1981

Margaret Dooly Olwell, Jane Dooly Gile, Walker Bank and Trust Company, and William H. Olwell, Trustees of a Testamentary Trust Created For and On Behalf of Bonnie Jane Gile, Eleanor Margaret Olwell, and Carol Jane Olwell, (or Their Heirs as Therein Respectively Named and as Their Interests Appear), Continental Bank and Trust Company, Trustee of A Testa-Mentary Trust Under The Will of John H. Dooly (or Heir or Heirs As Therein Named and As Their Interests Appear), and The Ruth Eleanor Bamberger and Ernest John Bamberger Memorial Foundation, a Charitable Corporation v. Thomas C. Clark, Luther I. Clark, E.

M. Clark, W. T. Gunter, Administrator, or John Doe, Successor Administrator or Representative of the Estate of Russell G. Schulder, Deceased, and Maude L. Schulder, Ann Schulder, Russell Graydon Schulder, His Heirs, and All Other Persons Known or Unknown Claiming An Interest In The Property, The Subject of This Action : Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

MARGARET DOOLY OLWELL, JANE DOOLY GILE, WALKER BANK AND TRUST COMPANY, AND WILLIAM H. OLWELL, TRUSTEES OF A TESTAMENTARY TRUST CREATED FOR AND ON BEHALF OF BONNIE JANE GILE, ELEANOR MARGARET OLWELL, AND CAROL JANE OLWELL, (OR THEIR HEIRS AS THEREIN RESPECTIVELY NAMED AND AS THEIR INTERESTS APPEAR), CONTINENTAL BANK AND TRUST COMPANY, TRUSTEE OF A TESTAMENTARY TRUST UNDER THE WILL OF JOHN E. DOOLY (OR HEIR OR HEIRS AS THEREIN NAMED AND AS THEIR INTERESTS APPEAR), AND THE RUTH ELEANOR BAMBERGER AND ERNEST JOHN BAMBERGER MEMORIAL FOUNDATION, A CHARITABLE CORPORATION,	:	
PLAINTIFFS AND RESPONDENTS:		
V.	:	NO. 17595
THOMAS A CLARK, LUTHER I. CLARK, E. M. CLARK, W. T. GUNTER, ADMINISTRATOR, OR RUSSELL GRAYDON SCHULDER, BY ORDER OF THE COURT, SUCCESSOR ADMINISTRATOR OR REPRESENTATIVE OF THE ESTATE OF RUSSELL G. SCHULDER, DECEASED, AND MAUDE L. SCHULDER, ANN SCHULDER, RUSSELL GRAYDON SCHULDER, HIS HEIRS, AND ALL OTHER PERSONS KNOWN OR UNKNOWN CLAIMING AN INTEREST IN THE PROPERTY, THE SUBJECT OF THIS ACTION,	:	
DEFENDANTS AND APPELLANTS.		

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BRIEF OF RESPONDENTS

IN THE SUPREME COURT

OF THE STATE OF UTAH

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* * * * * * *

BRIEF OF RESPONDENTS

BRIEF OF RESPONDENTS

Appeal from a Partial Summary Judgment of the District Court of Summit County, Utah. The Hon. David B. Dee, Presiding

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* * * * * * *

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is a partial judgment quieting title in Plaintiffs' to a one-sixth interest in two mining claims.

DISPOSITION IN LOWER COURT

The case was resolved by Summary Judgment on Plaintiffs' Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal and judgment in his favor as a matter of law or a new trial.

The Respondents seek affirmance of the judgment.

STATEMENT OF FACTS

The Appellant's statement of facts is accurate and fairly reported so far as they go. However, there are other material facts that Respondents wish to present to the Court.

Parenthetically, one statement made on page 8 of appellant's brief is accurate but possibly disarming, and might suggest that the Bamberger interests had not paid the taxes on the property, the subject of this 1/6 interest for the years 1974 through 1977, which is not the fact. The exhibit provoking Appellant's statement was Exhibit #9, an abstracter's certificate (R-89). Such certificate, with an attached chart, clearly shows that the taxes on the one-sixth interest were fully paid for each of said years, and any implication in Appellant's brief, pp. 8-9, to the effect that there may have been a "redemption," rather than "payment" of taxes would be without support in the record.

In addition to what is said in Appellant's brief, and without unnecessary repetition the following factual

background also appears from the record:

The original source of title to the mining claims involved here, was the U. S. Patent issued to the defendants Clark on July 12, 1909 (R-21 and Ex. P6) that created a tenancy in common for lack of language specifying otherwise, which, under Sec. 1973 of the 1907 Compiled Laws of Utah 1907 (now 57-1-5, U.C.A., 1953), created such tenancy.[1] The patent included the Virginia, Virginia #1, April and April Fraction claims.

Two years later, on July 31, 1911, the Clarks, by "Deed" (R-94) quitclaimed a one-third interest in only two of the claims, - the April and Virginia, - to Ernest Bamberger and Russell G. Schulder. Bamberger was a long time, well-known "mining man," and Schulder a practicing "lawyer." The former died in 1958, the latter in 1926, leaving estates. Schulder's estate was probated and is still pending, the present litigation having to do with the rights of the two grantees and their successors in the property deeded to them in July, 1911. The Administrator of Schulder's estate was W. T. Gunter, who died in 1932.

