

1980

Lucille Jesse Moffat Thornock, Et Al. v. Lois S. Cook : Brief of Respondents

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Thornock v. Cook*, No. 16231 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT OF THE STATE OF UTAH

NO. 16231

LUCILLE JESSE MOFFAT THORNOCK, et al.,

Plaintiffs-Respondents,

vs.

LOIS S. COOK, et al.,

Defendant-Appellant.

On Appeal from Judgment of the
First Judicial District Court
in and for Rich County,
Honorable VeNoy Christofferson, Judge

BRIEF OF RESPONDENTS
LUCILLE JESSE MOFFAT THORNOCK, et al
IN OPPOSITION TO APPELLANT'S
PETITION FOR REHEARING

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FILED

FEB - 6 1980

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IN THE SUPREME COURT OF THE STATE OF UTAH

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et al.,)

Plaintiffs-Respondents)

vs.)

No. 16231

LOIS S. COOK, et al.,)

Defendant-Appellant.)

BRIEF OF RESPONDENTS IN
OPPOSITION TO APPELLANT'S
PETITION FOR REHEARING

STATEMENT OF THE CASE

This is an action whereby plaintiffs-respondents, LUCILLE JESSE MOFFAT THORNOCK, et al., (hereinafter "THORNOCK"), seek to quiet title, pursuant to §78-40-1, et seq., Utah Code Ann. (Repl. Vol. 9A 1977), to all minerals in, upon, or under certain real property located in Rich County, Utah.

DISPOSITION IN LOWER COURT

The First Judicial District Court in and for Rich County, the Honorable VeNoy Christofferson, presiding, granted plaintiffs' Motion for Summary Judgment

and entered its Judgment and Decree of Quiet Title on October 23, 1978 (R. 349, 358-61, and 354-57, respectively).

Plaintiffs' Motion for Summary Judgment was considered by the court below on three separate occasions. An initial hearing was held on April 17, 1978, which was continued, without date, for the purpose of allowing both parties an opportunity to file additional documents. A second hearing was held on September 5, 1978, subsequent to which, defendant-appellant, Lois S. Cook, (hereinafter "COOK"), filed her Second Amended Answer and Counterclaim (R. 339-48).

Subsequent to the grant of summary judgment by the court below, COOK filed an "Objection to Plaintiffs Proposed Decree of Quiet Title, Judgment and Order Releasing Lis Pendens and Motion for Reargument" (R. 368-72). After these three separate opportunities for consideration of the issues involved, on December 11, 1978, the lower court rendered its Memorandum Decision denying COOK's Objection and Motion (R. 377).

RELIEF SOUGHT ON APPEAL

Defendant-Appellant, COOK, seeks reversal of the lower court's Judgment of November 16, 1978, of that court's Memorandum Decision dated December 11, 1978, and a rehearing of her arguments on appeal.

Plaintiffs-Respondents, THORNOCK, seek affirmation of the Judgment of November 16, 1978, the Decree of Quiet Title of that same date and of the Memorandum Decision of December 11, 1978. In addition, THORNOCK seeks a denial of COOK'S Petition for Rehearing.

STATEMENT OF FACTS

For purposes of brevity, THORNOCK adopts the Statement of Facts as contained in her Brief on Appeal. However, THORNOCK wishes to again emphasize that those arguments presented by COOK pertain to only 353 of the 1,946 acres involved in this action.

COOK asserts title through adverse possession by reason of certain alleged defects in THORNOCK's chain of title. Those alleged defects pertain only to 353 acres (See Brief of Respondent's pg. 4).

The court below held that the language of reservation contained in the Warranty Deed dated June 30, 1950, (R.219), whereby the real property in question was conveyed by THORNOCK's predecessor in interest to Lawrence B. Johnson served to reserve to the grantor all mineral rights (R. 349 and 377).

As COOK has not questioned that ruling on appeal, the remainder of the real property is not affected by COOK's assertion of adverse possession.

