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VELMA MARCHANT, ELMA WINTERTON,
LEORA ROBINSON, WANDA PENROD,
MONA LICHTY, MERLE ANDERSON v. PARK
CITY, a Municipal Corporation, and THE STATE
OF UTAH : Brief of Defendants/Respondent

Utah Supreme Court

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IN THE UTAH SUPREME COURT

VELMA MARCHANT, ELMA)	
WINTERTON, LEORA ROBINSON,)	
WANDA PENROD, MONA LICHTY,)	
MERLE ANDERSON,)	
)	
Plaintiffs/Appellants,)	CASE NO. 890139
)	
v.)	Priority No. 14(b)
)	
PARK CITY, a Municipal Corpora-)	
tion, and THE STATE OF UTAH,)	
)	
Defendants/Respondents.)	

BRIEF OF DEFENDANTS/RESPONDENTS
PARK CITY MUNICIPAL CORPORATION and THE STATE OF UTAH

Appeal From a Decision of
The Utah Court of Appeals

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Utah Code Ann. §78-12-11

Utah Code Ann. §78-12-12 (1953 as Amended)

Utah Code Ann. §78-12-13 (1953 as Amended)

Rule 489, RUCS

Rule 48, URCP

JURISDICTION

Jurisdiction of this Court lies in Rule 48, RUSC, pursuant to the Court's grant of Plaintiffs' Petition for Writ of Certiorari on July 6, 1989. This Court is reviewing the decision of the Utah Court of Appeals. The Court of Appeals, Honorable Pamela Greenwood, Honorable Gregory Orme, and Honorable Richard Davidson sitting, in an opinion reported at 771 P.2d 677, (Utah App. 1989), unanimously affirmed the Judgment entered by the Trial Court, Third District of Summit County, Honorable Leonard Russon presiding, dismissing with prejudice Plaintiffs' Complaint and all causes of action brought thereunder following a trial on the merits.

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming the District Court's Ruling that Plaintiffs were barred by Utah Code Ann. §78-12-5 (1987).
2. Whether the Court of Appeals erred in affirming the District Court's ruling that Utah Code Ann. §78-12-5.1 (1987) was inapplicable.
3. Whether the Court of Appeals erred in affirming the District Court's ruling that Plaintiffs failed to show adverse possession.

4. Whether Plaintiffs properly asserted the Utah Marketable Record Title Act, Utah Code Ann. §57-9-1 through 10 (1976), and if so, is such Act applicable.
5. Whether the Court of Appeals erred in affirming the District Court's ruling that Plaintiffs' Claim for Prescriptive Easement was meritless.
6. Whether the Court of Appeals erred in affirming the District Court's ruling that Park City Municipal Corporation was not liable for the act of an independent third party destroying a shack.
7. Were Plaintiffs barred by failing to comply with the Utah Governmental Immunity Act §63-30-1 through 38, Utah Code Ann. (1989.)

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES & RULES

Utah Code Ann. §57-9-1 - 10 (1986)
Utah Code Ann. §57-9-3 (1953 as Amended)
Utah Code Ann. §78-12-5.1 (1987)
Utah Code Ann. §78-12-9(4) (1953)
Utah Code Ann. §78-12-10 (1954 as Amended)
Utah Code Ann. §78-12-11
Utah Code Ann. §78-12-12 (1953 as Amended)
Utah Code Ann. §78-12-13 (1953)
Rule 489, RUCS
Rule 48, URCP

STATEMENT OF THE CASE

This is a quiet title action to determine the ownership of a certain parcel of real property (hereinafter "subject property") located in Summit County, Utah. Plaintiffs Velma Marchant, et al., (hereinafter "Plaintiffs"), also seek damages for destruction of a shack on the property.

Plaintiffs claimed the subject property through a number of theories including superior title, adverse possession, prescriptive easement and boundary by acquiescence. Defendant State of Utah (hereinafter "State") claimed a superior title which had not been undermined by any of Plaintiffs' theories.

After a two-day trial the Court issued a five-page Memorandum Decision and thereafter entered a Judgment in accordance with its decision dismissing with prejudice all of Plaintiffs' claims to the property and their claim for damages.

The Plaintiffs appealed to this Court, but subsequently the appeal was transferred to the Utah Court of Appeals pursuant to Rule 4A, RUSC. The appeal was thereafter argued to the Court of Appeals. On March 13, 1989 the Court of Appeals announced its unanimous opinion affirming in total the Trial Court's ruling. The opinion of the Court of Appeals is published at 771 P.2d 677 (Utah App. 1989).

Plaintiffs then petitioned this Court for a Writ of Certiorari, which was granted on July 6, 1989.

STATEMENT OF RELEVANT FACTS

Plaintiffs' Brief misstates certain important facts and omits other material facts upon which the Trial Court based its Judgment and the Utah Court of Appeals based its decision affirming the Trial Court.

1. Abandonment of Subject Property.

The earliest fixed date of claimed use of the subject property by Plaintiffs' alleged predecessor was not until 1925. (TR. 29-30.) Any use of the subject property by any and all of Plaintiffs' alleged predecessors ceased and the property was abandoned by Plaintiffs in approximately 1964. (TR. 66-67.) Plaintiffs admitted to never possessing the property. (TR. 65-66.) During the eighteen-year period from 1964 until this action was brought in 1982, the property was not used or possessed by Plaintiffs or by anyone through whom they claim. (TR. 65-66.) Every witness who observed the property, including plaintiff Merle Anderson, testified as to the abandoned nature of the property, including the vacant and deteriorating shack with no windows and no door, the unkempt yard overgrown with weeds and no discernible use of the property during the entire eighteen-year period prior to the filing of the action by Plaintiffs. (TR. 66-67, 109-110, 217-218, Vol. 2, p. 6.)

The testimony of Building Inspector Ron Ivie, who inspected the shack on the subject property in 1981, is that the shack appeared to be abandoned and open without windows or doors and there was no sign of any repair or rehabilitation of the shack. (TR. 109-110, 118.)

Plaintiffs' claim of use of the subject property, after 1964, by their own admission, consisted primarily of a single annual visit to the property which was uninhabited and unused. (TR. 65-69.)

2. Payment of Taxes on Subject Property by State's Predecessors.

According to the records of Summit County and the testimony of Deputy Summit County Assessor Steven Martin, the earliest record of payment of property taxes on the subject property was 1931. (TR. 208, Ex. 43.) From 1931 to 1969 taxes for the subject property were assessed to predecessors in the State's Chain of Title, and were paid every single year. (TR. 203-206, Ex. 43.) From 1969 to the trial in 1986, the property was tax exempt because it was owned by Park City and then the State. (TR. 206, Ex. 43.)

This testimony and records of Summit County were corroborated by Edwin L. Osika, Vice President and Secretary-Treasurer of United Park City Mines Company, the state's predecessor and the owner of the subject property from 1953 to 1969. (Ex. 32.) Mr. Osika presented proof of payment of real

property taxes on the subject property by United Park City Mines Company for each year from 1953 to 1969. (TR. 169-170, Ex. 35.)

3. Payment of Taxes by Plaintiffs or Their Predecessors.

While Plaintiffs maintained that their claimed predecessors had paid taxes on the subject property, Plaintiff Merle Anderson could only testify of payment for 1981 and one other year. (TR. 69-70.) Plaintiff Merle Anderson also admitted that she had no knowledge of any payment of taxes by the Plaintiffs or their claimed predecessors prior to 1966. (TR. 70.) No other Plaintiff or Witness testified regarding payment of taxes by Plaintiffs or their claimed predecessors.

Plaintiffs' claim of payment of taxes prior to 1966 is based solely on certain exhibits introduced at trial. One such Exhibit (Ex. 13) is a letter from then Summit County Treasurer Reed Pace to Charles Rolfe which states that "In the year 1955 you paid taxes of \$8.06 and in 1956 you paid taxes in the amount of \$7.33." However, no evidence was introduced as to what property Mr. Pace was referring in his letter. Mr. Pace testified at the trial that he did not remember what property he was referring to in the letter. (TR. 182.) The letter was addressed to Charles Rolfe, Oakley, Utah, (Ex. 13), and could be referring to any parcel of property in Park City.

