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Lanneita Godfrey and Beth Godfrey v. Flo Monson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LANNEITA GODFREY and
BETH GODFREY,

Plaintiffs and
Respondents,

vs.

Case No. 16084

FLO MUNSON, Administratrix
of the Estate of ELIZA M.
PACK GODFREY,

Defendant and
Appellant.

RESPONDENT'S BRIEF

Appeal from the First Judicial District
of Cache County, Utah

Honorable VeNoy Christoffersen

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LANNEITA GODFREY and
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Case No. 16094

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Appeal from the First Judicial District Court
of Cache County, Utah

Honorable VeNoy Christoffersen, Judge

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LANNITA GODFREY and
BETH GODFREY,

Plaintiffs and
Respondents,

vs.

Case No. 16094

ELC MUNSON, Administratrix
of the Estate of ELIZA M.
PACK GODFREY,

Defendant and
Appellant.

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This is an action to quiet title in real estate based on adverse possession. In this brief, Appellant shall be referred to as Defendant and Respondents shall be referred to as Plaintiffs. References to the Reporter's Transcript are to page number only and are not otherwise designated.

DISPOSITION IN LOWER COURT

The District Court, sitting without a jury, gave judgment to Plaintiffs on their Complaint and quieted title to the real property in dispute in the Plaintiffs.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek affirmance of the judgment of the trial court in their favor.

STATEMENT OF FACTS

George Godfrey acquired the property in dispute in 1880 (Defendant's Exhibit 5). He had three (3) wives--- Emily, Elizabeth and Eliza M. Pack (p. 21). By virtue of a deed dated and recorded in 1910, George Godfrey, together with Elizabeth, conveyed the real property to his third wife Eliza M. Pack (Defendant's Exhibit 4). She remains to date the record "chain of title" owner. The relationship between the parties is illustrated on Attachment A.

George Godfrey moved to Fielding, Utah from Clarkston, Utah in 1910 (pp. 68, 72). There is no evidence the record title owner ever used or gave anyone else permission to use the property, or even paid the taxes since those paid about 1910 by her husband (p. 69). In fact, Plaintiffs' father, George J. Godfrey, used the property until his death in 1945 (p. 35). Since that time Dale Godfrey, George J. Godfrey's son and the Plaintiffs' brother, has operated the property (pp. 34, 49). Plaintiffs' mother, Annie T. Godfrey, claimed ownership of the property for some years (p. 38) and since at least 1964 Plaintiffs have claimed ownership (p. 38, Plaintiffs' Exhibit 9). Plaintiffs have paid all taxes and assessments on the property from at least 1955 through 1977 (p. 38, Plaintiffs' Exhibit 11).

In 1964 Plaintiffs' mother, Annie T. Godfrey, conveyed a number of pieces of property to the Plaintiffs (Plaintiffs' Exhibit 9). The deed, recorded by Beth Godfrey, referred to "The South Half and" and described the correct Block and Plat, but did not name any specific lot number, and the deed then described the parcel outlined in green on Plaintiffs' Exhibit 7 and immediately south and adjacent to the property in dispute. Apparently the Cache County Recorder's office believed the description included or was to include the property in dispute and changed the names on the ownership plats to show the Plaintiffs as owners and directed the Assessor to thereafter assess in the names of the Plaintiffs (p. 44). Plaintiffs believed the deed (Plaintiffs' Exhibit 9) contained and described the property in dispute (p. 42). This is the only written instrument from which Plaintiffs claim title. No correction deed has ever been executed and subsequently, Annie T. Godfrey's mental clarity has become limited so no such deed could be signed (p. 42).

Hyrum Godfrey, son of the record title owner, Eliza M. Pack Godfrey, was administrator of her estate following her death in 1961. The probate documents purported to include all property of the decedent, yet did not include the property in dispute herein, with which Hyrum was very familiar (pp. 57, 58). There appears to be no "after discovered"

property to the original probate other than the parcel in dispute (see probate documents and file of Eliza M. Pack Godfrey of which judicial notice was taken).

