

1953

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Clothworthy v. Clyde*, No. 7962 (Utah Supreme Court, 1953).
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In the Supreme Court of the State of Utah

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.

CASE
NO. 7962

RESPONDENTS' BRIEF

FILED
MAY 9 - 1953
Clerk of the Court, Utah

ALDRICH & BULLOCK,
Attorneys for Defendants
and Respondents

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NO. 7962**

RESPONDENTS' BRIEF

STATEMENT OF FACTS

In 1900, Alphonzo B. Murdock, also known as A. B. Murdock, entered into a purchase contract with the State of Utah, identified as Certificate of Sale No. 3020, under

the terms of which he was to acquire from the State Sections 14, 15, 22, and 23 in Township 4 South, Range 2 East. Under the contract a specified sum was paid in cash, and the balance, together with interest, was to be paid in ten equal annual installments (Defendants' Exhibit A). In 1901, the said A. B. Murdock, by an agreement in writing and duly acknowledged, sold Section 14 to one Thomas Clotworthy and agreed to convey the same when patent was obtained. Good and adequate consideration in annual payments was provided for in the written instrument, which was recorded in Wasatch County (Plaintiff's Exhibit A, page 5), Thomas Clotworthy went into possession of Section 14 and used it as grazing land (Tr. 47). Section 14 was known as the "Clotworthy Section", and it was fenced (Tr. 48, 52).

Thomas Clotworthy died intestate in 1905, and in that year probate of his estate was commenced (Defendants' Exhibit B). In the inventory filed September 30, 1905, and in subsequent documents filed in connection with the probate of the estate, the interest of the decedent in the property in question was described, substantially, as follows:

"Eighth piece—consisting of a contract to purchase from Alphonzo B. Murdock the following described tract of land, to-wit: All of Section 14, Township 4 South, Range 6 East, Salt Lake Base and Meridian.

Said land having been sold to Alphonzo B. Murdock by the State of Utah under and by virtue of Certificate of Sale, of State Lands, No. 3020" (Def. Exhibit B).

The estate paid the taxes and the annual payment up to and including the year 1907 (Defendants' Exhibit B, Final Account of Administrator).

In the Decree of Distribution, filed April 4, 1907, the contract for the purchase of Section 14 was distributed one-half to the widow, Sarah M. Clotworthy, and one-twelfth to each child (Defendants' Exhibit B). By a Decree of Partition, filed about one month later, on May 6, 1907, Sarah M. Clotworthy, widow of the deceased, received as her sole and separate property, together with other property, (Defendants' Exhibit B), the following:

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

The property was entered upon the Inventory at an appraised figure of \$800, and Sarah M. Clotworthy took the same, as a part of her share, at a valuation of \$3,200 (Defendants' Exhibit B). Each minor child was duly represented by a guardian, and each such child received his or her share of the estate in cash (Defendants' Exhibit B).

On or about March 23, 1908, Sarah M. Clotworthy, by an instrument in writing, gave one Chase Hatch a Power of Attorney authorizing him to convey real estate owned by her. That Power of Attorney was recorded in Wasatch County (Plaintiffs' Exhibit A, page 36), but was not filed with the State of Utah. The power was never expressly revoked, and was in full force and effect in 1908, at the time the assignment hereinafter mentioned was made. The official records of the Secretary of State of the State of Utah (Defendants' Exhibit A) show the following instrument:

"Assignment

For and in consideration of Three Thousand Dollars, to me in hand paid by James W. Clyde of Heber City, Utah, I hereby sell, assign, and transfer unto the

said James W. Clyde all of 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 covering by mutual agreement with the holder of the other three-fourths interest therein, all of Section 14, Township 4 South of Range 6 East of Salt Lake Meridian, the holder of said other three-fourths taking Sections 15, 22 and 23 in said Township and Range.

SARAH M. CLOTWORTHY
By Chas. Hatch
Attorney in Fact

Witness

/s/ J. C. Jensen

STATE OF UTAH }
COUNTY OF UTAH } ss.

On the 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.

