

1982

Mary P. Massey v. Lewis H. Prothero and Alene Prothero : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARY P. MASSEY,

Plaintiff and
Respondent

vs.

LEWIS H. PROTHERO and ALENE
PROTHERO, husband and wife,

Defendants and
Appellants.

Case No. 18213

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT
IRON COUNTY, STATE OF UTAH
HONORABLE ROBERT F. OWENS, JUDGE PRO TEM

BRIEF OF APPELLANTS

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Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

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vs.)	
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PROTHERO, husband and wife,)	Case No. 18213
)	
Defendants and)	
Appellants.)	

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a judgment rendered after a trial on the merits by the Honorable Robert F. Owens District Court Judge Pro Tem, of the Fifth Judicial District Court, in and for Iron County, State of Utah, filed December 14th, 1981, which judgment ruled in favor of Plaintiff-Respondent (hereinafter "Plaintiff") and against Defendants-Appellants (hereinafter "Defendants") on Plaintiff's claim of quiet title in and to a certain undivided interest in real property.

RELIEF SOUGHT ON APPEAL

On appeal Defendants pray for reversal of the Trial Court Judgment and further pray that judgment be entered as a matter of law in favor of Defendants and against Plaintiff, and that title to the subject property be quieted in said Defendants to the exclusion of any interest by Plaintiff.

STATEMENT OF FACTS

This action was brought by Plaintiff to set aside a tax deed conveying title to certain real property to the Defendant Lewis Prothero, and his wife Alene Prothero, or in the alternative to declare that Plaintiff still had a valid interest in the property despite the tax deed.

By way of background, the property in dispute was initially owned by Jonathon and Amy Prothero. Plaintiff and Defendant are brother and sister, and are, along with three others not parties to this action, the sole heirs at law of Jonathon and Amy Prothero.

The property in dispute consists of three (3) parcels. The first is a home located in Paragonah,

Utah; the second is a farm located in the area immediately adjacent to Paragonah, Utah; and the third is a vacant lot located in Paragonah, Utah.

As was stated above, the property was originally owned by Jonathon and Amy Prothero. Upon their deaths, the property passed by intestacy to their children. Mr. and Mrs. Prothero lived in the home and farmed the farm ground until their deaths in 1953 and 1958, respectively. Upon the death of Jonathon and Amy Prothero, one Raymond Prothero and one Barton Prothero, brothers of the parties hereto, continued to live in the home and to farm the farm property until their deaths in 1961 and 1966 respectively. (T. 13-18,).

Since the death of David B. Prothero in 1966, no one has lived in the home in question but the Defendant Lewis Prothero has since that time continually farmed the farm property, has made improvements thereon (T. 87-90) has taken care of, maintained and improved the home, (T. 85-90), and has paid all taxes on all three (3) parcels (T. 90). These facts are not disputed by Plaintiff.

Defendants claim title to the three (3) parcels of property in question by virtue of two separate tax deeds, both dated May 31st, 1967, Exhibits D-2 and D-3 at the trial, and under the doctrine of adverse possession.

The record shows that the property taxes for the years 1962, 1963, 1964, 1965 and 1966 were not paid (T. 64) and that the property was thereafter sold to Iron County for the tax deficiency on January 15th, 1963. (See Exhibit 4). There was no redemption from the sale to the county and the property was subsequently sold by the county for taxes on May 31st, 1967. Defendants purchased at that sale, and received the tax deeds which were immediately recorded imparting notice to all persons including Plaintiff. Plaintiff has not contested the validity of the tax deed, nor has she raised any defects in the procedures followed by the county in either the January 15th, 1963 sale or the May 31st, 1967 sale. It is by the tax deeds described above that Defendants claim full title to the property in question.

As early as May of 1973 Defendant made it known to Plaintiff that he claimed the property by virtue of the tax title (T. 72-73, 73-80). On that date, Plaintiff wanted to go into the home in question. Defendant told her she could not have a key, that the property was his and that he had purchased the property at a tax sale. Even though these facts were made known to Plaintiff, she did not file this action until August of 1977.

ARGUMENT

INTRODUCTION

The Plaintiff contends, and the trial court found, that despite the unconditional nature of the tax deeds which name only Defendants Lewis and Alene Prothero as Grantees, the Plaintiff and the other heirs of Jonathan and Amy Prothero, maintained their intestate interest in the property.

