

1953

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

Utah Supreme Court

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7949

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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. WHITAKER,

Defendants and Appellants,

Case No.
7949

BRIEF OF RESPONDENT

L. DELOS DAINES,

FILED MILTON V. BACKMAN of
BACKMAN, BACKMAN &

JUN 25 1953 CLARK,

Attorneys for Respondent

Clerk, Supreme Court, Utah

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IN THE
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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. WHITAKER,

Defendants and Appellants,

Case No.
7949

BRIEF OF RESPONDENT

This is a case in which the District Court set aside an execution sale and sheriff's deed issued to appellant Dowse, a deed from appellant Dowse to appellants Treadway, and a mortgage to appellant A. C. Whitaker. The deed and mortgage covered a part of the property involved in this action. The sheriff's deed, the deed to

Treadways and the mortgage to Whitaker were vacated because the sheriff's sale was made upon a satisfied judgment and neither Treadway nor Whitaker were innocent purchasers. The trial court also found the execution sale was for a grossly inadequate price, that the sale was attended by fraud, conspiracy, irregularities, and that it was unfair. The court rendered a money judgment against appellant Dowse for rents and profits received from the properties sold at execution and for slander of title.

STATEMENT OF FACTS

The respondent accepts the statement of facts as set forth by appellant Dowse with the following additions and amplifications:

A cost judgment was entered by Dowse in Civil Case No. 86,895 (Ex. 1) in violation of an understanding between respondent's attorney, Milton V. Backman, and LaMar Duncan, attorney for Dowse. In line with this understanding Mr. Backman paid no heed to the provisions of the Findings and Decree providing for costs in case No. 86,895, and the cost bill did not come to his personal attention when served on his office, (R 91).

Subsequent to the entry of the cost judgment, Mr. Duncan approached Mr. Backman for the purpose of working out an arrangement for terminating respondent's right of appeal and settling the differences existing between the parties in case No. 86,895 (R 63, 64, 65, 67, 68 & 180) (Finding No. 7). An understanding

was reached, Mr. Dowse agreeing to give Mr. Pender \$100.00 for a quit-claim deed to the property, the subject of litigation in case No. 86,895. The \$100.00 was paid and the deed was delivered by respondent to appellant on January 29, 1949, (R 65, 189) (Ex. J). Nothing was said about the cost judgment during the negotiations, nor at the time of the payment of the \$100.00 for the delivery of the deed (R 189). Mr. Duncan, Dowse's attorney, who personally delivered the \$100.00 in consideration of the delivery of the deed, made no demand for payment of the \$22.80 cost judgment, nor did he claim a right to withhold the sum of \$22.80 to satisfy the cost judgment (R 189, 190).

The execution dated January 9, 1949 was not delivered to the sheriff for service until January 31, 1951, when Mr. Duncan delivered it to the sheriff together with the Praeipie (R. 137, 139.) (Ex. H, X).

The praecipe directed the sheriff to levy upon the property in question together with the other real property, the latter property referred to being struck from the sale when Mr. Bleak, the deputy sheriff, informed Mr. Duncan there was a question as to the ownership (R 138).

The date the execution and praecipe issued and at the time of the levy and sale appellant Dowse had in his possession personal property belonging to Mr. Pender of a value of more than sufficient to satisfy the judgment, (R. 108, 136, Finding No. 10).

Prior to the sale and the issuance of the sheriff's deed the respondent had had many business transactions with appellant Dowse and respondent had consummated the deals by checks drawn on the First Security Bank of Utah (R. 104, 105) (Ex. N), the last check being dated June 17, 1949. Respondent had bank accounts in three Salt Lake City banks, viz: \$1,000.00 in the Continental National Bank; \$100.00 in First Security Bank of Utah, N. A. and \$500 in Walker Bank & Trust Company (R. 105, 106, 115).

Prior to the delivery of the praecipe appellant told Mr. Duncan, his attorney, that respondent had kept accounts in several Salt Lake City banks (R 185).

The respondent owned an automobile in which appellant Dowse had ridden several times (R. 106), and both appellant and his attorney knew respondent owned such (R. 106).

Situated on part of the property levied upon, (not the property mortgaged or deeded to appellants Treadway and Whitaker) was a garage containing war surplus materials. In addition there was visible on the property, a walk-in refrigerator and a large stack of automobile mufflers. The mufflers were contained in boxes stacked 15 feet high, 75 feet long and 18 feet wide (R. 111, 112, 120 and 121). This personal property had stood on the property levied upon since 1948 or 1949, and several of the following signs were tacked thereon:

“FOR SALE
Call or Write
R. PENDER, Owner

672 Milton Ave. Phone 6-2346”

(R. 121, 122). The sign was approximately 13” x 20” (R. 112, 113, 121) (Ex. Q). The signs could be seen from Richards Street and also at South Temple and 13th South Streets (R. 112, 113, 123). This personal property was at all times in full view (R. 114, 115).

The respondent valued this personal property at from \$1,000.00 to \$2,000.00. Another witness, Mr. Larch, valued it at execution from \$2,000.00 to \$5,000.00 (R. 113, 125). Appellants did not question the value placed thereon. Exhibits R, S, T, U, V, and O are pictures of the personal property situated on the real property aforementioned.

Prior to the execution and issuance of the praecipe, the levy and sale, appellant Dowse examined the property, the subject of this action, and saw the personal property located thereon, (R. 129, 130 and 131). Appellant knew it belonged to respondent. Respondent had taken appellant to the property and had shown it to him (R. 134). Mr. Duncan also knew of the personal property on the premises as he examined the property prior to the issuance of the praecipe and prior to the sale (R. 183, 197, 198).

Appellant Dowse never told the sheriff or his deputies that the respondent owned personal property (R. 131).

No attempt was made by Dowse to collect the judgment by garnishment proceedings (R 131, 190). Neither did Dowse examine respondent on supplemental proceedings (R. 132).

The property sold consisted of four non-contiguous tracts of land situated in North Columbia Subdivision, Salt Lake County, State of Utah, of the fair market value at the date of the execution sale as hereinafter mentioned and subject to the following encumbrances:

Lots 2, 3 and 4, Block 8—Value \$6,000.00, less Freeman judgment of \$13.20 and a tax sale of \$171.86, or a net value of \$5,814.94 (R 78, 79) (Ex. F).

Lots 2 and 3, Block 4—Value \$1,080.00, less the same Freeman judgment of \$13.20, or a net value of \$1,066.81 (R 81, Ex. D).

Lots 6 and 7, Block 4—Value \$875.00, less the same Freeman judgment of \$13.20; special tax sale for paving extension of \$35.15, costs and interest; tax sale to Salt Lake County for the years 1929 to 1935, approximately \$240.00 plus interest and costs. A tax deed had issued to Salt Lake County, net value of approximately \$606.65. (R 80, Ex. E).

Lots 1, 19 and 20, Block 6—Value \$900.00, less the same Freeman judgment of \$13.20, or a net value of \$886.80 (R 81, 82. Ex. B).

Lots 13 to 21, Block 8, are contiguous to Lots 1, 19 and 20, Block 6. Title to Lots 13 to 21, Block 8, had been quieted subject to respondent paying Carl Morandi the sum of \$3,086.44 (Ex. C). These lots were valued at \$12.00 per foot. A total value of this tract of land was \$3600.00 less the Morandi claim in the sum of \$3,086.44. The

Morandi claim however included other property not covered by this action.

Appellant Mr. Dowse, a real estate broker for 24 years, did not question the foregoing values. Neither did appellants Treadway or Whitaker show that the property was of a lesser value.

No demand was made by appellant Dowse or his attorney Mr. Duncan for the payment of the judgment (R 189), nor did they advise the respondent or his attorney that the property was being levied upon and was being sold or that it had been sold. This was true notwithstanding the fact that the respondent and the appellant Dowse and their attorneys are all residents of Salt Lake City, Utah, and Mr. Dowse and the respondent had business dealings together, both before and after the entry of the judgment, Dowse was respondent's broker (R. 34), and Mr. Duncan and Mr. Backman had met each other several times on the street (R 67). Mr. Duncan explained his failure to notify Mr. Backman or to make a demand for the payment of the judgment was because he was angry with Mr. Backman as Mr. Backman would not get him a quit-claim deed without cost (R. 189).

Mr. Dowse and Mr. Duncan directed the sheriff to levy on the respondent's real property, knowing that there was personal property from which any valid judgment could be satisfied.

The sheriff made no effort to locate and sell respondent's non-exempt personal property (R 141),

and this notwithstanding as heretofore shown, personal property belonging to respondent was situated on the property upon which Mr. Bleak, the deputy sheriff, posted a notice (R. 143), and signs indicating ownership in the respondent were attached to the property (R. 121).

The real property, the subject of this action, worth approximately \$8,000.00 exclusive of taxes and other liens was sold to the appellant Dowse at execution sale for \$47.46 (Ex. I).

Neither respondent or his attorney, Mr. Backman, had actual knowledge of the levy, the sale or the sheriff's deed until after the deed had been issued (R 67, 68, 52) (Finding No. 14).

Respondent paid the Morandi claim of \$3086.44 (R. 174).

Respondent alleged in his amended complaint that he did not tender the amount of the judgment, interest and costs and the costs incurred by reason of the sheriff's sale for the reason that the sale was unlawful as it was upon a satisfied judgment, however, he offered to pay such amount provided the court should find that the judgment had not been satisfied (R 28).

STATEMENT OF FACTS AS THEY APPLY TO APPELLANTS TREADWAY

Respondent accepts the statement of facts of the appellants Treadway with the following additions and amplifications:

The certificate of sale and the sheriff's deed were of record in the office of the County Recorder of Salt Lake County prior to the sale to Treadways. Each of said instruments recited the purchase price for the whole of the property acquired by appellant Dowse at sheriff's sale of \$47.46. The abstract contained the execution, the certificate of sale and the sheriff's deed (Ex. 4).

Counsel for Treadways, being concerned about the regularity of the sheriff's sale, made inquiry of Mr. Duncan, attorney for appellant Dowse regarding the proceedings. Thereafter appellant Dowse delivered a special warranty deed to Treadways and not a general warranty deed which Dowse had agreed to deliver to Treadways.

STATEMENT OF FACTS AS THEY APPLY TO APPELLANT WHITAKER

The respondent accepts the statement of facts as outlined in brief of appellant Whitaker, with the exceptions, additions and amplifications herein noted.

Appellant Whitaker's testimony to the effect that in accepting a mortgage he did so in reliance on a title insurance policy was admitted by the court for the sole purpose of showing that he did not have actual knowledge of the execution, sheriff's certificate of sale and deed (R. 160).

Appellants Whitaker and Dowse had been friends for 25 years; they officed within seven or eight doors of each other and Dowse visited with Whitaker at Whitaker's place of business once or more each week (R. 162, 165).

Whitaker's mortgage covered only three of the 19 lots sold to Dowse at sheriff's sale, he did not inspect the property prior to the execution of the mortgage, however, he said he knew of it and that Dowse had described its location to him (R. 166).

