1972

Wilford M. Burton v. United States of America : Respondent'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. 12917

BRIEF OF RESPONDENT

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

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NATURE OF THE CASE

This action is by Wilford M. Burton, Trustee, and the United States of America, seeking to quiet title to the surface rights of property in Brighton, Salt Lake County, Utah.

DISPOSITION IN THE LOWER COURT

The Honorable Gordon R. Hall granted Finding of Fact, Conclusions of Law and Decree in favor of the plaintiffs and against the defendants.

STATEMENT OF FACTS

Appellants' Statement of Facts is not a fair statement of facts under Rule 73, Utah Rules of Civil Procedure. It is incomplete, is not objective and for the most part is merely an extended argument. The following is therefore submitted in lieu thereof.

The property is at Brighton, Salt Lake County and consists of the surface to a tract of land 501.5 feet east and west, and approximately 2,800 feet north and south, covering the East portions of patented mining claims, New York Extension 5945 A, Silver Lake No. 5 and Alton. (R. 116, Ex. 17-P). The property includes a portion of Silver Lake and is described by metes and bounds beginning with the first deed (Ex. 5-P) and continuing throughout the Chain of Title and all taxing documents, down to the present time as follows:

> Commencing at the Northwest corner of Section 35, Township 2 South, Range 3 East, Salt Lake Meridian and running thence West 501.5 feet more or less to a point 8 rods West of the extreme Western boundary of Silver Lake; thence South along a line passing through a point 8 rods West of the extreme Western boundary of Silver Lake to a point due West of the Southwest corner of said section; thence due East to

said Southwest corner of said section 35; thence North to point of beginning.

Respondents' Chain of Title

The Chain of Title from U.S. Patent down to the plaintiffs covering the surface rights to the property, and described as above, is as follows:

(a) U. S. Patent to the Old Evergreen Mining and Tunnel Company, No. 200253, dated May 22, 1911 and recorded July 21, 1953. (R. 95, Ex. 4-P)

(b) Quit Claim Deed from Old Evergreen Mining and Tunnel Company, a corporation to James H. Moyle, signed by Henry Cohn, president, H. G. McMillan, secretary, dated November 22, 1911, and recorded July 11, 1944. (R. 96, Ex. 5-P)

(c) Warranty Deed from James H. Moyle and Alice C. Moyle to the Lakewood Farm, a corporation, dated July 8, 1944, and recorded July 11, 1944. (R. 96, Ex. 6-P)

(d) Warranty Deed from the Lakewood Farm to Wilford M. Burton, Trustee, dated December 1, 1955, and recorded December 16, 1955. (R. 102, Ex. 7-P). Said Deed was made as a part of the Plan of Dissolution of the corporation, as appears on the second page thereof.

(e) Correction Warranty Deed from the Lakewood Farm to Wilford M. Burton, Trustee,

dated December 19, 1955, and recorded June 13, 1957. (R. 103, Ex. 8-P). Said Correction does not modify the original description.

(f) Quit Claim Deed from Wilford M. Burton, Trustee, to the United States of America, dated June 12, 1969, and recorded June 12, 1969. Said Deed includes additional property. (R. 104, Ex. 9-P)

(g) The U.S. Survey Plat No. 5945A is referred to in the Patent and appears herein as Ex. 10-P. (R. 104)

Additional facts relating to the plaintiffs' title to the surface of the property are as follows:

(a) The Lakewood Farm Corporation was dissolved. Incident to this dissolution the stockholders executed an escrow agreement wherein Wilford M. Burton was named as Trustee. (R. 124-127, 155, Ex. 18-P)

(b) The various stockholders in the Lakewood Farm conveyed their respective interests in the property to the United States Government. (Ex. 39-D, pages 69-76)

(c) Wilford M. Burton, Trustee, as plaintiff quieted title against Finn Z. Gurholt and Greta Gurholt, his wife, Gordon W. Kirby and Ruth J. Kirby, his wife, in a case filed January 2, 1963. The Decree was dated February 5, 1963, and recorded on February 5, 1963. The Lis Pendens was duly recorded Jan-

uary 2, 1963. (Exs. 12-P, 13-P). The Gurholts and Kirbys are predecessors in title to any interest claimed by the defendants-appellants herein.

