

1980

Lucille Jesse Moffat Thornock, Et Al. v. Lois S. Cook : Brief In Support of Appellant's Petition For Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LUCILLE JESSE MOFFATT THORNOCK,)
WILLA LUCILLE THORNOCK KENNEDY,)
ADEN KAY THORNOCK, JOHN RUSSELL)
THORNOCK, and LOIS ANN THORNOCK)
BROWN, the Determined Heirs of)
ADEN WOODRUFF THORNOCK,)

Plaintiffs and Respondents)

vs.)

LOIS S. COOK)

Defendant and Appellant)

CASE NO. 16231

BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

Appeal from the Judgment of the District Court of the First
Judicial District of the State of Utah, in and for the
County of Rich.

Honorable VeNoy Christofferson, Judge.

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Plaintiffs and Respondents)

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Defendant and Appellant)

STATEMENT OF THE CASE

This is an action to quiet title to mineral rights in certain real property located in Rich County, Utah.

DISPOSITION IN LOWER COURT

The District Court of Rich County granted a Default Certificate against all defendants except Appellant LOIS S. COOK, who alone appeared and answered; granted Summary Judgment for Plaintiffs upon Plaintiff's Motion; and issued a Decree of Quiet Title confirming title to the disputed mineral rights in plaintiffs. From this Summary Judgment and Decree, Defendant LOIS S. COOK appealed. The Supreme Court affirmed the Judgment and Decree, and Defendant petitions for rehearing.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Summary Judgment below, and a remand to the District Court for a trial by jury on the merits.

STATEMENT OF FACTS

Appellant refers to and incorporates herein by reference the Statement set forth in Appellant's Brief on this Appeal.

ARGUMENT

POINT I

THE DEFENDANT'S DEPOSITION TESTIMONY, IF ANY AMBIGUITIES AND INCONSISTENCIES ARE RESOLVED IN HER FAVOR BY VIEWING THE TESTIMONY IN THE LIGHT MOST FAVORABLE TO HER, AFFORDS EVIDENCE OF DURESS AND COERCION IN THE EXECUTION OF THE 1959 QUITCLAIM DEED WHICH PRECLUDES SUMMARY JUDGMENT.

Summary judgment is only in order where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). When such a motion against a defendant is made, it may be granted only if the undisputed facts establish that he has no defense:

On a motion for summary judgment against a defendant, where some of the facts are in dispute, a judgment can properly be rendered against a defendant only if, on the undisputed facts, the defendant has no valid defense; if then any material fact asserted by the plaintiff is contradicted by the defendant, the facts as stated by the defendant must, on such motion, be taken as true.

Disabled American Veterans v. Hendrixson,
9 Utah2d 152, 154, 340 P.2d 416 (1959).

The judgment can be given only if there is no dispute on a material evidentiary matter. Burningham v. Ott, 525 P.2d 620, 621 (Utah 1974). There is to be no weighing of evidence or evaluation of credibility of witnesses: "The court cannot consider the weight

of testimony or the credibility of witnesses in considering a motion for summary judgment." Singleton v. Alexander, 19 Utah 292, 294, 431 P.2d 126 (1967). As stated in Holbrook Co. v. ... 542 P.2d 191, 193 (Utah 1975):

It is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail. Only when it so appears, is the court justified in refusing such a party the opportunity of presenting his evidence and attempting to persuade the fact trier to his views. Conversely, if there is any dispute as to any issue, material to the settlement of the controversy, the summary judgment should not be granted.

