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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

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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

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

The appellant has given an accurate statement of the facts in his brief excepting statements made in Paragraph 2 on Page 4. The appellant's statement, however, emphasizes claimed irregularities supporting plaintiff's title.

The record discloses that the land in question was patented to Freeland Bales on November 8, 1926, but that he did not record this patent until August 5, 1930 (Page 1, abstract of title, plaintiff's Exhibit A). One year after he received this patent he allowed the taxes to go delinquent and never did pay the taxes for 1927 nor any other subsequent years. This property went to tax sale to San Juan County in 1927. The tax sale was not redeemed. Taxes for the subsequent

years, 1928, 1929 and 1930, were not paid and on March 12, 1932, an Auditor's Tax Deed was issued conveying the property to San Juan County because of the nonpayment of taxes by the original owner.

The original owner did nothing about paying these delinquent taxes or purchasing the property from the County. Title to the property remained in San Juan County for a period of 8 years from 1932 to 1940, at which time the plaintiff contracted the San Juan County Commissioners and arranged to purchase the property under a contract of sale. Plaintiff paid the agreed consideration to the County, and a Tax Deed was issued to him on February 9, 1944 (Page 3, abstract of title, plaintiff's Exhibit A). The plaintiff has each year since 1944 paid the taxes in full either by payment before they were delinquent or by redeeming them during their redemption period.

The original owner, Freeland Bales, did nothing with the land and apparently made no claim to it, and on September 1, 1948, he executed a Quitclaim Deed to William D. Callister, defendant and appellant herein, for the sum of \$10.00 and other consideration (Page 4, abstract of title, plaintiff's Exhibit A). Mr. Callister did nothing with the land, paid no taxes, but after land values had risen in San Juan County and after the plaintiff had cultivated and improved the property and made it an operating farm, and after plaintiff filed his suit to quiet title, defendant, after a lapse of time of approximately 29 years from the time of the first delinquent tax sale in 1927,

comes into Court and defends the action and claims that he is the owner.

At page 4, paragraph 2, of appellant's brief, appellant states that in the Auditor's Tax Deed there is no reference to the year for which the property was assessed and later on in his brief claims that this is fatally defective. The Auditor's Tax Deed which appears at page 2 of the abstract of title, plaintiff's Exhibit A, does state the year for which the taxes were assessed and not paid. The following language appears on page 2 of the abstract.

“Deed issued pursuant to Certificate of Sale by E. L. Jones, as County Treasurer of San Juan County, dated December 21, 1927, for delinquent taxes in the amount of \$32.74.”

The appellant's statement of fact mentions that Exhibit B shows the payment of taxes. The taxes were paid before they were delinquent by Victor L. Peterson for 4 consecutive years before the law suit was filed, 1951 to 1954 inclusive. This same Exhibit also shows that he paid the taxes before they were delinquent for 1955, but this payment was made after the suit was commenced.

STATEMENT OF POINTS

In connection with this appeal the appellant has argued his case under 4 separate headings. For the purpose of replying to the argument of appellant, respondent will answer each of appellant's points, and then submit argument supporting respondent's points which are as follows:

1. Defendant is barred from asserting any right, title or interest to the land or from setting up any defense to plaintiff's complaint by the 4 year statute of limitations where the property is acquired under tax title.

2. Defendant is barred from asserting any right, title or interest to the land or from setting up any defense to plaintiff's complaint by the general 7 year statute of limitations.

3. Plaintiff has a valid title to the property under the 4 year statute of limitations on tax titles plus exclusive possession during this period and the payment of taxes during the 4 year period.

ANSWER TO APPELLANT'S ARGUMENT

Defendant's point No. 1 is that "Plaintiff has not established a valid tax title." In answer to this point plaintiff admits that it has not established a valid title through the tax proceedings alone, because as stipulated at the trial, the Auditor's Affidavit was not attached to the 1927 tax sale record. We admit this but assert that we do not admit all of the proceedings in the tax sale being invalid. We do rely on the issuance of an Auditor's Tax Deed in 1932 conveying this property to San Juan County for nonpayment of taxes and the subsequent purchase of this tax title by the plaintiff from San Juan County in 1944. At the time of the purchase of this land from San Juan County on February 6, 1940 (Page 3, plaintiff's Exhibit A) plaintiff went into possession of the property in 1943 and has farmed the land, grazed it,

fenced it, cut wood and posts from it, and held it openly, continuously and adverse to the defendant and to the exclusion of the defendant. He has also paid the taxes and has established a title by adverse possession under the 4 year statute for tax titles which will be discussed later on as plaintiff's point No. 3.

