

1988

Mary Garland v. Floyd J. Rigby Ray Hall Rimaras Inc., and Anna R. Fleischmann : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Michael W. Park; Attorneys for Respondents.

Patrick H. Fenton; Attorney for Appellant.

Recommended Citation

Brief of Appellant, *Garland v. Rigby and Fleischmann*, No. 880707 (Utah Court of Appeals, 1988).
https://digitalcommons.law.byu.edu/byu_ca1/1474

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS

BRIEF

UTAH
DOCUMENT

K F U

50

.A10

DOCKET

IN THE UTAH COURT OF APPEALS

880707
~~ROBERT G. GARLAND and~~
MARY GARLAND,

Plaintiffs-Respondents,

vs.

FLOYD J. RIGBY, RAY HALL,
RIMARAS, INC., a Utah
Corporation,

Defendants,

and

ANNA R. FLEISCHMANN,

Defendant-Appellant.

Case No. 88-0707-CA

Priority 14b

APPELLANT'S BRIEF

Appeal from the Judgment of the Sixth
District Court of Garfield County
Honorable Don V. Tibbs

PATRICK H. FENTON, P. C.
Attorney for Appellant
154 North Main
P. O. Box 337
Cedar City, UT 84720

MICHAEL W. PARK
Attorney for Respondents
110 North Main, Suite H
P. O. Box 765
Cedar City, UT 84720

IN THE UTAH COURT OF APPEALS

ROBERT G. GARLAND and
MARY GARLAND,

Plaintiffs-Respondents,

vs.

FLOYD J. RIGBY, RAY HALL,
RIMARAS, INC., a Utah
Corporation,

Defendants,

and

ANNA R. FLEISCHMANN,

Defendant-Appellant.

Case No. 88-0707-CA

APPELLANT'S BRIEF

Appeal from the Judgment of the Sixth
District Court of Garfield County
Honorable Don V. Tibbs

PATRICK H. FENTON, P. C.
Attorney for Appellant
154 North Main
P. O. Box 337
Cedar City, UT 84720

MICHAEL W. PARK
Attorney for Respondents
110 North Main, Suite H
P. O. Box 765
Cedar City, UT 84720

IN THE UTAH COURT OF APPEALS

ROBERT G. GARLAND and
MARY GARLAND,

Plaintiffs-Respondents,

vs.

FLOYD J. RIGBY, RAY HALL,
RIMARAS, INC., a Utah
Corporation,

Defendants,

and

ANNA R. FLEISCHMANN,

Defendant-Appellant.

Case No. 88-0707-CA

APPELLANT'S BRIEF

All parties involved in this appeal are included in this caption. As of this date, Floyd J. Rigby, Ray all and Rimaras, Inc. are not parties to the appeal. Anna R. Fleischmann is Defendant-Appellant. Robert G. Garland and Mary Garland are Plaintiffs and should be Respondents.

TABLE OF CONTENTS

	<u>PAGE</u>
Caption	1
Table of Contents	2
Table of Authorities.	3
Jurisdiction.	4
Issues.	5
Statutes.	5
Title 78-12-7.	5
Title 78-12-7.1.	6
Title 78-12-12	6
Title 78-12-5.1.	6
Statement of Case	7
Summary of Arguments.	10
Arguments	11
1. What is adverse possession?.	11
2. There was never any adverse possession	14
3. No indicia of title.	17
4. Taxes must be paid	19
5. Definition of color of title	21
Conclusion.	23

LISTING OF ATTACHMENTS

1. Judgment, Findings of Fact, Conclusions of Law
2. Earnest Money Agreement
3. Exhibit #3, a copy of deed from Defendants Hall and Rigby to Plaintiffs-Respondents

TABLE OF AUTHORITIES

	<u>PAGE</u>
Home Owner's Loan Corp. v. Dudley, 105 Utah 208, 141 P.2d 160.	13, 14, 21
Kartchner v. State Tax Commission and Wyatt, 4 Utah 2d 382, 294 P.2d 790	17, 18, 22
Lach v. Deseret Bank, 746 P.2d 802	17, 18, 22
Lund v. Donihue, 674 P.2d 107.	18, 22
Peterson v. Weber County, 99 Utah 281, 103 P.2d 652. .	21
Royal Street Land Company v. Reed, 739 P.2d 1104 . . .	13
South Pacific v. Tarpey, 51 Utah 107, 168 P. 554 . . .	22
United Park City Mines Company v. Clegg, 737 P.2d 173.	13, 14, 20

OTHER AUTHORITIES

Rule 9A, Rules of the Supreme Court of Utah.	4
Title 78-12-7, Utah Code Annotated, (1953, as amended)	5
Title 78-12-7.1, Utah Code Annotated, (1953, as amended).	6
Title 78-12-12, Utah Code Annotated, (1953 as amended)	6
Title 78-12-5.1, Utah Code Annotated, (1953 as amended)	6
Restatement of Property, Section 458 Page 2933, Paragraph J	16
Corpus Juris Secundum, Volume 2, Section 62, Pages 581 and 582	21

