1972

Wilford M. Burton v. United States of America : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

WILFORD M. BURTON, Trustee,
Plaintiff and Respondent,
vs.
UNITED STATES OF AMERICA,
Involuntary plaintiff, respondent, and defendant,
vs.
WILLARD ROGERS, ARLENE ROGERS, his wife, WILLARD D. ROGERS, Jr.,
Defendants and Appellants.

Case No. 12,917

APPELLANTS' BRIEF

Appeal from the Judgment of the 3rd Judicial District Court for Salt Lake County
Honorable Gordon R. Hall, Judge

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APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by plaintiff-respondent Burton, and involuntary plaintiff-respondent United States of America to quiet title to realty situated in Salt Lake County, Utah, to which action defendants-appellants filed a counerclaim to quiet title to a part thereof in themselves.

DISPOSITION IN THE LOWER COURT

The case was tried to the Court, Honorable Gordon R. Hall, Judge, sitting without a jury. From a decision, judgment, and decree, quieting title in the plaintiffs-

(Note: While in theory, the surface rights were separated from the underground rights by the unrecorded deed to the Moyles, nevertheless, the same not being of record, the "whole title" would be assessed in gross by the tax commission as mining claims to the Evergreen Mining Company, and, hence, the tax deed would not be in effect a mere redemption of Evergreen's mining or underground rights, but would comprehend a sale of surface rights as well to Evergreen.) No attack or suit to set aside this tax deed has ever been made as such [unless the unsuccessful quiet title action decree of 1963, Exhibit 13-P, of which more hereafter, might be so construed]. Matters stood thus until 1944 when James H. Moyle et ux., by warranty deed [Exhibit 6-P] purportedly conveyed their interest to the surface rights under the until then unrecorded deed of 1911, to Lakewood Farm (a corporation). Lakwood Farm attempted to convey to Wilford M. Burton, Trustee under date of December 1, 1955 (recorded December 16th, 1955) [Exhibit 7-P], but Mr. Burton, the grantee also acted as the notary public taking the grantor's acknowledgment. Likewise, on a so-called correction deed, dated December 19th, 1955, Mr. Burton took the grantor's acknowledgment [Exhibit 8-P]. An attempted correction of this, proffered as Exhibit 24-P, was denied admittance by the Court [Tr. pg. 50, Rec. pg. 141]. Based on this incomplete and defectively acknowledged, purported title, Wilford M. Burton, Trustee, commenced a quiet title action in 1962 [Exhibit 33-D] against various transferees from the Evergreen Mining Company [Exhibits 28-D, 29-D]. There was a decree [Exhibits 13-P, 33-D] "purportedly" quieting title against various of the intermediate trans-

respondents, Burton and United States of America, defendant-appellants appeal.

RELIEF SOUGHT ON APPEAL

Defendant-appellants seek a reversal of the judgment and decree and entry judgment and decree in their favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

Basic title to the realty in question was deraigned through mineral patent from the United States of America to Old Evergreen Mining & Tunnel Company, a Utah territorial corporation, under date of May 22nd, 1911 [Exhibit 4-P]. Old Evergreen Mining & Tunnel Company under date of November 22nd, 1911 purportedly quit-claimed the "surface rights" to an area inclusive of the disputed tract herein — but there was no recordation of this deed for a period of almost *thirty* years until July 11th, 1944 [Exhibit 5-P]. Meanwhile, Old Evergreen Mining & Tunnel Company under date of December 31st, 1929, through intermediate trustees [Exhibits 26-D, 27-D] deeded to Evergreen Mining Company the mining claims, including the disputed area, deeds recorded December 31st, 1929. These two latter deeds made "no exception" for, nor were they noted to be "subject to" the Moyle deed or interest. These deeds were bargain and sale deeds [Exhibits 26-D, 27-D]. Next, it should be noted that there was a tax sale deed from Salt Lake County to the Evergreen Mining Company, encompassing the mining claims, including the disputed area [Exhibit 32-D] dated June 1st, 1936,

the United States after refusing to voluntarily join [Rec. pg. 46, par. 2]. The court ordered joinder (Rec. 48).

Further facts and the application of the law thereto will be set out in the several points argued hereinafter.

ARGUMENT

POINT I.

RESPONDENTS ARE NOT RECORD TITLE HOLDERS ENTITLED TO MAINTAIN AN ACTION TO QUIET TITLE – TITLE IN PREDECESSOR LAKEWOOD FARMS DUE TO DEFICIENT DEEDS.