The Patent and Deed established three important facts:

1) That the subject property was "mining" property, primarily to develop minerals "for the use of the occupant" (one of the three purposes necessary for acquiring adverse title under Sec. 78-12-9, U.C.A., 1953);

2) That those instruments created a present and continuing possession right in the patentees (Clarks) and

1. D.&.R.G.R.R. v. S. L. Inv. Co., 35 Utah 528.

their successors, Bamberger, Schulder, et al., that would satisfy "possession requirements" necessary to establish adverse possession under "Sec. 78-12-7, Adverse Possession"; and

3) Furnished any of such patentees and their successors, any necessary "color of title" to establish title by adverse possession under Sec. 78-12-7, U.C.A., 1953 based on a "Written Instrument."[2]

The parties have stipulated that at least since 1938, the Bamberger interests have paid all taxes on the subject mining claims. This alone eliminates any necessity further to prove the tax payment requirements found in the adverse possession statutes, as well it should dispel any confusion mentioned above as to plaintiffs' pleading a cause of action based on a written instrument.

The history and rights of the defendants Clark are not actually germane to this, the remaining part of the litigation, since this Court already has quieted title in the plaintiffs to five-sixths of the interest asserted in the April and Virginia claims (R-64 and R-76). The only circumstances that may be of some interest here having reference to the Clarks, is that the tax "notices," since the 1911 "Deed" to Bamberger and Schulder, have been sent to Bamberger's office at 163 Main Street, Salt Lake City, Utah, which notices sometimes combined the Bamberger-Clark names

2. Respondents urge and argue, infra, that Appellant's contention in his Brief (R-172) that Respondents' claim is not founded on a written instrument, is without merit and must be the result either of failure to read or mis-reading of Respondents' Second Cause of Action (R-304) and other parts of the complaint, which see.

and other times were sent separately in the names of Bamberger-Clark and separately in the names of Bamberger-Schulder, which appears to be a procedure of the County Treasurer.

There has been no offer made by Russell G. Schulder, grantee and co-tenant in the 1911 deed, nor by W. T. Gunter, Administrator of Schulder's estate, nor by Russell Graydon Schulder, present Administrator of the estate, nor by anyone else since at least 1957 (Ex. P-4), nor by any of the Schulders or anyone else shown in the record or by the defendant, Russell Graydon Schulder, individually or as Administrator, to reimburse Ernest Bamberger or any of his successors, for taxes paid, expenses incurred or other expense incident to the preservation or operation of the claims.

Nor has any offer of reimbursement been made or tendered into court at any time during the pendency of this litigation before the appeal of this case.

There was but one time when the Bambergers' claim to the property was in dispute, and then only by way of Summit County's claim for non-payment of the taxes for the year 1942. On that occasion Bamberger, through his accountant, made objection to the County's claim to the property by reason of tax delinquency, who promptly advised the County Assessor and Treasurer (R-110) of a double assessment. The County acknowledged the error at a regularly called Commission meeting on Nov. 1, 1943, and the minutes reflect that the taxes had been paid timely by Ernest Bam-

berger. The Commission ordered that the double assessment be eliminated "without costs to Ernest Bamberger." (R-118). Such error on the part of the County does not even appear in the Abstract.

Contrary to what the Appellant contends and in spite of the obvious and extreme difficulty in obtaining evidence as to the history of a mining claim operation in rather remote areas extending over more than a half century span, the record is not devoid of facts showing preservation and maintenance of the claims as the Appellant would have this Court believe. The record reflects the location of the claims, proof of labor and assessment work by the Patent itself, together with evidence of some development or operational work, as reflected in the affidavit of a prominent lawyer and early participant in working on mining properties in the area, and specifically on Bamberger claims, who, as a young man, with his father, performed work on "claims owned by the Bamberger family," and that he is generally familiar with the claims owned by that family. (Ex. P.3).

Other prominent people having knowledge of the area, were acquainted with the Bamberger interests and dealt with them on an across the board basis, with the assumption that Bambergers were the sole and only owners of the claims, even to an extent of agreeing orally and in writing to settle boundaries between their contiguous claims and those of the Bambergers, as sole owners of their respective claims with no reference to the Clarks, Schulders or anyone else (Osika Dep. R-120; 138, 139; Communication, R-141; Affi-

davit, R-143; Affidavit, R-145).

The claims involved here were not listed in the Inventory of Russell G. Schulder's estate, by the latter's Administrator, W. T. Gunter, who, like Schulder, was a practicing lawyer; and there is nothing in the record to indicate by pleading or affidavit, that Schulder ever mentioned the claims or offered reimbursement, for taxes and expenses, nor was an accounting ever shown to have been requested by him or anyone else. The record does show, however, that five separate claims of interest in mining or other real property in several different counties (R-103) were listed, with no listing of the April and Virginia claims, the subject of this litigation.

