

1988

Velma Marchant, Elma Winterton, Leora Robinson, Wanda Penrod, Mona Lichty, and Merle Anderson v. Park City and the State of Utah : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Velma Marchant v. Park City*, No. 880131.00 (Utah Supreme Court, 1988).
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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

IN THE SUPREME COURT OF THE STATE OF UTAH

88-0131-CA

* * * * *

VELMA MARCHANT, ELMA WINTERTON,
LEORA ROBINSON, WANDA PENROD,
MONA LICHTY, MERLE ANDERSON,

Plaintiffs-Appellants,

vs.

PARK CITY, a municipal corpora-
tion, and THE STATE OF UTAH
Defendants-Respondents

88-0131-CA

Case No. 870320

* * * * *

BRIEF OF RESPONDENTS
PARK CITY MUNICIPAL CORPORATION
THE STATE OF UTAH

* * * * *

APPEAL FROM THE JUDGMENT OF THE THIRD
JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

THE HONORABLE LEONARD RUSSON, JUDGE

* * * * *

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FILED

DEC 9 1987

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

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Utah Code Annotated § 78-12-11

Utah Code Annotated § 78-12-12, 1953 as amended

IN THE SUPREME COURT OF THE STATE OF UTAH

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* * * * *

BRIEF OF RESPONDENTS
PARK CITY MUNICIPAL CORPORATION &
STATE OF UTAH

* * * * *

STATEMENT OF THE CASE

Plaintiffs-appellants, Velma Marchant and others (hereinafter collectively "Plaintiffs"), appeal from the judgment of the Third Judicial District Court for Summit County, Utah, the Honorable Leonard H. Russon presiding, entering judgment in favor of Defendants-respondents, Park City Municipal Corporation (hereinafter "Park City") and the State of Utah (hereinafter "State"), quieting title to the subject property in the State and dismissing with prejudice the complaint of Plaintiffs.

DISPOSITION IN THE LOWER COURT

Plaintiffs commenced this action in December, 1982 against Park City, seeking the subject property. When Plaintiffs later learned that Park City had previously conveyed the subject property to the State, they amended their complaint to also name the State as a Defendant.

Prior to the trial, the Court granted Park City's Motion for Partial Summary Judgment, dismissing Plaintiffs' claim to the property in question pursuant to the Doctrine of Boundary by Acquiescence. This Order was not appealed. On May 6 and 7, 1987, trial was held without a jury. On May 22, 1987, the Court issued a Memorandum Decision directing Judgment to be entered in favor of Park City and the State. Judgment was entered by the Court on July 8, 1987. Plaintiffs Motion to Amend Findings of Fact, Conclusions of Law and Judgment or in the alternative, grant a new trial, was denied on August 19, 1987. This Order was also not appealed. On September 8, 1987, Plaintiffs filed their Notice of Appeal.

RELIEF SOUGHT ON APPEAL

Park City and the State seek an Order of the Court affirming the judgment of the District Court.

STATEMENT OF FACTS

The statement of facts in the brief of Plaintiffs misstates certain important facts and omits other material facts upon which the Trial Court based its judgment, which dismissed all of Plaintiffs claims to ownership or use of the property in question.

1. Subject Property, Title and Chain of Conveyances.

(a) State's Chain of Title

The subject Property (which is the property described in Plaintiffs' complaint) is a parcel of real property in Summit County located in Park City. The chain of title through which the State claims ownership of the subject property is rooted in the patent issued by the United States Government. On April 5, 1882, the United States issued a patent to George Snyder (Ex. 27), the metes and bounds legal description of the patent undisputedly encompasses the subject property (Tr. 129-130) (Ex. 25). The patent on its face, shows that it was duly recorded in the records of the Summit County Recorder (Ex. 27).

On November 14, 1883, George Snyder conveyed by Warranty Deed the portion of the patent real property (Ex. 28) which without dispute includes the subject property (Tr. 131-132) (Ex. 25) to the Park City Smelting Company. This deed was also duly recorded in the records of the Summit County Recorder (Ex. 28).

On September 21, 1912, Park City Smelting Company conveyed title to all of its property in Summit County by Indenture Deed to Lewis H. Withey and Clay H. Hollister (Ex. 29). While this deed, unlike the previous deed, does not have a metes and bounds description, the deed does convey "all the real property or rights of interest in real property belonging to the Park City Smelting Company and situated in the County of Summit, Utah, whether the same is particularly described in this deed or not". (Ex. 29) (Tr. 134) This deed was also duly recorded in the office of the Summit County Recorder. (Ex.29)

On November 5, 1926, the executors of the Last Will of Lewis H. Withey, deceased, a tenant in common with Clay H. Hollister, conveyed by Deed the property of Withey to Silver King Coalition Mines Company. (Ex. 30)

On February 5, 1927, Clay H. Hollister, a tenant in common with Lewis H. Withey, conveyed by deed his interest personally, and all interest as Trustee for the Park City Smelting Company in all real property in Summit County formerly owned by Park City Smelting and owned at the time of conveyance by Hollister to Silver King Coalition Mines Company through a general grant clause. This deed was duly recorded in the records of the Summit County Recorder, as Entry No. 38097. (Ex. 31)

On May 8, 1953, Silver King Coalition Mines Company conveyed by deed the subject property to United Park City Mines Company. (Ex. 32) The deed contains a locatable metes and bounds description which undisputedly includes the subject property. (Ex. 32) (Ex. 25) (Tr. 147) As all other deeds in Defendants'

chain of title, this deed was duly recorded in the records of the Summit County Recorder (Ex. 32).

On April 2, 1969, United Park City Mines Company conveyed certain real property described by a metes and bounds description to Park City by Deed (Ex. 33). The description in this deed contains a locatable legal description which, without dispute, encompasses the subject property (Ex. 33), (Ex. 25) (Tr. 149). This deed was also duly recorded in the records of the Summit County Recorder (Ex. 33). Park City provided valuable consideration to United Park City Mines Company for the subject property by exchanging real property for the subject property (Ex. 36)

On June 7, 1982, Park City conveyed the subject property to the State (Ex. 34). This deed contained a legal description of metes and bounds which, without dispute, encompasses the subject property (Ex. 34), (Ex. 25) (Tr. 149, 150).

(b) Plaintiffs' Deeds.

The Plaintiffs offered four deeds (Ex. 4, 5, 6, 7) as evidence of their claimed chain of title. The deeds are as follows:

On March 19, 1906, Dan McPolin and Belle McPolin quit claimed any interest they might have in a "certain one story, frame, three roomed dwelling house situated on the easterly side of Silver Creek and about one hundred feet easterly of the Summit Lumber Company" to Jesse McCarrel (Ex. 4).

On June 10, 1914 Summit County quit claimed any interest it might have in "improvements east U. C. Tracks, Park City, Utah to William Rolph (Ex. 5).

On June 21, 1917, Summit County quit claimed any interest it might have in "that certain frame dwelling house by lumber yard in Park City, Summit County, Utah, assessed to William Rolfe in the year 1912 (Ex. 6).

On June 13, 1962, Summit County issued a tax deed to Charles Rolfe for "house in lumber yard" (Ex. 7).

None of the deeds of Plaintiffs contained any locatable legal description or even a street address. All of the deeds of Plaintiffs, except one, are quit claim deeds. Plaintiffs' deeds were admitted pursuant to a stipulation they were authentic but subject to determination by the Court as to what, if anything, the deeds conveyed (Tr. 30-32) (R. 302-303)

2. Extrinsic Evidence Regarding Deeds.

Plaintiffs did not introduce any extrinsic evidence regarding the deeds dated 1906, 1914, 1917 (Ex. 4, 5, 6) except that said deeds were found among family and legal papers (Tr. 34, 36). There was no evidence as to the location of the property the deeds were referring to, the location of the lumber yard or the U. C. Tracks in relationship to the subject property.

The County Auditor, Reed Pace, who executed the 1963 deed (Ex. 7) on behalf of Summit County and was Summit County Treasurer from 1954 to 1962 and Clerk/Auditor from 1954 to 1986,

testified that the 1963 tax deed executed by him was a deed solely to improvements to real property and not a deed to real property (Tr. 184-186), and that Charles Rolfe, the grantee, had purposely not paid taxes on the same improvements in order to obtain a deed from Summit County and strengthen his claim of title. (Tr. 183-184)

Mr. Pace also testified that he had examined the records of Summit County back to the early 1900's (Tr. 179), and that the practice of Summit County, both in the present and past, was to issue a quit claim deed for property which was not purchased at a tax sale. (Tr. 193) Mr. Pace further testified that he had no knowledge of the location of the house referred to in the 1963 deed. (Ex. 7) (Tr. 186)

Both Mr. Pace and Deputy Summit County Assessor Steven Martin, who also had reviewed the records of Summit County (Tr. 200), testified that it was a common practice for Summit County, both currently and in the past, to assess real property and improvements constructed upon the real property separately if the improvements and underlying property were separately owned. (Tr. 179-180, 200-201) Mr. Pace also testified that if taxes became delinquent on the separately owned improvements, it was the practice of Summit County to treat the improvements like real property and sell the improvements at tax sale and issue a tax deed. (Tr. 189-190) If the improvements were not purchased at the tax sale, the County would later sell the improvements and issue a quit claim deed. (Tr. 193-194)

Mr. Pace also testified that when improvements were sold at the tax sale, the intent of of Summit County was to convey only the improvements and not the underlying real property. (Tr. 182)

3. Possession and Abandonment of Subject Property by Plaintiffs.

The first fixed date of possession by the Plaintiffs' claimed predecessors was 1925 (Tr. 30), according to testimony by Plaintiffs. All possession by Plaintiffs' claimed predecessors ceased when the shack was abandoned in approximately 1964. (Tr. 66-67) Plaintiffs never possessed the subject property. (Tr. 65-66) From 1964 until this action was brought in 1982, the subject property was abandoned. The shack was vacant and appeared to be abandoned, the yard was unkempt and over-grown with weeds and there was no discernible property use according to all four witnesses, including one of the Plaintiffs, who testified to have observed it. (Tr. 66-67; 109-110; 217-218; Vol. 2 p. 6)

