1965

State of Utah, By and Through Its Road Commission v. Polly Thompson, Also Known as Polly Thompson Brittain, Utah Power & Light Company; Morgan Guaranty Trust Company of New York; A. P. Neilson and Lillie M. Neilson, His Wife; Gerhardt Drechsel and Erna A. Drechsel, His Wife; Ben H. Da Vis and Dorothy M. Davis, His Wife; Donald W. Layton and Helen D. Layton, His Wife; Mary Izetta Ogden Mchale; and Phyllis Lucille Moore (Defendants), Utah Power & Light Company and Morgan Guaranty Trust Company of New York (Appellants) Vs. A. P. Neilson and Lillie M. Neilson, His Wife : Appellant's Brief

F. Gerald Ivine and Robert B. Porter; Attorneys for Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,

Plaintiff,

vs.

POLLY THOMPSON, also known as POLLY THOMPSON BRITTAIN, UTAH POWER & LIGHT COMPANY; MORGAN GUARANTY TRUST COMPANY OF NEW YORK; A. P. NEILSON and LILLIE M. NEILSON, his wife; GERHARDT DRECHSEL and ERNA A. DRECHSEL, his wife; BEN H. DAVIS and DOROTHY M. DAVIS, his wife; DONALD W. LAYTON and HELEN D. LAYTON, his wife; MARY IZETTA OGDEN McHALE; and PHYLLIS LUCILLE MOORE,

Defendants.

Civil No. 10508

UTAH POWER & LIGHT COMPANY and MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Appellants,

vs.

A. P. NEILSON and LILLIE M. NEILSON, his wife,

Respondents.

FILED

APR 1 3

Clerk, Supreme Court

APPELLANTS' BRIEF

Appeal from Judgment of the Third Judicial District Court in and for Salt Lake County State of Utah

HONORABLE A. H. ELLETT, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,

Plaintiff,

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POLLY THOMPSON, also known as POLLY THOMPSON BRITTAIN, UTAH POWER & LIGHT COMPANY; MORGAN GUARANTY TRUST COMPANY OF NEW YORK; A. P. NEILSON and LILLIE M. NEILSON, his wife; GERHARDT DRECHSEL and ERNA A. DRECHSEL, his wife; BEN H. DAVIS and DOROTHY M. DAVIS, his wife; DONALD W. LAYTON and HELEN D. LAYTON, his wife; MARY IZETTA OGDEN McHALE; and PHYLLIS LUCILLE MOORE,

Defendants.

UTAH POWER & LIGHT COMPANY and MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Appellants,

vs.

A. P. NEILSON and LILLIE M. NEILSON, his wife,

Respondents.

Civil No. 10308

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This action was originally commenced by the State of Utah acting by and through its Road Commission to condemn the fee title of certain lands for Interstate Highway purposes. The Appellants and the Respondents both claim to be the owners of such lands and this proceeding will determine such ownership.

DISPOSITION IN LOWER COURT

Following a pretrial hearing before the District Court on November 17, 1964, and a Stipulation there entered into between the present Appellants and the Respondents, the District Court on the 29th day of December, 1964, entered its Findings of Fact, Conclusions of Law and Judgment in favor of the Respondents, A. P. Neilson and Lillie M. Neilson, his wife. From these Findings, Conclusions and Judgment, the Appellants, Utah Power & Light Company and Morgan Guaranty Trust Company, appeal.

RELIEF SOUGHT ON APPEAL

The Appellants seek a reversal of judgment of the District Court and a judgment in their favor as a matter of law to the effect that they are the owners of the property involved herein.

STATEMENT OF FACTS

This action was commenced by the State of Utah acting by and through its State Road Commission by the filing of a complaint and by the service of summons on or about April 4, 1963. (Tr. 1) The action sought to condemn the fee title to approximately 20 separate tracts of land for Interstate Highway 80 and particularly the west approach of said highway from the Salt Lake City Airport to Interstate Highway 15. (Tr. 17) Both the Appellants and the Respondents were the owners of several tracts and the controversy between themselves

and the Road Commission has been resolved with the exception of the one tract involved in this proceeding. This tract is designated in the complaint as Parcel No. 02-3:47D:T and is legally described as all of Lots 19 and 20, Block 9, Irving Park Addition, Salt Lake City Survey. As to this tract of land, both the Appellants and the Respondents agreed that the appraised value as made and offered by the Road Commission was fair and such amount is reflected in the judgment. (Tr. 26 and 29) However, these parties have not agreed upon the ownership of the tract of land condemned.

