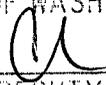


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

U.S. BANK NATIONAL ASSOCIATION as Trustee for Structured Asset
Mortgage Investments II Inc. Bear Stearns ALT-A Trust, Mortgage Pass-
Through Certificates, Series 2006-3,

Plaintiff/Appellant,

v.

NORTH AMERICAN TITLE COMPANY; CV JOINT VENTURES,
LLC; STEVEN SHELLEY AND JANE DOE SHELLEY; THE UNITED
STATES OF AMERICA; and JOHN AND JANE DOES, I THROUGH V,
OCCUPANTS OF THE SUBJECT REAL PROPERTY, and ALL
OTHER PERSONS OR PARTIES UNKNOWN, CLAIMING ANY
RIGHT, TITLE, INTEREST, LIEN OR ESTATE IN THE PROPERTY
HEREIN DESCRIBED,

Defendants/Respondents.

BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

U.S. Bank National Association as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns ALT-A Trust, Mortgage Pass-Through Certificates, Series 2006-3 (“U.S. Bank”) appeals from the trial court’s CR 12(b)(6) dismissal of its claims for quiet title and reformation based on mutual mistake and/or scrivener’s error against CV Joint Ventures LLC, a Washington limited liability company (“CV Joint Ventures”). Should the Court affirm the lower court’s holding, U.S. Bank will lose its property rights due to excusable mistakes, and be denied due process of law.

This case involves a house that spans two adjacent parcels of land (the “U.S. Bank House”). U.S. Bank owns one of those parcels, having purchased it at a trustee sale based on a deed of trust that was clearly intended by all relevant parties to encumber the entire U.S. Bank House, but mistakenly only referenced the single parcel. The Pierce County Assessor’s Office (the “Pierce County Assessor”) was similarly mistaken regarding the location of the U.S. Bank House, having assessed (and taxed) it as an improvement located entirely on the parcel owned by U.S. Bank. Accordingly, U.S. Bank and its predecessors have been responsible for paying all property taxes due on the U.S. Bank House.

The second parcel is owned by CV Joint Ventures, who bought its parcel at a tax foreclosure and received a tax deed from the Pierce County Assessor, who had assessed the parcel at all times as unimproved vacant land.

Currently, U.S. Bank and CV Joint Ventures each own parcels with clouds on title because the U.S. Bank House spans across both lots, and consequently neither party can occupy the home.

U.S. Bank brought this action in order to quiet its title in the U.S. Bank House and reform the deeds involved based on mistake and scrivener's error. Ignoring fundamental legal principles cemented in explicit statutory language as well as case law from both Washington and other jurisdictions, CV Joint Ventures moved to dismiss based on CR 12(b)(6), claiming that U.S. Bank's claims for quiet title and reformation are improper causes of action. It claimed that no causes of action could be properly pleaded by U.S. Bank because its tax deed is an unassailable final authority over which the Washington courts hold no jurisdiction. CV Joint Ventures further claimed that the statute of limitations has run and that it is an innocent purchaser. Thus, CV Joint Ventures concluded the parties "own what they own," and are left without any judicial remedy for a house spanning two lots. The trial court erroneously granted CV Joint Ventures' motion.

Correct analysis and application of the law reveals that U.S. Bank stated proper claims upon which relief can be granted, and its complaint against CV Joint Ventures should not have been dismissed. Quiet title is exactly the right cause of action for U.S. Bank to plead in order to establish its ownership rights in the U.S. Bank House and remove the cloud on its title thereto. Reformation is appropriate because there were mistakes of material fact and/or scrivener's errors regarding the location of the U.S. Bank House by (1) the previous owner of both parcels at issue; (2) the beneficiary (lender) who issued the deed of trust by which U.S. Bank ultimately bought its parcel at the trustee sale; and (3) the tax authority that issued the tax deed by which CV Joint Ventures took its title.

Because U.S. Bank has at all times paid taxes on the entire U.S. Bank House, the tax sale of the parcel now owned by CV Joint Ventures could not convey the U.S. Bank House, and the tax deed held by CV Joint Ventures does not bar the Court from exercising its judicial authority. Statutes of limitations do not bar U.S. Bank's claims because (1) quiet title actions are not subject to such statutes; (2) U.S. Bank paid taxes on the U.S. Bank House; and (3) CV Joint Ventures has not taken possession of the U.S. Bank House. CV Joint Ventures is in no position to object to U.S. Bank's claims based on its status as a purchaser at a tax sale because it

was not a bona fide purchaser for value—it was on inquiry notice that the vacant unimproved land that it purchased contained a rather significant portion of the U.S. Bank House.

On this Court's *de novo* review, U.S. Bank respectfully requests the Court to recognize that U.S. Bank states a claim upon which relief can be granted, and reverse (1) the trial court's order of June 05, 2015, granting CV Joint Ventures' motion to dismiss; (2) the trial court's order of July 2, 2015, awarding CV Joint Ventures attorney's fees and costs; (3) the trial court's order of July 2, 2015 releasing Lis Pendens; and (4) the trial court's denial of U.S. Bank's motion for reconsideration of dismissal of CV Joint Ventures.

II. ASSIGNMENT OF ERROR

The trial court erred in entering the order of June 05, 2015, granting CV Joint Ventures' motion to dismiss; entering the order of July 2, 2015, awarding CV Joint Ventures attorney's fees and costs; entering the order of July 2, 2015 releasing Lis Pendens; and denying US Bank's motion for reconsideration of dismissal of CV Joint Ventures.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Based on a *de novo* review, is it error to grant dismissal under CR 12(b)(6) when the complaint alleges the need to quiet title to, and reform the relevant deeds for, a house that spans two parcels of land, one of which

was mistakenly assessed and taxed as containing the entire house, and which was purchased at a deed of trust sale resulting from a foreclosed deed of trust that was intended by all relevant parties to encumber the entire house, but mistakenly encumbering only one; and the other of which was purchased as unimproved vacant land at a tax sale?

IV. STATEMENT OF CASE

The two lots at issue before the Court are actually two of three adjacent parcels originally owned by Steven Shelley (“Shelley”), identified by Pierce County Auditor’s parcel numbers 0420232039 (“Parcel A”); 0420232069 (“Parcel B”); and 0420232068 (“Parcel C”). CP 3-4, ¶ 10.

On or about January 31, 2006, Shelley borrowed \$910,000.00 from Stonecreek Funding Corporation (“the U.S. Bank Loan”) to refinance, and pay off two prior deeds of trust, both of which encumbered all three parcels owned by Shelley. CP 3, ¶ 8; CP 5, ¶ 15. As collateral for the U.S. Bank Loan, Shelley executed a Deed of Trust (“U.S. Bank Deed of Trust”). CP 3, ¶ 8.

It was the intent of the originating lender and Shelley that the U.S. Bank Deed of Trust encumber Parcels B and C, and include the U.S. Bank house, which was owned at the time of origination by Shelley, and was his

primary residence. CP 4, ¶ 11; 8 ¶ 33. The U.S. Bank Deed of Trust, however, only encumbered Parcel B. CP 3, ¶ 9.

North American Title Company, d/b/a North American Title, d/b/a North American Title Insurance Company (“NATC”), served as the escrow company and escrow agent that closed the U.S. Bank Loan transaction. CP 5, ¶ 12. NATC was instructed by the originating lender to obtain a lender’s title policy of insurance on all three parcels (Parcels A, B and C). *Id.* at ¶ 17. NATC was also instructed to ensure that the U.S. Bank Deed of Trust encumbered, at a minimum, Parcels B and C. CP 6, ¶ 18.

Parcel A was seized by the Internal Revenue Service, and was ultimately sold at auction. *Id.* at ¶ 19.

The U.S. Bank Loan encumbering Parcel B went into default, and U.S. Bank commenced nonjudicial foreclosure proceedings, which resulted in a Trustee’s Sale held on or about August 20, 2010, where U.S. Bank was the successful bidder at the sale. CP 5, ¶ 13. U.S. Bank remains the current owner of Parcel B. *Id.* at ¶ 14.

Pierce County foreclosed on Parcel C, and sold it at a tax foreclosure sale on or about December 4, 2009, to CV Joint Ventures for \$15,100. CP 6, ¶ 20. The assessed value for Parcel C at the time of the tax foreclosure was listed as \$53,500. *Id.* Because U.S. Bank’s Deed of

Trust did not identify Parcel C as well as Parcel B, as the parties intended, U.S. Bank was not notified of the tax foreclosure. CP 6, ¶ 24.

At all relevant times, Parcel C has been taxed as unimproved, vacant land by the Pierce County Assessor and Parcel B has been taxed as improved land—including both the land and the U.S. Bank House. *Id.* at ¶¶ 21-22.

On or about April 24, 2012, JPMorgan Chase Bank, N.A., as the attorney-in-fact for U.S. Bank, was notified that the U.S. Bank House is actually located on both Parcels B and C. *Id.* at ¶ 23.

U.S. Bank and CV Joint Ventures each own parcels with clouds on title because the dwelling spans Parcels B and C. CP 7, ¶ 25.

V. ARGUMENT

A. The Standard of Review is *De Novo*

An order granting a motion to dismiss under CR 12(b)(6) is reviewed *de novo*. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014); *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Dismissal under CR 12(b)(6) is appropriate only where it appears beyond doubt that the plaintiff cannot prove any facts that would allow recovery. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). The court must accept the allegations in the complaint as true; and it may consider even hypothetical facts outside

the record in determining if dismissal is warranted. *Lehman*, 153 Wn.2d at 422. “[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support the plaintiff’s claim.” *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (alteration in original) (quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)). All facts alleged in the plaintiff’s complaint are presumed true. *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

B. U.S. Bank is the True Owner of the U.S. Bank House and Properly Seeks to Quiet its Title Thereto

Under Washington law, a quiet title action is an equitable mechanism “designed to resolve competing claims of ownership”, governed by RCW 7.28.010. *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 322, 308 P.3d 716 (2013), *as modified* (Aug. 26, 2013). A quiet title action allows the party “claiming the right to possession of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination.”¹ *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621

¹ Because this case involves a dispute over the boundary between Parcel B and Parcel C, CV Joint Ventures is a necessary party to this action. See CR 19; *Smith v. Anderson*, 117 Wash. 307, 310, 201 P. 1 (1921) (holding that the necessary or proper parties to a boundary dispute are the landowners immediately affected by the controversy).

(2001). Even if the asserted claim “is absolutely invalid, the parties are still entitled to a decree saying so.” *Id.* (citing *McGuinness v. Hargiss*, 56 Wash. 162, 164, 105 P. 233 (1909), *overruled on other grounds by Rorvig v. Douglas*, 123 Wn.2d 854, 861, 873 P.2d 492 (1994)). Because “the object of the statute is to authorize proceedings ‘for the purpose of stopping the mouth of a person who has asserted or who is asserting a claim to the plaintiff’s property[,] [i]t is not aimed at a particular piece of evidence, but at the pretensions of the individual.’” *McGuinness*, 56 Wash. at 164 (quoting *Castro v. Barry*, 79 Cal. 443, 446, 21 P. 946 (1889)). U.S. Bank seeks to quiet title to the U.S. Bank House and the land lying thereunder in order to resolve any competing claims to ownership thereof.

CV Joint Ventures previously argued that U.S. Bank has not properly pleaded quiet title because U.S. Bank failed to set forth “a valid subsisting interest in” the U.S. Bank House. This is incorrect. As the successful bidder at the deed of trust sale, and the holder of the U.S. Bank Deed of Trust, U.S. Bank has the right to seek quiet title to its ownership of the entire U.S. Bank House and the land lying thereunder.

Glepeco, LLC v. Reinstra, involved a similar situation whereby the respondents purportedly purchased property at a nonjudicial foreclosure, which, based on the address and other references in the deed of trust and

notice of trustee's sale, they thought was a three-acre lot with a house on it. 175 Wn. App. 545, 549, 307 P.3d 744 (2013) *review denied*, 179 Wn.2d 1006, 315 P.3d 530 (2013). The respondents discovered after the sale that the legal description of the property in those documents described only a drain field portion of the property, and thereafter brought a quiet title action against the appellants, arguing that the deed of trust beneficiary's security interest was, in fact, on the entire three-acre lot and that the erroneous legal description should be reformed because it was the result of scrivener's error or mutual mistake in the deed of trust between the beneficiary and appellants. *Id.* The appellants moved to dismiss based on CR 12(b)(6), arguing that quiet title and reformation were unavailable as a matter of law for several reasons, including that the respondents lacked standing to bring a quiet title action because they had no "valid subsisting interest" under RCW 7.28.010 to the property omitted from the deed of trust. *Id.* at 549, 554-555. The trial court denied the motion and granted summary judgment in favor of the respondents, ordering reformation of the legal description in the trustee's deed, and quieting title in the respondents. *Id.* at 549. The appellate court affirmed, noting that the respondents properly alleged in their complaint that they had an interest in the property omitted from the deed of trust as it was obviously intended to be sold to them at the trustee's sale, and that their quiet title

action was properly concurrent with their effort to seek reformation of the trustee's deed based on scrivener's error or mutual mistake. *Id.* at 549, 554.

Like the respondents in *Glepeco*, U.S. Bank has a valid subsisting interest in the property at issue because U.S. Bank took its interest pursuant to the U.S. Bank Deed of Trust, which, like the deed of trust in *Glepeco*, was intended by all relevant parties to encumber the entire U.S. Bank House and Parcel C, but instead included an erroneous legal description of only Parcel B. Like *Glepeco*, U.S. Bank's concurrent claims for quiet title and reformation based on mutual mistake and/or scrivener's error in the U.S. Bank Deed of Trust are appropriate causes of action.

CV Joint Ventures also argued that quiet title is an incorrect cause of action because CV Joint Ventures holds a tax deed. That fact does not change anything. Quiet title has long been recognized as the correct cause of action to resolve situations comprising competing claims of ownership involving tax deeds. *See Morrison v. Berlin*, 37 Wash. 600, 79 P. 1114 (1905). (holding that where tax deed covered only a portion of a lot, it was error, in action to quiet title to the lot sold under tax foreclosure alleged to be void, to sustain general demurrer on its appearing that tax foreclosure was valid.); *Dolan v. Jones*, 37 Wash. 176, 79 P. 640 (1905). (holding that it is error to dismiss action brought by one out of possession to cancel void

tax deed and judgment and asking that his title be quieted.); *see also Morcom v. Brunner*, 30 Wn. App. 532, 635 P.2d 778 (1981) (setting aside tax deeds issued to defendant and quieting title in plaintiffs, who had acquired title to mesne conveyances from pre-tax foreclosure record title holder).

Moreover, as described in detail below, the U.S. Bank House has always been taxed with Parcel B, and those taxes have been paid by U.S. Bank. Therefore, the tax sale could have no effect on U.S. Bank's title to the U.S. Bank House and U.S. Bank properly pleads a quiet title cause of action in order to set aside and cancel (or reform) the void tax sale and tax deed as a cloud on its title. Pleading quiet title in such a case is well established in law. *See* G.J.C., Annotation, *Tax title as affected by fact that tax had been paid before sale*, 26 A.L.R. 622 (1923) ("The general rule is to the effect that one who had in fact paid his taxes upon property prior to a sale thereof for delinquency may maintain an equitable action to set aside and cancel the void sale and deed as a cloud on his title.") (collecting thirty-four cases on this point from multiple jurisdictions, including *Loving v. Maltbie*, 64 Wash. 336, 116 P. 1086 (1911); *Puget Sound Nat. Bank v. Biswanger*, 59 Wash. 134, 109 P. 327 (1910); *Taylor v. Debritz*, 48 Wash. 373, 93 P. 528 (1908); *Loving v. McPhail*, 48 Wash. 113, 92 P. 944 (1907); *Smith v. Jansen*, 43 Wash. 6, 85 P. 672 (1906)).

CV Joint Ventures also appears to claim that U.S. Bank somehow inappropriately seeks a windfall. This is preposterous. If anyone is getting a windfall, it is CV Joint Ventures who asserts that it has rights to the U.S. Bank House even though it purchased a vacant lot. The rule of *caveat emptor* applies to purchasers at tax sales. *Pierce Cnty. v. Newbegin*, 27 Wn.2d 451, 455, 178 P.2d 742 (1947) (“[Respondent] urges that tax titles should take free from any of the owner’s equitable rights. That might seem highly desirable from the purchaser’s point of view. However that may be, the rule of caveat emptor applies to a purchaser at a tax sale.”) (citing *Shelton v. Klickitat Cnty.*, 152 Wash. 193, 277 P. 839 (1929)); see also *Brower v. Wells*, 103 Wn.2d 96, 108, 690 P.2d 1144 (1984) (“A purchaser at a tax sale takes without warranties, gambling on the validity of title purchased for a nominal price with expectations of large profits.”). CV Joint Ventures gambled on its purchase of unimproved vacant land at a tax sale, and it must assume the risk that the rather large portion of the house located on the parcel it purchased belongs to U.S. Bank.

U.S. Bank properly pleaded quiet title to the property which was intended to be encumbered by the U.S. Bank Deed of Trust, and for which U.S. Bank has paid taxes. Should the Court affirm the trial court’s holding, a great inequity will occur and precedent will be established that

will effectively leave any party whose property (on which taxes were paid) is incorrectly described in a deed of trust or mistakenly included at a tax sale, without recourse.

C. US Bank Properly Seeks Reformation Based on Mutual Mistake and/or Scrivener's Error

Reformation is an equitable remedy that brings a writing that is materially different from the parties' agreement into conformity with their agreement. *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 669, 63 P.3d 125 (2003) (citing *Akers v. Sinclair*, 37 Wn.2d 693, 702, 226 P.2d 225 (1950)). Reformation of a deed is appropriate when a deficient description in a deed is caused by a mutual mistake or scrivener's error. *Snyder v. Peterson*, 62 Wn. App. 522, 527, 814 P.2d 1204 (1991) (citing *Maxwell v. Maxwell*, 12 Wn.2d 589, 593, 123 P.2d 335 (1942) (*Tenco, Inc. v. Manning*, 59 Wn.2d 479, 483, 368 P.2d 372 (1962))).

A mutual mistake occurs when the parties had the same intentions but their written agreement does not accurately express their intentions. *Id.* "A scrivener's error occurs when the intention of the parties is identical at the time of the transaction but the written agreement errs in expressing that intention." *Reynolds v. Farmers Ins. Co. of Wash.*, 90 Wn. App. 880, 885, 960 P.2d 432 (1998). A court ascertains the parties' intent "by viewing the contract as a whole, the subject matter and objective of

the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.”
Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)). To establish either mutual mistake or scrivener’s error, it must be shown that the parties to the instrument possessed the same intentions. *GlepcO*, 175 Wn. App. at 561.

Here, U.S. Bank seeks reformation of the U.S. Bank Deed of Trust, and the tax deed held by CV Joint Ventures based on two separate mistakes. First, contrary to the intent of all parties to the U.S. Bank Loan, the legal description in the U.S. Bank Deed of Trust did not encumber the entire U.S. Bank House and Parcel C. CP 3, ¶ 9; 4, ¶ 11; 5, ¶ 12, 17, 18. Second, the Pierce County Assessor taxed Parcel C as unimproved land and Parcel B as improved land (the U.S. Bank House being the improvement), and without providing notice to U.S. Bank, sold Parcel C at a tax sale. CP 6, ¶¶ 20-22, 24.

1. The U.S. Bank Deed of Trust Should Be Reformed Based on Mistake and/or Scrivener’s Error

All relevant parties to the U.S. Bank Deed of Trust, including the originating lender and the borrower, intended it to encumber the U.S.

Bank House and Parcel B and C. In such a situation, reformation based on mutual mistake and/or scrivener's error coupled with quiet title is the appropriate remedy to address the errors in the U.S. Bank Deed of Trust. *See* 175 Wn. App. at 559 ("We disagree with the [Appellants] that anything in the Act or the cited authorities precludes a trial court from exercising its equitable power to reform a legal description in a conveyance instrument because the instrument in question arises in the context of a nonjudicial foreclosure sale."). Thus, U.S. Bank's claims for reformation of the U.S Bank Deed of Trust should not be dismissed.

2. The Tax Deed Held by CV Joint Ventures Should Be Reformed Based on Mistake and/or Scrivener's Error

In cases similar to this, Washington has historically cancelled faulty tax deeds and quieted title to the property at issue. *See Smith v. Henley*, 53 Wn.2d 71, 330 P.2d 712 (1958); *Berry v. Pond*, 33 Wn.2d 560, 562, 206 P.2d 506 (1949)). That approach would provide a suitable remedy in this case. However, the less extreme remedy of reforming the tax deed held by CV Joint Ventures would also serve the interests of justice and ensure that U.S. Bank is not wrongfully deprived of its property. This approach would be similar to that employed in *Glepeco*, but involves a tax deed instead of a deed of trust.

Encroachment cases provide some guidance on this subject. Washington has long recognized the “liability rule” in determining property disputes involving encroachments, whereby an exchange of damages is made for a transfer of a legal right. *Proctor v. Huntington*, 169 Wn.2d 491, 497, 238 P.3d 1117 (2010) (Although an encroachers’ possession did not give rise to a claim for adverse possession, the neighboring party was also not entitled to eject them.); *Peoples Sav. Bank v. Bufford*, 90 Wash. 204, 209, 155 P. 1068 (1916) (holding that encroachers could remain on the land, but had to deed their identical parcel to the other party in exchange for this privilege, or, if the bank preferred, reimburse the bank for any taxes it paid on the lot the encroachers had been occupying.). Reformation of the tax deed would allow a remedy akin to the liability rule in this situation.

Other jurisdictions hold that absolute title conveyed by a tax deed will not prevent an action for equitable reformation to correct an error based on mutual mistake. In *Buk Lhu v. Dignoti*, 727 N.E.2d 73 (Mass. 2000), the court held that it was appropriate to reform the deeds to abutting properties where a mutual mistake in the legal descriptions based on a surveyor’s error in metes and bounds descriptions at the time the property was subdivided, caused an encroachment. The Supreme Court of New Jersey similarly upheld reformation of a tax deed where plaintiffs

purchased property they thought contained a house, and defendant purchased the adjacent property from a tax sale, which in reality contained the house. *Riggle v. Skill*, 81 A.2d 364 (N.J. 1951). The court held that the defendant did not intend to purchase the house, and the municipality did not intend to convey the house, and it was therefore proper to reform the tax deed. *Id.* The Supreme Court of Michigan reached a similar result in *McCreary v. Shields*, 52 N.W.2d 853 (Mich. 1952), when it reformed a tax deed that described the wrong parcel altogether.

Regardless of the remedy applied (whether reformation or cancellation of the tax deed held by CV Joint Ventures), the Pierce County Assessor's mistaken sale of Parcel C cannot stand because it contains the U.S. Bank House, for which taxes were paid. As the Washington Supreme Court stated in *Smith v. Henley*:

By the express reservation contained in RCW 84.64.180, it was made manifest that it was not the intent of the legislature to subject land on which taxes have been paid to foreclosure.... It is true that the mistake was that of the defendants their predecessors as well as the assessor, but it was an honest mistake, based on a reasonable assumption, and... 'it is not the policy of the law that the owner should lose his land through excusable mistake.'

53 Wn.2d at 75-76 (quoting *Pierce County*, 27 Wn.2d 454); *see also Nalley v. Hanson*, 11 Wn.2d 76, 87, 118 P.2d 435 (1941) ("It is not the policy of the law that the owner should lose his land through excusable

mistake, and, while it may not be said that there was any negligence on the part of the treasurer in this case, the fact remains that an honest attempt had been made on the part of the owners to pay the taxes, and that the mistake was one which the exercise of ordinary prudence would not detect.”).

U.S. Bank’s basis for seeking reformation is clear: the parties to the U.S. Bank Deed of Trust intended the security for the underlying loan to include the entire U.S. Bank House and Parcel C. U.S. Bank has always paid the taxes for the improvements located on Parcel C, but which were mistakenly only assessed against Parcel B, and the Pierce County Assessor failed to account for this fact when it sold Parcel C at a tax sale due to delinquent taxes on Parcel C. These pleaded facts provide the basis for the relief U.S. Bank has requested through both quiet title and reformation based on mutual mistake and/or scrivener’s error. Accordingly, the trial court’s dismissal for failure to state a claim should be reversed.

D. CV Joint Ventures is Not an Innocent Purchaser

CV Joint Ventures is not a bona fide purchaser for value. Reformation of a deed will not be permitted where it would affect the rights of subsequent bona fide purchasers for value. *Biles-Coleman Lumber Co. v. Lesamiz*, 49 Wn.2d 436, 442, 302 P.2d 198 (1956). “A

bona fide purchaser for value is one who without notice of another's claim of right to, or equity in, the property prior to [his or her] acquisition of title, has paid the vendor a valuable consideration." *Miebach v. Colasurdo*, 102 Wn.2d 170, 175, 685 P.2d 1074 (1984) (quoting *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960)). A party is not a bona fide purchaser for value if the party: "(1) had 'knowledge or information of facts which are sufficient to put an ordinarily prudent [person] upon inquiry' and (2) 'the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question.'" *Levien v. Fiala*, 79 Wn. App. 294, 298–299, 902 P.2d 170 (1995) (quoting *Miebach*, 102 Wn.2d at 175). Persons cannot be bona fide purchasers if they "refuse to pursue inquiry, to which, were [they] honest and prudent, the knowledge [they have] would clearly send [them]." *Id.* (quoting *Miebach*, 102 Wn.2d at 177. What makes inquiry a duty is "such a visible state of things as is inconsistent with a perfect right in him who proposes to sell." *Id.* (quoting *Paganelli v. Swendsen*, 50 Wn.2d 304, 308, 311 P.2d 676 (1957)).

CV Joint Ventures appears to have claimed that it was a bona fide purchaser for value. CP 32. However, it had knowledge or information of one significant fact which is more than sufficient to put an ordinarily prudent purchaser on inquiry notice—namely the large portion of the U.S.

Bank House that is physically located on Parcel C, a parcel assessed by the Pierce County Assessor as unimproved vacant land.

A reasonably prudent purchaser does not buy real property sight unseen. CV Joint Ventures must be deemed to have possessed the same information as would have been ascertainable by any purchaser who physically inspected the property before purchase. Simply looking at the property would have revealed that not only was it not unimproved vacant land, but that the U.S. Bank House extended over the boundary onto the adjacent parcel, which was not the subject of the tax sale. *See Schultz v. Plate*, 48 Wn. App. 312, 317, 739 P.2d 95 (1987) (“A purchaser/grantee ‘may not now be heard to say that [he] failed to see that which was plainly visible and which could have been ascertained upon inquiry.’” (quoting *Atwell v. Olson*, 30 Wn.2d 179, 184, 190 P.2d 783 (1948))). And any reasonable person would know that a lender would intend to secure its loan against an entire house as opposed to part of a house. *See e.g. Glepco*, 175 Wn. App. 562 (“[W]e can discern no logical reason whatsoever, nor is any offered, as to why GMAC would have agreed to eliminate the valuable part of the security with the house on it.”).

Moreover, it is improperly premature to resolve the issue of whether CV Joint Ventures was a bona fide purchaser on a CR 12(b)(6) motion. CV Joint Ventures paid only \$15,100 at the tax sale for Parcel C.

CP 6, ¶ 20. This was significantly lower than the assessed value at the time of the tax foreclosure, which was \$53,500. *Id.* Whether CV Joint Ventures should have been on notice of title issues due to this discrepancy requires examination of CV Joint Ventures' experience as a real estate investor. *See Miebach*, 102 Wn.2d at 176 (holding that a purchaser of house sold at an execution sale was not a bona fide purchaser, when he was an experienced investor, had seen a sign allowing for improvements on the property, and was aware that the property had been sold at the sheriff's sale for small percentage of the fair market value). Also, the question of whether a person is a bona fide purchaser is itself a mixed question of law and fact. *See Levien*, 79 Wn. App. at 299 (citing *Miebach*, 102 Wn.2d at 175). And "[c]ourts should dismiss a claim under CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts exist that would justify recovery." *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). "Under this rule, a plaintiff's allegations are presumed to be true, and a court may consider hypothetical facts not part of the formal record." *Id.* (citations omitted). "CR 12(b)(6) motions should be granted sparingly and with care and only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Id.* (citations omitted). Thus U.S. Bank's claims should not be dismissed.

E. The Tax Deed Held by CV Joint Ventures Cannot Affect U.S. Bank's Ownership of the U.S. Bank House

In this case, the tax deed is not conclusive evidence in CV Joint Ventures' favor. RCW 84.64.180 provides that a judgment for a tax deed "shall be conclusive evidence of its regularity and validity in all collateral proceedings" However, there are two important exceptions to this statute, both of which apply here: (1) taxes were paid; and (2) the owner made a bona fide attempt to pay his taxes and was prevented from doing so by the act of the County Treasurer. *Smith*, 53 Wn.2d at 74 ("a real property tax judgment shall be conclusive evidence of its regularity and validity in all collateral proceedings, *except in cases where the tax has been paid . . .*" (emphasis added)); *Berry*, 33 Wn.2d at 565 ("A tax title when valid is a new title and takes free from all pre-existing claimants, but that does not mean . . . *that the judgment of foreclosure is valid against one who has either paid his taxes in fact or made a bona fide attempt to do so.*" (emphasis added)).

1. A Tax Sale Cannot Convey Improvements for Which Taxes Are Not Delinquent

A tax foreclosure sale cannot affect property for which taxes have been paid. This fundamental legal principle has long been recognized by the judiciary and expressly reserved in statutes, including RCW 84.64.180

(a statute heavily relied upon by CV Joint Ventures before the trial court),
which states that a judgment for a tax deed:

shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, *except in cases where the tax has been paid*, or the real property was not liable to the tax.