Park City Building Official Ron Ivie, a certified building inspector with 23 years experience (Tr. 108-9), testified that when he inspected the shack on the subject property in 1981, it appeared abandoned and did not appear as though someone was attempting to re-habilitate it. (Tr. 109-110)

4. Taxation of Subject Property.

Until the subject property was acquired by Park City in 1969 and became tax-exempt, it was subject to assessment for real

property taxes. Deputy Summit County Assessor, Steven Martin, testified that according to the records of the Summit County Assessor's Office, beginning in 1931, the subject property could be identified in the tax records by a locatable legal description. Prior to 1931, the Summit County Assessor's records do not contain a locatable legal description for the subject property. (Tr. 208) A summary of the County Assessor's records was admitted at trial. (Ex.43) The summary and testimony of Mr. Martin showed that from 1931 to 1936 taxes for a parcel of real property which undisputedly includes the subject property were assessed to the State's predecessor in interest, Silver King Coalition Mines Company, and that the assessment was for the real property and no taxes were assessed for improvements, and that said taxes were paid. (Tr. 203-4) (Ex. 43) (Ex. 25)

The testimony and exhibits show that from 1937 to 1953 under a slightly different legal description which also undisputedly encompassed the subject property, the real property taxes on the subject property were also assessed to Silver King Coalition Mines Company and that such real property taxes were paid every year. (Tr. 204-5) (Ex. 43) (Ex. 25)

Mr. Martin's testimony was also that from 1954 to 1969, real property taxes on the subject property were assessed to State's predecessor United Park City Mines Company under a slightly different legal description which also encompassed the subject property and were also paid every year. (Ex. 43) (Tr. 206) In 1951, Summit County assigned tax identification numbers to parcels of real property. The subject property was assigned

the number SA-400. (Tr. 206) From 1969 to the present, no taxes were paid on the subject property because of its ownership by Park City from 1969-1982 and the State from 1982 to the present (Tr. 206).

Ed Osika, Vice President, Secretary-Treasurer of United Park City Mines Company testified that according to the records of United Park City Mines Company, it paid the real property taxes assessed to the United Park City Mines Company against the subject property for the year 1953-1969. (Tr. 167-169) Records of such tax payment were admitted as Exhibit 35.

The only evidence of payment of any taxes by the Plaintiffs or any of their predecessors was the testimony of Plaintiff, Merle Anderson, that she or her mother paid taxes. When asked what years she had knowledge of payment of taxes the only years she had knowledge of were 1982 and two years prior to 1982 (Tr. 69) and she had no knowledge of payment of taxes prior to 1966 (Tr. 70). The Plaintiffs introduced no records or testimony from the Summit County Assessor's office and Deputy Assessor, Steve Martin, testified that he had no knowledge of any payment of taxes by the Plaintiffs or their predecessors. (Tr. 212).

The quit claim deeds which Plaintiffs claim show payment of taxes (Ex. 5, 6) do not establish payment of any taxes.

A letter from Reed Pace (Ex. 13), Summit County Treasurer, reveals that Plaintiffs' predecessors paid no taxes from 1940-1954.

Plaintiffs introduced no evidence which could tie any of the scattered and infrequent tax payments to the subject property and it would be pure speculation as to any relationship between the subject property and Plaintiffs' claimed tax payments.

5. Destruction of Shack on Subject Property.

No evidence was admitted that Park City had any involvement in the destruction of the shack on the subject property other than to issue a demolition permit to a third party. No claim for the destruction of the shack was made against the State of Utah. (Tr. Vol. 2 P. 14)

The employee of Park City who is responsible for tearing down dangerous structures which are public nuisances testified that Park City did not tear down the shack on the subject property (Tr. 198). The Chief Building Official, who was called as a witness for the Plaintiffs, testified that a demolition permit for the shack on the subject property was issued to a third party (Ex. 38) (Tr. 94) and that the shack to be demolished was identified to him by a photograph since street names and addresses were uncertain in that area of Park City (TR. 103-105) (Ex. 39, 40) and the shack was demolished to the best of his knowledge by Lloyd Brothers Construction, which was not working for Park City and was employed by a third party (Tr. 93). The procedure for issuance of a demolition permit does not require the applicant to prove ownership of the property (Tr.

96), but is issued upon the signature of the applicant that the applicant has the right to demolish the structure. The Building Official testified that he never ordered the destruction of the shack on the subject property (Tr. 103), that he is not aware of all properties owned by Park City (Tr. 107), and believed at that time that Deer Valley owned the shack on the subject property and could legally demolish it. (Tr. 106)

Ross Lloyd, one of the owners of Lloyd Brothers Construction, testified that he was familiar with the demolition of the shack on the subject property (Tr. Vol. 2 Pg. 2). Mr. Lloyd testified that Lloyd Brothers Construction installed a water line through the subject property for Deer Valley and that Deer Valley ordered the shack on the subject property demolished. (Tr. Vol. 2 p.4)

ARGUMENT

POINT I

PLAINTIFFS ARE BARRED BY GOVERNMENTAL IMMUNITY

When this action was originally brought against only Park City, the Answer filed by Park City set forth that the owner of the subject property, the State, was an indispensable party and the action could not proceed unless the State as an indispensable party was properly joined. The Plaintiffs failed to properly join the State.

In order to bring this action against the State, Plaintiffs must comply with the Utah Governmental Immunity Act, Utah Code Annotated § 63-30-1, et. seq., 1953, as amended.

Pursuant to § 63-30-12, Utah Code Annotated, notice of claim against the State must be filed within one year after the claim arose and failure to timely and properly file notice of claim by the Plaintiffs bars this action.

In Ash v. State, 572 P.2d 1374, 1376-80 (Utah 1977) the Utah Supreme Court indicated that the Utah Governmental Immunity Act was applicable to quiet title actions involving the State and that those bringing quiet title actions against the State must file timely notice of claim within one year of the arising of the cause of action.

No claim was filed against the State at any time. Thus, no action could be brought against the State (which preserved the defense of governmental immunity in its Amended Answer), to recover the subject property from the State.¹ The Trial Court properly ruled that the Plaintiffs were barred for failing to properly file a claim against the State. Thus, this Court should uphold the ruling of the Trial Court and dismiss this action since an the State, an indispensable party, was never properly joined and Plaintiffs claim for relief against the State is barred.

¹See Yates v. Vernal Family Health Center 617 P.2d 532 (Utah 1980); and Scarborough v. Granite School Dist. 531 P.2d 480 (Utah 1975)

POINT II

BURDEN OF PROOF AND STANDARD OF REVIEW

In order to prevail in a quiet title action the moving party must succeed on the strength of its own title to the subject property and cannot rely only on weaknesses in the opposing party's title. This essential element of quiet title is cited in no fewer than six Utah Supreme Court decisions since 1967.²

Plaintiffs, without setting forth which of the Trial Court's factual findings they claim to be erroneous, have submitted a statement of facts which selectively sets forth only those facts which they believe support their case. In Bennion v. Hansen, 699 P.2d 757, 759 (Utah 1985), the Supreme Court held:

In reviewing the evidence, we view it in the light most favorable to the trial court...the Brother's Counsel has not approached this appeal with these standards in mind. His brief ignores the Trial Court's findings and invites this Court to reweigh all the evidence on the issue and independently find the facts. That is not this Court's role, and we firmly decline the brother's invitation. (Citation omitted)

The Plaintiffs in the instant matter are also inviting the Appellate Court to reweigh the evidence and independently find the facts. This invitation must again be firmly denied.

²See Music Service Corporation v. Walton, 432 P.2d 334, 20 Utah 2d 16 (1967); Smith v. DeNiro, 486 P.2d 1036, 26 Utah 153 (1971); Olsen v. Park Daughters Investment Co. 511 P.2d 145, 29 Utah 2d 421 (1973); Colman v. Butkovich, 538 P.2d 188 (Utah 1975); Ash v. State, 572 P.2d 1374 (Utah 1977); Church v. Meadows Springs Ranch, Inc., 659 P.2d 1045 (Utah 1983)

The proper standard of review requires the Appellate Court to not disturb the findings of the Trial Court if there is substantial evidence in the record to support them. Bennion at 759. Also the evidence must be reviewed in the light most favorable to the judgment of the Trial Court. (City Electric v. Industrial Indem Co., 683 P.2d 1053, 1059-60 (Utah 1984), Ash v. State, 572P.2d 1374 (1977)). Moreover if there is a conflict in the evidence, the Appellate Court must "defer to the Trial Court's first-hand assessment of the witnesses' credibility and assume that the Trial Court believed those aspects of the evidence which support its findings". (Hal Taylor Associates, v. Union America, Inc., 657 P.2d 743, 749 (Utah 1982)).

As is shown in the extensive statement of facts in this brief, in the record itself and the facts found by the Trial Court in its memorandum decision (Rec. 368-373) and Findings of Fact (Rec. 378-385) entered with the judgment are supported by substantial facts and should be upheld by this Court.

POINT III

PLAINTIFFS FAILED TO PROVE ADVERSE POSSESSION

The Plaintiffs claim the subject property by Adverse Possession under Utah Code Annotated § 78-12-10 et. seq. In order to obtain the subject real property by Adverse Possession, the Plaintiffs must prove that they have complied precisely with all of the requirements for adverse possession found in Utah Code

Annotated § 78-12-10, et. seq., 1954 as amended. The Court in Home Owners' Loan Corporation v. Dudley, 141 P.2d 160, 166 (Utah 1943) held that the party claiming adverse possession "has the burden of pleading and proving full compliance with the statute." This holding was reaffirmed in Neeley v. Kelsch, 600 P.2d 979 (Utah 1979), and most recently in United Park City Mines Co. v. Estate of Clegg, 737 P.2d 173 (Utah, 1987) where the Court held: "One who seeks to acquire title to real property other than by conveyance must comply precisely with the statutory requirements for doing so." (Emphasis added.)