The property in dispute is farmed together with an adjacent parcel owned by the Plaintiffs, the two parcels are fenced, and the fences have been maintained since 1955, so as to be one parcel (pp. 19, 49, 50). Barley or alfalfa have been planted and harvested on the property every year since the 1950's and animals have grazed on the property every year since at least 1955 (pp. 19, 49).

In 1974 Hyrum Godfrey and Florence Munson met with the Plaintiffs' mother, Annie T. Godfrey. At that time Annie asked that the property in dispute be placed in her name (p. 63). Also by letter dated September 26, 1974 from an attorney, Annie asked the heirs of the record title holder to help "perfect" title to the property in dispute (Defendant's Exhibit 1). Annie and one of the Plaintiffs had gone to see the attorney (p. 42).

There is no evidence that can be dated of any further written communications between the parties or recorded instruments affecting the property other than as above described. Defendant claims to have always claimed ownership to the property by virtue of the 1910 Deed (Defendant's Exhibit 4), though not having made any inquiry concerning it in the last thirty (30) years (pp. 69, 70). Plaintiffs claim

ownership by virtue of possession, payment of taxes and Warranty Deed (Plaintiffs' Exhibit 9), though not having given Defendant any notice except as described herein.

I. BY POSSESSION AND OTHER ACTIONS, PLAINTIFFS ADVISED THE DEFENDANT AND ALL OTHERS THEY CLAIMED OWNERSHIP TO THE REAL PROPERTY IN QUESTION; THAT OWNERSHIP CLAIM IS PRESUMED HOSTILE TO THAT OF THE DEFENDANT; THE DEFENDANT KNEW OR SHOULD HAVE KNOWN IT WAS HOSTILE, AND THE TRIAL COURT CORRECTLY RULED THAT PLAINTIFFS OWNED FEE SIMPLE TITLE TO THE REAL PROPERTY IN QUESTION BY ADVERSE POSSESSION.

A. THE PLAINTIFFS EXERCISED VIRTUALLY EVERY ACT OF OWNERSHIP ONE COULD EXERCISE WITH A SMALL PARCEL OF FARMING PROPERTY; THERE IS NO EVIDENCE DEFENDANT EVER GAVE PERMISSION TO PLAINTIFFS' POSSESSION OR PAYMENT OF TAXES, AND AS SUCH, THE TRIAL COURT FOUND, ON AMPLE EVIDENCE, THE PLAINTIFFS WERE IN POSSESSION IN AN OPEN, EXCLUSIVE, NOTORIOUS AND HOSTILE MANNER.

Plaintiffs' acts of ownership are summarized as follows:

1. They have maintained fences on three sides of the disputed property since at least 1955 (pp. 6, 15).
2. They have farmed the property since the early 1950's as one parcel with another piece to which they hold record title (outlined in green--Plaintiffs' Exhibit 7), and the two parcels were kept fenced as if they were one parcel (pp. 6, 50).
3. They have grazed animals on the property every year since 1950 (pp. 49-50).
4. They paid the taxes on the property every year from at least 1955 to 1977 (pp. 12-14, Plaintiffs' Exhibit 11).
5. They caused a deed to be recorded which they (p. 42) and the Cache County Recorder believed placed the

property in question in their names. The Cache County Recorder's Plats and Cache County Assessor's Tax Notices reflected the Plaintiffs as the record title owners (pp. 44, 70).

It is uncontradicted that about ninety percent (90%) of the property has been farmed every year with barley or alfalfa for well over twenty (20) years (pp. 16, 49). Sometimes there have been three (3) crops of alfalfa harvested in one season (p. 16). Alfalfa has been used to feed animals of Plaintiffs (p. 19), and animals have grazed every year on the property (pp. 19, 50). The tenant, Dale Godfrey, under an informal arrangement, has never paid money to Plaintiffs for the use of the property, but he has maintained it, has run it on the same basis as the property immediately adjacent and owned by the Plaintiffs (pp. 51-52), has supplied Plaintiffs with feed for their animals and he acknowledges Plaintiffs' ownership of all the property. These factors give more than an adequate basis for the decision of the trial court. Cope v. Bountiful Livestock Company, 13 Utah 2d 20, 368 P.2d 68 (1962); Falconaero Enterprise, Inc. v. Bowers, 16 Utah 2d 202, 398 P.2d 207 (1965). In the case quoted by Defendant, Cooper v. Carter Oil Company, 7 Utah 2d 9, 316 P.2d 320 (1957), the adverse claimant only possessed the property three (3) weeks each year.

