2001

Royal Street Land Company v. William J. Reed : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ROYAL STREET LAND COMPANY,
A Utah corporation,

Appellant,

vs. Case No. 19480

WILLIAM J. REED and
PATSY REED,

Respondents.

BRIEF OF RESPONDENTS

On Appeal From The Third Judicial District Court
For Summit County
The Honorable Homer F. Wilkinson, District Judge

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is an action brought by appellant Royal Street Land Company ("Royal Street") pursuant to Utah Code Ann. §§ 78-40-1 to -13 (1977) to quiet title to the surface rights in a certain parcel of land located on Deer Valley Road in Park City, Utah. R. 1-2. Respondents William J. Reed and Patsy Reed (the "Reeds") answered claiming title to the property by adverse possession under Utah Code Ann. §§ 78-12-7 to -15 (1977) and asserting that, in any event, Royal Street's action was barred by the applicable statute of limitations, Utah Code Ann. § 78-12-5 (1977). R. 19-20.

DISPOSITION IN THE COURT BELOW

Judge Homer F. Wilkinson granted summary judgment in favor of the Reeds and, on September 12, 1983, signed a judgment quieting title in the Reeds to the surface rights in the property. R. 358-59.

NATURE OF RELIEF SOUGHT ON APPEAL

On appeal, the Reeds seek to affirm the summary judgment entered by the district court.

STATEMENT OF FACTS

This action involves a rectangular parcel of land encompassing approximately two-thirds of an acre on Deer Valley Road in Park City, Utah. The property is located in a residential area on one of the many patented mining claims in Park City. A home, built in the 1920s, is situated on approximately the center of the property, and a double garage is located on a rear corner. The home is surrounded by a lawn and by various shrubs, bushes and gardens, all of which the Reeds maintain. The Reeds have expended years of personal effort and substantial sums of money on improving and caring for the home and surrounding property. R. 106-111. In contrast, Royal Street and its predecessors have had such remote contact with the property that, for over fifty years,

they remained unaware that a house had been built and that the property was being used as a residence. R. 27.

This is an appeal from summary judgment, so the facts as reflected in the district court record are crucial. The issue on appeal is a narrow one: whether Royal Street's (and its predecessors') payment of the $5.00 per acre tax imposed by Utah Code Ann. § 59-5-57 (1973) on "mines and mining claims" prevents the Reeds from acquiring title to the surface estate by adverse possession. The Reeds dispute Royal Street's statement of facts to the extent it implicitly raises factual questions which were undisputed in the court below. Thus, the Reeds present the following account of the undisputed facts to demonstrate the narrowness of the issue around which the case revolves.

It was undisputed in the district court that Royal Street holds the record title to the surface of the property, but that the Reeds and their predecessors have been in exclusive, open, notorious and continuous possession of the surface estate and its improvements for over fifty years. In addition, it was undisputed that the Reeds have paid all taxes being assessed against the property or its improvements of which they were aware, and that they have met all of the other statutory requirements for adverse possession. They

entered possession under claim of title founded upon a written instrument, have been in continuous, open and notorious possession since that time, either in person or through lessees, and have cultivated and improved the property, which has been substantially enclosed. See Utah Code Ann. §§ 78-12-7 to -14 (1977). Certainly, 50 years of residential use could not have been mistaken for an occasional trespass, and Royal Street has disputed neither the conclusion nor the facts supporting the conclusion that those statutory requirements have been met.

Royal Street's record title to the surface estate originates in mining patents issued by the United States. The property is part of 40 acres to which Royal Street has received record title following various conveyances stemming from the patents to the mining claims. Record title to the underlying mineral rights is owned by United Park City Mines Company, Royal Street's predecessor.

The Reeds' predecessors first occupied the property in the 1920s. In 1928 or 1929, William Lawry, a shift boss for Park Utah Consolidated Mine Company, built a house and double garage which are still located on the property, and which serve as the Reeds' residence. R. 155. Mr. Lawry built fences on the east and west boundaries of the property, extending from a roadway on the south to a railroad track

near and parallelling the present road on the north side of the property. The west side fence was later replaced with railroad ties. Those railroad ties, along with the east fence line and the north and south roadways, still exist on the property today. R. 155.

In 1946, Mr. Lawry and his wife quitclaimed the house and other improvements on the property to Ray Pedersen. R. 161. Mr. Pedersen died in 1954. R. 158. After his death, his wife Edythe, in order to establish ownership rights to the house and improvements, paid past due taxes at a tax sale and received title by quitclaim deed from Summit County in 1955. R. 158-162. In order to further establish her rights to the house and the property surrounding the house, Mrs. Pedersen executed and recorded a document entitled "Declaration of Homestead" dated November 2, 1956. R. 158, 163-64. Until she quitclaimed the property to the Reeds, she claimed the exclusive right to possession of the property and intended to exclude all others from any interest in the property except with her permission. R. 159-160.

