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IN THE SUPREME COURT OF THE STATE OF UTAH

RONALD L. and SHIRLEY DIANE BAXTER, husband and wife,

Plaintiffs-Appellants;

RIO VISTA OIL LTD., a Utah corp.
An Involuntary Plaintiff

-vs-

UTAH DEPARTMENT OF TRANSPORTATION,

Defendant and Third-Party Plaintiff-Respondent,

-vs-

ROBERT REES DANSIE and MARIE GROW DANSIE, his wife; DAVIS COUNTY COMMISSIONERS; DAVIS COUNTY ASSESSOR; DAVIS COUNTY RECORDER; and WEBER COUNTY, a body politic of the State of Utah,

Third-Party Defendants

No. 19097

BRIEF OF PLAINTIFFS-APPELLANTS

Appeal from Summary Judgment and Final Order
of Second District Court of Weber County
Honorable Calvin Gould, Judge

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FILED

Clerk, Supreme Court, Utah

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UTAH DEPARTMENT OF TRANSPORTATION,

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ROBERT REES DANSIE and MARIE GROW DANSIE, his wife; DAVIS COUNTY COMMISSIONERS; DAVIS COUNTY ASSESSOR; DAVIS COUNTY RECORDER; and WEBER COUNTY, a body politic of the State of Utah,

Third-Party Defendants

No. 19097

APPELLANTS' BRIEF

NATURE OF THE CASE

Appellants take this appeal from a Summary Judgment entered

in an action wherein they seek to quiet title to 6.00 acres of unimproved real property allegedly located in Davis County, State of Utah.

DISPOSITION IN LOWER COURT

Summary Judgment was entered in this matter on March 3, 1983, and Notice of Appeal was filed and entered on March 31, 1983; thereafter, on or about April 8, 1983, respondent prepared and mailed to counsel for appellants a further document, entitled Final Order, wherein title was purportedly quieted in the name of Utah Department of Transportation as to the real property which is the subject matter of this litigation and an additional 12-acre tract.[1]

RELIEF SOUGHT ON APPEAL

Appellants seek to have the Summary Judgment and the Final Order reversed and set aside and an Order remanding this matter for trial for the purpose of determining title, as between appellants, respondent and such other parties as are necessary to a final title determination, to the subject lands and such other lands as may be

---

1. The Final Order does not appear in the Record on Appeal nor (as of May 3, 1983) is there a Docket entry or other evidence of the document in the Weber County Clerk's office. Respondent's counsel has not advised the writer of this brief that the Final Order might have been intercepted or never signed by the Court; accordingly it is set forth in the Appendix for reference purposes.

affected by the true location of the county line between Weber and Davis counties.

STATEMENT OF MATERIAL FACTS

Rule 56 (c) provides that summary judgment shall be rendered "... if the <u>pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits</u>, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Accordingly, since appellants hereinafter raise an issue on appeal challenging the procedure followed by respondent in its Motion for Summary Judgment, the material facts hereinafter set forth will be restricted to matters set forth in the pleadings (Complaint-- R. 1 and Answer-- R. 62), the Affidavits of Ronald L. Baxter (R.127) and Stephen M. Smith (R. 236), and the admissions of fact-- which appellants herewith stipulate to-- contained in this Statement.

Appellants brought this action against the Department of Transportation of the State of Utah to quiet title to 6.00 acres of unimproved land claimed to be located in Davis County (R. 1), the land being valuable primarily as a source of gravel-type materials.

The Department of Transportation resisted, claiming that it is the owner of the subject tract because the land is located in Weber County (R. 62).

On May 26, 1969 Davis County issued a Tax Deed (R. 100) to Thomas Hollberg, Ronald Baxter and Ronald A. Toone, one-third each, as tenants in common, to 18.00 acres of land in Davis County in the S. ½ of the N. ½ of SW ¼ of Sec. 25, 5 N., 1 W., Salt Lake Base and Meridian. Thereafter, the purchasers divided the lands, and on September 29, 1970, Baxters acquired the 6.00 acre tract which is the subject of this litigation (R. 116, 117).

On or about August 20, 1975, Johnson Construction Company entered upon the westerly 6.00 acre tract, which had been previously conveyed to Ronald A. Toone, and began to excavate and crush gravel for a road construction job. Toone then brought action in the Second District Court of Davis County in September, 1975 against Johnson Construction Company to recover the value of the gravel materials removed, but he was unsuccessful in the litigation because a jury held that the Toone tract of land was located in Weber County and, accordingly, Davis County had no authority to tax the land and to issue a Tax Deed. In the Toone case the matter went to the jury on similar Instructions submitted by both parties which, in effect,

directed the jury to find whether, as of January 4, 1896, the Weber River was located where it then existed at the time of trial (and presently exists) or whether in 1896 the river was located approximately 1,000 feet farther north, which would have placed it north of the Toone tract (R. 143, 145). It was admitted by both litigants in the Toone case that the location of the Weber River, as established by law, constituted the boundary line between the two counties.

