1956

Jessup Thomas et al v. Karl V. King et al : Brief of Appellants

Utah Supreme Court

George B. Stanley; Attorney for Plaintiffs and Appellants;

IN THE SUPREME COURT
of the
STATE OF UTAH

JESSUP THOMAS and IRENE THOMAS, his wife; WILLIAM H. VAN TASSELL and DAPHNE VAN TASSELL, his wife; ORVEN J. MOON and DELPHIA N. MOON, his wife; and EDWIN CARMAN,

Plaintiffs and Appellants,

vs.

KARL V. KING, as Administrator of the Estate of HANNAH J. BAFFET, Deceased; DALLAS H. YOUNG, Jr., as Administrator with the will annexed of the Estate of JOHN MAXCY ZANE, deceased; THE CONTINENTAL BANK & TRUST COMPANY OF SALT LAKE CITY, as Administrator of the Estate of DAVID G. SMITH, deceased; JUANITA G. SMITH, surviving wife of DAVID G. SMITH, deceased; HELEN B. MOTT; L. L. PACK and NORA E. PACK, his wife; W. H. COLTHARP and ORAL COLTHARP, his wife;

Defendants, Intervenors and Respondents.

Case No. 8519

BRIEF OF APPELLANTS

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Attorney for Plaintiffs
and Appellants

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PRELIMINARY STATEMENT

In order to take away any chance for confusion, the caption of the action has been amended to cover the actual

appellants and respondents who are now before the court in this appeal. All other parties who were previously named in the caption of the action in the court below and who are not interested in this appeal have been omitted.

STATEMENT OF FACTS

A.

PARTIES.

The plaintiffs in the court below and appellants herein are the following: Jessup Thomas and Irene Thomas, his wife, William H. Van Tassell and Daphne Van Tassell, his wife, Orven J. Moon and Delphia N. Moon, his wife, and Edwin Carman. In this brief, these parties shall be designated, for the purpose of brevity and clarity, the plaintiffs.

The defendants in the court below and who are respondents herein, are the following:

1. The Continental Bank and Trust Company of Salt Lake City, Administrator of the Estate of David G. Smith, Deceased, Jaunita C. Smith, surviving widow of David G. Smith, Deceased; Helen B. Mott; L. L. Pack and Nora E. Pack, his wife; and W. H. Coltharp and Oral Coltharp, his wife; all of whom claim under the same title, and these parties will be designated as the Smith defendants for brevity and clarity.

2. Karl V. King, administrator of the estate of Hannah J. Braffet, deceased, who claims the same interest as the

above Smith defendants, and is in default in the action, who will be called the Braffet defendants.

3. Dallas H. Young, Jr., Administrator with the will annexed of the Estate of John Maxcy Zane, sometimes known as John M. Zane, Deceased. This interest will be called the Zane defendants.

B.
PLEADINGS.

The pleadings which are pertinent to this appeal are as follows:

1. Complaint filed June 25th, 1952, alleging a short form to quiet title against the Smith interests, the heirs of Mark P. Braffet and Hannah Braffet, both deceased, the heirs of John M. Zane, deceased, and others. (Rec. 1-5)

2. Answer of David G. Smith and Juanita C. Smith, his wife; Helen B. Mott; L. L. Pack and Nora E. Pack, his wife; W. H. Coltharp and Oral Coltharp, his wife. This answer makes certain general admissions and denials as to the allegations of the complaint and nothing else. There are no affirmative allegations. There is no claim that the defendants or either or any of them own any interest in the lands involved in the action, or that they are entitled to the possession of the same. There is no counterclaim. There is a prayer that "these defendants' title and ownership in an undivided one-third (⅓) interest in the real property described in the complaint be quieted in these defendants" but there is no allegation of any nature to

support such a prayer. This answer was filed March 21st, 1953. Said answer was signed by Dallas H. Young, Young, Young & Sorensen, Attorneys for said defendants. (Record 14-16)

3. Order Authorizing Joinder of Additional Parties, filed March 21st, 1953, joining The Carter Oil Company, Edwin Carman, Irene Thomas, Daphne Van Tassell and Delphia N. Moon as parties. (Record 22-23)

4. Reply of the Carter Oil Company, to the answer of the Smith interests setting up the bar of the Statute of Limitations as contained in Section 78-12-6, U.C.A. 1953, and the provisions of Chapter 19, Laws of Utah, 1951, and claiming an Oil and Gas Lease under Jessup Thomas and Irene Thomas, his wife, plaintiffs, herein. This was filed May 7th, 1953. Said Answer denies any title in the defendants and sets forth many matters not in issue here. (Record 32-36)

5. Order dismissing the action as to all defendants excepting David G. Smith and Juanita C. Smith, his wife; Helen B. Mott; L. L. Pack and Nora E. Pack, his wife; and W. H. Coltharp and Oral Coltharp, his wife. Filed September 14, 1953. The dismissal is without prejudice. (Record 52).

6. ORDER SUBSTITUTING A REPRESENTATIVE FOR DAVID G. SMITH, DECEASED, filed March 26th, 1954. The Continental Bank and Trust Company of Salt Lake City was substituted for the defendant, David G. Smith. (Record 74).

7. ANSWER OF INTERVENOR, filed April 27, 1954, wherein Karl V. King, Administrator of the Estate of Hannah J. Braffet, Deceased, in his first defense, makes general admissions and denials of the matters alleged in the complaint. Said answer further alleges that "at the time of the death of said Hannah J. Braffet, she had an undivided interest in the real estate described in the complaint and that upon her death her interest descended to her heirs subject to being probated." Said answer prays that the "undivided interest in the real property described in the complaint, as her interest may appear, be quieted in the intervenor." Said answer is signed by Dallas H. Young, attorney for Administrator of the Estate of Hannah J. Braffet, deceased.

As a second defense the answer alleges the civil action No. 2263 in the same court, setting forth the names of the plaintiffs and defendants. Jessup Thomas is not listed as a plaintiff, and Hannah J. Braffet, her legal representative, or anyone connected with her is not listed as a defendant. Neither are The Carter Oil Company, Edwin Carman, Irene Thomas, Daphne Van Tassell and Delphia N. Moon listed as parties, these parties having been made parties on March 21st, 1953, before the filing of the answer. The following named persons were made parties to this present action who were not made parties to the said civil action No. 2263, namely: Jane Doe Miller, the wife of C. E. Miller; Jane Doe Stenger, the wife of Ernest Stenger; Minnie Barboglio, the wife of Peter Barboglio; R. J. Turner and Gertrude Ella Turner, his wife; J. R. Sharp; and Duchesne County.

Further continuing as a second defense, said answer sets up the present action and alleges the names of the plaintiffs and the defendants therein, omitting, however, the names of The Carter Oil Company, Edwin Carman, Irene Thomas, Daphne Van Tassell and Delphia N. Moon, who had been made parties previously to the filing of the answer, and prior to the dismissal alleged. The answer further sets up that the actions were voluntarily dismissed by the plaintiffs, and that the two dismissals operated "as an adjudication upon the merits and under Rule 41 of the Rules of Civil Procedure, Utah Code Annotated 1953."

No mention is made in this answer of Civil Action No. 2693. (Record 77-81)

No counterclaim was filed by this defendant.

8. AMENDED ANSWER OF INTERVENOR, filed April 27th, 1954, wherein Dallas H. Young Jr., Administrator with the will annexed of the estate of John Maxcy Zane, deceased, in his first defense, makes general admissions and denials of the matters alleged in the complaint. Said answer further alleges "that at the time of the death of the said John M. Zane, he had an undivided 1/6 interest in the real estate described in the complaint and that upon his death his interest descended to his heirs subject to being probated."

The same defenses are set up in the second cause of action as are set up in No. 7 last above. Other than the fact that John M. Zane was made a party defendant in

Civil Action No. 2263, the same differences in parties exist. The same issue is set forth as is raised in paragraph 7 above. The answer is signed by Dallas H. Young as attorney for said administrator. No counterclaim was filed by this defendant. (Record 82-86)

9. REPLY BY PLAINTIFFS AND BY DEFENDANT, THE CARTER OIL COMPANY, TO ANSWER OF DALLAS H. YOUNG, JR., ADMINISTRATOR, filed April 27th, 1954, making general admissions and denials, and setting up the Statute of Limitations, particularly 78-12-6, U. C. A. 1953, and Chapter 19, Laws of Utah, 1951. (Record 87)

10. Decree Quieting Title, filed September 13th, 1954, wherein an undivided ⅓ interest in the lands described in the complaint was quieted in the Smith defendants, 1/6 in the Zane defendants, and 2/9 in the Braffet defendants. The Smith and the Braffet interests are the same, and the ⅓ in litigation was quieted to cover 5/9 undivided interest. The Smith and Braffet defendants are adverse to each other. (Record 104-106)

11. ORDER OPENING AND WITHDRAWING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE, AND ORDER GRANTING A NEW TRIAL, filed December 13th, 1954. This was granted mainly on the double interest quieted in the original decree. (Record 113.)

