

1953

Thomas Clothworthy et al v. Don Clyde et al : Brief of Appellants

Utah Supreme Court

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Stanley & Lewis; Attorneys for Plaintiffs and Appellants;

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

APR 23 1953

LEGAL SUCCESSORS IN INTEREST TO
ESTATES OF THOMAS CLOTWORTHY,
and SARAH M. CLOTWORTHY, both De-
ceased:

SARAH J. WITT;
JANET HATCH;
VIOLA VAN WAGONER;
GRACE LINDSAY;
SARAH BOOKER;
VIOLA CLOTWORTHY BUMGARD-
NER;
JOHN MARVIS CLOTWORTHY;
ALPHONZO B. MURDOCK, Jr.;
WILLIAM COLE;

Plaintiffs and Appellants,

vs.

DON CLYDE and KATHRYN CLYDE, his
wife; VIRGIL P. JACOBSON and EVA
JACOBSON, his wife;

Defendants and Respondents.

Clerk, Supreme Court, Utah

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Case No. U. of U.
7962

APPELLANTS' BRIEF

STANLEY & LEWIS,

Attorneys for Plaintiffs
and Appellants.

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Case No.
7962

APPELLANTS' BRIEF

STATEMENT OF FACTS

This is an appeal by the appellants, plaintiffs in the court below, from a decree of the district court given and entered in favor of the respondents, defendants below. In this brief, the appellants will be called plaintiffs, and the respondents will be called defendants.

In the original complaint (Rec. 87-88 and 106), the plaintiffs sought to have partitioned their undivided one-fourth interest in all of Sections 14, 15, 22, and 23, in Township 4 South of Range 6 East of the Salt Lake Meridian, claiming to be the owners of an undivided one-fourth interest in said lands.

The defendants answered (Rec. 90-95) and denied the claim of ownership of the plaintiffs, claiming to be the sole owners in fee of said lands and all of the same. They also claimed that they and their predecessors in title have been such owners for forty years or more and that they have been in adverse possession of the property for that time. They then set up that prior to patent, a purchase of the lands was made by James W. Clyde, the predecessor in interest of the defendants, wherein the said James W. Clyde purchased from Sarah M. Clotworthy, the undivided one-fourth interest in dispute in this action. They further allege that Patent was issued "possibly by error or mistake" to the Legal Successors in interest of the Estate of Thomas Clotworthy to an undivided one-fourth interest in and to said lands and that by reason of said purchase and error or mistake, the patentees received nothing under said patent, and the equitable title rested in James W. Clyde. They further allege that they have been in adverse possession of the property for more than forty years, and set forth certain other facts to establish said adverse possession. However, they do not allege that the plaintiffs claim any ad-

verse interests in the land nor do they allege that the adverse interest so claimed by the plaintiffs is without right.

In said answer they also insert "for a second alternative defense an affirmative cause of action", that the grantor and predecessor in interest of the defendants, James W. Clyde, purchased all right, title and interest of the heirs and successors in interest of Thomas Clotworthy in the certificate of sale No. 3020 (Defendants' Exhibit1) issued by the State of Utah, to the lands in dispute herein, and that for forty years they have been in the adverse possession of the property under the purchase from said Clotworthy heirs. Defendants do not affirmatively allege in said second defense that the interest claimed by the plaintiffs is adverse to the rights of the defendants nor do they allege that any interest so claimed is without right.

In their reply to the answer of defendants, the plaintiffs set forth a denial that the defendants are the sole owners in fee of the property and deny possession of the property by the grantors and their predecessors in interest for more than forty years last past. (Red. 101, 102, 104, 105). The plaintiffs also deny that the property or any part thereof was sold to the said James W. Clyde on the 21st day of September, 1908, or any other time. By an amended reply to the answer (Rec. 103, 105), the plaintiffs set forth that the matters asserted by the defendants of either errors, mistake or fraud are barred by the provisions

of Section 104-12-26 paragraph 3, of the Judicial Code, Laws of Utah, 1951, from asserting the matters of error or mistake. The plaintiffs further set forth in said amended reply that all taxes which have been assessed against the property since 1911, have been assessed to the legal successors in interest in the Estate of Thomas Clotworthy and to James W. Clyde, and his successors in title, that such matters are a matter of public record and that defendants are barred by laches from asserting the defenses set forth in the answer. The reply further states that the taxes on said land herein were assessed to the defendants and their predecessors in title and to the Estate of Thomas Clotworthy, deceased, and all payments of taxes since 1911 have been made for the benefit of the plaintiffs and their predecessors in title, as co-tenants with the said defendants and their predecessors in title.

The history of the title as shown by the Abstract of Title (Plaintiffs' Exhibit A), shows the steps in the chain of title as far as they are pertinent as the same are recorded in the office of the County Recorder of Wasatch County, Utah, to be as follows:

1. Transcript of selection by the State of Utah of the lands from the United States under the grand for permanent reservoirs as set forth at pages 3 and 4 of said Exhibit A.
2. A contract for the sale of Section 14, in Township 4 South of Range 6 East of the Salt Lake Meridian, made

by A. B. Murdock, also named as Alphonzo B. Murdock, in favor of Thomas Clotworthy, wherein the signer agreed as follows: "And I hereby agree to transfer to the said Thomas Clotworthy as soon as I obtain title thereto, from the State of Utah, the said Section 14, provided the said Thomas Clotworthy shall pay or cause to be paid the payments as they become due to the said State of Utah and all payments, of costs or interest incident thereto," as shown at pages 5 and 6 of said Exhibit A. Said agreement is dated October 4, 1901. Said contract of sale refers to Certificate of Sale No. 3020 but does not assign any interest in said certificate.

3. Decree partitioning property of estate amongst the several heirs in the matter of the Estate of Thomas Clotworthy, deceased, entered on May 6, 1907, wherein, as item 7 on page 9 of Exhibit A, the following appears: "7. A contract of purchase from Alphonzo B. Murdock to all of Section 14, in Township 4 South of Range 6 East, Salt Lake Meridian, containing 640 acres." This decree in partition is shown at pages 7 to 11 inclusive of said Exhibit A. Certificate of Sale No. 3020 from the State of Utah is not mentioned in this Decree.

4. Patent from the State of Utah, to the legal successors in interest of the Estate of Thomas Clotworthy, deceased, shown at page 12 of Exhibit A, granting an undivided one-fourth interest in and to all of Sections 14, 15, 22 and 23, in Township 4 South of Range 6 East of the Salt Lake

Meridian, containing 2560 acres. This patent is dated January 5, 1911 and recorded September 11th, 1924, in Book "5" of Patents, page 128, as Entry No. 40631 of the records of Wasatch County, Utah.

5. Patent from the State of Utah to James W. Clyde, granting an undivided three-fourths interest in and to all of Sections 14, 15, 22, and 23, in Township 4 South of Range 6 East, of the Salt Lake Meridian, containing 2560 acres, shown at page 13, of Exhibit A, and being dated January 5th, 1911, recorded September 11th, 1924, in Book "5" of Patents, page 129, as Entry No. 40632 of the records of Wasatch County, Utah.