The statutory elements of Adverse Possession are:

1. Possess land in the statutorily prescribed manner, for the statutory period of seven years;
2. Hold the land adversely to title holder;
3. Pay all taxes legally assessed against the land for the seven year period.

It is only required that Plaintiffs' fail to comply precisely with the statutory requirements of a single element to have their claim of adverse possession fail completely.

A. PLAINTIFFS CANNOT SHOW PAYMENT OF ALL TAXES LEGALLY ASSESSED AGAINST THE LAND FOR ANY SEVEN YEAR PERIOD.

Utah Code Annotated § 78-12-12, 1953 as amended, requires that "the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law." (emphasis added)

The Utah Supreme Court has consistently held that the requirement of payment of all taxes is a mandatory requirement, which if not proven by the party claiming adverse possession, will defeat his claim. The Court explained this requirement in its ruling in Home Owners' Loan Corporation v. Dudley, 141 P.2d 160, 166 (Utah 1943), stating: "An adverse claimant has the duty of pleading and proving full compliance with the statute, including payment of all taxes lawfully assessed...."³

Prior to 1931, no evidence of payment of taxes was available. Deputy Summit County Assessor Steven Martin was unable to locate records of payment of taxes on the subject property. The two quit claim deeds issued by Summit County (Ex. 5, 6), which Plaintiffs cite as proof of tax payment, only recite that consideration paid was \$28.68 and \$1.00, respectively. There was no evidence that such consideration had any relationship whatsoever to any taxes assessed. There was no evidence as to what years of taxes the consideration represented. The deeds are entitled Quit Claim deeds, probably issued after a tax sale found no buyers. Plaintiffs' claim that issuance of such deeds "unequivocally" proves payment of all taxes for the pre-1931 period is incredible and contrary to settled Utah law. In Bowen v. Olsen 2 Utah 2d 12, 268 P2d 983 (1954), the Court ruled that redeeming property at a tax sale or purchasing property at a tax sale does not constitute the payment of taxes

³See also Neeley v. Kelsch, 600 P.2d 979 (Utah 1979)

necessary to comply with the statutory requirement for adverse possession. Thus any redemption or purchase from Summit County by Plaintiffs' predecessors could not satisfy the requirement that taxes be paid for seven years by the party claiming adverse possession.⁴

From 1931 to 1969, the State's predecessors and not the Plaintiffs' predecessors paid all real property taxes on the subject property from 1931 to 1969. A letter from then County Treasurer Reed Pace, dated May 16, 1957, (Ex. 13) reveals that Plaintiff's predecessor did not pay any taxes whatsoever for the period of 1940-1955 and Plaintiffs themselves admitted to no knowledge of payment of any taxes prior to 1966 and only claimed payment in 1982 and two other years before 1982 and after 1966.

Thus, at trial Plaintiffs failed to show payment of all taxes assessed for any seven year period, failing to meet the requirements of Utah Code Annotated § 78-12-12, 1953, as amended. In Neeley v. Kelsch, 600 P2d 979, 982 (Utah 1979), the Supreme Court held:

This Court has held an adverse claimant has the burden of proving full statutory compliance, including the payment of all taxes assessed. Kelsch testified that he did not know whether or not he had paid taxes on the disputed property, and he did not present any evidence of the payment of taxes. Since Kelsch did not carry his burden of proof, the Trial Court erred in holding adverse possession as an alternative basis for Quieting Title in Kelsch.

⁴See also Aggelos v. Zella Mining Co., 107 P.2d 170 (Utah 1940), where the Supreme Court also held that redemption at a tax
(Footnote Continued)

Parkwest Village v. Avise, 714 P.2d 1137 (Utah 1986), which is relied upon by Plaintiffs, is distinguishable from the instant matter and totally inapplicable. In Avise, the Court ruled that if the land holder did not pay any taxes, the improvement owner's payment of taxes for seven years is sufficient for adverse possession purposes. There is no holding or suggestion in Avise that the Adverse Possessor is relieved from his duty to prove payment of all taxes for seven consecutive years.

Clearly the failure by the Plaintiffs to prove payment of all taxes for any seven year period precludes them from obtaining the subject property by adverse possession.

Even if Plaintiff could show payment of taxes for the required seven year period, the enunciated purpose behind the requirement of payment of all taxes by the party claiming adverse possession is to put the true owner on notice that his land is being adversely claimed. This purpose is stated in Bowen v. Olson, 2 Utah 2d 12, 268 P.2d 983 (1954). In the instant matter, there is no identifiable location of the improvements on which Plaintiffs claimed to have paid taxes. The absence of any description sufficient to locate the improvements assessed is insufficient to put the State or its predecessors on notice of any adverse claim as required by Bowen.

(Footnote Continued)

sale did not constitute payment of taxes required under adverse possession.

B. PLAINTIFFS DID NOT POSSESS THE SUBJECT PROPERTY
AFTER 1964

The requirements for establishment of "possession" depend on whether the adverse claimant is claiming under color of title or not. Color of title is not necessary, but it makes the element of possession easier to meet for the adverse claimant. Claiming under color of title also affects the amount of land which can be secured by possessory activities.

Plaintiffs, through their complaint, have not claimed Adverse Possession under color of title, but only claimed under the non-color of title section. (See Paragraph 8 of Plaintiff's Amended Complaint (Rec. 13))

Plaintiffs, as adverse claimants without color of title, may establish possession only through the possessory activities found in Utah Code Annotated § 78-12-11 (this Section has been in effect and remains substantially unchanged since 1872); The adverse claimant without color of title can thus only acquire the land actually inclosed, cultivated, improved, or irrigated. The statutory language allows claiming "the land so actually occupied and no other, is deemed to have been held adversely." Utah Code Annotated § 78-12-10, 1953 as amended. The adverse claimant without color of title does not have the benefit of the statutory section applicable to those who claim with color of title which reads:

Where a known farm of single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining county is deemed to have been occupied

for the same length of time as the part improved and cultivated. Utah Code Annotated § 78-12-9(4), 1953 as amended.

Since 1964, Plaintiffs have failed to reach the minimum threshold of possession under either color or non-color of title. The testimony at trial, upon which the Court ruled the property was abandoned, was that Plaintiffs neither lived in or rented the property and only occasionally visited the property allowing it to deteriorate and become overgrown with brush and weeds. There were no fences or defined yard and no sign of any cultivation or improvements. Additionally, the activities of Plaintiffs failed to, "give actual or constructive notice to the legal title holder...[sufficient] to give a reasonably prudent title holder notice of the claimant's intention." Olwell v. Clark, 658 P.2d 585, 587 (Utah 1982).⁵ In order for conduct alone to give such notice, "it must be conduct that is inconsistent with the rights of the owner." Olwell at 587. In Pender v. Jackson, 123 Utah 501, 260 P.2d 542, (1953) the Utah Supreme Court ruled that holding land for speculation was not a use sufficient to meet the requirements of adverse possession. The Court stated:

Merely holding land for speculation is the purpose for which the land is held and not use of the land; we are not disposed to distort the phrase "ordinary use of the occupant" to a point beyond meaning. This is true even though a landowner is cognizant of the facts and the adverse claim became the necessary element of occupation, as defined by the Utah Statute, is not established.

⁵See also Dillman v. Foster, 656 P.2d 974, 980 (Utah 1982)

The Court in Pender cited with approval its earlier decision in Day v. Steele, 111 Utah 481, 184 P.2d 216 (1947) where surveying of the property erecting tie posts in corners, clearing greasewood from the property, placing a sign on the property, allowing a carnival to use a small portion of the property for a week, and placing fill dirt on the property were all cumulatively held to be insufficient to possess the property under the lesser standard of the color of title statute.⁶

The possessory activities must continuously be of the character necessary under § 78-12-9 or § 78-12-11. The adverse claimant need not occupy the land constantly in order to occupy it "continuously", but the adverse claimant's possession may not be sporadic. In determining what is "continuous" and what is "sporadic" the character of the land and the type of use to which it is being put are important. In the instant matter with the residential nature of the property at issue, the complete failure to occupy the property since 1964 destroys Plaintiffs' ability to claim ripening of adverse possession during this period.

C. PLAINTIFFS' USE OF THE REAL PROPERTY WAS PERMISSIVE
NOT ADVERSE

In Utah, "[t]o acquire title by adverse possession...the possession [must be] with an intention on the part of the claimant to claim title as owner and against the

⁶See also Powell on Real Property, § 1018, pg 739

rights of the true owner."⁷ Since intent is generally unstated, it must be inferred from the possessory acts. The intent to claim title will be inferred "[w]henver the possession is of such a character that ownership may be inferred."⁸

In the instant matter, the testimony trial was that it was a common practice of mining companies in Park City to permit the use of their property. The Defendants predecessors in interest, Silver King Coalition Mines (1927-1953) and United Park City Mine Company (1953-1969), both permitted the use of their property, including the subject property, by employees and others to erect homes and live there (Tr. 174), the 1906 deed (Ex. 4) by which Plaintiffs claim title, recognizes the permissive use of the underlying real property by referring to "privileges" in the land. Plaintiffs introduced no evidence that the use of the subject property by their predecessor was adverse rather than permissive.

Once it is established the use was initially permissive the inference and burden of proof of the adverse nature of the use shifts back to the adverse claimant to show that the use somehow became adverse. In Richens v. Struhs, 412, P.2d 314 17 Utah 2d 356 (1966) the shifting of the burden is enunciated. The Court reasoned that unless the person claiming adverse possession

⁷Montgomery Adverse Possession of Land Titles in Utah 3 Utah Law Review 294, at 309 (quoting Dignan v. Nelson, 72 P. 936, 937 (Utah 1903))

⁸Montgomery at 309 (quoting Pioneer Investment & Trust Co. v. Board of Education, 99 P. 150, 152 (Utah 1909))

could show that the use became adverse he would be allowed to "sneak up on the owner by using his property under permission and then after a lapse of time claim he was using it as a matter of right" (at 316). Plaintiffs' claim of adverse possession falls precisely into the category of behavior proscribed by Richins.

