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Keith Holbrook and Geneve K. Holbrook v. Elwood S. Carter and Linda N. Carter and J. Henry Ehlers and Nellie J. Ehlers : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

KEITH HOLBROOK and GENEVE K. HOLBROOK,
Plaintiffs-Respondents

vs.

ELWOOD S. CARTER and LIND N. CARTER,
Defendants,

J. HENRY EHLERS and NE J. EHLERS,

RESPONDE

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Defendants-Appellants.

Case No. 10777

RESPONDENTS BRIEF

STATEMENT OF THE NATURE OF THE CASE

Respondents seek to quiet title to certain real property acquired by quit claim deeds and adverse possession.

DISPOSITION IN THE LOWER COURT

The trial court quieted title in favor of plaintiffs-respondents (Holbrooks) and dismissed the counterclaim of defendants-appellants (Ehlers).

STATEMENT OF FACTS

The facts are not in dispute in this case; however, the Appellants, in their attempt to summarize them in their brief, have left out some very pertinent ones. Therefore, the facts as stipulated to by the parties and upon which the Lower Court based its judgment are here set out in full: (R-21 through R-23).

"1. That on July 1, 1949 at the so-called Salt Lake County May Sale, Salt Lake County sold to Rennold Pender, Margaret J. Eliason and defendant, J. Henry Ehlers, the property described in the Complaint on file herein which is the subject matter of this litigation, and gave to said Rennold Pender, Margaret J. Eliason and J. Henry Ehlers its so-called tax deed covering said property.

"At the time of the receipt of said deed, Pender and J. Henry Ehlers orally agreed between themselves that Pender could use the land as to Ehler's interest and for such use would pay taxes thereon attributable to Ehlers; *that plaintiffs had no knowledge of this oral agreement at any time pertinent herein.* (Emphasis Added)

"2. That on or about June 11, 1951, Rennold Pender for a good and valuable consideration made and executed his Quit Claim Deed to plaintiffs conveying his interest to them in the subject property, and that on or about June 21, 1951, Margaret, J. Eliason for a good and valuable consideration executed and delivered to plaintiffs her Quit Claim Deed conveying her interest in said property.

"3. That shortly after receipt of the Pender and Eliason deeds as set forth above, planitiffs contacted defendant, J. H. Ehlers, through one W. Louis Gardner to ascertain if Ehlers would sell his interest in the subject property to plaintiffs. Ehlers stated to Gardner that he would not sell.

"4. Neither plaintiffs nor defendants, Ehlers, have ever had personal contact or discussions with each other concerning the property.

"5. That immediately following the receipt of the two deeds aforesaid by plaintiffs, plaintiffs took physical possession of the property and enclosed the same with a strong, stock-proof, wire and post fence, which said fence has, since the date of erection on or about the month of July, 1951, stood in good repair against all persons. That plaintiffs have during said 15 years and at various time affixed to the wire enclosing said field, signs of various types, particularly during hunting seasons, which said signs have stated 'No Tresspassing,' 'No Hunting,' 'Private Property' and related wording. That for said 15 years last past plaintiffs have had good and sufficient gates at the entrance to said enclosure surrounding said real property.

"6. That defendant, J. Henry Ehlers, was personally aware that defendants had fenced the property as set forth in paragraph 5 next above and personally went through the gates in said fence enclosing the property at one time or another subsequent to the fencing.

"7. That for the first three or four agricultural seasons following June, 1951, plaintiffs plowed the property, sowed various grains therein and harvested the same. That for the last ten years, approximately, plaintiffs have plowed and seeded the land to alfalfa and pasturage. That during said 15 years last past plaintiffs have irrigated said land with irrigation water, which water was their sole and separate property.

