1983

Ronald L. And Shirley Diane Baxter, Husband And Wife And Rio Vista Oil Ltd., A Utah Corp. An Involuntary Plaintiff v. Utah Department Of Transportation v. Robert Rees Dansie And Marie Grow Dansie, His Wife; Davis County Com-Missioners; Davis County Assessor; Davis County Recorder; And Weber Co-Unty, A Body Politic of the State of Utah : Brief of Defendants-Respondents Utah Department Of Transportation And Third-Party Defendants Weber And Davis County

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs-Appellants,

RIO VISTA OIL LTD., a Utah Corporation,

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-Weber and Davis Counties, Respondents.

Case No. 19097

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BRIEF OF DEFENDANTS-RESPONDENTS UTAH DEPARTMENT OF TRANSPORTATION AND THIRD-PARTY DEFENDANTS WEBER AND DAVIS COUNTY

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

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Table of Contents

Table of Contents
Continued

CASES CITED

INDEX OF AUTHORITIES

STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

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NATURE OF THE CASE

The Plaintiffs-Appellants sought to quiet title to six (6) acres of property which they previously acquired from Davis County on an invalid tax sale.

DISPOSITION IN THE LOWER COURT

Judge Calvin Gould, after considering the extensive briefs that were filed by the parties, granted the Respondents' Motion for Summary Judgment on March 3, 1983. The Final Order referred to in Appellants' brief was prepared, but was never submitted to the Trial Court. Appellants' attorney filed the Notice of Appeal (R. 261, 262 Dated March 31, 1983), with the District Court, but failed to send Respondents a copy. The first Notice the Respondent, Utah Department of Transportation, had of the pending appeal came with the Appellants' Designation of the Record which occurred on April 8, 1983. (R. 266,267) The Respondent, thinking the appeal time expired on April 3, 1983, prepared the Final Order (Appendix A) and sent it to Appellant, but in the meantime received the Designation of the Record, and consequently did not submit the Final Order to the Court for execution.

RELIEF SOUGHT ON APPEAL

The Respondents, Utah Department of Transportation, Weber and Davis Counties seek to have this Court affirm a

Summary Judgment which was granted in their favor which quieted title to twelve (12) acres of landlocked property which was determined to be located in Weber County, State of Utah.

STATEMENT OF MATERIAL FACTS

These Respondents disagree in part with Appellants' Statement of Facts and therefore, restates the same. The Appellants' statement contains legal argument, wrong citations and statements in the form of argument without any reference to the record where such facts appear.

Just prior to May 25, 1964, the Third-Party Defendant, Robert Dansie (he was a Utah attorney who is now deceased), hereinafter referred to as "Dansie," was the owner of approximately 24.41 acres located near Uintah Junction where the Weber River intersects with U.S. Highway 89. The property in question, according to the Davis County plat maps, was located north of the existing Weber River. (R. 18)

In May of 1964, the Defendant-Respondent, Utah Department of Transportation, purchased the property in question by right-of-way contract (R. 99), and warranty deed from the Third-Party Defendant, Robert Dansie. (R. 98) The deed (R. 98) was recorded in Davis County on June 17, 1964, but Davis County only recognized, for recordation purposes, the

description in the deed which followed the portion of property which was designated "also in Davis County." This particular description involved a small tract of property which in fact, was situated south of the Weber River. The deed in question was then later sent to Weber County for recordation. The deed was held by Weber County until September of 1970, when it finally received a recordation seal.

