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Anest Aggelos v. Zella Mining Company; Lucille Y. Hays; Stephen J. Hays; Julia Hays Hoge; Lou Gorey; Ethel V. Reilly; Mary Louise O'Donnell; S. Hays Company; Et Al : Brief of Appellant

Utah Supreme Court

N. J. Cotro-Manes; Attorney for Plaintiff and Appellant;

IN THE

SUPREME COURT OF THE STATE OF UTAH

ANEST AGGELOS,
Plaintiff and Appellant,
vs.
ZELLA MINING COMPANY, a corporation of Utah, LUCILLE Y. HAYS, administratrix of the Estate of Lawrence J. Hays, deceased, STEPHEN J. HAYS, JULIA HAYS HOGE, MRS. LOU GOREY, MRS. ETHEL V. REILLY, MARY LOUISE O'DONNEL, and S. HAYS COMPANY, a corporation, ET AL,
Defendants and Respondents.

No. 6217

APPEAL FROM THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH

HONORABLE CLARENCE E. BAKER, JUDGE

BRIEF OF APPELLANT

N. J. COTRO-MANES,
Attorney for Plaintiff and Appellant.

TABLE OF CITATIONS

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STATEMENT OF CASE

This is an action brought by the appellant seeking to quiet title to the surface rights of a part of the Clays

Placer Mining Claim, Lot No. 118 in West Mountain Mining District, Salt Lake County, Utah, as particularly described in paragraph IX of the complaint.

The plaintiff alleged in his complaint:

That he was in the actual, open, notorious, adverse and continuous possession and occupancy of the property therein described for more than seven (7) years last past, to-wit, seventeen (17) years;

That he has paid all taxes lawfully assessed thereon during all such times;

That the premises were enclosed by a fence; and that he improved the premises.

All of the defendants failed to appear except the Zella Mining Company and S. Hays Company which filed an answer.

It was stipulated in open court by the respective counsel that the interests of the Zella Mining Company and S. Hays Company were identical in character and that the conduct of the trial by counsel for S. Hays Company would bind the Zella Mining Company.

The statute relating to the acquisition of title by adverse possession, so far as material to this case is found in Sec. 104-2-11, and 104-2-12, Revised Statutes of Utah, 1933, which is as follows:

WHAT CONSTITUTES ADVERSE POSSESSION NOT UNDER WRITTEN INSTRUMENT

"For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment or decree,

land is deemed to have been possessed and occupied in the following cases only:

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

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

(3) Where labor or money has been expended upon dams, canals, embankments, aqueducts or otherwise for the purpose of irrigating such lands, amounting to the sum of $5.00 per acre."

POSSESSION MUST BE CONTINUOUS, AND TAXES PAID

"In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law."

QUESTIONS INVOLVED

1. Has the plaintiff and appellant been in the actual, open, notorious, adverse and continuous possession and occupancy of the property in question for seven (7) years as required by statute?

2. Has the plaintiff and appellant paid all taxes which have been levied and assessed upon such land according to law?

3. Were the premises enclosed by a fence?

4. Has the plaintiff and appellant improved the premises?

ARGUMENT

There is no dispute that the plaintiff and appellant occupied the premises for more than seven (7) years, to-wit, approximately seventeen (17) years, and that he made certain improvements thereon as found by the Court in part of its Finding No. VI, which is as follows:

> "The said plaintiff and appellant Anest Aggelos has for more than seven (7) years last past, to-wit, for approximately seventeen (17) years, being in continuous possession and occupancy of a portion of the surface of said lands and premises, and has made certain improvements thereon."

But the Court erred in making and entering that part of its Finding of Fact No. VI which reads:

> "But that said occupancy by plaintiff of said portion of the lands and premises with reference to which this action is brought, by plaintiff was without title or claim of title by plaintiff, and that said occupancy by plaintiff during said period of time, and the whole thereof, was without any title or claim of title, and that plaintiff never at any time or at all, and particularly during the period of seven (7) years prior to the commencement of this action paid any taxes whatsoever lawfully levied and assessed upon the lands and premises described in paragraph 4, to which plaintiff is seeking to quiet title by this action."
>
> "The term "claim of right", "claim of title", and "claim of ownership" when used in connection with adverse possession, means nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right."

Amer. Jur. Pg. 897, Sec. 187.

> "To establish claim of right as a requisite element of adverse possession it is not necessary that the party in possession should have expressly declared his intention to hold the property as his own, nor need his claim thereto be a rightful or well-founded one. That his acts and conduct clearly indicate a claim of ownership is enough and it may be sufficient even though the disseisor has knowledge of a better title. *The actual occupation, use, and improvements of the premises by the claimant,* as if he were in fact the owner thereof, without payment of rent, or recognition of title in another, or disavowal of the title in himself, will be sufficient to raise a presumption of his entry and holding as absolute owner, and, unless rebutted, will establish the fact of a claim of right."

1 *Am. Jur.* Pg. 897-8, Sec. 189.

The Court further erred in finding that "plaintiff never at any time or at all, and particularly during the period of seven (7) years prior to the commencement of this action paid any taxes whatsoever lawfully levied and assessed upon the lands and premises."

The undisputed evidence shows that the plaintiff and appellant paid all of the taxes so assessed against said premises so occupied by him from the year 1927 to the year 1937. (Abs. Pg. 46-7.) And that there is no evidence to the contrary that the taxes so levied, assessed and paid were not assessed according to law.

