

1975

J.R. Bagnall, aka Joseph R. Bagnall, and Florence
Bagnall v. United Paint and Colors Company, et al. :
Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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J. R. BAGNALL, aka JOSEPH
R. BAGNALL, and FLORENCE
BAGNALL,

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Plaintiffs-Appellants,

vs.

Case No.
13753

UNITED PAINT AND COLORS
COMPANY, et al.,

Defendant-Respondents.

Brief of Defendant-Respondent

Appeal from Summary Judgment of the Sixth Judicial
District Court of Sanpete County, State of Utah,
Honorable Maurice Harding, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. R. BAGNALL, aka JOSEPH
R. BAGNALL, and FLORENCE
BAGNALL,

Plaintiffs-Appellants,

vs.

UNITED PAINT AND COLORS
COMPANY, et al.,

Defendant-Respondents.

Case No.
13753

Brief of Defendant-Respondent

NATURE OF THE CASE

This case, in its overall context, involves an action for forfeiture of a real estate agreement and to quiet title to some 570 acres of land in the plaintiffs. The particular matter involved in this appeal involves respondent's motion for summary judgment and the resulting decree of quiet title, quieting title as against the plaintiffs and in favor of the respondents to a portion of the land involved.

DISPOSITION IN LOWER COURT

An order of Summary Judgment and Decree of Quiet Title was granted in favor of United Paint & Colors

Company (respondent) on March 26, 1974. The plaintiffs then moved to vacate the summary judgment and that motion was heard and denied by the Court on June 25, 1974, and an order to that effect filed July 8, 1974. It is from the Summary Judgment and Decree of Quiet Title, and the Order refusing to vacate the said Summary Judgment that the plaintiffs have taken this appeal.

RELIEF SOUGHT ON APPEAL

Appellants (plaintiffs) seek reversal of the Summary Judgment and Decree Quieting Title and seek to have the matter remanded back to the District Court for trial.

STATEMENT OF FACTS

On September 1, 1952, a real estate agreement was entered into between Hannah Bagnall and J. R. Bagnall, as sellers, and Wallace J. Nyberg, Jean B. Nyberg and Glenna A. Nyberg, as buyers. At the time of the making of the said agreement, Jean B. Nyberg was the owner, apart from any interest acquired by virtue of the real estate agreement, of an undivided one-half interest in 140.15 acres of the land covered by the real estate agreement. She held that interest as co-tenant with her brother, J. R. Bagnall, by virtue of a warranty deed dated January 30, 1939, by which Joseph F. Bagnall and Hannah Bagnall conveyed to the plaintiff, J. R. Bagnall, and to his sister Jean B. Nyberg (one of the purchasers under the real estate agreement) an undivided one-half interest in the 140.15 acres. (R. 55, 56) On March 3, 1962, Jean

Nyberg, by warranty deed, deeded the aforesaid 140.15 acres to Utah Valley Land and Development Corporation. (R. 72)

The deed purported to convey a fee simple title to the land, although Mrs. Nyberg had only the purchasers interest under the agreement together with the undivided one-half interest by virtue of the 1939 deed from her mother and father. On July 16, 1962, Suburbia Land Company of Idaho, one of the defendants named in the within action, took possession of the land and entered into a modification agreement with the plaintiffs. (R. 56) About November 4, 1970, Plaintiffs commenced the within action in the Sixth District Court to recover possession of the land and to forfeit the agreements for non-payment. In March of 1971, Mr. Ronald C. Barker, attorney for the defendants at that time, filed an answer to the complaint and in defenses numbered 4 and 6 alleged that the plaintiffs had failed to acquire and maintain marketable title to the property. After the filing of the defendants answer by Mr. Barker, and after at least one conversation between Mr. Barker and Mr. Merlin O. Baker, plaintiffs' then attorney, wherein the matter of Jean Nyberg's interest in the property and her attempted disposition thereof was discussed, plaintiffs, on May 20, 1971, obtained and recorded a quit claim deed to the 140.15 acres, along with all the other property covered by the September 1952 agreement, from Donald W. Denton and wife. Mr. and Mrs. Denton had, at one time, been assignees under the real estate agreement and had subsequently assigned their interest under the contract. Also under date of