ARGUMENT

Defendant-Appellant COOK, in her Brief in Support of Appellant's Petition for Rehearing (hereinafter, "Appellant's Brief"), presents two arguments. The first is that an issue of fact exists as to the validity of the COOK-THORNOCK Quit-Claim Deed. The second, argued here for the first time, pertains to the alleged failure of THORNOCK to "specify the facts supposedly establishing a prior severance of surface and mineral estates". Those arguments will be discussed separately.

POINT I

THERE IS NO QUESTION OF FACT AS TO THE VALIDITY OF THE COOK- THORNOCK QUIT CLAIM DEED

COOK again asserts that a question of fact exists as to the validity of the COOK-THORNOCK Quit Claim Deed. This argument was considered by the lower court on three separate occasions and by this Court on COOK's initial appeal.

Central to COOK's renewed argument is the contention that in the context of a motion for summary judgment, "[t]here is to be no weighing of evidence or evaluation of credibility of witnesses" (Appellant's Brief pg. 4).

Admittedly, this proposition is correct, however, in the context of this appeal, the only evidence before the court is COOK's testimony. There is simply no conflicting testimony against which it might be weighed.

As COOK's testimony stands alone, apparently COOK wishes this court to question her own credibility. In the absence of conflicting testimony, THORNOCK assumes, as does this Court, that COOK testified truthfully. In summary, she testified that (1) the signature of Lois Cook appearing on the COOK-THORNOCK Quit Claim Deed appears to be her own (Cook depo. pg. 13 lns. 19-24), (2) the signature which purports to be that of Howland J. Cook appears to be that of her deceased husband, (Cook depo. pg. 13 ln. 25, pg. 14 lns. 1-2), (3) she knows of no facts which would tend to indicate that the signatures which appear on the Quit Claim Deed are other than what they purport to be, (Cook depo. pg. 14 lns. 13-16), (4) the Quit Claim Deed was signed at the request of Aden W. Thornock (Cook depo. pg. 10 lns. 11-16), (5) although she characterized her contacts with Aden W. Thornock as "hounding", she does not recall even the substance of Mr. Thornock's statements during those encounters (Cook depo. pg. 19 lns. 10-19, pg. 44 lns. 15-25, pg. 45 lns. 1-5), (6) she was not threatened

or coerced by Aden W. Thornock (Cook depo. pg. 51 lns. 19-25, pg. 52, lns. 1-13), (7) to her knowledge her deceased husband was neither threatened nor coerced (Cook depo. pg. 52 lns. 11-17, pg. 53 lns. 2-13), (8) the COOK-THORNOCK Quit Claim Deed was the only document which she signed at the request of Mr. Thornock (Cook depo. pg. 51 lns. 4-18), and (9) Aden W. Thornock was not present at the time the Quit Claim Deed was signed (Cook depo. pg. 53 lns. 14-17).

In spite of this testimony, COOK again asserts at page 5 of her Brief, that a "triable issue of fact...[is]...raised by the defendant's Amended Answer". As this Court noted in its original opinion in this matter, a mere allegation is not sufficient to raise an issue of fact which will preclude the grant of summary judgment.

In applying COOK's statement that the Court may not consider credibility or weigh the evidence on the record, only one conclusion may be reached, i.e., there is no issue of fact as to the validity of the Quit-Claim Deed because the record contains no conflicts. It is only if this Court questions COOK's credibility and assumes, even absent contradicting evidence, that her testimony may be disregarded might a question of fact be found to exist. Of course, the

Court may not question credibility or indulge in speculation. Simply stated, on the record there is no issue of fact.

COOK also argues that summary judgment is "not usually appropriate where the issue concerns a subjective state of mind" (Appellant's Brief, pg. 6). Even assuming, arguendo, that this is correct, the issue must first be raised. In the context of this action, there is no issue of fact as to coercion or duress.