Plaintiffs-Respondents' Possession and Non-Mining Use of Surface

For the last 50 to 60 years the Moyle family has used the premises. During this time, according to James D. Moyle, son of James H. Moyle, the following use was made of these properties:

(a) It was completely fenced and used as a pasture. (R. 113)

(b) After the pasturing ceased, a gate has been maintained leading into and out of the property, to keep trespassers out. (R. 113)

(c) There was a hotel for many years, and in the 1930's a stable was placed on the property. (R. 113)

(d) The property was enclosed many years ago with a three log fence. (R. 116, 117, Ex. 17-P). After the fence deteriorated, access to the entire area was controlled by a gate. (Ex. 17-P, "H", R. 117). Along the East border was a picket fence, and after the picket fence had deteriorated there was a large barrier of granite stones and logs embedded on end to keep vehicles out of the area. (R. 118)

(e) Where Brighton Road approaches the property, a gate had been placed and kept locked for many years. Parts of the property North and East of Silver Lake were heavily wooded which prevented access; and to the West and South where the word "steep" is written it was precipitious country where pasturing was not possible. (**R. 120**)

(f) Access along a public road was controlled by a gate. (**R. 120**)

(g) He has put up "no camping" and "private property" signs and these have been replaced from time to time. (**R. 121**)

(h) There has been no mining activity on the property. (**R. 120, 121**)

(i) The public has been permitted access by foot for picnicing, fishing and other related activities, however, vehicular traffic has been kept out. (**R. 145**). Barriers and this type of use of the property has lasted up to the present time. (**R. 151**). The nearest mines are more than **1,000** feet from the property and have not been operated for over 50 years. (**R. 147, 148, 151**)

There is no testimony or evidence of any kind that the defendants or any of their predecessors in title ever had possession or use of the subject property.

Payment Of Taxes On The Surface From 1946-1970

The County Assessor assessed the surface rights by the metes and bounds description set forth in the above mentioned Chain of Title, on the Assessment Rolls for the years 1946 through 1949. (R. 130-132, Exs. 20-23) and for the years 1950 through 1970. (R. 128, 129, Ex. 19-P)

Mr. James Moyle, the secretary of Lakewood Farm, personally paid all of these taxes on behalf of the Lakewood Farm Corporation. (R. 114-115). As secretary of the Lakewood Farm, James D. Moyle testified that it was his signature affixed to the Warranty Deed and the Correction Warranty Deed, (Ex. 7-P and 8-P), wherein the property was deeded to Wilford M. Burton, Trustee. (R. 122, 123). In connection with the transfer of the properties to the Lakewood Farm, the original Deed from the Old Evergreen Mining and Tunnel Company, (Ex. 5-P), was discovered in the old files of James H. Moyle. (R. 136). The Deed had not been recorded and was then delivered to Henry D. Moyle, brother to James D. Moyle and son of James H. Moyle, and the Deed was then recorded. (R. 137). At this time he did observe the signatures of Henry D. Moyle on the Lakewood Farm Deed and was present when the acknowledgment was placed on the Deed. (R. 138)

Defendants'-Appellants' Interests

Any interest the defendants had in the Brighton property was limited to the underground or mineral

rights. Any taxes paid by the defendants-appellants were on the underground or mineral rights. The various legal descriptions, tax notices and assessments as well as any unrecorded contracts merely relate to the underground rights or to interests expressly separated from the subject surface interests. (R. 74, 75, 76). The various instruments relating to the defendants'-appellants' interests are as follows:

(a) Deed from Old Evergreen Mining and Tunnel Company, dated December 31, 1929, (prior deed of surface rights to Moyle was in 1911) conveying the mining claims and signed by Herbert Cohen, president, and Charles L. Smith, secretary, in favor of Herbert Cohen and John V. Lyle, vice-president, as trustees in liquidation of the Old Evergreen Mining and Tunnel Corporation. Said deed was recorded December 31, 1929. (Ex. 26-D, Ex. 48-P)

(b) Deed from the aforesaid Herbert Cohen and John V. Lyle as trustees in liquidation to Evergreen Mining Company conveying the said lode mining claims listing said claims by name, dated December 31, 1929, and recorded on the same date.

(c) Warranty Deed from Evergreen Mining Company (the new corporation) to Gordon W. Kirby and Finn Gurholt, dated July 23, 1954 and recorded July 30, 1954. Said Deed, how-

ever, does not convey the Alton mining claim, which comprises most of the property in the lawsuit.

(d) An unrecorded real estate contract, (Ex. 29-D) wherein the said Finn Gurholt and Gordon Kirby agreed to sell to defendants certain mining claims, excepting therefrom in the second paragraph of the description, the property subject of this lawsuit. (Ex. 29-D). Said real estate contract thus excluded the surface rights of the plaintiffs property.

(e) In connection with the above stated unrecorded real estate contract, an escrow was established at Security Title Company. (R. 204, Ex. 47-P). All of the Deeds conveying into and out of the escrow excluded the subject property. (R. 205, Ex. 40-D). The escrow has been closed and all Deeds have been executed and there are no Deeds to the defendants.