In August, 1962, Mrs. Pedersen (then named Rasband) sold the land and improvements thereon to the Reeds.[1] R. 165. The quitclaim deed from Mrs. Rasband under which the Reeds came into possession described the property conveyed as:

> House No. 570, with double garage, being the ninth (9th) house on the rear, South side of Deer Valley, Park City, Utah, including all land surrounding the house between the lateral fence lines and extending from the road in front to the road in rear.

R. 107, 113. Since obtaining the property from Mrs. Rasband, the Reeds have continuously occupied and maintained the property as their principal residence, except for periods from 1967 to 1973 and from 1978 to 1979, when they leased the house to tenants who occupied the property. R. 109. The Reeds have expended over $20,000 on improvements to the house and the property, including landscaping, gardening, extensive remodeling of the house, addition of 60 to 70 feet of cement

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[1]In its brief, Royal Street alleges that the Reeds gave only nominal consideration for the property. Appellant's Brief pp. 15-16. That allegation was not raised in the lower court, so the record contains no contrary evidence. Nevertheless, the court may be assured that the Reeds paid a substantial sum for the property in 1962. The quitclaim deed's recital of $10 consideration, R. 113, merely reflects the uniform practice of stating only nominal consideration in deeds. The court may take note that Royal Street's deed to the property also recites only nominal consideration. R. 224-27.

sidewalk on the property and replacement of water lines on the property. R. 57-58, 110-111.

In 1973, the Reeds quitclaimed the property to themselves in order to establish a metes and bounds legal description of the property. R. 108. While the legal description was later found to be erroneous, the 1973 quitclaim deed incorporated by reference the terms of the 1962 deed from Mrs. Rasband and the 1956 Declaration of Homestead. R. 114-16. The Reeds' possession and right to possession of the property remained undisputed until October 23, 1979, when this suit was filed, and they have always considered themselves to be the rightful owners of the property. R. 108-110.

The only dispute in this case is whether the Reeds have legally satisfied the requirement under Utah law that claimants to title by adverse possession pay the taxes assessed on the property during the adverse possession period. Since they entered into possession of the property in 1962, the Reeds have paid all taxes assessed against the property or its improvements of which they were aware. Prior to 1973, the Reeds and their predecessors paid taxes on the property described as "9th House S Side Deer Valley PC House #570 with double garage." R. 110. In 1973, following the Reeds' conveyance of the property to themselves under a metes and bounds legal description, the tax notices were changed to

describe the property by the metes and bounds description. The Reeds have paid taxes on that description from 1973 to the present. R. 111. In fact, Royal Street commenced its quiet title action against the Reeds approximately one week prior to the tax assessment date for the seventh year of taxes under that description. R. 4, 63.

The only tax involving the property that the Reeds have not paid is the mining claim tax set forth in Utah Code Ann. § 59-5-57 (1973). That tax is levied on the mine or mining claim at the rate of $5.00 per acre, plus an adjustment based on gross revenues, if any. From 1939 to 1977, that tax was levied on the forty acre tract of mining claims now owned by Royal Street and United Park City Mines Company, which includes the 2/3 acre occupied and claimed by the Reeds, and was assessed to Royal Street or its predecessors in interest. In 1977 or 1978, because of the separation of record title to the surface and mineral estates in those forty acres occasioned by the 1975 conveyance, the State Tax Commission referred the surface rights in the mining claims to Summit County for separate assessment. In 1980, after this action was commenced, Summit County separately assessed the surface rights in the forty acre tract to Royal Street for 1980 and for 1977 through 1979 in arrears. R. 76.

ARGUMENT

INTRODUCTION

It is the Reeds' position that, under controlling Utah case law, they acquired ownership of the surface rights in the property prior to 1973 by virtue of their satisfaction of the statutory requirements for adverse possession and in spite of the payment of the $5.00 per acre tax on the mining claims by Royal Street and its predecessors. When the surface of a mining claim is unimproved, the mining claim tax may well include surface rights. As soon as the surface is used for non-mining purposes, however, Utah law requires separate assessment of the surface and mineral estates, and applies the mining claim tax only to the underlying mineral rights.

In the case at bar, non-mining use of the surface began in the 1920s when Mr. Lawry moved onto the property, constructed a house and occupied it as a residence. Under Utah law, adverse possessors must pay all taxes assessed against the interest they claim. In the case at bar, the Reeds claim only the surface rights to the property and make no claim to the underlying mieral estate. Because the required separate assessment of the surface rights was not made until 1980, no tax was lawfully assessed against the surface for over fifty years and the Reeds acquired ownership of the surface by

adverse possession. In addition, the Reeds assert that Royal Street's action is barred by the statute of limitations.