As discussed more fully in reviewing the evidence below, the triable issue of fact raised by the defendant's amended answer which is at issue in this phase of the case is duress. It is the defendant's position that if she and her husband quitclaimed mineral rights to Aden Thornock in 1959 they did so under duress. Her state of mind and that of her husband are consequently crucial issues: If they unwillingly executed the deed because their wills were overborne by Thornock's harassment, it is void and his successors cannot claim anything thereunder. In determining whether a conveyance is procured by duress, the grantor's physical and mental state may be considered as bearing upon his will to resist the likelihood of its being overcome. Johnson v. Johnson, 9 Utah

44, 337 P.2d 420 (1959). Thus both the circumstances of the execution of the conveyance and the personal attributes of the grantor enter into a determination of duress, and both these circumstances are matters of fact. But summary judgment is not usually appropriate where the issue raised concerns a subjective state of mind. Washington Post Co. v. Keogh, 365 F.2d 965, 967 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967). Summary judgment is particularly inappropriate where, as here, the issue involved is the defendant's state of mind. Ross v. John's Bargain Stores Corp., 464 F.2d 111, 115 (5th Cir. 1972). The perusal of transcribed deposition testimony at second-hand is insufficient basis for deciding whether this deed was the product of the genuine free will of the grantors or of the continuous "hounding" by the grantee--at least where, as here, the surviving grantor asserts that their will was overborne and further testifies to a pattern of harassment which compelled them to sign the deed in order to be left in peace.

Where there has been a motion for summary judgment, the burden of proof is on the moving party. Revlon, Inc. v. Regal Pharmacy, Inc., 29 F.R.D. 169, 171 (E.D. Mich. 1961). The moving party has the heavy burden of positively and clearly demonstrating that there is no genuine issue of fact, and any doubt as to the existence of such an issue is resolved against him. National Screen Service Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962). Even if the nonmoving party comes forth with nothing, summary judgment must be denied if the facts supporting

the motion do not establish the nonexistence of a genuine fact issue. Bloomgarden v. Coyer, 479 F.2d 201, 206-07 (D.C. Cir. 1973). Since the deposition testimony of the defendant, Mrs. Cook, does furnish some evidence of duress and coercion in the execution of the quitclaim deed under which plaintiffs assert their claim, summary judgment should not have been granted.

Even at this juncture of the case, on appeal, the defendant, against whom summary judgment has been rendered is entitled to have this Court survey the evidence, and all inferences reasonably to be drawn from it, in the light most favorable to her. Whitney v. W.T. Grant Co., 16 Utah2d 81, 82, 395 P.2d 918 (1964); Thompson v. Ford Motor Co., 16 Utah2d 30, 31-32, 395 P.2d 62 (1964). For purposes of appeal from summary judgment in favor of the plaintiff, the defendant's version of facts will be accepted as true. Franklin v. First National Bank of Anchorage, 584 P.2d 1125, 1126 (Alaska 1978). If there is the slightest doubt as to the material facts, the judgment will be reversed for a trial on the merits. Granger Dealers Mutual Insurance Co. v. James, 118 Ariz. 116, 118, 575 P.2d 315 (1978). Thus, apparent contradictions or ambiguities in Mrs. Cook's deposition testimony, if the Court perceives any, should be resolved in her favor. Not only is that the recognized standard of review, it also reflects the psychological reality of the situation if the Court takes into account the personal frailties of Mrs. Cook and the unfamiliar and threatening circumstances in which she underwent her first experience of being deposed. As discussed further below, the trial court concluded and this Court has hitherto agreed that the defendant Mrs. Cook's deposition

testimony does not prove her claim of duress and coercion in the execution of the 1959 quitclaim deed. That may be a reading of the evidence which a factfinder could properly arrive at. But such a determination necessarily involves the weighing of evidence, the crediting of certain statements and the discounting of others, and a judgment about the witness's credibility. For purposes of summary judgment, however, evidence may not be weighed nor credibility considered. Those functions properly belong to the jury. The fact, if it is a fact, that the party against whom the motion is made is unlikely to prevail at trial is not sufficient to authorize summary judgment against him. National Screen Service Corp. v. Poster Exchange, Inc., *supra*, 305 F.2d at 651. This Court should reconsider its judgment and reverse the trial court, not because its evaluation of the evidence is necessarily an unreasonable one, but because that kind of evaluation exceeds the narrow range of considerations justifying summary judgment.

It appears from the text of this Court's opinion that its conclusion that there is no genuine fact issue respecting the duress issue rests wholly on its interpretation of Mrs. Cook's own deposition testimony. There is no other evidence as yet adduced relating to the circumstances in which the 1959 quitclaim deed was executed. Thus the closest scrutiny of this testimony is called for, bearing in mind that it is to be viewed in a manner most favorable to Mrs. Cook.