The stipulation entered into between these parties on November 17, 1964, (Tr. 34) and the Findings of Fact and Conclusions of Law entered by the District Court on December 29, 1964, (Tr. 39 and 43) show the evidentiary facts to be the following. Since the issuance of the patent to these lands, taxes for three different years remained unpaid and for each of these years an Auditor's Tax Deed subsequently issued to Salt Lake County. Each of these tax deeds was issued without the attachment of the required affidavit of the County Auditor to the tax rolls. On March 12, 1958, Salt Lake County deeded the property to the Respondents who thereafter paid to the Salt Lake County Treasurer the general taxes levied against said property.

The Respondents have never had actual possession of the property and have done nothing with respect to said property that could be said in any way to evidence any claim of ownership thereto by way of fences, cultivation or improvements of any kind. (Tr. 39)

The Appellants contend that they are the owners of the property and base this contention of ownership upon conveyances from the admitted owner, Jacob I. Allenbach, through his widow, Harriet Allenbach. The record is wholly silent as to whether Jacob I. Allenbach died otherwise than intestate or left any heirs other than his wife, Harriet. (Tr. 39)

The Appellants became the owners of the property on January 10, 1955 and commencing with the year 1956 and for each year to and including 1963 Appellants paid to Salt Lake County the taxes on said Lots 19 and 20, Block 9, Irving Park Addition, Salt Lake City Survey, pursuant to assessment made therefor by the Utah State Tax Commission. (Tr. 39)

ARGUMENT

POINT I and POINT II

POINT I. THAT THE EVIDENCE AND THE FINDINGS DO NOT SUPPORT A CONCLUSION THAT THE RESPONDENTS HAVE ESTABLISHED ANY TITLE TO OR OWNERSHIP IN SAID REAL PROPERTY.

POINT II. THAT UNTIL THE RESPONDENTS HAVE ESTABLISHED SUCH TITLE AND OWNERSHIP, IT IS ERROR TO CONCLUDE THAT THE APPELLANTS ARE BARRED UNDER SECTION 78-12-5.2, UTAH CODE ANNOTATED, 1953, OR UNDER ANY OTHER SECTION, FROM ASSERTING THEIR OWNERSHIP.

For the purposes of argument, Appellants have combined Points I and II in order to avoid being repetitious and in order to clearly present the problem at issue. We believe the problem can be simply stated to be "Can

the holder of a tax title claim an absolute ownership to the real property based solely upon holding that tax title for four years after purchase from the County?" We earnestly contend that he cannot and that he must establish the other elements of adverse possession and particularly that of actual possession.

As this Court well knows, the various statutes dealing with limitations of actions and with adverse possession have been the subject of a number of legislative enactments and of a considerable number of decisions by the Court in recent years. The problem now presented has not been considered in its entirety in any prior decision. We have reviewed all of the cases bearing on the subject since the adoption of the 1951 amendments and have carefully considered those amendments. These amendments, together with the other pertinent sections of the Code, are now numbered as Sections 5, 5.1, 5.2, 5.3, 6, 7, 7.1, 8, 9, 12, and 12.1 of Chapter 12 of Title 78 of the Utah Code Annotated, 1953.

It is our contention that these sections must be read together, that they define the elements of adverse possession and that the holding of a tax title for four years after purchase from the County is only one of those elements.

It does not appear to us to be possible that a legislative enactment could constitutionally force a property owner to actually occupy, fence or cultivate property to which he has legal title should such owner be disinclined to do so; nor may such legislation deprive an owner of

title to his property solely by reason of such disinclination. Statutes of limitation and of adverse possession require affirmative action on the part of the disseisor, and not on the part of the true owner, in such manner and form that such owner is put on notice of the adverse claim.

