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IN THE SUPREME COURT OF THE STATE OF UTAH

FALCONAERO ENTERPRISE, INC., a Utah Corporation, and CHARLES W. TAGGART,
Plaintiffs-Respondents,

— vs. —

JOHN F. BOWERS, et al,
Defendants,

INTERMOUNTAIN DEVELOPMENT, INC., a Corporation,
Defendant-Appellant.

Case No. 10173

RESPONDENTS' BRIEF

Appeal From the Judgment of the Third District Court for Salt Lake County
HONORABLE STEWART M. HANSON, *Judge*

UNIVERSITY OF UTAH

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Plaintiffs-Respondents,

— vs. —

JOHN F. BOWERS, et al,
Defendants,

INTERMOUNTAIN DEVELOPMENT, INC., a Corporation,
Defendant-Appellant.

Case No. 10173

RESPONDENTS' BRIEF

RESPONDENTS' STATEMENT OF FACTS

Appellant's Statement of Facts is not objective, is consistently argumentative in favor of the appellant and significantly omits some very material facts. The following should be added to modify appellant's Statement of Facts in order to at least give a fair statement of the case.

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Defendant-appellant *did not* establish a fee title back to the patentee (Pre-trial Exhibit 3, defendant's abstract.)[1]

Respondent-plaintiff paid all of the taxes, delinquency penalties, interest and costs for the years 1949 through 1954 (R. 56, 67-69). Falconero paid the general taxes on time and without delinquency for the years 1955 through 1961 (R. 69, Exhibit P. 30).

Respondent Falconero erected and maintained a barbed wire and electric wire fence completely around the property (R. 31, 43, 57) from 1949 through 1962 (R. 34). The land in question was used as part of a larger tract of 1,000 acres owned by Falconero for horseback riding, pasturing and a combination recreation area (R. 41-42). The combination recreation area included the facilities of the Chuck Wagon Restaurant, stables and lake.

The appellant was never in possession of the land nor did the appellant or anyone make any claim to possession or use of the property adverse to that of Falconaero (R. 43, 57, 85, 86).

ARGUMENT

POINT I

RESPONDENT FALCONAERO ENTERPRISE, INC., WAS A PROPER PLAINTIFF.

[1] At page 15 of said Exhibit is a deed to Carrie A. Dunlevy. At page 16 is a deed to Genevieve J. Callister, wife of counsel for appellant, from C. Athleta Dunlevy Tearney, the daughter of one of the heirs at law of O. M. Dunlevy and Carrie A. Dunlevy. Obviously, such a deed from only *one* of the alleged heirs, without a probate proceeding or a determination of heirship proceeding to show the true heirship does not convey fee title.

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In appellant's Points 1 and 2 counsel for appellant claims that Falconero Enterprise, Inc., respondent, could not have brought this action since it had filed its complaint herein subsequent to the dissolution proceeding. Appellant makes this contention notwithstanding the fact that it admitted in its answer appellant's existence (R. 5). Thereafter in contradiction appellant amended its defense just prior to pre-trial (R. 8).

Appellant's contention under this point is obviously untenable because of the Utah statutes and the general principle of law to the effect that in a dissolution the corporation is entitled to sue in its own name upon any cause of action existing at the time of the dissolution.

Section 16-10-11, Utah Code Annotated, as amended, in the Business Corporation Act provides in part as follows:

> "The dissolution of a corporation . . . shall not take away or impair any remedy available to or against the corporation, its directors, officers or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution, if action or other proceeding thereon is commenced within two years after the date of such dissolution. *Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.*" (Emphasis added)

The corporation certainly had a claim and a right to quiet title to this property at the time of the dissolution. The fact that the property was distributed in the dissolution does not, under said statute, take away the right or

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claim existing prior to such dissolution. The statute very clearly states that the corporation can within two years bring such an action. This action was commenced within thirty days after the dissolution.

In the dissolution the corporation conveyed the property by warranty deed, (pre-trial Exhibit 1), to Charles W. Taggart, Trustee. In addition therefore to the reservation of the right to sue set forth in the statute above, the corporation had a sufficient property interest by reason of its obligation on the warranty deed to convey after acquired title to bring this action. See Section 57-1-10, Utah Code Annotated, *Boothe* v. *Wyatt,* 54 Utah 550, 183 P. 2d 323, and *Gulley* v. *Christian,* 176 P. 2d 812 cited by appellant. In the *Gulley* case the court in citing various cases stated, "a warrantor has sufficient interest upon which to base a suit in his own name to quiet the title of his grantee." See also *King Kade* v. *Plummer,* 239 Pac. 628 (Okla.); *Hacienda Homes* v. *Peck,* 113 P. 2d 487 (Calif.); *Piland* v. *Craig,* 154 P. 2d 583 (Okla.); and the annotation in 97 A. L. R. 711 citing many cases in support of this general rule.

