

1967

Mervin J. Russell and Ada J. Russell, His Wife v.
Geyser-Marion Gold Mining Company, a
Corporation, The Bothwell Corporation, a
Corporation, et al : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

NOV 14 1914

MERVIN J. RUSSELL and
ADA J. RUSSELL, his wife,
Plaintiffs,

vs.

BEYSER-MARION GOLD
MINING COMPANY, a
corporation, The BOTHWELL
CORPORATION,
a corporation, et al,
Defendants

APPELLANT'S REPLY

Appeal from Judgment, District Court,
Tooele County,
Honorable R. L. Tamm

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TABLE OF CONTENTS

	Page
Reply to Assertion by Respondent at page 1 of Respondent's brief that Appellant omitted pertinent facts	1
Reply to Assertion by Respondent at page 7 of Respondent's brief that Ault (Lessee) only grazed lower claims three times	8
POINT XI. A WRITTEN CONTRACT TO CONVEY REAL PROPERTY IS MERGED IN A DEED.....	1
Reference to page 34 of Appellants Brief citing reasons for omission of Exhibit 17	1 & 2
POINT XII. SEIZURE OR POSSESSION WITHIN SEVEN YEARS NECESSARY.	2 & 3

CASE CITED

Pender vs. Bird, 224 P2d 1057 119 U 91	8
Statute Cited, U.C.A. 1953	
78-12-5: SEIZURE OR POSSESSION WITHIN SEVEN YEARS NECESSARY:	2, 3 & 6

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Defendants.

Case No.
10577

APPELLANT'S REPLY BRIEF

POINT XI.

A WRITTEN CONTRACT TO CONVEY REAL
PROPERTY IS MERGED IN A DEED.

This point is fully covered at Page 34 in Appellant's brief. The law is well settled in Utah by the *Knight* case and other cases cited that an agreement to convey real property, even where shown to be the basis of a deed is extinguished, void and merged in the deed.

Respondent's brief on Page 1, in referring to Appellant's brief, states: "Very pertinent facts are

omitted.” The only pertinent fact Respondent refers to as being omitted is an agreement (Ex. 17) which was not even shown to be the basis upon which the deed referred to as the second grant (Ex. 2) was issued.

The lower Court erred in receiving Ex. 17 into the evidence for the reasons stated above and Respondent asks this Court to perpetuate said error of the lower Court despite the fact that Respondent has cited no cases supporting his position.

POINT NO. XII.

SEIZURE OR POSSESSION WITHIN 7 YEARS NECESSARY.

This point is a direct quote from Caption Utah Code Annotated 1953,

Section 78-12-5

“No action for the recovery of real property or for the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestor, grantor or predecessor was seized or possessed of the property in question within seven years before the commencement of the action.”

Inasmuch as this action was brought by the Respondent, Respondent had the burden of proving that he complied with the above-quoted statute. At Page 8 of Respondent’s brief, Respondent cites certain pages of the transcript and asserts they show Respondent was seized and possessed within seven

years before commencement of the action as required by Section 78-12-5 U.C.A. 1953. While admitting the necessity of being seized and possessed for seven years the record cited by Respondent entirely fails to support said seizure or possession.

I.

SEIZEN AND POSSESSION FROM 1957 THROUGH 1960.

1. Respondent asserts that he was seized and possessed of the property for the years from 1957 through 1960 through a predecessor, Rose Castagno. These years constituted the initial years of Respondent's alleged seven years. The only citation of the transcript referred to by Respondent to support seizure and possession of the property from 1957 through 1960 is Page 64 of said transcript. An examination of T64-12 reveals the following:

Rose Castagno on direct examination stated,

"A: I don't know where the graveyard is.

Q: You don't?

A: No."

Inasmuch as all the witnesses testified the graveyard was located immediately adjacent to the northerly portion of the southerly group of claims, T213-25, see also Exhibit 18, this definitely establishes the fact that Rose Castagno did not know where the mining claims she is asserted to have possessed were even located.

2. The only statement upon which Respondent could possibly rely is that Rose Castagno stated she did see cattle in the area around Milk Ranch, T64-4. She did not state whose cattle they were or that she owned them. Milk Ranch was located on Exhibit 18 by a red cross, T156-19. Milk Ranch is located on the Silver Cloud claim, T157-6. Silver Cloud claim is not involved in this litigation and is about a thousand feet west of the Hecla claim (the nearest claim to Milk Ranch in the upper group) T157-13, and is more than a mile from the Black Shale claim in the upper group, Exhibit 18.

3. Rose Castagno did not even know that said claims consisted of two groups, to-wit: an upper group and a lower group, which claims are separated several miles from each other, T62-29. Rose Castagno did not know where the claims were in relation to Sparrow Hawks Spring or the Milk Ranch, T62-8, demonstrating that she could not possibly have known whether her livestock were on the above-described claims or not. The court's attention is again invited to the fact that this testimony was given on direct, not cross-examination.

4. Respondent claims seizen and possession from the years 1960 to 1964 or the last part of said seven years by himself personally. Respondent did not have a map and testified he was not able to identify the location of said mining claims. (This point is fully treated on Page 10 of Appellant's

brief.) Moreover, he admitted Ault was grazing said area as shown later.

ALL OTHER PORTIONS OF THE TRANSCRIPT CITED BY RESPONDENT REFERRED TO YEARS PRIOR TO THE 7 YEARS IMMEDIATELY PRECEDING FILING OF THE ACTION.