6. A Warranty Deed was made by James W. Clyde and wife to Heber G. Crook and J. W. Giles, on May 20, 1915, recorded October 12, 1915, in Book "10" of Deeds, page 392, as Entry No. 31227 of the records of Wasatch County, Utah, conveying all that part of Section 14, in Township 4 South of Range 6 East of the Salt Lake Meridian, lying East and North of Lake Creek, the East bank of said Lake Creek as it now exists, being the Western boundary line of said land so conveyed and containing 320 acres more or less. Said deed is shown at page 14, of Exhibit A.

7. A Warranty Deed was executed by John W. Giles and wife and made to Heber G. Crook, under date of April 20, 1925, recorded April 21st, 1925, in Book "16" of Deeds, page 507, as Entry No. 41300 of the records of Wasatch

County, Utah, conveying an undivided one-half interest in and to the lands described in item 6 above, which deed is shown at page 16 of Exhibit A.

8. A Warranty Deed was made by Heber G. Crook and wife, to the defendant, Virgil P. Jacobson on October 11, 1929, recorded October 14th, 1929, in Book "17" of Deeds, page 537, as Entry No. 46251 of the records of Wasatch County, Utah, conveying the tract set forth in item 6 above, as shown at page 21 of Exhibit A.

9. A Warranty Deed was executed by James W. Clyde and wife to the defendant Don Clyde, on February 6, 1935, recorded February 6th, 1935, in Book "18" of Deeds, page 516, as Entry No. 52012 of the records of Wasatch County, Utah, conveying all of Sections 22 and 23 in Township 4 South of Range 6 East of the Salt Lake Meridian, containing 1280 acres, as shown at page 25 of Exhibit A.

10. Decree of Distribution to surviving widow in the matter of the Estate of James W. Clyde, deceased, distributing to Mary A. Clyde, an undivided one-fourth interest in and to all that portion of Section 14, Township 4 South of Range 6 East, Salt Lake Meridian, lying South and West of Lake Creek, area 320 acres, and all of Section 15, Township 4 South of Range 6 East, Salt Lake Meridian, area 640 acres, which decree of distribution was entered June 9, 1941, and recorded September 23rd, 1941, in Book 21 of Deeds, pages 378 to 381, as Entry No. 59684 of the records of Wasatch

County, Utah, as shown at pages 26-29 inclusive of Exhibit A.

11. Quit Claim Deed from Mary A. Clyde to defendant Don Clyde, dated June 28, 1941, recorded September 23rd, 1941, in Book "21" of Deeds, pages 381-383, as Entry No. 59685 of the records of Wasatch County, Utah, conveying all of her right, title and interest in and to the lands set forth in item 10 above, as shown at pages 30-32 inclusive in said Exhibit A.

12. Quit Claim Deed from Nellie C. De Graff, Nora C. Miller, Hazel C. Watkins and Jack P. Newton and Mary A. Newton, his wife, grantors to Don Clyde, grantee, dated January 10, 1946, recorded April 15th, 1946, in Book "22" of Deeds, pages 349-351, as Entry No. 64236 of the records of Wasatch County, Utah, conveying all of their right, title and interest of, in and to the lands set forth in item 10 above. Said deed recites that it is intended to convey all the right, title and interest of the grantors, who are heirs at law of James W. Clyde, deceased, in all the grazing lands, now remaining in the estate of James W. Clyde, deceased. Said quit claim deed is shown at pages 33-35 inclusive in the Abstract of Title, the plaintiffs' Exhibit A.

13. Plaintiffs' Exhibit A, also shows at pages 36 and 37, a Power of Attorney from Sarah M. Clotworthy, to Chase Hatch of Heber City, County Wasatch, State of Utah,

which power of attorney is dated March, 1908, and acknowledged March 23, 1908, and recorded March 31st, 1908, in Book "2" of Miscellaneous, pages 240-241, as Entry No. 17648 of the records of Wasatch County, Utah. Said Power of Attorney was executed at Redondo Beach in Los Angeles County, California.

The above constitutes all of the matters of record in the County Recorder's office of Wasatch County, State of Utah, which pertain to the chain of title to the lands in dispute herein.

The plaintiffs also introduced their Exhibit B, which is the Decree of Settlement of Accounts and final distribution in the matter of the Estate of Thomas Clotworthy, deceased, wherein as item 8, there was distributed to all of the heirs of the said estate, the contract from Alphonzo B. Murdock for the purchase of said Section 14, as set forth in item 2 above. No mention is made in the said Decree of the Certificate of Sale No. 3020 from the State of Utah.

The defendants introduced their Exhibit 1, which is a certified copy of the certificate of sale No. 3020 issued by the State of Utah, by its State Board of Land Commissioners under date of August 1, 1900, wherein the State of Utah sold to Alphonzo B. Murdock, all of Sections 14, 15, 22, and 23, in Township 4 South of Range 6 East of the Salt Lake Meridian, containing 2560 acres, under the terms and condi-

tions therein set forth. Appended to said contract of sale is an assignment dated March 25, 1905, wherein Alphonzo B. Murdock sold to A. M. Murdock, all of the within certificate No. 3020 and all the land described therein, which was duly acknowledged on January 25, 1905, as required by law. There is a further assignment from A. M. Murdock to Thomas Clotworthy, of an undivided one-fourth interest of all of his right, title and interest in the said certificate No. 3020, and all the land described therein, which assignment is dated January 25, 1905, and is duly acknowledged as required by law. There is also affixed to said certificate, a certified copy of the naturalization certificate of the said Thomas Clotworthy.

There is also filed with said certificate No. 3020, a certified copy of the Decree partitioning property of Estate amongst the several heirs in the matter of the Estate of Thomas Clotworthy, deceased, as hereinbefore set forth. Also attached to the said certificate is an assignment without date made purportedly by Sarah M. Clotworthy, by Chase Hatch, Atty-in-fact, assigning to James W. Clyde "All my right, title, and interest in and to the within certificate of sale and the land which it covers, which interest represents one-fourth thereof, said one-fourth conveying by mutual agreement of the holder of the other three-fourths interest therein, all of Section 14, Township 4 South, of Range 6 East, of the Salt Lake Meridian, the holder of said other three-fourths taking Sections 15, 22, and 23 in

said Township and Range.” Said assignment is witnessed by J. C. Jensen. There is an acknowledgment attached to said assignment which reads as follows:

“State of Utah :
County of Wasatch : s.s.

On this 21st day of September, A. D. 1908, personally appeared before me, Sarah M. Clotworthy, the signer of the foregoing instrument, who duly acknowledged to me that she executed the same.

My Commission expires Aug. 25, 1909.

J. C. Jensen
Notary Public.”

The acknowledgment is signed by the notary public but no seal is affixed thereto. The signature of “Sarah M. Clotworthy, by Chase Hatch, Atty-in-fact”, is made in a light lead pencil. The purported assignment gives the consideration for said assignment as \$3,000.00. It is this assignment under which the defendants claim title. The execution and delivery of this assignment is questioned by the plaintiffs.