The jury in the Toone case found the location of the Weber River in 1896 to be its present location, thus placing the Toone parcel north of the Weber River, and Toone's action against Johnson Construction Company failed. Judgment on the Verdict in that action was entered on January 7, 1977 (R. 45).

At no time during the Toone litigation, or prior thereto or at any time since, did Johnson Construction Company attempt to remove gravel materials from either the Hollberg or Baxter tracts; nevertheless, Johnson Construction Company filed a motion in the Toone case to join the Hollbergs and Baxters in order " ... to have a complete adjudication of the ownership of the properties in question." (R. 49). Respondent's counsel in this action, Stephen C. Ward, represented Johnson Construction Company in the Toone case,

listing his appearance on all papers in that litigation as " Assistant Attorney General"; however, at no time was the Utah Department of Transportation made a party to the Toone litigation nor did it seek to become a party. Obviously, since Johnson Construction Company had taken no materials for which damages would have been paid from the Hollberg or Baxter properties, they were not ordered to be made parties in the Toone litigation.

The Baxter tract of land, which lies contiguous to and immediately east of the Toone tract, was not disturbed until personnel of the Department of Transportation entered upon the land in the spring of 1978 and commenced to removal gravel therefrom (R.4). Accordingly, Baxters filed a Notice of Claim with the Department of Transportation of the State of Utah on May 10, 1978, as provided by Section 63-30-6, Utah Code Annotated, 1953(as amended, 1965). In their Notice of Claim they asserted title to the subject tract and objected to the removal of gravel therefrom. No response was made by the Department of Transportation of the State of Utah or by the Attorney General within the statutory period of one year, and this action was then brought.

Baxters' Complaint (R. 1) alleges their ownership to the

subject 6.00 acres of land derived from and through the Tax Deed from Davis County (which originally included 18.00 acres), that the defendant Department of Transportation claims title to the property, that they timely filed their Notice of Claim as provided by statute, that no response was made by defendant Department of Transportation, and that their title should be quieted against the Department of Transportation of the State of Utah. The State's Answer (although not so designated-- R. 62) contains a general denial; and it affirmatively asserts, among other things, that the Davis County tax sale was invalid, that the property is located in Weber County and at all times has been taxed by Weber County, that Davis County had no authority to sell the subject tract at tax sale and did not follow the proper statutory procedures pertaining to such sales, that plaintiffs failed to file their claim within the one-year period provided by Section 63-30- 12 (as amended 1978), that the Toone case was res judicata and that Baxter should be collaterally estopped from bringing this action because he was a witness in that case.

Although the Toone case was tried on the basis of the location of the Weber River as it existed on January 4, 1896, Baxters in this

action take the position that the Weber River's course has been substantially altered since the county lines were first established, and that the river's location on January 10, 1866, as established by the Territorial laws of the State of Utah and as adopted by the Constitution of the State of Utah should govern. Based upon this contention, Baxters maintain that the Weber River in 1866 was located more than 1,000 feet farther to the north, thus placing their tract of land in Davis County.

Utah Department of Transportation moved for Summary Judgment in this case on the grounds that Baxters were judicially barred from suing to quiet title against the State of Utah because of the decision in the Toone litigation (R. 84), claiming that the boundary line between Weber and Davis counties was finalized in that case and that judicial notice should be taken of that fact (R. 106), and that Ronald L. Baxter was further bound by the Toone decision for the reason that he appeared as a witness in the Toone case. Baxter countered by Affidavit (R. 127), asserting pointedly that his only contact with the Toone case was that of an expert witness furnishing surveying testimony. Department of Transportation did not counter Mr. Baxter's Affidavit and did not furnish any other admissible

evidence concerning that matter.

The Second District Court, Hon. Calvin Gould, Judge, granted Summary Judgment in favor of defendant Department of Transportation, and the same was entered on March 3, 1983. No formal Findings of Fact and Conclusions of Law were entered, but the Court's Memorandum Decision (R. 249) held that (a) Baxters were bound by the decision in the Toone v. Johnson Construction Company case under the doctrine of collateral estoppel since Ronald L. Baxter testified as a witness therein and " ... was interested in its result.", and was therefore in privity with Toone; that (b) the Court had previously found the Tax Deed from Davis County, of which it took judicial notice, to be void; and that (c) the Court had finally decided the location of the boundary line between Weber and Davis counties in the <u>Toone</u> case, of which it also took judicial notice.

ARGUMENT

I.

THE LOWER COURT AND RESPONDENT BOTH FOLLOWED IMPROPER PROCEDURES IN A SUMMARY JUDGMENT SITUATION.