May 20, 1971, plaintiffs obtained a quit claim deed to the same 140.15 acres, along with all the other property covered by the September, 1952 agreement, from Jean Nyberg (now known as Jean Nyberg Shirk). Curiously, enough, it was not recorded until May 28, 1971. (R. 92-94) Then under date of August 12, 1971, plaintiffs obtained another quit-claim deed to the same property from a Mr. and Mrs. Mortenson who, at one time, had also been purchasers and assignees under the contract. And finally, on October 5, 1971, Utah Valley Land & Development Corporation, as grantor, conveyed the same 140.15 acres by warranty deed to respondent, United Paint and Colors Company. (R. 72-A)

Pre-trial conferences in this matter were long and involved, and the final session thereof was held September 29, 1973, and the pre-trial order was signed November 9, 1973. (R. 49-61) It was not until the filing of the plaintiffs' Amendment to Amended Complaint (R. 45, 46) that the plaintiff ever called into question the validity of respondent's fee title to the one-half interest in the 140.15 acres. Respondents thereafter counterclaimed for judgment and a decree of quiet title in themselves, (R. 64-69) and for summary judgment in their favor. The matter was argued to the Court March 22, 1974. At the time of the hearing both Mr. and Mrs. Bagnall were in attendance. One of the matters extensively debated was the question of consideration paid by the Bagnalls for the quit claim deed. The plaintiffs and their counsel freely admitted to the Court the existence and the timing of the deeds from the Nybergs, from the Dentons and from the Mortonsons. When the Court asked them what had been

paid for the deeds, including the deed from Jean Nyberg, Mr. Bagnall, took some time to answer and then stated that he had forgiven the grantors of any obligations which they had under the contract.

ARGUMENT

POINT I

THE DEED FROM JEAN B. NYBERG SHIRK TO UTAH VALLEY LAND AND DEVELOPMENT CORPORATION IS VALID AS A MATTER OF LAW

Appellant (Plaintiff) seeks to rescue himself from his own folly by calling into question the validity of the warranty deed from Mrs. Shirk to Utah Valley Land & Development Corporation upon the ground that the corporate grantee, did not come into existence until some 20 days after the conveyance was signed and delivered to Mr. Redmond, a promoter of the corporation who became the president after incorporation. There is no question but that the contemplated corporation was ultimately formed under the name of Utah Valley Land & Development Company. Plaintiff has questioned whether that could be the same corporation since the name "corporation" as contained in the deed appears as "company" in the articles of the grantee. The record, as designated, by the plaintiff makes it amply clear that the Utah Valley Land and Development Corporation referred to in the deed was the same corporation as was ultimately incorporated under the name of Utah Valley Land and Development Company. (R. 72, 109 lines 15-20 et. seq.)

Fletcher's Cyclopaedia on Corporations, Volume 8, Section 3956, pages 278 and 279 states that "A person who conveys real property to an association as a corporation cannot avoid the conveyance by denying the corporate existence of the grantee, *and this estoppel also extends to persons who are in privity with the grantor as is seen in another section.*" (Emphasis added) He then goes on to say in section 3989 that:

"The estoppel of a person dealing with a pretended corporation to deny its legal incorporation also operates against persons who stand in his shoes, or, in other words, who are in privity with him. Thus it clearly operates as against his executor or administrator, or his heirs, and against one * * * to whom he conveys property which he has previously conveyed to a corporation * * *."

The Utah Court has spoken clearly and concisely upon this very question way back in 1903. In the case of Santaquin Mining Company vs. High Roller Mining Company, 71 Pacific Reporter 77, certain individuals by the name of Kirkman duly entered upon vacant mineral land of the United States and located the Silver King mining claim thereon. Subsequently they deeded the claim for \$1.00 and 4,000 shares of stock in the proposed corporation to Santaquin Mining Company, a corporation which had not yet been incorporated. The deed was handed to W. H. West, one of the promoters of the proposed corporation with instructions to deliver it to the secretary when the corporation was formed. Thereafter, certain individuals representing the High Roller Mining Company applied for a patent on some mining claims which

overlapped the property belonging to Santaquin Mining. High Roller claimed that the deed to Santaquin was a nullity because it was executed before the grantee came into existence. The Utah Court stated:

“A paper purporting to be a deed was made, signed, acknowledged, and placed on the public records before the grantee therein named (the plaintiff) had become a corporate entity. * * * After incorporation, W. H. West delivered it pursuant to directions, to J. A. West, the secretary of the company. It then took effect. It became eo instanti a deed and it then had every requisite required by law. * * * Is not the delivery the very essence of the transaction? Would it not be demanding a perfectly useless ceremony to require the owner of the premises to write, sign, and acknowledge another instrument to the same purport? Clearly such a proceeding would savor strongly of the nonsensical.”