POINT IV

THE APPLICABLE STATUTE OF LIMITATIONS BARS PLAINTIFFS

In order to bring an action for recovery of real property the person bringing the actions must be seized or possessed of the property within seven years of the commencement of the action. This statute of limitation is found at § 78-12-5 Utah Code Annotated, 1953 as amended, which states:

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.

The Trial Court correctly ruled that Plaintiffs were barred by this statute of limitations since at the trial they failed to show possession within seven years of commencement of the action.

POINT V

THE SPECIAL TAX TITLE STATUTE OF LIMITATIONS IS INAPPLICABLE

Plaintiffs, who never claimed a tax title in their Amended Complaint (Rec. 12-15), now contend on appeal that the deeds issued in 1914, 1917 and 1963 by Summit County (Ex. 5, 6,

7), are entitled to the special protections for tax titles found in Utah Code Annotated § 78-12-5.1, § 78-12-5.2 and § 78-12-5.3 1953 as amended. This argument is totally without merit.

The Plaintiff's predecessors in 1914, 1917 and 1963 were attempting to misuse the property taxation and enforcement system to boot strap themselves into a title by failing to pay taxes. The Plaintiffs claim that their predecessors became the owner of the subject property pursuant to the 1906 deed (Ex. 4). The 1917 deed on its face states that the taxes had been previously assessed in 1912 to William Rolfe, the Grantee, (Ex. 6) who obviously owed taxes prior to 1914 and failed to pay them. The testimony of retired County Treasurer Reed Pace, who executed the 1963 deed, (Ex. 7) was that Charles Rolfe, the Grantee, was the person who owed the taxes on the "house in lumberyard" for which the 1963 tax deed was conveyed and purposely failed and refused to pay the taxes in order to obtain a tax deed to the house in the lumber yard.

The Plaintiffs are urging this Court to rule that those who fail to pay their taxes should be rewarded with the special statutory protection of third parties who purchase at tax sale. The Supreme Court of Utah has already rejected this spurious argument. In Dillman v. Foster, 656 P2d 974 (Utah 1982), the Court held that: "One who is under an obligation to pay taxes on land cannot be allowed to strengthen his title to such land by buying in the tax title when the property is sold as a consequence of his omission to pay taxes". (at 979).

The Court in Dillman refused to apply the special statutes of limitations found in § 78-12-5.1, § 78-12-5.2 and §78-12-5.3.,⁹ and also held that those who were legally obligated to pay taxes obtained nothing at the tax sale except release of the lien imposed by the County for failure to pay their taxes.

The rule in Dillman prevents exactly the type of activity engaged in by Plaintiffs' claimed predecessors that of attempting to clothe themselves with a title by willfully failing to pay property taxes.

Secondly, in 1983, the United States Supreme Court in Mennonite Board of Missions v. Adams, 462 U. S. 791 (1983) ruled that a tax foreclosure and sale was void for denial of due process of law if all lienholders did not receive actual prior notice of the foreclosure proceeding. In applying this holding to a situation identical to the instant action, the Third Circuit held in Benoit v. Pathaky, 780 F.2d 336 (3rd Cir. 1985), that failure to give constitutionally sufficient notice was a jurisdictional defect which rendered inapplicable the special tax title statute of limitations.

In the instant matter, what notice or what tax foreclosure proceedings, if any was given at the turn of the century, is unknown. However, it is clear that State's predecessor and grantor, United Park City Mines Company, had no

⁹The Utah Supreme Court also refused to apply the special statute of limitations for tax titles in a situation where one tenant in common had obtained a tax deed in Massey v. Prothero, 664 P.2d 1176 (Utah 1982)

notice of any tax sale in 1963 which would affect its title since it paid property taxes on the underlying real property both before and after the issuance of the 1963 tax deed.

Even if, arguendo, the deeds which Plaintiffs claim are shielded by virtue of the special statute of limitations for tax titles, the unassailable title is to improvements only since that is all the deeds convey by their descriptions. According to Harman v. Polter, 592 P.2d 653 (Utah 1979), the description in a deed is prima facie evidence of the intent of the grantor. There is no evidence which would rebut the prima facie evidence that Summit County only intended to convey improvements by the deeds issued by them.

POINT VII

MARKETABLE TITLE ACT VESTS PROPERTY IN PLAINTIFFS NOT DEFENDANTS

The Plaintiffs in Point III of their brief wrongly claim that the marketable title act operates to vest title in them. Plaintiffs are ignoring the requirement in the Act, found in §57-9-1, Utah Code Annotated, 1953, as amended, that the recorded conveyances relied upon must either create an interest in, "(1) the person claiming such interest, or (2) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest..."(emphasis added).

The Act clearly and unequivocally requires that the root of the unbroken chain of title in excess of forty years contain a chain of recorded conveyances to the person claiming

protection under the Marketable Title Act.¹⁰ The root deed Plaintiffs claim is a conveyance to a William Rolfe. There are no subsequent conveyances from William Rolfe to anyone else, including the Plaintiffs. Plaintiffs clearly cannot meet the requirement of §57-9-1, Utah Code Annotated 1953, as amended, and thus cannot claim the benefits and protections of the Marketable Title Act.

On the other hand, State's chain of title does meet the requirements for protection under the Marketable Title Act. The chain of title through which Defendant State of Utah claims title is an unbroken chain extending back to the Patent issued in 1882. The conveyance from Clay H. Hollister to Silver King Coalition Mines Company in 1927 would satisfy the requirements of the Act and serve to vest title free and clear of the prior conveyances claimed by Plaintiffs, pursuant to §57-9-3, Utah Code Annotated, 1953 as amended.

POINT VIII

THE DOCTRINE OF PRESCRIPTIVE EASEMENT IS INAPPLICABLE AS AN ALTERNATIVE TO ADVERSE POSSESSION

Plaintiffs have sought a prescriptive easement covering the entire subject property. This claim is extremely novel. Plaintiffs would have this Court rule that if a person seeking adverse possession fails to establish all of the elements for

¹⁰See Swenson, The Utah Marketable Title Act, 8 Utah L. Rev. 205-206, 1963

adverse possession, he may obtain all of the attributes of ownership by prescriptive easement. In other words, Plaintiffs are attempting to gain title to the subject property prescriptively without proving all of the elements necessary to gain title by adverse possession. An easement of the scope claimed by Plaintiffs is actually not an easement at all; it is a fee simple interest

An easement, as distinguished from ownership, is a mere right to use the land of another for a limited purpose. The Utah Supreme Court has described the interlocking interests of owner and easement holder created by the existence of an easement in the following terms:

Whenever there is ownership of property subject to an easement there is a dichotomy of interests, both of which must be represented and kept in balance. On the one hand, it is to be realized that the owner of the fee title, because of his general ownership, should have the use and enjoyment of his property to the highest degree possible, not inconsistent with the easement. On the other, the owner of the easement should likewise have the right to use and enjoy his easement to the fullest extent possible not inconsistent with the rights of the fee owner.

North Union Canal Company v. Newell, 550 P.2d 178, 179 (Utah 1976) (citations omitted).¹¹ This formulation of balanced rights assumes that the owner of the servient tenement retains some rights in the land. The extent of the "easement" claimed by Plaintiffs leaves no rights to the fee owner, the State.

¹¹See also United States v. O'Block, 788 F2d 1433 (10th Cir. 1986)

The concept of "easement" clearly addresses use, as distinguished from occupation and enjoyment of land. While the Utah Supreme Court has not yet had an opportunity to rule on the nature of this distinction, the distinction has been recognized by Courts throughout the nation, for example, the Illinois Supreme Court observed:

There are... rights to be exercised in connection with corporal things but without any ownership, possession, control or power of disposition of the thing in connection with which the power may be exercised and without any profit therein, such as a right to pass over another's land;...These are easements which consist in the right of the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property in the owner, and there are always distinct from the occupation and enjoyment of the land itself. [citations omitted]. A distinguishing feature of an easement is the absence of all right to participate in the profits of the soil charged with it. [citations omitted.]

Transcontinental Oil Co. v. Emmerson, 131 N.E. 645, 648 (Ill. 1921).

Our neighboring jurisdiction of Colorado described the limits of the extent of easement rights as follows: "[W]hile plaintiff had obtained an easement by prescription, it had not acquired title to the land over which it flows. The easement, therefor, should not work a dispossession of the landowner."

Osborn & Claywood Ditch Co. v. Green, 673 P.2d 380, 382 (Colo. 1983) (emphasis added).¹²

¹²The West Virginia and Missouri Courts are also in accord. See Ballanges v. Beckley Coal & Supply Co., 161 S. E. 562, 563 (W. Va. 1931); and St. Louis County v. St. Appalonia Corp., 471 S. W. 2d 238, 246 (Mo. 1971)

Plaintiffs' claimed "easement" over the subject property is essentially inconsistent with both the "general ownership," (North Union Canal at 179), of the fee owner and the "use and enjoyment," (Id at 179), pursuant thereto that the Utah Supreme Court contemplates in its concept of an "easement". (Id at 179).¹³ Plaintiffs claim the right to the exclusive use and enjoyment of the entire surface. Plaintiffs claim the right to alienate, devise and assign that right of exclusive use. Plaintiffs' claim the right to profit from the land by leasing that right of exclusive use to others. Plaintiffs' claim the right to maintain a dwelling on the land and to use the land as they see fit without regard to the fee owner's interests. The sum of the rights claimed by Plaintiffs leaves nothing to the State that can qualify as a "general ownership".

In short, Plaintiffs' are seeking ownership of the property in dispute through a misapplication of the Prescriptive Easement Doctrine. The result urged by Plaintiffs has never been reached by any Court in Utah or the nation. The granting of such a prescriptive easement would also subvert adverse possession and violate the public policy behind the requirement of payment of taxes so as to put the record owner on notice. See Bowen v. Olsen, 2 Utah 2d 12, 268 P.2d 983 (1954).