/s/ J. C. Jensen
Notary Public

My Commission Expires
August 25, 1909"

James W. Clyde had previously acquired all of the interest of A. B. Murdock in and to Certificate No. 3020 by assignment through one A. M. Murdock, bearing date January 25, 1907 (Defendants' Exhibit B). James W. Clyde went into possession of Sections 15, 22, and 23 in 1907 and took over possession of Section 14 in the year 1908 (Tr. 48, 55). Never, since the years 1907 and 1908, has anyone other than James W. Clyde and his successors in interest

had any use or occupation of the premises (Tr. 48). Taxes on the property have always been paid by James W. Clyde or his successors in interest (Tr. 72). All of the property in Section 14 lying north and east of Lake Creek has been assessed to Defendant Virgil Jacobcen and his predecessors in interest since 1915. Prior to 1915 all of Section 14 lying south and west of Lake Creek was assessed to James W. Clyde and his successors in interest. Since 1911 taxes on the remaining three sections have been assessed to "Thomas Clotworthy Estate" and to either James W. Clyde or Don Clyde (Tr 72). James W. Clyde made the annual payments to the State of Utah on Certificate of Sale No. 3020 after he acquired Mrs. Clotworthy's interest. None of the plaintiffs, or anyone in their behalf, ever claimed any right or interest in the property at all until about one year before this case was tried (Tr. 49, 74). None of the plaintiffs have ever been on any of the land in question (Tr. 17, 49).

On the 5th day of January, 1911, the State of Utah issued patents as follows: An undivided one-fourth interest in Sections 14, 15, 22, and 23 to "The Legal Successors in interest to the Estate of Thomas Clotworthy, deceased", (Plaintiffs' Exhibit A, page 12), and an undivided three-fourths interest in and to the same sections to James W. Clyde (Plaintiffs' Exhibit A, page 13). Part of Seceion 14 was conveyed by Warranty Deed from James W. Clyde in 1915 and after several other conveyances came into the hands of defendant Virgil P. Jacobsen in the year 1929 (Plaintiffs' Exhibit A, pages 14, 16, 24). Part of the property has also been mortgaged on several occasions (Plaintiffs' Exhibit A, pages 15, 17, 18). Sections 15, 22 and 23 have also been the subject of several conveyances for valu-

able consideration (Plaintiffs' Exhibit A, pages 25 and 30). When the patents were issued by the State, the State Records did not contain the Power of Attorney from Sarah M. Clotworthy to Chase Hatch, nor did they contain the contract of purchase between Thomas Clotworthy and Alphonzo B. Murdock. Both of said instruments were on file in Wasatch County.

On or about the 17th day of May, 1952, certain of the plaintiffs, claiming to be "Legal Successors in Interest to the Estate of Thomas Clotworthy, deceased", filed a complaint in Wasatch County against these defendants, claiming that they were the owners and tenants in common with the defendants and praying that an undivided one-fourth part of all four sections be partitioned and set over to them.

Defendants filed their Answer denying any ownership, possession, tenancy or interest on the part of any of the plaintiffs, and claiming complete fee ownership by the defendants. The Answer also set forth, as an alternative defense and affirmative cause of action, facts in support of and a prayer for an order quieting title in the defendants.

The case was tried to the court, sitting without a jury, on the 6th and 7th days of November, 1952, and thereafter the court found in favor of the defendants.

STATEMENT OF POINTS RELIED UPON

POINT I

That the trial court could properly have found and held, under the evidence in this case, that the plaintiffs had no legal or equitable interest whatever in the property here considered.

POINT II

In the alternative, that if the court did find that the plaintiffs were tenants in common with the defendants' predecessor in interest, then the defendants are entitled to a decree quieting the title in them by reason of adverse possession.

ARGUMENT

POINTS I AND II

There can be no question but that the court admitted the patents in evidence. They are set out in the abstract of title which was offered and received, without objection, as Plaintiffs Exhibit Exhibit A.