12. WITHDRAWAL OF COUNSEL. Dallas H.

Young withdraws as counsel for Karl V. King, Administrator of the Estate of Hannah J. Braffet, Deceased. (Record 114)

13. NOTICE TO APPEAR BY COUNSEL OR PERSONALLY, filed February 17th, 1955, wherein Karl V. King, Administrator, is given notice to appear. (Record 116). The default of Karl V. King, Administrator as aforesaid, was entered March 16th, 1955. (Record 124.)

14. REPLY OF PLAINTIFFS AND ADDED PARTIES TO ANSWER, filed April 25th, 1955. This reply makes general denials and admissions, and sets up limitations set forth in Section 78-12-6, U.C.A. 1953, and the provisions of Chapter 19, Laws of Utah, 1951. This affects the Smith interests.

15. REPLY TO AMENDED ANSWER OF INTERVENOR. Plaintiffs and added parties make general denials and admissions, and set up limitations of Section 78-12-6, U.C.A. 1953, and the provisions of Chapter 19, Laws of Utah, 1951. This affects the Zane interests.

16. STIPULATION FOR DISMISSAL OF ACTION AS TO DEFENDANT THE CARTER OIL COMPANY, filed November 28th, 1955.

The issues tried and which are pertinent to this appeal under the pleadings were the following:

a. Plaintiffs claim under a tax title.

b. Plaintiffs and added parties claimed that the various defendants, Smith, Braffet and Zane defendants, were

barred from interposing their various answers by the provisions of Section 78-12-6, U. C. A. 1953, and the provisions of Chapter 19, Laws of Utah, 1951.

c. The Smith defendants claimed that while the statute might be effective at the time of the commencement of this action, the statute was tolled by the filing by the plaintiffs of civil action No. 2693, and by the filing of the answer by the said defendants in civil action No. 2693.

d. The Smith and Zane defendants claimed that the tax proceedings were invalid because there was no auditor's affidavit affixed to the assessment rolls for the year 1929. (Transcript 9).

e. The Zane defendants claimed that the dismissals by order of the court in Civil Actions 2263, 2693 and in the present action constituted dismissals on the merits under Rule 41 of the Rules of Civil Procedure, Utah Code Annotated, 1953.

No claim was made by the defendants or any of them that the deed to the County, and the deed from the county to Jessup Thomas were not valid of their face or that the deeds were not made by the proper governmental authority.

There was some evidence introduced to show possession by the plaintiffs, (Record 133-4), but the issue was disposed of by the court and the case decided on the issue of the Auditor's Tax Deed given May 19th, 1936, and as to plaintiffs further claim, that defendants are barred by the statute of limitations. (Record 133-4)

C.

EVIDENCE.

Except as to the testimony regarding possession, which is not in issue on this appeal, all of the testimony offered by both plaintiffs and defendants was documentary. The plaintiffs introduced the following evidence.

EXHIBIT A: A certified photographic copy of the Tax Sale Record showing the tax sale of the property involved in this action on Line 5 of Page 56, Sale No. 665, which certification was made by Dorothea W. Allred, County Recorder of Duchesne County, State of Utah, under date of March 15th, 1954. No objection was made to this exhibit by defendants (Transcript 7).

EXHIBIT B: Certified photographic copy of the record in the office of the County Recorder of Duchesne County, Utah, of the Auditor's Tax Deed of the property involved in this action, made to Duchesne County, Utah. No objection was made to this exhibit by defendants (Transcript 7).

EXHIBIT C: Abstract of title No. 3002, prepared by Stanley Title Company, final certificate dated January 20th, 1953, at 9:00 o'clock A. M., showing the title up to the date of certification of the lands involved in this action. No objection was made by defendants to this exhibit (Transcript 7).

EXHIBIT D: Statement of the assessment and payment of taxes on the property involved in the action from

1937 to 1954, inclusive, certified to by Leland Wright, Treasurer, Duchesne County, Utah under date of April 25th, 1955. Objection was made by defendants to this exhibit but the objection was withdrawn. (Transcript 7.)

EXHIBIT E: Photographic copy of minutes of the Fourth Judicial District Court, Duchesne County, State of Utah, for June 23, 1952, showing that Dallas H. Young made no objection to the dismissal of civil action No. 2693, on behalf of the defendants he represented.

The defendants introduced the following evidence:

Civil file No. 2263, in the Fourth Judicial District Court of the State of Utah, County of Duchesne, wherein William H. Van Tassell, et al., were plaintiffs, and Mark P. Braffet, et. al., were defendants, was offered in evidence by defendants, and over the objection of the plaintiffs, the file was rceived in evidence (Transcript 10.)

Civil file No. 2693 was offered in evidence by the defendants to which to the plaintiffs objected as follows: "We object to the introduction of the exhibit on the grounds that it is not within the issues of the case. There is no pleading to warrant the introduction of this file in evidence and we object further on the grounds that this is an attempt to set aside a valid order of this Court, the order being one dismissing the action without prejudice which was duly signed by Judge Tuckett and therefore the introduction of this is not within the issues of the case." (Transcript 10-11).

The only other evidence introduced by defendants was by stipulation that there was no auditor's affidavit attached to the assessment rolls for the year 1929. No other evidence attacking the Auditor's Tax Deed or the validity thereof was presented, and no other irregularities claimed. (Transcript 9.)

It is interesting to note that all of the plaintiffs were present in court but that none of the defendants were present. (Record 172 and 184).

It is to be noted further that no evidence was introduced by the defendants or either or any of them that they had ever been in possession of the lands described in the complaint.

The plaintiffs claim error in the admission of Civil files Nos. 2263 and 2693 into evidence over the objections stated at pages 9, 10 and 11 of the transcript.

There is no evidence in the case to alter or amend any instrument in writing and nothing to vary the instruments as they appear on file.

STATEMENT OF POINTS.

POINT I.

Conclusion of Law No. 1 is contrary to and not supported by the findings of fact, the documentary evidence on file, and the law, the defendants named therein being barred from asserting any claim to the lands involved in the action by the provisions of Chapter 19, Laws of Utah, 1951.

POINT II.

Conclusion of Law No. 2 is contrary to and not supported by the findings of fact, the documentary evidence on file, and the law, the defendants in said conclusion failing to raise any issue of the tolling of the statute by appropriate pleadings, and the evidence showing that the statute was not tolled by former actions.

POINT III.

Conclusions of Law Nos. 3, 5 and 7 are contrary to and not supported by the findings of fact and documentary evidence on file, and the law, the defendants named therein failing to make any pleadings upon which such conclusions can be made.

POINT IV.

Conclusion of Law No. 4 is contrary to and not supported by the findings of fact, the documentary evidence on file, and the law, and the record shows that the defendants named therein did not at any time have the interest awarded to them in said conclusion.

POINT V.

Conclusion of Law No. 6 is contrary to and not supported by the findings of fact, the documentary evidence on file, and the law.

POINT VI.

The Amended Decree is contrary to and not supported

by the findings of fact, the documentary evidence on file, and the law.

POINT VII.

From the findings of fact, the documentary evidence on file, and the law, the plaintiffs and appellants are entitled to a decree quieting their title as against all of the answer-in defendants and all of the respondents.

ARGUMENT.

As a preliminary statement to the argument, the findings of fact shown in the record are accepted in their entirety by the plaintiffs as correct findings except that the plaintiffs object to the admissibility of the civil files Nos. 2263 and 2693 from which findings of fact Nos. IX and X, shown at pages 178 and 179 of the record, were made. The appeal is made on the basis that the conclusions of law made upon the findings of fact are not in accordance with the facts and the law, and that the Amended Decree shown at pages 183 to 185 of the record, upon the facts and the law, should be reversed and the title to the property involved quieted in the plaintiffs as against the various defendants.

POINT I.

CONCLUSION OF LAW NO 1 IS CONTRARY TO AND NOT SUPPORTED BY THE FINDINGS OF FACT, THE DOCUMENTARY EVIDENCE ON FILE, AND THE LAW, THE DEFENDANTS NAMED THEREIN BEING BARRED FROM ASSERTING ANY CLAIM TO THE

LANDS INVOLVED IN THE ACTION BY THE PROVISIONS OF CHAPTER 19, LAWS OF UTAH, 1951.

The lower Court in his decision (Record 138) finds that Chapter 19, Laws of Utah, 1951, is a validly enacted statute and states the law applicable in this case. The decision then goes to the effect that as to the Smith interests, the filing of the prior actions tolled the statute as to the Smith interests. The court further decided that the prior dismissals of former acions was an adjudication on the merits under rule 41A. As to the tolling of the statute and the effect of the rule 41A, these matters will be discussed later.

It therefore goes without saying that the limitations are effective unless so tolled or made inoperative by prior actions.

Subject to the above exceptions or matters in avoidance, the present case is exactly in point with the case of Hansen v. Morris, 283 P.2d 884, 3 Utah 2d 310. "No claim is made that the deed was not valid on its face or that it was not issued by the proper governmental authority." In the light of the decision in this quoted case, Findings of Fact Nos. VI, VII and VIII are immaterial. (Record 177.) There is no finding of fact that the plaintiffs or either or any of them had ever been in possession of the lands involved in the action.

