

1962

Peter G. Condas v. Sugarhouse Mercantile : Defendant and Respondent Sugarhouse Mercantile Company's Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

PETER G. CONDAS,
Plaintiff and Appellant,

vs.

SUGARHOUSE MERCANTILE
COMPANY, a Utah corp.,
Defendant and Respondent.

DEC 1 1962

Supreme Court, Utah
Case No.
9657

DEFENDANT AND RESPONDENT SUGARHOUSE
MERCANTILE COMPANY'S BRIEF

Appeal from Judgment of the Third District Court
in and for Salt Lake County,
Honorable Stewart M. Hanson, District Judge.

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INDEX

	<i>Page</i>
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN THE LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	1
STATEMENT OF FACTS.....	1-6
THE SUPREME COURT DOES NOT HAVE JURISDICTION OF THE APPEAL.....	6-10
ANSWERING PLAINTIFF'S BRIEF.....	11
POINT I—Plaintiff Barred from Asserting Claim....	11-15
POINT II—New Trial Determined All Issues.....	16
POINT III—Tax Title Adjudicated at New Trial.....	16-17
CONCLUSION	18

AUTHORITIES CITED

Cases

	<i>Page</i>
Anderson v. Anderson, 3 U. 2d 277, 282 P. 2d 845.....	9
Consolidated Cut Stone Co. et al v. Seindenbach, 180 Okla., 128, 114 P.2d 480 (Second Appeal).....	15
Consolidated Cut Stone Co. et al v. Seindenbach, 181 Okla., 578, 75 P. 2d 442 (First Appeal).....	15
Everhill v. Swan ,20 U. 56, 57 P. 716.....	12
Greehalgh v. United Tintic Mines Co., 42 U. 524, 132 P. 390....	14
Hathaway v. United Tintic Mines Co., 42 U. 520, 132 P. 388....	14
Henderson v. Barnes, 27 U. 348, 75 P. 759.....	9
Jeremy Fuel and Grain Co. v. Millen, 50 U. 49, 165 P. 791.....	12
Jorgensen v. Bigelow, 34 Idaho 541, 217 P. 265 (Second Appeal)	15
Jorgensen v. McAllister, 34 Idaho 182, 202 P. 1059 (First Appeal)	15
Larsen v. Gasberg, 43 U. 203, 134 P. 885.....	13-14
Logan City v. Utah Power and Light Co., 86 U. 340, 16 P.2d 1097	11
Lynch's Estate, 123 U. 57, 254 P. 2d 454.....	9

Peay v. Salt Lake City, 11 U. 331, 40 P. 206.....	12
Progress Spinning and Knitting Co. v. Dixie Fire Ins. Co., 43 U. 303, 134 P. 1166.....	9
State v. Hansen, 51 U. 514, 171 P. 515.....	10
Stephani v. Abbott, 137 Cal. App. 510, 30 P. 2d 1033.....	12
Sugarhouse Mercantile Company v. Salt Lake County, and R. J. Fry, Inc., Peter G. Condas, and Mrs. Peter G. Condas, 225 P.2d 1050, 119 Utah 234.....	3
Todaro vs. Gardner, 3 Utah 2d 404, 285 P.2d 839.....	11-16
Toronto vs. Sheffield, 118 U. 460, 222 P.2d 594.....	3, 14, 17

INDEX TO TEXT AND STATUTES

Rule 73 (a) Utah Rules of Civil Procedure.....	7, 8, 10
Rule 7 (b) Utah Rules of Civil Procedure.....	7
Laws of Utah, 1943, 104 Chapter 41.....	9
Rule 13(d) Utah Rules of Civil Procedure.....	12
Utah Statute, 1943, 104-9-3.....	12
Rule 76, Utah Rules of Civil Procedure.....	13

IN THE SUPREME COURT OF THE STATE OF UTAH

PETER G. CONDAS,
Plaintiff and Appellant,

vs.

SUGARHOUSE MERCANTILE
COMPANY, a Utah corp.,
Defendant and Respondent.