Plaintiffs, without benefit of any authority whatever, take the position that "Legal Successors in Interest to the Estate of Thomas Clotworthy, deceased", as used on the patent, can only mean "Heirs at Law" and that the patent thereby conveyed the interest to the named plaintiffs in this case. As a matter of law, there is no basis for any such position. Under and by virtue of the estate proceedings (Defendants Exhibit B) the decedent's interest was partitioned to his widow, Sarah M. Clotworthy, as part of her share of the estate. Prior to the issuance of the patent, she assigned that interest to James W. Clyde. At the time of the issuance of the patent James W. Clyde was the "Legal Successor in Interest" to the said estate. The word "legal" means that which is according to law. **Words and Phrases, Vol. 24, pages 524-525.** "Successor in interest" includes administrator. **Moss v. Ramsey (Okl.) 153 Pac. 843** and the term "successor in interest" includes assignees. **Barr v. Roderick (Cal.) 11 Fed. (2) 984; McNulta v. Hunt-**

ington, 70 NYS 897. The fact that the patent was not issued until after the decree of partition makes no difference. 102-10-28, Utah Code Annotated, 1943.

Plaintiff, also without citation of authority, urges the Court to adopt the position that the trial court could not, as a matter of law, look beyond the patent. This Court long ago held that it could be shown that a patent was improvidently issued or fraudulently obtained and therefore void. *Glassman v. O'Donnell*, 6 Utah 446, 24 P. 537.

Defendants' Exhibit A was a transcript of the records of the Secretary of State kept by that office in connection with the sale by the State and the patent of the lands in question. The transcript was duly certified by the Secretary of State. A public record of private writing may be proved by the original record or by a copy thereof certified by the legal keeper of the record. 104-47-14, Utah Code Annotated, 1943.

Defendants' Exhibit B was the complete record of the Fourth Judicial District Court in Probate No 107 in Wasatch County, entitled "Thomas Clotworthy Estate." It was a judicial record of the trial court and a public writing. 104-47-4, Utah Code Annotated, 1943. It could be proved by the production of the original or by a copy thereof certified by the clerk having the legal custody thereof. 104-47-10, Utah Code Annotated, 1943.

Defendants' Exhibit A shows the assignment from Sarah M. Clotworthy to James W. Clyde and Defendants' Exhibit B shows the partition of Thomas Clotworthy's interest in the property to his widow, Sarah M. Clotworthy. Obviously, both exhibits were material and admissible.

POINTS III, IV AND V

The plaintiffs' argument on this point is confusing. It is argued that the defendants' predecessor in interest knew of the so called "mistake", but that the present defendants cannot assert any claim for relief because they were not parties to the mistake. The evidence is uncontradicted that defendant Don Clyde knew nothing whatever of any adverse claim on the part of any of these plaintiffs until Mr. Witt mentioned it about one year prior to the trial hereof (Tr. 15, 49) and defendant Virgil Jacobsen didn't know anything about this claim until he was served with Summons in this action (Tr. 39, 40). These defendants believed that James W. Clyde's title was derived through the legal successor in interest to the estate of Thomas Clotworthy, deceased. If Sarah M. Clotworthy was not the legal successor in interest of the estate, so far as the property here considered is concerned, these defendants were never so apprised until the plaintiffs communicated their claim to them. Accordingly, on any theory, under the statute cited by plaintiffs, they had three years after notice of plaintiffs' claim.

In his argument counsel for plaintiff argues that the assignment from Sarah M. Clotworthy to James W. Clyde was not executed because the signature was in "light pencil"; that the acknowledgment was for Sarah M. Clotworthy, and that the notary failed to place his seal thereon.

