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Minnie Pearl Dalton v. Max Dalton et al : Brief of Appellant

Utah Supreme Court

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Raymond R. Brady; Dean E. Flanders; Counsel for Appellants;

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In the
Supreme Court of the State of Utah

FILED

DEC 18 1956

MINNIE PEARL DALTON, as Ad-
ministratrix of the Estate of James
F. Dalton, deceased, and MINNIE
PEARL DALTON,

Plaintiff and Appellant,

vs.

MAX DALTON, et al.,

Defendants and Respondents.

Clerk, Supreme Court, Utah

Case No.
8568

BRIEF OF APPELLANT

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In the
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BRIEF OF APPELLANT

STATEMENT OF FACTS

A. PRELIMINARY STATEMENT

The parties will be referred to as in the Court below.
All italics are ours.

B. THE FACTS

In this case the plaintiff filed an action to quiet title
to the following described real property in San Juan County,
State of Utah:

“The West half of the Northeast quarter, the
Southeast Quarter of the Northwest quarter and

the Northeast quarter of the Southwest quarter of Section Twenty-six in Township Thirty-six South of Range Twenty-four East, Salt Lake Meridian, Utah, containing 160 acres.

“Together with all improvements and appurtenances thereunto belonging.”

The defendants Max Dalton and Nell Dalton filed an answer denying the ownership by the plaintiffs and alleged that they are the owners of said real property subject only to a mortgage to the Mutual Life Insurance Company of New York (R. 7). The plaintiff Minnie Pearl Dalton, as the administratrix of the estate of James F. Dalton and in her personal capacity, claims title to the property by virtue of a patent from the United States Government issued on the 29th day of November, 1927 (Def. Ex. 5, p. 10).

The defendants Max Dalton and Nell Dalton, his wife, claimed title from a chain of title derived from Daniel Perkins, and that the said James F. Dalton and Minnie Pearl Dalton conveyed their interest in said property to Daniel Perkins by warranty deed dated October 27, 1930 (Def. Ex. 1).

The plaintiff denies that the said warranty deed (Def. Ex. 1) was ever executed by the said James F. Dalton and Minnie Pearl Dalton, and that the property was ever conveyed to Daniel Perkins by said warranty deed.

The defendants Max Dalton and his wife Nell Dalton offered evidence as part of their affirmative defense that they were the fee owners of the property, that the plaintiff Minnie Pearl Dalton and James F. Dalton, deceased, exe-

cuted a warranty deed (Def. Ex. 1) to Daniel Perkins, and that at the time of the execution of the deed an escrow agreement was signed and the deed placed with the San Juan State Bank, Monticello, Utah, in escrow (Def. Ex. 2), and that they derived the title to the property described in plaintiff's complaint by a chain of title from Daniel Perkins to the said Max Dalton and Nell Dalton, his wife, defendants.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE COURT'S FINDING THAT THE DECEASED JAMES F. DALTON AND HIS WIFE MINNIE PEARL DALTON EXECUTED THE WARRANTY DEED DATED OCTOBER 27, 1930 (DEF. EX. 1), TO DANIEL PERKINS.

POINT II.

THE COURT ERRED IN FINDING THAT THE ESCROW AGREEMENT (DEF. EX. 2) HAD BEEN COMPLIED WITH, AND THE WARRANTY DEED DATED OCTOBER 27, 1930 AND ALLEGEDLY EXECUTED BY JAMES F. DALTON AND MINNIE PEARL DALTON, GRANTORS, AND LEFT IN ESCROW WITH THE SAN JUAN STATE BANK HAD BEEN VALIDLY DELIVERED.

POINT III.

THAT THE COURT ERRED IN FINDING THAT THE DEFENDANT MAX DALTON HAD ACQUIRED TITLE TO THE PROPERTY BY VIRTUE OF ADVERSE POSSESSION.

ARGUMENT

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE COURT'S FINDING THAT THE DECEASED JAMES F. DALTON AND HIS WIFE MINNIE PEARL DALTON EXECUTED THE WARRANTY DEED DATED OCTOBER 27, 1930 (DEF. EX. 1), TO DANIEL PERKINS.

Plaintiff contends that the evidence is insufficient to support the court's finding that James F. Dalton and Minnie Pearl Dalton signed and executed the purported warranty deed dated October 27, 1930 (Def. Ex. 1).

The deed purports to have been executed on the 27th day of October, 1930 (Def. Ex. 1). The instrument purports to bear the signatures of both James F. Dalton, deceased, and Minnie Pearl Dalton, his wife. The preponderance of the evidence in this case establishes that the deed was never executed by Mr. and Mrs. Dalton.

The defendants produced an alleged deed which purports to have been signed by both Mr. and Mrs. James F. Dalton October 27, 1930, *and the deed first appears and*

was recorded November 5, 1948, by the defendants, *eighteen years after its execution*. The deed itself recites that the grantors were residents of Cortes, County of Montezuma, Colorado, and was signed on the 27th day of October, 1930, but was acknowledged on the 28th day of October, 1930 by Frank Halls, Notary Public, residing in Monticello, San Juan County, Utah.

Frank Halls, the Notary Public who acknowledged the said deed, called as a witness, testified that the deed was not prepared by him, but was prepared before it was presented to him for his acknowledgement (Trans. 33). Mr. Halls further testified (Trans. 30-31) :

“Q. Mr. Halls, was that document signed in your presence as a Notary Public?

“A. Well, I would say so, yes.

“Q. Were you acquainted with James F. Dalton’s signature aside from this notarized signature?

“A. Yes, acquainted with James F. Not Minnie Pearl.

“Q. Would you say this was James F. Dalton’s signature?

“A. Yes.

“Q. Would you say that was Minnie Pearl Dalton’s signature?

“A. I would say so if I acknowledged it, yes.”

Mr. Halls further testified he was sure that the signature of James F. Dalton in Defendant’s Exhibit 1 was Mr. Dalton’s signature, but he was not sure it was Mrs. Dalton’s signature (Trans. 32) :

“Q. Now, just a moment, please. Answer the question. Why are you so sure it was the Daltons?