(emphasis added); *see also Smith*, 53 Wn.2d at 75 (“By the express reservation contained in RCW 84.64.180, it was made manifest that it was not the intent of the legislature to subject land on which taxes have been paid to foreclosure”) *Smith v. Jansen*, 43 Wash. 6, 8, 85 P. 672 (1906) (applying Revenue Act, § 114, Laws 1897, p. 190, c. 71—the precursor to RCW 84.64.180 with almost identical language—and finding that “[t]he prima facie presumption arising from the production of the tax deed was overcome by the admission that the tax had been paid, and the statute by clear and unmistakable implication permits the property owner to show in a collateral proceeding that ‘the tax or assessments have been paid, or the real estate was not liable to the tax or assessment.’ And when either of these facts is shown, the implication that the tax judgment and tax deed must give way, is equally explicit.”). A tax deed issued from a tax sale for a property for which taxes were not delinquent at the time of the

sale “could convey no title, as it rests upon no foundation in law.” *Port of Port Angeles v. Davis*, 21 Wn.2d 660, 664, 152 P.2d 614 (1944).

The Pierce County Assessor has at all relevant times assessed Parcel B as having the entire U.S. Bank House located upon it, and assessed Parcel C as entirely vacant land. CP 6, ¶ 21-22. Consequently, U.S. Bank and its predecessors have been responsible for paying taxes on the entire U.S. Bank House. The tax deed issued to CV Joint Ventures by the Pierce County Assessor “could convey no title” to the U.S. Bank House (regardless of its location) because taxes on the U.S. Bank House were paid, thus the tax deed “rests upon no foundation in law.” *Port of Port Angeles*, 21 Wn.2d at 664.

2. A Tax Sale Cannot Convey Property for Which the Owner Made a Bona Fide Attempt to Pay His Taxes and Was Prevented From Doing so by the Act of the County Treasurer

An additional ground for setting aside a tax sale involves a taxpayer who makes a bona fide attempt to pay taxes, but is prevented from doing so by an act of the county treasurer. *Smith*, 53 Wn.2d at 75 (“That a tax deed may be invalidated on a showing that the owner made a bona fide attempt to pay his taxes and was prevented from doing so by the act of the county treasurer is well settled.”) (citing *Pierce Cnty.*, 27 Wn.2d 451; *Nalley*, 11 Wn.2d 76; *Bullock v. Wallace*, 47 Wash. 690, 92 P. 675 (1907); Comment, 23 Wash. L. Rev. 132).

In *Smith*, the plaintiff bought an ejectment action to quiet title when he purchased the western of two adjacent parcels at a tax sale, and thereafter obtained a survey which revealed that his parcel included a house, which had been thought to have been located on the adjacent eastern parcel. *Id.* at 73. The assessor had listed the house as an improvement to the eastern parcel, and the defendants and their predecessors who owned the eastern parcel had paid the taxes assessed against the eastern parcel, including those assessed against the house. *Id.* at 72. The plaintiff contended that any interest the defendants had in the house was cut off by the tax deed he obtained at the tax sale. *Id.* at 73. *Smith* rejected the plaintiff's argument, holding that the tax deed could not include the house because the taxes had been paid on the house by the defendants, stating:

By the express reservation contained in RCW 84.64.180, it was made manifest that it was not the intent of the legislature to subject land on which taxes have been paid to foreclosure.... It is true that the mistake was that of the defendants their predecessors as well as the assessor, but it was an honest mistake, based on a reasonable assumption, and....it is not the policy of the law that the owner should lose his land through excusable mistake.

Id. at 75-76 (citations omitted). Moreover, *Smith* found that the defendants must have paid taxes on the land under the house as well, since, assuming the assessor followed statutory assessment requirements,

the assessment “could have been done only on the assumption that the land on which it stood was within the legal description of the east half” *Id.* at 74. *Smith* also rejected the plaintiff’s argument that the house could have been assessed to the defendants as a severed improvement, noting that the governing statute only allows segregation where buildings, structures, or improvements are held in separate ownership from the fee, of which there had never been any claim. *Id.* at 74. Thus, *Smith* affirmed the trial court’s finding that the defendants had sustained the burden of proving that the taxes on the disputed land had been paid, and the plaintiff did not acquire title thereto by his tax deed. *Id.* at 71, 76.

In *Berry v. Pond*, the plaintiff purchased his property at a tax sale and thereafter obtained a survey which revealed that the defendants and their predecessors had encroached onto the plaintiff’s property by 60 feet, and which said encroachment included the defendants’ house. 33 Wn. 2d at 562. The plaintiff filed suit to quiet title to the 60 feet, asserting that he had purchased the property at a tax sale, and thus his deed was conclusive as to ownership of the 60 feet in question. *Id.* Affirming the trial court, *Berry* quieted title in the defendants, finding that they had paid taxes on the 60 feet in question. *Id.* at 565. In its decision, *Berry* heavily cited *Sorensen v. Costa*, stating that in *Sorensen*

the plaintiff had a deed describing a vacant lot. Due to a mistaken notion held generally throughout the community for many years, plaintiff, since he first purchased the vacant lot, had lived in a home occupying an improved residential lot which extended 75 feet west of the vacant lot. The assessor appraised the residence and the improvements on the lot which plaintiff occupied and sent the tax statement to the plaintiff who paid the taxes, the legal description on the tax statement described the adjacent vacant lot. The defendant, also a resident of this block, made the same mistake for forty years. When it was discovered that the defendant's deed described the land which the plaintiff occupied, plaintiff brought an action to quiet title in the disputed lot in himself by adverse possession. The defendant claimed that plaintiff's adverse possession had not been perfected because the plaintiff had not paid taxes on the disputed lot. He supported his position by introducing the tax receipts on which the legal description described the vacant lot. The court, held that plaintiff's adverse possession had been perfected because plaintiff and his predecessors had actually paid all the taxes assessed on the improved lot, irrespective of the description on the tax rolls.

Id. at 562-63 (citing *Sorensen v. Costa*, 196 P.2d 900 (Cal. 1948)). *Berry* concluded that “[i]t is the fact of payment of the taxes on the land occupied not the description used on the tax receipt” that is determinative of whether the bona fide attempt to pay or actual payment of the taxes on the property will defeat the tax deed. *Id.* at 565.

This is not a novel legal principle. Other jurisdictions regularly recognize the rule that “when a property owner intends in good faith to pay all of his taxes but fails to do so because of a mistake in description, the payment will exonerate the entire property and a tax sale of the

excluded part will be held invalid.” *Conklin v. Jablonski*, 324 N.Y.S.2d 264, 273 (N.Y. 1971) (citing *Lewis v. Monson*, 151 U.S. 545 (1894); *Addison v. Benedict*, 225 So. 2d 335 (Fla. Dist. Ct. App. 1969); *Euse v. Gibbs*, 49 So. 2d 843 (Fla. 1951); *Conover v. Allison*, 178 So. 756 (La. Ct. App. 1938); *Richter v. Beaumont*, 7 So. 357 (Miss. 1890); *Shackelford v. McGlashan*, 202 P. 690 (N.M. 1921); *Pratt v. Parker*, 57 N.M. 103, 255 P.2d 311 (1953); *Smith*, 53 Wn.2d 71; W.A.S., Annotation, *Payment of tax assessment which improperly describes property owned by taxpayer as good payment on that property*, 23 A.L.R. 79 (1923)).

Here, the Pierce County Assessor mistakenly assessed Parcel B as the parcel containing the entire U.S. Bank House. Parcel C, on the other hand, was assessed as entirely vacant land. Accordingly, U.S. Bank believed that it had been paying all taxes due on the U.S. Bank House when it paid the taxes due on Parcel B—and U.S. Bank was in fact doing so.² U.S. Bank had no reason to believe that the U.S. Bank House would

² As pointed out in its Motion for Reconsideration, and in its original briefing, U.S. Bank will amend its Complaint to include the allegation that the taxes on Parcel B have been paid at all relevant times. For the purposes of this appeal, this fact may be presumed based on U.S. Bank’s pleaded facts regarding the assessor’s inclusion of the house on Parcel B tax assessments, and exclusion of the house on Parcel C tax assessments. *See Bravo*, 125 Wn.2d at 750 (“[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support the plaintiff’s claim.”) (alteration in original) (quoting *Halvorson*, 89 Wn.2d at 674).

(or could) be sold at a tax foreclosure sale, nor was U.S. Bank notified of the tax foreclosure on Parcel C. CP 6, ¶ 24. Like *Smith*, this case involves “an honest mistake, based on a reasonable assumption, and....it is not the policy of the law that the owner should lose his land through excusable mistake.” 53 Wn.2d at 76. According to *Smith, Berry, and Sorenson*, the Pierce County Treasurer could not convey any portion of the U.S. Bank House (or the underlying property) to CV Joint Ventures as the purchaser of Parcel C at the tax sale, because the taxes on the U.S. Bank House were paid in full by U.S. Bank. Thus, U.S. Bank’s claims against CV Joint Ventures should not have been dismissed.

F. The Statute of Limitations Do Not Apply to U.S. Bank’s Claims

According to Washington law, U.S. Bank’s claims are not barred by a statute of limitations for three reasons. First, quiet title actions are not subject to any statute of limitations. Second, U.S. Bank paid taxes on the U.S. Bank House. Finally, CV Joint Ventures does not possess the U.S. Bank House.

1. The Statute of Limitations Cannot Apply to U.S. Bank’s Action for Quiet Title

Washington has long recognized that actions to quiet title are not subject to any statute of limitations. *Van Sant v. City of Seattle*, 47 Wn.2d 196, 200, 287 P.2d 130 (1955) (“Respondent’s action was brought to

remove a cloud on his title, and such actions are not subject to the statute of limitations.”); citing *Inland Empire Land Co. v. Grant Cnty.*, 138 Wash. 439, 443, 245 P. 14 (1926) (“An action to remove a cloud upon title to real property is not subject to the statute of limitations.”); *Kent Sch. Dist. No. 415 v. Ladum*, 45 Wn. App. 854, 856, 728 P.2d 164 (1986) (“This action was brought pursuant to RCW 7.28.010. There is no statute of limitations with regard to an action to quiet title.”); *Petersen v. Schafer*, 42 Wn. App. 281, 284, 709 P.2d 813 (1985) (“This action is an action to quiet title. Actions to quiet title are not subject to the statute of limitations”).

Here, both parcels owned by U.S. Bank and CV Joint Ventures have clouds on title because the U.S. Bank House spans Parcels B and C. U.S. Bank filed this action in order to quiet its title to the U.S. Bank House and remove the cloud on its property. As long recognized by the Washington courts, such action is not subject to a statute of limitations. Any holding otherwise contravenes firmly established judicial authority and would leave the parties without remedy. Thus, U.S. Bank’s claims should not be dismissed.

2. The Statute of Limitations does not Apply Because U.S. Bank Paid Taxes on the U.S. Bank House

RCW 4.16.090 establishes a three-year statute of limitations on actions to set aside or cancel a tax deed. However, RCW 4.16.090 is only

applicable where there exist certain “fundamental prerequisites” with reference to the tax and tax foreclosure proceeding on which any challenged tax deed rests, including

that the real property involved was within the taxing district, that it was subject to taxation, that it was actually assessed and a valid tax levied, that there was a tax lien against the property subject to foreclosure, *that the taxes for which the lien was foreclosed were actually unpaid and delinquent*, and that the real property on which the lien was foreclosed was susceptible of identification from the description used in the foreclosure proceeding.

Sallee v. Bugge Canning Co., 38 Wn.2d 737, 744, 232 P.2d 81 (1951) (emphasis added); *see also* Randall Thomsen, *Washington State Property Tax Foreclosures: Quoerere Dat Sapere Quoe Sunt Legitima Vere*, 32 GONZ. L. REV. 123, 165 (1997) (“The statute of limitations does not apply if taxes have actually been paid and a tax deed issued because of the allegedly delinquent taxes.”); *see also* *Port of Port Angeles*, 21 Wn.2d at 666 (the statutory statute of limitations “does not apply to an action to set aside a tax deed or to recover land sold for taxes in a tax foreclosure proceeding based upon an alleged delinquent tax, when in fact the taxes for which the land was purportedly sold had been seasonably paid”); *Smith*, 43 Wash. at 9 (“The property owner has paid his taxes and discharged his obligations to the state. He had no reason to expect that proceedings would be taken against him or his property, and he was not

required to be ever on the lookout less some negligent or corrupt official should cause or suffer his property to be sold for a tax that had long since been paid.”)

Here because U.S. Bank paid the property taxes assessed on the U.S. Bank House, the “fundamental prerequisite” to RCW 4.16.090, that “the taxes for which the lien was foreclosed were actually unpaid” has not occurred. Thus, the statute of limitations set forth in RCW 4.16.090 does not apply to this action and U.S. Bank’s claims should not have been dismissed.

3. The Statute of Limitations Does Not Apply Because CV Joint Ventures Does Not Possess the U.S. Bank House

Washington courts have long held that actual possession by the purchaser under a tax deed is a prerequisite to invoking the three-year bar of RCW 4.16.090. Thomsen, *supra* (citing *Morcom*, 30 Wn. App. at 534; *Kupka v. Reid*, 50 Wn.2d 465, 472-473, 312 P.2d 1056 (1957); *Berry*, 33 Wn.2d at 564-565; *Buty v. Goldfinch*, 74 Wash. 532, 542, 133 P. 1057 (1913)); *see also* 15A Wash. Prac., Handbook Civil Procedure § 5.19 (2015-2016 ed.) (“This statute has long been interpreted to apply only in those instances where the purchaser under a tax deed has taken possession of the property.”). This means the statute of limitations does not run in favor of the holder of a tax deed while the property in question is in the

actual possession of the original owner or a party continuing the possession. *Berry*, 33 Wn.2d at 564-565; *Morcom*, 30 Wn. App. at 534; 15A Wash. Prac., Handbook Civil Procedure § 5.19. So long as possession is maintained to the exclusion of the holder of the void tax deed, “the statute of limitations should not run against the party retaining or continuing the possession.” *Morcom*, 30 Wn. App. at 534.

Here, both parcels are vacant and have been at all relevant times. Because of the issues raised in this case, neither party can possess the U.S. Bank House or exercise complete dominion and control of the property. However, through the U.S. Bank Deed of Trust, U.S. Bank holds unquestionable title to the portion of the U.S. Bank House located on Parcel B. U.S. Bank has also paid all taxes on the U.S. Bank House. As the successor to the previous owner of the U.S. Bank House, U.S. Bank has continued to maintain the exclusion of possession by CV Joint Ventures. Thus, the three year statute of limitations under RCW 4.16.090 should not apply to this action and U.S. Bank’s claims should not have been dismissed.

VI. CONCLUSION

The Court should reverse the superior court’s order granting dismissal in CV Joint Ventures’ favor. U.S. Bank is the true owner of the U.S. Bank House, and seeks a judgment reflecting the same. U.S. Bank

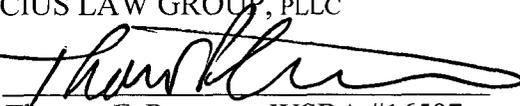
seeks to quiet title to the U.S. Bank House based on (1) the understanding of all relevant parties at the time the U.S. Bank Deed of Trust was executed that it would encumber the entire U.S. Bank House (including Parcels B and C), and (2) the present location of the U.S. Bank House. The U.S. Bank deed should be reformed based on the omission of Parcel C and the U.S. Bank house from its description caused by mistake or scrivener's error. The tax deed should be reformed or set aside based on the mistake or scrivener's error of the Pierce County Assessor by assessing Parcel C as unimproved vacant land and holding a sale thereof for delinquent taxes without accounting for the taxes paid on the U.S. Bank House by U.S. Bank. CV Joint Ventures is not an innocent purchaser because it had notice that a large portion of a house occupied the lot it purchased at the tax sale. That subject is also premature for determination on a motion to dismiss.

Because U.S. Bank paid taxes on the U.S. Bank House, the tax deed issued by the Pierce County Assessor could not convey the house to CV Joint Ventures, and the tax sale of Parcel C cannot impede U.S. Bank's true ownership of the U.S. Bank House. The statute of limitations does not apply to this case because (1) it cannot apply to quiet title claims; (2) taxes were paid on the U.S. Bank House; and (3) CV Joint Ventures is not in possession of the property in dispute.

Property disputes such as this are commonly resolved in the courts. CV Joint Ventures' allegation that the Court holds no authority is preposterous. The U.S. Bank House spans two lots. Neither party can possess the house, and it currently sits vacant. CV Joint Ventures stated that the parties "own what they own"—U.S. Bank agrees that it is the true owner of the U.S. Bank House and the land lying thereunder, and accordingly seeks to quiet title thereto. This case is exactly why the power of judicial equity exists, and U.S. Bank respectfully requests that the Court reverse: (1) the trial court's order of June 05, 2015, granting CV Joint Ventures' motion to dismiss; (2) the trial court's order of July 2, 2015, awarding CV Joint Ventures attorney's fees and costs; (3) the trial court's order of July 2, 2015 releasing Lis Pendens; and (4) the trial court's denial of US Bank's motion for reconsideration of dismissal of CV Joint Ventures.

Respectfully submitted this 16th day of November, 2015

SOCIUS LAW GROUP, PLLC

By 

Thomas F. Peterson, WSBA #16587

Joshua D. Krebs, WSBA #47103

Attorneys for U.S. Bank National
Association as Trustee for Structured
Asset Mortgage Investments II Inc. Bear
Stearns ALT-A Trust, Mortgage Pass-
Through Certificates, Series 2006-3,
Appellant

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VII. CERTIFICATE OF SERVICE

I certify that on the 16 day of November 2015, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

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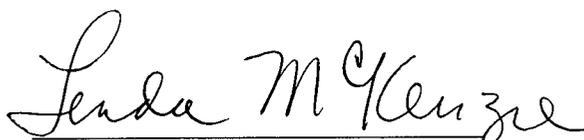
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COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

U.S. BANK NATIONAL ASSOCIATION as Trustee for Structured Asset
Mortgage Investments II Inc. Bear Stearns ALT-A Trust, Mortgage Pass-
Through Certificates, Series 2006-3,

Plaintiff/Appellant,

v.

NORTH AMERICAN TITLE COMPANY; CV JOINT VENTURES,
LLC; STEVEN SHELLEY AND JANE DOE SHELLEY; THE UNITED
STATES OF AMERICA; and JOHN AND JANE DOES, I THROUGH V,
OCCUPANTS OF THE SUBJECT REAL PROPERTY, and ALL
OTHER PERSONS OR PARTIES UNKNOWN, CLAIMING ANY
RIGHT, TITLE, INTEREST, LIEN OR ESTATE IN THE PROPERTY
HEREIN DESCRIBED,

Defendants/Respondents.

OUT OF STATE AUTHORITY CITED

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Attached are copies of out of state authorities cited by U.S. Bank National Association in its Brief of Appellant:

- 1 *Addison v. Benedict*, 225 So. 2d 335 (Fla. Dist. Ct. App. 1969)
- 2 *Buk Lhu v. Dignoti*, 727 N.E.2d 73 (Mass. 2000)
- 3 *Castro v. Barry*, 79 Cal. 443, 21 P. 946 (1889)
- 4 *Conklin v. Jablonski*, 67 Misc. 2d 286, 324 N.Y.S.2d 264 (N.Y. 1971)
- 5 *Conover v. Allison*, 178 So. 756 (La. Ct. App. 1938)
- 6 *Euse v. Gibbs*, 49 So.2d 843 (Fla. 1951)
- 7 *Lewis v. Monson*, 151 U.S. 545 (1894)
- 8 *McCreary v. Shields*, 52 N.W.2d 853 (Mich. 1952)
- 9 *Pratt v. Parker*, 57 N.M. 103, 255 P.2d 311 (1953)
- 10 *Richter v. Beaumont*, 7 So. 357 (Miss. 1890)
- 11 *Riggle v. Skill*, 81 A.2d 364 (N.J. 1951)
- 12 *Shackelford v. McGlashan*, 202 P. 690 (N.M. 1921)
- 13 *Sorensen v. Costa*, 196 P.2d 900 (Cal. 1948)

Respectfully submitted this 13th day of November, 2015

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Asset Mortgage Investments II Inc. Bear
Stearns ALT-A Trust, Mortgage Pass-
Through Certificates, Series 2006-3,
Appellant

225 So.2d 335

District Court of Appeal of Florida, Second District.

Hazel ADDISON and Henry Futch, Appellants,

v.

Elena Duke BENELECT et al., Appellees.

No. 68-95. | July 3, 1969. |

Rehearing Denied Aug. 18, 1969.

Suit to quiet title. The Circuit Court, Lee County, Archie M. Odom, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Pierce, J., held that where description of properties, title to which was held by defendants' predecessors in title and owner prior to tax sale to plaintiffs' predecessor in title, was by metes and bounds that overlapped and where defendants' predecessors failed to receive notice of tax sale proceeding, tax deed vested in plaintiffs only such title as that held by owner prior to tax sale.

Judgment affirmed.

Attorneys and Law Firms

*335 William L. Stewart, of Stewart & Stewart, Fort Myers, for appellants.

*336 Julian D. Clarkson, of Henderson, Franklin, Starnes & Holt, Fort Myers, for appellee Benedict.

John W. Sheppard, of Sheppard & Woolslair, Fort Myers, for appellees Bixby and another.

Opinion

PIERCE, Judge.

This is an appeal by the plaintiffs below, Hazel Addison and Henry Futch, from a final judgment rendered by the Lee County Circuit Court in favor of the defendant Elena Duke Benedict, and the other defendants who claim as successors in interest of Harold M. Bixby, deceased, (hereinafter referred as the Bixbys), in a suit to quiet title.

Addison and Futch filed their amended complaint in which they alleged that they are the owners of:

The North 150 feet of the South one-half of Gov't. Lot 3, Section 35, Township 45 South, Range 21 East,

and

All of the South one-half of Gov't Lot 3, Section 35, Township 45 South, Range 21 East, excepting the North 150 feet thereof, and the North one-half of Gov't Lot 4, Section 35, Township 45 South, Range 21 East;

That they obtained title from Wm. Franklin Futch who purchased the land on May 16, 1941, from the Trustees of the Internal Improvement Fund at a Murphy Tax Sale; and that Benedict and the Bixbys assert claims to part of the above described property. They alleged adverse possession by their predecessor in title of the disputed strips of land claimed by the defendants; and prayed that plaintiffs' title be quieted against the claims of defendants. Benedict filed her answer and counterclaim and the other defendants filed their answers and affirmative defenses. Addison and Futch filed their answer to Benedict's counterclaim.

It appears from the record that prior to 1941 Government Lots 3 and 4 were irregular lots on Buck Key in Lee County and were owned by three separate owners, (1) Benedict's predecessor in title, (2) one Tusch, and (3) the deceased Bixby's predecessor in title; each having acquired title by a metes and bounds description, based upon the prior established line and sustained by monuments reflected in field notes of prior surveyors. None of these owners returned their land to the Tax Assessor for ad valorem taxation, such failure being the then rule rather than the exception in Lee County.

Beginning prior to 1924 the Tax Assessor designated these three parcels on the tax roll as (1) N 1/2 Lot 3, (2) S 1/2 Lot 3 and N 1/2 Lot 4, and (3) S 1/2 Lot 4, which abbreviated form was locally customary in describing lands on the tax roll. Taxes were paid on the Benedict and Bixby parcels regularly. Tusch did not pay the taxes assessed to him on the 1925 roll and a tax certificate was sold in 1926. Another tax certificate was issued against the Tusch land in 1933, and Wm. Franklin Futch, one of plaintiffs' ancestors, obtained a Murphy Act deed in 1941 describing the land by the abbreviated tax roll description-S 1/2 of Lot 3 and N 1/2 of Lot 4-which overlaps the northern portion of the Bixby property and the southern portion of the Benedict property. In 1955 Wm. Franklin Futch deeded the north 150 feet of the S 1/2 of Government Lot 3 to his granddaughter, Hazel Addison, and in 1959 he deeded

the remainder of the property to his son, Henry Futch. They are plaintiffs in the instant suit.

Carl E. Johnson, a highly respected Registered Land Surveyor, in 1966 made the only survey that ever attempted to mark the boundaries of the South half of Lot 3 and the North half of Lot 4. The original surveyor did not run the government lot line between Government Lots 3 and 4. Johnson testified that the distance from the township and section line to the north end of the island was actually 2814 feet rather than 3465 feet as shown by the original survey. He testified that he would *337 set the government lot lines by proportional measurement, based upon the actual length, giving each government lot that proportion of the actual length that the length of its east line, as shown on the original survey, bore to the total length of the east line as shown on the original survey; and that he would stake the half lot lines at half of the proportional length of the east line of the lots.

At the conclusion of the trial the Court entered final judgment, finding inter alia that the apportionment of lands by linear measurement was not correct, and if the lands were to be apportioned they would have been apportioned by the Court by acreage measurement; that the plaintiffs failed to establish title by adverse possession; that the metes and bounds descriptions took precedence over the tax deed granted to plaintiffs' predecessor in title; that the failure of the defendants or their predecessors to return the property for taxes did not relieve the tax assessor of his obligation to assess the properties upon the tax roll by proper legal description; and that the title acquired by plaintiffs pursuant to the tax deed vested in them only such title and ownership as that owned by Tusch.

The Court ordered and adjudged that Benedict and the Bixbys were the owners in fee simple of the properties described in their respective deeds; that the titles to their said lands were quieted and established; that any right, title or interest of the plaintiffs in lands adjudged to be owned by the defendants were cancelled and annulled; and the plaintiffs were enjoined from asserting or attempting to assert any right or title to said lands or any part thereof.

Addison and Futch first contend that a Murphy tax deed is not invalid because of assessment, where a portion of the land owned by one person is included in a description of a parcel assessed to a contiguous landowner, but not in the assessment to the real owner, neither party having returned the property for taxation. It must be noted, however, that the lower Court

did not hold that the tax deed was invalid, but that the tax deed vested in Addison and Futch only such title and ownership as that owned by the former owner, Tusch.

Section 718, Revised General Statutes of Florida 1920, (now included in the compilations as F.S. s 193.20 F.S.A.) which was in effect at the time the Tax Assessor designated the parcels involved by the abbreviated form, provides in part:

'* * * the county assessor of taxes may correct any errors in the description so returned, and if the owner or agent fails to make such returns, the county assessor of taxes shall assess all lands not returned, according to the government survey, and shall assess in one assessment all the lands in a section belonging to the same owner, or assessed as 'unknown,' * * * Provided, That when private surveys of land or descriptions by metes and bounds have taken the place of government surveys, and the land is known, designated and described only by such private surveys or metes and bounds, the description in the assessment shall be made in accordance with such surveys or descriptions as recorded in the office of the clerk of the circuit court, or by reference to deed of record, giving the book and page as appears in the office of the clerk of the circuit court. * * *'

As stated above, Benedict, Tusch and Bixby acquired their titles by metes and bounds. The lot lines and the half lot lines of Government Lots 3 and 4 had not been marked by a government survey. In fact, the only attempt to mark these lines was made in 1966 by Mr. Johnson who testified that he would set the government lot lines by proportional measurement, and that he would stake the half lot lines at half of the proportional length of the lots. There is no indication in the record that this method of marking the lines had been adopted. Therefore, there was no way for *338 the tax assessor or the Benedicts and Bixbys or their predecessors in title to know where the half lot lines would fall on the ground.

[1] The lower Court was eminently correct in holding that the failure of Benedicts and the Bixbys or their predecessors in title to return their property for taxes does not relieve the tax assessor of his obligation to assess the properties upon

the tax roll by proper legal description in compliance with the statute. *Crawford v. Rehwinkel*, 1935, 121 Fla. 449, 163 So. 851; *Crawford v. Rehwinkel*, 1937, 127 Fla. 871, 174 So. 455.

[2] Abbreviations may be used so long as they are not misleading and indicate the thing intended with certainty, *Crawford v. Rehwinkel*, 1935, 121 Fla. 449, 163 So. 851, or where they are intelligible and leave no uncertainty as to the property upon which the imposition is intended to be placed, 1 A.L.R. 1228-1234. In *Inter-City Security Co. v. Barbee*, 1932, 106 Fla. 671, 143 So. 791, our Supreme Court said: 'All that the tax laws require is that an assessment roll shall show such description of the Taxed property as will make it possible for a surveyor, with the aid of the whole tax roll and the information conveyed thereby, to identify the property with reasonable accuracy.' (Emphasis supplied)

See *Jarrell v. McRainey*, 1913, 65 Fla. 141, 61 So. 240; *Florida East Coast Fruit Land Co. v. Mitchell*, 1920, 80 Fla. 291, 85 So. 661; *Dixon v. City of Cocoa*, 1932, 106 Fla. 855, 143 So. 748; *Crawford v. Rehwinkel*, Fla. 1935, 163 So. 851, *supra*; *Crawford v. Rehwinkel*, Fla. 1937, 174 So. 455, *supra*; *H & H Investment Co. v. Goldberg*, Fla.App. 1958, 103 So.2d 682; *Allison v. Rogero*, Fla.App. 1959, 112 So.2d 578; *Holmes v. Kiser*, Fla.App. 1962, 138 So.2d 782; 31 Fla.Jur., Taxation ss 243, 244. Compare *Mouton v. Southern Saw Mill Co.*, 1916, 138 La. 813, 70 So. 813, in which case the Supreme Court of Louisiana held a tax deed void for want of a description by which the property could be identified where the tax deed described land, of which the land in dispute was apparently a part, as being the North part of Section 79, it appearing that the Section in question had never been divided into a north part and a south part.

It is clear, as to the lands here involved, that the descriptions of the properties on the tax roll did not indicate with certainty the properties intended to be assessed. The government lots were irregular and the half lot lines had never been marked by a government survey. A surveyor could not with certainty locate the land intended to be assessed from the description used in the tax roll. *Crawford v. Rehwinkel*, *supra*.

