

1988

William Averett and Marie A. Averett v. Utah County Drainage District No. 1 : Brief of Appellant

Utah Supreme Court

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CKET NO. 88-0239-CA IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM AVERETT and MARIE
A. AVERETT,

Plaintiffs-Appellants,

vs.

UTAH COUNTY DRAINAGE DISTRICT
NO. 1, a corporation,

Defendant-Respondent.

INTERMOUNTAIN POWER AGENCY,

Intervenor.

Case No. 86-0133

13-B

88-0239-CA

BRIEF OF APPELLANTS

Appeal from Judgment, February 6, 1985
Fourth Judicial District Court, Utah County
Honorable George E. Ballif, District Judge

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FILED

Clerk, Supreme

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STATEMENT OF ISSUES PRESENTED ON APPEAL

- I. THE DISTRICT COURT ERRONEOUSLY HELD THAT THE AVERETTS HAD NOT ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE THEIR ADVERSE POSSESSION.
- II. THE AVERETTS CAN ADVERSELY POSSESS THE DISPUTED PROPERTY WHICH WAS NOT HELD BY THE DRAINAGE DISTRICT FOR PUBLIC USE.

IN THE SUPREME COURT OF THE STATE OF UTAH

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A. AVERETT,

Plaintiffs-Appellants,

vs.

UTAH COUNTY DRAINAGE DISTRICT
NO. 1, a corporation,

Defendant-Respondent.

INTERMOUNTAIN POWER AGENCY,

Intervenor.

Case No. 86-0133

STATEMENT OF THE FACTS

Plaintiffs-Appellants, William and Marie Averett (Averetts hereinafter) appeal from an adverse judgment of the Fourth Judicial District Court of Utah County, The Honorable George E. Ballif, District Judge, dismissed the Averett's Complaint for adverse possession, no cause of action, quieted title in and to approximately two acres of farmland west of Springville, Utah County in the defendant-respondent Utah County Drainage District, (Drainage District hereinafter) No. 1, and awarded the Drainage District all funds tendered to the Court by the Intervenor, Intermountain Power Agency (IPA hereinafter).

On or about April 30, 1968, Averetts purchased property from Joseph C. and Naida R. Williamson receiving a Warranty Deed naming Marie Averett as sole grantee (R. 300-307). Averetts did not see or receive a copy of the deed until this cause of action arose (R. 306-446). The Warranty Deed described a rectangular

parcel of land west of Springville, Utah County, Utah, consisting of approximately 20 acres and enclosed by a fence (R. 306-307). The Warranty Deed excluded:

that portion of the above-described property sold to Utah County Drainage District No. 1, a corporation, by Warranty Deed dated July 31, 1934, executed by Chillian F. Packard and Phoebee S. Packard, his wife, recorded April 3, 1935, as Entry No. 3091, in Book 316, Page 50, records of Utah County, Utah. (R. 214).

Shortly after Averetts purchased the land, they sold the west half (R. 310) and retained the east 10.19 acres (R. 337, 346).

The property subject to this dispute is the area within the Averetts remaining 10.19 acres which was deeded by Chillian F. Packard to the Drainage District and excluded on the deed conveying the Williamsons' interest in the property to the Averetts. The disputed area is a 66 foot wide strip of land running from the southeast corner, within and adjacent to the east boundary and fence line of the Averett property to approximately 15 feet south of the northern border of the Averett property. From there the 66 foot wide strip runs west almost parallel with the northern boundary and fence line of the Averett property until the strip continues past the west boundary and fence line of the Averett property. (See defendant's Exhibit No. 11). The disputed property consists of approximately two acres (R. 374).

The Averetts and the Drainage District discovered the Drainage District's interest in the disputed strip when the IPA offered to purchase the entire 10.19 acres. The IPA, Averetts and the Drainage District stipulated to a price of \$30,000.00 for

the disputed parcel, such parcel being subject to the final disposition of this case. The IPA tendered the funds to the District Court and judgment was entered condemning the property in fee for the use and benefit of the IPA (R. 245-246). The IPA has subsequently constructed and is currently operating a coal rail car maintenance facility on the property.

A drainage ditch, which was constructed in 1919 or 1920, (R. 453-457, 473-474) was in place along the eastern strip of the disputed property. The ditch then turns west and runs between the Averetts' northern boundary and fence line and the northern strip of the disputed property. (See defendant's Exhibit No. 11).

The average width of the channel of water in the ditch is normally four to five feet unless the channel is blocked. Then it expands to approximately eight feet (R. 481-485, 494, 503). From the edge of the bank of the ditch to the water surface level measures approximately eight to ten feet (R. 372-373).

After purchasing the land in 1968, the existing fences surrounding the 10.19 acres, including the disputed property, were maintained by William Averett or neighboring property owners (R. 322-324). Those fences allowed Averetts to maintain a feed lot with up to 200 head of cattle on the property at various times of the year (R. 324-328, 447, 479, 531, 534). Although the adequacy of the fences from 1968 until this dispute arose is disputed by the Drainage District, (R. 491-492, 528-529, 533) the fence line was recognized as the outside perimeter of the Averett

property (R. 308, 322-324, 479-480, 512, 528-529, 533).

Inside the fence and partially on the disputed parcel, Averetts built a corral, loading chute, and shed (R. 315-317, 466, 479). Averetts also built a corn silage pit partially on the disputed parcel and excavated through the banks of the ditch in order to drain water out of the pit and into the ditch (R. 317-320, 466, 479). The exact size of the silage pit is disputed but evidence ranged from 100 feet by 40 feet (R. 321) to 25 feet by 50 feet (R. 532, 495). The Averetts never received any notice from the Drainage District or anyone else that they had invaded Drainage District property by building a corral, loading chute, shed and silage pit (R. 328). This is true even though Drainage District personnel saw the construction in the ditch and on the disputed parcel (R. 447, 459, 461, 479, 495).

The Averetts otherwise indicated their ownership claim in the disputed property by placing "NO TRESPASSING" and "NO HUNTING" signs on the gate and fences surrounding the property (R. 336). The Averetts also excluded trespassers when the occasion required (R. 336).

The Utah County Tax Assessment was based on the entire 10.19 acres, including the disputed property each year from 1968 until this dispute arose (R. 337-342, 449-450). Also, until this dispute arose, the Drainage District assessed its tax as authorized under Title 19 of the Utah Code Annotated at the rate of 50 cents per acre on the entire 10.19 acres, including the disputed property in which the Drainage District held fee title

(R. 418-425, 433-434). The Averetts always paid the taxes as assessed either by Utah County or the Drainage District (R. 345, 448).

The Drainage District was organized on November 4, 1918 as a Municipal Corporation under the predecessor to Title 19, Utah Code Annotated (R. 213). In 1919 or 1920, the Drainage District constructed the open drains including the drain on the disputed property from Utah Lake eastward into the fields (R. 454-455, 470-472). The Drainage District has a right of entry on lands for Drainage District purposes under Utah Code Annotated, Section 19-4-4. The Drainage District constructed the ditch on the disputed property under this statutory right of entry (R. 455) and continued to use and maintain the ditch under that right of entry until the disputed parcel was deeded to the Drainage District in 1934 by Chillian F. Packard and Phoebe S. Packard. (See defendant's Exhibit No. 17). Arthur C. Boyer was president of the Drainage District for approximately 30 years ending in 1982 (R. 470) and was predecessor to Raphael Palfreyman (R. 452).