“A. *I am not sure it was her signature*. I am sure it was Dalton’s, all right.”

Mr. Halls further testified (Trans. 32) :

“Q. Did you see Mrs. Dalton any time in 1930?

“A. I don’t know now. I can’t go back years. Dalton worked for me one year down there on my farm.

“Q. You specifically remember that Mrs. Dalton came in and signed a paper before you?

“A. No.

“Q. Do you specifically remember that Mrs. Dalton came in and signed this paper before you?

“A. No.

“Q. You wouldn’t swear that she came before you and signed this paper?

“A. *No, I don’t remember the circumstances at all.*”

The witness frankly admitted he did not remember the circumstances, but the witness was sure the deed bore the signature of Mr. Dalton, but he was not sure that it was the signature of Mrs. Dalton. Now, Mr. Halls was permitted to testify over the objection of plaintiff’s counsel that it was his practice to have the people present before him before he would take their acknowledgements and therefore she must have appeared before him; and it is on this testimony alone that the court based its findings that Mrs. Dalton signed the deed.

The testimony of Mr. Halls, which was elicited by his counsel in redirect examination over the objection of plaintiff’s counsel that it was his custom to have people personally present at the time he acknowledged an instrument

should be given very little credence, because of the testimony of Mr. Halls in his direct examination (Trans. 32) :

“Q. Do you specifically remember that Mrs. Dalton came in and signed this paper before you?

“A. No.

“Q. You wouldn’t swear that she came before you and signed this paper?

“A. No, I don’t remember the circumstances at all.”

Now, if it were a fact that it had been the practice of Mr. Halls not to acknowledge a paper unless the persons were present and there had never been any departures from this practice, the witness would not have so testified. If it were in fact his practice to have every person present before he acknowledged the instrument and he had never departed from that practice, there would have been no hesitation in swearing that Mrs. Dalton had appeared before him and signed the purported deed (Def. Ex. 1), but he was not sure and he would not swear under oath that she appeared before him and executed the purported deed (Def. Ex. 1).

That Mrs. Minnie Pearl Dalton never appeared before the Notary Public Halls and executed said purported warranty deed (Def. Ex. 1) is supported by the preponderance of the testimony. The instrument itself recites that the grantors were residents of Cortes, Montezuma County, Colorado. There is no evidence that James F. Dalton and Minnie Pearl Dalton ever lived in Cortes, Montezuma County, Colorado.

We wish to bring to the attention of this court that Defendants' Exhibit 2, purporting to be a copy of a letter addressed to the State Bank of San Juan, Monticello, Utah, refers to a purported written agreement by and between the said James F. Dalton and George W. Perkins, Hyrum C. Perkins, and Daniel Perkins, all of Blanding, Utah, dated the 27th day of October, 1930. The letter reads in part as follows:

"I hand you herewith a deed to said property under the terms of which the same is transferred to Daniel Perkins, one of said co-partners, and you are instructed the same is transferred to Daniel Perkins upon payment to me of the balance due on said contract according to its terms, or to return the same to me if default is made in making such payments or any of them."

The terms are then set out.

This exhibit of the defendants recites on its face that the deed (Def. Ex. 1) was delivered to and accepted by the bank on the 27th day of October, 1927. The following day, October 28, the deed was acknowledged by Mr. Halls. *The signatures were on the deed before the deed was presented to Mr. Halls for acknowledgement.* Yet Mr. Halls testified under oath that the document was signed in his presence as a Notary Public (Trans. 30):

"Q. Now, Mr. Halls, I am going to hand you what is marked for identification 'Defendant's Exhibit 1,' and ask you if you can identify your signature on that document.

"A. Yes.

"Q. Mr. Halls, *was that document signed in your presence as a Notary Public?*

"A. Well, I would say so, yes.

"Q. Were you acquainted with James F. Dalton's signature aside from this notarized signature?

"A. Yes, acquainted with James F. Not Minnie Pearl.

"Q. Would you say that this is James F. Dalton's signature?

"A. Yes.

"Q. Would you say that is Minnie Pearl Dalton's signature?

"A. I would say so if I acknowledged it, yes."

It is quite apparent that the witness did not identify the signature by reason of the fact that she appeared before him and signed the deed, but from his memory of James F. Dalton's signature, which he had been familiar with many years previous.

Defendants' Exhibit 2 shows on its face that deed was executed and signed on the 17th day of October, 1930 and delivered by Mr. Dalton to the bank in escrow. At the time of the delivery of the deed to the bank to be held in escrow the signatures of James F. Dalton and Minnie Pearl Dalton must have been put on the deed at that time. Now if Mr. and Mrs. Dalton were in the bank at the time the deed was signed and delivered to the bank to be held in escrow, it seems almost incredible that the bank did not require them to acknowledge the deed before it was received by the bank in escrow, which most certainly is the practice of every bank. Every fact and circumstance in this transaction seems to indicate that even if the deed was signed by Mr. Dalton, Mrs. Dalton did not sign this purported deed. Defendants' Exhibit 2 purports to have type-

written on the bottom of said instrument, under the signature of James F. Dalton, the purported original agreement to sell the property, and the instrument does not purport to be signed by Mrs. Minnie Pearl Dalton, so that it is undisputed that Mrs. Minnie Pearl Dalton never at any time signed any agreement to sell this property to Daniel Perkins. Now there is an escrow agreement appearing over the signature of James F. Dalton which recites that "I hand you herewith a deed," etc., signed only by James F. Dalton and it is not purported to bear the signature of Minnie Pearl Dalton. It seems only reasonable to assume that if Mrs. Dalton was actually in Monticello on the 27th day of October, 1930, the day they claim she signed the said deed, and was present when the deed was signed, it seems almost incredible that the bank and Mr. Perkins would not have requested her to sign the escrow agreement also, at the same time she signed the deed and the deed was delivered to the bank. Mrs. Dalton testified that she never at any time signed the said deed (Trans. 105).

