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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.

No. 10173

REPLY BRIEF

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

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REPLY BRIEF

ARGUMENT

POINT 1.

PLAINTIFF FALCONAERO ENTERPRISE, INC., LACKED LEGAL CAPACITY TO FILE SUIT, AND THE TRIAL COURT ERRED IN NOT DISMISSING THE ACTION.

Whether Falconaero's corporate existence continued after dissolution is determined by Section 101,

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Chapter 28, Laws of Utah, 1961. Under this Section, inasmuch as Respondent Falconaero distributed the property to its sole stockholder, not during dissolution, but *prior thereto,* the corporation died upon the execution of the Certificate of Dissolution.

Respondent relies solely upon Section 100, Chapter 28, Laws of Utah 1961 to save it. But that section applies only to corporations which have claims, rights or liabilities incurred. The claim upon which Respondent predicates its continued existence is a supposed cause of action to quiet title. Why Respondent cited Boothe v. Wyatt, 54 U. 550, 183 P. 323, is a complete mystery. Neither the fact situation nor the law of the case is in point. Respondent cites Hacienda Homes v. Peck, 113 P 2d 487, and Piland v. Craig, 154 P. 2d 583, to support the position that where one has conveyed by warranty deed, he still retains a claim upon which a quiet title action may be predicated. These two cases are not in point. In each one, the Plaintiff fee title holder had placed a warranty deed in escrow, to be delivered upon the completion of a contract by a purchaser. But the deed in each case had not yet been delivered. Thus, the Plaintiff grantor had not actually parted with title.

To support its position that a grantor by warranty deed still had a claim upon which an action to quiet title may be brought, Respondent cites 97 A.L.R. 711. This annotation divides the cases on this point into three classes: One class upholds the position of Appellant that no quiet title action may be brought by a warrantor

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after conveyance, and Appellant's citations in the original brief support this view. A second class of cases holds that a warrantor may file an action after parting with title if the grantee retains part of the purchase price pending clearing of title. But this requirement does not exist in the case at bar. The third class permits a warrantor to sue to quiet title, having a sufficient interest, *because of his liability under the warranty.* These are poorly reasoned cases. But even this reason for permitting suit by the warrantor does not exist here. In the case at bar, Respondent Falconaero, the dissolved corporation, had warranted to its sole stockholder as a distribution to him of its assets. The stockholder is entitled only to that which the dissolved corporation had. Thus, any warranty is ineffectual. The stockholder certainly has no need of, nor is he legally entitled to such protection. Suppose he sued for breach of warranty. He would have to disgorge some of his distribution back to the corporation to pay his own judgment.

Thus, under neither Section 100 or Section 101, Chapter 28, Laws of Utah 1961, is the corporate existence of Respondent Falconaero prolonged. Logic and the law point to no other result. The trial court should have held there was no capacity to sue and should have dismissed the cause, and disposed of this case.

On page 3 of its brief, Respondent attempts to make an issue of Appellant's admission of Respondent's corporate existence, and later denial of it by amendment to the answer. Evidently, Respondent is attempting to

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cover its embarrassment for the discovery of its misrepresentation in its complaint as to the corporate existence and the ownership of the property at the time suit was filed. The amendment was proper, if for no other reason than that the pleadings might conform to the evidence as established at the trial.

POINT 2.

PLAINTIFF FALCONAERO ENTERPRISE, INC., WAS NOT THE REAL PARTY IN INTEREST, AND THE TRIAL COURT ERRED IN NOT DISMISSING THE COMPLAINT.

Appellant has nothing to add to the argument in the original brief on this Point. Respondent-Falconaero having distributed the property to its sole stockholder prior to the filing of the within action, was not and is not the real party in interest as required by Rule 17 (2), Utah Rules of Civil Procedure.

POINT 3.

THE TRIAL COURT ERRED IN PERMITTING TAGGART TO BE JOINED AS A PARTY PLAINTIFF.

In attempting to support its claim that Taggart was properly joined, Respondent cites the following cases:

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Johnson v. Continental Casualty Co., 78 U. 18, 300 Pac. 1032. This case held that a bill of exceptions was not filed in the time allowed. Nothing in the opinion related to permitting a party to be joined where the Plaintiff was not the real party in interest. Why this case was cited is a mystery.

