1970

State of Utah, By and Through Its Road Commission v. Betty Lesourd, Alex T. Davies and Thelma Davies, His Wjfe, and Valley Bank & Trust Company : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,

Plaintiff and Appellant,

vs.

BETTY LeSOURD, a woman, ALEX T. DAVIES and THELMA DAVIES, his wife, and VALLEY BANK & TRUST COMPANY,

Defendants and Respondents.

Case No. 11866

BRIEF OF RESPONDENTS

Appeal from Judgment of the Third District Court
in and for Summit County, Utah
Honorable Thornley K. Swan, District Judge

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1160
1155
1150
1145
LOCAL SERVICE ROAD
RIGHT OF WAY LINE
TANKS
STORE
N

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

AUTHORITIES CITED

CASES CITED

TABLE OF CONTENTS—Continued

RULES CITED

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STATEMENT OF THE NATURE OF THE CASE

This is an action in eminent domain. In September 1967, the State Road Commission filed its Complaints in the District Court of Summit County to condemn a part of the larger property of Alex and Thelma Davies and their daughter, Betty LeSourd, Respondents herein, said property being described in three tracts,[1] for the development and

[1]Said parcels, 4:28, 4:28H, and 4:28G, were described by the State in its Complaints as being in the ownership of the Davies and LeSourd and there was no dispute as to the ownership by these Defendants of the same (R. 4, 13).

construction of Interstate Highway I-80. The appeal herein is taken by the State from the Findings of Fact, Conclusions of Law and Judgment of Just Compensation, entered by District Judge Swan on April 17, 1969, on claimed errors of law.

DISPOSITION IN LOWER COURT

The owner admitted and the trial Court found that the Road Commission was authorized to condemn and that the requisite finding of public use and necessity was made as to the Respondents' property (R. 49). The case thereafter was set down for trial on the issues of Just Compensation to be paid to the owners for the expropriation of the property condemned and for damages to their remaining property caused by the taking and the construction of the highway facility (Tr. 2, R. 49). It was not until the first day of trial that the State gave any indication that it intended to raise any question as to title of the Landowners' property (Tr. 14-17, 19-22).[2]

After trial of better than three days on the ownership issue and an ensuing three days of trial on the issue of the market value of the land and improvements condemned and the damages to the remainder, the Court entered Findings

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[2]While we do not urge any absolute doctrine of waiver by or estoppel on the part of the State, it is nonetheless the fact that no notice was given to the landowners by the State regarding title in any pleading or pre-trial hearing prior to the commencement of the trial on the issues of Just Compensation. This was in full view of the fact that the landowners had clearly asserted their ownership and possession in and to land remaining and lying outside of the condemned area and that the same had been substantially and irreparably damaged (R. 30-33); no reply was filed to the Defendants' Answer in accordance with Rule 7, U.R.C.P., although the circumstances would have suggested that such would have been appropriate.

of Fact, Conclusions of Law and a Judgment of Just Compensation, pursuant to Rule 52 U.R.C.P. (R. 48-55).

The Motions of the State for a new trial on the ground of errors in law, and alternatively for remittitur were denied by the trial Court on September 10, 1969 (R. 56, 57).

RELIEF SOUGHT BY STATE ON APPEAL

The Road Commission herein requests that the Judgment of the trial Court be reversed and that the case be remanded for new trial.

STATEMENT OF FACTS

State's counsel has failed to set forth in his Brief the facts elicited at the trial which underwrite and support the Findings, Conclusions and Judgment of Judge Swan. Rather, State counsel has given a portrait of only those facts relevant to an issue which has been newly invented for the purpose of this Appeal, viz., *adverse possession*, a subject which did not play even a latent part of the trial of the case. Consequently, in order that the Court be apprised of the issues framed for trial, of the theory, evidence of these Landowners and the State on ownership, possession and concomitant entitlement to Just Compensation, and Findings and Conclusions upon which the Judgment herein is predicated, Respondents find it necessary to make their own statement of the record of trial pursuant to 75(p)(2) U.R.C.P.

