

1978

# Shirley Rodgers v. Annie N. Hansen And Albert J. Hansen : Petition For Rehearing

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

SHIRLEY RODGERS, )  
 )  
Plaintiff and Appellant, )  
 )  
vs. )  
 )  
ANNIE N. HANSEN and )  
 )  
ALBERT J. HANSEN, )  
 )  
Defendants and Respondents. )

Case No. 15334

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PETITION FOR REHEARING

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Appeal from the Judgment  
of the Third Judicial District Court in and for  
Salt Lake County

The Honorable Peter F. Leary, Judge

---

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TABLE OF CONTENTS

i.	PETITION FOR REHEARING . . . . .	1
ii.	STATEMENT OF THE FACTS . . . . .	1
iii.	ARGUMENT . . . . .	2
	<u>POINT I:</u> The court's decision does not fully adjudicate the controversy. The court should determine whether res- pondents are entitled to interest on the obligation secured by their "mortgage" . . . . .	2
	<u>POINT II:</u> This court erred in ruling that the statute of limitations did not begin to run until Mrs. Neil's death . . . . .	3
	<u>POINT III:</u> The court erred in ruling that as between Mrs. Neil and the Hansens a mortgagor-mortgagee rela- tionship existed . . . . .	6
iv.	CONCLUSION . . . . .	8

AUTHORITIES CITED

CASES

McCready v. Frederickson, 41 Utah 388, 126  
P. 316 (1912) . . . . . 4

Rasmussen v. Sevier Valley Canal Co., 48 Utah  
490, 160 P. 444 (1916) . . . . . 4

Sperry v. Tolley, 114 Utah 303, 199 P.2d  
542 (1948) . . . . . 4

STATUTES

Utah Code Annotated, §15-1-1 . . . . . 2,3

OTHER AUTHORITIES

Corpus Jursi Secundum

59 C.J.S. Mortgages, §9 . . . . . 6

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SHIRLEY RODGERS, )  
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Defendants and Respondents.)

---

PETITION FOR REHEARING

---

Pursuant to Rule 76(e), Utah Rules of Civil Procedure, respondents Annie N. Hansen and Albert J. Hansen respectfully petition this Court for a rehearing in the above entitled case. This petition is based upon the following reasons:

STATEMENT OF THE FACTS

This case arises from the purchase of certain real property located in Salt Lake County. The original deed to the property which was executed in 1944 listed Myrtle Neil and respondents as joint tenants. Mrs. Neil's successor, appellant here, brought suit after Mrs. Neil's death seeking to quiet title in herself. Appellant alleged that the deed had been intended to create a mortgage as between Mrs. Neil and the Hansens. The Hansens denied this allegation, saying

that the deed accurately reflected the true relationship of the parties.

The trial court found that the parties to the deed did not intend to create a mortgage. By its Opinion dated May 23, 1978, this Court reversed and found that certain receipts signed by Mrs. Hansen acknowledging Mrs. Neil's "payment on home" were "clear and convincing" evidence of the existence of a mortgage. The Court also held that the statute of limitations did not begin to run until Mrs. Neil's possession of the property was terminated by her death.

#### POINT I

THE COURT'S DECISION DOES NOT FULLY ADJUDICATE THE CONTROVERSY. THE COURT SHOULD DETERMINE WHETHER RESPONDENTS ARE ENTITLED TO INTEREST ON THE OBLIGATION SECURED BY THEIR "MORTGAGE".

This Court's Opinion dated May 23, 1978, states, in part:

We conclude that Mr. and Mrs. Hansen have an equitable mortgage on the property in the amount of \$1,055 . . . (Opinion p. 3)

The decision does not address itself to the question of whether respondents are entitled to interest on this sum. Respondents believe that if this Court now refuses to address this issue, sale of the premises will be further delayed until the matter can be brought before the Court by subsequent litigation. Respondents respectfully suggest that in the interest of judicial economy the issue should be settled now, by this Court.