The record clearly shows that there is nothing in the pleadings that specifically refutes or explains such failure to list or claim an interest in the claims, nor has a claim or supplementary inventory and appraisement requested or filed in Russell G. Schulder's estate. Nor is there any affidavit, or even unsworn document or answer to interrogatories shown in the record that is called for and required under 56(e) of the Rules, to refute material facts shown in the record in support of plaintiffs cause that might preclude summary judgment.[3]

To any suggestion appellant might make to the effect that the Bamberger interests have not laid any claim

3. Rule 56(e), entitled "Form of Affidavits; Further Testimony; Defense Required," says: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to the matters stated therein."

in the property involved here and claimed by the appellant, counsel for appellant have, in fairness, conceded that the abstract of title shows that in a Deed issued by the Trustee in the Estate of Eleanor F. Bamberger, he conveyed an undivided interest in "all" of the claims involved in the present suit, on July 25, 1962. Eleanor was the sole beneficiary of whatever Ernest had in such claims. The conveyance was eighteen years before the present suit was filed, well in excess of the seven year adverse title requirements. It is significant that the record shows that all taxes were paid on the claims involved here, the claims were possessed since that time, and the operation of the Trustee's Deed obviously was a "hostile" act reflecting both an intention to adverse, and by its recordation, a notice to any party claiming an interest in the property, including the Schulders.

ARGUMENT

I

THE TRIAL COURT CORRECTLY DETERMINED THAT THERE WAS NO GENUINE ISSUE OF FACT TO RESOLVE.

Rule 56(e), that implements Rule 56(c), U.R.C.P. 1953,[4] sets forth the procedure to determine whether a Summary Judgment is appropriate and reads as follows:

4. "(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

> "(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgent is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The Answer filed by the appellant is not under oath, and even if it were it is simply a general denial, accompanied by two "affirmative" unverified defenses saying that 1) if the plaintiffs used the property "openly or notoriously" as alleged, it was with the defendants' consent, and that 2) if the plaintiffs paid the taxes as alleged, it was done "voluntarily."

Where a prima facie case has been made out by the plaintiffs' pleadings and supporting affidavits, verified answers to interrogatories and the like, under Rule 56(e) as has been done here, a motion for Summary Judgment shall be granted, as was done here, and the Supreme Court will affirm, as demonstrated by its numerous precedents, some of which are called to its attention, such as:

Thornock V. Cook,[5] where it was said through

5. 604 P.2d 934 (Utah 1979).

Mr. Justice Stewart, that:

> "The defendant cannot rely on the mere allegations or denials of her pleadings to avoid a Summary Judgment, but must set forth specific facts showing that there is a genuine issue for trial, Rule 56(e) U.R.C.P."

This basic principle has been repeated and reaffirmed many times by this Court, by different language saying about the same thing. Perhaps the most frequently cited case is Dupler v. Yates,[6] which has the following to say:

> "When adequate proof is submitted in support of the motion, the pleadings are not sufficient to raise an issue of fact."

Again, the Court said:

> "Upon motion for summary judgment, the courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant's case or specify in an affidavit the reason why he cannot do so."

A more recent case, James v. Hinkle[7], authored by Mr. Justice Stewart, unanimously stated the purpose of Rule 56(e) to be as follows:

> "Pursuant to Rule 56(e), Utah Rules of Civil Procedure, when a motion for summary judgment is made, the affidavit of an adverse party must contain specific evidentiary facts showing that there is a genuine issue for trial. Walker v. Rocky Mountain Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973); Preston v. Lamb, 20 Utah 2d 260, 436 P.2d 1021 (1968). Defendants have failed to identify with specificity any material issue of fact, and plaintiff, as a matter of law, is entitled to conveyance of the title."

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6. 10 Utah 2d 251, 351 P.2d 624 (1960).
7. 611 P.2d 733 (1980).

In Walker v. Rocky Mtn. Rec. Corp.,[8] which had to do with an affidavit in opposition to a Motion for Summary Judgment, in holding that the defendant did not preclude summary judgment because there remained a genuine issue of fact, the Utah Supreme Court took the position that no further findings were necessary because:

> "The opposing affidavit submitted by the defendant did not comport with the requirements of Rule 56(e), i.e., such affidavit must be made on personal knowledge of the affiant."

See also Western States v. Blomquist.[9]

In the instant case, the appellant Schulder filed no affidavit whatever, and his pleading simply was an unsworn general denial, and two conclusions that even were prefaced by "ifs."

The interpretations of Rules 56(c) and (e) have been affirmed in many other cases, including Albrecht v. Uranium Services,[10] involving "abandonment" of mining claims. In a split decision, Mr. Justice Maughan, author, and Mr. Justice Stewart differed, but only as to whether the "facts" did or did not present a genuine "issue," but not as to interpretation of Rule 56, in which they agreed. See also Jensen v. M.S.T.T.[11]

The most recent pronouncement by the Supreme Court, which requires counter-affidavits on Motion for Summary Judgment under Rule 56(e) is Clarkson v. Western Heritage,

8. 29 Utah 2d 274, 508 P.2d 538 (1973).
9. 29 Utah 2d 58, 504 P.2d 1019 (1972).
10. 596 P.2d 1025 (Utah 1979).
11. 611 P.2d 363 (Utah 1980).

