

1957

## Minersville Land and Livestock Co. v. Earl P. Staten : Brief of Plaintiff and Respondent

Utah Supreme Court

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John S. Boyden; Allen H. Tibbals; Attorneys for Plaintiff and Respondent;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

MINERSVILLE LAND AND  
LIVESTOCK COMPANY,

*Plaintiff and Respondent*  
vs.

EARL P. STATEN, Administrator of the Estate of William Story, Jr., deceased, WILLIAM MacARTHUR STORY, MARION S. GOELTZ, FLORENCE M. STORY HAINES, ELEANOR STORY NOWELS, FRANK PRYOR, Administrator of the Estate of Frederick Steigmeyer, deceased, MRS. FREDERICK STEIGMEYER, THE STATE OF UTAH, and all persons unknown claiming any right, title estate, lien or interest in the real property described in the complaint adverse to the plaintiff's ownership or clouding the plaintiff's title thereto,

*Defendants and Appellants.*

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BRIEF OF PLAINTIFF AND RESPONDENT

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and Respondent*

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Clerk, Supreme Court, Utah

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Case No. 8662

## TABLE OF CONTENTS

	Page
STATEMENT OF FACTS .....	1
POINTS RELIED UPON .....	14
ARGUMENT .....	16
POINT I. STATE AGRICULTURAL SCHOOL LANDS GRANTED TO THE STATE BY THE FEDERAL GOVERNMENT ARE HELD BY THE STATE IN TRUST FOR THE PEOPLE TO BE DISPOSED OF AS MAY BE PROVIDED BY LAW AND RELINQUISHMENT OF TITLE BY THE STATE OTHERWISE THAN BY WAY OF A SALE AND ISSUANCE OF PATENT TO A PERSON OTHER THAN A PURCHASER, HIS ASSIGNEE OR SUCCESSOR IN INTER- EST, IS UNCONSTITUTIONAL AND VOID AND IN CONTRAVENTION OF THE ENABL- ING ACT, THE UTAH STATE CONSTITUTION AND THE STATE STATUTES PERTAINING TO THE ADMINISTRATION, MANAGEMENT AND SALE OF STATE LANDS. ....	17
POINT II. UNDER UTAH LAW POSSESSION OF LANDS CANNOT BE ADVERSE PRIOR TO ISSUANCE OF PATENT. ....	33
POINT III. THE COURT WILL NOT LEND ITS AID IN A SUIT BASED ON A DEED ACQUIR- ED BY MALFEASANCE OF PUBLIC OFFICE. ....	43
POINT IV. THE LOWER COURT DID NOT ERR IN REFUSING TO ORDER THE STATE TO ISSUE PATENT TO THE APPELLANTS AS PURCHASERS TO THE LAND FROM THE STATE BUT CORRECTLY HELD THAT THE RESPONDENTS WERE ENTITLED TO THE ISSUANCE OF PATENT. ....	47
CONCLUSION .....	50

## TABLE OF CONTENTS — Continued

	Page
CASES CITED	
Barney vs. Dolph, 97 U.S. 652, 24 L. Ed. 1063.....	20
Boe vs. Arnold, 54 Oregon 52, 102 P. 290 .....	42
Dick vs. Roraker, 155 U.S. 404, 39 L. Ed. 201 .....	45
Fear vs. Barwise, 93 Kan. 31, 143 P. 505 .....	21
Hansen vs. Hansen, 3 Utah 2nd, 310, 283 P. 2nd 884 ....	38
Livingston vs. Thornley, 74 Utah 561, 280 P. 1042 .....	26
McNiel vs. McNiel, 61 Utah 141, 211 P. 988 .....	26
Murtaugh vs. C. M. & St. P. Rd., 112 N.W. 860 .....	31
Steele vs. Boley, 7 Utah 64, 24 P. 755 .....	39
Stowell vs. State, 100 Utah 420, 115 P. 2nd 914 .....	22
Toltec Ranch Co. vs. Babcock, 24 Utah 183, 66 P. 876..	40
Utah Copper Co. vs. Eckman, 47 Utah 165, 152 P. 178	42
Van Wagoner vs. Whitmore, 58 Utah 418, 199 P. 670....	28
Young vs. Corless, 56 Utah 564, 19 P. 647 .....	25
Z. Russ & Sons Co. vs. Crichton, Tax Collector, 117 Calif 695, 49 P. 1043 .....	20

## TEXTS

### American Jurisprudence:

Vol. 42, Page 857, Sec. 80 .....	19
Vol. 1, Page 848-9 Sec. 104 .....	21

## TABLE OF CONTENTS — Continued

	Page
Vol. 44, Quieting Title, Page 69, Sec. 83 .....	45
Vol. 43, Public Officers, Page 254, Sec. 511 .....	46
Vol. 43, Public Officers, Page 251-2, Sec. 507.....	46
Corpus Juris Secundum	
Vol. 73, Public Lands, Page 884, Sec. 242.....	20
STATUTES	
UTAH CODE ANNOTATED, 1953	
59-2-2 U.C.A. 1953 (R.S. 1898 & 1907 S. 2, 502) 22, 35	
59-2-3 U.C.A. 1953 .....	48
59-5-12 U.C.A. 1953, (1898 Revised Statutes as Sec. 2524) .....	24
78-12-2, U.C.A. 1953 .....	35
78-12-3, U.C.A. 1953 .....	35, 36
78-12-5 U.C.A. 1953 (was 104-12-5, 1933 & 1943 Code) .....	28
78-12-12 U.C.A. 1953 (was 104-12-12, 1933 & 1943) .....	28
78-12-7.1, 5.1, 5.2, 5.3 U.C.A. 1953 .....	37
78-12-24 U.C.A. 1953 .....	46
65-1-32 U.C.A. 1953 .....	34
65-1-43 U.C.A. 1953 .....	34
Laws of Utah, 1919, Chapter 113, Sec. 1 .....	22
Laws of Utah, 1899, Chapter 64 .....	34

IN THE SUPREME COURT  
of the  
STATE OF UTAH

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MINERSVILLE LAND AND  
LIVESTOCK COMPANY,

*Plaintiff and Respondent*

vs.

EARL P. STATEN, Administrator of  
the Estate of William Story, Jr., de-  
ceased, WILLIAM MacARTHUR  
STORY, MARION S. GOELTZ,  
FLORENCE M. STORY HAINES,  
ELEANOR STORY NOWELS,  
FRANK PRYOR, Administrator of  
the Estate of Frederick Steigmeyer,  
deceased, MRS. FREDERICK  
STEIGMEYER, THE STATE OF  
UTAH, and all persons unknown  
claiming any right, title estate, lien  
or interest in the real property de-  
scribed in the complaint adverse to  
the plaintiff's ownership or clouding  
the plaintiff's title thereto,

} Case No. 8662

*Defendants and Appellants.*

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BRIEF OF PLAINTIFF AND RESPONDENT

---

STATEMENT OF FACTS

The plaintiff and respondent in this court, is  
not in agreement with the statement of facts as  
set forth in the appellants' brief.

Over the plaintiff's and respondents objection

made in the court below (R. 81, 82) defendants and appellants prevailed in having the Lower Court amend the original proposed findings of fact and particularly finding Number 11 thereof, by the inclusion of what was viewed by the plaintiff as a great surplusage of evidentiary material, not necessary to the decision. There is no dispute that the findings made by the court, (R. 102,-106 incl.) and referred to by the appellant in their brief at Page 2 thereof with approval, are the facts. Nevertheless, appellants after having cited the courts findings promptly depart from them in setting forth their argumentive version of the facts. We submit that basically the facts in this case and as found by the lower court are as follows:

The State of Utah was granted by law the right to select certain federal lands as grants in aid of the Agricultural College and to sell the land so acquired by it. One Joseph Henshaw signed an agreement to purchase selected lands on the 24th day of November 1902 and submitted the same in the manner and form required by law to the State of Utah, accompanied by the requisite payment on deposit, all of which appears from an examination of the Land Board records (R. 51), and particularly the documents contained therein consisting of excerpts from the Minute Book of the State Board of Land Commissioners, from the sales

record, and the document entitled "Agreement to Purchase Selected Land".