The only other exhibits upon which Plaintiffs rely for payment of taxes are several deeds issued by Summit County. Two Quit Claim tax deeds were issued by Summit County in 1914 and 1917 (Exhibits 5 and 6), and a tax deed in 1963 (Exhibit 7). These deeds were issued subsequent to a tax sale. None of the deeds introduced by Plaintiffs contain a locatable description of any parcel of real property and were admitted solely under a Stipulation as to being authentic but not as to any relationship with the subject property. (TR. 31-32.) No seven-year period where plaintiffs or their predecessors paid taxes was identified and there is no other evidence of payment of taxes by plaintiffs or their claimed predecessors.

4. Documents Through Which Plaintiffs Claim Title.

1. A quit claim deed from Dan and Belle McPolin to Jesse McCarrell dated March 19, 1906 for "that certain one-story framed, three-room dwelling house situated on the easterly side of Silver Creek and about 100 feet easterly from the lumberyard of the Summit Lumber Company." (Ex. 4.)

2. A quit claim deed from Summit County to William Rolph dated June 10, 1914 for \$28.68 for "[i]mprovements East U.C. Tracks, Pack City, Utah." The quit claim deed states that the deed is "made from title secured from a tax sale in the year 1909 and by an Auditors deed to Summit County, dated May 1st, 1914." (Ex. 5.)

3. A quit claim deed from Summit County to William Rolfe dated June 21, 1917 for \$1.00 for "that certain frame dwelling house by Lumber Yard in Park City, Summit County, Utah, assessed to William Rolfe in the year 1912." (Ex. 6.)

4. A tax deed from Summit County to Charles Rolfe dated June 13, 1963 for "House in lumber yard,"

stating "[t]his conveyance is made in consideration of payment by the Grantee of the sum of \$12.53 delinquent taxes, penalties, interest and (Ex. 7.)

5. Extrinsic Evidence Regarding Plaintiffs' Deeds.

No evidence was introduced which would tie any of the deeds introduced by Plaintiffs to the subject property. Exhibits 4 - 7 were admitted into evidence under the Stipulation that they were authentic but that the Court would determine what, if anything, they conveyed. (TR. 31-32.)

Both Mr. Pace and Deputy Summit County Assessor Steven Martin testified that they had examined the records of Summit County dating back to the early 1900's (TR. 179-180) and that it was, and is, a common practice of Summit County to separately assess and tax real property and improvements constructed on real property if the improvements and real property were separately owned. (TR 179-180, 200-201.) Mr. Pace testified that if taxes became delinquent on the separately owned improvements, Summit County would treat the improvements the same as real property and conduct a tax sale and issue a tax deed to the improvements. (TR. 189-190.) If the improvements were not purchased at the tax sale Summit County would purchase the improvements later and issue a Quit Claim Deed to the improvements to a subsequent purchaser. (TR. 193-194.) The intent was to sell the improvements only and not disturb the ownership of the underlying real property. (TR. 182.)

Former Summit County Clerk/Auditor Reed Pace testified that the 1963 tax deed (Ex. 7) executed by him was a deed solely to improvements and not a deed to any underlying property (TR. 184-186), and that the grantee, Charles Rolfe, had purposely not paid taxes assessed against the same improvements in order to obtain a tax deed from Summit County to strengthen his claim of title. (TR. 183-184.)

6. State's Deeds and Chain of Title.

The Trial Court found and the Court of Appeals affirmed that the State had superior title based on the following chain of recorded deeds:

1. A patent from the United States government to George Snyder on April 5, 1882. (Ex. 27.)
2. A warranty deed from George Snyder to the Park City Smelting Company, dated November 14, 1883. (Ex. 28.)
3. An indenture deed from the Park City Smelting Company to Lewis H. Withey and Clay H. Hollister on September 21, 1912. The deed did not contain a metes and bounds description, but described the conveyed property as "all of the real property or rights or interest in real property belonging to the Park City Smelting Company and situated in the County of Summit, Utah." (Ex. 29.)
4. A deed from the executors of Lewis H. Withey's estate to Silver King Coalition Mines Company on November 5, 1926. The deed did not have a metes and bounds description, but conveyed "all the estate, right, title, interest, property, claim and demand

whatsoever of the said Lewis H. Withey . . .
(of) the property above described." (Ex.
30.)

5. A trustee's deed from Clay Hollister, Withey's tenant in common, to Silver King Coalition Mines on February 18, 1927. The deed did not contain a metes and bounds description but described the property as "all other real property or rights or interests in real property . . . belonging to Park City Smelting Company, and situated in the County of Summit, State of Utah." (Ex. 31.)
6. A deed from Silver King Coalition Mines Company to United Park City Mines Company, dated May 8, 1953. (Ex. 32.)
7. A deed from United Park City Mines Company to Park City, dated April 2, 1969. (Ex. 33.)
8. A deed from Park City to the State of Utah, dated June 7, 1982. (Ex. 34.)

The patent from the United States (Ex. 27) contains a legal description undisputedly encompassing the subject property (TR. 129-130.) (Ex. 25.) The conveyance from George Snyder to Park City Smelting (Ex. 28) likewise described a parcel of real property which contained the subject property. (TR. 131-132.) (Ex. 25.)

While the deed from Park City Smelting to Withey and Hollister (Ex. 29), and the deeds from Withey and Hollister to Silver King Coalition Mines Co. (Exs. 30 and 31) did not contain a metes and bounds description, they did have general grant clauses conveying all property owned by the grantor in Summit County. All other deeds in the state's chain of title (Exs. 32,

33 and 34) contain metes and bounds descriptions which include the subject property. (TR. 147, 149-150.) (Ex. 25.)

7. Demolition of Shack.

In 1981, Deer Valley Resort Company was installing a water line leading to its resort. In the water lines pathway were a number of derelict and abandoned buildings. Deer Valley's pipeline contractor, Lloyd Brothers Construction Company, applied for and received a demolition permit from Park City. (Ex. 38.) Lloyd Brothers' subcontractor then tore down the abandoned buildings, including the shack for which Plaintiffs claim damages. (TR. Vol. 2, 7-8.)

On its permit application, Deer Valley's Contractor, Lloyd Brothers, represented that it had authority from the owner to demolish those buildings (TR. 96), and Park City relied upon that representation in issuing the permit. (TR. 96.) Park City never ordered the destruction of the shack. (TR. 120-121.) Park City had no other involvement with the destruction of the shack.

SUMMARY OF ARGUMENT

Plaintiffs brought an action claiming their father and grandfather, both deceased, had gained title to the subject property. The theories under which Plaintiffs claimed were superior title, adverse possession, prescriptive easement and

boundary by acquiescence. Plaintiffs also claimed damages for destruction of a shack on the subject property.

At the trial, the State was able to prove an unbroken chain of title from the granting of a patent by the United States. This chain of title is superior to the claimed title of the Plaintiffs who rely on four disconnected Quit Claim deeds for their "chain" of title.

Plaintiffs' deeds fail to create any chain of title and are defective in failing to contain any locatable description. Additionally, three of the deeds purport to be from Summit County pursuant to tax sales. An examination of the law surrounding tax deeds reveals that one who had a duty to pay taxes cannot strengthen his title through nonpayment of taxes and receiving a tax deed. Alternatively, tax deeds cannot be a link in a chain of title, but create a new title. Therefore, the latest of the tax deeds, issued in 1963, either created a new title or added nothing, as did the other deeds from Summit County to Plaintiffs' title based on a 1906 Quit Claim deed. The 1906 deed is nothing more than a wild deed since it cannot be connected to any other grantee or grantor.

If the 1963 tax deed created a new title, this title is only to the improvements described in the deed, since the State's predecessors paid all taxes on the subject property from 1931 to 1969.

Plaintiffs' claim to the property by adverse possession also fails. Plaintiffs were unable to show any seven-year period where taxes were paid by them or their claimed predecessors. Also, the trial court, on evidence presented, found the use of the property to be permissive and not adverse.

Similarly, the prescriptive easement claim is an attempt to misuse the doctrine to obtain all of the attributes of title.

Finally, the evidence at trial clearly demonstrated that the shack was torn down by a third party acting independently and not the defendants.

