

2001

Kanawha and Hocking Coal and Coke Company v. Carbon County and Centennial Development Company : Brief of Respondent

Utah Supreme Court

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John W Horsley; Joseph J Palmer; James T Jensen; Dan C Keller; Attorney for Defendant-Respondents

Wallace D Hurd; Attorney for Plaintiff-Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

KANAWHA AND HOCKING COAL
AND COKE COMPANY,

Plaintiff-Appellant,

- vs. -

CARBON COUNTY, a municipal corporation, and CENTENNIAL DEVELOPMENT COMPANY, a corporation,

Defendants-Respondents.

BRIGHAM YOUNG UNIVERSITY
a Clark Law School

Case No.

13853

BRIEF OF RESPONDENTS

Appeal from a Judgment of the Seventh District Court
In and For Carbon County, Utah
The Honorable Edward Sheya, Judge

JOHN W. HORSLEY
JOSEPH J. PALMER
15 East First South
Salt Lake City, Utah

JAMES T. JENSEN
190 North Carbon Avenue
Price, Utah 84501
*Attorneys for Defendant-Respondent
Centennial Development Company*

DAN C. KELLER
County Attorney
County Courthouse
Price, Utah 84501
*Attorney for Defendant-Respondent
Carbon County*

WALLACE D. HURD
1011 Walker Bank Building
Salt Lake City, Utah 84111
Attorney for Plaintiff-Appellant

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TABLE OF CONTENTS

	<i>Page</i>
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT	4
POINT 1: THE DISTRICT COURT CORRECTLY HELD PLAINTIFF'S CLAIM TO THE COAL TITLE TO BE BARRED BY LIMITATIONS.	4
POINT 2: PLAINTIFF IS BARRED, NOTWITH- STANDING ITS ASSERTION OF CONSTRUC- TIVE POSSESSION.	10
CONCLUSION	12

CASES CITED

<i>Hansen v. Morris</i> , 3 U2d 310, 283 P2d 884 (1955)	5, 6
<i>Layton v. Holt</i> , 22 U2d 138, 449 P2d 986 (1969)	6
<i>Pender v. Alix</i> , 11 U2d 58, 354 P2d 1066 (1960)	6
<i>Peterson v. Callister</i> , 6 U2d 359, 313 P2d 814 (1957), aff'd on reh'g, 8 U2d 348, 334 P2d 759	6
<i>Utah Copper Co. v. Chandler</i> , 45 U 85, 142 P 1119 (1914)	9
<i>Utah Copper Co. v. Eckmann</i> , 47 U 165, 152 P 178 (1915)	9

CONSTITUTION

Constitution of Utah, Art. XIII, §11	8
--	---

STATUTES

Section 78-12-5.1, UCA 1953 (Pocket Part)	4, 7
Section 78-12-5.2, UCA 1953 (Pocket Part)	4
Section 78-12-7.1, UCA 1953 (Pocket Part)	10
Section 59-5-3, UCA 1953	9
Section 59-5-57, UCA 1953	9

TEXTS

<i>Thompson on Real Property</i> , Vol. 1A, §165	10, 11
35 ALR2d 124, 204	8, 9

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is a quiet title action.

DISPOSITION IN LOWER COURT

The district court granted a summary judgment determining appellant to be the owner of the title to the surface of the property described in the complaint, denying appellant's claim of ownership of the coal title, and determining respondent Carbon County to be the owner of the coal title subject to a mining lease granted by it to respondent Centennial Development Company.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the ruling below.

STATEMENT OF FACTS

The statement of facts set out in appellant's brief is accurate so far as it goes, but it is incomplete. Respondents accordingly submit the summary which follows.

The lands claimed in the complaint are coal lands situated in Carbon County. Appellant (hereafter, "Kanawha") was by stipulation substituted as plaintiff during pendency of the action (R. 24), which had been commenced initially by North American Coal Corporation. Kanawha's claim of title is based upon a record chain of deeds pre-dating the tax titles mentioned below. So far as concerns the surface, Kanawha's alleged ownership was not denied by the County or Centennial and the district court accordingly adjudged Kanawha to be the owner of the surface title (R. 56).