Prior to the execution of the mortgage Whitaker had taken property in his name for the benefit of himself and Dowse and at the time of the execution of the mortgage and the date of its foreclosure, Dowse and Whitaker were the co-owners of four tracts of land (R. 163, 167, 168).

Some time prior to the mortgage transaction, Dowse had shown Whitaker a \$10,000.00 title policy covering the 19 lots in question and Whitaker asked for a title insurance policy to the three lots covered by the mortgage (R. 170, 171, Ex. 9).

The \$5,000.00 promissory note was payable two years after date with interest payable semi-annually. Dowse defaulted in the payment of the first two semi-annual interest payments and yet no demand was made for payment of either of them until March, 1952, which was after the commencement of this action. Thereafter Whitaker foreclosed the mortgage (R. 160).

PRETRIAL ORDER

The appellant Dowse set forth part of the pretrial order only. In addition to his statement the following amendment should be included: (R 47 and 54)

“On motion of counsel for plaintiff and good cause appearing, the pretrial order heretofore entered in this case is amended by adding as ISSUES OF LAW the following:

1. May a court of equity set aside the Sheriff's Deed affecting the property in question and impose a trust on the property in favor of plaintiff.

2. Are the defendants Treadway innocent purchasers for value or did they take subject to any right, title or interest plaintiff has in the property.

3. Was the defendant Whittaker an innocent mortgagee for value or did he take subject to plaintiff's title.

4. Provided the court should find that defendants Treadway are innocent purchasers for value, is plaintiff entitled to judgment against defendant S. W. Dowse for the sum of \$1000.00 paid by Treadways for a portion of said property or its fair market value.

5. Provided the court should find that defendant Whittaker's mortgage is not subject to plaintiff's title, is the plaintiff entitled to judgment against S. W. Dowse in the amount represented by the lien of the mortgage.

6. Is plaintiff entitled to damages against S. W. Dowse for slander of title and if so in what amount.”

ARGUMENT

A SUIT IN EQUITY TO SET ASIDE AN EXECUTION SALE AND SHERIFF'S DEED PURSUANT THERETO AND THE DEED OF INTERVENING THIRD PARTIES IS PROPER AND MAY BE MAINTAINED AND A JUDGMENT DEBTOR NEED NOT PROCEED IN THE ORIGINAL ACTION OUT OF WHICH THE SALE AROSE WHERE SHERIFF'S DEED HAS ISSUED OR THE PROPERTY IS DEEDED OR MORTGAGED TO OTHERS OR WHERE THE SALE IS ATTENDED WITH FRAUD, OR AN ACCOUNTING IS NECESSARY TO ADJUST THE RIGHTS OF THE PARTIES.

The Appellants contend that the Respondent's action does not lie in equity that he should have proceeded in the original action out of which the execution, sale and sheriff's deed resulted. He characterizes respondent's suit in equity as a collateral attack. In no respect is their position correct. The Courts uniformly hold where a sheriff's deed has issued, or the rights of a third party intervened, or an accounting is necessary to adjust the rights of the parties, or the sale is attended with fraud that the proper remedy is by a suit in equity, the remedy at law is inadequate, the law Court not having the authority to vacate or set aside the sheriff's deed or the deeds of third parties or render an accounting and a suit in equity is proper and is a direct attack upon the sale and deeds and not collateral.

Not one, but all of the elements conferring equity jurisdiction are present here. The sheriff's deed had issued, there are intervening third parties, the sale was attended with fraud and an accounting of rents, profits and taxes was necessary.

“A bill in equity, however, may be maintained for this purpose where proper grounds for equity jurisdiction exist, and where the remedy at law by motion to vacate the sale, or by ejectment or defense thereto, is inadequate. Thus a bill in equity is the proper remedy where the questions involved are such that they cannot be as satisfactorily investigated on the hearing of the motion as on the trial of a suit in equity, as in cases where it may be necessary to execute long delay in attacking the sale, or where there may be one who may possibly claim to be an innocent purchaser; or where the purchaser has rightfully paid out considerable sums which should be refunded or secured to him if the sale is vacated; or where the property has been conveyed by the purchaser at the sale to a third person; or where the purchaser is not a party to the action; or after the time for a motion has expired.

“Before or after execution of deed. While as shown *supra* pp. 238 b, there are decisions authorizing a motion to set aside the sale after the execution of a sheriff's deed; it is generally held that equity has exclusive jurisdiction of a bill to set aside a sale where the sale has been followed by a deed from the sheriff, since a court of law is incompetent to decree the cancellation of such deed and thus remove the cloud it casts on the title, * * *.” 33 CJS page 500 Sec. 239 (a).

The Court in *DUNN v. PONCELER*, 178 So. 40, 235 Ala. 269, held that all a law court out of which the execution issued could do was to vacate the sale, it had no authority to cancel the sheriff's deed. The remedy at law was inadequate and a suit in equity would lie. The Court said:

“Where, therefore, there has been a sale of property under judicial process and a deed has been issued to the purchaser, and the circumstances attending the sale are such as render the sale voidable at the election of the execution defendant, a Court of equity will entertain a bill to vacate the sale and cancel the deed as a cloud upon the debtor's title.”

In *STRONG v. TEDDER*, 196 S. 829, 143 Fla. 473, the Court held that a motion to vacate a sheriff's deed cannot be addressed to a common law court from whence it issued as the common law court would not have authority to cancel the deed, that the remedy at law was inadequate and resort must be had in equity.

In *Young v. Schroeder*, 10 U. 155, 37 P. 252, affirmed 16 S. Ct. 512, 116 U.S. 334, 40 L. Ed. 721, the court in an equity action vacated sheriff's deeds and the Supreme Court of the United States in discussing equity jurisdiction, said:

“Probably, if a motion had been made in the original case to set aside the sale upon the ground of mere irregularities, such motion would have to be made before the statutory period for redemption had passed; but in this class of cases, where fraudulent conduct is imputed to the

parties conducting the sale, there is a concurrent jurisdiction of a court of equity, founded upon its general right to relieve from the consequences of fraud, accident, or mistake, which may be exercised, notwithstanding the statutory period for redemption has expired. It is evident that, where a sale has culminated in the execution and delivery of a deed to the purchaser, which is not void upon its face, or a mortgage has been put upon the property, as in this case, no remedy is complete which does not go to the cancellation of such deed, and the complete reinvestment of the title in the plaintiff. It also appears from the findings that appellant has received rents from the property, that various sums had been expended for taxes and other purposes, that an accounting was necessary in adjusting the rights of the parties, which could not be effectually carried on in a court of law. There can be no doubt of the jurisdiction of a court of equity in such case notwithstanding the expiration of the statutory time of redemption."

To the same effect see *DRAGON MARBLE AND MINING COMPANY v. McNEISH*, 235 Pac. 401, 28 Ariz. 96; *JENKINS v. MERRIWEATHER*, 109 Ill. 647; *SCHANTZ v. CLEMMER, et al*, 50 A. (2) 289.

The foregoing decisions not only establish that a suit to set aside sheriff's deed in equity is a proper remedy but they recognize that such is a direct and not a collateral attack.

In *Thomas v. Thomas*, 44 Mont. 102, 119 Pac. 283, the purchaser after receiving the sheriff's deed petitioned the court by way of a writ of assistance to be put

in possession. The appellant resisted on the ground that the sale was irregular. He did not seek to vacate the deed. The court said :

“At most, the failure to sell separately is a mere irregularity, which may or may not result in prejudice to the defendant. *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.” (Italics added)

See also 33 C.J.S. Sec. 242, p. 507. Home Owners Loan Corp. v. Braxton, 44 N.E. (2) 989.

THE EXECUTION AND DELIVERY BY PENDER TO DOWSE OF THE QUIT CLAIM DEED DATED JULY 22, 1949, EFFECTED A SATISFACTION AND DISCHARGE OF THE JUDGMENT ENTERED IN CASE No. 86,895 AND THE EXECUTION AND SALE WAS ON A SATISFIED JUDGMENT.

The Respondent alleged and the trial court found that the execution and sale was made upon a satisfied judgment. By Finding of Fact No. 7 (R. 241), the Court found:

“7. 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 the said S. W. Dowse a Quit Claim Deed to the property involved in Civil Action No. 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."

and the Court's Conclusion of Law said:

"1. That the execution and delivery of the quit claim deed by Rennold Pender, plaintiff, to defendant S. W. Dowse, affecting property, the subject of action, Civil No. 86,895, constituted a full and complete settlement of said case for all intents and purposes, and a satisfaction of the judgment in said action and plaintiff was entitled to have the judgment out of which execution and levy and sale of the property herein affected satisfied. That defendant S. W. Dowse is estopped from denying otherwise."

The evidence supports the finding. The Court was entitled to draw all reasonable inferences from the evidence and we believe in light of the evidence that the finding is clearly supported.

It is undisputed that after the entry of the judgment upon which the execution issued and the sale was made Mr. Duncan attorney for Dowse approached Mr. Backman, attorney for Pender, for the purpose of negotiating an arrangement by which Respondent's appeal time in Civil Case No. 86,895 could be terminated. An arrangement was worked out and Mr. Dowse paid

Mr. Pender the sum of \$100.00 to terminate Pender's right of appeal and Pender executed and delivered a quit claim deed. The dispute here is whether the delivery of the deed by Respondent was intended as a settlement of the differences of the parties and a satisfaction of the judgment entered. Although no mention was made of the cost judgment during negotiations the arrangements arrived at were all had after the entry of the cost judgment and Respondent's right of appeal lay from both the judgment quieting title and the cost judgment. His right of appeal was from the judgment quieting title, which included costs. When respondent and Dowse, through their counsel, reached an agreement terminating respondent's right of appeal it effected a settlement of all of the phases of the action and resulted in a settlement of the differences of the parties and a satisfaction of the judgment. This intent is further borne out by the fact that Mr. Duncan did not nor did he claim the right to deduct \$22.80 from the \$100.00 in satisfaction of the costs. Certainly no other finding could have been reached from the evidence.

It is most difficult to follow appellant's argument that a deed given to cut off an appeal period as is conceded by appellant is not a settlement of the case as to that part of the judgment assessing costs. Appellant says: "The quit claim deed mentioned in said finding was to terminate Pender's right of appeal from the judgment against him in said case and not satisfy the judgment for costs against him," we are unable to conceive of one part of a judgment being satisfied without the

other. How can it be said that only the judgment quieting title was satisfied, inasmuch as respondent's right of appeal was from the judgment quieting title which included the cost judgment, it is one judgment.

There is an abundance of evidence supporting the court's finding on this point. However, even if there was no evidence the court would not be in error in finding as it did, this being an equity case the court had a right to invoke the maxim equity regards as done what ought to be done.

As to the date of the deed delivered by respondent to appellant that is of no consequence, Backman explained that the deed had been made out previous to the time of delivery to be used in a deal with a Mr. Steiner which deal was never consummated. (R 92).