ARGUMENT

POINT I

STATUTE OF LIMITATIONS BARS PLAINTIFFS

The District Court ruled and the Court of Appeals affirmed that Utah Code Ann. §78-12-5 (1987) barred Plaintiffs. This statute of limitation requires possession or seizure of real property within seven years in order to bring an action for recovery of the real property.

Plaintiffs' own witnesses testified that their claimed possession of the subject property ceased in 1964, more than 18 years prior to bringing the action. (TR. 66-67.) Similarly, the deeds by which Plaintiffs could claim seizure of the subject property fail to describe the subject property. (Ex. 4, 5, 6,

7.) No evidence was offered at the trial which tie Plaintiffs' deeds in any way to the subject property.

POINT II

PLAINTIFFS FAILED TO PROPERLY RAISE ANY STATUTE OF LIMITATIONS

Even assuming, arguendo, that deeds introduced by Plaintiffs relate in some way to the subject property, Plaintiffs' claim that §78-12-5.1, Utah Code Ann. (1987) bars the State is meritless.

At the outset it should be noted that Plaintiffs never pled §78-12-5.1 Utah Code Ann. (TR. 12-15), and never asserted it until arguing it at the conclusion of the trial. (TR. Vol. 2, p. 31.) Generally, failure to plead a statute of limitations pursuant to Rule 8, URCP, waives the statute, Staker v. Huntington Cleveland Irr. Co., 664 P.2d 1188 (Utah 1983). In circumstances where no responsive pleading is allowed, a slightly more liberal standard requiring the party asserting the statute must "do all he [can] to assert the statute" was adopted in Hansen v. Morris, 3 Utah 2d, 310 283 P.2d 884, 887 (1955). Under either standard, Plaintiffs failed to properly assert §78-12-5.1, Utah Code Ann. (1987) and have waived any reliance on §78-12-5.1, Utah Code Ann. (1987).

Even if Plaintiffs had properly raised the statute of limitation found in §78-12-5.1, it is inapplicable. Depending upon which deed fits Plaintiffs' purposes, Plaintiffs contend

that a 1914 Quit Claim Deed issued to William Rolfe after a tax sale, a 1917 Quit Claim Deed issued to William Rolfe after a tax sale, or a 1963 Tax Deed issued to Charles Rolfe evidences their "tax title" which is protected by §78-12-5.1, Utah Code Ann. (1987).

In addition to the fatal defects in each of these deeds which will be discussed below, there is an inherent flaw in an argument which contends that three separate "tax" deeds, all from Summit County, are all viable.

The Plaintiffs' claim that the muniments of their title are found in a 1906 Quit Claim Deed from Belle McPollum. (Ex. 4). This deed predates the three "tax" deeds from Summit County. If Plaintiff's predecessors had title under the 1906 deed from McPollum, obviously these predecessors had a duty to pay the property taxes. The issuance of tax deeds or Quit Claim deeds after a tax sale by Summit County in 1914, 1917 and 1963 evidence one of the following: (1) an attempt by these predecessors to misuse the property taxation and enforcement system to boot-strap themselves into a better title by failing to pay their taxes; or, (2) each successive tax deed created a new and distinct chain of title and the plaintiffs must claim title solely through the 1963 tax deed (Ex. 7), the last tax deed issued by Summit County. The 1917 deed, (Ex. 6), on its face states that the taxes had been previously assessed in 1912 to William Rolfe, the Grantee, 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, (Ex. 7), was issued. Mr. Rolfe purposely failed and refused to pay the taxes in order to obtain a tax deed to the house in the lumber yard. (TR. 183-184.) The purpose of such a strategy is obviously to strengthen a weak claim of title.

In Dillman v. Foster, 656 P.2d 974, 979 (Utah 1982), this 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." This Court in Dillman specifically held that one who purchases at a tax sale whose duty it was to pay those taxes gains nothing except the release of the lien for nonpayment of taxes. The Plaintiffs are urging this Court to overrule Dillman and rule that their claimed predecessors who failed to pay their taxes be rewarded with something more than the release of the county's lien. This Court has already rejected this spurious argument.

This Court in Dillman also refused to apply the special statute of limitations found in §78-12-5.1¹ to situations identical to the instant one. This Court observed that the policy behind this statute to give stability to tax titles should not be extended to one who has a duty to pay taxes and is simply

¹ The 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).

attempting to misuse the tax enforcement and collection system. The rule in Dillman prevents exactly the type of activity engaged in by Plaintiffs' claimed predecessors, of attempting to clothe themselves with a title, and a limitation on the attack of the title, by willfully failing to pay property taxes.

Alternatively, if the "tax title" deeds from Summit County are more than void attempts at bootstrapping a title by those having a duty to pay taxes, prohibited by Dillman, then the 1963 tax deed, (Ex. 7), created a new title. In Tuft v. Federal Leasing, 657 P.2d 1300 (Utah 1982) this Court affirmed the rule in Utah that a tax deed creates a new and paramount title and which totally destroys the prior title to the property. See also Dillman.

Assuming that the 1963 tax deed, (Ex. 7), created a "tax title," an examination of this "tax title" and whether it is entitled to protection from §78-12-5.1 Utah Code Ann. (1987) is in order.

First, if such a "tax title" were protected from question by §78-12-5.1, Utah Code Ann. (1987) the state and its predecessors would be denied their due process of law. 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 the Mennonite holding to an identical situation involving a statute of limitations, 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, were held and given at the turn of the century, is unknown. However, it was clearly established at the trial that State's predecessor and grantor, United Park City Mines Company, had no notice of any tax sale in 1963 which would affect its title (if it were to convey the underlying property) to the subject property since it paid property taxes without fail, on the subject property every single year from 1954 to 1969.

Second, even if the deeds through which Plaintiffs claim are shielded by virtue of Utah Code Ann. (1987), §78-12-5.1, the unassailable title is, at best, to improvements only since that is all Summit County had obtained and all that the deeds describe and convey. 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 in what is conveyed by the deed. All evidence at trial supported the prima facie presumption that Summit County only intended to convey improvements through the three deeds issued by it and not any real property, which Summit County had no title to anyway.

POINT III

PLAINTIFFS FAILED TO PROVE ADVERSE POSSESSION

Plaintiffs have misconstrued the case of Parkwest Village, Inc. v. Avise, 714 P.2d 1137 (Utah 1986) in asserting that the Trial and Appellate Court erred in dismissing their claim to the subject property by Adverse Possession under Utah Code Annotated §78-12-10, et seq. As will be discussed below, Avise is factually distinguishable and inapplicable.

In order to obtain the subject 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., (1987). 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 by this Court in United Park City Mines Co. v. Estate of Clegg, 727 P.2d 173 (Utah, 1987), where this 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 undisputed that a failure to comply precisely with the requirements of a single element of adverse possession causes the claim of adverse possession to 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 completely 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. . . ." ²

Prior to 1931, no evidence of payment of taxes on the subject property by anyone was available. Deputy Summit County Assessor Steven Martin was simply unable to locate records of

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

payment of taxes on the subject property prior to 1931. The two ancient 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. No evidence was offered 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' bald assertion claim that Mr. Rolfe paid all taxes between 1910 and 1931 is simply not supported by the record. During the pre-1931 period, there is no record of any tax payment by anyone. If Plaintiffs are attempting to rely on the consideration recited in the Quit Claim deeds, their reliance is misplaced. In Bowen v. Olsen, 2 Utah 2d 12, 168 P.2d 983 (1954), this Court ruled that redeeming property at a tax sale or purchasing property at a tax sale does not constitute the payment of taxes necessary to comply with the statutory requirement for adverse possession. Thus any redemption or purchase from Summit County by Plaintiffs' predecessors could not possibly satisfy the requirement that taxes be paid for a minimum of seven years by the party claiming adverse possession.³

From 1931 to 1969, the State's predecessors and not the Plaintiffs' predecessors paid all real property taxes on the

³ See also Aggelos v. Zella Mining Co., 107 P.2d 170 (Utah 1940), where the Supreme Court also held that redemption at a tax sale did not constitute payment of taxes required under adverse possession.

subject property. 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 one other year before 1982 and after 1966.

