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Victor L. Peterson v. William D. Callister et al : Brief of Appellant

Utah Supreme Court

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Ralph J. Hafen; William D. Callister; Attorneys for Defendant and Appellant;

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In the Supreme Court of the State of Utah

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VICTOR L. PETERSON,

Plaintiff and Respondent,

vs.

WILLIAM D. CALLISTER, et al.,

Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No. 8584

APPELLANT'S BRIEF

RALPH J. HAFEN and WILLIAM D. CALLISTER

Attorneys for Defendant and Appellant.

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VICTOR L. PETERSON,

Plaintiff and Respondent,

vs.

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Defendant and Appellant.

Case No. 8584

APPELLANT'S BRIEF

STATEMENT OF FACTS

The above-entitled cause of action presents a contest between the holder of a tax title, the Plaintiff and Respondent herein, and the owner of the legal title, the Defendant and Appellant herein.

Said cause came on for trial on May 22nd, 1956, in the San Juan County District Court, before the Hon. F. W. Keller, Judge, sitting without a jury.

The record shows that one Freland Bales secured a patent to the property which is subject to the suit, from the United States on November 8th, 1926, recorded August 5th, 1930, in the San Juan County records. (Page 1, Abstract of Title, Plaintiff's Exhibit "A".) On September 1st, 1948, the said Freland Bales and Mildred Bales, his wife, quit-claimed to Defendant, William D. Callister, which deed was recorded September 7th, 1948, in the San Juan County records. (Page 4, Abstract of Title, Plaintiff's Exhibit "A" and Defendant's Exhibit 2.)

Page 2 of said Plaintiff's Exhibit "A" shows a document entitled "Auditor's Tax Deed" dated March 12th, 1932, whereby said property purportedly was conveyed to San Juan County by the County Auditor. In this document there was no reference to the year for which the property was assessed. Page 3 of said Abstract shows a document entitled "Tax Deed" dated February 9th, 1944, whereby said property purportedly was conveyed by San Juan County to Victor L. Peterson, the Plaintiff herein. Neither of these two deeds was acknowledged or witnessed, although they were recorded in the County records.

The other documents contained in said abstract are not material to the issues raised in this appeal.

It was stipulated between counsel for the respective parties hereto that the assessment roll for the year 1927 did not have attached thereto the two auditor's affidavits required by law. (Page 15 of Transcript.)

From the evidence, it is quite clear that the Plaintiff and

his family lived on the premises from about 1943 until the action was filed; that they had a home on the property; had cleared and cultivated about 100 acres and had grazed the balance thereof; and that they had enclosed the property with fencing, although there is no evidence as to the date the fencing was constructed. (Pages 6 to 13 of Transcript.)

Plaintiff's Exhibit "B", admitted in evidence, is a statement by the San Juan County Treasurer, setting forth the taxes and payment thereof from 1945 to 1955. The property was assessed to Victor L. Peterson each year. The property went to treasurer's tax sale for the years 1945 and 1946, and redemption thereof was by Victor L. Peterson on March 4th, 1947. The property also went to treasurer's tax sale for the years 1947 and 1948, and redemption thereof was by Mrs. V. L. Peterson on February 17th, 1949. The property also went to treasurer's tax sale for the year 1949, and redemption thereof was made May 15th, 1954, by Victor L. Peterson, at the May sale at the expiration of the redemption period.

This exhibit also shows that the taxes for the year 1950 were paid, but no date or name of payor is shown. The taxes for the years 1951, 1952, 1953 and 1954 were paid before delinquency. The taxes for 1955 were paid after the commencement of the within suit.

At the conclusion of the trial, the Court found the issues for the Plaintiff and against this Defendant, quieting title in said Plaintiff, and findings, conclusions and decree were signed and filed accordingly. From this decree, the Defendant William D. Callister appealed.