Shay v. Union Pacific Railroad Co., 47 U. 252, 153 Pac. 31, permitted amendment to add a new allegation. Evans v. Houtz, 57 U. 216, 193 Pac. 858, permitted an amendment as to tender. The opinions in these cases say nothing as to substitution of a party plaintiff who was not the real party in interset, and for that reason are not in point.

Plotkin v. Merchants Bank & Trust Co., 125 SE 541, held it was discretionary with the trial court whether one who has conveyed property while an action was pending may continue to prosecute his suit or whether the name of the grantee should be substituted. Again, this case is not in point.

Not one of the above cited cases upholds the position of Respondent—that there may be substitution of a plaintiff in the stead of one who is not the real party in interest at the commencement of the suit.

It is most interesting to observe that Respondent's citation of 135 A.L.R. 325 (which supposedly supports the proposition that amendment may be made to substitute the real party in interest as a plaintiff) at page 331 holds directly contrary to its position in stating:

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"It has been held that where an action is brought in the name of a plaintiff who is dead or nonexistent, the complaint may not be amended by substituting a plaintiff having capacity to sue." Numerous cases are cited by A.L.R. to support this proposition, some of which cases are cited in Appellant's original brief.

Respondent cites Kehrlein-Swinerton Construction Co. v. Rapkin, 156 Pac. 972, and Norton v. Steinfeld, 288 Pac. 3, to support its position that an action by a non-existent Plaintiff could be amended to insert the name of a proper party. In these two cases, corporate charters were suspended due to non-payment of fees to the state, there being provisions for reinstatement of corporate charters upon payment of fees and penalties. The court permitted the substitution of the officers and directors as trustees. However, there is a vast difference between the suspension of corporate powers as in these two cases, and the termination of corporate existence by voluntary dissolution as in the case at bar. Thus, the two cited cases are not in point.

The other cases cited by Respondent are poorly reasoned and appear to set forth a minority view of the subject. They discuss whether or not amendment is abuse of discretion, while the real point is whether there is anything before the court to be amended, when the plaintiff is non-existent.

Appellant relies upon the authorities cited in the original brief, and the conclusions therein stated: That Respondent-Falconaero was non-existent at the time

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the within action was filed; therefore, the action was a nullity and there was nothing before the court to amend. The law and the facts here cannot be seriously disputed.

POINT 4.

THE COMPLAINT DID NOT STATE A CLAIM AS AGAINST DEFENDANT-APPELLENT UPON WHICH RELIEF CAN BE PREDICATED, AND SHOULD HAVE BEEN DISMISSED.

Respondents are laboring under the impression that Appellant did not raise this issue below, and therefore cannot now raise it for the first time on appeal, citing the cases of Dean v. Davis, 242 U.S. 438, and Idaho State Bank v. Hooper Sugar Co., 74 U. 24, 276 Pac. 659.

There are two things wrong with this position. The first is that Appellant DID raise the sufficiency of the Complaint. The quotation from Appellant's First Defense, on Page 15 of the original brief filed herein, raises the sufficiency of the Complaint.

The other thing wrong is that the cited cases relate to ambiguities in the respective complaints, which the courts held could not be raised for the first time on appeal. But here, we do not have an ambiguity in the Complaint. The Complaint does not state a cause of action. As to the law on this point, please see 5 Am.

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Jur. 2d, Appeal and Error, paragraphs 592 and 593, pages 59 to 61. This annotation cites the Utah case of Mayer v. Rankin, 91 U. 193, 63 P 2d 611, 110 A.L.R. 837. The Utah case holds that the absence of an allegation vital to the cause of action is not a mere technical omission, but is a fatal defect which can be raised on appeal for the first time. The defect in the case at bar is vital to the cause of action, and may be raised at any time.

Thus, on both these matters, the Respondents are in error.

As to the defect, a complete reading of paragraph 3 of the Complaint as quoted in Respondents' brief at pages 10 and 11, shows clearly that while it is alleged " . . . ; that the defendants . . . claim or may claim some interest in and to said property **ADVERSE** to that of the plaintiff," it is further alleged in the same paragraph" . . . , 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 . . ." In other words, the admission in the latter part of the allegation, that the right **IS INFERIOR**, in effect repudiates the allegation that it is **ADVERSE**.

Thus, by admitting Defendant's interest was inferior, and praying that it be so declared, the Plaintiffs are not entitled to a decree quieting title to the property.

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POINT 5.