Appellant accepted the benefits of the act and has made no offer to place the parties in status quo.

(1 Am. Jur. 220)

Assuming for the purpose of argument that the cost judgment was not satisfied, had appellant intended to press payment on his cost judgment it was his duty to do so at the time he was paying over monies to respondent against whom he held the judgment, then appellant had monies under his control, belonging to respondent out of which the judgment could have been satisfied, it is clearly evident that appellant was not desirous of effecting satisfaction of the judgment, but appellant saw an opportunity

to grab thousands of dollars worth of property for little or nothing.

Appellant treated the judgment as wholly satisfied in passing title to the property described in the deed to a third party, otherwise that property which appellant conveyed to his grantee would have been clouded with the lien of the cost judgment.

We agree with the statement of appellant that it is from the evidence that the intent of the parties must be determined and the court found on such evidence. Nothing could be so far from the truth that it was not the intention of the parties to make a complete and full settlement of the case in which the cost judgment was entered. Even if this were not the fact appellant Dowse is estopped to deny otherwise.

AN EXECUTION SALE AND SHERIFF'S DEED WILL BE SET ASIDE FOR GROSS INADEQUACY OF PRICE IF SO GREAT AS TO SHOCK THE UNDERSTANDING OR THE CONSCIENCE OR AS TO AMOUNT TO FRAUD, UNFAIRNESS OR OPPRESSION.

We believe that the sale was on a satisfied judgment and of necessity void. However, we now pass to a consideration of the effect of the sheriff's sale.

As it is questionable whether the Court in *National Realty Sales Company v. Ewing*, 55 U. 438, 186 P. 1103, intended to lay down the rule that gross inadequacy of consideration was not sufficient grounds to set aside a

sheriff's sale or deed, we present this question to the Court for its consideration, particularly in view of Young vs. Schroeder, supra.

The property, the subject of this action, consisted of four noncontiguous tracts of land situated in the North Columbia Subdivision, Salt Lake County, Utah. It is undisputed that at the date of sale they had a fair market value, at execution sale, of approximately \$8000.-00.

The values of the property were fixed as to their fair market value at a forced or execution sale at the date of sale. The following similar questions and answers were given as to all of the tracts:

"Q. Mr. LeCheminant, do you have an opinion as to what the fair market value of Lots 2, 3 and 4, Block 8, of the North Columbia Sub-division at execution sale was the 14th day of March, 1950?

A. Yes, I do.

Q. Will you state?

A. My opinion of the value is \$6,000.00 for those three lots.

Q. In establishing that value, did you take into consideration there was a judgment against this property in the sum of \$13.20?

A. In establishing value I assumed the title is marketable.

Q. Then this value you placed on this property would be \$13.20 less?

A. If there were any judgments against it, it would be less the judgments.

Q. Less the amount of the judgment?

A. Yes. (R. 78-79).

The appellants did not dispute the values placed on the properties by the respondent's witness and this is so notwithstanding the appellant Dowse was a real estate broker.

As heretofore stated the properties were purchased by appellant Dowse at execution sale for \$46.47.

The general rule is that a Court in equity will not set aside a sheriff's sale or deed for inadequacy of consideration unless accompanied by irregularities, unfairness, oppression or fraud. However, there is a well recognized exception and that is where the consideration is so grossly inadequate as to shock the conscience of the Court, one which no honest man would take advantage of there arises a conclusive presumption of fraud, unfairness or oppression. In *YOUNG v. SCHROEDER*, 10 U. 155, 37 P. 252, affirmed 16 Sup. Ct. 512, 161, U.S. 334, 40 L. Ed. 721, *supra*, the Court said at page 166:

"It is insisted by appellants that mere inadequacy of price, however gross, will not authorize the courts to set aside a judicial sale. The general rule undoubtedly is that mere inadequacy of price, alone, does not authorize the disturbance of such a sale; but we are not prepared to sanction the unqualified statement of the rule as put by appellants' counsel. If the inadequacy is so gross as at once to shock the conscience of all fair and impartial minds, if the sacrifice is such that every honest man would hesitate to take advantage of it, it may well be doubted whether every such case would be beyond the power of a court of equity to relieve against."

In *BRATTON v. GRAHAM*, 111 So. 353, 146 Miss. 246, the Court held that a sale was void where property valued between \$12,000 to \$25,000 sold at execution sale for \$600.00 and the sheriff's deed was set aside. The Court said:

“With reference to the judgment obtained by James Stone and Sons, attorneys, and the sale under execution, this sale was *void* because of gross inadequacy received for the land * * *.”
(Italics added)

In *DUNN v. PONCELER*, 178 So. 40, 235 Ala. 269, *supra*, the Court set aside a sheriff's deed for gross inadequacy of consideration. On June 20, 1932, the judgment creditor purchased at execution sale a tract of land worth \$6,000.00 for \$100.00, another \$1500.00 for \$10.00. The sheriff's deed issued on the same day. Subsequently, under an alias writ of execution he purchased a tract of land worth \$2,770.00 for \$75.00, another worth \$500.00 for \$25.00 and a third worth \$200.00 for \$25.00. Sheriff's deed issued August 1, 1932. The purchaser took possession and held for four years before suit was brought. The sole ground for setting aside the deeds was gross inadequacy of price. The Court said:

“The rule obtaining in this jurisdiction, and which has been recognized and followed by this Court for more than 100 years, is that mere inadequacy of price not sufficient to create the presumption of fraud will not violate a judicial decision, but where the inadequacy is so glaring and gross as to at once shock the understanding

and conscience of an honest and just man it will, of itself, authorize the Court to set aside the sale."

In *ELLIS v. POWELL*, 117 S. W. (2) 225, the Supreme Court of Missouri set aside a sheriff's deed for gross inadequacy of consideration and said:

"It is the general rule that a sheriff's sale of real property under execution will not be set aside on mere inadequacy of consideration. However, an exception to this rule is stated by a standard text as follows: 'Inadequacy of consideration, if it be so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for cancelling the transaction. In such cases the relief is granted, not on the ground of inadequacy of consideration, but on the ground of fraud as evidenced thereby.' Kerr on Fraud and Mistake, 161, citing many authorities."

In *VAN SENDEN v. O'BRIEN*, 58 Fed. (2), 689, (C.C.D.C.) the Court set aside Marshall's Deed *nine* years after the deeds had issued. Judgment was obtained in 1916 for \$250.00 against Irving E. Jones. In 1918 his property was sold at Marshall's sale. One tract of land valued at \$4,000 was purchased for \$200.00, another worth \$1300.00 for \$25.00 and a third tract worth \$700.00 for \$10.00. Jones died in 1923, and in 1917 Mrs. Jones conveyed her dower interest in the property to the purchaser. In 1927 Jones' children filed an action to set aside the deeds, the Court at that late date ordered them vacated. The Court said, at page 691:

"While it is true the lower court found that there was no active fraud on Van Senden's part,

which we understand to mean that the sale was had in the ordinary way and after proper advertisement, it nevertheless found, and we think correctly, that the inadequacy of the sale price was so gross as to shock the conscience. Where this is the case, the invariable practice has been, on proper showing, to set the sale aside. The difficulty in the present case grows out of the delay in the application."

and again the Court said at page 692:

"The court below saw and heard the witness, and reached the conclusion that the transaction out of which this property was acquired for this grossly inadequate sum could not be approved, and we see no good reason to reverse its conclusion. As was said by Chancellor Desaussure in *Butler v. Haskell*, 4 Desaus. (S.C.) 651,697: 'Wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and in general a conclusive presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the distress and necessity of the vendor.' In Massachusetts the statute provides that property sold at judicial sale may be redeemed within a year and not after, but the Supreme Court, in *Graffam v. Burgess*, 117 U.S. 180, 6 S.Ct. 686, 29 L. Ed. 839, relieved against this statutory provision and permitted a later redemption in a case in many respects similar to this."

In the case of *McLellan v. Penick*, 289 Fed. 366 (CC 5th), the Court in equity declared a sale void after the purchaser went into possession where the price paid

for property worth \$75,000.00 was \$27,500.00. The Court said:

“The plantation was unincumbered, and was easily divisible. It was unnecessary to sell the whole of it. Under these circumstances, which surrounded the attachment suits and the sheriff’s sale, and considering the small aggregate amount of the judgments as compared to the value of the property, we are of opinion that the levy was so excessive as to make it the duty of a court of equity to declare void the sheriff’s sale and deed to the appellant. 17 R.C.L. 206; Fortin v. Segwick, 133 Iowa, 233, 110 N.W. 460, 12 Ann. Cas. 337; Williamson v. White, 101 Ga. 276, 28 S. E. 846, 65 Am. St. Rep. 302; Forbes v. Hall, 102 Ga. 47, 28 S.E. 915, 66 Am. St. Rep. 152.”

To the same effect Hart v. Parrish, 244 S.W. (2) 105; Butler v. Slattery, 237 N. W. 232, 212 Iowa 277; Haish v. Hall, 265 P. 1030, 90 Cal. App. 547; 33 C.J.S. p. 494, Sec. 234.

AN EXECUTION SALE AND SHERIFF’S DEED ISSUED AFTER THE PERIOD OF REDEMPTION HAS EXPIRED WILL BE VACATED WHERE THE PRICE IS INADEQUATE AND THE SALE IS ATTENDED WITH IRREGULARITIES, A CONSPIRACY, FRAUD OR UNFAIRNESS.

This is not a case where Respondent must rely on gross inadequacy of price for there was gross inadequacy of price coupled with fraud, a conspiracy, unfairness and irregularities.

The real purpose of the sale was not to satisfy a judgment of \$22.80 but was a result of a design to gain all of Pender's real estate worth several thousand dollars for a few dollars. Dowse and others conspired to this end.

If, as Dowse argues, there was no intent to satisfy the cost judgment by the delivery of the deed, he had already set in motion his scheme. No demand during negotiations being made for its payment nor was there an attempt to withhold the \$22.80, the amount of the judgment, out of the \$100.00 paid by Dowse for the quit claim deed. We believe, however, it was the intent that the judgment was to have been satisfied and that the scheme developed later because of the silence on the part of Mr. Backman regarding the cost judgment, no demand being made for its release, which it was Dowse's duty to satisfy regardless.

The record clearly supports the Court's findings of fraud and of conspiracy. After the entry of the cost judgment no demand was made for its payment either by Dowse or Duncan nor did they advise Respondent or Mr. Backman, his attorney, that execution had issued; that they had levied on his real estate or that a sale had taken place. They stood by silent until after the period of redemption had expired. There was ample opportunity to advise them as Dowse, Duncan, Pender and Backman are all residents of Salt Lake City; Dowse and Pender were in conferences about other matters and Duncan and Backman not only negotiated the deed transaction but they saw each other on the street several

times. The telephone was always available. Why this silence if a conspiracy was not in progress?