Thus, at trial Plaintiffs simply failed to meet their burden by failing to show payment of all taxes assessed for any seven year period, and thereby failed to meet the requirements of Utah Code Annotated, §78-12-12, 1953, as amended. In Neeley v. Kelsch, 600 F.2d 979, 982 (Utah 1979), this 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.

Similarly, Plaintiffs failed to carry their burden of proof and the trial Court and Utah Court of Appeals correctly so ruled on this factual issue.

Plaintiffs' heavy reliance on the opinion in Parkwest Village v. Avise, 714 P.2d 1137 (Utah 1986) is misplaced. In Avise, this Court recognized the Summit County practice of separately assessing and taxing improvements and real property. While the adverse possessor was able to show payment of taxes by

his predecessors for a period in excess of 23 years on the improvements, there was no evidence that taxes were even levied and assessed on the underlying real property prior to 1975. This Court ruled that until 1975 the adverse possessor's predecessors paid all taxes that were levied and assessed, since no other taxes were levied and assessed. Similarly, the successful adverse possessor in Royal Street Land Co. v. Reed, 739 P.2d 1104 (Utah 1987), paid all taxes assessed and levied on the surface estate or improvements for a seventeen-year period.

Conversely in the instant matter, the County records show assessment and levying of taxes on the underlying property from 1931 until the property became tax exempt in 1970. These taxes were paid every one of those years by the predecessors of the State. In order for Plaintiffs to be aided by the decision in Avisé, they must demonstrate payment of all taxes that were levied and assessed on the subject property for a seven-year period. There is no holding or suggestion in Avisé that the Adverse Possessor is relieved from his absolute statutory duty to prove payment of all taxes assessed for seven consecutive years.⁴

Clearly the failure by the Plaintiffs to identify and prove payment of all taxes levied and assessed for any seven year period precludes them from obtaining the subject property by adverse possession. Even if Plaintiff could prove payment of

⁴ Plaintiffs' citation of Affleck v. Morgan, 12 Utah 2d. 200, 364 P.2d 663 (1961), and Houghton v. Barton, 49 Utah 611, 165 P. 471 (1917) is not helpful to this Court since those cases are factually distinguishable.

taxes for the required seven year period on improvements, such payment period must coincide with a period when no other taxes were levied and assessed.

The purpose behind the statutory 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). The true owner does not obtain notice during the years the party claiming adverse possession does not pay the taxes with a hidden motive of purchase at a future tax sale. Additionally, 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.

B. Plaintiffs Did Not Possess the Subject Property.

The requirements for establishing 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.)

Plaintiffs, as adverse claimants without color of title, may establish possession only through the possessory activities found in Utah Code Annotated, §78-12-11 (1987). (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 enclosed, 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. Utah Code Ann., §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 of all witnesses at trial, upon which the Court ruled the property was abandoned by Plaintiffs, was that Plaintiffs neither lived in or rented the subject 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.

This 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 Utah Code Ann. §78-12-9 or §78-12-11. The adverse claimant need not occupy the land constantly in order

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

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

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, the subject property is residential in character. Therefore, the complete failure to occupy the property since 1964 constitutes something less than "sporadic" possession and destroys Plaintiffs' ability to claim ripening of adverse possession during this period.⁷

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 rights of the true owner."⁸ Since intent is generally unstated, it must be inferred from the possessory acts. The intent to claim title

⁷ Even if Plaintiffs could show possession of the subject property during the past 1964 period, the window of opportunity for adverse possession closed in 1969. In 1969 the subject property was obtained by Park City, a political subdivision of the State of Utah. Utah Code Ann. §78-122-13 (1986) prohibits property held by any city for a public purpose to be obtained by adverse possession.

⁸ Montgomery Adverse Possession of Land Titles in Utah, 3 Utah Law Review 294, at 309 (quoting Dignan v. Nelson, 72 P. 936, 937 (Utah 903)).

will be inferred "[w]henver the possession is of such a character that ownership may be inferred."⁹

In the instant matter, the testimony at trial was that it was a common practice of mining companies in Park City to permit miners to build homes on mining company property. (TR. 157.) The state's predecessors in interest, Silver King Coalition Mine Company (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.) Plaintiff Merle Anderson testified and Exhibit 15 showed that Plaintiff's father worked for Jim Ivers. (TR. 71.) It was also established at the trial that Jim Ivers was either president or owner of Silver King Coalition Mine Company. (TR. 175.) 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. Based on this evidence the trial court ruled and the Court of Appeals affirmed that the use of the subject property by Plaintiffs' claimed predecessor was permissive. Plaintiffs introduced no evidence that the use of the subject property by their claimed predecessor was adverse rather than permissive.

This Court should view the evidence in the light most favorable to the judgment of the trial court and the findings of the trial court should not be disturbed unless there is no

⁹ Montgomery at 309 (quoting Pioneer Investment & Trust Co. v. Board of Education, 99 P. 150,152 (Utah 1909)).

substantial record evidence to support them. Harline v. Campbell, 728 P.2d 980 (Utah 1926).

Once it is established a 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, Utah 2d 356 (1966), 412 P.2d 314 17, the shifting of the burden is enunciated. The Court reasoned that unless the person claiming adverse possession 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

COURT OF APPEALS PROPERTY AFFIRMED
THAT MARKETABLE RECORD TITLE ACT
DID NOT APPLY TO PLAINTIFF-APPLICANTS

Plaintiffs assert that the Marketable Record Title Act, Utah Code Ann. §57-9-1 through -10, insulates their "title" from challenge by Park City or the State of Utah. This is based upon a total misreading of the Marketable Record Title Act. In fact, said Act insulates the title that was obtained by Park City and conveyed to the State of Utah.

The Act required "an unbroken chain of title of record to any interest in land for forty years or more . . . ". §57-9-1,

Utah Code Ann. (1986). (Emphasis added.) An unbroken chain of title is defined in §57-9-1 as when the recorded conveyances relied upon 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.

Plaintiffs appear to be relying upon two instruments, one being a Quit Claim tax deed issued in 1914 and another being a Quit Claim tax deed issued in 1917. The 1914 deed was a Quit Claim deed resulting from a tax sale and conveyed "Improvements East U.C. Tracks, Park City, Utah. (Ex. 5). The 1917 deed had a different description of the improvements being "That certain frame dwelling house by Lumber Yard in Park City, Summit County, Utah, assessed to William Rolfe in the year 1912. (Ex. 6.)

Neither of these deeds conveyed the underlying real property, but only the improvements. The Marketable Record Title Act would offer no protection for the underlying real estate for this reason alone. The cases cited by Plaintiffs are "land" cases and are not analogous. For instance, in Baker v. Goodman, 57 Utah 379, 194 P.2d 117 (1920), a tax deed was found sufficient to give color of title. But the tax deed in that case was for "land" and is therefore not analogous to this case. Defendants do not contest that Plaintiffs' predecessors owned the improvements. The subject tax deeds cannot give color of title to property (the land) that is beyond the description of the tax

deeds. Therefore, the Baker case was improperly applied by the Plaintiffs.

The Plaintiffs cite Falcenaro Enterprises v. Valaley Investment Co., 16 Utah 2d 77, 395 P.2d 915 (1974), for the proposition that their tax deeds and possession provided actual notice. This is also absurd. The tax deeds only gave notice of an interest in improvements, not the underlying real property. The possession also was consistent with employee ownership of the improvements and a mining company owning the underlying property.

Not only do Plaintiffs fail to show compliance with the Marketable Record Title act by not having root deeds to the "land", but also fail to show "an unbroken chain of title" for at least forty years. There are no subsequent conveyances from William Rolfe to anyone else, including the Plaintiffs. Plaintiffs clearly cannot meet this requirement to invoke the Act. Additionally, there are recorded conveyances in the State's chain of title in 1926, 1927, 1953, 1969, and 1982, which purport to divest the Plaintiffs of any interest in the subject property. (Exs. 30, 31, 32, 33, 34.)

It is entirely fallacious for the Plaintiffs to be challenging the District Court decision and the affirming thereof by the Utah Court of Appeals by relying upon the Marketable Record Title Act, because the Act protects the title obtained by Park City and conveyed to the State of Utah.

