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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED
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Supreme Court, Utah

STATE OF UTAH, By and Through Its Road Commission,
Plaintiff and Respondent,

vs.

BEN DAVIS et ux et al,
Defendants and Respondents,

DONALD W. LAYTON et ux,
Defendant and Appellant.

Case No. 10112

APPELLANTS' BRIEF

Appeal from Judgment of Third District Court in and for Salt Lake County
Hon. Ray Van Cott, Jr.

Donald W. Layton
220 Banks Court
For Self

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UNIVERSITY OF UTAH
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, By and Through Its Road Commission,
Plaintiff and Respondent,

vs.

BEN DAVIS et ux et al,
Defendants and Respondents,

DONALD W. LAYTON et ux,
Defendant and Appellant.

Case No. 10112

APPELLANTS' BRIEF

NATURE OF CASE

An action by the Utah State Road Commission to condemn various property interests in Irving Park Addition, Salt Lake County.

DISPOSITION IN LOWER COURT

The trial court disregarded directives in Utah Code and entered judgment for respondents concerning lot

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19 Block 7, Irving Park Addition. Trial court denied motion for new trial.

RELIEF SOUGHT ON APPEAL

Appellants seek an order reversing lower court's judgment and an order directing the lower court to set compensation for the property interest owned by appellants and taken by plaintiff as set forth in the demand for judgment of plaintiff's complaint.

STATEMENT OF FACTS

Following the year 1956 appellants purchased various lots in Irving Park Addition. In the acquisition of these lots appellant had occasion to discuss the method of acquiring land, on which there was delinquent taxes, with an attorney who represented to appant that he had offices at 141 East 2nd South and a client who was also interested in such acquisitions.[1]

In the spring of 1958, appellant, in examining the records in the County Recorder's office pertaining to said subdivision, found that respondent Mr. Davis had succeeded in acquiring deeds to lot 19 Block 7, Irving Park Addition. As the lot in question stood in the name of James L. Turner and appellants were also looking for this man or his heirs to clear title to additional land in another area which appellants were

1. Return address from body of Davis' and Neilson's deeds, shown in title report contained in record, is same address where appellants had discussion.

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interested in, appellants began checking to see if the grantor James Blair Turner was connected. Upon the finding that James L. Turner was deceased and had one son, James Blair Turner, and one daughter, Mae Elaine Turner, appellant was convinced that these were the proper people to convey the title that had descended to them from their father, James L. Turner.

Upon approaching Mr. Turner, appellant discovered that he knew Mr. Turner personally, though not by name. When in the course of the conversation concerning the signing of the deed to Mr. Davis, the appellant asked Mr. Turner why his wife had not joined in signing the deed to Mr. Davis. Mr. Turner replied that the gentleman offered no extra compensation for her signature as he thought she had no claim, therefore she did not join with him in signing the deed. Appellant, having bought and sold two or three parcels of land knew a wife's signature was necessary and questioned Mr. Turner further. Mr. Turner said that if appellant would like to buy his wife's interest, he (Mr. Turner) would give the appellant the abstract to the lot his father had left them also. As evidenced by the title report, this offer was accepted by appellant and Mr. Turner and his wife signed the deed as shown by the record.[1]

Appellants recorded the deed from the Turners concerning this lot Jan. 8, 1960, and shortly thereafter had occasion to inform Mr. Clarence Williams

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1. No. 7 page 3 of Title Report.

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of the Right of Way Department of the Utah State Road Commission of the interest they claimed.

As negotiations between the parties broke down, plaintiff filed this action and served appellants on April 4, 1963. Appellants read contents of complaint and respondent's answer filed April 23, 1963 and declined to file answer since they were satisfied at that time that their interests were recognized although not in full compliance with the law.[1] Respondents in their answer (paragraph 1) admitted appellants had some interest in the parcel in question as set forth in paragraphs No. 6 and 7 of plaintiff's complaint. On or about July 29, 1963 plaintiff filed an amended complaint. Service was made on appellants on July 31, 1963. This, appellants read, agreed with, then checked respondent's answer to amended complaint which admitted appellants' claim again in paragraph No. 2. Appellants still being satisfied, again declined to file an answer.[2]

Hearing nothing more, appellants had no knowledge of Trial Court's actions until Dec. 10, 1963 when appellants again checked the record and much to their surprise, now found that their claim as pertains to lot 19 block 7, Irving Park Addition, had been the subject of discussion at pretrial on Nov. 4, 1963 where it had been the ruling of the pretrial court that appellants could be barred. Trial was set for Dec. 18, 1963, but judgment was entered Dec. 11, 1963.

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1. 78-34-9 Directs Court in granting orders of immediate occupancy.
2. Rule 54 (c) (2) Limits of default judgments.