¹³ See also Wycoff v. Barton, 646 P.2d 756, 759 (Utah 1982); McBride v. McBride, 581 P.2d 996, 997 (Utah 1978); Flying Diamond v. Rust, 551 P.2d 509, 511 (Utah 1976)

The cases cited by Plaintiffs in support of their claim of prescriptive easement are all factually distinguishable and inapplicable to the instant matter.¹⁴ Plaintiffs have not cited a single case which holds for their proposition that an adverse possessor can gain all of the attributes of ownership through the doctrine of prescriptive easement if he fails to meet the requirements for adverse possession.

POINT IX

PLAINTIFFS DID NOT PROPERLY RAISE STATUTES OF LIMITATIONS, ESTOPPEL AND LACHES

The Utah Supreme Court has declared and held that "it is axiomatic that defenses and claims not raised by the parties in the trial cannot be considered for the first time on appeal." Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983)

While the special statute of limitations is inapplicable for the reason found in Point V of this brief, it is also important to note that such statute of limitations was never properly raised. The general rule is that statute of limitations must be pleaded pursuant to Rule 8 U.R.C.P. or it is waived. See

¹⁴Richards v. Pines Ranch, Inc., 559 P.2d 948 is a ruling on use of a right-of-way across another's property. Richins v. Struhs, 412 P.2d 314, 17 U.2d 35 (1966) is a ruling that the owner of a driveway could not prevent the use of the driveway by the neighboring owner who had gained prescriptive rights. The final case cited by Plaintiffs, Zollinger v. Frank, 110 Utah 514, 175 P.2d 714 (1946) also involved use only of a right-of-way across another's property.

Staker v. Huntington Cleveland Irr. Co., 664 P.2d 1188 (Utah 1983). The Court has adopted a more liberal standard in Quiet Title actions which requires, in lieu of pleading the statute of limitations in situations where no responsive pleading is allowed to the party asserting statute of limitations, to "do all he [can] to assert the statute," Hansen v. Morris, 3 Utah 2d 310, 31, 283 P.2d 884, 887 (1955).

In the instant matter, Plaintiffs did not claim a tax title in their pleading (Rec. 12-15), and did absolutely nothing to assert the statute before raising it at the time of trial and thus should be barred from relying upon it.

In Point V of their brief, Plaintiffs declare that the State's claim to the subject property is barred by Laches and Estoppel. This is the first time Plaintiffs raised Laches and Estoppel in this matter. According to Rules 8 and 12 U.R.C.P., both Laches and Estoppel are defenses of an affirmative nature which must be raised no later than the responsive pleading. Failure to timely raise Laches and Estoppel until the appeal results in such defenses being forever waived pursuant to Rule 12(h) U.R.C.P.

In Manger v. Davis, 619 P2d 687, 692 (Utah 1980), a party failed to plead estoppel as required by Rule 8(c) U.R.C.P. and the Court ruled that the defense of estoppel was waived pursuant to Rule 12(h) U.R.C.P. The result in Manger is not

unique. The Utah Supreme Court has routinely held that the claim of estoppel could not be considered the first time on appeal.¹⁵

While the Utah Court has not had the opportunity to rule on the precise issue of waiver of laches, it is governed by the same rules as estoppel and also cannot be raised initially on appeal.

Thus it is beyond dispute that Plaintiffs' failure to timely raise estoppel and laches in response to Defendant's claim of ownership of the subject property constitutes waiver of estoppel and laches and Plaintiffs cannot raise such defenses for the first time on appeal.

Even if, *arguendo*, Plaintiffs had properly raised laches and estoppel, such doctrines favor Defendants and not Plaintiffs. When Park City obtained the subject property by exchanging property with United Park City Mines Company in 1969, the Plaintiffs had already abandoned the subject property. When Plaintiffs brought this action in 1982, they asserted ownership by ancient deeds which had no identifiable description and could not put anyone on notice of any claim to the subject property.

Until Plaintiffs asserted their claim to the subject property in 1982, Park City and the State had no notice of any claim and had an unbroken chain of title extending back to Patent. It is the Plaintiffs and not the Defendants who should be barred by estoppel and laches for delaying 72 years in

¹⁵ See Davis v. Barrett, 24 Utah 2d 162, 467 P.2d 603 (1970), Tanner v. Provo Reservoir Co., 2 P.2d 107 (1931)

bringing this action. Defendant State of Utah was the record holder of the property and thus had no reason to bring any action. The delay of Plaintiffs disadvantaged the State. It is extremely difficult to defend against an adverse possession claim when the adverse possession allegedly occurred seventy years ago.

POINT X

PLAINTIFFS DEEDS ARE NULL AND VOID

At the trial, Plaintiffs submitted four deeds through which they claimed title to the subject property. A common element of all of the Plaintiffs deeds is the complete absence of any locatable description of the property which the deed was purporting to convey. The Trial Court specifically found that the Plaintiff's deeds were void for lack of a description by which the property to be conveyed could be located or even identified. (Rec. 368).

The Trial Court obviously relied on well-settled Utah law that "a deed must contain a sufficiently definite description to identify the property it conveys", Colman v. Butkovich, 556 P2d 503, 505 (Utah 1976). If, after applying the rules of construction which are generally applicable to controversies over the meaning of documents to the deed in question, the Court is still unable to identify the property the deed is attempting to convey, then the deed is null and void.

While the Utah Supreme Court has upheld descriptions in option agreements which identified the property by street address in Park West Village, Inc. v. Avise, 714 P2d 1137 (Utah 1986);

and Reed v. Alvey, 610 P2d 1374 (Utah 1980), the descriptions in the Plaintiffs' deeds do not contain even a street address to identify the property. The opportunity to resort to reasonable inferences and extrinsic evidence at the trial as prescribed in Colman, did not yield any clue as to the relationship, if any, between the property referred to in the deeds and the subject property.

The absence in Plaintiffs' deeds of any descriptions to locate or identify the property to be conveyed makes the instant matter easily distinguishable from Colman where the commonly used abbreviations in the legal description was not fatal because there was "a sound basis for the trial courts conclusion that the description in the deed was sufficiently definite to convey the property in question" (Colman at 505).

The testimony regarding the deeds which was given at the trial was that the Plaintiffs found the deeds among papers at their mothers' or fathers' homes or among their families' legal documents. (Tr. 34, 36) No testimony was given which would relate, in any way, the subject property to the deeds offered by Plaintiffs. In Barnard v. Barnard, 700 P2d 1113 (Utah 1985), the Utah Supreme Court acknowledged that it allowed parol evidence to fix the location of an ambiguous or uncertain description in an option agreement in Reed v. Alvey, but held that where no additional evidence is available such indefinite documents are void.

It is also important to note the higher standard to which deeds are held to by the Utah law in contrast with other

documents such as options. In Howard v. Howard, 12 Utah 2d 407, 367 P.2d 193, (1962), the Utah Supreme Court held that a warranty deed was a nullity simply because the description found in the deed failed to close on the fifth and sixth courses. The deeds on which the Plaintiffs' rely in the instant matter, do not even contain an identifiable description of real property. The Court in Howard held:

Either it is impossible to determine what Howard had in mind or, conjecture indulged one would have to divine that any number of areas could be said to have been intended. In such case, abstractors and lawyers should be able to turn down a title based on the contentions of such an illusory intention of a deceased (at 195).

It is clearly beyond dispute that if a deed with a defective legal description in which Grantors' intent is not reasonably determinable is fatally deficient, then the Plaintiffs' deeds with no locatable or identifiable legal descriptions and no clue as to the Grantors' intent, are even more deficient.

The only party to the 1963 Deed (Ex. 7) who testified is former Summit County Auditor Reed Pace. Mr. Pace's testimony was that the deed he executed (Ex. 7) conveyed title to the improvements described only and not to any underlying real property the improvements may be situated on. Mr. Pace further testified that he had no knowledge of the location of the improvements referred to in the deed he executed.

The Plaintiffs in the instant matter are asking this Court to reverse the trial court and ignore the well-founded requirement in Utah that deeds identify the property they are to convey, and to rule that the vague and unlocatable descriptions

in the deeds upon which the Plaintiffs rely are sufficient to quiet title in the Plaintiffs to the real property described in their complaint. This is clearly contrary to settled Utah law.

The rule in Utah, which requires a deed to contain a description sufficient to identify the property, is well founded and followed throughout the United States.¹⁶

Tax Deeds are routinely held to even higher standards than inter-party deeds. The New Mexico Supreme Court in Brylinski v. Cooper, 624 P.2d 522 (New Mexico 1981) held that a stricter test for the description of a tax deed is applied. The reason for the stricter test is that tax deeds must give notice to the foreclosed owner and the public of what particular property is being conveyed.¹⁷

POINT XI

THE TITLE OF THE STATE IS THE SUPERIOR TITLE

If, arguendo, the Plaintiffs deeds were deemed to be valid, the chain of title through which the Defendant State of Utah claims the subject real property is still clearly the

¹⁶See Boone v. Pritchett, 130 Se.2d 288 (North Carolina 1963); MacKubbin v. Rosedale Memorial Park, Inc., 198 A.2d 856 (Pennsylvania 1964); See also 4 Tiffany, Real Property, 3rd Ed. Sec. 990

¹⁷See also Wingard v. Heinkel, 424 P.2d 1010 (Wash. 1967) and Yetter v. Gallatin County, 645 P.2d 941 (Mont. 1982)

superior chain of title. Plaintiffs claim of a chain of title is indeed curious. The Plaintiffs' deeds are a quit claim deed from McPolin to McCarrel (Ex. 4), a quit claim deed from Summit County to a William Rolph (Ex. 5), a quit claim deed from Summit County to a William Rolfe (Ex. 6), and a tax deed from Summit County to Charles Rolfe (Ex. 7). There are no deeds from any of the Grantees to any other Grantee, and none from any Grantee to any of the Plaintiffs. There are simply four disconnected deeds upon which the Trial Court ruled that the chain of title of Plaintiffs was discontinuous. (Rec. 368)

In contrast, the paper chain of title of the State is an unbroken chain back to the original source, the Patent issued by Chester A. Arthur as President of the United States. This is a complete and perfect chain of title as defined by the Utah Supreme Court and no proof of actual possession is needed. In Music Service Corporation v. Walton, 432 P.2d 334, 20 Utah 2d 16 (1967) the Utah Supreme Court cited with approval Cottrell v. Pickering, 32 Utah 62, 88 P. 696 (1907) and held that: "Of course, where one proves a perfect chain of paper title from its original source, no proof of actual possession is required. In such event the presumption would be all sufficient and the title would be a complete and perfect title" (at 336).