Addison and Futch cite *Wells v. Thomas*, Fla. 1954, 78 So.2d 378, to support their contention that attacks made by former owners on Murphy tax deeds after one year are limited to jurisdictional defects. See F.S. s 192.48(1) F.S.A. They also cite *Sovereign Finance Co. v. Beach*, Fla. 1949, 38 So.2d 831, which states the rule that a tax deed issued in full compliance with requirements of the statute will not be held invalid

because of an unintentional error in the making of the tax roll. But we are not here concerned with whether or not the tax deed to the property intended to be assessed, owned by the tax debtor Tusch, was valid or protected by the limitation provision of the statute, where the description in the tax assessment or deed did not describe the property purported to have been sold for taxes, or the description thereof was so vague, uncertain, or erroneous that the property in question could not be identified. See 133 A.L.R. 570.

[3] The real question for decision is whether a landowner may lose title to a portion of his property by reason of the tax assessor's failure to assess such property by a proper legal description. The general rule is that when the owner of *339 property pays taxes believing in good faith that it is assessed against his land, though that land is not accurately described in the assessment, the payment discharges from the tax the land in exoneration of which it is intended. *Euse v. Gibbs*, Fla. 1951, 49 So.2d 843; *Shackleford v. McGlashan*, 1921, 27 N.M. 454, 202 P. 690, 23 A.L.R. 75; *Kellogg v. McFatter*, 1904, 111 La. 1037, 36 So. 112; *Conover v. Allison*, La.App. 1938, 178 So. 756; *Meller v. Hodsdon*, 1885, 33 Minn. 366, 23 N.W. 543; *Lewis v. Monson*, 151 U.S. 545, 14 S.Ct. 424, 38 L.Ed. 265; *Trujillo v. Montano*, 1958, 64 N.M. 259, 327 P.2d 326; *Smith v. Henley*, 1958, 53 Wash.2d 71, 330 P.2d 712; 23 A.L.R. 79, and cases collected there.

[4] As was stated in *Bird v. Benlisa* (1892) 142 U.S. 664, 12 S.Ct. 323, 35 L.Ed. 1151, '(t)he owner, as the Florida supreme court has repeatedly held, has a right to rely upon the assessment roll.'

It is not disputed that Benedict and Bixby and their predecessors in title paid their taxes on the property as assessed, believing in good faith that they were paying them on their property, and that there was no way for them to know where the half lots would fall on the ground. During the tax sale procedure the land being sold for non-payment of taxes was identified as that of Tusch. The notice of publication in the newspaper, the 1926 tax sale books, and the record in the office of the clerk of the circuit court relating to the Murphy Act Sale in 1941 contained Tusch's name. There is no evidence in the record that the predecessors in title of Benedict and the Bixbys received any notice of a tax sale proceeding.

[5] The time limitation of F.S. s 192.48, F.S.A. is not applicable because the properties owned by Benedict and the Bixbys including the disputed strips, in legal effect were not

covered by the descriptions in the tax deed, and the taxes on these properties had been paid. *Euse v. Gibbs*, supra; *Mid-State Homes, Inc. v. Nassau County*, Fla.App.1967, 198 So.2d 382.

[6] We find no error in the holding of the lower Court that the title acquired by Addison and Futch pursuant to the tax deed vested in them only such title and ownership as that owned by Tusch.

Addison and Futch cite *Stuart v. Stephanus*, 1927, 94 Fla. 1087, 114 So. 767, as authority for the proposition that a tax title in Florida is not dependent upon or connected with the former title. Our independent research has revealed no Florida cases or decision from other Courts on point with the case sub judice. The reported cases deal with the former title of the Tax debtor, or the person who was last seized of the fee, and have no relevancy to the title to property erroneously included in the tax assessment roll. See *Dean v. Kane*, 1932, 106 Fla. 814, 143 So. 656; *Hecht v. Wilson*, 1932, 107 Fla. 421, 144 So. 886, 145 So. 250; *Torreyson v. Dutton*, 1939, 137 Fla. 683, 188 So. 805, 190 So. 430; *Daniell v. Sherrill*, Fla.1950, 48 So.2d 736; 23 A.L.R.2d 1410; 31 Fla.Jur., Taxation s 438; 51 Am.Jur., Taxation s 1078.

Addison and Futch next claim title to the disputed land by adverse possession. The record shows that Wm. Franklin Futch, plaintiffs' ancestor, after he had obtained the tax deed in 1941, built a house near the center of the Tusch property and lived on the island until 1958, during which time he maintained his house and other buildings, kept live stock which were permitted to run all over the island, cultivated a garden in the vicinity of the house which was fenced, cut posts and gathered fuel wood, but did not put a fence on the boundaries of his property. The aerial photographs admitted into evidence, which were taken in 1944, 1953 and 1958, showed clearing and cultivation of the Benedict parcel down to the south boundary of her metes and bounds description; clearing and cultivation of the Bixby parcel up to the *340 north boundary of the Bixby metes and bounds description; and clearing and cultivation of the Tusch parcel

within a limited area approximately in the center of that parcel. Although the aerial photographs taken in 1953 and 1958 showed the occupation gradually diminished and the areas overgrown, the occupational lines are still apparent on the 1958 photograph.

[7] The evidence of the 'residential' use of the property clearly did not encompass lands covered by the Benedict or Bixby metes and bounds descriptions, or the disputed parcels which are the subject of this suit. The areas cultivated by Futch were well within the confines of the Tusch ownership. The aerial photographs demonstrated that the disputed parcels were occupied not by the plaintiffs, but by the Benedicts and Bixbys. The Chancellor found from the evidence before him that the plaintiffs had failed to establish their claim of title to the subject property by adverse possession. We conclude that the evidence amply supports his finding.

It is not necessary to consider appellants' third point. The trial Judge found that 'the apportionment of lands by linear measurement is not correct, and if the lands were to be apportioned that the same would have to be apportioned by this Court by acreage measurement.' Since we uphold the lower Court's finding that the boundary lines between the properties are not the government half lot lines, but the lines established by the metes and bounds descriptions in the original deeds, whether a shortage in government lots should be apportioned by proportionate lineal measurement as distinguished from proportionate acreage is not properly a question before this Court.

The judgment of the lower Court is affirmed.

Affirmed.

HOBSON, C.J., and MANN, J., concur.

All Citations

225 So.2d 335

431 Mass. 292
Supreme Judicial Court of Massachusetts,
Suffolk.

Leo BUK LHU, trustee, ¹

v.

Salvatore J. DIGNOTI & others, ² trustees. ³

Argued Feb. 8, 2000. | Decided April 21, 2000.

Owner of lot brought suit against abutting owner to remove alleged encroachment and for monetary damages. Abutting owner counterclaimed to reform deeds based on mutual mistaken as result of surveyor's error in metes and bounds description at time lots were subdivided. On motions for summary judgment, the Superior Court Department, Suffolk County, Barbara J. Rouse, J., entered summary judgment for abutting owner for reformation of deeds. Lot owner appealed. The Supreme Judicial Court granted application for direct appellate review. The Supreme Judicial Court, Cowin, J., held that: (1) lot owner was not bona fide purchaser for value against whom deed could not be reformed, and (2) lot owner's possession of tax deed did not prevent action for equitable reformation to correct error in tax deed resulting from mutual mistake.

Affirmed.

Attorneys and Law Firms

****74 *292** Evan T. Lawson, Boston (Caroline A. Smith with him) for the plaintiff.

Linda A. O'Connell, Andover, for the defendants.

Present: MARSHALL, C.J., ABRAMS, LYNCH, GREANEY, IRELAND, SPINA, & COWIN, JJ.

Opinion

COWIN, J.

The plaintiff, Leo Buk Lhu (Buk Lhu), trustee of the Barnacle Marina Realty Trust (Barnacle), and the defendants, Salvatore J. Dignoti, Richard L. Kanter and Frederic S. Clayton, trustees of the Wharf Nominee Trust (Wharf), are abutting landowners. Barnacle, claiming that Wharf had encroached 252 square feet onto its property, commenced an action in Superior ***293** Court seeking an injunction to remove

the encroachment and requesting monetary damages. Wharf counterclaimed for equitable reformation of both parties' deeds based on a mutual mistake as a result of a surveyor's measuring error. A Superior Court judge allowed Wharf's motion for summary judgment for a reformation of the deeds. We granted Barnacle's application for direct appellate review and affirm the Superior Court judgment.

We summarize the essential undisputed facts in the summary judgment affidavits and accompanying material. See *Longval v. Commissioner of Correction*, 404 Mass. 325, 327, 535 N.E.2d 588 (1989). We include as well facts conceded by Barnacle at oral argument. The two pieces of property at issue are located on Atlantic Avenue in Boston (city). Originally, the land was owned as a single parcel by the Blue Water Trust (Blue Water). On May 8, 1984, Whitman & Howard, Inc. (Whitman & Howard), prepared a plan of this area (plan) that subdivided the property into two lots, known as Lots 2 and 3. The plan showed a wood building on Lot 3, which housed a restaurant, and a marina and water on Lot 2. As Barnacle conceded at oral argument, at the time of the subdivision, the parties to the original deeds intended that Lot 2 contain only the marina and the water and that Lot 3 contain only the building. The plan also contained measurements of the property, and some of the measurements, unbeknownst to Blue Water and Whitman & Howard, were incorrect due to a surveyor's measuring error. (It is this error that is at the center of this case.) A surveyor's report, prepared by Whitman & Howard at the same time, stated that no encroachment or overhanging projections existed on Lots 2 and 3.

Following this subdivision, on June 22, 1984, Blue Water conveyed Lot 2 to the Marina Nominee Trust (Marina) and Lot 3 to Wharf. ⁴ The deeds to Lots 2 and 3 ****75** referred to the plan and, as a result of the incorrect measurement on the plan, contained an incorrect metes and bounds description. On October 6, 1986, the city took Lot 2 subject to any rights of redemption because Marina had failed to pay property taxes. These rights of redemption were foreclosed on July 9, 1992.

Philip Y. DeNormandie purchased Lot 2 from the city on March 29, 1995, and received a tax collector's deed pursuant to ***294** G.L.c. 60, § 64. ⁵ On April 4, 1995, David Pogorelc, then trustee of Barnacle, purchased Lot 2 from DeNormandie. Pogorelc transferred his beneficial interest in Barnacle to Buk Lhu in July, 1997. ⁶ A survey of Lot 2, in October, 1997, revealed that a portion of the building on Lot 3, which housed the Boston Sail Loft Restaurant, encroached on Lot 2. Until

Barnacle had Lot 2 surveyed in 1997, it had never asserted any ownership interest in any part of Lot 3.

A Superior Court judge ruled that the deeds held by Barnacle and Wharf must be reformed to reflect the original intent, at the time of the subdivision, that Lot 2 contain only the marina and water and Lot 3 contain the building. On appeal, Barnacle contends that summary judgment was inappropriate because (1) there are disputed issues of material fact whether Barnacle is a bona fide purchaser for value without notice (bona fide purchaser); and (2) the tax title purchased by Barnacle's predecessor in title for Lot 2 is an absolute title that prevents a claim for equitable reformation.

[1] 1. *Bona fide purchaser.* It is well established that legal instruments, including deeds, may be reformed on the ground of mutual mistake. *Mickelson v. Barnet*, 390 Mass. 786, 791, 460 N.E.2d 566 (1984), and cases cited. *Reder v. Kuss*, 351 Mass. 15, 17, 217 N.E.2d 904 (1966). *Raymond v. Jackson*, 297 Mass. 509, 512, 9 N.E.2d 409 (1937). The original deeds conveyed to Marina and Wharf contained a mutual mistake resulting in an error. The metes and bounds description in the deeds did not reflect the intent of the parties to place the building on Lot 3 and the marina and water on Lot 2.

[2] However, a deed may not be reformed against a bona fide purchaser on the ground of a mutual mistake. *Burke v. McLaughlin*, 246 Mass. 533, 538, 141 N.E. 601 (1923), and cases cited. Barnacle argues that the burden of showing that it is not a bona fide purchaser of Lot 2 rests with Wharf and that Wharf has not met this burden. Barnacle, however, misconstrues its burden at the *295 summary judgment stage of the proceedings.⁷ At summary judgment, Wharf, as the moving party, was required affirmatively to demonstrate that there was no genuine issue of material fact concerning Barnacle's status as a bona fide purchaser.⁸ *Pederson v. Time, Inc.*, 404 Mass. 14, 17, 532 N.E.2d 1211 (1989). Once Wharf made that showing, in order to defeat summary judgment, Barnacle was required to respond by alleging specific facts that would establish the existence of a genuine issue of material fact regarding Barnacle's bona fide purchaser status. *Id.*

[3] Wharf demonstrated ample facts to show that Barnacle was not a bona fide purchaser. Barnacle's conduct before and after the purchase indicates that it had actual notice that the building was located **76 entirely on Lot 3 and did not intend to purchase any part of that building. Just prior to purchasing the property, Barnacle's trustee attended an "open

house" to view Lot 2. At that time, he reviewed the lot and examined the proposal prepared by the city describing the lot as containing a marina and consisting entirely of "water area" and "no upland area." The proposal made no reference to the building as a part of the Lot 2 property.⁹ After purchasing the property, Barnacle purchased insurance for Lot 2 and never indicated to the insurer that the property contained a building. Finally, from 1995 when Barnacle purchased Lot 2 until the survey of the property in October of 1997, Barnacle never challenged Wharf's assertion of ownership of the entire building.

In response to Wharf's showing, Barnacle failed to allege any specific facts creating the need for trial. Barnacle merely recites facts surrounding the transfer of Lot 2 from the city to DeNormandie to Barnacle. It does not allege any specific facts creating a genuine issue of material fact whether it had actual notice of Wharf's claim of ownership over the disputed property. Thus, the Superior Court judge properly determined that no genuine issue of material fact existed regarding Barnacle's bona fide purchaser status. Given these facts, established for purposes of *296 summary judgment, Barnacle was not a bona fide purchaser. Barnacle purchased the deed to Lot 2 with knowledge that the entire building was located on Lot 3 and never intended to purchase any more than the water and the marina located on Lot 2.

[4] 2. *Tax deed.* Barnacle argues that, regardless of its status as a bona fide purchaser, it is entitled to ownership of the disputed property because it possesses absolute title through a tax deed to Lot 2. We disagree. Barnacle's possession of a tax deed does not prevent an action for equitable reformation to correct an error in the tax deed resulting from a mutual mistake.

[5] [6] [7] Barnacle relies on G.L. c. 60, § 64, which provides that the title conveyed by a tax deed is "absolute after foreclosure of the right of redemption by decree of the land court." The absolute title conveyed under § 64, however, extinguishes only the interests of any party claiming rights "through the record owner, such as 'mortgagees, lienors, [or] attaching creditors.'" *Sandwich v. Quirk*, 409 Mass. 380, 384, 566 N.E.2d 614 (1991), quoting G.L. c. 60, § 66. The purpose of absolute title under § 64 is to clear the new title of all encumbrances placed on the property by the prior record owner. *Sandwich v. Quirk, supra; Crocker-McElwain Co. v. Assessors of Holyoke*, 296 Mass. 338, 349, 5 N.E.2d 558 (1937). Wharf's claim of ownership does not arise from an encumbrance placed on Lot 2 by a prior record owner. Rather,

Wharf makes an independent claim of ownership through its own deed. Thus, § 64 does not bar a claim for equitable reformation of a tax deed because of a mutual mistake.

Our conclusion that possession of a tax deed does not prevent an action for an equitable remedy to correct a mutual mistake is consistent with cases from other jurisdictions. In *Riggle v. Skill*, 7 N.J. 268, 81 A.2d 364 (1951), the Supreme Court of New Jersey upheld a decision permitting the reformation of a tax deed because of a mutual mistake by the municipality and the defendant, the purchaser of the tax deed. *Id.* The plaintiffs bought two lots which they thought contained a house. *Riggle v. Skill*, 9 N.J. Super. 372, 375, 74 A.2d 424 (1950). The defendant purchased a tax deed to the lot abutting the plaintiffs' property which mistakenly contained the plaintiffs' house. *Id.* at 376-377, 74 A.2d 424. The court held that the municipality did not mean to convey and **77 the defendant did not mean to purchase the land containing the plaintiffs' house. *Id.* at 381, 74 A.2d 424. The court held that in these circumstances it was proper to reform the tax deed to reflect the parties' intentions *297 so that the plaintiffs did not suffer hardship because of the error in the defendant's tax deed. *Id.*

The Supreme Court of Florida, in *Crompton v. Kirkland*, 157 Fla. 89, 24 So.2d 902 (1946), reached a similar conclusion. The plaintiff, a party not involved in a tax sale, brought suit to enjoin the holder of a tax deed from seeking to eject him from disputed property and to reform the tax deed. The description of the land in the tax deed included land owned by the plaintiff. *Id.* at 93, 24 So.2d 902. The plaintiff alleged in his complaint that, while the tax deed on its face included the disputed land, it was an erroneous description and it was common knowledge to abutting landowners and the taxing authority that he and his predecessors in interest had ownership of part of the described land. *Id.* at 91-92, 24 So.2d 902. The court held that it was proper for the plaintiff to seek reformation of the tax deed to correct the erroneous description of land. *Id.* at 94-95, 24 So.2d 902. The court recognized that when a party claims an interest in land based on his own title and the description in his title conflicts with

the terms of a tax deed, an equitable claim for the reformation of the tax deed is an appropriate remedy. *Id.*

In a similar situation, the Supreme Court of Michigan, in *McCreary v. Shields*, 333 Mich. 290, 52 N.W.2d 853 (1952), held that an equitable remedy was appropriate to correct an error arising from a tax deed. One of the plaintiffs had purchased a lot, called Lot K, pursuant to a deed that mistakenly described the adjacent vacant lot, called Lot L. *Id.* at 291, 52 N.W.2d 853. Because of the error in the deed, the plaintiff mistakenly paid taxes on Lot L rather than Lot K. *Id.* at 292, 52 N.W.2d 853. As a result of the unpaid taxes on Lot K, the State received title to Lot K through delinquency proceedings and it conveyed the property to the defendant. *Id.* The State believed it was selling, and the defendant believed she was purchasing, Lot L. *Id.* at 293, 52 N.W.2d 853. The court stated that in these circumstances the defendant "has no just ground for complaint that she is not allowed to unjustly enrich herself out of the error common to all three parties." *Id.* at 294, 52 N.W.2d 853. Thus, the court concluded that a constructive trust requiring the defendant to convey Lot K to the plaintiffs and requiring the plaintiffs to reimburse the defendant for her purchase price of the disputed lot was the proper remedy. *Id.* at 296, 52 N.W.2d 853.¹⁰

These cases accord with our view that the conveyance of a *298 tax title does not preclude an equitable remedy to prevent a party from being unfairly deprived of its land. We conclude that in the circumstances of this case reforming the deeds is a proper remedy. It is apparent that Barnacle, the city, and Wharf all believed that Wharf owned the disputed area. Refusing to reform the tax deed deprives Wharf of property that all parties believed Wharf owned since it purchased Lot 3 in 1984 and would allow Barnacle "to reap the harvest of a bargain [it] never intended to make." **78 *Burke v. McLaughlin*, 246 Mass. 533, 540-541, 141 N.E. 601 (1923).

Judgment affirmed.

All Citations

431 Mass. 292, 727 N.E.2d 73

Footnotes

- 1 Of the Barnacle Marina Realty Trust.
- 2 Richard L. Kanter and Frederic S. Clayton.
- 3 Of the Wharf Nominee Trust.
- 4 Richard L. Kanter, Frederic S. Clayton, and Salvatore J. Dignoti were the trustees for both Marina and Wharf.

- 5 Section 64 provides, in relevant part, that “[t]he title conveyed by a tax collector’s deed or by a taking of land for taxes shall be absolute after foreclosure of the right of redemption....”
- 6 Pogorelc was both trustee and beneficiary of Barnacle. He sold his beneficial interest to Lhu and then resigned as trustee. Lhu was then appointed trustee.
- 7 Barnacle argues that it had no burden whatsoever to allege facts regarding its bona fide purchaser status.
- 8 At trial Wharf would have the burden of showing that Barnacle is not a bona fide purchaser. *Richardson v. Lee Realty Corp.*, 364 Mass. 632, 634, 307 N.E.2d 570 (1974).
- 9 The only reference to Lot 3 in the proposal is that a steel ramp and walkway on Lot 3 provide access to a timber platform on Lot 2. The only reference to the building is that the Boston Sail Loft is “immediately adjacent to the subject property....”
- 10 Barnacle erroneously relies on *Piceme v. Sylvestre*, 113 R.I. 598, 324 A.2d 617 (1974). There the Supreme Court of Rhode Island described a tax deed as “an independent grant from the sovereign which bars or extinguishes all former titles, interests and liens not specifically excepted.” *Id.* at 600, 324 A.2d 617. Barnacle argues that this broad language indicates that possession of a tax deed extinguishes all possible claims, including the claims of adjacent property owners. However, the language used refers only to those claims that arise from the chain of title of the property subject to the tax deed. The language does not refer to claims arising from the independent chain of title of adjacent property owners. Thus, the *Piceme* case does not provide any guidance regarding whether a tax deed extinguishes a claim of an adjacent property owner for reformation because of mutual mistake.

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79 Cal. 443
 Supreme Court of California.

CASTRO
 v.
 BARRY.

No. 11,855. | June 11, 1889.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Attorneys and Law Firms

****947 *444** *Wm. H. Webb*, for appellant.

Geil & Morehouse, for respondent.

Opinion

HAYNE, C.

The complaint in this case alleged in substance that the plaintiff was the owner of certain real property; that the defendant claimed an interest therein adverse to the plaintiff; that such claim was without right; and that the defendant had no right, title, or interest whatever in the property. There were other allegations, which will be noticed below. The prayer was that defendant be required to set forth the nature of his claim; that it be adjudged to be void; and that defendant be enjoined from asserting it. The trial court found the above allegations to be true. Judgment was entered for the plaintiff, and the defendant appeals.

It is contended for the appellant, in the first place, that 'an action to quiet title, or to remove a cloud from title, will not lie where the facts alleged, if true, would not ***445** legally affect the plaintiff's title.' But in this the learned counsel overlooks the distinction between actions to determine adverse claims, which are provided for by the Code of Civil Procedure, and which in this state are commonly referred to as 'actions to quiet title,' and suits to have an instrument canceled, or adjudged to be void, which are usually called 'actions to remove a cloud.' Suits to have an instrument canceled or adjudged to be void were quite common in the old

chancery practice, and constituted one of the applications of the principle *quia timet*. 2 Story, Eq. Jur. § 701. This suit is preserved by the Civil Code, which has the following provision on the subject: 'Sec. 3412. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled. Sec. 3413. An instrument, the invalidity of which is apparent upon its face, or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury, within the provisions of the last section.' In this kind of action, therefore, it is expressly provided by statute that if the instrument is void upon its face, or when construed with another instrument with which it is necessarily connected, the relief will not be granted. This provision is the embodiment in statutory form of an old and well-settled rule of equity, and, as a matter of course, in order to obtain the relief, it is necessary that the complaint should state a case within the rule. In the language of SANDERSON, J., in *Society v. Ordway*, 38 Cal. 681: 'In an action to remove a cloud there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated.' ***446** Suits to determine adverse claims, such as exist in this state, were not known to the old chancery practice, but were provided for by statute. The provision of the Code of Civil Procedure is as follows: 'Sec. 738. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.' Compare section 254 of old practice act, (Laws 1851, pp. 92, 93.) The distinction between the two kinds of action is clear. They are different not merely in form, (for we have no forms of action in the old sense,) but in purpose. In the former case the proceeding is aimed at a particular instrument, or piece of evidence, which is dangerous to the plaintiff's rights, and which may be ordered to be destroyed in whosoever hands it may happen to be; while in the latter the proceeding is for the purpose of stopping the mouth of a person who has asserted or is asserting a claim to the plaintiff's property. It is not aimed at a particular piece of evidence, but at the pretensions of an individual.

The statutory action to determine an adverse claim is an improvement upon the old bill of peace. The statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It is not necessary, as formerly, that the plaintiff should first establish his right by an action at law. 'He can immediately upon knowledge of

the assertion of such claim require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined; and the question of title be thus forever quieted.' *Curtis v. Sutter*, 15 Cal. 262, 263. And see *Stark v. Starrs*, 6 Wall. 409. Nor is it necessary that the adverse claim should be of any particular character. As said by BALDWIN, J., delivering the opinion in *Head v. Fordyce*, 17 Cal. 151, the statute 'does not confine the remedy to the *447 case of an adverse claimant setting up a legal title or even an equitable title; but the act intended to embrace every description of claim whereby the plaintiff might be deprived **948 of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse pretention.' See, also, *Horn v. Jones*, 28 Cal. 204; *Joyce v. McAvoy*, 31 Cal. 287, 288. And the rule may be even more broadly stated, viz., that the action may be maintained by the owner of property to determine any adverse claim whatever, for, if the defendant, by his answer, disclaims all interest whatever, judgment may, nevertheless, be entered against him, though in such case it must be without costs. Code Civil Proc. § 739. Compare *Brooks v. Calderwood*, 34 Cal. 566, and *Scorpion Co. v. Marsano*, 10 Nev. 380, 381. The plaintiff, therefore, is not required to set forth the nature of the defendant's claim. *People v. Center*, 66 Cal. 562, 5 Pac. Rep. 263, 6 Pac. Rep. 481; *Scorpion Co. v. Marsano*, 10 Nev. 380, 381; *Railroad Co. v. Oyler*, 60 Ind. 392. The defendant must set forth his claim if he has one, in view of which the complaint may in one aspect be said to be a bill for discovery. The pleading is very simple, and it is well settled that the allegations above mentioned are sufficient. *Rough v. Simmons*, 65 Cal. 227, 3 Pac. Rep. 804; *Heeser v. Miller*, 19 Pac. Rep. 375. It is argued for the appellant, however, that the complaint contains something besides the allegations above mentioned; that it is really a complaint to reform a deed; and that, when so considered, both the complaint and findings are insufficient, because it is neither alleged nor found that the deed sought to be reformed embraced the property in controversy. The complaint, after the allegations above mentioned, proceeded to set forth the nature of the defendant's claim. It alleged that said claim was founded on a mistake in the description of a deed. The mistake was this: *448 After reaching a post on the west bank of Moro slough, the description called for the following course, viz.: 'Thence down the said slough north 72° west, 61.50 chains, to a stake

in a small slough at a point known as the 'Bolsita,' while it was alleged and found that instead of 'north 72° west' the course should have been 'north 12° west.' Now, if it had appeared that the land in controversy was included in the deed as made, so as to pass thereby, the plaintiff could not have maintained an action under the statute to determine an adverse claim; for it has been held that a mistake in the description of a conveyance cannot be corrected in such an action. *Brewer v. Houston*, 58 Cal. 345. In such case the legal title would have passed by the conveyance; and the holder of a mere right in equity, to have the conveyance reformed, cannot maintain an action like the present against the holder of the legal title. *Von Drachenfels v. Doolittle*, 19 Pac. Rep. 518. But, according to the appellant's own statement, this does not appear, and we think that the contrary appears affirmatively; for the description contained in the deed made is given in the complaint and in the findings, and it appears therefrom that the mistake in the course is immaterial. The wrong course is controlled by the direction to go 'down the said slough' to a specified point. Courses and distances yield to visible boundaries. *Spring v. Hewston*, 52 Cal. 442; *Serrano v. Rawson*, 47 Cal. 55; *More v. Massini*, 37 Cal. 436. It affirmatively appears, therefore, both from the complaint and findings, that there was nothing requiring reformation, and no basis for the defendant's claim. As above stated, it was not necessary for the complaint to set forth the nature of the defendant's claim. But the unnecessary allegations merely show that the defendant's claim was based upon a harmless error of description, and do not change the character of the action; *449 and the judgment does not undertake to reform the deed, but merely quiets the plaintiff's title. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

All Citations

79 Cal. 443, 21 P. 946

67 Misc.2d 286, 324 N.Y.S.2d 264

Lily Conklin, Plaintiff,

v.

Margaret A. Jablonski et al., Defendants

Supreme Court, Special Term, Nassau County,
July 29, 1971

CITE TITLE AS: Conklin v Jablonski

HEADNOTES

Taxation

tax liens, tax sales and tax titles

erroneous tax map--good title, by metes and bounds description and by possession, was not defeated by erroneously drawn tax map lot and consequently erroneous assessment and erroneous tax sale and by bar-claim default judgment as to such tax lot--"conclusive" presumption of regularity (Nassau County Administrative Code, § 5-54.0, subd. b, par. 3) cannot constitutionally result in forfeiture against property owner who is in possession and who has paid all her taxes.

([1]) Plaintiff's good title, by a deed containing a metes and bounds description, and by over 35 years' possession, of a parcel of land on the rear portion of which stood a 1 1/2-story house, was not defeated (a) by the tax assessor's error in including, in the rear adjoining tax lot No. 110, some 117 feet of land which encompassed plaintiff's 1 1/2-story house, and (b) by a tax sale and tax deed of said erroneously mapped and erroneously assessed tax lot No. 110, and (c) by a bar-claim action instituted by the tax deed grantee in which the complaint merely described the tax-deeded property as "Lot 110" and vaguely alleged that the various defendants named in the complaint "might claim an interest or easement in said premises adverse to that of the plaintiff ... in fee", and (d) by a default judgment which was entered in that action upon an attorney's affidavit which omitted to inform the court (cf. CPLR 5015) that said tax lot included the 1 1/2-story house. Plaintiff has always paid all the taxes assessed against her as tax lot No. 111. She is not chargeable with constructive notice that her house and grounds were erroneously excluded from her tax lot 111 and were erroneously included in an adjoining tax lot 110 which was assessed against someone else, or with constructive notice that said adjoining tax lot 110 was being advertised and sold for nonpayment of taxes.

Nor is such bar-claim default judgment *res judicata* against her. Accordingly, the present bar-claim action instituted by plaintiff against the successors of said tax sale grantee will not be summarily dismissed.

([2]) Although, after a tax deed has been recorded for six years, the "presumption" of regularity is "conclusive" (Nassau County Administrative Code *287 [L. 1939, ch. 272], § 5-54.0, subd. b, par. 3), constitutional due process forbids such forfeiture against a property owner who is in possession and who has paid all her taxes. The tax deed grantee made no attempt to take possession of plaintiff's house until more than six years had elapsed since he obtained the purported bar-claim default judgment; and that attempt was the first time that plaintiff had any notice of the erroneous tax mapping and the ensuing erroneous tax sale.