A succinct and somewhat general definition of duress is found at 25 Am.Jur. 2d DURESS AND UNDUE INFLUENCE, §1 where it is stated:

Generally speaking, duress may be said to exist whenever one, by the unlawful act of another, is induced to make a contract or to perform some other act under circumstances which deprive him of the exercise of free will.

The "subjective state of mind" to which COOK refers is this deprivation of the "exercise of free will". In this regard, COOK has testified as follows:

Q. [By counsel for Thornock] Did anyone force you to sign Exhibit "1" . . . [the Cook-Thornock Quit Claim Deed] . . . to your deposition?

A. No.

Q. Did anyone threaten you?

A. No.

Q. Did anyone coerce you to sign Exhibit "1"?

A. I signed it because my husband asked me to.
(Cook depo. pg. 51 lns. 19-25)

Clearly, COOK was not deprived of the exercise of her free will. In fact, her only testimony concerning the conduct of Aden W. Thornock was an expression of irritation at his requests that the Quit Claim Deed be signed and a characterization of those requests as "hounding" (Cook depo. pg. 10 lns. 11-16).

Neither COOK's testimony, nor any other evidence before this Court suffice to raise an issue of fact as to her "subjective state of mind" at the time of the signing of the Quit Claim Deed; rather, the record serves to demonstrate the absence of duress or coercion in the execution of that document.

COOK relies on the Court's opinion in Ross v. John's Bargain Stores Corp., 464 F.2d 111 (5th Cir. 1972) in support of the proposition that summary judgment is inappropriate where the defendant's "state of mind" is at issue.

Ross, supra, was a products liability action. The issue of fact before the court was whether the retailer of an allegedly defective product should have known of the product's defect. The court noted that the

defendant retailer had filed an affidavit stating that it had no actual knowledge of the defect and that plaintiffs had filed an affidavit setting forth media publicity about the defect. In this context of conflicting affidavits, the court held summary judgment was inappropriate.

The court's decision in Ross, supra, is distinguishable from the case at hand. In Ross, supra, the conflicting affidavits before the court presented an issue of fact as to whether the retailer should have known of the product's alleged defect. In the present case, the testimony of defendant alone is before the court. That testimony demonstrates the nonexistence of an issue of fact as to duress or coercion. Simply stated, in Ross, supra, the court was confronted with an unquestionable issue of fact created by opposing affidavits while in the present situation no such issue of fact is present.

COOK similarly urges that this Court's decision in Reliable Furniture Co. v. Fidelity & Guarantee Ins. Underwriters, Inc., 16 Utah 2d 211, 398 P.2d 685 (1965) stands for the proposition that this Court is "adverse" to the grant of summary judgment where duress or coercion is an issue. A careful reading of that case reveals that it is procedurally dissimilar to the

case at hand. In Reliable Furniture, supra, defendant was granted summary judgment during the pre-trial conference. No Motion for Summary Judgment had been filed. In view of this procedural irregularity, the court stated:

It is appropriate to reiterate that the dismissal of an action at pre-trial, which peremptorily turns a party out of court, is a drastic action which should be used sparingly and with great caution. This is especially true where the dismissal was ordered without any motion for summary judgment being filed to put the party on notice of such contemplated action and afford him an opportunity to meet it. (398 P.2d at 688) (emphasis added)

In the procedural context of that case, it is clear that plaintiff did not have an opportunity to create a factual record. Based upon this absence of opportunity and the condition of the record, the court stated:

Upon consideration of the record as 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 . . . (398 P.2d at 688) (emphasis added)

The court, in Reliable Furniture, did not, as COOK contends, hold that summary judgment is inappropriate where duress or coercion is an issue. The court held, that on the record in that particular case, where a Motion for Summary Judgment had not been filed,

plaintiff should be entitled to present evidence. In the present case, COOK has had three opportunities to present any evidence whatsoever and has wholly failed so to do.

COOK suggests that a review of transcribed testimony is an inadequate basis for a decision on a Motion for Summary Judgment because the court has not witnessed the demeanor of the witness.