The taxes on the property in question were not paid for the years of 1964 through 1968 in Davis County and consequently, came up for tax sale in May of 1969. (R. 85) Apparently, both Davis and Weber County had been each taxing the same property. The parties who purchased the property at the May, 1969 tax sale (R. 100), were Thomas Holberg [Rio Vista, Involuntary Plaintiff, that default judgment was entered against (R. 255, 256)], Ronald Baxter (Plaintiff-Appellant) and Ronald Toone, (Plaintiff in Civil No. 20915, R. 47.) Mr. Baxter (Plaintiff-Appellant) is currently an engineer for the Respondent (Utah Department of Transportation) and was also, at the time he purchased at tax sale the property, his employer, the Utah Department of Transportation, Respondent, had previously purchased from Dansie. The facts appear to be that Davis County probably sent tax and sale notices to Dansie for the years in question, but the Respondent Utah Department of Transportation did not receive

any such notices. Dansie, since he had previously sold the property, disregarded the tax notices from Davis County. (R. 85) Weber County did not attempt to assess taxes on the property in question since they recognized the Respondent, Utah Department of Transportation, as the lawful owner of the property in question.

The tax sale purchasers, Holberg (Involuntary Plaintiff), Baxter (Plaintiff-Appellant) and Toone (Plaintiff in Civil No. 20915), then divided the property, each taking six (6) acres and paid taxes to Davis County until 1978. (R. 113-117)

In January of 1975, the Defendant-Respondent then notified the tax sale purchasers and Davis County of the foregoing tax sale and its invalidity. (R. 101-104)

In August of 1975, a contractor for the Respondent, Utah Department of Transportation, LeGrande Johnson Construction Company, entered upon a portion of the 18 acres in question and set up a gravel crushing operation. Shortly thereafter, one of the tax sale purchasers, Ronald Toone, in Civil No. 20915 in Davis County, commenced a damage action against LeGrande Johnson Construction Company.

The foregoing action in Civil No. 20915, resulted in a Judgment against the Plaintiff on December 13, 1976. (R. 106, 107) The Plaintiff, Toone, was represented by Mr. Glen

E. Fuller, the same attorney who is now representing the current Plaintiffs-Appellants. (R. 106, 107) The Trial Court found that the property in question was not located in Davis County and therefore, was improperly assessed and sold at tax sale. (R. 106, 107) Further, the Toone case was tried on the basis of the location of the Weber at the time of Statehood. The jury concluded that the Weber River had not changed since 1896, which was the critical time for determining the boundary line (Weber River), between Davis and Weber County. At least 10 maps were shown to the jury from 1892 to the present time which established the location of the Weber River. Mr. Fuller attempted by parol evidence to dispute the 10 maps in question. The Judgment was then recorded in Davis County. (R. 106, 107) During the pendency of the Toone action, a Motion to Join the other tax sale purchasers (Toone and Holberg) was made to the Court which the Plaintiffs opposed and the Court denied. (R. 49)

As a result of the Toone Judgment, Davis County then abated and refunded the taxes which the Plaintiffs-Appellants in the present action, had previously paid. (R. 108, 109) The Respondent Davis County also marked their plats and tax records reflecting that the entire 18 acres in question were located in Weber County. (R. 110) Since 1978 to the present, none of the three tax sale purchasers have

paid taxes on the 18 acres in question and Davis County has neither assessed the 18 acres in question nor accepted any taxes with respect to it. The current Plaintiff-Appellant, Ronald Baxter, testified as an interested witness on behalf of the Plaintiff, Toone, in the Trial of Civil No. 20915. Mr. Baxter was definitely interested in the outcome of the Toone case, since his property was located on its east boundary. (R. 251)

The current Plaintiffs in Civil No. 74206, filed their Notice of Claim in May of 1978 (R. 111, 112), and their Complaint in May of 1979 (R. 1, 2 & 3), in the District Court of Davis County. The Davis County Court then granted the Respondent, Utah Department of Transportation's Motion for a Change of Venue to Weber County. (R. 33, 34, 35, 36) The Davis District Court presumptively ruled that the property in question was shown to be in Weber County. After the case was removed to Weber County, the Defendant-Respondent, Utah Department of Transportation, then filed its Answer and Third-Party Complaint.