Utah, 627 P.2d 72 (1981), written by Judge Gould, District Judge, which re-affirms the decisions set out hereinabove, in the following language:

> "Plaintiffs' motion for summary judgment was supported by affidavit, which recited facts sufficient to found jurisdiction in the State of Arizona. This affidavit was not countered by an opposing affidavit by defendants. Our Rule 56(e)[2] clearly requires an opposing affidavit in order to create a genuine issue of material fact, and does not permit a party to rely upon his pleading to create a disputed fact issue. The trial court correctly took the facts set forth in the plaintiffs' affidavit to be true, and ruled accordingly. We find no error in the trial court's ruling on the summary judgment motion." [Emphasis supplied]

The Appellant's First Point on appeal claims that his "Answer" and his "Memorandum" filed in this case raised genuine issues of fact. Neither pleading was verified, neither was supported by any affidavit, nor by anyone claiming to be competent to testify, as is required under Rule 56(e), - and the Point, therefore, is of no avail whatever in forcing a trial of issues that the Rule says can be tried if, and only if, the defendant, one way or another submits 1) specific facts, 2) under oath in order to preclude the granting of a Motion for Summary Judgment.

Assuming, arguendo that he had offered statements under oath, which he clearly did not do, he says erroneously that his Answer and Memorandum would raise the following issues:

a) "Possession of the Bambergers for the necessary seven years to adverse. This is not an issue here, since the Bambergers have had a right of possession by virtue of a

tenancy-in-common deed, dated in 1911, and their pleadings and affidavits reflect that recorded fact, as shown in the abstract of title.

b) Whether Bambergers paid the taxes "voluntarily," which may be answered by saying that, first, it makes no difference under the statute how the taxes are paid, and it would be an unusual case where one claiming by "adverse possession" did not pay the taxes other than "voluntarily"; and

c) Whether the taxes levied were paid according to law. This so-called "issue" also is not an issue here, since it obviously is born of appellant's error in examining the the record, since he relies on "non-payment of taxes for the years 1974 through 1977, saying in his Brief, pp. 8-9:

> "However, the taxes levied on the claims were not paid on such interests for the years 1974, 1975, 1976 and 1977."

He then claims they were "redeemed." An examination of the Record clearly shows that what appellant is talking about is the two-thirds interest of Clarks, the original patentees, and that with respect to the one-third interest conveyed by them to Bamberger and Schulder, the taxes have been paid on time and have never been delinquent, as shown in the record. (Ex. 8).

From the above, any attack on the judgment based on error in granting the Motion for Summary Judgment, is without any merit, since appellant, under the statutes and the cases construing them, not shown any effort by him or his predecessors to do anything in compliance with the statutes or the case law applicable to adverse possession

situations.

Clearly, the lower Court's summary judgment should be affirmed, since the appellant has not complied with Rules 56(c) and (e) in any manner.

II

THE FACTS SUPPORT THE TRIAL COURT"S JUDGMENT.

Although we contend the failure of appellant to comply in any way with Rules 56(c) and (e), is dispositive here without deciding Point II, we address that Point by briefly reviewing the facts and pertinent authorities to refute appellant's claim of insufficiency of the evidence.

As a preliminary matter, it is conceded that this is a proper case where one co-tenant may claim title by adverse possession; that to acquire such title, the claimant must have a) an intention to do so, b) a possession that is inconsistent with the co-tenant's interest (which the cases variously term as "open," "notorious," "adverse," "hostile" or the like, c) coupled with the co-tenant's knowledge thereof, or that which reasonably he should know by "notice" given by the adversing co-tenant,[12] or by circumstances that reasonably would impart such notice to such co-tenant.[13]

Also, that "adverse possession" statutes are not only 1) limitation statutes, but 2) such as expressly are

12. 82 A.L.R.2d 5.
13. Elder v. McCluskey, 70 F. 529: "The adverse claimant need not give actual notice, but need only to 'bring it home to his co-tenant by his conduct, the implication of which cannot escape the notice of the world about him, or of anyone, though not a resident of the neighborhood, who has an interest in the property, and exercises that degree of attention in respect to what is his, that the law presumes in every owner.'"

based on "presumptions" such as Sec. 78-12-7, U.C.A., 1953, that indulges 1) a presumption of ownership in the record title holder and 2) that occupation by anyone else is subordinate thereto, unless occupied adversely by the latter for seven years, - with the necessary implication that the latter has at least one leg up on acquiring the former's title. Sec. 78-12-7.1 also expressly presumes ownership in a tax title claimant who shows possession for 4 years to the exclusion of the record owner. Such presumptions have statutory probative force such as do common law presumptions where guaranty of truthfulness is attributed to a number of reasons. Some have to do with "passage of time," a "lost" or "pre-sumed" grant, "continued payment of taxes," "quiet enjoyment for a long time," "failure of owners to assert rights for a long time," "notice of adverse user by filing suit," policy of "repose" in making certain title to property, etc. All these would appear pertinent in this case, where continuity of treatment of the property began about seventy years ago in 1909 and has persisted even up to the time of judgment in this case.