We are unable to find any statutory provision or case law which requires that a conveyance be signed by any particular medium. Certainly the plaintiff has not cited any authority whatever to the effect that a pencil signature is not legally adequate. At the time this acknowledgment was

made the State of Utah had no statutory form for an attorney in fact for a conveyance. The statutory form for an attorney in fact came in the Code Report and Revised Statutes of 1933. Where the Statute provides no specific form of acknowledgment, the form prescribed for ordinary conveyances may be used. **Annotation: 108 Am. St. Reports 532.** In those earlier days there was considerable authority to the effect that an attorney in fact must acknowledge the instrument in the name of his principal, and not in his own name. **1 Am. Jur. 331, 332.** In any event, an acknowledgment is the act of the principal wherever it can be discovered that the intention of the party was to act in a representative capacity, and not for himself. Substantial compliance with the form of requirements of Statute is all that is required, and it is the settled policy of the courts to sustain Certificate of Acknowledgment whenever it is possible to do so. **1 Am. Jur. Acknowledgments, Sec. 74, page 344; Annotations 29 ALR 926; 72 ALR 1293.** Close examination of the assignment in question (Defendants' Exhibit A) will reveal that the paper upon which the assignment was made contains an extra notarial seal. The attorney for the defendants could not tell whether the imprint was of the seal of J. C. Jensen or not. Moreover, the presumption, in the absence of facts or circumstances to the contrary, is that the seal was affixed in due form. Also, in 1943 the legislature of the State of Utah validated, among others, all instruments of writing copied into the records of the various county recorders previous to January 1, 1943, notwithstanding any defect in the acknowledgment. **(57-3-9, UCA, 1953).** Prior to that time all such instruments recorded prior to January 1, 1921, had been validated by the legislature.

The objection of the plaintiff that the assignment was improperly received because of a defective acknowledgment is not well taken on this appeal, for the reason that plaintiff did not raise that objection when the exhibit was offered. The objection stated by counsel for plaintiff at the trial was only as to relevancy and materiality. The objection shown on page 60 of the transcript was as follows:

“THE COURT: How is that marked, Exhibit 1, Defendants’ Exhibit 1?

MR. STANLEY: Defendants’ Exhibit 1.

THE COURT: Any objection:

MR. STANLEY: Yes, there is an objection, Your Honor. It isn’t on the ground as to the admissibility, as for as the certificate and the admissability in that respect, but we say that is is irrelevant and immaterial, not within the issues of this case, the matter therein set forth, that now is before the Court. All of the proceedings therein are proceedings that were had before patent, and the patent is conclusive, as to the conveyance of title from the State of Utah to the parties designated thereon.”

Since the plaintiff did not object to its admissibility because of claimed defective acknowledgment, but only as to its relevancy or materiality, he should not now be permitted to claim error in the court’s receiving it. **I Am. Jur., Acknowledgments, Sec. 42, page 330.**

Of course, whether the instrument of assignment in the instant case was properly acknowledged so as to entitle it to recordation is not a problem here. The plaintiffs in this case are not, and do not claim to be, subsequent purchasers in good faith and for a valuable consideration. Under the Laws of the State of Utah, parties to an unacknowl-

edged or defectively acknowledged instrument, and those in privity with such parties, are bound by the instrument. (57-1-6, U.C.A., 1953); **I Am. Jurisprudence, Acknowledgments, Sec. 12, page 321.** The heirs and representatives of parties to an unacknowledged instrument are bound in the same manner as were the persons under whom they claim. **I Am. Jur., Acknowledgments, Sec. 12, page 322.**

By the decree of partition in 1907, all of the interest of Thomas Clotworthy, deceased, in and to the lands being acquired by Alphonzo B. Murdock from the State of Utah, was distributed and set over to Sarah M. Clotworthy, widow of the deceased, as her sole and separate property (Plaintiffs' Exhibit A, pages 7 to 10). Her assignment was made in the year 1908. Plaintiffs did not contend at the trial, nor do they now directly contend, that the contract of purchase distributed to Sarah M. Clotworthy covered other or different property from that under consideration in this case. The case, **Dunn v. Wallingford, 47 Utah 491, 155 P. 3447**, is not in point.

For some reason beyond the comprehension of these defendants, the plaintiffs refuse to recognize the decree of partition, an integral and component part of the estate proceeding. That decree of partition gave the interest of the estate and the interest of any other heirs, to the lands in question, to Sarah M. Clotworthy, widow of the deceased (Plaintiffs' Exhibit A, pages 7 to 10). There is no question but that such a contract interest could be distributed or partitioned in the estate proceedings. Plaintiff doesn't expressly contend otherwise.

