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Annie Ray Hieselt v. Nadine Heiselt : Appellant's Reply Brief

Utah Supreme Court

Rawlings, Wallace, Roberts & Black; Brigham E. Roberts; Attorneys for Appellant;

Case No. 9065

IN THE SUPREME COURT

of the

STATE OF UTAH

ANNIE RAY HEISELT,
Appellant,

—vs.—

NADINE HEISELT, et al.,
Respondents and Cross-Appellants.

APPELLANT'S REPLY BRIEF

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TEXTS

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STATEMENT

We deem it advisable to present authorities to the Court on only two points raised by defendants in their brief. We also desire to point out an error made by the Court in determining the amount of rental collected.

By making this argument we expressly want it understood that we are not in any way abandoning our position that the trial court should have found that plaintiff has complete title to the property.

POINTS RELIED UPON

POINT I.

THE STATEMENTS OF LAWRENCE HEISELT WERE PROPERLY STRICKEN FROM EVIDENCE.

POINT II.

THE TRIAL COURT PROPERLY DEDUCTED FOR THE TAXES PAID AND IMPROVEMENTS MADE.

POINT III.

PLAINTIFF ONLY COLLECTED $492.50 RENTALS.

ARGUMENT

POINT I.

THE STATEMENTS OF LAWRENCE HEISELT WERE PROPERLY STRICKEN FROM EVIDENCE.

The first two points in Respondents' Brief concern the same conversation which defendant sought to introduce in evidence. The defendant Nadine Heiselt testified to this conversation and William J. Christensen also testified to it. The trial court struck this testimony of both witnesses.

This conversation allegedly occurred shortly after February 28, 1941, the date of the death of Wallace Heiselt. Christensen testified that the defendant Nadine Heiselt asked Lawrence Heiselt what she was going to do and she was worried. Mr. Heiselt told her not to worry that he would take care of all the property interests and her interests (R. 75). The defendant Nadine Heiselt's testimony was to the same effect (R. 86). This was before

the death of N. H. Heiselt, who lived in the home. There was no indication that this testimony in any way referred to, or had anything to do with the real property involved in this case. It apparently related to the Wallace Heiselt estate.

The trial court could not see that this in any way related to the real property here involved and this was the basis of his ruling.

We submit the ruling striking this testimony was proper.

POINT II.

THE TRIAL COURT PROPERLY DEDUCTED FOR TAXES PAID AND IMPROVEMENTS MADE.

Defendants have attempted to combine the matter of rentals on one hand, and taxes and improvements on the other, and assert they cancel each other. They cite no law, and there is none, which would justify such a position. Each subject must be explored separately.

RENTALS

Defendants find themselves in an analogous position. As will hereinafter appear, a cotenant is not entitled to rent from the commonly owned property unless he has been ousted or excluded. If such is the case, and we believe it is, title is then in plaintiff by virtue of adverse possession for seven years. If there is no ouster defendants are not entitled to rent. Cotenants own undivided interests in the property and the use of it, by either does

not imply an agreement to pay. The rule is well stated in *Brown v. Thrustin,* 83 Kan. 125, 109 Pac. 784 (quoting from an earlier case):

> "'It is a well-settled principal of the common law that the mere occupation by a tenant of the entire estate does not render him liable to his co-tenant for the use and occupation of any part of the common property. The reason is easily found. The right of each to occupy the premises is one of the incidents of a tenancy in common. Neither tenant can lawfully exclude the other. The occupation of one so long as he does not exclude the other is but the exercise of a legal right. If for any reason one does not choose to assert the right of common enjoyment, the other is not obliged to stay out; and, if the sole occupation of one could render him liable therefor to the other, his legal right to the occupation would be dependent upon the caprice or indolence of his co-tenant, and this the law would not tolerate.'"