It is elementary that a party must have title upon which to base a claim and pursue a quiet title action. Neither respondent Wilford M. Burton, the original plaintiff, or the impleaded plaintiff, United States of America, taking by quit-claim deed from appellant Burton, have EVEN THE PURPORTED TITLE CLAIMED THROUGH THEIR CHAIN OF TITLE, because the deeds from LAKEWOOD FARM purportedly conveying any title respondents might have in their alleged line of title are, under holdings of Utah case law, invalid, as being improperly on record, due to insufficient acknowledgments [Exhibits 7-P, 8-P]. In each instance WILFORD M. BURTON, who as trustee was *grantee* in the deeds, took the acknowledgment of the *grantor*. And, an attempt to validate the void self-serving acknowledgments [Exhibit 24-B], was denied admittance by the Court. See *Norton vs. Fuller,* 68 Utah 524, 251 Pacific 29, holding at page 30:

> [3, 4] The fact that plaintiff's mortgage was recorded is of no avail to him. As before indicated, the acknowledgment of the execution of the mort-

ferees in the appllants' chain of title, but, the decree did not become conclusive against unnamed persons because there was "*no publication*" made against such persons [Exhibit 33-D, page 1] nor were they named in the title of said action or complaint. By unrecorded assignments [Exhibits 29-D, 30-D, 52-D] title had passed from the transferees named as defendants in above complaint prior (June 1, 1961) to commencement of the purported quiet title action.

It should likewise be noted that although Moyle at or about date of unrecorded deed was in possession of some part of the surface rights of the group of mining claims, but, not specifically on territory herein embraced, that they had by 1936 when the tax deed sale was had, relinquished their possession, since Hotel had been torn down, and, as Mr. James D. Moyle stated, "I have been very much interested in the preservation of the area as it originally was" [Tr. pg. 21, Rec. 112], and while the witness couldn't tell how long the hotel was used, he thought it was torn down around 1930 to 1936 [Tr. 53, Rec. 144]. Furthermore, area was always open to public access over the years [Tr. 54, Rec. 145]. Appellants' rights as successors under the tax deed constituted possession by operation of law.

Finally, plaintiff-respondent commenced this action on June 30th, 1969 (Rec. 1), apparently without advising his counsel that any such purported title as he had, had by quit-claim deed [Exhibit 9-P, recorded June 12th, 1969] been transferred to the United States of America. This resulted in his motion (Rec. 46-7) to add the United States as a party. The motion was resisted by

POINT II.

APPELLANTS' CHAIN OF TITLE IS AND WAS COMPLETE AND EFFECTIVE, EIGHT YEARS BEFORE LINKS IN RESPONDENTS' TITLE WERE FINALLY RECORDED, AFTER A TOTAL LAPSE OF ALMOST THIRTY-THREE YEARS.

The chain of title to these properties, subject of this suit, commenced with issuance of United States Patent to OLD EVERGREEN MINING COMPANY, as patentee on May 22nd, 1911.

Shortly thereafter, under date of November 22nd, 1911 [Exhibit 5-P], Old Evergreen Mining Company purportedly deeded the *surface rights* of various mining claims, including the presently involved claims to James H. Moyle. Now a most singular thing begins — said deed to James H. Moyle REMAINING UNRECORDED FOR ALMOST THIRTY-THREE YEARS, being placed on record on July 11th, 1944!!!

As between the parties, of course, the deed purportedly severed the surface rights from the mineral or underground rights, and, both respondents and the trial court seemed thereafter erroneously to view the rights of the parties as through these proceedings continued in that state!!

In 1929 [Exhibit 26-D, Exhibit 27-D] Old Evergreen Mining Company on eve of dissolution conveyed mining claims including those in dispute here, to John V. Lyle and Herbert Cohen as Trustees in dissolution, and the latter conveyed to Evergreen Mining Company [Exhibits 26-D, 27-D], the same property. This was some fourteen years after the issuance of the Moyle deed, which was

> gage sued on was made before and certified by the plaintiff, himself, as a notary public. By reason of this defect in execution, the plaintiff's mortgage was not entitled to be recorded, *and the fact that it was actually recorded had no legal effect.*

To the same effect see also *Crompton vs. Jenson,* 78 Utah 55 (61), 1 Pac. 2d 242.

It is our contention that under these circumstances, title claimed by the respondents if any still resides in Lakewood Farms, and they are not parties to, nor have they been joined in this action.

Furthermore, by virtue of Section 57-1-6, Utah Code Annotated 1953, providing a conveyance having the word "trustee" after grantee's name, without naming the beneficiaries or stating terms of the trust, and the like, is made; it is no notice of any trust, and grantee is regarded as solely an individual grantee.

And, our curative statute, Section 57-4-4, Utah Code Annotated 1953, has to do only with instruments recorded prior to January 1, 1943, whereas exhibits 7-P and 8-P were recorded in 1955, and so is of no avail to respondents.

Furthermore [Rec. 103, Tr. 12; Rec. 104, Tr. 13], appellants objected to the receipt of Exhibit 7 [Deed from Lakewood Farms to Burton], Exhibit 8 [Correction Deed from Lakewood Farms to Burton], Exhibit 9 [Deed from Burton to United States], which objections were overruled and are hereby cited as further error on part of the trial Court.

still unrecorded. It might be well to note here, that both these deeds recited that the property described in the conveyances was subject to Moyle's surface rights on Silver Lake Claims No. 1, No. 2, No. 3 and the Moyle deed at that time was still not recorded.