A motion for summary judgment has been recognized by the courts as an extension of a motion for judgment on the pleadings. By permitting

either or both parties to file affidavits and other admissible evidence or admissions, cases can sometimes be disposed of without the burden of an unnecessary trial. However, Rule 56 (c) of the Utah Rules of Civil Procedure limits consideration to "... the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, ..." The foregoing requisites were summarized in the matter of In re Williams' Estates, 10 U.2d 83, 348 P. 2d 683, where this court held that --

> " A summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no issue of material fact and that the moving party is entitled to judgment as a matter of law."
>
> ....
>
> "... without giving plaintiff the opportunity to present ... evidence (which plaintiff claims she can produce) in a trial we cannot hold as a matter of law that plaintiff is not entitled to recover."
>
> (Underlining added)

The Record on Appeal in this matter is replete with Memorandum Briefs filed by respondent wherein carefully excerpted exhibits and documents from the case of Toone v. Johnson Construction Company were added to support respondent's position. Inasmuch as a motion for summary judgment is primarily handled by oral argument and

briefs and documentation, it is not always possible for the opposing party to raise objections and keep such items completely out of the Record on Appeal as would be done if the offering of such items in evidence were attempted at trial. Nevertheless, appellants repeatedly objected to the procedure, pointing out that respondent "... has carefully sorted out and selected facts peculiar to its own version of the matter, most of which lack materiality..." (R. 119), engendering such retorts from respondent as the following:

> " The Plaintiffs neither controverted the stated facts nor attempted to state any additional facts. It must then be assumed that the Defendant's statement of facts must be true."

Also, in oral argument:

> "Mr. Ward: ' It is always amazing to me, your Honor, that when I listen to his side and compare it with our side, there is no similarity whatsoever...'
>
> THE COURT: ' That's generally what makes a lawsuit.' "
>
> (R. 268)

It is not proper for the moving party seeking summary judgment to reach out and, by way of brief or simple argument, raise matters which are not properly admitted, nor should the movant attempt to shift its burden of proof to the defending party by such tactics.

The identical Rule 56 of the Federal Rules of Civil Procedure contains several annotated cases which advance the foregoing proposition:

> "Summary judgment is neither method of avoiding necessity for proving one's case nor clever procedural gambit whereby claimant can shift to his adversary his burden of proof on one or more issues."
>
> U. S. v. Dibble, C. A. Cal. 1970, 429 F. 2d 598

Further:

> " Admissibility of evidence on motion for summary judgment is governed by rules of evidence applicable at trial."
>
> Roucher v. Traders & General Ins. Co., 235 F. 2d 423

Similarly, in the recent case of Schaer v. Utah Department of Transportation (No. 18009, filed January 10, 1983), this Court quoted from an earlier case, saying:

> " Upon a motion for summary judgment, the courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant's case or specify in an affidavit the reason why he cannot do so."

Nor is it sufficient for a lower court to take " judicial notice" of another case in the manner outlined in the Memorandum Decision on file herein (R. 249). Rule 9 of the Utah Rules of Evidence sets forth facts which may be judicially noticed by a trial court, but

the rule does not specifically include the taking of judicial notice of the record in another action in another case. At any rate, Rule 10 provides that the judge "... afford each party reasonable opportunity to present to him information relative to the propriety of taking judicial notice of a matter or to the tenor of the matter to be noticed."

Under the federal cases interpreting Rule 56 (c) it has been held :

> "Grant of a summary judgment would not be sustained on basis of judicial notice of a court's prior case, where trial court did not inform parties as to what he noticed, and in his order granting summary judgment merely stated he referred to the record in a prior action, but failed to include any portions of the record of such prior action in his order."

> Soley v. Star & Herald Company, C. A. Canal Zone 1968, 390 F. 2d 364

> "Before an action may be summarily dismissed on ground of res judicata, defense of res judicata must appear from the face of complaint or the record of the prior case must be received in evidence."

> Guam Inv. Co. v. Central Building, Inc., C.A. Guam 1961, 288 F. 2d 19

46 Am. Jur. 2d, Judgments, Sections 599 and 600 cover the matter at hand:

"Sec. 599. - Necessity of proof of record.
The question sometimes arises whether it is necessary to offer or introduce evidence of the record of a prior judgment set up as a bar or estoppel, or whether it may be established by judicial notice. Although there is some authority in support of the rule that a court will take judicial notice of a judgment previously rendered by it and sought to be made available as a basis for the application of the doctrine of res judicata, at least where such judgment is referred to in the pleadings, a court ordinarily will not take judicial notice of a judgment rendered in a different action; it is generally held that the existence and contents of a judgment sought to be made available as a basis for the application of the doctrine of res judicata must be proved by offering the record or a copy thereof in evidence, whether the judgment was rendered by the court trying the principal case, or by another court. It has also been adjudged that oral testimony of a witness relating to facts established by a judgment is, under the best evidence rule, inadmissible where proper objection is made."

"Sec. 600 Necessity of proof of whole record.
Ordinarily, questions as to the effect of judgments as res judicata cannot be decided from the judgment alone, but must be determined by the aid of the entire record, and the general rule is that proof of the whole record must be introduced where a party intends to avail himself of a judgment as an adjudication on the subject matter, particularly where it is material to show the premises and grounds on which the judgment is based, or the jurisdiction of the court rendering the judgment. Under this rule, a judgment entry alone unaccompanied by any part of the record or an explanation of its absence, is not admissible in evidence, notwithstanding that it emanates from a court of general jurisdiction and contains general recitals of jurisdiction."