Appended to said Exhibit 1 of defendants are two receipts signed by James W. Clyde, dated May 3rd, 1911, receipting for two patents hereinbefore set forth.

Finding 1 of the findings of fact (Rec. 107-108) finds that the plaintiffs as set forth in the amendment to include new parties at page 106 of the record, are all of the heirs of Thomas Clotworthy and Sarah M. Clotworthy, both deceased. This question is therefore not before the court on appeal. The plaintiffs rely upon the patent (Plaintiffs’ Ex-

hibit A, page 12) to establish their title to an undivided one-fourth interest in and to the lands in dispute in this action. They point out as a fact that the record title to this undivided one-fourth interest is still in the patentees thereof. Any title owned by the defendants or either or any of them, does not include any conveyances in the chain of title from the patentee of this undivided one-fourth interest. There are no instruments conveying the land to the County for taxes or for any other governmental purposes which would institute a new chain of title to this undivided one-fourth interest. Don Clyde has no record title of any kind for this undivided one-fourth interest in all of the part of Section 14 South and West of Lake Creek and all of Section 15, in Township 4 South of Range 6 East of the Salt Lake Meridian, as there is no conveyance of this interest to said defendant.

It is to be noted here that the contract between Alphonzo B. Murdock and Thomas Clotworthy, set forth at pages 5 and 6 of plaintiffs' Exhibit A, was partitioned to Sarah M. Clotworthy in the decree partitioning the property of the Estate of Thomas Clotworthy, deceased, as shown at pages 7-11 of plaintiffs' Exhibit A. There was no assignment of the certificate of sale No. 3020 as set forth in defendants' Exhibit 1, from the Estate of Thomas Clotworthy, Deceased, to Sarah M. Clotworthy or to any other person, even though the undivided one-fourth interest of this certificate was assigned to Thomas Clotworthy on January

25, 1905. Sarah M. Clotworthy was not acting as Administratrix of the Estate of Thomas Clotworthy, Deceased, which estate held the title to the certificate No. 3020, in the purported assignment of the one-fourth interest to James W. Clyde. A. M. Murdock, who made the agreement with Thomas Clotworthy, on October 4, 1901 (Plaintiffs' Exhibit A, pages 5-6), parted with all of his title in and to said certificate of sale, by his assignment dated March 25, 1905, but acknowledged January 25, 1907. The new assignment to Thomas Clotworthy from A. M. Murdock, on January 25, 1905, would supercede the old agreement between Alphonzo B. Murdock and Thomas Clotworthy shown at pages 5 and 6, of the plaintiffs' Exhibit A, the Abstract of Title. The Decree of Distribution in the Clotworthy Estate (Plaintiffs' Exhibit B), and the subsequent partition among the heirs (Plaintiffs' Exhibit A, pages 7-10) in no way affected certificate No. 3020, set forth in Defendants' Exhibit 1.

The letter of J. C. Jensen (Defendants' Exhibit 1) dated February 28, 1910, enclosing said certificate of sale No. 3020 for transfer, stated as follows:

"I understand that under your ruling, you do not recognize orders of Court distributing interests in contracted lands to heirs and suppose the patent will have to be issued to Clyde and the heirs of Thomas Clotworthy."

The writer of this letter was acting in behalf of James W. Clyde, who received patent for three-fourths undivided interest in the lands in question. The letter shows that the

State Land Board, to whom it was addressed, had already made a determination that they would not accept the purported assignment under the distribution of the agreement of A. B. Murdock. There is nothing in the evidence or the record to show that the issuance of the patent to the one-fourth interest to the legal successors in interest of the Estate of Thomas Clotworthy, deceased, was any surprise to James W. Clyde, and in fact, he received the patent for this land from the State of Utah (Defendants' Exhibit 1). There is no evidence in the record that any parties claiming under James W. Clyde, or James W. Clyde himself, did anything to obtain any title from the Clotworthy patentees for this undivided one-fourth interest.

The introduction of Defendants' Exhibit 1 into evidence was strenuously objected to by the plaintiffs for the reasons stated (Tr. 60).

After the parties had rested and started to argue the case, the defendants moved to re-open to offer proof of the execution of the purported "Assignment" from Sarah M. Clotworthy to James W. Clyde (Defendants' Exhibit 1.) Testimony was finally produced from one of plaintiffs' attorneys that the signature of J. C. Jensen, who witnessed the assignment, was his signature. However, no proof was even offered as to the signature of either Sarah M. Clotworthy or her attorney in fact, Chase Hatch. No proof was offered as to the payment of the \$3,000.00 consideration

stated in the assignment. No proof was offered that said assignment was ever delivered. It was stipulated that all of the parties to the assignment, including witness and notary public, were dead. (Rec. 85-86.)

As to the payment of taxes, Plaintiffs' Exhibit C was received in evidence (Tr. 70) showing that the taxes for the year 1952, as to Section 14, were assessed individually to Don Clyde and Virgil P. Jacobson, for their respective interests in this section. As to the other three sections, 15, 22 and 23, the taxes were assessed to Thomas Clotworthy estate, one fourth; and Don Clyde, three-fourths. It was stipulated (Tr. 71, 72, 73, 74) that the taxes were assessed to the owners and their predecessors in interest for the various interest as set forth in Exhibit C, back to 1915, but not including the year 1915; that from 1911 to 1915 inclusive the taxes were assessed on the whole of Section 14, to James W. Clyde, three-fourths, and to Thomas Clotworthy Estate, one-fourth, and the same applied to the other four sections during this same period. It was further stipulated (Tr. 72) that the taxes had been paid by James W. Clyde and his successors in title from 1911 to the present time.

The defendant, Virgil P. Jacobson, testified that he did not obtain an abstract of the title when he purchased his part of Section 14, neither did he examine the County records to determine whether or not there were any prior liens or outstanding interests in the property in any other

person or party (Tr. 42). He did not know that the plaintiffs claimed any interest in his property until he was served with summons in this action (Tr. 40). He did not testify as to any facts which would give him adverse possession of the property as alleged in his answer (Rec. 90-95). He offered no testimony as to the nature of the property, the use to which it was put, the times of the year used, or any attempts by others to use it. No fencing was done (Tr. 40) and no testimony as to improvements, planting seed, building of reservoirs or the grazing of livestock was given by this witness to support his complaint. (Rec. 90-95). He did not testify as to any notice given to the plaintiffs or to any one that he was claiming the property adversely to them. He did not testify as to any conduct which would be sufficient to give notice to the plaintiffs or either or any of them that he was claiming the property adversely to them.

The defendant, Don Clyde, testified that he did not at any time go to the Recorder's office to see where the title was, neither did he obtain an abstract of the title on this property, and that he didn't attempt to find out the nature of these titles he was purchasing from his father, his father's estate, his mother and his brothers and sisters (Tr. 59). He testified that Thomas Clotworthy used Section 14 "as grazing land" (Tr. 47-48). He did not testify as to the character or the use of the rest of the land. He did not testify that the land was put to any particular use. He did not offer any testimony as to improvements, planting seed,

building of reservoirs, or the grazing of livestock to support his complaint (Rec. 90-95) for adverse possession. He did not testify as to any notice given to the plaintiffs or any one of them, that he was claiming the property adversely to them. He did not testify as to any conduct which would be sufficient to give notice to the plaintiffs or either or any of them that he was claiming the property adversely to them.