The Court goes on to say that “Both upon reason and authority we think it is established that the deed offered by plaintiff was prima facie a valid instrument * * *.” The Santaquin Mining case was relied upon in 1919 when the Utah Court again held that a deed was valid even though executed before the formation of the grantee corporation. The writer will merely refer the Court to headnote number 4 in the case of *Beggs et al. vs. Myton Canal & Irrigation Co. et al.*, 179 P. 984, wherein the Utah Court stated that “A deed executed by one company to another before the incorporation of the grantee company was not for that reason invalid.” The writer is unaware of any Utah case since that time which is in opposition to the principle.

Clearly, then, under Utah law, the deed executed before incorporation becomes effective upon delivery and acceptance after incorporation. A 1907 South Carolina case is instructive on this point. In the case of Sumter Tobacco Warehouse Co. vs. Phoenix Ins. Co., Limited, of London, 56 S.E. 654, a deed made out to Sumter Tobacco & Cotton Warehouse Company was executed a few days before a charter was obtained by the grantee corporation. The grantee was actually incorporated as the Sumter Tobacco Warehouse Company, leaving out the word "Cotton" as contained in the deed. The warehouse was destroyed by fire and the insurance company attempted to avoid payment upon the grounds (among others) that the deed was a nullity because issued before incorporation of the grantee, and also because the name of the grantee was not the same in the deed as it was on the articles of incorporation.

The South Carolina Court stated that "A Deed to a corporation made before the charter will have effect as soon as the charter is obtained, on the ground that *its acceptance should be presumed as soon as the corporation is competent to accept it.*" (Emphasis added) The Court made the observation that it is the duty of the courts to give effect to deeds made in good faith rather than to destroy them on technical grounds. The court further stated that the slight change in the name of the corporation could make no difference. "To hold that the slight change in the name of the corporation should defeat the deed would be to refuse to regard the intention of all parties concerned for the sake of an attenuated technicality." See also 4 Thompson on Corporations, 5114, 5115.

POINT II

THE VALIDITY OF THE DEED IS GOVERNED BY UTAH LAW

Plaintiffs have erroneously implied that the law of the State of California, where the deed was purportedly executed, should govern the interpretation and effect thereof. Such is definitely not the case. 16 Am. Jur. 2d, Conflict of Laws, § 16 states as follows:

“From the general principles heretofore stated, it follows that all instruments affecting the title to real estate, no matter what their nature, must be governed, as to their execution, construction, and validity, exclusively by the laws of the state in which the real estate is situated. For example, if a deed is executed in one jurisdiction and the land lies in another, the requisites and validity of the conveyance are governed by the law of the jurisdiction where the land is situated. Questions as to legal effect of a conveyance are also governed by the law of the state in which the land is situated.”

Section 17 states:

“So omnipotent is the *lex loci rei sitae* that it even governs in regard to the capacity of the person making the instrument, no matter what its nature. Therefore, an instrument will be ineffective to transfer title to land if the person making it is incapacitated by the *lex rei sitae*, even though by the law of his domicil and by the law of the place where the instrument is actually made his capacity is undoubted. *The same principles apply as to capacity of the person who is to take.* (Emphasis added)

It is abundantly clear, without belaboring the point, that it is the law of Utah that is to determine whether the deed is valid, and it is likewise abundantly clear that as a matter of Utah law, it is valid in this case.

POINT III

THE TITLE OF UNITED PAINT AND COLORS COMPANY IS SUPERIOR, AS A MATTER OF LAW, TO THAT OF PLAINTIFFS, J. R. AND FLORENCE BAGNALL

It is undisputed that Jean Nyberg held an undivided one-half interest in the 140.15 acres with her brother, J. R. Bagnall, as a result of a warranty deed from her father and mother dated January 30, 1939. Such interest, of course, arose prior to, and was separate from any claim she would have to the property as a purchaser under the 1952 real estate agreement. It is also undisputed that she conveyed her interest in that 140.15 acres of land to Utah Valley Land and Development Corporation by means of a warranty deed signed March 3, 1962 (R. 72).