The matter is well discussed and excellently presented in the following excerpts from 3 Am Jur 2d commencing on page 86 of the treatise on Adverse Possession:

> "The basic requisite of adverse possession is that a cause of action accrue against a disseisor in order that the statute of limitations may begin to run. As developed in succeeding sections, it is generally held that in order to bar the true owner of land from recovering it from an occupant in adverse possession and claiming ownership through the operation of the statute of limitations, the possession must have been for the whole period prescribed by the statute, actual, open, visible, notorious, continuous, and hostile to the true owner's title and to the world at large; it is also essential that the possession have been held under a claim of right or title. Under particuar statutes color of title may also be necessary. When these elements coincide and the possession continues for the statutory period, a title by adverse possession is acquired." 3 Am Jur 2d 86

> "One claiming title by adverse possession always claims in derogation of the right of the real owner; he admits that the legal title is in another. He rests his claim, not upon a title in himself, as the true owner, but upon holding ad-

versely to the true owner for the period prescribed by the statute of limitations. Generally, adverse possession may exist independently of title. Thus, as a general rule, one who seeks to set up an adverse possession need not have a good title, or in fact any title, except a possession adverse and hostile to that of the true owner under a pretense or claim of title. Adverse possession may exist with color of title, however; under some statutes color of title is essential to the acquisition of title by adverse possession, and under others the requirements for obtaining such a title are less stringent with color of title than without it." 3 Am Jur 2d 87

"The whole doctrine of title by adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the person in possession. The theory upon which title may be acquired by adverse possession is that it is to be implied from the acquiescence of the owner in the hostile claim for the statutory period. The ultimate element in the rise of a title through adverse possession is the acquiescence of the real owner in the exercise of an obvious, adverse, or hostile ownership through the statutory period. The true owner of land who fails to protect his right against one holding in adverse possession thereof and manifesting the same as required by statute and for the length of time fixed thereby, is considered as having acquiesced in the transfer of ownership." 3 Am Jur 2d 87

And with respect to the question of possession, the authors at 3 Am Jur 2d 89 make the following assertions:

"Possession is one of the indispensable elements in adverse possession. Actual possession or occupancy is always involved in any claim to

land by adverse possession. There must be an actual possession of the lands to create a title by adverse possession. It is therefore a general rule that one claiming land adversely must, in order that his claim may be effective as against the owner, be in actual possession thereof, for, without such occupancy, the law assumes the possession to be in the owner of the legal title. In the absence of color of title, the rule requires actual possession of all the land claimed. The statutory requirements are not satisfied by the assertion of the right of possession. Possession will not be presumed from the execution of a deed. Nor will the rights of the lawful owner be affected by his mere neglect to assert them, unless the property is actually occupied by an adverse claimant."

Since the 1951 amendments to the adverse possession statute, this Court has been called upon to decide a number of cases brought for the purpose of quieting title to real estate. Some of these cases were commenced before the effective date of the 1951 amendments and some are concerned with the amendments, but each case hereinafter cited involves in some manner the question of adverse possession following the acquisition of a tax title deed from the County.

In *Pender* v. *Jackson,* 260 P. 2d 542, 123 Utah 501, decided on July 28, 1953, the Court found against the tax title holder even though taxes had been paid by such holder from 1940 through 1949. In quoting from *Madsen* v. *Cohn,* 122 Cal App 704, 10 P. 2d 531, the Court said:

"Hence, an open and notorious occupation with hostile intent is a necessary constituent of

an adverse possession. Neither a hostile intent without such occupation, nor such occupation without hostile intent, is sufficient."

In *Farrer* v. *Johnson,* 271 P. 2d 462, 2 Utah 2d 189, decided on June 10, 1954, the Court found against the holder of a tax title who, though out of possession, had paid all of the taxes on the lands in question.

The case of *Hansen* v. *Morris,* 283 P. 2d 884, 3 Utah 2d 310, decided on May 12, 1955, was the first case involving the 1951 amendments. Although the Court upheld the statute, the factual matters upon which the adverse possession was based do not appear in the Court's decision and it is not possible to determine factually the question of possession.

