

1958

Karl R. Lyman and Edith K. Lyman v. National Mortgage Bond Corp et al : Petition for Rehearing

Utah Supreme Court

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Frandsen and Keller; Attorneys for Plaintiffs and Respondents;

Recommended Citation

Petition for Rehearing, *Lyman v. National Mortgage Bond Corp.*, No. 8633 (Utah Supreme Court, 1958).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

KARL R. LYMAN and EDITH K.
LYMAN, his wife,
Plaintiffs and Respondents,
— vs. —

NATIONAL MORTGAGE BOND
CORPORATION, a corporation of
the State of Delaware; SAN JUAN
COUNTY, a body corporate and
politic of the State of Utah, and all
other persons unknown claiming
right, title, estate or interest in or
lien upon the real property de-
scribed in the complaint adverse to
plaintiffs' ownership or clouding
plaintiffs' title thereto,

Defendants,

AMALIA V. YBARRA, personally;
AMALIA V. YBARRA as adminis-
tratrix of the Estate of Thomas Ve-
larde, Deceased,

Defendants and Appellants.

FILED

MAR 14 1958

Clerk, Supreme Court, Utah

Case
No. 8633

PETITION FOR REHEARING

FRANDSEN AND KELLER
*Attorneys for Plaintiffs
and Respondents*

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Case
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PETITION FOR REHEARING

PETITION FOR REHEARING

Come now the plaintiffs and respondents and re-
spectfully petition the court to grant a rehearing and re-
consider the above case on the following grounds:

1. The court failed to give effect to its prior decisions interpreting the so-called four year tax title statute, (see *Hansen v. Morris*, 3 Ut. 2d 310, 283 P. 2d 884, and *Peterson v. Callister*, 6 Ut. 2d 359, 313 P. 2d 814).

2. In determining whether the so-called four year statute on tax titles was strictly a statute of limitations and determining the legislative intent in the enactment of this particular statute, the court erred in disregarding the preamble of the bill which was enacted by the Legislature.

3. The court erred in holding that the limitation statutes only barred the right of the original owner to maintain an action where the tax title purchaser establishes a right of possession or ownership in the property.

4. The court erred in stating that plaintiffs had failed to establish any valid claim or right to the property in themselves, and that to hold for the plaintiffs would leave them in possession although they failed to establish any valid claim.

5. The Court erred in failing to determine that there had been payment of all taxes assessed against the property for at least a four year period.

FRANDSEN AND KELLER

By Duane A. Frandsen,

Attorneys for

Plaintiffs and Respondents

BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF FACTS

The statement of facts heretofore set forth in respondents' brief is correct and of sufficient detail adequately to present the fact situation. Reference is hereby made to the statement of facts in that brief.

ARGUMENT

POINT I.

THE COURT FAILED TO GIVE EFFECT TO ITS PRIOR DECISIONS INTERPRETING THE SO-CALLED FOUR YEAR TAX TITLE STATUE.

The question of the validity and the effect of the so-called four year statute of limitation on tax titles has been before the court on at least two other occasions. It was first before the court in the case of *Hansen v. Morris*, 3 Utah 2nd 310; 283 Pac. 2nd 884, decided on May 12, 1955. In that case the court held that this four year statute on limitations on tax titles was constitutional and in commenting on the passage of the law which is now Sec. 78-12-5.2, UCA 1953, the Court stated:

“Another effort to provide a statute of limitations designed to validate tax titles was made by passage of Chapter 19, 104-2, Laws of Utah 1951, 78-12-5.2, UCA 1953. . . . It appears obvious that such sections were enacted to eliminate the objections pointed out in the Toronto case, and were

intended to prevent raising of defenses based on failure to comply with statutory steps leading down the long road traversable in perfecting tax titles, unless one claiming a better title assert his rights within four years after a document of transfer, valid on its face, has been executed and delivered 'in the course of a statutory proceeding for the liquidation of any tax levied against * * * property whereby the property is relieved from a tax lien.' ”

The construction of this four year statute of limitations on tax titles and the legislative intent in enacting the statute was again before the court in the case of *Peterson v. Callister*, 6 Utah 2nd 359, 313 Pac. 2nd 814. In that case the court stated:

“Title 78-12-5.1 is a *statute of limitations* which prevents the *assertion of a defense* by a record owner if he has not had *possession of the property* during a four year period *after one has received a tax title thereto*. . . . It is not unlike other statutes of limitation, such as those barring an action on negotiable paper by passage of time. The obligation in such case may remain but the holder cannot enforce it. . . . It is a statute of repose, obviously intended to lay at rest claims against tax titles which are asserted more than four years after acquisition of a tax title under statutory proceedings, and where the record owner has not had possession during that period.