The State's title is rooted in the patent issued by the United States Government on April 5, 1882, to George Snyder which

indisputably includes the subject property. (Ex. 25 and Ex. 27.) The patent on its face, indicates that it was duly recorded in the records of the Summit County Recorder.

On November 14, 1883, George Snyder conveyed, by Warranty Deed, a portion of the real property acquired by said patent, which also indisputably contains the subject property, to the Park City Smelting Company. (Ex. 25 and Ex. 28.) This deed was also recorded in the records of the Summit County Recorder. (Ex. 28.)

On November 21, 1912, the Park City Smelting Company conveyed title to all of their property in Summit County, by Indenture Deed, to Lewis H. Withey and Clay H. Hollister. (Ex. 29). This deed was also duly recorded in the records 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, Withey's interest to Silver King Coalition Mines Company. (Ex. 30.)

On February 5, 1927, Clay H. Hollister conveyed, by deed, to Silver King Coalition Mines Company. This deed was recorded in the records of the Summit County Recorder. (Ex. 31.)

At this point, the Marketable Record Title Act, having had forty years of record title already pass, protects the title of the State's predecessors. Section 57-9-3, Utah Code Annotated, 1953 as amended. Nevertheless, through a series of duly recorded

deeds, title passed from Silver King Coalition Mines Company to the State of Utah. (Exs. 32, 33, and 34.)

It is therefore the State that has the more than forty years of continuous record title which should be protected by the Act from the challenge of the Plaintiffs. The Act never intended to pass title beyond the description of the root deed. Therefore, the Utah Court of Appeals properly affirmed the trial court decision by not granting the Plaintiffs relief (ownership of the underlying property) under said Act.

POINT V

THE DOCTRINE OF PRESCRIPTIVE EASEMENT IS NOT AN ALTERNATIVE TO ADVERSE POSSESSION

Plaintiffs have claimed a prescriptive easement as the alter ego of adverse possession. Plaintiffs would have this Court rule that if a person seeking adverse possession fails to establish the elements for 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. This 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).¹⁰ 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.

The concept of "easement" clearly addresses use, as distinguished from occupation and enjoyment of land. While this 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. The Utah Court of Appeals recognized this distinction in its opinion in this matter and 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

¹⁰ See also United States v. O'Block, 788 F.2d 1433 (10th Cir. 1986).

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 these are always distinct from the occupation and enjoyment of the land itself. [Citations omitted.]

Transcontinental Oil Co. v. Emerson, 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.)¹¹

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.)¹² Plaintiffs claim the right to the exclusive use and

¹¹ The 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).

¹² 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).

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, 268 P.2d 983 (1954). If this Court adopts the application of Prescriptive easements urged by Plaintiffs, the requirement of payment of taxes in Utah Code Ann., §78-12-12 (1987), would be rendered meaningless.

The cases cited by Plaintiffs in support of their claim of prescriptive easement are all factually distinguishable and inapplicable to the instant matter.

POINT VI
PLAINTIFFS DEEDS ARE NULL AND VOID

Plaintiffs rely on four deeds through which they claimed title to the subject property. (Exhibits 4, 5, 6, and 7.) A common element of all of Plaintiffs' deeds is the complete absence of any locatable description of real property. The Trial Court specifically found and the Court of Appeals affirmed that all deeds upon which the Plaintiffs rely were void for lack of a description by which the property to be conveyed could be located or even identified. (Rec. 368.)

It is well-settled Utah law that "a deed must contain a sufficiently definite description to identify the property it conveys". Colman v. Butkovich, 556 P.2d 503, 305 (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 P.2d 1137 (Utah 1986), and Reed v. Alvey, 610 P.2d 1374 (Utah 1980), the descriptions in the Plaintiffs' deeds do not contain even a street address to identify any specific 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 improvements referred to in the plaintiffs deeds and the subject property.

The lack of any description in these deeds sufficient to locate or identify the property to be conveyed distinguishes these deeds from the deed in Colman. The use of commonly employed abbreviations in the legal description in the Colman deed 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 trial court was not able to make any such conclusion in the instant matter. The only testimony regarding Plaintiffs' deeds given at 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 could have assisted the Court in relating the deeds offered by Plaintiffs to any parcel of real property. With no parol evidence which would assist the Court in fixing the location of the ambiguous and uncertain descriptions in the deeds, the Court's only alternative was to rule that the deeds, upon which Plaintiffs rely, were void for lack of descriptions.

It should also be noted that in Utah deeds are held to a higher standard in contrast with other documents such as options. In Howard v. Howard, 12 Utah 2d 407, 367 P.2d 193, (1952), this Court held that a warranty deed was a nullity simply because the

deed's description failed to close on the fifth and sixth courses. The deeds on which the Plaintiffs' reply 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 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 fatally deficient.

The only party to the 1963 Deed, (Ex. 7), who testified is retired Summit County Auditor Reed Pace. Mr. Pace's testimony was that the deed he executed (Ex. 7) conveyed title only to the improvements described in the deed and not to any underlying real property. Mr. Pace further testified that he did not know the location of the improvements referred to in the deed he executed.

The Plaintiffs in the instant matter are asking this Court to 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 Plaintiffs' deeds 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.¹³ Additionally, Tax Deeds are routinely held to even higher standards of certainty of their description than inter-party deeds. The New Mexico Supreme Court in Brylinski v. Cooper, 624 P.2d 522 (New Mexico 1981), held that a description of a tax deed must describe the property to be conveyed. The Court refused to allow the use of extrinsic evidence to identify the property to be conveyed. The reason extrinsic evidence could not be used is that tax deeds must give notice to the foreclosed owner and the public of what particular property is being conveyed.¹⁴

POINT VII

THE STATE HOLDS SUPERIOR TITLE

If, arguendo, the Plaintiffs' deeds were valid, the chain of title through which the State claims the subject real property is still clearly the superior chain of title. Plaintiffs do not have a chain of title. The Plaintiffs' deeds are a series of quit claim deeds, and a tax deed from Summit County. There are

¹³ See 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.

¹⁴ See also Wingard v. Heinkel, 424 P.2d 1010 (Wash. 1967) and Yetter v. Gallatin County, 645 P.2d 941 (Mont. 1982).

no deeds from any of the Grantees to any one else, and none from any Grantee or Grantor to any of the Plaintiffs. There are simply four disconnected deeds upon which the Trial Court properly ruled and the Court of Appeals correctly affirmed that the chain of title of Plaintiffs was discontinuous. (Rec. 368.)

In contrast, the 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 this 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 proved 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." (Rec. at 336.)

The only expert title abstractor who testified at trial, Nick Butkovich, testified that State's chain of title was superior to Plaintiffs'. (TR. 156.)

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).

POINT VIII

TAXATION AND FORECLOSURE OF REAL ESTATE BY SUMMIT COUNTY AT BEST CONVEYED IMPROVEMENTS AND MAY BE VOID

The trial of this matter brought to light once again 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. This Court had previously encountered this practice in Parkwest Village v. Avise, 714 P.2d 1137 (Utah 1986).

Plaintiffs point out that Summit County was authorized pursuant to Section 2655, compiled laws of Utah, to sell Real Estate at Tax Sales. Real Estate is defined in Black's Law Dictionary, 5th Ed., 1979, to include improvements to real property. Therefore, Plaintiffs argument that real estate and real property are synonymous is not well founded. The practice of selling real estate, i.e., improvements, did not disturb the underlying real property.

However, even if Plaintiffs argument is then accepted, this practice of separately assessing improvements was illegal and ultra-vires, this Court cannot conclude that a tax deed issued by Summit County for improvements only passes title as well to the

underlying real property. Such a conclusion is prohibited by controlling constitutional law and this Court's prior rulings.

Rather than broadly constructing 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 P.2d 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.¹⁵

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 can only convey that property which was assessed and obtained for non-payment of taxes. In Webermier 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."

In Webermier, 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

¹⁵ See 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 1965).

issued by the County after tax sale, which purported to convey all mineral rights. The Court held that the deed only conveyed ownership 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 description of the tax deed. The Utah Court in Hayes v. Gibb, 110 Utah 54, 169 P.2d 731 (1946), held that only the interest that is properly assessed is sold at a tax sale.