There is no evidence that Heber G. Crook or J. W. Giles ever used the land which was conveyed to them by James W. Clyde and wife (Plaintiffs' Exhibit A, pages 14 and 16.)

There is no evidence as to the use made of the land by James W. Clyde even though the defendant, Don Clyde, testified that he "used" the land (Tr. 57).

There is no evidence that the land at any time was cultivated or improved.

There is no evidence that the land was protected by a substantial enclosure, in fact, there was no fencing around the property during the alleged period of adverse possession (Tr. 41, 52).

There is no evidence that any sum was expended upon dams, canals, embankments, aqueducts or otherwise for the

purpose of irrigating such lands amounting to any sum.

There is no evidence that any notice was given by any of the defendants or their predecessors in title to the plaintiffs or their predecessors in title, or to anyone else, that the land was being claimed adversely.

Defendants allege in Paragraph III of their answer (Rec. 92) that "for some reason unknown to these Defendants and possibly by error or mistake, patent was issued, on the 5th day of January, 1911, to the successors in interest of the estate of Thomas Clotworthy to an undivided one-fourth interest in and to said lands." There is no evidence in the record that anything was done to correct this "error or mistake" although James W. Clyde received the original patent to the Clotworthy people (Plaintiffs' Exhibit A, page 12) from the State of Utah on May 3rd, 1911 (Defendants' Exhibit 1).

All taxes on Sections 15, 22 and 23 were assessed to either James W. Clyde or Don Clyde for a three-fourths interest, and to Thomas Clotworthy Estate for a one-fourth interest from 1911 to 1952. Don Clyde knew that the taxes were so assessed when he paid such taxes during the period he paid taxes on his claimed portion of the lands (Tr. 55). This would also apply to James W. Clyde, his predecessor in title.

STATEMENT OF POINTS

I. THE LOWER COURT SHOULD HAVE TAKEN JUDICIAL NOTICE OF THE ACTS OF THE GOVERNOR AND SECRETARY OF STATE IN ISSUING THE PATENT TO THE LEGAL SUCCESSORS IN INTEREST TO THE ESTATE OF THOMAS CLOTWORTHY, DECEASED, AND REFUSED TO CONSIDER ANYTHING THAT TRANSPIRED PRIOR TO THAT TIME.

II. THE LOWER COURT ERRED IN ADMITTING DEFENDANTS' EXHIBITS 1 AND 2 INTO EVIDENCE.

III. THE DEFENDANTS ARE BARRED BY THE PROVISIONS OF SECTION 104-12-26 (3) OF THE JUDICIAL CODE, LAWS OF UTAH 1951, FROM MAKING ANY CLAIM THAT THE PATENT WAS ISSUED BY ERROR OR MISTAKE.

IV. THE DEFENDANTS ARE BARRED BY LACHES FROM ASSERTING THAT THE PURPORTED ASSIGNMENT FROM SARAH M. CLOTWORTHY TO JAMES W. CLYDE CONVEYED ANY INTEREST IN THE LANDS IN DISPUTE.

V. THE TWO PATENTS TO THE LANDS INVOLVED THIS ACTION CREATED A TENANCY IN COMMON BETWEEN AND AMONG THE PATENTEES WHICH CAN BE PARTITIONED IN THIS ACTION.

VI. THE ANSWER FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CLAIM UPON WHICH DEFENDANTS' TITLE CAN BE QUIETED.

VII. THE EVIDENCE DOES NOT SUPPORT CERTAIN FINDINGS OF THE LOWER COURT, NAMELY PART OF FINDING 3, PART OF FINDING 4, PART OF FINDING 6, PART OF FINDING 7, ALL OF FINDING 8, PART OF FINDING 9, AND ALL OF FINDING 10, AS SET FORTH SPECIFICALLY IN THE ARGUMENT HEREIN.

VIII. THE CONCLUSIONS OF LAW ARE NOT SUPPORTED BY THE FINDINGS OF FACT, AND ARE CONTRARY TO LAW.

IX THE FINDINGS AND CONCLUSIONS ARE INSUFFICIENT TO SUPPORT THE DECREE.

X. THE DEFENDANTS DID NOT ESTABLISH ADVERSE POSSESSION TO THE PROPERTY INVOLVED IN THIS ACTION.

ARGUMENT

POINT I.

THE LOWER COURT SHOULD HAVE TAKEN JUDICIAL NOTICE OF THE ACTS OF THE GOVERNOR AND SECRETARY OF STATE IN ISSUING THE PATENT TO THE LEGAL SUCCESSORS IN INTEREST TO THE ESTATE OF THOMAS CLOTWORTHY, DECEASED, AND REFUSED TO CONSIDER ANYTHING THAT TRANSPIRED PRIOR TO THAT TIME.

In writing this brief, the plaintiffs will consider first the fact as to the co-tenancy existing between the patentees of the two patents affecting the lands in dispute, which patents are shown at pages 12 and 13 of the abstract of title (Plaintiffs' Exhibit A).

Section 78-25-1, of the Judicial Code, Utah Code Annotated, 1953, Volume 9, page 213, recites as follows:

"78-25-1. JUDICIAL KNOWLEDGE.—Courts take judicial notice of the following facts:

* * * *

"(3) Public and private official acts of the legislative, executive and judicial departments of this state and of the United States."

This law has been the same since Chapter 50, Judicial Knowledge, Section 3374 of the Compiled Laws of Utah, 1907.

Section 2348, Compiled Laws of Utah, 1907, provided as follows:

"2348. ISSUANCE OF PATENTS. Upon the filing of the certificate of sale with receipts attached, evidencing full payment of principal and interest, for any tract of land sold, the governor shall, under the great seal of the state, issue a patent therefor to the purchaser or his assignee. All patents so

issued shall be attested by the secretary of state, and a record thereof shall be kept in the office of the board."

This law was in effect when the patent was issued on January 5th, 1911.

At the time of issuance of the patent, all of Defendants' Exhibit 1 was before the State Board of Land Commissioners, the Governor and the Secretary of State. There is no doubt but that they considered the question of the purported assignment from Sarah M. Clotworthy (or her attorney-in-fact) to James W. Clyde, and that they considered this ineffectual to assign the certificate or convey any title thereto. The parties were all alive at that time. The officers issuing the patent knew of the death of Thomas Clotworthy by the Decree attached to the exhibit, and issued the patent to his legal successors in interest. The letter of J. C. Jensen mailed with the other papers admitted the determination of the State Land Board that the assignment from Sarah M. Clotworthy to James W. Clyde would not be accepted, and asked that the patent be issued to the Legal Heirs of Thomas Clotworthy, Deceased. This is indicative of the fact that the officers empowered to issue the patent had considered the efficacy of the assignment in question. They determined in a right-on-the ground decision that the assignment was of no effect. These acts should be noticed judicially by the court.

