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Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

LYNN S. SCOTT and ANN B. SCOTT, his wife, and FRANK H. BJORNDAL and AUDREY K. BJORNDAL, his wife,

Plaintiffs and Appellants,

—vs—

WILFORD HANSEN and VIOLA L. HANSEN, his wife; CECIL HANSEN and LaDONNA HANSEN, his wife; MARJORIE BAKER; DARRELL A. TATE; BARBARA BUCKLEY and MICHAEL S. TATE,

Defendants and Respondents.

Case No. 10580

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APPELLANTS' BRIEF

Appeal from a Judgment of the District Court of Salt Lake County
Honorable Stewart M. Hanson, Judge

KIRTON & BETTILYON
F. Burton Howard
Attorneys for Appellants
336 South Third East
Salt Lake City, Utah

DWIGHT L. KING
Attorney for Respondents
2121 South State
Salt Lake City, Utah

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IN THE SUPREME COURT
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LYNN S. SCOTT and ANN B. SCOTT, his wife, and FRANK H. BJORNDAL and AUDREY K. BJORNDAL, his wife, *Plaintiffs and Appellants,* —vs— WILFORD HANSEN and VIOLA L. HANSEN, his wife; CECIL HANSEN and LaDONNA HANSEN, his wife; MARJORIE BAKER; DARRELL A. TATE; BARBARA BUCKLEY and MICHAEL S. TATE, *Defendants and Respondents.*	Case No. 10580

APPELLANTS' BRIEF

STATEMENT OF THE CASE

This is a quiet title action between adjoining land owners arising out of a conflict between Respondents' metes and bounds description and Appellants' description according to a monument.

DISPOSITION OF THE CASE BY LOWER COURT

The Lower Court granted judgment quieting title in the Respondents based on a finding of payment of

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taxes and possession of the property in question under a 1935 court decree awarding said property to Respondents.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment and judgment quieting title to the property in dispute in them as a matter of law.

STATEMENT OF FACTS

With one exception, the facts herein are largely stipulated and are not in dispute. The appellants are owners of land in Salt Lake County. (R. 33). Substantially all of this property, and all of the property in dispute, was owned prior to December 17, 1906, by one Maggie B. Thompson. (R. 44-45). (Ex. P-5). The Appellants' predecessors in interest obtained their deed on December 17, 1906. (R. 44). This deed awarded certain properties bounded on the north by the south line of a county road. (Ex. P-2).

The Respondent's predecessors in interest acquired their deed from Maggie B. Thompson in 1913. (Ex. P-5). The latter deed awarded certain properties bounded on the south by the south line of the same county road. (Ex. P-5). Respondents' property has been fenced for over 40 years along the north line of the county road. (R. 63). Respondents never occupied any land south of the road. (R. 54).

The legal description of the boundary in controversy as conveyed by Maggie Thompson to both Appellants'

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and Respondents' precedessors was substantially as follows:

> "... *along the south side of the County Road thence westerly along the south side of said road* 80 *rods, more or less,* to a point on the west line of said quarter section due south from the point of beginning ... *this deed is made subject to the use of the above mentioned County Road by the public as said road is now located.*" (Emphasis supplied) (Exhibit P-5) (R. 64).

Appellants' property south of the road has been fenced in places to prevent dumping of trash and in addition "no dumping" signs have been placed in strategic locations on this property by Appellants. (R. 46). The property south of the road has not been farmed while the property of Respondents north of the road has been used for farming purposes. (R. 54).

The road in question is maintained by the county. (R. 43). It is the only road that has ever divided the property of the parties and has been in existence for many years. R. 38). Certain incomplete county surveys indicate that the road in question proceeds in a straight line between the properties owned by the Appellants and those owned by the Respondents. (Ex. D-8). However, the true facts as revealed in the trial below indicate that the road is not a straight road but rather follows a meandering course commencing and ending at the boundary line between the properties but extending in a northerly direction into properties owned by Respondents. (Ex. 1). This road

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is a public road and is used by anyone desiring to travel onto Danish road and is extensively used by many residents of the area and has been for over 10 and probably over 50 years. (R. 38, 54).

In the year 1935, the estate of Respondents' predecessor in interest, Andrew Hansen, Jr., was probated and the property decedent had acquired in 1913 was distributed to Respondents. (R. 59). The decree awarding such property did not adopt the south boundary description contained in the deed whereby Andrew Hansen, Jr., acquired the property. Instead it purported to distribute more property than was acquired by Andrew Hansen, Jr., by establishing a metes and bounds description for the south boundary of the property. (Ex. P-2). This description did not follow the south line of the county road but rather cut straight across the top of the Appellants' property, severing a substantial portion of land lying between this line and the actual course of the road.