The Agreement to Purchase Selected Land so filed by Henshaw was duly accepted by the State on the 3rd day of December 1902 (R. 51) and the State made the necessary selection of lands and submitted the same to the United States Land Office on the same day. The United States Land Office approved the selection on December 16, 1902. Approval by the Washington D.C. land office was had on December 1, 1904. Thereafter, on the 1st day of January 1905, certificate of sale #8515 was duly issued by the State of Utah to Joseph Henshaw (R. 51). On March 30th, 1914, the State of Utah received the final payment constituting payment in full to the State of Utah of the consideration due on the purchase of the land under the certificate aforesaid (R. 17, 18).

Joseph Henshaw died in September 1905 (R. 51, 104). Prior to his death, as shown by the records of the State Land Board, he transferred his interest in the Certificate of Sale aforesaid, to one A. B. Lewis (R. 51). On December 28, 1910, A. B. Lewis, as shown by land board records (R. 51), assigned and transferred the Certificate to Lewisiana Land Company, which company assigned and transferred said certificate to William Story, Jr., and Frederick Steigmeyer, a co-partnership, on August 21, 1914.



None of these assignments were recorded in the office of the County Recorder of Beaver County. William MacArthur Story, Marion S. Goeltz, Florence M. Story Haines and Eleanor Story Nowels, appellants herein, are the assignees and successors in interest of said William Story, Jr., and Frederick Steigmeyer, a co-partnership. One Gus S. Holmes having acquired a money judgment in the District Court for Salt Lake County, State of Utah, against A. B. Lewis, procured to be issued to the Sheriff of Beaver County a writ of execution on March 4, 1914. Under said writ the said sheriff sold at sheriff's sale to said Gus S. Holmes on March 28, 1914, the interest of A. B. Lewis in the real estate described in said Land Board Certificate. Sheriff's Certificate of Sale of said real estate on execution was issued March 28, 1914 to Gus S. Holmes, and duly recorded in the office of the Recorder of Beaver County (R. 51, Ex. 1 & 2). Thereafter Gus S. Holmes applied to the State Land Board for issuance of patent to the lands in question. The application was resisted by Story and Steigmeyer. (R. 51)

The Land Board sought a determination by the Attorney General as to whom patent should be issued and it was the Attorney General's ruling made in March 1915 that the sale by the Sheriff to Gus S. Holmes should be ignored and patent issued to Lewisiana Land Co., upon compliance with certain

conditions. (R. 51) The State Land Board advised Lewisiana Land Company and Story and Steigmeyer, its attorneys, of the requirements for the issuance of patent by letter dated July 8, 1915 (R. 51). By its further letter of July 14, directed to the same parties (R. 51) it was stated:

“That in addition to the requirement made in the said letter (referring to the letter of July 8) you will have the County Treasurer of Beaver County notify this office of the redemption of the tax sale for the 1911 and subsequent years.”

An examination of the files of the State Land Board with respect to this land and Certificate #8515, does not reflect that the appellants predecessors in interest ever complied with the requirements and submitted the necessary documents to permit the State of Utah to issue its formal patent to the lands in question (R. 51). Nor did the appellants or their predecessors in interest ever pay the taxes or redeem the tax sales as required. (R. 51, Ex. 1 & 2, 105-6)

No action was ever taken by the appellants or their predecessors in interest to correct the status of the record title to this land in the office of the Beaver County Recorder and it stands as of today, in the order of succession determined by the tax sale by Beaver County of the

interest of Gus S. Holmes, the purchaser at the sale on execution. (R. 51, Ex. 1 & 2)

The lands in question were assessed by the County Assessor of Beaver County in the name of Joseph Henshaw for the years 1906 to 1911 inclusive and in the name of the Estate of Joseph Henshaw for the years 1912 thru 1916 inclusive (R. 73-74). In 1917, a portion of this land, namely the South  $\frac{1}{2}$  of Section 17 was for the first time assessed in the name of Gus S. Holmes. The remainder was assessed in the name of the estate of Joseph Henshaw (R. 73,74). From 1918 to 1940, all of the lands were assessed in the name of Gus S. Holmes (R. 73, 74). Taxes assessed against the lands were not paid and the lands were sold to Beaver County for non-payment of taxes. On January 2, 1937, an auditors tax deed on the tax sale was issued to Beaver County and duly recorded (R. 51, Exhibit 1, Pages 11, 12; Exhibit 2, Page 25). Thereafter in the year 1940, Beaver County proceeded to foreclose its tax lien in an action commenced in the District Court for Beaver County, Civil File No. 2060 (R. 106, Finding #11). A default judgment was taken and a sheriff's deed on foreclosure sale was issued to Beaver County on or about May 1st, 1941. The plaintiff purchased the property from Beaver County under contract approved by the County Commissioners of that County

on the 5th day of June 1941 (R. 106). The contract was paid out by the plaintiff, respondent herein, and Beaver County gave its deed to the respondent under date of December 11, 1945 (R. 106, R. 51, Exhibit 1, Page 16; Exhibit 2, Page 30). Ever since the date of acquisition under the contract, the 5th day of June 1941, respondent has been in the exclusive, open, continuous, uninterrupted and adverse possession and occupancy of all of the said real property under a claim right and title and has paid all of the taxes regularly levied and assessed thereon according to law (R. 68, 75, 106).

The appellants predecessors in title are not presently and never have at any time been in the actual possession of the land in controversy, nor have they received any part of the rents, issues or profits from said lands (R. 68).

Respondent desiring to secure patent to the lands which it had acquired from Beaver County as noted above, approached the State Land Board and after a conference with one of the commissioners and the Land Board attorney, wrote to the Honorable Herbert Smart, Commissioner requesting advice as to the requirements which would be made by the State in order to enable the respondent to secure patent. (R. 51, Page 37 of the Land Board Records). By letter dated May 17, directed to Allen

H. Tibbals, one of the attorneys for respondent, respondent was advised

“You are advised that if you wish to bring an action to quiet title in order that the state may patent the land to the custodians lawfully thereto entitled, it will be necessary for you to join Mr. Steigmeyer and Mr. Story or those claiming under them. When this is completed, the Board will issue patents in accordance with the Decree of the Court.” (R. 51, Page 40 of the Land Board Records).”

Action was instituted accordingly by the filing of the complaint, issuance of summons, and publication of summons thereon (R. 1-16 incl.). The State of Utah was joined as a party defendant in order that the court, might be vested with jurisdiction to direct the state to whom to issue patent after determination of the issues between the litigants. The state answered, setting up the fact that the land had been sold under Certificate of Sale, that payment in full was received by the State, March 30th, 1914; disclaimed any beneficial interest in or to the lands in question and further indicated its willingness to issue patent to the party determined by the court to be the lawful claimant thereto (R. 17, 18). Details of the various arguments, motions, etc. before the court appear to be surplusage in this statement of facts and are not recited for that reason since appellants raise no issue and do not assign as error any of the rulings of the court made on any of the motions.

The statement of facts made by the appellants in their brief, contains statements not in conformity with the record which the respondent brings to the attention of the court as briefly as possible in compliance with Rule 75 (P) (2). Utah Rules of Civil Procedure.

Appellants state at Page 1 and 2 of their brief:

“This is an appeal by four of the above defendants from a judgment of the District Court of Beaver County, the Hon. Will L. Hoyt, Judge, presiding, quieting title by adverse possession to certain unpatented state school lands in Beaver County in favor of plaintiff and against the defendant, State of Utah, holder of legal title \* \* \*”.

The judgment of the Trial Court cannot be truthfully considered adverse to the State of Utah. The judgment of the Trial Court is adverse to the appellants who were purchasers of the land from the State of Utah. Throughout the entire proceedings in this case, in the lower court and also in this court, appellants have adhered to this same policy of attempting to identify themselves with the State of Utah as though they were the State and any action adverse to them has been classified by them as being also adverse to the State of Utah. Such is not the fact. The disclaimer filed by the State (R. 17 and 18), the memorandum decision of Judge Hoyt (R. 76) and the decree entered by the Court (R. 110-111) support the statement by Respondents

that this judgment is not in any sense hostile to the State of Utah.

Appellants at page 2 of their brief state:

“It was stipuated and the Court found (Par. 13) neither appellants nor any of their predecessors in interest have ever, at any time, under the certificate, taken possession of the lands from the State, or received any part of the rents, issues or profits therefrom. The State has, therefore, never relinquished either title to or possession of the land to the purchaser.”