Appellant cites *Wilson* v. *Kiesel,* 9 Utah 397 as support for his position. This case, however, involves the assignment of a claim after a suit is brought and in a subsequent suit the assignee is required to sue. Any different holding would present different issues. Appellant's *Glas and Chapman* cases appear to be contrary to the weight of authority.

Thus, Falconero was legally capable of bringing the lawsuit under the statute and was a proper party plain-

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tiff having sufficient interest under its warranty deed upon which to bring its action.

POINT II

THE TRIAL COURT PROPERLY ADDED CHARLES W. TAGGART AS A PLAINTIFF.

Shortly before trial appellant filed an amended answer raising the issue as to the dissolution of Falconaero Enterprise, Inc. Because of this pleading and the argument at pre-trial Charles W. Taggart, Trustee, Grantee in the warranty deed from Falconaero Enterprise, Inc., was added as a plaintiff in the action.

Appellant argues in its Point 3 that (a) one, not the real party in interest can not join the real party in interest in the lawsuit, and (b) that one lacking the legal capacity to sue can not amend the complaint. Neither of these contentions are supported by the cases cited by appellant nor do these propositions have any application to our case.

(*A*) *ADDING PARTIES PLAINTIFF IS DISCRETIONARY WITH THE TRIAL COURT.*

Rule 15(a) Utah Rules of Civil Procedure, in effect permits the amendment of the complaint. The Utah cases, including those cited below, uniformly hold that such amendments are within the discretion of the trial court. Unless the defendant is prejudiced thereby the trial court does not abuse its discretion in granting such an amendment and the Supreme Court will not usually interfere.

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See *Johnson* v. *Continental Casualty Co.,* 78 Utah 18, 300 Pac. 1032; *Shay* v. *Union Pacific Railroad Co.,* 47 Utah 252, 153 Pac. 31; and *Evans* v. *Houtz,* 57 Utah 216, 193 Pac. 858. See also *Plotkin* v. *Merchants Bank & Trust Co.,* 125 S.E. 541 in which the grantor in a quiet title action had conveyed property and was permitted to amend to include the grantee as a plaintiff.

Amendments of the pleadings wherein a plaintiff is added or even substituted come within the purview of the amendments permitted under ule 15(a). See the many cases annotated in 135 AL 325 in support of the general rule that substitutions of the real party in interest are permissible.

Rule 21, Utah Rules of Civil Procedure provides:

> "Misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped or added by order of the court or motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

The addition of Mr. Taggart therefore was a mere formality and does not render the complaint subject to dismissal. No new issues were raised and appellant was in no way prejudiced thereby. It would be inequitable and unnecessary to dismiss the action and require the plaintiff to proceed through a complete new action upon the new name. Justice does not countenance this useless proceeding.

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Under paragraph A of appellant's Point 3 it cites *Skeeves* v. *Dunn*, 3 Utah 186. In that case, however, the plaintiff, after obtaining judgment in the Justice's Court assigned the notes upon which the judgment was granted to his wife so that upon appeal by the defendant to the District Court and in the new trial to be had therein the wife could testify. She had been precluded from testifying by statute in the earlier action. This prejudiced the defendant and the court did not permit a substitution of the wife as plaintiff. However, it appears that if there had been no prejudice to the defendant the substitution would have been permitted. This holding is a far cry from that contended for by appellant.

(*B*) *INCAPACITY TO SUE DOES NOT PREVENT JOINING OF ADDITIONAL PLAINTIFFS.*

Appellant repeatedly states that Falconaero had no legal capacity to sue. This contention, as we have pointed out under Point I is laid at rest by the statute which in express language grants the corporation the right to sue for two years after its dissolution.