As point No. 2 defendant states "Plaintiff has failed to establish any title whatsoever." In answer to this claim plaintiff relies on the Auditor's Tax Deed at page 2 of the abstract, plaintiff's Exhibit A, and the Tax Deed from San Juan County to plaintiff at page 3 of the same abstract and exhibit. Defendant claims that these instruments are defective in that they do not show they are witnessed and do not show an acknowledgment. These instruments were not set forth in full in the abstract and were not intended as full instruments. They are both briefed down as abstract entries and under Section 1-1-15, UCA, 1953, are prima facie evidence of their contents. If defendant claims that the Auditor's Tax Deed and the Tax Deed from the County to the Plaintiff were defective in the abstract and the abstract did not correctly show the instruments or their contents briefed down, defendant should have then gone forward and introduced the entire instruments in evidence. They were both recorded and available for the defendant to introduce as evidence at the trial if he claimed that they were defective in any way.

The abstract of title showing the conveyances against a particular tract of land is by nature briefed

down and it does not purport to show the instruments in full nor all of the recitations in the instruments. An abstract of title is defined as follows:

“An abstract of title is a compilation in orderly arrangement and abridged form of the materials and facts of record affecting title to a specific piece of land . . . a short methodical summary of the documents and instruments of record, . . . a short account of the state of the title, or a synopsis of the instruments which show title, . . . It is not the complete evidence of the title, but a synopsis of the data as to the title.” 1 Am. Jur. page 155, Section 1.

There is no requirement in the laws that the signature to a Deed must be witnessed. As a matter of practice many deeds do show the name of the individual who witnessed the Grantor sign, but it is not essential for the validity of the deed.

Defendant claims that the instruments are also defective because there is no acknowledgement shown on these two abstract entries. The fact that the abstracter did not show an acknowledgement on these two entries is not conclusive that there were no acknowledgements on the original instruments. As stated above, if defendant claims the lack of an acknowledgement as a defect in the instrument he should have introduced the full instrument in evidence to negative the prima facie showing of these two Deeds by the abstract entries.

Section 80-10-68, UCA, 1943, sets forth the form for a Tax Deed and recites that this Deed “shall be

prima facie evidence of all proceedings subsequent to the preliminary sale and of the conveyance of the property to the Grantee in fee simple." The Tax Deed at page 3 of the abstract, plaintiff's Exhibit A, conforms exactly to the form set forth in this Section. This form does not prescribe any acknowledgement and does not show any requirement for the signature of the Auditor to be witnessed. This instrument is, therefore, prima facie evidence of the regularity of all the pocedings and of the conveyance to San Juan County by Auditor's Tax Deed and the subsequent conveyance by the County of the property to Victor L. Peterson in fee simple, excepting only the admission at the trial that the Auditor's Affidavit was not attached to the 1927 tax sale. All the other proceedings to and including the issuance of the deed to plaintiff are presumed to be regular. Under this statute the Auditor's Tax Deed would, therefore, be presumed to be regular in all respects and to convey a fee simple title as far as the form and contents of the Auditor's Tax Deed is concerned, and if defendant claimed to the contrary he would have the burden of coming forward with proof to show that the Auditor's Tax Deed was defective in some respect.

Section 57-4-4, UCA, 1953, validates all instruments recorded prior to January 1, 1943, notwithstanding any defect, omission or informality in the acknowledgement of the instrument. The Auditor's Tax Deed issued March 12, 1932, would, therefore, be validated under this section even if there were a defect or omission in the acknowledgement of this instrument.

There is also a presumption that public officers have complied with the law in the execution, delivery and recording of the Auditor's Tax Deed and the Tax Deed from San Juan County. 20 Am. Jur. beginning at page 174 provides:

Section 170. "In the absence of any proof to the contrary there is a very strong presumption . . . that public officers have properly discharged the duties of their office and performed faithfully those matters with which they are charged."