APPEARANCES OF COUNSEL

Robinson & Cincotta for plaintiff. *Cohn & Foley* for Margaret A. Jablonski, defendant.

OPINION OF THE COURT

Bernard S. Meyer, J.

This bar-claim action raises the question of the effect of an error of the tax assessors in locating, on the land and tax map, the dividing line between properties. Plaintiff, Lily Conklin, except as her title was affected by the tax sale of Lot 110, Block A, Section 26, is the owner by inheritance of land encompassed by all of Lot 111 and the southernmost one quarter of Lot 110. Defendant Jablonski, the only contesting defendant, acquired title to Lot 110 by mesne conveyance from the tax sale purchaser of that lot. Defendant Jablonski moves pursuant to CPLR 3211 (subd. [a], par. 5) to dismiss the action on the grounds of *res judicata* and because, she claims, the action having been brought more than six years after the recording of the treasurer's deed to the tax sale purchaser is barred by the Statute of Limitations (contained in Nassau County Administrative Code [L. 1939, ch. 272], § 5-54.0, subd. b). Plaintiff cross-moves for leave to add a party plaintiff and a party defendant and to serve a supplemental complaint. For the reasons hereafter stated, defendant's motion is denied. Plaintiff's cross motion is granted.

FACTUAL BACKGROUND

Since the motion is made prior to answer, the facts on which it is to be decided are to be drawn from the complaint and affidavits. The facts necessary to decision are undisputed and are as hereafter stated.

Lily Conklin's predecessor in title, her father-in-law, acquired title in 1908, by metes and bounds description, of the property now encompassed in the southernmost quarter of Lot 110, of the one and one-half story frame house located thereon, and of Lot 111, from Mary E. Conklin. Mary E. Conklin continued to own the land encompassed in the northernmost three quarters of Lot 110 and a two and one-half story house thereon. Mary Conklin died in 1951, the two and one-half story house became dilapidated, her administratrix failed to pay the 1960 taxes, a tax sale of the lien resulted, and in December 1962, the treasurer conveyed to the tax lien purchaser, one Harris, by deed *288 referring to "Section 26, Block A, Lot 110 on the Nassau County Land and Tax Map".

The treasurer's deed was recorded on January 2, 1963 and on February 25, 1963, Harris began a bar-claim action in the County Court in which Lily Conklin, but not Mary E. Conklin or her administratrix, was named as one of the parties defendant. The complaint in that action covered nine separate parcels of land at diverse locations within the county, parcel number 2 being identified simply as "Section 26, Block A, Lot 110". With respect to the reason for joining the various defendants named, the complaint contained only the allegation: "That the defendants unjustly claim or might claim an interest or easement in said premises adverse to that of the plaintiff, the particular nature of such interest being a claim in fee on the part of all of the defendants herein, except" defendants other than Lily Conklin.

Lily Conklin admits service upon her of "a document", which it may be inferred was the summons and complaint, that being what the affidavit of service says was served on her. She checked with the Department of Assessment and was advised that she was the owner of Lot 111, on which the taxes were not in default, and since the "document" referred only to Lot 110 she took no further action. Judgment was entered on default on August 2, 1963, on the basis of an affidavit (only part of which is contained in the moving papers, but which the court has requisitioned and of which it takes judicial notice, *George v. Time, Inc.*, 259 App. Div. 324, *affd.* 287 N. Y. 742) of the attorney for plaintiff in that action reciting "That deponent has inspected the premises described as Parcels Nos. 2, 3, 4, 6, 8 and 9 of the complaint herein and finds all of them are vacant and unoccupied, except ... Parcel No. 2 of the complaint

herein [Lot 110], which is improved with a dwelling house, but which said structure is completely uninhabitable". On August 9, 1963, Lot 110 was conveyed by Harris to one Connolly, defendant Jablonski's immediate predecessor in title, by a deed bearing the notation "No consideration".

Lot 110 is roughly rectangular in shape, being 107 feet across its northern border and running south approximately 429 feet to the northern border of Lot 111. Lot 111 is an irregular pentagon, its western line being the continuation of the western line of Lot 110, but its eastern line veering abruptly eastward from the end of the eastern line of Lot 110 and then back to the west. At about the middle of Lot 110 stands the dilapidated two and one-half story frame house above referred to, and, on *289 its southernmost quarter, the one and one-half story house conveyed by Mary Conklin to Lily Conklin's predecessor. On Lot 111 the only building is a garage 10.5 feet by 21.5 feet in size. Had the tax map lines been drawn consistently with the metes and bounds descriptions of the two properties, the dividing line between them would be located some 117 feet north of the line shown on the map, and the one and one-half story house would be located on Lot 111.

The assessment on Lot 111 from 1962 through 1971 has been "Land \$1,000. Total \$3,350.", thus reflecting the existence of the house, and since it is undisputed that the house has existed on Lily Conklin's property since before the 1908 conveyance to her father-in-law, it may reasonably be inferred that the assessments of Lot 111 prior to 1962 likewise reflected the existence of the house. Through 1963 Lot 110 was carried on the assessment rolls at \$1,800 for land and \$4,100 total, but on the basis of a petition submitted in 1963 by Harris or Connolly to have the property declared vacant because of the uninhabitable condition of the house located thereon, the assessment on Lot 110 was reduced in 1964 to, and remains, "land \$1,800. total \$1,800."

The taxes on Lot 111 have never been in default and the one and one-half story house has been occupied by Lily Conklin and her husband or by her tenants from at least 1935 and through June, 1970. In June, 1970 the then tenant left and Lily Conklin sought to transfer the house and land to her nephew. None of the tenants were ever contacted by Harris or Connolly or in any way disturbed in possession. By deed dated July 28, 1970, defendant Jablonski acquired title from Connolly to Lot 110 and during the late summer of 1970 made claim to the one and one-half story house, preventing entry by Lily

Conklin and her nephew. The present action was begun by Lily Conklin within two months thereafter.

THE STATUTE OF LIMITATIONS

The limitations point will be dealt with first, since, if plaintiff is barred by limitations in any event, there is no need to consider the *res judicata* question.

Unlike sections 1020 (subd. 3) and 1136 (subd. 7) of the Real Property Tax Law or section 53 of the Suffolk County Tax Act (L. 1929, ch. 152, as amd. by L. 1941, ch. 140) and unlike section 93 of the Nassau County Tax Act (L. 1916, ch. 541, as added by L. 1919, ch. 154, § 1) which it superseded, *290 section 5-54.0 (subd. b) of the Nassau County Administrative Code is not stated in one continuous paragraph. It is, rather, subdivided within itself and appears in the following form:

“b. Every such conveyance shall be attested by the county treasurer and the seal of the county treasurer shall be attached thereto. When so executed, the conveyance shall be presumptive evidence that:

“1. The sale of the tax lien was regular.

“2. All proceedings prior to such sale, including the assessing of the lands affected by such tax lien were regular.

“3. All notices required by section 5-51.0 of the code to be given previous to the expiration of the time allowed by that section for the satisfaction of the tax lien, were given and were regular and according to law. After six years from the date of record of any such conveyance in the county clerk's office, such presumption shall be conclusive.”

Since the six-year conclusive presumption sentence is part of subparagraph 3, it can be argued that the word “such” in its concluding clause refers only to the presumption concerning notices and not to the regularity of the sale and proceedings prior to sale (*American Smelting & Refining Co. v. Stettenheim*, 177 App. Div. 392, 396; *Cannon v. Towner*, 188 Misc. 955, 965), the more so because doubts as to the construction of taxing statutes are to be resolved in favor of the taxpayer and the burdens imposed by such statutes are not to be extended by implication (*Matter of American Cyanamid & Chem. Corp. v. Joseph*, 308 N. Y. 259, 263; McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 313). Were the provision so construed the presumption concerning regularity of assessment would be rebuttable (*Werking v. Amity Estates*, 2 N Y 2d 43, 48, app. dsmd. and cert. den.

353 U.S. 933), and would be rebutted by the evidence, above detailed, concerning the tax assessors' error in locating the southerly line of Lot 110. The court concludes that the provision should not be so construed, however, because section 5-54.0 (subd. b) is a re-enactment of section 93 of the Nassau County Tax Act, and changes in arrangement or in division of a re-enactment will not work a change in its meaning or construction unless the legislative intent to change is manifest (*Fifth Ave. Bldg. Co. v. Kernochan*, 221 N. Y. 370, 375-376; *Davis v. Davis*, 75 N. Y. 221; McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 422). Nothing but the change in form itself indicates any intent to change the scope of the conclusive presumption, and the Report of the Board of Statutory Consolidation and Revision of Nassau County (N. Y. Legis. Doc., 1939, No. 104, at p. 46, see, also, pp. 34, 47) states that the legislation *291 prepared by the board with limited (and here inapplicable) exceptions was “not intended to and ... does not change the law”.

Nevertheless, the action cannot be dismissed as barred by limitations on the facts presented by the present papers, for a number of reasons.

The first is that if plaintiff's rights in the house, which was not included in the assessment of Lot 110, are held to have been extinguished by the tax sale and deed to Lot 110, there would be a taking of property without due process of law (*Tax Lien Co. v. Schultze*, 213 N. Y. 9; *Jackson v. Smith*, 153 App. Div. 724, affd. on opn. below 213 N. Y. 630). Not only must the property assessed and the property conveyed on the tax sale be the same (*Jackson v. Smith. supra*, at p. 727) (which is not true here, the one and one-half story house not having been included in the Lot 110 assessment), but also “the title of the county for unpaid taxes was no greater than the title of the party against whom the assessment was made” (*Hannah v. Baylon Holding Corp.*, 28 N Y 2d 89, 93; see *Middle Is. Land & Water Co. v. Hutner*, 259 App. Div. 294, 297). Inclusion of the southernmost quarter and the house thereon in Lot 110 did not revert Mary E. Conklin with title to it and the tax sale and deed by the county of Lot 110 vested in the tax purchaser the title to only the land and improvements that Mary E. Conklin had title to (*Tax Lien Co. v. Schultze, supra; Jackson v. Smith, supra; Addison v. Benedict*, 225 So. 2d 335 [Fla.]).

The basis for the conclusion stated being due process, plaintiff could be divested of her title by the tax assessors' error if she had actual or constructive notice of the error or the subsequent tax proceedings and a means of correcting the error. Means there was, at least until the property was advertised for sale for

nonpayment of taxes (Nassau County Administrative Code, § 6-24.0, subds. 4, 5; § 6-28.0). Plaintiff, however, denies actual notice of both the error and the proceedings and cannot be charged with constructive notice of either. Nothing in the statutes authorizing preparation of the tax map (Real Property Tax Law, § 502, subd. 2; § 568; Nassau County Govt. Law, § 603) makes the map anything more than a shorthand method of describing the property assessed (see Nassau County Administrative Code, § 6-7.0). True, the courts will take judicial notice of the map (*Wallach Co. v. Rooney*, 177 App. Div. 640, 643) and when it describes “the property of the plaintiff [owner] and none other” it is sufficient for the purposes of a lawful and effective conveyance of it (*Lancaster S.B.I. Co. v. City of New York*, 214 N. Y. 1, 9). But constructive notice depends *292 upon whether it is provided for by some statute (*Dunn v. City of New York*, 205 N. Y. 342, 353; *Jefferson v. Bangs*, 169 App. Div. 102, 106, affd. 226 N. Y. 612), and while a property owner is chargeable with notice of the tax assessment record (*Dunn v. City of New York*, *supra*; *Curnen v. Mayor of City of New York*, 79 N. Y. 511) he is only chargeable with notice of what the record itself states and not any underlying error and is not bound to go beyond the record (*Curnen v. Mayor of City of New York*, *supra*, at p. 517). Since plaintiff is not chargeable with notice that Lot 110 included part of her property, she is not chargeable with notice of the tax proceeding relating to Lot 110. It follows that the tax deed could not divest plaintiff's title to the property in dispute and was as to that property a nullity.

The second reason is that the Statute of Limitations did not begin to run until defendant's ouster of plaintiff in 1970. Recording of the deed did not start it running, because of the so-called payment rule and because plaintiff, through her tenants, was in continuous occupancy; and the 1963 bar-claim action did not start it running because (as hereafter developed) the complaint was insufficient to give plaintiff notice that a claim of superior title to her property was being made.

It is settled law that a Statute of Limitations, as distinct from a curative act, bars an action to cancel a tax deed, whether the claimed basis for cancellation be an irregularity or a jurisdictional defect in the tax sale (*Helterline v. People*, 295 N. Y. 245; *Robbins v. Abrew*, 275 N. Y. 233; *Dunkum v. Maceck Bldg. Corp.*, 256 N. Y. 275; *Bryan v. McGurk*, 200 N. Y. 332; *Halsted v. Silberstein*, 196 N. Y. 1; *Meigs v. Roberts*, 162 N. Y. 371; see *Weaver Sons Co. v. Burgess*, 7 N Y 2d 172). Nevertheless, if the taxes on a property have in fact been paid, the right to sell the property for nonpayment of taxes

never existed, the tax deed is, therefore, a nullity, and the recording of the deed does not set the Statute of Limitations running (*Cameron Estates v. Deering*, 308 N. Y. 24, 30-31; *Bryan v. McGurk*, 200 N. Y. 332, *supra*; *Challete, Inc. v. Leeds*, 28 A D 2d 717, mot. for lv. to app. den. 20 N Y 2d 647; *Zipperer v. Siegel*, 27 A D 2d 552, on second appeal 29 A D 2d 868; *Middle Is. Land & Water Co. v. Hutner*, 259 App. Div. 294, *supra*; 3 Cooley, Taxation [4th ed.], § 1258; 58 N. Y. Jur., Taxation, § 286), although it appears that the entry into possession of the holder of the tax title will (see *Doud v. Huntington Hebrew Congregation*, 178 App. Div. 748). Furthermore, it is the rule that when a property owner intends in good faith to pay all of his taxes but fails to do so because of a mistake in description, the payment will exonerate *293 the entire property and a tax sale of the excluded part will be held invalid (*Lewis v. Monson*, 151 U.S. 545; *Addison v. Benedict*, 225 So. 2d 335, *supra* [Fla.]; *Euse v. Gibbs*, 49 So. 2d 843 [Fla.]; *Conover v. Allison*, 178 So. 756 [La.]; *Richter v. Beaumont*, 67 Miss. 285; *Shackelford v. McGlashan*, 27 N. M. 454; Ann. 23 A. L. R. 79; *Pratt v. Parker*, 57 N. M. 103; *Smith v. Henley*, 53 Wn. 2d 71 [some of which cases are remarkably close on their facts to the instant case] see Ann. 23 A. L. R. 79, notwithstanding the running of the period of limitations, *Addison v. Benedict*, *supra*; *Euse v. Gibbs*, *supra*; *Conover v. Allison*, *supra*; *Pratt v. Parker*, *supra*; see Ann. 133 A.L.R. 570; *contra*: *Caplan v. Jerome*, 314 Mich. 198).

No New York case exactly in point has been found, but the reasoning of *Kiamesha Development Corp. v. Guild Props.* (4 N Y 2d 378, 387) that it violates due process to deprive an owner of his property by virtue of tax proceedings in which the description of the property is so erroneous as not to give reasonable notice that the property is involved, supports the court's conclusion that it should follow the cases cited above extending the payment rule to partial payment in good faith and hold that recording of the tax deed to Lot 110 did not give notice sufficient to start the running of limitations against plaintiff's claim to that part of her property erroneously included in Lot 110.

Defendant Jablonski argues that the payment rule cannot be applied because the taxes on Lot 110 were never paid. That argument overlooks the fact that what is here in dispute is not Lot 110 but that part of plaintiff's property erroneously included in Lot 110. For the reasons already discussed plaintiff's tax payments for Lot 111 were sufficient to exonerate the disputed part of Lot 110 as well. Moreover, the assessment on Lot 111 and, therefore, plaintiff's tax payments for Lot 111, included the one and one-half story

house, and perhaps also the land, owned by plaintiff and erroneously included within the tax map boundaries of Lot 110. Thus, at least a part of the taxes on Lot 110 had in fact been paid. It could, therefore, be argued that, a tax lien being valid or invalid in its entirety (*Helterline v. People*, 295 N. Y. 245, 251, *supra*; *Middle Is. Land & Water Co. v. Hutner*, 259 App. Div. 294, 297, *supra*), the payment of plaintiff's taxes on Lot 111 invalidated the tax sale of Lot 110 in its entirety. It is not necessary to go that far, for as noted above, plaintiff is not chargeable with notice concerning the error in assessment; there can, therefore, be no question concerning her good faith and she is, consequently, entitled to the benefit of the payment rule. *294

The occupancy of the house and the land in dispute is a further reason why the recording of the deed did not start the statute running. Cooley on Constitutional Limitations (8th Ed., Vol. 2, pp. 763-764) states that: "one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no steps to enforce. It has consequently been held that a statute which, after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims".

Prior to the *Cameron Estates* case (308 N. Y. 24, *supra*) the Court of Appeals had many times suggested, without deciding, that there might be a distinction in tax cases between vacant and occupied land (*Dunkum v. Maceck Bldg. Corp.*, 256 N. Y. 275, *supra*; *Peterson v. Martino*, 210 N. Y. 412; *Bryan v. McGurk*, 200 N. Y. 332, 336, *supra*; *Halsted v. Silberstein*, 196 N. Y. 1, *supra*; *People v. Ladew*, 189 N. Y. 355, on rearg. 190 N. Y. 543; *Meigs v. Roberts*, 162 N. Y. 371, *supra*; *Joslyn v. Rockwell*, 128 N. Y. 334) and had been careful to note that the land in question in those cases was vacant and unoccupied (*ibid.*, and see *Helterline v. People*, 295 N. Y. 245, *supra*). In the *Cameron Estates* case (*supra*, p. 31) the court, citing an earlier edition of the Cooley passage quoted above, espoused the principle and declared applicable to tax cases the holding of *Ford v. Clendenin* (215 N. Y. 10, 17) that "The owner of real property who is in possession thereof may wait until his possession is invaded or his title is attacked before taking steps to vindicate his right". Here, as

already noted, there was no invasion of possession until the late summer of 1970.

Nor was the 1963 bar-claim action a sufficient attack on plaintiff's title to start the statute running, for far from stating "the object of the lawsuit in such a way as to warn her [plaintiff] of the need of a defense" (*Fuhrmann v. Fanroth*, 254 N. Y. 479, 483) the vague and general allegation of the reason for joining plaintiff as a party defendant in that action was insufficient to constitute notice to her that the object of the action was to divest her of title to her property (*Peterson v. Martino*, 210 N. Y. 412, 420, *supra*; see *Zipperer v. Siegel*, 27 A D 2d 552, on second appeal, 29 A D 2d 868, *supra*; *Union & New Haven Trust Co. v. People*, 15 A D 2d 1, 5). *295

A third and final reason why the motion cannot be granted is that defendant's affidavits do not negate the possibility of an estoppel against pleading the statute, such as was involved in *Kemp v. Hunt* (268 App. Div. 621, and see decision of Mr. Justice Van Voorhis, as he then was, in the Record on Appeal at folio 425 and following; see, also, *Zipperer v. Siegel*, *supra*, and Ann. 50 A. L. R. 668, 870). The possible basis for estoppel against the tax purchaser and his "no consideration" grantee is outlined below, under the *res judicata* heading, and nothing in defendant's affidavits suggests that such an estoppel would not operate against her as well (see 31 C. J. S., Estoppel, § 133, p. 670).

THE RES JUDICATA ISSUE

Generally a final judgment, though not sustained by the evidence or erroneously decided on the law is, nonetheless, conclusive between the parties and their privies (*Matter of New York State L. R. Bd. v. Holland Laundry*, 294 N. Y. 480, 486; *Matter of Holmes*, 291 N. Y. 261, 269), and a judgment by default is as conclusive as any other (*Crouse v. McVickar*, 207 N. Y. 213). There is, however, an exception to those rules when a person who has a prior and superior interest to a bar-claim plaintiff is joined as a party defendant. In such a case, unless the complaint clearly sets forth plaintiff's claim that such defendant's interest be declared subordinate, the issue concerning defendant's interest is not tendered in the action and defendant, though he defaults, is not barred (*Tax Lien Co. v. Schultze*, 213 N. Y. 9, *supra*; see, also, *Pagano v. Arnstein*, 292 N. Y. 326; *Jasper v. Rozinski*, 228 N. Y. 349; *King v. Franmor Equity Corp.*, 260 App. Div. 303, *affd.* 285 N. Y. 563). Involved in the *Tax Lien Co.* case (*supra*) were easements of light, air and access appurtenant to property adjoining the tax lot described in the judgment of tax lien foreclosure. Though the owners of the adjoining property

were not necessary parties to the foreclosure action, they were joined, the complaint alleging "That all of the defendants have or may have and the plaintiff believes that such defendants have or may have an interest in or claim upon the real property hereinafter described by way of lien, mortgage, devise, dower right, purchase, *easement*, operation of law, inheritance from or marriage with any of the above named defendants or otherwise" (p. 13, emphasis supplied). The adjoining property owners, having acquired their easements prior to the tax lien, were not subject to it, and despite their default the easements were held not extinguished, the court *296 stating (at p. 12) that "If property rights which are excluded from an assessment are sold or extinguished by a tax sale, there would be a taking of property without due process of law" and that (at p. 14) "As the question of the defendants' having prior and superior easements to the tax lien was not tendered as an issue in the foreclosure action, the defendants are not bound by the judgment therein".

Plaintiff Lily Conklin had title to the disputed area that was prior and superior to the tax lien on Lot 110. She was not, except for the tax assessor's error in locating the southerly line of Lot 110, even a proper party to the 1963 bar-claim action. The allegation in the complaint in that action was general, the only attempt at particularization being the statement that the interest claimed by defendants other than those named was a fee. That allegation was no more notice to Lily Conklin that the title to her house and part of her land were in dispute than was the reference to "easement" in the *Tax Lien Co.* case (*supra*), especially since the complaint served upon her referred to Lot 110 only and made no reference to Lot 111. Since Lily Conklin did not, as did the defendant in *Pagano v. Arnstein* (*supra*), litigate the question in the 1963 action, she is not concluded by the judgment entered in that action.

While the rule of the *Tax Lien Co.* case (*supra*) is determinative, the court notes that, were it not denying the motion, it would in any event grant plaintiff leave to replead to set forth a cause of action to set aside the 1963 judgment for fraud or excusable mistake. The court has inherent power, not limited by the provisions of CPLR 5015, to set aside a judgment on such grounds, or "in the interests of substantial justice" (*Pagano v. Arnstein*, 292 N. Y. 326, 331, *supra*; *755 Seventh Ave. Corp. v. Carroll*, 266 N. Y. 157; *Crouse v. McVickar*, 207 N. Y. 213, *supra*; *Ladd v. Stevenson*, 112 N. Y. 325; 5 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 5015.12; 9 Carmody-Wait, *Cyclopedia of New York Practice* [2d], § 63:163; 20 N. Y. Jur., Equity, § 130 *et seq.*; Restatement, Judgments, §§ 112-130). That there may be basis for such an action is strongly suggested by the facts that (1) Lily Conklin was joined as a party defendant in the 1963 action though she had no interest in Lot 110, and there was no basis for joining her in the action, except through the error of the tax assessor in locating the southerly line of Lot 110, (2) though plaintiff in the 1963 action was, therefore, apparently aware of the assessment error and of the fact that the one and one-half story house was on Lot 110, his attorney affirmatively represented to the court that Lot 110 was vacant except for a *297 dilapidated house (the 2 1/2 story house on the northerly portion) and concealed from plaintiff, by the very general allegations of the complaint the true reason for joining her, (3) notwithstanding the rights ostensibly obtained by the 1963 judgment, the tax lien purchaser and his immediate grantee played possum for six years, while leaving plaintiff in undisturbed possession of both house and land, allowing her to collect the rents and pay the taxes on the house, if not the house and lot, in the evident hope that plaintiff would not discover the tax assessor's error until the conclusive presumption period had run.

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178 So. 756
Court of Appeal of Louisiana, First Circuit.

CONOVER et al.

v.

ALLISON et al

No. 1798 | Feb. 15, 1938

Appeal from District Court, Parish of Calcasieu; Mark C. Pickrel, Judge.

Action by W.B. Conover and another against Mrs. Ernestine Perkins Allison and others for recognition of ownership of realty purchased by the plaintiffs from a tax purchaser. From an adverse judgment, the defendants appeal.

Reversed and rendered.

Attorneys and Law Firms

*756 Ellis Barnes and Tinsley Gilmer, both of Lake Charles, John H. Benckenstein, of Beaumont, Tex., and Richard A. Anderson, of Lake Charles, for appellants.

Liskow & Lewis, of Lake Charles, for appellees.

Opinion

OTT, Judge.

This suit involves the validity of a tax title dated May 16, 1925, covering the E. ½ of S.W. ¼ of N.W. ¼, Sec. 3, T. 8 S, R. 10 W., in Calcasieu parish. The said property was sold by the sheriff of said parish to J.H. Mathieu for the taxes of 1924, assessed in the name of J.K. Perkins. The tax purchaser sold the property to the present plaintiffs on June 1, 1936, for a consideration of \$1,200. Plaintiffs allege the regularity of the tax sale and the validity and incontestability of their title to the property by reason of the prescription provided for in article 10, § 11, of the Constitution, as amended, see Act. No. 4 of 1927, Ex.Sess.

Plaintiffs are asking that they be recognized as the owners of said property, and that a certain oil, gas, and mineral lease on said property and a certain sale of the mineral rights thereon made by defendant, Mrs. Allison, to S.P. Benckenstein in 1936, be canceled and erased from the records of the parish; that an assignment *757 made by said Benckenstein to

the Humble Oil & Refining Company of said mineral lease from Mrs. Allison be set aside and canceled; and that certain royalty and mineral sales made by said Benckenstein to three other persons be likewise canceled and erased from the records of the parish. All of the parties holding and claiming mineral rights on the property from or through Mrs. Allison are made parties defendant with her, and all defendants have filed practically the same answer, in which the validity of the tax sale through which plaintiffs claim is attacked and alleged to be null and void.

The trial court rendered judgment in favor of plaintiffs recognizing them as the owners of said land, and decreeing the lease and sale from Mrs. Allison to Benckenstein, and the assignment and sale made by him to the other defendants, to be null and void, and ordering said instruments canceled and erased from the records of the parish. From this judgment all defendants have appealed.

The case was tried on an agreed statement of facts. The issues in the case are somewhat involved, but we will endeavor to give a brief statement of them as they appear from the pleadings and the agreed statement of facts.

In May, 1923, a judgment was rendered in the succession of Mrs. Delphine Perkins, deceased wife of J.K. Perkins, in which the surviving husband and the ten major children of the deceased, issue of her marriage with said J.K. Perkins, were recognized as owners and put in possession of several tracts of land, including that involved in this suit, located in the parishes of Calcasieu and Beauregard, in the proportion of an undivided one-half to the surviving husband and one-twentieth to each of the children. The defendant, Mrs. Ernestine Perkins Allison, was one of the children and heirs. Some four months after the rendition of this judgment, the co-owners executed an act of partition in which they declared that they were co-owners of the property as set forth in said judgment, and, desiring to partition same, they proceeded to allot to each co-owner certain specified tracts; Mrs. Allison receiving 110 acres in Calcasieu parish, including the twenty acres in controversy. The only tract in section 3 allotted to Mrs. Allison in the partition was the property here in controversy; that is, the E. ½ of S.W. ¼ of N.W. ¼. Another coheir, Mrs. Odelia Alston, received, among other property, the S.W. ¼ of N.E. ¼ in section 3.

The act of partition was recorded in the conveyance records of Calcasieu parish, but, through an error of the recorder, the property allotted to Mrs. Allison in section 3 was described

as the E. ½ of S.W. ¼ of N.E. ¼; that is, the quarter section was given as N.E. ¼ instead of N.W. ¼. As Mrs. Alston was allotted all of the S.W. ¼ of N.E. ¼ of this section, it is obvious that, as erroneously recorded, the act of partition appeared to give the E. ½ of S.W. ¼ of N.E. ¼ to both Mrs. Alston and Mrs. Allison, with no disposition whatever made of the land in suit, the E. ½ of S.W. ¼ of N.W. ¼. The original act of partition was withdrawn from the recorder's office in Calcasieu parish in order to be recorded in Beauregard parish, on March 31, 1924, and this original act remains on file in Beauregard parish.

In making up the assessments for the year 1924, the assessor, in describing the property of Mrs. Allison, listed it as 110 acres, assessed at \$550, and described her property as it appeared on the records; that is, the property in section 3 was described as the E. ½ of S.W. ¼ of N.E. ¼ instead of E. ½ of S.W. ¼ of N.W. ¼, as it should have been described, Mrs. Allison did not return her property for assessment for that year.

For that year, the assessor assessed Mrs. Alston with the W. ½ of S.W. ¼ of N.E. ¼ of section 3, instead of all of said S.W. ¼ of N.E. ¼ which should have been assessed to her as she owned the whole forty, and not merely the west half. The E. ½ of S.W. ¼ of N.W. ¼ of section 3 was assessed to J.K. Perkins, Sr., for the year 1924, along with other property, although this twenty acres was not owned by J.K. Perkins, as it had been included in the partition the previous year, and had been allotted to Mrs. Allison in the original act of partition.

In December, 1924, Mrs. Allison paid all of the taxes on the 110 acres of land with which she had been assessed in the parish of Calcasieu. She owned no more than 110 acres in this parish, all of which she had acquired in the partition. She owned only 20 acres in section 3.

J.K. Perkins, Sr., did not pay the taxes on the E. ½ of S.W. ¼ of N.W. ¼ of section 3, which had been assessed to him *758 along with other property for the year 1924, and the sheriff sold this tract at tax sale in May, 1925, under the assessment in the name of J.K. Perkins, Sr.; J.A. Mathieu becoming the purchaser. It is this tax title under which plaintiffs claim ownership of this twenty-acre tract. It is admitted that the property in controversy has not been in the actual possession of any of the parties to the suit.