The evidence further established the fact and the trial court found that on the date of the execution and sale, appellant Dowse had in his possession personal property belonging to respondent worth several times the amount of the judgment; that respondent owned an automobile; that he had bank accounts in three Salt Lake City banks, and upon the property levied upon and sold stood personal property worth in excess of \$1000.00 out of which the judgment could have been satisfied. All of which was known to appellant Dowse and to his attorney.

If this was no design on the part of Dowse to deprive respondent of realty worth many thousands of dollars under color of attempting to satisfy a judgment of \$22.80, why did appellant Dowse direct the sheriff to levy on respondent's realty in violation of law which directs that before sale of real estate a judgment must be satisfied from the un-exempt personal property of the debtor? And further, why no attempt to collect the judgment by garnishment proceedings?

Appellant Dowse knew if he had a valid judgment, respondent would have paid the same had request for payment been made, or that by a simple, inexpensive method, the judgment could have been collected. Appellant Dowse had ample opportunity to enlighten respondent. This he never did but on the contrary he continued to deal with respondent in all respects as theretofore,

being most careful to not disclose the fact that the judgment had been entered and remained unsatisfied, and that execution and sale had been instituted thereon. It was a wary and crafty silence on the part of appellant Dowse calculated to and actually succeeded in lulling respondent into a sense of security until the redemption period had passed. The judgment, if not satisfied, could have been satisfied at the time the \$100 was paid to respondent by appellant Dowse when the quit claim deed was obtained by Dowse to cut off respondent's appeal period in the action in which the judgment was entered.

The evidence is undisputed that the property levied on consisted of four non-contiguous tracts of land and that either of them was worth more than enough to satisfy the judgment, one tract being worth approximately, \$5,814.96, a second tract \$1,066.80, a third \$606.65, and the fourth tract approximately \$500.00. This was known to Dowse for he was a real estate broker of many years' experience and he did not deny the values placed thereon by Respondent's witness and, notwithstanding, instead of merely directing the sheriff to levy on one tract, which was more than sufficient to satisfy the judgment, he caused the sheriff to levy on all of them—an excessive levy.

In addition, Dowse directed the Sheriff to levy on the property in such a manner as would discourage bidders and to diminish the value of the property being sold. They joined commercial and residential property and this, in itself, would discourage bidding as usually a person interested in commercial property would not

be interested in residential property and vice versa. These conditions could only be calculated to discourage bidders and the prices bid. That there was a conspiracy is further borne out by the conduct of Dowse after he had contracted to convey two of the lots to Treadway for \$1000.00, by general warranty deed, he conveyed the property by a special warranty deed after Mr. Bird, Treadway's attorney, had questioned Mr. Duncan regarding the sheriff's sale.

In addition to the irregularities noted, that is the levying on and selling the real estate before attempting to satisfy the judgment out of non-exempt personalty, the excessive levy, the court found that the four non-contiguous tracts were offered en masse and never offered separately. Furthermore, Dowse stood by and permitted Respondent to pay the \$3,086.44 to Morandi, clearing the title to part of the lots in question, knowing that Respondent would probably do so if he remained silent.

Certainly, in view of the foregoing the trial Court's findings of fraud, conspiracy and unfairness should be upheld.

Rule 69 Utah Rules Civil Procedure, directs the manner in which property will be sold to satisfy a judgment. Sub-section (b) provides that the execution shall direct the officer to satisfy the judgment out of the personal property of the debtor before levying on his real property. Sub-section (d) provides that the levy shall not be excessive. Sub-section (e) (3) provides

that where property is situated in separate parcels they will be offered separately before it is offered en masse. We have not set forth the rule verbatim as Appellant Dowse set it forth at page 12 of his brief.

As to excessive levy the editors of C.J.S. in vol. 33, page 591 said:

“Excessive levy. It has been held that a levy which is excessive, see *supra* paragraph 107, will not invalidate a sale thereunder; but according to some authorities if the levy is entirely out of proportion to the debt the purchaser acquires no title, although this is so only in extreme cases.”

A judgment debtor has a right to have his personal goods exhausted before any of his real estate can be levied on.

33 C.J.S. page 251, Sec. 100;

Haws v. Fracarol, 27 F. (2) 74;

Blasingame v. Wallan, 261 P. 42, 32 Ariz. 580;

Stone v. Ordian-Wells Co. 20 P. (2) 639, 94 Mont. 20;

Barry v. Horton, 238 N. W. 763, 122 Neb. 20;

Alt v. Kwiatek, 17 A (2) 161, 128 N. J. Eq. 469.

A sale en masse where property is in separate parcels is prejudicial and void where substantial injury is shown and in any event voidable.

33 C.J.S. page 491, sec. 232;

National Realty Sales Co. v. Ewing, 55 U. 438, 186 Pac. 1103;

Adams v. Pratt, District Judge, et al, 87 U. 80,
48 P. (2d) 444.

In *Young v. Schroeder*, 10 Ut. 155, 37 Pac. 252, supra, the Court vacated three marshall's deeds where property worth \$26,000.00 sold for \$1927.06. Before levying on the real property the marshall attempted to satisfy the judgment out of unexempt property of judgment debtor. There were three levies all directed by the judgment creditor's attorney. The first levy severed a portion out of a larger tract to which there was no ingress or egress. All of the realty levied upon was held in common by the judgment debtor with his sister. The Court said:

"It further appears from the record that it was the design and purpose of Stephens & Schroeder at the outset to exhaust, if possible, all the property of plaintiff, of whatever nature or description, regardless of its value, under said several executions, and that they in fact accomplished that purpose."

Again the court said:

"This is not a case which rests on mere inadequacy of price alone, but one where the sales complained of were attended by such substantial irregularities as must have prevented a sale at a fair sum. For instance, one of the parcels of said lot 2, levied upon and sold under the first execution, is described as beginning 101 feet north and 391½ feet east of the southwest corner of said lot 2, thence east 151½ feet, north 28 feet, west 151½ feet, and south 28 feet to the beginning. Reference to the plat in evidence

shows that the property thus described is a portion of that part of lot 2 to which plaintiff and his sister derived title through the will of their deceased father, as before stated, and is included within the exterior boundaries of that portion thereof shown by the record to have been at that time leased to one Gebhardt. The purchaser of the part thus levied on and sold by the marshall acquired a piece of land having no means of access to it. It is needless to say that such a transaction must necessarily result in a sacrifice of the property. Again, in the sales made under the several executions of portions of said lot 2 it appears that in each instance the levy was upon and the sale of all the plaintiff's right, title and interest in a specific part of the portion of said lot 2 so owned by him and his sister, Lydia Y. Merrill. This is also an irregularity that renders the sale voidable, if not void, the necessary tendency of a sale under such a levy being to depreciate the value of the property sold."

And again the court said:

"It is contended by the appellants that relief cannot be granted in this case, because the statutory period for redemption had expired before this suit was brought. The cases are by no means rare where a court of equity has interfered to set aside a sale after the time for redemption has expired, such sale having been attended by irregularities, and having resulted in a gross sacrifice of the judgment debtor's property."

In *Magnus v. Tobias* 169 N. E. 741, 337 Ill. 605, the Equity Court set aside a sheriff's deed which issued after the period of redemption had expired where

property valued at \$25,000.00 was purchased for \$107.73. The judgment debtor had no notice of the sale. Demand for payment of the judgment was never made upon her. The Court said:

“Appellants also insists that services of the execution and demand for property was not necessary. Whether section 28 of the Cost Act (Smith-Hurd Rev. St. 1929, C. 33) applies or not, appellee was not served with the execution, and one cannot read this record without being convinced that the actions of appellant and his attorney, Webster, in levying the execution, selling the land at judicial sale, and acquiring a deed to it, were conducted in a manner well calculated to leave appellee in ignorance that her property had been sold. It is very evident from the record that she did not intend to abandon the property, for she reduced the principal of the mortgage on the property to \$10,000 after the sale, also collected rents from the property and paid the taxes against it. After appellant had notified the tenants on the property to pay him the rent appellee became aware of the fact her property worth \$35,000.00, subject to encumbrances of \$11,500.00, had been sold to appellant and Webster for \$107.73 to pay a judgment for \$86.45 rendered against appellee. The price for which the property was sold was grossly inadequate, in sales under judicial process where there is a right of redemption, inadequacy of price and accompanied by circumstances of irregularity or unfairness will not avoid a sale. It has been uniformly held by this court that where property has been sold at judicial sale for a grossly inadequate price, even slight circumstances indicating unfairness or fraud will furnish sufficient

grounds for equitable interference. *Wilkinson v. Cox*, 228 Ill. 306, 81 N.E. 1020; *Davis, Cory & Co. v. Chicago Dock Co.* 129 Ill. 180; 21 N.E. 830; *Block v. Cooper*, 318 Ill. 182, 149 N.E. 21. It also appears that appellee had ample resources both personal and real to pay the judgment for costs had she been notified it was demanded by appellant."

The above case is very much like the case at issue.

In *Greenberg v. Kaplan*, 268 N. W. 788, 277 Mich. 1, the Court set aside a deed to property purchased at execution sale for \$377.40 where the property was worth \$9,000.00. No demand was made for payment of judgment. Judgment creditor permitted the owner to pay the tax. No attempt was made to satisfy the judgment by garnishment proceedings although counsel for the judgment debtor knew that such a remedy was available. The court set aside the deed and held the sale was void. The court said:

"In view of the gross inadequacy of the price, coupled with the unmistakable signs of fraud and unfairness in the instant case, we hold the sale must be set aside. It is quite significant that no attempt was made to collect the balance of the judgment and that Bartlett, who had an interest in the judgment, was not given any share of the proceeds. Chaplain, as attorney for *Schevitz & Bartlett*, knew that he had funds either in his possession or largely under his control which by a simple, inexpensive method, quickly could have been applied to the judgment. *Baier's* interest in the property of a value of at least \$9,000 was bid in for \$377.40 in Chaplain's

presence by his brother-in-law, in the name of one who had every appearance of being a dummy. Although Chaplain had reasons to believe that Baier did not know of the sale because of Baier's actions in bringing the injunction suit and paying taxes, both after the sale had taken place, and although Chaplain had ample opportunity to enlighten Baier, he never did this. Although Chaplain, if he had told his partner, Greenberg, of the opportunity to rid themselves of an obligation of approximately \$9,000 for much less, might have been able to procure enough cash to bid in at the sale, he chose to remain silent and let his brother-in-law buy in under the name of a client and friend of Chaplain. In view of the surrounding circumstances and the actions of the parties despite the carelessness of Mulford and the attack on his credibility, we believe that an agreement was made between Chaplain and Mulford that garnishment would be resorted to in collecting the Schevitz judgment against Baier; but, in view of Baier's and Mulford's reasonable reliance upon this agreement, the execution and sale, in contravention of the understanding, were fraudulent."

In *Citizens State Bank vs. McRoberts*, 239 P. 1028, 29 Ariz. 173, the court in equity vacated a sheriff's deed issued after the period of redemption had expired where property worth \$17,833.00 sold to satisfy a judgment of \$705.39. The Court said:

"Now, it must be admitted that the price realized for the property was grossly inadequate—less than 5 per cent. of its average estimated value. We know the courts are reluctant to set aside deeds of property, sold under legal process, merely for inadequacy of price, and justly so.