At most, Plaintiffs' tax deed and quit claim deeds from Summit County conveyed only improvements, since that was the only ownership interest obtained by the County through tax foreclosure. Such deeds could not possibly disturb the separately owned and assessed 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 are void. Such illegal actions of Summit County absolutely cannot now be broadly construed to include the underlying real property.

In addition to the limitations and defects set forth above, the Plaintiffs' Quit Claim deeds, (Ex. 4, 5, 6), have additional legal limitations. 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 only the improvements

since that was all Summit County owned, and not the subject 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.¹⁶ Courts throughout the Nation have uniformly held that in order to divest an owner of his 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.¹⁷

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 describing only improvements to include the subject real property even though the then owner of the subject property, United Park City Mines Company, paid all real property taxes assessed and levied on the

¹⁶ Amendment Five, United States Constitution which is made applicable to actions of the State by the Fourteenth Amendment and Article 1, Section 1, Constitution of Utah.

¹⁷ See 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)

subject property both before and after the tax sale and obviously had no notice of or knowledge of any foreclosure affecting its ownership of the subject property.

The result urged by Plaintiffs would clearly deprive the owners of the underlying real property Due Process of Law.¹⁸

POINT IX

PARK CITY NOT LIABLE FOR DESTRUCTION OF SHACK

The evidence presented at trial was that Deer Valley Resort Company was constructing a water pipeline to its ski resort and engaged Lloyd Brothers Construction Company as its Contractor. There were several derelict and abandoned shacks which were in the path of the pipeline. Lloyd Brothers sought to demolish the shacks which were in its way. In Park City, as in most cities, a permit is required from the city to either construct or demolish a building.

These permits are issued to contractors upon the contractor's representation that he is authorized by the property owner to conduct the activity allowed in the permit. The permit does not require the contractor to act and simply expires if not acted upon within 180 days.

¹⁸ The Utah Court has also held that a purported sale for taxes when taxes were not delinquent was void and conveyed no interest whatsoever to purchasers in Mecham v. Mel-O-Tone Enterprises, Inc., 23 Utah 2d 403, 4364, P.2d 392 (1970).

Plaintiffs would misconstrue the purpose of governmental regulation of building activity. Building and demolition permits are required to regulate the construction industry and enforce safety codes and practices. The purpose of permits is not to determine whether the permittee is authorized by the owner. The true purpose was recognized by the New York Court of Appeals in its decision in Rolfe v. Village of Falconer, 467 N.E. 2d 517 (N.Y. 1984). In Rolfe, the Court held that the purpose of building permits was to assure compliance with pertinent construction laws. The issuance of such permits is not to protect owners from unauthorized contractors who wrongly represent to the village that they have authority to obtain the permit. The New York Court dismissed a claim that the municipality was responsible because it issued a permit for the acts of unauthorized contractors.

Similarly in the instant matter, the demolition permit is issued to assure compliance with Park City Ordinances, not to determine whether the permittee is authorized or to prevent unauthorized acts of contractors. Plaintiffs were made aware of the fact that Deer Valley's contractor and not Park City demolished the shack they claim. Plaintiffs chose to ignore this fact and simply failed to sue the responsible parties, Deer Valley Resort Company and Lloyd Brothers Construction. Plaintiffs' claim that Park City destroyed the shack is simply not supported by the record.

Finally, Plaintiffs' claim that the Trial Court erred in ruling that no believable evidence as to value of the shack was offered is also unfounded. Only one of the Plaintiffs attempted to place a value on the shack. After the Court had heard numerous witnesses testify as to the abandoned derelict and decrepit nature of the shack, it found such evidence as to value unbelievable and speculative.

The Trial Court is well within its prerogative to view the demeanor of witnesses and believe or disbelieve their testimony.

CONCLUSION

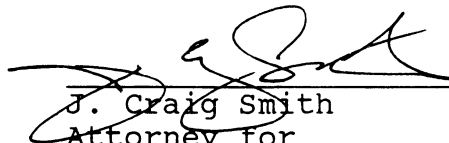
Notwithstanding the above issues raised by the Plaintiff-Appellants, there are other matters that the trial court decided and the Utah Court of Appeals affirmed which support the overall decision that title be quieted to the State of Utah. No notice of claim, as required by the Utah Governmental Immunity Act, Utah Code Annotated, §63-30-1, et. seq., was filed against the State of Utah. Therefore, the matter was dismissed as against the State, which was an indispensable party. With the State being dismissed as a party, and being indispensable to the quiet title case, there can be no successful claim of quieting title against Park City Municipal Corporation.

Plaintiffs are asserting ancient claims, which should have been asserted by their ancestors decades ago hoping to undermine the superior title of the State. Despite the difficulties

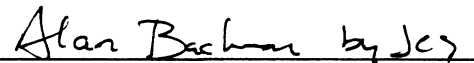
inherent in trying matters which occurred many years ago, the State was able to prove its superior title. Neither of the theories put forth by the Plaintiffs, adverse possession, or prescriptive, are viable, and this Court should affirm the trial court and the Court of Appeals.

Plaintiffs also failed to show that Park City destroyed the shack. In fact, it was proven at trial that an independent third-party destroyed the shack. This Cause of Action also failed at trial and on initial appeal, and this Court should affirm this ruling.

Respectfully submitted this 18th day of November, 1989.



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Corporation



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State of Utah

APPENDIX

struction of home on property. The District Court, Summit County, Leonard H. Russon, J., quieted title in the state and dismissed the complaint. Plaintiffs appealed. The Court of Appeals, Greenwood, J., held that: (1) plaintiffs failed to establish title to the property by deed; (2) tax deed statute of limitations was inapplicable; (3) plaintiffs failed to prove payment of taxes for seven-year period necessary to claim adverse possession; and (4) prescriptive easement to the property was not established.

Affirmed.

1. Appeal and Error ⇐842(2)

In reviewing the trial court's conclusions of law, the Court of Appeals applies a correction of error standard with no deference to the trial court.

2. Taxation ⇐726

Person who has duty to pay taxes cannot fail to pay taxes and subsequently purchase the land at tax sale and thereby attempt to strengthen his title to the property.

3. Taxation ⇐805(2)

One who has tax deed but does not hold title to the property cannot assert the special statute of limitations applicable to tax titles. U.C.A.1953, 78-12-5.1.

4. Adverse Possession ⇐80(2)

For adverse possession purposes, plaintiffs' predecessors at most received title only to improvements described in deeds and not underlying land where language in deeds described property as "that certain frame dwelling house by Lumber Yard" and "house in lumber yard"; title to real property by deed was not established as against the state even though the state's chain of title was flawed.

5. Taxation ⇐726

Quit claim deeds from county to plaintiffs' predecessor received after payment of delinquent taxes and tax deed did not



**Velma MARCHANT, Elma Winterton,
Leora Robinson, Wanda Penrod, Mona
Lichty, Merle Anderson, Plaintiffs and
Appellants,**

v.

**PARK CITY, a municipal corporation,
and the State of Utah, Defendants
and Respondents.**

No. 880131-CA.

Court of Appeals of Utah.

March 13, 1989.

Plaintiffs sued to quiet title to certain property and to recover damages for de-

strengthen predecessor's title to the property but merely indicated that he paid delinquent taxes on the property.

6. Taxation ¶805(2)

Tax deed statute of limitations did not apply against state's claim of ownership of real property where plaintiffs' predecessors received quit claim deeds from county on various dates after paying delinquent taxes and received a tax deed to the improvements. U.C.A.1953, 78-12-5.1.

7. Adverse Possession ¶95

Proponent of an adverse possession claim has the burden of proving full statutory compliance, including the payment of all taxes levied and assessed.

8. Adverse Possession ¶94

If party in possession of property and his predecessors have paid taxes based on value of improvements on the property and no taxes have been levied based on valuation of the land, party has established title to the property by adverse possession if all other elements of adverse possession are met.