"8. That at no time during said 15 years last past has the public at large ever had any physical ingress or egress of said property by reason of the installation of the fences, gates and the constant surveillance and supervision of the property by plaintiffs. That plaintiffs in connection with their farming and agricultural usages of other lands surrounding the subject premises have rented the use of the subject premises for pasturage and so forth and have held themselves out to the public at large as the owners thereof, and have duly collected any rents imposed for pasturage thereon.

"9. That plaintiffs have paid all and singular, the total property taxes assessed against said property since the year 1951 to date hereof, and the defendants, nor any of them, have not paid any of said taxes nor have offered to reimburse plaintiffs for the payment of said taxes. Defendant, J. Henry Ehlers, from time to time during said 15-year period personally checked the Salt Lake County records and determined that the taxes had been paid by plaintiffs.

"10. That defendant, J. H. Ehlers, from some time prior to July, 1949 and during the 15 years subsequent thereto has been aware of acts necessary to adverse fee title owners by one relying upon color of title through a tax deed having made it a practice to purchase the so-called tax deeds from Salt Lake County and has been, at all times pertinent herein, generally familiar with the laws of the State of Utah governing the doctrine of adverse possession; that he has perfected title in the time above set forth to certain tax deeds which he has purchased, by means of purchase, adverse possession litigation and related means.

"To the extent that the within and foregoing Stipulation of Facts contradicts the factual statements set forth in the affidavits of plaintiffs and defendants on file herein, this Stipulation of Facts shall prevail over assertions of fact in said affidavits.

"WITNESS OUR HANDS this 14th day of October, 1966.

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ARGUMENT

Point I

THE TRIAL COURT'S JUDGMENT QUIETING TITLE IN THE HOLBROOKS MUST BE AFFIRMED BECAUSE THE HOLBROOKS ACQUIRED COLOR OF TITLE TO THE PROPERTY BY QUIT CLAIM DEEDS AND SUBSEQUENTLY SATISFIED THE UTAH STATUTORY REQUIREMENTS FOR ADVERSE POSSESSION.

Color of Title:

The Holbrooks purchased the real property in question from Rennold Pender and Margaret J. Eliason by quit claim deeds. Certified copies of the quit claim deeds are included in the file of this matter, and the Court is requested to take judicial notice of each deed. This Court can and has taken judicial notice of such documents which appear of public record. *State Board of Land Commissioners, et al. v. Ririe*, 56 U. 213, 190 P. 59, (1920); *McGarry v. Thompson*, 114 U. 442, 201 P.2d 288 (1948).

Adverse Possession:

The Utah Legislature has set out provisions whereby title to property can be acquired by adverse possession. Section 78-12-8, U.C.A. 1953 provides in part:

> Whenever it appears that the occupant . . . 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 . . . and that there has been a continued occupation and possession of the

> property included in such instrument . . . or of some part of the property under such claim for seven years, the property so included is deemed to have been [held] adversely . . .

Section 78-12-9, U.C.A., 1953 sets forth the requirements of obtaining title by adverse possession as follows:

> 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 occupancy.
>
> (4) ...

The Holbrooks have been in possession for over fifteen (15) years, twice the required period!

The Holbrooks have paid all of the taxes on the property since 1951!

Immediately after taking possession, the Holbrooks inclosed the real property with a "strong, stock-proof, wire and fence post," which said fence has since the date of its erection in July of 1951 stood in good repair against all persons.

The Holbrooks have attached to the fence signs such as: "No Hunting," "No Trespassing," and "Private Property."

Gates have been installed and maintained by the Holbrooks at the entrances to the real property for over fifteen (15) years.

For the first three or four agricultural seasons following June, 1951, the Holbrooks plowed the property. They planted various grains and harvested the crops.

For the last approximate ten (10) years, the Holbrooks have plowed and seeded the land to alfalfa and pasturage.

During the fifteen (15) years, the Holbrooks have irrigated the land with their own water.

The Holbrooks have prevented the public from entering the property by reason of the fences, gates, and personal supervision and surveilance.

The Holbrooks have rented part of the ground out for pasturage.