Generally speaking, they will not do so, unless the equity of the situation is so appealing as that to do otherwise would shock the judgment and the conscience. * * * In view of the fact that plaintiff had never denied her liability on the note but always admitted it, and only neglected to take it up because of the assurance of the primary debtor that he would endeavor to pay it, and the bank's agents having full knowledge that she was only an accommodation maker, we think in fairness such agents should have seen her personally and told her, not only of Starr's delinquency, but what steps they contemplated taking against her property; or, somewhere along the line and before the right of redemption expired, they should have informed her of the situation. In failing to impart such information to plaintiff, and in instructing the bank's attorney not to do so, they not only took an undue advantage of her, but pursued a course well calculated to mislead and surprise her. This circumstance, in connection with the great disparity of price realized to the value of the property, it would seem is amply sufficient reason to cancel the deed."

In *Lovejoy v. Americus* 191 P. 790, 111 Wash. 571, the court set aside the sheriff's deed issued after the period of redemption had expired where property worth in excess of \$4000.00 was sold at sheriff's sale for \$87.29, because of inadequacy of price failure to notify the judgment creditor of the sale although the statute did not require it, and this notwithstanding that prior to the sale the judgment debtor had made repeated demands upon the judgment debtor for payment of the judgment. The judgment creditor permitted the judg-

ment debtor to pay taxes and special improvements and to improve the property. The Court said:

“The judgment in the present case is entirely justified. The respondents acted promptly upon receiving notice that their property had been sold. Mr. Lovejoy was a teamster in the town of Hillyard, and trusted nearly all his other business to his wife, who was, much of the time, almost an invalid. After the issuance of the execution, followed by the sheriff’s sale, and while the rights of respondents were passing away by the lapse of time into the hands of appellant Americus, the continuous dunning theretofore engaged in was changed into an apparently wary and crafty silence, highly calculated to and actually succeeded in lulling the respondents into a sense of security until the year for redemption passed by. *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839. The judgment, with interest and costs, could have been satisfied, prior to the execution, by garnishment proceedings against the tenant of respondents for less than 5 months’ rental, while during the period of redemption from the sheriff’s sale the amount of the judgment, interest, and costs, and increased costs, of \$87.92, could have been satisfied by less than 6 months’ rental from the same tenant, to which appellants, as purchasers at the sheriff’s sale, were entitled under the provisions of section 602, Rem. Code.”

To the same effect see:

Graffam v. Burgess, 117 U.S. 180, 6 Sup. Ct. 686,
21 L. Ed. 839;

VanGraafieland v. Wright, 228 S.W. 465, 268
Mo. 414;

33 CJS, page 494, Sec. 234;

Foote v. Kansas City Life Insurance Co. 92
Fed (2) 744;

Home Owners Loan Corp. vs. Braxton, 44
N.E. (2) 989;

Rogers v. Barton, 53 N.E. (2) 862, 386 Ill. 244;

Fox v. Jackson, 64 N.E. (2) 799, 116 Ind.
App. 390;

Baar v. Smith, 257 P. 861, 97 Cal. App. 398;

Hyman v. Stern, 215 P. 911, 61 Cal. App. 566;

Darden v. Reese, 200 P.(2) 81, 88 Cal. App. 904;

Boiani v. Wilson, 132 Atl. 881, 41 R. I. 317;

Neussler v. Bergman, 251 P. 578, 141 Wash. 297.

THE EVIDENCE SUPPORTS THE COURT'S FINDING OF SLANDER OF TITLE, ITS AWARD OF EXEMPLARY DAMAGES AND ATTORNEY'S FEES.

Appellant Dowse asks this court to reverse its decision in the case of Dowse v. Doris Trust Co., (Utah), 208 P2d 956.

In the instant case we have a real estate broker of long years' experience who knew the effect his acts would have on the title to respondent's property. Appellant by his wrongful acts wholly deprived respondent of the use and enjoyment of his property and deprived respondent of the rentals received therefrom by respondent prior to the sheriff's sale.

Appellant challenges the court's finding of slander of title and contends that a cause of action for slander

or disparagement of property or of the title thereto was neither alleged or proved.

Respondent alleged in paragraphs 13 and 14 of his complaint that appellant in all of the acts theretofore specifically set forth acted maliciously and in order to vex and harass respondent and that appellant knew the filing of the judgment and the sale of the property would cast a cloud upon and slander upon respondent's title and that the same decreased the value of respondent's real estate and made it unmarketable.

That by paragraph 17 of respondent's complaint respondent alleges that appellant acted maliciously and that appellant was guilty of oppression and malice. That the case is one in which punitive and exemplary damages is proper and that \$20,000 is a proper amount of exemplary and punitive damages.

The evidence not only showed that the appellant failed to satisfy the judgment which cast a cloud upon all of the property of respondent after having accepted the benefits of the deed given by respondent to cut off his appeal period and settle the differences between appellant and respondent which the trial court found satisfied the judgment but in addition appellant procured title to all of the property levied upon and sold at sheriff's sale, thus depriving respondent of his title to his property.

The decision in *Burkett v. Griffiths* cited by appellant was decided in 1891. That decision has been broadened as is pointed out by appellant.

The *Gudger v. Manton* case, 21 Cal. 2d, 537, 134 P2d 217 relied upon by appellant appears to be more favorable to respondent than to appellant. In that case the plaintiff was awarded compensatory damages in the sum of \$16,000 in an action for slander of title. The slander consisted of defendant's having caused execution on a judgment to be made without a privilege to do so. The court quoted from Restatement, Torts, Sec. 624 saying:

“At the outset it is helpful to have before us an accurate definition of that tort. It may be best stated as follows: ‘One who, 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 person as purchaser or lessee thereof might be determined thereby, is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.’”

The court in applying the rule said:

“It has been held that the recording of a document making a false claim to real property may constitute the publication of the disparaging matter in the tort in question.”

Appellant cites the Wyoming case of *Barquin v. Hall Oil Co.*, 28 Wyo. 164, 201 Pac. 352, 202 Pac. 1107, and argues that the facts showing the special damages claimed must be stated, that an intending purchaser of the property was prevented from making a contract to buy or from buying the land or that a third party

purchaser was induced to breach his contract. This same argument was used by the defendant Doris Trust Company in the case of *Dowse vs. Doris Trust Company*, supra, in which the court speaking through Mr. Justice Wade said:

“Defendants president is a real estate broker with more than 40 years of experience in the real estate business. At the time he filed the instrument he knew that he had no rights or interest in the property, and did so either to force plaintiff to sell to him or make it difficult to sell to anyone else, under such a state of facts his filing was malicious. See *Kelly v. First State Bank*, 145 Minn. 331, 177 N.W. 347, 9 ALR 929 and annotation on page 931. In the *Kelly* case the court held that the malicious filing for record of an instrument known to be inoperative is regarded as slander of title, but if the person records an instrument he has a right to record, it is, of course, not slander of title. Under the pleading and the facts proved, defendant did not have a privilege to record the instrument and his doing so was malicious.”

The court further said:

“It is defendant’s contention that plaintiff having failed to allege and prove a particular sale or sales which had been lost because of its action that plaintiff had failed to present for the consideration of the court, an essential element of the action for slander of title, i.e., a pecuniary loss. It is defendant’s contention that attorneys fees are not recoverable as special damages and that such damages can only be proven by the loss of a particular sale which must be alleged as

well as proved. It cites as authority for this contention the cases of McGuiness v. Hargiss, 56 Wash. 162, 105 P.233, 21 Ann. Cas. 220, Hubbard v. Scott, 85 Or. 1, 166 P. 33, and City of Shreveport v. Kahn, 194 La. 55, 193 So. 461. All of the above cases held that attorneys' fees are not recoverable in an action for slander of title. *However, we are not impressed with the reasoning of those cases and others to the same effect. The action of slander of title is based on a wrongful act but for which the plaintiff would not have had to incur any expense, either for costs or for attorney's fees. The reasoning in Chesbro v. Powers, 78 Mich. 472, 44 N.W. 290, is more in harmony with justice."* (Italics added)

Mr. Justice Wade then goes on and quotes extensively from the Chesebro case.

Appellant contends that there is no evidence to support the court's finding 9 and charges the trial court with an illegal, capricious and wholly arbitrary finding and says the court was confused in awarding punitive and exemplary damages, claiming that the only damages allowable for slander of title are special damages. Such is not the case. This court said in the Dowse v. Doris Trust Company case supra:

"That punitive damages may be awarded in an action for slander of title see Hopkins v. Drowne, 21 R.I. 20, 41 A. 567."

From a reading of the Hopkins case cited by the Utah court in the Doris Trust case we find the following statement by the court:

“In addition to the actual damages sustained by the plaintiff, it was discretionary with the jury to also award punitive or exemplary damages. (Kenyon v. Cameron, 17 R.I. 122, 20 Atl. 233; Vogel v. McAuliffe, 18 R.I. 791, 31 Atl. 1.)”

The trial court having properly found that the acts of appellant were malicious, respondent is entitled to an award as pecuniary and exemplary damages of considerably more than the \$500.00 granted by the trial court.

In answer to subdivision V of appellant's brief, Whether Attorney's fees in an action for slander of title are allowable, appellant again asks this court to reverse the Dowse v. Doris Trust Company case supra from which case we have quoted under Respondent's answer to subdivision IV of appellant's brief and in which case this court quoted from Restatement of the Law of Torts, Sec. 633, pages 347-8, wherein it is stated:

“The pecuniary loss for which a publisher of disparaging matter is liable under the rules stated in Secs. 624 and 626-627 is restricted to

‘(a) that pecuniary loss which directly and immediately results from the impairment of the vendibility of the thing in question caused by publication of the disparaging matter, and

(b) the expense of litigation reasonably necessary to remove the doubt cast by the disparagement upon the other's property in the thing or upon the quality thereof.’”

Following which Mr. Justice Wade said:

“Attorney’s fees are certainly a reasonable expense of litigation.”

To the same effect do we answer subdivision VI on the question of punitive damages.

It has been said that to support a judgment for pecuniary damages malice must be expressed. It is also said that malice need not be expressly shown but it may be implied.

See *Gudger v. Manton*, (Cal.) 134 P2d 217 in which the court said:

“True, it has been said or intimated that malice is an essential element in slander of title. (Citing cases) That malice may, however, be express or implied. *Feron v. Fodera*, 169 Cal. 370, 148 P. 200; *Kendis v. Cohn*, 90 Cal. App. 41, 265 P. 844; see cases collected 129 A.L.R. 179. And if there is an absence of privilege or justification, and the other elements necessary are present, an implication of malice in law is proper, if that term is used, or actual malice may in some cases show lack of privilege.”