The fact is, that a stipulation was made and entered into between counsel for the respective parties to the effect that

“Defendant or defendants, predecessors in title or any of them and particularly any person claiming by, through or under William Story, Jr., and Frederick Steigmeyer, or either of them are not now and never have at any time, been seized or in possession of any part of the lands in controversy herein, or received any part of the rent, issues, or profits from said lands.” (R. 68, 69)

It was neither stipulated nor did the Court find as a fact that the State had never relinquished either title or possession of the land to the purchaser.

Again at Page 2 and 3 of Appellants' brief, we find included in Appellants' statement of facts an argumentative analysis of the complaint filed by respondent in the lower court. This statement is not

factual, but is purely argumentative. (For the full text of Appellants' statement see appendices page 51.)

Respondent's complaint was drawn in the form required to comply with the statutory procedure for quieting title. Since respondent was already in possession and had been since June 5th, 1941 neither trespass or ejectment appeared appropriate. (R. 17, 18). It should be noted that the sufficiency of the complaint has never been attacked by the appellants herein. No issue was raised in the court below, nor is any made in the assignment of errors or the statement of points in the appellants' brief with respect to the sufficiency of the complaint. The argumentative analysis of the plaintiff's complaint made by appellants may or may not be a valid analysis of the complaint and its function, but under the circumstances nothing is before this court for determination with respect to the matter of the complaint and the statement voluntarily included as a statement of fact in appellant's brief, we, therefore, respectfully suggest to the court is both misplaced and inaccurate and cannot be considered a factual statement supported by the record.

We direct the courts attention to the appellants brief at Page 3 with respect to assessment of taxes on the lands in question:

"After that time until 1940, they were *erroneously* assessed in the name of Gus S. Holmes, *a complete stranger to both land*



*and certificate*, apparently by reason of a sheriffs certificate of sale on execution issued March 28, 1914 to Gus S. Holmes against one A. B. Lewis who on the date of execution by ruling of the attorney general and decision of the Land Board, had no interest in either land or certificate (R. 105, and Land Board Records R. 51)". (*Italics ours*)

The facts in connection with this matter are that the taxes were actually assessed from 1906 through 1916 in the name of either Joseph Henshaw or his estate by the Assessor of Beaver County. In 1917, the South  $\frac{1}{2}$  of Section 17 was assessed in the name of Gus S. Holmes (R. 74.) In 1918, all of the lands in question were assessed in the name of Gus S. Holmes (R. 74). The statement by the appellants in their brief as above quoted that the assessment in the name of Holmes was "erroneous" as well as their further statement that, "Gus S. Holmes was a stranger to both land and certificate," are conclusions in which the respondents do not concur and which cannot be logically drawn from the evidence before the trial court. The reference by Appellants to the opinion of the Land Board and of the Attorney General do not strengthen the conclusions drawn by the Appellants. The Trial Judge specifically pointed out that he did not believe himself bound by the rulings of the Attorney General and indicated that he believed them immaterial (R. 80). He included the fact of the exist-

ence of these rulings in his findings only as a concession to the defendants theory of the case (R. 80). We believe it significant that the Trial Court drew no such conclusion as that drawn by the Appellants (R. 106, 107).

In the second full paragraph on Page 4 of the Appellant's brief, we find the following statement:

“The Attorney General filed an answer for the State on May 2nd, 1956 (R. 17), attempting to disclaim on behalf of the State any “right, title or interest” in the lands and attempting to renounce any statutory or constitutional duty or obligation of the state in connection therewith \* \* \*”

It is a fact that the Attorney General, after due consideration of the matter, by the State Land Board, and by members of his own staff (R. 51, Pages 38, 39, 40, 49, and 50) did issue an answer in which (R. 17, 18), the Attorney General on behalf of the State of Utah sets forth the fact that in the year 1902, a State Land Certificate #8515 was issued to one Joseph Henshaw for the purchase of certain described state agricultural college lands, being the lands in question in this case, and that on March 30th, 1914, the State of Utah received final payment of the purchase of the lands. Therefore, the State of Utah, disclaimed any right, title, or interest in the lands and indicated it stands ready, willing and able to issue a patent to the land described upon the final adjudication of the interests of the

persons named as parties defendant. To characterize this action taken by the Attorney General on behalf of the State of Utah as "*an attempt to renounce any statutory or constitutional duty or obligation of the State in connection therewith,*" as is done by the Appellant in the statement of facts in their brief, is manifestly unfair to the Attorney General and does not fairly or factually characterize the action taken by the Attorney General.

### POINTS RELIED UPON

Appellants set forth their argument in their brief under points which do not coincide in wording with the Assignments of Error set forth at page 6 of the appellants' brief. In replying to the Appellants' brief, we shall set forth our argument under the points as set out in appellants brief, and we are grouping with the appellants point the Assignment of error to which we deem the point to relate. It is noted that there is no point relating to assignment of error number 4. We have chosen, therefor, to set out the affirmative of our position on this matter and discuss the assignment of error under this affirmative statement of the point.

#### POINT I

STATE AGRICULTURAL SCHOOL LANDS GRANTED TO THE STATE BY THE FEDERAL GOVERNMENT ARE HELD IN TRUST FOR THE PEOPLE TO BE DISPOSED OF AS MAY BE PROVIDED BY LAW AND RELINQUISHMENT OF TITLE BY THE STATE OTHERWISE THAN BY WAY OF A SALE

AND ISSUANCE OF PATENT TO A PERSON OTHER THAN A PURCHASER, HIS ASSIGNEE OR SUCCESSOR IN INTEREST, IS UNCONSTITUTIONAL AND VOID AND IN CONTRAVENTION OF THE ENABLING ACT, THE UTAH STATE CONSTITUTION AND THE STATE STATUTES PERTAINING TO THE ADMINISTRATION, MANAGEMENT AND SALE OF STATE LANDS.

1. *The court erred in permitting title to State Agricultural College School lands received from the Federal Government to be relinquished by the State not by purchase but under State Statutes of limitations based on adverse possession, the decree being unconstitutional and void under the provisions of the Enabling Act, the Utah State Constitution and the statutes pertaining to the administration, disposal and sale of such state lands.*

#### POINT II

UNDER UTAH LAW POSSESSION OF LANDS CANNOT BE ADVERSE PRIOR TO ISSUANCE OF PATENT.

*The Court erred in holding that adverse possession under State statutes of limitations commences to run not from the date of issuance of the patent but from the date of final payment of the State Land Certificate.*

#### POINT III

THE COURT WILL NOT LEND ITS AID IN A SUIT BASED ON A DEED ACQUIRED BY MALFEASANCE OF PUBLIC OFFICE.

*The Court erred in holding that a quiet title decree may be based on an official abuse of public trust and malfeasance of office.*

#### POINT IV

THE LOWER COURT DID NOT ERR IN REFUSING TO ORDER THE STATE TO ISSUE PATENT TO

THE APPELLANTS AS PURCHASERS OF THE LAND FROM THE STATE BUT CORRECTLY HELD THAT THE RESPONDENTS WERE ENTITLED TO THE ISSUANCE OF PATENT.

*The Court erred in refusing to order the State to issue patent to appellants as purchasers of the land from the State.*

(Italics are ours and used to indicate the assignment of error by the appellant as set forth in Page 6 of their brief. Though no point 4 appears in appellants brief, we have chosen to set forth the affirmative of our position on the matter as our point 4.)

## ARGUMENT

### INTRODUCTION

In its argument respondent will set forth its position in this matter essentially under the points as presented in the brief of the appellant with notation thereunder of the assignment of error to which we believe the point relates. The entire situation in the presentation of respondent's side of this case is unusual in that there is no essential disagreement between appellants and respondent as to the law and it will be noted that both parties cite many of the same cases in support of their respective theories of the case. It is primarily the position of the respondent that the appellants incorrectly interpret and misapply the existing law and do not recognize the facts as they actually exist. We believe that this

situation can be clearly pointed out to the court in the course of the argument.

#### POINT I

STATE AGRICULTURAL SCHOOL LANDS GRANTED TO THE STATE BY THE FEDERAL GOVERNMENT ARE HELD IN TRUST FOR THE PEOPLE TO BE DISPOSED OF AS MAY BE PROVIDED BY LAW AND RELINQUISHMENT OF TITLE BY THE STATE OTHERWISE THAN BY WAY OF A SALE AND ISSUANCE OF PATENT TO A PERSON OTHER THAN A PURCHASER, HIS ASSIGNEE OR SUCCESSOR IN INTEREST, IS UNCONSTITUTIONAL AND VOID AND IN CONTRAVENTION OF THE ENABLING ACT, THE UTAH STATE CONSTITUTION AND THE STATE STATUTES PERTAINING TO THE ADMINISTRATION, MANAGEMENT AND SALE OF STATE LANDS.