Tax notices containing the description set forth in the 1906 deed have been sent to Appellants and their predecessors. Appellants have paid taxes on the property according to this description since acquiring the property in 1955. (Ex. P-6) (R. 48). In addition, Appellants acquired tax title to the property from Salt Lake County by deed in 1958. (Ex. P-2).

Appellants disagree with the findings of the Lower Court that Respondents have been in possession of the property in controversy since 1935. The evidence re-

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garding actual possession is to the contrary. Mr. Wilford Hansen, one of the Respondents, testified that he had fenced the southern boundary of his property along the north edge of the county road and had never attempted to farm or otherwise use the property south of the county road. (R. 54).

ARGUMENT

POINT I

APPELLANTS HAVE FEE TITLE TO AND POSSESSION OF THE PROPERTY IN CONTROVERSY

Appellants or their predecessors hold title to the property in controversy under a warranty deed from one Maggie B. Thompson, acquired in 1906. Respondents and their predecessors also acquired title to the property north of that obtained by Appellants from Maggie B. Thompson in 1913. The boundary line between the properties in both cases was established by Mrs. Thompson as the south line of the county road then dividing the properties.

This county road served as a boundary line between the properties conveyed by Mrs. Thompson until the death of Andrew Hansen, Jr., in 1935. For all practical purposes the road has been the boundary line ever since.

However in 1935, in a decree of distribution entered in the probate of the Andrew Hansen, Jr., estate, the court ordered that the south boundary of decedent's property be fixed by a metes and bounds description.

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This description did not follow the south line of the county road but rather followed a straight line course across the property of Appellants' predecessors in interest creating an interlock between the boundaries contained in the decree on the south and the north boundary of Appellants' property as marked by the county road. At the time of the decree no one was aware that this interlock or overlap existed.

The effect of the 1935 decree was not to deprive Appellants' predecessors of their previously acquired fee title, but rather, in addition, to give Respondents color of title to the interlocked property.

The Lower Court's decision was apparently based on the payment of taxes coupled with constructive possession under a claim of right or color of title by Respondents. Such a decision would have perhaps been proper were this an ordinary adverse possession case where Respondents had actual possession of the property in question and had received such possession from Appellants.

But in this case, certain essential elements are lacking which effectively prevent Respondents' color of title from being converted into title through adverse possession as against the fee title in Appellants. The Lower Court neglected to determine who had superior title to the overlapping portions of the interlock.

As a general rule it is true that possession of a part of a tract of property under color of title gives rise

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to constructive possession of the entire tract commensurate with the description in the instrument establishing color of title. See 3 Am Jur 2d, Adverse Possession, § 27.

In addition 78-12-7, U.C.A., 1953, provides as follows:

> "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to be possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under an insubordination to the legal title, unless it appears the property has been held and possessed adversely to such legal title for 7 years before the commencement of the action."

Apparently the Lower Court concluded that possession of the property was to be presumed in the Respondents because of this statute and the general rule previously quoted.

However, where two conflicting parties both have legal title to the property, Section 78-12-7 is not applicable. And color of title in itself is not capable of creating implied possession without actual entry on and occupancy of the land in question. *Kentucky Coal and Timber Development Co. v. Kentucky Union Co.*, 214 F. 590; *French v. Hillman,* 216 F. supp 117, affirmed 331 F. 2d 305; *State v. Stockdale,* 34 Wash 2d 857, 210 P 2d 686. There can be no concurrent seisin of land under conflicting claims of right, and the person with the best title will

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be deemed to be in possession of the property in case of controversy. 3 Am Jur 2d, Adverse Possession, § 53.

Where an instrument purporting to give title disregards a previously established boundary line, crossing over it and including other properties so as to create an overlap, there must be actual possession of the interlock or overlap by the color of title claimant in order for his possession to be deemed co-extensive with his described boundary whereby the interlock came into existence. See *Illinois Central R. Co. v. Taylor,* 164 Ky 150, 175 SW 26; *Bradtl v. Sharkey,* 58 Or. 153, 113 Pac. 653.

Therefore where the true owner or superior claimant of a parcel of land on which a color of title overlaps or into which a color of title extends, is in possession of his land, and the claimant never takes possession of the portion in controversy but only occupies some other portion within his described boundaries, the possession of the orginal owner and fee title owner remains intact and is not displaced by claimant's possession. The legal title carries possession of the overlapping portion with it in such a situation. See 2 CJS, Adverse Possession, §198; *Bunger v. Grimm,* 142 Ga., 448, 83 SE 200; 23 Harvard Law Review 56; 6 Columbia Law Review 582.

The case of *Howard v. Stanolind Oil and Gas Co.,* 197 Okl. 269, 169 P. 2d 737, is pertinent. There plaintiffs claimed title to certain properties both under a void contract of sale and an oral promise to convey a quarter section of land. Plaintiffs' predecessors in interest entered into possession of the land without securing a valid

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conveyance and continued in possession during the life-time of their grantors.

