

1949

# Stephen Adams v. John Lamicq and Jean Arcuby : Brief of Appellant

Utah Supreme Court

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Dillman and Dillman; Attorneys for Appellant;

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In the  
**Supreme Court of the State of Utah**

STEPHEN ADAMS,  
Plaintiff and Appellant,

vs.

JOHN LAMICQ and JEAN ARCUBY,  
Defendants and Respondents.

No. 2126  
**FILED**  
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**BRIEF OF APPELLANT**

DILLMAN AND DILLMAN  
Attorneys for Appellant.

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**BRIEF OF APPELLANT**

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In the above action plaintiff is the appellant and appeals from a judgment rendered in the above cause April 18, 1947, and from rulings of the court during the proceedings of said trial.

**STATEMENT OF FACTS:**

Plaintiff, who is the appellant, filed in said court on March 5, 1945, his short form of complaint seeking to quiet title to the following described land in Duchesne County, Utah, as follows:

The North half of the Northeast quarter of Section 33, Township 1 South, Range 2 West of the Uintah Special Meridian.

To said complaint and respondents, defendants therein, filed their answer claiming title to said property by reason of:

1. A valid tax title
2. Adverse possession under color of title

The court determined that the tax title was invalid.

Plaintiff was the patentee of said ground and had never conveyed it to anyone. The court found that said land went to tax sale in 1925 and that auditor's tax deed was issued May 12, 1930, to Duchesne County. (Tr. 4) That in the summer of 1937 County Commissioners of Duchesne County entered into an oral lease of said lands, together with a large tract of grazing lands to Eldon Brady as lessee, who used a part of said land for grazing of sheep from November, 1937, until April 1938, but was not on said land after said April, 1938. (Tr. 11) That on October 4, 1938, the respondents herein leased a large tract of county ground which included the above described land that they grazed sheep on all of said lands from December until the first day of April following. That on December 5, 1939, respondents entered into a contract for the purchase of several thousand acres of land including the land herein in question, said contract being marked Exhibit A. That on March 1, 1944, Duchesne County executed a quit claim deed to the respondents. (Tr. 4) That a part of said land is chiefly brush, unimproved and unreclaimed land,



although it is shown that approximately 35 acres used by appellant was at all times under irrigation and cultivation, and that none of such 35 acres was ever used by respondent. That respondent knew appellant was using it at all times.

The court found that the tax proceedings were irregular and the tax sale and deed thereon void. (Tr. 5)

Said land lies adjacent to and apart of the farming area. That approximately 35 acres of said land are under canal and every year during the period herein in question, plaintiff cultivated, improved and harvested crops and held fenced said portion so farmed, being about 35 acres of the 80 acres. That respondent did not attempt at any time to graze other than the brush land and made not protests of the use of said land for agricultural purposes and grazing by the appellant. That he, nor anyone for him, was not in the vicinity of said land from April 1st, until November of each year. That he did not cultivate, improve, irrigate, or fence or spend any money in the improvement or irrigation of said land. That he never camped on said land or in any way asserted any rights other than occasionally grazing in winter. That he bought some hay from appellant and fed a little on a part of said ground. That the appellant raised crops every year on 35 acres of said land and that his possession was at all times exclusive in the use of said 35 acres of land. That Eldon Brady rented for winter grazing of his sheep a large tract of land in the Cedar View country and gave \$100.00 for the use of the land. That he went on to the area the first part of November and remained in that area until the first of April, 1938. That he did not use said land nor was on said land after that time.

That the appellant wrote for a lease on the same general land and that on November 14, 1938, gave his check,

Exhibit 3, for \$150.00, which check was paid December 22, 1938. (Tr. 21). That each year thereafter he did bring his sheep from the summer range to that section in the forepart of November and stay until the first of April. That no one made any protests to the appellant of his use of said ground and that they did not any of them attempt to use any of the ground under cultivation, except the appellant. That Brady purposely (Tr. 11) avoided it and likewise (Tr. 29) LaMicq knew Adams was using said cultivated land.