(Underlining added)

This Court has adopted the above-quoted reasoning in the case of Carter v.Carter (Utah 1977), 563 P.2d 177.

The lower court was insistent that the other Tax Deed purchasers and Weber County be brought into the litigation (R.160), but it refused Baxters' motion to join Monroc(R.229), though the Affidavit of Stephen M. Smith, manager of the real property department of that company, asserted that Utah Department of Transportation "... claims title to...approximately eight (8) acres of land belonging to Monroc, Inc. in the area north of the Weber River as now located." and that the State of Utah has "... trespassed upon and removed gravel materials from Monroc's lands in the S. W. ¼ of the SW ¼ of said Section 25 which lie north of the Weber River as now located, without any right whatsoever..." (R. 236).

Weber County was served with the Third Party-Complaint, but the lower court, in the final analysis, disregarded its own order requiring that Weber County be brought into the action and proceeded to summary judgment, stating in its Memorandum Decision (R. 251) that it "... is unfortunate in this case that neither of the subject counties saw fit to enter this litigation and thus protect their citizens by causing the proper determination of a correct boundary." Actually, however, Weber County duly filed its Answer

to the Amended Third-Party Complaint (R. 226), asserting therein that respondent's Complaint " fails to state a cause of action against defendant Weber County...", that it denied " allegations 1 through 6 or parts thereof ..." of the Complaint, and that the Third-Party Complaint be dismissed and that Weber County have judgment against the Utah Department of Transportation for costs and attorney's fees incurred in defending the action.

It is highly unusual for a lower court to order the inclusion of an affected governmental agency into a litigation and then, as here, proceed to summary judgment and a ruling adverse to the same governmental agency brought into the action by its own ruling. The subject property lies south (on the Davis County side) of the Interstate Freeway which proceeds east up through Weber Canyon, thus making the subject tract physically isolated, in part, from access by Weber County, and any transfer of ownership to the Utah Department of Transportation certainly eliminates any possibility that Weber County would receive property taxes from the subject lands in future years. There is the further matter that open gravel pit operations create special problems of surveillance, control, policing and possible nuisances, thus making it further probable that

Weber County would possibly prefer that Davis County should keep the property within the latter's jurisdiction. At any rate, and irrespective of whatever position Weber County might have ultimately taken in the proceedings, the lower court should not have proceeded to summary judgment without considering its position. Likewise, in order to properly arrive at a determination of title in the area which could have been affected by any sudden change of the Weber River since 1866, Monroc, Inc., and any other owners of similarly situated tracts of land, should have been brought into the litigation in order to effect a final determination of titles.

Respondent's high-grading of the documents and exhibits taken from the file in the Toone case so as to advance matters favoring its own position should not be condoned nor allowed to substitute for the admission into evidence of the entire record. Further, the arguments set forth in its various Memorandum briefs seeking summary judgment, being devoid of any affidavits, admissions, stipulations or other admissible evidence, cannot possibly be upheld by argumentative statements volunteered by counsel for respondent. The lower court compounded the problem by ordering Weber County into the litigation so that there could be a proper determination of the boundary line between the two counties, but chose to ignore the

fact that Weber County complied with the order and did in fact file its Answer. In short, the mistakes, omissions and contradictions of respondent and the lower court clearly establish such disregard for the proper rules of procedure in summary judgment situations as to clearly violate constitutional safeguards of due process of law. The procedural errors and omissions, standing alone, should mandate a remand of this matter.

II.

A PLAINTIFF WHOSE TITLE IS DERIVED IN PART BY SUCCESSION THROUGH ANOTHER LITIGANT PRIOR IN TIME TO THE COMMENCEMENT OF RELATED LITIGATION BY HIS GRANTOR, WHOSE ONLY PARTICIPATION OR INTEREST IN THE LITIGATION INVOLVING HIS GRANTOR WAS THAT OF A WITNESS FURNISHING EXPERT TESTIMONY, AND WHO HAS A CAUSE OF ACTION PREDICATED ON A DIFFERENT SET OF MATERIAL FACTS AND A DIFFERENT LEGAL PREMISE FROM THAT INVOLVED IN THE LITIGATION INVOLVING HIS GRANTOR, IS NOT BARRED UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL FROM PROCEEDING WITH A SUBSEQUENT ACTION IN HIS OWN BEHALF.

The lower court's Memorandum Decision based its summary judgment ruling on the generic concept of judicial estoppel. Although at times the ruling crosses over from one concept to

another without making its position absolutely clear, it is difficult to see how summary judgment could be considered in this case unless mandated by the doctrine of collateral estoppel.