The *Gudger v. Manton* case *supra*, involved the levy and recording of a writ of execution upon real property regarding which the ruling of the court is applicable and which is in part as follows:

“Such instruments on record had all the appearance of an assertion by defendants of a claim to an interest in the property, and as a matter of common knowledge would have an effect upon a prospective purchaser of the property and the merchantability of the title. He would naturally

assume that plaintiff's title was not merchantable, as it was encumbered by a lien to an indefinite extent. Defendants as reasonable persons should have reasonably foreseen that such would be the effect of their action. Restatement, Torts, Sec. 629. As we have seen, the reasonable imputation of the recording was a claim of an interest adverse to plaintiff's title. Whether a cloud on the title in the technical sense existed was immaterial."

It is not necessary, however, to rely on implied malice inasmuch as there is an abundance of evidence to show malice in fact. It is clearly evident that appellant was disgruntled at respondent's asking for and collecting \$100 for a quit claim deed given to cut off respondent's appeal period. The act thereafter on the part of appellant was a design to get even with respondent, not to collect the mere pittance of \$22.80 but to incur the greatest amount of expense possible upon respondent and to take from respondent all property possible. This malice is further borne out by the evidence of appellant's having sold the washing machine for \$10.00 which respondent entrusted to appellant when it had a value of \$175.00, which was more than enough to satisfy the judgment had it been a valid one.

Under subdivision V appellant cites general principles of law which do not apply to recorded instruments affecting title to real property, nor does appellant distinguish those cases involving instruments recorded and affecting title to real property and those cases not involving these facts. There is a clear distinction.

It has been held that where one places of record an instrument which compels the owner to come to terms with him is liable in a suit for slander of title. See *Collins v. Whitehead*, (CC) 34 F 121, cited in 150 ALR 721 in which the court in sustaining a suit in the nature of an action for slander of title to recover damages for the recording by the defendant of a proposed contract of sale after he had failed to comply therewith within the required time, said that one who wantonly puts on record such a paper, apparently with the intent to compel the owner of the property to come to terms with him, ought not to have refuge in the technicalities or the weakness of the law; that the injury to the plaintiff was real, as he was compelled to bring suit to remove the cloud from his title, and, for the time, his property was useless to him; and that it would be a reproach to the law to give only nominal damages in such a case, and a verdict for substantial damages was upheld.

On appeal, all conflicts in evidence must be resolved in favor of respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible.

ANALYSIS OF AUTHORITIES CITED BY APPELLANT DOWSE

Appellant Dowse cites four Utah decisions in support of his claim that the sale could not be attacked in equity, none of which are in point.

In *Dickert v. Weise*, 2 Ut. 350, 40 Pac. St. Reports, 350, there was no inadequacy of price, irregularities, fraud, unfairness or conspiracy. The sale was fair and regular.

In *National Realty Sales Co. v. Ewing*, 55 U. 438, 186 Pac. 1103, the debtor had knowledge of the sale and stood silent. The court said there was nothing in the record "to suggest fraud and concealment."

In *Chausse v. Bank of Garland*, 71 U. 586, 268 Pac. 781, inadequacy of price, not gross inadequacy of price was the sole ground.

In *Adams v. Pratt*, District Judge, 87 Utah, 89, 48 Pac. (2) 444, the only ground for vacating the sale was failure to offer separately non-contiguous tracts before selling enmass.

All of the foregoing cases were foreclosure proceedings and the judgment debtor had been notified of the sale. In none of the cases cited was there a multiple of causes, viz: gross inadequacy of price, irregularities, concealment, fraud, unfairness and conspiracy. It should be noted that from this list of cases the only Utah case in point *Young v. Schroeder*, 10 Ut. 155, 37 Pac. 252, 161 U.S. 334, 40 Law Ed. 721, 16 Sup. Ct. 512 was omitted.

The appellant Dowse also cites seven California cases in support of his position, none of which are in point. Some of the cases relied on support respondent. In *Smith v. Randall*, 6 Cal. 47, 2 Pac. St. Rep. 47, the judgment debtor was present at the sale

and directed the sheriff to sell realty rather than his personality. The debtor claimed that he could not waive this right. There was no fraud, concealment, unfairness or conspiracy. In *Bechtel v. Weir*, 152 Cal. 443, 93 Pac. 75, 15 A.L.R. (N.S.) 549, the only irregularity was in offering the property for sale, that is, it was not offered separately before being sold enmasse. *Batini v. Ivancich*, 105 Cal. App. 391, 287 Pac. 523 the sole ground was the mis-statement of the date of the entry of the judgment the court said:

“and further than this the court has 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.”

Mitchell v. Alpha Hardware & Supply Co., 7 Cal. App. (2) 52, 45 Pac. (2) 442 the sole grounds was failure to offer separately before offering enmasse.

In *Knapp vs. Rose*, 32 Cal (2d) 530, 197 P (2d) 7, the court supports respondent and recognizes that under certain facts a suit in equity to vacate a sale and deed is proper.

Appellant would have this Honorable Court apply the rule of law as laid down in *Rauer v. Hertweck*, 175 Cal 278; 165 Pac. 946. While it is recognized there is no legal duty imposed upon the Sheriff to search for the debtor in order that he might be given actual notice nor of the creditor to do so, still the courts do not and will not we think encourage a judgment creditor to refrain from making demand upon the debtor, to trans-

act business matters with the debtor from time to time and to continue to deal with the debtor at all times after the judgment has been entered and especially one of such a small amount, in the same manner as the creditor would have done had the relationship of debtor and creditor not existed. Appellant knew respondent could pay the judgment at any time demand was made upon him, however, the record reflects the fact that the concern of appellant at all times was that respondent might learn of the judgment before appellant had accomplished his cunning act and thus defeat the purpose of appellant.

Appellant cites Story's Equity Jurisprudence Sec. 245 as authority in support of his argument that inadequacy of consideration is not of itself sufficient grounds for relief in equity. Respondent does not rely upon inadequacy of consideration alone, neither did the trial court find inadequacy of consideration alone as grounds for setting aside the sale, the court found inadequacy coupled with irregularities, unfairness, fraud and a conspiracy.

The following cases cited by appellants appear to be those on which one element alone is involved, viz: either inadequacy of consideration, failure to offer in separate parcels, failure to satisfy out of unexempted personal property or failure to give personal notice of sale to debtor; no case is cited wherein all of the elements are present as in the instant case.

In *Thomas v. Thomas*, 44 Mont. 102, 119 Pac. 283, the deed was collaterally attacked because of failure

to sell property separately. The court said that the debtor should have either moved to set aside the sale or proceeded by a bill in equity. That either was a direct attack.

In *Fox v. Curry*, 96 Mont. 212, 29 Pac. (2) 663, the sole ground was a defective notice, however, the court said that it appears the whole transaction was in good faith.

In the Idaho case of *Coghlan v. City of Boise*, 36 Ida. 613, 212 Pac. 867, the court merely held that a judgment debtor present at a sale cannot complain of a sale enmasse when he made no request to sell otherwise.

In *Mt. Vernon National Bank v. Morse*, 128 Ore. 64, 264 Pac. 439, the sole ground was an irregularity in the notice of sale.

In *Whitworth v. McKee*, 32 Wash. 83; 72 Pac. 1046 the court held that a collateral attack could not be made on a judgment when the sheriff made a return that he was unable to find personal property sufficient to satisfy a judgment. The court recognizes the necessity of such a return. We again direct the court's attention to *Lovejoy v. Americus*, supra, which set aside a Sheriff's Deed issued after the period of redemption had expired because of inadequacy of price, failure to give notice and failure to collect by garnishment proceedings.

Oliver v. Dougherty, 8 Ariz. 65, 68 Pac. 553 the sole ground was failure to levy on personality, nothing more.

Regarding the Arizona decision cited, the attention of the Court is directed again to Citizen's State Bank vs. McRoberts, supra, in which the court vacated a deed issued after the period of redemption had run where inadequacy of price, no demand, or notification of sale was given.

In Bird v. Kitchens, Ark; 221 SW (2d) 795, cited by appellant we find a case wherein complainant knew of the sheriff's sale being conducted and while he did not attend the sale still he sent his secretary to attend with instructions to make notes of that which took place, after the deed issued he sought to collaterally attack the deeds on alleged irregularities committed by the officer conducting the sale.

And in Gross v. Simsack, 364 Pa. 337; 72 Atl. (2d) 103, we find where property which had an assessed value of \$7500.00 brought \$9100 at the execution sale and the court held that there was no showing of inadequacy of consideration.

Respondent is unable to find the Knox v. Noggle case under Appellant's citation.

In Bonner v. Lockhart, 236 Ala. 171; 181 South. 767, the court found that the record did not sustain an averment that complainant had no knowledge of the execution sale. Complainant had received and ignored the statutory demands for possession of the property levied upon. The court further found that the right of redemption had been forfeited without any action on the part of respondent lulling complainant into delay or

non-compliance with the demand for possession. It appears complainant persistently ignored and disregarded all rights of respondent.

The Horken v. Eason, 10 Ga. App. 236; 73 S.E. 352 case cited is one which was decided on an agreed statement of facts which does not appear in the record of the case.

In Dixon v. Peacock, 30 Okla. 87; 141 Pac. 429 it was agreed between the plaintiff and defendant that the proceeding was a collateral attach on the judgment, the property sought to be recovered was sold at sheriff's sale and the sale was confirmed by the court, the court having found the proceedings of the sheriff regular.

The Sheehan v. All Person, etc. 80 Cal. App. 393; 252 Pac. 337 case does not appear to be in point, there the complaint sought to collaterally attach the judgment on which execution issued.

And in Sellers v. Johnson, 207 Ga. 644; 63 S.E. (2d) 904 the fraud relied upon was breach of an alleged agreement between counsel for the litigants under which it was agreed they would notify each other before any hearing or issuance of execution or levys or sale of property. Respondent failed to give actual notice of sale. There was nothing in the record to show that the sale was not properly conducted.

In White v. Adams, 52 Cal. 435; 1 Pac. States Rep. 435 the court said:

“It is to be observed there is nothing in the record showing any fraud or bad faith upon the part of White, who was the plaintiff in the proceedings to foreclose the mortgage.”

The *Hamilton v. Waters*, case 93 Cal. App. 866; 210 Pac. (2d) 67 is one in which action was brought to recover damages against the purchasers at sheriff's sale and the marshall by reason of the eviction of complainant from property purchased at sale. In sustaining demurrers to the complaint the court said:

“Her only relief, if her allegation is true, is by an action in equity to set aside the judgment. The instant cause is a collateral attack on a valid, final judgment.”

In *H.O.L.C. v. Edwards*, 329 Pa. 529; 198 Atl. 123, 124 the question was on constitutionality of a Mortgage Deficiency Act enacted under the laws of the state of Penn. This act was held unconstitutional. This case is not in point. True the question of inadequacy of consideration was brought up but that was not the controlling factor in the case.

In *Sikes et al. v. Beaver, et al.* Sup. Ct. Ga. 157 S.E. 467 there was no evidence of irregularities or facts from which fraud could be drawn, nor does it appear that personality was available upon which levy could have been made.

