not a ground to nullify the sale on a collateral attack thereon in an independent action. Such irregularity can only be asserted in a direct assault by way of motion to set aside the sale.

Solomon v. Neubrecht, *supra*;

Clark v. Fell, 139 Pa. 469; 22 Atl. 649;

Smith v. Randall, *supra*;

Jacobsen v. Wigen, 52 Minn. 6; 53 N.W. 1016.

5. Where, as in Utah, neither a legislative enactment nor Rules of Civil Procedure require that the judgment creditor or the sheriff give personal notice of a proposed execution sale to a judgment debtor, the absence of such notice is no ground upon which to nullify the sale.

Bock v. Losekamp, 179 Cal. 674; 179 Pac. 516;

Mortimer v. Young, 53 Cal. App. (2d) 317; 127 Pac. (2d) 950.

The foregoing authorities clearly teach

- (a) that the provision of Rule 69 (b) U.R.C.P. requiring the sheriff to satisfy the judgment out of personal property and if sufficient personal property cannot be found then out of the debtor's real property, is directory only and not mandatory. Violation of this rule and of the directions of the writ may be a ground for setting aside the sale on direct attack but never on collateral attack.



- (b) Likewise under Rule 69 (e) (1) defect in the notice of sale is voidable only on motion to set aside the same and is not a defect which affords relief in a collateral action to quiet title.
- (c) The requirement of rule 69 (e) (3) that when the sale of real property consisting of several known lots or parcels that they must be sold separately when the judgment creditor is present at the sale and directs the order of sale is directory and a violation of same does not afford relief except on a direct motion to set aside the sale. It is unavailable to the debtor in a subsequent action to quiet title.
- (d) That there is no duty upon either the sheriff conducting an execution sale or the judgment creditor to give personal notice to or otherwise notify him of the proposed execution sale.

A summation of the whole matter is found in 23 C.J. 693, 694, Sec. 691, as follows:

“\* \* \* On the other hand, if the defect or irregularity relied on, whether occurring before the sale, or in the conduct of the sale, makes the writ, levy, or sale merely voidable and not void, it cannot be urged by way of a collateral attack, but only on a motion to set it aside or in a direct action instituted for that purpose; and this is particularly true after the sale has been confirmed. For instance, the want of proper notice of sale is not ground for a collateral attack on the sale, as against an innocent purchaser, especially after confirmation and a finding that due notice



of the sale was given. So it cannot be urged collaterally that the sale was en masse instead of in parcels, or that the price for which the property was sold was inadequate.”

An elaborate annotation demonstrating that execution sales en masse instead of in several parcels are merely voidable and that inadequacy of price cannot be collaterally attacked but relief must be by way of motion to set aside the sale and recall the sheriff's certificate of sale and deed is set forth in 1 A.L.R. 1442, 1443.

It is manifest that when measured against the above elucidated legal background that much of the testimony submitted by the Respondent at the trial and admitted in evidence by the court was entirely irrelevant and immaterial on the issues of (1) irregularities in the conduct of the execution sale; (2) inadequacy of consideration or bid price; (3) sale of land en masse; (4) failure to satisfy judgment out of unexempt personal property, and (5) absence of personal notice of the sale to Respondent. The court committed gross error in admitting and considering the same upon these issues. This evidence runs through the entire case. The Appellant Dowse here invites attention to examples of this type of inadmissible evidence. There is the testimony of the witness, Backman (with included exhibits) (R. 72-76) which attempts to prove that the land levied on was composed of four separate parcels. The testimony of the witness, LeCheminant (R. 77-78) which was directed to the question of excessive levy. The testimony of Respondent Pender (R. 104-117), wherein an attempt



was made to prove that he had available personal property upon which the levy could have been made and his lack of knowledge of time and place of sale is another example of this type of immaterial and irrelevant evidence. The testimony of Larch, one of Respondent's witnesses (R. 118-128) was also directed towards the proof of the existence of personal property of the Respondent upon which the writ of execution could have been levied. The testimony of Deputy Sheriff Bleak (R. 136-144) pertaining to the method of the conduct of the sheriff's sale was not only inadmissible on these issues but was an attempt to impeach the sale in a collateral attack.

Without burdening this brief with a further detailed reference to this type of inadmissible evidence the Appellant Dowse contends that the action of the court in admitting it was error which highly prejudiced his rights in this case.

As a direct consequence of the trial court admitting and considering irrelevant and immaterial evidence of the nature hereinabove immediately described the court also committed serious error prejudicial to Dowse in making the following Findings of Fact:

10. (Pertaining to the existence of personal property belonging to Pender of sufficient value to satisfy the judgment) R. 241;
11. (Determining that the real property consisted of four non-contiguous parcels of land) R. 242;
12. (Attempting to fix the value of the land levied upon) R. 242;



13. (That the real property was sold en masse) R. 242;
14. (That plaintiff had no actual notice of the levy and execution sale) (R. 242-243;
15. (That the levy was excessive and bid price inadequate) R. 243;
16. (The existence of personal property of Pender upon which levy could have been made) R. 243.

Therefore, on this facet of the case the appellant Dowse asserts and vigorously contends that the trial court committed error most prejudicial to him. First, in admitting irrelevant and immaterial evidence on the five issues above enumerated, and, secondly, in making the findings of fact above enumerated based upon this inadmissible evidence.

## II.

**WHETHER THE EXECUTION AND DELIVERY BY PENDER UNTO DORIS TRUST COMPANY, A CORPORATION, OF THE QUIT CLAIM DEED DATED JULY 22, 1949 (EX. J), EFFECTED A SATISFACTION AND DISCHARGE OF THE JUDGMENT FOR \$22.80 IN FAVOR OF DOWSE ENTERED IN ACTION 86,895, AND UPON WHICH THE WRIT OF EXECUTION WAS ISSUED?**

Dowse instituted and prosecuted an action against Pender in the Third District Court designated as action 86,895, wherein Dowse sought to quiet title against Pender to Lots 18 and 19, Block 1, North Columbia Subdivision and also to collect damages from Pender for slander of title (R. 59).