A preliminary analysis of the Memorandum Decision should make it abundantly clear that the lower court's reference to " judicial notice" can only serve this litigation insofar as we might be concerned with admissible evidence which fits within the confines of Rule 56(c); likewise, there is no possibility that the ordinary rules of res judicata can apply because there is not a single identical property-claimant litigant in either the subject case or the Toone case. Proceeding next to the nature of quiet title actions, it would seem self-evident that no area-wide determination of title, whether based upon a river boundary or other critical matter, could possibly bind property claimants whose <u>properties</u> were not included in the referenced litigation. Such an action should also be clearly labeled a quiet title action, either in the pleadings or by publication of notice to landowners who either reside beyond the local jurisdiction or who cannot otherwise be found or served.

Any lawyer working in the field of real property titles, or an abstractor or title insurance examiner, would find it really

amusing to suggest that the Toone litigation could ever affect title to lands whose owners were not parties or privies to that litigation. Section 78-40-1 through 13, Utah Code Annotated, relating to Quiet Title Actions, details the procedure to be followed in such actions, and provides the method of service of summons upon unknown defendants by publication. Certainly, a property owner such as Monroc, Inc., whose property manager filed an Affidavit (R. 236) asserting that the State of Utah was claiming and using land which it assertedly owned, would have to be considered a prime defendant in any quiet title action which the Utah Department of Transportation might bring.

As will be pointed out subsequently, the boundary line between Weber and Davis counties was established by the location of the Weber River on January 10, 1866. Thus, no final determination of the physical location of the line could have been made in the Toone litigation without Weber County having been made a party to it. See American Mutual Building & Loan Co. v. Jones, 102 U. 318, 117 P.2d 293. Nor could any court proceed on its own in litigation between two private litigants and change the boundary line between two counties since Article XI, Section 3, of the Constitution of

Utah explicitly sets forth the procedure to be followed:

> Sec. 3.(Changing county lines)
> No territory shall be stricken from any county unless a majority of the voters living in such territory, as well as of the county to which it is to be annexed, shall vote therefor, and then only under such conditions as may be prescribed by general law.

By the simple process of elimination, it remains that the only judicial bar which could conceivably prevent Baxters from presenting their case must be premised on the claim that Toone v. Johnson Construction Company contained the necessary elements of collateral estoppel. That feature, as it might affect the granting of summary judgment in this action, will now be addressed.

The doctrine of collateral estoppel requires that the Baxters must be " in privity" with one of the litigants in the Toone case. The basic law in Utah is set forth in the case of Searle Bros. v.Searle (Utah 1978), 588 P. 2d 689, where the test of privity was defined as --

> "... a person so identified in interest with another that he represents the same legal right. This includes a mutual or successive relationship to rights in property. Our Court has said that as applied to judgments or decrees of court, privity means ' one whose interest has been legally presented at the time.' "

In setting forth the four tests determinative of whether

collateral estoppel applies, this Court adopted the California rule, as follows:

> "1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
>
> 2. Was there a final judgment on the merits?
>
> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
>
> In a subsequent opinion, the California Supreme Court recognized the necessity for a fourth test: ' Was the issue in the first case competently, fully, and fairly litigated? ' These four tests have been adopted by the majority of jurisdictions as the correct standard to apply..."

Thus, we concern ourselves with whether Baxters had either a mutual or successive relationship to rights in property. These appellants contend that neither relationship existed.

(A) Baxters never had a "mutual" relationship in the case of Toone v. Johnson Construction Company.

The lower court's Memorandum Opinion (R. 251) recites:

> " Plaintiff Baxter appeared in the trial as a witness; obviously knew its character and object and was interested in its result. Plaintiff is, therefore, estopped from making this challenge to the determination of invalidity of the tax sale and deed."

Similar general statements, which the lower court apparently accepted, are liberally placed throughout the various Memorandum briefs filed in this matter by respondent Department of Transportation.

Baxters, on the other hand, expressly deny that either of them had any tie or interest in the Toone litigation such as would invoke collateral estoppel. Except for the admission and stipulation set forth in this brief, there is nothing in this record on appeal to even show that Ronald L. Baxter was a witness in the Toone case, let alone being interested in its results. Respondent has failed to produce any relevant portion of the record in the Toone case showing any participation by either of the Baxters therein, no transcript of the testimony of Ronald L. Baxter in the Toone case has been introduced, and respondent has failed to support its assertions concerning Ronald L. Baxter's appearance as a witness in the Toone case by affidavit or any other credible evidence. Further, except for the fact that Ronald L. Baxter furnished expert surveying testimony as a witness in the Toone case, both of these appellants categorically deny that either of them were otherwise involved in

that litigation in any way whatsoever.

Ronald L. Baxter filed his Affidavit in this matter (R. 127) wherein he stated:

> " 5. I appeared as an expert witness in the case of Toone v. LeGrande Johnson Construction Company, et al., Civil No. 20915, as referenced in the Motion of the State of Utah for Summary Judgment; however, my appearance was solely for the purpose of furnishing survey information taken from my field notes and old government survey notes and to establish physical points and boundaries in the general area, and I took no part in the litigation as a participant in any way whatsoever and was not represented in the action by legal counsel."