In upholding the Plaintiff's interest, the Court found that upon the death of Jonathan and Amy Prothero the property passed to Plaintiff, Defendant and the other heirs as tenants in common and that the tenancy was still in existence at the time of the sale on May 31st, 1967. (See paragraphs 1, 2 of the Court's Conclusion of Law, dated December 2nd, 1981). The Court then found that because of the tenancy in common, and because of family tradition and the nature of the occupancy by Defendant, a fiduciary duty existed and the purchase by Defendant Lewis Prothero acted as a purchase for and on behalf of all of the heirs. (See paragraphs 2, and 3 the Court's Conclusions of Law, dated December 2nd, 1981). The Court also imposed that same fiduciary duty on Alene Prothero "by reason of her

being named as a Grantee in the tax deeds." (See paragraph 4 of the Court's Conclusions of Law, dated December 2nd, 1981).

As will be discussed below, Defendants contend that the Court erred in several ways. First, the Court erred in holding that the May 31st, 1967 sale inured to the benefit of the other heirs of Jonathan and Amy Prothero. Secondly, any such claim of co-tenancy as determined by the trial court is barred by Utah Code Ann. § 78-12-5.1, 5.2 (1953 as amended). And third, even if Plaintiff had a valid interest after the tax sale in 1967, that interest was extinguished by Defendants adverse possession.

POINT ONE

EVEN ASSUMING ARGUENDO THAT THE PURCHASE BY DEFENDANTS WAS FOR ALL OF THE HEIRS OF JONATHAN AND AMY PROTHERO, DEFENDANTS HERETO CLAIM TITLE PURSUANT TO A GOOD AND VALID TAX DEED ISSUED BY IRON COUNTY IN 1967, AND PLAINTIFF'S CLAIM CHALLENGING THAT TAX TITLE IS THEREFORE BARRED BY UTAH CODE ANN. § § 78-12-5.1, 5.2 (1953).

On May 31st, 1967, the Defendants obtained title to the property in dispute by two (2) tax deeds issued

by Iron County pursuant to the terms of Utah Code Ann. § 59-10-64 (1953). Plaintiff does not dispute the fact that the holder of a valid tax title holds such title free and clear from all other inferior claims. The Plaintiff, however, contends and the trial court found that the tax title is not valid as to her, and that the purchase was for the benefit of her and the other heirs of her parents.

Even assuming that argument to be valid, which is certainly not conceded, any claim by Plaintiff to the property is barred by the statute of limitations as to tax deeds. Utah Code Ann. § 78-12-5.1 (1953 as amended) provides as follows:

No action for the recovery of real property or for the possession thereof shall be maintained, unless the Plaintiff or his predecessor was seized or possessed of such property within seven years from the commencement of such action; provided, however, that with respect to actions or defenses brought or interposed for the recovery or possession of or to quiet title or determine the ownership of real property against the holder of a tax title to such property, no such action or defense shall be commenced or interposed more than four years after the date of the tax deed, conveyance, or transfer creating such tax title unless the person commencing or interposing such action or defense or his predecessor has actually occupied or been in possession of such property within four years prior to the commencement or interposition of such action or defense. . . . (Emphasis added).

Similarly, Section 78-12-5.2 provides:

No action or defense for the recovery or

possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other purchase (sic) thereof at any public or private tax sale and after the expiration of one year from the date of this act. Provided, however, that this section shall not bar any action or defense by the owner of legal title to such property where he or his predecessor has actually occupied or been in actual possession of such property within four years from the commencement or interposition of such action or defense. (Emphasis added).

These two statutes directly control the facts of the instant case and bar the action as a matter of law. It cannot be disputed that this action is an action "to quiet title or determine the ownership of real property against the holder of a tax title to such property." Indeed, the judgment of the trial court quieted title to the property in the Plaintiff, as her interest appears, and had the affect of determining the ownership to that property. Likewise, it cannot be disputed that the Defendant and his wife are the holders of a tax title. Utah Code Ann. § 78-12-5.3 defines a tax title as "any title to real property, whether valid or not which has been derived through or is dependent upon any sale, conveyance or transfer of such property in the course of a statutory proceeding for the liquidation of any tax levied against such

property whereby property is relieved from a tax lien." The trial court found that this statute was not applicable since "the legislative intent was manifestly to enhance marketability of tax titles by cutting off rights of previous owners. A dispute among tax title Grantees does not infringe upon this purpose." (See paragraph no. four of the trial court's findings dated August 12th, 1981.) This finding is in error since the statute by its terms specifically states that no action shall be brought longer than four years after the date of the tax deed. Defendants-Appellants contend that the trial court went beyond its authority, and acted inconsistently with the law by ignoring the specific language of the statute under the pretense of interpreting legislative intent.