Riley Dalton, a son of Minnie Pearl Dalton, called as a witness, testified (Trans. 74) :

"Q. Calling your attention to about the 27th day of October, 1920, do you know where you were living?

"A. Living at Declo, Idaho.

"Q. Where did you live previous to that?

"A. We lived in Montezuma Canyon?

"Q. Is that in Utah?

"A. That is in San Juan County.

"Q. San Juan County. And when did you live there?

"A. In 1927.

“Q. And you lived where in Idaho?

“A. Declo, Idaho.

“Q. How long did you live up there?

“A. From about '27 to '31.

“Q. '31?

“A. 1931.

“Q. 1931?

“A. Yes.

“Q. Now, was your father and mother—do you recall them leaving Idaho at any time?

“A. No, sir.

“Q. Was it their custom to leave you alone and go places?

“A. No, sir.

“Q. Did they ever?

“A. No, sir.

“Q. Did they leave Idaho for any purpose or for any place, to go any place about 1930?

“A. No, sir.

“Q. During the year 1920?

“A. No, sir.

“Q. Now, how can you remember that?

“A. My birthday is the 18th day of October, I was nine years and ten days old when that deed was supposed to be executed. We had the measles on my birthday.

“Q. You had the measles on your birthday?

“A. Yes, sir.

“Q. And you say your father and mother were both there?

“A. My father and mother was both there.

“Q. That is in the month of October of 19 when?

“A. 1930.

“Q. 1930?

“A. Yes.

“Q. Now did you—you came from Idaho in about 1931, is that true?

“A. Yes, sir.”

Belva Isabel Conrad, a daughter of the plaintiff Minnie Pearl Dalton, testified (Trans. 86) :

“Q. Now, calling your attention to the 27th day of October, 1930, do you know where you were living?

“A. Yes, sir.

“Q. Where were you living?

“A. I was living at Declo, Idaho.

“Q. Declo, Idaho. Whom were you living with?

“A. My mother.

“Q. Your mother is Mrs. Minnie Pearl Dalton?

“A. Yes, sir.

“Q. Now, why were you living with your mother at that time?

“A. Because I had a young son, a young baby.

“Q. And when was that baby born?

“A. The 11th day of July, 1930.

“Q. The 11th day of July, 1930?

“Q. I show you what has been marked for identification Plaintiff's Proposed Exhibit 2. Is that the birth certificate of your son?

“A. That is the birth certificate of my son, Roy W. Knudsen.

"Q. And he was born on the 11th day of July, 1930 in Declo, Idaho?

"A. Yes, sir.

Belva Catherine Oliver, a daughter of Mrs. James F. Dalton, testified (Trans. 91) :

"Q. And James Franklin Dalton. Calling your attention to the 27th day of October, 1930, where were you living?

"A. I was living with my mother and father at Declo, Idaho.

"Q. How long did you live there, for a considerable time both before and after that?

"A. Yes.

"Q. What makes you remember that you were there specifically on the 27th of November—(October) ?

"A. Well, I had a love affair, I thought I was in love with a young gentleman at that time. His name was George King. And my brothers and mother all had the measles except I.

"Q. Now, was it the practice of your father and mother to leave you and go away for a day or two at a time?

"A. No sir.

"Q. They never did at any time?

"A. Never.

"Q. Particularly around the first to the 27th of October, 1930, did they leave you?

"A. Neither my mother nor dad could never leave us at that time.

"Q. Do you ever remember a time that they went and left you for a day at a time?

"A. No.

“Q. Did they have a car?

“A. Well, we had part of one.”

We submit that the evidence in this record clearly establishes that Mr. and Mrs. James F. Dalton never executed the warranty deed (Def. Ex. 1), and particularly Mrs. James F. Dalton. The evidence is entirely insufficient to sustain the court's finding that James F. Dalton and Minnie Pearl Dalton executed the said warranty deed, and most certainly is insufficient to support the finding that Mrs. Minnie Pearl Dalton ever signed and executed the said warranty deed (Def. Ex. 1), through which deed defendants claim a chain of title to the property.

POINT II.

THE COURT ERRED IN FINDING THAT THE ESCROW AGREEMENT (DEF. EX. 2) HAD BEEN COMPLIED WITH, AND THE WARRANTY DEED DATED OCTOBER 27, 1930 AND ALLEGEDLY EXECUTED BY JAMES F. DALTON AND MINNIE PEARL DALTON, GRANTORS, AND LEFT IN ESCROW WITH THE SAN JUAN STATE BANK HAD BEEN VALIDLY DELIVERED.

Defendants' Exhibit 2, which purports to be an escrow agreement executed by James F. Dalton and the San Juan State Bank, which escrow agreement was offered in evidence by the defendant Max Dalton himself, conclusively proves that if James F. Dalton and Minnie Pearl Dalton

in fact executed the warranty deed (Def. Ex. 1) to Daniel Perkins on the 27th day of October, 1930, the deed was placed in the San Juan State Bank in escrow with instructions that the deed be delivered to Daniel Perkins upon the performancy by Daniel Perkins of the conditions of the agreement. There is absolutely no evidence in the record that the conditions of the escrow agreement were ever performed by Daniel Perkins or any of the Perkins brothers.

By the great weight of authority, where a deed has been executed by the grantors and delivered by the grantors to an escrow agent, the title to the property does not vest in the grantee until all the terms and conditions of the escrow agreement have been complied with. The rule is stated in 30 C. J. S. page 1216:

“It is frequently or broadly stated that the escrow takes effect as a fully executed instrument at the time it is rightfully delivered by the depository to the grantee, obligee, or payee. However it is held that an actual manual delivery of an escrow is not necessary to vest the title; that a constructive delivery may be sufficient and the instrument takes effect the moment the conditions have been performed or the event happens upon which grantee or obligee is entitled to possession.”

In the case of *Shelton vs. Stagg*, (169 S. W. 2nd 550) the court said:

“The law is well settled in this state and in the state of Wisconsin, as well as practically every other jurisdiction in the country, that where an instrument is placed in escrow it cannot become operative until the conditions under which it was deposited

have been complied with or the contingency agreed upon has happened."