The present Plaintiffs-Appellants feel they should be allowed to retry the issue of the location of the Weber-Davis County line. The six (6) acres which was conveyed to the Appellants lies immediately east of the six (6) acres which was involved in the Toone case and just west of the

six (6) acres which Rio Vista (Thomas Holberg) acquired, and allowed default judgment to be entered against. (R. 255, 256) It must be noted that the entire 18 acres in question lies north of the Weber River and is bordered on the west and north by the Defendant-Respondent's freeway. The entire 18 acres is both physically and legally landlocked. The location of the Weber River determined the boundary between the two counties. Since the Plaintiffs-Appellants' property lies north of the existing Weber River and depends upon a tax sale from Davis County, the issue of the legality of the original tax sale has already been determined. The Plaintiffs-Appellants feel that 1896 should not be the critical time for the determination of the location of the Weber-Davis County line, but rather the date should be 1866. If Mr. Fuller felt the Trial Court in the Toone case erroneously used 1896, rather than 1866 as the year to determine the location of the boundary between Davis and Weber County, he should have appealed the decision rendered in the Toone case. The Plaintiffs-Appellants have to accept the foregoing since the evidence is so overwhelming in favor of where the Weber-Davis County line (Weber River) was in 1896. It must also be noted that Mr. Fuller in the Toone case, filed a Motion for New Trial alleging that 1866 should be the critical date instead of 1896. The Trial Court Judge

Gould, denied the Motion.

Judge Gould (who was the same Judge who tried the Toone quiet title action) then required that Weber County and the remaining tax sale purchaser, Rio Vista Oil Ltd., (Company owned by Holberg) be joined in the present action. (R. 198, 199) Both Respondents, Weber and Davis County, now join in requesting this Court to affirm the Lower Court's decision. Weber County filed an answer alleging it wanted nothing to do with the present action. (R. 226, 227, 228) Rio Vista failed to file any type of responsive pleading and default judgment was then entered. (R. 255, 256)

The Defendant-Respondent, Utah Department of Transportation then filed a Motion for Summary Judgment in its favor upon the ground and for the reason that no genuine issue of fact remains to be decided and therefore, Judgment should be granted in its favor as a matter of law. (R. 84) The Trial Court then granted the Defendant-Respondent, Utah Department of Transportation's Motion for Summary Judgment. (R. 249, 250, 251, 252, 258, 259)

ARGUMENT

POINT I

THE LOWER COURT FOLLOWED PROPER PROCEDURES IN GRANTING OF THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

It appears that Plaintiffs-Appellants' counsel has in

his arguments attempted to cite all the criteria that should be followed in determining when a party should be granted a Summary Judgment, but then failed to state what facts were in dispute. Rule 56(c) of the Utah Rules of Civil Procedure states the following:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, 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.

Plaintiffs-Appellants' counsel is very skillful in accusing Defendants-Respondents' counsel of only quoting and using these facts and documents which support their position. At all times during the proceedings of the two cases, Plaintiffs-Appellants' counsel has been afforded every opportunity to object to any facts and/or documents which were inadmissable or irrelevent and therefore, should not have been considered by the Trial Court. Defendants-Respondents can only submit to this Court that the only real objection to the documents and facts used are that Plaintiffs-Appellants' counsel feels the facts and documents are detrimental to his clients case, but cannot legally keep the documents from consideration by this Court.

On Page 11 of their Brief, Plaintiffs-Appellants cite an excerpt from a transcript of one of the hearings and give

the page as 268. The quote is actually contained on page 274, and came as a result of a hearing wherein Plaintiffs-Appellants' counsel attempted to cite facts to the Trial Court as reasons for allowing an adjoining landowner (Monroc) to intervene in the present lawsuit, when they had nothing whatsoever to do with the present lawsuit and with Plaintiffs-Appellants invalid tax title. (R. 281) If this Court will read the transcript (R. 268-286), it will be readily apparent that the disparity existed in the facts as they relate to whether Plaintiffs-Appellants should be allowed to have an adjoining landowner (Monroc) intervene in the present action. The facts that Plaintiffs-Appellants are attempting to have this Court believe existed with respect to Monroc, do not pertain to the facts as exist in the present action.