(f) In said real estate contract, the purchasers', Allstate Builders, Inc., Dale L. Jensen and Eugene M. Openshaw all have disclaimed any interest in the property. (R. 93, 94, 95). An unrecorded Assignment dated August 10, 1965, assigns the interest of Dale Jensen and Eugene M. Openshaw to Willard D. Rogers. Said Assignment relates only to the said real estate contract and thus excludes the properties subject of the plaintiffs' ownership. (R. 159)

warded to the Tax Commission by the County offices. (R. 199, 200)

ARGUMENT

There are three basic propositions:

(1) The surface rights were separated from the underground rights in the very first Deed to James H. Moyle in 1911, (Ex. 5-P) and were thus separately described and conveyed in an unbroken chain of title from Mr. Moyle on down to the United States Government. The defendants' claims on the other hand being initiated subsequent to the Moyle family claims have been described in terms of the mining claims and underground rights and whatever tax assessments, tax deeds or other instruments that have been introduced have all shown merely underground rights.

(2) The plaintiffs' possession and use of the property since the inception of title 50 years ago have been for agricultural, recreational and non-mining activities. Based upon this usage the assessment of taxes and payment of same has been properly initiated through the County Assessor's office on the surface rights only.

(3) The defendants-appellants have no Chain of Title which reaches them. The Gurholt-Kirby interests were cut off by a Quiet Title action in 1963. Defendants-Appellants had no unrecorded interests. However, if they did they were only underground rights, and never reached these defendants by either unrecorded or

(g) A Tax Deed (Ex. 32-D) together with the auditor's Tax Deed and a description of property assessed was issued to Evergreen Mining Company, but no statutory steps leading up to the Deeds were shown. A Tax Deed covering East ½ of Alton mining claim (Ex. 34-D) only covered mining rights and not the surface rights, since the assessment and tax sale record for 1962, the year referred to in the Tax Deed, was clearly based upon a specific mining claim assessment. (Ex. 46). Such assessments are made by the State Tax Commission and are assessments of the mining activities. (R. 190, 191, Ex. 46-P, 1962 Assessment Roll, page 76 of mines)

(h) All Assessment Rolls and Tax Deeds (Ex. 43-D, Ex. 45) relate to the assessment and payment of taxes on underground rights only. All tax sale records for the underground rights for the years 1958 through 1966 where surface rights are mentioned, specifically exclude the rights previously deeded to Wilford M. Burton, Trustee, in the following language: "less tract deed to Wilford M. Burton, TR." (Ex. 46-P)

(i) Where surface rights and underground rights are separate, the surface rights are assessed by the County Assessor and the underground rights are assessed by the State Tax Commission, all based upon information which is for-

recorded documents. The best that can be said for defendants' claim, is the fact that they did file and record a Notice of Interest in an attempt to cloud plaintiffs' title. Until this Notice was filed in 1968 there are no documents which even remotely indicate any claim to surface rights in the Moyle property.

Respondents submit the following points in answer to the correspondingly numbered points of the appellants' brief.

POINT I

RESPONDENTS ARE PROPER RECORD TITLE HOLDERS HAVING OBTAINED PROPER TITLE FROM LAKEWOOD FARMS.

Wilford Burton was properly authorized to take acknowledgments under Section 57-2-2 Utah Code Annotated wherein the requirements are set forth, and are summarized as follows:

If the acknowledgment is within this State, then it must be taken by a Judge, Clerk, Notary Public or Recorder; if acknowledged outside of the State then it must be taken by a Judge, Clerk, Notary Public or Commissioner; and if acknowledged outside of the United States, by a Judge or Clerk of any Court in that particular Country. Under paragraph 6 of said Section, only the acknowledgment of a person known to the officer can be taken. Then paragraph 7 provides for the form of the Certificate of Acknowledgment.

Section 57-3-1, Utah Code Annotated, provides that a document with the above required Certificate of Acknowledgment is entitled to be recorded. Paragraph 2 then states that this recordation gives notice, and paragraph 3 states that the failure to record shall render the instrument void as to any subsequent *purchaser in good faith* who first records his own conveyance. Our Court has held that improper recordation does not destroy or affect the validity of the conveyance as between the parties. *Tarpey vs. Deseret Salt Company*, 5 Utah 205, 14 Pac. 338.

Appellants contend that Wilford M. Burton is disqualified to take acknowledgment because of his interest in the transaction, and by reason of this disqualification, the Deed from Lakewood Farms to Wilford M. Burton, Trustee, is invalid and the title has stopped in Lakewood Farms. There is no substance for this claim to be made under these statutes cited above. There is no disability set forth by reason of relationship of the officer taking the acknowledgment or by reason of any interest that he might conceivably have in the transaction. However, even if the trial court had found there was such a disability which a trial court apparently can do, nevertheless these defendants have absolutely no standing to take advantage thereof.