By tax deed from Salt Lake County to Evergreen Mining Company dated [Exhibit 32-D] June 1st, 1936, the Evergreen Mining Company acquired all the rights, both surface and subsurface to the mining claims in question here. Inasmuch as the failure of Moyle to record his deed, did not, in the tax assessment procedure effectuate any change in the tax rolls separating the two titles (since the tax commission is bound by the record of title in the recorder's office), which were still in the Evergreen Mining Company. Hence, the tax sale was not, insofar as Evergreen Mining Company was concerned, a mere redemption of its title, but, included the whole bundle of rights, including the *surface* of these claims, that Moyle title being an adverse one to appellants' predecessor and *underground rights.* There is now a fully and completely made chain of title from the beginning, vesting title in appellants' predecessor at this point, and PRIOR TO THE RECORDATION OF A LINK (the Moyle deed) of the RESPONDENTS' LINE OF TITLE.

Next, the Evergreen Mining Company conveyed to Kirby and Gurholt by deed under date of July 23rd, 1954 [Exhibit 28-D].

Kirby and Gurholt, and their wives, entered into a contract [Exhibit 29-D] for sale of property (unrecorded) covered herein and other property to Allstate

Builders, Inc., Dale L. Jensen, Willard Rogers, and Eugene M. Openshaw as buyers under date of June 1, 1961, and, it is from various assignments of the buyers thereunder to the present holders of interests that title is deraigned in defendants [Exhibits 30-D, 52-D].

The appellants hereunder on all points were and are within the doctrine set forth in Annotation in 133 A.L.R. 886, which cites the Wisconsin case of *Zimmer vs. Sundell* [296 N.W. 589, 133 A.L.R. 882], from which annotation is quoted:

> Page 887, 133 ALR
>
> ". . . As between two bona fide purchasers deriving title to the same real estate from its common record owner through different intermediate grantors, strangers to the record title, the one who first recorded his entire chain from the record owner although done after the other had recorded his immediate deed to himself, possessed the better title, by reason of a statutory provision that every conveyance of real estate which is not recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate whose conveyance shall first be duly recorded."

POINT III.

KNOWLEDGE OF MOYLE DEED TO BE CHARGEABLE TO A PARTY MUST BE OF CURRENT TIME, OR CURRENTLY KNOWN TO IT.

In an attempt to negative appellants' titles to the realty here involved, respondents endeavored to predicate knowledge of the Moyle deed, though unrecorded, to and through all takers under appellants' chain of title.

As before noted, the Moyle deed [Exhibit 5-P] dated 1911 wasn't recorded until mid-1944. There was no showing that in 1929, when conveyance from Old Evergreen Mining Company to Evergreen Mining Company, was had that the latter company, still had knowledge of the Moyle deed, which, already for 18 years had remained unrecorded; and, the deeds from Old Evergreen to the trustees and from the trustees to the Evergreen [Exhibits 26-D, 27-D] contained an entirely different version of the retention of Moyle surface rights, *relating only to surface rights on Silver Lake Claims No. 1, No. 2, No. 3.* These claims not involved in this suit.

The rule is, insofar as applicable law is concerned: 58 Am. Jur. 2nd, Notice, Sec. 19, Pages 502:

> "Notice in Another Transaction. If it is apparent that knowledge acquired by a person in a previous transaction was present in his mind at the time of a subsequent transaction he is chargeable with notice thereof, and the fact that it was so present in his mind may be the inference from the proximity of the transaction. Where, however, it is sought to charge a person with notice in a particular transaction, it is not enough that he had previously received notice of the fact while engaged in another transaction, where the knowledge thus acquired has been forgotten."

During the lapse of 18 years, there was a change in officers and directors; and the knowledge of contents of an unrecorded deed given by the prior corporate officers a long time ago, was not in detail in their minds, and the Evergreen Mining Company, paying a valuable consideration and otherwise a bona fide purchaser for value [Sec. 57-3-3 UCA 1953] even if deemed a taker

with knowledge initially, certainly could not be deemed to have recollections (in a changed directorate) and, third persons looking at record would find the grant in the Moyle deed recorded 33 years later, on record as against the 3 claim reservation contained in the Evergreen deed, and could rely thereon. Furthermore, the 1936 tax deed [Exhibit 32-D] would revest in the Evergreen Mining Company in 1936, any title theretofore conveyed by it to Moyle by virtue of the 1911 deed.

Finding of Fact Number 7, and Conclusion Number 2, are, because of the foregoing, erroneous to extent of their conflict therewith. [Rec. 74, 76]

POINT IV.