This suggested limitation upon the grant of summary judgment would, if adopted by this court, serve to render Rule 56, Utah Rules of Civil Procedure, a nullity. If a court cannot render summary judgment without observing the demeanor of the witness, judgment could not be granted outside the parameters of a trial.

In summary, COOK is correct in her assertion that the weighing of evidence and consideration of credibility is inappropriate in the context of a Motion for Summary Judgment. COOK's testimony as contained in her deposition should be given full credit without speculation as to her motives or what she might have said. In this action, evidence cannot be weighed as there is no conflict on the record. The record establishes that there is no question of fact as to the validity of the Quit-Claim Deed.

As there is no question of fact, there is similarly no issue as to COOK's "state of mind" at the

time of the execution of the COOK-THORNOCK Quit-Claim Deed.

COOK's suggestion that transcribed testimony should not be the basis of a grant of Summary Judgment simply does not comport with the law, nor the practice of this jurisdiction.

Throughout her argument COOK has failed to indicate one instance in the record which serves to create a question of fact as to the validity of the Quit-Claim Deed.

This Court's original opinion was correct, there is no question of fact as to the validity of the COOK-THORNOCK Quit-Claim Deed. COOK's Petition for Rehearing on this basis should be denied.

POINT II.

COOK apparently presents several diverse arguments under her heading "Point II". They appear to be that (1) THORNOCK has failed to specify a basis for severance of the mineral and surface estate, therefore she is precluded from arguing that point, (2) COOK has obtained title by adverse possession because the mineral and surface estates have not been severed, (3) COOK may simultaneously assert and deny her title, and (4) severance, is by its very nature, a question of fact. For purposes of clarity, those various themes contained

in the arguments presented in COOK's second point will be discussed separately.

A.

THE ISSUE OF SEVERANCE IS
PROPERLY BEFORE THIS COURT

COOK, for the first time, asserts THORNOCK has failed to "specify the facts supposedly establishing a prior severance of surface and mineral estates". (Appellant's Brief pg. 16) As this issue was not raised before the trial court, and was not raised on appeal, it may not properly be considered by this Court.

As this Court noted in Dahlquist v. Denver & Rio Grande RR Co., 52 Utah 438, 174 P. 833 (1918):

A rehearing will not be granted on the ground that petitioner has failed to argue an important point on the hearing. All points relied upon in support of a case must be presented by the briefs and arguments on appeal, and the practice of reserving certain points to be argued subsequently, in the event of an adverse decision, is condemned by the court. [citing 84 CJ 627, 628] (52 Utah at 469) (emphasis added)

Should the Court consider COOK's belated argument, it remains somewhat surprising after three hearings in the court below and an appeal to this Court on the issues of reservation, the validity of a Quit Claim Deed, and the use of the mineral estate involved,

that COOK would contend she has not been advised of the basis for severance of the mineral estate. COOK notes in her own brief, "[s]everance may be effected by deed or by reservation or by adverse possession" (Appellant's Brief pg. 17). Each of the primary issues in this action constitute a basis for severance and THORNOCK has raised those issues at each stage of the proceedings in this action.

Without question, COOK has received notice of the bases for severance of the mineral estate from the surface estate in this action.

B.

THORNOCK'S MOTION FOR SUMMARY JUDGMENT
COMPLIES WITH THE REQUIREMENTS
OF RULE 56, UTAH RULES OF CIVIL PROCEDURE

COOK also urges, for the first time, that plaintiffs did not sufficiently specify the basis for summary judgment in their Motion for Summary Judgment.

Rule 56, Utah Rules of Civil Procedure, provides in pertinent part:

(a) Claimant. A party seeking to recover upon a claim, counter-claim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for summary judgment in his favor upon all or any part thereof.

THORNOCK's Motion clearly complies with the requirements of Rule 56, Utah Rules of Civil Procedure, in that it asserts by implication that there exists no question of fact and that plaintiffs are entitled to judgment as a matter of law.