JURISDICTION

The jurisdiction of this appeal is from the Court of general trial jurisdiction, to-wit: The District Court of Garfield County, Utah, to the Supreme Court of the State of Utah. The jurisdiction of this item comes from Rule D of the Utah Rules of the Supreme Court in which it has specific authority to appeal this item to the Utah Supreme Court. The final right is the basis on which this is appealed from the final judgment and order effecting title of land in the State of Utah. The appeal as a matter of right is from the Sixth Judicial District Court of Garfield County, State of Utah, to the Supreme Court of the State of Utah under the provisions of Rule 9 (a) of the Rules of the Supreme Court. A copy of the Judgment appealed from is attached hereto. The Court turned jurisdiction of this matter under the date of the 22nd day of December, 1988, in the form of a pleading, "Pursuant to the authority vested in this Court, these cases are poured-over to the Court of Appeals for disposition. All further pleadings and correspondence should be directed to that Court. Their address is 230 South 500 East, Suite 400, Salt Lake City, Utah 84102." This pleading was signed by Geoffrey J. Butler, as Clerk of the Supreme Court of the State of Utah. It is presumed by the undersigned that this pour-over by the Supreme Court of the State of Utah to the Utah Court of Appeals confirms jurisdiction to the Court of Appeals of the State of Utah.

ISSUES

There are several issues presented on this particular item, to-wit.

1. Plaintiffs are squatters with nothing but possession by consent of officers of the Corporation that owns the property.

2. The conditional sale agreement on other land is insufficient indicia of title on which to base a quiet title action.

3. Can a land description in a conditional sale contract be change by parol evidence for use as indicia of title for a quiet title action over objection and over the statute of frauds?

4. What is color of title for purposes of a quiet title action?

5. What is seven years' taxes for purposes of a quiet title action?

6. Was this a permitted use rather than an adverse use?

STATUTES, ORDINANCES AND RULES

1. Title 78-12-7:

"Adverse possession--Possession presumed in owner. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action. "

2. Title 78-12-7.1

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."

3. Title 78-12-12.

"Possession must be continuous, and taxes paid.--
In no case shall adverse possession be considered established under the provision 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."

4. Title 78-12-5.1:

"Seizure or possession within seven years--Proviso--
Tax title.--No action for the recovery of real property or for the possession thereof shall be maintained, unless the plaintiff or his predecessor was seized or possessed such property within seven years from the commencement of such action; provided, however, that with respect to actions or defenses brought or interposed for the recovery or possession of or to quiet title or determine the ownership of real property against the holder of a tax title to such property, no such action or defense shall be commenced or interposed more than four years after the date of the tax deed, conveyance,

or transfer creating such tax title unless the person commencing or interposing such action or defense or his predecessor has actually occupied or been in possession of such property within four years prior to the commencement or interposition of such action or defense or within one year from the effective date of this amendment."

STATEMENT OF THE CASE

This is definitely a case of statutory interpretation, and it is a question of law. There probably is very little controversy as to the fact situation.

The Plaintiffs-Respondents brought this case against several Defendants including the Defendant-Appellant Fleischmann who claims title to the land. The second and third causes of action were primarily damage items which did not apply to the Defendant-Appellant Fleischmann and were dismissed as to every one else. Statements were made before trial that they did not apply to Miss Fleischmann. Plaintiffs-Respondents claimed title to the property based upon adverse possession on a verbal agreement with officers of Rimaras, Inc. who did not own the property but said that they could occupy the same in this fashion, this is permissive use when the property belonged to Rimaras, Inc. and was consented to by officers of Rimaras, Inc. at the time Rimaras, Inc. owned the land. The Defendant-Appellant claims title and occupation upon being the successor in interest to the record title holder by virtue of a judicial sale. This matter was tried before the District Court of Garfield County, Utah, which awarded specific title to the Plaintiffs-Respondents, with findings to the effect that said Plaintiffs-Respondents were there by right of possession. The

Judgment Order dated the 21st day of October, 1988, filed in the District Court of Garfield County, Utah, on the 26th day of October, 1988, started an appeal process with a Notice of Appeal being filed in the District Court of Garfield County, Utah, on the 18th day of November, 1988, and filed by the Clerk of the Supreme Court of Utah on the 21st day of November, 1988.

From the factual situation, the Plaintiffs-Respondents did business with Defendants Rigby and Hall in their own capacity in 1980. At that time, Plaintiffs-Respondents entered into an Earnest Money Receipt and Offer to Purchase on a printed form. Riby and Hall agreed to sell to Plaintiffs-Respondents Garland Lot #126, Tommy Creek Subdivision, Garfield County, Utah. This receipt is attached hereto or a photosat of the same. A photostatic copy was entered into evidence and is the nearest to indicia of title that the Plaintiffs-Respondents can produce. It does not say anything about Lot #128. It says in substance and effect Lot #126 and that Plaintiffs-Respondents may change to Lot #127 or Lot #41. It might be interpreted to say that any lot between #127 and #41 could be picked by Plaintiffs-Respondents. Lot #128 does not come under either category. Defendants Rigby and Hall never owned the property in question which is Lot #128. As officers of Rimaras, Inc., Defendants Rigby and Hall obtained title to Lot #128 in the name of Rimaras, Inc. and did not record the deed and did not deliver the deed to Plaintiffs-Respondents until later. It was recorded after about one year from the time of the transaction between Defendants Rigby and Hall and the Plaintiffs-Respondents. Both Defendants Rigby and Hall were

officers of Rimaras, Inc. and are now officers of Rimaras, Inc. This was true at the time of the transaction and is true at the present and at all times inbetween.