There is nothing in the Record on Appeal in this case beyond the above-quoted statement from Mr. Baxter's Affidavit which this Court can consider relative to any "mutual" relationship that either appellant had with any litigant in the Toone case. Obviously, neither appellant was legally represented in the Toone litigation nor did either of them have a legal, economic or other interest in any possible proceeds of that litigation. This Court has had occasion to expand upon the Searle Bros. case in Tanner v. Bacon, 103 U. 494, 136 P.2d 957:

> "It is well settled that the doctrine of res judicata does not operate to affect strangers to a judgment; that it only affects the parties and their successors in interest, and those who are in privity with a party thereto... This court has defined the word ' privity'

> as a 'mutual or successive relationship to the same right or property.' As applied to judgments, the word means one whose interest has been legally represented at the time."
>
> (Underlining added)

Further, this Court has also held that for the " mutual" relationship to occur there must be identical interests present. See Glen Allen Mining Co. v. Park Galena Mining Co., 77 U. 362, 296 P. 233. That Ronald L. Baxter was a stranger to the Toone litigation is pointed out in 46 Am. Jur. 2d, Judgments, Sec. 530:

> "530. Who is a stranger; right to intervene.
>
> A party to the principal case is regarded as a stranger to the judgment rendered in the previous action where he was not directly interested in the subject matter thereof, and had no right to make defense, adduce testimony, cross-examine witnesses, control the proceedings, or appeal from the judgment, even though he could have made himself a party to the previous action. ..."

These appellants, being non-parties, cannot possibly be bound by the decision in the Toone case.

As stated in 46 Am. Jur 2d, Judgments, Sec. 532, even if Baxters might have anticipated a future situation such as that which involved Mr. Toone, such interest does not constitute privity:

"Privity is not established, however, from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action. The term ' privity' when applied to ajudgment or a decree refers to one whose interest has been legally represented at the trial...."

Similarly, the rule is amplified in Section 536:

Sec. 536. Necessary interest and control in case; amicus curiæ

"... It is recognized that the participant's interest in the outcome of the litigation within the contemplation of this rule may not be an incidental interest, but must be a direct interest-- an interest which will be directly and immediately affected by the judgment in the case; and such incidental interest as that the decision may in another, disconnected litigation, pending or contemplated, be used as a precedent in favor of the participant, is not sufficient to call into operation the application of the rule. On the same principle, participation at amicus curiae is not sufficient to put the rule into operation."

The mere appearance as an expert witness in another case is clearly insufficient to create the " mutual" relationship necessary to invoke collateral estoppel against appellant Ronald L. Baxter. Nor, for that matter, can the appearance as a witness in a case possibly raise collateral estoppel against appellant Shirley Diane Baxter, his wife, since she, too, did not actively participate or have an interest in the Toone litigation and, further, Utah law no longer ties a woman's rights and liabilities to those of her

husband simply by reason of the marital relationship. See Richards v. Hodson, 26 U. 2d 113, 485 P. 2d 1044.

(B) Baxters never had a " successive" relationship in the case of Toone v. Johnson Construction Company.

The lower court and respondent both placed heavy emphasis upon the fact that both Baxters and Toone acquired their holdings through the 1969 Tax Deed from Davis County (R. 250), but both followed an erroneous line of reasoning inasmuch as a common source of title simply does not constitute " successive " interests within the concept of collateral estoppel. There is absolutely no issue in this litigation as to the fact that Hollberg, Toone and Baxters divided the larger tract and took separate deeds to separate 6-acre tracts some five years prior to the suit brought by Toone against Johnson Construction Company. It is just that 5-year time span which completely destroys any " successive" relationship between Toone and Baxters since collateral estoppel cannot reach backwards in the chain of title to a common source, and then proceed forward into another property owner. The situation was explained in the previously quoted case of Searle Bros. v. Searle, wherein this Court stated:

> " The property interest arose before the commencement of the first action, not subsequent thereto, so that appellants cannot be regarded as in privity and subject to the judgment rendered therein. "

Collateral estoppel as between grantor and grantee will not run against the grantee (here, Baxters) unless the estoppel arose prior to and was in existence at the time of the grant. See 28 Am. Jur. 2d Estoppel and Waiver, Sec. 117. Obviously, a contrary rule would create havoc with land titles and rights in land since every landowner would live in fear that his title might be impaired or destroyed through litigation involving another securing title subsequent in time to a conveyance from the source of title common to both.

46 Am. Jur., Judgments, Sections 532 and 533 stresses the necessity that title or interest must be acquired subsequent to the judgment in order to create the " successive" interest establishing privity:

"Sec. 532. Persons included as privies.

> ... Under this rule, privity denotes mutual or successive relationship to the same right of property, so that a privy is one who, after the commencement of the action, has acquired an interest in the subject matter affected by the

judgment through or under one of the parties, as by inheritance, succession, purchase, or assignment. There is privity within the meaning of the doctrine of res judicata where there is an identity of interest and privity in estate, so that a judgment is binding as to a subsequent grantee, or lienor of property. ..."