Plaintiffs rely on the prescription or peremption provided in article 10, § 11, of the Constitution, as amended, to cure

and perfect their tax title against any and all defects and irregularities, as more than ten years have elapsed since the sale. They also plead an estoppel against all defendants to urge any invalidity against their tax title on the ground that Mrs. Allison did not assert title to the property in suit at any time since the act of partition, but, on the contrary, asserted title to and claimed ownership of the E. ½ of S.W. ¼ of N.E. ¼ of section 3, as the act of partition was recorded by the recorder, by selling said last-mentioned tract and reacquiring it by the same description; and also by permitting the property in dispute to be assessed to and the taxes to be paid by said tax purchaser from 1925 to 1936. The trial court sustained both the plea of prescription and the plea of estoppel.

[1] If the payment by Mrs. Allison of her taxes on 110 acres of land in Calcasieu parish for the year 1924 included the payment of the taxes on the 20 acres in dispute and as described in the original act of partition, it follows that the assessment and sale of this 20 acres in the name of J.K. Perkins, Sr., for that year would be a nullity, and the prescription or peremption provided by the Constitution could not validate the sale. *Bernstine v. Leeper et al.*, 118 La. 1098, 43 So. 889. In order to determine the effect to be given the payment by Mrs. Allison of the taxes on 110 acres of land with which she was assessed, the situation must be viewed in the light of conditions as they existed in 1924. At least three vital considerations must be given effect in discussing the situation as it then existed.

[2] In the first place, Mrs. Allison paid taxes for that year on exactly the number of acres of land that she had acquired in the partition, and this was all the land that she owned in the parish. It follows from this circumstance that she intended to pay the taxes on her property in that parish and not on the property of her sister, Mrs. Alston. All of the property was described by governmental subdivisions, and the acreage with which Mrs. Allison was assessed corresponded exactly with the number of acres which she acquired in the partition.

In the second place, Mrs. Alston should have been assessed with all of N.W. ¼ of N.E. ¼ of section 3, as she was the record owner of this forty. If the assessor followed the record of the partition in assessing Mrs. Allison with the east half of this forty, there is no reason why he should not also have assessed Mrs. Alston with the whole forty, in which case there would have been a clear duplication in the assessment of the east half. If the assessor was so meticulous in following the record in the one case, there is no reason why he should not be charged with the same meticulous care in following the

record in the other. If he had done so, Mrs. Alston would have been required to pay taxes on the property that she owned as shown by the records, and in that case there would have been no difficulty in imputing the payment by Mrs. Allison of her taxes on all the property she actually owned in the parish. She cannot be held responsible for the failure of the assessor to assess Mrs. Alston with property which the record showed that she owned.

And in the third place, the act of partition as recorded showed on its face that all of the land owned by the parties in indivision, including the land in controversy, was divided and partitioned, and this recorded act of partition showed that J.K. Perkins, Sr., did not acquire this twenty acres here in dispute with which he was assessed in 1924, and under which assessment the tax sale here involved was made. The record did not show that J.K. Perkins, Sr., owned this twenty acres any more than it showed that the other co-owners owned it. Consequently, it cannot be said that this twenty acres was assessed and sold in the name of the record owner, and, certainly, it was not assessed and sold in the name of the real owner.

[3] Our conclusion is that the payment by Mrs. Allison of the taxes on all the property which she owned in Calcasieu parish in 1924, being 110 acres, operated as a payment by her of the taxes on the property here in dispute assessed and sold for the taxes of that year in the name of one who was not the owner. The mere *759 fact that she paid the taxes on part of her property which was incorrectly described as being in a different quarter of the section in which her property was actually located, could not affect the fact that she paid the taxes for that year on all the property owned by her in the parish. *Verdine et al. v. Carter et al.*, 170 La. 226, 127 So. 609; *Kellogg v. McFatter*, 111 La. 1037, 1038, 36 So. 112; *Page v. Kidd, Chaffraix, Intervenor*, 121 La. 1, 46 So. 35.

The last of the above-cited cases has peculiar application here. In that case the court made the following statement on a set of facts not materially different from the situation here: "The assessor is expected to describe the property. He is supposed to familiarize himself with areas and boundaries, and, after examination of the record, to properly assess the property of taxpayers. After this has been done, the owner who is in good faith is warranted in taking it for granted that the assessment had been properly made, and in paying the taxes is naturally led to believe that he has paid on the whole property, even though there may be error in the description of the assessment, which is seldom indorsed on the tax receipt. If the description

in fact is erroneous, and is not strictly within the boundaries, owing to the error, he nevertheless pays for that which he has a right to assume is the whole area, particularly if the amount on which he pays corresponds to the assessed value of the land, he cannot be made to lose his land."

[4] As the tax sale was null for the reasons stated above, plaintiffs cannot now give life and effect to an invalid deed by urging against the owners a plea of estoppel. The rights of plaintiffs and their author in title must be judged from the situation as it existed in 1924 when the invalid sale was made; if the tax purchaser acquired no title then to the property, neither he nor his vendees could acquire any by urging the plea of estoppel.

[5] Moreover, there is nothing to show that plaintiffs and their author in title have been misled by anything said or done by Mrs. Allison. The latter was not aware of the error in the description of her property, and, so far as the record shows, she knew nothing of the sale of her property for the taxes of 1924. She had paid all of her taxes for that year, and had no reason to believe that some of her property would be sold for taxes.

[6] It is true that Mrs. Allison transferred to a third person in 1926 all the property which she had acquired in the partition, and reacquired the property in 1930, and that in both transfers the twenty acres was incorrectly described in the same way as the act of partition was incorrectly recorded. But it does not appear that Mrs. Allison was then aware of this error in the description. It must be presumed that she intended to sell the property that she actually owned, as it is not to be presumed that she intended to commit a fraud by selling property that she did not own. *Waller v. Colvin et al.*, 151 La. 765, 92 So. 328. So far as the record shows, she did not discover the error in the description of the property until the year 1936, when she executed a deed correcting the erroneous recordation of the original act of partition. Neither plaintiffs nor their author in title were parties to the acts by which Mrs. Allison sold and reacquired the property by an erroneous description. Their course of action does not appear to have been affected in the least by these transfers, as it does not appear that they would have taken any different course relative to the property than they have taken had Mrs. Allison never executed the acts of transfer and reacquisition.

We think the plea of estoppel is without merit. The conclusion that we have reached necessitates a reversal of the judgment.

For the reasons assigned, it is ordered that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the suit of the plaintiffs be dismissed, and their demands rejected; that there be judgment in favor of the defendants and against the plaintiffs, annulling and setting aside the tax deed by the sheriff and tax collector of Calcasieu parish to J.H. Mathieu, dated May 16, 1925, and recorded on May 26, 1925, in the conveyance records of Calcasieu parish, in Conveyance Book 209, page 118, and that said deed be decreed null and void and of no effect; that plaintiffs be decreed to have acquired

no right or title to the property described in said tax deed by reason of the sale by said tax purchaser to them on June 1, 1936, under deed recorded in Conveyance *760 Book 288, page 164, of the conveyance records of Calcasieu parish.

It is further ordered that plaintiffs pay all cost of the suit in both courts.

All Citations

178 So. 756

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49 So.2d 843
Supreme Court of Florida, en Banc.

EUSE et al.
v.
GIBBS et al.

Jan. 9, 1951. | Rehearing Denied Jan. 24, 1951.

Suit by Lola J. Gibbs, joined by her husband, W. R. Gibbs against Arthur F. Euse and another, involving a boundary line between contiguous tracts of property. From a decree of the Circuit Court for Hillsborough County, L. L. Parks, J., the defendants appealed. The Supreme Court, Sebring, C. J., held that where defendant paid taxes on tract assessed according to description in his deed and a fence line had been established as the boundary line between adjoining tracts by the parties though it was erroneously located some 64 feet west of the true line between the properties, payment of taxes assessed against the east 20 acre tract in accordance with the deed description became a payment of taxes on the entire tract in possession of defendant including the disputed strip.

Reversed with directions that a decree be entered for defendant.

Thomas, J., dissented.

West Headnotes (6)

[1] **Boundaries**

⇒ Agreement or Recognition as to Location of Boundary

In suit involving boundary line between contiguous tracts, substantial evidence sustained findings that when conveyances of tracts were made by grantors to defendant, parties agreed that fence line should constitute true line between parties and that after defendant executed a deed in 1931, he remained in actual possession of the strip of land lying between fence line and true line and that the line agreed upon by the parties became established as the true line by acquiescence and recognition.

3 Cases that cite this headnote

[2] **Boundaries**

⇒ Conclusiveness and Effect of Agreement

Where boundary line between contiguous land is uncertain or disputed, owners thereof may agree upon a certain line as the permanent boundary line, and where the agreement is followed by actual occupation according to such line as the boundary, the line will be binding upon them and their successors in title as the boundary.

1 Cases that cite this headnote

[3] **Boundaries**

⇒ Persons Bound by Agreement

Where parties were uncertain as to exact boundary line between adjoining tracts when deeds were executed and they all agreed that at time of executing the deeds a fence line should constitute the true boundary, and such line was established by acquiescence and recognition for a 27-year period, successors in title to one of the parties could not question the legality of the agreement.

1 Cases that cite this headnote

[4] **Boundaries**

⇒ Conclusiveness and Effect of Agreement

Where original party breached an agreement that a fence line should constitute the true line because parties were uncertain as to exact boundary line, a disputed strip of land west of the true line but east of the fence became part of the 20-acre tract lying east of the true line regardless of the fact that the description thereof was not contained in the description in the deed executed by the grantor of defendant to defendant.

1 Cases that cite this headnote

[5] **Taxation**

⇒ Operation and Effect of Payment in General

Taxation

⇒ Ownership of Property

Where defendant paid taxes on tract assessed according to description in his deed and a fence line had been established as boundary line

between adjoining tracts by parties though it was erroneously located some 64 feet west of the true line, payment of taxes assessed against east 20 acre tract in accordance with deed description became a payment of taxes on the entire tract in possession of defendant including the disputed strip, and issuance of a tax deed on the west tract had no effect on disputed strip which remained a part of the east 20 acre tract owned by defendant. F.S.A. § 95.19.

3 Cases that cite this headnote

[6] **Taxation**

↔ Actions by Claimant Under Tax Title

Where suit by plaintiff against defendant was a suit by tax deed claimant against a person lawfully in possession of his own property which he had derived by deed and agreement fixing the boundary line thereof which property in legal effect was not covered by the description in the tax deed, the statute providing that holder of a tax deed not bringing suit to recover possession of property conveyed by his deed within four years after its issuance shall not be entitled to recover possession as against the adverse possessor was not applicable. F.S.A. § 196.06.

2 Cases that cite this headnote

Attorneys and Law Firms

*844 Maynard Ramsey, Tampa, for appellants.

Hampton, Bull & Crom and John R. Himes, all of Tampa, for appellees.

Opinion

SEBRING, Chief Justice.

The appeal is from a final decree entered in favor of the plaintiffs in a suit involving the boundary line between two contiguous tracts of property.

In 1924 one Cook deeded to Euse, the defendant below, a 20-acre tract of land described in the deed as the East Half of the Northwest quarter of the Northwest quarter of section 36,

Township 27 South, Range 18 East, being twenty acres more or less. The following year one Keubler conveyed to Euse the title to an adjoining 20-acre tract of land, described in the deed as the West Half of the Northwest quarter of the Northwest quarter of section 36, Township 27 South, Range 18 East, being twenty acres more or less. In 1931 Euse deeded the westerly 20-acre tract acquired from Keubler to Frank J. Costa and Maybelle Henock Costa, his wife. By agreement between Cook and Euse and Keubler and Euse, grantors and grantee in the original conveyances, and by agreement between Euse and Costa and wife, grantor and grantees in the conveyance executed in 1931, an existing fence line which ran between the tracts of land was fixed by the parties as the common boundary line between the properties. As will be noticed later, the fence line fixed by common consent as the boundary line was some 64 feet west of the true line between the properties.

In 1938 Costa entered into an agreement to deed the west 20-acre tract of land to one Greenlee; the agreement describing the property to be conveyed as the West Half of the Northwest quarter of the Northwest quarter of section 36, Township 27 South, Range 18 East, being twenty acres more or less. Sometime between 1938 and 1942 the west tract of land reverted to the State of Florida for non-payment of taxes and in 1941 a tax deed issued on the property. In the same year the tax deed holder sold his interest in the property to Costa, the holder of the former legal title, and in 1942 Costa conveyed title to the property to Greenlee pursuant to the agreement for deed. In 1947 Greenlee and wife conveyed the property acquired from Costa to the appellee Lola J. Gibbs and the latter went into possession.

At all times between the date of his purchase of the east 20-acre tract in 1924 and the institution of this suit, the appellant Euse remained in possession of all property east of the boundary line fence, claiming the entire area as his own by reason of the deed given him by the grantor Cook and by virtue of the existing agreements that the fence line should constitute the west boundary line of the property. During this period of time Euse regularly returned, and paid taxes on, the East Half of the Northwest quarter of the Northwest quarter of section 36 but never filed a separate return on the 64-foot strip of land which lay between the true line and the fence line that had been established as the boundary line between the adjoining 20-acre tracts.

In 1949 Lola Gibbs caused the property described in her deed to be surveyed by a duly licensed surveyor. She learned from the survey that the fence line was not on the true line but

lay some 50 to 65 feet west of the true line between the properties. *845 She thereupon sought to take possession of the property up to the true line by attempting to erect a temporary fence along the true line. The defendant Euse resisted her efforts by a show of force and she then brought the present suit, praying in her bill that the court decree that Euse had no interest in the strip of property and that he be enjoined from interfering with or molesting her in the enjoyment, occupation and use thereof.

Evidence was submitted on the issues made by bill and answer and at final hearing the trial court rendered a decree containing, in substance, the following findings: (1) When, on August 4, 1931, Costa acquired his deed from Euse to the property which had been conveyed by Keubler to Euse and which was described as the West Half of the Northwest quarter of the Northwest quarter of Section 36, Township 27 South, Range 18 East, being twenty acres more or less, the legal title to the entire 20-acre tract, including the strip of land in controversy, passed to Costa; (2) at the time of the conveyance of the title by Euse to Costa both Euse and Costa agreed that the eastern boundary of the tract conveyed by the deed was marked and fixed by the fence line, and as the result of this agreement Costa went into actual physical possession of only so much of the 20-acre tract as was located west of the fence line; (3) Costa and his successors in title acquiesced for more than 27 years in Euse's actual possession, occupancy, and use of the strip of land lying east of the fence line; (4) by reason of his actual possession, occupancy and use of the strip of land in controversy for a period of 7 years after the execution of the Costa deed, Euse, on August 4, 1938, acquired title to the controverted strip by adverse possession; (5) when the tax deed to the West Half of the Northwest quarter of the Northwest quarter of Section 36 issued in 1941 it cut off Euse's title to this strip of land acquired by adverse possession just as it extinguished Costa's legal title to the remainder of the 20-acre tract, and it vested in the holder of the tax deed, a new, paramount and independent title from the State of Florida to the whole of the 20-acre tract; (6) the new and independent title acquired by the tax deed holder to the whole of the 20-acre tract was subsequently conveyed by the holder to Costa in 1941 and by mesne conveyances became vested in the plaintiff, Lola J. Gibbs, in 1947; (7) during the 27-year period of occupancy of the disputed strip of land by Euse the latter never returned the strip of land for taxation and never paid taxes thereon; (8) due to the fact that Euse did not pay taxes on this strip of land after the issuance of the tax deed he never acquired title by adverse possession against, and never became an 'adverse possessor' of, the strip as against

the tax deed holder and his successors in title; for the reason that at the time of the execution of the tax deed chapter 19254, Laws of Florida, 1939, Section 95.19 Florida Statutes, 1941, F.S.A., was in force and effect, and provided, in substance, that there could be no adverse possession without color of title unless the adverse claimant returned the property for taxation within one year after entry thereon and paid taxes annually thereafter; (9) because Euse was not an 'adverse possessor' of the strip of land within the contemplation of section 95.19, supra, Euse was precluded from setting up as a defense to the suit section 196.06 Florida Statutes, 1941, F.S.A., which provides that the holder of a tax deed who does not bring suit to recover possession of property conveyed by his deed within a period of 4 years after its issuance shall not be entitled to recover possession as against a person in adverse actual possession, use and occupancy.

Based upon these findings the trial court decreed that the equities of the cause were with the plaintiffs and against the defendant; that the plaintiff Lola J. Gibbs was the owner of the westerly 20-acre tract of land described in the tax deed, including the disputed strip; and that the defendant Euse should be perpetually enjoined from going upon the premises or molesting plaintiff in her possession, occupancy, use and enjoyment of the premises.

The present appeal is from this ruling.

*846 [1] We find substantial evidence in the record to sustain the findings of the trial court that when the conveyances of the two 20-acre tracts were made by Cook and Keubler to Euse in 1924 and 1925, respectively, the parties agreed that the fence line should constitute the true line between the properties. There is sufficient evidence to sustain the finding that when Costa purchased the westerly tract from Euse in 1931 he understood and agreed that the fence line should constitute the boundary line and understood and agreed that only so much of the westerly tract as was located west of the fence line should pass to him under his deed. The record also amply sustains the finding that at all times after Euse executed a deed to Costa in 1931 Euse remained in the actual possession of the strip of land lying between the fence line and the true line claiming the same as his own, and that the line agreed upon by the parties became established as the true line by acquiescence and recognition.

We cannot agree with the findings of the trial court that Euse lost title to the strip of land in controversy by virtue of the issuance of the tax deed in 1941 and that thereafter he was

precluded from claiming title to the land by reason of the fact that he did not return the land for taxation as required by chapter 19254, Laws of Florida 1939, section 95.19 Florida Statutes, 1941, F.S.A.

[2] We find the law to be that where the boundary line between contiguous lands is uncertain or disputed, the owners of such lands may agree upon a certain line as the permanent boundary line; and where the agreement is followed by actual occupation according to such line as the boundary, the line will be binding upon them, and their successors in title, as the boundary. 'The line becomes binding, not upon the principle that the title to real estate can be passed by parol, but for the reason that the proprietors have by such consent and conduct agreed permanently upon the limits or the extent of their respective lands or property.' *Watrous v. Morrison*, 33 Fla. 261, 14 So. 805, 807; *Kilgore v. Leary*, 131 Fla. 715, 180 So. 35; *Williams v. Pichard*, 150 Fla. 371, 7 So.2d 468; *Palm Orange Groves v. Yelvington, Fla.*, 41 So.2d 883.

[3] As we view the evidence in the record, Cook, Keubler, Costa and Euse were uncertain as to the exact boundary line between the adjoining tracts of land at the time deeds were executed in 1924, 1925 and 1931. In this state of uncertainty they all agreed at the time of executing the respective deeds that the fence line should constitute the true boundary. The line agreed on by these parties has been established by acquiescence and recognition for a 27-year period. The successors in title to Costa cannot now be heard to question the legality of the agreement.

[4] The original parties having reached an agreement that the fence line should constitute the true line, the disputed strip of land west of the true line, but east of the fence, became for all purposes part of the 20-acre tract lying east of the true line, regardless of the fact that the description of such strip of land was not contained in the description in the deed given in 1924 by Cook to Euse. As stated in *Price v. De Reyes*, 161 Cal. 484, 119 P. 893, 894: 'The line so agreed on becomes in legal effect the true line, the agreement as to the line may be in parol, and it does not operate to convey title to the land which may lie between the agreed line and the true line, but it fixes the line itself and the description carries title up to the agreed line regardless of its accuracy; the agreement as to the line is not in violation of the statute of frauds, because it does not transfer title; the parties hold up to the agreed line by virtue of their original deeds and not by virtue of the parol agreement; 'the division line when thus established attaches

itself to the deeds of the respective parties and simply defines, not adds to, the lands described in the deeds,' and, if more is thus given to one than the calls of his deed actually require, he 'holds the excess by the same tenure that he holds the main body of his land.'

*847 [5] [6] It is plain from the evidence that Euse paid taxes on the east 20-acre tract assessed each year according to the description in the deed which he acquired from Cook in 1924. The boundary line fixed by agreement of the parties attached itself to the land described in the deed from Cook to Euse and under such circumstances the payment of taxes assessed against the east 20-acre tract in accordance with the description contained in the Cook deed became a payment of taxes on the entire tract of land in possession of Euse under the deed and the agreement between the parties. See *Price v. De Reyes*, supra.

So it is that while in 1941 the legal title to the westerly 20-acre tract of land owned by Costa may have been cut off and extinguished by virtue of the issuance of the tax deed, the issuance of the tax deed had no effect upon the strip of land lying east of the fence line which theretofore had been established as the boundary line by the parties. This strip of land was and remained part of the east 20-acre tract which was owned by the defendant Euse and as to which taxes had been regularly paid. Thus it was not affected by the tax deed proceedings instituted against the west 20-acre tract and hence the provisions of chapter 19254, Laws of Florida 1939, section 95.19, Florida Statutes 1941, F.S.A. were not applicable. Neither were the provisions of section 196.06, Florida Statutes 1941, F.S.A. applicable, for the suit by the plaintiff against the defendant was not, in legal effect, a suit against a person in adverse possession as against one claiming the right of possession by virtue of the issuance of a tax deed creating a new and independent title, but was a suit by a tax deed claimant against a person lawfully in possession of his own property which he had derived by deed and agreement fixing the boundary line of such property-property which, in legal effect, was not covered by the description in the tax deed.

It follows that the plaintiff has not established that she is the owner of the fee simple title to the strip of land in controversy and hence that the decree appealed from should be reversed with directions that a decree be entered for the defendant in conformance with the principles herein stated.

It is so ordered.

THOMAS, J., dissents.

TERRELL, CHAPMAN, ADAMS, HOBSON, and
ROBERTS, JJ., concur.

All Citations

49 So.2d 843

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14 S.Ct. 424

Supreme Court of the United States

LEWIS

v.

MONSON.

No. 385. | February 5, 1894.

In error to the circuit court of the United States for the southern district of Mississippi. Affirmed.

****424** Statement by Mr. Justice BREWER:

This was an action brought by the plaintiff in error (plaintiff below) against David D. Withers to recover possession of a tract of land containing 80 acres, and described as follows: 'Lots 5 and 6 of section 22, township 3, range 5 west, Wilkinson county, Mississippi.' A jury was waived, and the case tried by the court. Findings of fact were made, and a judgment entered thereon in favor of the defendant, which judgment is now before us on error. 44 Fed. 165. Since the record was filed in this court, the defendant, Withers, has died, and the suit been revived in the name of his executor. The facts are these: Plaintiff's title was based on a tax deed, and the single question in the case is as to the sufficiency of that deed, for the defendant was in possession by his tenants, and, as is not disputed, held, prior thereto, the fee-simple title. The tax deed was for the delinquent taxes of the year 1887, which amounted to \$4.84, while the land was of the value of \$6,000. At the time of the entry and patent of these lands in 1833 and 1835 they were included in lots 3 and 4 of section 22, and the whole section, as shown by the tract book of original entries, was subdivided into four lots,—lot 1, containing 88 acres; lot 2, 62 acres; lot 3, 80 acres; and lot 4, 120 acres; and such was the description in all the defendant's muniments of title. In 1884 an act passed the legislature authorizing the board of supervisors to purchase a new and complete set of maps of the several townships of the county. In pursuance of this law, and soon after its passage, new maps were purchased and deposited in the chancery clerk's office. On the map of this township, section 22 was subdivided into six lots,—lot 1, containing 88 acres; lot 2, 62 acres; lot 3, 40 acres; lot 4, 80 acres; lot 5, 40 acres; and lot 6, 40 acres. The findings do not show the form of the assessment prior to 1875, but in that year, under a special act of the legislature, it was assessed to the defendant as section 22, containing 350 acres. In 1879 it was assessed to him as lots 2, 3, and 4, section 22, etc., containing

262 acres. In 1883 in the same way, except that the number of acres was stated at 260. In 1887, for the first time, the section was assessed as follows: Lot 1, 88 acres, to S. A. Fetters, agent; lots 2, 3, and 4, 182 acres, to D. D. Withers; and lots 5 and 6, 80 acres, to 'Unknown.' The pencil memorandum of defendant's lands, sent by his agent to the assessor as a return of assessment, was not in the form required by the assessment laws of Mississippi, but was accepted as sufficient by the assessor. That memorandum describes the land as lots 2, 3, and 4, and as containing, respectively, 62, 80, and 120 acres. Without the knowledge of defendant or his agents, the assessor, in making up the assessment roll, changed the description to conform to that in the new map. On the roll as finally prepared, lots 2, 3, and 4 appear as valued at \$9 per acre, and lots 5 and 6 at \$1 per acre.

The minutes of the board show no order changing the assessment of D. D. Withers, or the acreage of lots 2, 3, and 4, and none in regard to the said lands or lots 5 and 6 of said section, other than the general one receiving and approving the assessment roll of 1887, which describes lots 2, 3, and 4 as containing 182 acres, and lots 5 and 6, 80 acres.

The defendant had no notice of the new subdivision of the section into six lots, or of the procuring of new maps by the board of ****425** supervisors, or of the change in the form of description from that previously used in all deeds, in assessments, and in the memorandum of return made by his agent.

In reference to the payment of taxes the court found as follows:

'The defendant's agent and attorney went to the county site of Wilkinson county to pay defendant's taxes, because, upon a statement to defendant by the collector, the amount was much less than in former years, and the acreage of his land largely reduced, and for the purpose of clearing up and adjusting the whole matter. He discovered lands of defendant not included in the list furnished to the assessor by Swan, the defendant's agent, and paid on them. He applied to the collector then engaged in attendance on the chancery court, who informed him that he did not think he had paid on all of defendant's lands, and introduced him to a Mr. Miller, his deputy, there in his office, as one more familiar with the lands in the county than any one else, and requested defendant's agent to make himself at home, and use Miller until he got everything straight. In comparing the tax receipts of previous years with the tax receipt then in his possession, said agent noticed the discrepancy in the acreage of lots 2, 3, and 4, and called

Miller's attention to it. Miller said he would see about it, stepped to the corner of the room and got the township maps, footed up the acreage of lots 2, 3, and 4, and found it 182 acres. Defendant's agent asked him how he accounted for the acreage, and he replied Withers had been paying for years on land in the Mississippi river, but added, referring to the maps, 'These are the latest surveys, and are, I suppose, correct.'

'Defendant's agent then looked at the map, and saw lots 5 and 6 thereon and asked, 'Who do lots 5 and 6 belong to?' Miller replied, 'I don't think they belong to Withers'. Said agent replied, 'They are very close to Withers' land,' and Miller answered he did not think they were ever assessed to Withers, and did not know whether they belonged to him or not. Said agent was doubtful about it; went back; made a thorough examination of Withers' muniments of title, to see if lots 5 and 6 belonged to him. It was the first time he had ever heard of said lots 5 and 6, and he had no knowledge of the discrepancy nor of the map beyond the fact that said Miller told him it was the latest survey of the particular tract. When he saw a survey of lots 5 and 6, and could find no such lots in defendant's muniments of title, he concluded the land did not belong to Withers, but that they were water lots, that belonged to no one, and that there was no land there. Said agent was then and there ready and willing to pay the taxes on lots 5 and 6, but he did not tender the money for the taxes and demand a tax receipt, as prescribed by law, because he did not think the lands belonged to Withers. He first ascertained his mistake when this suit was brought.'

In addition, it may be noticed that the list of lands furnished by the defendant's agent contained over 30 tracts, aggregating several thousand acres.

Attorneys and Law Firms

*549 W. L. Nugent, for plaintiff.

Marcellus Green, for defendant.

Opinion

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

No question is more clearly a matter of local law than one arising under the tax laws. Tax proceedings are carried on by the state for the purpose of collecting its revenue, and the various steps which shall be taken in such proceedings, the force and effect to be given to any act of the taxing officers, the results to follow the nonpayment of taxes, and

the form and efficacy of the tax deed, are all subjects which the state has power to prescribe, and peculiarly and vitally affecting its well-being. The determination of any questions affecting them is a matter primarily belonging to the courts of the state, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the federal constitution has been invaded.

Turning to the decisions of the supreme court of Mississippi, we find in *Richter v. Beaumont*, 67 Miss. 285, 7 South. 357, a case almost precisely like the one at bar. It is true that the question there presented arose upon the admissibility of testimony; but the views expressed by the court in its opinion, if accepted as controlling, as they must be, are decisive of this case. In that case there was an old and a new map,—an old and a new description. The owner in possession paid according to the old, and in ignorance of the new, intending to pay on all the land that he owned. But by the new map and description the number of lots in the section had been increased, and the tract described by the added number was sold for nonpayment of taxes. The lot thus numbered and sold was a part of the land belonging to him, and upon which he was intending and attempting to pay all the taxes. The court, by Mr. Justice Campbell, thus disposes of the question: 'By the ancient division of the town and designation of lots, lot six embraced the parcel of land sued for in this action, which *550 parcel is, by the modern map, a part of lot seven. The defendant (appellant) was in 1883, and prior and subsequent thereto, in the actual possession of lot six, and he gave the description of his land to the assessor as lot six, and it was so assessed, he intending and understanding that lot six extended eastward according to the ancient order, so as to include what, by the new map, is part of lot seven. He paid the taxes on lot six, and lot seven, not being paid on, was sold for taxes. It does not appear that the **426 appellant had ever done anything in recognition of the new map, or that he knew that the new map was conformed to by the assessor in assessing lots in Woodville. It may be inferred from the fact of his residence in the town, and the recognition by citizens and officials of the new map, that he was aware of it, and that the assessor was governed by it in assessing. If so, he should not be allowed to defeat the assessment and sale by his secret understanding or purpose. A mental reservation of the owner cannot be permitted to defeat assessment. On the other hand, if, until a recent date, lot six was understood to embrace what, by a new map, is part of lot seven, and the owner and occupant was governed by the former description in giving it to the assessor, and did not know, and should not have known, that the assessor would deal with it as designated by the new map, he should not lose his land.'