RESPONDENTS' CLAIM (UNDER PLEADING AMENDMENT) TO PREVAIL ON ADVERSE POSSESSION IS UNSUPPORTED BY THE EVIDENCE, AND INSOFAR AS FINDINGS AND CONCLUSION PURPORT TO FIND FACTS SO HOLDING, IS ERRONEOUS.

Respondents [Rec. 223, 224, Tr. 134, 135], by amendment to their pleadings, to conform to the evidence, pleaded adverse possession under a written instrument as a cause on which to base their quiet title action.

The Court's findings of fact [par. 4 and 5, Rec. 74] purport, in paragraph 4 to cover respondents' possession, and in paragraph 5, "timely" payment of "taxes" through the years 1950 to and including 1960, and from 1964 to and including 1969 on or before tax delinquent date(s).

It is elementary, of course, that timely payment of taxes [Section 78-12-12.1, Utah Code Annotated, 1953,

ignore the 1964-9 period as being short of a 7 year period, and therefore ineffectual.

POINT V.

RESPONDENT BURTON'S 1963 QUIET TITLE DECREE INEFFECTUAL AS AGAINST APPELLANTS AND THEIR IMMEDIATE CONTRACTUAL PREDECESSORS.

Commencement of a quiet title action by Respondent Burton [Exhibits 13-P, 33-D] against Kirby and Gurholt and their wives, and unknown persons in 1962, is relied upon by the respondents and listed in the courts' findings of facts [Finding No. 7, Rec. 75, Conclusions of Law No. 1 and No. 2, Rec. 76] as a further bar to appellants' titles. This is not so, and is erroneous in toto.

(1) Messrs. Kirby and Gurholt had by contract dated 1961 [Exhibit 29-D, 6-1-'61] parted with their title, two years prior to the commencement of said action, and title could not thereby be barred by the action insofar as these appellants were concerned, unless they were covered by the term "unknown" parties. Reference to Exhibit 33-D will show that although authority to publish summons against unknown parties was obtained, NO PROOF OF PUBLICATION WAS EVER FILED, and, the decree entered January 2nd, 1963, was not effective as barring either the unnamed parties to the contract dated June 1st, 1961, or their unnamed assignees, even IF UNRECORDED.

(2) Utah case law holds that even recording a decree or a judgment does not cut off title under a prior unrecorded deed or instrument, and is subordinate thereto.

as amended] for an unbroken period of 7 years is a requisite to such adverse possession proof, plus proof of occupancy [Section 78-12-9, Utah Code Annotated, 1953, as amended].

Even assuming, arguendo, for the purposes of this point, that there was adequate possession by respondents; nevertheless they fail to make proof of seven years continuous timely (*Bowen vs. Olson,* 2 Utah 2d 12 (15), 268 Pac. 2d 983) payment of taxes as "found by the Court." Exhibits 42-D, 43-D, 46-P, show that for the years 1955 and 1956, that appellants paid taxes for those respective years PRIOR TO PAYMENT OF THE RESPONDENTS [*Railway vs. Inv. Co.,* 35 Utah 528 (540) 101 Pac. 586]. Facts show that:

Tax Year	*Date Paid Receipt*	*Serial Number*	*By Whom Paid*
1955	10-26-'55	35532*	Kirby & Gurholt Interests (Appellants' Predecessor)
1955	11-30-'55	79916	Moyle-Burton Interests
1956	11-30-'56	63859*	Kirby & Gurholt Interests (Appellants' Predecessor)
1956	11-30-'56	64383	Moyle-Burton Interests

*First in time of payment.

Under these circumstances, there is lacking, over the 10 year period 1950-60, any continuity [*Home Owners Loan Corp. vs. Dudley,* 105 Utah 208 (220), 141 Pac. 2d 160] of a 7 year period, which the findings differently make error. There is a 5 year continuous payment, and a 4 year continuous payment, neither of which are sufficient to sustain "adverse possession for 7 years." It is therefore apparent that these findings [No. 4 and No. 5 (Rec. 74)], particularly No. 5, are wholly erroneous. We

Appellants' chain of title is deraigned through tax deed [Exhibit 32-D], dated June 1st, 1936 as one of the links, and, the findings of the court [Conclusion of Law No. 1, No. 2, No. 4; Findings of Fact 3, 6, 7], fail to give effect to this deed, and thereby give rise to a most serious error.