Defendant's statement of facts and claim that the use

of the property arose by permission is spurious. There is no evidence of how possession arose, or when it arose, or that it arose by permission. It is simply an assumption by Defendant not borne out by the record. Under the facts of this case, it should be presumed that the possession is precisely that which gives rise to adverse use since "... there may be adverse possession where possession is with forbearance of the owner who knew of such possession and failed to prohibit it." Weldon v. Heron, 78 N.M. 427, 432 P.2d 392 (1967); Myron v. Smith, 117 Cal. App. 355, 4 P.2d 219 (1931) The Defendant, Florence Munson, testified she watched the property "very carefully" (p. 66). As the Supreme Court of Alaska has quoted with approval,

"The intent with which the occupant holds possession is normally determined by what he does upon the land. Where the land is used in the manner that an owner would use it there is a presumption that the possession is adverse." Peters v. Juneau-Douglas Girl Scout Council, Alaska, 519 P.2d 826, 832 (1974) quoting Springer v. Durette, 217 Or. 196, 342 P.2d 132, 135 (1959).

Defendant makes an issue of the fact that there is no evidence the Plaintiffs called Eliza M. Pack Godfrey and said, "we claim the property." Plaintiffs had no reason and no legal responsibility to do so. See Reymore v. Tharp, Wash. App., 553 P.2d 456 (1976). Plaintiffs felt that by possession, deed and by payment of taxes, they legally owned the property in question and needed to notify no one. Utah law in fact presumes that Defendant should have known

of Plaintiffs' claim, not only because the Recorder's Plats and Tax Notices were in the Plaintiffs' names from at least 1966 through 1977 (pp. 25,70; Plaintiffs' Exhibit 11), but because of Plaintiffs' acts in farming and maintaining the property:

"Whenever the possession is of such a character that ownership may be inferred therefrom, then the possession ordinarily may be presumed to be hostile to the rights of the true owner; that is, if a party places permanent structures upon the land belonging to another, and uses the land and structures the same as an owner ordinarily uses his land, then, in the absence of something showing a contrary intention, a claim of ownership may be inferred in favor of the party in possession..." (emphasis added). Pioneer Investment and Trust Co. v. Board of Education, 35 Utah 1, 99 P. 150, 151 (1909) and quoted with approval in State of Utah v. Hopkins, 29 Utah 2d 131, 506 P.2d 57 (1973).

Other courts have similarly held that acts of ownership by a possessor are such as to put a record title owner on constructive notice that a party asserts ownership adverse to his. Winslow v. Watts, Okl. 446 P.2d 598 (1968) (adverse claimant fenced land, pastured cattle, built pond and paid taxes); McKelvy v. Cooper, Colo., 437 P.2d 346 (1968) (adverse possessor grew hay and pastured property, and record title owner did not object to possession).

Defendant attempts to claim that Dale Godfrey, Plaintiffs' tenant, did not always assert an ownership interest in the property on behalf of the Plaintiffs. There is no evidence that Dale Godfrey had any relationship

with the Plaintiffs other than that of a tenant, and he had no duty or obligation to assert their ownership claim. Even if he did have such an obligation, Dale Godfrey testified he never was at the family reunion where Flo Munson claims the lot in question was pointed out as belonging to the Defendant (p. 54). Furthermore, the Plaintiffs certainly took the strongest action possible to prevent any sale of the property by the Defendant by recording a Lis Pendens and filing a Complaint prior to any purported sale of the property by the Estate of Eliza M. Pack Godfrey. Plaintiffs filed the Lis Pendens and Complaint June 16, 1977 and the Box Elder County Court approved the sale June 27, 1977. There is no evidence the Defendant ever executed and delivered any documents of conveyance.