1. *The court erred in permitting title to State Agricultural College School lands received from the Federal Government to be relinquished by the State not by purchase but under State Statutes of limitations based on adverse possession, the decree being unconstitutional and void under the provisions of the Enabling Act, the Utah State Constitution and the statutes pertaining to the administration, disposal and sale of such state lands.*

Appellants correctly state the law in Point I of their brief as follows:

“State Agricultural School lands granted to the State by the Federal Government are held by the State in trust for the people to be disposed of as may be provided by law and the relinquishment of title by the State in any other manner than by sale and issuance of patent to a person becoming the purchaser thereof would indeed be unconstitutional and

void and in contravention of the Enabling Act and in violation of the State constitution and statutes relating to administration and management of state lands."

The only claim which appellants have to the lands in question is as purchasers of state lands from the State in accordance with law and the Constitution. The attempt by appellants to characterize the disposition of these lands as having been made by the state in a manner other than that authorized by law is not in accordance with facts. Joseph Henshaw, one of the predecessors in title of the appellants, made a proper selection in the manner required by law, of state lands granted to the State by the Federal Government in aid of the Agricultural College (R. 51). Joseph Henshaw and his successors in interest, paid the State of Utah the full consideration for these lands (R. 17, 18, 51). The State received the final payment on March 30, 1914 (R. 17, 18, 51). The State was then left at this point vested with only the naked legal title to this land impressed with the right by Joseph Henshaw and his successors in interest to the issuance of patent from the state upon compliance with the necessary formalities to show their true succession to Joseph Henshaw's interest and the payment of taxes as required by state law. There is no irregularity cited by the appellants from the beginning to the end of their brief or in any of the proceedings before the

lower court, in the action of the State of Utah through its designated officials in making the sale to Joseph Henshaw, in accepting the payment thereon, or in the distribution of the funds received therefrom. The entire procedure was regular and proper. What the appellant seeks to do is to invest Joseph Henshaw and his successors in interest with immunity from the intervening claims of others to the lands which he thus bought from the state, and to do so the appellant seeks to confuse the issue by attempting to make it appear that the State of Utah is an interested party in this action by reason of the fact that the ministerial function of the issuance of patent has not yet been carried out, and that respondents action is perforce adverse to the state.

The action brought here by respondent against the appellants is one in which the State is joined merely because it holds the naked legal title to the land in question. It is not an action adverse to the state. The mere fact that the state holds naked legal title does not preclude respondents from the perfection of an adverse title against the appellants. We believe the following quotation from American Jurisprudence on the subject clearly states the law:

“\* \* \* The holder of a receipt or certificate of purchase from the state is the equitable owner of the land and indefeasibly entitled to a patent; such receipt or certificate is inchoate evidence of an absolute title, the state then being merely a naked trustee of the



legal title, which it is bound to convey to such equitable owner on demand, and it has no right thereafter to sell and convey the land to another \* \* \*". — 42 Am. Jur., PUBLIC

LANDS P. 857, 8 Sec. 80.

The California case of *Z. Russ & Sons Co. vs. Crichton*, Tax Collector, 49 P. 1043 holds:

"The state owned the lands, and when, on payment of a part of the purchase price, it issued its certificates of purchase therefor, an equitable title vested in the purchasers, which was subject to assessment for taxes.  
\* \* \*"

Corpus Juris Secundum — PUBLIC LANDS  
— Vol. 73, Page 884, Sec. 242 states the rule:

"A certificate of purchase does not pass the legal title, but such title remains in the state until the patent issues; but where, on payment of part of the purchase price of state lands, a certificate of purchase is issued by the state, an equitable title to the land vests in the purchaser. \* \* \*"

The Supreme Court of the United States has held in the case of *Barney vs. Dolph*, 97 US 652, 24 L. Ed. 1063:

"Where the right to a patent has become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution of and delivery of a patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty."

Being thus vested with the absolute equitable

title, can the interest of the appellants be subject to adverse possession by others? Again there seems to be no dispute in the law on this matter.

“In the absence of legislation providing otherwise, the Statute of Limitation does not run against the Government, and, therefore, title to public lands cannot be acquired by adverse possession either as against the United States or as against any of the several states, in some of which there are constitutional and statutory provisions to this effect. *This rule, however, has no application in litigation where the state is only a nominal party, its name being used merely for the enforcement of the rights of third persons who alone will enjoy the benefits. \* \* \* Even where the statute does not run against the government, one may acquire rights in public lands by adverse occupancy against all third persons, and this is true even though the claimant admits the governments ownership, in other words, the claimant's possession may be adverse without being hostile to the government.*” 1 Am. Jur. Adverse Possession P. 848-9 Sec. 104. (Italics ours)

In the case of *Fear vs. Barwise*, Kansas 93 Kan. 131, 143 P. 505, the above quoted phrase from American Jurisprudence is quoted from its original source, Ruling Case Law, with approval at Page 507 of the opinion.

We submit that these authorities outline the position of the respondents in this case. We do not make, and never have made any claim hostile to the

State of Utah. This fact is recognized by the pleading filed by the attorney general (R. 17, 18) but we do claim adverse possession under claim of right and title against the appellants. This very vital fact is the one which distinguishes this case from all of the authorities cited by appellants and makes the authorities cited by appellants in their brief inapplicable.

The Utah law specifically requires that upon the issuance of a certificate of sale by the State Land Board the County Assessor in the County in which the lands so sold or covered by the certificate of sale may lie shall assess the interest of the purchaser under the certificate of sale to the extent of the money paid or then due. (Sec. 59-2-2 UCA 1953, R.S. 1898 & 1907 S 2502, Also see *Stowell vs. State* 100 U. 420-115 P. 2d 914).

The assessments made as indicated by the records of Beaver County and incorporated in the stipulation between the parties hereto (R. 73, 74) were made by the Beaver County Assessor in accordance with law in the name of Joseph Henshaw and subsequently in the name of his estate thru the year 1916.

The laws of Utah 1919 Chapter 113, Sec. 1, added to the law the following:

“And provided further that where final payment has been made upon such lands the contract of sale shall, for the purpose of taxation, be regarded as passing title to the pur-

chaser or assignee, and the Secretary of the land board shall immediately certify the receipt of such final payment to the Assessor of the county where such lands are located, and the assessor shall thereupon place such lands upon the assessment roll of such county."

Prior to the time of final payment to the state under the certificate March 30th, 1914 (R. 17, 18) and the time of inclusion of the lands as such on the assessment roll, it appears that one Gus S. Holmes acquired a money judgment in the District Court of Salt Lake County, State of Utah, and proceeded to have the same abstracted and docketed in Beaver County and the Sheriff of Beaver County was thereupon instructed to levy execution on the lands in question and sell so much thereof as necessary to satisfy the execution. (R. 105). Gus S. Holmes bought the lands at the execution sale. (R. 105) Gus S. Holmes properly recorded the certificate of sale and Sheriff's deed, with the Recorder of Beaver County, Utah. (R. 51, Ex. 1 P. 8) (R. 51 Ex. 2 P. 8). Though the predecessors in interest to appellants proceeded to contest the right of Gus S. Holmes to issuance of patent (R. 51) before the State Land Board, and succeeded in getting an opinion from the Attorney General that the assignment made by A. B. Lewis, to the Lewisiana Land Company of the Certificate of Sale No. 8515, was valid and defeated the rights of Gus S. Holmes as against A. B. Lewis as an individual, nothing was ever done to correct

the status of the record in Beaver County in the office of the Recorder thereof, or in the office of the Assessor. (R. 51, Ex. 1, & 2, and R. 73, 74). Therefore, when as required by law the Assessor included the lands on the assessment roll he did so from the year 1917, as to the South  $\frac{1}{2}$  of Sec. 17, and from the year 1918 on all of the lands in the name of Gus S. Holmes. This is in accordance with the law. The Utah law, Section 59-5-12 UCA 1953 originally appearing in the 1898 Revised Statutes as Section 2524 provides:

“\* \* \* If the name of the owner or claimant of any property is known to the Assessor or if it appears of record at the Office of the County Recorder where the property is situated, the property must be assessed in such name; if unknown to the assessor and if it does not appear of record as aforesaid, the property must be assessed to unknown owners.”