However, assuming arguendo that Falconaero had ceased to do business, the complaint under the liberal rules and under the weight of authority could still be amended by adding a property plaintiff. In *Lehl* v. *Strong Mercantile Co.*, 259 Pac. 512 (Colo.) the court held that a corporation even though having dissolved could still bring the action and amend the complaint to substitute a proper plaintiff. The court in discussing the defendant's contention that the action was a nullity and could

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not therefore be amended because of the incapacity of the plaintiff denied such a contention and stated:

> "Of course it is not in fact a nullity; it is a very real thing, though not a complete action and that an amendment is possible all know, including those who say the contrary . . . and when we have added what would have made it a complete action what is the sense in saying that it is not one."

The court further went on to hold as an additional reason for allowing the amendment that a fiction should never be allowed to work an injustice and that such an injustice would be worked by the fiction of holding the action a nullity. See also the following cases which have likewise held that a corporation ceasing to do business can substitute another plaintiff; *Kehrlein-Swinerton Construction Co.* v. *Rapkin,* 156 Pac. 972 (Calif.); *Hall* v. *Cutler Bindery Co.,* 26 P. 2d 1109 (Ore.); and *Norton* v. *Steinfeld,* 288 Pac. 3 (Ariz.).

Appellant's cited cases under its paragraph B give him very little help. The *St. Marks* case is only reported by syllabi, but it seems to involve a plaintiff designated only by a description of the hospital instead of as a legal entity. One of the syllabi states that if the suit had involved the name of a legal person then the substitution would have been permitted. In the *Brooks* case the action was brought after death but prior to probate and simply in the name of the dead person. In the *Mexican Mill* case the plaintiff was designated as follows:

> "The plaintiffs, the proprietors of the Mexican Mill, a co-partnership doing business in that name in the county of Ormandy."

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Obviously this describes nothing. Whereas our plaintiff, even under appellant's theory, was a legal person, but had ceased to do business.

It seems reasonable and proper to point out that appellant's arguments are not supported by the fact nor by the law. Under the rules and the increasingly practical and liberal application of them the amendment to add Mr. Taggart is not only legally sound, but equitable. Appellant was in no wise imposed upon by such an amendment.

POINT III

THE COMPLAINT PROPERLY STATED A CLAIM AGAINST THE DEFENDANT AND SHOULD NOT BE DISMISSED.

(A) APPELLANT'S POINT 4 IS RAISED FOR THE FIRST TIME ON APPEAL.

Appellant can not now raise this point for the first time in this court since it did not bring this objection to the complaint up at any time prior to the filing of appellant's brief herein. (Cite cases.) See *Dean* v. *Davis*, 242 U. S. 438; *Idaho State Bank* v. *Hooper Sugar Co.*, 74 Utah 24, 276 Pac. 659; 68 A. L. R. 969; and 3 Am. Jur. paragraphs 316-327.

Appellant contends that the use of the word "inferior" does not show the clear adversity of appellant's title. Appellant contends that the defense relating to the failure to state a claim raised this particular point. How could plaintiff possibly cure any defect in its pleadings (if there were any) under a defense so general as

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that contended for by appellant. The statement means little unless it is made more specific.

Appellant did not raise this matter concerning the words "invalid and inferior" by any motion prior to pre-trial. He did not raise the issue at pre-trial (pre-trial order, R. 9-11), neither did he raise the matter at the beginning of the trial (R. 26), at the conclusion of plaintiff's case (R. 67-70), at the conclusion of the trial (R. 86), nor at any point during trial (R. 26-86).

Certainly had such a minor defect (if it is such) been brought to light it could have been readily cured. Such a defect is not prejudicial error, but is a mere technical question involving semantics.

(*B*) *THE ALLEGATION IN THE COMPLAINT IS NOT DEFECTIVE.*

It is remarkable that appellant in his Point 4 only quotes a *portion* of plaintiff's complaint in order to make his point. He omits the very wording which he claims is not alleged in the complaint. He concludes then that the mere words "invalid and inferior" are inadequate in expressing the adverse nature of appellant's claim.

The full allegation of the complaint wherein I have italicized the omitted portion is as follows:

> "3. *That plaintiff is the legal and equitable owner of and in the exclusive possession and entitled to possession of said property; that the defendants named herein, both known and unknown, claim or may claim some interest in and to said property*

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> *ADVERSE to that of the plaintiff*, but that said claimed interest of said defendant is invalid and is inferior to the right, title and interest of the plaintiff in and to said property . . . (R. 2, 3).

The complaint clearly alleged therefore that any interest claimed by the defendants was adverse to the ownership of the plaintiff. Appellant mistakenly concludes that such language is just not proper.