The second case under the 1951 amendments was decided on July 16, 1957 and is cited as *Peterson* v. *Callister,* 313 P. 2d 814, 6 Utah 2d 359, affirmed on rehearing on February 3, 1959, in 334 P. 2d 759, 8 Utah 2d 348. In this case the County recorded an unacknowledged auditor's tax deed in 1932 and issued an unacknowledged deed to the plaintiffs in 1944. However, both deeds were recorded; the plaintiffs were in actual possession and farmed the property continuously from 1944 to the commencement of the action in 1955; and the plaintiff paid all of the taxes during these years. A finding for the plaintiff was upheld.

In *Michael* v. *Salt Lake Investment Company,* 345 P. 2d 200, 9 Utah 2d 370, decided on October 19, 1959, the Court found that the defendant had only a 1909 deed

from the County with no possession or payment of taxes. The Court found for the plaintiff and made the following observation:

> "With defendant's assertion that plaintiffs must prevail on the strength of their own title we have no quarrel, believing, however, that their burden in this respect successfully has been shouldered."

In *Pender* v. *Alix,* 354 P. 2d 1066, 11 Utah 2d 58, decided on August 24, 1960, the Court upheld a summary judgment in a quiet title action. A reading of the decision would indicate that the Court was satisfied with the proof of possession offered by the successful intervenor.

We have called the Court's attention to the preceeding six cases in order to show that the actual occupancy of the property by the successful litigant conclusively appears in each, either from the fact recital or from the Court's assumption in each case.

We would now urge that the case of *Lyman* v. *National Mortgage Bond Corp.,* 320 P. 2d 322, 7 Utah 2d 123, decided on January 14, 1958, should be conclusive of the matter in controversy here. In that case the plaintiffs had secured a tax deed from the County in 1941 and had since been in actual possession, had cultivated the property and improved and fenced it. However, they failed to show payment of taxes for four consecutive years even though the evidence was clear that those taxes not paid were subsequently redeemed.

The Court found, however, that the plaintiffs did not bring themselves within the statute as to adverse possession and we urge the following ruling from that case to be controlling upon the case at bar:

> "In Bowen v. Olson, decided in 1953 under Section 78-12-12, U.C.A. 1953, prior to the 1951 amendment, we held that a redemption from a delinquent tax assessed against this property claimed by adverse possesion under a tax sale did not constitute a payment of taxes levied and assessed upon such property within the meaning of that statute. After a careful consideration we adopted the majority rule on that question and we are not now inclined to overrule that decision but adhere thereto. The facts in that case are not distinguishable from the facts in this case.
>
> "Plaintiffs contend that a different result is required by the 1951 amendments to Section 104-2-5, U.C.A. 1943, which is the same as 78-12-5.1, Pocket Supplement to Volume 9 ,U.C.A. 1953, and Section 104-2-5.10, Laws of Utah for 1951, which is the same as Section 78-12-5.2, Pocket Supplement to Volume 9, U.C.A. 1953. In plaintiff's brief these sections are referred to as statutes of limitation as distinguished from the other sections previously cited above, which are referred to as adverse possession statutes. Hereinafter these designations will be used to distinguish the two sets of statutes.
>
> "These sections forbid the commencement or maintenance of an action or defense claiming ownership or right of possession to real property, unless the claimant was seized, possessed or occupied such property within seven years prior to

the commencement of such action. Where the adverse party, in such action, claims under a tax title the limitations period is shortened to require seizure, possession or occupation within four years after the creation of the tax title claim. These statutes are different from the adverse possession statutes considered above in that they contain no requirement that the adverse party to the claimant in such action must have had adverse possession and paid all taxes assessed against such property during the limitations period. In fact, the limitation statutes make no mention of any rights which the adverse party must have in order to invoke the provisions of these limitation statutes.

"A very strict construction of these statutes might require a holding in plaintiff's favor even though they have failed to show payment of the taxes for the period required by the adverse possession statutes, for it is clear that none of the defendants have actually occupied or been in possession of the property within the prescribed limitations period. However, plaintiffs can prevail only if we hold that defendants' claims are barred under these limitations statutes by their failure to occupy or be in possession of the property within the prescribed period, regardless of whether plaintiffs have proved a valid claim to this property. Such a holding would leave the plaintiffs in possession although they have failed to establish any valid claim to such property under the adverse possession statutes previously discussed on which their claims are based or by any other means.