This action resulted in a judgment dated November 4, 1949, quieting title in Dowse as against Pender in and to said land and awarding to Dowse his costs therein (Exhibit A). It was upon this judgment that writ of execution was issued (Exhibit H). Thereafter on November 29, 1949 Pender delivered a deed in favor of Doris Trust Company quit-claiming said real property (Exhibit J). This deed, however, was dated July 22, 1949. Two of the issues of fact to be determined at trial as set forth in the pretrial order (R. 34-35) were:

- “4. Did S. W. Dowse agree to satisfy the judgment in connection with the transaction wherein he paid \$100.00 to Rennold Pender and received a quit claim deed from Pender?
5. Did Rennold Pender agree to forego an appeal in case 86,895 in connection with the transaction mentioned in paragraph 4 above.”

By Finding of Fact 7 (R. 241) the court found:

“That on November 29, 1949, the said Rennold Pender upon the solicitation and request of S. W. Dowse and in consideration of the payment by S. W. Dowse to Rennold Pender of \$100.00 executed and delivered to said S. W. Dowse a quit claim deed to the property involved in Civil Action 86,895. That it was agreed between the said S. W. Dowse and Rennold Pender that said transaction was to settle all differences arising in and out of said case, Civil No. 86,895, and to terminate the said Rennold Pender's right of appeal from the judgment entered therein.”

Dowse contends that the part of said finding reading as follows:



“\* \* \* to settle all differences arising in and out of said case, Civil No. 86,895, and \* \* \*”

is clearly erroneous and is not supported by the evidence in this case. With this quoted phrase eliminated from the finding it will be correct inasmuch as it will then determine that the purpose of the quit claim deed mentioned in said finding was to terminate Pender's right of appeal from the judgment entered against him in said case and not satisfy the judgment for costs against him.

It is important to determine the consequences of Pender executing and delivering the quit claim deed (Exhibit J) and of Dowse's acceptance of same. A court in adjudicating the effect of a quit claim deed in circumstances similar to those of the instant case will look into the intent of the parties as shown by evidence of the surrounding facts and circumstances. If such evidence shows that the parties intended a specific purpose by the use of said quit claim deed said intention will be recognized and made effective. The case of *Chesney v. Valley Live Stock Co.*, 34 Wyo. 378; 244 Pac. 216, 44 A.L.R. 1255, illustrates this principle. In that case a quit claim deed was given by a mortgagee to the owner of the mortgaged property who had assumed and agreed to pay the mortgage. It was contended by the property owner and its judgment creditors junior to the mortgage that the quit claim deed released the mortgage. The court examined into the circumstances of the giving of the deed and concluded:

“While it is possibly true that a quitclaim deed from a mortgagee to the mortgagor or his



assignee, of the mortgaged premises, is prima facie a release and satisfaction of the mortgage lien \* \* \* the court will look into the intent of the parties, and if the intent is not to release the mortgage, that intent will prevail \* \* \*."

The cases of *Chausse v. Bank of Garland*, supra, and *O'Reilley v. McLean*, 84 Ut. 551, 37 Pac. (2d) 770, reaffirmed the rule that the effect of a quit claim deed is dependent upon the intention of the parties thereto and that the court will examine into the facts and circumstances surrounding the giving of said deed to determine this intention.

Exhibit "J," being the quit claim deed from Pender to Doris Trust Company, is dated July 22, 1949, but was not recorded until November 29, 1949. The judgment in action 89,895 was dated and filed on November 4, 1949. Backman, the attorney for Pender in action 89,895, stated in the present case as follows (R. 92):

"Q. I note this Exhibit "J" is dated July 22, 1949, but not recorded until November 29, 1949, had that been in your file all the time from the time of its execution in July until final payment on its delivery of this \$100.00 payment?

"A. As I recall I had Mr. Pender sign the deed in July, and I think at that time there were some negotiations on the part of Mr. Steiner for this property which is here described and that could have been in fact this deed which you have reference to.

"Q. Exhibit "J"?



“A. Could have been the deed that was delivered to Mr. Duncan at the time he paid the \$100.00, in 1950, that is just possible.

“Q. You mean November of 1949?

“A. No, in 1950.

“Q. I show you the recording date on this.

“A. Yes, November of 1949, thank you, Mr. Pugsley.”

Further, Backman testified that in a street encounter with Duncan, attorney for Dowse in action 86,895, after the judgment was entered, Duncan inquired of Backman if Backman could secure a quit claim deed from Pender to the property involved in that action and offered to pay Pender \$100.00 consideration (R. 63). Backman admitted that Duncan informed him that Dowse wanted a quit claim deed to cut off the appeal period because Dowse had a deal pending with a Mr. West, an attorney (R. 63-64). Backman promised to contact Pender. Later Backman informed Duncan that Pender had authorized Backman to deliver a quit claim to the property and had executed a deed for delivery to Duncan or to whomever he directed (R. 64). The name of the grantee was left blank in the deed (R. 64). Backman at first denied that Exhibit “J” was the deed delivered to Duncan for the sum of \$100.00 (R. 64-65) but thereafter in his examination by Mr. Pugsley, above quoted, apparently corrected his testimony. According to Backman, Duncan called at his office, paid the \$100.00 and “picked up the deed” (R. 65). Backman also stated that in his conversations with Duncan that nothing was said concerning



the cost judgment against Pender (R. 66). In October or November Backman first learned that the execution sale had been held and after the delivery of the sheriff's deed he interviewed Duncan (R. 68) and questioned him as to the cost judgment asserting that he informed Duncan that when he delivered the quit claim deed (Exhibit "J") to Duncan and Duncan paid the \$100.00 that he, Backman, assumed that if Dowse was going to press the cost judgment something would have been said about it or the amount would have been deducted from the \$100.00 (R. 68). Backman claimed that Duncan asserted that he could not explain the transaction and asserted that it was a mistake and that he, Duncan, knew nothing of the cost bill (R. 68).