1. *Nature of the Property Prior to Condemnation.*

The total tract[3] of the Landowners constituted 6.27 acres of real property (Tr. 571), upon which were located substantial commercial improvements consisting of a restaurant, service station and cabin area (Tr. 70, 278). The property was known throughout the State as the "Kimball Junction Cafe and Service Station." Located at the junction of U.S. Highway 40 and the Snyderville Highway to Park City in Summit County (Tr. 586), the property was located on a swing corner giving it direct access to U.S. Highway 40 and unlimited access to the Park City roadway thus serving the traveling public between Salt Lake City and Park City, Eastern Utah, Colorado, Wyoming, etc. (Tr. 300, 572, 575). That the situs, access, location, actual use of the property and potential use in the reasonably foreseeable future was for a commercial restaurant, service station and tourist development site was undisputed in the evidence of both parties (Tr. 383, 502, 575, 621).

Throughout the years, the restaurant had been substantially and continually remodeled and upgraded. Cabins at the rear of the property were rented year round by tourists, travelers, hunters and fishermen; they too, had been completely remodeled (Tr. 287).

Utilizing the employment of ten to twelve people throughout the year on a twenty-four hour basis in the operation of the restaurant and service station (Tr. 294-295), the station pumped between 135,000± and 161,000

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[3]The subject property is portrayed in yellow on the base map of trial Exhibit 1 reproduced and attached hereto in this Brief.

gallons of gasoline (Tr. 300) and sale from all services were in excess of $117,000.00 in the year prior to condemnation. Portions of the south and west sections of the property were not physically utilized but the highest and best use of the same as of September 1967, was as a motel site (Tr. 305).

Contrary to the representation of State counsel in his Brief, the Defendants' property had not been indiscriminately used by the public as a thoroughfare, but rather served as an entrance to and exit from the commercial improvements situated on the larger property (Tr. 109-111).

2. *The Subject Property After Condemnation.*

The State in its Complaint, condemned .42 of an acre of land across the entire commercial frontage of the Defendants' property, resulting in a total taking of all of the landowners' easements and rights of access to U.S. Highway 40 and the Park City Highway (Tr. 402). The southerly edge of the right of way line of the State came within less than one foot of the service station pumps on the Defendants' property (Tr. 311); the taking ripped out the sanitary system and commercial storage tanks and as well changed the grade of the remaining property (Tr. 118-119, 406).

The remainder property lost its "swing corner influence" as a result of the expropriation and its sole means of access was forsaken for a newly constructed local service farm road (Tr. 514, 595, 596). The visibility of the prop-

erty for commercial use was substantially impaired as a result of the acquisition (Tr. 466, 595).

As a result of the foregoing, commercial operations on the subject property were no longer economically feasible and the Landowners were forced to discontinue business thereon (Tr. 311, 312).

The testimony is undisputed on both sides that after condemnation, the highest and best use of the subject property changed from commercial service station-restaurant useage to agricultural-transitional (Tr. 513). However, the appraiser for the State did contend that the remaining property could be possibly used for an out-of-the-way "beer hall" (Tr. 662).

3. *The Ownership Question.*

At the outset of the trial the State raised, for the first time, the issue of the Landowners' title, claiming that a portion of the remaining property after condemnation was not owned by the Defendants (Tr. 14-17, 19-22). After extended argument of counsel, the Court set down precise and clear procedural guidelines as to how the issue of ownership was to be resolved. The Court held that there was an issue of title, that the Landowners had the burden of establishing a prima facie case with respect thereto and *that such prima facie case could be established by evidence indicating that the subject property was under quiet and peaceable possession by the Defendants under claim of ownership and color of title* (Tr. 57). Judge Swan further determined that if the Defendants met such burden, the Road Commission

would be responsible for calling witnesses to assert or claim an interest in the subject property foreign to that of these Defendants (Tr. 57). The establishment of the rule by the Court was premised upon the admitted case and treatise authority (Tr. 35, 36, 51, 57).