POINT II.

THE LOWER COURT ERRED IN ADMITTING DEFENDANTS EXHIBITS 1 AND 2 INTO EVIDENCE.

The objections to the admitting of these two exhibits into evidence are shown at pages 60, 61 and 62 of the transcript. Plaintiffs urge that these objections should have been sustained by the trial court. No further argument will be given in this connection, except as set forth under Point I.

POINT III.

THE DEFENDANTS ARE BARRED BY THE PROVISIONS OF SECTION 104-12-26 (3) OF THE JUDICIAL CODE, LAWS OF UTAH 1951, FROM MAKING ANY CLAIM THAT THE PATENT WAS ISSUED BY ERROR OR MISTAKE.

The limitation statute above referred to reads as follows:

“104-12-26. WITHIN THREE YEARS:

• • • •

“(3) An action for relief on the ground of fraud or mistake; but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.”

This action is in effect one to set aside a patent from the State of Utah on the ground of mistake alleged in the answer of the defendants. This mistake is alleged in paragraph III of the said answer (Rec. 92) as follows:

“and for some reason unknown to these Defendants and possibly by error or mistake, patent was issued, on the 5th day of January, 1911, to the successors in interest of the estate of Thomas

Clotworthy to an undivided one-fourth interest in and to said lands. However, Defendants verily believe and allege the facts to be: That patent to the interest of the Clotworthy heirs in the lands represented by Certificate No. 3020 should have been issued to James W. Clyde instead of the successors in interest of Thomas Clotworthy, since the interest of said persons had been sold to James W. Clyde more than three years prior to the date patent was issued."

Such an allegation is an attempt to reform the patent. James W. Clyde knew of the alleged mistake inasmuch as he received the patent from the State Land Board on May 3rd, 1911 (Defendants' Exhibit 1). More than three years have elapsed since that date. The present defendants cannot assert any claim for relief as prayed for in their complaint for the reformation of the patent on the ground of mistake. They were not parties to the mistake.

POINT IV.

THE DEFENDANTS ARE BARRED BY LACHES FROM ASSERTING THAT THE PURPORTED ASSIGNMENT FROM SARAH M. CLOTWORTHY TO JAMES W. CLYDE CONVEYED ANY INTEREST IN THE LANDS IN DISPUTE.

Here we have a claim under a purported assignment which was made about September 21st, 1908 (Defendants' Exhibit 1) that James W. Clyde purchased the lands in dispute from "Sarah M. Clotworthy" (paragraph III, Rec. 92) and from "the heirs and successors in interest of Thomas Clotworthy" (paragraph II, Rec. 93). All of the parties to

this assignment are now dead including the witness there-to.

Don Clyde testified that he knew of this sale when he was a small boy (Tr. 55-58). He also testified that he paid taxes assessed to the Clotworthy people during all the time he owned his interest in this property (Tr. 55). The patent to the Clotworthy people was recorded September 11th, 1924 (Plaintiffs' Exhibit A, page 13). Neither of the defendants Jacobson nor Clyde examined the records which imparted notice to them of the ownership of the Clotworthys (Tr. 42 and 59). Neither of them were parties to the purported assignment. They claim under James W. Clyde, one of the parties to the said assignment, and as successors in title to him.

An examination of the said assignment and the evidence also shows that it was not executed. There is a signature in light lead pencil which reads: "Sarah M. Clotworthy By Chase Hatch, Atty in fact." The acknowledgment is made for "Sarah M. Clotworthy," but the notary public has failed to affix his seal to such acknowledgment. The signature is witnessed by J. C. Jensen. At the trial, the evidence showed the signature of the witness to be genuine (Tr. 85). However, no evidence was presented as to the signature of the party executing the assignment.

Section 57-2-1, Utah Code Annotated, 1953, recites:

“MANNER OF ACKNOWLEDGING OR PROVING CONVEYANCES—Every conveyance in writing whereby any real estate is conveyed or may be affected shall be acknowledged or proved and certified in the manner hereinafter provided.”

Section 57-2-10, Utah Code Annotated, 1953, recites:

PROOF OF EXECUTION—HOW MADE.—The proof of the execution of any conveyance whereby real estate is conveyed or may be affected shall be:

* * * *

“(2) When all the subscribing witnesses are dead, or cannot be had, by evidence of the handwriting of the party, and of a subscribing witness, if there is one, given by a credible witness to each signature.”

Section 57-2-14, Utah Code Annotated, 1953, provides:

“WHEN SUBSCRIBING WITNESS DEAD—PROOF OF HANDWRITING.—No proof by evidence of the handwriting of a party, or of the subscribing witness or witnesses, shall be taken unless the officer taking the same shall be satisfied that all the subscribing witnesses to such conveyance are dead, out of the jurisdiction, or cannot be had to prove the execution thereof.”

Section 57-2-15, Utah Code Annotated, 1953, provides:

“WHAT EVIDENCE REQUIRED.—No certificate of any such proof shall be made unless a competent and credible witness shall state on oath or affirmation that he personally knew the person whose name is subscribed thereto as a party, well knows his signature, stating his means of knowledge, and believes the name of the party subscribed thereto as a party was subscribed by such person; nor unless a competent and credible witness shall in like manner state that he personally knew the person whose name is subscribed to such conveyance as a witness, well knows his signature, stating his means of knowledge, and believes the name

subscribed thereto as a witness was thereto subscribed by such person.”

In failing to offer testimony as to the signature of the “party” who purportedly executed the assignment, the defendants failed in their burden of proving the execution of the said assignment.

Furthermore, the letter written transmitting Defendants’ Exhibit 1 to the State Land Board, shows that the assignee, James W. Clyde, knew that the purported assignment was not accepted by the said state agency. James W. Clyde, assignee in said purported assignment, although having full knowledge of the facts, never did attempt to enforce any equitable title he had in the lands involved, even though he owned the three-fourths interest in most of them (3½ sections) for more than twenty-five years after he received the patents as above set forth.

10 R. C. L. 396 states:

“Its (laches) object is in general to exact of the complainant fair dealing with his adversary, and the rule was adopted largely because after great lapse of time, from death of parties, loss of papers, death of witnesses, change of title, intervention of equities, or other causes there is danger of doing injustice, and there can be no longer a safe determination of the controversy.”

The above quotation is especially applicable in this action insofar as it applies to the purported assignment from Sarah M. Clotworthy to James W. Clyde.

Further, Sarah M. Clotworthy had no title in the certificate of sale or in the land described therein, except as provided by Chapter 4 of Title 74, Successions, which sets forth the interests of the plaintiffs in the property involved in this action. Even though the assignment in question were properly executed, it would convey only the interest which Sarah M. Clotworthy, as the widow of the deceased, would have in the land. *Dunn v. Wallingford*, 47 U. 491, 155 P. 647.

There is not attempt made for the Administratrix of the Estate of Thomas Clotworthy, Deceased, to make any assignment of this certificate.