The Holbrooks have held themselves out to the public as the owners of the land.

Point II

THE HOLBROOKS ARE "STRANGERS" TO EHLERS, NOT CO-TENANTS, AND THEREFORE, THE HOLBROOKS' ASSERTION OF OPEN AND EXCLUSIVE OWNERSHIP IN SEVERALTY CONSTITUTES AN OUSTER AS TO EHLERS, AND AFTER SEVEN YEARS TITLE

BY ADVERSE POSSESSION BECAME VESTED IN THE HOLBROOKS.

Appellants brief would lead the Court to believe that the Holbrooks and Ehlers are co-tenants and that this matter falls within the body of law annotated in 85 A.L.R. 1535 entitled "Right of CoTenant to Acquire and Assert Adverse Title or Interest As Against Other CoTenant."

Do not be misled. The Holbrooks are properly characterized as "strangers" to the Ehlers, not "co-tenants." This matter is thoroughly treated in 32 A.L.R.2d 1214 under the heading, "Possession By Stranger Claiming Under Conveyance By Cotenant As Adverse To Other Cotenants. Therein the proper rule is stated as follows:

> §2. General Rule (Supplementing 27 A.L.R. 8)
>
> The general rule stated in the original annotation that, where one of several cotenants conveys the joint estate by an instrument purporting to vest the fee to the entire property in a grantee who is not a cotenant, and the latter enters, asserting open and exclusive ownership thereof, in severalty, the cotenant not participating in the conveyance is deemed to be ousted, and, on the termination of the statutory period, title by adverse possession becomes vested in the grantee.

See also 3 Am. Jur. 2d *Adverse Possession* §182, 71 A.L.R. 444.

The fact that the conveyances were by Quit Claim Deeds would not alter this situation. See 32 A.L.R.2d 1221, 3 Am. Jur. 2d *Adverse Possession* §183.

In addition, the fact that the Respondents knew and in 1951 tried, through a third party, to purchase the Appellants' interest is not a circumstance that would preclude the ripening of title by adverse possession. 32 A.L.R.2d 1224.

Ehlers, Pender and Eliason bought the property at tax sale. They were co-tenants.

Pender and Eliason later conveyed by quit claim deed to the Holbrooks. Ehlers and the Holbrooks were thus "strangers", not co-tenants.

Pender and Eliason did not expressly convey just "a one-third interest" or "his interest" or "her interest." The language of the deed purports to convey the entire interest. The certified copies of the deeds show the exact language.

In *McCready v. Fredericksen*, 41 U. 388, 126 P. 316 (1912) which the Appellants cite, there was a conveyance by one of the co-tenants to Fredericksen, a third party. The Court by way of dicta said that if the grantee of one of the co-tenants had been in possession under the co-tenant's deed, claiming title to the whole of the property, for the time required by the Statute of Limitations, he would have acquired title by adverse possession.

Point III

EVEN ON APPELLANTS ERRONEOUS THEORY THAT HOLBROOK AND EHLERS WERE CO-TENANTS, THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE THE ACTS

OF HOLBROOK WERE SUFFICIENT TO ACQUIRE TITLE BY ADVERSE POSSESSION EVEN AS TO A CO-TENANT.

Appellants cite the following as the law for one co-tenant adversing another co-tenant:

> . . . he [the co-tenant in possession] must show that at the time in question he was personally, or by tenant or agent, in actual possession of the premises, or of the particular and sufficiently defined part of the premises to which he makes claim, that he intended an actual adverse possession operative as of that time, that he did in fact hold and claim the premises adversely, and lastly, that his co-tenant or co-tenants had knowledge or notice of that fact . . . (82 A.L.R. 2d 5 at pp. 23, 24)

It is agreed between the parties that the Respondents held possession of the premises for approximately 15 years from June 1951 and continuously thereafter. Thus, the requirement of actual possession is clearly satisfied. The second requirement that the Respondents intended actual adverse possession is apparent from the agreed facts setting out their exclusive, hostile possession. The only question that properly could be inquired into on this appeal under Appellant's theory is whether the Appellants had notice of the adverse possession.