On the 3rd day of January, 1985, in the District Court of Iron County, Utah, the Defendant-Appellant obtained a money judgment against Rimaras, Inc for the sum of \$17,066.12, plus \$54.50 in costs. A judgment was filed in Iron County, Utah, on that date. The transcript of this judgment from Iron County, Utah was filed in the Garfield County Clerk's office on or about the 6th day of July, 1985. As of that date, Lot #128 was in the name of Rimaras, Inc. and had considerable taxes over due on the same. Tax notices were sent to Rimaras, Inc., and were transmitted by Defendants Hall and Rigby to the Plaintiffs-Respondents for the years 1981, 1982, 1983, 1984, and 1985. Taxes were paid by the Plaintiffs-Respondents in the spring of 1986. In November, 1987, the Plaintiffs-Respondents paid the 1987 taxes on Lot #128. In September, 1987, the Defendant-Appellant Fleischmann by and through her representative had execution taken on the judgment. The execution together with a praecipe was sent to the Sheriff of Garfield County, Utah, listing the usual items of sale, to-wit: Personal property and then real property. The praecipe specifically requested that if the execution was not answered by other property items then the interest of Rimaras, Inc. in Lot #128, Tommy Creek Subdivision, Mammoth Creek Ranchetts in Garfield County, Utah, be sold.

Garfield County Sheriff levied on Lot #128 and noticed the same for sale on the 11th day of January, 1988, in

accordance with the statutes of the State of Utah. On the date of said sale, the sale was attended by Patrick H. Fenton as attorney for Defendant-Appellant and by Michael W. Park as attorney for Plaintiffs-Respondents. At said sale, Michael W. Park announced that he was there as a representative of the Plaintiffs-Respondents and that Plaintiffs-Respondents claimed possession. The sale went forward, and the Defendant-Appellant Fleischmann was the bidder. She purchased said Lot #128 for \$10,000. Since that time, the Sheriff of Garfield County, Utah, has issued a Sheriff's Deed to the Defendant-Appellant Fleischmann. Said deed has been recorded due to the failure of Rimaras, Inc. or anyone else holding title under Rimaras, Inc. to redeem. A Certificate of Sale was issued on the 11th day of January, 1988; it was recorded on that date. After the commencement of the action, the Defendant-Appellant Fleischmann by and through her agents ascertained that the 1986 taxes were not paid on Lot #128, said agents for Defendant-Appellant Fleischmann paid said taxes.

SUMMARY OF THE ARGUMENTS

It is the Defendant-Appellant Fleischmann's position that she obtained title to the property by virtue of the judicial sale. The Plaintiffs-Respondents Garland never had adverse possession by and for the reason that they entered the property believing it to be the property of the Defendants Rigby and Hall and they were entering with their consent. Later when Plaintiffs-Respondents Garland found out that it was the property of Rimaras, Inc., they entered the property with the consent of the Defendants Rigby and Hall, the two principal

officers of Rimaras, Inc. Under these conditions, there can be no adverse possession but the occupation was by consent. This occupation was by mistake caused by misrepresentation, but at no time was it intentional adverse possession by Plaintiffs-Respondents. In addition, Plaintiffs-Respondents have not complied with statutory requirements for adverse possession in the following respects:

1. Plaintiffs-Respondents have no indicia of title having only a carbon copy of a conditional sale contract on other property and not the subject property of this action.

2. Plaintiffs-Respondents have not paid seven years' taxes, having admittedly not paid the 1986 taxes and having paid five years before that and the 1987 taxes. The 1988 taxes were not due at the time of trial.

Under these conditions, adverse possession has not been met out. Defendant-Appellant Fleischmann is entitled to the property by virtue of the execution deed.

ARGUMENTS

1. What is adverse possession?

In the first place to create adverse possession, we have to overcome Title 78-12-7 which has been quoted and stated above. It is the Defendant-Appellant's contention that this puts the Defendant-Appellant in possession of the property as successor in interest of Rimaras, Inc. by virtue of an execution sale. This particular statute gives a presumption of the person establishing legal title to the property shall be presumed to have been possessed thereof within the time required by law, and the occupation of such property is in subordination of this occupation of

Defendant-Appellant Fleischmann. There is no question as to the legal title being in the Defendant-Appellant Fleischmann as is shown in the transcript in the testimony of Thomas V. Hatch, beginning on page 33 at line 16 of the transcript of testimony and running through to page 38, line 21. This shows legal title under Rimaras, Inc. and by virtue of the sheriff's sale to the Defendant-Appellant Fleischmann. Under these conditions, this puts the provisions of Title 78-12-7, Utah Code Annotated, (1953, as amended), squarely into consideration of this particular matter as to establishing legal title and the right of possession. It is uncontested that legal title has been in Rimaras, Inc. since 1982, and came into them promptly by virtue of a deed that takes back legal title to the 1960 period and ends up in Rimaras, Inc. By virtue of the sheriff's sale, legal title is in the Defendant-Appellant Fleischmann. The sheriff's sale shows in the title information, title records in the transcript, page 37, line 22 and the remainder of that page and several pages preceeding thereto, which shows the title to run from Mrs. Jensen to Mr. and Mrs. Allen and a change of name on Mrs. Allen and a deed from Mrs. Allen in her later name to Rimaras, Inc. The transfer from Rimaras, Inc. to the Defendant-Appellant Fleischmann is by virtue of the sheriff's sale; this is shown on page 37 of the transcript. The recording to Rimaras, Inc. is shown on page 36 of the transcript, at line 6; it is shown to have taken place on July 14, 1981.