Plaintiffs-Appellants' counsel cites only a portion of this Court's decision in Schaer v. UDOT. (No. 18009 January 10, 1983). The end of the quote reads as follows:

> Where ... the materials presented by the moving party are sufficient to entitle him to a directed verdict [as a matter of law] and the opposing party fails either to offer counter-affidavits or other materials that raise a credible issue [of fact] or to show that he has evidence not then available, summary judgment may be rendered for the moving party.

The Court in the Schaer case upheld the Trial Court's granting of the Summary Judgment because its ruling was sup-

ported by uncontroverted facts.

Plaintiffs-Appellants (on Page 13 of their Brief) cite Rule 10 of the Utah Rules of Evidence 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."

Plaintiffs-Appellants' counsel was the attorney of record in the case of Toone v. LeGrande Johnson (Civil No. 20915) and therefore, was intimately familiar with its contents. What Plaintiffs-Appellants' counsel fails to cite are the facts which he feels the Trial Court erroneously found to exist or judicially noticed which he now disputes. Whether Monroc, as noted above, should have been joined in this lawsuit has nothing whatsoever to do with the issues raised by this proceeding, i.e., whether the Davis County tax sale was valid or not. Monroc's chain of title had nothing whatsoever to do with the tax sale in question. (R. 268-286)

Any claims of the Plaintiffs-Appellants that deal with Defendant-Respondent Weber County should be summarily disposed of, since they have joined in as a Respondent in the present appeal. It is, therefore, inappropriate for Plaintiffs-Appellants to attempt to raise issues that solely be-

long to the Respondent, Weber County.

POINT II

THE COUNTY BOUNDARY LINE BETWEEN DAVIS AND WEBER COUNTY WAS DETERMINED IN THE CASE OF TOONE v. JOHNSON CONSTRUCTION COMPANY . (DAVIS DISTRICT COURT CIVIL NO. 20915)

On Page 19 of the Plaintiffs-Appellants' Brief, it states there is not a single identical litigant in either the present case or the Toone v. LeGrande Johnson case. The judgment in the Toone case (R. 106-107), should readily disclose that Davis County, Davis County Commission, Davis County Assessor, Davis County Recorder and Robert Rees and Marie Grow Dansie, his wife, were all parties to that action as well as the present one before this Court.

It becomes interesting at this point to speculate if Toone had prevailed in his case, whether the present Plaintiffs-Appellants would be arguing that the Toone case is not dispositive as to the validity of the tax sale in question. It would seem logical that Plaintiffs-Appellants would then be arguing res judicata, estoppel and judicial notice so that they would not have to re-try the same issues that were tried in the Toone case.

The important factor at this time for this Court to consider is that all of the tax sale purchasers derived their title from the original tax sale and tax deed from Davis County (R. 100), and were dependent upon the property

in question being situate in Davis County.

One of the facts this Court should consider is that the present Plaintiffs-Appellants were given notice of the pendency of the Toone action. (R. 103, 104, 106, 107) In fact, as early as November of 1976, the present Plaintiff-Appellant, Ron Baxter, as well as the Davis County Recorder, Davis County Assessor, and Robert Dansie were listed as witnesses who would testify on behalf of the Plaintiff in the Toone case. (See attached Exhibit "I") It must be noted that although the Respondent, Davis County now joins in opposing the Plaintiffs-Appellants' appeal, that it, along with Dansie, opposed the Respondent, Utah Department of Transportation in the trial of the Toone case.

One of the most important facts that emerges from the Toone Judgment is that the Respondent, Davis County changed its plat maps, tax records and refunded any prior taxes the Plaintiffs-Appellants may have paid on the six acres in question. (R. 108, 109, 110) The foregoing was done during the year of 1977, and yet the Plaintiff-Appellants failed to state any cause of action in its Complaint against the Respondent, Davis County. (R. 1, 2, 3) The Respondent, Davis County then recognized that the six acres in dispute was located in Weber County and consequently, the tax sale deed under which the Plaintiffs-Appellants acquired

their title was void and invalid ab initio.