During Mr. Boyer's presidency, he understood that the Drainage District had only an easement across the disputed property (R. 474-477, 495-496) and believed that all entry on the disputed land by Drainage District personnel was permissive (R. 475-477). Whenever Mr. Boyer entered the Averetts' property, he entered through a gate maintained by William Averett (R. 479). Mr. Boyer was unaware of any fee interest in land held by the

Drainage District until after the dispute arose (R. 479-480, 482, 495-496).

Mr. Palfreyman worked as a maintenance man for the Drainage District for four to five years prior to the time he became president (R. 451-452). As president and an employee of the Drainage District, Mr. Palfreyman understood and believed that his entry on the disputed property was under right of an easement (R. 460, 463, 467, 546-547) and was unaware of the Drainage District's fee interest in the property until this dispute arose (R. 461, 530-531). Mr. Craig Giles Crandall, secretary of the district at the time of trial and Mrs. Jesse Packard Condee, Mr. Giles' predecessor as secretary, were both unaware of the District's ownership of any real property until after this dispute arose (R. 429-430, 435).

Generally, the only method of maintaining the ditch was by walking along the ditch bottom with a shovel to remove debris (R. 458-459, 477). The Drainage District has not used heavy equipment to clean or maintain the ditch since its construction in 1919 or 1920 (R. 458). Only once or twice has a jeep or pick-up truck been taken on the disputed property with a load of rocks to be used to maintain the ditch (R. 481, 485).

Statements by Mr. Palfreyman as president of the Drainage District were that the Drainage District had no specific plans for the property owned (R. 461, 546). It was only after the IPA searched title and surveyed the property that the Drainage District became aware of its interest in the disputed property

(R. 430, 435, 460, 490). It was at this same time that the Averetts became aware that they did not own the interest in the disputed property (R. 188, 345). As part of the agreement with the Drainage District, the IPA agreed in its "Stipulation of Immediate Occupancy" to:

provide in its construction on the property for the irrigation and drainage facilities that presently exist on the property pursuant to the requirements and permits of Springville City.

5. Petitioner and Intervenor shall not during the course of modification or alteration of the irrigation and drainage facilities or during the course of construction of its other facilities, unduly or unreasonably interfere with the irrigation and drainage facilities and rights of defendant...

7. Defendant Utah County Drainage District No. 1, reserves to itself, and petitioner in intervention grant to defendant, Utah County Drainage District No. 1, an easement for purposes of maintenance of its drainage facilities. The location and description of said easement shall be as agreed by said parties..... (R. 64).

IPA has completed construction of a pipeline rerouting a portion of the ditch, granted an easement to the Drainage District in the area where the ditch runs and will maintain the ditch across its property (R. 462-463, 547).

SUMMARY OF THE ARGUMENT

The Averetts adversely possessed the approximately two acre disputed property based on their belief of ownership and not based on a written instrument. Therefore Section 78-12-10, Utah Code Annotated applied.

The Averetts purchased the farmland in 1968 unaware of the exclusion of the disputed parcel. From 1968 until 1983 they believed and acted as if the land were theirs. Both the Averetts

and Drainage District Personnel believed that the District maintained the drainage ditch across the Averett property pursuant to a statutory or prescriptive easement. Drainage District personnel were unaware of the District's fee interest in the property until the IPA agreed to purchase the land from the Averetts.

Under Section 78-12-10, Utah Code Annotated, the Averetts adversely possessed the land by continued occupation of the land under a claim of title. They excluded all others by placing "NO TRESPASSING" and "NO HUNTING" signs on the perimeter fences. Drainage District personnel always entered through the gates and did so on the mutual belief of a statutory right of entry granted in Utah Code Annotated 19-4-4 or the existence of an easement.

In Kouri v. Burnette, 416 P.2d 963 (Ok. 1966), Burnette adversely possessed land of a third party despite the private easement of ingress and egress Kouri had acquired. Kouri's use of the easement did not disturb Burnetts' exclusive possession of the property. In Stark v. Stanhope, 206 Kan. 428, 480 P.2d 72 (1971), Stark adversely possessed land held by a municipal corporation cemetery district subject to the Cemetery District's easement of ingress and egress to other cemetery property. The Court held that the use by Stark of the land for farming purposes was similar to other uses of land in the area and that the cemetery's use of the roadway for access to its other property did not interrupt the exclusive possession of the property by Stark.

The Averetts' use of the disputed property was similar to that of other property in the area while the Drainage District's use was believed to be an easement and is dissimilar to other properties in the area. Therefore, the Averetts' possession of the disputed property was exclusive and continuous as required in Section 78-12-10.

The Averetts also maintained the fences surrounding the property at the time of purchase and kept up to 175 or 200 head of cattle on the property at various times of the year. This satisfies the substantial inclosure requirement of Section 78-12-11(1), Utah Code Annotated.

The Averetts built a corral, loading chute, sheds and corn silage pit next to the ditch near the southwest corner of the acreage and partially on the disputed property. The IPA paid the Averetts \$27,000 for these improvements. Therefore, the improvement requirement of Section 78-12-11(2) was also satisfied.

Section 78-12-12 requires that all taxes assessed on the property be paid before adverse possession is found. In Utah Copper Company v. Chandler, 45 UT 85, 142 P. 1119 (1914), this Court held that if no taxes were lawfully assessed, then taxes need not be paid to adversely possess the property. In the instant case, the fee was held by the Drainage District which is generally not taxed on its property. However, Utah County taxed the Averetts for the two acres of the disputed property. Also the Drainage District itself taxed the Averetts on the two acres

in dispute. The Averetts paid all taxes assessed in a timely manner. If these taxes were not lawfully assessed, the Averetts did not need to pay those taxes under Utah Copper Company to comply with Section 78-12-12, Utah Code Annotated. If those taxes were properly assessed, then the Averetts paid the assessments thereby fulfilling the requirements of that section.

Because the Averetts continuously occupied the property under a claim of ownership for the requisite time period excluding all others, inclosed the property with a substantial inclosure, improved the property and paid all taxes assessed, they have adversely possessed the property.

The Drainage District did not hold the property for public purposes and therefore the Averetts' adverse possession is not barred by Utah Code Annotated, Section 78-12-13.

In Pioneer Investment and Trust Company v. Board of Education of Salt Lake City, 35 UT 1, 99 P. 150 (1909), this Court held that property on which the public use has been terminated, and the property held for sale is not held for a public use and can be adversely possessed.

The Drainage District in this case was unaware of its fee interest in the property for over 30 years just prior to this action. All its entries on the disputed property were based on a belief of an easement or statutory right of entry. The District president admitted that it had no plans for the land; that it was not necessary for the District to own land; and that the ownership of this land was not critical to the operation of the

District. The IPA has granted an easement to the District; constructed a pipeline for the water across the property; and agreed to maintain the ditch across the property. Therefore, the property is not necessary or held for a public use and the Averetts adverse possession is valid.

If it is determined that the ditch itself is a public purpose, then portions of the disputed property held by the District beyond that occupied by the ditch and used for access and maintenance is unnecessary for accomplishment of the District's public purpose. That excess is subject to adverse possession by the Averetts.

Defendant's Exhibit No. 11 shows that the ditch is less than half the width of the disputed property and that along the north end of the property, the ditch is almost entirely on the Averetts' property rather than on the disputed property. Therefore, the excess property can be adversely possessed by the Averetts and title should be quieted in them to such property.

ARGUMENT

POINT I

THE DISTRICT COURT ERRONEOUSLY HELD THAT THE AVERETTS HAD NOT ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE THEIR CLAIM TO THE SUBJECT PROPERTY BY ADVERSE POSSESSION.