At this time it seems appropriate that there should be some discussion in this matter as to what is adverse possession.

In the case of Home Owner's Loan Corp. v. Dudley, 105 Utah 208, 141 P.2d 160, 1943, there was considerable discussion on this point. There was quite a discussion on what adverse possession is. That case indicates that adverse possession can only be acquired in accordance with the exact provisions of the statutes requiring the adverse possession to be for a continuous period of time during which claimant is in possession and has paid all taxes levied and levied on that particular property. At that time we were talking about Title 104-2-7 to 104-2-12. We are now talking about Title 78-12-7 to 78-12-12, to include 78-12-12.1. These last items refer to Utah Code Annotated, (1953, as amended.) Adverse possession is interpreted and how it is acquired. It refers specifically to the statutory provisions of adverse possession and acquiring title by such method. Paying taxes and items of this nature are discussed in great ramification in the Home Owner's Loan Corp. v. Dudley case and the various cases that have used it for authority ever since. In that particular case, adverse possession was allowed by the trial court and reversed by the Supreme Court of the State of Utah. This has been held as a leading case for many years since that time including the present time. This case specifically limits adverse possession to the statutory method. It specifically holds that the statute has to be complied with and there has to be possession for the required period of time plus the payment of taxes. This doctrine was upheld by the Utah Supreme Court as late as 1987 in the case of Royal Street Land Company v. Reed, 739 P.2d 1104. This was also upheld in the case of United Park

City Mines Company v. Clegg, 737 P.2d 173, 1987. Cases upholding this doctrine in the appellate court system of the State of Utah between Home Owner's Loan Corp. v. Dudley case and the later cases above quoted indicate approximately 30 cases as cited in Shepard's Citations.

2. There was never any adverse possession.

It is admitted by all parties at all times that officers of Rimaras, Inc. had actual knowledge to the occupation of the premises by the Plaintiffs-Respondents and consented to the same. Under these conditions, there can be no adverse possession where you have consented occupation and this is known by all parties. Exhibit #1, as identified by the Plaintiffs-Respondents was a conditional sale contract for other property although it was signed by Mr. Hall and Mr. Rigby. This is claimed by the Plaintiffs-Respondents to be their indicia of title and is the only item that has been offered as indicia of title. It refers to Lot #127 or in the alternative, Lots #127 or #41. To torture this into saying Lot #128 is allowing us to change a written agreement by parol testimony and is in violation of the statute of frauds. This was objected to at the time on that basis. Page 10 of the transcript shows that the agreement is identified as Exhibit #1, which is apparently a carbon copy of a conditional sales contract, describes Lot #127. Further on Page 10 commencing on line 19, there is talk about changing it. There seems to be no question that Mr. Hall, Mr. Rigby and the Plaintiffs-Respondents did make some verbal agreement pertaining to Lot #128. However, they did not change the written agreement.

Through Page 11 of the transcript there is discussion of this and reference is made as to the statute of frauds on line 10 of Page 11. On page 13 commencing with line 3, over objection the Plaintiffs-Respondents were allowed to testify that they talked to Mr. Hall and Mr. Rigby about changing lots to Lot #128 with the consent of Mr. Hall and Mr. Rigby. Mr. Rigby actually cleared the area and the cabin was built within the next year or two. It was Plaintiffs-Respondents' interpretation that they were building on Lot #128 and that this was what they were going to get. In their opinion this was also the interpretation of Mr. Hall and Mr. Rigby who were officers of Rimaras, Inc., the corporation who actually owned the property. Exhibits #2 and #3 that were identified, beginning on Page 14, line 3, were entered into evidence. Said Exhibit #2 was a letter from Mr. Hall to Mr. Garland to which was attached a copy of a Deed, Exhibit #3, from Mr. Hall and Mr. Rigby to Mr. Garland of Lot #128. The letter stated something to the effect that we have sent these to be recorded and in due course of time, the recorder will send them to you. At that time there is no question that Rigby and Hall were officers of Rimaras, Inc. Under those conditions, any occupation under the theory of permission by Mr. Hall and Mr. Rigby was a consented occupation and was not adverse possession. Although it is quite plain that Mr. Hall and Mr. Rigby got a deed to Rimaras, Inc. to Lot #128 in 1981, they did not record the same until 1982. At no time have Mr. Hall and/or Mr. Rigby owned the property. At all times they have been officers of Rimaras, Inc. Under these conditions, with

their consent to occupy the property, it cannot be adverse possession but is permitted possession. The Plaintiffs-Respondents Garland had actual knowledge of Rimaras, Inc.'s interest and the parties involved in the same about the 31st day of January, 1986, and possibly earlier. In the transcript, Page 36, line 12 to line 16, Plaintiffs-Respondents admit that they knew then that the property was in the name of Rimaras, Inc. And since they did not know that it belong to Rimaras, Inc. until that time, the possession could not be adverse until that time inasmuch as prior to that time and after that time, they occupied the property with the consent of the principal officers of Rimaras, Inc. It can never be adverse.