“We believe the legislature had in mind a four year statute of limitations barring claims against tax titles, which four year period dated from the initiation of the tax title, during which period any claimants against the tax title must have had possession of the property to protect any claim he

might have. Any other interpretation does not square with the general nature and purpose of the act, and could lead to novel and, we believe, unintended results, so as to defeat the entire purpose of a statute that seems to be designed to settle, not confuse, and to make certain, not uncertain, titles based on statutory liquidation of tax charges.” (Emphasis added)

✓ In these two cases the court has clearly stated that the present four year statute of limitation was strictly a statute of limitation which prevented the asserting of any defense or claim if the prior owner had been out of possession for more than four years after one had received tax title thereto. No reference is made to any other requirements, such as the other elements of adverse possession or payment of taxes. To now hold that the other elements of adverse possession are necessary in order to establish a title is to completely disregard these other two former decisions which do not set up any such requirement.

POINT II.

IN DETERMINING WHETHER THE SO-CALLED FOUR YEAR STATUTE ON TAX TITLES WAS STRICTLY A STATUTE OF LIMITATIONS AND DETERMINING THE LEGISLATIVE INTENT IN THE ENACTMENT OF THIS PARTICULAR STATUTE, THE COURT ERRED IN DISREGARDING THE PREAMBLE OF THE BILL WHICH WAS ENACTED BY THE LEGISLATURE.

The Legislature in 1951 when it enacted the four year statute of limitations on tax titles declared its inten-

tion in the preamble of the act. This preamble makes no mention of other elements of adverse possession or other elements of ownership being necessary along with the running of the four year period of time in order for tax title holder to assert title under the particular act. The preamble to this act is set forth in the dissenting opinion of Justice Worthen and is as follows:

“An Act Amending Sections 104-2-5, UCA 1943 as Amended by Chapter 18, Laws of Utah 1943; 104-2-7 Utah Code Annotated 1943 and 104-2-12, Utah Code Annotated 1943, and Repealing Section 104-2-5.10, as Amended by Chapter 19, Laws of Utah 1943 as Amended by Chapter 8, Laws of Utah 1947, and Enacting New Laws to be Known as Sections 104-2-5.10 and 104-2-5.11, *Limiting the period within which actions may be commenced for recovery of real property sold and conveyed to the County under tax deed or for the possession thereof.*” (Emphasis added)

How can there be any other construction placed on the preamble of this Act than that it was intended strictly as a statute of limitations? The legislature had already enacted laws which required the other elements of adverse possession, including possession for a period of seven years, in order for one holding under a tax deed where there was some defect in the proceeding to assert a valid title. With that law already enacted, the Legislature added these two additional sections which I have referred to herein as statutes of limitation. Had the Legislature intended that the four year statute of limitations should be effective only after other elements of adverse possession were present, it would have amended the prior

law and made a proviso for a four year period where others claim under tax title rather than a seven year period which had theretofore prevailed. Instead of doing this the Legislature enacted new acts and entitled them Statute of Limitations.

POINT III.

THE COURT ERRED IN HOLDING THAT THE LIMITATION STATUTES ONLY BARRED THE RIGHT OF THE ORIGINAL OWNER TO MAINTAIN AN ACTION WHERE THE TAX TITLE PURCHASER ESTABLISHES A RIGHT OF POSSESSION OR OWNERSHIP IN THE PROPERTY.

As stated above in Point II, the Legislature by enacting two new sections and calling them Statutes of Limitations and also by the Preamble of the Act, intended that such enactments should be strictly statutes of limitations and not dependent upon establishing other elements of adverse possession or ownership. To hold otherwise gives no effect to the new sections enacted and goes back to the prior statutes which required all of the elements of adverse possession. The holding of the court leaves a county in an impossible situation regarding the tax titles it receives through the May sale. In order for the four year statute to be effective there must be some of these other elements of ownership or adverse possession as stated by the court. In most instances a county, after receiving title to tax property at the May sale, does not go into possession, but the property stays as is until some interested purchaser comes along who is interested