Section 15-1-1, Utah Code Annotated (1953) states:

The legal rate of interest for the loan or forebearance of money, goods or things in action shall be six percent per annum.

The acknowledgment of the fact that as between Mrs. Neil and respondents there existed a contract whereby the Hansens would lend Mrs. Neil money and she would repay them is implicit in this Court's holding that respondents' interest in the subject property is that of a mortgage. There is no evidence that an interest rate was ever agreed upon. Thus, the case falls squarely within the rule of Section 15-1-1, supra. Respondents are therefore entitled to interest on the principal amount of the alleged loan from 1944 to the present.

Furthermore, since this is an equitable action, respondents ask the Court to consider that the appellant and her predecessor have had interest-free use of the "loan" proceeds for almost 35 years and that the house purchased with respondents' money has increased several fold in value. Thus, absent payment of interest, appellant will realize a windfall upon the sale of the house.

Respondents therefore respectfully suggest to the Court that it would be inequitable to deny them interest on their "investment".

## POINT II

THIS COURT ERRED IN RULING THAT THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL MRS. NEIL'S DEATH.

In its decision this Court held that the statute of limitations did not begin to run until Mrs. Neil's death since

she was in possession of the premises until that time. Although appellant had previously argued that laches was inapplicable where a joint tenant was in possession, her sole argument concerning the statute of limitations was that it is inapplicable to a quiet title action. (See Appellant's Brief, pp. 16-17.) Appellant never argued that the running of the statute was tolled until death of the tenant in possession. Thus, the Court adopted a theory never raised by appellant, and to which respondents never had a chance to respond. Respondents believe that they should be heard on this issue and that the Court should reverse itself for the following reasons:

1. The Court's ruling violates accepted principles of law. It is well-established in this jurisdiction that where the acts of one co-tenant constitute an ouster of another co-tenant, the statute of limitations for purposes of establishing adverse possession begins to run on the date of ouster. Sperry v. Tolley, 114 Utah 303, 199 P.2d 542 (1948); Rasmussen v. Sevier Valley Canal Co., 48 Utah 490, 160 P. 444 (1916); McCready v. Frederickson, 41 Utah 388, 126 P. 316 (1912).

In McCready v. Frederickson, supra, the court, quoting a decision of Justice Taft, stated that an ouster is accomplished where one co-tenant "bring[s] it home" to another co-tenant that his interest is adverse. 126 P. at 320. Similarly, in Rasmussen v. Sevier Valley, supra, the court stated that the statute would begin to run from the date of

the repudiation of the interests of the co-tenant. 160  
p. at 446.

Thus, as a general principle, where one co-tenant seeks to quiet title against another, the period of limitations begins to run when the plaintiff becomes aware of the defendants adverse interest.

As the Court's Opinion notes, Mrs. Neil knew as early as 1958 that the Hansens claimed a fee rather than a mortgage interest in two-thirds of the property. (See Opinion, p. 2.) Thus, the limitations period began to run no later than 1958. It is therefore clear that the Court was incorrect in ruling that Mrs. Neil and her successor were not barred from bringing this action.

2. The Court's reasoning was erroneous. The Court stated that the period of limitations did not begin to run until Mrs. Neil's death because,

The burden on Mrs. Neil to initiate legal action can be no greater than the burden on the Hansens to establish their claim to the property.  
(Opinion, p. 3.)

There are two weaknesses in this position: First, since the Hansens had previously agreed to Mrs. Neil's possession, there was no reason why they should have attempted to quiet title against her, particularly in view of the fact that as a co-tenant, Mrs. Neil had a possessory interest in the property.

Second, even if it is assumed that both parties had the same burden to quiet title to the property, it does not

follow that the statute did not run. On the contrary, the only logical conclusion would be that after expiration of the statutory period, neither could quiet title -- not that both could.