In an older case in the State of Utah, quoted in Restatement of Property, Section 458, Page 2933, in paragraph J, in discussing the open and notorious use and the special relationship of the same for adverse possession, the following statement is found:

"Where a user of land and one having an interest affected by the use have a relationship to each other sufficient in itself to justify the use, the use is not adverse unless knowledge of its adverse character is had by the one whose interest is affected. The responsibility of bringing this knowledge to him lies upon the one making the use."

In this particular instance, this was not adverse possession, it was permitted use inasmuch as the agents of the owner knew that it was going on. The adverse user, if there was one, had no knowledge that it was an adverse use until the last three years, and Rimaras, Inc. consented thereafter because Plaintiffs-

Respondents expected the officers of the corporation to clear up their title even when they found out that they had no title to the lot in question.

3. No indicia of title.

Whenever we get into this question of statutory adverse possession, we still have to answer the question of what is indicia of title. Under the cases that discuss this are Lach v. Deseret Bank, 746 P.2d 802. This case did require that the earnest money agreement pertain to the land in question. This is a question of a valid earnest money agreement describing the property in question that was in existence long before the judgment lien came up. In the instant case, we do not have this, as Plaintiffs-Respondents Garland's earnest money agreement was for other property. Pertaining to Lot #128, if they had any earnest money agreement whatsoever, it was a verbal agreement between Plaintiffs-Respondents Garland and the officers of Rimaras, Inc. acting in an individual capacity. There was only a verbal agreement. This Court must decide whether or not it can change the terms of an earnest money agreement by parol evidence to make it apply to different property and use it as it was used in the Deseret Bank case. In the Deseret Bank case it obtained judgment liens as set forth in Title 78-22-1, Utah Code Annotated, (1953, as amended.) In the case of Kartchner v. State Tax Commission and Wyatt, 4 Utah 2d 382, 294 P.2d 790, which is the case Judge Tibbs relied upon after having been reversed on the Lach v. Deseret Bank case quoted above, which is the case that establishes that indicia of title may be

a non-recorded sale contract. This varies from the case at bar by and for the reason that the Kartchner sale contract was for property on which the judgment lien affixed. In the case at bar, the conditional sale contract is not on the property in question, it is on different property; only by torturing the same in violation of the statute of frauds and to say that the verbal transaction is to be upheld can you uphold Judge Tibbs' decision in the instant case. In addition to the Kartchner case used to reverse Judge Tibbs on the Lach v. Deseret Bank case, the case at bar brings in another point entirely away from these two cases. That is the question that complies with the statute, the question of the conditional sale contract, and in addition, an additional point that Plaintiffs-Respondents Garland had not paid the taxes. The 1986 taxes had not been paid until 1988 by an agent of the Defendant-Appellant Fleischmann. Plaintiffs-Respondents Garland have not paid them yet nor have they tendered them. In the Kartchner case there was a deed which predated the judgment lien that had not been recorded. This was amplified in the case of Lund v. Donihue, 674 P.2d 107, in relation to a divorce. The deed was made and lost. In any event, it was not recorded. In the Lund v. Donihue case, it was held that it did not produce judgment lien because the property had already been transferred. In the case at bar, we have no instrument in existence as between Plaintiffs-Respondents Garland and anyone else at anytime that describes the land in question. To uphold Judge Tibbs in the case at bar, the Appellate Court must take the position that any verbal transaction is ahead of the judgment lien, and that the statutes

have been followed even though the taxes have not been paid. The best we can say about Plaintiffs-Respondents Garland is that they were squatters.

4. Taxes must be paid.

The payment of taxes encompasses statutory and case interpretation and goes back directly to Title 78-12-12, Utah Code Annotated, (1953, as amended,) which has previously been set forth verbatim herein, to the effect that taxes must be paid. In no case shall adverse possession be considered established under the provision of any section of this code unless it shall be shown that the land has been occupied and claimed continuously and that the parties, their predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law.

Under the conditions of this particular title, we come to the question of the payment of the 1986 taxes. On cross-examination, Plaintiff-Respondent Mr. Garland admitted that he found out the taxes were delinquent in the spring of 1986, having been told so by agents of Rimaras, Inc., to-wit: Mr. Hall and Mr. Rigby. He made some sort of contact and paid for the five-year period including 1981-1985 inclusive. This was in the spring of 1986, immediately prior to the May, 1986 tax sale. Upon examination, he admitted that he had not paid the 1986 taxes although he probably did not know about it and he did not know he had not paid them until the question was raised in cross-examination. In November, 1987, he paid the 1987 taxes only. He admitted that he had not paid the 1986 taxes, and the testimony of Mrs. Judy Henrie, Garfield County Treasurer confirmed

this: She testified that Defendant-Appellant Miss Anna R. Fleischmann through an agent had paid the 1986 taxes.