Duncan explains the anomaly of Exhibit "J" being dated in July, 1949, as follows (R. 178-179) :

"A. This was prepared in July of 1949, July 22nd, or 1949 at the time Mr. Pender had placed a deed on the record to Lots 18 and 19, Block 1, North Columbia Subdivision, which was then in the name of Mr. Steiner, who was acting for Mr. Dowse, as I recall I talked to — I think I wrote a letter to Mr. Pender and in response to the letter, Mr. Backman called me and said he would take the deed off for \$250.00. Now, I might explain at the same time that the same grantor, that Mr. Steiner, for Mr. Dowse had purchased this property, owned another piece of property in the north part of the city and Mr. Dowse sold that piece to Mr. Pender for \$250.00, and that Mr. Backman said he didn't think we had the right grantor because there



was an elderly woman that lived in Los Angeles. I said if there is any doubt, question about that, to give us our \$250.00 back and we will give you the deeds to both pieces. He said he wouldn't give us anything back. He wanted \$250.00 to take this deed off placed on the record subsequent to our deed to this property, Lots 18 and 19, Block 1, North Columbia Sub-division.

“Q. After that time, did the trial of the case 86,895, S.W. Dowse v. Rennold Pender go forward?

“A. Yes it did.”

As to the delivery of Exhibit “J” in consideration of the payment of \$100.00 Duncan testified as follows (R. 180-182):

“A. Well, as I recall, from refreshing my recollections here, it was on the 9th of November, cost bill was filed and by the decree our title was quieted to that property and we had a sale of it; we were negotiating a sale with Mr. David West, who represented the purchaser, and Mr. West—the sale was help (sic) up—I think the purchasers were represented by both Mr. West and Mr. Wilde, and Mr. Wilde had testified that the transaction was still alive, his client would still pay \$10,000.00 for the property if the title were quieted and it was on that basis Judge Hogensen ruled we hadn't proved any slander of title. After we got to this transaction, after the trial, and Judge Hogensen had quieted title, I had drawn the Findings and so forth, I completed my negotiations, but Mr. West and Mr. Wilde did not want to go



further until they were certain that the time for appeal had been terminated, and at that time, of course, it was 90 days, and I went to Mr. Backman and asked him if he intended to appeal. He said 'no.' And I said, "Will you give us a quit claim deed or any other consideration, we waived the right to appeal." He said, "You are going to make something out of this, I think you ought to give me \$100.00." He said, "I still have the deed you were talking about last July."

"Q. Is that the deed, Exhibit "J," in your hands?

"A. Yes, I paid the \$100.00 to him, as he testified, and I think I indicated to him at that time it was a shake down, but I paid it. \* \* \*

"Q. (By Mr. Pugsley) At the time of the payment of \$100.00 and delivery of the deed to you, was there any discussion between you and Mr. Backman with respect to a cost bill previously served and his office?

"A. None whatever.

"Q. Was it your intention in paying that \$100.00 to settle that cost judgment? \* \* \*

"A. None whatever, all I was doing was cutting off his right to appeal as indicated.

"Q. Were you ever authorized by Mr. Dowse, your client, to satisfy that cost judgment?

"A. No, sir."

Duncan further testified that he had a conference with Backman in Duncan's office after the sheriff's deed had issued wherein Backman asked the reason for taking cost judgment. At that time Backman stated he over-



looked the costs and he understood Dowse had a judgment for same. Duncan informed him that he not only had the judgment but a sheriff's deed had been issued. Backman desired to know what could be done about it. Duncan said he would recommend to Dowse that if Pender would pay the cost judgment and the sheriff's additional costs on sale, for Dowse to quit claim the property to Pender (R. 186-187). Backman replied that he would talk to his client and left Duncan's office (R. 187). Some time later Backman returned and informed Duncan that he thought that Duncan should give a deed because he (Dowse) had paid this \$100.00. Duncan denied that he had ever informed Backman that the cost judgment was a mistake (R. 187) and denied that there was any mistake in serving and filing the cost bill (R. 188). Duncan declared on cross-examination that at the time he paid the \$100.00 at Backman's office he said nothing about the cost judgment (R. 189).

It is from this evidence that the intent of the parties must be determined.

*Did Dowse pay the \$100.00 and accept the deed for the purpose only of foreclosing Pender's appeal time of 90 days or did the giving of the quit claim deed by Pender and the payment of the \$100.00 by Dowse effect a complete settlement and compromise of the action?*

Backman admits that at no time in the negotiations with Duncan prior to the issuance of the sheriff's deed was anything said of the cost judgment. There is not a line of evidence in the case that Pender required not only the payment of the \$100.00 but also a satisfaction



of the judgment as the price of the quit claim deed. Backman acknowledged receipt of copy of the judgment which carried costs to Dowse. He also admitted that the cost bill had been duly received in his office and that he took no action either to amend the judgment or to strike the cost bill. During the entire period of redemption he remained silent and it was only after the issuance of the sheriff's deed did he raise a question as to the judgment for costs. Dowse had a buyer of the property soon after the entry of the judgment quieting title in him. In order to make his sale it was incumbent upon him to make the judgment final. It was for this reason that he desired, acting through Duncan, to secure from Pender a waiver of the right of appeal. He therefore asked for this quit claim deed. Pender exacted the sum of \$100.00 for the deed but neither he nor his attorney, Backman, said anything about the cost judgment although there was obvious evidence of its existence in Backman's office. This situation which is implicit in both Backman's and Duncan's testimony makes certain that Pender gave the deed and accepted the sum of \$100.00 and Dowse accepted the deed with the intent of terminating immediately Pender's right of appeal and not as a final and complete settlement of the action. At the time the deed was given and the consideration paid the parties through their attorneys talked only of ending Pender's right of appeal. Backman admits this in his testimony and Duncan positively affirms it. This is a case of a judgment creditor paying a consideration to his judgment debtor for a deed and with both parties remaining silent as