The State did not register an objection to this ruling, nor did it object to the procedure upon which the ruling was predicated; nor did it aver or allege that the question of adverse possession was the guiding issue (Tr. 57). Rather, within the framework of the trial Court's ruling, both the Landowners and the State proceeded to present evidence regarding the question of ownership.

4. *Evidence on Ownership.*

(a) *The Landowners' evidence.*

The evidence was undisputed that the Landowners, as of September 1967, had occupied, possessed, fenced in part, improved, and used the subject property of 6.27 acres for better than 15 years (Tr. 70, 72, 82-83). During that time, no person whomsoever manifested or asserted any claim, right, title or interest in and to said land (Tr. 82, 90-91). And the evidence was that no other individual had used or occupied any part of the said premises in a manner inconsistent with the quiet and peaceable possession of the Defendants during the 15 year period. The testimony indicated that it was not until 1965 that these Landowners had notice that their record title did not conform to the property actually under possession and claim of ownership (Tr. 73, 82, 85). At that time, the Defendants had the entire

property surveyed, documentary title was executed and placed on record of the survey description, the County Assessor was notified of the same, and the Defendants from 1965-1967 made payment of real property taxes on the entire 6.27 acres (Tr. 82, 83, 95, 153).

(b) *The State's evidence.*

The State produced no witnesses claiming or asserting any interest or title in the subject property foreign to the interests of these Defendants with the exception of two fragmented parcels on each end of the property as to which the State, itself, asserted an interest (R. 45).[4] In other respects, the State produced only the testimony of an abstractor (Tr. 167) and a Road Commission staff attorney (Tr. 219), both of whom limited their testimony to the veritable jumble of documentary recordings, inconsistent chains of title, overlapping and gapping instruments found in the Recorder's office of Summit County. Neither the State's abstractor, its title attorney nor any other witness made a physical inspection of the property to determine possession nor did they talk with any person who claimed any interest in the subject property foreign to these Landowners (Tr. 198, 225-229). The State's title attorney had no knowledge or opinion as to any possesory interest in the subject property (Tr. 229). The State's evidence further indicated that there were no documents of any type specifically relating to the subject property *during the period which these Defendants had been in possession which pur-*

[4]Such parcels were excluded by the Court in favor of the State from the total tract of these Defendants prior to trial on the issue of Just Compensation.

ported in any way to divest, encumber or jeopardize the interests, claims of ownership and documentary recordings of the Defendant-landowners.

As it turned out, the only property of the 6.27 acres as to which the State disputed the ownership of these Defendants was a portion of the rearage land. Such property involved a difference of but $3,900.00 between the value evidence of the State Road Commission and that of the Defendants (Tr. 419, 667, 693).

(c) *Additional evidence of ownership.*

At the end of the State's testimony on title, the Summit County attorney entered his appearance in behalf of the County (Tr. 229) and unequivocally stated that as to the 6.27 acres under the possesion, claim of ownership and color of title of these landowners, Summit County made no claim of any right, title or interest in and to the same (Tr. 230). It was further adduced that former County right-of-way through the property of these Defendants had not been used as a public highway since the late 1930's, that the County had not asserted any claim to or use of the same since that time, that the same had not been open as a right-of-way to the traveling public, that these Defendants had continuously occupied, possessed and fenced in part such property since 1952 and that in the fall of 1965, the County Commission, in open hearing "agreed" to abandon the old County right-of-way under the 1927 deed (Tr. 73, 80-81, 237, 239, 244).

5. *Ruling of Trial Court on Ownership of Property.*

After submission of all the evidence on ownership, the lower Court, consistent with its initial ruling as heretofore outlined, determined that the Landowners herein had met their burden of proof of establishing a prima facie case of ownership of the 6.27 acres shown in yellow on Exhibit 1, that the Road Commission had not overcome that prima facie showing by the introduction of any evidence of asserted claims or interests in said land foreign to the possession, interest, and ownership of these Defendants and that accordingly, the 6.27 acres was to be considered for the purposes of condemnation, as being that of these Defendants (Tr. 267). The trial Court further concluded that the Road Commission, with respect to the two parcels on each end of the larger piece (R. 45), had overcome the Defendants' prima facie showing regarding the same by virtue of the Quitclaim Deed from Summit County (Tr. 266).