The assessment in the name of Gus S. Holmes was a strict compliance by the Assessor with the law quoted. Thus we find the lands properly assessed in the name of Gus S. Holmes. When the taxes were not paid the County thereafter caused the same to be sold for delinquent taxes and ultimately the respondent became the purchaser from the county, thereby acquiring color of title. (R. 51, Ex. 1 P. 1112, 13, 14, 15, 16; & Ex. 2 P. 9, 10, 11, 12, 13, 14, 15, 16, 30) The respondent immediately entered

into possession of the lands upon entering into the contract with Beaver County for acquisition of title on June 5th, 1941, and ever since said date has occupied the lands under claim of right, openly, adversely, exclusively, continuously and uninterruptedly and paid all taxes regularly levied and assessed thereon according to law. (R. 68, 69, 75, 106 Finding 12.)

That the Appellants were entitled to possession under the certificate of sale and that respondents holding of the land in question was therefor adverse to the appellants we believe is established by the following cases.

It is the established and recognized law of this state that the purchaser under a certificate of sale issued as in this case, is entitled to the immediate possession of the land, could enter upon the land, cultivate it, improve it and was entitled to any crops produced thereon. We specifically refer to the case of *Young vs. Corless* found at 56 Utah 564, 191 Pac. 647 decided by the Utah Supreme Court in the year 1920. In that case the Supreme Court stated:

“\* \* \* Under the certificates of sale and the law authorizing the issuance of the same, the purchaser was entitled to immediate possession, and could enter upon the land, cultivate it, improve it, and was entitled to any crops produced thereon. \* \* \*” (*Young vs. Corless* 56 Utah 564; 191 Pac. 647)

That this is the effect of a certificate of sale

is also recognized in the later case of *McNiel* vs. *McNiel* decided by the Utah Supreme Court in 1922 and found at 61 Utah 141, 211 Pac. 988. In the case of *Livingston* vs. *Thornley* decided by the Supreme Court of Utah in 1929 and found at 74 Utah 561, 280 Pac. 1042, the Supreme Court was confronted with a problem involving the right of one possessing lands under purchase from the state to initiate and prosecute to successful conclusion a trespass action against a defendant who had permitted sheep to trespass upon the land for which the plaintiff was entitled to a certificate of sale from the state. The court there said:

“\* \* \* The presumption may well be indulged that when the legislature by its enactment, laws of Utah 1925, Chapter 31, Section 5594, required that the purchaser of state land shall pay interest on deferred payments from and after the date of sale, it was the intention of the legislature that such purchaser should be entitled to possession of the land purchased from and after the date of purchase. The mere fact that the State Land Board may delay in issuing a certificate of sale cannot well be said to effect the right of a purchaser to possession of the land purchased. \* \* \*”

The Supreme Court thereby recognized the fact that a purchaser even though he had not yet received the certificate of sale could support the action of trespass against trespassers upon lands which he was purchasing from the State.



In the light of the cases cited, there seems to be no question but that Joseph Henshaw and his successors, predecessors in title to the appellants, were entitled to the possession of the lands described in the certificate of sale No. 8515, from and after the date of issuance thereof, January 1, 1905 (R. 51, Land Board Record, R. 106). Joseph Henshaw and his successors in title, the predecessors in interest through which appellants claim were entitled to the issuance of patent as well. The fact that they failed to pay the taxes levied in the manner required by law by the Beaver County Assessor, and otherwise failed to complete the requisite formalities required of them by the State Land Board by its letters of July 8, and 14th, 1915 (R. 51) did not reinvest the State of Utah with the beneficial interest in this property since the State had received full payment of all monies due it on the purchase contract. The State was therefore left only the ministerial function of issuing patent. The interest of the State had been disposed of in accordance with law to a purchaser, to wit, Joseph Henshaw, and it is through this purchaser that the appellants claim. It having been established by the authorities above cited that the appellants predecessors in title were entitled to possession of the lands in question and that they could have maintained an action to evict a trespasser on the lands or ejected an unlawful claimant holding the lands, it logically follows



that if the respondents held the lands adversely, hostilely, continuously, uninterruptedly under claim of right and paid all taxes lawfully levied thereon for the statutory period they would acquire title by adverse possession which would cut off the rights of the appellants and their predecessors in title. That the respondents so held the lands is admitted by stipulation. (R. 68, 69) and was so found by the court (R. 106). The statutory period for establishing title by adverse possession is set by 78-12-5 UCA 1953 which was 104-12-15 in the 1933 and 1943 codes, at seven years. The requirements that taxes be paid is created by 78-12-12 UCA 1953, which was 104-12-12 in the 1933 and 1943 codes. The attempt by appellants to save themselves from this consequence by attempting to identify themselves with the State of Utah because patent had not issued, we submit, must fail.

Not one authority cited by the appellants in their brief holds that the interest of purchaser of state lands under a State Land Certificate can not be the subject of adverse possession. The authorities are to the contrary. The authorities cited by the appellant generally speaking involve an adverse action directed against the state involving lands which had not been acquired under a certificate of sale or purchased from the state. For example the appellant cites the *Van Wagoner vs. Whitemore* case, 58 Utah

418, 199 P. 670, decided by the Utah Supreme Court in 1921 as determinative of the issues in this case. We have no quarrel with the *Van Wagoner vs. Whitmore* case or any of the other authorities cited by the appellant. They state the law and state it accurately. The appellant simply misapplies the same to the factual situation involved in this case. The distinction between the *Van Wagoner vs. Whitmore* case and the present situation is that George C. Whitmore had been in open and notorious occupancy and possession of the land in question prior to the date on which the State of Utah was admitted to the Union. He had inclosed the land with a fence and made other improvements. At the time, that the State of Utah was admitted to the Union a provision was incorporated into the law, whereby one who was in possession of land then given to the state by the Federal Government in grants in aid of schools could make application and exercise preference rights for acquisition of title. Whitmore did not take this action. Instead he sought to acquire the lands by claiming that he had held them adversely to the State of Utah. The State in the meantime sold the lands to Van Wagoner under a proper application and selection in accordance with the Utah Law. The issue in the Van Wagoner case was not whether or not there could be an adverse interest acquired against the *purchaser* of State lands from the State but the question raised was

whether or not Whitmore by reason of his occupancy of the lands prior to the acceptance of Utah into the Union and his refusal thereafter to inaugurate the necessary steps to acquire title by preference as provided by law could hostilely acquire title to this land in an action against the State and thereby deprive the state of the revenue it was intended by Congress it should receive. The Supreme Court held that he could not do so.

We quote from the courts statement of the facts in the Van Wagoner case, Page 671:

“It is an undisputed fact that George C. Whitmore was in the open and notorious occupancy and possession of the land in question ever since long before Utah was admitted into the Union. It is also undisputed that he inclosed the land with a fence, made other improvements thereon, such as the construction of water ditches, and that he cultivated the land and produced crops thereon from year to year. \* \* \* and as to whether or not he intended to hold adversely to the state, which at the date of its admission into the Union became the legal owner of the property, does not appear, but for the purposes of the discussion the fact may be admitted. \* \* \*”

The Court then analyzes the applicable statutes and particularly the statutes creating the limitation on the action, being the same as are applicable to the instant case, and points out at page 673 of the opinion that everything necessary had been done to comply with the Statute to create an adverse

title against the State of Utah. The court says however, that such an end cannot be considered as having been the intention in the enactment of the statutes referred to and quotes with approval the case of *Murtaugh vs. C. M. & St. P. Rd.* 112 N. W. 860 as being the correct interpretation of the statutes in question at page 675 of the Utah opinion:

“We are, then of the opinion that, if the statute under consideration must be construed as authorizing the acquisition of title to the school lands of the state by adverse possession, it violates in this respect not only the terms of the grant, but also of the Constitution of the state. We are, however, of the opinion that the statute (referring to a statute identical in all pertinent application to Utah Statute 78-12-2) fairly may be given a construction which is consistent with the terms of the school land grant and the provisions of the State Constitution applicable thereto. If the Statute be read in connection with the general and well understood rule of law that title to public land cannot be acquired by adverse possession, the history of our school land grant, the nature of the title of the state to its school lands and the mandates of our Constitution with reference to them, it is clear upon the face of the statute that the Legislature did not intend to provide for the acquisition of the title to school lands by adverse possession. We accordingly hold that title to lands granted to the State of Minnesota for the use of its schools by the United States cannot be acquired by adverse possession, as against the state.”