The Averetts claim of ownership of the disputed property is based on adverse possession of the property for the requisite period under a claim of right rather than on a written instrument. Therefore, their adverse possession of the property is determined under Sections 78-12-10, 78-12-11 and 78-12-12 of

the Utah Code Annotated.

A. The Averetts Have Claimed Ownership and Occupied the Land Exclusive of Any Other Right.

Section 78-12-10 of the Utah Code Annotated states:

Where it appears that there has been an actual, continued occupation of land under a 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 be held adversely.

It was undisputed at trial that the Averetts occupied the entire 10.19 acre area within their fences, including the disputed property as owners of such property from the time of their purchase in 1968 through 1983 when this dispute arose (R. 307, 310, 312-313, 325, 336-337, 342-346, 447, 458-459). During the period of their possession, the Averetts held the disputed property "exclusive of any other right" even though the Drainage District had statutory right to enter the property to maintain the ditch under Utah Code Annotated, Section 19-4-4. In Kouri v. Burnett, 415 P.2d 963 (Ok. 1966), Burnett adversely possessed land held by third parties even though Kouri had an easement of ingress and egress to his own property. The Court said:

The circumstances that the defendant had a private easement over the strip did not weaken the exclusive character of plaintiff's possession to the extent that plaintiff would be precluded from acquiring prescriptive title to the strip of land. Id. at 968.

In Stark v. Stanhope, 206 Kan. 428, 480 P.2d 72 (1971), Stark adversely possessed land held by a cemetery district, which was a municipal corporation under Kansas law, even though the cemetery district used a road across the disputed parcel for

access to the cemetery. In that case the Court held that since the Starks' use of the land was the ordinary use to which other land similarly situated was used, the cemetery use of the property as a roadway was not sufficient to break the continuity of the Starks' exclusive possession and use of the remainder of the tract. Therefore the Court quieted title in Stark subject to the cemetery district's easement in the property.

In the instant case, the Averetts used the land as a feed lot which is similar to farming purposes in the area (R. 324-328, 447, 479, 531, 534). The Drainage District on the other hand, used the property in the form of an easement for its drainage ditch. Although there are other ditches in the vicinity which are maintained by the Drainage District (R. 212-213), the primary use of the land around the area is for farming and therefore the Drainage District's use of the land under its right of entry authorized by Section 19-4-4 of the Utah Code did not disturb the Averetts' exclusive and continuous possession of the land. Therefore, this Court, upon finding the other elements of adverse possession are satisfied, should quiet title to the subject property in the Averetts subject to the easement rights of the Utah County Drainage District.

B. The Averetts Protected the Land By a Substantial Inclosure and Improved the Land.

Section 78-12-11 of the Utah Code Annotated states:

For the purpose of continuing and 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 \$5.00 per acre.

Plaintiffs concede that they have not satisfied the third requirement of expending labor or money on dams, etc. and that the trial court's Finding of Fact No. 17 concerning that factor of adverse possession is correct. However, the statute is disjunctive and only one of the three requirements need be satisfied to establish title by adverse possession. Central Pacific Railway Company v. Tarpey, 51 Ut. 107, 168 P. 554 (1917).

1. The Averetts Protected the Property With a Substantial Inclosure

With respect to the first requirement that the property be protected by a substantial Inclosure, the trial court's Findings of Facts Nos. 20 through 23 are clearly erroneous. William Averett testified at trial that the entire property was fenced when he purchased it (R. 303-304, 357-358) and he fully believed that he was purchasing the property within the four fences (R. 307, 360). He testified that when he purchased the property the existing fence on the east side of the property, had been built by the railroad (R. 307-308). The fence on the north side of the property was in "less than desirable condition" so he constructed a new fence along the old fence line (R. 308). Shortly after the Averetts purchased the property, they sold the west ten acres to his neighbor on the south (R. 310) and together they built a new

fence to separate the properties (R. 312-313). That new fence and the fence on the south was always kept in "A-1 condition" by his neighbor (R. 313). Mr. Averett testified that he maintained the fences in order to keep his cattle in (R. 322-323) or that his neighbor to the south and west maintained the south and west fences (R. 323).

Although there is some discrepancy regarding how well maintained the fences were, (R. 359, 491-492, 524-527, 533) it was still recognized that the property within the four fences was the Averetts' property (R. 479-480, 495, 528-529, 533-534). Furthermore, from 1968 to 1983, William Averett maintained a cattle feed lot on the entire 10.19 acres within the fences (R. 324, 447, 478-479, 534) and had 175 to 200 cattle on the property at various times of the year (R. 325-328, 531). To further protect his property, William Averett put either "NO TRESPASSING" or "HUNTING BY PERMISSION" signs on the perimeter fences (R. 336).

The fences described above constitute a substantial inclosure satisfying Section 78-12-11(1) of the Utah Code and therefore the trial court's Findings of Fact Nos. 20-23 are erroneous and should be reversed.

2. The Averetts Improved the Disputed Property

The trial court properly found that the Averetts did not usually cultivate the disputed property as stated in Paragraph 18 of its Findings of Fact. However the Court's finding in Paragraph 19 that the Averetts failed to establish by a

preponderance of the evidence the size of the silage pit and the extent to which it existed on the disputed property is clearly erroneous. William Averett's testimony indicated that he built a corral, loading chute and shed (R. 315) on the property next to the ditch in the southeast corner of the Averett property partially on the disputed land (R. 315-317). The corral was constructed out of pine poles and was approximately 40 feet by 100 feet (R. 319). In 1973, Averetts built a silage pit on the edge of the ditch as it ran along the east boundary of the Averett property at a cost of \$3,700.00 (R. 317-318). The pit was four to six feet deep (R. 321). Although testimony varies, the silage pit was at least 20 feet by 50 feet (R. 321, 495, 532, 543). The silage pit drained its excess water into the ditch (R. 321) and during construction, the bank of the ditch was excavated to install a drain pipe from the silage pit (R. 466, 495). When IPA negotiated the price of the land and improvements with William Averett, they agreed to purchase the land for \$15,000.00 an acre, the silage pit for \$25,000.00 and the corral, loading chute and sheds for \$2,000.00 (R. 344-348).

These improvements valued at nearly as much as the two acres of disputed property were constructed next to the ditch and partially on the disputed property. Therefore, they satisfy the improvement requirement of Section 78-12-11(2) and the trial court's Findings of Fact No. 19 is clearly erroneous.

C. The Averetts Paid All Taxes Assessed By Utah County and The Drainage District on the Disputed Property Whether Or Not Those Assessments Were Lawful.

Section 78-12-12 of the Utah Code Annotated states:

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 a 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.

The trial court's Findings of Fact Nos. 14 and 15 state:

14. Utah County has not levied or assessed any real property taxes against the real property of defendant.
15. Plaintiffs have paid all the taxes which were levied and assessed against their property which adjoins the subject property. Said tax assessments included the subject property of the defendant.

From those Findings it can be said that the county has not assessed taxes to the Drainage District for any of its property, but Utah County has assessed taxes to the Averetts for the disputed property in which record title was in the Drainage District (R. 338). The Averetts have paid all taxes assessed to them by Utah County on the disputed property (R. 337-339, 341-342, 449). In addition, the Drainage District itself assessed taxes of 50 cents an acre on the entire 10.19 acres of the Averetts' property including the disputed property, these taxes also were timely paid by the Averetts (R. 338, 419-426).

In Utah Copper Company v. Chandler, 45 Ut. 85, 142 P. 1119 (1914), this Court held that an adverse possessor must pay all taxes lawfully levied and assessed against the premises claimed to obtain title therein.