"We do not think that such construction of these statutes was intended. Plaintiffs must succeed on the strength of their own claim and not

alone on the weakness of the defendants' claims in order to succeed. The mere failure of the defendants to show that they have actually occupied or been in possession of this property is not sufficient to bar their rights to recover the property where, as here, plaintiffs have failed to establish any valid claim or right to the property in themselves. These limitation statutes, although they do not expressly so provide, only bar the right of a party to maintain an action to recover real property where the opposing party established a right of possession or ownership in the property. This plaintiffs have failed to do, so the decision must be reversed."

POINT III.

POINT III. THAT THE RESPONDENTS HAVE NOT PAID THE TAXES ON SAID REAL PROPERTY WITHIN THE DEFINITION OF PAYMENT ADOPTED BY THIS COURT IN ITS INTERPRETATION OF THE STATUTES AS TO SUCH PAYMENT AND THE RESPONDENTS HAVE NOT BY REASON THEREOF ESTABLISHED ANY TITLE TO OR OWNERSHIP IN SAID REAL PROPERTY.

The Findings of Fact in this case (Tr. 41) state that:

"Utah Power & Light Company has paid taxes to the State Tax Commission within the requirements of the Public Utilities Act covering real and personal property owned by said Company in the State of Utah. Said taxes have been paid each year since the conveyance from Valley Investment Company to Utah Power & Light Company. The defendants, A. P. Neilson and Lillie M. Neilson, have paid to Salt Lake County when due the general property taxes assessed by said County each year since the conveyance from

> Salt Lake County. This action was commenced April 4, 1963, and the State secured an Order of Occupancy on the 22nd day of April, 1963."

In order that this apparent discrepancy may become understandable, it is necessary to refer to the statutes under which the property of a public utility is assessed and taxed.

Section 59-5-3, Utah Code Annotated, 1953, provides that ". . . All property of public utilities whether operated within one county or more . . . must be assessed by the State Tax Commission . . ."

Section 59-5-52, Utah Code Annotated, 1953, specifies the time of assessment and Section 59-5-55, Utah Code Annotated, 1953, provides for the record of such assessment. Following compliances with these sections, the State Tax Commission must apportion public utility property in proportion to each county and Section 59-6-2, Utah Code Annotated, 1953, provides for such report from the State Tax Commission to each county auditor. Thereafter the public utility receives its tax statement from the county and pays the same to the county treasurer.

Thus, under the Findings in this case the Appellants have paid the general taxes on this property for each of the years from 1956 to 1963, both inclusive; and from these same Findings it can be determined that the Respondents have paid these taxes only for the years 1959, 1960, 1961, and 1962.

We urge that the case of *Christensen* v. *Munster*, 266 P. 2d 756, 1 Utah 2d 335, decided on February 11, 1954, is controlling here. In that case although the defendants were in actual possession under their tax deed from the county and had paid taxes for five of the seven years necessary to perfect their title, the payment of taxes for two years by the record owner effectively barred the continued assertion of an adverse title. This Court in holding for the plaintiffs said:

> "We prefer to adopt the view espoused by the authorities cited by plaintiff, and we conclude, therefore and hold that payment by the record owner or his agent of the taxes for one or more years during the 7-year period, prior to any payment thereof having been made by the adverse possessor, not only extinguishes his tax liability, but extinguishes the tax itself and effectively interrupts the continuity of events necessary to perfect title by adverse possession."

The principles here adopted were upheld and reaffirmed in the succeeding cases of *Bowen* v. *Olson,* 268 P. 2d 983, 2 Utah 2d 12, and *Lyman* v. *National Mortgage Bond Corp.,* supra.

CONCLUSION

We respectfully submit that the evidence and the findings made therefrom in this matter wholly fail to support any title or ownership in the Respondents as to the real property involved in this proceeding and that the Appellants as a matter of law are entitled to a decree to the effect that the legal and beneficial title to said property remains in them.

Respectfully submitted,

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