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Richard Gerald Dye, aka R. Gerald Dye, and Gas Producing Enterprises, Inc. , A Corporation v. Miller & Viele, A Corporation Lee Charles Miller, Lesley F. Lewis, and Chevron Oil Company, A Corporation v. All Other Persons Unknown Claiming Any Right, Title, Estate, Lien Or Interest In the Real Property Described In the Complaint Adverse To Plaintiffs' Ownership, Or Any Cloud Upon Plaintiffs' Title thereto : Reply Brief of Appellant

IN THE SUPREME COURT
OF THE STATE OF UTAH

RICHARD GERALD DYE, aka R. GERALD DYE, and GAS PRODUCING ENTERPRISES, INC., a corporation, Plaintiffs, -vs- MILLER & VIELE, a corporation, LEE CHARLES MILLER, LESLEY F. LEWIS, and CHEVRON OIL COMPANY, a corporation, Defendants, and All Other Persons Unknown Claiming Any Right, Title, Estate, Lien or Interest in the Real Property Described in the Complaint Adverse to Plaintiffs' Ownership, or any Cloud upon Plaintiffs' Title Thereto.	Case No. 15475

REPLY BRIEF OF APPELLANT

Appeal From the Summary Judgment of the
Fourth District Court for Duchesne County
Honorable David Sam, Judge

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OF THE STATE OF UTAH

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Plaintiffs,	:	
-vs-	:	
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Defendants,	:	
and	:	
All Other Persons Unknown Claiming Any Right, Title, Estate, Lien or Interest in the Real Property Described in the Complaint Adverse to Plaintiffs' Ownership, or any Cloud upon Plaintiffs' Title Thereto.	:	

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REPLY BRIEF OF APPELLANT

SUPPLEMENTAL STATEMENT OF THE CASE AND MATERIAL FACTS

The material facts and statement of the case are set forth in full in Appellant's initial brief (see pp. 1-7 of Appellant's Brief).

The Respondents have agreed that the facts set forth in Appellant's initial Brief are accurate (see p. 3 of Respondents' Brief). Respondents, however, have added their own statement of

facts which sets forth at length the parties' respective claims to title to the one-half mineral interest in dispute (see p. 3 of Respondents' Brief). Title, however, is not at issue on this appeal. This is a statute of limitation case.

It must be stressed again, that the lower court rendered it's decision on Respondents' statute of limitation Motion for Summary Judgment without ever determining or even considering the validity or relative priority of the parties' alleged titles to the one-half mineral interest in question. Accordingly, any facts on this appeal with respect to how the parties obtained their respective titles are irrelevant.

Analysis of the parties' respective claims of title to the subject mineral interest is appropriate at trial only where evidence pertaining to the parties' alleged titles can be adduced by all parties.

This is exactly what Appellant seeks on appeal: Remand to the trial court for trial on the ultimate issue of who holds valid title to the disputed one-half mineral interest.

On appeal, the only issues before this Court are as follows:

(1) Whether Miller & Viele is in actual possession of the disputed one-half interest through it's Lessee, Chevron, which is daily extracting oil and gas at the wellhead. Such actual possession entitles Miller & Viele, pursuant to the applicable language in the tax title Statutes of Limitation, to a trial on the issue of the validity and relative priority of the parties' titles to the one-half mineral interest in question, and

(2) Whether the case should be remanded for trial on the issue also of a compromise and settlement having been reached in 1946 by Plaintiff Dye's predecessors in interest whereby Dye's predecessors acquiesced in Miller & Viele's title to the one-half mineral interest now in dispute while receiving from Miller & Viele undisputed title to the remaining one-half mineral interest and the surface estate of the NW¼NE¼. This is an issue of fact never stipulated to by the parties. Accordingly, Respondents' statements (see pp. 2 and 7 of Respondents' Brief) are incorrect that all the facts were stipulated to or otherwise not in dispute.