to the disposition of the cost judgment. It is difficult, almost impossible, to deduce from this situation the conclusion that the transaction was a complete compromise and settlement. Rather, it confirms Duncan's testimony that he paid the \$100.00 for Dowse and Pender delivered the deed only for the purpose of securing from Pender a waiver of his right of appeal. The cost judgment was not taken into consideration in the negotiations and transaction and stood outside of the deal. This interpretation of the evidence reconciles any differences between the versions of Backman and Duncan, and makes the testimony of these two witnesses consistent. It leads to the conclusion that the cost judgment remained an obligation of Pender's and there was available to Dowse all the remedies to enforce the judgment granted by law. The truth of the transaction is although having due notice of the existence of this cost judgment, Pender and Backman in addition to demanding \$100.00 for the deed failed to exact from Dowse a release of the judgment. At no place in the evidence is there any suggestion that Pender exacted from Dowse \$100.00 and a full release of the judgment. It was an after-thought, purely and simply, that the consideration for the quit claim deed was the sum of \$100.00 and the release of the judgment. The conclusion is that the part of finding 7, "to settle all differences arising in and out of said case Civil No. 86,895, and" is clearly erroneous and is not supported by any evidence in this case. Oppositely, the evidence does sustain that part of the finding "that the said transaction was \* \* \* to terminate the said



Rennold Pender's right of appeal from the judgment entered therein." (R. 241). Therefore, prejudicial error was committed by the trial court by including in finding 7 the conclusion that the quit claim deed was delivered by Pender and the \$100.00 paid by Dowse to him to compromise and settle the case.

### III.

**WHETHER DOWSE PRACTICED ANY FRAUDULENT DEVICES UPON PENDER IN INITIATING THE SHERIFF'S SALE AND ACQUIRING THE REAL PROPERTY LEVIED UPON WHICH ENTITLES PENDER TO EQUITABLE RELIEF IN A COLLATERAL ACTION ATTACKING THE VALIDITY OF THE SHERIFF'S SALE AND SEEKING CANCELLATION OF THE DEED ISSUED BY THE SHERIFF TO DOWSE?**

Finding 17 reads as follows:

"17. That the praecipe delivered to the sheriff by said defendant S. W. Dowse instructed the sheriff to sell other real property belonging to plaintiff than that executed and levied upon. That the same was stricken from the praecipe at the request of the sheriff. That the execution and levy so directed to be made by defendant S. W. Dowse, was not made to satisfy a valid existing judgment, but the same was a part of a conspiracy on the part of said defendant S. W. Dowse to deprive plaintiff of his property and to unlawfully obtain title thereto and it was a fraud upon plaintiff." (R. 243).

By the above finding the court attempted to charge Dowse with collusion and fraud in causing the writ to issue on the judgment in his favor and in bidding in



the real property levied upon by the sheriff at the public sale. As has been clearly demonstrated, irregularities of the sheriff's sale of the nature hereinabove discussed do not constitute fraud. The court cannot consolidate a series of such irregularities and find therefrom that thus cumulated they constitute such fraud, overreaching or sharp practice by the judgment creditor as to justify the court in nullifying the sheriff's sale. The following quotation from *Victor Inv. Co. v. Roerig*, supra, is much in point:

"It was concluded as matter of law (1) 'that inadequacy of price is not within itself sufficient to warrant the setting aside of the sale'; and (2) 'that the circumstances of unfairness proven are not alone sufficient to invalidate the sale'; but (3) that the two elements combined were sufficient to justify the decree. \* \* \* It is believed that nothing less than collusion between the officer and the purchaser would justify the cancellation of the sheriff's deed for the irregularity in making the levy."

Fraud or overreaching by a judgment creditor which will authorize a nullification of the sheriff's sale on collateral attack must be of the nature that the court may find that the judgment debtor has been under some kind of legal or other restraint which has prevented him from attending the sale by inducements or circumstances of a fraudulent character at the instance of the judgment creditor or the purchaser at such sale. (*McLain Land & Investment Company v. Swofford Bros. Dry Goods Company*, supra), or the proof must show that there was collusion between the sheriff and the judg-



ment creditor or purchaser. (*Myers v. Sanders*, 7 Dana (Ky.) 507; *Hill v. Whitfield*, 48 N.C. 120).

The evidence in this case exculpates Deputy Sheriff Bleak from any wrong-doing or collusion with Dowse or his attorney Duncan. There was not even a suggestion throughout the trial of the case that this public officer was guilty of any misconduct in violation of his oath. Any charge of collusion between Bleak and Dowse or Duncan must be put out of the case.