If the Defendant felt Plaintiffs' tenant, Dale Godfrey, "should have" asserted some claim to the real property in question which he did not, Defendant could have called the prospective purchaser of the real property to the stand to testify and Defendant did not. Even so, to suggest that permitting a test hole to be dug defeats twenty (20) plus years of adverse possession simply does not seem reasonable. If Dale Godfrey "should have" responded to a letter from the estate, the Defendant could have introduced the letter

to see exactly what it stated and Defendant did not.

The evidence is that Plaintiffs tried to settle the matter amicably. Defendant refers to the Plaintiffs' mother, Annie T. Godfrey, trying to "buy" the Defendant's interest [Appellant's Brief (hereinafter AB) p.8]---there is no evidence Annie ever sought to "buy" the property. "...she said that she would like to have this land put in her name..." (p. 63, lines 12-13). The testimony was clear---the Plaintiffs' mother had the best relationship with the Defendant's heirs and, consequently, had the best potential to peaceably obtain record title from them (pp. 41-42). This likewise is the reason the letter dated September 26, 1974 from Attorney L. Brent Hoggan to Hyrum Godfrey was sent in Annie's behalf (Defendant's Exhibit 1), and the record indicates one of the Plaintiffs accompanied their mother to see the attorney (p. 42, line 25).

Defendant's Exhibit No. 1 evidences a claim of ownership by and for the Plaintiffs when it states, "Mrs. Godfrey has advised me that your family is willing to cooperate in the perfecting of Mrs. Godfrey's title...". The letter did not ask the land be given or sold---it asked that a title defect be corrected. Naturally, the Plaintiffs would pay for such a proceeding---it cleared title to property they claimed. It is interesting that the Defendant did absolutely nothing for almost three (3) years after

this letter to give any indication whatsoever that they made any claim to the property.

Even if one assumes that the evidence of Plaintiffs' ownership claim prior to 1974 is inadequate, there is still a clear privity between Plaintiffs and their parents, and the time of adverse possession by Plaintiffs in the last three and one-half (3-1/2) years can certainly be tacked on the time of possession of either or both of the parents claiming an ownership interest. "A transfer of possession alone, without written evidence of the transfer, is sufficient to create privity." (For purposes of tacking one adverse possessor's possession to that of the prior adverse possessor). Adverse Possession, 3 Am. Jur. 2d § 60, p. 150. Even if the deed of 1964 (Plaintiffs' Exhibit 9) did not completely describe the property in dispute, there is adequate privity to tack the claims of prior possessors to those of the Plaintiffs. Howard v. Kunto, Wash. App., 477 P.2d 210 (1970).

Simply, the fact that in 1964 the Plaintiffs thought they had legal/record title, that the tax notices indicated the same, and that Plaintiffs acted as owners, raises a presumption of adverse possession which the record owner must rebut. Haney v. Olson, Colo. App. 470 P.2d 933 (1970); Michael v. Salt Lake Investment Company, 9 Utah 2d 370,

345 P.2d 200 (1959).

B. PLAINTIFFS' PAYMENT OF TAXES LEGALLY ASSESSED FURTHER COMPELS AND SUPPORTS THE JUDGMENT OF THE DISTRICT COURT.

Plaintiffs' Exhibit 11 clearly evidences payment of property taxes by Plaintiffs from 1955 to 1977 inclusive. Defendant's innuendo that perhaps Plaintiff, Beth Godfrey, changed the name to whom the property was assessed in 1955 has no basis in the record. There is no evidence the assessment ever went to anyone but George Godfrey. Furthermore, it would seem rather bizarre for Plaintiff to change the assessed name to someone who had been dead many years. Receipts of tax notices found since the trial further indicate George Godfrey had long been the name to which the assessment went.

The evidence is that George J. Godfrey and Annie T. Godfrey (Plaintiffs' parents and predecessors) and Plaintiffs had possessed the property for years; the evidence is their acts of ownership were manifest; that they have considered themselves both owners and claimants, and it could reasonably be concluded from the evidence that it was under claim of right. Assessments are appropriately made, under Section 59-5-12, Utah Code Annotated (1953 as amended) to an owner or claimant, both of which Plaintiffs and their predecessors are. The assessments were legally made pursuant to statute contrary to Defendant's claim.