If, however, no taxes were lawfully assessed or levied against the premises so claimed and occupied by them, they could acquire title by adverse possession without payment of taxes. Id. at 1120.

In the case at hand, the Averetts paid taxes on the disputed property levied by Utah County and the Drainage District even though those taxes were assessed unlawfully. Therefore, under Utah Copper Company, the Averetts were not required to pay taxes unlawfully assessed. Their payment of those unlawful taxes more than satisfies the requirements of Section 78-12-12.

POINT II

THE AVERETTS CAN ADVERSELY POSSESS THE DISPUTED PROPERTY WHICH WAS NOT HELD BY THE DRAINAGE DISTRICT FOR PUBLIC USE.

Section 78-12-13 states:

No person shall be allowed any right or title in or to any land held by any town, city or county or the corporate authorities thereof, designated for public use ... or for any other public purpose, by adverse possession thereof for any length of time whatsoever...

That section of the Utah Code Annotated prevents running of the statute of limitations for property held for public purposes by a municipal corporation. However, in Pioneer Investment and Trust Company v. Board of Education of Salt Lake City, 35 Ut. 1, 99 P. 150 (1909), this Court held that a similar predecessor statute applied "only to property which is devoted to a special public use." Id. at 153. In that case, the school board ceased using the disputed property for school purposes and held it for sale for ten to fifteen years prior to the actions giving rise to the case. The Court determined that the statute was not applicable because the property was not held for public purpose.

In Sisson v. Koelle, 10 Wash. App. 746, 520 P. 2d 1380 (1974), the trial court found that Clallam County, the Sissons

predecessor in interest, "had abandoned and forgotten about and had done nothing to sustain any title, or ownership or control of the land in questions." Id. at 1383. The Court of Appeals held that Koelle had adversely possessed the property against the county when the county never devoted, reserved or set apart the property for use as a public right of way or for any other public purpose.

In the case at hand, the Drainage District president, Mr. Boyer, who was president for 30 years up until 1982, was unaware that the Drainage District owned any property anywhere until he heard of the IPA desire to purchase the property (R. 482, 490, 496). During his years as president, Mr. Boyer always believed the Drainage District had an easement to access the ditch for maintenance purposes (R. 496). Mr. Palfreyman, president of the Drainage District from 1982 until trial (R. 451) and maintenance person for the Drainage District for four to five years prior to that time, (R. 452) was unaware of the fee interest until IPA notified him of its desire to purchase the disputed property (R. 460, 463-464, 466). Mr. Palfreyman always believed that he had a right or easement to enter the property (R. 452, 455, 460-462, 467). In addition, the last two secretaries of the Drainage District were also unaware of its fee interest in the property until after this dispute arose (R. 429-430, 434-435).

The Drainage District was organized in 1918 under the predecessor of Title 19 of the Utah Code Annotated. Under Section 19-4-4 of the Utah Code Annotated, Drainage District

personnel:

may go upon said lands with their servants, teams, tools, instruments, or other equipment, for the purpose of constructing [the drains], and may forever thereafter enter upon said lands, as aforesaid, for the purpose of maintaining or repairing such proposed works.

It is undisputed that the drain was built and constructed in 1919 or 1920 (R. 453-457, 473-474). From that date until 1934 when the Packards deeded the disputed property to the Drainage District, the District did not own the ditch as stated in Paragraph 11 of the trial courts Findings of Fact (R. 215). During that time the Drainage District had a statutory right of entry to construct and maintain the ditch across the land. Testimony indicated that it was never necessary for the Drainage District to own the land to accomplish its purpose either before or after the deed to the District had been granted (R. 452, 455, 461, 475-477). Statements by Mr. Palfreyman indicated that the Drainage District didn't need to own land (R. 464-465). Also, Mr. Palfreyman indicated that the disputed property was not necessary or critical to the operation of the Drainage District (R. 546-547) and that the District had no plans for the property (R. 461).

In its negotiation with the parties, IPA agreed to grant an easement to the Drainage District across the acquired property (R. 63-65, 462-464, 523-524).

In summary, the Drainage District operated for fourteen years from 1920 to 1934 under a statutory right of entry. In 1934, the District obtained fee title to the disputed property

but for at least 30 years prior to this action, Drainage District personnel were unaware that it owned the property. All entries on the disputed property during that time were under the statutory right of entry or a belief of the existence of an easement. The Drainage District remained unaware of its fee interest in the disputed property until the IPA attempted to purchase it. At that time the IPA agreed to pay either the Averetts or the Drainage District for the property as determined in this action, also the IPA granted an easement for the continued use of the property. From these circumstances, the trial court should have determined that the Drainage District did not hold the property for public purpose; that the plaintiffs adversely possessed the disputed property; and that Section 78-12-13 is not applicable in this case.

Alternatively, if the property where the ditch runs is determined to be held for a public purpose, the subject property exceeds that amount of property reasonably necessary for Drainage District purposes and the excess is not held for public purpose.

The water in the ditch ranges from four to eight feet wide (R. 330, 481-485, 494, 503). Expert testimony presented by the Drainage District indicated that the area that the ditch and banks occupied as it ran through the 10.19 acres of the Averetts' property was approximately one acre (R. 374-375). However, defendant's Exhibit No. 11 shows that the ditch and banks only lie on the subject property as the ditch runs from the southeast to the northeast corner of the 10.19 acres. From the northeast

corner to the northwest corner of the property, the ditch lies almost entirely on property to which the fee is held by the Averetts. The disputed strip of land is just south of the ditch as it runs across that end of the property (See defendant's Exhibit No. 11).

Also, since the ditch on the subject property was constructed, the ditch has been maintained generally by Drainage District personnel as they walk in the ditch to remove blockages and to dig out problem areas (R. 458-459, 488-489, 519-520). Drainage District personnel have used a pick-up or jeep to haul rocks in to the ditch but only on one or two occasions (R. 481-482, 486-487). Not since the ditch was constructed has the Drainage District used heavy equipment to maintain the ditch (R. 458-459, 529-530).

The width of the ditch and land necessary for its maintenance is much less than the 66 foot strip on which the ditch runs along on the east side of the Averett property along the northern side of the property, the ditch is almost entirely on the Averett property rather than the disputed parcel. Therefore, the excess land not necessary for maintaining the ditch along the east and the entire strip along the north should be quieted in the Averetts. Therefore, this Court should remand the case to establish the extent of the land occupied by the ditch and that reasonably necessary for maintenance thereof. Title should then be quieted in the Drainage District to that portion of the eastern strip of the disputed property as

reasonably necessary for Drainage District purposes. The remaining portion of the disputed property should be quieted in the Averetts.

CONCLUSION

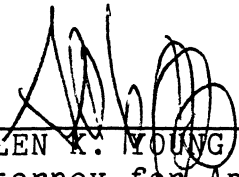
The Averetts purchased property enclosed by a fence less approximately two acres deeded in 1934 to the Drainage District which is the subject of this dispute. However, they believed they owned the entire 10.19 acres including the disputed property. For 15 years they treated the property as theirs by posting "NO TRESPASSING" and "NO HUNTING" signs on the perimeter fences. They allowed the Drainage District personnel to enter under a mutual belief of an easement or right of entry.

The perimeter fences were maintained and contained from 175 to 200 head of cattle. The Averetts also placed improvements on the property and paid all taxes assessed by Utah County and the Drainage District itself whether or not lawfully assessed. Therefore, the Averetts have adversely possessed the disputed property.