The pleadings of the County and Centennial deny Kanawha's ownership of the coal and coal mining rights, and allege ownership by the County subject to a mining leasehold interest covering the coal title held by Centennial under a mining lease granted by the County. The coal and coal mining rights were conveyed to the County by auditor's tax conveyances, one made in 1937 as to a portion of the property and another in 1949 as to the remainder. These conveyances followed upon the non-payment by Kanawha's predecessor of the property taxes on the coal title, which in prior years had been assessed separately from the surface title (R. 7). Kanawha's predecessor did not redeem the tax sales of the coal title nor pay the separately assessed taxes on the coal, but has for all years continued the payments of the taxes on the surface title (R. 29).

Kanawha's answers to interrogatories state that there were procedural defects in the assessment and sale procedures underlying the auditor's conveyances of the coal title to the County, and make the claim that these would invalidate the auditor's conveyances (R. 28-29). For purposes of the motion for summary judgment in the district court, invalidity as a matter of fact and law was assumed (R. 38).

The discovery materials also reflect Kanawha's assertion that it has maintained actual possession of the surface through various grazing lessees and by grants of surface rights of way (R. 29-30), and such surface possession thus was assumed below.

Kanawha admitted that no possessory act in relation to the coal has ever been performed by it or any predecessor. No mining of coal was ever conducted by Kanawha or its predecessors. Neither Kanawha nor its predecessors ever explored the coal seam by drilling or otherwise, nor physically entered the seam by shaft or drift, nor exposed it by any removal of overburden or other physical opening (R. 30). The record shows Kanawha's effort to obtain by discovery in this case the records or logs of Centennial's exploratory drill holes, and the lower court's denial of such discovery on grounds that such confidential information would not lead to discovery of admissible evidence (R. 19).

The general property taxes have been assessed as to the surface title separately from the coal. Since the times of the non-payment of the property taxes on the coal title which preceded the auditor's conveyances (1932 as to part and 1944 as to the remainder), Kanawha and

its predecessors have paid the separately levied surface taxes (R. 29), but no taxes on the coal. The property tax on the coal, which is by law assessed by the Tax Commission, has not been levied by the County since the dates (1937 and 1949) of the auditor's conveyances of the coal title to the County (R. 31). Kanawha has never tendered payment of any of the taxes on the coal.

Kanawha's brief recites that its predecessor severed the surface title from the mineral title by a deed delivered in 1932 to another, conveying the surface rights and reserving to itself the coal rights. That same predecessor was grantee of a conveyance back of the surface rights in 1950 (Kanawha's brief, p. 3).

ARGUMENT

POINT 1

THE DISTRICT COURT CORRECTLY HELD
PLANTIFF'S CLAIM TO THE COAL TITLE TO
BE BARRED BY LIMITATIONS.

The district court's decision was based on Sections 78-12-5.1 and 78-12-5.2, the statutes which prescribe the four-year period of limitations applicable in tax title litigation. Kanawha's position on this appeal is that the four-year statute does not apply. The reasoning is: because of the assumed invalidity of the auditor's conveyances, there was no severance of the coal title from the surface title; therefore, it is said, Kanawha's possession of the surface constitutes "possession" of the coal. Such possession, according to Kanawha's reasoning, defeats the application of the four-year statute.

The same argument was urged upon the district court, and was correctly rejected by that court. There are two basic defects in Kanawha's position: first, the tax title limitations statute and the passage of many years' time precludes the assertion that the tax title is invalid; second, in any event, the "no severance" argument of Kanawha is not available to it, under Utah law, in view of the history of the separate assessment and taxation of the two estates, surface and coal, and their actual severance by deed of Kanawha's predecessors.

Kanawha's argument has been put forward in almost identical terms in prior tax title litigation arising under the four-year statute and this Court has explicitly rejected it. In *Hansen v. Morris*, 3 U2d 310, 283 P2d 884 (1955), which upheld a tax title attacked by a presale owner, this Court stated (283 P2d, at 886):

In holding such sections valid, we can see no merit in any argument to the effect that if any of the statutory steps necessary to perfect a tax title have not been taken, such as failure to give notice of sale, failure of the auditor to execute affidavits, etc., compels the conclusion that title remains in the record owner, hence no title passes, hence any claim by the county and/or its grantee by tax deed is invalid, hence the statute of limitations does not apply. The same argument could be leveled against other statutes of limitation where the authorities have validated a situation where one becomes the owner absolute of the property of another, without conveyance of any kind, but merely as an adjunct of the passage of time and the performance of statutorily prescribed conditions. The same argument also could be leveled

against the so-called prima facie statutes which legitimize such shifting of unconveyed title by permitting certain documents to establish, prima facie, facts therein recited or the regularity of proceedings theretofore had, where such prima facie evidence is either not attacked or survives an attack, even though later it develops that occurrences prior to the adduction of such evidence would have prevented such shifting of title had they been urged before such evidence was adduced (citations omitted).