During this period one of the alleged grantors executed five mineral deeds to defendants' predecessors in interest.

The plaintiffs contended that even if the mineral deeds were valid the title should be quieted in them because they had acquired it by adverse possession, having had open and notorious possession of the property for the statutory period. The court in quieting title in defendants replied to this contention:

> "Adverse possession in order to ripen into title must be exclusive. 'Exclusive possession' means that the disseizor must show an exclusive dominion over the land and an appropriation of it to his own use and benefit. Two persons cannot hold one piece of property adversely to each other at the same time, and where two persons have entered upon the land, he who has the better title will be deemed to be in possession thereof. It is therefore essential that the possession of one who claims adversly should establish as an ouster of the true owner because in the absence of ouster, the title draws to itself the continuous possession of the property. Possession not amounting to disseizin is insufficient. 1 Am Jur 875, 876.
>
> "Where the possession of land is mixed, the legal seisin is according to legal title." *Deputron v. Young,* 134 U.S. 241, 10 S. Ct. 539, 33 L. Ed. 923.

Because of the superiority Appellants' title, there can be no presumption of possession in Respondents.

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And the record contains no reference whatsoever to any actual possession of the property in controversy by Respondents. The only possible basis for a finding of possession in Respondents is the well-worn rule that actual possession is to be constructively extended to include possession of the entire tract for which color of title is had. See 3 Am Jur, Adverse Possession, §27.

But this rule is not applicable to land owned by third parties other than that held by the one having color of title and his grantor. *United Fuel Gas Co. v. Dyer,* 185 F. 2d 99 (CCA 4th, 1950).

"Thus where A enters under a deed from B describing 80 acres of land, but C owns 40 acres of B land, and A has no actual possession of any of that part owned by C, A's actual possession of a part of B's land will not draw to it the constructive possession of the tract owned by C even though it is within the limits of the boundaries described in the deed to A." 3 Am Jur 2d, Adverse Possession §29.

It has been stated that to rule otherwise would require a fee owner of land to seek out and examine the color of title to every newcomer taking possession of land in the vicinity, less the latter's actual possession be constructively extended to destroy the former's title. *McCoy v. Anthony Land Co.,* 230 Ark, 244, 322 SW 2d 439.

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As Respondents are without either actual or constructive possession of the land in controversy, the judgment of the trial court cannot be upheld.

The rule that possession of part under color of title is possession of whole cannot prevail where another party in possession under a better title. *Buras v. United Gas Pipe Line,* 127 So. 2d 271. Actual possession must prevail over any constructive possession by another even though under color of title. *Giddens v. Atl. Coast Line R. Co.,* 218 Ala. 217, 118 So. 383; 2 CJS Adverse Possession, 196 (pocket parts).

POINT II

THE PARTIES HAVE ACQUIESCED AND AGREED THAT THE COUNTY ROAD CONSTITUTES THE BOUNDARY BETWEEN THE RESPECTIVE PROPERTIES.

It is clear that the predecessors in interest of both the Appellants and Respondents consider the existing county road to be the boundary line between their properties. The deeds which both received from Maggie B. Thompson make it clear that this boundary was to be the south side of the existing road.

Respondents should not now be allowed to question this boundary line if the elements of the doctrine of boundary by acquiescence are met. The case of *Fuoco v. Williams,* 15 Utah 2d 153, 389 P. 2d 143, seems to clearly determine that boundary by acquiescence may be established by:

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a. Occupation up to a visible line.

b. Acquiescence in that line as a boundary.

c. For a long period of time.

d. By adjoining land owners.

The facts show herein that both parties, and their predecessors in interest as well, have occupied up to the county road and no more. This occupancy has been consistent since the year 1906. During this period of time, no protest has been made that the road was not the true boundary. Respondents have fenced their property along the road, and the road is clearly visible and has not changed its course or position during the period nor has there ever been another road between the properties. In addition, Appellants have occupied their property up to the country road. They have placed signs thereon and have fenced certain strategic portions of their property to prevent its being used for dumping.

Boundary by acquiescence can be established without an express agreement that the road is to constitute the boundary. See *Hummel v. Young,* 1 Utah 2d 237, 265 P. 2d 410. However, in the present case an express condition in the original deed has determined that the road would constitute the boundary between the properties. A boundary by acquiescence was clearly established and intended since 1906, and the road has been treated by the parties as the boundary ever since that time.

In the year 1935 the probate court of Salt Lake County purported to change this boundary. Whether it

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did so intentionally or whether it merely tried to conform the south boundary in several deeds to what it thought was the legal description of the road is unknown. The significant thing is that Appellants predecessors were not parties to the probate proceeding. All parties to adjoining properties are necessary parties in an action to determine the true boundary line between properties. *Cady v. Kerr,* (Wash), 118 P. 2d 182.