In *Bell vs. Rudd*, (191 S. W. 2nd 289) the court held:

"It is elementary that before a grantee or obligee can assert any rights under an escrow contract, he must show that he has complied with the escrow."

In *Mississippi Highway Commission vs. Anderson*, (184 Southern 450) the court said:

"Where a deed is given to a third person to be delivered as operative only upon the performance of specific acts by the grantee, there is no delivery that will place title until the specific acts have been performed as specified."

The rule is also stated in 19 A. M. J. 437:

"When an instrument has been deposited in escrow to be delivered to a designated person upon the performance of a certain condition or the happening of a certain event, it is the well-established general rule that the performance of the stipulated conditions or the happening of the event is essential in order to entitle the beneficiary to a delivery of the instrument, although in some instances by fiction of law and in the furtherance of justice it is allowed to take effect from the first delivery."

There is not one word of evidence in this record that the money was paid and the conditions of the escrow agreement performed, while Mrs. Dalton testified that no payments had ever been made to them under the terms of any agreement (Trans. 104). There is absolutely no evidence that the deed was ever delivered by the escrow agent, the

San Juan State Bank, to Daniel Perkins, the grantee named in the deed, or to any of the Perkins brothers mentioned in the escrow agreement.

In order for the deed to be operative to convey the title to the property to the grantee, there must be a delivery of the deed to the grantee and until the delivery was made the title did not pass.

Now it may be conceded that possession of a deed by the grantee creates a presumption that the deed was delivered to the grantee, but this is only a presumption and may be rebutted (*Stanley vs. Stanley*, 94 P. 2nd 465). But this general rule that the possession of a deed by the grantee creates a presumption that the deed was delivered does not apply where a deed has been executed and placed in the hands of an escrow agent for delivery to the grantee upon performance by the grantee of the conditions of the escrow (16 A. M. J. 654).

“The fact that a conveyance is found in the possession of a grantee does not give rise to the presumption of its delivery where the evidence shows that such conveyance, though signed by the grantor, was given to a depository with instructions respecting it which as a matter of law show that the grantor did not part with the right to recall it in his lifetime.”

There is not one word of evidence in this record that the warranty deed (Def. Ex. 1) alleged to have been executed by Mr. and Mrs. James F. Dalton, was ever in the possession of the grantee, Daniel Perkins, or any one of the Perkins brothers mentioned in the escrow agreement.

All the evidence shows is that eighteen years after the deed was executed it was found in the hands of Donald Adams. There is absolutely no evidence in the record to show how Donald Adams came into possession of the deed, from whom he obtained it, for whom he was holding it, or in what capacity he obtained and was holding the deed.

Max Dalton testified (Trans. 40):

“Q. When did you first see the deed marked Exhibit 1?

“A. When I had Don making up these quit-claim deeds from Perkins.

“Q. That is Donald Adams?

“A. Donald Adams, and he had his quit-claim deed.

“Q. The deeds from what Perkins?

“A. Mrs. Hyrum C. Perkins and her children.

“Q. Then what?

“A. He said, ‘*I have the other deed,*’ and we got it, looked at it and noticed it wasn’t recorded, and we took them both over and recorded them at the same time.”

It will be noticed that this discovery of the alleged deed, executed by Mr. and Mrs. Dalton and placed in escrow, first appears in the possession of Donald Adams, in 1948, eighteen years after it was placed in escrow, without any explanation as to how or from whom he received the deed. There is no evidence in the record that Donald Adams was holding the deed as a part of the papers of the H. C. Perkins estate except the statement of the defendant Max Dalton that Donald Adams had been the attorney for the H. C.

Perkins estate (Trans. 41); and as far as this record is concerned, in 1948, when this deed was found in the office of Donald Adams, it was found in the possession of a perfect stranger to the title; and there is no evidence that the deed (Def. Ex. 1) was ever delivered by the escrow agent to Daniel Perkins, grantee, or to any of the Perkins brothers. We submit that if the warranty deed (Def. Ex. 1) was placed in escrow, it was incumbent upon the defendants to prove that the terms of the escrow had been performed and that the deed had been delivered by the escrow agent to Daniel Perkins, the grantee, or to some one of the Perkins brothers mentioned in the escrow agreement (Def. Ex. 2).

We agree that the law is well settled that in a case, where there is no escrow agreement involved, the possession of the deed by the grantee creates a prima facie presumption that the deed was delivered to the grantee, but no such presumption prevails where the deed executed by the grantor is placed in the hands of a stranger to be delivered to the grantee. In the case of *Lewis vs. Tinsley*, (124 A. L. R. 459) the court said:

“While it is natural and reasonable to presume from the possession of a deed that the title was delivered to the grantee by the grantor, and that the grantor intended to convey title, the fact here compels the question of whether this presumption of delivery which arises from the possession of the deed, should remain after it is shown that the deed was not placed in the possession of the grantee by the grantor but came to the grantee by the hands of a third person. The fact here is clear that the deed came into possession of Bert through the hands of

Mr. Buel, as stated above, the natural presumption is that if a person has possession of a deed in which he is named the grantee, that he obtained such possession from the grantor, who, when he placed the grantee in possession of the deed, intended to convey title. Would this presumption continue when it is shown that the deed was not placed in possession of the grantee by the grantor, but came to his possession by some third person? It appears to us that when this fact (delivery by some person other than the grantor) is shown, that the underlying reason which justifies the presumption has ceased to exist."

In *Huber vs. Williams*, (170 N. E. 195) the Illinois court held that if the deed is in possession of a third person at the grantor's death, that the grantee has the burden of proving delivery. In *Evans vs. Taylor*, (182 N. E. 809) the court held that the unexplained possession of a deed by a third party after the grantor's death raises no presumption of delivery and if custody of deed by any other person in whose possession it was left by the grantor was intended for grantee, it was incumbent upon the one claiming under deed to prove the delivery. In *Eddy vs. Pender*, (159 Atlantic 727) it is held that possession of the deed acquired after grantor's death rebuts the presumption of delivery from possession of the instrument by the grantee. In *Smith vs. Peltz*, (51 N. E. 2nd 534) the Illinois court held that where possession of a deed is received by grantee after the death of grantor, there is no presumption of delivery, the facts constitute a prima facie case against a valid delivery.