The tax deed [Exhibit 32-D] runs from Salt Lake County to Evergreen Mining Company, covering delinquent taxes on mining claims for 1931-5 (inclusive of the property herein in dispute), such tax sales being against the properties assessed to Evergreen Mining Company. The final tax deed is of course prima facie evidence of validity of all proceedings since tax sale [Section 80-10-66, Rvsd. Statutes 1933 and Sec. 59-10-64 Utah Code Annotated 1953, Subsection 5 amend], and supported by Auditor's Tax deed to property of Evergreen Mining Company, and tax sale record for the year 1931 with subsequent taxes for the years 1932, 1933, 1934, 1935 in the amounts of $22.99, $25.19, $24.14, $26.03, $24.99, respectively. These instruments are prima facie evidence of regularity of all proceedings leading up to and including the tax sale. [Section 80-10-35 Revsd. St. 1933, and Sec. 59-10-36, Utah Code Ann. 1953, as amended]. Thereafter, taxes for the years 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, and 1946 were paid timely by appellants' predecessors. [Note: respondents claim no tax payments prior to 1946, and 1946 taxes (See Summary Sheet, Exhibits 42-D, 43-D) were paid by both parties, with appellants' payment on October 1st, 1946, being prior to respondents' payments November 15th, 1946. IT IS TO BE NOTED THAT ALL DURING THIS PERIOD (1931-1946) that the DEED

See *Kartchner vs. State Tax Commission,* 4 Utah 2nd 382, 294 Pacific 2nd 790, from which we quote:

> ". . . Most courts . . . have held as we do here, that the judgment lien was subordinate and inferior to a deed which predated it, whether recorded after such judgment or not recorded at all. . . ."

See also *Johnson vs. Casper,* 1954, 75 Idaho 246, 270 Pac. 2d, 1012 in accord. The Kartchner case notes also that "This situation has received different treatment by courts under varying recording statutes." Both these cases relate to "monetary judgments." A California case, covering a "quiet title decree" situation while reaching an opposite conclusion (*Evarts vs. Jones*) points out on page 186-7, 274 Pac. Reporter 2nd, that before amendment the California statute was similar to statutes like the Utah Statute, but that by amendment, adding to the situations where unrecorded instruments were barred by a prior recorded instrument, was effective:

> ". . . as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action. . . ."

Accordingly, we regard all reliance upon the 1963 quiet title decree initiated by respondent Burton herein in 1962, as being without any validity against appellants or their title, or, contracts relating thereto.

POINT VI.

COURT'S FINDINGS BASED ON RESPONDENTS' PURPORTED CHAIN OF TITLE ERRONEOUS IN VIEW OF EFFECT OF VALID TAX TITLE IN APPELLANTS' CHAIN TITLE.

to JAMES H. MOYLE WAS STILL UNRECORDED, except for period after July 11th, 1944, when the Moyle deed was finally recorded.]

This gives the chain of title of appellants an unbroken tax payment of 10 years timely payments after acquisition of title by the tax deed, and, as there has never been any action to contest that deed, its title, or the interest acquired thereunder is now fully established.

Furthermore, appellants' title is further strengthened by the fact that they paid (under Salt Lake County surface right assessments 1955 and 1956) first in time taxes thereon, thereby further validating their tax title under the provisions of Utah Code Annotated 1953 (1951 law) by making a payment of 1 year's taxes, subsequent to the effective date 1951 statute (Sections 78-12-5.1 and 78-12-5.2).

This tax title and its consequences made and make the appellants' and/or their predecessors back to 1936 the "legal title holders," and by virtue of the provisions of Section 78-12-7, Utah Code Annotated, 1953, as amended as follows:

> "Adverse possession—Possession presumed in owner — In every action for the recovery of real property, or the possession thereof, the person establishing the legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of 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."

Appellants are deemed in possession, unless dispossession is proved within seven year before the commencement of the action, which, here would be in 1962. As will be more detailed in the next subdivision on adverse possession, it will be shown that neither (a) The actual possession, or (b) Payment of legally assessed taxes for any continuous or consecutive 7 year perid by respondents ever occurred, and hence, as legal title holder appellants' and/or predecessors will prevail.

[See Point II, this brief, as to conveyance of respondents' surface rights, and not merely redemption of appellants' title.]

POINT VII.

THE COURT ERRED IN ITS DETERMINATION OF ADVERSE POSSESSION:

(A) FAVORABLY TO RESPONDENTS

(B) UNFAVORABLY TO APPELLANTS.

(A) Trial Court erred in its determination of Adverse Possession Favorably to respondents (Finding of Facts 4, 5, 6, 7, 8, Conclusion of Law 1, 2, 3, 4). [Rec. 74, 75, 76.]

The plain and simple answer to respondents' claim of adverse possession as a basis for their recovery is that they can nowhere point to an uninterrupted and timely consecutive period of 7 years payment of taxes legally levied against their interests. This is one of the requisites of proving adverse possession [Section 78-12-12.1 Utah Code Annotated, 1953, as amended]. See Point IV, this brief.

However, even a more extended illustration of the tax situation is here appended to eliminate all possibili-

ties of any argument on such a period of tax payments as would support the purported seven year title of respondents.