### ASSIGNMENT OF ERROR:

Appellant presents three separate assignments of error:

1. That the court erred in admission and exclusion of evidence during the trial of said cause.

2. That the court erred in its findings of fact and conclusions of law in finding that sufficient adverse possession had been had to constitute adverse possession under the laws of this state.

3. That the court erred in rendering judgment quieting title to said property in the defendants, respondents herein, and against the plaintiff, appellant herein.

A. For arid grazing area, being the uninclosed brush lands.

B. For cultivated area.

C. That 35 acres of said ground is definitely irrigated agricultural crop producing ground under an inclosure and that no adverse possession was had or asserted of any portion thereof, in any manner.

## ARGUMENTS:

Assignment of Error No. 1 directed to alleged error in ruling of the court, which rulings were excepted to at the trial:

Exhibit A being the purported agreement dated December 5, 1939, was presented and identified by Porter Merrell. It is shown at Page 15 of the Tr. to have contained other entries in which Mr. Merrell testified as follows:

A. "These entries have to do with the equity tax that has been added to the property for 1942, 1943, as well as 1941."

On Tr. 16 he testified:

Q. "Then these entries that were made since the date of the contract have been placed there since it was signed, if at all?"

A. "Yes."

The admission of such a contract unsigned changed by various entries covering a period of three years or four were received without excluding anything therefrom. Its admission constituted prejudicial error.

Tr. 19 referring to minute entries of County Commissioners, counsel asked respondent, who was not present, and not a county commissioner:

Q. "And you have heard the minute which I just read into the record, which exhibit has not yet been admitted. You made application to lease certain

county ground. Can you tell us what county ground is referred to in this matter.”

It was objected to and the court sustained the objection, then Mr Jensen said:

“It is the only way I can do it. I can call back Mr. Young.”

The court:

“Uncertain and ambiguous, consequently parole evidence can be heard to explain it. It is overruled.”

Q. “What is the ground?”

A. “North and West of Roosevelt, Cedar View, and all that I got under the contract now, all that I bought.”

Q. “All that was subsequently conveyed to you in the deed and referred to in the contract, which are attached and made a part of your answer in this law suit?”

Objection on the ground that it was incompetent.

The court:

Tr. “It is overruled. He may answer.”

It is the contention of the appellant that such questions and answers were definitely incompetent. The minutes

of County Commissioners showing that a letter was written asking for lease when the respondent apparently was not present and that an answer was made to his letter, to permit him to state what was included and intended to be included in a minute entirely by a Board of County Commissioners, when he was personally not present or to interpret the meaning of the minutes, did not lie within his right as a witness, and it is the contention of appellant that the admission of the same constituted error.

On page Tr. 2a LaMicq upon cross-examination was asked by counsel for appellant:

Q. "Do you know whether Mr. Adams was in possession of this land and cultivated it during all of that summer of 1939?"

Objection:

"I object to that as calling for a conclusion on a legal matter whether he was in possession or not."

The court:

"I think that is well taken."

The defendant was under cross-examination. He had testified as to his possession and use of all the lands. The question was directed to a matter of common experience as to cultivation by appellant and in possession for that purpose it was not directed and cannot reasonably be interpreted to have been directed to the matter of what constituted legal possession. The relative items of possession,

the manner and time of use are all items of possession and the court may determine therefrom whether or not such possession constituted the legal possession required by law. The exclusion was error.

Assignment No. 2 is: "That the court erred in its findings of fact and conclusions of law in finding that sufficient adverse possession had been had to constitute adverse possession under the laws of this state." In presenting respondents cross-complaint and answer based upon adverse possession, attempt was made to tie into the period of adverse possession use by one Eldon Brady and the only testimony given by him is as follows: Tr. Page 9:

Q. "I will ask you whether or not you made an offer to Duchesne County to lease the land which lay in the Cedar View country, which Mr. Young has mentioned in his testimony?"