In the case of *Lewis vs. Tinsley*, (124 A. L. R. 459) the court said:

"The presumption of delivery of a deed shown to be in possession of the grantee is overcome when

it appears that it came to the grantee through the hands of a third person, as the presumption itself is that the deed was delivered by the grantor to the grantee.

“The facts and circumstances attending the transaction must be such as to show that the grantor intended the deed to be delivered by the custodian to the grantee. The delivery to a third person raises no such presumption as that such delivery is for the use of the grantee, and it is incumbent on those claiming under the deed to make proof of the fact.”

In the case at bar the evidence shows that the deed purported to have been executed by James F. Dalton and Minnie Pearl Dalton (Def. Ex. 1) was executed on the 27th day of October, 1930 and placed with the San Juan State Bank in escrow. There is no evidence of payment for the property in accordance with the terms of the escrow agreement, but Mrs. Dalton testified that there had never been any money paid to them under the terms of said agreement (Trans. 104). In 1948, Kisten Perkins, the widow of Hyrum C. Perkins, deceased, Dorothy P. Jones, Beverly P. Alexander, Calvin J. Perkins, Richard C. Perkins, and Margaret P. Tennity, the heirs at law of Hyrum C. Perkins, conveyed the property in question by quit-claim deed to the defendant, Max Dalton. At the time of this conveyance, Donald Adams was making up this quit-claim deed. *Donald Adams, at that time attorney for the defendant Max Dalton*, told the defendant Max Dalton that he had the other deed. This was eighteen years after the deed was executed and three years after the death of James F. Dalton that the deed first appeared unrecorded in the office of Donald Adams, without any evidence as to from who he received possession of the

deed. Can a court assume from a mere statement of the defendant Max Dalton that the deed was in the office of Donald Adams and that Donald Adams had six years earlier probated the estate of Hyrum C. Perkins, that the escrow agreement had been completed and the deed delivered to Hyrum C. Perkins, and that the deed was a part of the H. C. Perkins estate? We think not.

H. C. Perkins died October 31, 1939, and letters of administration were issued on November 28, 1939, and the final distribution of the estate was made and the proceedings closed on the 21st day of April, 1942 (Def. Ex. 5, p. 13-14) and that the estate of H. C. Perkins had been closed six years before the deed was found in the possession of Donald Adams without any evidence to show when he came into possession of the deed or how he came into possession of the deed or from whom he obtained it. Certainly the mere fact that the deed appeared in Donald Adams' office six years after the probate proceedings had been closed would not justify the court in concluding that it was a part of the H. C. Perkins estate papers and had been delivered to H. C. Perkins during his lifetime.

It seems almost incredible that if the terms of the escrow agreement had actually been complied with and the deed actually delivered by the bank to H. C. Perkins during the lifetime of the grantor, and the deed was a part of the papers of the H. C. Perkins estate, that Donald Adams, as attorney for the estate, would not have recorded the deed at least sometime during the process of the administration of the estate. But eighteen years after the execution of the deed and six years after the estate of H. C. Perkins was

closed, the deed first appears in the possession of Donald Adams as a perfect stranger to the title. The defendant Max Dalton testified (Trans. 38) :

“Q. How long have you had control of the property?

“A. I bought it from the H. C. Perkins estate in 1941.

“Q. What did you pay for the property?

“A. \$500.00, as I remember.”

The abstract of title shows that he did not buy the property from the H. C. Perkins estate, because the property was distributed to the heirs of the H. C. Perkins estate in April, 1942. Six years after the estate of H. C. Perkins was closed the defendant took from the heirs of the H. C. Perkins estate a quit-claim deed when the heirs had a good and marketable title, as shown by the abstract of title (Def. Ex. 5). If there had been a compliance with the terms of the escrow agreement and the deed had actually been delivered to H. C. Perkins during his lifetime and it was a part of the papers of the H. C. Perkins estate, it seems incredible that Donald Adams would have advised the defendant Max Dalton, then his client, to take only a quit-claim deed to the property (Trans. 43).

“Q. Then of course Kisten gave you the deed?

“A. Yes.

“Q. Why didn't you ask for a warranty deed? You had paid \$500.00 for only a quit-claim deed?

“A. *Under advice of Donald Adams.*”

Under the advice of Donald Adams, the defendant Max Dalton took only a quit-claim deed. It seems almost incredible that if the terms of the escrow agreement had been complied with and the delivery of the deed made to H. C. Perkins and the deed was actually a part of the H. C. Perkins estate, that Donald Adams would not have recorded the deed sometime during the process of probating the estate of H. C. Perkins, and there would have been no hesitancy on the part of Donald Adams to advise the heirs of H. C. Perkins to give the defendant Max Dalton a warranty deed instead of a quit-claim deed to the property in October, 1948. We have in this case the unique situation where a deed executed in 1930 and placed with an escrow agent, and 18 years after its execution and three years after the death of James F. Dalton, and six years after the H. C. Perkins estate had been distributed and closed, the deed first appears in the hands of Donald Adams, one of the attorneys in this action, unrecorded, without any evidence whatsoever explaining how or when he obtained possession of the deed. We submit that under the facts in this record justice would require the defendant Max Dalton to prove by competent evidence that there had been in fact a delivery of the deed and that Donald Adams was holding the deed as a part of the papers of the H. C. Perkins estate and not as a perfect stranger to the title, before any presumption could possibly arise that the escrow agreement had been complied with and that there had been a delivery by the bank to H. C. Perkins in accordance with the escrow agreement. We submit that the facts in this record overcome any presumption of a delivery of the deed by the

escrow agent that might prevail, because of the deed being found in the hands of Donald Adams.