Mrs. Cook is an elderly widow, without business experience, who relied on her husband to handle business matters (Dep. 1, 16, 17).

She is legally unsophisticated. She had never been deposed before (Dep. 3), she had difficulty understanding many of the questions -- including those inquiring about "duress" and "coercion" (Dep. 52) -- and was not even sure what a "defendant" is (Dep. 58), although that is her role in this case. She was confused by the proceeding (Dep. 7). Counsel for the plaintiff took advantage of her age and inexperience and badgered her by repeating questions which she was unable to answer, often asking them five, six or even more times. (E.g., Dep. 24). The interrogation related to events occurring almost 20 years ago, which as Mrs. Cook observed, "a long ways back" (Dep. 10). Not surprisingly she was unable to recollect many details, a circumstance seized upon by plaintiffs' counsel to impugn her honesty and threaten her with legal sanctions. One of these attorneys gratuitously threatened her with sanctions unless she agreed on the spot to ascertain and disclose her checking account number to him at a later time (Dep. 41), and repeated his threat a little later (Dep. 46). The same attorney charged that Mrs. Cook had "sworn during the last hour and consciously and maliciously lied under oath for the sole purpose of obfuscating the truth" (Dep. 42).

Mrs. Cook did not recollect very much of the 1959 transaction but she testified straightforwardly that Aden Thornock procured the execution of the deed, if at all, by constantly repeated

demands upon each of the Cooks until their resistance was worn down. She was not sure if she signed the deed at all (Dep. 6); she knew only that she had signed "some papers" because "Mr. Thornock was after us continually" (Dep. 8; see also Dep. 10 and passim). As she put it:

He hounded us continually. He just was at us continually. He never gave us any peace. When we stepped out the door, he was there, and I thought when we bought the house, we bought everything (Dep. 9).

Her understanding had always been that she and her husband bought the property "and all that went with it." (Dep. 17). She said Thornock didn't threaten her "with physical violence," but plaintiff's counsel did not pursue the matter when she did not directly answer a question whether legal or other threats were made against her (Dep. 21). Thornock did contact each of the Cooks separately and repeatedly to get them to sign (Dep. 56). Toward the end of the deposition, after the aforementioned threats were made, she did say that no one forced, threatened or coerced her (Dep. 51), but this answer is hardly decisive under the circumstances, especially since it immediately came out that she did not know what "duress" and "coercion" meant in any event (Dep. 52). If viewed in the light most favorable to her, the defendant's testimony was such that a trier of fact could find that, even absent explicit threats or overt violence, the Cook's consent to execution of the quitclaim deed was procured by incessant harrassment at

their home by Aden Thornock until the Cooks agreed to sign, as Mrs. Cook testified, quoting her husband, to "get him off our back" (Dep. 29). That is all the defendant maintains at this juncture of the case. But that is enough to preclude summary judgment as to the duress issue.

Mrs. Cook made some statements that may tend to be adverse to her in answer to harrassing and conclusory questions whose import was unclear to her. The defendant does not take the position that the plaintiffs are not entitled at trial to make use of this testimony, to the extent consonant with the rules of evidence, to be accorded such weight as seems appropriate to the jury. By the same token, the defendant would be entitled to explain her answers, to introduce other answers from her testimony which sustain her position, and to show the circumstances which the testimony was taken. But the defendant does emphatically insist that the weighing of evidence, the resolution of conflict and the assessment of credibility are matters peculiarly within the province of the factfinder. These functions cannot properly be discharged by either a trial court or an appellate court working from the cold record alone. At trial, Mrs. Cook will have the protection of an independent judge and any interrogation which takes place will be subject to the rules of evidence and controlled by the court.