Rule 56 contains no requirements that each of the various grounds for the grant of summary judgment which might exist in a given case be enumerated with specificity. If this Court were to accept COOK's contention that such an enumeration is essential to the grant of summary judgment, motions for summary judgment would, of necessity, become lengthy documents containing denials of every possible defense which might be asserted by the opposing party either at hearing or subsequently on appeal.

COOK has emphasized in her recent brief, that she did not raise the issue of adverse possession until after the filing of THORNOCK's Motion for Summary Judgment. In view of this factor, COOK should not be heard to protest the inclusion of a response to this argument in THORNOCK's Memorandum in Support of Motion for Summary Judgment (R.55), rather than in the motion itself. At any rate, there is no question that the issues of adverse possession and severance were raised and addressed before the court below.

COOK's suggestion that a Motion for Summary Judgment must delineate each and every basis upon which summary judgment might be granted simply does not comport with the Utah Rules of Civil Procedure or with the law of the State of Utah. For that reason, THORNOCK's Motion for Summary Judgment was properly before the court below.

C.

COOK DID NOT OBTAIN TITLE TO THE
MINERAL RIGHTS OF 353 ACRES BY
ADVERSE POSSESSION

COOK asserts, for the first time, in her Petition for Rehearing, that the mineral and surface estates were not effectively severed.

Simply stated, three separate conveyances serve to sever the mineral from the surface estate; they are, the reservation of mineral rights in the THORNOCK-Johnson and Johnson-COOK deeds and the conveyance of mineral rights in the COOK-THORNOCK Quit Claim Deed. (R. 219,220 and 224, respectively).

COOK now argues, for the first time, before this Court, that the reservation of mineral rights found in the THORNOCK-Johnson and Johnson-COOK Warranty Deeds is insufficient to reserve those mineral rights to the grantor. The court below found that the language of reservation contained in those documents was the result

of a scrivener error and held, as a matter of law, that the reservation clauses serve to reserve the mineral rights to the grantor. As COOK did not object to this finding on appeal, she is precluded from objecting to it at this point.

COOK further asserts that the reservation is ineffective to create a severance of the surface and mineral estates for the reason that there exists a defect in her chain of title.

COOK's rationale is that because her predecessors in interest allegedly lacked title to the 353 acres in question, she obtained title by adverse possession. This theory is somewhat interesting, however, for purposes of argument, should the court apply it to the case at hand it is similarly applicable to Lawrence Johnson and his predecessors in interest.

The chain of title to the disputed 353 acres may be traced to a Warranty Deed, dated April 1, 1941, whereby Joseph and Katherine Hatch conveyed the entire 1,946 acres to their four daughters (R. 245). As THORNOCK and Johnson, as well as their heirs, may similarly assert title to the entire property by virtue of adverse possession, the reservation clause contained in the Johnson-COOK Warranty Deed effectively severed the mineral and surface estates as to the entire parcel conveyed, including the disputed 353 acres.

This Court in Michael v. Salt Lake Inc., 9 Utah 2d 370, 345 P.2d 200 (1959), impliedly recognized that in the context of adverse possession under a written instrument, periods of possession by the claimant's predecessors-in-interest may be included in establishing adverse possession.

Through application of the theory of adverse possession as it is advanced by COOK, it is clear that her predecessor-in-interest, Lawrence B. Johnson, had obtained title to the 353 acres in dispute through adverse possession. The periods of possession of his predecessors in interest may be "tacked" to his own. In short, title to the disputed 353 acres was vested in Lawrence B. Johnson at the time of his conveyance of the entire 1,946 acres to LOIS S. COOK and Howland J. Cook, appellant's deceased husband.

As Johnson held title by adverse possession to the 353 acres at the time of his conveyance of the same to COOK, the reservation clause contained in the Johnson-COOK deed (R. 220) was effective to reserve to the grantor all mineral rights, thereby severing the surface estate from the mineral estate. This severance is, of course, sufficient to preclude COOK's claim by adverse possession to the mineral rights.