Did Dowse or Duncan engage in any act which induced Pender to remain away from the sheriff's sale or did they pursue a course of conduct which lulled him into security? The authorities hereinbefore cited show beyond any dispute that there was no duty on Bleak, the deputy sheriff, Dowse or Duncan to notify Pender of the proposed sale. Pender was charged with knowledge of the cost judgment against him, and that it might be executed upon. The evidence shows that he gave the quit claim deed (Exhibit "J") for the purpose only of waiving his right of appeal. It is impossible from this evidence to conclude that Dowse or his attorney Duncan deliberately and willfully prevented Pender from being present at the sale. Therefore the elements which characterized the conduct of the judgment creditor and its counsel in *Young vs. Schroeder*, 10 Ut. 155, 37 Pac. 252, 161 U.S. 334, 40 Law. Ed. 721, 16 Sup. Ct. 512, is entirely missing in this case. In the *Young* case counsel for the judgment creditor not only was the bidder at the sale but had informed Young that the statutory time for redemption would not be insisted upon and thereupon



Young permitted the period for redemption to elapse without making redemption. Therefore, there is eliminated from consideration in this case the question as to whether Dowse or Duncan took any action which induced Pender to remain away from the sale and to fail to exercise his right of redemption. The evidence beyond controversy exculpates them from wrong-doing in this regard.

As to inadequacy of the bid price at the sheriff's sale it is interesting to analyze the status of the title to the various parcels of land, all in North Columbia Subdivision, sold at the execution sale.

Lots 6 and 7, Block 4 were subject to (a) a special tax sale for paving extension 79 in the amount of \$35.15, costs and interest; (b) a tax sale to Salt Lake County for general taxes for the years 1928 to 1935, in an approximate gross amount of \$220.00, plus interest and costs upon which a tax deed had issued to Salt Lake County; and (c) a judgment against Pender in favor of Freeman in the sum of \$13.20. (Exhibit "E").

Lots 2 and 3, Block 4, were subject to the aforesaid judgment in favor of Freeman for \$13.20. (Exhibit "D").

Lots 1, 19 and 20, Block 6, were subject to the aforesaid Freeman judgment for \$13.20. (Exhibit "B").

Lots 2, 3 and 4, Block 8 were subject to (a) the Freeman judgment of \$13.20; and (b) a tax sale to Salt Lake County for \$171.86 for 1949 taxes (thereafter redeemed by Dowse). (Exhibit "F").



Lots 13 to 21, Block 8, were subject to (a) the Freeman judgment in the amount of \$13.20; (b) two tax sales to Salt Lake County for 1949 taxes of \$12.48 and \$24.29, respectively (thereafter redeemed by Dowse); and (c) judgment lien in favor of Carl Morandi for \$3,086.44. (Exhibit "C").

The testimony of witness LeCheminant as an expert on real property values is of little importance because he insisted that his opinion was based upon good marketable title (R. 84) and that the values were fair market values in ordinary commercial sales. He was not testifying as to the value of property at a forced sale on execution.

The Colorado Supreme Court in *Victor Inv. Co. v. Roerig*, supra, quoted from *Watt v. McGalliard*, 67 Ill. 513, as follows:

"At judicial sales, where there is a redemption, it is a well-known fact that lands, unless where necessary to secure the debt, are rarely sold at anything approximating their real value. Such purchases are not looked upon as a desirable mode of investment. There is seldom competition. The creditor, for the most part, has to take the land in satisfaction of his debt and wait for it to be redeemed. \* \* \*"

When the conduct of Dowse and Duncan is subjected to microscopic examination there is no parallel with the conduct of the judgment creditor and its counsel in the *Young* case, supra. After Duncan paid the \$100.00 to Backman and received the quit claim deed to the property involved in action 86,895 there was no contact



between Pender and Dowse or between Duncan and Backman relative to the instant case until Backman learned of the sheriff's sale and contacted Duncan and went to the latter's office. The parties were dealing at arms length. Pender faced the hazard of a writ of execution on this judgment against him. He took no action either before the writ was executed or during the period of redemption. It was through his own carelessness and neglect that his property was subjected to execution sale. The situation called for affirmative action on Pender's part to protect his property. He was under no restraint imposed by Dowse or Duncan. He remained inactive at his peril. Dowse was under no compulsion to refrain from pursuing his legal remedies.

A fair analysis of the conduct of Dowse and Duncan must compel a conclusion that neither of them were guilty of fraud or overreaching which would nullify the sheriff's sale. One cannot be guilty of fraud by doing what he has a legal right to do and courts will not inquire into motives for doing a lawful act. (*Prudential Insurance Company of America v. Bohlken*, 40 Fed. Supp. 494; *Owens v. Owens*, 347 Mo. 80, 146 S.W. (2d) 569; *Yoder v. Givens*, 179 Va. 229, 18 S.E. (2d) 380). Therefore, one must conclude that Finding 17 is without substantial evidence to support it.

There is an absurd statement contained in this finding concerning which comment should be made. It is declared that the execution and levy directed by Dowse "*was a part of a conspiracy on the part of the defendant*



*S. W. Dowse* to deprive plaintiff of his property.\* \* \*

There is no necessity of discussing the law of conspiracy at length but it is most pertinent to remark that a man cannot conspire with himself. There must be two or more parties to a conspiracy. (15 *C.J. Sec. 1*, p. 996; *Frost v. Hanscome*, 198 Cal. 500, 246 Pac. 53; *Moropoulos v. Fuller Company*, 186 Cal. 679, 200 Pac. 601; *McIntire v. Chevrolet Motor Company*, 115 Cal. App. 187, 1 Pac. (2d) 40; 11 *Am. Jur. Conspiracy*, Sec. 4, p. 544). There is no finding that Dowse and Bleak, the deputy sheriff, conspired together or that Dowse and Duncan conspired together or that Duncan and Bleak conspired together. As above stated the evidence exculpates Bleak from any wrongdoing to which a charge of conspiracy could be attached. As between Dowse and Duncan there is not a line of evidence that indicates any concerted action to accomplish an unlawful purpose or to accomplish some purpose not in itself unlawful by unlawful means. Duncan is securing the issuance of the writ of execution, delivering the praecipe to Bleak and making the bid at the sale for Dowse acted only as every attorney must act in like circumstances for his client who is a judgment creditor. To find such conduct by Duncan as a participation in a conspiracy with his client Dowse is to find that a lawyer is a conspirator in representing his client in litigation. Such finding would destroy the legal profession. This part of Finding 17 is not only not supported by the evidence but is manifestly without merit.



