1982

Margaret Dooly Olwell, Jane Dooly Gile, Walker Bank and Trust Company, and William H. Olwell, Trustees of a Testamentary Trust Created For and On Behalf of Bonnie Jane Gile, Eleanor Margaret Olwell, and Carol Jane Olwell, (or Their Heirs as Therein Respectively Named and as Their Interests Appear), Continental Bank and Trust Company, Trustee of A Testa-Mentary Trust Under The Will of John H. Dooly (or Heir or Heirs As Therein Named and As Their Interests Appear), and The Ruth Eleanor Bamberger and Ernest John Bamberger Memorial Foundation, a Charitable Corporation v. Thomas C. Clark, Luther I. Clark, E.

M. Clark, W. T. Gunter, Administrator, or John Doe, Successor Administrator or Representative of the Estate of Russell G. Schulder, Deceased, and Maude L. Schulder, Ann Schulder, Russell Graydon Schulder, His Heirs, and All Other Persons Known or Unknown Claiming An Interest In The Property, The Subject of This Action : Respondents' Brief On Petition For Rehearing

Utah Supreme Court

IN THE SUPREME COURT

STATE OF UTAH

MARGARET DOOLY OLWELL, et al.,	)	
Plaintiffs-Respondents,	)	RESPONDENTS' BRIEF ON PETITION FOR REHEARING
vs.	)	
THOMAS A. CLARK, et al.,	)	Case No. 17595
Defendants-Appellants.	)	

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STATE OF UTAH

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The respondents respectfully petition this Honorable Court for:

I. A rehearing, or that failing:

II. For an amendment of the remand portion of the judgment, to include an order for determination of the amount of contribution for which the appellants should contribute for expense and taxes assessed to the property and paid by the respondents.

In discussing request No. I, respondents seek the indulgence of the Court briefly to review the majority opinion, in the hope they may suggest possible errors in interpretation of the purpose of the adverse possession legislation and authorities cited as applied to the facts of this case, sufficient to entertain a rehearing.

For what it may be worth, it appears that the decision in asserting that the claim here is against a co-tenant, technically is incorrect, since the claim actually is against a tenant in common. There are times when the difference between the two tenancies could, in a given case, lead to divergent results.

The opinion observes that, that except for one instance where a Trust Deed stated it was a transfer of "all" the property, instead of the one-sixth really involved in this case, the remaining documents of transfer dealt only with a one-sixth interest. We confess the error which is subject to reformation, but of no consequence in this case, except one. The error, however, in and of itself, is itself important, since it represented a claim to all of the April claim, not just one-sixth, and having been made in a document that was duly recorded, it was adverse to the one-sixth interest claimed by appellants, and it constituted a "notice" to the world, including the appellants, of an adverse claim in their one-sixth asserted interest. This one circumstance, it is respectfully suggested, renders the position taken in the majority opinion, that there was no evidence of such notice or "bringing the claim of adverse possession home to the Schulders," something short of complete accuracy. The very purpose of the Recording Acts is to impart notice to the record owners of property, of error or other facts appearing on the public record impeaching one's

title. Since the decision is based solely on lack of notice, the judgment of the lower court should be affirmed. This error remained on the public record for years, during which time appellants took no action to attack the claim.

In appellants' First Defense they asserted that respondents' use was not open and notorious but if so, it was with appellants' consent, and not in accord with the adverse possession legislation, - an issue to be tried. The case was tried, and neither the trial court nor the Supreme Court found any merit in the alleged defense. Had there been no finding on the question of notoriety and consent, under the Supreme Court's recent pronouncement in Jones v. Hinkle, Utah, 611 P.2d 733 (1980)[1] appellants clearly are foreclosed from a favorable judgment by failing to present specific evidence by affidavit, or otherwise, though they had full opportunity to do so:

> Pursuant to Rule 56(e), Utah Rules of Civil Procedure, when a motion for summary judgment is made, the affidavit of an adverse party must contain specific evidentiary facts showing that there is a genuine issue for trial. Walker v. Rocky Mountain Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973); Preston v. Lamb, 20 Utah 2d 260, 436 P.2d 1021 (1968). Defendants have failed to identify with specificity any material issue of fact, and plaintiff, as a matter of law, is entitled to conveyance of the title. The judgment of the trial court is in error; indeed, the record shows that plaintiff is entitled to summary judgment in her favor.