Plaintiffs' Exhibit B, the Decree of Distribution, and the Decree Partitioning Property (Plaintiffs' Exhibit A, pages 7-11) distributed only the following:

“A contract of purchase from Alphonzo B. Murdock of all of Section 14, in Township 4 South of Range 6 East of the Salt Lake Meridian, containing 640 acres.

For the defendants to attack these decrees and try to modify them is a collateral attack on them which the court cannot countenance. None of the defendants were parties or heirs. The actual contract distributed and partitioned is set forth at pages 5 and 6 of Plaintiffs' Exhibit A, and does not assign any interest in Certificate No. 3020.

POINT V.

THE TWO PATENTS TO THE LANDS INVOLVED IN THIS ACTION CREATED A TENANCY IN COMMON BETWEEN AND AMONG THE PATENTEES WHICH CAN BE PARTIONED IN THIS ACTION.

Tenancy in common is defined as follows:

“A tenancy in common may be defined as that character of tenancy whereby two or more persons are entitled to land in such manner that they have an undivided possession, but several freeholds.”
Am. Jur. Vol. 14, page 87.

The one patent (Plaintiffs' Exhibit A, page 12) granted “an undivided one-fourth interest in and to” the lands involved in this action, to “Legal Successors in Interest to the Estate of Thomas Clotworthy, deceased.”

The other patent (Plaintiffs' Exhibit A, page 13), granted “an undivided Three-fourths interest in and to” the lands involved in this action, to “James W. Clyde.”

These patents under the above definition granted undivided possession, but several freeholds to the different patentees. They are tenants in common.

Section 78-39-1, Utah Code Annotated, 1953 under PARTITION, taken from the Judicial Code, Chapter 58, paragraph 1, Laws of 1951, reads as follows:

“BY CO-TENANTS OF REAL PROPERTY.—When several co-tenants hold and are in possession of real property as joint tenants or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property or a part

thereof, if it appears that a partition cannot be made without great prejudice to the owners."

Finding 1 of the findings of fact herein, finds the plaintiffs to be the heirs and only heirs of the Estate of Thomas Clotworthy, Deceased, and as such under our law of Succession, Chapter 4, of Title 74, Utah Code Annotated, 1953, are entitled to a partition of their one-fourth interest in the lands involved in this action. If the plaintiffs prevail on this appeal, the lower court should be ordered to proceed with such partition.

POINT VI.

THE ANSWER FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CLAIM UPON WHICH DEFENDANTS' TITLE CAN BE QUIETED.

It appears from the affirmative allegations of the Answer of defendants, set forth at pages 91 to 95 of the record, that the defendants are attempting to allege adverse possession to support their prayers on pages 94 and 95 that their title be quieted against all the world. In these affirmative pleadings, there are no allegations that the plaintiffs claim adversely to them.

Section 78-40-1, Utah Code Annotated, 1953, which is the same as previous statutes for many years, provides:

"ACTION TO DETERMINE ADVERSE CLAIM TO PROPERTY—AUTHORIZED.—An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to

him, for the purpose of determining such adverse claim."

In *Worley v. Peterson*, 80 Utah 27, 12 P. (2d) 579, this Supreme Court holds:

There is no express allegation that the asserted claims of the defendants are adverse or hostile to or in conflict with the alleged title of the plaintiffs. What is alleged in such respect is that such asserted claims or interest of the defendants, 'if any they have, is junior and inferior' to the right, title and interest of the plaintiffs, and that 'the defendants have no valid right, title or interest in or to the said described premises nor any part thereof.' To allege, as it is, that the asserted claims of the defendants were merely 'junior and inferior' to the title and interest, etc., of the plaintiffs, does not show that such asserted claims were adverse or hostile to or in conflict with the plaintiffs' alleged title or interest. As the nature or character of the asserted claims are not alleged, it is somewhat difficult on the face of the complaint to ascertain that the asserted claims were adverse or hostile to or in conflict with the title or interests of the plaintiffs. Simple as are the requirements of allegations in a suit to quiet title, yet it is essential to aver that the asserted claims are adverse or hostile to or in conflict with the plaintiffs' alleged title or interest. It is enough if such allegations are made merely in general terms without alleging the nature or character of the asserted claims. When, however, that is not done, as here it was not, then something more should be alleged which tends to show that the asserted claims are adverse or hostile or in conflict."

There is not a pleading in the whole file which claims

an adverse interest, in the plaintiffs as against the defendants. The plaintiffs allege that they are co-tenants in the lands in dispute. They claim under a patent. There is no allegation by the defendants that the claim under the patent is adverse to them. They merely try to amend the patent. These pleadings fail to satisfy the requirement of the statute in quieting title to an adverse claim.

POINT VII.

THE EVIDENCE DOES NOT SUPPORT CERTAIN FINDINGS OF THE LOWER COURT.

The evidence does not support the findings in the following particulars:

FINDING 3.

“By assignment bearing date September 21, 1908 filed with other assignments in connection with certificate of sale No. 3020 in the office of the Secretary of State of the State of Utah, Sarah M. Clotworthy by and through Chase Hatch, attorney in fact, (who had also been attorney for the administrator), assigned all of her interest in and to Section 14, or in and to all of the ground or lands covered by certificate of sale No. 3020 to James W. Clyde for a stated consideration of \$3000.00. Said assignment was witnessed by one J. C. Jensen, and also acknowledged before J. C. Jensen, Notary Public, although the notarial seal was omitted.”

As to such part of finding 3, plaintiffs have already set out in Point IV, supra, that the said assignment was never executed. As to the acknowledgment, the purported signer was Chase Hatch, attorney in the fact, and the ack-

nowledgment was for "Sarah M. Clotworthy, the signer" so that the acknowledgment was entirely improper and did not acknowledge the execution by the attorney in fact.

FINDING 4.

Speaking of the various assignments of Certificate of Sale No. 3020, (Defendants' Exhibit 1), this finding states that "On the same day A. M. Murdock assigned an undivided one-fourth interest in said contract to Thomas Clotworthy". The following sentence in the finding is objected to and reads as follows:

"Said assignment was never recognized by estate or by the court in the probate proceeding."

As to what is meant by the word "recognized" is not understood by the plaintiffs. If the word was "considered" instead of "recognized" it would be in accordance with the facts. The probate proceedings did not in any place claim any interest in Certificate of Sale No. 3020, and did not consider any interest therein either in the inventory, distribution or partition of the property of the estate.

FINDING 6.

"That the said James W. Clyde received all of Sections 14, 15, 22 and 23 by the assignments herein mentioned in the years 1907 and 1908 and that he held and used the same to the exclusion of all others until the year 1915 * * *. That by Warranty Deed dated October 1922, the property conveyed to defendant Virvil P. Jacobson for a good

and valuable consideration. That during all of the years from 1907 to the time of the commencement of this lawsuit, defendant, Virgil P. Jacobson and his predecessors in interest, have had the sole and exclusive use, possession and enjoyment of the property owned by him and his predecessors in interest * * *. Until the time of bringing of the present action, defendant Jacobson had no knowledge that plaintiff claimed any portion of the land."