This language adopted by the Utah Supreme Court from the Minnesota opinion clearly is limited in its application to acquisition of title adversely to the State.

In the case now before the Court, the State of Utah *did* dispose of the lands in the manner required by law, not by adverse possession, and there has never been any question raised but what the funds paid by Joseph Henshaw to the State of Utah for the acquisition of the lands represented by Certificate 8515 were properly applied to the purposes for which the lands were granted to the state. In the Whitmore case, obviously had Whitmore been permitted to prevail in his hostile action against the State of Utah and thereby achieve a title without recognition of the ownership by the State and without complying with the law of the State of Utah for acquisition of title, the State would have been deprived of the funds which it was the intention of Congress it should have.

At Page 11, Appellants state in their brief referring to themselves:

“The State having accepted full payment for the lands from the appellants and their predecessors in interest is now honor bound to execute its constitutional trust and issue patent to the purchaser, his assignee or his successor in interest.”

The absurdity of the appellant's position is

manifest in this statement. Appellants, at one and the same time recognize that their only claim to these lands is as a purchaser from the State and they thereby admit the validity of the transaction whereby the right to patent was acquired from the state. They then refuse to recognize that by virtue of other applicable laws of the state, to wit, the tax laws and the laws with respect to adverse possession, their rights as purchasers from the state might be cut off by an intervening claimant such as Respondent in this case.

## POINT II

UNDER UTAH LAW POSSESSION OF LANDS CANNOT BE ADVERSE PRIOR TO ISSUANCE OF PATENT.

*The Court erred in holding that adverse possession under State statutes of limitations commences to run not from the date of issuance of the patent but from the date of final payment of the State Land Certificate.*

Respondent is not in accord with the position taken by the appellants on this point. We respectfully submit to this court that the holding of the lower court in regard thereto is sound and is in conformity with the established law. The position taken by the appellants is neither sound or logical nor is it sustained by the authorities cited by them.

It must first be remembered in connection with the consideration of this point that the State of Utah has been paid the full consideration charged

for the land in question. (R. 17, 18, 51) Respondent acquired its title to the land in question, under which it claims, from Beaver County, which county had acquired its interest in the lands by reason of sale for delinquent taxes. (R. 51, Ex. 1 & 2, 106.) From March 30th, 1914, date on which final payment under the certificate of sale was made to the State, until Respondent purchased the lands from Beaver County under contract, June 5th, 1941, the lands had stood from year to year on the delinquent tax rolls of Beaver County and the county had been deprived of any revenue therefrom. (R. 17, 18, 106, 51 Ex. 1 & 2, and 68 & 69.)

The law relating to the Selection of State Land is found enacted by Laws of Utah 1899 Chapter 64, and with minor amendments, largely as to the price to be paid therefore, comes to the 1953 Code basically unchanged as 65-1-32. It is admitted and found by the lower court as a fact that the provisions of the law with respect to the selection of the lands in question by Joseph Henshaw, predecessor in title of the appellants was complied with in all respects, and that Certificate of Sale issued to Joseph Henshaw. (R. 104 No. 8) The State Received payment in full under the Certificate. (R. 17, 18) Accordingly by the provisions of applicable law as now set forth at 65-1-43 UCA 1953 Henshaw or his successors in interest became entitled to patent upon the surrender of the original certificate of sale plus the

payment of taxes due to the County as required by the provisions of 59-2-2 UCA 1953. Under this state of facts this court has already determined that the transaction constitutes a sale of the lands in question and the purchaser is entitled to possession from and after the date of purchase and before issuance of the Certificate of Sale. *Young vs. Corless*, 56 U. 564, 191 P. 647, and *Livingston vs. Thornley*, 74 U. 516, 280 P. 1042.

The Utah Statute of Limitations found at 78-12-2 & 3, UCA 1953 — [For text of sections cited see appendices page 51] imposes a limitation upon both the state and its patentees in the bringing of an action to recover lands unless the claimant had been in possession or received the rents and profits of such land within 7 years from commencement of the action.

It was admitted that appellants and their predecessors in title had not been in the actual possession of the lands in question at any time and that they had never received any of the issues, rents or profits thereof. (R. 68, 69)

The statutory bar would seem to be absolute were it not for the doctrine announced in the case of *Van Wagoner vs. Whitmore*, 58 Utah 418, 199 P. 670, if that case is applicable to the instant situation. We have previously under Point I analyzed the Whitmore case in some detail and it is not our purpose to again belabor the court on the distinction



between the situation there confronting the court and the situation in this case. We believe it suffices to point out that because of the fact that the State of Utah had not received the consideration which Congress had intended it should receive for relinquishment of its interest in the school lands the court adopted the position that such lands constitute trust lands and the State could not have intended by the enactment of the law referred to above, 78-12-3. UCA 1953, to deprive the people of the state of the benefits which Congress intended they should receive. That reasoning has no application to the instant situation because the state has received all to which it is entitled. We believe the answer to the problem lies in recognition of the fact as urged under Point I that the State is a nominal party in this action. We again refer the Court to the citation from American Jurisprudence set out at pages 21 and 22 of this brief as an excellent statement of the law applicable to the facts in this case.

To view this situation otherwise would give to the appellants a preferred situation which they would not have enjoyed had they complied with the formalities required and the patent been issued. Can it be then that by their own default they have insured themselves of a position where after the lapse of more than forty years without the payment of taxes, or the taking of possession, they can deprive of title one who under claim of right has paid the

taxes, has taken possession and improved the land? We do not believe this is either law or equity.

Appellants in their brief chose to ignore a further grounds establishing the sufficiency of respondents title to the lands in question. It will be recalled by the court that the respondent claims under a deed acquired from Beaver County, which county in turn acquired its interest in the property through tax sale (R. 51, Exhibits 1, page 11 and 12, 15 and 16; Exhibit 2, pages 11, 12, 14, 15, 16 & 30). We have previously referred the court to the Utah Code, Section 59-2-2, U.C.A. 1953, which exists substantially in its present form in the 1898 code and the 1907 code, except for the provision that after final payment has been made, the contract of sale for the purpose of taxation should be considered as passing title to the purchaser or assignee. This provision was enacted by Chapter 113, Section 1 of the Laws of Utah 1919. The respondent makes claim as the holder of a good and sufficient tax title from Beaver County and in the lower court upon motion duly made and by leave of the court, granted in open court, the respondent filed a reply (R. 70, 71) in which respondent claimed the benefit of the statute of limitations, Title 78, Chapter 12, Section 7.1, 5.1, 5.2 and 5.3 U.C.A. 1953 as enacted by the laws of Utah 1951, Chapter 19, Section 1, et seq. [The cited sections of the code are set forth in full in the appendices page 52-53].

The sections of the code referred to impose an absolute bar to the maintenance of an action to recover possession or title to real property or to interpose a defense as against one claiming under tax title unless the party so seeking to recover possession or title or interpose the defense was in fact possessed of the land within 4 years from the commencement of the action or within one year from the date of the enactment.

This court in the case of *Hansen vs. Hansen* 3 Utah 2nd 310, 283 P. 2nd 884, has upheld the validity and constitutionality of these sections of the code. Since more than four years elapsed between the effective date of the statutes referred to and the commencement of this action, respondent claimed the benefit of the statute of limitations and the lower court in its memorandum decision (R. 76) states:

“That the respondent by virtue of its purchase of said lands from Beaver County became entitled to possession and use of said lands.”

In its findings of fact and conclusions of law (R. 102 through 107) the court made findings which verified the validity of the respondent's claim to the protection of the statutes referred to. No appeal has been taken by the appellant from the findings of fact made and entered by the lower court. With respect to this matter appellants choose rather to direct their entire attention to the contention, which

they raise, that respondent can not acquire any rights prior to the issuance of patent. We submit that the rights acquired by the respondent from Beaver County were substantial rights, were recognized by the court below as a part of its decision. We can not conceive of a more appropriate case in which to apply the provision of the statute above referred to than the instant case where the appellants and their predecessors in title have permitted the lands in question to stand idle on the tax rolls of Beaver County for more than 40 years and yet now seek to come forward and assert title to the same.

We believe a short analysis of the cases cited by appellants in support of their position on this Point 2 may be helpful to the court.

We direct the courts attention to the quotation appearing in appellant's brief at page 16, taken from the case of *Steele vs. Boley*, 7 Utah 64, 24 P. 755.