POINT I

PRIOR TO 1973, NO TAXES WERE LAWFULLY ASSESSED AGAINST THE SURFACE ESTATE OF THE PROPERTY AND THE REEDS ARE THEREFORE ENTITLED TO OWNERSHIP THROUGH ADVERSE POSSESSION WITHOUT PAYMENT OF TAXES.

A. Where No Taxes Are Legally Assessed, Title Can Be Acquired Through Adverse Possession Without Payment of Taxes.

In order to establish title by adverse possession, Utah law requires that, during the seven years of continuous possession relied upon for adverse possession, the possessing party "must have paid all taxes which have been levied and assessed upon such land according to law." Utah Code Ann. § 78-12-12 (1977). The law in Utah is well settled, however, that where no taxes are lawfully assessed, title by adverse possession may be acquired without payment of taxes. Farrer v. Johnson, 2 Utah 2d 189, 271 P.2d 462, 466 (1954). As will be shown below, the $5.00 mining claim tax paid by Royal Street could not lawfully include the surface rights to the property after non-mining use of the surface began in the 1920s. Therefore, because the Reeds have paid all taxes lawfully assessed on the surface, they are entitled to ownership by adverse possession.

B. The Collateral Issues Royal Street Raises Involving the Assessment of the Taxes Paid by the Reeds Are Irrelevant.

In its brief, Royal Street raises the issues of whether the assessment under which the Reeds paid taxes prior to 1973 included the surface or only the improvements on the surface of the property, and of whether, beginning in 1973, the assessment of taxes under an erroneous legal description operated to invalidate those taxes. Appellant's Brief pp. 6-7, 14, 17-18, 39-40. Royal Street's assertion is that, because of those alleged defects, the taxes so assessed were not assessed against the realty in issue and that therefore, the Reeds paid no taxes on the property. Based on that assertion, Royal Street concludes that the Reeds did not satisfy the payment of taxes requirement of Utah Code Ann. § 78-12-12 (1977).

Royal Street's focus is misplaced in two respects. First, while the erroneous property description contained in the post-1973 tax notices may raise a question concerning the lawfulness of the taxes so assessed, resolution of that question has no impact on the outcome of this case. It is undisputed that no other tax, except the mining claim tax, was assessed involving the property, and that the Reeds therefore paid all taxes lawfully assessed. In addition, it is not disputed that the Reeds paid the post-1973 taxes for one year

less than the requisite seven years before commencement of this action. Finally, it is undisputed that the Reeds began paying the pre-1973 taxes in 1962. Because the Reeds paid the pre-1973 taxes for over seven years, any rights the Reeds have acquired by adverse possession would have been acquired before 1973. Therefore, the error in the post-1973 property description is not relevant. In any event, the 1973 deed also referred to the descriptions in prior conveyances, R. 114, and the parties stipulated in the district court that the legal description was intended to describe the same property. R. 347-52.

Second, Royal Street's assertion that the pre-1973 taxes only included improvements on the surface, and its concomitant questioning of whether the Reeds paid <u>any</u> tax on the surface rights, is misplaced. The proper focus is on whether any taxes were validly assessed on the property which the Reeds did not pay, rather than on whether the Reeds paid any taxes on the property. It is undisputed that both the pre-1973 taxes and the post-1973 taxes, valid or not, were paid by the Reeds and that no other taxes, except the $5.00 per acre mining claim tax, were assessed involving the property during the critical period. If the pre- and post-1973 taxes were lawfully assessed, the Reeds paid them. If the taxes were not lawfully assessed, the Reeds were not required to

pay them in order to preserve their adverse possession claim. In either event, the case turns on the effect of the payment of the $5.00 per acre mining claim tax by Royal Street and its predecessors. Thus, if this court finds that the mining tax was not lawfully assessed against the surface rights to the property, it must find that the Reeds have acquired ownership of those surface rights through adverse possession.

C. Where the Surface of a Mining Claim is Used For Non-Mining Purposes, Utah Law Requires Separate Assessment of the Surface Use.

In the case at bar, it is undisputed that the only tax paid by Royal Street or its predecessors involving the property was the $5.00 per acre tax imposed by Utah Code Ann. § 59-5-57 (1973). That tax, however, is imposed only on "mines and mining claims," and is only the first part of a two-part taxation scheme mandated by the Utah Constitution:

> All metalliferous mines or mining claims, both placer and rock in place, shall be assessed as the Legislature shall provide; but the basis and multiple now used in determining the value of metalliferous mines for taxation purposes and the additional assessed value of $5.00 per acre thereof shall not be changed before January 1, 1935, nor thereafter until otherwise provided by law. . . . [T]he value of any surface use made of mining claims, or mining property for other than mining purposes, shall be assessed as other tangible property.