### POINT III

THE COURT ERRED IN RULING THAT AS BETWEEN MRS. NEIL AND THE HANSENS A MORTGAGOR-MORTGAGEE RELATIONSHIP EXISTED

The Court found that the existence of the receipts showing "payment[s] on the house" was "clear and convincing" evidence of the existence of a mortgage. Respondents believe that the Court confused the concept of an obligation relating to real property with the concept of an interest in real property created to secure payment of that obligation.

A mortgage is created in two steps. First, the mortgagee gives consideration -- usually in the form of a loan. Second, the mortgagor conveys an interest in real property to the mortgagee for the purpose of securing payment of the underlying obligation. Thus, it has been stated:

[A] mortgage is always created by the act or agreement of the parties and stands as security for the performance of an obligation or the payment of a debt.

59 C. J. S., Mortgages, § 9 (emphasis added).

In the instant action, this Court found that the existence of the receipts was clear and convincing evidence of the existence of a mortgage. Thus, the Court's logic appears to have been as follows: Mrs. Neil was indebted to the Hansens for repayment of the money they had spent in purchasing the house. Therefore, the Hansens held a mortgage; **not a fee interest.**

The fallacy in this reasoning is that while the receipts may well show the existence of an obligation, they can hardly be said to rise to the dignity of "clear and convincing" evidence of the existence of an agreement to reconvey the property to Mrs. Neil upon payment of the obligation. Indeed, no evidence exists as to the existence of such an agreement. Thus, the Court's disregarding of the trial court's finding of fact on this issue was improper.

Respondents respectfully suggest to the Court that its decision on this issue sets an unfortunate precedence in two respects: First, it establishes the principle that this court may freely disregard a determination of fact regarding the issue of intent which was made by the trier of fact. Second, it appears to adopt the rule that the existence of a mortgage is presumed where evidence of an indebtedness arising from the purchase of real property is adduced. Thus, whereas in general a deed absolute may only be altered by clear and convincing evidence, where the deed is obtained by one co-tenant with the understanding that the other will reimburse him for all or part of the purchase price, the burden is on the purchaser to show that the deed accurately reflects the intention of the parties. Such a rule must surely call into question the validity of many deeds heretofore executed in this State.

Appellants believe that the Court's decision is a departure from its general policy of upholding the clear

language of deeds, and that it should therefore reconsider this issue.

CONCLUSION

Petitioners/respondents believe that the Court should rehear this case for several reasons.

First, the issue of interest on the alleged mortgage was left unresolved. If the Court fails to resolve this question, further litigation and a possible subsequent appeal may be required.

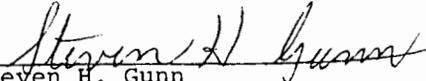
Second, the Court erred in ruling that as between co-tenants the statute of limitations does not begin to run for the adjudication of adverse claims until the death of the tenant in possession. By contrast, the law is well-established that the statute begins to run from the date of notice of the adverse claim.

Third, the Court also erred in holding that proof of an obligation arising from purchase of real property is clear and convincing evidence of the existence of a mortgage to secure payment of that obligation. In reality, there was ample evidence that an obligation existed, but little or no evidence that the debt was secured by a mortgage or provisional conveyance.

Respondents urge the Court to reconsider these issues.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of July, 1978.

RAY, QUINNEY & NEBEKER

  
Steven H. Gunn

Attorneys for Respondents

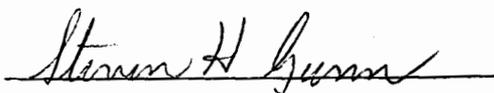
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MAILING CERTIFICATE

A copy of the foregoing Respondents' Petition for Rehearing was mailed, postage prepaid and properly addressed, to Gordon L. Roberts and Stephen K. Schroeder, Parsons, Behle & Latimer, 79 South State Street, P.O. Box 11898, Salt Lake City, Utah 84147 on this 5<sup>th</sup> day of July, 1978.

A handwritten signature in cursive script, reading "Steven H. Gorman", is written over a horizontal line.