Neither the trial court nor this Court was present when Mrs. Cook testified, and the record is barren of evidence of her bearing and demeanor and the manner in which she delivered her testimony. These intangible but important aspects of determining credibility will clearly be crucial, upon the trial of this case, to the resolution of the duress issue. It may be resolved adversely to the defendant. But where such considerations properly enter into the factfinder's determination, as here, summary judgment is premature and inappropriate. "Summary judgment is not proper when an issue turns on credibility." Eagle v. Louisiana & Southern Life Insurance Co., 464 F.2d 607, 608 (10th Cir. 1972). Such is the situation here.

Where any arguable issue of duress or coercion is in issue, this Court has shown itself to be adverse to efforts to abort exploration of the issue at trial by way of summary judgment. In Reliable Furniture Co. v. Fidelity & Guaranty Insurance Underwriters, Inc., 16 Utah2d 211, 213, 398 P.2d 685 (1965), in an opinion authored by Chief Justice Crockett, the Court reversed the entry of summary judgment for defendant insurer where its insured alleged that a settlement and release was obtained by fraud and duress. The plaintiff claimed he was coerced into executing the release as to one claim because the adjuster told him he could not be paid on a second and related claim unless he signed. 16 Utah2d at 214. It was enough for the Court to

justify its reversal of summary judgment that if the facts were entirely as the insured claimed that -- not that, in fact, he was entitled to relief from settlement -- but that he "may well" be so entitled:

If we accept the facts as plaintiff contends them to be, as we are obliged to do on this review, we must assume not only that the plaintiff was in economic distress, but that the defendant knew this and took advantage of him by falsely representing that money belonging to the plaintiff could not be delivered to him, and wrongfully refusing to deliver it unless plaintiff would also accept the proffered settlement on defendant's policy, which resulted in compelling plaintiff to accept the latter settlement against his will. If found to be true, this false representation, coupled with the wrongful withholding of that which belonged to plaintiff, may well justify a finding of duress which would afford him relief from the settlement.

16 Utah2d at 215. (footnotes omitted).

In holding that summary disposition was unwarranted, the Court set forth the rationale for a standard of review by which doubts are resolved in favor of trial by jury:

The summary disposal of a case serves a salutary purpose in avoiding time, trouble and expense of a trial when it is justified. But unless it is clearly so, there are other evils to be guarded against. A party with a legitimate cause, but who is unable to afford an appeal, may be turned away without his day in court; or, when an appeal is taken, if a reversal results and a trial court is ordered, the time, trouble and expense is increased rather than diminished. It is to avoid these evils and to safeguard the right of access to the courts for the enforcement of rights and the remedy of wrongs by a trial, and by a jury if desired, that it is of such importance that the court should take care to

see that the party adversely affected has a fair opportunity to present his contentions against precipitate action which will deprive him of that privilege. His contentions as to the facts should be considered in the light most favorable to him, and only if it clearly appears that he could not establish a right to recovery under the law should such action be taken; and any doubts which exist should be resolved in favor of affording him the privilege of a trial.

Upon the consideration of the record it has come to us we cannot conclude with such certainty as to justify ruling as a matter of law that there was no duress and/or fraud practiced upon the plaintiff in obtaining the release in question. Accordingly, it is necessary that the cause be remanded for trial.

16 Utah2d at 216-17. (footnotes omitted).

In the instant case, it is enough to preclude summary judgment if Mrs. Cook's story of unceasing harrassment of both her husband and herself caused them to execute the quitclaim deed to be rid of Aden Thornock's importunities. Whether the harassment was of such effect as to amount to duress and coercion is a question for the jury, taking into account the personalities and circumstances of the parties and the meaning they attributed to their act. Cases in which the underlying issue is one of motive, intent, or other subjective fact are particularly inappropriate for summary judgment, as are those in which the issue turns on credibility. Conrad v. Delta Airlines, Inc., 494 F.2d 914, 918 (7th Cir. 1974).

Since this case implicates both these considerations, it is doubly inappropriate for resolution by the drastic and final disposition of summary judgment.

