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Charles H. Orison v. Herman Herbrig et al : Brief of Respondents

Utah Supreme Court

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7961

In the Supreme Court of the State of Utah

CHARLES H. ORISON, sometimes known as CHAS. H. ORISON,
Plaintiff and Respondent
vs.
HERMAN HERBRIG, a single man; WILLIAM CHARLES HERBRIG and wife, MARY R. HERBRIG: ILA R. WICHSTROM: FREDERICK HERBRIG, a single man: and LEOLA FORSBERG, heirs-at-law of Millie M. Herbrig, deceased; and all other persons unknown claiming any right, title or interest in or lien upon the real property described in the pleadings adverse to the complainant's ownership or clouding his title thereto,
Defendants and Appellants

Case No. ~~7329~~

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Utah, in and for the County of Cache

Honorable Lewis Jones, District Judge

NEWEL G. DAINES
Attorney for Plaintiff and Respondent.

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AUTHORITIES CITED

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STATEMENT OF FACTS

This case was decided by the trial court on conflict in the evidence.

As the Appellant set forth only those facts favoring his position we, of necessity, must set forth the facts upon which the trial court ruled in favor of Respondent.

Millie M. Herbrig, the wife and mother of the Appellants, purchased the property in question June 9, 1917, (Ex. "A," sheets 13-14) and owned it until May 1, 1937, when title passed to Cache County because of unpaid taxes (Exhibit "A" Sheet 18). On May 26, 1937, Cache County conveyed the property to the Respondent (Exhibit "A," sheet 19). On February 28 ,1951, Respondents filed this notice to quiet title, (R-2) thirteen years and nine months after he acquired ownership.

Millie M. Herbrig and Herman Herbrig, her husband and family lived in Logan until 1922 when they moved to California where she died March 9, 1935. (R. 74-75). Her mother, Annie E. Orison for several years lived with Mrs. Herbrig and family until her death June 16, 1936. (R. 45). The Respondent attended his mother's funeral in California. (R. 46).

The Respondent, between 1910 and 1946 lived at Arbon, Idaho, when he moved to Logan. However, beginning with the fall of 1936, during the winter months he resided at Logan, Utah (R. 44, 103). Arbon, Idaho, is 100 miles from Logan Utah (R. 102). At the time of his mother's death and when he purchased the property he was residing in Idaho (R. 48, 102). Millie M. Herbrig on her death was survived by her husband Herman Herbrig and the following children: Ila Wichstrom, Leola Forsberg, Fred O. Herbrig (R. 73). All of them, on May 26, 1937, the date Respondent purchased the property, were residents of the State of California.

In 1942, the defendant Leola Forsberg moved to Logan at which time she was told by Respondent that he

owned the property in question having purchased it because of delinquent taxes. (R. 42, 53, 54, 55, 92, 99).

Herman Herbrig testified that the Respondent while attending his mother's funeral in California agreed with him to look after the property, collect the rents, pay the taxes and pay the mortgage indebtedness thereon which was $150.00 plus some interest and maintain the property for him and all of the children except the daughter Leola Forsberg. That respondent was to keep the balance of the rents for his trouble (Ex. 4, pages 4, 5, 6). *This conversation the Respondent denied* (R. 48, 49, 50).

From 1927 to 1946 the property was occupied by only one tenant, Frederick Jufer and family (R. 63, 111, 112). Appellants, Herbrig and Ila Wichstrom, testified they received no rents after the death of Mrs. Orison in June, 1936. That Respondent collected rents from that date on. (R. 84, Ex. 4, p. 8). This the respondent denied asserting that he did not collect the rents until after he purchased it on May 26, 1937. (R. 50, 51). The tenants, Jufers, testified that after the death of Millie M. Herbrig they forwarded the rents to Appellant Herman Herbrig in California, until June or July, 1937, when they started paying the rent to Respondent (R. 63 64, 112, 113, 125, 127).

The Appellants received no tax notices after the sale of the property to Respondents. Soon after the Respondent purchased the property in June or July, 1937, he called on the Jufers who occupied the property as tenants, exhibited to them the deed he received from the County conveying the property to him, advising Jufers he had

purchased it because of unpaid taxes and directed them thereafter to pay the rents to him. (R. 50, 51, 64, 113) Mr. Jufer wrote to Mr. Herbrig in California telling him the Respondents claimed the property and that he had been directed to pay him the rent. Mr. Herbrig replied requesting more information. To this letter Mr. Jufer then replied advising Herbrig that the Respondent said he had purchased the property because of delinquent taxes. No reply was had to this letter. (R. 64, 115, 116, 126, 127).