Utah Const. Art. XIII § 4 (emphasis added). Under the Constitution, separate assessment and taxation of the surface of the property are required once the surface acquires an identity separate from the mining claim.

Pursuant to the Constitutional requirement, the taxation statute first requires assessment of the mine or mining claim itself, without reference to the accompanying surface rights:

> All metalliferous mines and mining claims, both placer and rock in place, shall be assessed at $5.00 per acre and in addition thereto at a value equal to two times the average net annual proceeds thereof for the three calendar years next preceding or for as many calendar years next preceding that the mine has been operating, whichever is less . . . .

Utah Code Ann. § 59-5-57 (1973).[2] Second, the statute requires assessment of mining machinery, surface improvements and any non-mining use being made of the surface:

> All machinery used in mining and all property or surface improvements upon or appurtenant to mines or mining claims and the value of any surface use made of mining claims or mining property for other than mining purposes shall be assessed at 30% of their reasonable fair cash value.

Id.[3] (emphasis added).

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[2]A 1981 amendment increased the $5.00 figure to $10.00. See Utah Code Ann. § 59-5-57 (Supp. 1983).

[3]A 1981 amendment decreased the 30% figure to 20%. See Utah Code Ann. § 59-5-57 (Supp. 1983).

The statutory language is not permissive; rather, it requires that non-mining use of the surface be separately assessed, and thus demonstrates that the $5.00 per acre tax was intended only as a minimum tax on dormant mining claims. Utah Copper Co. v. Chandler, 45 Utah 85, 142 P. 1119, 1120 (1914) (discussed in detail below). For purposes of that minimum tax, the "mining claim" includes both surface and mineral rights only while the surface of the mining claim remains unimproved or is used for mining purposes, because, until some separate use occurs, the surface has no identity separate from the mining claim. As soon as the surface of the claim is used for other than mining purposes, however, the surface acquires a separate identity, and the statute and Constitution require that the surface be separately assessed by the State Tax Commission or the appropriate county. At that point, the minimum assessment of $5.00 per acre becomes applicable only to the mineral rights underlying the property. That rule applies regardless of whether the surface is occupied by the record owner or someone other than the record owner; the character of the use itself is determinative.

Thus, once a non-mining use of the surface of the claim occurs, the question of whether the $5.00 minimum tax on unimproved claims was intended to include the surface rights becomes irrelevant. In the case at bar, that event occurred

in the 1920s, when William Lawry began using the surface as his residence. At that point, the surface acquired an identity separate and apart from the mining claim, triggering the statutory provision requiring separate assessment of the mining claim and the surface use. Because the required separate assessment was never made, no tax, other than any tax paid by the Reeds or their predecessors, was lawfully imposed on the surface during the adverse possession period, and the Reeds are entitled to ownership of the surface rights through adverse possession without payment of the tax imposed on the mining claim. See Farrer v. Johnson, 2 Utah 2d 189, 271 P.2d 462, 466 (1954).

D. Under Controlling Utah Case Law, Royal Street's Payment of the $5.00 Minimum Tax on Mining Claims Does Not Prevent the Reeds from Obtaining Title by Adverse Possession.

It has been the settled law of Utah for over 70 years that a patented mining claim owner's payment of the $5.00 per acre minimum tax imposed by Utah Code Ann. § 59-5-57 (1973) and its predecessors does not preclude persons who have otherwise fulfilled the statutory adverse possession requirements from obtaining title to the surface of the claim by adverse possession. The landmark Utah case on the subject, Utah Copper Co. v. Chandler, 45 Utah 85, 142 P. 1119 (1914),

involved controlling facts identical to those presented in the case at bar.

In Chandler, the record owner of a mining claim sought to quiet title to the surface of the claim against two defendants who had built a home and a hall on the claim and who claimed title by adverse possession. It was agreed that the defendants had paid all taxes separately assessed against the surface lots they claimed, and that the tax on the mining claim assessed at $5.00 per acre in accordance with Utah Revised Statutes § 2504 (1898 as amended), a statute essentially identical to Utah Code Ann. § 59-5-57 (1973), had been paid by the plaintiff. Thus, the case turned on the same issue as the case at bar: whether, after non-mining use of the surface had occurred, payment of the $5.00 per acre minimum tax by the record owner of the mining claim precluded acquisition of title by adverse possession. This court, reasoning that the statute required separate assessment of the mining claim and the surface rights once a non-mining surface use had begun, held that the $5.00 tax applied only to the mineral rights and that the defendants were therefore entitled to ownership of the surface estate by adverse possession.