POINT II

PLAINTIFFS AS MOVING PARTY DID NOT SPECIFY
THE FACTS SUPPOSEDLY ESTABLISHING A PRIOR
SEVERANCE OF SURFACE AND MINERAL ESTATES
SUFFICIENT TO DEFEAT DEFENDANT'S CLAIM OF
ADVERSE POSSESSION, AND ON THE FACTS PRESENTED
BY THE RECORD THE RULE RELATING TO SEVERANCE
IS INAPPLICABLE.

As noted under Point I above, the burden is on the moving party to justify summary judgment in his favor. One aspect of this burden is a basic obligation to relate the legal arguments to the record evidence on which the moving party proposes to rely. The opposing party should not have to speculate about the factual underpinnings of the moving party's conclusory assertions, nor should the opposing party have to do the moving party's job for him by anticipating and refuting every imaginable use which might conceivably be made of the evidence in the record. Courts disapprove the practice "of dumping an extensive record on a busy trial judge without guidance from counsel, expecting him to ferret out facts which might conceivably be relevant on a motion for summary judgment: American Standard, Inc. v. Crane Co., 510 F.2d 1043, 1056 n.3 (2d Cir. 1974), cert. denied, 421 U.S. 1000 (1975). If there was any severance of surface and mineral estates in this case might have occurred at any of many different times and in a variety of different ways. Severance may be effected by deed or by reservation or by adverse possession. Broadhurst v. American Colloid Co., 177 N.W.2d 261, 265 (S.D. 1970). What transaction or occurrence the plaintiffs rely on as constituting a severance cannot be determined from the file and the record in their present state. Unless and until they identify the

supposed severance with specificity, summary judgment in their favor is, to say the least, premature.

A close examination of the proceedings before the trial court reveals that the plaintiffs never discharged their duty to articulate a proper basis for summary judgment as to the adverse possession claim, viz., prior severance of the mineral and surface estates, and to identify with specificity the undisputed evidence showing as a matter of law that severance took place. Plaintiffs' motion for summary judgment of April 3, 1978, was based on the grounds (1) that record title was in the plaintiffs; (2) that the defendant in her deposition testimony admitted she knew of no facts contradicting plaintiffs' record title; and (3) that the defendant admitted knowing of no facts sufficient to "reform, modify or rescind" the 1959 quitclaim conveyance." (The latter ground, relating to the quitclaim deed as an independent basis of plaintiffs' claims as discussed under Point I above, is for present purposes irrelevant.) Thus, the stated grounds of the motion, relating as they do solely to record title, are irrelevant to any claim by the defendant based on extrinsic circumstances outside the sequence of conveyances -- such as title obtained prescriptively by adverse possession. However, the defendant's amended answer and counterclaim filed two days later, on April 5, 1978, asserted the defendant's claim to the surface estate and its attendant mineral rights based on

adverse possession. The plaintiffs never amended their motion to reflect the introduction of this new issue. Thus, the motion for summary judgment which the trial court granted does not even purport to state grounds alleging that there is no genuine fact issue as to adverse possession and that the plaintiffs are entitled to judgment as against that claim as a matter of law.

Despite this seemingly fatal oversight, the plaintiffs' brief in support of their motion went beyond the grounds added in the motion itself by briefly disputing the adverse possession claim (at page 34). Citing Kanawha & Hocking Coal & Coke Co. v. Carbon County, 535 P.2d 1139 (Utah 1975), plaintiffs argued that assuming a severance of the mineral and surface estates, adverse possession of the surface estate is not adverse possession of the minerals. But a fact issue cannot be eliminated just by citing a case: Citation of authority "do[es] not supplant on a motion for summary judgment the need for presentation of facts justifying the granting thereof." Orange National Bank of Orange v. Bank of Louisiana in New Orleans, 382 F.2d 945, 949 (5th Cir. 1967).

Neither the brief nor any other paper ever filed by the plaintiffs explained how or when the suppositious severance occurred. Instead, the brief simply asserts a legal conclusion:

"The mineral estate was effectively severed long before Defendant Cooks acquired possession of the subject property." In passing on a motion for summary judgment, statements which are legal conclusions rather than allegations of fact are disregarded. Welles v. Sauber, 142 F. Supp. 449, 451 (N.D. Ill. 1956); Chi-Mil Corp. v. W.T. Grant Co., 70 F.R.D. 352, 358 (E.D. Wis. 1976).

