1959

Annie Ray Hieselt v. Nadine Heiselt : Brief of Respondents and Cross Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

ANNIE RAY HIESELT,
Appellant,

vs.

NADINE HEISELT, a widow, et al.,
Respondents and Cross Appellants.

Case No. 9065

BRIEF OF RESPONDENTS AND CROSS APPELLANTS

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ADDITIONAL STATEMENT OF FACTS

The statement of the case in Appellant's Brief is correct as to the facts therein recited, but these additional facts disclosed by the evidence we believe have a bearing on the case:

At the time of the death of Wilson Heiselt, sometimes known as Wallace Heiselt, on February 28, 1941, he left surviving him five children. Among such children were two daughters, one of whom named Winnie was 10 years of age, and a daughter named Rhea was 17 years of age. One of the sons named Joseph was 20 years of age, the other two sons

were over 21 years of age (Tr. 51). Mrs. Nadine Heiselt, the surviving widow of Wallace Heiselt, testified over the objection of Counsel for plaintiff, that at the time of the funeral of her husband she had a talk with Lawrence Heiselt, the husband of plaintiff, in which he told her that he would see that all of her property right would be protected, and if she needed any advice, she should talk to Mr. Dalton. Upon motion of Counsel for plaintiff the evidence was stricken (Tr. 51).

William J. Christenson was called as a witness by defendants, and in part testified as follows: That he is an attorney at law; that he is familiar with the property involved in this controversy. That Lawrence Heiselt, who then lived in Colorado and who was the husband of plaintiff, contacted the witness about finding someone to rent the property here involved. That the witness found a person to whom he rented the property at $75.00 per month, of which amount the witness was paid 10% for his trouble (Tr. 37). That the balance of the money was sent to Lawrence Heiselt (Tr. 48). That he had no dealings with plaintiff herein. That at the time of the funeral of Wallace Heiselt he had a conversation with Lawrence Heiselt, the husband of plaintiff, in which Lawrence stated that Nadine was worried, and that Lawrence told Nadine not to worry about anything, that he would take care of all of her property interests, and assured her not to worry about it. Upon motion of Counsel for Plaintiff the foregoing testimony was stricken (Tr. 40). Mr. Christenson further testified that in about 1940 Lawrence Heiselt requested him to have a talk with Caroline Heiselt; that Lawrence Heiselt sent a Deed to witness in which Caroline Heiselt was the Grantor and Annie Ray Heiselt was the Grantee, together with

a check for $400.00; that witness secured a Deed and sent it to Lawrence Heiselt, who then lived in Colorado. That it was about that time that Lawrence Heiselt took bankruptcy (Tr. 45). Objection was taken and sustained to questions touching the manner in which Lawrence Heiselt was taking title to property (Tr. 45).

On cross examination Mr. Christenson testified that all of his dealings were had with Lawrence Heiselt and not his wife, the plaintiff herein (Tr. 46).

Plaintiff testified that the money paid for the improvements was from the joint account of plaintiff and her husband; that the improvements were made to make the house livable (Tr. 25).

Respondents have cross appealed, and the Points upon which they rely in support of their Cross Appeal are:

POINT I.

THE TRIAL COURT ERRED IN STRIKING THE TESTIMONY OF DEFENDANT, NADINE HEISELT, WHEREIN SHE TESTIFIED THAT LAWRENCE HEISELT, THE HUSBAND OF THE PLAINTIFF, TOLD HER THAT HE WOULD SEE THAT ALL OF HER PROPERTY RIGHTS WOULD BE PROTECTED, AND IF SHE NEEDED ANY ADVICE, SHE SHOULD TALK TO MR. DALTON (Tr. 51).

POINT II.

THE TRIAL COURT ERRED IN STRIKING THE TESTIMONY OF WILLIAM J. CHRISTENSON WHEREIN

HE TESTIFIED THAT LAWRENCE HEISELT, THE HUSBAND OF PLAINTIFF, STATED THAT NADINE, THE WIDOW OF WALLACE, SHOULD NOT WORRY ABOUT ANYTHING, THAT HE WOULD TAKE CARE OF ALL OF HER PROPERTY INTERESTS (Tr. 40).