This action was commenced by the filing of the com-

plaint on June 25th, 1952. Chapter 19, Laws of Utah, 1951, took effect on May 8th, 1951, with a provision that it would not become effective for one year. It became fully effective on May 8th, 1952 as to all parties.

Finding of Fact V(6) finds the Auditor's Tax Deed upon which plaintiffs rely was dated April 10th, 1936, recorded May 19th, 1936, in Book "5" of Auditor's Tax Deeds, page 506, as Entry No. 57393 of the records of Duchesne County, Utah. (Record 176) There is no finding that the deed is void on its face, or otherwise. Subject to the matters above mentioned, the record and the findings of fact show that the plaintiffs have established their claim to title.

POINT II.

CONCLUSION OF LAW NO. 2 IS CONTRARY TO AND NOT SUPPORTED BY THE FINDINGS OF FACT, THE DOCUMENTARY EVIDENCE ON FILE, AND THE LAW, THE DEFENDANTS IN SAID CONCLUSION FAILING TO RAISE ANY ISSUE OF THE TOLLING OF THE STATUTE BY APPROPRIATE PLEADINGS, AND THE EVIDENCE SHOWING THAT THE STATUTE WAS NOT TOLLED BY FORMER ACTIONS.

This point goes to the Smith interests only.

We have the same situation here as existed in the case of Hansen v. Morris, supra. There is no limitation running against the plaintiffs. The limitation is running against the defendants. In the last mentioned case, this Supreme Court holds that it is not necessary for the plaintiff to plead

the statute of limitations running in favor of the plaintiff and against the defendant. It is necessary for the defendant against whom the statute is running to plead special matters in avoidance of the statute of limitations which has run against him.

Rule 8 (c) of the Utah Rules of Civil Procedure, provides as follows:

> "(c) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and other matter constituting an **avoidance** or affirmative defense." (Emphasis added.)

The answer of the Smith defendants (Record 14-16) alleges nothing with respect to the special matters in avoidance of the statute of limitations set forth in Conclusion of Law No. 2, namely the tolling of the statute by the filing of Civil Action Nos. 2693 and 2764. (Record 14-16). Plaintiffs think this is fatal. No issue was raised without proper pleadings. Objection was made by plaintiffs to the introduction of the file in Civil No. 2693 on the very ground that there were no pleadings upon which such file could be introduced. (Transcript 10-11).

In the case of Johanson v. Cudahy Packing Co., 152

P.2d 98, 107 Utah 114, in a case involving the tolling of the statute of limitations, said:

> "The appellants contend that in view of the former action brought by plaintiffs the running of the statute of limitations was tolled by Section 104-2-41, which section permits the plaintiff to commence a new action within one year after the former action (which involved the former appeal referred to above) failed otherwise than on its merits. But there is nothing on the face of this complaint to show that Section 104-2-41 has been brought into play. From all that appears from the complaint this is the first time that any action has been commenced to recover for the wrongful death of Robert Johanson. We cannot judcially notice proceedings and records of a case previously determined. Robinson v. Kelly, 69 Utah 376, 255 P. 430; Spencer v. Industrial Commission, 81 Utah 511, 20 P.2d 618."

While the position of the plaintiffs and defendants in this action is reversed, the same rule applies to the answer made by the defendants. We have a dearth of decisions regarding litigation wherein the plaintiff raises the statute of limitations. The general rule which was upheld in Johanson v. Cudahy Packing Co., supra, is best stated under Limitation of Actions in 54 C.J.S., page 594:

> e. Prior Action.
>
> As a general rule the party who relies on the dismissal or other termination of a prior action to bring a subsequent action within an exception extending the time for suing where a prior action was terminated under certain circumstances must,

by his allegations, show all that is essential to bring the case within the exception.

See also 115 A. L. R., page 765, under III. Necessity of alleging matter in avoidance under the subdivision A, General Rule, which cites Clawson v. Boston Acme Mines Development Co., 269 P. 147 at page 152, 72 Utah, 137. The latter goes into some detail about the necessity of pleading specially to avoid limitations.

Departing from the necessity of pleading the avoidance of the statute, we now turn to the proposition of whether or not the filing of the complaint in Civil Action No. 2693 and the answer filed therein by the Smith defendants (Record 14-16) tolled the statute of limitations in favor of the Smith defendants so that the Statute of Limitations in said Chaper 19 does not apply herein.

34 Am. Jur. 227, states as follows:

> "No. 281. DISMISSAL, DISCONTINUANCE, AND NONSUIT.—In the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him, and if, before he commences a new action after having become nonsuited or having had his action abated or dismissed, the limitation runs, the right to a new action is barred. * * * * * In a number of jurisdictions, however, the statutes, in language that is by no means uniform, authorize the commencement of a new action within a prescribed

> period after a nonsuit or dismissal of a prior action. Some of such statutes apply to both voluntary and involuntary dismissals."

The above rule has universal application. In Utah, our Code has a chapter dealing with matters which toll the statute of limitations. This is article 3, of Chapter 12 of the Judicial Code, comprising sections 78-12-35 to 78-12-46, pages 152 to 164, of Volume 9, U.C.A. 1953. From the answer of the Smith defendants (Record 14-16) plaintiffs are at a loss to know which section is claimed to provide the tolling of the statute by the filing of civil action No. 2693, and the basis upon which Conclusion of Law No. 2 (Record 11) concludes that such filing "tolled the statute of limitations from July 27, 1951, until it was dismissed on June 23, 1952." (Record 181). The only section upon which anyone could rely for tolling the statute would be Section 78-12-40, U.C.A. 1953, which reads:

> "78-12-40. EFFECT OF FAILURE OF ACTION NOT ON MERITS.—If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure."

This quoted section provides for the only way in which a new action may be brought after the statute of limitations

has run. This section is for the benefit of a **PLAINTIFF** and says nothing about a **DEFENDANT.** In the present action, there is no statute running **AGAINST** the plaintiff which plaintiffs are setting up as being tolled by any prior action. The statute of limitations relied on by plaintiffs is running in their favor and against the defendants.

The defendants cannot claim the benefit of Section 78-12-40. They are not plaintiffs and they did not institute the actions, either No. 2693 or the present action.

It may be argued that the defendants, as counter-claimants, might claim the benefit of Section 78-12-40, providing that they can show that they filed a counter-claim within time. This they cannot do.

In Civil Action 2693 admitted into evidence over the plaintiffs' objection, the plaintiffs filed a complaint in the usual short form to quiet title. On August 20th, 1951, the Smith defendants filed an Answer. In this answer, the defendants made no claim of ownership of the lands involved in the action. The only claim of interest is stated as follows:

> "1. Admit that they claim a right title and interest in and to the property described in plaintiffs complaint which is adverse to the alleged claim of interest of the plaintiffs."

The nature of this claim is not set forth as demanded in the plaintiffs' complaint. The right, title and interest which defendants claimed might have been as a lien-holder, mortgagee, or any number of interests which would not be

possessory. This answer could in no-wise be denominated a counter-claim. Rule 8 (a) of the Utah Rules of Civil Procedure, provides as follows:

> "(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgement for the relief to which he deems himself entitled."

The prayer in said answer prays "that defendants title be quieted in the property above described." There is nothing alleged in the answer which upon this relief can be granted. The defendants do not allege that they own any interest in the property described. Hence, this answer can not be treated as a counterclaim.

On June 16th, 1952, the Smith defendants filed an "Amended Answer" in said Civil Action No. 2693. In this new amended answer, they set up a new counterclaim, alleging that "they are the owners in fee simple of a one-third interest in all of the surface rights in the property described in the complaint, and of a five-eighteenths interest in all oil, gas and minerals under said premises." They also prayed that their title be quieted to these interests. On the face of the pleading it appears that a good cause of action was stated and the relief prayed for thereunder.

However, there are factors which negative the effectiveness of this "Amended Answer."

At the time of the filing of this "Amended Answer" on June 16th, 1952, the provisions of Chapter 19, Laws of Utah, 1951, were in full force and effect. The limitation statute became effective on May 8th, 1951. More than one year had elapsed before the filing of this "Amended Answer". There was no counterclaim or affirmative allegations made in the original answer. The affirmative allegations constituted a new cause of actions which was not set up in the original answer, wherein the defendants set up ownership in the property and prayed for a decree quieting their titles. Under these circumstances, the statute of limitations continued to run against this new cause of action stated by the defendants. See 127 A.L.R., 918.

At best, the Smith defendants cannot maintain the statement in Conclusion of Law No. 2 (Record 181) which reads:

> "The filing by plaintiffs on June 27, 1951 of Civil Action 2693 and the filing of the answer by the defendants * * * * * tolled the statute of limitations from July 27th, 1951, until it was dismissed on June 23, 1952."