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Upon reading the following statements:

> "At the time of the pretrial, it was the ruling of the Pretrial Court that if the Davises would establish their chain of title at the time of the trial, that would be all that would be necessary to bar Laytons from making any claim in this action, and Laytons are in default in this action and their default is entered. Title may be proven in the Davises by a certified title report from a duly licensed title company." (From page 3 of pretrial order)

and

> "The fee simple title to lot 19 block 7 was in A. P. Neilson, but subject to encumbrances shown in Schedule B." (From page 1 of Title Report).

appellants decided that in order to preserve their rights in the matter, they had best enter an appearance. Therefore on Dec. 17, 1963 appellants filed a motion to set aside judgment as pertains to lot 19 block 7, Irving Park Addition, and also an answer to plaintiff's complaint. This motion stated the grounds for appellants' claim to said lot. A hearing was held and the motion was granted. A trial was set for Jan. 29, 1964. At this trial appellants found respondents again denying the validity of appellants' claim to said lot CONTRARY TO THE ADMISSIONS MADE IN RESPONDENT'S ANSWER.[1] As soon as the appellants admitted there had been four years elapse between date

1. Nothing was indicated in answer that respondents claimed under a tax title or that their claim was adverse to appellant's claim.

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of redemption when taxes were paid by respondents[1] and the date this action was filed, the Court said appellants were barred[2] from making any further showing as to the validity of their claim. From this adverse and ultra vires holding, appellants made a motion for new trial or an amendment to proceedings.[3] From a denial of this motion Feb. 27, 1964 and from the adverse judgment, appellant appeals.

STATEMENT OF POINTS

POINT I

Appellants were denied the options afforded by the law as the rules pertaining to default judgments and good pleadings were ignored. The Court committed ultra vires acts in adjudicating title when that question was not before the Court.

1. The plaintiff and/or the Court erred in not following the directives as outlined in the following sections and Rules of Civil Procedure of Utah Code Annotated 1953 as revised.

a. Section 1 to 14th Amendment to Constitution of the United States.

" . . . no state shall make or enforce any law which shall abridge the privileges of citizens . . . ; nor deny to any person within its juris-

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1. One who is under a duty to pay taxes cannot add to or strengthen his title by purchasing the land at a tax sale. Hadlock v. Benjamin Drainage District 89 P 94, 53 P2d 1157.
2. Contrary to Art. I, Sect. 11 Constitution of Utah.
3. See Motion for New Trial filed Feb. 7, 1964.

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diction, the equal protection of the laws. (Against 4-year statute).

b. Section 2, Article 1, Constitution of Utah.

"All political power is inherent in the people and all free governments are founded on their authority for their equal protection and benefit . . . " (Against 4-year statute).

c. Section 11, Article 1, Constitution of Utah.

"All courts shall be open, and every person, for an injury done to him in his . . . property, shall have remedy by due course of law . . . and no person shall be barred from prosecuting or defending before any tribunal . . . , by himself, any civil cause to which he is a party." (Against 4-year statute).

d. Section 27, Article 1, Constitution of Utah.

"Frequent recourse to fundamental principles is essential to the security of individual rights . . . "

e. Section 74-4-3, Utah Code Annotated.

Defines wife's interest in husband's property. (Also in statement of facts and motion Dec. 17, 1963).

f. Section 76-20-10.

Husband conveying as unmarried man. Protection given dower as dower has always been favorite in the law.[1] Davis and Neilson took all the proceeds as in judgment Dec. 11, 1963, and never told of outstanding dower interest. When confronted by appellants, they changed story and resorted to ambiguous law for protection. (4-year statute).

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1. In Re. Madsen's Estate 123 U 329 point number 9.

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g. Section 78-34-9.

Pertains to method of procuring order of immediate occupancy. Bond is necessary to protect condemnee. Had the Court required compliance with this procedure, respondents would not have had opportunity to claim appellant's share nor invoke ambiguous statute.

h. Section 78-34-10 (1).

Compensation. How assessed. (Each interest must be ascertained).

i. Section 59-10-45.

One who is under a duty to pay taxes cannot add to or strengthen his title by purchasing the land at a tax sale. (Hadlock v. Benjamin Drainage District 53 P2d 1157).

j. Section 59-5-12.

Taxes must be assessed in name of owner if known. Appellants recorded deed properly so interest claimed by them was known to all. Apparently there are no taxes to be assessed against dower right and it is to be treated as life tenant and remainderman.

It is duty of assessor to assess all property at its value, and it is likewise duty of every person and corporation having taxable property to list same for taxation. (Ut. Id. Sugar Co. v. S. L. County 60 U 491, 210 P 106, 27 ALR 874).