Chandler was, as Royal Street asserts, decided on an agreed statement of facts, but the agreement did not render

unnecessary the court's resolution of the effect of the mining claim tax. The parties agreed (1) that the record owner had paid the mining tax, (2) that the claimants had paid all other taxes, although there was an issue concerning whether those taxes had been validly assessed, and (3) that, if the taxes paid by the claimants were valid, the taxes were deemed to be cumulative and any legal rights arising out of a double assessment of tax were waived. 142 P. at 1119-20. This court held in favor of the claimants on alternative grounds: (1) If the taxes paid by the claimants were validly assessed, they were entitled to ownership of the surface rights by virtue of their payment of those taxes, and (2) if the taxes paid by the claimants were not validly assessed, then no taxes were validly assessed on the surface rights and the claimants were entitled to ownership without payment of taxes. 142 P. at 1120.

This court's conclusion that payment of the mining tax by the record owner did not preclude the claimants' right to adverse possession was essential to its ruling in Chandler. Had the court found payment of the mining tax sufficient to overcome the adverse possession claim to the surface rights, it could not have held for the claimants, because it was agreed that the record owner, and not the claimants, had paid the mining tax. 142 P. at 1119. Under the court's first

alternative, that the taxes paid by the claimants were lawfully assessed and paid, the agreed fact statement would have the effect of waiving the claim that the mining tax also included the surface, because the taxes paid by the claimants did in fact purport to include the surface. Thus, under the first alternative, the agreement that taxes were not cumulative would have eliminated from consideration the issues surrounding the applicability of the $5.00 tax to the surface of the claim.

Under the court's second alternative, that the taxes were invalid, however, the agreement over the cumulative effect of double assessments could have no impact, because the surface was not otherwise assessed and by definition no double assessment could exist. In that framework, the question concerning the applicability of the mining tax to the surface was squarely presented. Thus, the finding that the mining tax does not apply to the surface rights where the surface is used for "other than mining purposes" was necessary to the court's resolution of the second alternative. The agreed statement of facts under which the case was decided cannot defeat that conclusion.

One year after Chandler, in Utah Copper Co. v. Eckman, 47 Utah 165, 152 P. 178 (1915), this court reaffirmed the Chandler holding:

> Under the [taxation] statute, if a person is in actual and adverse possession of the surface ground of a mining claim for the period of time required by our statute, and has, during that time, improved the surface under a claim of right, such person may be assessed with such surface area and the improvements thereon, and . . . may pay the taxes so assessed, and such payment will be sufficient to entitle him to make a claim of adverse possession to such surface ground, together with the improvements thereon, as against the owner of the mining claim, although the latter may also have paid the taxes on the mining claim as such and in accordance with the fixed statutory evaluation aforesaid, and may claim all the minerals beneath the surface.

152 P. at 180. Eckman involved facts essentially the same as Chandler, but this court found the record to be inadequate to determine whether the record owner had been assessed only the $5.00 per acre minimum tax, or whether it had also been assessed separately for surface improvements. If the record owner had also been assessed separately for surface improvements, a double assessment would exist and Chandler would not apply. Thus, the court remanded the case for further factual findings. In the case at bar, however, it is undisputed that Royal Street was assessed only the minimum tax, and was assessed no separate tax upon the surface use or improvements until after this action was commmenced.

Whether the statute requires separate assessment of the mineral and surface rights is a legal, not factual, question. Chandler and Eckman are dispositive: the Reeds are entitled to ownership by adverse possession despite Royal

Street's payment of the $5.00 per acre mining claim tax. To hold otherwise would require that both Chandler and Eckman be overruled.

E. The Cases Royal Street Cites to Distinguish Chandler and Eckman are Inapplicable.

Royal Street cites several cases in an attempt to explain away Chandler and Eckman. Those cases, however, if applicable at all, are applicable only by analogy, and should not be followed in the face of better controlling authority. Royal Street cites Aggelos v. Zella Mining Co., 99 Utah 417, 107 P.2d 170 (1940), for the court's finding therein that Chandler and Eckman were not dispositive of that case. Appellant's Brief pp. 30-31. It is clear from the case and from Royal Street's quotation of the case, however, that the court did not reject Chandler and Eckman on their merits. Instead, the court held that the question of the effect of the mining tax had not been reached because, although Salt Lake County had been assessing taxes on the property since 1927, the claimant had paid those taxes for only four years prior to commencement of the action in 1937. 107 P.2d at 171. The court held that the claimant's purchase of the property under a tax deed from the county in 1936 did not constitute a payment of taxes, and thus, that the claimant had failed to pay the taxes actually assessed against the

interest he was claiming for the required seven-year period. 107 P.2d at 171-72. Thus the court merely held that Chandler and Eckman did not fit in the circumstances; the dictum cited by Royal Street reflects little if any consideration of those cases. It should be noted that in the instant case, the Reeds have paid all taxes separately assessed against the surface interest they claim.