The case of Welner vs. Stearns, et. al., 120 Pac. 490, 40 Utah, 185, is directly in point in this regard. The plaintiff, a tax title holder, brought suit to quiet title. The defendant raised the statute of limitations. Two actions were involved, one of wihch was dismissed. One of the questions involved was whether or not the time consumed by the pendency in the dismissed action could be deducted

from the full statutory time which had run until the commencement of the second action. Regarding this question, the court said, commencing on page 495 of the Pacific Reporter:

> "Nor does the statute cease to run, except for the purpose of the particular action, and, unless there is a special statute saving the right to bring a new action in case a pending action fails, or is dismissed otherwise than upon merits, no new action can be maintained if the statutory period of limitations had fully run, pending the action which had so failed or been dismissed.
>
> * * * * *
>
> "The rule is clearly stated by the author of Wood on Limitation of Actions (section 272) in the following words: 'Although the adverse possession of a defendants in ejectment cannot, during the pendency of the suit, ripen into an absolute title under the operation of the statute of limitations, yet the effect of the statute is neutralized only in respect to the particular suit and the plaintiff therein. And, after the termination of that suit, the statutory limitation having meanwhile expired, no subsequent action can be brought, either at law or in equity, to question that title or possession; and if the plaintiff fails therein the period during which the action was pending is not deducted from the period requisite to gain a title by possession.'
>
> "This principle is frequently applied in our own courts. Suppose a cause of action accrues on a promissory note on one day, and an action is commenced to enforce payment thereof on the next day. Suppose, further, that the action remains pending and undisposed of for the full

> period of the statute of limitations, and then fails or is dismissed otherwise than on merits. Would anyone contend that, in case another action was commenced on the same note, the defendant could not successfully avail himself of the statute of limitations, in case the latter action was not commenced within a year from the time the first action failed, or was dismissed, as provided in Comp. Laws 1907, No. 2893 (now 78-12-40, U.C.A. 1953)? And would anyone further contend that if it were not for that section the plaintiff, under the foregoing circumstances, could successfully maintain a new action, in case the defendant plead the statute of limitations? It is manifest, therefore, that the commencement of an action, although commenced against the adverse party, doest not arrest the running of statute, even as against such a party, except for the purpose of the particular proceeding that is pending."

The holding in conclusion of law No. 2 is therefore in error.

By way of emphasis, Section 78-12-40 is for the benefit of **PLAINTIFFS.** It cannot be relied upon by **DEFENDANTS.** In the instant case, this is especially so. The Answer of the Smith defendants (Record 14-16) is a mere answer of admissions and denials, and does not set forth any counter-claim or affirmative allegations of any nature. It cannot be said to set forth an independent cause of action in any respect, although there is a plea that the title of the defendants be quieted. They have brought no "new action" which saves their "cause of action" which might have been stated in Civil Action No. 2693.

This very point is ruled on the case of Welner v. Stearns, supra, as set forth on page 497 of the Pacific Reporter:

> "Where, however, as in the case here, the action is commenced by the party who subsequently pleads the bar, we cannot see how the statute of limitations can be arrested, as against him, by the bringing of an action."
>
> * * * * *
>
> "While it is true that Borg had disputed appellants's title to the property in his action commenced in January, 1907, yet that action was dismissed; and hence, under the rule to which we have hereinbefore referred, the statute continued to run against him until he made his subsequent application in the following February."

It is interesting to note in reviewing the facts of the case above quoted that the defendant commenced his counter action on January 29th, 1907, that said action was dismissed and on February 25, 1907, said defendant filed an application in the original action. The above quotation holds that the commencing of the action on January 29th, 1907, did not toll the statute of limitations, and that the statute ran until February 25th, 1907. The benefits of Section 2893, Compiled Laws, 1907, now Section 78-12-40 U.C.A. 1953, were not allowed to the defendant. They cannot be allowed to the defendants in this action.

The present action was commenced on June 25th, 1952 (Record 2764). The dismissal of civil action No. 2693 took place on June 23rd, 1952 (see file)) pursuant to

the allegations in the Amended Answer of the Smith defendants (see file), on motion of the plaintiffs, and without objection by Dallas H. Young, Attorney for all defendants, who was present at the hearing when the motion for dismissal was made (Plaintiffs' Exhibit E).

In summary on Point II, the plaintiffs set forth:

(1) There are no pleadings in the complaint (Record 1-5) nor in the Answer of the Smith defendants (Record 14-16) to show that any other action had been commenced on the same claim presented in this action, and the court cannot take judicial notice of the previous action No. 2693. Johanson v. Cudahy Packing Co., 152 P.2d 98, 107 Utah 114, supra.

(2) It was error to allow the introduction of the file in Civil Action No. 2693 over the plaintiffs' objection (Transcript 10-11).

(3) The statute of limitations set up in Chapter 19, Laws of Utah, 1951, was not tolled by the pendency of Civil Action No. 2693 only for that particular action, and upon the dismissal of that action, the statute had fully run against the defendants.

(4) That at the time of the commencement of the present action, on June 25th, 1952, the provisions of Chapter 19, Laws of Utah, 1951, were fully effective as against the defendants, and they are barred from asserting any answer, counterclaim or other claim for relief in this Civil Action No. 2764.

POINT III.

CONCLUSIONS OF LAW NOS. 3, 5 and 7 ARE CONTRARY TO AND NOT SUPPORTED BY THE FINDINGS OF FACT AND DOCUMENTARY EVIDENCE ON FILE, AND THE LAW, THE DEFENDANTS NAMED THEREIN FAILING TO MAKE ANY PLEADINGS UPON WHICH SUCH CONCLUSIONS CAN BE MADE.

Conclusions of Law 3, 5 and 7 involve the Zane defendants. They are based upon the Amended Answer of the Intervenor (Record 82-86) and Findings of Fact IX, X and XI. (Record 178-180).

The Amended Answer of Intervenor (Record 82-86) states in paragrah 6:

> "6. That the dismissal of these actions by the plaintiffs operated as an adjucations upon the merits and under Rule 41 of the Rules of Civil Procedure, Utah Code Annotated 1953, this defendant is entitled to a judgement of this Court quieting the title of the John M. Zane estate to an undivided one-sixth interest in the property above described."

The Zane defendants do not claim that the statute of limitations was tolled as to them. Their sole claim is that the dismissals in the two former actions constituted an adjuication on the merits. The two former actions alleged are No. 2263, filed June 1st, 1946, and No. 2764 (the instant action), filed June 25th, 1952. Conclusion of Law 3 (Record 181) finds that "Plaintiffs' dismissal of Civil

actions 2693 and 2764 as to the heirs of John M. Zane, deceased, operated as an adjucation of the claim stated in those actions upon the merits."

There are two errors on the face of said conclusion of law No. 3. The Finding of Fact No. X (Record 179) finds with respect to Civil Action No. 2693:

> "On June 23, 1952, Judge R. L. Tuckett of this court, at the instance and request of plaintiffs, entered an order dismissing said action without prejudice for the reasons set forth in the Amended Answer of defendants and without objection by the attorneys for said defendants."

The Finding of Fact No. XI (c) finds with respect to civil action No. 2764:

> "(c) Judge R. L. Tuckett of this court, at the instance and request of plaintiffs, entered an order dismissing this action as to all defendants excepting those who had answered in paragraph (b) last above, said order being filed September 14, 1953, and said order being without prejudice."

The first error is that the conclusion that PLAINTIFFS dismissed the actions. They were both dismissed by order of court.

The second error is that the pleadings of the Zane defendants goes to the effect that the present action cannot be prosecuted by the plaintiffs because of the two dismissals in Civil Actions No. 2263 and 2764, and the conclusion of law is to the effect that said two dismissals took place in Civil Actions No. 2693 and 2764.

In both the amended answer and in Conclusion of Law No. 3, Civil Action No. 2764 is the basis of the relief prayed for and obtained in this action which is now before this Supreme Court on appeal. The Zane defendants plead that the second dismissal in Civil Action No. 2764 amounted to a dismissal on the merits, and then the lower court gives them judegement in Civil Action No. 2764, on the ground that the action has been dismissed. It is true that Judge R. L. Tuckett dismissed Civil Action No. 2764 as to the Zane defendants on September 14th, 1953 (Record 52). It is just as true that the Zane defendants filed an answer in intervention (Record 67-69) and an amended answer (Record 82-86.) This intervention on the part of the Zane defendants reinstated the action as to them, or in the alternative, the dismissal is still effective. They cannot have their cake and eat it too. Either there was no second dismissal which was effective as to them, or they have no standing in this case. These defendants cannot voluntarily reinstate this action as to them, and then claim relief in the action on the ground that the action has been dismissed as to them.

There are three actions which are involved in this phase of the case, and in each there is an order dismissing the action. They are as follows:

No. 2263, filed May 22nd, 1946. The first Order of dismissal was signed by R. L. Tuckett on October 10th, 1949, and filed November 3rd, 1949, dismissing the action

as to the Zane defendants. There was another Order of dismissal signed by Judge R. L. Tuckett completely dismissing the action on June 23rd, 1952. (Finding 9, Record 178)

No. 2693, filed July 27th, 1951. Judge R. L. Tuckett signed the Order of Dismissal on June 23rd, 1952, and it was filed the same day. (Finding 10, Record 178-9)

No. 2764, the present action, was filed June 25th, 1952. There is an Order signed by Judge R. L. Tuckett, dismissing this action as to all defendants except the Smith defendants, dated September 14th, 1953, filed September 14th, 1953. (Finding 11, Record 179).

Each of the dismissals signed by Judge R. L. Tuckett is made without prejudice excepting the first one in Civil Action No. 2263. Nothing is said in No. 2263 in the Order dismissing the action as to the parties named therein as to whether it was made with or without prejudice.