The defendants are in no way bona fide purchasers taking subsequent to the Lakewood Farms conveyance, nor have the defendants recorded any documents under which they claim subsequent to that conveyance. Defendants' only claim is through an unrecorded real estate

Court held that where the Grantee is merely a conduit and has no beneficial interest, that acknowledgment is not defective if taken by that Grantee as the acknowledging officer. *Carroll v. National Live Stock Credit Corporation*, 286 F.2d 362, (C.A., 10th Cir.). *Overton v. Harband*, 44 Pac.2d 484 6 Cal. Appel. 2d 465, wherein the Court stated that when the only effect of the acknowledgment is to impart notice, the disqualification must appear on the face of the instrument. See also *Stockmans Nat. Bank v. Lukis*, 33 P.2d 254 (Wyo.). In our State the effect of the acknowledgment is only to give form for recordation and does not affect the validity of the instrument. Clearly no defect appears on the face of the instrument. The testimony clearly indicates that Wilford Burton, Trustee, had no beneficial interest. (R. 124). *Lankford v. First National Bank*, 183 Pac. 56 (Okla.).

Admitting, arguendo, that the Deeds were not properly recorded, that no title passed through Mr. Burton, that defendants' were bona fide purchasers and in some way were entitled to assert the claim of invalidity, nevertheless the title to the property through the dissolution vested in the United States of America by means of the various conveyances from the corporate stockholders in said dissolution. (R. 219, Ex. 40-D, pages 55-60).

POINT II

APPELLANTS HAVE NO CHAIN OF TITLE TO THE SURFACE OF THE SUBJECT PROPERTY.

contract executed in 1961. The only recorded document under which the defendants could conceivably claim is a Warranty Deed dated July 23, 1954, and recorded July 30, 1954, wherein Mssrs. Kirby and Gurholt obtained title to a portion of the underground from Evergreen Mining Company. (Ex. 28-D). Such a conveyance, *however, is prior in time to the conveyance from Lakewood to Burton as Trustee.*

However, notwithstanding the above, the appellants' claim is without merit or substance as a factual matter simply because Wilford Burton personally had no interest in the transaction, but in his capacity as Trustee was a mere conduit of the title under the dissolution procedures whereby the Lakewood Farms Corporation was conveying its property. In the escrow agreement (Ex. 18-P) it is clear that Wilford M. Burton acts as Trustee to receive property in distribution and in trust for the various beneficiaries and to convey out. This he did. (R. 124)

Appellants cite two Utah cases, *Norton v. Fuller*, and *Crompton v. Jensen*. Neither of the above cases is in point, since in each case the Notary Public had a direct personal interest in the transaction. In the *Norton* case he was the mortgagor and he also notarized his own signature. In the *Crompton* case the Notary acknowledged the release of a mortgage on property while he was the record title holder to the property; not as trustee, however. Both cases only hold that the mortgages were not entitled to be recorded. In the case of *U.S.F&G. vs. Schoul*, 157 Atlantic 717, 161 Md. 425 (1931), the

Appellants claim that because the Deed to the Trustee in dissolution of Old Evergreen Mining Company was recorded before the prior deed of the surface rights to Mr. Moyle was recorded, that these trustees and the new Evergreen Mining Company have a completed Chain of Title prior to the effective completion of the Moyle Chain of Title. This argument is not sound for two primary reasons:

1. The Grantees, Herbert Cohen and John V. Lyle were merely trustees in liquidation of the Old Evergreen Mining and Tunnel Company, and were thus charged with notice of the prior Deed made by the same company when it conveyed the surface rights in the property to Moyle. These two gentlemen as officers of the corporation conveyed to themselves as trustees for the corporation and thereafter as trustees in liquidation conveyed to the new Evergreen Mining Company, which by the very wording of the Deeds was set up to receive the property which the trustees were holding in liquidation. (Exs. 26-D, 27-D). Thus the knowledge of the prior conveyance by Old Evergreen Mining and Tunnel Company is imputed to the officers of the Old Evergreen Mining and Tunnel Company, in turn to themselves as trustees in liquidation and then to the new mining company which was set up in order to complete the trust which had been imposed by the Old Evergreen Mining Company. The two Deeds executed at the same time by the same persons, recorded and acknowledged simultaniously clearly indicate that new Evergreen took only that which Old Evergreen was able to convey and took

subject to any notice of prior action of said Old Evergreen. *Palmer v. Great Northern Railway Company*, 170 Pac.2d, 768, 775, 119 Montana 68 (1946), *Hays Oyster v. Key Point Oyster Company*, 391 Pac.2d 979, 986, 64 Wash.2d 375 (1964), *Phillips v. Colfax Company*, 243 Pac.2d 276, 282, 195 Oregon 285 (1952). See also *Stevens Company vs. First National Building Company*, 89 Utah 456, 57 Pac.2d 1099, 1123 (1936).