STATEMENT OF POINTS

1. Plaintiff has not established a valid tax title.
2. Plaintiff has failed to establish any title whatsoever.
3. Legal title holder is not barred by the four-year adverse possession or limitation statutes on tax titles.
4. Legal title holder is not barred by the seven-year adverse possession or limitation statutes.

ARGUMENT

POINT 1.

PLAINTIFF HAS NOT ESTABLISHED A VALID TAX TITLE.

Plaintiff, in introducing in evidence the Abstract of Title, Exhibit "A", which contains the patent to Bales and Bales' subsequent quit-claim deed to this Defendant, established this Defendant's legal title. In order to prevail, it is mandatory either that Plaintiff prove a valid tax title, or that he prove adverse possession of the property, or that he establish a statutory limitation as a bar to the defense.

Plaintiff and this Defendant stipulated that the auditor's affidavits required by law (Compiled Laws of Utah 1917, Paragraphs 5982 and 6006) were not attached to the assessment roll for the year 1927, which appears to be the year the taxes became delinquent, and for which the property went to treasurer's tax sale.

Our Supreme Court has held, repeatedly, that the failure of the county auditor to attach either one of these two affidavits voids the treasurer's tax sale, and the subsequent auditor's tax deed. Please see *Telonis v. Staley*, 104 Utah 537, 144 Pac. (2) 513; *Tree v. White*, 171 Pac. (2) 398; *Petterson v. Ogden City*, 176 Pac. (2) 599; *Equitable Life and Casualty Insurance Co. v. Schoewe*, 105 Ut. 569, 144 Pac. (2) 526. In the last cited case, at page 527, the Court stated: "We hold that both of these auditor's affidavits are essential, and that both must be executed and attached to the assessment roll . . . By reason of the failure of the County Auditor to execute and attach his affidavits to the assessment roll as required by the statutes, the tax sale for the year 1936 was invalid, and the tax deed issued to Plaintiff and Appellant is likewise invalid."

Thus, for the lack of the two auditor's affidavits on the assessment roll in the instant case, Plaintiff's tax title is defective and void.

There are three other reasons why Plaintiff has not established a valid tax title.

First, he did not put in evidence the treasurer's tax sale certificate for the year 1927, the year for which the property went to sale. It is elementary that this evidence is vitally essential in establishing the chain of events to prove a tax title.

Second, the auditor's tax deed (page 2 of abstract of title, Plaintiff's Exhibit "A") did not have any reference to the year for which the taxes were assessed, as required by Compiled Laws of Utah, 1917, Paragraph 6030.

Third, neither the auditor's tax deed nor the deed from the County to the Plaintiff (Pages 2 and 3 of Plaintiff's Exhibit "A") was acknowledged or proved as required by our statutes in proving conveyances of real property. However, the argument on this matter will be set out at length under Point 2.

Consequently, there is but one conclusion, and that is, that Plaintiff failed completely to prove a valid tax title.

POINT 2.

PLAINTIFF HAS FAILED TO ESTABLISH ANY TITLE WHATEVER.

This Defendant takes the position that the Plaintiff not only has failed to show a valid tax title, but has absolutely failed to show any title in himself whatever.

The attention of this Court is respectfully called to Section 1-1-15, Utah Code Annotated 1953, which provides that an abstract of title "shall be received by the courts of this state as prima facie evidence of its contents . . ."

Plaintiff's Exhibit "A", an abstract of title, contains an auditor's tax deed followed by a deed from the County to the Plaintiff (Pages 2 and 3, Plaintiff's Exhibit "A") both of which are essential to establish any title in Plaintiff. There was no other evidence of title. Neither document was acknowledged; neither was witnessed.

It might be pointed out here that all other documents in the abstract were either acknowledged, or were subscribed

and sworn to before a notary. So, this does not seem to be just an abstractor's mistake.

Thus, under the provisions of Section 1-1-15, Utah Code Annotated 1953, as set out above, all the trial court had before it was prima facie evidence of two documents entitled "deeds" which were not acknowledged or witnessed.