DEFENDANT-APPELLANT'S FEE TITLE IS NOT DEFEATED BY THE FOUR-YEAR ADVERSE POSSESSION AND LIMITATION STATUTES RELATING TO TAX TITLES.

Respondents and their counsel are having difficulty in understanding that in the case of the four-year statute relating to tax titles, as in all other cases either in law or in equity, the plaintiff has the burden and must establish a *prima facie case* by his evidence.

Section 104-2-5.11, Chapter 19, Laws of Utah 1951, in defining the term "tax title", sets forth the required proof to establish a prima facie case. This includes proof that a tax was levied against the property, there was a tax sale for non-payment of taxes, and, the redemption period having expired, that a final sale was made to the county. Then must follow evidence that the property was relieved of the tax lien. These are the requirements of the definition of a tax title as cited above. Counsel for Appellant affirms that such definition *is the law,* in spite of protests from counsel for Respondents on page 13 of the answer brief. It was enacted by the Legislature, signed by the Governor and duly published. Why counsel for Respondents questions the assertion that "this is the law" is difficult to understand, especially when he is relying on other provisions of the same enactment.

There is wisdom in these requirements. After such evidence has been introduced, the fee title claimant is

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on the horns of a dilemma: First, if he cannot show irregularities to defeat the tax title, he loses his case. Second, if he does show such irregularities, he then is confronted with the effect of the four-year statute. Appellant's position is that Respondents did not prove a prima facie case to come within the purview of the four-year statute.

The only evidence consisted of the auditor's tax deed (Pre-Trial Exhibit 4) dated February 28, 1939, issued by authority of Section 80-10-66, Utah Revised Statutes 1933, and the deed from Salt Lake County to Mr. Hancock (P. Exhibit 3) dated December 31, 1943, executed pursuant to Title 80, Chapter 10, Section 68 (8), Utah Code Annotated 1943.

While it is true that Section 80-10-66, Utah Revised Statutes 1933 provided that an auditor's tax deed, executed under its provisions, was "prima facie evidence of the facts recited therein", it was repealed by Chapter 101, Laws of Utah 1939, which provided new procedures, a new form of tax deed, and new provisions as to what shall be prima facie evidence. As to the effect of such a repeal, the court in Bejger v. Zawadzki, 252 Mich. 14, 232 NW 746, at page 747 says: "A remedy or rule of evidence, created by the Legislature in derogation of the common law, creates no vested right to that remedy, and can be taken away by repeal." Sutherland, Statutory Construction, 3rd Edition, Vol. 1, Section 2032, states under the heading of Repeal of Statutes prescribing remedies: "Likewise, where a

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particular form of procedure by express or implied provision is made mandatory in the enforcement of an existing right, it operates to abrogate previous remedies whether those remedies are prescribed by another statute or exist by common law." Thus, the repeal of Section 80-10-66, Utah Revised Statutes 1933, destroyed the prima facie effect of the auditor's tax deed. Consequently, the auditor's tax deed in this case is not now prima facie evidence of anything.

Respondents state that the deed from Salt Lake County to Mr. Hancock is prima facie evidence of all the prior proceeding leading up to the execution of said deed, by virtue of Title 80, Chapter 10, Section 68, Utah Code Annotated 1943. This is a gross misstatement of the law. Section 68 is divided into eight subparagraphs. Subparagraph (5) provides that an auditor's tax deed conveying property sold to a purchaser at the public sale at the conclusion of the statutory redemption period is prima facie evidence of certain matters. But the deed from the County to Mr. Hancock is no such deed. Subparagraph (7) provides that, as to property not bid in at the said public sale, the auditor's endorsement made on the tax sale record, conveying the fee simple title to the county, duly certified, is prima facie evidence of certain matters. But again, the deed to Mr. Hancock does not come within these provisions. The deed to Mr. Hancock was executed under subparagraph (8). *This counsel defies Respondents and their counsel to point out any provision in this subparagraph providing that any statement in such a*

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deed is prima facie evidence of any matter recited therein.

Appellant agrees with Respondents' cited Utah cases which hold that a *valid tax title* does not have to be established under the four-year statute. But no Utah case has laid down the rule that a tax title claimant, relying upon the statute, is relieved from the responsibility of proving *a prima facie case.*

Thus, Respondents, having not established a prima facie case as defined by Section 104-2-5.11, Chapter 19, Laws of Utah, 1951, cannot claim protection under the four-year statute.