Royal Street's citation of Rio Grande W. Ry. v. Salt Lake Inv. Co., 35 Utah 528, 101 P. 586 (1909), is similarly inapposite. In that case, the railway claimed title by adverse possession, asserting that it had listed the land in question with the State Board of Equalization, which had exclusive statutory authority to tax railway property, and had paid all taxes so assessed. The record owner, however, had continued to pay taxes assessed on the property by the Salt Lake County Assessor. The court held that, because the railway did not own the property when it listed it with the Board of Equalization, the property was not "railway property" and thus the Board had no jurisdiction to tax the property. Thus, the only tax "lawfully assessed" on the property was that assessed by the county. Because the railway had not paid the county tax, the court held that it had not satisfied the statutory requirements.

Royal Street's analogy of the present case to the Rio Grande case is flawed in several respects. First, Rio Grande turned on the court's express finding that the property involved had not been used for railway purposes, 101 P.2d at 591, and thus was not subject to the jurisdiction of the Board of Equalization. Furthermore, in Rio Grande, a proper filing was necessary to trigger a change in taxation; in the case at bar, the operation of the statute is automatic. Most importantly, however, the outcome of the case at bar hinges on whether the statute requires or merely permits separate taxation of non-mining surface activities. Thus, the case turns on unique statutory language. In asserting, based on Rio Grande, that the Reeds' unilateral occupation of the surface could not by itself trigger separate taxation of the surface, Royal Street assumes the very conclusions it seeks to establish: that the $5.00 minimum tax includes surface rights and that the statute does not automatically require separate taxation of non-mining uses.

F. Public Policy Supports the District Court's Grant of Title to the Reeds by Adverse Possession.

> "Adverse possession" functions as a method of transferring interests in land without the consent of the prior owner, and even in spite of the dissent of such owner. It rests upon social judgments that there should be a restricted duration for the assertion of "aging claims," and that the elapse of a reasonable time should assure security to a person claiming to be an owner.

R. Powell & P. Rohan, The Law of Real Property ¶ 1012[2] at 91-4 (1982). Public policy demands that persons who have improved and made beneficial use of a piece of property for over 50 years be favored over those whose contact with the property was so far removed that they were apparently not even aware of the long-time residential use. R. 27. Those facts, coupled with Royal Street's use of tenuous analogies and sophisticated distinctions to overcome explicitly stated rules of longstanding property law, demonstrate for the court the weakness of Royal Street's position. The district court's granting of title to the Reeds by adverse possession must be upheld.

POINT II

ROYAL STREET'S ACTION TO RECOVER POSSESSION IS BARRED BY THE STATUTE OF LIMITATIONS.

A. The Express Provisions of the Statute of Limitations Bars Royal Street's Action.

The Reeds have established their title to the property by adverse possession under the controlling authorities discussed above. In addition, however, Royal Street's action to challenge the Reeds' title by adverse possession is barred by the seven year statute of limitations:

> No action for the recovery of real property or for the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestor, grantor or predecessor was seized or possessed of

> the property in question within seven years before the commencement of the action.

Utah Code Ann. § 78-12-5 (1977). In this case, it is undisputed that the Reeds and their predecessors were in actual possession of the property in question for over 50 years prior to commencement of this suit, and that at no time during that period was Royal Street in actual possession. R. 155-56, 196-98. Under the express provisions of the statute, Royal Street was not "seized or possessed" of the property within the seven year period, and thus is barred from asserting title thereto.

Royal Street argues that, by virtue of its record ownership, it was "seized" of the property within the meaning of the statute. In so arguing, Royal Street ignores the fact that the Reeds were also "seized" of the property and assumes that its constructive seisin can overcome the Reeds' actual seisin. In essence, Royal Street's argument is that the statute of limitations cannot operate against record owners because record owners are always constructively "seized or possessed" of their property. Analysis of the statute of limitations in context, however, reveals that it was intended to operate against record owners and that adoption of Royal Street's interpretation would render meaningless several related provisions of the Code.

B. Royal Street's Interpretation of the Statute of Limitations Would Render Several Other Statutory Provisions Superfluous.