As to the Second Defense - that the taxes paid by

1. Also Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624 (1960) and a number of other subsequent cases.

respondents were made by them "voluntarily," such defense is without merit, for several reasons: Those mentioned in the foregoing paragraph for failure of proof by affidavit or otherwise, and also because, in statutory adverse possession cases, whether the taxes are paid voluntarily or not is of no moment.

The appellants' pleading consists of one short document, - an "Answer," - and at most it is a denial without supporting affidavits reciting specific facts creating a triable issue, that if proved, would constitute an affirmative defense.

The facts supporting the trial court's judgment, clearly show that for nearly 70 years, appellants offered no reimbursement of taxes, did nothing to protect the property as had the respondents, nor did they even list the property along with other listed mining property in the inventory of the estate of the Schulder grantee and alleged owner, filed over 40 years ago, and still unlisted, all reflecting an abandonment of their claim with the intention so to do.

Such silence, absence of attention to one's property, and actual neglect in failing to list it as an asset in the estate, together with the universally accepted presumptions as to settling rights by passage of a long period of time, that of establishing certainty of title by presuming a lost grant, abandonment, and others, are as weighty in the scales of equity, as is the spoken word.

All of the above can lead to no conclusion other than some time over a 68 year period, the appellants or one of them had "notice," or "knowledge" of, or "reasonably should have known" of an adverse user, the most likely of which would be a tenant in common, who, if one but looked at the tax roll, would have found Ernest Bamberger or his successors who, by the public record, clearly have been the payors of the taxes during the entire span of 68 years. The trial judge, in entering the judgment now reversed, presumably weighed the evidence, applied appropriate legislation, without any abuse of discretion. Under such circumstances, the Supreme Court many times has said that which universally is axiomatic: That the trial court's findings and judgment will not be reversed except for a clear showing of abuse of discretion. Nowhere in the majority opinion has any such abuse been referenced.

Citation for the principles stated is unnecessary. However, the time-honored and often-quoted case of Stanley v. Stanley, 94 P.2d 465 (Utah 1939) reflects the position of the cases re-stated repeatedly over the years.

Apropos generally of the substantive law relating to what is adequate "notice" necessary in tenancy-in-common cases, is a case cited in the Court's own decision in McCready v. Frederickson, which we espouse, found in 41 Utah 388, 126 P. 316 (1912),[2] which quotes from Elder v. McClaskey, 70 Fed.

2. The appellants rely as heavily on the McCready case, which they consider dispositive here. It is the application of the exhaustive principles restated to the application of the facts of this case, which provoked this action, the lower court's judgment, its appeal, the reversal and now the petition for rehearing.

542, a leading case, as follows:

> It is not necessary for him (tenant) to give actual notice of the ouster. He must, in the language of the authorities, bring it home to his co-tenant. 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 resident 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 decision in this case is not entirely accurate in appraising the very basis upon which it was written, in light of the purpose and wording of Rule 56. The opinion states that:

> The Rule itself sets the criteria for judgment: a party may receive the judgment requested if (a) the pleadings and affidavits, if any show no issue as to any material fact, and (b) the party [sic] is entitled to judgment as a matter of law. . . Where the party opposed to the motion submits no documents in opposition, the moving party may be granted summary judgment only "if appropriate," that is if he is entitled to judgment as a matter of law.

The word "moving," which appears before "party" in the Rule, apparently was omitted by mistake in the above quotation. However, its omission lends a different complexion to the application of the Rule to this case. The "moving" party mentioned in the Rule is Bamberger, who is the beneficiary of the phrase "entitled to judgment as a matter of law." The Rule does not say that the non-movant, in this case Schulder, is "entitled to judgment in his favor as a

matter of law." In other words, the Rule, under such circumstances does not entitle Schulder, no party to the Motion for Summary Judgment, to a judgment quieting title to the property in him.

Such a result, however, appears to be the end-product of the decision which remands the case "for entry of judgment for the appellants." The decision virtually quiets title in Schulder based on facts actually presented by the respondents, not the appellants. The opinion says such facts are insufficient to show title in Bambergers for only one reason, lack of notice, but sufficient to prove title in someone else. It is submitted that on appeal the decision at least should have been against Bambergers but not for Schulders, who filed no counterclaim, offered no proof whatever and even did not ask for any specific property nor did they even describe the property they might claim. It is suggested that if it still be the concensus of a majority that respondents failed in proof, there should be a remand to modify, with instructions to determine and adjudge the amount due from appellants to respondents as contribution for the taxes and expenses made by respondents, in line with the universally accepted principle that equity requires such contribution.