This Court has considered the statutes discussed above on several occasions, and though none directly control this case, has each time held that the statute applies according to its specific language to bar any action brought more than four years after the tax deed. See, Dye v. Miller & Viele, 587 P.2d 139 (Utah 1978); Peterson v. Callister, 6 Utah 2d 359, 313 P.2d 814 (1957), affd. on rehearing, 8 Utah 2d 348, 334 P.2d 759 (1959).

The Court most recently considered these statutes in Frederikson v. LaFleur, 632 P.2d 827 (Utah 1981). In that case the Plaintiffs (record owners of certain property) had challenged the tax title of Defendants because of certain improprieties in the sale. In enforcing the statute the Court stated, "these tax purchasers may avail themselves of the special statute of limitation regardless of either the invalidity of their tax title or their inability to establish an affirmative claim to title apart from their tax title." Frederikson v. LaFleur, 632 P.2d at 831 (citations omitted). It is also important to note that in that case this Court specifically refused to extend the statute beyond its express terms or to reach beyond the terms of the statute in determining the scope of its application. There is no reason in law or logic why this rule should not apply to claims asserted by an ousted co-tenant. Indeed, a holding otherwise would subvert the purposes for which the statute of limitations was adopted. See, (Lear, Utah's Short Statutes of Limitation for Tax Titles: The Continuing Specter of Lyman v. National Mortgage Bond Corp. - A Need for Remedial Legislation, 1976 B.Y.U. L. Rev. 457.) In that article, in urging for a more strict enforcement of Utah's statutes of limitations for tax

titles, the author pointed out the effects of less than strict enforcement:

First, title examiners cannot rely on the statute to nullify defects that should no longer subject to attack. Occasionally, title insurance is refused all together. The second consequence is that tax titles are undesirable and lack marketability; they are often avoided for their nuisance value.

Thus Defendants contend that the trial court erred by not following the clear mandate of the sections stated above. Those sections provide that no action to quiet title or determine interests in real property shall be commenced against the holder of a tax title more than four years after the date of the tax deed. It is undisputed that the tax deed in this case was dated May 31st, 1967. It is undisputed that the Defendant and his wife Alene Prothero are holders of tax title. It is undisputed that this action was commenced in August of 1977. It is undisputed that this is an action to quiet title to or determine an interest in real property. The action is barred by the statute of limitations stated above and the trial court therefore erred in not applying said statute.

At the trial in this matter, one other issue was raised in relation to this statute. Plaintiff asserted that the above described statutes of limitation were not applicable to her since she fit within the proviso

stated therein, namely, that she had been in "actual occupancy or possession" of the property within the last four years. This is clearly contrary to the evidence produced at trial. The recent case of Frederikson v. LaFleur, 632 P.2d 827 (Utah 1981) discussed the type of possession necessary to bring a person within the exceptions stated in Sections 78-12-5.1, 5.2. In that case the Plaintiffs contended that since they were record owners of the premises their possession was implied in law and that possession constituted the possession or occupancy required to come within the exception. The Supreme Court specifically stated that only actual possession would suffice. The record in this case discloses that the Plaintiff never possessed nor occupied the property. Indeed, she left Utah shortly after World War II and the only times she went on the property after 1967 were on infrequent visits to Utah which occurred at a maximum of once every year, for a period of a couple of days each time. (T. 23-26). In fact, Plaintiff testified at the time of trial that she had never visited the farm property and did not even know where it was located. (T. 26). Clearly that does not suffice as the actual possession or occupancy within the meaning of the statute.

Plaintiff also contends that since she was a tenant in common with Defendant that his possession was tantamount to her possession. This Court in Frederikson, supra, specifically held that possession presumed by law, such as the possession asserted here by the Defendant through Plaintiff, will not suffice and the Frederikson case is controlling on this point.

Clearly, then, Plaintiff was not in actual possession and therefore was not within the exceptions stated in Sections 78-12-5.1, 5.2. The bar imposed by those Sections remain valid as against her.

POINT TWO

THE COURT ERRED IN FINDING THAT THE PURCHASE BY DEFENDANTS WAS FOR THE BENEFIT OF PLAINTIFF AND THE OTHER HEIRS OF JONATHAN AND AMY PROTHERO, AND THEREFORE PLAINTIFF HAS NO INTEREST IN THE PROPERTY EVEN IF THIS ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

A. THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF AND DEFENDANTS WERE TENANTS IN COMMON AT THE TIME OF THE MAY 31st 1967 SALE.