#### IV.

### WHETHER A CAUSE OF ACTION FOR SLANDER OR DISPARAGEMENT OF PROPERTY OR OF THE TITLE THERETO WAS ALLEGED AND PROVED IN THIS ACTION?

Finding 9 is as follows:

“9. That defendant S. W. Dowse, in causing execution to be issued and in levying upon the property of plaintiff and in causing the same to be sold at Sheriff’s sale, and in purchasing the same at Sheriff’s Sale acted maliciously in said matter and by such actions said defendant slandered the title of plaintiff to said property herein described.” (R. 241).

With respect to the elements of a cause of action for slander of title or disparagement of property the correct rule is stated as follows:

“The rule is generally recognized that special damage is a necessary element of a cause of action for slander of title or disparagement of goods or property, and that the special damages recoverable must be such as proximately flow from the slander uttered. According to some authorities, in order to show that the words uttered in slander of title have caused injury or special damage to the plaintiff, it is essential that they were uttered pending some negotiation or proceeding for the sale of the property, and that thereby some intending purchaser was prevented from purchasing, bidding, or competing; and in any case where the loss of sale of a thing disparaged is claimed and relied on as special damages occasioned by the disparagement, it is necessary to show a loss of sale to some particular



person. \* \* \*” (33 Am. Jur. Libel and Slander, Sec. 350, p. 314 and 315).

The early case of *Burkett v. Griffiths*, 90 Cal. 532, 27 Pac. 527, 13 L.R.A. 707, laid down the rule that an action for slander of title cannot be maintained for statements causing the breach by a third person of a valid contract to purchase plaintiff's property. The court said:

“In an action like the present, the plaintiff can recover only such damage as he may have sustained by reason of an intending purchaser being prevented from making the contract; but the complaint herein shows that whatever statements or declarations were made by the defendant prior to the making of the contract did not have the effect to prevent Sketchley from entering into the same, and those which he made thereafter have not caused the plaintiff any damage which can be said to have resulted therefrom. We know of no case in which it has been held that, when the plaintiff has a valid contract of sale, he can recover damages for its breach against one whose words, however false and malicious, have induced the other contracting party to violate such agreement.” (13 L.R.A. 710).

In *Gudger v. Manton*, 21 Cal. (2d) 537, 134 Pac. (2d) 217, the California Supreme Court broadened the narrow doctrine of the *Burkett* case, *supra*, in the following language:

“In *Burkett v. Griffith*, *supra*, the court was not concerned with a recorded instrument affecting the title. Further, it seemed persuaded that



where a binding contract exists between the purchaser and plaintiff, and the disparaging matter induced the purchaser to breach his contract rather than preventing him from agreeing to purchase, the plaintiff had an adequate remedy against the purchaser. That reasoning is no longer valid inasmuch as an action will lie for inducing the breach of a contract by a resort to unlawful means such as libel or slander."

The doctrine of the *Gudger* case, supra, was followed in *Baker v. Kale*, 83 Cal. App. (2d) 89, 189 Pac. (2d) 57, wherein it was held that one publishing without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, under such circumstances as would lead a reasonable man to foresee that the conduct of a third as purchaser or lessee thereof might be determined by such publication he is guilty of slander of title.

The Wyoming Supreme Court in *Barquin v. Hall Oil Company*, 28 Wyo. 164, 201 Pac. 352, 202 Pac. 1107, made the following pertinent statements:

"Hence the special damages must be specifically pointed out or the petition is demurrable. It is not sufficient to allege in general terms that the plaintiff has been damaged or that he has been prevented from making a sale; if the property could have been sold for more than its value, or for more than it actually brought, the amount thereof must be stated and the parties must be named. It is clear, therefore, that on this issue the pleadings of plaintiffs are not sufficient against a demurrer." (201 Pac. 354).

"The facts showing how the special damages claimed arose must be stated (17 C.J. 1003) in



order to apprise the adverse party so as to put him in position to properly meet the question by opposite proof, if he has any. Hence, when plaintiff simply alleges that he has been damaged by reason of the failure to release the instruments of record without stating the facts upon which that loss is based and the amount thereof, the pleading is not merely indefinite, but in such case there is a total want of sufficient allegations." (202 Pac. 1108).

In the instant case Issue of Fact 12 contained in the Pretrial Order (R. 35) reads as follows: "Did S. W. Dowse slander the title of the realty described in paragraph 1 of plaintiff's amended complaint by causing the same to be sold at sheriff's sale and to be mortgaged and sold to the other defendants in this action?"

Plaintiff's amended complaint contains no allegation of special damages. There is no claim either (a) that an intending purchaser from Pender was prevented from making a contract to buy or from buying the land sold at the sheriff's sale (*Burkett* case, *supra*) or (b) that a third party purchaser of the land from Pender was induced to breach his contract (*Gudger* case, *supra*). Under the authorities a part of the cause of action are the special damages accruing to a plaintiff because of the defendant's malicious actions in disparaging the land of the title thereof. He must allege and prove either one or both elements (a) and (b) above which are constituent parts of his cause of action. If they are not alleged and proved no cause of action for slander of title exists. Pender did not prove that Dowse had



prevented a sale to a third person nor did he prove that Dowse caused a third party purchaser to breach a contract of purchase with Pender. Therefore, it appears beyond doubt that no cause of action for slander of title by Dowse existed in Pender's favor. Finding 9 is not supported by the evidence and is an illegal, capricious and wholly arbitrary finding by the court. Under all circumstances it should be annulled and set aside. It is obvious that this error permeated the judgment which allowed Pender \$500.00 punitive damages and \$1,000.00 attorney's fees. The court was confused and considered the allowance of punitive damages and attorney's fees as the damages supported by Pender for slander of title. Such award was clearly illegal because damages which are allowed a plaintiff for slander of title are special damages of the nature above described.