The only case cited by Defendant, Tintic Undine Mining Co. v. Ercanbrack, 98 Utah 560, 74 P.2d 1184 (1938), analyzes the foregoing statute in light of a tax sale where an owner could be deprived of property virtually without notice if the property has not been properly assessed. That is considerably different than the case on appeal where the record title owner has ample notice of an adverse claim by virtue of the possession of the Plaintiffs.

Regardless, assessments came in Plaintiffs' names from 1966 to 1977 and in 1977 came in the record title owner's name. Plaintiffs clearly made claim to the property during this time by virtue of prior payment of taxes and a deed (Plaintiffs' Exhibit 9). Sections 78-12-9, 78-12-11, Utah Code Annotated, (1953 as amended). Thus even accepting the validity of Defendant's claim about whether taxes were legally assessed to George Godfrey, for at least eleven (11) years they were legally assessed to and paid by Plaintiffs. "Payment of taxes is evidence that the adverse possessor is acting as if he owned the land." Alaska National Bank v. Linck, Alaska, 559 P.2d 1049, 1053 n. 10; Powell, Real Property, §1018, p. 746. The evidence on payment of property taxes further substantiates Plaintiffs' claim and gives ample basis to uphold the trial court.

II. DEFENDANT PRESENTED NO EVIDENCE SHOWING SHE OR HER HEIRS PERFORMED ANY ACT OR MADE ANY CLAIM TO THE

PROPERTY IN QUESTION BETWEEN APRIL OF 1910 AND DECEMBER OF 1976, OTHER THAN HOLDING RECORD TITLE.

A. FROM 1910 TO 1976 THE DEFENDANT DID NOTHING THAT AN OWNER OF REAL PROPERTY COULD REASONABLY BE EXPECTED TO DO.

The Defendant took title to the real property in question by Deed dated February 23, 1910, and recorded April 11, 1910. The Defendant's husband moved to Fielding, Utah, in 1910 (p. 72). There was no evidence that Eliza M. Pack Godfrey ever paid taxes on the property. There was no evidence of permission for the Plaintiffs or their predecessors to ever possess the property. There is no evidence the Defendant or her heirs ever inquired concerning the property, went on the property, or made inquiry as to whom, if anyone, was paying the taxes (pp. 68-69). The following evidence is clear and unrefuted in questioning of Florence Munson:

"Q Have you ever paid the property taxes on that property?

A No.

Q Has Hyrum to your knowledge?

A No. My father did after he moved to Fielding.

Q But not in the last thirty years or so?

A No.

Q So you've never inquired of Dale in the last 30 years what was happening with that property, is that correct?

A No.

Q And no members of your family have, to your knowledge; is that correct?

A No." (p. 69)

The essence of this entire question and answer sequence is that the Defendant and her heirs have done absolutely nothing with the property in question in the last thirty (30) years.

Additional evidence of this disinterest and abandonment on the part of Defendant is that Florence Munson claimed to be very knowledgeable and familiar with the property (p. 66). Yet both Dale Godfrey (p. 50, line 12) and Beth Godfrey (p. 20), who have lived near and have run the property since the early 1950s, testified there was no fence on the south edge of the property in question. Florence Munson claimed there was and is such a fence (p. 68). This further questions the credibility of testimony of the record title holder and heirs and points out the fact that, even if they have driven by the property, they have taken no interest whatsoever in it or what was being done with it. The Trial Court correctly evaluated, considered and gave weight to the testimony of the various parties as to their role and activity with the property in dispute.

B. DEFENDANT'S CLAIM OF ERROR BY THE DISTRICT COURT BECAUSE SOME OF THE PARTIES ARE MEMBERS OF AN EXTENDED FAMILY IS WITHOUT MERIT AND NOT SUPPORTED BY CASE LAW.