As has been discussed, the crux of Plaintiff's

argument, and the basis for the Court's finding in this case, was the alleged fiduciary duty imposed upon Lewis and Alene Prothero which was the vehicle enabling the Court to find that his purchase was a purchase for all. The Court found that the fiduciary duty was created in two ways. First, the Court found that the Plaintiff and Defendant Lewis Prothero were tenants in common as to the property at the time of the May 1967 sale and therefore the purchase by said Defendant was for the benefit of Plaintiff and all other tenants in common. The Court erred in finding such a tenancy in common and basically ignored the record ownership of Defendant Alene Prothero.

While the Prothero children may have owned the property as tenants in common immediately following the death of their mother, that tenancy did not continue to the May sale in 1967. On the contrary, the property was sold to Iron County for taxes on January 15th, 1963. The law is very clear that any conveyance to a third-party of the entire property terminates any existing co-tenancy relationship. The rule is well stated as follows:

Since unity of possession is the very essence of a tenancy in common, it is clear that anything which severs or destroys that unity must necessarily terminate the tenancy. Thus, a tenancy in common will come to an end upon forfeiture or abandonment of the common

property, upon its conveyance, voluntary or otherwise, to a stranger, or upon the definite ouster, by one co-tenant of his fellows.

20 Am.Jur. 2d Co-tenancy and Joint Ownership § 31
(1965) (citations omitted).

The conveyance to Iron County for taxes in 1963 was such a conveyance within the mandate of this general rule and therefore any co-tenancy relationship which might have existed was terminated in January of 1963. While the parties may have retained a redemption period for four years after the date of that sale pursuant to Utah Code Ann. § 59-10-56 (1953 as amended), that redemption was never exercised and is certainly not enough to continue the co-tenancy relationship when actual title is in a stranger to the co-tenancy.

B. THE TRIAL COURT ERRED IN IMPOSING A FIDUCIARY DUTY UPON DEFENDANTS BY VIRTUE OF PRIOR USE OF THE PROPERTY AND FAMILY TRADITION.

In addition to the trial court's finding that a fiduciary duty was created as to both Lewis and Alene Prothero (because of the tenancy in common under intestacy), the trial court also found such a duty was created by virtue of certain representations allegedly

made by Defendant Lewis Prothero, and because of the fact that the family occupant of the premises had traditionally paid the taxes thereon. While there is some authority for the proposition that under certain conditions such a duty will be imposed, it is limited to situations where the tax purchaser is under a legal or moral obligation to pay the taxes. See, e.g., Crofts v. Johnson, 6 Utah 2d 350, 313 P.2d 808 (1957). In this case Defendants were not even living on the property when the 1962 taxes were assessed. Certainly no such obligation could be imposed. Defendant has been unable to locate any direct authority on this point and therefore contends that the finding by the Court was in error and is unsupported by any legal theory. The Court apparently arbitrarily imposed this nebulous fiduciary duty on the basis of an estoppel type argument. Defendants contend that this finding was clearly in error.

Since the Court erred in finding the fiduciary relationship, it follows that the Court erred in finding that the purchase by Defendants was a purchase for and on behalf of Plaintiff.

POINT THREE

EVEN ASSUMING THE COURT WAS CORRECT IN FINDING THE FIDUCIARY OBLIGATION, THAT OBLIGATION TERMINATED IN 1973 WHEN DEFENDANT NOTIFIED PLAINTIFF THAT HE WAS CLAIMING SOLE TITLE TO THE PROPERTY BY VIRTUE OF HIS TAX DEED.

The trial court found as a matter of law that if the Defendant notified the Plaintiff of his intention to claim title adverse to hers, that any fiduciary obligation was terminated and the statute of limitations (assuming that it had not already started to run) would at that time begin to run. (See paragraph no. 6 of the Court's Conclusions of Law dated December 2nd, 1981). The Court found, however, as a matter of fact, that Defendant did not make this intention known to the Plaintiff until 1974 or thereafter, and thus the action was brought within the four year statute of limitations.

While Defendants agree with the court's statement of the law (that is, if the statute of limitations did not begin to run upon the date of the tax deed, it did begin to run as soon as Defendant notified Plaintiff of his intention to claim the property by virtue of those

tax deeds), Defendant disagrees with the Court's application of law to fact and contends that the Court's factual findings is not supported by the evidence. While there was some testimony to the contrary, the only logical and creditable evidence indicated that Defendants' adverse claim was made known to the Plaintiff in May of 1973. At this point, by the Court's finding, the statute of limitations should have begin to run, even assuming it did not start on the day of the tax deed, and therefore Plaintiff's action should be barred.