6. *Trial Court's Determination of Just Compensation.*

Predicated upon the Court's determination of the ownership issue, the case proceeded to trial on the issues of Just Compensation. The Landowners produced three witnesses, all from Salt Lake City, whose opinions on the fair market value of the property condemned and the damages to the remainder were, respectively:

Werner Kiepe (Tr. 605)	$78,400.00
Jerome H. Mooney (Tr. 520)	$83,008.00
Marcellus Palmer (Tr. 423)	$79,900.00

The sole witness of the Road Commission was from Provo, whose total value opinion was:

Gregory Austin (Tr. 685)	$34,500.00

The State's witness acknowledged that the highest and best use of the subject property for commercial purposes had been destroyed by reason of the condemnation acquisition, that the sale of the remainder property would meet substantial buyer resistance, and that most of the commercial improvements, i.e., service station, storage tanks, gasoline pumps, cabin sites and the predominant portion of the restaurant had only salvage value remaining (Tr. 662, 667, 704, 725-726, 734).

The Court found that by reason of the State expropriation, the prime access to U. S. Highway 40 and the Park City roadway had been taken, that the property could no longer feasibly and economically be used for commercial purposes and that the highest and best use of the remnant property after condemnation was speculative and transitional (R. 51). The Court determined that Just Compensation for the acquisition and remainder damages was a compromise between the evidence of the Landowners and the State of $65,992.00 (R. 51).

ARGUMENT

POINT I

CONTRARY TO THE CLAIM OF STATE COUNSEL, THE ISSUE OF ADVERSE POSSESSION WAS NOT RAISED IN THE LOWER COURT AND IS NOT NOW HERE ON APPEAL.

The State rests its appeal in this case on the singular point that the Defendants did not make a case of adverse possesion. At the outset, therefore, it should be made very clear that this case does not involve, nor has it ever involved (as State's counsel would have the Court believe) any issue, question or claim of adverse possession by these Landowners. The Landowners never rested their case on ownership of any of the property under consideration on any ethereal argument of adverse possession and the question was not debated, expressly or by innuendo, at any point of trial in the lower Court. The State's Brief misses the whole thrust of the Defendants' case on ownership. Their position was and is that open and continuous use, possession and claim to the 6.27 acres for better than 15 years under color of title is sufficient to establish a prima facie case of ownership as against all others except for one who claims and manifests a higher or better title. The record is beyond dispute that these owners had been for upwards of 20 years in quiet and peaceable possession of the subject property under color of title without any claimant having ever asserted any right, title or interest in and to the property.

Thus the State was never confronted with the issue of adverse possession, or of who, as between two or more adverse claimants, was entitled to compensation. The laborious treatise of State counsel in his Brief on the elements of adverse possession, on the long recognized doctrine that adverse possession cannot be maintained as against the sovereign, and on the argument that these Landowners did not make a sufficient showing of adverse possession, *totally*

misses the mark of the lower Court's ruling, ignores three days of testimony spent on the issue of ownership, and fails to even mention the authorities upon which the trial Judge obviously predicated his ruling.

It is sufficient to note at this juncture that the title to the property condemned by the State was indisputably vested in the Defendants. App. Br. p. 26. Accordingly, there was no question but that the State did acquire full record and possessory title and ownership to the property sought in the action. The only query was whether the Defendants had established an adequate showing of ownership to the remaining property so as to entitle them to the recovery of damages which had been undeniably sustained.

POINT II

THE RULING OF THE COURT ON OWNERSHIP OF THE 6.27 ACRES WAS IN FULL ACCORDANCE WITH RULING CASE LAW.

After better than a day of argument and proffers of proof on the part of both counsel, the trial Court quite succinctly announced the rule that would govern and control the resolution of the ownership question:

> "The Court is of the opinion that in the light of counsels' very comprehensive and enlightening opening statements, the Court should at this time find that there is an issue of title in the case, and that that issue should be met by defendants moving forward with their burden of proof; at least, Mr. Campbell, to the point of establishing quiet possession under some claim of ownership or color of title in the defendants. And then I believe that if that

> burden is met by defendants, we can then determine whether the State has the witnesses that you refer to who can come before this Court and claim an interest in subject lands." (Tr. 57).