in purchasing it either under contract or by paying the full purchase price. Under the court's decision an original owner could abandon his property and not pay any taxes thereon for an extended period of years, such as the 26 year period in the instant case. The property still standing in the name of the county could be recovered back by the original owner after these many years have elapsed if there was some defect in the tax proceedings. Under these circumstances the county could not get the benefit of the four year statute because the county itself had not entered into actual possession of the property and no purchaser had come to buy the property so that the land remained idle. Likewise the county would lose the revenue which it might otherwise have collected if the property had remained on the tax rolls and been assessed against the original owner. This was the very problem that the enactment of the four year statute of limitations on tax title was intended to correct. To hold otherwise places a premium on land owners not paying their taxes and allowing them to go to the county and held and owned by the county for any period of time until a prospective purchaser attempts to acquire the tax title and go into possession of the property. The original owner could keep watch on the property and before the four years had run, after the purchaser from the county went into possession, the original owner could file an action to quiet his title and he would not be barred by the four year statute of limitations even though the county had held the property for 12 to 15 years as in the instant case prior to the sale to the new purchaser.

As stated in the *Hansen v. Morris* Case, *supra*, this problem was the very situation that the enactment of these statutes of limitation sections were designed to prevent, but with the holding of the court in the instant case the situation is not corrected and the problem still prevails. It was not the intention of the Legislature to allow an original land owner to come in 26 years after he had stopped paying tax on the property and the land had gone to the county for non-payment of taxes, and be able to assert his claim against a bona fide purchaser from the county.

POINT IV.

THE COURT ERRED IN STATING THAT PLAINTIFFS HAD FAILED TO ESTABLISH ANY VALID CLAIM OR RIGHT TO THE PROPERTY IN THEMSELVES, AND THAT TO HOLD FOR THE PLAINTIFFS WOULD LEAVE THEM IN POSSESSION ALTHOUGH THEY FAILED TO ESTABLISH ANY VALID CLAIM.

The plaintiffs do have a valid claim. They hold under a tax title deed from San Juan County. The only reason that this tax title deed from San Juan County does not give good, full ownership is that in some of the prior proceedings there was an omission to attach an affidavit to one of the assessment rolls. The plaintiffs come into title under a written instrument and they have color of title.

Possession is a major factor in ownership and possession alone is recognized by the law in many instances.

One example is possession of a mining claim under a Notice of Location. A party may not have a valid mining claim because he has not as yet made a valid discovery of ore; yet if he is in possession of the claim and attempting to discover and find ore so that he has a valid discovery, he has prior rights to that claim and his possession bars others from asserting any title to the claim or attempting to locate the area.

Another example of where possession alone can ripen into ownership is in the case of easements. A party by adversely using another's land for a period of 21 years without any claim of ownership and without any payment of taxes and without any benefits to the land owner acquires an easement right which is the right to continue to adversely use the land after the 21 year period. There is, therefore, no traversity to the law to recognize a right of possession in the tax title claimant which right of possession would ripen into a right of ownership and a source of title through adverse possession initiated by his tax title purchase. Recognizing this four year statute as strictly a statute of limitation without the other elements of adverse possession would leave the tax title claimant in possession of the property, if four years had expired from the time that the property was taken from the original owner for failure to pay the taxes. This is by reason of the express wording of the statute, which states that the original owner cannot assert any title or defense after this four year period.

This problem of the tax title claimant remaining in possession has already been considered by the Court in

Peterson v. Callister, supra. The portion of that case hereinabove quoted, and particularly those portions in *italics*, hold that the tax title claimant may remain in possession of the land by reason of the four year Statute of Limitations.

POINT V.

THE COURT ERRED IN FAILING TO DETERMINE THAT THERE HAD BEEN PAYMENT OF ALL TAXES ASSESSED AGAINST THE PROPERTY FOR AT LEAST A FOUR YEAR PERIOD.

This question is discussed under Point 3 of Plaintiff's first Brief filed herein, and involves a determination of whether redemption of taxes before the May sale to the County is equivalent to the payment of taxes before they are delinquent. The prior Utah case of *Bowen v. Olson*, 2 Ut. 2d 12, 268 P. 2d 983, holds that redemption is not equivalent to payment of taxes. We respectfully submit that in light of the new decisions in other jurisdictions cited in our first Brief under Point 3, pages 13, 14, and 15, the *Bowen v. Olson* case should be overruled and the Court follow the rule of Virginia, California, Montana, and other jurisdictions that redemption prior to the May sale is equivalent to payment of the taxes before they become delinquent after November 30th.

We respectfully submit that a rehearing should be granted and the matter reconsidered by the court and that the four year statute on tax title be recognized as a

statute of limitation without reference to the other elements and requiremens of adverse possession as required in the court's opinion.

Respectfully submitted,

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