Further, there is not one Notice of Dismissal made without order of the court by the plaintiffs or either or any of them in any of the actions.

In order to appreciate the stand taken by the Zane defendants and upheld by the Lower Court, it is necessary to quote from one of the briefs of the defendant, filed in the Lower Court:

> "It is to be noted that there is no provision in the rules which allows the court to make an order of dismissal against a defendant who has not either answered or filed a motion for a summary

judgment. The only procedure for dismissing against such a defendant is contained in Rule 41(a)1."

"The recitals in the orders of dismissal that the dismissals are without prejudice cannot be of significance. If it were otherwise, then the parties and the court may defeat the operation of the rules by placing something in the order of the court contrary to the provisions of the rules. As we have pointed out, the dismissals, if they are effective against the Zane and Braffet interests, must have been made pursuant to Rule 41(a)1."

In the event that the judge does actually dismiss an action by order without prejudice prior to the filing of an answer or motion for summary judgment, what is its legal effect? Is it void because the court has no jurisdiction or because the court exceeds his jurisdiction? If such is the case, then the actions are still pending. No notices of dismissal have been filed or entered by the plaintiffs without order of the court. Plaintiffs have found no cases in point, and challenged the defendants to present such cases, which they have not done.

Rule 41(a) of the Rules of Civil Procedure reads as follows:

"(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

"(1) By Plaintiff; By Stipulation. Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before

service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim."

"(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjuication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

Following the line of reasoning of the defendants, the various orders dismissing the three actions without prejudice, all signed by Judge R. L. Tuckett, and all being specifically without prejudice, are nullities. The fact that plaintiffs moved for these orders made them invalid, according to defendants. The plaintiffs have never gone along with this reasoning although the lower court did.

Each of the orders were made in open court and were regularly filed therein. They were not appealed from.

No motion has been made to set any of them aside, except for the voluntary interpleadings made by the Zane and Braffett defendants which interpleadings nullified the order of dismissal in this action 2764 now before this Supreme Court, insofar as it pertains to the Zane and Braffet defendants.

Furthermore, the reasoning of the defendants which has been sustained by the Lower Court, in effect says that the provisions of Rule 41-(a) (1) are exclusive, that any dismissal made either by plaintiff or on motion by plaintiff followed by an order of court, and made before answer or motion for summary judgement is filed, comes under the purview of said subdivision. Under this reasoning the court has no jurisdiction to make an order dismissing an action without prejudice until after an answer has been filed or a motion for summary judgement is made. Further, under this reasoning, the defendants virtually claim that all of the Orders made by Judge R. L. Tuckett, are set aside by the Decree in this present case, and that said actions were not dismissed without prejudice but are now dismissed with prejudice.

The plaintiffs cannot go along with this reasoning. Rule 41 (a) (1) states that the plaintiff "MAY" file a notice of dismissal of an action. He is not required to do so. There is nothing in the whole rule which deprives the judge of jurisdiction to make an order dismissing an action before an answer is filed or a motion for summary judgement made. Plaintiffs claim that all of the orders

made by by Judge R. L. Tuckett are res adjudicata, and except for the interpleadings, are final orders which cannot be set aside by Judge Joseph E. Nelson in the Decree Quieting Title in this present action. The plaintiffs cannot be bound by Notices of Dismissal when they have filed none.

In arguing this matter before the lower court and in briefs, plaintiffs urged that they could find no case anywhere that applied the two dismissal rule set up in subdivision (1) of said Rule to an action which had been dismissed by order of the court. In answer to this suggestion, defendants quoted from several cases, some of which are as follows:

Robertshaw-Fulton Controls Company vs. Noma Electric Corporation, 10 Federal Rules Decisions at page 32, which in part said:

> "Plaintiff filed notice of dismissal of the present suit."

Cleveland Trust Company vs. Osher and Reiss, 31 Federal Supplement, page 985:

> "The purpose of the rule providing that dismissal is without prejudice, except that a **notice of dismissal** operates as an adjuication on the merits when filed by a plaintiff who has once dismissed, is to prevent the delays and litigation by numerous dismissals without prejudice."

Hineline vs. Minneapolis Honeywell Company, 78 Federal 2d, 854:

> "The case was set for trial and later the **plaintiff dismissed the case.**"

Even after inviting the defendants to quote one case in which the double-dismissal rule was held to be effective after a dismissal by order of the court plaintiffs have yet to read any case providing for the application of the rule after the action has been dismissed without prejudice, by order of the court.

At page 84 of the record, the Zane defendants in their Second Defense, allege the filing of Civil Action No. 2263 as being the first action which was dismissed. This action was dismissed by Order of Judge R. L. Tuckett, insofar as the Zane defendants are concerned, on November 3rd, 1949. (See file). That was long before our present rules were adopted. The Note at the end of Rule 41 (a) (1) states that the double dismissal feature was new matter. Therefore, Civil Action No. 2263 cannot be used here. When the Civil file No. 2263 was presented in evidence, (Transcript 10) objection was made to its admission by the plaintiffs on the following grounds:

> "on the grounds that the file is incompetent immaterial, and that the issues therein stated and stated in the answer of Dallas H. Young, Jr. as administrator of the estate with the will annexed of the estate of John Macy Zane, deceased, is Res Judicata and the action was dismissed by order of the Court and the order was not appealed from." (Transcript 10).

When the file in Civil Action No. 2693 was offered

in evidence by defendants (Transcript 10-11), objection was made by the plaintiffs as follows:

> "We object to the introduction of an exhibit on the grounds that it is not within the issues of the case. There is no pleading to warrant the introduction of this file in evidence and we object further on the grounds that this is an attempt to set aside a valid order of this Court, the order being one dismissing the action without prejudice which was duly signed by Judge Tuckett and therefore the introduction of this is not within the issues of the case."

Plaintiffs urge that both of the above objections were well taken. The orders of dismissal in both actions speak for themselves and make the issue res adjudicata. There are no pleadings in the Amended Answer of the Zane interests (Record 92-86) to warrant the introduction of the file in Civil Action No. 2693.

The file in Civil Action No. 2263 discloses that it is not the same cause of action as set forth in civil actions Nos. 2693 and 2764. As set forth at page 5 of this brief, there were numerous parties who were either plaintiffs or were joined with them, who were not parties in No. 2263 who were made parties in Nos. 2693 and 2764. Likewise, numerous defendants were brought into Nos. 2693 and 2764 who were not parties in 2263. Therefore, the dismissal of No. 2263 could in no wise be construed as a dismissal of the same causes of action set forth in Nos. 2693 and 2764. Plaintiffs who were not parties therein could not dismiss No. 2263. Civil Action No. 2764 is the present action. It

cannot be used in connection with either 2263 or 2693 to show double-dismissal, inasmuch as the Zane defendants rely on the continuation of Action No. 2764 in order to obtain any judgement.

The defense of the double dismissal made by the Zane defendants is therefore untenable. The decree of the lower court should be reversed as to them.

Findings of Fact IX, X and XI, and the Orders of Dismissal in civil actions Nos. 2263, 2693 and 2764 show that all dismissals were made by order of court under Rule 41-(a) (2). Plaintiffs believe that the rule means what it says and that any dismissal made by order of the court is without predjudice unless otherwise stated in the order. Plaintiffs further believe that the rule requires that a plaintiff file two notices of dismissal without order of the court to be bound by the two dismissal rule. The plaintiffs have yet to file their first notice of dismissal without order of the court.

Plaintiffs have searched diligently to find a case which turns on the point of that a plaintiff is bound under the two dismissal rule when the former actions were dismissed by order of the court. We have found none, and therefore no authorities are quoted.

POINT IV.

CONCLUSION OF LAW NO. 4 IS CONTRARY TO AND NOT SUPPORTED BY THE FINDINGS OF FACT,

THE DOCUMENTARY EVIDENCE ON FILE, AND THE LAW, AND THE RECORD SHOWS THAT THE DEFENDANTS NAMED THEREIN DID NOT AT ANY TIME HAVE THE INTEREST AWARDED TO THEM IN SAID CONCLUSION.

If this Supreme Court holds that all of the defendants are barred by limitations, that the statute was neither tolled as to any of them, nor avoided by the two dismissal rule set up by defendants, then it will be unnecessary to consider Points IV and V in this brief. If, however, the ruling should be against the plaintiffs on these matters of limitation, it will be necessary to determine the interests actually held by the defendants.

Conclusion of Law No. 4, (Record 181-2) awards to the Smith defendants "an undivided ⅓ interest in the land described in the complaint as against the plaintiffs, all and severally, and all persons claiming under them, subject to the interest in said land reserved by Maude White Waring." There is no conclusion as to the interest reserved by Maude White Waring. In the Amended Decree, (Record 184) it is decreed that the Smith defendants "are the owners in fee simple of an undivided ⅓ interest in the land hereinafter described, as against the plaintiffs, all and severally, and all persons claiming under them."