This position is supported by the record wherein the Defendant Lewis Prothero testified that he clearly made known to the Plaintiff in May of 1973 his adverse claim to her interests and the fact that he was claiming the property as his own by virtue of the tax title. (T. 72-73, 78-80). Mr. Prothero testified that on that date, Plaintiff Mrs. Massey was in Utah visiting. She asked Mr. Prothero for a key and he told her she could not have a key, that the property was his, and that he had bought it at a tax sale. The testimony of Lewis Prothero was substantiated by similar testimony from Alene Prothero. (T. 97-99).

Both Mr. and Mrs. Prothero also testified that in May of 1972, the Plaintiff's son, and apparently some

of his friends, had come onto the property and removed some valuable personal property from the old home (T. 78-82, 96-97). This incident apparently prompted Defendants to a decision that no other family members should be allowed on the property after that date.

It is by reason of these two occasions that Defendants contend that the trial court should have found as a matter of law that in 1973 (and possibly as early as 1972) the Defendants "brought home" to Plaintiff the fact that they were claiming title adverse to Plaintiff and under the Court's application of the law, the statute of limitations, if it had not already begin to run, should have begun at that point. Since the statute of limitations is four years and this action was filed in August of 1977, any claim by Plaintiff is therefore barred.

POINT FOUR

EVEN ASSUMING FOR THE ARGUMENT THAT THE COURT PROPERLY FOUND THERE WAS A FIDUCIARY DUTY ON THE PART OF LEWIS PROTHERO, THE COURT CLEARLY ERRED IN IMPOSING THE SAME FIDUCIARY DUTY ON ALENE PROTHERO.

The tax deeds issued in May of 1967 conveyed the

property to Lewis Prothero and Alene Prothero. The trial court found that the fiduciary obligations stated above which were imposed upon Lewis Prothero were also imposed on Alene Prothero by virtue of her simply being named as a Grantee on the tax deeds. There is no evidence in the record which indicated any relationship of any kind between Alene Prothero and Plaintiff. Alene Prothero was not a co-tenant with Plaintiff, she was not a member of the family, she made no representations or promises to Plaintiff and was indeed a stranger to the prior title. Her claim to the property was solely and exclusively by virtue of the tax deed. The Court found no other conduct or legal relationship of any kind on her part contributed to the fiduciary obligation. Yet the Court found that her title had to be shared with Plaintiff by virtue of her being named a Grantee on the tax deed. This legal burden imposed by the trial court was clearly in error and is totally unsupported by any concept of law or equity. The Court should therefore minimally hold that the record interest of Alene Prothero was not effected by any claim of Plaintiff and if Plaintiff prevails, she takes subject to Alene Prothero's undivided one-half ownership interest in the subject property.

POINT FIVE

EVEN ASSUMING FOR THE ARGUMENT THAT PLAINTIFF'S CLAIM IS NOT BARRED BY THE STATUTE OF LIMITATIONS SET FORTH ABOVE, AND FURTHER ASSUMING THAT PLAINTIFF DID HAVE A LEGITIMATE INTEREST IN THE PROPERTY FOLLOWING THE MAY 1967 SALE, ANY INTERESTS CLAIMED BY PLAINTIFF HAVE BEEN EXTINGUISHED BY THE DEFENDANTS' ADVERSE POSSESSION.

In addition to the statutes of limitation discussed above, Defendant has established title to the property by adverse possession. The Utah Code allows adverse possession if the party claiming such possession has been in actual occupancy and has paid all taxes on the premises for a seven-year period. Utah Code Ann. § 78-12-8 (1953 as amended). In cases such as this, however, where the party claiming such possession does so by virtue of a tax deed, the period of possession is shortened to four years. Utah Code Ann. § 78-12-7.1, 12.1 (1953 as amended). In the instant case, the evidence is uncontroverted that the Defendant occupied the premises beginning in 1966 and occupied them continually thereafter up to the present day. In addition, the Defendant improved the premises,

including both the farm land and house, paid taxes thereon and was the only one ever claiming possession thereto.