If Donald Adams was the attorney for the H. C. Perkins estate and the deed (Def. Ex. 1) was found among the papers of the H. C. Perkins estate, evidence of payment would also have been with the deed among the papers of H. C. Perkins, if payment had in fact been made. Before the trial of this case the plaintiff submitted interrogatories for answer by the defendant Max Dalton (R. 9):

“Interrogatory No. 5: If such an agreement was entered into and a deed executed on or about June 1, 1927, were they placed in escrow? If so, when?

“Answer: *We do not know.*”

Since these answers were prepared by Donald Adams, defendant's attorney, it certainly can be presumed that neither Donald Adams or the defendant Max Dalton had defendants' Exhibit 2 in their possession at that time, because the letter itself (Def. Ex. 2) was addressed to the bank and recites “I hand you herewith a deed,” etc.

“Interrogatory No. 7: If there was such an agreement, was payment made according to the terms of the agreement?

“Answer: *We do not know.*”

Since Donald Adams had possession of the papers of the H. C. Perkins estate, if payment had been made he should have had the evidence of payment; but the defendant answered that he did not know whether payment had been made or not.

We submit that the evidence in this record does not show that warranty deed (Def. Ex. 1) was ever in the possession of Daniel Perkins or any of the Perkins brothers mentioned in the escrow agreement, but that the deed was found in the office of Donald Adams, a perfect stranger to the title, and that the burden of proof was upon the defendants to at least show by evidence that there had been a valid delivery of the deed by the escrow agent, and to whom the delivery was made. The defendants did not assume this burden.

POINT III.

THAT THE COURT ERRED IN FINDING
THAT THE DEFENDANT MAX DALTON HAD
ACQUIRED TITLE TO THE PROPERTY BY
VIRTUE OF ADVERSE POSSESSION.

Adverse possession is an affirmative defense and must be affirmatively pleaded (Civil Rules of Procedure (8-C)). The defendants filed and answer to plaintiff's complaint, but did not affirmatively plead adverse possession. At the trial of the case, leave was granted to amend the answer of the defendants Max Dalton and Nell Dalton, and the answer was amended so as to include as an affirmative defense Sections 78-12-5 and 78-12-6, U. C. A., 1953 (Trans. 3).

The trial court found in its findings of fact and conclusions of law that by reason of the provisions of Sections 78-12-5, 78-12-6, 78-12-7, 78-12-8, 78-12-9 and 78-12-12, U. C. A. 1953, the plaintiffs were forever barred from claiming any interest in the property. It cannot be determined whether court's opinion was based upon the two sections

of the statute pleaded in the defendants' answer, or one or more of those enumerated by the court and not properly pleaded by the defendants.

Since neither of the sections pleaded by the defendant Max Dalton constitutes a defense under the evidence offered by the defendant, the plaintiffs had no burden of offering evidence and no evidence was offered by the plaintiffs on the question of adverse possession.

The abstract of title (Def. Ex. 5) shows that the record title to the property was in the name of James F. Dalton until November 5, 1948, when the alleged deed from James F. Dalton to Daniel Perkins (Def. Ex. 1) was recorded and the quit-claim deed of Kisten A. Perkins, Dorothy P. Jones, Beverly P. Alexander, Calvin J. Perkins, Richard C. Perkins and Margaret P. Tennity, heirs of Hyrum C. Perkins, to Max Dalton (Def. Ex. 5, p. . .) was executed and recorded. Plaintiff's action was filed on the 18th day of June, 1955, well within the seven years, so that at the time of the commencement of the action the plaintiff was seized of the property within seven years and well within the provisions of Sections 78-12-5 and 78-12-6, U. C. A.

Since Sections 78-12-5 and 78-12-6 were the only sections affirmatively pleaded by the defendant Max Dalton the court committed error in applying the remaining sections of the statute enumerated by the court in determining the question of adverse possession by the defendant. But even if the remaining sections as set forth by the trial court but which had not been properly pleaded, are deemed to have been properly pleaded by the defendant Max Dalton,

there is still insufficient evidence in the record to justify the trial court's decision that the defendant Max Dalton had acquired title and the right of possession by virtue of adverse possession.

Section 78-12-8, U. C. A. 1953, provides:

“UNDER WRITTEN INSTRUMENT OR JUDGMENT.—Whenever it appears that the occupant, or those under whom he claims, entered into possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree or judgment, or of some part of the property under such claim, for seven years, the property so included is deemed to have been (held) adversely, except that when the property so included consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.”

Max Dalton testified (Trans. 37):

“Q. When did you first go into occupancy of that property. First I will ask you this: Do you have possession of that property at the present time?

“A. Well, I think so, yes.

“Q. How long have you had control of the property?

“A. I bought it from the H. C. Perkins estate in 1941.”

The alleged purchase of the property by the defendant Max Dalton from the Perkins estate was oral and there was no evidence offered of any written instrument of any kind evidencing the sale and purchase of the property in 1941. It was by virtue of this alleged oral agreement with the Perkins estate that the defendant first entered into possession in 1941. So that clearly under the evidence the defendant entered into possession not under the terms of any written instrument, but purely under the terms of an alleged oral sale, and in order for the defendant Max Dalton to acquire title by adverse possession under circumstances such as these, where there is no written instrument, he would clearly have to comply with all of the provisions of Section 78-12-11. There is no evidence in this record that the defendant Max Dalton fenced the property or that he had cultivated the property or that he had expended any money on the property, one of which would clearly be necessary under the provisions of 78-12-11.

Section 78-12-9 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 a 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.”

This section sets forth the requirements that are necessary in order for the defendant to have acquired title by adverse possession where he claims title by adverse possession, having entered into possession under a written agreement. The defendant Max Dalton acquired a color of title to the property in question October 1, 1948 by virtue of a quit-claim deed from the heirs of the H. C. Perkins estate to the defendant Max Dalton (Def. Ex. 5, p. 15) and he continued in possession until the commencement of this action on June 18, 1955, a period of only six years and eight months, so that no title could vest in the defendant Max Dalton by virtue of Section 78-12-9 because seven years had not elapsed between the acquisition of the title by virtue of the said quit-claim deed and the filing of plaintiff's complaint. The defendant Max Dalton was not only *not* in possession of the property for the full period of seven years as required in Section 78-12-9, but the nature of the defendant's possession was not of the nature as required by Section 78-12-9. There is no evidence that the defendant had made any improvements. There is no evidence that the defendant had fenced the property. There is no evidence as to whether the property was fenced or un-

fenced. The only evidence in the record concerning the occupancy of the property was the evidence of the defendant Max Dalton who testified (Trans. 38) :

“Q. What have you used the property for?