Clotworthy v. Clyde,[14] a Utah case, adheres to the principle that conduct alone, by acts inconsistent with ownership in another, is tantamount to and presumably effective in establishing title by adverse possession.

Irrespective of, but in addition to, and as a separate basis for satisfying the principle that one should have notice about any adverse use before divestiture of an

14. 265 P.2d 420; see also Smith v. Hamakua, 13 Hawaii 716; Mounce v. Hargis, 278 S.W. 107.

interest, it is held that bringing an action to quiet title in and of itself constitutes notice sufficient to establish title, along with other facts, in one claiming by adverse use. Peper v. Trust Co.[15]

Other typical facts showing an adverse user and notice thereof by prescription is shown in Richins v. Struhs[16] an adverse possession case involving a driveway, which said:

> "The origin and purpose of their recognition arises out of the general policy of the law of assuring the peace and good order of society by leaving a long establilshed status quo at rest rather than by disturbing it . . . Consequently it should be given effect to prevent the very thing which defendants have attempted here: the upsetting of a situation which has existed amicably since "the memory of man runneth not to the contrary."

In Baber v. Baber, 94 S.E. 209 (Va. 1917) it was held that where a tenant had had possession of the property for 34 years, that notice "may be presumed from a great lapse of time, with other circumstances."

In an old "leading" case stressing long-possession as being an important factor for a jury to consider in determining an effective adverse possession on the basis of a co-tenant's knowledge thereof sufficient to affirm a verdict to that effect, is Doe, ex Fishar v. Prasser, 98 Eng. Reprint 1052 (1774), where possession for 36 years was claimed to be sufficient for an "ouster" on the basis of long possession reflecting co-tenants "notice" or "knowledge," Lord Mansfield left it to the jury to say "whether

15. 219 S.W. 942.
16. 17 Utah 2d 356, 412 P.2d 314 (1966).

there was not sufficient evidence before them to presume an actual ouster," and the jury having so found, Lord Mansfield then said "they were warranted by the length of time to presume an adverse possession by one of the tenants in common," - and the other circumstances of the case were that the adverse co-tenants never sought an accounting from the plaintiff co-tenant. This case, besides imposing a duty on the part of a disseised tenant to seek such an accounting from the co-tenant trying to disseise him, along with other cases, firmly establishes that the question of adverse possession is a jury question based on a "reasonable man" concept.

The Bamberger interests having had the right of possession and paying the taxes continuously for at least 40 years, and presumptively for 70 years from 1911, the date of the deed, certainly is evidence of notice of their claim to the Schulders, who have had an opportunity to learn of such adverse claim by such possession, payment of taxes, common knowledge of those in the neighborhood, preservation of the claim against double tax assessment by the County and filing of this lawsuit, after which, up to and including date of judgment, neither appellant nor Schulder's estate, nor any other Schulder has as much as offered to pay any pro rata taxes levied, or expenses incurred on the property.

For some unknown reason, the appellant, in its Trial Memorandum" spent a good portion thereof in asserting that the respondents' "claim of adverse possession is not founded on a written instrument or judgment under color of

title" under Sec. 78-12-8, and discusses other statutes and authorities that in no way are germane to respondents' written instrument claim under Sec. 78-12-8. At the bottom of page 2 of the First Cause of Action, the complaint alleges ownership by virtue of a written quitclaim deed, in the April and Virginia claims which was incorporated in the Second Cause as being with "color of title," and alleging an open and notorious possession as against "all persons, including the defendants."

The above observations are made to eliminate doubt or confusion as to the nature of one of plaintiffs' claims. The appellant apparently has abandoned any argument on this point, since it is not repeated in his brief on appeal, nor is it assigned as a Point on Appeal. Hence, the only matters that need to be demonstrated on appeal to affirm the summary judgment, are those in satisfaction of the pertinent parts of Sec. 78-12-9, "What Constitutes Adverse Possession Under Written Instrument," which, eliminating parts unnecessary to prove in this case, reads as follows:

> "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) . . . . . .
>
> (2) . . . . . .
>
> (3) Where, although not inclosed it has been used . . . for the ordinary use of the occupant.

Sub-sections (1) and (2) need not be proved singly or in tandem to perfect title by adverse possession. Only Sub-section (3) needs satisfying. In Toltec Ranch v. Babcock,[17] an unfenced mining claim case where an "adverse use" was held to have established title under Sec. 78-12-9, Sub-section (3) "for the ordinary use of the occupant," there was only a small part of the adversed land occupied and used for storing vehicles over a 34 year continuous period, the Utah Court said:

> "The land was occupied and used the same as other lands were in the neighborhood. The possession was open, notorious . . . and under claim of right. It must, therefore, necessarily be deemed to have been adverse to the holder of the legal title, and such long-continued possession may be deemed to have been adverse, though not in character hostile. Where one is shown to have been in possession as owner for the period of limitation, apparently as owner, and such possession is not explained or otherwise accounted for, it will be presumed to have been adverse."