Any decree purporting to change an established boundary would necessarily be void if it did not adjudicate the rights of all land owners adjacent to the boundary. It is also clear that owners of adjoining lands who occupy their respective premises up to a certain line which they mutually recognize as the boundary line for a long period of time, cannot deny that the boundary so recognized is the true line. *Nelson v. DaRouch,* 87 Utah 457, 50 P. 2d 273. The latter case conditions this rule upon the boundary being open to observation and marked by monuments. In this case, the boundary is a monument and has been opened to observation long before 1906 when the property was first conveyed by Maggie B. Thompson.

And even in an ordinary possession case, possession resting upon color of title is restricted where less property is claimed than that described in the instrument giving color of title. See *Pennell v. Brookshire,* 193 N.C. 73, 136 SE 257; 2 CJS, Adverse Possession §185, Page 781.

A claimant may by his own acts restrict his claims

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within narrower bounds than those delineated in his title grant. *Lyles v. Fellers,* 138 S.C. 31, 136 SE 13; *Sturgis v. Hughes,* 206 Ark. 946, 178 SW 2d 236.

Such restriction was present in the instant controversy as Respondents never attempted to take possession of any additional property purported to have been distributed by the 1935 decree. Even if this decree does give them a color of title, they will not be presumed to possess property which they have not attempted to possess. In this case, the Respondents' possession is not measured by the boundaries of the 1935 decree but only by the boundaries of their claim. Respondents' claim has never extended south of the county road.

Appellants submit that the road herein was acquiesced in as the boundary between their property and the property of Respondents. This boundary was fixed long before 1935 and the probate court was powerless to change it. Appellants further submit that the road continued to be viewed as the boundary by all adjoining land owners until shortly before the commencement of the quiet title action herein and that the decision of the Lower Court quieting title in Respondents is not in harmony with established decisions of this Court and therefore should be overturned.

POINT III

EVEN IF TITLE TO THE PROPERTY IN CONTROVERSY COULD BE FOUND IN RESPONDENTS, APPELLANTS HOLD TITLE TO SAID PROPERTY BY ADVERSE POSSESSION AND TITLE SHOULD BE QUIETED IN THEM.

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While Respondents cannot adversely claim title to the property in question because of their inferior title and lack of actual possession, Appellants can successfully acquire title by this means. Assuming, without conceding, that the 1935 decree established a north boundary for Appellants' property, it is nonetheless apparent that Appellants have been in actual possession of the property in controversy since their acquisition thereof in 1955. They are in possession both under a deed granting them the property to the south of the county road as well as under a tax title assessing the property up to this same monument line.

Section 78-12-7.1 provides in part:

> ". . . [I]f If in any action any party shall establish prima-facie evidence that he is the owner of any real property under a tax title held by him and his predecessors for four years prior to the commencement of such action and one year after the effective date of this amendment, he shall be presumed to be the owner of such property by adverse possession unless it appears that the owner of the legal title or his predecessor has actually occupied or been in possession of such property under such title or that such tax title owner and his predecessors have failed to pay all of the taxes levied or assessed upon such property within such four-year period."

Appellants have paid all of the taxes levied upon the property in question and are the owners of the property under a bona fide tax deed and have been for a period of over 8 years. All taxes on the property during this time have been paid. Tax notices in the name of Appellants

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describing the property in question have been mailed to Appellants and have been paid by them. These notices describe the property in question as bordering along the south side of the county road as far as the north boundary is concerned.

Section 78-12-5.2 provides in part:

> "No action or defense for the recover or possession of real property or to quiet title or to determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale, conveyance, or transfer of such tax title to any county or directly to any other purchase (sic) thereof at any public or private tax sale and after the expiration of one year from the date of this act."

Where, as in the present case, the Appellants have been in actual possession of the property in controversy and have paid the taxes thereon and hold title thereto under a tax title in addition to their warranty deed, it appears that the statutory requirements of adverse possession of tax titles have been met and that the title to the property should be quieted in Appellants as a matter of law.

CONCLUSION

The judgment of the Lower Court is not supported by the facts and is not in harmony with well established decisions of this Court. The Appellants are the owners in fee of the property in question and have superior title thereto as contrasted to Respondents color of title creat-

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ing an overlap along the north-south boundary of the property in question. The overlap created by the decree of the probate court in 1935 cannot control the rights of the property as far as Appellants' predecessors in interest are concerned, and title to the property should be quieted in Appellants. The judgment of the Lower Court should be overruled.

Respectfully submitted.

KIRTON & BETTILYON

F. Burton Howard
Attorney for Appellants

336 South Third East
Salt Lake City, Utah

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