“A. Well, it was kind of run down so we have used it for grazing livestock.

“Q. Has it always been used for that purpose?

“A. Well, when I was a little boy they had hayricks on it, and raised alfalfa.

“Q. Who is ‘they’ you refer to?

“A. I think my uncle Frank, which is James F. Dalton. He lived on it when I was a little kid.”

The only evidence offered on the question of use and occupancy was the defendant Max Dalton’s statement that he had used the land for grazing. There is no evidence as to how much the land was pastured; whether it was winter or summer or just in the winter, whether the whole tract was pastured or only a part of it. There was absolutely no evidence that the defendant’s pasturing of the land was exclusive, and that it had not also been pastured by the Daltons or others acting as their agents or others not acting as the agents of the Daltons. There is absolutely no evidence showing that the pasture of the land by the defendant Max Dalton was anything more than a mere trespass. The mere fact that the defendant Max Dalton had pastured the land in question, even if exclusively, is not sufficient for him to acquire title by adverse possession under Section 78-12-9 (No. 3). There was no evidence offered by the defendant Max Dalton as to what the use of the land was. The only evidence on the subject offered at all was the

statement by the defendant Max Dalton that he had used the land for grazing, and it is evidenced from Mr. Dalton's own testimony that the land had previously been used by the Daltons for other purposes than grazing. The land was improved, cultivated ground. It had been used by the Daltons for raising hay (Trans. 38). In the case of 221 Pac. 2nd 1037, a recent Utah case, this court said:

"The rule that title to real property may be acquired by adverse possession if it is grazed by an adverse claimant during the grazing season is limited to land which, because of its character, are reasonably suited to grazing purposes only, and has not been extended by the courts to include lands which can be cultivated during non-grazing months of the year."

In order to acquire title to land by adverse possession, it is elemental that the possession of the one who claims adverse possession must show that his possession was exclusive to that of all others. 1 A. M. J. 870 states this rule:

"It is unanimously agreed that to be adverse the possession must be exclusive, not only as against the true owner, but also as against the whole world, except only the government."

There is absolutely no evidence in this record that the possession of the defendant Max Dalton was exclusive. He merely stated that he had used the land for grazing. There is no evidence that the plaintiffs themselves or their agents had not also used the land for grazing during that same time. So the evidence in the record clearly fails to show that the possession of the defendant Max Dalton was exclusive.

Adverse possession being an affirmative defense, the burden of proof was clearly upon the defendant to prove every single element of adverse possession (1 A. M. J. 925). The defendant Max Dalton testified that he owned the adjoining land and that he used the land for the purpose of grazing. There is no evidence even that the properties were separated by a fence. The using of plaintiff's ground under such conditions would amount to nothing more than a trespass by the defendant Max Dalton. The use of property for grazing under such circumstances would not give notice to the plaintiff that the defendant Max Dalton was claiming the property adversely to her under a claim of right. The occupancy must be of such as to reasonably give notice to the owner that the property is being claimed adversely. In this case, the plaintiff's land and the land of the defendant were adjoining properties, and under the testimony of Max Dalton himself, the Dalton property has been used for cultivation for the purpose of raising hay, and the mere grazing of the plaintiff's land by the defendant is not such an open and notorious use of cultivated ground and would give the plaintiff notice that her land was being claimed by the defendant Max Dalton. This rule is well stated in 1 A. M. J. 874:

“§ 140.—NECESSITY AND SUFFICIENCY: One of the requisites of adverse possession is that the possession of the disseisor must be open and notorious. The mere possession of the land is not enough for this purpose. An adverse possession entirely excludes the idea of a holding under the true owner. It is the knowledge, either actual or imputable, of the possession of his lands by another, claiming to own them bona fide and openly, that affects

the legal owner thereof. It is, therefore, essential in all cases that the owner shall have notice to that effect. If he has actual notice, that will, of course, be sufficient in itself. Where, however, there has been no actual notice, it is necessary to show that the possession of his disseisor was so open, notorious, and visible as to warrant the inference that the owner must, or should have known of it; otherwise, a mere trespass might be evidence of ouster."

In the case of *Perry Estate vs. Ford*, (151 Pac. 59) this court followed the generally accepted rule that the possession of the defendant, in order to ripen into a title by adverse possession, must be so open and notorious as to reasonably give notice to the owner that the land was being claimed adverse to the owner. In this case the court said

"The chief ground on which a disseisor acquires his title by adverse possession is laches of the owner, in seeing his boundary and land invaded by an adverse claimant and himself remaining passive and acquiescing in such adverse claim and assertion. Hence the general rule that the possession of an adverse claimant must be continuous, exclusive, open, hostile and notorious, and of such a character as to enable the owner to know of the invasion of his rights."

Certainly under the facts of this case the mere grazing of the plaintiff's ground, which had been used by the plaintiff for farming, by the defendant Max Dalton, an adjoining neighbor, could not in and of itself be sufficient notice to the plaintiff that the defendants were claiming the property adversely.