POINT III.

THE TRIAL COURT ERRED IN MAKING FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT DEDUCTING FROM THE INTEREST OF DEFENDANTS IN THE PROPERTY IN CONTROVERSY THE TAXES PAID ON SUCH PROPERTY BY PLAINTIFF AND HER HUSBAND.

POINT IV.

THE TRIAL COURT ERRED IN MAKING FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT DEDUCTING FROM THE INTEREST OF DEFENDANTS IN THE PROPERTY IN CONTROVERSY THE MONEY EXPENDED BY PLAINTIFF AND HER HUSBAND IN IMPROVING SUCH PROPERTY.

Before taking up a discussion of the Points relied upon by Respondents and Cross Apellants for a modification of the Judgment appealed from, we shall answer Appellant's contentions.

THE TRIAL COURT DID NOT ERR IN FINDING THAT PLAINTIFF WAS AND IS A TRUSTEE OF THE PROPERTY FOR HERSELF AND DEFENDANTS.

The law applicable to facts somewhat similar to the facts here involved have heretofore been before this Court on a number of occasions. An analysis of the law announced in such cases will go far toward reaching a proper conclusion in this case. The law seems to be well settled in this and other jurisdictions that tenants in common stand in a confidential relation to each other in respect to their interest in the common property and the common title under which they hold, and that it is inequitable to permit one without the consent of the other to buy in an outstanding adversary claim to the common estate and claim it for his exclusive benefit to the injury or benefit of his co-tenants, and that he is regarded as holding it in trust for the benefit of himself and his co-tenants in proportion to their respective interests. Obviously Appellant does not contend the law to be otherwise, because Counsel cite a number of cases and authorities where the law is so stated. Such is the law announced in the cases in this jurisdiction which are hereinafter cited.

The case of *McCready v. Fredricksen,* 41 Utah 388, 126 P. 316, contains a full discussion of the law, and has been referred to and followed in subsequent cases. These are the controlling facts in that case:

On February 1, 1891, John McCready and Fenno Wakeman were each the owner of an undivided interest in a tract of land situated in Salt Lake County, Utah. On February 17, 1897, the property was sold to Alex Olson for the delinquent taxes levied for the year 1896. The Certificate of Sale was recorded in the office of the County Recorder of Salt Lake County on March 22, 1897. On December 21, 1897, the

property was sold to M. C. Moon for the delinquent taxes for the year 1897, and on the same day that the sale was made the Certificate of Sale was recorded in the office of the County Recorder of Salt Lake County, Utah. In the year 1899 the above mentioned Certificates of Sale were assigned to Fenno Wakeman. On or about March 6, 1901, the Auditor of Salt Lake County executed and delivered to Fenno Wakeman a Tax Deed which was recorded on March 6, 1901 in the office of the County Recorder of Salt Lake County, Utah. In 1896 and 1897 the property was assessed in the name of Fenno Wakeman, et al. That the plaintiff, John McCready knew that the property had been sold for taxes for the years 1896 and 1897, and also knew of the recording of the tax deed to Fenno Wakeman; that McCready made no offer to pay the taxes for the years 1896 or 1897, or for any of the years thereafter. That during the years 1901, 1902, 1903, 1904, 1905, 1906 and 1907 the property was occupied by a tenant of Fenno Wakeman. For the use of the property the tenant agreed to attempt to sell the same. While in possession of the premises the tenant had a garden and raised vegetables thereon.

On Octobr 15, 1907, said Fenno Wakeman and wife conveyed the property to N. A. Frederickson, the defendant in the case. Such deed was recorded on October 30, 1907, in the office of the County Recorder of Salt Lake County, Utah. That since the 15th day of October, 1907, defendant N. A. Frederickson caused the land to be cultivated, had a barn built thereon, had a sewer extended along the full length of the property, had a large number of loads of earth hauled on the land for the purpose of raising a garden thereon. Defendant and his Grantor paid all of the annual taxes levied

against the property from 1896, to and including the year 1910. That defendant had not paid or offered to pay the taxes levied against the property until shortly before the action was commenced; that no revenue was derived from the premises since 1896, except the occupancy thereof by defendant and Fenno Wakeman.