2. Furthermore the Chain of Title claimed by appellants, if any, descends from Finn and Gurholt. These two gentlemen did not receive any conveyance from the new Evergreen Mining Company until July, 1954, at which time they recorded a Deed from Evergreen Mining Company. (Ex. 28-D). Even assuming that said Deed perfected the Chain of Title of Kirby and Gurholt, nevertheless the Moyle Chain of Title was completed in 1944, 10 years prior thereto when the Old Evergreen Mining and Tunnel Company Deed was uncovered by James D. Moyle and recorded by Henry D. Moyle, July 11, 1944. Thus Finn and Gurholt took title in 1954 with full knowledge of the recorded Chain of Title from Old Evergreen Mining Company to James Moyle and with full knowledge of the limitations in the new Evergreen Deed.

Of course, thereafter in 1963 the Finn and Gurholt title was eliminated in the quiet title action filed by Wilford M. Burton, Truestee. There still has been no recorded document subsequent thereto, evidencing title in the present defendants.

Appellants claim on page 8 of their brief that the Tax Deed from Salt Lake County to Evergreen Mining Company in 1936 for delinquent taxes for the years 1932-1936 (Ex. 32-D), in effect initiated a whole new perfect title. This argument is without substance, and would seem to be an attempt to lift one by ones own boot straps.

Said Exhibit 32, which consisted of a Tax Deed, Auditor's Tax Deed and a description of property assessed, included none of the required statutory steps preceding a tax sale and thus there was no valid tax sale. See section 59-10-6 UCA. *Bolognese vs. Anderson*, 87 Utah 450 and *Bogievick vs. Slechta*, 109 Utah 373. In effect since the assessment was against Evergreen Mining Company, since Evergreen failed to pay the tax, and since it thereafter paid the tax and thus obtained a Deed, it becomes nothing more than a redemption procedure. Evergreen could in no way be deemed to take the property under such a Tax Deed as a bona fide purchaser since it already had knowledge, when it obtained the property in 1929, of the prior conveyance of surface rights.

The appellants at page 9 of their brief cite a quotation concerning the status of two Chains of Title, one of which is completely recorded before the other is recorded. There are several reasons why the quotation is of very little help to us. In the first place it is not taken from the opinion itself, but is a note on the *Zimmer* opinion and is preceded by another note to the effect that there is very little authority upon this particular

question other than the *Zimmer* case. The difference between *Zimmer* and our situation, is that the Wisconsin statute provides that a Deed if not recorded is void, whereas our statute provides that the Deed is valid between the parties. Secondly in the *Zimmer* case the plaintiff purchased from a Grantor who had no recorded title. In our case every purchase and transaction was from a record title holder so no similar question is presented. Thirdly, as has been indicated, the trustees of the Old Mining Company were not bona fide purchasers and thus the new Mining Company being conceived out of the dissolution was in the same position. Finally there is one other distinction. The complete recorded Chain of Title of the defendants Rogers, et al. herein does not reach them. They merely claim under an unrecorded real estate contract. On the other hand the plaintiffs'-respondents' title in this matter has been completely recorded. And thus if the quotation did have any possible meaning under our Utah statutes it would be of *no* help to the appellants, defendants herein.

POINT III

KNOWLEDGE OF THE DEED TO MOYLE FROM THE OLD EVERGREEN MINING AND TUNNEL COMPANY IS CHARGEABLE TO THE TRUSTEES (GRANTEES) AND NEW EVERGREEN MINING COMPANY.

Appellants argue that there is no showing of the knowledge of the prior Moyle Deed and cite a quotation from American Jurisprudence 2d.

Company. There is no question about notice nor is there any concept that the new Evergreen Mining Company was in any way a bona fide purchaser.

Appellants' reference to various exceptions in the Deed is quite immaterial since said exceptions in no way relate to the property in question, but instead refer to a conveyance to the Old Evergreen Mining Company from James H. Moyle conveying other properties. We have no evidence or record of any such conveyance to the Old Evergreen Mining Company by James H. Moyle.

POINT IV

RESPONDENTS' PAYMENT OF TAXES WAS SUFFICIENT FOR ADVERSE POSSESSION.

The appellants challenge respondents' payment of taxes from 1950 through 1960, claiming that by paying taxes during 1955 and 1956 at an earlier hour or date than did the respondents for those years, appellants interrupted the 10 years of continuous and timely payments.

Neither the evidence nor the law cited by appellants support this position for the following reasons.