In their answer (Record 14-16), the Smith defendants do not make any affirmative allegations as to what interest they own in the lands involved in the action. Their entire

answer consists in general admissions and denials of the complaint. No counter-claim is alleged. In their prayer in said answer, these defendants pray that defendants' "title and ownership in an undivided one-third (⅓) interest in the real property described in the complaint be quieted in these defendants" without any pleadings upon which to base this prayer.

Under Rule 8 (a), Utah Rules of Civil Procedure, the Smith defendants are entitled to no affirmative relief as prayed for in their Answer. They have alleged no facts showing that they are entitled to the affirmative relief prayed for.

Finding of Fact IV shows that the Smith defendants and the Braffet defendants claim the same interest, namely the undivided ⅓ interest which was not conveyed away by Mark P. Braffet during his lifetime. This finding further sets forth that Mark P. Braffet conveyed an undivided ⅔ interest during his lifetime, and that his wife, Hannah J. Braffet, who survived him, did not join in the conveyances. (Record 173-174). The question is then posed: Did the remaining ⅓ interest descend to Hannah J. Braffet as her statutory one-third interest, or did the interest descend to the heirs of Mark P. Braffet, deceased, and the subsequent Decree of Distribution set forth in Finding IV (g) (Record 154) vest the title in Maude White? In other words, did Maude White succeed to her title as an heir of Mark P. Braffet, or as an heir of Hannah J. Braffet? The crux of the argument under this point is as to what interest

was conveyed by Maude White, also known as Maude V. White, also known as Maude Braffet White, to David G. Smith, by the deed set forth in said Finding IV in paragraph (i) (Record 154, Plaintiffs' Exhibit C, page 205.)

It is to be noted here that all deeds, instruments and proceedings must be taken at their face value as there is no testimony to alter or vary the instruments and proceedings.

At pages 77 to 81 of the record appears the Answer of Intervenor, wherein Karl V. King, administrator of the Estate of Hannah J. Braffet, Deceased sets forth that at the time of her death "the said Hannah J. Braffet," "had an undivided interest in the real estate described in the complaint and that upon her death her interest descended to her heirs subject to being probated." The prayer prayed that "defendant's title and ownership in an undivided interest in the real property described in the complaint, as her interest may appear, be quieted in the intervenor and this defendant." The same attorneys represented the Smith defendants as represented the Braffet defendants. The interest claimed by the Braffet defendants were adverse to the interests claimed by the Smith defendants. If Hannah J. Braffet had any interest in the property, she took it under her statutory one-third allowed by law out of her husband's estate, and she had the whole interest. If she had this one-third interest, her property succeeded to her three children who are named in Finding of Fact IV, paragraph (h).

What about the one-third undivided interest?

Hilton v. Thatcher, 31 Utah, 360, 88 Pac. 20 settles the law as to the statutes governing in the instant case. It reads in part as follows, at page 22 in the second column:

> "It is further conceded that the right of dower is governed by the law in force at the death of the husband while the measure of the right is determined by the law in force at the time of the husband's conveyance where the wife did not relinquish her right. This, beyond peradventure, is the settled law, and we so hold."

In other words, the law that was applicable to the dower or statutory interest of the widow on January 2nd, 1927, the date of the death of Mark P. Braffet, governs this interest. Section 6406, Compiled Laws of Utah, 1917, Volume 2, page 1232, was the governing statute. It reads as follows:

> 6406. (2826). Wife's interest in her husband's real property. One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, and to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple if she survive him; provided, that the wife shall not be entitled to any interest under the provisions of this section in any such estate of which the husband has made a conveyance when the wife, at the time of the conveyance, is not or never has been a resident of the territory or state of Utah. Property distributed under the provisions of this section shall be free from all debts of the decedent, except those secured by mechanics' or laborers' liens for work or labor done or material furnished exclusively for the

> improvement of the same, and except those created for the purchase thereof, and for taxes levied thereon. The value of such part of the homestead as may be set aside to the widow shall be deducted from the distributive share provided for her in this section. In cases wherein only the heirs, devisees, and legatees of the decedent are interested, the property secured to the widow by this section may be set off by the court in due process of administration.

The above statute was formely Section 2826, Compiled Laws of Utah, 1907. Prior to that it was Section 2826, Revised Statutes of Utah, 1898. In the Revised Statutes of Utah, 1933, it is unchanged as Section 101-4-3. In the Utah Code Annotated, 1943, it is unchanged as Section 101-4-3. In the Utah Code Annotated, 1953, the section is 74-4-3, Volume 8, page 49.

The original basic case involving the issue before the court, namely, the wife's share in the lands of her deceased husband conveyed by him during the marriage without her consent, is best presented by the case of In re Park's Estate, Hilton v. Stewart, 31 Utah, 255, 87 P. 900, 8 L. R. A. (N.S.) 1101. In that case the wife was attempting to get a money judgment against the estate of her deceased husband for a one-third of the value of lands conveyed by the husband during his lifetime without her consent. The court says, at pages 902 and 903:

> Does section 2826 give such a right? We think not. Counsel for appellant lays much stress upon the wording of that section in that it says "one-

third in value" shall be the wife's interest. This of itself added nothing at all to her interest. At common law all courts in distributing the wife's share always sought to fix it as nearly as possible in each case at one-third the value, even where the same was set off to her in kind. To have done otherwise would have been a farce not to be tolerated by any court. But the statute does not say that this one-third in value shall be set apart to her out of the estate of the husband, but the statute says "one-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage * * * shall be set apart as her property in fee simple if she survives him." **This refers to the land itself that was possessed by him during the marriage, not to any kind of property that may be left by him at his death constituting his estate.** Moreover appellant's counsel concedes that the law in force at the time of the husband's conveyance controls as to the measure of the wife's interest. If this be so, in case the law is changed after conveyance, and before the death of the husband, so as to enlarge the wife's interest, how can the wife claim the enlarged right against the husband's estate any more than she could against his grantee?

Under the law as it was at the time of the conveyance the husband had a legal as well as a moral right to transfer his entire interest. This interest consisted of the fee to the land, except that it was encumbered by the inchoate interest of the wife. In case she survived him she thus had and could have no greater interest in the lands conveyed by him than the law gave her. The Legislature, by adopting section 2826, could not nor did it attempt to enlarge the widow's in-

terest in then alienated lands. What could not be done directly we do not think can be or was contemplated to be done indirectly. But if appellant's contention is sound, the Legislature accomplished by indirection what she concedes they could not do directly. We cannot yield our assent to this contention, but feel constrained to hold that the wife, if she desires to recover her interest in her husband's lands alienated by him during marriage, without her consent, must resort to the lands themselves, and that she can recover such interest only as the law gave her at the time the lands were alienated by the husband. In all lands possessed by him at the time of his death, and in all that were alienated by him under the law as it stood at the time of his death, she takes her interest in accordance with that law. **It must not be overlooked that the inchoate contingent interest of the wife in her husband's lands is in the nature of an incumbrance which may or may not become an absolute and enforceable right dependent upon the one fact that she survives her husband. This incumbrance is against the land, and exists against each specific parcel while the right remains inchoate. Neither is the right changed when it becomes vested and enforceable upon the death of the husband, so that it may be shifted at the pleasure of the wife from one parcel to another, or against one grantee, and not against another. THE INTEREST OF THE WIFE IS IN THE LAND ITSELF TO BE APPORTIONED TO HER ONE-THIRD IN VALUE OUT OF EACH PARCEL.** (Emphasis ours.)

The right to an interest exists, if it exists at all, by virtue of the law, and not by virtue of contract, and hence must be enforced according to the law that gives the right to such interest.

From this case, it is noted that where the deceased has conveyed the property without his wife's consent, that the one-third interest of the wife in that property vests immediately upon the death of her husband in the surviving widow, that she must resort to the property itself, and in this case, where only two-thirds undivided interest in the land was alienated by the husband, the remaining one-third vests in fee simple in the widow without further proceedings in the estate. This interest belongs to her by operation of law and vests a fee simple title in the widow. The estate of the husband and the heirs of the deceased have absolutely no interest therein.

The next case is the one which is used in Utah as the basic case on the subject. It is the case of In Re Bullen's Estate, 47 Utah 96, 151 Pac. 533, L.R.A. 1916c, 670. The rule is still in effect in Utah and is as follows:

> That the wife receives under section 2826—one-third in fee simple of all the legal and equitable estate on real property possessed by the husband during coverture, and not relinquished by her—she receives, **not as an heir of her husband, but in her own right, something which belongs to her absolutely, and of which she could not have been deprived by will or by any other voluntary act of her husband without her consent. Under that section, she is not an heir within the meaning of our intestate or succession statutes.**
>
> * * * * *
>
> So here, while under our statute the wife does not take as a survivor of community property, she nevertheless takes her one-third interest in the

husband's real estate in fee simple, just as absolute and as much in her own right as does the wife take her one-half in community property. In neither instance can she be deprived of that right by will, or by any other voluntary act of her husband without her consent, and neither is her interest awarded or acquired by succession, descent, or inheritance. Succession, as defined by the statute, "is the coming in of another to take the property of one who dies without disposing of it by will." That implies that property acquired by sucession may be disposed of by will. But the property which the wife takes under section 2826 may not be disposed of by will without her consent.