This brings us to the question of what does Title 78-12-12 mean when it talks about payment of taxes for the seven-year period. This has been decided many times by the Supreme Court of the State of Utah. The case of United Park City Miners Company v. Clegg, 737 P.2d 173, decided March 31, 1987, to the effect that it means payment of taxes, an adverse possession suit such as this Garland case at bar was brought. The trial court did not find adverse possession. The Supreme Court of Utah affirmed the judgment. It was found that the taxes assessed on mining claims were jointly on the service on the underground and that adverse possession mean nothing without the payment of taxes. On Page 175 of the report is a quote, "all taxes which have been levied and assessed upon such land according to law." Under these circumstances, until even on mining claims there can be an assessment of the underground and the surface, the law is applicable according to the Supreme Court of the State of Utah in 1987. One of the head notes makes a finding of the Court as follows:

"6. Adverse Possession:

One who seeks to acquire title to real property, other than by conveyance, must comply precisely with statutory requirements for doing so.

What this means to the case at bar is that until the statute has been complied with there is no way to get title except by conveyance and there has been no conveyance.

5. Definition of Color of Title.

Oftentimes when we are talking about color of title and items of this nature, we wonder what we mean. There is a quote in Corpus Juris Secundum, Volume 2, Adverse Possession, Section 62, Pages 581 and 582, in the last paragraph of this Section on Page 582, the following statement appears:

Registered assurance of title necessary
to perfect a title by adverse possession
is not shown by a deed which fails definitely
to include the land claimed.

The above quoted case of Home Owner's Loan Corp. v. Dudley, 105 Utah 208, 141 P.2d 160, found that color of title had to be based upon some sort of a written instrument. This Home Owner's Corp. v. Dudley case states to require color of title required payment of taxes within the statutory period. This case upheld that this method was exclusive. To uphold adverse possession, the taxes must be paid during the statutory period. In addition, it held that the color of title had to be based upon some sort of a written instrument. Putting improvements on adjoining land took place to that owned by the quiet title Plaintiff and was performed by quiet title Plaintiff and the Court held this was not sufficient for a quiet title action without some sort of an indicia of title and without the payment of taxes. The Court held that the statutory method of proving adverse possession was exclusive. In Peterson v. Weber County, 99 Utah 281, 103 P.2d 652, it was held that a tax deed was sufficient for color of title even though there were technical defects in the same and it was used as indicia of title or color of title. In the discussion of that particular case, there is considerable

discussion as what is meant by color of title or something of that nature, and the term is finally used by the Court at that time as, "apparent title." We do not have anything of that nature in the case at bar.

The current change that the Kartchner case quoted above, 4 Utah 2d, 382, 294 P.2d 790; Lund v. Donihue, 674 P.2d 107; and Lach v. Deseret Bank, 746 P.2d 802, being Court of Appeals' case, says pertaining to the color of title, may be warranty deed or something of this nature. It states to the effect that it still has to be in existence although it may not have to have been recorded. These previous cases cover the case at bar. There was no color of title in the case at bar as to the land in question although there was apparently discussions and possibly agreements to change it. This puts us right back to the old case of South Pacific v. Tarpey , 51 Utah 107, 168 P. 554, to the effect that "one that has a contract and no conveyance cannot prevail in adverse possession, and possession before conveyance does not count on adverse possession." In the later cases, it states that you have to have a contract and that you do not have to have a conveyance. Possibly it goes as far as to say that the contract does not have to be recorded; however, it does have to be in existence. This brings us to the question: Without a written contract describing the property and nothing that described the property and without payment of taxes, can adverse possession be granted?

CONCLUSION

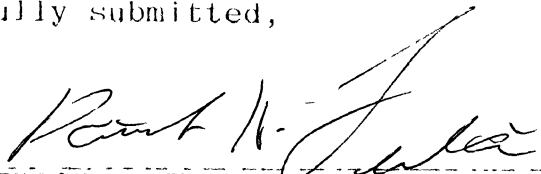
As the conclusion on this matter, the only item that can be drawn is that as pertaining to Lot #128, Tommy Creek Subdivision, Mammoth Creek Ranchetts in Garfield County, Utah, this is now the property of Defendant-Appellant Miss Anna R. Fleischmann by virtue of the judgment sale by which the interest of Rimaras, Inc., which was the complete interest at that time, was sold to her. This is now past the time of redemption.

Although Plaintiffs-Respondents Garland built a home on the property, he did so with consent and under the belief that the property belonged to Defendants Rigby and Hall who allowed him to do it; they were not in anyway in the frame of mind that it was adverse. In addition, Plaintiffs-Respondents have failed to make out questions of adverse possession even if they did have indicia of title by the failure to pay taxes. A conditional sales contract on other land is not indicia of title.

Under these conditions, the first possession is ~~not~~ *PK* made out in the proper forms to Miss Anna R. Fleischmann, Defendant-Appellant.

DATED this 13 day of January, 1988.