The statute of limitations is part of a broader statutory scheme which seeks to protect from attack the interests of those who, under some claim of right, have been in continuous possession of property over an extended period of time. At the same time, the statutory scheme recognizes the special interests of record owners, protecting those interests with evidentiary presumptions which can only be rebutted upon a special showing by the person in possession:

> 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.

Utah Code Ann. § 78-12-7 (1977). If Royal Street were correct in arguing that the term "seized" in the statute of limitations refers to constructive possession, the

presumption of possession provided in Section 78-12-7 as a protection for record owners would be rendered superfluous.[4]

C. The Reeds Have Rebutted Royal Street's Presumption of Possession by Holding the Property "Adversely" Within the Meaning of the Statute of Limitations.

The Legislature, recognizing the applicability of the statute of limitations to actions by record owners, required the person in possession to rebut the presumption that the record owner is in possession with a special showing that the property "has been held or possessed adversely to such legal title for seven years before the commencement of the action." Royal Street argues, based on the phrase "possessed adversely" in the statute, that the presumption of possession can only be overcome by a showing of title by adverse possession. In so arguing, Royal Street tacitly admits that the statute of limitations operates against record owners.

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[4]The requirement of the tax title statute of limitations, Utah Code Ann. § 78-12-5.1 (1977), that the record owner must show actual possession to defeat a tax title, should be interpreted as directed at the presumption created by the constructive possession statute, Utah Code Ann. § 78-12-7 (1977), rather than at the broad interpretation of the word "seisin" proposed by Royal Street.

In any event, the Code does not provide that a showing of title by adverse possession is required to overcome the presumption; rather, it requires a showing that the property has been "held and possessed adversely." The Code's specific definition of the elements of such a showing conclusively refutes Royal Street's assertion that a showing of title by adverse possession is required:

> Whenever it appears that the occupant, or those under whom he claims, entered into possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and there has been a continued occupation and possession of the property included in such instrument, decree or judgment, or of some part of the property under such claim, for seven years, the property so included is deemed to have been held adversely, except that when the property so included consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

Utah Code Ann. § 78-12-8 (1977) (emphasis added). The statute contains no requirement that taxes be paid.

In the case at bar, it is undisputed that the Reeds entered into possession under a claim of title founded upon a written instrument (the deed from Edythe Rasband). R. 197. It is undisputed that the Reeds have continuously occupied the premises under that instrument, either in person or through tenants, for substantially in excess of seven years. R. 109. It is undisputed that at no time was Royal Street in actual possession. R. 155-56, 196-98. Thus, the property

has been "held and possessed adversely" within the meaning of the statute, and the Reeds are entitled to judgment dismissing Royal Street's complaint.

D. Other Considerations Refute Royal Street's Interpretation of the Statute of Limitations.

While Royal Street is precluded from asserting its record ownership regardless of whether the district court is upheld on adverse possession or statute of limitations grounds, the two theories are nevertheless not alternative routes to the same conclusion. The statute of limitations imposes limited requirements and grants a limited remedy, merely shielding the instrument under which possession is claimed from attack. The adverse possession statute, on the other hand, imposes more stringent requirements and grants a broader remedy -- a new title which forecloses all interests to which possession was adverse, including equitable interests. See Frederiksen v. LaFleur, 632 P.2d 827, 830 (Utah 1981); 1983 Utah L. Rev. 256, 259.

The Reeds' approach avoids the problems of statutory interpretation inherent in Royal Street's analysis, and preserves the meaningfulness of the statutes safeguarding the special interests of record owners. In addition, it preserves the distinctions between the statutory remedies involved. The actual, open and adverse use of the property by the Reeds and their predecessors for over 50 years, and

the concomitant failure of Royal Street or its predecessors to assert any rights to the property during that time, require at minimum that this court hold Royal Street's action to be barred by the statute of limitations.

POINT III

IT IS UNNECESSARY TO REMAND THE CASE TO ALLOW THE DISTRICT COURT TO ADDRESS THE REMAINING ISSUES RAISED BY ROYAL STREET.

A. <u>The Issue of Whether or Not the Tax Notices Under Which the Reeds Paid Taxes Adequately Described the Property is Irrelevant</u>.

Royal Street asserts that "the District Court never really confronted the fact that the Reeds have not paid any taxes on the property that they actually claimed," relying upon the misdescription of the property contained in the tax notices. Appellant's Brief, p. 40. The Reeds, however, pointed that issue out to the court in their original briefing of the summary judgment motion, R. 172, and it was raised numerous times thereafter. R. 324-25, 329, 332, 347-52. Prior to the court's signing its judgment, the parties stipulated and the court ordered that the correct legal description should be substituted for the erroneous description. R. 347-52. Clearly, the district court was apprised of and considered the situation.