The thrust of Defendant's claim for retaining an ownership interest in the real property is that the parties are relatives of one another. The argument is simply

not consistent with the evidence and the case law. Plaintiffs and their parents (George J. and Annie T. Godfrey) had no blood relationship whatsoever to the Defendant. In fact, if Defendant's statement of facts is accepted, the Defendant's husband never lived in Clarkston after 1910. Plaintiffs' claim is against Eliza M. Pack Godfrey and her estate, yet Plaintiffs are not heirs and could not be heirs to Eliza M. Pack Godfrey under the facts of this case.

Virtually all the cases involving adverse possession and family members are parent versus child, spouse versus spouse or brother versus brother. The case before the court contains no such relationship. The only case cited by Defendant, Sheppick v. Sheppick, 44 Utah 131, 138 P. 1169 (1914) involves a father and son where there was constant contact between the parties and clearly an instance where possession originated by permission---factors and relationship entirely absent from the present case on appeal.

As the relationship is more tenuous, courts have not, and appropriately, should not refuse to grant title by adverse possession where the facts warrant. In Morris v. Wells, Okl., 381 P.2d 882 (1963), the Oklahoma Supreme Court found ample evidence to award title by adverse possession to the surviving spouse and grandson of the record title

holder. Likewise, the Oregon Supreme Court in Fehl v. Horst, Or., 474 P.2d 525 (1970) quieted title by adverse possession in favor of a son-in-law against his wife's mother, the record title holder. The foregoing are analogous to the case before this Court, contrary to that cited by Defendant. The trial court appropriately and consistent with case law rejected the contention Defendant again raises on appeal.

C. THE PROBATE OF THE RECORD TITLE OWNER'S ESTATE IN 1962 AND 1963 IS FURTHER EVIDENCE THE DEFENDANT DID NOT INTEND AND NEVER HAS INTENDED TO MAKE CLAIM TO THE REAL PROPERTY IN QUESTION.

Hyrum Godfrey was administrator of the Estate of Eliza M. Pack Godfrey. Florence Munson, Hyrum's sister and daughter of Eliza, described Hyrum as meticulous, of excellent mind, that he lived his entire life with his mother, and that there was absolutely no doubt that Hyrum always knew of the existence of the property in question (pp. 57-58).

Yet, in the probate of Eliza's Estate in 1962, the property in dispute is conspicuously absent. Certainly if Hyrum was as meticulous and knowledgeable of his mother's property as Florence Munson claims, his apparent intentional decision to not claim an ownership interest in this property should be recognized by the Court and should be binding upon the Defendant.

In the probate of Eliza's Estate, Hyrum signed and

approved numerous documents and statements indicating the completeness of that probate as to property owned by Eliza M. Pack Godfrey, and the file clearly indicates that Florence Munson received all legal notices of the same and yet took no action. The following are quotations from various papers and pleadings filed in the probate and signed by Hyrum Godfrey:

1. The Petition for Letters ---"That the character and value of the property left . . . so far as known to your Petitioner . . ."

2. The Acknowledgment to the Inventory---"Hyrum Godfrey . . . says that the Amended Inventory contains a true statement of all the estate of the said deceased, which has come to the knowledge and possession of said administrator . . ."

3. The Final Accounting and Petition for Settlement---" . . . all property belonging to said estate . . . that has come to the possession or knowledge of petitioner . . ."

4. The Petition for Final Distribution---
"That your petitioner has heretofore made and filed in this Court an Inventory and Appraisement of all of the property belonging to said deceased."

Florence Munson in fact deeded her interest to Hyrum in all the real property probated in 1962 and 1963, and there should be little question that she knew or should have known then what property was and was not included in the probate.

Even in Florence Munson's Petition to reopen Eliza M. Pack Godfrey's Estate, she asserts this property was "omitted" from the first probate and in the Order Appointing her Successor Administrator, she asserts the South Half of Lot

7 is "after discovered property." But Mrs. Munson testifies that she and Hyrum always knew of the property (pp. 57, 70) and received the letter from L. Brent Hoggan in September of 1974 (Defendant's Exhibit 1) referring to the property (p. 71), and yet neither she nor Hyrum took any action to probate the property, pay taxes or take possession between March of 1963 (the closing of the first probate) and December of 1976, or between September, 1974 (the Hoggan letter) and December of 1976, many months after Hyrum's death.