By such ruling, the trial Judge recognized and followed the leading and only authority cited by the parties on the question, *Nichols on Eminent Domain.* Nichols states the proposition to be that with respect to evidence of ownership of land not condemned but claimed to have been damaged by the condemnation:

> "It is accordingly quite generally the law that, in condemnation proceedings under authority of law, proof of possession under claim of title will be treated as *prima facie* evidence of ownership in fee, and will be sufficient to entitle the person in such possession to receive the compensation awarded for the land, *if no one showing a better title lays claim to it.*"
>
> 2 *Nichols on Eminent Domain* 28, §5.2[3]

The rationale of Judge Swan's ruling, uncontested as it was by the State, and the authoritative statement of Nichols are grounded upon the avoidance of imposing the otherwise intolerable hardship upon a land-condemnee of showing good title against all the world to severed property remaining after condemnation where the public records disclose the lack of a perfect chain of record title, along with possible clouds and stray instruments which have never been discharged, released, or abandoned. In a word, this well reasoned authority and ruling prevents a full scale trial of a quiet title action regarding property *not condemned by the State,* but rather possessed, fenced and openly

occupied by the Defendants under clear color of title, which had sustained permanent damage and as to which no one had ever made any foreign claim prior to condemnation or at any time.

Accordingly and to this end, the trial Court determined that Davies and LeSourd had the initial burden of establishing quiet, peaceable and undisturbed possession of the 6.27 acres under color of title, and that thereupon, the State had the responsibility of producing claimants who bona fidely asserted an interest in such property as suggested by the spurious and unconnected documents on the records of the County Recorder. *These landowners met and established their burden of proof by showing such quiet, undisturbed and peaceable possession of the subject property shown in yellow on Exhibit 1 for better than 15 years under full color of title during which time no person whomsoever asserted any claim or interest against them.* The State, on the other hand, failed to produce one witness, who asserted or would assert any claim in or to the property. Rather, it chose to fall back on a hodge-podge of unrelated, inconsistent, overlapping and ancient documents of record. It was just such an attempt on the part of the condemning agency in challenging the tite of the landowner which, but for such condemnation, would have obviously gone unchallenged by anyone, to avoid the condemning agency's constitutional and statutory obligation to pay full and just compensation which the Court attempted to mitigate by its ruling in the landmark decision of *Perry v. Clissold,* (1907) A.C. 73 (a case cited favorably in Nichols on Eminent Domain Vol. 2 §5.2[3]) :

> "It could hardly have been intended or contemplated that the Act *should have the affect of shaking titles which, but for the Act would have been secure, and would in the process of time become absolute and indisputable,* or that the Governor, or responsible Ministers acting under his instructions should take advantage of the infirmity of anybody's title in order to acquire his land for nothing."

The rule in *Perry* is a corollary to the long established principal of the common law that a trespass is an injury to possession and *that possession under claim of title is good as against all the world except one actually claiming a superior title.* As a trespasser cannot defend against one in possession by proving that record title to the property is in a third party, neither can the condemning body in an eminent domain suit shirk its constitutional obligation to pay Just Compensation by attacking the title of a party in quiet and peaceable possession. *Morrison v. Hinkson,* 87 Ill. 587 (1878); *LaFayette v. Wortman,* 107 Ind. 404, 8 NE 277 (1886). This Court has followed the footstep authority of *Perry* as recognized in *Nichols* in the case of *Ketchum Coal Company v. District Court of Carbon County, et al,* 48 Utah 432, 159 Pac. 737 (1916). Therein, it was held that a condemnor may not dispute a title of a party in possession, for the purposes of assessment of just compensation, *unless the condemnor, itself, holds or has acquired a paramount title to the land.* Justice Frick, writing for an undivided Court, stated:

> "The condemning party cannot dispute the title of the party in possession, against whom proceedings

have been instituted, unless such party had acquired a paramount title."