## V.

### **WHETHER ATTORNEY'S FEES IN AN ACTION FOR SLANDER OF TITLE ARE ALLOWABLE?**

The right to recover attorney's fees from one's opponent in litigation as part of the costs thereof does not exist at common law. Such item of expense is not allowable in the absence of statute or of some agreement expressly authorizing the taxing of attorney's fees in addition to the ordinary statutory costs. The term "costs" or "expenses" does not ordinarily include attorney's fees.

"In the absence of contract, statute or recognized ground of equity there is no inherent right



to have attorneys' fees paid by the opposing side." (Johnson v. Gerald, 216 Ala. 581, 113 So. 447, 59 A.L.R. 348).

"With respect to the award of \$200.00 for attorney fees as damages for depriving plaintiff of possession by writ of attachment, the judgment was clearly erroneous. There was no contract involved which authorized the award of counsel fees and there was no basis for an award of punitive damages. See 15 Am. Jur. p. 551, 25 C.J.S., Damages, Sec. 50, p. 531, and Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869. Cf. St. Joseph Stock Yards Co. v. Love, 57 Utah 450, 195 P. 305, 25 A.L.R. 569." (Dahl v. Prince, ..... Utah .....; 230 Pac. (2d) 1328).

"Evidence was admitted, over the objection of intervener, as to expenses incurred by plaintiffs in pursuit of and for locating the horse prior to the commencement of the action, including \$500.00 for the services of an attorney in that regard. Plaintiffs admit that the admission of the testimony constituted error, but contend that 'the items were small, and apparently the jury gave no consideration thereto.' \* \* \* In this case the amounts claimed to have been so spent were, no doubt, definitely fixed in the minds of the jurors and, in view of the court's instruction, we may safely assume that they included the entire amount of the \$500.00 attorney's fees in their award of damages. For that reason the judgment against the defendant should be reduced by that amount." (Drinkhouse v. Van Ness, 202 Cal. 359, 260 Pac. 869; See Beindorf v. Thorpe et al., 126 Okla. 157, 259 Pac. 242, 55 A.L.R. 1014; 14 Am. Jur. Costs Sec. 63, p. 38; Ann. 150 A.L.R. 720).



In the *Barquin v. Hall Oil Company*, supra, the Wyoming Supreme Court disallowed a claim for attorney's fees.

*McGuinness v. Hargiss*, 56 Wash. 162, 105 Pac. 233, contains the following statement:

“Upon the second point submitted, we are of the opinion that the court below erred. In actions of slander of title it is the recognized rule that only special damages are recoverable, and that such damages must be pleaded and proved. 25 Am. & Eng. Enc. Law. 1079; 25 Cyc. 561. There was no plea nor proof of special damage, except the claim for an attorney's fee for the prosecution of this action. We have uniformly held that in this state attorney's fees, either as damages or costs, other than statutory, are not recoverable. In *Spencer v. Commercial Company*, 36 Wash. 374, 78 Pac. 914, the court attempts to forever settle the question by saying: ‘It has been so often decided that the granting of attorney's fees in cases of this kind was error that it is no longer a proper subject for discussion.’ ”

There is no statute in Utah authorizing the recovery of attorney's fees in a slander of title action. There was certainly no agreement of the parties hereto for the losing party to pay opponent's attorney's fees. The authorities cited in point IV above demonstrate that attorney's fees is not part of the special damages which can be alleged and proved in a slander of title action. The result is that the allowance of attorney's fees in this action (Finding 27, (R. 246); Conclusion of Law 4 (R. 248); Judgment (R. 250) is invalid and without justification of law.



**WHETHER PUNITIVE DAMAGES ARE ALLOWABLE IN THIS ACTION?**

Finding of Fact 26 (R. 246) reads as follows:

“26. That defendant Dowse in all of said acts acted maliciously and with intent to vex and harass plaintiff. That said defendant S. W. Dowse knew that his not satisfying the judgment as herein referred to and in executing on and selling plaintiff's property would cast a cloud upon and slander upon plaintiff's title to all land owned or that might thereafter be owned by plaintiff, and the said defendant has been guilty of oppression and malice. That this is a proper case for punitive and exemplary damages. That the sum of \$500.00 is a reasonable sum to be awarded plaintiff as punitive damages.”

The Judgment (R. 248) awarded Pender \$500.00 punitive and exemplary damages.

Issue of Fact 10 in the Pretrial Order (R. 35) read as follows:

“Did S. W. Dowse act maliciously in directing the sheriff to sell the real property under the execution herein and if he did what would be the amount of punitive damages to assess against S. W. Dowse in case Rennold Pender prevails in this law suit?”

Allowance of punitive damages is discussed in the following excerpts from decided cases:

“Exemplary, punitive, or vindictive damages are such damages as are in excess of the actual loss, and are allowed where a tort is aggravated



by evil motive, actual malice, deliberate violence, oppression or fraud." (*Murphy v. Booth*, 36 Utah 285; 103 Pac. 768).

"The law does not, and in the nature of things cannot, allow exemplary or punitive damages for mere negligence, although gross, nor for mistakes that may affect the rights of others, unless some act or acts indicative of bad motives or an intention to oppress or wrongfully vex and harass another is made manifest. Actual and compensatory damages is the rule, and exemplary or punitive damages the exception." (*Rugg v. Tolman*, 39 Utah 295, 117 Pac. 54).