Little need be added to this extract from the opinion in that case. The suggestion there made as to a mental reservation is out of this case by the finding of the court. That the owner was not bound, as matter of law, to take notice of the new map, is shown by that decision, and if he was not bound to know, and did not in fact know, and paid under a mistake, relying upon the ancient descriptions and the old map, and intended

in good faith to pay all his taxes, then clearly, within the scope of that decision, the sale was invalid, and the deed fails. Upon the authority of that case the judgment of the court below is affirmed.

All Citations

151 U.S. 545, 14 S.Ct. 424, 38 L.Ed. 265

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333 Mich. 290
Supreme Court of Michigan.

McCREARY et al.

v.

SHIELDS et al.

No. 30. | April 10, 1952.

Plaintiffs filed a bill praying for a determination in equity that a certain house and lot was owned by one of the plaintiffs, subject to a land contract made by her to her coplaintiffs, as against defendant, who was purchaser of the tax forfeited property from the state, and for other equitable relief. Defendant filed a cross-bill. The Circuit Court commissioner was joined as a defendant. The Circuit Court for the County of Wayne, in Chancery, Joseph A. Moynihan, J., rendered a decree granting plaintiffs the relief prayed for and the defendant appealed. The Supreme Court, Reid, C. J., held that the tax forfeited lot which defendant purchased from state and which all parties, including state officials believed to be a vacant lot rather than improved lot occupied by plaintiffs would be awarded to plaintiffs and that defendant was entitled to receive either amount she paid state for lot or a quit claim deed to the vacant lot from plaintiffs.

Decree as modified affirmed.

Boyles and Sharpe, JJ., dissented.

West Headnotes (13)

[1] **Adverse Possession**

⚡ Mistake in Conveyance or Survey

Where grantees, husband and wife, received warranty deed in 1925 in which description covered a vacant lot, but which grantors and grantees supposed covered an improved lot, and under such deed grantees' possession of improved lot was continuous for a period of over fifteen years, grantees became legal owners of improved lot by adverse possession in 1940, and became equitably owners by entireties of such lot in 1940.

Cases that cite this headnote

[2] **Taxation**

⚡ Weight and Sufficiency

In suit for determination that certain house and lot was owned by a plaintiff, subject to land contract made by her to her coplaintiffs, as against defendant, who was a purchaser of such lot from state as tax forfeited property, evidence sustained finding that public officials that had to do with forfeiture of title to lot in question all supposed that taxes, for which plaintiff's title to lot was forfeited to state, were levied against neighboring vacant lot and not improved lot occupied by plaintiffs.

Cases that cite this headnote

[3] **Taxation**

⚡ Compensation for Improvements

Where state officials who had to do with forfeiture to state of title of improved lot owned by plaintiffs, defendant who purchased forfeited lot from state, and plaintiffs all supposed that title to neighboring vacant lot, the description of which had been erroneously inserted in deed to plaintiffs, had been forfeited to state and trial court awarded improved lot to plaintiff subject to land contract to her coplaintiffs and required repayment to defendant of amount which she paid state as well as certain costs and expenses incidental to transaction, defendant could not complain because she was not allowed to unjustly enrich herself out of an error common to all three parties interested.

3 Cases that cite this headnote

[4] **Implied and Constructive Contracts**

⚡ Money Received

Doctrine of "unjust enrichment" is that person shall not be allowed to profit or enrich himself inequitably at another's expense.

15 Cases that cite this headnote

[5] **Implied and Constructive Contracts**

⚡ Money Received

Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

16 Cases that cite this headnote

[6] **Trusts**

↳ Nature of Constructive Trust

A constructive trust is imposed on a person in order to prevent his unjust enrichment and an equitable duty to convey property to another is imposed on him to prevent the unjust enrichment.

9 Cases that cite this headnote

[7] **Trusts**

↳ Nature of Constructive Trust

A constructive trust arises, not from agreement but from operation of equities in order to satisfy demands of justice.

1 Cases that cite this headnote

[8] **Trusts**

↳ Nature of Constructive Trust

Fraud is not necessary to give rise to a constructive trust, but if circumstances are such as to render it inequitable for holder of legal title to retain same, court may charge it with a trust in favor of equitable owner.

2 Cases that cite this headnote

[9] **Improvements**

↳ Ownership

Improvements

↳ Compensation

Owners of lot on which house was constructed by mistake should be given privilege of taking improvement at fair value or of releasing to builders at fair value.

1 Cases that cite this headnote

[10] **Improvements**

↳ Actions

If owners of lot on which house was constructed by mistake refuse to take improvement or convey lot at fair value, conveyance to builders on payment of fair value may be decreed.

1 Cases that cite this headnote

[11] **Taxation**

↳ Scope and Extent of Relief

where state officials who had to do with forfeiture to state of title of improved lot owned by plaintiffs, defendant who purchased lot from state, and plaintiffs all supposed that title to neighboring vacant lot, description of which had been erroneously inserted in deed to plaintiffs at time they purchased improved lot, had been forfeited to state, improved lot would be awarded to plaintiffs and defendant would be directed to execute to plaintiffs, a quitclaim deed thereof, and defendant would be entitled to receive amount which she paid state plus certain costs and expenses or in lieu of that sum, at her option, be entitled to receive from plaintiffs a quitclaim deed of vacant lot.

2 Cases that cite this headnote

[12] **Declaratory Judgment**

↳ Injunction

Where in suit brought by plaintiffs for a determination in equity that certain house and lot owned by a plaintiff, subject to land contract made by her to her coplaintiffs, as against defendant who was purchaser of property from state after title was forfeited to state for nonpayment of taxes, it was determined that state officials who had to do with forfeiture to state of title of improved lot, defendant and plaintiffs, supposed that title to neighboring vacant lot had been forfeited to state and by decree defendant was directed to convey improved lot to plaintiffs, circuit court commissioner who had been joined as a defendant would be directed not to proceed further with ouster proceedings brought by defendant.

2 Cases that cite this headnote

[13] **Costs**

☞ Prevailing or Successful Party

Where neither party prevailed in full on appeal, no costs would be awarded.

Cases that cite this headnote

Attorneys and Law Firms

*291 **854 Walter M. Nelson, Detroit, for plaintiff, cross-defendant and appellee Mary Frances McCreary.

Swan Lindsfold, Detroit, for plaintiffs, cross-defendants and appellees Lewis E. and Jennette Makie.

Vandevor & Haggerty, Detroit, Samuel A. Garzia, Detroit, of counsel, for defendant, cross-plaintiff and appellant.

Before the Entire Bench.

Opinion

REID, Justice.

Plaintiffs filed their bill praying for a determination in equity that a certain house and lot is owned by plaintiff McCreary subject to a land contract made by her to her coplaintiffs, as against defendant Shields, who is a purchaser of the said property from the State on a mistaken supposition (as plaintiffs claim) that the lot defendant Shields bought was an adjacent vacant lot spoken of in the testimony as lot L. Plaintiffs also pray for an injunction against ouster proceedings and for other equitable relief.

Defendant Shields answered and filed a cross-bill asking that she be decreed to be the owner of the premises in question and for other equitable relief.

[1] On November 27, 1925, plaintiff McCreary and her husband (who died in 1946) received a warranty deed, in which the description covered premises spoken of in the testimony as lot L, a vacant lot, but the grantees and evidently the grantors also in said deed supposed the description to cover the premises spoken of in the testimony as lot K. Under that deed, possession has been continuous up to and including the time of the hearing in the trial court, by plaintiff McCreary and her husband and after his death by plaintiff McCreary and those claiming for her or under her authority; thus was

covered a period of over 15 years before the deed to *292 the State hereinafter mentioned. So far as concerns any right, title, interest or claim of defendant, under the showing in this record plaintiff McCreary became the legal owner of lot K by adverse possession on November 27, 1940, and she and her husband became equitably the owners by the entireties of lot K on November 27, 1925.

An agreement by Mrs. McCreary to sell to her coplaintiffs, Mr. and Mrs. Makie, for \$2,500, is dated August 24, 1946. The **855 Makies are now in actual possession of the premises under that agreement.

The State through delinquent tax proceedings received title to the premises, lot K, June 3, 1941, and deeded the same to defendant Shields, March 27, 1947, for \$150. During its ownership, the State very evidently made no effort to collect rent from any of the plaintiffs, none of whom knew that the State had title until the ouster proceedings had been begun in 1947.

In the meantime plaintiff McCreary, and her husband during his lifetime, had paid the taxes on lot L supposing that to be lot K. The drafter of the deed to McCrearys had evidently considered that the county line was in the middle of a parkway now existing between two double lanes along the so-called Eight Mile Road, one double lane of cement being for westbound traffic and the other double lane for eastbound traffic, whereas, in fact, the county line was in the center of the southerly (eastbound) traffic lane. The discrepancy was 53 feet.

In the county line was the starting point from which the distance to the corner of the lot in question was measured on Hubbell avenue, as per description in the deed to McCrearys.

The mistake was common as to several lots on Hubbell avenue and several years ago, by interchange *293 of deeds and confirmatory court decree unknown to the McCrearys, was corrected as to several of other lots about which the same mistake had occurred.

[2] The conclusion is clearly supported by the testimony that the public officials that had to do with the forfeiture to the State of title to the lands in question, all supposed that the taxes for which the title of McCrearys to lot K was forfeited to the State, were levied against the neighboring vacant lot.

Defendant Shields admits that she supposed the lot she bought was a vacant lot. The State sold for only \$150 property worth \$2,500 and never sought rent in the five years the State owned the title. It is clear that all three, the State, the plaintiffs and defendant Shields all supposed until after the deed to Shields defendant, that the title to the McCreary house had not been forfeited to the State.

The trial court evidently acted on the theory of a mutual (or common) mistake as to identity of the lot. The court did not question the absoluteness of a forfeiture to the State of the title to land for nonpayment of taxes.

The identity of the lot to which the forfeiture is, in equity, to be considered applicable, is the controlling question in the instant case. Not only are the equities in favor of plaintiff McCreary very strong, but the controlling facts claimed by her are clearly established and for the most part beyond controversy.

[3] [4] [5] [6] [7] [8] The trial court in effect awarded lot K to plaintiff McCreary, subject to the land contract to her coplaintiffs, the Makies, and required repayment to defendant of the \$150 which she paid the State as well as certain costs and expenses incidental to the transaction, a total of \$337.63. The State has had its money and no reason is apparent why it should complain. Defendants did not object that the State *294 was not made a party. Defendant Shields has no just ground for complaint that she is not allowed to unjustly enrich herself out of the error common to all three parties interested, the State, the plaintiffs and defendant Shields.

'Doctrine of 'unjust enrichment' is that person shall not be allowed to profit or enrich himself inequitably at another's expense.' American University v. Forbes, 88 N.H. 17, 183 A. 860, syl. 6.

'Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.' Hummel v. Hummel, 133 Ohio St. 520, 14 N.E.2d 923, 927.

'A constructive trust is imposed upon a person in order to prevent his unjust enrichment. To prevent such unjust enrichment an equitable duty to convey the property to another is imposed upon him.' Restatement of the Law, under Restitution, pages 642-3.

**856 'A constructive trust arises, not from agreement but from operation of equities in order to satisfy demands of

justice.' Union Guardian Trust Co. v. Emery, 292 Mich. 394, syl. 8, 290 N.W. 841, 846.

'Constructive trusts arise by operation of law, not by agreement or from intention, and are raised by a court of equity whenever it becomes necessary to prevent a failure of justice.' Digby v. Thorson, 319 Mich. 524, syl. 4, 30 N.W.2d 266, 272.

'Fraud is not necessary to give rise to a constructive trust, but if circumstances are such as to render it inequitable for the holder of the legal title to retain the same, the court may charge it with a trust in favor of the equitable owner.' Digby v. Thorson, 319 Mich. 524, syl. 2, 30 N.W.2d 266, 272.

On a bill in chancery to set aside sale of lands by state land office board, we have declared the board's grantees to be trustees ex maleficio holding title for *295 the benefit of defrauded party, for fraud preceding the State's acquisition of title. Gulf Refining Co. v. Perry, 303 Mich. 487, 491-492, 6 N.W.2d 756.

The instant case so far as concerns defendant Shields, falls fairly within the rule as to unjust enrichment.

We do not intend by this opinion to reverse our rulings in Darby v. Freeman, 304 Mich. 459, 8 N.W.2d 137, and Lowrie & Webb Lumber Co. v. Ferguson, 312 Mich. 331, 20 N.W.2d 209.

Plaintiffs in their bill prayed that the Court decree lot K to plaintiff McCreary and lot L to defendant Shields. Defendant Shields by her testimony disclosed that lot L is worth much more than the amount of \$337.63 awarded to her by the decree appealed from.

The decree of the trial court awarded both lots K and L to plaintiffs and required the payment to defendant Shields of \$337.63, as moneys paid by defendant.

[9] [10] For cases in which this court has determined alternative remedies where parties by their common or mutual mistake as to the identity of property have acted to their detriment, we have in mind Hardy v. Burroughs, 251 Mich. 578, 232 N.W. 200, in which we say, per syl.:

'3. Owners of lot on which house was constructed by mistake should be given privilege of taking improvement at fair value or of releasing lot to builders at fair value.

'4. If owners of lot on which house was constructed by mistake refuse to take improvement or convey lot at fair value, conveyance to builders upon payment of fair value may be decreed.' Also, Rzeppa v. Seymour, 230 Mich. 439, per syl. 5, 203 N.W. 62:

'Where one builds a house on another's land by mistake, a court of equity does not follow the common-law *296 rule denying all relief, but follows the more lenient rule of the civil law (3 Comp.Laws 1915, § 13211 [C.L.1948, § 629.44 (Stat. Ann. § 27.1957)]), and permits the owner of the land to elect whether to pay the value added to the land by the building, or take the value of the land.'

[11] The decree of this court will award lot K to plaintiffs and will direct defendant to execute to plaintiffs a proper quitclaim deed thereof. In lieu of such execution this decree may be recorded in the office of the register of deeds of the county with like effect as though such deed had been executed and delivered. Said decree will further provide that defendant Shields shall receive the sum of \$337.63, which amount may be deposited in the office of the county clerk by plaintiffs for defendant's benefit, or in lieu of such sum said defendant may at her option, to be exercised by filing a notice thereof in the office of the county clerk and serving a copy on the plaintiffs within 30 days after the filing of the decree of this court, be entitled to receive from the said plaintiffs a quit claim deed of lot L in proper form to permit it to be recorded.

[12] Circuit court commissioner Cody was joined as a defendant in order that he might be enjoined from proceeding further with an ouster proceedings brought **857 by defendant Shields. Such ouster proceedings should proceed no further.

[13] Except as herein modified, the decree appealed from is affirmed. A decree will be entered in this court in accordance with this opinion. No costs, neither side having in full prevailed.

*297 BUTZEL, CARR and BUSHNELL, JJ., concurred with REID, J.

NORTH, C. J., and DETHMERS, J., concurred in the result.

BOYLES, Justice (dissenting).

I am for reversal.

These two lots referred to by Mr. Justice Reid were described in the conveyances and of record by metes and bounds. Plaintiff McCreary admittedly was in open and continuous possession of the lot on which the house stands (now called 'lot K') beginning with 1925 up to the present litigation. It may be conceded that she had acquired title to said house and lot by adverse possession, by 1940, as found by Justice Reid. But plaintiff has never acquired any record title by deed or otherwise. The taxes never have been paid on said house and lot and the State acquired the legal title therein by decree and State bid at a tax foreclosure sale in 1941. The title of the State became absolute, a new chain of title was started and all previous claims of interest or title therein were then extinguished. Plaintiff McCreary thereafter had no more interest or right in said property than a stranger. James A. Welch Co., Inc., v. State Land Office Board, 295 Mich. 85, 294 N.W. 377; Meltzer v. State Land Office Board, 301 Mich. 541, 3 N.W.2d 875. If, as stated by Mr. Justice Reid, said plaintiff became the equitable owner of said house and lot in 1925, and the legal owner thereof by adverse possession in 1940, said title, both equitable and legal, became and was extinguished when the title of the State became absolute in 1941. At the so-called scavenger sale in 1947 the State land office board sold and deeded said house and lot to defendant Shields. Mr. Justice Reid would now take away that record title from defendant Shields and decree it to plaintiff McCreary in exchange for plaintiff's title to the vacant lot which *298 all the time since 1925 has stood in the plaintiff. I do not agree with that conclusion.

Nowhere, since the State land office board act was passed, have we ever adjudicated a return of title to the former owner, from a purchaser at scavenger sale, solely on the ground that the equities were with the former owner. We have recognized that tax foreclosure decrees, and scavenger sales of State-owned land, often result in hardship to the former owner, but that is not ground for equitable relief. For the purpose of terminating the years of tax delinquency and with the purpose of turning tax delinquent lands over to taxpaying private owners with finality, we have uniformly held that a new chain of title was started.

Nor am I in accord with the view that the plaintiff McCreary in the instant case is without fault which if otherwise might entitle her to equitable consideration. In 1925 she and her husband took title to a vacant lot without determining whether the description in their deed covered the house and lot they

intended to acquire. During more than 20 years while plaintiff was in possession, the owners of other lots in the same plat amicably straightened out like mistakes in their descriptions by exchanging deeds and by the entry of a consent decree in the circuit court in chancery. But it was not until after defendant Shields had acquired title to the house and lot in question by a deed from the State land office board in 1947 that the plaintiff took any steps toward obtaining a correct title. The plaintiff knew, or should have known, from her tax bills from 1929 to 1938 and other circumstances, that the house was not assessed as a part of the lot on which she was paying taxes. During that time McCreary paid only about one fourth as much taxes as she had previously been paying on a house and lot. It is not reasonable to believe that such a variance would pass unnoticed. *299 Furthermore, plaintiff had actual notice that there was something wrong with her title and taxes. A tenant of the plaintiff's **858 in the house and lot in question from 1940 to 1947 testified:

'Mrs. McCreary, the daughter, came to the house once, around 1940 or 1941. I had received a letter at that time addressed only by house number. It had something to do with the back taxes on the lot. I gave the letter to Mrs. McCreary and she stated she would look into the back taxes. She also remarked that the lot number wasn't the same but that she would look into it. This letter arrived sometime in 1940 or 1941.'

We should also note that the published notice of hearing on the auditor general's petition and order of hearing for a chancery decree on foreclosure of taxes, in 1941, were equivalent to a personal service on McCreary. Triangle Land Co. v. City of Detroit, 204 Mich. 442, 170 N.W. 549, 2 A.L.R. 1526. Yet the plaintiff apparently paid no attention to those proceedings, not to the proceedings under which the State land office board deeded the house and lot to defendant Shields. During that time, 1941 to 1947, inclusive, McCreary not only had lost all her right or title in the house and lot, but they were legally acquired under admittedly regular proceedings by defendant Shields. I do not agree that the equities are with the plaintiff McCreary.

Plaintiff for relief in equity relies solely on the claim of a mutual mistake. There was no mutual mistake as between McCreary and Shields, although there were other mistakes. The tax assessor made a mistake in sometimes assessing plaintiff's vacant lot on a valuation of a house and lot. Plaintiff made the mistake of accepting a deed on the wrong description, and in failing to ascertain the true situation during

all the years when the taxes were not paid on *300 the house and lot in plaintiff's possession. Neither the auditor general nor the State land office board can be said to have made any mistake when a decree was entered foreclosing on the delinquent taxes unpaid on the house and lot, and in deeding that description over to the defendant at scavenger sale. The State foreclosed and deeded the proper description, on which the taxes had not been paid. The only mistake charged against defendant Shields seems to be that she thought she was buying a vacant lot but, instead, acquired the description of a house and lot.

However, it cannot be said that such was a mutual mistake as between McCreary and Shields when McCreary admits that she did not even know that defendant Shields had a deed until the proceedings started later by Shields before a circuit court commissioner. Equity does not relieve from a unilateral mistake of fact. The mistake must be mutual and common to both parties, and the proof thereof must be clear and satisfactory. Emery v. Clark, 303 Mich. 461, 6 N.W.2d 746; Holda v. Glick, 312 Mich. 394, 20 N.W.2d 248.

At the time when plaintiff's bill of complaint was filed, the record legal title to the vacant lot was, and still is, in McCreary. The legal title to the house and lot is in defendant Shields by virtue of the State deed. I am not in accord with Mr. Justice Reid's conclusion that title to the house and lot should be taken from defendant Shields and turned over to plaintiff McCreary in exchange for a transfer of the title to the vacant lot from McCreary to Shields. The 'option' thus extended to defendant Shields is that she convey to plaintiff the title to her lot by the execution and delivery of a deed of conveyance, or decline to do so and thereby be compelled to accept a decree to the same effect; in short, to give up the title to the lot which she has legally acquired from the State, by one of two different methods, by deed or by decree, and accept plaintiff's vacant lot, or \$337.63 *301 for a lot she now owns worth \$2,500. The only ground for such a result, alleged in plaintiff's bill of complaint or discussed in her brief, is that there was a mistake. Not only must there have been a *mutual* mistake, but the evidence of such a mistake 'ought to be so clear as to establish the fact beyond cavil.' Vary v. Shea, 36 Mich. 388, 398.

The decree of the trial court which Mr. Justice Reid would affirm, except as modified, specifically reforms the deed by which the McCrearys obtained title in 1925, and also the deed whereby defendant Shields obtained title to her lot in 1947, by conveyance **859 from the State. None of the grantors

in these conveyances was made a party to the instant case, although the descriptions in their conveyances are specifically reformed by said decree.

In *Emery v. Clark*, supra, 303 Mich. at pages 470, 473, 6 N.W.2d 746, 750, many decisions of this Court are gathered and considered which clearly establish the rule in this State, that to reform a written instrument the mistake must be mutual and common to both parties and the proof must be clear and convincing, 'so clear as to establish the right to relief beyond cavil.' *Schuler v. Bucuss*, 253 Mich. 479, 235 N.W. 226.

'The evidence must be clear and convincing and must establish beyond cavil the right to reformation.' *Sobel v. Steelcraft Piston Ring Sales, Inc.*, 294 Mich. 211, 217, 292 N.W. 863, 866.

Neither the bill of complaint nor plaintiff's brief filed here seek relief on the ground of unjust enrichment. Absent that claim we should not base an opinion or enter a decree in the instant case on that foundation.

The decree of the court below should be set aside and the bill of complaint dismissed. Costs to appellant.

SHARPE, J., concurred with BOYLES, J.

All Citations

333 Mich. 290, 52 N.W.2d 853

KeyCite Yellow Flag - Negative Treatment

Distinguished by Gutierrez v. Ortiz, N.M., April 2, 1954

57 N.M. 103
Supreme Court of New Mexico.

PRATT et al.

v.

PARKER et al.

No. 5428. | Jan. 23, 1953. |
Rehearing Denied March 26, 1953.

Quiet title action. The District Court, Otero County, Scoggin, D. J., entered judgment for defendants and plaintiffs appealed. The Supreme Court, Lujan, J., held that plaintiffs' payment in good faith of taxes, although the assessment on which the payment was made erroneously described the land intended to be assessed, was a defense against the tax sale, based upon a second assessment of the same land with a proper description, and the tax deed issued to defendants' grantor. On motion for rehearing, the Supreme Court, Lujan, J., held, inter alia, that the two year curative statute of limitations did not apply to preclude recovery of the land by plaintiffs, though the action was brought more than two years after the tax sale.

Reversed and remanded with directions.

West Headnotes (13)

[1] **Taxation**

☞ Operation and effect of payment in general
Payment in good faith of taxes, although assessment on which payment was made erroneously described land intended to be assessed, was a defense against sale and tax deed based upon second assessment of the same land with a proper description.

2 Cases that cite this headnote

[2] **Taxation**

☞ Compensation for improvements
Where land sold at invalid tax sale was unfenced, unimproved and unoccupied prairie land, and defendants claiming under holder of tax deed

erected valuable improvements, and tax sale was set aside in favor of plaintiffs, under the circumstances, defendants would be entitled to a lien on the land for the value of the improvements placed there by them.

Cases that cite this headnote

[3] **Adverse Possession**

☞ Continuity in general

In order to perfect title by adverse possession, such possession must be continuous for entire period prescribed by statute of limitations. 1941 Comp. § 27-121.

Cases that cite this headnote

[4] **Adverse Possession**

☞ By public

Where, during running of statute of limitations in favor of adverse occupant of land, land is forfeited to state for taxes, continuity of possession is interrupted, in absence of statute providing that statute of limitations runs against the state. 1941 Comp. § 27-121.

Cases that cite this headnote

[5] **Adverse Possession**

☞ By public

Where purchaser from state, which had acquired land by forfeiture for delinquent taxes, had been in possession only eight years, defense of adverse possession was not available to purchaser in quiet title action, though combined period of possession by purchaser and state exceeded ten years. 1941 Comp. § 27-121.

Cases that cite this headnote

[6] **Adverse Possession**

☞ By public

Adverse possession of land did not start to run during time state was owner of property under tax deed. 1941 Comp. § 27-121.

Cases that cite this headnote

[7] **Adverse Possession**

☞ Tax Sales and Tax Deeds

Taxation

☞ Demand of payment and default of owner

Where record owners of land had paid taxes under assessments erroneously describing the land, tax sale of land to state for delinquent taxes under assessment accurately describing the land, subsequent sale by state, and conveyance by state's grantee were void, and pretended sale to state could not be basis for claim of adverse possession by purchaser from state's grantee under ten year color of title statute. 1941 Comp. § 27-121.

3 Cases that cite this headnote

[8] **Equity**

☞ Nature and elements in general

The defense of laches is not favored and is applied only in those cases where party has been guilty of inexcusable negligence in enforcing a right.

5 Cases that cite this headnote

[9] **Equity**

☞ Nature and elements in general

"Laches" in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what should have been done, and is inexcusable delay in asserting a right, and implied waiver arising from knowledge of existing conditions and acquiescence in them.

6 Cases that cite this headnote

[10] **Taxation**

☞ Actions Against Claimant Under Tax Title

Where record owners of land in good faith paid taxes under assessment which erroneously described land, and land was sold for delinquent taxes under assessment which properly described the land, and record owners brought quiet title action approximately eight months after learning of tax sale to state and of claim asserted by

purchasers from grantee of state, and purchasers did not appear to have altered their conduct between date that record owners learned of such sale and claim and date of quiet title suit, any laches on part of record owners was excusable.

1 Cases that cite this headnote

[11] **Estoppel**

☞ Persons to whom estoppel is available

Where tax sale to state was void with result that state's grantee acquired no title to property involved from the state, neither grantee nor his vendees could acquire title by urging plea that record owners were estopped from asserting title.

Cases that cite this headnote

[12] **Estoppel**

☞ Weight and sufficiency of evidence

In quiet title action by record owners of land which had been sold at void tax sale against purchasers from grantee of tax deed holder, wherein purchasers urged plea of estoppel, evidence did not show that purchasers had been misled by anything done by record owners.

Cases that cite this headnote

[13] **Taxation**

☞ Sufficiency of deed or title to set statute in operation, and defects cured by limitation

Where record owners had paid taxes under assessment which improperly described land, and land was sold at tax sale based upon subsequent assessment which properly described the land, the two year curative statute of limitations did not preclude record owners' recovery of the land more than two years after the sale. 1941 Comp. § 76-727.

1 Cases that cite this headnote

Attorneys and Law Firms

****312 *105** Sherman & Hughes, Deming, for appellants.

Shipley & Shipley, Alamogordo, for appellees.

Opinion

LUJAN, Justice.

{1} The plaintiffs (appellants) brought this action in the District Court of Otero County to quiet title to Lot 13, Section 5, Township 16 South, Range 10 East, and other land not involved herein, situated about six miles north of the City of Alamogordo, New Mexico, against the defendants (appellees), asserting a fee-simple title based upon an inheritance from their parents. The defendant, C. J. or John Parker claims title under a deed issued to him by the State Tax Commission. The defendants, L. H. Riddle and J. W. Parker base their titles on warranty deeds given to them by C. J. or John Parker. The defendant Barr Fifer bases his title on a warranty deed given him by J. W. Parker. The case was tried to the court without a jury which resolved the issues in favor of the defendants and plaintiffs appeal.

{2} The record discloses that on October 19, 1925, C. J. Nevell and his wife conveyed the lot in question to A. M. Horne which was described as hereinabove mentioned, also Lot 12, Section 6, Township 16 South, Range 10 East, which is not involved in this suit.

{3} On November 9, 1925, A. M. Horne and his wife, Lou Horne, conveyed a one-half interest in Lot 13, Section 5, Township 16 South, Range 10 East, to W. K. Stalcup. On May 3, 1927, W. A. Stalcup, a single man, conveyed his one-half interest in said lot to A. M. Horne. For the year 1927 W. A. Stalcup rendered for taxation Lot 13, Section 6, Township 16 South, Range 10 East, and Lot 12, Section 5, Township 16 *106 South, Range 10 East. In so doing he designated the section numbers erroneously.

{4} During the year of 1927, C. E. Mitchell, acting as agent for A. M. Horne, rendered this lot for taxation as situated in Section 6 instead of in Section 5, and continued to do so up to and including the year of 1943. From 1927 through 1948, with the exception of 1944, the lot was described in the tax rolls as Lot 13, Section 6, Township 16 South of Range 10 East, and the taxes were regularly paid and receipts issued under this description by A. M. Horne or his predecessor in title. For the year 1944 the lot is described on the tax rolls as Lot 13, Section 5, Township 16 South, Range 10 East, and the taxes were paid by the A. M. Horne Estate and a receipt issued showing that description.