1. *Adverse Possession Against the Sovereign Was Never an Issue in This Case.*

The prolonged argument of State counsel in its Brief (pages 8-12) that ownership by adverse possession may not be acquired by a private individual *vis-a-vis* the sovereign is quite unnecessary to the disposition of this case. While such hornbook rule of law is accurately stated, it is, as noted in this Brief, plainly irrelevant to the issue of ownership before the trial Court and on appeal for the following reasons:

(a) Adverse possession, as observed above, exists as an issue only between two or more parties, each of whom claim some interest in the same land. As against all others, one in possession has perfect title except as to another who actually asserts a recognized paramount interest.

(b) Judge Swan ruled that as to any property or parcels in which the State claimed and proved a recognized paramount interest, these Defendants had no right or interest therein even though the Defendants might otherwise have been in quiet, undisturbed and peaceable possession; and thus, to the extent any issue of sovereignty was involved, *the Court ruled in favor of the State.*

(c) The record is clear that neither the State Road Commission, Summit County, or any other sovereign en-

tity, claimed any right, title or interest in or to any part or portion of the remainder of land occupied and possessed by the Defendants. In fact, Summit County expressly diavowed and disclaimed any interest in the subject land within the "old County roadway" (Tr. 229-230). Consequently there were no adverse claims asserted by the sovereign upon which the trial Court was called upon to make a ruling.

2. *The Statute of Frauds is not Available to the State Road Commission as a Defense.*

For the premiere time in this Proceeding, State counsel in his Brief, raises the spurious contention that, somehow, the State of Utah is entitled to avail itself of the defense or claim of the Statute of Frauds as against the possessory rights and interest under color of title of these Landowners. App. Br. page 15 para. 2.

Never during this trial did the State argue that the Statute of Frauds, was even latently relevant. Nor did it affirmatively plead such defense as required by Rule 8(c) U.R.C.P. Even if it had, the argument would have been abortive, for besides the elementary and overriding rule as stated by *Nichols, supra* and this Court in *Ketchum Coal Co., supra,* it is blackletter law that the Statute of Frauds, 25-5-1 U.C.A. 1953, is a personal defense available only to a party to a parol contract and cannot be seized upon by an unrelated third party. *Demeter v. Annenson,* 180 P.2d 998 (Cal. 1947); *Powell v. Leon,* 239 P.2d 974, (Kan. 1952); *Forrester v. Rock Island Oil & Refining Co.,* 323 P.2d 597, (Mont. 1957); *Dodge v. Davies,* 179 P.2d 735, (Ore. 1947).

Under the penumbra of events surrounding the ownership of the subject property, the Road Commission was not a party to any of the transactions that occurred prior to condemnation and its unprecedented claim to the protection of the Statute of Frauds flies in the face of sound and established principals of common law.

3. *The Rulings of the Trial Court were Consistent and Comported with the Evidence and the Rule of the Case.*

State counsel goes to the bottom of the well to urge, on page 16 of his Brief, that the trial Court made inconsistent determinations in ruling on the one hand, that land granted to the State Road Commission via the Summit County Quitclaim Deed was vested in the State, while at the same time holding on the other hand that the ownership of land under the "old County road" was, for purposes of the eminent domain trial, vested in these Defendants by virtue of their continuous, quiet, undisturbed and peaceable possession.

Any reasonable examination of the record quickly illustrates that the trial Court did not make inconsistent rulings as claimed by the State. What Judge Swan did say was that to the extent that the State Road Commission had record fee title stemming from a Quitclaim Deed from Summit County, such title was paramount to the possessory ownership and the clouded record title of the Defendants. However, as to the 6.27 acres determined to be in the ownership of these Defendants, the State did not nor could it assert a paramount record interest and Summit County,

appearing through its County Attorney resolved any doubt on the subject by expressly disclaiming any such paramount interest. Judge Swan's determination, on the facts adduced, was, therefore, quite consistent with the enunciated rule that the Defendants' possessory ownership, based upon quiet and undisturbed possession together with bona fide color of title, was good against all with the world with exception of a party actually asserting a determined superior right. Such conclusionary ruling is in complete accord with the manifest case law prevalent in a quiet title action, viz., a disclaimer or non-appearance by a recorded interest negates any legal force or validity which such interest might otherwise have. Herein, not only did Summit County expressly disclaim any interest in the former County roadway, but the former Chairman of the Summit County Commission, Archie Pace, testified that Summit County resolved and agreed in 1965 to abandon the alignment of the old road.