9. Adverse Possession ¶95

Payment of taxes for seven-year period necessary for adverse possession was not proven by tax deeds and letter which indicated only that predecessor had paid delinquent taxes on personal property at various tax sales and that taxes were assessed but not paid during years plaintiffs claimed to have established title by adverse possession and evidence that predecessor paid taxes on improvements for three years during period in which state's predecessor in title paid real property taxes on underlying land. U.C.A.1953, 78-12-7.1.

10. Adverse Possession ¶94

Payment of delinquent taxes at a tax sale cannot be used to establish the payment of taxes necessary to a successful claim of adverse possession. U.C.A.1953, 78-12-7.1.

11. Easements ¶41

Prescriptive easement does not result in ownership but allows only use of property belonging to another for a limited purpose.

12. Easements ¶36(3)

Claimant of prescriptive easement has the burden of proving the necessary elements by clear and convincing evidence.

13. Appeal and Error ¶901

Appellants claiming prescriptive easement contrary to trial court findings were required to marshal all evidence supporting the trial court's findings and then to demonstrate that the evidence, when viewed most favorably to the trial court, was insufficient; appellants were required to marshal evidence which would support each element required to prove their claim of prescriptive easement.

14. Appeal and Error ¶756, 760(1)

Court of Appeals will not consider conclusory arguments without citation to either the record or cases involving pivotal issues.

15. Appeal and Error ¶173(9, 10)

Issues of laches and estoppel which were not raised in the trial court would not be considered on appeal.

Robert Felton, Salt Lake City, for plaintiffs-appellants.

J. Craig Smith, James W. Carter, Park City, for Park City.

Alan Bachman, Salt Lake City, for State.

OPINION

Before DAVIDSON, GREENWOOD
and ORME, JJ.

GREENWOOD, Judge:

Appellants challenge the trial court's ruling that they did not have vested title to certain real property in Park City and thus were not entitled to recover damages for destruction of the home on the property. Appellants claim that they have title to the property through adverse possession, deed or alternatively, that their use was prescriptive. Accordingly, they claim entitlement to \$20,000 in damages for the destruction of the residence on the property. We affirm.

In August of 1981, Park City issued a demolition permit to Deer Valley Resort to remove a building. The building was demolished by Lloyd Brothers Construction Company between August 4 and September 7 of 1981 allegedly to build an access road to Deer Valley Resort. Appellants brought this action seeking to quiet title to the real property and to recover damages for the destruction of the home located on the property.

According to appellants, their grandfather, William Rolfe, possessed the home and yard on the property from 1910 until his death in 1939. After his death, his wife continued to occupy the property until 1946. She died in about 1949. William Rolfe's son, Charles Rolfe, rented out the house from 1949 until about 1964. Charles Rolfe died in 1966 and his wife, Ethel Rolfe, died in 1981. Charles Rolfe's daughters, appellants, claim to have visited the property at least once a year since 1964. In support of their claim that they have vested title to the property, appellants rely on the following documents:

1. A quit claim deed from Dan and Belle McPolin to Jesse McCarrell dated March 19, 1906 for "that certain one-story framed, three-room dwelling house situated on the easterly side of Silver Creek and about 100 feet easterly from the lumberyard of the Summit Lumber Company."

2. A quit claim deed from Summit County to William Rolph [sic] dated June 10, 1914 for \$28.68 for "[i]mprovements East U.C. Tracks, Park City, Utah." The quit claim deed states that the deed is "made from title secured from a tax sale in the year 1909 and by an Auditors deed to Summit County, dated May 1st, 1914."

3. A quit claim deed from Summit County to William Rolfe dated June 21, 1917 for \$1.00 for "that certain frame dwelling house by Lumber Yard in Park City, Summit County, Utah, assessed to William Rolfe in the year 1912."

4. A letter from the Summit County Treasurer to Charles Rolfe dated May 16, 1957 stating that in 1938 the county issued a quit claim deed to Charles Rolfe's father. The letter also stated that from 1940 to

1954, taxes were taken care of by widows abatement and that Charles Rolfe paid taxes of \$8.06 in 1955 and \$7.33 in 1956.

5. A tax deed from Summit County to Charles Rolfe dated June 13, 1963 for "House in lumber yard," stating "[t]his conveyance is made in consideration of payment by the Grantee of the sum of \$12.53 delinquent taxes, penalties, interest and costs, constituting a charge against said real estate for the year 1958 in the sum of \$7.81."

The State of Utah claims chain of title through a series of documents, all of which were recorded, and all, except numbers 3, 4 and 5 below, contained a metes and bounds description of the property. The documents are as follows:

1. A patent from the United States government, undisputedly containing the property in question, to George Snyder on April 5, 1882.

2. A deed from George Snyder to the Park City Smelting Company, dated November 14, 1883.

3. A deed from the Park City Smelting Company to Lewis H. Withey and Clay H. Hollister on September 21, 1912. The deed did not contain a metes and bounds description, but described the conveyed property as "all of the real property or rights or interest in real property belonging to the Park City Smelting Company and situated in the County of Summit, Utah."

4. A deed from the executors of Lewis H. Withey's estate to Silver King Coalition Mines Company on November 5, 1926. The deed did not have a metes and bounds description, but conveyed "all the estate, right, title, interest, property, claim and demand whatsoever of the said Lewis H. Withey ... [of] the property above described."

5. A trustee's deed from Clay Hollister, Withey's tenant in common, to Silver King Coalition Mines on February 18, 1927. The deed did not contain a metes and bounds description but described the property as "all other real property or rights or interests in real property ... belonging to Park

City Smelting Company, and situated in the County of Summit, State of Utah."

6. A deed from Silver King Coalition Mines Company to United Park City Mines Company, dated May 8, 1953.

7. A deed from United Park City Mines Company to Park City, dated April 2, 1969.

8. A deed from Park City to the State of Utah, dated June 7, 1982.

There was no evidence that anyone other than William Rolfe paid taxes on the property until 1931. From 1931 to 1953, the real property in question was assessed as part of Silver King Coalition Mines Company. From 1954 to 1969, real property taxes were assessed to and paid by United Park City Mines.

The trial court found that appellants' chain of title was discontinuous and, at best, conveyed title to improvements on the property only. The court concluded that the State's claim to title of the property was superior to that of appellants and, therefore, quieted title in the State of Utah and dismissed appellants' complaint.

On appeal, appellants assert that: 1) the trial court erred in finding that they did not have vested title to the property by deed or adverse possession; 2) even if appellants do not have title to the property, they established prescriptive use; 3) respondents are barred from challenging appellants' tax title by the statute of limitations set forth in Utah Code Ann. § 78-12-5.1 (1987); and 4) respondents' claims are barred by laches and estoppel.

Vested Title

Appellants first claim on appeal that the trial court erred in concluding they did not have vested title to the property by deed. Appellants assert they obtained tax title to the property by virtue of the 1914 quit claim deed and the 1963 tax deed from Summit County, and any action challenging that title is barred by the four year statute of limitations set forth in Utah Code Ann. § 78-12-5.1 (1987). In addition, they claim title under the Marketable Record Title Act, Utah Code Ann. § 57-9-1 through -10 (1986), commencing with the 1917 quit

claim deed as the "root" of title. The trial court concluded that the tax deeds under which appellants claimed title did not convey title to the underlying real property.

[1-3] In reviewing the trial court's conclusions of law, we apply a correction of error standard with no deference to the trial court. *Creer v. Valley Bank and Trust Co.*, 770 P.2d 113 (1988). A person who has a duty to pay taxes cannot fail to pay taxes and subsequently purchase the land at a tax sale and thereby attempt to strengthen his title to the property. *Dillman v. Foster*, 656 P.2d 974, 979 (Utah 1982); *Crofts v. Johnson*, 6 Utah 2d 350, 313 P.2d 808, 810 (1957). In addition, one who has a tax deed but does not hold title to the property cannot assert the special statute of limitations contained in Utah Code Ann. § 78-12-5.1 (1987). *Dillman*, 656 P.2d at 978-79.