POINT 6.

DEFENDANT-APPELLANT'S FEE TITLE IS NOT DEFEATED BY THE SEVEN-YEAR ADVERSE POSSESSION AND LIMITATION STATUTES.

In rebutting the arguments of Respondents' brief, Appellant respectfully urges this Court to keep three things in mind: First, that the claimed acts of adverse possession must be confined to the period of 1955 to 1961, inclusive, for that is the only period of time during which the taxes were paid prior to delinquency. Please see Bowen v. Olson, 2 U.2d 12, 268 P 2d 983, 985, which holds that redemption after preliminary sale does not constitute the payment of taxes necessary to establish adverse possession. Second, that under the rule

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of Kurz v. Blume, 407 Ill. 383, 95 NE 2d 338, adverse possession "cannot be made out by inference or implication, but must be established by evidence that is clear, positive and unequivocal, all presumptions being in favor of the true owner."

Third, the use of the stables and the operation of the chuck wagon restaurant on Redwood Road, three-quarters of a mile east of subject property, and the maintenance of the lake some distance to the south of it, did not constitute acts of trespass as against the subject property or the owner thereof. There being no trespass, no cause of action arose, and no adverse possession or limitation statute commenced to run, which could ripen into title. Thus, these acts cannot be considered in the case at bar.

Respondents, in their brief, rely upon three main provisions of Section 78-12-9, U.C.A. 1953, as follows:

1. *Land cultivated or improved.*

This was valuable commercial and industrial property, which Respondent intended to use for commercial purposes, and which sold for $2,000.00 per acre. In the words of Mr. Firmage, the son, it was actually used as follows (Tr. page 16): "It was used for grazing purposes. It was used for about three years as a catch basin for diverting water from the lake that we were developing, and it was used for drainage ditches. It was also—we did some leveling. Mr. Hancock tilled it before we bought it from him."

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First, no definite time was established for any of said acts, except grazing, which appeared to have been continuous. Appellant submits there was no clear, positive or unequivocal evidence the other acts occurred during the period 1955 to 1961, when taxes were paid. Thus, these acts cannot be considered. In addition, as stated in Day v. Steele, 111 U. 481, 184 P 2d 216, an act of leveling is insufficient to establish adverse possession, even though coupled with other acts of casual use. Also, under Day v. Steele, and 3 Am. Jur. 2d, pages 93 and 94, the adverse acts must be commensurate with the nature, character, and locality of the property, and to some purpose to which it is adapted. These acts of using the property as a catch basin and for drainage ditches not only failed to be appropriate use of the property to ripen into title, but actually were detrimental to subject property, and not improvements, whether the subject property be considered as commercial and industrial in nature, or merely agricultural.

Also, Mr. Firmage, the son, admitted in his testimony (Tr. page 42) as follows: " . . . and no, we didn't till it. Mr. Hancock tilled it and we pastured it." So, neither did Respondents cultivate the land. With it having been neither cultivated nor improved, the claimed adverse usage of the property could not ripen into title.

2. *Protection by a substantial inclosure.*

As to the claimed fencing, a careful reading of Mr. Firmage's testimony (Tr. page 43, lines 22 to 26)

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indicates there were some places where net wire fencing occurred, some places where "they" (apparently referring to someone else) had barb wire fencing, and some places where there was neither. But that around the entire area Respondent Falconaero put up the electrified wire. According to this testimony, it appears the horses got cut up in the other fencing, and the electric wire kept them out of it.

Mr. Firmage was asked by his own counsel the purpose of the fencing (Tr. page 56). His answer was, "Just to keep the livestock in." This admission affirmatively establishes that Respondent never did intend the electric wire to protect the property, and certainly it failed to constitute a substantial inclosure.

An inspection of the pictures (P. Exhibits 7 to 21) confirms the inadequacy of the claimed fencing. P. Exhibits 7, 8, 9, 11, 12, 16, 17 and 18, show only an irregularly spaced line of posts, but absolutely no wire of any kind, either electric, barb or net. The other pictures show fragments of what appear to be barb wire, running into the ground either in one or in both directions.

By no stretch of the imagination can one conclude that the oral testimony and pictures establish that Respondent Falconaero protected the claimed property by a substantial inclosure. The electrified wire was solely to keep the stock from straying and from getting cut up in the barb wire. These admissions, coupled with the revelations of the photos, establish by affirmative

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evidence the very opposite of Respondents' claim. There was absolutely no substantial inclosure which protected the property.