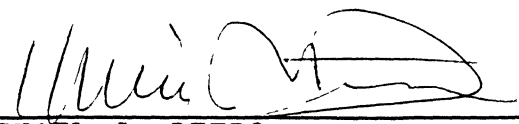
The Drainage District personnel were unaware of its interest in the property for over 30 years prior to this action. The District's president's belief was that the property was not critical to the operation of the District and all prior entry on the land was under a statutory right of entry or easement. Therefore, the property is not held for public use and may be adversely possessed. Therefore, title to the property, all or the portion which is found to be unnecessary to the public

purpose of the District, should be quieted in the Averetts.

Respectfully submitted this 6th day of February,
1987.




ALLEN K. YOUNG
Attorney for Appellant



MICHAEL J. PETRO
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered four true and correct copies of the foregoing Appellants' Brief to Mr. David D. Jeffs of Jeffs and Jeffs at 90 North 100 East, P. O. Box 683, Provo, Utah 84603 this 23 day of February, 1987.



MICHAEL J. PETRO

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM AVERETT and MARIE A. AVERETT,	:	
	:	
Plaintiffs-Appellants,	:	Case No. 86-0133
	:	
vs.	:	
	:	
UTAH COUNTY DRAINAGE DISTRICT NO. 1, a corporation,	:	
	:	
Defendant-Respondent.	:	
	:	
INTERMOUNTAIN POWER AGENCY,	:	
	:	
Intervenor.	:	

ADDENDUM TO BRIEF OF APPELLANTS

Appeal from Judgment, February 6, 1985
Fourth Judicial District Court, Utah County
Honorable George E. Ballif, District Judge

DAVID D. JEFFS, for:
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ALLEN K. YOUNG
YOUNG & KESTER
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ATTORNEY FOR RESPONDENTS

MICHAEL J. PETRO, for:
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ATTORNEYS FOR APPELLANTS

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OF UTAH

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IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

WILLIAM AVERETT and)	Case Number 65070
MARIE A. AVERETT,)	
Plaintiffs,)	
vs.)	DECISION
UTAH COUNTY DRAINAGE DISTRICT)	
NO. 1, a corporation,)	
Defendant.)	
INTERMOUNTAIN POWER AGENCY,)	
Intervenor.)	

In this matter the court finds the issues in favor of the defendant and against the plaintiff on plaintiff's complaint and the claim there alleged against Utah County Drainage District No. 1 alleging title by adverse possession of the subject property described as "DP408" as set forth in defendant's Exhibit No. 17.

The property in question having been conveyed by Chillian F. Packard and Phoebe S. Packard to Utah County Drainage District No. 1 by that deed dated July 31, A.D., 1934. The plaintiff having succeeded to an interest in the adjoining property pursuant to deed to them on April 30, 1968, from Joseph C. Williamson and Nada R. Williamson containing a "less that portion" clause deleting the property above referred to described in defendant's Exhibit No. 17 from the operation of the April 30 deed from Williamson to Averett.

It having been established by the evidence that the Utah County Drainage District No. 1 was created in accordance with the laws of the State of Utah wherein it was endowed with the powers and status of a municipal corporation, the property of which being exempt from real property taxation, and protected from being acquired by adverse possession, the findings with relation to the foregoing as set forth in the proposed findings of fact of defendant are hereby adopted and found to be consistent with the evidence, or lack thereof, presented to the court at the trial of this matter.

The court finds the issues in favor of the defendant and against the plaintiff on the counterclaim of defendant to quiet its title against any interest or claim of plaintiffs herein, and the court similarly adopts the findings of defendant's proposed findings of fact and the proposed judgment as the findings of the court. All is consistent with the evidence or lack of evidence presented at the trial.

The court will not sign or enter the findings of fact, conclusions of law and judgment as submitted by counsel for defendant until after the expiration of 10 days from the date hereof to allow plaintiff an opportunity to file whatever objection they may have to the decision of the court.

DATED at Provo, Utah, this 20 day of November, 1985.



GEORGE E. BAILLY, JUDGE

DAVID D. JEFFS
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FEB 6 1986

LC Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

WILLIAM AVERETT and
MARIE A. AVERETT,

Plaintiffs.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

vs.

UTAH COUNTY DRAINAGE DISTRICT
NO. 1, a corporation,

Defendant.

INTERMOUNTAIN POWER AGENCY,

Civil No. 65,070

Intervenor.

This matter came on duly and regularly to be heard on the 17th day of July, 1985, before the Honorable George E. Ballif, Judge, sitting without a jury upon the Complaint of plaintiff and the Counterclaim of defendant. The plaintiffs were present in Court and represented by their attorney, Allen K. Young. The defendant was present in Court and represented by its attorney, David D. Jeffs. The Court having heard the evidence and arguments of counsel, and being fully advised in the premises, now makes and enters the following:

FINDINGS OF FACT

1. Utah County Drainage District No. 1 (hereinafter defendant) was organized on November 4, 1918 as a drainage district under Title XIX and has existed since that date. The District as such is a municipal corporation.

2. During the years of 1919 through 1920, defendant commenced and completed construction of an open drainage district on the subject property.

3. On the 31st day of July, 1934, a deed from Chillian F. and Phoebe S. Packard was executed to Utah County Drainage District No. 1 which deed was recorded on April 3, 1935 as Entry No. 3091, Book 316, Page 50, on the Records of the Utah County Recorder.

4. The above described deed conveyed to defendant the property which is the subject matter of this dispute (herein subject property) and which is more particularly described as follows:

DP 408-ALSO BEGINNING at a point 1209' South 0°30' West and 385.44 feet North 88°30' West from the Northeast corner of Section 31, Township 7 South, Range 3 East, Salt Lake Base & Meridian; thence North 0°30' East 732 feet; thence North 88°30' West 1287 feet; thence West 0°30' East 480 feet; thence North 88°30' West 66 feet; thence South 0°30' West 515 feet; thence South 66°30' East 660 feet; thence South 0°30' West 27 feet; thence South 88°20' East 627 feet; thence South 0°30' West 627 feet; thence South 88°30' East 66 feet, to point of beginning containing 3.32 acres more or less.

5. The above described deed further conveyed to defendant a strip of land approximately 66 feet wide which ran generally north and west of the subject property to Utah Lake.

6. There is no evidence of the grant of an easement to defendant for construction of the open drainage ditch prior to the above described deed. The evidence fails to establish that defendant had acquired a prescriptive easement prior to delivery of the deed to defendant in 1934.

7. On the 30th day of April, 1968, Joseph C. Williamson and Naida R. Williamson conveyed a certain parcel of property encompassing the subject property to plaintiff, Marie A. Averett. Said deed was recorded May 1, 1968 as Entry No. 4291, Book 1109, Page 365 on the records of Utah County.

8. The said deed from Joseph C Williamson and Naida R. Williamson to Marie A. Averett contained the following exclusion:

LESS that portion of the above described property sold to Utah County Drainage District No. 1, a corporation by Warranty Deed dated July 31, 1934, executed by Chillian F. Packard and Phoebe S. Packard, his wife, recorded April 3, 1935, as Entry No. 3091, in Book 316, Page 50, records of Utah County, Utah.

9. The plaintiffs did not have actual knowledge of the ownership by defendant of the 66 foot wide strip of land including the subject property. Plaintiffs had constructive notice by the recording statute and the deed to their property of the ownership by defendant of the subject property.

10. There is no evidence that the officers and agents of the defendant who are alive had actual knowledge of the ownership of the subject property, although the recitation of \$100.00 consideration for the deed to the defendant in 1934 is evidence that prior officers and agents may have known of said ownership.