Section 171. "The presumptions that public officers discharge the duties of the office and that in the discharge of such duties observe all the necessary and proper formalities imposed by law are applicable to all Federal, State, County and Municipal officers of high or low rank and to the official duties and acts of Public Boards and Commissions . . . It is the settled and well entrenched policy of the law to indulge in every reasonable presumption in favor of sustaining the ministerial acts of officers."

There would, therefore, be a presumption that these acknowledgements, if they were required, were in proper form and signed and the burden would again be upon the defendant to come forward with proof to show the contrary. *Farrer Vs. Johnson*, 271 P 2d 462, 2 Utah 2d 189 (1954).

The only purpose for an acknowledgement is to add formality to the execution of an instrument so that it can be recorded. Failure to acknowledge a

deed of conveyance does not render the instrument void or invalid as between the parties. See 57-1-6, UCA, 1953, states that a deed

“ . . . shall be valid and binding between the parties thereto without such proofs, acknowledgment, certification or record and as to all other persons who have had actual notice.”

Plaintiff was in actual possession of the land in 1948 when defendant received his deed and defendant would, therefore, be charged with notice of plaintiff's ownership and claim to the land. See Toland Vs. Corey, 6 Utah 392, 24 P. 190, affirmed 154 U.S. 499; Neponset Land and Livestock Co. Vs. Dixon, 10 Utah 334, 37 P. 573. The Auditor's Tax Deed and the Tax Deed from San Juan County would, therefore, be valid as between the defendant and San Juan County and the Plaintiff.

Defendant's argument and the citations as to the manner of acknowledging and proving conveyances has no application here because they apply only as to whether the instruments are admissible in evidence. Both instruments were admitted in evidence in plaintiff's Exhibit A under the signature and seal of the Abstract Company.

As defendant's point 3 he asserts “The legal title holder is not barred by the 4 year adverse possession or limitations statutes on tax titles.” In support of this claim defendant states that plaintiff has failed to show that the title was acquired by plaintiff in the course of a statutory proceeding for the liq-

uidation of a tax levied against the property and to show that the property is relieved from a tax lien. Plaintiff overlooks the recitations in the last paragraphs of the two Deeds at page 2 and 3 of the abstract, plaintiff's Exhibit A. Both recite that the taxes on the land were delinquent and that there was a preliminary sale in 1927. This claim is an afterthought by the defendant because his counsel at page 15, lines 20 to 25 of the transcript admits that the property was sold for non-payment of taxes in 1927.

Plaintiff was not required to introduce in evidence the Certificate of Sale as claimed by the defendant. The Auditor's Tax Deed and the Tax Deed from San Juan County were both prima facie evidence of the regularity of the proceedings prior to their issuance.

That defendant is barred by the 4 year statute of limitations on tax titles will be discussed hereafter in plaintiff's points Nos. 1 and 3.

As point No. 4 defendant asserts "Legal title holder is not barred by the 7 year adverse possession or limitation statutes." In answer to this claim plaintiff admits that the evidence does not show payment of taxes before they were delinquent for a period of 7 consecutive years, but plaintiff was in actual possession of this property since 1943, which is a period in excess of 7 years. This possession was open, notorious, exclusive and adverse to the defendant, as stated above, and was to the exclusion of the defendant. There is no evidence that defendant was in possession of the land at any time after 1932 when the Auditor's Tax Deed was issued, and defendant makes

no claim that he was in actual possession of the land after that date. Under the provisions of 104-2-5 and 104-2-5.10 of Chapter 19, Laws of Utah, 1951, which are now Sections 78-12-5.1 and 78-12-5, 2, UCA, 1953, defendant is barred from asserting any claim or title or setting up any defense to plaintiff's complaint.

This problem will be further discussed under plaintiff's point No. 2.