The trial court held that respondent Frederickson had acquired title by adverse possession, and entered judgment quieting title in him. On appeal the judgment was reversed and judgment ordered entered in favor of appellant.

In the course of the opinion it is said:

> "that when the whole of the property is assessed in the names of all without stating the interest of each, the courts generally hold that it is the duty of one cotenant, just as much as of the other, to pay all the taxes. * * * Wakeman's acts up to the time he conveyed the whole property to respondent, when keeping in mind his relation to the property and to appellant, were not such as would necessarily be construed by anyone to amount to a claim by him of title to the whole of the property. Indeed, all of his acts and conduct up to the time he made the deed to respondent were such as could readily be reconciled with the legal presumption that what he did was for the benefit of his cotenants, as well as for the benefit of himself. To merely have paid the taxes under the circumstances would not have conferred any right upon him to claim the whole property by adverse possession. To purchase the Tax Sale Certificate before the sale ripened into a complete and indefeasible legal title and the subsequent payment of taxes could have no greater effect than the continuous payment of taxes would have had."

One of the provisions of the Pretrial Order is that:

> "No auditor's affidavit was attached to the tax rolls which was the basis of the sale of the property under Pretrial Exhibit 1."

That being so, no valid title was acquired by the Auditor's Tax Deed marked Exhibit 1, and Exhibit 3P. *Anson v. Ellison,* 104 Utah 576, 140 Pac. (2d) 653. It will also be noted from Exhibit 3P, which is dated July 7, 1939, that the sum of $29.67 was paid for the taxes for 1932, 1933, 1934, 1935 and 1936. It follows that the only possible legal effect of the Deed from Salt Lake County to plaintiff was to pay the taxes for the years 1932 to 1936, both inclusive.

Mary C. Heiselt, the owner of the property here involved, died on March 10, 1926, leaving as one of her heirs at law her son Lawrence Heiselt, the husband of plaintiff. It is apparent that at the time the Tax Deed was issued to plaintiff, Lawrence Heiselt was a tenant in common with the defendants herein. It is also made evident from the testimony of plaintiff that she too had a common interest with the defendants herein, in that, she had an inchoate interest in her husband's property, and according to her testimony the money with which she paid was from a joint account of herself and her husband. Moreover, only a period of less than two years elapsed between the time the County gave the Deed to plaintiff and the time she secured the Deed from Caroline Christensen Heiselt. The Ded from the County to plaintiff is dated July 7, 1939, and the Deed from Caroline Christensen Heiselt is dated March 3, 1941. These facts are recited on page 3 of Appellant's Brief. There can thus be no doubt that plaintiff became a tenant in common with the defendants on March 3, 1941, when she purchased the one-third interest, which formerly belonged to

N. H. Heiselt, the surviving husband of Mary C. Heiselt, who died on March 10, 1926.

In this connection, the attention of the Court is directed to the law above quoted from the decision in the case of *McCready v. Frederickson, supra,* to the effect that the presumption that taxes paid by one tenant in common is paid for the benefit of all tenants in common applies alike to all such payments, not only the first payment, but to all subsequent payments.

Counsel for plaintiff contends that because plaintiff and her husband used their money to improve the property here involved, plaintiff acquired a right to the whole of the property. There is considerable diversity of opinion among the authorities as to when, if at all, a tenant in common may recover the value of improvements placed on the property without consent of the other tenants, especially when the person making the improvements is in the exclusion possession thereof. See 14 *Am. Jur.,* page 102, Sec. 35. However, the view which is in accord with established principles of equity and which find support by the weight of authority is that if a tenant in common pays the taxes and has the exclusive possession and use of the common property, he is entitled to credit for the taxes paid and chargeable with the reasonable rental value of the property. The law dealing with such a situation is discussed at considerable length in 14 *Am. Jur.,* page 102 to 119, both inclusive, where numerous cases are cited in footnotes.