11. Since completion of the open drainage ditch in 1920, defendant has owned, used and maintained the open drainage ditch on the subject property.

12. Defendant has not intended to abandon nor has it abandoned any of the subject property. Defendant has not sold nor has it intended to sell any of the subject property prior to the time that Intermountain Power Association sought condemnation of the subject property.

13. The entire subject property was reasonably necessary for the use and maintenance of defendant's open drainage ditch.

14. Utah County has not levied or assessed any real property taxes against the real property of defendant.

15. Plaintiffs have paid all taxes which were levied and assessed against their property which adjoins the subject property. Said tax assessments included the subject property of the defendant.

16. Since defendant is a municipal corporation, its property is exempt from taxation. Any taxes levied and

assessed against its property, wheter assessed in the name of plaintiffs or otherwise, were unlawful.

17. Plaintiffs have not paid any amounts for dams, canals, embankments, aqueducts or otherwise for the purpose of irrigating the subject property amounting to the sum of \$5 per acre.

18. Plaintiffs have not usually cultivated the subject property.

19. Plaintiffs have improved a portion of the subject property by the construction of a sileage pit. Plaintiffs have failed to establish by a preponderance of the evidence the size of such such sileage pit and the extent to which it lies on the subject property.

20. Plaintiffs have protected by a substantial inclosure a portion of the subject property contained within the corral fence. Plaintiffs have failed to establish by a preponderance of the evidence the size of such corral and the extent to which such corral encloses the subject property.

21. The fence on the east of the subject property was constructed by the railroad. The fence on the north of the property was constructed by a Mr. Forbush.

22. Plaintiffs did not adequately maintain the fence on the east of the subject property nor the fence on the north of the subject property to the extent that animals were adequately confined or retained within the fences and as such the fences were not a substantial inclosure.

23. Plaintiffs have failed to establish by a preponderance of the evidence that they have protected the subject property by a substantial inclosure.

24. Any possession of the subject property by the plaintiffs was not exclusive in that other persons, including particularly the agents and employees of the defendant made use of the subject property. Further, any possession of the subject property by plaintiffs was not of sufficiently open, notorious, hostile and adverse nature as to bring such possession to the knowledge of the agents and employees of defendant.

25. Plaintiffs have failed to establish by a preponderance of the evidence all of the elements necessary to permit them to adversely possess the subject property.

26. Defendant assessed plaintiffs a drainage district assessment for the subject property in the amount of \$1.00 or \$1.50 per year for the years 1977 to 1983.

27. Any assessment by defendant is of such a minimal nature that defendant would not be estopped thereby to claim the subject property.

Based upon the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. Plaintiffs may not adversely possess the property of defendant held for public use.

2. All of the subject property constitutes property held for a public use by defendant.

3. Defendant has not abandoned or otherwise given up any claim to the subject property.

4. Defendant is not estopped to assert its rights to the subject property.

5. Plaintiffs have not established by a preponderance of the evidence their claim to the subject property by adverse possession. Plaintiffs' Complaint is dismissed, no cause of action.

6. Defendant is entitled to have the title to the subject property quieted to it free and clear of any and all claims of the plaintiffs by adverse possession or otherwise. The subject property is more particularly described as follows:

DP 408-ALSO BEGINNING at a point 1209' South 0°30' West and 385.44 feet North 88°30' West from the Northeast corner of Section 31, Township 7 South, Range 3 East, Salt Lake Base & Meridian; thence North 0°30' East 732 feet; thence North 88°30' West 1287 feet; thence West 0°30' East 480 feet; thence North 88°30' West 66 feet; thence South 0°30' West 515 feet; thence South 66°30' East 660 feet; thence South 0°30' West 27 feet; thence South 88°20' East 627 feet; thence South 0°30' West 627 feet; thence South 88°30' East 66 feet, to point of beginning containing 3.32 acres more or less.

7. Defendant is entitled to all funds tendered by Intermountain Power Agency.

Dated and signed this 6th day of February 1985.

BY THE COURT:

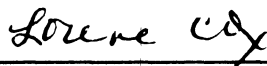

George E. Ballif, Judge

CERTIFICATE OF MAILING

I hereby certify that the original of the foregoing was mailed to the Clerk of the Court, Utah County, P. O. Box 49, Provo, Utah 84603, and a copy to the below named parties by placing same in the United States mails, postage prepaid, this 26th day of July, 1985, addressed as follows:

Allen K. Young, Esq.
Young, Harris & Carter
Attorney for Plaintiffs
350 East Center
Provo, Utah 84601

M. Byron Fisher, Esq.
Fabian & Clendenin
Attorneys for Intermountain Power Agency
800 Continental Bank Building
Salt Lake City, Utah 84101


Secretary

DAVID D. JEFFS
JEFFS AND JEFFS
Attorneys at Law, P.C.
Attorneys for Defendant
90 North 100 East
P. O. Box 683
Provo, Utah 84603
Telephone: (801) 373-8848

FEB 6 1986

LC Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

WILLIAM AVERETT and
MARIE A. AVERETT,

Plaintiffs,

J U D G M E N T

vs.

UTAH COUNTY DRAINAGE DISTRICT
NO. 1, a corporation,

Defendant.

INTERMOUNTAIN POWER AGENCY,

Civil No. 65,070

Intervenor.

_____/

This matter came on duly and regularly to be heard on the 17th day of July, 1985, before the Honorable George E. Ballif, Judge, sitting without a jury upon the Complaint of plaintiff and the Counterclaim of defendant. The plaintiffs were present in Court and represented by their attorney, Allen K. Young. The defendant was present in Court and represented by its attorney, David D. Jeffs. The Court having heard the evidence and arguments of counsel, and being fully advised in the premises, and having heretofore submitted its Findings of

Fact and Conclusions of Law, now makes and enters the following:

J U D G M E N T

1. Plaintiffs' Complaint for adverse possession of the following described real property is dismissed, no cause of action.

2. Defendant is quieted title in and to the following described real property free and clear of any claim of plaintiffs by adverse possession or otherwise:

DP 408-ALSO BEGINNING at a point 1209' South 0°30' West and 385.44 feet North 88°30' West from the Northeast corner of Section 31, Township 7 South, Range 3 East, Salt Lake Base & Meridian; thence North 0°30' East 732 feet; thence North 88°30' West 1287 feet; thence West 0°30' East 480 feet; thence North 88°30' West 66 feet; thence South 0°30' West 515 feet; thence South 66°30' East 660 feet; thence South 0°30' West 27 feet; thence South 88°20' East 627 feet; thence South 0°30' West 627 feet; thence South 88°30' East 66 feet, to point of beginning containing 3.32 acres more or less.

3. Defendant is awarded all funds tendered by Intermountain Power Agency.

Dated and signed this 6th day of February 1985.

BY THE COURT:


George E. Ballif, Judge

CERTIFICATE OF MAILING

I hereby certify that the original of the foregoing was mailed to the Clerk of the Court, Utah County, P. O. Box 49, Provo, Utah 84603, and a copy to the below named parties by placing same in the United States mails, postage prepaid, this 26th day of July, 1985, addressed as follows:

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350 East Center
Provo, Utah 84601

M. Byron Fisher, Esq.
Fabian & Clendenin
Attorneys for Intermountain Power Agency
800 Continental Bank Building
Salt Lake City, Utah 84101

Louise Co

Secretary

"Usually cultivated or improved."