The argument of State counsel on this point is unworthy of this Court's consideration.

POINT III

THE LEGAL PRINCIPAL OF UNITY OF OWNERSHIP AND UNITY OF USE IN EMINENT DOMAIN ARE NOT HERE AT ISSUE.

State counsel urges that under the facts of the case at Bar, or at least his version, these landowners have failed to show unity of ownership and unity of use of the total property before condemnation. See App. Br. pp. 16-22. The argument is made with such anxiety that it by-passes the

admitted and uncontroverted fact *that the property condemned, as well as the land underlying all of the commercial improvements were under the common ownership of Davies and LeSourd.*[5] The contention of the lack of unity of ownership and use presupposes on the State's part that the trial Court erred in its rulings on the issue of ownership and that consequently there were at least five separate parcels under five separate ownerships. That is the best that can be said of State counsel's argument.

If the lower Court in this case is correct in its initial and ultimate rulings of ownership (which clearly it was), then the conclusion is required that the subject property met the ordinary tests of unity of ownership, unity of use and unity of possession. While State counsel in his recitation of case authority is something less than completely candid in his statement of the fact in *McIntyre v. Board of County Commissioners,* 211 P.2d 59 (Kan. 1949), and *San Benito County v. Copper Mountain Mining Company,* 45 P.2d 428 (Cal. 1935), we have no quarrel with the recognized legal maxim that in a partial taking case, there must be unity of ownership and actual or probable potential use between the land taken and the land remaining.[6] But we need not resort to authority from Kansas, California or

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[5]And it was with respect to this land, title to which was not in dispute herein, that predominately all severance damage was predicated (Tr. 419, 667, 693).

[6]It is of importance to note that without exception, all the cases cited by State counsel in support of the proposition of unity of ownership involved two or more adverse claimants, asserting adverse ownership in two or more separate parcels or arose out of a circumstance where ownership admittedly was vested in the condemnee and a third person. Such were not the facts of the instant case.

other jurisdictions for such pristine concepts. Justice Callister stated the proposition as well as anyone in setting out the facts of *State of Utah v. Williams, et al,* 22 U.2d 301, 452 P.2d 548 (1969), and this Court addressed itself to the question in some detail in *North Salt Lake v. St. Joseph Water and Irrigation Company,* 118 Utah 600, 223 P.2d 577, 584 (1950).

Thus while time need not be lost in rebutting a doctrine, the correctness of which is uncontested, the relevant application of that doctrine to the facts at hand is quite another thing. The best evidence that the issue is not appropriately under consideration herein, is the Plaintiff's own Brief, for after rendering forth a role call of cases from foreign jurisdictions, its argument on the point peters out and is exhausted on page 22 of Apellant's Brief without any attempt to tie it or apply it to the subject property or the case at Bar. It is gainsaid that the term "owner" in general real property parlance and in eminent domain proceedings specifically, includes any person who has a legal or equitable interest in the land condemned or the remaining property. 2 Nichols of Eminent Domain §5.2[1] and authorities therein cited; *Campbell v. New Haven,* 101 Conn. 173, 125 Atl. 650 (1924); *Knoth v. Barclay,* 8 Colo. 300, 6 Pac. 924 (1885). 78-34-7 of the Eminent Domain Code particularly describes an owner as one being in occupation of the property. While possession alone obviously is not sufficient for the establishment of a compensable interest in a condemnation suit,[7] the facts of this case clearly illustrate an inter-

[7]For example, a tenant at will, tenant at sufferance or mere parol licensee.

est in the subject property far beyond such minimal relation. As indicated herein, trial Court rulings on the ownership of Davies and LeSourd are fully sustained.