"Section 533. Necessity of subsequent acquisition of interest.

In the absence of the applicability of a statutory provision requiring a different result, the general rule is that although one to whom an assignment is made or property granted by a party to an action during the pendency thereof is regarded as in privity with such party within the meaning of the doctrine of res judicata, a judgment is regarded as conclusive only as between the parties and their successors in interest by title acquired subsequently to the commencement of the action, so that a person to whom a party to an action has made an assignment or granted property or an interest therein before the commencement of the action is not regarded as in privity with the assignor or grantor so as to be affected by a judgment rendered against the assignor or grantor in the subsequent action.

"Ordinarily, a grantee is in privity with his grantor and entitled to the benefits of judgments entered in favor of the grantor only if the judgments were prior to the conveyance of the property...."

(Underlining added)

Baxters' title, having arisen more than seven years prior to the date of the Toone trial, is in no way a " successive" interest; accordingly, privity simply cannot possibly exist in the circumstances.

(C) <u>The issue in the subject action is not " identical" with the issue tried in the case of Toone v. Johnson Construction Company.</u>

Two of the four tests set forth in the case <u>Searle Bros. v. Searle</u>, insofar as they apply to the matter at hand, are rather closely related. Not only must privity be established for collateral estoppel to apply, but it must appear that (1) the issue decided in the prior adjudication must be " identical" with that presented in the subject action and (4) the issue actually litigated in the first case must have been competently, fully and fairly litigated.

Both litigants in the Toone case submitted requested jury instructions tying the location of the boundary between Weber and Davis counties to the statehood date of January 4, 1896, and the court so instructed the jury. Unfortunately, the Allen Smith Company, publishers of Utah Code Annotated, 1953, did not furnish cross-references or annotations for Article XI, Section 1, of the Constitution of the State of Utah or Sections 17-1-9 and 32 (defining the boundary line between Davis and Weber counties) beyond a point of time determined from Revised Statutes of Utah of 1898, and this omission was the cause of, or at least a contributing

factor to, the use of an improper date to establish the true boundary line between the two counties. It was only sometime after the conclusion of the Toone trial and the entry of judgment that an analysis of the evidence in that case revealed the existence of old Davis County plat maps and taxing history which could not be reconciled with some of the evidence introduced at that trial. A subsequent detailed examination of older Utah statutes provided the answer.

The Constitution of the State of Utah adopted the <u>then existing</u> counties:

> "ARTICLE XI. COUNTIES, CITIES AND TOWNS
>
> Section 1. (<u>Existing counties, precincts, and school districts recognized</u>.)
>
> "The several counties of the Territory of Utah, <u>existing at the time of the adoption of this Constitution</u>, are hereby recognized as legal subdivisions of this State, and the precincts, and school districts, now existing in said counties, as legal subdivisions thereof, and they shall so continue until changed by law in pursuance of this article.
>
> (Underlining added)

The boundaries of the counties of Utah which were " ... existing at the time of the adoption of (the) Constitution..." were specifically defined in Sections 156 and 157 of the Compiled

Laws of Utah of 1876. Thus, unless contiguous county lines were changed by a majority vote as provided in Section 3 of Article XI, the original county lines cannot be changed. Further, the various statutory provisions relating to the boundaries between counties as have been adopted over the years-- and usually with different numbered sections and titles-- cannot alter the January 10, 1866 boundary line because to do so would constitute an unconstitutional act. Summit County v. Rich County, 63 U. 194, 224 P. 653. As a matter of fact, the location of the Weber River in the affected area constituted the boundary between the two counties as of January 10, 1866, and no constitutional change has been made, nor has any statutory change been made or attempted.

In the case of Schaer v. State of Utah, by and through the Utah Department of Transportation, previously cited, this court noted that collateral estoppel will not apply-- even if privity is present-- where there is a different issue to be litigated:

> " The issues in the present case focus on whether the first and fourth tests are satisfied. 'We (must, therefore) determine whether the issues actually litigated in the first action are precisely the same as those raised in the present action. ' Wilde v. Mid-Century Insurance Co., Utah 635 P.2d 417, 419 (1981) (emphasis added). "

The general rule enunciated in similar situations, even when applicable to the same parties in two litigated cases, is that res judicata (and, obviously, collateral estoppel) does not apply where the result of the first trial resulted from an erroneous proposition of law. 46 Am. Jur. 2d, Sec. 416 states the rule:

> Sec. 416. <u>Issues of law</u>.
>
> There are cases stating that the doctrine precluding the relitigation of issues previously adjudicated in an action on a different cause of action, is confined to issues of fact or, at least, to mixed questions of fact or law, and thereby excluding questions of law from the operation of the doctrine. Under the rule, the doctrine does not extend to erroneous propositions of law applied by the court in reaching its decision. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases.
>
> " ... As to questions of law, ... the rule supported by the American Law Institute Restatement is that where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; and in any event it is not conclusive if injustice would result. "

It would constitute an unusual and unjust rule of law to hold that Baxters should be bound by an erroneous rule of law adopted in the

Toone case, particularly under circumstances where they had absolutely no ability or authority to control that litigation. Again, and for an entirely different reason, collateral estoppel cannot and does not apply in the situation before this Court.