{5} For the years 1927 to 1937, both inclusive, Lot 13, Section 5, Township 16 South, Range 10 East, was assessed to 'unknown owners' and no taxes were paid for said *313 years under said rendition and description. On December 7, 1934, this lot was sold to the State of New Mexico, and on March 9, 1935, Tax Sale Certificate No. 341 was issued to the State pursuant to said sale, for the delinquent taxes for the year 1933. On March 18, 1937, the County Treasurer issued Tax Deed No. 206 to the State of New Mexico for the above lot pursuant to the sale of said property held on December 7, 1934.

{6} On April 25, 1942, the State Tax Commission executed and delivered to C. J. Parker its deed conveying the lot in question to him. On January 26, 1948, C. J. or John Parker and Josie Parker, his wife, made, executed and delivered to L. H. Riddle a warranty deed conveying a tract of land in the northeast corner of Lot 13, Section 5, Township 16 South, Range 10 East, described as follows:

'Beginning at the northeast corner of said Lot 13, thence west 570 feet, thence south 210 feet, thence east 570, thence north 210 feet, to the place of beginning.'

{7} On February 2, 1948, C. J. or John Parker and Josie Parker, his wife, made, executed and delivered to J. W. Parker a warranty deed conveying all of Lot 13, Section 5, Township 16 South, Range 10 East, save and except the land above described in the conveyance to L. H. Riddle. On November 22, 1948, J. W. Parker and Maud M. Parker, his wife, made, executed and delivered to Barr Fifer a warranty deed conveying to him all of Lot 13, Section 5, Township 16 South, Range 10 East, except the land previously conveyed to L. H. Riddle as described above.

{1} {8} It is plaintiffs' contention that since they and their predecessors in title in good faith paid taxes under an assessment on Lot 13, Section 6 in Township 16 South, *107 Range 10 East, thinking and intending the payment to cover taxes on Lot 13, Section 5 in said Township and Range, such payment under the facts shown constitutes a good defense against the sale and tax deed based upon a second assessment of the same land with a proper description. We think this contention is well taken.

{9} The appeal in this case presents the identical question urged in the case of Shackelford v. McGlashan, 27 N.M. 454, 202 P. 690, 691, 23 A.L.R. 75. In that case John Schroeder

owned a tract of land in Bernalillo County. He described that tract of land incorrectly in his rendition as Precinct 1, Section SW 1/4 Tp. 17, Tp. 7, Range 5 E, 160 acres. The assessor did not copy the description in Schroeder's rendition exactly, but entered an assessment against him for SW 1/4 Sec. —, Tp. 17, R. 5 E, on which he paid, intending to pay the taxes on the tract of land he owned. The land described in the assessment under which Schroeder paid would be located in Sandoval County and not in Bernalillo County. For the same year the assessor made an additional assessment under 'unknown owners' in which he correctly described the land owned by Schroeder as SW 1/4 Section 17, Tp. 9, R. 3 E. Schroeder had no actual notice or knowledge of this assessment. After Schroeder had paid the taxes under the assessment above set out, containing the incorrect description of his lands, the land was sold under the assessment to 'unknown owners,' and such proceedings were had that the tax title thus instituted became vested in A. E. McGlashan under a tax deed from the county. Later McGlashan and his wife conveyed the land by warranty deed to D. V. Wardall, who, with his wife, and likewise by warranty deed, conveyed the premises to J. J. Weisendanger. On this state of facts the court said:

'The question in this case is whether payment of the tax has in fact been shown, or, in other words, whether payment under this assessment which improperly described the land was good payment on the land he owned. It is conceded that appellant intended by this payment to pay the tax on his land and believed that he was doing so.'

{10} (In the case at bar the plaintiff, Yukola Horne Pratt, testified that she intended to pay the taxes on the land previously owned by her father and believed that she was doing so.)

{11} In the Shackelford case, the court continued:
**314 'Since the treasurer of the county accepted the money, it must be assumed that he understood it was payment on the same land, for he certainly would not knowingly accept the payment of taxes upon land not within his county. We have, therefore, a case where the owner has paid money to the county as *108 taxes on a certain piece of land, and the county has accepted it as payment on that land, although in fact the land was not properly described on the tax roll and can only be identified by proof of circumstances wholly apart from the roll itself.

'Payment in good faith of taxes, although the assessment on which the payment is made erroneously describes the land intended to be assessed, is a defense against a sale and tax deed based upon a second assessment of the same land with a proper description.'

{12} The conclusions announced in *Shackelford v. McGlashan*, supra, find support in still later cases of *Mutual Investment & Agency Co. v. Albuquerque, Etc., Co.*, 34 N.M. 10, 275 P. 92, *N. H. Ranch Co. v. Gann*, 42 N.M. 530, 82 P.2d 632, on rehearing, pages 542 and 639 respectively, and *Lawson v. Serna*, 48 N.M. 299, 150 P.2d 122.

{2} {13} The lot in question was unfenced, unimproved and unoccupied prairie land at the time it was purchased from the State by J. C. or John Parker. Several valuable improvements have been erected thereon since the defendants purchased it. The plaintiffs recognize it is a cardinal rule of equity that 'he who seeks equity must do equity,' and, ordinarily, this would consist of an offer to allow the defendants, who own the improvements on the land, to remove them. Under the facts in this case, however we do not feel that this would be sufficient.

{14} Following the cases hereinabove referred to, the judgment is reversed and the cause remanded to the district court with directions to it to ascertain the present value of the improvements placed on the lot by the respective defendants and, thereupon, to enter judgment quieting title of the plaintiffs to the lot in question as against each of said defendants, subject to a lien in favor of each of them on said lot for the value of the improvements found to have been placed there by him, as such value is ascertained by the trial court pursuant to the directions aforesaid; the liens mentioned to have equal priority.

{15} Authority supporting by analogy the disposition we are making of this case as to provision for reimbursing the value of improvements is to be found in *Shaw v. Board of Education*, 38 N.M. 298, 31 P.2d 993, 93 A.L.R. 432, and cases there cited.

{16} It is so ordered.

SADLER, C. J., and McGHEE, COMPTON, and COORS, JJ., concur.

On Motion for Rehearing

LUJAN, Justice.

{1} Defendants (appellees) have moved for a rehearing and therein complain that we *109 did not discuss certain points argued in their briefs and orally in our opinion. It must not be thought that because we do not reply to all arguments of counsel that such arguments have not been duly considered. In the present instance we thought the matter so well settled that no comment was necessary. However, the zeal and insistence of counsel for defendants have caused us to go over the matter again, and we conclude that it may be of service to the bar if we discuss the points briefly.

{2} In so far as defendants' claim under the plea of ten years adverse possession is concerned, 1941 Comp. § 27-121, even if the sale to the state by the county treasurer had been valid, the fact is that, at the time they acquired the property in question it was purchased from the state and the statute did not run against it.

[3] {3} In order to perfect a title by adverse possession, such possession must be continuous for the entire period prescribed by the statute of limitations. In the case at bar the defendants had actual possession of the lot in question for only eight years at the time suit was instituted by the plaintiffs.

**315 {4} In the case of *Armstrong v. Morrill*, 14 Wall. 120, 81 U.S. 120, 20 L.Ed. 765, it was held that: 'Forfeiture to the state within the period necessary to give effect to the statute, has the effect to break the continuity of adverse possession, and prevents the operation of the statute bar.'

{5} In that case the defendant claimed to have acquired certain property in the State of Virginia by adverse possession. The court found that 'Beyond all doubt the land described in the deed of Robert Morris and others to the grantors of the plaintiff, became forfeited to the state by reason of the failure to enter the same on the books of the Commissioners of the Revenue.' One of the errors complained of was: 'That the court erred in the instruction to the jury that the statute of limitations (meaning the statute relating to the acquisition of property by adverse possession) ceased to run when the land became forfeited to the state.'

{6} The Supreme Court held that the instruction to the jury was correct, and in the course of its opinion said: 'Argument to show that the statute of limitations ceased to run when the forfeiture attached and the title became vested in the State can

hardly be necessary, as the rule that time does not run against the State has been held for centuries, and is supported by all courts in all civilized countries.'

{7} The court further said:

'Continuity of possession is also one of the essential requisites to constitute such an adverse possession as will be of efficacy under the statute of limitations. Whenever a party quits the possession *110 the seizin of the true owner is restored, and a subsequent wrongful entry by another constitutes a new disseizin, and it is equally well settled that if the continuity of possession is broken before the expiration of the period of time prescribed by the statute of limitations, an entry within that time destroys the efficacy of all prior possession, so that to gain a title under the statute, a new adverse possession for the time limited must be taken for that purpose. (*Brinsfield v. Carter*, 2 Kelly [Ga.] 143; *Ringgold v. Malott*, 1 Har. & J. [Md.] 316; *Hall v. Gittings*, 2 Har. & J. [Md.] 112.)

'Beyond all question the case (last cited) presented the same question as that involved in the case before the court, and the decision was that the forfeiture to the State within the period necessary to give effect to the statute did have the effect to break the continuity of adverse possession, and prevented the operation of the statute bar. *Taylor v. Burnside*, 1 Grat. [Va.] 190.'

[4] {8} In 2 C.J., Adverse Possession, § 162, the general rule is stated as follows:

'Where, during the running of the statute of limitations in favor of the adverse occupant of land, the land is forfeited to the state for taxes, the general rule is that continuity of possession is interrupted for the reason that the statute of limitations does not run against the state in the absence of some special provision to that effect.' See also, 2 C.J.S., Adverse Possession, § 152e.

{9} The rule announced in the case of *Armstrong v. Morrill*, supra, seems to be the general rule. 2 C.J.S., Adverse Possession, § 152e, p. 721; *Reusens v. Lawson*, 91 Va. 226, 21 S.E. 347; *Monroe v. Morris*, 7 Ohio 262; *Daveis v. Collins*, C.C., 43 F. 31; *Lawless v. Wright*, 39 Tex.Civ.App. 26, 86 S.W. 1039; *Wall v. Rabito*, 138 La. 609, 70 So. 531. See, also, *Burgett v. Calentine*, 56 N.M. 194, 242 P.2d 276; *Field v. Turner*, 56 N.M. 31, 239 P.2d 723; *Wilson v. Kavanaugh*, 55 N.M. 252, 230 P.2d 979.

[5] [6] {10} The plea of adverse possession of ten years is attempted to be sustained by showing that defendants and

their predecessor in title (State) had been in possession of the property for more than ten years prior to the filing of this suit on March 7, 1950. But the State of New Mexico owned the land from the year 1938 until it sold the same to C. J. Parker in 1942. Adverse possession did not start to run during the time the state was the owner **316 of the property; and ten years had not elapsed since the state parted with title in favor of defendants.

[7] {11} Under the decision of *111 Shackelford v. McGlashan, 27 N.M. 454, 202 P. 690, 23 A.L.R. 75, the sale of the property in question by the treasurer of Otero County to the State of New Mexico was void and the subsequent sale of said property by the State Tax Commission to C. J. Parker, and his conveyance of the same to the other defendants, was likewise a nullity. It follows that the said pretended sale by the county treasurer cannot be the basis for ten years' adverse possession acquirendi causa by the defendants.

[8] [9] {12} Defendants further contend that the plaintiffs have been guilty of laches and for that reason should be denied relief. The defense of laches is not favored. It is only in those cases where the party has been guilty of inexcusable negligence in enforcing a right that the rule has been applied. 'Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what should have been done. More specifically, it is inexcusable delay in asserting a right; and implied waiver arising from knowledge of existing conditions and an acquiescence in them, * * *.' 21 C.J., p. 210, § 211; 2 C.J.S., Adverse Possession, § 112.

Then on page 245 of the same volume, the author says:

'* * * Another frequent application of the rule occurs in suits on the ground of mistake, where the court in determining whether relief should be denied as for laches, considers only such time as elapsed after the discovery of the mistake.'

[10] {13} Plaintiffs were nonresidents. They had paid their taxes believing that they were paying them correctly and felt secure in their belief that it was all that was required of them as the holders of the legal title. The taxes had been accepted by the treasurer even though he knew that they were paying taxes under the mistaken description, and must have known what

land they intended for them to apply. No actual knowledge of any tax sale or claim by any other person became known to them until July of 1949. Suit was instituted on March 7, 1950, and there does not appear to have been any alteration of conduct by defendants between the date of notice and date of suit. Under these circumstances we feel that if there were any laches on the part of plaintiffs they were excusable laches.

[11] [12] {14} The next question is whether or not plaintiffs are estopped by their actions and conduct from asserting title to the property in dispute, or, in other words, whether their acts have raised then an equitable estoppel. In treating of this question it must be borne in mind that the sale of the property for taxes to the state was absolutely void and that therefore it *112 had absolutely no title to convey to C. J. Parker. Dye v. Crary, 13 N.M. 439, 85 P. 1038, 9 L.R.A.,N.S., 1136. As the tax sale was null, the defendants cannot now give life and effect to an invalid deed urging against the owners of the lot a plea of estoppel. If C. J. Parker acquired no title to the property from the state, neither he nor his vendees could acquire any by urging the plea of estoppel. There is nothing to show that defendants have been misled by anything done by the plaintiffs. First National Bank of Clayton v. Harlan, 30 N.M. 356, 234 P. 305; Doran v. First National Bank of Clovis, 22 N.M. 236, 160 P. 770. Plaintiffs were not aware of the error in the description of their land, and so far as the records show, they knew nothing of the sale of their property for taxes. They had paid all their taxes for the year for which their property was sold and had no reason to believe that it would be sold for taxes.

{15} It is next claimed that the plaintiffs failed to do or offer equity and hence are not entitled to be heard in a court of equity. This proposition was disposed of in our opinion and needs no further discussion.

[13] {16} Lastly, it is urged that the two year curative statute of limitations on actions **317 attacking the regularity of assessments and sale of real estate for delinquent taxes, 1941 Comp. § 76-727, is a bar to plaintiffs' recovery. Since the Shackelford v. McGlashan case, supra, is authority for our holding that the taxes in the instant case had in fact been paid on the disputed land, notwithstanding the erroneous description, the two year curative statute of limitation could not apply.

{17} The motion for rehearing should be denied and,

{18} It is so ordered.

Pratt v. Parker, 57 N.M. 103 (1953)

255 P.2d 311, 1953 -NMSC- 005

SADLER, C. J., and COMPTON and COORS, JJ., concur.

All Citations

McGHEE, J., concurs in the result.

57 N.M. 103, 255 P.2d 311, 1953 -NMSC- 005

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67 Miss. 285
Supreme Court of Mississippi.

RICHTER
v.
BEAUMONT.

March 3, 1890.

Appeal from circuit court, Wilkinson county; RALPH NORTH, Judge.

Ejectment by B. Beaumont against George Richter, the owner of a lot sold for taxes, and bought in by plaintiff. From a judgment for plaintiff, defendant appeals.

Attorneys and Law Firms

*357 A. G. Shannon, for appellant.

D. C. Bramlett, for appellee.

Opinion

CAMPBELL, J.

The land sued for as part of lot 7 in a certain square in Woodville, was assessed in 1883, and in 1884 lot 7 was sold for taxes. For several years prior to 1883, a map of Woodville was recognized by the citizens and officials of the town, and the county assessor, as the map of the town; but this map was never adopted by an order of the board of aldermen until 1887. By the ancient division of the town, and designation of lots, lot 6 embraced the parcel of land sued for in this action, which parcel is, by the modern map, a part of lot 7. The defendant (appellant) was in 1883, and prior and subsequent thereto, in the actual possession of lot 6, and he gave the description of his land to the assessor as lot 6, and it was so assessed; he intending and understanding that lot 6 extended eastward according to the ancient order, so as to include what by the new map is part of lot 7. He paid the taxes on lot 6; and lot 7, not being paid on, was sold for taxes. It does not appear that the appellant had ever done anything in recognition of the new

map, or that he knew that the new map was conformed to by the assessor in assessing lots in Woodville. It may be inferred from the fact of his residence in the town, and the recognition by citizens and officials of the new map, that he was aware of it, and that the assessor was governed by it in assessing. If so, he should not be allowed to defeat the assessment and sale by his secret understanding or purpose. A mental reservation of the owner cannot be permitted to defeat assessment. On the other hand, if, until a recent date, lot 6 was understood to embrace what by a new map is part of lot 7, and the owner and occupant was governed by the former description in giving it in to the assessor, and did not know, and should not have known, that the assessor would deal with it as designated by the new map, he should not lose his land. The value of the lot, the manner of its inclosure, the description by which it was acquired by the appellant, and his dealing with it, might remove all uncertainty as to what would be a legal and just result; but, in the absence of such evidence, the question is, should the court have excluded from the jury the evidence for the defendant? (appellant;) and we think it should have left the matter for the jury to determine. A motion to exclude all the evidence of a party should be sustained only where it is plainly and unmistakably insufficient to maintain the issue.

The true test here is this: Had the case been submitted to a jury, and a verdict been rendered for the defendant, would it be set aside as unwarranted by the evidence? While we have a strong suspicion that the defendant is seeking to defeat an assessment and sale of the lot by a secret understanding he now says he had at the time of assessment, and that he must have known of the practical adoption by the citizens and officials of the new map, we are not prepared to say we would set aside a verdict found, by a jury properly instructed, in his favor, and, with this view, the judgment must be reversed, and the cause remanded for a new trial, when we trust all uncertainty will be removed as to the truth of the case.

Reversed and remanded.

All Citations

67 Miss. 285, 7 So. 357

7 N.J. 268

Supreme Court of New Jersey.

Edgar L. RIGGLE et al. (The Township of Lower, intervening), plaintiffs-respondents,

v.

Joseph W. SKILL, defendant-appellant.

No. A-143. | Argued June 4,
1951. | Decided June 11, 1951.

On appeal from a judgment of the Superior Court, Chancery Division, to the Appellate Division, which appeal was certified by the Supreme Court of its own motion.

Attorneys and Law Firms

*268 Herbert F. Campbell, Cape May, argued the cause for the appellant.

Nathan C. Staller, Wildwood, and T. Millet Hand, Cape May, filed a brief for the respondents.

Opinion

PER CURIAM.

The judgment is affirmed for the reasons expressed in the opinion of Judge Haneman, reported at 9 N.J.Super. 372, 74 A.2d 424 (Ch.Div. 1950).

For affirmance: Chief Justice VANDERBILT, and Justices CASE, HEHER, OLIPHANT, WACHENFELD, BURLING and ACKERSON-7.

For reversal: None.

All Citations

7 N.J. 268, 81 A.2d 364 (Mem)

KeyCite Yellow Flag - Negative Treatment

Distinguished by State ex rel. State Tax Commission v. Garcia, N.M., May 1, 1967

27 N.M. 454
Supreme Court of New Mexico.

SHACKLEFORD

v.

MCGLASHAN ET AL. ^{a1}

No. 2561. | Nov. 17, 1921.

Syllabus by the Court.

Payment in good faith of taxes, although the assessment on which the payment is made erroneously describes the land intended to be assessed, is a defense against a sale and tax deed based upon a second assessment of the same land with a proper description.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by W. H. Shackelford against A. E. McGlashan and another to cancel a tax deed and subsequent conveyance

based on it. Demurrer to complaint sustained, and the plaintiff appeals. Reversed and remanded.

Attorneys and Law Firms

*690 M. J. Helmick, of Albuquerque, for appellant.

George S. Downer and Simms & Botts, all of Albuquerque, for appellees.

Opinion

DAVIS, J.

{1} This is a proceeding to cancel a tax deed and subsequent conveyances based upon it. It was decided by the trial court upon a demurrer alleging that the complaint did not state facts sufficient to constitute a cause of action, this demurrer being sustained. The facts are therefore admitted, and we state them from the complaint. On January 1, 1908, John Schroeder was the owner of 160 acres of land described as the S. W. 1/4, S. 17, Tp. 9 N., R. 3 E., N. M. P. M., the land being located in Bernalillo county. This was the only 160-acre tract which he owned at that time. For the year 1908 Schroeder made a return for taxation purposes in Bernalillo county in which he included this 160 acres of land, but through inadvertence, error, and mistake he incorrectly described the land, the description set out in his tax schedule, literally read, being as follows:

tp. 7

Sec.	Tp.	Range	No. Acres
Precinct No. 1 SW1/4	17	# 5E	160

{2} This description was intended by Schroeder to identify and describe the 160 acres which he owned and was a bona fide attempt on his part to comply with the law.

{3} The assessor in making up the rolls for the year 1908 did not copy exactly the return made by Schroeder, but entered an assessment against him for the "SW1/4, Sec. _____, Tp. 17, R. 5 E." Under this assessment Schroeder paid the taxes levied, intending thereby to pay the taxes upon the 160 acres of land which he owned, and this payment was accepted by the treasurer of Bernalillo county.

{4} The land described in this assessment would be located in Sandoval county, and not in Bernalillo county, in which the assessment was made.

{5} For the year 1908 the assessor made an additional assessment against "unknown owners," and there correctly described and assessed the lands owned by Schroeder as the "S. W. 1/4, Sec. 17, Tp. 9, R. 3 E." Schroeder had no actual notice or knowledge of this assessment.

{6} After Schroeder had paid the taxes under the assessment above set out, containing the incorrect description of his lands, the land was sold under the assessment to "unknown owners," and such proceedings were had that the tax title thus instituted became vested in the defendant A. E. McGlashan under a tax deed from the county. Later McGlashan and his wife conveyed the land by warranty deed to D. V. Wardall, who, with his wife, and likewise by warranty deed, conveyed the *691 premises to J. J. Weisendanger, one of the appellees

here. The assessment to "unknown owners," the sale made under it to McGlashan, and the subsequent conveyances to Weisendanger all appear to be regular.

{7} The tax sale was made during the year 1909, and is therefore governed by the provisions of section 25, c. 22, Laws 1899, which has frequently been before this court, the latest case being *Chisholm v. Bujac*, 202 Pac. 126, decided at this term. This section expressly permits a tax sale made under that law to be attacked on the ground that the tax had been paid before the sale. In this respect it is merely declaratory of the rule which would exist without it. Nonpayment of the tax is an essential foundation for every tax sale.

{8} The question in this case is whether payment of the tax has in fact been shown, or, in other words, whether payment under this assessment which improperly described the land was good payment on the land he owned. It is conceded that appellant intended by this payment to pay the tax on his land and believed that he was doing so. Since the treasurer of the county accepted the money, it must be assumed that he understood it was payment on the same land, for he certainly would not knowingly accept the payment of taxes upon land not within his county. We have, therefore, a case where the owner has paid money to the county as taxes on a certain piece of land, and the county has accepted it as payment on that land, although in fact the land was not properly described on the tax roll and can only be identified by proof of circumstances wholly apart from the roll itself.

{9} The assessment under which this tax was paid was not a valid one. It would not have supported the tax sale based upon it. On the record presented to us the assessment to "unknown owners" was a valid assessment, and the tax sale based upon it was regular on its face. The conclusion that this assessment was valid necessarily follows from the decision of this court in *Knight v. Fairless*, 23 N. M. 479, 169 Pac. 312, in which this court held that an assessment of a specific piece of property to "unknown owners" could not be attacked by proof that the owner had attempted to include it in another assessment which did not describe it. We see nothing in the present record to differentiate that case from this one in that regard. But *Knight v. Fairless* did not involve the question of the payment of the tax. Here we are determining whether the tax was in fact paid, not primarily whether the assessment to "unknown owners" was good, and upon that point the former case is not authority.

{10} We are not presented with the issue as to whether payment may be shown to avoid a tax sale based upon a

record which incorrectly shows the tax unpaid, nor as to whether payment under one assessment, valid on its face, will avoid a sale under another equally regular, a question which arises in the ordinary case of double assessment. The authorities on such questions are uniform to the effect that payment in fact may be shown, and there would seem to be little chance for argument to the contrary. Here the question is somewhat different. We are determining whether payment under an assessment, invalid because it fails to describe the land sufficiently for identification, is good payment on the land intended to be assessed, so as to avoid a sale under another assessment with a proper description.

{11} The primary purpose of every law for the enforcement of tax liens is to obtain payment of the tax. The end desired is the obtaining of the funds necessary for governmental purposes. If that payment has been obtained, the primary purpose of the law has been accomplished, and this is true whether or not payment is made with technical accuracy. While the law provides for a tax sale and allows a purchaser at such sale to acquire title, divesting the former owner, that is but a method by which the county obtains its funds. The owner of the land having failed to pay, the county obtains its money from another. Under our statutes the purchaser at such a sale is amply protected. If the sale is invalid for the reason that no tax is in fact due, he recovers back from the county the amount which he paid to it. If his sale is valid, he obtains under it property usually worth many times the amount which he pays. He has all to gain and nothing to lose. The remedy as against the owner of the land is a harsh one in any event, and to hold that, where he has in good faith attempted and intended to return his land and to pay the taxes upon it, he must nevertheless lose it because of a failure to obey the provision of law which says that his assessment must properly describe the land, is to lay down too severe a rule. While it is true that the result would come from his own fault, the forfeiture of his property would be punishment far greater than the offense.

{12} It being admitted in this case that Schroeder acted in good faith, intended to return his land, intended to pay the taxes upon it, and believed that he had done so, and that the county authorities accepted the payment with the same understanding, we hold that it was good payment in fact upon the 160 acres of land which he then owned, and that this payment was a bar to any sale under the second assessment to "unknown owners" may be shown in avoidance of it, and when so shown defeats it.

{13} While cases presenting this exact question are few, we are not without authority for this decision. In *Kellogg v. McFatter*, 111 La. 1037, 36 South. 112, the facts were that Kellogg was the owner of 60 acres of land in the N. W. 1/4 of section 20. For the *692 year 1897 there was an attempt to assess this land, but it was described as "lying in the N. E. 1/4" of that section instead of the N. W. 1/4. Another assessment was made to A. E. Minor of a portion of the N. W. 1/4 of section 20, which included the Kellogg land, and under that assessment the land was sold for taxes. Before this sale Kellogg had paid the taxes under the assessment containing the erroneous description. The court held that the payment by Kellogg on his 60 acres of land was a good payment thereon, although the description of the land on the roll was erroneously given and further stated:

"A. E. Minor, having no interest in the matter, and being, besides, an absentee, made no opposition to this assessment; and Kellogg, having paid his own taxes in full for that year, rightfully considered that he was no longer concerned in the matter of tax sales for the taxes of that year. The attempt of the tax collector to collect taxes erroneously supposed to be due on that property and by A. E. Minor was utterly without justification, and any adjudication made under such circumstances was absolutely null and void."

{14} In *Meller v. Hodsdon*, 33 Minn. 366, 23 N. W. 543, the facts were that Hodsdon was the owner of certain land in what was known as "lot 2." The lot contained about 55 acres. The land was assessed to him as the west 30 acres of lot 2, and he paid the taxes so assessed and listed in his name. This was not a good description of his land and did not cover all that he owned. An additional assessment was made to "unknown owners," the land being described as "that part of lot 2, except west 30 acres and southeast 10 acres," and under this description a tax sale was made. This tax sale was attacked on the ground that the taxes had been paid under the incorrect assessment. The court found that it was shown by the evidence of the assessor that he in fact valued and assessed the defendant's land in lot 2 in connection with the rest of his farm under the first description, so that an assessment and valuation of the entire lot was in fact made, and then held:

"It is not necessary to consider whether the description would be sufficient to support a tax title as against the owner; but, upon the issue of payment by him of the taxes, under the assessment originally made, we see no reason why the facts we have recited were not proper to be shown in evidence, and upon them we think the finding warranted that the taxes lawfully levied upon defendant's land in lot 2 for the years in question were actually paid by him."

{15} In the case of *Bender v. Bailey*, 138 La. 433, 70 South. 425, it appears that an assessment was made for the year 1904 in the name of Gus Bender to the "south half of south half of section 17, township 22, range 15," and under this assessment the property was sold. For the same year there was assessed to L. A. Thomason land as follows: "number of acres, 160, \$200." This assessment contained no further description of the land. Thomason paid the taxes under this assessment and proved that the property on which he intended to pay was the same as that assessed to Gus Bender; Thomason not being the owner of any other 160 acres of land. There was no dispute as to the identity of the property, as there is none in the present case. The court said:

"It is quite clear from the evidence of this last witness that L. A. Thomason was the owner of the 160 acres in question; that he was not the owner of any other large body of land in Caddo parish in the year 1904; that the assessment of the property to him and the payment of the taxes thereon relieved the property from the assessment and taxes in the name of Gus Bender for the same property, for the same year; that the tax sale was null; that the property belongs to plaintiffs."

{16} In *Lewis v. Monson*, 151 U. S. 545, 14 Sup. Ct. 424, 38 L. Ed. 265, certain land was originally described as lot 6 in a designated section, and under this assessment the owner paid the tax. By a later map, which was effective at the time of the assessment, not all of the land was included in lot 6, but a part of it was within lot 7. An assessment was made against lot 7, and, the tax not being paid under this assessment, the lot was sold. The question was as to whether the owner

might invalidate this tax sale by showing that the payment which he made upon lot 6 was intended to cover all of the land. After quoting from the opinion of the Mississippi court, the Supreme Court of the United States says:

“That the owner was not bound, as matter of law, to take notice of the new map is shown by that decision, and if he was not bound to know, and did not in fact know, and paid under a mistake, relying upon the ancient descriptions and the old map, and intended in good faith to pay all his taxes, then clearly, within the scope of that decision, the sale was invalid, and the deed fails.”

{17} The decision in this case cannot be influenced by the fact that the present claimant under the tax title is not the

original purchaser, but a subsequent grantee from him. If the tax title in the hands of the first purchaser is invalid, it gains no validity by transfer to another. The stream of title rises no higher than its source. The purchaser of the tax title took with the knowledge that it might be defeated by proof of payment of the tax, and his grantee is in no better position. The question of notice and of the recording acts is not involved in this case.

{18} For the error of the trial court in sustaining this demurrer, the judgment is reversed, *693 and the cause remanded; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur

All Citations

27 N.M. 454, 202 P. 690, 23 A.L.R. 75, 1921 -NMSC- 093

Footnotes

a1 Rehearing denied.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Fessenden v. Onthank, Cal.App. 6 Dist., June 29, 2010

32 Cal.2d 453
Supreme Court of California, in Bank.

SORENSEN

v.

COSTA et al.

