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) v. A. P. Neilson and Lillie M. Neilson, His Wife ; Respondent's Brief

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. 10808

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

Appellants,

— vs. —

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

Respondents.

RESPONDENTS' 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
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STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff,

— vs. —

POLLLY 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

RESPONDENTS' BRIEF

STATEMENT OF THE KIND OF CASE

This action was initiated by the State of Utah to acquire certain tracts of land through condemnation for interstate highway purposes. The Appellants and Re-

spondents both claim to be owners of a certain tract of land involved in said condemnation action.

DISPOSITION IN THE LOWER COURT

The District Court on December 29, 1964, entered its Findings of Fact and Conclusions of Law and Judgment holding that the Respondents, A. P. Neilson and Lillie M. Neilson, his wife, are entitled to judgment from the State of Utah for the appraised value of the property involved herein.

RELIEF SOUGHT ON APPEAL

The Appellants seek a reversal of the 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 initiated on or about April 4, 1963, by the State of Utah, by and through its State Road Commission, to acquire certain tracts of land through condemnation (Tr. 1). Of the numerous tracts of land designated in the State's Complaint, the only one of concern in this case is designated "Parcel No. 02-3: 47D:T" which is located in Salt Lake County, State of Utah, and described as all of Lots 19 and 20, Block 9, Irving Park Addition, Salt Lake City Survey.

There is no dispute between the parties herein that the appraised value offered by the State represents the

reasonable value of said property (Tr. 26, 29). There is a dispute, however, between the Respondents and Appellants as to the recipient of said appraised value.

The Appellants' alleged ownership of the property is based upon the following chain of title. Jacob I. Allenbach, deceased, was vested with a fee simple title to said property at the time of his death (Tr. 40). Following his death, Harriet Allenbach, widow of said Jacob I. Allenbach, executed a quitclaim deed to Valley Investment Company, dated July 7, 1950, which Investment Company in turn executed a quitclaim deed to Utah Power & Light Company, dated January 10, 1955, (Tr. 40). Since the conveyance from Valley Investment Company, Utah Power & Light Company has paid taxes assessed on said property within the requirements of the Public Utilities Act of the State of Utah, (Tr. 41).

There is no evidence that Harriet Allenbach was vested with fee title at the time she executed the quitclaim deed to Valley Investment Company. Appellants offered no evidence as to whether her husband, Jacob I. Allenbach, died testate or intestate or whether or not he left any heirs in addition to his wife (Tr. 40).

The Respondents derive their title to said property by virtue of a deed from Salt Lake County dated March 12, 1958, which deed transferred the county's interest in said land, which interest was obtained from tax sales for the years 1916, 1917 and 1932, and the issuance of an auditor's tax deed, which instruments were promptly re-

corded (Tr. 40, 41). The affidavit of the county auditor was not attached to the assessment rolls for the years the taxes were delinquent (Tr. 40, 41).

Since the conveyance on March 12, 1958, from Salt Lake County up to the commencement of the State's condemnation action on April 4, 1963, Respondents have paid when due all general property taxes assessed by said county (Tr. 41).

The property involved herein is not fenced or improved, and neither the Appellants nor the Respondents have, at any time, been in actual physical possession of said property (Tr. 41).

ARGUMENT

POINT I.

THE APPELLANTS HAVE ESTABLISHED NO RIGHT IN OR TITLE TO THE PROPERTY INVOLVED HEREIN.

The Appellants' alleged record ownership to the property in question is based upon a quitclaim deed from Harriet Allenbach to Valley Investment Company, which Company in turn executed a quitclaim deed to Utah Power & Light Company. It is of import, and Respondents deem it controlling, that in regard to the first link of Appellants' chain of title, i.e., quitclaim deed by Harriet Allenbach to Valley Investment Company, there was no evidence introduced by Appellants in their attempt to quiet title in themselves that Harriet Allen-

bach was vested with the fee title at the time of the execution of said quitclaim deed.

This defect is not cured by the fact that her husband, Jacob I. Allenbach, was vested with fee simple title at the time of his death, since no evidence was introduced concerning any probate proceedings, whether he died testate or intestate, or whether or not he left any heirs in addition to his wife.

Appellants have failed to establish that Harriet Allenbach possessed any interest in the property whatever at the time she executed the quitclaim deed to Valley Investment Company. There is therefore no evidence from which the court could conclude that Appellants are the owners of any interest in the premises or that Appellants have any standing to attack Respondents record title. It is respectfully submitted that Appellants on the basis of the record below were not under any circumstances entitled to attack Respondents title or to receive compensation as the owners of the real estate.

POINT II.

THE RESPONDENTS POSSESS A VALID TAX TITLE TO THE PROPERTY INVOLVED HEREIN, AND THE APPELLANTS ARE BARRED FROM ATTACKING SUCH TITLE.

Assuming arguendo that Appellants are record title holders, they are barred from asserting their claim to the property involved herein under Section 78-12-5.2 and 78-12-5.3, U.C.A., 1953.

Section 78-12-5.2 precludes the bringing of an action for the recovery of real property against the holder of a tax title after the expiration of four years from the date of conveyance under which the tax title was acquired unless the owner of the legal title has occupied or been in actual possession of the property within the four-year period. Section 78-12-5.3 defines a tax title as being any title, whether valid or not, which has been derived through tax sale proceedings whereby the property is relieved from a tax lien.