The only expert title abstractor who testified at Trial, Nick Butkovich, testified that State's chain of title was superior to Plaintiffs'.

Plaintiffs have attacked the State's chain of title because two of the seven links in the chain (Ex. 28, 29, 30),¹⁸ contain general grant or "Mother Hubbard" descriptions rather than a metes and bounds description of the subject property. "'Mother Hubbard' descriptions purporting to convey all of the Grantor's land or all land situate in a certain area have been repeatedly upheld."¹⁹ A recent case example of a "Mother Hubbard" description being upheld is Luthi v. Evans, 576 P.2d 1064 (Kan. 1978). Such descriptions are not void for uncertainty because the property referred to by the "Mother Hubbard" description can be determined from previous of-record conveyances to the Grantor.

Finally, Plaintiffs claim of a chain of title is further barred by an attempt to claim tax deed(s) as part of their chain of title. It is settled Utah law that a tax deed either adds nothing to title if the tax deed is obtained by the party who actually owed the taxes, or creates a new title if the tax deed is obtained by a third party who had no duty to pay taxes.

This rule of law is set forth in Dillman v. Foster, 656 P.2d 974 (Utah 1982) and Tuft v. Federal Leasing, 657 P.2d 1300 (Utah 1982).

¹⁸Two of the deeds (Ex. 29 and 30) are deeds from each of two tenants in common and therefore represent only a single link in the chain.

¹⁹Thompson on Real Property, 1962 Repl. Vol. 6 3023 pg. 453

POINT XII

SEPARATE TAXATION & FORFEITURE OF REAL PROPERTY AND IMPROVEMENTS IS ULTRA VIRES AND DEEDS SO ISSUED ARE VOID

The practice of Summit County to separately assess and tax improvements from the real property upon which the improvements were constructed if there is separate ownership, was recognized by this Court in Parkwest Village v. Avise, 714 P.2d 1137 (Utah 1986). In the trial of the instant matter, this practice was testified to at length by retired Summit County Official Reed Pace and Deputy County Assessor Steven Martin.

Plaintiffs have correctly pointed out that the practice of Summit County separately assessing, foreclosing and selling for non-payment of taxes, improvements to real property was not sanctioned by State Law. However, Plaintiffs then contend that since this practice was ultra-vires that this Court should conclude that any tax deed issued by Summit County for improvements only passes title to the underlying real property. Such a conclusion is prohibited by controlling constitutional law.

Rather than giving the broad construction to the ultra-vires acts of Summit County in tax assessment, foreclosure and sale, this Court has uniformly held that tax assessment, foreclosure and sale should be strictly and narrowly construed. In Frederickson v. La Fleur, 632 P2d 827, 828 (Utah 1987), Justice Oaks wrote:

American courts have long looked upon tax titles with a jaundiced eye. Like the courts of most other States, this Court has consistently held that statutes providing for the sale of tax

delinquent lands and the issuance of tax deeds pursuant to such sales are to be construed narrowly and in favor of the tax debtor.²⁰

Not only are such activities to be construed narrowly and strictly, but other jurisdictions which, unlike Utah, have had the opportunity to rule, have consistently ruled that a tax deed or any subsequent conveyance to a tax deed can only convey that property which was assessed and obtained for non-payment of taxes. In Webermeier v. Pace, 552 P.2d 1021, 1024 (Colo 1976), the Colorado Court of Appeals held that "the grantee of a tax deed secures title to no more than that owned by the Grantee's predecessor in title".

The Colorado Court of Appeals in Webermeier had the opportunity to rule on a similar issue to the instant matter. In Webermeier, A person only owned the mineral rights to coal in a certain parcel of real property. This person's ownership rights were foreclosed for non-payment of taxes and a deed was issued by the County after tax sale, which purported to convey all mineral rights. The Court held that the deed only conveyed ownership rights in coal since the County had only obtained the mineral rights to coal through the tax foreclosure and could only convey what it had obtained. The ownership of the other mineral interest holders could not be disturbed and grantees of the tax deeds had no claim to other mineral interests, regardless of the

²⁰See also Mecham v. Mel-O-Tone Enterprises, Inc., 23 Utah 2d 402, 464 P.2d 392 (1970) and Salt Lake Home Builders, Inc., v. Colman, 518 P.2d 165 (Utah 1974)

description of the tax deed. The Utah Court in Hayes v. Gibbs, 110 Utah 54, 169 P.2d 731 (1946) held that only the interest that is properly assessed is sold at a tax sale. The same rule applies to the Plaintiffs quit claim deeds (Ex. 4, 5, 6). In Johnson v. Bell, 666 P.2d 308 (Utah 1983), the Court held that a grantee under a quit claim deed acquires only the interest of the grantor. Thus, it is beyond dispute that the Plaintiffs deeds at most conveyed the improvements only and no real property.

At most Plaintiffs' tax deed and quit claim deeds conveyed only improvements, since that was the only ownership interest obtained by the County through tax foreclosure. Such deeds could not disturb the ownership of the underlying real property. Because such taxation, foreclosure and sale of improvements was an ultra vires act, the tax deed and quit claim deeds issued subsequent to the tax foreclosure of the improvements may well be void. In any event, such action absolutely cannot be broadly construed now to include the underlying real property.

The public policy underlying the narrow and strict construction of the forfeiture of the property through the tax foreclosure and sale process is grounded in the Constitutional Prohibition against taking of property without due process of law. Courts around the country have uniformly held that in order to divest an owner of property through tax foreclosure, the owner must be given actual notice prior to the proceeding and the notice must contain a sufficient description of the property

being foreclosed to identify and locate it. (Sufficiency of description is discussed in Section X).²¹

Strict and narrow construction of all tax foreclosures and sale proceedings is also demanded by the Fifth Amendment to the United States Constitution, which is made applicable to actions by the States by the Fourteenth Amendment and by Article 1, Section 1 of the Constitution of Utah, which both guarantee due process of law, before deprivation of property.

In 1983, the United States Supreme Court ruled in Mennonite Board of Missions v. Adams, 462 U. S. 791 (1983) that not only must owners receive actual notice of impending tax foreclosure, but due process demands that all lienholders also be given actual notice.

In the instant action, Plaintiffs would have this Court construe a 1963 tax deed issued by Summit County for a house in lumber yard to include the subject real property even though the then owner, United Park City Mines Company, paid all real property taxes both before and after the tax sale and obviously had no knowledge of any foreclosure affecting their ownership.

The result urged by Plaintiffs would clearly violate the Due Process of Law. The Utah Court has also held that a purported sale for taxes when taxes were not delinquent was void

²¹See Wenatchee Reclamation District v. Mustell, 665 P.2d 909 (Wash. App. 1983); Wingard v. Heinkel, 424 P.2d 1010 (Wash. 1967); Yetter v. Gallatin County, 645 P.2d 941 (Mont. 1982)

and conveyed no interest whatsoever to purchasers in Mecham v. Mel-O-Tone Enterprises, Inc., 23 Utah 2d 403, 464 P2d 392 (1970).

POINT XIII

ADVERSE POSSESSION DOES NOT OPERATE AGAINST POLITICAL SUBDIVISIONS OF THE STATE

Even if Plaintiffs had been able to prove adverse possession, their window of opportunity for Adverse Possession to ripen closed April 2, 1969. On this date Park City, a political subdivision of the State of Utah, obtained the subject property by deed. The public policy prohibiting adverse possession against political subdivisions of the State is codified in § 78-12-13, Utah Code Annotated, 1953 as amended, which states:

No person shall be allowed to acquire any right or title in or to any lands held by any town, city or county, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks or public squares, or for any other public purpose, by adverse possession thereof for any length of time whatsoever,...

Public purpose is defined throughout the country very broadly as any activity which promotes health, safety and welfare.²²

Pursuant to § 10-8-2, Utah Code Annotated, the City Council of Park City determines what activities promote the health, safety, and welfare, and Park City may purchase property,

²²See Anderson v. Baehr, 217 SE2d 43, 47 (S. Car. 1975); Clifford v. City of Cheyenne, 487 P.2d 1325 (Wyo. 1971); Kearney v. City of Schenectady 325 NYS2d 278, 280 (N.Y. 1971)

and hold property only if the purchase and holding of such property will promote health, safety, and welfare. Thus, State law allows Park City to determine what public purposes are, and only buy and hold property if it promotes a public purpose.

When the City Council of Park City obtained the subject property from United Park City Mines Company in 1969, such action is presumed to be an action promoting a public purpose. The holding of the subject property is also presumed to be promoting a public purpose. McQuillan on Municipal Corporations 3rd Ed. Revised 1981 § 28.11 pg. 23 states: "However, in the absence of a contrary provision, ordinarily it will be presumed that lands purchased by a municipal corporation were purchased for a purpose authorized by law."

No evidence was admitted at trial which would rebut the presumption that the property was acquired and held for a public purpose. The property is now a part of Utah State Highway 224, and is still serving a public purpose.

Although its inapplicability to the instant matter is discussed in Point VIII, the doctrine of prescriptive easement, like adverse possession, is unavailable against the State and its political subdivisions. The Utah Supreme court held that a private individual could not obtain a prescriptive easement in a public roadway in Thurman v. Byram, 626 P.2d 447 (Utah 1981).