On Page 21 of the Plaintiffs-Appellants' Brief, they cite the procedure for changing county lines. The citation is totally inapplicable. There was no intent to change any boundary lines, but rather the Toone case only served to establish where in fact, the county line was between Davis and Weber Counties.

Generally, to raise the defense of res judicata, it requires that both actions must involve the same parties, their privities and the same cause of action. An exception exists when a person who was not a party is bound by the results of the first action where the claim he subsequently brings involves the same issue as adjudicated in the original action. This doctrine is known as collateral estoppel. Idaho State University v. Mitchel v. Bingham Mechanical and Metal Products, 97 Idaho 724, 552 P.2d 776 (1976). The trend of recent cases has approved the foregoing doctrine. Richards v. Hudson, 26 Utah 2d 1131, 485 P.2d 1044 (1971).

The Utah Supreme Court in International Resources v. Dunfield, 599 P.2d 515, 516 (1979) held that "The principle which underlies the doctrine ... [of] collateral estoppel, is that when there has been a proper adjudication upon a controversy, and the judgment has become final, that should

settle the matter and there should be no further litigation thereon."

The general standard to use to determine if collateral estoppel can be applied to a particular case was initially identified by the California Supreme Court in Bernhard v. Bank of America Nat'l Trust and Savings Assoc., 19 Cal.2d 807, 122 P.2d 892 (1942). Along with other State Supreme Courts, the Utah Supreme Court adopted the Bernhard standard. Wilde v. Min-Century Ins. Co., 635 P.2d 417 (Utah 1981); Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978). In Searle Bros. at 691, the Utah Supreme Court stated:

> In Bernhard v. Bank of America Nat'l Trust & Savings Assoc. the California Supreme Court considered the question of the applicability of res judicata as a basis for applying the collateral estoppel doctrine and identified the following three tests as being determinative:
>
> 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.

Pursuant to the first test of the Bernhard standard, the issue presented in the instant case is identical of the issue presented in the prior action in Civil No. 20915. In both the prior action and the current action the main issue was the location of the property in question (the entire eighteen acres), of which six acres is described in the Plaintiffs-Appellants tax sale deed. In the prior action in Civil No. 20915, the jury found that the property in question ($S\frac{1}{2}$ of $N\frac{1}{2}$ of the $SW\frac{1}{4}$ of Section 25, 5 N., 1 W., S.L.M. containning 18 acres) was and is located in Weber County; and therefore, Davis County improperly assessed and sold the property at the tax sale.

In the prior action in Civil No. 20915 there was a final judgment on the merits. This satisfied the second test of the Bernhard standard. In the prior action, witnesses on behalf of both parties testified as to the location of the property in question. The current Appellant, Ronald Baxter, testified on the behalf of the previous Plaintiff, Toone. A jury was impaneled and on December 16, 1976, a final judgment against the previous Plaintiff was entered. (R. 106, 107)

In the instant case, only the Plaintiffs-Appellants must be parties or in privity with a party to the prior action in Civil No. 20915 to satisfy the third test of the

Bernhard standard. Mutuality of parties is not essential in asserting collateral estoppel. Bernhard, supra; Wilde v. Mid-Century Ins. Co., 635 P.2d 417 (Utah 1981).

In Searle Bros., the Utah Supreme Court provided the definition of a person in privity. That Court stated:

> The legal definition of a person in privity with another, is 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." Id. at 691.

Pursuant to the Court's definition of privity in the Searle Bros. case, the current Appellants are in privity with the prior Plaintiff in Civil No. 20915 because they both represent the same legal right.