As conclusions defendant asks that the lower Court be reversed and that a Decree be entered against the plaintiff in favor of the defendant and appellant herein adjudging and decreeing that defendant is the owner in fee simple of the land involved in the suit. In this demand defendant exceeds the prayer of his complaint. In the prayer of his complaint defendant does not ask for any affirmative relief but only asks that the plaintiff take nothing by his Complaint. Defendant only filed an Answer, and there is no Counter Claim or Cross Complaint. Defendant is, therefore, not entitled to any affirmative relief, and there should be no Decree quieting title in the defendant, even if the court found that plaintiff was not entitled to have title quieted in him. The most that could be done would be to send the case back for new trial or to set aside the Findings and Decree Quieting Title in the Plaintiff.

ARGUMENT IN SUPPORT OF PLAINTIFF'S POINTS

POINT 1

DEFENDANT IS BARRED FROM AS-
SERTING ANY RIGHT, TITLE OR INTEREST

TO THE LAND OR FROM SETTING UP ANY
DEFENSE TO PLAINTIFF'S COMPLAINT BY
THE 4 YEAR STATUTE OF LIMITATIONS
WHERE THE PROPERTY IS ACQUIRED UN-
DER TAX TITLE.

Sections 78-12-5.1 and 78-12-5.2, UCA, 1953, set up the 4 year statute of limitations against the original owner where property has been acquired under tax title and is held and possessed by the new tax title purchaser. These two sections were formerly Sections 104-2-5 and 104-2-5.10 of the 1943 code as amended and enacted by Chapter 19 of the 1951 session laws. Section 78-12-5.3, UCA, 1953, which was formerly Section 104-2-5.11 of the 1943 code enacted by Chapter 19 of the 1951 session laws defines what is a tax title. In order to come within this definition the tax title does not have to be valid. In the words of this section it states "Whether valid or not." The tax title under these 3 Sections quoted in this paragraph originated by the Auditor's Tax Deed issued to San Juan County in 1932, which appears at page 2 of the abstract of title, plaintiff's Exhibit A. This Auditor's Tax Deed by its very terms is one of the instruments issued where the original owner has failed to pay the taxes and they have gone delinquent for a period of 4 years, after which time the County was authorized to issue an Auditor's Tax Deed conveying the property to San Juan County. The term "Auditor's Tax Deed" brings it within the provisions of Section 78-12-5.3 and shows that it was issued to relieve property for the non-payment of taxes by the original owner. In addition to this the deed itself recites that the 1927 taxes were delinquent, not paid,

and there was a tax sale on December 21, 1927, for these delinquent taxes. A period of 24 years has elapsed since this Deed was issued, and the original owner is now barred from attempting to assert his title.

Argument is made by the defendant that the Auditor's Tax Deed as it appears in the abstract entry is fatally defective. This question has already been answered heretofore in this brief. As heretofore stated Section 80-10-68, UCA, 1943, provides that the tax deed issued by San Juan County to the plaintiff herein which appears at page 3 of the abstract, plaintiff's Exhibit A, makes all of the tax proceedings including the Auditor's Tax Deed and Tax Deed from San Juan County prima facie, regular and valid. This same Tax Deed from San Juan County also recites that the taxes for 1927, 1928 and 1929 and 1930 were not paid by the original owner and that this tax title deed was issued by reason thereof.

Plaintiff's title is based on a tax title and section 104-2-7, UCA, 1943, as amended by Chapter 19, 1951 Session Laws, which is now Section 78-12-7.1, UCA, 1953, states that "He (the plaintiff herein) shall be presumed to be the owner of such property by adverse possession . . . " because defendant has not been in possession and plaintiff has paid the taxes for more than 4 years.

Plaintiff has been in actual possession of the land since 1943 and has occuppied, farmed and grazed the area continuously since then. Defendant

has not been in possession of the land since prior to 1932 and makes no claim that he was.

The lower Court found that plaintiff's title was derived from a tax title more than 4 years prior to bringing this action and that plaintiff had been in possession to the exclusion of defendant since 1943. There is an abundance of evidence to support these findings by the trial court to bring the case under these 2 statutes and the trial court should be sustained therein.

POINT 2

DEFENDANT IS BARRED FROM ASSERTING ANY RIGHT, TITLE OR INTEREST TO THE LAND OR FROM SETTING UP ANY DEFENSE TO PLAINTIFF'S COMPLAINT BY THE GENERAL 7 YEAR STATUTE OF LIMITATIONS.