ARGUMENT

POINT ONE

MILLER & VIELE IS NOT BARRED BY THE APPLICABLE STATUTES OF LIMITATION FROM INTERPOSING DEFENSES TO PLAINTIFF DYE'S TAX TITLE TO THE DISPUTED ONE-HALF MINERAL INTEREST BECAUSE MILLER & VIELE WAS IN POSSESSION OF THE DISPUTED ONE-HALF MINERAL INTEREST WITHIN FOUR (4) YEARS PRIOR TO THE INTERPOSITION OF ITS DEFENSES IN THIS LAWSUIT TO DYE'S TAX TITLE.

A. Analysis of and Reply to Respondents' Arguments.

The lower court, on summary judgment, held that Miller & Viele was barred by the applicable statutes of limitation from interposing its defenses to Plaintiff Dye's alleged tax title to the disputed one-half (½) mineral interest. This decision, of course, was rendered without hearing any argument or considering any evidence with respect to the validity of Dye's tax title or the relative priority of the parties' interests in the disputed one-half mineral interest. Nor have the parties stipulated as to who holds valid title to the one-half mineral interest in dispute. The validity of Dye's tax title would be the ultimate question to be decided, but is not the subject matter of this appeal.

On an appeal from a summary judgment, the facts are to be viewed in a light most favorable to the Appellant. E.g., Whitman v. W. T. Grant Co., 16 Utah 2d 81, 395 P.2d 918 (1964); Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62 (1964). Since there has not yet been any judicial determination as to the validity or relative priority of the parties' claimed interests in this one-half mineral interest, it must be assumed on this appeal that the prior tax deed conveyance by Duchesne County to Dye in 1940 (see

p. 5 of Appellant's Brief; R-231) did not vest any interest in Dye to the subject property; it must also be assumed that Dye obtained his interest in the subject property from the 1946 conveyance from Miller & Viele when Miller & Viele reserved to itself the disputed one-half mineral interest (see pp. 4-5 of Appellant's Brief; and p. 5 of Respondents' Brief; R-73; 233).

Plaintiffs-Respondents, however, have assumed throughout their Brief that it has already been judicially established that Plaintiff Dye's tax deed is valid. Respondents claim that this case does not deal with a severed mineral interest (see p. 12 of Respondents' Brief); Respondents claim that "the undivided one-half mineral interest has never been severed from the surface estate obtained by Duchesne County at the tax sale" (Respondents' Brief at p. 12). Accordingly, Respondents' argument on this appeal rests on a finding never made or even considered by the lower court: the validity and relative priority of Plaintiff Dye's tax title obtained from Duchesne County. The lower court did not hold nor could it have so held that the mineral estate in question has not been severed from the surface estate. Such a holding would require a finding that Dye's alleged tax title, rather than Miller & Viele's title to the NW¼NE¼, was the valid title with priority; because, if Miller & Viele's title is the valid title with priority, then when Miller & Viele conveyed the surface estate and one-half of the mineral rights to Dye's predecessors in interest in 1946, while reserving to itself the disputed one-half mineral interest, the disputed one-half mineral interest was in fact severed!

The question on appeal is whether Miller & Viele was in actual possession of the disputed mineral interest within four (4) years prior to the interposition of its defenses in this law suit to Dye's tax title. The tax title Statutes of Limitation clearly provide that, being in actual possession of the disputed mineral interests, Miller & Viele is entitled to interpose its defenses to the validity of Dye's alleged tax title and have a judicial determination, following an evidentiary hearing, of the validity of that tax title. This is all that Miller & Viele seeks from this Court on appeal.

Respondents admit in their Brief that the only land interest in question in this case is the disputed one-half mineral interest and not the surface estate of the subject property or the remaining one-half mineral interest (see Respondents' Brief at p. 7, and pp. 3-6). Yet Respondents argue in their Brief that the "actual possession" concerned with in the instant case is actual possession constituting such acts as cultivating or improving land, protecting land by substantial enclosure, using land for fuel, timber, pastureage, or expending five (5) dollars per acre in labor or money to erect or maintain irrigation works (see p. 11 of Respondents' Brief). Obviously, none of those acts could even possibly constitute actual possession of a one-half mineral interest. Respondents' claim that actual possession requires pedis possessio (foothold on the land, an actual entry, a possession in fact, a standing upon it, an occupation of it, as a real, demonstrative act done. See p. 11 of Respondents' Brief). Appellants agree. Pedis

possessio of a mineral estate is obtained by withdrawing the mineral and taking control at the wellhead. Kanawha and Hocking Coal and Coke Co. v. Carbon County, 535 P.2d 1139 (Utah 1975) (discussed in detail hereinafter).