We quote the following statement of the law which we

deem applicable to the facts established by the evidence in this case.

> "A tenant in common in possession of the premises, who claims the entire premises, has been allowed repairs as a setoff against rents. Recovery has been denied, however, where the necessity for the repairs is not shown. In general, if an action or bill for an accounting for rents and profits or a suit for partition is brought against a cotenant, he will be allowed any amount expended for necessary repairs on the equitable principle that any who seeks equity, must do equity." 14 *Am. Jur.* page 114, Sec. 48.

> "The courts appear to be fully agreed, however, as to the proper rule to be applied where the tenant in possession has ousted or excluded his co-owners; in such a case it is held, he must answer to them on the basis of the uable rental value of the entire premises during the term of his occupation regardless of whether or not wrongdoing was profitable to him. It appears to be a general rule that when a cotenant is chargeable with rents, profits, etc., he should be credited with payments on encumbrances, taxes, insurance, repairs, etc." 14 *Am. Jur.*, page 205, Sec. 37.

We have examined a number of the numerous cases cited in footnotes to the text above quoted, and find that the same support the law announced in the text.

The Court in its Finding numbered 18, (R. 102), found:

> "That the amount of money received by plaintiff and her husband Lawrence Heiselt from the rental of the above described premises, together with the reasonable rental value of said premises during the time that the same has been occupied by plaintiff and her husband is substantially more than the amount that plaintiff

and her husband have expended in the payment of taxes levied against said premises and in the improvement of the same."

Appellant does not attack the Finding of the Trial Court just quoted. Nor may such Finding be successfully attacked. Plaintiff and her husband received payment of the rental of the premises at $75.00 less ten per cent thereof for a period of seventeen months, or a total of $1147.50. It was so found by the Trial Court, and the accuracy of such Finding is not questioned. (*Finding* No. 18, R. 152).

Plaintiff and her husband up to the time of his death in 1951 were in possession of the premises here involved from 1945 until the property was sold in January, 1958, a period of at least twelve years. At $75.00 per month the rental would amount to approximately $10,800.00. She claims to have expended $4075.00 in repairs and improvements, (R. 102), and paid taxes in the sum of $1322.87, making a total of $5397.87. Thus appellant is chargeable with $1147.50 rentals paid to her or her husband and $10,800.00 rental, making a total of $11,947.50. She is entitled to a credit for improvements of $4075.00 and taxes of $1322.87, making a total of credits $5397.87. Appellant has thus profited to the extent of $6549.63 by reason of respondents having permitted appellant and her husband to collect and retain the rent and have the exclusive possession of the premises from 1945 to 1958 without paying respondents any of the rent collected or for the exclusive occupation of the premises here involved.

It will also be noted that in Finding No. 18, (R. 113), the Trial Court found:

"That at no time prior to the commencement of this action did the answering defendants seek possession of the property here involved, nor did plaintiff inform such defendants that she claimed to be the owner of the same."

Counsel for appellant cites cases which in effect hold that one co-tenant is not legally bound to pay the taxes of a co-tenant, and that the co-tenant is obligated to pay his proportion of the taxes so paid. In our view, none of those cases aid appellant in this case because, unlike the facts in the authorities cited, in this case plaintiff and her husband had received and apparently placed in their joint account the sum of $1147.87 which was collected from the rental of the property before they moved into the possession of the same. It will be seen that the money so received lacked only $175.37 of being sufficient to pay all of the taxes levied against the premises and paid by plaintiff during the period involved in this controversy. If the money so collected had been placed in a Savings Account, the amount of principal and interest would doubtless have been at least sufficient to pay all of such taxes.

THE COURT DID NOT ERR IN FAILING TO FIND THAT PLAINTIFF'S POSSESSION OF THE PROPERTY WAS ADVERSE TO DEFENDANTS.