The current Appellant, Ronald Baxter, along with the prior Plaintiff, Ronald Toone, and another purchaser, Thomas Holberg, purchased the property in question at the Davis County tax sale. The tax deed stated that the current Appellant, Ronald Baxter, the prior Plaintiff, Ronald Toone, and Thomas Holberg (Rio Vista Oil) each owned an undivided one-third interest in the property in question. (R. 100) Rio Vista Oil and the current Appellants, by quit-claim deeds, conveyed their interest in the westerly six acres of the property in question to the prior Plaintiff, Ronald

Toone. (R. 113-117) By quit-claim deeds, Thomas Holberg (Rio Vista Oil) and the prior Plaintiff, Ronald Toone, conveyed their interest in the middle six acres of the property in question to the current Appellants. (R. 113-118)

As shown by the conveyances, the current Plaintiffs-Appellants and the prior Plaintiff in the action in Civil No. 20915 are in privity by purchase concerning the middle six acres and the westerly six acres of the property in qeustion, when they purchased the property in question at the tax sale. Therefore, pursuant to the Utah Supreme Court's definition of a person in privity with another, the current Plaintiffs-Appellants and the prior Plaintiff are so identified in interest with the same property (S½ of N½ of the SW¼ of Section 25, 5 N. 1 W., S.L.M. containing 18 acres) as to represent the same legal right.

In the prior action in Civil No. 20915, the issue was the location of the entire 18 acres. The prior Plaintiff (Toone), litigated this issue and a final judgment against him resulted. The current Plaintiffs-Appellants testified as an interested witness at that trial. The current Plaintiffs-Appellants' interest in the middle six acres of the property in question has been legally represented in the action in Civil No. 20915; thus, this satisfied the Court's definition of privity in Searle Bros. Therefore, the

current Plaintiffs-Appellants must be collaterally estopped from litigating the issue concerning the location of the property in question.

Pursuant to the fourth test of the Bernhard standard, the issue as to the location of the property in question in the prior action in Civil No. 20915 was competently, fully, and fairly litigated.

In the prior action, there was a jury trial and the issue was heard on its merits. The current Plaintiffs-Appellants, Ronald Baxter, was a witness in the prior action; therefore, he had an opportunity to contest the issue. Also, the current Plaintiffs-Appellants must feel that the issue was competently presented because they employed the same legal counsel as did the prior Plaintiff. However, the existence of a full and fair opportunity to contest the issue in the prior adverse action is not the only criteria Courts use for the application of collateral estoppel. The Court in State Farm Fire & Gas Co. v. Century Home Company, Inc., 275 Or. 97, 105, 550 P.2d 1185, 1189 (1976), held that: "The Court must also consider the fairness under all the circumstances of precluding a party." That Court further stated:

> Once the court has concluded that the evidence is sufficient to establish that an identical issue was actually decided in a previous action, "prima facie the first judg-

> ment should be conclusive." The burden then shifts to the party against whom estoppel is sought to bring to the court's attention circumstances indicating the absence of a full and fair opportunity to contest the issue in the first action or other considerations which would make the application of preclusion unfair. Whether the proffered circumstances and considerations warrant a conclusion that the litigant lacked a "full and fair" opportunity to litigate the issue and that it would be otherwise "unfair" to preclude him from contesting the issue again are likewise questions of law. Collateral estoppel involves a policy judgment balancing the interests of the administration of justice, and this court reserves the final word as to where the balance is struck in any given case. Id. at 105, 1189.

In the instant case, the Court must also consider the Respondents' burden of relitigating this issue. If the Court does not allow the current Plaintiffs-Appellants to be collaterally estopped from relitigating this issue, the Court is then allowing the Plaintiffs-Appellants the unfair opportunity of litigating the same issue twice. This would result in a waste of the Court's time, as well as the possibility of inconsistent judgments.

The Court must find, as a matter of law, that Plaintiffs-Appellants have had a fair and full opportunity to contest this issue and that they must be collaterally estopped from litigating this issue again. Thus, Summary Judgment granted in favor of the Respondents should then be affirmed.