Appellant cites *City of Sanford v. Ashton*, 131 Fla. 759; 179 South. 765. Here the court laid down the rule

that the judgment debtor was not entitled to cancellation of deed at execution sale after one year following the sale in the absence of a showing of mistake, accident, surprise, misconduct, fraud or irregularity in connection with the judgment, execution or sale.

In *Solomon v. Neubrecht*, 300 Mich. 177; 1 N.W. (2d) 501 it was held that the sale would not be set aside because of inadequacy of consideration where no evidence of any wrongdoing by the creditor or of fraud, irregularities or unfairness appeared.

Lawyers Co-op. Publ. Co. v. Bennett, 34 Fla. 302; 16 South. 185 is relied upon by appellant. As an example of the cases cited by appellant we quote syllabus 3 and 4 of this case.

“3. \$15.00 is a grossly inadequate price, at a public judicial sale, for land worth \$350 to \$400.
4. The general rule is that mere inadequacy of price alone is not sufficient to set aside a judicial sale, but when such inadequacy is connected with or shown to result from any mistake, accident, surprise, misconduct, fraud or irregularity, the sale will generally be set aside.”

The Sellers v. Johnson, 207 Ga. 644; 63 S.E. (2d) 904 held the pleading not sufficient.

And in *Marr v. Marr*, 73 N.J.Eq. 643; 70 Atl. 375 the evidence was to the effect that the consideration paid was for but one-half the value of the property and the court held this fact was not such inadequacy as would warrant the setting aside the sale.

The case of *McAlvay v. Consumers Salt Co.*, 112 Cal. App. 383; 297 Pac. 135 involved a sale of stock in a corporation, the evidence showed the total number of shares issued does not appear and the only direct evidence of the value of the stock in litigation was Stockwell's testimony that it was worth \$150,000.00. As against this however, is evidence that the business showed a deficit for the year ending June 30, 1925 and that the net profits for the following year approximated but \$2200.00.

Rauer v. Hertweek, 175 Cal. 278; 165 Pac. 946; *McLain Land & Investment Co. v. Swofford Bros. Dry Goods*, 11 Okla. 429; 68 Pac. 502; *Dickinson-Reed Anderson Co. et al v. Markley*, 117 Okla. 17, 244 Pac. 754; *Burton v. Kipp*, 30 Mont. 275; 76 Pac. 563; and *Elliott & Healy v. Wirth*, 34 Idaho, 797; 198 Pac. 757 each held mere inadequacy of price is not sufficient to set aside a sale if unaccompanied by elements of fraud, unfairness or oppression.

In *Pavlovich v. Watts*, 46 Cal. App. 103; 115 Pac. (2d) 511, the action involved notes evidencing a claim levied on which claim had a face value of \$21,000.00 but subject to the term of an option and lease agreement so that the actual value of the claim levied upon was not as great as \$21,000, because of the uncertainty of the value of the claim it was held that the sale of the claim for \$250 did not require the sale to be set aside because of inadequacy of price paid.

And in the Dewey v. Loomis case, 113 Kan. 750; 216 Pac. 271, it is not shown just what value the property had but it was sold for \$100 and while it was contended that but one bid was made it was evident that about 20 persons attended the sale.

In St. Paul Trust v. Olson, 52 N.D. 315; 202 N.W. 472 the price was held not inadequate when property worth \$136,000 was sold for the equivalent of \$111,000.

Raymond v. Halborn, 23 Wis. 57. This case was decided in 1868. The property sold consisted of lots 5 and 6 in Block 1 in City of Racine, the two lots were mortgaged by complainant and sold under foreclosure as mortgaged, the court found they could have been sold separately but having been mortgaged as one there was no defect in the sale.

Coulter v. Meiggs, 58 R.I. 30; 191 Atl. 115 in which the court said there was no evidence that the sale in one parcel was unjust or inequitable but the court further said:

"This court has approved the principle laid down in many cases that a sale enmasse, when less would be sufficient, will be declared void, and generally it is the duty of the officer to sell by parcel and not the whole tract in one entire sale."
(Italics added)

The Coulter case supports the contention of respondent and is in harmony with the trial court's decision in the instant case.

In Reed v. Gourley, Tex. C.A.; 109 S.W. (2d) 242 there was no proof whether or not the property was sold in bulk or in separate parcels.

The cases of Solomon v. Neubrecht and Smith v. Randall have heretofore been distinguished.

In Clark v. Fell, 139 Pa. 469; 22 Atl. 649 there was no evidence that personalty was available or that sheriff did not attempt to levy on personalty. The court said, "the presumption is that a sheriff who has levied an execution on real estate without making a return that there was no personalty, did his duty and that there was no personalty."

In the instant case deputy sheriff Bleak testified to the fact that he made no effort to levy upon personalty.

The case of Jacobsen v. Wigen, 52 Minn. 6; 53 N.W. 1016 is favorable to respondent and the law therein stated is applicable to respondent's case. Under 2 of the syllabus we find the following:

"So an execution sale of real estate where there is personal property subject to levy, within the knowledge of the execution creditor is not absolutely void; but if prejudicial, and especially if fraudulent or unconscionable, such sale may be set aside or vacated and the proper relief may be sought in a suit in equity brought directly for such purpose."

In Bock v. Losekamp, 179 Cal. 674; 179 Pac. 516 the purchaser at the sale was not a party to the action but a stranger, the judgment debtor knew of the entry of the judgment; three futile demands for payment of the judgment were made on the debtor's attorneys. It was not

claimed or found that there was any irregularity in the proceedings connected with the sale. This case cites and distinguishes the earlier California case of *Odell v. Cox*, 90 Pac. 194 in which we find 1 of the syllabus reading as follows:

“Though mere inadequacy of price is not sufficient grounds for vacating an execution sale, it is a circumstance to be considered in connection with other circumstances. Where property worth \$2,000 was sold at execution sale to the creditor for \$26.50, and the execution debtor’s ignorance of the levy and sale was excusable, the sale will be vacated, though statutory notice of the sale was given.”

It is most unusual to find a case which so definitely supports respondent’s contention and the trial court’s finding as does the *Odell v. Cox* case *supra*.

In *Mortimer v. Young*, 53 Cal. App. (2d) 317; 127 Pac. (2d) 950 also cited by appellant under subdivision 5, we find the case was controlled by section 692a of the Code of Civil Procedure of California which requires demand for notice of sale to be given, complainant made no such demand and could therefore not complain of having received no notice.

IN ANSWER TO APPELLANTS TREADWAY’S BRIEF

Preliminary to respondent’s argument to appellants Treadway respondent cites:

66 C. J. 1131, sec. 968. Records—(a) General.

“Constructive notice arising from the registry of instruments is purely a matter of positive

statutory regulation, but registry laws have been widely passed, the intention being to do away with all notice, other than that given by statute, except actual notice in fact. When the statutory requirements are substantially complied with, subsequent purchasers are charged with constructive notice of the record, which is as effectual in law as actual notice. The presumption of notice thus raised is conclusive and incontrovertible, and proof of actual notice is dispensed with."

Sec. 969. Duty of Searching Record and Right to Rely Thereon.

Where titles to real estate are of record, it is the duty of a purchaser, in the absence of any special agreement, to search the public records for himself, and to make a complete examination of such records, for such information as they may contain regarding the validity of the title of the real estate he would purchase. The intending purchaser is not required to do more than to examine the public records in order to ascertain the state of the recorded title, and, if he find this complete, he can purchase with safety.

"ABSTRACT. A party is not entitled to rely on an abstract but is charged with notice of all matters affecting his title which are of record."

Sec. 970. FACTS OF WHICH RECORD IS NOTICE.

An instrument properly recorded is notice of all the facts therein expressly set forth, and also of all other material facts which an inquiry thereby reasonably suggested would have disclosed. (And see long line of cases cited in support of this principle.)

Sec. 57-3-2 UCA 1953 provides:

“Every conveyance, or instrument in writing affecting real estate, executed, acknowledged or proved, and certified, in the manner prescribed by this title, and every patent to lands within this state duly executed and verified according to law, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lienholders shall be deemed to purchase and take with notice.”

In the annotation to the above section is found under subdivision 5 the case of *Crompton v. Jenson*, 78 U. 55, 70, 1 P. 2d 242 which holds as follows:

“One who deals with real property is charged with notice of what is shown by the records of the county recorder of the county in which the real property is situated.”

The county records as reflected by the abstract of title (Ex. 4) at entries No. 40, 41, 42 and 43 set forth the execution, the sheriff's certificate of sale and sheriff's deed. The execution reflects that same was issued upon a judgment of \$22.80 and the sheriff's certificate of sale and the sheriff's deed sets forth the nineteen lots, the subject of this action, which were purchased at sheriff's sale for \$47.46.

It is clearly evident from the above law and cases that appellant Treadways were bound not by simply that which appeared in the abstract of title but that which appeared of record, and as heretofore pointed out

the execution and Sheriff's Deed each recited a consideration as having been paid for 19 lots, of \$47.46.

Attention of the Honorable Court is directed to the fact that appellants Treadway willingly paid \$1000.00 for two of the nineteen lots. Such valuation placed on the property by these appellants themselves, appellants must have assumed the whole of the property to be worth not less than \$8000.00, which property was procured for a mere pittance of \$47.46. Such would have put any person of common reason and prudence on inquiry as to the regularity of the proceedings by which the party from whom they were acquiring title came into title. Not only this but it was evident that the property had been sold enmasse, that more than enough property had been sold than was necessary to satisfy the judgment, and that personalty was not exhausted before the real property was levied upon and sold.

Recognizing weakness in the title, counsel for Treadways did make some investigation as to the regularity of the proceedings leading up to the sale but strangely, counsel went to the one who brought about the irregularities instead of to the proper source. Is it reasonable to expect that the one who must defend the title would admit of irregularities?

The editors of American Jurisprudence at Vol. 55, page 1081, Sec. 703 say:

“In any event, the law does require reasonable diligence in ascertaining any defect of title, and mere inconvenience will not excuse the failure to perform this duty. Moreover, the inquiry

must be made at a reliable source from which the true state of facts will be naturally disclosed; it is not sufficient that the purchaser make an inquiry of a person when he knows that it is to such person's interest to misrepresent or conceal the existence of the outstanding interest, and that such person does deny its existence."

The Supreme Court of this state is committed to the rule that where a recent and immediate grantor's deed in a chain of title shows on its face that the grantor paid a nominal consideration for the property being conveyed it puts the purchaser on notice, and he must make an inquiry as to whether or not grantor had a right to convey property and whether it was subject to other unrecorded and outstanding interests.

See *Lawley et al. vs. Hickenlooper et al.*, 61 U. 298, 212 Pac. 526.

Respondent is mindful of the fact that subsequent to the *Lawley vs. Hickenlooper* case the Legislature has passed a statute, Chapter 106, 1945 Session Laws, which provides that a nominal consideration in the deed is no longer notice of outstanding equitable interests.