Ex. 43-D upon which appellants rely has a tax ledger with a serial number 40-645 covering years 1955, 1956, 1957 showing assessment in the name of Kirby and Gurholt. At the top is a typed statement, "*Old serial*

Of course respondents' argument is that the subsequent officers of Old Evergreen Mining and Tunnel Company are charged with knowledge of the prior corporate actions. *Palmer*, supra and other authorities cited above under Point II so hold. Subsequent knowledge is chargeable as a matter of law from the very documents themselves. It would be a strange concept indeed, if every new set of corporate officers was freed from responsibility and knowledge of the prior actions of the corporation.

The first Deed, (Ex. 5-P) was executed and issued to James H. Moyle pursuant to a valid acknowledgment wherein it is clearly set forth that the action was by authority of a resolution of the Board of Directors of the corporation. The Deed in 1929 signed by Herbert Cohen, president, and Charles L. Smith, secretary, was likewise properly acknowledged and executed by authority of a resolution of the Board of Directors. Can it reasonably be said that the 1929 Board of Directors is not charged with the knowledge of the 1911 actions of the Board of Directors?

Furthermore the 1929 Deed was executed by Cohen and Smith in favor of Cohen and Lyle, a vice-president of the company, each of which was acting as a trustee in liquidation to hold the property and to transfer it to the (new) Evergreen Mining Company. The Deed to the new Mining Company was made, executed and delivered on the same date in full satisfaction and discharge of the trust imposed by and recited in the conveyance from the Old Evergreen Mining and Tunnel

number None. Not previously assessed." This statement on the assessment is obviously incorrect for the following reasons:

(a) The property description should have included a statement which *is* included under the same serial number for the year beginning 1958 "less tract deeded to Wilford M. Burton, Tr." In the same Ex. 43 appear the tax ledger and assessment sheet for that serial number assessed to Kirby and Gurholt showing that quite clearly the surface rights being assessed did not include the property deeded to Wilford M. Burton. The above quoted reservation appears thereafter in all of the tax ledgers covering the Kirby claimed rights.

(b) On the other hand the tax serial number for the Lakewood Farm or Moyle property begins in 1946 (Exs. 20, 21, 22, 23 with serial numbers 19-290, (R. 130-132). Then commencing with the year 1950 the serial number is changed to 40-644 (Ex. 19-P). Thereafter the property has a serial number from 1950 through 1959 of 40-644. Then for the years 1960 the serial number for the Burton property is changed to 40-645 and Continues under that number through 1969. (Ex. 19-P)

(c) The serial number for the Kirby interest changes from 40-645 in 1960 to 40-645-1.

In view of the foregoing there is ample evidence to determine as a matter of fact and law that the assessment on the Kirby serial number pages for the years 1955 and 1956 was improper and could not properly cover the Moyle property. The payment of taxes by

anyone pursuant to that assessment would not affect the Moyle payment. The proper assessment was made by the County for the surface as described in the metes and bounds description on the Moyle or Lakewood Farm property, and the payment of those taxes being timely, was valid. Thus the Court properly concluded that the Moyles through Lakewood Farm have properly paid the taxes on a timely basis from 1950 through 1960.

Appellants cite *Railway v. I.N.V. Company* for the proposition that the first one to pay the taxes (when there is a double payment) is the one given credit for said payment in determining adverse possession. The case does not stand for that proposition, but to the contrary holds that it is not the first person paying the tax that gets the benefit, but rather the person paying the tax which was properly assessed. In the Railway case the state had assessed the property to the railroad and the county had assessed the property to the resident owner. The Court held that even though the state assessment was first, the county assessment was proper and the resident was given the benefit of the payment of the tax. Such should be the case here.

The *Homeowners Loan Corporation* case in no way holds that the adverse possession claimant must be the only one to pay the taxes. It instead holds that such a claimant must pay all taxes validly and legally assessed. In fact respondents paid all of the taxes validly assessed on the surface rights. Any duplicate payment, if there was such, should not destroy the efficacy of the respondents' payments.

There is no evidence by appellants' as to *who* paid the taxes. On the other hand, respondents' testimony through James D. Moyle was clear in showing that he personally had paid the taxes over these many years either for his family or for the Lakewood Farms Corporation. (R. 114, 115)

Therefore the Trial Court was clearly justified in finding as a fact that the respondents had properly, timely and continuously paid the taxes from 1950 through 1960, including these two years in question, and that the appellants had not paid taxes on the surface rights or if they had paid any taxes the payments were only made for underground rights.

POINT V

THE 1963 QUIET TITLE DECREE IS A BAR TO APPELLANTS CLAIM.