A life tenant should be assessed as owner during the continuance of life estate. (Sheppick v. Sheppick 44 U 131, 138 U 1169).

k. Section 78-39-1.

If property held by cotenants, can have partition.

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l. Section 78-39-2.

Complaint must set forth interest of all parties specifically and particularly if known to plaintiff. (Statement of facts).

m. Section 78-39-3.

Parties must be named if of record and as record shows. (Title report).

n. Section 78-39-30.

Protection of contingent future rights. (Court must protect).

o. Section 59-5-14.

Assessment of property of decedents. "... and the payment of taxes made by either binds all the parties in interest for their proportions." As a matter of equity, the party entitled to present possession should also pay all the taxes during the time his right to possession is unimpaired. (Sheppick v. Sheppick 44 U 131, 138 P 1169). (Madsen's Estate 123 U 327).

p. Rule 7 (a) Utah Rules of Civil Procedure.

Limits question before the Court to that which is asked for in demand for judgment. (Toone v. Oneil Const. Co. 40 U 265, 277, 121 P 10).

q. Rule 52 (a).

"... find the facts specially ..." (There was never a finding as to value of appellant's interest). The trial Court should not make findings of fact where there is no evidence to support them. If it does so, judgment will be reversed. (Hathaway v. United Tintic Mines Co. 42 U 520, 132 P 388, 390).

(Title report showing Neilson's title also showed it encumbered by Layton's deed).

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It is the duty of the trial Court to find upon all material issues raised by the pleadings, and failure to do so is reversible error (Baker v. Hatch 70 U 1, 257 P 673).

Until the Court has found on all the material issues raised by the pleadings, the findings are insufficient to support a judgment. (Prows v. Hawley 72 U 444, 450, 271 P 31).

r. Rule 52 (b).

Motion to amend may be made. Appellants tried to tell the Court that it had erred in motion filed Feb. 7, 1964. Court said appellants were barred by section 78-12-12.1.

s. Rule 54 (c) (2).

Pertains to default judgments. After disobeying this directive, *does Court have jurisdiction over appellants who have been forced into Court to set the record straight?*

t. Rule 61 Error.

In action for damages to coat left with defendant for cleaning and repairing, instruction charging that if coat was unfit for use, jury should find for plaintiff, and also *find that defendant be permitted to retain coat was not proper subject for disposition,* but such error was beneficial, rather than prejudicial, to defendant. (Garff v. Myers Cleaning & Dyeing Co. 65 U 548, 238 P. 278).

Causes are not reversed for mere error. They are reversed for prejudicial error. Therefore to entitle appellant to pevail, he must show both error and prejudice. (Boyd v. San Pedro, L.A. & S.L. R. R. Co. 45 U 449, 146 P. 282). While burden is on appellant, not only to show

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error, but also prejudice offsetting some substantial right, yet if he shows this, then the burden, or rather duty of going forward is cast upon respondent to show by the record that committed error was not or could not have been of harmful effect. (Jensen v. Utah R.R. Co 72 U 366, 270 P 359).

One who induces the Court to charge something not the law, will not be heard thereafter to complain. (Hunter v. Wm. M. Roylance Co. 45 U 135, 143 P. 140).

p. Rule 15 (b)

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. (Issues consented to, limited by appellants motion of Dec. 17, 1963).

Closely related to this rule is the well-settled doctrine that a litigant cannot come into court upon one theory and recover on another. (Free v. Little 31 U 449, 88 P 407).

Appellants call attention at this point to the reason for vacating the default judgment.[1] Respondents will undoubtedly contend that by the order vacating Findings of Fact, Conclusions of Law and Judgment of Dec. 11, 1963, appellants gave permission to enlarge the question before the Court to one of quiet title. Were that the case, appellants would not be before the Court now on appeal. Appellants have objected all the way. (Buehner Block Co. v. Glezon 6 U2d 226, 410 P2d 517).

1. Motion filed Dec. 17, 1963 stating appellant's claims.

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POINT II

The Court was prevented from hearing appellant's full story by the use of Section 78-12-5.1, . . .

Appellants were denied the equal protection of the law as there is no provision for the protection of holders of contingent or future rights in the four year short statutes.

Holders of such legal rights, by the very nature of such rights, are denied the present possession to such property. Therefore holding such a law to be valid in this case is contrary to constitutional restraints.[1]

78-12-5.1 " . . . with respect to actions brought or interposed . . . 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 . . . unless the person commencing or interposing such action or defense *has actually occupied* or been in possession within four years prior to commencement or interposition of such action or defense."