But this is not all. The subject property consisted of several blocks in a platted subdivision known as Asbury Park. The question naturally arises as to the legal effect of inclosing an area which includes platted streets. Can such an inclosure (flimsy in this particular case) ripen into an adverse title by cutting off the owner's access? This same question came up in regard to the use of a public stream in the case of North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co., 16 U. 246, 52 Pac. 168. This case held that where there was a public right involved as well as a private one, adverse usage by a claimant could not ripen into a lawful right against the public, nor as against a private user. Here, the platted streets are public property. Applying this Utah case here, Respondent Falconaero, regardless of the kind of fencing used, cannot get an adverse claim either as against the public, nor as against a private owner, the Appellant in this case.

3. *Pasturage.*

This valuable industrial and commercial property was surrounded by such uses. It sold for a high price. The income from pasturage ranged from $150.00 to $400.00 per year, not just for the subject property of 20 acres, but for the entire 1000 acre tract (15 cents to 40 cents an acre). As stated in Day v. Steele and 3 Am. Jur. 2d, supra, the nature, character, and locality

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of the property govern the use that an adverse claimant must make of it to perfect his title. The evidence shows conclusively that subject property was not so used by Respondents.

However, there is still another reason why pasturing this property could not ripen Respondents' claim into title. On pages 40 and 42 of the Transcript, Mr. Firmage admitted that it was tillable property, and that Mr. Hancock had so used it before they became his successors. But they did not till it. This Court, in Adams v. Lamicq, ... U. .... 221 P 2d 1037, at page 1040, said: "The rule that title to property may be acquired by adverse possession if it is grazed by an adverse claimant during the entire grazing season of each year is limited to lands which because of their character are reasonably suited for grazing purposes only and has not been extended by the courts to land which can be cultivated during the non-grazing months of the year." Thus, even if we ignore the commercial and industrial propensities of the subject property, under the rule of this Court, the grazing of this property, which was at least cultivatable by Respondents' own evidence, could not cause Respondents' claim to ripen into title under our statute.

It is uncontrovertible that Respondents have not established their adverse claim by "clear, positive and unequivocal evidence," or at all, under any one of three bases relied upon in the their brief.

To rebut Respondents' claim on page 17 of its

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brief that Appellant is barred by the seven-year limitation statutes, we respectfully refer this Court to Section 78-12-7, U.C.A. 1953. This section provides that the holder of the legal title is presumed to have been possessed of the property within the time required by law, and that the occupation of the property by any other person is deemed have been in subordination to the legal title, unless adverse possession has been established. Respondents have failed to establish adverse possession. Appellant submits that it is entitled to the above presumption.

POINT 7.

A DEED FROM AN HEIR CONVEYS TITLE.

In a footnote to Respondents' Statement of Facts (page 2 of the Answer brief), Respondents make a misstatement of the law which needs correcting. The statement is as follows: "Obviously, such a deed from only *one* of the alleged heirs, without a probate proceeding or a determination of heirship proceedings to show true heirship does not convey fee title."

Please see Chamberlain v. Larsen, 83 U. 420, 29 P 2d 355, wherein this Court said at page 357: " . . . Appellants urge that the complaint did not state a cause of action and that plaintiffs have not the capacity to sue because there has been no adjudication of heirship; that plaintiffs are not all the heirs of the decedent; . . . We find no merit in this contention. Upon the death

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of the decedent, the title to any property of which she died possessed immediately passed to and vested in her heirs, subject to administration and the payment of debts. The purpose of an adjudication of heirship is not to vest title but to adjudicate where the title of the decedent has already vested. Regardless of whether there had been an adjudication of heirship, the rights of heirs can be asserted *or defended* in any proper manner." (Italics ours).

CONCLUSION

If the decision of the lower court is permitted to stand in this matter, we sincerely believe that some well-established and fundamental principles of law relating to parties in interest and their substitution, to tax titles, and to our statutes relating to adverse possession, will be overturned or seriously clouded, which would result in future uncertainty and consequential litigation. We therefore respectfully submit that the lower court's decision should be reversed.

Respectfully submitted,

WILLIAM D. CALLISTER,

Attorney for Defendant-
Appellant

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