That Respondents are confused as to what must be "actually possessed" is further evident from their statements on pages 12 and 13 and elsewhere in their Brief, where they argue that Miller & Viele has admitted that it was never in actual occupancy or possession of the NW¼NE¼, which they assert includes the unsevered and undivided one-half mineral interest. Miller & Viele obviously does not need to be in possession of the NW¼NE¼, since that is not the property in dispute in this case. Again, as indicated in the Statement of Facts in Appellant's initial Brief (pp. 4-5), and as admitted in the parties' Stipulation and Respondents' brief (p. 5), in 1946 Miller & Viele conveyed to Plaintiff Dye's predecessors in interest all but the disputed one-half mineral interest. Miller & Viele certainly does not claim any interest in the surface and one-half mineral estate that it conveyed to Plaintiff Dye's predecessors in interest.

Pursuant to the possession exception in the applicable Statutes of Limitations for tax titles, Miller & Viele must be in possession not of the surface estate of the NW¼NE¼, but of the one-half mineral interest only which is the only property in dispute. Respondents admit that the only property in question on this appeal is the subsurface mineral interest (see Respondents' Brief p. 7), yet they contradict themselves by continually making

reference to and arguing that Miller & Viele must be in possessio of the surface estate (see e.g., pp. 11 and 12 of Respondents' Brief). In arguing that Miller & Viele must be in possession of the surface estate, Respondents are arguing with their own admitte facts that the only property in dispute in this case is the one-half mineral interest.

There is absolutely no question that Miller & Viele, through its lessee, Chevron Oil, has in fact been in actual possession of the minerals. We have the oil and gas! Respondents have admitte that Chevron Oil, Miller & Viele's lessee, has in fact for the past four (4) years extracted oil and gas from the common source of supply underlying the subject and surrounding properties (see Respondents' Brief at p. 6 and compare with Appellant's Brief at p. 7).

It is of absolutely no consequence that the Chevron well is located on property adjacent to the surface property allegedly conveyed to Dye by tax deed from Duchesne County. The appropriat Utah State governmental agency has duly made findings of fact and issued an order making it clear that the Chevron well has been producing and will continue to produce from a "common pool" of oil and gas for a six hundred and forty (640) acre area which includes the disputed one-half mineral interest (see pp. 6, 12, and 14 of Appellant's Brief). Based upon these findings, it makes no difference, notwithstanding Respondents' argument on page 13 of their Brief, whether the Chevron well was or was not a directional slanted well drilled from its adjacent location into

the minerals located under the surface property which Dye alleges he received by tax deed conveyance from Duchesne County. It is a simple fact that you cannot drain half of a lake. When pumping oil and gas from a common pool the oil and gas, which is located under the surface of the property Plaintiff Dye claims to have received by tax title conveyance from Duchesne County, is going to be withdrawn and therefore possessed at the wellhead. The Utah Board of Oil and Gas Conservation so found in its Findings of Fact and Order set forth in Appellant's initial Brief (pp. 6, 12 and 14), which fact is admitted by Respondents (Respondents' Brief at p. 6). There is no basis for the Respondents to argue that Chevron Oil Company, Miller & Viele's lessee, was not in possession of the oil and gas and therefore the mineral estate so as to fall within the exception set forth in the applicable Statutes of Limitation for tax titles.