A. "I did."

Q. "What offer did you make?"

A. "I offered Porter Merrell \$100.00 for the use of land per year." (Tr. 10)

Tr. Page 11:

Q. "What stock did you run there?"

A. "I ran sheep there."

Q. "Which was probably the forepart of November?"

A. "Until the first of April, spring of 1938."

Tr. Page 12:

Q. "Is there any physical thing on it that would cause you to remember that land?"



A. "Well, I herd my sheep from the North line of this 80 acres which was a field I didn't want them to get into."

There isn't anything in the testimony of Mr. Brady that would show what lands were leased; that he used any exclusive possession, but the contrary is shown definitely as to the field under cultivation wherein he indicated that he didn't want his sheep to get onto that property.

Brady's use, if at all, was not of cultivated area, and was not exclusive, and did not tie in with any claimed possession of respondent. There elapsed not less than seven months between any use between time Brady left the area and time respondents came into that vicinity. All of this time appellant used, cultivated and had fenced 35 acres of Adams' tract. Balance was open, arid territory open to use of anyone.

That there is no privity between Brady and respondents and that there was no continuity of any attempted possession however meager from that time Brady left in April until LaMicq paid for the lease in November. It is essential to find that open, exclusive, uninterrupted possession was had during all of this period and that privity existed to make up the required adverse period.

For the grazing season following, (Exhibit 4), (Tr. 22), appellant sent check for \$100.00 dated October 28, 1939, paid November 16, 1939, for another rental period. That the balance of said grazing season was paid April 6, 1939, by check which was paid April 20, 1939. That the minutes of the County Commissioners (Tr. 18) show that the original lease was not to take effect until the rental was paid. This fact would further extend the period that any of said portion of land was not under even a contract

of lease and would further amplify that possession was not exclusive and uninterrupted.

Section 104-2-9, UCA 1943, classifies and defines what constitutes adverse possession in which section it provides for cultivation. Section 104-2-7, UCA 1943, is a legal presumption in favor of the owner. 104-2-12, UCA 1943, provides specifically that possession must be continuous.

Buswell on Adverse Possession, Section 269, Page 271, provides:

“Where there is a mixed possession under color of title or a possession at the same time of more than one, claiming under a separate colorable title, the seisin of the estate is in him who has the better title for all cannot be seised. The possession follows the title. In other words, although there may be concurrent possession, there cannot be concurrent seisin of land; and only one being seised, the possession must be in him because he has the best right.”

Hall vs. Powell, 4 S. E.R., Page 465:

“There would appear to be no clearer principal of reason and justice than this: That if the rightful owner is in the actual occupancy of a part of his tract by himself or tenant, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession. If this were not the law the possession by wrong would be more favored than the rightful possession. In this kind of mixed constructive possession the legal seisin is according to the title. Title draws possession to the owner. It remains until he is dispossessed and then no further than actual dispossession by a trespasser who cannot acquire a constructive possession, which always remain with the legal title.”



Buswell on Adverse Possession on Page 373:

“It was thus held that claiming under a deed of flats and the occasional passing over them would not be considered in law an ouster, but it must include entry and ouster.”

Abel vs. Love, 143 N.E. 515:

“The doctrine of adverse possession is to be taken strictly; there are no equities in favor of a person who seeks to acquire the property of another by adverse holding, and his acts are to be strictly construed.”

Nelson vs. Johnson, 226 S.W. 94:

“There can be no adverse possession without intent to claim title coincidental with the possession and to make the possession adverse, hostile, and exclusive.”

Superior Oil Corporation vs. Alcorn, 47 S.W. 2d, 973:

“It has been stated that a person has no possession whatever where he has neither clearing, inclosure, nor a well-marked line surrounding the property.”

2 C.J.S. 544:

“Ordinarily, the use of land merely for pasturage does not constitute adverse possession, especially where the use is only occasional, claimant uses no means to restrain the livestock to any particular

land, the land is not inclosed, and the stock of other persons also graze on the land; and even though there are other acts besides the grazing of livestock, adverse possession is not made out where the other acts are only occasional or lack the requisite continuity or where they are not proved to have been performed on the land in controversy. The use of land for grazing purposes and the payment of taxes are insufficient."