“\* \* \* We must hold that the District Court erred in admitting evidence of adverse possession by defendants prior to the issuing of the patent to the plaintiff \* \* \*”

Taken thus from the context one is given the impression that this case does indicate that there could be no adverse possession prior to issuance of patent.

The case of *Steele vs. Boley* involved the question of whether the State Statutes of Limitations

and adverse possession of lands for which the patent had not yet been issued out of the United States Government could result in the acquisition of an adverse title against both the Federal Government and its patentee. The Court at Page 755 of the Pacific report of the case says:

“But since the former decision in this court, the Supreme Court of the United States had held that while the title to public land is still in the United States, no adverse possession of it can, under state statute of limitations, confer a title which will prevail in an action of ejectment in the court of the United States against the legal title under a patent from the United States. *Redfield vs. Parks*, 132 US 239, 10 Sup. Ct. 83. In that case the court says: “It cannot be conceded that state legislation can in that manner imperil the rights of the United States or overcome the general principle that it is not amenable to the Statute of Limitations or the doctrine of laches.”

When viewed in the light of what the court was actually considering it is seen at once that the quotation taken out of context and put in appellants brief has no significance at all in connection with the problem involved in this case.

A similar misleading quotation is made by appellants from the Toltec Ranch case at page 16 of appellants' brief.

“But counsel for the appellant insist that the Statute of Limitations could only begin to run from the issuance of patent, and that,

therefore, the defense of adverse possession must fail. This position would be sound if the legal title to the land had remained in the United States until the patent was issued; but such was not the case.”

A different interpretation is derived when one considers that the facts in the case disclose that plaintiff was a grantee from the Central Pacific Railroad Company and that the Central Pacific Railroad Company received the lands by grant from the United States. On September 5, 1896, the Railroad received its patent from the government and on May 4, 1897 conveyed the land to plaintiff. The defendant and intervener had occupied the land since 1875 or 1876. The question was whether or not the adverse possession, which was substantially proved commencing long prior to the actual issuance of the patent, would cut off the interest of the grantee of the Railroad or whether such possession did not become adverse until issuance of patent. The court said that the title passed long prior to issuance of patent and that the patent was merely evidence of compliance with the terms of the grant. The holding is thus exactly to the contrary of the position for which appellants cite the case. The court held that the statute of limitations had run and that the grantee of the patentee was barred. [For the full text of the portion of the opinion from which the excerpt quoted by Appellants was taken, see appendices page 54-55].

This case, far from being hostile to the respondents position and supporting the position of appellants for which it is cited, becomes in actuality authority for the respondents and holds that even in the case of United States Patents, adverse possession may commence in the State of Utah prior to the issuance of patent, against a claimant who possesses legal title under grant. The parallel between that situation and the one in the instant case is close, and while the matter involves a United States Patent rather than State the principles applied in that case are applicable to the case at hand.

We believe that since the appellants and their predecessors in title were the parties entitled to possession under the Certificate of Sale issued by the State and enjoyed the rights as defined by the court in the cases above cited, the adverse possession of the respondents would, under the doctrine of the Toltec Ranch case, cut the appellants off.

The same principles are again recognized in the *Utah Copper Co. vs. Eckman* case cited by appellants. In that case the Supreme Court cites with approval the case of *Boe vs. Arnold*, an Oregon case, 102 P. 290, which case held that,

“One claiming title to the land by adverse possession for the statutory period as against all persons, but recognizing the superior title of the government may assert such adverse possession as against any person

claiming to be the owner under a prior grant from the government.”

It should be remembered that the *Utah Copper Co. vs. Eckman* case 47 Utah 165, 152 P. 178, involved an attempt to foreclose the interests of the United States Government in a mining claim which had not yet been patented. Since the only means by which acquisition of title to a mining claim is by patent from the United States Government, the holding of a mining claim adverse to the claimant prior to the issuance of the patent would obviously avail one nothing because until the requirements for issuance of patent had been met, the claimant had nothing. When viewed in this light, the quotation appearing at page 17 of the appellant's brief from the Eckman case, becomes understandable and is not in conflict with the holding of the lower court in the instant case.

In view of the foregoing we respectfully submit that the decision of the lower court on this point is correct and should be sustained as in conformity with both law and equity.

### POINT III

THE COURT WILL NOT LEND ITS AID IN A SUIT BASED ON A DEED ACQUIRED BY MALFEASANCE OF PUBLIC OFFICE.

*The Court erred in holding that a quiet title decree may be based on an official abuse of public trust and malfeasance of office.*



We believe this point is presented to this court, as in the answer filed in the court below, solely for the purpose of confusing the issues. We submit that there are no facts before this court which substantiate the unsupported allegation made in either the Fifth Defense of the answer or appellants' brief of malfeasance in public office by the Beaver County Commissioners in making sale of the lands in question to Minersville Land and Livestock in the year 1941. The respondent in the court below moved to strike the fifth defense of appellant's answer. (R. 50). By order dated the 15th day of September 1956, the court granted the motion to strike the fifth defense from the answer. (R. 66) No appeal was ever taken from this order of the court. No error is assigned in this appeal based upon the court's order striking the fifth defense. Appellants entire presentation consists of nothing more or less than their own unsubstantiated statements attributing to these worthy men ulterior motives for the transaction which was publicly conducted, made a matter of public record and known about by virtually all of the residents of the area and which has never previously been subject to question from 1941 to the present. Appellants' brief makes no mention of the order of the court striking the Fifth Defense from the answer. Appellants argue as though the alleged misconduct were a proven fact and the lower court a co-conspirator to breach the public trust.

That the court was entirely justified in rejecting this scurrilous attack on reputable officials of the County becomes apparent when one realizes that the appellants must succeed, if at all in this action, on the strength of their own title. They cannot prevail by pointing out a weakness, real or supposed in respondents title.

“As frequently stated, the complainant’s right to relief depends upon the strength of his own title, not upon the weakness of the title of his opponent. Having failed to establish title in himself, he cannot complain of insufficiency of the evidence upon which the court adjudged title to be in the defendant.”  
44 Am. Jur. QUIETING TITLE, P. 69 Sec. 83.

The Supreme Court of the United States in the case of *Dick vs. Roraker* 155 U.S. 404, 39 L. Ed. 201, states the rule as follows:

“The rule in ejectment is that the plaintiff must recover on the strength of his own title and not on the weakness of the title of his adversary. A like rule obtains in an equitable action to remove a cloud from a title, and title in the complainant is of the essence of the right to relief.”

We further submit that the court below was justified in its action in striking the fifth defense in that the facts alleged as the basis for the defense would constitute, even if proved, a collateral attack upon the actions of these public officials.

The actions of public officials are presumed, in the absence of proof, to the contrary to have been faithfully and properly performed.

“In the absence of any proof to the contrary there is a presumption that public officers have properly discharged the duties of their office and have faithfully performed those matters with which they are charged. This presumption applies to Federal, State, County and municipal officers \* \* \*” 43 Am. Jur. PUBLIC OFFICERS P. 254, Section 511..

The officials not being parties to this action, would be powerless to defend themselves or to come in and show the justification for their acts. The actions of public officials are always subject to the public scrutiny, but if they are to be called to task is must be in a direct proceeding for the purpose, not by way of a side attack in a proceeding to which the official is not even a party.

“\* \* \* It is frequently held that an officer is a necessary party to a suit where it is sought to pass on the validity of his acts. \* \* \*” 43 Am. Jur. PUBLIC OFFICERS P. 251-2 Sec. 507.

Under the Utah law if the public official was to be called to account for his official conduct. The action would have to be commenced within six years from the date of the act complained of. See 78-12-24 UCA 1953. Can it be permitted to the appellants to

sit idly by knowing of these acts committed by the County officials and let 14 years go by and then seek to raise them indirectly in a proceeding to which the officials are not even parties? We submit this would not only be inequitable, it is not the law. We believe this court would be justified in striking from the brief the appellants Point Three. Had the Fifth Defense of appellants been deemed pertinent by the court below, and the issues raised therein been subjected to proof we submit that the facts proved would have cleared the actions of these commissioners of wrongdoing. It is beneath the dignity of this court to permit the presentation of such an argument as that set forth in Point Three of the appellants brief based solely upon innuendo and the unsupported statements of the appellants' counsel, with its inherent implication of complicity by the lower court to accomplish an ulterior end.