As to the phrase "*Has actually occupied*" from Section 78-12-5.1, the appellants are in confusion as to exactly what its meaning is. Just how does one go about occupying vacant property—much less when one does not have the right to possession at present? Appellants, in the course of filling their adjacent lots with

1. Section 1, 14th Amendment—Equal protection of law.

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fill dirt and leveling same, have on numerous occasions been upon the lot in question. Does this fulfill the statutory requirement? Respondents did not fence, fill, grade, plow or in any other manner change the character of the lot in question nor in any manner show an adverse claim to appellants.

By its terms, this statute, contrary to most such statutes bars actions or defenses brought to overturn a tax title.[1] Construed as it was in this action its use became not one of compliance by respondent of statutory requirements to perfect their title, but as a bar[2] to prevent appellants from pointing out where the Court strayed from its jurisdiction and facts that would prevent its use in the first place.

A holding to the words in this statute does not allow protection for contingent interests such as appellant's claim.[3] As has been pointed out in Madsen's Estate (123 U 327), "The right of dower does not affect the sesien of the husband's grantee." Therefore as appellants have no right to present possession, how can the fact that appellants were not in possession be held against them.[4] Had appellants brought an action within four years, nothing would have been accomplished and the parties would be exactly where they

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1. To defeat a claim by the bar of the statutes of limitation is not a determination of a case upon its merits. (Goeltz v. Continental B & L Co. 5 U2d 204, 299 P2d 832).
2. Article I Section 11 Constitution of Utah.
"... and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party."
3. Toronto v. Sheffield et al 222 P2d 594 point 2.
4. Article 1, Section 2, Constitution of Utah.

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were the date this action was filed. That is, appellants knew of the manner respondents cleared the taxes and what claim they had, and respondents knew of appellants' claims.

As a matter of equity, which, by Section 68-3-2 Utah Code Annotated, must prevail over statutory enactments, this short statute is the height of absurdity. It enables one who is in possession of the real property in question to reap the benefits that are distributed freely to inhabitants of the taxing district while harshly holding against an owner of vacant property that is taxed to provide the benefits needed by the party in possession. Why should the legislature penalize the person who gets no benefits and protect the one who rides for free?

This statute is not equal in its protection in that if a person buys a vacant piece of real estate under a tax title rather than one that is occupied by the owner, he merely has to pay the taxes for four years then presto, the land is practically his. If he does the same with one that is occupied, then what? Has the law given equal protection to the tax title buyer? He might even have to resort to litigation to recover his money while the other buyer is protected after a statutory time lapse. Does he get the property? Not according to these sections, nor does it in any way shed light upon the method of achieving equality. A statute which bars actions, after four years, for the recovery of real property sold by the County for the non-payment of

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delinquent taxes, but which does not bar an action for the recovery of real property when the former owner is in possession or actually occupies the property, is arbitrary, unreasonable, and unconstitutional since the differentiation between the two buyers bears no reasonable relation to the purpose to be accomplished by the statute and is discriminatory to buyers who purchase tax titles where the land is occupied or possessed by the tax debtor.[1]

CONCLUSION

Appellants contend that due to an unconstitutional law (four year short statute), an attempt was made to deprive them of a property right in violation of Section 1, 14th Amendment of the Federal Constitution, and in variation to law as set forth in the statutes and in the Utah Rules of Civil Procedure.

As is shown by the record and directed by law, appellants should have had their rights presented to the Court by counsel for the plaintiff, together with a fair appraisal of its worth before title could be divested from them.[2]

When individuals are claimants of the same lot as disclosed by the title report contained in the record

1. Toronto v. Sheffield P 594 P2d point No. 3.
2. Article 1, Section 7 Utah State Constitution. "No person to be deprived of property without due process of law." Article I, Section 22, Utah State Constitution. "Private property not to be taken or damaged for public use without just compensation."

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of this action, the presumption should be that each knows the facts and the law surrounding the acquisition and disposition of their respective shares.

In the light of these facts, admissions in respondent's answer, and directives given by statute, appellants, therefore, pray for an order reversing the lower Court's judgment and directing that Court to set compensation to be paid appellants in order to extinguish their claim and for their costs and any other further relief this Court sees fit to direct.

After reading Toronto v. Sheffield, Crystal Lime and Cement Co. v. Robbins,[1] and other cases pertinent to tax titles, it reminds one of the eminent English chemist who was seeking the universal solvent until one day the village nit wit confronted him with the question, "What are you going to keep it in?"

Respectfully submitted,

DONALD W. LAYTON
For Self

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1. Crystal Lime and Cement Co. v. Robbins 116 U 314, 209 P2d 739
Brief on petition for rehearing, Volume 594 No. 7134.
Toronto v. Sheffield 222 P2d 594, Brief in Volume 594 No. 7233, pages 37 and 38.

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