In *Pender v. Bird*, (Utah) 224 P2d 1057 this court had occasion to consider a transfer of title predicated on a quit claim deed to property of considerable value when a consideration of \$25 was paid for the deed and in which case Mr. Justice McDonough, speaking for the court, said:

"The (recording) statute was not enacted to protect one whose ignorance of the title is

deliberate and intentional, *nor does a mere nominal consideration satisfy the requirements that a valuable consideration must be paid.*" (Itallics added)

We believe it was not the intention of the legislature to make Chapter 106 applicable to those transfers in which the instrument reflects and is intended to reflect the actual consideration, such as a sheriff's deed. We contend that the statute covers voluntary conveyances in which actual consideration is not expressed and not non-voluntary conveyances in which true consideration is expressed.

In the case of *Hart v. Parrish*, 244 S.W. (2d) 105, supra the Supreme Court of Missouri held that a subsequent grantee in the immediate chain of title was not an innocent purchaser where the Sheriff's deed recited a consideration of \$37.50 and the property had a value of \$3500.00, the court said:

"When the deed of trust was executed August 23rd, 1948, defendant-appellant Mittler, beneficiary in the deed of trust, had constructive notice of the sheriff's deed priorly recorded August 20th, 1948, Sec. 442.390, R.S. 1949. The recorded deed recited a consideration of \$37.50. The described property was admittedly of the fair market value of \$3500.00. Defendant, cross-appellant Mittler had inspected the property sometime in July 1948. He testified, 'I know property when I see it.' Mittler testified he had made the loan to plaintiffs on August 14th, at which time he 'did not know who owned the property.' He said: 'when you make a loan to

a man who is a friend of yours you loan him money of his face if necessary.' Appellant Mittler testified he was depending on plaintiff Hart's 'knowledge of the transaction,' and upon Hart's judgment as to the title. Plaintiff was familiar with the property and knew defendant-respondent Lillian Parrish, widow of Charles H. Parrish, was in possession, 'living on the property'. In these circumstances it should not be held Mittler had no notice of the sale upon which defendant, Lillian Parrish, had relied for cancellation."

This appellant also argues as does appellant Dowse that the sale was not void, but voidable only. We have fully answered this argument under the Dowse section of this brief.

Appellant Treadway takes the position that he obtained from Dowse a better title and a stronger position as to respondent than Dowse enjoyed. This is not the law for it has been repeatedly held that a judgment creditor who purchases at his execution sale is not a bona fide purchase, and that he is chargeable as a matter of law with notice of all irregularities attending the execution and sale.

Simons vs. Clark, 99 Pac. 739;

Hazelwood v. Jenkins, 205 Pac. 1038;

Kuehn v. Kuehn, 259 S.W. 290;

Anderson Buick Co. v. Cook, 110 P2d 857;

Tallyn v. Cowden, 290 Pac. 1005;

Badin v. Henry McCleary Timber Co., 289;
Pac. 1016;

Bradt v. Beloit Dary Co., 230 N.W. 135.

Thus it follows as a corollary to this doctrine that one taking title through a judgment creditor who purchased at the execution sale is not a bona fide purchaser. In support of this position we cite 33 C.J.S. Sec. 296 at page 589 reading as follows:

“Purchasers from judgment creditor. If a judgment creditor purchasing at an execution sale is not regarded as a bona fide purchaser, (Sec. 295), a party claiming under such judgment creditor is not an innocent purchaser, and acquires no better title than that of the judgment creditor, at least where he has notice of facts placing him on inquiry.”

The record affecting the property being purchased by appellants Treadways did disclose the amount of property acquired at sheriff's sale, the price for which it was acquired and the fact that the property was not contiguous and further the fact that more than enough property to satisfy the amount of the judgment was sold under execution.

SPECIAL WARRANTY DEED

It is further respondent's contention that appellants Treadway were not bona fide purchasers without notice, this inasmuch as these appellants accepted a special warranty deed and did not insist on a general warranty deed. The special warranty deed put Treadways on notice of the fact that appellant Dowse was conveying only such right, title and interest as he himself had in and to the premises. The special warranty deed was

accepted notwithstanding the fact that appellant Dowse had agreed to convey the property to Treadways by a general warranty deed.

Although the authorities are not in harmony, the general rule appears to be that where a grantor gives a special warranty deed conveying all his right, title and interest it puts the purchaser on notice of infirmities in the title, this is especially true under the circumstances of this case.

In 66 C.J. at page 1098 the law is stated as follows:

“A purchaser need not claim under a general warranty deed to entitle him to the defense of bona fide purchaser, if the deed purports to convey the land itself and not merely the grantor’s title or interest therein, and the fact that it contains a limited or special warranty, or no warranty at all, cannot of itself impute notice of prior or lateral equities, so as to preclude one claiming under such a deed from being a bona fide purchaser, *although, on the other hand, it has been held that a deed with only a special covenant of warranty raises a presumption of knowledge by the grantee that the title is defective.* But one who takes property under a deed containing an express exclusion of warranty of title, and as to which there is a complete chain of title, to another on record, is not a bona fide purchaser.” (Italics added).

Thus it appears that that which the record title reflected, namely, that the gross lack of consideration, sale enmasse of 19 lots which consisted of three separate

parcels, more than sufficient property sold than necessary to satisfy the judgment, the sheriff's return failing to show that personalty was exhausted before levying upon the real property, the excessive levy and the failure of appellant Dowse to convey title by a general warranty deed as he had agreed, most certainly placed Treadways on notice of irregularities and defects and he cannot now claim to be a bona fide purchaser.

Having made an investigation and having recognized infirmities, inadequacy of price and irregularities, these appellants cannot now say they were innocent purchasers for value.

IN ANSWER TO APPELLANT WHITAKER'S BRIEF

A complete answer to the arguments and contentions of appellant Whitaker is heretofore set forth.

It should be remembered that appellants Whitaker and Dowse were close friends and had been for a long period of time, that they visited each other at least once each week, that they had had numerous business transactions, both prior to the time the mortgage was placed on the corner lots and subsequent thereto. That at the time the mortgage was given and when the foreclosure thereof was instituted they were jointly interested in several properties in Salt Lake County.

The fact that appellant Dowse permitted the interest on the mortgage to become delinquent and to permit

the foreclosure of the mortgage covering the corner lot which has a value without contradiction of at least \$6,000.00 as was testified to by Mr. LeCheminant, risking the total loss of the property mortgaged, without any apparent effort on the part of appellant Dowse to so much as pay the interest is the clearest evidence of collusion on the part of Dowse and Whitaker.

It is further evident that as a part of the connivance they obtained title insurance on the property in an amount necessary to cover the mortgage. This of course does not excuse the title company for having issued the policy in the face of all that appeared of record, but it does go to show that it is all part of a well planned scheme of these two appellants to protect their every move in the transaction.

It is further clearly evident that little time was lost by appellant Dowse in placing a mortgage on the corner property after having acquired the sheriff's deed thereto. Does Mr. Whitaker expect the court to believe if this were a bona fide transaction in all respects that Mr. Dowse would permit a foreclosure of the mortgage to be entered when but two interest installments were due and owing thereon? In such cases where fraud is so apparent, the trial court was not bound by that which appeared on the record alone but it is within the discretionary power of the court to look behind the evidence and to determine that which is at the very foundation of the fraudulent acts of the parties.

This appellant in setting out the status of the title to the nineteen lots executed upon, urges on this court as he did in the trial court that Lots 13 to 21, Block 8, were subject to a lien of judgment in favor of Carl Morandi for \$3,086.44 (Ex. C). It is evident that no money judgment lien stood against respondent in favor of Carl Morandi as appellant would have this court believe, but the same was a judgment in favor of respondent and against Morandi quieting title in respondent to certain property therein described, subject to the payment by respondent to Morandi of taxes, interest, penalty and costs in the sum of \$3,086.44. Judge Neely, counsel for Morandi, testified to the fact that it was never intended that a judgment be entered against respondent in favor of Morandi. By this same kind of argument at the trial of the case appellant attempted to depreciate the value of respondent's interest in the properties executed upon and sold at sheriff's sale.

The evidence in this case very clearly shows that appellant Whitaker is not a bona fide mortgagee for value without notice of title defects, but on the contrary it is evident that this appellant was a party to the fraud perpetrated on respondent.

STABILITY OF LAND TITLE DERIVED THROUGH JUDICIAL PROCESS

It is believed the case of *Dunn v. Poncelier*, 193 So. 723, 236 Ala. 53, completely answers the appellant's

argument that the stability and marketability of real property requires a reversal of the trial court's decision. In the Dunn case the court said:

“What was said by Brickell, C. J., in Ray's *Adm'r. v. Womble*, *Supra*, is here pertinent and settles this question adversely to the contention of appellant. ‘While it is the policy of the law to protect purchasers at judicial sales and to inspire confidence in their validity, it is equally its policy to prevent such sales from being perpetrated into instrumentalities of oppression and confiscation of men's estates. It was the clear duty of the sheriff in which he would have been fully protected, to have postponed the sale, returning the execution, stating the facts and that the lands had not been sold for want of bidders.’ *Powell v. Governor*, 9 Ala. 36; *Lankford v. Jackson*, 21 Ala. 650; *Henderson vs. Sublett*, 21 Ala. 626. The sale, under the facts appearing in the record were mere spoilation and not the execution of the process of the court. There can be no hesitancy in pronouncing it invalid and decreeing its vacation and a cancellation of the deed of the sheriff.”

CROSS-APPEAL

(1) The court erred in awarding punitive damages in the sum of \$500.00 only in respondent's claim for slander of title.

(2) The court erred in allowing respondent the sum of \$1,000.00 attorney's fee only under his claim for slander of title.

ARGUMENT

The court having found that the appellant Dowse had executed upon and sold respondent's property upon a satisfied judgment, it decreed a judgment slander of title holding that appellant Dowse had intentionally and maliciously slandered respondent's title to his property. For this the court awarded but the sum of \$500.00 punitive damages and \$1,000.00 attorney's fees.

We submit that under the circumstances of this case that the punitive damages awarded should have been not less than \$2500.00.

The uncontradicted evidence was that a reasonable attorney's fees incurred in this action for slander of title was \$1500.00, however the trial court awarded only the sum of \$1,000.00.

Respondent therefore respectfully submits that the trial court erred in setting punitive damages in the sum of \$500.00 and attorneys' fees in the sum of \$1,000.00 and respondent respectfully requests that this court enter a mandate requiring the trial court to enter punitive and exemplary damages in the sum of \$2500.00 and attorneys' fees in the sum of \$1500.00 in the slander of title of respondent.

WHEREFORE, respondent respectfully submits:

That the judgment of the trial court vacating and setting aside the sheriff's deed to the appellant Dowse and the deed of the appellant Dowse to the appellant's Treadway and the mortgage be sustained and that a

mandate be issued from this court ordering the trial court to modify the judgment in the slander of title action setting the respondent's punitive and exemplary damages in the sum of \$2500.00 and \$1500.00 attorneys' fees.

Respectfully submitted,

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