It would appear that the appellants' and their predecessors paid all taxes prior to 1946, respondents making no claim to prior payments, and, it should be noted that the deed to James H. Moyle of 1911, was until 1944 unrecorded. During this period, to June 1st, 1936 approximately, in theory, the surface and subsurface rights were separated as between the parties; but insofar as public records were concerned there was no separation, and, all assessments against this property as mining claims would be made by the Tax Commission or its state predecessor entity, and, but one overall assessment would be made. In 1936, the tax sale to Evergreen Mining Company, included, both "surface" and "subsurface" rights. While, in legal effect, a repurchase of its "own" rights at a tax sale merely effects a redemption of purchasers' rights, here, it would include also, the "surface" rights, since both were comprehended in this transaction. Hence, the reason for separate assessment of taxes for each type of usage would not exist after that date, until, for example, rights might again be severed. Hence in viewing tax payments after that time, based on either the tax or assessment notices introduced in evidence as to the mode of assessment or tax for a particular year [Exhibits 42-D, 43-D, Summary Sheets and Exhibits "A," to each Summary Sheet] show payments of taxes or redemption of same, based on assessments valid in some years, and invalid in other years, because of separation of surface and subsurface rights when they should be made as one unit, and valid in other

years, because of a further separation of rights, to-wit: [This listing is a composite of the items on the two Summary Sheets.]

Year Tax	*Overall Valid Ass't*	*Valid Sub Surface Ass't*	*Valid Surface Ass't*	*Invalid Surface Ass't*	*Paid or Redeemed By*	*Valid Ass't Payment Timely*
1946	Tax Com.			County	Both	Appel.
1947	Tax Com.			County	Both	Appel.
1948	Tax Com.			County	Both	No
1949	Tax Com.			County	Both	No
1950	Tax Com.			County	Both	No
1951	Tax Com.			County	Both	No
1952	Tax Com.			County	Both	No
1953	Tax Com.			County	Both	No
1954	(Record Not Available)			County	Resp.	Resp.
1955		Yes	County		Appel.	Appel.
1956		Yes	County		Appel.	Appel.
1957		Yes	County		Resp.	Resp.
1958		Yes		County	Both	Appel.
1959	No			County	Both	No
1960	No			County	Both	No
1961	No	Yes		County	Both	No
1962	Tax Com.			County	Both	No
1963	Tax Com.			County	Both	Appel.
1964	Tax Com.			County	Both	No
1965	Tax Com.			County	Both	No
1966	Tax Com.			County	Both	Appel.
1967	No	Yes		County	Both	No
1968	No	Yes		County	Both	No
1969	(Action Commenced June 30th, 1969 to quiet title herein.)					

It is to be noted that in tabulating the above, there are in some years both valid tax commission assessment, and invalid county assessment, and in some years both invalid tax commission assessment (relating to subsurface only) and invalid county assessments due to the fact that surface and subsurface had been again combined after 1958 tax sale to Kirby and Gurholt [Exhibit 45-P] (predecessors of appellants). Now viewing the situation from the point of validity or invalidity of the assessments and taxes paid on the property during the years in question, it is absolutely apparent that despite respondents' claims of taxes paid, that no adverse possession predicated on taxes is available, since there are not and never have been proper, regular, and valid assessments, in connection with many years of appellants' interests when the surface and underground rights were vested in appellants or predecessors. The county may assess surface rights only when validly separated from the underground rights. [Utah Code Annotated, 1953, as amended, Section 59-5-57]. Checking it out, on our count, respondent can or might claim only two years of payment of taxes *timely*, on *valid* assessments between 1946 and 1968.

(B) The Court erred in its determination of adverse possession, in holding unfavorably to appellants on their claim of lack of possession by respondents approximately prior to the tax deed of June 1st, 1936 and subsequently. [Findings of Fact 4, 8, Conclusion of Law 3.]

As testified to by Mr. James D. Moyle, early in the situation and prior to recording of their deed, they had used the land for pasturage to some extent, had had a building thereon, and had maintained a stable [but as

nearly as we can ascertain from his testimony and drawings the latter [Exhibit 17-P] was not on the affected ground embraced in this action], and there was some fencing on the land, apparently erected by one, Robert Brighton, whose relationship to the plaintiffs was not disclosed. The fencing was not an enclosure in the sense that it completely circumscribed the realty involved as an outside boundary fence [Exhibit 17-P].