Property located in city's business district, consisting of unimproved vacant lots covered with greasewood brush and irregularly depressed from about one to three feet below street level, was not "usually improved" within meaning of subd. (1) by slight leveling of small portion of the property which was not done to extent that was noticeable, by dumping of few loads of dirt thereon which did not change its appearance or enhance its usefulness as property upon which a business could be located, by weeding that was done in such manner that weeds soon flourished again, or by placing building upon the property a few months before institution of suit in question, preliminary work for its placement not having been done for statutory period, since property was not improved in manner usual to improve that kind and character of land for uses to which it could be put. *Day v. Steele*, 111 U. 481, 184 P. 2d 216.

"Usually improved."

In order for land to have been "usually improved" within meaning of subd. (1), changes made must have been of substan-

tial and permanent nature and of such type as would be suitable for use to which particular type of land was fitted, and changes must have been sufficient to apprise anyone that land was being used in manner in which an owner would so use it and not such as could be mistaken for mere occasional trespasses. *Day v. Steele*, 111 U. 481, 184 P. 2d 216.

Collateral References.

Adverse Possession § 14 et seq.
2 C.J.S. *Adverse Possession* § 88 et seq.
3 Am. Jur. 2d 188 et seq., *Adverse Possession* § 105 et seq.

Adverse possession: sufficiency, as regards continuity, of seasonal possession other than for agricultural or logging purposes, 24 A. L. R. 2d 632.

Grazing of livestock or gathering of natural crop as fulfilling traditional elements of adverse possession, 48 A. L. R. 3d 818.

Reputation as to ownership or claim as admissible on question of adverse possession, 40 A. L. R. 2d 770.

Tacking adverse possession of area not within description of deed or contract, 17 A. L. R. 2d 1128.

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.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-10.

Compiler's Notes.

This section is identical to former section 104-2-10 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Cross-References.

Marketable record title, 57-9-1 et seq.
Occupying claimants, 57-6-1 et seq.

Adjoining owners.

After twenty years' occupancy of land to fence bordering adjoining property, owner may maintain action to prevent encroachment of adjoining owner claiming certain land beyond fence. *Davis v. Lynham*, 67 U. 283, 247 P. 294.

Exclusiveness of statutory methods.

Statutory methods of acquiring title by adverse possession, set out in former sections 104-2-7 through 104-2-12, were

held to be exclusive. *Jenkins v. Morgan*, 113 U. 534, 196 P. 2d 871.

Record title.

Generally, where a person holds record title to one tract and also occupies an adjoining area adversely, his conveyance of the land to which he holds record title does not thereby transfer title to land held adversely. *Home Owners' Loan Corp. v. Dudley*, 105 U. 208, 141 P. 2d 160.

Collateral References.

Adverse Possession § 96.
2 C.J.S. *Adverse Possession* § 227.
3 Am. Jur. 2d 183 et seq., *Adverse Possession* § 100 et seq.

Adverse possession by donee under parol gift of land, 43 A. L. R. 2d 6.

Reputation as to ownership or claim as admissible on question of adverse possession, 40 A. L. R. 2d 770.

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.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-11.

Compiler's Notes.

This section is identical to former section 104-2-11 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Cross-References.

Marketable record title, 57-9-1 et seq.
Occupying claimants, 57-6-1 et seq.

Boundary by acquiescence.

Boundary by acquiescence is an equitable concept governed by the principles of equity. Each case is viewed in its own light and the establishment of boundaries is predicated usually, but not always, upon a period of twenty years or more of possession. It is unrealistic to use the period called for in the adverse possession statute. *King v. Fronk*, 14 U. (2d) 135, 378 P. 2d 893.

There is no boundary by acquiescence where owners of tract met with buyer and by use of a hand compass purported to locate the boundary line. *Hobson v. Panguitch Lake Corp.*, 530 P. 2d 792.

Construction of fence along erroneous boundary line does not constitute acquiescence of boundary where adjacent landowner nine years later had a survey made to establish the true boundary. *Hobson v. Panguitch Lake Corp.*, 530 P. 2d 792.

Evidence.

In an action to quiet title, where defendants proffered evidence that they had constructed a house and other buildings, that they had fenced the property in question, and that the house had been occupied as a summer house for more than seven years prior to the action, the trial court erred in not admitting the evidence of adverse possession. *Affleck v. Morgan*, 12 U. (2d) 200, 364 P. 2d 663.

Exclusiveness of statutory methods.

Statutory methods of acquiring title by adverse possession, set out in former sections 104-2-7 through 104-2-12, were held to be exclusive. *Jenkins v. Morgan*, 113 U. 534, 196 P. 2d 871.

One who claims title by adverse possession not founded on written instrument must bring himself within this section. *Jenkins v. Morgan*, 113 U. 534, 196 P. 2d 871.

Operation and effect of section.

The statute defining what shall constitute adverse possession is of the same degree of efficacy as is the statute of frauds. *Tripp v. Bagley*, 74 U. 57, 276 P. 912, 69 A. L. R. 1417.

Prescription.

Prescriptive rights to easement of way can arise only from use and enjoyment of way for period of twenty years. *Funk v. Anderson*, 22 U. 238, 61 P. 1006.

Water rights.

Water rights may be acquired by adverse possession, that is, by continued possession thereof for seven years. *Springville v. Fullmer*, 7 U. 450, 27 P. 577.

What constitutes adverse possession.

It is not a compliance with rule that possession of an adverse claimant must be continuous, exclusive, open, hostile, notorious, and of such a character as to enable owner to know of invasion of his rights, that he let vehicles stand on uninclosed and unoccupied ground of another, led or drove horses over it, and threw manure and rubbish on it. *D. H. Peery Estate v. Ford*, 46 U. 436, 151 P. 59.

Claimant could not succeed under this section even though his occupancy may have been open, notorious, peaceable, and under claim of right, without showing actual cultivation or improvement, or money expended for irrigation or an inclosure. *Central Pac. Ry. Co. v. Tarpey*, 51 U. 107, 168 P. 554, 1 A. L. R. 1319.

In view of federal statute entitling one to land patent who has been in possession of and working mining location for limitation period provided in state statute, one in possession for more than twenty years, continuously working and improving land for quarrying of limestone, cannot be deprived of possession because land was located as lode mining claim

when it was suitable only for placer mining, where another subsequently and surreptitiously located and filed placer claim covering land. *Springer v. Southern Pac. Co.*, 67 U. 590, 248 P. 819.

Defendants failed to establish occupation or possession of certain land within limits of requirements of this section, where only evidence of possession consisted of use by defendants of that land for grazing of their cattle, which use was not exclusive inasmuch as third person used the land for same purpose to knowledge of defendants without intervention or complaint on their part. *Jenkins v. Morgan*, 113 U. 534, 196 P. 2d 871.

Repairs and improvements made by cotenants in possession to dwellings, buildings and fences were insufficient to put other cotenants on notice that cotenants in possession were claiming title adversely to them, since such acts were normally consistent with tenancy in common and not adverse to it. *Sperry v. Tolley*, 114 U. 303, 199 P. 2d 542.

Maintenance of a fence, payment of taxes, and other evidence of possession and occupation for over twenty years were sufficient to establish ownership as against city's claim. *Gibbons v. Salt Lake City Corp.*, 6 U. (2d) 219, 810 P. 2d 513.

Collateral References.

Adverse Possession § 19-21.
2 C.J.S. Adverse Possession § 80 et seq.

3 Am. Jur. 2d § 7 et seq., Adverse Possession § 19 et seq.

Acquisition by user or prescription of right of way over uninclosed land, 46 A. L. R. 2d 1140.