"Whether there is evidence justifying exemplary damages is a question of law for the court, and, where there is no evidence, it is error to submit the issue to the jury." (*Tripp v. Bagley*, 75 Utah 42, 282 Pac. 1026; Cf. *Haycraft v. Adams*, 82 Utah 347, 24 Pac. (2d) 1110).

"In the second place, what is known as malice in fact, as distinguished from malice in law, must exist before punitive or exemplary damages can be given. Appellants quote the definition of malice as 'legal malice, or the malice aforethought of the statute, denotes a wrongful act done intentionally, and without legal cause or excuse.' *People v. Taylor*, 36 Cal. 255. In other words, appellants contend that malice in a legal sense simply means a wrongful act done intentionally, without just cause or excuse. This is true so far as supporting an award of compensatory damages is concerned, but malice in fact goes to the state of mind and evil motive of defendant, and the burden to proving the existence of that state of mind is in every case upon the plaintiff who seeks an award of punitive damages based upon its exist-



ence, and whether this state of mind existed is always a question for the court or jury to determine. Taylor v. Hearst, 107 Cal. 262, 40 P. 392; Trabing v. California Navigation Co., 121 Cal. 137, 53 P. 644; Davis v. Hearst, 160 Cal. 143, 116 P. 530." (Ross v. Sweeters, 119 Cal. App. 716, 7 Pac. (2d) 234).

In order to sustain this allowance of exemplary damages there must be preponderating evidence that Dowse acted maliciously and vindictively in causing the writ of execution to issue and the sale to be held thereunder. This malice must be *malice in fact* and not malice in law. There must be evidence to show that Dowse was motivated by a malicious desire to injure Pender and not simply to vindicate his (Dowse's) rights. The *Murphy* case, supra, illustrates graphically what is meant by *malice in fact*. Booth used criminal processes in attempting to collect a debt pretending that Mrs. Murphy had fraudulently contracted the obligation. It was manifest from Booth's actions and expressions that he sought to punish and humiliate Mrs. Murphy so as to compel her to pay a debt which she denied existed. The *Rugg* case, supra, illustrates that mere negligence or mistake although gross is not sufficient to support punitive damages unless there is evidence of bad motives or intention to oppress or wrongfully vex or harass another without legal justification.

The record in the instant case must therefore be searched to discover *malice in fact* on the part of Dowse in order to support exemplary damages. It is confidently asserted that the evidence herein is totally lacking in



proof of such fact. Dowse held a money judgment against Pender. He pursued his legal remedy by causing writ of execution to issue on said judgment. There is no requirement of law that prohibited Dowse from adopting this legal process to collect the judgment owing him. It was authorized by law. He had paid Pender \$100.00 in order to secure Pender's waiver of time to appeal. Neither Pender himself nor his attorney Backman as a condition for waiving the time of appeal exacted from Dowse a satisfaction of the judgment. The record shows that the judgment was ignored by Pender in requiring Dowse to pay for the appeal waiver. With this status of the transaction Dowse simply pursued a remedy granted him by law. There is no evidence that he threatened Pender or expressed the desire of punishing him. There is not a line of evidence to indicate that Dowse entertained personal animus against Pender. Under these circumstances there is a total absence of *malice in fact* in Dowse's actions. Finding of Fact 26 and the provisions of the judgment based on the same should be nullified.

## STABILITY OF LAND TITLES DERIVED THROUGH JUDICIAL PROCESS

The stability and marketability of real property titles is a matter of grave concern to the courts. Any rule which would permit a judgment debtor to upset a sheriff's sale after the period of redemption has expired and the sheriff's deed issued to the purchaser by instituting an independent action collaterally attacking the sale



and asking for cancellation of the deed on the grounds herein asserted would be highly destructive of land titles derived through judicial process. It is manifest from a study of the decisions of the courts of the several states that they are well aware of the chaotic condition as to real property titles which would result as a consequence of permitting a dissatisfied judgment debtor successfully to impeach and nullify sheriff's sales on the grounds here urged. Public policy very definitely dictates that the integrity of such sales be upheld and that irregularities of the nature here discussed be disallowed in a collateral action as grounds for nullifying such sale and the conveyance issued pursuant thereto. A judgment debtor is not denied relief by this rule. In Utah he may directly question the validity of the sale by a motion filed at any time during the period of redemption. Title to the real property does not pass upon the sale or by the issuance of the certificate of sale but only by the sheriff's deed at the expiration of the period of redemption. (*Local Realty Company v. Lindquist, et ux*, 96 Utah 297, 85 Pac. (2d) 770). During the period of redemption the purchaser at the sale or anyone dealing with the property is on notice that the sale is not final and that during such period the judgment debtor may question the regularity of the sale in all particulars. There is, therefore, no hardship visited upon a judgment debtor. It certainly does not lie in his mouth to say that he did not know there was a judgment against him and further he is charged with the knowledge that an execution may issue on such judgment to satisfy the same. It is his



responsibility to keep himself informed as to the issuance of a writ of execution and any sale held thereunder. When he stands by during the whole period of redemption and fails to question the procedure on sale and allows the sheriff's deed to issue he has certainly waived all objections to those irregularities which produce voidable conditions only. He should be absolutely forbidden to attack the processes of sale on the grounds here urged after he has waited until after the sheriff's deed has issued to the purchaser. Any other rule would render titles on judicial sales infirm and rather shadowy affairs. The purchaser or mortgagee dealing with such titles would be charged at his peril to ascertain facts which might and usually would be difficult, if not impossible of discovery. The economic and social well-being of the state dictates that the titles produced by such sales should be sustained against such attacks.

WHEREFORE, Dowse prays that the judgment in this action be reversed and set aside and the trial court be directed to enter judgment against Pender with costs in favor of Dowse.

Respectfully submitted,

LAMAR DUNCAN  
FRANKLIN RITER

*Attorneys for Defendant  
and Appellant*

S. W. DOWSE