Respondents question whether possession by the lessee constitutes possession by the lessor (see p. 8 of Respondents' Brief). Respondents do not, however, cite any cases or other authority for their position. On the other hand, Miller & Viele, on page 11 in its initial Brief, cited numerous cases supporting the universal rule of law that "possession of a tenant is that of his landlord." See also, e.g., Edgeller v. Johnston, 262 P.2d. 1006, 1011 (Idaho 1953); Cusic v. Givens, 215 P.2d. 297, 298 (Idaho 1950); 49 Am. Jur. 2d. Section 1, "Landlord and Tenant".

Respondents further argue, on page 22 of their Brief, that as a matter of policy, Chevron "should not be considered to be in

possession of the undivided one-half mineral interest in the NW¼NE¼." In so arguing, Respondents again err in assuming that the disputed one-half mineral interest is undivided. As indicated above, it must be assumed on this appeal that the mineral interest in dispute was severed at the time Miller & Viele conveyed to Dye's predecessors the NW¼NE¼, except for the one-half mineral interest now in dispute.

In addition, Respondents argue that even though Chevron has possession of the oil and gas at the wellhead, Chevron is in possession in its capacity as operator of the drilling unit rather than as Miller & Viele's lessee (see Respondents' Brief at p. 22). Respondents then argue that it would be inequitable and contrary to the purpose of statutes of limitation generally to allow Miller & Viele to claim its possession pursuant to the exceptions in the statutes of limitation for tax titles by the "fortuitous fluke of circumstances" in which Chevron, as Miller & Viele's lessee, became the operator of the drilling unit established by the Utah Board of Oil & Gas Conservation (see Respondents' Brief at p. 22). In so arguing, Respondents fail to realize that Chevron became a party to the pooling agreement in the first instance in that it claims and holds a lease-hold interest from Miller & Viele in the disputed one-half mineral interest. In making this argument, it is evident that Respondents' real point of contention is with the tax title Statutes of Limitation themselves. While Respondents may feel that the tax title Statutes of Limitation are ill-advised in providing the exception they do to the running

of the Statutes, the Statutes as passed by the Utah Legislature are the prevailing applicable law in Utah, and those statutes clearly provide an exception to the running of the limitation time period when the one interposing defenses to a tax title has actually been in possession of the property interest in dispute within four (4) years prior to the interposition of the defenses to the tax title. Nowhere in the Statutes does it say that actual possession of disputed property by fortuitous circumstances does not fall within the exception set forth therein.

In addition, it is totally irrelevant and immaterial for Respondents to argue that notwithstanding its actual possession of the disputed one-half mineral interst, Miller & Viele should not be afforded the opportunity to challenge the validity of the tax title "forty-six years after creation of the title" (see Respondents' Brief at p. 23). This in fact is exactly what the tax title Statutes of Limitation contemplate. There is no provision in those Statutes of Limitation to the effect that the possession exception does not apply after a certain passage of time. All that is required is actual possession of the property in dispute within four (4) years prior to the interposition of defenses to the tax title. Respondents' argument that we ignore the statutes simply is not a viable alternative in this case.

Respondents also argue, on page 23 of their Brief, that "it is inconceivable that a sophisticated mortgage banking company such as Miller & Viele would not have paid property taxes on the NW¼NE¼ from 1928 to 1946 or investigated the reasons for not

having been assessed if they really thought they owned the proper Again, however, there has been absolutely no judicial determination or even investigation into the actual ownership of or title to the property in question. It is not known at this point whether Dye's tax title is valid, or, if so, whether it has priority over or is subordinate to Miller & Viele's mortgage foreclosure interest in the subject property. Respondents evidently want to argue on appeal who has the actual ownership of the subject property and who thought they had ownership of the subject property. This is exactly what Miller & Viele desires and seeks: A remand to the trial court for determination by that court, following trial, of the validity of Dye's alleged tax title and the relative priority of the parties' claimed interests.

Respondents also miss the point when they argue on page 23 of their Brief that it would be injustice if

> Miller & Viele might now be allowed to reap the benefits of the land when it was Dye's predecessors in interest who paid all property taxes levied and assessed upon the land since 1927, and who have actually possessed, improved, and maintained the NW¼NE¼ since 1940.