[4-6] In this case, there is no indication that William Rolfe was the record titleholder. Even assuming he received quit claim deeds from Summit County in 1914, 1917 and 1957 after paying delinquent taxes, we agree with the trial court that, at most, he received title to the improvements described in the deeds. The 1963 tax deed, similarly, conveyed only the improvements, not the underlying real property. Taxes at that time were apparently separately assessed on improvements and real property in Summit County, and the State's predecessor in title, United Park City Mines, paid real property taxes from 1954 to 1969. The deeds did not strengthen Rolfe's title to the property, but merely indicated that he paid delinquent taxes on the property. The State's title, on the other hand, while flawed, is clearly superior to that of appellants. Therefore, we hold that the trial court did not err in concluding that appellants failed to establish title to the property by deed and that the tax deed statute of limitations was inapplicable.

Adverse Possession

[7,8] Appellants' second assertion of error is that the trial court erred in finding that appellants did not have title to the property by adverse possession. The pro-

ponent of an adverse possession claim has the burden of proving full statutory compliance, including the payment of all taxes levied and assessed. *Neeley v. Kelsch*, 600 P.2d 979, 982 (Utah 1979). However, if a party in possession of property and his predecessors have paid taxes based on the value of improvements on the property and no taxes have been levied based on the valuation of the land, the party has established title to the property by adverse possession if all other elements of adverse possession are met. *Park West Village, Inc. v. Avise*, 714 P.2d 1137, 1140-41 (Utah 1986); see also *Royal Street Land Co. v. Reed*, 739 P.2d 1104, 1106 (Utah 1987).

In *Avise*, the trial court found that Mrs. Lake failed to acquire title to property because she failed to pay taxes on the property. The Utah Supreme Court reversed, stating that the trial court's finding that Mrs. Lake failed to pay taxes on the property was contrary to the evidence. The court noted that an employee of the Summit County Assessor's office testified at trial that he had searched the records in that office and could find no evidence that any taxes had been assessed on the land prior to 1975. The undisputed evidence established that Mrs. Lake received a tax notice every year and paid the tax that was levied. Although those taxes were based only on the value of the improvements on the property, the Utah Supreme Court held that because no other taxes were levied, Mrs. Lake had "paid all taxes levied and assessed" in accordance with Utah Code Ann. § 78-12-12 (1977). The court also noted that there was no evidence that there were any delinquent taxes owing on the land for the years prior to 1975 or that the land had been sold by the County for failure to pay taxes for those years.

[9,10] Appellants claim that this case is indistinguishable from *Avise*. We disagree. In *Avise*, unlike this case, Mrs. Lake established that she had paid taxes on the improvements to the property for twenty-three years. In this case, however, the only evidence that appellants' predecessors had paid taxes on the property for seven continuous years were quit claim and tax

deeds and a letter from Reed Pace to Charles Rolfe. There was no evidence that taxes were paid prior to delinquency. At best, the deeds and letter indicate that William Rolfe paid delinquent taxes on the personal property at various tax sales. Further, appellants established that Charles Rolfe paid taxes on improvements on the property in 1955, 1956 and 1958, but it was also proven that real property taxes were paid by Silver King Coalition Mines Company those same years. Thus, unlike *Avise*, appellants failed to prove that they paid taxes on the home or on the underlying land for a continuous seven year period. See Utah Code Ann. § 78-12-7.1 (1987). Payment of delinquent taxes at a tax sale cannot be used to establish the payment of taxes necessary to a successful claim of adverse possession. Otherwise, anyone purchasing property at a tax sale would be able to claim the number of years taxes had gone unpaid as a credit on the seven year period required for adverse possession. In addition, in contrast to *Avise*, the quit claim deeds themselves establish that taxes were assessed and not paid during the years appellants claim to have established title by adverse possession. Therefore, we hold that appellants failed to sustain their burden of proving payment of taxes for the requisite seven year period, and the trial court correctly concluded that appellants did not acquire the property by adverse possession.

Prescriptive Easement

[11-14] Appellants also assert that even if they do not have fee title to the property by adverse possession or chain of title, they have a prescriptive easement. Appellants are unclear as to what they claim flows from the alleged prescriptive easement. If they claim that a prescriptive easement, if established, would give them ownership rights in the underlying property, they err. See *Osborn & Caywood Ditch Co. v. Green*, 673 P.2d 380, 382 (Colo.Ct.App.1983). A prescriptive easement does not result in ownership, but allows only use of property belonging to another for a limited purpose. *North Union Canal Co. v. Newell*, 550 P.2d 178, 179

(Utah 1976). A prescriptive easement "arises under our common law from a use of the servient estate that is 'open, notorious, adverse, and continuous for a period of 20 years.'" *Crane v. Crane*, 683 P.2d 1062, 1064 (Utah 1984) (quoting *Jensen v. Brown*, 639 P.2d 150, 152 (Utah 1981)). The trial court concluded that appellants had not established a prescriptive easement.¹ A claimant of prescriptive easement must establish the necessary elements by clear and convincing evidence. *Garmond v. Kinney*, 91 N.M. 646, 579 P.2d 178, 178 (1978). Appellants not only had the burden of proof at trial, but on appeal are similarly required to marshal all evidence supporting the trial court's findings and then to demonstrate that the evidence, when viewed most favorably to the trial court, is insufficient. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). Appellants have not marshalled the evidence supporting the trial court's findings in connection with the issue of prescriptive easement. It further follows that on appeal, appellants are required to marshal evidence which would support each element required to prove their claim of prescriptive easement. For example, the trial court found that appellants' predecessors in interest worked for Silver King Coalition Mines Company, and were given permission by the company to build a house on the property in question. Appellants claim that this finding is not supported by the evidence but they do not provide other argument or reference to the trial record to establish that the use was "adverse," one of the required elements for prescriptive easement. Similarly, appellants have not compiled evidence which establishes the other necessary elements and have further failed to analyze what rights or claims to damages might flow from the alleged prescriptive easement. We will not consider conclusory arguments without citation to either the record or cases involving pivotal issues. *Randall v. Salvation Army*, 100 Nev. 466, 686 P.2d 241, 244 (1984). There-

fore, we find that appellants did not establish a prescriptive easement to the property.

Laches and Estoppel

[15] Finally, appellants assert that Park City is barred from claiming ownership of the property by laches and estoppel. Those issues were not raised in the trial court and, therefore, we decline to reach them. See *James v. Preston*, 746 P.2d 799, 801 (Utah Ct.App.1987).

Affirmed.

DAVIDSON and ORME, JJ., concur.



1. The court also concluded that the prescriptive easement claim was barred by Utah Code Ann. § 78-12-5 (1987). However, in *Morris v. Blunt*, 49 Utah 243, 161 P. 1127 (1916), the Utah Su-

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.

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

CERTIFICATE OF SERVICE

I hereby certify that on the 1 day of November, 1989,
four copies of the foregoing document were mailed, first class,
postage prepaid to:

Robert Felton, Esq.
310 South Main Street, Suite 1305
Salt Lake City, UT 84111

JCS.429

A handwritten signature in black ink, appearing to be "R. Felton", is written over a horizontal line.

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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 $36^{\circ}40'9''$ 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.

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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J. CRAIG SMITH, #4143
JAMES W. CARTER, #0586
Park City Municipal Corporation
445 Marsac Avenue
P.O. Box 1480
Park City, Utah 84060
Telephone: (801)649-9321

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.

JUDGMENT

Civil No. 7174

Honorable Leonard H. Russon

This matter came regularly for Trial on May 6, 1987 before the Court, the Honorable Leonard H. Russon presiding, the Trial concluded on May 7, 1987, after all parties had fully presented all evidence and argued their respective positions. 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 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°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.

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
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

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 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.

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 30

GOVERNMENTAL IMMUNITY ACT

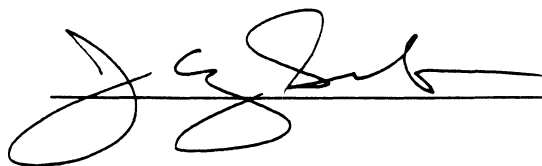
63-30-12. Claim against state or its employee — Time for filing notice.

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).

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November, 1989,
four copies of the foregoing document were mailed, first class,
postage prepaid to:

Robert Felton, Esq.
310 South Main Street, Suite 1305
Salt Lake City, UT 84111

A handwritten signature in dark ink, appearing to read 'Robert Felton', is written over a horizontal line.

JCS.429