To acquire title to another's property by adverse possession, the claimant must not only be in possession of the

property, but he must pay the taxes for seven years. The defendant Max Dalton first entered into possession, according to his testimony, in the year 1941 under an oral agreement of sale from the Perkins estate, but did not get the deed until 1948 (Trans. 38). So that from 1941 to 1948 the property was assessed in the name of the Perkins estate and the defendant Max Dalton paid the taxes for the Perkins estate (Plaintiff's Ex. D). Now Defendants' Exhibit 2, the escrow agreement, explicitly provided that the Perkins brothers would pay all the taxes during the life of the escrow agreement as part of their agreement with James F. Dalton, and if Max Dalton did in fact undertake to buy the property from the Perkins estate he was paying the taxes for the Perkins estate, who were bound under the escrow agreement to pay the taxes until such time as the escrow agreement had been complied with and the deed delivered. Since there is no evidence as to when the escrow agreement was complied with, there is no evidence as to when the defendant Max Dalton commenced paying the taxes adversely to the plaintiff. The defendant Max Dalton acquired a quit-claim deed to the property on October 21, 1948 (Def. Ex. 5, p. 15). Plaintiff's Exhibit D shows that the defendant Max Dalton paid the taxes for the year 1948 for the Perkins estate, who were still bound under the escrow agreement to pay the taxes until the escrow agreement was complied with, and there was no evidence as to when the escrow agreement was complied with. The defendant Max Dalton received the deed to the property from the heirs of the Perkins estate on October 21, 1948, so that the first taxes that were actually paid by Max Dalton that

were not being paid in compliance with the terms of the escrow agreement were paid by him for the year 1949. Now the taxes for the year 1955 were not due at the time of the filing of plaintiff's complaint, so that the defendant has not actually paid the taxes for seven years adversely to the plaintiff.

SUMMARY

The plaintiff in this action filed an action to quiet title to certain real property in San Juan County, Utah. The defendants Max Dalton and Nell Dalton filed an answer claiming ownership of the property and claiming title through a deed executed by James F. Dalton, dated October 27, 1930 and recorded November 5, 1948. The defendants offered evidence that the warranty deed (Def. Ex. 1) purported to have been executed by James F. Dalton and Minnie Pearl Dalton was placed in escrow with the San Juan State Bank. The plaintiff Minnie Pearl Dalton denies that she ever signed the said warranty deed or the alleged escrow agreement, or that they ever received any money according to the terms of said escrow agreement. That the evidence is entirely insufficient on which to base a finding that James F. Dalton and Minnie Pearl Dalton ever executed the warranty deed (Def. Ex. 1), and there is most certainly insufficient evidence to sustain a finding that Minnie Pearl Dalton executed said warranty deed.

Since the deed was not found in the possession of the grantee, the possession of the deed by the defendant creates no presumption that the escrow agreement had been complied with and that there had been a delivery to the grantee

by the escrow agent, and the defendant failed to assume the burden of proving a valid delivery of the deed.

The defendants also claim title to the property by adverse possession, and the court so found. Adverse possession is an affirmative defense and must be pleaded. The defendants pleaded only Sections 78-12-5 and 78-12-6, U. C. A. 1953; and clearly since the plaintiff was the title holder until November 5, 1948 and the action was filed June 18, 1955 the plaintiff was well within the seven-year period in bringing this action.

The defendants have not acquired title by adverse possession under any of the provisions of the Utah Code Annotated, 1953. The defendants claim to have entered into possession of the property under an oral agreement of sale with the Perkins estate in 1941 (Trans. 38), and to have paid the taxes on the property since that time. The evidence does not show that the defendant Max Dalton complied with any of the provisions of Section 78-12-11 defining adverse possession not founded upon a written instrument. On October 21, 1948 the defendant Max Dalton acquired title to the property by a written instrument, a quit-claim deed from the heirs of the H. C. Perkins estate. But the defendant had not been in possession under this deed for seven years prior to the commencement of this action by the plaintiffs, which action was filed June 18, 1955.

The possession of the defendant was not of such a nature as to give the defendant title by adverse possession. The plaintiff's land was agricultural farm land used for raising hay (Trans. 38), and this court has heretofore ruled

that adverse possession of property by grazing alone by an adverse claimant is limited to land that is suitable for grazing only (241 Pac. 1037). That the possession of the defendant Max Dalton of plaintiff's property was not so open and notorious as to give the plaintiff notice that it was being claimed adversely to plaintiff. There is absolutely no evidence that the defendant's possession was exclusive.

That from 1941 to 1948 the taxes were paid by Max Dalton for the H. C. Perkins estate, (Plaintiff's Ex. D), and the H. C. Perkins estate was legally bound under the terms of the escrow agreement to pay the taxes until such time as the terms of the escrow agreement had been complied with, and there is no evidence as to when the terms of the escrow agreement had been complied with, if they had been complied with at all. So that as it appears from this record, Max Dalton paid the taxes for the H. C. Perkins estate for the years 1941 to 1948, which was legally bound to pay the taxes. And the period from October 21, 1948 when the defendant Max Dalton acquired a deed up to the filing of plaintiff's complaint on June 18, 1955 is a period of less than seven years, and there had only been six years' taxes due and paid by Max Dalton. The taxes for the year 1955 were not due and payable at the time of filing of plaintiff's complaint.

CONCLUSIONS

There is insufficient evidence to sustain the court's finding that the plaintiff Minnie Pearl Dalton and her deceased husband signed and executed a warranty deed (Def.

Ex. 1), and particularly the plaintiff Minnie Pearl Dalton. The warranty deed (Def. Ex. 1) never having been found in the possession of the grantee or any of the Perkins brothers mentioned in the escrow agreement (Def. Ex. 2), there was no presumption that the escrow agreement (Def. Ex. 2) had ever been complied with and the deed delivered to the grantees, and the burden of proof was on the defendants to explain how the deed (Def. Ex. 1) came into the possession of Donald Adams, defendant's attorney, eighteen years after its execution, three years after the death of the grantor and six years after Donald Adams had completed probate proceedings of the estate of H. C. Perkins. The defendants did not assume that burden. The court committed error in finding the deed executed by James F. Dalton and the plaintiff Minnie Pearl Dalton (Def. Ex. 1) had been validly delivered and the defendants, being subsequent grantees, had acquired title to the property described in plaintiff's complaint.

That the evidence in this record is insufficient to sustain a finding that the defendant Max Dalton had acquired title to the property by adverse possession under the provisions enumerated by the court of the Utah Code Annotated, 1953.

Respectfully submitted,

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