Respondents, in making this statement, completely ignore their own stipulated facts that Miller & Viele is not claiming any interest in the NW¼NE¼ except for the disputed one-half mineral interest. Miller & Viele is not seeking any benefit from the surface of the land nor would Miller & Viele have paid any such property taxes on the land, since in 1946 Miller & Viele itself conveyed all but the disputed one-half mineral interest to Plaintiff Dye's predecessors in interest. In addition, this

again is an argument to be made before the trial court at trial, and not in this Court on appeal, since it deals with whether Miller & Viele has title to the disputed one-half mineral interest or whether Dye has title to the same through his purported tax title.

It should also be noted that Respondents' argument that Chevron never participated in the motions for summary judgment nor the appeal (page 23 of Respondents' Brief), has no bearing whatsoever on the issue on appeal. In fact, this argument further underscores Respondents' apparent confusion in believing that there has been a determination of who owns title to the disputed one-half mineral interest or that that issue is somehow on appeal before this Court. This is a further indication of the need to remand this case to the trial court for a determination of the validity of Dye's purported tax title with respect to Miller & Viele's mortgage foreclosure title. Miller & Viele notes, however, for the record, that in an effort to minimize litigation expense and delay, Chevron Oil simply tendered to Miller & Viele a defense of Miller & Viele's position regarding ownership of the disputed one-half mineral interest.

With respect to Section 40-6-6(f), Appellants have not, as Respondents claim on page 18 of their Brief, miscontrued that section. Section 40-6-6(f) states: "In the absence of voluntary pooling, . . [o]perations incident to the drilling of a well upon any portion of a unit covered by a pooling order shall be deemed for all purposes to be the conduct of such operations upon

each separately owned tract in the unit by the several owners thereof [emphasis added]." Although the parties "voluntarily" agreed to enter into the Communitization Agreement, they were actually and in fact forced to enter into said Agreement because of the drilling order establishing the six hundred forty (640) acre tract as a single drilling unit.

Also, it is important to note that the intent of the drafter of Section 40-6-6(f) has been carried forth, preserved, and agreed to in Paragraph 8 of the Communitization Agreement (see Appellant's Brief at pp. 13, 14, and 19). The parties themselves including Respondent Gas Producing Enterprises, Inc., have agreed and dictated that the production of the oil and gas from the Chevron well constitutes production of the oil and gas from each of the lands comprising the six hundred forty (640) acre drilling unit. This Agreement parallels the findings of the Utah Board of Oil and Gas Conservation that there is a pool of gas and oil common to the entire six hundred forty (640) acres, including the disputed one-half mineral interest property from which Chevron, as Miller & Viele's lessee, is extracting oil and gas.

B. Inapplicability of Respondents' Authorities as Support For Their Position.

The few authorities cited by Respondents in their Brief either clearly support Appellant's position or are distinguishable and not on point with the facts or issues in the instant case.

In Kanawha and Hocking Coal and Coke Co. v. Carbon County, 535 P. 2d 1139, 1140 (Utah 1975), cited on Page 11 of Respondents' Brief, the Court held that there was no actual possession of the severed mineral estate where there was no actual possession of the bed through mining and extraction. This case clearly supports Appellant's position. Applying Kanawha to the instant case, there is no actual possession of the mineral estate where there is no actual possession of the oil or gas. In the instant case, Appellant in fact has been in actual possession of the oil and gas from the mineral interest in dispute and therefore is in actual possession of the mineral estate. Appellant has been in possession of this oil and gas within four (4) years prior to the initiation of this action and interposition herein of its defenses to Dye's alleged tax title; consequently, the Appellant falls within the exception expressly set forth in the tax title Statutes of Limitation and now, therefore, Appellant should be given its day in court to challenge the validity of Dye's alleged tax title at trial.