The opinion, as evidenced by the quote above concedes that Rule 56 authorizes judgment in favor of the plaintiffs "if the pleadings and affidavits show no issue as to

any material fact." However, it minimizes the importance of the word "pleadings," which is an equal conjunctive in Rule 56, and accepts nothing in the affidavits as reflective that "notice" was given, or that appellants had "knowledge of," or "reasonably should have known of" the adverse claim. It seems to have ignored the fact that Sec. 78-40-13, U.C.A. requiring a trial in quiet title actions, with the taking of evidence and entering Findings, expressly was employed and its provisions satisfied in this case.

Based upon the facts "pleaded," an examination of the documentary evidence of title introduced, taxes paid, saving the property from forced tax sale, notoriety of ownership and the community, abandonment of claim by the tenant-in-common, and reviewing the memoranda of authorities and hearing the arguments of counsel, the trial court took the matter under advisement. Based on the evidence adduced, complemented by respondents' "Motion for Summary Judgment" and on the Pleadings, the Court entered Findings, Conclusions and Judgment in favor of Bambergers, which, under well known principles, presumptively were correct.

No objection was made to the Findings, or the Conclusions of the Judgment, based on any ground, including insufficiency of the evidence. No Motion to Amend was filed under Rule 52(b), based on that or any other ground, and no Motion for a new Trial was made under Rule 59, based on that or any other ground. Under such circumstances a judgment generally is affirmed on appeal, based on a presumptive cor-

rectness, of the pleadings and record. The decision in this case being bottomed on "lack of notice," and the appeal not stating specifically such issue on appeal, and the opinion being specifically directed to such contentions, appears to have raised it sua sponte, without the solicitation of the losing party.

Parenthetically, a footnote in the opinion suggests that "The determination that respondents' conduct constituted adverse possession with adequate notice is not a finding of fact but a conclusion of law." Respondents respectfully suggest this is a matter of debate, since "conduct" is an important and necessary fact in order to prove adverse possession, as is the seven-year period, payment of the taxes, etc. The adverse possession statutes primarily are based on proof of such facts, and in large part treat "presumptions" as fact, as does the majority opinion, which states:

> Sec. 78-12-7 is Utah's adverse possession statute, setting forth the preposition that possession of real property is presumed to be in the legal title holder and that occupancy by any other is deemed subordinate. . . unless the occupant can show that the property is held and possessed for seven years.

The above statement appears to have been made in support of Schulder, as title holder. The knife cuts both ways, however, since Bamberger also is a title holder, to which the presumption applies. He, however, has the better side of the presumption and merit, by proof of active occupancy, - which Schulder has never claimed or asserted by

pleaded fact, counter-affidavit or otherwise.

Since the opinion bases its decision on actual notice, citing the case it relies on primarily,[4] that says notice must be given to a tenant-in-common by acts (conduct) of the "most open and notorious" character, it is only fair that the rest of the paragraph from which the phrase is listed should be referred to, which reflects the real gist of the requirement, especially as to property rights in unpopulated areas and asserted over a long period of time, to the effect that:

> "It is not necessary for him to give actual notice of this ouster of 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 anyone, who has an interest in the property, and exercises that degree of attention, in respect to what is his that the law presumes in everyone."

We earnestly contend that upon the trial and under Rule 56, the facts pleaded, presented at trial and shown by affidavits, depositions and appellants' admissions, fully justified the judgment entered by the trial court. In aid of such contention, it is pointed out that:

The pleading (complaint) asserted that a) the Respondents occupied, and claimed the property adversely for more than a half century; b) paid the taxes for the required statutory time; and that appellants did not assert, but

4. McCready v. Frederickson, supra, quoting Elder v. McClaskey.

abandoned any claim to the land (by filing no claim thereto in the tenant-in-common's Estate.)

The maps (Ex. P-11) show that the Silver Queen claim abuts the April claim, but that it was excluded by the Patent (Ex. P-4); that it is owned by United Park City Mines, whose Secretary-Treasurer, Mr. Osika, employed for 35 years, by the United Park City Mines, gave his deposition (Ex. P-2), introduced in evidence, without objection, and by affidavit attached to the pleadings, without objection, and testified that since the Eighties, Ernest Bamberger "laid claim to these properties (Several, including the April) over that period of time: and that "most of these claims had a monument of sorts . . . which pretty well disappeared," that he noticed there had been a road that bisected the April, which is used occasionally, and that the area is pretty much the same as it was 50 or 60 years ago and that he has never heard of anyone else making claim to the property; that his employer, United Park had stipulated, as owners, of the Silver Queen, with respondents, as owners, of the April, settling their boundaries and that he and the other officials of the Company considered and treated the Bambergers as sole owners of the abutting April claim.