Even assuming that the Plaintiff was a co-tenant during this possession the rule is virtually unanimous that one co-tenant can adversely possess another co-tenant if the possession is sufficiently open and notorious so as to give the other tenant notice that the party in possession claims exclusive ownership. Kennedy v. Reinhart, 574 P.2d 1119 (Or. 1978); Zolezzi v. Michelis, 195 P.2d 835 (Cal. App. 1948); See generally, 3 Am Jur. 2d Adverse Possession §§ 173-180 (1962). When Plaintiff visited the property prior to 1973, she knew Defendants were in possession, had made improvements, and were utilizing the subject property. Furthermore, the tax deeds were of record, and she was thus charged with implied notice of the same under Utah Code Ann. 57-1-6. As has been discussed above, the Defendant notified Plaintiff in May of 1973 that he claimed title to the property solely and independently by virtue of his tax deeds. In addition, he refused to allow Plaintiff to enter the home and further refused to give her any keys so she could do so. (T. 72-73, 78-80). Again, this testimony was substantiated by the testimony of Alene Prothero to the same effect. (T. 98-99).

The record shows that the Defendants in this action have been in open, notorious and exclusive possession of the premises for ten years prior to the initiation of this lawsuit. (T. 23-24) In addition, they have maintained, cared for and improved all of the property. (T. 87-90). Defendants therefore own the premises by adverse possession. Therefore, even assuming for argument that Plaintiff's claim is not barred by the statute of limitations, the Defendants should prevail as a matter of law on the theory of adverse possession.

CONCLUSION

Defendants' position in this matter is a simple straight forward one. Defendants purchased the title to this property in May of 1967 by a tax deed issued from Iron County to Defendants as Grantees. Utah Code Ann. § 78-12-5.1, 5.2 specifically states that no action to determine an ownership interest or to quiet title to real property against a holder of a tax deed can be commenced more than four years after the date of the deed. The tax deed granting title to the Defendants was dated May 31st, 1967 and this action was not instituted until August of 1977. The action is

therefore barred by the statute of limitations and the trial court erred in not so holding.

Additionally, even assuming that the action is not barred by the statute of limitations, the trial court erred in finding that a fiduciary relationship was created as to both Defendants and that the Defendants purchase at the tax sale was for the benefit of all other heirs and co-tenants. In the first place, there was no co-tenancy at the time of the sale in May of 1967 since the property had already been sold to a "stranger" in January of 1963. Secondly, the nebulous fiduciary duty based on the estoppel argument is not substantiated by the law or the facts. Since the Court erred in finding the fiduciary relationship and thus in its finding that the purchase by Defendants was a purchase for all of the other heirs and co-tenants, the Plaintiff had no interest in and to the property and the Defendants are sole owners thereto by virtue of their tax deed.

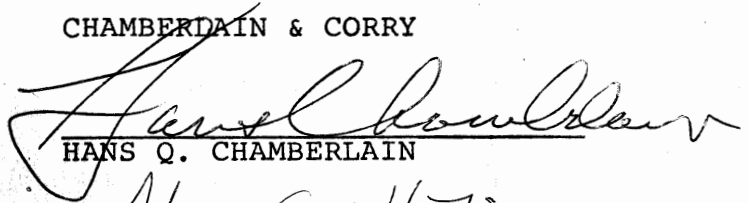
Finally, further assuming that the Court finds in favor of Plaintiff as to the arguments discussed above, any title which Plaintiff may have had at some time in the past has been cut off by the Defendants' adverse possession, since 1967 and at least since 1973.

Minimally the Court should award to Defendant Alene Prothero an undivided one-half interest in the subject property by reason of her ten-year record ownership in the subject property.

Defendants, however, specifically request that this Court reverse the ruling of the trial court and find as a matter of law that Defendants are owners of the property in questions free and clear of any claims or interests of the Plaintiff thereto.

DATED this 17th day of May, 1982.

CHAMBERLAIN & CORRY

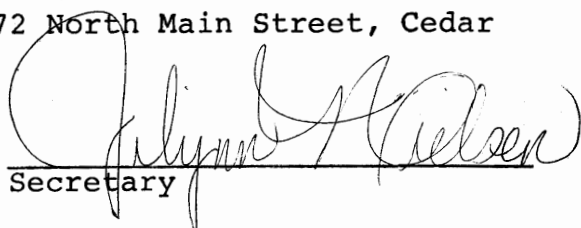

HANS Q. CHAMBERLAIN


THOMAS M. HIGBEE

Attorneys for Defendants -
Appellants

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of May, 1982, two (2) copies of the within and foregoing BRIEF were mailed to Willard R. Bishop, Attorney for Plaintiff-Respondent, at 172 North Main Street, Cedar City, Utah 84720.


Secretary