Respondents' statement that the lower court found Dixon v. American Liberty Oil Co., 77 So.2d 533, 538, 4 Oil and Gas 17, 21 (1954), to be "so convincing in ruling in plaintiffs' favor" is totally unsubstantiated (see Respondents' Brief at p. 14). There are absolutely no findings by the lower court with respect to the court's application of that case to the instant case. In addition, Respondents' citation of that case in hopeful support of their own position, evidences the misunderstanding of Respondents with

respect to the actual issues on appeal before this Court. As indicated on pages 16 and 17 of Appellant's initial Brief, the court in Dixon rejected the claims of the operator of an oil and gas well located on pooled lands to adverse possession over all the lands of the pooled area by virtue of its operation of and control of the well. In rejecting that argument, and in holding that each mineral lessee of land within the pooled area was in possession of its own respective leasehold interests, the court again stated that

> the drilling and production of oil from a unitized area constitutes an exercise and user of mineral rights throughout the entire unit and operates as a substitute for performance of drilling obligations contained in a mineral lease [4 Oil and Gas Reporter at 22].

Although Respondents' argument is less than clear, they are apparently taking the position that since the court in Dixon held that the well operator could not adversely possess the mineral interests of lease holders of property within the pooled area, Chevron Oil in the instant case, as the well operator of the pooling unit, was not in possession of minerals extracted from its own leased land within the six hundred forty (640) acre area. This argument not only does not follow from the Court's holding in Dixon, but in fact just the opposite: Dixon stands for the proposition that each holder of a lease covering lands within the pooled area is in actual possession of its minerals as extracted by the well operator for the pooled area. Chevron, therefore, as Miller & Viele's lessee of the NW¼NE¼, is in actual possession of

the oil and gas from the NW¼NE¼, through its efforts as operator of the one well allowed on the six hundred forty (640) acre drilling unit.

In citing Dixon as support for their position, Respondents also evidence once again their confusion of the issue on appeal in the instant case. The lower court in the instant case did not hold, as Respondents claim the court did in Dixon, that "the mineral estate could not be thought of as separate from the surface estate, since both estates were owned by the same party and had not been severed" (see p. 15 of Respondents' Brief). As discussed in detail above, there has not yet been any judicial decision as to the validity of the parties' respective claimed titles or severance of the mineral estate. The fact that Respondents rest their argument on a finding that the lower court never made or even considered (that Dye's tax title is valid), simply underscores the necessity of remanding this case to the trial court for determination of which of the parties' respective titles and interests are valid and have priority.

The only applicable holding in Dixon to the instant case is the one set forth in Appellant's initial Brief, pages 16 and 17, showing that the court in Dixon explicitly held that drilling and production of oil from a unitized area constitutes an exercise and user of mineral rights throughout the entire unit, but that such acts are not sufficient to evict other interest holders of land in the pooled area. The reason is obvious; there is no notice or hostility that is required for purposes of adverse possession.

The Respondents also cite R. Hemingway, The Law of Oil and Gas 124 (1971) (see p. 14 of Respondents' Brief) as standing for the persuasive rule that removal of oil and gas from under a tract of land by means of a well located on adjacent or nearby tracts, even if included in the same production unit, is insufficient to constitute actual possession of the mineral estate. It is important to note, however, that this statement extracted by Respondents was made in the context of determining whether oil and gas was being adversely possessed. Specifically, removal of oil and gas from under a tract of land by means of a well located on an adjacent tract in the same production unit is not sufficient to constitute possession so as to satisfy the requirements for adverse possession. The citation from Hemingway which Respondents cite in their Brief, refers in footnote to the case of Brizzolara Powell, 214 Ark. 870, 218 S.W. 2d 728 (1949). The footnote explicitly states that the result in this case was based upon "lack of notice" thus eliminating the hostility requirement for adverse possession. There was no actual possession sufficient to satisfy the adverse possession statute because possession by drilling on an adjacent tract of land does not provide the necessary notice and is not open and notorious nor hostile as required by the elements for adverse possession. Accordingly, this statement from Hemingway cited by the Respondents is irrelevant and immaterial to the instant case.