On June, 1961, Finn and Gurholt entered into a real estate contract (Ex. 29-D) with defendants. The contract was placed in escrow at Security Title (R. 204). Kirby and Gurholt on July 10, 1961, recorded December 29, 1961, executed a Warranty Deed to Security Title expressly *excluding* the subject property. (Ex. 39-D, page 45) The Decree Quieting Title against Kirby and Gurholt was entered and recorded February 5, 1963. There is little doubt in that decree that Burton's title prevailed and Kirby and Gurholt were adjudged not to have any title in the surface rights. Anyone taking title subsequent thereto would have to take subject to

the effect of the Decree. Section 57-3-2 U.C.A. provides that every

> ". . . Judgment, Order or Decree shall from the time of filing same with the recorder, impart notice to all persons and all shall be deemed to purchase and take notice."

Since the defendants claimed interest stems from Gurholt and Kirby, since the unrecorded contract gave no notice to Burton, Trustee, and since his "conveyance" from Kirby and Gurholt was perfected and recorded before defendants had recorded any conveyance, Burton takes free of any claim of defendants.

Even arguing that such is not the case and this real estate contract is given the same status as an unrecorded Deed then what interest of the defendants therein does the evidence support? Absolutely none.

Perhaps, if, during the years 1962 through 1969, there had been some Deed to the defendants executed and recorded, then the *Kartchner* case or *our* recording statute would give appellants some help.

However, the escrow was closed and all Deeds were issued by Security Title to other Grantees but no Deed, conveyance or document of any kind was executed and recorded in favor of defendants. (R. 205, Ex. 39, 40, 41-D). In fact no Deeds for benefit of defendants were ever executed by Kirby and Gurholt to Security Title.

Thus there is absolutely no evidence that defendants have any interest in the property. The Court was

certainly justified in finding that the defendants had no interest and were barred by the 1963 Decree (R. 75)

POINT VI

APPELLANTS HAVE NO VALID CHAIN OF TITLE.

Again we must emphasize that respondents' title is to the surface rights and that the various documents under which appellants claim relate only to the underground rights upon this property.

Appellants however claim that the Tax Deed in 1936 is the origin of a valid tax title which together with subsequent payment of taxes for 10 years strengthens into a full legal title overriding all legal and possessory interests of the respondents. The Trial Court has properly found that such is not the case.

Said Tax Deed is deficient on its face because the Auditor's Deed only relates to the one year of 1931, whereas the Deed of the County attempts to pass title for tax sales for years of 1931 through 1935.

Additionally, however, an examination of the property description when compared to the description in the various documents for 1939 through 1954 in Ex. 43-D shows that these descriptions and the corresponding assessments are by the State Tax Commission for Mines. Furthermore, said assessments are only for $5.00 an acre and in the applicable columns on the Assessment Rolls show no assessment for surface rights, but do show

assessment for mining rights. The subject Deed is deficient because there is not shown for the years 1931 through 1935 just what was assessed. In other words we have no proof that it is the surface rights rather than the underground rights which were subject of the alleged deficiency. Thus Ex. 32-D is defective. This problem is discussed in more detail under Point IV above.

POINT VII

THE COURT PROPERLY DETERMINED THAT RESPONDENTS HELD TITLE BY ADVERSE POSSESSION.

The question of payment of seven years taxes has already been discussed above and therefore the essence of appellants' point VII relates to the basis for separate assessment of the surface and underground rights and the sufficiency of the evidence to show possession and occupancy of the premises.

On page 18 appellants contend that up to 1936 all assessments would be made by the Tax Commission on both surface and subsurface rights combined. There is no such evidence in the record to support this supposition.

Contrary to appellants' statement the 1936 tax sale did not include both surface and subsurface rights. Once again if appellants were claiming this to be the case, then evidence should have been submitted by way of the various assessment rolls to so indicate.

and the State were properly making the separate assessments, i.e. the surface to the Moyles and the underground to the Kirby and Gurholt or Evergreen Mining Company interests. Thus the appellants' elaborate chart which concludes that most of the assessments are invalid has very little efficacy in our case. The chart on page 19 of appellants' brief would lead one to believe that there was double taxation all the way down through the various years and that all of the County assessments were invalid and all of the Tax Commission assessments were valid. The chart is misleading and is not in accordance with the documents of record and certainly is contrary to the statute and to the procedures of the Utah State Tax Commission.