The plaintiffs never timely and sufficiently specified what facts their legal conclusion was based upon, nor did they establish as they were obliged to, that there was no genuine issue as to those facts or that those facts entitled them to judgment as a matter of law.

In the present procedural posture of the case, the conclusion is inescapable that triable issues of fact exist with respect to the defendant's claim to title to the minerals by adverse possession. The defendant is in possession of the surface estate, and her claim to have adversely possessed the surface estate has never been controverted. Adverse possession of the surface estate extends to the underlying minerals. Gerhard v. Stephens, 68 Cal. 2d 864, 899, 442 P.2d 692 (1968). Prior to the severance of subsurface rights, possession of the surface implies possession of the minerals below; when title to the surface passes by adverse possession, so does the mineral estate. Sachs v. Board of Trustees, 89 N.M. 712, 721, 557 P.2d 209 (1976); 3 Am. Jur. 2d

"Adverse Possession" § 216 (1962); Annot., "Acquisition of Title of Mines or Minerals By Adverse Possession," 35 A.L.R.2d 124, 129 (1954). But until severance, minerals in and under land are a part thereof. Broadhurst v. American Colloid Co., supra, 177 N.W.2d at 265. Thus, the presumption at this point must be that the defendant as adverse possessor of the surface likewise has title to the minerals. This presumption is rebuttable -- but it is up to the plaintiffs to rebut. This they have never explicitly done.

The Cooks went into possession of the land in question in 1952. Any severance would have had to have occurred prior to their taking possession. See, e.g., Gesell v. Martin, 463 P.2d 697, 700 (Okla. App. 1969). Hence, the 1959 quitclaim deed, even if it was not the product of duress (see Point I above), could not operate to divest the Cooks of the mineral estate, since their possession of only seven years fell far short of the 25-year limitations period and so they had no interest in either the surface or subsurface estates which they could convey. If they could not convey the mineral rights in 1959, no severance occurred at that time. So when, prior to 1952, did the severance take place? The plaintiffs have not answered this question. Neither did the trial court. Possibly they thought the severance occurred in 1950 when Aden Thornock purported

convey the larger part of the land to Lawrence Johnson. But whether this is the case is a question of fact. On its face the deed recorded by the parties contained a reservation of mineral rights to the "grantee." The grantee being Johnson, to whom the surface estate was likewise granted by the same instrument, no severance took place since the full fee estate purportedly passed to Johnson then.

However, even if "grantee" is held to mean "grantor" here -- a matter better left to a jury to decide -- no severance took place which is effective as against the Cooks, for several reasons. In the first place, only an effective deed will operate to sever the mineral estate from the surface estate. Thomas v. Southwestern Settlement & Development Co., 132 Tex. 413, 123 S.W.2d 290, 300 (1939). But Thornock's deed to Johnson was ineffective to convey the surface to Johnson or reserve the minerals to Thornock because neither estate was ever Thornock's to convey, in other words, Thornock's title was defective. Without reiterating the full rationale for this position, which is set forth in the defendant's brief on appeal (at pages 3-4 and 12-13) and in her reply brief (pages 3-12), it suffices to note by way of summary that there is an as-yet-unexplained break in Thornock's chain of title, namely, there is no record of a conveyance from Joseph E. Hatch & Co. to Joseph E. Hatch, who in turn conveyed the land to Thornock's grantors, the four Hatch daughters. Absent any evidence--and none has been adduced--that Joseph Hatch conveyed the land as agent of the corporation, and absent any evidence or even any allegation that the corporation