Respondents also rely upon Chase v. Morgan, 9 Utah 2d 125, 339 P.2d 1019 (1959) (see p. 15 of Respondents' Brief). The

facts in Chase are completely distinguishable from the facts in the instant case. The issue in Chase was whether undetached minerals are part of the earth and therefore realty. In other words, are oil and gas leases included within the term "real estate"? That case is not applicable since in the instant case, the minerals are detached as they are extracted by Chevron Oil. Oil and gas is pumped and actually possessed by the Appellant at the wellhead. What constitutes actual possession of a mineral estate was not even at issue in the Chase case.

Pan American Petroleum Corp. v. Candelaria, 403 F.2d 351, 31 Oil and Gas 215 (10th Cir. 1968), cited by Respondents on page 16 of their Brief, also deals exclusively with actual possession in terms of the absence of the hostility requirement. In that case, the court stressed the elements of adverse possession: Actual, visible, physical, exclusive, hostile, and continuous possession. The court stated that when any of the elements is missing no title by adverse possession can be obtained. The court then held that the Appellants had not met all of the requirements of the adverse possession statute and the title was quieted in the Respondent.

In attaching to their Brief Findings of Fact 10 through 19 from the Pan American case (see p. 3 of appendix to Respondents' Brief), Respondents make clear the fact that this is an adverse possession case turning on the issue of a lack of notice and hostility. Contrary to the statement made by the Respondents on page 16 their Brief to the effect that the case did not turn on

the elements of notice or hostility, but rather lack of actual possession, paragraph 17 of the Findings of Fact clearly states that the plaintiffs were not aware of the wells there involved o: that they owned the land involved, nor were they aware of any of the proceedings relative to the quiet title suit, in that plainti did not discover that they could assert any of the claims asserte therein until they were joined as parties-defendant. This findi: of fact led the court to conclude that there was no actual posse: because of lack of notice since the drilling was being performed on land adjacent to the land in question. Accordingly, the findings of fact and conclusions of law cited by Respondents in their Brief fail to support Respondents' conclusion.

Finally, Phillips Petroleum Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954), cited by Respondents on Page 16 of their Brief, is also distinguishable on its facts and has absolutely no relevance to the issue on appeal. In Phillips, the court held that the rule of perpetuities, which was at issue in the case, was not violated by unitization because unitization affects allocation of production and the computation of royalties, but not cross-transfers or royalty interests. This is obviously totally irrelevant to the issue at hand.

Also at issue in Phillips was whether the unitization provisions in the oil and gas leases were sufficient to grant authority to the lessee, as lessor's agent, to enter into a unit plan for development and operation, and to make a future contract to effectuate such plans. The court held that the unitization

agreements were sufficient to grant authority to the lessee to enter into a unit plan so long as the lessee acted in good faith, with due regard for the lessor's interests, and provided for fair apportionment of the oil produced. It is evident that this issue is also totally irrelevant to the facts and issue in the instant case. The question of actual possession of the mineral estate was never at issue in Phillips.

POINT TWO

PLAINTIFF DYE'S PREDECESSORS IN INTEREST ACQUIESCED IN MILLER & VIELE'S TITLE TO THE DISPUTED ONE-HALF MINERAL INTEREST BY SOLICITING AND ACCEPTING THE 1946 DEED IN WHICH THE DISPUTED ONE-HALF MINERAL INTEREST WAS RESERVED TO MILLER & VIELE.

In response to Point Two of Appellant's argument in its initial brief, Respondents admit the question of fact that must yet be determined by the trier of fact.

In their argument, Respondents correctly observe that the 1946 deed conveying Miller & Viele's interest to Plaintiff Dye's predecessors in interest in the surface and one-half of the mineral estate of the NW¼NE¼ was entitled "Quit-claim deed (special)," but, in the words of counsel for Respondents, "strangely enough, contains words of warranty" (see Respondents' Brief at p. 25).

After correctly making that observation, however, Respondents conclude on pages 25 and 26 of their Brief that "[i]t is obvious that a standard form 'Warranty Deed (Special)' was used from which the words 'warranty' were struck from the title of the document in words of grant". Respondents then conclude:

> The words 'Quit-Claim' were interlineated in both the title and words of grant, demonstrating that both parties desire that the instrument evidence a quitclaim of the NW¼NE¼ [Respondents' Brief at p. 26].