As previously pointed out in this brief, the term "legal successors in interest" doesn't necessarily mean "heirs." Mrs. Clotworthy was the "legal successor in interest of the

estate." Had Mr. Clotworthy assigned the contract in his lifetime, his assignee would have been the "legal successor."

POINTS VI, VII, VIII, AND IX

There is a new contention by the plaintiffs raised for the first time before the Supreme Court. Plaintiff raised no question by either his replies or by motion as to whether the cross-claim or counterclaim stated a claim upon which relief could be granted. It is required by Rule 12(b), Rules of Civil Procedure, that such objection be raised by answer or by motion. An examination of the case cited by plaintiffs, *Worley v. Peterson*, 80 Utah 27, 12 P(2) 579, shows that the contention there considered was properly raised in the trial court. That case also holds that the allegations by answer and counter-claim of the defendants aided the complaint and cured the defect of the complaint in such respect.

In the instant case, the plaintiffs' complaint alleged that "The plaintiffs and defendants are the owners and tenants in common" of the land in question, and "they are now in possession thereof." The complaint prayed for a partition of one-fourth of the property to them. Defendants denied any ownership or tenancy or possession on the part of the plaintiffs; denied that the plaintiffs had any estate of inheritance in the property, or had any interest at all. The answer sets up the facts and makes claim of sole ownership on the part of the defendants, and prays that the Court quiet title in the defendants. The answer also sets up an alternative defense and affirmative cause of action showing adverse possession by the defendants and a prayer for an order quieting this title on that ground. Certainly the

pleadings in this case, taken together, show that the plaintiffs did assert a claim adverse and hostile to the plaintiffs. **Worley v. Peterson, supra.**

Plaintiffs persist in taking the position that they are owners of an undivided one-fourth interest in the land in question because they were "heirs" of Thomas Clotworthy.

If they claim at all, they must claim under Sarah M. Clotworthy. As heirs of Sarah Clotworthy, they stand in privity with her, and it matters not that the assignment was or was not acknowledged. Plaintiffs did not claim at the trial, nor have they claimed in their brief, that Chase Hatch, as attorney in fact, did not sign for and in behalf of his principal, nor do they claim or assert that he was not empowered to do so.

In their brief plaintiffs contend that the probate proceedings did not claim an interest in Certificate of Sale No. 3020. The Inventory (Defendants' Exhibit B) described the property as Section 14, and further states:

"Said land having been sold to Alphonzo B. Murdock by the State of Utah under and by virtue of Certificate of Sale, No. 3020"

On brief, and again without citation of authority, plaintiffs state: "The assignment does not have the effect of a warranty deed or any other deed which might convey after acquired property." In the first place, this was not "after acquired property." Secondly, when public land has been sold by the State, the purchaser's assignee in good faith is entitled to a patent therefor, lawfully issued whenever he has fully complied with all of the conditions of the purchase, and it is held that upon issuance of a patent, even though erroneously, to the heirs of the transferrer, the whole title,

both legal and equitable, inures to the transferee or his heirs. In such case, the issuance of the patent to the transferer's heirs could not even vest them with color of title to support title by limitation as against the transferree's heirs. **42 Am. Jur., Public Lands, Sec. 80, page 858.** In the instant case the State of Utah, at the time the patents were issued, had before it Mrs. Clotworthy's assignment to James W Clyde, also a statement to the effect that the Clotworthy interest had been distributed and partitioned to Mrs. Clotworthy (Defendants' Exhibit A). However, the State did not have in its files the Power of Attorney from Mrs. Clotworthy to Chase Hatch, who had executed the assignment as her attorney in fact. For that reason alone the State issued the patent to the legal successors in interest, so that the property would go to whoever was entitled to receive it under the law.

POINT X

By argument on this point, and mainly by citation of statutes, the plaintiffs contend that defendants have failed to establish adverse possession.