Let us now consider the statutes relating to the proving of execution of conveyances.

Section 57-2-1, Utah Code Annotated 1953, reads as follows: "Manner of acknowledging or proving conveyances.—Every conveyance in writing whereby any real estate is conveyed or may be affected shall be acknowledged or proved and certified in the manner hereinafter provided."

Then follow several sections relating to the manner of taking acknowledgments, including Section 57-2-7, which sets forth the form of the certificate itself.

Section 57-2-10, Utah Code Annotated 1953, reads as follows: "Proof of execution—How made.—The proof of the execution of any conveyance whereby real estate is conveyed or may be affected shall be:

(1) By the testimony of a subscribing witness, if there is one; or,

(2) When all the subscribing witnesses are dead, or can not be had, by evidence of the handwriting of the party, and of a subscribing witness, if there is one, given by a credible witness to each signature."

Following this section are several others relating to other

details of the proof, including Section 57-2-13, which sets forth the form of the certificate to be used in such proof.

In view of the foregoing, we are not concerned here merely with the identification of documents for admission into evidence, nor merely with the formalities incident to recording. We are concerned with the establishment of the execution of conveyances of real property. Definitely, the requirements of the foregoing statutes are clear, and they are mandatory.

Although the statutes provide two methods, either by acknowledgment of the conveyance, or the proving of the execution of the conveyance by a subscribing witness, neither requirement was met in the instant case.

Section 57-1-13, Utah Code Annotated 1953, after setting forth the form of quit-claim deed, reads as follows:

“Such deed when executed as required by law shall have the effect of a conveyance of all right, title, interest and estate of the grantor in and to the premises therein described and all rights, privileges and appurtenances thereunto belonging, at the date of such conveyance.”

But these two deeds were not “executed as required by law.” As a result, they do not have the effect of conveying the right, title, interest and estate of the grantors.

Thus, the Plaintiff has failed to establish the execution of the conveyances in his chain of title. And having failed to establish the conveyances, he has failed to establish the title itself, upon which he relies. In fact, he has established no title in himself at all, either valid or invalid.

This step in Defendant's argument is preliminary to Point 3 which follows.

POINT 3.

LEGAL TITLE HOLDER IS NOT BARRED BY THE FOUR-YEAR ADVERSE POSSESSION OR LIMITATION STATUTES ON TAX TITLES.

From Plaintiff's Findings of Facts and amendments thereto (Pages 36 and 55 of the Record), it appears that the Plaintiff relied upon the provisions of Chapter 19, Laws of Utah 1951, which is a four-year adverse possession statute and a four-year limitation statute on the holder of a legal title out of possession, wherein a tax title is involved.

This Defendant contends that the Plaintiff has not introduced sufficient evidence to come within the provisions of this act. Let us first consider the definition of a "tax title" as provided in said act.

"Section 104-2-5.11. The term tax title as used in Section 104-2-5.10 and section 80-10-68.10, and the related amended sections 104-2-5, 104-2-7, and 104-2-12, means any title to real property, whether valid or not, which has been derived through or is dependent upon any sale, conveyance or transfer of such property in the course of a statutory proceeding for the liquidation of any tax levied against such property whereby the property is relieved from a tax lien."

As set out above, in order for Plaintiff to come within the protection of this act, he is required to prove the following three facts:

First, that he has a title, whether valid or not.

Second, that he received it in the course of a statutory proceeding for the liquidation of a tax levied against the property.

Third, he is required to show that the property is relieved from a tax lien.

These requirements are specific and definite. If Plaintiff has failed to show any one of them, he cannot avail himself of the provisions and benefits of the act.

Now let us look at the evidence, or rather the lack of evidence.

As set forth in Point 2 above, Plaintiff in introducing deeds essential to his title which were not acknowledged or proved as required by law, established no title whatsoever, valid or otherwise. Consequently, he has failed in the first requirement of the definition of a tax title.