As to the first sentence above quoted, it is conclusively shown in Point IV, supra, that no assignment was made to James W. Clyde of the one-fourth interest patented to the plaintiffs and their predecessors.

As to the second sentence, Plaintiffs' Exhibit A, page 21, shows that the land was conveyed to Virgil P. Jacobson on October 11th, 1929.

As to the third sentence above quoted, there is absolutely no evidence that the defendant, Jacobson, or his predecessors in title ever used the property, that they were ever in possession of it, or that they made any enjoyment thereof. While it may be assumed that the land was grazing land, there is no testimony that even one animal was ever grazed thereon during the period stated.

As to the last sentence above quoted, Plaintiffs' Exhibit A, page 12, shows that the patent to the plaintiffs was duly recorded at the time defendant Jacobson purchased the property, and this is constructive notice of the claim of plaintiffs.

FINDING 7.

“After the death of James W. Clyde the South and West half of Section 14 and all of Section was distributed through his estate to Mary A. Clyde, his surviving widow. Thereafter by deed dated June 28, 1941, the said Mary A. Clyde conveyed the Southwest half of Section 14 and all of Section 15 to defendant Don Clyde for a good and valuable consideration. That from the years 1907 and 1908 down to the time of the commencement of this action, defendant Don Clyde and his predecessors in interest have had the exclusive use, possession and enjoyment of * * * * the property now owned by him.”

The abstract of title, Plaintiffs' Exhibit A, pages 26-29, shows that distribution was made to the widow of “An undivided one-fourth interest of, in and to” all of Section 14 South and West of Lake Creek and all of Section 15. At pages 30 and 32 of said Exhibit A, a Quit-Claim Deed is made by Mary A. Clyde, the widow, to Don Clyde, of “All her right, title and interest in” the said two sections. The above quotation is then in error by stating that Don Clyde received the whole property through Mary A. Clyde, the widow.

Furthermore, at pages 33-35 of said Exhibit A, there is shown a Quit Claim Deed from the heirs of the said James W. Clyde, Deceased, to Don Clyde for “all of their right, title, and interest of, in, and to” the said two sections in dispute. Such a deed would not convey the title of the Clotworthy people and would give to Don Clyde no color of title to the plaintiffs' interests. This would apply to all that portion of Section 14, lying South and West of Lake

Creek, and all of Section 15.

As to the exclusive use, possession and enjoyment of the property of Don Clyde, there is no record that he put it to any use whatsoever. There is no testimony that he, his father or anyone else ever grazed an animal on the property although he testified that it was "used as grazing land" (Tr. 47). There is no evidence of possession or of the enjoyment thereof.

FINDING 8.

Plaintiffs object to finding 8 in its entirety. Plaintiffs' Exhibit A, page 12, shows that the patent to the plaintiffs was duly recorded at the time defendant, Don Clyde, received conveyances for any of the property, and this is constructive notice of the claim of plaintiffs. Further, he testified that Thomas Clotworthy's name was on all tax notices which he paid (Tr. 55). This is actual notice of the claim of the Clotworthy heirs.

FINDING 9.

"That during all of the years in question, the defendants and there predecessors in interest have regarded the property as their own; have never paid any rent or any other consideration for the use thereof; * * * and have dealt with the property as though they were the sole owners thereof. The defendants have never tolerated any use or occupation of the premises by any person other than themselves and have used the land continuously and have improved the same over the course of the years. * * * * To the best knowledge and information of the defendants, none of the heirs of

Thomas Clotworthy or Sarah M. Clotworthy, his wife, both deceased, had ever been on any of the premises in question, and, aside from the inquiry by Mr. Witt, have never expressed any interest therein or made any claim thereon."

Down to the first semi-colon in the above quotation, the finding is a mere conclusion without any evidence in the record to support it. There is no evidence that either Heber G. Crook and J. W. Giles, or James W. Clyde himself made any such claim.

There is evidence that no rent was paid to the Clotworthys but there is no evidence that rent was not paid to someone else.

As to the use and occupation of the land there is absolutely no evidence that any use was made of the land. While it appears that it may be grazing land, there is no evidence that any animals were ever grazed thereon, and whether they were sheep, cattle, horses, goat or any other species of animal. There is no evidence that anyone was excluded from the use of the land, although there was some testimony that the Clotworthys were never seen upon it. There is no testimony or evidence that any improvements were made upon the land. There is no testimony or evidence as to any year in which any of the purported things were done which are set forth in this finding.

The last sentence is a mere conclusion and not an actual finding of fact.

FINDING 10

All of finding 10 is objected to. There is no evidence to support any of it. As heretofore stated, there is no evidence of any use of the property, or of actual possession thereof. There is no evidence of interruption or of non-interruption. As to their dealing with and treating the property as their own, there is no testimony or evidence in the record to substantiate any such dealing or treatment as the record is silent in that respect. The last part of this finding is a mere conclusion and not an actual finding of fact. The conclusions of the defendants in their pleadings, and in their testimony, is entirely unsupported by evidence.

POINT VIII.

THE CONCLUSIONS OF LAW ARE NOT SUPPORTED BY THE FINDINGS OF FACT, AND ARE CONTRARY TO LAW.

CONCLUSION 1.

The plaintiffs in their complaint allege that they are the owners of "an undivided $\frac{1}{4}$ part or interest in the fee" of the four sections in dispute. Finding 5 of the Findings of Fact finds that patent for this interest was issued to the plaintiffs on January 5, 1911, and recorded in Wasatch County in the year 1924. The purported assignment from Sarah M. Clotworthy to James W. Clyde is dated September 21, 1908, in Finding 3. The assignment does not have the effect of a Warranty or any other deed which might convey

after-acquired title. The subsequent patent conveyed the legal title to the plaintiffs. The findings do not show that the patent has ever been set aside and the legal title still rests in the patentees.

42 Am. Jur. 861, under Public Lands, paragraph No. 86 states:

“It is essential to the validity of a state grant that it be signed by the proper officials specified in the statute. Patents which are signed by the proper officers and in due form to convey the title of the state to the patentees are not subjects of collateral or individual attack, but can be set aside only in judicial proceedings instituted on behalf of the state. And a subsequent grantee cannot avoid a prior grant on account of fraud practiced on the state in obtaining it. * * * * * It has been held that one not in privity cannot attack the validity of a patent and the antecedent proceedings leading up to it, and that under a state statute enabling an interested private citizen to sue in equity to set aside a state patent, a showing of interest by the complainant is essential to the maintenance of such suit.”

Under the above, it is plainly manifest by the findings of fact that the state patent has not been set aside, that it is dated after the purported assignment upon which the defendants rely, and that the plaintiffs are the actual owners in fee of the one-fourth interest they claim. There is no finding that any of them, subsequent to patent, have conveyed any interest therein. The conclusion then, that the complaint of the plaintiffs should be dismissed, is contrary to law.