Also in 51 A.L.R. 2d 388, (Annotation on "Accountability of cotenants for rents and profits or use and occupation") at page 413, the rule is stated as follows:

> "The rule which prevails in the majority of jurisdictions, founded on the plainest principles of property ownership, is that, absent statute construed to work a different result (see § 11, infra), a tenant in common, joint tenant, or coparcener who has enjoyed occupancy of the common premises or some part thereof is not liable to pay rent to the others therefor, or to account to them respecting the reasonable value of his occupancy, where they have not been ousted or excluded nor

> their equal rights denied, and no agreement to pay for occupancy, or limiting or assigning rights of occupancy, has been entered into."

As sustaining this rule is cited the Utah case of *Utah Oil Refining Company v. Leigh,* 98 Utah 149, 96 P. 2d 1106 (1939), wherein this Court stated:

> "As cotenants, plaintiff and defendant each had the right to the free and unobstructed possession and enjoyment of this land without liability for rents for the use and occupation thereof. That one cotenant is not liable to his cotenant for rents for the occupancy of the common property is elemental. See note in 27 A.L.R. p. 184ff; 39 A.L.R. 408ff. And this is true even though he uses it and derives income therefrom, as where he occupies a house, Brown v. Thurstin, 83 Kan. 125, 109 P. 784, 29 L.R.A., N.S., 238; Kirchgassner v. Rodick, 170 Mass. 543, 49 N.E. 1015."

We submit that if the Court finds ouster or exclusion plaintiff has title and if otherwise, no rents are due.

TAXES AND IMPROVEMENTS

Under the circumstances of this case, if defendants have an interest in the property they should share in the taxes and improvements. Defendants do not contest plaintiff's right to recover for these items. They only claim these expenditures were offset by rental due from plaintiff and which there is none.

The law is well settled that a cotenant paying taxes is entitled to contribution from the other cotenants. See

14 *Am. Jur.*, 113, *Cotenancy* § 47, *Willman v. Koyer*, 168 Cal. 369, 143 Pac. 694.

So far as improvements are concerned, the rule is well stated in 14 *Am. Jur.* 118, *Cotenancy*, § 49, as follows:

> "Although there is authority to the contrary, the great weight of authority holds that compensation may be awarded where the improving tenant acted in the bona fide belief that he was the sole owner of the property. Where the tenant in common holds adversely, compensation for improvements has likewise been allowed. There is, however, authority to the contrary."

Because cotenants are involved it may be doubtful that the Occupying Claimants Statute applies, but under that statute plaintiff would be entitled to recover for improvements and taxes. See *Peterson v. Weber County*, 99 Utah 281, 103 P.2d 652 (1940).

We submit that plaintiff was properly awarded judgment for taxes paid and improvements made.

POINT III.

PLAINTIFF ONLY COLLECTED $492.50 RENTALS.

The court found that plaintiff was paid as rentals by third parties $75.00 per month for 17 months. There is no testimony to support this. Mr. Christensen testified that he collected rentals and paid same to Mr. Heiselt in 1941 and certainly before N. H. Heiselt died (R. 82, 84). Mr. N. H. Heiselt died in January of 1943 (R. 49). This money was not paid to plaintiff and there is no testimony how many payments were made.

Plaintiff testified that she received rentals from March, 1943 until July of 1944, a total of 17 months. She testified she received $27.50 per month except for two months at which time she received $40.00 per month (R. 50-53). This totals $492.50, not the $1,147.50 deducted (R. 112).

It is apparent from reading the testimony of these two witnesses that they are talking about two different times. One of them was when Mr. Christensen collected rentals and paid them to Mr. Heiselt. The other was after N. H. Heiselt's death and the amounts were paid through Wicks to plaintiff.

We submit that the judgment should be modified to deduct only $492.50 from the amounts expended by plaintiff.

CONCLUSION

Plaintiff respectfully submits that the Court should find that plaintiff is the title holder through adverse possession of the property here involved. In any event, the judgment should be modified as indicated by plaintiff and affirmed.

Respectfully submitted,

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