None of the Appellants except as above mentioned ever communicated with the tenants regarding the property nor did they at any time communicate with Respondent regarding it, demand an accounting for the rents, demand the rents nor did they claim any right, title or ownership in the property until thirteen years and nine months had passed after its purchase by the Respondents, when this action was commenced. (R. 65, 85, 86, 87, 89).

The property was subject to a mortgage in the sum of $150.00 and interest which Respondent satisfied after he purchased the property. He first learned of the mortagage after its conveyance to him. (R. 39, 51, 52).

ARGUMENT

In view of the evidence the trial court could not have reasonably reached any other conclusion than that which it did, namely, that there was never any agreement wherein the Respondent agreed to act as the Appellant's agent, collecting the rents, paying the taxes and satisfying the mortgage. All of their acts were inconsistent with such an understanding and the trial court very aptly stated it when it said:

"In the case of Orison vs. Herbrig findings and decree may be prepared in favor of plaintiff and against the defendants the court finding that no agreement was ever entered into by the surviving husband and the plaintiff, the court being influenced by the conduct of the parties since the alleged date in that the defendants have not conducted themselves in a manner consistent with the claim of ownership." (R. 108).

The evidence is not contradicted that from the time Respondent purchased the property, May 26, 1937, to the date this action was filed no inquiry was made by any of the appellants regarding the property except by Mrs. Forsberg who, in 1942, was told by Respondent, her uncle, that he purchased the property, and the inquiry by Herman Herbrig in 1937 when he worte to Mr. Jufer, the tenant, requesting additional information regarding Respondent's claim of ownership. Appellants never claimed they owned the property, did not visit it, make any demands on the tenants for the payment of the rent or communicate with Respondent in any manner. Had there been such an arrangement or had appellants claimed to have owned the property during this period of thirteen years and nine months some inquiries and investigations would have been made regarding the property. In other words, from 1937 until this action to quiet title was commenced the Appellants took no interest, except as above mentioned, in the property which now has a value of approximately $2,000.00.

The evidence established further that the Appellants knew that the Respondent claimed the ownership of the property because in 1942 he told the Defendant Leola Forsberg that he had purchased it and in 1937 Mr. Jufer,

the tenant, wrote to Mr. Herbrig that the Respondent had visited them, told them, he had purchased the property, exhibited to them a deed to it and demanded that they thereafter pay the rents to him which they did.

To support their contention of such an agreement it was necessary for them to assert that immediately upon the death of Mrs. Orison on June 16, 1936 the date of the so-called agency agreement that the Respondent began to look after the property and collect the rents. That after her death they received no rent on the property. This position is not in keeping with the truth. The Respondent testified that he did not collect any rents until he purchased it in May, 1937, as did the tenants, Jufers. Mr. Jufer and his daughter, Mrs. Marie Zimmerman, testified that they forwarded the rents to California to appellants until June or July, 1937, when Respondent called on them, exhibited his deed and requested payments thereafter be made to him.

The Appellants make a great deal of the fact over the years Mrs. Orison lived with them, and that they cared for her, paid her funeral and burial expenses. It is not clear from the record just what the arrangement was between Mrs. Orison and the Appellants except we do know that she lived with them from at least 1922 on. Apparently there was more than a moral obligation in taking care of her otherwise there would have been some demands made upon Respondent and his sister, Leatha McNeal, to assist in carrying the financial responsibilities for her support. (Leatha McNeal after her sister's death did go to California and assist in the care of her mother.) If Respond-

ent was delinquent in the support of his mother as they contend it is highly questionable that they would have reposed in him the responsibility of the care of the property in Utah when all that was involved was the collection of rents and the payment of taxes which they could do by mail nor would they have remained silent regarding the property for approximately fourteen years after they had notice that it had been purchased by Respondent, and that he claimed the ownership. Certainly, some investigation would have been made by them. The care of the grandmother, Mrs. Orison apparently was an obligation of the Appellants, and one not expected of the Respondent otherwise they would have made some demand on the Respondent to not only assist in her financial support but in taking care of her funeral and burial expenses.