Another deed exists which also was signed by Jean B. Nyberg purporting to convey the same piece of property together with all the other property covered by the September 1952 agreement, to Mr. and Mrs. Bagnall. This deed was signed May 20, 1971. Finally, a third deed is involved dated October 5, 1971, by which Utah Valley Land conveys its interest by warranty deed to United Paint and Colors Company, respondent herein.

It is impossible for the plaintiffs, under the circumstances in this case, to become bona fide purchasers for value so far as the subject piece of property is concerned. The whole warp and woof of one of the defenses to plaintiffs complaint, raised by Suburbia Land Company and others named as purchasers under the contract, was that Bagnalls had not acquired and maintained a good title to all of the land. As early as March 1971, Bagnalls were made aware of such claim by means of the answer filed by the defendants then attorney, Ronald C. Barker, particularly in defenses 4 and 6. The Court, at the hearing on the Summary Judgment motion, was aware of much which is not revealed by the record, including the existence of the quit claim deeds from the Dentons and the Mortonsons, the supposed consideration paid for those deeds and etc., all of which showed actual knowledge by the plaintiffs of the respondents claim to the property.

In addition, Suburbia Land Company, Sanpete Land and Livestock Company, and various others had been in possession of the land from 1962 under various claims of right. Bagnall was aware of such and in fact joined them as defendants in his lawsuit to forfeit the contract. It is a general rule of property law that one who deals with property in the possession of a third party is chargeable with knowledge of everything which inquiry of the party in possession would have, or could have, revealed. Bagnalls, in securing the quit claim deed from Jean knew unequivocally that Jean was not in possession. Therefore they are chargeable with anything which an inquiry of the parties in possession would have revealed. The claim of the defendants had been all along that Bagnall did not

have good title, and that Jean Nyberg had issued certain warranty deeds which constituted a cloud upon the title. An inquiry by Bagnall would almost certainly have revealed that United Paint and Color was asserting a claim of ownership to the land.

The Utah Court, in 1939, in the case of Meagher vs. Dean et al, 91 Pacific Reporter 2d. 454 on page 454 stated:

“An open, notorious, unequivocal, and exclusive possession of realty under an apparent claim of ownership, is constructive notice to all the world of whatever claim the possessor asserts, whether such claim is legal or equitable in its nature.”

The Court further stated:

“To establish the fact of notice of claim to land from possession thereof, it is not necessary to show that person to be affected by notice knew of possession, but if possession was of character required by law, and had sufficient notoriety, certainty and exclusiveness, the notice is a legal deduction from the fact of possession.”

“The possession of a tenant is the possession of the landlord, and hence notice of the possession of the tenant is notice of the possession of the landlord.”

“The possession of a purchaser of land under an unrecorded contract therefor is sufficient to put all persons upon inquiry as to his right, and they are chargeable with such knowledge of vendor's title which they would obtain by such inquiry.”

“Whatever is notice enough to excite attention and put purchaser on his guard and call for inquiry is notice of everything to which such inquiry might have led.”

Bagnalls knew that parties other than Jean Nyberg were in possession. Having such knowledge, there is no way they could escape the legal consequences of that knowledge. It is a legal deduction that they are chargeable with the claim of United Paint and Colors. The sequence of events leading up to the acquisition of the deeds by the Bagnalls from the Nybergs, from the Dentons, and from the Mortensons, plus the fact that the deed describes all the land covered by the September 1952 Real Estate Agreement makes it quite evident that they were merely tying up loose ends of the lawsuit and not purchasing property for any real consideration. The recording statute was not enacted to protect one from deliberate nor intentional ignorance of the title. In the case of *Pender vs. Bird*, 224 P.2d, 1057, the Utah Court stated that:

“The recording statute was not enacted to protect one whose ignorance of the title is deliberate and intentional, nor does a mere nominal consideration satisfy requirement that a valuable consideration must be paid, but the purpose of the statute is to protect one who honestly believes he is acquiring a good title, and who *invests some substantial sum* in reliance on that belief.” (Emphasis added)

Clearly then, the plaintiffs could not become bona fide purchasers of the 140.15 acres because they had actual knowledge of claims by third parties (Utah Valley Land and also United Paint and Color), and even if they actually did not, they are chargeable with such knowledge because of the possession of the defendants, Suburbia, Sanpete and etc. They knew that someone other than

Jean Nyberg was claiming some rights in the land. That is sufficient to put them on notice of respondent's claim.