Case No.
9657

DEFENDANT AND RESPONDENT SUGARHOUSE MERCANTILE COMPANY'S BRIEF

STATEMENT OF THE KIND OF CASE

This is Plaintiff's action to quiet title. Defendants' defense is that there was a prior action between the same parties, involving the same property.

DISPOSITION IN THE LOWER COURT

Motion for Summary Judgment was made by the Defendant, and the Court granted it dismissing the Plaintiff's Complaint.

RELIEF SOUGHT ON APPEAL

Defendant asked that the judgment of the lower court be sustained.

STATEMENT OF FACTS

Plaintiff's Complaint alleges he is the owner of one-half interest in certain real property. Defendant, Sugar-

house Mercantile Co., denies that Plaintiff has any interest in the property and alleges a prior suit between the same parties involving the same property in which it was adjudged that Plaintiff, Mr. Condas, had no interest in the property.

There can be no dispute about the facts in this case because it is all documentary consisting of pleadings and answers to Interrogatories.

Sugarhouse Mercantile Co. sued Salt Lake County, R. J. Fry, Incorporated, Peter G. Condas and Mrs. Peter G. Condas, his wife, in a prior case which will hereinafter be referred to as the 1st case. R. J. Fry, Inc. was not served with Summons and did not enter its appearance. Salt Lake County was served with Summons, but its default was entered. Mr. and Mrs. Peter G. Condas entered their appearance and the case proceeded from thereon as a case between Sugarhouse Mercantile Co. and Mr. and Mrs. Peter G. Condas. Defendant, Mr. Condas, claimed title through a tax deed from Salt Lake County, Mr. Condas obtained judgment quieting title in his favor and against Sugarhouse Mercantile Co. Sugarhouse Mercantile Co. appealed the 1st case to the Supreme Court and while the case was pending on appeal Mr. Condas, on October 20, 1950 acquired a deed from R. J. Fry, Inc. (R 37). There is nothing in the record to show what title, if any, R. J. Fry, Inc. had in the property.

The Supreme Court reversed the lower court's decision because it was controlled by the case of Toronto vs.

Sheffield, 118 U. 460 222 P.2d 594, in which case this Court held Sec. 104-2-5. 10 Laws of Utah 1943 old statute on Limitations on Tax Titles was held to be unconstitutional. Judgment was reversed and the cause remanded with instructions to grant a new trial unconditionally. The Supreme Court did not quiet title in the Sugarhouse Mercantile Co., but the judgment was reversed with instructions to grant a new trial, and said the defendant *may* present their claims for the amount they have paid to the county for the property as a condition of quieting appellant's title thereto.

We quote the Utah Supreme Court's entire decision in the 1st case:

IN THE SUPREME COURT OF THE STATE
OF UTAH

Sugarhouse Mercantile Company,
Plaintiff and Appellant,

vs.

Case No.
7487

Salt Lake County, and R. J. Fry, Incorporated,
Peter G. Condas, and Mrs. Peter G. Condas,
Defendants and Respondents.

PER CURIAM:

This case is controlled by our decision in the case of Toronto vs. Sheffield, Utah....., 222 P.2d 594, in which Section 104-2-5.10, Laws of Utah, 1943, was held to be unconstitutional.

The judgment is reversed and the cause remanded with instructions to grant a new trial

wherein defendants may present their claims for the amounts they have paid to the county for this property as a condition of quieting appellant's title thereto. Appellant shall recover its costs on appeal.

Found at 225 P.2d 1050, 119 Utah 234.

The case was remanded to the District Court for a new trial and a Demand for Trial was made in accordance with the mandate and a new trial had. The Findings of Fact made at the trial (R 24) states:

“The above entitled case was tried in the above court and that an appeal was taken to the Supreme Court and that a remittiture has been filed in the above entitled case and that said case was again set for trial and that said case came on for hearing before the Honorable Judge, Joseph G. Jeppson on the 3rd day of June, 1953 for a pre-trial. Golden W. Robbins appearing as the attorney for the plaintiff and Mary J. Condas appearing as attorney for the defendant, Peter G. Condas and Mrs. Peter G. Condas, his wife. That Salt Lake County default having been regularly entered, it was stipulated that the pre-trial should be the trial of the said case. Evidence was introduced including the evidence introduced at the previous trial.”