POINT III

A PARTY WHO WAS A WITNESS IN A PRIOR ACTION, FULLY ACQUAINTED WITH ITS CHARACTER AND OBJECT AND INTERESTED IN ITS RESULTS, IS ESTOPPED BY THE JUDGMENT AS FULLY AS IF HE HAD BEEN A PARTY.

It is an undisputed fact that the present Plaintiffs-Appellants appeared as an interested witness in the action of Toone v. LeGrande Johnson Construction Co., et al., Civil No. 20915, and that the Trial Judge in that case was Judge Calvin Gould. (R. 128) Also, as shown in the attached Exhibit "I", the Plaintiff-Appellant, Ronald Baxter, was listed as one of the Plaintiffs' witnesses in the Toone case. In the Plaintiffs-Appellants own affidavit he readily admits furnishing survey information from his personal field notes and from government surveys which he located and described. All of the foregoing was offered to establish the location of the Weber River in an attempt to show that in fact the eighteen acres in question was located in Davis County. If the foregoing could have been established, then the present Plaintiffs-Appellants would be making the same arguments as the Defendants-Respondents are now making. The current Plaintiff-Appellant, Ronald Baxter, was ultimately called upon to render an opinion on the location of the Weber River in 1896. The jury in the Toone case elected not to believe the current Plaintiff-Appellant, Ronald Baxter, since they ruled in favor of the Defendants-

Respondents' agent, LeGrande Johnson Construction Company in the Toone case.

The following cases stand for the proposition that where a person who was a witness in a prior action, fully acquainted with its character and agent and interested in the result, and who might have intervened had he so desired, will be bound by the Judgment. Briggs v. Madison, 82 P.2d 113 (1938); Terry & Wright of Kentucky v. Crick, 418 S.W. 2d 217 (1967); Security Ins. v. Owen, 501 S.W. 2d 229 (1973); Moreland v. Meade, 159 Atlantic 101 (1932); Talbot, et al v. Quaker-State Oil Refining Co., 104 F.2d 967.

Although this has been mentioned earlier, the current title to the three six acre parcels is totally dependent upon the validity of the original tax sale title from Davis County. Title to the three tracts of property is dependent upon a common tax sale title, and upon the existence of the same set of facts, i.e., the boundary between Davis and Weber Counties. Ipsofacto, a prior Judgment entered with respect to the same subject matter operates as an estoppel to any right claimed under the original title tax title wherein the present Plaintiffs-Appellants was listed as a grantee. 50 C.J.S. Judgments § 735 Southern Pacific Rail road Co. v. U.S., 168 U.S. 355.

POINT IV

THE COURT MUST TAKE JUDICIAL NOTICE OF ITS PRIOR JUDGMENT IN CIVIL NO. 20915 AND DECLARE THAT PLAINTIFFS-APPELLANTS' TAX DEED IS VOID, AND THUS, AFFIRM SUMMARY JUDGMENT FOR THE DEFENDANTS-RESPONDENTS.

The Utah Supreme Court in Carter v. Carter, 563 P.2d 177, 178 (1977) held:

> It is true that notice may be taken of the record of another case. But for this to be done it should be so offered in evidence by a party, or so stated by the trial court, so that it will be known to them what is being relied on.

Thus, the Trial Court in the instant action must take judicial notice of its earlier judgment in the action in Civil No. 20915. (R. 106, 107)

In the prior action in Civil No. 20915, the jury found the property in question (S½ if N½ of the SW¼ of Section 25, 5 N., 1 W., S.L.M., containing 18 acres) is and always was located in Weber County. Subsequently, the Respondent, Davis County marked its plats and tax records reflecting that the property in question (the entire 18 acres) was and is located in Weber County. (R. 108, 109, 110) The Respondent, Davis County then abated the taxes which the current Plaintiffs-Appellants had previously paid and refused to accept Appellants' checks for any taxes on the property thereafter. The Davis County Credit Memo, (R. 108) reflecting the abated taxes to the Plaintiffs, stated that the reason for abatement was "Property was determined to be in Weber

County by Second District Court. Error of assessment by Davis County." Thus, the Respondent, Davis County, who was a party in Civil No. 20915, admitted that it had no power to tax the property in question. It must follow then that the tax deed which the Respondent, Davis County issued to the three tax sale purchasers for the property in question was void ab initio.