Without for one moment conceding that there is any merit whatever to plaintiffs' contention that they were originally co-tenants of the property with defendants' predecessor in interest, we will concern ourselves with that theory of the case.

If there was such a co-tenancy, it came into existence upon the death of Thomas Clotworthy on August 23, 1905, and the other co-tenant at that time was one A. M. Murdock (Defendants' Exhibit A). In 1907, James W. Clyde succeeded to all of the interest of A. M. Murdock, and in that year went into possession of Sections 15, 22 and 23 (Tr.

46). At that time Section 14 was known as the Clotworthy Section," and was fenced away from the rest of the ground (Tr. 48, 52). In 1908, James W. Clyde went into possession of Section 14 (Tr. 57) and from 1908 to the date of the trial of this case no one other than James W. Clyde, or his successors in interest, had used any part of Sections 14, 15, 22, or 23 (Tr. 48). For as far back as 40 or 45 years, the property had been used as grazing land (Tr. 47, 57). None of the Clotworthy heirs had ever been on the land (Tr. 17, 49). None of the Clotworthy heirs had ever indicated that they owned or claimed a portion of these sections until about one year before the trial (Tr. 49). Defendant Virgil Jacobsen had no indication of any claim by any of the Clotworthy heirs until the Summons was served upon him (Tr. 40). Never during the time since James W. Clyde acquired the property had he or any of his successors in interest paid anything to the Clotworthy heirs for the use of the property (Tr. 50). Defendant Don Clyde had been in the sheep business with his father since he was "big enough to be of any use" (Tr. 53) and took over the active management of the sheep end of the business 35 years ago. (Tr. 53). While part of the property was assessed in the name of either James W. Clyde or Don Clyde and to Thomas Clotworthy estate, the taxes were paid by Clyde or his successors in interest (Stipulation Tr. 72). That part of Section 14 lying south and west of Lake Creek had been assessed to the Clydes alone since 1915 Also since 1915 taxes on the other portion of Section 14 had been assessed to defendant Virgil Jacobsen or his predecessors in interest (Stipulation Tr. 72)

Part of the property was sold by James W. Clyde in the year 1915 to one Heber G. Crook and J. W. Giles Plain-

tiffs Exhibit A, page 14). Between 1915 and 1925, it was mortgaged twice (Plaintiffs' Exhibit A, pages 15, 17). The property was conveyed again in 1925 and was mortgaged the third time (Plaintiffs' Exhibit A, pages 16 and 17). Defendant Virgil Jacobsen bought his land in 1929, by Warranty Deed (Tr. 43) and ever since that time he has had the sole use and possession of it (Tr. 38, 39). Defendant Don Clyde purchased Sections 22 and 23 in the year 1935 and paid valuable consideration for it (Plaintiffs' Exhibit A, page 25, and Tr. 46, 45). He purchased the balance of the property from the heirs of James W. Clyde, deceased in the year 1941 (Plaintiffs' Exhibit A, page 30), for valuable consideration (Tr. 46). For 40 or 45 years it has been used as grazing ground (Tr. 47).

Assuming that the assignment from Sarah M. Clotworthy was invalid, still it serves as "color" of title for defendants to rely upon. Neither of these defendants entered into possession avowedly as tenants in common with others. They and their predecessors in interest treated and utilized the property as theirs alone. James W. Clyde conveyed one-half of Section 14 in 1915, and he conveyed Sections 22 and 23 in 1935. One-half of Section 14 and Section 15 passed through his estate. We submit that every unequivocal act of complete ownership has been exercised by the defendants and their predecessors in interest, and that the facts and circumstances bring this case clearly within the ambit of the rule stated in **McCreedy v. Frederickson**, 41 Utah 388, 126 Pac. 316.

CONCLUSION

Defendants submit that the plaintiffs have failed to show any error whatever on the part of the trial court, and that the appeal should be dismissed and that the respondents should have judgment against the appellants for their costs.

Respectfully submitted,

ALDRICH & BULLOCK,
Attorneys for Defendants
and Respondents