The Court decreed in the new trial that the defendants, Salt Lake County, Peter G. Condas, and Mrs. Peter G. Condas, his wife, and each of them has no right, title interest or estate therein. (R 23).

At the time of the new trial on June 3, 1953, Mr. Condas had a deed from R. J. Fry, Inc. see Interrogatories (R 37).

“Q. Did the plaintiff have a deed from R. J. Fry, Incorporated on the 31st day of January, 1952?

“A. Yes, plaintiff obtained a deed from R. J. Fry, Inc. dated October 20, 1950; plaintiff thought this deed was lost and therefore obtained a second deed at a later date; plaintiff later discovered, however, that the first deed had been recorded by his attorney, Mary Condas. The deed was recorded in the Salt Lake County Recorder's Office in Book 809, Page 413.

Defendant asked Interrogatories, (R 13) which were not answered by Mr. Condas, but by his then attorney, who was F. Burton Howard, who set up a deed dated January 12, 1956, and the tax deed which was adjudicated in the first case (R15, 16, 17). Defendant made a motion requiring the Plaintiff to sign and fully answer the Interrogatories (R 26) which motion was granted. In compliance with the Court Order Peter G. Condas signed the Interrogatories, still relying upon the tax deed adjudicated in the 1st case and the deed dated January 12, 1956 (R 33). It was not until the 2nd set of Interrogatories (R 35, 36) that Mr. Condas admitted the first deed dated October 20, 1950 (R 37).

The Judgment and Findings were signed and filed on the 3rd day of November, 1958. R. J. Fry, Inc. was never served with Summons or entered its appearance

in the 1st case. In this action, Peter G. Condas has filed suit claiming title through his tax deed, the same deed that was involved in the case of Sugarhouse Mercantile Co. vs. Salt Lake County and Condas, upon the deed that he received from R. J. Fry, Inc. prior to the new trial of the 1st case. (R 20, 25).

The court in its Summary Judgment sets out the facts upon which it relied for entering the Summary Judgment. (R 44, 45).

THE SUPREME COURT DOES NOT HAVE JURISDICTION OF THE APPEAL

NOTICE OF APPEAL WAS NOT SERVED WITHIN ONE MONTH AS REQUIRED BY RULE 73(a).

Respondent made a Motion to Dismiss the Appeal, which Motion was denied, but inasmuch as the grounds for dismissal of the appeal were jurisdictional, which may at any time be inquired into and there was no written decision, Respondent respectfully requests the permission of the Court to call again to its attention the following rules and facts.

That a Summary Judgment was signed and filed on February 7, 1962. (R 44, 45) A Motion for a New Trial was filed and argued and the Motion was denied by an Entered Order dated February 23, 1962 (R 51). The Notice of Appeal was not filed until March 30, 1962 (R 52) 7 days after the time for appeal had expired. The Second Order denying the Motion for a New Trial was filed on March 30, 1962. (R 50).

We contend that the District Court had lost jurisdiction before it signed the Second Order and it cannot have any effect and this Court does not have jurisdiction of the appeal under Rule 73(a).

Rule 73(a)

PROCEDURE FOR TAKING AN APPEAL

(a) "When and How Taken. When an appeal is permitted from a district court to the Supreme Court, the time within which an appeal may be taken shall be one month from the entry of the judgment appealed."

Rule 73(a) further states:

"The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the ENTRY of any of the following orders made upon a timely motion under such rules: granting or denying a motion * * * or denying a motion for a new trial under Rule 59."

The Court will note time to appeal runs from the ENTRY of the Order denying a new trial.