To further support his specious argument appellant cites *Worley* v. *Peterson*, 80 Utah 27, 41, 12 P. 2d 579, 584. However, that case holds just opposite to appellant's statement of the holding. The *Worley* case holds that even if the complaint had insufficiently alleged the adversity of the defendants' claim such defect was cured by the defendant in its answer wherein he claims title to the property. This obviously would be our case even if the complaint had not alleged the adverse nature of appellant's claim, since Appellant claims title adverse to that of respondent.

Even so in the *Worley* case there was *no* allegation that the defendants' claim was adverse — merely an allegation that the claim was inferior. We can only conclude that a cursory look at our complaint and also at the court's opinion in the *Worley* case demonstrates that appellant is mistaken both as to the fact and the law under this point.

POINT IV

APPELLANT IS BARRED BY THE FOUR-YEAR STATUTE OF LIMITATIONS.

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(*A*) *THERE IS NO ABANDONMENT OF THE FOUR-YEAR STATUTE OF LIMITATIONS.*

Title 78-12-5.1, Utah Code Annotated 1953, limits the time within which appellant in this case could assert any defense against respondents, to four years after the date of the tax deed, unless, of course, appellant was actually occupying or in possession of the land within that four-year period. The evidence shows and the court properly found that appellant was not in possession or in occupancy of the land within said four-year period or actually since 1949 (R. 14, 15). Plaintiff, in its complaint, did not need to plead this statute of limitations. *Hansen* v. *Morris,* 3 Utah 2d 310, 283 P. 2d 884. At the pre-trial, see paragraph 10 of the pre-trial order (R. 10), the issue of the statute of limitations was set forth. During the trial the statute of limitations was interjected into the case (R. 31, 52, 68). The memorandum decision is couched in terms of said statute (R. 12, 13).

The Findings of Fact certainly set forth sufficient facts to warrant the conclusions that the defendant has no rights or claim in the property or against the plaintiff. The specific grounds need not be stated in the decree if the facts and law are in support thereof.

(*B*) *RESPONDENTS' TITLE STEMS FROM THE SALT LAKE COUNTY TAX DEED.*

Pre-trial Exhibit 4 is the auditor's tax deed issued February 28, 1939, by virtue of a previous tax sale and pursuant to authority of Section 80-10-66 Utah Revised

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Statutes of 1933 This. statute made said deed prima facie evidence of the matters and proceedings therein stated and preceding the execution of said deed.

The deed from Salt Lake County dated December 31, 1943, executed pursuant to Title 80, Chapter 10, Section 68, Utah Code Annotated, 1943, is prima facie evidence of all of the prior proceedings leading up to the execution of said deed.

There can be no doubt but that Falconaero has acquired the property under the tax deed and is claiming a tax title. Certainly each of the two deeds indicates their execution in "the course of a statutory proceeding." See Title 78-12-5.3 Utah Code Annotated, 1953. Each deed refers specifically to that portion of the Revenue and Taxation statutes governing redemption from tax sales.

Notwithstanding the clear language quoted by Mr. Callister to the effect that the tax title may be "valid or invalid" he nevertheless contends that respondents were required to prove the complete validity of the entire tax sale proceeding. Obviously, if there were no defects in this procedure we would not be concerned about adverse possession and the tax title would be perfect.

Appellant's counsel at top of page 18 of his Brief states with such certainty "this is the law . . ." that we must assume he is the authority in this field of law. He apparently deems it unnecessary to cite any cases in support of such a proclamation. Certainly *Anson* v. *Ellison*, 104 Utah 576, 140 P. 2d 653 does not support his con-

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tention. In that case the deed was issued under Title 80-10-68 prior to 1939 when such statute had no provision relating to the prima facie effect of the deed. Our deed was executed pursuant to Section 80-10-66 which did have such a provision relating to the prima facie effect of the deed.

However, whether we consider the county deed to be a tax deed or not is immaterial. In *Cope* v. *Bountiful Livestock Co.*, 13 Utah 2d 20, 368 P. 2d 68, this court held that the invalidity of the tax deed was immaterial in upholding the adverse possession and that the claim of title under the deed was all that was required. Also, in *Peterson* v. *Callister*, 6 Utah 2d 359, 313 P. 2d 814, the court, in holding that the tax title need not be perfect, stated, "This contention is answered by the observations above to the effect that title technically need not pass to protect a tax title claimant. . . ."

Thus, the fact that respondents claim under the tax deed, and not whether the tax procedure was perfect, is the important factor which brings into play the four-year statute of limitations.