In Cooper v. Carter, 7 Utah 2d 9, 316 P.2d 320 (1957) where the land was unfenced, and involved "color of title," a Title 78-12-12 adverse possession situation, "for the ordinary use of the occupant," with payment of taxes, the court, after saying the possession need be open and notorious, said, however, that fencing the property was not dispositive, and that:

> ". . . it is common knowledge that in the unfenced grazing areas of our state entry or trespass is commonly done and is not regarded as of any serious impact. People often go on such lands for riding,

17. 24 Utah 183, 66 P. 876 (1901).

hiking, hunting and other innocuous purposes . . . without any objection from the owners."

So saying, the court upheld an adverse possession claim of title, where a sheep man grazed his sheep, with exclusive possession, for only three weeks a year, for over seven years."

Compare the facts in that case with the facts in the instant case.

As to Schulder's knowledge of the adverse claim asserted by the Bamberger interests, it is significant that the appellant filed precisely nothing, sworn or not-sworn, specifically evidencing any absence of knowledge or "notice" of the latter's adverse claims. This failure to assert any claim at any time, under oath, or not under oath, should foreclose any claim of "genuine issue of fact" that has to be set out specifically under Rules 56(c) and (e).

Under the authorities, it is almost inconceivable that the appellant and his predecessors had no "notice" of Ernest Bambergers mining activities in the area and his adverse claim. His co-grantee, a lawyer, during his life-time, from 1911 to 1926 and for 15 years, at no time registered any interest in these claims, or made any claim of an interest in them or offered to share in taxes or expense that can be found in the record. Nor was any hint made in any affidavit, or other document as to any interest in the claims. Even the lawyer who was appointed administrator of Schulder's estate did not list any interest in the inventory and appraisement, nothing appears in the record to indicate

any such listing. On the contrary, the inventory that was filed specifically listed real properties by metes and bounds situate in Sevier County, Utah; Lots 28 and 29 in Block 7, Arlington Heights, in Salt Lake County; an undivided interest in the Braffet Coal Land case pending in the U. S. Supreme Court; an undivided interest in the Davis Oil Shale lands;" and an undivided interest in the Milner-Carbon County Coal case pending in the same court. Since the filing of that inventory, the defendant here, Russell Graydon Schulder, son of the grantee, and his present administrator, has done nothing over the past 31 years, nor has Maude L. Schulder, wife of the decedent, nor has Ann Schulder, daughter of the decedent, done anything whatever by way of payment of any assessed taxes, offering to pay any pro rata share of any taxes paid or expenses incurred by Bambergers, nor is there anything in the abstract of title, in the record, or by any other evidence that any of said heirs, or their decedent father, have ever been present on the claims or done anything at all to support any claim whatever hat they might have asserted in said claims other than is evidenced by a single document, the 68 year old deed mentioned hereinabove. Such failure is quite inconsistent with the established presumption that an owner will watch over and do what is necessary to protect his property.

Our own Supreme Court in Godfrey v. Munson, 597 P.2d 885, has considered the importance of such failure to list assets in proving adverse possession in another. In Godfrey there was a family difference, where one side claimed

under a written instrument (deed) but nonetheless failed in establishing title against one having a history of long possession (67 years), where this Court assigned as a significant factor, the fact that "the property was not included in the estate of Eliza M. Pack Godfrey."

Furthermore, since the complaint was filed, which in itself is "notice" of the adverse claim of plaintiffs, the defendant has had knowledge of the claim ever since has not offered to pay any share of taxes or expense, nor made any tender in court to cover any such share, nor offered a bond to secure payment of any such amounts.

The authorities touchng the question of what kind of adverse possession is necessary to import notice to interested persons vary in definition, but they generally require that something be done that either gives actual or constructive notice that would put an erstwhile record owner on guard to protect his property against one who claims an adverse interest under the statute or the common law. Otherwise, the doctrine of "repose" can operate to accomplish a divestiture.

Harking back to the adverse possession statutes involved in this case, the Courts have seen fit to interpret their provisions as to what kind of adverse possession is necessary to satisfy them. For example, 78-12-9, - where the adverse possession required is found in the subdivision: (1) "cultivation or improvement," or (2) fencing, or, (3) where "although uninclosed," by occupation "for the ordinary

use of the occupant."

As to requirements under the statute, "open, notorious and adverse," generally are said by the cases to be adverbs that are synonymous, meaning the same, and not connoting "hostile" as a layman might conclude. On the contrary they may mean even "friendly, such as enunciated in Quincy v. Kratiz, 328 N.E.2d 699, where a family dispute arose as to entitlement of the property, - where one member claimed by adverse possession, the court said:

> "While we recognize that for possession to be hostile in its inception, no spirit of animosity or hostility is required nor need the adverse claimant be guilty of deliberate or wilful tortious conduct, (Wijas v. Clorfene, 126 Ill.App. 2d 315, 262, N.E.2d 830, it has been held that using and controlling the property as an owner is the ordinary way of asserting title thereto."