Respectfully submitted,


PATRICK H. FENTON
Attorney for Defendant-Appellant
Miss Anna R. Fleischmann

MICHAEL W. PARK (2516)
ATTORNEY AT LAW
110 N. Main, Suite H
P.O. Box 765
Cedar City, UT 84720
Telephone: (801) 586-6532

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
GARFIELD COUNTY, STATE OF UTAH

ROBERT G. GARLAND and)	
MARY GARLAND,)	
)	
Plaintiffs,)	JUDGMENT
)	
vs.)	
)	
FLOYD J. RIGBY, RAY HALL,)	Civil No. 86-431
RIMARAS, INC., a Utah)	
Corporation, and ANNA R.)	
FLEISCHMANN,)	
)	
Defendants.)	

The above entitled matter came on regularly for hearing on Thursday the 6th day of October, 1988, before the Honorable Don V. Tibbs, District Court Judge and the Plaintiffs were present and represented by their attorney, Michael W. Park and Anna R. Fleischmann was represented by her attorney, Patrick H. Fenton and the Court having heard the testimony of the parties and having reviewed the exhibits and having heard the arguments of counsel,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that title to the following described property located in Garfield County, State of Utah is hereby quieted in favor of Robert G. Garland and Mary Garland and against Rimaras, Inc., a Utah Corporation, Anna R. Fleischmann and Ray Hall. Said property is located in Garfield

County, State of Utah and more particularly described as follows:

All of Lot 128 MAMMOTH CREEK RANCHETTS, TOMMY CREEK UNIT 1, a subdivision, according to the Official Plat thereof, recorded in the office of the County Recorder of said County.

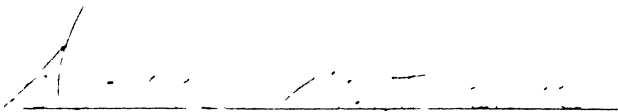
Rimaras, Inc., a Utah Corporation, Ray Hall and Anna R. Fleischmann have no interest in said property.

DATED this _____ day of October, 1988.

DON V. TIBBS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I do hereby certify that on the 13th day of October, 1988, I mailed a true and correct copy of the foregoing, first class, postage prepaid to Patrick H. Fenton, Attorney at Law, 154 North 1ain Street, Cedar City, UT 84720 and Willard R. Bishop, BISHOP & RONNOW, P.O. Box 279, Cedar City, UT 84720.



Secretar

MICHAEL W. PARK (2516)
ATTORNEY AT LAW
110 N. Main, Suite H
P.O. Box 765
Cedar City, UT 84720
Telephone: (801) 586-6532

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
GARFIELD COUNTY, STATE OF UTAH

ROBERT G. GARLAND and)	
MARY GARLAND,)	
)	
Plaintiffs,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
vs.)	
)	
FLOYD J. RIGBY, RAY HALL,)	Civil No. 86-431
RIMARAS, INC., a Utah)	
Corporation, and ANNA R.)	
FLEISCHMANN,)	
)	
Defendants.)	

The above entitled matter came on regularly for hearing on Thursday the 6th day of October, 1988, before the Honorable Don V. Tibbs, District Court Judge and the Plaintiffs were present and represented by their attorney, Michael W. Park and Anna R. Fleischmann was represented by her attorney, Patrick H. Fenton and the Court having heard the testimony of the parties and having reviewed the exhibits and having heard the arguments of counsel, now makes its findings of fact and conclusions of law.

1. The Court finds that the Plaintiff purchased property from Floyd Rigby and Ray Hall in the area of Mammoth Creek Estates, pursuant to a certain earnest money receipt and offer to purchase. The Court finds that the Plaintiffs were given the option to take a different lot in the Tommy Creek Subdivision and

Plaintiffs examined the premises and exercised their option to purchase lot #128.

2. The Court finds that the Plaintiffs went into possession of lot #128 at Tommy Creek Subdivision in 1981 and purchased a cabin kit from Floyd Rigby or Ray Hall and put a cabin on lot #128.

3. The Court finds that the Plaintiffs were in physical possession of said cabin on a regular basis until 1986 when Plaintiff became ill and could not go to the high altitudes because of said illness.

4. The Court finds that the Plaintiffs received a letter from Ray Hall on January 21, 1981, together with a copy of a deed and the Defendant, Ray Hall said in his letter that the warranty deed would be recorded and that the seller, at that time was Ray Hall and Floyd Rigby.

5. The Court finds that the Plaintiff did not take further action until there was notice that a Sheriff's sale would be held on the 11th day of January, 1988 and said Sheriff's sale was for lot #128, Tommy Creek Subdivision.

6. The Court finds that the Plaintiff paid taxes on the property for the year 1982, 1983, 1984 and 1985.

7. The Court finds that the Plaintiff paid the taxes for the year 1987 and that the attorney for Anna R. Fleischmann paid the taxes for the year 1988.

8. The Court finds that the attorney for Anna R. Fleischmann obtained a judgment against Rimaras Inc., and filed said judgment of record on the 8th day of July, 1985.

9. The Court finds that the property was noticed for Sheriff's sale on January 11, 1988 and that the attorney for Anna R. Fleischmann and the attorney for Plaintiffs attended said sale and the attorney for Plaintiffs put Fleischmanns on notice that the Plaintiffs claimed that they owned all of lot #128 and the cabin situated thereon and Fleischmann was put on notice, through her attorney, prior to the time of the Sheriff's sale.

10. The Court finds that the Sheriff's sale took place and the Sheriff's deed was issued to Fleischmann on July 12, 1988.