5. Respondent cites Pages 66-88. T76-7 contains testimony regarding a deer hunter who indicated that he rode the Mercur Bench *only* during the deer-hunting season, T76-11. T66 to 88 in the main contained evidence regarding the years 1947 and 1948 and the party giving said testimony could not identify or locate even one single claim. T67-16.

6. Respondent next cites T96-97 to support the alleged seizen and possession during said 7 years. Inasmuch as they do not concern said 7 years immediately prior to the commencement of this action, Appellant requested the Court to strike said testimony, T95-9. T94-12 shows no more than that there was an imaginary line purportedly involving property west of Milk Ranch at a time prior to said 7 year period. Testimony found on T97-21 involves the years 1945 to 1946, more than 20 years ago during which time said property was leased by Appellant to Nordell, and during which time Nordell paid 1/2 of the general taxes for such use to Appellant.

Respondent at Page 7 in Respondent's brief cites a finding of the lower Court:

"For many years last past plaintiffs and their predecessors in interest have used the surface of mining claims for livestock grazing."

78-12-5 requires that Respondent sustain the burden of proving seizen and possession for 7 years immediately prior to the commencement of the action. A finding that an individual has used surface lands for grazing over many years last past does not meet this requirement as set forth in the Utah statute and the phrase, "many years last past" is a meaningless, ambiguous phrase, insufficient to comply with the mandate of the legislature on this particular point. Furthermore, for the foregoing reasons found in Paragraphs 1-6 above, there is no evidence to support a finding that Respondent or Rose Castagno ever grazed the surface of said mining claims.

ADMISSION BY RESPONDENT OF SEIZEN AND POSSESSION IN APPELLANT AND DEFENDANT DURING 7 YEAR PERIOD AND FOR 20 YEARS.

Appellant plead as an affirmative defense that Appellant was seized and possessed of and paid taxes on said claims for 20 years.

Respondent's own admissions demonstrated the fact that Appellant was in fact seized and possessed of the property in question particularly during the

7 years immediately prior to the commencement of this action.

1. Respondent admitted that Appellant's lessee (Ault) had sheep in the area for:

T13-28 'Fifteen or twenty years.'

2. Respondent admitted that Appellant's lessee (Ault) had his sheep all over the area which would include the public land as well as the mining claims here involved, T26-27. Russell also admitted that he knew Ault leased said claims from Bothwell, T14-26.

3. The lower group of said claims is very narrow, dividing two large areas of land leased by the United States Bureau of Land Management to Respondent. Respondent further testified that he called the B.L.M. to resolve the problem of Ault's sheep grazing said claims.

T17-6

"Q: He showed the lease to B.L.M.?"

A: Yes.

Q: What did B.L.M. say?

A: The B.L.M. Just left it up to us to straighten that out."

The B.L.M. after examining Respondent's deed and the lease held by Appellant, refused to be involved in the matter and left it up to Respondent and Ault

to straighten the matter out, after which Respondent filed this suit.

The law is well settled in Utah in an opinion written by Justice McDonough that where premises are rented and rents collected under a claim of right in facts similar to the case at bar that plaintiff and Respondent is not seized or possessed.

Pender vs. Bird, 224 P2d 1057 119-U-91:

“ . . . the third amended complaint shows on its face that defendants Bird were then in possession of at least some portion of the premises under a claim of right and *were collecting the rents, issues and profits*. In face of such allegation, the court could not, on the pleadings, hold that defendants were not seized nor possessed of the property in question within seven years before the commencement of the action.” (Emphasis supplied)

III

Counsel for Respondent at Page 7 of Respondent's brief represents to the Court that Owen Ault personally herded sheep on the lower group of claims or the Mercur Bench only three times and therefore, Ault's sheep grazed the lower group of claims only three times. This is inaccurate and misleading for the following reasons:

1. The transcript of testimony contains pages of testimony demonstrating that Ault's son herded Ault's sheep on the Mercur Bench or the lower group while his father herded other sheep and livestock at

Mercur and north of Mercur on the northerly mining claims and on Sections 17 and 20 which were owned by Ault and on which he had a summer home. T144-30.

2. Ault's son (Harold Ault) herded Ault's sheep on the lower group of claims from the time he was 14 years of age to the time of his testimony in court. Harold Ault was at the time of the trial 34 years old, T283-19.

3. In speaking about herding on Mercur Bench Harold Ault stated:

"A: Every spring we have come down Mercur Canyon." T287-16.

On cross-examination Harold Ault was asked whether he just drove the sheep on the claims, and he testified:

"A: Not driven them, we have grazed them there.

Q: Grazed them?

A: Until the feed was gone and then went on up." T284-16.

4. Virginia Ault testified she had been with her husband whose livestock had been grazing on the mining claims in the summer.

T210-7

“A: Most of the time” T209-29 Since “1922”
and that Aults sheep had “been there all
the time” T214-26.

Mrs. Ault lived in the area during the grazing
season, and drove the water truck.

The Court’s attention is further invited to the
fact that Ault paid rent for the grazing use of said
claims. He possessed a map with claim numbers
thereon, which he had colored in green to enable
him to locate the claims and graze them.

For the foregoing reasons Appellant respect-
fully submits to the Court that Respondent not only
failed to sustain the burden of prof, but also by his
own admissions proved that Appellant was seized
and possessed of the property in question for the
seven years immediately prior to the commencement
of this action.

Respectfully submitted,

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