SUMMARY

The Utah Department of Transportation is attempting to quiet title in itself in and to the entire 18.00 acres of land sold at tax sale by Davis County without ever going to trial and putting on evidence to support its title. In the subject action, which involves 6.00 acres, its Third-Party Complaint has attempted (Appendix a-c) to quiet title to the entire 18.00 acres. Although Mr. Ward appeared as attorney for Johnson Construction Company in the case brought by Toone, listing his appearance as " Assistant Attorney General", he made no attempt to include the State of Utah as a party to that litigation. We can ask why respondent chose to remain in the shadows in that case-- and the answer appears rather obvious.

In seeking to quiet title to the larger 18.00 acre-tract of which the subject parcel is a portion, respondent both disregards the

appearance of Weber County in the case and fails to submit admissible evidence before any trial court, in clear contravention of the statutory rules of procedure applicable to those who seek to quiet title to real property. The Department of Transportation apparently takes the position that it need not comply with Section 78-40-13, Utah Code Annotated, 1953:

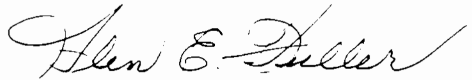
> "Section 78-40-13. Judgment on default-- Court must require evidence-- Conclusiveness of judgment.-- When the summons has been served and the time for answering has expired, the court shall proceed to hear the cause as in other cases, and shall have jurisdiction to examine into and determine the legality of the plaintiff's title and of the title and claims of all the defendants and of all unknown persons, and to that end must not enter any judgment by default against unknown defendants, but must in all cases require evidence of plaintiff's title and possession and hear such evidence as may be offered respecting the claims and title of any of the defendants, and must thereafter enter judgment in accordance with the evidence and the law. The judgment shall be conclusive against all the persons named in the summons and complaint who have been served and against all such unknown persons as stated in the complaint and summons who have been served by publication."

(Underlining added)

CONCLUSION

The Summary Judgment should be reversed and set aside, and this matter should be remanded for trial on the issue of the location of the Weber River as of January 10, 1866 and such other legal and factual matters as may be necessary to determine real property titles and boundaries among plaintiffs Baxters, defendant Department of Transportation, Weber County, Davis County and such other real property owners whose titles might be affected by any substantial change in the course of the Weber River subsequent to January 10, 1866.

Respectfully submitted.



GLEN E. FULLER
Attorney for Plaintiffs-Appellants

APPENDIX

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Attorneys for Defendant and
Third Party Plaintiff
115 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-6684

IN THE SECOND DISTRICT COURT IN AND FOR WEBER COUNTY

STATE OF UTAH

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<table>
<tr><td>RONALD L. and SHIRLEY DIANE BAXTER, husband and wife,

Plaintiffs,

AND

RIO VISTA OIL LTD., a Utah Corporation,

An Involuntary Plaintiff,

-vs-

UTAH DEPARTMENT OF TRANSPORTATION,

Defendant and Third-Party Plaintiff,

-vs-

ROBERT REES DANSIE and MARIE GROW DANSIE, his wife; DAVIS COUNTY COMMISSIONERS; DAVIS COUNTY ASSESSOR; DAVIS COUNTY RECORDER; and WEBER COUNTY, a body politic of the State of Utah,

Third-Party Defendants.</td><td>:
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:</td><td>FINAL ORDER

Civil No. 74206</td></tr>
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It appearing to the Court and the Court now finds that heretofore, on the 3rd day of March, 1983, this Court made and entered its Summary Judgment in favor of the Defendant and Third-Party Plaintiff, Utah Department of Transportation in the above-entitled proceeding, and said Summary Judgment is hereby referred to; and

It appearing to the Court and the Court now finds that pursuant to the law and the said Judgment,

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the parcel of property hereinafter described:

> S 1/2 of N 1/2 of the SW 1/4 of Section 25, 5 N., 1 W., S.L.M. containing 18 acres.

is hereby quieted in the name of the Utah Department of Transportation and is located in Weber County.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this Final Order be filed with the County Recorder of Weber and Davis County, State of Utah.

DATED this ________ day of April, 1983.

BY THE COURT:

____
CALVIN GOULD, District Judge

MAILING CERTIFICATE

This is to certify that a copy of the Final Order was mailed, postage prepaid, to Glen E. Fuller, 678 East South Temple, Salt Lake City, Utah 84102, Rodney S. Page, Davis County Attorney, Davis County Courthouse, Farmington, Utah 84025, and Donald C. Hughes, Jr., Weber County Attorney, Weber County Courthouse, Ogden, Utah 84401, this 8 day of April, 1983.