2 C.J.S. 550:

"There can be no adverse possession of wild land without actual possession. Apart from statute, land is not susceptible of adverse possession while it remains completely in a state of nature; acts of ownership, changing to a substantial extent the condition of the land from a wild to an inclosed or cultivated state, are essential. Intermittent, trivial, and destructive acts are insufficient, especially where like acts are committed by the public generally with equal freedom. Particular matters held insufficient include sporadic entries, hunting and trapping, the cutting of hay, and the grazing or pasturing of cattle."

Jeffers vs. Johnson, 175 S.W. 581:

"One or two possessory acts performed on wild land are insufficient to acquire title by adverse possession."

2 C.J.S. 551—Hole v. Rittenhouse, 37 Pa. 116:

"If the land is woodland, there must be some act of actual possession of such character as will be

sufficient under well-known rules to acquire title. There must ordinarily be such a continuous and persistent cutting of timber or wood from the tract as to be evidence of a claim of ownership or there must be some other continuous acts of adverse possession. In some jurisdictions actual possession of woodland means residence on, or cultivation of, a part of the tract to which the woodland belongs, accompanied by designation of boundaries and the ordinary use of the woodland.”

2 C.J.S. 556—Foulke v. Bond, 41 N.J. Law 527:

“Unless the true owner has actual knowledge of hostile claim, it is essential to the acquisition of title by prescription or adverse possession that the possession be open, visible, public, and notorious. The foregoing rule is applicable not only where the adverse claimant is without color of title but also where such claimant has color of title.”

2 C.J.S. 557—Lasley vs. Kniskern, 115 N.W. 971:

“While it is not required that the occupation be such as to inform a passing stranger that some one is asserting title, possession is not sufficiently open when neither the original owner nor a stranger passing over the land can see any indication of possession.”

2 C.J.S. 558—McKay vs. Bullar, 178 S.E. 95:

“To be notorious, possession must be so conspicuous that it is generally known and talked of by the public or at least by the people in the vicinity of the premises. The possession must be as notorious as the nature of the land will permit.

"It is essential to the acquisition of title by adverse possession that the true owner shall have knowledge or notice, actual or constructive, that the possession is hostile or adverse."

2 C.J.S. 559—Murray vs. Bousquet, 280 P. 935:

"The element of notice is important where title by adverse possession is asserted to land located in a country which is wild, broken, mountainous, and very sparsely settled, and a small portion of which might be taken and held for years without anyone knowing whether or not there was a trespass."

2 C.J.S. 561—In re St. Louis Register Title, 147 N.W. 655:

"In order that possession may constitute constructive notice of an adverse claim, physical acts must be performed on the land and they must be of such character, and so definite and observable, as reasonable to indicate to the owner, should he visit the premises, that a claim of ownership adverse to his is being asserted, or at least the circumstances must be such as to put a man of ordinary prudence on inquiry or notice and not mislead the owner into reasonably supposing that a mere trespass has been or is being committed."

2 C.J.S. 562—DuMez vs. Dykstra, 241 N.W. 182:

"While use alone may give notice of an adverse claim of inclosed premises, it raises no presumption of hostility in the use of wild lands. This distinction is in the recognition of the general cus-

tom of owners of wild lands to permit the public to pass over them without hindrance.”

2 C.J.S. 563—Walker vs. Maynard, 31 S.W. (2d) 168:

“The mere running of stock on open range is insufficient notice of an adverse claim.”

2 C.J.S. 563—Trager vs. Elliot, 187 P. 875:

“The grazing of cattle on unoccupied prairie land is insufficient to charge the owner with notice of an adverse claim where the cattle of other persons also graze over the same land.”

2 C.J.S. 566—Fiorella vs. Jones (Mo.) 259 S.W. 782:

“To be effective as a means of acquiring title, the possession of an adverse claimant must be exclusive of the true owner. The owner must be wholly excluded from possession by claimant.”