The word 'order' is defined by Rule 7(b) as follows:

(2) Orders. An Order includes every direction of the court including a minute order made and entered in writing and not included in a judgment."

The following is the Order that was entered. (R 51)

IN THE DISTRICT COURT OF THE THIRD
JUDICIAL DISTRICT, in and for SALT LAKE
COUNTY, STATE OF UTAH

PETER G. CONDAS

Plaintiff

vs

SUGARHOUSE MERCANTILE COMPANY

Defendant

ENTERED ORDER

Case Number 125563

Dated Feb. 23, 1962

STEWART M. HANSON, *Judge*

The matter of plaintiff's motion for a new trial and to amend summary judgment comes now on before the Court for hearing, the plaintiff being represented by David E. West as counsel, the defendant being represented by G. W. Robbins as counsel. Thereupon the Court having considered and now being fully advised in the premises, orders said motion for new trial denied, and motion to amend summary judgment is granted.

Rule 73(a) above quoted provides that the appeal must be taken within one month from the entry of the judgment or if a Motion for a new trial is timely made, then the appeal must be taken within one month from the ENTERED ORDER denying the motion for a New Trial, the 1st Entered Order is at (R 51). Since the rules have been adopted this Court has held that it

is jurisdictional that the appeal be taken within one month and the following cases have been decided by this Court under the new rules.

Anderson v. Anderson 3 U. (2d) 277, 282 P.2d 845 at page 848:

“This appeal was not taken in time and the failure to do so is jurisdictional and noticeable by the court sua sponte.”

In re Lynch’s Estate, 123 U.57 254 P.2d 454 column one page 454:

“held that the one month period for taking an appeal from order entered on November 22, 1952, expired at the end of December 22, 1952, and appeal taken on December 23, 1952 was not timely.”

Prior to the rules under section title 104, chapter 41, this Court held to the same effect that the notice of appeal had to be filed within the time allowed by the Code of Civil Procedures. The following cases so hold.

Henderson v Barnes, 27 U. 348, 75 P. 759. The Court held:

Appeal which was not taken within prescribed period after entry of judgment was ineffectual.

Progress Spinning & Knitting Co. v Dixie Fire Ins. Co., 43 U. 303, 134 P. 1166. The Court held:

Where the record affirmatively shows that the appeal was not taken in time, it must be dis-

missed, and in the absence of a showing that for some good and sufficient reason the appeal was, nevertheless, taken in time, the dates given in the record are controlling.

State v Hansen, 51 U. 514, 171 P. 515. The court held:

Appeal would be dismissed where it was not taken until eleven days after six months from time of entry of judgment.

Rule 73 states, the time to appeal is one month from the ENTRY OF AN ORDER denying a Motion for a New Trial, and this appeal was not taken within one month from the date of the Entered Order (R 51).

Therefore, the time for appeal commenced to run on February 23, 1962 at the time of the Entered Order. If this is not the rule, the time for appeal could be extended indefinitely by getting the trial court to enter a Second Order, even years after the ruling on the Motion for a new Trial. It has been the practice of both the Trial Court and Attorneys not to prepare a Second Order. If the Trial Court and the Attorneys are not doing this correctly, we respectfully submit that the Lawyers and the Judges of the State of Utah should be informed by a written opinion of this Court, that the time for appeal does not start to run until after the Entered Order and the preparation and filing of a Second Order.

ANSWERING PLAINTIFF'S BRIEF

POINT I

PLAINTIFF BARRED FROM ASSERTING CLAIM

The plaintiff is barred from asserting a new title because his deed was obtained prior to the hearing of the case in the Supreme Court and prior to the new trial of the first case (R 37). Mr. Condas received the deed of October 20, 1950 and the new trial was held on the 3rd day of June, 1953 (R 24). Mr. Condas had all of the title at the time of the new trial that he now has and under the rule this Court laid down in the case of *Todaro v Gardner*, 3 Utah 2d 404, 285 P.2d 839. He must assert that claim and we quote from page 841 top of the 1st column:

“* * * that a party is concluded in a subsequent matter not only as to matters actually determined in the prior action, but also as to other issues which could properly have been determined.”