The Lower Court found the facts were sufficient to put the Appellants on notice that the Respondents intended to and were holding the property adverse to Appellants' interest. In this connection it should be pointed out that unless the Lower Court's judgment

is clearly against the weight of the evidence or unless the Court has misapplied the principles of law or equity, the finding of the Lower Court should not be disturbed. *Heiselt vs. Heiselt,* 10 U2d 126, 349 P.2d 175 (1960). See also *Clotworthy vs. Clyde,* 1 U.2d 251, 265 P.2d 420, So unless it is clear from the agreed facts that the facts do not import notice to the Appellants of the open, notorious and exclusive possession of the Respondents, the Lower Court's finding should be affirmed. Viewing all of the facts together, there is clearly more than enough weight to warrant the determination of the Lower Court.

Although generally the possession of property by one co-tenant is considered to be for the benefit of the other co-tenant, this does not mean that a co-tenant cannot hold adversely to another co-tenant. This is true only because of the close relationship between co-tenants. One co-tenant's occupancy is considered for the benefit of other co-tenants only until there are facts that show his occupancy is in repudiation of the rights of other co-tenants.

McCready vs. Fredericksen, 41 Utah 388, 126 Pac. 316 (1912), which the Appellants cite, sets out the rule in Utah for obtaining title by adverse possession from a co-tenant. Under that case there is no requirement of actual ouster. The possession must be of such an open and notorious nature so as to clearly show the world that this possession is intended to exclude and does exclude the rights of co-tenants. Nevertheless, under the McCready rule,

notice of ouster need not be actual, but may be implied from conduct.

There is a rule widely accepted in other jurisdictions that notice of ouster may be implied from the long uninterrupted possession of property by a co-tenant. *Dixon vs. Henderson*, 267 S.W.2d 869; *Black vs. Beagle*, 59 Wyo. 268, 139, P.2d 439 (1943), 82 A.L.R.2d 132. The Court in *Sperry vs. Tolley*, 114 Utah 312, 199 P.2d 542 favorably acknowledged this rule. There, the Court said:

> Some jurisdictions hold that a sole, uninterrupted possession together with the exclusive taking of profits by one tenant in common, with the knowledge by the others, continued for a long series of years, without any possession or claim of right and without any participation in the profits, or demand for them, if unexplained by any evidence tending to show a reason for such neglect to assert a right is sufficient to infer an ouster and adverse possession.

The Respondents have held the property for 15 years, more than double the duration of the Statute of Limitations. During that entire period they have collected the rents and profits, leased the property, put up no trespassing signs, paid taxes, farmed the property, fenced it, irrigated it, and in every respect maintained exclusive and adverse possession against all the world including the Appellants. At no time have Appellants asserted any interest or claim to title. They have made no demand for sharing in the profits and have had absolutely no contact with the Respondents, nor have Appellants offered any ex-

planation as to the reason for sleeping on their rights. Consequently, the long, continued delay coupled with the exclusive, hostile possession of the Respondents is sufficient to infer an ouster and adverse possession.

The Appellants, in their brief, attempt, by referring to previous cases, to establish what acts are required to impute notice of adverse possession to a co-tenant. They claim that the facts now before the Court are insufficient by asserting that such acts were held insufficient in the *McCready*, *Sperry* and *Heiselt* cases. This conclusion is improper and would be unfair if followed since the facts in this case are different. So that justice might prevail, each case should be decided on its own merits taking all factors into consideration. What is not sufficient in one case might be sufficient in another. In *Linebarger v. Late*, 214 Ark. 278, 216 S.W.2d 56 (1948) the Court recognized this. The Court said:

> Notice of the hostility of the possession resulting from acts or conduct of the possessor may appear in so many ways that judges and text writers have not undertaken an enumeration. What in one case would be sufficient warning might not be enough in another. *The relationship of the parties,* their reasonable access to the property and opportunity of or necessity for dealing with it, *their right to rely upon the conduct and assurances of the one in possession,* matters of kinship, business transactions directly or incidentally touching the primary subject matter, the fact of silence when there was a duty to speak, natural inferences arising from indifference

> — these and other means of conveying or concealing intent may be important in a particular case but not controlling in another; consequently, there can be no "open and shut rule" by which the result can be ascertained. (Emphasis added)

One of the reasons for the rule that the possession of one co-tenant is possession for the others is because of their right to rely upon each other. Where the relationship is interrupted by a conveyance to a third party stranger, what right does the other co-tenant have to assume that the grantee will continue to hold possession for him and account to him for all income and rent. The logical inference is for him to be apprised that the grantees' interest may be adverse to him. He at least has some duty to speak and where a co-tenant sleeps on his rights for as long as the Appellants have done without any contact or any claim or assertion of their rights or without even any explanation for the reason of their long delay, the clear implication is that they have notice of ouster. When the Appellants' knowledge and understanding of the law of adverse possession is considered and when, in fact, it is considered that the Appellants themselves have utilized the doctrine to obtain clear title to property purchased under tax deeds, notice of ouster seems conclusive. The least that could be said is that any reasonably prudent person would have been on notice. In *Black vs. Beagle* (see supra) the Court said:

> From such acts it is the duty of the other co-tenants to be informed thereof and to draw

> such reasonable inferences therefrom *as prudent persons possessed of* and interested in, *like information would naturally do,* and such co-tenants out of possession cannot prevent the operation of the Statute of Limitations by proving that they did not know of the facts affecting their interest or knowing of them did not draw correct conclusions therefrom .. . We think that, under the circumstances, he *can hardly come into a court of equity with any hope of success.* (Emphasis added)

Furthermore, the language of the deed from Pender and Eliason to the Holbrooks purporting to convey the entire interest would put Appellants on notice that the Holbrooks were holding adversely to them.

ARGUMENT

Point IV

THERE WAS NO AGREEMENT BETWEEN APPELLANTS AND RESPONDENTS RELATIVE TO PERMISSIVE POSSESSION OF THE REAL PROPERTY AND NO KNOWLEDGE BY HOLBROOK OF THE ALLEGED AGREEMENT OF PERMISSIVE POSSESSION AS BETWEEN PENDER AND APPELLANT; HENCE, THE ALLEGED AGREEMENT IS NO BAR TO ADVERSE POSSESSION.

Appellants claim that an agreement of the Appellants to allow their co-tenant to possess the property precludes the assertion of title by adverse possession. There was no such agreement between the

Appellants and the Respondents here. (See italicized last sentence of FACT STIPULATION, Paragraph No. 1.) This is definitely not a case of permissive possession as the Appellants' brief argues. It was stipulated that the alleged agreement was between the Appellants and Mr. Pender, and that the Respondents "*have never had knowledge of their agreement.*"

The very existence of the agreement puts some burden on the Appellants to inquire of the Respondents as to their intent with respect to the property. Since there is no basis either in law or in fact for the Appellants to rely upon an agreement made with one grantor of the Respondents, it would be unreasonable and unfair to bind the Respondents to it. It cannot be assumed that by the purchase of one co-tenant's interest in the property that the purchaser steps in the shoes of that co-tenant with respect to a verbal agreement made between the co-tenants three years prior. Such an assumption would be unreasonable.

CONCLUSION

Since the Respondents were strangers to Appellants not co-tenants, the law clearly supports the judgment quieting title. But, even assuming the relationship of co-tenancy, the Appellants were on notice of their adverse possession establishing clear title in Respondents. The Lower Court's judgment should be

affirmed since the weight of evidence supports it and there was no misapplication of any principal of law.

Respectfully submitted,

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