The usage must have been very small, since no assessment either to the Evergreen Companies, or any of their successors, was made of "surface usage" of the claims as apart from mining purposes, ever, 1911-1936. By surface usage here, is meant surface usage of the mining claims as such — as apart from the assessment which is involved when a separation of surface and mineral or underground rights is obtained and separate titles to each put on record. Furthermore, Mr. Moyle's testimony, showed that by the late twenties and early thirties that the fences were gone, usages declined, building was torn down, and the land reverted almost to its original wild state. Note the following extracts from the record; Mr. James D. Moyle testifying:

> "THE WITNESS: O.K., Well I spent most of time summers up there and presently have a year round home in the area. I have been very much interested in the preservation of the area as it originally was." (Rec. 112, Tr. 21)
>
> "A. . . . The general public have had foot access to all of Silver Lake and have used the property much as it was originally located. (Rec. 113, Tr. 22)
>
> "Q. Now continuing up . . . to the present time

is the fence still there in any portions of the fence line you have drawn? (Rec. 117, Tr. 26) [Exhibit 17-P]

"A. None of the original log fence, except you might find a corner here and there that is not fully deteriorated, however in order to block access to this area, and originally there used to be a gate about in this area (indicating). (Rec. 117, Tr. 26)

"Q. Go ahead. (Rec. 117, Tr. 26)

"A. As this fence deteriorated and livestock was eliminated from the area and it was not important then to impound them here, this gate was abandoned and access to the property, access to the whole area. (Rec. 117, Tr. 26)

"Q. When you say the whole area, you mean the property subject to this lawsuit? (Rec. 117, Tr. 26)

"A. Yes." (Rec. 117, Tr. 26)

* * * *

"Q. Did you ever have occasion to put up any signs on the property? (Rec. 148, Tr. 57)

"A. Yes. From time to time we have put up signs. . . . There hasn't been any in the last few years." (Rec. 121, Tr. 30)

* * * *

"Q. How long was that hotel used? (Rec. 144, Tr. 53)

"A. Well, I can't answer that. Around the turn of the century it was used for many years — many years it has been vacant — torn down in about, of I recollect in around '36. (Rec. 144, Tr. 53)

"Q. Actually torn down? (Rec. 144, Tr. 53)

"A. Yes, it was. (Rec. 144, Tr. 53)

"Q. Used after the turn of the century as a hotel? (Rec. 144, Tr. 53)

"A. Entirely, yes. It was used for many years after the turn of the century, and well into the twenties. (Rec. 144, Tr. 53)

"Q. And stopped being used as a hotel in the twenties, is that correct? (Rec. 144, Tr. 53)

"A. That's right. Was used as a boys' home and one or two other things, but fell into disrepair. (Rec. 144, Tr. 53)

"Q. I see, and that approximately, that essentially it was not used any more in the twenties? (Rec. 144, Tr. 53)

"A. I would say in the early thirties — I don't remember, I couldn't tell you. (Rec. 144, Tr. 53)

"Q. . . . do you have any idea who erected that fence? (Rec. 145, Tr. 54)

"A. I think it was erected by Mr. W. S. Brighton or at his request. (Rec. 145, Tr. 54)

"Q. And you didn't erect the fence yourself? (Rec. 145, Tr. 54)

"A. Well, not the three-log fence. . . . (Rec. 145, Tr. 54)

"Q. I see. Is the fence still standing? (Rec. 145, Tr. 54)

"A. No, you would have a hard time finding where it was. (Rec. 145, Tr. 54)

"Q. I see. And can you tell us when the fence more or less fell down or —? (Rec. 145, Tr. 54)

"A. Well after the livestock was removed from area, I would say in the early middle thirties, it just gradually deteriorated. People used it for firewood. (Rec. 145, Tr. 54)

"Q. I see. Now did you indicate in your testimony that — did I understand you correctly that the public generally had access to this Silver Lake area over the years? (Rec. 145, Tr. 54)

"A. Oh, yes. (Rec. 145, Tr. 54)

"Q. For fishing and other things? (Rec. 145, Tr. 54)

"A. Fishing and at times boating. (Rec. 145, Tr. 54)

"Q. But the members of the public have come and gone to Silver Lake for many years uninhibited, have they not? (Rec. 146, Tr. 55)

"A. Yes. (Rec. 146, Tr. 55)

"Q. But people walking have come and gone over the years? (Rec. 146, Tr. 54)

"A. That is correct. (Rec. 146, Tr. 55)

"Q. And would this essentially, is this correct for the entire time of your recollection? (Rec. 146, Tr. 55)

"A. Yes. (Rec. 146, Tr. 55)

"Q. Which would go back, I assume, to the early part of the — (Rec. 146, Tr. 55)

"A. Back a long ways. (Rec. 146, Tr. 55)

"Q. Early part of the century, anyway? (Rec. 146, Tr. 55)

"A. Yes." (Rec. 146, Tr. 55)

We think that the evidentiary part of the testimony relating to the years after approximately 1935 shows no substantial usage or holding by the plaintiff, or its predecessors, and that the property is essentially undeveloped and in a more or less natural state, so, that when the Evergreen Mining Company purchased it in 1936 for taxes, they as fee owners became possessed of it, and, their possession was never since attacked, disturbed, or adversed. This usage even less than that found insufficient possession in *Day vs. Steele,* 111 Utah 481, 184 Pac. 2nd 160.

POINT VIII.