Section 80-5-18, R. S. U., 1933, provides:

> "Lands once described on the assessment book need not be described a second time, but any person claiming the same and desiring to be as-

> sessed therefor may have his name inserted with that of the person to whom such land is assessed."

The evidence is conclusive that the premises were enclosed by a fence and that the plaintiff and appellant improved said premises by erecting in 1927 a four room frame dwelling house at a cost of $1,350.00, a garage which cost $100.00 and a smaller house costing $400.00, and that the plaintiff lived on said premises for thirty-two (32) years, and that further he tore down the fence about two (2) years ago and filled the ground with dirt six feet high. (Abs. 26-7.)

The beginning of adverse possession is plainly stated by this Court in the case of Welner vs. Stearns, 40 Utah 185, as when the premises are entered and fenced and the entryman commences to improve the property.

The Court erred in making and entering its Finding of Fact No. VII, for the reason that there was not sufficient evidence or evidence at all to support or warrant said finding;

> "That the defendants and the predecessors in interest paid under the description "*real estate,*" taxes for the years 1929 to 1936."

But the evidence is to the effect that the defendants were assessed and paid taxes *only* on the mining claims, which mining claims were assessed at the rate of $5.00 per acre.

Section 80-5-56 Revised Statutes of Utah, 1933, is substantially the same as Section 5864 Compiled Laws of Utah, 1917, and as Section 2504, Comp. Laws 1907, but it further provides as follows:

> "In all cases where the surface of the land is owned by one person and the mineral underlying such lands is owned by another, such property rights shall be separately assessed to the respective owner."

This Court in the case of Utah Copper Company vs. Chandler, 45 Utah 85, held:

> "*The surface and improvements thereon used for other than mining purposes are taxable, and one occupying and paying taxes may acquire adverse possession thereto.*"

And again in the Chandler case, this Court held:

> "If no taxes are lawfully assessed, payment of taxes is not necessary to acquisition of title by adverse possession, under Compiled Laws of 1907, Sec. 2866, providing one can not establish adverse possession unless he has paid all taxes levied and assessed on the land according to law."

Section 104-2-12 R. S. U. 1933, is identical with Section 2866 Compiled Laws of Utah 1907, with the exception the word "persons" is omitted and "theirs" is substituted by "his".

I believe the case of Utah Copper Company vs. Chandler above referred to plainly defines the law governing adverse possession in case of mining claims for mining purposes and the independent title or surface right for other than mining purposes, which case I believe is analogous with the case at bar.

This Court in the case of Utah Copper Company vs. Eckman, 47 Utah 65, cites and approves the holding in the Chandler case and particularly states that adverse possession for other than mining purposes may be ac-

quired *even against the owner who pays taxes on the mining claim.*

The Court erred in making and entering its Finding of Fact No. IX, to the effect:

> "That the possession and occupancy by plaintiff of a portion of the surface of said Clays Mining Claim Lot No. 118, as aforesaid, has not been hostile or adverse to said defendants, but on the other hand has been in subordination to the legal title of said answering defendants."

As there was no evidence whatsoever introduced to sustain said finding, the evidence is clear that plaintiff and appellant has complied with the laws of Utah in every respect to acquire title by adverse possession and particularly with the requirements of Sections 5, 6, 7, 10, 11 and 12 of Title 104, Chapter 2, Revised Statutes of Utah, 1933, which sections are identical with Sections 6449, 6450, 6451, 6454, 6455, and 6456, respectively, Compiled Laws of Utah, 1917.

I submit that there is no dispute concerning, and the evidence is conclusive that the plaintiff has been in the actual, open, notorious, adverse and continuous possession of the premises described in the complaint for more than seventeen years, or ten years more than the statute requires; that he and his predecessors in interest have been in such possession for more than twenty-seven years or since 1910; the evidence stands undisputed that the plaintiff and appellant has improved the property by building a dwelling house and other buildings thereon costing in excess of $1700.00; that the property was enclosed with a substantial fence on the three sides and

that on the east side of said premises there was an inaccessible hill which served as a barrier or fence, and has paid all taxes which have been levied and assessed upon such land according to law; and that there is no shadow of doubt but that the premises so occupied by the plaintiff and appellant are the premises described in plaintiff's complaint, and it is so admitted by the defendant Hays in their answer in paragraph 15 thereof, and that the plaintiff and appellant has through his acts and conduct during all of the period of over seventeen years asserted an exclusive ownership in himself of the premises in question.

> "Adverse possession may exist independent of title. One who seeks to set up an adverse possession need not have a good title, or in fact any title, except a possession adverse or hostile to that of the true owner under a pretense or color of title."
>
> *Pillow vs. Roebrts,* 13 How. (U. S.) 472, 14 L. ed. 228.

"Under the decisions of the courts, and in the absence of statutes providing otherwise, in order to constitute adverse possession which results in obtaining title to real property, the possession must be actual, open, notorious, hostile, under claim of right, continuous, and exclusive. *When these elements coincide and the possession continues for the statutory period, a title by adverse possession is acquired.*"

I respectfully submit that the judgment of the trial court should be reversed and judgment entered in favor of the plaintiff and appellant quieting title in plaintiff

and against the claims and demands of the defendants covering the premises described in the complaint, and for such other relief that is just and equitable in the premises.

Respectfully submitted,

N. J. COTRO-MANES,

Attorney for Plaintiff and Appellant.