While the document itself is obviously some evidence of the intent of the parties, it is not sufficient evidence in and of itself for this Court to determine what the actual intention of the parties was with respect to that conveyance. The actual intention of the parties involved can only be ascertained from evidence heard by the trial court at trial. It is not sufficient for Respondents to merely conclude that "it is obvious" that the parties intended to convey Miller & Viele's interest in the surface and one-half mineral estate by means of a quit claim deed as opposed to a Warranty deed. The only way proper determination can be made of this factual issue is for the case to be remanded to the trial court for consideration of that issue which the trial court previously refused to consider.

In that regard, it is extremely significant that in the case of Wallace v. Build Inc., 16 Utah 2d 401, 402 P.2d 699 (1965) (cited by Respondents on page 26 of their Brief for the principal that a quitclaim deed does not imply the conveyance of any particular interest in the property), this Court stated as follows with respect to whether Plaintiff breached the contract evidenced by the quitclaim deed in question:

> We are quite in accord with the Defendant's contention that the various dealings of the parties should be considered together [402 P. 2d at 700].

The court then listed all the evidentary facts before the trial court supporting the trial court's decision that the Plaintiff did not breach the contract evidenced by the quitclaim deed. In the instant case, of course, the trial court did not consider any evidence at all; consequently, the Respondents have no support of any kind for their conclusion that the compromise and agreement between the parties in 1946 did not constitute an acquiescence on the part of Dye's predecessors in interest to Miller & Viele's title in the subject property.

Accordingly, this case should be remanded to the trial court for further discovery and trial on the issue of whether a compromise and settlement was actually reached between Plaintiff Dye's predecessors in interest and Miller & Viele as evidenced by the solicitation and acceptance of the 1946 Miller & Viele deed to the subject property.

From the above discussion, it is evident that Respondents' statement made several times in its Brief, that all of the facts in the instant case have been stipulated to, simply is not true (see Respondents' Brief at pp. 2 and 7). There has not been any stipulation whatsoever with respect to the acquiescence by Plaintiff Dye's predecessors in interest to Miller & Viele's title to the subject property or with respect to a compromise and settlement having been reached in 1946. Accordingly, Miller & Viele takes exception to Respondents' statements to the effect that all the facts have been stipulated to. They simply have not.

CONCLUSION

Respondents' Brief and argument are based upon the mistaken premise that the alleged tax title of Plaintiff Dye is valid and has priority over Miller & Viele's mortgage foreclosure interest. The lower court, however, never determined or even considered this issue in granting Respondents' Motion for Summary Judgment on the appeal issue of the Statutes of Limitation. In addition, the authorities cited by Respondents clearly are not on point with the real issue on appeal in the instant case, with the exception only of the Kanawha and Dixon cases, which actually support Appellant's position.

Miller & Viele, through its lessee, Chevron, is in actual possession of the disputed one-half mineral interest. Chevron, since 1974, has continuously extracted the oil and gas from the common source of supply for the entire six hundred and forty (640) acre pooling unit, including the NW¼NE¼. We have the oil and gas and therefore actual possession of the disputed mineral interest. Miller & Viele therefore comes within the "actual possession" exception in the tax title Statutes of Limitation. Accordingly, this case should be remanded to the trial court for trial on the issue of the validity and relative priority of the parties' respective titles to the disputed one-half mineral interest.

There also remains for trial the factual determination of whether the predecessors in interest to Plaintiff Dye's alleged tax title reached a compromise and settlement with Miller & Viele in 1946 whereby Dye's predecessors acquiesced in Miller & Viele's title to the one-half mineral interest now in dispute while receiving from Miller & Viele undisputed title to the other one-half mineral interest and the surface estate of the NW¼NE¼.

Respectively submitted:

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DELIVERY CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief was hand delivered to Robert Pruitt and Phillip Lear, attorneys for plaintiffs, at 79 South State Street, Suite 400, Salt Lake City, Utah 84111, this 8 day of September, 1978, postage prepaid.

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