In addition, the COOK-THORNOCK Quit Claim Deed serves to sever the surface and mineral estates. The

validity of that deed is discussed above and will not be addressed here. However, in addition to urging that the deed is invalid, COOK argues that no interest in the 353 acres was conveyed by virtue of that deed because she did not have title to that portion of the land in question. Assuming for the sake of argument that the nature of COOK's possession of the minerals in question subsequent to the Johnson-COOK deed is sufficient to establish adverse possession, COOK had acquired title at the time of execution of the COOK-THORNOCK Quit Claim Deed. This is because the period of possession of her predecessor-in-interest, Lawrence Johnson, may be "tacked" to her period of possession.

There is no question that COOK entered into possession of the subject land under claim of title based upon a written instrument. In this context, periods of occupancy by the claimant's predecessor-in-interest are included in calculations of the period of adverse possession. As noted above, the period of adverse possession of the 353 disputed acres began on April 1, 1941, with the conveyance by Joseph and Katherine Hatch to their four daughters (R.245). Therefore, COOK had title, by adverse possession, to the 353 acres at the time of the COOK-THORNOCK Quit Claim Deed. For this reason, the Quit-Claim Deed also serves

to sever mineral and surface estates, thereby precluding COOK's subsequent claim by adverse possession.

On the record before this Court, there is no question that the mineral and surface estates have been severed, therefore COOK's purported adverse possession of the surface does not extend to minerals.

D.

COOK IS PRECLUDED FROM SIMULTANEOUSLY
ASSERTING A DEFECT IN HER CHAIN
OF TITLE AND TITLE BY
ADVERSE POSSESSION AGAINST THE
RECORD TITLE HOLDER

Apparently in response to this Court's holding that COOK's allegation that her chain of title is defective serves to defeat her standing to challenge THORNOCK's title, COOK again argues that she may simultaneously assert and deny her claim of title. As noted at 55 Am.Jur. 2d QUIETING TITLE §45:

One cannot defeat a quiet title bill by showing that the complainants claim or interest . . . is subject to superior rights in third persons who are not parties to the suit; it is sufficient that the interest asserted by complainant in possession be superior to that of those who are parties defendant. In this regard, it has been said that the court determines the rights of the parties under the pleadings and evidence, grants proper relief, and determines the better title as between the parties to the proceeding, though a title superior to the rights of either party may be held by a stranger to the suit.

Without question, COOK entered into possession of the property in question under a claim founded upon a written instrument. By denying the validity of her chain of title, she simultaneously denies the validity of her claim of title, thereby precluding her assertion of title by adverse possession.

E.

IN THE PRESENT CASE, SEVERANCE
OF THE MINERAL AND SURFACE ESTATES
IS NOT A QUESTION OF FACT

COOK argues that the severance of mineral and surface estates is, by its very nature, an issue of fact. In sole support of this proposition she cites Toth v. Bigelow, 1 N.J. 399, 64 A.2d 62 (1949).

In Toth, the plaintiff brought an action to quiet title. Defendant answered, denying certain allegations of the plaintiff's Complaint, thereby placing the jurisdiction of the New Jersey Court of Chancery in issue. The matter then came on for preliminary hearing as to the jurisdictional issue and defendant's request for dismissal was denied. It is important to note, that at this juncture, only pleadings containing allegations had been exchanged. From this denial, defendant appealed.

On appeal, the sole issue before the court was the existence of jurisdiction in the Court of Chancery.

That jurisdiction was challenged upon two grounds. As the court stated, " . . . [t]he first of these is the allegation that the respondent is not in possession of the land in question within the meaning of the statute" (64 A.2d at 63) (emphasis added).

In their pleadings, both parties claimed title to the mineral estate through different chains of title, both of which involved a severance of the surface and mineral estates. In order to maintain a Bill in Chancery, plaintiff would had to have proved possession of the mineral estate under color of title. Of course, this possession was challenged by the allegation of severance.