These same sections mentioned above, 78-12-5.1 and 78-12-5.2, UCA, 1953, give a general statute of limitations for a 7 year period and the 7 year feature of the same statutes also bar the defendant from asserting his claim in this action. Plaintiff has been in possession and more than 7 years has expired since the Tax Deed was issued to the plaintiff in 1944. The argument supporting Plaintiff's point No. 1 is also applicable to this 7 year statute of limitations. The only difference between the 2 provisions of the same statutes is the period of time.

Any presumption that defendant may claim by reason of the patent issued to the patentee and de-

fendant's Quitclaim Deed from the patentee of the effect that the owner under a Deed is presumed to be in possession is overcome by the facts and evidence in this case showing that plaintiff has actually been in open, notorious, exclusive and adverse possession of this property since and including 1943.

The facts in this case come within the provisions of the Utah case Farrer vs. Johnson, 2 Utah 2d 189, 271 P. 2d 462, which by part of the decision held that the plaintiff in that case were barred from asserting their title under the 7 year statute of limitations, 78-12-5 and 78-12-6, UCA, 1953, and held that the parties holding this property under adverse possession were entitled to have title quieted in them.

POINT 3.

PLAINTIFF HAS A VALID TITLE TO THE PROPERTY UNDER THE 4 YEAR STATUTE OF LIMITATIONS ON TAX TITLES PLUS EXCLUSIVE POSSESSION DURING THIS PERIOD AND THE PAYMENT OF TAXES DURING THE 4 YEAR PERIOD.

In addition to the defendant being barred by the 4 year statute of limitations on tax titles and the general 7 year statute of limitations, both discussed above, in plaintiff's points Nos. 1 and 2, plaintiff has initiated a new and valid title by being fendant has initiated a new and valid title by being in open, notorious and adverse possession of property since 1943 (See page 12 of defendant's brief for supporting statement of facts.) and paying the taxes for more than 4 years. Plaintiff has paid the taxes before they became delinquent on said prop-

erty for the years 1951 to 1955 inclusive, in excess of 4 years. (Plaintiff's Exhibit B)

Plaintiff could establish a new and valid title by adverse possession under the general 7 year statute except for the fact that the taxes were not paid before they became delinquent for a period of 7 consecutive years and under the court's ruling in *Bowen vs. Olsen* 2 Utah 2nd 12, 268P. 2d 983, that redeeming the delinquent taxes for some of these years is not the same as payment. Except for these taxes being redeemed rather than paid before delinquent for the years 1943 to 1949 inclusive plaintiff would come under the provisions of this general 7 year statute. This section was amended in 1951 for the specific purpose of helping to validate these tax titles under which the plaintiff holds and plaintiff has established title under this 4 year statute of limitations.

The fact situation in this case is identical with the fact situation set forth in the case of *Hansen vs. Morris*, 3 Utah 2d 310, 283 P. 2d 884, wherein this Court upheld the validity of this 4 year statute of limitations on tax titles and quieted the title of the tax sale purchaser after he had held the property for a period in excess of 4 years after receiving a tax deed from the County, and the original owner had not been in possession during this 4 year period.

The trial court, therefore, properly found that plaintiff's title had been purchased from San Juan County by a tax deed, that his title was a tax title, that he had been in open, notorious and adverse possession of the property continuously since 1943

and had paid the taxes on said property for a period of 5 consecutive years. Pursuant to the findings the court properly decreed that plaintiff was the owner of this property. There is ample evidence to support the court's findings as detailed above.

CONCLUSIONS

1. Defendant is barred from asserting any defense to plaintiff's complaint or from asserting any right, title or interest in said property by reason of the 4 year statute of limitations on tax titles and also by reason of the general 7 year statute of limitations.

2. Plaintiff has established a good and valid title by adverse possession and payment of taxes under the 4 year statute of limitations on tax titles.

3. There was ample evidence to support plaintiff's findings and the trial court's findings and decree should be sustained.

4. Even if the lower court is not sustained, the case should be remanded back for further proceedings for a new trial and for proceedings in accordance with Section 59-10-65, UCA, 1953.

Respectfully submitted,

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