was merely the alter ego of Hatch whose independent existence should be disregarded, it necessarily follows that the land, and a fortiori its minerals, were not Thornock's to convey in 1952 or any other time. Nor does the record disclose any conveyance by Ezra T. Hatch of his one-half interest in the 80-acre tract (N $\frac{1}{2}$ SE $\frac{1}{4}$ of Sec. 24) which he and Joseph E. Hatch had acquired from the State of Utah. There is no showing that authority had been granted to Joseph E. Hatch to convey the interest in this tract owned by Ezra T. Hatch. There had been no severance of the minerals from the surface estate in this tract prior to the time the period of adverse possession by Mrs. Cook had begun to run. (The principle that a party has no standing to challenge another's title on grounds which would invalidate her own record title--invoked by this Court in its prior opinion--is correct but is inapplicable here. In disavowing Thornock's record title Mrs. Cook is not breaking a link in her own chain of title (namely, the conveyance from Thornock to her ostensible grantor Johnson) because she is not claiming pursuant to that chain of title: Instead she claims title by adverse possession vis-a-vis the owner of record, apparently still Joseph E. Hatch & Co.)

Kanawha & Hocking Coal & Coke Co. v. Carbon County, *supra* relied upon by the plaintiffs and also cited in the earlier opinion of this Court, is not inconsistent with this reasoning. In that case the successor of the surface owner (not, as here, a claimant of the subsurface estate) sued to quiet title to the subsurface rights asserted by defendant county pursuant to a

tax sale. 535 P.2d at 1139. For purposes of passing on a motion for summary judgment, the trial court assumed the invalidity of the conveyance resulting from the tax sale. 535 P.2d at 1140. This Court held that the tax sale was effective to sever the surface from the subsurface estates. 535 P.2d at 1140. This instant case does not involve a tax sale and the plaintiffs here have not identified the transaction which they contend proves severance as a matter of law. Kanawha & Hocking was not an ordinary adverse possession case; it was decided, not under the usual limitations statute, but under the provisions of Utah Code Ann. § 78-12-5.2 (repl. vol. 1953). 535 P.2d at 1139-40. Under that statute, "tax title" refers to any title to real property, "whether valid or not," derived through or dependent upon a tax sale of the property. U.C.A. § 78-12-5.3; Kanawha & Hocking Coal & Coke Co. v. Carbon County, supra, 535 P.2d at 1140. In Kanawha there was no doubt as to which transaction effected a severance, and under the applicable statute the validity vel non of the conveyance was irrelevant to the effectiveness of the resulting severance. Absent such a special statute, however, as previously noted, only an effective deed results in severance of surface and mineral estates. Kanawha did not address that situation and is not contrary to the general rule.

That severance is pre-eminently an issue of fact, unsuitable to summary disposition is apparent from Toth v. Bigelow, 1 N.J. 399, 64 A.2d (1949), which involved an appeal from the trial court's denial of a motion to dismiss an action to quiet title. The defendant-appellant, who conceded the plaintiff's title to the surface, contended that his claim to the mineral rights was nonetheless based upon a misinterpretation of certain deeds in the plaintiff's chain of title, and that actually there was a break in the chain of title. He further argued that, since there had been a prior severance of the surface and mineral estates, the plaintiff's possession of the surface did not import possession of the minerals. 1 N.J. 399. The New Jersey Supreme Court held that the issues of interpretation of the deeds and of severance pertained to the merits of the case and should be resolved at trial, not before:

We are met at the outset by the preliminary question of whether it is necessary at this time to enter into an examination and interpretation of the instruments in the respective chains of title of all the parties concerned. Appellant urges us that it is necessary to do so, his premise being based upon the argument that, a severance having occurred, a proper interpretation of the chains of title would show that such severance has never been reunited. While this could conceivably be true we do not deem it necessary to consider the matter for we are of the opinion that this is a matter for decision at the time when the case is heard on the merits. At that time the appellant's present evidence and argument that it deems fit in opposition to respondent's case, including the argument based upon an interpretation of the chains of title, will be presented. We are of the opinion, however, that at this stage of the suit it is neither necessary nor proper for the court to consider this argument.

In its essential elements the question is whether possession of the surface carries with it possession of the minerals underneath it in the face of an allegation of severance by a prior common owner, neither party having attempted to reduce the minerals in question to possession. We are of the opinion that it does.