The claim of State counsel that there was a lack of showing of *unity of use* in this case, because the landowners had not applied every square inch of their property to the commercial operation is clearly esoteric; in fact, the claim misconceives the "concept of unity of use" altogether. The rule is so well established in this jurisdiction by a legion of cases that we need not belabor the question with authority that market value and highest and best use in eminent domain are based upon not only the actual use being made of the property in question but as well the potential uses to which the property may be probably placed in the foreseeable future. The fact, therefore, that a portion of the total property was, at the date the sheriff served his Summons, lying idle does not alter the clearly promulgated definition of unity of use in the Case. After nearly a week of trial, the evidence on both sides was unqualified, that the total property of the Defendants, prior to condemnation, had a similar highest and best unity of use, viz., commercial. The claim of the State on this point is incongruous.

POINT IV

THE DEFENDANT LANDOWNERS CLEARLY MET THEIR BURDEN OF PROOF ON ALL PHASES OF THE CASE.

Lastly, the State charges under Point II of its Brief, that the Defendant-landowners failed in their burden of

proof regarding ownership and the right to severance damage. The charge is followed by a recitation of Utah cases, of value to this question only in showing that State counsel may have had occasion at one time or another, to read them. Particular emphasis is put upon this Court's decision in *State of Utah v. Tedesco,* 4 U.2d 31, 286 P.2d 785 (1955), wherein it was held that as between *two disputing claimants in property actually condemned* by the State for "This is the Place Monument" in Salt Lake County, the claimant urging an interest *by virtue of a parol contract* must sustain such interest by "clear and convincing evidence." The rule of *Tedesco* is inapposite herein for such rule, pertaining to an oral and non-possessory estate in land, has nothing to do with the positive proof of the Defendants herein of quiet, peaceable and undisturbed possession of property under color of title not of just the land condemned, but of the remainder land as well.

The measuring rod required of a landowner in meeting his burden of proof for entitlement to severance damage has been raised by Road Commission special counsel in four recent cases: *State of Utah v. Howes, et al.,* 20 U.2d 246, 436 P.2d 803 (1968); *State of Utah v. Style-Crete, Inc.,* 20 U.2d 365, 438 P.2d 537 (1968); *State of Utah v. Bingham Gas & Oil Co.,* 21 U.2d 66, 440 P.2d 260 (1968); and *State of Utah v. Williams, et al., supra;* and the Court has in each case responded in clear and convincing fashion. The ruling law is thus clear that a citizen, whose property is condemned, is under no onerous burden of proving severance damage by "clear and convincing evidence," but rather,

is required to satisfy only the ordinary "preponderance of the evidence" rule. The State continues to raise the question and this Court continues to answer it in the same way.

CONCLUSION

The attempt of State counsel in this Appeal to disguise the issues raised and the facts as presented at trial under the untried question of adverse possesion is ill fated in this Court. The contention was never made by the Defendants nor was it the subject of any debate or issue before Judge Swan. It should not now be the target for the first time on appeal. *In Re Ekker's Estate,* 19 U.2d 414, 432 P.2d 45 (1967); *Riter v. Cayias,* 19 U.2d 358, 431 P.2d 788 (1967). The Landowners' case on ownership, predicated upon undisturbed, peaceable and quiet possession of the subject property for 15 years under color of title, satisfied the uncontested case authority, warranted the ruling of the trial Court, and dictated that the case proceed on to the issues of Just Compensation. The State has raised no issue in this Appeal with respect to the adequacy of proof on the issues of market value and/or severance damage to support the Findings of Fact, Conclusions of Law and Judgment as entered. The proof of ownership was not overcome by the State's proffer of indiscriminate, inconsistent and stray documents in the public records.

After better than six days of comprehensive trial on all the issues, the Judgment as entered, premised upon

fully adequate Findings and Conclusions should be, we do respectfully submit, upheld and affirmed by this Court in all respects.

Respectfully submitted,

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