11. The Court finds that on November 11, 1987, that Floyd Rigby wrote to Plaintiffs and told him that he would give Mr. Garland a warranty deed from Rimaras, Inc., to Mr. & Mrs. Garland, if Mr. Garland would pay certain amounts requested by Mr. Rigby as set forth in the letter. The Court finds that Mr. Garland refused to pay that amount.

12. The Court finds that the record title is in the name of Mrs. Anna R. Fleischmann, pursuant to a Sheriff's deed and that possession of the property is in the Plaintiffs.

13. The Court finds that Rimaras Inc., is in default and asserts no ownership interest in said property and that Ray Hall, through his attorney, Willard R. Bishop, does not claim an ownership interest in said property.

14. The Court finds that the case of Kartchner v. State Tax Commission, 294 P.2d 790, (Utah 1956) is controlling and that the Defendant, Anna R. Fleischmann purchased whatever interest Rimaras owned in lot #128 at Tommy Creek Subdivision at Sheriff's sale.

15. The Court finds that Rimaras Inc., did not have any ownership interest in the property at the time the Sheriff's sale was made.

16. The Court finds that to hold otherwise would shock the Court and that it would be patently unfair to deliver the real property and the cabin to the Defendant Anna R. Fleischmann.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact the Court concludes that the Plaintiffs are entitled to judgment quieting title to said property in favor of Plaintiffs and against the Defendants Anna R. Fleischmann, Rimaras Inc., and Ray Hall.

DATED this _____ day of October, 1988.

DON V. TIBBS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I do hereby certify that on the 13th day of October, 1988, I mailed a true and correct copy of the foregoing, first class, postage prepaid to Patrick H. Fenton, Attorney at Law, 154 North Main Street, Cedar City, UT 84720 and Willard R. Bishop, BISHOP & RONNOW, P.O. Box 279, Cedar City, UT 84720.

Secretary

EARNEST MONEY RECEIPT AND OFFER TO PURCHASE

1 TO CEASE CITY Utah, OCT 31 1980
 2 Name of Broker Company AND
 3 IN CONSIDERATION OF your agreement to use your efforts to present this offer to the Seller I/we ROBERT G. GARLAND AND MARY GARLAND
 4 hereby deposit with you as earnest money the sum of (\$ 7,700.00) SEVEN THOUSAND SEVEN HUNDRED DOLLARS
 5 in the form of TRADE (FED TRACTOR, TRAILOR, 4, TOL, TRUCK)
 6 to secure and apply on the purchase of the property situated at LOT # 126, TONYNY CREEK SUBDIVISION
 7 (SEE PAGE 126)
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100

1 10/31/80 Date Robert G. Garland Seller
 2 10/31/80 Date Mary Garland Seller
 3
 4
 5
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100

NOTE

IT SHALL BE FURTHER UNDERSTOOD THAT GARLAND SHALL HAVE THE RIGHT TO AGAIN INSPECT SUBJECT PROPERTY AND SHOULD HE DESIRE, SELECT A DIFFERET LOT WITHIN TONYNY CREEK SUBDIVISION. HE MAY SELECT FROM LOTS # 41, 126, FOR THE SAME TERMS AND CONDITIONS.

IT IS FURTHER UNDERSTOOD AND STATED THAT A CABIN IS TO BE CLAIMED BY SELLER WHEN GARLAND SO INSTRUCTS

53 (State law requires brokers to furnish copies of this contract bearing all signatures to buyer and seller. Dependent upon the method used, one of the following forms must be completed)

RECEIPT

54 I acknowledge receipt of a final copy of the foregoing agreement bearing all signatures

55
 Seller Date Purchaser Date

56 I personally caused a final copy of the foregoing agreement bearing all signatures to be mailed to the ☐ Seller ☐ Purchaser on

57 by registered mail and return receipt is attached hereto

58 Broker By

Recorded at Request of _____
at _____ M. Fee Paid \$ _____
by _____ Dep. Book _____ Page _____ Ref.: _____
Mail tax notice to _____ Address _____

WARRANTY DEED

FLOYD J. RIGBY and R. W. HALL grantor
of Cedar City, County of Iron, State of Utah, hereby
CONVEY and WARRANT to

ROBERT G. GARLAND and MARY GARLAND, His Wife grantee
of Henderson, Nevada for the sum of
\$10.00 and other valuable consideration -----DOLLARS,

the following described tract of land in Iron County,
State of Utah:

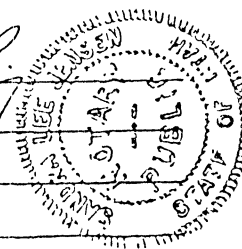
All of Lot # 128, TOMMY CREEK SUBDIVISION.

COPY

WITNESS, the hand of said grantor, this 20th day of
January, A. D. 19 81

Signed in the Presence of

Floyd J. Rigby
R. W. Hall



STATE OF UTAH,

County of IRON

ss.

On the 20th day of January, A. D. 19 81
personally appeared before me

FLOYD J. RIGBY AND R. W. HALL

the signer of the within instrument, who duly acknowledged to me that they executed the same.

Andrea Y. Owen
Notary Public.

My commission expires 4-12-83 Residing in Cedar City, Utah 84720