While the precise question does not appear to have been decided in this jurisdiction its answer flows from well known and logical principles. At the common law the rule was that ownership of the surface imported ownership of an indefinite extent, upwards and downwards. [Citations omitted]***

This rebuttable presumption of the common law is the rule in other jurisdictions as well as our own. [Citation omitted.]***

The appellant will be afforded an opportunity to rebut the presumption at the final hearing and if it is proven that a severance does in fact exist then the respondent's surface possession would not extend to the minerals.

The appellant concedes the principle of the scope of ownership but asserts that, by reason of the alleged severance, it no longer applies. To be sure, the ownership of subsurface rights, including minerals, may be severed from the surface and thereafter constitute a separate fee in another plane of the same land and after such severance has been effected a distinct and separate estate of inheritance exists therein. [Citations omitted]

And, although the question does not seem to have been passed upon in New Jersey the great weight of authority is to the effect that, when such severance has been made, a possession of the surface does not constitute possession of the subsurface. [Citations omitted].

However, in the instant case the question is not, as appellant would have it, whether such a severance is valid, but whether it exists at all and this cannot be determined until a hearing on the merits.

1 N.J. at 403-05. (Emphasis added).

The rule of the Toth case is controlling here. The claim of severance, here as in Toth, presumably reflects one party's interpretation of the deeds in the chain of title. If there is such a severance, possession of the surface concededly does not constitute possession of the minerals. But severance is a question of fact for the factfinder which is inappropriate summary disposition.

Finally, even if the foregoing arguments were not decisive, the law relating to severance is inapplicable on these facts anyway. A severance is effective only between the parties to the severance and those in privity with them. Clements v. B Co., 273 S.W. 993, 1005 (Tex. Ct. Civ. App. 1925). The Cooks were not parties to the Thornock/Johnson transaction and, therefore, their color of title, for purposes of adverse possession, derived from Johnson, actually they could never have been in privity with Johnson vis-a-vis this property because Johnson, like the grantor Thornock, was without title to the land. Mrs. Cook's claim of title to the land with its subsurface rights depends not upon record title but rather upon her adverse possession of the property as against its true owner. Whether the claim

of adverse possession can be shown to exist in these circumstances is, of course, a question of fact for the jury at trial. But it is at least clear that the plaintiffs have made no serious effort to show that no genuine issue of material fact exists as to the adverse possession issue, or that the plaintiffs are entitled to judgment as to that issue as a matter of law. Insofar as this Court in its previous opinion relied upon the severance allegation, it had no occasion to pass upon the question whether the elements of adverse possession may be shown.

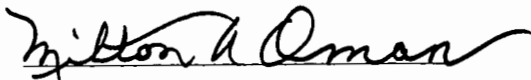
CONCLUSION

It merits reiteration that the issues before the Court, in the present posture of the case, are very narrow. Essentially, the question is whether the plaintiffs as moving party have articulated grounds and identified record evidence establishing that there is no genuine issue of material fact to either the duress or the adverse possession issues and, further, that the plaintiffs are entitled to judgment as a matter of law. For present purposes, the defendant asserts that such issues do, indeed, exist. The issue is not whether the Court finds the defendant's case to be particularly persuasive; the only issue is whether the defendant is to be allowed to present and develop her case at all to a jury of her peers. Under the established standard of review of summary judgment, the Court should reverse and remand, with the understanding that such a disposition is by no means an endorsement of the merits of the defendant's case or a prediction as to the likely outcome at trial. These other considerations are simply beside the point at this stage in the proceedings. It is enough to justify reversal of the trial court that either there are triable issues of material fact as to the duress and adverse possession issues or else that, whether or not there truly are such issues, the plaintiffs have not discharged their heavy burden of showing

the non-existence of such issues.

For these reasons, appellant, prays the honorable Court to set aside the summary judgment below, together with the decree of quiet title, and to remand the entire matter for a trial on the merits in the District Court.

Respectively submitted,

A handwritten signature in cursive script, reading "Milton A Oman". The signature is written in dark ink and is positioned above the printed name.

MILTON OMAN

Attorney for Appellant