Under Point II Counsel for plaintiff cites the case of *Mathews v. Baker, et al.*, 47 Utah 532, 155 Pac. 427. In that case the action was commenced on March 16, 1907. It was made to appear in that case that Mathews had been in continuous possession and paid all taxes levied against the premises since 1886; thta she had placed valuable improvements thereon of the approximate value of $12,000.00; that she was

"occupying, holding and using said premises openly, continuously, publicly, and adversely against all persons whomsoever and against the claims of all of the defendants * * * that the defendants had either personal or constructive knowledge at all times since plaintiff's possession of said real estate of her claim of ownership and title in and to said described premises and that said claim and ownership on the part of plaintiff was not as a cotenant with the defendants or a tenant in common" etc.

Needless to say, the facts in the Mathews case are so unlike the facts in this case that the Mathews case is of little, if any, aid as a precedent in this case. Thus the property involved in the Mathews case was apparently unimproved when Mrs. Mathews took possession and no income could be derived therefrom until the $12,000.00 was expended in placing improvements thereon. In this case there was a home on the premises which had a rental value of $75.00 per month. In the Mathews case the Court found that the defendants had either personal or constructive knowledge at all times that Mrs. Mathews claimed to be the owner of the premises. In this case no such finding was made. Nor does the evidence justify such a finding. Plaintiff did testify that Helen Chipman Dixon, the widow of a brother of plaintiff's husband, had been at the home here involved at and before plaintiff's husband died. That she made no claim to the home (Tr. 24). That defendant, Nadine Heiselt, the widow of Wallace Heiselt, had also been to the home, but had made no claim to the home (Tr. 24). The husband of Nadine Heiselt died on February 28, 1941, leaving two minor daughters and a minor son (Tr. 51). There is nothing to show that either Nadine Heiselt or her children were aware of the fact that

her deceased husband had an interest in the property, or if he did, what arrangements had been made with respect to the occupation thereof. While the date of the death of Delbert Heiselt was not made to appear, it is apparent that he was dead at the time it is claimed that his widow, Helen Chipman Heiselt Dixon, was at the home here involved. So far as appears, she was not familiar with the fact that her deceased husband had an interest in the home, or if he had such an interest, what arrangements had been made about appellant and her husband being entitled to the possession of the home.

The case of *Clotworthy, et al. v. Clyde, et al.*, 1 Utah (2d) 251, 265 Pac. (2d) 420, is cited in support of appellant's claim. It does not appear from that case whether or not the parties to that litigation were ever tenants in common. The case of *McCready v. Frederickson, supra,* is cited and some of the language of that case is cited, particularly the statement of Mr. Justice Taft in the case of *Elder v. McCloskey,* 70 Fed. at page 542, 17 C.C.A., at page 264. In this case the trial court found against appellant, which under the holding in *Clotworthy, et al., v. Clyde, et al., supra,* must prevail unless it is against the weight of the evidence. The mere fact that appellant occupied the premises and made repairs and improvements thereon and paid the taxes thereon without more does not support the conclusion that plaintiff

> "by acts of the most open and notorious character, clearly show to the world and to all having occasion to observe the conditions on occupancy of the property that his possession is intended to exclude and does exclude the rights of his cotenants."

It is not uncommon for the heirs of a common ancestor to

permit one of such heirs to occupy the premises on condition that such heir pay the taxes thereon and keep the property in a liveable condition. We do not know what, if any, arrangements were had with the deceased brothers of the husband of appellant or with the appellant as to what were the conditions upon which appellant and her husband took possession of the premises here involved. However, the only reasonable inference to be drawn from the evidence is that someone should take possession of the premises and care for the same. If, as the authorities teach, the other heirs actually or impliedly consented to appellant and her husband taking possession of the premises, they could not claim adversely against the respondents without giving notice of such adverse claim. The case of *Sperry v. Tolley, et al.*, 114 Utah 303, 199 Pac. 542, shows the extent to which courts go to maintain the rights of tenants in common to their interest in real estate. The facts in that case are these: Two brothers owned 52 acres of land as tenants in common. The 52 acres were divided into four tracts. Each brother occupied two tracts. The tracts so occupied were separately farmed and each built homes and other improvements on the tracts so occupied. The property was sold for unpaid taxes in 1912 and each brother purchased the tracts occupied by him and received an Auditor's deed to the same. The Deeds were void, however, because the assessment rolls for that year were not supported by the Auditor's Affidavit. Notwithstanding that each of the brothers had occupied, improved and paid the taxes on the property so occupied for more than seven years, it was held that:

> "Any act done by a cotenant for the protection of the common property would be presumed to be for

the benefit of all tenants and the presumption prevails until the contrary is clearly made to appear."

and that:

> "The fact that a tenant in common makes repairs and improvements on dwellings, buildings and fences on the common property does not indicate an intent to hold adversely to the other tenants in common, since such acts are consistent with the tenancy and not adverse to it."

The quotations are from the sylabus, which reflects the law announced in the opinion.

In support of respondents' Cross Appeal they claim:

POINT I.

THE TRIAL COURT ERRED IN STRIKING THE TESTIMONY OF DEFENDANT, NADINE HEISELT, WHEREIN SHE TESTIFIED THAT LAWRENCE HEISELT, THE HUSBAND OF THE PLAINTIFF, TOLD HER THAT HE WOULD SEE THAT ALL OF HER PROPERTY RIGHTS WOULD BE PROTECTED, AND IF SHE NEEDED ANY ADVICE, SHE SHOULD TALK TO MR. DALTON (Tr. 51).

and

POINT II.

THE TRIAL COURT ERRED IN STRIKING THE TESTIMONY OF WILLIAM J. CHRISTENSON WHEREIN HE TESTIFIED THAT LAWRENCE HEISELT, THE HUSBAND OF PLAINTIFF, STATED THAT NADINE, THE WIDOW OF WALLACE, SHOULD NOT WORRY ABOUT ANYTHING, THAT HE WOULD TAKE CARE OF ALL OF HER PROPERTY INTERESTS (Tr. 40).

The testimony referred to in Point I and Point II go directly to the question as to whether or not Nadine Heiselt, the widow of Wallace Heiselt, had a right to assume that plaintiff and her husband would not make the claim that they held the property here involved adversely to the rights of respondents and cross appellants. If such statements were made and relied upon by Mrs. Nadine Heiselt, appellant and her husband would obviously be precluded from succeeding in making any such a claim.

In support of their Cross Appeal, cross appellants also assign as error:

POINT III.

THE TRIAL COURT ERRED IN MAKING FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT DEDUCTING FROM THE INTEREST OF DEFENDANTS IN THE PROPERTY IN CONTROVERSY THE TAXES PAID ON SUCH PROPERTY BY PLAINTIFF AND HER HUSBAND.

and

POINT IV.

THE TRIAL COURT ERRED IN MAKING FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT DEDUCTING FROM THE INTEREST OF DEFENDANTS IN THE PROPERTY IN CONTROVERSY THE MONEY EXPENDED BY PLAINTIFF AND HER HUSBAND IN IMPROVING SUCH PROPERTY.

We adopt what has heretofore been said in answering appellant's arguments in support of respondents' and cross

appellants' claim that the Trial Court erred in the particulars mentioned under Points III and IV.

CONCLUSION

It is the position of respondents and cross appellants that they are entitled to a judgment for four-ninths interest of the property free from any claim of appellant for money paid for taxes and improvements on the property. That appellant has collected in rent from the property, which together with interest thereon during the time plaintiff and her husband had the use thereof before taxes became due and were paid amounting to as much or more than was paid in taxes. That the reasonable rental value of the premises during the time that appellant and her husband occupied the property far exceeded the value of the improvements. That the principles of equity and fair dealing between the parties to this proceeding entitled the respondents and cross appllants to at least the relief which they seek.

Respectfully submitted,

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