The plaintiffs are further frustrated in their efforts to claim BFP status because of their failure to pay any significant consideration for the quit claim deed. It is their obligation to come forward, both at the time of the original hearing as well as now, with evidence to establish that they were bona fide purchasers. They have completely failed in any such proof. The affidavits of the plaintiffs, Mr. and Mrs. Bagnall (R. 90-91, 95-96) do not mention any consideration whatsoever. They make a legal conclusion that they paid "valuable consideration" but they do not tell us what it was. It is clearly the prerogative of the Court to determine whether "valuable consideration" was given, and it is not bound by the affiants self serving statement that it was given. The record, then, even as designated by the plaintiffs clearly will support the trial court's determination that the deed to United Paint and Colors is superior to that of plaintiffs.

In addition to the lack of evidence produced by the appellants, the response which they made to the inquiry by the Court as to what they had paid is even more damning. When asked, Mr. Bagnall, after some hesitation, responded that Jean had been forgiven her obligations under the contract. The Court will observe that she had absolutely no obligation under the contract at all. By bringing suit to forfeit the contract, plaintiffs had made their election. They could not, and did not, sue for any damages or deficiencies under the contract. Their remedy of forfeiture was complete in itself and no other remedy

was available to plaintiffs against Jean. Furthermore, she had not answered, and her default had been entered. Under these circumstances, it is readily seen that the "valuable consideration" given by Bagnalls to Jean was absolutely no consideration at all. Add to this, the fact that the recording statute requires something more than nominal consideration to support a claim of bona fide purchaser, and it is again clear that Bagnalls could not, under any view of the pleadings and facts available to the trial judge, establish that they were purchasers in good faith.

In modern practice a quitclaim, such as the one from Jean Nyberg to the Plaintiffs, is used where the grantor intends to convey only such interest as he has, in contradistinction to a grant of the fee or other estate with warranty of title. Such a deed is as effectual to convey whatever interest the grantor has in the subject of the deed as is any other form of conveyance. It must be noted, however, that it will convey *only* such interest as the grantor actually has. See 23 Am. Jur 2d., Deeds, Section 291.

In section 292 of 23 Am Jur 2d., it states:

"All courts agree that a quitclaim deed, unless a contrary intent appears, passes all the right, title, and interest which the grantor has at the time of making the deed, which is capable of being transferred by deed, *and nothing more.*" (Emphasis added)

Further on, on page 324 it states:

"Conversely, under a conveyance by a quitclaim deed the grantee can acquire no better in-

terest than the grantor had. If the grantor himself has no title or interest of the property conveyed, most courts hold that the grantee takes nothing under a quitclaim deed, and *the instrument is regarded as merely a release or formal disclaimer on the part of the grantor*, notwithstanding the use of additional words of grant." (Emphasis added)

Again, on page 325 it is said:

"In those jurisdictions where it is customary to convey by grant with express or implied warranty of title, presumably the grantee will not accept a quitclaim deed unless the contract of sale provides that this form of conveyance shall be accepted by the purchaser. *Accordingly, it may be said that a quitclaim deed carries with it notice of every defect which there may be in the grantor's title.*" (Emphasis added)

The Utah Court has not decided the precise question of whether one who takes under a quitclaim deed can become a bona fide purchaser for value. Many jurisdictions have decided this question though, and the decisions have admittedly gone both ways. Texas is illustrative of the decisions holding that the grantee under a quitclaim deed cannot become a bona fide purchaser and is therefore chargeable with knowledge of all prior legal and equitable titles, whether recorded or unrecorded. Numerous Texas cases relying on the holding of *Miller et al. vs. Pullman et al*, 72 S.W. 2d. 379, have so held. In the case of *Stonum et ux. vs. Schultz et al.*, 138 S.W. 2d. 825, the Texas court at page 828 stated:

"* * * They still would not have been entitled to protection as innocent purchasers, for

the reason that the residuum-like instruments under which they sought to claim this property amounted to merely a quitclaim of something that had already been conveyed away out of their chains of title; so that, even though they did pay value for those instruments, and despite that fact that they carried such warranty, they still could not qualify under them, as subsequent bona fide purchasers of this particular property for value”

The law in Utah is similar to that of other jurisdictions concerning the interpretation and effect of quitclaim deeds. The Utah statutes make a clear and unmistakable differentiation between the two types of conveyances. 57-1-12, referring to the form and effect of a warranty deed states that such a deed, when executed, shall have the effect of a conveyance in fee simple to the grantee. 75-1-13, on the other hand, referring to the form and effect of a quitclaim deed, states that a quitclaim, when executed, shall only have the effect of a conveyance of all right, title, interest and estate of the grantor. In *Nix et al. vs. Tooele County*, (Utah 1941) 101 U. 84, 118 P. 2d. 376, Tooele County conducted a tax sale of certain property and conveyed it by quitclaim deed. It turned out that the County's title was defective and the purchasers at the tax sale acquired nothing. They then sued to get their money back. The trial court granted judgment for the plaintiffs and against the county. On appeal the judgment was vacated and remanded with instructions to dismiss. The Court stated on page 377:

“Plaintiffs’ title is founded upon quitclaim deeds. *Such deeds do not imply the conveyance of any particular interest in property.* See section 78-1-12, R.S.U. 1933, as compared with section

78-1-11, R.S.U. 1933. *Plaintiffs acquired only the interest of their grantors, be that interest what it may.*" (Emphasis added)

In the case of Dowse vs. Kammerman, (Utah 1952) 122 U. 85, 246 P.2d 965, the plaintiff Dowse obtained certain property by tax deed at a time when values were low. The consideration therefore was relatively small. He quitclaimed to the Doris Trust Company, apparently for a substantial consideration, and Doris Trust conveyed by warranty deed to the defendants. Years later, but a comparatively short time before defendants interest would have ripened into unimpeachable title by adverse possession, — when land values had trebled or quadrupled — plaintiff purchased the title of the record owners for a paltry sum, sued to quiet title against the defendant on the grounds that the tax deed was defective, and thereby attacked the very title which he formerly had and sold. He did not even offer to disgorge the amount of his unjust enrichment. Even in the face of the obvious unjust enrichment of the plaintiff, the Court refused to depart from the long standing rule that a quitclaim does not convey after acquired title. In other words, *the plaintiff won because the quitclaim conveyed only such interest as he had at the time* and his own after acquired title was superior to his previous quitclaim conveyance for value. The Court stated that the grantee *must know* that a quitclaim deed only passes the right, title and interest which the grantor then has, and cited 78-1-12, Utah Code Annotated, 1943 in support thereof. This section is contained in the 1953 Code as 57-1-13.

Clearly, then, Utah would, and should, hold that the grantee under a quitclaim deed must take subject to all infirmities, recorded and unrecorded, in the grantor's title. The very nature of the quitclaim deed to the Bagnalls amounts to **nothing more than a disclaimer** by Jean and precludes the appellants from becoming innocent purchasers for value.

CONCLUSION

It is respectfully submitted that the facts and the record in this case clearly demonstrate that the judgment of the trial court quieting title in respondents as against the plaintiffs was proper and should not be disturbed on appeal. The deed from Jean Nyberg to Utah Valley Land was valid and effective, as was the conveyance from Utah Valley Land to United Paint and Colors.

The quitclaim from Jean Nyberg to plaintiffs, coming some nine years after Jean has conveyed by warranty deeds to Utah Valley Land, was made with full knowledge by the Bagnalls that there were claims by third parties against the land, and the complete lack of any meaningful consideration from Bagnalls to Jean negatives any possibility of them becoming bona fide purchasers for value. The record is completely lacking in anything which would even imply that anything of value was given by the plaintiffs for the conveyance, and

there was nothing to be decided by a trial of these matters. Respondent was entitled to judgment as a matter of law.

Respectfully submitted,

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