Now, under parts of section 2828 the widow is an heir of her husband; when he dies intestate leaving a wife and one child, the estate going one-half to her and one-half to the child, and if no issue, the whole of the estate, if not over $5,000 in value, to her. Thus what goes to her under section 2828, over and above her one-third interest granted under section 2826, she takes as an heir of her husband, for that he may dispose of by will to her or to another. That she takes under the intestate laws or statutes of inheritance. But that which she takes under section 2826 she takes absolutely and in her own right, and not by succession or inheritance. We think that the fair meaning of the statute of succession.

The case of Jeppson v. Jeppson, 115 Utah, 541; 206 P.2d 711, states:

The surviving widow's statutory have been fully discussed by this court in several cases, and need not be further set out here. See In re Bullen's

Estate, 47 Utah 96, 151 P. 533, L.R.A. 1916C, 670; In re Kohn's Estate, 56 Utah 17, 189 P. 409; and Staats v. Staats, 63 Utah 470, 226 P. 677.

The law quoted in these three cases above is still in force in Utah.

Great stress was laid by the Smith defendants, adversely to the Braffet defendants, upon the "Waiver of Notice and Consent to Partial Distribution" signed by Hannah Braffet, and appearing at page 131 of the Abstract of title, Plaintiffs' Exhibit C. The petition for partial distribution is set forth at pages 103 to 111 of the said abstract. At page 106, the petition reads:

> That your petitioner, believing it to be for the best interests **OF SAID HEIRS** and that no one **INTERESTED IN SAID ESTATE** will be prejudiced by the partial distribution of the **property of said estate** at this time and, each of said **HEIRS** having consented thereto, as will appear from their written waiver of notice and consent to partial distribution to be hereafter filed herein, your petitioner recommends and prays that the following property, now on hand as shown by the inventary of said estate and the account filed herewith, be distributed in the manner and to the persons entitled as follows, to-wit: (Emphasis ours.)

The said waiver at page 131 of the abstract reads:

> The undersigned, **BEING AN HEIR OF MARK P. BRAFFET, DECEASED,** hereby waives notice of the time and place of hearing of the Administrator's First Account and Report and Petition for

> Partial Distribution, copies of which are hereto annexed, and consents to the hearing of said First Account and Report and Petition for Partial Distribution at any time; and the **UNDERSIGNED HEIR,** believing it to be for the best interests of all **OF THE HEIRS** of said deceased and that no one **INTERESTED IN SAID ESTATE** will be prejudiced thereby, hereby consents and agrees to the manner and mode of partial distribution as set forth and as provided for in said annexed Petition for Partial Distribution, and further consents and agrees that the property **BELONGING TO SAID ESTATE,** not so distributed, shall remain in the estate subject to administration and future distribution. And the undersigned further certifies that he has read the annexed First Account and Report and Petition for Partial Distribution.
>
> Dated this 5th day of August, 1927.
>
> Hannah Braffet
>
> (Emphasis ours.)

There is nothing in this waiver and consent which refers to any separate property of Hannah Braffet. The only property affected is that BELONGING TO THE ESTATE and to which Hannah Braffet succeeded as an HEIR. There is nothing in the waiver and consent that suggests that the property distributed by the court to said Hannah Braffet was in lieu of her statutory interest or that it was made as a set-off to such interest.

The Decree of Partial Distribution is shown at pages 148 to 152 of the abstract. (Plaintiff's Exhibit C). At page 149 the following statement is made:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that partial distribution **OF SAID ESTATE** be made as follows: to-wit: (Emphasis ours.)

The case of Staats v. Staats, 63 Utah 470, 226 Pac. 677 states at page 680, second column:

> This court is, however, committed to a contrary doctrine, in that we have held that under our statute the widow of a deceased husband does not take as an heir. In re Bullen's Estate, 47 Utah, 90, 151 Pac. 533, L. R. A. 1916C, 670. It is held that a widow takes her one-third interest in her husband's real estate not as an heir, but in her own right.

This being so, the interest that Hannah Braffet relinquished as an heir in the probate proceedings in her husband's estate, had absolutely no effect upon her one-third interest which she owned in fee simple by operation of law upon her husband's death. Because of this, Maude White received no title by virtue of the Decree of Distribution in the Matter of the Estate of Mark P. Braffet, Deceased. The estate had no title to distribute. Hannah Braffet, the widow, has never relinquished her one-third interest in the lands involved in this action which belonged to her in fee simple upon the death of her husband.

Hannah Braffet (or Hannah J. Braffet), the widow of Mark P. Braffet, died on or about December 7th, 1938, at Price, Utah (Plaintiff's Exhibit C, page 181.) Her estate is being probated as No. 1206 in Carbon County, Utah. No

distribution in the estate has yet been made, although the original administrator was appointed on August 19th, 1940 (Plaintiff's Exhibit C page 187), but said administrator never qualified. Karl V. King is now the duly appointed, qualified and acting administrator of her estate, and was represented herein by the same attorneys who represent the Smith interests.

Said Hannah J. Braffet left three heirs, namely, Robert I. Braffet, Maude White and James H. Braffet. (Finding of Fact IV (h)). Under Section 74-4-5, Utah Code Annotated, 1953, these heirs succeeded to the title of the one-third interest vested in the deceased at the time of her death. Maude White would have a vested interest of an undivided one-ninth in the lands involved in this action, she receiving one-third of the one-third fee simple title owned by the deceased. In the actions herein involved, Maude White (now Maude White Waring) has made no appearances. Karl V. King as the administrator of the Estate of Hannah J. Braffet, Deceased, represents her in this action. (Section 75-11-5 U.C.A. 1953).

The above one-ninth interest is all that Maude White has ever been vested with in fee simple, as she took no title under the Estate of Mark P. Braffet, Deceased. Whatever interest the Smith interests have in this action came through this one-ninth interest vested in Maude White upon the death of her mother, Hannah J. Braffet.

At page 205 of the abstract of title is shown a Quit-

Claim Deed from Maude White, also known as Maude V. White, also known as Maude Braffet White, being one and the same person in her own right, grantor, to David G. Smith, grantee, which deed is dated December 4th, 1945, and recorded December 19th, 1945, in Book "19" of Deeds, at page 492, as Entry No. 76857 of the records of Duchesne County, Utah. It is under this deed that the Smith interests claim all of the title which they have in the property involved in this action, and the other prior actions. What did this deed convey to David G .Smith?

As above set forth, Maude White was vested upon the death of her mother, Hannah J. Braffet, with an undivided one-ninth interest in the property involved in this action. She could not convey more than she had. The deed conveys:

> All of Section 11, except the Northeast Quarter (NE¼ of the Northeast Quarter (NE¼), of Township 4 South, Range 5 West, Uintah Special Meridian.
>
> Saving and excepting and reserving to the Grantor, her heirs, and assigns, out of the grant hereby made, a one-sixth (1/6) interest in all oil, gas and minerals under said premises hereby conveyed, and the right to go upon the said land and drill and prospect and remove, by pipe-line or otherwise, any oil, gas or minerals belonging to the Grantor, her administrators, assigns, or executors.

In the light of the discussions had above, this conveyance would convey an undivided one-ninth interest in the

surface rights of the above property, and would reserve one-sixth of the oil, gas and minerals in all of the property to the grantor. The grantor did not have one-sixth to reserve so that she would reserve all that she did have, one-ninth of such oil, gas and minerals. This one-ninth of the minerals would remain in the possession and control of the administrator of the Estate of Hannah J. Braffet, Deceased, until distribution is made. The appearance of Karl V. King, as administrator of the Estate of Hannah J. Braffet, Deceased, would place the interests in the minerals retained by Maude White in litigation here, with Karl V. King as such administrator representing the Maude White interests. The appearance of the Smith interests personally would litigate only the one-ninth of the surface conveyed by the above Quit-Claim Deed. All of the defendants' claims are made by the same attorneys.

It is interesting to note the Decree entered by this Court on September 10th, 1954 as to the interests quieted in the various parties. (Record 104-106). In paragraphs 1 and 3 of the Decree the following appears:

> 1. That subject to the interest of Maude White Warring, the defendants L .L. Pack, Helen B. Mott and W. H. Coltharp and The Continental Bank and Trust Company, administrator of the estate of David G. Smith, deceased, are the owners in fee simple of an undivided ⅓ interest in the land hereinafter described, as against the plaintiffs all and severally and all persons claiming under them.

* * * * *

> 3. Karl V. King, administrator of the estate of Hannah J. Braffet, deceased, is the owner in fee simple of an undivided 2/9 interest in the land hereinafter described as against the plaintiffs all and severally and all persons claiming under them.

5/9 of the title is quieted in successors in title to Mark P. Braffet when he only owned an undivided ⅓ interest in the property at the time of his death. The same attorneys represent all answering interests. They have prepared a Decree which in effect says that Hannah J. Braffet at the time of her death was vested with a fee simple to an undivided one-third of the property involved in this action. They then say in the Decree which they prepared that when Maude White, one of the heirs of Hannah J. Braffet, conveyed her interest as an heir of Hannah J. Braffet, deceased, she conveyed a one-third interest in the proprty when she could not have inherited more than one-ninth thereof.