In *Pender* v. *Alix,* 11 Utah 2d 58, 354 P. 2d 1066, the tax title holder intervened in a suit by the record owner to quiet title. The Court, applying the provisions of Section 78-12-5.2, and citing *Hansen* v. *Morris,* 3 Utah 2d 310, 283 P. 2d 884, and *Peterson* v. *Callister,* 6 Utah 2d 359, 313 P. 2d 814, aff'd on rehearing 8 Utah 2d 348, 334 P. 2d 757, as controlling, held that the record owner "was vulnerable to the four-year limitation statute. . . ."

In *Hansen* v. *Morris,* supra, this Court sustained the constitutionality of Sections 78-12-5.1 and 5.3. This case involved a quiet title suit brought by the plaintiff against the record owner. Against the record owner's assertion that the statutory steps necessary to perfect a valid title were not accomplished, the Court stated:

> "It appears obvious that such sections were enacted to eliminate the objections pointed out in the Toronto case, and were intended to prevent raising of defenses based on failure to comply with statutory steps leading down the long road traversable in perfecting tax titles, unless one

> claiming a better title assert his rights within four years after a document of transfer, valid on its face, has been executed and delivered 'in the course of a statutory proceeding for the liquidation of any tax levied against * * * property whereby the property is relieved from a tax lien.' "
>
> "In holding such sections [78-12-5.1 and 5.3] valid, we can see no merit in any argument to the effect that if any of the statutory steps necessary to perfect a tax title have not been taken, such as failure to give notice of sale, failure of the auditor to execute affidavits, etc., compels the conclusion that title remains in the record owner, hence no title passes, hence any claim by the county and/or its grantee by tax deed is invalid, hence the statute of limitations does not apply."

In *Peterson* v. *Callister,* supra, this Court was again called upon to interpret the statute of limitations designed to validate tax titles. This case involved a quiet title action by the tax title holder against the successor in interest of the record owner. The Court held that the defense of irregularities in a tax sale proceeding, one of which was the failure to attach an auditor's affidavit to the assessment rolls, was not available to the successor in interest of the record owner by virtue of Title 78-12-5.1 and 5.3. In so holding, the Court stated:

> "We agree with the defendant that title technically may not have passed, but the plaintiff can prevail here even with an invalid tax title by virtue of Titles 78-12-5.1 and 5.3, Utah Code Annotated 1953. Plaintiff had a tax title, valid or not, which was derived through a sale and conveyance of the property in the course of a statu-

> tory proceeding for the liquidation of a tax which had been levied against it, which tax was relieved by the transfer. Defendant did not have possession thereof at any time during the statutory period in which he must have occupied the property in order to protect his record title."
>
> "Title 78-12-5.1 is a statute of limitations which prevents the assertion of a defense by a record owner if he has not had possession of the property during a four-year period after one has received a tax title thereto, valid on its face, and this is true whether the tax title is valid or not."

The decisions in *Hansen* v. *Morris,* supra; *Peterson* v. *Callister,* supra; and *Pender* v. *Alix,* supra, are controlling in the instant case.

Lyman v. *National Mortgage Bond Corp.,* 7 Utah 2d 123, 320 P. 2d 322, upon which case Appellants so heavily rely, is not applicable to, or controlling in, the determination of the instant case. Plaintiff in the *Lyman* case brought suit to quiet title based upon a tax deed and adverse possession. The defense raised by the record owner was failure on the part of the plaintiff to show payment of all taxes for a consecutive period of four years after obtaining his tax title from the county. The plaintiff did prove, however, the payment of all taxes or redemption of the property from such taxes before the May sale. The Court held that the plaintiff had failed to establish any property right in themselves and had failed to make out a case to quiet title because the redemption from tax sales was not considered to be payment of taxes in line with the decision in *Bowen* v. *Olsen,* 2 Utah 2d 12, 268 P.

2d 983. The latter case involved an action to acquire title by adverse possession.

Respondents claim of title to the property involved herein, based solely upon a tax deed from Salt Lake County, valid on its face, has been held by the Respondents for a period in excess of four years, during which period Appellants have not been in possession of the property, and during which period Respondents have paid when due all general property taxes assessed by the county. Respondents therefore contend that Appellants are barred under the four-year limitation statutes as applied in *Hansen* v. *Morris,* supra; *Peterson* v. *Callister,* supra; and *Pender* v. *Alix,* supra, from asserting their claim or attacking the validity of Respondents' title.

POINT III.

APPELLANTS' PAYMENT OF TAXES ON THE PROPERTY INVOLVED HEREIN IS NOT CONTROLLING.

The payment of taxes levied by Salt Lake County based upon an assessment by the State Tax Commission under the requirements of Section 59-5-3, U.C.A. 1953, does not cure the Appellants' fatal title defect, nor does it thereby allow Appellants to succeed in their attempt to invalidate Respondents' title. This is so because Respondents' title is derived not from the payment of taxes since the conveyance from Salt Lake County, which taxes the Respondents have duly paid, but rather from the sale of said property for the non-payment of delin-

quent taxes in past years. It is therefore contended that the payment of taxes by Utah Power & Light Company has no bearing upon the question to be decided by this Court; it neither validates Appellants' claim, nor does it invalidate Respondents' claim.

CONCLUSION

We submit that the evidence clearly establishes that the Respondents, based upon their tax title, are entitled to compensation from the State of Utah for the appraised value of the property involved herein and that the Appellants have failed to show any title in themselves and are precluded from attacking the title held by the Respondents. Therefore, the Respondents respectfully urge that the decision of the lower court be affirmed.

Respectfully submitted,

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