Since the *Hansen* holding, the Court's decisions have followed it and have applied the tax title limitations statute in accordance with its terms. *Peterson v. Callister*, 6 U2d 359, 313 P2d 814 (1957), aff'd on reh'g, 8 U2d 348, 334 P.2d 759; *Pender v. Alix*, 11 U2d 58, 354 P2d 1066 (1960); *Layton v. Holt*, 22 U2d 138, 449 P2d 986 (1969). The basic reasoning is applied in the *Peterson* case in which the Court rejected the same argument, stating (313 P2d, at 815):

Likewise, title technically may not have passed here, but the record owner cannot assert his title because of the statute's interdiction against asserting title or setting up defenses.

While the Kanawha brief quotes the statutes on which the decision it appeals from is based, it does not address the statutory argument respondents made to the district court nor does it even mention the Utah cases cited below in support. There is a striking absence of Utah cases from Kanawha's brief. The cases it cites from other jurisdictions are not in point because they do not address the matter of the applicability of the con-

trolling Utah statute nor take account of the governing Utah precedents.

Kanawha's argument cannot succeed because its obvious effect would be to read the four-year statute of repose out of the Code. What the statute clearly says is that a pre-tax sale owner situated as Kanawha is situated, admittedly not in possession of the mineral rights and admittedly having paid no taxes on the separately assessed mineral rights for many years, may not as a plaintiff assert that the tax title to the coal is invalid.

Moreover, the language of Section 78-12-5.1 makes the resultant rule clear. It says:

“ . . . [W]ith respect to actions . . . to quiet title . . . against the holder of a tax title *to such property*, no action . . . shall be commenced . . . more than four years after the date of the tax deed . . . creating such tax title unless the person commencing . . . such action . . . has actually occupied or been in possession *of such property* within four years prior to the commencement . . . of such action.” (Emphasis supplied.)

The issue in this action is Kanawha's claim of title, not to the surface rights, but to the mineral rights. It is the mineral right which is “such property” within the meaning of the statute and therefore, possession of the surface is not possession of “such property” the title to which Kanawha seeks to quiet.

The present facts present a particularly appropriate case for the application of the statute. This is the case of a coal company which for decades has consciously chosen to pay no taxes on the coal title even though

continuing the surface payments, and which has performed no possessory act in respect to the coal, which has made no claim of ownership of the coal title until suit was commenced nor any tender of the back taxes on the coal, and which waited until after exploration by another to assert a paper title. The statutory policy of laying stale title claims to rest applies with special force.

Kanawha's "no severance" contention is unsound for further reasons, based upon the facts of the present case.

The two titles, surface and coal, have for all years involved been separately assessed. Such separate assessments result from provisions written into the Utah Constitution (Art. XIII, §11) and statutes (Sections 59-5-3 and 59-5-57, UCA 1953) which direct that coal rights be assessed by the Tax Commission rather than the more usual assessment of lands by local authorities. In this context, Kanawha's predecessor intentionally effected a total severance of the two titles. It deeded away the surface, retaining the coal title. It chose not to pay the coal tax. The recognition of the separation of the titles has been reflected in its conduct ever since. The decision not to pay the coal taxes was a decision consciously taken, as appears from the pattern of continued payment of all taxes on the surface. Its physical acts of possession, since the severance, have solely related to the surface.

Moreover, the rule in Utah is that as to mineral lands, possession of the surface is not of itself possession of minerals. The Utah rule is in fact shown in the later page of the annotation cited in Kanawha's brief, *Acquisition of title to mines or minerals by adverse possession*,

35 ALR 2d 124. Kanawha mentioned the generalization stated early in the annotation (quoted in its brief, page 6), but stopped too soon. A later section of the annotation, beginning at page 204 of 35 ALR 2d, shows the Utah rule to be as stated here. Two Utah cases, not mentioned by Kanawha, are discussed by the annotator. These are *Utah Copper Co. v. Chandler*, 45 U 85, 142 P 1119 (1914) and *Utah Copper Co. v. Eckmann*, 47 U 165, 152 P 178 (1916). These cases involved lands in the Bingham Canyon area which had been possessed, as to the surface, by persons who had moved upon the land, built thereon, and paid the general property taxes assessed as to the surface. As to the minerals, the general property taxes had been separately assessed to, and were paid by, the mining company which was the grantee of the patent granted by the federal government under the general mining laws. This Court held that title to the surface was owned by the surface possessors, and that title to the underlying minerals was owned by the mining company, thus holding that possession of the surface is not possession of the underlying minerals. The holdings of these two Utah cases support the basic concept embodied in the lower court's ruling.