Adverse possession based on encroachment of building or other structure, 2 A. L. R. 3d 1005.

Adverse possession involving ignorance or mistake as to boundaries—modern views, 80 A. L. R. 2d 1171.

Adverse possession of common, 9 A. L. R. 1373.

Adverse possession of railroad right of way, 50 A. L. R. 303.

Cutting of timber as adverse possession, 170 A. L. R. 887.

Grazing of livestock or gathering of natural crop as fulfilling traditional elements of adverse possession, 48 A. L. R. 3d 818.

Possession by widow after extinguishment of dower as adverse to heirs or their privies, 75 A. L. R. 147.

Reputation as to ownership or claim as admissible on question of adverse possession, 40 A. L. R. 2d 770.

Use by public as affecting acquisition by individual of right of way by prescription, 111 A. L. R. 221.

Use of property by public as affecting acquisition of title by adverse possession, 56 A. L. R. 3d 1182.

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.

History: L. 1951, ch. 58, § 1; O. 1943, Supp., 104-12-12.

Compiler's Notes.

This section is identical to former section 104-2-12 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3. Section 104-2-12 was amended by Laws 1951, ch. 19, § 1; that provision is compiled as 78-12-12.1 herein. The Supreme Court held the amendment was valid despite the repeal of section 104-2-12.

Cross-References.

Marketable record title, 57-9-1 et seq.
Occupying claimants, 57-6-1 et seq.
Tax sales, 59-10-29 et seq.

Acquisition of title in general.

Where claimant under claim of owner-

ship went into actual possession of certain lots which had been sold to county for unpaid taxes, and immediately thereafter fenced lots and commenced to improve them, subsequently receiving deed from county, held possession was adverse, from time of entry, as to all the world except county. *Welner v. Stearns*, 40 U. 185, 120 P. 490, Ann. Cas. 1914C, 1175.

Open, notorious and hostile use and possession of the property and payment of taxes thereon, all under claim of right, will constitute adverse possession. *Mansfield v. Neff*, 43 U. 258, 134 P. 1160.

Where defendant and his predecessors had been in actual, open, and adverse possession of land for statutory period, and for seven successive years had paid taxes thereon, and they were inclosed, occupied, and cultivated, title was ac-

tural or logging purposes, 24 A. L. R. 2d 632. **Law Reviews.**

Use of property by public as affecting acquisition of title by adverse possession, 56 A. L. R. 8d 1182.

Note, Boundaries by Agreement and Acquiescence in Utah, 1975 Utah L. Rev. 221.

78-12-12.1. Possession and payment of taxes — Proviso — Tax title. —

In no case shall adverse possession be established under the provisions 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 the taxes which have been levied and assessed upon such land according to law. Provided, however, that payment by the holder of a tax title to real property or his predecessors, of all the taxes levied and assessed upon such real property after the delinquent tax sale or transfer under which he claims for a period of not less than four years and for not less than one year after the effective date of this amendment, shall be sufficient to satisfy the requirements of this section in regard to the payment of taxes necessary to establish adverse possession.

History: R. S. 1896 & C. L. 1907, § 2866; C. L. 1917, § 6456; R. S. 1933 & C. 1943, 104-2-12; L. 1951, ch. 19, § 1.

Compiler's Notes.

This section reflects the amendment by Laws 1951, ch. 19, § 1 to section 104-2-12 (Code 1943). Although section 104-2-12 was repealed by Laws 1951, ch. 58, § 3, the Supreme Court held that chapter 19 was not repealed. (See *Hansen v. Morris* annotated under 78-12-5.1, *supra*.) Section 1 of ch. 58 enacted the successor to 104-2-12, now compiled as 78-12-12.

Repealing Clause.

Section 2 of Laws 1951, ch. 19 provided: "Sec. 104-2-5.10 as amended by chapter 19, Laws of Utah 1943 as amended by chapter 8, Laws of Utah 1947, is hereby repealed."

Cross-References.

Marketable record title, 57-9-1 et seq.
Occupying claimants, 57-6-1 et seq.
Tax sales, 59-10-29 et seq.

Payment of taxes.

Payment of taxes is a necessary require-

ment in order to establish adverse possession by a tax title claimant, and redemption from taxes cannot be considered as payment of taxes. *Lyman v. National Mtg. Bond Corp.*, 7 U. (2d) 123, 320 P. 2d 322.

Judgment was properly entered for defendants in a declaratory judgment action to determine rights of parties to realty possessed by defendants under tax deed where plaintiffs had not been in possession of the realty for more than twelve years prior to the bringing of the action and had not paid any taxes thereon since 1932 and defendants held possession under an apparent claim of right adversely to plaintiffs for more than seven years by grazing sheep thereon, the validity of the tax deed being immaterial. *Cope v. Bountiful Livestock Co.*, 13 U. (2d) 20, 368 P. 2d 68.

Collateral References.

Adverse Possession—79(4); Taxation—805(4).

2 C.J.S. Adverse Possession § 138; 85 C.J.S. Taxation §§ 984, 985.

3 Am. Jur. 2d 209 et seq., Adverse Possession § 124 et seq.

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.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-13.

Compiler's Notes.

This section is identical to former section 104-2-13 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Cross-References.

Disposal of unused rights of way, 27-12-97.

Highways continue until abandoned, 27-12-90.

Vacation of highways, 27-12-102 et seq.

Establishment of a holding by city.

The city must have some semblance of title, possession or right to use, and making a survey, destruction of a fence between the street and adjoining property, and verbal assertion of ownership by the city are not sufficient to establish a holding. *Gibbons v. Salt Lake City Corp.*, 6 U. (2d) 219, 310 P. 2d 513.

Estoppel.

There is no bar of the statute of limita-

tions against a city, in respect to a public street within its boundaries; the city may, however, be estopped by its affirmative acts to claim land as part of a street. *Wall v. Salt Lake City*, 50 U. 593, 168 P. 766.

Where city quitclaimed alley to private party in contravention of statute, for small consideration, and there was no evidence that property ever was assessed against grantee or his successors in interest, and time element was short and there was no replatting or change in whole neighborhood to benefit of all adjacent landowners, there was no ground for estoppel in pais as against city's right to quiet title as against parties holding under grantee of quitclaim deed. *Tooele City v. Elkington*, 100 U. 485, 116 P. 2d 406.

Collateral References.

Adverse Possession—§ 8(1), (2).
2 C.J.S. Adverse Possession § 14.
3 Am. Jur. 2d 300, Adverse Possession § 205.

78-12-14. Possession of tenant deemed possession of landlord.—When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of seven years from the termination of the tenancy, or, where there has been no written lease, until the expiration of seven years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord; but such presumption cannot be made after the periods herein limited.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-14.

Compiler's Notes.

This section is identical to former section 104-2-14 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Cross-References.

Landlord and tenant may be joined as parties, Rules of Civil Procedure, Rule 20(a).

Tenant does not hold under color of title against landlord, 57-6-4.

Nonresidents.

Under this section a nonresident guardian may maintain a possessory right for his ward, who is also a nonresident, through

an agent. *Hyndman v. Stowe*, 9 U. 23, 33 P. 227.

Scope and operation of section.

This section does not seem to be limited to parties actually residing within this state, nor does it establish a rule that where a party settles on the public domain, incloses a parcel of land for a farm, and makes valuable improvements thereon, with the bona fide intention of purchasing the same whenever a title could be procured from the government, he must be constantly present on such land. Actual occupancy may be evidenced by an inclosure, and maintained by an agent or tenant. *Hyndman v. Stowe*, 9 U. 23, 33 P. 227.