Logan City v Utah Power & Light Co., 86U340 16 P.2d 1097 at page 1101 first column last paragraph:

“It is well settled that it is the duty of a party to interpose such defense as it may have to an action brought against it, and, if it fails to do so, the resulting judgment is conclusive against it as to all matters of defense which were or might have been interposed.”

And on page 1100 second column second paragraph:

“There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, in terest rei publicae, ut sit finis litium, and nemo debet bis vexari pro una et eadam causa.”

And on page 1100 first column end of first paragraph:

“The interests of society demand that there shall be a termination to every controversy.”

Other cases holding to the same effect are:

Stephani v Abbott, 137 Cal. App. 510 30 P.2d 1033

Everhill v Swan, 20 U. 56, 57 P. 716

Peay v Salt Lake City, 11 U. 331, 40 P. 206

Jeremy Fuel & Grain Co. v Millen 50 U. 49, 165 P. 791

Rule 13(d) provides:

“(D) COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.”

Our former section of the Utah Statute was 104-9-3. Failure to Set up Counterclaim, states:

“If the defendant omits to set up a counterclaim in the cases mentioned in the first subdivisions of the next preceding section, neither he nor his assignee can afterwards maintain an action against the plaintiff therefore.”

It is immaterial what title he had at the time of the first trial because the new trial gave Mr. Condas

the opportunity to put in evidence all the title he had up to and including the time of the retrial. In suits to quiet title the plaintiff pleads that he is the owner of the property and the defendant pleads that he is the owner of the property and then they put in all of the evidence that they have. There was no need for the pleading to be amended in the first case, but if Plaintiff wanted to amend the pleadings, the Court could have allowed the amendment.

Larsen v. Gasberg, 43 U. 203, 134 P. 885, on page 887, 2nd column:

“* * * and it may permit amendments to the pleadings to the same extent that it might have done before the trial.”

The first case was reversed and unconditionally granted a new trial. Mr. Condas had the deed of October 20, 1950 when the case was re-tried. He had the right and the duty to put in evidence whatever title he was going to rely upon. At the new trial the Sugarhouse Mercantile Co. and Mr. and Mrs. Condas were both put on the duty of proving their respective title and case.

The words ‘new trial’ has been discussed in the following Rule and cases:

Rule 76 provides:

“If a new trial is granted, the court shall pass upon and determine all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case.”

Larsen v Gasberg, 43 U. 203, 134 P. 885 at page 887 top of page 2nd Column states:

“Where a judgment is reversed and a new trial granted without any specific instructions or directions, the case stands in the lower court precisely as it did before a trial was had in the first instance.”

Hathaway vs United Tintic Mines Co. 42 U. 520, 132 P. 388 and Greehalgh v United Tintic Mines Co., 42 U. 524, 132 P. 390 holds:

Where the matters involved have not been fully litigated, Supreme Court will not enter up judgment on appeal, but will remand for new trial.

The Supreme Court decision in the first case states the case was remanded for a new trial unconditionally and the mere stating of the fact that the defendant was entitled to reimbursement was not a restrictive condition.

At the new trial the Court had to determine all of the issues including the rights to reimbursement. The court made it clear in the case of Toronto v Sheffield 118 U. 460 222 P.2d 594, that where the fee title owner sued that a tax title claimant was entitled to reimbursement

It is true that where a case is remanded for restrictive purposes that the lower court has to follow the mandate of the Supreme Court, but there was no mandate contained in the Supreme Court decision limiting Mr. Condas to any particular evidence or title. The

cases cited in Defendant's Brief are distinguishable on the facts and the orders in the decision. The cases did not grant a new trial, but gave specific directions. The defendant cites the case of Consolidated Cut Stone Co. et al v Seindenbach, 180 Okla, 128, 114 P.2d 480, it was not reversed and remanded for a new trial, but was remanded with specific instructions. See the first case of Consolidated Cut Stone Co. et al v Seindenbach, 181 Okla, 578, 75 P.2d 442 and the Order on page 463.