Florence Munson's claim in the probate documents that this property was "discovered" after the completion of probate cannot be reconciled with her testimony. It would appear that Eliza M. Pack Godfrey and her representatives and heirs abandoned any and all claims to the property from 1910 until December of 1976. The law is clear that court pleadings are binding admissions upon the Defendant and they clearly indicate that upon the death of Eliza Godfrey, her estate claimed no interest in the property Plaintiffs claim by adverse possession. "Evidence," 29 Am. Jur. 2d § 700, p. 758.

D. MANY STATEMENTS, "FACTS," AND OBSERVATIONS IN APPELLANT'S BRIEF ARE UNSUPPORTED IN THE RECORD.

Plaintiffs have attempted to solely rely on the record of this case as it was presented to the Trial Court, and upon reasonable inferences to be drawn from that record.

1. It is not known how Plaintiffs or their predecessors came into possession. When Appellant states it was by permission, the statement is at best an assumption or presumption which is not supported by any testimony (AB pp. 2,6).

2. Referenced or unreferenced reliance upon Florence Munson's deposition should be disregarded since it was not published and was not made a part of the record (AB p. 2).

3. There is no evidence Plaintiffs' mother ever asked the Defendant to "sell" the property (AB p. 8).

4. There is no evidence the Defendant consummated any sale of the property to Stan Lott and no evidence Stan ever sought possession (AB p. 9).

5. Reference to a "1910 agreement" is without fact in the record (AB pp. 9-10).

6. Analysis of why Hyrum Godfrey or Defendant did not probate the property in dispute and did probate other property is pure speculation and nothing more (AB pp. 11-12).

Appellant has in effect considerably embellished its brief with statements not in the record on appeal and upon which the Trial Court's decision was not predicated.

CONCLUSION

Based upon the testimony and the Exhibits, Plaintiffs have been in possession of the South Half of Lot 7 claiming ownership since at least 1964. They have paid the taxes since at least 1955. Defendant provided no explanation for Plaintiffs' payment of the same. Possession by Plaintiffs has been open, exclusive, notorious, continuous and adverse, and no payment has ever been made to the Defendant or predecessors in interest for use of the property. There is

no evidence Plaintiffs' possession or that of predecessors ever arose by permission. The hostile nature of Plaintiffs' claim is appropriately determined from Plaintiffs' intent and belief as the Trial Court so found. C & F Realty Corporation v. Mershon, 81 N.M. 169, 464 P.2d 899 (1969); Thomas v. State, Hawaii, 514 P.2d 572 (1973).

Neither Eliza M. Pack Godfrey (record title owner), Florence Munson nor Hyrum Godfrey ever inquired about the property or took action to assert ownership to the property between 1910 and December of 1976, yet they always knew about and "watched" the property. Defendant never asked who was paying the taxes, nor checked to see if taxes were paid; the Defendant and predecessors in interest never checked ownership records with the County Recorder's Office until 1977.


The pleadings of Defendant Florence Munson's predecessor, Hyrum Godfrey, should be final and conclusive: the Estate of Eliza M. Pack Godfrey did not in 1962 or 1963 claim this property and made no serious assertion of ownership until December of 1976.

The Trial Court's finding of the nature and character of Plaintiffs' possession of and claim to the property in dispute is amply justified and supported in the record. Plaintiffs submit the evidence establishes title by adverse possession and the Trial Court's decision should be

affirmed.


Dated this 5th day of February, 1979.

Respectfully submitted,
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HAND CARRY CERTIFICATE

I certify that I served the foregoing Plaintiffs-
Respondents Brief on the Defendant-Appellant by hand-
carrying two exact copies thereof to Defendant-Appellant's
Attorney, Lyle W. Hillyard, HILLYARD, LOW & ANDERSON, Attorneys
at Law, 175 East First North, Logan, Utah, 84321, this
5th day of February, 1979.


Nancy L. Gamble