No. Sac. 5842. | Aug. 24, 1948.
| Rehearing Denied Sept. 20, 1948.

West Headnotes (19)

[1] Adverse Possession

⚡ Constitutional and Statutory Provisions in General

Where deeds of claimant and his predecessors in interest did not include land occupied, title thereto by adverse possession must be established under statutes relating to actual continuous occupation of land under a claim of title not founded upon a written instrument, judgment or decree and not under statute relating to color of title. Code Civ.Proc. §§ 322, 324, 325.

5 Cases that cite this headnote

[2] Adverse Possession

⚡ Recognition of Better or Other Title or Claim

The "hostility" essential to acquisition of title by adverse possession means not that parties must have a dispute as to title during period of possession, but that claimant's possession must be adverse to record owner unaccompanied by any recognition, express or inferable from the circumstances, of record owner's right. Code Civ.Proc. §§ 324, 325.

18 Cases that cite this headnote

[3] Adverse Possession

⚡ Entry and Possession by Mistake

Title by adverse possession may be acquired through possession or use commenced under mistake, the statute of limitations running from date of accrual of cause of action for recovery of the property and not from date of discovery of mistake. Code Civ.Proc. §§ 312, 318, 321, 324, 325; Civ.Code, § 1007.

2 Cases that cite this headnote

[4] Limitation of Actions

⚡ Causes of Action in General

Statute of limitations generally begins to run when cause of action actually accrues. Code Civ.Proc. § 312.

Cases that cite this headnote

[5] Limitation of Actions

⚡ Title to or Possession of Real Property

A cause of action for recovery of real property accrues so as to start statute of limitations running, when owner is deprived of possession. Code Civ.Proc. §§ 312, 318, 321; Civ.Code, § 1007.

1 Cases that cite this headnote

[6] Adverse Possession

⚡ Evidence

One claiming title to land by adverse possession must show that occupation thereof was such as to constitute reasonable notice to true owner that occupant claimed land as his own, but fact that record owner was unaware of his own rights in the land is immaterial. Code Civ.Proc. §§ 324, 325.

7 Cases that cite this headnote

[7] Adverse Possession

⚡ Mistake as to Location

That plaintiff and his predecessors in interest occupied land adjoining that described in their deeds due to mistake, shared by owner of land thus occupied, as to location of land described in deeds, did not preclude acquisition of title by

adverse possession to land thus occupied. Code Civ.Proc. §§ 324, 325; Civ.Code, § 1007.

2 Cases that cite this headnote

[8] Adverse Possession

⚡ Knowledge of or Notice to Former Owner

Where land protected by substantial enclosure and usually cultivated was occupied continuously by plaintiff and his predecessors in interest for more than five years and all taxes assessed thereon had been paid by plaintiff and his predecessors, such occupation constituted reasonable notice to true owner that plaintiff and predecessors in interest claimed the land as their own. Code Civ.Proc. §§ 324, 325; Civ.Code, § 1007.

1 Cases that cite this headnote

[9] Adverse Possession

⚡ Privity of Estate in General

In order to tack one person's possession to that of another so as to establish continuity of possession for five year period necessary to acquire title by adverse possession, some form of privity between successive claimants for the five year period is necessary. Code Civ.Proc. § 325.

Cases that cite this headnote

[10] Adverse Possession

⚡ Privity of Estate in General

The "privity" necessary to support the tacking of successive possessions of property in order to establish continuity of possession for period required to acquire title by adverse possession may be based upon any connecting relationship which will prevent a breach in the adverse possession and refer the several possessions to the original entry, and for such purpose no written transfer or agreement is necessary. Code Civ.Proc. § 325.

Cases that cite this headnote

[11] Adverse Possession

⚡ Privity of Estate in General

Privity, which is necessary to permit tacking in acquisition of title by adverse possession, may exist without a recorded conveyance or writing of any kind where one by agreement actually surrenders his possession to another in such manner that no interruption or interval occurs between the two possessions. Code Civ.Proc. § 325.

Cases that cite this headnote

[12] Adverse Possession

⚡ Verdict and Findings

Trial court's finding that land to which plaintiff claimed title by adverse possession was conveyed by deeds mistakenly describing adjoining property supported conclusion that plaintiff's predecessors in interest intended to transfer the land to which plaintiff claimed title and together with evidence that possession of such land was actually transferred to each successive occupant during 5 year period necessary to acquire title by adverse possession justified conclusion that plaintiff and his predecessors were in continuous possession for the statutory period. Code Civ.Proc. § 325.

2 Cases that cite this headnote

[13] Adverse Possession

⚡ Evidence

Evidence supported trial court's determination that improved land occupied by plaintiff and his predecessors in interest had been mistakenly described on tax rolls as adjoining land, which was unimproved, and that plaintiff and his predecessors had actually paid all taxes assessed on land thus occupied for the statutory period necessary to acquire title by adverse possession, and record owner of such land could not complain of such mistake in description, where at the time he did not know that he had any claim to such land and paid taxes on property he was occupying assessed to him under a similar mistake in description. Code Civ.Proc. § 325.

15 Cases that cite this headnote

[14] **Adverse Possession**

↔ Property Assessed

That land was not assessed by its description is not controlling under statute making payment of taxes essential to acquisition of title by adverse possession where the possession is not founded upon written instrument, judgment or decree. Code Civ.Proc. § 325.

2 Cases that cite this headnote

[15] **Taxation**

↔ Real Property

The purpose of description of land on tax assessment rolls is to notify interested parties of taxes due on the property, and record owner of land could not complain of any mistake in the description unless, he was misled thereby.

1 Cases that cite this headnote

[16] **Adverse Possession**

↔ Evidence

One claiming title by adverse possession must show that he and his predecessors actually paid the taxes assessed on the particular land occupied as required by statute, and where land occupied was assessed under a correct description that applied to other land, proof that claimant and his predecessors thought or supposed they were paying taxes on the land occupied is insufficient. Code Civ.Proc. § 325.

6 Cases that cite this headnote

[17] **Adverse Possession**

↔ Property Assessed

Where claimant of title by adverse possession has paid the taxes actually assessed on the land occupied, a misdescription on tax rolls or in tax receipts will not generally affect the efficacy of payment under statute requiring payment of taxes in order to establish title by adverse possession. Code Civ.Proc. § 325.

4 Cases that cite this headnote

[18] **Adverse Possession**

↔ Evidence

Where descriptions in tax receipts are insufficient by themselves to identify land occupied by claimant of title by adverse possession, so far as statutory requirements as to payment of taxes in order to establish title by adverse possession are concerned, claimant may show by other evidence that the particular land occupied was assessed and the taxes paid by him or his predecessors. Code Civ.Proc. § 325.

6 Cases that cite this headnote

[19] **Adverse Possession**

↔ Constitutional and Statutory Provisions in General

A person claiming title to property by adverse possession must establish his claim under either § 322 or under §§ 324 and 325, Code Civ.Proc.

1 Cases that cite this headnote

*455 Appeal from Superior Court, Solano County; Joseph M. Raines, Judge.

Actions by Ernest T. Sorensen against Manuel Costa and Nettie Connolly to quiet title to realty and for reformation of a deed, wherein defendant Costa filed a cross complaint and secured an order to bring in new parties. The actions were consolidated for trial. From judgment in favor of plaintiff in first action, defendant Costa appeals.

Judgment affirmed.

For prior opinion, see 187 P.2d 472.

Attorneys and Law Firms

**902 Ernest C. Crowley, of Fairfield, for appellants.

Morse & Richards and Stanley C. Smallwood, all of Oakland, for respondent.

Opinion

TRAYNOR, Justice.

Appellant, Manuel F. Costa, appeals from a judgment in favor of plaintiff and respondent, Ernest T. Sorensen, determining the latter to be the owner of a lot described as "The Westerly one-half of Lot 7, Block 51, Benicia, California, as the same is laid down and delineated on the Official Map of the City of Benicia."

According to the evidence and the findings of the trial court, this litigation arose out of a "general mistake existing as to the proper description of several lots lying in and upon block fifty-one as shown on the Official Map of the City of Benicia, California." For many years appellant and at least three of his neighbors living in Block 51 had been occupying land other than that described in their deeds. In 1940 it was *456 discovered that the actual boundaries of the lots occupied by appellant and his neighbors were approximately seventy-five feet, or one-half a lot's width, to the west of the land described in their respective deeds. Thus, appellant had been living for over forty years in a house on a lot that is actually the east half of lot 8, but which his deed describes as the west half of lot 7. His next-door neighbor, respondent, has a deed describing the east half of lot 7, but he has been occupying a house on land described in appellant's deed, the west half of lot 7. Nettie Connolly has been in possession for many years of property that includes the east half of lot 7, which is unimproved land, and the west half of lot 6. Her deed, however, describes the whole of lot 6. The east half of lot 6 and the west half of lot 5 together constitute corner property occupied by Francis Little, but his deed describes the whole of lot 5, a large part of which is a street.

At a tax sale in September, 1940, appellant purchased land described as the east half of lot 8. He had the land surveyed and discovered that the tax deed actually described the land on which he had been living for nearly forty years. A dispute subsequently arose between appellant and respondent with respect to the land occupied by respondent but described in appellant's deed, and respondent brought this action to quiet his title to the land in question on the ground that he had acquired **903 title thereto by adverse possession. By a subsequent amendment to his complaint he also sought reformation of his deed. Appellant filed an answer and cross-complaint and secured an order to bring in new parties, including E.E. Rose and Bessie C. Rose, who claim an interest in the land in question under a deed of trust. Meanwhile, respondent also brought an action against Nettie Connolly

claiming title under his deed to the east half of lot 7. The actions were consolidated for trial. Judgment was entered for respondent quieting his title to the land occupied by him, namely, the west half of lot 7, subject to the deed of trust in favor of E.E. Rose and Bessie C. Rose; the judgment also determined that Nettie Connolly owns the land occupied by her, namely, the east half of lot 7. No appeal has been taken from the part of the judgment quieting title in favor of Nettie Connolly.

In 1890 L.B. Misner executed a deed to lot 7 to E.F. Albee and F.M. Carson. Shortly thereafter the grantees exchanged deeds, dividing the lot between them. Carson received a deed describing the east half of lot 7, and Albee received a deed describing the west half. In 1901 Albee executed a deed to *457 Manuel Costa likewise describing the west half of lot 7, but Costa took possession of the east half of lot 8 and has resided thereon ever since.

In 1893 E.M. Carson executed a deed to Nicholas Nelson describing the east half of lot 7. Similar deeds were executed by Nelson and his successors in interest, including a deed executed in 1928 by H.C. and Myrtle Glass to George Costa, the son of appellant, who occupied the land until 1936, when he transferred possession to E.E. Rose and Bessie Rose and executed a deed in their favor likewise describing the adjoining land. In 1938 E.E. Rose and Bessie Rose executed a like deed in favor of Nicholas Kadas and Josephine Kadas. The land was in possession of tenants of Nicholas and Josephine Kadas in March, 1940, when they executed a deed in favor of respondent, Ernest T. Sorensen, likewise describing adjoining land. The tenants remained in possession, paying their rent to respondent until the termination of their tenancy, about six months later, when respondent went into possession.

The trial court found that "for more than forty years last past, and prior to the commencement of this action, plaintiff Ernest T. Sorensen and his predecessors of title, have been in actual possession" of the property in question; that "from the year 1893, to the date of the commencement of this action, due to the mistake of the several Grantees and Grantors of said real property, the same has been mistakenly described in the several conveyances thereof, including the conveyance to plaintiff herein, as the East one-half (E ½) of Lot Seven (7), Block Fifty-one (51), City of Benicia, California, instead of the West one-half (W ½) of Lot Seven, Block Fifty-one (51), City of Benicia, California."

With respect to the payment of taxes, the trial court found that for many years “and particularly during the five year period prior to the commencement of this action, the real property hereinabove described *** has been described on the tax assessment rolls of both the County of Solano, and the City of Benicia, California, as the East one-half (E ½) of Lot Seven (7) Block Fifty-one (51), City of Benicia, California and that all taxes assessed by the County of Solano and City of Benicia, California, against said property have been assessed against plaintiff, Ernest T. Sorenson and his predecessors in possession and occupation of said real property ***.” The court also found that both appellant and respondent and their predecessors “have paid all of the *458 taxes assessed by the City of Benicia and the County of Solano, against the properties actually occupied by them.”

In addition, the trial court found that respondent “and his predecessors in interest have since the 19th day of April, 1890, been in actual possession” of the property in question “and have ever since the last date *** occupied, used and cultivated said land, having and keeping the same surrounded by a substantial enclosure, using and claiming the same in their own right from that date to the present time adversely, to all the world.”

[1] A person claiming title to property by adverse possession must establish his claim under either section 322 or under sections 324 and **904 325 of the Code of Civil Procedure. Adverse possession under section 322 is based on what is commonly referred to as color of title. In order to establish a title under this section it is necessary to show that the claimant or “those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property *** for five years *** so included ***.” Since the deeds in question did not include the land occupied, adverse possession thereof is governed by sections 324 and 325 of the Code of Civil Procedure. *Park v. Powers*, 2 Cal.2d 590, 594, 42 P.2d 75.

Section 324 of the Code of Civil Procedure provides that “where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no

other, is deemed to have been held adversely.” Section 325 provides that “For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

“(1) Where it has been protected by a substantial inclosure.

“(2) Where it has been usually cultivated or improved.

“Provided, however, that in no case shall adverse possession be considered established under the provisions of any section or sections of this code, unless it shall be shown that the land *459 has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land.”

The trial court found that the land was occupied continuously by respondent and his predecessors for more than five years; that throughout that period it was protected by a substantial enclosure and usually cultivated; and that all the taxes assessed thereon had been paid by respondent and his predecessors. Appellant contends, however, that respondent is precluded, as a matter of law, from establishing title by adverse possession. Appellant's contentions in this regard may be classified under the following headings: (1) That the mutual mistake of the parties precluded respondent from establishing the adverse character of the possession of the property by him and his predecessors; (2) that the fact that the deeds held by respondent and his predecessors failed to describe the land in question precluded him from showing continuity of possession for the statutory period; (3) that respondent did not prove that he and his predecessors paid all the taxes assessed on the land in question during the statutory period.

The Adverse Character of the Possession

[2] [3] Appellant contends that as a matter of law respondent could not have acquired title by adverse possession because the mutual mistake of the parties for the statutory period precluded respondent from showing that the possession was hostile or adverse to the rights of the record owner. A similar contention was rejected by this court in *Woodward v. Faris*, 109 Cal. 12, 17, 41 P. 781. The requirement of “hostility” relied on by appellant (see *West v. Evans*, 29 Cal.2d 414, 417, 175 P.2d 219) means not

that the parties must have a dispute as to the title during the period of possession, but that the claimant's possession must be adverse to the record owner, "unaccompanied by any recognition, express or inferable from the circumstances of the right in the latter." (4 Tiffany, Real Property, [3rd ed.] 425.) Appellant's contention that respondent's possession was not adverse is based on the statement in *Holzer v. Read*, 216 Cal. 119, 123, 13 P.2d 697, 698, that "where the occupation of land is by mere mistake, and with no intention on the part of the occupant to claim as his own, land which does not belong to him, but with the intention to claim only to the true line **905 wherever it may be, *460 the holding is not adverse." [Italics added.] That statement is not applicable to the present case, for the trial court found on the basis of substantial evidence that respondent and his predecessors did claim the land as their own and held it "adversely to all the world." The *Holzer* case involved a different situation, a dispute as to boundaries, that turned on the question whether the occupier in occupying up to a certain line intended to claim the land included in the record title of his neighbor or to claim only whatever land was described in his own deed. (See Code of Civil Procedure, §§ 322, 324.) The trial court found that he intended to claim only the land described in his deed, and this court affirmed the judgment on the ground that in the absence of an intention to claim the land in dispute as his own, his possession was not adverse. On the other hand, in *Woodward v. Faris* supra, 109 Cal. 12, 17, 41 P. 781, this court expressly held that if the claimant intends to claim the area occupied as his land, the mere fact that the claim was based on mistake does not preclude him from acquiring title by adverse possession. Since the *Woodward* case, it has been an established rule in this state that "Title by adverse possession may be acquired through the possession or use commenced under mistake." *Park v. Powers*, supra, 2 Cal.2d 590, 596, 42 P.2d 75, 77; *Lucas v. Provines*, 130 Cal. 270, 272, 62 P. 509; see 1 Cal.Jur. 578; cases from other jurisdictions collected, 97 A.L.R. 14, 58; 4 Tiffany, Real Property, [supra] section 1159; 1 Walsh, Commentaries on the Law of Real Property, section 19.

[4] [5] Nor is there any merit to appellant's contention that if adverse possession may be based on a mistaken entry, the period of the statute of limitations runs only from the discovery of the mistake. Appellant relies on *Breen v. Donnelly*, 74 Cal. 301, 305, 15 P. 845, and a dictum in *Marsicano v. Luning*, 19 Cal.App. 334, 336, 125 P. 1083. The case of *Breen v. Donnelly*, supra, is not in point, for it involved the application of the statute of limitations to an action for relief on the ground of fraud or mistake under

section 338(4) of the Code of Civil Procedure. Section 338(4) provides that in such a case the cause of action for purposes of the statute of limitations is deemed not to accrue until the discovery of facts constituting the fraud or mistake. The section is an express exception to the general rule that the statute of limitations begins to run when the cause of action actually accrues. (Code Civ.Proc. § 312.) A cause of action of the recovery of real property accrues when the owner is deprived of possession. (Code Civ.Proc. §§ 318, 321.) "Occupancy for the *461 period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto *** sufficient against all ***." (Civil Code, § 1007.) The dictum in *Marsicano v. Luning*, 19 Cal.App. 334, 336, 125 P. 1083, that the period of adverse possession does not commence to run until the discovery of the mistake, must be disapproved, for it is not only inconsistent with the statutes of this state but is directly contrary to the holding of this court in *Woodward v. Faris*, supra, 109 Cal. at 15, 41 P. at 781, where both parties were operating under a mutual mistake during the statutory period.

[6] [7] [8] Appellant also contends that the mutual mistake precludes respondent from showing that his possession and that of his predecessors was under "such circumstances as to constitute reasonable notice to the owner." *West v. Evans*, supra, 29 Cal.2d 414, 417, 175 P.2d 219, 220. Appellant has evidently misconstrued the foregoing language to mean that a person claiming title by adverse possession must establish that the record owner knew of his own rights in the land in question. All that the claimant must show, however, is that his occupation was such as to constitute reasonable notice to the true owner that he claimed the land as his own. The fact that the record owner was unaware of his own rights in the land is immaterial. *Wood v. Davidson*, 62 Cal.App.2d, 885, 889, 145 P.2d 659; *McLeod v. Reyes*, 4 Cal.App.2d 143, 157, 40 P.2d 839; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 578, 77 P. 1113; additional cases collected, 1 Cal.Jur. 550; 4 Tiffany, Real Property, supra, § 1140. In the present case there can be no question under the findings of **906 the trial court that the occupation of respondent and his predecessors was such as to constitute reasonable notice that they claimed the land as their own.

Continuity of Possession

[9] Under section 325 of the Code of Civil Procedure, respondent was required to prove that "the land has

been occupied and claimed for the period of five years continuously." Since respondent did not himself possess or occupy the land for five years, it was necessary for him to rely on the possessions of his predecessors to establish continuous possession for the five-year period. In order to tack one person's possession to that of another, some form of privity between successive claimants for the five-year period is necessary. *462 *San Francisco v. Fulde*, 37 Cal. 349, 353, 99 Am.Dec. 278; *Meier v. Meier*, 71 Cal.App.2d 502, 507, 162 P.2d 950. Appellant contends that respondent failed to establish the necessary privity.

The trial court found that respondent "and his predecessors in title, have been in possession and occupied the West one-half (W ½) of Lot Seven *** by virtue and under deed describing their said property as the East one-half (E ½) of Lot Seven. ***" from the year 1893 to the date of the commencement of the action.

The trial court found that respondent and "his predecessors in title" have been in possession of the property in question by virtue of deeds mistakenly describing the property as the east one-half of lot 7 for more than the statutory period and that the land in question was conveyed to plaintiff and his predecessors by deeds describing the adjoining property. Since respondent's claim of title by adverse possession cannot be based on a written instrument it must be supported, if at all, under Code of Civil Procedure sections 324 and 325, which do not require a written instrument. The question remains what privity other than that based on a deed describing the land will supply the necessary continuity of possession between respondent and his predecessors for the five-year period preceding the commencement of this action.

Relying on *Messer v. Hibernia Savings Society*, 149 Cal. 122, 128, 84 P. 835, and *Von Neindorff v. Schallock*, 21 Cal.App.2d 44, 48, 68 P.2d 278, appellant contends that only a deed describing the land claimed will supply the necessary privity. Although the cases relied on contain statements to that effect, the actual holdings are not inconsistent with the view that privity may be supplied by other means. In both cases the claimant attempted to support his claim of adverse possession by a deed excluding the land claimed, and it was held that such deeds did not supply the necessary privity. In the *Von Neindorff* case, supra, 21 Cal.App.2d 44, 48, 68 P.2d 280, the court stated that a person claiming title to land by adverse possession "cannot tack to the time of his possession that of a previous holder where the land claimed adversely was not included within the boundaries of the conveyance he received

from such previous holder." The court stated as the reason for this rule that "otherwise a person receiving a conveyance of a part of lands occupied by a predecessor might use the possession of that predecessor of another part of the land to defeat the rights of that predecessor with respect to that part of the land *463 which he intended to keep for himself. The rule is particularly appropriate in a case such as this where the land, the predecessor's possession of which is relied upon, was particularly excepted from the conveyance made by the predecessor." This statement of the reason for the rule and its application to the facts of the *Von Neindorff* and *Messer* cases shows that the rule was too broadly stated in those cases. The reasoning supports, at most, a rule designed to protect the claimant's predecessor where he transfers by deed a part but not all of the land he possessed. It has no application to a situation where the deed describes none of the land possessed by the claimant's predecessor and the predecessor has transferred possession and attempted to transfer title to all of the land that he possessed. In such a situation the deed to land possessed by neither the present claimant nor his predecessors does not preclude a claim by the person in possession to the land occupied.

Appellant relies also on *Allen v. McKay and Co.*, 120 Cal. 332, 52 P. 828, and *Saner v. Knight*, 86 Cal.App. 347, 260 P. 942. *907 The court's only comment relevant to the problem of privity in the *Allen* case, however, is that [120 Cal. 332, 52 P. 831] "it may be further suggested that a privity of estate is absolutely necessary before various periods of adverse possession created by different parties may be tacked together, and, as to the land in controversy, the existence of such privity *** is not entirely plain." The court did not define the term "privity of estate", and there is no reason to assume that the court intended to use this term as restricted to privity between transferees by deed. (See *Ballantine, Title by Adverse Possession*, 32 Harv.L.Rev. 135, 147.) In *Saner v. Knight*, 86 Cal.App. 347, 351, 260 P. 942, it was held that deeds describing the property were sufficient to establish the privity necessary to tack the adverse possession of the claimant to that of his predecessors. Although the court assumed that privity might not be established by other means, any language in the opinion supporting such a rule was unnecessary to the decision in that case and is disapproved.

[10] [11] The requirement of privity between several possessors of land is based on the theory that "The several occupancies must be so connected that each occupant can go back to the original entry or holding as a source of title. The successive occupants must claim through and under their predecessors *464 and not independently to make a continuous holding united into one ground of

action.” (Ballantine, *supra*, 32 Harv.L.Rev. 135, 147.) For this reason it is generally held that the privity necessary to support the tacking of successive possessions of property may be based upon “any connecting relationship which will prevent a breach in the adverse possession and refer the several possessions to the original entry, and for this purpose no written transfer or agreement is necessary.” (4 Tiffany, *Real Property*, *supra*, 434; *Illinois Steel Co. v. Paczocha*, 139 Wis. 23, 28, 119 N.W. 550; *Gregory v. Thorez*, 277 Mich. 197, 200, 269 N.W. 142; *Bonds v. Smith*, 79 U.S.App.D.C. 118, 143 F.2d 369, 371; cases collected 46 A.L.R. 792, 795; Ballantine, *supra*, 32 Harv.L.Rev. 135, 147–159; 5 Thompson on *Real Property* [Perm.Ed.], 468; 1 Walsh, *Commentaries on the Law of Real Property*, *supra*, sec. 23.) “It is possession not title which is vital. *** Privity may exist where one by agreement surrenders his possession to another in such manner, that no interruption or interval occurs between the two possessions without a recorded conveyance, or even without writing of any kind if actual possession is transferred.” *Bonds v. Smith*, *supra*, 79 U.S.App.D.C. 118, 143 F.2d 369, 371.

[12] In the present case, although the finding that the land in question was conveyed by deeds mistakenly describing the property does not alone support the conclusion that the privity necessary to tack successive possessions existed between respondent and his predecessors, it does support the conclusion that respondent's predecessors intended to transfer the land in question. There is no question that the evidence before the trial court showed that possession to the land in question was actually transferred to each successive occupant during the five-year period. It therefore follows that the conclusion of the trial court that the respondent and his predecessors were in continuous possession for the statutory period must be sustained.

Payment of Taxes

The trial court found that the land occupied by respondent, the west half of lot 7, is improved land, whereas the east half of lot 7 described in respondent's deed is unimproved, and that through a general mistake, the improved lot occupied by respondent “has been generally known and described in and about the City of Benecia” as the east half of lot 7, an unimproved part of the property occupied by Nettie Connolly. The court found that this same mistake was made on the *465 assessment rolls and that the property occupied by respondent has been described in the tax assessment rolls

of both the city and county as the east half of lot 7 and assessed to respondent and his predecessors as improved property. The court therefore determined that respondent and his predecessors have paid all the taxes that have been assessed on the property actually occupied by them for the five-year period before the commencement of the action.

**908 [13] Thus, all interested persons have mistakenly believed during the statutory period that the description of the land and improvements on the tax assessment rolls referred to the land occupied by respondent, when, in fact, the description erroneously referred to certain unimproved property. The evidence before the trial court, particularly the fact that the land was assessed as improved property whereas the description on its face referred to a vacant lot, supports the trial court's determination that the description was mistaken and that the respondent and his predecessors actually paid all taxes assessed for the statutory period on the land that they occupied.

[14] [15] [16] Appellant contends that the description on the tax assessment rolls is controlling, and that as a matter of law the respondent must have paid taxes only on the land described on the assessment rolls. This court has held, however, that the fact that land was not assessed by its description is not controlling under section 325 of the Code of Civil Procedure. *Ward Redwood Company v. Fortain*, 16 Cal.2d 34, 44, 104 P.2d 813. The purpose of the description on the tax assessment rolls is to notify interested parties of the taxes due on the property, and appellant cannot complain of any mistake in the description unless he was misled thereby. *San Francisco v. San Mateo*, 17 Cal.2d 814, 819, 112 P.2d 595; *E.E. McCalla Co. v. Sleeper*, 105 Cal.App. 562, 567, 288 P. 146; *Biaggi v. Phillips*, 50 Cal.App.2d 92, 98, 122 P.2d 619; see also *Lummer v. Unruh*, 25 Cal.App. 97, 103, 104, 142 P. 914. Since appellant as well as other interested parties at the time the taxes in question were assessed also understood that the taxes related to the property occupied, he could not have been misled thereby. He was not injured by the mistake in the description, for at the time he did not know that he had any claim to the land in question and paid taxes on the property he was occupying assessed under a similar mistake in description. Appellant contends, however, that respondent *466 cannot rely on his own mistake and that of his predecessors as to the payment of taxes on the wrong land. There is no question that a person claiming title by adverse possession must show that he and his predecessors actually paid the taxes assessed on the particular land occupied, and he cannot show compliance with section 325 of the Code of Civil Procedure by merely proving that he

and his predecessors "thought or supposed they were paying taxes" on the land occupied by them, when the lands were assessed under a correct description that applied to other land. *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, 124, 64 P. 113; *Reynolds v. Williard*, 80 Cal. 605, 608, 22 P. 262. In the present case, however, the respondent proved by substantial evidence that the description on the tax assessment rolls was mistaken and that he and his predecessors not only thought that they were paying taxes on the land occupied but in fact paid taxes actually assessed against such lands.

[17] [18] Appellant also relies on certain cases involving boundary disputes between adjoining landowners, in which the courts have denied claims of title by adverse possession up to the boundaries of the land occupied, on the ground that the claimant failed to establish payment of taxes on the disputed part of the occupied land by tax receipts that failed to describe the land. See *Freidman v. Southern Calif. T. Co.*, 179 Cal. 266, 176 P. 442; *Mann v. Mann*, 152 Cal. 23, 29, 91 P. 994; *Wilder v. Nicolaus*, 50 Cal.App. 776, 195 P. 1068; *Johnson v. Buck*, 7 Cal.App.2d 197, 202, 46 P.2d 771. In none of these cases, however, does it appear that the claimant showed that the descriptions on the tax receipts were erroneous and that he actually paid the taxes assessed on the land in controversy. Where a claimant of title by adverse possession has paid the taxes actually assessed on

the property occupied, a misdescription on the tax assessment roll or in the tax receipts will not generally affect the efficacy of payment under statutes requiring the payment of taxes in order to establish title by adverse possession. *West Chicago Park Commissioners v. Coleman*, 108 Ill. 591, 598; *W.D. Cleveland & Sons v. Smith*, Tex.Civ.App., 156 S.W. 247, 251; cases collected 2 C.J.S., *Adverse Possession*, § 177, page 752; 132 A.L.R. 216, 227. Even if the descriptions on the **909 tax receipts are insufficient by themselves to identify the property, as far as the requirements of adverse possession are involved, the claimant may show by other evidence that the particular land occupied was assessed, and the *467 taxes were paid by him or his predecessors. See *Branch v. Lee*, 373 Ill. 333, 26 N.E.2d 88; see also *Lummer v. Unruh*, supra, 25 Cal.App. 97, 104, 142 P. 914.

The judgment is affirmed.

GIBSON, C.J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

All Citations

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