The defendant cites the case of Jorgensen v Bigelow 34 Idaho 541 217 P. 265. It was not reversed and remanded for a new trial, but was remanded with specific instructions. See the first case which was entitled Jorgensen v McAllister 34 Idaho 182 202 P. 1059 and the Order on page 1061.

These cases are entirely different and distinguishable from this Court's decision in the first case, in which case the judgment was reversed and the case was remanded with instructions to grant a new trial with no limitations on the issues.

Mr. Condas had the deed from R. J. Fry, Inc. at the time of the new trial. It was not only his privilege, but it was the duty of Mr. Condas to decide whether or not he was going to rely upon his tax title deed or on the deed from R. J. Fry, Inc., or on both of them and when he didn't do so, he forever waived it. From the first set of Interrogatories it is apparent that Mr. Condas intended not to mention the deed of October 20, 1950, but to rely upon the later deed so that it would appear he only had the tax deed at the time of the new trial.

POINT II

NEW TRIAL DETERMINED ALL ISSUES

The Trial Court at the time of the new trial did not refuse to determine any matter pertaining to the title that Mr. Condas acquired from R. J. Fry, Inc. (R 22, 23, 24 24A, 25). At the time of the new trial R. J. Fry, Inc. was neither a necessary nor a proper party because its interest in the property had been conveyed to Mr. Condas and as successor in interest to R. J. Fry, Inc. he was bound to assert that title. The case of *Todaro v Gardner* 3 Utah 2d 404, 285 P.2d 839 holds that to matters actually determined in the prior action, but also as to other issues which could properly have been determined. A party is concluded in a subsequent trial from asserting it and the other cases we have cited.

The issues at the new trial was what title Mr. Condas had, and if for reasons best known to him and to his attorney, he elected not to put his newly acquired title in evidence, he is estopped from asserting it later as against the plaintiff.

POINT III

TAX TITLE ADJUDICATED AT NEW TRIAL

Plaintiff has contended throughout the case that he did have a deed from R. J. Fry, Inc. Now he cannot assume that he did not have a deed.

This action cannot be maintained on the basis of the original tax title because the tax title was adjudicated

at the new trial of the case to be invalid, and Mr. Condas acquired no title from Salt Lake County, only the right to reimbursement which money he received (R. 24A).

Toronto v Sheffield, 118 U. 460, 222 P.2d 594 at page 600 paragraph 4 it states:

“As the result of this action plaintiff’s title will be adjudicated to be invalid.”

And at page 595 2nd column it states:

“Defendants’ claim that under the evidence plaintiffs’ title was invalid and the action must be dismissed. See Telons v. Staley, 104 Utah 537, 144 P.2d 513; Equitable Life and Cas. Inc. Co. v Schoewe, 105 Utah 569, 144 P.2d 526; Tree v White, 110 Utah 233, 171 P.2d 398; Petterson v Ogden City, 111 Utah 125, 176 P.2d 599; Anson v Ellison, 104 Utah 576, 140 P.2d 653.”

A statute passed and a case decided subsequent to the trial of the instant case certainly cannot have any effect upon this case.

The interest of R. J. Fry, Inc. was or should have been adjudicated at the new trial. The interest of R. J. Fry, Inc. at the time of the new trial was held by Mr. Condas and he was bound to assert any claim that he had by virtue of that title, and Mr. Condas cannot assert a title against himself. R. J. Fry, Inc. at the time of the new trial was neither a party or a necessary party and it would have been improper to make them a party.

CONCLUSION

Litigation should be brought to an end. A party should not be allowed to assert one defense in one lawsuit and then bring a new lawsuit asserting a claim which he had and which could have been asserted in the other case. Sugarhouse Mercantile Co., defendant and respondent, respectfully requests that the judgment of the lower court be sustained or the appeal be dismissed for lack of jurisdiction.

Respectfully submitted,

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Defendant and Respondent

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