At page 20 of appellants' brief appellant claims that respondent has only paid two years of taxes and that all other assessments since 1946 have been invalid. As an example of the unrealistic reasoning appellants cite Exhibit 45 as evidence of the fact that the 1958 Tax Deed (Ex. 45-P) was a conveyance of both underground and surface rights. Such is patently not the case. I quote from the last sentence of the property description. *"Underground rights only."* Furthermore if one refers to the 1953 assessment included in Exhibit 43 it is explicitly clear that the assessment was for mines, was made by the State Tax Commission, was for $35.09, was not for surface rights, and was for underground rights. Once again this points up the disregard the appellants have for the record documents in this case. Carrying the same Assessment Rolls back to 1939, it is

Appellants then conclude that there would be no reason for separate assessments from 1936 on. This concept is erroneous simply because beginning in 1944 when the Deed to Moyle was recorded, there then was as a matter of record separation of the surface and the underground rights. But, as early as 1939, the assessment records which we do have (Ex. 43-D) show clearly assessment at $5.00 an acre on mine and mining claims *but not on surface rights.*

However, appellants' theory that the State Tax Commission looks at the record title to determine whether or not it should make an assessment, is contrary to the statutes. As Mr. Cooper from the Utah State Tax Commission testified that the procedure followed was in accordance with Section 59-5-57 U.C.A. (R. 200). He further indicates that he gets information primarily from the County Recorder's office and from that a file is made and information is then requested from the owner as to the nature of the mining activity.

Section 59-5-57 U.C.A. provides in effect that where the surface of the land is owned by one person and the mineral underlying the land is owned by another, the property rights shall be separately assessed to the respective owners in such cases.

> "The value of the surface if it is used for other than mining purposes shall be assessed by the Assessor of the County in which the property is situate."

It is quite clear therefore that at least beginning in 1939 where there is separate ownership that the County

verse to any claimed possession which appellants seem to assert for Evergreen.

POINT VIII

THE REAL ESTATE CONTRACT DOES NOT COVER THE LAND IN QUESTION.

The real estate contract quite clearly describes a portion of the mining claims involved in the area and clearly excepts "therefrom the following described portions thereof," describing the Moyle property in the exact description set out in all of the Moyle Deeds, Tax documents and the 1963 Quiet Title Decree. That description is the second paragraph in the description on the first page of the contract.

On the second page of the contract the agreement provides that the Sellers will sell different portions of the mining claims by Quit Claim Deed, but then quite clearly incorporates in this description the exceptions which have been spelled out above. Of course the pertinent wording is "as excepted hereinabove." There are no other exceptions above except those exceptions named on the first page, which of course include our subject property.

If there was any doubt in that language, the actions of the parties have quite clearly interpreted the contract just as we interpret it here. The only Deeds from Kirby and Gurholt to Security Title Company under this contract to be put in escrow is a Deed which expressly re-

clear that the same description and the same assessment were made by the State Tax Commission for underground rights and not for surface rights. For appellants to claim that this was an assessment of surface rights is inconceivable.

Appellants then recite a portion of the testimony of Mr. James D. Moyle. Quite obvious in its omission are the references to more recent use of the property for recreational purposes and the more recent errection of signs, gates and stones as well as upended logs to limit access to the property. (R. 116, 117, 118, 121, 145 and 151). The evidence in testimony is more than ample to sustain the Lower Court's finding that the property has been occupied and has been in possession of the Moyle family over the entire 50 year period right up to the filing of the lawsuit. It is true the useage changed from agricultural to recreational. Nevertheless the property was controlled, it was improved, the public was regulated by signs and gates. There is no evidence to the contrary.

Appellants finally claim on page 25 that the Evergreen Mining Company purchased the land in 1936 and then they became fee owners and as such were possessed of it and this possession was never attacked, disturbed or adversed. The purchase in 1936 was by the Tax Deed the validity of which is certainly in question as we have outlined above. Furthermore the Tax Deed was clearly for the mineral rights and not for the surface rights, but I suppose more importantly under this particular point the Moyles have been in possession of the property ad-

serves and excepts therefrom the Moyle property, describing the Moyle property in the exact language of the second paragraph in the contract. (Ex. 39-D, page 45). There have been no other Deeds by Gurholt and Kirby to the escrow in an attempt to convey the reserved land nor have there been any Deeds from the escrow to the purchasers attempting to convey the land. There have been no Deeds from Gurholt and Kirby directly to the purchasers attempting to convey the reserved land and the escrow has now been closed since 1965.

What better proof can there be of the intent of the parties than the parties' actions all undertaken before they learned that the Moyles were selling the land to the United States Government. It was only until 1968 that any interest was indicated by these defendants. At that time a Notice of Interest was filed and recorded in an obvious attempt to cloud the title to the property. (Ex. 39-D, page 64). Even at that point the Notice of Interest was so indefinite as to be no notice at all. It claims under "certain unrecorded instruments and documents."

Can there be any doubt therefore, but that the contract was never intended to convey to these people or to grant to these people, who are defendants herein, any interest in the Moyle property.

SUMMARY

The respondents established a legal chain of title from the patent to the present owners. During this pe

riod of ownership respondents through the Moyle family and Lakewood Farms have been in possession thereof, paying the taxes since 1946. The defendants have established no interest in the property—no chain of title, no possession and no payment of taxes.

The Trial Court should be upheld.

Respectfully submitted,

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