Mr. Dixon signed an affidavit which was introduced in evidence without objection or counter-affidavit, who testified he had been an employee of Bambergers over twenty years as Controller and would be the person who would receive claims of interest in the subject property; that he had received

none; that Ernest Bamberger claimed the property shown on the tax notices as his own, sole property.

An affidavit was executed and filed without objection, by William H. Olwell, Secretary Treasurer of the respondent Bamberger charitable Foundation in which, under oath, he stated that as such Secretary and also as co-executor of Ernest Bamberger's widow's Estate, and representative of the heirs, he knew the taxes were paid by respondents since 1958, and that he has been approached by a number of prospective purchasers in the area, as sole representation of the respondents, as sole owners of the property, without recognizing any other claimant to the property.

A letter from Ernest Bamberger's accountant to the Summit County Treasurer, was attached to the complaint, resisting a Tax Notice to the effect that the April had been sold for taxes, followed by a hearing before the County Commission, who vacated the sale and thus preserved the property solely for Ernest Bamberger.

The tax notices (Ex. P) show payment of all taxes since 1912, except for the year 1942, when it was necessary for Bamberger's accountant to appear before the County Commissioners, who at an open meeting, whose minutes were recorded and constituted notice of Mr. Bamberger's claim to the property entered an order crediting him with payment of the taxes for 1942 and vacating the sale of the property theretofore made.

Under such circumstances, it is urged that the Schulders' "had notice," or "knowledge of" or "reasonably should have known" of the adverse claim, under the cases cited in the majority opinion itself, which recognizes that actual notice is not an absolute, nor an unconditional necessity to acquire title by adverse possession against a tenant-in-common, - which was the type of tenancy considered in such cases. The case most relied on by the opinion which concedes that actual notice is unnecessary, is Mc Cready v. Frederickson, followed by Clotworthy v. Clyde, Herselt v. Herselt and Bergstrom v. Bergstrom.

The evidence in the case, coupled with the presumptions having the stature of evidence, found in the various adverse possession statutes, such as that mentioned in the opinion, Sec. 78-12-7, and in 78-12-9, where adverse possession is deemed to have been possessed based on any one of four "facts." Also, in Sec. 78-12-10, where adverse holding is deemed on possession exclusive of other rights, and other presumptions recognized by the opinion as stated in McCready, together with the well known presumptions as to title by passage of time as in titles by prescription, by lost grant, and the like, appear fully to justify the trial court's judgment in this case.

II

The respondents, in requesting a remand with instruc-

tions to determine the matter of entitlement by way of contribution in tenancy-in-common cases, for payment of taxes and expenses innuring to the benefit of and chargeable on a pro-rata basis assessable against all the tenants it would appear, that if no one of the concurring members of the Court is disposed to review the Record again on appeal, as to the facts and the law, it should follow as a matter of course, that the case should be returned for such determination as to the equities between the tenant parties, since this is a case in equity.

In the case relied on mostly by the majority opinion, Mc Cready v. Frederickson, this right of contribution should be litigated in this case. There it was said that:

> "We think the court has power to make a decree quieting title . . . conditionally. That is, the court may quiet title upon condition that he pay into court, within a time to be fixed by it, his proportion of the taxes and accrued interest and such other sums as the court may find he should pay under the law. . . In case appellant shall pay the taxes and accrued interest thereon, together with any other sums that the court may find legal and just, the title to (appellants') interest in said premises should be quieted in him."

This right of contribution is acknowledged also in Herselt v. Herselt, cited in the majority opinion, and also Sperry v. Tolley, where on one tenant's payment of taxes, the Court said:

> "He acquires no other or greater interest, except that he has a claim upon the others for reimbursement according to their respective shares."

Under such circumstances the remand "for entry of judgment for the appellants" should be changed to provide "for determining the amount of contribution, plus accrued interest thereon and upon payment thereof, to enter judgment quieting title to appellants' claim of interest," - as substantially was stated in McCready v. Frederickson.

Respectfully submitted this _____ day of December, 1982.

_____
CLIFFORD L. ASHTON
Attorney for Plaintiffs-Respondents.