In addressing this issue, the court in Toth, supra, noted that it was " . . . 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 and their respective chains of title" (64 A.2d at 64). The court appraised the issue confronting it as follows:

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
(64 A.2d at 64) (emphasis added)

Confronted only with the allegations contained in pleadings, the court held that a mere allegation of severance was not sufficient to deprive the Court of Chancery of jurisdiction. That court then noted that the appellant would be afforded an opportunity to prove the severance as the action followed its normal course. (64 A.2d at 64).

In essence, the court, in Toth, merely held that an allegation of severance of mineral and surface estates was not sufficient to deprive the Court of Chancery of jurisdiction. In the posture of that case, as it was presented upon appeal, the court was unable to render a decision upon the validity of the severance and it so stated.

The statement as contained in COOK's Brief in Support of Rehearing, at page 25, to the effect that "[t]he New Jersey Supreme Court held that the issue of interpretation of the deeds and of severance pertained to the merits of the case and should be resolved at trial . . ." is correct. However, COOK fails to note that, in Toth, the issue before the New Jersey court was not the validity of the severance, rather it was the existence of jurisdiction, and, most importantly, the record before that court consisted only of the allegations contained in pleadings. For that reason,

that court could not have ruled on the validity of the severance.

The court's decision in Toth is distinguishable from the present case on procedural, factual, and legal bases. Toth is simply inapposite! A careful reading of Toth reveals that it does not stand for the proposition that severance is, by its nature, an issue of fact.

F.

COOK HAS NOT ADVERSELY POSSESSED
THE MINERAL ESTATE IN QUESTION

Assuming, for purposes of argument, that COOK entered into adverse possession of the mineral estate of the 353 acres in question, she did so under a claim of title founded upon a written instrument, that is, the Johnson-COOK Warranty Deed. Therefore, the provisions of Sections 78-12-7 and -9, Utah Code Ann. (Repl. Vol. 9A 1977) are applicable.

Pursuant to those provisions, the adverse claimant must have exclusive and hostile adverse possession for a period of seven years before the claim by adverse possession ripens.

The undisputed facts on the record before this Court are that COOK entered into possession of the real property in question by Warranty Deed dated December 1,

1952 (R. 220). On July 19, 1958, THORNOCK's predecessor in interest, Aden W. Thornock and Lucille Thornock, his wife, executed an Oil & Gas Lease whereby one J. R. Williams obtained mineral lease rights to a substantial portion of the real property to which COOK claims title by adverse possession. (R. 91,93). This lease was recorded in the office of the Rich County Recorder on November 2, 1958.

Both the execution of this lease and its recordation were within seven years of the date COOK entered into possession of the real property in question.

By virtue of the execution and recordation of this Oil & Gas Lease, COOK's possession was neither exclusive nor hostile. Indeed, as the recording of a conveyance of an interest in real property is deemed, under the law, to provide notice to the world, COOK's failure to object or protest this conveyance constitutes acquiescence in the use of the mineral estate, and assertion of ownership by THORNOCK.

Because COOK's possession was neither exclusive nor hostile, she did not adversely possess the mineral estate in question for a period of seven years, as required by 78-12-7, Utah Code Ann. (Repl. Vol. 9A 1977), therefore as a matter of law her claim by adverse possession must fail.

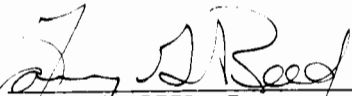
CONCLUSION

For the reasons set forth above, Appellants
Petition for Rehearing should be denied.

Respectfully submitted this
6th day of February, 1980



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CERTIFICATE OF HAND DELIVERY

I hereby certify that a true and correct copy
of the foregoing Brief of Respondents in Opposition to
Appellant's Petition for Rehearing was hand delivered
this 6th day of February, 1980, to:

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