CONCLUSIONS 3 AND 4

The defendants in the answer (Rec. 92, 93) allege that for more than forty years last past they and their predecessors in interest have held the "actual, open, peaceful, quiet, continuous, notorious, adverse, undisputed occupancy and possession of said lands and the whole thereof, as against said Plaintiffs and all the world."

Finding 6 finds as follows:

"That during all of the years from 1907 to the time of the commencement of this lawsuit, defendant, Virgil P. Jacobson and his predecessors in interest, have had the sole and exclusive use, possession and enjoyment of the property owned by him."

Finding 7 finds as follows:

"That from the years 1907 and 1908 down to the time of the commencement of this action, defendant and his predecessors in interest had had the exclusive use, possession and enjoyment of and had paid all taxes assessed against the property now owned by him."

Finding 10 recites:

"That the defendants and their predecessors in interest have used, held and possessed the lands in question without interruption for the space of more than forty (40) years and during such period they have dealt with and treated the property as if they were the sole and exclusive owners thereof as fully as could reasonably be expected from anyone in like circumstances."

As heretofore shown, the plaintiffs have a legal title to

an undivided one-fourth interest in the four sections involved in this action. Under the provisions of Section 78-12-7, Utah Code Annotated, 1953, the holder of the legal title is presumed to be in possession and all occupancy in subordination to such legal title unless adverse possession be shown. This will be fully treated in Point X infra.

The above findings are not findings of adverse possession and in fact do not even set forth that defendants possessed the land adversely to the plaintiffs. Under such findings, the second and third conclusions of law are contrary to law.

POINT IX.

THE FINDINGS AND CONCLUSIONS ARE INSUFFICIENT TO SUPPORT THE DECREE.

From the arguments put forth in points VIII and IX, supra, it goes without saying that the Decree (Rec. 115-116) is without foundation and is absolutely void.

POINT X.

THE DEFENDANTS DID NOT ESTABLISH ADVERSE POSSESSION TO THE PROPERTY INVOLVED IN THIS ACTION.

As heretofore shown, the patent to the Clotworthy heirs for an undivided one-fourth interest in the four sections involved in this action conveyed to them a fee simple title in such interest, and established them as co-tenants in

the property. None of the patentees have conveyed any interest in the lands so patented. They have the legal title to said one-fourth interest.

Section 78-12-7, Utah Code Annotated, 1953, which has been the law for many years in this state, reads as follows:

“ADVERSE POSSESSION—POSSESSION PRESUMED IN OWNER.—In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action.”

Section 78-12-9, Utah Code Annotated, 1953, provides:

“WHAT CONSTITUTES ADVERSE POSSESSION UNDER WRITTEN INSTRUMENT.—For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

“(1) Where it has been usually cultivated or improved.

“(2) Where it has been protected by a substantial inclosure.

“(3) Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purpose of husbandry, or for pasturage or for the ordinary use of the occupant.

“(4) Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining county is deemed to have been occupied for the same length of time as the part improved and cultivated.”

Section 78-12-11, Utah Code Annotated, 1953, provides:

“WHAT CONSTITUTES ADVERSE POSSESSION NOT UNDER WRITTEN INSTRUMENT.—For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment or decree land is deemed to have been possessed and occupied in the following cases only:

“(1) Where it has been protected by a substantial inclosure.

“(2) Where it has been usually cultivated or improved.

“(3) Where labor or money has been expended upon dams, canals, embankments, aqueducts or otherwise for the purpose of irrigating such lands amounting to the sum of \$5 per acre.”

The ruling case in this jurisdiction on an action by one co-tenant against another co-tenant for adverse possession seems to be that of *McCready v. Fredericksen*, 41 Utah, 388, 126 Pac. 316. This case holds that payment of taxes alone does not establish an ouster of the co-tenant. In this jurisdiction, the basis for such an ouster is established as follows:

“We think the true rule with regard to what constitutes an ouster is stated in the case of *Elder v. McClaskey*, 70 Fed. at page 542, 17 C. C. A. at page 264, by Mr. Justice Taft, in the following

words: 'Where one enters avowedly as tenant in common with others, his possession is the possession of those others, so long as the tenancy in common is not openly disavowed. Before adverse possession by one tenant in common against another can begin, the one in possession must, by acts of the most open and notorious character clearly show to the world, and to all having occasion to observe the condition and occupancy of the property, that his possession is intended to exclude, and does exclude, the rights of his cotenant. It is not necessary for him to give actual notice of this ouster or disseising of his cotenant to him. He must, in the language of the authorities, "bring it home" to his cotenant. But he may do this by conduct, the implication of which cannot escape the notice of the world about him, or of any one, though not a president in the neighborhood, who has an interest in the property, and exercises that degree of attention in respect to what is his that the law presumes in every owner.' "

The statement of Mr. Taft is followed in all of the decisions we have read, which pertain to co-tenancy.

There is another case upon the decision in *McCready v. Fredricksen*, *supra*, and quoting Mr. Taft's statement which gives an example of the adverse possession necessary to oust a co-tenant. That is the case of *Mathews v. Baker*, et al., 47 Utah, 532, 155 Pac. 427.

In the light of the decisions in *McCready v. Frederickson*, *supra*, and *Mathews v. Baker et al.*, *supra*, we can safely say that the evidence and findings and conclusions conforming thereto must be such as would at least satisfy

the provisions of Sections 78-12-9 and 78-12-11 hereinabove quoted, in order for the defendants to prevail over the plaintiffs. The law set forth in Section 78-12-7 requires this. In examining the facts in this case there is not one of the seven requirements of said Sections 78-12-9 and 78-12-11 which has been complied with. That being so, the ouster of the plaintiffs has not been "brought home" to them by the adverse possession of the defendants or by any conduct shown in evidence in this action.

The case of *McCready v. Fredericksen*, *supra*, states as follows:

"The act of Mr. Wakeman in making a deed, whereby he in terms conveyed the title to the whole of the premises in question, was an unequivocal act, by virtue of which he clearly indicated to every one, including his cotenant, that he claimed the title to the whole of the premises in question. Such an act was therefore one which was notice to all the world that the grantor claimed title to the whole property, and thus excluded all others, including the appellant."

Thus, the conveyances by James W. Clyde would have set the state of limitations to running from the date of the respective conveyances. However, to obtain the benefit of the statute, the defendants would have to prove their adverse possession for a seven year period continuously as set forth in Section 78-12-12, Utah Code Annotated, 1953. They have failed to establish adverse possession by evidence in any one year during the period.

Further, as heretofore shown, the findings of fact do not, as they now stand, show facts sufficient to constitute adverse possession against the plaintiffs, by the acts of the defendants. The defendants must fail.

CONCLUSION.

Plaintiffs have shown that they are the owners of a legal fee simple title to an undivided one-fourth interest in the lands in dispute in this action. The defendants have failed in their effort to show title dating back prior to patent and are estopped from so doing by limitations and laches. The defendants have failed to establish adverse possession to the lands in question.

The decision of the lower court should be reversed and the cause remanded with instructions to partition the lands among the respective owners according to their interests.

Respectfully submitted,

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and Appellants**