Article 13, Section 10 of the Utah Constitution and Section 59-4-1 of the Utah Code Annotated, (1953 as amended), provides that a County may only tax property within its territorial limits. The Utah Supreme Court in several cases has held that a taxing authority is required to follow procedures prescribed by law with accuracy and particularly before it can forfeit one's property. If one step of the proceeding is invalid, the tax title is invalid. Salt Lake Home Buildings, Inc. v. Coleman, 518 P.2d 165 (Utah 1974); Huntington City v. Peterson, 30 Utah 2d 408, 518 P.2d 1246 (1974); Tintic Undine Mining Co. v. Ercanbrack, 93 Utah 561, 74 P.2d 1184 (1938).

Therefore, the Court must judicially notice that the property in question was determined in Civil No. 20915 to be in Weber County and that Davis County had improperly sold the property in question at a tax sale. Thus, the Court must uphold the Lower Court's ruling that the Plaintiffs-

Appellants tax title to the property in question is void ab initio.

CONCLUSION

The Plaintiffs-Appellants are attempting by this action to relitigate issues that have already been previously decided. The Weber District Court has already litigated the location of the Weber-Davis County line and the validity of the tax sale in question. Presently, neither Weber nor Davis Counties are now contesting the present location of the Weber-Davis County line. The present Plaintiffs-Appellants appeared as an interested witness in the prior proceeding involving the issues set forth above. To now allow the Plaintiffs-Appellants to relitigate issues that have already been fully and fairly litigated would make a mockery of our legal system and the finality of judgments. Consequently, for the reasons as outlined and set forth above, these Defendants-Respondents, Utah Department of Transportation, Weber and Davis County, respectfully request this Court affirm the Judgment of the Lower Court.

Respectfully submitted this 21st day of June, 1983.

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Attorney General

STEPHEN C. WARD
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Weber County Attorney

CERTIFICATE OF MAILING

This is to certify that two copies of the foregoing Brief of Respondent were mailed first class, postage prepaid, to Glen E. Fuller, 678 East South Temple, Salt Lake City, Utah 84102, this 21st day of June, 1983.

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IN THE SECOND JUDICIAL DISTRICT IN AND FOR DAVIS COUNTY
STATE OF UTAH

RONALD A. TOONE,

Plaintiff,

-vs-

LEGRANDE JOHNSON CONSTRUCTION COMPANY, a corporation,

Defendant and Third Party Plaintiff,

-vs-

ROBERT REES DANSIE and MARIE GROW DANSIE, his wife; DAVIS COUNTY COMMISSIONERS; DAVIS COUNTY ASSESSOR, and DAVIS COUNTY RECORDER,

Third Party Defendants

PLAINTIFF'S ANSWERS TO INTERROGA

Civil No. 20915

COMES NOW Glen E. Fuller, attorney for plaintiff in the above entitle action, and representing that he is more fully informed concerning the informatic requested in the Defendant's Interrogatories than is his client, and herewith answers the Interrogatories as follows:

INTERROGATORY No. 1. State the names and addresses of all witnesses the plaintiff intends to call at the forthcoming trial.

ANSWER:

Marguerite Bourne, Davis County Recorder
Thayne W. Corbridge, Davis County Assessor
Ronald Baxter, 3050 East 3020 South, Salt Lake City, Utah
Robert R. Dansie, Third Party Defendant
Earl Kendell, Morgan, Utah
Lee B. Rollins, Morgan, Utah

We have personally contacted numerous other individuals in the general area of Uintah and South Weber, and, depending upon the course of the trial,

Exhibit I