Richards v. Struhs, 17 Utah 2d 356, 412 P.2d 314 (Utah 1966), adhered to such position, quoting another case that re-affirmed the concept with more emphasis by saying:

> "The elements of a title by limitation are uninterrupted possession - actual, visible, notorious, adverse, and hostile, under color and claim of right for the statutory period. 'The words adverse and hostile mean practically the same thing.' And either of them can be omitted in defining the character of the possession, provided the other is used."

As to the Schulders' doing anything to show any claim to the property, Plaintiffs' affidavits tend to show that Russell G. Schulder and his successors were and are unknown in mining circles, as claimants of an interest in the property subject of this litigation. The owners of claims contiguous therewith, to-wit, the Silver Queen and

two Lilly claims, owned by United Park City Corp. before and after 1958 and at this time, have not been aware of anyone named Schulder claiming an interest in the April and Virginia claims, as reflected in Mr. Osika's affidavit. The record shows that these owners actually settled their boundary lines between their claims and the plaintiffs' claims, without concerning any claim of the Schulders, which reflects the common knowledge and understanding in the mining community that the Bamberger interests were the sole owners of the property. The same is reflected in a letter from one Huseth, addressed to W. H. Olwell, plaintiff herein, dated June 2, 1980, describing a sewer easement he sought to acquire. The letter and "location map" are in evidence, and were forwrded to Olwell, as representative of the Bambergers as sole owners. Nothing was mentioned as to any joint interest with any other possible claimants or the Schulders.

The same treatment by others in the mining industry, based on an assumption that no one but the Bambergers owned the claims, reflects a common understanding in the area that the Bambergers were sole owners, holding themselves out to the world, including Schulders as being the sole owners of the claims, lending considerable substance to the fact that Schulders must have had knowledge of Bambergers' adverse intention and claim or that a strong presumption exists that they did or should have had such knowledge. Such understanding in the neighborhood would justify a finding even of abandonment, which has been alleged here but not canvassed

in length. (Noebuck v. Mecasta, 229 N.W.2d 343 (Mich); Jakober v. Loews, 265 A.2d 429).

It would appear that somewhere along the line the Schulders, if they claimed any interest at all, reasonably should have known what the Bambergers' have been claiming, and what the understanding in the community has been, as reflected by contiguous owners who even settled their own boundaries on the assumption that the Bambeger people were sole owners.

Besides, there is competent authority to the effect that an owner is bound to know about an adverse useage of his property. In Alaska Bank v. Linck, 559 P.2d 1049 (Alaska), it was said that:

> "The owner need not actually know about the presence of an adverse possession; what a duly alert owner would have known, the owner is charged with knowing, and where possession is otherwise proven, courts generally recognize that community repute as well as physical visibility is relevant evidence that the true owner has been put on notice.

The affidavits of E. Lamar Oshika, Donald Dixon and William H. Olwell, all attest to the fact that the Schulders failed to exercise the required "diligence" in protecting any claimed interest, over a 68 year period. They are attestations reflecting the Schulders' "knowledge" or reason to know of Bambergers' claim.

Other representative cases of adverse user that would give notice or knowledge of a person's adverse claim, are:

Adams v. Johnson, 136 N.W.2d 78, involving a family dispute based on color of title and adverse possession, the

court said that to overcome the presumption of the sort of "per tout et non per my" concept of co-tenancy, the court said what courts generally espouse, that: "An express notice is not necessary, an intention to hold the land adversely to the owners may be derived from all the circumstances of the case." In that case the court pointed out that two brothers' possession was actual, open and notorious, farming as owners for 50 years, payng the taxes, and that "the surrounding neighbors and acquaintances considered them to be the sole owners" and went even so far as to say "we do not think that ignorance of ownership by a co-tenant out of possession is necessarily conclusive against a finding of adverse possession by a co-tenant in possession." Clotworthy v. Clyde, supra, also subscribes to the principle that actual notice of the claim of adverse possession may be unnecessary.

The very recent case of Alaska v. Linck, 589 P.2d 1049 (1977) where both the parties claimed under written instruments, or "color of title" was determined on Motion For Summary Judgment, as here, based on affidavits anent adverse possession, as filed here. The determination of ownership was arrived at under the provisions of a seven year statute idential to ours. That case considers most of the dispositive features of this case, and its language and citation of authority are supportive of the contentions of plaintiffs here, some of which we respectfully present for consideration by the Court.

1. It says, as to the requirement that adverse possession need be "continuous and uninterrupted," that:

"This does not necessarily mean that the possessor must reside on or be physically present at the property (M. v. G., 322 P.2d 789, 3 Am.Jur.2d, Adv. Poss., Secs. 50, 56).

2. That "The nature of possession to meet this requirement depends on the character of the property. One test is whether the adverse possessor has used the land as 'an average owner of similar property would use it.'" (F. v. E., 436 P.2d 582; Cooper v. Carter, 7 Utah 2d 9).

3. That "Any one of the acts . . . standing alone might be insufficient, but in combination demonstrate continuous and uninterrupted possession.

4. "Other courts have found similar activity sufficient for adverse possession of forested land in rural areas." (24 A.L.R.2d 632).