IF A TRUST EXISTED IT WAS REPUDIATED BY THE RESPONDENT MORE THAN SEVEN YEARS PRIOR TO THE COMMENCEMENT OF THIS ACTION.

The evidence is undisputed that in 1942, Leola Forsberg, one of the defendants, an heir of Millie M. Herbrig, were told by the Respondent that he owned the property having purchased it because of unpaid taxes. Mr. Jufer, the tenant, and his daughter, Marie Zimmerman testified that in 1937, Mr. Jufer wrote to Mr. Herbrig, the Appellant who claimed to have represented all of the appellants, advising him that Respondent claimed that he owned the property having purchased it because of delinquent taxes and that he had shown them a deed.

As to the question of notice the Court in the case of Salt Lake City vs. Salt Lake Investment Co., 134 P. 603, 43 Utah 181, said:

> In Shain vs. Sresovich, 104 Cal. at page 405, 38 Pac. at page 52, the Supreme Court of California, in passing upon the effect of a statute of which the portion we have quoted above is an exact transcript, says:
>
> "The rule is well established that the means of knowledge is equivalent to knowledge and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine and inactive, and afterwards allege a want of knowledge that arose by reason of his laches or negligence."

As to the question of notice, also see the Utah case of Gibson vs. Jensen, 158 P. 426, 48 Utah 244; Smith vs. Edwards, 17 P. 2nd 264, 81 Utah 244.

And as to when the Statute of Limitations begins to run in such an action, the Supreme Court of Arizona, in the case of Jack Waite Mining C., vs. West, 101 P. 2nd 202, said:

> (1-3) We consider this last contention of defendant first, for if it be correct and applicable to the facts, there is no need for us to go further. We think it is the law that where the trustee of an express trust, to the knowledge of his cestui que trust, repudiates the trust and converts the property, the statute then begins to run. Nor do we understand that plaintiff questions this. We also think the better reasoning is that even though plaintiff may not have notice of the specific repudiation of the trust, yet if he knows facts

from which a reasonable man would be put on notice that the trust has been, or is about to be, repudiated, this is equivalent to actual notice of the repudiation. A cestui que trust should not be permitted to shut his eyes and refuse to recognize a plain warning of danger and then claim that he had no knowledge of the catastrophe when it comes. Weniger vs. Success Mining Co., 8 cir. 22*7 F. 548.

And to the same effect is the Supreme Court of Montana in the case of State ex rel. Central Auxiliary Corporation vs. Rorabeck, County Treasurer, of Golden Valley County, et al. (Phillips Inv. Co. et al., Interveners), 108 P 2nd 601.

The court said:

(5, 6) It is generally held that as between the trustee and the beneficiary of a trust, the status of limitations does not run until the trust has been repudiated and notice of repudiation received by the beneficiary. Blackford vs. City of Libby, supra; City 44 L. Ed 96. The rule is succintly stated in 4 Bogert of New Orleans vs. Warner, 175 U. S. 120, 30 S. Ct. on Trusts and Trustees, page 951, as follows:

"The true rule with respect to the statute of limitations and express trusts is more clearly stated as follows: During performance of the express trust there is no cause of action for breach and so the statue of limitations has no bearing on the rights of the cestui; but, if the trustee violates the trust and the cestui knows of such conduct, or could have learned of it by the use of reasonable diligence, the court will apply the statute of limitations which governs equitable causes of action or an analagous statute concerning legal causes of action. To cause the statute to begin running during the life of the trust there

must be some act of repudiation of the trust by the trustee, as where he declines to account to the cestui, takes trust income for his own purpose, or sets himself up as the owner of the trust capital.

Also see Mayse vs. Mineola Co-op Exchange, 30 P. 2nd. 120.

In this case Appellants had actual notice that Respondent owned the property and if a trust ever existed it was repudiated by Respondent more than seven years before commencement of this action to quiet title.

CONCLUSION

In conclusion we merely desire to say that the judgment of the trial court was in keeping with law and equity and made upon a preponderance of the evidence and it should be affirmed.

Respectfully submitted

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Attorney for Plaintiff and Respondent.