POINT V

RESPONDENT HAS ESTABLISHED ADVERSE POSSESSION.

(A) *ADVERSE POSSESSION IS AMPLY SUPPORTED BY THE EVIDENCE.*

Title 78-12-9 Utah Code Annotated, 1953, sets forth the elements of adverse possession when claimed under a

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written instrument, any one of which is sufficient to sustain a title by adverse possession. By uncontroverted evidence respondent has conclusively proven more than one of the elements. These statutory elements proven in this case and found by the court in the Findings of Fact are as follows:

1. *Land cultivated or improved.* Mr. Darrel Firmage testified that the land was leveled and drainage ditches placed thereon (R. 40).

2. *Protection by a substantial enclosure.* Mr. Bennett, Mr. Andy Firmage and Mr. Darrell Firmage all testified that beginning in 1948 and continuing to 1963 the land was fenced by a barbed wire and electric wire fence and that said fencing was maintained for the purpose of keeping stock grazing on the land (R. 31-34, 43, 57, 61, Exhibit P. 29). The nature of the land and the fencing shown by the photographs and testified to by Mr. Knowlton all conclusively prove that the fencing was certainly open and visible (R. 79, 80).

3. *Pasturage.* It is clear that from 1948 on through 1963 the land was used for pasturing the riding horses and for riding, all in connection with the overall development of the land owned by Falconaero (R. 40-42, 54, 62, Exhibits P. 22-26). These financial records for the company show receipts year after year for the pasturage and expenses for fencing, (Exhibit P. 29), which are the financial account cards, show horse rental and pasturing over the years in question.

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The land in question is situate on the interior of an entire tract of land owned by Falconero (Exhibit P. 5). The land surrounding the subject 20 acres, as well as the land outside of the thousand-acre tract of land, is essentially pasture land (Exhibit P. 8 through P. 18). Appellant, however compares the land to the Industrial Center, formerly the Arms Plant and the large buildings situate thereon which lie to the North of this property and North of 21st South Street. Appellant seems to contend that unless Falconero had used the thousand acres including the Chuck Wagon, the lake and the pasture land for some sort of industrial endeavor that the use would not be adequate for adverse possession. Such a position is extreme to say the least and without legal authority. Furthermore, it is completely beyond the statutory provisions relating to adverse possession cited above.

(*B*) *THE TAXES ARE PAID FOR SEVEN YEARS.*

Respondent promptly paid all of the general taxes on the land from 1955 through 1961 for a total of seven years (Exhibit P. 20). In addition the respondent had paid the taxes, although said taxes were delinquent from 1949 through 1954 (R. 68, 69). The adverse possession occurred not only during the seven years during which taxes were paid, but also during the prior period from 1949 through 1954. All of the evidence to support the foregoing facts is uncontroverted, is substantial and is more than sufficient to sustain the adverse possession ruling of the lower court.

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(C) *APPELLANT IS BARRED BY THE SEVEN YEAR STATUTE OF LIMITATIONS.*

Title 78-12-5.1 and 78-12-6 require that one seeking either in a complaint or a counterclaim to rcover possession of real property shall have been seized thereof within seven years prior to bringing the action or interposing the defense. There is absolutely no proof that appellant has been seized of this property within said seven year period. To the contrary, the evidence is uncontroverted that appellant has not been in occupancy or possession of the property within that period. Therefore, it is inescapable that appellant is barred from asserting any claim in said property.

SUMMARY

When Falconaero, through the Firmages, has purchased the property pursuant to tax deeds from Salt Lake County, has changed the property in its entirety, has used the property for pasturing and for the development of an overall recreation area, all occurring over the continuous period from 1949 to the beginning of the lawsuit, it seems strange indeed that appellant can contend that such usage does not constitute open, adverse and notorious possession. Appellant tlthough acquiring a quit claim deed from an heir of the prior record owner has neither established a record title to the property nor has it established any possession or occupancy or even a claim thereof. The evidence therefore precludes appellant from challenging the title and possession of respondent.

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The questions raised by appellant relating to allegations and the sufficiency of the complaint are more in the nature of last-minute technical objections, and they are completely without merit or equity. They are an attempt by fiction to require respondent to commence the action anew. These objections as to the technicalities not only are without merit, but they do not serve as prejudicial errors subject to appeal.

Respondents respectfully submit that the appellant's arguments are completely without merit and that the judgment of the lower court should be sustained.

Respectfully submitted,

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By..

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