5. As to "notorious" possession: "The owner need not know about the presence of an adverse possession; - what a duly alert owner would have known, the owner is charged with knowing.'" (C v K. 237 P.2d 1053 (Ida. 1951).

6. We cannot expect the possessor of uninhabited and forested land to do what the possessor of urban residential land would do before we charge the record owner with notice.

Statutes having to do with acquisition of rights by adverse possession, like those dealing with prescriptive rights under the common law right based on possession of another's land for more than 20 years, are ordinarily referred to as statutes of "repose." It is suggested that the instant case can be affirmed on any "time frame" basis, since

the Bambergers have had possession for 70 years. It is further urged that the complimentary requirements found in the Utah 7-year statute, have been satisfied as to "payment of taxes" and "use," - particularly "for the ordinary use of the occupant under Sec. 78-12-9(3). Such principle of laying titles to rest has been employed progressively more and more, and with greater liberality. The Utah Court has so embraced it on a number of occasions, reflected by the following cases:

In Dye v. Miller & Viele, 587 P.2d 139 (Utah 1978) the Utah Supreme Court adopted such principle by expressly affirming Peterson v. Callister, 2 Utah 2d 359, 313 P.2d 814 (Utah 1955) and Hansen v. Morris, 3 Utah 2d 310, 283 P.2d 884 (Utah 1953), which applied it. Others are Cope v. Bountiful Livestock, 13 Utah 2d 20, 368 P.2d 68 (Utah 1962); and Falconaero v. Bowers,, 16 Utah 2d 202, 398 P.2d 206 (Utah).

The principle aptly is stated in the opinion of a sister state, - Alaska v. Linck, supra, which says:

> "The trial court's decision furthers the public policies underlying the law of adverse possession. While, like other statutes keep stale cases out of the courts, they serve other important public policies as well. They exist because of a belief "that title to land should not long be in doubt, that society will benefit from someone's making use of land the owner leaves idle, and that third persons who come to regard the occupant as owner may be protected."

The defendant cites only one case that even remotely could be germane here, - Beckstrom v. Beckstrom, 578 P.2d 520 (Utah 1978). Clearly, however, it has no dispositive force. No Motion for Summary Judgment was involved.

There was a plenary trial, resulting in disputed facts, one of which was that one of the two contesting, joint tenancy brothers, conceded that they talked about selling their property after the one had operated the farm for 10 years unprofitably, and had left, and which then was farmed by the other, who, after seven years, attempted to convey full title to a third party. There were few, if any facts, similar to those in the instant case. It is simply an adverse possession case where the trial court believed the first brother's evidence as opposed to the other's, which the Utah Supreme Court also chose to believe, by affirming the judgment.

CONCLUSION

THE JUDGMENT SHOULD BE AFFIRMED FOR THE FOLLOWING REASONS:

1. The defendants' Answer is an unsupported, unverified pleading which cannot preclude the granting of a Summary Judgment under Rule 56(c) and (e). This alone should decide this case.

2. It is undisputed that Ernest Bamberger and his successors have satisfied "payment of taxes" requirements, evidenced by the record and stipulation of the defendant.

3. It is undisputed that they have had actual, constructive and continuous possession of the claims, as shown in the abstract, document of title and otherwise.

4. Schulders have made no claim to possession other than through the original 1911 deed.

5. No one ever has offered to reimburse Bamberger or his successors for taxes and other expenses.

6. The Record shows that Schulders knew or reasonably should have known of Bambergers' adverse claim of ownership.

7. People acquainted with the area and claims understood the claims were owned solely by the Bamberger interests; and that they had not known of any claim being registered by Schulders in the unfenced, forested property claimed by Bambergers.

8. That neighbors even settled contiguous boundaries on the assumption that the Bambergers were sole owners.

9. That they treated the claims as unfenced,

forested mining claims, as they own, without necessity of cultivation or fencing.

10. That Sec. 78-12-9(3) allows for title by adverse possession, if the property is used for one of four reasons, i.e., "for the ordinary use of the occupant;" that in which Bamberger was well known, - mining.

11. That Bambergers protected the property by possession, payment of taxes, and actively keeping the title straightened out with the County officials.

12. That the claims were never listed in Schulder's probate; but were in Bamberger's.

13. That even after this suit was filed, and for 18 months, defendant or no one else, personally or as representative, offered or tendered into Court, any reimbursement for taxes or expenses incurred against the property, nor for a period of at least 68 years.

14. That defendant's cited authorities are not pertinent under the facts developed by plaintiffs in the pleading and procedural process requirements.

15. The defendant erred in Point II of his Brief when he claimed respondents had not paid the taxes within the 7-year statutory period. The record reflects that the taxes were paid, and he was talking about different property.

16. The only authority cited by appellant clearly is not germane. There was no Motion for Summary Judgment involved, a trial was had on disputed testimony and the

trial court believed to be against a finding of adverse possession.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Respondents' Brief was mailed, postage prepaid, to James A. Murphy and Tel Charlier, Attorneys for Defendant and Appellant, 376 East 400 South, Salt Lake City, Utah 84101, on this _____ day of June, 1981.