POINT IV

PARK CITY IS NOT LIABLE FOR DESTRUCTION OF SHACK

Plaintiffs claim for damages for the destruction of the shack is so weak that it barely merits response. It is

elementary tort law that a person is not liable for the actions of a third person actin independently. Plaintiffs, without authority, contend that Park City should be held liable for the actions of a third party in demolishing the shack.

The evidence adduced at trial was clearly that the shack was demolished by a third party in connection with the construction of a waterline by the Deer Valley Resort. Park City did not participate in the demolition in any way except to issue a demolition permit. The building official who issued the permit believed that Deer Valley had the right to demolish the shack and a contractor for Deer Valley obtained the permit (Ex. 38) representing in writing that it had such right.

It is well founded and univerally accepted law that a municipality has no liability if a permit is issued erroneously to one who is not the owner. The New York Court of Appeals held in Rolfe v. Village of Falconer, 467 N. E. 2d 516 (N. Y. App. 1984) held; that the Village could not be held liable for damages or theft by a person who represented himself as the owner & obtained a building permit.

CONCLUSION

Like the proverbial ship in a storm which seeks any port, Plaintiffs have sought the subject property by any theory. This shotgun approach was undoubtedly precipitated by Plaintiffs' realization that they have no single valid claim to the subject property, and hope to patch together bits and pieces of various theories to obtain the subject property.

The Trial Court considered Plaintiffs' claim of title, their four disconnected and faulty deeds, none of which have an identifiable description of the property to be conveyed, and ruled that the State's unbroken chain of title extending back to Patent was superior.

The Plaintiffs then contended that the State's title had been undermined by adverse possession. However, adverse possession requires that the adverse possessor prove payment of all taxes for a seven year period. Plaintiffs could only show payment of taxes for three years at most, while the State's predecessor paid taxes every year from 1931 to 1969. An adverse possessor must also hold the property adversely to the true owner. The evidence adduced at trial was that the use of the subject property by Plaintiffs' predecessors was permissive and not adverse. Finally, to bring an action for adverse possession, the adverse possessor must possess the property during the seven year period prior to bringing the action, while the Plaintiffs had abandoned the property over twenty years earlier. Clearly Plaintiffs cannot obtain the subject property by adverse possession.

Alternatively, Plaintiffs claimed all of the attributes of ownership through prescriptive easement. This claim is a novel one, and would so blur the distinction between use and ownership as to make an easement indistinguishable from fee ownership. Unfortunately for Plaintiffs, there is no authority for this position, not only in Utah but throughout the nation.


Plaintiffs' faulty adverse possession claim, cannot be rehabilitated by changing its title to prescriptive easement.

The Plaintiffs then seek to shield their defective title with the statues of limitations afforded to purchasers of tax titles. This argument fails in multiple respects. First, the deeds Plaintiffs seek to shield are for improvements only and not for the subject property. Second, the Plaintiffs' predecessor purposely failed to pay taxes on the improvements in order to "boot strap" themselves a title. Such attempts in creating title out of thin air were declared futile in Dillman v. Foster, 656 P.2d 974, 980 (Utah 1982) Third, the deeds have no identifiable description and cannot be related to the subject property.

Finally, the Plaintiffs seek repayment from Park City for the destruction of an abandoned shack when all of the evidence was that a third party demolished the shack to make way for a waterline to its property. Once again, Plaintiffs are seeking to fashion a cause of action where none exists.

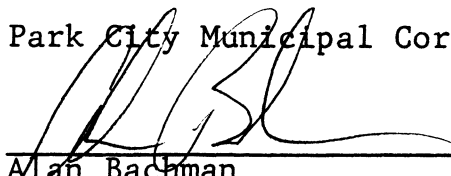
It is clear that the Trial Court correctly ruled in dismissing every count of Plaintiffs' complaint. The Plaintiffs have no rights to the subject property and the well-thought and reasoned ruling of the Trial Court should be affirmed.

Respectfully submitted this 9th day of December, 1987.



J. Craig Smith
Assistant City Attorney
Attorney for Respondent

Park City Municipal Corporation



Alan Bachman
Assistant Attorney General
Attorney for Respondent
State of Utah

CERTIFICATE OF SERVICE

This is to certify that four copies of the foregoing BRIEF OF RESPONDENT PARK CITY, A MUNICIPAL CORPORATION AND THE STATE OF UTAH were mailed, postage prepaid, this 9th day of December, 1987, to the following:

Robert Felton
310 South Main Street, Suite 1309
Salt Lake City, Utah 84101

J. Craig Smith

Marchant3/PLEAD6

ADDENDUM

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

VELMA MARCHANT, et al.,	:	MEMORANDUM DECISION
Plaintiffs,	:	CIVIL NO. 7174
vs.	:	
PARK CITY, a Municipal	:	
corporation, JACK COPPEDGE,	:	
and the STATE OF UTAH,	:	
Defendants.	:	

The above case was tried, commencing May 6, 1987. The Court received evidence by way of testimony, exhibit, and stipulation, and after hearing final arguments of counsel, took the matter under advisement. The Court has now reviewed the evidence and law in this matter, and renders its Memorandum Decision as follows:

1. The defendants' title to the underlying property in question, even with the claimed Michigan Trust Company gap, is superior to the title line claimed by the plaintiffs. The defendants' title is traceable to the patent of the United States Government. Plaintiffs' title is insufficient in description and continuity. The plaintiff does not have title to the underlying property. Plaintiffs' title, if any, was to the house or improvements on the underlying property.

2. The underlying property in question was owned by the mining company, who allowed certain miners to build houses on the said property. Summit County assessed taxes against the underlying property separately from against the improvements thereon. If the owner of the improvements (house) failed to pay taxes, legal process eventually led to a tax sale only as to that improvement. Anyone who purchased at the tax sale acquired only that property that had been so assessed and levied against.

3. The various tax deeds did not give plaintiffs' predecessors more than they already had.

4. Plaintiffs' predecessors never paid taxes on the underlying property, but only on that which had been assessed against them, the improvements.

5. The defendants' predecessors paid all assessed taxes on the underlying property.

6. The plaintiffs' predecessors did not obtain the underlying property by adverse possession, since they never paid taxes on the same, and did not hold the same adversely against the true owner who did pay taxes on the said property.

7. The plaintiffs did not obtain the underlying property by adverse possession, since such cannot be had against a political subdivision of the State of Utah. In any case, they did not have possession for more than seven years before filing of the Complaint, they did not pay all assessed taxes on the property

in question, and their claims are barred by the statute of limitations.

8. For more than seven years prior to the filing of the Complaint, the property in question was not possessed by plaintiffs, rather it was abandoned. It was empty and open. It was in a state of deterioration. Those rare visits claimed by defendant did not constitute possession.

9. The tax deeds conveyed only the house and not the underlying property.

10. Prescriptive easement is not applicable, inasmuch as it applies only to use, and not to title claims to the fee simple.

11. The house which had been owned by plaintiffs' predecessors was removed or demolished by a third party, not a party to this legal action. Because the house was abandoned, open, and considered a nuisance, Park City demanded of owners to abate the same. On application for permit, Park City granted such permit allowing demolition of the house. Park City did not participate in destruction of the house, and cannot be liable thereof.

12. The granting of a demolition permit by Park City to a contractor, based on proper application, does not impose liability on Park City if the permit was wrongfully obtained or the work therein unlawfully performed.

13. Plaintiffs make no claim against the State of Utah for removal or destruction of the house.

14. Even if plaintiffs had established liability on a party hereto for destruction of the house in question, the evidence of such damage is insufficient for an award to be made. There was no evidence presented as to the value of this old building, and no finding could be made without gross speculation in regards thereto.

15. Furthermore, the plaintiffs' claims are barred by the Utah Governmental Immunity Act, Section 63-30-1, et seq. No notices of claim were filed within one year after the claim arose as required by that Act. The plaintiffs were aware of the destroyed building prior to Labor Day 1981. No notice of claim was ever filed against the State of Utah. Notice of claim was filed against Park City on September 20, 1982, more than one year after the plaintiffs learned of the destruction of the building. The very latest the claim could arise was at that time.

16. Title to the land in question is quieted in the defendants (State of Utah). Plaintiffs are not entitled to damages against these defendants.

Attorney for the defendant Park City will prepare the appropriate Findings of Fact, Conclusions of Law, and Judgment, and

submit the same to plaintiffs' attorney for approval as to form before submitting them to the Court for final signature.

Dated this 22 day of May, 1987.

151 Leonard H. Russon
LEONARD H. RUSSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this _____ day of May, 1987:

Robert Felton
Attorney for Plaintiffs
5 Triad Center, Suite 585
Salt Lake City, Utah 84180

J. Craig Smith
James W. Carter
Attorneys for Defendant Park City
445 Marsac Avenue
P.O. Box 1480
Park City, Utah 84060

Allen Backman
Assistant Attorney General
236 State Capitol
Salt Lake City, Ut 84114

for Defendant State of Utah, and Robert Felton, Esq., for Plaintiffs, Velma Marchant, Leora Robinson, Wanda Penrod, Mona Liechty and Merle R. Anderson.

Evidence was received in the form of testimony, exhibit and stipulation, oral argument on the facts and law were made by respective counsel and legal memoranda were submitted.

Having given full consideration to the evidence admitted, the legal memoranda submitted, and the oral argument made, the Court having entered a Memorandum Decision and entered its Findings of Fact and Conclusions of Law does hereby Order, Adjudge and Decree as follows:

1. Plaintiff's Complaint, and each cause thereof, is dismissed with prejudice.

2. Fee ownership of the real property in question, which is particularly described as:

Beginning at a point which is North 407.38 feet West 41.39 feet of the Southwest corner of the Southeast one-quarter of the Northeast one-quarter Section 16, Township 2 South, Range 4 East, Salt Lake Base and Meridian thence North $36^{\circ}40'9''$ West 71.46 feet; thence North $57^{\circ}29'15''$ East 77.50 feet; thence South $18^{\circ}58'45''$ East 70.93 feet; thence South $55^{\circ}6'25''$ West 55.77 feet to the point of beginning.

is quieted in the State of Utah free of any interest, lien, easement, or encumbrance of Plaintiffs.