In any event, as pointed out earlier in this brief, the issue Royal Street raises is irrelevant. See supra pp. 11-13. The Reeds paid taxes under the erroneous legal description for about one week less than seven years prior to filing of this action, and so cannot and do not rely only on payment of those taxes for their adverse possession claim. In addition, it is conceded that Royal Street paid only the $5.00 mining claim tax, and that the only other taxes even purporting to involve the property were paid by the Reeds. Even if the taxes the Reeds paid were not correctly assessed, no other taxes were assessed, and the Reeds were therefore not required to pay taxes in order to acquire title by adverse possession. Farrer v. Johnson, 2 Utah 2d 189, 271 P.2d 462 (1954). The validity of the taxes assessed under the erroneous property description can have no impact on the outcome of this case.

B. The Purported Dedication of Roadway to Park City Is Not Properly Contained in the Record and in Any Event Does Not Affect the Outcome.

Royal Street asserts that the judgment quieting title in the Reeds should be reversed, and the case remanded, so that the district court may address Royal Street's purported dedication of a portion of the property to Park City in 1979 as part of the Deer Valley Ski Resort access road. Royal

Street's argument must be rejected on several grounds. First, there is no competent evidence in the record supporting Royal Street's assertion; the record reflects the assertion only in unsworn statements of counsel. R. 338-39. As this is an appeal from summary judgment, the record is crucial, and Royal Street's failure to properly raise the issue in the record is fatal.

In addition, Royal Street admits that the purported dedication of roadway occurred prior to the filing of its complaint in 1979, R. 343, yet Royal Street failed to raise the question until after summary judgment had been granted. The district court granted summary judgment on November 19, 1982. R. 307. On July 25, 1983, Royal Street stipulated to the revised property description contained in the court's final order without raising the question of the alleged dedication. R. 350. It was not until after it had so stipulated that Royal Street raised the question of dedication of the roadway. R. 342-44. Royal Street should not be allowed to overturn an adverse judgment simply by virtue of its own failure to timely reveal facts, arising out of its own actions, of which it knew or should have known even prior to filing its complaint.

Even if the record were sufficient to raise the issue of dedication, however, that issue has no bearing on the outcome

of the case. The adverse possession by the Reeds and their predecessors divested Royal Street and its predecessors of record title many years prior to the purported dedication. Even if the dedication issue remains, however, Park City was not an indispensible party to the quiet title action. Any rights Park City may have derived to the property through Royal Street can still be determined in a separate action. Under the quiet title sections of the Code, the rights of persons who are not made parties to a quiet title action, either by actual service or service by publication, are not affected by the judgment rendered in such action. Utah Code Ann. § 78-40-12 (1977). Thus, Park City remains free to assert any rights arising out of the purported dedication, and does not stand in the way of affirmance of the district court's judgment in favor of the Reeds.

CONCLUSION

The Reeds and their predecessors have exclusively occupied and possessed the real property and improvements in dispute in this matter since the 1920s. The property has been substantially enclosed and the Reeds have expended substantial money and effort on its cultivation and improvement. Royal Street's only claim to the property is its payment of the $5.00 per acre annual tax on the mining claim underlying

the property, which encompasses less than two-thirds of an acre. Since approximately 1928, the property has been used for residential purposes by other than its record owners without anyone questioning or disputing the Reeds' or their predecessors' right to do so. Royal Street and its predecessors remained unaware of the extensive, open and notorious use of the property for over fifty years.

Under such circumstances, the Utah Constitution and taxation statutes require that the surface of the property be separately assessed to reflect its non-mining residential use. As this was not done, no lawful taxes, other than taxes paid by the Reeds and their predecessors, were assessed against the surface of the subject property. The $5.00 minimum tax paid by Royal Street and its predecessors under the statute covered only the mineral rights during that period, and the only taxes assessed against the surface of the property were paid by the Reeds and their predecessors. The Reeds have thus satisfied the requirements for adverse possession under Utah law, and the district court's judgment quieting title in them must be upheld.

In addition, Royal Street's action is barred by the seven year statute of limitations. The statute, read in context with related statutes, clearly indicates an intention that it apply to record owners of property. While Royal Street's

record ownership entitles it to a presumption of possession, that presumption was rebutted in the instant case by unchallenged facts which clearly demonstrate that the Reeds and their predecessors have openly and actually possessed the property without interference for over fifty years preceding Royal Street's initiation of this action.

DATED this 1st day of March, 1984.

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CERTIFICATE OF HAND-DELIVERY

I hereby certify that I caused two true and correct copies of the foregoing Brief of Respondents to be hand-delivered to:

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