It follows that Kanawha's surface possession has nothing to do with the possession of the coal title in the circumstances of this case. Both in Utah law, and by reason of the actual facts of this case, severance took place. Surface possession does not affect the running of the four-year period of limitations prescribed by law.

POINT 2

PLAINTIFF IS BARRED, NOTWITHSTANDING ITS ASSERTION OF CONSTRUCTIVE POSSESSION.

Kanawha's second point of argument is but a restatement in other terms of the first point. It is said that Kanawha as record owner of the fee continues, presumptively, in possession of the coal title until the opposite is shown. Kanawha says: "Seisin once established is presumed to continue until contrary is proved" (Brief p. 9).

This generalization, for which support is sought in general language appearing in cases borrowed from other jurisdictions, does not apply. The matter is settled in Utah by our four-year statute, Section 78-12-7.1, UCA 1953, which expressly provides the opposite of what Kanawha contends:

Adverse possession—Presumption—Proviso—Tax title. — In every action for the recovery or possession of real property or to quiet title to or determine the owner thereof the person establishing a legal title to such property shall be presumed to have been possessed thereof within the time required by law; and the occupation of such property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such property has been held and possessed adversely to such legal title for seven years before the commencement of such action. Provided, however, that if in any action any party shall establish prima facie evidence that he is the owner of any real property under

a tax title held by him and his predecessors for four years prior to the commencement of such action and one year after the effective date of this amendment he shall be presumed to be the owner of such property by adverse possession unless it appears that the owner of the legal title or his predecessor has actually occupied or been in possession of such property under such title or that such tax title owner and his predecessors have failed to pay all the taxes levied or assessed upon such property within such four year period.

The statute says that the County and Centennial, its coal lessee, are presumed the owners in possession of the coal title in the present circumstances. Kanawha could overturn the presumption only if it had been in actual possession of the coal (admittedly not the fact) or if there were a failure by the County to pay, to itself, any general property tax levied on the coal title (which obviously Kanawha cannot show).

In the context of the present case, the generalizations quoted in Point II of Kanawha's brief are fatal to its own position. Wholly apart from the tax title, the legal titles to the two estates, surface and coal, have for decades been treated separately, by all involved, in respect to possessory acts, conveyancing, leasing, and taxation. Kanawha's theory that its surface possession amounted also to a legally presumed continuous possession of the coal is shown to be incorrect in the passage from *Thompson on Real Property* which was partially quoted by Kanawha. The full paragraph (Vol. 1A, §165, p. 77), the first portion of which Kanawha omitted (see p. 9), states:

Where there has been a severance of ownership of the surface and minerals, the surface owner, in order to establish a claim to the minerals through adverse possession, must establish possession of the mine, as such, independently of his possession of the surface. His possession of the mine must be actual, notorious, exclusive, continuous and hostile for the statutory period in the same manner as a stranger. Actual possession is shown by opening and operating the mine, and the possession is continuous if the operation is carried on at such seasons as the nature of the work permits or the custom of the neighborhood requires. It is not required that the act of ownership should be done every day or month or at any definite intervals, but they should be of such frequency and character as would at all times apprise the owner that his seizin is being interrupted and his title endangered.

Kanawha's effort is to turn the case upside down. As plaintiff it cannot succeed by demanding proof that it has been "dispossessed." On its own record, Kanawha cannot prevail because the statute precludes it.

CONCLUSION

The four-year statute is a statute of repose. Its intention is to lay tax titles to rest where the claims against them have become stale by the expiration of the specified period, and where as in this case the presale owner has had absolutely no possession during the period.

The lower court should be affirmed.

Respectfully submitted,

John W. Horsley

Joseph J. Palmer

and

James T. Jensen

*Attorneys for Centennial
Development Company*

Dan C. Keller

Attorney for Carbon County

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