D.H. Perry vs. Ford, 46 Utah, Page 453, 151 P. 59:

“The chief ground on which a disseisor acquires title by adverse possession is laches of the owner, his seeing his boundary and land invaded by an adverse claimant asserting title, and himself remaining passive and acquiescing in such adverse claim and assertion. Hence the general rule that the possession of an adverse claimant must be continuous, exclusive, open, hostile, notorious, and of such character as to enable the owner to know of the invasion of his rights.”

Jenkins v. Morgan, 196 P.2d, Page 873:

"The only evidence of any possession of the land consists of the use by the defendants of the land for grazing of their cattle. However, this use was not exclusive. One Okelberry also used the lands in dispute for the grazing of his cattle during the years in question. Defendants admit knowledge of Okelberry's use of the land without intervention or complaint on their part. It would thus appear that defendants have failed to establish occupation or possession within the limits of the statutory requirements."

Home Owners' Loan Corporation v. Dudley, 141 P.2d 160, Page 168:

"There must be privity between persons successively holding adversely in order to tack the possession of a predecessor in possession to that of his successor."

The second and third assignments of error deal then with adverse possession. The record disclosed that near the farming area where appellant resides is a large area of unreclaimed arid land. That a part of the land involved is uninclosed area. That the respondent is engaged in sheep culture and runs his herds in Colorado during the summer months and that he has wintered during the time involved herein in the vicinity of these arid lands near Cedar View. The use of sheep in this manner is such that sheep were grazed for a small time over an area, a part of which may have gotten on to the uninclosed part of the Adams land, but that it was in the winter time and only infrequent occasions did this occur.



The records show that a part of this land was under the canal and such was inclosed and farmed at all times by Mr. Adams whose house was near by. That he took the crops, utilized the land, applied irrigation water to this 35 acres without interruption, without exclusion, and without protest.

The record is undisputable that no one was in possession of this land claimed under or through respondents, or ever appeared on the land for all of the late spring, summer and fall, which would be more than half of the entire year and the period when livestock in that vicinity, including those of the plaintiff, had unrestricted use of this arid country and that the appellant had exclusive use, at all times and every year, of the 35 acres that were cultivated.

The appellant established his record title to the property. He established his continuous, uninterrupted use to the 35 acre tract. The burden of proof under respondents counter-claim to have acquired title by the continuous and adverse use could not effect the area so held by the appellant even if the court should determine that continuous, uninterrupted and adverse possession should be held of the other area, which is the part not under the fence or canal and not cultivated. Failure to establish adverse possession should cause the court to hold definitely that there had been no adverse possession on the cultivated area. It is, likewise, appellant's contention that the facts do not disclose that continuous, uninterrupted possession that is required by law to establish adverse rights that will ripen into title was ever exercised by respondent. The court under its equity powers, if it felt that adversity existed in the arid section, might have so found and appointed a commis-

sioner to determine and render definite the boundaries of the area under the canal and farmed by appellant.

The maximum of law that speaks down through all of the history of this class of cases on Adverse Possession requires: "That he set up the flag of conquest."

## CONCLUSIONS:

It is the contention of the appellant:

1. That he was the record owner at all times of said property and had not parted with such title.
2. That the court erred in its exclusion of the testimony on cross-examination of Mr. LaMicq concerning possession of appellant.
3. That respondents' possession has not been adverse, exclusive, and uninterrupted.
4. That a period of time elapsed aggregating seven months between the time Brady left said property and any attempt of the respondents to go upon said land at all, which would be fatal.
5. That no adverse possession of the arid ground has been had as required by law.
6. That the appellant, plaintiff herein, has continuously, uninterruptedly, and exclusively and openly at all times held the 35 acre farming area and that no adverse possession of any part of it has ever been had.



We, THEREFORE, submit that the decision of the trial court should be overruled and that title to the property should be quieted in the plaintiff, who is the appellant herein.

Respectfully submitted,  
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