#### POINT IV

THE LOWER COURT DID NOT ERR IN REFUSING TO ORDER THE STATE TO ISSUE PATENT TO THE APPELLANTS AS PURCHASERS OF THE LAND FROM THE STATE BUT CORRECTLY HELD THAT THE RESPONDENTS WERE ENTITLED TO THE ISSUANCE OF PATENT.

*The Court erred in refusing to order the State to issue patent to appellants as purchasers of the land from the State.*

Since we believe we have established in the

argument under Points 1 and 2, the respondents title to the land in question, the narrow point here involved seems to be whether the State should as a matter of form issue patent to the appellants and then the court make and enter its decree quieting title against the appellants and recognizing the title in the respondents by adverse possession and by acquisition of tax title. We believe that to issue the patent to the appellants after the appellants rights thereto, have been cut off by reason of the respondents intervening adverse possession and claim under tax title would be an improper act and one which does not give credence to the legislative intent as expressed by the statutes relating to the taxation of lands acquired from the State on certificates of sale cited under our discussion of Point 1.

There has been a recent manifestation of this legislative intent in the enactment in 1945 of 59-2-3 UCA 1953 which provides that the interest of a purchaser of state lands shall be assessed and the tax collected thereon shall be collected as taxes on personal property, and that if sold for taxes a certified copy of the tax sale when furnished to the land board shall act as an assignment of the interest of the original purchaser. [For full text see appendices page 55-56].

The legislature here recognizes a tax sale may cut off a purchaser's right to patent. In the in-

stant case, we believe the notification of the State by letter of respondents counsel bearing date of April 21, 1955 and the conference therein referred to (R. 51 Land Board Records, P. 37), constitutes notice to the State Land Board of the rights of Minersville Land and Livestock as purchaser of the tax title from Beaver County. Certainly the joinder of the State as a party defendant to this action brought by respondents constitutes such notice. The action of the State in refusing to issue patent to the appellants as successors to the rights of the original certificate holder, in the light of the impending litigation and the claims of the respondents seems entirely appropriate. The Answer filed by the Attorney General on behalf of the State disclaiming any beneficial interest in the State and re-affirming the State's intention to carry out its function imposed by law with respect to the issuance of patent upon determination by the court of the party or parties entitled thereto seems an entirely proper manner to insure performance in conformity with the Revenue Laws and Laws relating to issuance of patent by the State.

## CONCLUSION

The Court below correctly decided the issues presented. The judgment of the Lower Court should be affirmed with costs to respondent.

Respectfully submitted,

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## APPENDIX

Excerpt from Appellants' brief, Page 2 & 3:

"The suit filed by plaintiff and respondent was not an action of trespass, nor a possessory action in the nature of ejectment, nor a suit to have plaintiff declared to be the present owner of the state land Certificate No. 8515 as a successor in interest of Joseph Henshaw, nor a suit alleging any right in plaintiff to title and patent under the land laws of the state by rights of purchase or otherwise. It was a quiet title suit instituted against the state and the holders of the certificate claiming ownership of the lands and right to a patent under the statute of limitations by reason of payment of taxes and of title (7 year statute) and for four years adverse possession for seven years under color under a tax title (4 year statute)."

78-12-2 UCA 1953:

Actions by the state: The state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right of title of the state to the same, unless:

(1) Such right or title shall have accrued within seven years before any action or other proceeding for the same shall be commenced; or,

(2) The state or those from whom it claims shall have received the rents and profits of such real property, or some part thereof, within seven years.

78-12-3 UCA 1953:

Actions by patentees or grantees from state: No action can be brought for or in



respect to real property by any person claiming under letters patent or a grant from the state, unless the same might have been commenced by the state as herein specified, in case such patent had not been issued or granted.

“78-12-7.1 UCA 1953 as amended — In every action for the recovery or possession of real property or to quiet title to or determine the owner thereof the person establishing a legal title to such property shall be presumed to have been possessed thereof within the time required by law; and the occupation of such property by another person shall be deemed to have been under and in subordination to the legal title unless it appears that such property has been held and possessed adversely to such legal title for seven years before the commencement of such action. Provided, however, that if in any action any party shall establish prima facie evidence that he is the owner of any real property under a tax title held by him and his predecessors for four years prior to the commencement of such action and one year after the effective date of this amendment he shall be presumed to be the owner of such property by adverse possession unless it appears that the owner of the legal title or his predecessor has actually occupied or been in possession of such property under such other title than that such tax title owner and his predecessors have failed to pay all the taxes levied or assessed upon such property within such four year period.”

“78-12-5.1 — No action for the recovery

of real property or for the possession thereof shall be maintained, unless the plaintiff or his predecessor was seized or possessed of such property within seven years from the commencement of such action; provided, however, that with respect to actions or defenses brought or interposed for the recovery or possession of or to quiet title or determine the ownership of real property against the holder of a tax title to such property, no such action or defense shall be commenced or interposed more than four years after the date of the tax deed, conveyance or transfer creating such tax title unless the person commencing or interposing such action or defense or his predecessor has actually occupied or been in possession of such property within four years prior to the commencement or interposition of such action or defense or within one year from the effective date of this amendment."

"78-12-5.2 — No action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other purchaser thereof at any public or private tax sale and after the expiration of one year from the date of this act. Provided, however, that this section shall not bar any action or defense by the owner of the legal title to such property where he or his predecessor has actually occupied or been in actual possession of such property within four years from the commencement or interposition of such action

or defense. And provided further, that this section shall not bar any defense by a city or town, to an action by the holder of a tax title, to the effect that such city or town holds a lien against such property which is equal or superior to the claim of the holder of such tax title."

"78-12-5.3 — The term "Tax Title" as used in section 78-12-5.2 and section 59-10-6 and the related amended sections 78-12-5, 78-12-7 and 78-12-12 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."

Full text of quotation from *Toltec Ranch Co. vs. Babcock*:

"\* \* \* but such was not the case. The land in controversy constituted part of the lands granted by congress to the Central Pacific Railroad Company. The original grant was made by act of July 1, 1862 (12 Stat. 489) and the amount of the grant was enlarged by the act of July 2, 1864 (13 Stat. 356). The grant was one in praesenti, and vested the legal title to the land in the railroad company subject to some conditions relating to the construction of the line of the railroad and the identification of the lands. The lands which passed by the grant became identified October 20, 1868, the date of the filing of the map of definite location in the office of the Secretary of Interior. *Tarpey vs. Madsen* 178

U.S. 215, 20 Sup. Ct. 849 44 L. Ed. 1042. Upon their identification, and the location and the construction of the road, the title vested in the grantee as of the date of the grant, and the patent thereafter issued by the government was not essential to vest the legal right, but it constituted evidence that the conditions of the grant had been complied with by the grantee, and to that extent relieved the grant from the possibility of forfeiture for failure to comply with these conditions. *The grantee being thus vested with the legal title, had the right to enter upon the land, occupy, and use it after identification, the same as after the patent had been issued.* \* \* \* The railroad company having had, as we have seen the legal title to the land in dispute at least from time of filing of the map of definite location with the Secretary of the Interior, and having had the right to enter upon, occupy and use the land, *there would seem to be neither reason nor authority to hold that the statute of limitations did not run against the company and its grantee as well before as after the issuance of the patent, and this even though the intervener may have supposed her title was subordinate to that of the United States; for possession held in subordination to the title of the government may be adverse to another claimant.* *Francoeur vs. Newhouse* 14 Sawy. 600 (C.C.) 43 Fed. 236; 9 Am. Eng. Enc. Law, 58; *Hayes vs. Martin* 45 Cal 559. From the foregoing considerations, and from a careful examination of the proof, we are of the opinion that the intervener is entitled to hold the land in controversy and the crops raised thereon, by adverse possession, and

that as against the plaintiff she has the absolute title thereto. (*Italics ours*)

59-2-3. UCA 1953—Collection of tax on interest of purchaser—Certificate of sale—Effect of filed certificate.—Any tax levied on the interest of a purchaser of state lands before title passes to such purchaser or his assignee, shall be collected in the same manner as taxes on personal property and the said interest shall be subject to sale for taxes in the same manner as personal property.

Upon the sale of any interest, the officer making such sale shall issue a certificate of sale, and such certificate or certified copy thereof, upon being filed with the state land board, shall operate as an assignment of the interest of the original purchaser or his assignee in said contract to the purchaser at the tax sale.