In construing the deed from Maude White to David G. Smith set forth above, there is no evidence in the record to show an intent of the parties in the execution of this deed. The deed must be taken at its face value.

The deed conveys all of the land and reserves "one-sixth (1/6) interest in **ALL** oil, gas and mineral under said premises hereby conveyed" (Emphasis ours.) The grantor, no doubt, thought that she had a one-third interest in the land and was reserving one-half of the oil, gas and minerals which she supposedly owned. Whatever she thought does not change or alter the interest which she actually had in

the property. What she actually owned and reserved is still her property. She therefore, as an heir of Hannah J. Braffet, deceased, is vested with an undivided one-ninth of the oil, gas and minerals in the lands involved in this action, subject to probating, and subject to the rights of the plaintiffs herein.

At pages 254 and 255 of the abstract of title (Plaintiffs' Exhibit C) is shown a Quit-Claim Deed from David G. Smith and Juanita C. Smith, his wife, to Helen B. Mott, dated February 1st, 1950, and recorded April 25th, 1950, in Book "24" of Deeds, pages 83-84, as Entry No. 87490 of the records of Duchesne County, Utah. This deed purports to convey an undivided one-fourth interest in the entire property involved in this action. Inasmuch as David G. Smith was vested with an undivided one-ninth of the surface at the time of the execution of this deed, all of his interest passed to said Helen B. Mott. He, and The Continental Bank and Trust Company, administrator of the Estate of David G. Smith, Deceased, and Juanita C. Smith, widow of deceased David G. Smith, had no interest in the property at the time of the commencement of this action.

At page 256 of the abstract of title (Plaintiffs' Exhibit C) is shown a Quit-Claim Deed from David G. Smith and Juanita C. Smith, his wife, to W. H. Coltharp, dated February 1st, 1950 and recorded May 3rd, 1950, in Book "9" of Mining Records, page 132, as Entry No. 87621 of the records of Duchesne County, Utah. While this deed was executed the same day as the deed to Helen B. Mott above, there is

no evidence in the record that Helen B. Mott had any actual notice of the execution of this second deed which was not recorded for some time after the deed to Helen B. Mott was recorded. Helen B. Mott, having succeeded to all of the title of David G. Smith, William H. Coltharp took no interest by his deed, and the defendants, W. H. Coltharp and Oral Coltharp had no right, title or interest in the lands involved in this action at the time of the commencement of the action.

At page 257 of the abstract of title (Plaintiffs' Exhibit C) is shown a Quit-Claim Deed from David G. Smith and Juanita C. Smith, his wife, to L. L. Pack, dated February 1st, 1950, and recorded May 10th, 1950, in Book "9" of Mining Records, page 175, as Entry No. 87685 of said County Records. The same facts govern as are set forth above. L. L. Pack and Nora E. Pack, his wife, had no right, title or interest in the lands involved in this action at the time of the commencement of this action.

Therefore, even though this Supreme Court should hold that the Smith defendants are entitled to recover, the only interest that it would affect would be an undivided one-ninth interest in the surface rights. That is all of the title they can show by the findings of fact and documentary evidence introduced in evidence. This interest is subject to probating in the Estate of Hannah J. Braffet, deceased.

POINT V.

CONCLUSION OF LAW NO. 6 IS CONTRARY TO

AND NOT SUPPORTED BY THE FINDINGS OF FACT, THE DOCUMENTARY EVIDENCE ON FILE, AND THE LAW.

The argument for this point is the same as that for Point IV, as far as it goes. The same attorneys represented all defendants, even though the interests of the Smith defendants and Braffet defendants were adverse. As set forth under Point IV, anything the Smith defendants get is by succession through Hannah J. Braffet, deceased. Section 74-4-2 U.C.A. 1953, provides:

> "74-4-2. PROPERTY OF INTESTATE PASSES SUBJECT TO PROBATE PROCEEDINGS.—The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the court for the purposes of administration."

Section 75-11-4, U.C.A. 1953, provides:

> "75-11-4. POSSESSION OF REPRESENTVATIVE POSSESSION OF HEIRS AND DEVISEES.—For the purpose of bringing suits to quiet title, or for partition of the estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator for the purposes of administration as provided in this title."

When the attorney for all defendants filed the Answer

of Intervenor (Record 77-81) of Karl V. King, administrator of the Estate of Hannah J. Braffet, Deceased, the entire interest owned by Hannah J. Braffet at the time of her death was being litigated by said administrator. This action is a possessory action. Finding of Fact No. II (Record 173) finds that Karl V. King is the duly appointed, qualified and acting administrator of the Estate of Hannah J. Braffet, deceased. Karl V. King, as such administrator, has the right of possession to any interest in and to the property involved in this action, owned by Hannah J. Braffet at the time of her death. The Smith defendants claim under Maude V. White (Waring), and her only interest was as an heir of Hannah J. Braffet deceased. Therefore, Karl V. King, as such administrator, has the right of possession to any interest the Smith defendants may claim in this action. In withdrawing as counsel for Karl V. King, administrator, (Record 114) the same counsel for the Smith defendants cannot now say that he has not withdrawn as counsel for same interests which are now claimed by the Smith defendants adversely to the said administrator. Karl V. King, administrator, is in default. The record shows that subject to the tax sale and before her death, Hannah J. Braffet was vested with the one-third interest she took upon the death of her husband. Because of the default of such administrator, plaintiffs are entitled to a decree quieting their title to an undivided one-third interest in the property involved in this action, said interest to include any rights claimed by the Smith and Braffet defendants. This would apply even though the Smith defendants are not barred by limi-

tations, which plaintiffs do not admit.

Conclusion of Law No. 6 should be set aside and a new conclusion made setting forth that the plaintiffs are entitled to a decree quieting their title as to this one-third interest.

POINT VI.

THE AMENDED DECREE IS CONTRARY TO AND NOT SUPPORTED BY THE FINDINGS OF FACT, THE DOCUMENTARY EVIDENCE ON FILE, AND THE LAW.

Plaintiffs most strongly urge that the argument presented heretofore in this brief has shown that all of the conclusions of law (Record 181-183) are not suported by the findings of fact and the documentary evidence on file, and that all of them are in error in applying the law to the facts found. Plaintiffs urge that they are entitled to have this Supreme Court withdraw all of the conclusions of law on the grounds herein set forth, and order new conclusions made to conform to the arguments hereinbefore presented. Under these circumstances, the Amended Decree should be reversed and judgment given to plaintiffs.

POINT VII.

FROM THE FINDINGS OF FACT, THE DOCUMENTARY EVIDENCE ON FILE, AND THE LAW, THE PLAINTIFFS AND APPELLANTS ARE ENTITLED TO A DECREE QUIETING THEIR TITLE AS AGAINST ALL OF THE ANSWERING DEFENDANTS AND ALL OF THE RESPONDENTS.

Plaintiffs claim that the amended findings of fact (Record 171-180) show that the plaintiffs are entitled to a decree quieting their title as against all of the respondents. Plaintiffs filed proposed findings of fact (Record 151-160) which are nearly identical with the Amended Findings of Fact (Record 171-180). Plaintiffs most strongly urge that applying the law hereinbefore set forth to these findings of fact, that the plaintiffs are entitled to a Decree quieting their title.

The basis of the plaintiffs title is set forth in finding of fact No. 5 (Record 176). The validity and regularity of the instruments set forth in said finding is nowhere questioned. Plaintiffs' Exhibit B is a certified copy of the Auditor's Tax Deed and is regular on its face in every respect. Under the ruling of this Supreme Court in Hansen v. Morris, supra, plaintiffs are entitled to a decree quieting their title in the premises against all of the respondents.

CONCLUSION.

The plaintiffs and appellants have proved their case. They are entitled to a Decree quieting their title on the record on appeal.

Karl V. King, administrator of the Estate of Hannah J. Braffet, Deceased, the claimant of an undivided one-third interest in the property, is in default. He represents any interest claimed by the so-called Smith defendants.

The so-called Smith defendants cannot recover for the following reasons:

(1) They are barred by the provisions of Chapter 19, Laws of Utah, 1951.

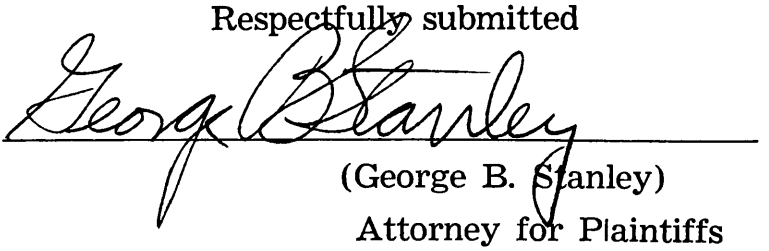
(2) They did not plead in their answer any affirmative allegations which would avoid the bar of the statute of limitations.

(3) Civil Action No. 2693 tolled the statute of limitations only for the purpose of that particular action, and did not toll said statute as to the present action.

(4) The answer filed by said defendants did not make any allegations for any affirmative relief.

The so-called Zane defendants are barred by the provisions of Chapter 19, Laws of Utah, 1951. The orders dismissing the various actions, all signed by Judge R. L. Tuckett, did not constitute an adjudication on the merits.

Respectfully submitted



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