3. Each party is to bear its own attorney's fees and costs of court.

4. This is a final and appealable judgment.

DATED this 6 day of ^{July}~~June~~, 1987.

BY THE COURT

s/ Homer E. Wilkinson

Leonard H. Russon
District Court Judge

Approved as to Form:

J. Craig Smith, Esq.
Attorney for Defendant
Park City Municipal Corporation

Alan Bachman, Esq.
Attorney for Defendant
State of Utah

Robert Felton, Esq.
Attorney for Plaintiffs

FILED

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IN THE THIRD DISTRICT COURT OF
SUMMIT COUNTY, STATE OF UTAH

VELMA MARCHANT, et al.
Plaintiffs,

v.

PARK CITY, a municipal
corporation, JACK
COPPEDGE, and the STATE
OF UTAH,
Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Civil No. 7174

Honorable Leonard H. Russon

This matter came on regularly for Trial on May 6, 1987 before the Court, the Honorable Leonard H. Russon, District Judge presiding. The parties appeared through and were represented by their respective counsel, J. Craig Smith, Esq., Assistant City Attorney and James W. Carter, Esq., City Attorney for Defendant Park City Municipal Corporation, Alan Bachman, Esq., Assistant Attorney General for Defendant State of Utah and Robert Felton, Esq., for the Plaintiffs,

Velma Marchant, Leora Robinson, Wanda Penrod, Mona Liechty and Merle R. Anderson.

At the Trial the Court received evidence by way of testimony, exhibit and stipulation and heard argument by counsel representing the respective parties.

Having given full consideration to all of the testimony heard and evidence admitted and having reviewed the legal memoranda and heard the oral argument, and now being appraised as to all and singularly the law and the facts of the matter, the Court herewith makes and enters its:

FINDINGS OF FACT

1. The real property in question which was the subject of this action is described as follows:

Beginning at a point which is North 407.38 feet West 41.39 feet of the Southwest corner of the Southeast one-quarter of the Northeast one-quarter Section 16, Township 2 South, Range 4 East, Salt Lake Base and Meridian thence North 36°40'9" West 71.46 feet; thence North 57°29'15" East 77.50 feet; thence South 18°58'45" East 70.93 feet; thence South 55°6'25" West 55.77 feet to the point of beginning.

2. The chain of title through which Defendant State of Utah claims title to the real property in question is traceable to the patent derived from the United States Government.

3. The real property in question was previously owned by Silver King Coalition Mines Company. It was a common

practice for Silver King Coalition Mines Company to allow miners to construct houses on real property the Company owned.

4. Plaintiffs' predecessors in interest worked for Silver King Coalition Mines Company and were permitted to construct a house on the real property in question.

5. The underlying real property in question was assessed by Summit County separately from the house located thereon claimed by Plaintiffs.

6. Defendant's predecessors in interest paid all real property taxes assessed against the underlying real property in question.

7. Neither Plaintiffs nor their predecessors in interest paid any taxes on the underlying real property in question.

8. Plaintiffs did not have possession of the real property in question for a period in excess of seven years prior to filing their complaint; it was abandoned, empty and open and in a state of deterioration and was rarely visited by Plaintiffs.

9. The chain of title through which Plaintiffs claim title to the real property in question is discontinuous.

10. The tax deeds through which Plaintiffs claim title were given by Summit County pursuant to unpaid tax delinquencies on the improvements located on the underlying real property in question.

11. The house which had been owned by Plaintiffs' predecessors was removed or demolished by a third party, not a party to this action.

12. Because of the abandoned and deteriorated nature of the house on the property Park City granted a demolition permit for the demolition of the house, on proper application, to a third party claiming ownership of the house.

13. There was no evidence presented as to the value of the house and no finding as to the value can be made without gross speculation.

14. Plaintiffs were aware of the destruction of the house prior to September 7, 1981.

15. No notice of claim was ever filed by the Plaintiffs against Defendant State of Utah.

16. Notice of claim was filed against Defendant Park City on September 20, 1982, more than one year after the Plaintiffs learned of the destruction of the house.

CONCLUSIONS OF LAW

1. The chain of title through which the Defendant State of Utah claims title is superior to the chain of title through which Plaintiffs claim title.

2. Plaintiffs' claim to title by deed to the underlying real property in question, fails due to insufficient descriptions in the claimed deeds and a lack

of continuity of Plaintiffs' claimed chain of title. Plaintiffs' title, if any, was to the house or improvements located upon the real property in question.

3. The tax deeds under which Plaintiffs claim title to the real property conveyed improvements only and had no effect on title to the underlying real property in question.

4. The tax deeds under which Plaintiffs claim title to the underlying real property in question add nothing to the title of the Plaintiffs'.

5. Adverse possession cannot be had against Defendant Park City, a political subdivision of the State of Utah, or against Defendant State of Utah pursuant to Utah Code Annotated § 78-12-13, 1953 as amended.

6. Plaintiffs' claim of title to the real property in question by adverse possession and claim of easement by prescription are barred by the applicable statute of limitations pursuant to Utah Code Annotated § 78-12-5, 1953 as amended.

7. Plaintiffs' claim against the State of Utah is barred by Plaintiffs' failure to comply with the Utah Governmental Immunity Act, Utah Code Annotated § 63-30-1, et. seq.

8. Plaintiffs' claims against Defendant Park City Municipal Corporation are barred by Plaintiffs' failure to comply with the Utah Governmental Immunity Act, Utah Code Annotated § 63-30-1, et. seq.

9. Plaintiffs' claim of adverse possession of the real property in question fails, pursuant to Utah Code Annotated § 78-12-12, 1953 as amended, for failing to show payment of all taxes which have been levied and assessed upon the real property in question according to law.

10. Plaintiffs' claims of adverse possession of the real property in question and of prescriptive easement fail since possession by Plaintiffs' predecessors in interest was not adverse to the interests of Defendants' predecessors in interest.

11. Plaintiffs' claim of prescriptive easement to the entire area of the real property in question fails as inapplicable to the facts of the case and concerns only use rather than possession of or title to real property.

12. Defendant Park City is not liable to Plaintiffs for issuing a demolition permit, based on proper application, notwithstanding whether the permit was wrongfully obtained or the demolition work unlawfully performed.

13. Plaintiffs have stated no claim against the State of Utah for the destruction of the house.

14. Plaintiffs' complaint, and each cause thereof, should be dismissed with prejudice and title to the real property in question should be quieted in the State of Utah free and clear of any interest, lien, easement, or encumbrance by Plaintiffs.

15. Plaintiffs are not entitled to any damages against Defendants.

Wherefore, let judgment be entered in favor of the Defendants and against the Plaintiffs in accordance with these findings of fact and conclusions of law.

Dated this 6th day of June, 1987

By the Court

s/ Homer
Leonard H. Russon
District Court Judge

Approved as to form:

J. Craig Smith
J. Craig Smith, Esq.
Attorney for Defendant
Park City Municipal Corporation

Alan Bachman
Alan Bachman, Esq.
Attorney for Defendant
State of Utah

Robert Felton
Robert Felton, Esq.
Attorney for Plaintiffs

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the Findings of Fact and Conclusions of Law, and Judgment, postage prepaid, to the following individual on the ____th day of June, 1987:

Alan Bachman, Esq.
236 State Capital
Salt Lake City, Utah 84114

Robert M. Felton, Esq.
5 Triad Center, Suite 585
Salt Lake City, Utah 84180

AMENDMENTS
TO THE
CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF UTAH

ART. I, § 7

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

CHAPTER 30

GOVERNMENTAL IMMUNITY ACT

63-30-12. Claim against state or its employee — Time for filing notice.

A claim against the state or its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the claim arises, or before the expiration of any extension of time granted under Subsection 63-30-11(4).

PART III.
PLEADINGS, MOTIONS, AND ORDERS.

Rule 8. General rules of pleadings.

(c) **Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance of affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

Rule 12. Defenses and objections.

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject-matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

CHAPTER 12

LIMITATION OF ACTIONS

78-12-5. Seizure or possession within seven years necessary.

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.

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.

78-12-9. What constitutes adverse possession under written instrument.

For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

- (1) where it has been usually cultivated or improved.
- (2) where it has been protected by a substantial inclosure.
- (3) where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, for the purpose of husbandry, or for pasturage or for the ordinary use of the occupant.
- (4) where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining county is deemed to have been occupied for the same length of time as the part improved and cultivated.

78-12-10. Under claim not founded on written instrument or judgment.

Where it appears that there has been an actual continued occupation of land under claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

LIMITATION OF ACTIONS

78-12-11. What constitutes adverse possession not under written instrument.

For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only:

- (1) where it has been protected by a substantial inclosure.
- (2) where it has been usually cultivated or improved.
- (3) where labor or money has been expended upon dams, canals, embankments, aqueducts or otherwise for the purpose of irrigating such lands amounting to the sum of \$5 per acre.

78-12-13. Adverse possession of public streets or ways.

No person shall be allowed to acquire any right or title in or to any lands held by any town, city or county, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks or public squares, or for any other public purpose, by adverse possession thereof for any length of time whatsoever, unless it shall affirmatively appear that such town or city or county or the corporate authorities thereof have sold, or otherwise disposed of, and conveyed such real estate to a purchaser for a valuable consideration, and that for more than seven years subsequent to such conveyance the purchaser, his grantees or successors in interest, have been in the exclusive, continuous and adverse possession of such real estate; in which case an adverse title may be acquired.

78-12-12. Possession must be continuous, and taxes paid.

In no case shall adverse possession be considered established under the provisions 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.