In regard to the second requirement of the above definition of a tax title, he did not put in any evidence of a tax levied against the property for the year 1927, the year for which it presumably went to sale, which was subsequently liquidated. Thus, he has failed in this requirement of the definition.

Plaintiff put in absolutely no evidence of a tax lien, from which the property was relieved. The only evidence whatsoever that referred to any tax was the auditor's tax deed, defective as it was, and it was not competent to show either the tax or the lien.

Had Plaintiff put in evidence a certified copy of the treas-

urer's tax sale certificate, showing the tax and subsequent sale for the unpaid 1927 taxes, then the second and third requirements of the definition set forth above might have been met. Having not done so, he has completely failed to prove a tax title as defined.

Consequently, the Plaintiff, having failed completely to establish all three requirements of the definition of tax title set forth in Chapter 19, Laws of Utah 1951, all of which are essential to bring him within the protection of its provisions, cannot successfully contend that Defendant's legal title is barred by its limitation provisions. Nor can he successfully contend that his title is established by the adverse possession provisions thereof.

By way of passing, this Defendant points out that the findings of facts do not set out the three requirements of the statutory definition of a tax title. Consequently, they are defective, and are insufficient to support the conclusions of law and decree.

POINT 4.

LEGAL TITLE HOLDER IS NOT BARRED BY THE SEVEN-YEAR ADVERSE POSSESSION OR LIMITATION STATUTES.

Inasmuch as the Plaintiff has failed to prove sufficient facts to come within the provisions of the four-year statute favoring tax deeds, the question now arises whether he has complied with the requirements of the seven-year statute on adverse possession.

According to the provisions of Section 78-12-12 of the Judicial Code, Utah Code Annotated 1953, and the provisions of Section 104-2-12, Chapter 19, Laws of Utah 1951, the payment of taxes lawfully assessed for a period of seven years is necessary to establish adverse possession.

However, the evidence in this case (Plaintiff's Exhibit "B") shows that the property involved in this suit went to treasurer's tax sale for unpaid taxes during the years 1945, 1946, 1947, 1948, and 1949. Redemption subsequently was made of each sale, the sale for the 1949 taxes being made five years thereafter, on May 15th, 1954, at the final May sale.

According to the decision of this Court in *Bowen v. Olson*, 2 Utah (2) 12, 268 Pac. (2) 983, redemption from a treasurer's tax sale is not the payment of taxes as required by our adverse possession statutes. Applying this to the instant case, the taxes for the years 1945 to 1949 cannot be counted. From the evidence, we do not know who paid the 1950 taxes, or when. Thus, the only taxes lawfully assessed which were paid and which may be computed in behalf of the Plaintiff are those for the years 1951, 1952, 1953, and 1954. The action was filed before payment of the 1955 taxes. But this is only four years, and not seven.

Consequently, the only conclusion that can be reached is that, again, Plaintiff has failed to prove his case and defeat this Defendant's legal title.

CONCLUSION

By way of summary and conclusion, the following are evident from the facts and the law of the instant case:

1. This Defendant's legal title was established by the evidence.

2. This Defendant's legal title was not defeated by a valid tax title in Plaintiff.

3. Plaintiff completely failed to establish any title in himself whatever, either valid or otherwise.

4. Plaintiff failed to introduce sufficient evidence to bring him within the protection of the four-year statute favoring tax titles, to defeat this Defendant's legal title.

5. Plaintiff, in failing to prove payment of taxes for seven years as required by the adverse possession statutes, has not defeated this Defendant's legal title.

Thus, inasmuch as the Plaintiff has failed as set forth above, it is respectfully urged by this Defendant that the decree of the District Court be reversed; that a decree be entered against the Plaintiff and in favor of the Defendant William D. Callister, adjudging and decreeing that he is the owner in fee simple of the property subject to the suit.

Respectfully submitted.

RALPH J. HAFEN and WILLIAM D. CALLISTER
Attorneys for Defendant and Appellant.