RESPONDENTS' INTERPRETATION OF PURCHASE—CONTRACT AND NON-ASSIGNMENT TO APPELLANTS, AND ITS EFFECTIVENESS, IS ERROR.

Respondents' attempted interpretation of the 1961 purchase contract [Exhibit 29-D] running to the Rogers is not only illogical, incorrect, and improper, and the wording thereof would be unduly strained to attempt to reach such conclusion as embodied in Finding Fact 7, and Conclusion of Law 2, herein. [Rec. 74, 75, 76]

The contract provides for the sale of:

> "That portion of the George Lode Survey #5945 which lies North of the Southerly line of Silver Lake #3, Survey #5945, West one-half of Alton Lode Survey: 5945, All of New York Extension Survey #5945-A, Silver Lake Survey #5945, excepting therefrom:"

Not A Quote — SUMMARY

(a) Description of some of plaintiff's land not in conflict with the above.

(b) Description excluding conflicts with certain other mining claims.

(c) Description of a parcel on a claim with 50' radius on Lade of Lake Claim, being water source.

(d) Certain right of way.

(e) An acre tract on the Alton lode, previously sold.

"In addition to the above seller covenants and agrees to sell and convey by quit-claim deed only the following described property, to-wit:

> That portion of the George Lode Survey #5945 which lies South of Silver Lake #3, Survey #5945, the East ½ of the Silver Lake #1, Survey #5945, Alton Lode Survey #5945, New York Extension 5945-A, and Silver Lake #5, Survey #5945, as excepted hereinabove."

Plaintiff's argument is that the last three words "as excepted above" means that the exceptions listed on page 1 of the contract's provisions are again excepted from the listing of Second set of descriptions on page 2 thereof, as well.

Such reasoning is fallacious in the extreme, for it would make the wording of the property to be conveyed by quit-claim deed nugatory with no meaning, and nothing to be so conveyed.

Secondly, the reference to property in the exceptions listed is not property IN CONFLICT WITH THE CLAIMS OR PORTIONS THEREOF TO BE CONVEYED UNDER EITHER THE WARRANTY

SECTIONS OR THE QUIT-CLAIM DEED, and is not, as we understand matters involved in his lawsuit — and, there is a residue of property covered or to be covered by quit-claim deed (as well as under the warranty section). Whether the transaction has been completed, or is still to be completed is not within the matters for consideration here, but there is a RESIDUUM OF PROPERTY TO BE CONVEYED.

Also, in considering a contract, one must construe it as a whole, and whatever is ambiguous (if it is so) must be considered in the light of other contract provisions.

Note that in paragraph Sixth (Page 4 of said contract), there appears the following language:

"Seller shall furnish to buyer marketable title to said premises by Warranty Deed (less we presume the exceptions described on page 1 of said contract), EXCEPT as to those portions to be conveyed by Quit Claim Deed, as first hereinabove stated said premises to be free and clear (as to properties conveyed by quit-claim, we assume) of encumbrances save and except the following: ... [lists various patent, right of way, and tax matters]." These, we take it are the exceptions to be considered in connection with the property to be conveyed by quit-claim deed.

Also, in paragraph 7th of the said contract on page 6th, is the following language:

> "The parties recognize and agree that the subject properties are encumbered by various reservations as more specifically set forth in paragraph

six hereinabove, and it is not intended by the Seller to reserve any interest in the properties unto themselves and, therefore the seller covenants and agrees to give a deed of conveyance to the Buyer as to all right, title and interest in and to said lands subject only to the encumbrances set forth in paragraph six hereinabove."

As stated, we feel that the contract is clear, certain, and unambiguous as to how and what is to be conveyed.

Exhibits 30-D and 50-D, from contract purchasers to appellants refute findings of non-assignment, and material in Point V of this brief shows the unrecorded contract of sale to take precedence over respondents' title.

CONCLUSION

In retrospect, it is submitted that the facts shown by the record and delineated herein, showing divestiture of legal title from respondents, dwindling and insufficient claim of possession, their 1961 futile attempt to quiet title, and their failure to prove adverse possession by reason of (among other things) lack of any period of seven year consecutive, timely tax payments, and non-recordation of their deed for almost thirty-three years, and, the gap in title due to defective deeds leaving them without basis for bringing this action, all lead only to the absolute conclusion, that the findings, decree, and decision of the trial court are so compounded with error as to be untenable and without sustaining basis for its findings, conclusions, and decree, warranting the relief sought by appellants herein.

WHEREFORE, appellants pray that this Honorable Court (1) For reversal of the judgment and decree herein entered by the Trial Court, as a matter of law, or that failing, (2) a new trial.

Respectfully submitted,

ROBERT C. CUMMINGS
RICHARD S. JOHNSON
Attorneys for Appellants

Receipt of two copies of the foregoing Brief of Appellants, is hereby acknowledged ..... day of August, 1972.

ELLIOT LEE PRATT,

By .....
Respondents' Attorney